



Brussels, 18.12.2015
C(2015) 9722 final

Comisión Nacional de los Mercados
y de la Competencia (CNMC)
Bolivia, 56
E-08018 Barcelona
Spain

For the attention of:
Ms María Fernández Pérez

Fax: + 34 91 575 71 02

Dear Ms. Fernández Pérez,

Subject: Commission Decision concerning

Case ES/2015/1818: Wholesale local access market provided at a fixed location in Spain

Case ES/2015/1819: Wholesale central access provided at a fixed location for mass-market products in Spain

Case ES/2015/1820: Wholesale high-quality access products provided at a fixed location in Spain

Comments pursuant to Article 7(3) of Directive 2002/21/EC

1. PROCEDURE

On 18 November 2015, the Commission registered a notification from the Spanish national regulatory authority, *Comisión Nacional de los Mercados y de la Competencia* (CNMC)¹, concerning the markets for wholesale local access provided at a fixed location², wholesale central access provided at a fixed location for mass-market

¹ Under Article 7 of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), OJ L 108, 24.4.2002, p. 33, as amended by Directive 2009/140/EC, OJ L 337, 18.12.2009, p. 37, and Regulation (EC) No 544/2009, OJ L 167, 29.6.2009, p. 12.

² Corresponding to market 3a in Commission Recommendation 2014/710/EU of 9 October 2014 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services (Recommendation on Relevant Markets), OJ L 295, 11.10.2014, p. 79.

products³, and wholesale high-quality access products provided at a fixed location⁴, all in Spain.

The national consultation⁵ ran from 19 December 2014 to 23 February 2015.

On 26 November 2015, a request for information⁶ was sent to the CNMC and a response was received on 1 December 2015. Additional information was received on 3 December 2015.

2. DESCRIPTION OF THE DRAFT MEASURE

2.1. Background

2.1.1. Market 3a: Wholesale local access provided at a fixed location in Spain

The last full review of the market for wholesale local access provided at a fixed location in Spain was notified to and assessed by the Commission under case ES/2008/0804⁷. The relevant product market was defined by the *Comisión del Mercado de las Telecomunicaciones* (CMT) as incorporating wholesale unbundling services for copper pairs. CMT excluded from the market definition (i) Fibre to the Home ("FTTH") networks with a point to multipoint topology currently rolled out in Spain and (ii) cable, due to, *inter alia*, the technical limitations of cable unbundling. The relevant geographic market was defined as national.

CMT designated Telefónica de España, S.A.U. (Telefónica) as the undertaking holding significant market power (SMP). CMT imposed on it the provision of access to the local loop and sub-loop, together with the obligations of (i) cost-orientation; (ii) cost accounting; (iii) accounting separation; (iv) transparency; and (v) non-discrimination. CMT also imposed on Telefónica the provision of access to passive infrastructure together with the obligations of (i) submission of an offer at cost-oriented prices as a basis for commercial negotiations with access seekers; (ii) cost accounting; (iii) accounting separation; (iv) transparency; and (v) non-discrimination. CMT did not impose access to FTTH⁸.

The Commission at the time commented on the exclusion of FTTH infrastructure from the market definition, on the lack of a precise price control obligation as regards access to the physical network infrastructure, and on the economic viability of access to ducts in Spain.

³ Corresponding to market 3b in the Recommendation on Relevant Markets.

⁴ Corresponding to market 4 in the Recommendation on Relevant Markets.

⁵ In accordance with Article 6 of the Framework Directive.

⁶ In accordance with Article 5(2) of the Framework Directive.

⁷ SG-Greffe (2008) D/206852

⁸ CMT imposed symmetric obligations to telecom operators in relation to infrastructure inside the building. The Commission assessed this measure under case ES/2008/0820, SG-Greffe (2008) D/207468.

In 2013 CMT notified a new bottom-up long run incremental cost (BU-LRIC+) model⁹, which estimated the monthly costs incurred by an efficient operator for providing unbundled loop services throughout Spain. CMT set the prices with reference to: (i) the results of the BU-LRIC+ model; (ii) Telefónica's cost accounting results; and (iii) regulated prices in certain Member States. The Commission commented on the lack of explanation (and therefore transparency) regarding the setting of the price levels. The Commission further invited CMT to clearly indicate in its final measure by when it plans to rely solely on the developed cost model.

2.1.2. *Market 3b: Wholesale central access provided at a fixed location for mass-market products in Spain*

The last full review of the market for wholesale broadband access at a fixed location in Spain was notified to and assessed by the Commission under case ES/2008/0805¹⁰. The Commission had serious doubts on the product and geographic market definition put forward by CMT, in particular regarding (i) the exclusion of high speed access (above 30 Mbps) from the marked definition; (ii) the inclusion of LLU and cable in the relevant market; and (iii) the extent to which the different competitive conditions would point towards geographic segmentation of the market. CMT amended its proposed measure, so that the relevant product market comprised the provision of wholesale broadband access over copper (PSTN network) and over fibre (FTTH, FTTN, etc.). The geographic scope of the market was considered to be national.

CMT designated Telefónica as the undertaking holding SMP and imposed the following obligations: (i) provision of access up to 30 Mbps; (ii) non-discrimination; (iii) cost-orientation and cost accounting; (iv) accounting separation; (v) *ex ante* communication of retail offers; and (vi) transparency. In its comments letter the Commission urged CMT to reconsider imposing remedies for wholesale access products also with speeds exceeding 30 Mbps.

Under case ES/2010/1097¹¹, CMT proposed to modify the wholesale reference offer so as to incorporate the "New Broadband Ethernet Service" (NEBA service¹²). According to CMT, the obligation to allow for retail service differentiation could not be implemented on the basis of existing bitstream inputs provided by Telefónica. The Commission commented again on the need to reconsider the imposition of remedies for speeds exceeding 30 Mbps.

A subsequent notification assessed by the Commission under case ES/2011/1194¹³ proposed an increase in the regulated bitstream price¹⁴. The Commission commented on the lack of transparency of CMT's decision-making procedure. Under case

⁹ Case ES/2013/1465, C(2013) 4184

¹⁰ SG-Greffe (2008) D/208672

¹¹ SG-Greffe (2010) D/11907

¹² NEBA has 50 Indirect Access Points (PAIs), one per province.

¹³ C(2011)2454.

¹⁴ Based on Telefónica's audited 2008 cost accounts, CMT proposed to decrease the prices for naked bitstream surcharge (-4.6%) and for analogue PSTN and ISDN Wholesale Line Rental (-4.7% and -20.2%, respectively).

ES/2013/1433¹⁵ CMT proposed a revised methodology for the *ex ante* analysis of Telefónica's commercial offers, as well as of certain communication obligations. The Commission commented on the need to conduct a new market review, and highlighted that it is working towards the adoption of a Recommendation which will give some guidance on the design of an *ex ante* economic replicability test.

In 2013, CMT proposed a review of remedies for wholesale broadband access products¹⁶ by setting price levels for the NEBA service as well as for the bitstream legacy products above cost-efficient levels, which raised the Commission's serious doubts. The Commission issued a Recommendation which asked CMT to reconsider whether a departure from cost-oriented prices is necessary, appropriate and proportionate, to align the outcome with the cost model more closely if appropriate, to improve the transparency of its proposed draft measures by justifying in detail the price levels set and to eliminate the arbitrary element in the draft measure by explaining the methodology followed when setting the prices.

In 2015, the Commission assessed under case ES/2015/1744¹⁷ the update of prices for the NEBA service following the update of the cost model in 2014. The Commission commented on the need to conduct a new market review for markets 3a and 3b.

2.1.3. Market 4: Wholesale high-quality access products provided at a fixed location in Spain

The last full review of the market for wholesale terminating segments of leased lines in Spain was notified to and assessed by the Commission under case ES/2013/1425¹⁸. CMT defined a market in which fixed, symmetrical transmission capacity is provided, regardless of the technology used. Both traditional interfaces and Ethernet technologies were included. The geographic scope of the market was found to be national.

CMT identified Telefónica as holding SMP, and proposed to impose the following obligations for leased lines up to 1Gbps¹⁹: (i) access (ii) price regulation (cost orientation for traditional leased lines and retail-minus for Ethernet leased lines), (iii) accounting separation; (iv) non-discrimination; and (v) transparency. For leased lines with capacities above 1 Gbps, CMT imposed an obligation to meet reasonable requests for access, and an obligation to charge reasonable prices. The Commission welcomed CMT's commitment to amend the original draft measure and to impose appropriate obligations for leased lines with Ethernet interfaces above 1 Gbps²⁰.

¹⁵ C(2013) 2270.

¹⁶ Case ES/2013/1466, C(2013) 4184

¹⁷ C(2013) 1484

¹⁸ C(2013) 1484

¹⁹ Except traditional leased lines of 622 Mbps which were deregulated due to their low number and lack of demand at wholesale level.

²⁰ Later in 2013 (case ES/2013/1459, C(2013) 4054), CMT reviewed the prices for terminating leased lines (i) with traditional interfaces and (ii) with Ethernet interfaces. In its comments letter the Commission invited CMT to reconsider the cost-oriented price methodology imposed on terminating leased lines with traditional interfaces.

2.2. Market definition

2.2.1. Retail broadband markets in Spain

Based on the current competitive conditions in the retail market and the prospect for further NGA deployment, CNMC proposes two relevant criteria to assess the level of competition.

1st criterion - used to assess the current level of competition at retail level

This criterion is applied on an MDF basis. The competitive 'zone 1' is made up of a collection of MDFs, each of which fulfils the 'current level of competition criterion'. All remaining MDFs form the uncompetitive 'zone 2'.

In accordance with this criterion, in order for an MDF to become part of the zone 1, (i) at least 2 alternative operators have to be operating in the area of influence of the MDF, either by means of own infrastructure or of LLU access, having each a retail market share of at least 10%, and (ii) Telefonica's market share at retail level has to be below 50%.

There are currently 758 MDFs in zone 1 (corresponding to 58.4% of Telefónica's copper pairs²¹) and 8109 MDFs in zone 2 (corresponding to 41.6% of Telefónica's copper pairs).²²

2nd criterion – used to assess the prospect for further NGA deployment

This criterion intends to assess the prospect for NGA infrastructure-based competition and it is applied on an MDF basis. The criterion is fulfilled if within the area of influence of an MDF (i) there are at least 3 NGA networks (FTTH or HFC) deployed, and (ii) each of the NGA networks has a coverage²³ of at least 20% of the area of influence.

When an MDF fulfils both of the above criteria, meaning that in its area of influence the level of competition in the retail market as well as the NGA deployment is above the Spanish average, it is considered as an Ultra-Fast Broadband MDF (UFB MDF). The municipality containing at least one UFB MDF becomes an UFB municipality²⁴. CNMC puts forward that the fact of considering a geographic unit bigger than the MDF, such as

²¹ Including both active and inactive copper pairs.

²² According to market data from June 2015 provided by CNMC in its reply to the request for information. The data was indicated to be provisional and pending validation, but will be included in CNMC's final measure. CNMC indicated that new data will be available during the 3-year review period, however CNMC does not envisage updating the proposed measure as new data becomes available.

²³ The coverage within the area of influence of an MDF is computed as the ratio between the number of NGA accesses in that area and the total number of copper pairs of the MDF (both active and inactive). Since the copper network reaches practically all the buildings, the total number of copper pairs would indicate the maximum coverage that could be deployed by NGA networks.

²⁴ CNMC explained that the geographic unit alternative operators use for their investment plans is the municipality, as opposed to the MDF.

the municipality, confers a prospective approach to the analysis that is required in view of the ongoing and foreseen NGA investment plans.

According to market data from June 2015 there are [60-70] UFB municipalities²⁵ in Spain. For each of the municipalities, CNMC computed the percentage of copper pairs that correspond to MDFs belonging to the competitive zone 1 (1st criterion) as well as the percentage of copper pairs that correspond to MDFs expected to be competitive in the future (as per the 2nd criterion). The two variables seem to be correlated to a significant extent: the percentage of pairs fulfilling the 1st criterion within the set of UFB municipalities is 78%, while the corresponding value for the 2nd criterion is 66.4%.

The geographic market definition and the remedies differentiation in markets 3b and 3a, respectively, will be based on the two criteria described above.

2.2.2. Market 3a: Wholesale local access market provided at a fixed location in Spain

Contrary to its previous market review, CNMC now proposes to include fibre access networks as part of the relevant product market. Cable continues to be outside of the market since, according to CNMC, it does not pose a strong direct or indirect constraint at wholesale level. CNMC considers the geographic scope of the market to be national.

2.2.3. Market 3b: Wholesale central access provided at a fixed location for mass-market products in zone 1 and zone 2 in Spain

Contrary to its previous review, CNMC now considers that wholesale central access for business and for the mass-market²⁶ do not belong to the same relevant market. CNMC concludes that the different demand characteristics of the end-users (in terms of technical requirements, coverage, channels to market, contracts and after-sales services) are reflected in the fact that the mass-market wholesale products are standardized, whereas the business products are complex and customized. The differences in demand also trigger differences in terms of supply (some suppliers are only present in the business market; the size of the business market is smaller and therefore does not allow for the same economies of scale). The main technical differences between these products are the level of the quality of service (QoS) and maintenance²⁷. Wholesale central access for business will be further analysed in section 2.2.4.

CNMC concludes that operators based on cable and LLU exert a competitive constraint on market 3b, which is significant enough to be considered part of the relevant product market. Moreover, CNMC concludes that the differences in competitive conditions both at wholesale and retail level allow to identify two sub-national markets corresponding to zone 1 and zone 2 (as defined in section 2.2.1).

²⁵ The population of the [60-70] UFB municipalities corresponds to [30-40]% of the national population. Among the municipalities there are several provincial capitals, such as Madrid, Barcelona, Valencia, Sevilla and Zaragoza.

²⁶ Mainly residential customers and small businesses.

²⁷ The NEBA service for business includes Premium maintenance and QoS Gold.

2.2.4. *Market 4: Wholesale high-quality access products provided at a fixed location in Spain*

CNMC considers that market 4 includes not only terminating segments of leased lines but also access to bitstream for business customers. Within bitstream for business customers, CNMC does not include operators based on cable and LLU in the relevant product market. These operators would have a diminished role due to the limited economies of scale linked to the interconnection of business sites. CNMC puts forward that the situation at both retail and wholesale level in Spain is in line with the 2014 Explanatory note accompanying the Recommendation on Relevant Markets²⁸. Therefore, market 4 would include not only terminating segments of leased lines but a wider range of access products necessary to fulfil the needs of business services providers (and ultimately final business customers). The geographic scope of the market is found to be national.

2.3. **Finding of significant market power ("SMP")**

CNMC proposes to designate Telefónica as holding SMP in market 3a due to, inter alia, (i) its high market share²⁹, (ii) its vertical integration, (iii) barriers to entry to the market, and (iv) economies of scale and scope.

Market 3b (zone 1) will be deregulated³⁰ given that there are no SMP findings. According to CNMC, strong infrastructure-based competition has developed in market 3b (zone 1). Alternative operators have efficiently used the regulatory instruments available in market 3a (LLU and access to passive infrastructure) so that Telefónica's market share has significantly decreased³¹. Contrary to this, there has not been a significant deployment of alternative infrastructure in market 3b (zone 2), which coupled with the high entry barriers results in Telefónica holding SMP in market 3b (zone 2).

In 2013, CNMC concluded that Telefónica was holding SMP in the market for terminating segments of leased lines. Now that it has identified the business bitstream product as part of the relevant market, CNMC finds that Telefónica still holds SMP in the newly defined market 4. CNMC refers to the high market shares³² and barriers to entry that are common to both sub-segments of the market. Moreover, Telefónica is the only operator that can take advantage of significant economies of scope and scale, as well as of its vertical integration. CNMC also refers to the very limited bargaining power of

²⁸ Commission staff working document Explanatory note accompanying the document Commission Recommendation on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, Brussels, 9.10.2014, SWD(2014) 298.

²⁹ Telefónica is the only provider of copper LLU. Regarding the self-supply of local access over fibre, Telefónica's market share in terms of lines was 97% in December 2014.

³⁰ This deregulation will take place 6 months after the adoption of the final measure.

³¹ In December 2014, Telefónica's market share in terms of value in the bitstream market (including both mass market and business market) in zone 1 was 38.8% while the corresponding figure in zone 2 was 74.1%.

³² CNMC estimates that Telefónica's market share in the newly defined market 4 in 2014 was 59.5% in value terms. The second operator in terms of market share was ONO, holding 11.3% of the market.

leased lines access seekers, given the limited number of alternative providers. Therefore, Telefónica is designated as holding SMP in market 4.

2.4. Regulatory remedies

2.4.1. Market 3a: Wholesale local access provided at a fixed location in Spain

CNMC proposes to keep the current obligations³³ imposed on Telefónica at national level regarding access to copper LLU³⁴ and to passive infrastructure³⁵.

As to fibre, CNMC proposes to impose an obligation of virtual³⁶ access to fibre differentiated on a geographic basis. In this respect, Telefónica would be obliged to provide virtual access to fibre (so-called "local NEBA") in the whole territory of Spain with the exception of the so-called UFB municipalities (as defined in section 2.2.1), given their current competitive situation at retail level, as well as the prospect for further NGA infrastructure-based competition.

Local NEBA will be developed on the basis of the existing fibre-based NEBA service which is currently imposed in the former wholesale broadband access market (market 5 from the 2007 Recommendation on Relevant Markets³⁷). The fibre-based NEBA service will be adapted to include access points (PAIs) at the MPoP³⁸, which is equivalent to the MDF in a copper access network. The expected implementation period for the local NEBA product is 18 months³⁹ from the adoption of the final measure. Only during this transitional period, CNMC will impose on Telefónica the ancillary obligation of

³³ To decommission the copper accesses of an MDF Telefónica will have to announce it to CNMC and each of the wholesale customers served by the relevant MDF. Telefónica will be obliged to continue providing access through the relevant MDF during a guarantee period of either 5 years (if there is colocation in that MDF), or 1 year (if colocation is not in place). If after the expiration of the guarantee period there are still active copper accesses in a given MDF, Telefónica will be obliged to continue providing access during 6 additional months.

³⁴ Together with (i) cost-orientation, (ii) cost accounting, (iii) accounting separation, (iv) non-discrimination and (v) transparency.

³⁵ Together with (i) the submission of an offer at cost-oriented prices as a basis for commercial negotiations with access seekers, (ii) cost accounting, (iii) accounting separation, (iv) non-discrimination and (v) transparency.

³⁶ Since physical unbundling of Gigabit-capable Passive Optical Network (GPON) is not technically possible for the time being.

³⁷ Commission Recommendation 2007/879/EC of 17 December 2007 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services (2007 Recommendation on Relevant Markets), OJ L 344, 28.12.2007, p. 65.

³⁸ Metropolitan Point of Presence means the point of inter-connection between the access and core networks of an NGA operator.

³⁹ After this period, CNMC will verify whether the local NEBA fulfils the characteristics as set out in the reference offer, and adopt a corresponding decision in an approximate period of 6 months.

providing fibre-based NEBA in those areas where local NEBA will be subsequently available (the whole of Spain except the UFB municipalities, as defined in section 2.2.1).

The local NEBA service will not be price regulated, as CNMC believes that the criteria set out in the Recommendation on Non-Discrimination and Costing⁴⁰ for the non-imposition of regulated wholesale access prices on NGA networks have been fulfilled. First of all, CNMC will impose on Telefónica equivalence of inputs (EoI)⁴¹, together with an economic⁴² and technical replicability test. Finally, CNMC believes that a demonstrable competitive constrain exists, due to the existence of a copper anchor (current monthly LLU price is 8.60 euros).⁴³

2.4.2. *Market 3b: Wholesale central access provided at a fixed location for mass-market products in zone 2 in Spain*

CNMC proposes to keep for each of the MDFs belonging to zone 2 the obligation of providing access to the copper-based NEBA service⁴⁴. The current speed cap of 30 Mbps will be removed⁴⁵.

As to fibre, CNMC proposes to maintain for each of the MDFs belonging to zone 2, with the exception of those situated within the UFB municipalities, the obligation of providing access to the fibre-based NEBA service. The current speed cap of 30 Mbps will be

⁴⁰ Commission Recommendation 2013/466/EU on consistent non-discrimination obligations and costing methodologies to promote competition and enhance the broadband investment environment, OJ L 251, 21.9.2013, p.13.

⁴¹ CNMC imposes EoI, however explains that the access interface used by alternative operators is different from the one used by Telefónica to provide wholesale inputs to its retail services. The network operation is also different, even using the same equipment. However, given that NEBA was chosen by the access seekers because it confers high flexibility and independence, and despite the existence of other alternatives that used the same architecture as Telefónica, CNMC concludes that the NEBA local service is very close to fulfilling the EoI obligation as described in the Recommendation on Non-Discrimination and Costing. Also, CNMC does not see it proportionate to define a completely new service for fibre unbundling given that NEBA is already operative.

⁴² CNMC explains that the economic replicability test has the following characteristics: (i) the costs of providing the UFB service are calculated according to a long-run incremental cost, (ii) the retail costs are calculated according to the Equally Efficient Operator standard, (iii) discounts offered to Telefónica's retail arm will be taken into account only in the case in which the highest discount offered to third parties in good faith is not exceeded, (iv) both existing and new flagship services will be taken into account. Within 2 months after the entry into force of the notified decision, Telefónica will notify to CNMC the details of the methodology for approval.

⁴³ CNMC will notify to the Commission both the reference offer and the methodology for analysing Telefónica's commercial offers over fibre (including the prices proposed by Telefónica and the results of the replicability test).

⁴⁴ Together with (i) cost-orientation, (ii) cost accounting, (iii) accounting separation, (iv) non-discrimination, (v) transparency and (vi) ex-ante communication of retail offers. Moreover, Telefónica is obliged to continue providing GigADSL and ADSL-IP in those areas where NEBA is not yet available.

⁴⁵ Telefónica will therefore have to implement new technical access profiles. The availability of those profiles will have an impact neither on prices nor on their structure.

removed. Moreover, equivalence of inputs⁴⁶ together with an economic and technical replicability test will replace the previous cost-oriented approach.⁴⁷

2.4.3. *Market 4: Wholesale high-quality access provided at a fixed location in Spain*

CNMC proposes to keep for the whole territory of Spain the obligation of providing access to the copper based NEBA service⁴⁸. The current speed cap of 30 Mbps will be removed.

As to fibre, CNMC proposes to maintain for the whole territory of Spain the obligation of providing access to the fibre-based NEBA service. The current speed cap of 30 Mbps will be removed, and equivalence of inputs together with an economic and technical replicability test will replace the previous cost-oriented approach.

3. COMMENTS

The Commission has examined the notifications and the additional information provided by CNMC and has the following comments.⁴⁹

Monitoring of the market outcome based on the proposed retail criteria and potential updates of the proposed measure

The Commission notes that the proposed methodology for the categorisation of municipalities – the existence of one single UFB MDF classifies the whole of a municipality as UFB for the purpose of remedy differentiation in both the local access market and the central access market in zone 2 – serves only as an approximation of the actual degree of competition on a forward looking basis and may lead to inaccuracies and errors in the assessment of the competitive situation over time in the municipality as a whole. As is apparent already on the basis of the currently proposed [60-70] UFB municipalities, in certain UFB municipalities around 50% of the copper pairs are still located at non-competitive exchanges.

The Commission takes note of the high overall share of copper pairs located at competitive MDFs across all UFB municipalities. Therefore, the UFB municipalities currently selected as a result of the proposed methodology seem overall to adequately reflect the competitive situation at MDF level. However, the Commission asks CNMC to closely monitor the market and ensure that the UFB MDF(s) accurately reflect(s) the level of competition of the corresponding UFB municipality over time so that adequate measures are imposed according to the actual level of competition.

⁴⁶ The same characteristics of EoI for local NEBA apply to fibre-based NEBA.

⁴⁷ CNMC will notify to the Commission the methodology for analysing Telefónica's commercial offers over fibre (including the prices proposed by Telefónica and the results of the replicability test).

⁴⁸ Together with (i) cost-orientation, (ii) cost accounting, (iii) accounting separation, (iv) non-discrimination, (v) transparency and (vi) ex-ante communication of retail offers. Moreover, Telefónica is obliged to provide business GigADSL and ADSL-IP in those areas where business NEBA is not yet available.

⁴⁹ In accordance with Article 7(3) of the Framework Directive.

In this respect, the Commission further asks CNMC to monitor whether its proposed methodology gives rise to strategic investment behaviour by the SMP operator, potentially targeting the maximum number of municipalities which are prone to become UFB municipalities with the minimum investment necessary to secure deregulation, rather than determining its investment strategy on the basis of market conditions and signals.

The Commission further notes that the proposed geographic differentiation of remedies is highly complex (in particular, the fact that the geographic differentiation for the wholesale local access market is based on municipalities and the deregulation of the wholesale central access market is based on MDF areas). The Commission considers that neither access seekers nor the access provider may be able to predict in which municipalities and at which MDF regulated fibre access may be granted, once measures are updated, and whether such access is of local or central nature.

In this respect, the Commission notes that CNMC does not envisage updating the proposed measure as new data becomes available, which appears preferable in terms of regulatory predictability. With regard to the periodicity of any future update CNMC will, in any case, have to find the right balance between predictability of market regulation on the one hand, and ensuring that the regulation is fit for purpose in light of new market developments on the other hand. CNMC shall, in any case, notify any update to the Commission pursuant to Article 7 of the Framework Directive.

Partial review of new market 4

The Commission notes that despite the fact that the draft notified measure also concerns market 4, CNMC has not carried out a fully-fledged review of the newly defined market, which now includes a business bitstream product, as well as terminating segments of leased lines. In particular, CNMC has not analysed in detail the level of substitutability between the different products in this market.

The Commission notes CNMC's explanation that the market for terminating segments of leased lines has been reviewed in 2013. The Commission, however, points out that all products belonging to a relevant market need to be analysed at the same time. However, based on the additional explanations and data provided by CNMC, the Commission has no reason to believe that the outcome of the SMP analysis would have differed from the proposed one if a fully-fledged review of market 4, including the termination segments of leased lines, had been carried out. Moreover, the Commission takes note of CNMC's intention of reviewing the newly defined market 4 within the framework of review of the market for terminating segments of leased lines which should, in any case, be finalised and notified to the Commission in line with CNMC's obligations under Article 16(6) of the Framework Directive.

Pursuant to Article 7(7) of the Framework Directive, CNMC shall take the utmost account of the comments of other NRAs, BEREC and the Commission and may adopt the resulting draft measure; where it does so, shall communicate it to the Commission.

The Commission's position on this particular notification is without prejudice to any position it may take *vis-à-vis* other notified draft measures.

Pursuant to Point 15 of Recommendation 2008/850/EC⁵⁰ the Commission will publish this document on its website. The Commission does not consider the information contained herein to be confidential. You are invited to inform the Commission⁵¹ within three working days following receipt whether you consider that, in accordance with EU and national rules on business confidentiality, this document contains confidential information which you wish to have deleted prior to such publication.⁵² You should give reasons for any such request.

Yours sincerely,

For the Commission,
Roberto Viola
Director-General

⁵⁰ Commission Recommendation 2008/850/EC of 15 October 2008 on notifications, time limits and consultations provided for in Article 7 of Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, OJ L 301, 12.11.2008, p. 23.

⁵¹ Your request should be sent either by email: CNECT-ARTICLE7@ec.europa.eu or by fax: +32 2 298 87 82.

⁵² The Commission may inform the public of the result of its assessment before the end of this three-day period.