EUROPEAN COMMISSION
DG Competition

CASE M.7421- ORANGE / JAZZTEL

(Only the English text is authentic)

MERGER PROCEDURE
REGULATION (EC) 139/2004

Article 8(2) Regulation (EC) 139/2004
Date: 19/05/2015

EUROPEAN
COMMISSION

Brussels, 19.5.2015
C(2015) 3370 final

Public Version

COMMISSION DECISION

of 19.5.2015

declaring a concentration to be compatible with the internal market and the EEA agreement (Case M.7421 – ORANGE / JAZZTEL)

(Only the English text is authentic)

TABLE OF CONTENTS

COMMISSION DECISION

of 19.5.2015

declaring a concentration to be compatible with the internal market and the EEA agreement (Case M.7421 – ORANGE / JAZZTEL)

(Only the English text is authentic)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to the Agreement on the European Economic Area, and in particular Article 57 thereof,

Having regard to Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings[1], and in particular Article 8(2) thereof,

Having regard to the Commission Decision of 4 December 2014 to initiate proceedings in this case,

Having given the undertakings concerned the opportunity to make known their views on the objections raised by the Commission,

Having regard to the opinion of the Advisory Committee on Concentrations[2],

Having regard to the final report of the Hearing Officer in this case[3],

Whereas:

1. INTRODUCTION

(1) On 16 October 2014, the European Commission received a notification of a proposed concentration by which Orange SA ("Orange" or the "Notifying Party"), based in France, intends to acquire sole control over Jazztel p.l.c. ("Jazztel"), based in the United Kingdom, by way of a public bid (the "Proposed Transaction"). Orange and Jazztel are jointly referred to as the "Parties".

(2) Orange, through its fully owned subsidiary France Telecom España S.A.U which operates under its trade name Orange España, offers mobile telecommunication, fixed telephony and Internet access services to customers in Spain. Orange is the third largest Mobile Network Operator ("MNO") in Spain. For its provision of fixed Internet access and fixed voice services, Orange mainly relies on access to the local copper network of the incumbent telecom operator Telefónica de España, SAU

1 OJ L 24, 29.1.2004, p. 1 ("the Merger Regulation"). With effect from 1 December 2009, the Treaty on the Functioning of the European Union ("TFEU") has introduced certain changes, such as the replacement of "Community" by "Union" and "common market" by "internal market". The terminology of the TFEU will be used throughout this Decision.

2 OJ C 407, 8.12 2015. p.14.

3 OJ C 407, 8.12 2015, p.16.

("Telefónica")[4] through local loop unbundling ("LLU") (via its proprietary backbone network, as well as technical equipment installed in a number of local LLU exchanges operated by the incumbent telecom operator Telefónica) and partially on its own Fibre to the Home ("FTTH") network, covering 800 000 building units ("BUs") as of end 2014. On the retail market for fixed Internet access services, Orange is the fourth largest player based on revenues and the third largest player based on subscribers.

(3) Jazztel offers fixed telephony, Internet access and mobile telecommunication services in Spain. Jazztel offers fixed line services through its proprietary network consisting of a backbone, equipment in local LLU exchanges of the incumbent telecom operator Telefónica and a FTTH network that covers 3 million households in Spain. Jazztel offers mobile telecommunication services as a mobile virtual network operator ("MVNO") on Orange's network. In the retail markets for fixed telephony and for fixed Internet access services, Jazztel is the third largest player based on revenues and the fourth largest player based on subscribers.

2. THE OPERATION AND THE CONCENTRATION

(4) Orange intends to acquire control over Jazztel by way of a voluntary cash tender offer over the entire share capital of Jazztel. Orange publicly announced that offer on 16 September 2014. On 16 October 2014, Orange requested authorization from the Spanish stock exchange authority *Comisión Nacional del Mercado de Valores* ("CNMV") to launch a takeover bid over Jazztel.

(5) The proposed concentration constitutes a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.

3. UNION DIMENSION

(6) The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 000 million (Orange: EUR 40 981 million; Jazztel: EUR 1 044 million). Each of them has a Union-wide turnover in excess of EUR 250 million (Orange: EUR 39 251 million; Jazztel: EUR 1 044 million), but they do not achieve more than two-thirds of their aggregate Union-wide turnover within one and the same Member State. The notified operation therefore has an EU dimension within the meaning of Article 1(2) of the Merger Regulation.

4. THE PROCEDURE

(7) Based on the results of the first phase market investigation ("Phase I Market Investigation"), the Commission raised serious doubts as to the compatibility of the transaction with the internal market and, on 4 December 2014, adopted a decision to initiate proceedings pursuant to Article 6(1)(c) of the Merger Regulation (the "Article 6(1)(c) Decision")[5].

(8) The Notifying Party submitted its written comments to the Article 6(1)(c) Decision on 15 December 2014. On 14 January 2015 the Notifying Party submitted a report by its external consultant Analysys Mason (the "AM Report") on the subject of the

---

4 The main companies of Telefónica Group operating in Spain are Telefónica de España, SAU which runs the fixed and Pay-TV business, and Telefónica Móviles España, SAU which runs the mobile business.

5 OJ C 441, 10 December 2014, p. 1

Parties' fibre roll-out plans before and after the merger which was followed on 16 January 2015 by a report of its economic consultants on the use of upward pricing pressure/ illustrative price rise ("UPP/IPR") analysis in the Article 6(1)(c) Decision (the "First UPP/IPR Report"). A supplementary report on UPP (the "Second UPP Report") was submitted on 4 February 2015.

(9) Based on the results of the second phase investigation ("Phase II Market Investigation") which supplemented the findings of the Phase I Market Investigation (jointly referred to as "Market Investigation"), the Commission addressed a Statement of Objections (the "Statement of Objections") dated 25 February 2015 to the Notifying Party pursuant to Article 18 of the Merger Regulation in which the Commission further substantiated its competition concerns.

(10) On 6 March 2015, before replying to the Statement of Objections, the Notifying Party submitted a first set of commitments in order to address the competition concerns identified in the Statement of Objections. The Commission carried out a market test of those commitments on 13 March 2015.

(11) The Commission issued a letter of facts to the Notifying Party on 10 March 2015 (the "Letter of Facts"). The Notifying Party submitted its comments on the Letter of Facts on 13 March 2015.

(12) The Notifying Party replied to the Statement of Objections (the "Reply to the Statement of Objections") on 11 March 2015. Masmovil, an interested third party, submitted comments on the Statement of Objections on the same date. Other interested third parties, namely Vodafone and Yoigo made submissions on 12 March 2015 and R Cable on 30 March 2015.

(13) An oral hearing took place on 16 March 2015 during which the Commission, the Parties and certain interested third parties, namely Vodafone, Yoigo and Masmovil presented their views on the competition concerns addressed in the Statement of Objections. The competition authorities of several Member States including the Spanish competition authority *Comisión Nacional de los Mercados y la Competencia* ("CNMC") attended the oral hearing and had the opportunity to ask questions.

(14) On 18 March 2015, the Commission adopted a decision pursuant to Article 11(3) of the Merger Regulation, following the Notifying Party's failure to respond to several requests for information pursuant to Article 11(2) of the Merger Regulation from the Commission. That decision had the effect of suspending the time limits for the Commission's procedure as of 4 March 2015. The Notifying Party responded to the Request for Information on 27 March 2015 and the procedure was resumed on 28 March 2015.

(15) On 29 March 2015 the Notifying Party submitted a second set of commitments. A market test of those commitments was sent to market participants on 8 April 2015. The Notifying Party submitted another set of commitments on 6 April 2015 and a final set of commitments on 20 April 2015.

(16) The Advisory Committee discussed the draft of this Decision on 7 May 2015 and issued a favourable opinion.

5. REFERRAL REQUEST

(17) On 5 November 2014, the CNMC, submitted a request pursuant to Article 9(2)(a) of the Merger Regulation for full referral of the Proposed Transaction from the Commission to the Kingdom of Spain (the "Referral Request").

(18) In the Referral Request, the Kingdom of Spain considered that the Proposed Transaction threatens to significantly affect competition in the Spanish markets for: (i) fixed voice services; (ii) fixed Internet access services; (iii) mobile telecommunication services; and (iv) the possible market for multiple play services. Furthermore, the Kingdom of Spain considered that those markets are national in scope and present all the characteristics of distinct markets within Spain. Moreover, the Kingdom of Spain considered that it is best placed to deal with the Proposed Transaction.

(19) Given the Commission's decision of 4 December 2014 to initiate proceedings in this case, the Commission did not have to take a position on the Referral Request in Phase I pursuant to Article 9(4)(a) of the Merger Regulation.

(20) After the initiation of proceedings, the Kingdom of Spain submitted a reminder of its Referral Request on 19 December 2014, pursuant to Article 9(5) of the Merger Regulation.

(21) The Notifying Party was informed of Spain's Referral Request on 10 November 2014 and submitted its comments on 14 November 2014. Furthermore, the Notifying Party was informed of the Kingdom of Spain's reminder on 5 January 2015.

(22) The Notifying Party essentially submitted that the Proposed Transaction does not threaten to affect significantly competition and, therefore, that the legal requirements for a referral are not met. In any event, the Notifying Party submitted that the Commission is better placed to examine the case. In addition, a referral of the Proposed Transaction to Spain would cause an unnecessary administrative burden for the Notifying Party. Finally, it would generate additional legal uncertainties, which would be particularly disruptive given that Orange proposes to acquire Jazztel by way of a public bid.

(23) With a letter dated 9 January 2015 the Kingdom of Spain was informed of the Commission’s intention to refuse the Referral Request and given the opportunity to make known its views. In response, the Kingdom of Spain informed the Commission that it had no further comments.

(24) On 26 January 2015 the Commission adopted a decision rejecting the Referral Request of the Kingdom of Spain. The Commission considered that, at least as regards some of the markets discussed in the Referral Request, the Proposed Transaction threatens to significantly affect competition. Moreover, each of those markets presents all the characteristics of a distinct market within Spain. In any event, even if the conditions for a referral provided for in Article 9(2)(a) of the Merger Regulation are fulfilled with regard to the Proposed Transaction, in exercising its discretion the Commission took into account that it is well placed and is the most appropriate authority to investigate the Proposed Transaction for a number of reasons, including the need to ensure a coherent and consistent approach when addressing mergers in the converging fixed and mobile telecommunication sectors in different Member States falling into the Commission's competence and the fact that the Commission has developed significant expertise in the European telecommunication markets over the last years.

6. RELEVANT MARKETS

(25) The Proposed Transaction gives rise to certain horizontal overlaps between the Parties' activities in a number of relevant telecommunication services markets in Spain.

(26) In particular, at retail level, the Parties' activities overlap in:

(a) the supply of fixed voice services;

(b) the supply of fixed Internet access services; and

(c) the supply of mobile telecommunication services to end consumers.

(27) The Parties offer the services referred to in recital (26) as stand-alone products, as well as bundles of those services (so-called "multiple play" services).

(28) At wholesale level, Orange and Jazztel both operate in:

(a) the wholesale market for call termination on fixed networks;

(b) the wholesale market for mobile call termination;

(c) the wholesale provision of domestic call transit services on fixed networks[6];

(d) the wholesale broadband access services;

(e) the wholesale Internet connectivity market[7];

(f) the global telecommunication services ("GTS") market[8]; and

(g) the wholesale international carrier services market[9].

[6] Both Orange and Jazztel provide wholesale domestic call transit services on fixed networks in Spain. Such services in the fixed public telephone network involve the transmission and switching or routing of calls and are complementary to wholesale call origination and call termination services. The Notifying Party estimates the combined share of Orange and Jazztel on the market for domestic call transit services market to be [5-10]*% in terms of revenue and [0-5]*% in terms of traffic (in minutes) for 2013. As a consequence, there is no affected market and those services will not be discussed further in this Decision. For market definition, see Commission decision of 3 July 2012 in Case M.6584 – Vodafone/Cable & Wireless, paragraph 26 and Commission decision of 29 January 2010 in Case M.5730 – Telefónica/Hansenet Telekommunikation, paragraphs 15 and 19.

[7] As the Internet works as a network of networks, a local Internet Service Provider ("ISP") that wants to offer Internet services to end-consumers, has to connect with other networks to allow his end-customers to exchange traffic with other end-customers/ content providers beyond its own local network. In order to reach networks in far distance, an ISP has to connect to larger networks which can link both ISPs to each other. For market definition, see Commission decision of 7 October 2005 in Case M.3752 – Verizon/MCI, paragraph 24. In the present case the Notifying Party estimates the combined market share of Orange and Jazztel on the global market for Internet connectivity to be below 5% (Orange's share is [0-5]*% at worldwide level while Jazztel's turnover generated from Internet connectivity services is negligible with […]* EUR in 2013). As a consequence, the market for wholesale Internet connectivity is not affected and will not be discussed further in this Decision.

[8] Global telecommunications services are telecommunications services linking a number of different customer locations, generally in at least two different continents and across a large number of different countries. They are generally purchased by multinational companies with a presence in many countries across different continents. GTS include several broad types of services: dedicated Internet access, leased lines, virtual private networks (VPNs) and hosting services. The Notifying Party estimates that the activities of both Orange and Jazztel in this market are rather limited as their combined market share is below 5% in all relevant segments in the market. As a consequence, the market for global telecommunication services is not affected and will not be further discussed in this Decision. For market definition, see Commission decision of 3 July 2012 in Case M.6584 - Vodafone/Cable&Wireless, paragraphs 32-33.

[9] In its decision of 3 July 2012 in Case M.6584 - Vodafone/ Cable&Wireless (paragraph 33), the Commission considered whether a distinction between GTS and international carrier services (comprising lease of transmission capacity and the provision of related services to third party telecommunication traffic carriers and service providers) is appropriate but ultimately left the exact product market definition open. Orange's market share in the provision of international carrier services is below 5% while Jazztel's share on the same market is estimated to be below 1%. As a consequence,

(29) In addition, Orange is active in:

(a) the wholesale access and call origination on mobile networks;

(b) the wholesale provision of international roaming on mobile networks[10];

(c) the wholesale market for end-to-end calls[11]; and

(d) the retail supply of Pay-TV services[12].

6.1. Retail supply of fixed voice services

(30) Fixed voice services include the provision of connection services or access at a fixed location or access to the public telephone network for the purpose of making and receiving calls and related services.

6.1.1. Product market definition

(31) The Notifying Party does not take a view on the exact product market definition.

(32) In previous decisions[13], the Commission considered drawing a distinction between residential and non-residential customers as well as between local or national and international calls but ultimately left the product market definition open. In the more recent *Vodafone/ONO* decision[14], the Commission considered the market for retail

the market for wholesale international carrier services is not affected and will not be further discussed in this Decision.

10 International roaming is a service which allows mobile subscribers to use their mobile handsets and SIM cards to make and receive calls, to send and receive text messages and to use other data services when abroad. There is no horizontal overlap between the Parties' activities as Jazztel does not operate a mobile network in Spain and does not provide international roaming services. Orange provides such international roaming services over its mobile network in Spain and has a [20-30]*% market share by revenue in 2013. As a consequence, the wholesale market for international roaming is not horizontally affected. The Notifying Party was not able to provide market shares for Orange in other European countries where Orange is active as an MNO, however given Orange's overall presence on the mobile telecommunications markets in France, Poland and Romania, the Notifying Party cannot exclude the possibility that Orange's market share in the wholesale provision of international roaming in these three countries could be above 30%. Therefore it cannot be entirely excluded that the wholesale markets for international roaming outside of Spain (in France, Poland and Romania) are vertically affected. The Commission discusses such potential vertical links in recital (124) below. For market definition, see Commission decision of 1 March 2010 in Case M.5650 – T-Mobile/Orange paragraphs 32-34.

11 Fixed telephone network operators package origination and termination services and provide communications providers without their own network a package which they can use to offer retail fixed voice services to consumers without the need to invest in infrastructure. The Notifying Party estimates Orange's market share in terms of revenue in 2013 at below 1%. Jazztel does not provide such services. As a consequence, the wholesale market for end-to-end calls is not affected and will not be discussed further in this Decision. For market definition, see Commission decision of 3 July 2012 in Case M.6584 – Vodafone/Cable & Wiresless, paragraphs 19-21.

12 In previous decisions (Commission decision of 25 June 2008 in Case M.5121 – News Corp/Premiere, paragraphs 17-20 and Commission decision of 21 December 2010 in M.5932 – News Corp/BSkyB, paragraphs 92-99), the Commission distinguished between Free-to-Air TV (FTA) and Pay-TV services. Jazztel does not provide its own retail Pay-TV services since 2010 and its activities on the market are limited to being an agent of Distribuidora de Television Digital, S.A. ("DTS"). Orange has a market share on the Spanish Pay-TV market of [0-5]*% in terms of revenue and [0-5]*% in terms of subscribers in 2013. As a result, the market for retail supply of Pay-TV services is not affected and will therefore be further discussed in this Decision only in the context of multiple-play bundles involving a Pay-TV component.

13 Commission decision of 29 June 2009 in Case M.5532 – Carphone Warehouse/Tiscali UK, paragraphs 35 and 39; Commission decision of 29 January 2010 in Case M.5730 – Telefónica/Hansenet Telekommunikation, paragraphs 16-17; Commission decision of 20 September 2013 in Case M.6990 – Vodafone/Kabel Deutschland, paragraphs 126-131.

14 Commission decision of 2 July 2014 in Case M.7231 – Vodafone/ONO, paragraphs 26-28.

supply of fixed voice services to comprise managed VoIP services and fixed voice services provided through fixed lines but ultimately left open the market definition without further segmenting between residential and business customers.

(33) The results of the Market Investigation conducted in the present case are largely in line with the market definition used in previous Commission decisions. Several competitors note, however, that the supply of fixed voice telephony, Internet and mobile telecommunication services, and to some extent of Pay-TV services, are increasingly converging.

(34) The Commission considers that for the purpose of the present decision, the exact product market definition can be left open as the Proposed Transaction does not raise competition concerns under any alternative product market definition considered.

6.1.2. Geographic market definition

(35) The Notifying Party does not take a view on the exact geographic scope of the market for the retail provision of fixed voice services.

(36) The Commission has in the past considered that the geographic scope of the market for the retail provision of fixed voice services is national[15]. In the present case, all the respondents to the Market Investigation agreed with that definition[16].

(37) Therefore the Commission considers that the relevant market for the retail provision of fixed voice services is national in scope.

6.2. Retail supply of fixed Internet access services

(38) Fixed Internet access services consist of the provision of a fixed telecommunications link enabling customers to access the Internet.

6.2.1. Product market definition

(39) A relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumers, by reason of the products' characteristics, their prices and their intended use[17]. In determining the relevant market, the Commission assesses demand substitution by determining the range of products which are viewed as substitutes by the consumers[18]. The Commission can also take into account supply-side substitutability, namely when its effects are equivalent to those of demand substitution in terms of effectiveness and immediacy[19], such as when suppliers are able to switch production to the relevant products and market them in the short term without incurring significant additional costs or risks in response to small and permanent changes in relative prices[20].

(40) The Notifying Party submits that broadband Internet services with download speed of up to 30 Mb/s and very high broadband ("VHBB") services with download speed above 30 Mb/s in Spain are largely substitutable and therefore belong to the same

---

15 Commission decision of 29 June 2009 in Case M.5532 – Carphone Warehouse/Tiscali UK, paragraph 56; Commission decision of 20 September 2013 in Case M.6990 – Vodafone/Kabel Deutschland, paragraph 137.

16 See replies to Commission Questionnaire to competitors Q1 of 17 October 2014, question 11, and Questionnaire to customers Q2 of 20 October 2014, question 9.

17 Commission Notice on the definition of relevant market for the purposes of Community competition law ("Notice on Relevant Market"), paragraph 7 (OJ C372, 9.12.1997, p.5).

18 Notice on Relevant Market, paragraph 15.

19 Notice on Relevant Market, paragraph 20.

20 Notice on Relevant Market, paragraph 20.

market for fixed Internet access services. The Notifying Party argues that even in cases where there is no direct substitution between broadband and VHBB services, both services belong to the same relevant product market as there is a "chain of substitution"[21] between the different services. The Notifying Party considers that narrowband ("dial-up") services constitute a negligible part of the Spanish market. In addition, the Notifying Party takes the view that a distinction between residential and small business customers on the one hand, and large business customers on the other hand can be considered relevant.

(41) In previous decisions[22], the Commission considered, but ultimately left open, a subdivision of the market for the retail provision of fixed Internet access services by product type, distinguishing narrowband, broadband and dedicated access. The Commission also considered a distinction by broadband distribution technology, namely digital subscriber line ("DSL") and cable but ultimately found that the relevant product market included services offered both through DSL technology and cable[23]. In that respect, in *Hutchison 3G Austria/Orange Austria*[24], the Commission found that fixed broadband services are not a substitute for mobile data services and therefore do not form part of the same product market.

(42) Finally, the Commission distinguished between residential and small business customers on the one hand and large business customers on the other, based on their different needs for Internet services. Large business customers require Internet access services based on higher performance in terms of both security and bandwidth. In addition, those customers could also require services such as dedicated access (leased lines) and virtual private network ("VPN") technology. In light of those differences, the Commission considered that retail broadband Internet access services for large business customers belong to a distinct product market[25]. In more recent Commission decisions[26], that separate product market for large business customers is referred to as retail business connectivity market[27]. The Commission considers that in line with previous Commission practice, for the purpose of this Decision, there is a separate market for retail business connectivity catering for large enterprise customers.

---

21 Such chain of substitution occurs where it can be demonstrated that although products A and C are not directly substitutable, product B is a substitute for both product A and product C and therefore products A and C may be in the same product market since their pricing might be constrained by the substitutability of product B.

22 Commission decision of 29 January 2010 in Case M.5730 – Telefónica/Hansenet Telekommunikation, paragraph 11 and Commission decision of 22 July 2009 in case M.5532 - Carphone Warehouse/Tiscali UK, paragraph 14.

23 Commission decision 29 June 2009 in Case M.5532 - Carphone Warehouse/Tiscali UK, paragraphs 17-21.

24 Commission decision of 12 December 2012 in Case M.6497 - Hutchison 3G Austria/Orange Austria, paragraph 57.

25 Commission decision of 29 June 2009 in Case M.5532 – Carphone Warehouse/Tiscali UK, paragraphs 24-27.

26 Commission decision of 29 January 2010 in Case M.5730 – Telefónica/Hansenet Telekommunikation, recital 6 and subsequent.

27 For business customers the estimated combined market share of Orange and Jazztel amounts to [10-20]*% for 2013 and [10-20]*% as of third quarter of 2014 in terms of number of subscribers. However this share covers all types of business customers: big enterprises, small and medium enterprises ("SMEs") and small offices/ home offices ("SoHo") as the Notifying Party was not able to provide an estimate of the market and relevant market shares for large business customers only. In any event, given the limited combined market share for all business customers and absent any indication that the combined market share in the market for business connectivity services, the Commission considers that the retail business connectivity market is not an affected market and will not be discussed further in this Decision.

6.2.1.1. Internet access services with speeds below and above 30Mb/s

(43) The Market Investigation did not yield clear results as to whether a distinction should be made between retail provision of Internet access services of up to 30 Mb/s and services above 30 Mb/s.

(44) Some respondents[28] consider that speed is an important differentiating factor while other respondents state that Internet access services offered on a stand-alone basis (without being packaged with another service such as fixed voice telephony or television("TV")) compete only on price[29]. The majority of respondents however consider that Internet access services below and above 30 Mb/s are substitutable. A respondent explains that the speed of what is considered an appropriate connection varies depending on the consumer's needs and usage patterns: for browsing, checking emails, publishing photos and videos (including video calls) speeds of up to 30 Mbps seem sufficient while for consumers with more intensive usage (multiple Internet users per household for example), including online gaming and watching High Definition TV ("HDTV") over the Internet, speeds above 30 Mb/s are necessary.

(45) Market participants also confirm that there is a price gap between Internet access services of different speeds with higher prices for higher speeds[30]. The majority of the respondents that consider that substitutability is possible between Internet access services of speed of up to 30 Mb/s and Internet access services of speed above 30 Mb/s in case of a permanent 5% to 10% increase in the price of Internet access services of speed of up to 30 Mb/s, expect rather strong rates of substitution (ranging between 20% and 50%) in case both services are available to the consumers. Respondents explain that a potential price increase of the Internet access services of speed of up to 30Mb/s would reduce the current price gap between Internet access services of speed of up to 30 Mb/s and VHBB access services[31].

(46) The Commission considers that on the one hand, even if Internet access services below and above 30Mb/s may not be perfect substitutes for all consumers, there is possibly a chain of substitution between the different fixed Internet access services that is strongly influenced by the specific usage patterns of the individual consumer. The price points of retail broadband Internet offers also vary significantly depending on the corresponding speed of connection. That makes it difficult to determine the specific point in the chain of substitution where a potential rupture could occur. On the other hand, while Telefónica has an obligation to provide indirect wholesale access to its network, including its fibre network, the National Regulatory Authority ("NRA") limited the access remedies to a maximum bandwidth of 30Mb/s[32]. Therefore, the Commission considers that in the context of the Spanish regulatory

---

28 Respondents to the Phase II Market Investigation include competitors of the Parties in the retail provision of fixed Internet access products, MVNOs, resellers (such as supermarkets reselling telecommunication products) and business connectivity providers. In the Phase I Market Investigation, also business connectivity customers have been addressed.

29 See replies to Commission Phase II Questionnaire to Competitors of 23 December 2014, question 3.

30 See replies to Commission Phase II Questionnaire to Competitors of 23 December 2014, questions 9 and 10.

31 See replies to Commission Phase II Questionnaire to Competitors of 23 December 2014, question 12.

32 *Resolución de la CMT 22.01.2009, por la que se aprueba la definición y el análisis del Mercado de acceso (físico) al por mayor a infraestructura de Red (incluido el acceso compartido o completamente Desagregado) en una ubicación fija y el mercado de acceso de Banda ancha al por mayor, la designación de operador con Poder significativo de mercado y la imposición de obligaciones Específicas, y se acuerda su notificación a la Comisión Europea, MTZ 2008/626.* (In the following: "CMT Decision of 22 January 2009").

regime, the distinction between speeds above and below 30 Mb/s is not artificial, since different regulatory obligations apply and potentially impact the competitive situation.

(47) However, for the purpose of this Decision, the question whether fixed Internet access services of speeds below 30 Mb/s and above 30 Mb/s belong to the same product market can be left open, as the transaction would significantly impede effective competition irrespective of the precise market definition[33].

6.2.1.2. Segmentation by distribution technology

(48) The large majority of respondents to the Market Investigation confirm that the retail market for provision of fixed Internet access services comprises all the different distribution infrastructures: copper, hybrid fibre coaxial ("HFC") cable and FTTH. Consumers can select the service that corresponds to their preferences in terms of price, speed and availability. The geographic coverage of the different technologies varies and some technologies, such as FTTH and HFC cable, have more limited coverage compared to copper so users are able to choose only between the technologies that are present in their respective geographic area[34]. The Market Investigation did not result in a clear picture as to whether consumers would switch to copper-based Internet access services in case of a 5% to 10% permanent price increase of Internet access services delivered over HFC cable or FTTH. Some respondents point out that currently there is a 20% to 30% price difference between the less expensive services delivered over copper and higher-priced services over another infrastructure[35].

(49) The Commission considers that the fact that all the different technologies currently compete on the market and given that consumers tend to base their choice of Internet access services on price and speed rather than on the exact delivery technology, do not justify a distinction between the different technologies available on the market. Therefore the Commission considers that for the purposes of this Decision there is no reason to divide the relevant market according to different infrastructures such as copper, HFC cable and FTTH.

6.2.1.3. Mobile compared to fixed broadband Internet access services

(50) As regards mobile broadband Internet access services the vast majority of respondents consider that fixed and mobile broadband services are not substitutable for a number of reasons, such as different uses (mobile broadband permits mobility but also access to mobile applications), different capacity and pricing models (mobile broadband unlike fixed broadband is almost always capped at a certain amount of data transferred and is also invoiced per amount of data traffic) as well as different speeds (only 4G/LTE mobile technology[36] can provide comparable speeds to fixed broadband). In addition, respondents explain that customers demand both mobile and fixed broadband which demonstrates the complementary character of the two services. Some respondents consider that mobile broadband can in some cases

---

33 See conclusion in recital (415).

34 See replies to Commission Phase II Questionnaire to Competitors of 23 December 2014, question 4.

35 See replies to Commission Phase II Questionnaire to Competitors of 23 December 2014, question 5.

36 4G stands for "fourth generation of mobile telecommunication technology" and LTE stands for "Long Term Evolution". 4G/LTE is a mobile technology which increases the speed and capacity of the network and is adapted for improved voice quality and high speed data transmission from wireless devices (for example, to stream video, Internet TV and to use broadband Internet).

substitute fixed Internet access services but not the other way around[37]. A small majority of respondents also expect that there will be very little to no substitution between fixed and mobile Internet access services in case of a permanent 10% price increase for fixed Internet services of speeds of up to 30 Mb/s while price of mobile broadband remains unchanged[38].

(51) Currently all four mobile network operators in Spain (Telefónica, Vodafone, Orange and Yoigo) are deploying 4G and overall 4G coverage extended to more than 50% of Spanish population in 2014. That large-scale 4G coverage however does not impair the existing differences in use, capacity, pricing and speed between mobile and fixed Internet access services that have been pointed out by the market respondents.

(52) The Commission has previously found that there is one overall market for retail mobile communication services which comprises voice calls, short messaging services ("SMS") and data services[39]. The Commission has not previously found that there is a separate market for data-only services[40]. In the more recent *Vodafone /ONO* case the Commission concluded that mobile broadband services are not yet substitutable to fixed Internet services in Spain but stated that there is a possibility of future convergence of the two services[41].

(53) In light of previous Commission's decisions and the differences between mobile and fixed Internet access services indicated by the respondents to the Phase II Market Investigation the Commission considers that a distinction between mobile and fixed Internet access services is justified at the present point in time and that for the purpose of this Decision the relevant product market is the retail market for provision of fixed Internet access services.

6.2.1.4. Residential and small business customers compared to Large business customers

(54) The large majority of respondents to the Market Investigation consider that the retail provision of Internet access services to residential and small business customers on the one hand and to large business customers on the other hand constitute two separate markets[42]. In particular, most competitors confirm that operators provide similar services at similar prices both to residential customers and to Small and Medium Enterprises ("SME") and Small Offices or Home Offices ("SoHo")[43], while there are several differences between large enterprises and residential and small business customers. Large enterprises regularly require value added services (that is to say, VPN, hosting, etc.) and customer and technical support[44] which has an impact on the final price paid for the provision of Internet access services[45].

(55) As mentioned in recital (42) the Commission previously considered that retail broadband Internet access services for large business customers belong to a distinct

---

37 See replies to Commission Phase II Questionnaire to Competitors of 23 December 2014, question 13.

38 See replies to Commission Phase II Questionnaire to Competitors of 23 December 2014, question 14.

39 Commission decision of 28 May 2014 in Case M.6992 - Hutchison 3G UK / Telefónica Ireland, paragraph 141

40 Commission decision of 12 December 2012 in Case M.6497 – H3G Austria / Orange Austria, paragraph 52.

41 Commission decision of 2 July 2014 in Case M.7231 – Vodafone/ONO, paragraph 17.

42 See replies to Commission Phase II Questionnaire to Competitors of 23 December 2014, question 20.

43 See replies to Commission Phase II Questionnaire to Competitors of 23 December 2014, question 16.1.

44 See replies to Commission Phase II Questionnaire to Competitors of 23 December 2014, question 16.3.

45 See replies to Commission Phase II Questionnaire to Competitors of 23 December 2014, question 17.

product market[46]. In more recent Commission decisions[47], this separate product market for large business customers is referred to as retail business connectivity market.

(56) In light of the differences in the needs of large business customers compared to the services required by residential and small businesses, the Commission considers that for the purpose of this Decision the relevant product market is the retail market for the provision of Internet access services to residential and small business customers, which is separate from the market serving large business customers with Internet access services.

6.2.2. Geographic market definition

(57) The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply of and demand for products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas[48].

(58) In line with the Commission's conclusions in the Vodafone/Kabel Deutschland case[49], the Notifying Party submits that the geographic scope of the relevant market in the present case is national. Correspondingly, nearly all respondents to the Phase I Market Investigation, both competitors and customers, consider that the geographic scope of the relevant market is national as competition takes place on a national basis and there are no geographically differentiated retail offers for fixed Internet access services in Spain[50].

(59) Aside from the three regional cable operators (Euskaltel, S.A., Telecable de Asturias, S.A.U. and R Cable, S.A.) all major retail telecommunication services providers in Spain operate networks with national reach and compete on the national market.

(60) For the reasons stated in recitals (58) and (59), for the purpose of this Decision, the Commission considers that the relevant geographic market is national in scope.

6.2.3. Conclusion

(61) The Commission concludes that, for the purposes of this Decision, fixed Internet access services to residential and small business customers, regardless of whether their speeds is less or more than 30Mb/s and irrespective of the distribution technology used for the delivery of those services to the end user, belong to the same relevant market for the retail supply of fixed Internet access services in Spain.

---

46 Commission decision of 29 June 2009 in Case M.5532 – Carphone Warehouse/Tiscali UK, paragraphs 24 -27.

47 Commission decision of 29 January 2010 in Case M.5730 – Telefónica/Hansenet Telekommunikation, recital 6 and subsequent.

48 Notice on Relevant Market f, paragraph 7.

49 Commission decision of 20 September 2013 in Case M.6990 - Vodafone/Kabel Deutschland, paragraph 197.

50 See replies to Commission Questionnaire to competitors Q1 of 17 October 2014, question 11, and Questionnaire to customers Q2 of 20 October 2014, question 9.

6.3. Retail supply of mobile telecommunication services

(62) Mobile telecommunication services to end customers include services for national and international voice calls[51], SMS (including MMS and other messages), mobile Internet data services and retail international roaming services.

6.3.1. Product market definition

(63) The Notifying Party submits that there is a single market for the retail provision of mobile telecommunication services.

(64) In previous decisions[52], the Commission considered that there is one single market for retail supply of mobile telecommunication services without segmenting the market according to the type of customer, whether business or private, the type of tariff (pre-paid or post-paid contracts), by network technology (2G/GSM, 3G/UMTS and 4G/LTE), or by type of service (Internet data services, voice and text services).

(65) In *Hutchison 3G Austria/Orange Austria*[53] the Commission considered the segmentations referred to in recital (64), but eventually concluded that there is a single market for the provision of mobile telecommunications services to end customers.

(66) The large majority of respondents to the Commission's Market Investigation consider that the provision of mobile telecommunication services to end customers constitutes a single market. Several respondents note the current trend toward convergence of different services (fixed voice telephony, Internet, mobile telecommunication services and Pay-TV) taking place on the Spanish market[54].

(67) For the purpose of this Decision, the Commission considers that the exact definition of the product market can be left open as the Proposed Transaction does not raise competition concerns under any alternative product market definition considered.

6.3.2. Geographic market definition

(68) In line with previous Commission decisions[55], the Notifying Party submits that the market for mobile telecommunications services is national in scope.

(69) The large majority of respondents to the Market Investigation in the present case confirmed that the relevant geographic market is national and corresponds to the territory of Spain. A respondent noted that in Spain there are no geographically differentiated retail offers[56].

(70) The Commission notes also that customers are only able to obtain mobile communication services from licensed network operators and licenses for the operation of a mobile network in Spain are granted on a national basis.

---

51 The term international voice calls is used for calls that are made by a domestic user when in its home country, but that terminate at destinations which are abroad such as if the receiving number is a foreign one.

52 Commission decision of 1 March 2010 in Case M.5650 – T-Mobile/Orange, paragraphs 20-21; Commission decision of 26 April 2006 in Case M.3916 – T-Mobile Austria/tele.ring, paragraphs 10-11.

53 Commission decision of 12 December 2012 in Case M.6497 - Hutchison 3G Austria/Orange Austria, paragraphs 30 to 58.

54 See replies to Commission questionnaire to competitors Q1 of 17 October 2014, question 7.

55 Commission decision of 1 March 2010 in Case M.5650 – T-Mobile/Orange, paragraphs 25-26; Commission decision of 26 April 2006 in Case M.3916 – T-Mobile Austria/tele.ring, paragraph 19; Commission decision in Case M.7231 - Vodafone/ONO, paragraph 42.

56 See replies to Commission questionnaire to competitors Q1 of 17 October 2014, question 11, and Questionnaire to customers Q2 of 20 October 2014, question 9.

(71) The Commission considers the relevant market to be national in scope.

6.4. Multiple play services

(72) Multiple play services comprise a bundle of two or more services to end-consumers: among the fixed telephony services, fixed Internet access services, mobile telecommunication services and TV services. Such packaged services can consist of so called dual-play, triple-play or even quadruple-play packages comprising some or all of those services.

(73) Table 1 summarises the relative size of the different product types offering fixed broadband, either as stand-alone or as part of a bundle[57].

(74) The most common product types including a fixed broadband component are (i) the double play product type, consisting in fixed voice and fixed broadband ("2p"), and (ii) the triple and quadruple-play product types, consisting in double play plus mobile and possibly TV ("3p/4p")[58]. Other product types included in the market for fixed internet access, such as fixed broadband only and fixed broadband plus mobile products only represent approximately 1% of the retail market for fixed internet access services.

Table 1: Shares of subscribers of product types

	2013			2014		
	1P	2P	3P_4P	1P	2P	3P_4P
Relative share of active fixed subscribers	1.1%	60.4%	38.5%	0.9%	35.8%	63.3%

Source: Commission calculation based on data obtained from operators

6.4.1. Product market definition

(75) The Notifying Party submits that multiple play services are not a relevant market but rather a trend that affects different relevant markets, such as retail mobile telecommunications services, retail fixed voice services, retail fixed Internet access services and TV services. The Notifying Party argues that operators are free to decide whether to offer their services either bundled or not. Furthermore, the Notifying Party points out that consumers would also have the choice of cancelling an individual component or individual components of a bundled service and procuring it or them from an alternative operator.

(76) In previous decisions, the Commission ultimately left open the question as to whether there is a market for multiple play services that is separate from the markets for each of the components of the bundles[59]. If multiple play services would not form a separate market, they would consist of two or more separate products.

(77) A majority of respondents to the Phase I Market Investigation stated that multiple play services should not be considered a distinct market from the retail supply of the

57 1p means Fixed Broadband, 2p means Fixed Broadband and Fixed Voice, 3p/4p means Fixed Broadband, Fixed Voice, Mobile and possibly TV.

58 It was not possible to split 3p from 4p because certain operators could not provide data at such a level of disaggregation.

59 Commission decision of 16 June 2011 in Case M.5900 – LGI/KBW, paragraphs 183-186; Commission decision of 25 January 2010 in Case M.5734 – Liberty Global Europe/Unitymedia, paragraphs 43-48; Commission decision of 3 July 2012 in Case M.6584 – Vodafone/Cable&Wireless, paragraphs 102-104; Commission decision of 20 September 2013 in Case M.6990 – Vodafone/Kabel Deutschland, paragraph 261.

respective unbundled components (that is to say, Internet access services only, fixed telephony services only, mobile communication services and TV only)[60]. However, most competitors supported the view that bundled services play a significant role in the residential segment in Spain. They explained that bundles allow end-consumers to obtain better prices in a price-driven market and to simplify the customer's purchasing decision in exchange for less flexibility in selecting one or part of the services in the bundle.

(78) The majority of the respondents that provided a detailed answer to the relevant question in the Phase II Market Investigation point to the price of the bundle as indeed being the main driver of consumer choice for packaged services over a combination of stand-alone services. Convenience and additional services, such as TV for example, are other important factors influencing the consumer choice. However, price is designated as the most important driver of convergence by far.

(79) From a supply side's perspective, bundled services are a way of increasing customer loyalty (reducing the customer churn) as it is more onerous for a customer to change several services at once. Some respondents to the Phase II Market Investigation consider that there are certain cost savings in the provision of multiple play services, given that the different services are provided over the same infrastructure, such as single installation cost, lower commercial cost and some reduction in the administrative costs. At the same time, the emergence of bundled services makes it more difficult for retailers that are not capable of offering such services to compete successfully in the market[61].

(80) Currently, bundles that contain a TV component, have a relatively minor share in Spain as the most popular bundles, according to CNMC[62] data, are dual-play (fixed Internet access services plus fixed voice services) and triple-play convergent bundles (fixed Internet access services, fixed voice services plus mobile telecommunications services). Market participants explain that the relatively lower penetration of Pay TV services is mainly due to the availability of attractive Free to Air ("FTA") TV content and the relatively expensive price of Pay-TV. Few respondents consider that bundles comprising a Pay-TV component may gain higher uptake in the coming two or three years facilitated by the increased availability of high-speed Next Generation Access ("NGA") networks[63] and possibly by availability of content, including premium content, at reasonable price.

(81) The Commission notes that due to the different services included in different multiple play bundles, instead of one possible market for multiple play products, there could also be several markets for different multiple play products.

(82) Whereas dual-play services are provided over the same, fixed infrastructure, triple- or quadruple-play services are provided over more than one infrastructure. Triple-play services combine fixed and mobile infrastructures and quadruple-play services

---

[60] See replies to Commission questionnaire to competitors Q1 of 17 October 2014, question 10 and Questionnaire to customers Q2 of 20 October 2014, question 8.

[61] See replies to Commission questionnaire to competitors Q1 of 17 October 2014, question 5 and Questionnaire to customers Q2 of 20 October 2014, question 5.

[62] See Table 6 based on CNMC data.

[63] Definition from 2010/572/EU "Commission Recommendation on regulated access to NGA: "Next generation access (NGA) networks' means wired access networks which consist wholly or in part of optical elements and which are capable of delivering broadband access services with enhanced characteristics (such as higher throughput) as compared to those provided over already existing copper networks."

include in addition a TV component. Those different components of multiple play products can be visualised in Table 2:

Table 2:

	Dual-Play	Triple-Play	Quadruple-Play
Fixed	☑	☑	☑
Mobile		☑	☑
TV			☑

(83) If multiple play services were not to form a separate market from their respective components, the market for fixed Internet access services would include all fixed Internet access services irrespective of whether they are sold as stand-alone services or as part of a bundle with other services. In Table 2, such assessment would include the entire horizontal line "Fixed" in addition to a small number of fixed Internet access services that are provided on a stand-alone basis without being bundled in at least a dual-play product.

(84) If multiple play services were to form separate product market(s), the market for fixed Internet access services would include only stand-alone services sold or (for the supply-side considerations discussed in recital 21) as part of a dual-play bundle but not Internet access services sold as part of triple- or quadruple-play bundles.

(85) A possible multiple play market could be a general market for multiple play products or separate markets for dual-, triple- and quadruple-play products. In the table above, such definition would require separate assessments of the vertical columns for "dual-play" and for "triple-play" and "quadruple-play". One could also regard dual-play services as not belonging to a separate market while grouping triple-play services and quadruple-play services together[64]. Therefore, there are in total five possible markets for multiple play services: (i) a general market for all multiple play services, (ii) separate markets for dual-play services, (iii) triple-play services, (iv) quadruple-play services, and (v) a market combining triple- and quadruple-play services[65].

(86) In any event, the Commission considers that, for the purpose of this Decision, the question as to whether multiple play services constitute a separate product market (including all dual, triple and quadruple-play combinations) or several separate product markets (including selected combinations of bundled components, for example dual-play only, triple-play only, triple and quadruple-play only, quadruple-play only) distinct from each of the underlying telecommunications services or whether such services combine several separate products can be left open, as the Commission concludes in recital (415) that the transaction would significantly impede effective competition irrespective of the conclusion regarding this point.

6.4.2. Geographic market definition

(87) The Notifying Party does not take a view as to the geographic definition of the possible market for multiple play services.

---

64 As regards the involved infrastructures, both triple- and quadruple-play offers combine services provided over fixed and mobile infrastructure.

65 Other market that could be thought of would comprise of the combination of fixed voice with pay-TV services or of fixed Internet access with pay-TV services. Furthermore, there could be a market for the combination of fixed voice, fixed Internet access and pay-TV services. However, as Jazztel offers no TV services of its own and Orange has only a very limited market share in such services, the Decision will not further discuss these possible markets.

(88) Previously, the Commission considered that a possible market for triple-play services comprising fixed voice services, fixed Internet access services and Pay-TV services would be national in scope[66]. Equally, in its *Vodafone / Kabel Deutschland* decision, the Commission considered the possible triple-play market comprising fixed voice services, mobile telecommunications services and fixed Internet access services as national in scope[67]. However, ultimately, in both cases the exact geographic market definition was left open.

(89) The large majority of respondents to the first phase market investigation considered that, in the event that the provision of multiple play services constitutes a separate market, the relevant geographic scope of such market would be national. This would be because, first, the main operators offering those services are active at national level, second, the offers do not differ by territory (with small exceptions for Pay-TV, where local TV channels might be included depending on the region) and, third, each of the components of the multiple play offers is offered individually at national level so that packaging the services in a bundle would not change the geographic scope of its components.

(90) In any event, the Commission considers that, for the purpose of this Decision, the question as to whether the geographic scope of the possible market for multiple play services – and in particular, dual-play or triple-play services – is national or regional can be left open, as the Commission concludes in recital (415) that the transaction would significantly impede effective competition irrespective of the conclusion on this point.

6.4.3. Conclusion

(91) The Commission concludes that, for the purposes of this Decision, the question whether multiple play services constitute a separate market or separate markets distinct from each of the underlying telecommunications services can be left open, as the Commission considers that the transaction would significantly impede effective competition irrespective of the conclusion on this point. For the same reason, the question of whether such market or markets are national or regional in scope can be left open.

6.5. Wholesale market for call termination services on fixed networks

(92) Call termination is the service provided by a network operator on the supply side to other network operators on the demand side, whereby a call originating in a demand side operator's network is delivered to a user in the supply side operator's network allowing users of different networks to communicate with each other. Call termination is a wholesale service that is resold or used as an input for the provision of downstream retail telephony services.

6.5.1. Product market definition

(93) In line with the Commission's previous decisions, the Notifying Party submits that wholesale termination on each individual fixed network constitutes a separate

66 Commission decision of 16 June 2011 in Case M.5900 – LGI/KBW, paragraphs 183-186.

67 Commission decision of 20 September 2013 in Case M.6990 – Vodafone/Kabel Deutschland, paragraphs 263-265.

product market[68]. The majority of the respondents to the market investigation in the present case agreed with this product market definition[69].

(94) The Commission considers that there is no substitute for call termination on each individual network since the operator transmitting the outgoing call can reach the intended recipient only through the operator of the network to which the recipient is connected.

(95) The Commission considers that, as regards wholesale call termination services, termination on each individual fixed network constitutes a separate product market.

6.5.2. Geographic market definition

(96) In the Notifying Party's view the wholesale market for call termination services on fixed networks is national in scope. In its previous decisions, the Commission concluded that the geographic scope of the market is national[70].

(97) All respondents to the market investigation in the present case take the view that the geographic market is national in scope.

(98) Moreover, given that the geographic dimension of fixed networks is usually limited to national borders owing to regulatory barriers, for the purpose of this Decision, the Commission considers that the relevant geographic market is national.

6.6. Wholesale access and call origination on mobile networks

(99) MNOs provide wholesale access and call origination services which enable operators without their own network, that is to say MVNOs, to provide their own retail mobile telecommunication services to end customers. There are different types of MVNOs, ranging from so-called full MVNOs that typically own some of the core infrastructure but do not own radio network access or spectrum, to service providers and pure resellers[71] of MNOs.

6.6.1. Product market definition

(100) The Notifying Party did not express its view on the exact product market definition.

(101) In the past, the Commission considered that wholesale network access and call origination services belong to the same relevant product market[72]. The majority of respondents to the market investigation in the present case agreed with that product market definition[73].

(102) For the purpose of this decision, the Commission considers that the exact definition of the product market can be left open.

---

68 Commission decision of 1 March 2010 in Case NM.5650 – T-Mobile/Orange UK, paragraph 37; Commission decision of 3 July 2012 in Case M.6584 – Vodafone/Cable & Wireless, paragraphs 22- 23 and Commission decision of 20 September 2013 in Case M.6990 – Vodafone/Kabel Deutschland, paragraphs 117.

69 See replies to Commission questionnaire to competitors Q1 of 17 October 2014, question 7.

70 Commission decision of 1 March 2010 in Case M.5650 – T-Mobile/Orange, paragraph 38; Commission decision of 3 July 2012 in Case M.6584 – Vodafone/Cable & Wireless, paragraph 24; Commission decision of 20 September 2013 in Case M.6990 – Vodafone/Kabel Deutschland, paragraph 119.

71 Both service providers and resellers rely on the same network elements and services provided by MNOs (including SIM cards) with the main difference being that resellers rely on the MNO also for the provision of equipment (handsets, etc.).

72 Commission decision of 1 March 2010 in Case M.5650 – T-Mobile/Orange, paragraph 27; Commission decision of 2 July 2014 in Case M.7231 – Vodafone/ONO, paragraph 56.

73 See replies to Commission Questionnaire to competitors Q1 of 17 October 2014, question 7.

6.6.2. *Geographic market definition*

(103) In line with previous Commission's decisions, the Notifying Party submits that the relevant geographic scope of the market for wholesale access and call origination on mobile networks is national[74].

(104) All respondents to the market investigation in the present case take the view that the geographic market is national in scope.

(105) In light of the above, for the purpose of this decision, the Commission considers that the relevant geographic market is national.

6.7. Wholesale mobile call termination market

(106) When someone calls a mobile phone connected to a different network, that call is terminated on the network of the receiving mobile phone. In order for a retail mobile services provider to be able to provide calls to a different network, it must purchase wholesale terminations services on other networks by means of interconnection agreements between the various network operators.

6.7.1. *Product market definition*

(107) The Notifying Party submits that, in line with previous Commission's decisions, call termination on each individual mobile network constitutes a separate relevant product market[75]. Nothing in the course of the investigation in this case justifies a deviation from previous Commission findings. Therefore, the Commission considers, in line with its previous decisions, that termination on each individual mobile network constitutes a separate product market.

6.7.2. *Geographic market definition*

(108) The Notifying Party submits that the definition of the market is national in scope. The Commission has consistently found that the markets for wholesale mobile call termination are national in scope, given that licenses to operate a mobile telecommunication network are granted for national territories[76]. Nothing in the course of the investigation in the present case justifies a deviation from previous findings. Therefore, the Commission considers that the wholesale markets for mobile call termination are national.

6.8. Wholesale broadband access services

(109) Wholesale broadband access includes different types of access that allow Internet service providers to provide services to end consumers. It comprises physical access at a fixed location such as LLU, of non-physical or virtual network access such as bitstream access and of the resale of fixed broadband offerings of a third party, most often the incumbent operator.

6.8.1. *Product market definition*

(110) The Notifying Party did not express its view on the exact product market definition.

---

[74] Commission decision of 1 March 2010 in Case M.5650 – T-Mobile/Orange, paragraph 31; Commission decision of 2 July 2014 in Case M.7231 – Vodafone/ONO, paragraph 59.

[75] Commission decision of 3 July 2012 in Case M.6584 - Vodafone/Cable & Wireless, paragraphs 47- 48; Commission decision of 20 September 2013 in Case M.6990- Vodafone/Kabel Deutschland, paragraph 111-122.

[76] Commission decision of 1 March 2010 in Case M.5650 – T-Mobile/Orange, paragraph 38;Commission decision of 2 July 2014 in Case M.7231 – Vodafone/ONO, paragraph 76.

(111) In the market investigation for the *Carphone Warehouse/Tiscali UK* decision[77], the Commission found significant differences in the characteristics, price, performance and service between the following different types of wholesale broadband access:

(a) LLU: unbundled (shared) access to metallic loops of the local access network in a number of local telecommunications exchanges (in particular in urban areas), as it is the most cost-efficient way for alternative operators to provide differentiated retail broadband services;

(b) Bitstream: indirect or virtual wholesale access in the form of "bitstream", where a wholesale capacity of bidirectional data transmission to and from the end-customer is provided;

(c) Resale of the fixed incumbent's broadband offering: reselling the line of the owner of the telecommunication network. That third form of obtaining wholesale Internet access does not enable the alternative provider to differentiate its service from that of the wholesale provider, but allows it to offer a broadband product with no investment and at mostly variable costs.

(112) In *Carphone Warehouse/Tiscali UK*, as well as in the more recent *Vodafone/Kabel Deutschland*[78], the Commission, however, ultimately left open the exact product definition of the market for wholesale broadband access services.

(113) The majority of the respondents to the market investigation in the present case confirmed that the market definition, considered by the Commission in the *Carphone Warehouse/Tiscali UK* case, is still valid. A number of competitors consider that each of the different type of broadband access services constitutes a separate market. A respondent states that LLU, bitstream and resale of the fixed incumbent's broadband offering should be treated as separate markets in line with the concept of "investment ladder", used by national regulators and telecom operators referring to the gradual nature of investments by alternative operators in telecommunications. The different types of wholesale broadband access services constitute different steps of the ladder where LLU requires more investments by the alternative provider but grants it more autonomy when creating a fixed retail offer. Reselling the fixed incumbent's broadband offering does not allow the reseller to differentiate the product but allows the operator to offer a fixed broadband product without significant investments[79].

(114) In any event, for the purpose of this Decision, the Commission considers that the exact product market definition can be left open as the Proposed Transaction does not raise competition concerns under any alternative product market definition considered.

6.8.2. Geographic market definition

(115) The Notifying Party did not express its view on the exact geographic market definition. In *Carphone Warehouse/Tiscali UK*, while there were indications

---

77 Commission decision of 29 June 2009 in Case M.5532 - Carphone Warehouse/Tiscali UK, paragraphs 28- 34.

78 Commission decision of 20 September 2013 in Case M.6990 – Vodafone/Kabel Deutschland, paragraph 161.

79 See replies to Commission Questionnaire to competitors Q1 of 17 October 2014, question 8.

supporting a national scope of the market, the Commission ultimately left open the exact geographic market definition[80].

(116) The Spanish regulator NRA had considered segmenting geographically the national wholesale broadband market based on the number of active players in each area covered by each of Telefónica's local switches differentiating between zones considered competitive areas and zones considered non-competitive. The final decision of the regulator, however, declared the geographic market to be national in scope with no further geographic segmentation[81].

(117) In any event, for the purpose of this Decision, the Commission considers that the exact geographic market definition can be left open.

6.9. Affected markets

(118) The Proposed Transaction gives rise to the affected markets referred to in recitals (119) and (121).

6.9.1. Horizontally affected markets

(119) The Spanish retail market for fixed Internet access services, possible separate Spanish retail markets for multiple play services, the Spanish retail market for fixed voice services, the Spanish retail market for mobile telecommunication services and the Spanish wholesale market for broadband access services are horizontally affected since the Parties' combined shares on those markets or on a potential definition of those markets exceed 20%.

(120) As regards the affected retail market for fixed voice services, as well as the retail market for mobile telecommunications services, the Commission considers that competition concerns are not likely to arise. Post-transaction the combined entity will continue to face strong competition on the retail market for fixed voice services from both Telefónica and Vodafone, who have market shares in terms of number of subscribers of 48% and 22% respectively. Furthermore as the same underlying infrastructure necessary for the distribution of fixed Internet access services is used also for the delivery of fixed voice services to consumers any commitments aimed at addressing competition concerns identified on the retail market for fixed Internet access services would remedy also any potential competition concern on the retail market for fixed voice services. On the retail market for fixed mobile services Jazztel operates as an MVNO with a rather limited market share so the Proposed Transaction will have no impact on Orange's position as MNO on the market. In addition the merged entity will continue to face competition on the market from the other three MNOs in Spain: Telefónica, Vodafone and Yoigo.

---

80 Commission decision of 29 June 2009 in Case M.5532 - Carphone Warehouse/Tiscali UK, paragraphs 48-53.

81 CMT Decision of 22 January 2009. The draft CNMC proposal on the wholesale broadband regulation currently under public consultation (see section 7.1.4 for more details) foresees a geographical segmentation in competitive and non-competitive areas. See CNMC "Consulta Pública Relativa A La Definición Y Análisis Del Mercado De Acceso Local Al Por Mayor Facilitado En Una Ubicación Fija Y Los Mercados De Acceso De Banda Ancha Al Por Mayor, La Designación De Operadores Con Poder Significativo De Mercado Y La Imposición De Obligaciones Específicas (EXPEDIENTE ANME/DTSA/2154/14/Mercados 3a 3b 4)", published on 19 December 2014, available at http://www.cnmc.es/Portals/0/Ficheros/Telecomunicaciones/Consultas_Publicas/Consulta_cnmc/20141219_ProyectoMedida.pdf.

6.9.2. *Vertically affected markets*

(121) The Spanish wholesale market for fixed call termination services and the Spanish markets for retail supply of fixed voice services and retail supply of mobile telecommunications services, the Spanish wholesale market for mobile call termination services and the Spanish markets for retail supply of fixed voice services and retail supply of mobile telecommunications services as well as the Spanish wholesale market for access and call origination services on mobile networks and the Spanish market for retail supply of mobile telecommunications services are vertically affected.

(122) As regards the affected wholesale markets for fixed call termination services, for mobile call termination services, and for wholesale broadband services, the Commission considers that competition concerns are not likely to arise from the Proposed Transaction as both the markets for wholesale fixed call termination and wholesale mobile call termination are subject to an ex ante regulation by the national telecom regulator CNMC and on the wholesale broadband services market the Parties have only a marginal market share of less than 1%. In addition, the respondents to the Commission's Market Investigation have not raised any specific concerns regarding those markets.

(123) The Commission considers that competition concerns are unlikely to arise from the Proposed Transaction also on the wholesale market for access and call origination services on mobile networks. Orange's position on that market will not change as a result of the Proposed Transaction as there is no reduction in the number of MNOs and a sufficient number of providers of wholesale access and call origination services on mobile networks will remain post-transaction. Furthermore Orange is subject to a regulatory obligation imposed by the CNMC to meet all reasonable requests for access.

(124) As regards the wholesale market for international roaming Orange is active on that market in other European countries where it operates as an MNO but the Notifying Party was not able to provide the corresponding market shares of Orange in those countries. Given Orange's overall presence on the mobile telecommunications markets in France, Poland and Romania, the Notifying Party submitted that it cannot exclude the possibility that Orange's market share in the wholesale provision of international roaming in those three countries could be above 30%. As there is a vertical link between the Spanish retail market for mobile telecommunications services and the wholesale international roaming services in France, Poland and Romania, where Orange operates as an MNO it cannot be excluded that the wholesale markets for international roaming services in those three countries would be affected by the Proposed Transaction if Orange's market share in any of those wholesale markets is indeed above 30%. However the Commission considers that even if there were any such affected wholesale international roaming markets competition concerns are unlikely to arise. The Regulation (EC) No 717/2007 on roaming[82] imposes a price cap on the wholesale prices that MNOs can charge their roaming customers. At the wholesale level, that Regulation caps prices for operators from Member States for voice roaming charges, SMS and data. In addition, MNOs must meet all reasonable requests for wholesale roaming access. MNOs are,

---

[82] Regulation (EC) No 717/2007 of the European Parliament and of the Council of 27 June 2007 on roaming on public mobile telephone networks within the Community and amending Directive 2002/21/EC.

therefore, prevented from refusing access to their network and from charging excessive termination fees. Therefore the wholesale markets for international roaming are not discussed any further in this Decision.

7. COMPETITIVE ASSESSMENT

(125) The Commission considers that the Proposed Transaction would lead to significant impediment to effective competition in the market for the retail supply of fixed Internet access services and the possible markets for dual-play services, triple-play services, triple- and quadruple-play services or for multiple play services. The reasons for such conclusion are presented in the sections 7.1 and 7.2 of this Decision.

7.1. The Spanish Telecommunication Markets

(126) The Proposed Transaction combines two national providers of telecommunication services in Spain. Its effects on competition have to be assessed in the light of the structure and developments of the telecommunication markets in Spain.

7.1.1. Providers of telecommunication services in Spain

(127) In Spain, there are currently four providers of fixed telecommunication services at a national level as well as four mobile network operators that offer mobile telecommunication services of which Telefónica, Vodafone and Orange operate a fixed as well as a mobile network.

(128) Telefónica is the incumbent provider of telecommunication services in Spain and still by far the largest operator. Telefónica operates a nation-wide copper network for fixed voice and xDSL services, a large FTTH network as well as a mobile network. As the incumbent provider, Telefónica is subject to mandatory access regulation and has to offer certain wholesale access to its copper and FTTH network.

(129) Despite the access regulation, Telefónica is still the largest provider of fixed voice, fixed Internet access and mobile telecommunication services. Telefónica's market share in the market for fixed voice services in Spain amounted to more than 49% in terms of subscribers and more than 71% in terms of revenues in 2014. At the same time, the market shares of Telefónica for fixed Internet access services have been almost 45% in terms of subscribers and more than 42% in terms of revenues. For mobile telecommunication services, Telefónica in 2013 achieved market shares of 34% in terms of subscribers and of 36% in terms of revenues.

(130) After the acquisition of the cable operator Ono in Summer 2014, Vodafone became the second largest provider of telecommunication services in Spain. The integration of the two businesses of Vodafone and Ono is still ongoing. Vodafone operates a mobile network and offers fixed voice and fixed Internet access services through its own backhaul network[83] combined with wholesale access to the "last mile"[84] of Telefónica's copper network. Under a co-deployment agreement with Orange, Vodafone also started to roll-out an own FTTH network. After the acquisition of Ono, Vodafone also owns Ono's cable network.

(131) In the market for fixed voice services, the combined market shares of Vodafone and Ono in 2014 amounted to 21% in terms of subscribers and to 14% in terms of

83 The "backhaul" portion of the network comprises the intermediate links between the core or backbone network and the "edge" of the entire network.

84 The "last mile" is the portion of the infrastructure that carries communication signals from the main system to the end users' home or business.

revenues. In the market for fixed Internet access services, Vodafone and Ono had, in 2014, combined market shares of approximately 21% in terms of subscribers and of 18% in terms of revenues. In the market for mobile telecommunication services, Vodafone achieved market shares of 22.5% in terms of subscribers and 27% in terms of revenues in 2014.

(132) Orange is the third integrated provider of telecommunication services. It operates a mobile network and offers fixed voice and fixed Internet access services through its own backhaul network and wholesale access to the "last mile" of Telefónica's copper network. Recently, Orange started to roll-out an own fibre network under a co-investment agreement with Vodafone.

(133) In the market for fixed voice services, Orange's market shares in 2014 amounted to 13% in terms of subscribers and 2.4% in terms of revenues. Orange provided Internet access services in 2014 to 15% of all subscribers and earned a share of 16% of the total revenues in that market. Orange's market share for mobile services has been 23% in terms of subscribers and 20% in terms of revenue.

(134) The fourth nationwide provider of fixed voice and fixed Internet access services is Jazztel. Jazztel offers xDSL services through its own backhaul network and wholesale access to Telefónica's copper network as well as through its FTTH network. The largest part of that FTTH network was built under a co-deployment agreement with Telefónica. Jazztel offers mobile services under a wholesale agreement with Orange bundled with its fixed products.

(135) In 2014 Jazztel's market share in the market for fixed voice services amounted to 11% in terms of subscribers and 5% in terms of revenue in 2014. Its shares in the market for fixed Internet access services have been 12% in terms of subscribers and 14% in terms of revenue. Jazztel's position in the market for mobile telecommunication services is very modest. Jazztel achieved market shares of 2% in subscribers and of 1% in terms of revenue in 2013.

(136) Yoigo is the smallest of the four mobile network operators in Spain with 2014 market shares for mobile telecommunication services of approximately 7% in terms of subscribers and 5% in terms of revenue. Yoigo does not offer fixed voice or Internet access services. Instead, Yoigo resells Telefónica's fixed products since October 2013[85].

(137) In addition to the nationwide providers of telecommunication services referred to in recitals (128) to (136), the three cable companies Euskaltel, Telecable de Asturias and R Cable have each sizeable market shares in a certain region of Spain. Euskaltel is active in the Basque country, Telecable serves customers in Asturias and R Cable conducts its business in Galicia. All three regional cable companies offer fixed voice services and fixed Internet access services through their own fixed networks. In addition, each of them has a wholesale contract for mobile services and offers bundles of fixed and mobile services to consumers.

7.1.2. Next-Generation Access Networks and Very High-Broadband Services

(138) As of the third quarter of 2014, there were 12.8 million active lines in Spain for the provision of fixed Internet access services. Currently, the main technology (70%)

---

85 Yoigo launches a fixed+mobile offering which is almost identical to that of Telefónica "Yoigo lanza una oferta fijo+móvil casi igual a la de Telefónica", in Expansion dated 14 October 2013, http://www.expansion.com/2013/10/14/empresas/tmt/1381761241.html, Doc ID2651.

used by Spanish customers is a Digital Subscriber Line ("DSL"). DSL can be further differentiated between subcategories like High Bit Rate DSL (HDSL), Symmetric DSL (SDSL), Asymmetric DSL (ADSL) or Very-high-bit-rate DSL (VDSL). Those technologies are usually collectively referred to as "xDSL". All xDSL technologies are technically limited to speeds below 30 Mb/s except for VDSL in cases where the distance to the local exchange or street cabinet is relatively short. Therefore, most DSL subscribers (96%) have Internet access speeds below 30 Mb/s. VHBB services can be delivered to the end consumer mainly over HFC cable and fibre infrastructures.

(139) However, all four national providers of fixed telecommunication services are currently in the process of deploying, what is referred to as NGA networks that allow for much higher Internet access speeds than the existing copper network of Telefónica. Those networks either rely on fibre up to a certain point in the network (for example, fibre to the node, fibre to the home) or on the combination of fibre and cable infrastructure (hybrid fibre-coaxial, HFC).

(140) At present Telefónica has deployed the largest NGA network. Telefónica's FTTH network has a span of approximately 10 million BUs (that is to say, single houses or apartments) of which, 3 million BUs have been connected under a co-deployment agreement between Telefónica and Jazztel. According to that agreement, Telefónica and Jazztel jointly rolled-out two separate FTTH networks. The agreed roll-out of 3 million BUs had been achieved at the end of 2014.

(141) The second largest NGA network is operated by Vodafone. The acquired HFC network of Ono covers approximately 7.5 million BUs. In addition, Vodafone has access to a FTTH network of approximately 0.8 million BUs that has been rolled-out jointly with Orange under a co-investment agreement.

(142) Currently, Jazztel owns the third largest FTTH network of approximately 3 million BUs which network has been deployed jointly with Telefónica.

(143) Orange has the smallest NGA network of all nation-wide providers of fixed Internet access services. Under the co-investment agreement with Vodafone, Orange has access to approximately 0.8 million BUs.

(144) Operators rolling-out FTTH networks have been successful in promoting fixed Internet services through their FTTH networks. According to data available from the CNMC, set out in Table 3, the number of active FTTH lines increased by more than 150% between December 2013 and December 2014 from 615 063 to 1 563 035, the large majority of which are with Telefónica:

Table 3: Number of active fixed broadband lines by technology and operator

	DSL (TEF)	***DSL (others)***	***DSL (total)***	***HFC***	***FTTH (TEF)***	***FTTH (others)***	***FTTH (total)***	***Total***
Dec. 2013	5 114 002	4 464 783	9 578 785	2 025 735	597 889	17 174	615 063	12 219 583
Dec. 2014	4 431 475	4 796 036	9 227 511	2 150 758	1 315 958	247 078	1 563 036	12 941 305

Source: CNMC data

(145) The figures in Table 3 show that Telefónica lost 682 527 DSL customers while gaining 718 069 FTTH customers. That shift has likely been caused by a strategy on behalf of Telefónica to migrate its DSL customers to its FTTH network. However, other operators also increased their FTTH customer base considerably from 17 174 active lines in December 2013 to 247 078 active lines in December 2014. At the

same time, the number of DSL lines of operators other than Telefónica also increased by more 300 000.

(146) An overview of the distribution of different technologies and speeds in the Spanish market as of the third quarter of 2014 is provided below in Table 4.

Table 4: Speeds and technologies of Internet access subscriptions as of 2014[86]

	< 2 Mb/s	*2-10 Mb/s*	*10-30 Mb/s*	*Total < 30 Mb/s*	*30-50 Mb/s*	*> 50 Mb/s*	*Total >= 30 Mb/s*	*Total*
xDSL	0.7%	0.7%	58.9%	67.0%	3.0%	0.0%	3.0%	70%
HFC/ Cable	0.1%	0.1%	6.1%	6.6%	1.1%	9.5%	10.6%	17.2%
FTTH	0.0%	0.0%	2.4%	2.4%	0.1%	9.7%	9.8%	12.2%
Other	0.2%	0.2%	0.0%	0.6%	0.0%	0.0%	0.0%	0.6%
Total	1.0%	1.0%	67.4%	76.6%	4.2%	19.2%	23.4%	100%

Source: Commission calculation based on CNMC data

(147) A minority of consumers (almost 26% of active lines) use NGA networks. However, a third of HFC cable or FTTH customers have, or chose to pay for, speeds below 30 Mb/s. Table 5 displays that, across all technologies, only about 20% of all broadband customers have Internet access services that allow speeds above 30 Mb/s.

Table 5: Active VHBB lines in Spain by technology[87]

	2012	*2013*	*Q3 2014*	*2014*
Number of active FTTH lines	312 000	611 000	1 mln	1 564 413
Number of active HFC cable lines	704 000	954 000	1.21 mln	2 205 492
Number of active xDSL lines	149 000	260 000	360 000	8 982 812
Total Number of active VHBB lines (≥30Mb/s)	1.17 mln (10% of total lines)	1.8 mln (15% of total lines)	2.59 mln (20% of total lines)	3 000 472 (23.4%)
Total Number of active broadband lines	11.5 mln	12.2 mln	12.61 mln	12 834 057

Source: Commission calculation based on CNMC data

(148) Therefore, at the moment, Internet access services with speeds equal to or less than 30 Mp/s are still the standard offer for fixed Internet access services in Spain.

7.1.3. Convergent offers

(149) The telecommunication market in Spain is undergoing a major transformation, with a strong movement from the provision of stand-alone telecom services (that is to say, stand-alone mobile telecommunications services and stand-alone fixed Internet access services) to the provision of multiple play services which provide the

[86] Data include both residential and large enterprises customers because market information published by CNMC does not provide disaggregated data.

[87] Data include both residential and large enterprises customers because market information published by CNMC does not provide disaggregated data.

possibility to contract multiple telecommunications services with the same operator at a discounted price for the entire bundle.

(150) In its annual report on telecommunications markets in Spain[88], the CNMC highlighted that the year 2013 had been characterized by strong dynamism in the retail market for multiple play packages combining mobile and fixed telecommunications services. According to these figures, 59.1% of the total number of fixed telephony lines and more than 92% of the total number of fixed broadband lines were contracted as part of a convergent offer in 2013.

(151) The table shows this rapid evolution of the market and the movement from dual-play to triple- and quadruple-play services.

Table 6: Number of subscribers for each type of multiple play services

	2011	***2012***	***2013***	***2014 Q3***
Fixed Internet access only	967,871	898,189	910,022	605,561
Fixed voice + Fixed Internet access ("dual-play")	8 225 095	7 731 228	4 344 481	3 672 371
Fixed Voice + Fixed Internet Access + Mobile Telecommunications services ("triple-play")	0	1 062 107	5 195 278	5 728 316
Fixed Voice + Fixed Internet Access + Mobile Telecommunications services + Pay-TV ("quadruple-play")	0	146 132	689 645	1 898 477

Source: Notifying Party based on CNMC data

(152) CNMC market data shows that the most popular multiple play offer as of the third quarter of 2014 is the combination of fixed voice telephony, fixed Internet access and mobile telecommunications services ("triple-play"), which accounts for around 5.7 million subscribers, followed by the traditional package of fixed voice telephony and fixed Internet access services ("dual-play", around 3.6 million subscribers), while almost 1.9 million subscribers opted for a package which comprises fixed voice telephony, fixed Internet access, mobile telecommunications services and Pay-TV services ("quadruple-play")[89]. Triple-play represents 45.4% of the total number of fixed Internet access lines and is the package of which sales have grown most rapidly since 2012 (4.7 million new subscribers).

(153) According to the CNMC, the popularity of triple-play packages is mainly due to the financial attractiveness of contracting both mobile and fixed telecommunications services with a single operator, with discounts between 3% and 19% of the total

88 Informe Económico de las Telecomunicaciones y del Sector Audiovisual 2014, Doc ID 1579, available at http://www.cnmc.es/Portals/0/Ficheros/Telecomunicaciones/Informes/Informes%20Anuales/2014/Informe%20Telecomunicaciones%20CNMC%202014.pdf.

89 Note that in its Annual Report for 2014, the CNMC refers to triple-play packages as "*cuádruples*" (quadruple-play). This difference in terminology can be explained by the fact that the CNMC considers mobile voice telephony and mobile data as separate services. Consistently with its previous practice (Commission decision of 12 December 2012 in Case M.6497 - Hutchison 3G Austria/Orange Austria), the Commission considers a single market for mobile telecommunications services comprising both mobile voice telephony and mobile data services.

price. In its most recent analysis, the CNMC reports that in 2013 44.6% of all households currently demanding fixed and mobile telecommunications services procure such services from a single operator. That figure was 37.2% in 2012. Moreover, the possible market for triple-play services is broader, given that almost all the households which have subscribed to a fixed Internet access service are also customers of mobile telecommunications services. According to an internal document of Jazztel of 2013[90], the market for convergent fixed-mobile services could attain 60% of the total number of subscribers in 2015, a result which was achieved already by the end of the third quarter of 2014, showing the success for this type of products.

7.1.4. Upcoming changes in the regulation of the fixed telecommunication sector in Spain

(154) The CNMC is currently reviewing the regulatory framework for wholesale access to Telefónica's fixed networks (markets 3a, 3b and 4 of the Commission Recommendation on Relevant Markets of 2014[91]). On 19 December 2014, the regulatory division of the CNMC, the Directorate for Telecommunications and Audiovisual Sector ("DTySA") published a draft regulation[92] according to which Telefónica would be obliged to, inter alia, grant wholesale access to its FTTH network in all of Spain except for nine municipalities which are covering approximately 16% of the Spanish population. The terms of such wholesale access are not yet proposed by the CNMC.

(155) Market participants were able to comment on that draft until 23 February 2015[93]. After the public consultation, the CNMC Council will have to approve the proposal for a regulation. Once the proposed regulation is formally notified to the Commission

90 Presentation by Jazztel: "2013 - 2017 Business Plan", dated 15 March 2013, Doc ID 39, slide 13.

91 Commission Recommendation of 9 October 2014 on relevant product and service markets within the electronic communication 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 communication networks and services (Text with EEA relevance) – Brussels, 9.10.2014 – C(2014) final.

92 CNMC Public Consultation concerning the definition and market analysis of the market for wholesale local access provided at a fixed location and of the markets for wholesale broadband access, of the designation of operators with significant market power and of the imposition of specific obligations (RECORD ANME / DTSA / 2154/14 / Markets 3a 3b 4) "Consulta Pública Relativa A La Definición Y Análisis Del Mercado De Acceso Local Al Por Mayor Facilitado En Una Ubicación Fija Y Los Mercados De Acceso De Banda Ancha Al Por Mayor, La Designación De Operadores Con Poder Significativo De Mercado Y La Imposición De Obligaciones Específicas (EXPEDIENTE ANME/DTSA/2154/14/Mercados 3a 3b 4)", published on 19 December 2014, available at http://www.cnmc.es/Portals/0/Ficheros/Telecomunicaciones/Consultas_Publicas/Consulta_cnmc/20141219_ProyectoMedida.pdf.

93 The formal publication of the public consultation in the Spanish official journal took place on 23 December 2014: Notification of the CNMC of the opening of the procedure for the definition and the analysis of the market for wholesale local access provided at a fixed location and of the markets for wholesale broadband access, of the designation of operators with significant market power and of the imposition of specific obligations as well as of the opening of the public inquiry (Anuncio de la Comisión Nacional de los Mercados y la Competencia por el que se notifica la apertura del procedimiento para la definición y análisis del mercado de acceso local al por mayor facilitado en una ubicación fija y los mercados de acceso de banda ancha al por mayor, la designación de operadores con poder significativo de mercado y la imposición de obligaciones específicas, así como la apertura del trámite de información pública http://www.boe.es/boe/dias/2014/12/23/pdfs/BOE-B-2014-45191.pdf]. Natural and legal persons can submit their comments on the draft measure until 2 months after publication in the official journal.

in accordance with the procedure pursuant to Article 7a of Directive 2002/21/EC[94], the Commission will need to agree to the proposed regulation. A decision is due one month after notification, extendable by two months if a Phase 2 consultation is opened.

(156) Changes in the regulatory environment are a relevant element to be taken into consideration in the Commission's assessment, if they can be reasonably predicted[95]. The draft regulatory proposal by the CNMC indicates that the proposed changes follow the guidelines of the Recommendations on Relevant Markets[96] and Costing and Non-discrimination methodologies[97]. Notwithstanding the relevance of potential regulatory changes the Commission considers however that the outcome of the CNMC's market review and the content and effect of future regulatory provisions cannot be reasonably predicted at this stage. Firstly, the draft proposal might be amended in response to the public consultation or the proceedings with the Commission. Secondly, the proposed regulation will be adopted only after the Commission would have decided on the Proposed Transaction. Thirdly, important elements, such as wholesale prices, are not part of the current proposal. For those reasons, the CNMC's regulatory proposals cannot be relied upon for the purpose of the competitive assessment.

(157) Independently of the proposed review of the regulatory framework for wholesale access to Telefónica's fixed networks referred to recital (154) above, on 30 March 2015, the CNMC published a public consultation concerning a potential reduction of the current capacity prices related to the regulated indirect access product called Nuevo servicio Ethernet de Banda Ancha ("NEBA")[98]. The consultation proposes a reduction by approximately 45% the NEBA capacity prices. Other elements of the regulated NEBA offer such as the monthly recurrent prices of the service and prices related to the Points of Interconnection are not considered by the draft proposal. As to the timing, the consultation was published on 30 March and is open for 20 days. It is unknown if and when the revised regulation will enter into force. Moreover, the outcome of the consultation and the effect of a potential overhaul of the NEBA regulation on the market conditions of a potentially revised NEBA regulation are uncertain at this stage. For those reasons, the CNMC's proposal to modify the NEBA regulation cannot be relied upon for the purpose of the competitive assessment.

---

94 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 of 24.4.2002, p.33-50.

95 According to paragraph 9 of the Commission's Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, (2004/ C 31/03), generally, the conditions existing at the time of the merger constitute the relevant comparison for evaluation the effects of a merger. Only in some circumstances, the Commission may take into account future changes to the market that can reasonably be predicted.

96 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.

97 Commission Recommendation 2013/466/EU of 11 September 2013 on consistent non-discrimination obligations and costing methodologies to promote competition and enhance the broadband investment environment (Recommendation on non-discrimination and costing methodologies), OJ L 251, 21.9.2013, p.13.

98 CNMC, Consulta pública sobre la revisión del precio de la capacidad en PAI del servicio de banda ancha mayorista NEBA, MTZ 2014/1840. NEBA stands for *Nuevo servicio Ethernet de Banda Ancha*.

7.1.5. The acquisition of ONO by Vodafone in summer 2014

(158) The Spanish telecommunication markets are further affected by the recent acquisition of ONO by Vodafone in summer 2014. After reviewing that merger, the Commission concluded that the transaction would not raise competition concerns, because the Parties' activities are largely complementary: ONO's main field of business have been Pay-TV and fixed telecommunication services, whereas Vodafone is mainly active in mobile telecommunication services. The Commission further found that the impact of the transaction on the markets for fixed and mobile telecommunication services is likely limited because the combined entity would continue to face significant competition from other market players, such as Telefónica, Orange and Jazztel.

(159) The reasons for clearing the transaction between Vodafone and ONO[99] cannot be applied to this case. First of all, the combined market shares of Orange and Jazztel are higher than the ones of Vodafone and ONO. The combined market shares of Vodafone and ONO in the market for fixed Internet access have been less than 25%, the threshold under which, according to the Commission's Guidelines on the assessment of horizontal mergers (the "Horizontal Merger Guidelines")[100], a concentration is generally presumed to be compatible with the internal market. Based on subscribers and according to data provided by the Notifying Party, the combined market shares of Vodafone and ONO amounted to 21.4% in terms of subscribers and to 18.4% in terms of revenues in the period between the first and the third quarter in 2014. The respective combined market shares of Orange and Jazztel amount to 26.9% and 30.0% in the same period.

(160) Next, the complementary of the two businesses was reflected in the market shares of Vodafone and ONO as the position of Vodafone in the market for fixed Internet access services was rather weak compared to ONO whereas the share of Orange or Jazztel in that market are closer to each other. While Vodafone achieved only a market share in terms of subscribers of 8.9% and in terms of revenues of only 4.8% in the period between the first and the third quarter in 2014, the respective market shares of Orange and Jazztel were 15.0% or 11.9% in terms of subscribers and 15.7% or 14.3% in terms of revenues in the same period.

(161) Furthermore, the Commission took into account the continued competition by other market players which included in particular competition from the other three remaining nationwide operators Telefónica, Orange and Jazztel. After the Proposed Transaction, there would be only three nationwide operators left.

(162) Finally, the Commission also notes that the current investigation showed that the combined gross add shares of Vodafone and ONO have been and still are much lower than the ones of Orange and Jazztel (see recitals (310) *et seq*.).

(163) The Commission notes that many facts and the competitive structure in the present case are different from the ones underlying Commission decision M.7231 Vodafone/ Ono[101] which inevitably influences the competitive assessment of the present case.

---

99 As stated in the respective press release of the Commission dated 2 July 2014.

100 Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings ("Horizontal Merger Guidelines"), paragraph 18 (OJ C31, 5.2.2004, p.5).

101 Commission decision of 2 July 2014 in Case M.7231 – Vodafone/ONO.

7.1.6. *Alternative Jazztel/Yoigo merger scenario*

(164) Before Orange announced its intent to acquire Jazztel, Jazztel was in the process of negotiating a potential acquisition of Yoigo, the smallest MNO in Spain, with Yoigo's shareholder, TeliaSonera. According to the Horizontal Merger Guidelines, the effects of the proposed merger have to be compared with the conditions that would have prevailed without the merger and such alternative scenario might include future changes in the market that can reasonably be predicted[102]. Therefore, the competitive effects of the Proposed Transaction might have to be compared to the potential Jazztel/Yoigo transaction (the "Jazztel/Yoigo Scenario").

(165) The Jazztel/Yoigo Scenario would have combined the only operator of a mobile network that does not own a fixed network and the only operator of a nationwide fixed network that does not own a mobile network. The Spanish market would have featured four integrated fixed-mobile players (Telefónica, Vodafone, Orange and Jazztel/Yoigo). According to Orange's own assessment in its internal documents, [reference to the Notifying Party's internal business documents]*[103].

(166) The Notifying Party submits that the acquisition of Yoigo by Jazztel cannot be reasonably predicted and therefore it is not an appropriate alternative scenario for the current investigation.

(167) Jazztel submitted a document setting out […]*. In that document, Jazztel describes the negotiations and further procedural steps that took place and those that were still outstanding with regard to a potential acquisition of Yoigo by Jazztel. [conclusion relating to a strategic decision of Jazztel]*.

(168) The information currently available to the Commission indicates that the negotiations between Jazztel and Yoigo had not reached a stage where the transaction appears to be reasonably predicted in the absence of the present transaction. Therefore, the Commission bases its competitive assessment of the Proposed Transaction in this Decision on the current competitive conditions and does not take into account the situation that would have resulted from the Jazztel/Yoigo Scenario.

7.2. Retail markets including fixed Internet access services

(169) Orange and Jazztel are two of the four nationwide operators offering retail fixed Internet access services. Both Parties provide fixed-line telecommunication services mainly through wholesale access to Telefónica's unbundled local copper loops (xDSL network). Furthermore, each of the two operators has started deploying its own NGA network.

(170) In Spain, fixed Internet access services are being sold most often as part of multiple play bundles. As discussed in section 6.4, multiple play offers either constitute a market separate from the ones of their individual components or can be seen as consisting of several separate products. After providing an overview over possible retail markets including fixed Internet access services in section 7.2.1, the Decision analysis the different relevant markets in sections 7.2.2 to 7.2.6.

(171) Section 7.2.7 sets out the results of a calibrated merger simulation which quantifies the extent to which the elimination of competition between the Parties will generate,

---

102 Horizontal Merger Guidelines, paragraph 9.

* Parts of this text have been edited to ensure that confidential information is not disclosed; those parts are enclosed in square brackets and marked with an asterisk.

103 [Reference to the Notifying Party's internal business documents]*.

post-transaction, an increase in prices. The economic model predicts that the elimination of competition for contestable customers between the merging parties is likely to lead to significant price increases.

(172) Section 7.2.8 shows that entry into the market involving fixed Internet access services by potential new competitors is unlikely due to high barriers to entry. The Commission considers that there could be a risk if the current regulatory framework does not allow for a timely entry of competing players in the current market conditions. Wholesale (physical) access to the local loop of Telefónica's copper network would require considerable investments which could not be recouped in time before the likely transition of the market to NGA networks. Likewise, the conditions for regulated bitstream access to Telefónica's network, in particular as regards its FTTH network, do not allow an alternative player to compete with attractive commercial terms on the downstream markets. The Commission acknowledges that the regulatory framework is in the process of being amended, but deems that without the adoption of a final text of such new regulation, the future changes are not sufficiently certain to change the findings, namely that there currently are high barriers to entry (see section 7.1.4).

(173) Section 7.2.9 discusses the impact of the Proposed Transaction on the future roll-out of NGA networks by the Parties. The Commission concludes that contrary to the Notifying Party's claim, the merger is unlikely to lead to any significant pro-competitive effects arising from reaching additional households that Orange or Jazztel or both would not have covered in a standalone scenario.

(174) Finally, section 7.2.10 assesses efficiency claims brought forward by the Notifying Party. As a consequence of the Commission's analysis of the likely future roll-out of NGA networks, any efficiency claims based on additional roll-out are not sufficiently verifiable. As to the loss of competition in areas where the NGA networks of the Parties would have overlapped in the future, the Commission notes that such a potential anti-competitive effect cannot be established with the required degree of certainty. The Commission acknowledges in section 7.2.10.4 that the Proposed Transaction will likely create efficiencies based on elimination of double marginalisation of mobile services provided by Orange to Jazztel.

7.2.1. Overview of possible retail markets including fixed Internet access services

(175) If multiple play services were not to form a separate market from their respective components, the market for fixed Internet access services would include all fixed Internet access services irrespective of whether they are sold as standalone services or as part of a bundle with other services. By reference to Table 2, such assessment would include the entire horizontal line "Fixed".

(176) Narrower markets have to be assessed if multiple play products were to be regarded as markets separate from their respective components. Such market could be a general market for multiple play products or, even narrower, separate markets for dual-, triple- and quadruple-play products. Finally, one could also consider that dual-play services do not belong to a separate market while grouping triple-play services and quadruple-play services together[104]. Therefore, there are in total five possible markets for multiple play services: (i) a general market for all multiple play services,

[104] As regards the involved infrastructures, both triple- and quadruple-play offers combine services provided over fixed and mobile infrastructure.

(ii) separate markets for dual-play services, (iii) triple-play services, (iv) quadruple-play services, and (v) a market combining triple- and quadruple-play services[105].

(177) Table 7 shows the market shares of the Parties in the different possible multiple play markets.

Table 7: Market shares by subscribers for the different Multiple play packages in 2014

	Orange	*Jazztel*	*Combined*	*Others*
Fixed voice + Fixed Internet access ("dual-play")	[10-20]*%	[10-20]*%	[20-30]*%	[70-80]*%
Fixed Voice + Fixed Internet Access + Mobile Telecommunications services ("triple-play")	[20-30]*%	[10-20]*%	[30-40]*%	[60-70]*%
Fixed Voice + Fixed Internet Access + Mobile Telecommunications services + pay-TV ("quadruple-play")	[0-5]*%	[0-5]*%	[0-5]*%	[90-100]*%
Triple-play + Quadruple-play[106]	[10-20]*%	[10-20]*%	[30-40]*%	[60-70]*%

Source: Notifying Party based on CNMC data

(178) The Parties' activities overlap in the possible general market for all multiple play services, in possible markets for dual-play services and for triple-play services, as well as in a possible market combining triple- and quadruple-play services. There is no overlap in the provision of quadruple-play services because Orange has limited activities in retail Pay-TV services and Jazztel is not active in such market[107].

(179) The position of the Parties in a general market for all multiple play services would be almost identical to their position in the market for fixed Internet access services as the share of fixed Internet access services provided as a standalone service outside of a bundle is negligible[108]. Hence, an assessment of a general market for multiple play services reaches the same result as the competitive assessment in section 7.2 for fixed Internet access services therefore there is not further detail about it in this section.

(180) If a separate market for dual-play is considered, the combined market share of the Parties by subscribers amounted to [20-30]*% (Orange: [10-20]*%; Jazztel: [10-20]*%) at the end of 2014. That possible market is further assessed in section 7.2.3.

(181) On the possible market for triple-play services, the Parties' combined market share would account for almost [40-50]*% of the total subscribers (Orange: [20-30]*%; Jazztel: [10-20]*%) at the end of 2014. Other main players active on the possible

---

105 Other market that could be thought of would comprise of the combination of fixed voice with pay-TV services or of fixed Internet access with pay-TV services. Furthermore, there could be a market for the combination of fixed voice, fixed Internet access and pay-TV services. However, as Jazztel offers no TV services of its own and Orange has only a very limited market share in such services, the Decision will not further discuss these possible markets.

106 Based on the Parties' market shares for triple- and quadruple-play products as set out in section 7.2.4 and weighted according to the total number of subscribers to triple- and quadruple-play services as presented in section 7.1.3.

107 Jazztel ceased the provision of retail Pay-TV services through its platform Jazztelia in July 2010. In April 2010, Jazztel entered into a partnership agreement with Distribuidora de Television Digital, S.A ("DTS"), whereby Jazztely simply distributes DTS's services in exchange of a commission fee. Clients contract Pay-TV services directly with DTS.

108 As indicated in Table 1, only about 1% of all fixed Internet access services are not provided as part of a bundle.

market for triple-play services are Telefónica and Vodafone. Post-transaction, Telefónica, Vodafone and the merged entity will account for a substantial part of the triple-play market[109]. For the reasons set out in recital (182), the assessment of that possible market is not further detailed in this section.

(182) On a possible market combining triple and quadruple-play services, the Parties' combined market share would account for [30-40]*% (Orange: [10-20]*%; Jazztel: [10-20]*%) at the end of 2014. Section 7.2.4 assesses the impact of the Proposed Transaction of the possible market combining triple- and quadruple-play services. It concludes that the Proposed Transaction gives rise to competitive concerns on the possible market for triple- and for quadruple-play services. Consequently, the Proposed Transaction would give rise to even more serious concerns on a possible market for triple-play offers, as both Parties mainly offer triple-play services. Therefore, the assessment of the possible market for triple-plays services is not carried out separately in more detail.

(183) The Commission will first assess, in section 7.2.2, a market that includes all Internet access services, whether provided as part of multiple play bundles or not. For the assessment of competitive concerns related to fixed Internet access services, this is the broadest possible market definition as it includes products that would otherwise be part of separate markets. This Decision then discusses whether the outcome of the competitive assessment related to fixed Internet access products would change in case multiple play services were to form one or several separate markets in section 7.2.3 to section 7.2.6.

7.2.2. Retail market for fixed Internet access services

(184) The retail market for fixed Internet access services includes all fixed Internet access services irrespective of whether such services are sold standalone or as part of a bundle with other services.

7.2.2.1. Horizontal non-coordinated effects

(185) The Commission considers that the proposed merger would lead to a significant loss of competition as it reduces the number of fixed telecommunication operators active at national level from four to three. This loss of competition concerns mainly competition in fixed Internet access services based on wholesale access to the xDSL network of Telefónica, which currently represents the large majority of all fixed Internet access services, as in particular Orange has currently only a very limited own FTTH network.

(186) As regards future competition in fixed Internet access services based on NGA networks in those geographic areas which in the absence of the merger would have been covered by the separate NGA networks of both Jazztel and Orange, the loss of competition caused by the Proposed Transaction cannot be established with the required degree of certainty. According to the Commission's estimates, the Proposed Transaction will lead to a reduction of choice for NGA customers in an area comprising approximately 20% to 30% of all BUs in Spain[110].

(187) Section 7.2.2 shows in detail that the Proposed Transaction would cause a higher degree of concentration in the market for fixed Internet access services. The market

---

[109] Other players active on the possible market for triple-play services in Spain are the three regional cable operators (Euskatel, R Cable and Tele Cable) and other small players (for example Pepephone).

[110] […]*% of the combined footprint of the two companies, see section 7.2.9.

structure following the merger would consist of the incumbent operator, Telefónica, with a market share of 42% in revenues and 45% in number of subscribers, followed by Orange with market shares of 30% in revenues and 27% in subscribers and by Vodafone with market shares of 18% in revenues, and 21% in subscribers. The combined market share of the three regional cable operators in terms of subscribers amounts to 4.75% in 2014.

(188) While the Proposed Transaction would not lead to the creation or strengthening of a (single) dominant position of the merged entity, the Merger Regulation explicitly recognises that mergers in oligopolistic markets involving the elimination of important competitive constraints that the merging parties previously exerted upon each other together with a reduction of competitive pressure on the remaining competitors, could, even if there is little likelihood of coordination between the members of the oligopoly, also result in a significant impediment to effective competition[111].

(189) Section 7.2.2.3 shows that Orange and Jazztel are currently important competitive forces in Spain in terms of prices and innovation. The two companies are perceived by the majority of market players (competitors and customers) as innovative and price aggressive players. This is further confirmed by the internal documents of Orange and Jazztel, as well as the percentage of total new contracts in these markets gained by each of Orange and Jazztel in 2013 and 2014 which is well above the percentage to be expected based on their market shares. This is a clear indication of the attractiveness of the two companies and their importance for the competitive dynamics in the market.

(190) If the merger takes place, Orange would gain a significant customer base. Section 7.2.2.4 sets out that this is likely to reduce the Parties' current incentives to compete aggressively, likely leading to price increases by the merged entity. In addition, the review of internal documents of Orange has shown that the merged entity would no longer have the incentive to compete as aggressively as each of the two companies before the merger. In fact, in its internal assessment of the impact of the merger, Orange expects retail prices to be higher following a merger with Jazztel compared to a scenario without such merger.

(191) Section 7.2.2.5 shows that the loss of competition between Orange and Jazztel would also reduce the competitive pressure on the remaining operators who would not have the incentive to compensate for such loss. In its internal documents, Orange expects Telefónica and Vodafone to behave rather rationally and not to assume an aggressive stance. This is further supported by public statements of representatives of Telefónica and Vodafone: both companies expressed the view that, in the future, they will likely accommodate price increases rather than oppose them. Furthermore, smaller operators without significant own network infrastructure or with a limited regional presence do not have the ability and/or incentive to counter possible price increases of the merged entity.

(192) Section 7.2.7 sets out the results of a calibrated merger simulation presented in section 7.2.2.6 for the retail market for fixed Internet access services.

(193) Finally, section 7.2.9 discusses the impact of the Proposed Transaction on the future roll-out of NGA networks by the Parties. The Commission concludes that contrary to the Notifying Party's claim, the merger is unlikely to lead to any significant pro-

111 The Merger Regulation, recital 25; Horizontal Merger Guidelines, paragraph 25.

competitive effects arising from reaching additional households that Orange and/or Jazztel would not have covered in a standalone scenario. Consequently, any efficiency claims based on additional roll-out are not sufficiently verifiable. As to the loss of competition in areas where the NGA networks of the Parties would have overlapped in the future, the Commission notes that such a potential anti-competitive effect cannot be established with the required degree of certainty.

7.2.2.2. Market structure

Overall market

(194) The Notifying Party submits that the Proposed Transaction does not give rise to any competition concerns because of the limited combined market share of the Parties post-transaction, which will not exceed 30%. Moreover, the merged entity will continue to face strong competition post-transaction from several other players active at national level such as the incumbent operator Telefónica as well as Vodafone, and smaller players. Other players' combined share is 8.6% by revenue and includes (i) the three regional cable operators operating in 3 out of the 17 Spanish regions[112] and (ii) largely service-based fringe competitors (mainly relying on bitstream or resale of fixed telecommunication products) such as Masmovil or Pepephone. In addition, the Notifying Party submits that the businesses of Orange and Jazztel are largely complementary as Orange is mainly active in mobile telecommunication businesses whereas Jazztel is mainly active in fixed Internet access services.

(195) Orange and Jazztel offer retail fixed Internet access services in Spain mainly by relying on regulated direct wholesale access to Telefónica's copper network through LLU (necessitating own infrastructure in local exchanges as well as backhaul and core networks). Furthermore, the Parties compete to a limited extend through their own infrastructure (deployment of own NGA networks) and through regulated indirect wholesale access to Telefónica's copper and fibre networks through bitstream or bitstream-like access.

(196) With regard to the market for the provision of retail fixed Internet access services in Spain, the Notifying Party only provided market share data for an overall market for fixed Internet access that also includes large enterprise customers[113]. However, as set out in recital (55) above, large enterprise customers are part of a separate product market. Orange and Jazztel have smaller market shares in the "business segment" – that includes, as defined by the Notifying Party, Small and Medium Enterprises ("SMEs") and Small offices/Home offices ("SoHo") as well as large enterprise customers (see Table 10 below at recital (208)). Therefore, the Parties' market shares in the fixed Internet access market defined as including only residential and smaller enterprise customers are likely higher than those that are set out in recital (197) and in Table 8, and closer to the market shares in the residential segment (see Table 10 below).

(197) In an overall market for fixed Internet access services comprising also large business customers, in 2013, Orange had a market share of 13.7% in terms of revenue and

112 The three regional cable operators (Euskaltel, R Cable and Telecable) compete in the Northern regions of Spain only, namely the Basque country, Galicia, and Asturias, respectively.

113 The Notifying Party submits that it is not possible to provide market shares as regards a segment comprising both residential and SoHo customers as market information published by CNMC does not provide this disaggregation (see response to question 3 of the Commission Request for Information No 9 of 28 November 2014, Doc ID 595, p. 2., as well as response to question 29 of the Commission Request for Information No 12 of 13 January 2015, Doc ID 896).

14% in terms of subscribers. Jazztel had a market share of 13.8% in terms of revenue and 11.9% in terms of subscribers. The Parties market shares in 2014 by revenue were higher (Orange: 16.0%; Jazztel 14.4%; combined: 30.4%). Other competitors in this market are the incumbent Telefónica (42.7% in terms of revenues and 44.9% in terms of subscribers in 2014) and Vodafone (21.7% in terms of revenues and 18.2% in terms of subscribers in 2014).

Table 8: 2014 Market shares for fixed Internet access by revenue and subscribers[114]

	Telefónica	*Orange*	*Jazztel*	*OR/JZ*	*Ono*	*Vodafone*	*VF/Ono[115]*	*Other*
Subscribers	44.9%	15.3%	12.1%	27.4%	12.8%	8.9%	21.7%	6.1%
Revenue	42.7%	16.0%	14.4%	30.4%	13.4%	4.8%	18.2%	8.6%

Source: CNMC data

(198) As of end of 2014, four players on the market, Telefónica, Vodafone, Orange and Jazztel, account for around 91% of the market in terms of revenue and almost 94% in terms of subscribers. Post-transaction, the number of players operating a fixed network at national level will be reduced from four to three, with the merged entity accounting for 30.4% in terms of revenues and 27.4% in terms of subscribers.

Table 9: Evolution of market shares for fixed Internet access by subscribers and by revenue[116]

	Subscribers					*Revenues*				
	2010	*2011*	*2012*	*2013*	*2014*	*2010*	*2011*	*2012*	*2013*	*2014*
Telefónica	52.7%	49.2%	48.5%	46.8%	44.9%	55.2%	50.8%	44.1%	42.3%	42.7%
Orange	10.5%	11.3%	12.1%	13.8%	15.3%	8.1%	9.4%	11.6%	13.5%	16.0%
Jazztel	8.0%	10.0%	11.5%	11.7%	12.1%	8.2%	9.9%	13.0%	13.5%	14.4%
ONO	14.3%	14.3%	13.8%	12.6%	12.8%	13.0%	13.8%	15.2%	14.9%	13.4%
Vodafone	7.0%	7.6%	6.7%	7.8%	8.9%	5.1%	5.7%	5.9%	5.3%	4.8%
Vodafone/ONO	21.3%	21.9%	20.5%	20.4%	21.7%	18.1%	19.5%	21.1%	20.2%	21.3%
Others	7.5%	7.7%	7.3%	7.4%	6.0%	10.5%	10.3%	10.2%	10.5%	8.6%

Source: Notifying Party based on CNMC data

(199) The evolution of the market shares demonstrates that both Orange and Jazztel have been the most dynamic fixed Internet access operators in the last years. Since 2010, they gained an additional market share, based on subscribers, of 4.8% (an increase of 45%) in case of Orange and of 4.1% (an increase of 50%) in case of Jazztel. In terms

114 As set out in recital (208), these market shares provided by the Notifying Party wrongly include large business customers that are not part of the retail fixed Internet access market, so that the Parties' correct market shares are likely higher.

115 Vodafone acquired ONO for 7.2 billion EUR in July 2014.

116 As set out in recital (208), these market shares provided by the Notifying Party wrongly include large business customers that are not part of the retail fixed Internet access market, so that the Parties' correct market shares are likely higher.

of revenues, the Parties increased their market shares by 7.9% (an increase of 99%) and 6.2% (an increase of 76%) respectively.

(200) In contrast, Telefónica has experienced a strong decline in the same period, losing 12.5% of market share by revenues (a decrease of 23%) and 7.8% by subscribers (a decrease of 15%). The other national operators, Vodafone and ONO, had a stable performance. Vodafone has slightly increased its market shares by revenues and subscribers, but only by 0.2% and 1.8% respectively. ONO has been losing market share by subscribers, but slightly strengthened its position in terms of its market share by revenues. The other operators (mainly the three regional cable operators), did not experience any significant change in the last years regarding their combined position in the overall market.

(201) As regards the concentration levels, the post-transaction Herfindahl-Hirschman Index ("HHI") as regards the overall retail market based on revenue market shares would be 3157, with a delta of 461. The corresponding HHI based on subscriber market shares would be 3273, with a delta of 370[117,118]. These concentrations levels significantly exceed the safe harbour provided for by paragraphs 19 and 20 of the Horizontal Merger Guidelines[119], and provide an indication of the oligopolistic structure of the retail market for the provision of fixed Internet access services in Spain.

(202) As regards the argument of the Notifying Party, that the businesses of the Parties are largely complementary, the Commission notes that while that holds true in the market for mobile telecommunication services where Orange operates an own mobile network and Jazztel utilises Orange's network to offer mobile telecommunication services as an MVNO, both Parties are significant and successful competitors on the market for fixed Internet access services. On that market, instead of complementing each other, the activities of the Parties overlap.

(203) The Commission considers that the Proposed Transaction will create a market with three nationwide fixed Internet access providers and lead to a market with all the characteristics of an oligopolistic market. An oligopolistic market structure is characterised by a limited number of sizeable firms. Because the behaviour of one firm has an appreciable impact on the overall market conditions, and thus indirectly on the situation of each of the other firms, oligopolistic firms are interdependent[120].

(204) The market share increments brought about by the Proposed Transaction in the retail market for fixed Internet access services and in particular in its residential segment are analysed in recitals (208) to (231).

(205) Moreover, on this national market for retail provision of fixed Internet access services, the activities and therefore the competitive constraint of regional cable

---

117 The Notifying Party did not provide market shares of small competitors other than Telefónica, Orange, Jazztel and Vodafone ("Other players") on this market. Therefore, the HHI was calculated assuming that Other players constitute a single entity, which may slightly overstate the HHI. However, even under a more conservative approach (i.e., not including such players at all in the calculation of the overall HHI), the proposed transaction would still significantly exceed the safe harbour provided for by the Horizontal Merger Guidelines (post-transaction HHI level of 3082 in revenue and 3236 in number of subscribers – the delta figures would not change).

118 These calculations are based on market shares provided by the Notifying Party. As set out in recital (208), the market shares provided by the Notifying Party wrongly include large business customers that are not part of the retail fixed Internet access market.

119 Horizontal Merger Guidelines, paragraphs 19-21.

120 Horizontal Merger Guidelines, footnote 29.

operators (namely Euskaltel, Telecable de Asturias and R Cable) are limited to only three Spanish regions, respectively the Basque Country, Asturias and Galicia.

(206) Lastly, the market shares of other operators selling fixed Internet access services (but not owning any significant infrastructure) such as Masmovil and Pepephone are negligible. As for the third quarter of 2014, based on CNMC data, other operators excluding the four national operators and the three regional cable operators had a market share of 1.2% in terms of subscribers and 2% in terms of revenue[121].

(207) The Commission concludes that the Proposed Transaction will result in a further concentration of the retail market for fixed Internet access services in Spain, thereby leading to an oligopolistic market structure.

Residential vs. business customers

(208) According to information provided by the Notifying Party, the total market size of the residential segment, in 2014, amounts to around 10.1 million subscribers. The total size of the "business segment" – including large enterprises, SMEs and SoHo – amounts to almost 2.5 million subscribers. Both Parties are stronger in the residential segment than in the business segment. As set out in recital (196) above, large enterprise customers are however part of the separate product market of business connectivity and are not relevant for the current analysis.

Table 10: 2014 Segment Shares based on subscribers[122]

	Telefónica	*Orange*	*Jazztel*	*OR/JZ*	*Ono*	*Vodafone*	*VF/Ono*	*Other*
Residential	39.4%	16.4%	14.2%	30.7%	14.4%	9.4%	23.8%	6.1%
Business	67.7%	10.6%	3.1%	13.7%	6.0%	6.8%	12.8%	5.9%
Total	44.9%	15.3%	12.1%	27.4%	12.8%	8.9%	21.7%	6.0%

Source: Notifying Party based on CNMC data

(209) Table 10 illustrates how that the Proposed Transaction would lead to an oligopolistic market structure in the residential market segment. The three competitors Telefónica, Orange and Vodafone would account for almost 94% of all residential subscribers. Even though Telefónica is the leader in that segment with a share of almost 39.4% in terms of subscribers, the merged entity as well as Vodafone would be sizable competitors, accounting for 30.7% and 23.8% respectively.

121 CNMC, http://data.cnmc.es/datagraph/

122 Market shares for business customers provided include large enterprises, SMEs and SoHo. The Notifying Party submits that it has not been possible to obtain market shares as regards a segment comprising both residential and SoHo customers as market information published by CNMC does not provide this level of disaggregation.

Table 11: Evolution of segment shares for residential fixed Internet access by subscribers

	2011	*2012*	*2013*	*2014*
Telefónica	43.3%	41.8%	41.0%	39.4%
Orange	12.9%	13.9%	15.4%	16.4%
Jazztel	11.6%	13.7%	13.8%	14.2%
OR/JZ Combined	**24.5%**	**27.6%**	**29.2%**	**30.7%**
Vodafone	7.8%	6.9%	7.8%	14.4%
ONO	16.7%	16.2%	14.4%	9.4%
Vodafone/ONO	24.5%	23.0%	22.2%	23.8%
Other	7.6%	7.6%	7.6%	6.1%

Source: Notifying Party based on CNMC

(210) The relevant position of Orange and Jazztel in the segment is confirmed by analysing the evolution of market shares in the last years.

(211) Table **11** shows how, both Telefónica and ONO are losing segment shares in term of subscribers, while Orange and Jazztel are the two operators experiencing the highest growth with an increment of 3.6% and 2.6% respectively, as compared to 2011, followed by Vodafone with an increment of 2.5%, as compared to 2011 as well.

Internet access services with speeds below and above 30 Mb/s

(212) At the end of 2014, there were 12.8 million active lines in Spain for the provision of fixed Internet access services, and by the end of 2013 there were eight hundred thousands more. recitals (146) to (148) set out that the main technology (73%) used by Spanish customers is a Digital Subscriber Line ("DSL"). Only a minority of consumers (around 26% of active lines) use NGA network lines. Moreover, a third of HFC cable or FTTH customers have, or chose to pay only for speeds below 30 Mb/s. Therefore, across all technologies, only about 20% of all Spanish broadband customers currently have Internet access services that reach speeds higher than 30 Mb/s.

<u>Segment/Market with speeds below 30 Mb/s</u>

(213) In the segment or market of fixed Internet access services with download speeds of up to 30 Mb/s (representing currently 80% of the overall market in terms of active lines), Orange had a 17.2% share in terms of number of active broadband lines for the first half of 2014. Jazztel's share for the same period amounted to 13.3%, resulting in a combined market share of 30.5% post-merger.

(214) In its response to the Article 6(1)(c) Decision, the Notifying Party submits that the share mentioned in recital (213) has to be put into perspective since it is quickly diminishing as services provided over copper networks are being replaced with services provided over fibre networks and customers are rapidly migrating from Internet access services with download speeds of up to 30 Mb/s to VHBB services. Furthermore, Telefónica España CEO's Luis Gilpérez Miguel has already announced on 20 November 2014 the company's intention to dismantle, in about five years, a significant part of the copper network over which the Parties provide their service[123].

(215) The Commission noted in its Article 6(1)(c) Decision that fibre take-up in Spain so far appears to be relatively modest as the active FTTH lines represent only around 10% of all active broadband lines at the end of the third quarter of 2014[124]. The Notifying Party submits that the fibre uptake in Spain for the first half of 2014 stands close to 20% and expects a significant increase in the fibre uptake in the next 3 years ([30-40]*% in 2015, [40-50]*% in 2016 and [50-60]*% in 2017)[125].

(216) The Commission notes that the Notifying Party's figures are calculated on the basis of fibre subscribers out of the number of existing fixed broadband subscribers that fall into the areas covered by FTTH. That is different from calculating FTTH uptake by number of fibre subscribers out of the total number of addressable households (that have been passed with FTTH). Under the latter method, the current uptake is indeed around 10%.

---

123 See http://www.telecompaper.com/news/telefonica-to-replace-spanish-adsl-network-with-ftth-by-2020--1050512, Doc ID 1567.

124 CNMC, http://data.cnmc.es/datagraph/

125 Those claims are corroborated by Orange internal document where there are similar internal estimates but with a segmentation of the market by speed and not by technology. [Reference to the Notifying Party's internal business documents]*.

(217) Market respondents do not seem to share the Notifying Party's very optimistic expectations although respondents have divergent views on the pace of the future uptake of high speed lines. The majority of respondents to the Phase II Market Investigation have expectations of a more modest uptake ranging between 15% and 25% in 2015, between 15% and 37.5% in 2016 and between 20% and 50% in 2017[126]. Moreover, respondents to the Phase II Market Investigation indicated that higher download speed, the capacity to accommodate browsing on multiple devices and increased consumption of video streaming services or IPTV services, or both, are the main factors driving uptake of high speed lines. At the same time, price remains the most important decision factor for consumers, and most consumers migrate from ADSL to FTTH only when those are both offered at similar prices[127].

(218) Recently, the share of the VHBB segment has been increasing as customers shift from lines giving access to Internet services up to 10 Mb/s of speed to lines giving access to a speed up to and above 30 Mb/s[128]. Table 12 shows how in less than one year, there has been almost a 10% decrease in active lines with speeds up to 30 Mb/s. That change has been mainly driven by the growth of FTTH active lines and the increase of active HFC cable lines with speeds above 30 Mb/s.

Table 12: Speeds and technologies of Internet access subscriptions in 2013 and 2014[129]

	2013			***2014***		
	Total < 30 Mb/s	***Total >= 30 Mb/s***	***Total***	***Total < 30 Mb/s***	***Total >= 30 Mb/s***	***Total***
xDSL	74.1%	2.1%	76.2%	67.0%	3.0%	70.0%
HFC Cable	9.7%	7.8%	17.5%	6.6%	10.6%	17.2%
FTTH	0.1%	5.0%	5.1%	2.4%	9.8%	12.2%
Other	1.1%	0.0%	1.1%	0.6%	0.0%	0.6%
Total	85.1%	14.9%	100.0%	76.6%	23.4%	100%

Source: Commission calculation based on CNMC data

(219) Respondents to the Phase II Market Investigation provided highly divergent estimates of the percentage of Internet access service customers which are likely to be served through copper infrastructure in the coming years: between 50% and 80% by the end of 2015, between 30% and 70% by the end of 2017 and between 20% and 60% by the end of 2018[130].

(220) According to Orange's internal estimates, competition in the coming years will be based on copper infrastructure as follows: [60-70]*% of active Internet lines by the end of 2015, [50-60]*% by the end of 2016 and [40-50]*% by the end of 2017[131].

126 See replies to Commission Phase II Questionnaire to Competitors of 23 December 2014, question 42. For the purpose of question 42, FTTH uptake is calculated as number of fibre subscribers out of the total number of addressable households.

127 See replies to Commission Phase II Questionnaire to Competitors of 23 December 2014, question 42.

128 In the first three quarters of 2014, there has been a reduction of 730 000 lines with speeds up to 10 Mb/s and an increase of 500 000 lines with speeds up to 30 Mb/s and 780 000 lines with speeds above 50 Mb/s. See CNMC, http://data.cnmc.es/datagraph/.

129 Data include both residential and large enterprises customers because market information published by CNMC does not provide disaggregated data.

130 See replies to Commission Phase II Questionnaire to Competitors of 23 December 2014, question 39.2

131 [Reference to the Notifying Party's internal business documents]*. Orange submits that these figures stemming from an internal document of summer 2014 are based on Telefónica's fibre deployment plans

(221) As regards Telefónica's announcement to dismantle its copper access network in numerous other densely populated areas by 2020, where it will have it replaced by its own FTTH network[132], the Commission notes that in 2009, the former Spanish telecommunication regulator CMT had imposed conditions on the dismantling of Telefónica's copper network. Most importantly, if any alternative operator is co-located at a local exchange, Telefónica needs to provide wholesale services for 5 years to protect those operators' investments[133]. Therefore, over the next five years, there will be no dismantling of Telefónica's copper network without the consent of all operators co-located at the local exchange so that alternative operators can continue to compete on the basis of their LLU infrastructure.

(222) The Commission considers that while its importance will likely decrease, the segment for speeds below 30 Mb/s – currently 80% of the market – is likely to still be relevant for the competitive situation in the overall market in the years to come. Similarly, there will probably be co-existence of the copper and NGA networks in the coming years. Therefore, contrary to the view expressed by the Notifying Party in the Reply to the Statement of Objections, the Commission considers that the merged entity's position on the market or segment for Internet access services with speeds below 30Mb/s is of relevance for the competitive assessment of the Proposed Transaction.

VHBB market/segment (speeds above 30 Mb/s)

(223) As to the market or segment of fixed Internet access services with download speeds exceeding 30 Mb/s ("the VHBB segment"), the Notifying Party submits that the combined share of Orange and Jazztel has been 4.0% (respectively, 0.7% and 3.3%) in the first half of 2014[134]. The Notifying Party further submits that since the wholesale access obligation imposed on the incumbent Telefónica is capped at 30Mb/s, other operators, including the Parties, would have to invest in own infrastructure to be able to offer high-speed Internet access services. In its response to the Article 6(1)(c) Decision and to the Statement of Objection, the Notifying Party argues that the Commission's approach of relying on BUs instead of active lines to describe the Parties' future position in VHBB is unjustified, as it ignores Telefónica's first mover advantage in deploying fibre. Instead, the Commission should rely on current shares of the Parties for the purposes of its competitive assessment.

(224) As regards the VHBB segment, there are no data publically available for each operator. A good proxy for shares in the VHBB market or segment can be obtained by analysing the market or segment by technology since HFC cable and FTTH (together "the NGA segment") account for 86% of all VHBB lines, as illustrated in

---

covering 13m BUs. Under the more recent Telefónica roll-out scenario of 20m BUs, figures would be [60-70]*%, [40-50]*% and [30-40]*%, respectively.

132 Speaking at the Smart City Expo World Congress in Barcelona on 20 November 2012, Telefónica España CEO Luis Gilpérez Miguel said according to press reports that Telefónica would close down practically the entire copper network through which the operator provides ADSL services. See http://www.telecompaper.com/news/telefonica-to-replace-spanish-adsl-network-with-ftth-by-2020--1050512, Doc ID 1567.

133 See CNMC press release of 23 October 2014: "La CNMC acepta el primer cierre de centrales de Telefónica". See http://www.cnmc.es/CNMC/Prensa/TabId/254/ArtMID/3078/ArticleID/1315/La-CNMC-acepta-el-primer-cierre-de-centrales-de-Telef243nica.aspx. With this CNMC decision, Telefónica has received approval to dismantle its first 2 local exchanges (out of the more than 8800 that it operates), Doc ID 1566.

134 See response to question 2 of the Commission Request for Information N°9 of 28 November 2014, Doc ID 595, p. 2.

Table 13. As of the third quarter of 2014, Orange and Jazztel would have a combined share of 5.6% within the NGA market or segment. Vodafone/ONO has 42.4% and Telefónica holds 34.9% of the NGA market/segment[135].

Table 13: Shares for active NGA lines by technology and operator for 2014[136]

	FTTH	HFC	NGA segment
Telefónica	34.9%	0.0%	34.9%
Orange	1.4%	0.0%	1.4%
Jazztel	4.2%	0.0%	4.2%
Orange/ Jazztel	5.6%	0.0%	5.6%
Ono	0.0%	41.8%	41.8%
Vodafone	0.6%	0.0%	0.6%
Vodafone/ ONO	0.6%	41.8%	42.4%
Other	0.8%	16.7%	17.0%
Total	41.5%	58.5%	100.0%

Source: Commission calculation based on CNMC data

(225) Given the very recent start for operators to deploy FTTH networks, current market or segment shares are not likely to reflect the competitive role that one could expect in the future in the VHBB segment. Particularly, Jazztel and Orange only started deploying their FTTH networks towards the end of 2012 and March 2013 respectively. Therefore, their current shares are not an appropriate indicator for their future position in the VHBB market or segment with speeds above 30 Mb/s. Given that the currently relatively small VHBB market or segment is expected to expand over the coming years in terms of consumer uptake, the Commission considers it appropriate to analyse the footprint of the NGA networks (that is to say the number of potential customers that are covered by the network) in a dynamic perspective in order to assess competition in that segment. Naturally, the metrics of active lines is not available for assessing future competition. The NGA network footprint (expressed in "BUs") of each operator gives a certain indication as to the likely competitive situation in the future.

(226) The Notifying Party objects to the use of BUs as an indicator of the future competitive position of the Parties arguing that Telefonica's first mover advantage in deploying FTTH and the lower churn related to Telefonica's convergent products would disadvantage the third or fourth mover in acquiring customers in the future. The Commission acknowledges that the number of BUs passed by an operator is an imperfect indicator for the likely competitive situation as the actual future uptake by consumers of NGA lines offered by each operator is unknown. However, it notes that operators such as Orange and Jazztel need to roll out their FTTH networks if they want to be able to compete for customers within the footprint of their FTTH networks. Therefore, the Commission considers that the future footprint of the NGA networks, as currently foreseen by the operators, may give useful indications as to each operator's potential impact on competition in the VHBB segment going forward.

135 CNMC, http://data.cnmc.es/datagraph/

136 Data include both residential and large enterprises customers because market information published by CNMC does not provide disaggregated data.

(227) All of the currently four nationwide operators of fixed Internet access services are rolling-out their own NGA infrastructure in order to offer high-speed Internet access services. The current leader in the FTTH roll-out in Spain, Telefónica, operated a fibre network covering 10.3 million BUs, starting December 2014[137]. Telefónica publicly announced plans envisaging fibre roll-out reaching 15 million BUs in 2015 with the ambition to cover with fibre 80% of the BUs in Spain by end of 2017, corresponding to 20 million out of the total 25 million BUs in Spain[138].

(228) After its acquisition of local cable operator ONO in July 2014, Vodafone became the owner of an HFC cable network covering 7.3 million BUs. In addition Vodafone is deploying FTTH to 1 million BUs under a joint roll-out agreement with Orange and will have access to the 1 million BUs covered by Orange under the same agreement. Jazztel, with its fibre network covering 3 million BUs and Orange, with a current FTTH coverage of around 800 000 BUs (to which the 1 million BUs covered by Vodafone to which Orange will have access under the joint roll-out agreement with Vodafone must be added), are respectively third and fourth nation-wide operators in terms of VHBB coverage.

(229) Smaller players like regional cable companies Euskaltel, Telecable de Asturias and R Cable also operate HFC cable infrastructures providing VHBB, but the coverage of their respective networks is strictly regional, concentrated in the northern part of the country. Orange internal documents […]* expect the three regional cable operators' NGA footprint […]* in the future[139]. Therefore, the Commission does not consider that the regional cable operators are likely to have any significant competitive impact on the overall national market with respect to VHBB in the future.

Table 14: NGA networks (HFC cable and FTTH) by operator per building unit in Spain[140]

End of:	Telefónica	Vodafone/ Ono	Orange	Jazztel
2014	10 mln BUs	8 mln BUs	0.8 mln BUs	3 mln BUs
2017	20 mln BUs	10 mln BUs	[…]* mln BUs	[…]* mln BUs[141]

Source: Commission based on information provided by the Parties

(230) Table 14 demonstrates that while each of the Parties currently lags behind as regards the roll-out of NGA networks, and hence in the VHBB segment, each of them would considerably increase its footprint and become a stronger player also in that market or segment over time, when this market/segment becomes more important in terms of consumer take up of VHBB lines[142].

137 Document by Telefónica: "Results January – December 2014", Doc ID 2652, p. 36: http://www.telefonica.com/en/shareholders-investors/pdf/rdos14t4-pres.pdf]

138 Note, however, that Telefónica recently announced it would slow down FTTH roll-out in 2015 by 35% over its previous internal plan (3.6 m instead of 5.5m BUs) in reaction to the CNMC's draft regulation published on 19 December 2014, Doc ID 1568. http://economia.elpais.com/economia/2015/02/01/actualidad/1422824643_028880.html. According to the CNMC's draft proposal, Telefónica would be obliged to grant wholesale access to its FTTH network in all of Spain except for nine cities covering approximately 16% of the Spanish population.

139 [Reference to the Notifying Party's internal business documents]*.

140 The term building units ("BUs") comprises both residential buildings and office. The total number of BUs in Spain is around 25 million, with the total number of residential BUs being around 18 million.

141 […]*.

142 As discussed above, currently, the segment with speeds below 30 Mb/s represents 80% of the market.

(231) The Commission therefore considers that the Proposed Transaction has less impact in the VHBB segment in the short term where both the Parties have a limited presence. However, the dynamics as regards NGA deployment are such that the Parties are expected to play a more significant role in that segment in the coming years. The Commission considers that absent the Proposed Transaction, it is likely that the future VHBB market or segment will be characterised by four operators active at national level. The impact that the Proposed Transaction will have in the NGA market or segment in the future will be further discussed in section7.2.9.

Conclusion on market structure

(232) The Commission concludes that the Proposed Transaction will reduce the number of nationwide players in the overall market for fixed Internet access services from four to three by merging the two most successful operators, in terms of market share growth, in the last years.

7.2.2.3. Removal of two important competitive forces

Notifying Party's view

(233) The Notifying Party submits in the Form CO that the key question is not whether Orange or Jazztel are important competitors but rather whether the merger of both entities is likely to impede effective competition in the respective market. In that regard, the Notifying Party submits that the combined market share of the merged entity will be 27.45% in terms of revenues in 2013. That figure would be only slightly above the 25% threshold mentioned in the Commission's Horizontal Merger Guidelines[143], and in any case below 30%. Moreover, the merged entity would face strong competition from the incumbent Telefónica and Vodafone/ONO. As a result, the Proposed Transaction is not likely to raise competition concerns.

(234) In its reply to the Commission's Article 6(1)(c) Decision, the Notifying Party submits that the Commission should not ignore the existence of MVNOs also selling fixed Internet access services as well as the regional cable operators, the market for fixed Internet access services is moving towards VHBB, Telefónica, not the Parties, is the real competitive force on that market, and the use of shares of new customers, referred to as gross adds, to estimate the Parties' attractiveness is inadequate.

(235) In the Notifying Party's view, when assessing the impact of the Proposed Transaction on the fixed Internet access services market in Spain, the Commission should not underestimate the role played by MVNOs and regional cable operators. The Notifying Party submits that MVNOs such as Pepephone, Masmovil, Eroski Movil, BT and Oceans are currently providing multiple play offers combining mobile and fixed telecommunications services. Likewise, regional cable operators such as Euskatel, R Cable and Telecable would hold strong market positions in their respective regions (Euskatel between 30% and 40% in the Basque Country; R Cable between 40% and 50% in Galicia; Telecable around 32% in Asturias).

(236) Moreover, as the market for fixed telecommunications services in Spain is evolving towards VHBB, the Notifying Party submits that the Commission should not focus on competition on services based on copper, but rather take a more long-term approach. As far as VHBB is concerned, the Parties are currently lagging behind much larger players such as Telefónica and Vodafone/ONO as regards both deployment of NGA networks and customer take-up for VHBB services. In that

---

143 Horizontal Merger Guidelines, paragraph 18.

respect, the Notifying Party claims that the Proposed Transaction would create a much stronger third player in Spain, rather than removing two competitive forces.

(237) Furthermore, the Notifying Party does not deny that the Parties have been active competitors in the Spanish market. However, the Notifying Party submits that the Commission has not put forward any evidence to substantiate its claim that the Parties would have been aggressive, as opposed to active competitors. On the contrary, the Notifying Party claims that Telefónica, not the Parties, is the most aggressive competitor on the market. In the Notifying Party's view, Telefónica was the first player to launch in 2012 a convergent offer, Fusión, combining fixed telephony, fixed Internet access services and mobile telecommunications services. That move would have allegedly forced competitors to follow suit. Furthermore, Telefónica would have engaged in, and is currently pursuing, its large-scale strategy to deploy a FTTH network to replace its legacy copper network and to migrate customers to VHBB services. Finally, Telefónica would have accelerated convergence even further, by including Pay-TV services in its Fusión offer and by securing some strategic content providers (such as DTS).

(238) Fourth, the Notifying Party disagrees with the Commission as regards the use of gross add shares in this case. In that regard, the Notifying Party submits that the Commission should not base its assessment on factors other than market shares unless justified by objective reasons related to the market. As regards the present case, the Notifying Party points to the fact that the use of long term contracts is much more common in the mobile market than in the fixed Internet access services market and that the standard duration of contracts in the latter market would be limited to 12 months. Furthermore, the Notifying Party submits that the Commission's calculation contained in its Article 6(1)(c) Decision is not correct.

(239) The Notifying Party submits that the gross adds shares would be different, as set out in Table 15.

Table 15: Gross add calculation of Notifying Party as per its Reply to the Article 6(1)(c) Decision

[…]*

(240) Moreover, the Notifying Party considers that the calculation of portability data is inaccurate, since subscribers previously served by Orange or Jazztel through the bitstream offer of Telefónica deciding to switch to Telefónica would not be included in the portability data, since in both cases the telephone number belongs to Telefónica. In addition, when a Telefónica customer moves from a narrowband offer to a broadband offer from Telefónica, this switch would not be recorded in the portability data.

(241) In its Reply to the Statement of Objections, the Notifying Party submits further elements regarding the importance of Telefónica as the driving force on the Spanish market and regarding the temporary nature of the Parties' aggressiveness.

(242) Firstly, as regards Telefónica, the Notifying Party submits that the declining market share of Telefónica is not an indication of its lack of aggressiveness: indeed, in the Notifying Party's view, in a market with an incumbent and late entrants, the incumbent firm would lose market shares vis-à-vis competitors even assuming that the incumbent firm competes as aggressively as the other firms.

(243) According to the Notifying Party, Telefónica is even the most aggressive provider of fixed Internet access services, because of its highest share of gross adds. Furthermore, according to the Notifying Party, the market share for retail fixed Internet access services from Telefónica in terms of revenue is smaller than its market share in terms of subscribers. That would be an indication of Telefónica's

pricing below the market average. According to the Notifying Party, the "most objective evidence" to measure the relative aggressiveness of market participants would be the development of the ratio between their respective market positions in terms of subscribers and revenues. If the revenue share of a competitor would fall faster than the subscriber share, then, according to the Notifying Party, the price must have fallen relative to the weighted average price of all firms in the industry. As a result, the Notifying Party is of the opinion that, the firm must be reducing prices relative to its competitors. Based on such benchmark, the Notifying Party argues that Telefónica has steadily become more competitive. All in all, the Notifying Party submits that Telefónica's leading position will not be changed by the Proposed Transaction and that such leading role will continue to force the smaller operators to compete aggressively.

(244) Secondly, as regards the temporary nature of the Parties' aggressiveness, the Notifying Party submits that the alleged past aggressiveness of the Parties should not be projected into the future. The Notifying Party explains that as a matter of fact, the Parties have been successful in the past in cross-selling fixed or mobile services to their customers. However, such success will come to a halt, in the Notifying Party's view, as soon as all clients of the Parties will be converted to convergent products. Finally, the Notifying Party submits that the evidence put forward by the Commission does not support the Commission's claims, since neither the internal documents of the Parties nor the gross add shares would prove that the Parties have been the most aggressive players on the Spanish market.

Commission's assessment

(245) The Commission considers that some firms have more of an influence on the competitive process than their market share would suggest[144]. A merger involving such a firm would therefore also have a higher impact on competition than suggested by the mere market shares of the involved undertakings. Contrary to the argument of the Notifying Party, for an undertaking to have a higher impact on competition than suggested by its market share it is not necessary that the said undertaking should be identified as the "most aggressive" competitor. Whether or not an undertaking is an important competitive force within the meaning of the Horizontal Merger Guidelines does not depend on a ranking of all competitive forces in the market but rather on a comparison of an undertaking's actual influence on competition with the influence suggested by its market share.

(246) Based on such measurement, the results of the Commission's in-depth investigation have shown that both Orange and – particularly – Jazztel have played an important role in exerting competitive constraints upon each other and on remaining competitors in the Spanish market for fixed Internet access in the recent years.

(247) Jazztel and Orange have been competing, although differently, in proposing a number of price-attractive and innovative offers for fixed Internet access services and convergent offers containing fixed Internet access services in Spain. In particular, the Commission notes that the Parties have been important competitive forces on the market not only thanks to their price-aggressiveness but also and especially for their perceived value-for-money (that is, offering the best product for the cheapest price), which is generally also associated to brand reputation and customer satisfaction).

(248) The Notifying Party submits that the proposed merger could not significantly impede effective competition because of the limited combined market share of the Parties and the presence of alternative strong operators. However that a concentration can significantly impede effective competition not only by creating or strengthening a dominant position, but also by removing important competitive constraints that the merging parties were previously exerting upon each other, together with a reduction of competitive pressure on the remaining competitors[145].

(249) In this section the Commission will therefore analyse Jazztel and Orange's role in the retail market for fixed Internet access services.

(250) The Commission has gathered evidence submitted by the Notifying Parties, by third parties and general data publicly available, to substantiate its findings.

Jazztel's role

(251) Overall, Jazztel's market share growth provides a first indication of the success of its activities in the fixed Internet access services market in Spain. In that respect, the CNMC published, in October 2012, a blog post indicating how the market had changed since 2007. In that post, the CNMC affirms that "*Also noteworthy is Jazztel's growth, which has gone from a 3% to a 11% market share*"[146]. That growth

---

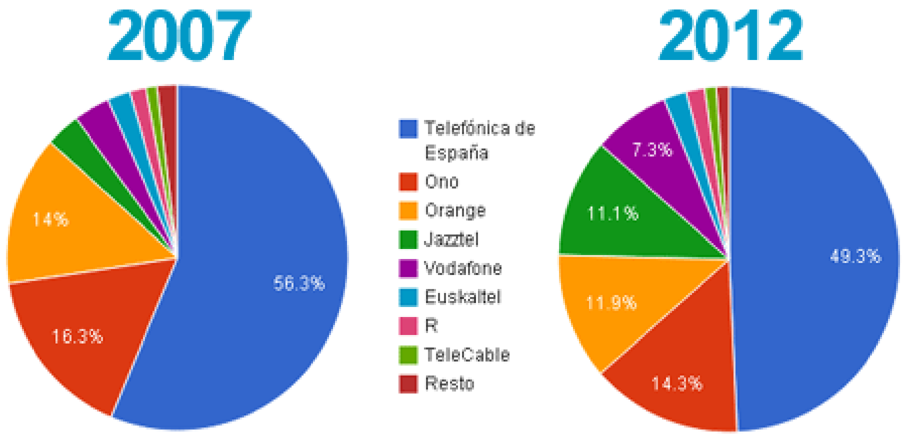
144 Horizontal Merger Guidelines, paragraph 37.

145 Horizontal Merger Guidelines, paragraph 25.

146 "También destaca el crecimiento de Jazztel, que ha pasado de 3% de cuota, al 11%."

is visualised by a graph published alongside the post, which is reproduced in Graph 1[147].

Graph 1:



Source: CNMC

(252) The Commission's in-depth investigation shows the importance of Jazztel as an aggressive competitor that is characterised by a reputation of "value-for-money".

(253) The assessment is based, among others, on the Market Investigation. The Commission deems it important to assess which players are regarded as price aggressive, capable of innovation, have a good customer perception and offer value-for-money. Given the diversified nature of products offered in the Spanish retail market for fixed Internet access services, a price comparison between the different players on the Spanish market seems rather inconclusive.

(254) According to the competitors of the Parties responding to the Market Investigation the brand "Jazztel" is most often associated with value-for-money, that is, offering the best product for the cheapest price[148]. The brand "Jazztel" was also regarded by most of the competitors responding to the Market Investigation as the brand under which the second most-innovative tariffs in Spain have been offered during the last three years (through the packs "Pack Ahorro" and "Pack Sin Límite fibra 200"), following Telefónica's "Fusión" tariffs[149]. Furthermore, most respondents to the Market Investigation indicated the brand "Jazztel" more often than any other competing brand as the most price aggressive[150]. The company Jazztel was regarded as having the second most price aggressive tariffs in the past three years by the respondents, following Orange, considered by the highest number of respondents as being the most price aggressive company[151].

(255) The Commission notes that the Market Investigation results provide a first indication of Jazztel's importance as a competitive force on the market. Regarding price aggressiveness, innovative tariffs and value-for-money, Jazztel is ranked first or second according to the Market Investigation. The Commission finds that those

---

147 "La evolución del mercado de la banda ancha en España", CNMC blog, 5 October 2012, available at http://cnmcblog.es/2012/10/05/la-evolucion-del-mercado-de-la-banda-ancha-en-espana/, Doc ID 1496.

148 See replies to Commission Phase II Questionnaire to Competitors of 23 December 2014, question 33.

149 See replies to Commission Phase II Questionnaire to Competitors of 23 December 2014, question 32.

150 See replies to Commission Phase II Questionnaire to Competitors of 23 December 2014, question 30.

151 See replies to Commission Phase II Questionnaire to Competitors of 23 December 2014, question 31.

results provide a strong indication that Jazztel is an important competitive force on the market even though Jazztel was only the second most often mentioned by the respondents regarding some of the mentioned parameters.

(256) Jazztel's important role as a competitive force in the Spanish market is further supported by evidence contained in the internal documents submitted by the Parties. Orange's internal documents describe Jazztel as an innovative and aggressive player with high customer satisfaction and a perception of value-for-money.

(257) As regards its commercial strategy, internal documents of Orange express the view that Jazztel has established its growth in recent years on two main strategic products on offer, namely convergence – with a strong emphasis on cheap mobile telecommunications offers – and a commitment to develop its fibre offer.

(258) Internal documents of Orange suggest that Jazztel has been one of the first players on the Spanish market to have understood the importance of convergent offers in Spain. In a strategic document produced by Orange in January 2013, Orange provides a background to the convergent market in Spain, before its own evaluation of the possibility to introduce a convergent offer. That document reads:

[Reference to the Notifying Party's internal business documents]*[152]

(259) The Notifying Party submits that Jazztel's decision to launch the first convergent pack in August 2012 was only meant as a promotion. The Commission notes, nonetheless, that Jazztel's move, despite being a promotion, was the first one of its kind in the Spanish telecommunications market. This would further support the impression from the Market Investigation, the respondents to which point at Jazztel as one of the most tariff-innovative brands in Spain.

(260) Jazztel's entry into the emergent convergent market in Spain was made possible thanks to the MVNO contract that Jazztel has with Orange. That is further recognized in another internal document of Orange:

[Reference to the Notifying Party's internal business documents]*[153]

(261) Therefore, due to its presence in the fixed Internet access market, Jazztel has been able to leverage its position in fixed Internet access services (mainly DSL services) to make an aggressive convergent offer comprising attractive commercial terms as regards the mobile component. Another of Orange's internal documents recognizes Jazztel's strategic move as follows:

[Reference to the Notifying Party's internal business documents]*[154]

(262) While improving its convergent offers comprising a fixed xDSL Internet access component and a mobile telecommunications component, it appears from the internal documents of Orange, that Jazztel is investing also in FTTH technology in order to improve speed and quality of its commercial offer. In internal documents, Orange describes Jazztel as follows:

[Reference to the Notifying Party's internal business documents]*[155]

[Reference to the Notifying Party's internal business documents]*[156]

152 [Reference to the Notifying Party's internal business documents]*.
153 [Reference to the Notifying Party's internal business documents]*.
154 [Reference to the Notifying Party's internal business documents]*.
155 [Reference to the Notifying Party's internal business documents]*.
156 [Reference to the Notifying Party's internal business documents]*.

(263) Internal documents of Orange explain how Jazztel is perceived as an aggressive competitor, focussing on the segment of the Spanish telecommunications market for low-cost convergent offers, and having a significant impact on the overall decline of the average revenue per user ("ARPU").

(264) In a marketing plan for 2012, Orange benchmarks its customer acquisition strategy on Jazztel. That document recognizes that Jazztel has one of the best and most aggressive [a specific customer acquisition scheme]* for the following reasons:

[Reference to the Notifying Party's internal business documents]*[157]

(265) Orange's internal documents dated October 2013 and July 2014 consistently recognize that:

[Reference to the Notifying Party's internal business documents]*[158]

[Reference to the Notifying Party's internal business documents]*[159]

[Reference to the Notifying Party's internal business documents]*[160]

(266) In one of the documents referred to in recital (265), Orange evaluates the aggressiveness of each competitor by assigning them […]*. Jazztel is attributed […]* for its aggressiveness, the highest value[161]. […]*[162].

(267) Finally, another presentation prepared for Orange by investment banks dated September 2014 stresses that in the recent years, Jazztel has been one of the main contributors to the pressure on prices. In more detail, the document reads:

[Reference to the Notifying Party's internal business documents]*[163]

(268) Another aspect of Jazztel's success reflected in Orange's internal documents relates to Jazztel's perceived leadership in terms of customer satisfaction.

(269) Orange's internal documents usually report Jazztel as the company which is highly recommended by its clients and the company that […]*[164]

(270) Orange's marketing team analysed Jazztel's strengths and weaknesses. A document prepared in March 2013 reads:

[Reference to the Notifying Party's internal business documents]*[165].

(271) In the same presentation, Jazztel was ranked first in customer satisfaction and customer recommendation for 2012, an element which is constant over time.

(272) A customer survey conducted by an external consultant for Orange in late 2014 shows that Jazztel's customer perception is high and the reasons why a customer usually prefers Jazztel are the following:

[Reference to the Notifying Party's internal business documents]*[166]

157 [Reference to the Notifying Party's internal business documents]*.
158 [Reference to the Notifying Party's internal business documents]*.
159 [Reference to the Notifying Party's internal business documents]*.
160 [Reference to the Notifying Party's internal business documents]*.
161 [Reference to the Notifying Party's internal business documents]*.
162 [Reference to the Notifying Party's internal business documents]*.
163 [Reference to the Notifying Party's internal business documents]*.
164 [Reference to the Notifying Party's internal business documents]*.
165 [Reference to the Notifying Party's internal business documents]*.
166 [Reference to the Notifying Party's internal business documents]*.

(273) As a result of its aggressiveness, the perception that it offers value-for-money and its optimal customer reputation, Jazztel's success was significant in the Spanish market. In internal documents, Orange acknowledges that this is reflected in the high proportion of new customers which have decided over time to subscribe with Jazztel for fixed Internet access services or convergent offers. The Commission notes that this finding is in line with the assessment of Jazztel's gross add shares as set-out in recitals (311) *et seq*.

(274) Orange's internal documents closely review on a monthly or quarterly basis the number of new customers of the company and of its rivals. According to Orange Spain's financial plan for 2012 to 2016, Jazztel was the leading company as regards net adds[167] of customers of fixed Internet access services for 2010, 2011 and 2012[168].

(275) A document of Orange called [Reference to the Notifying Party's internal business documents], describes Jazztel as the leader in terms of gross adds of fixed Internet access services […]* and the company having the highest share of gross adds, along with ONO […]* as regards cross-selling convergent packs to mobile customers […]*[169].

(276) Orange's strategic plan for 2015 to 2017, dated 2 June 2014, describes Jazztel as the leader in acquiring customers for its convergent offers […]* and the second best in cross-selling convergent offers to mobile customers [170].

(277) In an internal document of Orange, […]*, provided some insights on the performance of Jazztel over the last years. That supporting document reads:

[Reference to the Notifying Party's internal business documents]*[171]

(278) Likewise, a presentation by the investment banks […]* in support of the Proposed Transaction consistently explains that:

[Reference to the Notifying Party's internal business documents]*[172].

(279) An internal document of Orange discussing the possibility of an acquisition of Jazztel and dated […]* reads:

[Reference to the Notifying Party's internal business documents]*[173]

(280) The Notifying Party submits that Jazztel's (and Orange's) aggressiveness in the past should not be projected in the future. In particular, the Notifying Party submits that the Parties' aggressiveness will come to a halt once each of the Parties will have cross-sold fixed or mobile telecommunications products to its respective existing customer base.

(281) The Commission disagrees with the Notifying Party's argument. The Commission notes that, as already explained in recitals (274) to (275), the Parties have been successful players not only by cross-selling fixed or mobile customers to their existing customer bases, but also and mostly by attracting new convergent clients. In particular Jazztel's high gross adds represented by customers which were not

---

167 Net adds being the difference between gross adds and the customers lost to the competitors.
168 [Reference to the Notifying Party's internal business documents]*.
169 [Reference to the Notifying Party's internal business documents]*.
170 [Reference to the Notifying Party's internal business documents]*.
171 [Reference to the Notifying Party's internal business documents]*.
172 [Reference to the Notifying Party's internal business documents]*.
173 [Reference to the Notifying Party's internal business documents]*.

previously Jazztel's subscribers and therefore, which are new clients for both fixed and mobile telecommunications services – cannot be explained by such effects.

(282) The Commission concludes that Jazztel has been and is an important competitive force in the fixed Internet access market in Spain.

Orange's role

(283) Orange also is an important competitive force in the Spanish telecommunications market. Orange's aggressive growth in recent years has been achieved not only by competing aggressively on prices, but also by means of its innovative products and its capacity to react to successful competitors' offers, like Jazztel's.

(284) This assessment is based on the Market Investigation addressed to the Parties' competitors. On average, respondents to the Market Investigation pointed at Orange most often as the company with the most price aggressive tariffs in the past three years, either under its own brand Orange (for example, "Canguro 35[174]") or under the low-cost brand "Amena" (for example, "Amena.com en casa")[175].

(285) The competitors of the Parties that took part in the Market Investigation also associated Orange's low-cost brand "Amena" and the brand "Orange" itself most often with price-aggressiveness in Spain, after Jazztel[176].

(286) The Commission has further analysed the internal documents of both Parties and according to these documents, Orange is perceived as a threat by Jazztel. The documents also reflect that Orange has become one of the most successful companies in the Spanish market, along with Jazztel.

(287) In an internal document of Jazztel dated April 2013, Jazztel analyses Orange's changed position in the market:

[Reference to the Notifying Party's internal business documents]*[177]

(288) The perceived aggressiveness of the Canguro offer is shown in a presentation by Jazztel of June 2013 where, comparing the situation before and after the launch of Canguro on the market, Jazztel noticed that: […]*[178].

(289) Likewise, in June 2013, Jazztel elaborates internally a commercial campaign aimed at […]* and […]*. An internal e-mail of Jazztel dated 25 June 2013 explains the strategic consideration of Jazztel for such a campaign.

(290) In particular, a presentation attached to the e-mail referred to in recital (289) reads as follows:

[Reference to the Notifying Party's internal business documents]*[179].

(291) That e-mail contains the details of the following […]* commercial campaign:

[Reference to the Notifying Party's internal business documents]*[180]

---

174 Canguro is the commercial name of Orange's multiple play offer comprising fixed voice services, fixed Internet access services and mobile telecommunications services.

175 See replies to Commission Phase II Questionnaire to Competitors of 23 December 2014, question 31.

176 See replies to Commission Phase II Questionnaire to Competitors of 23 December 2014, question 30.

177 [Reference to the Notifying Party's internal business documents]*.

178 [Reference to the Parties' internal business documents]*.

179 [Reference to the Notifying Party's internal business documents]*.

180 [Reference to the Notifying Party's internal business documents]*.

(292) As a result of its aggressiveness, Orange has become a successful company in the Spanish market. This is further reflected in the high proportion of new customers which have decided over time to subscribe with Orange for fixed Internet access services or convergent offers. The Commission notes that that finding is in line with the assessment of Orange's gross adds shares as explained in recitals (311) *et seq*.

(293) In that regard, Orange's internal documents closely review on a monthly or quarterly basis the amount the company's new clients and that of its rivals. Those documents reflect Orange's success as explained in recitals (294) to (297).

(294) Firstly, Orange Spain Financial plan for 2012-2016 clearly shows that Orange was the second leading company as regards net adds of fixed Internet service clients for 2010, 2011 and 2012 (Jazztel being the first)[181].

(295) Secondly, an internal presentation of Orange dated August 2013 intended to analyse the market for residential offers in Spain shows that, between December 2012 and June 2013, Orange is the operator that grows the most. […]*[182].

(296) Thirdly, a document of Orange called […]* describes Orange as the leader in terms of gross adds of newly-attracted convergent clients […]* and of cross-selling convergent packs to fixed Internet access customers […]*[183].

(297) Finally, an internal document of Orange entitled "Orange Spain Country Business Review" and dated December 2014 portrays Orange as the operator which has the highest net adds since the third quarter of 2013 and strong net adds in the mobile market […]*[184].

(298) As a result of its aggressiveness and its commercial success, Orange has seen its customer base and financial results increase over time. The internal documents indicating Orange and Jazztel's performance are described in recitals (277) to (279) above.

(299) The Commission concludes that Orange has been an important competitive force in the fixed Internet access market in Spain, at least in the last two to three years.

<u>Telefónica's role</u>

(300) The Notifying Party submits that Jazztel and Orange are not to be regarded as important competitive forces because Telefónica would be by far the most aggressive player on the fixed Internet access market in Spain. The Commission disagrees with that argument for the reasons explained in recitals (301) to (308).

(301) For a concentration to result in a significant impediment to effective competition – and contrary to the Notifying Party's argument, the Commission is not required to show that the merging parties have been the <u>most</u> important competitive forces, as long as the merging parties have exerted significant competitive constraints upon each other and on the remaining competitors for a period of time before the proposed transaction.[185]

(302) In this case, even with the assumption that Telefónica would be the most aggressive player on the Spanish market or just as aggressive as the Parties, the removal of

181 [Reference to the Notifying Party's internal business documents]*.
182 [Reference to the Notifying Party's internal business documents]*.
183 [Reference to the Notifying Party's internal business documents]*.
184 [Reference to the Notifying Party's internal business documents]*.
185 See e.g. Horizontal Merger Guidelines, paragraph 25.

important competitive forces on the market, such as Orange and, particularly, Jazztel, could still result in a significant impediment to effective competition in view of the likely influence on the ability and incentives of the merged entity to compete in the resulting new market structure.

(303) Moreover, internal documents of Orange […]*. For example, an internal document of Orange detailing the financial plan of the company for the period 2015 to 2018 and dated December 2014[186] provides useful insights of the role played by Telefónica.

(304) In a slide describing the competitive positioning of each of the Spanish telecommunications players along the lines of "Low-cost/Mainstream" and "Mobile-only/Convergence", Orange describes Telefónica […]*[187].

(305) The Notifying Party argues that aggressiveness should be measured as the development of the ratio between revenue and subscriber market shares. Since the share of Telefónica in terms of customer number has fallen "much less dramatically" than its revenue share, the Notifying Party concludes that "the price of Telefónica has fallen relative to the average price of its competitors". That would make Telefónica, in the view of the Notifying Party, an aggressive competitor. Regarding Jazztel and Orange, the Notifying Party finds that their shares in terms of revenue have increased faster than their shares in terms of subscribers and concludes that the reduction in prices of both companies has been less steep than that of their main competitors.

(306) The Commission finds that the arguments put forward by the Notifying Party are unconvincing. The Notifying Party implies that the absolute ratio between market shares in terms of revenues and market shares in terms of subscribers mirrors the price. However, this seems to be a gross over-simplification in particular in markets with differentiated products and product types (such as fixed Internet access services ("1p"), dual-play ("2p"), triple-play ("3p") and quadruple-play ("4p") products).

(307) Differences in the ratio between revenue shares and subscriber shares could be caused in the market for fixed Internet access services by factors such as speeds offered, product mix, brand perception or customer service, to name just a few potential factors[188]. Indeed, to take the example of Jazztel which, according to the Notifying Party, must have become less aggressive because the revenue or subscriber ratio increased, was able to gain in particular new subscribers to its triple-play offers in 2014 as illustrated in Table 16 and Table 19 while the overall subscriber share for Internet access services grew less[189].

(308) Next, looking at the development of such ratio over time does neither have to be indicative for the developments of the prices of the respective operator. The same factors mentioned in recital (306) that could distort a potential relation between the revenue or subscriber ratio and prices, could also distort any potential link between the development of such ratio and the development of prices. Those effects

186 [Reference to the Notifying Party's internal business documents]*.

187 [Reference to the Notifying Party's internal business documents]*.

188 […]*.

189 According to data contained in Table 16 and Table 19 below, Jazztel's market share grew by 2.7 percentage points from 2013 to 2014 in the possible market for triple- and quadruple-play services while its market share in the market for fixed Internet access services increased only by 0.1 percentage points.

compound further if one tries to draw conclusions based on the relative developments of such ratios between different operators[190].

(309) For the reasons outlined in recitals (301) to (308), the Commission discards the arguments of the Notifying Party derived from the alleged significance of the ratio between subscriber and revenue market shares or the developments thereof.

(310) The Commission will analyse Telefónica's incentives to compete in the market post-transaction in section 7.2.2.5.

<u>Gross add shares</u>

(311) The finding that the Parties are two important competitive forces is further supported by their gross add shares[191].

(312) Existing subscriber market shares do not fully depict the nature of competition in that market. That is because many customers may be bound by longer-term contracts, which means that, at any given time, only a fraction of the total customer base is contestable. At any given moment, competition occurs only in respect of contestable customers and entirely new customers (that is to say those who are not yet fixed subscribers at all), whose numbers have been declining significantly in recent years as the market has matured. Consequently, it would take a number of years before trends in winning new business were reflected in overall market share.

(313) In this respect, the Market Investigation has provided indications that on average the minimum contractual commitment period (that is to say the duration during which a customer cannot freely terminate its contract) of fixed Internet access services contracts is around 12 months. The minimum contractual commitment period of multiple play offers comprising fixed Internet access services, along with fixed voice services and mobile telecommunications services goes from 12 to 18/24 months, depending on whether a mobile handset is included in the offer[192].

(314) Gross add shares provide a more dynamic picture of the market, since they show how successful different providers are in attracting new customers. In contrast, market shares indicate the "stock" of clients that each provider is currently serving. As such, gross add shares that are higher than the respective (static) market shares provide an indication that a certain provider is more important for competition than suggested by its market share (and the likely increase of its market share in the future).

---

190 To provide an example: If operator A has many customers for its product A+ that pay on average EUR 50 and also customers for its product A- that costs EUR 35, whereas operator B has mostly customers that pay on average EUR 30 for the product B-, there could be several reasons to explain such difference based, for example, on the products offered, quality of customer service, brand value or subsidies. If then operator B successfully starts targeting customers using product A+ with a product B+ that is priced at EUR 45, the ratio between operator B's revenue and subscriber shares will increase whereas the one of operator A will decrease. The increase of the ratio between revenue and subscriber share of B does, however, not imply that B has become less aggressive – in fact, quite the contrary would be true –, neither is the decrease of the same ratio of operator A i a sign of a particularly aggressive conduct as, in this example, for operator A changes nothing except that he is losing customers of his product A+.

191 For the purpose of this Statement of Objections, operators A's quarterly gross adds relating to product type X have been defined as the number of new subscribers acquiring product type X with operator A in each quarter. New subscribers have been defined as subscribers of the operator who were not subscribers of a product type containing a fixed broadband component at the beginning of the relevant quarter and were subscribers of a product type containing a fixed broadband component at the beginning of the following quarter.

192 See replies to Commission Phase II Questionnaire to Competitors of 23 December 2014, question 25.

(315) The figures relative to the total active fixed subscribers and gross adds of Table 16 show how both Orange and Jazztel attract more customers than their market share would suggest. In 2014, Orange attracted […]*% of the total new customers or customers switching their provider, compared to a subscriber market share of […]*%. Likewise, in the same year Jazztel attracted.[…]*% of new or switching customers, as opposed to a subscriber market share of […]*%. Moreover, both Orange and Jazztel grew in terms of number of active subscribers and in terms of market share. Therefore, Orange and Jazztel are to be considered as important competitive forces on the Spanish telecommunications market.

(316) Furthermore, the Commission points out that Telefónica provided the number of fixed lines and not the number of fixed subscribers, as Telefónica records the number of lines in its systems. To the extent subscribers have on average more than one fixed line, both the subscriber figures as well as the number of gross adds of Telefónica in Table 16 could be overstated.

(317) The Notifying Party submits that, according to the Commission's calculations, Telefónica has the highest gross add share. That would further support the Notifying Party's claim that Telefónica, not the Parties, is the most aggressive player on the market.

(318) The Commission disagrees with this argument. As explained in paragraph 37 of the Horizontal Merger Guidelines, a merger involving undertakings that have "more of an influence on the competitive process than their market shares or similar measures would suggest" could change the competitive dynamics in a significant, anti-competitive way. Thus, the Horizontal Merger Guidelines use the term "important competitive force" to describe an undertaking that is more important for competition than its market shares would indicate. Therefore, it is very relevant to note that the gross add shares of both Parties are significantly higher than their market shares.

(319) While the Commission does acknowledge that Telefónica is a very significant competitor, its outstanding role in the Spanish telecommunication markets in general and in the retail market for fixed Internet access services in particular is already reflected in Telefónica's very high shares in those markets. The argument of the Notifying Party that Telefónica has the highest gross adds – even though less than its market shares – thus misses the point.

(320) The Notifying Party further submits that the Parties' gross add shares have been […]*. As a result, in the Notifying Party's view, the Parties cannot be considered as the most aggressive players on the market.

(321) However, the argument in recital (320) misses the point of the use of gross adds to assess whether an undertaking is an important competitive force as well. As explained in recital (318), gross adds can provide an indication of whether undertakings have more of an influence on the competitive dynamics in a specific market than suggested by their market shares. The fact that the Parties' gross add shares have consistently been significantly higher than their market shares provides a particularly strong indication of such importance. For the purposes of assessing whether an undertaking has been an important competitive force, the comparison between gross adds and market shares is relevant to assess whether such undertaking punches "above its weight", whereas a comparison of gross adds in any given year with gross adds in the previous year does not affect the finding that the respective undertaking is an important competitive force as long as the gross add shares are significantly higher than the market shares.

Table 16: Total active fixed subscriber shares and gross add shares[193] [194]

Total active fixed subscribers	2013	2014	2013	2014
Orange	[…]*	[…]*	[…]*	[…]*
Jazztel	[…]*	[…]*	[…]*	[…]*
Telefonica	[…]*	[…]*	[…]*	[…]*
Vodafone + Ono	[…]*	[…]*	[…]*	[…]*
Others	[…]*	[…]*	[…]*	[…]*
Total	**10,260,069**	**10,988,331**	**100%**	**100%**

New fixed subscribers	2013	2014	2013	2014
Orange	[…]*	[…]*	[…]*	[…]*
Jazztel	[…]*	[…]*	[…]*	[…]*
Telefonica	[…]*	[…]*	[…]*	[…]*
Vodafone + Ono	[…]*	[…]*	[…]*	[…]*
Others	[…]*	[…]*	[…]*	[…]*
Total	**2,771,020**	**2,852,919**	**100%**	**100%**

Source: Commission calculation based on data obtained from operators

Conclusion

(322) The Commission concludes that both Orange and Jazztel have played an important role in exerting competitive constraints upon each other and on remaining competitors in the recent years.

7.2.2.4. Change of the incentives of the merged entity to compete

Notifying Party's view

(323) The Notifying Party argues that the transaction will allow Orange to better compete with Telefónica and Vodafone particularly because of the higher fibre coverage of the merged entity.

(324) The Notifying Party submits that the evidence from the Market Investigation is inconclusive and Orange's internal documents do not demonstrate an intention to modify its competitive strategy. Moreover, Orange points out that a large number of respondents to the Market Investigation were not concerned about potential price increases. Orange further argues that its internal documents demonstrate that "*the main aim of the acquisition is to increase the ability of Orange to compete in the Spanish market by investing in the development of a fibre network*". In addition, Orange points out that its strategic plan expects ARPUs to continue decreasing after the transaction.

(325) The Notifying Party draws attention to the fact that the quotes that were used in the Article 6(1)(c) Decision to conclude that the merged entity would have less incentives to compete refer to the general evolution of the market "*from a passive*

193 The data contained in Table 16 relates to all product types including a fixed broadband component, that is: (i) fixed broadband only products, possibly including mobile, (ii) double play products (including fixed broadband and fixed voice), (iii) triple-play products (including fixed broadband, fixed voice and mobile) and (iv) quadruple-play products (including the triple-play services plus TV).

194 The existing subscriber numbers and the gross adds numbers for operators other than the Parties are considered confidential.

perspective" and do not mention active changes in the competitive strategy of the merged entity like new pricing policies or less aggressive marketing strategies.

(326) Moreover, the Commission would ignore the structural changes in the market – notably the transition to NGA networks, that prevent the merged entity from increasing prices or reducing aggressiveness. According to Orange, Telefónica and Vodafone/ONO enjoy a first mover advantage to acquire clients interested in VHBB. Price increases by the merged entity would only accelerate customer migration to VHBB services to the detriment of the Parties that are lagging behind in NGA roll-out. Therefore, low prices for broadband over copper provided by the merged entity would be important to disincentivise customers from migrating to competitors' VHBB services.

(327) The Notifying Party further submits in its Reply to the Statement of Objections that the internal documents of Orange on which the Commission relies in its assessment in the Statement of Objections do not mention a direct impact of the Proposed Transaction on retail prices. The Notifying Party argues that […]*[195][…]*.

(328) In that regard, the Notifying Party points out that the Commission acknowledges in the Statement of Objections that most internal documents […]*. The Notifying Party further argues that all internal documents of Jazztel have no evidentiary value when it comes to evaluating the incentives of the merged entity. Moreover, the Notifying Party objects to the use of statements by investments banks as those could not identify the reasons behind the acquisition decision of Orange.

(329) In its reply to the Letter of Facts, the Notifying Party submits that […]*.

(330) Finally, the Notifying Party claims that it would be unable to increase retail prices for fixed Internet access services offered both via DSL and via FTTH post-transaction due to the competitive pressure of the larger NGA networks of Telefónica and Vodafone. If the merged entity increased prices for DSL-based fixed Internet access services, it would create an additional incentive for its customers to switch to NGA networks. Given the current coverage of NGA networks, those customers would likely switch to either Telefónica or Vodafone. As regards the retail prices of fixed Internet access services offered via its FTTH network, the Notifying Party argues that it will have an "empty" NGA network and thus the incentive to gain customers quickly rather than to increase prices.

Commission's assessment

(331) The Commission finds that the merged entity would have lower incentives to compete on the retail market for fixed Internet access in comparison to Orange's and Jazztel's incentives on a standalone basis. That finding is based on the market structure and the expected loss of competition as a consequence of the Transaction as well as on indications of a decrease in competition contained in internal documents of Orange.

(332) The Horizontal Merger Guidelines state in paragraph 24 that "[a] *merger may significantly impede effective competition in a market by removing important competitive constraints on one or more sellers, who consequently have increased market power. The most direct effect of the merger will be the loss of competition between the merging firms. For example, if prior to the merger one of the merging firms had raised its price, it would have lost some sales to the other merging firm.*

195 [Reference to the Notifying Party's internal business documents]*.

[…] Non-merging firms in the same market can also benefit from the reduction of competitive pressure resulting from the merger, since the merging firms' price increase may switch some demand to the rival firms which in turn, may find it profitable to increase their prices. The reduction in these competitive constraints could lead to significant price increases in the relevant market".

(333) As established in section 7.2.2.3, the Proposed Transaction will combine two important competitive forces on the fixed Internet access market in Spain.

(334) For the reasons developed in this section, the Commission considers that the loss of competition between the Parties provides the merged entity with the incentive to raise prices compared to prices absent the merger. In a market characterised by decreasing prices, that could also mean an incentive to a slower decrease of prices following the Proposed Transaction. Loss of competition as a result of a merger can arise because at least some of the sales that would have been lost to competitors as a result of a price increase by one of the merging parties pre-merger will be diverted to the other merging party post-merger. A merger thereby changes pricing incentives (since some sales that would be lost after a price increase pre-merger will be diverted to the products of the other merging party post-merger) and may lead to upward pricing pressure. Section 7.2.7 sets out the quantitative assessment of the consequences of the Proposed Transaction and suggests also that the merged entity is likely to have substantial incentives to significantly increase its prices as a consequence of the loss of competition between the Parties.

(335) In particular the transaction will lead to a loss of competitive pressure by the low-cost, convergent offers of Jazztel. Internal documents of Orange describe […]*[196][…] Jazztel is seen as the only low-cost, convergent operator[197]. According to internal documents of Orange, the low-cost, convergent offers of Jazztel […]*[198]. […]* Telefónica expects a "*more rational behaviour in the Spanish markets*" and thus less competitive pressure from Orange after the merger[199].

(336) Those considerations further are supported by a statement in an internal document of Orange according to which […]*[200].

(337) The main reasons for the Commission to conclude that the incentives of the merged entity to compete will decrease after the merger, emerge from internal documents of Orange showing that Orange assumes that the Proposed Transaction will lead to less

---

196 [Reference to the Notifying Party's internal business documents]*.

197 [Reference to the Notifying Party's internal business documents]*.

198 [Reference to the Notifying Party's internal business documents]*.

199 "*[…] and now it looks like we are reaching a point with the different players, namely the consolidated or convergent players of the market -ourselves, Vodafone and Orange-, would have similar ARPUs to defend on the existing customer base both on the wireline and on the wireless side. So, we forecast a more rational Spanish market […]*" José María Álvarez-Pallete López, Chief Operating Officer, CEO and Chairman of Telefónica Europe Division, Telefónica January-September 2014, Results Conference Call Transcript, 12 November 2014, Doc ID 1459; "*We see that from our perspective, I mean, the consolidation of the market, the example that you gave on Vodafone ONO, but potentially also the case with Orange, Jazztel means that the major competitors in Spain on the convergence side are going to have kind of similar ARPUs, overall ARPUs in the blended scenario, which means that the average mobile ARPU and the average wireline ARPU is going to be completely similar once you put both things together. […]So overall, we think that we should expect a more rational performance of behaviour from our competitors, as they become integrated.*" José María Álvarez-Pallete López, Chief Operating Officer, CEO and Chairman of Telefónica Europe Division, in an earnings call on 25 February 2015, DocID 1876

200 [Reference to the Notifying Party's internal business documents]*.

competition in the Spanish markets. That is expressed in different ways – usually without mentioning a direct impact on (retail) prices[201] […]*[202]. Despite the argument of the Notifying Party that that document was not drafted during the preparation of the acquisition of Jazztel approximately half a year later, the Commission finds that the document is in sufficiently close context to the transaction to provide insights on the effects of the acquisition of Jazztel as expected by Orange.

(338) Other documents refer to […]*[203] as a result of the transaction or […]*[204] […]*[205].

(339) That internal due diligence assessment of Orange was featured prominently in documents summarizing the transaction for the purpose of a decision on the transaction by Orange's internal hierarchy. […]*.

(340) The most important synergies which Orange assumed would be the result of the transaction are […]*[206]. Those synergies imply, according to this document[207] that the consolidation […]*[208]. […]*[209]. On the same slide in this document[210], Orange points out that […]*[211].

(341) The Commission assumes that the synergies expected from the transaction by Orange have been an important factor in deciding whether to pursue the acquisition of Jazztel or not. They have even been taken into account in calculating the price Orange offers to Jazztel's shareholders. According to a press release of Orange, Orange's offer values Jazztel "*at Enterprise Value / EBITDA 2015-multiple of 8.6x after accounting for the synergies generated by the integration of the two entities*"[212]. The press release continues to state that the transaction "*will generate estimated global synergies for the combined entity of up to 1.3 billion euros*"[213].

(342) Those synergies of "up to 1.3 billion euros" referred to in recital (341), that have been used to calculate the price offered to Jazztel's shareholders […]* (340). Therefore, the argument of the Notifying Party, that the assessment of the incentives of the merged party to compete is based only on a limited number of documents misses the point. The document [Reference to the Notifying Party's internal business documents]* summarizes the key expectations and calculations of Orange that formed the basis for the internal decision to acquire Jazztel as well as for calculating the consideration offered to shareholders of Jazztel. Its evidentiary value for the reasons and expectations of Orange regarding the transaction is thus of high significance.

(343) […]*.

(344) […]*.

---

201 […]*.
202 [Reference to the Notifying Party's internal business documents]*.
203 [Reference to the Notifying Party's internal business documents]*.
204 [Reference to the Notifying Party's internal business documents]*.
205 [Reference to the Notifying Party's internal business documents]*.
206 [Reference to the Notifying Party's internal business documents]*.
207 [Reference to the Notifying Party's internal business documents]*.
208 [Reference to the Notifying Party's internal business documents]*
209 Calculated as three consecutive and compounding increases of […]* and […]* respectively.
210 [Reference to the Notifying Party's internal business documents]*.
211 [Reference to the Notifying Party's internal business documents]*.
212 Press release by Orange "Orange to launch a voluntary offer to buy the Spanish operator Jazztel" dated 15 September 2014, Doc ID 744-177.
213 Press release by Orange "Orange to launch a voluntary offer to buy the Spanish operator Jazztel" dated 15 September 2014, Doc ID 744-177.

(345) The presentation, referred to in recital (341), provides a clear explanation of how such synergies have been derived. […]*[214]. […]*[215]. […]*.

(346) Furthermore, based on the presentation, the argument of the Notifying Party that […]* seems implausible. […]*[216]. […]*[217]. […]*.

(347) It also seems unreasonable to assume that […]*. All those factors are general market developments that evolve irrespective of the Proposed Transaction. […]*

(348) […]*. For those reasons, the Commission concludes that it is evident, even from the presentation itself, that […]*.

(349) The Commission made substantial efforts to retrace in internal documents […]* and requested further information several times and finally in a decision pursuant to Article 11(3) of the Merger Regulation. In its response to the Article 11(3) decision, the Notifying Party provided some additional documents that contain the same figures as in the [Reference to the Notifying Party's internal business documents]* presentation and show that those figures have been provided by Orange to its investment bank. However, the respective values are always imported from another excel file[218].

(350) In its [Reference to the Notifying Party's internal business documents]*, Orange assumes that in a stand-alone case, the ARPU will amount to, by the end of […]*, EUR […]* for convergent offers, EUR for mobile offers[219]. In the same documents, Orange also forecasts the development of ARPUs in case of a merger with Jazztel. Under such assumption, Orange envisages the average ARPUs of its customers to amount at the end of […]* to EUR […]* for converged offers, EUR […]* for fixed broadband offers and EUR […]* for mobile offers[220].

(351) […]* whereas the main opportunity mentioned is […]*[221].

(352) A further document, an Excel file named [Reference to the Notifying Party's internal business documents]*[222], contains forecasts by Orange of several figures related to the mobile and fixed broadband ("FBB") business of all major telecommunication operators in Spain. Regarding the ARPUs, the document states within the slide entitled [Reference to the Notifying Party's internal business documents]*[223] the estimated ARPUs of Orange for mobile and FBB customers from 2012 to 2018 as well as the resulting compound annual growth rate ("CAGR") between 2013 and 2018. That information is complemented by a similar set of figures a few lines further down within the document that are described as […]*[224].

(353) The respective figures are set out in the following table:

---

214 [Reference to the Notifying Party's internal business documents]*.
215 [Reference to the Notifying Party's internal business documents]*.
216 [Reference to the Notifying Party's internal business documents]*.
217 [Reference to the Notifying Party's internal business documents]*.
218 [Reference to the Notifying Party's internal business documents]*.
219 [Reference to the Notifying Party's internal business documents]*.
220 [Reference to the Notifying Party's internal business documents]*.
221 [Reference to the Notifying Party's internal business documents]*.
222 […]*.
223 […]*.
224 […]*.

Table 17:

ARPUs of ORANGE	'12	'13	'14e	'15e	'16e	'17e	'18e	CAGR 13/18
[…]*	[…]*	[…]*	[…]*	[…]*	[…]*	[…]*	[…]*	[…]*
[…]*	[…]*	[…]*	[…]*	[…]*	[…]*	[…]*	[…]*	[…]*
[…]*[225]		[…]*	[…]*	[…]*	[…]*	[…]*	[…]*	[…]*
[…]*[226]		[…]*	[…]*	[…]*	[…]*	[…]*	[…]*	[…]*

Source: Notifying Party

(354) According to the figures in Table 17, the […]*. That becomes obvious if the CAGR is calculated based on the figures in Table 17 for the period between 2015 and 2018, as follows:

Table 18:

ARPUs of ORANGE	'15e	'16e	'17e	'18e	CAGR 15/18
[…]*	[…]*	[…]*	[…]*	[…]*	[…]*
[…]*	[…]*	[…]*	[…]*	[…]*	[…]*
[…]*	[…]*	[…]*	[…]*	[…]*	[…]*
[…]*	[…]*	[…]*	[…]*	[…]*	[…]*

Source: Commission based on Notifying Party

(355) The change in the CAGR between 2015 and 2018 in case of […]* amounts to […]*% in the mobile market and […]*% in the fixed market. […]*[227] […]*[228] […]*.

(356) The Commission finds that those numbers do not appear to be "calculations, trash and other byproducts" that could be found in a working file at some point in time as argued by the Notifying Party. While the Notifying Party is correct in pointing out that the respective table in the excel file available to the Commission is not used in other parts of the excel file, the Commission notes that the values in the excel file for the […]* scenario are derived from another excel file – a certain cell in a slide called […]* of an excel file named […]* which was located in a subfolder called […]*.

(357) The Commission requested from Orange that other excel file and further related documents by a decision pursuant to Article 11(3) of the Merger Regulation. While Orange was not able to provide the exact files linked in the excel file, the additional documents provided in response to that decision show that those calculations have neither been byproducts nor have they been made by investment banks. Several other excel files contain those or similar values which are all not calculated within the respective excel file but included by referencing to another excel file.

(358) Neither the excel file […]* nor any other document that actually calculates the ARPUs following the Proposed Transaction has been provided to the Commission. […]*[229].

(359) Even though the Commission was thus unable to fully retrace and understand how the changes in the ARPU following the merger have been calculated, the Commission finds that for the reasons set-out, the respective internal documents provide sufficient evidence that the […]* assumed by Orange will be caused by a

225 […]*.
226 […]*.
227 […]*.
228 […]*.
229 [Reference to the Notifying Party's internal business documents]*.

loss of competition from the merged entity following the transaction compared to the competitive pressure of Orange and Jazztel as separate entities going forward.

(360) Orange's estimate is also shared by others. An internal document of Jazztel […]*[230]. In the same document, […]*'s analysis of the proposed merger is quoted […]*.

(361) Contrary to the Notifying Party's argument, the higher revenues are not just "passive" developments. They are, first of all, triggered by the acquisition of Jazztel by Orange. Furthermore, the different assumptions for the average revenues per customer show that Orange does not just assume to profit from a larger customer base but rather to generate more revenues per customer. The Commission deems it highly unlikely that such different averages can be solely explained by factors other than higher prices. Such potential explanation would also conflict with the risk mentioned in the document as the highest risk in the stand-alone scenario that clearly links "ARPU erosion" to "competitive aggressiveness"[231]. A slower decrease of ARPUs therefore seems to be caused by less competitive aggressiveness.

(362) The Commission acknowledges that [Reference to the Notifying Party's internal business documents]* also shows that Orange plans to continue increasing its market shares after the merger with Jazztel and thus aims at retaining its competitiveness and aggressiveness. However, taking into account that Orange also estimates that its ARPUs and, as already explained, the prices for its products […]*, the Commission finds that the merged entity will likely compete less aggressively than the two Parties absent the merger.

(363) The structural changes in the market which, according to the Notifying Party, would prevent the merged entity from reducing aggressiveness because of the first mover advantage of Telefónica and Vodafone/ONO in NGA networks will, in the Commission's assessment, not provide sufficient incentives for the merged entity to compete as aggressively as the two Parties on a stand-alone basis. The Notifying Party argues that price increases by the merged entity would accelerate customer migration to VHBB services and thus benefit Telefónica and Vodafone because of their larger NGA networks.

(364) The argument in recital (363) assumes that only planned or likely price increases of the merged entity would indicate lesser incentives to compete. However, in particular in a market in which prices decreased consistently over the last few years, also the likelihood of prices decreasing slower than without the merger is an indicator for fewer incentives to compete. Furthermore, the trend towards VHBB services might have even increased competition between Orange and Jazztel absent the Proposed Transaction. Given that Telefónica and Vodafone can offer VHBB services to a much larger amount of customers, Orange and Jazztel would have been both forced to compete for customers with attractive xDSL offers in a large area of Spain where both would have had no NGA network.

(365) The responses to the Market Investigation did not provide a clear opinion of the market participants about the incentives of the merged entity to compete. Respondents to the Phase II questionnaires had no majority view on whether the incentives of the merged entity to compete will increase, decrease or remain the same. Five respondents answered that the incentive to compete will decrease, four answered that it will stay the same and three respondents replied that it will

230 [Reference to Jazztel's internal business documents]*.

231 [Reference to the Notifying Party's internal business documents]*.

increase[232]. While the reply that the incentives of the merged entity to compete will decrease was most frequent, the Notifying Party is correct in pointing out that taking together the replies that the incentives will not change or increase, a small majority does not foresee a decrease in the incentives of the merged entity to compete.

(366) Respondents replying that the incentives will increase or stay the same provided only few reasons for their opinion. One respondent stated that the market is competitive and is likely to remain that way. The Commission also notes that there is a discrepancy between Telefónica's response to the market questionnaire and other public statements by Telefónica. In response to the market questionnaire Telefónica stated that the merger will increase the incentives of the merged entity to compete and explained that the Proposed Transaction "*will create a stronger and more complete operator*" and "*enable Orange to compete even more fiercely against Telefónica and other infrastructure operators*"[233]. In a statement addressed to investors, however, Telefónica expects "*a more rational pricing scenario*" in which Vodafone and Orange "*need to defend higher ARPUs in order to make sure that the value that they acquired is not destroyed*" and "*being more focused on defending their core customer segments*"[234]. While it is not obvious whether only the answer to the questionnaire or only the statement addressed to investors or both of those statements have been guided by strategic considerations, the Commission finds that the strong discrepancy between those statements render Telefónica's response to the question for the incentives of the merged entity to the Market Investigation non-credible. Instead, the detailed arguments, addressed to Telefónica's investors, about why Telefónica expects Orange to behave more "rationally" provide another indication that the incentives of the merged entity to compete are likely to decrease.

(367) Respondents taking the view that the merged entity will have fewer incentives to compete provided a number of arguments for their opinion. Competitors point to the disappearance of one of the major players in the market for fixed Internet access services and to the fact that only three nation-wide players will remain active on the market. Another respondent replied that the high market shares of the remaining nation-wide operators will decrease their incentive to compete and that the merger would remove Jazztel, a particularly challenging and innovative competitor. However, the Commission also takes into account that those, as well as all other, answers might have been guided by individual interests of the respective parties in the outcome of the Commission's assessment.

(368) As regards the Notifying Party's argument that it will not be able to increase its prices for DSL Internet access services to prevent its subscribers from switching to NGA networks and thus likely to either Telefónica or Vodafone, the Commission underlines, first of all, that in markets with falling prices, a slow-down of the price decrease would also give rise to competitive concerns and that, based on the assessment in section 7.2.2.4, is precisely what Orange is assuming to be the result of the Proposed Transaction.

(369) Moreover, absent the Proposed Transaction, Jazztel would also compete in most areas for customers that are not willing to pay a premium for fixed Internet access services via a NGA network. Therefore, regardless of the pricing pressure exercised

232 See replies to Commission Phase II Questionnaire to Competitors of 23 December 2014, question 35.

233 See reply of Telefónica to Commission Phase II Questionnaire to Competitors of 23 December 2014, question 35.1.

234 José María Álvarez-Pallete López, Chief Operating Officer, CEO and Chairman of Telefónica Europe Division, in an earnings call on 25 February 2015, Doc ID 1876.

by existing NGA networks, competition for the remaining DSL customers will be reduced. Absent such additional competitive pressure from Jazztel, Orange could likely decrease its prices less without triggering higher churn towards NGA offers of Telefónica or Vodafone.

(370) Orange also claims that the merged entity will have an incentive to fill its FTTH network with new customers and thus to compete aggressively in areas in which the merged entity rolls-out an own fibre network and thus will have no incentive to raise prices. However, again, it is more likely that, absent the Proposed Transaction, the situation would have been even more competitive. If either Jazztel or Orange would have rolled-out fibre in the same area absent the transaction, they would have had the same incentives to "fill-up" their respective networks. Therefore, according to Orange's argument, competition would have increased and thus, prices would have likely decreased more, in a stand-alone scenario than if the Transaction was concluded.

Conclusion on the change of the incentives of the merged entity to compete

(371) The Commission concludes that the merged entity's incentives to compete aggressively would be significantly weaker than those of Orange and Jazztel without the transaction.

7.2.2.5. Likely reaction of competitors

Notifying Party's view

(372) The Notifying Party argues that the remaining competitors, and in particular Telefónica, are already "price challengers". Telefónica had added services to its multiple play bundles without increasing prices (for example, TV channels) and will continue to compete aggressively by rolling out its fibre network. In the Notifying Party's view, the Transaction will rather incentivise Telefónica to accelerate its fibre roll-out in order to continue benefiting from a first mover advantage.

(373) As regards the Commission's interpretation of internal documents of Orange, the Notifying party submits that the Commission misinterprets the statement that Vodafone/ ONO will limit itself to consolidate its position. Instead, the merger between Vodafone and ONO would rather allow Vodafone to cross-sell its services.

(374) Furthermore, the Notifying Party argues that Telefónica is a dominant firm and very aggressive in getting additional clients and revenues. According to Orange, Telefónica's statement quoted by the Commission whereby Telefónica does "try to drive the market" and that it provoked a "painful" process towards convergence shows the importance of Telefónica in the Spanish telecommunication markets.

(375) With regard to the price increases recently announced by Telefónica for dual-play services, the Notifying Party argues that it is just another example of Telefónica's market power by which Telefónica tries to further drive the market towards quadruple-play offers.

Commission's assessment

(376) According to the Horizontal Merger Guidelines, "*Non-merging firms in the same market can also benefit from the reduction of competitive pressure that results from the merger, since the merging firms' price increase may switch some demand to the rival firms, which, in turn, may find it profitable to increase their prices. The*

reduction in these competitive constraints could lead to significant price increases in the relevant market"[235].

(377) In line with the Horizontal Merger Guidelines, the Commission decision concerning Hutchison 3G Austria/Orange Austria noted that just as the merged entity, "competitors would also face the same trade-off between attracting additional new customers by practising lower prices and cannibalising the flow of customers who would anyway have switched to them"[236] and found that "other competitors are unlikely to increase supply or reduce prices in response to a price increase by the merged entity. Even assuming competitors are not capacity constrained, it is unlikely that they would increase supplies in response to a price increase of the Parties. Since the products are endogenously differentiated in terms of their market positioning, generally accepted and robust economic theory demonstrates that the profit-maximising response of competitors to a price increase would be to increase prices themselves"[237]. A similar conclusion was drawn in Hutchison 3G UK/Orange Austria[238]. Although the cases cited concerned primarily the retail mobile telecommunications services market, the Commission considers that the market characteristics of the retail market for fixed Internet access services are very similar and the Spanish nationwide operators are active in both markets.

(378) In the Commission's view, the reasoning in recitals (376) and (377) applies to this case. Both merging Parties exert an important competitive pressure on all other competitors, including Telefónica and Vodafone. The change of incentives of the merged entity following the merger and the likely price increase by the merged entity would significantly reduce that pressure on those operators' customer bases and induce some of the merged entity's customers that would have remained with the Parties in the absence of the transaction to switch to Telefónica and Vodafone. Accordingly, those operators would find it easier to retain their customers and could even attract new customers who would switch away from the merged entity. The resulting increase in the demand faced by those operators provided them with an incentive to raise its prices in turn.

(379) The finding that competing firms have incentives to raise prices as a response to a price increase by another firm is a general characteristic in standard models of oligopolistic competition[239]. That characteristic is also reflected in the Commission's quantitative analysis which shows that, in response to a price increase by the Parties, it is likely that the Parties' rivals, including Telefónica and Vodafone, would, all else being equal, also raise their prices so that the transaction is likely to lead to general price increases on the market compared to what would be the case in the absence of the merger.

(380) In the present case, the Commission found several indications that operators indeed tend to follow price changes of their competitors. Therefore, it must be anticipated

---

235 Horizontal Merger Guidelines, paragraph 24.

236 Commission Decision of 12 December 2012 in Case No COMP/M.6497 – *Hutchison 3G Austria / Orange Austria*, recital 374.

237 Commission Decision of 12 December 2012 in Case No COMP/M.6497 – *Hutchison 3G Austria / Orange Austria*, recital 367.

238 Commission Decision of 28 May 2015 in COMP/M.6992 Hutchison 3G *UK / Telefónica Ireland,* recital 582.

239 See also Commission Decision of 12 December 2012 in Case No COMP/M.6497 – *Hutchison 3G Austria / Orange Austria*, recital 369. See also BULOW, J. I., J. D. GEANAKOPLOS, AND P. D. KLEMPERER (1985): "Multimarket Oligopoly: Strategic Substitutes and Complements," The Journal of Political Economy, 93(3), 488–511.

that competing operators will respond to price increases of the merging parties with raising their own prices, implying a more pronounced market-wide price increase.

(381) Internal documents of Orange show prices of its products are intentionally set close to its competitor's prices. […]*[240]. […]*[241].

(382) Likewise, the document discussed in recital (286) documents that Jazztel reacts to the introduction of the attractive […]* products by Orange by offering more attractive conditions to its own customers. That is another instance that illustrates that competitors tend to follow price changes of their competitors.

(383) Regarding the competitive behaviour absent the Proposed Transaction by Vodafone, an internal document of Orange setting out Orange's strategy for the 2015-2018 period explains that […]* The Commission considers that those quotes distinguish cross-selling opportunities from other, presumably price-related aggressive moves. The latter are clearly not expected from Vodafone by Orange.

(384) In the same document, […]*'s future behaviour is described as […]*[242]. Customer retention, as opposed to customer acquisition, cannot be described as a particularly aggressive focus that Orange expects from […]*[243].

(385) Another internal document of Orange describes the current priorities and main risks for the main market players. For Telefónica, Vodafone and Orange, one of the main risks is described as […]*[244]. It follows from that document that Orange perceives those players as unlikely to compete aggressively by themselves.

(386) The expectations of Orange for the development of the Spanish market as of 2015 are set forth in another internal document of Orange. According to that document, Orange assumes that […]*[245].

(387) In general, it appears from those documents that […]*

(388) That is also confirmed by certain public statements of Telefónica executives according to which Telefónica expects consolidation to lead to a "more rational" market with stabilising prices and that Telefónica will be driving the market toward a rational price policy, described as a market where players would mainly try to consolidate their existing customers in fixed and mobile services. Thus, the Chief Operating Officer, CEO and Chairman of Telefónica Europe Division, Mr. Álvarez-Pallete López, stated the following at an earnings call with investors on 12 November 2014:

"So overall, if you ask me to give you an overall picture of the Spanish market, we see a much more rational behaviour of the market. It has been painful because we have been provoking this convergent process and now it looks like we are reaching a point with the different players, namely the consolidated or convergent players of the market -ourselves, Vodafone and Orange-, would have similar ARPUs to defend on the existing customer base both on the wireline and on the wireless side. So, we forecast a more rational Spanish market and this is starting to flow through the

---

240 [Reference to the Notifying Party's internal business documents]*.

241 [Reference to the Notifying Party's internal business documents]*.

242 [Reference to the Notifying Party's internal business documents]*.

243 By definition, customer retention is focused on retaining the existing customers of a company. A firm focusing on its existing customer base will compete less aggressively for customers of other companies and will thus impose less competitive pressure on its competitors.

244 [Reference to the Notifying Party's internal business documents]*.

245 […]*.

stabilisation that you saw in the ARPU of Fusión. So we think this is the way to go. This is the way we, as the leaders, are going to try to drive the market and I think that the consolidation processes are going to be one more step into that direction."[246]

(389) Telefónica's Europe's CEO's statement supports, in the Commission's view, that the other nation-wide operators do not have an incentive to make-up for the loss of competition by Jazztel in several ways. First, it shows that Telefónica expects consolidation to lead to a "more rational market". Secondly, Telefónica does not only assume that to be a mere result of the transaction but will also aim to "drive the market" that direction. It is clear that Telefónica will not compete aggressively if the Proposed Transaction is implemented.

(390) Furthermore, the opinion supports the assessment of the Commission concerning Orange's reduced incentives to compete after the merger. It also expresses that the same reasoning that let the Commission conclude that the merged entity will have lesser incentives to compete also applies to Telefónica and Vodafone. Both face the same trade-off when deciding whether to gain new customers or to protect the margins of their current customers.

(391) In the view of the Commission, this statement also shows that Telefónica does not expect either Orange or Vodafone to compete aggressively after the merger between Orange and Jazztel. More precisely, Mr. Álvarez-Pallete López argues that Orange and Vodafone will have "higher ARPUs" to defend as well as "being more focused on defending their core customer segments".

(392) The finding of a less competitive behaviour on behalf of Telefónica is supported by the fact that on 5 February 2015, Telefónica reportedly announced a price increase for its fixed broadband products that are not bundled with a mobile or TV component, applicable as from 7 April 2015[247]. Prices for its ADSL products will increase by EUR 3, an increase of 10-12%[248]. Telefónica will also raise prices for optical fibre capped at 100 Mbps by EUR 2 or 4%, from EUR 48 to EUR 50. That increase demonstrates Telefónica's intention to drive the retail market of fixed Internet access services toward higher prices. Given the price increases for broadband connections that are not bundled with mobile or TV services, it can be expected that Telefónica would not counter any price increases for fixed Internet access products by the merged entity.

(393) That the pricing decision was not taken to facilitate the migration of customers to quadruple-play products, as argued by the Notifying Party, is demonstrated by the subsequent price increase of all quadruple-play services. Effective as of early May 2015, Telefónica increases the price of all Fusion products by EUR 5 per month, a

---

246 "Recent consolidation processes" being described earlier as the Vodafone/ ONO transaction, and the potential Orange/ Jazztel transaction. José María Álvarez-Pallete López, Chief Operating Officer, CEO and Chairman of Telefónica Europe Division, Telefónica January-September 2014, Results Conference Call Transcript, 12 November 2014, Doc ID 1459.

247 Expansion, "Movistar, Vodafone y Orange empiezan a subir precios tras 7 años", 19 February 2015, Doc ID 1571. ADSL Zone, "Movistar aumentará la velocidad del ADSL por 3 euros al mes", 3 February 2015, Doc ID 1570 http://www.adslzone.net/2015/02/03/maxima-velocidad-adsl/ (retrieved on 19 February 2015).

248 In return, Telefónica will lift the previous speed limit of 10 Mbps so that – depending on the quality of each copper line – certain customers may get slightly improved Internet speeds. Having said this, all affected customers will have to pay more as they do not have the option to stay with the current ADSL product capped at 10 Mb/s. Moreover, there will be a portion of customers who will not benefit of slightly improved speeds who will still suffer the price increase.

price increase of 12% from EUR 42 to EUR 47 for the least expensive Fusion product[249]. That additional price increase by a roughly equal percentage than the price increase for dual-play products[250] demonstrates that Telefónica does not intend to facilitate the migration of customers to quadruple-play products through those price increases but rather increases the prices for all products including a fixed Internet access service.

(394) As to Vodafone/ ONO, both the CEO and the European CEO of Vodafone have stated that consolidation in Spain would permit Vodafone/ ONO to raise prices and that today the current situation is hindering such price increases. Philipp Humm (Regional CEO, Europe of Vodafone) said: *"[W]e are still faced with a very aggressive price in bundle proposition in Spain. As long as this is the case, it's very hard for us to raise prices as TV has been right now given in for free in the big bundles from Telefonica. As this things* [sic] *maybe change over time, we should be able to increase prices; and then, we are then in a very good position again here with Ono.*"[251]. That statement does not only express the willingness of Vodafone to increase prices, but also the expectation of a less aggressive competitive behaviour on behalf of Telefónica.

(395) Philipp Humm added that Vodafone had already "*carried out quite a lot of price increases in the last times, be it in KD* [Kabel Deutschland in Germany], *on fixed line in Spain…*"[252]. Responding to a question enquiring about possible price increases by Telefónica in Spain, Vittorio Colao (Group CEO Vodafone) noted that "[*W]ith more consolidation in Spain, with more investment in 4G, with more homes reached by fiber from us and Orange, in theory, longer term, even Spain could follow a more kind of healthy path*."[253].

(396) On 2 March 2015, Vodafone's international CEO Vittorio Colao said at the Mobile World Congress in Barcelona that he would like the Spanish market to be more profitable to support investments[254]. In this regard, he considers it necessary to increase the prices of these telecommunications services if the strong pace of investments that companies are making is to be maintained, especially in the deployment of the 4G mobile network and fibre optical network.

(397) In the view of the Commission, that statement of Vodafone's international CEO further shows that Vodafone has no incentive to compete aggressively. It complements the statements of Philipp Humm (Regional CEO, Europe of Vodafone) and the earlier statement of Vittorio Colao quoted in recital (395).

---

249 Article from El Pais dated 27 March 2015, "*Telefónica sube 5 euros a los clientes de Movistar Fusión a partir de mayo*", Doc ID 2477

250 Similar to the price increase for fixed Internet access offers, Telefónica increases the speed limits of its Fusion products together with increasing the prices. A product that previously had a speed limit of 10 Mbit/s will now allow for downloads with up to 30 Mbit/s, the Fusion product that allowed for up to 100 Mbit/s will not provide Internet access sevices with a speed of up to 300 Mbit/s. However, since this speed increase is not optional but mandatory, it effectively increases the price for all customers.

251 Vodafone Group Plc (VOD) Earnings Report: Q3 2014 Conference Call Transcript, 5 February 2015, TheStreet Transcripts, http://www.thestreet.com/print/story/13036807.html (retrieved on 6 February 2015), Doc ID 1453.

252 Ibid.

253 Ibid.

254 As reported by an article of El Mundo on 2 March 2015, "Vodafone cree que los precios deben subir 'para apoyar las inversiones'", http://www.elmundo.es/economia/2015/03/02/54f4972922601ddf108b4573 html, (retrieved on 6 May 2015), Doc ID 2762.

(398) As regards the internal documents of Orange, the statements […]*, […]*, already imply that also in the view of Orange, the loss of competition by Jazztel is not completely offset by the other remaining operators.

(399) Specifically regarding low-cost, converged offers, internal documents of Orange suggest that […]*[255].

(400) The same document sets out that other players have difficulties in capturing relevant market shares with low-cost, convergent offers. With regard to […]*[256].

(401) The documents go on explaining that it is also difficult for "ethnic players", that is to say, in particular mobile operators that focus on specific ethnic minorities, to address the low-cost, convergent part of the market[257].

(402) As regards the argument of the Notifying Party that Telefónica is a strong player that has considerable market power, the Commission notes that the existence of strong players before and after the transaction is not sufficient to assume that the merger would not significantly impede effective competition in the respective markets. In the view of the Commission, the statements by Telefónica quoted in this section and the announced price increases by Telefónica of up to 12% for all products including a fixed Internet access service demonstrate that Telefónica will not make-up for the loss of competition caused by the Transaction.

(403) While thus Telefónica and Vodafone lack the incentives to make-up for the loss of competition caused by the Proposed Transaction, other market participants and in particular the three regional cable operators lack the ability to do so. The three regional cable operators are each only active in one region of Spain. Together, they account for less 5% of all subscribers to fixed Internet access services in Spain. The Commission deems their limited regional presence to be too small in order to make-up for the loss of competition by a nation-wide competitor since customers are only able to procure fixed Internet access services from an operator that is present where the services are to be provided.

Conclusion on the likely reaction of competitors

(404) The Commission concludes that competitors of the merged entity, namely Telefónica and Vodafone/ ONO, are unlikely to counter potential price increases of the merged entity after the Proposed Transaction.

7.2.2.6. Quantitative analysis

(405) The quantitative analysis presented in section 7.2.7 contains an assessment of the likely effect of the transaction on the average price of products including a fixed Internet broadband component[258]. Even though that assessment predicts price increases for product bundles that include not only fixed Internet access services, the Commission deems that the results of the analysis in section 7.2.7 apply to fixed Internet access for several reasons.

(406) As regards the data that is used for the quantitative analysis, bundles consisting of several products that are sold for one joint price constitute the vast majority of all

---

255 [Reference to the Notifying Party's internal business documents]*.

256 [Reference to the Notifying Party's internal business documents]*.

257 [Reference to the Notifying Party's internal business documents]*.

258 These are (i) fixed broadband only products, possibly including mobile, (ii) double play products (including fixed broadband and fixed voice), (iii) triple-play products (including fixed broadband, fixed voice and mobile) and (iv) quadruple-play products (including the triple-play services plus TV).

fixed Internet access services. Looking at new contracts for fixed Internet access services, they even represent more than 99% of all contracts. Excluding such bundles would disregard the vast majority of fixed Internet access services.

(407) Furthermore, taking into account the prices for bundles is the only way to properly reflect the actual market conditions in Spain. Pricing decisions of the market participants are made on the basis of the price and the margin of the bundle, not on hypothetical prices of the included components. The overall price cannot reasonably be split into prices for individual components as any allocation of the overall price to the individual components would be arbitrary.

(408) As regards the results of the quantitative analysis, the Commission notes that the likely price increases predicted in section 7.2.7 are expressed in terms of percentages and not in terms of absolute amounts. In light of this, and considering the difficulties of disaggregating the price of the bundle into the prices of the included components, for the purpose of this Decision the Commission considers it reasonable to assume that the same relative price increases apply to each of the components included in the relevant bundles (including the fixed Internet access component).

(409) The Commission further notes that the Notifying Party itself assessed potential price effects on the market for fixed Internet access services by taking account of all bundles that include such services and by including the entire revenues and costs of bundles into the analysis.

(410) According to the baseline scenarios, the average price increase across all operators and across all products including a fixed broadband component is in the range of 3 to 7% based on 2013 data and 3 to 6% for 2014 data[259]. The sensitivity scenario using diversion ratios that are exclusively based on purely horizontal switches (that is, customer's switching across operators but within a given product type) indicates that the predicted price increases could also reach up to 10% according to 2013 data and 7% for 2014 data.

(411) Those average price increases are a combination of a significant expected price increase for triple and quadruple-play products and a more limited expected price increase for dual-play products. As explained in section 7.2.7, no price increases have been computed for fixed broadband only products (possibly including mobile as well), as those products only represent 1% of the new contracts including a fixed broadband component.

(412) The lower bound of the estimated price increases has been obtained by including in the analysis an assumption of strong diversion to the outside good (that is, the hypothesis whereby, following a price increase, customers may choose not to subscribe to any fixed broadband product at all, instead of simply switching provider) equivalent to the one put forward by the Notifying Party[260]. The Commission considers that such an assumption is rather extreme, mainly because the elasticity and the modelling assumed by the Notifying Party lead to rather implausible results[261]. Incorporating this rather extreme assumption reduces significantly the estimated price effects but not to an extent that allows dispelling any concern of potential price increases post-merger. The price increases from the analysed transaction are expected

---

259 The estimated price increases from the baseline scenarios presented in the Statement of Objections were 5-10%.

260 This is discussed in more detail in section 5.7 of Annex A.

261 See section 5.7 of Annex A.

to be closer to the upper bound of the Commission's estimates than to this purely illustrative lower bound.

(413) The details of the robustness checks of the Commission's quantitative analysis and the Commission's responses to the arguments raised by the Notifying Party are set out in in section 7.2.7 and Annex A. In particular, the sensitivity analysis conducted on the effect of the assumption of no cross bundle diversions (section 6.2 of Annex A) shows that while considering that cross bundle diversions slightly increase the price effects for 2p and slightly decreases the price effects for 3p, it does not materially affect the overall price increase expected on average across all products including a fixed broadband component.

7.2.2.7. Limited likelihood of sufficient entry

(414) In section 7.2.8.1, the Commission sets out why it deems that sufficient entry to markets including fixed Internet access services is unlikely. Based on the analysis in that section, the Commission concludes that the likely effects of the Proposed Transaction on the retail market for fixed Internet access services are not offset by low barriers to enter this market.

7.2.2.8. Conclusion on horizontal non-coordinated effects on the market for fixed Internet access services

(415) In light of recitals (185) to (414), the Commission considers that the Proposed Transaction would give rise to non-coordinated anti-competitive effects because it involves, in an already highly concentrated market, the elimination of important competitive constraints that the merging parties previously exerted upon each other together with a reduction of competitive pressure on the remaining competitors. Moreover, as discussed below in section 7.2.8.2 and 7.2.4.7, those non-coordinated anti-competitive effects are not offset by countervailing factors such as efficiencies. Therefore, the Commission considers that the Proposed Transaction would significantly impede effective competition on the market for fixed Internet access services in Spain.

7.2.3. Possible retail market for dual-play services

(416) In a possible market for dual-play services, Orange holds a market share in terms of subscribers of [10-20]*% and Jazztel of [10-20]*%. The Parties' combined market share would thus amount to [20-30]*%. As such, the combined market share of the Parties does not exceed the market share threshold indicated in paragraph 18 of the Horizontal Merger Guidelines, under which there is a presumption that the transaction is unlikely to impede effective competition.

7.2.3.1. Removal of two important competitive forces

(417) As to whether the two Parties can be regarded as important competitive forces in a possible market for dual-play services, the Commission notes that certain elements in the respective assessment for fixed Internet access services relate specifically to triple-play products while others also apply to dual-play products.

(418) As regards Jazztel, the Commission notes that the significant growth of Jazztel from a share in the overall market for fixed Internet access services of 3% in 2007 to 11% in 2012, as noted in a publication of the CNMC in October 2012, was mainly due to

its success with dual-play offers as those offers were the standard proposition until 2012[262].

(419) Furthermore, the questions in the Market Investigation enquiring about the most aggressive or the most innovative market participant did not distinguish between different multiple play offers. Therefore, the respective conclusions from the Market Investigation as set out in section 7.2.2.3 similarly apply to the possible market for dual-play products.

(420) Other elements in the assessment of the importance of Jazztel for the competition in the market for fixed Internet access products, however, do not apply to dual-play products. For example, Jazztel's strategy to provide one or even two mobile lines for free (as part of a triple-play offer) to win customers and to decrease customer churn does only apply to triple-play products. Also the internal Orange documents relating to Jazztel's convergent offers do not relate to Jazztel's competitive position in a possible market for dual-play offers.

(421) As regards the role of Orange in a possible market for dual-play offers, the Commission notes that while Orange's success in recent years is most likely mainly based on dual-play offers up until at least 2012, the current strategy of Orange is centred around its converged offers.

(422) Overall, the Commission regards Jazztel and Orange as important competitive forces in the possible market for dual-play services. However, that importance is lower than their importance in the market for fixed Internet access services as not all elements of the assessment in section 7.2.2.3 also apply to dual-play products.

7.2.3.2. Change in the merged entity's incentives to compete

(423) The elements of the assessment presented in section 7.2.2.4 do also apply to the merged entity's incentives to compete on a possible market for dual-play offers. In particular, Orange's internal documents cited in that section indicate that Orange expects higher average revenues per user following the transaction. Such internal documents of Orange do not distinguish between fixed Internet access services or dual-play services. They only separate effects related to fixed products and to mobile products. Therefore, the conclusion of the Commission in section 7.2.2.4 also applies to dual-play products.

7.2.3.3. Likely reaction of competitors

(424) Similarly, the likely reactions of competitors also stay the same if assessed in the context of a possible market for dual-play offers. Neither the internal documents of Orange nor the quotes from Telefónica and Vodafone distinguish between specific telecommunication products.

7.2.3.4. Quantitative analysis of horizontal non-coordinated effects

(425) The quantitative analysis presented in section 7.2.7 contains an assessment of the likely effect of the transaction on the average price of dual-play products.

(426) According to the baseline scenarios, the average price increase for dual-play products across all operators is approximately 1.2% to 4.5% and 0.6 to 1.9% for 2013 and 2014 respectively. The price increases for the Parties are in the range of 2% to 9% and 1% to 6%, according to 2013 and 2014 data, respectively).

[262] See paragraph (251).

(427) Those price increases are significantly lower than the predicted prices increases for triple- and quadruple-play offers and are thus also lower than the overall price increases predicted for all products containing a fixed Internet access component.

(428) The lower bound of the estimated price increases has been obtained by including in the analysis an assumption of strong diversion to the outside good equivalent to the one put forward by the Notifying Party[263]. Incorporating that rather extreme assumption reduces significantly the estimated price effects but not to an extent that allows dispelling any concern of potential price increases post-merger. The price increases from the analysed transaction are expected to be closer to the upper bound of the Commission's estimates than to that purely illustrative lower bound.

(429) The details of the robustness checks and the Commission's responses to the arguments raised by the Notifying Party are set out in in section 7.2.7 and Annex A. In particular, in light of the sensitivity analysis conducted on the effect of the assumption of no cross bundle diversions (section 6.2 of Annex A), the Commission considers that price effects for 2p products could be slightly higher than those suggested by the baseline scenarios and in the range of 3% to 6% and 2% to 3% for 2013 and 2014 respectively.

(430) Therefore, the light of recitals (425) to (429) and in particular the results of the baseline scenario, it cannot be shown with sufficient likelihood that the Proposed Transaction will lead to a significant price increase in the possible market for dual-play services.

7.2.3.5. Limited likelihood of sufficient entry

(431) In section 7.2.8.1, the Commission sets out why it deems that sufficient entry to markets including fixed Internet access services is unlikely. Based on the analysis in that section, the Commission concludes that the likely effects of the Proposed Transaction on the possible market for dual-play services are not offset by low barriers to enter that market.

7.2.3.6. Conclusion horizontal non-coordinated effects on the possible market for dual-play services

(432) In conclusion, the Commission finds that the competitive concerns raised with regard to a possible separate retail market for dual-play services are less strong but still present. Indeed, in such a market for dual-play services, the Parties are overall less aggressive but still important competitive forces.

(433) In particular, the Commission concludes that the Proposed Transaction will remove two important competitive forces, reduce the merged entity's incentives to compete without offsetting such loss of competition by additional competitive pressure from either existing or new competitors. Therefore, the Commission concludes that the Transaction raises significant competitive concerns also in a possible market for dual-play services.

7.2.4. Possible retail market for triple- and quadruple-play services

(434) In a possible market for triple- and quadruple-play services, Orange holds a market share in terms of subscribers of [10-20]*% and Jazztel of [10-20]*% calculated on the basis of the Notifying Party's estimates and CNMC data[264]. The Parties' combined

---

[263] This is discussed in more detail in section 5.7 of Annex A.

[264] Based on the Parties' estimates of market shares for triple- and quadruple-play products as set out in Table 7 and weighted according to the total number of subscribers to triple- and quadruple-play services

market share would thus amount to [30-40]*%. As such, the combined market share in terms of subscribers of the merged entity in a possible market for triple- and multiple play offers is slightly higher than in the market for fixed Internet access services discussed in section 7.2.

(435) The Commission considers that the Proposed Transaction would significantly impede effective competition on the possible market for triple- and quadruple-play services in Spain. The Proposed Transaction would result in the removal of the Parties as two important competitive forces on that possible market, and in the reduction from four to three of the number of convergent players active at national level.

(436) In that respect, the Commission considers that (i) each of the Parties is an important competitive force in the market, (ii) the merged entity would have less incentives to compete post-transaction, (iii) the Parties' competitors will have reduced incentives to counter the likely reduction of competitive pressure of the merged entity and, (iv) entry of new players in response to price increases into the possible retail market for triple-play services is unlikely. Generally, the Commission's assessment of the Spanish retail market for fixed Internet access services applies to the possible market comprising triple- and quadruple-play services. To the extent the assessment of the possible market comprising triple- and quadruple-play services is based on different or additional considerations than the competitive assessment of fixed Internet access services, the Commission will explain its findings in recitals (437) to (491).

7.2.4.1. Removal of two important competitive forces

(437) Most of the Commission's assessment and conclusions listed in section7.2.2 relating to the retail market for fixed Internet access services in Spain apply to the possible retail market for triple- and quadruple-play services. The competitive concerns expressed in the market for fixed Internet access services are even further compounded as regards the possible market for triple- and quadruple-play services for the reasons set out in recitals (438) to (441).

(438) Both Parties are described in [Reference to the Notifying Party's internal business documents]*, as the most successful companies in acquiring new customers for convergent services: Jazztel is mentioned as most successful with acquiring […]*% new customers for triple-play services followed by Orange with the acquisition of […]*% of all new customers at the end of 2013[265].

(439) That finding is in line with the Parties' gross add shares, as calculated by the Commission. Gross add shares for a possible market comprising triple- and quadruple-play services indicate that Orange and Jazztel are even more important competitive forces in triple- and quadruple-play services than in fixed Internet access services.

---

as presented in Table 6. According to data the Commission collected from all operators, the market share in a market for triple- and quadruple-play services of the Parties amount to [10-20]*% and [10-20]*% and the combined market share to [30-40]*%.

265 [Reference to the Notifying Party's internal business documents]*.

Table 19: Total active fixed subscriber shares and gross add shares[266,267]

Total active fixed subscribers (3p and 4p)	2013	2014	2013	2014
Orange	[…]*	[…]*	[…]*	[…]*
Jazztel	[…]*	[…]*	[…]*	[…]*
Telefonica	[…]*	[…]*	[…]*	[…]*
Vodafone + Ono	[…]*	[…]*	[…]*	[…]*
Others	[…]*	[…]*	[…]*	[…]*
Total	3,946,508	6,952,488	100%	100%

New fixed subscribers (3p and 4p)	2013	2014	2013	2014
Orange	[…]*	[…]*	[…]*	[…]*
Jazztel	[…]*	[…]*	[…]*	[…]*
Telefonica	[…]*	[…]*	[…]*	[…]*
Vodafone + Ono	[…]*	[…]*	[…]*	[…]*
Others	[…]*	[…]*	[…]*	[…]*
Total	1,332,816	1,617,866	100%	100%

Source: Commission calculation based on data obtained from operators

(440) According to data the Commission gathered from all providers of triple- and quadruple-play services, the Parties acquired more than half of all customers who concluded a new contract for triple- or quadruple-play services in 2013 and 2014. In 2013, the combined gross add share of the Parties amounts to […]*%, in 2014 they acquired […]*%. Those gross add shares are significantly higher than their combined market shares of […]*% in 2013 and […]*% in 2014.

(441) In conclusion, the Commission considers that the Parties are particularly important competitive forces in the possible Spanish market for triple- and quadruple-play offers, even more significantly than in the market for fixed Internet access services discussed in section 7.2.

7.2.4.2. Change in the merged entity's incentives to compete

(442) Regarding the incentives of the merged entity to compete, the Commission notes that the assessment set-out in section 7.2.2.4 for fixed Internet access services also applies to a possible market for triple- and quadruple-play services.

(443) Moreover, the internal forecasts of the Notifying Party indicate that the effect of the transaction on ARPUs for mobile component is even stronger than on ARPUs for fixed components. Therefore, according to those estimates, the overall impact on multiple play services is stronger than on fixed Internet access services only.

(444) In conclusion, the Commission finds that the assessment set-out in section 7.2.2.4 also evidences that the merged entity will have less incentives to compete in a possible market for triple- and quadruple-play services in Spain after the Proposed Transaction.

266 The data contained in Table 19 comprises (i) triple-play services (including fixed BB access services, fixed telephony services and mobile), and (ii) quadruple play services (consisting of a triple-play service plus TV).

267 The redacted subscriber numbers and gross adds relating to operators other than the Parties are considered confidential.

7.2.4.3. Likely reaction of competitors

(445) The Notifying Party submits that other strong players, like Telefónica and Vodafone, will remain active at national level. The Notifying Party describes Telefónica as an aggressive player, which introduced its "Fusión" offer in October 2012. Vodafone would also be a strong competitor, in particular as a result of its access to Pay-TV services after the acquisition of ONO. In addition, other competitors in the triple- and quadruple-play market are the regional cable operators, as regards the respective regional markets where they are active.

(446) Moreover, the Notifying Party submits that the Proposed Transaction will not have any anticompetitive effects on the possible market for multiple play services because:

(a) there would be a large number of alternative operators, including Telefónica, Vodafone/ONO, MVNOs and the three regional cable operators;

(b) Telefónica would be the undisputed leader; and

(c) the merged entity will be in a better position to compete with the leading operator, Telefónica.

(447) The Commission finds, however, that the assessment of the likely reactions of competitors conducted in section 7.2.2.5 also applies to a possible market for triple- and quadruple-play products. The quotes of Telefónica and Vodafone cited in that section expressly refer to convergent products. Furthermore, the Commission notes that […]* predicted by Orange as a result of the transaction already factor in the reactions of the Parties' competitors. […]*.

(448) Therefore, the Commission concludes that competitors of the Parties will not make-up for the loss of competition caused by the transaction in the possible retail market for triple- and quadruple-play products in Spain.

7.2.4.4. Quantitative analysis of horizontal non-coordinated effects

(449) The quantitative analysis presented in section 7.2.7 contains an assessment of the likely effect of the transaction on the average price of triple- and quadruple-play products.

(450) According to the baseline scenarios, the average price increase for triple and quadruple-play products across all operators is approximately 5% to 11% and 4% to 10% for 2013 and 2014, respectively. The price increases for the Parties are in the range of 7% to 18% and 5% to 14%, according to 2013 and 2014 data, respectively.

(451) The details of the robustness checks and the Commission's responses to the arguments raised by the Notifying Party are set out in Annex A. In particular, in light of the sensitivity analysis conducted on the effect of the assumption of no cross bundle diversions (see section 6.2 of Annex A), the Commission considers that the price effects for triple- and quadruple-play products could be slightly lower than those suggested by the baseline scenarios.

(452) The lower bound of the estimated price increases has been obtained by including in the analysis an assumption of strong diversion to the outside good equivalent to the one put forward by the Notifying Party[268]. Incorporating that rather extreme assumption reduces significantly the estimated price effects but not to an extent that allows dispelling any concern of potential price increases post-merger. The price

[268] This is discussed in more detail in section 5.7 of Annex A.

increases from the analysed transaction are expected to be closer to the upper bound of the Commission's estimates than to the purely illustrative lower bound.

(453) Overall, the Commission's quantitative assessment indicates that the merger will likely lead to significant price increases in the possible Spanish retail market comprising triple- and quadruple-play services. Those effects are even more pronounced than the price effects found in the retail market for residential fixed internet access services.

(454) The larger price effects in the possible Spanish retail market comprising triple- and quadruple-play services compared to the overall market for residential fixed internet access services (and in particular compared to a possible market for dual-play services) are due to a number of factors. In particular, the Parties' diversion ratios and benchmark diversion ratios based on gross add shares are systematically significantly higher for the triple- and quadruple-play product type compared to those for the dual-play product type. Those high diversion ratios for triple- and quadruple-play, coupled with the higher margins earned by the Parties in triple- and quadruple-play services compared to dual-play services, determine price effects for triple- and quadruple-play services which are more pronounced compared to dual-play services.

(455) It is also noted that the more pronounced price effects for triple- and quadruple-play services are consistent with Orange's own internal documents which […]*[269].

(456) The Commission concludes that the Proposed Transaction will likely lead to significant price increases in the possible market for triple- and quadruple-play services.

7.2.4.5. Limited likelihood of sufficient entry

(457) In section 7.2.8.1, the Commission sets out why it deems that sufficient entry to markets including fixed Internet access services is unlikely. In section 7.2.8.2, it is explained why entering multiple play markets that also include a mobile component is confronted with even higher barriers to entry.

(458) Based on the analysis in the sections mentioned in the previous recital, the Commission concludes that the likely effects of the Proposed Transaction on the retail market for triple- and quadruple-play services are not offset by low barriers to entry.

7.2.4.6. Future competitive strength of the Parties in light of the growing share of quadruple-play bundles

View of the Notifying Party

(459) Given that the Parties' position in providing triple-play services is much stronger than their combined position in the provision of quadruple-play services ([30-40]*% of all triple-play bundles are sold by either Orange or Jazztel compared to only [0-5]*% of all quadruple-play bundles (see Table 7), in the Reply to the Statement of Objections the Notifying Party argues that the growing number of quadruple-play offers will limit the competitive strength of Orange and Jazztel in the future.

(460) The Notifying Party submits that Telefónica would already have (and would be further developing) a strong position in the Pay-TV market because (i) it would acquire directly premium content and (ii) it would be currently acquiring the leading Pay-TV provider in Spain, Distribuidora de Television Digital, S.A, ("DTS").

[269] See paragraphs (340) and (355).

(461) Furthermore, in the Notifying Party's opinion, Vodafone/ONO would have a strong position in Pay-TV as well, thanks to the acquisition of the leading cable operator ONO. In that respect, ONO would have a solid customer base for the provision of Pay-TV services.

(462) The Notifying Party also submits that all regional cable operators have a customer base of Pay-TV services larger than the one of Orange.

(463) The Notifying Party submits that the merged entity would be in a weaker position if compared to Telefónica and Vodafone/ONO as regards VHBB and Pay-TV services and, thus, would have no incentives to raise prices post-transaction. As a result the merged entity would face increasing difficulties to attract customers for its triple-play services.

Results of the Market investigation

(464) When asked about the future take-up of quadruple-play services in Spain, the respondents to the Market Investigation indicated that the importance of quadruple-play services is likely to increase in the future. Half of the respondents to the Market Investigation indicated that they expect quadruple-play services to attain the same level of popularity as triple-play services in 2 to 3 years. A minority of respondents expects quadruple-play services to attain a higher uptake than triple-play services, and an equal minority to attain a lower uptake than triple-play services[270]. A majority of respondents also indicated that they expect quadruple-play services to achieve higher take-up then dual-play services (comprising fixed Internet access services and fixed telephony services) or at least the same level of take-up[271].

(465) The reported reasons for such an increased take-up of quadruple-play services are two-fold. First, telecommunications operators use Pay-TV as a differentiator in their service offers. Second, the demand for premium content would drive the take-up[272].

(466) Furthermore, respondents to the Market Investigation took the view that the six TV-channels offered by Telefónica in its entry-level Fusión quadruple-play offer (namely, Fox, AXN, Calle 13, Comedy, Cosmo, Fox Life) are generally not crucial to successfully sell multiple play offers with a TV component in Spain. In that respect, respondents generally indicated that the success of quadruple-play services in Spain rather depends on the availability of premium or exclusive content and especially content related to sports events and in particular football. Moreover, all respondents that currently offer Pay-TV services indicated that they currently offer all or some of the channels mentioned in this recital[273].

Commission's assessment

(467) As regards the role of Pay-TV services in Spain, the Commission considers that the future relevance of a Pay-TV offer for competing successfully in a possible market for triple- and quadruple offers is uncertain. It will depend on many factors like the attractiveness of bundled Pay-TV services, the price for such services, the discount for bundling Pay-TV services with triple-play services, and whether there will be any popular content that could be accessible exclusively as part of bundled offers.

---

270 See replies to Commission Phase II Questionnaire to Competitors of 23 December 2014, question 70.1.

271 See replies to Commission Phase II Questionnaire to Competitors of 23 December 2014, question 70.2.

272 See replies to Commission Phase II Questionnaire to Competitors of 23 December 2014, question 70.

273 See replies to Commission Phase II Questionnaire to Competitors of 23 December 2014, questions 71, 71.1 and 71.2.

(468) On the one hand, internal documents of Orange dated […]* describe Spain as a market where Pay-TV services are in constant decline. As evidenced by a strategic document of Orange dealing with the evolution of the residential market, the net adds in the retail market for Pay-TV services declined from a total of […]* in December 2012 to […]* in June 2013. Likewise, the total revenues in that market declined from a total of EUR […]* million for the second quarter of 2013. The document explains that the steady decline is a consequence of the increase in the prices for football broadcasting rights and the increment in VAT rates[274].

(469) On the other hand, the Commission recognizes that the total number of clients for IPTV (television services provided over Internet-Protocol– that is, clients procuring TV services as a managed service over Internet infrastructure, which is the case of quadruple-play services) has been constantly increasing since 2013. According to publicly available data published by the CNMC, the number of clients of IPTV rose from 673 482 in the third quarter of 2013 to 1 665 765 exactly one year later. This finding seems to be in line with the replies to the Market Investigation reported at recital (464).

Table 20: Total number of subscribers of Pay-TV and Mobile TV services in Spain

	2013 Q3	***2013 Q4***	***2014 Q1***	***2014 Q2***	***2014 Q3***
Pay-TV	3 740 138	3 845 378	3 969 823	4 309 356	4 709 572
Satellite TV	1 633 527	1 620 632	1 631 607	1 597 311	1 580 313
Cable TV	1 176 382	1 142 015	1 128 605	1 141 636	1 131 062
IPTV	***673 482***	***817 154***	***947 748***	***1 296 592***	***1 665 765***
Terrestrial TV	234 795	237 178	232 084	247 153	237 900
Other	21 952	28 399	29 779	26 664	94 532
Mobile TV	119 501	117 957	118 474	49 028	48 465

Source: CNMC[275]

(470) The CNMC explains that "The significant growth of IPTV is noteworthy, as IPTV achieved almost one million new subscribers in the span of a year, and marking an unprecedented gain in Pay-TV subscribers in a one year period. In that regard, it should be noted that the entry fibre package of the leading operator in terms of penetration contains six TV channels. Therefore, all those fibre clients have been included as Pay-TV subscribers"[276]. That increase in Pay-TV subscribers would seem to be related to Telefónica's (the leading provider of Internet access services via FTTH networks) decision of March 2014 to stop marketing its triple-play offer, and rather to include in all its convergent Fusión offers additional Pay-TV services

274 Presentation by Orange: "Evolución del mercado Home" dated October 2013, Doc ID 745-1456, slides 12 and 13.

275 Doc ID 1542.

276 [Destaca el notable crecimiento producido en el formato de Televisión IP, logrando casi un millón de nuevos abonados en periodo interanual, lo que marca un hito sin precedentes en ganancia de abonados de TV en periodo de un año. En su interpretación debe tenerse en cuenta que el paquete básico en fibra del operador con mayor penetración ya integra seis canales de televisión, por lo que todos sus clientes en fibra computan como accesos a televisión de pago.] CNMC data, Doc ID 1542.

(notably the six channels mentioned in recital (466) above) for free (thus formally marketing only quadruple-play services).

(471) The Commission notes that, as of 2014, the most popular multiple play offer in Spain remains the triple-play services, with a subscriber base of around 5.7 million, although quadruple-play services are gaining momentum, from a customer base of only 689 645 clients in the end of 2013 to already almost 1.9 million in the third quarter of 2014. Table 21 is a more detailed comparison of all the multiple play offers offered in Spain.

Table 21: Total number of subscribers per standalone/multiple play offer in Spain[277]

	Subscribers			
	2011	***2012***	***2013***	***2014 Q3***
Fixed Telephony Only	9 496 584	8 803 460	7 925 733	6 872 881
Pay TV Only	2 263 681	2 126 338	1 949 948	1 919 226
FBB Only	967 871	898 189	910 022	605 561
Fixed Telephony + Fixed Internet access services (FBB)	8 225 095	7 731 228	4 344 481	3 672 371
FBB + Pay TV	87 085	73 434	70 968	46 351
Fixed Telephony + Pay TV	282 444	225 792	197 436	180 401
Fixed Telephony + FBB + Pay TV	1 884 915	n/a	1 031 672	665 117
Fixed Telephony + FBB + Mobile	0	1 062 107	5 195 278	5 728 316
Fixed Telephony + FBB + Mobile + Pay TV	0	146 132	689 645	1 898 477

Source: Notifying Party based on CNMC

(472) The Commission considers that, contrary to the Notifying Party's submission, even assuming an unprecedented success of quadruple-play offers in the near future and the first-mover advantage of Telefónica in quadruple-play offers, both Orange and Jazztel will be able to compete successfully and exercise a similar competitive pressure as today. Currently, Telefónica's position in terms of quadruple-play

277 As set out in recital (208), these market shares provided by the Notifying Party wrongly include large business customers that are not part of the retail fixed Internet access market, so that the Parties' correct market shares are likely higher.

products and NGA network is the strongest vis-à-vis the Parties'. According to the Notifying Parties, NGA networks would allow operators to offer high-quality TV content, as opposed to copper lines. Despite Telefónica's current strong position in terms of quadruple-play services, as already discussed in section 7.2.2.3, both Parties have been able to successfully compete on the market for triple-play offers. As the market potentially moves toward quadruple-play products, the Commission considers that each of Orange and Jazztel's position vis-à-vis Telefónica in terms of NGA deployment will improve, as indicated in section 7.2.9. Moreover, for the reasons explained in recitals (473) to (483), the Commission considers that access to television content does not today, and will not likely in the future, constitute an obstacle to provide Pay-TV services in Spain.

(473) As regards access to content, the Commission considers that both Orange and Jazztel would not have been in a weaker position vis-à-vis Telefónica in the likely future, as compared to their current position vis-à-vis Telefónica.

(474) According the most recent data available, Orange has a market share of around 2% in the Spanish retail market for Pay-TV services by number of subscribers. The leading providers of retail Pay-TV services are DTS, with a market share of 36%, Telefónica, with a market share of 33% and ONO, with a market share of 16% for the third quarter of 2014.

Table 22: Market shares for Pay-TV services in Spain in terms of number of subscribers

	2012		***2013***		***2014 Q3***	
	Subscribers	***%***	***Subscribers***	***%***	***Subscribers***	***%***
DTS	1 733 644	43%	1 649 031	43%	1 674 845	36%
Ono	872 608	21%	789 895	21%	775 144	16%
Telefónica de España	707 278	17%	741 126	19%	1 576 779	33%
GolTV	290 246	7%	237 178	6%	237 900	5%
TeleCable	134 456	3%	125 953	3%	128 910	3%
Euskaltel	136 186	3%	106 768	3%	113 222	2%
R	103 333	3%	98 009	3%	91 944	2%
Orange	70 578	2%	76 028	2%	88 986	2%
Others	28 772	1%	21 390	1%	21 842	0%
Total	4 077 101	100%	3 845 378	100%	4 709 572	100%

Source: CNMC

(475) The Notifying Party submits that the acquisition of the leading provider of Pay-TV services DTS will strengthen Telefónica's position in Pay-TV services. Moreover, it will incentivize the merged entity to compete effectively on the market and not to raise prices.

(476) In this respect, the Commission notes that on 22 April 2015 the CNMC approved the proposed acquisition of DTS by Telefónica with conditions and obligations[278]. In its decision, the CNMC conditioned its approval of the proposed acquisition of DTS by Telefónica to three major sets of commitments, relating to commercial conditions for Telefónica's Pay-TV customers, wholesale access to Telefónica's exclusive television content and access to Telefónica's Pay-TV clients to providers of Over-the-top services.

(477) As regards access to its exclusive television content, the combined Telefónica/DTS entity committed to provide a wholesale access to its premium channels at cost. In the framework of those commitments, a television channel is considered "premium" if it contains non-sports-related content produced by any of the Hollywood "Majors" (Sony, Warner, Disney, Universal, Paramount and Fox) or if it contains live sports-related content[279], on which Telefónica enjoys exclusive broadcasting rights for Spain. The totality of the "premium" channels of the combined Teléfonica/DTS will be made available through this wholesale offer, although each acquirer will be able to purchase a maximum of half of them. Prices for wholesale access to such television content will be generally at cost, and will be supervised by the CNMC.

(478) The Commission notes that access to television content in the Spanish market will be facilitated by the commitments imposed by the CNMC over the combined Telefónica/DTS entity. However, the Commission considers that, despite the formal set of commitments entered into by Telefónica, it is too early to take a view on the effectiveness of such commitments to allow alternative providers of Pay-TV services in Spain to compete effectively on the market.

(479) Furthermore, the Commission notes that, in its internal documents, […]*, as explained in recitals (480) and (481) here below.

(480) By means of example, an internal document of Orange Spain intended to respond to Orange Group's questions as regards the group's strategic review of the Spanish business plan for 2015 to 2018 reveals that the acquisition of DTS by Telefónica […]*. Orange foresees two different strategic options in reaction to Telefónica's proposed acquisition of DTS. […]*

(481) Moreover, and consistently with the Commission's Market Investigation findings described in recital (466) above, […]*

[…]*[280].

(482) As an additional element, the Commission notes that, with the exception of Telefónica, currently almost all the Spanish players offering multiple play services comprising Pay-TV (Vodafone/ONO, Orange, Euskaltel, R Cable, Telecable) offer almost the same TV channels, despite having completely different market shares in terms of Pay-TV subscribers.

278 Resolution of the CNMC of 22 April 2015, Case C/0612/14 - TELEFÓNICA/DTS. The resolution of the CNMC council became final on 30 April 2015, since the case was not elevated to the Spanish Council of Ministers.

279 Sports-related content includes the Spanish first división footbal league, the football "Copa de S.M. el Rey", the football "Champions League", the European football league, the football world cup, the basketball world cup, Formula 1, Moto GP and Olympic Games.

280 [Reference to the Notifying Party's internal business documents]*

(483) Therefore, the Commission concludes that access to TV content is not an obstacle to provide quadruple-play services, given that Orange itself does not consider it an issue.

(484) As regards the necessity to offer fibre products in order to be able to offer Pay-TV within quadruple-play services on competitive terms in Spain, the Notifying Party submits that the Proposed Transaction will allow the merged entity to become a stronger player against Telefónica, in particular as regards the deployment of its own FTTH network.

(485) The Commission disagrees with the Notifying Party's argument for two reasons.

(486) Firstly, as regards the combination of Orange and Jazztel's fibre networks, the considerations explained in section 7.2.9 apply. In that regard, the merged entity will not deploy a FTTH network with a significantly larger footprint than the combined footprint of Orange and Jazztel absent the merger. In that respect, the Commission has concluded in section 7.2.9 that, contrary to the Notifying Party's claim, it is unlikely that the Proposed Transaction leads to any significant increase in the FTTH coverage by the merged entity, as compared to the standalone scenario[281]. On the other hand, the Proposed Transaction removes a competitive player on fibre in the areas where the footprints of the fibre networks of Orange and Jazztel would have overlapped.

(487) Secondly, as regards the importance of fibre for a fixed network operator to be able to provide Pay-TV services, the Commission notes that currently each of the Parties are able to provide Pay-TV services over their existing xDSL network.

(488) According to data submitted by the Notifying Party, from a technical point of view, Table 23 sets out the bandwidths needed in order to stream IPTV channels.

Table 23: Bandwidth associated with IPTV channels

Quality of channel	Bandwidth	
	1 channel	2 channels simultaneously
Standard quality channel[282]	3/3.5 Mbps	6/7 Mbps
High quality[283]	Approx. 4.5 Mbps	7 Mbps

Source: Notifying Party

(489) At the moment, both Orange and Jazztel offer fixed Internet access services with maximum speeds above 10 Mbps. In particular, Orange offers xDSL Internet with a maximum download speed of 20 Mbps and Jazztel of 30 Mbps. That means that currently, even if the actually observed speeds are lower than the advertised maximum speeds[284], the Parties are able to offer simultaneously high quality Pay-TV

281 See section 7.2.10 above also as regards the verifiability and merger specificity criteria of the Notifying Party's efficiency claim.

282 Standard quality corresponds to a video resolution of 720x576 pixels.

283 High quality corresponds to a video resolution of 1280x720 pixels.

284 According to a report by the Spanish Minister for Industry, Energy and Tourism, Orange ADSL offer with a nominal download speed of 20 Mbps has a reported average speed of around 14 Mbps. Jazztel ADSL offer with a nominal download speed of 20 Mbps has a reported average speed of around 13 Mbps. "INFORME DE SEGUIMIENTO DE LOS NIVELES DE CALIDAD DE SERVICIO" for the

services and fixed voice services[285] with enough bandwidth left to allow a user to access the Internet at broadband speed.

(490) To further support that finding, Orange and Jazztel currently offer (or in the case of Jazztel, distributes) IPTV services over their xDSL networks. Therefore, the current download speed offered by each of Orange and Jazztel would be already sufficient to provide quadruple-play services.

(491) The Commission concludes, first, that the Proposed Transaction will not have any impact on the quadruple-play market. In second place, the Commission considers that, contrary to the Notifying Party's argument, the findings set out in sections 7.2.4.2, 7.2.4.3 and 7.2.2.5 above as regards incentives which the merged entity and its competitors are likely to have post-transaction apply in the same way to the possible market for triple-play services.

7.2.4.7. Commission's assessment of the Notifying Party's efficiencies claims

(492) The reasons provided in recital (703) also apply to triple- and quadruple-play offers. The elimination of double marginalisation of mobile services provided by Orange to Jazztel applies in particular to triple- and quadruple-play offers as they include a mobile component (see section 7.2.10.4). As set out in section 7 of Annex A, the predicted price effects of 3p/4p products can be expected to decrease by approximately 0.8 percentage points, but the remaining expected price increases are still significant.

(493) Therefore, the Commission concludes that the claimed efficiencies are not such to balance identified anti-competitive effects.

7.2.4.8. Conclusion on horizontal non-coordinated effects on the possible market for triple- and quadruple-play offers

(494) The Commission considers that the Proposed Transaction would give rise to non-coordinated anti-competitive effects on the possible retail market for fixed-mobile triple- and quadruple-play services in Spain because it involves, in an already highly concentrated market, the elimination of important competitive constraints that the merging parties previously exerted upon each other together with a reduction of competitive pressure on the remaining competitors. Moreover, those non-coordinated anti-competitive effects are not offset by countervailing factors such as efficiencies. Therefore, the Commission considers that the Proposed Transaction will significantly impede effective competition on the possible market comprising triple- and quadruple-play services in Spain.

7.2.5. Possible retail market for triple-play services

(495) On the possible market for triple-play services, the Parties' combined market share would account for almost [40-50]*% of the total subscribers (Orange: [20-30]*%; Jazztel: [10-20]*%) at the end of 2014. Other main players active on the possible market for triple-play services are Telefónica and Vodafone. Post-transaction,

---

third quarter of 2014, available at http://www.minetur.gob.es/telecomunicaciones/es-ES/Servicios/CalidadServicio/informes/Documents/Seguimiento_SAI_T3_14.pdf.

[285] The Commission estimates that the bandwidth necessary to provide fixed telephony services is limited and in any case below 80/87 Kbps.

Telefónica, Vodafone and the merged entity will account for a substantial part of the triple-play market[286].

(496) The position of the Parties on a possible market for triple-play services is thus much stronger than their combined market of [30-40]*% (Orange: [10-20]*%; Jazztel: [10-20]*%) at the end of 2014 in a possible market for triple- and quadruple-play services assessed in section 7.2.4. Consequently, the Proposed Transaction would give rise to even more serious concerns on a possible market for triple-play offers, as both Parties mainly offer triple-play services. Therefore, the assessment of the possible market for triple-plays services is not presented separately in more detail.

7.2.6. Possible retail market for multiple play services

(497) The position of the Parties in a general market for all multiple play services would be almost identical to their position in the market for fixed Internet access services as the share of fixed Internet access services provided as a stand-alone service outside of a bundle is negligible[287]. Therefore, an assessment of a general market for multiple play services reaches the same result as the competitive assessment in section 7.2.2 for fixed Internet access services.

7.2.7. Quantitative analysis of horizontal non-coordinated effects

(498) The Commission has also carried out an assessment of the extent to which the elimination of competition between the Parties will generate an incentive to increase price for the merged entity post-concentration. The Commission applied a calibrated merger simulation approach that uses observed diversion ratios between competitors and observed margins and shares of new customers to calibrate demand and predict the likely price effects of the concentration[288]. In the context of differentiated products markets, similar approaches were used in previous cases[289]. The Commission's quantitative analysis is described in more detail in Annex A to this decision.

(499) The incentive for the Parties to raise prices arises because the concentration eliminates competition between them. More precisely, since the Parties offer substitute products, following a unilateral price increase by one merging Party, a number of subscribers would switch to products offered by the other merging Party. Pre-merger, from the viewpoint of one merging Party, customers that switch to products of the other merging Party are lost after a price increase. Post-merger, customers that switch to products that were previously offered by the other merging Party (and after the merger are offered by the merged entity[290]) increase the profits of those products. Put differently, the threat of losing consumers to competitors is reduced post-merger since some of the alternative products that pre-merger were

---

286 Other players active on the possible market for triple-play services in Spain are the three regional cable operators (Euskatel, R Cable and Tele Cable) and other small players (for example Pepephone).

287 As indicated in Table 1, only about 1% of all fixed Internet access services are not provided as part of a bundle.

288 This approach is more extensive than standard Upward Pricing Pressure (UPP) techniques in particular as it also captures the expected pricing reaction of competitors.

289 Case COMP M.4854 *TomTom / Tele Atlas*, Case COMP M.5644 *Kraft Foods / Cadbury*, Case No COMP/M.5658 – *Unilever / Sara Lee*, Case COMP/M.6497 *Hutchison 3G Austria / Orange Austria*, Case COMP/M.6992 Hutchison 3G *UK / Telefónica Ireland*, Case COMP/M.7018 *Telefónica Deutschland / E-Plus*.

290 Orange currently plans to maintain the Jazztel brand at least in the short run.

owned by a competitor are offered post-merger by the merged entity[291]. Since some of the demand that would be lost following a price increase pre-merger will thus be recaptured by the merged entity post-merger, it will be more profitable to increase price post-merger relative to the non-merger scenario.

(500) The analysis of the Commission aims at quantifying how strong the Parties' incentives to raise price are as a consequence of the loss of competition. In that respect, the calibrated merger simulation is used to quantify the "most direct effect" of a merger and the additional effect that, in reaction to price increases by the merged entity, the Parties' rivals could also increase price, which are described in paragraph 24 of the Horizontal Merger Guidelines. The calibrated merger simulation abstracts from other factors (such as, for example, barriers to entry, countervailing buyer power and repositioning by rivals) which could affect the merged entity's ability and incentives to raise prices.

(501) The Commission's analysis focusses on two product types, namely (i) the double play product type consisting in fixed voice and fixed broadband and (ii) an aggregation of triple and quadruple-play services consisting in double play plus mobile and possibly TV [292]. All of those product types offer fixed broadband as part of the bundle[293]. Other product types included in the market for fixed Internet access, such as fixed broadband only products and fixed broadband plus mobile products have not been explicitly modelled in the analysis, as they represent approximately 1% of the retail market for fixed Internet access services, as detailed in Table 1[294]. The analysis is therefore directly relevant to the market for fixed Internet access, since that product is practically always sold as part of the bundles considered in the quantitative assessment.

7.2.7.1. Measurement of diversion ratios

(502) Diversion ratios provide a measure of the extent to which one operator is able to attract the sales that another operator would lose as a result of a price increase. The diversion ratios thus capture the competitive constraint that the Parties impose on one another pre-concentration and which is lost as a result of the concentration.

(503) The main source used for the measurement of diversion ratios is the Fixed Number Portability ("FNP") data of the Asociación de Operadores para la Portabilidad

291 If the merged entity discontinues some of the products of the merging Parties, from the viewpoint of consumers this is even worse than a price increase, because consumers would not even have the choice to buy the discontinued product at a much higher price compared to the price absent the Proposed Transaction.

292 It was not possible to split 3p from 4p because certain operators could not provide data at such a level of disaggregation. In any event, the number of 4p subscribers of the merging parties compared to 3p subscribers is very small. Therefore, the number of switchers based on which diversion ratios could be derived is very limited, so that the reliability of diversions would suffer. In light of the small proportion of 4p products, the Commission considers that the market wide price effects (i.e. across all product types including fixed broadband) are unlikely to significantly change when analysing 3p and 4p products separately.

293 The analysis is based on the entire bundles (and not just on the fixed broadband component) since 99% of the new subscriptions including a fixed broadband component are bundles, that is, 99% of new customers acquiring a fixed broadband subscription make a single choice of subscribing to an entire bundle (see Table 1). Moreover, the incentive to raise prices depends on the characteristics of the whole bundle and not just on the fixed broadband component.

294 While this 1% of the products constituting the fixed Internet broadband market has not been explicitly included in the analysis, the Commission has conservatively assumed that no price increase occurs for these products as a result of the Proposed Transaction.

("AOP"). As reported by the Notifying Party in its response to the Article 6(1)(c) Decision[295], the number portability data does not record (or records wrongly) a number of migrations of broadband customers, notably those served on the basis of Wholesale Line Rental ("WLR")[296].

(504) The Commission has addressed that issue by complementing the number portability data with information on the number of migrations relating to WLR, which has been provided by Telefónica. The details of that adjustment are presented in section 3.1.2 of Annex A.

(505) The Commission has also analysed more disaggregated portability information (at the product-type level) collected directly from the operators. That information complements the FNP because it allows separating the business segment from the residential segment and allows identifying the origin and destination product-type of the port (that is to say the product type the customer ports from and to).

(506) Each of Orange, Jazztel, Telefónica and Vodafone has been asked to provide quarterly data[297] on subscribers that ported their number to and from each operator from and to each of its rivals. For each of port-in, the Commission asked to provide information on the operator of origin and the new product type that the customer subscribed to. For each port-out, the Commission requested information on the operator of destination and the product type to which the customer was subscribed before leaving[298].

(507) The Commission considers that data covering actual switching events from each operator to the other operators is informative on the extent of substitution patterns between different operators. For instance, if one observes a large share of lost customers of Jazztel porting their number to Orange, that provides a good indication that Orange is an important alternative for Jazztel customers, even if some of the observed switches are not driven by price changes.

(508) There was a significant shift from 2p to 3p/4p products in 2013 and 2014 (both internally within each operator and externally, across operators). In contrast to observed horizontal switching[299], vertical switching across product types[300] may be less likely to reflect consumer reactions to marginal price changes compared to observed switching across operators (especially within the same product type). Because the observed vertical diversion ratios do not necessarily reflect consumer reactions to marginal price changes, in its calibrated merger simulation the Commission assumes that no price based switching from one product type to another occurs. The analysis is thus focused on the horizontal choice between operators[301].

295 Report "Comments on the use of UPP / IPRs in the 6(1)(c) decision" of 16 January prepared by the Notifying Party.

296 Wholesale Line rental is known in Spain as "Acceso Mayorista a la Línea Telefónica (AMLT)". The terms WLR and AMLT will therefore be used interchangeably in the remainder of this document.

297 Relating to the first month of each quarter only (for the period Q1 2013-Q4 2014).

298 The Commission has applied to this disaggregated product type-level portability data a similar correction to the one applied to the FNP data from the AOP.

299 That is, customer's switching across operators but within a given product type.

300 For example switches from a double play product to a convergent product.

301 This assumption is further motivated by the fact that many subscribers who switched from 2p to 3p/4p products would have presumably switched to 3p/4p products even if the prices of 3p/4p products had been marginally higher (that is, for these switchers the original 2p products were unlikely to be the second best choice anymore).

(509) In order to isolate switches which are purely horizontal, the Commission has matched the ported-out numbers (and the corresponding operator of destination) of all operators with the numbers ported-in to all operators (and corresponding operator of origin). That provides for each switcher a comprehensive view of (i) the operator of origin, (ii) the product type of origin, (iii) the operator of destination and (iv) the product type of destination. The Commission then retained only those ports whose origin and the destination product type were identical.

(510) Based on that information, the Commission has calculated the diversion ratios for switching which occurs within the same product type, that is to say from 2p to 2p and from 3p/4p to 3p/4p, which allows isolating those switching occurrences that are least likely to be driven by shifts in preferences over time, notably from lower value product types such as 2p to higher value product types such as 3p/4p[302].

(511) The diversion ratios based on number ports across operators but within the same product type[303] are summarised in Table 24.

Table 24: Diversion ratios matrix for 2p and for 3p/4p product types (based on switching within the same product type, adjusted for WLR)[304]

	2013		2014	
	2p	**3p/4p**	**2p**	**3p/4p**
Diversion from Orange to Jazztel	[...]*	[...]*	[...]*	[...]*
Diversion from Jazztel to Orange	[...]*	[...]*	[...]*	[...]*

Source: Commission calculation based on data obtained from operators

(512) As Table 24 illustrates, the diversion ratios for 3p/4p product types between the merging parties are especially significant. The diversion ratios from Jazztel to Orange were […]*% and […]*% in 2013 and 2014, respectively. The diversion ratios from Orange to Jazztel were […]*% and […]*% in 2013 and 2014, respectively[305]. This suggests that Orange and Jazztel particularly constrain each other's pricing for their 3p/4p offers.

(513) The Commission has also calculated the diversion ratios by product type of destination (irrespective of the product type of origin)[306].

302 Because the Commission obtained port-in information only from Orange, Jazztel, Telefónica and Vodafone, the Commission cannot infer the segment of destination for subscribers switching to the smaller operators. Therefore, the Commission assumed that for each origin operator, the diversion ratio from a major operator to a smaller operators for each destination product type corresponds to the proportion of port-outs of that origin from this major operator to the smaller operators. This assumption does not materially affect the results, as the diversion ratios to the smaller operators are small and because the level of anti-competitive effects is mainly driven by the diversion ratios between the merging Parties.

303 Adjusted for migrations relating to WLR.

304 The first column of the table indicates the operator of departure whereas the first row of the table indicates the operators of arrival.

305 However, the Commission notes that in particular in 2013, only 5.7% of total number ports were made from 3p/4p products to 3p/4p products, which may have repercussions on the reliability of the diversion ratio.

306 For each destination product type *x*, the diversion ratio from operator i to operator j is computed as the number of port-ins to operator j for destination product type *x* from operator i (irrespective of the originating product type), divided by the total number of ports from operator i to other operators of destination product type *x*.

(514) Calculating the diversion ratios based on an aggregation of the migrations across all product types of origin, and conducting the merger simulation analysis by product type of destination (2p or 3p/4p), reflects the implicit assumption that consumers who switched vertically, would have only considered subscribing to the destination product type, but not the product type they were currently subscribed to. In the context of the present case, in light of the market developments driving the trend to 3p/4p products, it seems reasonable to assume that many subscribers who switched from 2p to 3p/4p products did not consider, at the time of their new choice, subscribing again to a 2p product.

(515) Compared to the choice of matching the product type-level portability data, aggregating over the origin product types has the further advantage of increasing the number of switchers on which diversion ratios are based[307], thereby improving the reliability of the resulting estimated diversion ratios.

(516) The resulting diversion ratios[308] for the 2p product type and for the 3p/4p product type are summarised in Table 25.

Table 25: Diversion ratios matrix for 2p and for 3p/4p product type, based on operator data on product type-level portability (adjusted for WLR), aggregated across all product types of origin[309]

	2013		**2014**	
	2p	**3p/4p**	**2p**	**3p/4p**
Diversion from Orange to Jazztel	[...]*	[...]*	[...]*	[...]*
Diversion from Jazztel to Orange	[...]*	[...]*	[...]*	[...]*

Source: Commission calculation based on data obtained from operators

(517) As regards the 3p/4p product type, the diversion ratios from Jazztel to Orange were […]*% and […]*% in 2013 and 2014, respectively. The diversion ratios from Orange to Jazztel were […]*% and […]*% in 2013 and 2014, respectively. That level of diversion again suggests that Orange and Jazztel significantly constrain each other's pricing for their offers in the 3p/4p product type.

(518) The Commission has also derived benchmark diversion ratios based on the assumption that each operator attracts from the others a share of subscribers proportional to its gross add share. The diversion ratios between the merging parties are roughly of the same level as set out in Table 25 and are presented in Table 26 and below.

307 This is because a matching of the product type-level portability data can be successfully performed on 70% of the dataset only.

308 Adjusted for migrations linked to WLR

309 The first column of the table indicates the operator of departure whereas the first row of the table indicates the operators of arrival.

Table 26: Benchmark diversion ratios matrix for 2p and for 3p/4p product type (based on gross add shares)[310]

	2013		2014	
	2p	**3p/4p**	**2p**	**3p/4p**
Diversion from Orange to Jazztel	[...]*	[...]*	[...]*	[...]*
Diversion from Jazztel to Orange	[...]*	[...]*	[...]*	[...]*

Source: Commission calculation based on data obtained from operators

(519) Overall, the level of diversion between the merging parties indicates that the two operators impose a significant competitive constraint on each other. As regards 3p/4p products, the observed diversion ratios suggest that the competitive constraint imposed by the merging parties on each other is comparable or larger than the constraint imposed by Vodafone and Telefónica, respectively. The loss of that constraint as a consequence of the notified transaction is likely to induce incentives to raise the price.

7.2.7.2. Measurement of margins and volumes

(520) The Commission requested from the Parties detailed quarterly information on revenues relating to Orange's and Jazztel's main product types (in particular, 2p and 3p/4p[311]). The Commission used the information collected on revenues to construct a measure of the ARPU for the 2p and for the 3p/4p product types. That was obtained by dividing the total revenues allocated to the product type by the number of active fixed subscribers to the product type.

(521) The Commission also requested from the Parties detailed quarterly information on costs relating to Orange's and Jazztel's main product types (analogously to what was done for revenues).

(522) For products including further components along with fixed broadband (such as fixed voice or mobile services), the Commission included also the revenues and costs relative to those components, and the analysis has been done on the basis of the entire bundle, in line with the analysis performed by the Notifying Party. Indeed, pricing decisions of the market participants are made on the basis of the price and the margin of the bundle, not on hypothetical prices of the included components.

(523) The incremental costs for each product type have been defined as the merging parties' estimates on costs that the operator could avoid (that is to say no longer incur) in the hypothetical case of a substantial reduction of the subscriber base. Those include all direct costs (that is to say those costs that can be directly attributed to a subscriber and that therefore vary in direct proportion with the number of subscribers)[312] and a portion of costs and overheads which could be reduced in case

---

310 The first column of the table indicates the operator of departure whereas the first row of the table indicates the operators of arrival. The redacted diversion ratios relating to operators other than the Parties are considered confidential.

311 As explained in recital (501) the Commission's analysis has focused on 2p and 3p/4p products, as the remaining products represent approximately 1% of the market.

312 Includes the following: Interconnection costs, customer access connectivity, subscriber acquisition costs, subscriber retention costs, purchase of contents, handset subsidies, bad debts and revenue-based commissions paid by the operator.

of a substantial reduction in the subscriber base (for example costs relating to outsourced call centre services).

(524) Based on the computed ARPU and incremental cost per user, the Commission has calculated the incremental margins per user (a conservative measure of margins, compared to other definitions which would uniquely account for the direct costs).

(525) Incremental margins are considered an appropriate measure of profitability for the purposes of the calibrated merger simulation in that context. Incremental margins reflect an operator's profitability from the new subscribers acquired and this is the profitability measure that governs the decisions of a profit maximising operator when setting the price of its products.

(526) Finally, the Commission also based its analysis on estimates of the number of new subscribers to the relevant fixed Internet products (that is to say the gross adds). The Commission considers that the share of the operators's new fixed subscribers (the so called gross add share) is a good indicator of the share of contestable subscribers attracted by each operator and therefore a good indicator of the current competitive strength of each market participant[313].

(527) Section 3.2 of Annex A contains further details on the construction of margins and section 3.3 of Annex A contains further details on the use of gross add shares as a measure of demand.

7.2.7.3. The results of the calibrated merger simulation presented in the Statement of Objections

(528) In support of the Statement of Objections, the Commission has calculated the post-merger expected price increase for each of the main operators, namely the Parties, Telefónica and Vodafone.

(529) In the first baseline scenario[314] the market wide expected price increase, that is, the weighted average price increase across all operators and across all product types including a fixed broadband component was 10% for 2013 and 7% for 2014[315].

(530) In the second baseline scenario[316], the market wide expected price increase was 7% for 2013 and 5% for 2014.

(531) The Statement of Objections contained a variety of further sensitivity scenarios. For instance, the Commission considered a scenario based on benchmark diversion ratios calculated from gross add shares and a scenario based on diversion ratios calculated from the FNP data from the AOP. The results of all those further scenarios also

---

313 See also section 3.3 of Annex A.

314 Where the Commission used incremental margins computed as discussed in section 7.2.7.2 and diversion ratios based on purely horizontal number ports as presented in Table 24.

315 The average price increase for each product type has been calculated as the weighted average of the price increase expected from each operator for that product type (where the weights used are the gross add shares of each operator for that product type and no price increase is assumed for operators other than the main four). The market wide price increase has been calculated as the weighted average of the (average) price increases expected for each product type (where the weights used are the gross add share of each product type and no price increase has been assumed on average for the fixed broadband only product type and for the fixed broadband plus mobile product type).

316 Where the Commission used incremental margins computed as discussed in section 7.2.7.2 and diversion ratios based on the product type-level portability data collected from the operators for residential customers, aggregated across all product types of origin and disaggregated by product type of destination as reported in Table 25.

pointed to significant price increases as a consequence of the notified transaction (the details are presented in section 4.3 and 4.4 of Annex A).

7.2.7.4. The Notifying Party's main arguments in the response to the Statement of Objections

(532) In its reply to the Statement of Objections, the Notifying Party strongly criticises the calibrated merger simulation carried out by the Commission, claiming that the switching data used to calculate price effects is tainted by the rapid shift to multiple play products[317]. The Notifying Party argues that the switching data is confounded by the rapid and significant shift of consumers' choice from dual-play ("2p") to triple-play ("3p") and quadruple-play ("4p") products (in particular internal switching from 2p to 3p).

(533) According to the Notifying Party, using the available data on internal switching invalidates the merger simulation model because the level of internal diversions by far exceeds the levels compatible with profit maximisation (that is, only a positive own price elasticity could reconcile the two). The Notifying Party considers that the issue cannot be solved by using the available data and that the solution proposed by the Commission in the Statement of Objections, by ignoring switching across bundles and estimating the expected price effects separately for 2p and 3p products, not only fails to address the issue but also results in an upward bias in the diversion ratios[318].

(534) In addition to the overarching critiques to the use of a merger simulation in this case, the Notifying Party submitted a number of more technical comments pointing to problems of data inconsistency in the Commission's quantitative analysis.

(535) The Notifying Party also noted that the Commission did not allow for any diversion of subscribers to an outside good, that is, it did not allow for the possibility that some subscribers could choose to no longer subscribe to any fixed broadband product following to a price increase.

(536) The main comments by the Notifying Party are summarised and addressed in section 7.2.7.5 and the remainder is addressed section 5 of Annex A.

7.2.7.5. The Commission's assessment of the main arguments by the Notifying Party

(537) This section presents the Commission's assessment of the main arguments raised by the Notifying Party in response to the Statement of Objections.

(538) As a general principle, the Commission notes that the precision of a quantitative analysis where the effects are estimated based on observed parameters in a constantly evolving environment is inevitably lower than in stable environments.

(539) The Commission agrees that observed switching between operators from the portability data is unlikely to be exclusively based on consumers' reactions to small price changes. Therefore, caution has to be applied when calibrating demand based on observed switching patterns. In particular, in light of the observed on-going shift of the product mix in the retail market for fixed Internet access services, it cannot be simply assumed that as a consequence of a small price change consumers would switch from 2p to 3p (or 4p) products in the same proportion as observed in the past.

(540) However, in line with its practice in recent past cases, the Commission considers that diversion ratios based on observed switching in the present case are a reasonably

317 Notifying Party's response to the Statement of Objections, sections 5.1. and 5.2.

318 Notifying Party's response to the Statement of Objections, section 5.4.

good indicator to calibrate horizontal switching[319] between competitors in case of a unilateral price increase of one of the merging parties[320]. In particular, as stressed in recital (507), the Commission considers that the portability data is informative on the extent of substitution between different operators[321]

(541) The Commission considers that focusing its analysis on the choice between competing operators in the present case can be expected to produce results which provide relevant insights to the assessment of the case for several reasons[322].

(542) Firstly, in the applied differentiated goods framework, the magnitude of predicted anti-competitive effects from a horizontal merger is mainly driven by diversions ratios between the merging parties and not by diversion ratios between product types within each merging party (that is to say the internal diversions)[323]. Indeed, the Notifying Party simulated how sensitive the estimated results are to modifications of internal diversion ratios. As long as the internal diversions between 2p and 3p products do not exceed 20% the estimated price effects change mostly by less than one percentage point (for internal switching beyond 20% the profit maximisation assumptions underlying the merger simulation no longer hold in this case)[324]. Moreover, the Notifying Party's simulations indicate that the predicted price effects are lowest when assuming zero internal diversions. That suggests that assuming no competitive interaction across product types is a conservative assumption in this context.

(543) Secondly, the Commission disagrees with the Notifying Party's claim that focusing on the competition between operators is not a reasonable approximation because the calculations only lead to consistent results for internal diversion rates that are much

---

319 That is, switching across operators but within the same product type.

320 Case COMP/M.6992 Hutchison 3G *UK / Telefónica Ireland, Annex A, recitals 82 - 86;*
Case COMP/M.7018 *Telefónica Deutschland / E-Plus, Annex A, recitals 105 - 108.*
Ideally, one would want to observe subscribers' first and second choice of operator at the point in time when the subscriber decides whether to switch operator or not. The observation that a customer switches from Jazztel to Orange implies that, at that point in time, Orange was the customer's first choice. While it is possible that the customer's second choice at the same time could have been an operator other than Jazztel, the fact that the customer is currently with Jazztel implies that Jazztel was the customer's first choice in the previous subscription decision. For the purposes of a diversion ratio based analysis, it appears hence reasonable to assume that the customer's preferred products are provided by Jazztel and Orange.

321 The observed diversions also reflect switches that were done from xDSL to fibre. The observed diversions thus reflect the current strength of the merging Parties' fibre offer. In particular, Orange attracted many subscribers in 2013 and 2014 despite not having a large fibre footprint. As discussed in section 7.2.9.3, relative to Telefónica and Vodafone, the footprint of the Parties' NGA networks can be expected to grow. On the other hand, the additional value customers may derive from having an NGA access may increase in the future.

322 The Commission also considers that the theoretical model of vertically and horizontally differentiated products put forward by the Notifying Party's economic advisers ("Comments on the use of UPP / IPRs in the 6.1.c Decision –Supplementary Report – revised" of 4 February prepared by the Notifying Party, p.6-7) is not well suited to argue that observed horizontal diversion ratios are systematically biased or uninformative. In particular, as noted by the Notifying Party, the theoretical model does not predict any diversion between operators in the scenario discussed by the Notifying Party. It follows that such a model cannot be used to discuss how well price-based diversions between competitors can be proxied by observed diversions between competitors.

323 This is because each merging party takes already into account cannibalization effects between different product types it offers into account in its pricing-decisions pre-merger, so that the loss of competition between the merging parties does not significantly alter this aspect of the pricing decision.

324 See Table 9 and 10 of the Notifying Party's report "Economic Considerations in Response to the Commission's Statement of Objections.

smaller than those actually observed. As regards observed internal switching from 2p to 3p products, it has to be taken into account that during the past years the prices of 3p products have significantly decreased relative to 2p products[325]. Many subscribers who switched from 2p to 3p/4p products would have presumably switched to 3p/4p products even if the prices of 3p/4p products had been marginally higher (that is, for those switchers the original 2p products are unlikely to represent their second best choice). That implies that the internal diversion ratios between 2p and 3p products in case of small price changes are likely to be much lower than the Notifying Party's estimation of the past switching that occurred between those product types. The past internal diversion ratios do therefore not point to inconsistencies that would in themselves invalidate the results[326].

(544) Thirdly, the arguments of the Notifying Party as to why the Commission's estimates of the diversion ratios between the Parties would be biased upwards, as opposed to being less precise, are not convincing. The Notifying Party suggests that high switching between the merging Parties might be due to the fact that in 2013 and 2014 Orange mobile customers who did not have a preference for a particular mobile offer, but had an affinity to Jazztel as a fixed provider would have switched to the Jazztel 3p bundle. Likewise, customers who were not particularly committed to the Jazztel fixed offer, but had a strong preference for Orange’s mobile service would appear as switchers from Jazztel 2p to Orange 3p[327].

(545) However, Jazztel has been an MVNO on Orange's mobile network, so that there is presumably no significant quality difference in the mobile services offered at the retail level by both companies. Thus, the argument as put forward by the Notifying Party is more convincing when applied to the remaining nationwide competitors, that is to say, Jazztel customers who were particularly committed to the Jazztel fixed offer could have switched to Telefónica or Vodafone because they had a strong preference for the latter's mobile services. Similarly, previous Orange mobile customers who did not have strong preferences on the mobile provider may have switched to a 3p product of Telefónica or Vodafone. Therefore, to the extent the introduction of 3p products has triggered additional switching, the argument of the Notifying Party does not imply that diversion ratios between the Parties would be overestimated.

(546) Moreover the observed diversion ratios from Jazztel to Orange do not support that argument of the Notifying Party.[328] When focusing on purely horizontal switches between 3p/4p products, the diversion ratios from Jazztel to Orange tend to be significantly higher than the diversion ratios from Jazztel to Orange based on ports from 2p to 3p/4p products.

(547) Fourthly, the Commission notes that the high diversions between the Parties are unlikely to be due to temporary effects which are unrelated to the strength of the Parties. Indeed, the high observed gross add shares, especially for 3p products, and

325 The observed internal diversions do not necessarily reflect preference shifts as claimed by the Notifying Party but are likely caused also by changes in the relative prices of the relevant product types.

326 The Commission also notes that when deriving a full diversion matrix that contains both flows within operators and across operators it is important to distinguish flows of number porters from flows of switching customers, as not all switching customers request that their number be ported. Moreover, depending on the products between which subscribers switch, the telephone number may be automatically preserved so that no number request is necessary.

327 Notifying Party's response to the Statement of Objections, p. 31.

328 See also section 5.3. of Annex A.

the observation that especially Orange grew significantly in 2014 are in line with the high observed diversion ratios for the Parties. Moreover, Jazztel would have likely remained an MVNO on the Orange mobile network in the absence of the merger, which would have implied a persistent similarity between the mobile services of both Parties.

(548) Therefore, whereas it is true that the introduction of 3p offers could have resulted in switching that is not exclusively driven by price, the Notifying Party has failed to provide arguments as to why the observed past diversions between the merging parties would overestimate their competitive constraint on each other. Moreover, 3p products were mainly introduced in the third quarter of 2012 or in the beginning of 2013, so that the observed diversion ratios are presumably less affected by that product introduction in 2014. That is, for example, reflected in more stable diversion ratios over the quarters of 2014 as compared to 2013.

(549) As regards the elimination of data that the Notifying Party criticises, the Commission notes that the elimination of switching across product types is done in order to focus the analysis on the horizontal switching (2p to 2p and 3p/4p to 3p/4p), which are the instances in which observed switching is most likely to be driven by consumers' reactions to small price changes.

(550) The observed vertical switching across product types in the portability data (for example switches from a double play product to a convergent product) is less likely to reflect consumers' reactions to marginal price changes compared to observed switching across operators within the same product type, for the reasons already discussed. Since the observed vertical diversion ratios do not necessarily reflect consumer reactions to marginal price changes, in its calibrated merger simulation the Commission assumes that no price based switching occurs from one product type to another. The analysis is thus focused on the horizontal choice between operators and does not explicitly model the possibility of switching to other product types as a consequence of small price increases.

(551) That assumption is implemented in several ways. In one scenario, the assumption is implemented by eliminating the cross bundle diversions across operators and retaining only the diversions relating to switching across operators but within the same product type. In another scenario, the data is aggregated by product type of origin, which implies assuming that all consumers acquiring a 2p product had only 2p products in their choice set and all consumers who acquitted a 3p/4p product only had a 3p/4p product in their choice set[329]. In a third scenario, diversions between competitors are derived based on the gross add shares of the operators.

(552) The Notifying Party claims that the first methodology, by focussing only on the purely horizontal switching instances and discarding the diagonal instances produces biased diversion ratios due to a number of data issues. The Commission carefully considered those issues (see sections 5.2 and 5.3 of Annex A) and decided to attribute less weight to the scenario based on a matching of the product type-level FNP data and no longer retain it amongst the baseline scenarios of its updated analysis.

(553) The Notifying Party further claims that the all scenarios result in biased IPRs, due to implicit assumption of no competitive interaction between product types. To analyse

329 The second methodology does not eliminate any data and retains all the information relating to the cross bundle switching across operators.

that claim, the Commission compared the expected price increases in case no cross-bundle switching is assumed and the expected price increases in case a certain degree of cross-bundle switching is assumed. The results of that sensitivity (see section 5.3.2 of Annex A) suggest that including a certain degree of cross bundle switching has three implications: (i) it slightly increases the IPRs for 2p products, (ii) it slightly decreases the IPRs for 3p/4p products and (iii) it does not significantly affect the market wide IPRs.

(554) Overall, the Commission considers that in the present case a calibrated merger simulation based on observed portability patterns between competitors is a useful indicator to assess the likely anti-competitive effects of the loss of competition between the merging parties. Although vertical switching as a consequence of price increases is difficult to predict within this framework, the estimated magnitude of likely price increases for the relevant product types primarily depends on switching between competitors. Therefore the quantitative assessment performed by the Commission can still provide additional insights to assess the present case.

(555) In any event, the Commission does not exclusively rely on predicted effects based on observed portability data. Alongside the scenarios based on portability data, it has carried out a scenario where price effects are estimated based on benchmark diversion ratios derived from gross-adds[330]. That approach assumes that diversion between competitors is proportional to their share of gross adds, which effectively implies that all operators are equally close[331]. In its updated analysis, the Commission has decided to give more prominence to the results obtained from that scenario. As set out in section 7.2.7.6, the results point to significant price increases.

(556) The Commission has also revised the range of its estimated price effects, specifically by considering the impact of introducing a strong assumption that a significant proportion of subscribers would choose to no longer subscribe to any fixed broadband product after a price increase.

(557) The revised estimates of the expected price increases are presented in the section 7.2.7.6..

7.2.7.6. The Commission's assessment of the expected price increases

(558) Following to the Statement of Objections and the Notifying Party's reply, the Commission has refined its predictions of the post-merger price increases.

(559) While a number of sensitivity scenarios are contained in Annex A, the Commission presents, in recitals (563) to (575), the results of its baseline scenarios. These scenarios differ in the diversion ratios that are used to calibrate the customers' switching behaviour.

(560) For each of the baseline scenarios considered, the upper bound of the estimated price effects corresponds to the figures presented in the Statement of Objections, which are based on an assumption of no diversion to the outside good. An extreme lower bound to the price effects has been computed instead by reducing the diversions between the operators so as to attain a market elasticity of minus 1 (as suggested by the Notifying Party). That should be seen as an extremely conservative sensitivity assumption (see section 5.7 of Annex A).

---

330 See sections 4.4 and 6.1 of Annex A for details.

331 The assumption of equally close competitors appears to be acceptable in particular in light of the statements made by the Notifying Party in the Hearing.

(561) Adding that extreme diversion to an outside good reduces the estimated price effects but not to an extent that allows dispelling any concern of potential price increases post-merger. In addition, for both scenarios, the Commission expects the diversions to outside goods to be significantly lower than those assumed for that lower bound. Therefore, the reported lower bound to the expected price increases should be interpreted as an illustrative and extremely conservative reference. The price increases from the analysed transaction are more likely to be closer to the upper bound of the Commission's estimates than to the purely illustrative lower bound.

(562) The Commission has not explicitly modelled the changes in the incentives of the remaining market participants (in particular the three regional cable operators active in Spain[332]). Those changes are present in the Commission's calculations in terms of market shares (see Table 16) but their pricing behaviour has been assumed to be unchanged post-merger compared to the situation prior to the transaction. That assumption is expected to be conservative, because under the assumed horizontally differentiated demand model with Bertrand competition modelling the pricing behaviour of those additional players would likely lead to further increases in price for all market participants[333].

(563) In one baseline scenario, the Commission used the incremental margins computed as discussed in section 7.2.7.2 and diversion ratios based on the product type-level portability data, aggregated across all product types of origin and disaggregated by product type of destination as reported in Table 25.

(564) For the 2p product type, the resulting average price increase across all operators[334] is approximately 2.2% to 4.5% in 2013 and 1.0% to 1.9% in 2014. The corresponding price increases for Orange and Jazztel are in the range of 4% to 9% in 2013 and 2% to 6% to […]* in 2014.

(565) For the 3p/4p product type, the resulting average price increase across all operators is approximately 5% to 11% in 2013 and 4% to 7% in 2014. The corresponding price increases for Orange and Jazztel are in the range of 7% to 17% in 2013 and 5% to 10% in 2014.

(566) The market wide expected price increase, that is, the weighted average price increase across all operators and across all product types including a fixed broadband component is 4% to 7% for 2013 and 3% to 5% for 2014.

(567) Another baseline scenario considered by the Commission assumes the incremental margins computed as discussed in section 7.2.7.2[335] and benchmark diversion ratios based on gross add shares as reported in Table 26.

(568) For the 2p product type, the resulting average price increase across all operators[336] is approximately 1.2% to 2.4% in 2013 and 0.6% to 1.1% in 2014. The corresponding price increases for Orange and Jazztel are in the range of 2% to 5% in 2013 and 1% to 3% in 2014.

---

332 Euskaltel, Telecable and R Cable.

333 This is because under the horizontally differentiated demand model with Bertrand competition each firm's best reply to a price increase by rivals normally is to also increase its own price (the firms pricing decisions are said to be strategic complements in this case).

334 Including operators other than Orange, Jazztel, Telefonica, and Vodafone, which are assumed not to vary their prices after the merger.

335 The measures of margins used do not vary across the baseline scenarios considered.

336 Including operators other than Orange, Jazztel, Telefonica, and Vodafone, which are assumed not to vary their prices after the merger.

(569) For the 3p/4p product type, the resulting average price increase across all operators is approximately 6% to 11% in 2013 and 5% to 10% in 2014. The corresponding price increases for Orange and Jazztel are in the range of 6% to 18% in 2013 and 6% to 14% in 2014.

(570) The market wide expected price increase, that is, the weighted average price increase across all operators and across all product types including a fixed broadband component is 3% to 6% for 2013 and 2014.

(571) Across the two scenarios, the Commission notes that for both 2p and for 3p/4p product types the magnitude of the predicted price increases is lower for 2014 data compared to 2013 data. However, the Commission also notes that the relative share of 3p/4p subscribers increased significantly from 2013 to 2014 as reported in Table 1. In its assessment of results of the quantitative analysis the Commission has taken into consideration both the fact that overall price effects are less pronounced based on more recent data but also the fact that a forward looking analysis which takes into consideration the direction in which the market is evolving must inevitably place significant weight on the higher price increases expected for the 3p/4p product types.

(572) As explained in section 7.2.2.4, an internal document of Orange[337] suggests that the ARPUs by Orange in a […]* scenario for 2018 would be […]* for the mobile segment and […]* for the fixed broadband segment than the respective ARPUs absent […]*. Another internal document of Orange[338] suggests that the ARPU […]* for the mobile segment and […]*for the fixed broadband segment (compared to the respective ARPUs absent […]*.

(573) Overall, the results of the Commission's calculations are aligned with Orange's expectations, as set out in Orange's internal documents. For the 2p product type, the price increases estimated by the Commission for each of Orange and Jazztel are in the range of 2% to 9% in 2013 and 1% to 6% in 2014. For the 3p/4p product type, the expected price increases for each of Orange and Jazztel are in the range of 6% to 18% in 2013 and 5% to 14% in 2014.

(574) Since in some of the relevant internal documents also other synergies are analysed, the expected price increases indicated in these internal documents presumably already account for the countervailing effect of efficiencies. As explained in section 7.2.10.4, the elimination of double marginalisation for mobile services included in Jazztel's 3p products can be expected to reduce the estimated average price increase for 3p/4p products (across all operators) by approximately 0.8 percentage points. Therefore, once the elimination of double marginalisation is taken into account, the predicted price increases for 3p/4p products are more in line with the estimates of internal documents of Orange.

(575) The Commission has estimated the price effects for a variety of further sensitivity scenarios. For instance, the Commission has conducted sensitivities on the margins assumed for the non-merging parties (see section 4.6 of Annex A). Another sensitivity scenario included diversion ratios based on the operator level FNP data from the AOP (see section 4.5 of Annex A). The results of all sensitivity scenarios also pointed to significant price increases as a consequence of the notified transaction.

337 [Reference to the Notifying Party's internal business documents]*.

338 [Reference to the Notifying Party's internal business documents]*.

7.2.7.7. Conclusions from the quantitative analysis

(576) The quantitative analysis conducted indicates that the merging parties impose a significant competitive constraint on each other, in particular as regards 3p/4p products. This follows from the significant size of the Parties' gross add shares and from the fact that the diversion ratios between the merging parties are even higher than suggested by their gross add shares. In deriving its price predictions, the Commission took into account a number of arguments raised by the Notifying Party in its Reply to the Article 6(1)(c) Decision and throughout Phase II. These arguments (which are summarised and addressed in section 7.2.7.5 and in more detail in Annex A) have been given thorough consideration.

(577) As explained in the detailed assessment of the Parties' arguments, as a general principle the Commission notes that the precision of a quantitative analysis with regard to a constantly evolving market (as is it occurs in this case) is inevitably lower than with regard to stable markets. Nevertheless, the Commission considers that in this case the quantitative analyses performed provide a valuable additional insight in addition to the other elements presented.

(578) The Commission has revised downwards the range of its predicted price effects compared to the Statement of Objections, also to reflect a degree of precision loss in this case. Overall, the final estimated market-wide price increases in the two baseline scenarios likely are in the range of 3% to 7% based on 2013 data and 3% to 6% for 2014 data. The Commission considers that the estimates based on 2014 data are more relevant than the 2013 ones for the likely price effects of the merger.

(579) The Commission expects the diversions to outside goods to be significantly lower than those assumed for this lower bound. Therefore, the reported lower bound to the expected price increases should be interpreted as an illustrative and extremely conservative reference.

(580) The revised predicted price increases do not materially alter the concerns presented in the Statement of Objections, that is, the elimination of competition for customers between the merging parties is likely to lead to significant price increases[339].

7.2.8. Limited likelihood of sufficient entry in the market

(581) A merger is unlikely to pose any significant anti-competitive risk if entering a market is sufficiently easy. For entry to be considered a sufficient competitive constraint on the merging parties, it must be likely, timely and sufficient to deter or defeat any potential anti-competitive effects of the merger[340].

(582) In the present case, entry of a viable operator able to compete at national level could dispel the concerns in relation to the affected retail market for the provision of fixed Internet access services as well as in relation to the possible retail markets for the provision of multiple play services. The Commission has assessed the likelihood of entry by a new operator and whether such entry would be sufficient to deter or defeat the potential anti-competitive effects on the merger.

---

339 The possibility to increase prices post-concentration may also take the form of the merged entity introducing fewer improvements in the services available than would have applied in the absence of the merger. Likewise, a reduction of handset subsidies may also be a way to realise a price increase as regards multiple play bundles.

340 Horizontal Merger Guidelines, paragraph 68.

(583) The following assessment discusses, first, the likelihood of a sufficient entry into markets based on products provided only over fixed infrastructure (e.g., fixed Internet access services and a possible market for dual-play products). Second, the additional barriers to entry are assessed when looking at convergent markets that combine fixed and mobile services (e.g., triple- and quadruple-play services), including regarding potential entry of fixed infrastructure-only operators into such convergent markets.

7.2.8.1. Likelihood of sufficient entry into markets involving a fixed Internet access services component

Notifying Party's view

(584) In the Form CO, the Notifying Party submits that it is relatively easy to enter the retail fixed telecommunication markets. While barriers to entry to most telecommunications markets are very relevant, as in all network industries, the EU telecommunications regulatory regime implemented by Spain imposes on operators with significant market power the obligation to provide access to the fixed network. Therefore, the most relevant barrier to entry, the deployment of infrastructure, is significantly reduced. Moreover, wholesale access services provided by Telefónica have improved over the last years.

(585) In its replies to the Article 6(1)(c) Decision and to the Statement of Objection, the Notifying Party points to recital 183 of the Commission's decision in the case Vodafone/ ONO where it stated that "*the merged entity will not have the ability to foreclose its competitors in multiple play offers by denying access to fixed wholesale services, as competitors have a regulated alternative option*." In Orange's view, this statement would be proof that the Commission had, in that decision, concluded that the regulated access to Telefónica's network eliminates the barriers to entry.

(586) On the other hand, the Notifying Party acknowledges that "the existing barriers to entry are not new and definitely have not been exacerbated over the last years", but are the same faced both by Orange and Jazztel to develop and sustain their current position[341]. The Notifying Party states: "The deployment of a full parallel network, either a copper network or a fibre network, requires a significant investment. Orange is fully aware as it is actually undertaking such a deployment. However, such investment is not lower for Orange than for any other possible market entrant."[342].

(587) Finally, the Notifying Party submits in its reply to the Statement of Objection[343], that at this point in time, there is "no doubt" that alternative carriers will have at least two wholesale access products to Telefónica's FTTH network: (i) access to FTTH at the local level (through Virtual Unbundled Local Access ("VULA")-type services) in a significant part of Spain; and (ii) access at a regional level through bitstream services (including for speeds above 30 Mb/s) in a significant part of the territory. However, the Notifying Party acknowledges that "details" of access services such as the access conditions and the geographic segmentations still have to be determined.

Results of the Market Investigation

(588) The vast majority of respondents to the Phase I Market Investigation questionnaire to competitors consider that barriers to entry are high for fixed Internet access

[341] Notifying Party's response to the Article 6(1)(c) Decision, paragraph 138.
[342] Notifying Party's response to the Article 6(1)(c) Decision, paragraph 139.
[343] Notifying Party's response to the Statement of Objection, paragraph 220.

services[344]. First, significant investments are required to develop own fixed infrastructure connecting to end-customers (such as a FTTH network or a HFC cable network)[345]. Vodafone points out that there has not been any significant entry in this market in the last 5 years.

(589) Second, investments into a backbone network connecting to local exchanges to enable physical access to Telefónica’s regulated unbundled copper network are significant, considering in particular the long return cycle for such investment. Several respondents point out the market is mature, requiring also significant resources to build up a sufficient customer base to amortize the significant investment[346].

(590) Third, several respondents to the Phase 1 and the Phase II Market Investigations pointed out that they had considered to enter the market but they would have needed access to fixed broadband at reasonable price to compete on the market[347]. According to them, prices set by the existing wholesale regulation for indirect access to Telefónica's network through bitstream do not enable a new entrant to compete effectively in the market[348]. While Telefónica has an obligation to provide indirect access to its network for speeds below 30Mb/s (regardless of the underlying broadband technology), the regulated terms and conditions are currently such that new entrants cannot compete effectively on this basis at least in the residential segment of the market (where customers do not demand value-added products such as security or data centre services) and in particular with respect to convergent products (whose retail prices tend to be significantly discounted as opposed to the standalone fixed and mobile components). Moreover, some respondents submitted that the nationwide fixed Internet service providers other than Telefónica do not have the incentive to offer wholesale access at reasonable cost. One respondent states that it is "*extremely difficult to provide fixed Internet access services because […] there are a limited number of players, not willing to provide a competitive wholesale offer and current regulated offers are not feasible*."[349].

Commission's assessment

(591) Before possibly deploying its own network, a new entrant is most likely to enter markets involving fixed Internet access services by climbing up the ladder of investment including by benefitting from regulated access. Such regulated access in Spain is currently limited to the segment with speeds below 30 Mb/s. In the following, the Commission considers in more detail three ways for a new entrant to enter the retail markets involving fixed Internet access services without rolling out its own last mile access network. These ways are currently limited to the segment with speeds below 30 Mb/s and concern, notably, (1) the resale of another operator's product, (2) regulated indirect (or virtual) access to the incumbent's last mile

---

344 Responses to question 15.1 of the questionnaire to competitors Q1 of 17 October 2014.

345 See for instance, responses by Masmovil Ibercom S.A., Lycamobile, Truphone, Vodafone, to question 15.4 of the questionnaire to competitors

346 Responses by Telecable de Asturias, More Minutes, Truphone Spain, to question 15.4 of the Phase 1 questionnaire to competitors Q1 of 17 October 2014.

347 See replies to Commission Phase II Questionnaire to Competitors of 23 December 2014, question 79.

348 For instance, Carrier Enabler S.L. notes: "*En red fija la oferta pública de acceso al bucle de abonado para líneas fijas para voz y banda ancha (actualmente el NEBA) es muy favorecedora al operador dominante MOVISTAR, es decir, los precios regulados son altísimos comparados con la oferta minorista de MOVISTAR, sobre todo en el acceso a la banda ancha."* Response by Carrier enabler S.L., to question 15.4 of the Phase 1 questionnaire to competitors.

349 Response by Yoigo to question 15.4 of the Phase 1 questionnaire to competitors Q1.

network, and (3) regulated direct (or physical) access to the incumbent's last mile copper network. Yoigo is an example for reselling a fixed Internet access product of another operator (Telefónica). Orange and Jazztel rely on regulated direct access for the vast majority of their xDSL customer base (approximately […]*% and […]*% respectively). Their other xDSL customers (located in less densely populated areas) are served through regulated indirect access[350]. (4) The remainder of this section discusses potential entry into the VHBB segment by deploying its own NGA network.

Resale

(592) To the extent that non-fixed operators currently succeed in agreeing commercial terms with a fixed Internet access provider to resell the latter's services – for instance, so that mobile-only players can offer a convergent product – the Commission observes that these products do not seem to be successful in the market. Internal documents of Orange show that […]*[351] […]*[352].

(593) In any case, the Commission considers that agency contracts to resell a product do not allow a reseller to act as a competitive force in the market as the reseller generally does not set the price. Moreover, customer invoicing for the fixed component may be handled by the fixed operator, which means that the fixed operator has direct access to the customer and can therefore more easily entice the customer to switch from the reseller to the fixed operator for the services it does not yet supply to the customer. This would help explain why a reseller would hesitate to compete offensively in the market with a resale product for fixed Internet access.

(594) These findings are confirmed by Orange's internal documents where, assessing the ability to compete of low-cost mobile only players in the convergent segment, Orange states that it is […]*[353].

Regulated indirect wholesale access to Telefónica's network

(595) Regulated indirect wholesale access to Telefónica's network (so-called "bitstream access") is considered to be the second step on the ladder of investment for an alternative operator. However, as shown below, the Commission does not consider that a new entrant can, currently, compete effectively in the markets including fixed Internet access services on the basis of bitstream access.

(596) Telefónica offers two legacy regulated products for indirect access to its network. First, GigADSL is a service for the indirect access to the local loop with an ATM hand-over and 109 points of access to reach national coverage. Second, ADSL-IP is a service for the indirect access to the local loop with an IP hand-over and either 50 points of access (regional service) or one point of access (national) to reach national coverage.

(597) The Commission had expressed serious doubts based on a draft of the current regulation that "*by setting price levels […] for bitstream legacy products (GigADSL and ADSL-IP) up to 50% above cost-efficient levels, CMT is safeguarding and*

350 Form CO, paragraph 520, and Commission request for information to Jazztel of 19 March 2015, question 7.
351 [Reference to the Notifying Party's internal business documents]*.
352 [Reference to the Notifying Party's internal business documents]*.
353 [Reference to the Notifying Party's internal business documents]*.

promoting competition on the Spanish broadband markets."[354]. For the final regulation, the CNMC revised the relevant access prices criticised by the Commission.

(598) In any event, a new Telefónica product called NEBA was formally approved by the Spanish NRA on 10 November 2011 to replace the bitstream legacy products[355]. On 1 April 2014, the CNMC confirmed the effective availability of NEBA services[356].

(599) The Commission considers that the NEBA product as currently regulated[357], and in particular NEBA delivered over Telefónica's FTTH network, is unlikely to allow a new entrant to replicate current retail prices, let alone undercut those prices in order to induce customers to switch provider and to replicate the competitive pressure on prices that is lost with the merger. First, according to the Notifying Party's own submission in the Form CO[358], NEBA contains several important weak points that have limited the appeal of the offer to alternative operators. For one, the service is limited to a maximum of 30Mb/s bandwidth. While in theory, NEBA is technology neutral and includes different access technologies such as ADSL2+, VDSL2 and FTTH, the bandwidth restriction excludes the effective provision of indirect access to fibre. Moreover, the geographic coverage of NEBA is more limited than the coverage of the bitstream legacy products such as GigADSL as not all DSL access multiplexers[359] support NEBA. This is particularly the case in low-density areas, which are the areas where NEBA is of more relevance for operators that already have direct access to the local loop or fibre deployment in high density areas. Furthermore, the bandwidth limitations and quality of service parameters in NEBA create problems for the provision of IPTV services. The Notifying Party notes that NEBA was not specifically developed to replicate the TV services provided by Telefónica. Thus, Orange submitted to the CNMC that it is impossible to replicate Telefónica's convergent FTTH products (Fusión) that all incorporate, as from April 2014, TV services[360]. Finally, Orange submits that […]*[361]. The current traffic charges are as follows:

---

354 Commission Recommendation of 28 October 2013 in accordance with Article 7a 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") in Case ES/2013/1466: Wholesale broadband access (review of prices) in Spain, 28 October 2013, para. 17 (in the following "Commission Recommendation of 28 October 2013").

355 Resolución de la CMT de 10 de noviembre de 2011, sobre la propuesta de oferta de referencia del servicio NEBA remitida por Telefónica de España, S.A.U., expe. DT 2011/738. For regulated prices, see Resolución de la CNMC por la que se revisan los precios de los servicios mayoristas de banda ancha Gigadsl, ADSL-IP y NEBA, (Expte. DT 2011/739), 30 January 2014.

356 Resolución de la CNMC de 1 de abril de 2014, sobre la solicitud de declaración de disponibilidad efectiva del servicio NEBA, expe. OFE/DTSA/1287/13/DISPONIBILIDAD.

357 As discussed in recital (157), the CNMC published, on 30 March 2015, a public consultation concerning a potential reduction of the current NEBA capacity prices. (CNMC, Consulta pública sobre la revisión del precio de la capacidad en PAI del servicio de banda ancha mayorista NEBA, MTZ 2014/1840).

358 See Form CO, Addendum III "Access Regulation in Spain".

359 DSL access multiplexers are network devices, often located in local exchanges hat connect multiple customer DSL interfaces to a high-speed digital communications channel using multiplexing techniques.

360 As reported by the CNMC in its public consultation document, CNMC, Consulta pública sobre la revisión del precio de la capacidad en PAI del servicio de banda ancha mayorista NEBA, MTZ 2014/1840, page 1. In fact, Orange's request to the CNMC to revise the NEBA FTTH prices triggered that consultation.

Table 27: Traffic Charges (applicable to Copper and FTTH)	
	Price (€/Mbps)
Quality - Best Effort	14,56
Quality - Gold	16,89
Quality - Real Time	19,07

(600) Second, almost after one year after being operational, actual usage of the regulated NEBA product has been minimal. On 31 January 2015, there were only 1801 NEBA xDSL lines and 29 248 NEBA FTTH lines[362]. In its public consultation published on 30 March 2015 concerning a potential reduction of the current NEBA capacity prices, the CNMC therefore states that the current regulated prices (approved more than a year ago based on the model results of 2013) should be reviewed without awaiting the outcome of the review of markets 3a, 3b, and 4 as otherwise they would lead, given the evident non-use of NEBA, unjustified additional cost for operators that use NEBA[363].

(601) Third, Orange's internal documents further corroborate that NEBA does not allow a new entrant to compete effectively in the retail markets involving fixed Internet access services. The current regulated NEBA FTTH offer has, in Orange's own words, […]*[364]. The price payable to Telefónica for fixed voice and broadband (double play) would be EUR […]* (excluding VAT of 21%, assuming the projected 2015 average traffic for double play of […]* kbps). According to Orange, NEBA fees payable to Telefónica for a convergent offer including TV amount to EUR […]* (excluding VAT of 21%, assuming the projected 2015 average traffic for fixed-TV triple-play of […]* kbps). Another Orange document describes NEBA as […]*[365].

(602) Fourth, based on the figures in recital (601) above, a new entrant cannot compete effectively in the markets involving fixed Internet access services. A dual-play fixed package would cost a new entrant a monthly fee of EUR […]* per customer (including VAT of 21%, based on Orange's capacity assumption). On top of this monthly cost calculated by Orange, one-off costs for setting up a line and certain other charges[366] may need to be added. Furthermore, this cost excludes customer acquisition cost (sales commission, logistics or promotional costs) and any additional monthly recurrent costs of billing, collection, and customer care etc[367].

(603) For the above reasons, it seems unlikely that regulated indirect wholesale access to Telefónica's network allows operators to enter or geographically expand in the

361 Response to question 17 of the Commission Request for Information N° 1 of 29 September 2014, Doc ID 52, p. 32.

362 CNMC, Consulta pública sobre la revisión del precio de la capacidad en PAI del servicio de banda ancha mayorista NEBA, MTZ 2014/1840, page 7.

363 "En este sentido, debe incidirse en que el precio vigente –aprobado hace ya más de un año- se basa en los resultados del modelo para 2013. Por lo tanto, resulta imprescindible su revisión, sin esperar a la culminación del procedimiento de análisis de los mercados 3a, 3b y 4. De lo contrario, el precio actual conllevaría, por su evidente desactualización, un sobrecoste injustificado para los operadores que hacen uso de NEBA." CNMC, Consulta pública sobre la revisión del precio de la capacidad en PAI del servicio de banda ancha mayorista NEBA, MTZ 2014/1840, page 6.

364 [Reference to the Notifying Party's internal business documents]*.

365 [Reference to the Notifying Party's internal business documents]*.

366 These may include one-off cost for connecting port at Point of Interconnection ("PoI"), Backhaul to PoI, BRAS/RADIUS, Backbone, Internet connectivity, hosting, and common costs.

367 [Reference to the Notifying Party's internal business documents]*.

market. The regulated wholesale prices and conditions do not allow replication of current retail prices in the market, let alone undercut those prices to induce customers to switch provider and to replicate the competitive pressure on prices that would be lost with the Proposed Transaction. With respect to the consultation published on 30 March 2015 in which the CNMC proposes certain changes to the regulation the Commission considers that the outcome, as well as the timing of the possible entry into force of a potentially revised NEBA regulation are not sufficiently certain to be taken into account in the present assessment. While the consultation proposes to reduce by 45% the NEBA capacity prices shown in Table 27, other elements of the regulated NEBA offer such as the monthly recurrent prices of the service[368] and prices related to the Points of Interconnection are not considered as part of the proposed draft measure. Therefore, the effect of a potential overhaul of the NEBA regulation on the market conditions and the barriers to entry cannot be determined.

(604) As to the Notifying Party's argument that the Vodafone/ ONO decision is proof that, in that decision, the Commission had concluded that the regulated access to Telefónica's network eliminates barriers to entry, the Commission notes that this reading misinterprets the said decision. The statement invoked by the Notifying Party refers to a foreclosure scenario which is subject to the legal test of whether the merged entity has the ability to foreclose a competitor from the market by not offering wholesale services for fixed Internet access services. The Commission answered this question by stating that a competitor seeking access to fixed Internet access services has the option to rely on Telefónica's wholesale access products, such as bitstream products. The question discussed in the context of the present case is different as it concerns the question as to whether a new entrant would be able to enter the market and replicate the competitive role Jazztel is currently exercising in the market. The conclusion reached in this sub-section is that this is not the case due to the specific economics of the regulated bitstream products (as compared to the more favourable economics of services based on LLU access, which Jazztel is mainly relying on). As shown in the next sub-section, a new entrant is, moreover, unlikely to roll-out its own infrastructure in order to be able to rely on LLU access to Telefónica's copper network.

<u>Local loop unbundling</u>

(605) Orange and Jazztel have undertaken significant investments in order to rely on Telefónica's regulated LLU offer delivered to end-customers over Telefónica's copper network. They have rolled-out their own aggregation and backbone networks in Spain. For a certain percentage of local exchanges that each covers[369], they have deployed their own optical fibre backhauling networks. They have installed xDSL equipment in, respectively, […]* and […]* "local exchanges" (Telefónica's central offices containing the so-called Main Distribution Frames ("MDFs")[370].

---

368 These prices are EUR 15,02 for NEBA copper, and EUR 19,93 for NEBA FTTH per month and per line (excl. VAT).

369 Jazztel has connected […]* of the local exchanges it uses with owned optical fibre backhaul networks. For Orange, the percentage is approximately […]*%.

370 According to the Notifying Party, Jazztel has deployed, or will deploy shortly, LLU equipment in […]* local exchanges. Orange is present (or will be shortly) in […]* local exchanges. According to the Notifying Party, the geographic overlap concerns at least […]* local exchanges, corresponding to […]* million lines or at least […]*% of all Spanish copper lines. Orange's network overlaps with Jazztel's xDSL network for […]*%. Jazztel overlaps with Orange's xDSL network at […]*%.

(606) The Commission considers that a new entrant is unlikely, post-merger, to replicate such an xDSL network, as the required investments are unlikely to be recouped.

(607) First, costs for setting up a LLU site – typically at a local exchange - are significant. Orange has submitted estimates for the average costs of setting up a LLU site at a local exchange according to different scenarios:[371] (i) two different sizes of equipment (larger number of ports […]* vs. smaller number of ports […]*); and (ii) whether the backhaul network is rented or owned by the operator.

Table 28: Average cost for setting up a LLU site (in EUR)

Size of Local Exchange	Backhaul Type	Total one off-cost	Total OPEX Recurrent (€/year)
Large	Rented	[…]*	[…]*
	Owned	[…]*	[…]*
Small	Rented	[…]*	[…]*
	Owned	[…]*	[…]*

Source: Notifying Party

(608) For replicating Jazztel's current xDSL network at […]* local exchanges, the required investment would be significant. Assuming (i) an utilisation period of 5 years of the new entrant's network (see recital (610) below for plausibility of this assumption), and (ii) a network utilisation rate of […]* with an optimal mix of large and small local exchanges[372] to cover approximately 1.5 million fixed subscribers (Jazztel's subscriber base)[373], the minimum infrastructure cost over 5 years would be […]* million, based on Orange's estimates in Table 28 above[374]. These figures do not include regulated recurrent and non-recurrent fees payable to Telefónica under its LLU offer such as the line rental fee of EUR 8.60 per customer per month, nor any other non-infrastructure related cost such as customer acquisition costs (sales commission, logistics or promotional costs) and any additional monthly recurrent costs of billing, customer service, etc.

(609) Second, copper networks are today the most widespread technology for providing Internet access and are forecasted to continue to lead over the next few years. A public study foresees that in 2018 xDSL will still be the largest technology for at least 50% of premises[375]. At the same time, VHBB connections over fibre and HFC cable rapidly increase in importance. Telefónica España's CEO recently announced that the incumbent plans to dismantle its copper access network in many more densely populated areas by 2020 where it will have replaced it with fibre[376]. In 2009,

371 […]*, Annex 3 to Orange response to the Commission request for information N° 8 of 22 November 2014, Doc ID 555.

372 […]*.

373 1 429 821 subscribers as of end of 2013.

374 Under these assumptions, the most economic option is to own the backhaul network at 100%, whereas renting half or all of the backhaul would bring costs to EUR […]* or EUR […]* million, respectively.

375 Analysys Mason, Western European telecoms market: trends and forecasts 2013–2018, June 2013, Doc ID 1569.

376 Speaking at the Smart City Expo World Congress in Barcelona on 20 November 2014, Telefónica España's CEO Luis Miguel Gilpérez said according to press reports that Telefónica would close down practically the entire copper network through which the operator provides ADSL services. See http://www.telecompaper.com/news/telefonica-to-replace-spanish-adsl-network-with-ftth-by-2020--1050512, Doc ID 1567.

the former Spanish telecommunication regulator CMT had imposed conditions on the dismantling of Telefónica's copper network. Most importantly, it imposed that if any alternative operator is co-located at a local exchange, Telefónica needs to provide wholesale services for 5 years to protect those operators' investments. Moreover, Telefónica can only close a Local Exchange if more than 25% of customers covered by it are connected by alternative means (such as FTTH)[377].

(610) This limited time horizon of about five years after which large parts of Telefónica's copper network are likely to be dismantled (and the xDSL network becomes obsolete), is unlikely to allow a new entrant to amortize the significant cost for investing into the roll-out of a xDSL network given significant upfront infrastructure cost (as established in recital (608) above) and high customer acquisition cost to induce subscribers to switch provider and to gain a sufficient customer base in a market with relatively high broadband penetration.

(611) This is also the main reason why the Notifying Party is incorrect in stating that the barriers to entry are currently the same as they used to be when Orange and Jazztel entered the market. Jazztel, for instance, started to operate in 1997 and therefore has had a long period to recoup its investments into direct access via LLU. Today, the recoupment period for a new entrant would be significantly shorter, limited by the regulated period of 5 years that Telefonica is obliged to operate a local exchange that meets the regulated criteria for closure.

(612) As regard the Notifying Party's argument that there is "no doubt" that alternative carriers will have at least two wholesale access products to Telefónica's FTTH network: (i) access to FTTH at the local level (VULA type service) in a significant part of the territory; and (ii) access at a regional level through bitstream services (including for speeds above 30 Mb/s) in a significant part of the territory, the Commission considers, for the reasons set out in section 7.1.4 above, that the outcome, terms and conditions including wholesale prices and geographic coverage, as well as the timing for such potential regulated access options are not sufficiently certain and cannot, therefore, be relied upon for the purposes of this Decision.

Deployment of a NGA network

(613) Access to VHBB Internet services is currently not regulated in Spain. An operator who wishes to compete in the VHBB segments currently needs to deploy its own NGA network to the homes of end-customers. Operators deploying NGA networks in Spain may rely on the civil infrastructure sharing imposed by the CNMC in 2009 via the so-called MARCo reference offer. This sharing service features cost oriented prices and the availability of ducts in the outside plant up to the building entrance, avoiding for operators using it the need for trench digging. Moreover, there is an IT-based graphical information system for access to the complete duct database of Telefónica, made available to alternative operators, to enable them to construct business cases for fibre deployment. This helps explain that costs for civil

[377] See CNMC press release of 23 October 2014: "La CNMC acepta el primer cierre de centrales de Telefónica". See http://www.cnmc.es/Portals/0/Ficheros/notasdeprensa/2014/TELECOSyAUDIOVISUAL/20141023_NP_Centrales.pdf. With this CNMC decision, Telefónica has received approval to dismantle its first 2 local exchanges (out of the more than 8800 that it operates), Doc ID 1566. In its draft regulatory proposal to revise markets 3a, 3b and 4 currently under consultation and referred to in section 7.1.4, the CNMC proposes to simplify the procedure including by eliminating the condition that 25% of customers need to be covered by other means than copper and by shortening the minimum guarantee period from five years to six months if there are no wholesale clients in the local exchange.

engineering appear to be lower in the fibre deployment in Spain as compared to other European countries[378] and that all four nationwide operators – Telefonica, Vodafone, Jazztel and Orange – have been deploying in recent years FTTH networks[379].

(614) Despite the MARCo regulatory regime granting access to ducts, the Commission considers that the deployment of an own NGA network is a high barrier to enter the retail market involving Internet access services. This is because a new entrant would likely need to build up first its own customer base in fixed Internet access services to be able to profitably amortise the significant investments of deploying its own access network.

(615) First, as discussed in recital (588) above, respondents to the Market Investigation stated that significant investments are required to develop own fixed infrastructure connecting to end-customers (such as a FTTH network or a HFC cable network).

(616) Second, the Notifying Party submits itself (see recital (586) above) that rolling-out an NGA network such as an FTTH network or a HFC cable network to the building/ homes of end-customers requires significant investments. Jazztel invested EUR […]* million to roll out a FTTH network to 3 million BUs[380]. Orange publicly announced to invest EUR 300 million to roll out a FTTH network to almost 1.5 million BUs[381]. Given that both companies have network sharing agreements for the mentioned footprint (Jazztel with Telefonica, and Orange with Vodafone), the total investments to reach this footprint likely are likely to be higher.

(617) Third, as discussed in more detail in recital (665) below, Orange's internal documents as well as the AM report submitted by the Notifying Party state that one of the main criteria for making the roll-out profitable for a company is that it already has an existing customer base in fixed Internet access services in the roll-out areas that can be converted to the new NGA network. Therefore, deployment of an own (NGA) network would only make business sense if there is a minimum customer base in fixed Internet access services. By definition, a new entrant does not have such customer base and can therefore not profitably enter the market by deploying its own network.

Conclusion on the limited likelihood of sufficient entry in retail markets involving fixed Internet access services

(618) For the above reasons, the Commission considers that the barriers to enter the retail markets involving fixed Internet access services are high. This applies both to the VHBB segment for which the market is not regulated in Spain as well as to the segment for speeds below 30 Mb/s that is subject to regulation. The regulated wholesale prices and conditions for indirect access to Telefónica's copper network do not currently allow replication of the retail prices in the market, let alone undercut those prices, in particular with respect to convergent product offers. As regards direct access to Telefónica's copper network, a new entrant today is unlikely to amortize the

378 As discussed in recitals (700) to (701).

379 Access to Telefónica's civil infrastructure is complemented with a symmetrical obligation regarding in-house wiring also imposed by the CNMC in 2009 to all operators. The first operator that installs in-house fibre wiring in a building is obliged to grant access at reasonable prices to any requesting operator.

380 [Reference to the Notifying Party's internal business documents]*.

381 See Orange press release, "In Spain, Orange announces its intention to build a fiber network (FTTH)", 8 October 2012, http://www.orange.com/en/news/2012/juillet/in-Spain-Orange-announces-its-intention-to-build-a-fiber-network-FTTH (retrieved 20 February 2015).

significant cost for investing into xDSL equipment and backhauling, aggregation and backbone networks given the limited time horizon after which large parts of Telefónica's copper network are likely to be dismantled.

7.2.8.2. Likelihood of sufficient entry into multiple play markets involving a mobile component

(619) As already explained in section 7.2.8.1, because of the structure of the market and because of the current regulatory framework, the Commission considers that access to the fixed network infrastructure of Telefónica will likely not allow a timely or sufficient entry of alternative providers of fixed Internet access services, in the event that the merged entity and its competitors decided to raise prices post-transaction.

(620) This finding is even further exacerbated if considering that providers of triple- and quadruple-play services need to have competitive access to mobile networks as well. In fact, providers of triple-play services often cross-subsidize either the fixed or the mobile component of the bundle by offering it at competitive commercial terms (sometimes, as it is the case of Jazztel, "for free", that is, at no additional charge to subscribers of their triple-play services).

(621) Whereas considerations about entry into retail markets involving fixed Internet access services have been explored in section 7.2.8 above, the current section will discuss the additional obstacles for successfully entering into multiple play markets involving a mobile component.

The Notifying Party's view

(622) The Notifying Party explains that effective regulation at wholesale level, as regards both the mobile and the fixed telecommunications markets, ensures that other competitors can easily enter the possible multiple play markets involving a mobile component.

(623) The Notifying Party submits that, as regards the mobile component of the possible market for multiple play services, entry is facilitated by the existing regulation of the Spanish national wholesale access and call origination on mobile networks market ("wholesale mobile regulation"). Such wholesale mobile regulation imposes on MNOs, including Orange, the obligation to provide such service to MVNOs[382].

(624) In its reply to the Commission Article 6(1)(c) Decision, the Notifying Party submits that regulation on access to the mobile network is scarce if compared with access on the fixed network of Telefónica. In fact, in the Notifying Party's view, there are no regulated reference offers or regulated prices, but a simple obligation to provide "reasonable prices". This would be explained by the fact that in mobile communications, there is competition in the provision of wholesale access services between MNOs.

(625) The Notifying Party submits that, even if the wholesale mobile regulatory regime is light compared to the obligations imposed in other telecommunication wholesale markets, the number of MVNOs is high, since the market works effectively, and MNOs are in competition against each other to host MVNOs in order to recoup

[382] Resolución de la CMT de 2 de febrero de 2006, por la que se aprueba la definición y análisis del mercado de acceso y originación de llamadas en las redes públicas de telefonía móvil, la designación de los operadores con poder significativo de mercado y la imposición de obligaciones específicas, y se acuerda su notificación a la Comisión Europea, expe. AEM 2005/933.

network investments. This would be explained by the fact that MVNOs generate significant revenues for their hosting MNO.

(626) As regards access to 4G, the Notifying Party submits that access to this technology is being negotiated with all MVNOs. The Notifying Party further submits that an agreement was reached with Jazztel in July 2014 and with the MVNO HP in 2014.

(627) The CNMC issued a resolution on 30 October 2014[383] clarifying that access to 4G technology is part of the obligations contained in the wholesale mobile regulation. The Notifying Party indicates that the above resolution is not binding for any specific operator since it was only an answer to a consultation by an association of MVNOs.

(628) According to data of the CNMC, 4G coverage was around 60% of the population in Spain in 2013. The Notifying Party submits that, as of April 2014, Orange had more than 1 million customers for 4G services, out of a total of around 8.2 million mobile customers for the first half of 2014. It is expected that 4G penetration will progressively grow as customers change to 4G-enabled smartphones and coverage expands.

Commission's assessment

(629) In 2006, the Spanish NRA issued a decision on wholesale access and call origination on mobile networks (at that time, corresponding to market 15 of the Commission's recommendation on relevant products and service markets susceptible to ex-ante regulation[384]). In this wholesale mobile regulation, the Spanish NRA demonstrated that the three MNOs (Telefónica, Vodafone and Orange) jointly held a position of collective dominance on the wholesale market for access and call origination on public mobile telephone networks in Spain and imposed on MNOs the following obligations:

1) meet all reasonable requests for access;

2) provide services at reasonable prices;

3) intervention of the Spanish regulator in case no interconnection agreement can be reached with another operator.

(630) Several MVNOs entered the retail market for mobile telecommunications services and gained sizeable market shares in the last years. As reported by the CNMC in its annual report for 2013[385], MVNOs have registered the largest increase in mobile customers in 2013 (+1.7 million) as compared to MNOs and have reached a combined market share of around 13% in terms of revenues. The Commission notes

---

383 The CNMC recently held that the three leading MNOs are obliged to give access to their 4G networks, Doc ID 1581 (see: http://www.cnmc.es/Portals/0/Ficheros/Telecomunicaciones/Resoluciones/2014/Noviembre/141030_Acuerdo_CNS-DTSA-1730-14-Consulta%20AENOM%20Servicios%204G.pdf).

384 Commission Recommendation of 11 February 2003 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 communication networks and services (OJ L114, 8.5.2003, p.45). That recommendation has now been replaced by Commission Recommendation 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 (OJ L295, 11.10.2014, p.79).

385 Informe Económico de las Telecomunicaciones y del Sector Audiovisual 2014, available at http://informetelecom.cnmc.es/docs/Informe%20economico%20sectorial/Informe%20Telecomunicaciones%20CNMC%202014.pdf

that ONO and Jazztel, which are MVNOs, have been able to compete in the possible market for triple-play offers and acquire a relevant number of customers thanks to their cross-selling of mobile offers to their fixed broadband and telephony customer base.

(631) Respondents to the Market Investigation indicated that, as of today, the regulation does not oblige MNOs to make wholesale offers that would allow an MVNO to replicate retail prices for multiple play bundles. In the respondents' view, MNOs would not have the incentive to offer adequate conditions to MVNOs. In this respect, respondents to the Market Investigation indicate that the fact that MNOs have been, and still are, reluctant to offer wholesale 4G mobile services to MVNOs is telling[386].

(632) Moreover, a number of respondents to the Market Investigation have raised concerns in relation to access to 4G technology at national level in the framework of their agreements on wholesale access and call origination on mobile networks[387].

(633) For example, one respondent explains that "*The mobile service is provided in precarious conditions, with contracts imposed by the provider of the network, with uncompetitive wholesale prices, short durations and the refusal to provide 4G services, which is of fundamental importance in order to be able to compete*"[388].

(634) Likewise, another respondent highlighted that to provide multiple play services including a mobile component at national level, access to 4G at reasonable price and conditions would also be needed[389]. The same respondent argues that 4G is essential to compete on the market. In its view, the inability to offer such services would have a strong impact on reputation[390].

(635) The same respondent submits that the CNMC resolution of 30 October 2014[391], which was adopted following a complaint by an association of MVNOs and which was aimed at receiving clarification by the NRA as regards the obligation for MNOs to offer wholesale access to 4G as part of their regulated wholesale mobile offers, despite confirming that obligation, did not determine the prices at which access should be granted. The resolution simply confirmed that prices must be "reasonable" and allow potential entrants to compete in the market. According to the respondent, this resolution leaves a high degree of uncertainty in the market and MNOs can further delay granting any effective access to 4G to MVNOs.

(636) The Commission notes that, as regards the possible multiple play markets involving a mobile component in Spain, operators must be able to offer mobile and fixed telecommunications services in a bundle at prices that, while at least replicating the

---

386 See replies to Commission Phase II Questionnaire to Competitors of 23 December 2014, question 72.1.

387 See replies to Commission Phase II Questionnaire to Competitors of 23 December 2014, question 53.

388 [El servicio móvil se presta en condiciones precarias, con contratos de adhesión impuestos por el proveedor de red, a precios mayoristas fuera de mercado, periodos temporales muy cortos, y la negativa a suministrar el servicio en formato 4G, asunto de la máxima relevancia para poder competir.] See reply by Telecable de Asturias to Commission Phase II Questionnaire to Competitors of 23 December 2014, question 53.

389 See reply by Masmovil to Commission Phase II Questionnaire to Competitors of 23 December 2014, question 82.2.

390 Conference call with Masmovil: "Non confidential minutes- Conference call with Masmovil", dated 11 December 2014, Doc ID 1484.

391 The CNMC recently held that the three leading MNOs are obliged to give access to their 4G networks CNS/DTSA/1730/14/AENOM Servicios 4G; (see: http://www.cnmc.es/Portals/0/Ficheros/Telecomunicaciones/Resoluciones/2014/Noviembre/141030_Acuerdo_CNS-DTSA-1730-14-Consulta%20AENOM%20Servicios%204G.pdf).

retail prices observed in the market, allow for a positive margin for the operator. Therefore, reasonable wholesale prices for mobile telecommunications services – including 4G technology – are key.

(637) The Commission considers that access to the possible multiple play markets involving a mobile component on the basis of the current wholesale mobile regulation is difficult for players that do not have their own fixed telecommunications infrastructure based on ULL or NGA technology.

(638) As revealed by the Market Investigation, it appears that access to mobile telecommunications services on competitive terms (including 4G services) is key for convergent operators to offer credible multiple play services involving a mobile component in Spain. The Market Investigation has shown that the current wholesale mobile regulation implies substantial legal uncertainties, first of all as regards the price of access – which is not regulated - and, second, as regards access to 4G technology.

(639) The Commission notes that, in its resolution dated 30 October 2014, the CNMC considered that 4G technology is not excluded from the market product of the 2006 resolution and therefore subject to the current obligations under market 15. In the same resolution, the CNMC pointed out to the various MNOs the non-discrimination obligation and the obligation to provide such regulated services at reasonable prices.

(640) Nonetheless, the Commission notes that, despite the resolution dated 30 October 2014, there is currently legal uncertainty if and to what extent access to 4G services can be obtained by MVNOs. In this regard, the Commission notes that the views of MNOs such as the Notifying Party and of MVNOs such as the respondents to the Market Investigation diverge as regards the legal force of the CNMC opinion of 30 October 2014. Even if it is assumed that the resolution of the CNMC is legally binding on MNOs, the Commission stresses that it would be still time-consuming and generally difficult for MVNOs to obtain access to 4G services. Because of the MNOs' reticence in providing such access, MVNOs would need to clarify the legal situation before the CNMC or even before a court at the end of each negotiation with an MNO.

(641) The Commission has explained that, to be able to offer aggressive multiple play offers involving a mobile component on the market, telecommunications operators need to have access to the fixed and mobile components of the bundle. Whereas Telefónica, Vodafone/ONO and Orange are both MNOs and operate a fixed network, Jazztel (and previously, ONO) have been the only convergent players who have been able to compete aggressively on the convergent market by cross-subsidizing the terms of their retail mobile offers through their fixed offers (where they operated owned fixed networks based on ULL – Jazztel – or HFC technology – ONO).

(642) After the acquisition of ONO by Vodafone and following the Proposed Transaction, no other player will be able to timely and sufficiently enter the market to outweigh the anticompetitive effects of the Proposed Transaction. Access to the fixed component of the bundle is difficult for the reasons explained in section 7.2.8. At the same time, no other player operating its own fixed network would be able to enter the possible multiple play markets involving a mobile component by relying on wholesale access to the mobile component, since there is no other fixed network operator active at national level other than Telefónica, Vodafone/ONO and the merged entity. Finally, because of the currently unattractive commercial terms attached to the regulated wholesale broadband access in Spain and to the regulated wholesale access to mobile networks in Spain, no other new player would be able to enter the markets. In fact, the Commission notes that no player has successfully

entered the possible multiple play markets involving a mobile component in the past by relying entirely on regulated wholesale broadband access and wholesale access and call origination on mobile networks.

(643) In light of the above and given the additional barriers to entry for providing the mobile telecommunication services, the Commission considers that the barriers to entry into multiple play markets involving a mobile component (e.g., the possible retail market for triple- and quadruple-play services) are even higher than the barriers to entry into the retail markets based on products provided only over fixed infrastructure (e.g., the market for fixed Internet access services and for dual-play products).

7.2.9. Impact of the proposed transaction on the deployment of NGA networks

(644) In parallel to the current evolution of the Spanish telecommunication markets towards convergence (see sections 7.1.3, 7.2.3 and 7.2.4), the other major trend is the rapid deployment of NGA networks, in particular FTTH. This section discusses the likely impact of the proposed transaction on the deployment of NGA networks. A distinction is made between the pure FTTH roll-out which comprises only the operator's own physical fibre infrastructure and its NGA deployment/coverage which can include also other types of infrastructure different from fibre (like HFC cable) as well as bitstream access to the NGA infrastructure of another operator under a wholesale or access agreement between the two operators. In this section the Commission concludes that, contrary to the Notifying Party's claim, the proposed transaction is unlikely to lead to any significant increase in the FTTH roll-out by the merged entity, as compared to a standalone scenario of the combined FTTH footprint of Orange and Jazztel. The proposed transaction could also lead to a loss of future competition in those geographic areas which, absent the merger, would have been covered by the separate FTTH networks of both Jazztel and Orange. However, in the Commission's view, this loss of future competition cannot be established with the required degree of certainty. While the future FTTH footprint of the Parties may give a certain indication as to the Parties' future competitive position, it is nevertheless an imperfect proxy for measuring likely market power in the future (see recital (226) above).

7.2.9.1. Plans for deployment of NGA networks in Spain

(645) The incumbent operator Telefónica was the first to start rolling out FTTH on a commercial scale in 2011, reporting a significant national footprint by the end of 2014.

(646) The other major national players (Jazztel, Vodafone and Orange) reacted by each starting the roll-out of their own FTTH network: Jazztel entered in a co-deployment agreement with Telefónica for the roll-out of fibre to 3 million BUs while Orange joined forces with Vodafone in order to put in place a FTTH network expected to cover 2 million BUs[392].

[392] Under the initial co-deployment agreement between Orange and Vodafone the FTTH target was 3 million BUs but after the acquisition of local cable operator ONO by Vodafone in July 2014 the agreement was amended and the target changed to 2 million BUs with the possibility of Orange to request bitstream access on the HFC cable network of ONO for up to 1 million BUs.

(647) The table hereafter shows the coverage of NGA networks at the end of 2014 as well as the expected coverage by the end of 2017[393]. The total number of BUs in Spain is around 25 million. BUs comprise both residential buildings and offices, with the total number of residential homes/households being around 18 million.

Table 29: NGA networks (HFC cable and FTTH) by operator per building unit in Spain (given in millions of BUs)

End of:	Telefónica	Vodafone/ Ono	Orange	Jazztel
2014	10 mln BUs	8 mln BUs	0.8 mln BUs	3 mln BUs
2017	20 mln BUs	10 mln BUs	[…]* mln BUs	[…]*[394] mln BUs

Source: Commission based on information provided by the Parties

(648) Telefónica and Vodafone are at present much more advanced in the deployment of NGA networks than the Parties. The figures for 2017 show, however, that each of the Parties will significantly expand its NGA network in the coming years.

7.2.9.2. Notifying Party's view

(649) The Notifying Party submits in the Form CO that one of the main rationales of the transaction is to allow the merged entity to significantly increase its FTTH roll-out in order to compete more effectively with the two leading operators (in terms of NGA coverage) Telefónica and Vodafone. The Notifying Party submits that combining the existing customer base of the Parties will allow the merged entity to deploy fibre in areas where investment into FTTH would not have been economically justified on a standalone basis for neither Orange nor Jazztel.

(650) In its reply to the Article 6(1)(c) Decision, the Notifying Party claims that the geographic footprint of the FTTH network of the merged entity will be wider than the geographic footprint of the combined networks of each Jazztel and Orange pre-merger. The Notifying Party argues that, in a standalone scenario, Jazztel's plans are limited to the deployment of a fibre network to cover 5 million BUs, while Orange's objective was to reach […]* million BUs. In its reply to the Article 6(1)(c) Decision, Orange assumes that the total footprint of the Orange and Jazztel combined networks would reach a […]* million BUs with an overlap of […]* million BUs between the two networks. Thus, in a standalone scenario, the combined fibre footprint of the independent entities Jazztel and Orange would be limited mainly to high density areas of large cities and their metropolitan areas but would not include medium density areas.

(651) Orange further submits in its reply to the Article 6(1)(c) Decision that the coverage of the merged entity could reach […]* million BUs covering all medium density areas in Spain.

(652) On 15 January 2015, Orange submitted the AM report which compares the combined future FTTH roll-out of Orange and Jazztel on a standalone basis with the expected

[393] See recitals (670) to (683) for more detailed explanation on the Parties' figures for 2017. As for Telefónica and Vodafone / ONO, refer to recitals (225) to (228).

[394] As discussed in detail in recitals (672) *et seq.*, while Jazztel had announced, on 24 July 2014, to consider reaching up to 7 million households by 2017, it submits that […]*. However, certain preparatory works have started in order to reach a footprint of […]* million so that it is a possibility that, absent the merger, Jazztel's footprint could have reached […]* million by 2017.

FTTH roll-out of the merged entity post-transaction. In certain aspects, the report deviates from the Notifying Party's earlier reply to the Article 6(1)(c) Decision.

(653) According to the AM report, the total combined fibre footprint of Orange and Jazztel in a standalone scenario (excluding any overlap between their two fibre networks) will amount to […]* million BUs at the end of 2017, (with the overlap amounting to […]* million BUs)[395].

Table 30: Orange and Jazztel standalone fibre roll-out according to the AM report

Footprint - BUs	**End of 2014**	**End of 2017**
Orange standalone (A)	[…]*	[…]*
Jazztel standalone (B)	[…]*[396]	[…]*
Overlap under standalone scenario (C)	[…]*[397]	[…]* ([…]*% of Jazztel's coverage and […]*% of Orange's coverage)
Orange and Jazztel taken together (standalone scenario) (D=A+B-C)	[…]*[398]	[…]*

Source: AM report submitted by the Notifying Party

(654) Based on the theoretical profitability model developed in the AM report, the merged entity would extend its FTTH coverage to a total of 11.1 million BUs by the end of 2017. Therefore, the transaction would result in […]* million more BUs covered compared to the standalone scenario.

(655) In addition, Orange submits that the projected […]* million BUs increase in the fibre coverage to be achieved post-merger should be assessed as an efficiency, as it complies with the three cumulative conditions for being (i) beneficial for consumers; (ii) merger-specific; and (iii) verifiable. With respect to the merger specificity, Orange submits that such scale effects can be achieved only through a merger, as opposed to co-deployment.

(656) The Notifying Party has also submitted the paper "Competitive landscape of NGA networks in Spain", which illustrates in a more detailed manner the current NGA footprint of the Parties' main competitors Telefónica and Vodafone, and aims at substantiating the Notifying Party's claim that the future fibre roll-out of both the merged entity and both Orange and Jazztel on a standalone basis would occur in areas where […]*.

(657) In response to the Commission's concerns as set out in the Statement of Objections, the Parties argue that the fibre roll-out figures that the Commission considers in its

---

395 The combined fibre footprint is […]* BUs higher than what the Notifying Party claimed in its reply to the Article 6(1)(c) Decision while the overlap is […]* BUs smaller.

396 Jazztel's footprint as of October 2014.

397 Maximum overlap by local exchange in FTTH footprint across all cities in which both operators are present. Maximum overlap by city would be […]* as of Annex to the AM report " Analysis of the overlap OSP - Jazztel FTTH networks", Doc ID 1076.

398 Minimum combined footprint by local exchange. Maximum overlap by city is […]* according to the Annex to the AM report "Analysis of the overlap OSP - Jazztel FTTH networks", Doc ID 1076.

Statement of Objections as the likely standalone scenario for Jazztel (that is, […]* million BUs) are unrealistic […]*. In addition, the Notifying Party considers that the […]* BUs due to bitstream access on ONO's network ("the ONO bitstream BUs") that the Commission counts towards the likely NGA coverage of the merged entity should be excluded from any fibre roll-out as it does not represent infrastructure deployment.

(658) As regards the NGA coverage of the merged entity considered by the Commission in its Statement of Objections as likely (that is, […]* million BUs including ONO bitstream BUs, or […]* million BUs without those) the Notifying Party claims that the […]* million coverage, although stated repeatedly in Orange's internal documents and announced in public statements, should no longer be considered relevant in light of the theoretical model on investment incentives developed in the AM report (which predicts a fibre roll-out to […]* million BUs, excluding the ONO bitstream BUs). According to the Notifying Party, only the theoretical model should be taken into account as it represents the most relevant and likely scenario.

(659) In particular, the Notifying Party submits that the Commission has based its assessment in the Statement of Objections on the most extreme figures available for both the standalone roll-out of Orange and Jazztel and for the merged entity's fibre roll-out. In this regard the Notifying Party further submits that other plausible roll-out figures should be analysed. Such alternative roll-out figures, presented by the Notifying Party, aim at demonstrating that in all other scenarios, except the most extreme ones used in the Statement of Objections, the merger would result in a neutral or wider footprint (up to an extra […]* BUs).

(660) Moreover the Notifying Party argues (i) that any loss of competition in the overlapping footprint of the standalone Orange and Jazztel (amounting to […]* million BUs according to the theoretical investment incentives model) is not significant, and (ii) that the negative price effects in the overlapping area where the merger would result in a reduction of infrastructure operators would be largely outweighed by the positive price effects in the areas where the merger would result in an increase of infrastructure operators due to an enlarged fibre roll-out.

7.2.9.3. Commission's assessment

Likely NGA and FTTH footprint of the merged entity

(661) As regards the future fibre roll-out of the merged entity, the theoretical profitability model established in the AM report submitted by the Notifying Party calculates a maximum roll-out area of […]* BUs (excluding the BUs covered by the ONO bitstream) where the merged entity could deploy its FTTH network post-transaction. The Commission's review and analysis of Orange's internal documents revealed, however, that there is a discrepancy between this theoretical maximum coverage and the strategic NGA deployment plans of Orange post-transaction. Orange's […]*[399] targets an NGA footprint in a merger scenario to a total of […]* consisting of: […]*. If only fibre roll-out were to be taken into account rather than total NGA coverage (the NGA coverage would include the […]* BU bitstream access on Vodafone/ONO's HFC cable network) the pure fibre roll-out target of the merged entity would therefore amount to […]* million BUs according to Orange’s strategic plan.

399 [Reference to the Notifying Party's internal business documents]*.

(662) The NGA coverage target of […]* million BUs is confirmed by additional internal documents where Orange assesses […]*[400] and considers two different scenarios to reach this objective: with or without bitstream access to ONO's HFC cable network[401]. The NGA coverage target of […]* BUs is mentioned in a number of other strategic internal documents including the synergies documents prepared by Orange for the purposes of evaluating the Jazztel transaction (e.g. a presentation of the Jazztel acquisition project to […]*[402]) and a document called […]*[403].

(663) On 17 March 2015, Orange has publically announced its plans to accelerate NGA deployment in Spain with the aim of reaching coverage of 10 million BUs by the end of 2016 instead of 2017 as previously planned. […]*[404] […]*. However, according to the same document, there is no additional deployment planned for the period between the end 2016 and the end of 2017. Therefore, the number of BUs covered by the merged entity with NGA networks at the end of 2017 would remain unchanged at 10 million BUs. The Commission therefore notes that the announced acceleration in the merged entity's NGA deployment will not alter the final number of BUs covered in 2017.

(664) In its assessment, the Commission needs to decide whether to accord higher evidentiary value to a theoretical model established by external consultants to the Notifying Party for the specific purpose of the merger review process than to relevant internal documents that are drawn up in the ordinary course of business, including internal documents evaluating the synergies brought about by the transaction.

(665) First, the Commission observes that there is a difference between the AM report and Orange’s business practices in the criteria based on which certain geographic areas are identified and designated as areas of interest where FTTH could be rolled out. The main criterion used in the AM report is the number of existing xDSL customers of the Parties out of the total number of BUs per city, while internal documents of Orange indicate that the Notifying Party determines the business potential[405] for FTTH deployment of each city by taking into account […]*[406], […]*[407].

(666) Second, some of the assumptions on which the theoretical profitability model is based do not take into consideration the behaviour of the Parties in the market. For example, the model assumes that the percentage of gross adds for both Orange and Jazztel is equal to their respective market shares for retail provision of fixed Internet access services (Orange has a 24% market share in 2014, hence the assumption is that its gross adds also amount to 24%). It follows from this assumption that the merged entity, by combining Orange's and Jazztel's individual shares, will have a higher combined market share and a higher gross adds percentage than each of Jazztel and Orange would have in a standalone scenario. The higher the gross adds percentage, the higher the incentive for the operator to deploy more FTTH and acquire more new subscribers. The Commission considers that this assumption

400 [Reference to the Notifying Party's internal business documents]*.
401 [Reference to the Notifying Party's internal business documents]*.
402 [Reference to the Notifying Party's internal business documents]*.
403 [Reference to the Notifying Party's internal business documents]*.
404 [Reference to the Notifying Party's internal business documents]*.
405 […]*.
406 Response to question 14 of the Commission Request for Information N° 13 of 27 January 2015, Doc ID 1332, p. 15 and […]*, Doc ID 1350.
407 Response to question 52 of the Commission Request for Information N° 12 of 13 January 2015, Doc ID 896, p. 30.

ignores the fact that gross adds are in fact related to the aggressiveness of a given operator on the market, and not a direct result of its market share. An operator with a larger market share would not necessarily be more aggressive (resulting in higher gross adds) compared to another competitor that has a smaller market share.

(667) Third, the Commission verified the plausibility of the minimum accesses per BU threshold as set out in the AM report, which also have an impact on the incentive to deploy fibre. The model distinguishes different thresholds of existing xDSL customers depending on the geographic type of the area ([…]*). These thresholds seem to match (at least for the densely populated areas) the minimum share required in the AM report as previously indicated by Orange. However, the Commission notes that for cities where Orange's and Jazztel's deployments are already planned on a standalone basis, the assumed thresholds in the AM report are not always met (that is, Orange rolls out in regions with lower shares), which puts into question the reliability of this assumption and, by extension, of the model as a whole.

(668) Lastly, the Commission considers the model's result of a fibre roll-out of […]* million BUs to be unrealistic as it assumes that the merged entity will be able to deploy FTTH in all BUs located a given city. Such assumption fails to reflect the fact that, as explained by both Orange and Jazztel, due to various technical and practical constraints (such as civil work permits, difficulty to get licenses, etc.), the final number of BUs covered with FTTH infrastructure per city is always smaller than the initial gross amount of BUs targeted. In its internal FTTH planning, Orange uses an efficiency rate[408] equal to […]*% of the initial gross BU deployment target for a given area. Jazztel's predicted efficiency rate for its deployment up to 2015 is equal to […]*%[409].Applying Orange's efficiency rate to the FTTH roll-out of the AM model would result in a maximum fibre roll-out by the merged entity of […]* million BUs. It would therefore be wrong to consider the […]* million BUs as the merged entity's likely roll-out.

(669) In light of the above, the Commission considers that for the assessment of the future potential NGA network deployment of the merged entity, more weight should be given to the strategic plans as discussed by Orange in its internal documents and its public announcements, as they reflect with higher reliability the future plans of the merged entity, than to the theoretical profitability model established in the AM report.

Likely NGA coverage and likely FTTH footprint of Orange and Jazztel in a standalone scenario

(670) As mentioned in recital (661) above, regarding the fibre roll-out of Orange and Jazztel absent the transaction on a standalone basis, the Commission considers, that a distinction should be made between NGA *deployment* and strict FTTH *roll-out* or *footprint*. When analysing FTTH roll-out targets and plans the […]* BUs[410] on ONO's HFC cable network to which Orange will obtain bitstream access under its amended agreement with Vodafone should not be taken into account as bitstream

---

[408] Number of BU connected divided by potential number of BU in the area.

[409] See Jazztel's Annex 1 to reply to Request for Information N°16 of 1 April 2015, Doc ID 2370. The efficiency rate is equal to the final deployed BUs divided by the original planned ("gross") BUs for which work permits have been asked (in the terminology of the supporting document: "UUII CONSTRUCCIÓN NETAS ACUMULADAS" divided by "UUII PERMISOS NETAS ACUMULADAS").

[410] As mentioned in recital (661), the total bitstream access to Vodafone/Ono's HFC cable network would cover initial […]* BUs plus a […]* BUs extension.

access does not represent infrastructure deployment. The bitstream access can be counted towards target figures relating to total NGA deployment. This approach is in line with the Notifying Party's submission. In a standalone scenario, Orange would have rolled out its FTTH network to […]* million BUs: […]* million BUs under the co-deployment agreement with Vodafone and […]* million BU as standalone deployment[411]. Adding the […]* million BU bitsream to this FTTH roll-out would result in a NGA coverage of […]* million BU.

(671) These figures submitted by the Notifying Party are further confirmed by internal documents of the Notifying Party that establish Orange's objective to roll-out a fibre network to […]* households by […]* in a standalone scenario and to […]* BUs in case of acquisition of Jazztel[412,413].

(672) Regarding Jazztel's FTTH network in the standalone scenario, the AM report considers a roll-out of […]* million BUs, assuming that Jazztel will stop investing in fibre deployment after 2015. The Notifying Party submits that, […]*, this roll-out could not be considered as likely.

(673) The Commission considers that although the possible fibre roll-out of Jazztel […]* million BU by 2017 seems at the present moment to some degree uncertain, there are a number of indications that it is a possibility that, absent the merger, Jazztel's footprint could have reached […]*million by 2017.

(674) On 24 July 2014, Jazztel publicly announced that it is working on an additional plan which envisages the roll-out of up to a total of 7 million BUs by the end of 2017[414]. An internal document of Jazztel reveals that this additional plan has been discussed internally as Jazztel […]*[415]. In a presentation to the Board dated 29 October 2014, which analyses the internal standalone roll-out plan, this target has been divided in three parts: (i) co-deployment with Telefónica reaching […]* BUs (achieved), (ii) Jazztel standalone Phase I for […]* (ongoing); and (iii) Jazztel standalone Phase II for an additional […]* BUs[416,417]. […]*. However Jazztel seems confident in its ability to "*pursue the fibre project while maintaining its strong financial position*"[418]. Some preparatory steps of a technical character for the Phase II standalone deployment have been undertaken as well: conducting geographic planning and preliminary engineering works (including reserving space in Telefónica's OLT[419] rooms)[420].

(675) In internal discussions, Orange also considered the Jazztel target of […]* million BUs when analysing the FTTH roll-out plans of Jazztel in internal documents discussed both within Orange España[421] and at Board level within Orange France[422].

---

411 Response to question 24 of the Commission Request for Information N° 13 of 27 January 2015, Doc ID 1332, p. 23.

412 [Reference to the Notifying Party's internal business documents]*.

413 [Reference to the Notifying Party's internal business documents]*.

414 "*FTTH additional roll-out, Jazztel Press release*" dated 24 July 2014, Doc ID 1581. http://corporativo.jazztel.com/documents/10156/52144/Actualizaci%C3%B3n+despliegue+de+red+FTTH

415 [Reference to the Parties' internal business documents]*.

416 [Reference to the Parties' internal business documents]*.

417 [Reference to the Notifying Party's internal business documents]*.

418 Presentation by Jazztel: "Foundations for continued value creation" dated Q2 2014, Doc ID 1115-21721, slides 26 and 27.

419 Optical Line Terminal (a device that serves as the service provider's end point of an optical network).

420 [Reference to the Notifying Party's internal business documents]*.

421 [Reference to the Notifying Party's internal business documents]*.

In addition, in an internal analysis of its competitors business plan, Orange considers that […]*[423].

(676) Jazztel however claims that its standalone Phase II deployment consists […]* [424] […]*[425]. […]* 2015[426], […]*.

(677) […]*[427], […]*[428]. […]*.

(678) In light of this information, the Commission considers that […]* FTTH deployment covers […]*.

(679) However, the fact that […]* should not constrain the Commission to extend its analysis further into medium-term NGA deployment in the next two to three years. For this reason, the Commission's view is that Jazztel's Phase II standalone plan should also be considered. It emerges from the analysis of Jazztel's internal documents that […]*[429]; […]*[430]; […]*[431].

(680) Moreover, Orange's internal due diligence […]*[432].

(681) In conclusion, it appears that a number of preparatory steps for additional deployment […]* have taken place. On this basis, […]* it is nevertheless a possibility that, absent the merger, Jazztel's footprint could have reached […]*. Therefore, the Commission’s analysis will consider both scenarios, a Jazztel footprint of 5.5 million BUs and of 7 million BUs.

(682) Furthermore, the Commission notes that, contrary to the AM report, it is coherent in its analysis when considering both the additional […]* BUs for Jazztel […]* and the […]* BUs to be deployed on a standalone basis by Orange, […]*[433]. As shown in recital (670), the AM report also considers the standalone deployment of additional […]* BUs by Orange.

(683) In the light of the above, the Commission estimates a possible NGA coverage of the networks of Orange and Jazztel under a standalone scenario and of the merged entity by the end of 2017 as follows:

---

422 [Reference to the Notifying Party's internal business documents]*.

423 [Reference to the Notifying Party's internal business documents]*.

424 See Jazztel’s reply to Request for Information N° 15 of 19 March 2015, Doc ID 2160-30.

425 See Jazztel’s reply to Request for Information N° 16 of 1 April 2015, question 3.b, Doc ID 2369.

426 See Jazztel’s Annex 1 to reply to Request for Information N° 16 of 1 April 2015, Doc ID 2370.

427 See Jazztel’s Annex 2 to reply to Request for Information N°16 of 1 April 2015, Doc ID 2371.

428 See Jazztel’s Annex 1 to reply to Request for Information N°16 of 1 April 2015, Doc ID 2370. […]*.

429 [Reference to the Notifying Party's internal business documents]*.

430 See Jazztel’s Annex 8 (ii) to Request for Information N° 15 of 19 March 2015, Doc ID 2160-8, […]*.

431 [Reference to the Notifying Party's internal business documents]*

432 [Reference to the Notifying Party's internal business documents]*.

433 [Reference to the Notifying Party's internal business documents]*.

Table 31: Likely NGA footprint of Orange and Jazztel by the end of 2017

Footprint	AM report	Commission estimate
Orange standalone (A)	[…]* BUs	[…]* BUs (including BUs via ONO bitstream access)
Jazztel standalone (B)	[…]* BUs	[…]* BUs (taking into account additional roll-out plans of Jazztel)
Overlap under standalone scenario (C)	[…]* BUs	[…]* BUs[434]
Orange and Jazztel taken together (standalone scenario) (D=A+B-C)	[…]* BUs	[…]* BUs
Merged entity	[…]* **BUs**	[…]* **BUs**

Source: Commission based on Notifying Party

(684) This possible NGA coverage in Table 31 is calculated using the same assumption used in the AM model for a 100% overlap between the Parties' networks at city level (scenario C) which as explained in recitals (685) and (686) below the Commission considers to be unrealistic.

(685) It should be recalled that, as pointed out in the AM report; *"the model calculates the maximum overlap, therefore the number of BUs will be significantly lower"*[435]. Consequently, the combined coverage should be significantly higher. The reason is that, for lack of more granular data, in the AM report and in the Commission's analysis the future overlap analysis was undertaken at city level, which overestimates the total overlapping area compared to a potential analysis made closer to the building unit (i.e. at local exchange level) or even at building level. In the AM report, the analysis of the overlap as of October 2014 was made both at city and at local exchange level. While at city level the calculated overlap stands at […]* BUs, performing the same analysis at local exchange level resulted in a decrease in the overlap by one quarter to […]* BUs[436]. The reason for this difference is that in each city there are different local exchanges and each operator may choose to deploy in different ones based on their own internal strategy and customer footprint. Analysing the data at city level suggests the presence of an overlap between the parties that is, however, likely more limited (or might not exist at all) because the operators chose to deploy in (partly) different local exchanges.

434 An overlap of […]* BUs is assumed in case of a footprint of Jazztel which is […]* BUs. Assuming the total size of Jazztel's network to equal […]* BUs at the end of 2017, the overlap would likely amount to […]* BUs.

435 Notifying Party submission "Analysis of OSP and Jazztel's FTTH roll-out plans before and after the merger" dated 14 January 2015, Doc ID 1077, p.21.

436 Note that, as both Parties continue with the execution of their standalone roll-out plans, the Notifying party's high level estimation before the announcement of the public bid for the acquisition of Jazztel is that, by mid-2015, the overlap between Orange and Jazztel FTTH infrastructures could reach up to 1 million BUs. (See Orange's reply to Request for Information N°6 of 21 November 2014, questions 3.4.)

(686) In order to make a best estimate of the likely FTTH roll-out in a standalone scenario, the Commission has first calculated the maximum possible overlap between Orange and Jazztel. Using the methodology adopted in the AM report for identifying the overlap in a standalone scenario at city level, adjusted by the Jazztel and Orange standalone roll-out targets that the Commission considers the most likely ([…]* BUs and […]* BUs, respectively)[437], the maximum overlap would be […]* BUs. As explained in recital (684) above, this calculation overestimates the likely overlap and should therefore be viewed as the upper bound for the overlap. Consequently, the […]* BUs set out in Table 31 as the combined footprint of Orange and Jazztel in a standalone scenario are to be understood as the absolute minimum footprint under the (highly unrealistic) assumption that the Parties' FTTH networks perfectly overlap at city level.

(687) In order to estimate a more realistic overlap of the Parties in a standalone scenario, the Commission finds it useful to rely on Orange's own estimates as expressed in recent internal documents (see also the extract in graph 1) and on most likely results obtained when comparing the model developed in the AM report with two different scenarios: one based on Parties' internal documents and the second comparing the results of the AM reports obtained at city level with results obtained at local exchange level).

(688) In Orange's Strategic Plan 2015-2018 of 14 November 2014[438], Orange assumes: (i) an overlap of almost […]* BUs between Orange and Jazztel upon implementation of the Proposed Transaction; and (ii) an additional deployment of […]* BUs[439] by the merged entity, after deducting an overlap estimated at […]* FTTH-covered BUs between Orange and Jazztel standalone plans. This means that, when taking into account the […]* BUs of Jazztel to be rolled out until end of 2015 and the internal Orange deployment plan of […]* BUs, Orange expects a total overlap of […]* BUs. This contrasts with the overlap of […]* BUs calculated in the AM report using the same roll-out figures as input.

Graph 2: Likely NGA footprint of Orange by the end of 2017 in a standalone[440] and merger scenario[441]

[Reference to the Notifying Party's internal business documents]*

Source: Internal document of Orange

(689) In the Statement of Objections, the Commission considered that AM report's methodology has a […]*% efficiency rate in predicting the maximum overlap compared to Orange's internal estimations. This percentage had been calculated dividing the best estimate overlap obtained internally by Orange with the maximum

437 See recitals (670) to (677). (677). For the analysis of the overlap, the Commission relied on the dataset used for the AM report as well as the geographic roll-out data for the additional […]* BUs from Jazztel's Phase II standalone deployment, contained in the document: "FTTH deployment program", Doc ID 1115-6575. Based on the same document, the Commission also calculated Jazztel's Phase I standalone deployment in order to meet the most likely objective of 2.5 million BUs instead of the 2 million assumed in the AM report.

438 [Reference to the Notifying Party's internal business documents]*.

439 This figure has been compared with the Orange standalone scenario of Orange's own FTTH deployment to […]* households as detailed in Presentation by Orange: [Reference to the Notifying Party's internal business documents]*.

440 For the plan of Orange in a standalone scenario, see: Presentation by Orange: [Reference to the Notifying Party's internal business documents]*.

441 For the plan of the merged entity, see: Presentation by Orange: [Reference to the Notifying Party's internal business documents]*.

overlap calculated in the AM report for an equivalent scenario (i.e. […]* BUs divided by […]* BUs = […]*%). In its response to the Statement of Objections, the Notifying Party submits, first, that the Orange internal estimation of an overlap of […]* million BUs is methodologically flawed as the two Orange estimations reproduced in graph 1 have been produced independently from each other. Second, the Notifying Party argues that this ratio is artificial as it compares the estimation done by two different models – Orange's internal estimations compared to the AM report - using different methodologies and different sources.

(690) The Commission considers, first, that while the two documents[442] were produced in two different periods – one from October 2014, the other from November 2014 – Orange itself links them. In the Strategic Plan 2015-18 of November 2014, […]*. Therefore, the figure of […]* can well be considered as Orange's estimate for the overlap between the two FTTH networks. With regard to the second argument, the Commission notes that Orange does not substantiate the methodology used internally to estimate the NGA coverage[443], as compared to the AM report. In any event, the Statement of Objections had also used a second efficiency rate that does not compare different models but compares different scenarios established with the methodology of the AM report. The Notifying Party has not objected to using this efficiency rate. Therefore, in the present Decision, the Commission will use this efficiency rate for the purposes of is analysis.

(691) This efficiency rate compares the estimate of the overlap by the end of 2014 at city level, as established by the AM report, (i) with the overlap estimated at local exchange level in the AM report and (ii) with the overlap at BUs level calculated using data provided by the Parties[444]. In this case, the efficiency rate amounts to […]*% at local exchange level (which is similar to the […]*% obtained with the methodology based on Orange's internal documents) and to […]*% at BUs level.

(692) Using these efficiency rates, the Commission estimates, for the end of 2017, ranges for different scenarios concerning the NGA footprint and FTTH rollout of Orange and Jazztel in a standalone scenario and of the merged entity. Given the uncertainty related to the NGA deployment plans of the Parties, different scenarios are considered that take into account the two uncertain aspects related to future NGA deployment of the Parties, namely (i) the […]* BU bitstream access to Vodafone/ONO's HFC network and (ii) the additional Jazztel's FTTH rollout to […]* BU via its Phase II standalone deployment plan.

442 For the plan of Orange in a standalone scenario, see: Presentation by Orange: [Reference to the Notifying Party's internal business documents]*. For the plan of the merged entity, see: Presentation by Orange: [Reference to the Notifying Party's internal business documents]*.

443 See Orange's reply to Request for Information N° 6 of 21 November 2014, question 3, Doc ID 526.

444 For Orange: Annex 5.1 (Doc ID 511) and 5.2 (Doc ID 512) of Request for Information N°7 of 21 November 2014, Doc ID 510.For Jazztel: Annexes to Request for Information N°2 of 21 November 2014, Doc ID 510: Question 5_1 (Doc ID 518) and Question 5_2 (Doc ID 517).

(693) Table **32** below summarises the results for a number of scenarios that the Commission has run using the Parties' detailed geographic roll-out plans by city, in order to cover all plausible variations both for fibre rollout and for total NGA deployment[445].

[445] The NGA footprint comprises the fibre roll-out plus the 1.5 million bitstream access on Vodafone/ONO's HFC network.

Table 32: Possible NGA and FTTH footprints and overlaps of Orange and Jazztel by end of 2017

FTTH roll-out		**Lower bound** (calculated assuming overlap equal to […]*% of the upper bound overlap)	**Median** (calculated assuming overlap equal to […]*% of the upper bound overlap)	**Upper bound** (calculated assuming 100% overlap at city level)[446]	**Merged Entity Roll-out Footprint**
Scenario A Orange […]* BU, Jazztel […]* BU, ONO NOT included	Overlap	[…]*	[…]*	[…]*	[…]* BU
	Combined roll-out	[…]*	[…]*	[…]*	
Scenario B Orange […]* Jazztel […]*, ONO NOT included	Overlap	[…]*	[…]*	[…]*	[…]* BU
	Combined roll-out	[…]*	[…]*	[…]*	
NGA footprint		**Lower bound** (calculated assuming overlap equal to […]*% of the upper bound overlap)	**Median** (calculated assuming overlap equal to […]*% of the upper bound overlap)	**Upper bound** (calculated assuming 100% overlap at city level)	**Merged Entity NGA Footprint**
Scenario C Orange […]* BU, Jazztel […]* BU, ONO included	Overlap	[…]*	[…]*	[…]*	[…]* BU
	Combined Footprint	[…]*	[…]*	[…]*	
Scenario D Orange […]*BU, Jazztel […]*BU, ONO included	Overlap	[…]*	[…]*	[…]*	[…]* BU
	Combined Footprint	[…]*	[…]*	[…]*	

Source: Commission based on Notifying Party information

Merged Entity's Footprint/Rollout smaller than combined Footprint/Rollout of Orange and Jazztel in standalone scenario

Merged Entity's Footprint/Rollout greater than combined Footprint/Rollout of Orange and Jazztel in standalone scenario

(694) The analysis in the table demonstrates that the combined FTTH roll-out of Orange and Jazztel in a standalone scenario (scenarios A and B) would be greater than or equal to the fibre roll-out of the merged entity ([…]* BUs) regardless of whether Jazztel's standalone deployment amounts to […]* BUs or […]* BU. Only under the unrealistic assumption of a 100% network overlap and for the smallest Jazztel roll-out, the roll-out of the merged entity would be slightly higher (scenario B, upper bound). As regards the NGA footprint analysis (scenarios C and D), the merged entity would have a larger footprint only when assuming an unrealistic 100%

446 City level analysis overestimates the total overlapping area compared to a potential analysis made closer to the building unit (i.e. at local exchange level) and at building unit level. The reason for this difference is that in each city there are different local exchanges and each operator may choose to deploy in different local exchanges based on their own internal strategy and customer footprint. Analysing the data at city level assumes an overlap between the Parties' deployment of 100% that in reality will likely be more limited (or might not exist at all) because the operators chose to deploy in (partly) different local exchanges.

network overlap (scenarios C and D, upper bound) or when considering the smaller […]* BUs Jazztel roll-out in combination with an NGA coverage of Orange that comprises the ONO bitstream which Orange submits should not be taken into account (scenario D, median). In any case, the additional number of BUs deployed by the merged entity in that scenario amounts to less than […]* BUs or […]*%.

(695) Therefore, according to the most likely scenario (the "median" scenario in

(696) Table 32 above), the combined NGA footprint of Jazztel and Orange on a standalone basis would be similar to, or even greater than, the estimated footprint of the merged entity ([…]* BUs), thereby at least substantially reducing or more likely eliminating any residual potential benefit of additional fibre roll-out in a merger scenario as claimed by the Notifying Party.

Overlap of Orange's and Jazztel's NGA networks

(697) Absent the Proposed Transaction, as indicated in Table 31 above, according to the Commission's estimate, Orange's and Jazztel's standalone networks would have a […]* to […]* BU overlap by the end of 2017. Given the extensive current coverage of Telefónica's fibre network and its ambitious roll-out plans, consumers located in the geographic areas of the Orange-Jazztel overlap would have been able to choose their provider of retail Internet access services among at least three operators each having its own proprietary NGA infrastructure: Telefónica, Orange and Jazztel. Taking into account the fact that the HFC cable network of ONO, now operated by Vodafone, has a national presence of nearly 8 million BUs[447] (expected to expand to 10 million BUs by the end of 2017), it can be assumed that in a portion of the Orange-Jazztel overlap, consumer's choice for a NGA provider would have been possible between four operators: Telefónica, Orange, Jazztel and Vodafone/ONO.

(698) The Proposed Transaction could therefore result in a reduction of the number of operators with NGA network within the areas of future overlap between the standalone Orange and Jazztel fibre networks, between […]* and […]* BUs by the end of 2017 – a significant part of the combined entity's footprint (between […]*% and […]*% of the merged entity's footprint). This reduction would bring the number of NGA operators from four to three in the areas where both Telefónica and Vodafone have already or would have deployed NGA infrastructure and from three to two in those areas covered with a NGA only by Telefónica. Therefore, the Proposed Transaction could lead to a loss of competition concerning not only existing competition (mainly based on wholesale access to the xDSL network of Telefónica) but also future competition in those geographic areas which absent the merger would have been covered by the separate FTTH networks of both Jazztel and Orange.

(699) The Notifying Party submits, in essence, that post-merger, there will be three remaining NGA networks nationwide, which compares favourably to other European countries where fewer NGA networks are being rolled-out[448].

(700) In this respect, the Commission notes that Spain is an example of intense NGA infrastructure roll-out in Europe. According to internal documents of Jazztel[449], this is due in particular to several important factors that facilitate FTTH deployment:

- favourable regulated access to the existing passive infrastructure[450] (the ducts installed and operated by the incumbent Telefónica), which eliminates a significant part of the civil works costs (up to 80% of the overall roll-out cost);

---

447 Due to the lack of granular data for the coverage of ONO's HFC cable network at city level, the Notifying Party estimates ONO's presence at province level (ONO presence in […]* provinces and possibly above […]* municipalities (Analysys Mason report "Competitive landscape of NGA networks in Spain", dated 9 February 2015, Doc ID 1492).

448 Orange's Position paper from 1 December 2014 (paragraphs 35 and 36) and Reply to Article 6(1)(c) Decision, paragraphs 184 and 185, respectively Doc ID 588 and Doc ID 705.

449 Presentation by Jazztel: "Foundations for continued value creation" dated Q2 2014, Doc ID 1115-21721, slide 13.

- high population density in the urban areas (Spain has a high-rise apartment stock of 30% while in France are 16% and only 6% in Germany); and
- regulated shared access to vertical elements of the network (last portion of the fibre network reaching the individual households within the building): whichever operator is the first one to install vertical fibre elements in a certain building unit is obliged to provide access to those vertical elements to any other operator that has deployed a fibre line to the said building unit[451].

(701) Jazztel estimates the average FTTH roll-out cost per home passed in densely populated areas to be significantly lower compared to Germany and the UK[452].

(702) The Commission considers therefore that the assessment of the competitive situation needs to be specific to the geographic market concerned. Comparisons of the number of NGA networks being rolled-out across different countries, as suggested by the Notifying Party, are not helpful as the conditions for NGA roll-out vary significantly between countries, as established in recital (700) above.

Conclusion on the impact of the Proposed Transaction on the roll-out of NGA networks

(703) The Commission concludes that, contrary to the Notifying Party's claim, the Proposed Transaction is unlikely to lead to any significant increase in the FTTH coverage by the merged entity, as compared to the standalone scenario. As regards the potential loss of competition in areas where the NGA networks of the Parties would have overlapped in the future, the Commission considers that such a finding of loss of future competition cannot be established with the required degree of certainty for the reasons discussed in recital (226) above.

7.2.10. Commission's assessment of the Notifying Party's efficiencies claims

(704) The Commission considers any pro-competitive effects of efficiencies that benefit consumers as part of its overall assessment of the merger. For the Commission to take account of efficiency claims in its assessment of the merger and to be in a position to reach the conclusion that, as a consequence of efficiencies, there are no grounds for declaring the merger to be incompatible with the internal market, the efficiencies must be substantiated and satisfy the three cumulative criteria defined in the Horizontal Merger Guidelines[453]:

(a) Verifiability: efficiencies have to be verifiable such that the Commission can be reasonably certain that the efficiencies are likely to materialise and be substantial enough to counteract a merger's potential harm to consumers[454];

---

450 Resolution of the Spanish Regulatory Agency ("CMT") of November 19, 2009, on the analysis of the offer to access to Telefónica's ducts and manholes, and its adaptation to the requirements established by CMT. MTZ 2009/1223. *Resolución de la Comisión del Mercado de las Telecomunicaciones de 19 de noviembre de 2009, sobre el análisis de la oferta de acceso a conductos y registros de Telefónica de España, S.A. y su adecuación a los requisitos establecidos por la Comisión del Mercado de las Telecomunicaciones, expe. MTZ 2009/1223.*

451 CMT Resolution of February 12, 2009, to impose symmetrical access obligations on telecom operators related to the vertical part of their FTTH network and agreement to its notification to the European Commission, expe. MTZ 2008/965. *Resolución de la CMT de 12 de febrero de 2009, por la que se aprueba la imposición de obligaciones simétricas de acceso a los operadores de comunicaciones electrónicas en relación con las redes de fibra de su titularidad que desplieguen en el interior de los edificios y se acuerda su notificación a la comisión europea, expe. MTZ 2008/965.*

452 [Reference to the Notifying Party's internal business documents]*.

453 Horizontal Merger Guidelines, paragraph 78.

454 Horizontal Merger Guidelines, paragraph 86.

(b) Merger specificity: efficiencies have to be a direct consequence of the merger and cannot be achieved to a similar extent by less anticompetitive alternatives[455];

(c) Benefit to consumers: efficiencies have to benefit consumers in the sense that they should be substantial and timely and should, in principle, benefit consumers in those relevant markets where it is otherwise likely that competition concerns would occur[456].

(705) The Horizontal Merger Guidelines further explain that the burden of proof for showing that efficiencies fulfil the above criteria lies with the Notifying Party as most of the information is solely in the possession of the Parties. It is therefore incumbent upon the Notifying Party to provide in due time all the relevant information necessary to demonstrate that the claimed efficiencies are merger-specific and likely to be realised. Similarly, it is for the Notifying Party to show to what extent the efficiencies are likely to counteract any adverse effects on competition that might otherwise result from the merger and therefore benefit consumers[457]. Furthermore, evidence relevant to the assessment of efficiency claims should include, in particular, internal documents that were used by the management to decide on the merger, statements from the management to the owners and financial markets about the expected efficiencies, historical examples of efficiencies and consumer benefit, and pre-merger external experts' studies on the type and size of efficiency gains, and on the extent to which consumers are likely to benefit[458].

(706) In the following recitals, the Commission will assess whether the submitted efficiency claims fulfils the three criteria defined in the Horizontal Guidelines.

7.2.10.1. Efficiencies stemming from allegedly increased fibre roll-out post-merger

(707) As already mentioned in recital (654) the Notifying Party submits that according to the theoretical profitability model developed in the AM report the Proposed Transaction would result in a […]* million BUs increase in the fibre footprint of the merged entity, which would be a clear benefit to the consumers located in the area of these additional […]* million BUs covered by FTTH.

Verifiability

(708) The Commission's assessment of the future fibre coverage under both the standalone and the merger scenarios, carried out in recitals (661) to (695) above, already showed that the Proposed Transaction is unlikely to lead to any significant increase in the FTTH coverage by the merged entity, as compared to the standalone scenario. In the more likely scenario, the merged entity's footprint would even be […]*% smaller. Under the (highly unrealistic)[459] assumption of perfect overlap at city level in the Parties' NGA networks, the merged entity's coverage would increase by around […]*% as compared to the standalone scenario.

(709) Moreover, none of the internal synergies documents prepared by Orange for the purposes of assessing the acquisition of Jazztel envisage an increase in the coverage achieved by the merged entity (relative to the joint coverage of the two standalone networks). There is no reference in these documents to a higher value (in the form of

455 Horizontal Merger Guidelines, paragraph 85.
456 Horizontal Merger Guidelines, paragraph 79.
457 Horizontal Merger Guidelines, paragraph 87.
458 Horizontal Merger Guidelines, paragraph 88.
459 See recital (686).

greater profits for the merged entity) generated by the merger and deriving from more effective competition against rival operators. The fibre-related synergies contained in the Orange documents[460] […]*. However, these synergies do not relate to higher value created by the merged entity via an increased fibre roll-out. Therefore, the Notifying Party has not been able to produce any of the documentary evidence indicated in paragraph 88 of the Horizontal Merger Guidelines, in support of its claim on greater fibre roll-out post-merger.

(710) The Commission therefore considers that the claimed efficiency in terms of increase in the NGA network coverage is not sufficiently verified.

Merger specificity

(711) The Notifying Party in its efficiency claims submitted via the AM report argues that the increased fibre footprint of the merged entity could be achieved only through the merger. Orange submits that such a large increase in the fibre footprint could not result from a possible co-deployment agreement between the Parties for a number of reasons. First, a possible co-deployment scheme would impose certain limitations in the open exchange of confidential and granular information between the Parties which inevitably would affect the scope of the co-deployment areas. The Notifying Party considers that full transparency can be obtained only in the framework of the Proposed Transaction. Second, under a co-deployment scheme there would be a certain number of areas where co-deployment would still not make the business case for one or both of the Parties as their respective thresholds of existing customers in the said areas would be too low. And third, Orange submits that the level of uncertainty in co-deployment is much higher compared to a merger scenario, one practical example being the revised scope of the joint fibre roll-out of Orange and Vodafone following the acquisition of ONO by Vodafone in 2014.

(712) The existence of co-deployment agreements in Spain (between Jazztel and Telefónica and between Orange and Vodafone) shows that the possible limitation in the exchange of confidential information between the co-deployment parties does not seem to represent an unsurmountable hurdle for the efficient co-deployment of FTTH. Although the level of uncertainty as regards joint roll-out may be higher compared to a merger scenario it should be noted that the Parties are free to negotiate contractual provisions in a potential co-deployment agreement to safeguard against major dramatic changes in the deployment strategy of one of the partners. The Commission notes that although the […]* BUs target under the Orange/Vodafone agreement has been altered following the Vodafone/ONO transaction to […]* BUs, in fact the amended agreement envisages Orange to obtain bitstream on Vodafone/ONO's HFC cable network in order to offset this reduction in the fibre coverage target. In case such bitstream access is not technically feasible the parties would increase their roll-out commitment to […]* BUs.

(713) As to the Notifying Party's argument that, under a co-deployment scheme, there will be a number of areas where fibre roll-out would still not make the business case for one or both of the partners due to their asymmetric shares of existing DSL customers, the Commission notes that this argument relies on the assumption that the split of the deployment costs for each area would always be equal (50:50) between the co-deployment partners. However, it is likely that co-deployment partners could design a way that would overcome this issue, for example by sharing roll-out costs

460 [Reference to the Notifying Party's internal business documents]*.

according to the partners' shares of subscribers in a given area where fibre is rolled out. Alternatively it could be agreed that fibre is rolled out in some areas where one partner has more subscribers and in other areas where the other partner has more subscribers so that, overall, both partners achieve an acceptable balance between benefits and costs.

(714) The Commission considers that the Notifying Party has failed to prove the merger specificity given that a number of co-deployments have happened in the market in the past and joint roll-out is still an option for the future. Orange, in a presentation discussing the potential coverage of its standalone plan and ranking the Spanish territory for its business potential[461], states that there is […]*.[462]. In the same document, […]*[463]. […]*[464].

Benefit to consumers

(715) The Notifying Party argues that the increased Orange/Jazztel footprint post-merger would generate entry in areas that would otherwise be served by Telefónica and possibly Vodafone only[465]. This effect tends to lower the prices of Telefónica and Vodafone, which in the context of national pricing policies could offset the upward pricing pressure due to the first effect.

(716) The Commission considers that whereas the claim that a larger fibre footprint of the merged entity may indeed intensify competition with Telefónica and Vodafone, which due to national pricing policies could have an effect on the overall price level of the relevant products, the entire argument relies on the assumption that the notified transaction entails merger specific additional fibre rollout. However, a significant increase in the merged entity's fibre footprint due to the transaction is unlikely to materialize.

Conclusion on Efficiencies stemming from allegedly increased fibre roll-out post-merger

(717) In light of the above, the Commission concludes that the AM report significantly overstates the potential increase of fibre coverage resulting from the Proposed Transaction by underestimating the standalone coverage of Orange and Jazztel absent the merger and by overestimating the merged entity's future roll-out. According to the Commission's estimate the Proposed Transaction is unlikely to lead to any significant increase in the FTTH coverage by the merged entity, as compared to the standalone scenario. In the more likely scenario, the merged entity's footprint would actually be […]*% smaller. In a more unrealistic scenario, the merged entity's coverage would increase by up to […]*% as compared to Orange and Jazztel taken together absent the transaction.

(718) Furthermore, the Parties failed to prove that any additional FTTH rollout would be merger specific. From the analysis of both past co-deployment agreements and internal documents of the Parties on future rollout, the Commission showed that similar objectives may be achieved through partnership with other market players.

---

461 The criteria assessing FTTH business potential have been already discussed at recital (665).

462 [Reference to the Notifying Party's internal business documents]*.

463 [Reference to the Notifying Party's internal business documents]*.

464 For the plan of the merged entity, see: [Reference to the Notifying Party's internal business documents]*.

465 Report "Comments on the use of UPP / IPRs in the 6.1.c Decision" of 16 January prepared by the Notifying Party as well as report "Comments on the use of UPP / IPRs in the 6.1.c Decision – Supplementary Report – revised" of 4 February prepared by the Notifying Party.

(719) The Commission therefore concludes that the merger will not lead to any significant pro-competitive effects arising from reaching additional households that Orange and/or Jazztel would not have covered in a standalone scenario. Consequently, any efficiency claims based on additional roll-out appear to be not sufficiently verifiable or merger-specific.

7.2.10.2. Efficiencies from an improved offer of quadruple-play bundles

Notifying Party's view

(720) The Notifying Party argues that the notified transaction will accelerate the move of the merged entity into the top tier of offerings compared to a non-merger counterfactual, since it will enjoy better fibre coverage[466]. To the extent Orange enters due to the merger into the quadruple-play product type, intensified competition will lead to lower prices for that product type. Lower prices in the quadruple-play product type constrain the prices of triple or dual-play products. As a consequence, potential anticompetitive effects from the loss of competition must therefore be counterbalanced with the pro-competitive effect of price reductions by Telefónica in its quadruple-play offers.

(721) In its reply to the Statement of Objections, the Notifying Party further argues that greater scale in terms of footprint and customers means greater ability to obtain access to attractive content. By increasing the customer base this allows the Parties to compete more credibly for content and as a result also for 4p customers.

Commission's assessment

(722) The underlying assumption that the merged entity will be in a better position to offer quadruple-play products as a consequence of the Proposed Transaction appears not to be supported by the facts. The Notifying Party raised two arguments for being in a better position to offer quadruple-play products. First, the Notifying Party has clarified that the higher transmission speeds with greater reliability on the basis of fibre connections is particularly important for the delivery of audio-visual content[467]. However, as set out in recital (718) of this Decision, the Commission considers that the notified transaction does not lead to significant merger specific additional fibre roll-out. This in turn implies that the Proposed Transaction is unlikely to improve the ability of the merged entity to compete effectively to offer quadruple-play products.

(723) Although each of the merging parties will in the absence of the merger be likely to have a smaller fibre footprint than the merged entity, each party will be able to offer a TV component in particular wherever it will have fibre access. Moreover, audio-visual content can be also transmitted on copper to the extent the transmission speed is high enough.

(724) As to the second argument of economies of scale in the acquisition of content, the Notifying Party has not submitted any evidence (other than a claim that this basic principle is recognised by regulatory authorities such as OFCOM) to support or quantify its claim. The Commission is therefore not in a position to validate this claim.

(725) Moreover, the Commission notes that Orange is already successfully selling products that include a TV component now. For instance, Orange had […]* residential

466 Reply of 29 January 2015 to Q28 of RFI No.13 of 27 January 2015 to Orange.
467 Reply of 29 January 2015 to Q28 of RFI No.13 of 27 January 2015 to Orange.

subscribers of products which include a TV component at the beginning of Q4 2014. Of these, […]* subscribers had quadruple-play products[468].

(726) Therefore, the Commission considers that increased competitive pressure based on a merger specific improved ability by the merged entity to offer quadruple-play products has not been demonstrated.

7.2.10.3. Improved ability to serve consumers based on fibre network and to save xDSL access charges

Notifying Party's view

(727) According to the Notifying Party, the merger-related build-out of FTTH also makes it possible to shift consumers onto fibre. This allows the operators to avoid access charges to copper to deliver xDSL services, thus lowering the effective marginal cost of their services – even when offering exactly the same bundle (by capping the speed and service at the existing xDSL level).

Commission's assessment

(728) In Annex A to the Statement of Objections, the Commission pointed out that the claims relating to xDSL access charges need to be assessed by applying the three cumulative criteria for efficiencies[469]. These efficiency claims must be verifiable, merger specific and passed on to consumers, for the Commission to be able to take them into account.

(729) In particular, the Commission pointed out that the Notifying Party could quantify the claimed effects reasonably well by way of additional submissions. This would allow the Commission to balance consumer benefit from the claimed cost savings against competitive harm within the Commission's quantitative approaches[470].

(730) However, the Notifying Party has failed to produce the necessary information to verify and possibly quantify this claim.

(731) The Commission stresses that it is incumbent upon the Notifying Party to provide in due time all the relevant information necessary to demonstrate that the claimed efficiencies are merger-specific and likely to be realised. Given that the Notifying Party has not provided the information required to assess the above-mentioned claims, the claimed efficiencies cannot be acknowledged.

7.2.10.4. Efficiencies stemming from the elimination of double marginalisation of mobile services provided by Orange to Jazztel

(732) The Notifying Party also claimed that the notified transaction will reduce marginal costs in the provision of mobile services, as it eliminates the wholesale margin that Jazztel currently pays to Orange for hosting its MVNO activity[471]. This efficiency claim is based on the elimination of so-called "double marginalisation", and it can be the result of mergers that bring together complementary assets[472].

---

468 File "M 7421 - v5 EC (2) 30 Jan 2015 version2.xlsx" submitted on 30 January 2015 in reply to the data RFI of 19 January 2015 to Orange.

469 See Horizontal Merger Guidelines, paragraphs 76 – 88.

470 Annex A to Statement of Objections, paragraph 28.

471 Report "Comments on the use of UPP / IPRs in the 6.1.c Decision" of 16 January prepared by the Notifying Party, p. 19 and 30.

472 See Non-Horizontal Merger Guidelines, paragraph 55. In this case, double marginalisation occurs because Orange charges a markup for wholesale access to its mobile network to Jazztel, which itself charges its final customers of mobile services a markup on the wholesale price it pays to Orange. Each

(733) In Annex A to the Statement of Objections, the Commission noted that the Notifying Party had not submitted the information required to evaluate this efficiency claim, and therefore did not assess the impact of the claimed elimination of double marginalisation[473]. Following the Statement of Objections, the merging parties provided additional information in support of this claim.

Verifiability

(734) Based on the additional submissions by the Parties, the Commission considers that the efficiencies stemming from the elimination of double marginalisation of mobile services are sufficiently verified. Based on Orange's average cost per MVNO mobile line, the difference between Orange's costs and the charged average wholesale price per 3p product to Jazztel amounts to EUR […]* in 2013.

(735) The Commission considers that after the merger Orange will likely base its price for hosting Jazztel as an MVNO on the actual costs of providing the service. This would reduce the (transfer) price that Jazztel pays to Orange in relation to the provision of mobile services[474]. It is likely that Jazztel currently bases its pricing decisions *inter alia* on the wholesale costs for the mobile services that it pays to Orange. To the extent that the actual costs for providing the mobile services are below the wholesale cost faced by Jazztel, the costs that are relevant for pricing decisions concerning the former Jazztel products would thus decrease after the merger.

(736) Jazztel submitted that it paid on average EUR […]* and EUR […]* MVNO fees to Orange per fixed triple-play (3p) products subscriber per month in 2013 and 2014, respectively[475]. The Commission further notes that the MVNO contracts between Jazztel and Orange […]*[476]. Furthermore, Jazztel submitted that there were on average […]* and […]* active SIM cards per fixed 3p subscriber in 2013 and 2014, respectively[477]. Jazztel also submitted an average usage per active SIM card of […]* outgoing voice minutes, […]* incoming voice minutes, […]* outgoing SMS and […]* MB of mobile data usage per month in 2013[478].

(737) Orange submitted the mobile costs it incurred in 2013 for mobile service provided to full MVNOs in accordance with regulatory cost accounting data submitted to the

---

firm individually maximises profits and does not take into account that a higher markup reduces the demand and thus the profits on the mobile services of the other firm. This may result in inefficiently high prices.

473 Annex A to Statement of Objections, paragraph 28.

474 To the extent Orange's actual costs of providing the mobile services are below the wholesale prices charged to Jazztel.

475 See file "Template 01 - aggregate.xls" submitted on 26/01/2015. The average cost per fixed subscriber is derived by dividing the total wholesale costs paid by Jazztel to Orange for 3p products by the number of fixed subscribers. 3p products offered by Jazztel contain mostly fixed voice, fixed broadband and mobile services.

476 See LTE Agreement signed Jazztel 17 June 2014, "Acuerdo firmado LTE Jazztel 17-6-14.pdf", "Acuerdo renovación OMV Jazztel_Vdef.doc" and "Versión firmada renovación OMV Jazztel 26-9-13_vdef.pdf".

477 There are more active SIM cards for 3p products than fixed subscribers because sometimes 3p packages include more than one SIM card per package for additional mobile users.

478 See Jazztel reply of 20 April 2015 to RFI of 17 April 2015. The average usage per active SIM card of […]* outgoing voice minutes, […]* incoming voice minutes, […]* outgoing SMS and […]* of mobile data per month in 2014.

CNMC[479]. Orange could not provide 2014 figures as these had not been prepared yet at the time of this Decision.

(738) The Costes de Actividades Costes de Red ("CACR") submitted by Orange reflect the allocation of network costs across the mobile network components and include OPEX and CAPEX (amortization plus Net Book Value multiplied by the WACC approved by the CNMC). The CACR exclude spectrum fees, billing costs, interconnection payments in the case of resellers and other taxation and common structure costs. Table 33 shows the CACR incurred by Orange in 2013 for full MVNOs. Orange further submitted that it hosted on average […]* active mobile SIM cards of full MVNOs in 2013.

Table 33: CACR for full MVNOs and resulting unitary CACR costs of 2013

MVNO Categories	MVNO SERVICES	CACR (network costs)	TRAFFIC 2013	UNITARY CACR COSTS 2013
FULL MVNOS	Originación voz y videotelefonía	[…]* €	[…]* MIN	[…]* €/min
	Originación SMS	[…]* €	[…]* SMS	[…]* €/SMS
	Originación datos	[…]* €	[…]* GB	[…]* €/GB

(739) Based on the submitted figures, the estimated cost savings are derived as follows.[480] First, the total CACR for MVNOs is divided by the number of hosted active MVNO SIM cards. This yields costs of EUR […]* per month per active SIM card.[481] Second, taking into account Jazztel's ratio of active mobile SIM cards per 3p subscriber[482], this results in mobile costs of EUR […]* per 3p fixed subscriber. The 2013 estimate of the costs per active MVNO SIM card (EUR […]* per month) is also used for 2014 as a proxy[483], which implies mobile costs of EUR […]* per 3p subscriber. Based on these figures, the resulting indicative cost saving for 2014 is of EUR […]*per 3p fixed subscriber.

Merger Specificity

(740) The Commission considers that the cost reduction in the incremental costs for mobile services compared to the wholesale price paid by Jazztel cannot be realistically achieved by other, less anti-competitive means.

(741) One theoretical possibility to reduce the incremental costs would be to commit to pay a fixed wholesale fee (independent of the number of hosted subscribers or the traffic generated by the hosted subscribers) that is determined for a period of several years in advance in return for a low variable wholesale price.

(742) The Notifying Party submits that its MVNO contracts in Spain have a similar pricing structure and include typically fees per active subscriber and variable price per

---

479 See Orange reply of 17 April 2015 to RFI 18 and Orange reply of 20 April 2015 to RFI of 17 April 2015.

480 See section 7 of Annex A to this Decision for more details.

481 See Orange reply of 17 April 2015 to RFI 18 and Orange reply of 20 April 2015 to RFI of 17 April 2015.
Alternatively, the CACR per active MVNO SIM card could be estimated on the basis of the average usage per active SIM card of Jazztel in 2013 yields a monthly cost of EUR […]* per month per active SIM card. This results in mobile costs of EUR […]* per 3p product and hence in a slightly lower difference between Orange's cost and the wholesale charges to Jazztel. Based on this alternative estimate the same conclusion of paragraph (750) would apply.

482 Jazztel submits that sometimes as part of a single 3p contract several SIM cards are activated. For example, a couple subscribing to a 3p product may have a single fixed line but two mobile phones.

483 For 2014, Orange has not submitted cost estimates MVNOs in accordance with regulatory cost accounting data submitted to the CNMC.

service usage (mobile voice, SMS and mobile data). On top of this general pricing structure that can be described as a pay-as-you-go model, there are ad hoc temporary promotional agreements based on growth objectives to help and promote growth of the MVNOs.

(743) The Notifying Party further submits that to its knowledge there are no MVNO contracts with a price structure whereby the MVNO would pay a fixed wholesale price (independent of the number of hosted subscribers or the traffic generated by the hosted subscribers) that is determined for a period of several years in advance and a low variable wholesale price[484]. According to the Notifying Party, it is practically impossible to negotiate a fixed wholesale price (independent of the number of hosted subscribers or the traffic generated by the hosted subscribers) which would cover the non-incremental costs of rendering the service. The Notifying Party further claims that, as the market has demonstrated, it is more straightforward to negotiate pay-as-you-go wholesale contracts with a unitary price per service (that is, Euros per minute of voice or per GB of data) covering average costs of delivering the service to the MNO.

(744) The Commission accepts that contracts as described in recital (741) are very uncommon (outside the context of recent merger commitments) and probably inexistent in Spain. The Commission also considers that agreeing on such contracts may be particularly difficult if both parties do not share common information as to the number of subscribers that the MVNO can realistically attract in the contracted period. Therefore, the Commission considers that the cost reduction in the incremental costs for mobile services compared to the wholesale price paid by Jazztel cannot be realistically achieved by these types of contracts.

(745) For the above-mentioned reasons the Commission considers that Jazztel's mobile cost savings are merger specific.

Benefit to consumers

(746) In Annex A to the Statement of Objections, the Commission pointed out that if the variable mobile cost savings of Jazztel were to be quantified, the Commission could balance consumer benefit from the claimed cost savings against competitive harm within the quantitative analysis conducted[485]. The information provided by the Notifying Party shows that the mobile cost savings which Jazztel would benefit from as a result of the merger are of a variable cost nature, and as such could benefit consumers.

(747) Within the Commission's quantitative framework[486], the pass through of variable cost savings to subscribers is treated similarly to the anti-competitive effects. The Commission considers that this similar treatment is justified by the similarity of these concepts from an economic point of view.

(748) The Commission has thus considered the effect of accounting for the verified expected cost savings in the calibrated merger simulation. As set out in detail in section 7 of Annex A to this Decision, for both baseline scenarios considered in the quantitative analysis, the predicted anti-competitive effects of the merger are partially offset by Jazztel's reduced incentives to raise prices due to Jazztel's (perceived) cost savings. Compared to the results reported in section 7.2.7, the expected cost savings

[484] In addition, […]*.

[485] Annex A to Statement of Objections, paragraph 28.

[486] The details of which are described in Annex A to this Decision.

reduce the predicted market wide price increases only by 0.4 percentage points. This means that in both scenarios significant market-wide price increases remain after accounting for efficiencies.

(749) The Commission reiterates that the (perceived) cost savings applicable to former Jazztel products in 2014 are imprecise as no accurate estimates for 2014 were submitted by Orange. The Commission therefore bases its assessment on the benefit to consumers due to the elimination of double marginalisation using the 2013 data. The estimated effects of this efficiency for 2014 are therefore only indicative.

Conclusion on the elimination of double marginalisation of mobile services provided by Orange to Jazztel

(750) For the above mentioned reasons, the Commission accepts that the elimination of double marginalisation relating to mobile services provided by Orange to Jazztel will likely reduce the incentives to raise prices of former Jazztel products post-merger. However, these efficiencies are not expected to entirely offset anti-competitive effects of the merger. The anti-competitive effects net of this efficiency remain significant.

7.2.11. Conclusion on markets including fixed Internet access services

(751) In light of the above, the Commission concludes that the Proposed Transaction will significantly impede effective competition on the market for fixed Internet access services, possible markets for multiple play services, on the possible market for dual-play services, on the possible market for triple-play services, and on the possible market comprising triple- and quadruple-play services in Spain. Given that Jazztel is not active on the possible market for quadruple-play services, the Proposed Transaction will have no impact on this latter market.

(752) The Commission considers that the impediment of effective competition resulting from the Proposed Transaction concerns mainly competition based on wholesale access to the xDSL network of Telefónica. As regards future competition based on NGA networks, the Commission considers that the loss of competition caused by the Proposed Transaction cannot be established with the required degree of certainty.

7.3. Retail market for fixed voice services

(753) Both Orange and Jazztel provide retail fixed voice services in Spain and had a combined market share on the overall market for fixed voice services of 22.84% by volume[487] (Orange 12.38% and Jazztel 10.46%) and 7.56% by value (Orange 2.53% and Jazztel 5.03%) for the first half of 2014[488]. This overall market comprises all fixed voice services regardless of whether these are sold on a standalone basis or as part of a bundle.

(754) On the narrower segment of provision of fixed voice services to residential customers the combined market share of the Parties is 24.11% by number of subscribers (Orange 12.63% and Jazztel 11.48%). The Notifying Party was unable to provide market shares based on revenue.

---

487 Volume is measured by number of subscribers.

488 Source: data provided by the Notifying Party on the basis of CNMC Quarter reports for 2014.

7.3.1. Notifying Party's view

(755) The Notifying Party submits that the combined market share of the Parties in 2013 both in terms of volume, measured in number of minutes, (18.98%) and in terms of value (6.87%) is below the 20% threshold, and only if the number of subscribers is taken into consideration the combined market share of the Parties is slightly above the 20% threshold: 21.96%.

(756) The Notifying Party argues that the market shares in terms of revenues and in minutes of traffic are more relevant than the market share by subscribers as the market share in revenues illustrates more correctly the real economic impact of the operator for the retail provision of fixed voice services, while the market share in minutes shows the real volume of traffic generated by the customer base of each operator. The Notifying Party submits that subscribers can have very different consumption patterns (some subscribers generating significant number of minutes and consequently revenue while others make or receive a very limited number of calls thus generating very little traffic and revenues for the operator) and market shares by subscribers does not provide insight on the profitability of the subscriber base of the operator.

(757) Therefore the Notifying Party further submits that it does not consider the market for retail supply of fixed voice services in Spain to be an affected market.

(758) In any event the Notifying Party argues that in the retail fixed voice market the merged entity will be the third supplier in the market as both Telefónica and Vodafone/ONO will have larger market shares.

7.3.2. Commission's assessment

(759) The market share of the merged entity based on subscribers amounts to 23% in the retail market for supply of fixed voice services in Spain. This share is slightly higher for residential customers: 24.11% (12.63% for Orange and 11.48% for Jazztel) and much lower for business customers: 16.14% (11.08% for Orange and 5.06% for Jazztel).

Table 34: Market shares for 2014 for fixed voice services in Spain in total market by revenue and by subscribers[489]

	Subscribers		Revenue (million EUR)	
	Total	%	Total	%
Orange	2 041 815	13.12%	84.70	2.44%
Jazztel	1 694 486	10.89%	177.23	5.11%
OR/JZ COMBINED	3 736 301	24.01%	261.93	7.56%
Telefónica	7 675 860	49.33%	2 463.85	71.10%
Vodafone	1 420 773	9.13%	207.25	5.98%
ONO	1 889 670	12.14%	277.83	8.02%
Vodafone/ONO	3 310 443	21.28%	485.08	14.00%
OTHERS	836 847	5.38%	182.91	5.25%
TOTAL	15 559 451	100%	3 465.33	100.00%

Source: CNMC data

Table 35: Market shares for 2013 for fixed voice services in Spain in total market by revenue and by subscribers[490]

	Subscribers		Revenue (mln EUR)	
	Total	%	Total	%
Orange	1 794 987	11.64%	102.20	2.46%
Jazztel	1 590 946	10.32%	183.07	4.41%
OR/JZ COMBINED	3 385 933	21.96%	285.27	6.87%
Telefónica	8 136 826	52.77%	2 978.39	71.68%
Vodafone	1 253 859	8.13%	199.60	4.80%
ONO	1 794 516	11.64%	415.95	10.01%
Vodafone/ONO	3 048 375	19.77%	615.55	14.81%
OTHERS	847 657	5.50%	275.97	6.64%
TOTAL	15 418 791	100%	4 155.18	100%

Source: Notifying Party based on CNMC data

(760) First, the Commission notes that Telefónica is by far the leading operator on the overall retail market for fixed voice services both in terms of number of subscribers (49.33%) and in terms of revenues (71.10%). In 2014, the second largest competitor, Vodafone/ONO, had a market share of 21.28% by subscribers, and of 14% by value. Post-transaction the merged entity will continue to face strong competition from these two operators both in the overall retail market for voice services but also in its residential and business segments (where Telefónica's shares by subscribers are

489 As set out in recital (208), these market shares provided by the Notifying Party wrongly include large business customers that are not part of the retail fixed Internet access market, so that the Parties' correct market shares are likely higher.

490 As set out in recital (208), these market shares provided by the Notifying Party wrongly include large business customers that are not part of the retail fixed Internet access market, so that the Parties' correct market shares are likely higher.

48.61% and 63.41% respectively and Vodafone has a market share of 22% and 14.18%).

Table 36: Market shares for 2014 for the residential and business segments of fixed voice services in Spain by subscribers

	Residential subscribers		Business subscribers	
	Total	**%**	**Total**	**%**
Orange	1 734 747	13.19%	307 068	12.75%
Jazztel	1 578 869	12.01%	115 617	4.80%
OR/JZ COMBINED	3 313 616	25.20%	422 685	17.55%
Telefónica	6 176 442	46.96%	1 499 418	62.26%
Vodafone	1 241 147	9.44%	179 626	7.46%
ONO	1 737 441	13.21%	152 229	6.32%
Vodafone/ONO	2 978 588	22.65%	331 855	13.78%
OTHERS	682 598	5.19%	154 249	6.41%
TOTAL	13 151 244	100%	2 408 207	100%

Source: CNMC data

Table 37: Market shares for 2013 for the residential and business segments of fixed voice services in Spain by subscribers

	Residential subscribers		Business subscribers	
	Total	**%**	**Total**	**%**
Orange	1 974 378	12.7%	1 544 313	11.86%
Jazztel	1 651 511	10.65%	1 501 185	11.53%
OR/JZ COMBINED	3 625 889	23.39%	3 045 498	23.40%
Telefónica	7 780 378	50.2%	6 572 120	50.49%
Vodafone	1 411 912	9.10%	1 040 351	7.99%
ONO	1 842 852	11.89%	1 666 314	12.80%
Vodafone/ONO	3 254 764	21%	2 706 665	20.79%
OTHERS	836 721	53.39%	692 926	5.32%
TOTAL	15 497 752	100%	13 017 209	100%

Source: CNMC data

(761) Second, beside Telefónica and Vodafone/ONO, a number of other operators are also active in the retail provision of fixed voice services to residential customers: the regional cable operators Euskaltel, R Cable and Telecable, and to business customers: such as BT and Colt.

(762) Third, respondents to the Phase I Market Investigation did not raise any concerns regarding the provision of fixed voice services as the majority of respondents consider that post-transaction a sufficient number of suppliers of retail fixed voice services will remain active on the market[491].

(763) Fourth, with the evolution of the Spanish retail telecommunication markets towards convergence more and more standalone fixed voice lines migrate to fixed and

491 See replies to Commission Phase I Questionnaire to Competitors Q1 of 17 October 2014, question 14.2 and Commission Phase I Questionnaire to Customers Q2 of 20 October 2014, questions 12.2

convergent dual- and triple-play bundles. Less than 10% of both Orange and Jazztel fixed voice subscribers for 2013 and for the first half of 2014 have a standalone fixed telephony product while the rest of the Parties' fixed voice customers are subscribed to either a fixed or a convergent bundle.

Table 38: Number of fixed voice subscribers of Orange and Jazztel for 2013

	Orange		Jazztel	
Fixed telephony only	[…]*	[5-10]*%	[…]*	[5-10]*%
Fixed telephony + Fixed Internet	[…]*	[40-50]*%	[…]*	[30-40]*%
Fixed telephony + Fixed Internet + Pay TV	[…]*	[0-5]*%	-	-
Fixed telephony + Fixed Internet + Mobile	[…]*	[40-50]*%	[…]*	[50-60]*%
Fixed telephony + Fixed Internet + Mobile + Pay TV	-	-	-	-
Total fixed voice subscribers	[…]*	100%	[…]*	100%

Table 39: Number of fixed voice subscribers of Orange and Jazztel for the first half of 2014

	Orange		Jazztel	
Fixed telephony only	[…]*	[5-10]*%	[…]*	[5-10]*%
Fixed telephony + Fixed Internet	[…]*	[20-30]*%	[…]*	[20-30]*%
Fixed telephony + Fixed Internet + Pay TV	[…]*	[0-5]*%	-	-
Fixed telephony + Fixed Internet + Mobile	[…]*	[60-70]*%	[…]*	[60-70]*%
Fixed telephony + Fixed Internet + Mobile + Pay TV	[…]*	[0-5]*%	-	-
Total fixed voice subscribers	[…]*	100%	[…]*	100%

(764) Although it has a number of legacy fixed voice services only customers, at present Jazztel offers fixed voice services only in combination with other telecommunication services such as fixed Internet access services or mobile telecommunication services[492].

(765) Orange on the other hand provides fixed voice services both as a standalone product and as a component in its multiple play services: convergent FTTH and ADSL-based packages "Canguro" and its fixed bundled offers[493].

(766) The Parties provide retail fixed voice services on the same underlying infrastructures used for the delivery of fixed Internet access services: the unbundled local loop of Telefónica's copper network and the Parties' respective FTTH networks. Therefore even if competition concerns on the retail market for fixed voice services were assumed, the final commitments aimed at addressing the serious impediment to effective competition identified on the retail market for fixed Internet access services

492 When reporting multiple play revenues to the CNMC Jazztel reports the part of multiple play revenues corresponding to fixed services as fixed broadband revenue. If the bundle includes mobile telecommunication services, […]*% of the fixed revenue of the bundle is reported as revenue originated by the provision of mobile communication services.

493 When reporting multiple play revenues to the CNMC Orange distributes the revenue from the fixed monthly fees between the retail fixed voice service and the retail fixed Internet access service based on usage estimates of Orange's customers.

would remedy also any such potential competition concern on the retail market for fixed voice services.

7.3.3. Conclusion

(767) In light of the above, the Commission concludes that the Proposed Transaction would not significantly impede effective competition on the Spanish retail market for fixed voice services, including its possible segments.

7.4. Retail market for mobile telecommunication services

(768) Both Parties provide mobile telecommunication services to end customers in Spain. While Orange acts as an MNO, Jazztel is an MVNO hosted on Orange's network. On the Spanish market, there are four active MNOs: Telefónica, Vodafone, Orange and Yoigo.

(769) In the first half of 2014, the Parties had a combined market share of 22.5% by revenues (Orange 20.9%, Jazztel 1.6%) and 25.7% by subscribers (Orange 22.6%, Jazztel 3.1%). On the market segment of mobile post-paid telecommunications services, the Parties had a combined market share of 24.1% by revenues (Orange 22.2%, Jazztel 1.9%) and 27.6% in terms of subscribers (Orange 23.3%, Jazztel 4.3%)[494].

7.4.1. Notifying Party's view

(770) The Notifying Party submits that the Proposed Transaction will not lead to competition concerns on the retail mobile telecommunications market in Spain as Orange's competitive position in the Spanish retail market for mobile telecommunications services will remain virtually the same after the acquisition of Jazztel.

(771) First, the removal of Jazztel as a provider of retail mobile telecommunication services is not likely to impede effective competition in the market due to the limited market share of Jazztel. The Proposed Transaction, as a consequence, will not have an important impact on Orange's position in the market. Orange will remain the third largest provider in the market by revenue (22.5% combined market share) behind Telefónica (34.1%) and Vodafone (27.6%)[495].

(772) Second, the Notifying Party submits that Orange and Jazztel are not close competitors. Jazztel is focused on the low-cost segment of the market and its mobile telecommunications services are bundled with its fixed telecommunications services in order to defend its customer base in fixed services by attempting to reduce churn in those services. Therefore, direct competition between Orange and Jazztel in the retail market for mobile telecommunication services would only be relevant if bundled offers are considered as a relevant market segment, which Orange considers not appropriate.

(773) Third, the Notifying Party notes that post-merger the combined entity will continue to face competition from three MNOs: Telefónica, Vodafone and Yoigo, with a combined market share of 67.5% in terms of revenue and 61.8% in terms of subscribers. Furthermore, the Notifying Party submits that after the concentration, the

---

494 Source: data provided by the Notifying Party on the basis of the CNMC data (http://data.cnmc.es/datagraph/). These market shares include mobile services provided as part of a bundle with fixed services.

495 Source: data provided by the Notifying Party on the basis of the CNMC data (http://data.cnmc.es/datagraph/). Data for the first half of 2014.

merged entity will continue to face competition from a high number of MVNOs (31 active, out of which 9 are full MVNOs and 22 are service providers). According to Orange, MVNOs are aggressive players on the Spanish market for retail mobile telecommunications and represent more than 10% of the market in terms of subscribers. Their price aggressiveness has not decreased and their entry has been successful in the last years.

(774) Fourth, the Proposed Transaction will not have any impact on spectrum rights due to the spectrum cap regime in Spain.

7.4.2. Results of the Market Investigation

(775) Based on the results of the Market Investigation, the Commission did not identify competition concerns in relation to the retail market for the supply of mobile telecommunications to end customers in Spain on a standalone basis.

(776) The majority of respondents recognize that mobile-only services are still important today, especially for certain types of customers (such as young people) who do not require a fixed component[496]. In the next 2-3 years, this situation may change, as almost half of the respondents expect mobile-only services to become less important due to the increasing popularity of fixed-mobile triple-play bundles[497]. A higher proportion of customers are expected to purchase mobile telecommunications services within a bundle[498]. In this context, one competitor notes that access to fixed services will be required to avoid the erosion of the mobile customer and revenue base.

(777) The Market Investigation was inconclusive as regards the closeness of competition between Orange and Jazztel on this market. On the one hand, a majority of respondents to the Market Investigation consider Jazztel and Orange to be close competitors in the provision of mobile telecommunication services[499]. Respondents argue that Orange and Jazztel's offers target the same customers in the residential segment and they are both rather aggressive competitors on this market. On the other hand, respondents point out that Jazztel mainly provides mobile telecommunications services together with its multiple services bundles (which include fixed services) and that Orange is a much larger competitor in mobile services.

(778) Respondents to the Market Investigation consider that a sufficient number of providers of retail mobile telecommunications services will remain active on the market[500]. However, entry on this market is considered to be difficult[501]. One competitor perceives a possible positive impact on prices which would decrease[502].

7.4.3. Commission's assessment

(779) The key question is whether the removal of Jazztel is likely to significantly impede effective competition on the retail mobile market. The Commission notes, first, that Jazztel acts as an MVNO and its presence on the market is rather limited (1.6% market share by revenues). The increment brought about by the Proposed Transaction is not higher than 3% (in terms of subscribers) in the overall market and

---

496 See replies to Commission Phase II Questionnaire to Competitors of 23 December 2014, question 73.
497 See replies to Commission Phase II Questionnaire to Competitors of 23 December 2014, question 74.
498 See replies to Commission Phase II Questionnaire to Competitors of 23 December 2014, question 75.1.
499 See replies to Commission Phase I Questionnaire to Competitors Q1 of 17 October 2014, question 14.3.
500 See replies to Commission Phase I Questionnaire to Competitors Q1 of 17 October 2014, question 13.3.
501 See replies to Commission Phase I Questionnaire to Competitors Q1 of 17 October 2014, question 15.3.
502 See replies to Commission Phase I Questionnaire to Competitors Q1 of 17 October 2014, question 32.4

below 5% in the market segment of mobile post-paid telecommunications services. The Proposed Transaction will therefore not have a large impact on Orange's position in the market. The combined market share of the Parties amounts to 22.5% by revenue and remains below 30% for all possible market segments (mobile data only, mobile voice only, pre-paid and post-paid) regardless of whether it is measured by subscribers or revenue.

(780) Second, after the merger, the combined entity will continue to face competition from the three remaining MNOs in Spain, namely Telefónica (34.2% market share by revenues), Vodafone (27.6%) and Yoigo (5.8%) as well as from other MVNOs (10%).

Table 40: Market shares for the first half 2014 for mobile telecommunications services in Spain by revenue and by subscribers[503]

	Subscribers		Revenue (mln EUR)	
	Total	**%**	**Total**	**%**
Orange	11 460 559	22.6%	1 026.95	20.84%
Jazztel	1 575 234	3.11&	80.76	1.63%
COMBINED	13 035 793	25.71%	1 107.71	22.47%
Telefónica	16 463 062	32.46%	1 683	34.15%
Vodafone	11 491 783	22.66%	1 359.09	27.58%
Yoigo	3 392 437	6.69%	285.35	5.79%
Other MVNOs	6 324 584	12.48%	492.39	9.99%
TOTAL	50 707 659	100%	4 927.40	100%

Source: Notifying Party based on CNMC data

7.4.4. Conclusion

(781) In the light of the above, and in particular given the small increment brought about by the transaction, as well as the presence of several competitors on this market, the Commission concludes that the Proposed Transaction would not significantly impede effective competition on the retail market for mobile telecommunications services and its possible segments in Spain.

7.5. Wholesale market for broadband access services

(782) Looking at all wholesale access services taken together, including LLU services, bitstream services and the resale of broadband offerings, the market shares of both Orange and Jazztel are minimal.

503 As set out in recital (208), these market shares provided by the Notifying Party wrongly include large business customers that are not part of the retail fixed Internet access market, so that the Parties' correct market shares are likely higher.

Table 41: Market shares for 2013 for all wholesale broadband services

	Subscribers		Revenues (in million €)	
	Total	%	Total	%
Orange	4 525	0.10	[…]*	[0-5]*
Jazztel	14 050	0.31	[…]*	[0-5]*
OR/JZ COMBINED	18 575	0.41	[…]*	[0-5]*
Telefónica	4 465 321	99.38		
OTHERS	9 219	0.21		
TOTAL	4 493 115	100	653.77	100

Source: Notifying Party based on CNMC

(783) The majority of wholesale broadband access services (84% in terms of subscribers and 75% in terms of revenues) are provided as LLU services exclusively by Telefónica. The second largest wholesale offers are bitstream services which constitute approximately 15% of all subscribers to wholesale broadband services and 23% of the overall revenues by such services. The vast majority of all bitstream services are provided by Telefónica. […]*. According to the Notifying Party which based its assessment on CNMC data, Jazztel had a market share in wholesale bitstream services of approximately [0-5]*% in terms of subscribers and [0-5]*% in terms of revenues in 2013 whereas Telefónica had a market share of almost [90-100]*% in terms of subscribers.

(784) The resale of broadband services constitutes 0.36% of all wholesale broadband services in terms of subscribers and 1.26% in terms of revenues. In a possible market for the resale of broadband services the Parties would be strong.

Table 42: Market shares for 2013 for resale of broadband services

	Subscribers		Revenues (in million €)	
	Total	%	Total	%
Orange	4 525	28.2	[…]*	[10-20]*
Jazztel	6 956	43.4	[…]*	[30-40]*
COMBINED	11 481	71.6	[…]*	[40-50]*
Telefónica	2 055	12.8		
OTHERS	2 493	15.6		
TOTAL	16 029	100	8.21	100

Source: Commission based on data from CNMC and the Parties

(785) As regards such a possible market for the resale of broadband offerings, the Commission notes, first of all, that the reselling of broadband services plays a marginal role in the Spanish telecommunication market. Out of more than 12.2 million subscribers to fixed Internet access services, only 16 thousand have been served under a resale agreement. This amounts to 0.13% of all subscribers.

(786) Second, the Commission finds that although reselling allows for the least fixed cost of all wholesale broadband services, bitstream offers do not require wholesale customers to undertake significant investments. Therefore, wholesale bitstream offers constrain wholesale resale offers as customers of wholesale resale services could switch to wholesale bitstream services without incurring significant costs. In the possible market for bitstream services that is roughly 43 times larger in terms of subscribers and 18.6 times larger in terms of revenues, the Parties have only a

marginal share of slightly more than 1%. Moreover, competing providers of wholesale access to broadband services could easily increase their resale offerings, if the merged entity were to raise prices for the resale of broadband services. For this reason, it is unlikely that the Parties will be able to significantly raise prices for the resale of broadband services post-transaction.

(787) In conclusion, the Commission finds the Proposed Transaction would not significantly impede effective competition on the overall wholesale market for broadband access services. As regards a possible wholesale market for the resale of broadband offerings, which would be of marginal size, the Commission notes the high combined market share of the Parties, the significant constraints exercised by wholesale bitstream offers as well the possibility of providers of bitstream services to also offer the resale of broadband offerings.

7.6. Vertical assessment

(788) The Proposed Transaction gives rise to a number of vertically affected markets.

7.6.1. Wholesale market for fixed call termination services – Retail supply of fixed voice services and retail supply of mobile telecommunications services

(789) Both Orange and Jazztel provide call termination services in fixed networks in Spain.

(790) The wholesale market for fixed call termination services where the Parties have a 100% market share in their respective networks ("one net-one market" principle) is upstream of the markets for the retail supply of fixed voice services (Orange 2.5%, Jazztel 5.0%) and of the retail supply of mobile telecommunication services (Orange 20.8%, Jazztel [0-5]*%) as of the first half of 2014[504].

7.6.1.1. The Notifying Party's view

(791) The Notifying Party submits that any possible competition concerns are excluded from the outset, as the wholesale market for fixed call termination in Spain is subject to regulatory obligations. According to a CNMC regulation of September 2014[505], all operators including Orange and Jazztel have the following obligations: (1) provide fixed call termination to all operators; (2) provide the service at cost-oriented prices and (3) on a non-discriminatory basis; (4) intervention of the Spanish regulator in case no interconnection agreement can be reached with another operator. The CNMC defined cost-oriented prices following the Bottom-Up Long Run Incremental Cost (BULRIC) standard indicated in the Commission Recommendation on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU[506]. A maximum termination price applying to all operators has been set at 0.0817 €cent/min which is charged by the second starting from the first second.

7.6.1.2. The Commission's assessment

(792) The Commission notes, first, that no respondent to the Market Investigation raised any issues related to vertical competition concerns arising from the Proposed

---

504 Source: data provided by the Notifying Party on the basis of the CNMC data (http://data.cnmc.es/datagraph/).

505 Resolución de la CNMC de 23 de septiembre de 2014, por la cual se aprueba la definición y el análisis de los mercados mayoristas de terminación de llamadas en redes fijas, la designación de los operadores con poder significativo de mercado y la imposición de obligaciones específicas y se acuerda su notificación a la Comisión Europea y al organismo de reguladores europeos de comunicaciones electrónicas (ORECE), expe. ANME/DTSA/628/14/m3-3ªronda).

506 Commission Recommendation of 7 May 2009 on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU (2009/396/EC).

Transaction on the market for fixed call termination services on the one hand, and the markets for retail supply of fixed voice services and of mobile telecommunications services on the other hand.

(793) Second, the Commission notes that there are detailed regulatory obligations applying to the wholesale fixed call termination market, including an obligation to provide call termination to all operators on a non-discriminatory basis and with a regulated maximum price, subject to intervention by the Spanish regulatory authority.

(794) Third, in any case, the Parties' combined market share on the downstream market for retail supply of fixed voice services remains under 15% (by revenues). In relation to the downstream market for retail supply of mobile telecommunication services, the Commission notes that the Proposed Transaction only brings an insignificant increment (less than 2% by revenues)

(795) In light of the above, the Commission concludes that the Proposed Transaction would not significantly impede effective competition as regards the relation between the market for wholesale fixed call termination services on the one hand, and the markets for retail supply of fixed voice services and retail supply of mobile telecommunication services on the other hand.

7.6.2. Wholesale market for mobile call termination services – Retail supply of fixed voice services and retail supply of mobile telecommunications services

(796) Orange is active on the market for wholesale mobile call termination services on its own network. Jazztel is also active on this market and provides mobile termination services for its own network.

(797) The wholesale market for mobile call termination services where the Parties have a 100% market share in their respective networks ("one net-one market" principle) is upstream of the markets for the retail supply of fixed voice services (Orange 2.5%, Jazztel [5-10]*%) and of the retail supply of mobile telecommunication services (Orange [20-30]*%, Jazztel [0-5]*%) as of the first half of 2014[507].

7.6.2.1. Notifying Party's view

(798) The Notifying Party submits that any possible competition concerns are excluded from the outset, as the wholesale market for mobile call termination in Spain is subject to detailed regulatory obligations. According to a regulation adopted in May 2012[508], all operators have the following obligations: (1) provide fixed call termination to all operators; (2) provide the service at cost-oriented prices and (3) on a non-discriminatory basis; (4) transparency obligations; and (5) intervention of the Spanish regulator in case no interconnection agreement can be reached with another operator. Moreover, a cost accounting separation obligation is imposed on Telefónica, Vodafone and Orange. As from 1 July 2013, the regulated mobile termination maximum price is set at EUR 0.00109 per minute, applying to all operators and charged by the second starting from the first second.

---

507 Source: data provided by the Notifying Party on the basis of the CNMC data (http://data.cnmc.es/datagraph/).

508 CMT Decision dated 10.5.2012 in case MTZ 2011/2503 corresponding to market 7 in Commission Recommendation 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.

7.6.2.2. Commission's assessment

(799) The Commission notes, first, that none of the respondents to the Market Investigation raised any concerns related to vertical issues arising from the transaction on the market for wholesale mobile call termination services on the one hand, and the retail supply of fixed voice services and retail mobile telecommunication services on the other hand.

(800) Second, the Commission notes that there are regulatory obligations, including price caps, applying to the wholesale mobile call termination market

(801) Third, the Parties' combined market share on the downstream market for retail supply of fixed voice services remains under 10% (by revenues). In relation to the downstream market for retail supply of mobile telecommunication services, the Commission notes that the Proposed Transaction only brings an insignificant increment (less than 2% by revenues).

(802) In light of the analysis above, the Commission concludes that the Proposed Transaction does not significantly impede effective competition on the markets for wholesale mobile call termination services on the one hand, and retail supply of fixed voice services and retail mobile telecommunication services on the other hand.

7.6.3. Wholesale market for access and call origination services on mobile networks – Retail supply of mobile telecommunications services

(803) MNOs supply wholesale access and call origination services which enable MVNOs to provide their own retail mobile services. In Spain there are four MNOs, out of which three are currently providing such services (Vodafone, Telefónica and Orange). Yoigo is not active at present on this market due to the fact that it depends on roaming services provided to it by Telefonica. The market for wholesale access and call origination services where only Orange, and not Jazztel, is active ([20-30]*% in terms of revenues) is upstream of the market for retail supply of mobile telecommunications services where both Parties are active (Orange 20.8%, Jazztel [0-5]*% in revenues).

7.6.3.1. Notifying Party's view

(804) The Notifying Party submits that the Proposed Transaction will not lead to any input or customer foreclosure concerns.

(805) Firstly, the concentration does not create any overlap, as Jazztel is not active in this market. Only Orange, an MNO, provides wholesale access and call origination on mobile networks services.

(806) Secondly, the market share of the only party active in the market, Orange, is below the 25% threshold specified in paragraph 18 of the Commission's Horizontal Merger Guidelines.

(807) Thirdly, Orange is the smallest provider of the service in the Spanish market. Vodafone and Telefónica have larger market shares in this market.

(808) Fourthly, the size of the market, EUR 433 million, is limited if compared with the retail market for the provision of mobile telecommunication services.

(809) Finally, this is a regulated market and Orange, as well as Vodafone and Telefónica, have the regulatory obligation to provide the service, which is supervised by the Spanish NRA.

7.6.3.2. Commission's assessment

(810) The Market Investigation confirmed that Spanish legislation imposes an obligation on Vodafone, Orange and Telefónica to provide wholesale access and call origination services on reasonable terms. The majority of respondents indicated that while entry on the retail mobile market may be difficult[509], there would be a sufficient number of providers of wholesale access and call origination on mobile networks in Spain post-transaction[510].

(811) In order to be competitive in the market, most respondents to the Market Investigation consider it essential to be able to offer 4G services. Data usage has an increasing importance in the mobile sector and customers require higher speeds. Respondents submit that if MVNOs do not have access to 4G on reasonable terms they will not be able to compete and may be forced to leave the market[511]. Moreover, half of respondents consider that the incentive of Orange to provide 4G access to MVNOs will decrease after the transaction[512]. Post-transaction, the merged entity would give priority to its own MVNO brands Jazztel and Simyo. One respondent submits that Orange would countenance a profit loss for not providing 4G services to its MVNOs as it would gain profits from expanding sales through Jazztel, by raising prices to consumers and by expelling MVNOs from the market (who no longer can compete without 4G services).

(812) The Market Investigation thus showed that MVNOs currently experience difficulty in contracting 4G services at reasonable prices from MNOs. The Commission notes that the relevant question as regards the assessment of possible input foreclosure by the merged entity is whether Orange's ability and incentives to provide this service change after the transaction.

(813) With respect to ability, the Commission notes, first, that Orange's position on the wholesale market for access and call origination service on mobile networks does not change. The transaction does not reduce the number of MNOs providing wholesale access to their networks as Jazztel is not present on the upstream market.

(814) Second, Orange's market share in the upstream market is below 25%, which typically does not confer the necessary market power to engage in input foreclosure. Two alternative providers, Telefónica and Vodafone, are present on the upstream market. The Commission notes that at least one MVNO, Pepephone, was able to conclude an agreement with an MNO (notably with Telefonica) for the provision of 4G services. Therefore, Orange on its own does not have the ability to foreclose MVNOs from the market.

(815) Third, in 2006, the Spanish telecommunication regulator imposed on Telefonica, Vodafone and Orange obligations to meet all reasonable requests for access to their network and to provide services at reasonable prices[513]. According to MVNOs responding to the Market Investigation, it appears unclear to what extent these provisions are enforceable with respect to 4G services.

---

509 See replies to Commission Phase I Questionnaire to Competitors Q1 of 17 October 2014, question 15.3.
510 See replies to Commission Phase I Questionnaire to Competitors Q1 of 17 October 2014, question 28.
511 See replies to Commission Phase I Questionnaire to Competitors Q1 of 17 October 2014, question 17.
512 See replies to Commission Phase II Questionnaire to Competitors of 23 December 2014, question 78.
513 Resolución de la CMT de 2 de febrero de 2006, por la que se aprueba la definición y análisis del mercado de acceso y originación de llamadas en las redes públicas de telefonía móvil, la designación de los operadores con poder significativo de mercado y la imposición de obligaciones específicas, y se acuerda su notificación a la Comisión Europea, expe. AEM 2005/933.

(816) One competitor submits that without the initiated merger, Jazztel would have initiated a regulatory conflict against Orange before the CNMC. According to that respondent, without the merger, Jazztel would have continued to exercise pressure on Orange to make it comply with its legal and regulatory obligation to provide mobile wholesale access in 4G and would have supported the demands for 4G access of the rest of the MVNOs. The Commission notes that if this is correct, other MVNOs than Jazztel would have the possibility to initiate a regulatory conflict against Orange to oblige it to grant access to 4G services.

(817) With respect to incentives, the Commission considers, first, that Orange's incentive to provide wholesale 4G services to MVNOs does not significantly change post-transaction. Orange is already present on the downstream market for retail mobile telecommunications services and the increment in the downstream market for retail mobile telecommunication services brought about by the acquisition of Jazztel is small ([0-5]*% in terms of revenues).

(818) Second, the Commission notes that pre-transaction, Orange had not concluded an agreement to provide 4G services with any of the MVNOs it hosts except with Jazztel. Therefore, Orange does not appear to have had the incentive to conclude such agreements with MVNOs. Therefore, if Orange were to continue post-transaction to refuse to provide 4G wholesale services, its incentives would not have changed post-merger and therefore would not be merger-specific.

(819) In light of the analysis carried in recitals (813) to (818), the Commission concludes that the Proposed Transaction would not significantly impede effective competition on the markets for wholesale access and call origination on the one hand, and retail supply of mobile telecommunications on the other hand.

8. COMMITMENTS

8.1. Procedure

(820) In order to address the Commission's serious doubts raised during the Phase I investigation, the Notifying Party submitted commitments on 13 November 2014 and revised commitments on 19 November 2014 pursuant to Article 6(2) of the Merger Regulation consisting of several different wholesale access offers.

(821) The Commission considered that these commitment packages did not address in full and in a clear-cut fashion the competition concerns raised during the Phase I investigation and that they therefore did not meet the standard for an acceptable remedy in Phase I. As a result, the Commission decided not to market test the proposed set of commitments.

(822) Upon completion of the Phase II Market Investigation, on 25 February 2015 the Commission addressed the Statement of Objections to the Notifying Party. The Commission further substantiated its competition concerns in the Letter of Facts.

(823) To address the Commission's concerns raised in the Statement of Objections, the Notifying Party submitted a commitments package on 6 March 2015 (the "First Commitments").

(824) The Commission launched a market test of the First Commitments on 13 March 2015 (the "First Market Test"). Questionnaires were sent to competitors of the Parties in Spain and outside Spain. The CNMC also submitted its comments on the First Commitments on 19 March 2015.

(825) Following the First Market Test, the Notifying Party submitted a new set of commitments on 29 March 2015 ("the Second Commitments") and a revised set of

commitments on 6 April 2015 ("the Third Commitments", together with the Second Commitments referred to as the "Modified Commitments").

(826) On 8 April 2015, the Commission launched a market test of the Third Commitments (the "Second Market Test"). Questionnaires were sent to competitors of the Parties in Spain and outside Spain.

(827) Following the Second Market Test, on 20 April 2015, the Notifying Party submitted a final set of commitments (the "Final Commitments").

8.2. Analytical framework

(828) Where the Commission finds that a concentration raises competition concerns in that it could significantly impede effective competition, the parties may seek to modify the concentration in order to resolve the competition concerns and thereby gain clearance of their merger[514].

(829) Under the Merger Regulation, it is the responsibility of the Commission to show that a concentration would significantly impede effective competition. The Commission then communicates its competition concerns to the parties to allow them to formulate appropriate and corresponding remedies proposals[515]. It is then for the parties to the concentration to propose commitments that would be suitable to address entirely such competition concerns[516]. The Commission only has power to accept commitments that are deemed capable of rendering the concentration compatible with the internal market so that they will prevent a significant impediment of effective competition in all relevant markets where competition concerns were identified[517]. To this aim, the commitments have to eliminate the competition concerns entirely[518] and have to be comprehensive and effective from all points of view[519]. The commitments must also be proportionate to the competition concerns identified[520].

(830) In assessing whether the proposed commitments will likely eliminate the competition concerns identified, the Commission considers all relevant factors including *inter alia* the type, scale and scope of the proposed commitments, judged by reference to the structure and particular characteristics of the market in which the competition concerns arise, including the position of the parties and other participants on the market[521].

(831) In order for the commitments to comply with these principles, commitments must be capable of being implemented effectively within a short period of time[522]. Where, however, the parties submit remedies proposals that are so extensive and complex

---

514 Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (the "Remedies Notice"), OJ 2008/C 267/01, paragraph 5.

515 See Case T-209/01 *Honeywell International, Inc. v. Commission* [2005] II-5527, paragraph 99.

516 Remedies Notice, paragraph 6.

517 Remedies Notice, paragraph 9.

518 See also Case C-202/06 P *Cementbouw Handel & Industrie v Commission* [2007] ECR 2007 I-12129, paragraph 54.

519 Remedies Notice, paragraphs 9 and 61.

520 recital 30 of the Merger Regulation. The General Court set out the requirements of proportionality as follows: "*the principle of proportionality requires measures adopted by Community institutions not to exceed the limits of what is appropriate and necessary in order to attain the objectives pursued; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued*" (T-177/04 *easyJet v Commission* [2006] ECR II-1931, Paragraph 133).

521 Remedies Notice, paragraph 12.

522 Remedies Notice, paragraph 9.

that it is not possible for the Commission to determine with the requisite degree of certainty, at the time of its decision, that they will be fully implemented and that they are likely to maintain effective competition in the market, an authorisation decision cannot be granted[523].

(832) As concerns the form of acceptable commitments, the Merger Regulation leaves discretion to the Commission as long as the commitments meet the requisite standard[524]. Structural commitments will meet the conditions set out above only in so far as the Commission is able to conclude with the requisite degree of certainty that it will be possible to implement them and that it will be likely that the new commercial structures resulting from them will be sufficiently workable and lasting to ensure that the significant impediment to effective competition will not materialise[525].

(833) Divestiture commitments are generally the best way to eliminate competition concerns resulting from horizontal overlaps, although other structural commitments, such as access remedies, may be suitable to resolve concerns if those remedies are equivalent to divestitures in their effects[526].

(834) It is against this background that the Commission analysed the proposed Commitments in this case.

8.3. Assessment of the Commitments

8.3.1. First Commitments

(835) To address the Commission's competition concerns raised in the Statement of Objections, the Notifying Party submitted the First Commitments on 6 March 2015.

8.3.1.1. Description

(836) The First Commitments comprise two elements: (i) the divestment of a FTTH network located in some of the cities where Jazztel's and Orange's networks currently overlap (the "Divested FTTH Network"); and (ii) the wholesale access to Jazztel's DSL network ("Wholesale ADSL Bitstream Access").

Divested FTTH network

(837) Orange commits to divest an FTTH network that covers [500-600 000]* BUs. These BUs are located on the current fibre network of Jazztel at 11 local exchanges located in the four cities of Barcelona, Madrid, Sevilla and Valladolid.

(838) According to Orange, the Divested FTTH Network constitutes an independent, coherent network at the level of the cables (which bundle many fibre lines). It would also cover BUs located on parts of Jazztel's non-overlapping fibre network in exchange for BUs located in the other […]* local exchange areas, where Orange's and Jazztel's networks currently overlap. Therefore, the divested network infrastructure would be independent from Orange.

(839) As the Divested FTTH Network includes parts of Jazztel's fibre network that are non-overlapping, the First Commitments provide for an Indefeasible Right of Use ("IRU") to the benefit of Orange for 35 years (renewable for another 35 years) for a "limited capacity" on the Divested FTTH Network. In return, Orange commits to pay

523 Remedies Notice, paragraphs 13, 14 and 61 *et seq.*
524 Case T-177/04 *easyJet v Commission* [2006] ECR II-1913, paragraph 197.
525 Remedies Notice, paragraph 10.
526 Remedies Notice, paragraph 19.

to the purchaser a one-time fee and a recurrent fee that should cover maintenance costs.

(840) To allow the purchaser to build up the necessary capability to manage the Divested FTTH Network, during a minimum of 12 months, renewable at the purchaser's request (the "Transition Period"), Orange will operate the Divested FTTH Network on behalf of the purchaser.

Wholesale ADSL Bitstream Access

(841) The structural divestment of the Divested FTTH Network is complemented by granting the purchaser wholesale access to the merged entity's ADSL network. The Notifying Party commits to provide a national bitstream service to its LLU network, with interconnection in one single point of presence and for a duration of seven years. This wholesale access would be constructed using as an input Telefónica's regulated physical LLU offer, thus providing access to either Orange or Jazztel's ADSL network ([…]* local exchanges, covering 78% of the Spanish territory). The purchaser could choose among three different pricing structures.

(842) The first pricing structure comprises two elements: (i) a fixed fee of EUR […]* which would pay for a block of […]* lines usable over seven years, and (ii) an additional monthly fee of EUR […]* per line. In addition, a number of non-recurrent fees are payable, such as a one-off set up fee per line of EUR […]*.

(843) The second option does not have any fixed fee but a higher monthly fee of EUR […]* per line. The set up cost for a line is EUR […]*. There is a minimum of […]* lines to be activated during the first 12 months of the contract.

(844) The third option is modeled on the current prices of the regulated Telefónica offer called NEBA (copper), but […]*.

(845) For both the first and the second option, the average peak hour subscriber throughput is limited to 375 kb/s per customer. In the event of traffic in excess of the threshold of 375 kb/s per customer, an additional EUR […]* per Mb/s per customer per month would be payable.

(846) For all options, other non-recurrent fees apply for disconnecting a line, incident management, on-site support, equipment, etc.

8.3.1.2. Results of the First Market Test

Divested FTTH network

(847) Respondents to the First Market Test provided mixed results as regards the scope of the Divested FTTH Network. Half of the respondents to the First Market Test indicated that the geographic scope of the Divested FTTH Network would be enough to compete on the national Spanish market for fixed Internet access services. A small minority indicated that such geographic scope would be sufficient only to be active on part of the Spanish retail markets involving fixed Internet access services, whereas the remaining respondents to the market test indicated that the geographic scope of the Divested FTTH Network would not be of a sufficient size to compete on the Spanish market[527].

---

[527] See replies to the Commission's First Market Test, question 30.

(848) Respondents to the First Market Test indicated that the cities where the Divested FTTH Network is located are generally all commercially attractive areas[528].

(849) A number of respondents indicated that the scope of the Divested FTTH Network would only partially cover the four cities included in the First Commitments, and that the purchaser would need to invest further to acquire sufficient coverage[529]. As regards the parts of the four cities not covered by the Divested FTTH Network, the majority of the respondents to the market test indicated that it would be difficult for the purchaser to offer fixed Internet access services with NGA technology to those parts[530]. In particular, a respondent stressed that, in order to achieve significant coverage in those parts, access to the merged entity's FTTH network would be needed[531].

(850) When asked whether the purchaser will have the ability and the incentive to roll out additional fibre, respondents provided mixed replies[532]. Some respondents to the market test affirmed that the purchaser would need time to acquire a sufficient customer base for it to be able to extend its FTTH network. As a consequence, wholesale access to the merged entity's FTTH network would be needed[533]. A majority of the respondents to the market test stated that, for Orange to remove completely the competition concerns identified in the Statement of Objections, the commitments package should include a wholesale access to the merged entity's FTTH network[534].

(851) As explained in recital (839), Orange will be granted an IRU over a limited capacity of the Divested FTTH Network, in exchange for a one-time fee and a recurrent fee. A large majority of the respondents to the First Market Test affirmed that, despite the existence of such IRU, the Divested FTTH Network can be considered a viable and independent business[535]. Respondents generally explained that IRUs are industry standard practice. However, as regard the exact definition of the IRU, the large majority of the respondents to the market test stressed that the formulation of the "limited capacity" needed clarification[536].

(852) Regarding the possibility for the purchaser to require Orange to provide maintenance services for the operation of the Divested FTTH Network, the large majority of the respondents to the First Market Test generally acknowledged the need of such maintenance services for the purchaser to be able to acquire the necessary knowledge during the Transition Period. The majority of the respondents indicated that a sufficient duration for such maintenance services would be 12 months[537].

(853) Likewise, the large majority of the respondents to the market test affirmed that it may be necessary for Orange to operate the Divested FTTH Network on behalf of the purchaser during the Transition Period[538]. Respondents generally explained that the Transition Period would ensure continuity of the service, and it would allow the

---

528 See replies to the Commission's First Market Test, question 31.
529 See replies of Pepehone and Euskaltel to the Commission's First Market Test, question 30.
530 See replies to the Commission's First Market Test, question 33.
531 See reply of Yoigo to the Commission's First Market Test, question 33.
532 See replies to the Commission's First Market Test, question 34.
533 See replies to the Commission's First Market Test, question 34.
534 See replies to the Commission's First Market Test, question 55.
535 See replies to the Commission's First Market Test, question 46.
536 See replies to the Commission's First Market Test, question 48.
537 See replies to the Commission's First Market Test, questions 51 and 52.
538 See replies to the Commission's First Market Test, question 53.

purchaser to acquire the necessary knowledge to operate the network by itself. Moreover, all respondents expressed the view that a duration of 12 months for the Transition Period is an adequate timeframe[539].

(854) A majority of the respondents to the market test affirmed that the Divested FTTH Network does not need to include other network layers, such as the Metropolitan Area Network for it to be considered a viable business[540].

(855) In its comments submitted on 19 March, the CNMC comments that the proposed remedies would be insufficient to address the competition concerns identified in the Statement of Objections and to allow the effective entry of a fourth operator. As regards the FTTH network, while such a divestment has positive aspects, its scope is too small and geographically dispersed. Given the short time that a purchaser has to acquire clients on the DSL network and considering the terms of the Wholesale ADSL Bitstream Access, the new entrant may be unlikely to acquire a critical mass of clients, to be able to profitably expand its FTTH footprint.

Wholesale ADSL Bitstream Access

(856) The Wholesale ADSL Bitstream Access will be provided to the purchaser in one national interconnection point. As regards the underlying technology for such interconnection point, the majority of the respondents affirmed that an IP-based interface would be technically performing and future-proof[541]. A respondent indicated, however, that Ethernet technology would represent a newer alternative[542].

(857) The large majority of the respondents to the market test also explained that a web-based management service is industry standard[543].

(858) As regards the technical capabilities of the Wholesale ADSL Bitstream Access, the majority of the respondents affirmed that it is technically possible for the purchaser to offer fixed voice services via an ADSL bitstream offer, both as a standalone service or in bundle with fixed Internet access services, including by relying on Voice over IP ("VoIP") technology[544]. Respondents generally proposed to include Quality of Service ("QoS") levels similar to those offered by Telefónica for its regulated wholesale access offer NEBA. Another respondent explained that QoS should include agreed service levels on latency, packet loss and availability[545].

(859) The large majority of the respondents to the market test stressed that the Wholesale ADSL Bitstream Access should contain agreed terms as regards QoS and guaranteed minimum download/upload speed[546].

(860) Respondents' views were inconclusive as regards the technical possibility for the purchaser to offer Pay-TV services with the Wholesale ADSL Bitstream Access offer, both as a standalone service or bundled with fixed Internet access services and fixed voice services[547]. The possibility to offer Pay-TV services depends mainly on

---

539 See replies to the Commission's First Market Test, question 54.

540 See replies to the Commission's First Market Test, question 45.

541 See replies to the Commission's First Market Test, question 6.

542 See reply of Telefónica to the Commission’s First Market Test, question 6.

543 See replies to the Commission's First Market Test, question 7.

544 See replies to the Commission's First Market Test, questions 10.1 and 10.3.

545 See reply of BT to the Commission’s First Market Test, question 12.1.

546 See replies to the Commission's First Market Test, question 12.1 and 12.2.

547 See replies to the Commission's First Market Test, questions 10.2 and 10.4, three respondents consider it possible to offer Pay-TV services, three disagree and four do not reply. Masmovil considers it possible to offer standard definition services but not HDTV.

the quality of the Pay-TV channel offered, standard definition TV or HDTV- and on the technical capability of each copper pair to guarantee a download speed of at 6 Mb/s for each specific user[548].

(861) In its Wholesale ADSL Bitstream Access offer, Orange considers that, once an average peak hour throughput of 375 kb/s per subscriber is exceeded, an additional traffic charge will be charged to the purchaser. The majority of the respondents to the market test explained that a throughput of 375 kb/s is not generally sufficient to provide fixed Internet access services, in particular in the coming years when Internet traffic is expected to grow. Moreover, already today, the provision of IPTV services in standard- or high-quality or a combination of fixed Internet access services and IPTV could not be provided without exceeding the traffic cap[549].

(862) With regard to the duration of the Wholesale ADSL Bitstream Access offer, the majority of the respondents to the market test affirmed that 6 months after the adoption of the Commission's decision is an adequate timeframe for the purchaser to start providing fixed Internet access services via the Wholesale ADSL Bitstream Access offer, although a large minority of the respondents indicated that a shorter timeframe would be sufficient[550]. In particular, the majority of the respondents to the market test indicated that a period shorter than 6 months would be enough to allow the purchaser to make all the necessary preparations for it to meaningfully benefit from the Wholesale ADSL Bitstream Access[551]. Likewise, a shorter period would also be sufficient for Orange to provide the purchaser with the Wholesale ADSL Bitstream Access, in particular because both Parties would be already today providing similar services to third parties[552].

(863) Finally, the large majority of the respondents to the market test indicated that a duration of 7 years for the Wholesale ADSL Bitstream Access would be sufficient for the purchaser to establish itself as a fixed network operator in Spain[553].

(864) As to the pricing of the first and the second options, respondents to the First Market Test expressing a view generally indicated that monthly recurrent per line prices should be lowered to a level close to the recurrent monthly fee of OBA regulated access, with which both Orange and Jazztel provide today most of their fixed Internet access services[554].

(865) The Wholesale ADSL Bitstream Access is also offered under a third pricing option. According to the third pricing option, the purchaser will be offered the same prices as Telefónica's regulated wholesale broadband offer NEBA, but […]*. According to the majority of the respondents to the market test, […]* would not be enough for the purchaser to compete effectively on the market[555]. In particular, some respondents indicated that such a pricing option, which provides for a monthly fee and a recurrent

548 See in particular replies of Masmovil and R Cable to the Commission's First Market Test, question 10.2.

549 See replies to the Commission's First Market Test, questions 11.1, 11.2, 11.3,11.4 and 11.5.

550 See replies to the Commission's First Market Test, question 13.

551 See replies to the Commission's First Market Test, question 14.

552 See replies to the Commission's First Market Test, question 15, and in particular, the reply of BT.

553 See replies to the Commission's First Market Test, question 16.

554 See replies to the Commission's First Market Test, questions 20 and 24.

555 See replies to the Commission's First Market Test, question 26.

fee based on the effective traffic consumption, would be insufficient to allow the purchaser to compete against retail offers that do not provide for traffic limitations[556].

(866) The CNMC considers, first, that DSL technology will be competitive in the short term (probably the next two years). However, in the mid and long term, DSL will be insufficient to compete with the other three competitors who likely have NGA networks in place in the areas that are covered by the DSL bitstream access offer. Second, the minimum capacity the purchaser is required to purchase is very limited. Third, variable cost per subscriber is significant. Fourth, the average peak hour throughput per customer of 375 kbps will effectively hamper the purchasers' ability to compete in the quadruple-play segment (to the extent that the ADSL line allows offering TV).

Lack of access to mobile services

(867) When asked about the criteria necessary for the purchaser to be able to preserve competition in the retail market involving fixed Internet access services, respondents to the market test provided mixed views[557]. Generally, respondents indicated that a sufficiently large client base, either in fixed telecommunications or in mobile telecommunications services, would be needed[558]. Other respondents stressed the importance for the purchaser to be able to offer mobile telecommunications services[559]. Several respondents indicated that wholesale access to the mobile network of Orange would need to be included in the commitments package[560].

(868) In its comments of 19 March, the CNMC also considers that the remedies lack a wholesale mobile offer including 4G services. Therefore, a new entrant would not be able to compete in the possible retail market for multiple play services except if the purchaser has its own mobile network with a considerable coverage in Spain.

Respondents' overall assessment of the commitments package

(869) The respondents to the First Market Test provided mixed replies as to the ability of the First Commitments to remove the competition concerns set out in the Statement of Objections[561]. In particular, respondents pointed to the lack of a wholesale access to Orange's mobile network and the lack of access to the merged entity's FTTH network as factors limiting the effectiveness of the remedy package.

8.3.1.3. Commission's assessment of the First Commitments

Divested FTTH Network

(870) The Commission notes that the Divested FTTH Network includes the current fibre network […]* at 11 local exchanges in the four cities of Barcelona, Madrid, Sevilla and Valladolid and covers a total amount of [500-600 000]* BUs. While this is a coherent network – involving the divestment of parts of Jazztel's non-overlapping network – the Divested FTTH Network does not cover the entire existing overlap between Orange and Jazztel. According to Orange, the overlap between the FTTH networks of Orange and Jazztel amounted to [500-600 000]* BUs by 12 February 2015. Moreover, these BUs are located in […]* different local exchanges that are

---

556 See in particular the replies of Yoigo and Aire Network to the Commission's First Market Test, question 26.
557 See replies to the Commission's First Market Test, question 59.
558 See reply of Euskaltel to the Commission's First Market Test, question 59.
559 See reply of R Cable and Euskaltel to the Commission's First Market Test, questions 59 and 59.1.
560 See replies to the Commission's First Market Test, questions 60.2 and 64.
561 See replies to the Commission's First Market Test, question 61.

located (in addition to the four aforementioned cities) in particular in the major Spanish cities of Valencia and Malaga.

(871) Taking into account that the size of the Divested FTTH Network does not reach the size of the current overlap of the Parties’ FTTH networks (measured in BUs) and that it does not reflect its geographic distribution, the Commission considers that it falls short of what is required to address the identified competition concerns.

Wholesale ADSL Bitstream Access

(872) As regards the Wholesale ADSL Bitstream Access, the Commission considers that, in the present case, in order to be an acceptable component of the remedies and for the reasons explained in recitals (929) and (929) below, the wholesale agreement needs to replicate as much as possible the current pricing structure of the Parties so as to create an incentive for the purchaser to behave in a similar manner in the market as the Parties. This means that the Notifying Party would need to commit to give access to a fixed capacity for a price that has the highest possible fixed component. The fixed capacity should be sufficiently large to achieve a customer base of a size similar to that of Jazztel's customer base, and may be unlimited. In other words, the variable parts of the price stipulated in the Wholesale ADSL Bitstream Access agreement should match the Parties incremental costs. The actual price of the "capacity" acquired by the purchaser (which corresponds to the fixed component of the price) would be a matter of commercial negotiations between Orange and the purchaser.

(873) The three proposed pricing options fall short of allowing the purchaser to replicate the incentives and ability of Jazztel to compete with its LLU-based network. First, options 2 and 3 are essentially pay-as-you-go pricing options, as for each additional subscriber a relatively high recurrent price has to be paid, with no or minimal upfront capacity commitment. Therefore, the purchaser would not have incentives similar to Jazztel or Orange who have invested upfront into their LLU-networks and price aggressively in order to recuperate their cost. While option 1 includes an upfront payment for […]* subscribers, such commitment is too small to ensure that the purchaser comes close to replicating Jazztel's current role (more than […]* gross adds in 2014) that is lost as a result of the merger in the retail markets involving fixed Internet access services[562].

(874) Second, the monthly payable fees per subscriber combined with charges for Internet traffic under the three options are above Orange's variable cost of providing the service. The cost structure of Jazztel and Orange based on the regulated offer to access subscriber loop "Oferta de acceso al Bucle de Abonado" ("OBA")[563] implies incremental costs of EUR 8.60 per subscriber (the regulated OBA price payable to Telefonica), plus a minor cost payable to Telefonica for energy and cabling in the local exchange, as well as other cost such as the traffic transport through different network layers (the backhauling network, the aggregation network and the backbone network). For the purchaser to be able to compete as aggressively as Jazztel or Orange currently do, its variable (recurrent) cost should be aligned with Orange’s incremental cost for providing the service. Any incremental wholesale price

562 Moreover, the upfront fee payable by the purchaser (EUR 1.54 million for a 20K subscriber package) should be a matter of negotiations with the purchaser and should not be fixed in the Commitments text.

563 See the CNMC website: http://www.cnmc.es/es-es/telecomunicacionesysaudiovisuales/regulaci%C3%B3n/ofertasmayoristas/ofertadeaccesoalbucledeabonado%28oba%29.aspx.

significantly above the incremental cost of Jazztel implies that the purchaser would have fewer incentives to compete than Jazztel currently has on the basis of its OBA wholesale product.

(875) Third, the Commission considers that the fee for additional traffic (above 375 kb/s) may significantly disadvantage the purchaser if it is not based on incremental cost, in particular if average traffic volumes increase over time, so that the purchaser would not be able to replicate the fixed Internet services of competitor, including quadruple-play offerings, on competitive terms.

Lack of access to mobile services

(876) The Commission considers that the purchaser of the Divested FTTH Network and beneficiary of the Wholesale ADSL Bitstream Access offer needs to be able to offer multiple play bundles comprising a fixed and a mobile component. These bundles are essential for gaining customers for fixed Internet access services in Spain. The remedy package therefore needs to be complemented with a wholesale access and call origination offer to mobile networks including access to 4G services. In order for the purchaser to be able to replicate Jazztel's current role, this offer needs to be at least as favourable as the MVNO agreement currently in place between Orange and Jazztel. This commitment would not be needed if the purchaser of the Divested FTTH network already has access to wholesale mobile services including 4G services.

Conclusion

(877) In sum, the Commission concludes that the First Commitments are insufficient to address the competition concerns raised by the proposed transaction on the retail market for fixed Internet access, the possible markets for multiple play services, on the possible market for dual-play services, on the possible market for triple-play services, and on the possible market comprising triple- and quadruple-play services in Spain.

8.3.2. Modified Commitments

8.3.2.1. Description

(878) Following the First Market Test, the Notifying Party submitted the Second Commitments on 29 March 2015 and the Third Commitments on 6 April 2015.

(879) Given that there are only minor differences between the scope of the Second and the Third Commitments, and that these differences are improvements of the package, the Commission will assess only the Third Commitments (also referred to as the "Modified Commitments")[564].

---

[564] The main differences between the Second and the Third Commitments concern: the scope of the Divested FTTH Network, which increased from [600-700 000]*BUs in the Second Commitments to [700-800 000]* BUs in the Third Commitments (a local exchange situated in the city of Badalona next to the city of Barcelona was included); the Wholesale ADSL bitstream Service, which included the explicit possibility to offer fixed voice services via VoIP technology. The duration of the Wholesale ADSL bitstream Service was reduced from 7 years to 4 years, with the possibility of extending the period for an additional 4 years. The price structure of the Wholesale ADSL bitstream service in the Third Commitments provides for two different price structures for the initial contract period of 4 years and the possible extended period (see recitals (885) and (886)), as opposed to the same pricing structure applying over the entire contract period of 7 years under the Second Commitments. Finally, a clause on agreed service levels for the Wholesale ADSL bitstream Service was added.

(880) The Third Commitments follow the structure of the First Commitments and provide for the divestment of part of Jazztel's FTTH network in the areas where the current FTTH networks of Orange and Jazztel overlap (the "Divested FTTH Network") and a wholesale ADSL bitstream access offer giving access to Jazztel's DSL network (the "Wholesale ADSL Bitstream Access"). The two elements of the commitment package are considered inseparable and will benefit a single purchaser.

Divested FTTH Network

(881) The Notifying Party commits to divest an FTTH network that covers [700-800 000]* BUs. These BUs are located on the current fibre network of Jazztel at […]* local exchanges in the five cities of Barcelona, Madrid, Malaga, Sevilla and Valencia. The Notifying Party will be reserved an IRU on 40% of the capacity of the divested FTTH cables for at least 35 years against a one-time fee and a recurrent fee covering maintenance costs.

(882) To allow the purchaser to build up the necessary capability to manage the Divested FTTH Network, during a period of up to 12 months as of the execution of the commitments package, renewable at the purchaser's request up to 12 months (the "Transition Period") with the agreement of the monitoring trustee, Orange will operate the Divested FTTH Network on behalf of the purchaser.

(883) The Divested FTTH Network comprises several technical elements, in addition to the fibre cables, identified in Schedule 1 including the optical line terminal equipment located in the local exchange, the FTTH supply network – comprising the fibre cables and the optical junction boxed deployed from the local exchange to the manhole where the first passive splitter is installed, and the FTTH distribution network – comprising the fibre cables from the first passive splitter to the second passive splitter, next to the customer's premises. The Divested FTTH Network does not comprise the FTTH dispersion network, which is the part of the network aimed at connecting each client to the second passive splitter and which is not yet deployed.

Wholesale ADSL Bitstream Access

(884) The Notifying Party commits to provide a national bitstream service to its LLU network, with interconnection in one single point of presence and for a duration of 4 years ("Initial Period"), renewable for a maximum additional period of 4 years ("Extended Period"). This wholesale access will be constructed using as an input Telefónica's regulated physical LLU offer, thus providing access to […]* Telefónica's MDFs or local exchanges) on Jazztel's ADSL network. The Wholesale ADSL Bitstream Access offer would be available with two different pricing structures, one for the Initial Period and one for the Extended Period.

(885) During the Initial Period, the purchaser will pay a monthly access fee of EUR […]* per month per line, in addition to a fixed fee to be agreed upfront between Orange and the purchaser. This fixed fee shall not be related to the number of lines eventually activated or used by the purchaser.

(886) During the Extended Period, the purchaser will pay only a monthly access fee. The amount of the monthly access fee per customer will be calculated […]*. The Modified Commitments stipulate that such monthly access fee cannot exceed EUR […]* per month per line.

(887) For both the Initial Period and the Extended Period, the average peak hour subscriber throughput is limited to 375 kb/s per customer, measured as the total throughput at the interconnection point divided by the total number of active final customer connections. In the event of traffic in excess of the threshold of 375 kb/s per

customer, an additional EUR […]* per kb/s per customer per month would be payable. This additional fee for excess traffic would be "adjusted according to any increase or decrease of Telefónica's wholesale prices of the input service based on which traffic capacity is provided". No further details are contained in the Modified Commitments.

(888) In addition, other non-recurrent fees apply for disconnecting a line, incident management, on-site support, equipment, etc.

(889) The Wholesale ADSL Bitstream Access offer will include agreed service levels in line with industry standards, and it will allow the purchaser to provide fixed voice services using VoIP technology.

Access to mobile services

(890) The Third Commitments package provides that, if the purchaser does not already benefit from access to a mobile telecommunications network including 2G, 3G and 4G services, the Notifying Party will provide the purchaser with such mobile access on competitive terms and, in any case, at terms as favourable as those that Orange has granted to Jazztel in its existing MVNO contract. This optional wholesale access to Orange's mobile network must be of a duration at least equal to the term of the Wholesale ADSL Bitstream Access service.

8.3.2.2. Results of the Second Market Test

Divested FTTH Network

(891) Respondents to the Second Market Test provided mixed replies as regards the scope of the Divested FTTH Network[565]. While half of the respondents indicated that the offered coverage in terms of BUs could be considered a good starting point[566], the other half stressed that the divested FTTH Network should allow the purchaser to address the entire market in those cities where the Parties' fibre networks currently overlap and should therefore be accompanied by (limited) access to Orange's FTTH network[567].

(892) Respondents to the market test generally agreed with the IRU to be granted to Orange over 40% of the capacity of the Divested FTTH Network[568]. However, a respondent expressed the view that the capacity limit of 40% should apply at central office level, rather than only at the level of the whole Divested FTTH Network, in order to avoid an unbalanced usage of the Divested FTTH Network by Orange[569].

(893) When asked about possible other elements to be included in the Divested FTTH Network[570], a respondent indicated that, in order to ensure viability of the Divested FTTH network, the rented space in Telefónica's local exchanges where the Divested FTTH Network's optical line termination equipment is stored should be transferred. The same should apply for the agreements providing for the hosting of the FTTH cables in the infrastructure ducts[571].

565 See replies to the Commission's Second Market Test, question 7.
566 See replies of Masmovil and R Cable to the Commission's Second Market Test, question 7.
567 See replies of Aire Network and Yoigo to the Commission's Second Market Test, question 7.
568 See replies to the Commission's Second Market Test, question 8.
569 See reply of Masmovil to the Commission's Second Market Test, question 8.
570 See replies to the Commission's Second Market Test, question 9.
571 See reply of Masmovil to the Commission's Second Market Test, question 9.

(894) Concerning the underlying wholesale agreements the Parties have concluded with third parties such as Telefónica for the rented space and energy provision in the local exchanges (under the OBA regulation) and with respect to the ducts (under MARCo reference offer), the Notifying Party submits that these agreements cannot be transferred to the purchaser because it still needs them for the non-divested FTTH network. Instead, the purchaser would need to sign independent contracts with Telefónica. Given that the provision of space and energy as well as the ducts are regulated, Telefónica cannot refuse to do so unless there are objective reasons such as the lack of space.

Wholesale ADSL Bitstream Access

(895) The majority of the respondents to the Second Market Test generally affirmed that the level of the recurrent and non-recurrent costs of the Wholesale ADSL Bitstream Access generally will allow the purchaser to be competitive on the market[572]. However, some respondents expressed concerns as regards the capability of the purchaser to provide multiple play offers based on the Wholesale ADSL Bitstream Access, first, because of the fee on the traffic in excess of an average peak hour throughput of 375 kb/s per subscriber, and second, because an attractive wholesale offer to access the mobile network of Orange would be needed[573].

(896) As regards specifically the excess traffic fee, the majority of the respondents indicated that the current level of EUR […]* per kb/s would affect the future viability and/or competitiveness of the purchaser's ADSL offer[574]. In this regard, a respondent expressed the concern that the purchaser will not be able to provide IPTV services without incurring the additional traffic fee, and that, in the next two years, even the simple provision of fixed Internet access services would likely exceed the cap of 375 kb/s, triggering significant additional monthly charges per subscriber[575].

(897) As regards the Notifying Party's proposed indexation mechanism of the excess traffic fee, respondents provided mixed views[576]. While some respondents welcomed the indexation, others indicated that such a mechanism, based on the review of Telefónica's regulated prices for wholesale leased lines, would not be effective since the revision of Telefónica's regulated prices is undertaken rather infrequently (approximately every three years)[577]. The majority of respondents indicated that the cost of maintaining, upgrading and extending the backhaul, the backbone and the aggregation network, which is the infrastructure whose maintenance justifies the excess traffic fee, would decrease or in any case not increase in the future[578].

(898) As regards the technical possibility for the purchaser to offer VoIP services by relying on the Wholesale ADSL Bitstream Access offer, the majority of the respondents stressed the importance of including agreed Quality of Service levels in the commitments package[579]. In particular, a respondent indicated that agreed QoS level should encompass jitter, latency and packet loss[580].

572 See replies to the Commission's Second Market Test, question 1.
573 See replies of Yoigo, R cable and Aire Network to the Commission’s Second Market Test, question 1.
574 See replies to the Commission's Second Market Test, question 3.
575 See reply of Yoigo to the Commission’s Second Market Test, question 3.
576 See replies to the Commission's Second Market Test, question 3.1.2.
577 See in particular replies of R Cable and Yoigo to the Commission’s Second Market Test, question 3.1.2.
578 See replies to the Commission's Second Market Test, question 2.
579 See replies to the Commission's Second Market Test, question 4.
580 See reply of Yoigo to the Commission’s Second Market Test, question 5.

(899) Finally, a respondent expressed the opinion that a second point of interconnection would be needed as a back-up[581].

Access to mobile services

(900) Two respondents indicated that the terms of the wholesale access to Orange's mobile network should be clarified in the Commitments text[582].

Respondents' overall assessment of the commitments package

(901) Four respondents to the Second Market Test expressed their interest in entering or expanding in the Spanish telecommunications market based on the Modified Commitments[583].

8.3.2.3. Commission's assessment of the Modified Commitments

Divested FTTH Network

(902) As to the scope of the Divested FTTH Network, the Commission notes an increase of the covered BUs by […]* to [700-800 000]* BUs at […]* local exchanges located in the five major cities of Barcelona, Madrid, Valencia, Sevilla and Malaga (from [500-600 000]* BUs at […]* local exchanges in the four cities of Barcelona, Madrid, Sevilla and Valladolid in the First Commitments). The revised scope better reflects the geographic footprint of the overlap of the Parties' existing FTTH networks as the Divested FTTH Network is now located in five out of the six largest Spanish cities. While the size exceeds the current overlap of the Parties' FTTH networks in order to ensure that the divested network is a standalone business that can be operated independently from Orange, this is compensated by an IRU for Orange over 40% of the divested network's capacity.

(903) However, the Second Market Test revealed that the IRU's capacity limit of 40% should apply at central office level, rather than only at the level of the whole Divested FTTH Network, in order to avoid an unbalanced usage of the Divested FTTH Network by Orange. The Modified Commitments fall short of this requirement.

(904) Moreover, the Modified Commitments foresee an initial duration of the IRU for 35 years, "renewable for successive periods of equivalent duration over the same capacity" (paragraph 16 of the Modified Commitments). The Commission considers, however, that the Commitments should not require in any way that the purchaser agrees to an IRU for longer than the initial 35 year period.

(905) The Commission considers that the Modified Commitments need to provide for a best effort clause applicable in the event that the purchaser is not able to conclude similar contracts with Telefónica with respect to (i) the rented space in Telefónica's local exchanges needed for the Divested FTTH Network and/or (ii) to the access to the ducts utilised by the Divested FTTH Network. In this case, Orange shall use its best efforts to provide the purchaser with access to (i) Orange's rented space in Telefónica's local exchanges and (ii) to Orange's access to these ducts under terms and conditions no worse than those Orange contracted with third parties for its own access.

---

581 See reply of Masmovil to the Commission's Second Market Test, question 6.

582 See replies of R cable and Yoigo to the Commission's Second Market Test, question 10.

583 See replies to the Commission's Second Market Test, question 11.

Wholesale ADSL Bitstream Access

(906) Under the Modified Commitments, Orange commits to provide a national bitstream service to Jazztel's LLU network for 4 years ("Initial Period"), renewable for a maximum additional period of 4 years ("Extended Period"). Two different pricing structures apply to each period: During the Initial Period, the purchaser will pay a monthly access fee of EUR […]* per month per line. According to the Modified Commitments, this fee contains the following costs:

Table 43: Structure of the monthly fee per subscriber for Wholesale ADSL Bitstream Access

Concept	**Cost (€/month)**
Unbundling recurrent cost	8.60
Recurrent cost of OBA energy and cablings	[…]*
Backhauling Leased lines (*)	[…]*
Transport aggregation cost (*)	[…]*
Technical assistance	[…]*
TOTAL COST	[…]*

(*) Note: these costs are dependent on the average traffic generated by each line and have been calculated based on a maximum monthly average traffic of […]* kb/s.

Source: Notifying Party

(907) The Commission has scrutinised in detail the costs that Orange and Jazztel currently incur in providing LLU-based services and considers that the costs reflected in Table 43 most likely does not exceed their incremental costs[584].

(908) In addition to the monthly fee, a fixed fee can be agreed upfront between Orange and the purchaser for the Initial Period in commercial negotiations. However, the Modified Commitments explicitly prevent this fixed fee being related to the number of lines eventually used by the purchaser. Moreover, the Commission notes that Modified Commitments do not establish any limit for the capacity to be provided by Orange to the purchaser. In order to comply with the Modified Commitments, the capacity cannot be limited in Orange's Wholesale ADSL Bitstream Access agreement with the purchaser. Therefore, this component is a quasi-structural solution and results in similar incentives for the purchaser to compete as Jazztel has today.

(909) During the Extended Period, the purchaser will pay only a monthly access fee, but no upfront fee. The amount of the monthly access fee per customer will be calculated as […]*. This solution is designed to address the concern that, given long term uncertainties regarding the competitiveness of ADSL, a purchaser would possibly not commit to significant upfront payments over a period of 8 years. At the same time, it

[584] For Orange, see response to the Commission Request for Information N°15 of 27 March 2015, Doc ID 2302-2; to the Commission Request for Information N°16 of 1 April 2015, Doc ID 2357; to the Commission Request for Information N°17 of 9 April 2015, Doc ID 2498; and to the Commission Request for Information N°18 of 10 April 2015, Doc ID 2516.
For Jazztel, see response to the Commission Request for Information N°15 of 27 March 2015, Doc ID 2376; and to the Commission Request for Information N°16 of 1 April 2015, Doc ID 2369; and to the Commission Request for Information N°17 of 9 April 2015, Doc ID 2494.

maintains the purchaser's incentives to compete as aggressively as possible during the Initial Period as this will lower the payable price for the Extended Period. As a safeguard mechanism, the Modified Commitments foresee that the monthly fee per subscriber cannot be higher than EUR […]*.

(910) The Commission considers that the aforementioned monthly price per subscriber and the pricing structure described in recitals (908) and (909) above will enable the purchaser to be competitive and ensure that it has comparable incentives to compete as aggressively as the Parties do today.

(911) The Modified Commitments, however, do not address the concern expressed in the First Market Test and again in the Second Market Test that the additional monthly traffic charge of EUR […]* per subscriber per kb/s for peak hour traffic exceeding 375 kb/s could endanger the effectiveness of the Modified Commitments over time. In particular, and in line with the considerations outlined in recital (874) above, the Commission considers, first, that in order to ensure that the purchaser has the same ability and incentives to compete in the market as Jazztel has today, the proposed price must not exceed the Parties' current incremental cost for providing the service. Second, based on the results of the market tests regarding expected Internet traffic growth and the Parties' own average peak hour traffic statistics, it is likely that the cap of 375 kb/s for average peak hour throughput per customer will be exceeded within a short period in time[585]. Moreover, given that the average IPTV client of Orange already today consumes roughly three times as much traffic as the 375 kb/s cap, and the Notifying Party itself submits that the market will evolve towards quadruple-play services that include an IPTV component, the proposed level of the traffic fee could significantly increase the monthly price in the future and endanger the viability of the purchaser's offering.

(912) While the Modified Commitments propose to index the traffic charge to Telefónica's regulated wholesale prices for backhaul leased lines, on which the Parties currently rely in part, the text does not provide a clear and self-enforcing indexation method[586]. Moreover, the Second Market Test revealed that regulated prices for leased lines under the regulated reference offer for leased lines Oferta de Referencia de Lineas Alquiladas ("ORLA")[587] are adjusted too infrequently (approximately every three years) to allow for a meaningful annual adjustment of the fee for additional traffic. Therefore, the indexation mechanisms would need to be clarified and improved.

(913) Furthermore, the Commission considers that the purchaser needs to be able to provide fixed voice services as Jazztel and Orange currently do. The Commitments suggest that the purchaser can do so independently using VOIP technology. However, Jazztel's network (over which the ADSL wholesale access offer is

---

585 For Orange, the average throughput per customer at the LLU exchange interface has been 312 kbps in December 2014. Without IPTV traffic, average DSL traffic ranges between 258 and 273 kbps, while IPTV services currently require 1245 kbps per customer. See response to question 7 of the Commission Request for Information N°15 of 27 March 2015, Doc ID 2302-2 and Annex 7, Doc ID 2302-34. For Jazztel, the average throughput per customer at the LLU exchange interface for the last week of March 2015 has been 312 kbps, 44% more with respect to the 217 kbps reported in the last week of June 2014. See response to question 7 of the Commission Request for Information N°15 of 27 March 2015, Doc ID 2376 and Annex 6, Doc ID 2381.

586 The Modified Commitments provide that the additional fee for excess traffic would be "adjusted according to any increase or decrease of Telefónica's wholesale prices of the input service based on which traffic capacity is provided". No further details are contained in the Modified Commitments.

587 Resolución por la que se aprueba la revisión de precios de la oferta de referencia de líneas alquiladas de Telefónica de España, S.A.U. y se acuerda su notificación a la CE y al ORECE (AEM 2013/237).

provided) currently lacks traffic prioritisation technology to guarantee voice quality of VOIP. Jazztel currently provides fixed voice services via traditional (circuit-switched) technology[588]. Orange today provides that service via VOIP technology using prioritisation equipment to ensure sufficient voice quality. The Commission considers that the Modified Commitments do not ensure that the purchaser can provide fixed voice services at a guaranteed quality comparable to the service as provided today by Jazztel and Orange.

(914) In light of the Second Market Test, the Commission finally considers it necessary and reasonable to include a second point of interconnection into the Modified Commitments in order to ensure availability of the service in case of technical problems with, or maintenance services on, the main point of interconnection.

Access to mobile services

(915) The First Market Test identified that the purchaser's access to a mobile telecommunications network including 2G, 3G and 4G services is essential to ensure it can compete in the multiple play market(s)/ segment. The Modified Commitments foresee that Orange will provide such services to the purchaser if the latter does not already have access to them. Paragraph 37(c) explicitly provides that terms need to be competitive and "as favourable as those granted to Jazztel for a duration at least equal to the term of the Wholeale ADSL Bitstream Agreement". The Commission considers that this clause is sufficiently clear to ensure that a purchaser that does not have access to a mobile communication network including 4G services can benefit from at least the same terms as Jazztel has been enjoying. At the stage of the purchaser approval, the Commission will assess the terms agreed between Orange and the purchaser against the existing MVNO contract between Orange and Jazztel.

Conclusion

(916) In light of the above, the Commission concludes that the Modified Commitments are a significant improvement over the First Commitments and comprise all components to address the concerns of the Commitments. However, a number of mostly technical issues need to be further improved for the Modified Commitments to entirely address the competition concerns raised by the Proposed Transaction on the retail market for fixed Internet access, the possible markets for multiple play services, on the possible market for dual-play services, on the possible market for triple-play services, and on the possible market comprising triple- and quadruple-play services in Spain.

8.3.3. Final Commitments

8.3.3.1. Description

(917) On 20 April 2015, following the results of the Second Market Test, the Notifying Party submitted a fourth and final set of commitments ("Final Commitments").

(918) The Final Commitments are substantially similar to the Modified Commitments but improve a limited number of mostly technical issues that the Second Market Test revealed or confirmed. Therefore, only these improvements will be described and discussed in this section.

[588] For completeness, the Commission notes that if the purchaser were to use traditional (circuit-switched) technology, it would be dependent (i) on Orange to contract this service with Telefónica for the purchaser and (ii) on the terms and conditions set by Orange if not defined in the undertakings.

Divested FTTH Network

(919) The Notifying Party will be reserved an IRU on 40% of the capacity of the divested FTTH cables measured at the level of each local exchange.

(920) Moreover, the IRU is now granted for 35 years against a one-time fee and a recurrent fee covering maintenance costs. Moreover, the Final Commitments simply state that there is nothing in the commitments that prevent the Orange and the purchaser from agreeing on an extension of that period.

(921) Furthermore, in the event that the purchaser cannot conclude the necessary contracts with Telefónica, the Notifying Party will use its best efforts to provide the purchaser with access to (i) Orange's rented space in Telefónica's local exchanges and (ii) to Orange's access to the ducts used by the Divested FTTH Network, under terms and conditions no worse than those Orange contracted with third parties for its own access.

Wholesale ADSL Bitstream Access

(922) The Wholesale ADSL Bitstream Access is identical to the one contained in the Third Commitments package, with certain exceptions as follows.

(923) First, for the Initial Period, the level of the fixed fee, to be agreed by the Notifying Party and the purchaser upfront, can be linked to market parameters that are outside the control of the Notifying Party or the purchaser such as the market-wide uptake of FTTH connections in Spain.

(924) Second, in the event of traffic in excess of the threshold of 375 kb/s per customer, an additional EUR […]* per kb/s per customer per month would be payable (the "Backhauling Price for Additional Traffic"). Such Backhauling Price for Additional Traffic would be adjusted on an annual basis to reflect the upward or downward trend in prices of Telefónica's regulated input services used to provide traffic capacity. During the period between the adoption of the Final Commitments and the first review of Telefonica's regulated input services, the annual correction factor will be […]*, thereby providing for a yearly reduction in price of the Backhauling Price for Additional Traffic of […]*%. Once the revision of the prices of Telefonica's regulated input services is published, that annual correction factor will be superseded by a discount factor calculated to reflect the mean yearly reduction in prices of the regulated inputs since the last price review. That adjustment mechanism will be supervised by the monitoring trustee.

(925) Third, as regards other non-recurrent fees of which the prices are fixed in Schedule 2 of the Final Commitments, including the fees for on-site support, the Final Commitments now clarify that on-site support should be optional, and that the purchaser shall have the possibility to outsource such on-site support to a reliable service provider operating according to common industry standards and practices. Moreover, incident management fees shall only be charged to the purchaser to the extent that such incidents are attributable to the purchaser.

(926) Fourth, under the Final Commitments the Notifying Party commits to provide for a second point of interconnection, for back-up purposes.

(927) Fifth, the Wholesale ADSL Bitstream Offer will allow the purchaser to provide fixed voice service using VoIP technology. The Notifying Party commits to provide VOIP prioritisation technology to ensure quality of service. The Final Commitments include agreed service levels for VoIP that are specified in schedule 2 of the Final Commitments.

(928) Finally, the Final Commitments provide for a guarantee clause whereby the purchaser can instruct Orange to oppose the proposed closure of any of Telefónica's MDFs, unless Orange has justified grounds to believe that such opposition is abusive[589].

8.3.3.2. Commission's assessment

(929) As explained in recital (833), divestiture commitments are generally the best way to eliminate competition concerns resulting from horizontal overlaps. Access remedies may be suitable to resolve concerns if those remedies are equivalent to divestitures in their effects, that is, they have a quasi-structural effect. The Final Commitments consist of the divestiture of the FTTH Network complemented by an access remedy – the Wholesale ADSL Bitstream Access – having a quasi-structural effect. Moreover, they include the optional access to Orange's mobile network. Finally, the standard purchaser criteria are included in the Commitments.[590]

(930) The Commitments in the present case must enable the purchaser of the divestment business to enter, or expand in, the retail markets involving fixed Internet access services in Spain. Furthermore, the undertakings must allow the purchaser to be able and to have the incentives to replicate the competitive pressure that is lost due to the Proposed Transaction. Against this background, the Commission has to assess whether (i) the Final Commitments comprise the divestment of the overlap between the Parties' FTTH networks as a viable, standalone business, and (ii) the Wholesale ADSL Bitstream Access offer allows the purchaser to compete with a similar cost structure as Jazztel and Orange do today.

Divested FTTH Network

(931) The Commission noted in recital (902) above that the Modified Commitments foresee the divestment of the entire overlap respecting the geographic footprint of the overlapping network and ensure that a coherent standalone business is divested. Therefore the proposed Divested FTTH Network is an appropriate structural remedy to enable the purchaser to enter the market with NGA technology. For the reasons explained in recitals (936) to (940), the Commission considers that the Final Commitments undertake the necessary technical adjustments to render the divested network viable and effective.

(932) First, the duration of the IRU is now limited to 35 years and the Final Commitments no longer contain an extension clause triggering successive periods of 35 years.

(933) Second, the IRU's reserved capacity cap of 40% is now measured at the level of each local exchange, preventing a potential situation whereby Orange could use all or most of the capacity of the network in certain areas, making it technically impossible or difficult for the purchaser to compete in that area.

(934) Third, the Final Commitments now address the case where the purchaser is unable to get access to Telefónica's space in a local exchange to store and operate the network equipment and to have access to the third party ducts used by the Divested FTTH Network. Orange now commits to use its best efforts to provide the purchaser with access to (i) Orange's rented space in Telefónica's local exchanges and (ii) to Orange's access to the ducts used by the Divested FTTH Network, under terms and

[589] See recital (609) as regards the possibility for Telefónica to announce its intention to close any of its local exchanges.

[590] See paragraph 37 of the Final Commitments. Notably, paragraph 37(d) ensures that the Commission can only accept a purchaser that does not raise any *prima facie* competition concerns.

conditions no worse than those Orange contracted with third parties for its own access.

(935) Finally, the Commission recalls that the First Market Test had shown support for wholesale access to the merged entity's combined FTTH network. The Final Commitments do not include such wholesale access to fibre. The Commission considers that such wholesale access does not need to be part of the package for the following reasons. First, the Final Commitments provide for the divestment of the FTTH network that is larger in terms of covered BUs than the current overlap of the Parties' fibre networks. Second, as pointed out in recital (2) above, Orange had a FTTH coverage of around 800 000 BUs as of the end of 2014, which compares to the coverage of around 720 000 BUs by the Divested FTTH network. Therefore, the purchaser is essentially in a similar position as Orange is today with respect to FTTH deployment. Third, the Final Commitments significantly improve the Wholesale ADSL Bitstream Access offer. Given that the purchaser can compete as aggressively as Jazztel and Orange compete today (essentially on the xDSL infrastructure), the purchaser will have an incentive to extend the Divested FTTH network once a sufficient customer base has been acquired. Fourth, as explained in recital (703) above, a potential loss of competition in areas where the NGA networks of the Parties would have overlapped in the future cannot be established with the required degree of certainty.

Wholesale ADSL Bitstream Access

(936) The Commission noted in recital (908) above that the Modified Commitments ensure that the Wholesale ADSL Bitstream Access has quasi-structural effects and result in similar incentives for the purchaser to compete as Jazztel has today. The Commission considers that the Final Commitments provide for a number of mostly technical improvements which render this component of the remedy fully viable and effective.

(937) First, the additional fee for traffic in excess of average peak hour throughput of 375 kb/s per customer has been reduced significantly by […]*% from EUR […]* to EUR […]*per kb/s per month. The Commission considers that the level of this fee likely does not exceed the current incremental cost incurred by the Parties to provide this service[591].

(938) Second, the revised indexation clause now foresees an annual decrease (starting with an annual decrease of […]*%) of this fee. It is periodically adjusted to Telefónica's (regulated) wholesale prices for leased lines in a self-enforcing way that is supervised by the monitoring trustee.

(939) Third, the Notifying Party now commits to provide a second point of interconnection for back-up purposes. This addresses the concerns expressed in the First and Second Market Tests and renders the Wholesale ADSL Bitstream Access resilient in relation to potential technical interruptions.

(940) Fourth, the Notifying Party now commits to ensure that the Jazztel network (on which the Wholesale ADSL Bitstream Access is given) employs VOIP prioritisation

591 For Orange, see response to the Commission Request for Information N°15 of 27 March 2015, Doc ID 2302-2; to the Commission Request for Information N°16 of 1 April 2015, Doc ID 2357; to the Commission Request for Information N°17 of 9 April 2015, Doc ID 2498; and to the Commission Request for Information N°18 of 10 April 2015, Doc ID 2516.
For Jazztel, see response to the Commission Request for Information N°15 of 27 March 2015, Doc ID 2376; and to the Commission Request for Information N°16 of 1 April 2015, Doc ID 2369; and to the Commission Request for Information N°17 of 9 April 2015, Doc ID 2494.

technology to ensure quality of service of VOIP calls. Moreover, the Final Commitments include agreed service levels for VoIP (specified in Schedule 2 to the Final Commitments) with respect to packet loss, jitter and latency[592].

8.3.4. Conclusion

(941) In light of all the preceding considerations, the Commission concludes that the Final Commitments taken as a whole and, in particular, the Divested FTTH Network, the Wholesale ADSL Bitstream Access and the optional access to Orange's mobile network, address in full the competition concerns raised by the Proposed Transaction on the market for fixed Internet access services, possible markets for multiple play services, on the possible market for dual-play services, on the possible market for triple-play services, and on the possible market comprising triple- and quadruple-play services in Spain. Furthermore, as concluded in section 7.2.10.4 above, the Commission notes that some of the identified anti-competitive effects of the Proposed Transaction are also likely to be offset by the elimination of double marginalisation of mobile services provided by Orange to Jazztel.

(942) The Commission therefore concludes that, subject to full compliance with the Final Commitments given by the Notifying Party, the Proposed Transaction will not significantly impede effective competition in the internal market or a substantial part thereof. The Proposed Transaction should therefore be declared to be compatible with the internal market and the EEA agreement pursuant to Article 2(2) and Article 8(2) of the Merger Regulation and Article 57 of the EEA Agreement, subject to full compliance with the commitments in Annex B to this Decision.

9. CONDITIONS AND OBLIGATIONS

(943) Pursuant to the second subparagraph of Article 8(2) of the Merger Regulation, the Commission may attach to its decision conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into in relation to the Commission with a view to rendering the concentration compatible with the internal market.

(944) The fulfilment of the measure that gives rise to the structural change of the market is a condition, whereas the implementing steps which are necessary to achieve this result are generally obligations on the parties. Where a condition is not fulfilled, the Commission's decision declaring the concentration compatible with the internal market is no longer applicable. Where the undertakings concerned commit a breach of an obligation, the Commission may revoke the clearance decision in accordance with Article 8(6) of the Merger Regulation. The undertakings concerned may also be subject to fines and periodic penalty payments under Articles 14(2) and 15(1) of the Merger Regulation.

(945) In accordance with the basic distinction described in recital (944) as regards conditions and obligations, this Decision should be made conditional on the full compliance by the Notifying Party with paragraphs 2 to 33 of Section B (including

---

592 Note that these values are not as stringent as the Real Time quality of service category of the regulated NEBA offer. However, this is justified by the fact that NEBA is a regional service with 50 regional access points whereas the Wholesale ADSL bitstream access service is national collect service. Since a large additional section of the network needs to covered, the quality of service parameters cannot be the same than the ones of NEBA. See section 7.2 of the Telefónica's "Oferta De Referencia Del Nuevo Servicio Ethernet De Banda Ancha (NEBA)", version of February 2014, see http://telecos.cnmc.es/neba.

Schedules 1 to 2) of Annex B. All other Sections and paragraphs 34 to 36 of Section B should be obligations within the meaning of Article 8(2) of the Merger Regulation. The full text of the commitments is an integral part of and is attached as Annex B to this Decision.

HAS ADOPTED THIS DECISION:

Article 1

The notified operation whereby Orange S.A. acquires sole control of Jazztel p.l.c. within the meaning of Article 3(1)(b) of the Merger Regulation is hereby declared compatible with the internal market and the EEA Agreement.

Article 2

Article 1 is subject to compliance by Orange S.A. with the conditions set out in paragraphs 2 to 33 of Section B (including Schedules 1 and 2) of Annex B.

Article 3

Orange S.A shall comply with the obligations set out in Sections A, B paragraphs 34 to 36, C, D, E, F and G of Annex B.

Article 4

This Decision is addressed to:

Orange S.A.

78, rue Olivier de Serres,

75015 Paris,

France

Done at Brussels, 19/05/2015

For the Commission

(Signed)
Margrethe VESTAGER
Member of the Commission

ANNEX A: THE COMMISSION'S QUANTITATIVE ANALYSIS

Contents

1. INTRODUCTION

(1) As explained in Section 7.2.7 of the Decision, the Commission has carried out a quantitative assessment of the likely price effects resulting from the elimination of horizontal competition between Orange and Jazztel. This assessment is discussed in more detail in this Annex.

(2) The Commission applied a calibrated merger simulation approach that uses observed diversion ratios between competitors and observed margins and quantities to calibrate demand and to predict likely price effects. This approach is more extensive than standard Upward Pricing Pressure (UPP) techniques as it also captures the expected reaction of competitors.

(3) This approach assumes a differentiated products industry in which firms set prices to maximize their respective profits. It allows quantifying the implied price changes resulting from the elimination of horizontal competition between Orange and Jazztel by comparing the optimal pre-merger prices with the post-merger prices. In the context of differentiated products markets, similar approaches were used in previous cases.[1]

(4) The framework adopted is the so-called Bertrand-Nash equilibrium where firms set prices in a differentiated products market to maximise their own profits.

(5) The entire analysis is performed at the product type level, treating each product type-firm combination (for example "Jazztel fixed voice and fixed broadband") as one product. However, observed vertical switching across product types in the Fixed Number Portability (FNP) data (for example switches from a double play product to a triple play product) may be less likely to reflect consumer reactions to marginal price changes compared to observed switching across operators within the same product type. For this reason, in its calibrated merger simulation the Commission assumed that no price based switching from one product type to another occurs. The analysis is thus focused on the horizontal choice between operators and does not explicitly model the possibility of switching to other product types as a consequence of small price increases.

(6) The Commission's analysis focussed on two product types, namely (i) the double play product type consisting in fixed voice and fixed broadband ("2p") and (ii) an aggregation of triple and quadruple play products consisting in double play plus mobile and possibly TV ("3p/4p").[2]

(7) The Bertrand-Nash framework of differentiated goods (which underlies the merger simulation model) is explained in Section 2 below. Section 3 explains how the main parameters of the merger simulation model are calibrated. Section 4 contains a

---

1 Case COMP M.4854 *TomTom / Tele Atlas*, Case COMP M.5644 *Kraft Foods / Cadbury*, Case No COMP/M.5658 – *Unilever / Sara Lee*, Case COMP/M.6497 *Hutchison 3G Austria / Orange Austria*, Case COMP/M.6992 Hutchison 3G *UK / Telefónica Ireland,* Case COMP/M.7018 *Telefónica Deutschland / E-Plus*.

2 As set out in Table 11 of the Statement of Objections, the subscriber shares of product types other than 2p and 3p/4p products are very small. It was not possible to split 3p from 4p because certain operators could not provide data at such a level of disaggregation. In any event, the number of 4p subscribers of the merging parties compared to 3p subscribers is very small. Therefore, the number of switchers based on which diversion ratios could be derived is very limited, so that the reliability of diversions would suffer. In light of the small proportion of 4p products, the Commission considers that the market wide effects (across all relevant product types) are unlikely to significantly change when analysing 3p and 4p products separately.

summary of the results reported in the Statement of Objections. Section 5 assesses a number of critiques by the Notifying Party's to the analysis performed by the Commission and Section 7 concludes.

2. Common Framework: Bertrand-Nash Competition in Differentiated Products

(8) The standard Bertrand-Nash differentiated products framework to model the effect of the merger assumes that firms compete on price in a market with differentiated products.

(9) The starting point of the analysis is the standard assumption that firms set prices to maximise their profits, given the prices set by their rivals. This implies that the pre-merger situation constitutes a Bertrand-Nash equilibrium. As a result of the merger, Orange's and Jazztel's products are brought under common ownership. This eliminates competition between these products and generates incentive for the merged entity to raise price. Post-merger, Orange will take into account the effect on the profitability of all of its products when contemplating to change the price of one of its products. If, for example, before the merger Orange increases the price of one of its products it would lose subscribers. A number of these lost subscribers would choose the Jazztel products. After the merger, when Orange controls the Jazztel products, these subscribers would no longer be lost. Moreover, the more there is substitution between Orange and Jazztel products (that is to say the higher the diversion ratios between Orange and Jazztel), the stronger the unilateral incentive for the merged entity to raise price. Unilateral price changes by the merged entity will also lead to price reactions by rivals so that in the post-merger equilibrium all firms' prices may change. The overall extent of the price increases will depend on the level of substitution between the merging parties' products and on the degree of competition from rivals.

(10) Moreover, the incentives to raise price in the framework may be reduced or offset by merger related reductions in marginal costs or increases in quality (if such effects can be quantified to the required standard).[3]

2.1. The model of Bertrand-Nash competition in differentiated products

(11) Bertrand-Nash competition in differentiated products is formally modelled as follows. Each firm f is assumed to have a portfolio of products, J^f. The total (variable) profits of firm f are given by the sum of profits for each product in its portfolio:

$$\Pi_f(p) = \sum_{j \in J^f} \left(p_j - mc_j\right) q_j(p).$$

(12) Here, p_j denotes the price of product j, p is the vector with the prices of *all* products by all firms, mc_j is the constant marginal cost of product j, and $q_j(p)$ is the demand of product j which depends on all prices offered.

(13) The effect of a change in the price of product j for given prices of other products is given by the derivative of the firm f's profit function with respect of the price of product j (denoted as $f_j(p_j, p_{-j})$):

[3] See Horizontal Merger Guidelines, paragraphs 77 and 78.

$$f_j\left(p_j, p_{-j}\right) = q_j(p) + \sum_{j' \in J^f} \left(p_{j'} - mc_{j'}\right) \frac{\partial q_{j'}(p)}{\partial p_j},$$

(14) Where p_{-j} is a vector of price of all products other than *j*. A price increase of product *j* hence has three effects on profits. First, it directly raises profits, proportional to current demand, $q_j(p)$. Second, it lowers the product's own demand which decreases profits proportional to the current mark-up, $(p_j - mc_j)$. Third, as other products are substitutes, it raises the demand for the other products, including the firm's other products. This rise in the demand of the firm's other products in its portfolio partially compensates for the reduced demand of the firm's product *j*, and hence it has a positive effect on the firm's profits.

At profit maximising prices, the positive and negative effects of further price rises by firm *f* must exactly offset one another. This implies that for each product *j* belonging to firm *f*, and for given prices of rivals firms, $f_j\left(p_j, p_{-j}\right) = 0$. This is the first order condition for p_j to be a profit maximising price given the prices of other products.

(15) If the first-order conditions hold simultaneously for each product *j* (across all firms) then the price vector *p* defines the Bertrand-Nash equilibrium of the overall market. In matrix notation, the first order conditions for the equilibrium can be expressed as:

$$q(p) + \left(\Theta \bullet \nabla(p)'\right)(p - mc) = 0,$$

where *q(p)* is a *J*x1 vector with the demand for each product, $\nabla(p) \equiv \partial q(p) / \partial p'$ is the *JxJ* Jacobian matrix of first derivatives, and *mc* the vector of marginal costs. Θ denotes the product ownership matrix, that is, a *JxJ* matrix, whose element in its row *i*, column *j* is equal to 1 if product *j* and *i* are supplied by the same firm pre-merger and to 0 otherwise. The symbol • denotes element-by-element multiplication of two matrices of the same size. The ownership matrix is multiplied (element-by-element) with the transpose of the Jacobian matrix to account for the fact that each firm only takes account the effect of a price change on its own products but not that on rival products.

(16) Inverting this equation yields an expression of the Bertrand-Nash equilibrium price vector:

$$p = mc - \left(\Theta \bullet \nabla(p)'\right)^{-1} q(p).$$

(17) The first element on the right hand side is the marginal cost component of the equilibrium price, while the second is the markup. The markup depends on the own- and cross-price elasticities of demand. The lower the own-price elasticities and the greater the cross-price elasticities, the greater will be the mark-up over marginal cost.

2.2. Measures of effect of the notified transaction

(18) As the merger brings together the products of the merging parties, it changes the ownership matrix. The post-merger ownership matrix Θ^{post} reflects the fact that post-merger all Orange and Jazztel products are controlled by the merged entity. Elements of this matrix which refer to the interaction between Orange and Jazztel products and which took the value 0 pre-merger are changed to 1.

(19) This change in ownership implies that the first order conditions for a Bertrand-Nash equilibrium do no longer hold for the merged entity's products at the pre-merger price.

(20) Within this framework the post-merger first order conditions, which take account of the change in ownership of products induced by the merger (via the post-merger ownership matrix Θ^{post}) can be expressed as:

$$p^{post} = mc^{pre} - \left(\Theta^{post} \bullet \nabla\left(p^{post}\right)'\right)^{-1} q(p^{post}). \quad \textbf{(1)}$$

(21) The predicted post-merger prices within this framework are the prices which satisfy these post-merger first order conditions.

(22) With linear demand, first order conditions can be inverted to directly provide the post-merger price as a function of marginal costs and demand parameters. In general, however, this is not possible and one must solve p^{post} as the solution to a non-linear system of first order conditions numerically. One strategy to do this is to express the first order equations as in equation (1) and then, starting from an initial guess for the new equilibrium price on the right hand side, iterate this equation to update the value p^{post} until convergence is achieved.

2.2.1. Indicative price rise

(23) If it is assumed that rivals do not react to post-merger price changes by the merged entity, then this problem reduces to finding post-merger prices for the merged entity's products on the basis of the merged entity's first order conditions post-merger. This approach is often called an Indicative Price Rise (IPR). It requires information on the elements in post-merger first order conditions for the merged entity's products as well as an assumption of the functional form of demand. However, as the approach assumes there are no rival reactions, no information on demand derivatives of rival's products is required.

2.2.2. Merger simulation

(24) A full merger simulation which also takes account of price reactions by rivals amounts to finding the post-merger price vector which corresponds to the new post-merger Bertrand-Nash equilibrium for all firms, that is, the price vector which satisfies the above equation (1) for all products of all firms simultaneously.

(25) In addition to an assumption on the functional form of demand, this approach hence requires information on the elements in the first order equations for all firms' products, not just for the merging firms' products.

2.3. Efficiencies

(26) It is also straightforward to use this framework to predict price increases taking account of quantified marginal cost efficiencies. To do so, one needs to replace the marginal cost estimate in the equation (1) with the marginal cost after efficiencies.[4]

3. CALIBRATION OF MAIN PARAMETERS

(27) This section explains the details of the construction of diversion ratios (Section 3.1), of the construction of margins (Section 3.2), and of the measure of demand (Section 3.3). These measures are used to calibrate the main parameters of the merger simulation.

---

4 Quality improvements may in principle also be accounted for. See Willig, R., (2011) "Unilateral Competitive Effects of Mergers: Upward Pricing Pressure, Product Quality, and Other Extensions," *Review of Industrial Organization*, 39, pages 19-38.

(28) This calibration based approach relies on two key data sources obtained from operators: (i) product type level quarterly data on each operator's subscribers, revenues and costs in the respective product type; and (ii) FNP data which is collected when customers port their fixed number from one operator to another.

3.1. Calibration of diversion ratios

3.1.1. Calibration of demand based on observed switching data

(29) The diversion ratio from product *j* to *i* is defined as:

$$DR_{ji} = -\frac{\partial q_i}{\partial p_j} \Big/ \frac{\partial q_j}{\partial p_j}.$$

(30) With this definition, the pre-merger first-order condition for product *j* can be rewritten as:

$$q_j \Big/ \frac{\partial q_j}{\partial p_j} - \sum_{i \in J^f} (p_i - mc_i) DR_{ji} = 0.$$

(31) Observed diversion ratios, margins and quantities hence imply values of $\partial q_j / \partial p_j$, which then imply values for $\partial q_i / \partial p_j$ via the definition of diversion ratios.

(32) With the assumption of linear demand the first derivatives do not change as prices change and it is also straightforward to calculate demand changes and compute price increases either by assuming no price reactions from competitors (IPRs) or by solving the full equilibrium effect which takes account of and predicts price reactions by rivals.

(33) In order to calibrate diversion ratios, the Commission collected information on subscriber switching from two main sources.

(34) First, it requested Orange to produce operator level FNP data for the period 01 January 2012 to 30 November 2014. These operator level FNP data have been extracted based on an ad hoc request to the Asociación de Operadores para la Portabilidad (AOP). This data will be referred to as the "FNP data from the AOP" in the reminder of this document. The raw data obtained contains all flows of (business and residential) subscribers who in a given quarter switch operator and decide to port their number. The FNP data collected from the AOP contains all fixed telecom operators active in Spain.

(35) This data is based on information on "port out" requests in each operator's FNP database. These "port out" requests represent the number of porting requests an operator receives from other operators relating to customers that want to port their number to the other operator.

(36) Overall, on the basis of this FNP data from the AOP, the Commission estimated the diversion ratio matrix at the operator level.[5] The diversion ratios from Jazztel to Orange were […]*% and […]*% in 2013 and January to November 2014, respectively. The diversion ratios from Orange to Jazztel were […]*% and […]*% in 2013 and 2014, respectively.

---

5 Each cell of the matrix indicates the proportion of total subscribers switching away from the operator indicated in the row that is captured by the operator indicated in the column.

(37) Second, for the period between January 2013 and December 2014, the Commission requested to each of Orange, Jazztel, Vodafone and Telefónica to produce a comprehensive list of residential subscribers that have been gained and lost in the first month of a given quarter and ported in/out their number. Being at the individual subscriber level, this FNP data is significantly more granular than the (operator-level) FNP data provided by the AOP. This data will be referred to as the "product type-level FNP data" or "product type-level portability data" in the reminder of this document.

(38) The Commission notes that using the FNP data to calibrate demand presents a number of difficulties. These are addressed as follows.

(39) First, switching in the FNP data does not necessarily reflect consumers' reactions to small price changes, as would be required by a strict interpretation of the concept of diversion ratio. Nevertheless, the Commission considers actual switching to be informative for consumer preferences and hence considers the diversion ratios resulting from the FNP data to provide an informative measure for likely consumer reactions to price changes as explained in Section 7.2.7.1 of the Decision and in Section 3.1.2 below.

(40) Second, as reported by the Notifying Party in its response to the 6(1)c decision[6], the FNP data does not record (or mis-records) a number of migrations of broadband customers, notably those served on the basis of Wholesale Line Rental (WLR) which in Spain is called Acceso Mayorista a la Línea Telefónica (AMLT). The Commission has addressed this point by complementing the FNP data with information on the number of migrations relating to WLR, which has been provided by Telefónica as set out in Section 3.1.2 below.

(41) Third, the FNP data from the AOP does not allow separating the business segment from the residential segment. This is likely to lead to an underestimation of the Notifying Party's competitive strength due to the potentially stronger position of Telefónica's in the business segment. To address this point, the Commission has also analysed portability data directly from the operators, with a focus on the residential segment only. The details of this analysis are contained in Section 3.1.3.

(42) Forth, the FNP data from the AOP does not allow identifying the origin and destination product type of the port (that is to say the product type the customer ports from and to). This means that the FNP data allows capturing the overall flow of customers between operators but not whether consumers upgraded or downgraded their product or simply switched "horizontally" between operators without changing the product type.

(43) In order to further investigate the impact of considering diversion ratios that are not purely price-based, the Commission has also derived diversion ratios on the basis of product type-level switching data collected from the operators. This data allows isolating those instances where customer switch "horizontally" between operators and remain within the same product type. The details of this analysis are contained in Section 3.1.3.

(44) Fifth, the Commission has also analysed the diversion ratios by destination product type, aggregated over all origin product types. The details of this analysis are contained in Section 3.1.4.

---

6 Report "Comments on the use of UPP / IPRs in the 6.1.c Decision" of 16 January prepared by the Notifying Party.

(45) Sixth, the Commission has derived so called benchmark diversion ratios based on new subscribers the operators acquired in the relevant period. For each product type, these diversion ratios are based on the assumption that subscribers switch to competing operators proportionally to the competitors' gross adds shares of the respective product type. The Commission found that these diversion ratios are similar to the diversion ratios based on number portability data. This indicates that the portability based diversion ratios of the merging parties are unlikely to suffer from a significant bias (e.g. biases that might be induced by selection issues related to the fact that not all subscribers port their number or by the recent demand shift to 3p/4p products.

(46) Overall, the observed switching between operators from the portability data is likely not exclusively price based and caution has to be applied when calibrating demand based on observed switching patterns.[7] In particular, in light of the observed on-going shift of the product mix in the retail market for fixed Internet access services, it cannot be simply assumed that as a consequence of a small price increase consumers would switch from 2p to 3p (or 4p) products in the same proportion as observed in the past.

(47) However, the Commission considers that diversion ratios based on observed switching are in the present case a reasonably good indicator to calibrate *horizontal* switching patterns between competitors in case of a unilateral price increase.

3.1.2. Adjustment for fixed retail telecom services provided on the basis of Wholesale Line Rental/Bitstream wholesale services

(48) Whenever a fixed voice service is provided on the basis of indirect wholesale access (such as wholesale line rental which is often combined with a wholesale bitstream access for fixed broadband services), the fixed number is "owned" by the operator providing the wholesale service. To the extent indirect wholesale access is used, number porting requests do not necessarily mirror the actual switches of subscribers at the retail level.

(49) Specifically, the fixed-line number portability database does not include the following flows of broadband customers: (i) from one operator using AMLT to another operator using AMLT; (ii) from an operator using AMLT to Telefónica; (iii) from Telefónica to an operator using AMLT. For these migrations, no number porting request is required because the number will remain being operated by Telefónica, implying that the subscriber automatically retains the number.

(50) On the other hand, if a subscriber switches from an operator using AMLT to an operator other than Telefónica and ports the number, then this is recorded as a porting request from Telefónica to the new operator to which the subscriber switches. If an operator previously offered retail services to a subscriber based on AMLT, and migrates this customer to an own network (possibly on the basis of ULL) and the

[7] Ideally, one would want to observe subscribers' first and second choice of operator at the point in time when the subscriber decides whether to switch operator or not. The observation that a customer switches from Jazztel to Orange implies that, at that point in time, Orange was the customer's first choice. While it is possible that the customer's second choice at the same time could have been an operator other than Jazztel, the fact that the customer is currently with Jazztel implies that Jazztel was the customer's first choice in the previous subscription decision. For the purposes of a diversion ratio based analysis, it appears hence reasonable to assume that the customer's preferred products are provided by Jazztel and Orange.

customer's number is ported, this is also recorded as a port from Telefónica to that operator, although no customer switching occurred at the retail level.

(51) The Commission accounted for the fact that certain flows which involve services provided on the basis AMLT are recorded in a peculiar way in the number portability data. Specifically, the Commission obtained from Telefónica data on the number of migrations (and the related number porting requests) involving AMLT. The Commission then derived for each operator the share of new subscribers that port-in their telephone numbers[8]. Then the Commission added:

(i) the number of migrations from one operator using AMLT to another operator using AMLT, multiplied by the share of subscribers that port-in their telephone numbers to the destination operator;

(ii) the number of migrations from an operator using AMLT to Telefónica, multiplied by the share of subscribers that port-in their telephone numbers to Telefónica;

(iii) the number of migrations from Telefónica to an operator using AMLT multiplied by the share of subscribers that port-in their telephone numbers to the destination operator.

(52) The Commission further deducted the number of ports from Telefónica to another operator of subscribers that previously were offered retail services to a subscriber based on AMLT. For these ports, the operator that provided the retail services based on AMLT was used as originating operator. Number ports that corresponded to customers that did not switch operator but where the operator changed the means of providing this service from a technical point of view were deducted from the number of ports from Telefónica to that operator.

(53) The diversion ratios after implementing the above-mentioned adjustments on the FNP data provided by the AOP from Jazztel to Orange were […]*% and […]*% in 2013 and 2014, respectively. The adjusted diversion ratios from Orange to Jazztel were […]*% and […]*% in 2013 and 2014, respectively. These diversion ratios are by up to 2 percentage points higher than the diversion ratios implied by the unadjusted porting data of the AOP.

(54) Adjusting the porting data for AMLT tend to increase the diversion ratios mainly for three reasons: First, flows of subscribers that were served by one merging party on the basis of AMLT which switch to the other merging party are not recorded in the porting data. Second, flows of subscribers that were served by one merging party on the basis of AMLT and switch to the other merging party were originally recorded as a port from Telefónica to the other merging party. Third, flows of subscribers that were served by one merging party and switch to the other merging party if they are served on the basis of AMLT were originally recorded as a port the first merging party to Telefónica. Adjusting these flows as described in paragraphs (504) and (52), implies visualising more switching between the merging parties which in turn implies higher diversion ratios.

(55) The Commission also performed a similar adjustment to the FNP data at the product type level (see Sections 3.1.3 and 3.1.4 below). Since the data provided by Telefónica on migrations related to AMLT does neither allow distinguishing product

8 For migrations which involve services provided on the basis AMLT customers automatically retain their telephone number, so that a number porting request is not necessary.

types nor residential and business customers, the Commission allocated AMLT related migrations to the relevant product types proportionally to port-in flows of the relevant product types. The Commission notes that the adjustment for AMLT related migrations sometimes decreased the (relatively high) diversions between the Jazztel and Orange for 3p/4p products.

3.1.3. Diversion ratios of subscribers that switched the operator but stayed in the same product type

(56) As introduced in Section 3.1.1, two of the limitations of the FNP data from the AOP are that (i) it does not allow separating the business segment from the residential segment and (ii) it does not allow identifying the origin and destination product type of the port (that is to say the product type the customer ports from and to).

(57) The first limitation does not allow focussing the analysis on residential (and SoHo[9]) customers. Including business customers in the analysis can dilute the estimation of the competitive strength of the merging parties, as Telefónica is the player that dominates the business segment. As set out in Section 6.2.1.4 of the Decision, the Commission considers that the market for large business customers (also referred to as retail business connectivity market) is a separate market that is not affected by the Proposed Transaction.

(58) The second limitation does not allow disentangling the effect of the Notified Transaction on 2p and 3p/4p products, respectively.

(59) Therefore, in order to complement the FNP data from the AOP, the Commission has also analysed more disaggregated portability information (at the product type level) collected directly from the operators (the product type-level FNP data).

(60) The Commission has asked to each of Orange, Jazztel, Telefónica and Vodafone to provide data on subscribers that ported their number to/from each operator from/to each of its rivals of the first month of each quarter for the period Q1 2013-Q4 2014. For each of port-in, the Commission asked to provide information on the operator of origin and the new product type that the customer subscribed to. For each port-out, the Commission asked information on the operator of destination and the product type to which the customer was subscribed before leaving.

(61) In order to isolate switches which are purely horizontal, the Commission has matched the ported-out numbers (and the corresponding operator of destination) of all operators with the numbers ported-in to all operators (and corresponding operator of origin).[10]

(62) This provides for each switcher a comprehensive view of (i) the operator of origin, (ii) the product type of origin, (iii) the operator of destination and (iv) the product type of destination.[11] The Commission then retained only those ports whose origin and the destination product type were identical.

---

9 Small Offices and Home Offices.

10 The Commission requested this data for the first month of ach quarter between Q1 2013 and Q4 2014 from the merging parties, Vodafone and Telefónica. Vodafone has not been able to provide complete data for Q1 2013 and therefore the 2013 diversion ratios presented in this section are based on Q2, Q3 and Q4 of 2013 only.

11 It is noted that 70% of the telephone numbers provided by the operators could be matched. The remaining 30% unmatched telephone numbers are presumably due to the fact that only data corresponding to the first month of each quarter has been requested (in order to reduce the workload for the operators). This could mean that if the operator left by the subscriber and the new operator do not

(63) Based on this information, the Commission has calculated the diversion ratios for switching which occurs within the same product type (from 2p to 2p and from 3p/4p to 3p/4p). This allows isolating those switching occurrences that are least likely to be driven by shifts in preferences over time (notably from lower value product types such as 2p to higher value product types such as 3p/4p).

(64) Because the Commission obtained port-in information only from Orange, Jazztel, Telefónica and Vodafone, the Commission cannot infer to which destination product type of smaller operators customers switched. Therefore, the Commission assumed that for each origin operator, the diversion ratio to operators other than Orange, Jazztel, Telefónica and Vodafone for each destination product type corresponds to the proportion of port-outs of that origin from this operator to operators other than Orange, Jazztel, Telefónica and Vodafone. This assumption does not materially affect the results, as the diversion ratios to other operators are small and as the level of anti-competitive effects is mainly driven by the diversion ratios between the merging parties.

(65) Table 1 below summarises the proportion of total switchers who ported their number in a given year which corresponds to switching within the 2p product type and within the 3p/4p product type, as opposed to switching across product types. In 2013, the proportion of total switchers corresponding to switching within the 2p product type was […]*%, down to […]*% in 2014. The proportion of switchers within the 3p/4p product type was instead […]*% in 2013 and […]*% in 2014.

Table 1: Proportion of total switchers by product type of origin and destination[12]

Year	2p	2p	3p_4p	Other
2013	2p	[…]*	[…]*	[…]*
	3p_4p	[…]*	[…]*	[…]*
	Other	[…]*	[…]*	[…]*
2014	2p	[…]*	[…]*	[…]*
	3p_4p	[…]*	[…]*	[…]*
	Other	[…]*	[…]*	[…]*

(66) The diversion ratios based on flows across operators but within the 2p product type (adjusted for migrations linked to WLR) are summarised in Table 2. The diversion ratios from Jazztel to Orange were […]*% and […]*% in 2013 and 2014, respectively. The diversion ratios from Orange to Jazztel were […]*% and […]*% in 2013 and 2014, respectively.

record the migration in the same month, it is not possible to match this telephone number across the two operators in the data provided to the Commission. Overall, the Commission does not expect that the omission of the 30% unmatched observations would lead to a systematic bias in the results of the analysis.

12 Category "Others" includes fixed broadband only, fixed voice only, fixed broadband plus mobile, and fixed voice plus mobile.

Table 2: Diversion ratios matrix for switching within the 2p product type (based on matching of the operator data on product type-level portability, adjusted for WLR)[13]

	2013	2014
Diversion from Orange to Jazztel	[…]*	[…]*
Diversion from Jazztel to Orange	[…]*	[…]*

(67) The diversion ratios based on customers diversions across operators but within the 3p/4p product type are summarised in Table 3. The diversion ratios from Jazztel to Orange were […]*% and […]* in 2013 and 2014, respectively. The diversion ratios from Orange to Jazztel were […]*% and […]*% in 2013 and 2014, respectively.

Table 3: Diversion ratios matrix for switching within the 3p/4p product type (based on matching of the operator data on product type-level portability, adjusted for WLR)[14]

	2013	2014
Diversion from Orange to Jazztel	[…]*	[…]*
Diversion from Jazztel to Orange	[…]*	[…]*

(68) The product type specific diversion ratios reported in Table 2 and Table 3 have been adjusted for fixed retail telecom services provided on the basis of Wholesale Line Rental/Bitstream wholesale services. For 3p/4p products, the diversion ratios from Jazztel to Orange without adjustment are slightly higher than those reported in Table 3.

(69) These diversion ratios between the merging parties focused on 3p/4p product types are significantly higher than the diversion ratios calculated based on the market-wide operator level adjusted FNP data from the AOP. This suggests that Orange and Jazztel particularly constrain each other's pricing for their offers in the 3p/4p product type. The diversions between the merging parties are also higher than the diversions to […]*, which is in contrast to the argument of the Notifying Party that […]* imposes a particularly strong competitive constraint on the merging parties.

3.1.4. Diversion ratios based on product type-level data from operators, aggregated by destination product type

(70) There has been a significant shift from 2p to 3p/4p products in 2013 and 2014. Many subscribers who switched from 2p to 3p/4p products would have presumably switched to 3p/4p products even if the prices of 3p/4p products had been marginally higher (that is, for these switchers the original 2p products are likely not the second best choice any more). Calculating the diversion ratios based on an aggregation of the migrations across all product types of origin, and conducting the merger simulation analysis by product type of destination (2p or 3p/4p), thus reflects the implicit assumption that consumers who switched vertically, would have only considered subscribing to the destination product type, but not to the product type

[13] The first column of the table indicates the operator of departure whereas the first row of the table indicates the operators of arrival. The redacted diversion ratios relating to operators other than the merging parties are considered confidential.

[14] The first column of the table indicates the operator of departure whereas the first row of the table indicates the operators of arrival. The redacted diversion ratios relating to operators other than the merging parties are considered confidential. These have been made available to the Notifying Party's economic advisers in the data room. This comment applies to each of the result tables presented in the remainder of this document.

they had previously chosen (i.e. the origin product type). In the context of the present case, in light of the trend to 3p/4p products and the underlying market developments driving this trend, many subscribers who switched from 2p to 3p/4p products likely did not consider subscribing again to 2p products.

(71) Compared to the analysis described in Section 3.1.3, aggregating the portability data over the origin product types has the further advantage of increasing the number of switchers on which the diversion ratios are based (since no matching of port-in and port-out data is required), thereby improving the estimates' reliability.

(72) Based on the data collected on ported numbers provided by Orange, Jazztel, Telefónica and Vodafone, the Commission has also calculated the diversion ratios by product type of destination (irrespective of the product type of origin). For each destination product type *x*, the diversion ratio from operator i to operator j is computed as the number of port-ins to operator j for destination product type *x* from operator i (irrespective of the originating product type), divided by the total number of ports from operator i to other operators of destination product type *x*.

(73) The resulting diversion ratios for the 2p product type are summarised in Table 4, while the diversion ratios for the 3p/4p product type are summarised in Table 5.

(74) As regards 2p products, the diversion ratios from Jazztel to Orange were […]*% and […]*% in 2013 and 2014, respectively. The diversion ratios from Orange to Jazztel were […]*% and […]*% in 2013 and 2014, respectively.

Table 4: Diversion ratios matrix for the 2p product type, based on operator data on product type-level portability (adjusted for WLR), aggregated across all product types of origin[15]

	2013	2014
Diversion from Orange to Jazztel	[…]*	[…]*
Diversion from Jazztel to Orange	[…]*	[…]*

(75) As regards 3p/4p products, the diversion ratios from Jazztel to Orange were […]*% and […]*% in 2013 and 2014, respectively. The diversion ratios from Orange to Jazztel were […]*% and […]*% in 2013 and 2014, respectively.

Table 5: Diversion ratios matrix for the 3p/4p product types, based on operator data on product type-level portability (adjusted for WLR), aggregated across all product types of origin

	2013	2014
Diversion from Orange to Jazztel	[…]*	[…]*
Diversion from Jazztel to Orange	[…]*	[…]*

(76) The product type specific diversion ratios reported in Table 4 and Table 5 have been adjusted for fixed retail telecom services provided on the basis of Wholesale Line Rental/Bitstream wholesale services. For 3p/4p products, the diversion ratios from Jazztel to Orange without adjustment are slightly higher than those reported in Table 3.

(77) Overall, these diversion ratios from Orange to Jazztel based on switching to 3p/4p products are somewhat lower than the corresponding diversion ratios based on

[15] The first column of the table indicates the operator of departure whereas the first row of the table indicates the operators of arrival. The redacted diversion ratios relating to operators other than the merging parties are considered confidential.

switches within 3p/4p products (Table 3), in particular as regards 2013. Nevertheless, the same pattern emerges of much higher diversion ratios between the merging parties as regards 3p/4p products compared to the diversion ratios concerning 2p products, as already found in Section 3.1.3.

(78) The diversion ratios to 3p/4p products between the merging parties are significantly higher than the diversion ratios calculated based on the market-wide adjusted FNP data from the AOP. This suggests that Orange and Jazztel particularly constrain each other's pricing for their 3p/4p products.

3.1.5. Benchmark diversion ratios based on gross adds

(79) Another relevant benchmark for assessing the extend of substitutability between the operators' offers are the diversion ratios calculated based on gross adds shares, under an assumption that consumers consider all operators' offers to be equally close. Under such assumption, the diversion ratios between operators are such that each operator attracts from the others a share of subscribers proportional to its share of gross adds.[16]

(80) Table 6 and Table 7 contain the benchmark diversion ratios based on gross add shares for 2p and for 3p/4p product types respectively.

Table 6: Benchmark diversion ratios matrix for the 2p product type (based on gross adds shares)[17]

	2013	2014
Diversion from Orange to Jazztel	[…]*	[…]*
Diversion from Jazztel to Orange	[…]*	[…]*

(81) The benchmark diversion ratios of 3p/4p products between the merging parties are significantly higher than those of 2p products. This finding, which is consistent with the observations as set out in Sections 3.1.3 and 3.1.4 suggests that Orange and Jazztel particularly constrain each other's pricing for their 3p/4p products.

Table 7: Benchmark diversion ratios matrix for the 3p/4p product type (based on gross adds shares)[18]

	2013	2014
Diversion from Orange to Jazztel	[…]*	[…]*
Diversion from Jazztel to Orange	[…]*	[…]*

3.2. The construction of margins

3.2.1. ARPUs as a measure of prices

(82) The Commission requested from the Parties detailed quarterly information on revenues relating to Orange's and Jazztel's residential subscribers. The relevant period considered spans from Q1 2013 to Q4 2014 and the data has been requested at

---

16 Technically, the diversion ratio from operator i to operator j (that is, the proportion of subscribers lost by i which is captured by j) is calculated as: $DR_{ij} = \frac{Gross\ adds\ share(operator\ j)}{1-Gross\ adds\ share\ (operator\ i)}$.

17 The first column of the table indicates the operator of departure whereas the first row of the table indicates the operators of arrival. The redacted diversion ratios relating to operators other than the merging parties are considered confidential.

18 The first column of the table indicates the operator of departure whereas the first row of the table indicates the operators of arrival. The redacted diversion ratios relating to operators other than the merging parties are considered confidential.

a level of aggregation corresponding to the Parties main product types (in particular, 2p –defined as fixed broadband plus fixed voice- and 3p/4p[19]).

(83) Whenever the internal financial reporting did not allow separation of revenues across the product types requested by the Commission, each of Orange and Jazztel performed an allocation of the total revenues to the individual product types based on a number of drivers including the split of subscriber numbers.[20]

(84) The Commission used the information collected on revenues to construct a measure of the Average Revenue Per User (ARPU) for the 2p and for the 3p/4p product types. This was obtained by dividing the total revenues allocated to the product type by the number of active fixed subscribers to that product type.

(85) The ARPU has been constructed by including the subscription revenues, all usage related revenues and other revenues such as revenues from cancellations and penalties incurred by subscribers.[21]

(86) The Commission uses ARPU as a price measure and has therefore excluded incoming termination fees. Termination revenues from incoming calls are not paid by an MNO's own subscribers. They can therefore be interpreted as a negative marginal cost. Also revenues from handsets have been excluded, since only the net handset subsidies[22] have been included amongst costs.

(87) The ARPU calculated on this basis provides an estimate of the unit revenues received by an operator by its own subscribers. It is hence the appropriate basis to approximate the prices paid by consumers.

(88) In the Commission's view, the use of ARPU is justified as a single measure of price in order to estimate the predicted price increase in this approach. This is because the ARPU allows the use of a single value to conceptually represent the price of the "typical" bundle offered by each firm in each product type, which is demanded in unit quantities.

3.2.2. Costs

(89) The Commission also requested from the Parties detailed quarterly information on costs relating to Orange's and Jazztel's residential subscribers. The relevant period considered spans from Q1 2013 to Q4 2014 and the data has been requested at a level of disaggregation corresponding to the Parties main product types (analogously to what was done for revenues).

(90) Whenever the internal financial reporting did not allow separating the costs by the product types requested by the Commission, each of Orange and Jazztel performed

---

19 The Commission's analysis has focused on 2p and 3p/4p product types, as the remaining products represent approximately 1% of the market.

20 The Commission acknowledges this is an approximation and that more sophisticated drivers could have been used (e.g. usage by product types). However, the merging parties reported that this exercise would have been either not feasible or significantly more time consuming.

21 The Commission had already based its UPP analysis in Phase I on revenue data collected from the merging parties. Compared to Phase I, the revenues used for the calibrated merger simulation contained in the Statement of Objections include additional revenues that Jazztel reported from customer cancellations, penalties, etc.

22 That is, the difference between the costs relating to handsets and the revenues earned from handsets' sales.

an allocation of the total costs to the individual product types based on a number of drivers including the split of subscriber numbers.[23]

(91) The Commission used the information collected on costs to construct a measure of the incremental costs for the 2p and for the 3p/4p product types.

(92) The incremental costs have been defined as the merging parties' estimates on costs that the operator could avoid (i.e. no longer incur) in the hypothetical case of a substantial reduction of the subscriber base. These include all direct costs (i.e. those costs that can be directly attributed to a subscriber and that therefore vary in direct proportion with the number of subscribers)[24] and a portion of costs and overheads which could be reduced in case of a substantial reduction in the subscriber base (e.g. costs relating to outsourced call centre services).

(93) Direct costs included the following cost categories: Interconnection costs, customer access connectivity, subscriber acquisition costs, subscriber retention costs, purchase of contents, handset subsidies, bad debts and revenue-based commissions paid by the operator. The handset subsidies and the subscriber acquisition costs have been amortised over an average customer lifetime of 27 months.[25]

(94) The incremental costs also contain customer premises equipment, costs of installation of new copper lines in the customer premises, and costs relating to ULL ports in the local exchange.[26]

(95) As regards Orange, significant additional costs have been included in the analysis conducted in Phase II, compared to the data used in the UPP analysis conducted in Phase I. In its response to the 6(1)(c) decision, Orange explained that the costs provided to the Commission during Phase I did only include direct costs and did not include any other incremental costs which can be considered variable in the event of a significant change in the subscribers base.

(96) As regards Jazztel, customer-specific CAPEX such as customer premises equipment has been added in the analysis conducted in Phase II, compared to the data used in the UPP analysis conducted in Phase I. These costs have been reported by Jazztel after the adoption of the 6(1)(c) decision.

3.2.3. Margins

(97) Based on the computed ARPU and incremental cost per user, the Commission has calculated the incremental margins per user (a conservative measure of margins, compared to other definitions which would uniquely account for the direct costs).

(98) Since only Orange and Jazztel provided the avoidable costs for a reduction in the subscriber base, it was assumed that for each product type the remaining nationwide

23 The Commission acknowledges that this is an approximation and that more sophisticated drivers could have been used (e.g. usage by product types). However, the merging parties reported that this exercise would have been either not feasible or significantly more time consuming.

24 This includes the following: Interconnection costs, customer access connectivity, subscriber acquisition costs, subscriber retention costs, purchase of contents, handset subsidies, bad debts and revenue-based commissions paid by the operator.

25 The average customer lifetime is estimated to be 27 months by the Spanish regulator, as reported in the Notifying Party's report of 16 January "Comments on the use of UPP / IPRs in the 6.1.c Decision", p.24.

26 These costs have been amortised over an average customer lifetime of 27 months, except the costs relating to ULL ports in the local exchange, which have been amortised over a useful life of […]*, as indicated by Jazztel in its email of 29 January 2015, in response to the Commission's questions of 19 January 2015, Doc ID 1346.

operators (namely, Telefónica and Vodafone) have margins equal to the average of the incremental margins calculated for the Parties for that product type.[27]

(99) Incremental margins are considered an appropriate measure of profitability for the purposes of the calibrated merger simulation in this context. Incremental margins reflect an operator's profitability from the new subscribers acquired. This is the profitability measure that governs the decisions a profit maximising operator when setting the price of its products.

(100) The Notifying Party argues that there likely has been a trend of decreasing margins. […]*.[28] In the view of the Notifying Party, this would be due to companies competing to offer better deals to subscribers and more generous tariffs which make subscribers less likely to exceed their allowances.

(101) First, the Commission notes that the decreasing trend in ARPU is significantly less marked (or even absent) in the more recent periods (see Figure 1).

(102) Second, the Commission notes that the decreasing trend in ARPU does in fact reflect to a significant extend a decrease in the underlying costs. This implies that the resulting margins either decrease to a significantly lesser extent compared to the ARPU […]* or stabilise and even increase […].

Figure 1: ARPU, cost and margin trends relating to 3p/4p product types

[…]*.

(103) Third, the use of the current and past incremental margins is also considered conservative in the context of a progressive transition by each of the Parties from copper to fibre. As explained by the Parties during the State of Play meeting of 18 December 2014, establishing a fibre network requires significant fixed costs upfront but involves, once the network is installed, a significant reduction in the variable costs of the operator. This is because owning a fibre network allows an operator to convert its subscribers from a copper-based service (which currently requires the payment of a EUR 8.60 access fee to Telefónica in relation to the use of its local loop) to the operator's newly established own fibre network, for which an access fee is no longer required. Therefore, the transition by each of the Parties from copper to fibre is expected, if anything, to reduce their variable costs and therefore increase their margins in the future.

3.3. Pre-merger demand measure: new subscribers to fixed internet products

(104) The Commission's quantitative assessment of price effects intends to capture the effect of the merger on the competition for customers which are contestable. Contestable customers are defined as those who are in a position and willing to consider moving to a different tariff or provider. The set of contestable customers normally includes not only customers that decide to switch operator and which are usually reported as gross-adds but also those customers who switch to another tariff but stay at the same operator and potentially even those subscribers who (actively) decide to stay in their existing contract and operator although they could switch to another operator.

---

27 Sensitivity analyses show that the results do not materially change even if the margins of assumed Vodafone and Telefónica are decreased or increased by 50% (see Section 4.5).

28 Report "Comments on the use of UPP / IPRs in the 6.1.c Decision" of 16 January prepared by the Notifying Party.

(105) However, some of the operators contacted by the Commission (including Jazztel and to some extent Orange) indicated that they could not provide reliable estimates of the total number of subscribers that switched internally between and within the relevant product types[29].

(106) The Commission thus based its analysis on estimates of the number of new subscribers to the relevant fixed telecom products (i.e. the gross adds). The Commission considers that the share of new fixed subscribers of the operators (the so called gross adds share) is a good indicator of the current competitive strength of market participants.

(107) Therefore, the gross adds shares have been used by the Commission in its calibrated merger simulation as the relevant measure of the pre-merger contestable demand that each operator is able to attract. These shares are reported in Table 8.

Table 8: Gross adds shares for 2p product types and for 3p/4p product types (residential segment)[30]

New fixed subscribers (2p)	2013	2014	2013	2014
Orange	[...]*	[...]*	[...]*	[...]*
Jazztel	[...]*	[...]*	[...]*	[...]*
Telefonica	[...]*	[...]*	[...]*	[...]*
Vodafone + Ono	[...]*	[...]*	[...]*	[...]*
Others	[...]*	[...]*	[...]*	[...]*
Total	**1,421,640**	**1,216,770**	**100%**	**100%**

New fixed subscribers (3p and 4p)	2013	2014	2013	2014
Orange	[...]*	[...]*	[...]*	[...]*
Jazztel	[...]*	[...]*	[...]*	[...]*
Telefonica	[...]*	[...]*	[...]*	[...]*
Vodafone + Ono	[...]*	[...]*	[...]*	[...]*
Others	[...]*	[...]*	[...]*	[...]*
Total	**1,332,816**	**1,617,866**	**100%**	**100%**

4. THE PRELIMINARY RESULTS OF THE CALIBRATED MERGER SIMULATION PRESENTED IN THE STATEMENT OF OBJECTIONS

(108) This Section reports the price effects computed by the Commission in the Statement of Objections. An assessment of the Notifying Party's response to the quantitative assessment contained in Statement of Objections, and revised computations of price effects (where relevant) are presented in Section 5.

(109) The results on price effects presented in the Statement of Objections and in this Annex are based on the stylized model of price competition described in Section 2 of this Annex. This framework is used to gauge the magnitude of the expected price

29 In response to a Request for Information from Commission (dated 19 January 2015), Jazztel (and, to same extent, Orange) responded that reliable estimates of the internal diversions within and across product types were only partially available. For example, Jazztel could only provide the number of subscribers that switched from 2p to 3p products but not the number of subscribers switching from 3p to 2p. Jazztel was also unable to provide the number of subscribers who switched tariff within the same product type. During the course of Phase II (including during the data room exercise) the Notifying Party's economic consultants presented a reconstruction of the merging parties' internal diversions (across product types only, and not across tariffs within the same product type). However, as stated in the merging parties' Data Room Report, these estimations were "*both large and – in all likelihood – very imprecise*". For these reasons, the Commission considers that it was not possible in this case to rely on sufficiently precise estimates of the internal switchers.

30 The redacted gross adds relating to operators other than the merging parties are considered confidential.

increases following to the merger. This analysis necessarily abstracts from certain aspects affecting the merging parties pricing incentives. As such, these results should not be interpreted as providing a precise quantification of the exact increase in prices expected following the merger but should nevertheless be interpreted as the Commission's best estimates of the price effects of the merger.

(110) While relatively simple, the applied framework captures, in the Commission's view, the most important factors on how the transaction will likely affect the market participants' pricing incentives. The Commission considers that the market features and dynamics outside the scope of this model cannot be reasonably expected to significantly bias the results in a particular direction.

(111) The Commission has calculated the post-merger price increase for each of the main operators, namely the merging parties, Telefónica and Vodafone.

(112) The Commission has not explicitly modelled the changes of the incentives of the remaining market participants (in particular the three regional cable operators active in Spain). These are present in the Commission calculations in terms of market shares (see Table 8) but their pricing behaviour has been assumed to be unchanged post-merger compared to the situation prior to the transaction. This assumption is expected to be conservative, because under the assumed horizontally differentiated demand model with Bertrand competition modelling the pricing behaviour of these additional players would likely lead to further increases in price for all market participants.[31]

(113) The Commission considered two baseline scenarios in the analysis contained in the Statement of Objections.

(114) In its first baseline scenario, the Commission used the incremental margins computed as discussed in Section 3.1.5 and diversion ratios based on a matching of the product type-level portability data collected from the operators (as discussed in Section 3.1.3 and reported in Table 4 and Table 5. The results of this baseline scenario are presented in Section 4.1.

(115) In its second baseline scenario, the Commission used the incremental margins computed as discussed in Section 3.1.5 and diversion ratios based on the -portability data collected from the operators for residential customers, aggregated across all product types of origin and separately for each product type of destination (as discussed in Section 3.1.3). The results of this baseline scenario are presented in Section 4.1.

(116) The Commission has also conducted a number of sensitivity analyses in order to test the robustness of the results from the baseline scenarios. These sensitivity analyses are presented in sections 4.3 to 4.5.

4.1. Baseline scenario using diversion ratios based on purely horizontal switches

(117) The diversion ratios used in this baseline scenario are those based on a matching of customers won and lost by each of the main operators (as further described in Section 3.1.3 and reported in Table 2 and Table 3). The margins used are the incremental margins calculated as described in Section 3.2.

---

31 This is because under the horizontally differentiated demand model with Bertrand competition each firm's best reply to a price increase by rivals normally is to also increase its own price (the firms pricing decisions are said to be strategic complements in this case).

(118) For the 2p product type, the resulting average price increase across all operators[32] is approximately 4% in 2013 and 2% in 2014. The corresponding price increases for each of Orange and Jazztel are in the range of 8-9% in 2013 and 5-6% in 2014.

(119) For the 3p/4p product type, the resulting average price increase across all operators is approximately 17% in 2013 and 10% in 2014. The corresponding price increases for each of Orange and Jazztel are in the range of 21-27% in 2013 and 13-15% in 2014.

(120) The market wide expected price increase, that is, the weighted average price increase across all operators and across all product types including a fixed broadband component is 10% for 2013 and 7% for 2014.[33]

Table 9: Merger simulation results using purely horizontal diversion ratios based on matching of operator data on product type-level portability (corrected for WLR)[34]

2P 2013

Firms	ARPU	cost	margin	share	IPR
Orange	[…]*	[…]*	[…]*	[…]*	0.09
Jazztel	[…]*	[…]*	[…]*	[…]*	0.08
Telefonica	[…]*	[…]*	[…]*	[…]*	0.01
Vodafone	[…]*	[…]*	[…]*	[…]*	0.04
Average					4.3%

2P 2014

Firms	ARPU	cost	margin	share	IPR
Orange	[…]*	[…]*	[…]*	[…]*	0.06
Jazztel	[…]*	[…]*	[…]*	[…]*	0.05
Telefonica	[…]*	[…]*	[…]*	[…]*	0.01
Vodafone	[…]*	[…]*	[…]*	[…]*	0.01
Average					2.0%

3P 4P 2013

Firms	ARPU	cost	margin	share	IPR
Orange	[…]*	[…]*	[…]*	[…]*	0.21
Jazztel	[…]*	[…]*	[…]*	[…]*	0.27
Telefonica	[…]*	[…]*	[…]*	[…]*	0.07
Vodafone	[…]*	[…]*	[…]*	[…]*	0.08
Average					16.7%

3P 4P 2014

32 Including operators other than Orange, Jazztel, Telefonica, and Vodafone, which are assumed not to vary their prices after the merger.

33 The average price increase for each product type has been calculated as the weighted average of the price increase expected from each operator (where the weights used are the gross add shares of each operator for that product type). The market wide price increase has been calculated as the weighted average of (average) price increases expected for each product type (where the weights used are the gross adds share of each product type and no price increase has been assumed on average for the fixed broadband only product type and for the fixed broadband plus mobile product type).

34 The 2p margins of Vodafone and Telefonica are assumed to be the average of the margins of the merging parties. The same has been assumed for the 3p/4p margins of Vodafone and Telefonica. Sensitivity analyses show that the results do not materially change even if the margins of assumed Vodafone and Telefónica are de- or increased by 50%.
The redacted ARPU, costs, margins and gross add shares relating to operators other than the merging parties are considered confidential.

Firms	ARPU	cost	margin	share	IPR
Orange	[…]*	[…]*	[…]*	[…]*	0.13
Jazztel	[…]*	[…]*	[…]*	[…]*	0.15
Telefonica	[…]*	[…]*	[…]*	[…]*	0.06
Vodafone	[…]*	[…]*	[…]*	[…]*	0.06
Average					10.2%

4.2. Baseline scenario using diversion ratios based on operator data on product type-level portability, aggregated across all product types of origin

(121) The diversion ratios used in this baseline scenario are those based on operator data on product type-level portability, aggregated across all product types of origin, as presented in Table 4 and Table 5. The margins used are the incremental margins calculated as described in Section 3.2.

(122) For the 2p product type, the resulting average price increase across all operators[35] is approximately 4% in 2013 and 2% in 2014. The corresponding price increases for Orange and Jazztel are in the range of 8-9% in 2013 and 4-6% in 2014.

(123) For the 3p/4p product type, the resulting average price increase across all operators is approximately 11% in 2013 and 7% in 2014. The corresponding price increases for Orange and Jazztel are in the range of 12-17% in 2013 and 8-10% in 2014.

(124) The market wide expected price increase, that is, the weighted average price increase across all operators and across all product types including a fixed broadband component is7% for 2013 and 5% for 2014.[36]

Table 10: Merger simulation results using diversion ratios based on operator data on product type-level portability (corrected for WLR), aggregated across all product types of origin[37]

2P 2013

Firms	ARPU	cost	margin	share	IPR
Orange	[…]*	[…]*	[…]*	[…]*	0.09
Jazztel	[…]*	[…]*	[…]*	[…]*	0.08
Telefonica	[…]*	[…]*	[…]*	[…]*	0.01
Vodafone	[…]*	[…]*	[…]*	[…]*	0.04
Average					4.3%

2P 2014

Firms	ARPU	cost	margin	share	IPR
Orange	[…]*	[…]*	[…]*	[…]*	0.06
Jazztel	[…]*	[…]*	[…]*	[…]*	0.04
Telefonica	[…]*	[…]*	[…]*	[…]*	0.01
Vodafone	[…]*	[…]*	[…]*	[…]*	0.01
Average					1.8%

[35] Including operators other than Orange, Jazztel, Telefonica, and Vodafone, which are assumed not to vary their prices after the merger.

[36] The average price increase for each product type has been calculated as the weighted average of the price increase expected from each operator (where the weights used are the gross add shares of each operator for that product type). The market wide price increase has been calculated as the weighted average of (average) price increases expected for each product type (where the weights used are the gross adds share of each product type and no price increase has been assumed on average for the fixed broadband only product type and for the fixed broadband plus mobile product type).

[37] The redacted ARPU, costs, margins and gross add shares relating to operators other than the merging parties are considered confidential.

3P 4P 2013					
Firms	ARPU	cost	margin	share	IPR
Orange	[…]*	[…]*	[…]*	[…]*	0.12
Jazztel	[…]*	[…]*	[…]*	[…]*	0.17
Telefonica	[…]*	[…]*	[…]*	[…]*	0.06
Vodafone	[…]*	[…]*	[…]*	[…]*	0.06
Average					10.5%

3P 4P 2014					
Firms	ARPU	cost	margin	share	IPR
Orange	[…]*	[…]*	[…]*	[…]*	0.08
Jazztel	[…]*	[…]*	[…]*	[…]*	0.10
Telefonica	[…]*	[…]*	[…]*	[…]*	0.04
Vodafone	[…]*	[…]*	[…]*	[…]*	0.05
Average					7.1%

(125) The Commission notes that for both 2p and for 3p/4p product types the magnitude of the predicted price increases is lower for 2014 data compared to 2013 data. However, the Commission also notes that, focussing on 2p and 3p/4p product types, whereas the relative share of 3p/4p subscribers in the market in 2013 was 40% (against 60% 2p subscribers) the relative share of 3p/4p subscribers in the market in 2014 is 64% (against 36% 2p subscribers). This means that a forward looking analysis which takes into consideration that the market is evolving toward 3p/4p products must inevitably place significant weight on the higher price increases expected for those products.

4.3. Sensitivity scenario using benchmark diversion ratios based on gross adds

(126) In order to further scrutinize the results obtained in the baseline scenarios based on diversion ratios calculated from the product type-level portability data (see Section 4.1 and 4.2), the Commission has also simulated the predicted price increases based on the benchmark diversion ratios calculated from the gross adds shares collected from each operators. The results are presented in

(127) Table 11.

(128) For the 2p product type, the resulting average price increase across all operators[38] is approximately 2% in 2013 and 1% in 2014. The corresponding price increases for Orange and Jazztel are in the range of 3-5% in 2013 and 2-3% in 2014.

(129) For the 3p/4p product type, the resulting average price increase across all operators is approximately 11% in 2013 and 10% in 2014. The corresponding price increases for Orange and Jazztel are in the range of 12-18% in 2013 and 11-14% in 2014.

(130) The market wide expected price increase, that is, the weighted average price increase across all operators and across all product types including a fixed broadband component is approximately 6% for both 2013 and 2014.[39]

---

38 Including operators other than Orange, Jazztel, Telefonica, and Vodafone, which are assumed not to vary their prices after the merger.

39 The average price increase for each product type has been calculated as the weighted average of the price increase expected from each operator (where the weights used are the gross add shares of each operator for that product type). The market wide price increase has been calculated as the weighted average of (average) price increases expected for each product type (where the weights used are the gross adds share of each product type and no price increase has been assumed on average for the fixed broadband only product type and for the fixed broadband plus mobile product type).

Table 11: Merger simulation results using benchmark diversion ratios based on gross adds[40]

2P 2013

Firms	ARPU	cost	margin	share	IPR
Orange	[…]*	[…]*	[…]*	[…]*	0.05
Jazztel	[…]*	[…]*	[…]*	[…]*	0.03
Telefonica	[…]*	[…]*	[…]*	[…]*	0.01
Vodafone	[…]*	[…]*	[…]*	[…]*	0.01
Average					2.3%

2P 2014

Firms	ARPU	cost	margin	share	IPR
Orange	[…]*	[…]*	[…]*	[…]*	0.03
Jazztel	[…]*	[…]*	[…]*	[…]*	0.02
Telefonica	[…]*	[…]*	[…]*	[…]*	0.01
Vodafone	[…]*	[…]*	[…]*	[…]*	0.01
Average					1%

3P 4P 2013

Firms	ARPU	cost	margin	share	IPR
Orange	[…]*	[…]*	[…]*	[…]*	0.12
Jazztel	[…]*	[…]*	[…]*	[…]*	0.18
Telefonica	[…]*	[…]*	[…]*	[…]*	0.06
Vodafone	[…]*	[…]*	[…]*	[…]*	0.07
Average					11.0%

3P 4P 2014

Firms	ARPU	cost	margin	share	IPR
Orange	[…]*	[…]*	[…]*	[…]*	0.11
Jazztel	[…]*	[…]*	[…]*	[…]*	0.14
Telefonica	[…]*	[…]*	[…]*	[…]*	0.06
Vodafone	[…]*	[…]*	[…]*	[…]*	0.06
Average					9.7%

4.4. Sensitivity using diversion ratios based on the adjusted FNP data from the AOP

(131) The diversion ratios based on FNP data from the AOP adjusted to account for the migrations relating to WLR, provide another meaningful way to capture the relative strength of each operator in capturing subscribers from rivals.

(132) The results of this further sensitivity scenario are presented in Table 12 below. The resulting average price increase across all operators[41] is approximately 5% in 2013 and 3% in 2014. The corresponding price increases for Orange and Jazztel are in the range of 7-9% in 2013 and 5-6% in 2014.

(133) These effects can also be interpreted as the expected market wide price increase, that is, the weighted average price increase across all operators and across all product types including a fixed broadband component. This is because 2p/3p/4p together account for approximately 99% of the market for fixed internet access (as indicated in Table 14 of this Decision). One reason why these estimates are

40 The underlying gross adds correspond to those in Table 4.

41 Including operators other than Orange, Jazztel, Telefonica, and Vodafone, which are assumed not to vary their prices after the merger.

somewhat lower than those of the baseline scenarios is presumably that number ports of business customers are also reflected in the diversion ratios which likely diminishes the diversions between the merging parties as set out in paragraph (41).

Table 12: Merger simulation results using diversion ratios based on the adjusted FNP data from the AOP[42]

2P 3P 4P 2013					
Firms	ARPU	cost	margin	share	IPR
Orange	[…]*	[…]*	[…]*	[…]*	0.07
Jazztel	[…]*	[…]*	[…]*	[…]*	0.09
Telefonica	[…]*	[…]*	[…]*	[…]*	0.02
Vodafone	[…]*	[…]*	[…]*	[…]*	0.03
Average					4.7%

2P 3P 4P 2014					
Firms	ARPU	cost	margin	share	IPR
Orange	[…]*	[…]*	[…]*	[…]*	0.05
Jazztel	[…]*	[…]*	[…]*	[…]*	0.06
Telefonica	[…]*	[…]*	[…]*	[…]*	0.02
Vodafone	[…]*	[…]*	[…]*	[…]*	0.02
Average					3.3%

4.5. Sensitivity scenario using (i) diversion ratios based on based on purely horizontal switches (corrected for WLR) and (ii) assuming 50% higher/lower margins for Vodafone and Telefonica

(134) As a further sensitivity check to the baseline scenario presented in Section 4.1, the Commission has simulated an additional scenario where (i) the diversion ratios are assumed to be the same as per the baseline scenario of Section 4.1 and (ii) the margins of Vodafone and Telefonica are assumed to be 50% higher or 50% lower than the average margins of the merging parties (which was the assumption taken in the baseline scenario).

(135) The results show that assuming a 50% higher margin for Vodafone and Telefonica slightly increases the price effects, while assuming a 50% lower margin slightly decreases these effects. Overall, however, the results are not sensitive to even large changes in the assumed margins of competitors and the qualitative conclusions of Section 4.1 regarding the expected price effects are not affected.

[42] For each of the merging parties, the margins used in this scenario are the weighted average of the 2p and 3p/4p margins, where the weights are the relative share of 2p versus 3p/4p gross adds. The average margins across 2p/3p/4p for Vodafone and Telefonica have been calculated by taking a weighted average of the assumed 2p and 3p/4p margins (the average of the merging parties' 2p and 3p/4p margins, respectively, has been assumed) where the weights are the relative share of 2p versus 3p/4p gross adds of Vodafone and Telefonica, respectively.

Table 13: Merger simulation results using diversion ratios based on matching of operator data on product type-level portability (corrected for WLR), assuming 50% *higher* margins for Vodafone and Telefonica

2P 2013					
Firms	ARPU	cost	margin	share	IPR
Orange	[…]*	[…]*	[…]*	[…]*	0.09
Jazztel	[…]*	[…]*	[…]*	[…]*	0.08
Telefonica	[…]*	[…]*	[…]*	[…]*	0.02
Vodafone	[…]*	[…]*	[…]*	[…]*	0.06
Average					5.0%

2P 2014					
Firms	ARPU	cost	margin	share	IPR
Orange	[…]*	[…]*	[…]*	[…]*	0.06
Jazztel	[…]*	[…]*	[…]*	[…]*	0.05
Telefonica	[…]*	[…]*	[…]*	[…]*	0.01
Vodafone	[…]*	[…]*	[…]*	[…]*	0.02
Average					2.3%

3P 4P 2013					
Firms	ARPU	cost	margin	share	IPR
Orange	[…]*	[…]*	[…]*	[…]*	0.21
Jazztel	[…]*	[…]*	[…]*	[…]*	0.27
Telefonica	[…]*	[…]*	[…]*	[…]*	0.11
Vodafone	[…]*	[…]*	[…]*	[…]*	0.12
Average					18.3%

3P 4P 2014					
Firms	ARPU	cost	margin	share	IPR
Orange	[…]*	[…]*	[…]*	[…]*	0.13
Jazztel	[…]*	[…]*	[…]*	[…]*	0.15
Telefonica	[…]*	[…]*	[…]*	[…]*	0.08
Vodafone	[…]*	[…]*	[…]*	[…]*	0.08
Average					11.3%

Table 14: Merger simulation results using diversion ratios based on matching of operator data on product type-level portability (corrected for WLR), assuming 50% *lower* margins for Vodafone and Telefonica

2P 2013					
Firms	ARPU	cost	margin	share	IPR
Orange	[…]*	[…]*	[…]*	[…]*	0.09
Jazztel	[…]*	[…]*	[…]*	[…]*	0.08
Telefonica	[…]*	[…]*	[…]*	[…]*	0.01
Vodafone	[…]*	[…]*	[…]*	[…]*	0.02
Average					3.7%

2P 2014					
Firms	ARPU	cost	margin	share	IPR
Orange	[…]*	[…]*	[…]*	[…]*	0.06
Jazztel	[…]*	[…]*	[…]*	[…]*	0.05
Telefonica	[…]*	[…]*	[…]*	[…]*	0.00
Vodafone	[…]*	[…]*	[…]*	[…]*	0.01
Average					1.7%

3P 4P 2013					
Firms	ARPU	cost	margin	share	IPR
Orange	[…]*	[…]*	[…]*	[…]*	0.21
Jazztel	[…]*	[…]*	[…]*	[…]*	0.27
Telefonica	[…]*	[…]*	[…]*	[…]*	0.04
Vodafone	[…]*	[…]*	[…]*	[…]*	0.04
Average					15.1%

3P 4P 2014					
Firms	ARPU	cost	margin	share	IPR
Orange	[…]*	[…]*	[…]*	[…]*	0.13
Jazztel	[…]*	[…]*	[…]*	[…]*	0.15
Telefonica	[…]*	[…]*	[…]*	[…]*	0.03
Vodafone	[…]*	[…]*	[…]*	[…]*	0.03
Average					9.0%

4.6. Conclusion from the calibrated merger simulation contained in the SO

(136) The baseline and sensitivity analyses presented in Section 4.1 to 4.5 constitute the core of the quantitative analysis presented in the Statement of Objections. On the basis of this evidence, the Commission reported significant anti-competitive effects would be expected on the retail market for fixed Internet access service and in particular for 3p/4p product types. The expected market wide price increases presented in the Statement of Objections were in the range of 5-10% (in the baseline scenarios).

5. ASSESSMENT OF THE ARGUMENTS RAISED BY THE NOTIFYING PARTY

(137) This section further addresses the arguments raised by the Notifying Party in response to the quantitative analysis presented in the Statement of Objections.[43]

(138) In particular, in addition to the overarching critiques to the application of a merger simulation analysis in this case, the Notifying Party submitted a number of comments pointing to several problems of data inconsistency in the Commission's quantitative analysis. These comments are summarised and addressed in the following sections.

5.1. The (WLR adjusted) product type-level FNP data used for generating the baseline diversion ratios assign significantly larger relative shares to the merging parties than the flows in the (WLR adjusted) FNP data from the AOP

5.1.1. Notifying Party's view

(139) The Notifying Party compares the merging parties' competitive strength relative to the other major operators from three different datasets, all aggregated at the operator level.[44] The metric used to compare the merging parties' relative competitive strength across datasets is the following:

$$\frac{[Orange\ share/(Telefonica\ share + Vodafone\ share)]^{dataset\ 1}}{[Orange\ share/(Telefonica\ share + Vodafone\ share)]^{dataset\ 2}}$$

43 Notifying Party's report named "Economic considerations in response to the Commission's Statement of Objections", 11 March 2015 ("Notifying Party's economic response to the SO").

44 Notifying Party's economic response to the SO, Section 5.5.3.

(140) Overall, these datasets can be ranked according to which generates the highest port-in shares for the merging parties as follows: (1) the WLR adjusted product type-level portability data (before matching and elimination of cross-bundle diversions), (2) the WLR adjusted FNP data from the AOP and (3) the gross adds data.

(141) Given this ranking, the Notifying Party claims that the EC used for its baseline scenarios the dataset which most inflates the merging parties' strength (that is, the product type-level portability data).

5.1.2. The Commission's assessment

(142) Table 15 below reports the merging parties' port-in shares for 2p/3p/4p product types for the two datasets that, based on the ranking of the Notifying Party, generate the highest and lowest port-in shares. These are, respectively, the port-in shares from product type-level port-in data and the gross add shares.

Table 15: Orange and Jazztel port-in shares according to the product type-level port-in data (before matching) and the gross adds data

Product type: 2p/3p/4p		2013	2014
Based on gross add shares	Orange Jazztel Combined	[…]*% […]*% […]*%	[…]*% […]*% […]*%
Based on the product type--level FNP data before matching	Orange Jazztel Combined	[…]*% […]*% […]*%	[…]*% […]*% […]*%

(143) As a first remark, the Commission notes that it is true that the product type-level FNP data generates higher port-in shares for the merging parties compared to the gross add shares. The differences are however less pronounced in 2014 compared to 2013.

(144) The two dataset differ in various aspects and differences in the gross-add and port-in shares could be caused by a number of reasons. One reason could be inconsistencies in the data. Another reason could be due to the fact that porters are only a subset of the gross adds. For example, the portability data does not include new customers who subscribe to a fixed broadband product for the first time. It could be the case that the merging parties are relatively […]* successful in acquiring customers from their rivals as opposed to attracting subscribers who acquire a fixed broadband product for the first time.

(145) A further determinant of discrepancy between the port-in shares from product type-level FNP data as opposed to gross add data could be the fact that Telefónica provided the number of fixed lines and not the number of fixed subscribers, as Telefónica records the number of lines in its systems. To the extent subscribers have on average more than one fixed line, the gross adds figures collected from Telefónica may be overstated and consequently the gross adds shares of the merging parties may be understated.

(146) Given the impossibility to test the cause of any difference between the product type-level FNP data and the gross add data, and in light of the additional information contained in the product type-level FNP data on switching patterns, the Commission relies equally on both sources in this Decision in order to calibrate the diversion ratios. Therefore, compared to the Statement of Objections, the Commission has attached more weight on the scenario with diversion ratios based on gross add shares of the merging parties. In particular, a baseline scenario based on benchmark

diversion ratios calculated from gross add shares […]* is given significant prominence in the Decision[45].

(147) Finally, independently of the data source used, the resulting diversion ratios between the merging parties (and, consequently, the IPRs) are still substantial[46]. For instance this is the case for the market wide price effects corresponding to the baseline scenario using benchmark diversions calculated from gross adds (reported in Table 20).

5.2. Focussing on the matched product type-level port-out and port-in datasets biases the flows used to calculate diversion ratios

5.2.1. Notifying Party's view

(148) The Notifying Party notes that only roughly 70% of the product type-level portability data available are matched. The Notifying Party further notes that the diversion ratios at the operator level based on the matched observations are higher than the diversion ratios based on the full unmatched dataset.[47] Focusing only on the phone numbers that can be matched between ported-out and ported-in data would bias the flows used to calculate diversion ratios.

5.2.2. The Commission's assessment

(149) The Commission agrees that only 70% of the observations available in the port-in and port-out product type-level datasets are matched.

(150) A priori, while it is conceivable that a proportion of phone numbers cannot be matched between the port-out and the port-in datasets,[48] this limitation does not necessarily generate any systematic difference between the dataset obtained as a result of the matching and the original port-out dataset.

(151) The Commission carefully considered the claim of the Notifying Party and confirmed that indeed matching the port-in and port-out data leads to (operator level) diversion ratios between the merging parties that are higher than the (operator level) diversion ratios calculated from the original port-out dataset.

(152) For this reason, given the impossibility to disentangle the underlying reasons for this discrepancy and in light of the potential selection bias discussed in Section 5.3 below, the Commission has decided to attribute less weight to the scenario based on diversions which focus on purely horizontal ports and are derived by a matching of the product type-level portability data and no longer retain it as one of the baseline scenarios.

5.3. Focusing only on the within product switches of the matched product type-level portability data increases the diversion ratios for the 3p/4p product type

5.3.1. Notifying Party's view

(153) First, the Notifying Party claims that when focusing on purely horizontal ports, the 3p/4p diversion ratios to Jazztel (from all other operators) based on the matched

---

45 See section 7.2.7.6 of the Decision.

46 Even when taking extreme assumptions on the magnitude of the market elasticity (see discussion in Section 5.7).

47 Notifying Party's economic response to the SO, Section 5.5.2.

48 Only data relating to the first month of each quarter has been collected. If the port-out and port-in are not recorded by the two operators in the same month, then it is likely that the phone number cannot be matched between the port-out and the port-in datasets.

product type-level portability data are implausibly high when compared to Jazztel's gross adds share.[49]

(154) On average, across operators, considering switching within 3p/4p product types, the diversion ratio to Jazztel was orders of magnitude larger in terms of switchers attracted. In the Notifying Party's view, if Jazztel's 3p/4p offers strong pull relative to other operators were true for the market on average, then Jazztel should have captured a large share of gross adds to 3p/4p products relative to the other major operators. However, it claims that Jazztel's share of gross adds in 3p/4p is […]*% and […]*% in 2013 and 2014, respectively.[50]

(155) Second, the Notifying Party argues that focussing only on the within product type switches (i.e. ignoring cross bundle diversions) leads to artificially inflated diversion ratios between the merging parties (and hence to higher IPRs) for the 3p/4p product type, compared to the case where only internal diversions are eliminated.[51]

(156) The Notifying Party computed diversion ratios based on horizontal switching only and diversion ratios allowing for the observed cross-product switching as well, arguing that the former produces larger diversion ratios between the Parties for the 3p/4p product type.[52]

5.3.2. *The Commission's assessment*

(157) As regards the comparison of Jazztel's port-in shares with Jazztel's gross add shares, the Commission makes the following considerations.

(158) The Commission notes that the Notifying Party's first claim can be examined by comparing the port-in share of Jazztel relating to horizontal number ports within 3p/4p products and Jazztel's gross add share in 3p/4p.

Table 16: Jazztel port-in shares and gross add shares (3p/4p)[53]

	2013	2014
Based on matched product type-level portability data, with elimination of cross bundle diversions	[…]* %	[…]* %
Based on product type-level data aggregated across products of origin	[…]* %	[…]* %
Based on gross add shares	[…]* %	[…]* %

(159) The Commission agrees that Jazztel's port-in share calculated based on number ports for horizontal switches only (i.e. focussing on customers changing operator but remaining on a 3p/4p product) is significantly higher compared to its gross add share in 3p/4p (see the first and third line of Table 16 above).

(160) However, the Commission first notes that this difference is less pronounced in 2014 and, as stressed in this Decision, the price effects based on 2014 data have been

49 Notifying Party's economic response to the SO, Section 5.5.1.
50 Annex A of the SO, Table 11.
51 Notifying Party's economic response to the SO, Section 5.5.4.
52 Notifying Party's economic response to the SO, Table 18.
53 Port-in shares have been rescaled since only ports between the 4 nationwide operators have been collected to account for others and make the port-in shares comparable with the gross add shares.

given more prominence in the assessment of the overall results of the quantitative analysis.

(161) The Commission also notes that the difference between Jazztel's port-in share when considering all ports to 3p/4p products and Jazztel's 3p/4p gross-add share is relatively small (see the second and third line of Table 16 above), suggesting that focusing on porters does not induce a strong upward bias, particularly according to 2014 data.

(162) One plausible reason why the diversion ratios to Jazztel based on the horizontal number ports within 3p/4p are high could be that Jazztel simply attracts a particularly large share of switching within 3p/4p products (as opposed to switches from other product types to 3p/4p). As discussed in Section 5.2, also the fact that some ports were dropped in the matching process may increase the port-in shares based on purely horizontal switching.

(163) The Commission has also analysed the more general claim that focussing only on the purely horizontal switches increases the diversion ratios between the merging parties (and hence the IPRs) for the 3p/4p products.

(164) To analyse this claim, the Commission compared the diversion ratios between operators when focusing on purely horizontal ports from 3p/4p product types to 3p/4p product types (see Section 3.1.3) to the diversion ratios when also including ports to 3p/4p products from other product types (e.g. notably from 2p to 3p/4p). In both cases the Commission used the matched FNP dataset collected from the operators. The results of this analysis are shown in Table 17 below[54].

(165) The Commission acknowledges that there are substantial differences in the switching patterns from Orange to Jazztel when focusing only on horizontal ports compared to including also ports to 3p/4p from other product types. This difference however is not present in the case of switching patterns from Jazztel to Orange and it is decreasing from 2013 to 2014 for switching from Orange to Jazztel (as shown in Table 17).

(166) On the one hand, using diversions on the basis of purely horizontal ports bears a risk, as claimed by the Notifying Party, that the predicted market wide price increases could be biased upwards. In particular, such a bias may emerge to the extent Jazztel attracts a larger share of number porters from Orange who switch from a 3p/4p product to a 3p/4p product of Jazztel as opposed to a scenario where number porters switching from other product types to 3p/4p products are also included[55].

(167) On the other hand, the share of 3p/4p subscribers is constantly increasing (the share was already 63.3% on average in 2014). This means that a larger proportion of

54 In this context, the Commission notes that its analysis slightly differs from the analysis done by the Notifying Party. The Notifying Party compared the diversion ratios when focusing on purely horizontal ports (e.g. from 3p/4p to 3p/4p) to diversion ratios by each originating product type when also admitting ports to other destination product types (e.g. from 3p/4p to any other product type). The Commission's and the Notifying Party's analyses deliver qualitatively similar results showing that primarily diversions from Orange to Jazztel increase when focusing on purely horizontal ports.

55 I could be argued that there may be a selection effect in the sense that for subscribers that have not switched purely horizontally to 3p/4p products in 2013 or 2014 the 3p/4p products of the Parties are less close substitutes than for those customers who already switched purely horizontally between 3p/4p products in 2013 or 2014. Intuitively, this could be the case if subscribers who value a lot the 3p/4p products of the Parties, and for that reason early adopted these products at the same time, consider the Parties' 3p/4p products as closer substitutes than other subscribers.

porters to 3p/4p products in the future is expected to switch from a 3p/4p product to another 3p/4p product. In light of this, the observed diversion ratios within 3p/4p product types can be expected to become increasingly representative of the overall switching to 3p/4p products[56].

Table 17: Effect of selecting purely horizontal ports on diversion ratios for 3p/4p products

Matched port-in data, keeping only horizontal ports (A)

Year: 2013	Orange	Jazztel
Orange	[...]*	[...]*
Jazztel	[...]*	[...]*

Year: 2014	Orange	Jazztel
Orange	[...]*	[...]*
Jazztel	[...]*	[...]*

Matched port-in data, aggregated over products of origin (B)

Year: 2013	Orange	Jazztel
Orange	[...]*	[...]*
Jazztel	[...]*	[...]*

Year: 2014	Orange	Jazztel
Orange	[...]*	[...]*
Jazztel	[...]*	[...]*

Difference (A minus B)

Year: 2013	Orange	Jazztel
Orange	-	0.28
Jazztel	-0.06	-

Year: 2014	Orange	Jazztel
Orange	-	0.19
Jazztel	-0.03	-

(168) In light of the fact that the diversion ratios based on purely horizontal ports may overestimate diversion ratios for 3p/4p products from Orange to Jazztel, the scenario in which price effects are estimated based on these diversions is no longer retained as a baseline scenario in the analysis but is rather treated as a sensitivity scenario. Nevertheless, for the above-mentioned reasons, the fact that the diversions are higher for 3p/4p products when focusing on purely horizontal ports provides some indications that the Parties impose a stronger competitive constraint on each other than suggested by the diversion ratios based on ports to 3p/4p products or based on benchmark diversion ratios calculated from the gross adds shares in 3p/4p.

(169) The Commission also notes that there are other scenarios (the one where all diversions are aggregated across the product types of origin[57]) where indeed the port-in shares of Jazztel are significantly lower and more aligned with the Jazztel's gross add shares (see Table 16). These scenarios still generate significant price effects, not only for the 3p/4p product type but also for the market overall (see Table 10).

5.4. Single product merger simulations suggest that the impact of matching the product type-level portability data on the estimated price effects can be substantial

5.4.1. Notifying Party's view

(170) The Notifying Party argues that single product merger simulations[58] based on the (WLR adjusted) matched product type-level portability data show the existence of an upward bias in diversion ratios and IPRs compared to a single product merger simulation based on (WLR adjusted) FNP data from the AOP. [59]

56 Purely horizontal ports between 3p/4p products could be more likely driven by priced-based considerations than ports to/from 3p/4p products from/to other product types. This might be a reason for why the diversion ratios between the merging Parties when focusing on purely horizontal ports are higher compared to including also ports from other products to 3p/4p products.

57 Aggregating the portability data across the product types of origin makes the portability data more aligned with the concept of gross add share, where the amount of customers gained by an operator are collected according to the product type taken up by the customer, independently of the customer's product type of origin.

58 That is, a merger simulation where all product types are aggregated up at the operator level.

59 Notifying Party's economic response to the SO, Section 5.5.5.

5.4.2. The Commission's assessment

(171) First, the FNP data from the AOP also include business customers (a segment in which the merging parties' are notably significantly weaker compared to Telefonica), whereas the matched product type-level portability data only includes residential customers. Therefore, a priori, the two datasets are not readily comparable and it is plausible that FNP data from the AOP produce lower diversion ratios (and consequently price effects) for the merging parties.

(172) Second, a sensitivity scenario based on WLR adjusted FNP data from the AOP is included in this Annex (Section 4.4)[60] and the results suggest that the market wide price effects are significant: 5% in 2013 and 3% in 2014.

(173) Third, consistently with the Commission's results, according to the Notifying Party's own calculations, the difference in IPRs between a single product merger simulation based on the matched portability data compared to a single product merger simulation based on the WLR adjusted FNP data from the AOP is not large (2 percentage points in 2013 and 1 percentage point in 2014) and in any event the resulting IPRs for the latter are still significant (4% in 2013 and 3% in 2014[61]).

(174) In conclusion, for the reasons mentioned above, the Commission rejects this criticism that the IPRs from a single product merger simulation based on the (WLR adjusted) product type-level FNP data are biased upwards compared to IPRs from a single product merger simulation based on (WLR adjusted) FNP data from the AOP.

5.5. No adjustment of customer flows to match operators' gross adds

5.5.1. Notifying Party's view

(175) The Notifying Party argues that the portability data, which focuses only on the switching instances in which the subscribers port their numbers, are only a subset of the full set of switching data.[62] In particular, in this context, the ratio of port-ins to gross adds is particularly low for Telefonica compared to the merging parties. In the Notifying Party's view, it would therefore be appropriate to perform an adjustment to the subscribers' flows from the portability data in order to ensure that the total port-ins of each operator match the operator's gross adds. Without any adjustment, the portability data would potentially understate Telefonica's competitive strength.

(176) The Notifying Party further argues that it should be better explained why a small divergence between port-in shares and gross-add shares should take precedence over ensuring that the portability data better reflect consumers’ relative valuations across products by scaling up all portability flows in such a way that each operator’s total ports-in sum up to its total gross adds.

5.5.2. The Commission's assessment

(177) First, as regards the comparison between the gross adds data and the (WLR adjusted[63]) FNP data from the AOP, already in the Statement of Objections the Commission compared the gross add shares for 2p and3p/4p[64] products with the port-

60 And was already included in the SO.

61 Notifying Party's economic response to the SO, Table 21.

62 Notifying Party's economic response to the SO, Section 5.5.6.

63 See Section (45).

64 As explained in paragraph (247) of the Statement of Objections, the Commission's analysis has focused on 2p (defined as fixed broadband plus fixed voice), 3p (defined as 2p plus mobile) and 4p (defined as 3p plus TV) products only because the remaining products represent approximately 1% of the market.

in shares based on the (WLR adjusted) FNP data from the AOP. The results suggest that Telefónica attracts a higher share of new subscribers compared to its port-in shares (both in 2013 and 2014), as suggested by the Notifying Party.[65] However, it is also clear from the comparison (see Table 18) that the gross add shares of the merging parties (which are a stronger driver of the results of a merger simulation compared to the shares of the outsiders) are very similar to their port-in shares.

Table 18: Comparison of shares of new subscribers (gross adds) and shares of port-ins (adjusted for WLR) from the AOP data[66]

Gross adds shares	2013	2014
Orange	[...]*%	[...]*%
Jazztel	[...]*%	[...]*%
Telefonica	[...]*%	[...]*%
Vodafone + Ono	[...]*%	[...]*%
Others	[...]*%	[...]*%

Port-in shares	2013	2014
Orange	[...]*%	[...]*%
Jazztel	[...]*%	[...]*%
Telefonica	[...]*%	[...]*%
Vodafone + Ono	[...]*%	[...]*%
Others	[...]*%	[...]*%

(178) Second, as regards the comparison between the gross adds data and the (WLR adjusted[67]) product type-level FNP data, it should be noted that the adjustment proposed by the Notifying Party's economic advisers (i.e. scaling up the total port-ins of each operator) is done by uniformly scaling up the total number of port-ins per receiving operator such that the total port-ins for each of the four nationwide operators corresponds to its total gross-adds. However, a discrepancy between the gross-add and the port-in shares from the product type-level FNP data does not necessarily imply that the porting data results in biased diversion ratios. For instance, the matched product type-level FNP data contains by construction only ports from/to the four nationwide operators and no ports from/to other (regional) operators. In contrast, the gross adds include also new subscribers that chose the relevant products for the first time (i.e. who did not switch between operators) or who switched from regional operators. If Telefónica achieves a higher gross-add share than port-in share, this could be for example due to the fact that disproportionally more new subscribers are attracted by Telefónica when subscribing for the first time to a fixed product. The adjustment method proposed by the Notifying Party may in such a case unduly inflate the diversion ratios from the other operators to Telefónica although in reality for many of the subscribers of Vodafone, Jazztel or Orange for whom Telefónica is not the second best alternative.

(179) Third, in its assessment the Commission relies (amongst other measures) on the benchmark diversions implied by the gross-add shares and uses these to scrutinize the predicted price effects obtained by using the portability data. This scenario, which reflects the full strength of Telefonica as embodied in its gross-add shares, still delivers significant price effects market wide (see Section 4.3).

---

65 The gross add shares and the port in shares of operators other than the merging parties are considered confidential.

66 Gross add shares and port in shares here are based on 2p, 3p and 4p together. The redacted diversion ratios relating to operators other than the merging parties are considered confidential.

67 See Section 3.1.2.

5.6. Approach to calculate market wide average price increases

5.6.1. Notifying Party's view

(180) In its reply to the Statement of Objections, the Notifying Party puts forward in a slightly different approach to the calculation of market wide price effects, compared to the method proposed by the Commission in the Statement of Objections.

(181) For each of the scenarios considered, the Commission calculated the market wide price increase as the weighted average of the price increases expected for each operator and each product type where the weights used are the gross adds share of each operator and product type and no price increase has been assumed on average for the operators other than the main nationwide four.

(182) For each of their scenarios, instead, the Notifying Party's economic advisers calculate the market wide price increase as the percentage difference between (i) the average post-merger price calculated as a weighted average of the post-merger price of each operator for each product type (where the weights used are the post-merger gross add shares of each operator for each product) and (ii) the average pre-merger price calculated as a weighted average of the pre-merger price of each operator for each product type where the weights used are the pre-merger gross add shares of each operator and each product type).

5.6.2. The Commission's assessment

(183) The Commission notes that in calculating the market wide price effects the Notifying Party's economic advisers only average the prices of the four main operators and do not consider the prices of the operators other than the main four. The Commission instead assumes that there is no price increase for these operators. Mainly for that reason, the method adopted by the Notifying Party leads to higher market wide price increases compared to the Commission's method in almost all of the merger simulation scenarios considered by the Notifying Party.

(184) The main instance in which the method adopted by the Notifying Party leads to lower market wide price increases compared to the Commission's method is the sensitivity scenario based on the FNP data from the AOP. This is because of the following reason.

(185) Given that the FNP data from the AOP are not disaggregated by product type, the merger simulation has to be performed by constructing a single composite product consisting of a combination of 2p and 3p/4p products.

(186) The post-merger price effects calculated by the Notifying Party based on the post-merger gross add shares give more weight to the non-merging parties (Vodafone and Telefonica) who according to the merger simulation model increase their prices by less than the merging parties. In addition, Vodafone and Telefonica have relatively higher proportions of […]* gross adds (as opposed to […]* gross adds) compared to the merging parties. This "product composition effect", coupled with the simplifying assumption that for each product type Vodafone and Telefonica have margins equal to the average of the merging parties' margins, implies that Vodafone and Telefonica have blended prices of the composite products that are lower than those of the merging parties' composite products. The applied merger simulation framework with a single composite product does not allow for a change of the composite product price due to a change of the composition of the represented 2p/3p/4p products. Therefore, in the calculation of the post-merger average price, the […]* weight is given to the post-merger prices of Vodafone and Telefonica due to an increasing

gross-add share, the […]* are the estimated market wide price increases, essentially due to this product composition effect.

(187) In summary, the calculation of the market wide price effects put forward by the Notifying Party leads to higher market wide price effects compared to the Commission's method for all the baseline scenarios considered by the Commission in this Decision. In one sensitivity scenario (the one based on the FNP data from the AOP), the method of the Notifying Party leads to lower market wide price increases compared to the Commission's method and this is mainly due to the changed composition of Telefónica's and Vodafone's composite products as a consequence of the predicted price increases of the operators which are not reflected in the single product simulation..

(188) As a conclusion, the Commission considers appropriate its own method of calculating market wide price increases and considers that its application is overall to the advantage of the Notifying Party. Therefore, this approach is applied to all of the baseline and sensitivity scenarios considered.

5.7. The assumption of zero price elasticity for market demand

5.7.1. Notifying Party's view

(189) The Notifying Party argues that the merger simulations performed by the Commission in support to the Statement of Objections discards the fact that a certain proportion of consumers may indeed choose not to subscribe to any fixed broadband product after a market wide price increase (e.g. pass to mobile broadband). [68]

(190) For this reason, the Notifying Party presents a scenario in which the total port-outs from each of the main four operators to the smaller operators not included in the model (the regional cable operators) are scaled up so that the resulting market elasticity is minus 1.

5.7.2. The Commission's assessment

(191) The Commission agrees that a certain degree of diversion to a so called outside option, such as not using fixed broadband, can be conceived. However, a number of considerations are in order.

(192) First, in light of the current attractive commercial offers for fixed broadband products, the overall proportion of subscribers switching to outside goods can be expected to be rather low.

(193) Second, the elasticity assumed (minus 1) and the modelling assumed by the Notifying Party (scaling up port-outs to the smaller operators) lead to rather implausible proportions of switchers to completely stop their fixed broadband subscription in the event of a price increase. This is the case in particular for the merging parties, which are characterised by a […]* than average diversion to the smaller operators: in the Notifying Party's scenario, roughly […]*% of switchers of Jazztel and […]*% of switchers of Orange would choose to no longer subscribe to any fixed broadband product.

(194) The Commission considers that the assumption and modelling put forward by the Notifying Party are rather implausible. The Commission also considers that reliable benchmarks for the market wide elasticity of the Spanish fixed broadband products

[68] Notifying Party's economic response to the SO, Section 5.5.7.

are not available.[69] For this reason, the Commission has decided to derive a very conservative estimate of the anti-competitive effects of the transaction based on the Notifying Party's assumption of a market elasticity equal to minus 1, mainly for illustrative purposes.[70]

(195) This extremely conservative sensitivity has been performed on the baseline scenarios presented in Section 6 below, namely the scenarios based on diversion ratios calculated (1) from operator data on product type-level portability (corrected for WLR) aggregated across all product types of origin, and (2) from the gross add shares. For each of the scenarios considered, assuming a market elasticity of minus 1 as proposed by the Notifying Party reduces significantly the estimated price effects but not to an extent that allows dispelling any concern of potential price increases post-merger (see Section 6).

(196) In any event, the Commission expects the diversions to outside goods to be significantly lower than those assumed for this lower bound. Therefore, the reported lower bound to the expected price increases should be interpreted only as an illustrative and extremely conservative reference. The price increases from the analysed transaction are thus likely to be closer to the upper bound of the Commission's estimates than to this purely illustrative lower bound.

6. THE PREDICTED PRICE INCREASES OF THE MERGER

(197) This section presents the details of the price effects estimated by the Commission in a merger scenario.

(198) Section 6.1 below presents the results of the merger simulation for the two baseline scenarios considered, while Section 6.2 presents a sensitivity analysis on the effect on the predicted price increases of considering a certain extent of cross bundle diversion.

6.1. The predicted price increases in the baseline scenarios

(199) For each of the baseline scenarios considered[71], the upper bound of the price effects corresponds to the figures presented in the Statement of Objections, which are based on an assumption of no diversion to the outside good. The upper bound to the estimated price increases has decreased compared to the Statement of Objections, because the scenario leading to the strongest price increases (Section 4.1) has been retained only as a sensitivity scenario.

(200) An extreme lower bound to the price effects has been computed by taking a very conservative sensitivity assumption of a diversion to the outside good equivalent to a market elasticity of minus 1, as suggested by the Notifying Party (see Section 5.7).

---

69 In a recently published study, the elasticity of demand for the Portuguese fixed broadband retail services has been estimated econometrically. See Pedro Pereira, Tiago Ribeiro, João Vareda, "Delineating markets for bundles with consumer level data: The case of triple-play", International Journal of Industrial Organization 31 (2013), pp. 760–773, Doc ID 2757. Based on the results of this estimation, the elasticity of demand of all products which include a fixed broadband component is 0.67. See email by Pedro Pereira of 30 April 2015, Doc ID 2756.

70 This however is not implemented by scaling up the port-outs to the smaller operators (as suggested by the Notifying party) but by reducing the diversion ratios between all operators by an amount which makes the market elasticity equal to minus 1.

71 Namely (i) the scenario based on diversion ratios calculated from operator data on product type-level portability (corrected for WLR), aggregated across all product types of origin[71] and (ii) the scenario based on benchmark diversion ratios calculated from gross adds.

Adding this extreme diversion to an outside good reduces the estimated price effects but not to an extent that allows dispelling any concern of potential price increases post-merger.

(201) The tables below show that the market wide price increases across the two baseline scenarios likely are in the range of 3-7% based on 2013 data and 3-6% for 2014 data.[72] The sensitivity scenario based on diversion that are exclusively based on the purely horizontal ports indicates that the predicted price increases could also be up to 10% and 7%, based on 2013 and 2014 data, respectively[73].

(202) The Commission considers that for the reasons discussed above, the estimates based on 2014 data are more relevant than the 2013 ones for the assessment of the likely price effects of the merger.

Table 19: Merger simulation results using diversion ratios based on operator data on product type-level portability (corrected for WLR), aggregated across all product types of origin[74]

Upper bound

2013					
Firms	p0	c0	m0	q0	IPR
O2P	[…]*	[…]*	[…]*	[…]*	0.09
O3P	[…]*	[…]*	[…]*	[…]*	0.12
J2P	[…]*	[…]*	[…]*	[…]*	0.08
J3P	[…]*	[…]*	[…]*	[…]*	0.17
Market wide					**7.3%**
Average 2P					**4.5%**
Average 3P/4P					**10.6%**

2014					
Firms	p0	c0	m0	q0	IPR
O2P	[…]*	[…]*	[…]*	[…]*	0.06
O3P	[…]*	[…]*	[…]*	[…]*	0.08
J2P	[…]*	[…]*	[…]*	[…]*	0.04
J3P	[…]*	[…]*	[…]*	[…]*	0.10
Market wide					**4.8%**
Average 2P					**1.9%**
Average 3P/4P					**7.2%**

Lower bound[75]

2013					
Firms	p0	c0	m0	q0	IPR
O2P	[…]*	[…]*	[…]*	[…]*	0.06
O3P	[…]*	[…]*	[…]*	[…]*	0.07
J2P	[…]*	[…]*	[…]*	[…]*	0.04
J3P	[…]*	[…]*	[…]*	[…]*	0.09
Market wide					**3.6%**
Average 2P					**2.2%**
Average 3P/4P					**5.4%**

2014

[72] The estimated price increases from the baseline scenarios presented in the Statement of Objections were 7-10% and 5-7%, based on 2013 and 2014 data, respectively.

[73] See Table 9.

[74] The redacted ARPU, costs, margins and gross add shares relating to operators other than the merging parties are considered confidential.

[75] Based on a rescaling of the diversion ratios which gives an implied market elasticity equal to minus 1.

Firms	p0	c0	m0	q0	IPR
O2P	[…]*	[…]*	[…]*	[…]*	0.04
O3P	[…]*	[…]*	[…]*	[…]*	0.05
J2P	[…]*	[…]*	[…]*	[…]*	0.02
J3P	[…]*	[…]*	[…]*	[…]*	0.06
Market wide					**2.5%**
Average 2P					**1.0%**
Average 3P/4P					**3.8%**

Table 20: Merger simulation results using benchmark diversion ratios based on gross adds[76]

Upper bound

2013					
Firms	p0	c0	m0	q0	IPR
O2P	[…]*	[…]*	[…]*	[…]*	0.05
O3P	[…]*	[…]*	[…]*	[…]*	0.12
J2P	[…]*	[…]*	[…]*	[…]*	0.03
J3P	[…]*	[…]*	[…]*	[…]*	0.18
Market wide					**6.4%**
Average 2P					**2.4%**
Average 3P/4P					**11.0%**

2014					
Firms	p0	c0	m0	q0	IPR
O2P	[…]*	[…]*	[…]*	[…]*	0.03
O3P	[…]*	[…]*	[…]*	[…]*	0.11
J2P	[…]*	[…]*	[…]*	[…]*	0.02
J3P	[…]*	[…]*	[…]*	[…]*	0.14
Market wide					**5.9%**
Average 2P					**1.1%**
Average 3P/4P					**9.7%**

Lower bound[77]

2013					
Firms	p0	c0	m0	q0	IPR
O2P	[…]*	[…]*	[…]*	[…]*	0.03
O3P	[…]*	[…]*	[…]*	[…]*	0.06
J2P	[…]*	[…]*	[…]*	[…]*	0.02
J3P	[…]*	[…]*	[…]*	[…]*	0.10
Market wide					**3.2%**
Average 2P					**1.2%**
Average 3P/4P					**5.5%**

2014					
Firms	p0	c0	m0	q0	IPR
O2P	[…]*	[…]*	[…]*	[…]*	0.02
O3P	[…]*	[…]*	[…]*	[…]*	0.06
J2P	[…]*	[…]*	[…]*	[…]*	0.01
J3P	[…]*	[…]*	[…]*	[…]*	0.08
Market wide					**3.0%**
Average 2P					**0.6%**
Average 3P/4P					**4.8%**

76 The underlying gross adds correspond to those in Table 4.

77 Based on a rescaling of the diversion ratios which gives an implied market elasticity of minus 1.

6.2. Sensitivity scenario on the impact of considering cross bundle switching

(203) As explained in Section 5.3.2, the Notifying Party claimed that the choice of focussing only on the purely horizontal switches increases the diversion ratios between the merging parties (and hence the IPRs) for the 3p/4p products.

(204) This section presents a sensitivity analysis on the effect on the predicted price increases of considering a certain degree of cross bundle diversion.

(205) For each of the two baseline scenarios, the Commission compared the expected price increases in case no switching across bundles is assumed and the expected price increases in case a certain degree of cross bundle switching is allowed for.

(206) While the Commission cannot infer the diversions across bundles from the observed switching patterns (for the reasons discussed in Section 7.2.7.5 of the Decision), the Commission considers that truly price based diversions from 2p to 3p are much smaller than the observed diversions. For illustrative purposes, the Commission thus assumes symmetric vertical switching in the sense that 10% of the subscribers that decide to switch to another product (or competitor) due to price increases are assumed to change also the product type from 2p to 3p and from 3p to 2p, respectively. This assumption thus addresses the Notifying Party's argument that 2p products impose some competitive constraint on 3p products and vice versa.[78]

(207) Specifically, for each product type of origin, cross bundle switching has been assumed to be 10% of the horizontal switching. Specifically, the purely horizontal diversion ratios from 2p products of operator A to the 2p products of operator B are reduced by 10% whereas the diversion ratios from the 2p products of operator A to the 3p products of operator B are assumed to be 10% of the horizontal diversion ratios between 2p products of these operators of the baseline scenarios. Similarly, respective 3p to 3p diversion ratios have been reduced by 10 % and 3p to 2p diversion ratios have been assumed to be 10% of the respective 3p to 3p diversion ratios.

(208) The Commission has assumed zero internal diversions from a given product type to other product types offered by the same operator. This assumption is mainly done for convenience as including such diversions does not materially affect the predicted price effects as long as the internal diversions between 2p and 3p products do not exceed approximately 20%. The analyses submitted by the Notifying Party suggest that the estimated price effects change mostly by less than one percentage point.[79]

(209) This sensitivity has been performed on the two baseline scenarios, namely (i) the scenario based on diversion ratios calculated from operator data on product type-level portability (corrected for WLR), aggregated across all product types of origin[80] and (ii) the scenario based on benchmark diversion ratios calculated from gross adds[81].

---

78 Notifying Party's economic response to the SO, Section 5.4.

79 See Table 9 and 10 of Notifying Party's report "Economic Considerations in Response to the Commission's Statement of Objections. The impact of internal diversions on predicted price increases is small because each merging party takes already into account cannibalization effects between different product types it offers into account in its pricing-decisions pre-merger, so that the loss of competition between the merging parties does not significantly alter this aspect of the pricing decision.

80 See Table 21.

81 See

Table 22.

(210) Across the two scenarios, the overall conclusion is that including a certain degree of (symmetric) cross bundle switching has the following effects: (i) it increases the IPRs for 2p products, (ii) it decreases the IPRs for 3p/4p products and (iii) but it does not significantly affect the market wide IPRs.

Table 21: Impact of assuming 10% cross bundle switching on the merger simulation results in the scenario based on diversion ratios calculated from operator data on product type-level portability (corrected for WLR), aggregated across all product types of origin

Assuming no cross bundle switching

2013					
Firms	p0	c0	m0	q0	IPR
O2P	[…]*	[…]*	[…]*	[…]*	0.09
O3P	[…]*	[…]*	[…]*	[…]*	0.12
J2P	[…]*	[…]*	[…]*	[…]*	0.08
J3P	[…]*	[…]*	[…]*	[…]*	0.17
Market wide					**7.3%**
Average 2P					**4.5%**
Average 3P/4P					**10.6%**

2014					
Firms	p0	c0	m0	q0	IPR
O2P	[…]*	[…]*	[…]*	[…]*	0.06
O3P	[…]*	[…]*	[…]*	[…]*	0.08
J2P	[…]*	[…]*	[…]*	[…]*	0.04
J3P	[…]*	[…]*	[…]*	[…]*	0.10
Market wide					**4.8%**
Average 2P					**1.9%**
Average 3P/4P					**7.2%**

Assuming 10% cross bundle switching

2013					
Firms	p0	c0	m0	q0	IPR
O2P	[…]*	[…]*	[…]*	[…]*	0.11
O3P	[…]*	[…]*	[…]*	[…]*	0.11
J2P	[…]*	[…]*	[…]*	[…]*	0.10
J3P	[…]*	[…]*	[…]*	[…]*	0.16
Market wide					**7.4%**
Average 2P					**5.7%**
Average 3P/4P					**9.8%**

2014					
Firms	p0	c0	m0	q0	IPR
O2P	[…]*	[…]*	[…]*	[…]*	0.07
O3P	[…]*	[…]*	[…]*	[…]*	0.07
J2P	[…]*	[…]*	[…]*	[…]*	0.06
J3P	[…]*	[…]*	[…]*	[…]*	0.09
Market wide					**4.6%**
Average 2P					**2.6%**
Average 3P/4P					**6.2%**

Table 22: Impact of assuming 10% cross bundle switching on the merger simulation results in the scenario based on benchmark diversion ratios calculated from gross adds

Assuming no cross bundle switching

2013					
Firms	p0	c0	m0	q0	IPR
O2P	[…]*	[…]*	[…]*	[…]*	0.05
O3P	[…]*	[…]*	[…]*	[…]*	0.12
J2P	[…]*	[…]*	[…]*	[…]*	0.03
J3P	[…]*	[…]*	[…]*	[…]*	0.18
Market wide					**6.4%**
Average 2P					**2.4%**
Average 3P/4P					**11.0%**

2014					
Firms	p0	c0	m0	q0	IPR
O2P	[…]*	[…]*	[…]*	[…]*	0.03
O3P	[…]*	[…]*	[…]*	[…]*	0.11
J2P	[…]*	[…]*	[…]*	[…]*	0.02
J3P	[…]*	[…]*	[…]*	[…]*	0.14
Market wide					**5.9%**
Average 2P					**1.1%**
Average 3P/4P					**9.7%**

Assuming 10% cross bundle switching

2013					
Firms	p0	c0	m0	q0	IPR
O2P	[…]*	[…]*	[…]*	[…]*	0.06
O3P	[…]*	[…]*	[…]*	[…]*	0.10
J2P	[…]*	[…]*	[…]*	[…]*	0.05
J3P	[…]*	[…]*	[…]*	[…]*	0.15
Market wide					**6.2%**
Average 2P					**3.3%**
Average 3P/4P					**9.5%**

2014					
Firms	p0	c0	m0	q0	IPR
O2P	[…]*	[…]*	[…]*	[…]*	0.04
O3P	[…]*	[…]*	[…]*	[…]*	0.09
J2P	[…]*	[…]*	[…]*	[…]*	0.04
J3P	[…]*	[…]*	[…]*	[…]*	0.12
Market wide					**5.3%**
Average 2P					**1.9%**
Average 3P/4P					**8.0%**

7. ELIMINATION OF THE DOUBLE MARGINALISATION ON MOBILE SERVICES PROVIDED BY ORANGE TO JAZZTEL

(211) The Notifying Party claimed that the transaction will reduce the perceived marginal costs for the provision of mobile services included in Jazztel's products, as it eliminates the wholesale margin that Jazztel currently pays Orange for being hosted as an MVNO.[82]

[82] Report "Comments on the use of UPP / IPRs in the 6.1.c Decision" of 16 January prepared by CRA, p. 19 and 30.

(212) Based on information submitted by Orange and Jazztel, it is possible to compute by how much Orange's actual costs of providing the mobile services are below the wholesale prices charged to Jazztel. First, Orange's costs per active Jazztel SIM card can be derived based on the cost information submitted by Orange. Table 23 summarizes the cost savings for 2013 and 2014 respectively. For 2013, Orange has submitted cost estimates relating to services provided to MVNOs in accordance with regulatory cost accounting data submitted to the CNMC. Since the corresponding 2014 figures were not available at the time of this Decision, the 2013 estimate of the Orange costs per active MVNO SIM card (EUR 4.03 per month) have been used as a proxy for 2014 mainly for illustrative reasons.

Table 23: Incremental cost savings per subscriber for Jazztel products due to elimination of double marginalisation

	2013	2014
Incremental cost to Jazztel for access to Orange	[...]*	[...]*
Incremental cost to Jazztel (per subscriber per month) for access to Orange	[...]*	[...]*
Incremental cost (per SIM per month) to Orange for providing access to Jazztel	[...]*	[...]*
Number of SIM per subscriber (Orange)	[...]*	[...]*
Incremental cost (per subs per month) to Orange for providing access to Jazztel	[...]*	[...]*
Efficiencies (cost savings) for Jazztel	[...]*	[...]*

(213) The estimated cost savings can then be included in the merger simulation as explained in Section 2.3. Table 24 and Table 25 show that for both of the baseline scenarios considered the predicted price increases of the merger are partially offset by Jazztel's reduced incentives to raise its price due to the elimination of double marginalization. When using observed diversion ratios, compared to the estimated price increases of 7.3% and 4.8% based on 2013 and 2014 data, respectively, reported in

(214) **Table** 22, once the elimination of double marginalization is taken into account the estimated price increases are reduced to 6.6% and 4.4%, respectively as shown in Table 24. Therefore, the elimination of double marginalization for Jazztel's products reduces the predicted market wide price increases only by 0.4 percentage points. Similarly, using diversion ratios based on gross adds, comparing the results of Table 19 and Table 25 also yields a market wide reduction of the predicted price increases by 0.4 percentage points. Therefore, in both of the baseline scenarios significant market-wide price increases remain.

Table 24: Expected price results using diversion ratios based on operator data on product type-level portability (corrected for WLR), including elimination of double marginalisation of mobile services provided by Orange to Jazztel[83]

2013					
Firms	p0	c0	m0	q0	IPR
O2P	[...]*	[...]*	[...]*	[...]*	0.09
O3P	[...]*	[...]*	[...]*	[...]*	0.12
J2P	[...]*	[...]*	[...]*	[...]*	0.08
J3P	[...]*	[...]*	[...]*	[...]*	0.14
Market wide					6.9%
Average 2P					4.5%
Average 3P/4P					9.8%

2014					
Firms	p0	c0	m0	q0	IPR
O2P	[...]*	[...]*	[...]*	[...]*	0.06
O3P	[...]*	[...]*	[...]*	[...]*	0.08
J2P	[...]*	[...]*	[...]*	[...]*	0.04
J3P	[...]*	[...]*	[...]*	[...]*	0.08
Market wide					4.4%
Average 2P					1.9%
Average 3P/4P					6.4%

Table 25: Merger simulation results using benchmark diversion ratios based on gross adds, including elimination of double marginalisation of mobile services provided by Orange to Jazztel[84]

2013					
Firms	p0	c0	m0	q0	IPR
O2P	[...]*	[...]*	[...]*	[...]*	0.05
O3P	[...]*	[...]*	[...]*	[...]*	0.12
J2P	[...]*	[...]*	[...]*	[...]*	0.03
J3P	[...]*	[...]*	[...]*	[...]*	0.15
Market wide					6.0%
Average 2P					2.4%
Average 3P/4P					10.2%

2014					
Firms	p0	c0	m0	q0	IPR
O2P	[...]*	[...]*	[...]*	[...]*	0.03
O3P	[...]*	[...]*	[...]*	[...]*	0.11
J2P	[...]*	[...]*	[...]*	[...]*	0.02
J3P	[...]*	[...]*	[...]*	[...]*	0.12
Market wide					5.5%
Average 2P					1.1%
Average 3P/4P					8.9%

(215) When focusing on 3p/4p products, accounting for the loss of double marginalization reduces the predicted price effects by 0.8 percentage points. Specifically, when using observed diversion ratios, compared to the estimated price increases of 10.6% and 7.2% based on 2013 and 2014 data, respectively, reported in

83 No diversion to the outside goods is assumed. The elimination of double marginalisation can also be expected to reduce the predicted price increases of the merger when a diversion to the outside goods is assumed. The expected cost savings would reduce the predicted market wide price increases but in both scenarios significant market-wide price increases would remain, even if an extreme diversion to outside goods is assumed.

84 No diversion to the outside goods is assumed.

(216) **Table** 22, once the elimination of double marginalization is taken into account the estimated price increases are reduced to 9.8% and 6.8%, respectively as shown in Table 24. Similarly, using diversion ratios based on gross adds, comparing the results of Table 19 and Table 25 also yields a market wide reduction of the predicted price increases by 0.8 percentage points concerning 3p/4p products. Therefore, in both of the baseline scenarios significant market-wide price increases remain.

(217) In summary, the elimination of double marginalisation relating to mobile services provided by Orange to Jazztel will likely dampen the incentives to raise prices of former Jazztel products post-merger. However, these efficiencies are not expected to entirely offset the expected anti-competitive effects. The anti-competitive effects net of this efficiency remain significant.

8. CONCLUSIONS

(218) The Commission carried out a quantitative assessment of the likely price effects resulting from the elimination of horizontal competition between Orange and Jazztel. In generating these price predictions, the Commission took into account a number of arguments raised by the Notifying Party in its Reply to the 6(1)(c) decision an throughout Phase II.

(219) Overall, the Commission considers that the implications derived from this quantitative analysis indicate that the elimination of competition for contestable customers between the merging parties is likely to lead to significant price increases. The predicted market-wide price increases of the baseline scenarios are in the range of 3-6% across the baseline scenarios when using 2014 data. The lower bound of this range was obtained by including in the analysis an assumption of strong diversion to the outside good equivalent to the one put forward by the Notifying Party[85]. Incorporating this favourable for the Notifying Party but rather extreme assumption reduces significantly the estimated price effects but not to an extent that allows dispelling any concern of potential price increases post-merger.

(220) The sensitivity scenario based on diversion ratios that are exclusively based on the purely horizontal ports indicates that the predicted price increases could also be up to 7%, according to 2014 data. The elimination of double marginalization concerning mobile services used for Jazztel's products and purchased from Orange can be expected to reduce the market wide predicted price effects by approximately 0.4 percentage points and is thus not sufficient to offset the predicted anti-competitive effects.

(221) Overall, the Commission's quantitative assessment suggests that even when including efficiencies stemming from the elimination of double marginalization concerning Jazztel's products, the merger would lead to significant price increases in the retail market of fixed internet access services.

85 This is discussed in more detail in Section 5.7.

CASE M. 7421 – ORANGE/ JAZZTEL

COMMITMENTS TO THE EUROPEAN COMMISSION

Pursuant to Article 8(2) of Council Regulation (EC) No 139/2004 (the "***Merger Regulation***"), Orange SA (the "***Notifying Party***" ***or Orange)*** hereby enters into the following Commitments (the "***Commitments***") vis-à-vis the European Commission (the "***Commission***") with a view to rendering the acquisition of Jazztel, p.l.c (the "***Concentration***") compatible with the internal market and the functioning of the EEA Agreement.

This text shall be interpreted in light of the Commission's decision pursuant to Article 8(2) of the Merger Regulation to declare the Concentration compatible with the internal market and the functioning of the EEA Agreement (the "***Decision***"), in the general framework of European Union law, in particular in light of the Merger Regulation, and by reference to the Commission Notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (the "***Remedies Notice***").

Section A. Definitions

1. For the purpose of the Commitments, the following terms shall have the following meaning:

ADSL (Asymmetric Digital Subscriber Line): Internet access service using telephone lines on a frequency band wider than for telephone services.

Affiliated Undertakings: undertakings controlled by the Parties and/or by the ultimate parents of the Parties, whereby the notion of control shall be interpreted pursuant to Article 3 of the Merger Regulation and in light of the Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (the "Consolidated Jurisdictional Notice").

Answer: As specified in Section E. 4.

Arbitrational Institution: As specified in Section E. 3.

Arbitral Tribunal: As specified in Section E. 5.

Bitstream Service: the electronic communications service consisting in the provision of transmission capacity (upward/downward) between an end-user and the point of presence of the requesting party at a high level in the network hierarchy. In the case of the Wholesale ADSL Bitstream Service, there would be only one point of access at the national level. A second point of access will however be made available to the Purchaser as a back-up point of presence. The bitstream service in these Commitments is built on the OBA access service.

BUs: Building Units, comprising both residential and office buildings.

Closing: shall mean the execution of the Commitment Agreement, by which the ownership of the Coherent Network is transferred to the Purchaser, and the Wholesale ADSL Bitstream Agreement is entered into by Orange and the Purchaser, following the satisfaction of all the condition precedents included in the Commitment Agreement.

Closing Period: the period of […][*] from the approval of the Purchaser and the terms of the Commitment Agreement by the Commission.

Commitment Agreement: the binding agreement to be entered into between Orange or one of its Affiliated Undertakings with the Purchaser comprising two inseparable components, namely the Sale Agreement in relation to the Coherent FTTH Network and the Wholesale ADSL Bitstream Agreement, as described in Section B and Schedules 1 and 2.

Confidential Information: any business secrets, know-how, commercial information, or any other information of a proprietary nature that is not in the public domain.

Conflict of Interest: any conflict of interest that impairs the Trustee's objectivity and independence in discharging its duties under the Commitments.

Dispute: As specified in Section E. 3.

Divestment Network, *also referred to as* the Coherent FTTH Network: the network as defined in Section B.1 and Schedule 1, which the Notifying Party commits to divest.

Divestiture Trustee: one or more natural or legal person(s) who is/are approved by the Commission and appointed by Orange pursuant to paragraphs 39 to 46, and who has/have received from Orange the exclusive Trustee Mandate to conclude the Commitment Agreement with a Purchaser at no minimum price.

Effective Date: the date of adoption of the Decision.

First Divestiture Period: the period of […][*] months from the Effective Date.

FTTH (Fibre to the Home): a form of fibre-optic communication delivery that reaches one living or working space. The fibre extends from the central office and reaches the boundary of the living space, such as a box on the outside wall of a building.

FTTH supply network: the fibre cables and optical junction boxes deployed from the Central office OLT to the first splitter in the field in a Gigabit-capable passive optical network (GPON) architecture, as further specified in Schedule 1.

FTTH distribution network: the fibre cables network and optical junction boxes deployed from the first splitter to the second splitter in a Gigabit-capable passive optical network (GPON) architecture, as further specified in Schedule 1.

Fibre (optical fibre): a flexible, transparent fibre made of extruded glass (silica) or plastic, slightly thicker than a human hair. Optical fibres are widely used in fibre-optic communications, where they permit transmission over longer distances and at high bandwidths (data rates).

Indefeasible right of use (IRU): is a right of access granted by the owner of the Coherent FTTH Network to Orange Espagne in consideration of a price and for a specific period of time.

---

[*] Parts of this text have been edited to ensure that confidential information is not disclosed; those parts are enclosed in square brackets and marked with an asterisk.

IP: Internet Protocol.

Local Loop: the physical circuit, made of a twisted pair of metallic cables, that connects the network terminating point at the facilities of the subscriber with the main distribution frame or with a corresponding installation in the fixed public network of an operator.

Monitoring Trustee: one or more natural or legal person(s) who is/are approved by the Commission and appointed by Orange pursuant to paragraphs 39 to 46, and who has/have the duty to monitor Orange's compliance with the conditions and obligations attached to the Decision.

NEBA: Nuevo Servicio Ethernet de Banda Ancha. Telefónica de Espana SAU's regulated offer for the provision of the bitstream services with Ethernet handover.

Notice: As specified in Section E. 3.

OBA: Oferta de Bucle de Abonado. Telefónica de Espana SAU's regulated offer for the provision of the Unbundling of the Local Loop.

Optical Line Termination (OLTs) : an optical line terminal is a device that is located at the service provider central office and is the endpoint of Gigabit-capable passive optical network (GPON) architecture, as further specified in Schedule 1.

Orange SA ("Orange"): company owning 100% of Orange Espagne, incorporated under the laws of France, with its registered office at 78 rue Olivier de Serres – 75015 PARIS, and registered with the RCS Paris under number 380 129 866.

Orange Espagne: Orange Espagne, S.A.U

Parties: the Notifying Party and the undertaking that is the target of the concentration (i.e. Jazztel plc).

Parties to the Arbitration: As specified in Section E. 3.

Purchaser: the entity approved by the Commission as party to the Commitment Agreement and acquirer of the Divestment Network in accordance with the criteria set out in Section C.

Purchaser Criteria: the criteria laid down in paragraph 37 of these Commitments that the Purchaser must fulfill in order to be approved by the Commission.

Request: As specified in Section E. 2.

Rules: As specified in Section E. 6.

Sale Agreement: agreement as described in Section B.1 and Schedule 1, by which the Coherent FTTH Network is sold to the Purchaser, and which forms one of the two inseparable components of the Commitment Agreement.

Schedules: the schedules to these Commitments describing more in detail the Divestment Network, and the wholesale ADSL Bitstream agreement.

Telefonica: means Telefónica de Espana, S.A.U.

Trustee(s): the Monitoring Trustee and/or the Divestiture Trustee as the case may be.

Trustee Divestiture Period: the period of […][*] months from the end of the First Divestiture Period.

Trustee Proposal: As specified in Section E. 2.

Unbundling of the Local Loop (ULL): the electronic communication service that allows the requesting parties to use the local loop of another operator for the provision of telecommunications services to the final user.

Voice over Internet Protocol (VoIP): methodology and group of technologies for the delivery of voice communications and multimedia sessions over Internet Protocol networks, such as the Internet.

Wholesale ADSL Bitstream Agreement: agreement as described in Section B.2 and Schedule 2, by which Orange provides the Wholesale ADSL Bitstream Service to the Purchaser, and which forms one of the two inseparable components of the Commitment Agreement.

Wholesale ADSL Bitstream Service: the wholesale Bitstream Service as described in Section B.2 and Schedule 2, to be provided under the Wholesale ADSL Bitstream Agreement.

Section B. Description of the Commitment Agreement

2. Orange commits to enter, or procure one of its Affiliated Undertakings to enter, into the Commitment Agreement with the Purchaser by the end of the Trustee Divestiture Period on terms approved by the Commission in accordance with the procedure described in paragraph 38 below.

3. The Commitment Agreement to be entered into by Orange or one of its Affiliated Undertakings with the Purchaser includes the following two inseparable components:

   - the sale of the Coherent FTTH Network (**B.1**); and

   - the conclusion of the wholesale ADSL Bitstream Agreement (**B.2)**

4. Orange commits to find a Purchaser and to enter into a Commitment Agreement within the First Divestiture Period. If Orange has not entered into such an agreement at the end of the First Divestiture Period, Orange shall grant the Divestiture Trustee an exclusive mandate to conclude the Commitment Agreement in accordance with the procedure described in paragraph 50 in the Trustee Divestiture Period.

B.1. First part of the Commitment Agreement: divestiture of a coherent FTTH network

➢ Commitment to divest

5. Orange commits to divest the Coherent FTTH Network which is described below.

6. The divestiture of the Coherent FTTH Network is part of the Commitment Agreement and as such is indivisible from the Wholesale ADSL Bitstream Agreement referred to below in B.2. In order to maintain the structural effect of the Commitments, Orange shall, for a period of 10 years after Closing, not acquire, whether directly or indirectly, the possibility of exercising influence (as defined in paragraph 43 of the Remedies Notice, footnote 3) over the whole or part of the Coherent FTTH Network, unless, following the submission of a reasoned request from Orange showing good cause and accompanied by a report from the Monitoring Trustee (as provided in paragraph 91 of these Commitments), the Commission finds that the structure of the market has changed to such an extent that the absence of influence over the Coherent FTTH Network is no longer necessary to render the proposed concentration compatible with the internal market.

➢ Structure and definition of the Coherent FTTH Network

7. The Coherent FTTH Network is identified at the level of individual cables, the ownership of which is to be transferred under the Sale Agreement. For the avoidance of doubt, it follows from the above that the sale agreement will also provide for the transfer of the ownership of every fibre located inside the said cables.

8. The Coherent FTTH Network will be composed of cables currently belonging to Jazztel.

Coverage

9. The total scope of the Coherent FTTH Network amounts to at least ***[700.000–800.000]*** BUs, located in 13 densely populated urban areas in Spain, as indicated in the table below:

AREA	**CENTRAL OFFICE**	**NUMBER OF Bus**
Barcelona	Arenes	***[40,000-50,000]***
	Hospitalet de Llobregat	***[50,000-60,000]***
	Badalona / Ventos	***[70,000-80,000]***
Madrid	Delicias	***[60,000-70,000]***
	Pilar	***[50,000-60,000]***
	Manoteras	***[40,000-50,000]***
	Alcorcon / S.J. Valderas	***[50,000-60,000]***
Malaga	Sol	***[40,000-50,000]***
	Maldonado	***[60,000-70,000]***
Sevilla	Triana	***[30,000-40,000]***
	Pino Montano	***[60,000-70,000]***
	Aeropuerto	***60,000-70,000]***
Valencia	San Vicente	***[50,000-60,000]***
TOTAL		***[720,000]***

Schedule 1 includes, as annex 1, aerial photographs showing the location of the Central Offices and BUs, as well as the technical specifications of the Coherent FTTH Network.

Economic terms

10. The main economic terms relating to the divestiture of the Coherent FTTH Network are the following:

- A sale's price paid by the Purchaser in consideration for the transfer of ownership of the Coherent FTTH Network;
- An economic consideration paid by Orange Espagne to the Purchaser in exchange for the grant of the IRU detailed below.

Other details

11. The Sale Agreement shall include the following elements :

- The Optical Line Termination (OLTs) equipment (electronic equipment GPON Gigabit Passive Optical Network);
- The FTTH supply network which includes passive elements of connection and splitter
- The FTTH distribution network including passive elements with its splitters for connecting rush/HDMI through two different modalities :
    - By building : including the box with Splitter and rush connectors/HDMI.
    - Indoor : including the indoor box and the Risser.

- <u>Conditions for the implementation of the commitment to divest the Coherent FTTH Network</u>

<u>Transition period</u>

12. At the request of the Purchaser, Orange will operate the Coherent FTTH Network on behalf of the Purchaser for a transition period of up to 12 months as of the Closing. The Purchaser may request to extend the transition period only for an additional period of up to 12 months, provided that Orange agrees with this request, and provided that the Monitoring Trustee gives its favorable opinion prior to the extension.

13. Conditions of the operation of the Coherent FTTH Network by Orange during the transition period are detailed in <u>**Schedule 1**</u>.

14. This service will enable the Purchaser to immediately start operating (indirectly, at first) the Coherent FTTH Network as of the Closing and while the Purchaser initiates the processes and investments needed to exploit the Coherent FTTH Network on its own.

15. At the request of the Purchaser, Orange will provide its maintenance services to the Purchaser with respect to the Coherent FTTH Network in exchange of a price to be paid by the Purchaser and to be agreed jointly by Orange and the Purchaser. The Maintenance services will involve the outsourcing of the complete management of the network and will be provided by Orange under a Service Level Agreement (***SLA***) to be agreed between the parties. These maintenance services will be offered for a maximum period of 6 months following the transition period of up to 12 or 24 months referred to in paragraph 12.

<u>IRU in favor of Orange Espagne</u>

16. In exchange for an economic consideration, Orange Espagne will be granted by the Purchaser a non-exclusive IRU for a period of 35 years over 40% of the capacity of the Coherent FTTH Network at the level of each local exchange. Nothing in the Commitments shall prevent the Purchaser and Orange to agree to renew the IRU for successive periods.

17. <u>**Schedule 1**</u> provides more details on the conditions of the IRU.

B.2 – Second part of the Commitment Agreement: *the Wholesale ADSL Bitstream Agreement*

18. Orange further commits to enter, or procure one of its Affiliated Undertakings to enter, into the Wholesale ADSL Bitstream Agreement with the Purchaser.

19. The Wholesale ADSL Bitstream Agreement is part of the Commitment Agreement and as such is indivisible from the divestiture of the Coherent FTTH Network referred to above in B.1.

20. Orange commits to provide the Purchaser with the Wholesale ADSL Bitstream Service described here below, under the Wholesale ADSL Bitstream Agreement.

21. The Wholesale ADSL Bitstream Service is a national Bitstream service with interconnection in a national concentration point at an Orange Espagne point of presence. The signal delivery from Orange Espagne to the Purchaser will occur in one unique national interconnection point to be agreed between the parties, with an IP interface. A second point of access will however be made available to the Purchaser as a back-up point of presence.

22. The Wholesale ADSL Bitstream Service will be constructed using as an input the physical access to the ULL service as defined in Telefónica's OBA offer. The Wholesale ADSL Bitstream Service only applies to OBA services built over copper local loops and related to ULL. The data service provided as part of the Wholesale ADSL Bitstream Service will allow the Purchaser to provide VoIP services.

23. The Wholesale ADSL Bitstream Service enables the access to 1 123 Telefónica Main Distribution Frames (***MDFs***) on Jazztel's network listed in Annex 1 of Schedule 2.

24. The Wholesale ADSL Bitstream Service includes a management web service through a portal that allows management of the following queries and requests, among others: fully unbundled service coverage query by telephone number, by MIGA code, by address; request for activation of unbundled service by telephone, by address; query on the status of the services; query on finalized services; request for unsubscription from an active service; request for a change to the speed of an active service; request for cancelation of an active service that had not been yet installed; opening of technical incidents.

Term

25. The Wholesale ADSL Bitstream Service is valid for an initial term of 4 years ("Initial Period"). At the end of the 4 year period, the Purchaser shall have the option to extend the term of the Wholesale ADSL Bitstream Agreement for a maximum additional period of 4 years ("Extended Period").

26. The Wholesale ADSL Bitstream Service will be available as soon as technically available and no later than 3 months after the Effective Date.

Economic terms

27. For the Initial Period, the following pricing structure for the Wholesale ADSL Bitstream Service shall apply:

    (i) a monthly access fee of […][*] per line applicable to each of the Purchaser's active ADSL lines; and

    (ii) a fixed fee to be agreed upon between the Purchaser and Orange. The fixed fee shall not be related to the number of ADSL lines eventually activated or used by the Purchaser. There shall be no limit to the number of lines that the Purchaser can activate or use.

    (iii) The Wholesale ADSL Bitstream Agreement may link the level of the fixed fee to market parameters that are not controlled by Orange Espagne or the Purchaser, such as the market-wide uptake of FTTH connections in Spain.

28. For the Extended Period, the following pricing structure for the Wholesale ADSL Bitstream Service shall apply:

    (i) a monthly fee per active line, to be calculated as […][*]

    (ii) In any case, the monthly access fee applicable to each of the Purchaser's active lines shall not be higher than […][*] per line. The Purchaser and Orange Espagne may at any time agree on a lower monthly access fee.

(iii) No fixed fee shall be payable.

29. More details on the pricing structure above are included in **Schedule 2**. Prices might be adjusted by Orange in case of an increase and shall be adjusted by Orange in case of a decrease in the cost of the regulated inputs service prices, such as OBA regulated services (ULL Reference Offer) or leased lines. In such case, the prices charged by Orange will be adapted to mirror these changes. Orange will provide the Monitoring Trustee with all relevant information justifying such price adjustment by Orange within a period […]* prior to the price adjustment. Based on the elements provided by Orange to justify the price adjustment, the Monitoring Trustee will have two weeks to approve or refuse the proposed price adjustment.

30. The Wholesale ADSL Bitstream Service will be configured using Telefónica's wholesale service offer and, in particular, the physical access to the full unbundling of the local loop. Orange will therefore not be held liable for any discontinuation of Telefónica's local loop services that would be the result of the closing of Telefónica's local exchanges or its decision to withdraw copper access, neither for the quality of the local loop or the service provided by Telefónica. In the event that Orange intends to express its agreement to a request by Telefónica and/or the relevant Spanish regulatory authority regarding the closure of any of the MDFs listed in Annex 1 to Schedule 2, the Purchaser shall be consulted by Orange, in writing, within two weeks of receiving the closure request. The Monitoring Trustee shall be sent, at the same time, a copy of the consultation request. For any MDFs listed in Annex 1 to Schedule 2, and within a period of one week after having received Orange's consultation request, the Purchaser shall have the right to instruct Orange to reject the closure request by Telefónica. In this case, Orange shall not agree to any closure of the specified MDFs. In the exceptional case that Orange has justified grounds to believe that the Purchaser rejects a closure respect without having a current or future economic interest in the concerned MDF, Orange will provide the Monitoring Trustee with all relevant information justifying the absence of the need to reject the closure request. Based on the elements provided, the Monitoring Trustee will have two weeks to approve or reject Orange's intention to express its agreement to a request by Telefónica and/or the relevant Spanish regulatory authority to close any of the MDFs listed in Annex 1 to Schedule 2.

Agreed Service Levels

31. The Wholesale ADSL Bitstream Agreement shall comprise agreed service levels for the Wholesale ADSL Bitstream Service, including prioritization of VoIP services over data traffic at no extra cost. These SLA shall be agreed upon between Orange and the Purchaser in good faith and in line with industry standards and best practices. The quality of service levels regarding the prioritization of VOIP services shall be no less favourable than the parameters outlined in Schedule 2.

32. Orange shall be deemed to have complied with the Commitments under sections B.1 and B.2 if:

   a) by the end of the Trustee Divestiture Period, Orange or the Divestiture Trustee has entered into a final binding Commitment Agreement and the Commission approves the proposed purchaser and the terms of the Commitment Agreement as being consistent with the Commitments in accordance with the procedure described in paragraph 38;

b) the Closing of the Commitment Agreement takes place within the Closing Period, and

c) Orange executes the Commitment Agreement in a manner consistent with these Commitments.

B.3. Related Commitments

Preservation of viability, marketability and competitiveness

33. From the Effective Date until Closing, the Notifying Party shall preserve or procure the preservation of the economic viability, marketability and competitiveness of the Coherent FTTH Network, in accordance with good business practice, and shall minimise as far as possible any risk of loss of competitive potential of the Coherent FTTH Network. In particular Orange undertakes:

a) not to carry out any action that might have a significant adverse impact on the value, management or competitiveness of the Coherent FTTH Network; and

b) to make available, or procure to make available, sufficient resources for the maintenance and development of the Coherent FTTH Network, on the basis and continuation of the existing business plans.

Due diligence

34. In order to enable potential purchasers to carry out a reasonable due diligence of the Coherent FTTH Network, Orange shall, subject to customary confidentiality assurances and dependent on the stage of the divestiture process provide to potential purchasers sufficient information as regards the Coherent FTTH Network.

Reporting

35. Orange shall submit written reports in English language on potential parties to the Commitment Agreement and developments in the negotiations with such potential parties to the Commission and the Monitoring Trustee no later than 10 days after the end of every month following the Effective Date (or otherwise at the Commission's request). Orange shall submit a list of all potential parties having expressed interest in entering into the Commitment Agreement to the Commission at each and every stage of the negotiation process, as well as a copy of all the offers made by potential parties within five days of their receipt.

36. Orange shall inform the Commission and the Monitoring Trustee on the preparation of the due diligence procedure and shall submit a copy of any information memorandum to the Commission and the Monitoring Trustee before sending the memorandum out to potential purchasers.

Section C. The Purchaser

37. In order to be approved by the Commission, the Purchaser must fulfill the following criteria:

(a) The Purchaser shall be independent of and unconnected to Orange or its Affiliated Undertakings (this being assessed having regard to the situation following the divestiture).

(b) The Purchaser shall have the financial resources, proven expertise and incentive to maintain and develop the Coherent FTTH Network and be a viable and active competitive force in competition with the Parties and other competitors;

(c) The Purchaser shall have access to a mobile telecommunication network, including 2G, 3G and 4G services. In case the Purchaser does not already benefit from such access, Orange will provide the Purchaser with such access on competitive terms and in any case at terms as favorable as those granted to Jazztel for a duration at least equal to the term of the Wholesale ADSL Bitstream Agreement.

(d) The acquisition of the Coherent FTTH Network and access to the Wholesale ADSL Bitstream Service by the Purchaser must neither be likely to create, in light of the information available to the Commission, *prima facie* competition concerns nor give rise to a risk that the implementation of the Commitments will be delayed. In particular, the Purchaser must reasonably be expected to obtain all necessary approvals (if required) from the relevant regulatory authorities to acquire and operate the Coherent FTTH Network and use the Wholesale ADSL Bitstream Service.

38. The final binding Commitment Agreement (as well as ancillary agreements) relating to the divestment of the Coherent FTTH Network and to the Wholesale ADSL Bitstream Service shall be conditional on the Commission's approval. When Orange has reached an agreement with a potential Purchaser, it shall submit a fully documented and reasoned proposal, including a copy of the final agreement(s), within […][*] to the Commission and the Monitoring Trustee. Orange must be able to demonstrate to the Commission that the purchaser fulfils the Purchaser Criteria and that the Commitment Agreement is consistent with the Commission's Decision and the Commitments. For the approval, the Commission shall verify that the purchaser fulfils the Purchaser Criteria and that the Commitment Agreement is consistent with the Commitments including their objective to bring about a lasting structural change in the market. The Commission may approve the Commitment Agreement without one or more of its components or parts thereof, or by substituting one or more components or parts thereof with alternative elements, if this does not affect the viability and competitiveness of the activities to be developed by the Purchaser on the basis of the Commitment Agreement following the conclusion of the Commitment Agreement, taking account of the proposed purchaser. For the avoidance of doubt, this clause does not empower the Commission to impose any additional commitments/elements upon Orange.

Section D. Trustee

I. Appointment procedure

39. Orange shall appoint a Monitoring Trustee to carry out the functions specified in these Commitments for a Monitoring Trustee. The Notifying Party commits not to close the Concentration before the appointment of a Monitoring Trustee.

40. If Orange has not entered into the binding Commitment Agreement before the end of the First Divestiture Period or if the Commission has rejected a purchaser proposed by Orange at that time or thereafter, Orange shall appoint a Divestiture Trustee. The appointment of the Divestiture Trustee shall take effect upon the commencement of the Trustee Divestiture Period.

41. The Trustee shall:

    (i) at the time of appointment, be independent of the Notifying Party and its Affiliated Undertakings;

    (ii) possess the necessary qualifications to carry out its mandate, for example have sufficient relevant experience as an investment banker or consultant or auditor; and

    (iii) neither have nor become exposed to a Conflict of Interest.

42. The Trustee shall be remunerated by the Notifying Party in a way that does not impede the independent and effective fulfillment of its mandate. In particular, where the remuneration package of a Divestiture Trustee includes a success premium linked to the final sale value of the Coherent FTTH Network, such success premium may only be earned if the divestiture takes place within the Trustee Divestiture Period.

Proposal by Orange

43. No later than […][*] after the Effective Date, Orange shall submit the name or names of one or more natural or legal persons whom Orange proposes to appoint as the Monitoring Trustee to the Commission for approval. No later than one month before the end of the First Divestiture Period or on request by the Commission, Orange shall submit a list of one or more persons whom Orange proposes to appoint as Divestiture Trustee to the Commission for approval. The proposal shall contain sufficient information for the Commission to verify that the person or persons proposed as Trustee fulfill the requirements set out in paragraph 41 of these Commitments and shall include:

    (a) the full terms of the proposed mandate, which shall include all provisions necessary to enable the Trustee to fulfill its duties under these Commitments;

    (b) the outline of a work plan which describes how the Trustee intends to carry out its assigned tasks;

    (c) an indication whether the proposed Trustee is to act as both Monitoring Trustee and Divestiture Trustee or whether different trustees are proposed for the two functions.

Approval or rejection by the Commission

44. The Commission shall have the discretion to approve or reject the proposed Trustee(s) and to approve the proposed mandate subject to any modifications it deems necessary for the Trustee to fulfill its obligations. If only one name is approved, Orange shall appoint or cause to be appointed the person or persons concerned as Trustee, in accordance with the mandate approved by the Commission. If more than one name is approved, Orange shall be free to choose the Trustee to be appointed from among the names approved. The Trustee shall be appointed within one week of the Commission's approval, in accordance with the mandate approved by the Commission.

New proposal by Orange

45. If all the proposed Trustees are rejected, Orange shall submit the names of at least two more natural or legal persons within […][*] of being informed of the rejection, in accordance with paragraphs 39 and 40 of these Commitments.

Trustee nominated by the Commission

46. If all further proposed Trustees are rejected by the Commission, the Commission shall nominate a Trustee, whom Orange shall appoint, or cause to be appointed, in accordance with a trustee mandate approved by the Commission.

II. Functions of the Trustee

47. The Trustee shall assume its specified duties and obligations in order to ensure compliance with the Commitments. The Commission may, on its own initiative or at the request of the Trustee or Orange, give any orders or instructions to the Trustee in order to ensure compliance with the conditions and obligations attached to the Decision.

Duties and obligations of the Monitoring Trustee

48. The Monitoring Trustee shall:

(i) propose in its first report to the Commission a detailed work plan describing how it intends to monitor compliance with the obligations and conditions attached to the Decision.

(ii) review and assess Orange's compliance with the obligations and conditions provided in Section B and paragraph 37(c) above, in particular, but not limited to, in relation with:

- the scope of the Coherent FTTH Network being divested and its number of BUs;
- the conditions under which Orange will operate the Coherent FTTH Network on behalf of the Purchaser during the transition period;
- the scope of the IRU granted to Orange, the identification of the concerned BUs and the conditions of practical implementation of the IRU;
- the conditions of the granting of the Wholesale ADSL Bitstream Service, including the adjustments mirroring potential modifications of the price of regulated input services ;
- the annual adjustment of the applicable Price Index Factor, Annual Correction Factor and Backhauling Price for Additional Traffic in accordance with the provisions contained in Schedule 2;
- the possible closure requests for any MDF listed in Annex 1 of Schedule 2; and
- the access by the Purchaser to a mobile telecommunication network, including 2G, 3G and 4G services, and, if this access is provided by Orange following paragraph 37(c), the terms on which this access is granted.

(iii) propose to Orange such measures as the Monitoring Trustee considers necessary to ensure Orange's compliance with the conditions and obligations attached to the Decision;

(iv) act as a contact point for any requests by third parties, in particular any potential Purchaser, in relation to the Commitments;

(v) review and assess any potential Purchaser as well as the progress in the process of the negotiation and conclusion of the Commitment Agreement and verify that potential Purchasers/Third Parties receive sufficient and correct information relating to the Commitments and in particular to the Coherent FTTH Network;

(vi) provide to the Commission, sending Orange a non-confidential copy at the same time, a written report within 15 days after the end of every month that shall cover the negotiations of the Commitment Agreement so that the Commission can assess the progress of the process as well as any potential Purchaser;

(vii) in addition to these periodic reports, promptly report in writing to the Commission, sending Orange a non-confidential copy at the same time, if it concludes on reasonable grounds that Orange is failing to comply with the Commitments;

(viii) within one week after receipt of the documented proposal referred to in paragraph 38 of these Commitments, submit to the Commission, sending Orange a non-confidential copy at the same time, a reasoned opinion as to the suitability and independence of the proposed purchaser and whether the Commitment Agreement is being entered into in a manner consistent with the conditions and obligations attached to the Decision;

(ix) assume the other functions assigned to the Monitoring Trustee under the conditions and obligations attached to the Decision.

49. If the Monitoring and Divestiture Trustee are not the same persons, the Monitoring Trustee and the Divestiture Trustee shall cooperate closely with each other during and for the purpose of the preparation of the Trustee Divestiture Period in order to facilitate each other's tasks.

Duties and obligations of the Divestiture Trustee

50. Within the Trustee Divestiture Period, the Divestiture Trustee shall conclude, at no minimum price, the Commitment Agreement containing the sale of the Coherent FTTH Network to, and access to the Wholesale ADSL Bitstream Service by, the Purchaser, provided that the Commission has approved both the purchaser and the final binding Commitment Agreement (and ancillary agreements) as in line with the Commission's Decision and the Commitments in accordance with paragraphs 37 and 38 of these Commitments. The Divestiture Trustee shall include in the Commitment Agreement (as well as in any ancillary agreements) such terms and conditions as it considers appropriate for an expedient conclusion of the Commitment Agreement in the Trustee Divestiture Period. In particular, the Divestiture Trustee may include in the Commitment Agreement such customary representations and warranties and indemnities as are reasonably required to conclude the Commitment Agreement. The Divestiture Trustee shall protect the legitimate financial interests of Orange, subject to Orange's unconditional obligation to enter into the Commitment Agreement at no minimum price in the Trustee Divestiture Period.

51. In the Trustee Divestiture Period (or otherwise at the Commission's request), the Divestiture Trustee shall provide the Commission with a comprehensive monthly report written in English on the progress of the divestiture process. Such reports shall be submitted within 15

days after the end of every month with a simultaneous copy to the Monitoring Trustee and a non-confidential copy to the Notifying Party.

III. Duties and obligations of the Parties

52. Orange shall provide and shall cause its advisors to provide the Trustee with all such co-operation, assistance and information as the Trustee may reasonably require to perform its tasks. The Trustee shall have full and complete access to any of Orange's books, records, documents, facilities, sites and technical information necessary for fulfilling its duties under the Commitments and Orange shall provide the Trustee upon request with copies of any document. Orange shall make available to the Trustee one or more offices on its premises and shall be available for meetings in order to provide the Trustee with all information necessary for the performance of its tasks.

53. Orange shall provide the Monitoring Trustee with all managerial and administrative support that it may reasonably request. Orange shall provide and shall cause its advisors to provide the Monitoring Trustee, on request, with the information submitted to any potential Purchaser. Orange shall inform the Monitoring Trustee on any potential Purchaser, submit lists of potential Purchasers at each stage of the selection process, including the offers made by any Potential Purchaser at those stages, and keep the Monitoring Trustee informed of all developments in the divestiture process.

54. Orange shall grant or procure Affiliated Undertakings to grant comprehensive powers of attorney, duly executed, to the Divestiture Trustee to conclude the Commitment Agreement (including ancillary agreements), the Closing and all actions and declarations which the Divestiture Trustee considers necessary or appropriate to conclude the Commitment Agreement, including the appointment of advisors to assist with the process. Upon request of the Divestiture Trustee, Orange shall cause the documents required for effecting the conclusion of the Commitment Agreement and the Closing to be duly executed.

55. Orange shall indemnify the Trustee and its employees and agents (each an "***Indemnified Party***") and hold each Indemnified Party harmless against, and hereby agrees that an Indemnified Party shall have no liability to Orange for, any liabilities arising out of the performance of the Trustee's duties under the Commitments, except to the extent that such liabilities result from the willful default, recklessness, gross negligence or bad faith of the Trustee, its employees, agents or advisors.

56. At the expense of Orange, the Trustee may appoint advisors (in particular for corporate finance or legal advice), subject to Orange's approval (this approval not to be unreasonably withheld or delayed) if the Trustee considers the appointment of such advisors necessary or appropriate for the performance of its duties and obligations under the Mandate, provided that any fees and other expenses incurred by the Trustee are reasonable. Should Orange refuse to approve the advisors proposed by the Trustee the Commission may approve the appointment of such advisors instead, after having heard Orange. Only the Trustee shall be entitled to issue instructions to the advisors. Paragraph 55 of these Commitments shall apply *mutatis mutandis*. In the Trustee Divestiture Period, the Divestiture Trustee may use advisors who served Orange during the Divestiture Period if the Divestiture Trustee considers this in the best interest of an expedient sale.

57. Orange agrees that the Commission may share Confidential Information proprietary to Orange with the Trustee. The Trustee shall not disclose such information and the principles contained in Article 17 (1) and (2) of the Merger Regulation apply *mutatis mutandis*.

58. The Notifying Party agrees that the contact details of the Monitoring Trustee are published on the website of the Commission's Directorate-General for Competition and they shall inform interested third parties, in particular any potential purchasers, of the identity and the tasks of the Monitoring Trustee.

59. For a period of 10 years from the Effective Date the Commission may request all information from the Parties that is reasonably necessary to monitor the effective implementation of these Commitments.

IV. Replacement, discharge and reappointment of the Trustee

60. If the Trustee ceases to perform its functions under the Commitments or for any other good cause, including the exposure of the Trustee to a Conflict of Interest:

(a) the Commission may, after hearing the Trustee and Orange, require Orange to replace the Trustee; or

(b) Orange may, with the prior approval of the Commission, replace the Trustee.

61. If the Trustee is removed according to paragraph 60 of these Commitments, the Trustee may be required to continue in its function until a new Trustee is in place to whom the Trustee has effected a full hand over of all relevant information. The new Trustee shall be appointed in accordance with the procedure referred to in paragraphs 39-46 of these Commitments.

62. Unless removed according to paragraph 60 of these Commitments, the Trustee shall cease to act as Trustee only after the Commission has discharged it from its duties after the Commitments with which the Trustee has been entrusted have been implemented. However, the Commission may at any time require the reappointment of the Monitoring Trustee if it subsequently appears that the relevant remedies might not have been fully and properly implemented.

Section E. Fast-track Dispute resolution

1. Scope

63. The fast-track Dispute resolution procedure as described herein shall apply in the event that the Purchaser claims that Orange or an Affiliated Undertaking is failing to comply with the requirements of Section B or of paragraph 37(c) of the Commitments vis-à-vis that Purchaser.

64. It is being understood that the fast-track Dispute resolution procedure only applies to claims related to Orange's compliance with its Commitments, not with other disputes between Orange and the Purchaser.

2. Pre-Dispute Escalation

65. If the Purchaser wishes to avail itself of the fast track Dispute resolution procedure, it shall send a written request to that effect (the “***Request***”) to Orange, with a copy to the Trustee.

In the Request, the Purchaser shall set out in detail the reasons leading that party to believe that Orange is failing to comply with the Commitments.

66. Within a reasonable period of time not exceeding ten (10) working days after receipt of the Request by Orange, the Purchaser and Orange will use their best efforts to resolve through cooperation and consultation all differences of opinion and to settle all Disputes underlying the Request. If the settlement of the Disputes fails within these ten (10) working days, the respective CEOs of Orange and the Purchaser may seek to resolve the matters in Dispute within an additional ten (10) working days from expiry of the ten (10) working days period.

67. The Trustee shall present to the Parties its own proposal (the "***Trustee Proposal***") for resolving the Dispute within five (5) working days after receipt of the Request by the Trustee, specifying in writing the action(s), if any, to be taken by Orange or an Affiliated Undertaking in order to ensure compliance with the Commitments vis-à-vis the Purchaser, and be prepared, if requested, to facilitate the settlement of the Dispute. To the extent Orange and the Purchaser have settled a Dispute on the basis of the Trustee Proposal and Orange complies with such settlement, Orange shall be deemed not to be in breach of the Commitments.

3. Dispute

68. If the Purchaser and Orange (hereinafter referred to together as the "***Parties to the Arbitration***") fail to resolve their differences of opinion in the consultation phase described under point 2 "***Pre-Dispute Escalation***", the Purchaser may, within twenty (20) calendar days of the expiry of the consultation time for the CEOs referred to in under point 2 "Pre-Dispute Escalation", serve a notice in the sense of a request for arbitration (the "***Notice***") to the Spanish Court of Arbitration (Corte Española de Arbitraje) (hereinafter referred to as the "***Arbitral Institution***") with a copy of such Notice to Orange.

69. The Notice shall set out in detail the Dispute, difference or claim (the "***Dispute***") and shall contain, inter alia, all issues of both fact and law, including any suggestions as to the procedure to be applied in the fast-track arbitration. All documents relied upon shall be attached, e.g. documents, agreements, communications with the Trustee, expert reports, and witness statements. The Notice shall also contain a detailed description of the action(s) to be undertaken by Orange (including, if appropriate, a draft contract comprising all relevant terms and conditions) and the Trustee Proposal, including a comment as to its appropriateness.

4. Answer

70. Orange shall, within fifteen (15) working days from receipt of the Notice, submit its Answer to the Notice (the "***Answer***") to the Arbitral Institution, with a copy to the Purchaser. The Answer shall provide detailed reasons for Orange's position and set out, *inter alia*, all issues of both fact and law, including any suggestions as to the procedure. All documents relied upon shall be attached, e.g. documents, agreements, communications with the Trustee, expert reports, and witness statements. The Answer shall, if appropriate, contain a detailed description of the action(s) which Orange proposes to undertake vis-à-vis the Purchaser (including, if appropriate, a draft contract comprising all relevant terms and conditions) and the Trustee Proposal (if not already submitted), including a comment as to its appropriateness.

5. Appointment of the arbitrators

71. The arbitral tribunal shall consist of three persons. The Purchaser shall nominate one arbitrator in the Notice; Orange shall nominate one arbitrator in the Answer. The arbitrators nominated by the Purchaser and by Orange shall, within five (5) working days of the nomination of the latter, nominate the third arbitrator who shall act as chairman of the arbitral tribunal, making such nomination known to the Parties to the Arbitration and the Arbitral Institution which shall forthwith confirm the appointment of all three arbitrators within five (5) working days after the nomination of the third arbitrator. The right to challenge an arbitrator pursuant to procedural rules of the Arbitral Institution shall apply.

72. Should the Purchaser wish to have the Dispute decided by a sole arbitrator, it shall indicate this in the Notice. In this case, the Purchaser and Orange shall agree on the nomination of a sole arbitrator within five (5) working days from the communication of the Answer and communicate the nominated sole arbitrator to the Arbitral Institution.

73. Should Orange fail to nominate an arbitrator, or if the two arbitrators nominated by the Parties to the Arbitration fail to agree on the chairman of the arbitral tribunal, or should the Parties to the Arbitration fail to agree on a sole arbitrator, the default appointment(s) shall be made by the Arbitral Institution within five (5) working days after the expiry of the time limit for the respective nomination.

74. The three-person arbitral tribunal or, as the case may be, the sole arbitrator, are herein referred to as the "***Arbitral Tribunal***".

6. Arbitration procedure

75. The Dispute shall be finally resolved by arbitration under the Arbitration Rules of the Arbitral Institution, with such modifications or adaptations as foreseen herein or necessary under the circumstances (the “***Rules***”). The place of arbitration is Madrid, Spain. The language of the procedure is Spanish. Unless the Parties to the Arbitration agree otherwise, hearings, if any, shall be held in Madrid.

7. Expedited proceedings

76. The procedure shall be a fast-track procedure pursuant to procedural rules of the Arbitral Institution. For this purpose, the Arbitral Tribunal shall shorten all applicable procedural time-limits under the Rules as far as admissible and appropriate in the circumstances. The Parties to the Arbitration shall consent to the use of email for the exchange of documents.

77. The Arbitral Tribunal shall, as soon as practical after the confirmation of the Arbitral Tribunal, hold an organizational conference to discuss any procedural issues with the Parties to the Arbitration. Terms of reference shall be drawn up and signed by the Parties to the Arbitration and the Arbitral Tribunal at the organizational meeting or thereafter and a procedural time-table shall be established by the Arbitral Tribunal. An oral hearing shall, as a rule, be established within two months of the confirmation of the Arbitral Tribunal by the Arbitral Institution.

8. Provision of information

78. In order to enable the Arbitral Tribunal to reach a decision, it shall be entitled to request any information from the Parties to the Arbitration which it deems relevant, to appoint experts and to examine them at the hearing, and to establish the facts by all appropriate means. The Arbitral Tribunal is also entitled to ask for assistance by the Trustee in all stages of the procedure if the Parties to the Arbitration agree.

9. Confidentiality

79. The Arbitral Tribunal shall not disclose Confidential Information and apply the standards attributable to confidential information under the Merger Regulation. The Arbitral Tribunal may take the measures necessary for protecting Confidential Information in particular by restricting access to Confidential Information to the Arbitral Tribunal, the Trustee, and outside counsel and experts of the opposing party or to the Arbitral Tribunal and the Trustee only.

10. Burden of proof

80. Each of the Parties to the Arbitration shall bear the burden of proof for the facts on which it relies in order to substantiate its claim, counter-claim or defence.

11. Involvement of the Commission

81. The Commission is allowed and shall be enabled to participate in all stages of the procedure by:

- Receiving all written submissions (including documents and reports, etc.) made by the Parties to the Arbitration;
- Receiving all orders, interim and final awards and other documents exchanged by the Arbitral Tribunal with the Parties to the Arbitration (including terms of reference and procedural timetable);
- Filing any *amicus curiae* briefs; and
- Sending representatives to the hearing(s) who are allowed to ask questions to the Parties to the Arbitration, witnesses and experts.

82. The Arbitral Tribunal shall forward, or shall order the Parties to the Arbitration to forward, the documents mentioned to the Commission without delay.

83. In the event of disagreement between the Parties to the Arbitration regarding the interpretation of the Commitments, the Arbitral Tribunal may seek the Commission’s interpretation of the Commitments before finding in favor of any Party to the Arbitration and shall be bound by the interpretation.

12. Decisions of the Arbitral Tribunal

84. The Arbitral Tribunal shall decide the Dispute on the basis of the Commitments and the Decision. Issues not covered by the Commitments and the Decision shall be decided (in the order as stated) in accordance with the Merger Regulation, EU law and Spanish law. Any

decision taken by the Arbitral Tribunal requires a majority vote by the members of the Arbitral Tribunal.

13. Preliminary rulings

85. Upon request of the Purchaser, the Arbitral Tribunal may make a preliminary ruling on the Dispute. The preliminary ruling shall be rendered within one month after the confirmation of the Arbitral Tribunal by the Arbitral Institution, shall be applicable immediately and, as a rule, remain in force until a final decision is rendered by the Arbitral Tribunal.

14. Final award

86. The Arbitral Tribunal shall, in a preliminary ruling as well as in a final award, specify the action(s), if any, to be taken by Orange or an Affiliated Undertaking in order to comply with the Commitments vis-à-vis the Purchaser (e.g. specify a contract including all relevant terms and conditions). The final award shall be final and binding on the Parties to the Arbitration and shall resolve the Dispute and determine any and all claims, motions or requests submitted to the Arbitral Tribunal. The arbitral award shall also determine the reimbursement of the costs of the successful party and the allocation of the arbitration costs. In case of granting a preliminary ruling or if otherwise appropriate, the Arbitral Tribunal shall specify that terms and conditions determined in the final award apply retroactively.

15. Timeframe

87. The final award shall, as a rule, be rendered within six months after the confirmation of the Arbitral Tribunal by the Arbitral Institution. The timeframe shall, in any case, be extended by the time the Commission takes to submit an interpretation of the Commitments if asked by the Arbitral Tribunal.

16. Publication of award

88. The Parties to the Arbitration shall prepare a non-confidential version of the final award, without business secrets. The Commission may publish the non-confidential version of the award. The Parties to the Arbitration, the Arbitral Tribunal, all other persons participating in the proceedings and all further persons involved, i.e. in the administration of the arbitral proceedings shall maintain confidentiality towards all persons regarding the conduct of arbitral proceedings. All proceedings are being held in private and remain confidential.

17. No restriction of Commission

89. Nothing in the arbitration procedure shall affect the power to the Commission to take decisions in relation to the Commitments in accordance with its powers under the Merger Regulation.

Section F. The review clause

90. The Commission may extend the time periods foreseen in the Commitments in response to a request from Orange or, in appropriate cases, on its own initiative. Where Orange requests an extension of a time period, it shall submit a reasoned request to the Commission no later than one month before the expiry of that period, showing good cause. This request shall be accompanied by a report from the Monitoring Trustee, who shall, at the same time send a non-confidential copy of the report to the Notifying Party. Only in exceptional

circumstances shall Orange be entitled to request an extension within the last month of any period.

91. The Commission may further, in response to a reasoned request from the Notifying Party showing good cause waive, modify or substitute, in exceptional circumstances, one or more of the undertakings in these Commitments. This request shall be accompanied by a report from the Monitoring Trustee, who shall, at the same time send a non-confidential copy of the report to the Notifying Party. The request shall not have the effect of suspending the application of the undertaking and, in particular, of suspending the expiry of any time period in which the undertaking has to be complied with.

Section G. Entry into force

92. The Commitments shall take effect upon the date of adoption of the Decision.

____

[Signed]

Duly authorized for and on behalf of Orange SA

Schedule 1

Details on the Divested Coherent FTTH network

1. *Geographic coverage*

The map in Annex 1 to Schedule 1 provides an overview of the geographic location of the densely populated urban areas concerned by the Coherent FTTH Network.

The table in paragraph 9 identifies the Coherent FTTH Network at the level of the Central Office.

2. *Technical details*

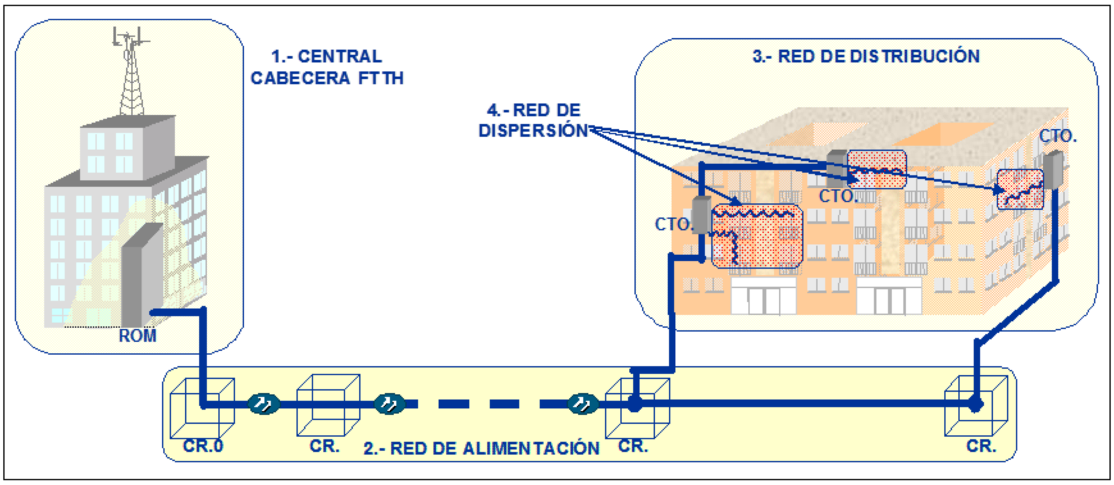
The sale agreement includes:

OLT equipment (equipment installed in the Central Cabecera FTTH): an optical line terminal is a device that is located at the service provider central office and is the endpoint of Gigabit-capable passive optical network (GPON) architecture.

FTTH supply network (Red de Alimentación): it is the fibre cables network and optical junction boxes deployed from the Central office OLT to the CR ("Cámara de Registro"), which is the manhole where the first level of GPON splitting can be installed (inside optical fiber splicing boxes). These elements would be installed in ducts and manholes, most of them provided by Telefonica using access to the ducts reference offer (MARCo).

FTTH distribution network (Red de Distribución): It is the fibre cables network and optical junction boxes deployed from the first splitter to the second splitter in a GPON architecture. This second splitter is inside the Optical Termination Box (OTB; CTO in Spanish) from which the drop cables to the subscribers are connected.

The diagram below shows the structure of the Coherent FTTH Network, which includes the elements described above:



Please note that networks connecting CRs with OTBs (CTOs) are considered part of the FTTH distribution network and therefore they are included in the Coherent FTTH Network object of the transaction. However, the FTTH dispersion network (*Red de Dispersion*), which is the part of the network aimed at connecting each client, has not been deployed as of today. Therefore, the FTTH dispersion network is not part of the Coherent FTTH Network object of the transaction.

For the avoidance of doubt, the underlying wholesale components of the Coherent FTTH Network currently provided by Telefónica to the Parties by means of contracts concluded between the Parties and Telefónica (regarding ducts used by the Coherent FTTH Network, rented space in Telefónica’s local exchanges or vertical infrastructure access agreement) will not be transferred as part of the Coherent FTTH Network as the Parties will continue to need access to these wholesale components to operate the non-divested part of its FTTH network and their ADSL networks. In the event that Telefónica definitively refuse to conclude similar contracts with the Purchaser with respect to (i) the rented space in Telefónica's local exchanges needed for the Coherent FTTH Network and/or (ii) to the access to the ducts utilised by the Coherent FTTH Network, Orange shall use its best efforts to provide the Purchaser with access to (i) Orange's rented space in Telefónica's local exchanges and (ii) to Orange's access to these ducts, to the extent they are necessary for the Purchaser to operate the Coherent FTTH Network independently and viably and taking into account the need for the Parties to remain independent and viable on their own operations. In this event and under these conditions, Orange commits to provide such access to the Purchaser under terms and conditions no worse than those Orange contracted with third parties for its own access.

3. Transition period

At the request of the Purchaser, during the transition period, Orange will operate the Coherent FTTH network on behalf of the Purchaser:

In order for the Purchaser to operate the fibre network instantly, a temporary service for the outsourcing of the management of the sold fibre network is offered. This service is offered over the NEBA interface and it allows the Purchaser to provide broadband services over fibre to its end customers from the moment the sale-purchase is executed.

The service includes a management web service through a portal that allows management of the following queries and requests, among others: fully unbundled service coverage query by telephone number, by MIGA code, by address; request for activation of unbundled service by telephone, by address; query on the status of the services; query on finalized services; request for unsubscription from an active service; request for a change to the speed of an active service; request for cancelation of an active service that had not been yet installed; opening of technical incidents.

Each party shall bear installation and maintenance costs for equipment and network on its side of the connection point.

The service is offered under a Service Level Agreement (SLA) that would be agreed between the parties. Orange Espagne, acting as network manager, shall be liable for repair of failures, anomalies or deficiencies of the Service except the same arise as a consequence of an erroneous, improper or unauthorized handling of elements owned by the Purchaser that are external to the network.

4. IRU in favor of Orange Espagne

In order for Orange Espagne to benefit from the IRU over the Coherent FTTH Network set out in paragraph 16 above, Orange commits to enter into an IRU agreement with the Purchaser at the conditions set herewith (the "IRU Agreement").

Orange Espagne shall be granted an IRU over 40% of the capacity of the Coherent FTTH Network at the level of each local exchange. Such capacity shall be expressed in terms of number of customers connected by Orange Espagne through the Coherent FTTH Network at the level of that specific local exchange, divided by the total number of BUs of the Coherent FTTH Network hosted at that local exchange.

The economic consideration to be paid to the Purchaser by Orange Espagne in exchange for the IRU over the Coherent FTTH Network shall be composed of two elements:

- a one-shot fee; and

- a recurrent fee. The recurrent fee shall cover maintenance costs incurred by the Purchaser for the provision of the IRU over the Coherent FTTH Network to Orange Espagne.

The one-shot fee and the recurrent fee shall be freely negotiated between the Purchaser and Orange Espagne in the IRU Agreement.

The IRU over the Coherent FTTH Network shall last a period of 35 years in exchange for an economic consideration to be agreed between Orange Espagne and the Purchaser. Nothing in the Commitments shall prevent the Purchaser and Orange to agree to renew the IRU for successive periods.

The IRU over the Coherent FTTH Network will be provided at a defined number of delivery points. The location and the number of the delivery points shall be jointly agreed upon between Orange Espagne and the Purchaser in the IRU Agreement.

The Purchaser shall be liable for the maintenance of the quality conditions of the Coherent FTTH Network (and thus directly affecting Orange Espagne's IRU).

The Purchaser shall be responsible of the acquisition and maintenance of any rights, leases, licenses, permits and agreements needed for Orange Espagne to access the premises and/or infrastructures of the Coherent FTTH Network, which are the object of the IRU.

In the event of the sale of the Coherent FTTH Network by the Purchaser to a third party, the IRU Agreement shall be transferred as part of this sale.

Schedule 2

Details of the Wholesale ADSL Bitstream Service

1. Economic terms

- Set-up cost per line (non -recurrent cost): […]*
- ULL line charge (monthly recurrent cost): […]*

Concept	**Cost (€/month)**
Unbundling recurrent cost	[…]*
Recurrent cost of OBA energy and cablings	[…]*
Backhauling Leased lines (*)	[…]*
Transport aggregation cost (*)	[…]*
Technical assistance	[…]*
TOTAL COST	[…]*

(*) Note: these costs are dependent on the average traffic generated by each line and have been calculated based on a maximum monthly average traffic of […]*

- Disconnection cost (non -recurrent cost): […]*.
- Offer valid up to a monthly average traffic of […]* per customer at peak hour.

  Traffic is measured at the interconnection point, under the same way as for other wholesale offers such as NEBA. The measurement process will be as follows:

  - Instant carried traffic samples will be taken, both for upstream and downstream, every X minutes (initially X=10 minutes) at the interconnection point, during one month;
  - The 95th percentile of the traffic measurements will be calculated for the highest series of measured values (upstream or downstream);
  - The resultant traffic of the month will be divided by the average number of active final customer connections during the same month.

  If the result of that division exceeds 375kbps, the additional price per incremental unit kb/s above […]* per line ("Backhauling Price for Additional Traffic") will be […]* per month per line. For the avoidance of doubt, at the interconnection point with an average traffic of 750 kb/s in a specific month, and with a number of provisioned Purchaser lines of 1.000, the price to be paid for those lines in that specific month will be the following:

  Price = […]*

  The Backhauling Price for Additional Traffic of […]* will be adjusted according to the following provisions:

i. The Wholesale ADSL Bitstream Agreement shall provide for an annual adjustment of the Backhauling Price for Additional Traffic. This adjustment shall reflect, on a yearly basis, the development of Telefónica's regulated leased lines prices.

ii. The applicable Backhauling Price for Additional Traffic in each year is […][*] per month per line multiplied by a Price Index Factor.

iii. The Price Index Factor in 2016 is 1. The Price Index Factor applicable in each year after 2016 corresponds to the Price Index Factor applicable in the previous year multiplied by an Annual Correction Factor.

iv. The initial Annual Correction factor weights the average Fast Ethernet circuits and Gigabit Ethernet circuits price drops per year over the last three years for the Orange leased lines portfolio (mix of circuits typology between Fast Ethernet or Gigabit Ethernet and length of each circuit). The initial Annual Correction factor is […][*].

v. If in any year the Spanish regulatory authority for telecommunications enacts new regulated wholesale prices for leased lines (such as Fast Ethernet or Gigabit Ethernet lines), currently regulated under the Oferta de Referencia de Lineas Alquiladas (ORLA),[1] the Annual Correction Factor applicable in the year following the issuance of the new regulation will be calculated as follows. The Annual Correction Factor is one plus the compound growth rate, on a yearly basis, of the mean regulated leased line prices (in €/month/Mbps) of the Orange leased lines portfolio (mix of circuits typology, length of each circuit and amortizing one-time payments over 8 years) compared to the previously published regulated prices but assuming the same Orange leased line portfolio. The new Annual Correction Factor apply from the year following the issuance of the new regulation.

vi. No later than 15 February of each year, Orange shall submit to the Purchaser and the Monitoring Trustee the calculated Backhauling Price for Additional Traffic to that year. At the same time, Orange shall submit to the Monitoring Trustee all relevant information used for the calculation of Backhauling Price for Additional Traffic, including the applicable Price Index Factor and the Annual Correction Factor. The Monitoring Trustee shall verify the calculations and request any further information it deems necessary to do so. The Purchaser may submit any observations to the Monitoring Trustee no later than 1 March of each year. In the event that by the end of March of each year, the Monitoring Trustee observes that there is no agreement between Orange and the Purchaser on the Backhauling Price for Additional Traffic, the Monitoring Trustee, after consulting Orange and the Purchaser, shall set the applicable Backhauling Price for Additional Traffic as well as the applicable Price Index Factor and Annual Correction Factor, based on the information available to it and applying the principles set out in paragraphs i.-v.

1 Resolución por la que se aprueba la revisión de precios de la oferta de referencia de líneas alquiladas de Telefónica de España, S.A.U. y se acuerda su notificación a la CE y al ORECE (AEM 2013/237).

Other applicable costs:

- Customer Premises Equipment (optional): […][*] €/equipment
- Incident management: […][*]. Such cost shall only be charged in case of incident attributable to the Purchaser.
- On-site support for provisioning/after sales : […][*] per on site visit. The on-site support should be optional, the Purchaser shall have the possibility to outsource such on-site support to a reliable service provider operating according to common industry standards and practices.
- Other OBA concepts requested by the Customer to be applied at […][*]

2. Coverage

The Wholesale ADSL Bitstream Service enables the access to 1.123 Main Distribution Frames listed in Annex 1 to Schedule 2.

3. Parameters for Quality of Service of VOIP services

- Loss of packets shall be less than 0.1%.
- Unidirectional delay (latency) shall be less than 90 ms (for 64 bytes packet size).
- Jitter shall be less than 20 ms.

These parameters shall be measured between the customer premises equipment and the national service delivery interconnection point, excluding during planned maintenance periods.

Annex 1 of Schedule 1 – Divestment Network – Aerial photographs

[…]*

Annex 1 of Schedule 2 – List of MDFs

[…]*