NOTIFICATION OF DRAFT MEASURES PURSUANT TO ARTICLE 7(3) OF DIRECTIVE 2002/21/EC REGARDING THE MARKETS FOR WHOLESALE LOCAL ACCESS PROVIDED AT A FIXED LOCATION, WHOLESALE CENTRAL ACCESS PROVIDED AT A FIXED LOCATION FOR MASS-MARKET PRODUCTS, AND WHOLESALE HIGH-QUALITY ACCESS PROVIDED AT A FIXED LOCATION.

As required under article 16 of Directive 2002/21/EC, CNMC has conducted an analysis of the markets for wholesale local access provided at a fixed location, wholesale central access provided at a fixed location for mass-market products, and wholesale high-quality access provided at a fixed location in Spain (markets 3a, 3b and 4 of the Commission Recommendation of 9 October 2014 on relevant product and service markets).

On November 18, 2015, CNMC reached its preliminary conclusions on market definition, the extent of competition in these markets, the designation of undertakings having significant market power and the regulatory obligations that need to be imposed.

CNMC hereby notifies the Commission of its proposed measures consistent with article 7(3) of Directive 2002/21/EC. These measures, as well as the proposed obligations pertaining to the reference markets under review, are set out in the attached summary notification form.

Under Article 6 of the Directive 2002/21/EC and according to national procedures, CNMC conducted a national consultation which started on December 19, 2014 and ended on February 23, 2015. This draft measure has taken into account the comments received during the public consultation.
Market definition

Please state where applicable:

1.1 The relevant product/service market. Is this market mentioned in the Recommendation on relevant markets?

The relevant product markets covered by this notification are the markets for wholesale local access provided at a fixed location, wholesale central access provided at a fixed location for mass-market products, and wholesale high-quality access provided at a fixed location in Spain.

The defined relevant markets are the same that those listed in the Commission Recommendation of 9 October 2014 on relevant product and service markets as markets 3a, 3b and 4.

With regard to market 4, it must be noted that the current notification refers specifically to the provision of high-quality wholesale broadband access products to the business market. The provision of other wholesale services that satisfy business needs, namely leased lines, has been the subject of separate market reviews, undertaken in April 2013 (terminating segments of leased lines and trunk segments of leased lines\(^1\)) and are thus not covered by this review.

1.2 The relevant geographic market.

The geographic market is deemed to cover the entire Spanish territory in the case of market 3a and market 4.

Market 3b is in turn segmented in two submarkets (market 3b_1 and market 3b_2). The proposed regulatory obligations will only apply to market 3b_2, as market 3b_1 is deemed to be effectively competitive.

1.3 A brief summary of the opinion of the national competition authority, where provided.

As of October 2013, the National Competition Authority and the National Regulatory Authority are part of the same organization (Comisión Nacional de los Mercados y de la Competencia, CNMC). Cooperation between the NCA and the NRA thus now takes place within CNMC itself, on an ad-hoc basis.

The current draft measure has been adopted by CNMC’s Board acting in its full composition. Thus, both the Board members of the Regulatory Chamber and the Competition Chamber have been involved in the adoption of the draft measure.

1.4 A brief overview of the results of the public consultation to date on the proposed market definition (e.g. how many comments were received, which respondents agreed with the proposed market definition, which respondents disagreed with it).

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\(^1\) Cases ES/2013/1425 and ES/2013/1426.
Twenty-three operators and economic/social agents submitted observations. The observations are mostly related to (i) the decision by CNMC to geographically segment market 3b and impose differentiated remedies in market 3a with regards to fibre-access products, and the criteria relied upon by CNMC when undertaking said decisions and (ii) the remedies proposed by CNMC to address the competition failures identified in the market review, in particular with regard to FTTH-related remedies.

Regarding remedies, in broad terms, while Telefónica and regional cable operators dispute CNMC’s proposal to introduce new wholesale fibre-access products (virtual fibre unbundling; wholesale broadband access with no limitations in terms of speed) in selected parts of the Spanish territory, LLU-based operators generally agree with the measures that are envisaged. CNMC’s proposal to develop specific wholesale access products that would address the needs of the business segment has in general also been welcomed.

A summary of the observations presented by the participants in the public consultation process is provided as an Annex to the draft measure.

1.5 Where the relevant market is different from those listed in the Recommendation on relevant markets, a summary of the main reasons justifying the proposed market definition by reference to Section 2 of the Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications and services\(^2\) and the three main criteria mentioned in the Recommendation on relevant markets and the accompanying Explanatory Note.

Not applicable.

Section 2

Designation of undertakings with significant market power

Please state where applicable:

2.1 The name of the undertakings designated as having, individually or jointly, significant market power.

Where applicable, the name of the undertakings considered no longer to have significant market power.

Telefónica is designated as having individually significant market power in markets 3a, 3b_2 and 4.

2.2 The criteria used to designate an undertaking as having significant market power, individually or jointly, or not.

- Market share;
- Barriers to entry, including control of non-replicable infrastructures and importance of economies of scale and scope;
- Lack of potential competition;

2.3 The name of the main undertakings (competitors) active in the relevant market.

Telefónica acts as a *de facto* monopolist in market 3a.

In market 3b_2, Telefónica is the most prominent player, with market shares that are above 70% (LLU and cable operators accounting for the remaining share of the market, on the basis of the consideration of self-supply for the purposes of the market review).

The market position of Telefónica is, finally, particularly prominent in the provision of wholesale broadband access services to operators that cater the business segment, where LLU and cable alternatives play a less significant role. In this regard, Telefónica’s share in the retail business market is close to 70% while its main competitor’s share would not reach 10%.

2.4 The market shares of the undertakings mentioned above and the basis for calculation of market share (e.g. turnover, number of subscribers).

Please see above. Reference is also made to sections III.2.1 and III.2.3 (market 3a) and IV.2.1 and IV.2.3 (markets 3b and 4) of the draft measure.

For market shares at retail level (broadband access services), please refer to section II.3.1 (national level) and II.3.2. (sub-national level) of the draft measure.

Please provide a brief summary of:

2.5 The opinion of the national competition, authority where provided.

Please see section 1.3 above.

2.6 The results of the public consultation to date on the proposed designation(s) as undertakings having significant market power (e.g. total number of comments received, numbers agreeing/disagreeing).

In general, most participants to the public consultation agree with the designation of Telefónica as having SMP in markets 3a, 3b_2 and 4.

A summary of the observations presented by the participants in the public consultation process is provided as an Annex to the draft measure.

Section 3

Regulatory obligations

Please state where applicable:

3.1 The legal basis for the obligations to be imposed, maintained, amended or withdrawn (Articles 9 to 13 of Directive 2002/19/EC).

For markets 3a, 3b_2 and 4, the following obligations are proposed on the basis of the 2002/19/EC Directive.

Market 3a:

1. Local Loop and Sub-Loop Unbundling. In addition to access to LLU and SLU, Telefónica is required to meet price control (cost-orientation) and
accounting separation obligations. Telefónica must also publish a reference offer for LLU services, and is subject to specific requirements (in the context of the transparency obligation) regarding provision of information on FTTH deployments and the closure of its local exchanges. Reinforced non-discrimination obligations also apply.

2. **Access to passive infrastructure.** In addition to access, Telefónica is required to meet price control (cost-orientation) and accounting separation obligations. Telefónica must also publish a reference offer. Reinforced non-discrimination obligations also apply.

3. **Virtual fibre loop unbundling.** In the municipalities where it has been concluded that no sufficient infrastructure based competition on NGA networks exists, Telefónica is required to provide access, on a virtual basis, to its fibre loop. Telefónica must also publish a reference offer. Reinforced non-discrimination obligations also apply.

Prices of the wholesale service will be subject to an economic replicability test (ERT) in line with the Recommendation on non-discrimination and cost accounting methodologies. The obligations of cost accounting and accounting separation are also imposed with the aim to implementing the ERT.

**Market 3b_2:**

1. **Wholesale Broadband Access.** WBA access must be ensured for both Telefónica’s legacy and NGA networks (there being no limitations in terms of download speeds). Telefónica must also publish a reference offer. Reinforced non-discrimination obligations also apply.

Prices of the wholesale service will be subject to the above mentioned ERT (in the case of NGA-based WBA products) and cost orientation obligations (in the case of legacy-based WBA products).

**Market 4:**

1. **Wholesale Broadband Access products specifically adapted to the business segment.** WBA services will be specifically adapted, to address the specific needs of operators that provide telecommunications services to the business segment.

WBA access must be ensured for both Telefónica’s legacy and NGA networks (there being no limitations in terms of download speeds). Telefónica must also publish a reference offer. Reinforced non-discrimination obligations also apply.

Prices of the wholesale service will be subject to an economic replicability test (in the case of NGA-based WBA products) that would be different from the ERT to be applied on markets 3a and 3b_2 and cost orientation obligations (in the case of legacy-based WBA products).
3.2 The reasons for which the imposition, maintenance or amendment of obligations on undertakings is considered proportional and justified in the light of the objectives laid down in Article 8 of Directive 2002/21/EC. Alternatively, indicate the paragraphs, sections or pages of the draft measure where such information is to be found.

See sections III.4 (market 3a), IV.4 (markets 3b_2 and 4) and V (ex ante communication obligations) of the draft measure.

3.3 Where the remedies proposed are other than those set out in Articles 9 to 13 of Directive 2002/19/EC, please indicate what "exceptional circumstances" within the meaning of Article 8 (3) of that directive justify the imposition of such remedies. Alternatively, indicate the paragraphs, sections or pages of the draft measure where such information is to be found.

Not applicable.

Section 4
Compliance with international obligations

In relation to the third intend of the first subparagraph of Article 8(3) of Directive 2002/19/EC, please state where applicable:

4.1 Whether the proposed draft measure intends to impose, amend or withdraw obligations on market players as provided for in Article 8(5) of Directive 2002/19/EC.

Not applicable.

4.2 The name of the undertakings concerned.

Not applicable.

4.3 What international commitments entered into by the Community and the Member States are to be met.

Not applicable.