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

For the attention of:
Mr José María Marín Quemada
President

Fax: + 34 91 577 13 62

Dear Mr Marín Quemada,

Subject: Commission Decision concerning

Case ES/2016/1948: Access to the public telephone network at a fixed location for residential and non-residential customers in Spain

Case ES/2016/1949: Call origination on the public telephone network provided at fixed location in Spain

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

1. PROCEDURE

On 17 November 2016, 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 access² to the public telephone network at a fixed

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 1 in 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.

location for residential and non-residential customers and for call origination³ on the public telephone network provided at fixed location, both in Spain.

The national consultation⁴ ran from 16 July 2016 to 16 September 2016.

On 30 November 2016, a request for information⁵ was sent to the CNMC and a response was received on 5 December 2016.

Pursuant to Article 7(3) of the Framework Directive, national regulatory authorities (NRAs), the Body of European Regulators for Electronic Communications (BEREC) and the Commission may make comments on notified draft measures to the NRA concerned.

2. DESCRIPTION OF THE DRAFT MEASURE

2.1. Background

2.1.1. Access to the public telephone network at a fixed location for residential and non-residential customers in Spain

The last full review of the market for access to the public telephone network at a fixed location for residential and non-residential customers in Spain was notified to and assessed by the Commission under ES/2008/0815⁶. While in the previous review the *Comisión del Mercado de las Telecomunicaciones* (CMT, the predecessor of CNMC) had defined separate markets for residential and non-residential users, in the second review (case ES/2008/0815) CMT distinguished between standardized and customized offers⁷ in the same relevant market. CMT considered that both accesses via analogue and digital access lines (ISDN basic and primary) are within the relevant market. CMT concluded that access provided over copper and cable networks belonged to the same relevant market, as well as home-zone access services provided over mobile networks. Access services using wholesale line rental (WLR) were also included in the market⁸.

CMT proposed to impose on Telefónica de España, S.A.U (Telefónica) (i) carrier selection (CS)/carrier pre-selection (CPS); (ii) price control on subscription fees⁹; (iii) non-discrimination; (iv) transparency¹⁰; (v) prohibition of anti-competitive behaviour; and (vi) accounting separation and cost accounting.

³ Corresponding to market 2 in the 2007 Recommendation on relevant markets.

⁴ In accordance with Article 6 of the Framework Directive.

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

⁶ SG-Greffe (2008) D/207467

⁷ CMT included both offer types in the same relevant market and defined customized offers as a bundle of services whose billing exceeds €12,000 per year. These customers represent approx. 2% of Telefónica's customers.

⁸ CMT excluded from the market definition access over broadband and mobile connections.

⁹ Price cap on the basis of an RPI-X factor.

¹⁰ Contrary to the standardized offers, CMT proposed that customized offers should not be subject to an ex-ante transparency obligation. Prices and conditions would be notified to CMT at CMT's request

The Commission at the time (i) asked CMT to further justify in its final measure both the substitutability between standardised and customized offers and the imposition of differentiated remedies, and (ii) invited CMT not to withdraw the price control obligation on one-off connection fees¹¹.

In 2012 (under case ES/2012/1380¹²) CMT found two different relevant markets: the "mass market" (residential customers and small businesses who have not opted for a specific business plan) and the "business market". However, the market review was limited to the "mass market". CMT proposed to analyse the remaining business market in a separate review.

The relevant product market as notified included the provision of access provided via copper, fibre-optic, cable, mobile/wireless networks¹³ and WLR. CMT specified that irrespective of whether the above networks/technologies are narrowband or broadband (excluding broadband internet access) they should be considered as substitutes¹⁴. The relevant geographic market was defined as the territory of Spain.

CMT proposed to designate Telefónica as having SMP in the mass-market and to impose on it (i) prohibition of anti-competitive practices (including non-discrimination) such as anticompetitive price-reductions, unfair bundling, discriminatory prices, and inappropriate contractual clauses, (ii) transparency, (iii) cost accounting and (iv) accounting separation. Furthermore, CMT proposed to repeal the current price control obligation.

The Commission commented on the need for a parallel analysis of all parts of the market and as a consequence of the partial market analysis, the need for maintaining previously imposed remedies in the market section excluded from the notified draft measure until a market review has been conducted also for this remaining part of the market.

In 2013 (ES/2013/1432¹⁵) CMT notified a new methodology for the ex ante analysis of commercial offers and a modification of the obligations of information and prior communication of retail offers. The Commission urged CMT to reassess the proportionality of the aggregate test which in addition to testing new and modified

only.

¹¹ In its final draft measure CMT imposed the following remedies: (i) CS/CPS, (ii) non-discrimination, (iii) prohibition of anticompetitive behaviour, (iv) transparency, (v) and accounting separation and cost accounting. In addition CMT imposed a price control obligation on recurrent subscription fees but withdrew the previously imposed price control obligation regarding connection fees.

¹² C(2012) 8866

¹³ Mobile services are included in the market definition to the extent that they are provided at a fixed location using geographic numbers, i.e. home-zone products.

¹⁴ With respect to the substitution with narrowband access, CMT specifies that (i) prices of BB access services are similar to those of narrowband access services, (ii) both types of access have similar technical characteristics and provide equivalent quality of service (e.g. ensuring uninterrupted access to emergency number 112). CMT proposed to exclude from the relevant market (i) services provided to the business market, (ii) access via ISDN lines, (iii) publicly available telephone service (PATS), (iv) mobile access, (v) broadband internet access. Bundles were also excluded from the relevant market.

¹⁵ C(2013) 2270

permanent offers will monitor all temporary offers and promotional activities by the SMP operator after their launch.

2.1.2. Call origination on the public telephone network provided at fixed location in Spain

The last full review of the market for call origination on the public telephone network provided at fixed location in Spain was notified to and assessed by the Commission under ES/2008/0816¹⁶. The relevant product market included services whereby an operator delivers a call from an end-user physically connected to the network of the first operator to another interconnected operator. Additionally, CMT found that the relevant market also included WLR and indirect access (CS/CPS), intelligent network and short numbering access services, as well as origination services based on IP technology. CMT found that the relevant geographic market covered the territory of Spain.

CMT designated Telefónica as operator with SMP and imposed on it: (i) access to certain network components; (ii) WLR obligation; (iii) cost orientation and cost accounting; (iv) accounting separation; (v) non-discrimination in the provision of origination services and in the migration process to IP interconnection; and (vi) transparency (publication of a Reference Interconnection Offer, WLR offer and transparency in the migration process to IP interconnection). The Commission had no comments.

In 2010, CMT notified¹⁷ several amendments of the Reference Interconnection Offer in particular concerning prices, payment conditions, technical aspects and procedures related to the provision of interconnection services. The Commission had no comments.

In 2011, CMT proposed¹⁸ to change the pricing of the relevant reference offers, including WLR, following the verification of Telefonica's cost accounting data for 2008 and in light of the 2009 non-audited accounts. The Commission did not comment specifically on the WLR price changes; however it made a general comment on the transparency of the national consultation process.

In 2014, CNMC proposed¹⁹ to calculate the WLR prices taking into consideration the fees for the unbundled loop, which have been recently modelled to achieve a new cost-oriented monthly price. The Commission urged CNMC to finalise its market review process for market 2 and to notify it to the Commission as soon as possible.

¹⁶ SG-Greffe (2008) D/207128

¹⁷ ES/2010/1088 (SG-Greffe (2010) D/10585).

¹⁸ ES/2011/1192 (SG-Greffe (2011) D/5364).

¹⁹ ES/2014/1584 (C(2014) 3030).

2.2. Market definition

2.2.1. Access to the public telephone network at a fixed location for residential and non-residential customers in Spain

The relevant market includes access services to the PSTN through individual lines as well as through ISDN lines (basic and primary accesses), together with associated services (such as waiting call and answerphone). As in the previous partial review, CNMC puts forward that based on the characteristic of the end-customers two differentiated relevant markets are to be defined: (i) mass-market (residential customers and small businesses who have not opted for a specific business plan) and (ii) business market. The geographic scope of both markets is considered to be national.

2.2.2. Call origination on the public telephone network provided at fixed location in Spain

As in the previous market review, CNMC defines the relevant product market as including services whereby an operator delivers a call from an end-user physically connected to the network of the first operator to another interconnected operator. WLR and indirect access (CS/CPS), special tariffs and short numbering access services belong to the relevant market. The market is not limited to services provided through traditional interfaces but also includes services based on IP interfaces²⁰. CMT finds that the relevant geographic market covers the territory of Spain.

2.3. Assessment of the three criteria and finding of significant market power ("SMP")

CNMC proposes to deregulate the market for access to the public telephone network at a fixed location since, based on the proposed wholesale regulation, both the mass-market and the business market²¹ no longer present high and non-transitory barriers to entry in Spain.

As to the fixed call origination market, CNMC is of the view that the three criteria test is fulfilled, even though this market no longer features in the Commission Recommendation on Relevant Markets²². CNMC considers that there are still significant entry barriers to the market (also in view of its declining trend), the market does not tend towards effective competition, and ex post competition law alone would not be sufficient to address the competition problems. Therefore, ex-market 2 would remain susceptible to ex ante regulation.

²⁰ In its notified measure, CNMC excludes from the relevant market services provided over mobile and broadband technologies.

²¹ Telefónica accounts for around 68% of the access lines in the business market, 46.44% in the mass-market, and 53% of the total access lines.

²² 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.

CNMC puts forward that in the case of Spain, the operators that deploy their own network or those that resort to the unbundling of the local loop services and indirect broadband access do so principally in order to offer packages of services that, as a fundamental element, include the service of broadband internet access. In this respect, CNMC underlines that there are around 6.5 million of fixed telephony accesses not bundled with broadband services (34% of total access lines in Spain). Telefónica would have a strong position in that segment²³. The number of standalone telephone lines has been following a decreasing trend. CNMC expects those lines to still exceed 4 million at the end of the review period.

As to the alternatives to the purchase of wholesale call origination services, CNMC states that there are more than 4 million copper pairs with no LLU coverage²⁴ (20% of the total), and that the prices of leased lines and bitstream would not allow to provide telephony services on a standalone basis. On the other hand, the household coverage of HFC is below 50% and of FTTH is below 60%. According to CNMC, mobile and fixed telephony are not substitutes but complementary. 82.7% of the Spanish households procure both services. This percentage follows an increasing trend and is higher than the European average. Moreover, there is a significant price difference between a mobile flat-rate and the €17.20 average consumption of the standalone telephony service. The price difference is also significant when compared to double-play offers (broadband and telephony). CNMC adds that home-zone substitutes only account for 2.45% of the fixed telephony lines in Spain and this percentage has not increased in the last years.

Referring in particular to business customers, CNMC argues that alternative operators encounter barriers to entry into the business segment that would be increased if the WLR offer did not exist. These barriers are related to the need to reach all of the premises of a single client, which is unlikely to be possible without access to Telefónica's network. In addition, business clients require certain services (fax, alarms, etc.) that can only be provided on the traditional fixed public telephone network. Although these services can be provided over IP offerings, such offerings do not guarantee the level of quality of service and availability demanded by clients, or require a technological migration from the premises of the companies (switchboards) to VoIP and a relevant change in key business processes for companies, such as customer service.

Moreover, in view of Telefónica's network capilarity and its vertical integration, the barriers to entry to the market, the very limited countervailing buyer power of alternative operators, the limited fixed-mobile substitutability and the lack of significant pressure from OTT services, CNMC concludes that there is no tendency towards effective competition.

CNMC proposes to designate Telefónica as holding SMP in the fixed call origination market, based *inter alia* on (i) its high market share²⁵, (ii) barriers to

²³ Telefónica holds a 70% market share in the segment of stand-alone fixed telephony access. Telefónica has a market share of 67% of the stand-alone fixed telephony access for business customers and 74% market share for mass-market customers.

²⁴ The number of unbundled loops is decreasing in Spain.

²⁵ Telefónica has a market share in the fixed call origination market of 98.88%.

entry, including control of non-replicable infrastructures and importance of economies of scale and scope, (iii) lack of potential competition; and (vi) vertical integration.

2.4. Regulatory remedies

2.4.1. Call origination on the public telephone network provided at fixed location in Spain

CNMC proposes to impose on Telefónica²⁶ (i) access to WLR; (ii) indirect access²⁷ (CPS) only when purchased in combination with WLR, (iii) special tariffs and short numbering access services²⁸; (iv) non-discrimination; (v) cost accounting and accounting separation; (vi) price control (cost-oriented), and (vii) transparency²⁹.

3. COMMENTS

The Commission has examined the notifications and the additional information provided by CNMC and has the following comment.³⁰

Monitoring of the call origination market

CNMC justifies the need for fixed call origination regulation based mainly on the lack of competitive pressure on a segment of residential and business customers in Spain which purchase fixed voice services on a stand-alone basis. These customers represent approximately 34% of the total of access lines in Spain (approximately 57% of these customers are businesses, while the remaining 43% are residential customers). In response to the Commission's RFI, the CNMC indicates that it does not know which share of these customers may be covered by alternative operators through either self-supply (e.g. HFC, FTTH or legacy networks from alternative operators) or wholesale access services other than WLR. However, the CNMC argues that any alternative available is unlikely to sufficiently constrain Telefónica's fixed telephony prices for this segment of customers for different reasons, in particular: (i) the limited coverage of either LLU (80% household coverage), HFC (49%) or FTTH (56%); (ii) the relatively high wholesale prices for services with ubiquitous geographic coverage such as bitstream or leased lines, when compared to fixed telephony prices; (iii) the relatively higher mobile telephony prices (CNMC shows that for a similar volume usage, mobile telephony prices are at least 27% higher than the average €17.20 cost of fixed telephony services); and (iv) the fact that both residential and business customers seem to consider mobile telephony services as complementary rather than substitute to fixed telephony. In response to

²⁶ The obligations to provide pre-selection and WLR only apply to Telefónica's traditional network. Within the NEBA offer, Telefónica is obliged to provide a regulated bitstream service capable of providing VoIP with guaranteed quality.

²⁷ Both through traditional and IP interconnection.

²⁸ Both through traditional and IP interconnection.

²⁹ Reference offer for WLR, for interconnection through traditional interfaces and for interconnection through IP interfaces.

³⁰ In accordance with Article 7(3) of the Framework Directive.

the RFI, the CNMC provided evidence that Telefónica increased its stand-alone retail fixed telephony access prices after the regulator removed its retail price regulation in 2012.

In light of the above, the Commission notes that the barriers to entry are to a large extent dependent on the ability of alternative operators to develop or acquire a direct link to the end customer. In this regard the Commission points out that CNMC's analysis does not provide a comprehensive assessment of the extent to which users of stand-alone fixed telephony services may have access to communications providers other than Telefónica (either currently or within the timeframe of this market review through the expected roll-out of NGA networks), through self-supply or wholesale access products other than WLR, which could constrain Telefónica's fixed telephony prices.

The Commission, however, agrees with CNMC that the evidence provided on network coverage can be presumed to suggest that at least some of the end users purchasing fixed telephony services on a stand-alone basis are unlikely to have any option other than Telefónica's services. Furthermore, the evidence showing that Telefónica has increased its fixed telephony prices only for its stand-alone customers, similarly seems to suggest that it is not facing sufficient competitive pressure at least in that market segment.

In light of the above, the Commission asks CNMC to closely monitor the market, particularly, future developments that may accentuate fixed to mobile substitutability in Spain, as well as NGA roll-outs that may increase the competitive constraints on fixed telephony services. If deemed necessary in view of those developments, a new review should be carried out prior to the standard period of three years.

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/EC³¹ 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 Commission³² 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.³³ You should give reasons for any such request.

³¹ 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.

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

³³ The Commission may inform the public of the result of its assessment before the end of this three-day

Yours sincerely,

For the Commission,
Roberto Viola
Director-General

period.