



COMISIÓN DEL MERCADO DE LAS TELECOMUNICACIONES

IGNACIO REDONDO ANDREU, Board Secretary of the *Comisión del Mercado de las Telecomunicaciones* (Telecommunications Market Commission, CMT), by means of those capacities bestowed on him by article 40 of the CMT's Regulations, approved by Spanish Royal Decree 1994/1996, of 6 September,

HEREBY CERTIFIES:

That Board Meeting No. 32/09 of the Comisión del Mercado de las Telecomunicaciones held on 1 October 2009, adopted the following

AGREEMENT

By this we hereby approve the following

Resolution regarding updating the methodology for the ex ante analysis of Telefónica de España S.A.U's commercial offers (AEM 2009/1106)

FACTUAL BACKGROUND

FIRST – Approval of the current methodology for analysis of TESAU's commercial offers

On 26 July 2007 the CMT issued a Resolution to approve the methodology for the *ex ante* analysis of Telefónica de España S.A.U.'s (hereinafter TESAU) commercial offers. This methodology set the obligations placed on TESAU as per the analysis of the access markets,¹ telephone traffic² and wholesale broadband³ corresponding to the first round of market analysis.

Said resolution developed the way of setting the maximum margins that TESAU counts on for their commercial approach with regards services included in the previous markets.

¹ Resolution of 23 March 2006 regarding the definition of the markets for access to the public telephone network in a fixed location for residential clients and access to the public telephone network in a fixed location for non-residential clients, the analysis of this, the designation of operators with significant market power and the imposition of specific obligations (markets 1 and 2 of the 2003 Recommendation).

² Resolution of 9 February 2006 regarding the definition of the markets for local and national telephone services available to the public supplied from a fixed location for residential clients, international telephone services available to the public supplied from a fixed location for residential clients, local and national telephone services available to the public supplied from a fixed location for non-residential clients and international telephone services available to the public supplied from a fixed location for non-residential clients, the analysis of these, the designation of operators with significant market power and the imposition of specific obligations (markets 3 and 6 of the 2003 Recommendation).

³ Resolution of 1 June 2006 regarding the definition of the market for wholesale broadband access, the analysis of this, the designation of operators with significant market power and the imposition of specific obligations (market 12 of the 2003 Recommendation).



Additionally, it imposed the obligation on TESAU of having to respond every six months to a request for information so that the CMT can bring the net present value (NPV) up to date on a six monthly basis.

SECOND.- Updating the methodology

As well as using information from other sources, with the use of the data gathered from the six-monthly requests for information, on 22 May and 18 September 2008, the CMT's Board approved the corresponding Resolutions which updated specific parameters of the methodology for the *ex ante* analysis of Telefónica de España S.A.U.'s commercial offers (AEM 2008/215 and AEM 2008/1442, respectively).

THIRD.- Second round of market analysis

Via the Comisión del Mercado de las Telecomunicaciones's Resolution dated 22 January 2009, the Board approved the definition and analysis of wholesale market access (physical) to network infrastructures in a fixed location (including shared or completely unbundled access), and the wholesale broadband access market (markets 4 and 5 of the 2007 Recommendation⁴).

Via the Comisión del Mercado de las Telecomunicaciones's Resolution of 5 March 2008, the Board approved the definition and analysis of retail market access to telephone networks in a fixed location for residential and non-residential clients (market 1 of the 2007 Recommendation).

In both Resolutions, after identifying the aforementioned markets, it was concluded that they are not truly competitive and TESAU was identified as the operator with significant market power (SMP), and the corresponding obligations were imposed upon them, among which is the obligation to supply all the alternative operators with the necessary wholesale services to guarantee the economic and technical replicability of all the retail products that TESAU or any of the group's companies market, and to guarantee transparency and non-discrimination, thereby prohibiting anticompetitive practices such as predation, margin squeezing or unfair bundling.

On the other hand, the Resolution of 12 December 2008 approved a review of the retail telephone markets available to the public supplied from a fixed location (former markets 3 and 6 of the 2003 Recommendation⁵).

That Resolution considered that the telephone traffic retail services available to the public supplied from a fixed location did not constitute a market with characteristics that justified the imposition of specific obligations, and therefore they were not susceptible to *ex ante* regulation. Consequently, it was agreed to abolish the obligations imposed on TESAU in the

⁴ European Commission's Recommendation of 17 December 2007 relating to the markets for electronic communications products and services that could be subject to *ex ante* regulation under the European Parliament and Council's EC Directive 2002/21 regarding a common regulatory framework for electronic communication services and networks.

⁵Commission's Recommendation of 11 February 2003 relating to the markets for electronic communications products and services that could be subject to *ex ante* regulation under the Framework Directive.



framework of the first round of market analysis, as well as the obligations that until that time had been applicable in virtue of the Resolution dated 26 July 2007.

FOURTH.- Initiation of the procedure and opening of period for comments

The start of the procedure for modifying the methodology for the ex ante analysis of TESAU's commercial offers was agreed upon on 9 July 2009.

As anticipated by article 84 of Law 30/1992 dated 26 November, from the Public Administrations Legal System and General Administrative Procedures (hereinafter LJPAC), in writing from the Secretary of the CMT dated the 13 July 2009, the interested parties were informed of the opening of the period for comments prior to the definitive Resolution report, as well as the report developed to this effect by the Services of the CMT.

Allegations were submitted during the comments period by the Asociación de Empresas Operadoras y de Servicios de Telecomunicaciones (hereinafter ASTEL), France Telecom España (hereinafter FTES), Vodafone España, S.A. (hereinafter Vodafone), CABLEEUROPA, S.A.U. and TENARIA, S.A. (hereinafter ONO) and TESAU.

The allegations from the interested parties are analysed in the body of this Resolution.

LEGAL BASIS

I COMPETITION RATING

Among others, Article 3 of the *General Telecommunications Law* (LGTel) 32/2003 dated 3 November fixed the following legal objectives:

“a) Encourage effective competition in the telecommunications market and in particular, in the running of the networks and in the supply of electronic communications services and in the supply of associated resources, thereby promoting efficient investment in infrastructure and innovation.”

In accordance article 48.2 of the LGTel, “the Comisión del Mercado de las Telecomunicaciones will aim to establish and supervise the specific obligations that operators must meet in the telecommunications markets and the promotion of competition in the audiovisual service market, in conformity with that laid out in their regulatory standards, the resolution of conflicts between operators and, where applicable, acting as arbitrary body for issues between operators”.

Also amongst the functions awarded to LGTel by the CMT are, in article 48.3 e), “adopt the necessary measures to safeguard the plurality of the service offer, access to electronic communication networks for operators, network interconnections, usage of open-networks, and price policies and commercialisation by service providers...”

Article 48.3 of the LGTel establishes that, with regards telecommunications matters as regulated under this law, amongst other functions the Comisión del Mercado de las Telecomunicaciones will exercise the following:



“g) Define the relevant markets for developing specific obligations in keeping with that outlined in Chapter II of Title II in article 13 of this law.”

In its Resolutions of 22 January 2009 (markets 4-5) and 5 March 2009 (market 1), the CMT prohibited TESAU from marketing retail offers that could impose risks on free competition, such as anticompetitive price reductions, exorbitant or unfair bundles, discriminatory practices or exorbitant contract clauses.

To this effect, the market analysis established that evaluation of potential anticompetitive practices be carried out in accordance with the procedures for assessment of *ex ante* intervention as attributed by sectoral NRAs. In particular, in the case of the affected services, it was signalled that “the regulations contained in the methodology for *ex ante* analysis of Telefónica de España S.A.U.’s (MTZ 2006/1486) commercial offers would apply, as well as any subsequent updates”.

The CMT also adapted their actions, conforming to the LJPAC in article 48.1 of the aforementioned LGTel.

II. UPDATING THE METHODOLOGY FOR THE *EX ANTE* ANALYSIS OF TESAU’S OFFERS

The CMT has applied the methodology for the *ex ante* analysis of TESAU’s retail offers during the last two years. This has given market agents significant legal security with regards the actions that can be carried out on a retail level by the operator with SMP. Furthermore, thanks to this methodology, the CMT can count on a flexible tool which has allowed them to analyse a large number of TESAU offers, reducing the time required for analysis and thus the “time to market” for offers that are beneficial for the user which do not impose risks for the competition. Therefore, the communication timeframe prior to marketing TESAU’s retail offers has been reduced following the review of markets 4 and 5.

However, the situation that served as a framework for defining the most relevant parameters and criterion in the methodology at the time of it being approved have since been modified, partially due to the evolution of market conditions. Even though the Resolution itself already predicted that certain aspects should be updated every six months, the CMT has used the revisions to update more substantial elements of the analysis.

Therefore, in addition to the review of the cost and income flows to be modified, where applicable, the Net Present Value (hereinafter NPV), other aspects will also be analysed that some operators have put forward to the CMT.

As well as this, analysis will also be carried out on the competitive standing of different bundled offers that TESAU has launched onto the market since the last review or bundles of which the CMT was informed.

Thirdly, it should be noted that the margin narrowing test, in accordance with the methodology, means updating the Discounted Cash Flows (DCF). Given income and cost flows (including wholesale prices of the network), this method calculates the updated margin that an alternative operator will get when supplying TESAU retail services at the end of the average client-life. This methodology is different from the period to period test which checks if the retail activity of operator with SMP has been profitable in a certain period, given current wholesale prices.



As can be seen further on, this difference is relevant at the time of assessing TESAU's retail activity with regards to its client base. In fact, the correct application of the DCFs requires understanding future cost and income flows as exactly as possible. It is important to differentiate between the uncertainty of these due to business development, and the direct effects produced by the actions taken by TESAU itself. In fact, although in the first case it would be hard to model it as *ex ante*, the reduction of income as a consequence of commercial activity from this operator could be taken into consideration, establishing clear rules that allow *ex ante* assessment of compliance with the obligations imposed by the Commission.

Finally, it is necessary to update the retail offer included in Annex 4 of the Resolution of 26 July 2007, on one hand keeping in mind the lifting of the obligations in the former markets 3-6 and on the other, those significant offers⁶ which TESAU has launched since the approval of the last update.

II.1 EXCLUSION FROM ANALYSIS FOR THE INDIVIDUAL TELEPHONE OFFERS

As mentioned in the third point of the Factual Background section, the review of the telephone traffic markets available to the public supplied from a fixed location (former markets 3 and 6) has concluded that the three accumulative criteria for considering whether a market is susceptible to *ex ante* regulation have not been met. Therefore, the obligations on TESAU have been lifted and in accordance with which, in its methodology the CMT has analysed the individual offers included in these markets as being subject to being updated.

Lifting the *ex ante* obligations imposed on TESAU in the retail telephone traffic markets happened during the month of April of this year after the three month transitory period had lapsed, as set by the reference Resolution.

Therefore, from then on, TESAU only need inform the CMT of the offers that include the fixed telephone services when these are marketed as bundles with access services and/or broadband internet.

II.2 UPDATING OF THE NET PRESENT VALUE OF THE ANALYSED SERVICES

Firstly, and prior to proceeding to update the value of specific parameters of the methodology which affect the calculation of NPV, it is necessary to highlight that, as is the case with other reviews, the CMT has carried out a conciliation of the retail costs used in the imputation test with the same existing cost categories as in the regulatory accounting costs as audited and verified by the CMT and corresponding to 2007.

From the results of said conciliation the differences existing between the most relevant parties are detailed below:

- Billing costs: in this case, the difference between the regulatory accounting and the management accounting used in the imputation test derives from the fact that with the first, the data corresponds to the billing cost for the ADSL service whilst the

⁶ In accordance with the methodology, significant offers are considered as being those whose average client base during the reference period exceeded 5000 subscribers. It should be pointed out that this threshold does not exempt TESAU from their obligation to *ex ante* communication for said offers.



management accounting corresponds to the billing cost per client that also includes the costs for access and traffic.

- Sales costs: for this section, the management accounting data corresponds exclusively to the residential sector,⁷ whilst the regulatory accounting does not differ per segment and therefore it represents an average cost for both.
- Irrecoverables: the origin of the management accounting for this section is the provision for loss in value of financial assets but given the accounting obligation to cancel the provision of each previous year and allocate the provision newly every year, the yearly cost would be the difference between the allocation and the cancellation of the supply, with this result being comparable to that from the management accounting.
- Value added services: the cost of the regulatory accounting incorporates specific sections of costs such as the sale of equipment and exit to the internet that are not included in the same cost category in the management accounting.
- Taxes: with regards the tax section, the difference encountered in the conciliation process is due to the fact that the accounting cost detracts from the part of the tax that corresponds to the wholesale figures.

It can therefore be concluded that as a result of the conciliation process with the most recent audited cost accounting figures that are available to the CMT, the amount of retail costs used in the replicability test from TESAU's offers is comparable to the data audited in the previous year.

II.2.1 Updating the WACC

Proposal submitted for comments

Via the Resolution of 2 April 2009, the CMT approved the annual rate of the weighted average cost of capital for the year 2009 for TESAU, which remained fixed at 10.94. Therefore, this rate has been used for this update.

Allegations and considerations from the CMT

In its allegations in the consultation proceedings, TESAU affirms that “(...) *the concept of actual value in the framework of the current public consultation should not be understood in strictly financial terms, but also as a form of updating income and cost flows over the course of the economic client-life of the analysed retail services (...)*”. TESAU believes that a Consumer Price Index should be used as a discount. It also indicates that if the CMT considered using a financial measurement, it should use a reference of the financial markets, such as Euribor.

In this respect, the CMT wants to point out that it has already used the previous indicators for updating the cost and income flows in the framework of the Resolution of 26 July 2007. In

⁷ These are generally the products aimed at the residential sector that the Commission analyses (ex ante) from their replicability test.



fact, as shown on this occasion, “*what this is about is most suitably reproducing the dynamic followed by companies for assessing the economic and commercial viability of the launch of a specific product or service. Therefore, it is believed that the intangible investment of a new product or service launched onto the market basically consists of a process of accumulation of capital with the hope of obtaining some future benefits. Consequently, the required conditions for carrying out an investment are the existence of unsatisfactory demand, whilst the sufficient condition is that their performance exceeds the costs of undertaking it*”⁸. Given this, the CMT derived that the capital cost associated with an investment is the weighted average cost of capital (WACC).

The previous premises have not been altered so the discount rate applied to calculate the NPV does not need to be altered, as TESAU had intended.

II.2.2 Updating the total network costs

Proposal subject to comments

At the same time as this procedure, the CMT modified the prices of indirect broadband access.⁹ Because of this, incorporated into the calculation of the NPV included in Annex I of the current Resolution are both (i) said modified wholesale prices and (ii) the update of the additional network costs, required for supplying retail services.

Allegations and Considerations from the CMT

Vodafone believes that the report submitted for comments does not include certain costs necessary for access to wholesale services and that these should be included. These costs refer to the costs for subscribing and deregistering of a RUO client, installation costs and the anticipated costs for deregistration.

FTES indicates that the network costs in the report have undergone reductions that are over the development of the already-weighted wholesale prices for each of them. This development is unjustified.

TESAU alleges that during the comments period, reference should not be made to the potential modification of wholesale prices and its impact on the methodology, until they have been approved. This is due to the fact that the prices referenced are of no analytical interest if they are not approved and it could give a sign to the market that the reduction is virtually decided.

With regards this last declaration, it should be pointed out that it is lacking in meaning, as on the date of the approval of the current Resolution the wholesale prices had already been approved. With regards Vodafone’s allegations, the point it makes regarding costs not considered in the methodology framework is limited. However, it is important to clarify that the client registration costs have been included in the replicability analysis.

⁸ See SUAREZ SUAREZ, A.S.: Decisiones óptimas de inversión y financiación en la empresa (1996).

⁹ Report DT 2009/871.



Lastly, in relation to FTES' allegations, it should be pointed out that it seems clear that the costs for acquiring some equipment should be corrected to the downward trend in the period between the previous revisions.

II.2.3 Update of the average client life

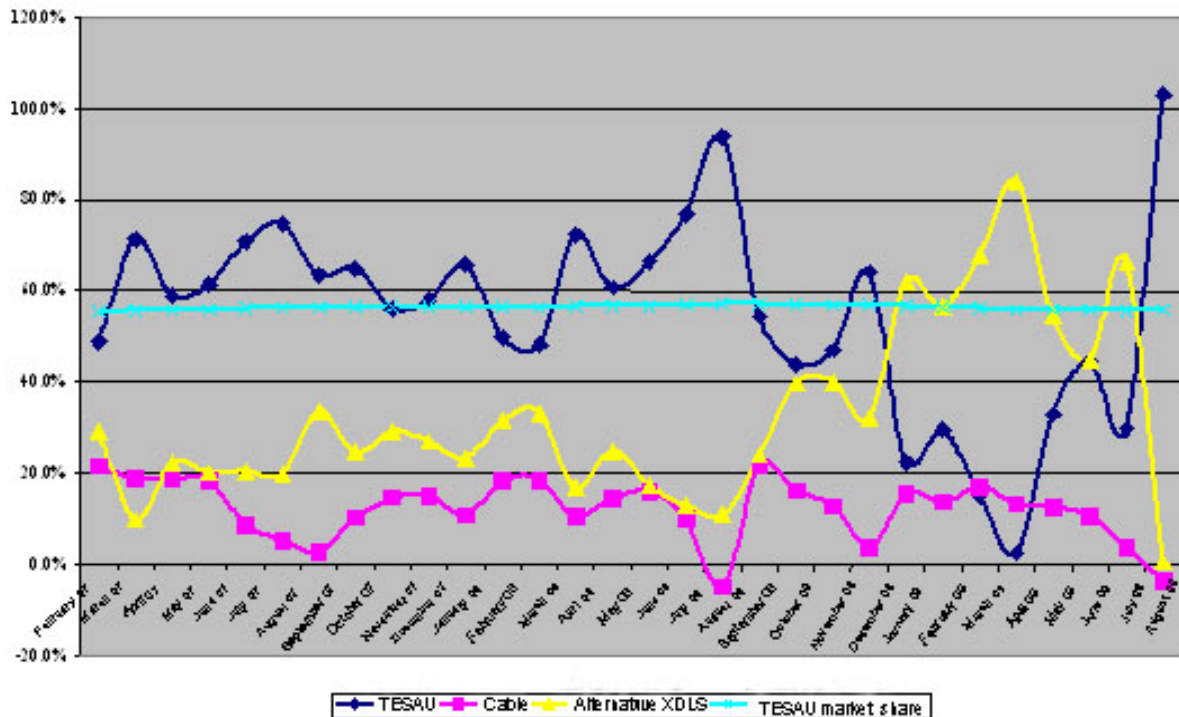
Proposal submitted to comments

Since the approval of the methodology, the CMT has been using an approximation of the average TESAU client-life as a recuperation period for retail services supply costs. Certain adjustments have been carried out to this average life in order to respect the principle of prudence, but at the same time an efficient entry into the market has been assured to the benefit of consumers.

It is certain that this variable has seen a downward trend in its development over the last months due mainly to the constant increase in clients deregistration, potentially caused by the current worsening economic trends.

Nevertheless, this general increase in the number of clients deregistration is accompanied by a trend in the opposite direction for registrations. On one hand, the alternative operators have seen a notable rise whilst the TESAU's sales are dropping slightly.

For these reasons, the evolution of the net profit share for broadband connections shows unfavourable change for TESAU, and benefits for alternative xDSL operators. This change has particularly the case from September 2008 as can be seen in the following graph:





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Figure 1. Evolution of TESAU's, cable operators' and xDSL operators' net profit share for broadband access

With the continuation of the tendency in alternative xDSL operators capturing new clients, TESAU saw their average client-life reducing and converging with the rest of the xDSL operators.

With all this said, the CMT believes it necessary to reduce the average client-life as used in the replicability test.

The table below shows the average client-life broken down by operator and wholesale service-type used. As can be seen, this value is less for clients who get their retail service supplied via bit-stream access.

Loop Unbundling					
	Client base	Operator weighting In the use of wholesale services	Deregistration	Churn	Average life
CONFIDENTIAL[
Total alternative DSL operators	1,364,660	100%	44,834	3.3%	32.14
Bit-stream Access					
	Client base	Operator weighting In the use of wholesale services	Deregistration	Churn	Average life
CONFIDENTIAL[
Total alternative DSL operators	387,878	100%	21,687	5.6%	18.04
Total (ULL + IA) (not including IA from ONO)					
	Client base	Operator weighting In the use of wholesale services	Deregistration	Churn	Average life
CONFIDENTIAL[
Total alternative DSL operators	1,708,104	100.0%	64,575	3.8%	26.95

Table 1: average client-life for those with xDSL connections, by operator and wholesale service used, in the second semester of 2008



In light of this information, the value for the average client-life is fixed at 27 months after the NPV calculation.

Allegations and Considerations from the CMT

During the period for comments, TESAU alleged that the CMT should use an operator test that is as efficient as that used in the *“decisions by the European Commission relating to anticompetitive practices and confirmed by the Trial Court”* and thereby recognise *“after-sales best-practice which deserves and results in a lesser rotation of clients”*.

The incumbent went on to state that the CMT’s forecasts stating that TESAU’s average client-life would continue to reduce and converge with that of the alternative operators was not sufficiently proven (it shows that the figures have remained unaltered since approval of the methodology). Furthermore, it states that reducing the average client-life is detrimental to the market as it reduces the promotions that this operator can offer to its clients *“at a financial point in time when consumer incentives are of particular relevance in growing the market”*.

The operators Vodafone, FTES and ASTEL positively rate this reduction in the average client-life as it is more realistically close to the profile of the average client in the market.

With regards the test that is to be used (operator equally efficient over reasonably efficient) it must be remembered that, from the ex ante point of view, the ERG has considered the application of the standard to be feasible, both for the equally efficient operator and for the reasonably efficient operator, at the time of analysing the ability to emulate the incumbent operator’s offers.¹⁰ Nevertheless, the test used, (currently¹¹ and as the result of this review) is that of an equally efficient operator,¹² although modified in application from the principal of prudence. Furthermore, it should not be forgotten that TESAU, due to its special position in the market, has a brand image that to date has allowed it to enjoy an average client-life above that of its competitors without the need to have achieved better commercial efficiency.

With regards the signs relating to the CMT’s predictions, the data supplied by TESAU shows a downward trend in this indicator.

¹⁰ See ERG report on the Discussion on the application of margin squeeze tests to bundles, ERG (09) 07.

¹¹ To date, a weighted average has been used as a network cost from the use of the regulated wholesale services. By using a strict approximation of the test of an operator as efficient as TESAU, only the cost of unbundling the loop would have been used (as TESAU uses their own network throughout the entire country).

¹² Both commercial and acquisition client costs and additional income and service use data (eg. Telephone minutes) correspond with TESAU’s.

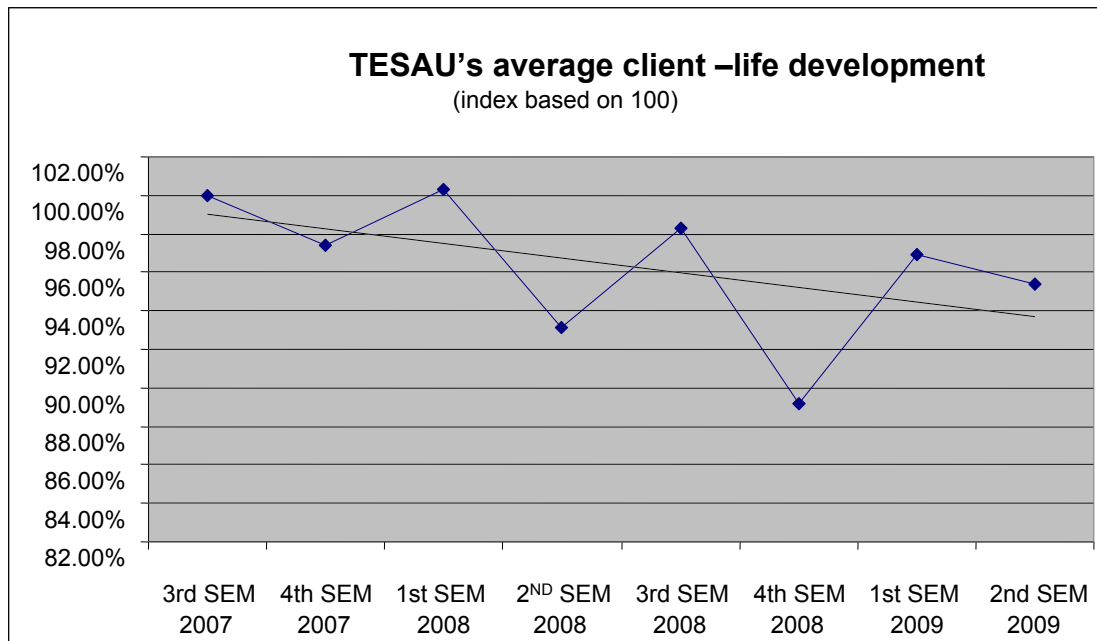


Figure 2: Development of the average TESAU client-life based on 100 and tendency

Finally, with regards the supposed detriment to market growth incurred by reducing TESAU's ability to promote its services, it should be pointed out that the NPVs approved in this review are very similar to those corresponding to the previous review.¹³

In conclusion, in line with the proposal contained in the comments report, it was resolved that the value for average client-life after the effects of the NPV calculations was fixed at 27 months.

In accordance with the aforementioned details, the resulting NPVs are detailed in Annex 1 of this Resolution.

II.3 MODIFICATION OF SPECIFIC ASPECTS RELATING TO THE ANALYSIS OF COMMERCIAL OFFERS

Once the NPV has been established that will serve as a reference for the analysis of the TESAU retail offers, as communicated by this operator, specific commercial practices should be more frequently analysed, which affect, although indirectly, the alternative operators' profitability. In general, these practices refer to promotions or offers that are added to the promotions that are the subject of this analysis, at the time of registration or during the client-life.

As previously mentioned, the NPV, in accordance with the DFC method, is the maximum limit by which TESAU can reduce its retail prices to its end clients – during the whole

¹³ As a representative example, the NPV of the "3Mb ADSL with national calls" previously in place was €410.46 and via this Resolution it is fixed at €408.75.



economic life – so that they are compatible with current wholesale prices. These price reductions can be of various different types. For example, under the framework of the Resolution of 22 May 2008, the CMT already analysed the impact that the speed duplications proposed by TESAU have had on the NPV of a typical client already ascribed to the service and that had received a promotion at the point of registration.

As in the aforementioned Resolution, TESAU's other commercial actions are analysed below and they should be kept in mind at the point of analysing their suitability for the obligations that this operator has imposed upon them.

II.3.1 Temporary concurrence of compatible promotions regarding different electronic communication services

As an operator with a wide range of electronic communication services, TESAU carries out simultaneous commercial actions on its various services. Therefore, it is very probable that promotions on broadband services occur at the same time, over others belonging to a different market,¹⁴ or they may come from an operator other than TESAU (such as Telefónica Móviles España, S.A. (hereinafter TME), However, in general, the information from TESAU refers to each one of the promotions separately, despite the fact that they are compatible.

From a commercial point of view this practice is justified because the users do not have to acquire all the promotional services at the same time. However, from a point of view of the analysis of TESAU's ex ante offers, it should be taken into account that for a proportion of the clients (those that acquire the services at the same time), the uptake costs that an alternative operator would incur when trying to compete with TESAU correspond to the group of promotions that this operator carries out simultaneously and which could potentially be accessible to the client, and not to the individual promotion that is analysed.

In fact, for an alternative operator that supplies broadband services to compete with TESAU, it must offer discounts that do not only compete with the particular promotion on this service, but also it needs to neutralise the discounts of other compatible promotions. Only if the alternative operator equals the entire amount of TESAU's discounts will it manage to make its offer economically indifferent for the potential client.

Therefore, it would be the total cost incurred by an alternative operator in trying to replicate TESAU's concurrent promotions that would be contrasted with the NPV of the service being analysed by the CMT.

The application of this criterion is particularly important at the time of analysing bundles which include mobile services. Independently of the fact that mobile services are probably supplied by TME, it is evident that any TME promotions that only clients benefit from who are contracted to one of these bundles will be subject to the effects of economic replicability analysis that the CMT carries out. At this point, the obligations that the companies in the Telefónica group have imposed upon them as an economic unit should not be forgotten.

¹⁴ As an example, the Resolution of 18 December 2008 (AEM 2008/2091) referred to a promotion which consisted in including the initial registration fee for the PSTN Line with the contract of a double or triple bundle offer, compatible with any other promotion involving broadband products. There is currently a promotion with similar characteristics in place.



Another equally important situation is that in which TESAU promotes the retail access registration cost to the PSTN upon contracting the broadband service, which in practice means that it offers a double discount to the broadband client. In accordance with the aforementioned Resolution of 18 December 2008, the CMT will take into consideration the sum of the amounts from both promotions to contrast them with the promotional limit, this is the NPV of the broadband product under promotion.

In conclusion, when faced with determining whether a particular promotion is compatible with the NPV calculated, the following will be taken into consideration; (i) the group of discounts that the client contracting the promotional product has access to; (ii) the promotions on other products or other operators that are linked with or conditioned to acquiring a service subject to the methodology.

In their allegations, TESAU states that *“in the case of different promotions existing at the same time, a new NPV is calculated, keeping in mind the income and the costs derived from the promotional products”*.

In addition, the CMT must watch over the replicability of the offer that a consumer could receive, whether it is formed by one or various simultaneous promotions, to ensure that an alternative operator has the ability to make it economically indifferent for the consumer receiving the offer. Therefore, faced with this situation, the analysis required is that described above, and therefore TESAU's allegation is rejected.

II.3.2 Conditions applicable to the promotions aimed towards the client base

The DCF method requires calculating, at the beginning of the average client-life, the costs and income flows that a client generates. This requires analysing the retail prices that TESAU fixes for a specific service, as well as those costs incurred by an alternative operator in supplying the service. In addition to the nominal prices, it is also necessary to consider the capturing costs that TESAU incurs and that are generally concentrated at the point of client registration.

However, over the last 12 months, a total of 154 commercial offers¹⁵ have been put forward, aimed at TESAU clients that already had a service contracted. One part of these promotions is aimed at favouring the migration of certain *origin* models to other *destination* models that offer superior supply and thus are more expensive.

On the other hand, there is another group of promotions aimed towards the client base that have other characteristics:

- They are aimed at clients that were previously contracted to an ADSL service or *Imagenio*, without specifying the exact original model;
- The reduction in the monthly fee is extended by an increased amount of time and, in certain cases, this reduction exceeds the difference with the price of the product of origin;

¹⁵ Only the promotions carried out in the field of the promotions framework are considered (maximum promotions communicated by TESAU).



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- The total amount for the promotional content can be increased;
- A 12 month contract agreement is required.

In the CMT's opinion, the launch of a promotion directed to the client base and characterised by one or more of these factors, depending on the intensity with which they are presented, can constitute a practice contrary to the obligations imposed on TESAU.

For these reasons, and with regards the practice of margin squeezing, for transparency of the analysis that is carried out in this regard, it is deemed necessary to establish the criteria under which the NPV will be determined for the stated promotions.

In this regards, it is important to specify that the analysis tool updated via the current Resolution is a tool for the evaluation of potential margin squeezing resulting from TESAU's promotions that can be identified *a priori* from their launch, which is the only reason for which it was designed, and therefore it is deemed suitable. Therefore it is also necessary to remember that this analysis is carried out so as to provide the necessary security for the commercial activity of the operators, (TESAU and its competitors), via the transparency of the analysis tool that the CMT uses, but does not exhaust the potential analysis of the real effects on the prices of the promotions assessed once effectively launched onto the markets, nor the control of TESAU's compliance with the various obligations imposed on them by the Resolution of markets 4 and 5, nor, in particular, the prohibition of exorbitant packaging, price discrimination or imposition of unfair contractual clauses.

II.3.2.1 Criteria which are applicable to promotions for client base who migrate to superior service supplies

For the purposes of the methodology, superior service supplies are understood to be any that comply with one of the following conditions with regards the product of origin:

- Those which involve an increase in internet access speed;
- Those that add a relevant service to a different market (as would be the case in the contract of a trio bundle by a client with a duo bundle, or the addition of mobile services to a bundle that does not have these services);
- In regards to bundles with telephone services, when the change in a model allows access to a higher number of contents (for example, where a client migrated from a trio with *Imagenio Básico* to another with *Imagenio Familiar*).

The methodology establishes that the NPV for each service constitutes the limit for the ~~promotions that are attributed~~ to it. However, the NPV of a client that migrated to a service

¹⁶ This commission will calculate the maximum promotion as a promotion which is enjoyed by 20% of the clients that are subscribed to the biggest promotions. This calculation will be carried out using the data obtained by this Commission in the framework of the requirements corresponding to the second and third semester prior to the reference semester (it is thought that the clients who subscribed in the previous semester will still be availing of the entrance promotion so they will not be subject to additional discounts):

$$\text{Maximum promotion}_t = \text{Average amount [20\% of clients with semester's biggest promotions}_{t-2 \text{ and } t-3}]$$



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with better benefits will exceed the initial calculation. This effect should be kept in mind at the time of analysing the promotions for the client base as well as the promotions that could have previously been enjoyed by the client.

To keep both effects in mind, the following must be considered: (i) the difference of the NPV of the end product with regards the product of origin and (ii) the existing margin between the NPV of the product of origin and the Maximum Promotion¹⁶ that has been carried out on it. The sum of both concepts will constitute the promotional limit for TESAU's offers aimed towards the client base, in such a way that:

$$\text{Promotion client base}_{\text{Migration}} < \text{NPV difference}_{\text{Origin and Destination Product}} + (\text{NPV}_{\text{Origin product}} - \text{Maximum Promotion}_{\text{Origin Product}})$$

This is equivalent to:

$$\text{Promotion client base}_{\text{Migration}} < \text{NPV}_{\text{Destination Product}} - \text{Maximum Promotion}_{\text{Origin Product}}$$

This estimation of the maximum promotion will use as a reference the data from the six monthly control that precedes the methodology. If the offer does not specify any particular origin model, the average promotion will be taken that is most suitable in accordance with how the recipients of the offer have been defined (for example, if it is about offers directed to clients with *Imagenio*, then the average promotion of those bundles will be taken that contain that service).

In its allegations, TESAU requested that *“all migrations that fall under the conditions of generating superior income for Telefónica de España with regards the originating service are to be considered as migrations to higher value services, and that the promotional limit that is available in these cases coincides with the total NPV of the destination product”*. TESAU named the antivirus service as an example of this situation.

The example below illustrates how the measure that TESAU requests could give rise to a margin-squeezing situation which would reject TESAU's request. For better representativeness of the example, one of the most marketed bundles has been chosen:

The NPV for the Dúo Bundle ADSL 3Mb + TPN is fixed at €408.75 whilst the NPV for the same bundle adding the antivirus increases to €425.67, which is a 4.14% (€16.92) increase. Therefore, if the CMT were to accept the incumbents request, it could promote it for €300 to a client that contracts the bundle without antivirus, reducing the monthly fees over 12 months, and when said time frame has passed, offer the client a contract for the antivirus thereby benefiting of another €300 promotion when faced with the client potentially deregistration. Therefore, an alternative operator could not feasibly replicate such promotions.

II.3.2.2 Criteria applicable to promotions for clients that do not migrate to superior service supplies

In reference to this type of promotion, TESAU requests the following:

- *“Commercial actions can be carried out that are aimed towards clients whose client-life is above the average client-life for Telefónica de España, with the only restriction imposed*



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being that the NPV set for the product contracted is not exceeded, and that the new client-life is re-set and calculated from scratch.

- *For clients whose client-life is not at the average length, and they have therefore not benefited from the entirety of the promotion that Telefónica de España had available at the time of registration, a promotion is applied to them (for the un-spent NPV)."*

II.3.2.2.1 Promotions to clients whose client-life with the operator since they availed of the latest promotion is superior to the average life as calculated by the CMT

As TESAU alleges, a user whose client-life with the operator since they availed of the latest promotion is superior to the average life as calculated by the CMT, would be reporting net benefits to TESAU that could be translated into cheaper prices without it necessarily implying a risk for the competition. In these cases, and due only to the effects of the calculation of potential margin-squeezing, these clients would be considered to be new clients.

II.3.2.2.2 Promotions to clients whose client-life with the operator since they availed of the latest promotion is less than the average life as calculated by the CMT

As TESAU alleges, it is true that on the occasions when the operator does not exceed the NPV, additional discounts to the clients would not, per se, involve anticompetitive behaviour. In any case, the methodology should ensure that there are sufficient ex ante components to guarantee that these commercial practices do not suggest narrowing of margins which would make the wholesale measures imposed on TESAU insufficient. Therefore, although the clients with a client-life above the average as established by the CMT could benefit from any promotion, given that they count on the total NPV for potential price reductions, the clients that have not exceeded this period require more supervision.

In fact, the maximum promotion amount, a priori, to avoid a situation of narrowing of margins, should respect the following limit:

$$\text{Promotion client base}_{\text{Without migration}} < \text{NPV}_{\text{Product}} - \text{Maximum Promotion}$$

This amount should be distributed throughout the average remaining client-life. Considering the average promotion that TESAU carries out is for 12 months, this operator should be interested in carrying out additional promotions once this period is complete. Given the average life of 27 months as established in the current Resolution, the additional promotions carried out in the remaining time (15 months) should not exceed the previous amount. It is important to point out that TESAU could design their promotions for the duration that they gauge as most opportune for them with the limit as previous stated, and without affecting point II.3.3.1 in relation to long-lasting promotions. Therefore, the CMT considers it necessary to link the figure that TESAU can promote to the duration of the proposed promotion, so that it ensures that additional promotions do not impose a situation of margin squeezing. This could be ensured by using the following formula:

$$\text{Monthly Promotion client base}_{\text{Without migration}} < (\text{NPV}_{\text{Product}} - \text{Maximum Promotion})/15$$

The CMT considers appropriate the imposition of this limitation given that a client that enjoys various consecutive promotions will never pay TESAU's nominal fixed price. The complications for carrying out a control of potential anticompetitive consecutive promotions



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include linking the NPV that can be promoted and the duration of the promotion, as has been described earlier.

For example, in accordance with the previous criteria, the maximum promotion that TESAU could offer to a client without migration for a period of 6 months would stand at:

$$\text{Monthly Promotion client base}_{\text{Without migration}} < 6 \times (\text{NPV}_{\text{Product}} - \text{Maximum Promotion})/15$$

With regards Vodafone, FTES and ASTEL's allegations regards the limitations of the promotions for the client base as well as in relation to the difficulties for implementing mechanisms for their control, the CMT believes that the group of previous criteria are suitable for identifying eventual margin-narrowing *a priori* to their launch on the market. Therefore, as can be seen in the following diagram, the previous restrictions ensure a positive margin over alternative operators (area shown as surplus NPV):

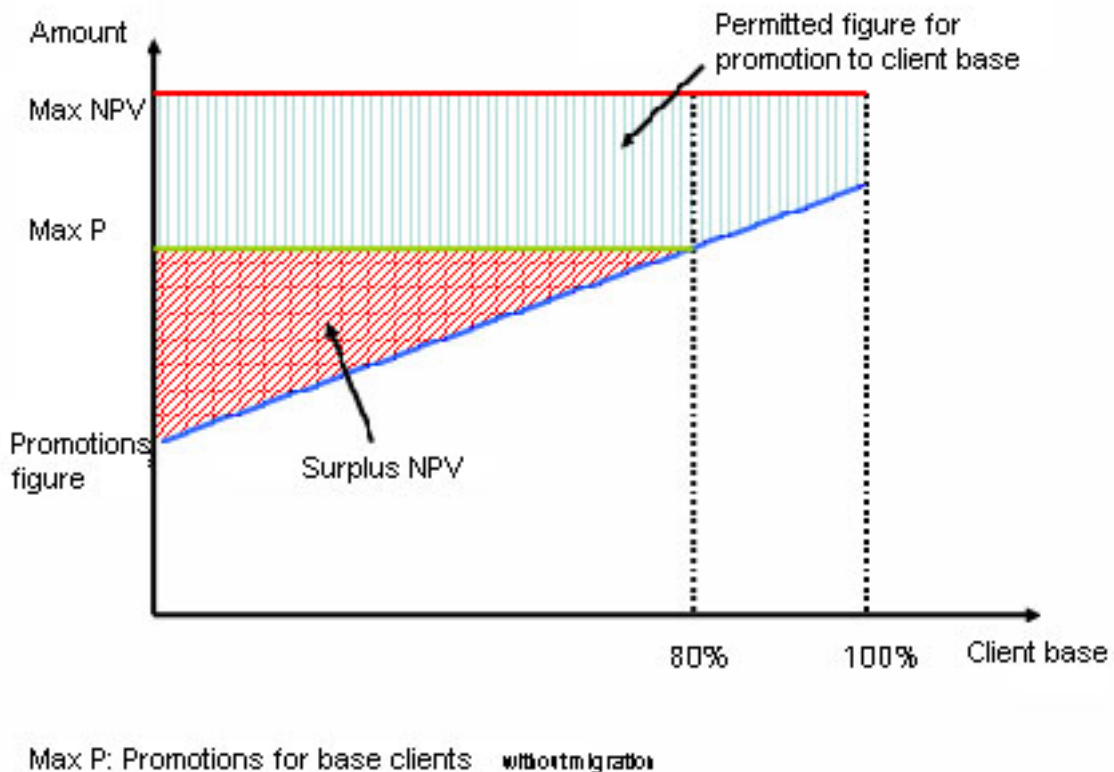


Figure 3: Surplus margin discounting the promotions to client base without migration

To assess the evolution of these margins as well as the possible modifications that could be carried out to the benefit of the end consumer, it is necessary that TESAU complements the information that they supply every six months in accordance with Annex 2 of the Resolution of 26 July 2007, with the relevant accounting information for income and costs for the retail services subject to analysis.



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Another type of potentially anticompetitive effects derived from TESAU's commercial policy is not subject to control by this methodology and as a consequence, these should be examined on a case by case basis by the CMT in order to guarantee the compliance of the obligations imposed upon TESAU.

II.3.2.3 Information to provide

To ensure that the offers to the client base are within the margins shown for allowing *ex ante* control of the potential narrowing of margins, the CMT requires TESAU to supply all the necessary information to fully understand the distribution of the clients that have contracted the most important products in keeping with the effective prices satisfied by them.

II.3.2.4 Permanence Agreement

The establishment of a permanence agreement is the aim and it is justified if it is linked to the commercial efforts of a particular promotion, as laid out in the Resolution of the AEM 2007/418 report.¹⁷ Applying this same logic, the permanence agreements on the client base are compatible with said Resolution, as long as they involve an increase in the commercial effort carried out by TESAU and they meet the rest of the criteria laid out in the aforementioned Resolution.

In the framework of the aforementioned Resolution of 12 July 2007, the CMT has already analysed the consequences of TESAU imposing a minimum period of permanence as a requirement for accessing certain promotions. These practices have become the market standard as can be seen in the following table:

Operator	Product Name	Price:	Permanence Agreement
Euskaltel	Despega Recarga 1M	15.5	No
Euskaltel	Despega Recarga 6M	39	No
Euskaltel	Dúo con Fibra 12M	49	No
Euskaltel	Dúo con Fibra 24M	75	No
Jazztel	Hasta 1Mb + Llamadas gratis con línea Jazztel	19.95	No
Jazztel	ADSL hasta 3 M + Llamadas gratis con Línea	34.4	No
Jazztel	ADSL hasta 20 M + Llamadas gratis con Línea	43.4	No
ONO	Banda ancha 2Mb (broadband)	28	12 months
ONO	Banda ancha 3Mb (broadband)	39.9	12 months
	Banda ancha 12 Mb		

¹⁷ Resolution of 12 July 2007 regarding the existence of anticompetitive practices in the marketing of a series of promotions of bundles on double and triple service offers proposed by TESAU.



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	(broadband)		
ONO	Banda ancha 50Mb (broadband)	60	12 months
Orange	1Mb + Llamadas (calls)	20	12 months
Orange	6Mb + Llamadas (calls) + TV	24.95	12 months
Orange	Todo en uno	34.95	12 months
R Cable	1Mb Option	36	No
R Cable	3Mb Option	45	No
R Cable	9Mb Option	36	No
Tele2 (Vodafone)	Línea Tele2 ADSL 1Mb	29.9	Free registration subject to permanence agreement of 18 months
Tele2 (Vodafone)	Línea Tele2 ADSL 3Mb	32.9	Free registration subject to permanence agreement of 18 months
Tele2 (Vodafone)	Línea Tele2 ADSL 20Mb	39.9	Free registration subject to permanence agreement of 18 months
Telecable	Pack Internet SAT Avanzado (advanced)	44	12 months
Telecable	Pack Internet Básico (Basic)	42	6 months
Telecable	Pack Internet Avanzado (advanced)	53.75	6 months
Telecable	Pack Internet Superior	63.75	6 months
Yacom	1Mb + Llamadas (calls)	19.95	12 months
Yacom	3Mb Yacom total	29.95	12 months
Yacom	10Mb Yacom total	32.95	12 months
Yacom	20Mb Yacom total	34.95	12 months

Table 2. Offers by operator with and without permanency¹⁸

In accordance with the information laid out by the CMT in the aforementioned Resolution of 12 July 2007, for their part, TESAU, links the permanency agreements to the fact that the client has availed of a particular promotion. However, from the previous table it can be concluded that this is not the regular practice in the market and instead the minimum periods of permanency are linked to the actual registration of the client and not to any market effort.

In the same way, given TESAU's market position, the CMT imposed on the operator the obligations of simultaneously offering a promotion with and without a permanency agreement. This obligation has multiplied the regulatory load and control of TESAU's commercial activity given that it has doubled the number of promotions that should be communicated. However, as shown in the following table, the practical impact of the promotions without a permanency agreement is reduced:

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¹⁸ Source: report into the prices of broadband by the *Oficina de Atención al Usuario de Telecomunicaciones* (Telecommunications Customer care Office), (3/07/2009).



Table 3. Percentage of promotions without permanency agreements per service/service bundle

Looking at the previous data, the CMT is of the belief that maintaining the obligation of offering simultaneous promotions with and without permanency agreements is unnecessary with a view to guaranteeing compliance of the obligations that TESAU has imposed on it as a dominant operator. This is justified for the following reasons: (i) on the one hand, the operators present in the market impose these agreements as a consequence of client registration and (ii) the acceptance of these types of promotions is low in the market so the effect on the market is limited.

Because of this, maintaining the general obligations with regards TESAU's obligations involves an "extra" commercial effort on the standard promotion that the market discounts for imposing a permanency agreement and paying a penalty in proportion to the length of time after which a client can deregister themselves, double communication of the promotions without permanency agreements is not deemed necessary.

II.3.3 Additional modifications requested by TESAU

In their allegations, TESAU requested that certain aspects of the methodology were modified to increase their flexibility thereby "allowing them to adapt their offers to their clients' needs":

II.3.3.1 Long-term promotions

TESAU requested "*[t]hat promotions longer than 12 months be permitted*".

With regards this, it must not be forgotten that the CMT to date has not prohibited any marketing of any promotion due to its duration, as the methodology does not mention any limitations in this sense as it is involved in detecting margin-narrowing practices.

Certainly, the longer the time frame that monthly fees are reduced for, the higher the possibility that the consumer sees that reduction not as a promotion but as the actual new price, so the CMT will keep this in mind when analysing a potential offer of this kind, taking into consideration the monthly price of the promotion for the entire duration of a promotion lasting over 12 months, as an effect of the NPV calculation which corresponds to the nominal price of the service.

II.3.3.2 Number of clients required for submitting an offer to the methodology

TESAU requested "*[t]hat the figure is raised from the current number of 5000 clients, and is made applicable to all the different services; both for new products and for the ex post analysis of the existing products. In the case of new products, they require a superior volume of clients to be able to impact on the competitive market conditions*".

In the request TESAU did not propose a new threshold for the analysis of offers. Nevertheless, the CMT considers that the exponential increase in the number of offers launched by the incumbent multiplies the possibility of crossed-subsidies between offers precisely because ever-increasing segmentation means that the average client base per service/service bundle is reduced. Therefore, the threshold of 5000 clients remains in place.

II.4 ANALYSIS OF THE COMPETITION IN BUNDLES OF CERTAIN SERVICES



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II.4.1 Bundled offers that on one hand include retail access to the PSTN, and on the other, one or more of the following fixed services: telephone traffic, broadband internet access and television

The group sale of retail access to the PSTN, and among others, the services of fixed telephone traffic, broadband internet access and television are becoming a more and more common way to market these services. Apart from the cable operators, Vodafone, FTS and Jazztel are launching these types of bundled offers. In general, they are characterised by being, at the least, triple offer bundles, with the exception of the products “*Línea Jazztel tarifa plana*” (Jazztel line with flat rate) and “*Vodafone en Casa*”, which include retail access services to PSTN and fixed telephone traffic.¹⁹

This conclusion is applicable to a cable operator such as ONO: of the 27 bundles that it markets with retail access to the PSTN, only one of them is a double offer (with fixed telephone traffic being the other service).²⁰

Operator	Bundled Offer	Date of Market Launch	Access to PSTN	Fixed line telephone	Fixed broadband internet access	Television	Access and Mobile phone	Access to mobile broadband internet (3G)
Orange	Todo en Uno	Sep-07	X	X	X	X		
Ya.com	YACOM TOTAL 20Mb	Jan-08	X	X	X			
	YACOM TOTAL 10Mb	Jan-08	X	X	X			
	YACOM TOTAL 3Mb	Jan-08	X	X	X			
Tele2	Línea Tele2 ADSL, Línea Tele2 Libre	Nov-05	X	X	X			
	ADSL + Línea (ADSL + phone line)	Apr-09	X	X	X			
Vodafone	ADSL Tarifa Plana	Oct-08	X	X	X			
	Navega y Habla Casa	Mar-08	X	X				X
	Internet Siempre	Jun-09	X	X	X			X

¹⁹ Independently of the fact that this service is supplied over Vodafone’s mobile network, due to its facilities and usage characteristics it is considered to be a product that is comparable to any other that offers these two services of retail access to the PSTN and fixed line telephone traffic. This is included in market 1.

²⁰ It is the product “All inclusive telephone” that ONO has marketed since September 2007.

²¹ In accordance with Vodafone, this product offers mobile broadband services aimed mainly during the period between DSL service supply (and during issues with fixed networks), with the aim of preventing a client from experiencing any potential supply delays or inconveniences. Therefore, this product is not seen to package the mobile broadband service.



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	Contigo I							
	Vodafone en Casa Tarifa Plana	Feb-08	X	X				
Jazztel	Línea Jazztel con tarifa plana	Aug-07	X	X				
	ADSL JAZZTELIA	Mar-06	X	X	X	X		
	ADSL 20M	Sep-05	X	X	X			
	ADSL 6M	Jul-08	X	X	X			
	ADSL 3M	Aug-08	X	X	X			
	ADSL 1M	Apr-07	X	X	X			

Table 4: Bundled offers with retail access to the PSTN from the main alternative operators (except cable operators)

The competitive dynamic in the market reflects that once significant network rollouts have been undertaken, the alternative operators try to supply the end client with the most complete offer possible, thereby seeing TESAU's clients leaving the incumbent operator who had historically been the supplier of fixed telephone access. For this reason, the alternative operators manage to not only achieve a better return on their investments, but they also have a more loyal client base.

As well as this, it is stated that the alternative fixed operators bundle their retail PSTN access with the main aim of competing for broadband clients²² (see table 4). In fact, the inclusion of this retail service represents a step further forward, in line with the progressive bundling of the broadband commercial offers²³: firstly, fixed telephone traffic is incorporated, then television, and from 2008, retail access.

Therefore, given the commercial strategies followed by these operators, it is useful to analyse the double offer bundles (which only include retail PSTN access and fixed telephone traffic) separately from the remaining triple and quadruple bundles.

II.4.2 Double bundled offer: retail access to the PSTN and fixed telephone traffic

At a first glance, the previous analysis could mean that this type of group offer has not been widespread. However, the reach of this conclusion should be clarified, as for a certain section of the market, retail PSTN access and mobile access represent a growing degree of substitutability.

In the framework of the market 1 Resolution, a group of clients have been identified whose telephone use is so low that the fixed operators (be it the incumbent or alternative) would

²² In the case of Orange, only four of the 27 bundled offers with retail PSTN access do not include broadband internet access: "Teléfono todo incluido", "Teléfono todo incluido + televisión esencial", "Teléfono todo incluido + televisión extra" and "Teléfono todo incluido + televisión total".

²³ On behalf of the alternative operators who do not have their own network.



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bear the competitive pressure that the mobile operators exert, via their bundled offer for access and telephone traffic over mobile networks.²⁴

Put differently, the volume of expense from these end clients gives the mobile operators' offers sufficient relevance to conclude that these types of bundled offers are widespread in this segment of the market. In addition, the fixed operators should design specific products for keeping these clients within the market, such as pre-pay products which eliminate fixed payments for access services. In fact, the competitive situation is such that an bit-stream access operator, based on pre-selection and that is obliged to maintain the recurrent fees for access services, faces significant disadvantages which, when not eliminated, reduce the possibilities for competition.

However, this does not imply that the end user is negatively affected as they can avail of alternative offers from TESAUs: not only the product "Vodafone en tu casa" but also all the offers and price plans from the mobile operators, including Mobile Network Operators with (hereinafter MNO) and Mobile Virtual Network Operators (hereinafter MVNO).

Therefore, in accordance with the limit established in the Market 1 Resolution, it can be concluded that the market sector with an expenditure level per end user for a fixed telephone service that is lower than €20 per month presents a sufficient level of widespread competition in this class of bundles. Given that the aim of this methodology is the analysis of the incumbent operator's offers, the CMT believes that included in this segment of the market are those bundled offers for access and fixed telephone traffic whose recurrent monthly fee was attractive for those users who, given the average income calculated for the traffic services, have billing lower than the quoted figure of €20 per month.

On the other hand, the second section of the market as formed by end clients with a unit-expenditure over €20 per month (for whom fixed access and mobile access are complementary and not substitutes) does not present a sufficiently widespread level of competition in this class of bundles:

- Only Vodafone, via "Vodafone en Casa" presents a bundled offer comparable in terms of coverage to those that TESAUs currently markets or could potentially market.
- The degree of implantation of the Wholesale Line Rental (hereinafter WLR) is still very low. In August of 2009, the number of WLR lines stood at **CONFIDENTIAL** [].
- These low levels of development of these retail and wholesale services are in contrast to the market power that TESAUs holds in the retail market for access to public telephone networks in fixed locations, with a residential market share of 74.4%.²⁵

²⁴ See Resolution of 5 March 2009 (market 1 of the 2007 Recommendation)

"The PSTN accesses have an associated monthly fee which currently stands at €13.97 (TESAU's fee). It is evident that when looking at these prices there are a group of clients whose billing would justify the substitutability of PSTN access to mobile access, which would prevent the payment of a monthly subscription charge independent of the consumption [...]." At the same time, in the aforementioned Resolution it is estimated the "the number of fixed lines susceptible to migration to mobile telephone services is only approximately 20% of the total of TESAUs' lines".

²⁵ 2008 CMT Annual Report. Table 53 (pg. 261)



Given this situation, clients can benefit from the offers from the operators who supply the traffic services independently from fixed telephone access. In fact, there are niche operators that offer specific types of calls at very competitive prices that would be non-viable if the traffic service was sold together with the access service.

TESAU's allegations and the CMT's considerations

TESAU states that the fact that a type of product marketing is not widespread does not mean that there is not sufficient competition regarding said product.

TESAU maintains that the numerous wholesale services available allow alternative operators to carry out these offers in a comparable way to them (in terms of coverage), not only Vodafone. In fact, according to TESAU:

- With regards the €20 per month threshold, the availability of these network alternatives is not restricted to the fact that the price to the end client for this type of bundle is above or below an established monthly fee. Proof of this are the flat rates as marketed by Vodafone and FTES whose monthly fees exceed this threshold.
- With regards the degree of implementation of WLR, said service has been available for one year and as of November 2008 the CMT confirmed its correct functionality. Therefore, the lack of demand for WLR does not prove a lack of competition in the market but instead a lack of interest on the part of the alternative operators who opt for other wholesale services.
- With regards the market share in the market of public telephone network access in a fixed location, the CMT does not see this as competing directly with mobile access.

The CMT has fixed a threshold which it believes to be reasonable and adjusted to market reality with the aim of identifying two market segments for which the supply options are different. Therefore, discussions based on demand are what will justify this decision and not those based on the offers, as TESAU suggests.

Likewise, the CMT believes that it would be hasty to conclude that the low uptake of WLR is due to the lack of interest on the part of alternative operators. For example, in May 2009, the products "*Vodafone en casa*" and "*Linea Jazztel con tarifa plana*" had only reached CONFIDENTIAL [] thousand registrations, respectively over the last year. These results reflect that the ability of the alternative operators to market these double-offer bundles is still weak, especially given TESAU's position in the retail PSTN access market.

Therefore, the CMT considers that the availability of the suitable wholesale services, such as WLR, is a necessary but not sufficient condition for determining that competition in this type of bundled offer is widespread. In addition, the potential access services of the PSTN over mobile networks that not only Vodafone could supply, but also the rest of the MNOs, does not allow for the conclusion that the competition has been widespread in this type of bundled offer given the volume of registrations and the big difference between TESAU and the rest of the operators in the retail market for PSTN access.



Lastly, it is necessary to point out that the relevant market share is that stated by the CMT and not other parties, as TESAU suggests, as it is in accordance with the reference market definition corresponding to the Resolution of Market 1. This does not prevent taking into consideration the higher level of substitution between fixed and mobile access for a specific user profile during the determination of ex ante controls for the bundled offers.

Vodafone and ASTEL's allegations and the CMT's considerations

Vodafone and ASTEL do not agree with the competition analysis for this type of double-offer bundle for expenditure levels lower than €20 per month. ASTEL believes that the volume of clients that have migrated to alternative offers is not significant, so it considers it to be inappropriate to relax TESAU's obligations, who still retain a significant market share. Vodafone considers that the arguments applied by the CMT for concluding that the competition is not sufficiently widespread for monthly expenditures over €20 are also applicable to lesser levels of telephone expenditure. In fact, Vodafone argue that:

- The CMT confused the fact that the products are substitutes with the fact that the specific product "*Vodafone en casa*" can exercise relevant competitive pressure on the access and traffic services supplied by the fixed operators, and in particular, by TESAU. With this argument, the paradoxical situation arises whereinafter only said product, with a market share of CONFIDENTIAL [] itself makes up a widespread offer that exercises competitive pressure on TESAU's access and traffic services.
- This conclusion does not fit with the market 1 analysis in which it is determined that access from mobile networks was substituted by PSTN access but that its development was incipient.
- It is not clear whether objective justification exists for the development of a €20 per month threshold CONFIDENTIAL [].
- The "*Vodafone en casa*" product presents some limitations on the traditional fixed service.

In this respect, the CMT considers that Vodafone has incorrectly read and interpreted the report submitted for comments. In the CMT Service Report it is explained that for this section of the market, the bundled offers for access and mobile telephone (voice) traffic compete directly with the bundled offers for retail access to the PSTN and fixed telephone traffic. Therefore, the conclusion which states that the competition for this type of bundle is widespread is not based on the sole marketing of the product "*Vodafone en casa*", as Vodafone suggests, and instead is based on the growing substitutability between the access and traffic offers from the fixed and mobile operators. In fact, included in these are all the products and price plans for pre-pay and post-pay that are attractive to this type of client, with reduced usage levels and who consequently could make use of just a mobile service.

For the rest of the residential clients – with a higher volume of telephone expenditure, and thus, for which the fixed and mobile telephone services are not a substitute – the CMT has kept in mind that amongst other aspects, the competitive pressure exercised by the "*Vodafone en casa*" product is not sufficient and it has concluded that the competition in this type of bundle is not sufficiently widespread.



With regards ASTEL's allegations, it is necessary to point out once more that the CMT is not only looking at the clients that have been able to change access operator, but also the competitive pressure that the mobile operators exercise with their bundled offers for access and mobile traffic.

FTES allegations and the CMT's considerations

Although FTES positively values the proposal for maintaining the current margin analysis methodology for bundles with telephone access or with mobile services (according to which the attributed cost for telephone access or for the bundled mobile service is the same as the retail price) it does not agree with the exception carried out with regards the bundles for access to the PSTN and fixed telephone traffic. According to FTES:

- The CMT proposes the imposition of telephone access costs in view of the real cost and not the retail cost. For this reason, given the NPV of €92.46 calculated for the PSTN access services, this measure gives TESAU the possibility of exploiting an additional margin of €4/month.
- This proposal leaves in doubt the effectiveness of WLR for introducing competition in broadband services and it raises question marks surrounding the prices levels established for WLR.
- As the monthly payment per residential client is €22.2/month, in the case of availing of a margin for reductions, promotions or bundles over €4/month, the total practice of the residential sector could be seen to be affected by this measure.
- The substitutability is restrictive in the case of prepay mobile phone with an ARPU per line over €10/month, which means that to prevent the production of an anticompetitive substitution it is important to call for a threshold in relation to the minimum payment that can be guaranteed for these offers.

The CMT believes that FTES is not questioning the analysis regarding the widespread level of the bundled offers for clients with reduced telephone expenditure (less than €20/month), but is in fact directly tackling the effects that this would have on TESAU's possibilities when designing their commercial strategy. In addition, the conclusion that TESAU could carry out more aggressive promotions would only be the logical result, once concluded that these double offer bundles are widespread for a user profile.

In any case, the CMT does not also believe the calculations carried out by FTES to be correct. Firstly it does not explain how it has worked out this additional margin of €4/monthly, thereby stopping the CMT from verifying whether these calculations are consistent with the methodology of emulability of TESAU's commercial offers. Secondly, it is calculated with regards the individual service of retail access to the PSTN and not with regards a bundled double-offer as is the case for those analysed in this section.

As a result of the above, it would also not be necessary to modify the price of the monthly WLR fee on the basis of these calculations. Furthermore, it is not justified to argue that the price of the monthly WLR fee should be modified to establish the maximum limit for promotions in such a way that it absorbs the impact of having concluded previously that the



competition in this type of bundle is sufficiently widespread. In other words, they are independent analyses, which are dealt with in the framework of different reports.

Lastly, the CMT does not consider it necessary to fix a minimum threshold for additional costs, once each one of these bundled offers should exceed the test of group emulability.

II.4.3 Triple and quadruple bundled offers, with retail PSTN access

As has been explained, these types of bundled offers are quite a lot more widespread than the previous ones. In May 2009 the number of clients on these offers from Vodafone (including Tele2) and Orange (including Ya.com) reached **CONFIDENTIAL []**; for their part, TESAU's figures stood at **CONFIDENTIAL []** clients.²⁶ It is certainly significant to point out that this figure does not reflect the real position of TESAU as (i) this operator began to market these packets in April 2009 and (ii) it has a client base of **CONFIDENTIAL []** million residential ADSL clients to whom it also supplies the retail PSTN access service.

In any case, at the moment of assessing to what measure the competition is developed, in terms of bundles with these characteristics, the actual reach of these offers marketed by alternative operators should be looked at. Given the current conditions in which the WLR wholesale services and indirect broadband access are supplied under, this will be determined by the level of wholesale service implementation for unbundled access to the loop and by the degree of roll-out of the access networks on the part of the cable operators.

- With regards the first point, the number of loops corresponding to the local exchanges where the alternative operators have co-located stands at **CONFIDENTIAL []** % of the total number of unbundled loops in May 2009 and **CONFIDENTIAL []** % of TESAU's total client base.²⁷
- With regards the second point, in December 2008, the coverage of the cable operators reached 51% of TESAU's access.²⁸

In view of these levels of coverage, it can be concluded that TESAU is able to carry out these bundled offers to practically half of the potential market, which cannot be emulated by the alternative operators to any reasonable level. Therefore, it is concluded that the competition in this type of bundle is not sufficiently widespread due to the insufficient reach of the triple and quadruple bundle offers marketed by the alternative operators.

TESAU's allegations and the CMT's considerations

²⁶ Corresponding to the bundled offers; Dúo ADSL Económico 1Mb, Dúo ADSL Económico 1Mb + FM, Dúo ADSL Económico 3Mb, Dúo ADSL Económico 3Mb + FM, Trío Familiar Económico 3Mb and Trío Familiar Económico 3Mb + FM, which started to be marketed in April 2009.

²⁷ The number of loops associated with the local exchanges where the alternative operators have co-located is equal to **CONFIDENTIAL []**. In December 2008, TESAU's complete client base was made up of 16,541,995, although **CONFIDENTIAL []** were unbundled.

²⁸ In December 2008, the number of accesses installed by cable operators stood at 8,436,167.



TESAU highlights that it has not been the first operator to market these bundled offers, which shows that from a technical and financial point of view, the alternative operators are able to offer such bundles. In fact, it shows that there are offers on the market that are comparable, and better even, than theirs.

With regards the levels of coverage, TESAU considers that the CMT overlooks access via mobile technology. This fact, together with the presence of the cable operators leads TESAU to conclude that in continuing with the restrictions imposed by the CMT, it cannot equally compete with the rest of the operators.

For the CMT, the relevant aspect at the time of determining whether competition in this type of bundled offer is widespread or not, is the insufficient geographical reach of the offers marketed by the alternative operators. The access over mobile technology still does not alter this conclusion as (i) the alternative operators use it to complement fixed access with the aim of providing the service to the end client in a lesser time frame and (ii) the degree of substitutability between fixed access and mobile access is insufficient, and in fact, TESAU themselves explain in their allegations that mobile broadband is a complementary service.

Furthermore, the CMT considers that the restrictions put on TESAU by the *ex ante* control of these bundled offers does not involve an unjustified burden nor does it risk the viability of the business for the half of the market due to: (i) TESAU's position in the national market with a market share of 74.4% for the residential sector and (ii) the fact that the demand for the access service to the PSTN on the one hand, and the demands for the fixed telephone traffic services, broadband internet access and television on the other, present an important degree of linkage (as they are complementary products²⁹).

In this competitive environment, in the absence of an implicit price test, as established further on in Table 6, the risk that TESAU could translate its dominant position in the retail market for PSTN access to the remaining retail markets would exceed the risk of TESAU being unable to respond with a sufficient degree of freedom to the bundled offers from the alternative operators.

ONO's allegations and the CMT's considerations

Although ONO agrees with the report with regards the point that refers to the insufficient widespread level of the triple and quadruple bundles with retail PSTN access and with mobile services, this operator considers that these criteria are perfectly applicable to all the triple offer bundles even when they do not include PSTN access or mobile services.

As the analysis carried out in the framework of the Resolution of 26 July 2007 which approved the methodology for the *ex ante* analysis of TESAU's commercial offers and the present analysis, the competitive environment in which these bundled offers are framed is not the same. Therefore, the way in which these should be treated cannot be the same either: and even less so when ONO does not supply additional evidence to support their theory.

²⁹ In financial terms, the crossed elasticity of their demands will be negative; therefore, a decrease in the price of the monthly fee for the retail access service will have a positive effect on the demand for fixed telephone traffic or access to broadband internet access and vice versa.



II.4.4 Bundled offers that include mobile telephone services³⁰ and/or mobile broadband access³¹ with one or more of the following fixed services: access to PSTN, telephone, broadband internet access and television

Vodafone has been the first and main operator to market mobile and fixed services together. In October 2008 this operator introduced the product “Vodafone ADSL Uno” which includes mobile telephone services and fixed broadband internet access.³² Recently, in June 2009, it launched the product “*Internet siempre contigo*”, which sees the group marketing of the “Vodafone ADSL Uno” and access to mobile broadband internet. TESAU has reacted with the launch of (i) the Duo and Trio products with mobile voice services, in February 2009, and (ii) the Duos and Trios with family solutions in June 2009.

With regards the remaining MNOs, neither FTES nor Xfera bundled mobile and fixed communication services³³. For their part, since April 2009 Jazztel marketed their access and mobile telephone services only linked with other services such as broadband internet access, retail PSTN access and telephone or mobile broadband internet access.³⁴ With regards this last service, Jazztel supplies it separately as well as in a bundle.³⁵ Lastly, of the cable operators (all of them with access agreements and call origination set with the MNOs) only Telecable de Asturias, S.A.U. (hereinafter Telecable)³⁶ and ONO³⁷ are marketing these types of bundled offers.

Given the short period of time that has passed and the market strategies from the fixed and mobile operators, these bundled offers have not reached the same level of importance as the remaining ones, as the number of clients attained by these operators is still very low: **CONFIDENTIAL []** for Vodafone, Jazztel and TESAU, respectively.

Despite the fact that the market is in the first stage of introducing this type of bundled offer, this does not make it impossible to conclude that the competition in this type of bundle is widespread.

- MNOs of the competitive magnitude and ability of Vodafone and FTES compete and/or are able to compete under almost the same conditions, especially when this market segment is new and Vodafone has taken the initiative.

³⁰ Given their nature, it would include access services to the telephone network from a mobile location as well as the services of voice and data traffic (including internet access) supplied over a mobile terminal.

³¹ Supplied via data storage device (USB modem or *datacard*).

³² See footnote 21.

³³ FTES is limited to bundling the two mobile services considered in the market product “*Tarifa Plana voz e Internet*”.

³⁴ This commercial practice is known as *tying*.

³⁵ Mixed bundling. Under this mode, Jazztel offers a discount in the broadband internet access service.

³⁶ According to Telecable, the “Pack UNNe”, is a combination of their four products: television, fixed voice, Internet and mobile (in the contract model).

³⁷ ONO only markets the mobile broadband internet access service to those clients who have contracted the fixed broadband internet access service.



- Stemming from the Resolution of 2 February 2007, MVNOs with the cable operators (ONO, Euskaltel, R-Cable and Telecable) and Jazztel reached access and call-origination agreements to mobile networks in 2006 and 2007, and they are able to design similar bundled offers.

Furthermore, in the case that mobile services were to make up a deciding competitive variable in the capture of broadband clients, it would not be clear whether TESAU was able to reinforce their market power in this market via their group marketing.

When looking at the gross volume of registrations to the Vodafone and TESAU offers, (see Table 5), it can be seen that the registration rhythm of the ADSL and mobile telephone bundled offers is less than those that bundle the ADSL service, retail access to the PSTN and fixed telephone traffic. This analysis would seem to show that the ability to capture broadband clients who have the ADSL bundle with mobile telephone is slightly less than this bundle itself but with the retail access to PSTN.

This result is in keeping with the fact that in the first case, the demands on the services will have to be independent whilst in the second case, the services are complementary³⁸ and their level of linkage is higher.

CONFIDENTIAL[

]

Table 5: Gross registrations for Vodafone and TESAU, corresponding to the offers bundled with retails access to the PSTN and mobile telephone

In summary, contrary to the proposal of the Hearing Report, the CMT concludes that, in the first stage of the launch of this type of bundle, the competition is sufficiently widespread and thus the group replicability test will be sufficient.

TESAU and ASTEL's allegations and the CMT's considerations

TESAU believes that there is competition in bundles which include mobile services; be them access and mobile traffic or mobile broadband:

- Given the current conditions (delicate economic environment, especially in Spain), the convergent fixed-mobile offers make up one of the main competitive tools for the operators. In fact, this form of bundling has experienced exponential growth in the first semester of 2009 (proof of this are the offers from mobile operators such as Vodafone and FTES, and the cable operators such as Jazztel). These commercial practices have developed in surrounding countries also (Telekom Austria, Belgacom, BT, Portugal Telecom and France Telecom).
- There are a sufficient number of convergent offers and there no technical conditions which would make any of the operators unable to carry them out for their clients.

³⁸ Similarly to the access service to a fixed telephone network and the fixed telephone service (see Resolution of 26 July 2007, which approved the methodology for ex ante analysis of Telefónica de España S.A.U's market offers. P. 66).



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There is no significant entrance or exit barrier over the current situation for each one of the alternative operators. In fact, TESAU emphasises that it has not been the first or main operator to launch proposals of this type.

- The publicity efforts carried out by Vodafone and FTES, with regards these convergent offers intensified notably at the end of 2008.
- In making reference to an internal market study, TESAU identified a potential market for these mobile-fixed bundles: for the CONFIDENTIAL [] of the sample formed by CONFIDENTIAL [] it can be concluded that there is the intention to additionally and complementarily acquire the mobile broadband on top of the fixed service. On the basis of this study, TESAU argues that the ability for the market to grow sits above the possibility of bundling fixed and mobile products. Likewise, the level of complementarity of the two services does not provoke a reduction in the market and instead it sustains the growth of the client value, upon adding the attribute of mobility.

For its part, ASTEL believes that the implicit price test should be maintained for the bundles with telephone access or mobile services as competition in access continues to be insufficient and the significant positions of the Telefónica Group in the fixed and mobile markets advise against the criteria being relaxed that are designed to guarantee replicability for configuring bundles, as TESAU has started to offer.

The CMT has kept in mind (i) the degree of immaturity of this segment of the market; (ii) that TESAU has not been the first operator to launch this type of offer; and (iii) the better balance of strengths between the operators in the mobile markets to arrive at the conclusion that the competition in these types of bundles is sufficiently widespread, as opposed to that proposed by ASTEL. Therefore, the CMT shares TESAU's conclusion in this respect although the arguments that justify this decision do not completely coincide with those of TESAU. In addition, it should be pointed out that the fact that these offers are acquiring more and more importance in the current economic context (both on a national and a European level) and that they present a potential for significant growth does not explain the competition in this type of bundle being sufficiently widespread.

With regards this form of bundling, the CMT considers that this analysis of group emulability will allow it to analyse to what measure the prices agreed upon by the MNOs and the MVNOs allow the emulability of these types of bundled offers, especially at a time when the voice and mobile data flat rates are being widespread on a retail level.

The following table summarises the main conclusions and their implications on the emulability test for the analysis of TESAU's bundled offers.

Type of Bundle	Level of Competition	Group replicability	Individual Replicability (Implicit price test)
Retail access to PSTN and fixed telephone traffic for clients with a monthly expenditure of less than €20	Widespread, by the offers from the mobile operators	Yes	No
Retail access to PSTN and fixed telephone	Not widespread, there is not sufficient fixed-mobile	Yes	Yes, with regards fixed



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traffic for clients with a monthly expenditure of more than €20	substitutability in access		telephone traffic
Triple and Quadruple bundled offers with retail access to PSTN	Not widespread; insufficient reach of the offers from alternative operators	Yes	Yes, individual or group replicability test on all the services except retail access to the PSTN ³⁹
Triple and Quadruple bundled offers, with mobile services	Widespread; first stage of launch of these products in which TESAU has not taken the initiative	Yes	No, limited ability for reinforcement of market power via the mobile services

Table 6: Summary of the analysis

III RESPONSE TO OTHER ALLEGATIONS RELATING TO THE METHODOLOGY OF EX ANTE ANALYSIS OF TESAU'S COMMERCIAL OFFERS

The current sections attempts to gather allegations with regards the parts of the methodology that are not subject to explicit consideration in the Service Report from the CMT and which in general, have been subject to analysis in the previous revisions.

III.1 PRACTICES GATHERED BY THE METHODOLOGY

Vodafone believes that in the framework of the methodology, the CMT should control TESAU from having market retail offers that discriminate the price in keeping with the destination network.

Firstly, the CMT reiterates that the markets for fixed telephone traffic are not susceptible to ex ante regulation, as has been shown in point II.1. Therefore, the conclusion has been reached that for the markets of fixed telephone traffic, the ex post control, exercised by the National Competition Authority or the CMT via the faculties attributed by articles 48.2 and 48.3(e) of the LGTel, it is sufficient to avoid the potential anticompetitive practices that could occur.

On the other hand, in relation to the offers for products included in the markets susceptible to regulation, it is worth remembering that the analysis of specific practices should be carried out on a case by case basis if an ex ante action rule is not defined. In fact, as shown in the Resolution of 26 July 2007, "*price discrimination as well as other potentially anticompetitive*

³⁹ For example, for a double-offer package with broadband internet access, the implicit price test will be carried out with regards the later service. However, for a triple-package offer that was to include broadband internet access and fixed telephone traffic, the implicit price test would consist of a group replicability test of these services where the income was the difference between the income for said package and for the retail PSTN access. This focus is consistent with the conclusion that the competition in this type of package is sufficiently widespread.



practices can adopt diverse forms which make their inclusion difficult in a methodology such as this. Therefore, and in relation to the allegations formed by Vodafone, Orange and ASTEL relating to the non-verification of the obligation of non-discrimination on the part of the methodology, the CMT concludes that the methodology is oriented towards the detection of situations of market squeezing between the regulated wholesale services and the retail services as proposed by TESAU given that these situations are the most frequent and have been a source of conflict with other operators. For these reasons, the CMT will analyse the achievement of the rest of the obligations imposed on TESAU, such as exorbitant discrimination, on a case by case basis, analysing both the prices and the contractual clauses for service supply”.

To summarise, as the CMT has shown in said Resolution, the methodology has the aim of detecting situations of market squeezing, requiring analysis of the rest of the practices on a case by case basis.

III.2 TREATMENT OF TESAU’S PROMOTIONS

Vodafone estimates that the requirement of an NPV > 0 cannot be the sole indicator for determining the feasibility of a product or promotion. On the other hand, it considers it to be detrimental that TESAU is allowed to market promotions with NPV < 0, so it proposed the elimination of the possibility that TESAU relies on to promote figures of up to 30% above the fixed NPV. This operator points out that TESAU’s promotions are for over 3 months, which is in contrary to the methodology. Finally it estimates that the combination of the previous factors means that the equivalent monthly cost (considering the promotional monthly fees) for the service offered by TESAU for a period of one year is less than their competitors, even in the area of the loop.

ASTEL also considers that promotions should not be allowed that exceed the NPV threshold.

In this respect, the CMT considers it necessary to clarify specific aspects of the treatment that it carries out for the promotions:

- The CMT calculated an NPV that attempts to estimate whether an operator that is equally efficient as TESAU and which uses the regulated wholesale services will have a positive margin fixing some economic conditions that are the same as those for the incumbent operator. However, this does not necessarily imply that the cost-effectiveness for the alternative operator is zero. The retail costs considered include the capital cost which means that the alternative operator will in reality be achieving a positive profitability over the capital invested.
- In relation to the promotions, the methodology imposed that in the six-monthly calculation of the NPV of the marketed lines is positive so that should TESAU reach the maximum limit of 1.3 x NPV in any one promotion, it can be compensated with others with lesser NPV. Therefore, the better commercial flexibility that the methodology give to TESAU in relation to the promotions, does not suggest, in any way, that the group of marketed lines in a six-month period be loss-making.
- Lastly, the time frame of 3 months refers to the current time frame of the promotion in a semester and not the time in which the client avails of the promotional fees. In addition, the CMT notes that according to its best understanding, TESAU does not



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market promotions with values that exceed the NPV during more than three months in keeping with the Resolution of 26 July 2007.

Finally, in relation to the allegation from Vodafone regarding the ability to carry out promotions from TESAU and its competitors, the CMT wants to highlight that tailoring their promotions is part of the commercial freedom of each operator. The current regulations must ensure that the offers carried out by the operator with SMP can be replicated by third parties. However, the regulation must not limit the way that operators design their offers given the different forms of price reductions that exist, such as service bundles, monthly reduced prices or promotions.

In any case, the CMT has carried out an effective price comparison exercise of the offers and promotions from different operators and speeds throughout the economic lifespan of the client. The following graphs show that it is incorrect to state that the figure that the users who chose TESAU should pay is less than for the rest of the operators as the promotions are not the only element that conforms to the real effective price that the user pays.

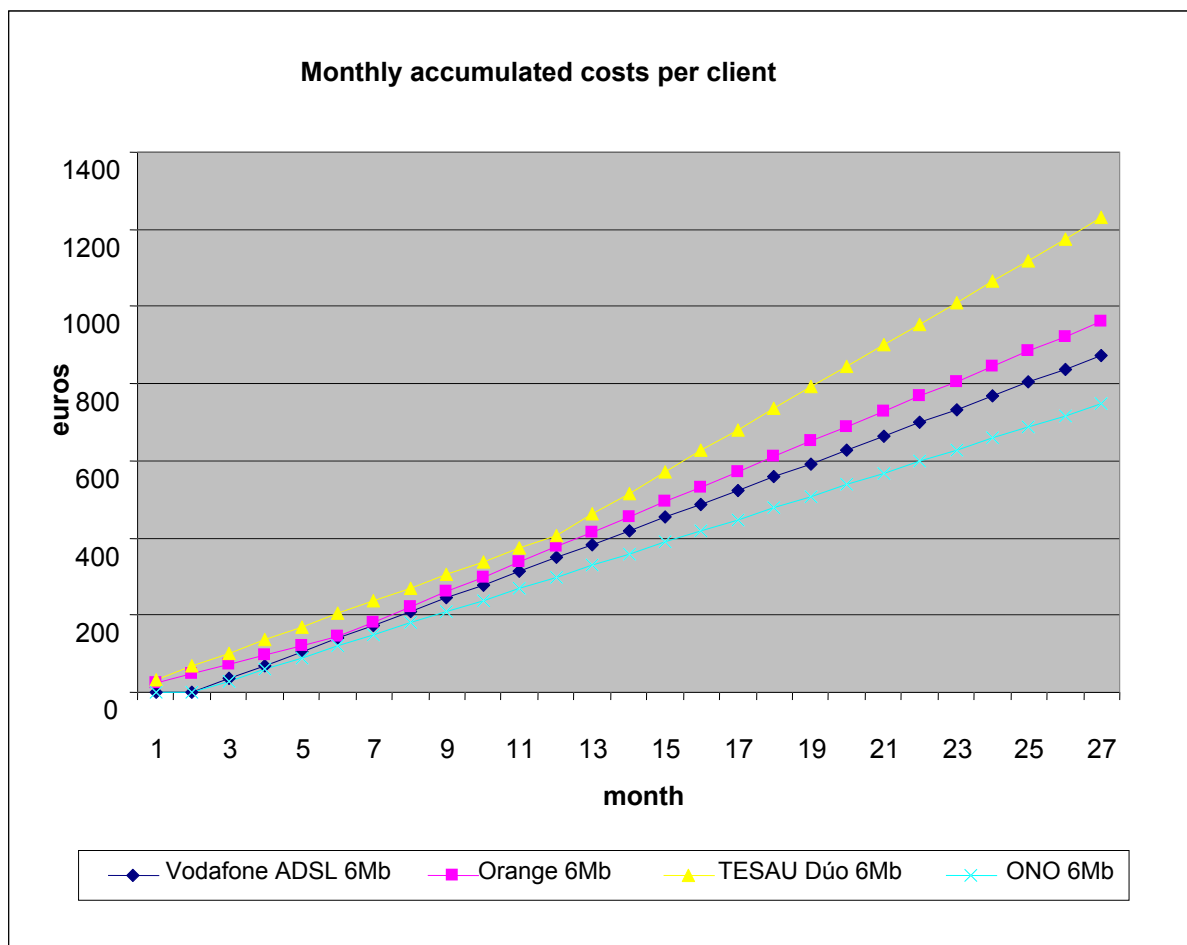


Figure 4. Effective Price paid by the client (service 6Mb/s⁴⁰)

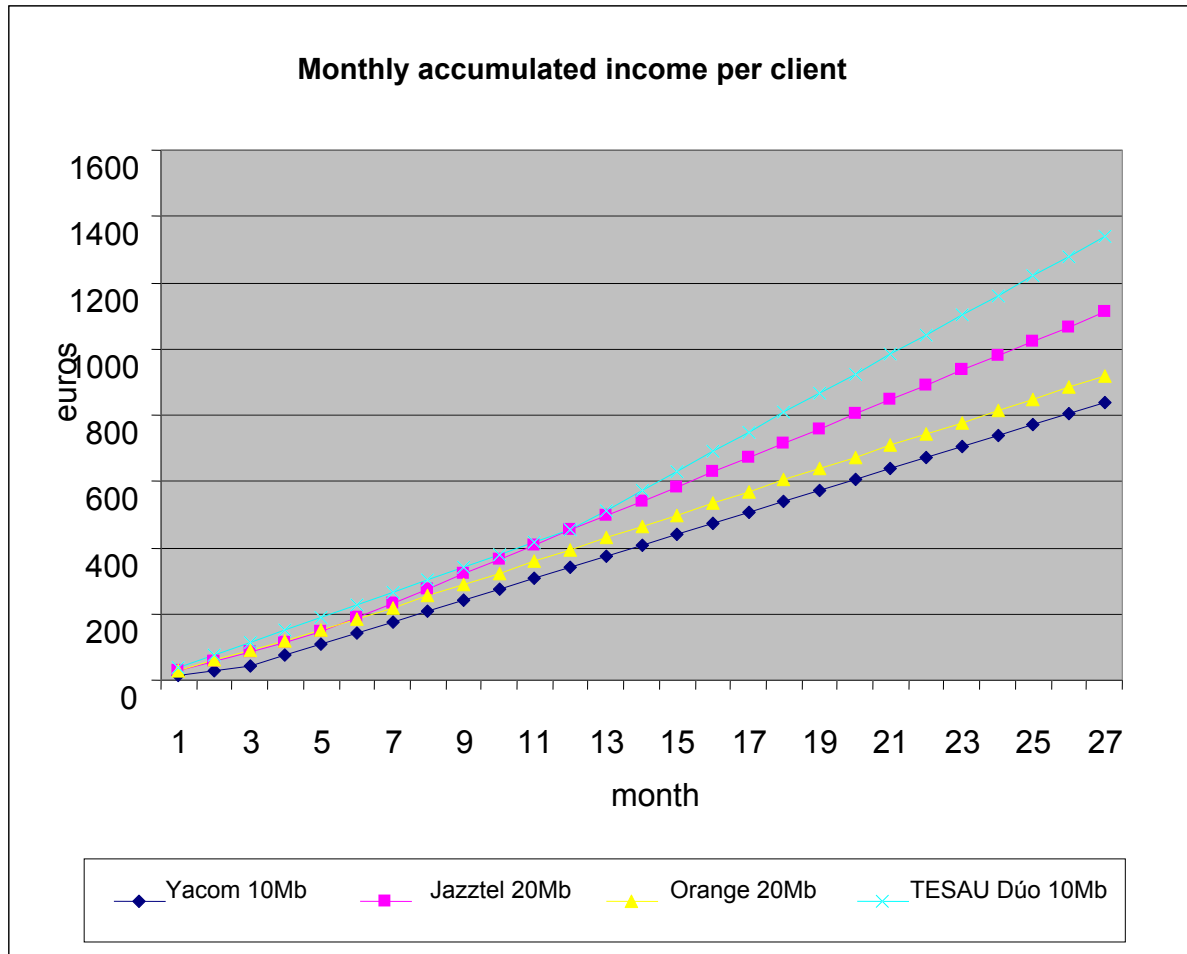


Figure 5. Effective Price paid by the client (10Mb/s service or more)

III.3 EFFICIENCY STANDARD CONSIDERED

Vodafone considers that the CMT should increase the costs considered for the calculation of replicability by a factor directed towards isolating the effects of vertical integrations and the economies of scale that TESAU enjoy. This increase should be around 20%.

In the same regards, FTES points out that it has notified this Commission on other occasions about the problems that the application of an equally efficient operator standard could mean for a sector characterised by significant economies of scale and scope.

In relation to the question of incorporating the costs of the historical operator and not those of a reasonably efficient operator is the most appropriate focus in the framework of the analysis of TESAU's retail offers. In fact, as shown in the Resolution of 22 May 2008,⁴¹ "in accordance

⁴⁰ Source: operator's Web pages. Including the access fee and the best available promotions



with the Jurisprudence in the Competition Law, [...] the efficiency standard should come from the dominant operator, in this case, TESAU. This focus is the only one that ensures efficient entry into the market, given that any other way would be protecting, unjustifiably and in detriment to the consumers, operators with lower levels of efficiency in the retail sector than the established operator”.

This approach is entirely in keeping with that established by the ERG when it concludes that the standard for a reasonably efficient operator can be in the sense of a market context in which it attempts to promote the entrance of relatively inefficient operators.⁴² However, this competitive reality is not that which is seen in the Spanish broadband market which has reached more than 9.3 million connections.

III.4 REFERENCE WHOLESALE SERVICE

Vodafone indicated that the wholesale service used by the CMT is unreal, distorting the analysis of margin-squeezing. Therefore, this operator considers that only the cost of the indirect service should be taken into consideration, in its most extensive mode, which is ADSL IP. As a secondary point, Vodafone indicates that the CMT should adjust the loop access service not in keeping with the usage, but instead in keeping with the coverage reached by the operators and the technical limits of the TESAU lines.

ASTEL and FTES make the same point that coverage should be suitable weighting factor for the unbundled loop services.

In this respect, the CMT refers once more to the Resolution of 22 May 2008 in which it is established that *“the reference wholesale service should correspond with an efficient use of the bit-stream access services and loop unbundling on which the alternative operators rely on in regulated conditions”*. For this reason, presenting a modification as to how the reference wholesale service is determined does not fit in the framework of this procedure. This focus is consistent with the definition of efficient operator as shown by the ERG.⁴³

III.5 INFORMATION SUPPLIED BY TESAU

⁴¹ Resolution which updates certain parameters of the methodology for the ex ante analysis of Telefónica de España, S.A.U. commercial offers (report AEM 2008/1442).

⁴² ERG Report on the Discussion on the application of margin squeeze tests to bundles: *“In a regulatory context, this reasoning may have merit where promotion of competition is the main regulatory principle. Specifically, regulators might find it justified to promote the entry of relatively inefficient operators in the short term in the expectation that they will become more efficient in the long run. Additionally, there might be efficiency benefits from having competitors in the market that although they might be less efficient may still be able to constrain the pricing of the SMP operator”* (section 54).

⁴³ ERG report on price consistency in upstream broadband markets: *“An alternative approach could assume that an “efficient operator” has climbed the ladder of investment and is using a combination of wholesale services. This “efficient operator” could therefore coincide with the theoretical operator defined by the NRA when determining the economic space (see section 3.2 above). The outcome of this approach would mean weighting prices of different wholesale services in the design of the price squeeze test”*.



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TESAU believes that the obligations to *ex post* report on the number of registrations per product and per promotion should be eliminated as the CMT has all the necessary information to determine the impact on the market. Vodafone states that the methodology should include verification procedures of the information supplied by TESAU in the six-monthly requirements, mainly with regards costs and gross registrations.

The CMT agrees with Vodafone in relation to the need to follow up on the number of registrations that each promotion generates. This is essential for determining the compliance to the limitations which TESAU has imposed upon them in relation to their commercial policy. The six-monthly reporting requests require a reliable source of information to establish the compliance of these obligations, although to control the achievement of TESAU's obligations the CMT can deem it necessary to resort to the exercise of any other functions that the LGTel assigns, such as the exercise of the inspectorate capacity as seen in article 50 of the aforementioned Law,

In relation to the costs, the CMT carries out verifications of the data supplied by TESAU in the framework of the methodology, conciliating the data from the management accounting with the data obtained from the last cost accounting audited by the CMT.

In virtue of the considerations of the elements of fact and law, the Board of the Comisión del Mercado de las Telecomunicaciones

HAS DECIDED

FIRST.- To approve the net present values of the methodology for the *ex ante* analysis of Telefónica de España, S.A.U.'s commercial offers included in Annex 1 of the current Resolution.

The offers that Telefónica de España, S.A.U. present should be coherent with those at the time of the launch and during the client-life in the case of a modification in the supply conditions being produced

SECOND.- Approve the modifications and updates of the methodology for *ex ante* analysis of Telefónica de España, S.A.U.'s commercial offers, as established in the Legal Basis II.

This certificate is issued under the provisions of article 27.5 of Law 30/1992, dated 26 November, and article 23.2 of the Consolidated Version of the Internal System Regulations approved by the CMT Board Resolution of 20 December 2007 (Spanish Official Journal of 31 January 2008), prior to the approval of the Minutes of the corresponding meeting.

Furthermore, it is hereby stated that a voluntary appeal for review may be lodged against this deed with the CMT within one month from the day following its notification or, directly, an Administrative-Contentious appeal before the Administrative-Contentious Division of the Spanish National Court (Audiencia Nacional), within two months as of the day following its notification, in accordance with the provisions of article 48.17 of Law 32/2003, dated 3 November, the General Telecommunications Law, the fourth additional Disposition, paragraph 5, of Law 29/1998, of 13 July, governing the Administrative-Contentious



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Jurisdiction, and Article 116 of Law 30/1992 of 26 November, of Legal Regime of Public Administration and of Common Administrative Procedure, and without prejudice to the provisions of number 2 of Article 58 of the same Law.

The present document bears the electronic signature of Secretary Ignacio Redondo Andreu with the approval of the President, Reinaldo Rodríguez Illera



ANNEX I
Net Present Value of the services analysed

PSTN telephone access	NPV
PSTN access service	85.97

Traffic and access bundles	NPV
Línea económica (S1/08)	15.38
Línea libre (S5/08)	2.10
Línea + TPN (S2/08)	150.15

Individual ADSL lines	NPV
ADSL Tiempo Libre	357.52
ADSL Mini	118.59
ADSL 512Kbps	563.70
ADSL 1Mb/hasta 1Mb	236.34
ADSL 3Mb	438.46
ADSL 6Mb	408.02
ADSL 10Mb	489.49

Double Bundle Offers (duos)	NPV
Dúo ADSL 512 Rural + TPN	531.81
Dúo ADSL Mini 1Mb + TPN	86.70
Dúo ADSL Hasta 1Mb + TPN + Bono Fijo-Móvil	262.16
Dúo ADSL Hasta 1Mb + TPN	206.63
Dúo ADSL 1Mb + TPN + Bono Fijo-Móvil	262.16
Dúo ADSL 1Mb + TPN	206.63
Dúo ADSL 3Mb + TPN	408.75
Dúo ADSL 3Mb + TPN + Antivirus	425.67
Dúo ADSL 3Mb + TPN + Bono Fijo-Móvil	420.77
Dúo ADSL 3Mb + TPN + Bono Fijo-Móvil + Antivirus	437.69
Dúo ADSL 6Mb + TPN	400.07
Dúo ADSL 6Mb + TPN + Antivirus	395.23
Dúo ADSL 6Mb + TPN + Bono Fijo-Móvil + Antivirus	407.25
Dúo ADSL 10Mb + TPN	459.79
Dúo ADSL 10Mb + TPN + Antivirus	454.95



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Triple Bundle Offers (trios)	NPV
Trío Familiar Mini 1Mb + TPN	413.90
Trío Familiar Hasta 1Mb + TPN	230.81
Trío Conexión 3Mb + TPN	291.60
Trío Básico 3Mb + TPN	452.35
Trío Básico 3Mb + TPN + Antivirus	469.26
Trío Familiar 3Mb + TPN	432.94
Trío Familiar 3Mb + TPN + Antivirus	449.85
Trío Familiar 3Mb + TPN + Bono Fijo-Móvil	444.96
Trío Familiar 3Mb + TPN + Bono Fijo-Móvil + Antivirus	461.88
Trío Conexión 6Mb + TPN + Antivirus	291.60
Trío Básico 6Mb + TPN + Antivirus	438.82
Trío Familiar 6Mb + TPN + Antivirus	419.41
Trío Familiar 6Mb + TPN + Bono Fijo-Móvil + Antivirus	431.43
Trío Familiar 10Mb + TPN	483.97