EUROPEAN COMMISSION
DG Competition

PUBLIC VERSION

Case M.10896 – ORANGE / MASMOVIL / JV

(Only the English text is authentic)

REGULATION (EC) No 139/2004
MERGER PROCEDURE

Article 8(2) Regulation (EC) 139/2004
Date: 20/02/2024

EUROPEAN
COMMISSION

Brussels, 20.2.2024
C(2024) 1161 final

COMMISSION DECISION

of 20.2.2024

declaring a concentration to be compatible with the internal market and the EEA agreement

(Case M.10896 – ORANGE / MÁSMÓVIL / JV)

(Only the English text is authentic)

TABLE OF CONTENTS

COMMISSION DECISION

of 20.2.2024

declaring a concentration to be compatible with the internal market and the EEA agreement

(Case M.10896 – ORANGE / MÁSMÓVIL / JV)

(Only the English text is authentic)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union[1],

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 20.1.2004 on the control of concentrations between undertakings[2], and in particular Article 8(2) thereof,

Having regard to the Commission's decision of 15 February 2024 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,

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

Whereas:

1. INTRODUCTION

(1) On 13 February 2023, the Commission received notification of a proposed concentration pursuant to Article 4 of Council Regulation (EC) No 139/2004[3] whereby Orange S.A. ("Orange", France) and Lorca JVCo Limited ("Lorca", UK, together with Orange hereafter referred to as the "Parties") intend to acquire joint control over a newly formed full-function joint venture (the "JV") within the meaning of Article 3(1) and 3(4) of the Merger Regulation, to which the businesses of Orange Espagne S.A.U ("OSP", Spain) and MásMóvil Ibercom S.A.U. ("MásMóvil ", Spain) will be transferred (the "Transaction").[4]

2. THE PARTIES

(2) Orange is a French global telecommunications operator present in the Spanish telecommunications market through its subsidiary OSP. OSP provides mobile and

1 OJ C 115, 9.8.2008, p.47.

2 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.

3 OJ L 24, 29.1.2004, page 1 (the "Merger Regulation").

4 Publication in the Official Journal of the European Union No C 96, 15.03.2023, page 9.

fixed telecommunication services to residential customers, business customers and wholesale customers in Spain. It operates under three brands: Orange, Jazztel, and Simyo.

(3) Lorca is a holding company controlling MásMóvil. MásMóvil provides fixed and mobile telecommunications services mainly to residential customers in Spain. It operates under a wide variety of brands, such as Yoigo, MásMóvil and Virgin, as well as digital-focused brand Pepephone, regional brands Euskaltel, R., Guuk, Embou and Telecable and international customers brands Llamaya, Lebara, Lycamobile.

(4) The newly founded JV will combine the mobile and fixed telecommunication businesses of OSP and MásMóvil. Orange will retain some business activities in Spain, which will not be contributed to the JV, in particular TOTEM TowerCo, a mobile passive infrastructure operator.[5]

3. THE OPERATION

(5) The Transaction concerns the creation of a full-function joint venture within the meaning of Articles 3(1) and 3(4) of the Merger Regulation, by combining OSP and MásMóvil's telecommunications and ancillary businesses.

(6) Upon completion of the Transaction, the JV will be 50/50 owned and jointly controlled by Orange and Lorca. A binding Framework Agreement which sets out the terms and conditions for the Transaction has been executed on 22 July 2022. Orange and Lorca will acquire joint control over the JV based on equal voting rights in the JV, in line with paragraph 64 of the Consolidated Jurisdictional Notice, and negative veto rights over key strategic decisions for the operation of the JV (e.g., approval of business plan, appointment of senior executive and decisions on major investments), in line with paragraph 67 of the Consolidated Jurisdictional Notice. Furthermore, the Shareholders Agreement requires equal representation of Orange and Lorca JVCo Limited on the Board of Directors of the JV. As a result, Orange and Lorca will acquire joint control over the JV under Article 3(1) of the Merger Regulation.[6]

(7) The JV will be full-function within the meaning of Article 3(4) of the Merger Regulation, since it will have sufficient resources, activities beyond one specific function for the parents, access to the market, and perform on a lasting basis all the functions of an autonomous economic entity.

4. UNION DIMENSION

(8) The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 000 million (Orange: EUR 42 728.012 million; MásMóvil: EUR 2 837 million; combined: EUR 45 565.012 million). Each of them has an EU-wide turnover in excess of EUR 250 million (Orange: EUR [...] million; Lorca:

---

[5] Other entities to be retained by Orange perform activities of a more ancillary nature and include: Inversión en Telecomunicaciones (a fund under liquidation process), Business & Decision España (management consultancies and system integrators for data intelligence & digital experience), Orange Business Spain SAU (providing communication products and services to enterprises), Orange Bank S.A. (aims to develop a complete banking offer, mainly for individual customers, accessible by mobile phone on the model of online banks).

[6] [Details of Shareholders Agreement regarding possible exit scenarios from the JV which do not impact the Parties' joint control over the JV].

EUR 2 837 million). Each of Orange and Lorca achieve more than two-thirds of its EU-wide turnover within a single Member State, but not within the same Member State (France for Orange and Spain for Lorca).

(9) Therefore, the Transaction has an EU dimension pursuant to Article 1(2) of the Merger Regulation.

5. THE PROCEDURE

(10) The Transaction was notified on 13 February 2023.

(11) After a preliminary examination of the notification and based on the Phase I market investigation, the Commission concluded that the Transaction raised serious doubts as to its compatibility with the internal market as regards the markets for the retail supply of: (i) mobile telecommunications services in Spain; (ii) fixed internet access services in Spain; (iii) multiple-play bundles in Spain; and (iv) fixed mobile convergent ("FMC") services in Spain as well as the markets for the wholesale supply of: (iv) access and call origination services on mobile networks, and (v) the wholesale supply of broadband access services in Spain and adopted a decision to initiate proceedings pursuant to Article 6(1)(c) of the Merger Regulation on 3 April 2023 (the "Article 6(1)(c) Decision").

(12) In accordance with paragraphs 45 and 46 of the Best Practices on the conduct of EU merger control proceedings, on 4 April 2023 the Commission provided a number of key documents to the Parties.

(13) On 12 and 17 April 2023, the Commission provided, at the request of the Parties, two additional key documents to the Parties.

(14) On 20 April 2023, the Parties submitted their written comments on the Article 6(1)(c) Decision (the "Article 6(1)(c) Response").

(15) On 27 April 2023, a state of play meeting between the Parties and the Commission took place.

(16) On 27 April 2023, the Phase II investigation period was extended by 10 working days at the request of the Parties pursuant to the first sentence of the second subparagraph of Article 10(3) of the Merger Regulation.

(17) On 3 May 2023, another state of play meeting between the Parties and the Commission took place.

(18) On 16 May 2023, a technical meeting between the Commission and the Parties' economists took place.

(19) On 22 June 2023, a state of play meeting between the Parties and the Commission took place during which the Commission explained its preliminary findings based on its Phase II investigation.

(20) Based on the Phase II investigation which supplemented the findings of the Phase I investigation (jointly referred to as the "market investigation"), the Commission issued a statement of objections on 26 June 2023 (the "SO")[7]. In the SO, the Commission came to the preliminary view that the Transaction would significantly impede effective competition in a substantial part of the internal market within the meaning of Article 2 of the Merger Regulation because of horizontal unilateral

[7] Commission's document C(2018) 6038.

effects in the markets for the retail supply of: (i) mobile telecommunications services in Spain; (ii) fixed internet access services in Spain; (iii) multiple-play bundles in Spain; and (iv) FMC services in Spain.

(21) The access to file was first granted on 27 June 2023. Subsequent access to the file was granted on a rolling basis until the Advisory Committee.

(22) The Parties submitted their written comments on the SO on 10 July 2023 (the "SO Reply").

(23) On 11 July 2023, the Parties confirmed that they would not request an Oral Hearing.

(24) A State of Play meeting between the Parties and the Commission took place on 20 July 2023.

(25) On 27 July 2023, the Commission adopted a decision pursuant to Article 11(3) of the Merger Regulation, addressed to the Parties requesting further information to carry out the necessary assessment on the remedies, following receipt of a letter signed by the Parties and Digi Spain outlining ongoing negotiations on potential commitments ("Article 11(3) Decision"). This Decision suspended the time limit referred to in Article 10(3) of the Merger Regulation. The Parties complied with the Article 11(3) Decision on 11 December 2023. Therefore, pursuant to Article 10(4) of the Merger Regulation, the suspension of the time limits expired at the end of 11 December 2023.

(26) On 1 September 2023, the Commission issued a Letter of facts ("LoF").

(27) On 22 September 2023, the Parties submitted their written comments on the Letter of facts ("LoF Reply").

(28) On 12 December 2023, the Parties submitted commitments pursuant to Article 8(2) second subparagraph of the Merger Regulation to address the competition concerns identified by the Commission. Accordingly, the legal deadline for the Commission decision was automatically extended by 15 working days, pursuant to Article 10(3) first subparagraph of the Merger Regulation.

(29) On 12 December 2023, the Commission launched a market test of the commitments submitted by the Parties.

(30) The Commission gave the Parties detailed feedback on the outcome of the market test on 11 January 2024.

(31) On 30 January 2024, the Parties submitted revised commitments pursuant to Article 8(2) of the Merger Regulation.

(32) The Advisory Committee was convened on 15 February 2024.

6. THE INVESTIGATION

(33) This Decision contains the Commission's findings on the basis of the market investigation it carried out prior to the notification of the Transaction, in the Phase I and in the Phase II of the investigation until the adoption of the Decision.

(34) Prior to the notification of the Transaction, the Commission sent 16 requests for information to the Parties, responses to which were included in the notification. The Commission conducted several interviews with market participants.

(35) During the Phase I investigation, the Commission sent 6 requests for information to the Parties pursuant to Article 11 of the Merger Regulation. The Commission also sent requests for information in the form of two different questionnaires to market

participants (the Parties' competitors, mobile and fixed wholesale customers, suppliers, and customers associations) as well as to Tower Companies.

(36) Over the course of its Phase II investigation, the Commission sent 24 requests for information to the Parties pursuant to Article 11 of the Merger Regulation, including detailed internal documents requests, resulting in the submission of over 2 million internal documents (approximately 930 000 documents from Orange side and 1.15 million documents from MásMóvil). Further, the Commission held several calls and meetings with market participants and sent requests for information to competitors, mobile and fixed wholesale customers, suppliers, and customers associations.

7. THE SPANISH TELECOMMUNICATIONS SECTOR

(37) This Section provides an overview of the telecommunications sector in Spain. The purpose of this Section is to set the framework and provide the context for the assessment undertaken in Sections 8 and 9.

(38) The Spanish National Markets and Competition Commission (Comisión Nacional de los Mercados y la Competencia, the "CNMC") acts both as national competition authority and as national communications regulator in Spain. It collects data on the development of mobile services, fixed telephony services, internet access services, television services and bundles in Spain based on which it prepares key data annual reports[8] and publishes quarterly data.[9] The latest available report was published on 18 July 2023 and covered the year 2022, and the CNMC has also provided annual data and statistics on its website on 28 July 2023. The overview of the Spanish telecommunications sector that follows is primarily based on CNMC's data.

7.1. Developments of the Spanish telecommunications market

(39) The Spanish telecommunications market, and in particular the mobile telecommunications sector, has a high level of digital connectivity compared to other EU Member States. As shown in **Figure 1** below Spain ranks third among the EU Member States for digital connectivity.[10]

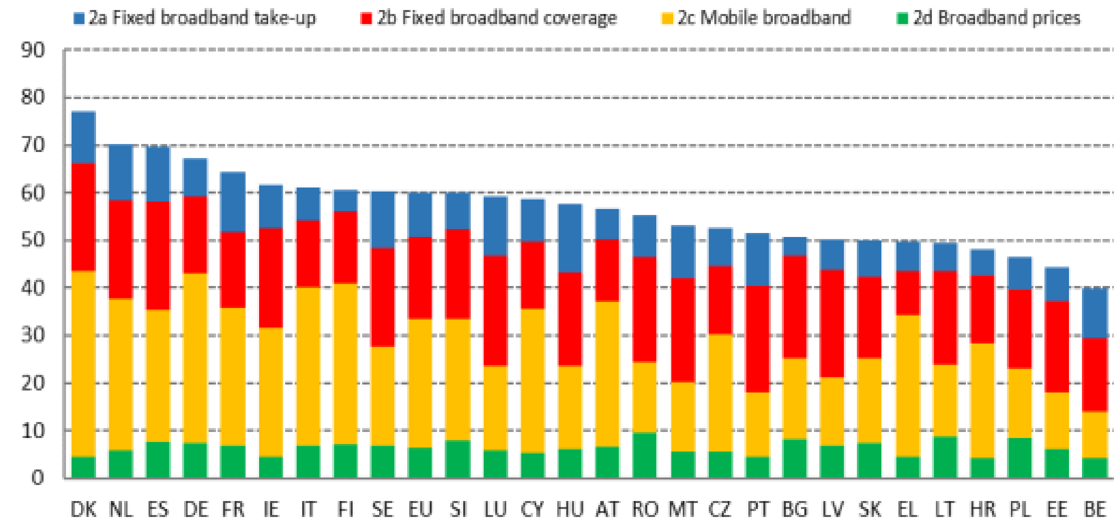
---

8 See ESTAD/CNMC/003/23: INFORME ECONÓMICO SECTORIAL DE LAS TELECOMUNICACIONES Y EL AUDIOVISUAL 2022, Doc ID 5655.

9 See https://data.cnmc.es/telecomunicaciones-y-sector-audiovisual/datos-trimestrales/datos-generales/telecomunicaciones, Doc ID 5653.

10 Form CO, paragraph 515. European Commission, Digital Economy and Society Index (DESI) 2022, page 8.

Figure 1 Digital Economy and Society Index (DESI) 2022, Connectivity.



Source: European Commission – DESI 2022.

(40) The major developments of the Spanish telecommunications market in the last ten years and its current dynamics are described below for mobile (Section 7.1.1), fixed internet (Section 7.1.2), and multiple-play offers (Section 7.1.3).

7.1.1. Mobile developments

(41) In 2022, the overall market for retail supply of mobile telecommunications services in Spain, including residential and business customers as well as mobile standalone or as part of multiple-play bundles, had a total size of approximately EUR [5-10] billion by revenue and [50-60] million SIM cards.[11] The market mainly includes residential customers, who represent EUR [5-10] billion by revenue and [40-50] million SIM cards, and account for a larger segment of the market than business customers.[12] The standalone mobile telecommunication services segment is small (EUR [0-5] billion and [20-30] million SIM cards[13]) compared to multiple-play bundles given the convergent nature of the Spanish market described in Section 7.1.3 below.

(42) At wholesale level, the wholesale mobile access market has been deregulated since 2017 in Spain, when the CNMC considered it to be competitive without a need for *ex ante* intervention and deregulated the market.[14] Its decisions were based, among others, on the high number of MVNOs active in the Spanish retail market (i.e., almost 30 full and light MVNOs in 2017).[15]

(43) The Spanish population is connected with the different generations of the mobile communication standard (2G, 3G, 4G, and 5G).

11 Annex RFI 37 Q1.

12 Annex RFI 37 Q1.

13 Annex RFI 37 Q1.

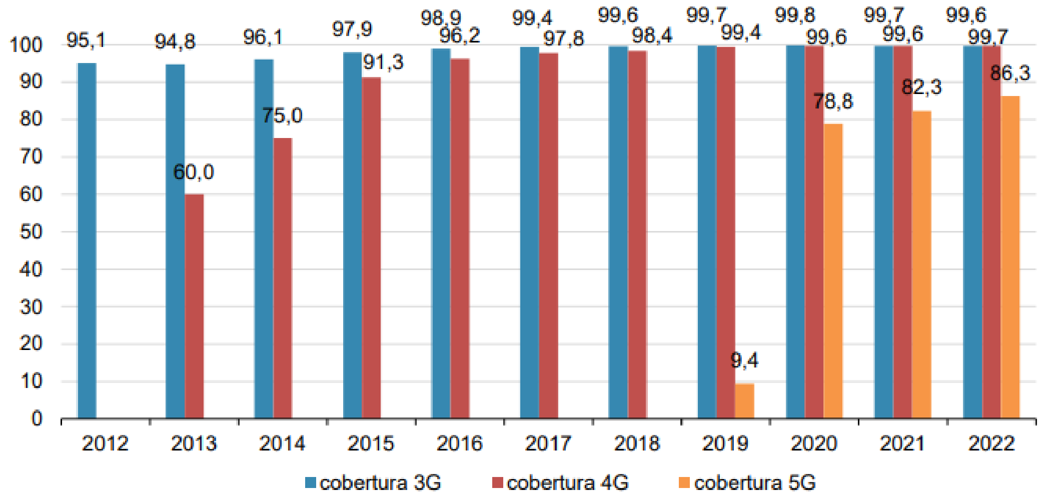
14 Form CO, paragraph 442. See CNMC (2017), Resolution approving the definition and analysis of the wholesale market for access and origination in mobile networks (market 15/2003) and agreeing to its notification to the European Commission and the Body of European Regulators for Electronic Communications, page 6, available at: https://www.cnmc.es/sites/default/files/1601180_46.pdf, Doc ID 5652.

15 Form CO, paragraph 442.

(44) Regarding 4G technology, its roll-out started in 2013. In terms of coverage of the Spanish population, its deployment expanded quickly between 2013 and 2016, then increased by one percentage point a year between 2016 and 2019 (from 96.2% to 99.4%) (see **Figure 2** below). In 2022, the equipment that provided coverage with 4G technology reached a total of 62.158 base stations and a population coverage of 99.7%. Data traffic managed through mobile networks grew by 42.5% in 2022 compared to the previous year, reaching 6.2 million Terabytes. Furthermore, the average monthly traffic per line increased by 37.8% in 2022 compared to the previous year to 9.8 Gigabytes.

(45) Finally, 4G networks remained the most frequently used technology by the Spanish customers, accounting for 90.3% of the total registered traffic in 2022.

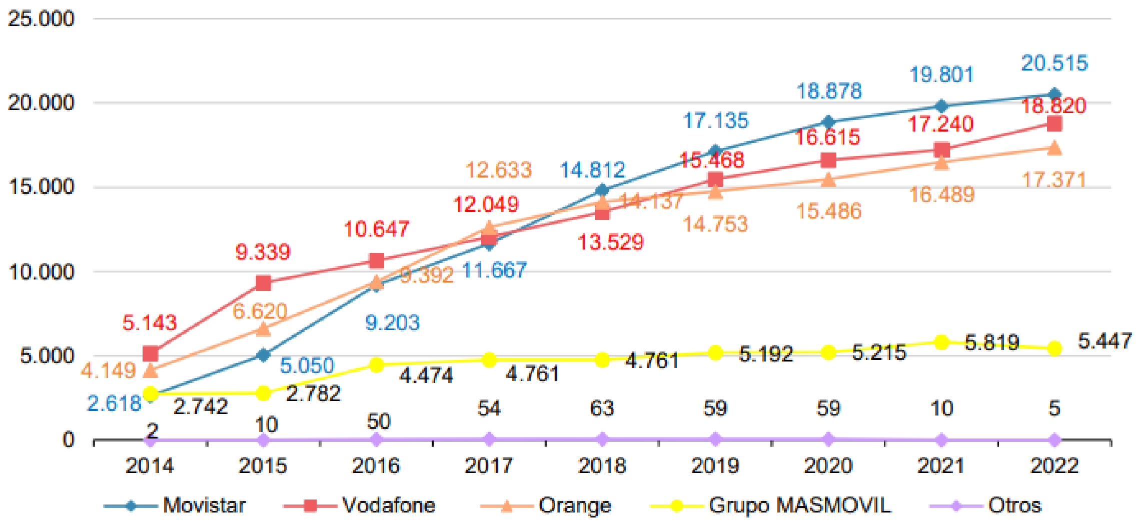
Figure 2 Total population of Spain covered by at least one 3G, 4G or 5G network (percentage) from 2012 to 2022



Source: CNMC 2022 report – Telecommunications and Audiovisual Sector Economic Report 2022 of 18 July 2023.

(46) **Figure 3** shows the evolution of the number of 4G base stations by operator. While MásMóvil has a lower number of 4G base stations compared to Telefónica, Vodafone and Orange it remains an MNO. Besides the four MNOs, however, there is no operator with a meaningful number of 4G base stations. The remaining operators have less than 0.01% of MásMóvil’s 4G base stations.

Figure 3 Distribution of 4G base stations by operator



Source: CNMC 2022 report – Telecommunications and Audiovisual Sector Economic Report 2022 of 18 July 2023.

(47) The roll-out of 5G started in 2019 and has quickly covered a significant part of the Spanish population in 2020 (78.8%) and continued to increase in 2022 (see **Figure 3** above). In 2022, a total of 16.649 base stations were already active and provided communications with 5G technology with a coverage of 86.3% of the population.[16] All four MNOs are already offering 5G services[17], based on their own network complemented with a national roaming agreement ("NRA") with another MNO to achieve a better coverage. The different agreements, including NRAs, are further described in Section 7.3.2 below.

(48) As shown in **Figure 4** dated 27 March 2023, compared to other European countries, Spain ranks 9th in terms of population coverage of 5G in Q3 2022, behind Italy, Germany and France.[18]

---

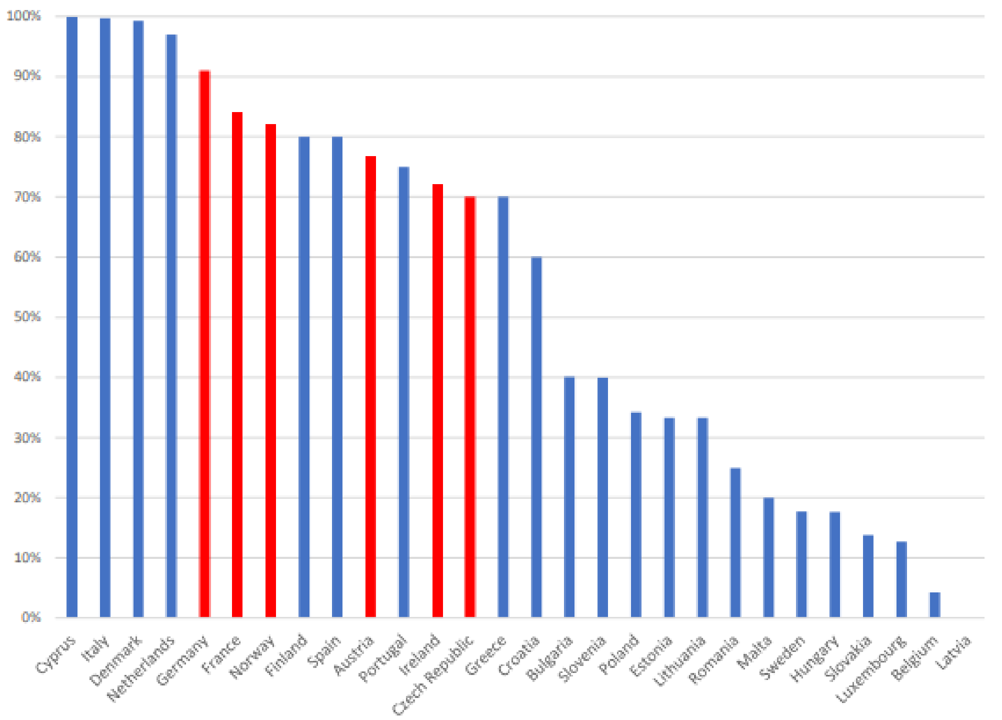
16 CNMC 2022 report – Telecommunications and Audiovisual Sector Economic Report 2022 of 18 July 2023.

17 See Form CO, paragraphs 571, 616, 655, and 686.

18 In the Form CO, paragraph 512, the Parties relied on a report of the European Commission's 5G Observatory, according to which Spain (58.9%) has a population coverage lower than the EU's average (66%). The Commission will not rely on this report, as it is dated 16 July 2022, whereas the study under **Figure 4** is dated 27 March 2023.

Figure 4 Population coverage of 5G of European countries

Figure 3-2: Population/household31 coverage of 5G, newest available data (where available: Q3 2022)



Source: BEREC, Study on wholesale mobile connectivity, trends and issues for emerging mobile technologies and deployments (WIK Consult, 27 March 2023)

(49) The Spanish mobile customer base (excluding machine-to-machine "M2M"[19]) is estimated at 59 million in 2022. Mobile penetration at the end of that year reached 124,4 lines per 100 inhabitants.[20]

(50) Mobile telecommunications subscriptions can be post-paid or pre-paid. Post-paid subscriptions are those charged after the services are used, whilst pre-paid subscriptions are those for which the payment is collected by the provider before the service is used.

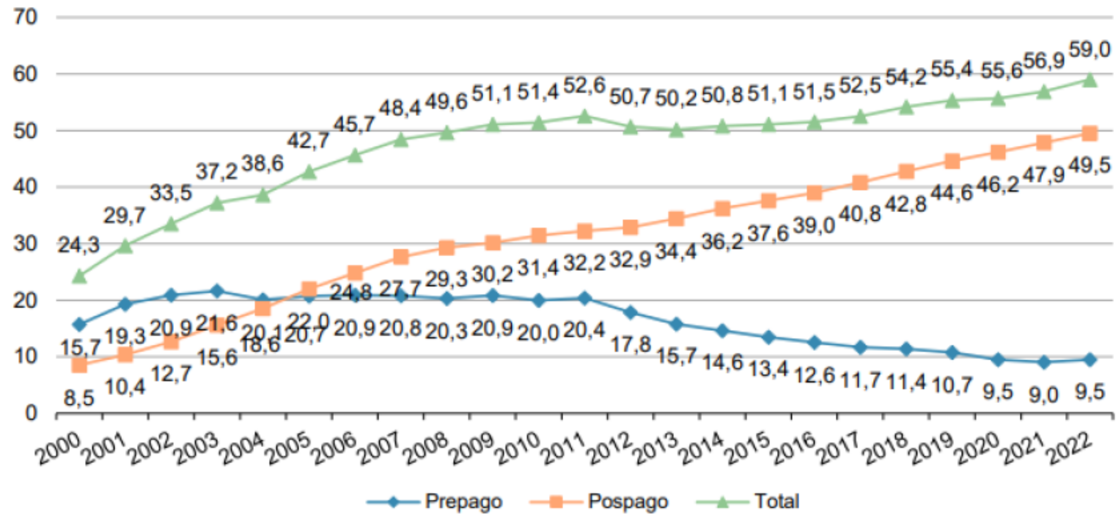
(51) In Spain, post-paid mobile lines represented over 83.8% of all active mobile lines in 2022.[21] The number of post-paid mobile lines has seen continued growth in recent years (as illustrated by the green line in **Figure 5** below), while the popularity of pre-paid mobile lines has continued to decline (as illustrated by the blue line in **Figure 5** below).

[19] M2M subscriptions allow machines, devices, appliances, etc. to connect wirelessly to the internet, permitting the transmission and receipt of data to a central server. Common examples of M2M include energy metering or a burglar alarm. Intelligent traffic lights, for instance, may rely on M2M services to communicate with each other to adjust their circuits.

[20] CNMC 2022 report – *Telecommunications and Audiovisual Sector Economic Report 2022* of 18 July 2023, page 78.

[21] In 2022, there were 59.0 million mobile lines in total, of which 49.5 million lines were post-paid mobile lines, amounting to 83.8%.

Figure 5 Number of mobile lines in Spain in millions (2000 – 2022)



Source: CNMC data, Report 2022

(52) In addition, there are two main types of retail mobile customers: private or residential customers to whom operators offer pre-paid and post-paid subscriptions, and business customers to whom operators offer post-paid subscriptions. In 2022, the mobile revenues of generated from sales of subscriptions to private and business customers amounted to EUR [5-10] billion and EUR [0-5] million, respectively.[22]

(53) **Table 1** below shows the evolution of number of subscribers and absolute gross adds for residential post-paid mobile standalone services and residential FMC bundles in Spain.

Table 1 Number of subscribers and gross adds in residential post-paid mobile standalone services and residential FMC bundles, Spain, 2019-H1 2022

Metric (millions)	Segment	2019	2020	2021	2022	Growth rate 2019-2022
Number of subscribers	Mobile post-paid standalone	[10-20]	[10-20]	[10-20]	[10-20]	-[5-10]%
	FMC bundles	[10-20]	[10-20]	[10-20]	[10-20]	[10-20]%
	Ratio bundles/standalone	[0-5]	[0-5]	[0-5]	[0-5]	[20-30]%
Gross adds	Mobile post-paid standalone	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]%
	FMC bundles	[0-5]	[0-5]	[0-5]	[0-5]	-[0-5]%
	Ratio bundles/standalone	[0-5]	[0-5]	[0-5]	[0-5]	-[5-10]%

Source: Parties' internal documents and Compass Lexecon's analysis, Form CO, paragraph 466, response to RFI 32, Annex Q2, and the Commission's analysis

7.1.2. Fixed internet developments

(54) In 2022, the overall market for the retail supply of fixed internet services in Spain, including residential and business customers as well as fixed internet standalone or as part of multiple-play bundles, had a total size of approximately EUR [...] by

[22] Annex RFI 37 Q1.

revenue and [...] fixed lines.[23] The market mainly includes residential customers, who represent EUR [...] in terms of revenues and [...] in terms of number of fixed lines.[24] In addition, the number of standalone offers in the retail market for standalone fixed internet services in Spain is negligible (less than 4%[25]), given the convergent nature of the Spanish market.

(55) At wholesale level, the fixed internet wholesale market started to be deregulated by the CNMC in 2016. In a recent decision dated October 2021, the CNMC further increased the level of deregulation. The deregulated area has expanded from 66 municipalities (35% of the population) in 2016 to 696 municipalities (70% of the population) in 2021.[26] The regulated area, where Telefónica's historical obligations remain only includes 30% of the population (7.435 municipalities).[27] Telefónica's regulatory obligations require it to grant wholesale access to its fibre to the home ("FTTH") network at a price which is determined by way of an economic replicability test.[28] The imposition of a regulated price on Telefónica ensures access to Telefónica's FTTH network for new entrants in the market of retail supply of fixed internet services in these specific areas of Spain. The CNMC is expected to examine by 2024 whether regulation is still required for the affected municipalities.[29] The key factors that may drive further deregulation will be the presence of alternative networks and the increased competition in the areas where Telefónica had market power in 2021. In addition, Telefónica is required to offer wholesale access to its infrastructure (i.e. fibre and copper pair infrastructure, as well as ducts and passive infrastructure) for the development of FTTH networks to other actors in the whole Spanish territory[30]. As a result of this obligation, the deployment cost of FTTH networks for a new entrant or for an active player that wants to expand to another part of Spain is considerably reduced. More explanations of Telefónica's obligations are included in Section 7.3.2.2.

(56) The retail market for provision of fixed internet access services comprises different fixed network infrastructures: Digital Subscriber Line ("xDSL"), hybrid fibre coaxial ("HFC") cable, fibre to the node ("FTTN"), and FTTH. **Figure 6** below provides the percentage of each fixed infrastructure in Spain in 2022. FTTH is the most frequently used technology in Spain in 2022 and represents 79.9% of the total fixed network infrastructures.[31] It has increased by 3.6 points compared to 2021, while all other technologies have decreased compared to the previous year.

---

23 Annex RFI 37 Q1.

24 Annex RFI 37 Q1.

25 Form CO, paragraph 1206.

26 CNMC (2021), "The CNMC approves the regulation of the wholesale markets for access to the optical fibre networks", available at: https://www.cnmc.es/sites/default/files/editor_contenidos/Notas%20de%20prensa/2021/20211015_NP_Mercados%20BA_CO_eng%20(1).pdf, Doc ID 5651.

27 CNMC 2022 report – Telecommunications and Audiovisual Sector Economic Report 2022, page 118; CNMC decision dated 6 October 2021, ANME/DTSA/002/20/MERCADOS ACCESO LOCAL CENTRAL, published in the Official bulletin on 14 October 2021, BOE-A-2021-17097.

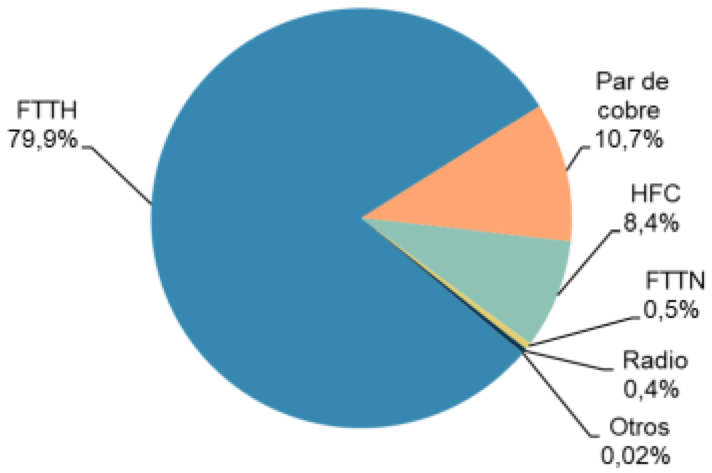
28 Commission Decision of 18 December 2015, Comments pursuant to Article 7(3) of Directive 2002/21/EC, C(2015)9722, pages 8-9.

29 Form CO, paragraph 436.

30 See https://www.cnmc.es/ambitos-de-actuacion/telecomunicaciones/concrecion-desarrollo-obligaciones

31 CNMC 2022 report – Telecommunications and Audiovisual Sector Economic Report 2022, page 8.

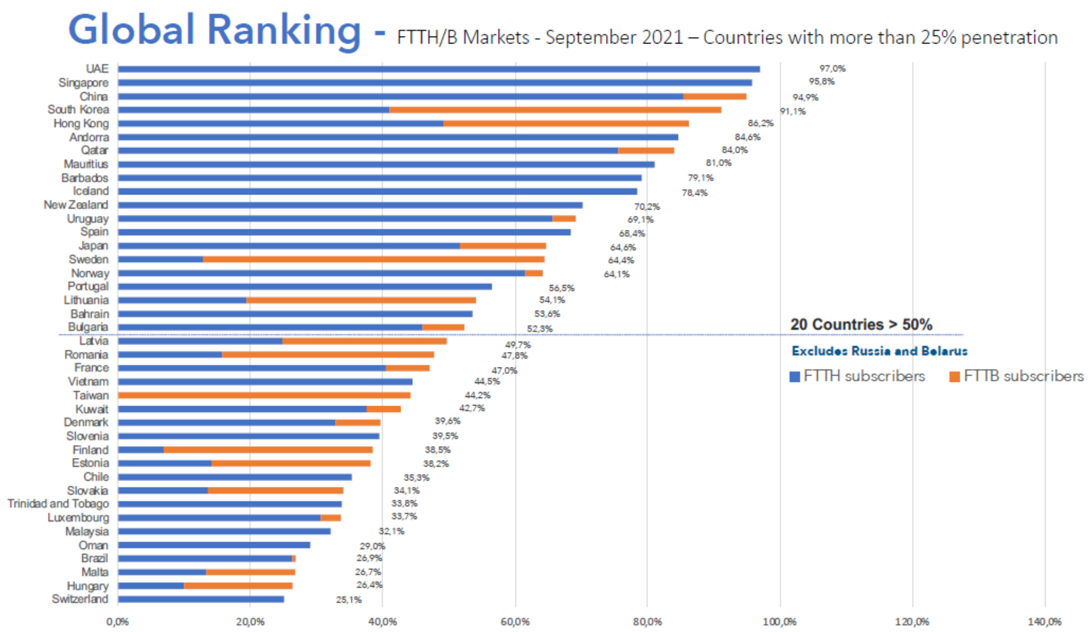
Figure 6 Type of connections in Spain in 2022



Source: CNMC Data, 2022 Report

(57) Compared to other European countries, Spain is one of the leading countries both in terms of coverage and penetration of FTTH fibre connections.[32] As of September 2021, Spain had the highest FTTH penetration rate among all EU Member States at 68.4%.

Figure 7 Global ranking of countries with over 25% FTTH penetration (September 2021)



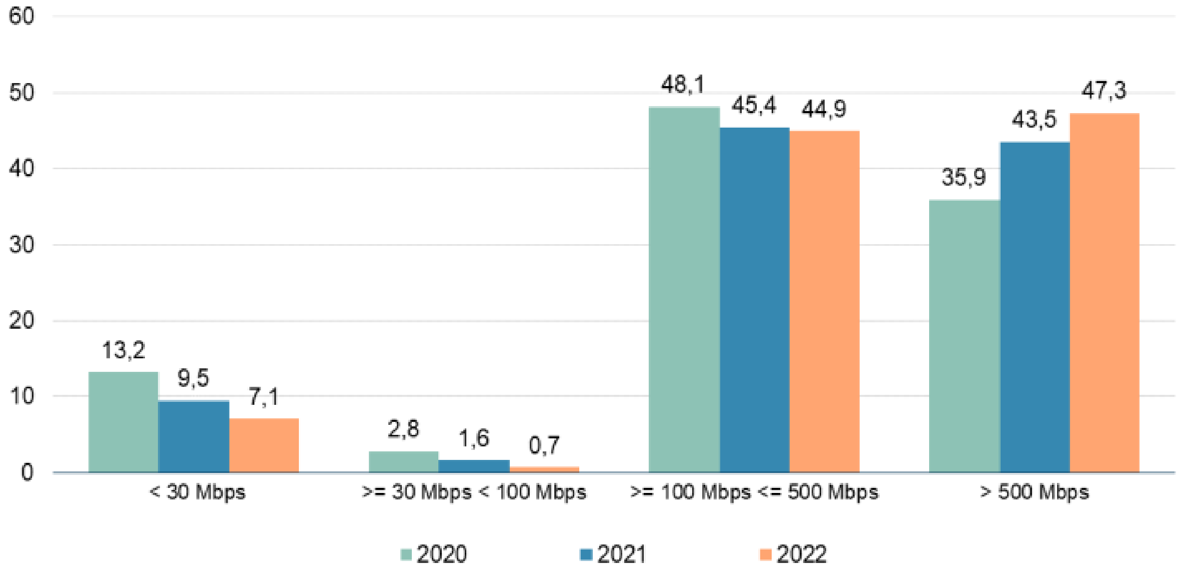
Source: FTTH Council, Form CO, paragraph 514

(58) Indeed, as regards FTTH coverage in Spain, the CNMC reported in 2022 that Spanish operators have continued to make progress in deploying FTTH with 92.9% of the lines having a speed equal to or greater than 30 Mbps, compared to 90.5% the previous year. The percentage of lines with speeds of 100 Mbps or higher reached

[32] CNMC (2021), "The CNMC approves the regulation of the wholesale markets for access to the optical fibre networks", available at: https://www.cnmc.es/sites/default/files/editor_contenidos/Notas%20de%20prensa/2021/20211015_NP_Mercados%20BA_CO_eng%20(1).pdf, Doc ID 5651.

92.3% compared to 88.9% in 2021. Likewise, lines with a speed of 500 Mbps or higher totalled 8.1 million (47.3% of total broadband accesses).[33]

Figure 8 Evolution of fixed lines by speed (2020-2022)



Source: CNMC Data, Report 2022

(59) In addition, the CNMC has noted the increased demand of Spanish customers of high speed offers as well as the significant increase of internet traffic. Indeed, according to the CNMC, 92.3% of sales in 2022 concerned offers with speed levels of at least 100 Mbps, as compared with 89% in 2021.[34] The CNMC also forecasts that residential customers will increasingly require accesses of 1 Gbps speeds, especially after 2025.[35] This requirement can be illustrated by the considerable increase in internet traffic in Spain between 2015 and 2022, insofar as average usage per line has increased from 50.27 Gigabytes per month and per fixed line in 2015 to 302.48 Gigabytes in 2022. Last year, the average increase per month and per fixed line was 32.7 Gigabytes compared to 2021. This increase is notably due to traffic coming from OTTs (e.g., Netflix, Amazon Prime, Disney+, etc.).

(60) Finally, in Spain, the active fixed internet accesses grew 2.6% in 2022 compared to the previous year. This increase placed the number of lines at 17.12 million and increased penetration to 36.1 lines per 100 inhabitants, which represents an increase of 1.1 lines per 100 inhabitants in the last year. In terms of households, the penetration of fixed internet rose to 91.3%. The total number of households amounted to 18.75 million in 2022.

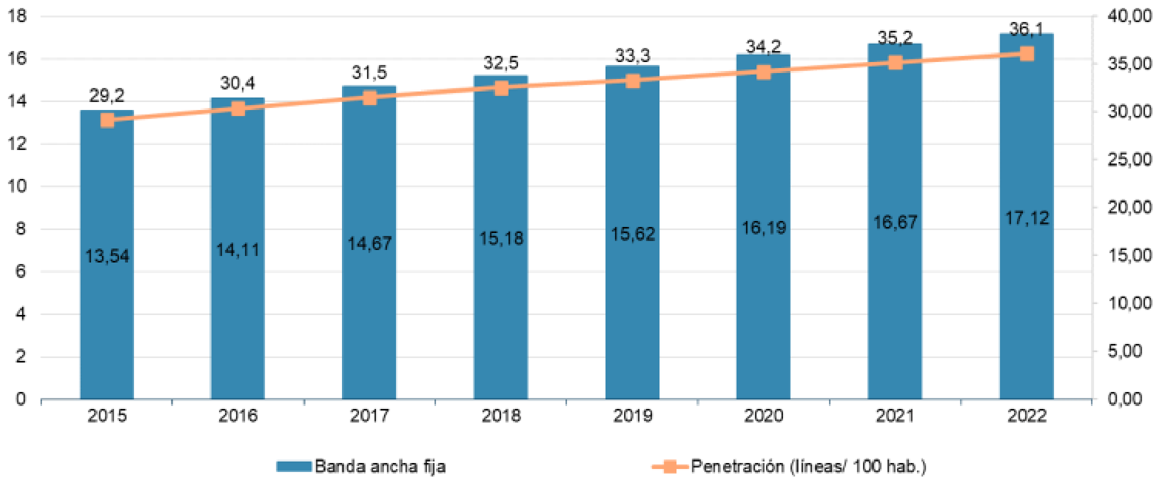
---

33 CNMC 2022 report – Telecommunications and Audiovisual Sector Economic Report 2022 of 18 July 2023, page 8.

34 CNMC 2021 2022 report – Telecommunications and Audiovisual Sector Economic Report 2021 2022 of 26 18 July 2023, page 65.

35 Communication from the Commission to the European Parliament, Council, the European Economic and Social Committee and the Committee of the Regions, Shaping Europe's digital future, 19 February 2020, COM(2020) 67 final, page 4 and footnote 3.

Figure 9 Evolution of internet lines and penetration (millions of lines and lines/100 inhabitant)



Source: CNMC 2022 report – Telecommunications and Audiovisual Economic Report 2022 of 18 July 2023.

7.1.3. *Multiple-play offers*

(61) The Commission notes that, as in other European Union Member States, an increasing number of Spanish customers are purchasing multiple services from a single provider.

(62) The term "multiple-play" relates to product offerings comprising two or more of the following services provided to retail consumers on the basis of single or multiple contracts by the same provider: mobile telecommunications services, fixed telephony services, fixed internet access and Pay-TV services. Within multiple-play bundles, a distinction may be made between fixed-only multiple-play bundles and fixed-mobile convergence ("FMC") bundles.[36] FMC bundles include at least one mobile and one fixed component (i.e., fixed internet, TV and/or fixed telephony/landline).[37] Multiple-play bundles and FMC bundles are also further described in Section 8.

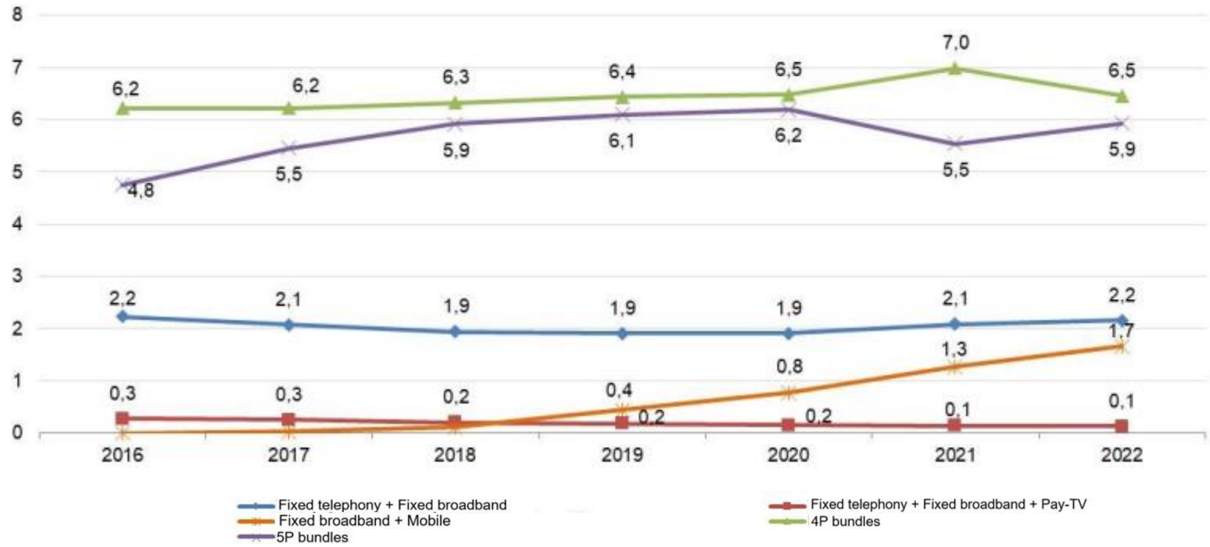
(63) According to the CNMC, multiple-play offers have grown significantly in Spain, with approximately 13.5 million multiple-play bundles in 2016 compared to 16.4 million in 2022, i.e., a growth of 21.5% in 6 years. In 2022, 14.8 million fixed telephony lines and 16.4 million fixed internet lines were part of a bundled offer in Spain, which corresponds to 79% and 95.8% respectively. With respect to post-paid mobile lines, 41.9 million were part of a bundled offer in Spain in 2022, which amounts to 84.7%.[38]

36 Article 6(1)(c) Decision, paragraph 65.

37 Article 6(1)(c) Decision, paragraph 65.

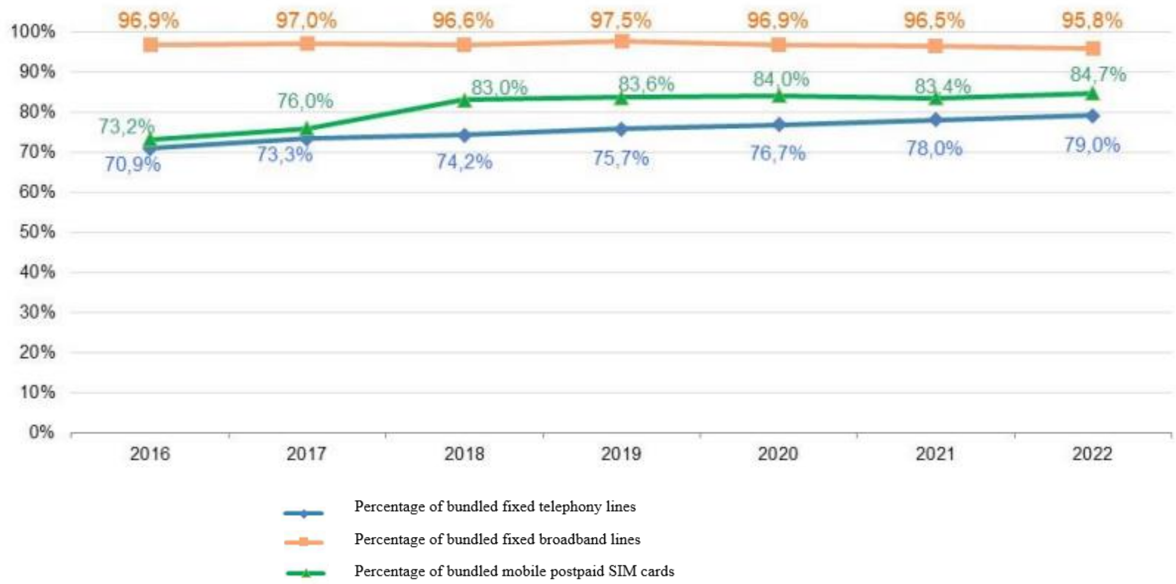
38 CNMC 2022 report - Telecommunications and Audiovisual Sector Economic Report 2022 of 18 July 2023, pages 53-55.

Figure 10 Evolution of multiple-play bundles in Spain (2016-2022)



Source: CNMC data.

Figure 11 Percentage of lines bundled / total lines per service (2016-2022)



Source: Form CO, Figure 15: Percentage of lines bundled & total lines per service (2015 – 2021) and CNMC 2021 report - Telecommunications and Audiovisual Sector Economic Report 2021 of 26 July 2022, page 55.

(64) In addition, Spain is the country with the highest penetration of FMC bundles with broadband connection, far ahead of the other European countries. Within the multiple-play bundles, the take-up of FMC bundles among telecoms consumers in Spain reached 84.7% of all fixed internet lines in 2022 (over 82.5% in 2021 and 80% in 2020), while in other EU countries it remained under 50% in 2021 e.g., 45% in Portugal, 44% in Belgium, 39% in the Netherlands, and 17% in Poland. Approximately 40% of the FMC bundles also include Pay-TV services which has become a key differentiating component of multiple-play and FMC offers.[39]

[39] Form CO, paragraph 464, FMC trends and forecasts in Europe and beyond (Mar 2022) Analysis Mason.

(65) Spanish customers buy these services together mainly because they tend to be cheaper than purchasing the standalone services separately. Convenience and the possibility of purchasing additional services are also important factors influencing consumers' choice, albeit less important than price.[40]

(66) Therefore, one of the distinguishing characteristics of the Spanish telecommunications market is the popularity of multiple-play bundles, and especially FMC bundles, among end consumers, far greater than in any other European country.

7.2. Telecommunications service providers in Spain

(67) Currently, four mobile network operators ("MNOs") are active in Spain (Orange, MásMóvil, Telefónica, and Vodafone). In addition to these MNOs, there are other non-MNOs[41] companies offering mobile and fixed services in Spain. The MNOs active in the Spain market are described in Section 7.2.1. and the non-MNOs in Section 7.2.2.

7.2.1. MNOs

(68) MNOs hold the necessary spectrum and mobile network to sell voice, message and data services to end-customers via their mobile network[42] as well as access to their mobile network and all services necessary to make calls and exchange data traffic for other operators without their own networks (Mobile Virtual Network Operators, or "MVNOs"). On the demand side, MVNOs may require different services. While some MVNOs operate their own core network infrastructure, others do not have their own network infrastructure and rely entirely on the network infrastructure of an MNO (light MVNOs or service providers).[43] Wholesale access and call origination services are provided by MNOs (on the supply side) to MVNOs (on the demand side) to enable MVNOs to provide retail mobile telecommunications services to end-customers.[44]

(69) The four MNOs in Spain are described in turn in the following paragraphs. The MNOs' spectrum is described in Section 7.3.1, while their network infrastructure arrangements are described in Section 7.3.2.

7.2.1.1. Orange

(70) Orange is a global telecommunications operator, which is present in the Spanish telecommunications market through OSP since 1998. Orange offers retail (fixed, mobile, and multiple-play bundles) and wholesale (fixed and mobile) telecommunication services throughout Spain, including tailor-made solutions for large accounts under its Orange brand. In 2022, Orange had a total revenue in Spain of approximately EUR 4.7 billion and reached [...] of mobile customers and [...] of fixed customers.[45]

---

40 Form CO, paragraph 462.

41 Non-MNOs include all operators that do not have a mobile network, i.e. full and light MVNOs and white label operators that provide retail mobile (and possibly also FMC) based on wholesale mobile access, as well as FNOs and FVNOs that rely on wholesale mobile access to provide mobile (including FMC) services.

42 Article 6(1)(c) Decision, paragraph 14.

43 Form CO, paragraph 316.

44 Article 6(1)(c) Decision, paragraph 89.

45 Orange Financial Results, FY_2022, available athttps://www.orange.com/sites/orangecom/files/2023-02/Q4%202022%20Presentation%20-%20EN%20-%20vdef.pdf, Doc ID 5672 and Annex RFI 37 Q1.

(71) OSP has a portfolio of three brands, Orange, Jazztel, and Simyo and currently generates a large part of its revenues through its Orange brand.[46] Recently, it became the second largest MNO in Spain, surpassing Vodafone.

(72) Orange's mobile network covers almost [90-100]% of the Spanish population with 2G, 3G, and 4G technologies, and approximately [70-80]% of the population with 5G technology as of the end of 2022. In terms of territory, Orange covers [80-90]% with 3G, [70-80]% with 4G and [10-20]% with 5G as of the end of 2022. In addition, Orange has spectrum holdings (705 MHz) across all spectrum bands, of which 305 MHz is in use.[47] Orange has an even presence across Spain with a proprietary mobile network of approximately [...] mobile sites and a fixed FTTH network of approximately [...] million building units ("BUs") [Details on Orange's FTTH fixed network] as of the end of 2022.[48] Orange completes its coverage with different partnerships with other operators to reach around [...] million BUs.[49] Orange provides both mobile and fixed wholesale services. Its top three wholesale customers by revenue on the wholesale mobile market are [Details of Orange's wholesale customers]. On the wholesale fixed market, [Details of Orange's wholesale customers] top three wholesale customers by revenue.[50]

7.2.1.2. MásMóvil

(73) MásMóvil is a telecommunications operator established in Spain in 2006.[51] MásMóvil provides services through a wide variety of brands, such as Yoigo, MásMóvil and Virgin, as well as digital-focused brand Pepephone, regional brands Euskaltel, R., Guuk, Embou and Telecable and international customers brands Llamaya, Lebara, Lycamobile. MásMóvil is also offering fixed telephony, fixed internet, and multiple-play services to residential customers. MásMóvil also provides fixed and mobile telecommunication services to business customers; however, its offering for business customers is limited, as it generally does not include tailor-made solutions for large accounts.[52]

(74) In 2022, MásMóvil generated a total revenue in Spain of approximately EUR 2.89 billon and reached 11.99 million of mobile customers and 3.15 million of fixed customers.[53]

(75) Today, MásMóvil is the fourth largest MNO in Spain and operates as a hybrid player. This means that to provide mobile telecoms services to customers in Spain, it relies partly on its own mobile network and partly on others' network.

(76) MásMóvil has its own fixed FTTH network consisting of [...].[54] Around [30-40]% of MásMóvil's retail fixed internet customers are served on its own network.[55] It complements its fixed network through different wholesale agreements, including

46 Form CO, parapraph 118.
47 Form CO, paragraph 497.
48 Form CO, paragraph 571 and Annex 6(1)(c) 2.6.
49 Form CO, paragraphs 116 and 572-575. [Details of Orange's agreements with third parties]..
50 Form CO, paragraphs 120 to 121.
51 See https://grupoMásMóvil MásMóvil .com/en/who-we-are/our-story/, Doc ID 5668.
52 Form CO, paragraphs 611 to 612.
53 Annex RFI 37 Q1.
54 Non-confidential minutes of a call with Vodafone of 20 December 20222, paragraph 18, Doc ID 2455.

55

[details on the wholesale agreements concluded by the Parties][56] and reached a fixed coverage across Spain of [...] BUs as of end of August 2022.[57]

(77) On mobile, MásMóvil has [...] mobile sites and its own network covers [80-90]% of the population in 3G and 4G and [5-10]% with 5G.[58] MásMóvil combines its own mobile infrastructure with wholesale agreements with Orange and [...] [59], with which it achieves [90-100]% 4G coverage and [70-80]% 5G coverage.[60]

(78) MásMóvil also has some spectrum holdings (175 MHz)[61] across mid and high spectrum bands, but decided not to participate in the spectrum auction for 700 MHz nor in the recent spectrum auction for the 26 GHz band.[62] [Details on MASMOVIL's business strategy regarding its own network investments].[63]

7.2.1.3. Telefónica

(79) Telefónica is the incumbent Spanish operator: it was originally a State monopoly providing first generation mobile services, but its exclusive rights were abolished in 1998. Today Telefónica is the largest provider of both fixed and mobile services, internet access services, multiple-play services as well as Pay-TV. Telefónica offers both retail and business services and is the largest provider of wholesale network access in Spain. In addition to its main brand Movistar, which offers mainly premium content, Telefónica offers multiple-play offers without premium content through its O2 brand.[64] Telefónica is "*the unmatched leader in Spain with regard to premium content*"[65], in particular with football premium content. Indeed, Telefónica holds 100% of the rights to the Champions League, La Liga (i.e. Spanish first division football), and Europa League for the coming years[66]. In 2022, Telefónica had a total revenue in Spain of approximately EUR 12.49 billion.[67]

(80) Telefónica's mobile network is based on approximately 21,900 mobile sites and it covers almost 100% of the Spanish population with 2G, 3G and 4G technologies. Its 5G technology covers approximately 82% of the Spanish population as of the end of 2022.[68] Telefónica has the largest spectrum holdings (1305 MHz, of which 305 MHz is in use) compared to the other MNOs across all spectrum bands.[69] In terms of FTTH footprint, Telefónica has an estimated ownership of 28 million FTTH BUs[70]. As the incumbent operator, Telefónica is still subject to regulatory obligations to

56 Form CO, paragraph 641.
57
58 Response to question 14b of RFI 1. Form CO, paragraph 2095 and Table 39.
59 Form CO, paragraph 951.
60 Form CO, Table 39.
61 Form CO, paragraph 497.
62 Form CO, paragraph 617.
63 Letter of Facts, paragraph 9.
64 Form CO, paragraph 668.
65 Form CO, paragraph 658.
66 Form CO, paragraph 665. In addition, regarding La Liga, DAZN, a subscription-based sports streaming service, has the right to broadcast five matches per match day, but Telefónica has already reached an agreement to obtain the rights from DAZN for the remaining matches.
67 Telefónica, Consolidated Annual Report 2022, available at:https://www.Telefónica.com/en/shareholders-investors/financial-reports/annual-report/, Doc ID 5673.
68 Form CO, paragraph 655.
69 Form CO, paragraph 497.
70 Annex 6(1)(c) 2.6.

grant access to its fixed infrastructure in certain areas (covering approximately 30% of the Spanish population).[71]

(81) In addition, Telefónica is the main provider of wholesale fixed access services through both regulated offers and non-regulated commercial offers. Telefónica's largest fixed wholesale customers currently are Orange, Vodafone, MásMóvil, and Digi. Similarly, Telefónica has a large mobile wholesale business and its largest customers currently are Digi (with over [3-4] million lines), Avatel (with approximately [0-0,5] million lines) and Aire Networks (with over [0-0,5] millon lines).[72]

7.2.1.4. Vodafone

(82) Vodafone is active in Spain since 2001. Vodafone offers retail (fixed and mobile) and wholesale (fixed, mobile, and multiple-play bundles) telecommunication services throughout the entire Spanish territory to non-residential as well as business customers. It is active through its Lowi and Vodafone brands.

(83) In 2022, Vodafone generated a total revenue in Spain of approximately EUR 4.18 billon and reached [10-15] million of mobile customers and [2-3] million of fixed customers.[73]

(84) Vodafone's mobile network is based on approximately 19.100 mobile sites, and it covers almost 100% of the Spanish population with 2G, 3G and 4G technologies. Its 5G technology covers approximately 46% of the Spanish population as of the end of 2022.[74] Vodafone's fixed network consists of [8-9] million BUs, of which [1-2] million BUs are FTTH and [0-0,5] million BUs are HFC in 2022.[75]

(85) Vodafone is currently the third largest player and is in a challenging position in Spain. In particular, Vodafone's primarily cable/coax/HFC-based fixed network needs to be upgraded to FTTH[76].

(86) Vodafone no longer has access to Telefónica's premium TV offering, in particular rights to La Liga and UEFA Champions League football content. As a result, Vodafone's premium TV offering is more limited.[77]

(87) On 31 October 2023 Vodafone announced the sale of Vodafone Spain to Zegona Communications PLC ("**Zegona**"), a UK public limited company which was the former owner of the Spanish companies Telecable and Euskaltel. [78]

7.2.2. Other telecommunications services providers in Spain

(88) This section describes the main non-MNOs offering mobile and fixed services in Spain.

(89) While MNOs own their mobile network, MVNOs offer mobile telecommunications services without owning a network.

(90) There are different types of MVNOs. "Full MVNOs" (or "Pure MVNOs") typically do not have radio network access or spectrum, but own some of the core

---

[71] Form CO, paragraph 656.
[72] Form CO, paragraph 670.
[73] Annex RFI 37 Q1.
[74] Form CO, paragraph 685 and Table 29: Estimate of mobile infrastructure holdings.
[75] Annex 6(1)(c) 2.6.
[76] Non-confidential minutes of a call with Vodafone of 20 December 2022, paragraph 6, Doc ID 2455.
[77] Form CO, paragraph 687.
[78] See https://www.vodafone.com/news/corporate-and-financial/sale-of-vodafone-spain, Doc ID 5643.

infrastructure, issue their own SIM cards, have network codes, a database of customers and back-office functions to manage customer relations. "Light MVNOs" or "partial MVNOs" do not own any network infrastructure and rely entirely on the infrastructure of the host MNO to provide retail services. Light MVNOs are also known as enhanced service providers ("ESPs").

(91) Branded resellers or "white labels" are companies that do not autonomously provide any retail mobile telecommunications services but merely resell the SIM cards and services of an MNO under their own brand on behalf of the host MNO. Most white label brands are subject to the tariff plans agreed with their host MNO (either mirroring the host's offer or with tariff plans defined specifically for them), which ultimately enters into the contract with the end customer – and compete with them only on customer services.[79]

(92) In this Decision, unless otherwise specified, the Commission will refer to the different types of MVNOs collectively as "MVNOs". In 2022, 43 MVNOs were active in the Spain market.[80]

(93) Similarly, on the fixed side, some operators own their fixed network ("FNOs"), and other operators offer fixed telecommunications services without owning a network (FVNOs). In order to increase their coverage, most FNOs have signed agreements to partially rely in other networks, in this capacity, they also act as partly FVNOs.

(94) MVNOs and FVNOs access a host network through a wholesale access agreement and use the host MNO's or FNO's network to provide retail services to end-customers.

(95) The principal MVNOs and FVNOs in Spain are described below. The remaining non-MNOs are very small.

7.2.2.1. Digi

(96) Digi is one of the largest telecommunications companies in Central and Eastern Europe, headquartered in Romania. It began operating in Spain in 2008, initially targeting the large Romanian immigrant community with pre-paid mobile services that included international calls.[81] In 2017, Digi started building its own FTTH network and has since then been serving customers with offers comprising mobile, fixed internet and telephony services combined multiple-play and FMC bundles.

(97) Digi is an MVNO that operates on Telefónica's mobile network (i.e., it does not own any mobile infrastructure or spectrum). For fixed services, Digi partly relies on its own network and has a wholesale agreement with Telefónica to access its fixed network.[82] These wholesale agreements allow Digi to offer nationwide mobile, fixed and convergent services and to compete in the entire country.[83]

(98) In 2022, it generated EUR 501 million in revenue in Spain, while it has reached 3.8 million mobile retail subscribers and 0.84 million fixed retail subscribers in March 2023.[84] Digi continued to grow in the first six months of 2023, when it gained 40 000

79 Form CO, paragraph 2419.
80 Form CO, paragraph 2403.
81 El País, "Digi, the Romanian mobile operator that is winning over Spaniards", 17 March 2019, available at: https://elpais.com/economia/2019/03/13/actualidad/1552502378_164741.html, Doc ID 5720.
82 Digi uses Telefónica's NEBA Local for 60% of their broadband customers.
83 Form CO, paragraph 697.
84 Non-confidential minutes of a call with Digi of 25 April 2023, Doc ID 3273.

new customers for a total portfolio of 5.7 million lines.[85] In Spain, Digi is currently the fifth operator in terms of subscribers.

(99) With respect to fixed, Digi is an FNO since 2020 and has been focusing on the roll out of its own FTTH network. In April 2023, it reported that it had an FTTH footprint of 6.5 million BUs, mostly in urban areas.[86] Today, Digi has the third largest FTTH network in Spain[87]. Digi is continuing to deploy its FTTH network and has announced a deployment of 2.5 million BUs in Andalucía.[88] Therefore, it is expected to cover at least 9 million FTTH BUs by the end of 2025.[89]

(100) Besides Romania and Spain, Digi is active in Italy and will shortly launch operations in Portugal[90] and in Belgium[91] in 2024.

7.2.2.2. Adamo

(101) Adamo started in 2007 its activities in Spain as a FNO and has since then deployed [2-3] million BUs.[92] Adamo is a white label of MásMóvil for its mobile offer. Adamo's FTTH network is primarily located in rural or less densely populated areas of Spain.

(102) In 2022, Adamo generated a total revenue in Spain of approximately EUR 100 million and reached [0-0,5] million mobile customers and [0-0,5] million fixed customers.[93]

(103) Adamo also provides wholesale fixed access to MásMóvil, Telefónica and Vodafone, and [Details of Adamo's commercial negotiations with one of the Parties]. Furthermore, Adamo has recently announced a partnership with Vodafone to develop FTTH in rural areas.[94] Adamo also hosts multiple small fixed operators.[95]

(104) In addition, Adamo has recently acquired Aire Networks[96], another MVNO active on the retail mobile market in Spain.

---

85 El Mundo, "Digi apuesta por comprar los activos sobrantes de la fusión de Orange y MásMóvil para crecer", 15 August 2023, available at: https://www.elmundo.es/economia/empresas/2023/08/14/64da3b2a21efa066368b4588.html, Doc ID 5661.

86 Article 6(1)(c) Response, paragraph 165. See also "Digi is the fastest-growing telco of all Europe", 17 April 2023, available at: https://www.expansion.com/empresas/tecnologia/2023/04/15/6439b29ae5fdea026b8b45da.html, Doc ID 5664.

87 Form RM, paragraph 39.

88 Digi's press release, 22 March 2023, available at: https://news.europawire.eu/digi-communications-n-v-announces-digi-spain-telecom-s-l-u-its-subsidiary-in-spain-entered-into-an-investment-agreement-with-abrdn-to-finance-the-roll-out-of-a-fibre-to-the-home-ftth-network-in/eu-press-release/2023/03/22/10/55/16/113105/, Doc ID 5658; Digi's press release, 29 June 2023, available at: https://www.digi-communications.ro/en/see-file/DIGI_Press-release_A2-to-Digi-Spain-Facilities-Agreement.pdf, Doc ID 5659.

89 SO Reply, paragraph 164.

90 See https://www.digi.pt/en//, Doc ID 5657 and https://www.mobileeurope.co.uk/digi-continues-romania-spain-growth-as-it-readies-portugal-entry/, Doc ID 5669.

91 See https://en.digi-belgium.be/news-post/vierde-mobiele-operator-digi-sluit-dubbele-deal-met-proximus, Doc ID 5655.

92 Article 6(1)(c) Response, paragraph 211.

93 Article 6(1)(c) Response, Table 7.

94 See https://www.saladeprensa.vodafone.es/c/notas-prensa/np_acuerdo_fibra_adamo/, Doc ID 5644.

95 Form CO, paragraph 717.

96 Article 6(1)(c) Response, paragraph 213.

7.2.2.3. Avatel

(105) Avatel started its operations in Spain in 2012 as a small local reseller of FTTH and mobile services in Malaga. Since 2018, it has grown through the acquisition of small local operators.[97]

(106) Avatel offers mobile, fixed and convergent services, mostly in the south and east of Spain. Avatel also has its own Pay-TV platform (ClicTV) and has recently reached an agreement with DAZN to offer 50% of La Liga matches, and another deal with Samsung to include ClicTV app in Samsung's Smart TVs.[98]

(107) Avatel is therefore an FNO with its own fixed network resulting from acquisitions of local operators and currently holds 2.6 million BUs[99]. Regarding mobile services, Avatel is an MVNO which relies on wholesale agreements with Telefónica to access its mobile network.[100] Today, Avatel only offers mobile services (and FMC bundles) in those, mainly rural and less densely populated, municipalities where it has its own FTTH network[101], serving less than c. 20% of the Spanish population.

(108) In 2022, Avatel has generated a total revenue in Spain of approximately EUR 300 million and reached [0-0,5] million of mobile customers and [0,5-1] million of fixed customers.[102]

7.2.2.4. Finetwork

(109) Finetwork was founded in 2015, as a small local operator offering mobile and fixed internet services. Finetwork was initially operating in the southeast region of Spain, with the aid of a mobile service reselling agreement with MásMóvil and through its own small fibre network. Later, Finetwork entered a wholesale agreement with Vodafone for fixed internet and mobile network access to become an MVNO and FVNO.[103]

(110) Finetwork provides mobile, fixed and multiple-play services (without Pay-TV), using both Vodafone's own network and the network accessed by Vodafone through different wholesale agreements with other fixed network operators (Telefónica and OSP).[104] Finetwork has the ambition to become a full nationwide provider of mobile and fixed retail services. Currently, it can provide retail mobile services at a national level by virtue of its mobile access agreement with Vodafone, however it faces substantial difficulties to sign fixed internet agreements allowing to scale up to national reach.[105]

(111) In 2022, Finetwork has generated a total revenue in Spain of approximately EUR 135 million and reached [0,5-1] million of mobile customers and [0-0,5] million of fixed customers.[106]

---

97 See https://murciaplaza.com/avatel-se-refuerza-en-la-region-con-la-compra-de-dos-empresas-a-agustin-ramos-fibranet, Doc ID 5670.
98 Form CO, paragraphs 710 - 711.
99 Article 6(1)(c) Response, Table 7.
100 Form CO, paragraph 707.
101 Response to questionnaire Q3 to wholesale customers, question B.3. Doc ID 3298.
102 Article 6(1)(c) Response, Table 7.
103 Non-confidential minutes of a call with Finetwork, 2 February 2023, paragraph 4, Doc ID 2471.
104 Form CO, paragraph 729.
105 Non-confidential minutes of a call with Finetwork 2 February 2023, paragraph 7, Doc ID 2471.
106 Article 6(1)(c) Response, Table 7.

(112) Furthermore, Finetwork has revealed plans to deploy an independent FTTH network.[107]

7.2.2.5. PTV/Procono

(113) PTV/Procono was originally based on a local level, providing fixed services as an FNO though its fixed network; however, it has expanded into mobile services [Details of commercial agreement].[108] It currently holds 1.5 million BUs[109].

(114) Its retail offerings currently include mobile and fixed internet services. In addition, PTV/Procono provides, through OSP's network, wholesale mobile services to small local cable operators mainly in the south of Spain. Finally, PTV/Procono offers TV via Zapi TV (similar to Agile TV).

(115) In 2022, PTV/Procono generated a total revenue in Spain of approximately EUR [50-100] million and reached [0-0,5] million of mobile customers and [0-0,5] million of fixed customers.[110]

7.2.2.6. Onivia

(116) Onivia is a pure fixed wholesaler. It is an independent and neutral operator that provides wholesale fixed services in the main Spanish cities and their metropolitan areas, and in a large number of small municipalities in rural areas throughout the country.

(117) Onivia has a FTTH network of approximately 3.6 million BUs, which it partly acquired from MásMóvil, and it intends to continue expanding its network. Indeed, in September 2022, Onivia announced the acquisition of 0.5 million additional BUs from MásMóvil (through the extension of Uclés agreement, which was closed in December 2022).[111]

(118) Onivia provides wholesale access to [Details of commercial agreements].[112]

7.2.3. Summary of the main operators in Spain

(119) **Table 2** below is a summary of the activities of Spain's main operators described above.

---

107 Form CO, paragraphs 728 to 730. See also https://www.commsupdate.com/articles/2022/02/08/finetwork-planning-ftth-rollout-aims-to-pass-600000-homes/, Doc ID 5728.

108 Form CO, paragraph 727.

109 Article 6(1)(c) Response, Table 7.

110 Article 6(1)(c) Response, Table 7.

111 Form CO, paragraph 732. See also https://www.commsupdate.com/articles/2021/05/05/onivia-doubles-footprint-with-second-masmovil-fibre-deal/, Doc ID 5729.
In addition to Onivia, there is another neutral operator of wholesale fixed services in Spain, Lyntia, which has a network of 2.6 million BUs.

112 Form CO, paragraph 732.

Table 2 Overview of the main telecommunications operators in Spain in 2022

Operator	Revenue (EUR million)	Number of mobile customers (million)	Number of fixed customers (million)	Mobile network[113]	Own FTTH network size	5G	FMC	National presence
Telefónica	12 497	15.98	5.78	MNO [...])	28 million BUs	Yes	Yes	Yes
Orange	[...]	[...]	[...]	MNO ([...])	[...] BUs	Yes	Yes	Yes
Vodafone	4 180	[10-15 million]	[2-3 million]	MNO ([...])	[1-2 million] BUs (and [8-9 million] HFC BUs)	Yes	Yes	Yes
MásMóvil	[...]	[...]	[...]	MNO ([...])	[...] BUs ([...])	Yes	Yes	Yes
Orange / MásMóvil JV	[...]	[...]	[...]	*MNO ([...])*[114]	*[business secret BUs ([...])*[115]	*Yes*	Yes	Yes
Digi	501	[3-4 million]	[0.5-1 million]	Full MVNO (Telefonica's network)	6.5 million BUs (Apr. 2023)	No[116]	Yes	Yes
Avatel	300	[0-0.5 million]	[0.5-1 million]	Full MVNO (Telefonica's network)	2.6 million BUs	No	Yes	No
Finetwork	135	[0.5-1]	[0-0.5]	White label (Vodafone's network)	0.1 million BUs	No	Yes	No[117]
Adamo	100	[0-0.5 million]	[0-0.5 million]	White label (MasMovil's network)	[2-3 million] BUs	No	Yes	No
PTV/Procono	[50-100]	[0-0.5]	[0-0.5]	MVNO ([...])	1.5 million BUs	No[118]	Yes	Regional
Onivia	n.a.	0	0	-	3.6 million BUs	No	No	Regional

113 This excludes 26 GHz band spectrum since it is not in use today and has limited envisaged use cases at present: As noted by the Parties, "*As of today, the 26 GHz spectrum band is not being used in Spain for 5G*" (Form CO footnote 149) and as further explained by Vodafone, "*this spectrum does not have coverage obligations, and came at a moderate cost (€8m for 400 MHz). Vodafone considers it as a future investment: currently there are few use cases for the 26 GHz spectrum, however if services are developed in the future based on the 26 GHz spectrum, Vodafone wants to be present*." Non-Confidential minutes of call with Vodafone dated 20 December 2022, paragraph 20, Doc ID 2455.

114 Part of the JV's spectrum holdings following the Transaction would exceed the current spectrum caps that applicable to MNOs in Spain. These spectrum caps are currently under review by the Ministry.

115 [Details of MásMóvil's commercial agreements]. See Annex RFI 20 Q4d.

116 According to the non-confidential minutes of meeting with Digi dated 25 April 2023, paragraph 13, "*Digi reported that its contract includes access to 5G for residential customers (individuals and SoHo customers), but not to develop special 5G services for business purposes or to cover big enterprises or industrial needs. Making use of this access possibility, is however dependent on Digi investing in the necessary equipment. Consequently, for the time being, Digi's customers do not have 5G access.*", Doc ID 3273.

117 The Commission understands that Finetwork may offer standalone mobile services on a nationwide basis, but not retail fixed internet services, multiple-play or FMC bundles. In the market investigation, Finetwork indeed indicated that "*Mobile-only services can be offered nationally, but FMC bundles cannot be offered competitively, because our fibre agreements do not give us access at reasonable prices*". See response to questionnaire Q3 to wholesale customers, question B.3, Doc ID 3407.

118 According to the Parties "[Details of Orange's commercial agreements]" (Form CO, footnote 1136).

Source: Parties estimates (Form CO (paragraphs 571, 641, Figure 25), Article 6(1)(c) Response, (paragraphs 194, 547), Annex 6(1)(c) 2.6, and Annexe RFI 37 Q1)

7.3. Telecommunications infrastructure

7.3.1. Structure of the mobile network and MNOs' spectrum holdings

(120) Two essential inputs are necessary to be active as an MNO: authorisation to use spectrum band(s) for mobile telecommunications and a mobile network.

(121) Spectrum is Member States' public property. In Spain, the Ministry of Digital Transformation and of Public Service (*Ministerio para la Transformación Digital y de la Función Pública*, the "Ministry") is responsible for managing the use of the radio spectrum and the granting of administrative rights, individual authorisations and administrative concessions, including the call for tenders and the specifications for the bidding procedure for the granting of the administrative rights allowing the use of the radio spectrum.

(122) The radio spectrum is divided into sections called bands. Different bands have different characteristics when it comes to coverage and data speeds. The higher the frequency of a particular spectrum band, the greater its propagation loss, i.e., the extent to which the intensity of a signal is reduced as it travels through space. In general, frequencies below 1000 MHz enable an operator to offer a good geographic coverage and indoor penetration, while higher frequencies have the advantage of high speeds for data communication.

(123) Currently eight bands of spectrum are used for mobile telephony and mobile broadband in Spain: 700 MHz, 800 MHz, 900 MHz, 1.8 GHz, 2.1 GHz, 2.6 GHz, 3.4-3.8 GHz, and 26 GHz covering 2G, 3G, 4G, and 5G.

(124) The following individual frequencies are considered to be included in the low, mid and high band spectrum groups:

(125) Low band: 700 MHz, 800 MHz, 900 MHz.

(126) Mid-band: 1.8 GHz, 2.1 GHz, 2.6 GHz.

(127) High-band: 3.5 GHz and 26 GHz.

(128) High-band spectrum (e.g., 3.5 GHz) has a high propagation loss. This type of spectrum is therefore more suitable for use in urban environments, given the shorter distance a signal will typically need to travel. Conversely, 5G low-band spectrum (e.g., 700 MHz) has relatively low propagation loss and is therefore often used to increase coverage in rural or low-density areas.

(129) Current MNOs' spectrum holdings across spectrum bands are summarised in **Figure 12** below. Telefónica, Vodafone, and Orange hold spectrum in all bands, while MásMóvil currently owns spectrum in the mid and high bands.

Figure 12 Spectrum holdings by operators[119]

	Technology			Current MNO spectrum holdings			
	2G/3G	4G	5G	Telefónica	vodafone	orange	GRUPO MASMOVIL
700 MHz		✓	✓	20	20	20	0
800 MHz		✓		20	20	20	0
900 MHz	✓	✓		30	20	20	0
1.8 GHz	✓	✓	✓	40	40	40	30
2.1 GHz	✓	✓	✓	35	35	35	35
2.6 GHz[2]		✓	✓	50 +20 regional	50 +10 regional	40 +20 regional	30 regional
3.4-3.8 GHz			✓	100	90	110	80

Source: CNMC, Form CO, paragraph 497

(130) As indicated in Section 7.1.1., the market for wholesale access and call origination services on mobile networks was deregulated in 2017 once the CNMC determined that the Spanish market was developing in an environment of sustainable effective competition.[120] But MNOs are still subject to certain obligations regarding their spectrum holdings. First, pursuant to the Regulation on the Use of the Radioelectric Public Domain,[121] the right of private use of the radioelectric public domain (i.e., not for self-provision by the applicant) requires a concession, granted through public bidding procedures, in order to ensure the effective and efficient use of the spectrum.

(131) Second, the holders of rights of use of the public radioelectric domain must comply with the limits on amount of frequencies to be used by the same MNO set by applicable regulations i.e., (a) in the CNAF (National Table of Frequency Allocation) or (b) in the Tender Documents. In this sense, the regulatory caps per operator for each spectrum frequency band are the following:

– 70 MHz limit for the 700 MHz, 800MHz and 900 MHz frequency bands combined (and 30 MHZ in the 700 MHz band, 50 MHz in the 800 MHz band and 50 MHz in the 900 MHz band).

– 160 MHz limit for the 1.8 GHz, 2.1 GHz and 2.6 GHz frequency bands combined (and 50 MHz in the 1.8 GHz band and 40 MHz in the 2.1 GHz band).

– 140 MHz limit for the 3.4 GHz to 3.8 GHz frequency bands.

– 1,000 MHz limit for the 26 GHz frequency band (not in use yet).

(132) Third, the Regulation on the Use of the Radioelectric Public Domain provides that prior authorisation from the Ministry is required for a direct or indirect change of control of the concession holder. Requests for such prior authorisations are processed by the General Secretary of Telecommunications and Management of Audiovisual Communication Services (*Secretaría General de Telecomunicaciones y Ordenación de los Servicios de Comunicación Audiovisual*, the "General Secretary") and

119 26 GHz band spectrum has also recently been auctioned, and acquired by Telefónica, Orange and Vodafone. It is expected to be used for 5G, but it is not in use at present (Form CO, footnote 419). Indeed, in the Form CO it is stated that currently there are "limited use cases for this spectrum band and there is a lack of supporting technologies available" (Form CO, para. 624).

120 CNMC decision dated 4 April 2017, ANME/DTSA/002.

121 Royal Decree 123/2017, 24 of February 2017.

decisions are issued by the General Secretary within three months after the submission of the request.

(133) As a consequence of the Transaction, a Spectrum Authorisation will be requested and processed before the General Secretary. According to current regulations, the JV will exceed the spectrum cap: (i) in the mid-bands (1.8 GHz band, by 20 MHz and 2.1 GHz band, by 20 MHz)); and (ii) in the 3.4-3.8 GHz band, by 50 MHz.

(134) As a result, a transfer by the JV to a third party will be required, within a period to be established by the Ministry. If such transfer is not fulfilled by the end of the period established by the Ministry, the Ministry will require the MNOs to communicate, within fifteen days, which enabling titles exceed the limits and order that they revert to the State, and subsequently terminate such titles and their corresponding rights.[122]

7.3.2. Mobile and fixed network sharing agreement

(135) A mobile network includes a large number of radio station sites. Each of them has a mast on which there are antennas as well as a base transceiver station system. The antennas and transceiver station equipment are the main elements of the Radio Access Network ("RAN") equipment. This equipment transmits and receives voice and data signals between the masts and subscribers' devices.

(136) MNOs can roll out their network by themselves, independently from other MNOs, or together with other MNOs through a network sharing agreement ("NSA"). In a NSA, MNOs agree to share some of the network elements in order to reduce costs and improve coverage and capacity. The degree of integration within NSAs varies depending on whether: (i) the MNOs only share their site infrastructure ("passive sharing" or "site sharing"); (ii) they also share the RAN equipment at the sites ("active sharing"); (iii) they also share their spectrum ("spectrum sharing"); or (iv) they also rely on the same network ("full network sharing").

(137) In particular, passive sharing involves sharing the basic infrastructure, such as masts, cabins and sometimes antennas and power supplies ("passive infrastructure"), as well as the cost of the site itself (rent and rates). In passive sharing, each operator has its own RAN equipment, which is built at the same site and fed into a shared antenna setup.

(138) Active sharing involves also sharing the RAN equipment ("active equipment"), meaning the base transceiver station and the controller nodes or the base transceiver station in addition to the passive infrastructure. There are two main models of active RAN sharing agreements:

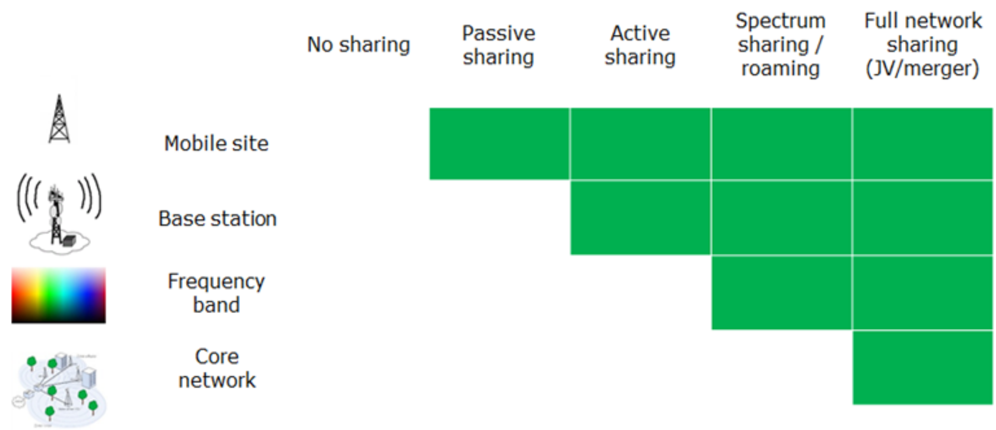
- Active RAN sharing on independent carriers (Multi Operator RAN, "MORAN"): one common RAN platform is used for both operators. However, the traffic of each operator is handled on each operator's own independent radio carriers representing each operator's independent spectrum with independent parameters and feature sets.
- Active RAN sharing on shared carriers (Multi Operator Core Network, "MOCN"): one RAN platform is used for both operators. The equipment is shared, and the spectrum resources are pooled. This means there will be common parameters and a common RAN-related feature set, and potentially fewer carriers will need to be deployed due to the pooling effect.

[122] Form CO, paragraphs 768 to 770.

(139) Transmission (backhaul to the MNOs' core networks) may also be shared under passive or active sharing agreements. It is also possible for MNOs to integrate further and share spectrum.

(140) **Figure 13** below provides an overview of the different forms of network sharing.[123]

Figure 13 Extent of sharing under different forms of network sharing



Source: Commission's compilation

(141) The main mobile and fixed agreements between the MNOs are described in Section 7.3.2.1 and Telefónica's obligations to provide wholesale access are described in Section 7.3.2.2.

7.3.2.1. Agreements between MNOs

(142) MNOs enter into various types of network sites/equipment sharing agreements, national roaming agreements, international roaming agreements and interconnection agreements.[124]

(143) The Parties have signed a [Details of the Parties' commercial agreements on mobile network access including 5G].[125]

(144) In addition, the Parties have [Details of the Parties' commercial agreement for MASMOVIL access to Orange's mobile network in Spain].[126]

(145) [Details on the wholesale agreements concluded by the Parties].[127]

(146) [Details on the wholesale agreements concluded by the Parties].

(147) In Spain, Orange has [Details of Orange's commercial agreements][128] whereas MásMóvil is not a party to any RAN sharing agreement.[129]

---

[123] The different network sharing agreements must comply with the Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreement.

[124] Form CO, paragraph 2093.

[125] Form CO, Table 36.

[126] Form CO, paragraph 589.

[127] Form CO, paragraph 2095. See also Form CO, footnote 1313 ("*the Parties do not intend to terminate any of the agreements concluded by MASMOVIL with third party operators. On the contrary, the Parties intend that all of these agreements remain in place, at least, until their expiration date. The NRA with Telefónica expires on 31 December 2027*").

[128] Form CO, paragraph 1656. Orange and Vodafone signed a network sharing agreement on 24 April 2019, enabling active network sharing including both radio access network and high-speed backhaul.

(148) In addition, each MNO in Spain has agreements with one or more mobile tower companies ("TowerCos").[130] Some of these TowerCos are independent operators, whereas others are subsidiaries of one of the MNOs but still act as independent tower companies. The below **Table 3** shows an overview of what operators are hosted by which TowerCo.[131]

Table 3 Overview of TowerCos in Spain

TowerCo Name	Approximate number of sites	Operators Hosted	Independent or owned
American Tower	[10,000-20,000]	[...]	Independent
Axion	[0-5,000]	[...]	Independent
Cellnex	[10,000-20,000]	[...]	Independent
Totem	[5,000-10,000]	[...]	Orange's subsidiary
Vantage Towers	[5,000-10,000]	[...]	Vodafone's subsidiary

Source: Form CO, table 133.

(149) Furthermore, the Parties have concluded international roaming agreements with other operators in the EEA. Furthermore, interconnection of communication networks is necessary for successful interoperability between subscribers in all telephone networks. For example, Orange has established interconnections with [Details of Orange's commercial agreements]. MásMóvil has entered into intercommunication agreements with operators such as [Details of MásMóvil's commercial agreements].[132]

(150) Finally, MVNOs have also signed mobile and fixed agreements with the MNOs, which are not covered in this Section.

7.3.2.2. Access obligations in Spain

(151) In 2016, the CNMC initiated the deregulation of the Spanish market for the wholesale broadband, the process was further developed in 2021.[133] As a consequence of this, the incumbent operator, Telefónica is still subject to certain obligations to make available to other operators certain elements and services of its network.

(152) <u>First</u>, the wholesale services that Telefónica is obliged to provide are (i) wholesale access to Telefónica's copper pair infrastructure, (ii) wholesale access to Telefónica's fibre infrastructure (*Nuevo servicio Ethernet de Banda Ancha*, "NEBA" and local NEBA or *Virtual Unbundled Local Access*, "VULA"), and (iii) access to

129 Form CO, paragraphs 296-297.

130 TowerCos are passive infrastructure and the access to them is traded in the wholesale wireless infrastructure market. For instance, MNOs install radio access network (RAN) equipment such as antennas, radio, and baseband units on towers to transmit mobile signals (active networks). These active networks and passive infrastructure together enable the MNOs to provide voice and data services to their retail customers.

131 Form CO, paragraph 2098.

132 Form CO, paragraphs 2099-2102.

133 CNMC Decision ANME/DTSA/002/20 of 6 October 2021.

ducts and passive infrastructures (piping, chambers, manholes, conduits and poles) in the whole Spanish territory.

(153) Second, regarding FTTH networks, Telefónica has different obligations depending on the competitive conditions established by the CNMC in each geographic area:

– A 'competitive area' which is characterised by a high level of infrastructure competition based on next generation access networks ("NGA"), where Telefónica's market share on the retail broadband market is less than 50% and there are at least three NGAs with a minimum coverage of 20%. This area covers 696 municipalities, representing 70% of the Spanish population, and;

– A 'non-competitive area', where either there are less than three networks, or these networks do not reach the 20% minimum individual coverage or Telefónica has more than a 50% market share on the retail broadband market. This area currently covers 7 435 municipalities, representing 30% of the Spanish population.

(154) Finally, in the competitive area, Telefónica has no access obligations regarding its FTTH network. On the contrary, in the non-competitive areas, Telefónica is required to provide a virtual unbundled access service (local NEBA or VULA) and a broadband central access service (regional NEBA) on its fibre network at a regulated price. The CNMC should examine by 2024 at the latest[134] whether the regulation is still required for the remaining regulated municipalities.[135]

8. RELEVANT MARKETS

8.1. Introduction

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

(156) At the retail level, the Parties' activities horizontally overlap and result in affected markets for the supply of: (i) mobile telecommunications services, (ii) Machine to Machine ("M2M") services, (iii) fixed internet access services; (iv) fixed telephony services; (v) multiple-play bundles (i.e., all bundles, including fixed-only and fixed-mobile convergence[136] ("FMC") bundles), and (vi) FMC bundles.

(157) At the wholesale level, the Parties' activities horizontally overlap and result in affected markets for the supply of: (vii) access and call origination services on mobile networks (i.e., wholesale mobile network access services); and (viii) the broadband access services, (ix) call termination services on mobile networks, (x) call termination services on fixed networks, and (xi) international roaming services.[137]

[134] CNMC Decision ANME/DTSA/002/20 of 6 October 2021.

[135] Form CO, paragraphs 738 to747.

[136] FMC bundles are bundled telecommunication products offered at retail level which include at least one mobile and one fixed component (i.e., fixed internet/broadband, TV and/or fixed telephony/landline services).

[137] The Commission notes that the market for wholesale supply of call origination services at fixed location would also be non-horizontally (vertically) affected as within the meaning of the Merger Regulation, as the Parties' combined market share is above 30% on the downstream market of retail supply of fixed telephony services. Nevertheless, the Commission considers that the Transaction will not lead to any input foreclosure concerns in these markets. The Commission considers that as the Parties are not present in the market for wholesale supply of call origination services at fixed location and to the extent

8.2. Legal Framework

(158) Market definition is a tool to identify and define the boundaries of competition between firms. It has both a product and a geographic dimension.

(159) A relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable, by reason of the products' characteristics, their prices and their intended use. In defining the relevant product market, the Commission assesses demand substitution by determining the range of products which are viewed as substitutes by the consumers. Demand-side substitutability is the focus of the Commission's assessment when defining the relevant markets[138].

(160) The Commission may also take into account supply-side substitutability, namely when its effects are equivalent to those of demand substitution in terms of effectiveness and immediacy. This is the case 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[139].

(161) The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of 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[140].

8.3. Retail supply of mobile telecommunication services

(162) The market for the retail supply of mobile telecommunications services is the market on which MNOs and MVNOs sell voice, message and data services to end-customers via a mobile network. This market excludes fixed telephony services. The latter comprises the provision of connection services at a fixed location or access to the public telephone network, for the purpose of making and/or receiving calls and for related services.

8.3.1. Parties' activities

(163) Both Orange and MásMóvil provide retail mobile telecommunications services to end-customers and both have their own mobile networks.

(164) Orange has deployed its own nationwide mobile network. MásMóvil's own mobile network is smaller than those of the other Spanish network operators, and it is

that, as further explained in Section 9.4.3.5, there will be sufficient commercial alternatives in the market of retail supply of fixed telephony, this market has been declining in Spain for years and the respondents of the Phase I market investigation have not flagged any competition concerns with regard to these markets, the Commission considers that the Transaction does not raise a significant impediment to effective competition within the meaning of Article 2(3) of the Merger Regulation as a result of the vertical links arising from the relationships between the market for the wholesale supply of call origination services at fixed location (upstream), and the market for retail supply of fixed telephony services (downstream).

138 Commission Notice on the definition of relevant market for the purposes of Community competition law Market Definition Notice, OJ C 372, 9.12.1997, p. 5–13 ("Market Definition Notice") points 7 and 15.

139 Market Definition Notice, point 20.

140 Market Definition Notice, point 8.

supplemented by National Roaming Agreements ("NRA").[141] Via their respective networks, Orange and MásMóvil provide mobile communication services to their subscribers.

(165) Orange's mobile network covers almost [90-100]% of the Spanish population with 2G, 3G, and 4G technologies, and approximately [70-80]% of the population with 5G technology as of end of 2022. In terms of territory, Orange covers [80-90]% with 3G, [70-80]% with 4G and [10-20]% with 5G as of end of 2022. Orange has an even presence across Spain with a proprietary mobile network of approximately [...] mobile sites as of the end of 2022.[142]

(166) MásMóvil's mobile national network is based on [...] mobile sites, which covers [80-90]% of the population and [30-40]% of the territory in 3G and 4G.[143] [Details on MASMOVIL's business strategy][144] [Details on MASMOVIL's business strategy],[145] [Details on MASMOVIL's business strategy].

8.3.2. *Product market definition*

8.3.2.1. Past Commission decisions

(167) In its previous decisions, the Commission identified an overall retail market for mobile telecommunications services constituting a separate market, distinct from retail fixed telecommunication services.[146] The Commission considered that the retail market for mobile telecommunications services does not need to be further segmented based on the type of service (voice calls, SMS, MMS, mobile Internet data services), or the type of network technology (2G, 3G, 4G).[147] The Commission did consider a number of other possible segmentations of the overall retail market for mobile telecommunication services: (pre-paid vs post-paid services;[148] private

---

141 MásMóvil has signed NRAs to access other operators' network and benefit from better geographic coverage or better technology coverage.

142 Form CO, paragraph 571.

143 Response to question 14b of RFI 1. Form CO, paragraph 2095.

144 [Details on MASMOVIL's business strategy].

145 Form CO, paragraph 789. Article 6(1)(c) Response, paragraph 229.

146 Commission decisions of 20 March 2023 in case M.10663 – *Orange/VOO/Brutélé*, paragraph 130; of 26 October 2020 in case M.9963 – *Iliad/Play Communications*, paragraph 10; of 18 July 2019 in case M.8864 – *Vodafone/Certain Liberty Global Assets*, paragraph 67; of 27 November 2018 in case M.8792 – *T-Mobile NL/Tele2 NL*, paragraph 160; of 31 August 2018 in case M.9041 – *Hutchison/Wind Tre*, paragraph 26; of 30 May 2018 in case M.7000 – *Liberty Global/Ziggo*, paragraph 206; of 11 May 2016 in case M.7612 – *Hutchison 3G UK/Telefónica UK*, paragraph 252; of 2 July 2014 in case M.7018 – *Telefónica Deutschland/E-Plus*, paragraph 64.

147 Commission decisions of 20 March 2023 in case M.10663 – *Orange/VOO/Brutélé*, paragraph 130; of 18 July 2019 in case M.8864 – *Vodafone/Certain Liberty Global Assets*, paragraph66; of 30 May 2018 in case M.7000 – *Liberty Global/Ziggo*, paragraph 207; of 1 September 2016 in case M.7758 – *Hutchison 3G Italy/Wind/JV*, paragraph 135 to 140; of 3 August 2016 in case M.7978 – *Vodafone/Liberty Global/Dutch JV*, paragraph 74; of 11 May 2016 in case M.7612 – *Hutchison 3G UK/Telefónica UK*, paragraph 259 to 265 and 287; of 02 July 2014 in case M.7018 – *Telefónica Deutschland/E-Plus*, paragraph 31 to 55; of 28 May 2014 in case M.6992 – *Hutchison 3G UK/Telefónica Ireland*, paragraph141; of 12 December 2012 in case M.6497 – *Hutchison 3G Austria/Orange Austria*, paragraph43 to 58.

148 Commission decisions of 20 March 2023 in case M.10663 – *Orange/VOO/Brutélé*, paragraph 130; of 18 July 2019 in case M.8864 – *Vodafone/Certain Liberty Global Assets*, paragraph 64 to 67; of 27 November 2018 in case M.8792 – *T-Mobile NL/Tele2 NL*, paragraph 202; of 30 May 2018 in case M.7000 – *Liberty Global/Ziggo*, paragraph 200 to 207; of 1 September 2016 in case M.7758 – *Hutchison 3G Italy/Wind/JV*, paragraph146 to 149; of 3 August 2016 in case M.7978 – *Vodafone/Liberty Global/Dutch JV*, paragraph72 to 74; of 11 May 2016 in case M.7612 – *Hutchison 3G UK/Telefónica UK*, paragraph266 to 270 and 287; of 2 July 2014 in case M.7018 – *Telefónica*

customers vs. business customers;[149] high-value vs low-value customers;[150] sim-card only ("SIMO") and handset subscriptions;[151] different distribution channels[152]) but considered that they do not constitute separate product markets but rather segments of the same market.

(168) The Commission considered that Over-the-Top ("OTT") services (e.g., instant messaging or voice over Internet Protocol ("VoIP") applications), whether provided over Wireless Fidelity ("Wi-Fi") or via mobile telecommunications data networks, were not part of the market for mobile telecommunications services, as OTT services rely on mobile telecommunications (data) services and/or fixed broadband services to function.[153]

(169) Finally, in previous decisions, the Commission concluded that there is a separate market for Machine-to-Machine ("M2M"[154]) services from the overall market for retail supply of mobile telecommunications services, due to the particular characteristics of the demand for and supply of these services. [155]

8.3.2.2. The Parties' views

(170) The Parties generally agree with previous Commission decisions and consider that the relevant product market to be taken into account is the overall market for the retail supply of mobile telecommunications services without further segmentation, excluding the Commission's position regarding OTT services.

Deutschland/E-Plus, paragraph37 to 39 and 65 to 71; of 28 May 2014 case M.6992 – *Hutchison 3G UK/Telefónica Ireland*, paragraph141 to 143; and of 12 December 2012 in case M.6497 – *Hutchison 3G Austria/Orange Austria*, paragraph 38 to 41 and 58.

149 Commission decisions of 20 March 2023 in case M.10663 – *Orange/VOO/Brutélé*, paragraph 130; of 18 July 2019 in case M.8864 – *Vodafone/Certain Liberty Global Assets*, paragraph 64 to 67; of 30 May 2018 in case M.7000 – *Liberty Global/Ziggo*, paragraph 200 to 207; of 3 August 2016 in case M.7978 – *Vodafone/Liberty Global/Dutch JV*, paragraph 72 to 74; of 11 May 2016 in case M.7612 – *Hutchison 3G UK/Telefónica UK*, paragraph 276 to 279; of 2 July 2014 in case M.7018 – *Telefónica Deutschland/E-Plus*, paragraph 30 to 36; of 28 May 2014 in case M.6992 – *Hutchison 3G UK/Telefónica Ireland*, paragraph 141, 149 and 150; and of 12 December 2012 in case M.6497 – *Hutchison 3G Austria/Orange Austria*, paragraph 32 to 35.

150 Commission decisions of 20 March 2023 in case M.10663 – *Orange/VOO/Brutélé*, paragraph 130; and of 2 July 2014 in case M.7018 – *Telefónica Deutschland/E-Plus*, paragraph 40 to 44.

151 Commission decisions of 20 March 2023 in case M.10663 – *Orange/VOO/Brutélé*, paragraph 130; and of 11 May 2016 in case M.7612 – *Hutchison 3G UK/Telefónica UK*, paragraph 271 to 275.

152 Commission decision of 20 March 2023 in case M.10663 – *Orange/VOO/Brutélé*, paragraph 130; in Commission decision of 11 May 2016 in case M.7612 – *Hutchison 3G UK/Telefónica UK*, paragraph 280 to 286, the Commission took into account also the segmentation between direct distribution and independent specialist retailers in view of the important role played in the retail market by independent specialist retailers and since direct distribution and independent specialist retailers account for the largest part of the market.

153 Commission decisions of 20 March 2023 in case M.10663 – *Orange/VOO/Brutélé*, paragraph 131; of 18 July 2019 in case M.8864 – *Vodafone/Certain Liberty Global Assets*, paragraph 65 to 66; of 27 November 2018 in case M.8792 – *T-Mobile NL/Tele2 NL*, paragraph 168 to 169; of 1 September 2016 in case M.7758 – *Hutchison 3G Italy/WIND/JV*, paragraph 138 to 145 and 162; and of 11 May 2016 in case M.7612 – *Hutchison 3G UK/Telefónica UK*, paragraph 262 to 265 and 286.

154 M2M subscriptions allow machines, devices, appliances, etc. to connect wirelessly to the internet, permitting the transmission and receipt of data to a central server. Common examples of M2M include energy metering or a burglar alarms.

155 Commission decisions of 20 March 2023 in case M.10663 – *Orange/VOO/Brutélé*, paragraph 131; of 28 July 2021 in case M.10153 – *Orange/Telekom Romania Communications*, paragraph 22; of 15 July 2019 in case M.9370 – *Telenor/DNA*, paragraph 39 to 42; of 19 November 2020 in case M.9559 – *Telefónica/Prosegur/Prosegur Alarmas España* paragraph 37; and of 27 November 2018 in case M.8792 – *T-Mobile NL/Tele2 NL*, paragraph 223 and 224.

(171) In the Form CO, the Parties submit that the market for the retail supply of mobile telecommunications services should include OTT services delivered via desktop devices and/or over fixed infrastructure networks. In the alternative, the Parties submit that they should at the very least be considered a relevant out-of-market constraint in the context of the competitive assessment.

(172) With respect to M2M subscriptions, the Parties consider that the definition of the relevant product market should be left open as to whether M2M constitutes a separate product market or a segment of the market for retail mobile telecommunications services given the rapid technological and usage changes that this market is still experiencing.

8.3.2.3. Commission's assessment

(173) Overall, the Phase I market investigation provided support for a finding that the Commission's previous decisional practice is also pertinent in the present case.[156] For instance, a competitor considered that: *"the market definition for retail market for mobile telecommunications services contained in the European Commission's decisions M.7421 Orange/Jazztel and M.8792 T-Mobile NL/Tele2 NL is still applicable to date in Spain. The retail market for mobile telecommunications services constitutes a separate market in Spain that should not be further segmented based on the type of service, network technology, type of customers, or whether the mobile services are provided on a standalone basis or as part of a multiple-play bundle"*[157]. In the same vein, another competitor indicated that *"there has been no change in the market that would make it appropriate to adopt a different market definition"*[158]. From the demand-side perspective, a competitor explained that: *"Although the Spanish telecommunications retail market is mainly convergent, there are still lots of consumers purchasing mobile telecommunication services on a stand-alone basis"*.[159] From the supply-side perspective, another competitor indicated that *"The retail mobile telecommunications market in Spain comprises the supply of mobile broadband services including voice, messages and data services. There are no major differences among what players offer that would justify a further segmentation of the market"*[160]

(174) Furthermore, specifically with respect to the possible segmentation of the overall retail market for mobile telecommunication services between pre-paid and post-paid services, the majority of respondents who expressed a view confirmed that this segmentation is not necessary in Spain. A competitor explained that *"From a consumer perspective, the use of pre-paid services is declining and there are no end-consumer groups that strongly prefer pre-paid over post-paid services. On the supply side, operators are able to provide both services from an economic and technical point of view without incurring high costs"*.[161] Three MVNOs considered the market should be segmented between pre-paid and post-paid services. In this regard, they explained that from a demand-side perspective, the clients represent different profiles as *"certain end-customer groups such as low-income groups or youngsters prefer pre-paid services to better control their monthly expense on mobile services"*.[162]

156 Responses to questionnaire Q1 to competitors, question C.A.A.A.
157 Response to questionnaire Q1 to competitors, question C.A.A.A., Doc ID 2733.
158 Response to questionnaire Q1 to competitors, question C.A.A.A., Doc ID 2796.
159 Response to questionnaire Q1 to competitors, question C.A.A.A., Doc ID 2834.
160 Response to questionnaire Q1 to competitors, question C.A.A.A., Doc ID 3624.
161 Response to questionnaire Q1 to competitors, question C.A.A.A., Doc ID 2796.
162 Response to questionnaire Q1 to competitors, question C.A.A.A., Doc ID 2834.

From a supply-side perspective, one respondent mentioned that there are *"no differences in terms of easiness to provide the services, regardless internally defining slightly different invoicing procedures for each type of service. Pre-paid however entails much less risk of non-payment and fraud than post-paid."* And another one pointed out that *"some mobile-only providers offer both, while some others just address a single sub-segment"*.[163]

(175) With respect to OTT services, consistent with the Commission's decisional practice,[164] a distinction between mobile services and OTT services is appropriate for the purposes of assessing the Transaction. Regardless of their innovative design and functionalities, OTT services still need an internet connection (whether individual mobile connection on the handset or a public or private WiFi) to function. Moreover, calling and texting functionality is typically bundled with data connectivity in mobile telecommunication tariff plans intended for handset users, being integrated in the protocol layer in a way that OTT services are not. Such integrated functionality also affords universal connectivity by means of the public numbering system, whereas OTT services, while they may offer functionality which traditional services do not and may therefore be preferred by some users for some purposes, are often limited in terms of the users they can address to other users of the same service, or if not are subject to additional costs if they need to terminate on public telecommunications networks. In addition, the Phase I market investigation has shown no evidence of a significant shift in the market to data-only tariffs (whether as regards the demand or the supply side) as might be expected if there were a general and widespread trend towards making use exclusively of OTT applications to meet a user's calling and messaging needs.

(176) Indeed, in the Phase I market investigation, the majority of respondents agreed with our previous decisional practise (in particular, to cases M.7421- Orange/Jazztel and M.8792 - T-Mobile NL/Tele2) defining the retail mobile telecommunication services. It is noteworthy that, case M.8792 - T-Mobile NL/Tele2 excluded the inclusion of OTT services in the retail mobile market definition. Further, only one respondent suggested including OTT services in the market definition, even though it also signalled that it agreed with our previous decisional practice defining the retail mobile market.[165] Further, only one competitor flagged the need of inclusion of Voice-over-LTE ("VoLTE") technologies in the market definition.[166]

(177) In the Article 6(1)(c) Response, the Parties do not contest the Commission's conclusions as regards the non-inclusion of OTT services within the relevant market.

(178) With regard to M2M services, except for one market participant who flagged the need of inclusion of M2M services in the market definition,[167] the Phase I market investigation has not yielded any evidence to suggest that the Commission should change its previous approach.

(179) In light of the above, the Commission preliminary concluded in the Article 6(1)(c) Decision that the relevant product market is the market for the retail supply of mobile telecommunication services, including both pre-paid and post-paid services and

---

163 Response to questionnaire Q1 to competitors, question C.A.A.A., Doc ID 2940.

164 Commission decisions of 20 March 2023 in case M.10663 – *Orange/VOO/Brutélé*, paragraph 131; and of 27 November 2018 in case M.8792 – *T-Mobile NL/Tele 2 NL*.

165 Response to questionnaire Q1 to competitors, question C.A.A.A., Doc ID 2796.

166 Response to questionnaire Q1 to competitors, question C.A.A.A., Doc ID 2821.

167 Response to questionnaire Q1 to competitors, question C.A.A.A., Doc ID 2913.

excluding OTT and M2M services. In the Article 6(1)(c) Response, the Parties did not continue to contest this view.

(180) The Commission's Phase II market investigation has not revealed any element which might justify departing from the preliminary conclusions reached in the Article 6(1)(c) Decision and the past Commission practice. Therefore, for the purpose of this Decision, the Commission considers that the relevant product market is the market for the retail supply of mobile telecommunication services, including pre-paid and post-paid services, and excluding OTT and M2M services.[168] M2M services are considered a separate relevant product market for the purposes of this Decision.

8.3.3. Geographic market definition

(181) In previous decisions, the Commission found that the market for the retail supply of mobile telecommunications services is national in scope.[169]

(182) The Parties agree with the Commission's previous decisions that the geographic scope of the market for the retail supply of mobile telecommunications services is national.

(183) The Commission's Phase I market investigation in the present case has generally confirmed this approach, only one competitor has submitted that *"There are important competitors that have a strong regional focus, such as ourselves and Euskaltel [MásMóvil]. As a result, the market is more competitive in some regions than in others"*.[170]

(184) In view of the above, in the Article 6(1)(c) Decision, the Commission preliminary concluded that the relevant geographic market for the retail supply of mobile telecommunication services is national, comprising of the territory of Spain. In the Article 6(1)(c) Response, the Parties did not contest this view.

(185) The Phase II market investigation did not provide additional evidence that would indicate a different conclusion.

(186) Therefore, for the purpose of this Decision, the Commission considers that the relevant geographic market for the retail supply of mobile telecommunication services is national, comprising of the territory of Spain.

8.4. Retail supply of M2M services

(187) The market for the retail supply of M2M services is the market on which MNOs and MVNOs sell subscription services which allow machines, devices, appliances, etc., to connect wirelessly to the internet via mobile networks, or other technologies, permitting the transmission and receipt of data to a central server. M2M services are received through specific data-only M2M (SIM) cards, used for communication between machines (for instance, between different devices of an alarm system) and are mainly supplied to business customers.

---

168 OTT services are excluded from this Decision's assessment, as the OTT services market is not a market affected by the Transaction.

169 Commission decisions of 20 March 2023 in case M.10663 – *Orange/VOO/Brutélé*, paragraph 135; of 28 July 2021 in case M.10153 – *Orange/Telekom Romania Communications*, paragraph 26; of 18 July 2019 in case M.8864 – *Vodafone/Certain Liberty Global Assets*, paragraph 70; and of 2 October 2008 in case M.5148 – *Deutsche Telekom/OTE*, paragraph 18 to 20.

170 Response to questionnaire Q1 to competitors, question C.B.A.A., Doc ID 2865.

8.4.1. Parties' activities

(188) Orange provides M2M services to end-customers, relying exclusively on its own mobile network to provide M2M services. Where Orange's SIM cards are located outside of Spain, M2M services are provided based on international roaming agreements with other foreign mobile operators.

(189) MásMóvil's presence in the market for the provision of M2M services is [...], with only a [0-5]% of market share. MásMóvil's [...] position in the M2M segment [...]. [Details on the wholesale agreements concluded by the Parties].

8.4.2. Product market definition

8.4.2.1. Past Commission decisions

(190) As mentioned above[171], in previous decisions, the Commission concluded that there is a separate market for the retail supply of M2M services distinct from the market for the retail supply of mobile telecommunication services, due to the particular characteristics of the demand for and supply of these services.[172]

8.4.2.2. The Parties' views

(191) As mentioned above[173], with respect to M2M subscriptions, the Parties consider that the definition of the relevant product market should be left open as to whether M2M constitutes a separate product market or a segment of the market for retail mobile telecommunications services given the rapid technological and usage changes that this market is still experiencing.

8.4.2.3. Commission's assessment

(192) As mentioned above[174], the Phase I market investigation has not yielded any evidence to suggest that the Commission should change its previous approach.

(193) Therefore, for the purposes of this Decision, the Commission considers that there is a separate relevant product market for the retail supply of M2M services.

8.4.3. Geographic market definition

(194) In previous decisions, the Commission assessed whether the geographic market was national or regional (e.g. including the Nordic countries in a specific case), but ultimately left the geographic market definition open.[175]

(195) The Parties submit that the geographic market definition can be left open, as the Transaction would not raise doubts as to its compatibility with the internal market under any plausible geographic market definition.

The Commission considers that, for the purposes of this Decision, the M2M market definition is national in scope, as the players in the market compete nationally amongst them.

---

171 See Section 8.3.2.1 * MERGEFORMAT 8.3.2.1.

172 Commission decisions of 20 March 2023 in case M.10663 – *Orange/VOO/Brutélé*, paragraph 131; of 28 July 2021 in case M.10153 – *Orange/Telekom Romania Communications*, paragraph 22; of 15 July 2019 in case M.9370 – *Telenor/DNA*, paragraph 39 to 42; of 19 November 2020 in case M.9559 – *Telefónica/Prosegur/Prosegur Alarmas España* paragraph 37; and of 27 November 2018 in case M.8792 – *T-Mobile NL/Tele2 NL*, paragraphs 223 and 224.

173 See Section 8.3.2.2 * MERGEFORMAT 8.3.2.2.

174 See Section 8.3.2.3 * MERGEFORMAT 8.3.2.3.

175 Commission decisions 15 July 2019 in case M.9370 – Telenor/DNA, paragraph 46; of 19 February 2020 in case M. 9559 *Telefónica/Prosegur*, paragraph 43.

8.5. Retail supply of fixed internet access services

(196) Internet access services consist of the provision of a telecommunications link enabling customers to access the internet. Internet access may be provided as dial-up ("narrowband") access, as higher bandwidth ("broadband") access via xDSL, a cable modem or mobile broadband technology, or in the form of dedicated access involving leased lines connecting a specific location to the internet and guaranteeing higher levels of performance and security ("dedicated access").[176]

8.5.1. Parties' activities

(197) Both Orange and MásMóvil are active in the market for the retail supply of fixed internet access services across Spain.

(198) OSP provides fixed internet access services both standalone and in multiple-play (including FMC) bundles. OSP provides fixed internet access services under its three brands Orange, Jazztel and Simyo across Spain mostly through FMC offers (which represent [80-90]% of its total number of fixed lines) and through standalone offers and fixed-only bundles.

(199) MásMóvil provides fixed internet access services both standalone and in fixed-only bundles or FMC bundles (which represent [80-90]% of its total number of lines) through national brands such as MásMóvil, Yoigo, Virgin Telco., Pepephone (digital brand), Lebara, Lycamobile and regional brands such as Euskaltel, R, Telecable and Guuk.

8.5.2. Product market definition

8.5.2.1. Past Commission decisions

(200) In recent cases, the Commission has considered that the relevant product market is the overall retail market for the provision of fixed internet access services, including all product types (narrowband, broadband, dedicated access), distribution modes (DSL, cable, fibre, fixed wireless access ("FWA")) and speeds/bandwidths, to residential and Small Office and Home Office ("SOHO") customers.[177]

(201) In these decisions, the Commission excluded fixed internet access services provided through mobile network infrastructure (e.g., fixed Long-Term Evolution ("fLTE")), which form part of the market for retail mobile telecommunications services.[178]

(202) With respect to Spain, the Commission excluded any segmentation according to the distribution technology and infrastructures (such as copper, Hybrid fibre-coaxial ("HFC") cable and fibre to the home ("FTTH").[179] Furthermore, the Commission concluded that a distinction between mobile and fixed internet access services is

---

176 Commission decisions of 20 March 2023 in case M.10663 – *Orange/VOO/Brutélé*, paragraph 39; of 28 July 2021 in case M.10153 – *Orange/Telekom Romania Communications*, paragraph 37; and of 29 January 2010 in case M.5730 – *Telefónica/Hansenet Telekommunikation*, paragraph 7.

177 Commission decisions of 20 March 2023 in case M.10663 – *Orange/VOO/Brutélé*, paragraph 43; of 28 July 2021 in case M.10153 – *Orange/Telekom Romania Communications*, paragraph 46; of 26 July 2021 in case M.10070 – *Eurofiber/Proximus/JV*, paragraph 74; and of 24 March 2021 in case M.10087 – *Proximus/Nexus/JV*, paragraph 74.

178 Commission decisions of 20 March 2023 in case M.10663 – *Orange/VOO/Brutélé*, paragraph 44; of 28 July 2021 in case M.10153 – *Orange/Telekom Romania Communications*, paragraph 40; of 26 July 2021 in case M.10070 – *Eurofiber/Proximus/JV*, paragraph 74; and of 24 March 2021 in case M.10087 – *Proximus/Nexus/JV*, paragraph 74.

179 Commission decision of 19 May 2015 in case M.7421 – *Orange/Jazztel*, paragraph 49.

justified,[180] and that the retail market for the supply of internet access services to residential and small business customers is separate from the market serving large business customers with internet access services.[181] Finally, the Commission left open the question of whether a distinction by speed (between speed below 30 Mb/s and speed above 30 Mb/s) was relevant.[182]

8.5.2.2. The Parties' views

(203) The Parties submit that the relevant product market to be taken into account is at most the market for the retail supply of fixed internet access services without any further potential segmentation and excluding both fLTE and retail business connectivity services. Additionally, the Parties consider that, to the extent that fixed-internet access services now mainly consist of higher bandwidth (HFC and FTTH), the distinction between broadband and narrowband is obsolete.

8.5.2.3. Commission's assessment

(204) The Phase I market investigation confirmed that the Commission's past decisions in relation to the market for the retail supply of fixed internet access services still adequately reflect the market realities in Spain. [183] First, the majority of the market participants who expressed a view confirmed the existence of an overall market for the retail supply of fixed internet access services including all product types without further segmentations, excluding fLTE and large business customers.

(205) Furthermore, in line with findings in previous cases, all market participants who expressed a view confirmed that retail internet access services for large business customers belong to a separate product market as opposed to residential and small customers.[184] From the demand-side perspective, one market respondent explained that: *"Large business customers have a very different approach to fixed broadband services to residential or SMEs, based on heavy data consumption, extreme reliability, intensive use of bandwidth and connectivity, plus enhanced concern for communications security"*.[185] From the supply-side perspective, one market participant explained that: *"Volumes of lines, requested services and capacity justify having different approaches for SoHo/SMEs and Large corporates".*[186] Another market participant pointed out that *"From a regulatory perspective, the residential and business segments are clearly differentiated"*.[187]

(206) Lastly, several market participants noted the high level of convergence in Spain that *"is breaking traditional silos between fixed and mobile stand-alone services"*.[188]

(207) In light of the above, in the Article 6(1)(c) Decision, the Commission preliminarily concluded that there is an overall market for the retail supply of fixed internet access services including all product types without further segmentations, excluding fLTE

[180] Commission decision of 19 May 2015 in case M.7421 – *Orange/Jazztel*, paragraph 53.
[181] Commission decision of 19 May 2015 in case M.7421 – *Orange/Jazztel*, paragraph 53.
[182] Commission decision of 19 May 2015 in case M.7421 – *Orange/Jazztel*, paragraph 47.
[183] A respondent to the Phase I market investigation explained that fibre gives much higher capacity than cable or ADSL. This quality difference between the distribution modes, that also depends on the investments made by the cable network owner, will be taken into account in the competitive assessment. See responses to questionnaire Q1 to competitors, question C.A.A.B., Doc ID 2821.
[184] Responses to questionnaire Q1 to competitors, question C.A.A.B.
[185] Response to questionnaire Q1 to competitors, question C.A.A.B., Doc ID 2877.
[186] Response to questionnaire Q1 to competitors, question C.A.A.B., Doc ID 3624.
[187] Response to questionnaire Q1 to competitors, question C.A.A.B., Doc ID 2796.
[188] Response to questionnaire Q1 to competitors, question C.A.A.B., Doc ID 2796.

and large business customers. In the Article 6(1)(c) Response, the Parties did not contest this view.

(208) The Phase II market investigation did not provide additional evidence that would indicate a different conclusion.

(209) Therefore, for the purposes of this Decision, the Commissions considers that the relevant product market is an overall market for the retail supply of fixed internet access services including all product types without further segmentations, excluding fLTE and large business customers.[189]

8.5.3. Geographic market definition

(210) In its previous decisions, the Commission has generally defined the retail supply of fixed internet access services as a national market.[190] With respect to Spain, the Commission concluded in another case that the retail market for the provision of fixed internet services (for residential and small business customers) is national in scope.[191] The Commission noted in its decision in M.7421 – *Orange/Jazztel* that, 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.[192]

(211) The Parties consider that the relevant market for the retail supply of fixed internet services is national in scope and corresponds to the territory of Spain.

(212) The Commission's Phase I market investigation in the present case has confirmed this approach.[193]

(213) Therefore, aligned with the previous decision concerning the Spanish market, the Commission in its Article 6(1)(c) Decision preliminary concluded that the relevant geographic scope of the retail market for fixed internet services is national, and comprises the territory of Spain. In the Article 6(1)(c) Response and in the SO Reply, the Parties did not contest this view.

(214) The Phase II market investigation did not provide additional evidence that would indicate a different conclusion.

(215) Therefore, for the purposes of this Decision, the Commission considers that the relevant geographic market for retail supply of fixed internet services is national, and comprises the territory of Spain.

8.6. Retail supply of fixed telephony services

(216) Fixed telephony services to end customers comprise the provision of subscriptions enabling access to public telephone networks at a fixed location for the purpose of making and/or receiving calls and related services.[194]

---

189 For the purposes of this decision, the fLTE and large business customers markets will not be further discussed as they are not affected by the Transaction.

190 Commission decisions of 20 March 2023 in case M.10663 – *Orange/VOO/Brutélé*, paragraph 52; of 28 July 2021 in case M.10153 – *Orange/Telekom Romania Communications*, paragraph 50; of 3 August 2016 in case M.7978 – *Vodafone/Liberty Global/Dutch JV*, paragraph 40; of 20 September 2013 in case M.6990 – *Vodafone/Kabel Deutschland*, paragraph 197; of 29 June 2010 in case M.5532 – *Carphone Warehouse/Tiscali UK*, paragraph 47; of 9 January 2010 in case M.5730 – *Telefónica/Hansenet Telekommunikation*, paragraph 28.

191 Commission decision of 19 May 2015 in case M.7421 – *Orange/Jazztel*, paragraph 61.

192 Commission decision of 19 May 2015 in case M.7421 – *Orange/Jazztel*, paragraph 59.

193 Responses to questionnaire Q1 to competitors, question C.B.A.B.

8.6.1. Parties' activities

(217) Both Orange and MásMóvil are active in the market for the retail supply of fixed telephony services across Spain.

(218) OSP provides fixed telephony services both standalone and in multiple-play (including FMC) bundles (which represent [80-90]% of its total number of fixed lines). OSP provides fixed telephony services under its three brands Orange, Jazztel and Simyo across Spain mostly through FMC offers and through standalone offers and fixed-only bundles.

(219) MásMóvil provides fixed telephony services both standalone and in fixed-only bundles or FMC bundles (which represent [90-100]% of its total number of lines) through national brands such as MásMóvil, Yoigo, Virgin Telco., Pepephone (digital brand), Lebara, Lycamobile and regional brands such as Euskaltel, R, Telecable and Guuk.

8.6.2. Product market definition

8.6.2.1. Past Commission decisions

(220) The Commission has considered distinguishing between local/national and international calls, as well as between residential and non-residential customers in the market for the retail supply of fixed telephony services,[195] but ultimately leaving the exact product market definition open.[196]

(221) The Commission also recently considered that managed Voice over Internet Protocol ("VoIP") services and traditional fixed telephony are interchangeable and therefore belong to the same market.[197]

8.6.2.2. The Parties' views

(222) The Parties submit that, in line with the Commission's decisional practice, the relevant product market to be taken into account is the market for the retail supply of fixed telephony services.[198]

8.6.2.3. Commission's assessment

(223) The Phase I market investigation did not produce anything that contradicts the Commission's decisional practice.

---

[194] Commission decisions of 20 March 2023 in case M.10663 – *Orange/VOO/Brutélé*, paragraph 139; of 18 July 2019 in case M.8864 – *Vodafone/Certain Liberty Global Assets*, recital 33; of 15 July 2019 in case M.9370 – *Telenor/DNA*, paragraph 47; of 30 May 2018 in case M.7000, *Liberty Global/Ziggo*, paragraph 147; of 3 August 2016 in case M.7978 – *Vodafone/Liberty Global/Dutch JV*, paragraph 21; of 4 February 2016 in case M.7637 – *Liberty Global/BASE Belgium*, recital 69; of 20 September 2013 in case M.6990 – *Vodafone/Kabel Deutschland*, paragraph 131.

[195] Commission decision of 20 March 2023 in case M.10663 – *Orange/VOO/Brutélé*, paragraph 142; of 18 July 2019 in case M.8864 – *Vodafone/Certain Liberty Global Assets*, recitals 35 to 40; Commission decision of 8 October 2018 in case M.8842 – *Tele2/Com Hem Holding*, paragraphs 14 to 17

[196] Commission decisions of 20 March 2023 in case M.10663 – *Orange/VOO/Brutélé*, paragraph 142; of 18 July 2019 in case M.8864, *Vodafone/Certain Liberty Global Assets*, paragraph 40; of 15 July 2019 in case M.9370, *Telenor/DNA*, paragraph 52; of 29 January 2010 in case M.5730, *Telefónica/Hansenet Telekommunikation*, paragraphs 16-17; of 29 June 2009 in case M.5532, Carphone Warehouse/Tiscali UK, paragraphs 35 and 39; of 7 September 2005 in case M.3914, Tele2/Versatel, paragraph 10.

[197] Commission decisions of 20 March 2023 in case M.10663 – *Orange/VOO/Brutélé*, paragraph 142; of 04 February 2016, in case M.7637, *Liberty Global/BASE Belgium*, paragraph 67; of 19 May 2015, M.7421, *Orange/Jazztel*, para. 24; of 20 September 2013, M.6990, *Vodafone/Kabel Deutschland*, para. 137; of 29 June 2009, M.5532, *Carphone Warehouse/Tiscali UK*, para. 56.

[198] Form CO, paragraph 250.

(224) Therefore, the Commission considers that, for the purposes of this Decision, the relevant product market is the market for the retail supply of fixed telephony services including VoIP services. The question whether the market should be segmented (i) between local/national calls on the one hand, and international calls on the other or (ii) by customer type (residential and non-residential) can be left open.

8.6.3. Geographic market definition

(225) In its decisional practice, the Commission concluded that the retail market for the provision of fixed telephony services is national due to the importance of national regulation in the telecommunications sector, the supply of upstream wholesale services that work on a national basis, and the fact that the pricing policies of telecommunications providers are predominantly national.[199]

(226) The Parties consider that the relevant market for the retail supply of fixed telephony services is national in scope and corresponds to the territory of Spain.[200]

(227) The Commission's Phase I market investigation in the present case has confirmed this approach.[201]

(228) The Phase II market investigation did not provide additional evidence that would indicate a different conclusion.

(229) Therefore, for the purpose of this Decision, the Commission considers that the relevant geographic market for retail supply of fixed telephony services is national, and comprises the territory of Spain.

8.7. Retail supply of multiple-play bundles including FMC bundles

(230) The term "multiple-play" relates to product offerings comprising two or more of the following services provided to retail consumers on the basis of single or multiple contracts by the same provider: mobile telecommunications services, fixed telephony services, fixed internet access and Pay-TV services[202]. Multiple-play offers comprising two, three, or four of these services are referred to as dual play ("2P"), triple play ("3P"), and quadruple play ("4P") respectively.[203]

(231) The CNMC has a particular approach to categorising the bundles, which differs from the Commission's approach. The CNMC treats "mobile data" as a separate service from "mobile telephony" whereas the Commission includes mobile data in mobile telecommunications services. Consequently, in Spain, the bundle which the Commission's past decisions have defined as 4P is known as quintuple play ("5P"). Following the CNMC's practice, **Table 4** below presents the different multiple-play combinations that exist in Spain.

199 Commission decision of 18 July 2019 in case M.8864 – *Vodafone/Certain Liberty Global Assets*, recital 46; of 30 May 2018 in case M.7000 – *Liberty Global/Ziggo*, paragraph 150; of 3 August 2016 in case M.7978 – *Vodafone/Liberty Global/Dutch JV*, paragraph 29; of 19 May 2015 in case M.7421 – *Orange/Jazztel*, recital 37; of 3 July 2012 in case M.6584 – *Vodafone/Cable & Wireless*, paragraph 13.

200 Form CO, paragraph 254.

201 Responses to questionnaire Q1 to competitors, question C.A.A.C.

202 Retail providers of audio-visual ("AV") services offer packages of linear audio-visual services and/or non-linear audio-visual services to end customers. In Spain, telecommunication operators sell only Pay-TV services. In addition, neither Party is active in free-to-air ("FTA") TV in Spain, therefore only Pay-TV services will be mentioned in the decision.

203 Commission decisions of 20 March 2023 in case M.10663 – *Orange/VOO/Brutélé*, paragraph 97; of 10 March 2022 in case M.10515 – *Iliad/UPC Polska*, paragraph 62; of 28 July 2021 in case M.10153 – *Orange/Telekom Romania Communications*, paragraph 62; and of 18 July 2019 in case M.8864 – *Vodafone/Certain Liberty Global Assets*, paragraph 146.

Table 4 Types of multiple-play bundles available in Spain

Type of bundle
2P – Fixed telephony and Fixed internet
3P – Fixed telephony, Fixed internet and Pay-TV
3P – Fixed internet, mobile telephony and mobile data
4P – Fixed telephony, Fixed internet, mobile telephony and mobile data
5P – Fixed telephony, Fixed internet, mobile telephony, mobile data and Pay-TV

Source: CNMC data, Annual Telecommunications Report, 2021.

(232) Three of the five services, namely fixed telephony services, fixed internet access and Pay-TV services, are fixed services as they are provided over a fixed network such as cable, copper, or fibre infrastructure. Multiple-play offers comprising any combination of two or more of these fixed services without a mobile component are referred to as "fixed multiple-play" products. Multiple-play offers comprising one or more of these fixed services in combination with a mobile component are referred to as "fixed-mobile convergent" ("FMC") products. FMC products may involve a single mobile subscription, or more than one mobile subscription combined with fixed services.[204]

(233) In addition, multiple-play bundles with Pay-TV include either premium Pay-TV (such as premium football or premium film and series content) or basic Pay-TV.

8.7.1. Parties' activities

(234) Both Orange and MásMóvil offer multiple-play bundles including FMC bundles.

(235) OSP provides multiple-play bundles services based on its own nation-wide mobile and fixed networks; to residential customers and to non-residential customers including tailor-made solutions for large accounts.[205]

(236) OSP provides these services under the Orange, Jazztel and Simyo brands. The Orange brand focuses on premium multiple-play bundles proposition, including bundles relying notably on offers that include premium Pay-TV content including all matches of La Liga and the Champions League football, devices as well as non-telecom services. Jazztel and Simyo brands also operate in this market, with mid-range (in the case of Jazztel) and low-cost (in the case of Simyo) offerings.[206]

(237) Concretely, in terms of premium Pay-TV football content, OSP has the rights to distribute all La Liga and UEFA Champions League matches, in part on the basis of wholesale access provided by Telefónica (which holds exclusivity over certain matches, initially pursuant to remedies imposed by the CNMC, which expire earlier in 2023[207]) and also by relying on a commercial agreement with DAZN, which exclusively manages a portion of La Liga football matches.[208] OSP bundles those

204 Commission decisions of 20 March 2023 in case M.10663 – *Orange/VOO/Brutélé*, paragraph 98; of 28 July 2021 in case M.10153 – *Orange/Telekom Romania Communications*, paragraph 63; and of 18 July 2019 in case M.8864 – *Vodafone/Certain Liberty Global Assets*, paragraph 147.

205 Form CO, paragraph 116.

206 Form CO, paragraph 2109.

207 See Form CO, paragraphs 548 and following. This initial set of remedies, imposed in the CNMC's 2015 *Telefónica / Canal+* merger approval decision, was set to be in force for five years. Following the initial term, the CNMC decided to extend them for a further three years, until 2023 There is no possibility to extend them further. Under the CNMC remedies, access is subject to price regulation, on the basis of a pre-defined formula.

208 Form CO, paragraph 2112.

premium football channels with its traditional Pay-TV channels as part of its multiple-play offering, in addition to selling traditional Pay-TV channels without premium football channels.

(238) MásMóvil provides multiple-play bundles based on its own mobile and fixed network, complemented with NRAs and [details on MASMOVIL's wholesale contracts], through a wide range of national brands—including Yoigo, MásMóvil, Virgin and Pepephone—as well as through regional brands—such as Euskaltel, R, and Telecable.[209]

(239) Contrary to Orange, MásMóvil does not provide its own Pay-TV services [details on MASMOVIL's contracts with third parties for distributing TV offerings].[210]

8.7.2. Product market definition

8.7.2.1. Past Commission decisions

(240) In its previous decisions, including specifically for Spain,[211] the Commission considered but ultimately left open the question whether there exist one or more multiple-play markets which are distinct from each of the underlying individual telecommunications services.[212] It also noted that, due to different services, delivered over different infrastructures (fixed for 2P and 3P or fixed and mobile for 4P), that are included in the different multiple-play bundles, instead of one hypothetical market for multiple-play, there could be several candidate multiple-play markets: a market for fixed bundles (2P and 3P) and another separate market for FMC bundles. The possibility for several mobile subscriptions to be included in a quadruple play bundle further complicates the picture.[213]

8.7.2.2. The Parties' views

(241) The Parties consider that, given the specific context of the Spanish market in terms of the uptake of multiple-play bundles, a separate market for multiple-play bundles should be defined.

(242) The Parties consider that within the wider multiple-play market, a separate market for FMC bundles should be defined as this represents 86% of the multiple-play offers in Spain.[214] The Parties also noted that the uptake of fixed-only bundles has

---

209 Form CO, paragraph 2117.

210 Form CO, paragraph 2118.

211 Commission decisions of 2 July 2014 in case M.7231 - *Vodafone/ ONO*, paragraphs 45 to 49; of 19 May 2015 in case M.7421 – *Orange/Jazztel.* The Commission further notes that in its decision of 16 July 2021 in CASE C/1181/21 *MasMovil/Euskaltel*, the Spanish NCA, the CNMC, also did not conclude on whether there were distinct relevant product markets for the retail supply of multiple-play bundles or FMC bundles.

212 Commission decisions of 20 March 2023 in case M.10663 – *Orange/VOO/Brutélé*, paragraph 102; of 28 July 2021 in case M.10153 – *Orange/Telekom Romania Communications*, paragraph 71; of 18 July 2019 in case M.8864 – *Vodafone/Certain Liberty Global Assets,* paragraph 152 to 161; of 3 August 2016 in case M.7978 – *Vodafone/Liberty Global/Dutch JV*, paragraph 108; of 4 February 2016 in case M.7637 – *Liberty Global/BASE Belgium*, paragraph 74 to 98; of 19 May 2015 in case M.7421 – *Orange/Jazztel*, paragraph 72 to 86; and of 24 February 2015 in case M.7194 – *Liberty Global/Corelio/W&W/De Vijver Media*, paragraph 130 to 132.

213 Commission decisions of 20 March 2023 in case M.10663 – *Orange/VOO/Brutélé*, paragraph 102; and of 3 August 2016 in case M.7978 – *Vodafone/Liberty Global/Dutch JV*, paragraph 107.

214 Form CO, paragraph 28, referencing the open data of the CNMC Data available at: https://data.cnmc.es/telecomunicaciones-y-sector-audiovisual/datos-anuales/datos-generales/telecomunicaciones-anual. The most recent data relates to 2022.

decreased since 2015, while the uptake of FMC bundles has significantly increased and in particular 4P and 5P bundles.[215]

(243) A further segmentation between FMC bundles with and without premium Pay-TV football content or different types of bundles is not necessary according to the Parties.

8.7.2.3. Commission's assessment

(244) According to the CNMC, multiple-play offers have grown significantly in Spain, with approx. 12.9 million multiple-play bundles in 2015 compared to 16.1 million in 2021, i.e., a growth of 24,8% in 6 years.[216] In 2021, 83.3% of all post-paid mobile lines, 96.3% of all fixed internet lines and 78% of all fixed lines were part of a bundled offer in Spain.[217]

(245) The vast majority of market participants who expressed a view consider that in Spain, consumers favour multiple-play bundles over unbundled (i.e. standalone) subscriptions. In this regard, from a demand-side perspective, in the event of a 10% price increase of a multiple-play bundles, the majority of the respondents that expressed a view indicated that a retail customer would likely not switch to obtaining separate standalone subscriptions, e.g. separately for mobile and for fixed internet.[218] Different reasons were given by market participants, including that some services, e.g. TV, are only available through bundles, and that in general due to bundle discounts, bundle prices are already cheaper by 10-15% compared to standalone services. A large majority of respondents also confirmed that multiple-play bundle customers tend to switch providers (including for part of their bundle) less frequently than customer with contracts for standalone (non-bundled) services.[219]

(246) **Possible distinction between fixed-only multiple-play bundles and FMC bundles.** Within multiple-play bundles, the Commission considers that a distinction may be made between fixed-only multiple-play bundles and FMC bundles. From a demand-perspective, a competitor explained that fixed-only multiple-play bundles and FMC bundles "*are not comparable with each other*".[220] In the same vein, another competitor pointed out that "*at retail level, residential retail customers behaviour is mostly driven by a perception of the fixed/mobile services as a single bundled service and can also state that commercial offers by the main operators in the retail market do follow this practice and offer primarily convergent offers (quadruple play) [i.e. FMC bundles] and with substantial discounts as compared to mobile-only or fixed-only offers*".[221]

(247) From a supply-side perspective, all main operators offer retail fixed internet and mobile services, as well as multiple-play and FMC bundles (i.e., the Parties, Telefónica and Vodafone, as well as access seekers such as Digi, etc.). However, market participants who expressed a view in response to the Commission's Phase I market investigation considered that a provider of standalone fixed internet services[222] (as it is the case as well for a provider of standalone mobile services[223]

[215] Form CO, paragraph 278.
[216] See Telecommunications and Audiovisual Sector Economic Report 2021, page 55, Doc ID 5719.
[217] See Telecommunications and Audiovisual Sector Economic Report 2021, page 55, Doc ID 5719.
[218] Responses to questionnaire Q1 to competitors, questions C.A.A.D.7 and C.A.A.D.8.
[219] Responses to questionnaire Q1 to competitors, questions C.A.A.D.36 and C.A.A.D.37.
[220] Responses to questionnaire Q1 to competitors, question C.A.A.D.2, Doc ID 2796.
[221] Responses to questionnaire Q1 to competitors, question C.A.A.D.2, Doc ID 2877.
[222] Responses to questionnaire Q1 to competitors, questions C.A.A.D.19 and C.A.A.D.20.

standalone fixed telephony services,[224] or standalone Pay-TV services[225]) in Spain could not, within a short time and without incurring significant additional costs, begin offering multiple-play bundles, including FMC bundles. Access seekers indicated that it is not easy to add retail mobile or fixed services on the basis of wholesale access if they did not do so already.

(248) On the other hand, the majority of respondents considered that a provider of multiple-play bundles including fixed internet, which does not offer any Pay-TV services, could easily start offering such services indirectly, either as a reseller (for example by reaching agreements with Video On Demand platforms), or by concluding wholesale agreements with audio-visual content rights holders, although virtual operators stressed that offering TV services on this basis is costly and difficult for them.[226]

(249) The Commission also assessed whether there was a basis for segmenting between (i) multiple-play and FMC bundles with and without any (i.e. basic or premium) Pay-TV content and (ii) multiple-play and FMC bundles with and without any premium Pay-TV film and series content. In relation to these segmentations, the Phase I market investigation did not provide enough support for such segmentations based on both demand and supply side considerations.[227] However, there was support for further segmenting between multiple-play and FMC bundles with and without premium Pay-TV football content.[228] In any event, the Parties indicated that they were unable to provide data for multiple-play and FMC bundles with and without any premium Pay-TV,[229] whereas they were able to do so for multiple-play and FMC bundles with and without premium Pay-TV football content. The Commission has therefore focused on the latter segmentation, including because the same conclusions hold for the broader markets for multiple-play bundles and FMC bundles, as assessed in the below section.

(250) **Possible distinction between multiple-play bundles (and FMC bundles) including premium Pay-TV football content and excluding premium Pay-TV football content**. As part of its in-depth investigation, the Commission further assessed whether there was a basis to consider further segmenting the multiple-play and FMC markets between multiple-play and FMC bundles with and without any basic or premium Pay-TV football content. Offering premium Pay-TV football content appears to be a key differentiating factor in the markets for multiple-play bundles and FMC bundles in Spain.[230] The Parties' activities only overlap in multiple-play and FMC bundles without premium Pay-TV football content.

(251) The Parties submit that there is no basis for such a segmentation "*because multiple-play/FMC bundles including football are both demand-side and supply-side*

[223] Responses to questionnaire Q1 to competitors, questions C.A.A.D.17 and C.A.A.D.18.

[224] Responses to questionnaire Q1 to competitors, questions C.A.A.D.21 and C.A.A.D.22.

[225] Responses to questionnaire Q1 to competitors, questions C.A.A.D.23 and C.A.A.D.24.

[226] Responses to questionnaire Q1 to competitors, questions C.A.A.D.25 and C.A.A.D.26.

[227] Responses to questionnaire Q3 to wholesale customers, question C.3.

[228] Responses to questionnaire Q3 to wholesale customers, question C.5.

[229] Response to RFI 32, Question 2.

[230] As explained in the previous section, the Commission has also assessed whether there was a basis for segmenting between (i) multiple-play and FMC bundles with and without any (i.e. basic or premium) Pay-TV content and (ii) multiple-play and FMC bundles with and without any premium Pay-TV film and series content. In relation to these segmentations, the Phase I market investigation was rather mixed and there was not enough support for such segmentations based on both demand and supply side considerations.

substitutes for bundles not including football."[231] The Parties' main argument in support of this is that "*football content is only provided on top of other pay-TV offerings and is not offered on top of a bundle that does not contain any pay-TV content*"[232]. Therefore, "*while there is demand-side substitutability between multiple-play and FMC offers including and excluding premium football, the only operator that is competitive across all types of offers (with or without football) is Telefónica due to its direct access to all premium football rights".*[233] However, the fact that Premium Pay-TV football content is only offered as an add-on rather suggests that it may be a distinct offering. Moreover, the results of the Commission's Phase I market investigation do not support the Parties' assertions. Lastly, the Parties' own internal documents support such possible segmentation.

(252) First, from a demand side perspective, all market participants that expressed a view in response to the Commission's Phase I market investigation—including Telefónica supplier which itself offers Premium Pay-TV football content—indicated that there is a material price difference (e.g. 10% or more) between the average multiple-play bundle and those with premium Pay-TV football content.[234] Indeed, this supplier Telefónica confirmed that based on its "*current offer, there is a material price difference (well above 10%), which is mainly due to the high cost of acquiring football content from the original right holders*"[235]. Accordingly, in the event of a hypothetical 10% price increase of a multiple-play or FMC bundle without Premium Pay-TV content, a customer is unlikely to consider switching to a bundles that includes such content, as suggested by the more substantiated responses to the Commission's Phase II market investigation.[236] A respondent noted that that "*Football content price is 45€/month with Telefónica and c.30€/month with Orange which makes a material price difference (between 40% and 50%) vs a Telefónica and Orange 5P bundle without football*"[237] and that "*a 10% price increase over a convergent pack with no TV services is not expected to cover the price premium of a multiple-play bundle with football*."[238] This view was also echoed by another market participant, which indicated that "*a 10% price increase over a convergent pack with no TV services is not expected to cover the price premium of a multiple-play bundle with football*."[239]

(253) Second, from a supply side perspective, the vast majority of respondents that expressed a view indicated that a provider of multiple-play bundles, or FMC bundles, without Pay-TV services could not begin to offer premium Pay-TV football content within a short time and without incurring significant additional costs.[240] One respondent explained that this is notably because "*There is a high cost to acquire football rights for the residential segment and you need a large customer base of Pay TV customers to offer it in an economical manner*"[241] while another player indicated that "*it is not possible for any small or independent provider to offer premium Pay*

231 Response to RFI 36, question 1.
232 Response to RFI 36, question 1.
233 SO Reply, paragraph 43.
234 Responses to questionnaire Q1 to competitors, question C.A.A.D.29.
235 Responses to questionnaire Q1 to competitors, question C.A.A.D.30., Doc ID 2796.
236 Responses to questionnaire Q3 to wholesale customers, questions C.15.
237 Responses to questionnaire Q1 to competitors, question C.A.A.D.30., Doc ID 2773.
238 Response to questionnaire Q3 to wholesale customers, question C.16., Doc ID 3463.
239 Response to questionnaire Q3 to wholesale customers, question C.16., Doc ID 3278.
240 Responses to questionnaire Q3 to wholesale customers, question C.5.
241 Response to questionnaire Q3 to wholesale customers, question C.6., Doc ID 3298.

TV football services at a reasonable cost. The rights for these services in Spain belong to Telefónica and DAZN and only Orange has a reseller agreement with Telefónica to provide them. No other provider offers these services. Even Vodafone had to give up football premium services given the overwhelming cost several years ago."[242]

(254) In a response covering both demand and supply side considerations, another market participant indicated that "*Premium content, esp. [i.e. especially] football (exclusive or very difficult to access or replicate at reasonable economic conditions, especially for smaller operators) has proven a very sticky service component for a relevant segment. Football fans segment has a lower churn rate than non-premium content segments, and their price sensitivity / elasticity is also lower,*"[243] which further supports a distinction between multiple-play bundles and FMC bundles with and without premium Pay-TV football content.

(255) Third, a June 2022 due diligence report prepared by [Advisor] on behalf of MásMóvil in the context of the Transaction examined the possible market for FMC bundles without premium Pay-TV football content, as shown in the extract below:

Figure 14 MásMóvil internal document on FMC market without premium Pay-TV football content

[MASMOVIL's market insights]

Source : MásMóvil internal document, page [...]

(256) In the Article 6(1)(c) Decision the Commission preliminary concluded basis that the question of whether there is a separate product market for the retail supply of multiple-play bundle services (as opposed to the underlying standalone services) can be left open. The Commission also considered, but ultimately left open, whether such a market for the retail supply of multiple-play bundle services should be further segmented between fixed-only bundles and FMC bundles.

(257) The Phase II market investigation did not provide additional evidence that would indicate a different conclusion from the preliminary conclusions reached in the Article 6(1)(c) Decision. In addition, the Commission Phase II market investigation supported a further possible segmentation, between multiple-play bundles (including FMC bundles) with and without premium Pay-TV football content, but the Commission considers that the market definition may be left open in relation to such segmentation.

(258) During the Phase I market investigation, competitors signalled that the Commission should not overlook that the percentage of customers who subscribe to bundles specifically to access football content is residual, especially taking into account that there is a tendency towards unbundling and that there is evidence that customers are switching to OTTs to access specific premium Pay-TV content, such as football.[244] Telefónica observes that there is no basis to define separate markets for 5P packages with or without football content because clients subscribing to Pay-TV driven by their desire to access sports content represent a minimal percentage of demand (<15%),[245] which is decreasing over time especially in light of the current trend

[242] Response to questionnaire Q3 to wholesale customers, question C.6., Doc ID 3278.

[243] Responses to questionnaire Q1 to competitors, question C.A.A.D.10., Doc ID 2940.

[244] Telefónica's written observations on the non-confidential SO summary of July 31, 2023, paragraph 12, Doc ID 4011.

[245] CNMC Telecommunications and Audiovisual Sectorial Economic Report 2020 (ESTAD/CNMC/002/21), pages 44-45. *For the majority of Pay-TV subscribers, sports content are not*

towards unbundling in the Spanish market. Customers subscribe to bundles that do not include Pay-TV and subscribe to additional TV content separately and directly from OTTs.[246] At the same time, there is also a decrease in football content clients overall.[247]

(259) In addition, the subscription to football content can easily be cancelled and there are no significant barriers to switching operators. Telefónica does not charge any cancellation costs for its Pay-TV packages, and there are no minimum commitment clauses. The ability to subscribe to sports content from other platforms, particularly OTTs like DAZN, is almost immediate and uncomplicated, "*in other terms, there is no barrier to mix and match Pay-TV packages with sports content to compete with Telefonica's Pay-TV offerings*".[248]

(260) For the purposes of this Decision, the Commission will, in addition to looking at standalone services of retail mobile telecommunication services and retail fixed internet services, assess the competitive effects of the Transaction in the hypothetical market for the retail supply of multiple-play bundles and in the narrower hypothetical market for the retail supply of FMC bundles. Within a hypothetical market for the retail supply of multiple-play bundles and in the hypothetical narrower market for the retail supply of FMC bundles, the Commission will, in view of the Parties' activities and the results of the Phase II market investigation, also briefly assess the narrower hypothetical market segments for the retail supply of multiple-play bundles and FMC bundles without premium Pay-TV football.

(261) Since, as explained below in Section 9, in the Commission's assessment, the Transaction gives rise to a serious impediment of effective competition in the markets for retail mobile telecommunication services and retail fixed internet services, which respectively include mobile and fixed internet services provided as part of multiple-play and FMC bundles, for the purposes of this Decision it can be left open whether there are narrower hypothetical markets for the retail supply of multiple-play bundles and for the retail supply of FMC bundles.[249]

(262) Similarly, since, as explained below in Section 9, in the Commission's assessment, the Transaction gives rise to a serious impediment of effective competition already at the level of the broader hypothetical markets for multiple-play bundles and FMC bundles, for the purposes of this Decision it can be left open whether the narrower

---

the main reason for their subscriptions. The CNMC reported that *only 13.8% of households with a Pay-TV subscription cited sports contents as the driver to subscribe to the bundle.*

246 CNMC Telecommunications and Audiovisual Sectorial Economic Report 2022 (ESTAD/CNMC/003/23), page 53. According to the CNMC, *the sale of Movistar (Telefónica) and Vodafone's bundles including Pay-TV decreased in absolute terms, in line with a downward trend in these operator's Pay-TV subscribers.*

247 Telefónica's written observations on the non-confidential SO summary of July 31, 2023, paragraph 66, Doc ID 4011.

248 Telefónica's written observations on the non-confidential SO summary of July 31, 2023, paragraphs 67-68, Doc ID 4011. *It is also worth noting that there has been an evolution in the conditions for the acquisition of content from La Liga. In its most recent tenders for the broadcasting rights of the Spanish National League ("La Liga"), the Liga Nacional de Fútbol Profesional ("LNFP"), who manages the tenders for broadcasting rights, has designed more diversified packages and has amplified the durations of the acquisition of content to up to five years, all with the objective of increasing demand and diversifying its clients base. This has been confirmed by the entry of DAZN.*

249 As such, any references in this Decision to the market for the retail supply of multiple-play bundles or the market for the retail supply of FMC bundles, or similar formulations, should be read as the hypothetical market for the retail supply of multiple-play bundles and the hypothetical market for the retail supply of FMC bundles respectively.

hypothetical market segments for the retail supply of multiple-play bundles and FMC bundles without premium Pay-TV football should be distinguished.[250]

8.7.3. *Geographic market definition*

(263) In its previous decisions, the Commission has considered that the geographic scope of the retail market for multiple-play bundles, and FMC bundles in particular, would be national.[251]

(264) The Parties consider that the geographic scope of the market for multiple-play bundles and for the market for FMC bundles should coincide with the geographic scope of the underlying individual telecommunications services and should therefore be national and correspond to the territory of Spain.

(265) The Commission's Phase I market investigation in the Article 6(1)(c) Decision has confirmed this approach.[252] A competitor indicated *that "The Spanish market for multiple-play bundles can be regarded national in scope. [T]here are no relevant differences across regions that could justify a split of the national market"*.[253] The Commission therefore concluded, that the relevant geographic scope of any plausible retail market for multiple-play bundles, or any plausible sub-segmentation of that market, is national, comprising of the territory of Spain. In the Article 6(1)(c) Response, the Parties did not contest this view.

(266) The Phase II market investigation did not provide additional evidence that would indicate a different conclusion.

(267) Therefore, for the purposes of this Decision, the Commission considers that the relevant geographic market for the retail supply of multiple-play bundles (and the retail supply of FMC bundles) services is national, comprising of the territory of Spain.

8.8. Wholesale access and call origination services on mobile networks

(268) Wholesale access and call origination services are provided by MNOs (on the supply side) to MVNOs (on the demand side) to enable MVNOs to provide retail mobile telecommunications services to end-customers. MVNOs can be distinguished depending on their features. "Full" MVNOs maintain their own core infrastructure and use MNOs only for access to a radio network, while "light" MVNOs do not have their own infrastructure an rely entirely on the infrastructure of an MNO.

---

250 For completeness, the Parties' activities do not overlap in the hypothetical market segments for the retail supply of multiple-play bundles with premium Pay-TV football content and FMC bundles with premium Pay-TV football content, since MásMóvil is not active, these hypothetical market segments will not be further discussed in this Decision.

251 Commission decisions of 20 March 2023 in case M.10663 – *Orange/VOO/Brutélé*, paragraph 113; of 10 March 2022 in case M.10515 – *Iliad/UPC Polska*, paragraph 75; of 28 July 2021 in case M.10153 – *Orange/Telekom Romania Communications*, paragraph 75; of 30 May 2018 in case M.7000 – *Liberty Global/Ziggo*, paragraph 232; of 3 August 2016 in case M.7978 – *Vodafone/Liberty Global/Dutch JV*, paragraph 112; of 19 May 2015 in case M.7421 – *Orange/Jazztel*, paragraph 89-90; of 20 September 2013 in case M.6990 – *Vodafone/Kabel Deutschland*, paragraph 263-265; and of 16 June 2011 in case M.5900 – *LGI/KBW*, paragraph 183-186.

252 Responses to questionnaire Q1 to competitors, question C.B.A.D. Indeed, 10 respondents out of 15 have considered the markets for multiple-play bundles and for FMC bundles to be national.

253 Response to questionnaire Q1 to competitors, question C.B.A.D., Doc ID 3624.

8.8.1. Parties' activities

(269) Both Orange and MásMóvil are active in the market for the wholesale access and call origination services on mobile networks, which is also interchangeably referred to as wholesale mobile network access services.

(270) OSP is Spain's second largest provider of wholesale mobile access services. OSP hosts on its mobile network multiple operators and MVNOs. OSP currently hosts in its network [Details of Orange's commercial agreements].[254]

(271) MásMóvil relies on wholesale mobile access agreements for approximately [40-60]% of its mobile data traffic ([details on the wholesale agreements concluded by the Parties]).[255] On the other hand, for the other [40-60]% of mobile data traffic it relies on its own infrastructure. MásMóvil only serves [details on the wholesale agreements concluded by the Parties].[256]

8.8.2. Product market definition

8.8.2.1. Past Commission decisions

(272) In its previous decisions, the Commission considered network access and call origination to be part of the same product market as both services are considered as key elements required for non-MNOs to be able to provide retail mobile telecommunications services and are generally supplied together.[257]

8.8.2.2. The Parties' views

(273) The Parties agree with the Commission's approach that network access and call origination are part of the same product market.

8.8.2.3. Commission's assessment

(274) The results of the Phase I market investigation did not provide reasons to depart from the Commission's decisional practice.

(275) In light of the above, the Commission considers that, for the purpose of this Decision, the relevant product market is the market for the wholesale supply of access and call origination services on mobile networks.

8.8.3. Geographic market definition

(276) In geographic terms, in line with the Commission's past decisions, the Parties submit that the geographical market for the wholesale supply of access and call origination

---

254 Form CO, pages 244 to 248, paragraphs 588 to 592.

255 Form CO, pages 257, paragraph 626.

256 Form CO, page 262, paragraph 640.

257 Commission decisions of 20 March 2023 in case M.10663 – *Orange/VOO/Brutélé*, paragraph 179; of 28 July 2021 in case M.10153 – *Orange/Telekom Romania Communications*, recital 197; of 18 July 2019 in case M.8864 – *Vodafone/Certain Liberty Global Assets*, recital 248; of 3 August 2016 in case M.7978 – *Vodafone/Liberty Global/Dutch JV*, recitals 185 to 187; of 11 May 2016 in case M.7612 – *Hutchison 3G UK/Telefónica UK*, recitals 296 to 300; of 2 July 2014 in case M.7018 – *Telefónica Deutschland/E-Plus*, recitals 77 to 79; of 28 May 2014 in case M.6992 – *Hutchison 3G UK/Telefónica Ireland*, recital 156; of 12 December 2012 in case M.6497 – *Hutchison 3G Austria/Orange Austria*, recitals 61 to 63; of 1 March 2010 in case M.5650 – *T Mobile/Orange UK*, paragraphs 27 to 30; and of 27 November 2007 in case M.4947 – *Vodafone/Tele2 Italy/Tele2 Spain*, recital 15.

services on mobile networks is national due to regulatory barriers (licenses granted to MNOs are generally national in scope), including for Spain.[258]

(277) The results of the Phase I market investigation did not provide reasons to depart from the Commission's decisional practice.

(278) In light of the above, the Commission considers that, for the purpose of this Decision, the relevant geographical market of the market for the wholesale supply of access and call origination services on mobile networks is national, comprising the territory of Spain.

8.9. Wholesale broadband access services

(279) Wholesale broadband access services include different types of access to fixed connections that allow internet service providers to provide services to end consumers. It comprises physical access at a fixed location, such as LLU; non-physical or virtual network access, such as bitstream access, at a fixed location; and resale of a fixed provider's internet access services.

8.9.1. Parties' activities

(280) OSP is Spain's second largest provider of wholesale broadband access services. OSP hosts on its fixed networks multiple operators and fixed virtual network operators ("FVNOs"). OSP currently hosts in its network [Details of Orange's commercial agreements].[259]

(281) As of the end of 2022, MásMóvil has [...] BUs of own FTTH network and completes its coverage through different wholesale agreements to reach a fixed coverage of [...] BUs. MásMóvil's wholesale agreements to access third parties' FTTH networks include [details on the wholesale agreements concluded by the Parties].[260]

(282) MásMóvil provides wholesale access to its fixed network only in exchange for reciprocal access to the co-contractor's network [details on the wholesale agreements concluded by the Parties].

8.9.2. Product market definition

8.9.2.1. Past Commission decisions

(283) In its previous decisions, the Commission defined a separate market for wholesale broadband access services. The Commission considered further segmenting such market by i) type of access (LLU, bitstream, resale of the incumbent's offering); and ii) infrastructure (access to DSL/copper, cable, or fibre (FTTH))[261] or (iii) based on the level where the point of interconnection is situated (local broadband access or central broadband access), but ultimately left the exact product market open.[262]

---

258 Commission decisions of 20 March 2023 in case M.10663 – *Orange/VOO/Brutélé*, paragraph 183; of 19 May 2015 in case M.7421 – *Orange/Jazztel*, recitals 103 – 105; and of 2 July 2014 in case M.7231 – *Vodafone/ONO*, recitals 57-59.

259 Form CO, pages 248 to 253, paragraphs 593 to 609.

260 Form CO, page 262, paragraphs 641.

261 Commission decisions of 20 March 2023 in case M.10663 – *Orange/VOO/Brutélé*, paragraphs 189-190; and of 26 July 2021 in case M.10070 – *Eurofiber/Proximus/JV*, recital 22.

262 Commission decisions of 20 March 2023 in case M.10663 – *Orange/VOO/Brutélé*, paragraph 190; of 9 July 2018 in case M.8808 – *T-Mobile Austria/UPC Austria*, recitals 74 to 76; of 29 September 2019 in case M.6990 – *Vodafone/Kabel Deutschland*, recital 161; and of 26 June 2009 in case M.5532 – *Carphone Warehouse/Tiscali UK*, recital 28 to 34.

8.9.2.2. The Parties' views

(284) The Parties consider that the relevant product market to be taken into account is the overall market for wholesale broadband access services.

8.9.2.3. Commission's assessment

(285) The results of the Phase I market investigation did not provide reasons to depart from the Commission's previous approach.

(286) In light of the above, the Commission considers that, for the purpose of this Decision, the relevant product market is the market for the wholesale supply of broadband access services. The question whether such market should be segmented by i) type of access, [263]ii) infrastructure[264] or iii) point of interconnection[265] can be left open as the assessment of the Transaction remains the same irrespective of the exact product market considered.

8.9.3. Geographic market definition

(287) In its previous decisions, the Commission considered whether the geographic market for wholesale broadband access was national or limited to the coverage area of each cable operator, but ultimately left open the exact geographic market definition, including in the case of Spain.[266]

(288) The Parties consider that the relevant geographic scope is national and corresponds to the territory of Spain, but that ultimately in line with past decisions the exact market definition can be left open in the present case.

---

263 As regards the potential segmentation of the market by type of access, this includes: (i) physical access at a fixed location such as local loop unbundling (LLU), (ii) non-physical or virtual network access at a fixed location, such as bitstream access, or (iii) resale of the incumbent's offering. The Commission notes that wholesale access is almost entirely provided through non-physical access, thus, the conclusions for the overall wholesale broadband access services in section 9 below will also hold in this segment. Physical access through LLU, which is in practice only Telefónica's copper network, represents a small fraction of the overall market ([0-5]% in volume and [5-10]% in value in 2022). A segmentation of the market including only LLU access would leave Telefónica with a [90-100]% market share, with the Parties not being active. A segmentation of the market including resale access only would result in a de minimis market, covering only [0-5]% of all wholesale broadband services in terms of lines, thus, and would not be an affected market.

264 As regards the potential segmentation of the market by infrastructure, this includes access to: (i) DSL/copper, (ii) cable (HFC), or (iii) fibre (FTTH). The Commission notes that the majority of the wholesale access occurs through FTTH (79.9% of all broadband lines are FTTH), thus, the conclusions for the overall wholesale broadband access services in section 9 below will also hold in this segment. Access through DSL/copper represents a small fraction of the market ([5-10]% of the total market). The Commission notes that a segmentation of the market including DSL/copper would not result in an affected market, as Telefónica will hold [80-90]% market share. Lastly, the Commission notes that a segmentation of the market including HFC/cable lines would not result in an affected market, as it would limit the market to Vodafone's network.

265 As regards the potential segmentation of the market by point of interconnection, this includes: (i) local broadband access, or (ii) central broadband access. The Commission notes that whereas the Parties have not been able to provide market shares, the majority of the local broadband access is provided by Telefónica through VULA, LLU and indirect access over FTTH ([60-70]% of the local access in 2022). Similarly, Telefónica also offers the majority of the central broadband access through regulated NEBA access and non-regulated access in commercial areas ([50-60]% of total lines in 2022). Thus, irrespective of the segmentation, Telefónica would therefore remain the clear market leader for the wholesale provision of broadband access.

266 Commission decisions of 20 March 2023 in case M.10663 – *Orange/VOO/Brutélé*, paragraph 194; and of 19 May 2015 in case M.7421 – *Orange/Jazztel*, recital 117.

(289) During the Phase I market investigation, most operators signalled that the market would be national in scope,[267] with some respondents signalling that the "*market for wholesale fixed internet access services remains national at scope*"[268], "*the providers of wholesale fixed internet access service compete at a national level to offer and make these services available to other operators"*[269] and "*the Spanish market for wholesale fixed internet access can be considered as national in scope. Major FNOs open their national footprints to wholesale agreements with other players, without relevant differences region-wise that would justify a further segmentation of its scope*".[270]

(290) In light of the above, the Commission considers that, for the purpose of this Decision, the geographic market for wholesale supply of broadband access is national in scope.

8.10. Wholesale supply of call termination services on mobile networks

(291) 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. This service is required by every originating operator, as it is necessary for its customers to be able to communicate with the customers of other networks. Call termination is therefore a wholesale service that is resold or used as an input for the provision of downstream retail telephony and mobile telecommunications services.

8.10.1. Parties' activities

(292) Orange and MásMóvil both provide wholesale call termination services on their respective mobile networks.

8.10.2. Product market definition

8.10.2.1. Past Commission decisions

(293) In previous decisions, the Commission has identified relevant markets for the wholesale supply of call termination services on mobile and fixed networks. Further, the Commission found that there is no substitute for call termination on each individual network, as the operator transmitting the call can reach the intended recipient only through the operator of the network to which the recipient is connected and thus concluded that each individual network, either fixed or mobile, constitutes a separate market.[271]

8.10.2.2. The Parties' views

(294) The Parties consider that the relevant product market to be taken into account is the market for wholesale provision of call termination services on mobile networks.

---

267 Responses to questionnaire Q1 to competitors, questions C.B.B.B.1 and C.B.B.B.2.

268 Responses to questionnaire Q1 to competitors, question C.B.B.B.2., Doc ID 2773.

269 Responses to questionnaire Q1 to competitors, question C.B.B.B.2., Doc ID 2834.

270 Responses to questionnaire Q1 to competitors, question C.B.B.B.2., Doc ID 3624.

271 Commission decisions of 20 March 2023 in case M.10663 – *Orange/VOO/Brutélé*, paragraph 255; of 28 July 2021 in case M.10153 – *Orange/Telekom Romania Communications*, paragraphs 185-188; of 26 October 2020 in case M.9963 – *Iliad/Play Communications*, paragraphs 36-38; of 15 July 2019 in case M.9370 – *Telenor/DNA*, paragraphs 68-70; of 27 November 2018 in case M.8792 – *T-Mobile NL/Tele2 NL*, recitals 255-259; of 27 July 2018 in case M.8883 – *PPF/Telenor Target Companies*, paragraphs 24-26; of 12 December 2012 in case M.6497 – *Hutchison 3G Austria/Orange Austria*, recitals 68-70.

8.10.2.3. Commission's assessment

(295) The results of the Phase I market investigation did not provide reasons to depart from the Commission's decisional practice.

(296) In light of the above, the Commission considers that, for the purposes of this Decision, the relevant product market is the market for the wholesale supply of call termination services on mobile networks. On the market for the wholesale supply of call termination services on mobile networks, each mobile network constitutes a separate product market.

8.10.3. Geographic market definition

(297) In previous decisions, the Commission considered the geographic market for the wholesale supply of call termination services on mobile networks to be national in scope.[272]

(298) The Parties consider that the relevant geographic market for the wholesale provision of call termination services on mobile networks corresponds to the territory of Spain.

(299) The results of the Phase I market investigation did not provide reasons to depart from the Commission's decisional practice.

(300) Therefore, the Commission considers that the geographic market for wholesale provision of call termination services on mobile networks is national, comprising the territory of Spain.

8.11. Wholesale supply of call termination services on fixed networks

(301) Call termination services are provided when calls originate from one network and terminate on another network (that is to say, when the calling party and the called party do not use the same network) and thus allow users of different networks to communicate with one another.

(302) For such calls, the operator on which network the call terminates, routes the call and connects it to the called party. This service is provided at a wholesale level between the network operator of the called party on the supply side and the network operator of the calling party on the demand side.

8.11.1. Parties' activities

(303) Orange and MásMóvil both provide wholesale call termination services on their respective fixed networks.

8.11.2. Product market definition

8.11.2.1. Past Commission decisions

(304) In its decisional practice, the Commission has concluded that also for fixed networks, each individual network constitutes a separate market for termination, as there is no substitute for call termination in each individual network since the operator

[272] Commission decisions of 20 March 2023 in case M.10663 – *Orange/VOO/Brutélé*, paragraph 259; of 28 July 2021 in case M.10153 – *Orange/Telekom Romania Communications*, paragraph 192; of 26 October 2020 in case M.9963 – *Iliad/Play Communications*, paragraph 39; of 18 July 2019 in case M.8864 – *Vodafone/Certain Liberty Global Assets*, recital 259; of 3 July 2012 in case M.6584 – *Vodafone/Cable & Wireless*, paragraph 48; of 3 July 2012 in case M.5650 – *T-Mobile/Orange UK*, paragraph 38.

transmitting the outbound call can reach the intended recipient only through the operator of the network to which the recipient is connected.[273]

8.11.2.2. The Parties' views

(305) The Parties consider that the relevant product market to be taken into account is the market for wholesale provision of call termination services on fixed networks.

8.11.2.3. Commission's assessment

(306) The results of the Phase I market investigation did not provide reasons to depart from the Commission's decisional practice.

(307) In light of the above, the Commission considers that, for the purpose of this Decision, the relevant product market is the market for wholesale supply of call termination services on fixed networks that is a distinct market from the market for the wholesale supply of call termination services on mobile networks. On the market for wholesale supply of call termination services on fixed networks, each individual fixed network constitutes a separate product market.

8.11.3. Geographic market definition

(308) In its decisional practice, the Commission considered the geographic market for call termination services in fixed networks to be national in scope[274], because the market should correspond to the dimensions of the operator's network, which is limited to national borders due to regulatory barriers.

(309) The Parties consider that the relevant geographic market for the wholesale provision of call termination services on fixed networks corresponds to the territory of Spain.

(310) In light of the above, the Commission considers that the geographic market for wholesale provision of call termination services on fixed networks is national.

8.12. Wholesale supply of international roaming services

(311) 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. To be able to offer this service to their customers, MNOs conclude wholesale agreements with one another providing access and capacity on mobile networks in the foreign country.

(312) With regards to calls, roaming consists of both terminating and originating calls. For originating calls while roaming, the foreign or visited mobile network is used to make phone calls when abroad and a wholesale roaming charge is paid by the home network to the visited network. For terminating calls, the call is routed by the home

---

[273] Commission decisions of 20 March 2023 in case M.10663 – *Orange/VOO/Brutélé*, paragraph 210; of 28 July 2021 in case M.10153 – Orange/Telekom Romania Communications, paragraph 138; of 26 October 2020 in case M.9963 – Iliad/Play Communications, paragraphs 42 to 44; of 18 July 2019 in case M.8864 – Vodafone/Certain Liberty Global Assets, recitals 190 to 193; of 3 August 2016 in case M.7978 – Vodafone/Liberty Global/Dutch JV, paragraphs 206 to 208; of 3 July 2012 in case M.6584 – Vodafone/Cable & Wireless, paragraphs 47 to 48; of 3 July 2012 in case M.5650 – T-Mobile/Orange UK, paragraphs 36 and 37.

[274] Commission decisions of 20 March 2023 in case M.10663 – *Orange/VOO/Brutélé*, paragraph 215; of 28 July 2021 in case M.10153 – *Orange/Telekom Romania Communications*, paragraph 142; of 26 October 2020 in case M.9963 – *Iliad/Play Communications*, paragraphs 45 to 47; of 18 July 2019 in case M.8864 – *Vodafone/Certain Liberty Global Assets*, recital 195; of 3 August 2016 in case M.7978 – *Vodafone/Liberty Global/Dutch JV*, paragraph 210; of 20 September 2013 in case M.6990 – *Vodafone/Kabel Deutschland*, paragraph 121; of 3 July 2012 in case M.6584 – *Vodafone/Cable & Wireless*, paragraph 48; of 3 July 2012 in case M.5650 – *T-Mobile/Orange UK*, paragraph 38.

network to the visited network, and the home network pays for the international carriage of the call and the normal termination charge to the visited network.

(313) Demand for wholesale international roaming services comes upstream from foreign mobile operators that wish to provide their own customers with mobile services outside their own network and, downstream, from subscribers wishing to use their mobile telephones outside their own countries.

8.12.1. Parties' activities

(314) Orange and MásMóvil both provide wholesale internal roaming services.

8.12.2. Product market definition

8.12.2.1. Past Commission decisions

(315) In previous decisions, the Commission found that international roaming services constitute a distinct product market.[275]

8.12.2.2. The Parties' views

(316) The Parties agree with the Commission's decisional practice and consider that the relevant product market to be taken into account is the market for wholesale supply of international roaming services.

8.12.2.3. Commission's assessment

(317) The results of the Phase I market investigation did not provide reasons to depart from the Commission's decisional practice.

(318) In light of the above, the Commission considers that, for the purpose of this Decision, the relevant product market is the market for the wholesale supply of international roaming services.

8.12.3. Geographic market definition

(319) In previous decisions, the Commission held that the relevant geographic market for the wholesale supply of international roaming is national in scope due to regulatory barriers.[276]

(320) The Parties agree with the previous Commission's decisional practice and consider that the relevant geographic market for the wholesale supply of international roaming services in the present case should be limited to the territory of Spain.

(321) The Commission's Phase I market investigation did not provide reasons to depart from the Commission's decisional practice.

---

[275] Commission decisions of 20 March 2023 in case M.10663 – *Orange/VOO/Brutélé*, paragraph 267; of 28 July 2021 in case M.10153 – *Orange/Telekom Romania Communications*, paragraph 203; of 26 October 2020 in case M.9963 – *Iliad/Play Communications*, paragraphs 29-31; of 18 July 2019 in case M.8864 – *Vodafone/Certain Liberty Global Assets*, recital 264; of 2 July 2014 in case M.7018 – *Telefónica Deutschland/E-Plus*, recital 97; of 12 December 2012 in case M.6497 – *Hutchison 3G Austria/Orange Austria*, recitals 64-67.

[276] Commission decisions of 20 March 2023 in case M.10663 – *Orange/VOO/Brutélé*, paragraph 271; of 28 July 2021 in case M.10153 – *Orange/Telekom Romania Communications*, paragraph 207; of 26 October 2020 in case M.9963 – *Iliad/Play Communications*, paragraphs 32-34; of 18 July 2019 in case M.8864 – *Vodafone/Certain Liberty Global Assets*, recital 266; of 2 July 2014 in case M.7018 – *Telefónica Deutschland/E-Plus*, recitals 99-100; of 20 September 2013 in case M.6990 – *Vodafone/Kabel Deutschland*, paragraphs 251-252; of 12 December 2012 in case M.6497 – *Hutchison 3G Austria/Orange Austria*, recitals 78-79; of 1 March 2010 in case M.5650 – *T-Mobile/Orange UK*, paragraph 35.

(322) In light of the above, the Commission considers that the geographic market for wholesale supply of international roaming services is national, comprising the territory of Spain.

9. COMPETITIVE ASSESSMENT

9.1. Identification of affected markets

9.1.1. Horizontally affected markets

(323) The Transaction gives rise to the following horizontally affected markets in Spain:

- Retail supply of mobile telecommunications services;
- Retail supply of M2M services;
- Retail supply of fixed internet access services;
- Retail supply of the fixed telephony services (and the possible segments of this market for local/national calls on the one hand, and international calls on the other and by customer type, residential and non-residential);
- Hypothetical market for the retail supply of multiple-play bundles (and the hypothetical market segment for the retail supply of multiple-play bundles without premium Pay-TV football content);
- Hypothetical market for the retail supply of FMC bundles in Spain (and the hypothetical market segment for the retail supply of FMC bundles without premium Pay-TV football content);
- Wholesale supply of access and call origination services on mobile networks;
- Wholesale broadband access services;[277]
- Wholesale supply of international roaming services.

9.1.2. Non-Horizontally affected markets

(324) The Transaction gives rise to the following vertically affected markets in Spain:

- The upstream market for the wholesale supply of access and call origination services on mobile networks, i.e., wholesale mobile network access, in Spain and the downstream markets for the retail supply of mobile telecommunication services, multiple-play and FMC bundles in Spain;[278]

277 As regards the potential segmentation of the market by type of access, which includes: (i) physical access at a fixed location such as local loop unbundling (LLU), (ii) non-physical or virtual network access at a fixed location, such as bitstream access, or (iii) resale of the incumbent's offering, the Commission notes that wholesale access is almost entirely provided through non-physical access. Physical access through LLU to Telefónica's copper network represents a small fraction of the market, (with market shares of [0-5]% in volume and [5-10]% in value in 2022). The Commission notes that a segmentation of the market including only LLU access would leave Telefónica with a 100% market share, and thus, it would not be an affected market. The Commission notes that a segmentation of the market including resale access only would therefore result in a de minimis market, covering only 0.001% of all wholesale broadband services in terms of lines, thus, it would not be an affected market.

278 The Commission's vertical assessment on the downstream markets for multiple-play bundles as well as FMC bundles also includes in each market the possible sub-segment of bundles without premium Pay-TV football content.

– The upstream market for the wholesale supply of broadband access services in Spain and the downstream markets for the retail supply of fixed internet access services, multiple-play and FMC bundles in Spain;[279]

– The upstream market for the wholesale supply of call termination services on mobile networks in Spain and the downstream markets for retail supply of the mobile telecommunications services, multiple-play and FMC bundles in Spain;[280]

– The upstream market for the wholesale supply of call termination services on fixed networks in Spain and the downstream markets for retail supply of the fixed internet services, fixed telephony, multiple-play and FMC bundles in Spain;[281]

– The upstream market for the wholesale supply of international roaming services in Spain and the downstream markets for retail supply of the mobile telecommunications services and multiple-play and FMC bundles in Spain;

– The upstream market for the wholesale supply of access and call origination services on mobile networks and the downstream markets for retail supply of M2M services in Spain.

(325) The Transaction also gives rise to potential conglomerate relationships in affected markets, due to the practice of selling retail telecom services as part of bundles (e.g. mobile, fixed internet, and audiovisual services), which is particularly prevalent in the Spanish market (See in this regard Section 7.1.3 above). However, the Commission has assessed concerns in that regard in Sections 9.4.3.3 and 9.4.3.4 below, where it assessed horizontal non-coordinated effects in the hypothetical markets for multiple-play bundles and FMC bundles.[282]

9.1.3. Conclusion

(326) The effects arising from the affected horizontal and vertical markets described above will be discussed in turn in the following sections. After setting out the market shares in the relevant markets, including all plausible segments (section 9.2), and the concentration levels (section 9.3), the Commission will first assess the potential horizontal non-coordinated effects stemming from the Transaction (section 9.4). Then, the Commission will assess the potential vertical effects stemming from the

[279] The Commission's vertical assessment on the downstream markets for multiple-play bundles as well as FMC bundles also includes in each market the possible sub-segment of bundles without premium Pay-TV football content.

[280] The Commission's vertical assessment on the downstream markets for multiple-play bundles as well as FMC bundles also includes in each market the possible sub-segment of bundles without premium Pay-TV football content.

[281] The Commission's vertical assessment on the downstream markets for multiple-play bundles as well as FMC bundles also includes in each market the possible sub-segment of bundles without premium Pay-TV football content.

[282] As further concluded in Section 10.8 below, the Commission considers that the Final Commitments fully address the horizontal competition concerns in relation to the markets listed in Section 9.4.3, including the hypothetical markets for multiple-play bundles and FMC bundles. Since the Final Commitments will fully remove the likely significant impediment to effective competition in each of the relevant retail markets individually, the Commission considers that they also address any potential conglomerate concerns. Rather than assessing such concerns from the angle of potential leveraging from one market into another, the Commission has assessed competition between the parties in the sale of multiple-play and FMC bundles. Moreover, since each of the Parties already offers retail mobile services, retail fixed internet services as well as retail multiple-play and FMC bundles today, the Transaction will not result in the creation of any new conglomerate relationships.

Transaction (section 9.5). Finally, the Commission will assess the potential efficiencies of the Transaction claimed by the Parties (section 9.6).

9.2. Market shares

(327) In assessing the effects of a merger, market shares constitute a useful first indication of the structure of the markets at stake and of the competitive importance of the relevant market players.[283]

(328) In the following recitals, the Commission presents the market shares of the Parties and their competitors in all of the markets listed in Section 8.7 above[284].

(329) The market shares were provided by the Parties in Annex 2.3 of the SO Reply based on their own revenue and subscriber numbers, CNMC data on competitors and market sizes, and the Parties' estimates.[285]

9.2.1. Retail markets

(330) The following tables present the market shares (by volume and value) on retail markets in Spain.

Table 5 Market shares in the market for the retail supply of mobile telecommunication services in Spain

	Shares by volume (SIMs) (%)				Shares by value (EUR) (%)			
	2019	**2020**	**2021**	**2022**	**2019**	**2020**	**2021**	**2022**
Orange	[20-30]%	[20-30]%	[20-30]%	[20-30]%	[20-30]%	[20-30]%	[10-20]%	[20-30]%
MásMóvil	[10-20]%	[10-20]%	[10-20]%	[10-20]%	[10-20]%	[10-20]%	[10-20]%	[10-20]%
Combined	[40-50]%	[40-50]%	[40-50]%	[40-50]%	[30-40]%	[30-40]%	[30-40]%	[30-40]%
Telefónica	[20-30]%	[20-30]%	[20-30]%	[20-30]%	[30-40]%	[30-40]%	[30-40]%	[30-40]%
Vodafone	[20-30]%	[20-30]%	[20-30]%	[20-30]%	[20-30]%	[20-30]%	[20-30]%	[20-30]%
Digi	[0-5]%	[0-5]%	[5-10]%	[5-10]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%
Others	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%
Total	**100%**	**100%**	**100%**	**100%**	**100%**	**100%**	**100%**	**100%**

Source: The Parties (SO Reply, Annex 2.3)

283 Horizontal Merger Guidelines, paragraph 14; Non-Horizontal Merger Guidelines, paragraph 24.

284 The total may be superior to 100% in some cells because the combined figures were rounded up by the Parties.

285 The Commission notes that the 2022 market shares, as provided by the Parties, are based on the CNMC's quarterly reporting, as opposed to CNMC annual reporting, as in the case of market shares for 2019-2022. The resulting market shares for the Parties in 2022 are estimates because some smaller operators are not required to report to the CNMC at a quarterly level. At the time of the Parties' submission, however, CNMC's annual reporting for 2022 has not been made available. In any case, the Commission has no reason to believe that market share estimates would materially differ based on whether CNMC quarterly or annual data is used for market sizes.

Table 6 Market shares in the market for M2M services in Spain

	Shares by volume (SIMs) (%)			Shares by value (EUR) (%)		
	2020	2021	2022	2020	2021	2022
Orange	[30-40]%	[30-40]%	[30-40]%	[30-40]%	[30-40]%	[30-40]%
MásMóvil	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%
Combined	[30-40]%	[30-40]%	[30-40]%	[30-40]%	[30-40]%	[30-40]%
Telefónica	[30-40]%	[30-40]%	[30-40]%	[30-40]%	[30-40]%	[30-40]%
Vodafone	[30-40]%	[30-40]%	[20-30]%	[20-30]%	[20-30]%	[20-30]%
MVNOs	Data not available	[0-5]%	[0-5]%	Data not available	[0-5]%	[0-5]%
Total	**100%**	**100%**	**100%**	**100%**	**100%**	**100%**

Source: The Parties (SO Reply, Annex 2.3)

Table 7 Market shares in the market for the retail supply of fixed internet services in Spain

	Shares by volume (fixed lines) (%)				Shares by value (EUR) (%)			
	2019	2020	2021	2022	2019	2020	2021	2022
Orange	[20-30]%	[20-30]%	[20-30]%	[20-30]%	[30-40]%	[20-30]%	[10-20]%	[20-30]%
MásMóvil	[10-20]%	[10-20]%	[10-20]%	[10-20]%	[5-10]%	[10-20]%	[10-20]%	[10-20]%
Combined	[30-40]%	[30-40]%	[30-40]%	[30-40]%	[30-40]%	[30-40]%	[30-40]%	[30-40]%
Telefónica	[30-40]%	[30-40]%	[30-40]%	[30-40]%	[40-50]%	[40-50]%	[40-50]%	[40-50]%
Vodafone	[20-30]%	[10-20]%	[10-20]%	[10-20]%	[10-20]%	[10-20]%	[10-20]%	[10-20]%
Digi	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%
Others	[0-5]%	[0-5]%	[5-10]%	[5-10]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%
Total	**100%**	**100%**	**100%**	**100%**	**100%**	**100%**	**100%**	**100%**

Source: The Parties (SO Reply, Annex 2.3)

Table 8 Market shares in the market for the retail supply of fixed telephony services in Spain

	Shares by volume (fixed lines) (%)				Shares by value (EUR) (%)			
	2019	2020	2021	2022	2019	2020	2021	2022
Orange	[20-30]%	[20-30]%	[20-30]%	[20-30]%	[5-10]%	[5-10]%	[5-10]%	[5-10]%
MásMóvil	[10-20]%	[10-20]%	[10-20]%	[10-20]%	[10-20]%	[10-20]%	[20-30]%	[20-30]%
Combined	[30-40]%	[30-40]%	[30-40]%	[30-40]%	[20-30]%	[20-30]%	[30-40]%	[30-40]%
Telefónica	[40-50]%	[40-50]%	[40-50]%	[40-50]%	[50-60]%	[50-60]%	[40-50]%	[40-50]%
Vodafone	[20-30]%	[20-30]%	[10-20]%	[10-20]%	[20-30]%	[10-20]%	[20-30]%	[20-30]%
Others	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%
Total	**100%**	**100%**	**100%**	**100%**	**100%**	**100%**	**100%**	**100%**

Source: The Parties (SO Reply, Annex 2.3)

Table 9 Market shares in the hypothetical market segment for the retail supply of fixed telephony services market in Spain for local/national calls

	Shares by volume (million lines) (%)			Shares by value (EUR) (%)		
	2020	**2021**	**2022**	**2020**	**2021**	**2022**
Orange	[10-20]%	[10-20]%	[10-20]%	[20-30]%	[20-30]%	[20-30]%
MásMóvil	[5-10]%	[10-20]%	[10-20]%	[5-10]%	[10-20]%	[10-20]%
Combined	[20-30]%	[20-30]%	[20-30]%	[20-30]%	[30-40]%	[30-40]%
Other competitors	[70-80]%	[70-80]%	[70-80]%	[70-80]%	[60-70]%	[60-70]%
Total	**100%**	**100%**	**100%**	**100%**	**100%**	**100%**

Source: The Parties (RFI 45)

Table 10 Market shares in the hypothetical market segment for the retail supply of fixed telephony services market in Spain for international calls

	Shares by volume (million lines) (%)			Shares by value (EUR) (%)		
	2020	**2021**	**2022**	**2020**	**2021**	**2022**
Orange	[10-20]%	[20-30]%	[20-30]%	[10-20]%	[10-20]%	[10-20]%
MásMóvil	[20-30]%	[10-20]%	[10-20]%	[5-10]%	[5-10]%	[5-10]%
Combined	[40-50]%	[40-50]%	[30-40]%	[10-20]%	[10-20]%	[20-30]%
Other competitors	[50-60]%	[50-60]%	[60-70]%	[80-90]%	[80-90]%	[70-80]%
Total	**100%**	**100%**	**100%**	**100%**	**100%**	**100%**

Source: The Parties (RFI 45)

Table 11 Market shares in the hypothetical market segment for the retail supply of fixed telephony services market in Spain for residential calls

	Shares by volume (million lines) (%)			Shares by value (EUR) (%)		
	2020	**2021**	**2022**	**2020**	**2021**	**2022**
Orange	[20-30]%	[20-30]%	[20-30]%	[10-20]%	[5-10]%	[5-10]%
MásMóvil	[10-20]%	[10-20]%	[10-20]%	[20-30]%	[20-30]%	[20-30]%
Combined	[30-40]%	[40-50]%	[40-50]%	[30-40]%	[30-40]%	[30-40]%
Telefonica	[30-40]%	[30-40]%	[30-40]%	[40-50]%	[40-50]%	[30-40]%
Vodafone	[20-30]%	[10-20]%	[10-20]%	[10-20]%	[10-20]%	[10-20]%
Other competitors	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%
Total	**100%**	**100%**	**100%**	**100%**	**100%**	**100%**

Source: The Parties (RFI 45)

Table 12 Market shares in the hypothetical market segment for the retail supply of fixed telephony services market in Spain for non-residential calls

	Shares by volume (million lines) (%)			Shares by value (EUR) (%)		
	2020	**2021**	**2022**	**2020**	**2021**	**2022**
Orange	[10-20]%	[10-20]%	[10-20]%	[5-10]%	[5-10]%	[5-10]%
MásMóvil	[5-10]%	[5-10]%	[5-10]%	[10-20]%	[10-20]%	[10-20]%
Combined	[20-30]%	[20-30]%	[20-30]%	[10-20]%	[20-30]%	[20-30]%
Telefónica	[50-60]%	[40-50]%	[40-50]%	[60-70]%	[50-60]%	[40-50]%
Vodafone	[20-30]%	[20-30]%	[20-30]%	[20-30]%	[20-30]%	[20-30]%
Other competitors	[0-5]%	[0-5]%	[5-10]%	[0-5]%	[0-5]%	[0-5]%
Total	**100%**	**100%**	**100%**	**100%**	**100%**	**100%**

Source: The Parties (RFI 45)

Table 13 Market shares in the hypothetical market for the retail supply of multiple-play bundles in Spain

	Shares by volume (bundles) (%)				Shares by value (EUR) (%)			
	2019	**2020**	**2021**	**2022**	**2019**	**2020**	**2021**	**2022**
Orange	[20-30]%	[20-30]%	[20-30]%	[20-30]%	[20-30]%	[20-30]%	[20-30]%	[20-30]%
MásMóvil	[10-20]%	[10-20]%	[10-20]%	[10-20]%	[10-20]%	[10-20]%	[10-20]%	[10-20]%
Combined	[40-50]%	[40-50]%	[40-50]%	[40-50]%	[30-40]%	[30-40]%	[30-40]%	[30-40]%
Telefónica	[30-40]%	[30-40]%	[30-40]%	[30-40]%	[40-50]%	[40-50]%	[40-50]%	[40-50]%
Vodafone	[10-20]%	[10-20]%	[10-20]%	[10-20]%	[10-20]%	[10-20]%	[10-20]%	[10-20]%
Digi	[0-5]%	[0-5]%	[0-5]%	[5-10]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%
Others	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%
Total	**100%**	**100%**	**100%**	**100%**	**100%**	**100%**	**100%**	**100%**

Source: The Parties (SO Reply, Annex 2.3)

Table 14 Market shares in the hypothetical market segment for the retail supply of multiple-play bundles without premium Pay-TV football content in Spain

	Shares by volume (bundles) (%)				Shares by value (EUR) (%)			
	2019	**2020**	**2021**	**2022**	**2019**	**2020**	**2021**	**2022**
Orange	[20-30]%	[20-30]%	[20-30]%	[20-30]%	[30-40]%	[20-30]%	[20-30]%	[20-30]%
MásMóvil	[10-20]%	[10-20]%	[20-30]%	[20-30]%	[10-20]%	[10-20]%	[20-30]%	[20-30]%
Combined	[40-50]%	[40-50]%	[40-50]%	[40-50]%	[40-50]%	[40-50]%	[40-50]%	[40-50]%
Telefónica	[20-30]%	[20-30]%	[20-30]%	[20-30]%	[10-20]%	[20-30]%	[20-30]%	[20-30]%
Vodafone	[20-30]%	[20-30]%	[10-20]%	[10-20]%	[20-30]%	[20-30]%	[20-30]%	[20-30]%
Others	[5-10]%	[5-10]%	[5-10]%	[10-20]%	[0-5]%	[0-5]%	[5-10]%	[10-20]%
Total	**100%**	**100%**	**100%**	**100%**	**100%**	**100%**	**100%**	**100%**

Source: The Parties (SO Reply, Annex 2.3)

Table 15 Market shares in the hypothetical market for the retail supply of FMC bundles in Spain

	Shares by volume (bundles) (%)				Shares by value (EUR) (%)			
	2019	**2020**	**2021**	**2022**	**2019**	**2020**	**2021**	**2022**
Orange	[20-30]%	[20-30]%	[20-30]%	[20-30]%	[20-30]%	[20-30]%	[20-30]%	[20-30]%
MásMóvil	[10-20]%	[10-20]%	[10-20]%	[10-20]%	[10-20]%	[10-20]%	[10-20]%	[10-20]%
Combined	[40-50]%	[40-50]%	[40-50]%	[40-50]%	[30-40]%	[30-40]%	[30-40]%	[30-40]%
Telefónica	[30-40]%	[30-40]%	[30-40]%	[30-40]%	[40-50]%	[40-50]%	[40-50]%	[40-50]%
Vodafone	[10-20]%	[10-20]%	[10-20]%	[10-20]%	[10-20]%	[10-20]%	[10-20]%	[10-20]%
Digi	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%
Others	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%
Total	**100%**	**100%**	**100%**	**100%**	**100%**	**100%**	**100%**	**100%**

Source: The Parties (SO Reply, Annex 2.3)

Table 16 Market shares in the hypothetical market segment for the retail supply of FMC bundles without premium Pay-TV football content in Spain

	Shares by volume (bundles) (%)				Shares by value (EUR) (%)			
	2019	**2020**	**2021**	**2022**	**2019**	**2020**	**2021**	**2022**
Orange	[30-40]%	[20-30]%	[20-30]%	[20-30]%	[30-40]%	[20-30]%	[20-30]%	[20-30]%
MásMóvil	[10-20]%	[10-20]%	[20-30]%	[20-30]%	[10-20]%	[10-20]%	[20-30]%	[20-30]%
Combined	[40-50]%	[40-50]%	[40-50]%	[40-50]%	[40-50]%	[40-50]%	[40-50]%	[40-50]%
Telefónica	[20-30]%	[20-30]%	[20-30]%	[20-30]%	[10-20]%	[20-30]%	[20-30]%	[20-30]%
Vodafone	[20-30]%	[20-30]%	[20-30]%	[10-20]%	[20-30]%	[20-30]%	[20-30]%	[20-30]%
Others	[0-5]%	[0-5]%	[5-10]%	[10-20]%	[0-5]%	[0-5]%	[5-10]%	[5-10]%
Total	**100%**	**100%**	**100%**	**100%**	**100%**	**100%**	**100%**	**100%**

Source: The Parties (SO Reply, Annex 2.3)

9.2.2. Wholesale markets

(331) The following tables present the market shares (by volume and value) on wholesale markets in Spain.

Table 17 Market shares in the market for the wholesale access and call origination services on mobile networks

	Shares by volume (SIMs cards) (%)				Shares by value (EUR) (%)			
	2019	**2020**	**2021**	**2022**	**2019**	**2020**	**2021**	**2022**
Orange	[20-30]%	[30-40]%	[30-40]%	[10-20]%	[30-40]%	[30-40]%	[30-40]%	[10-20]%
MásMóvil	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%
Combined	[30-40]%	[30-40]%	[30-40]%	[20-30]%	[30-40]%	[30-40]%	[30-40]%	[20-30]%
Telefónica	[60-70]%	[50-60]%	[50-60]%	[70-80]%	[50-60]%	[50-60]%	[50-60]%	[70-80]%
Vodafone	[5-10]%	[5-10]%	[5-10]%	[0-5]%	[0-5]%	[0-5]%	[5-10]%	[0-5]%
Others	-	-	-	-	-	-	-	-
Total	**100%**	**100%**	**100%**	**100%**	**100%**	**100%**	**100%**	**100%**

Source: The Parties (SO Reply, Annex 2.3)

Table 18 Market shares in the market for the wholesale broadband access services

	Shares by volume (fixed lines) (%)				Shares by value (EUR) (%)			
	2019	**2020**	**2021**	**2022**	**2019**	**2020**	**2021**	**2022**
Orange	[20-30]%	[30-40]%	[20-30]%	[20-30]%	[20-30]%	[20-30]%	[20-30]%	[20-30]%
MásMóvil	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%
Combined	[30-40]%	[30-40]%	[30-40]%	[30-40]%	[20-30]%	[20-30]%	[20-30]%	[20-30]%
Telefónica	[50-60]%	[50-60]%	[40-50]%	[40-50]%	[70-80]%	[60-70]%	[60-70]%	[60-70]%
Vodafone	-	-	-	-	-	-	-	-
Others	[10-20]%	[10-20]%	[20-30]%	[20-30]%	[5-10]%	[5-10]%	[10-20]%	[10-20]%
Total	**100%**	**100%**	**100%**	**100%**	**100%**	**100%**	**100%**	**100%**

Source: The Parties (SO Reply, Annex 2.3)

Table 19 Market shares in the market for the wholesale supply of call termination services on mobile networks

	Shares by volume (bundles) (%)				Shares by value (EUR) (%)			
	2019	**2020**	**2021**	**2022**	**2019**	**2020**	**2021**	**2022**
Orange's network								
Orange	100%	100%	100%	100%	100%	100%	100%	100%
Combined	*100%*	*100%*	*100%*	*100%*	*100%*	*100%*	*100%*	*100%*
MásMóvil's network								
MásMóvil	100%	100%	100%	100%	100%	100%	100%	100%
Combined	*100%*	*100%*	*100%*	*100%*	*100%*	*100%*	*100%*	*100%*
Total	**100%**	**100%**	**100%**	**100%**	**100%**	**100%**	**100%**	**100%**

(332) In Spain, on the market for wholesale supply of call termination services on mobile networks, each individual mobile network constitutes a separate product market.

Accordingly, each operator has a 100% market share on its own individual mobile network. The Transaction will therefore not affect the structure of this market.

Table 20 Market shares in the market for the wholesale supply of call termination services on fixed networks

	Shares by volume (bundles) (%)				**Shares by value (EUR) (%)**			
	2019	**2020**	**2021**	**2022**	**2019**	**2020**	**2021**	**2022**
Orange's network								
Orange	100%	100%	100%	100%	100%	100%	100%	100%
Combined	***100%***	***100%***	***100%***	***100%***	***100%***	***100%***	***100%***	***100%***
MásMóvil's network								
MásMóvil	100%	100%	100%	100%	100%	100%	100%	100%
Combined	***100%***	***100%***	***100%***	***100%***	***100%***	***100%***	***100%***	***100%***
Total	**100%**	**100%**	**100%**	**100%**	**100%**	**100%**	**100%**	**100%**

(333) In Spain, on the market for wholesale supply of call termination services on fixed networks, each individual fixed network constitutes a separate product market. Accordingly, each operator has a 100% market share on its own individual fixed network. The Transaction will therefore not affect the structure of this market.

Table 21 Market shares in the market for the wholesale supply of international roaming services

	Shares by volume (million SMS)[286] (%)			**Shares by value (EUR) (%)**		
	2020	2021	2022	2020	2021	2022
Orange	[20-30]%	[20-30]%	[20-30]%	[20-30]%	[20-30]%	[20-30]%
MásMóvil	[5-10]%	[5-10]%	[5-10]%	[0-5]%	[0-5]%	[0-5]%
Combined	[20-30]%	[30-40]%	[30-40]%	[20-30]%	[20-30]%	[30-40]%
Other	[70-80]%	[60-70]%	[60-70]%	[70-80]%	[70-80]%	[60-70]%
Total	**100%**	**100%**	**100%**	**100%**	**100%**	**100%**

Source: The Parties (RFI 45)

9.3. Concentration levels

(334) The overall concentration level in a market may also provide useful information about the competitive situation. In order to measure concentration levels, the Commission often uses the Herfindahl-Hirschman Index ("HHI"). The HHI is calculated by summing the squares of the individual market shares of all the firms in the market. The HHI gives proportionately greater weight to the market shares of larger firms. Although it is best to include all firms in the calculation, lack of information about very small firms may not be important because such firms do not affect the HHI significantly. While the absolute level of HHI can give an initial indication of the competitive pressure in the market post-merger, the change in the HHI (also known as the delta) is a useful proxy for the change in concentration directly brought about by the merger.[287] In a market where the post-merger HHI is no more than 1000, the Commission is unlikely to identify horizontal competition concerns.[288] Likewise, if the post-merger HHI is between 1000 and 2000 and the delta is below 250, the Commission is unlikely to identify horizontal competition concerns, except where special circumstances are present.[289]

[286] In RFI 45, the Parties have also provided market shares by volume according by data volume and voice traffic, which result in lower market shares by volume.

[287] Horizontal Merger Guidelines, paragraph 16.

[288] Horizontal Merger Guidelines, paragraph 19.

[289] Horizontal Merger Guidelines, paragraph 20.

(335) In this Section, the Commission analyses the concentration levels, before and after the Transaction, of the (i) mobile telecommunications services (offered standalone or as part of multiple-play bundles), (ii) fixed internet access services (offered standalone or as part of multiple-play bundles); and on the hypothetical markets for (iii) retail market for the supply of multiple-play bundles (i.e. all bundles, including fixed-only and fixed-mobile convergence ("FMC") bundles) and retail market for the supply of multiple-play bundles without premium Pay-TV football (iv) retail market for the supply of FMC bundles and retail market for the supply of FMC bundles without premium Pay-TV football, on the basis of the market share data provided by the Parties and illustrated in Section 9.2.

(336) According to the market shares above, the four MNOs (Orange, MásMóvil, Telefónica, and Vodafone) in 2022 accounted for:

(337) *Mobile telecommunications services*: [90-100]% of the market in terms of revenues, and for [90-100]% in terms of subscribers.

(338) The pre-merger HHI in the market for retail supply of mobile telecommunications services, based on the 2022 market is [2000-3000] in terms of revenues and [2000-3000] in terms of subscribers, which indicate that the market is already highly concentrated pre-Transaction.

(339) *Fixed internet access services*: [90-100]% of the market in terms of revenues, and for [80-90]% in terms of subscribers.

(340) The pre-merger HHI in the market for retail supply of fixed internet access services, based on the 2022 market is [2000-3000] in terms of revenues and [2000-3000] in terms of subscribers, which indicates that the market is already highly concentrated pre-Transaction.

(341) *Multiple-play bundles*: [90-100]% of the market in terms of revenues, and for [90-100]% in terms of subscribers.

(342) The pre-merger HHI in the hypothetical market for retail market for the supply of multiple-play bundles, based on the 2022 market is [2000-3000] in terms of revenues and [2000-3000] in terms of subscribers, which indicates that the market is already highly concentrated pre-Transaction.

(343) *Multiple-play bundles without premium Pay-TV football*: [90-100]% of the market in terms of revenues, and for [80-90]% in terms of number of bundles.

(344) The pre-merger HHI in the hypothetical market for retail market for the supply of multiple-play bundles without premium Pay-TV football, based on the 2022 market is [2000-3000] in terms of revenues and [2000-3000] in terms of number of bundles, which indicates that the market is already highly concentrated pre-Transaction.

(345) *FMC bundles*: [90-100]% of the market in terms of revenues, and for [90-100]% in terms of subscribers.

(346) The pre-merger HHI in the hypothetical market for retail market for the supply of FMC bundles, based on the 2022 market is [2000-3000] in terms of revenues and [2000-3000] in terms of subscribers, which indicates that the market is already highly concentrated pre-Transaction.

(347) *FMC bundles without premium Pay-TV football*: [90-100]% of the market in terms of revenues, and for [80-90]% in terms of number of bundles.

(348) The pre-merger HHI in the hypothetical market for retail market for the supply of FMC bundles without premium Pay-TV football, based on the 2022 market is [2000-

3000] in terms of revenues and [2000-3000] in terms of number of bundles, which indicates that the market is already highly concentrated pre-Transaction.

(349) **Table 22** below sets out the HHI levels before and after the Transaction, and the change in HHI level brought by the Transaction, for the retail markets and possible retail markets listed under (a) to (d) of Section 8.7 above, based on the market shares in terms of the relevant revenues and subscribers illustrated in Tables 5 to 12.

Table 22 HHI on retail markets and its segments (based on 2022 market shares)

Market/Segment	HHI pre-Transaction	HHI post-Transaction*	Change in HHI
Mobile telecommunications services			
Subscribers	[2000-3000]	[3000-4000]	[500-1000]
Revenues	[2000-3000]	[3000-4000]	[500-1000]
Fixed internet access			
Subscribers	[2000-3000]	[2000-3000]	[500-1000]
Revenues	[2000-3000]	[3000-4000]	[500-1000]
Multiple-play bundles			
Subscribers	[2000-3000]	[3000-4000]	[500-1000]
Revenues	[2000-3000]	[3000-4000]	[500-1000]
Multiple-play bundles without premium Pay-TV football			
Number of bundles	[2000-3000]	[3000-4000]	[1000-2000]
Revenues	[2000-3000]	[3000-4000]	[500-1000]
FMC bundles			
Subscribers	[2000-3000]	[3000-4000]	[500-1000]
Revenues	[2000-3000]	[3000-4000]	[500-1000]
FMC bundles without premium Pay-TV football			
Number of bundles	[2000-3000]	[3000-4000]	[1000-2000]
Revenues	[2000-3000]	[3000-4000]	[1000-2000]

Source: The Parties' estimates (Annex RFI 37 Q1)

(350) The post-Transaction HHI on the market for retail supply of mobile telecommunications services would be considerable, namely [3000-4000] based on subscriptions and [3000-4000] based on revenues. The change in HHI pre- and post-Transaction would also be considerable, namely [500-1000] based on subscriptions and [500-1000] based on revenues.

(351) In respect of the market of retail supply of multiple-play bundles, the HHI is particularly high: [3000-4000] based on subscribers and [3000-4000] based on revenues post-Transaction with an increase of [500-1000] and [500-1000] respectively. This is also the case of the market of retail supply of FMC bundles, where the HHI post-Transaction would be of [3000-4000] in terms of subscribers and [3000-4000] in terms of revenues, with an increase of [500-1000] and [500-1000] respectively. The HHI is also important on the possible markets of retail supply of multiple-play bundles without premium Pay-TV football and retail supply of FMC bundles without premium Pay-TV football, namely [3000-4000] based on bundles and [3000-4000] based on revenues and [3000-4000] based on bundles and [3000-4000] based on revenues respectively. The change in HHI pre- and post-Transaction would also be considerable and higher than on the markets of retail supply of multiple-play bundles and FMC bundles.

(352) Finally, on the market for retail supply of fixed internet access services, the HHI would amount to [2000-3000] based on subscribers and [3000-4000] based on revenues after the Transaction. In this market, the HHI would increase by [500-1000] based on subscribers and by [500-1000] based on revenues.

9.4. Horizontal non-coordinated effects

9.4.1. Legal framework

(353) Under Article 2(2) and (3) of the Merger Regulation, the Commission must assess whether a proposed concentration would significantly impede effective competition in the internal market or in a substantial part of it, in particular through the creation or strengthening of a dominant position. In this respect, a merger may entail horizontal and/or non-horizontal effects.[290]

(354) Horizontal effects are those deriving from a concentration where the undertakings concerned are actual or potential competitors of each other in one or more of the relevant markets concerned. The Commission appraises such effects in accordance with the guidance set out in the relevant notice, the Horizontal Merger Guidelines.[291]

(355) The Horizontal Merger Guidelines describe horizontal non-coordinated effects as follows: *"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. The merger removes this particular constraint. 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"*.[292]

(356) Generally, a merger giving rise to such horizontal non-coordinated effects would significantly impede effective competition by creating or strengthening of the dominant position of a single firm, one which, typically, would have an appreciably larger market share than the next competitor post-merger.

(357) However, under the substantive test set out in Article 2(2) and (3) of the Merger Regulation, mergers that do not lead to the creation or the strengthening the dominant position of a single firm may create competition concerns in oligopolistic markets. Indeed, the Merger Regulation recognises that in oligopolistic markets, it is all the more necessary to maintain effective competition.[293] This is in view of the more significant consequences that mergers may have on such markets. For this reason, the Merger Regulation provides that: *"under certain circumstances, concentrations involving the elimination of important competitive constraints that the merging parties had exerted upon each other, as well as a reduction of competitive pressure on the remaining competitors, may, even in the absence of a likelihood of*

---

290 Vertical effects are those deriving from a concentration where the undertakings concerned are active on different or multiple levels of the supply chain. A concentration may involve both types of effects.

291 Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings ("Horizontal Merger Guidelines"), OJ C 31,05.02.2004.

292 Horizontal Merger Guidelines, paragraph 24.

293 Merger Regulation, paragraph 25.

coordination between the members of the oligopoly, result in a significant impediment to effective competition."[294]

(358) Paragraph 24 of the Horizontal Merger Guidelines, which sets out the economic rationale underlying non-coordinated anti-competitive effects in horizontal mergers, states that a merger may significantly impede effective competition in a market by removing important competitive constraints on one or more firms. This paragraph furthermore clarifies that the most direct effect of the merger will be the loss of competition between the merging firms. In order to assess whether a notified merger will result in a significant impediment of effective competition on the basis of non-coordinated effects, the Commission therefore needs to analyse primarily the extent of the competitive constraint imposed pre-merger by each of the merging parties on each other. The following sentence of paragraph 24 of the Horizontal Merger Guidelines clarifies that the removal of the rivalry between the parties may have consequences also on the other players, who may find it profitable to increase their prices. The ultimate effect would thus typically be price increases by the merging parties but also by competitors in the relevant market.

(359) The Commission carries out an overall assessment of the likely effects of the Transaction arising from the elimination of important competitive constraints, taking into consideration the overall body of evidence in its file. The conclusion that a transaction leads to a significant impediment of effective competition is reached taking into account the degree to which all the relevant factors, including the ones listed in paragraphs 27 – 38 of the Horizontal Merger Guidelines, are present in the case under consideration.

(360) The Horizontal Merger Guidelines list a number of factors which may influence whether or not significant horizontal non-coordinated effects are likely to result from a merger. However, not all of these factors need to be present to make significant non-coordinated effects likely and it is not an exhaustive list.[295]

(361) The factors listed in the Horizontal Merger Guidelines include: the large market shares of the merging firms; the fact that the merging firms are close competitors; the limited possibilities for customers to switch suppliers; the fact that the merged entity would be able to hinder expansion by competitors; and the fact that the merger would eliminate an important competitive force ("ICF").[296]

(362) As regards the elimination of an ICF, according to the Horizontal Merger Guidelines, some firms have more of an influence on the competitive process than their market share would suggest. A merger involving such a firm may change the competitive dynamics in a significant anti-competitive way, in particular in a market that is already concentrated.[297] In this respect, paragraph 37 of the Horizontal Merger Guidelines refers to the example of a firm that is a recent entrant on the market, and is expected to exert significant competitive pressure in the future. There may,

[294] Merger Regulation, paragraph 25. Similar wording is also found in paragraph 25 of the Horizontal Merger Guidelines. See also Commission decisions of 2 July 2014 in case M.7018 – *Telefónica Deutschland/E-Plus*, paragraph 113; of 28 May 2014 in case M.6992 – *Hutchison 3G UK/Telefónica Ireland*, paragraph 179; and of 12 December 2012 in case M.6497 – *Hutchison 3G Austria/Orange Austria*, paragraph 88. See also judgment of the Court of Justice of the EU dated 13 July 2023 in Case C-376/20 P - Commission v CK Telecoms UK Investments ECLI:EU:C:2023:561 (the "CK Telecoms Judgment"), paragraphs 107-114.

[295] Horizontal Merger Guidelines, paragraph 26.

[296] Horizontal Merger Guidelines, paragraphs 27 et seq.

[297] Horizontal Merger Guidelines, paragraph 37.

however, also be other situations where a merger may lead to significant non-coordinated effects by removing an ICF.

(363) In situations where a merger may result in harmful non-coordinated effects on competition, the Horizontal Merger Guidelines describe a number of factors, which could counteract such harmful effects, that is, the likelihood of buyer power, entry, efficiencies and the fact that one of the merging parties is a failing firm.

(364) As regards entry, paragraph 68 of the Horizontal Merger Guidelines provides that when entering a market is sufficiently easy, a merger is unlikely to pose any significant anti-competitive risk. However, for entry to be considered a sufficient competitive constraint on the merging parties, it must be shown to be likely, timely and sufficient to deter or defeat any potential anti-competitive effects of the merger.

(365) On 13 July 2023, the European Court of Justice confirmed the Commission's approach to the assessment of non-coordinated effects in oligopolistic markets and provided guidance on the assessment to be carried out in each case.[298] The Court confirmed that while paragraphs 26 to 38 of the Horizontal Merger Guidelines list factors which may actually influence whether significant non-coordinated effects are likely to result from a merger, those factors, taken separately, are not necessarily decisive and not all of those factors need to be present for significant non-coordinated effects to be likely.[299] Closeness is one such factor, but it is not required that the parties to a concentration are 'particularly close' (which would imply a very high level of substitutability between the parties' products).[300]

(366) As for eliminating an ICF, the Court confirmed that it is one of the factors which may influence whether significant non-coordinated effects are likely to result from a merger and that on a given oligopolistic market a number of undertakings – not only one – may be classified as an ICF. Critically, the Court confirmed that ICF does not require the competitor in question to compete particularly aggressively on price. t merely requires the Commission to show that the competitor has more influence on the competitive process than implied by their market share or similar measures would suggest.[301]

(367) The Court also clarified that the Merger Regulation does not impose different standards of proof in relation approving a concentration and decisions prohibiting a concentration and that there is no general presumption that a concentration is compatible with, or incompatible with, the internal market.[302] The specific requirements relating to the quality of the evidence[303] do not, in principle, affect the standard of proof required.

9.4.2. The Parties' views

(368) In the Form CO, the Parties submit that the Transaction will not give rise to non-coordinated effects since the JV post-Transaction will not hold a dominant position on the market for retail mobile telecommunication services.[304] Further, the Parties submit that the Transaction will not give rise to non-coordinated effects absent the

---

298 Case-376/20 P Commission v CK Telecoms UK Investments, ECLI:EU:C:2023:561.
299 Case-376/20 P Commission v CK Telecoms UK Investments, ECLI:EU:C:2023:561, recitals 259-260.
300 Case-376/20 P Commission v CK Telecoms UK Investments, ECLI:EU:C:2023:561, recital 189.
301 Case-376/20 P Commission v CK Telecoms UK Investments, ECLI:EU:C:2023:561, recitals 160-167.
302 Case-376/20 P Commission v CK Telecoms UK Investments, ECLI:EU:C:2023:561, recitals 70-71.
303 See, recital 75 of the judgment: "*decisions must be supported by a sufficiently cogent and consistent body of evidence*". See also recitals 77-87.
304 Form CO, paragraphs 780-785.

creation of a dominant position. This is especially the case since [Details on MASMOVIL's mobile data traffic and business strategy]. Furthermore, post-Transaction, the retail mobile market will remain competitive due to competition between the three remaining MNOs Telefónica, Vodafone and the JV, as well as competitive pressure from growing MVNOs and a variety of FMC bundles.[305]

(369) With respect to the market for retail supply of fixed internet access services, in the Form CO the Parties submit that the JV will not hold a dominant position on the market post-Transaction, as Telefónica will remain the market leader, and other competitors will continue to exert aggressive competitive pressure on the JV.[306] The Parties consider that their position on the retail market for the supply of multiple-play bundles would be the same as their position on the market for the retail supply of fixed internet access, since multiple-play offers represent 96.3% of all fixed internet lines. An assessment of a general hypothetical market for multiple-play bundles would therefore reach the same results as the competitive assessment in relation to that market.

(370) With respect to the market for retail supply of FMC bundles, the Parties submit that the JV will not hold a dominant position on the market post-Transaction.[307] Second, the Parties submit that the Transaction will not give rise to any non-coordinated effects absent the creation of a dominant position. This is particularly the case since the Transaction will not result in the loss of any meaningful infrastructure competition for fixed and mobile networks, [Details on MASMOVIL's business strategy].[308]

(371) In the Article 6(1)(c) Response, the Parties submit that the Commission's assessment is erroneous as the Transaction does not raise to non-coordinated horizontal effects on any of the retail markets considered. The Parties submit that the Article 6(1)(c) Decision (i) disregards the specific characteristics of the Spanish market; (ii) mischaracterises the strong competitive positions and aggressivity of the Parties' competitors; (iii) fails to recognise that the Parties "are not closer to each other than to other competitors" (iv) fails to demonstrate that MásMóvil is an ICF and (v) wrongly concludes that any entry to the market would not be likely, timely and sufficient.

(372) Similarly, in their Response to the Statement of Objections, the Parties submit that the Commission's assessment (i) wrongly ignores the strong competitive pressure that Telefónica and Vodafone will exert on the Parties and on the market post-Transaction, (ii) fails to recognise that several alternative players will exert a strong competitive constraint on the Parties post-Transaction, (iii) fails to demonstrate that the Parties are close competitors, (iv) fails to demonstrate that MásMóvil is an important competitive force (ICF), (v) fails to demonstrate any significant impact of the Transaction. In their SO Reply, the Parties also submit that there are no significant barriers to entry and expansion on the relevant retail markets.

9.4.2.1.1. The position of competitors

(373) The Parties consider the Commission to be incorrectly stating that Telefónica would lose its position as market leader and would have no incentive to compete[309], as

305 Form CO, paragraphs 786-809.
306 Form CO, paragraphs 1213-1223.
307 Form CO, paragraphs 934-943.
308 Form CO, paragraphs 944-955.
309 Article 6(1)(c) Response, paragraph 96.

Telefónica remains market leader at the retail level by value market shares and other relevant metrics such as retail revenues, profitability, EBIDTA, free cash flow, ROCE, size of FTTH footprint, 5G coverage and spectrum holdings.[310]

(374) The Parties submit that the Commission's assessment largely mischaracterizes Telefónica's position as a competitor focusing on the premium segment. The Parties claim that Telefónica is active on all segments and price ranges of the markets with its Movistar and O2 brands, and, therefore, exerts competitive pressure on other players through e.g., O2's price aggressiveness and highly competitive offerings.

(375) Furthermore, the Parties submit that, contrary to what the Commission stated in the Statement of Objections, Vodafone has a strong position in the mobile, FMC and fixed retail markets. Moreover, the Parties submit that Vodafone has the ability to invest in its fixed and mobile networks, as it has the second largest mobile network in Spain (and it is investing significantly in 5G) and its HFC fixed network does not make it less competitive.

(376) Consequently, the Parties submit that both Telefónica and Vodafone will continue to have strong incentives to compete intensely following the Transaction. In their view, in addition to the competitive pressure that they will face from other players (such as Digi and Avatel), the SO has completely ignored the competitive constraint that Telefónica and Vodafone will impose on each other. As a result, Telefónica and Vodafone will have no choice but to continue competing strongly in order to maintain their subscriber base and to attract new subscribers to maintain and grow their market position.[311]

(377) The Parties also consider that the Commission's assessment underestimates and mischaracterises Digi's competitive impact and role in the market, despite Digi being the fastest growing telecommunications operator in Spain (and Europe) and already having an important market position.[312] The Parties submit that Digi has the necessary resources to compete in the fixed, mobile and FMC retail markets. According to the Parties, the fact that Digi does not offer premium Pay-TV does not alter its position as strong competitor, neither does that the operator has a 65% of brand recognition in the Spanish population. In the Article 6(1)(c) Response, the Parties submit that forecasts of market shares demonstrate Digi's increasing strength in market position.[313] Furthermore, the Parties underline that Digi has a fixed network of 6.5 million BUs and a wholesale mobile agreement with Telefónica that guarantees the same service and coverage as Telefónica's. Based on the number portability data, the Parties indicate that Digi has been the top net receiver of customers who switched providers since 2021, which proves that customers have and will have possibilities of switching supplier post-Transaction.

(378) Lastly, the Parties submit that the Commission's assessment ignores the competitive potential of other growing players, such as Avatel. According to the Parties, Avatel is the second fastest-growing operator in Spain.[314] The Parties also consider Finetwork

[310] Article 6(1)(c) Response, paragraph 100.
[311] Response to the Statement of Objections, paragraph 12.
[312] Response to the Statement of Objections, paragraph 17.
[313] Article 6(1)(c) Response, paragraph 161 and Annex 6(1)(c) 2.4.
[314] Article 6(1)(c) Response, paragraphs 195 to 202.

to be a relevant growing player (due to its aggressive retail pricing) [315] and Adamo as a growing operator.[316]

9.4.2.1.2. Closeness of competition

(379) Throughout the Form CO, the Parties submit that they are neither "particularly close competitors" nor "close competitors". In their view, this is supported by asymmetric diversion ratios between the two operators, according to which in the retail mobile telecommunications and FMC markets, other competitors are closer, equally close or increasingly close to the Parties. Further, the Parties consider that, in the fixed and Multiple-Play retail markets, [Details on the Parties' views on closeness of competition].[317]

(380) The Parties consider that they cannot be seen as close competitors due to (i) their pricing practices, (ii) the different business strategies (especially as regards future investments in infrastructure and spectrum licenses) strived after by the Parties, (iii) customers' perception of the Parties' brands as being far apart as regards service levels and overall satisfaction, and (iv) internal documents from the Parties showing that they closely monitor other competitors than each other.

(381) The Parties also refer to their assessment of closeness of competition specifically in relation to the retail market for the supply of FMC bundles.[318] They submit that the differences in their main brand positioning separates them in terms of closeness of competition. The differentiation of the Parties' different FMC offers, as well as the specific customer segments targeted by their various brands in terms of service attributes and pricing, positions the Parties closer to other brands, with Orange's brand closer to [...], and Jazztel and Simyo closer to [...]. Lastly, neither customers nor the Parties' internal documents [Details of internal documents describing the Parties' strategy].[319]

(382) In the Article 6(1)(c) Response, the Parties submit that OSP and MásMóvil are not close competitors as the Parties "*are not closer to each other than other competitors*". In relation to that, the Parties submit that the Article 6(1)(c) Decision mischaracterises the competitive positioning of Telefónica, Vodafone and Digi.

(383) [Details on the Parties' views on closeness of competition].[320]

(384) In addition, the Parties consider that the Commission's assessment errs in excluding Vodafone from the analysis of closeness of competition. The Parties submit that Vodafone is not in a challenging position or unable to materially invest in 5G and FTTH infrastructure and it strongly competes with the Parties in all retail markets.[321]

(385) Lastly, the Parties dispute the role of Digi. The Parties consider Digi to be a close competitor of OSP and MásMóvil, as they consider it to be a strong and aggressive operator with high gross and net adds in all retail markets. Further, according to the Parties, the diversion ratios from OSP and MásMóvil to Digi shows that [...].[322]The

---

315 Article 6(1)(c) Response, paragraphs 203 to 208.
316 Article 6(1)(c) Response, paragraphs 209 to 214.
317 Form CO, paragraphs 1265-1269.
318 Form CO, paragraphs 1069-1156.
319 Form CO, paragraphs 1069-1156.
320 Article 6(1)(c) Response, paragraph 258.
321 Article 6(1)(c) Response, paragraph 259.
322 Article 6(1)(c) Response, paragraphs 260 to 263.

Parties note that [...] diversion ratios between the Parties and Digi show that the Parties are "*increasingly less close to each other*". [323]

(386) In the Article 6(1)(c) Response, the Parties submit that the Commission's use of portability data to assess closeness of competition between OSP and MásMóvil is selective and biased. The Parties consider that mobile portability data cannot properly capture switching patterns across different market boundaries, nor the reasons behind the customers' switching. Furthermore, fixed portability data only covers a portion of all the actual switches by customers of fixed internet access services.[324]The Parties submit that mobile and FMC diversion ratios show that [...] attract more customers from [...], as well as more customers from [...]. The Parties submit that diversion ratios show that Digi represents a growing constraint on the Parties, and it is expected to become stronger in the future.[325] In the SO Reply the Parties emphasize that the SO failed to consider the diversion destinations from customers switching from MásMóvil. [326]

(387) Furthermore, the Parties consider that the Commission is wrong to dismiss the Parties' Tariff Comparison Analysis and provide a Hedonic Pricing Analysis to complement the Tariff Comparison Analysis.[327]

(388) The Parties claim that according to the 2022 data, the Parties' pricing is not closer to each other than to other operators for any of their brands. The Parties refer to the Tariff Comparison Analysis produced by the Parties, which, in their view, shows that neither [...] can be considered as close competitors.[328]

(389) The Parties indicate that they do not monitor each other's activities more than activities of other competitors. Therefore, the internal documents cited by the Commission provide no evidence of the Parties treating each other as benchmark in a way that is different to how they benchmark against many other retail operators in Spain.[329]

(390) The Parties submit that the Commission adopts a strained position that all operators in the Spanish market could conceivably be close competitors regardless of the degree of closeness between any two specific operators. In their view, this is an unduly low bar for determining that the Parties are close competitors and would enable the Commission to indiscriminately challenge every merger in concentrated markets based on closeness of competition concerns.[330]

9.4.2.1.3. The role of Orange and MásMóvil on the market

(391) The Parties submit that neither Party is an ICF on the retail markets for the supply of mobile telecommunications services, supply of fixed internet access services and supply of FMC bundles. The Parties state that they do not engage in behaviour

[323] SO Reply, paragraph 316.
[324] Article 6(1)(c) Response, paragraphs 270 to 274. SO Reply, paragraph 317. With regard to the Commission's usage of portability data the Parties further note in the SO Reply (paragraph 313) that the Commission does not take into account the most recent figures provided by the Parties (up to Q1 2023) submitted in the Article 6(1)(c) Response.
[325] Article 6(1)(c) Response, paragraphs 276 to 278.
[326] SO Reply, paragraph 314.
[327] SO Reply, paragraphs 318 et seq; Article 6(1)(c) Response, paragraphs 301 to 310; Annex 6(1)(c) 2.1a, Hedonic Pricing Analysis; Annex 6(1)(c) 2.2a, Tariff Comparison Analysis.
[328] Article 6(1)(c) Response, paragraphs 311 to 317.
[329] Article 6(1)(c) Response, paragraphs 320 to 325.
[330] Response to the Statement of Objections, paragraph 22.

typical for ICFs in particular in relation to their pricing policies, promotional activity, grade of innovation, market shares and gross adds developments.[331]

(392) With respect to the market for retail supply of fixed internet access services and market for retail supply of FMC bundles, the Parties note that MásMóvil's market share and gross adds developments are not sufficient to classify the company as an ICF and that OSP's customer base and market share has been steadily declining over the past years while the company's network or customer loyalty does not stand out from its competitors.[332]

(393) Regarding the market for retail supply of multiple-play bundles, the Parties consider that their position on the retail market for the supply of multiple-play bundles would be the same as their position on the market for the retail supply of fixed internet access, since multiple-play offers represent 96.3% of all fixed internet lines. An assessment of a general hypothetical market for multiple-play bundles would therefore reach the same results as the competitive assessment in relation to that of the retail supply of fixed internet access market.

(394) In the Article 6(1)(c) Response, the Parties refer to the General Court decision in the Hutchison case[333] according to which an ICF must stand out from other competitors and the mere exercise of competitive pressure by a firm in an oligopolistic market is not sufficient.[334] The Parties consider that the Commission in its Article 6(1)(c) Decision was wrong to view MásMóvil with respect to its past situation and growth (based on 2019 and 2020 data) and not taking the weakening of MásMóvil's position in 2021 and 2022 into account, especially when faced with the rise of Digi as a maverick.[335] The Parties consider that if MásMóvil's growth can be primarily explained by substantial acquisitions, then MásMóvil cannot be deemed to hold a unique position on the market, allowing it to exercise strong competitive constraints on other players. On the contrary, they consider this growth to be proof of a successful acquisition strategy.[336]

(395) The Parties add that the Commission's assessment fails to consider that MásMóvil's growth in terms of gross adds has slowed down, especially compared to Digi.[337] Furthermore, the Parties submit that the Article 6(1)(c) Decision is wrong to consider the fact that MásMóvil's switching share is higher than its market share as evidence of it being an ICF.[338]

(396) In the Article 6(1)(c) Response, the Parties also submit that the Commission is wrong to conclude that MásMóvil's network and wholesale agreements make it a more important competitive constraint on the market, and that, in any case, the fact of having its own network infrastructure does not render MásMóvil a maverick.[339] The Parties submit the Commission's 6(1)(c) Decision ignores the fact [Details on

331 Form CO, paragraphs 851 – 920, 1157-1205, 1272 – 1298.
332 Form CO, paragraphs 1157-1205 and 1272-1298.
333 Judgment of the General Court of 28 May 2020, T-399/16, CK Telecoms UK v Commission, EU:T:2020:217, paragraph 174.
334 Article 6(1)(c) Response, paragraph 328. The position of the General Court in that case has now been reviewed by the European Court of Justice.
335 Article 6(1)(c) Response, paragraph 329.
336 Article 6(1)(c) Response, paragraph 331.
337 Article 6(1)(c) Response, Section VI. a) ii).
338 Article 6(1)(c) Response, Section VI b).
339 Article 6(1)(c) Response, Section VI. d).

MASMOVIL's roll-out plan].[340] The Parties also submit that the Commission's assessment ignores that [Details on MASMOVIL's FTTH deployment plan].[341]

(397) The Parties consider the CNMC decision describing MásMóvil as a maverick to be dated and unfounded.[342] They view the CNMC's 2021 MásMóvil/Euskaltel decision[343] as reflecting past market conditions. In this context, the Parties submit that the Commission must base its assessment on the current and future context of the market and not past data that no longer reflects market reality.[344]

(398) In their Response to the SO, the Parties further submit that the Commission dilutes the essence of the test to the extent that it becomes uninformative. They submit that Tariff Comparison Analysis and Hedonic Pricing Analysis that they submitted clearly show that MásMóvil is not a price aggressive operator. The Parties submit that the Commission erroneously treats MásMóvil as an ICF by relying on a range of factors that are irrelevant to the assessment, such as the number of brands and the number of physical stores operated by MásMóvil. It ignores that the organic growth momentum of MásMóvil has been significantly slowing down over the last years and it has also experienced negative commercial results.[345]

9.4.2.1.4. The possibility of switching

(399) In the Article 6(1)(c) Response, the Parties contest that customers would have limited possibilities of switching supplier post-Transaction. Rather, the Parties claim that the barriers to switching in Spain are low, as there are a number of alternative convergent operators.

(400) The Parties submit that post-Transaction, Telefónica and Vodafone would not have less incentives to compete. The Parties claim that if the JV hypothetically increased prices post-Transaction, prices on the market would not rise since Telefónica and Vodafone would continue to compete for the JV's customers. They submit that it would be irrational for them not to do so because if prices were to increase generally, customers would simply switch to Digi, Avatel, Finetwork, Adamo, PTV/Procono or one of the other rapidly growing operators.[346]

(401) Lastly, the Parties point out that Spanish consumers are amongst the most price-sensitive in the EU. They point to CNMC data according to which, price is the main reason for switching operators.[347]

9.4.2.1.5. Barriers to entry

(402) In the Article 6(1)(c) Response, the Parties claim that by disregarding the specificities of the Spanish market, the Article 6(1)(c) Decision wrongly concludes that "any entry would not be likely, timely and sufficient".[348] Similarly, in their Response to the SO, the Parties submit that the Commission erroneously asserts that a new entrant would face significant barriers to entry in the Spanish market, as it

340 Article 6(1)(c) Response, paragraph 351.
341 Article 6(1)(c) Response, paragraph 351.
342 Article 6(1)(c) Response, Section VI f).
343 C/1181/21 MÁSMÓVIL / EUSKALTEL, 16 June 2021.
344 Article 6(1)(c) Response, paragraph 358 and 361.
345 Response to the SO, paragraphs 27, 29.
346 Article 6(1)(c) Response, paragraph 88.
347 Response to the SO, paragraph 70.
348 Article 6(1)(c) Response, Section IV.

would need to make a certain level of investments and obtain spectrum rights to become an MNO or deploy fibre to become an FNO.[349]

(403) The Parties submit that the Spanish retail market is effectively characterized by its convergent nature; however, convergence does not constitute a barrier to entry, insofar as operators in Spain can rely on wholesale access to other operators' networks.[350] The Parties submit that the extremely high number of convergent players, regardless of their size and model (i.e., own infrastructure and/or reliance on wholesale agreements) demonstrates that they are all able to obtain wholesale access easily. In this context, the Parties claim that not owning or owning a limited infrastructure, is not a barrier to entry to the Spanish retail market.[351]

(404) The Parties claim that the Commission's assessment errs in finding that Digi's example shows that it is difficult to enter the Spanish retail markets.[352] The Parties submit that the fact that Digi entered the market more than three years ago is irrelevant and that Digi has only recently been focusing on and investing in Spain.[353] To the contrary, the Parties submit that Digi's recent entry into the Spanish FMC market and Digi's exponential growth proves that the Commission's claims that "*the need to build up a loyal customer base and brand recognition further contributes to the difficulty of entering at a sufficient scale in a timely manner*" is inaccurate.[354]

(405) The Parties submit that the Commission is wrong to claim that own infrastructure is needed to effectively compete in the Spanish market, as Digi demonstrates precisely the opposite. Digi is an MVNO that operates on Telefónica's mobile network (without owning any mobile infrastructure or spectrum) and uses the wholesale access to Telefónica's fixed network to complete its own coverage, and exerts a strong competitive pressure on other MVNOs and network operators in the entire Spanish territory through nationwide mobile, fixed and convergent services.[355] In the Response to the SO, the Parties also submit that each MNO in Spain has agreements with one or more mobile tower companies ("TowerCos"), and thus it is not necessary to build mobile tower sites of its own by negotiating site by site as was the case a few years ago, as extensive infrastructure from TowerCos is already present at national level.[356]

(406) The Parties also submit the Commission errs in finding that MNO and MVNO entry is unlikely in the Spanish market. The Parties indicate that MásMóvil's entry shows that the Spanish market is competitive, and MNOs or operators combining own mobile network with wholesale access (such as MásMóvil) can enter and flourish in Spain.[357] The Parties also observe that the deregulation of the wholesale mobile markets was implemented in 2017 notably given the high number of MVNOs active in Spain, which, in their view, shows that barriers to entry are low.[358] In addition, in the Parties view, there is no evidence that shows that 5G will not be provided once 5G deployment and customer demand is more advanced, especially given that MNOs

349 Response to the SO, paragraph 377 ff.
350 Article 6(1)(c) Response, paragraph 216.
351 Article 6(1)(c) Response, paragraph 218, response to the SO, paragraph 384.
352 Article 6(1)(c) Response, paragraph IV b).
353 Article 6(1)(c) Response, paragraph 222.
354 Article 6(1)(c) Response, paragraph 223.
355 Article 6(1)(c) Response, paragraph 224.
356 Response to the SO, paragraph 378.
357 Article 6(1)(c) Response, paragraph 229.
358 Article 6(1)(c) Response, paragraph 238; response to the SO, paragraph 380.

have also previously provided 3G and 4G to MVNOs.[359] Thirdly, the Parties note that OSP and MásMóvil have [Details of the Parties' contractual obligations regarding 5G technology][360] [Details of the Parties' commercial offers for 5G access].[361] [Details of the Parties' commercial offers for 5G access].[362]

(407) The Parties submit that the Commission is wrong to claim that any potential entrant on the retail fixed markets, including multiple-play and FMC markets would face significant barriers to entry.[363] The Parties submit that new entrants can conclude wholesale agreements and operate as FVNOs and there are multiple examples of such players in the Spanish market. [364] In addition, FTTH deployment in Spain remains relatively cheap compared to other European countries.[365] The Parties claim that for players who are ready to invest, there exist tools to facilitate access to FTTH networks[366] and that access to the FTTH network in Spain is guaranteed to all operators at a moderate price, resulting in low barriers to entry. This is claimed to be proven by the presence of many alternative FTTH operators in the market, such as Digi, Avatel, Adamo.[367]

(408) In addition, the Parties submit that if there were barriers to entry and expansion in the retail markets, Telefónica, Vodafone and the Parties would not have lost market shares to the alternative providers.[368]

9.4.2.1.6. Negative impact of the Transaction

(409) In their Response to the SO, the Parties submit that the Commission's findings regarding price increases resulting from the Transaction are untenable, since (i) it attributes to the analysis of pricing incentives an evidential value that it does not have, because it does not provide any materiality threshold against which to benchmark results, (ii) estimates of the measures used by the Commission suffer from serious shortcomings (including: (a) the use of artificially high contribution margins that do not reflect the business reality; (b) the use of a static view and thus, not reflecting the dynamic nature of the Spanish market; and (c) a failure to take into account the offsetting impact of the substantial efficiencies flowing from the Transaction); (iii) it departs from previous assessments in all previous mobile telecommunications Phase 2 cases since 2014, that engaged in a more detailed economic assessment of price effects e.g. through calibrated merger simulations.[369]

9.4.3. The Commission's assessment

(410) The Commission's assessment of the horizontal non-coordinated effects stemming from the Transaction is divided into nine parts and contains analysis of the following markets: (i) retail supply of mobile telecommunication services (Section 9.4.3.1), (ii) retail supply of fixed internet access services (section 9.4.3.2), (iii) hypothetical market for the retail supply of multiple-play bundles (Section 9.4.3.3), (iv) hypothetical market for the retail supply of FMC bundles (Section 9.4.3.4), (v) retail

359 Article 6(1)(c) Response, paragraph 239.
360 Article 6(1)(c) Response, paragraph 240.
361 Article 6(1)(c) Response, paragraph 243.
362 Article 6(1)(c) Response, paragraph 243.
363 Article 6(1)(c) Response, Section IV d).
364 Article 6(1)(c) Response, paragraph 246.
365 Article 6(1)(c) Response, paragraph 247; Response to the SO, paragraph 383.
366 Article 6(1)(c) Response, paragraph 248.
367 Article 6(1)(c) Response, paragraph 249.
368 Response to the SO, paragraph 386.
369 Response to the SO, paragraph 31.

supply of fixed telephony services (Section 9.4.3.5), (vi) retail supply of M2M services (Section 9.4.3.6), (vii) wholesale supply of access and call origination services on mobile networks (including M2M services) (Section 9.4.3.7); and (viii) wholesale supply of broadband access services (Section 9.4.3.8), and (ix) wholesale supply of international roaming services (Section 9.4.9).

(411) The analysis of the market for the supply of mobile telecommunication services includes all mobile telecommunication services, irrespective of whether they are provided on a standalone basis or in a bundle. The same is true for fixed internet access services. As noted in Section 7.1.3 above, the majority of mobile telecommunication services and fixed internet access services in Spain are provided in bundles. At the same time, while multiple-play bundles are understood to include all types of telecommunication bundles, as indicated in Section 7.1.3, FMC bundles are the most popular type of multiple-play bundle in Spain. Although in some instances the Commission's assessment refers to overlapping evidence in the respective sections below, the present Decision contains a standalone competitive assessment for each of the four markets mentioned in the previous paragraph.

9.4.3.1. Retail supply of mobile telecommunication services

(412) The Commission has come to the view that the Transaction would significantly impede effective competition in a substantial part of the internal market resulting from horizontal non-coordinated effects on the market for the retail supply of mobile telecommunications in Spain. This is because (i) the Parties' combined market share is high and the increment as a result of the Transaction is significant (Section 9.4.3.1.1), (ii) remaining MNOs might have less incentives to compete (Section 9.4.3.1.2), (iii) competitive constraints from MVNOs are insufficient (Section 9.4.3.1.3) (iv) the Parties are close competitors (Section 9.4.3.1.4), (v) of the important role played by MásMóvil on the market (Section 9.4.3.1.5) and (vi) a negative impact on prices and/or quality of service is expected (Section 9.4.3.1.8).

(413) In addition, the Commission considers that the reduction of the competitive pressure resulting from the Transaction is not likely to be outweighed by other competitive constraints such as potential entry (Section 9.4.3.1.6) or buyer power (Section 9.4.3.1.7). Also, as set out in Section 9.6 below, the Commission notes that the Phase I market investigation, as well as evidence collected during its in-depth Phase II investigation, casts doubt on the Parties' arguments that the Transaction would generate significant efficiencies that could outweigh the negative effects of the Transaction.

9.4.3.1.1. The Parties' combined market share and HHI are high and the increment is significant

(414) As set out in the Horizontal Merger Guidelines, market shares and concentration levels provide useful first indications of the market structure and of the competitive importance of both the merging parties and their competitors, and are important factors in the assessment. The larger the market share, the more likely a firm is to possess market power. The larger the increment, the more likely it is that a merger will lead to a significant increase in market power.[370] A merger involving a firm whose market share will remain below 50% after the merger may raise competition concerns in view of other factors such as the strength and number of competitors, the

[370] Horizontal Merger Guidelines, paragraph 27.

presence of capacity constraints or the extent to which the products of the merging parties are close substitutes.[371]

(415) The Commission considers that the Parties' combined market shares are high, as is the increment in market shares resulting from the Transaction, and the Transaction would create a new market leader on the Spanish retail mobile telecommunication services market both by volume and by value.

(416) First, the combined market shares of the Parties are high. Based on share data provided by the Parties, as set out in Section 9.2 above, the JV would have a share of [40-50]% by volume and [30-40]% by value post-Transaction. The combined market shares by volume, which exceed 40%, could be indicative of market power. Currently, Orange is the third biggest player on the Spanish mobile telecommunication services market (less than [0-5]% behind Vodafone), while MásMóvil is the fourth largest player, reaching [20-30]% by subscriber numbers for the first time in 2022. Post Transaction, the JV would become the largest MNO in terms of both subscribers and revenues. The current incumbent operator, Telefónica, would no longer be the market leader with [20-30]% by volume and with [30-40]% by value, followed by Vodafone, with [20-30]% by volume and with [20-30]% by value. Vodafone, as the third player on the retail mobile telecommunication services market, would be nearly [significantly smaller than] the size of the JV by the number of subscribers. The next biggest operator, Digi, despite continued growth, would be more than [5-10] times smaller than the JV by the number of subscribers and nearly [5-10] times smaller than the JV by the number of subscribers and nearly 8 times smaller by revenue based on the 2022 data.

(417) Second, the increment in market share (i.e. [20-30]% by volume and [10-20]% by value) and the increment in HHI would be significant. As indicated in Section 9.3, the post-Transaction HHI on the market for retail supply of mobile telecommunications services would be significant, namely [3000-4000] based on subscriptions and [3000-4000] based on revenues. The change in HHI pre- and post-Transaction would also be considerable, namely [500-1000] based on subscriptions and [500-1000] based on revenues, especially given the fact that the increment exacerbates the concentration levels of a market that is already concentrated pre-Transaction with HHI levels of [2000-3000] in terms of revenues and [2000-3000] in terms of subscribers.

(418) This is due to the fact that currently, both Parties are of a similar size with a market share around [20-30]%, in particular in terms of the number of subscribers, on the market for the retail supply of mobile telecommunications in Spain. Their respective market shares by volume differed by only [0-5] percentage points in 2022, with the increment steadily increasing over the past 4 years and the difference in size between the parties becoming smaller, as MásMóvil continues to grow.

(419) Orange is a well-established MNO in Spain, being one of the strongest players on the retail supply of mobile telecommunication services. The vast majority of market participants who expressed a view in the Phase I market investigation consider that Orange is an "*established*" retail mobile player.[372] It is active in Spain through three brands, Orange, Jazztel, and Simyo, "*which enable a strategic positioning on the*

[371] Horizontal Merger Guidelines, paragraph 17.
[372] Responses to questionnaire Q1 to competitors, question D.A.A.7.

market with strong brand perception and maximized value extraction".[373] Orange has spectrum holdings (705 MHz) across all spectrum bands, [Details on Orange's spectrum usage] is in use, which is more than Vodafone (685 MHz, of which 258 MHz is in use),[374] and has deployed its own nationwide mobile network that covers almost [90-100]% of the Spanish population with 2G, 3G, and 4G technologies, and approximately [70-80]% of the population with 5G technology as of the end of 2022. Orange has an even presence across Spain with a proprietary mobile network of approximately [...] mobile sites as of the end of 2022. It is described by the Parties to rating agencies as a [Details of MASMOVIL's internal documents describing MASMOVIL's strategy].[375] In terms of financial performance, according to the same presentation to the rating agencies, Orange has a [Details of MASMOVIL's internal documents describing MASMOVIL's strategy]. It generated EUR [...] in revenues and a cash contribution margin of [...] % in mobile in 2022.[376] It is therefore a strong player on the Spanish mobile telecommunication services market.

(420) MásMóvil, on the other hand, provides services through a wide variety of brands, such as Yoigo, MásMóvil and Virgin, as well as digital-focused brand Pepephone, regional brands Euskaltel, R., Guuk, Embou and Telecable and international customers brands Llamaya, Lebara and Lycamobile since 2006. Although MásMóvil's own mobile network is smaller than the other Spanish MNOs, with [...] sites (as compared to [...] owned by Orange), its network covers [80-90]%% of the population in 3G and 4G.[377] Regarding 5G, MásMóvil has been able to achieve [70-80]% population coverage in 2022 using a combination of its own network and [Details on the wholesale agreements concluded by MASMOVIL].[378] Thus, it should be seen as an MNO competitor. In addition, according to the data provided by the Parties, over the last four years, MásMóvil's market share in terms of subscriptions has been steadily growing, with an increase of [0-5]% between 2019 and 2022. MásMóvil has also been number 1 operator in terms of gross adds in 2019, 2020 and 2021 and together with Vodafone [details on MASMOVIL's and Vodafone's position on the mobile market] in 2022. Finally, the pre-merger margins and EBIDTA of MásMóvil have been steadily growing the last three years. All of these elements show that it is a strong player that constrains Orange, Telefónica, and Vodafone.

(421) <u>Third</u>, the Parties themselves consider that they will become a [Details of internal documents describing the Parties' internal strategy][379] post-Transaction, with [...] combined of mobile lines and [40-50]% market shares in terms of subscribers. In the same vein, the transaction rationale for Orange is to [Details of Orange's internal documents describing Orange's internal strategy] and [Details of Orange's internal documents describing Orange's internal strategy][380] and is similar to that of

373 Internal document of MásMóvil, 2022.06 Project Kili - RAP v27 Non-Clean team version.pdf. MM-00818245, Doc ID 2659-3783.

374 Form CO, paragraph 497.

375 Internal document of MásMóvil, 2022.06 Project Kili - RAP v27 Non-Clean team version.pdf. MM-00818245, Doc ID 2659-3783.

376 RFI 18 – Q2 margins.

377 Response to question 14b of RFI 1. Form CO, paragraph 2095.

378 Form CO, Table 39.

379 Internal document of MásMóvil, 2022.06 Project Kili - RAP v27 Non-Clean team version.pdf. MM-00818245, Doc ID 2659-3783.

380 Internal document of Orange, ID ORANGE-EC-RFI22-00973596, Doc ID 3023-38123.

MásMóvil who considers it a [Details of MASMOVIL's internal documents describing MASMOVIL's internal strategy].[381]

(422) On the basis of the above, the Commission concludes, that the combined market shares and post-Transaction HHI of Orange and MásMóvil are high on the market for the retail supply of mobile telecommunications in Spain – creating the leading market player – and that the Transaction gives rise to an significant market share and HHI increment.

9.4.3.1.2. Competitive constraint from other MNOs

9.4.3.1.2.1. Legal Framework

(423) A merger is unlikely to harm competition where the reaction of the remaining competitors would discipline the behaviour of the JV. On the other hand, competition would be harmed if the remaining competitors may not be willing or able to compete sufficiently post-Transaction so as to compensate for the loss of competition.[382]

(424) 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"*.[383] The Horizontal Merger Guidelines further state that: "*mergers in oligopolistic market 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 may […] also result in a significant impediment to effective competition*."

(425) In *Hutchison 3G Austria/Orange Austria*, the Commission stated that, in the same way 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*" 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 that 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*".[384]

(426) In *Hutchison 3G UK/Telefónica Ireland*, the Commission also found that the: "*change of incentives of the merged entity following the merger and the likely price increase by the merged entity would significantly reduce this pressure on Vodafone's customer base and lead some of the merged entity's customers that would have remained with the Parties in the absence of the transaction to switch to Vodafone. Accordingly, Vodafone would find it easier to retain its customers and could even attract new customers who would switch away from the merged entity. This resulting increase in the demand faced by Vodafone provides Vodafone with an incentive to*

---

381 Internal document of MásMóvil, 28.02.2022 Mandarina - EU Partners Discussion vF.pdf. ID MM-00096262, Doc ID 2671-20033.

382 See Horizontal Merger Guidelines, paragraphs 24-25 and footnote 28.

383 Horizontal Merger Guidelines, paragraph 24.

384 Commission decision of 12 December 2012 in case No M.6497 – *Hutchison 3G Austria/Orange Austria*.

raise its prices in turn. Despite Vodafone's claims during the Oral Hearing and written submissions that it would continue to effectively compete post-merger, the Commission therefore considers that Vodafone's likely strategy would be a moderate price increase (inferior to that of the merged entity) in order to optimise profits from this additional demand. The finding that competing firms have incentive to raise prices as a response to a price increase by another firm is called "strategic complementarity" of pricing decisions and is a general characteristic in standard models of oligopolistic competition. This feature is also reflected in the Commission's quantitative analysis which shows that, in response to a price increase by the Parties, the Parties rivals, including Vodafone, would, all else being equal, also likely 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."[385]

(427) Likewise, in *Telefónica Deutschland/E-Plus* the Commission considered that: "*if the merged entity were to raise prices, some customers would consider switching to the rival MNOs, which would not have been the case in the absence of the merger. These newly available customers then increase the demand faced by the other competing MNOs, and as a result they have an incentive to raise prices themselves. This relates to the concept of "strategic complementarity" in the economic theory, where competing firms have the incentive to raise prices as a response to a price increase by another firm. The Commission notes that strategic complementarity of pricing decisions is a general characteristic in standard models of oligopolistic competition*."[386]

(428) These principles are also reflected in the decision in *Hutchison 3G Italy / Wind / JV*[387].

(429) The Commission's Horizonal Merger Guidelines and decisional practice was endorsed by the grand chamber of the Court of Justice of the EU in its judgment in CK Telecoms, in which it held that "*it is apparent from that recital 25 that while 'many oligopolistic markets exhibit a healthy degree of competition [the fact remains that], under certain circumstances, concentrations involving the elimination of important competitive constraints that the merging parties had exerted upon each other, as well as a reduction of competitive pressure on the remaining competitors, may, even in the absence of a likelihood of coordination between the members of the oligopoly, result in a significant impediment to effective competition'*".[388]

(430) The Commission considers that the above principles of the Horizontal Merger Guidelines and the Commission's decisions in past cases, as recently endorsed by the Court of Justice in *CK Telecoms*, related to the assessment of competitors' post-transaction incentives to compete in the mobile telecommunications sector are applicable to the assessment of the Transaction.

---

385 Commission decision of 28 May 2014 in case No M.6992 – *Hutchison 3G UK/Telefónica Ireland*, paragraph 572 and 573.

386 Commission decision of 2 July 2014 in case No M.7018 – *Telefónica Deutschland/E-Plus*, paragraph 531.

387 Commission decision of 1 September 2016 in case No M.7758 – *Hutchison 3G Italy / Wind / JV*, paragraph 843 – 844.

388 CK Telecoms Judgment, paragraph 108.

(431) In the following paragraphs the Commission assesses, first, the ability and incentives of Telefónica and Vodafone to compete and counteract the likely price effects resulting from the Transaction.

9.4.3.1.2.2. Ability to compete

(432) The Transaction would leave only two network operators on the Spanish market to compete with the JV; Telefónica and Vodafone. While the Commission considers that Telefónica and Vodafone are likely to have the ability to compete with the Parties post-Transaction, it cannot be concluded that they would have the incentives to do so, as further set out below.

9.4.3.1.2.3. Telefónica's ability to compete

(433) Telefónica is currently the largest MNO both by revenue and subscribers in the market for the retail supply of mobile telecom services.

(434) Telefónica has a national 2G, 3G, 4G and 5G network in Spain and holds 28.5% of the in-use spectrum[389] currently licenced for mobile telecommunications use in Spain. Telefónica competes by selling mobile subscriptions both as a standalone product as well as bundled with its fixed services including fixed internet, fixed telephony and/or television.

(435) In line with the Parties' views, the Commission considers that despite a slight decrease in market share in the 2019 to 2022 period (from [20-30]% to [20-30]% by volume and [30-40]% to [30-40]% by value), given its strong market position, particularly at the premium end of the market[390], and high network quality, Telefónica is currently able to compete in the retail mobile telecommunications market. Equally, the Commission does not consider that this would change in the future, either absent the Transaction or following the Transaction.

9.4.3.1.2.4. Vodafone's ability to compete[391]

(436) Vodafone is currently the second largest MNO both by revenue and subscribers in the market for the retail supply of mobile telecom services.

(437) Vodafone has a national 2G, 3G, 4G and 5G network and holds 26.6% of the in-use spectrum[392] currently licenced for mobile telecommunications use in Spain. Vodafone competes by selling mobile subscriptions both as a standalone product as well as bundled with its fixed services including fixed internet, fixed telephony and/or television.

(438) In line with the Parties' views, the Commission considers that despite a slight decrease in market share in the 2019 to 2022 period (from [20-30]% to [20-30]% by volume and [20-30]% to [20-30]% by value), given its overall strong market position and high network quality, Vodafone is able to compete in the retail mobile telecommunications market, at least in the short to medium term.

389 The recently auctioned 26 GHz band spectrum is not currently in use. Form CO, footnote 419.

390 For example, the Parties estimate that Telefónica accounts for around [80-90]% of all 5P FMC bundles with football content (see Annex RFI 37 Q1). These are the highest ARPU bundles available, and such a large share would mean that Telefónica captures a particularly large portion of high-paying retail customers in the market.

391 On 31 October 2023 Vodafone announced the sale of Vodafone Spain to Zegona Communications PLC ("Zegona"), a UK public limited company which was the former owner of the Spanish companies Telecable and Euskaltel, available at: https://www.vodafone.com/news/corporate-and-financial/sale-of-vodafone-spain, Doc ID 56443.

392 The recently auctioned 26 GHz band spectrum is not currently in use. Form CO, footnote 419.

(439) For completeness, the Commission notes that Vodafone currently finds itself in a challenged position in Spain in terms of ability to invest in both mobile and fixed networks,[393] which puts into question its ability to compete aggressively against the Parties in the future. Vodafone's reliance on HFC and the resulting growing unattractiveness of its fixed network[394] might have spill-over effects on its ability to compete on the mobile market, given that a large part of the market is convergent (i.e. entails mobile services being offered as part of a multiple-play bundle).

9.4.3.1.2.5. Incentives to compete

(440) The Commission considers that post-Transaction, in view of the reduction of competitive pressure, Telefónica and Vodafone are unlikely to have the incentive to compete sufficiently to counteract the negative impact resulting from the Transaction.

(441) First, as shown in Section 9.2 above, the market for the retail supply of mobile telecommunications services in Spain is highly concentrated, and is oligopolistic. The Parties, together with Telefónica and Vodafone, account for over 90% of the market by volume and by value. According to the principles of strategic complementarity, which is a general characteristic in standard models of oligopolistic competition and has been applied in several Commission decisions in the telecoms industry[395], competing firms have incentive to raise prices on the increased demand arising from the merger as a response to a price increase by another firm (which diverts some of the merging entity's demand to them).

(442) In its referral request under Article 9 of the Merger Regulation, the CNMC corroborated the concern that Telefónica and Vodafone would have little incentive to counteract price increases that could be applied by the JV as they could benefit from raising prices on any diverted demand themselves.[396]

(443) Second, Telefónica has focused its strategy in recent years on retaining customers and increasing its average revenue per user ("ARPU") through selling multiple-play and FMC bundles and value-added services, in particular premium football content, rather than aggressively competing to win new customers through lower prices. Indeed, it is estimated that around [80-90]% of Telefónica's overall mobile revenue in 2022 was accounted for by only around [30-40]% of its mobile subscriber base, i.e. its premium customers that subscribe 5P FMC bundles with premium Pay-TV football content, and this has increased from around [70-80]% in 2020,[397] suggesting that Telefónica is unlikely to focus on competing through lower prices following the Transaction.

(444) Like the Parties, each of Telefónica and Vodafone also operate lower price-positioned brands in addition to their main brands, namely O2 in the case of

393 Non-confidential minutes of a call with Vodafone of 20 December 2022, Doc ID 2455.

394 See further below Section 9.4.3.2.2.3.

395 See e.g. Commission decision of 12 December 2012 in case No M.6497 – *Hutchison 3G Austria/Orange Austria*; Commission decision of 28 May 2014 in case No M.6992 – *Hutchison 3G UK/Telefónica Ireland*; Commission decision of 2 July 2014 in case No M.7018 – *Telefónica Deutschland/E-Plus*; Commission decision of 1 September 2016 in case No M.7758 – *Hutchison 3G Italy / Wind / JV*.

396 Application under Article 9 of Council Regulation (EC) No139/2004 on the Control of Concentrations in file M.10896 Orange MásMóvil/JV of 2 March 2023.

397 Annex RFI 37 Q1. This was estimated by comparing Telefónica's overall mobile subscribers and revenues with the corresponding figures for 5P bundles with premium Pay-TV football content, by using Telefónica's average number of mobile lines per multiple-play bundle in 2022 (2.3).

Telefónica and Lowi in the case of Vodafone. However, according to market share data provided by the Parties, these sub-brands, while growing to some extent, have a minimal presence on the market with shares less than [0-5]% by volume and value in 2022, and having grown by no more than [0-5]% in the four-year period 2019-2022.[398]

(445) Indeed, both Telefónica and Vodafone are considered to be rational players (i.e. that they would act in their own long term best interest in terms of profit maximisation) by the Parties and by third party analysts as shown in the following examples taken from the Parties internal documents.

(446) Orange's own strategic rationale for the Transaction, which the Orange Spain CEO at the time, Jean-Francois Fallacher, explained includes a [Details of Orange's internal documents describing Orange's strategy][399] in other words, [Details of Orange's internal documents describing Orange's strategy].

(447) Analyst reports appear to align with Orange's own strategic rationale for the Transaction. For example, [Details of MASMOVIL's internal documents describing MASMOVIL's strategy][400] and [Details of MASMOVIL's internal documents describing MASMOVIL's strategy]:

– [Details of MASMOVIL's internal documents describing MASMOVIL's strategy],

– [Details of MASMOVIL's internal documents describing MASMOVIL's strategy].

(448) The Commission considers that these observations remain valid today, notably the lack of aggressive growth strategies via price wars, as evidenced by the price increases announced by all of the MNOs in Spain last year, including Orange (in August 2023) and Telefónica, Vodafone and MásMóvil (in December 2023).[401]

(449) Similarly, an Orange email [Details of Orange's internal documents discussing market reactions to the Transaction announcement].

(450) Similarly, on 29 September 2022, ratings agency Fitch published its view that the Transaction "*should ease market pressures" and that "the market should benefit from a reduced number of competitors [since] A market challenger [i.e. MásMóvil] is moving into a more incumbent-like position and should adapt its strategy accordingly*." Fitch noted that *"competition has been most pronounced in mobile, where MM [i.e. MásMóvil] has consistently taken market share from Orange and Vodafone [whereas] Telefónica's Movistar [is] positioned towards the premium end of the market*".[402]

(451) This trend in the Parties' MNO competitors' market shares provides an important indication of the lack of effective incentives of Telefónica and Vodafone to compete

398 Annex RFI 37, Q1 (Bundles – FMC). The Parties were not able to provide a brand-level breakdown of market shares in the overall market for retail mobile services, so the Commission took FMC bundles as the closest available proxy given that, according to the CNMC "*83.3% of all post-paid mobile … in 2021 were part of a bundled offer*" (Form CO, paragraph 416).

399 [Details of Orange's internal documents describing Orange's strategy].

400 MásMóvil internal document, ID MM-00931525, Doc ID 2661-8144.

401 See https://euroweeklynews.com/2023/01/08/movistar-and-vodafone-to-increase-rates-for-customers-this-january-in-spain/, Doc ID 5633.

402 See https://www.fitchratings.com/research/corporate-finance/orange-MásMóvil MásMóvil -merger-to-ease-spanish-telecoms-market-pressure-29-09-2022, Doc ID 5665.

post-Transaction, and the more reactive nature of their current competitive behaviour. The Commission does not consider that either would alter this strategy as a result of the Transaction, rather that they would continue on this track further as a result of the decrease in competition brought about by the removal of competition between Orange and MásMóvil. This is supported by quotes from senior management of both companies indicating that they favour consolidation, including in Spain, as they consider markets to be too competitive today. For example, Telefónica Group COO, Angel Vilá, is quoted as saying "*We would be supportive of consolidation of the Spanish market if that scenario were to take place*" and, in a meeting with the Commission, Telefónica expressed the view that "*the Spanish market cannot support more than three MNOs due to the need for an increase in the spectrum holdings of the existing network operators to deploy 5G networks and future services, among other considerations*"[403]. In a similar spirit, [Details of Parties' internal documents describing the Parties' strategy][404], and in a submission to the Commission calling for an unconditional clearance of the Transaction, Vodafone referred to the "*the inability of the Spanish market to support four MNOs due to the low margins*".[405]

(452) Additionally, respondents to the Commission's Phase I market investigation considered that Telefónica and Vodafone will have a reduced incentive to compete post-Transaction. One respondent, a consumer organisation, indicated that "*the merger would promote oligopoly in Spain [with the result that] Companies are not going to be interested in competing*"[406] while another respondent, a non-MNO, considered that as a result of "*the neutralization of the MásMóvil as the maverick operator on the market … incentive to compete will stagnate …[and]… the proposed Transaction is likely to lead to higher prices, which is a direct consequence of the decrease of number of MNOs in the market…*"[407] A further non-MNO that responded to the Commission's Phase I market investigation observed similarly that "*This transaction is a 4 -3 play. Despite bundled offers are a feature of the Spanish market, Más Móvil is a mobile network operator and hence four mobile networks will be reduced to three. …This may have an impact on margins for other MVNO players and translate in price increases in the market. In addition to this, having three and not four suppliers. It would be more difficult for an alternative supplier to differentiate their offer and make it more competitive. Also, there is little evidence that mergers unlock investment*"[408] Indeed, even an internal document of MásMóvil from April 2020 refers to the fact that the [Details of MASMOVIL's internal documents describing MASMOVIL's strategy].[409]

(453) In light of the above, the Commission takes the view that Telefónica and Vodafone would have reduced incentives to compete post-Transaction.

9.4.3.1.3. Competitive constraint from MVNOs

(454) The Commission, based on the results of the market investigation and the analysis of the Parties' internal documents, does not consider that MVNOs are able to exercise

403 Non-confidential minutes of a meeting with Telefónica, 19 September 2023, paragraph 4, Doc ID 5700.
404 MásMóvil internal document [Details of MASMOVIL's internal documents describing MASMOVIL's strategy].
405 Vodafone's views on the Commitments, page 4, Doc ID 5398.
406 Responses to questionnaire Q1 to competitors, question E.4, Doc ID 2956.
407 Responses to questionnaire Q1 to competitors, question E.4, Doc ID 2834.
408 Responses to questionnaire Q1 to competitors, question E.4, Doc ID 2865.
409 MásMóvil internal document, ID MM-00763233, Doc ID 2657-8771.

the same degree of competitive pressure that is exercised by MNOs. The Commission therefore considers that non-MNOs are unable to meaningfully constrain the competitive behaviour of MNOs on the market for retail mobile telecommunication services in Spain.

9.4.3.1.3.1. Different types of MVNOs in Spain

(455) As mentioned in Section 7 above, there are different types of MVNOs in Spain.

(456) In terms of network assets and infrastructure, it is possible to differentiate between full and light MVNOs.

– "Full MVNOs" usually own some of the core network infrastructure, issue their own SIM cards, have network codes and back-office functions to manage customer relations. They use MNOs for access to a radio network only. Digi is an example of a full MVNO.

– "Light MVNOs" (which also includes service providers) typically own/operate their own customer relationship management ("CRM") systems, managing sales, marketing, product configuration, billing/rating and customer service, while the host MNO provides all bearer, enabler and mediation services and manages network provisioning, call routing and termination. Light MVNOs distribute SIM cards and offer services under their own name (i.e. repackage the host MNO's mobile telephony services and sell it under their own brand). They generally do not own any of the core network infrastructure and rely fully on the infrastructure of the host MNO to provide retail mobile service. Lemonvil, Soup, Dragonet, Alai, Parlem and Momophone are all examples of light MVNOs.[410]

(457) In terms of profile and target customer groups, it is possible to differentiate between MVNOs focusing on private/residential customers, that is standalone pre-paid and/or post-paid mobile customers, or FMC customers (e.g. Digi and Avatel) and MVNOs focusing on B2B customers[411] or use cases (e.g. Sewan, Grupalia, BT Evolution, VozTelecom, Telsome and Sarenet). MVNOs are rarely active in several segments and no MVNO is active across all market segments in Spain.

(458) Within the private/residential segment, which is the main segment in which the Parties compete with one another, and therefore the focus of the Commission's investigation, the following types of MVNOs can be distinguished:

– "Mass-market MVNOs", such as Digi, that offer retail mobile subscriptions nationally, including through FMC bundles, for the low and mid budget segment and do not, or at least no longer[412], target particular niche customers.

– "Niche MVNOs", that target certain niche customers which represent in many cases a small proportion of the overall mobile market, e.g. which centre their offer on low-cost international calls and target immigrant and other customers who make a relatively large share of their calls to other countries, as used to be the case for Digi. Typical examples of niche operators in Spain include Alai

410 Form CO, Table 129.

411 In the Commission's understanding B2B customers tend not to overlap with FMC customers, as B2B mobile customers may have a separate business connectivity service for their fixed internet needs, as opposed to a retail fixed internet subscription.

412 Digi formerly targeted niche immigrant communities, notably of Romanian origin.

and Truphone. Alai focuses on M2M/IoT services, which is not part of the retail mobile market, and Truphone focuses on international data packages.[413]

(459) Niche MVNOs impose a weak constraint on MNOs. Many of these specialise in serving parts of the market which are either difficult to address for MNOs (such as international communities) or which MNOs are less interested in serving directly (for example, low-revenue pre-paid mobile-only customers). Niche MVNOs are typically focussed on pre-paid mobile customers, and a proportion of the customers of these providers may otherwise go unserved. Even if such providers would want to expand their business more broadly within the overall market for retail mobile telecommunication services, they may be an unattractive alternative from the point of view of the customer.

Table 23 Pre-paid (standalone) mobile customers as a proportion of total mobile customers (2022)

Operator	Percentage pre-paid (SIMs)	Percentage pre-paid (EUR)
Orange	[10-20]%	[5-10]%
MásMóvil	[20-30]%	[10-20]%
Telefónica	[5-10]%	[5-10]%
Vodafone	[10-20]%	[5-10]%
Digi	[40-50]%	[30-40]%

Source : Commission calculations based on Parties' data (Annex RFI 37 Q1)

(460) Mass-market MVNOs, such as those active nationally offering mobile post-paid subscriptions, including as part of multiple-play and FMC bundles, are better placed than niche MVNOs to compete with MNOs due to their business model, but are not in a position to exert a constraint on the Parties for the reasons explained in Section 9.4.3.1.3.3 below.

9.4.3.1.3.2. Competitive position of different types of MVNOs in Spain

(461) As a preliminary comment, MVNOs specialising in serving business customers are of little relevance, as they impose a weak competitive constraint in the private segment given that they cannot easily start to supply private customers. As the Parties' themselves note, *"some MVNOs are only active in the retail B2B market …[and]… business customers typically do not purchase FMC bundles but acquire dedicated mobile and fixed services separately …This applies to the following MVNOs: Sewan, Grupalia, BT Evolution, VozTelecom, Telsome and Sarenet*"[414] Indeed, Seranet, similarly confirmed that *"we only operate in the enterprise market*".[415] Furthermore, MVNOs originating from other industries are also weak competitive constraint on MNOs. While these MVNOs have a strong brand name and good distribution network, they typically do not offer post-paid propositions or handsets. In addition, the success of their mobile subscriptions is linked to the success and the visibility of their already existing main business. Moreover, the mobile business is not their main focus with the consequence that the offered mobile propositions receive little attention, are undifferentiated, and do not get adapted to market developments in a timely manner.[416] In the present case, the Parties do not

---

413 Article 6(1)(c) Response, paragraph 473.

414 Article 6(1)(c) response, paragraph 473.

415 Response questionnaire Q3 to wholesale customers, question C.6., Doc ID 3212.

416 See by analogy Commission decisions of 27 November 2018 in case M.8792 – *T-Mobile NL/Tele 2 NL*, paragraph 598.

submit than any such MVNOs (which included Pepephone, prior to its acquisition by MásMóvil and former players such as Carrefour Mobile) will exert a meaningful competitive constraint post-Transaction.

(462) In Spain, the large majority of MVNOs are light MVNOs. The Parties estimate that there are approximately 32 'independent' MVNOs (i.e. not owned by an MNO) active in the market for retail mobile telecommunication services in Spain, although without specifying the names or identifying which of these are full MVNOs, and note that of these 32, 18 have more than [0-0.5 million] mobile lines[417].

(463) The Commission notes, however, that there is currently only one full MVNO that is active across the entire territory of Spain in the retail market for mobile telecom services, namely Digi.[418]

(464) The Commission notes that Adamo and Finetwork are both white label operators on MásMóvil's and Vodafone's mobile networks respectively. While the Parties acknowledge that as a rule white label brands are subject to the tariff plans agreed with their host MNO and therefore are unable to exert meaningful price competition in the market, they consider that some white label operators can exert relevant competitive pressure, and that "*Finetwork is an example of a white label operator that acts independently of its host (Vodafone) to an important extent, due to its large customer base and resulting countervailing buyer power*."[419] However, the Commission understands that Vodafone nonetheless controls to a large extent the retail tariffs of Finetwork. No similar claim is made in respect of Adamo, whose MVNO agreement with Orange expires in [Date], and the Commission notes that Adamo is in any event primarily active as a regional fixed network operator and wholesale provider "*focused on rural areas*" of Spain.[420]

(465) Avatel, which the Commission understands to be a full MVNO on Telefónica's network since January 2022, is only active in certain rural regions of Spain, focused on "*small and medium-sized populations*" and therefore serves only a relatively small portion of the Spanish population.[421]

(466) Similarly, PTV/Procono, [Details of the Parties' commercial agreements], is a regional operator.

---

417 Form CO paragraph 457.

418 While Finetwork may offer standalone mobile services nationally, the Commission notes that Finetwork is a white label operator on Vodafone's mobile network. Similarly, Adamo is a white label operator on MásMóvil's mobile networks active mainly in rural areas of Spain. Avatel, which the Commission understand to be a full MVNO on Telefónica's network since January 2022, is likewise only active in certain rural regions of Spain, focused on "*small and medium-sized populations*" and therefore serves only a relatively small portion of the Spanish population. See https://www.avatel.es/avatel-arranca-2022-superando-las-200-000-lineas-moviles-en-su-omv-full/, Doc ID 5647. Similarly, PTV/Procono, [Details of the Parties' commercial agreements], is a regional player.

419 Form CO, paragraph 2420.

420 See https://www.ardian.com/press-releases/ardian-acquires-adamo-representing-its-first-investment-telecommunications-sector, Doc ID 5646.

421 See https://www.avatel.es/avatel-arranca-2022-superando-las-200-000-lineas-moviles-en-su-omv-full/, Doc ID 5647.

Table 24 MVNO and white label operators (2022)

Operator	Revenues (EUR, M)	Mobile SIMs (M)
Digi	501	[3-4]
Avatel	300	[0-0.5]
Finetwork	135	[0.5-1]
Adamo (incl. Aire Networks)	100	[0-0.5]
PTV/Procono	[50-100]	[0-0.5]
Total	[1,100-1,150]	[5-6]

Source: Parties estimates (Article 6(1)(c) Response, Table 7 and paragraph 147)

(467) Digi is the only MVNO active nationally which has been able to capture a non-marginal share of subscribers in the retail mobile market, with [3-4 million] mobile lines as of 2022, as set out in Table 24 above. Avatel, a regional MVNO had [0-0.5 million] mobile lines as of 2022. For completeness, the Commission notes that two white label operators/resellers, Finetwork and Adamo, had [0.5-1 million] and [0-0.5 million] mobile subscribers respectively as of 2022, while PTV/Procono had [0-0.5 million].[422]

(468) According to the data submitted by the Parties (see Annex RFI 37 Q1), collectively MVNOs (including white labels) had a cumulative share of [5-10]% in terms of subscribers and [5-10]% in terms of revenues in the retail mobile market overall in 2022. By way of comparison, Digi, the largest of the MVNOs by a significant margin, has a mobile customer base that remains more than [0-5] times smaller than that of MásMóvil (with c. [...] customers), and more than [5-10] times smaller than that of the Parties combined (with over [...] customers).

(469) In addition, there is a large difference when one looks at the split between pre-paid and post-paid standalone mobile customers. While MVNOs accounted for a large share of pre-paid mobile customers on a combined basis ([20-30]% of subscribers and [20-30]% of revenues), they account for less than [10-20]% of standalone post-paid mobile customers (by subscribers and revenues). Hence, MVNOs in Spain have a clear focus on lower revenue pre-paid mobile customers[423], and have weaker penetration with post-paid mobile customers. This is especially relevant for multiple-play bundles and FMC bundles, since only post-paid mobile subscriptions can be included as part of such bundles, which currently account for the vast majority of the Spanish market, as outlined in Section 7 above.

(470) MVNOs' market share has been increasing slightly over the last years. From 2019 to 2022, the cumulative subscriber share of MVNOs has increased from 5-10]% to [5-10]%, and from c. [0-5]% to just under [5-10]% by value over the same period.

[422] Form CO, Table 20.

[423] According to the Parties' own data, pre-paid mobile customers have a monthly ARPU (average revenues per user) of EUR [...]/month, whereas for post-paid standalone mobile subscriptions the ARPU is around double (EUR [...]/month). See Response to RFI 10, Q1, Doc ID 626-112. FMC bundle ARPUs are significantly higher, at around EUR [...]/month (see Annex RFI 25, Q.4.1 and Q.4.2).

Table 25 Market shares of MVNOs in the market for the retail supply of mobile telecommunication services in Spain

	Shares by volume (SIMs) (%)				Shares by value (EUR) (%)			
	2019	**2020**	**2021**	**2022**	**2019**	**2020**	**2021**	**2022**
Digi	[0-5]%	[0-5]%	[5-10]%	[5-10]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%
Finetwork	[0-5]%	[0-5]%	[0-5]%	[0-5]%	Included in Others			
PTV	[0-5]%	[0-5]%	[0-5]%	[0-5]%				
Adamo	-	[0-5]%	[0-5]%	[0-5]%				
Avatel	-	[0-5]%	[0-5]%	[0-5]%	-	[0-5]%	[0-5]%	[0-5]%
Others	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%
Total	[5-10]%	[5-10]%	[5-10]%	[5-10]%	[5-10]%	[5-10]%	[5-10]%	[5-10]%

Source: The Parties (SO Reply, Annex 2.3)

(471) The Parties point out that the gross adds' share of Spanish MVNOs, and Digi in particular, is significant showing that "*these players (in aggregate) will exert material competitive pressure on the JV*"[424] According to the market share data provided by the Parties, in 2022, the gross adds' share of Spanish MVNOs was [20-30]% in the overall retail mobile market.

(472) First, comparing the market share (or gross add share) of one company with the collective share of a number of other firms cannot be interpreted unambiguously. Even less so the comparison between the share of an MNO and the share of a heterogeneous collection of MVNOs with different business strategies and customer focuses.

(473) Second, MVNOs' gains in market share and higher gross add share from other MVNOs suggest that MVNOs exhibit a significant level of churn, which is likely to be higher than the rate of churn experienced by the Parties or other MNOs.[425]

(474) Third, except for Digi (which, as explained later in this Section, competes mainly in the low-end of the market), most MVNOs have a very small market presence. In the overall retail mobile market, only Digi had a non-negligible subscriber market share in 2022, with [5-10]% by volume and [5-10]% by value (which is still around [5-10] times smaller than the Parties' combined share). The next largest MVNOs (or white labels) are Finetwork, PTV, Adamo and Avatel, with a share of c. [0-5]% or less.

(475) As can be seen below, Digi continues to mainly focus on standalone mobile customers, which account for over two thirds of its total mobile customer base, and in particular pre-paid mobile customers, which account for close to half of its mobile customer base. Less than one third of Digi's mobile customers subscribed to FMC bundles, which as outlined in Section 7, account for the vast majority of mobile

424 Form CO, paragraph 1063.

425 While the Parties note that "*Churn is one of the least reported KPIs in the telecommunication industry*" (Form CO, footnote 415), which makes clear overall observations difficult, it appears to nonetheless be the case that churn rates are lower in the case of mobile services included in multiple-play and FMC bundles, compared to standalone (and in particular prepaid) mobile subscriptions, as has been observed in past Commission decisions, e.g. in M.8792 – *T-Mobile NL/Tele2 NL,* paragraph 567: "*…customers that purchase mobile as part of an FMC bundle are less likely to churn*". As outlined above, since a larger proportion of MVNOs' mobile customers are standalone customers, such MVNOs are therefore likely to experience a larger degree of churn than MNOs, which have a greater of mobile customers purchasing bundled services.

subscriptions and in which it is necessary to be present in order to compete in a meaningful way in Spain in view of the strong preference for convergent or bundled subscriptions.

Table 26 Breakdown of Digi's mobile customer base (2022)

Customer type	SIMs (2022)	% of total
Pre-paid standalone	[1-2 million]	[40-50]%
Post-paid standalone	[0.5-1 million]	[20-30]%
All Standalone (pre-paid and post-paid)	[2-3 million]	[60-70]%
FMC bundles	[1-2 million]	[30-40]%
All mobile customers (standalone and bundles)	[3-4 million]	100%

Source : Parties (Annex RFI 37, Q1)

(476) As the Parties' point out, Digi has indeed been growing rapidly, albeit from a very small base. Digi appears to be the fastest growing MVNO in the market which, according to the Parties, is explained by the fact that Digi is the "*most aggressive player*" in the market with "*low-priced offers*".[426]

(477) The Parties' internal documents confirm that Digi competes mainly with MNO's low-cost brands in the low-end of the market. For instance, [Details of MASMOVIL's internal documents describing Digi's positioning on the market].[427] A due diligence report prepared by [Details of MASMOVIL's internal documents describing Digi's positioning on the market][428] [Details of MASMOVIL's internal documents describing Digi's positioning on the market].

Figure 15 Mobile price positioning of main players in Spain (2022)

[...]

Source : Parties internal documents (MM-00098679)

(478) The same presentation notes that [Details of MASMOVIL's internal documents describing MASMOVIL's strategy],[429] suggesting that Digi may not exert significant pricing pressure on the Parties.

(479) To the extent Digi may also gain some mobile customers that switch away from the Parties' or other players mid-end and high-end brands, despite not itself being active in those segments (e.g. because it does not have an offer including Pay-TV services[430]), the Commission notes that, rather than being evidence that Digi competes closely with such higher-end brands, is likely a consequence of a general trend among certain customer demographics, e.g. those that place less value on having packages with premium TV content in a multiple-play or FMC bundle, towards 'cord cutting', i.e. dropping TV from their offerings, and is a trend that has also been observed in other markets across the EU in recent years.[431] Specifically

426 Form CO, paragraphs 490 and 936.
427 Annex RFI 1 Q53.7.
428 MásMóvil internal document, ID MM-00098679, Doc ID 2671-22450.
429 MásMóvil internal document, ID MM-00098679, slide 39 (43), Doc ID 2671-22450.
430 Non-confidential minutes of the call with Digi of 29 November 2022, paragraph 11, Doc ID 1846.
431 The Commission does not however consider that as a result OTT platforms represent an out of market competitive constraint on the market for retail mobile services. OTT services such as subscription video on demand services (e.g. Netflix, Disney+, etc.), are not interchangeable for retail mobile services, and indeed they can only be provided to customers that already have a mobile (and/or fixed) subscription, whether on a standalone basis or as part of a broader multiple-play or FMC bundle, as OTT platforms depend on data to deliver their services.

with regard to Spain, [Details of MASMOVIL's internal documents describing MASMOVIL's multi-brand strategy and demand for the premium segment].[432] [Details of MASMOVIL's internal documents describing MASMOVIL's multi-brand strategy and demand for the premium segment].[433] [Details of MASMOVIL's internal documents describing MASMOVIL's multi-brand strategy and demand for the premium segment][434]

(480) More generally, the Parties' typical competitor benchmarks do not take into account MVNOs, with the exception of Digi, and even in that case Digi typically appears less prominently in such reporting than other network operators.

(481) For example, [Details of MASMOVIL's internal documents describing MASMOVIL's benchmarking of competitors].[435]

Figure 16 [Details of MASMOVIL's internal documents describing MASMOVIL's strategy

[...]

(482) Another MásMóvil internal document paints a similar picture, [Details of MASMOVIL's internal documents describing MASMOVIL's perception of its competitors].

Figure 17 [Details of MASMOVIL's internal documents describing MASMOVIL's strategy]

[...]

(483) Similarly, an Orange brand strategy presentation, shown below, refers to [Details of Orange's internal documents describing Orange's strategy].[436]

Figure 18 Confidential information – Details of Orange's internal documents describing Orange's strategy]

[...]

9.4.3.1.3.3. Limited ability of MVNOs to compete in the present market conditions due to their reliance on the wholesale conditions

(484) A factor that strongly affects MVNOs' ability to exert the same competitive pressure as MNOs in the market for retail mobile telecommunication services in a significant and sustained way is their dependency on the wholesale access conditions granted by their respective host MNOs. The wholesale access conditions limit the range of services that they can offer, the customer segment they can address, and the prices they can offer.

(485) Throughout the market investigation, many of the non-MNOs pointed out this challenge and took the view that MVNOs are currently unable to compete effectively in the Spanish market for retail mobile telecommunication services due to the fact that MVNOs enjoy limited bargaining power in negotiations with MNOs and the poor terms of the resulting wholesale access conditions. As one MVNO indicated,

---

432 See also in this regard, Telefónica's response to questionnaire Q1 to competitors, question C.A.A.D.6, Doc ID 2796. ("*There is evidence that there is a trend in the market towards the "unbundling" of linear pay-TV services*").

433 [Details of MASMOVIL's internal documents describing MASMOVIL's strategy].

434 MásMóvil internal document, Report for MásMóvil by Analysys Mason in relation to the Transaction dated 6 October 2022, ID MM-00183330, Doc ID 2670-74995.

435 Annex RFI 1 Q53.7, page 18.

436 Orange internal document of 10 March 2020, ID ORANGE-EC-RFI22-00682896, Doc ID 2684-91180.

unlike MásMóvil, "*Pure MVNOs do not have this power of negotiation, as they fully depend on wholesale agreements with MNOs. This is why, it is more difficult for pure MVNOs to get affordable prices in wholesale agreements*."[437] The same operator noted that even though it could offer mobile services nationally, it does not do so as margins would be too low unless it can also offer bundled services, in view of the strong preference among Spanish consumers for convergent services: "*Furthermore, Avatel does not offer standalone mobile in the areas in which it is not present with its fixed network because its wholesale mobile agreement with Telefónica would not allow Avatel to have a profitable margin in order to provide nationwide services without offering convergent services as well*".[438] Other non-MNOs appear to operate a similar model, such as Adamo, which the Parties' note serves around [20-30]% of the Spanish population, mainly in rural areas and relies on a white label agreement with MásMóvil to provide convergent services, i.e. FMC bundles, in areas where it has its own fixed network footprint.[439] Despite having mobile wholesale access that would in principle allow Adamo to offer such services nationally, it also focuses on providing services within its fixed network footprint since, in its own words, "*as the market is strongly dominated by FMC offers, we focus on areas where we also have our own fixed network*."[440] Another example is PTV/Procono, which [Details of the Parties' commercial agreements] is not active nationwide in Spain.[441] Even if, in the short term, certain MVNOs may be able to rely on existing wholesale agreements to provide retail mobile services nationally (e.g. Digi and Finetwork), as one access seeker pointed out in response to the Phase I market investigation, "*competition pressure between MNOs help the MVNOs (whose bargaining position is much weaker than the one of the MNOs) negotiate or maintain reasonable terms with the existing MNOs*." [442] Indeed, Digi outlined that its current MVNO "*agreement is the result of renegotiations during which competitive pressure was exercised by the other MNOs, including Orange and MásMóvil. During these renegotiations, Digi has received alternative offers from other players in the wholesale access market (including Orange, MásMóvil and Vodafone). Digi considers that this competitive tension helped to have better terms agreed with Telefonica and it is concerned that the Transaction would result in less competition in this market*."[443]

(486) The Commission's investigation indicated that MNOs do not have an incentive to offer attractive wholesale terms and conditions, at least to MVNOs that they consider could become a potential competitive threat. Alluding to the [Details of the Parties' wholesale agreements] wholesale agreements Orange concluded with MásMóvil, [Details of MASMOVIL's internal documents describing MASMOVIL's strategy].[444]

(487) Further, the challenge of the wholesale conditions that the MVNOs face is twofold. First, MVNOs are dependent on the wholesale price charged by the host MNO when designing their own tariff plans. In particular, in an increasingly data-centric retail market, the non-MNOs already face and will continue to face significant difficulties to compete with the MNOs on larger data packages. As MásMóvil observed, it was

437 Non-confidential minutes of call with Avatel of 10 March 2022, paragraph 31, Doc ID 3069.
438 Non-confidential minutes of call with Avatel of 10 March 2022, paragraph 13, Doc ID 3069.
439 Form CO, paragraphs 714-716.
440 Response to questionnaire Q3 to wholesale customers, question B.3, Doc ID 3320.
441 Form CO, Table 51 and paragraph 727.
442 Response to questionnaire Q1 to competitors, question E.2., Doc ID 2834.
443 Non-confidential minutes of call with Digi of 29 November 2022, paragraph 17, Doc ID 1846.
444 MásMóvil internal document dated 10 February 2020, ID MM-00931525, Doc ID 2661-8144.

able to secure wholesale access under its NRA agreement that was not based on [Details of MASMOVIL's internal documents describing MASMOVIL's strategy].[445] Pricing under MVNO agreements however is typically based more closely on data consumption, which disincentivises MVNOs from offering larger data packages in mobile subscriptions. Indeed, in pointing out the lack of comparability between NRAs on the one hand and MVNO agreements on the other hand, the Parties indicate that NRAs often come with upfront volume commitments, which allow for more predictability, including for the access seeker, whereas MVNO agreements typically do not, since they claim "*as often MVNOs have less traffic*" which in turn impacts "*the financial conditions offered to the MVNO*."[446] The Commission notes that it may be the financial conditions offered to MVNOs that result in them having less traffic than MNOs, including partial MNOs that complement their coverage with NRAs.

(488) Second, MVNOs are reliant on the quality of their host network to provide services and therefore are not able to differentiate their retail services from those of the host MNO as regards quality or technical innovation. This is further exacerbated by the fact that the MNOs all have mobile offerings that include 5G, whereas currently no MVNO has a 5G offering. This is the case notably for Avatel, which indicated that it "*tried to seek access to the 5G network from both, Telefonica and Orange, but for the time being, neither operator provided any offer at any price for 5G access*.[447] The same is true for white label operator, Finetwork, which notes that "*currently, MNOs do not offer 5G network access as part of their wholesale mobile network access agreements to access seekers/MVNOs, as none of the 3-4 MNOs wants to be the first one offering 5G in wholesale deals*."[448] Digi likewise does not currently offer 5G to its customers, although it notes that its current MVNO agreement does permit it to offer 5G services to a part of the overall retail mobile market, subject to conditions, namely to "*residential customers (individuals and SoHo customers), but not to develop special 5G services for business purposes or to cover big enterprises or industrial needs …[subject to] Digi investing in the necessary equipment*."[449] In any event, Digi's MVNO agreement (even if permitting a 5G offering) does not enable it to differentiate its retail services from those of the host MNO as regards quality or technical innovation.

9.4.3.1.3.3.1. MNOs do not have an incentive to offer attractive wholesale terms

(489) In negotiations between MNOs and MVNOs, the incentives of both sides are misaligned. Because MNOs are vertically integrated and operate at both retail and wholesale level, there is a risk that they will lose some of their retail subscribers to the MVNOs they host. This is often referred to as "cannibalisation". The risk of cannibalisation means that MNOs face a trade-off when bidding for contracts to supply MVNOs. On the one hand, hosting MVNOs generates wholesale profits for

[445] MásMóvil internal document dated 10 February 2020, ID MM-00931525, Doc ID 2661-8144.

[446] Response to RFI 32, question 7: "*In the case of NRAs, the access seeker typically undertakes important minimum purchase commitments (in terms of traffic volumes per year and revenues) which gives more predictability to the host operator. These commitments are usually less important in MVNO agreements, as often MVNOs have less traffic. However, some large MVNOs could undertake important volume/revenue commitments. In addition, for smaller MVNOs, usually minimum purchase commitments are not included in the contracts which impacts predictability for the host operator and therefore the financial conditions offered to the MVNO*."

[447] Non-confidential minutes of call with Avatel of 10 March 2022, paragraph 16, Doc ID 3069.

[448] Non-confidential minutes of call with Finetwork of 2 February 2023, paragraph 22, Doc ID 2471.

[449] Non-confidential minutes of meeting with Digi of 25 April 2023, paragraph 13, Doc ID 3273.

the MNO. On the other hand, MVNOs can cannibalize the retail business of the host MNO as well as induce a lower retail market price due to potentially increasing retail competition.

(490) If the MNO and the MVNO target different customer segments in the retail market, the risk of cannibalisation is lower, and MNOs may be more inclined to provide wholesale access to MVNOs with a different profile than that of the MNO, i.e. where the MVNO in question may target niche customer groups (such as international communities or IoT services). [Details of MASMOVIL's internal documents describing Digi's target customers].[450]

(491) The wholesale market for access and call origination services is currently dominated by two players only, Telefónica and Orange. Telefónica had a market share of 70%-80%, which in fact is almost entirely accounted for by Digi, while Orange has a share of slightly more than [20-30]% in 2022 (although this likely understates to a large degree Orange's wholesale activities as it also host around [50-60]% of MásMóvil's traffic [Details of the Parties' commercial agreements][451], [Details of the Parties' commercial agreements].[452] MásMóvil and Vodafone, each with a share of less than 5% by value and volume in 2022[453], and have not made any material market share gains in the four years from 2019 to 2022.

(492) The Parties do not dispute that Vodafone has not been a particularly active player in the wholesale market in the past, but submit that it will be in the future, irrespective of the Transaction. Echoing the Parties' view, Vodafone—possibly as a result of its challenged position in Spain—has indicated that it "*will then have strong incentives (in fact it will have no alternative but) to aggressively compete in both the wholesale and the retail markets in order to gain scale to enable network investments*."[454] It remains to be seen whether Vodafone's position will materially change following completion of the sale of Vodafone Spain to Zegona, which was announced on 31 October 2023.[455] The Commission considers that while Vodafone is indeed likely to have the ability to compete for MVNO customers, it is very uncertain, even in view of strong statements such as the above, whether Vodafone will in fact do so in a way that would enable MVNOs to effectively compete with it and with other MNOs in the market. For example, Finetwork, the largest non-MNO on Vodafone's network continues to operate under a white label wholesale model, whereby Vodafone retains a large degree of control over Finetwork's retail pricing, and where Finetwork cannot offer 5G services.

(493) The wholesale market in Spain is thus concentrated and there is not sufficient competition among host MNOs: Orange and Telefónica have a significant degree of market power. This is reflected in the wholesale terms and conditions Spanish MVNOs are able to secure, and the fact that—as outlined in the previous Section—many MVNOs do not offer mobile services outside of the regions where they can

---

450 MásMóvil internal document dated 10 February 2020, ID MM-00931525, Doc ID 2661-8144.

451 [Details of the Parties' commercial agreements]. See Form CO Tables 35 and 36.

452 Annex RFI 37 Q1.

453 Annex RFI 37 Q1.

454 Position Paper, "Vodafone's views on the proposed transaction", 28 February 2023, Doc ID 2414.

455 See Vodafone Press Release, available at:https://www.vodafone.com/news/corporate-and-financial/sale-of-vodafone-spain, Doc ID 5643; and Zegona press release, available at: https://www.zegona.com/~/media/Files/Z/Zegona/press-release/2023/23-10-31-zegona-acquistion-of-vodafone-spain.pdf, Doc ID 5645.

also offer fixed and multiple-play services, as standalone mobile services would not offer sufficient margins in view of the wholesale terms.

(494) Consequently, MVNOs' bargaining position vis-à-vis MNOs in the Spanish market is particularly weak, and host MNOs such as Orange generally do not have an incentive to offer attractive wholesale conditions, at least to MVNOs that could develop into a competitive threat. [Details of MASMOVIL's internal documents describing Telefonica's competitive pressure][456] Second, given the concentrated nature of the wholesale market in Spain, there is no sufficient competition among host MNOs, and Orange and Telefónica have a significant degree of market power.

(495) This is reflected in the wholesale terms and conditions Spanish MVNOs are able to secure, and the fact that—as outlined in the previous Section—many MVNOs do not offer mobile services outside of the regions where they can also offer fixed and multiple-play services, as standalone mobile services would not offer sufficient margins in view of the wholesale terms.

9.4.3.1.3.3.2. Wholesale access terms limit MVNOs' ability to compete on price

(496) With regard to retail pricing, while the majority of non-MNOs (i.e. excluding white label operators such as Finetwork) are in principle free to design their own tariff plans, they are constrained by the wholesale pricing they receive from their host MNO. Access seekers expressed concerns that already pre-Transaction wholesale pricing is not competitive enough to enable competitive retail offerings. Accordingly, and as further explained below, non-MNOs exert limited competition on pricing by MNOs pre-Transaction, and following the Transaction, the greater concentration levels will be expected to only further reduce the constraint exercisable by non-MNOs.

(497) For example, Avatel indicated that it "*struggles to get profitable wholesale agreements at a price that would allow it to be able to operate nationally and to offer competitive prices*." It further clarified that even though it has a nationwide MVNO agreement, in view of retail customers preferences for convergent offers (i.e. FMC bundles), coupled with the high mobile wholesale price under its MVNO agreement, "*Avatel does not offer standalone mobile in the areas in which it is not present with its fixed network because its wholesale mobile agreement with Telefónica would not allow Avatel to have a profitable margin in order to provide nationwide services*"[457]

(498) [Details of MASMOVIL's internal documents describing MASMOVIL's strategy].[458] Even though no non-MNO offers 5G services today, respondents to the Commission's Phase I market investigation indicated that 5G was either "*essential*" or "*relatively important*" today, whereas in the next 3-5 years, the vast majority said it would be "*essential*" to be able to offer 5G services.[459]

(499) The MVNOs' inability to offer attractive mobile data packages, or 5G services, significantly reduces their competitive strength in relation to prices given the steadily increasing demand for data and next generation technologies, which leads tariff plans to become increasingly data centric. It is expected that the market for 5G, large data bundles and unlimited data propositions will continue to grow, thereby putting pressure on the lower-end segment of the market in particular, which is where Digi,

456 MásMóvil internal document dated 10 February 2020, ID MM-00931525, Doc ID 2661-8144.
457 Non-confidential minutes of a call with Avatel, paragraphs 9 and 13, Doc ID 3069.
458 MásMóvil internal document, ID MM-00175220, Doc ID 2670-66885.
459 Response to questionnaire Q1 to competitors, questions D.A.A.35 AND D.A.A.37.

Finetwork and other non-MNOs tend to focus. [Details of MASMOVIL's internal documents regarding tariff price increases][460] Overall, this slide points to a trend of increasing data requirements and an ability to increase wholesale prices, even though there is an expectation that such price increase may be partially mitigated through lower wholesale costs per GB.

(500) In the future, it will become even more critical for MVNOs to be able to compete on 5G and large data bundles to gain customers and exert some competitive pressure on prices in the market. As one of the main MVNOs that responded to the Phase I market investigation indicated "*In 3 years, most customers in all the Spanish market and in all segments (from low-cost to high-cost, from pre-paid to post-paid) will demand 5G services.*"[461] Similarly, the Parties' internal documents note that [Details of MASMOVIL's internal documents describing the impact of data allowance].[462] Therefore, competitive position of MVNOs may further decrease if their ability to offer 5G or large data bundles, or both, is constrained by their wholesale terms. Moreover, the price sensitivity of Spanish retail customers is likely to be even more pronounced in the low-end of the market where MVNOs like Digi focus, as indeed suggested by Digi's own customer survey data: "*According to data of DST's quarterly market survey, price stands out as the most important attributes in the decision-making process, both for the entire market and <u>among DST's mobile customers</u>*" (emphasis added).[463] This means that Digi and other MVNOs would be particularly vulnerable to changes in their wholesale costs or conditions, as they focus primarily on the low-cost end of the market and, as the Parties' note, [Details of MASMOVIL's internal documents describing Digi and MVNO's margins].[464] This point was echoed by a non-MNO respondent to the Commission's Phase II market investigation which noted their future growth was heavily dependent on being able to secure attractive wholesale terms: "*future expansion heavily depends on being able to close attractive wholesale deals - both on mobile and on fixed networks (>75% of our new clients join on FMC bundles)*."[465]

(501) Wholesale contracts can even be designed in a way to discourage MVNOs from competing aggressively with regard to medium-sized to large data bundles. Indeed, [Details of the Parties' commercial agreements].[466] This point is further clarified in the Parties' response to RFI 32 on the differences between NRAs and MVNO agreements, where the Parties concede that "*often MVNOs have less data traffic*"[467] relative to MNOs, such as MásMóvil, that complement their networks with NRAs. In this regard, Digi pointed out to the Commission that "*NRAs allow the parties to negotiate different pricing structure, including the possibility to define pricing based on volumes of traffic, number of subscribers that access the network, capacity, or a percentage of use of the network. Also, an MNO under an NRA with another MNO can define the service only for specific areas and it has leverage to control its costs by enhancing or building infrastructure in certain areas, for example, where suddenly there are more subscribers in that area. These possibilities, and the flexibility that they grant to an MNO in order to shape its commercial retail offer,*

460 MásMóvil internal document, ID MM-00175220, Doc ID 2670-66885.
461 Response to questionnaire Q1 to competitors, questions D.A.A.36., DOC ID 2834.
462 MásMóvil internal document, ID MM-00175220, Doc ID 2670-66885.
463 Response to questionnaire Q1 to competitors, question D.A.A.6., Doc ID 2834.
464 MásMóvil internal document, ID MM-00098679, slide 39 (43), Doc ID 2671-22450.
465 Response to questionnaire Q3 to wholesale customers, question B.3., DOC ID 3320.
466 MásMóvil internal document ID MM-00931525, Doc ID 2661-8144.
467 Response to RFI 32, paragraph 7.4.

are not available to an MVNO under an MVNO agreement, where the MVNO is, as already said, more tied to its host MNO.[468] [Details of the Parties' commercial agreements], MVNOs agreement are always exclusive in nature, contain more restrictive (e.g. pay as you use) pricing mechanisms, and MVNOs "*do not have the possibility to offer their own deployment to the other counterparty operator, since they do not have it*". Therefore, MVNOs do not have flexibility and are "*completely dependent on the cost paid to the host MNO*".[469]

(502) Overall, MVNOs also have little to no ability to compete with their host MNO as regards quality (and innovation) since, as Digi outlined "*MVNO agreements confine the MVNOs coverage and technical capabilities* ***and potentially curbs the quality and the availability of the MVNO's retail services, aspects that will always mirror (but not improve) those of the host MNO****. [By contrast]… under an NRA, the two MNOs can define, at a radio network level, which network the subscriber can roam in, including the possibility to have an NRA with more than one MNO, thus having the flexibility to control the distribution of the traffic between the networks in terms of volume of traffic, number of subscribers, access speed or coverage*"[470] (emphasis added). A similar observation was made by the telecommunications regulator of Ireland, Commission for Communications Regulation ("ComReg"), in a report dated 18 December 2020, in which it stated that "*there are important differences between MVNO's and MNOs; an MVNO cannot invest and compete in terms of the quality of its network, thus limiting the competitive strategies available to it. In particular, an MVNO may have no influence on its host MNO's coverage and related quality of service levels*".[471] Indeed, MásMóvil itself echoed this view in a statement from 2017, not long after it acquired Yoigo to become an MVO (with an NRA to complement its network), where it indicated that "*the availability of proprietary networks improves the cost structure compared to those operators without their own network [i.e. MVNOs] and gives MÁSMÓVIL greater autonomy and control over the quality of service" (emphasis added).*[472]

(503) In light of the above, the Commission considers that the MVNOs' ability to compete, in particular as regards 5G services and large data packages, which are expected to become increasingly important in the coming years, is severely constrained by their dependency on wholesale access terms from the larger, vertically integrated, operators. No non-MNO has a 5G offering in Spain today whereas all MNOs do offer 5G. Moreover "*most MNOs' second brands competing in the low-end market have incorporated 5G to their offers*,"[473] thereby further putting Digi, Finetwork and other non-MNO operators that also operate at the low-end of the market and do not offer 5G at a further disadvantage.

468 Digi submission, 22 June 2023, *MNOs and MVNOs bargaining position to obtain access to mobile networks*, Doc ID 3618.

469 Digi submission, 22 June 2023, *MNOs and MVNOs bargaining position to obtain access to mobile networks*, Doc ID 3618.

470 Digi submission, 22 June 2023, *MNOs and MVNOs bargaining position to obtain access to mobile networks*, Doc ID 3618.

471 See https://www.comreg.ie/media/2020/12/ComReg20122.pdf, Doc ID 5654.

472 See "Folleto Informativo Admisión a Cotización de las Acciones de MásMóvil Ibercom, S.A." of 12 July 2017, available at https://www.cnmv.es/portal/Consultas/Folletos/FolletosAdmision.aspx?nif=A20609459&lang=gl (registration number 106650), Doc ID 5666, , pages 146 and 147.

473 Response to questionnaire Q1 to competitors, question D.A.A.36., Doc ID 2773.

(504) Indeed, pre-Transaction, the main operators, including the Parties, Vodafone and Telefónica all announced inflation-related price increases, and smaller players in the market indicated that they expect "*that repricing up may continue to be the trend after the Transaction*".[474] This further suggests that the Parties and other MNOs do not feel constrained by pricing pressure from MVNOs pre-Transaction.

9.4.3.1.3.3.3. MVNOs have limited ability to compete on product differentiation and innovation

(505) Network quality (including network coverage) is one of the most important competitive parameters after price in the Spanish market, including in the retail mobile telecommunication services market.[475] However, in addition to difficulties related to designing attractive retail tariffs, MVNOs have very limited ability to differentiate their retail services from those of the host MNO as regards quality and coverage.

(506) This is because MVNOs obtain access to a host MNO's mobile network through a wholesale access agreement. The MNOs' decisions regarding network investments and roll-out greatly influence the performance of the MVNOs mobile services and affect the user experience, including through providing different levels of network reliability, coverage and speed. Full MVNOs have some scope for differentiation through value-added services.[476] However, the great majority of MVNOs in Spain operate as light MVNOs and are much more limited in this regard, and white label operators are further limited still.[477] In fact, light MVNOs (and white label operators) do not have any means to differentiate themselves with regard to network quality and coverage.

(507) In addition, MVNOs do not always have access to all technologies and services available in the MNOs' network. Notably in Spain, all non-MNOs responding to the Commission's Phase II market investigation that focus on the retail mobile market, including Digi, Finetwork, Avatel, Adamo and PTV/Procono, do not currently have 5G included in their retail offerings.[478]

(508) Rather, new technologies such as 5G have already been launched by each of the Spanish MNOs for their own subscribers only, and will only be offered with a significant delay to hosted MVNOs, if at all, and then likely only subject to other onerous conditions (e.g. higher wholesale prices compared to 4G). For example, according to the Parties, Telefónica is the market leader in terms of 5G coverage and network quality, covering approximately 82% of the Spanish population with 5G[479], yet as of January 2024, Digi, which is hosted on Telefónica's network via an MVNO agreement does not offer 5G to its own retail customers. As a further example, Finetwork, which relies on wholesale mobile access from Vodafone, indicated that "*5G access has been repeatedly requested and has been systematically denied… on*

474 Non-confidential minutes of a call with Finetwork dated 2 February 2023, paragraph 26, Doc ID 2471.

475 Form CO, paragraph 486-487, and Figure 19.

476 See for example Commission decisions of 27 November 2018 in case M.8792 – T-Mobile NL/Tele2 NL, paragraphs 651 et seq.

477 Form CO, paragraph 736: "*there are 42 full MVNOs/MVNEs hundreds of light MVNOs, and more than 800 white label brands in the Spanish market*."

478 For completeness, the Commission notes that Digi's MVNO agreement with Telefónica enables it to offer 5G to residential mobile customers but that this is "*dependent on Digi investing in the necessary equipment. Consequently, for the time being, Digi's customers do not have 5G access*." See Non-Confidential minutes of a meeting with Digi of 25 April 2023, paragraph 13. Doc ID 3273.

479 Form CO, paragraph 793.

the basis of the inexistence of any other low-end oriented independent operator having access to 5G".[480] Similarly, Adamo, which relies on wholesale mobile access from MásMóvil, pointed out that "*While MásMóvil has launched 5G free of charge to their own clients, it does not make this technology available to Adamo wholesale clients to date. To this regard it is notable that in our existing wholesale agreement with MásMóvil - closed before the merger announcement - MásMóvil agreed to offering such services to Adamo wholesale customers free of charge and at the same timing as offered to MásMóvil customers. However, when we started inquiring about the availability of such services after the merger announcement (in September 2022), we received the response that such an offer for Adamo wholesale customers was not even on the roadmap of MásMóvil at the time. When reaching out to MásMóvil during March/April 2023 asking about a possible prolongation of our wholesale contract (ending end 2023), we received back a first proposal including a sur-charge for access to 5G services - i.e. a deterioration of already existing wholesale conditions*" (emphasis added).[481] Avatel indicated that in the past "*Telefonica denied to give national roaming 4G access to Pepephone (before was acquired by MásMóvil) [and that] 5G was also denied to Avatel*".[482] It was further noted by one non-MNO that "*In general, getting access to any new features from your mobile provider is extremely complex even though this services are already available to the Clients of mobile provider. In the past getting access to 4G in the past was almost impossible, requiring long negotiations and opening very lasting and tiring regulatory conflicts. As we see it, getting access to 5G is going to be even more complicated as mobile providers will want to preserve the technological advantage for their Clients*."[483]

(509) Indeed, Vodafone began offering 5G services in June 2019, while Telefónica, Orange, and MásMóvil started offering 5G in mid-2020,[484] whereas some three years later, as of January 2024, no MVNO in Spain begun offering 5G services.

(510) Finally, if an MVNO could buy wholesale access from more than one MNO, and thus rely on so called multi-sourcing, it could have the possibility to improve its service offer from its host MNO. However, multi-sourcing is not used by Spanish MVNOs as they are generally subject to an exclusivity obligation with respect to their host MNO. The Parties' themselves note that exclusivity provisions (with narrow exceptions, e.g. for areas where there is no coverage available) are "*common practice among wholesale mobile contracts in Spain, including the existing wholesale mobile agreements between OSP and MÁSMÓVIL*".[485]

9.4.3.1.3.4. Competitive constraint by MVNOs unlikely to be exerted post-Transaction

9.4.3.1.3.4.1. General assessment

(511) As described in the previous paragraphs, already pre-Transaction MVNOs' ability to compete in the Spanish market for retail mobile telecommunication services to private customers is limited in several aspects. The Commission considers that the ability of MVNOs to compete with MNOs crucially depends on the access conditions

---

480 Response to questionnaire Q3 to wholesale customers, questions D.B.2 and D.B.21., Doc ID 3407.
481 Response to questionnaire Q3 to wholesale customers, questions D.B.11., Doc ID 3320.
482 Response to questionnaire Q3 to wholesale customers, questions D.B.21., Doc ID 3298.
483 Response to questionnaire Q3 to wholesale customers, questions D.B.21., Doc ID 3320.
484 European 5G Observatory, *Telefónica, Orange and MASMOVIL launched their 5G networks*, 11 September 2020, available at: https://5gobservatory.eu/telefonica-orange-and-masmovil-launched-their-5g-networks/, Doc ID 5662.
485 Form RM, paragraph 15.

that they obtain at the wholesale level, conditions that are controlled by the MNOs. Already pre-Transaction, MVNOs' ability to compete against MNOs is limited by the existing wholesale access conditions. Furthermore, MVNOs have limited bargaining power to negotiate better wholesale access conditions. Finally, most MVNOs are small niche players, with a small presence on the market and little ability to differentiate themselves from MNOs.

(512) The Commission considers that all the aforementioned factors currently limiting MVNOs' competitiveness would remain after the Transaction. Therefore, post-Transaction MVNOs would remain unable to compete effectively against MNOs. Furthermore, the expected increase of mobile data usage and growing importance of 5G is likely to further limit MVNOs' (including Digi's) competitiveness after the Transaction.

(513) The Commission's view is supported by non-MNOs' responses to the market investigation.

9.4.3.1.3.4.2. Specific assessment of the constraint likely to be exerted by Digi post-Transaction

(514) The Parties consider that the Commission underestimates and mischaracterises the position of Digi on the market (see section 9.4.2.1.1).

(515) The Commission considers that despite Digi's growth in recent years, it remains a relatively small player, exerting limited competitive constraint on the market.

(516) <u>First</u>, Digi does not consider itself to be in a position to compete at the same level as Orange or MásMóvil, since it is much smaller, depends on the much larger MNOs to provide mobile services in Spain[486] In this respect, Digi pointed out that MVNOs have limited control over the quality of service and pricing they can offer to their customers, which can make it difficult to offer differentiated or innovative services and limit their ability to compete with MNOs.[487] Furthermore, in Digi's view, MVNOs may face challenges in scaling their business due to their dependence on their host MNO. As an MVNO's business grows, it may require more network capacity and resources, which can increase their dependency on their host MNO.[488]

(517) Non-MNOs that responded to the Phase I market investigation similarly considered that "*access to large catalogue or beneficial conditions is challenging for smaller operators [and that they can face an] inability to access new technologies – e.g., MNOs not willing to offer 5G access on wholesale agreements*".[489] Therefore, while entry as an MVNO or white label may be possible in the market for retail supply of mobile telecommunication services, what remains critical are the terms of such entry. Without sufficiently attractive terms, such players cannot be expected to exert a meaningful competitive constraint in the market. And indeed, as the Parties in their submissions themselves mention, multiple MVNOs have exited the market in recent

486 Non-confidential minutes of a call with Digi of 29 November 2022, paragraph 14, Doc ID 1846.
487 Response to questionnaire Q1 to competitors, question D.A.A.4, Doc ID 2834.
488 Response to questionnaire Q1 to competitors, question D.A.A.4, Doc ID 2834.
489 Response to questionnaire Q1 to competitors, question D.A.A.4, Doc ID 2940.

years[490], including as many as [...] MVNOs hosted by the Parties that have exited or are discontinuing their MVNO agreements in 2023.[491]

(518) Digi, which is "*1/7 of MásMóvil size and 1/12 of Orange size … does not consider itself close competitors of the Parties …[and while it may be] the largest of the small players in Spain… Digi depends on the much larger MNOs to provide mobile services in Spain (as it needs to obtain access to the MNOs mobile network by means of an MVNO agreement or similar), and since the market is mainly convergent (making it necessary to offer both fixed and mobile services to compete), Digi considers it is not able to compete at the same level of said MNOs*." In this context, Digi also notes that currently it does not offer FMC bundles including Pay-TV, or 5G,[492] which the MNOs are able to offer, thus limiting its attractiveness as an alternative to Orange or MásMóvil to a portion of the customers for the retail supply of mobile telecommunication services.[493]

(519) Second, while Digi is growing, it remains a small player. While the Parties submitted market share forecasts for Digi based on 2022 net adds, the Commission does not consider that these market share forecasts based on historic data are appropriate to describe Digi's future position, because they ignore any reactions by competitors that may affect Digi. This is corroborated by an internal document of MásMóvil presentation assessing the competitive potential of "Small Operators" [Details of MASMOVIL's internal documents describing MASMOVIL's strategy].[494]

(520) Third, an analyst report from March 2022, when the Transaction was announced, suggested that [Details of Orange's internal documents describing Digi's competitive potential].[495] The Commission indeed notes that despite having expressed a willingness to participate in spectrum auctions, and having done so in other countries where it is active (e.g. Romania) or planning to enter (e.g. Belgium and Portugal), to date Digi has not succeeded in becoming a network operator in Spain, which is likely due to the difficulties meeting the spectrum auction requirements for a new entrant.[496] In Digi's view, proposed regulatory changes related to mobile spectrum in Spain "*will make practically impossible for a new entrant to become an MNO to access the Spanish mobile market for a long time, up to 2038-2040*."[497] Notably, "*in its view the proposal to extend the spectrum licenses [of each of the current MNOs] makes it practically impossible to bid for spectrum before 2040 (a very long period in which DIGI will be at the will of the 3 MNOs wholesale offers, while being direct competitors with them in the retail market), while the proposed spectrum cap increase will mean that at that point, it is unlikely that any player other than the*

490 See, Form CO, Table 130: Overview of MVNO exit since 2017.

491 See also Article 6(1)(c) response, paragraph 473: *"…some of the MVNOs have either terminated their wholesale agreements as of 2023 or not renewed agreements upon expiration in 2023 with either OSP or MASMOVIL … This applies to the following MVNOs:* [...]."

492 Non-confidential minutes of a call with Digi of 29 November 2022, paragraph 11, Doc ID 1846.

493 Digi has however indicated that it "*intends to start to offer pay TV services in Spain in the short to medium term*." See Digi Response to the Remedies Market Test, 21 December 2023, page 8, Doc ID 5423. The Commission notes moreover that, unlike Orange, "*MASMOVIL does not offer its own pay-TV services but is only a commercial agent of … third-party platforms … [and that its] TV offers are limited to packages of basic pay-TV channels and thematic/niche content provided by several platforms*" (emphasis added) (Form CO, paragraph 1123).

494 MásMóvil internal document, ID MM-00201059, Doc ID 2667-12028.

495 [Details of Orange's internal documents describing Orange's business strategy].

496 Non-confidential minutes of a call with Digi of 29 November 2022, paragraph 12, Doc ID 1846.

497 Minutes of meeting with Digi of 7 June 2023, Annex 1, Doc ID 3583.

three largest players (Telefonica, Vodafone and the resulting entity from Orange/MásMóvil transaction, if approved) would successfully acquire spectrum."[498]

(521) Fourth, Digi relies on a wholesale access agreement, which eventually will be subject to renegotiation. It appears unlikely that Digi would be in a position to receive better or equal pricing conditions compared to the terms it has today. In the previous negations, Digi received counteroffers from all other MNOs in the market, including both Orange and MásMóvil, which helped it to obtain the most favourable terms possible at that moment: "*Even though Digi has a wholesale access agreement with Telefónica, this agreement is the result of renegotiations during which competitive pressure was exercised by the other MNOs, including Orange and MásMóvil. During these renegotiations, Digi has received alternative offers from other players in the wholesale access market (including Orange, MásMóvil and Vodafone). Digi considers that this competitive tension helped to have better terms agreed with Telefónica".*[499]

(522) According to Digi, "*the only negotiating power an MVNO holds is the possibility to ask for offers from all the existing MNOs, but this is already a market with an inelastic supply. Also, the supply is oligopolistic, which means that the competition between the MNOs in the wholesale market might not be based on the prices, leaving little room for negotiation, in particular, when the number of MNOs is decreasing … On top of that, in Spain, the MVNOs' dependence vis-à-vis MNOs is exacerbated because all MNOs are vertically integrated and provide not only wholesale but also retail mobile services that compete with those services of the MVNOs.* "[500][501]

(523) [Details of MASMOVIL's internal documents describing MASMOVIL's strategy].[502] Taken together, these suggest that Orange would not be likely to offer attractive wholesale conditions to Digi after the experience of giving [Details of the Parties' wholesale agreements] wholesale conditions to MásMóvil which fostered the latter's growth and competitive strength in the past.

(524) In view of Digi's further growth in the intervening years (and arguably grater competitive potential as a result), and the signing of the Transaction (which further aligns Orange and MásMóvil), these statements are likely to be even more true today than they were in 2020. In fact, in an Orange internal document drafted in February 2022 by Jean-Francois Fallacher, the Orange Spain CEO at the time, outlining a non-exhaustive list of strategic benefits of the Transaction for Orange, [Details of Orange's internal documents describing Orange's strategy].[503]

(525) As Digi is the largest and fastest growing MVNO in Spain, the JV would have a reduced incentive to offer wholesale mobile access services to Digi, particularly on terms which enable it to compete more effectively in the retail market. Digi considers that with the new position of the JV in the market its appetite for offering wholesale access at commercial attractive rates may change negatively for MVNOs. Rather, the JV would have an incentive to limit cannibalisation effects due to additional churn from MásMóvil to Digi. In Digi's view, following the Transaction "*there is no backstop to prevent the MNOs from not offering reasonable wholesale prices. In*

498 Minutes of meeting with Digi of 7 June 2023, paragraph 4, Doc ID 3583.
499 Minutes of prenotification call with Digi dated 29 November 2022, paragraph 17, Doc ID 1846.
500 Digi submission, 22 June 2023, *MNOs and MVNOs bargaining position to obtain access to mobile networks*, Doc ID 3618.
501 See https://www.comreg.ie/media/2020/12/ComReg20122.pdf, Doc ID 5654.
502 MásMóvil internal document dated 10 February 2020, ID MM-00931525, Doc ID 2661-8144.
503 [Details of Orange's internal documents describing Orange's strategy]

other words, <u>MVNOs will have to rely on the will of the (vertically integrated) MNOs to offer good wholesale conditions, to be able to compete with the same MNOs at a retail level.</u> The proposed concentration will reduce to 3 the number of MNOs, which, in turn, will increase the likelihood of coordination, as <u>none of them will have any incentive to offer MVNOs wholesale conditions that will boost or leave intact the MVNOs' ability to compete on the retail market</u>. Yet, Vodafone has concluded very few MVNO agreements and it is publicly known that wholesale offers to MVNOs is not part of their business model in Spain. <u>MVNOs will therefore face mainly a duopoly made of Telefonica and the result of the proposed concentration</u>, for the conclusion of MVNO agreements" (emphasis added).[504] The vast majority of respondents to the Phase I market investigation that expressed a view also indicated that Orange and MásMóvil may have less incentive to offer such access and/or increase wholesale prices following the Transaction.[505]

(526) <u>Fifth</u>, Digi, as is typical for MVNOs, is subject to exclusivity clauses.[506] The exclusivity provisions prevent MVNOs from multi-homing or from a gradual migration to a new host, which also decreases their bargaining power vis-a-vis MNOs, both pre- and post-Transaction, and "*makes them completely dependent upon the commercial motivation and willingness of an [i.e. one] MNO to provide them access under reasonable pricing and conditions*".[507] By contrast "*Under an NRA, the MNO-access seeker normally does not have exclusivity obligations. For example, it can deal with a particular MNO to gain access in a particular area or for particular situations, while obtaining access from another MNO for other areas or situations*",[508] as is notably the case for MásMóvil today where it relies on NRAs with [Details of the Parties' commercial agreements]. In this regard, Digi noted that it "*would be open to mix providers of wholesale depending on the region, and <u>provided no exclusivity obligations are required by the MNOs</u>*" (emphasis added).[509]

(527) <u>Sixth</u>, a deterioration in Digi's wholesale access conditions is likely to further weaken Digi's ability to compete. The Commission notes that MVNOs' (including Digi's) retail margins are narrow, especially in relation to data, and therefore any increase in wholesale price would have a very significant impact, further reducing the limited competitive impact of MVNOs. The Commission also notes that access costs represent a significant proportion of MVNOs' (including Digi's) costs and are the largest cost per user for a non-MNO is the wholesale access cost.[510] Moreover, wholesale access is an essential input for non-MNOs to provide mobile services. The

504 Response to questionnaire Q3 to wholesale customers, questions D.B.11., Doc ID 3360.

505 Responses to questionnaire Q1 to competitors, question D.B.A.5.

506 See Minutes of prenotification call with Digi dated 29 November 2022, paragraph 6, Doc ID 1846.

507 Digi submission, 22 June 2023, *MNOs and MVNOs bargaining position to obtain access to mobile networks*, Doc ID 3618.

508 Digi submission, 22 June 2023, *MNOs and MVNOs bargaining position to obtain access to mobile networks*, Doc ID 3618.

509 Minutes of prenotification call with Digi dated 29 November 2022, paragraph 19, Doc ID 1846.

510 See by analogy Commission decisions of 27 November 2018 in case M.8792 – *T-Mobile NL/Tele 2 NL*, paragraph 738. An access seeker that responded to the Commission's Phase II market investigation indicated that "*<u>the cost for mobile wholesale services form the largest cost block in our profit and loss statement</u>. Therefore a change in future wholesale conditions would not only affect our ability to compete effectively in the market but could put into question the business model of independent operators in total. <u>From our insight into other players' economics</u> - gained through our extensive M&A activity <u>- we know that this should not only hold true for Adamo but for many of the local operators</u>*" (emphasis added). See also response to questionnaire Q3 to wholesale customers, question D.B.11., Doc ID 3320.

Commission also notes that the wholesale market for access and call origination services is not regulated in Spain and thus non-MNOs are dependent upon effective wholesale competition to achieve wholesale terms which allow them to be competitive on the market for retail mobile telecommunication services.

(528) It is the Commission's view that Digi, faced with an increase in its wholesale prices, may be forced to eventually increase its retail prices. In a MásMóvil presentation assessing the competitive potential of "*Small Operators*" [Details of MASMOVIL's internal documents describing MASMOVIL's strategy].[511]

9.4.3.1.3.4.3. Conclusion on competitive constraint from MVNOs

(529) In light of the above, the Commission concludes that it is unlikely that post-Transaction Digi, individually or in aggregate with any of the other MVNOs would have the ability to counteract the likely anti-competitive effects of the Transaction.

9.4.3.1.4. The Parties are close competitors

(530) The Commission considers, contrary to the Parties' argument as set out in Section 9.4.2 above, that the Parties are close competitors, in that there is a sufficient degree of substitutability between their products so that the Transaction would give rise to significant price effects.[512] This finding is based on a consistent body of qualitative and quantitative evidence presented in the following paragraphs.

(531) According to paragraph 28 of the Horizontal Merger Guidelines, the higher the degree of substitutability between the merging firms' products, the more likely it is that the merging firms will raise prices significantly. In this regard, the Commission needs to verify whether the rivalry between the parties has been an important source of competition on the market.[513] The same concept is set out in paragraph 17 of the Horizontal Merger Guidelines, according to which a merger may raise competition concerns based on "*the extent to which the products of the merging parties are close substitutes*". Both wordings set out a positive correlation between the degree of substitutability between the products of the merging parties and the likelihood and seriousness of the competition concerns raised by the proposed merger. If a substantial number of customers view the products offered by the parties as their first and second choices then this can be relevant and lead to significant price increases.[514]

(532) The simple fact that, due to the features of that market, it may be the case that the merging parties also closely compete with other operators is no impediment to the finding that such parties can be close competitors, and the finding in a given market that all participants are close competitors cannot be used as a basis to raise the standard applicable in the assessment of the merger in that market.[515] It is therefore not required that the merging parties' products are each other's closest substitutes. That is, it is not required that the majority of the customers having one of the parties as their first best option, consider the other merging party as the second-best option. The fact that for certain customers substitutability is lower between the products of the merging parties than between each of the merging parties' products and those supplied by other competitors, is not sufficient, in itself, to discount the possibility

[511] MásMóvil internal document, ID MM-00201059, Doc ID 2667-12028.

[512] Horizontal Merger Guidelines, paragraph 28.

[513] Horizontal Merger Guidelines, paragraph 28.

[514] Horizontal Merger Guidelines, paragraph 28.

[515] See further section 9.4.1 on the applicable legal framework, in particular the findings of the European Court of Justice in Case-376/20 P *Commission v CK Telecoms UK Investments*, ECLI:EU:C:2023:561.

that in an oligopolistic market a transaction can give rise to a significant impediment to effective competition in the internal market.[516]

9.4.3.1.4.1. Diversion ratios indicate that Parties are close competitors

(533) The Horizontal Merger Guidelines explain that diversion ratios are one of the methods that can be used to assess the closeness of competition between the merging parties and the other market participants.[517] The diversion ratios indicate the extent to which sales lost by one of the parties are taken up by the other party or the remaining market participants. The Commission has applied this type of analysis in previous merger cases in the telecommunications sector.[518]

(534) The Commission considers that the mobile number portability data ("MNP data") provided by the Parties supports the hypothesis that the Parties are close competitors.

(535) The Commission considers that MNP data, which covers actual switching events from each operator to each other operator, provides reliable information on customer preferences and hence on the relative closeness of substitution between different MNOs. In particular, if one observes a large number of customers porting their number from Orange group to MásMóvil group, then this provides a good indication that MásMóvil is a close alternative for Orange customers, even if some of the observed switches are not driven by price changes. MNP data can approximate diversion ratios by measuring how many customers requested a number transfer from their previous provider to a new provider.[519] **Table 27** and **Table 28** below report total port outs and diversion ratios for Orange and MásMóvil in the retail supply of mobile services.

---

516 Commission decision of 12 December 2012 in case No. M.6497 – *Hutchison 3G Austria/Orange Austria*, recital 176.

517 Horizontal Merger Guidelines, paragraph 29.

518 Commission decision of 2 July 2014 in case M.7018 – *Telefónica Deutschland/E-Plus*; Commission decision of 28 May 2014 in case M.6992 – *Hutchison 3G UK/Telefónica Ireland*; Commission Decision of 12 December 2012 in case M.6497 – *Hutchison 3G Austria/Orange Austria*; as confirmed by the European Court of Justice in Case-376/20 P *Commission v CK Telecoms UK Investments*, ECLI:EU:C:2023:561.

519 See Commission decisions of 28 May 2014 in case M.6992 – *Hutchison 3G UK/Telefónica Ireland*, Annex I, paragraph 83; and of 27 November 2018 in case M.8792 – *T-Mobile NL/Tele2 NL*, Annex A, paragraph 201. See also Opinion of Advocate General Kokott of 20 October 2022, *C-376/20 CK Telecoms*, paragraph 119.

Table 27 Number of port-outs and diversion ratios from Orange to the destination groups in the retail supply of mobile services

		2019		2020		2021		2022	
Donor Group	Destination group	Port-outs	Diversion ratios	Port-outs	Diversion ratios	Port-outs	Diversion ratios	Port-outs	Diversion ratios
Orange	MásMóvil	[600.000-650.000]	[30-40]%	[600.000-650.000]	[30-40]%	[500.000-550.000]	[30-40]%	[400.000-450.000]	[30-40]%
	Vodafone	[550.000-600.000]	[30-40]%	[550.000-600.000]	[30-40]%	[450.000-500.000]	[30-40]%	[350.000-400.000]	[20-30]%
	Telefónica	[450.000-500.000	[20-30]%	[350.000-400.000]	[20-30]%	[250.000-300.000]	[10-20]%	[200.000-250.000]	[10-20]%
	Digi	[50.000-100.000]	[5-10]%	[100.000-150.000]	[5-10]%	[100.000-150.000]	[5-10]%	[150.000-200.000]	[10-20]%
	Others	[50.000-100.000]	[5-10]%	[50.000-100.000]	[5-10]%	[50.000-100.000]	[5-10]%	[50.000-100.000]	[5-10]%
	Total	[1.850.000 - 1.900.000]	100,0%	[1.700.000 - 1.750.000]	100,0%	[1.500.000 - 1.550.000]	100,0%	[1.300.000 - 1.350.000]	100,0%

Source: Response to RFI 18 Q6 and Q7 – Diversion ratios by segment

Table 28 Number of port-outs and diversion ratios from MásMóvil to the destination groups in the retail supply of mobile services

		2019		2020		2021		2022	
Donor Group	Destination group	Port-outs	Diversion ratios	Port-outs	Diversion ratios	Port-outs	Diversion ratios	Port-outs	Diversion ratios
MásMóvil	Orange	[300.000-350.000]	[20-30]%	[350.000-400.000]	[20-30]%	[350.000-400.000]	[20-30]%	[300.000-350.000]	[20-30]%
	Vodafone	[450.000-500.000	[30-40]%	[450.000-500.000	[30-40]%	[550.000-600.000]	[30-40]%	[450.000-500.000	[30-40]%
	Telefónica	[200.000-250.000]	[10-20]%	[250.000-300.000]	[20-30]%	[150.000-200.000]	[10-20]%	[200.000-250.000]	[10-20]%
	Digi	[100.000-150.000]	[5-10]%	[100.000-150.000]	[5-10]%	[150.000-200.000]	[10-20]%	[250.000-300.000]	[10-20]%
	Others	[50.000-100.000]	[5-10]%	[50.000-100.000]	[5-10]%	[150.000-200.000]	[10-20]%	[100.000-150.000]	[10-20]%
	Total	[1.250.000-1.300.000]	100,0%	[1.250.000-1.300.000]	100,0%	[1.450.000-1.500.000]	100,0%	[1.400.000-1.4500.000]	100,0%

Source: Response to RFI 18 Q6 and Q7 – Diversion ratios by segment

(536) The number portability data indicates that customers lost by Orange switch most often to [...]. For each year in the period 2019-2022, the largest proportion of requests for number transfer from another player that Orange received relate to [...], almost [30-40]% as average of all requests. Second largest proportion of requests were from [...] and the third from [...] customers. [...].[520]

(537) Vice versa, customers lost by MásMóvil switch most often to [...], but [...] comes [...]. For every year of the period 2019-2022, MásMóvil group received most requests from [...], second most from [...], approximately [20-30]% of all requests, and third, from [...].

520 MásMóvil's market shares implied by diversion ratios presented in **Tables 27** and **28** are [20-30]% in 2019, [20-30]% in 2020, [20-30]% in 2021 and [20-30]% in 2022. These market shares are higher than those provided by the Parties', presented in Table 5. Implied market shares have been calculated as follows, taking 2019 as an example: MS=[...].

(538) Contrary to what the Parties submit in the SO Reply[521] and the Article 6(1)(c) Response, "*the visible trends in the evolution of switching patterns over the period 2019 to early 2023*"[522] demonstrate that Orange and MásMóvil are and remain close competitors in the mobile telecommunication market. The difference between the diversion ratios from 2019 to 2022 demonstrates that, not only for every year [...] has been the main destination of Orange's customers, but also that there is only a mere decrease of [0-5]% between the diversion ratios of Orange to [...] from 2019 to 2022. Furthermore, market trends also demonstrate that [...] is one of the main destinations of MásMóvil customers, as, consistently, during every year of the period, Orange has been the [...] destination of MásMóvil customers, with a mere decrease of [0-5]% between the 2019 to 2022 diversion ratios.

(539) Overall, with more than [30-40]% of all number portability requests by [...] from Orange and almost [20-30]% of all requests by [...] from MásMóvil, the number portability data indicates that the Parties are close competitors.[523] [524]

(540) Based on the Parties' high diversion ratios, combined with their high contribution margins, the Commission concludes that the Transaction would lead to significant price increases.[525] As discussed in Section 2 of Annex A, which forms an integral part of this Decision, Orange's contribution margins in the relevant markets range from [50-60]% to [60-70]%, %, while MásMóvil's contribution margins range from [30-40]% to [40-50]%.[526] This is indicative of market power and the ability to set prices independently of competitors.

(541) The Commission also considers that, contrary to what the Parties submit the Article 6(1)(c) Response, the role of Digi in the market, albeit growing, as explained in Section 9.4.3.1.3.3.2, is still limited. The data in Tables 5 and 6 confirms this.

(542) Concretely, for every year of the period from 2019 to 2022, Digi was only the fourth operator to which customers of Orange would switch, after [...].

(543) Vice versa, for MásMóvil customers, in every year from 2019 to 2021, Digi has been also the [...] operator to which customers would switch after [...]. Digi has only surpassed [...] in diversion ratios in 2022, but it remains the [...] most likely option for MásMóvil customers to switch to after [...].

(544) In the Article 6(1)(c) Response, the Parties provide an alternative calculation to diversion ratios based on (i) the Parties' MNP data (ii) and the [Details of Orange's internal documents describing Orange's strategic data].[527] However, this does not

---

521 SO Reply, paragraph 327, *"The SO, however, fails to take into consideration that: (a) the DRs between Parties have been decreasing and are asymmetric"*.

522 Article 6(1)(c) Response, paragraph 275, "*finally, the Decision fails to adopt the inherently forward-looking view that merger control requires. It does not properly consider the implications of historical switching patterns for the development of competition in the retail market over the next few years. This is the case despite the visible trends in the evolution of switching patterns over the period 2019-early 2023*".

523 See documents submitted in response to RFI 18, i.e., Q6 and Q7 - Diversion ratios by segment.

524 As per the judgment of the European Court of Justice in Case-376/20 P *Commission v CK Telecoms UK Investments*, ECLI:EU:C:2023:561, it is not necessary to show that the Parties are particularly close competitors.

525 See further section 9.4.3.1.8 on the expected negative impact of the Transaction.

526 See Annex A, Table 2. The Commission considers that Orange's retail contribution margins in 2022 were [50-60]% in mobile, [60-70]% in fixed internet, [50-60]% in multiple-play and [50-60]% in FMC. MásMóvil's retail contribution margins were [40-50]% in mobile, [30-40]% in fixed internet, [40-50]% in multiple-play and [40-50]% in FMC.

527 Article 6(1)(c) Response, Annex 6(1)(c) 2.9a.

undermine the conclusions the Commission draws from the above evidence that the Parties are close competitors. Even if the Commission would mainly base the analysis of switching data on the [Details of Orange's internal documents describing Orange's strategic data] as an alternative source of diversion ratios, the [Details of Orange's internal documents describing Orange's strategic data] also demonstrates that the Parties are close competitors.

(545) First, the Parties' calculation of diversion ratios using MNP data reaches the same results as described in **Table 27** and **Table 28Table** , also at the brand level.

(546) From 2019 to 2022, MásMóvil group has been the [...] mobile operator to which OSP customers switch. An analysis on a brand-by-brand basis reports that MásMóvil group has been the [...] destination of customers from Orange B2C, Simyo and Jazztel OSP brands in the period of 2019 to 2022. During the 2019 to 2022 period, OSP group has been the [...] destination of customers switching from MásMóvil group, [...].

(547) Second, the Parties provide diversion ratios based on the [Details of Orange's internal documents describing Orange's strategic data]. As further discussed in Section 2.2.1 of Annex A, which forms an integral part of this Decision, the Commission deems that MNP data is the most accurate representation of diversion ratios in the present case because MNP data directly records switching patterns for every customer that changes operator and keeps his or her personal phone number. If the share of customers keeping their personal phone number is high, as it is in the Spanish market, MNP data provides a very accurate picture of switching behaviour in the market. Survey data can also be accurate if the survey sample is representative. However, the representativeness of a sample cannot be directly assessed and there remains the risk that the sample is biased. Hence, MNP data, especially if the share of number portability is high, should be considered as primary source and evidence when analysing switching behaviour because it directly records customers' choices and preferences. While the Commission has used surveys in past telecom cases, it has typically relied on its own surveys rather than surveys prepared by the Parties and used this data alongside MNP data.[528] In the present case, the Parties voiced reservations with regard to the use of survey data and declined the offer to do a joint survey. [529]

(548) For the mobile telecommunication market, the Parties only provide brand-to-brand diversion ratios based on this dataset, unlike for the FMC market, where the Parties also provide group-to-group diversion ratios (comprising all brands held by a given group). Noting that the switching patterns between the brands also confirm that important brands of OSP and MásMóvil are close competitors based on diversion ratios, the Commission considers that in any case the group-level is the correct metric to describe closeness of the Parties. After all, the Transaction will internalize the competition between all brands of the Parties equally such that the incentive and ability to increase prices depends on the total re-capture options of switching customers to any brand of the Parties.

528 See for example Commission decision of 11 May 2004, M.7612 *Hutchison UK/Telefónica UK*, Annex A, Section 3.1.

529 E-mail sent on behalf of Jacques-Philippe Gunther on 9 February 2023, 12:35 "*RE: M.10896 Orange/MasMovil/JV - customer survey*", Doc ID 709.

(549) Data submitted in the Article 6(1)(c) Response demonstrates that MásMóvil group is the [...] operator to which customers of Jazztel brand switch.[530] Further, depending on the year during the period 2019 to 2022, MásMóvil group is the [...] or [...] (together with [...]) to which customers from Orange and Simyo brands would switch.

(550) Vice versa, data submitted in the Article 6(1)(c) Response evidences that OSP group is the [...] operator to which customers of Yoigo and MásMóvil brands switch during the period 2019 to 2022.[531]

(551) The Parties also provided linear forecasts of diversion ratios until 2025.[532] The Commission considers that historic data has sufficiently demonstrated that diversion ratios fluctuated in non-linear patterns, and are subject to non-predictable reactions of market participants, such that linear forecasts are inappropriate to describe future market positioning of any brand.

9.4.3.1.4.2. The Parties' Tariff Comparison and Hedonic Pricing Analyses do not demonstrate lack of closeness between the Parties

(552) The Parties submitted the Tariff Comparison Analysis and the Hedonic Price Analysis to support the argument that the Parties are not close competitors (i.e., they are not closer to each other than other operators) and to argue that neither Party can be considered an Important Competitive Force as result of an aggressive pricing strategy.[533] These arguments are unfounded.

(553) <u>First</u>, the Parties' analysis is based on a flawed premise with regard to closeness of competition and the definition of ICF. As confirmed by the Court of Justice in *CK Telecoms*, closeness of competition does not require that the Parties are each other's closest competitors. Furthermore, there can be more than one ICF and an ICF does not have to compete particularly aggressively in terms of price: it simply has to have more influence on the competitive process than its market share would suggest.[534]

(554) <u>Second</u>, there is a wide body of evidence supporting the Commission's conclusion that the Parties are close competitors based on diversion ratios (Section 9.4.3.1.4.1), internal documents and the results of the market investigation (Section 9.4.3.1.4.3). In addition, there is a wide body of evidence supporting the Commission's conclusion that MásMóvil is an ICF (Section 9.4.3.1.5).

(555) <u>Third</u>, both the Parties' Tariff Comparison Analysis (also in its updated version) and the Hedonic Pricing Analysis are methodologically flawed as outlined below.

(556) *In the first place*, the Tariff Comparison and Hedonic Pricing Analyses omit potentially important and relevant attributes such as fixed data allowances, voice allowances for FMC bundles, handset/CPE subsidies, minimum contract duration, regional availability of tariffs and data usage subject to reduced internet speed that may affect prices are omitted. Orange in its own surveys used for monthly market analyses frequently assesses and investigates [Details of Orange's internal documents describing Orange's strategic data].

---

530 Article 6(1)(c) Response, Annex (6)(1)(c) 2.9a, Table 3.
531 Article 6(1)(c) Response, Annex (6)(1)(c) 2.9a, Table 4.
532 Article 6(1)(c) Response, Annex 6(1)(c) 2.9a.
533 Article 6(1)(c) Response, Annex 6(1)(c) 2.1a, Annex 6(1)(c) 2.2a
534 See section 9.4.1 on the applicable legal framework.

(557) *In the second place*, the Tariff Comparison and Hedonic Pricing Analyses focus on price reactions only and dismisses non-price-based responses when, in fact, rivals may react to a price reduction by adjusting one or multiple other attributes while keeping the tariff's price unchanged.

(558) *In the third place*, the Tariff Comparison and Hedonic Pricing Analyses do not take quantities into account. The submissions only compare tariffs without weighting tariffs by quantity. By not taking quantities into account, a tariff comparison in vertically differentiated markets might ignore consumer preferences that are captured by diversion ratios.

(559) *In the fourth place*, the Parties' Tariff Comparison Analysis compares tariffs in selected configurations, grouping in the Parties' view similar types of contracts. On this basis, the Parties claim that neither Orange nor MásMóvil offers the lowest prices in the configurations, nor appear to be particularly close to each other or at least not closer to each other than other competitors, while Digi often features the lowest prices. However, the Parties have not demonstrated that these configurations are adequate and reflects business reality. In fact, [Details of Orange's internal documents describing Orange's strategic data].[535]

(560) *In the fifth place*, the configurations in the Tariff Comparison Analysis are defined strictly. The limits of the configurations are only based on a few attributes (mobile data allowance, TV and number of lines) and without sufficient explanation for the choice of configurations' boundaries.[536] The Parties only compare prices within the same configurations. However, the Commission observes large variation in both included and omitted attributes that could explain price differences within configurations such that some configurations are defined too broadly.

(561) *In the sixth place*, the Tariff Comparison Analysis does not allow for competition between configurations. The predefined boundaries and the comparison only within configurations ignore potential competition between bundles in adjacent configurations, which is likely under some circumstances.

(562) *In the seventh place*, with regard to the Parties' argument in the SO Reply that the Commission conducted price comparison analyses in past cases and *"relied on the results to support findings that the parties were close competitors"* and that in those cases the "*implications of unobserved factors like branding or perceived quality were never considered*".[537] Contrary to the Parties' argument, the Commission's price comparisons in past cases did account for parameters of competition such as quality, with regard to the specifics of the case. Firstly, in *Hutchison 3G UK/Telefónica Ireland* the Commission compared only the cheapest of an operators' five most popular tariffs, to mitigate concerns regarding the comparability of tariffs with different subscriber numbers.[538] Secondly, in *Telefónica Deutschland/E-Plus* the Commission again compared what a residential subscriber with an average usage

[535] See documents submitted to RFI 10, Q10.b

[536] The Parties define "configurations" as tariffs that are grouped together based on a small number of attributes. In the FMC market, the Parties define 9 configurations based (only) on the number of mobile lines included, mobile data allowance and TV content type (no TV, basic TV or premium TV). In mobile only (post-paid) segment the Parties define 2 configurations based on the mobile data allowance, in the mobile only (pre-paid) segment the Parties define 4 configurations based on the number of minutes included for national and international calls and the mobile data allowance.

[537] SO Reply, paragraph 326.

[538] Commission decision of 28 May 2014 in case M.6992 – *Hutchison 3G UK/Telefónica Ireland*, paragraph 369.

pattern (in terms of voice, SMS and data) and specifically noted that "*all factors must be taken into account in order to assess the price comparison that an average new subscriber is faced with*".[539] Thirdly, the Parties' reference to *Hutchison 3G/Italy/Wind* does not concern a price comparison exercise but the Commission's assessment of the most important parameters of competition prevailing in the relevant market at the time of the merger (price, network quality and network coverage) and a comparison of MNO's outdoor and indoor population coverage.[540]

(563) Fourth, the Parties' Tariff Comparison and Hedonic Pricing Analyses do not support the conclusions the Parties derive from them. *In the first place*, contrary to the Parties' arguments, the result from the Tariff Comparison Analysis, that in defined configurations MásMóvil is not always the cheapest option demonstrates that MásMóvil is able to set higher prices. Indeed, because of persistent market power of MásMóvil, MásMóvil can price higher and still exert a competitive pressure, which is indicated by high diversion ratios from all other players to MásMóvil and high gross and net adds. Price differentials and differentials in attributes are rather an indication of product differentiation and indication of market power and not demonstrating that more highly priced differentiated bundles do not exert competitive pressure, as is indicated by diversion ratios. *In the second place*, as regard the Hedonic Pricing Analysis, price differentials between providers for the same (hypothetical) bundle configuration do not allow to conclude that the cheaper provider is more competitive than other providers because price differentials can be driven by other factors that are important for customers, like for example branding or perceived network and service quality, that are causal for the differentials and do not measure competitive strength.[541] The Hedonic Pricing Analysis and the price differentials between providers describe that some providers can price higher due to their strong market position and by consumers perceived quality, as it is the case for OSP and MásMóvil. Hence, while it is acknowledged that Digi exerts some competitive pressure on some customer groups which is also reflected in its increasing customer base and market shares, Orange's and MásMóvil's strong market position and pricing strategy confirms that both are competitive forces in the market, both with significant market power. Further, as is the case in the Tariff Comparison Analysis, no quantities are taken into account in the Hedonic Pricing Analysis, potentially ignoring consumer preferences.

(564) *In the third place*, the fact remains that both OSP and MásMóvil have significantly stronger market positions than Digi, in terms of both market shares and diversion ratios between the Parties and the Parties and Digi, as well as in terms on net and gross adds.

(565) Firstly, in the mobile overall market segment and based on most recent 2022 data, OSP has approximately 0-5] times more SIM cards under contract compared to Digi, MásMóvil approximately [0-5] times more and the Parties combined even approximately [5-10] times more SIM cards.[542] Also in terms of diversion from the Parties to each other than to Digi the differences are significant, approximately [0-5]

539 Commission decision of 2 July 2014 in case M.7018 – *Telefónica Deutschland/E-Plus*, paragraph 377.

540 Commission decision of 1 September 2016, M.7758 – *H3G/Italy/Wind/JV*, paragraphs 440-445.

541 Hypothetically, only if all non-observable reasons for price differentials are taken into account, price differentials can be only caused by competitive strength (cost differentials) but in a market with differentiated products and in an econometric study without fully transparent cost functions for all providers, it is impossible that the competitive strength can be measured.

542 Annex RFI 32 Q2.

times more OSP customers switched to MásMóvil than to Digi and approximately [20-30]% more MásMóvil customers switched to OSP brands compared to Digi.[543]

(566) Secondly, although Digi may feature relatively high net adds (new subscribers net of lost customers) indicating its growth (albeit from a small base), OSP and MásMóvil are the only two larger groups that also feature positive net adds – in contrast to Telefónica and Vodafone – [...] behind Digi, whose net adds are also from a much smaller customer base. In terms of gross adds (total new subscribers) OSP and MásMóvil combined are the [...] player accounting for about [40-50]% of all new customers, approximately [0-5] times more new customers compared to Digi, [...] about [40-50]% more new customers than Digi based on 2022 data.[544] In other words, many new subscribers chose either Orange or MásMóvil as their new provider but only less than every [...] new customer chose Digi.

(567) To conclude, the Commission generally considers that the Parties' Tariff Comparison Analysis and Hedonic Pricing Analysis do not undermine a finding of closeness of competition between the Parties. In any event, as confirmed by the Court in the *CK Telecoms* case, the Commission is not required to show that the Parties are particularly close competitors, nor that MásMóvil is a particularly aggressive competitor, for the negative competitive effects stemming from the concentration to be likely. As shown below, there is ample evidence on file demonstrating that the Parties are close competitors, that MásMóvil is an ICF or at the very least an important competitive constraint, and therefore that removing MásMóvil from the four retail markets identified in Section 9.4.3 would lead to a SIEC.

9.4.3.1.4.3. Internal documents and the results of the market investigation support that the Parties are close competitors

(568) The Parties' internal documents corroborate the view that the Parties are in close competition with one another. They indicate that the Parties treat each other as benchmark competitors against whom they measure their performance (section 9.4.3.1.4.3.1) and that the Parties closely compete in the different sections of the market (section 9.4.3.1.4.3.2).

9.4.3.1.4.3.1. The Parties treat each other as benchmark competitors against whom they measure their performance

(569) [Details of Orange's internal documents describing Orange's benchmark of other operators' brand].[545] [Details of Orange's internal documents describing Orange's benchmark of other operators' brand]:

Figure 19 [Details of Orange's internal documents describing Orange's strategic data]

[...]

Source : RFI 10, Annex RFI Q10.b.45.

Figure 20 [Details of Orange's internal documents describing Orange's strategic data]

[...]

Source : RFI 10, Annex RFI Q10.b.45

(570) Conversely, MásMóvil also effectuates periodic analysis of the mobile market, in which Orange's brands are the benchmark to which MásMóvil measures its

543 Annex RFI 18 Q7 (RFI 10 Q9).
544 Annex RFI 32 Q2.
545 [Details of Orange's internal documents describing Orange's strategic data].

performance.[546] As MásMóvil recognizes in internal documents [Details of MASMOVIL's internal documents describing MASMOVIL's strategy]".[547] As can be seen in different internal documents, [Details of MASMOVIL's internal documents describing MASMOVIL's strategy]:

Figure 21 [Details of MASMOVIL's internal documents describing MASMOVIL's strategy]

[...]

Source: Annex RFI 1, Q53.10

(571) The Commission considers that the fact that in the same documents the Parties in addition to each other also discuss and monitor also Telefónica and Vodafone, does not exclude the fact that the Parties compete closely.

9.4.3.1.4.3.2. The Parties closely compete in the different sections of the market

(572) The market investigation and internal documents confirm not only that the Parties compete closely generally speaking, they also show that the Parties largely position themselves strategically ensuring the existence of a competitor/brand for each of the different type of offers and customer needs respectively.

(573) Operators in Spain, and MásMóvil in particular, operate with many brands focusing on different customer segments of the market (high-end/mid-end/low-end), serving different customer needs. For example, [Details of MASMOVIL's internal documents describing MASMOVIL's strategy].[548]

(574) Even though there is no clear-cut definition of the high-end, mid-end and low-end of the market, as evidenced by the Parties' internal document included in **Figure 22** below, the high-end of the market would comprise offers for mobile telecommunication services with the highest amount of data offered (more than 50 GB of data). The mid-end of the market would comprise those offers for retail mobile telecommunications with approximately offering more than 20 GB of data. Lastly, low-end offers in the retail mobile telecommunication market would comprise those offers with less than 20 GB of data.

(575) As regards the high-end segment of the market, i.e., those offers comprising the highest amount of data offered to consumers, it is important to note that for mobile telecommunication services offered as part of multiple-play bundles, the Parties distinguish bundles with Premium Pay-TV and/or football content, which entails an additional level of segmentation (premium bundles with TV and/or football) that will be addressed in Sections 9.4.3.3. and 9.4.3.4.

Figure 22 [Details of MASMOVIL's internal documents describing MASMOVIL's strategy]

[...]

Source: […]

(576) When it comes to these different data offers and customer needs, the evidence in internal documents shows that [Details of internal documents describing the Parties'

[546] See documents submitted to RFI 1, e.g., Q53.10, Q53.13, Q53.19, Q53.28, Q53.30, Q53.35, Q53.49, and to RFI 15: e.g. Q1.88 or Q1.91.

[547] Internal document, MásMóvil, ID MM-00076065, Doc ID 2663-76065.

[548] Internal documents - *MásMóvil Long form recom_v5.pdf* ID MM-00612974, Doc ID 2669-90024.

business strategy].[549] Indeed, as seen in the aforementioned internal documents, [Details of internal documents describing the Parties' business strategy].

(577) Similarly, KKR, one of the co-owners of MásMóvil, [Details of MASMOVIL's internal documents describing MASMOVIL's strategy]:

Figure 23 [Details of MASMOVIL's internal documents describing MASMOVIL's strategy]

[...]

Source: [...]

(578) As can be seen, [Details of MASMOVIL's internal documents describing MASMOVIL's strategy].

(579) According to internal documents of MásMóvil, **[Details** of MASMOVIL's internal documents describing MASMOVIL's strategy]"[550] [551]

(580) Vice versa, according to internal documents of Orange [Details of Orange's internal documents describing Orange' business strategy].

Figure 24 [Details of MASMOVIL's internal documents describing MASMOVIL's business strategy]

[...]

Source: […]

Figure 25 [Details of MASMOVIL's internal documents describing MASMOVIL's business strategy]

[...]

Source: […]

(581) Internal documents of MásMóvil, also confirm that both companies compete closely in the FMC segment without premium Pay-TV football content:

Figure 26 [Details of MASMOVIL's internal documents **describing MASMOVIL's strategy]**

[...]

Source: […]

(582) Even if Digi may be growing, including from customers switching away from the Parties, such gains are primarily in the low-end of the market. . [Details of Orange's internal documents describing Orange's assessment of portability data].[552] As can be seen in the following visuals, [Details of Orange's internal documents describing Orange' strategic data]. In the mid-end sections of the market, as internal documents of Orange demonstrate, MásMóvil represents up to [...] of customers leaving Orange in 2022, meanwhile, portability to Digi in these segments of the market only ranks between [...].

Figure 27 [Details of Orange's internal documents describing Orange' strategic data]

[...]

Source: [Details of Orange's internal documents describing Orange' strategic data]

---

549 Internal documents of the Parties, 20.05.2022 Mandarina – Commercial DD update KKR.pptx, ID MM-00612147, Doc ID 2669-89197.

550 Internal documents of the Parties, *20.05.2022 Mandarina - Commercial DD update KKR.pptx,* ID MM-00612147, Doc ID 2669-89197.

551 Internal documents of the Parties, 20.05.2022 Mandarina - Commercial DD update KKR.pptx, ID MM-00612147, Doc ID 2669-89197.

552 Convergent offers are representative of the mobile telecommunication market, as 83.3% of the mobile market in Spain is in convergent offers.

Figure 28 [Details of Orange's internal documents describing Orange' strategic data]

[...]

Source: [Details of Orange's internal documents describing Orange' strategic data]

(583) In any event, as noted in Section 9.4.3.1.3.4.2, to the extent Digi may also gain some customers that switch away from the Parties' or other players mid-end and high-end brands, despite not itself being active in those segments (e.g. because it does not have an offer including Pay-TV services), the Commission notes that, rather than being evidence that Digi competes closely with such higher-end brands, is likely a consequence of a general trend among certain customer demographics, e.g. those that place less value on having packages with premium TV content in a multiple-play bundle, towards 'cord cutting', i.e. dropping TV from their offerings, and is a trend that has also been observed in other markets across the EU in recent years.

(584) Furthermore, the Commission finds that Orange and MásMóvil compete closely in the different segments of the market on the main parameter of competition, that is price (as explained above in Section 7).

(585) Indeed, as can be seen in the internal documents quoted above, Yoigo and Orange brands have similar price points for the mobile-only and FMC average tariff prices in the high-end segment of the market, with price points closer to each other than to other competitors such as Vodafone. MásMóvil and Jazztel brands also compete closely on price in the mid-end part of the market.

(586) Even more, as mentioned in the previous paragraphs and as shown by Orange's internal documents, in the past years Orange has been repositioning its competitive strategy, in order to compete more closely in terms of pricing with MásMóvil in all parts of the market. [Details of MASMOVIL's internal documents describing MASMOVIL's strategy].

Figure 29 [Details of MASMOVIL's internal documents describing MASMOVIL's strategy]

[...]

Source: [...]

9.4.3.1.4.3.3. The Parties can be considered close competitors according to market respondents

(587) The respondents to the Phase I market investigation confirmed that Orange and MásMóvil are close competitors. First, all respondents to the Phase I market investigation consider that Orange and MásMóvil compete against each other in the retail mobile telecommunication market.[553] In this regard, some operators note that "*both Orange and particularly MásMóvil have played an important role in exerting competitive constraints upon each other*"[554], whereas other players signal that "*both companies provide the same sort of services to enable end-user mobile connectivity services*".[555]

(588) When asked which brands compete closely with MásMóvil's brands, the Orange brand was named as closely competing with at least one MásMóvil brand by all but one competitor respondents who provided an answer.[556] The same was true in the opposite direction – MásMóvil brands were indicated as closely competing with

[553] Responses to questionnaire Q1 to competitors, question D.A.A.2.

[554] Response to questionnaire Q1 to competitors, question D.A.A.2, Doc ID 2834.

[555] Response to questionnaire Q1 to competitors, question D.A.A.2, Doc ID 3624.

[556] Responses to questionnaire Q1 to competitors, question D.A.A.18.

Orange brands by a majority of respondents.[557] The respondents considered the Orange and Jazztel brands to be competing closely in particular with MásMóvil and Yoigo.[558] These findings are in line with the Commission's findings in the internal documents of the Parties.

9.4.3.1.4.4. Conclusion

(589) In light of the above, the Commission concludes that the evidence shows that Orange and MásMóvil are close competitors in the retail mobile telecommunications market.

9.4.3.1.5. The important role played by MásMóvil on the market

(590) The Commission considers that MásMóvil exerts significant competitive pressure on other mobile operators. It has acted as an ICF and in any event is an important competitive constraint on the retail mobile telecommunication services market in Spain, and that it would likely continue to exert an important competitive constraint in the absence of the Transaction. The Transaction would thus reduce competitive pressure that exists on the market because of the important role that is played by MásMóvil.[559]

(591) This conclusion is supported by the results of the market investigation, Orange's internal documents, as well as the market share and gross add data provided, all of which provide evidence of MásMóvil being an important competitor on the mobile telecommunication services market.

(592) First, contrary to the arguments made by the Parties,[560] the Commission considers MásMóvil's market shares and their evolution to be a relevant indication of its market position and relative strength. As can be seen in **Table 5** above, MásMóvil's market shares on the market for the retail supply of mobile telecommunication services market have been steadily growing. So much so, that in 2022 it surpassed Vodafone by number of subscribers, to become the 3rd biggest player on the market.

(593) MásMóvil's share of gross and net adds surpasses its actual position on the market. MásMóvil has also been the number [...] operator in terms of gross adds in each of 2019, 2020, and 2021 and is [...] in 2022.

(594) Similarly, in terms of net adds, MásMóvil has been the number [...] operator in 2020 and number [...] in 2021, [...] the number 1 operator Digi, as shown in **Table 29** below. Furthermore, as **Table 29** demonstrates, MásMóvil's net adds remained stable between 2021 and 2022, indicating a persistent growth and confirming MásMóvil's important and competitive market position.

Table 29 Net adds in the market for the retail supply of mobile services

	Number of SIM cards (millions)		
Operator	**2020**	**2021**	**2022**
Orange	-[1-0.50]	-[0.50-0]	[0-0.50]
MásMóvil	[0.50-1]	[0.50-1]	[0.50-1]
Telefónica	-[0.50-0]	-[0.50-0]	-[0.50-0]
Vodafone	-[0.50-0]	[0-0.50]	[0-0.50]
Digi	[0-0.50]	[0.50-1]	[0.50-1]

Source: Response to RFI 32 – Annex RFI 32 Q2

557 Responses to questionnaire Q1 to competitors, question D.A.A.11.
558 Responses to questionnaire Q1 to competitors, question D.A.A.11 and D.A.A.18.
559 See Horizontal Merger Guidelines, recital 25.
560 See section 9.4.2. above.

(595) The Commission also notes that the switching share of MásMóvil is materially larger than its actual market share as demonstrated above.[561] Indeed, the Commission's initial assessment, based on the win/loss data provided by the Parties, suggests that an outsized proportion of all switchers choose MásMóvil as their new provider, which confirms this. This is also consistent with MásMóvil's market share evolution.

(596) It results from the above that MásMóvil has competed aggressively over the years and has been steadily growing. Thanks to its main brands, notably Yoigo and MásMóvil, it has attracted a significant number of customers in Spain.

(597) [Details of MASMOVIL's internal documents describing MASMOVIL's strategy].[562] [Details of MASMOVIL's internal documents describing MASMOVIL's strategy]..[563]

(598) Although MásMóvil's own mobile network is smaller than those of the other Spanish network operators, with [...]sites (as compared to [...] owned by Orange), it serves today approximately [40-60]% of its customers via its own mobile network. [...], MásMóvil's network covers [80-90]% of the population in 3G and 4G, and will also cover 5G.[564] The market investigation indicated that its spectrum portfolio and partial own network coverage gives MásMóvil bargaining power thanks to which it has been able to obtain more attractive wholesale conditions than any other access seeker.[565] [Details of the Parties' commercial agreements], which until now none of the MVNOs managed to be in a position to offer.[566] Both of these elements allowed it to grow beyond a certain size to achieve scale, which distinguishes it from pure MVNOs. [Details of MASMOVIL's internal documents describing MASMOVIL's strategy],[567] [Details of MASMOVIL's internal documents describing MASMOVIL's strategy].[568] [Details of MASMOVIL's internal documents describing MASMOVIL's strategy].[569] At the same time, MásMóvil has applied for an extension of its current spectrum licences, which is suggestive of its willingness to keep the advantageous bargaining position in the future.

(599) [Details of MASMOVIL's internal documents describing commercial choice of acquiring additional spectrum].[570] [Details of MASMOVIL's internal documents describing commercial choice of acquiring additional spectrum].[571]

---

561 MásMóvil's market shares implied by diversion ratios presented in **Table 27** and **Table 28** are [20-30]% in 2019, [20-30]% in 2020, [20-30]% in 2021 and [20-30]% in 2022. These market shares are higher than those provided by the Parties', presented in Table 5. Implied market shares have been calculated as follows, taking 2019 as an example: MS=[...].

562 MásMóvil PE presentation to lenders (Feb 2020), slide 5, MM-00933576, Doc ID 2661-10195.

563 MásMóvil PE presentation to lenders (Feb 2020), slide 5; ID MM-00933576, Doc ID 2661-10195.

564 Response to question 14b of RFI 1. Form CO, paragraph 2095.

565 See Digi submission of 22 June 2023, *MNOs and MVNOs bargaining position to obtain access to mobile networks*, Doc ID 3618, which refers to public communications of MásMóvil which highlight the benefits and cost savings the company achieved through its NRAs.

566 Minutes of a call with Finetwork of 2 February 2023, paragraph 22, Doc ID 2471; response to questionnaire Q3 to wholesale customers, question, question D.B.1, D.B.2, and D.B.21, Doc ID 3407; minutes of meeting with Digi of 25 April 2023, paragraph 13, Doc ID 3273.

567 See also section 9.4.3.1.3.2 on the relative advantages of NRAs as compared to MVNO wholesale access agreements; see also Digi submission, 22 June 2023, *MNOs and MVNOs bargaining position to obtain access to mobile networks*, Doc ID 3618, highlighting the differing objects, technical terms, pricing and pricing structure; and typical duration (term) of the two types of agreements, as well as possible bi-directionality, non-exclusivity, and resale possibility under the NRAs.

568 MásMóvil Long form recom_v5.pdf, MM-00612974, Doc ID 2669-90024.

569 MásMóvil l PE presentation to lenders (Feb 2020), slide 34; ID MM-00933576, Doc ID 2661-10195.

570 Presentation for AC – MásMóvil ID MM-00373421, Doc ID 2665-42216, page 81.

(600) [Details of MASMOVIL's internal documents].[572] This strategy has been explained in detail by Avatel, which pointed out that "*as MásMóvil has spectrum, it has been easier for it to secure commercial agreements for wholesale mobile network access with third party MNOs. This is because it can choose between entering into wholesale mobile network access agreements and relying on its own mobile network infrastructure. By being able to leverage its own, albeit smaller mobile network, MásMóvil has been able to enter into wholesale agreements with particularly favourable conditions (as is the case with its current wholesale agreements with Orange or Telefónica), while also optimally relying on its own network to boost capacity and reduce wholesale access costs where possible, e.g. in denser areas. Pure MVNOs do not have this power of negotiation, as they fully depend on wholesale agreements with MNOs. This is why, it is more difficult for pure MVNOs to get affordable prices in wholesale agreements*."[573]

(601) This view has been also shared by Digi, who noted that "*having mid-band spectrum gives MásMóvil significant leverage in negotiations with other MNOs for an NRA, notabl[y] because the MNOs in Spain will know that MásMóvil has the option to deploy more towers and sites as needed, which would result in less traffic on the NRA provider's network, and less wholesale revenues*." In its view, MásMóvil "*likely made a strategic choice to instead rely to a greater extent on NRAs given the attractive conditions offered*." In this respect, Digi relied on its own experience in Romania, where having only some mid-band and low band spectrum gave Digi the leverage to negotiate an NRA. It also drew a parallel with the case M.7758 – *Hutchison 3G Italy / WIND / JV*, where one of the merging parties, Hutchison 3G Italy, mainly had mid-band spectrum and only limited low-band spectrum, that was transferred through the remedies package to Iliad. Overall, Digi explained that *"[b]y holding spectrum (even if it is only in some bands) and being able to invest in broader sense, the other MNOs are more open to giving wholesale access—and on better terms all else being equal—compared to a situation where the access seeker has no spectrum holdings*." It confirmed that "*the leverage that an MVNO, i.e. an access seeker with no spectrum, may have is certainly weaker than the leverage of an access seeker with its own mobile network (even if partial) in view of the ability of the latter to further develop and densify its network of mobile sites*."[574]

(602) Consequently, the Commission's market investigation does not support the Parties' arguments as outlined in the SO Reply that MásMóvil is moving closer and closer to being an MVNO and becoming less of a network operator, and implicitly therefore becoming less of an ICF or of exerting significant competitive pressure on other operators. This is in particular because MásMóvil's internal documents show that [MASMOVIL's internal documents]. This business model does not diminish its ability to act as an MNO, to invest to a greater extent in its network if it decides to do so in the future, or to exert an important competitive constraint on other operators. [MASMOVIL's internal documents][575] [MASMOVIL's internal documents].[576] [MASMOVIL's internal documents].[577]

571 See Grupo MásMóvil – 700MHZ Spectrum Strategy, February 2020, ID MM-00255136, Doc ID 2667-66105, page 4, 6, 8; Grupo MásMóvil- JVCo Board of Directors, January 2020, ID MM-00339544, Doc ID 2665-8339, page 49; Strategic Committee – MásMóvil, 1 February 2021, ID MM-01016232, Doc ID 2672-16922, page 151; MásMóvil internal document, MM-00173533, Doc ID 2670-65198, page 5.

572 MásMóvil Long form recom_v5.pdf, ID MM-00612974, Doc ID 2669-90024.

573 Minutes of meeting with Avatel of 10 March 2023, paragraph 31, Doc ID 3069.

574 Minutes of a call with Digi of 7 June 2023, Doc ID 3583.

575 MásMóvil internal document, ID MM-00373421, Doc ID 2665-42216.

(603) [MASMOVIL's internal documents].[578] Indeed, respondents to the Phase I market investigation indicated that MásMóvil managed to accumulate multiple brands with varied offers.[579] As they explained, "*MásMóvil counts on a brand portfolio that allows them to compete in all market segments.*"[580]

(604) However, MásMóvil's strength lies not only with having varied bundled offers, but also in standalone mobile services. On that market segment, MásMóvil is [...] operator by the number of subscribers, with [30-40]% share in 2022, while [...] Vodafone, held [20-30]% subscribers.[581] The situation is similar if looking only at the narrower pre-paid or post-paid segments of standalone mobile offers (with MásMóvil respectively holding [20-30]% and [30-40]% shares by the number of subscribers in 2022).

(605) While the Parties submit that the Commission failed to demonstrate that MásMóvil is a challenger or a maverick, this is not only how the respondents to the market investigation described MásMóvil,[582] but [Details of internal documents describing the Parties' business strategy]. In this regard, one respondent to the Phase I market investigation put it in relation to the Spanish mobile services market, "*MásMóvil has been the driving force of competit[i]on in the Spanish market in the last years*".[583] [Details of internal documents describing the Parties' business strategy].[584] Similarly, the CNMC in its recent decision concerning MásMóvil's takeover of Euskaltel, which describes MásMóvil as a 'maverick' who energized the retail telecommunication market with its low-cost offers.[585] Contrary to what the Parties claim this decision is not outdated and is reflective of market reality. In this regard, it is sufficient to note that the decision is dated June 2021 and that the[586] Commission has not observed any significant changes in the market dynamics since then. [Details of internal documents describing the Parties' business strategy],[587] [Details of internal documents describing the Parties' business strategy],[588] [Details of internal documents describing the Parties' business strategy]. Given that there could be more than one important competitive force on the market, the growing role of Digi on the market should not necessarily be taken as an indication that the findings in the Spanish decision are no longer pertinent.

(606) While recently it might not have been offering the most aggressive pricing, this might be explained by the stage of growth and market position it has attained. It is no longer a new entrant, but rather it has become a more mature player on the mobile telecommunication services market. In fact, [Details of MASMOVIL's internal documents describing MASMOVIL's strategy][589] Undeniably, an operator with a wide customer base might behave differently than a new entrant trying to establish

576 Presentation for AC MásMóvil, ID MM-00373421, Doc ID 2665-42216, page 54.
577 MásMóvil S&P – BRP discussion, September 2021, ID MM-00173533, Doc ID 2670-65198, page 6.
578 MásMóvil Long form recom_v5.pdf; ID MM-00612974, Doc ID 2669-90024.
579 Responses to questionnaire Q1 to competitors, question D.A.A.10.
580 Response to questionnaire Q1 to competitors, question D.A.A.10., Doc ID 2865.
581 Annex RFI 32 Q2 – Market shares and net adds, mobile standalone-all tab.
582 Responses to questionnaire Q1 to competitors, question D.A.A.9 and D.A.A.10.
583 Response to questionnaire Q1 to competitors, question E.4, Doc ID 3624.
584 20220526_Mandarina PRC update_v40.pdf. ID MM-00597536, Doc ID 2669-74586.
585 C/1181/21 MÁSMÓVIL / EUSKALTEL, 16 June 2021. The CNMC's assessment related to both mobile and fixed internet retail markets.
586 Section 9.4.3.1.5.
587 See document submitted in reply to RFI 1 Q53.35.
588 ID ORANGE-EC-RFI22-00973596, Doc ID 2023-38123.
589 MásMóvil l Long form recom_v5.pdf; ID MM-00612974, Doc ID 2669-90024.

itself on the market. Also, the Commission notes that MásMóvil's most recent behaviour on the market might have been influenced by the Transaction. In any event, even if the competitive positioning of MásMóvil is evolving over the years as it continues to grow, it is the Commission's view that MásMóvil nevertheless is an important competitor, and exercises an important competitive constraint in the market which would remain the case in the absence of the Transaction.

(607) The Commission also notes that potential existence of other players, who might be pricing (more) aggressively, such as Digi,[590] does not negate MásMóvil's role as an ICF or as an important competitive constraint on the market.[591] It is possible for more than one operator to "stand out" in a heterogeneous market and that this might occur for different reasons. Consequently, the growing position of Digi or its aggressive pricing need not negate the competitive constraint that MásMóvil exerts on the Spanish mobile telecommunication services market.

(608) In view of the above elements, taken as a whole, the Commission considers that the Transaction may result in the elimination of an ICF and in any event of reduce competitive pressure by eliminating an important competitive constraint from the Spanish retail mobile services market.

9.4.3.1.6. Any entry would not be likely, timely and sufficient

(609) The Horizontal Merger Guidelines provide that for entry to be considered a sufficient competitive constraint on the merging parties, it must be shown to be likely, timely and sufficient to deter or defeat any potential anti-competitive effects of the merger.[592] The Commission has assessed each of these three elements in relation to potential entry on the Spanish retail mobile services market and concluded that new entrants, MNOs and MVNOs alike, would face significant barriers to entry. Any threat to entry would not be sufficiently strong and timely to discipline the JV. In this context, the Commission notes that in order to be able to exert a significant constraint and thereby discipline the JV, entry would need to be of a sufficient scope and magnitude.

9.4.3.1.6.1. MNO entry

(610) First, the Commission does not consider that the threat of MNO entry is credible, as MNO entry is unlikely.[593] This is because of the high barriers to entry, which have also been enumerated in previous Commission decisions concerning mobile telecommunication markets,[594] As the Parties themselves acknowledge,[595] an entry as an MNO requires very substantial investments and meeting significant regulatory prerequisites. This was confirmed by the market participants who expressed a view in the course of the market investigation, who also explained that spectrum rights are

---

590 It was described as such by some respondents to the market investigation, see e.g. responses to questionnaire Q1 to competitors, question D.A.A10.

591 See section 9.4.1. on the applicable legal framework.

592 Horizontal Merger Guidelines, paragraph 68.

593 Contrary to the Parties' criticism made in Article 6(1)(c) Response (see section 9.4.2.1.5 above), this does not signify that the Commission concludes that an MNO entry would be impossible.

594 See Commission decisions of 28 May 2014 in cases M.6992 – *Hutchison 3G UK/Telefónica Ireland*, paragraph 262-269; of 2 July 2014 in case M.7018 – *Telefónica Deutschland/E-Plus*, paragraph 845-848; of 12 December 2012 in case M.6497 – *Hutchison 3G Austria/Orange Austria*, paragraph 287-292.

595 Form CO, paragraph 2075.

scarce and costly to obtain.[596] For those reasons, the majority of respondents to the market investigation considered entry on the mobile retail market difficult or very difficult.[597] In this context, past example of entry by MásMóvil, on which the Parties rely to dispute the Commission's conclusions,[598] might not be very telling of future prospects, as these depend among others on spectrum availability. In that regard, the Spanish government has not yet planned or announced plans to launch an auction of a sufficient amount of spectrum to allow a company to roll out its own mobile network in Spain.

(611) Furthermore, the Commission considers that an MNO entry at a sufficient scale, regardless of how unlikely it might be, would also not be timely. The Commission notes that a new MNO entrant first would need to obtain access to spectrum of the right quantity and nature in order to be able to deliver national services, which might take considerable time. Then, the new entrant would need to build its radio access network with national coverage to make its entry sufficient. Acquiring access to new sites is a lengthy and complex process because of the existence of a limited number of suitable locations for optimised outdoor coverage, the need for negotiations with landlords, potential planning requirements, potential works to host the network equipment and site engineering for interference management. While network sharing arrangements may reduce such costs, the entrant would still have to make a significant investment. Admittedly, the presence of TowerCos in Spain, who offer their infrastructure to network operators, lowers barriers to entry, as it is not necessary to build mobile tower sites of one's own by negotiating site by site. However, it still does not alter the Commission's conclusion. A new entrant would probably also need a national roaming agreement with an existing operator while it builds its network, and existing MNOs may have little incentive to contract with it. Moreover, a new entrant would have to win customers in a mature market, which might involve significant costs to develop a brand and a retail presence. The Commission therefore considers that the necessary investments and time required to enter as an MNO constitute a serious barrier to entry.

9.4.3.1.6.2. MVNO entry

(612) Similarly, the Commission concludes that any threat of MVNO entry would not be sufficiently strong and timely to discipline the JV.

(613) While entering the market as an MVNO appears easier than entering the market as an MNO since MVNOs do not need to build their own network, it still requires a certain level of investment. Moreover, the ability and incentive for MVNO entry depend on the conditions on the wholesale access market, as further described in Section 9.5.2 below.

(614) Contrary to the views presented by the Parties,[599] the results of the Phase I market investigation suggest that barriers to entry remain high also for MVNOs, despite several MVNOs being present on the market. The respondents to the Phase I market investigation indicated that already today, there exist difficulties in gaining wholesale access and inequalities between MNOs and MVNOs in this respect are a factor contributing to high barriers to entry.[600] Competitor respondents concentrated in

596 Responses to questionnaire Q1 to competitors, question D.A.A.4.
597 Responses to questionnaire Q1 to competitors, question D.A.A.3.
598 See section 9.4.2.1.5 .
599 See section 9.4.2.1.5.
600 Responses to questionnaire Q1 to competitors, question D.A.A.4.

particular on difficulties with obtaining wholesale access to 5G, which was considered essential to be able to compete in the future by the majority of respondents who expressed a view,[601] and which in the respondents' view, MNOs are unwilling to offer.[602]

(615) In addition, the need to build up a loyal customer base and brand recognition further contributes to the difficulty of entering at a sufficient scale in a timely manner. While the Parties rely on the fact that there are a number of MVNOs present on the Spanish market to demonstrate that entry is not difficult,[603] it is important to note that none of those MVNOs, apart from Digi which started operating in 2008 and started gaining market share only over the last two years, managed to gain a market share exceeding [0-5]% over the past years. Even if taken up together, these MVNOs in 2022 held a market share of [0-5]% by volume and [0-5]% by value, even though some of them have been present on the Spanish retail market for a number of years. As indicated in one of the internal documents of MásMóvil, "*[i]n the recent past it was hard for new players to gain market share within the first ten years*".[604] 10 years is hardly a timescale that would allow considering entry at scale to be timely.

9.4.3.1.6.3. Convergence as a barrier to entry

(616) The Commission disagrees with the Parties' view that convergence does not constitute a barrier to entry[605] and considers that high degree of convergence on the Spanish market contributes to the difficulty of entering the retail market. Competing with a standalone mobile offering would be difficult on the Spanish market, given the strong customer preference for bundled offers and the resulting narrow potential customer base. At the same time, converging to other services raises additional technical and financial requirements (see Section 9.4.3.2.6 below on the difficulties of entering retail market for fixed internet access services). Having to be able to provide an additional service in order to be an effective competitor in respect of the first service will always be an additional hurdle to pass for a prospective new entrant. In that regard, competitor respondents to the Phase I market investigation indicated that operators who lack direct and immediate access (or immediate access at reasonable prices) to the inputs (i.e., network) needed to bundle convergent services will not be able to provide multiple-play bundles and to compete in the Spanish telecommunications market.[606]

9.4.3.1.7. Buyer power

(617) According to the Horizontal Merger Guidelines, the competitive pressure on a supplier is not only exercised by competitors but can also come from its customers. Even firms with very high market shares may not be in a position, post-merger, to significantly impede effective competition, in particular by acting to an appreciable extent independently of their customers, if the latter possess countervailing buyer power. Countervailing buyer power in that context should be understood as the bargaining strength that the buyer has vis-à-vis the seller in commercial negotiations due to its size, its commercial significance to the seller and its ability[607].

601 Responses to questionnaire Q1 to competitors, question D.A.A.36.
602 Responses to questionnaire Q1 to competitors, question D.A.A.4.
603 See section 9.4.2.1.5.
604 MásMóvil internal document, ID MM-00081830, Doc ID 2671-5601.
605 See section 9.4.2.1.5.
606 Responses to questionnaire Q1 to competitors, question D.A.D.6
607 Horizontal Merger Guidelines, paragraph 64.

(618) The Commission does not consider that in the present case retail customers, i.e. end consumers, have any countervailing buyer power vis-à-vis the JV to offset the anti-competitive effects of the Transaction, given the fragmented nature of their demand. They do not individually negotiate their mobile contracts and their individual subscription value would be of no material commercial significance to the JV.

(619) Equally, regardless of the exact degree of customer loyalty, while customers may be able to switch mobile provider without too much difficulty, this is unlikely to afford customers, particularly private consumers, a significant degree of buyer power. In fact, if following the Transaction the JV and the other operators would lack the incentives to vigorously compete and would likely raise prices, customers could switch mobile operator, but would be unable to negotiate better terms with any operators.

(620) Furthermore, during the market investigation, no market participant raised any point about countervailing buyer power of customers.

(621) The Commission therefore concludes that buyer power does not constitute a countervailing factor that would offset the likely anti-competitive effects of the Transaction in relation to the provision of retail mobile telecommunications services.

9.4.3.1.8. Expected negative impact of the Transaction

(622) As set out in the Horizontal Merger Guidelines, the larger the increase in the sales base on which to enjoy higher margins after a price increase, the more likely it is that the merging firms will find such a price increase profitable despite the accompanying reduction in output.[608]

(623) This is especially important when assessing the potential impact of the Transaction as based on evidence from the market investigation and the Parties' own submissions price is the main parameter of competition in retail telecommunication markets in Spain, with Spanish retail consumers being particularly price sensitive. In the Form CO, the Parties submit that *"in Spain, price has taken on a primary importance in customer's choice"*.[609] The Parties refer to a CNMC Consumer survey indicating that price is one of the main factors that customers identify as influencing their choice of operator.[610] Moreover, when asked to rank a list of alternative parameters of competition, "price" was ranked first more than any other parameter, notably by around 80% of respondents,[611] with one such respondent further outlining that *"price and promotions are key drivers in the Spanish market."*[612]

(624) With this in mind, the Commission used data provided by the Parties to estimate to what extent the Transaction would be likely to lead to price increases, and the likely magnitude of any such increases.

(625) Overall, if diversion ratios between the Parties' brands as well as contribution margins are high, the incentive to increase price after internalising the competition between the Parties is also high. The Gross Upward Pricing Pressure Index ("GUPPI") provides a first measure of the extent to which the JV has an incentive to raise price. Alternatively, the Compensating Marginal Cost Reduction ("CMCR")

608 Horizontal Merger Guidelines, paragraph 27.
609 Form CO, paragraph 480.
610 Form CO, paragraph 479 – 486.
611 Responses to questionnaire Q1 to competitors, question D.A.A.5.
612 Response to questionnaire Q1 to competitors, question D.A.A.6, Doc ID 2773.

asks what level of marginal cost reduction is required for each of the JV's products to exactly offset the incentive to raise price.[613]

(626) GUPPIs and CMCRs, which the Commission similarly referred to in several past merger decisions involving the telecoms sector,[614] have been computed using the Parties' diversion ratios based on MNP data, the Parties' contribution margins, and average revenue per user (ARPU) as measure of the Parties' average retail prices.[615] From the contribution margins proposed by the Parties,[616] the Commission excluded certain cost items that were not considered to vary directly with the number of subscribers.[617] As set out in Annex A, which forms an integral part of this Decision, the exclusion of these items is appropriate in view of the insufficiency of the explanations, and/or lack of evidence provided by the Parties that these costs are truly variable, nor have the Parties' shown that these items were universally accepted by the Commission in past merger decisions involving the telecoms sector.

(627) **Table 30** below suggests that the Transaction would lead to substantial GUPPIs in the market for the retail supply of mobile telecommunication services of [10-20]% for Orange and [10-20]% for MásMóvil based on 2022 data. The marginal cost reduction (relative to prices) needed to prevent upward pricing pressure (CMCR) is [10-20]% for Orange and [10-20]% for MásMóvil based on 2022 data.

Table 30 GUPPI and CMCR in the market for the retail supply of mobile telecommunication services.

	Orange	MásMóvil
GUPPI	[10-20]%	[10-20]%
CMCR (relative to prices)	[10-20]%	[10-20]%

Source: Commission assessment (Annex A, Section 2.3.1.)

(628) Moreover, even if the Commission were not to question and instead were to accept in full the contribution margins submitted by the Parties, the likely price effects would in any event be substantial. Accepting the Parties' margin figures in full, which would not be appropriate for the reasons outlined, the GUPPI would remain substantial, [10-20]% and [10-20]% for Orange and MásMóvil respectively, and the CMCR (relative to prices) would likewise be sizeable, [10-20]% and [10-20]% for Orange and MásMóvil respectively.[618] Likewise, even if the Commission based diversion ratios on the [Details of Orange's internal documents describing Orange's strategic data] instead of MNP data, as submitted by the Parties,[619] the likely price effects would not materially change.

(629) Therefore, the Commission concludes that the Transaction will lead to substantial upward pricing pressure in the market for retail supply of mobile telecommunication services to the detriment of consumers.

613 See Annex A, Section 2.1.
614 See for example Commission decisions of 27 November 2018 in case M.8792 – *T-Mobile NL/Tele2 NL*, Annex A, paragraph 20 et seq.
615 See Annex A, Section 2.2.
616 See Response to RFI 25.
617 As explained in Annex A, Section 2.2.2, this concerns cost items related to [Parties' own methodology to estimate contribution margins].
618 See Annex A, Section 2.3.2.
619 Annex 6(1)(c) 2.9a - Analysis of Diversion Ratios.

(630) In line with the above, the majority of respondents that expressed a view in response to the Commission's Phase I market investigation considered that the Transaction would have a negative impact on the market for the retail supply of mobile telecommunication services, in terms of increases in prices and/or decreases in quality of services provided.[620] Among others, the consumer association, *La Asociación de Consumidores y Usuarios en Acción (FACUA),* considered that the Transaction would promote oligopoly on the retail market for mobile telecommunication services in Spain, with companies not being interested in competing.[621] In the same vein, a competitor commented that "*the retail mobile telecommunications market will be highly concentrated and incentive to compete will stagnate*" adding that "*the proposed Transaction is likely to lead to higher prices, which is a direct consequence of the decrease of number of MNOs in the market and the increase of coordination and transparency among them*."[622] The Commission's own assessment and the views of market participants are further corroborated by the Parties' own internal documents.

(631) Notably, in an Orange internal document drafted in February 2022 by Jean-Francois Fallacher, the Orange Spain CEO at the time, outlining a non-exhaustive list of strategic benefits of the Transaction for Orange, one of the reasons given in favour of the Transaction was because a [Details of Orange's internal documents describing Orange's strategy].[623] [Details of Orange's internal documents describing Orange's strategy].[624] [Details of Orange's internal documents describing Orange's strategy].[625]

(632) In the context of the Commission's review of the Transaction, the Parties have avoided claiming that the Transaction would not lead to a price increase, limiting themselves to pointing out that "*the Parties have not explored revenue synergies during the due diligence process.*"[626] However, internal discussions in relation to pitches toward lenders and rating agencies paint a more concrete picture in this regard. [Details of Orange's internal documents describing Orange's strategy][627] [Details of Orange's internal documents describing Orange's strategy].

(633) In light of the above, the Commission has come to the view that the Transaction would be expected to have a negative impact, and lead to substantial upward pricing pressure, in the market for retail supply of mobile telecommunication services to the detriment of consumers.

9.4.3.1.9. Efficiencies

(634) The Commission has come to the view that the negative effects on competition stemming from the Transaction would not be outweighed by efficiencies, as further discussed in Section 9.6.

9.4.3.1.10. Conclusion

(635) Based on the above, the Commission has come to the view that the Transaction would significantly impede effective competition in a substantial part of the internal

620 Response to questionnaire Q1 to competitors, question E.1.
621 Response to questionnaire Q1 to competitors, question E.4, Doc ID 2956.
622 Response to questionnaire Q1 to competitors, question E.4, Doc ID 2834.
623 [Details of Orange's internal documents describing Orange's strategy].
624 [Details of Orange's internal documents describing Orange's strategy].
625 Orange internal document, ID ORANGE-EC-RFI22-00906388, Doc ID 2687-96915.
626 Form CO, paragraph 1446.
627 Orange internal document, ID ORANGE-EC-RFI22-00778378, Doc ID 2687-26129.

market as a result of non-coordinated anti-competitive effects on the market for retail mobile telecommunication services in Spain.

9.4.3.2. Retail supply of fixed internet access services

(636) The Commission has come to the view that the Transaction would significantly impede effective competition in a substantial part of the internal market resulting from horizontal non-coordinated effects on the Spanish retail market for fixed internet access services. This is because (i) the Parties' combined market share (and HHI) is high and the increment as a result of the Transaction is significant (Section 9.4.3.2.1), (ii) remaining fixed network operators might have less incentives to compete (section 9.4.3.2.2), (iii) the competitive constraint from smaller operators is limited (section 9.4.3.2.3), (iv) the Parties are close competitors (section 9.4.3.2.4), (v) of the important role played by MásMóvil on the market (section 9.4.3.2.5) and (vi) the expected negative impact of the Transaction on prices and/or quality of service (Section 9.4.3.2.8).

(637) In addition, the Commission considers that the reduction of the competitive pressure resulting from the Transaction is not likely to be outweighed by other competitive constraints such as potential entry (section 9.4.3.2.6) or buyer power (section 9.4.3.2.7). Also, as explained in more detail in section 9.6 below, the Commission notes that the market investigation casts doubt on the Parties' arguments that the Transaction would generate significant efficiencies that could outweigh the negative effects of the Transaction.

9.4.3.2.1. The Parties' combined market share and HHI are high and the increment is significant

(638) The Commission considers that the Parties' combined market shares and HHI are high, as is the increment in market shares (and HHI) resulting from the Transaction, and the Transaction would create a new market leader on the Spanish retail fixed internet access services market in terms of subscribers.

(639) First, the combined market shares of the Parties are high. Based on share data provided by the Parties, as set out in section 9.2 above, on the market for the retail provision of fixed internet access services, the JV would have a share of [30-40]% by volume and [30-40]% by value post-Transaction. The combined market shares by volume, which will almost reach 40%, could be indicative of market power. In fact, the Transaction would create a new market leader on the Spanish retail fixed internet access services market in terms of subscribers.

(640) By comparison, Telefónica, the second biggest player on the market, held [30-40]% by volume and [40-50]% in value in 2022.[628] At the same time, Vodafone, the third biggest player on the market, would be less than half the size of the JV, with [10-20]% share by volume and [10-20]% by value. The new biggest operator, Digi, despite continued growth, would be more than [5-10] times smaller than the JV by the number of subscribers and nearly [10-20] times smaller by revenue based on 2022 data.

(641) Second, the increment in market share and HHI would also be significant (i.e. with an increment of [10-20]% by volume and [10-20]% by value respectively). As indicated in Section 9.3, the post-Transaction HHI on the market for retail supply of

[628] The Commission notes that over the last four years, Telefónica's market share in terms of revenues has been steadily decreasing, with a decline of [0-5] % between 2019 and 2022.

fixed internet access services would be important, namely [2000-3000] based on subscribers and [3000-4000] based on revenues after the Transaction. In this market, the HHI would be considerable, namely [500-1000] based on subscribers and [500-1000] based on revenues, especially given the fact that the increment exacerbates the concentration levels of a market that is already concentrated pre-Transaction with HHI levels of [2000-3000] in terms of revenues and [2000-3000] in terms of subscribers.

(642) This is due to the fact that, pre-Transaction, the Parties were two strong players of similar size in terms of subscribers on the Spanish retail fixed internet access services market. In fact, their market share by volume differed only [0-5] percentage points in 2022, with the increment steadily increasing over the past 4 years, as MásMóvil continues to grow.

(643) Orange is currently a well-established FNO in Spain, being currently the second player on the retail supply of fixed internet access services, behind Telefónica. Indeed, the vast majority of market participants who expressed a view during the course of the Phase I market investigation consider that Orange is an "*established*" retail fixed internet player.[629] Orange is active in Spain through three brands, Orange, Jazztel, and Simyo, "*which enable a strategic positioning on the market with strong brand perception and maximized value extraction*".[630] It has an even presence across Spain with a fixed FTTH network of approximately [...] as of the end of 2022 while Vodafone only owns [1-2] million FFTH BUs (and [7-8 million] million HFC BUs).[631] Orange is described by the Parties to rating agencies as a [Details of MASMOVIL's internal documents describing MASMOVIL's strategy].[632] In terms of financial performance, according to the same presentation to the rating agencies, Orange has a [Details of MASMOVIL's internal documents describing MASMOVIL's strategy]. Orange generated EUR [...] revenues and a cash contribution margin of [...]% in fixed internet in 2022.[633] All of these elements contribute to its strength on the Spanish fixed internet access services market.

(644) MásMóvil has its own fixed FTTH network, consisting of [...] BUs[634], which it complements through different wholesale agreements to reach a fixed coverage across Spain of [...] BUs as of the end of August 2022.[635] By the end of 2021, [20-30]% of MásMóvil's retail fixed internet customers were served on its own network.[636] The Commission also notes that MásMóvil has grown over the years. In four years, MásMóvil gained [0-5]% in terms of subscribers and [5-10]% in terms of revenues, overtaking Vodafone in 2022. Also, [...].[637] In addition, MásMóvil managed to expand its network in low-density areas where no other or very few competitors had reached.[638] Finally, the pre-merger margins and EBIDTA of

629 Responses to questionnaire Q1 to competitors, question D.A.B.5.
630 Internal document of MásMóvil, 2022.06 Project Kili - RAP v27 Non-Clean team version.pdf. MM-00818245, Doc ID 2659-3783.
631 Form CO, paragraph 571 and Annex 6(1)(c) 2.6.
632 Internal document of MásMóvil, 2022.06 Project Kili - RAP v27 Non-Clean team version.pdf. MM-00818245, Doc ID 2659-3783.
633 RFI 18 – Q2 margins.
634 Annex 6(1)(c) 2.6.
635 Form CO, paragraph 12.
636 Form CO, paragraph 650.
637 Non-confidential minutes of a call with Vodafone of 20 December 2022, paragraph 18, Doc ID 2455.
638 Non-confidential minutes of a call with Digi of 29 November 2022, paragraph 20, Doc ID 1846.

MásMóvil have been steadily growing the last three years. All of these elements show that it is a strong player that constrains Orange, Telefónica and Vodafone.

(645) Third, the Parties themselves consider that they will become a [Details of Orange's internal documents describing Orange's strategy][639] post-Transaction, with [...] combined of fixed internet lines and [40-50]% market shares in terms of subscribers. In the same vein, the Transaction rationale for Orange is to "[Details of Orange's internal documents describing Orange's strategy]" and [Details of Orange's internal documents describing Orange's strategy][640] and is similar for MásMóvil [Details of MASMOVIL's internal documents describing MASMOVIL's strategy].[641]

(646) On the basis of the above, the Commission concludes that the combined market shares of Orange and MásMóvil are high, and that the Transaction gives rise to a significant market share increment.

9.4.3.2.2. Competitive constraint from Telefónica and Vodafone

(647) As mentioned above, a merger is unlikely to harm competition where the reaction of the remaining competitors would discipline the behaviour of the merged entity. On the other hand, competition would be harmed if the remaining competitors may not be willing or able to compete sufficiently post-Transaction so as to compensate for the loss of competition.[642]

(648) In the following paragraphs the Commission assesses, the ability and incentives of Telefónica and Vodafone to compete and counteract the likely price effects resulting from the Transaction.

9.4.3.2.2.1. Ability to compete

(649) The Transaction would leave two large national fixed network operators on the Spanish market to compete with the JV: Telefónica and Vodafone. While the Commission considers that Telefónica and Vodafone are likely to have the ability to compete with the Parties post-Transaction, it is unlikely that they would have the incentives to do so, as further set out below.

9.4.3.2.2.2. Telefónica's ability to compete

(650) Telefónica is currently the largest FNO both by revenue and subscribers in the market for the retail supply of fixed internet access services.

(651) Telefónica has an estimated ownership of 28 million FTTH BUs[643] which covers most of the country. As the incumbent operator, Telefónica is still subject to regulatory obligations to grant access to its fixed infrastructure in certain areas (covering approximately 30% of the Spanish population).[644]

(652) In line with the Parties' views, the Commission considers that despite a decrease in market share in the 2019 to 2022 period (from [30-40]% to [30-40]% by volume and [40-50]% to [40-50]% by value), given its strong market position, and high network

[639] Internal document of MásMóvil, 2022.06 Project Kili - RAP v27 Non-Clean team version.pdf. MM-00818245, Doc ID 2659-3783.
[640] Internal document of Orange, 220213 - KILI - KEY BENEFITS - DRAFT v0.docx. ID ORANGE-EC-RFI22-00973596, Doc ID 3023-38123.
[641] Internal document of MásMóvil, 28.02.2022 Mandarina - EU Partners Discussion vF.pdf. ID MM-00096262, Doc ID 2671-20033.
[642] See Horizontal Merger Guidelines, paragraphs 24-25 and footnote 28.
[643] Annex 6(1)(c) 2.6.
[644] Form CO, paragraph 656.

quality, Telefónica is currently able to compete in the retail fixed internet access market. Equally, the Commission does not consider that this would change in the future, either absent the Transaction or following the Transaction.

9.4.3.2.2.3. Vodafone's ability to compete[645]

(653) Vodafone is currently the fourth largest FNO by subscribers and third largest FNO by revenue, but with a difference of only [0-5]% with MásMóvil, in the market for the retail supply of fixed internet access services.

(654) Vodafone's fixed network consists of 8.6 million BUs, of which 1.2 million BUs are FTTH and 439000 BUs are HFC in 2022.[646] Vodafone's primarily cable/coax/HFC-based fixed network needs to be upgraded to FTTH.[647]

(655) The Commission notes that Vodafone currently finds itself in a challenging position in Spain in terms of ability to invest also in fixed networks,[648] which puts into question its ability to compete aggressively against the Parties in the future. This is due to the growing unattractiveness of its mostly HFC-based fixed network[649] and resulting dependency on wholesale access to FTTH networks. As indicated by Vodafone itself "*FTTH is widely regarded as superior to HFC across a number of parameters, including speed and capacity (in particular bandwidth which is important for wholesaling to multiple providers); symmetry (i.e. equal upload and download speeds, which are increasingly important for applications such as video conferencing, cloud services, and gaming); and futureproofing. End consumers are increasingly demanding fibre, and this is a trend that is likely to continue to grow in the future. As a result, there is very little appetite from access seekers to enter into agreements with Vodafone for HFC access*". This position is shared by other market players. In this respect, 14 out of 16 respondents of the Phase II market investigation consider that the ability to offer FTTH is a competitive advantage on the Spanish market over operators who do not offer FTTH [650] and one respondent specifically pointed out the fact that "*Vodafone´s network, even if offering ample coverage, is largely based on outdated HFC technology which is unable to compete with Fiber*".[651] Vodafone itself indicated that it will depend on "*FTTH wholesale access provided by the remaining [two] MNOs (Telefónica and Orange/MásMóvil) …[and is concerned that]… the merged entity would have an incentive to worsen wholesale access conditions …[since]… the merged entity and Telefónica will face less competitive pressure and will have lower incentives to offer attractive wholesale conditions*."[652]

(656) This is confirmed by its market share evolution over the last 4 years. Vodafone lost [0-5]% in terms of subscribers and [0-5]% in terms of revenues, [...]. Last year, Vodafone had [10-20]% by volume and [10-20]% by value in 2022. If Vodafone's

645 On 31 October 2023 Vodafone announced the sale of Vodafone Spain to Zegona Communications PLC ("Zegona"), a UK public limited company which was the former owner of the Spanish companies Telecable and Euskaltel. See https://www.vodafone.com/news/corporate-and-financial/sale-of-vodafone-spain, Doc ID 5643.

646 Annex 6(1)(c) 2.6.

647 Non-confidential minutes of a call with Vodafone of 20 December 2022, paragraph 6, Doc ID 2455.

648 Non-confidential minutes of a call with Vodafone of 20 December 2022, Doc ID 2455.

649 See further below section 9.4.3.2.2.3.

650 Responses to questionnaire Q3 to wholesale customers, question D.A.5.

651 Avatel's response to questionnaire Q3 to wholesale customers, question D.B.35., Doc ID 3298.

652 Vodafone's response to questionnaire Q3 to wholesale customers, question D.A.13., Doc ID 3463.

fixed network remains based on HFC, this trend is likely to continue over the next few years.

9.4.3.2.2.4. Incentives to compete

(657) The Commission considers that post-Transaction, in view of the reduction of competitive pressure, Telefónica and Vodafone are unlikely to have the incentives to compete sufficiently to counteract the negative impact resulting from the Transaction.

(658) First, as shown in Section 9.2 above, the market for the retail supply of fixed internet services in Spain is highly concentrated and is oligopolistic. The Parties, together with Telefónica and Vodafone, account for around 90% or more of the market by volume and by value. According to the principles of strategic complementarity, which is a general characteristic in standard models of oligopolistic competition and has been applied in several Commission decisions in the telecoms industry[653], competing firms have incentive to raise prices on the increased demand arising from the merger as a response to a price increase by another firm (which diverts some of the merging entity's demand to them).

(659) In its referral request under Article 9 of the Merger Regulation, the CNMC corroborated the concern that Telefónica and Vodafone would have little incentive to counteract price increases that could be applied by the JV as they could benefit from raising prices on any diverted demand themselves.[654]

(660) Second, Telefónica has focused its strategy in recent years on retaining customers and increasing its average revenue per user ("ARPU") through selling multiple-play and FMC bundles and value-added services, in particular premium football content, rather than aggressively competing to win new customers through lower prices. Indeed, it is estimated that over [50-60]% of Telefónica's overall multiple-play bundle revenue in 2022 was accounted for by less than [20-30]% of its total multiple-play bundle subscriber base, i.e. its premium customers that subscribe to bundles with premium Pay-TV football content,[655] suggesting that Telefónica is unlikely to focus on competing through lower prices following the Transaction. The Commission considers this to be representative of Telefónica's position in each of the retail fixed internet, multiple-play and FMC markets in view of the fact that, as outlined in Section 7 above, in 2021, 96.3% of fixed internet lines were part of a bundled offer in Spain and, within the multiple-play bundles, the take-up of FMC bundles among telecoms consumers in Spain reached 82.5% of all fixed internet lines.

(661) Like the Parties, each of Telefónica and Vodafone also operate lower price-positioned brands in addition to their main brands, namely O2 in the case of Telefónica and Lowi in the case of Vodafone. However, according to market share

---

653 See e.g. Commission decision of 12 December 2012 in case No M.6497 – *Hutchison 3G Austria/Orange Austria*; Commission decision of 28 May 2014 in case No M.6992 – *Hutchison 3G UK/Telefónica Ireland*; Commission decision of 2 July 2014 in case No M.7018 – *Telefónica Deutschland/E-Plus*; Commission decision of 1 September 2016 in case No M.7758 – *Hutchison 3G Italy / Wind / JV*.

654 Application under Article 9 of Council Regulation (EC) No139/2004 on the Control of Concentrations in file M.10896 – *Orange MásMóvil/JV* of 2 March 2023.

655 Annex RFI 37 Q1. This was estimated by comparing Telefónica's overall residential bundle customers and revenues in 2022, with its customers and revenues of bundles without football in 2022, with the difference being its customers and revenues of bundles with football.

data provided by the Parties[656], these sub-brands, while growing to some extent, have a minimal presence on the market with shares c. [0-5]% or less by volume and value in 2022, and having grown by no more than c. [0-5]% in the four-year period 2019-2022.[657]

(662) Indeed, both Telefónica and Vodafone are considered to be rational players (i.e. that they would act in their own long term best interests in terms of profit maximisation) by the Parties and by third party analysts as shown in the following examples taken from the Parties internal documents.

(663) Orange's own strategic rationale for the Transaction, which the Orange Spain CEO at the time, Jean-Francois Fallacher, explained includes a [Details of Orange's internal documents describing Orange's strategy][658] in other words, [Details of Orange's internal documents describing Orange's strategy].

(664) Analyst reports appear to align with Orange's own strategic rationale for the Transaction. For example, [Details of MASMOVIL's internal documents describing MASMOVIL's strategy].[659] [Details of MASMOVIL's internal documents describing MASMOVIL's strategy].

(665) The Commission considers that these observations remain valid today, notably the lack of aggressive growth strategies via price wars, as evidenced by the price increases announced by all of the MNOs in Spain last year, including Orange (in August 2023) and Telefónica, Vodafone and MásMóvil (in December 2023).[660]

(666) Similarly, an Orange email [Details of Orange's internal documents discussing market reactions to the Transaction announcement].

(667) [Details of Orange's internal documents describing Orange's strategy].

(668) Similarly, on 29 September 2022, ratings agency Fitch published its view that the Transaction "*should ease market pressures*" and that *"the market should benefit from a reduced number of competitors [since] A market challenger [i.e. MásMóvil] is moving into a more incumbent-like position and should adapt its strategy accordingly*." Fitch noted that *"competition has been most pronounced in mobile, where MM [i.e. MásMóvil] has consistently taken market share from Orange and Vodafone [whereas] Telefónica's Movistar [is] positioned towards the premium end of the market*".[661]

(669) This trend in the Parties' FNO competitors' competitive positioning provides an important indication of the lack of effective incentives of Telefónica and Vodafone to compete post-Transaction, and the more reactive nature of their current competitive behaviour. The Commission does not consider that either would alter

656 See Annex RFI 37 Q1. Brand level data was not provided for Telefónica or Vodafone in relation to the overall retail fixed internet market, so the Commission used residential multiple-play and residential FMC share data as a proxy, given these represent the vast majority of retail fixed internet subscriptions.

657 Annex RFI 37, Q1 (Bundles – FMC). The Parties were not able to provide a brand-level breakdown of market shares in the overall market for retail mobile services, so the Commission took FMC bundles as the closest available proxy given that, according to the CNMC "*83.3% of all post-paid mobile … in 2021 were part of a bundled offer*" (Form CO, paragraph 416).

658 [Details of Orange's internal documents describing Orange's strategy]»

659 MásMóvil internal document, ID MM-00931525, Doc ID 2661-8144.

660 See https://euroweeklynews.com/2023/01/08/movistar-and-vodafone-to-increase-rates-for-customers-this-january-in-spain/, Doc ID 5633.

661 See https://www.fitchratings.com/research/corporate-finance/orange-MásMóvil MásMóvil -merger-to-ease-spanish-telecoms-market-pressure-29-09-2022, Doc ID 5665.

this strategy as a result of the Transaction, rather that they would continue on this track further as a result of the decrease in competition brought about by the removal of competition between Orange and MásMóvil. This is supported by quotes from senior management of both companies indicating that they favour consolidation, including in Spain, as they consider markets to be too competitive today. For example, [Details of MASMOVIL's internal documents describing MASMOVIL's strategy].[662]

(670) Additionally, respondents to the Commission's Phase I market investigation considered that Vodafone and Telefónica will have a reduced incentive to compete post-Transaction. One respondent, as consumer organisation, indicated, "*the merger would promote oligopoly in Spain [with the result that] Companies are not going to be interested in competing*"[663] while another respondent, a non-MNO, considered that "*The shift from four to three operators … will allow the MNOs to raise prices or reduce the quality of their services without fear of losing customers to other providers …Moreover, the Transaction could be a decrease in network investment in the market for fixed internet broadband services. If the merged entity were to focus on cost-cutting measures to maximize profits, this could lead to a decrease in investment in network infrastructure, which could result in a deterioration of the quality of services provided to end customers.…*".[664]

(671) In light of the above, the Commission takes the view that, post-Transaction, Telefónica and Vodafone would become less aggressive with regard to pricing and other relevant parameters of competition, and therefore would have reduced incentive to compete post-Transaction.

9.4.3.2.3. Competitive constraint from smaller operators

(672) The Commission, based on the results of the market investigation and the analysis of the internal documents of the Parties, does not consider that smaller operators, are able to exercise the same degree of competitive pressure that is exercised by the larger operators, i.e. the Parties, Telefónica and Vodafone who all have national offerings and substantial own networks (including IRUs[665]). The Commission therefore considers that such smaller operators are unable to meaningfully constrain the competitive behaviour of the Parties on the market for retail fixed internet services in Spain.

9.4.3.2.3.1. Overview of small fixed operators in Spain

(673) As mentioned in Section 7 above, in addition to the main network operators (Section 7.2.1), there are a number of smaller operators in Spain (Section 7.2.2) active in the provision of retail fixed internet services.

(674) An overview of such smaller operators is included in **Table 31** below[666].

---

662 [Details of MASMOVIL's internal documents describing MASMOVIL's strategy]..

663 Responses to questionnaire Q1 to competitors, question E.4, Doc ID 2956.

664 Digi's response to questionnaire Q1 to competitors, question E.6, Doc ID 2834.

665 Since IRUs provide for long-term low-cost access akin to ownership. As explained by Vodafone "*IRU agreements are common in the Spanish market. Typically, the user has to contribute towards 50% of the network investment costs (whether up-front or in staged payments) and, in exchange, it benefits from a long-term irrevocable right of use of the network under owner economics conditions*." Non-confidential minutes of a call with Vodafone of 20 December 2022, paragraph 7, Doc ID 2455.

666 The Commission notes that there are other operators in Spain active in the provision of retail fixed internet services with their own network, such as Avanza or Parlem, but as they are relatively modest size, they are not described in this section.

Table 31: Smaller retail fixed internet providers (2022)

Operator	Revenues (EUR, M)	Fixed customers (M)	BUs (m)	National / Regional
Digi	501	[0.5-1]	6.5 (April 2023)	National
Avatel	300	[0.5-1]	2.6	Regional
Finetwork	135	[0-0.5]	0.1	Regional
Adamo (incl. Aire Networks)	100	[0-0.5]	[2-3]	Regional
PTV/Procono	[50-100]	[0-0.5]	1.5	Regional
Total	[1,100-1,150]	[1-2]	[12-13]	-

Source: Parties estimates (Article 6(1)(c) Response, Table 7, and Annex 6(1)(c) 2.6)

(675) Digi relies on an FVNO agreement with Telefónica in order to complement its own FTTH network, which it is continuing to roll-out, in order to provide retail fixed internet services, including through multiple-play bundles, nationally in Spain.

(676) Avatel only provides retail fixed internet services, including through multiple-play bundles, regionally, mainly in rural areas of Spain, and predominantly based on its own fixed network footprint (in addition to that of rural wholesale provider Lyntia Access, referred to below). Avatel "*doesn't have any fixed wholesale access agreements to provide broadband services nationally*."[667]

(677) Finetwork operates a limited FTTH network, which it complements with a wholesale broadband access agreement with Vodafone. It provides retail fixed internet services, including through multiple-play bundles, regionally within Vodafone's fixed network footprint.

(678) Adamo provides retail fixed internet services, including through multiple-play bundles, regionally within its own network footprint.

(679) PTV/Procono provides retail fixed internet services based on its own fixed network, which is mainly HFC technology (approximately [70-80]%), and located in rural areas of Spain.[668]

(680) In addition, there are other small fixed network operators active in Spain, including Lyntia Access and Onivia, although only as wholesale providers, and mainly in rural areas of Spain. Such players are not active in the retail market for fixed internet services.

9.4.3.2.3.2. Competitive position of smaller retail fixed internet providers in Spain

(681) As outlined in Section 8 above, the retail market for fixed internet services is national in scope. The Parties, Telefónica, and Vodafone all have national offerings.

(682) Of the smaller operators however, as outlined in the table above, all of them—with the exception of Digi—only offer retail fixed internet services in certain, mainly rural, regions of Spain.

(683) As shown in **Table 32** below, collectively, they account for only around [10-20]% of fixed internet subscribers in the Spanish market in 2022, compared to over [80-90]% for the Parties, Telefónica and Vodafone, albeit this number has been growing.

667 Minutes of call with Avatel of 10 March 2022, paragraph 13, Doc ID 3069.
668 Form CO, paragraph 726.

Table 32 Volume share of smaller operators in the retail fixed internet market

	2019	2020	2021	2022
Digi	[0-5]%	[0-5]%	[0-5]%	[0-5]%
Avatel	[0-5]%	[0-5]%	[0-5]%	[0-5]%
Finetwork	[0-5]%	[0-5]%	[0-5]%	[0-5]%
Adamo	[0-5]%	[0-5]%	[0-5]%	[0-5]%
PTV/Procono	[0-5]%	[0-5]%	[0-5]%	[0-5]%
Total	[0-5]%	[0-5]%	[5-10]%	[5-10]%

Source: Parties (Annex RFI 37, Q1)

(684) Digi is the only one of these smaller operators that is active nationally and which has been able to capture a non-marginal share of subscribers in the retail fixed internet market, with [0.5-1 million] fixed lines as of 2022, although its market share remains less than 5%.

(685) Of the regional operators, Avatel has a share of a little over [0-5]% of the market and the other players are significantly smaller, with shares of c. [0-5]% or less. The Commission also notes that both Finetwork and PTV rely predominantly on HFC technology to provide retail fixed internet services, which respondents to the Phase I market investigation note is in the process of becoming "*a non-competitive technology*",[669] due to the high penetration of FTTH/fibre in Spain.

(686) As outlined above, with the possible exception of Digi (which, as explained later in this section below, competes mainly in the low-end of the market), the smaller retail fixed internet providers have a very small market presence.

(687) As can be seen from the below, Digi has a differentiated pricing strategy for retail fixed internet services depending whether it is providing retail services via its own network or on Telefónica's network. Digi is able to offer a lower price in areas where it has rolled out its own fixed network. According to the Parties: "*Digi has adopted a differentiated pricing approach in relation to customers on its owned footprint versus wholesale broadband access by offering a lower price and higher Fiber speed in the areas where it has deployed its owned network (so-called FIBRA SMART offers) versus the areas where it relies on wholesale access (so-called FIBRA offers).*"[670]

(688) The price difference is confirmed by a review of Digi Spain's website, in which lower-priced "Fibra Smart" offers appear more prominently at the top of the web page and there is a note that this is only "*Available in areas where we are developing our own fiber network.*"[671]

669 See e.g., Minutes of call with Avatel of 10 March 2022, paragraph 14, Doc ID 3069.

670 See Response to RFI 20 Q3(b).

671 See https://www.digimobil.es/fibra-optica/?gclid=CjwKCAjwv8qkBhAnEiwAkY-ahgntRbbmLHs3OPXXj-VLhuJHgT40MPNe7YjV9LOwjwfyouXFwBjiZxoCgboQAvD_BwE, Doc ID 5656.

Figure 30 Differentiated retail fixed internet pricing by Digi

Source: Digi website (machine translation to English)

(689) In this respect, Digi itself mentioned that its offers are different when it provides the services via its own network footprint or via the network of Telefónica, as can be seen from the above. The Parties do not follow a similar approach, and indicate that they are "*not aware of any other players in the market that have adopted such a differentiated pricing approach*"[672]. Indeed, none of the other non-MNOs offer retail fixed internet on a nationwide basis.

(690) The Commission considers that in the absence of granular data, it can be reasonably considered that Digi is exerting a weaker competitive constraint outside of its own network footprint area.[673] Even if, as the Parties outline, Digi's "*owned FTTH network has recently reached approximately 6.5 million Bus, as reported in the press on 17 April 2023*".[674] that accounts for [...] ([20-30]%) of the Spanish market, in addition to being smaller than the Parties' respective networks (including IRUs) today, and the JV's network following the Transaction.

(691) In addition, the Parties' internal documents confirm that Digi competes mainly with MNOs' low-cost brands at the low-end of the market. For instance, [Details of

672 See Response to RFI 20 Q3(b).

673 i.e. [4-5 million] divided by [27-28 million], i.e. the approximate total market size. See Form CO, paragraph 124.

674 Article 6(1)(c) Response, paragraph 165.

MASMOVIL's internal documents describing Digi's positioning on the market][675] [Details of MASMOVIL's internal documents describing Digi's positioning on the market].

Figure 31 [Details of MASMOVIL's internal documents describing MASMOVIL's strategy].

[...]

Source: […]

(692) The same presentation notes that [Details of MASMOVIL's internal documents describing MASMOVIL's strategy],[676] suggesting that Digi may not exert significant pricing pressure on the Parties.

(693) To the extent Digi may also gain some fixed internet customers that switch away from the Parties' or other players mid-end and high-end brands, despite not itself being active in those segments (e.g. because it does not have an offer including Pay-TV services[677]), the Commission notes that, rather than being evidence that Digi competes closely with such higher-end brands, is likely a consequence of a general trend among certain customer demographics, e.g. those that place less value on having packages with premium TV content in a multiple-play or FMC bundle, towards 'cord cutting', i.e. dropping TV from their offerings, and is a trend that has also been observed in other markets across the EU in recent years.[678] Specifically with regard to Spain, [Details of MASMOVIL's internal documents describing MASMOVIL's strategy regarding Pay-TV].[679] [Details of MASMOVIL's internal documents describing MASMOVIL's strategy regarding Pay-TV].[680] [Details of MASMOVIL's internal documents describing MASMOVIL's strategy regarding Pay-TV].[681]

(694) More generally, the Parties' typical competitor benchmarks do not take into account smaller players, with the exception of Digi, and even in that case Digi typically appears less prominently in such reporting than other network operators.

(695) For example, [Details of MASMOVIL's internal documents describing MASMOVIL's benchmarking of competitors].[682]

Figure 32 [Details of MASMOVIL's internal documents describing MASMOVIL's strategy].

[...]

Source: [Details of MASMOVIL's internal documents describing MASMOVIL's strategy].

675 MásMóvil internal document, ID MM-00098679, Doc ID 2671-22450.

676 MásMóvil internal document, ID MM-00098679, slide 39 (43), Doc ID 2671-22450.

677 Non-confidential minutes of the call with Digi of 29 November 2022, paragraph 11, Doc ID 1846.

678 The Commission does not however consider that as a result OTT platforms represent an out of market competitive constraint on the market for retail fixed internet services. OTT services such as subscription video on demand services (e.g. Netflix, Disney+, etc.), are not interchangeable for retail fixed internet services, and indeed they can only be provided to customers that already have a mobile (and/or fixed) subscription, whether on a standalone basis or as part of a broader multiple-play or FMC bundle, as OTT platforms depend on data to deliver their services.

679 See also in this regard, Telefónica's response to questionnaire Q1 to competitors, question C.A.A.D.6, Doc ID 2796. ("*There is evidence that there is a trend in the market towards the "unbundling" of linear pay-TV services*").

680 [Details of MASMOVIL's internal documents describing MASMOVIL's strategy].

681 MásMóvil internal document, Report for MásMóvil by Analysys Mason in relation to the Transaction dated 6 October 2022, ID MM-00183330, Doc ID 2670-74995.

682 Annex RFI 1 Q53.7, page 18.

(696) Another MásMóvil internal document paints a similar picture, [Details of MASMOVIL's internal documents describing MASMOVIL's perception of its competitors].

Figure 33 [Details of MASMOVIL's internal documents describing MASMOVIL's strategy]

[...]

Source: [Details of MASMOVIL's internal documents describing MASMOVIL's strategy]

(697) Similarly, an Orange brand strategy presentation, shown below, refers to its "peers" in terms of the segment(s) of the market they address as [Details of Orange's internal documents describing Orange's strategy].[683]

Figure 34 [Details of Orange's internal documents describing Orange's strategy]

[...]

Source: [Details of Orange's internal documents describing Orange's strategy]

9.4.3.2.3.3. Limited ability of smaller fixed internet providers to compete due to their reliance on wholesale conditions

(698) A factor that strongly affects smaller operators' ability to exert the same competitive pressure as MNOs in the market for retail fixed internet services in a significant and sustained way, and on a nationwide basis, is the availability of wholesale access at sufficiently good terms.

(699) As noted in Section 7 above, 70% of the Spanish wholesale broadband market has been deregulated, which means smaller operators would need to conclude commercial fixed wholesale agreements in order to offer retail fixed internet services in those areas, and therefore on a national basis as the Parties do today.

(700) While there are certain smaller, wholesale providers such as Lyntia Access available, such "*independent neutral [i.e. non vertically-integrated] wholesale FTTH companies [are] available in rural ... low-density areas only*",[684] whereas the only viable providers for operators wishing to offer services nationally, and in particular in large urban centres, are Telefónica and Orange. [685]

(701) The wholesale market for broadband access services is currently dominated by two players only, Telefónica and Orange ([70—90]% combined in 2022). Telefónica had a market share of [40-50]% by volume and [60-70]% by value, while Orange has a share of [20-30]% by volume and [20-30]% by value in 2022. MásMóvil has a share of [0-5]%, and Vodafone had a negligible position and are included among "Others",[686] which is largely as a result of its increasingly "*obsolete HFC technology*"-based fixed network.[687] Despite statements that it "*will then have strong incentives (in fact it will have no alternative but) to aggressively compete in ... wholesale ... markets*"[688], Vodafone is unlikely to be a credible player in the

683 Orange internal document of 10 March 2020, ID ORANGE-EC-RFI22-00682896, Doc ID 2684-91180.

684 Finetwork's response to questionnaire Q3 to wholesale customers, question D.A.13., Doc ID 3407.

685 Vodafone is not listed here because of its heavy reliance on HFC. As indicated by market respondents: "*only Orange and Telefonica offer FTTH wholesale access, while Vodafone mainly only offers HFC network access ... which is inferior ...*" Minutes of meeting with Finetwork, 2 February 2023, paragraphs 17 & 20, Doc ID 2471.

686 See Annex RFI 37 Q1.

687 Response to questionnaire Q1 to competitors, question E.16., Doc ID 2865.

688 Position Paper, "Vodafone's views on the proposed transaction", 28 February 2023, Doc ID 2414.

wholesale broadband access market until it is able to upgrade its network from HFC to FTTH (See section 9.4.3.2.2.3 above).

(702) The wholesale market in Spain is thus concentrated and there is no sufficient competition among host FNOs; Orange and Telefónica have a significant degree of market power. This is reflected in the following:

– Most smaller operators do not have wholesale broadband access from either Orange or Telefónica today; and

– While Digi does have wholesale access to Telefónica's FTTH network, it charges a higher price for retail fixed internet services in areas where it relies on Telefónica's fixed network compared to areas where it has rolled out its own fixed network, suggesting that it may need to pass on the high wholesale access cost charged by Telefónica in order to remain viable since, [Details of MASMOVIL's internal documents describing MASMOVIL's strategy].[689]

(703) As a consequence, the Commission concludes that FNOs such as Telefónica do not generally have an incentive to offer attractive wholesale conditions, or even any wholesale access to smaller operators wishing to compete in the market for retail fixed internet services.

9.4.3.2.3.4. Competitive constraint by smaller retail fixed internet providers unlikely to be exerted post-Transaction

9.4.3.2.3.4.1. General assessment

(704) As described in the previous paragraphs, already pre-Transaction smaller providers' ability to compete in the Spanish market for retail fixed internet services is limited, primarily due to their inability to obtain wholesale broadband access to offers services at national level in competition with the Parties, Telefónica and Vodafone.

(705) While some of these players are growing and/or rolling out their own FTTH networks, they remain very small (e.g. with a subscriber share of around [0-5]% for Avatel and [0-5]% or less for all others) as of 2022, and are unlikely to be able to roll out their own networks or obtain access on conditions that would enable them to effectively constrain the JV following the Transaction.

(706) The Commission considers that all the aforementioned factors currently limiting such smaller operators' competitiveness would remain after the Transaction. Therefore, post-Transaction smaller retail fixed internet providers would remain unable to compete effectively against the Parties.

9.4.3.2.3.4.2. Specific assessment of the constraint likely to be exerted by Digi post-Transaction

(707) The Parties consider that the Commission underestimates and mischaracterises the position of Digi on the market (see section 9.4.2.1.1).

(708) The Commission considers that despite Digi's growth in recent years, it remains a small player, exerting a limited competitive constraint on the market.

(709) Digi provides retail fixed internet services in Spain "*by means of its own fixed broadband network and using Telefonica's [FTTH] network (by means of NEBA*

[689] MásMóvil internal document, ID MM-00098679, Doc ID 2671-22450, slide 39.

offer) [in areas of Spain] where Digi does not have its own network."[690] In addition, Digi confirmed that it "*has started to deploy its own FTTH network.*"[691]

(710) In the Article 6(1)(c) Response, the Parties point out that Digi's "*owned FTTH network has recently reached approximately 6.5 million BUs, as reported in the press on 17 April 2023 …[which they say is] …*[...] *… and [argue that Digi's own network] is expected to reach approximately 9 million BUs by the end of 2025*".[692]

(711) While Digi indeed recently reported that its own fixed network has grown to 6.5 million BUs, this remains around [...] of Orange's FTTH network of [...] BUs[693] and [...].[694]

(712) In addition, while Digi appears to be continuing to roll out its own FTTH network, the Parties' projections are speculative and appear to contradict the Parties' own internal documents. In a MásMóvil presentation assessing the competitive potential of "*Small Operators*" [Details of MASMOVIL's internal documents describing MASMOVIL's strategy].[695] Another MásMóvil internal document, from February 2020, noted that [Details of MASMOVIL's internal documents describing MASMOVIL's strategy],[696] while a report prepared by an external adviser for MásMóvil in October 2022 in relation to the Transaction predicts that [Details of MASMOVIL's internal documents describing MASMOVIL's strategy].

Figure 35 [Details of MASMOVIL's internal documents describing MASMOVIL's strategy]

[...]

Source: [Details of MASMOVIL's internal documents describing MASMOVIL's strategy]

(713) As outlined in the previous section, today, for the more than 75% of the Spanish market that Digi provides retail fixed internet services via wholesale access to Telefónica's fixed network, Digi charges a higher price compared to in the areas (covering less than 25% of the Spain market) where it owns its own network. This is likely because, as one small fixed operator indicated, "*towards smaller operators (i.e. with a relatively small customer base) Telefonica only offers wholesale fixed network access at regulated prices (and selectively or tactically in non-regulated areas),* [Orange's commercial agreements with Telefónica].[697] By contrast, [MASMOVIL's commercial agreements]. According to Digi, this was as a result of "*taking the remedies from the Orange/Jazztel transaction was a relevant step for MásMóvil to enhance its competitive position. But the real turning point for MásMóvil was transitioning from an MVNO to an MNO, after purchasing in 2016 Xfera Móviles, S.A. (operating under the brand name Yoigo, and the 4th MNO in Spain, which already had in place an NRA to complement its own network) …[and which]… allowed it to become the 4th convergent operator in Spain*".[698]

690 Non-confidential minutes of a call with Digi of 25 April 2023, paragraph 6, Doc ID 3273.
691 Non-confidential minutes of a call with Digi of 25 April 2023, paragraph 6, Doc ID 3273.
692 Article 6(1)(c) Response, paragraphs 165-166.
693 Form CO, footnote 982 ("*OSP's FTTH footprint reaches [Orange's fixed network footprint]) as of the end of 2022*").
694 See Article 6(1)(c) Decision, paragraph 439 ("[...]").
695 MásMóvil internal document, ID MM-00201059, Doc ID 2667-12028.
696 MásMóvil internal document, ID MM-00931525, Doc ID 2661-8144.
697 Non-confidential minutes with Finetwork 2 February 2023, paragraph 13, Doc ID 2471.
698 Digi submission, 22 June 2023, *MNOs and MVNOs bargaining position to obtain access to mobile networks*, Doc ID 3618.

(714) Even if the Commission accepts the Parties' view that the fact that "*Telefónica is mandated to provide wholesale fixed access in regulated areas at the regulated price ... constitutes a de facto price ceiling for Telefónica, including in non-regulated areas*",[699] it remains the case that the regulated price (in the range of EUR [...] per subscriber per month)[700] is not considered by smaller operators as enabling them to compete effectively, as is evidenced by the fact that of the small operators, Digi is the only one that avails of such access to provide retail fixed internet services nationally, and only then at a substantially higher price than in areas where it has deployed its own network.

(715) While the Parties submitted market share forecasts for Digi based on 2022 net adds, the Commission does not consider that these market share forecasts based on historic data are appropriate to describe Digi's future position, because they ignore any reactions by competitors that may affect Digi. This is corroborated by an internal document of MásMóvil presentation assessing the competitive potential of "Small Operators" [Details of MASMOVIL's internal documents describing MASMOVIL's strategy].[701]

(716) Although Digi today relies on a wholesale agreement with Telefónica, such agreements are typically only concluded for a number of years. For example, Vodafone indicated that "*fixed and mobile wholesale access agreements are typically signed for a period between 3 and 5 years*."[702] Even if Digi was able to receive a renewed wholesale offer from Telefónica, such offer would be unlikely to contain better or equal pricing conditions compared to the terms that Digi has today (for the reasons indicated in section 9.4.3.2.3.1. above), which in any case are likely high, given Digi's differentiated retail pricing strategy of charging significantly higher prices in the areas where it relies on wholesale access to Telefónica's fixed network in order to pass on, at least part, of such wholesale cost.

(717) [Details of MASMOVIL's internal documents describing MASMOVIL's strategy].[703] Taken together, these suggest that Orange would not be likely to offer attractive wholesale conditions to Digi after the experience of giving [Details of the Parties' wholesale agreements] wholesale conditions to MásMóvil which fostered the latter's growth and competitive strength in the past.

(718) In view of Digi's further growth in the intervening years (and arguably greater competitive potential as a result), and the signing of the Transaction (which further aligns Orange and MásMóvil), these statements are likely to be even more true today than they were in 2020. In fact, in an Orange internal document drafted in February 2022 by Jean-Francois Fallacher, the Orange Spain CEO at the time, outlining a non-exhaustive list of strategic benefits of the Transaction for Orange, one of the reasons listed as [Details of Orange's internal documents describing Orange's strategy].[704] Indeed, the Transaction increases the retail business of the JV which will benefit from a larger customer base and an increased brand portfolio at the retail level and

699 Article 6(1)(c) Response, paragraphs 389 and 609.

700 See Form CO, footnote 1522 ("*NEBA costs are in the range of approximately [...] euro per line per month (split between [...] euro for the access cost, the rest being associated with the traffic cost") and Article 6(1)(c) Response, footnote 561 ("Depending on capacity or transmission charges that may be added, the regulated price could increase to EUR [...]*.

701 MásMóvil internal document, ID MM-00201059, Doc ID 2667-12028.

702 Response to RFI 1 to Vodafone, 2 June 2023, Q 12, Doc ID 3639.

703 MásMóvil internal document dated 10 February 2020, ID MM-00931525, Doc ID 2661-8144.

704 [Details of Orange's internal documents describing Orange's strategy].

hence, induce the JV to compete less aggressively at the wholesale level. Notably, the merger would result in a material increase in the downstream base of sales (compared to the standalone base of sales of the Parties separately). In the retail fixed internet market, the JV would become the largest operator in Spain by volume and second largest by revenue. As of 2022, it would have a market share materially above 30%.[705] In fact, the JV's share would be c. [30-40]% by volume, with an increment of [10- 20]%, and c. [30-40]% by value, with an increment of c. [10-20]%.

(719) The majority of respondents to the Phase I market investigation that expressed a view indicated that Orange and MásMóvil may not have the incentive to offer such access and/or increase wholesale prices following the Transaction.[706]

(720) The Commission considers that a deterioration in Digi's wholesale access conditions is likely to further weaken Digi's ability to compete. The Parties in their internal documents [Details of the Parties' internal documents describing the Parties' strategy], and this appears to be corroborated by its differentiated retail pricing strategy to pass on some of the wholesale cost to retail customers.

(721) It is the Commission's view that Digi, faced with an increase in its wholesale prices which may result from reduced competition at wholesale level following the Transaction, may be forced to increase its retail prices, at least in those areas where it relies on wholesale access to Telefónica's fixed network, today accounting for over 75% of the Spanish market. Therefore, the Commission considers that Digi's dependency on wholesale access will negatively impact its ability to compete with the Parties on the downstream retail market for fixed internet services in Spain.

(722) In light of the above, the Commission considers that any competitive constraint coming from Digi would not be sufficient to counteract the likely anti-competitive effects, such as the substantial likely price effects, stemming from the Transaction.

9.4.3.2.3.4.3. Conclusion

(723) In light of the above, the Commission concludes that it is unlikely that post-Transaction Digi or any of the other fixed internet operators would have the ability to counteract the likely anti-competitive effects of the Transaction.

9.4.3.2.4. The Parties are close competitors

(724) The Commission considers, contrary to the Parties' argument as set out in Section 9.4.2.1.2 above, that the Parties are close competitors, in that there is a sufficient degree of substitutability between their products so that the Transaction would give rise to significant price effects.[707] This finding is based on a consistent body of qualitative and quantitative evidence presented in the following paragraphs.

(725) The extent of closeness of competition between the merging parties is one of the relevant factors for the analysis of the likelihood of significant non-coordinated effects of a merger.[708] It is not required that the merging parties are each other's closest competitors for such likelihood to arise.[709] Neither it is required, as the Parties claim in the Article 6(1)(c) Response, that the Parties are "*closer to each other than to other competitors*".

705 See Non-Horizontal Merger Guidelines, paragraph 25.
706 Responses to questionnaire Q1 to competitors, question D.B.B.9.
707 Horizontal Merger Guidelines, paragraph 28.
708 Horizontal Merger Guidelines, paragraphs 26 and 28-30.
709 See section 9.4.1 on the applicable legal framework, in particular the judgment of the Court in the *CK Telecoms* case.

9.4.3.2.4.1. Diversion ratios

(726) The Horizontal Merger Guidelines explain that diversion ratios are one of the methods that can be used to assess the closeness of competition between the merging parties and the other market participants.[710] The diversion ratios indicate the extent to which sales lost by one of the parties are taken up by the other party or the remaining market participants. The Commission has applied this type of analysis in previous merger cases in the telecommunications sector.[711]

(727) The Commission considers that the fixed number portability data, which is combined with a switch of fixed internet broadband provider, submitted by the Parties, supports the hypothesis that the Parties are close competitors.

(728) The Commission considers that fixed number portability (“FNP”) data, which covers actual switching events from each operator to each other operator, provides reliable information on customer preferences and hence on the relative closeness of substitution between different FNOs. In particular, if one observes a large number of customers porting their line from Orange group to MásMóvil group, then this provides a good indication that MásMóvil is a close alternative for Orange customers, even if some of the observed switches are not driven by price changes. Port-in and Port-out data can approximate diversion ratios by measuring how many customers requested a number transfer from their previous provider to a new provider.[712] **Table 33** and **Table 34** below report total port outs and diversion ratios for Orange and MásMóvil in the retail supply of fixed internet access services.

(729) Using FNP data is in principle the most reliable source for switching behaviour and diversion ratios in the retail market for fixed internet under the premise that a sufficient majority of customers purchasing fixed internet services have a fixed line telephone number.

(730) Under this assumption, and as shown in **Table 33** below, the fixed number portability data indicates that customers lost by Orange switch most often to [...]. For each year of the period 2019-2022, the largest proportion of fixed number portability requests that included fixed internet that Orange received were made by customers switching to [...], with [30-40]% of all requests. This is by far the largest proportion in the market, as the second and third largest proportions requests were made by [...] (with a [20-30]% of all requests) and [...] (with [10-20]% of requests, less than half of MásMóvil requests). [...]. [713]

(731) [...] has been the main destination of Orange’s customers and there is only a small difference of [0-5]% between the diversion ratios of Orange to [...] from 2019 to

[710] Horizontal Merger Guidelines, paragraph 29.

[711] Commission decision of 2 July 2014 in case M.7018 – *Telefónica Deutschland/E-Plus*; Commission decision of 28 May 2014 in case M.6992 – *Hutchison 3G UK/Telefónica Ireland*; Commission Decision of 12 December 2012 in case M.6497 – *Hutchison 3G Austria/Orange Austria*.

[712] See Commission decisions of 28 May 2014 in case M.6992 – *Hutchison 3G UK/Telefónica Ireland*, Annex I, paragraph 83; and of 27 November 2018 in case M.8792 – *T-Mobile NL/Tele2 NL*, Annex A, paragraph 201. See also Opinion of Advocate General Kokott of 20 October 2022, *C-376/20 CK Telecoms*, paragraph 119.

[713] MásMóvil’s market shares implied by diversion ratios presented in **Tables 27 and 28**are [30-40]% in 2019, [30-40]% in 2020, [30-40]% in 2021 and [30-40]% in 2022. These market shares are higher than those provided by the Parties’, presented in **Table 5**. Implied market shares have been calculated as follows, taking 2022 as an example: MS=[Market shares].

2022.[714] Vice versa, customers lost by [...] to Orange amount to approximately almost [10-20]% of Orange's incoming customers in 2020-2022.

Table 33 Number of port-outs and diversion ratios from Orange to the destination groups in the retail supply of fixed internet access services market

		2019		2020		2021		2022	
Donor Group	Destination group	Port-outs	Diversion ratios	Port-outs	Diversion ratios	Port-outs	Diversion ratios	Port-outs	Diversion ratios
Orange	MásMóvil	[100,000-200,000]	[30-40]%	[100,000-200,000]	[30-40]%	[100,000-200,000]	[40-50]%	[50,000-100,000]	[30-40]%
	Telefónica	[100,000-200,000]	[20-30]%	[50,000-100,000]	[20-30]%	[50,000-100,000]	[20-30]%	[0-50,000]	[10-20]%
	Vodafone	[100,000-200,000]	[20-30]%	[50,000-100,000]	[20-30]%	[50,000-100,000]	[20-30]%	[50,000-100,000]	[20-30]%
	Digi	[0-50,000]	[0-5]%	[0-50,000]	[0-5]%	[0-50,000]	[5-10]%	[0-50,000]	[10-20]%
	Others	[0-50,000]	[0-5]%	[0-50,000]	[0-5]%	[0-50,000]	[0-5]%	[0-50,000]	[0-5]%
	Total	[400,000-500,000]	100,0%	[300,000-400,000]	100,0%	[200,000-300,000]	100,0%	[200,000-300,000]	100,0%

Source: Response to RFI 18 Q6 and Q7 – Diversion ratios by segment

Table 34: Number of port-ins and diversion ratios to Orange from donor groups in the retail supply of fixed internet access services market[715]

		2019		2020		2021		2022	
Destination Group	Donor group	Port-ins	Diversion ratios	Port-ins	Diversion ratios	Port-ins	Diversion ratios	Port-ins	Diversion ratios
Orange	MásMóvil	[0-50,000]	[10-20]%	[50,000-100,000]	[10-20]%	[50,000-100,000]	[10-20]%	[50,000-100,000]	[20-30]%
	Vodafone	[100,000-200,000]	[30-40]%	[100,000-200,000]	[30-40]%	[100,000-200,000]	[30-40]%	[50,000-100,000]	[30-40]%
	Telefónica	[200,000-300,000]	[50-60]%	[100,000-200,000]	[40-50]%	[100,000-200,000]	[40-50]%	[50,000-100,000]	[40-50]%
	Digi	[0-50,000]	[0-5]%	[0-50,000]	[0-5]%	[0-50,000]	[0-5]%	[0-50,000]	[0-5]%
	Others	[0-50,000]	[0-5]%	[0-50,000]	[0-5]%	[0-50,000]	[0-5]%	[0-50,000]	[0-5]%
	Total	[300,000-400,000]	100,0%	[300,000-400,000]	100,0%	[300,000-400,000]	100,0%	[200,000-300,000]	100,0%

Source: Response to RFI 18 Q6 and Q7 – Diversion ratios by segment

(732) The data in **Table 33** confirms that for every year of the period from 2019 to 2022 Digi was only the fourth operator to which customers of Orange would switch, after MásMóvil, Vodafone and Telefónica, with almost [0-5] times as many Orange customers switch to Orange than to Digi. Digi's limited role in the market is also suggested by **Table 34** which shows that Digi customers switching to Orange account for less than [0-5]% of all customers switching to Orange throughout 2019 to 2022, with most of Orange's incoming customers switching from Telefónica, Vodafone and MásMóvil.

714 See documents submitted to RFI 18, i.e. Q6 and Q7 - Diversion ratios by segment.

715 As FNP data for MásMóvil in the retail supply of fixed internet access services market is not available, the Commission uses port-ins data for Orange in the market for retail supply of fixed internet access services as a proxy. In principle, ports-in data on customers received by OSP mirrors ports-out data on departing customers from MásMóvil such that it is a suitable proxy if ports-out data is not available.

(733) The Parties did not provide information on diversion ratios from MásMóvil covering the retail supply of fixed internet access services market as such FNP data is not available.[716] Hence, in its computations the Commission has relied on port-ins data from Orange as a proxy as it believes this is the most suitable available metric.

(734) The Parties considered that FNP data represents only a portion of the actual switches by customers of fixed services because of a strong asymmetry between operators that offer fixed internet associated with fixed telephony services while other operators offer fixed telephony as optional.

(735) The Commission acknowledges that FNP data might not be fully representative for all operators but considers it representative for the Parties themselves as the Parties offer fixed internet associated with fixed line telephony. It is also representative for Telefónica and Vodafone.

(736) To evaluate diversion ratios for providers that do not necessarily automatically associate fixed internet services with fixed telephony, FNP data might be misleading if many contracts do not include fixed telephony services. As for other markets, [Details of Orange's internal documents describing Orange's strategy].

(737) Alternatively, the Commission could approximate diversion ratios in the fixed internet services with the diversion ratios of the market for FMC bundles, since FMC bundles contain fixed internet services, although it cannot be excluded that actual switching behaviour for FMC bundles is mainly, or at least partially, driven by mobile communication services and not by fixed internet services.

(738) An assessment whether the Parties are close competitors based on diversion ratios follows in section 9.4.3.2.4.1 below. The assessment of switching behaviour for FMC bundles, as far as it is applicable to the retail market for fixed internet services, confirms that the Parties are close competitors.

9.4.3.2.4.2. The Parties' Tariff Comparison and Hedonic Pricing Analyses

(739) The Parties submitted the Tariff Comparison and Hedonic Price Analyses to support the argument that the Parties are not close competitors (i.e., they are not closer to each other than other operators) and that neither Party can be considered an ICF as result of an aggressive pricing strategy.[717] These arguments are unfounded.

(740) First, the Parties' analysis is based on a flawed premise with regard to closeness of competition and the definition of ICF. As confirmed by the Court of Justice in CK Telecoms, closeness of competition does not require that the Parties are each other's closest competitors. Furthermore, there can be more than one ICF and an ICF does not have to compete particularly aggressively in terms of price.[718]

(741) Second, there is a wide body of evidence supporting the Commission's conclusion that the Parties are close competitors in the market for retail supply of fixed internet access services based on diversion ratios (Section 9.4.3.2.4.1), internal documents and the results of the market investigation (Section 9.4.3.2.4.3). In addition, there is a wide body of evidence supporting the Commission's conclusion that MásMóvil is an ICF (Section 9.4.3.2.5).

(742) Third, Parties' Tariff Comparison and Hedonic Pricing Analyses are methodologically flawed. As further discussed in Section 9.4.3.1.4.2 above, both

---

716 Article 6(1)(c) Response, paragraph 342.

717 SO Reply, paragraph 318 et seq, Article 6(1)(c) Response, Annex 6(1)(c) 2.1a, Annex 6(1)(c) 2.2a.

718 See section 9.4.1 on the applicable legal framework.

analyses omit important and relevant tariff attributes and do not take into account non-price responses and quantities. In addition, the Tariff Comparison Analysis artificially divides tariffs in configurations, which leads to biased comparisons.

(743) Fourth, the Parties' Tariff Comparison and Hedonic Pricing Analyses do not support the conclusions attributed to them by the Parties. As further discussed in Section 9.4.3.1.4.2 above, the analyses do not allow the conclusion that similar priced tariffs are closer or that cheaper tariffs are more competitive, because important tariff characteristics are omitted.

9.4.3.2.4.3. Internal documents and the results of the market investigation

(744) The Parties' internal documents corroborate the view that the Parties are in close competition with one another. They indicate that the Parties treat each other as benchmark competitors against whom they measure their performance (section 9.4.3.2.4.3.1) and that the Parties closely compete in the different sections of the market (section 9.4.3.2.4.3.2).

9.4.3.2.4.3.1. The Parties treat each other as benchmark competitors against whom they measure their performance

(745) [Details of Orange's internal documents describing Orange's benchmark of other operators' brand].[719] [Details of Orange's internal documents describing Orange's benchmark of other operators' brand]:

Figure 36 1. [Details of Orange's internal documents describing Orange's strategy]

[...]

Source: [Details of Orange's internal documents describing Orange's strategy].

Figure 37 [Details of Orange's internal documents describing Orange's strategy]720

[...]

Source: [Details of Orange's internal documents describing Orange's strategy].

(746) Conversely, MásMóvil also effectuates periodic analysis of the fixed market, in which Orange's brands are the benchmark to which MásMóvil measures its performance.[721] As MásMóvil recognizes in internal documents [Details of MASMOVIL's internal documents describing MASMOVIL's strategy].[722]

(747) As can be seen in different internal documents, [Details of MASMOVIL's internal documents describing MASMOVIL's strategy]:

Figure 38 [Details of MASMOVIL's internal documents describing MASMOVIL's strategy]

[...]

Source: [Details of MASMOVIL's internal documents describing MASMOVIL's strategy].

(748) The Commission considers that the fact that in the same documents, the Parties, in addition to each other, discuss and monitor also Telefónica and Vodafone does not exclude the fact that the Parties compete closely. Rather, in a concentrated market

719 [Details of Orange's internal documents describing Orange's strategy].
720 [Details of Orange's internal documents describing Orange's strategy].
721 See documents submitted to RFI 1, e.g., Q53.10, Q53.13, Q53.19, Q53.28, Q53.30, Q53.35, Q53.49, and to RFI 15: e.g. Q1.88 or Q1.91.
722 MásMóvil internal document, *2200906_mm_kili_second_consolidated_rfi.docx*, ID MM-00076065, Doc ID 2663-76065.

such as the Spanish one, monitoring of all major players seems to be a regular and prudent business practice.

9.4.3.2.4.3.2. The Parties closely compete in the different sections of the market

(749) The market investigation and internal documents confirm not only that the Parties compete closely generally speaking, but they also show that the Parties largely position themselves strategically ensuring the existence of a competitor/brand for each of the different type of offers and customer needs respectively.

(750) Operators in Spain, and MásMóvil in particular, operate with many brands focusing on different segments of the market (high-end/mid-end/low-end) and serving different customer needs.

(751) Both Orange and MásMóvil provide fixed telecommunication services on a standalone basis as well as part of multiple-play bundles with different add-ons, including Pay-TV. As assessed in the following paragraphs, the evidence in internal documents shows that the Parties have similar business strategies in the provision of retail fixed telecommunications services to private customers in Spain, with brands focusing on the different segments of the market. This is supported by the views of market participants, as well as by the Parties' internal documents.

(752) Even though there is not a clear-cut definition of the high-end, mid-end and low-end of the market, as evidenced by the Parties' internal document included in **Figure 39** below, [Details of MASMOVIL's internal documents describing MASMOVIL's strategy]:

Figure 39 [Details of MASMOVIL's internal documents describing MASMOVIL's strategy]

[...]

Source: [Details of MASMOVIL's internal documents describing MASMOVIL's strategy]

(753) As regards the high-end segment of the market, comprising the offers with highest FTTH speed in the market, it is important to note that for fixed telecommunication services offered as part of multiple-play bundles, the Parties distinguish bundles with Premium Pay-TV football content, which entails an additional level of segmentation (premium bundles with TV and/or football) that will be addressed in Sections 9.4.3.3. and 9.4.3.4.

(754) The internal documents of the Parties indicate that both of them consider that [Details of the Parties' market intelligence based on their internal documents].

(755) In this regard, MásMóvil considers that [Details of MASMOVIL's internal documents describing MASMOVIL's strategy].[723] KKR, one of the co-owners of MásMóvil, considered, [Details of MASMOVIL's internal documents describing MASMOVIL's strategy]:

Figure 40 [Details of MASMOVIL's internal documents describing MASMOVIL's strategy]

[...]

Source: [Details of MASMOVIL's internal documents describing MASMOVIL's strategy]

(756) [Details of MASMOVIL's internal documents describing MASMOVIL's strategy].

723 Internal documents - *MásMóvil Long form recom_v5.pdf*, ID MM-00612974, Doc ID 2669-90024.

(757) According to internal documents of MásMóvil [Details of MASMOVIL's internal documents describing MASMOVIL's strategy].[724]

(758) According to internal documents of Orange [Details of Orange's internal documents describing Orange's strategy] .

Figure 41 [Details of MASMOVIL's internal document describing MASMOVIL's strategy]

[...]

Source: [Details of MASMOVIL's internal document describing MASMOVIL's strategy]

(759) As explained above in Section 7, price is the most important parameter of competition on the Spanish market for the supply of retail fixed telecommunication customers. The Commission finds that Orange and MásMóvil compete closely on the main parameter of competition – price – in the different segments of the market.

(760) Indeed, as it can be seen in the internal documents quoted above,[725] [Details of MASMOVIL's internal documents describing MASMOVIL's strategy].

(761) As mentioned in the previous paragraphs and as shown by Orange's internal documents, [Details of Orange's internal documents describing Orange's strategy].[726]

Figure 42 [Details of MASMOVIL's internal document describing MASMOVIL's strategy].

[...]

Source: [Details of MASMOVIL's internal document describing MASMOVIL's strategy].

(762) Internal documents of MásMóvil, also confirm that both compete closely in the FMC segment without premium Pay-TV football content:

Figure 43 [Details of MASMOVIL's internal documents describing MASMOVIL's strategy].

[...]

Source: [Details of MASMOVIL's internal documents describing MASMOVIL's strategy].

(763) Even if Digi may be growing, including from customers switching away from the Parties, such gains are primarily in the low-end of the market. [Details of Orange's internal documents describing Orange's assessment of portability data].[727] [Details of Orange's internal documents describing Orange's assessment of portability data]. In the mid-end sections of the market, as internal documents of Orange demonstrate, MásMóvil represents up to [...] of customers leaving Orange in 2022, meanwhile, portability to Digi in these segments of the market only ranks between [...] [Details of Orange's internal documents describing Orange's assessment of portability data].

Figure 44 [Details of Orange's internal documents describing Orange's strategy]

[...]

Source: [Details of Orange's internal documents describing Orange's strategy]

---

724 MásMóvil internal document, ID MM-00076065, Doc ID 2663-76065.

725 With regard to fixed internet customers of the Parties, a share of [80-90]% MásMóvil's customers and [80-90]% of Orange's customers contract their fixed internet services as part of an FMC bundle. Therefore, FMC evidence is a good proxy to assess closeness in the retail fixed services market.

726 Internal document from Orange - Project Kili – Commercial DD report, ID MM-00745494.

727 Convergent offers are representative of the fixed telecommunication market, as 92.5% of the fixed market in Spain is in convergent offers.

Figure 45 [Details of Orange's internal documents describing Orange's strategy].

[...]

Source: [Details of Orange's internal documents describing Orange's strategy].

9.4.3.2.4.3.3. The Parties are considered close competitors by market investigation respondents

(764) The respondents to the market investigation confirmed that Orange and MásMóvil are close competitors. First, the vast majority of respondents to the Phase I market investigation consider that Orange and MásMóvil compete against each other in the retail fixed telecommunication market.[728] In this regard, some operators note that "*both Orange and particularly MásMóvil have played an important role in exerting competitive constraints upon each other*"[729] and that "*both companies have offers covering most of ranges of the market, with different brands and services approach*"[730].

(765) When asked which brands compete closely with Orange's brands, at least one MásMóvil brand was indicated by all but one competitor respondents who provided an answer.[731] The same was true in the opposite direction – Orange's brands were indicated as closely competing with MásMóvil's brands by a majority of respondents.[732] These findings are in line with the Commission's findings in the internal documents of the Parties.

9.4.3.2.4.4. Conclusion

(766) In light of the above, the Commission concludes that Orange and MásMóvil are close competitors in the retail fixed telecommunication market.

9.4.3.2.5. The important role played by MásMóvil on the market

(767) The Commission considers that MásMóvil exerts significant competitive pressure on other fixed internet operators and has acted as an ICF and in any event is an important competitive constraint on the retail fixed internet access services market in Spain and would likely to continue to exert an important constraint in the absence of the Transaction. The Transaction would thus reduce competitive pressure that exists on the market because of the important role that is played by MásMóvil.[733]

(768) This conclusion is supported by the results of the market investigation, Orange's internal documents, as well as the market share and gross add data provided, all of which provide evidence of MásMóvil being an important competitor on the mobile telecommunication services market.

(769) Contrary to the arguments made by the Parties, the Commission considers MásMóvil's market shares and their evolution to be a relevant indication of its market position and relative strength. As can be seen in **Table 7** above, MásMóvil's market shares on the market for the retail supply of fixed internet services have been steadily growing. MásMóvil has been number [...] operator in terms of net adds in 2020 and in 2021. In 2022, it continued to have considerable net adds, [...]. Similarly, when looking at gross adds, generally MásMóvil was the number [...] operator

728 Responses to questionnaire Q1 to competitors, question D.A.A.2.
729 Response to questionnaire Q1 to competitors, question D.A.A.2, Digi's response, Doc ID 2834.
730 Response to questionnaire Q1 to competitors, question D.A.B.2.
731 Responses to questionnaire Q1 to competitors, question D.A.A.9.
732 Responses to questionnaire Q1 to competitors, question D.A.A.17.
733 See Horizontal Merger Guidelines, recital 25.

adding new fixed lines in 2020 and 2021 and [...]. In effect, MásMóvil's share of gross and net adds surpasses its actual position on the market.

(770) The Commission's initial assessment based on the win/loss data provided by the Parties is that an outsized proportion of all switchers choose MásMóvil as their new provider, which suggests that the switching share of MásMóvil is materially larger than its actual market shares.[734] This is also consistent with MásMóvil's market share evolution.

(771) Respondents to the market investigation that expressed a view described MásMóvil first and foremost as fast-growing. One respondent to the market investigation described it as a 'maverick' on the Spanish retail market for fixed internet services, explaining that has been proposing a number of price-attractive and innovative offers for fixed Internet access services and convergent offers.[735] A majority of competitor respondents considered MásMóvil a particular constraint on the retail market for fixed internet services.[736] These findings are in line with a recent CNMC decision concerning MásMóvil's takeover of Euskaltel which describes MásMóvil as a 'maverick' who energized the retail telecommunications market with its low-cost offers.[737] Contrary to what the Parties claim,the Spanish decision is not outdated and is reflecting of market reality. In this respect, it is sufficient to note that the Decision is dated June 2021 and the Commission has not observed any significant changes in the market dynamics since then. Given that there could be more than one important competitive force on the market,[738] the growing role of Digi on the market should not necessarily be taken as an indication that the findings in the Spanish decision are no longer pertinent.

(772) Although MásMóvil's own fixed internet network is relatively small, given the popularity of convergent offers in Spain, it could use its strength as a mobile operator to boost its growth on the retail fixed internet market. The bargaining power that MásMóvil holds on the retail market for the supply of mobile telecommunication services (see section 9.4.3.1.5) might also be putting it in an advantageous position when it comes to negotiating wholesale access agreements for the fixed broadband access. Also, MásMóvil's network has more fibre than Vodafone's network.[739] In addition, MásMóvil managed to expand its network in low-density areas where no other or very few competitors had reached.[740] [MASMOVIL's commercial agreements].[741] [MASMOVIL's commercial agreements].[742] As of the end of 2022, MásMóvil's own FTTH footprint was supplemented by additional [...] BUs

[734] MásMóvil's market shares implied by diversion ratios presented in Tables **27** and **28** are [30-40]% in 2019, [30-40]% in 2020, [30-40]% in 2021 and [30-40]% in 2022. These market shares are higher than those provided by the Parties', presented in Table 5. Implied market shares have been calculated as follows, taking 2022 as an example: MS=[...].

[735] Responses to questionnaire Q1 to competitors, question D.A.B.8, Doc ID 2834.

[736] Responses to questionnaire Q1 to competitors, question D.A.B.31.

[737] See CNMC case C/1181/21 MÁSMÓVIL / EUSKALTEL, paragraph 47. The CNMC's assessment related to both mobile and fixed internet retail markets.

[738] See section 9.4.1 in particular the findings of the Court in the CK telecoms case.

[739] Non-confidential minutes of a call with Vodafone of 20 December 2022, paragraph 18, Doc ID 2455.

[740] Non-confidential minutes of a call with Digi of 29 November 2022, paragraph 20, Doc ID 1846.

[741] Non-confidential minutes of a call with Vodafone of 20 December 2022, paragraph 7, Doc ID 2455: "*IRU agreements are common in the Spanish market. Typically, the user has to contribute towards 50% of the network investment costs… and, in exchange, it benefits from a long-term irrevocable right of use of the network under owner economics conditions.* [Details of MASMOVIL's internal documents describing MASMOVIL's strategy]..

[742] MásMóvil Long form recom_v5.pdf, slide 20; ID MM-00612974, Doc ID 2669-90024.

[MASMOVIL's commercial agreements].[743] Together with own FTTH infrastructure, it amounts to a total of c. [...] BUs, [...].

(773) While the Parties point to the fact that MásMóvil recently divested parts of its fixed network, this might simply be a reflection of wider market trends, as suggested by the Parties in 6(1)(c) Response.[744] According to that article, Telefónica has similarly sold 45% of its rural fixed network and Vodafone is currently looking for private equity investors in the hope of achieving a similar fixed network sale.

(774) As indicated above,[745] the majority of fixed internet access services in Spain are provided as part of multiple-play bundles. For this reason, multi-brand offering becomes relevant for the assessment of the competitive constraint that MásMóvil exerts on the market. [Details of MASMOVIL's internal documents describing MASMOVIL's strategy].[746] In essence, multi-brand strategy allows it to effectively target various customer segments[747] and reach a wider customer base. In that respect, MásMóvil has been able to offer not only 'bare' multiple-play bundles at the low-end of the market, but also premium convergent offers, which contributes to its strength on the fixed internet access market.

(775) When it comes to service quality, a Cinven report for investors indicates that MásMóvil stands out in terms of network performance and has a leading fixed network in Spain in terms of download and upload speeds, as well as latency. This high network performance is described as one of the pillars of commercial success of MásMóvil.[748]

(776) MásMóvil's large network of stores across Spain further contributes to its strength on the market. [Details of MASMOVIL's internal documents describing MASMOVIL's strategy],[749] [Details of MASMOVIL's internal documents describing MASMOVIL's strategy].

Figure 46 [Details of MASMOVIL's internal documents describing MASMOVIL's strategy]

[...]

Source: [Details of MASMOVIL's internal documents describing MASMOVIL's strategy]

(777) In view of the above elements, taken as a whole, the Commission considers that the Transaction may result in the elimination of an ICF and in any event reduce competitive pressure by eliminating an important competitive constraint from the Spanish retail market for the supply of fixed internet access services.

9.4.3.2.6. Any entry would not be likely, timely and sufficient

(778) The Commission considers that any potential entrants on the retail market for fixed internet access services would face significant barriers to entry. Any threat to entry would not be sufficiently strong and timely to discipline the JV.

(779) Although the Parties claim that the barriers to entry on this market are low, they themselves acknowledge that fibre deployment is only possible with sufficient

743 Reply to RFI 20, paragraph 4.1.
744 Article 6(1)(c) Response, FN 145: Cinco Días, "*Vodafone signs Evercore to sell its fixed network in Spain*", 3 October 2022, available at: https://cincodias.elpais.com/cincodias/2022/10/03/companias/1664816331_973833.html, Doc ID 5649.
745 Section 7.1.3.
746 MásMóvil PE presentation to lenders (Feb 2020), slide 5. ID MM-00933576, Doc ID 2661-10195.
747 See e.g. MásMóvil Long form recom_v5.pdf, slide 8; ID MM-00612974, Doc ID 2669-90024.
748 MásMóvil Long form recom_v5.pdf, slide 18, ID MM-00612974, Doc ID 2669-90024.
749 MásMóvil internal document, ID MM-00306117, Doc ID 2664-47320.

financial resources and a sufficient customer base to ensure a payback on the roll-out investments.[750]

(780) In line with that, a majority of competitor respondents to the market investigation who expressed a view considered entry on the fixed internet retail market difficult or very difficult.[751] In that respect, respondents pointed to the investments necessary to deploy a fixed network, authorisations and licensing, economies of scale, customer loyalty and brand recognition, in addition to the need to have a convergent offer to be able to compete on the Spanish market.[752]

(781) Moreover, a strong majority of competitor respondents considered it essential to be able to offer fixed internet services via fibre/FTTH already today,[753] thus implicating that wholesale access for access seekers might be limited as Vodafone's network consists mostly of HFC, which would not ensure competitiveness to potential access seekers considering entering the market.

(782) Admittedly, regulated access somewhat lowers barriers to entry in particular areas of Spain. However, the regulated area, where Telefónica's historical obligations remain only includes 30% of the population (7.435 municipalities)[754] and has been decreasing over time.[755] In addition, Telefónica is required to offer wholesale access to its infrastructure (i.e. fibre and copper pair infrastructure, as well as ducts and passive infrastructure) for the development of FTTH networks to other actors in the whole Spanish territory.[756] As a result of this obligation, the deployment cost of FTTH networks for a new entrant or for an active player that wants to expand to another part of Spain is reduced.

(783) As regards recent examples of entry, recent entrants, such Finetwork, Avatel, PTV/Procono or Adamo, continue to hold limited market shares on the fixed internet access retail market, and operating only regionally mostly with their own limited fixed network, which is illustrative of the difficulty of entering at scale, even as an access seeker. While Digi managed to build a more expansive fixed network, it retains a moderate market share on the retail market for the supply of fixed internet access services ([0-5]% by volume and [0-5]% by value as of 2022). This might be in part due to the preference of Spanish customers for mobile-fixed convergent offers.

(784) In that regard, the Commission disagrees with the Parties and considers that the high degree of convergence on the Spanish market contributes to the difficulty of entering the retail market. Competing with a standalone fixed offering is difficult on the Spanish market, given the strong customer preference for bundled offers and the resulting narrow potential customer base for standalone offers. At the same time, offering mobile services on top of the fixed offer raises additional technical and financial requirements (see section 9.4.3.1.6 above on the difficulties of entering retail market for mobile telecommunication services). Having to be able to provide

750 Form CO, paragraph 427.
751 Responses to questionnaire Q1 to competitors, question D.A.B.3.
752 Responses to questionnaire Q1 to competitors, question D.A.B.4.
753 Responses to questionnaire Q1 to competitors, question D.A.B.33.
754 CNMC 2022 report – Telecommunications and Audiovisual Sector Economic Report 2022, page 118; CNMC decision dated 6 October 2021, ANME/DTSA/002/20/MERCADOS ACCESO LOCAL CENTRAL, published in the Official bulletin on 14 October 2021, BOE-A-2021-17097. Regulated access applies to a majority of municipalities, as it was deregulated in 696 municipalities (where 70% of the population lives).
755 See section 7.1.2
756 See https://www.cnmc.es/ambitos-de-actuacion/telecomunicaciones/concrecion-desarrollo-obligaciones

an additional service in order to be an effective competitor in respect of the first service will always be an additional hurdle to pass for a prospective new entrant. In that regard, competitor respondents to the market investigation indicated that operators who lack direct and immediate access (or immediate access at reasonable prices) to the inputs (i.e., network) needed to bundle convergent services will not be able to provide multiple-play bundles and to compete in the Spanish telecommunications market.[757]

9.4.3.2.7. Buyer power

(785) According to the Horizontal Merger Guidelines, the competitive pressure on a supplier is not only exercised by competitors but can also come from its customers. Even firms with very high market shares may not be in a position, post-merger, to significantly impede effective competition, in particular by acting to an appreciable extent independently of their customers, if the latter possess countervailing buyer power. Countervailing buyer power in that context should be understood as the bargaining strength that the buyer has vis-à-vis the seller in commercial negotiations due to its size, its commercial significance to the seller and its ability[758].

(786) The Commission does not consider that customers have any countervailing buyer power vis-à-vis the JV to offset the anti-competitive effects of the Transaction given the fragmented nature of their demand. They do not negotiate their fixed internet contracts on an individual basis and their individual subscription value would be of no material commercial significance to the JV.

(787) Equally, regardless of the exact degree of customer loyalty, while in some areas of Spain customers may be able to switch internet providers without too much difficulty, this is unlikely to afford customers a significant degree of buyer power. In fact, if following the Transaction the JV and the other operators would lack the incentives to vigorously compete and would likely raise prices, customers who could switch fixed internet (broadband) operator, would be unable to negotiate better terms with any operators.

(788) Furthermore, during the market investigation, no market participant raised any countervailing buyer power of customers.

(789) The Commission therefore concludes that buyer power does not constitute a countervailing factor that would offset the likely anti-competitive effects of the Transaction in relation to the provision of retail fixed internet access services.

9.4.3.2.8. Expected negative impact of the Transaction

(790) As set out in the Horizontal Merger Guidelines, the larger the increase in the sales base on which to enjoy higher margins after a price increase, the more likely it is that the merging firms will find such a price increase profitable despite the accompanying reduction in output.[759]

(791) This is especially important when assessing the potential impact of the Transaction as based on evidence from the market investigation and the Parties' own submissions price is the main parameter of competition in retail telecommunication markets in Spain, with Spanish retail consumers being particularly price sensitive. In the Form CO, the Parties submit that *"in Spain, price has taken on a primary importance in*

---

757 Responses to questionnaire Q1 to competitors, question D.A.D.6.

758 Horizontal Merger Guidelines, paragraph 64.

759 Horizontal Merger Guidelines, paragraph 27.

customer's choice". [760] The Parties refer to a CNMC Consumer survey indicating that price is one of the main factors that customers identify as influencing their choice of operator. [761] Moreover, when asked to rank a list of alternative parameters of competition, "price" was ranked first more than any other parameter, notably by around 80% of respondents,[762] with one such respondent further outlining that *"price and promotions are key drivers in the Spanish market."*.[763]

(792) With this in mind, the Commission used data provided by the Parties to estimate to what extent the Transaction would be likely to lead to price increases, and the likely magnitude of any such increases. If diversion ratios between the Parties' brands as well as contribution margins are high, the incentive to increase price after internalising the competition between the Parties is also high.

(793) As explained in Section 9.4.3.1.8, the GUPPI provides a first measure of the extent to which the JV has an incentive to raise price. Alternatively, the CMCR asks what level of marginal cost reduction is required for each of the JV's products to exactly offset the incentive to raise price.[764] GUPPIs and CMCRs, which the Commission similarly referred to in several past merger decisions involving the telecoms sector,[765] have been computed using the Parties' diversion ratios based on FNP data, the Parties' contribution margins, and average revenue per user (ARPU) as measure of the Parties' average retail prices.[766] From the contribution margins proposed by the Parties[767], the Commission excluded certain cost items that were not considered to vary directly with the number of subscribers.[768] As set out in Annex A, which forms an integral part of this Decision, the exclusion of these items is appropriate in view of the insufficiency of the explanations, and/or lack of evidence provided by the Parties that these costs are truly variable, nor have the Parties' shown that these items were universally accepted by the Commission in past merger decisions involving the telecoms sector.

(794) **Table 35** below suggests that the Transaction would lead to substantial GUPPIs in the market for the retail supply of fixed internet access services of [10-20]% for Orange and [10-20]% for MasMovil based on 2022 data. The marginal cost reduction (relative to prices) needed to prevent upward pricing pressure (CMCR) is [10-20]% for Orange and [20-30]% for MásMóvil based on 2022 data.

Table 35 GUPPI and CMCR in the market for the retail supply of fixed internet access services.

	Orange	MásMóvil
GUPPI	[10-20]%	[10-20]%
CMCR (relative to prices)	[10-20]%	[20-30]%

Source: Commission assessment (Annex A, Section 2.3.1.)

760 Form CO, paragraph 480.
761 Form CO, paragraph 479 – 486.
762 Response to questionnaire Q1 to competitors, question D.A.A.5.
763 Response to questionnaire Q1 to competitors, question D.A.A.6, Doc ID 2773.
764 See Annex A, Section 2.1.
765 See for example Commission decisions of 27 November 2018 in case M.8792 – T-Mobile NL/Tele2 NL, Annex A, paragraph 20 et seq.
766 See Annex A, Section 2.2.
767 See Response to RFI 25.
768 As explained in Annex A, Section 2.2.2, this concerns cost items related to [Parties' own methodology to estimate contribution margins].

(795) Moreover, even if the Commission were not to question, and were to accept in full, the contribution margins submitted by the Parties, the likely price effects would in any event be substantial. Accepting the Parties' margin figures in full, which would not be appropriate for the reasons outlined, the GUPPI would remain substantial, [5-10]% and [10-20]% for Orange and MásMóvil respectively, and the CMCR would likewise be sizeable, [10-20]% and [10-20]% for Orange and MásMóvil respectively.[769]

(796) Therefore, the Commission concludes that the Transaction will lead to substantial upward pricing pressure in the market for retail supply of fixed internet services to the detriment of consumers.

(797) Consistent with the above, the majority of competitor respondents that expressed a view considered that the Transaction would have a negative impact, in terms of increases in prices and/or decreases in quality of services provided.[770] As in case of the market for the retail supply of mobile telecommunication services, consumer association, FACUA, considered that on the market for the retail supply of fixed internet services the Transaction would promote oligopoly in Spain, with companies not being interested in competing.[771] Similarly, some of the competitor respondents expressed concerns about the level of market concentration with one stating that "*competition between the brands owned by both operators will become 'concerted' and in sum effectively decrease price / value competition in the market*."[772]

(798) Some market participants considered that the JV would effectively hold a duopoly at the wholesale level together with Telefónica, as Vodafone's network mainly relies on HFC.[773] In this respect, the market investigation confirmed that having (access to) fibre/FTTH connection is increasing becoming essential,[774] implying that this would have an effect on the access seekers' ability to compete with the JV at the retail level.

(799) The Commission's own assessment and the views of market participants are further corroborated by the Parties' own internal documents.

(800) Notably, in an Orange internal document drafted in February 2022 by Jean-Francois Fallacher, the Orange Spain CEO at the time, outlining a non-exhaustive list of strategic benefits of the Transaction for Orange, one of the reasons given in favour of the Transaction was because a [Details of Orange's internal documents describing Orange's strategy][775] [Details of Orange's internal documents describing Orange's strategy].[776] [Details of Orange's internal documents describing Orange's strategy].[777]

(801) In the context of the Commission's review of the Transaction the Parties have avoided claiming that the Transaction would not lead to a price increase, limiting themselves to pointing out that "*the Parties have not explored revenue synergies during the due diligence process*."[778] However, internal discussions in relation to pitches toward lenders and rating agencies paint a more concrete picture in this

769 See Annex A, Section 2.3.2.
770 Responses to questionnaire Q1 to competitors, question E.5.
771 Response to questionnaire Q1 to competitors, question E.6, Doc ID 2956.
772 Response to questionnaire Q1 to competitors, question E.6, Doc ID 3624.
773 Response to questionnaire Q1 to competitors, question D.B.B.3 and D.B.B.4.
774 Response to questionnaire Q1 to competitors, question D.A.B.33 and D.A.B.35.
775 [Details of Orange's internal documents describing Orange's strategy].
776 [Details of Orange's internal documents describing Orange's strategy]..
777 Orange internal document, ID ORANGE-EC-RFI22-00906388, Doc ID 2687-96915.
778 Form CO, paragraph 1446.

regard. [Details of Orange's internal documents describing Orange's strategy][779] [Details of Orange's internal documents describing Orange's strategy]:

– [Details of Orange's internal documents describing Orange's strategy]

– [Details of Orange's internal documents describing Orange's strategy]

– [Details of Orange's internal documents describing Orange's strategy]

– [Details of Orange's internal documents describing Orange's strategy]

(802) In light of the above, the Commission has come to the view that the Transaction would be expected to have a negative impact, and lead to substantial upward pricing pressure, in the market for retail supply of fixed internet services to the detriment of consumers.

9.4.3.2.9. Efficiencies

(803) The Commission considers that negative effects stemming from the Transaction are not likely outweighed by efficiencies, as further discussed in Section 9.6.

9.4.3.2.10. Conclusion

(804) Based on the above, the Commission has come to the view that the Transaction would significantly impede effective competition in a substantial part of the internal market as a result of non-coordinated anti-competitive effects on the market for retail fixed internet (broadband) access services in Spain.

9.4.3.3. Hypothetical market for the retail supply of multiple-play bundles (and hypothetical market segment for the retail supply of multiple-play bundles without premium Pay-TV football content)

(805) The Commission has come to the view that the Transaction would significantly impede effective competition in a substantial part of the internal market resulting from horizontal non-coordinated effects on the hypothetical Spanish retail market for multiple-play bundles, including FMC and all other possible sub-segmentations (2P, 3P, 4P, 5P). This is because (i) the Parties' combined market share is high and the increment as a result of the Transaction is significant (Section 9.4.3.3.1.), (ii) remaining large national network operators might have less incentives to compete (section 9.4.3.3.2), (iii) competitive constraint from smaller operators is limited (section 9.4.3.3.3), (iv) the Parties are close competitors (section 9.4.3.3.4), (v) of the important role played by MásMóvil on the market (section 9.4.3.3.5) and (vi) expected negative impact of the Transaction on prices and/or quality of service (section 9.4.3.3.8).

(806) In addition, the Commission considers that the reduction of the competitive pressure resulting from the Transaction is not likely to be counteracted by other competitive constraints such as potential entry (section 9.4.3.3.6), or buyer power (section 9.4.3.3.7). Also, as explained in more detail in section 9.6 below, the Commission notes that the Phase I market investigation, as well as evidence collected during its in-depth Phase II investigation, casts doubt on the Parties' arguments that the Transaction would generate significant efficiencies that could outweigh the negative effects of the Transaction.

779 Orange internal document, ID ORANGE-EC-RFI22-00778378, Doc ID 2687-26129.

9.4.3.3.1. The Parties' combined market share and HHI are high and the increment is significant

(807) The Commission considers that the Parties' combined market shares and HHI are high, as is the increment in market shares and HHI resulting from the Transaction, and the Transaction would create a new market leader on the hypothetical retail market for the supply of multiple-play bundles in Spain in terms of subscribers.

(808) First, the combined market shares of the Parties are high. Based on share data provided by the Parties, as set out in section 9.2 above, on the market for the retail provision of multiple-play bundles, the JV would have a share of [40-50]% by volume, which could be indicative of market power, and [30-40]% by value post-Transaction. In fact, the Transaction would create a new market leader on the hypothetical Spanish retail market for multiple-play bundles in terms of number of subscribers. By comparison, Telefónica held [30-40]% by volume and [40-50]% by value in 2022. However, the Commission notes that over the last four years, Telefónica's market share in terms of revenues has been steadily decreasing, with a decline of [0-5] % between 2019 and 2022. At the same time, Vodafone, the third biggest player on the market would be less than half the size of the JV, with [10-20]% share by volume in 2022. The next biggest operator, Digi, despite continued growth, would be more than [5-10l] times smaller than the JV by the number of subscribers and nearly [10-20] times smaller by revenue based on 2022 data.

(809) The situation is even more pronounced when considering the sub-segment of multiple-play bundles without premium Pay-TV football content in Spain for residential and business customers. This sub-segment accounts for [5-10 billion] by revenue and [13-14 million] bundles in 2022. Based on share data provided by the Parties, as set out in section 9.2 above, on this possible market, the JV would have a share of [40-50]% by volume and [40-50]% by value. The JV would become the largest player in terms of number of bundles, and also largest in terms of revenues post-Transaction. The current incumbent operator, Telefónica, , would no longer be the market leader, but rather would become the second player in this market, being much smaller than the JV, with [20-30]% by volume and with [20-30]% by revenue. The combined market shares, which exceed [40-50]%, could be indicative of market power.

(810) Second, the increment in market share would also be significant in the hypothetical retail market for the supply of multiple-play bundles (with an increment of [10-20]% by volume and [10-20]% by value). Pre-Transaction, the Parties were two strong players of similar size in terms of subscribers on the retail market for the supply of multiple-play bundles in Spain. As indicated in Section 9.3, the post-Transaction HHI on the potential market of retail supply of multiple-play bundles, the HHI is particularly high: [3000-4000] based on subscribers and [3000-4000] based on revenues after the Transaction with an increase of [500-1000] and [500-1000] respectively.

(811) The increment is even higher on the sub-segment of multiple-play bundles without premium Pay-TV football content (with an increment of [20-30]% by volume and [20-30]% by value). In fact, the Parties' market shares differed only [0-5] percentage points by volume in 2022, with the increment increasing over the past 4 years. The HHI is also important on the potential markets of retail supply of multiple-play bundles without premium Pay-TV football, namely [3000-4000] based on bundles and [3000-4000] based on revenues. In this market, the change in HHI pre- and post-

Transaction would also be considerable and higher than on the market of retail supply of multiple-play bundles.

(812) Orange and MásMóvil's importance on the mobile and fixed markets translates into strength on the multiple-play bundles market. In fact, given the popularity of convergent offers in Spain,[780] their strength on the mobile and fixed internet retail markets are in large part due to the popularity of their convergent offers.

(813) Orange is currently a well-established telecommunications player in Spain, being one of the strongest players on the retail market for the supply of multiple-play bundles in Spain. Indeed, the vast majority of market participants who expressed a view in the course of the market investigation consider that Orange is an "*established*" retail multiple-play bundles player.[781] Orange provides multiple-play bundles based on its own nation-wide mobile and fixed networks; to residential customers and to non-residential customers including tailor-made solutions for large accounts.[782] Orange provides these services under the Orange brand, Jazztel and Simyo brands. The Orange brand is a rich multiple-play bundles proposition relying notably on offers that include premium TV content. Jazztel and Simyo brands also operate in this market, but to a lesser extent.[783] In addition, Orange is described by the Parties to rating agencies as a [Details of the Parties' internal documents describing the Parties' strategy] .[784] In terms of financial performance, according to the same presentation to the rating agencies, Orange as a [Details of the Parties' internal documents describing the Parties' strategy]. Orange generated EUR [...] in revenues and a cash contribution margin of [...] in multiple-play bundles in 2022.[785] All of these elements contribute to its strength on the hypothetical retail market for the supply of multiple-play bundles.

(814) MásMóvil provides multiple-play bundles based on its own mobile and fixed network relying on wholesale agreements (fixed and mobile). The Commission notes that MásMóvil has grown over the years. In four years, MásMóvil gained [0-5]% in terms of subscribers and [0-5]% in terms of revenues, overtaking Vodafone in terms of subscribers in 2022. Its growing position on the market is supported by the results of the Phase I market investigation, in which many respondents that expressed a view described MásMóvil as a challenger and an aggressive player.[786]

(815) Third, the Parties themselves consider that they will become a [Details of MASMOVIL's internal document describing MASMOVIL's strategy][787] post-Transaction. In the same vein, the Transaction rationale for Orange is to [Details of Orange's internal documents describing Orange's strategy][788] and is similar for

---

780 See e.g., Form CO, paragraphs 2152 and 2154.

781 Responses to questionnaire Q1 to competitors, question D.A.D.9.

782 Form CO, paragraph 116.

783 Form CO, paragraph 2109.

784 Internal document of MásMóvil, 2022.06 Project Kili - RAP v27 Non-Clean team version.pdf. MM-00818245, Doc ID 2659-3783.

785 RFI 18 – Q2 margins.

786 Responses to questionnaire Q1 to competitors, question D.A.D.11.

787 Internal document of MásMóvil, 2022.06 Project Kili - RAP v27 Non-Clean team version.pdf MM-00818245, Doc ID 2659-3783.

788 Internal document of Orange, 220213 - KILI - KEY BENEFITS - DRAFT v0.docx. ID ORANGE-EC-RFI22-00973596, Doc ID 3023-38123.

MásMóvil [Details of MASMOVIL's internal document describing MASMOVIL's strategy].[789]

(816) On the basis of the above, the Commission concludes that the combined market shares of Orange and MásMóvil are high, and that the Transaction gives rise to a significant market share increment.

9.4.3.3.2. Competitive constraint from other large national network operators

(817) As mentioned above, a merger is unlikely to harm competition where the reaction of the remaining competitors would discipline the behaviour of the JV. On the other hand, competition would be harmed if the remaining competitors may not be willing or able to compete sufficiently post-Transaction so as to compensate for the loss of competition.[790]

(818) In the following paragraphs the Commission assesses, the ability and incentive of Telefónica and Vodafone to compete and counteract the likely effects resulting from the Transaction.

9.4.3.3.2.1. Ability to compete

(819) The Transaction would leave two large national mobile and fixed network operators in Spain to compete with the JV: Telefónica and Vodafone. While the Commission considers that Telefónica and Vodafone are likely to have the ability to compete with the Parties post-Transaction, they are unlikely to have the incentive to do so, as set out below.

9.4.3.3.2.2. Telefónica's ability to compete

(820) Telefónica is currently the largest operator both by revenue and subscribers in the market for the retail supply of multiple-play bundles.

(821) Telefónica has an estimated ownership of 28 million FTTH BUs[791] which covers most of the country. As the incumbent operator, Telefónica is still subject to regulatory obligations to grant access to its fixed infrastructure in certain areas (covering approximately 30% of the Spanish population).[792] Additionally, Telefónica's mobile network is based on approximately 21,900 mobile sites and it covers almost 100% of the Spanish population with 2G, 3G and 4G technologies. Its 5G technology covers approximately 82% of the Spanish population as of the end of 2022.[793] Telefónica has 305 MHz of in-use mobile spectrum, the same level as Orange, and 1305 MHz of mobile spectrum overall.[794]

(822) In line with the Parties' views, the Commission considers that despite a decrease in market share in the 2019 to 2022 period (from [30-40]% to [30-40]% by volume and [40-50]% to [40-50]% by value), given its strong market position, and high network quality, Telefónica is currently able to compete in the retail multiple-play market. Equally, the Commission does not consider that this would change in the future, either absent the Transaction or following the Transaction.

789 Internal document of MásMóvil, 28.02.2022 Mandarina - EU Partners Discussion vF.pdf. ID MM-00096262, Doc ID 2671-20033.

790 See Horizontal Merger Guidelines, paragraphs 24-25 and footnote 28.

791 Annex 6(1)(c) 2.6.

792 Form CO, paragraph 656.

793 Form CO, paragraph 655.

794 See Section 7 above. See also Form CO, paragraph 497.

9.4.3.3.2.3. Vodafone's ability to compete

(823) Vodafone is currently the fourth largest network operator by subscribers and third largest network operator by revenue, but with a difference of only [0-5]% with MásMóvil, in the market for the retail supply of multiple-play services.

(824) Vodafone's fixed network consists of [8-9 million] BUs, of which [1-2 million] BUs are FTTH and [0-0.5 million] BUs are HFC in 2022.[795] Vodafone's primarily cable/coax/HFC-based fixed network needs to be upgraded to FTTH.[796] Additionally, Vodafone's mobile network is based on approximately 19,100 mobile sites, 285 MHz of in-use spectrum, and it covers almost 100% of the Spanish population with 2G, 3G and 4G technologies. Its 5G technology covers approximately [40-50]% of the Spanish population as of the end of 2022.[797]

(825) The Commission notes that Vodafone currently finds itself in a challenging position in Spain in terms of ability to invest in fixed networks,[798] which puts into question its ability to compete aggressively against the Parties in the future. This is due to Vodafone's growing unattractiveness of its mostly HFC-based fixed network[799] and resulting dependency on wholesale access to FTTH networks. As indicated by Vodafone itself "*FTTH is widely regarded as superior to HFC across a number of parameters, including speed and capacity (in particular bandwidth which is important for wholesaling to multiple providers); symmetry (i.e. equal upload and download speeds, which are increasingly important for applications such as video conferencing, cloud services, and gaming); and futureproofing. End consumers are increasingly demanding fibre, and this is a trend that is likely to continue to grow in the future. As a result, there is very little appetite from access seekers to enter into agreements with Vodafone for HFC access*". This position is shared by other market players. In this respect, 14 out of 16 respondents of the market investigation consider that the ability to offer FTTH is a competitive advantage on the Spanish market over operators who do not offer FTTH [800] and one respondent specifically pointed out the fact that "*Vodafone´s network, even if offering ample coverage, is largely based on outdated HFC technology which is unable to compete with Fiber*".[801] Vodafone itself indicated that it will depend on "*FTTH wholesale access provided by the remaining [two] MNOs (Telefonica and Orange/MásMóvil) …[and is concerned that]… the merged entity would have an incentive to worsen wholesale access conditions …[since]… the merged entity and Telefonica will face less competitive pressure and will have lower incentives to offer attractive wholesale conditions*."[802]

(826) This is confirmed by its market share evolution over the last 4 years. Vodafone lost [0-5]% in terms of subscribers and [0-5]% in terms of revenues, being overtaken by MásMóvil in terms of subscribers in 2022. Last year, Vodafone had [10-20]% by volume and [10-20]% by value in 2022. If Vodafone's fixed network remains based on HFC, this trend is likely to continue over the next few years.

(827) However, the Commission considers that on balance Vodafone is still able to compete today and does not consider that Vodafone's position would materially

795 Annex 6(1)(c) 2.6.
796 Non-confidential minutes of a call with Vodafone of 20 December 2022, paragraph 6, Doc ID 2455.
797 Form CO, paragraph 685 and Table 29: Estimate of mobile infrastructure holdings.
798 Non-confidential minutes of a call with Vodafone of 20 December 2022, Doc ID 2455.
799 See further below section 9.4.3.2.2.3.
800 Responses to questionnaire Q3 to wholesale customers, question D.A.5.
801 Avatel's response to questionnaire Q3 to wholesale customers, question D.B.35., Doc ID 3298.
802 Vodafone's response to questionnaire Q3 to wholesale customers, question D.A.13., Doc ID 3463.

change in the near future (e.g. it will continue to have a sizeable position at retail level, which it could leverage, in addition to its mobile network assets and RAN sharing agreement with Orange, to secure any needed FTTH wholesale access), either absent the Transaction or following the Transaction.

9.4.3.3.2.4. Incentives to compete

(828) The Commission considers that post-Transaction, in view of the reduction of competitive pressure, Telefónica and Vodafone are unlikely to have the incentive to compete sufficiently to counteract the negative impact resulting from the Transaction.

(829) First, as shown in Section 9.2 above, the market for the retail supply of mobile telecommunications services in Spain is highly concentrated and is oligopolistic. The Parties, together with Telefónica and Vodafone, account for around 90% or more of the market by volume and by value. According to the principles of strategic complementarity, which is a general characteristic in standard models of oligopolistic competition and has been applied in several Commission decisions in the telecoms industry,[803] competing firms have incentive to raise prices on the increased demand arising from the merger as a response to a price increase by another firm (which diverts some of the merging entity's demand to them).

(830) In its referral request under Article 9 of the Merger Regulation, the CNMC corroborated the concern that Telefónica and Vodafone would have little incentive to counteract price increases that could be applied by the JV as they could benefit from raising prices on any diverted demand themselves.[804]

(831) Second, Telefónica has focused its strategy in recent years on retaining customers and increasing its average revenue per user ("ARPU") through selling multiple-play and FMC bundles and value-added services, in particular premium football content, rather than aggressively competing to win new customers through lower prices. Indeed, it is estimated that over [50-60]% of Telefónica's overall multiple play bundle revenue in 2022 was accounted for by less than [20-30]% of its total multiple-play bundle subscriber base, i.e. its premium customers that subscribe to bundles with premium Pay-TV football content,[805] suggesting that Telefónica is unlikely to focus on competing through lower prices following the Transaction. The Commission considers this to be representative of Telefónica's position in each of the retail fixed internet, multiple-play and FMC markets in view of the fact that, as outlined in Section 7 above, in 2021, 96.3% of fixed internet lines were part of a bundled offer in Spain and, within the multiple-play bundles, the take-up of FMC bundles among telecoms consumers in Spain reached 82.5% of all fixed internet lines.

(832) Like the Parties, each of Telefónica and Vodafone also operate lower price-positioned brands in addition to their main brands, namely O2 in the case of

---

803 See e.g. Commission decision of 12 December 2012 in case No M.6497 – *Hutchison 3G Austria/Orange Austria*; Commission decision of 28 May 2014 in case No M.6992 – *Hutchison 3G UK/Telefónica Ireland*; Commission decision of 2 July 2014 in case No M.7018 – *Telefónica Deutschland/E-Plus*; Commission decision of 1 September 2016 in case No M.7758 – *Hutchison 3G Italy / Wind / JV*.

804 Application under Article 9 of Council Regulation (EC) No139/2004 on the Control of Concentrations in file M.10896 Orange MásMóvil/JV of 2 March 2023.

805 Annex RFI 37 Q1. This was estimated by comparing Telefónica's overall residential bundle customers and revenues in 2022, with its customers and revenues of bundles without football in 2022, with the difference being its customers and revenues of bundles with football.

Telefónica and Lowi in the case of Vodafone. However, according to multiple-play bundle market share data provided by the Parties[806], these sub-brands, while growing to some extent, have a minimal presence on the market with shares c. [0-5]% or less by volume and value in 2022, and having grown by no more than c. [0-5]% in the four-year period 2019-2022.[807]

(833) Third, both Telefónica and Vodafone are considered to be rational players (i.e. that they would act in their own long term best interests in terms of profit maximisation) by the Parties and by third party analysts as shown in the following examples taken from the Parties internal documents.

(834) Orange's own strategic rationale for the Transaction, which the Orange Spain CEO at the time, Jean-Francois Fallacher, explained includes a [Details of Orange's internal documents describing Orange's strategy],[808] in other words, [Details of Orange's internal documents describing Orange's strategy].

(835) Analyst reports appear to align with Orange's own strategic rationale for the Transaction. For example, [Details of MASMOVIL's internal documents describing MASMOVIL's strategy].[809] [Details of MASMOVIL's internal documents describing MASMOVIL's strategy]:

– [Details of MASMOVIL's internal documents describing MASMOVIL's strategy]

– [Details of MASMOVIL's internal documents describing MASMOVIL's strategy]

(836) The Commission considers that these observations remain valid today, notably the lack of aggressive growth strategies via price wars, as evidenced by the price increases announced by all of the MNOs in Spain last year, including Orange (in August 2023) and Telefónica, Vodafone and MásMóvil (in December 2023).[810]

(837) Similarly, an Orange email [Details of Orange's internal documents discussing market reactions to the Transaction announcement]:

– [Details of Orange's internal documents discussing market reactions to the Transaction announcement]

– [Details of Orange's internal documents discussing market reactions to the Transaction announcement]

(838) [Details of Orange's internal documents discussing market reactions to the Transaction announcement].

(839) Similarly, on 29 September 2022, ratings agency Fitch published its view that the Transaction "*should ease market pressures*" and that *"the market should benefit from a reduced number of competitors [since] A market challenger [i.e. MásMóvil] is moving into a more incumbent-like position and should adapt its strategy*

806 See Annex RFI 37 Q1.

807 Annex RFI 37, Q1 (Bundles – FMC). The Parties were not able to provide a brand-level breakdown of market shares in the overall market for retail mobile services, so the Commission took FMC bundles as the closest available proxy given that, according to the CNMC "*83.3% of all post-paid mobile … in 2021 were part of a bundled offer*" (Form CO, paragraph 416).

808 [Details of Orange's internal documents describing Orange's strategy].

809 MásMóvil internal document, ID MM-00931525, Doc ID 2661-8144.

810 See https://euroweeklynews.com/2023/01/08/movistar-and-vodafone-to-increase-rates-for-customers-this-january-in-spain/, Doc ID 5633.

accordingly." Fitch noted that *"competition has been most pronounced in mobile, where MM [i.e. MásMóvil] has consistently taken market share from Orange and Vodafone [whereas] Telefónica's Movistar [is] positioned towards the premium end of the market*".[811]

(840) This trend in the Parties' network competitors' market shares provides an important indication of the lack of effective incentives of Telefónica and Vodafone to compete post-Transaction, and the more reactive nature of their current competitive behaviour. The Commission does not consider that either would alter this strategy as a result of the Transaction, rather that they would continue on this track further as a result of the decrease in competition brought about by the removal of competition between Orange and MásMóvil. [Details of MASMOVIL's internal documents describing MASMOVIL's strategy] they favour consolidation, including in Spain, as they consider markets to be too competitive today. For example, [Details of MASMOVIL's internal documents describing MASMOVIL's strategy] .[812]

(841) Additionally, respondents to the Commission's market investigation considered that Telefónica and Vodafone will have a reduced incentive to compete post-Transaction. One respondent, as consumer organisation, indicated, "*the merger would promote oligopoly in Spain [with the result that] Companies are not going to be interested in competing*"[813] while another respondent, a non-MNO, considered that "*The shift from four to three operators … will allow the MNOs to raise prices or reduce the quality of their services without fear of losing customers to other providers …Moreover, the Transaction could be a decrease in network investment in the market for fixed internet broadband services. If the merged entity were to focus on cost-cutting measures to maximize profits, this could lead to a decrease in investment in network infrastructure, which could result in a deterioration of the quality of services provided to end customers.…*".[814]

(842) In light of the above, the Commission takes the view that, post-Transaction, Telefónica and Vodafone would become less aggressive with regard to pricing and other relevant parameters of competition, and therefore would have reduced incentive to compete post-Transaction.

9.4.3.3.3. Competitive constraint from smaller operators

(843) The Commission, based on the results of the market investigation and the analysis of the internal documents of the Parties, does not consider that smaller operators, are able to exercise the same degree of competitive pressure that is exercised by the larger operators, i.e. the Parties, Telefónica and Vodafone who all have national offerings and substantial own networks (including IRUs[815]). The Commission therefore considers that such smaller operators are unable to meaningfully constrain the competitive behaviour of the Parties on the market for retail multiple-play services in Spain.

---

811 See https://www.fitchratings.com/research/corporate-finance/orange-MásMóvil MásMóvil -merger-to-ease-spanish-telecoms-market-pressure-29-09-2022, Doc ID 5665.

812 [Details of MASMOVIL's internal documents describing MASMOVIL's strategy]

813 Responses to questionnaire Q1 to competitors, question E.4, Doc ID 2956.

814 Digi's response to questionnaire Q1 to competitors, question E.6, Doc ID 2834.

815 Since IRUs provide for long-term low-cost access akin to ownership. As explained by Vodafone "*IRU agreements are common in the Spanish market. Typically, the user has to contribute towards 50% of the network investment costs (whether up-front or in staged payments) and, in exchange, it benefits from a long-term irrevocable right of use of the network under owner economics conditions*." Non-confidential minutes of a call with Vodafone of 20 December 20222, paragraph 7, Doc ID 2455.

9.4.3.3.3.1. Overview of small multiple-play operators in Spain

(844) As mentioned in Section 7 above, in addition to the main network operators (Section 7.2.1), there are a number of smaller operators in Spain (Section 7.2.2) active in the provision of retail fixed internet services, the majority of which are provided as part of multiple-play bundles, as outlined in Section 7 above.

(845) An overview of such smaller operators is included in **Table 36** below[816].

Table 36 Smaller retail fixed internet providers (2022)

Operator	Revenues (EUR, M)	Fixed customers (M)	BUs (m)	National / Regional
Digi	501	[0.5-1]	6.5 (April 2023)	National
Avatel	300	[0.5-1]	2.6	Regional
Finetwork	135	[0-0.5]	0.1	Regional
Adamo (incl. Aire Networks)	100	[0-0.5]	[2-3]	Regional
PTV/Procono	[50-100]	[0-0.5]	1.5	Regional
Total	[1,100-1,150]	[1-2]	[12-13]	-

Source: Parties' estimates (Article 6(1)(c) Response, Table 7, and Annex 6(1)(c) 2.6)

(846) Digi relies on a FVNO agreement with Telefónica in order to complement its own FTTH network, which it is continuing to roll-out, in order to provide retail multiple-play services, including through multiple-play bundles, nationally in Spain.

(847) Avatel only provides retail fixed internet services, including through multiple-play bundles, regionally in mainly rural areas of Spain, and predominantly based on its own fixed network footprint (in addition to that of rural wholesale provider Lyntia Access, referred to below). Avatel "*doesn't have any fixed wholesale access agreements to provide broadband services nationally*."[817]

(848) Finetwork operates a limited FTTH network, which it complements with a wholesale broadband access agreement with Vodafone. It provides retail fixed internet services, including through multiple-play bundles, regionally within Vodafone's fixed network footprint.

(849) Adamo provides retail fixed internet services, including through multiple-play bundles, regionally within its own network footprint.

(850) PTV/Procono provides retail fixed internet services based on its own fixed network, which is mainly HFC technology (approximately 70%), and located in rural areas of Spain.[818]

(851) Other small fixed network operators active in Spain, including Lyntia Access and Onivia, (both wholesale providers), are not active in the retail market for multiple-play services.

816 The Commission notes that there are other operators in Spain active in the provision of retail fixed internet services with their own network, such as Avanza or Parlem, but as they are relatively modest size, they are not described in this section.

817 Minutes of call with Avatel of 10 March 2022, paragraph 13, Doc ID 3069.

818 Form CO, paragraph 726.

9.4.3.3.3.2. Competitive position of smaller retail multiple-play providers in Spain

(852) As outlined in Section 8 above, the retail market for multiple-play services is national in scope. The Parties, Telefónica, and Vodafone all have national offerings.

(853) Of the smaller operators however, as outlined in **Table 36** above, all of them—with the exception of Digi—only offer retail fixed internet services in certain, many rural, regions of Spain.

(854) As shown in **Table 37** below, collectively, they account for only around [10-20]% of fixed internet subscribers in the Spanish market in 2022, compared to over [80-90]% for the Parties, Telefónica and Vodafone, albeit this number has been growing.

Table 37 Volume share of smaller operators in the retail multiple-play market

	2019	2020	2021	2022
Digi	[0-5]%	[0-5]%	[0-5]%	[5-10]%
Other operators (Finetwork, Avatel, PTV, Others)	[0-5]%	[0-5]%	[0-5]%	[0-5]%
Total	[0-5]%	[0-5]%	[5-10]%	[5-10]%

Source: Parties (Annex RFI 37, Q1)

(855) Digi is the only one of these smaller operators that is active nationally and which has been able to capture a non-marginal share of subscribers in the retail multiple-play market, with [0.5-1 million] fixed lines as of 2022, although its market share remains less than [5-10]% [...].

(856) As outlined above, with the possible exception of Digi (which, as explained later in this section below, competes mainly in the low-end of the market), the smaller retail multiple-play providers have a very small market presence.

(857) As can be seen from the below, Digi has a differentiated pricing strategy for retail fixed internet services depending whether it is providing retail services via its own network or on Telefónica's network. Digi is able to offer a lower price in areas where it has rolled out its own fixed network. According to the Parties: "*Digi has adopted a differentiated pricing approach in relation to customers on its owned footprint versus wholesale broadband access by offering a lower price and higher Fiber speed in the areas where it has deployed its owned network (so-called FIBRA SMART offers) versus the areas where it relies on wholesale access (so-called FIBRA offers).*"[819]

(858) The price difference is confirmed by a review of Digi Spain's website, in which lower-priced "Fibra Smart" offers appear more prominently at the top of the web page and there is a note that this is only "*Available in areas where we are developing our own fiber network.*"[820]

---

819 See Response to RFI 20 Q3(b).

820 See https://www.digimobil.es/fibra-optica/?gclid=CjwKCAjwv8qkBhAnEiwAkY-ahgntRbbmLHs3OPXXj-VLhuJHgT40MPNe7YjV9LOwjwfyouXFwBjiZxoCgboQAvD_BwE, Doc ID 5656.

Figure 47 46 Differentiated retail fixed internet pricing by Digi

Source: Digi website (machine translation to English)

(859) In this respect, Digi itself mentioned that its offers are different when it provides the services via its own network footprint or via the network of Telefónica, as can be seen from the above. The Parties do not follow a similar approach, and indicate that they are "*not aware of any other players in the market that have adopted such a differentiated pricing approach*"[821]. Indeed, none of the other non-MNOs offer retail fixed internet on a nationwide basis.

(860) The Commission considers that in the absence of granular data, it can be reasonably considered that Digi is exerting a less strong competitive constraint outside of its own network footprint area.[822] Even if, as the Parties outline, Digi's "*owned FTTH network has recently reached approximately 6.5 million BUs, as reported in the press on 17 April 2023*"[823], that accounts for less than one quarter (23.5%) of the Spanish market, in addition to being smaller than the Parties' respective networks (including IRUs) today, and the JV's network following the Transaction.

(861) In addition, the Parties' internal documents confirm that Digi competes mainly with MNOs' low-cost brands at the low-end of the market. For instance, [Details of

821 See Response to RFI 20 Q3(b).

822 i.e. 4.2 million divided by 27.6 million, i.e. the approximate total market size. See Form CO, paragraph 124.

823 Article 6(1)(c) Response, paragraph 165.

MASMOVIL's internal documents describing Digi's positioning on the market]. A due diligence report prepared by [Advisor] for [Details of MASMOVIL's internal documents describing Digi's positioning on the market][824] [Details of MASMOVIL's internal documents describing Digi's positioning on the market].

Figure 48 [Details of MASMOVIL's internal documents describing MASMOVIL's strategy]

[...]

Source: [Details of MASMOVIL's internal documents describing MASMOVIL's strategy]

(862) The same presentation notes that [Details of MASMOVIL's internal documents describing MASMOVIL's strategy],[825] suggesting that Digi may not exert significant pricing pressure on the Parties.

(863) To the extent Digi may also gain some multiple-play bundle customers that switch away from the Parties' or other players mid-end and high-end brands, despite not itself being active in those segments (e.g. because it does not have an offer including Pay-TV services),[826] the Commission notes that, rather than it being evidence that Digi competes closely with such higher-end brands, it is likely a consequence of a general trend among certain customer demographics, e.g. those that place less value on having packages with premium TV content in a multiple-play bundle, towards 'cord cutting', i.e. dropping TV from their offerings, and is a trend that has also been observed in other markets across the EU in recent years.[827] Specifically with regard to Spain, [Details of MASMOVIL's internal documents describing MASMOVIL's strategy regarding Pay-TV].[828] [Details of MASMOVIL's internal documents describing MASMOVIL's strategy regarding Pay-TV].[829] Corroborating this, [Details of MASMOVIL's internal documents describing MASMOVIL's strategy regarding Pay-TV].[830]

(864) More generally, the Parties' typical competitor benchmarks do not take into account smaller players, with the exception of Digi, and even in that case Digi typically appears less prominently in such reporting than other network operators.

(865) [Details of MASMOVIL's internal documents describing MASMOVIL's benchmarking of competitors]..[831]

Figure 49 [Details of MASMOVIL's internal documents describing MASMOVIL's strategy]

[...]

Source: [Details of MASMOVIL's internal documents describing MASMOVIL's strategy]

---

824 MásMóvil internal document, ID MM-00098679, Doc ID 2671-22450.

825 MásMóvil internal document, ID MM-00098679, Doc ID 2671-22450, slide 39.

826 Non-confidential minutes of the call with Digi of 29 November 2022, paragraph 11, Doc ID 1846.

827 The Commission does not however consider that as a result OTT platforms represent an out of market competitive constraint on the possible market for retail multiple-play services. OTT services such as subscription video on demand services (e.g. Netflix, Disney+, etc.), are not interchangeable for retail multiple-play services, and indeed they can only be provided to customers that already have a mobile (and/or fixed) subscription as part of their multiple-play or FMC bundle, as OTT platforms depend on data to deliver their services.

828 See also in this regard, Telefónica's response to questionnaire Q1 to competitors, question C.A.A.D.6, Doc ID 2796. ("*There is evidence that there is a trend in the market towards the "unbundling" of linear pay-TV services*").

829 [Details of MASMOVIL's internal documents describing MASMOVIL's strategy].

830 MásMóvil internal document, Report for MásMóvil by Analysys Mason in relation to the Transaction dated 6 October 2022, ID MM-00183330, Doc ID 2670-74995.

831 Annex RFI 1 Q53.7, page 18.

(866) Another MásMóvil internal document paints a similar picture, [Details of MASMOVIL's internal documents describing MASMOVIL's perception of its competitors].

Figure 50 [Details of MASMOVIL's internal documents describing MASMOVIL's strategy]

[...]

Source: Confidential information – Details of MASMOVIL's internal documents describing MASMOVIL's strategy]

(867) Similarly, an Orange brand strategy presentation, shown below, refers to its "peers" in terms of the segment(s) of the market they address as [Details of Orange's internal documents describing Orange's strategy].[832]

Figure 51 [Details of Orange's internal documents describing Orange's strategy]

[…]

Source: [Details of Orange's internal documents describing Orange's strategy]

9.4.3.3.3.3. Limited ability of smaller multiple-play providers to compete due to reliance wholesale conditions

(868) A factor that strongly affects smaller operators' ability to exert the same competitive pressure as MNOs in the market for retail multiple-play services in a significant and sustained way, and on a nationwide basis, is the availability of wholesale access on sufficiently good terms. The wholesale access conditions limit the range of services that they can offer, the customer segment they can address, and the prices they can offer. In this regard, in the retail market for the supply multiple-play bundles, access seekers are uniquely disadvantaged since they need both mobile and fixed access to provide FMC bundles.

(869) In addition, a large majority of respondents indicated that being able to offer FMC bundles is "*essential*"[833] in Spain to effectively compete, given the high degree of convergence. They also confirmed that it will be even more important in the next 3-5 years than today.[834]

(870) As pointed out by one respondent to our market investigation, "*Since multiple-play services are basically the combination of mobile services and fixed services, the barriers mentioned …for retail mobile services and …for retail fixed services apply also to enter the … market*".[835] This is corroborated by Avatel, which indicated that "*A new player to compete in the market requires at least balance and fair wholesale agreements to compete with players with own network*".[836]

(871) As noted in Section 7 above, 70% of the Spanish wholesale broadband market has been deregulated, which means smaller operators would need to conclude commercial fixed wholesale agreements in order to offer retail multiple-play services in those areas, and therefore on a national basis as the Parties do today.

(872) While there are certain smaller, wholesale providers such as Lyntia Access available, such "*independent neutral [i.e. non vertically-integrated] wholesale FTTH*

[832] Orange internal document of 10 March 2020, ID ORANGE-EC-RFI22-00682896, Doc ID 2684-91180.

[833] Response to questionnaire Q1 to competitors, question D.A.D.38. See also "*Given that in the Spanish market 80% of portability movements are convergent, it is essential to have a multiple-play proposition"* (Doc ID 2773).

[834] Response to questionnaire Q1 to competitors, question D.A.D.41.

[835] Digi's response to questionnaire Q1 to competitors, question D.A.D.6., Doc ID 2834.

[836] Avatel's response to questionnaire Q1 to competitors, question D.A.D.6, Doc ID 2865.

companies [are] available in rural ... low-density areas only",[837] whereas the only viable providers for operators wishing to offer services nationally, and in particular in large urban centres, are Telefónica or Orange. As one provider indicated "*only Orange and Telefonica offer FTTH wholesale access, while Vodafone mainly only offers HFC network access ... which is inferior ... The importance of fibre in terms of consumer preference is clear from the fact that even Vodafone markets its retail fixed internet as 'fibre' even though that service may in fact be provided over its HFC (hybrid-fibre coaxial, i.e. cable) network.*"[838]

9.4.3.3.3.3.1. FNOs do not have an incentive to offer attractive wholesale terms

(873) The wholesale market for broadband access services is currently dominated by two players only, Telefónica and Orange (70-85% combined in 2022). Telefónica had a market share of [40-50]% by volume and [60-70]% by value, while Orange has a share of [20-30]% by volume and [20-30]% by value in 2022. MásMóvil has a share of less than [0-5]%, and Vodafone had a negligible position and ins included among "Others"[839], which is largely as a result of its increasingly "*obsolete HFC technology*"-based fixed network.[840] Despite statements that it "*will then have strong incentives (in fact it will have no alternative but) to aggressively compete in ... wholesale ... markets*"[841], Vodafone is unlikely to be a credible player in the wholesale broadband access market until it is able to upgrade its network from HFC to FTTH (See section 9.4.3.3.2.3 above).

(874) The wholesale market in Spain is thus concentrated and there is no sufficient competition among host FNOs; Orange and Telefónica have a significant degree of market power. This is reflected in the fact:

– Most smaller operators do not have wholesale broadband access from either Orange or Telefónica today; and

– While Digi does have wholesale access to Telefónica's FTTH network, it charges a higher price for retail fixed internet services in areas where it relies on Telefónica's fixed network compared to areas where it has rolled out its own fixed network, suggesting that it needs to pass on the high wholesale access cost charged by Telefónica in order to remain viable since, as [Details of MASMOVIL's internal documents describing MASMOVIL's strategy].[842].

(875) As a consequence, the Commission concludes that FNOs such as Telefónica do not generally have an incentive to offer attractive wholesale conditions, or even any wholesale access to smaller operators wishing to compete in the retail market for the supply of multiple-play services.

9.4.3.3.3.4. Competitive constraint by smaller retail multiple-play providers unlikely to be exerted post-Transaction

9.4.3.3.3.4.1. General assessment

(876) As described in the previous paragraphs, already pre-Transaction smaller providers ability to compete in the Spanish market for retail multiple-play services is limited,

[837] Finetwork's response to questionnaire Q3 to wholesale customers, question D.A.13, Doc ID 3407.
[838] Minutes of meeting with Finetwork, 2 February 2023, paragraphs 17 & 20, Doc ID 2471.
[839] See Annex RFI 37 Q1.
[840] Response to questionnaire Q1 to competitors, question E.16, Doc ID 2865.
[841] Position Paper, "Vodafone's views on the proposed transaction", 28 February 2023 (Doc ID 2414).
[842] MásMóvil internal document, ID MM-00098679, Doc ID 2671-22450, slide 39.

primarily due to their inability to obtain wholesale broadband access to offers services at national level in competition with the Parties, Telefónica and Vodafone.

(877) While some of these players are growing and/or rolling out their own FTTH networks, they remain very small (e.g. with a subscriber share of around [0-5]% of Avatel and [0-5]% or less for all others) as of 2022, and are unlikely to be able to roll out their own network or obtain access on conditions that would enable them to effectively constrain the JV following the Transaction.

(878) The Commission considers that all the aforementioned factors currently limiting such smaller operators' competitiveness would remain after the Transaction. Therefore, post-Transaction smaller retail multiple-play providers would remain unable to compete effectively against the Parties.

9.4.3.3.3.4.2. Specific assessment of the constraint likely to be exerted by Digi post-Transaction

(879) The Parties submit that the Commission underestimates and mischaracterises the position of Digi on the market (see section 9.4.2.1.1). The Commission considers that despite Digi's growth in recent years, and own FTTH network roll-out, it remains unclear if Digi would be able, over the medium term, to exert a sufficient competitive constraint to counteract the likely negative effects of the Transaction.

(880) Digi provides retail multiple-play services in Spain "*by means of its own fixed broadband network and using Telefonica's [FTTH] network (by means of NEBA offer) [in areas of Spain] where Digi does not have its own network*."[843] In addition, Digi confirmed that it "*has started to deploy its own FTTH network.*"[844]

(881) While Digi recently reported that its own fixed network has grown to 6.5 million BUs, this remains around [Orange's network size] the size of Orange's FTTH network of [Orange's network size] BUs[845] and likewise remains smaller than the fixed network of MásMóvil [MASMOVIL's network size].[846]

(882) In addition, while Digi appears to be continuing to roll out its own FTTH network, the Parties' projections about its growth are speculative and appear to contradict the Parties' own internal documents. In a MásMóvil presentation assessing the competitive potential of "*Small Operators*" [Details of MASMOVIL's internal documents describing MASMOVIL's strategy].[847] Another MásMóvil internal document, [Details of MASMOVIL's internal documents describing MASMOVIL's strategy],[848] while a report prepared by an external adviser for MásMóvil in October 2022 in relation to the Transaction predicts that [Details of MASMOVIL's internal documents describing MASMOVIL's strategy].

Figure [Details of MASMOVIL's internal documents describing MASMOVIL's strategy]

[...]

Source: [Details of MASMOVIL's internal documents describing MASMOVIL's strategy

843 Non-confidential minutes of a call with Digi of 25 April 2023, paragraph 6, Doc ID 3273.

844 Non-confidential minutes of a call with Digi of 25 April 2023, paragraph 6, Doc ID 3273.

845 Form CO, footnote 982 ("*OSP's FTTH footprint reaches reaches [Orange's network size] as of the end of 2022*").

846 See Article 6(1)(c) Decision, paragraph 439 ([MASMOVIL's network size]).

847 MásMóvil internal document, ID MM-00201059, Doc ID 2667-12028.

848 MásMóvil internal document, ID MM-00931525, Doc ID 2661-8144.

(883) As outlined in the previous section, today, for the more than 75% of the Spanish market that Digi provides retail fixed internet services via wholesale access to Telefónica's fixed network, Digi charges a higher price compared to in the areas (covering less than 25% of the Spain market) where it owns its own network. This is likely because, as one small fixed operator and non-MNO indicated, "*towards smaller operators (i.e. with a relatively small customer base) Telefonica only offers wholesale fixed network access at regulated prices (and selectively or tactically in non-regulated areas), whereas Orange and other big operators, due to their scale, have been able to negotiate commercial agreements with Telefonica by which Telefonica offers wholesale access below the regulated price, e.g. based on volume discounts.*"[849] By contrast, MásMóvil is not in a comparable position, and has been able to negotiate commercial fixed wholesale (i.e. bitstream) agreements at prices materially below regulated prices, even if its own fixed network is also relatively small. According to Digi, this was as a result of "*taking the remedies from the Orange/Jazztel transaction was a relevant step for MásMóvil to enhance its competitive position. But the real turning point for MásMóvil was transitioning from an MVNO to an MNO, after purchasing in 2016 Xfera Móviles, S.A. (operating under the brand name Yoigo, and the 4th MNO in Spain, which already had in place an NRA to complement its own network) …[and which]… allowed it to become the 4th convergent operator in Spain*".[850]

(884) Even if the Commission accepts the Parties' view that the fact that "*Telefónica is mandated to provide wholesale fixed access in regulated areas at the regulated price … constitutes a de facto price ceiling for Telefónica, including in non-regulated areas*"[851], it remains the case that the regulated price (in the range of EUR [Confidential – Parties' estimates of Telefónica's regulated prices] per subscriber per month[852]), is not considered by smaller operators as enabling them to compete effectively, as is evidenced by the fact that of the small operators, Digi is the only one that avails of such access to provide retail fixed internet services nationally, and only then at a substantially higher price than in areas where it has deployed its own network.

(885) While the Parties submitted market share forecasts for Digi based on 2022 net adds, the Commission does not consider that these market share forecasts based on historic data are appropriate to describe Digi's future position, because they ignore any reactions by competitors that may affect Digi. This is corroborated by an internal MásMóvil presentation assessing the competitive potential of "Small Operators" [Details of MASMOVIL's internal documents describing MASMOVIL's strategy].[853]

(886) Although Digi today relies on an MVNO agreement with Telefónica, such agreements are typically only concluded for a number of years, Digi's agreement

849 Non-confidential minutes with Finetwork 2 February 2023, paragraph 13, Doc ID 2471.

850 Digi submission, 22 June 2023, *MNOs and MVNOs bargaining position to obtain access to mobile networks*, Doc ID 3618.

851 Article 6(1)(c) Response, paragraphs 389 and 609.

852 See Form CO, footnote 1522 ("*NEBA costs are in the range of approximately [Confidential – Parties' estimates of Telefónica's regulated prices] per line per month (split between [Confidential – Parties' estimates of Telefónica's regulated prices] for the access cost, the rest being associated with the traffic cost") and Article 6(1)(c) Response, footnote 561 ("Depending on capacity or transmission charges that may be added, the regulated price could increase to [Confidential – Parties' estimates of Telefónica's regulated prices]").*

853 MásMóvil internal document, ID MM-00201059, Doc ID 2667-12028.

included. For example, Vodafone, which would be well placed to answer in its position as an MNO, indicated that "*fixed and mobile wholesale access agreements are typically signed for a period between 3 and 5 years*."[854] Even if Digi was able to receive a renewed wholesale offer from Telefónica, such offer would be unlikely to contain better or equal pricing conditions compared to the terms that Digi has today (for the reasons indicated in section 9.4.3.2.3.3. above), which in any case are likely high, given Digi's differentiated retail pricing strategy of charging significantly higher prices in the areas where it relies on wholesale access to Telefónica's fixed network in order to pass on, at least part, of such wholesale cost.

(887) [Details of MASMOVIL's internal documents describing MASMOVIL's strategy] [855] Taken together, these suggest that Orange would not be likely to offer attractive wholesale conditions to Digi after the experience of giving [Details of the Parties' wholesale agreements].

(888) In view of Digi's further growth in the intervening years (and arguably greater competitive potential as a result), and the signing of the Transaction (which further aligns Orange and MásMóvil), these statements are likely to be even more true today than they were in 2020. In fact, in an Orange internal document drafted in February 2022 by Jean-Francois Fallacher, the Orange Spain CEO at the time, outlining a non-exhaustive list of strategic benefits of the Transaction for Orange, one of the reasons listed as [Details of Orange's internal documents describing Orange's strategy].[856] Indeed, the Transaction increases the retail business of the JV which will benefit from a larger customer base and an increased brand portfolio at the retail level and hence, induce the JV to compete less aggressively at the wholesale level. Notably, the merger would result in a material increase in the downstream base of sales (compared to the standalone base of sales of the Parties separately). In the hypothetical retail market for multiple-play bundles, the JV would become the largest operator in Spain by volume and second largest by revenue. It would have a 2022 market share materially above 30%.[857] In fact, the JV's share would be c. [40-50]% by volume, with an increment of [10- 20]%, and c. [30-40]% by value, with an increment of c. [10-20]%.

(889) Indeed, the large majority of respondents to the market investigation that expressed a view indicated that Orange and MásMóvil may not have the incentive to offer such access and/or increase wholesale prices following the Transaction.[858]

(890) The Commission considers that a deterioration in Digi's wholesale access conditions is likely to further weaken Digi's ability to compete. The Parties in internal documents [Confidential – Details of the Parties' internal documents describing their strategy], and this appears to be corroborated by its differentiated retail pricing strategy to pass on some of the wholesale cost to retail customers.

(891) It is the Commission's view that Digi, faced with an increase in its wholesale prices which may result from reduced competition at wholesale level following the Transaction, may be forced to increase its retail prices, at least in those areas where it relies on wholesale access to Telefónica's fixed network, today accounting for over 75% of the Spanish market. Therefore, the Commission considers that Digi's

854 Response to RFI 1 to Vodafone, 2 June 2023, Q 12, Doc ID 3639.
855 MásMóvil internal document dated 10 February 2020, ID MM-00931525, Doc ID 2661-8144.
856 [Details of Orange's internal documents describing Orange's strategy].
857 See Non-Horizontal Merger Guidelines, paragraph 25.
858 Responses to questionnaire Q1 to competitors, question D.B.B.9.

dependency on wholesale access will negatively impact its ability to compete with the Parties on the downstream retail market for multiple-play services in Spain.

9.4.3.3.3.4.3. Conclusion

(892) In light of the above, the Commission concludes that it is unlikely that post-Transaction Digi, individually or in aggregate with any of the other smaller operators would have the ability to counteract the likely anti-competitive effects of the Transaction in the retail market for the supply of multiple-play bundles.

9.4.3.3.4. The Parties are close competitors

(893) The Commission considers, contrary to the Parties' argument as set out in Section 9.4.2 above, that the Parties are close competitors, in that there is a sufficient degree of substitutability between their products so that the Transaction would give rise to significant price effects.[859] This finding is based on a consistent body of qualitative and quantitative evidence presented in the following paragraphs.

(894) The elements of the market investigation that support the finding that the Parties are close competitors on the retail mobile and fixed internet access markets (as detailed in section 9.4.3.1.4. and 9.4.3.2.4. above), apply also to multiple-play bundles. Given the popularity of convergent offers in Spain,[860] the Parties' closeness on fixed and mobile markets extends also to multiple-play markets.

(895) The extent of closeness of competition between the merging parties is one of the relevant factors for the analysis of the likelihood of significant non-coordinated effects of a merger.[861] It is not required that the merging parties are each other's closest competitors for such likelihood to arise.[862] Neither it is required, as the Parties claim in the Article 6(1)(c) Response, that the Parties are "*closer to each other than to other competitors*".

9.4.3.3.4.1. Diversion ratios

(896) The number portability data indicates that [Confidential – diversion ratios]. For the hypothetical retail market for the supply of multiple-play bundles, the Commission uses diversion ratios provide for the retail market for the supply of FMC bundles as an approximation because separate numbers for multiple-play bundles are not available but FMC bundles are the vast majority of all multiple-play bundles. For each year in the period 2019-2022, the largest proportion of requests for number transfer from another player that [...] received relate to [...]. More than [30-40]% of all requests Orange received 2019-2022 are requests for number transfer to [...]. Second largest proportion of requests were from [...] and the third from [...] customers. [...].[863]

859 Horizontal Merger Guidelines, paragraph 28.

860 See e.g., Form CO, paragraph 2152 and 2154.

861 Horizontal Merger Guidelines, paragraphs 26 and 28-30.

862 See section 9.4.1 on the applicable legal framework, in particular the findings of the Court in the *CK Telecoms* case.

863 MásMóvil's market shares implied by diversion ratios presented in **Tables 38** and **39** are [30-40]% in 2021 and [20-30]% in 2022. These market shares are higher than those provided by the Parties', presented in Table 5. Implied market shares have been calculated as follows, taking 2022 as an example: MS=[...].

(897) Vice versa, customers lost by MásMóvil switch most often to [...], but [...] comes second. For 2021 and 2022, MásMóvil group received most requests from [...], second most from [...], more than [20-30]% of all requests and third, from [...].

(898) **Table 38** and **Table 39** demonstrate that Orange and MásMóvil are and remain close competitors in the hypothetical retail market for the supply of multiple-play bundles. The difference between the diversion ratios from 2019 to 2022 demonstrates that, not only for every year MásMóvil has been the main destination [...], but also, that the diversion ratio has consistently remained above [30-40]% with only a small decrease of [0-5]% from 2019 to 2022. Conversely, market trends also demonstrate that [...] is one of the main destinations of MásMóvil customers with a diversion ratio above [20-30]% for 2021 and 2022.

Table 38 Number of port-outs and diversion ratios from Orange to the destination groups in the retail market for the supply of multiple-play (FMC) bundles[864]

		2019		2020		2021		2022	
Donor Group	Destination group	Port-outs	Diversion ratios	Port-outs	Diversion ratios	Port-outs	Diversion ratios	Port-outs	Diversion ratios
Orange brand	MásMóvil	[300,000-400,000]	[30-40]%	[300,000-400,000]	[30-40]%	[200,000-300,000]	[30-40]%	[200,000-300,000]	[30-40]%
	Vodafone	[200,000-300,000]	[20-30]%	[200,000-300,000]	[20-30]%	[200,000-300,000]	[20-30]%	[100,000-200,000]	[20-30]%
	Telefónica	[200,000-300,000]	[20-30]%	[200,000-300,000]	[20-30]%	[100,000-200,000]	[10-20]%	[100,000-200,000]	[10-20]%
	Digi	[0-50,000]	[0-5]%	[0-50,000]	[0-5]%	[50,000-100,000]	[5-10]%	[100,000-200,000]	[10-20]%
	Others	[0-50,000]	[0-5]%	[0-50,000]	[0-5]%	[0-50,000]	[0-5]%	[0-50,000]	[0-5]%
	Total	[900,000-1,000,000]	100,0%,	[800,000-900,000]	100,0%	[700,000-800,000]	100,0%	[700,000-800,000]	100,0%

Source: Response to RFI 18 Q6 and Q7 – Diversion ratios by segment and the Commission's assessment

Table 39 Number of port-outs and diversion ratios from MásMóvil to the destination groups in the potential market for the supply of multiple-play (FMC) bundles[865]

		2021		2022	
Donor Group	Destination group	Port-outs	Diversion ratios	Port-outs	Diversion ratios
MásMóvil	Orange	[100,000-200,000]	[20-30]%	[100,000-200,000]	[20-30]%
	Vodafone	[200,000-300,000]	[30-40]%	[200,000-300,000]	[30-40]%
	Telefónica	[100,000-200,000]	[10-20]%	[100,000-200,000]	[10-20]%
	Digi	[50,000-100,000]	[10-20]%	[100,000-200,000]	[10-20]%
	Others	[0-50,000]	[0-5]%	[0-50,000]	[0-5]%
	Total	[600,000-700,000]	100,0%	[600,000-700,000]	100,0%

Source: Response to RFI 18 Q6 and Q7 – Diversion ratios by segment

864 As MNP data is not available for the hypothetical retail market for the supply of multiple-play bundles, the Commission uses MNP data from the hypothetical retail market for the supply of FMC bundles as a proxy.

865 As MNP data is not available for the hypothetical retail market for the supply of multiple-play bundles, the Commission uses MNP data from the hypothetical retail market for the supply of FMC bundles as a proxy.

(899) The data in the above Tables confirms that for every year of the period from 2019 to 2022 Digi was only the fourth operator to which customers of Orange would switch, after MásMóvil, Vodafone and Telefónica.

(900) Vice versa, for MásMóvil customers, in 2021 and 2022, Digi has been also [...] operator to which customers would switch after [...].

9.4.3.3.4.2. The Parties' Tariff Comparison and Hedonic Pricing Analyses

(901) The Parties submitted the Tariff Comparison and Hedonic Price Analyses to support the argument that the Parties are not close competitors (i.e., they are not closer to each other than other operators) and that neither Party can be considered an ICF as result of an aggressive pricing strategy.[866] These arguments are unfounded.

(902) First, the Parties' analysis is based on a flawed premise with regard to closeness of competition and the definition of ICF. As confirmed by the Court of Justice in CK Telecoms, closeness of competition does not require that the Parties are each other's closest competitors. Furthermore, there can be more than one ICF and an ICF does not have to compete particularly aggressively in terms of price.[867]

(903) Second, there is a wide body of evidence supporting the Commission's conclusion that the Parties are close competitors in the hypothetical retail market for the supply of multiple-play bundles based on diversion ratios (Section 9.4.3.3.4.1), internal documents and the results of the market investigation (Section 9.4.3.3.4.2). In addition, there is a wide body of evidence supporting the Commission's conclusion that MásMóvil is an ICF (Section 9.4.3.3.5).

(904) Third, Parties' Tariff Comparison and Hedonic Pricing Analyses are methodologically flawed. As further discussed in Section 9.4.3.1.4.2 above, both analyses omit important and relevant tariff attributes, do not take into account non-price responses and quantities. In addition, the Tariff Comparison Analysis artificially divides tariffs in configurations, which leads to biased comparisons. The Tariff Comparison Analysis, as well as the Hedonic Pricing Analysis, are not market specific, meaning that the analyses in both studies targeted separate retails markets such that the results can be seen and acknowledged in a holistic way for all retail markets. Hence, interpretation and methodological issues are valid for all retail markets as explained in section 9.4.3.1.4.2 above.

(905) Fourth, the Parties' Tariff Comparison and Hedonic Pricing Analyses do not support the conclusions attributed to them by the Parties. As further discussed in Section 9.4.3.1.4.2 above, the analyses do not allow the conclusion that similar priced tariffs are closer or that cheaper tariffs are more competitive, because important tariff characteristics are omitted.

9.4.3.3.4.3. Internal documents and the results of the market investigation

(906) The Parties' internal documents corroborate the view that the Parties are in close competition with one another. They indicate that the Parties treat each other as benchmark competitors against whom they measure their performance (section 9.4.3.3.4.3.1) and that the Parties closely compete in the different sections of the market (section 9.4.3.3.4.3.2).

(907)

866 Response to the SO, paragraph 318 et seq, Article 6(1)(c) Response, Annex 6(1)(c) 2.1a, Annex 6(1)(c). 2.2a.

867 See section 9.4.1 on the applicable legal framework.

9.4.3.3.4.3.1. The Parties treat each other as benchmark competitors against whom they measure their performance

(908) [Details of Orange's internal documents describing Orange's benchmark of other operators' brand].[868] :

Figure 53 [Details of Orange's internal documents describing Orange's strategy] [869]

[...]

Source: [Details of Orange's internal documents describing Orange's strategy]

Figure 54. [Details of Orange's internal documents describing Orange's strategy]

[...]

Source: [Details of Orange's internal documents describing Orange's strategy].

(909) Conversely, MásMóvil also effectuates periodic analysis of the multiple-play bundles market, in which Orange's brands are the benchmark to which MásMóvil measures its performance.[870] As MásMóvil recognizes in internal documents [Details of MASMOVIL's internal documents describing MASMOVIL's strategy].[871] Further, as internal documents of MásMóvil recognize [Details of MASMOVIL's internal documents describing MASMOVIL's strategy].[872] As can be seen in different MásMóvil's internal documents, [Details of MASMOVIL's internal documents describing MASMOVIL's strategy]:

Figure 55 [Details of MASMOVIL's internal documents describing MASMOVIL's strategy]

[...]

Source: [Details of MASMOVIL's internal documents describing MASMOVIL's strategy].

(910) The Commission considers that the fact that in the same documents, the Parties, in addition to each other, discuss and monitor also Telefónica and Vodafone does not exclude the fact that the Parties compete closely.[873] Rather, in a concentrated market such as the Spanish one, monitoring of all major players seems to be a regular and prudent business practice.

9.4.3.3.4.3.2. The Parties closely compete in the different sections of the market

(911) The Commission notes that operators in Spain, and MásMóvil in particular, operate with many brands focusing on different segments of the market (high-end/mid-end/low-end) and serving different customer needs. Both Orange and MásMóvil provide mobile telecommunication services on a standalone basis as well as part of multiple-play bundles with different add-ons, including Pay-TV The evidence in internal documents shows that [Details of the Parties' internal documents describing the Parties' strategies].

(912) As evidenced by the Parties' internal documents, [Details of the Parties' internal documents describing the Parties' strategies]:

---

868 [Details of Orange's internal documents describing Orange's strategy].

869 [Details of Orange's internal documents describing Orange's strategy].

870 See documents submitted to RFI 1, e.g., Q53.10, Q53.13, Q53.19, Q53.28, Q53.30, Q53.35, Q53.49, and to RFI 15: e.g. Q1.88 or Q1.91.

871 MásMóvil internal document, MM-00076065, Doc ID 2663-76065.

872 MásMóvil internal document, ID MM-00277496, Doc ID 2664-18699.

873 See section 9.4.1 on the applicable legal framework, in particular the findings of the Court in the CK Telecoms case on the degree of closeness.

Figure 56 FMC [Details of MASMOVIL's internal document describing MASMOVIL's strategy].

[...]

Source: [Details of MASMOVIL's internal document describing MASMOVIL's strategy].

(913) As regards the high-end segment comprising the offers with the highest internet speed of the market, it is important to note that for multiple-play bundles, the Parties distinguish bundles with Pay-TV and/or football content, which entails an additional level of segmentation (premium bundles with TV and/or football). The Commission considers the Parties to be close in the premium part of the market with Pay-TV content, as both Orange and MásMóvil offer multiple-play bundles with Pay-TV. With regards to the premium segment of the market including Pay-TV football content, the Commission notes that MásMóvil is not active on this market segment.

(914) The internal documents of the Parties indicate that [Details of the Parties' internal documents describing the Parties' strategies].

(915) In this regard, MásMóvil considers that [Details of MASMOVIL's internal documents describing MASMOVIL's strategy].[874] KKR, one of the co-owners of MásMóvil, considered, [Details of MASMOVIL's internal documents describing MASMOVIL's strategy]:

Figure 57 [Details of MASMOVIL's internal documents describing MASMOVIL's strategy]

[...]

Source: [Details of MASMOVIL's internal documents describing MASMOVIL's strategy]

(916) As can be seen, Orange, Yoigo and Euskaltel brands are positioned in similar segments at the high-end of the market, whereas Jazztel, MásMóvil and Pepephone are positioned in the mid-end part of the market. Finally, Simyo, Llamaya and Lebara are considered to be in the low-end of the market.

(917) According to internal documents of MásMóvil, as regards the mid-end part of the market, according to KKR, [Details of MASMOVIL's internal documents describing MASMOVIL's strategy].[875]

(918) According to internal documents of Orange Confidential information – Details of Orange's internal documents describing Orange's strategy].

Figure 58 [Details of MASMOVIL's internal document describing MASMOVIL's strategy]

[...]

Source: Internal document from Orange - Project Kili – Commercial DD report, ID MM-00745494

(919) As explained above in Section 7, price is the most important parameter of competition on the Spanish market for the supply of retail multiple-play bundles customers. The Commission finds that Orange and MásMóvil compete closely on the main parameter of competition that is price in the different segments of the market.

(920) Indeed, as it can be seen in the internal documents quoted above, [Details of the Parties' internal documents describing the Parties' strategies].

(921) As mentioned in the previous paragraphs and as shown by Orange's internal documents, [Details of Orange's internal documents describing Orange's strategy].

---

874 Internal documents - *MásMóvil Long form recom_v5.pdf*, ID MM-00612974, Doc ID 2669-90024.

875 Internal documents of the Parties, 20.05.2022 Mandarina – Commercial DD update KKR.pptx, ID MM-00612147, Doc ID 2669-89197.

Figure 59 [Details of MASMOVIL's internal document describing MASMOVIL's strategy]

[...]

Source: Internal document from Orange - Project Kili – Commercial DD report, ID MM-00745494

(922) Internal documents of MásMóvil, also confirm that both companies compete closely in the FMC segment without premium Pay-TV football content. For example, [Details of MASMOVIL's internal documents describing MASMOVIL's strategy].

Figure 60 [Details of MASMOVIL's internal documents describing MASMOVIL's strategy]

[...]

Source: [Details of MASMOVIL's internal documents describing MASMOVIL's strategy]

(923) The respondents to the market investigation confirmed that Orange and MásMóvil are close competitors in the retail multiple-play services market.[876]

(924) In this regard, some operators note that "*both Orange and particularly MásMóvil have played an important role in exerting competitive constraints upon each other*"[877] and that "*Both [OSP and MásMóvil] provide retail multiple-play bundle services to the same segments of the market"*[878], other players signal that "*both companies provide the same sort of services to enable end-user mobile connectivity services*"[879] and that "*both companies have offers covering most of the ranges of the market, with different brands and services approach*"[880]. These findings are in line with the Commission's findings in the internal documents of the Parties.

9.4.3.3.4.4. Conclusion

(925) In light of the above, the Commission concludes that Orange and MásMóvil are close competitors in the multiple-play retail market.

9.4.3.3.5. The important role played by MásMóvil on the market

(926) The Commission considers that MásMóvil exerts significant competitive pressure on other multiple-play bundle providers and has acted as an ICF and in any event an important competitive constraint on the retail multiple-play bundles market in Spain and would likely to continue to exert an important competitive constraint in the absence of the Transaction. The Transaction would thus reduce competitive pressure that exists on the market because of the important role that is played by MásMóvil.[881]

(927) MásMóvil's importance on the mobile and fixed markets translates into strength on the multiple-play bundles market. In fact, given the popularity of convergent offers in Spain,[882] its strength on the mobile and fixed internet retail markets is in large part due to the popularity of its convergent offers.

(928) The elements of the market investigation that support the finding that MásMóvil is an ICF and in any event an important competitive constraint on the retail mobile and fixed internet markets, apply also to multiple-play bundles.[883] The market shares of MásMóvil have been similarly growing for multiple-play bundles and respondents to

---

876 Responses to questionnaire Q1 to competitors, question D.A.D.2.
877 Digi's response to questionnaire Q1 to competitors, question D.A.A.2, Doc ID 2834.
878 Digi's response to questionnaire Q1 to competitors, question D.A.D.2, Doc ID 2834.
879 Adamo's response to questionnaire Q1 to competitors, question D.A.A.2, Doc ID 3624.
880 Onivia's response to questionnaire Q1 to competitors, question D.A.D.2, Doc ID 2877.
881 See Horizontal Merger Guidelines, recital 25.
882 See e.g., Form CO, paragraph 2152 and 2154.
883 See sections 9.4.3.1.5 and 9.4.3.2.5.

the market investigation described MásMóvil in similar terms: a fast-growing and aggressive player.[884] In terms of net adds, MásMóvil featured [...] net adds in 2020 and 2021.[885] As market investigation respondents explained, MásMóvil is "*a challenger in all the retail markets during the past five years*" which *"having pushed down prices through its low-cost approach to offering has been forcing down overall market price levels for all operators*."[886]

(929) As indicated above, MásMóvil, operates 18 different brands at different price positions targeting a broad range of demographics and customer segments, includes 5G, and also includes Pay-TV services via Agile TV. As explained in the due diligence report prepared [Advisor], MásMóvil can [Details of MASMOVIL's internal documents describing MASMOVIL's strategy].[887] This multi-brand strategy allows it to effectively target various customer segments.[888] Consequently, it has been able to offer not only 'bare' multiple-play bundles at the low-end of the market, but also premium convergent offers, [Details of MASMOVIL's internal documents describing MASMOVIL's strategy].[889]

Figure 61 [Details of MASMOVIL's internal documents describing MASMOVIL's strategy]

[...]

Source: MásMóvil internal document, ID MM-00306117.

(930) MásMóvil's large network of stores across Spain further contributes to its strength on the market. [Details of MASMOVIL's internal documents describing MASMOVIL's strategy] ,[890] [Details of MASMOVIL's internal documents describing MASMOVIL's strategy]. This makes the fact that as of Q4 2022, MásMóvil had the second largest network of stores in Spain particularly relevant.

Figure 62 [Details of MASMOVIL's internal documents describing MASMOVIL's strategy

[...]

Source: MásMóvil internal document, ID MM-00306117.

(931) In view of the above elements, taken as a whole, the Commission considers that the Transaction may result in the elimination of an ICF and in any event reduce competitive pressure by eliminating an important competitive constraint from the Spanish retail multiple-play bundles market.

9.4.3.3.6. Any entry would not be likely, timely and sufficient

(932) The Commission considers that any potential entrants on the hypothetical retail market for multiple-play bundles would face significant barriers to entry. Any threat to entry would not be sufficiently likely, strong and timely to discipline the JV.

(933) The Commission's findings in relation to barriers to entry on mobile and fixed retail markets apply (as detailed in sections 9.4.3.1.6. and 9.4.3.2.6. respectively) in equal measure to multiple-play bundles.

884 Responses to questionnaire Q1 to competitors, question D.A.D.11.

885 Net adds calculated using the number of SIM cards reported in RFI 18 Q1.a – Market shares by segment - retail the residential only, bundles FMC sheet submitted in response to RFI 18.

886 Responses to questionnaire Q1 to competitors, question E.12.

887 MásMóvil PE presentation to lenders (Feb 2020), slide 5, ID MM-00933576, Doc ID 2661-10195.

888 See e.g. MásMóvil Long form recom_v5.pdf, slide 8; ID MM-00612974, Doc ID 2669-90024.

889 MásMóvil internal document, ID MM-00306117, Doc ID 2664-47320.

890 MásMóvil internal document, ID MM-00306117, Doc ID 2664-47320.

(934) Any potential entrants on the multiple-play market would need to overcome barriers to entry both as regards provision of mobile and fixed services. Operators who lack direct and immediate access to the inputs (i.e., network or network access) needed to bundle convergent services would not be able to provide multiple-play bundles and to compete on this market.

9.4.3.3.7. Buyer power

(935) According to the Horizontal Merger Guidelines, the competitive pressure on a supplier is not only exercised by competitors but can also come from its customers. Even firms with very high market shares may not be in a position, post-merger, to significantly impede effective competition, in particular by acting to an appreciable extent independently of their customers, if the latter possess countervailing buyer power. Countervailing buyer power in that context should be understood as the bargaining strength that the buyer has vis-à-vis the seller in commercial negotiations due to its size, its commercial significance to the seller and its ability[891].

(936) The Commission's findings in relation to buyer power on mobile and fixed retail markets apply in equal measure to multiple-play bundles. The Commission does not consider that customers have any countervailing buyer power vis-à-vis the JV to offset the anti-competitive effects of the Transaction given the fragmented nature of their demand. They do not negotiate their multiple-play bundles on an individual basis and their individual subscription value would be of no material commercial significance to the JV.

(937) Equally, regardless of the exact degree of customer loyalty, while customers may be able to switch multiple-play provider without too much difficulty, this is unlikely to afford customers a significant degree of buyer power. In fact, if following the Transaction the JV and the other operators would lack the incentives to vigorously compete and would likely raise prices, customers could switch to multiple-play bundle operators, but would be unable to negotiate better terms with any operators.

(938) Furthermore, during the market investigation, no market participant raised any countervailing buyer power of customers.

(939) The Commission therefore concludes that buyer power does not constitute a countervailing factor that would offset the likely anti-competitive effects of the Transaction in relation to the provision of retail multiple-play bundles.

9.4.3.3.8. Expected negative impact of the Transaction

(940) As set out in the Horizontal Merger Guidelines, the larger the increase in the sales base on which to enjoy higher margins after a price increase, the more likely it is that the merging firms will find such a price increase profitable despite the accompanying reduction in output.[892]

(941) This is especially important when assessing the potential impact of the Transaction as based on evidence from the market investigation and the Parties' own submissions price is the main parameter of competition in retail telecommunication markets in Spain, with Spanish retail consumers being particularly price sensitive. In the Form CO, the Parties submit that *"in Spain, price has taken on a primary importance in customer's choice"*.[893] The Parties refer to a CNMC Consumer survey indicating that

[891] Horizontal Merger Guidelines, paragraph 64.
[892] Horizontal Merger Guidelines, paragraph 27.
[893] Form CO, paragraph 480.

price is one of the main factors that customers identify as influencing their choice of operator.[894] Moreover, when asked to rank a list of alternative parameters of competition, "price" was ranked first more than any other parameter, notably by around 80% of respondents,[895] with one such respondent further outlining that *"price and promotions are key drivers in the Spanish market."*[896].

(942) With this in mind, the Commission used data provided by the Parties to estimate to what extent the Transaction would be likely to lead to price increases, and the likely magnitude of any such increases. If diversion ratios between the Parties' brands as well as contribution margins are high, the incentive to increase price after internalising the competition between the Parties is also high.

(943) As explained in X above, the GUPPI provides a first measure of the extent to which the JV has an incentive to raise price. Alternatively, the Compensating Marginal Cost Reduction (CMCR) asks what level of marginal cost reduction is required for each of the JV's products to exactly offset the incentive to raise price.[897] GUPPIs and CMCRs, which the Commission similarly referred to in several past merger decisions involving the telecoms sector,[898] have been computed using the Parties' diversion ratios based on MNP data, the Parties' contribution margins, and average revenue per user (ARPU) as measure of the Parties' average retail prices.[899] From the contribution margins proposed by the Parties[900], the Commission excluded certain cost items that were not considered to vary directly with the number of subscribers.[901] As set out in Annex A, which forms an integral part of this Decision, the exclusion of these items is appropriate in view of the insufficiency of the explanations, and/or lack of evidence provided by the Parties that these costs are truly variable, nor have the Parties' shown that these items were universally accepted by the Commission in past merger decisions involving the telecoms sector.

(944) **Table 40** below suggests that the Transaction would lead to substantial GUPPIs in the hypothetical retail market for the supply of multiple-play bundles (including FMC) of [10-20]% for Orange and [10-20]% for MasMovil based on 2022 data. The marginal cost reduction (relative to prices) needed to prevent upward pricing pressure (CMCR) is [20-30]% for Orange and [20-30]% for MásMóvil based on 2022 data.

Table 40 GUPPI and CMCR in the retail market for the supply of multiple-play bundles (including FMC).

	Orange	MásMóvil
GUPPI	[10-20]%	[10-20]%
CMCR (relative to prices)	[20-30]%	[20-30]%

Source: Commission assessment (Annex A, Section 2.3.1.)

894 Form CO, paragraph 479 – 486.
895 Response to questionnaire Q1 to competitors, question D.A.A.5.
896 Response to questionnaire Q1 to competitors, question D.A.A.6, Doc ID 2773.
897 See Annex A, Section 2.1.
898 See for example Commission decisions of 27 November 2018 in case M.8792 – T-Mobile NL/Tele2 NL, Annex A, paragraph 20 et seq.
899 See Annex A, Section 2.2.
900 See Response to RFI 25.
901 As explained in Annex A, Section 2.2.2, this concerns cost items related to [Parties' own methodology to estimate contribution margins].

(945) Moreover, even if the Commission did not question, and accepted in full, the contribution margins submitted by the Parties, the likely price effects would in any event be substantial. Accepting the Parties' margin figures in full, which would not be appropriate for the reasons outlined, the GUPPI would remain substantial, [10-20]% and [0-10]% for Orange and MasMovil respectively, and the CMCR (relative to prices) would likewise be sizeable, [10-20]% and [10-20]% for Orange and MásMóvil respectively.[902] Likewise, even if the Commission bases diversion ratios on [Details of Orange's internal documents describing Orange's strategy] instead of MNP data[903], the likely price effects would not materially change.

(946) Therefore, the Commission concludes that the Transaction will lead to substantial upward pricing pressure in the retail market for supply of multiple-play bundles to the detriment of consumers.

(947) Consistent with the above, in the course of the market investigation, many market participants indicated that the Transaction would have a negative impact on the market for the retail supply of multiple-play bundles. The majority of competitor respondents that expressed a view considered that the Transaction would have a negative impact, in terms of increases in prices and/or decreases in quality of services provided, on the retail market multiple-play bundles in Spain.[904] Respondents highlighted that negative effects on the mobile or fixed retail markets would have a spill-over effect on the multiple-play market.[905] As one of the respondents explained: "*There is a high degree of convergence in Spain. As a result, the Transaction's negative effects on competition in one market will spill over into other markets, including the supply of multi-play bundles*."[906]

The Commission's own assessment and the views of market participants are further corroborated by the Parties' own internal documents.

(948) Notably, in an Orange internal document drafted in February 2022 by Jean-Francois Fallacher, the Orange Spain CEO at the time, outlining a non-exhaustive list of strategic benefits of the Transaction for Orange, one of the reasons given in favour of the Transaction was because a [Details of Orange's internal documents describing Orange's strategy].[907] [Details of Orange's internal documents describing Orange's strategy].[908] [Details of Orange's internal documents describing Orange's strategy].[909]

(949) In the context of the Commission's review of the Transaction the Parties have avoided claiming that the Transaction would not lead to a price increase, limiting themselves to pointing out that "*the Parties have not explored revenue synergies during the due diligence process*."[910] However, internal discussions in relation to pitches toward lenders and rating agencies paint a more concrete picture in this

902 See Annex A, Section 2.3.2.
903 Using FMC diversion ratios as proxy for multiple-play diversion proxy as submitted by the Parties in the Article 6(1)(c) Response, Annex 6(1)(c) 2.9a.
904 Responses to questionnaire Q1 to competitors, question E.9.
905 Responses to questionnaire Q1 to competitors, question E.10.
906 Responses to questionnaire Q1 to competitors, question E.10, Doc ID 2773.
907 [Details of Orange's internal documents describing Orange's strategy].
908 [Details of Orange's internal documents describing Orange's strategy].
909 Orange internal document, ID ORANGE-EC-RFI22-00906388, Doc ID 2687-96915.
910 Form CO, paragraph 1446.

regard. [Details of Orange's internal documents describing Orange's strategy].[911] [Details of Orange's internal documents describing Orange's strategy].:

– [Details of Orange's internal documents describing Orange's strategy].

– [Details of Orange's internal documents describing Orange's strategy].

– [Details of Orange's internal documents describing Orange's strategy].

– [Details of Orange's internal documents describing Orange's strategy].

(950) In light of the above, the Commission has come to the view that the Transaction would be expected to have a negative impact, and lead to substantial upward pricing pressure, in the market for retail supply of multiple-play bundles to the detriment of consumers.

9.4.3.3.9. Efficiencies

(951) The Commission considers that negative effects stemming from the Transaction are not likely to be outweighed by efficiencies, as further discussed in Section 9.6.

9.4.3.3.10. Conclusion

(952) Based on the above, the Commission has come to the view that the Transaction would significantly impede effective competition in a substantial part of the internal market as a result of non-coordinated anti-competitive effects on the hypothetical market for multiple-play bundles in Spain (and the hypothetical market segment for the retail supply of multiple-play bundles without premium Pay-TV football content).

9.4.3.4. Hypothetical market for the retail supply of FMC bundles (and the hypothetical market segment for the retail supply of FMC bundles without premium Pay-TV football content)

(953) The Commission has come to the view that the Transaction would significantly impede effective competition in a substantial part of the internal market resulting from horizontal non-coordinated effects on the hypothetical Spanish retail market for FMC bundles. This is because (i) the Parties' combined market share is high and the increment as a result of the Transaction is significant (Section 9.4.3.4.1.), (ii) remaining large national network operators might have less incentives to compete (section 9.4.3.4.2), (iii) the competitive constraint from smaller operators is limited (section 9.4.3.4.3), (iv) the Parties are close competitors (section 9.4.3.4.4), (v) of the important role played by MásMóvil on the market (section 9.4.3.4.5) and (vi) market participants expect the Transaction to have a negative impact on prices and/or quality of service (section 9.4.3.4.8).

(954) In addition, the Commission considers that the reduction of the competitive pressure resulting from the Transaction is not likely to be counteracted by other competitive constraints such as entry (section 9.4.3.4.6) or buyer power (section 9.4.3.4.7). Also, as explained in more detail in section 9.6 below, the Commission notes that Phase I market investigation, as well as evidence collected during its in-depth Phase II investigation, casts doubt on the Parties' arguments that the Transaction would generate significant efficiencies that could outweigh the negative effects of the Transaction.

[911] Orange internal document, ID ORANGE-EC-RFI22-00778378, Doc ID 2687-26129.

9.4.3.4.1. The Parties' combined market share and HHI are high and the increment is significant

(955) The Commission considers that the Parties' combined market shares (and HHI) are high, as is the increment in market shares (and HHI) resulting from the Transaction, and the Transaction would create a new market leader on the retail market for the supply of FMC bundles in Spain in terms of bundles.

(956) First, the combined market shares of the Parties are high. Based on share data provided by the Parties, as set out in section 9.2 above, on the market for the retail provision of FMC bundles, the JV would have a share of [40-50]% by volume and [30-40]% by value. In terms of subscribers, the JV would become the largest player and the combined market shares, which exceed 40%, could be indicative of market power. The current incumbent operator, Telefónica, would no longer be the market leader, but rather would become the second player in the market, being smaller than the JV, with [30-40]% share by volume in 2022. At the same time, Vodafone, the third biggest player on the market would be less than half the size of the JV, with [10-20]% share. In terms of revenues, Telefónica will remain the first player with [40-50]% share, but the Commission notes that, over the last four years, its market share has been steadily decreasing, with a decline of [0-5]% between 2019 and 2022. Vodafone will also remain the third biggest player on the market when looking at market shares by value and would be less than half the size of the JV, with [10-20]% share. Finally, the next biggest operator, Digi, despite continued growth, would be more than [5-10] times smaller than the JV by the number of subscribers and nearly [10-20] times smaller by revenue based on 2022 data.

(957) The situation is even more pronounced when considering the sub-segment of FMC bundles without premium Pay-TV football content in Spain for residential and business customers. This sub-segment accounts for EUR [5-10 billion] by revenue and [10-20 million] bundles in 2022. Based on share data provided by the Parties, as set out in section 9.2 above, on this possible market segment, the JV would have a share of [40-50]% by volume and [40-50]% by value, which could be indicative of market power. The JV would become the largest player in terms of number of bundles, and also the largest in terms of revenues post-Transaction. The current incumbent operator, Telefónica, would no longer be the market leader, but rather would become the second player in this potential market, being much smaller than the JV, with [20-30]% by volume and with [20-30]% by revenue.

(958) Second, the increment in market share would also be significant (with an increment of [10-20]% by volume and [10-20]% by value). Pre-Transaction, the Parties were two strong players of similar size in terms of subscribers on the retail market for the supply of FMC in Spain. As indicated in Section 9.3, the post-Transaction HHI on the market of retail supply of FMC bundles would be important, where the HHI post-Transaction would be of [3000-4000] in terms of subscribers and [3000-4000] in terms of revenues, with an increase of [[500-1000] and [500-1000] respectively.

(959) The increment is even higher on the sub-segment of FMC bundles without premium Pay-TV football content (with an increment of [20-30]% by volume and [20-30]% by value). In fact, the Parties' market share differed less than [0-5] percentage points by volume in 2022, with the increment steadily increasing over the past 4 years, as MásMóvil continues to grow. The HHI is also important on the market of retail supply of FMC bundles without premium Pay-TV football, namely [3000-4000] based on bundles and [3000-4000] based on revenues. In this market, the change in

HHI pre- and post-Transaction would also be considerable and higher than on the market of retail supply of FMC bundles.

(960) Because FMC bundles necessarily require a mobile and fixed component, Orange and MásMóvil's strength on the mobile and fixed markets translates into strength on the FMC bundles market. In fact, given that the Spanish market is characterized by the predominance of FMC offers[912], their strength on the mobile and fixed internet retail markets are in large part due to the popularity of its convergent offers.

(961) Orange is currently a well-established telecommunications player in Spain, being one of the strongest providers of multiple-play bundles in Spain. The vast majority of market participants who expressed a view in the course of the market investigation consider that Orange is an "*established*" retail multiple-play bundles (including FMC) player.[913] Orange provides FMC bundles, including 3P and 5P FMC bundles that include Pay-TV and may include premium TV content such as football (all matches of La Liga and the Champions League football) or films and series contents though the Orange brand. Jazztel and Simyo brands also operate in this market, but to a lesser extent.[914] In addition, Orange is described by the Parties to rating agencies as a Confidential information – Details of MASMOVIL's internal documents describing MASMOVIL's strategy].[915] In terms of financial performance, according to the same presentation to the rating agencies, Orange as a "*strong financial profile with an Confidential information – Details of MASMOVIL's internal documents describing MASMOVIL's strategy]*". Orange generated EUR [...] and [...] in FMC bundles in 2022.[916] All of these elements contribute to its strength on the retail market for the supply of FMC bundles.

(962) MásMóvil provides FMC bundles based on its own mobile and fixed network and by relying on wholesale agreements. The Commission notes that MásMóvil has grown over the years. In four years, MásMóvil gained [0-5]% in terms of subscribers and [0-5]% in terms of revenues [...]. Its growing position on the market is supported by the results of the market investigation, in which many respondents that expressed a view described MásMóvil as a challenger and an aggressive player.[917]

(963) Third, the Parties themselves consider that they will become a [Details of MASMOVIL's internal document describing MASMOVIL's strategy][918] post-Transaction. In the same vein, the Transaction rationale for Orange is to [Details of Orange's internal documents describing Orange's strategy] and [Details of Orange's

912 See e.g., Form CO, paragraphs 923 and 2151. The retail market for the supply of FMC bundles represents approx. 86% of the multiple-play offers in the Spanish market. According to the CNMC, the most popular convergent packages are 4P and 5P bundles (both FMC offers), reaching 12.4 million in 2021, representing respectively 7 million and 5.5 million bundles and accounting respectively for 43.05% and 34.08% of all bundles.

913 Responses to questionnaire Q1 to competitors, question D.A.D.9.

914 Form CO, paragraph 2109.

915 Internal document of MásMóvil, 2022.06 Project Kili - RAP v27 Non-Clean team version.pdf. MM-00818245, Doc ID 2659-3783.

916 RFI 18 – Q2 margins.

917 Responses to questionnaire Q1 to competitors, question D.A.D.11.

918 Internal document of MásMóvil, 2022.06 Project Kili - RAP v27 Non-Clean team version.pdf MM-00818245, Doc ID 2659-3783.

internal documents describing Orange's strategy][919] and is similar for MásMóvil [Details of MASMOVIL's internal document describing MASMOVIL's strategy].[920]

(964) On the basis of the above, the Commission concludes that the combined market shares of Orange and MásMóvil are high on the market for the retail supply of FMC bundles in Spain, and that the Transaction gives rise to a significant market share increment.

9.4.3.4.2. Competitive constraint from other network operators

9.4.3.4.2.1. Introduction

(965) As indicated above, a merger is unlikely to harm competition where the reaction of the remaining competitors would discipline the behaviour of the JV. On the other hand, competition would be harmed if the remaining competitors may not be willing or able to compete sufficiently post-Transaction so as to compensate for the loss of competition.[921]

(966) In the following paragraphs the Commission assesses the ability and incentives of Telefónica and Vodafone to compete and counteract the likely price effects resulting from the Transaction.

(967) The assessment of Telefónica and Vodafone's market position on the retail markets for the supply of mobile telecommunication and fixed internet services also apply in the retail market for the supply of FMC bundles, given that the offer of FMC bundles was included in those markets and the Spanish market is characterized by the predominance of FMC offers.[922]

9.4.3.4.2.2. Ability to compete

(968) The Transaction would leave only two network operators on the Spanish market to compete with the JV: Telefónica and Vodafone. While the Commission considers that Telefónica and Vodafone are likely to have the ability to compete with the Parties post-Transaction, they are unlikely to have the incentives to do so.

9.4.3.4.2.3. Telefónica's ability to compete

(969) Telefónica is currently the largest MNO both by revenue and subscribers in the market for the retail supply of FMC bundles.

(970) Telefónica offers FMC bundles through Movistar and O2 with a high level of profitability thanks notably to its advantageous position in relation to premium football content.[923]

(971) In line with the Parties' views, the Commission considers that despite a slight decrease in market share in the 2019 to 2022 period (from [30-40]% to [30-40]% by volume and [40-50]% to [40-50]% by value), given its strong market position,

919 Internal document of Orange, 220213 - KILI - KEY BENEFITS - DRAFT v0.docx. ID ORANGE-EC-RFI22-00973596, Doc ID 3023-38123.

920 Internal document of MásMóvil, 28.02.2022 Mandarina - EU Partners Discussion vF.pdf. ID MM-00096262, Doc ID 2671-20033.

921 See Horizontal Merger Guidelines, paragraphs 24-25 and footnote 28.

922 See e.g., Form CO, paragraphs 923 and 2151. The retail market for the supply of FMC bundles represents approx. [80-90]% of the multiple-play offers in the Spanish market. According to the CNMC, the most popular convergent packages are 4P and 5P bundles (both FMC offers), reaching 12.4 million in 2021, representing respectively 7 million and 5.5 million bundles and accounting respectively for 43.05% and 34.08% of all bundles.

923 Form CO, paragraph 927.

particularly at the premium end of the market[924], Telefónica is currently able to compete in the retail market for the supply of FMC bundles. The Commission does not consider that this would change in the future, either absent the Transaction or following the Transaction.

9.4.3.4.2.4. Vodafone's ability to compete

(972) Vodafone is currently the third largest MNO both by revenue and subscribers in the market for the retail supply of FMC bundles.

(973) Vodafone is active through its Lowi and Vodafone brands. Vodafone no longer has access to Telefónica's premium TV offering, in particular rights to La Liga and UEFA Champions League football content. However, after the decision to stop broadcasting premium football content, Vodafone introduced specific film and series packages, repositioning in a strategic change its TV offering by launching theme packs for customers (series, films, documentaries or children's' content) and an exclusivity with HBO.[925]

(974) In line with the Parties' views, the Commission considers that despite a decrease in market share in the 2019 to 2022 period (from [10-20]% to [10-20]% by volume and [10-20]% to [10-20]% by value), given its overall strong market position, Vodafone is currently able to compete in the retail market for the supply of FMC bundles. Equally, the Commission does not consider that this would change in the future, either absent the Transaction or following the Transaction.

(975) The Commission notes that Vodafone currently finds itself in a challenging position in Spain in terms of ability to invest in both mobile and fixed networks,[926] which puts into question its ability to compete aggressively against the Parties in the future. Vodafone's reliance on HFC and the resulting growing unattractiveness of its fixed network[927] might have spill-over effects on the market of retail supply of FMC bundles, given that a large part of the market is convergent. Vodafone itself indicated that "*Post-merger, Telefonica is the only alternative operator offering fixed wholesale access […] Telefonica could also decide to increase price or worsen quality. This risk becomes more material as the potential gains from such behaviour in this market include a spill over effects in the FMC market*".[928]

9.4.3.4.2.5. Incentives to compete

(976) The Commission considers that post-Transaction, in view of the reduction of competitive pressure, Telefónica and Vodafone are unlikely to have the incentive to compete sufficiently to counteract the negative impact resulting from the Transaction.

(977) First, as shown in Section 9.2 above, the market for the retail supply of mobile telecommunications services in Spain is highly concentrated and is oligopolistic. The Parties, together with Telefónica and Vodafone, account for around 90% or more of the market by volume and by value. According to the principles of strategic

924 For example, the Parties estimate that Telefónica accounts for around [80-90]% of all 5P FMC bundles with football content (se Annex RFI 37 Q1). These are the highest ARPU bundles available, and such a large share would mean that Telefónica captures a particularly large portion of high-paying retail customers in the market.

925 Form CO, paragraph 686.

926 Non-confidential minutes of a call with Vodafone of 20 December 2022, Doc ID 2455.

927 See further below section 9.4.3.2.2.3.

928 Response to RFI 1 to Vodafone, 2 June 2023, Q 12, Doc ID 3639.

complementarity, which is a general characteristic in standard models of oligopolistic competition and has been applied in several Commission decisions in the telecoms industry[929], competing firms have incentive to raise prices on the increased demand arising from the merger as a response to a price increase by another firm (which diverts some of the merging entity's demand to them).

(978) In its referral request under Article 9 of the Merger Regulation, the CNMC corroborated the concern that Telefónica and Vodafone would have little incentive to counteract price increases that could be applied by the JV as they could benefit from raising prices on any diverted demand themselves.[930]

(979) Second, Telefónica has focused its strategy in recent years on retaining customers and increasing its ARPU through selling multiple-play and FMC bundles and value-added services, in particular premium football content, rather than aggressively competing to win new customers through lower prices. It is estimated that over [50-60]% of Telefónica's overall multiple play bundle revenue in 2022 was accounted for by less than [20-30]% of its total multiple-play bundle subscriber base, i.e. its premium customers that subscribe to bundles with premium Pay-TV football content,[931] suggesting that Telefónica is unlikely to focus on competing through lower prices following the Transaction. The Commission considers this to be representative of Telefónica's position in each of the retail fixed internet, multiple-play and FMC markets in view of the fact that, as outlined in Section 7 above, in 2021, 96.3% of fixed internet lines were part of a bundled offer in Spain and, within the multiple-play bundles, the take-up of FMC bundles among telecoms consumers in Spain reached 82.5% of all fixed internet lines.

(980) Like the Parties, each of Telefónica and Vodafone also operate lower price-positioned brands in addition to their main brands, namely O2 in the case of Telefónica and Lowi in the case of Vodafone. However, according to FMC bundle market share data provided by the Parties,[932] these sub-brands, while growing to some extent, have a minimal presence on the market with shares c. [0-5]% by volume and value in 2022, and having grown by no more than [0-5]% in the four-year period 2019-2022.[933]

(981) Indeed, both Telefónica and Vodafone are considered to be rational players (i.e. that they would act in their own long term best interest in terms of profit maximisation) by the Parties and by third party analysts as shown in the following examples taken from the Parties internal documents.

---

929 See e.g. Commission decision of 12 December 2012 in case No M.6497 – *Hutchison 3G Austria/Orange Austria*; Commission decision of 28 May 2014 in case No M.6992 – *Hutchison 3G UK/Telefónica Ireland*; Commission decision of 2 July 2014 in case No M.7018 – *Telefónica Deutschland/E-Plus*; Commission decision of 1 September 2016 in case No M.7758 – *Hutchison 3G Italy / Wind / JV*.

930 Application under Article 9 of Council Regulation (EC) No139/2004 on the Control of Concentrations in file M.10896 – *Orange MásMóvil/JV* of 2 March 2023.

931 Annex RFI 37 Q1. This was estimated by comparing Telefónica's overall residential bundle customers and revenues in 2022, with its customers and revenues of bundles without football in 2022, with the difference being its customers and revenues of bundles with football.

932 See Annex RFI 37 Q1.

933 Annex RFI 37, Q1 (Bundles – FMC). The Parties were not able to provide a brand-level breakdown of market shares in the overall market for retail mobile services, so the Commission took FMC bundles as the closest available proxy given that, according to the CNMC "*83.3% of all post-paid mobile … in 2021 were part of a bundled offer*" (Form CO, paragraph 416).

(982) Orange's own strategic rationale for the Transaction, which the Orange Spain CEO at the time, Jean-Francois Fallacher, explained includes a [Details of Orange's internal documents describing Orange's strategy][934] in other words, [Details of Orange's internal documents describing Orange's strategy].

(983) Analyst reports appear to align with Orange's own strategic rationale for the Transaction. For example, [Details of MASMOVIL's internal documents describing MASMOVIL's strategy].[935] [Details of MASMOVIL's internal documents describing MASMOVIL's strategy]:

– [Details of MASMOVIL's internal documents describing MASMOVIL's strategy].

– [Details of MASMOVIL's internal documents describing MASMOVIL's strategy]..

(984) The Commission considers that these observations remain valid today, notably the lack of aggressive growth strategies via price wars, as evidenced by the price increases announced by all of the MNOs in Spain last year, including Orange (in August 2023) and Telefónica, Vodafone and MásMóvil (in December 2023).[936]

(985) Similarly, [Details of Orange's internal documents discussing market reactions to the Transaction announcement].:

– [Details of Orange's internal documents discussing market reactions to the Transaction announcement]

– [Details of Orange's internal documents discussing market reactions to the Transaction announcement]

(986) [Details of Orange's internal documents discussing market reactions to the Transaction announcement].

(987) Similarly, on 29 September 2022, ratings agency Fitch published its view that the Transaction "*should ease market pressures" and that "the market should benefit from a reduced number of competitors [since] A market challenger [i.e. MásMóvil] is moving into a more incumbent-like position and should adapt its strategy accordingly*." Fitch noted that *"competition has been most pronounced in mobile, where MM [i.e. MásMóvil] has consistently taken market share from Orange and Vodafone [whereas] Telefónica's Movistar [is] positioned towards the premium end of the market*".[937]

(988) More generally, both Telefónica and Vodafone have been losing subscriber market shares in the recent years, with gross adds decreasing.[938] This trend in the Parties' MNO competitors' market shares provides an important indication of the lack of effective incentives of Telefónica and Vodafone to compete post-Transaction, and the more reactive nature of their current competitive behaviour. The Commission does not consider that either would alter this strategy as a result of the Transaction, rather that they would continue on this track further as a result of the decrease in

934 [Details of Orange's internal documents describing Orange's strategy].

935 MásMóvil internal document, ID MM-00931525, Doc ID 2661-8144.

936 See https://euroweeklynews.com/2023/01/08/movistar-and-vodafone-to-increase-rates-for-customers-this-january-in-spain/, Doc ID 5633.

937 See https://www.fitchratings.com/research/corporate-finance/orange-MásMóvil_MásMóvil_-merger-to-ease-spanish-telecoms-market-pressure-29-09-2022, Doc ID 5665.

938 Annex RFI 37 Q1.

competition brought by the removal of competition between Orange and MásMóvil. This is supported by quotes from senior management of both companies indicating that they favour consolidation, including in Spain, as they consider markets to be too competitive today. For example, [Details of MASMOVIL's internal documents describing MASMOVIL's strategy].[939]

(989) Additionally, respondents to the Commission's market investigation considered that Telefónica and Vodafone will have a reduced incentive to compete post-Transaction. One respondent, as consumer organisation, indicated, "*the merger would promote oligopoly in Spain [with the result that] Companies are not going to be interested in competing*"[940] while another respondent, a non-MNO, considered that "*after the merger, the remaining large operators would have an incentive to adopt a symmetry on prices to hamper competition from new challengers and increase prices. This has already been the case as the recent price increase announced by all large operators corroborates*".[941]

(990) In light of the above, the Commission takes the view that Telefónica and Vodafone would have reduced incentives to compete post-Transaction.

9.4.3.4.3. Competitive constraint from smaller operators

(991) The Commission, based on the results of the market investigation and the analysis of the internal documents of the Parties, does not consider that smaller operators, which typically rely on wholesale mobile network access services and in some cases also wholesale broadband access services, are unable to meaningfully constrain the competitive behaviour of MNOs on the market for retail supply of FMC bundles.

(992) The assessment of the access seekers' market position on the retail markets for the supply of mobile telecommunication and fixed internet services also apply in the retail market for the supply of FMC bundles, given that the offer of FMC bundles was included in those markets and the Spanish market is characterized by the predominance of FMC offers.[942]

9.4.3.4.3.1. Different types of access seekers in Spain

(993) Sections 7 and 9.4.3.1.3.2 outline the different types of access seekers in Spain.

9.4.3.4.3.2. Competitive position of different types of access seekers in Spain

(994) In the retail market for the supply FMC bundles, access seekers need mobile and fixed access from MNOs or FNOs to provide FMC bundles. All access seekers depend on a larger player to be active on the market for the supply FMC bundles.

(995) Currently only one smaller operator and non-MNO – Digi - is active across Spain in the retail market for the supply FMC bundles. However, Digi relies on a wholesale agreement with Telefónica for both fixed internet and mobile services.[943]

---

939 [Details of MASMOVIL's internal documents describing MASMOVIL's strategy].

940 Response to questionnaire Q1 to competitors, question E.4, Doc ID 2956.

941 Response to questionnaire Q1 to competitors, question E.4, Doc ID 2834.

942 See e.g., Form CO, paragraphs 923 and 2151. The retail market for the supply of FMC bundles represents approx. 86% of the multiple-play offers in the Spanish market. According to the CNMC, the most popular convergent packages are 4P and 5P bundles (both FMC offers), reaching 12.4 million in 2021, representing respectively 7 million and 5.5 million bundles and accounting respectively for 43.05% and 34.08% of all bundles.

943 Non-confidential minutes of the call with Digi of 29 November 2022, paragraphs 6 and 13, Doc ID 1846.

(996) Adamo and Finetwork are both white label operators on MásMóvil's and Vodafone's mobile networks respectively. While the Parties acknowledge that as a rule white label brands are subject to the tariff plans agreed with their host MNO and therefore are unable to exert meaningful price competition in the market, they consider that some white label operators can exert relevant competitive pressure, and that "*Finetwork is an example of a white label operator that acts independently of its host (Vodafone) to an important extent, due to its large customer base and resulting countervailing buyer power.*"[944] However, the Commission understands that Vodafone nonetheless controls to a large extent the retail tariffs of Finetwork. As regards fixed internet, Finetwork operates a limited FTTH network which it complements with a wholesale broadband access agreement with Vodafone (HFC technology). No similar claim is made in respect of Adamo, whose MVNO agreement with Orange expires in [2024-2029], and the Commission notes that Adamo is in any event primarily active as a regional fixed network operator and wholesale provider "*focused on rural areas*" of Spain.[945]

(997) Avatel, which the Commission understands to be a full MVNO on Telefónica's network since January 2022 and with its own fixed network, is only active in certain rural regions of Spain, focused on "*small and medium-sized populations*" and therefore serves only a relatively small portion of the Spanish population.[946]

(998) Similarly, PTV/Procono, [Details of the Parties' commercial agreements, is a regional operator and even it has its own fixed network, it is mainly HFC technology (approximately 70%).

Table 41 MVNO and white label operators (2022)

Operator	Revenues (EUR, M)	Mobile SIMs (M)	BUs (M)
Digi	501	[3-4 (incl. 1-2 FMC)]	6.5 (April 2023)
Avatel	300	[0-0.5]	2.6
Finetwork	135	[0.5-1]	0.1
Adamo (incl. Aire Networks)	100	[0-0.5]	[2-3]
PTV/Procono	[50-100]	[0-0.5]	1.5
Total	[1,100-1,150]	[5-6]	[12-13]

Source: Parties estimates (Article 6(1)(c) Response, Table 7, paragraph 147, and Annex 6(1)(c) 2.6)

(999) Digi has been the only smaller non-MNO operating nationally which has been able to capture a non-marginal share of subscribers in the FMC bundles market, with [1-2] million mobile lines as of 2022, as set out in **Table 41** above. The Parties have not provided the number of subscribers to FMC bundles for the other players, but their number of consumers is marginal for mobile services (which also includes standalone mobile services), and is necessarily smaller for FMC bundles. Indeed, Avatel, a regional MVNO had [0-0.5 million] mobile lines as of 2022. Finetwork and Adamo, white label operators/resellers, had [0-0.5 million] mobile lines as of 2022. Finetwork and Adamo, white label operators/resellers, had [0.5–1 million] and [0-0.5 million] mobile subscribers respectively as of 2022, while PTV/Procono had [0-0.5 million].[947]

944 Form CO, paragraph 2420.
945 See https://www.ardian.com/press-releases/ardian-acquires-adamo-representing-its-first-investment-telecommunications-sector, Doc ID 5646.
946 See https://www.avatel.es/avatel-arranca-2022-superando-las-200-000-lineas-moviles-en-su-omv-full/, Doc ID 5647.
947 Form CO, Table 20.

(1000) According to the data submitted by the Parties (see Annex RFI 37 Q1), collectively access seekers had a cumulative share of [5-10]% in terms of subscribers and [5-10]% in terms of revenues in the retail FMC bundles market in 2022. By way of comparison, Digi, the largest of the MVNOs by a significant margin, has a customer base that remains more than [0-5] times smaller than that of MásMóvil, and more than [5-10] times smaller than that of the Parties combined.

(1001) In addition, MVNOs accounted for a large share of pre-paid mobile customers on a combined basis ([20-30]% of subscribers and [20-30]% of revenues), and account for less than [10-20]% of standalone post-paid mobile customers (by subscribers and revenues). Since only post-paid mobile subscriptions can be included as part of such bundle, a large part of MVNOs are not active in the market for the supply of FMC bundles.

(1002) Smaller operators` share has increased over the last years but remain a small proportion of the market. From 2019 to 2022, the cumulative subscriber shares of access seekers has increased from [0-5]% to [5-10]%, and from c. [0-5]% to just under [5-10]% by value over the same period.

Table 42 Market shares of MVNOs in the market for FMC bundles services in Spain

	Shares by volume (SIMs) (%)				**Shares by value (EUR) (%)**			
	2019	**2020**	**2021**	**2022**	**2019**	**2020**	**2021**	**2022**
Digi	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%
Finetwork	Included in Others				Included in Others			
PTV								
Adamo								
Avatel								
Others	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%
Total	[0-5]%	[0-5]%	[5-10]%	[5-10]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%

Source: The Parties (Annex RFI 37 Q1)

(1003) The Parties point out that the gross adds' share of Spanish access seekers, and Digi in particular, is significant showing that "*these players (in aggregate) will exert material competitive pressure on the JV*"[948] According to the market share data provided by the Parties, in 2022, the gross adds' share of Spanish MVNOs was [20-30]% in the retail supply of FMC bundles market.

(1004) First, access seekers' increased market share and higher gross add share suggests that MVNOs exhibit a significant level of churn, which is likely to be higher than the rate of churn experienced by the Parties or other MNOs.[949]

(1005) Second, with the exception of Digi (which, as explained later in this section, competes mainly in the low-end of the market), most access seekers have a very small market presence. In the FMC bundles market, only Digi had a non-negligible market share in 2022, with [0-5]% by volume and [0-5]% by value (which is still

948 Form CO, paragraph 1063.

949 While the Parties note that "*Churn is one of the least reported KPIs in the telecommunication industry*" (Form CO, footnote 415), which makes clear overall observations difficult, it appears to nonetheless be the case that churn rates are lower in the case of FMC bundles, compared to standalone (and in particular pre-paid) mobile subscriptions, as has been observed in past Commission decisions, e.g. in M.8792 – *T-Mobile NL/Tele2 NL,* paragraph 567: "*…customers that purchase mobile as part of an FMC bundle are less likely to churn*". As outlined above, since a larger proportion of access seekers' mobile customers are standalone customers, such access seekers are therefore likely to experience a larger degree of churn than MNOs, which have a greater of mobile customers purchasing bundled services.

[5-10] times smaller than the Parties' combined share by volume and [10-20] times smaller than the Parties' combined share by value). The other access seekers (including Finetwork, PTV, Adamo and Avatel) hold a combined share of [0-5]% by volume and [0-5]% by value.

(1006) As can be seen from **Table 42** below, however, Digi continues to mainly focus on standalone mobile customers, which account for over two thirds of its total mobile customer base, and in particular pre-paid mobile customers, which account for close to half of its mobile customer base. Less than one third of Digi's mobile customers subscribed to FMC bundles, which as outlined in Section 7, account for the vast majority of mobile subscriptions and in which it is necessary to be present in order to compete in a meaningful way in Spain in view of the strong preference for convergent or bundled subscriptions.

Table 43 Breakdown of Digi's mobile customer base (2022)

Customer type	SIMs (2022)	% of total
Pre-paid standalone	[1-2]	[40-50]%
Post-paid standalone	[0.5-1]	[20-30]%
All Standalone (pre-paid and post-paid)	[2-3]	[60-70]%
FMC bundles	[1-2]	[30-40]%
All mobile customers (standalone and bundles)	[3-4]	100%

Source: Parties (Annex RFI 37, Q1)

(1007) As the Parties point out, Digi has grown rapidly, albeit from a very small base. Digi appears to be the fastest growing access seeker in the market which, according to the Parties, is explained by the fact that Digi is the "*most aggressive player*" in the market with "*low-priced offers*".[950]

(1008) Digi indicated that it has a "*value for money*" strategy in the long term and is "*willing to allow access for everybody to the latest technology at affordable prices*"[951], which is possible because Digi "*is investing in its own FTTH networks and is hiring its own employees*" and is able "*control its CAPEX and OPEX*"[952]. A large part of Digi's mobile base is still standalone/pre-paid (i.e. 40%), which targets price sensitive customers.[953] Digi is particularly attentive to prices offered to its consumers, and its own survey data suggests that its customers are particularly price sensitive,[954] which is why Digi indicated it does not want to increase its prices in 2023 like other players.[955] In terms of pricing, Digi has been and continues to mainly compete with the MNOs' second, or even third, brands (e.g. Simyo, Lowi, O2) and independent MVNOs, since Digi is active in a similar low-cost price segment.

(1009) The Parties' internal documents confirm that Digi competes mainly with MNO's low-cost brands in the low-end of the market. For instance, [Details of MASMOVIL's internal document describing Digi's positioning on the market].[956] [Details of

950 Form CO, paragraphs 490 and 936.
951 Non-confidential minutes of the call with Digi of 25 April 2023, paragraph 16, Doc ID 3273.
952 Non-confidential minutes of the call with Digi of 25 April 2023, paragraph 5, Doc ID 3273.
953 See "*From a consumer perspective, certain end-customer groups such as low-income groups or youngsters prefer pre-paid services to better control their monthly expense on mobile services*" Response to questionnaire Q1 to competitors, question C.A.A.A.4, Doc ID 2834.
954 Digi's response to questionnaire Q1 to competitors, question D.A.A.6, Doc ID 2834.
955 Non-confidential minutes of the call with Digi of 25 April 2023, paragraph 16, Doc ID 3273.
956 Annex RFI 1 Q53.7.

MASMOVIL’s internal document describing Digi’s positioning on the market][957] [Details of MASMOVIL’s internal document describing Digi’s positioning on the market].

Figure 63 Confidential information – Details of MASMOVIL’s internal document describing MASMOVIL’s strategy].

[...]

Source: Confidential information – Details of MASMOVIL’s internal document describing MASMOVIL’s strategy].

(1010) The same presentation notes that [Details of MASMOVIL’s internal document describing MASMOVIL’s strategy],[958] suggesting that Digi may not exert significant pricing pressure on the Parties.

(1011) To the extent Digi may also gain some FMC bundle customers that switch away from the Parties’ or other players mid-end and high-end brands, despite not itself being active in those segments (e.g. because it does not have an offer including Pay-TV services[959]), the Commission notes that, rather than being evidence that Digi competes closely with such higher-end brands, is likely a consequence of a general trend among certain customer demographics, e.g. those that place less value on having packages with premium TV content in an FMC bundle, towards ‘cord cutting’, i.e. dropping TV from their offerings, and is a trend that has also been observed in other markets across the EU in recent years.[960] Specifically with regard to Spain, [Details of MASMOVIL’s internal documents describing MASMOVIL’s strategy regarding Pay-TV].[961] [Details of MASMOVIL’s internal documents describing MASMOVIL’s strategy regarding Pay-TV].[962] [Details of MASMOVIL’s internal documents describing MASMOVIL’s strategy regarding Pay-TV].[963]

(1012) More generally, the Parties' typical competitor benchmarks do not take into account access seekers, with the exception of Digi, and even in that case Digi typically appears less prominently in such reporting than other network operators.

(1013) For example, [Details of MASMOVIL’s internal documents describing MASMOVIL’s benchmarking of competitors].[964]

Figure 64 [Details of MASMOVIL’s internal documents describing MASMOVIL’s strategy].

[...]

Source: [Details of MASMOVIL’s internal documents describing MASMOVIL’s strategy].

---

957 MásMóvil internal document, ID MM-00098679, Doc ID 2671-22450.

958 MásMóvil internal document, ID MM-00098679, Doc ID 2671-22450, slide 39.

959 Non-confidential minutes of the call with Digi of 29 November 2022, paragraph 11, Doc ID 1846.

960 The Commission does not however consider that as a result OTT platforms represent an out of market competitive constraint on the market for retail FMC bundles. OTT services such as subscription video on demand services (e.g. Netflix, Disney+, etc.), are not interchangeable for retail FMC bundles, and indeed they can only be provided to customers that already have a mobile and/or fixed subscription, as part of a broader FMC bundle, as OTT platforms depend on data to deliver their services.

961 See also in this regard, Telefónica’s response to questionnaire Q1 to competitors, question C.A.A.D.6 Doc ID 2796. (“*There is evidence that there is a trend in the market towards the "unbundling" of linear pay-TV services*”).

962 [Details of MASMOVIL’s internal documents describing MASMOVIL’s strategy]..

963 MásMóvil internal document, Report for MásMóvil by Analysys Mason in relation to the Transaction dated 6 October 2022, ID MM-00183330, Doc ID 2670-74995.

964 Annex RFI 1 Q53.7, page 18.

(1014) Another MásMóvil internal document paints a similar picture, [Details of MASMOVIL's internal documents describing MASMOVIL's perception of its competitors].

Figure 65 [Details of MASMOVIL's internal documents describing MASMOVIL's strategy]

[...]

Source: [Details of MASMOVIL's internal documents describing MASMOVIL's strategy]

(1015) Similarly, an Orange brand strategy presentation, shown below, refers to its "peers" in terms of the segment(s) of the market they address [Details of Orange's internal documents describing Orange's strategy].[965]

Figure 66 [Details of Orange's internal documents describing Orange's strategy]

[...]

Source: [Details of Orange's internal documents describing Orange's strategy]

9.4.3.4.3.3. Limited ability of access seekers to compete due to their reliance on the wholesale conditions

(1016) A factor that strongly affects access seekers' ability to exert the same competitive pressure as MNOs in the retail market for the supply of FMC bundles in a significant and sustained way is their dependency on both mobile and fixed wholesale access conditions. The wholesale access conditions limit the range of services that they can offer, the customer segment they can address, and the prices they can offer. In this regard, in the retail market for the supply FMC bundles, access seekers are uniquely disadvantaged since they need both mobile and fixed access to provide FMC bundles.

(1017) In addition, a large majority of respondents indicated that being able to offer FMC bundles is "*essential*"[966] in Spain to effectively compete, given the high degree of convergence. They also confirmed that it will be even more important in the next 3-5 years than today.[967]

(1018) As pointed out by one respondent to the market investigation, "*Since FMC services are basically the combination of mobile services and fixed services, the barriers mentioned …for retail mobile services and …for retail fixed services apply also to enter the … market*".[968] This is corroborated by Adamo, which indicated that its "*future expansion heavily depends on being able to close attractive wholesale deals – both on mobile and on fixed networks (>75% of our new clients join on FMC bundles*)".[969]

(1019) Regarding fixed internet, as noted in Section 7 above, 70% of the Spanish wholesale broadband market has been deregulated, which means smaller operators would need to conclude commercial fixed wholesale agreements in order to offer retail fixed internet services in those areas, and therefore on a national basis as the Parties do today.

965 Orange internal document of 10 March 2020, ID ORANGE-EC-RFI22-00682896, Doc ID 2684-91180.

966 Responses to questionnaire Q1 to competitors, question D.A.D.39. See also "*As most consumers will demand both fixed and mobile connectivity, trying to optimize their spend, bundled offers are crucial for providers to avoid being displaced in the market"* (Doc ID 3624).

967 Responses to questionnaire Q1 to competitors, question D.A.D.41.

968 Digi's response to questionnaire Q1 to competitors, question D.A.D.8, Doc ID 2834.

969 Response to questionnaire Q3 to wholesale customers, question B.3, Doc ID 3320.

(1020) While there are certain smaller, wholesale providers such as Lyntia Access available, such "*independent neutral [i.e. non vertically-integrated] wholesale FTTH companies [are] available in rural ... low-density areas only*"[970] whereas the only viable providers for operators wishing to offer services nationally, and in particular in large urban centres, are Telefónica or Orange. As one provider indicated "*only Orange and Telefonica offer FTTH wholesale access, while Vodafone mainly only offers HFC network access ... which is inferior ... The importance of fibre in terms of consumer preference is clear from the fact that even Vodafone markets its retail fixed internet as 'fibre' even though that service may in fact be provided over its HFC (hybrid-fibre coaxial, i.e. cable) network.*"[971]

(1021) Dependence on the fixed wholesale access conditions granted by its host FNO, and the importance of obtaining good conditions to compete on the retail market for the supply of FMC bundles were highlighted to the Commission by Finetwork: "*FMC bundles cannot be offered competitively, because our fibre agreements do not give us access at reasonable prices*"[972].

(1022) Similarly as regards mobile services, during the market investigation, many of the non-MNOs pointed out this challenge and took the view that MVNOs are currently unable to compete effectively in the Spanish market for retail mobile telecommunication services, including FMC bundles, due to the fact that MVNOs enjoy limited bargaining power in negotiations with MNOs and the poor terms of the resulting wholesale access conditions. As one MVNO indicated, unlike MásMóvil, "*Pure MVNOs do not have this power of negotiation, as they fully depend on wholesale agreements with MNOs. This is why, it is more difficult for pure MVNOs to get affordable prices in wholesale agreements.*"[973] The same operator noted that even though it could offer mobile services nationally, it does not do so as margins would be too low unless it can also offer bundled services, in view of the strong preference among Spanish consumers for convergent services: "*Furthermore, Avatel does not offer standalone mobile in the areas in which it is not present with its fixed network because its wholesale mobile agreement with Telefónica would not allow Avatel to have a profitable margin in order to provide nationwide services without offering convergent services as well*".[974] Other non-MNOs appear to operate a similar model, such as Adamo, which the Parties' note can serve around 25% of the Spanish population, mainly in rural areas and relies on a white label agreement with MásMóvil to provide convergent services, i.e. FMC bundles, in areas where it has its own fixed network footprint.[975] Despite having mobile wholesale access that would in principle allow Adamo to offer such services nationally, it also focuses on providing services within its fixed network footprint since, in its own words, "*as the market is strongly dominated by FMC offers, we focus on areas where we also have our own fixed network.*"[976] This is also the case for Avatel which "*only offers mobile services in those municipalities where it has its own FTTH network in order to compete in FMC bundles*".[977] Another example is PTV/Procono, [Details of the

970 Finetwork's response to questionnaire Q3 to wholesale customers, question D.A.13, Doc ID 3407.
971 Minutes of meeting with Finetwork, 2 February 2023, paragraphs 17 & 20, Doc ID 2471.
972 Response to questionnaire Q3 to wholesale customers, question B.3, Doc ID 3407.
973 Minutes of call with Avatel of 10 March 2022, paragraph 31, Doc ID 3069.
974 Minutes of call with Avatel of 10 March 2022, paragraph 13, Doc ID 3069.
975 Form CO, paragraphs 714-716.
976 Response to questionnaire Q3 to wholesale customers, questionB.3, Doc ID 3320.
977 Response to questionnaire Q3 to wholesale customers, question B.3, Doc ID 3298.

Parties' commercial agreements] is not active nationwide in Spain.[978] Even if, in the short term, certain MVNOs may be able to rely on existing wholesale agreements to provide retail mobile services nationally (e.g. Digi and Finetwork), as one access seeker that responded to the market investigation pointed out in response to the Phase I market investigation, "*competition pressure between MNOs help the MVNOs (whose bargaining position is much weaker than the one of the MNOs) negotiate or maintain reasonable terms with the existing MNOs*."[979] Indeed, Digi outlined that its current MVNO "*agreement is the result of renegotiations during which competitive pressure was exercised by the other MNOs, including Orange and MásMóvil. During these renegotiations, Digi has received alternative offers from other players in the wholesale access market (including Orange, MásMóvil and Vodafone). Digi considers that this competitive tension helped to have better terms agreed with Telefonica and it is concerned that the Transaction would result in less competition in this market*."[980]

(1023) The Commission's investigation showed that MNOs do not have an incentive to offer attractive wholesale terms and conditions, at least for access seekers that they consider could become a potential competitive threat. Alluding to the wholesale agreements Orange concluded with MásMóvil, [Details of MASMOVIL's internal document Details of MASMOVIL's internal document describing MASMOVIL's strategy].[981]

(1024) Further, the challenge of the wholesale conditions that the access seekers face is twofold. First of all, MVNOs are dependent on the wholesale price charged by the host MNO when designing their own tariff plans. In particular, in an increasingly data-centric retail market, the non-MNOs already face and will continue to face significant difficulties to compete with the MNOs on larger data packages. As MásMóvil observed, it was able to secure wholesale access under its NRA agreement that was not based [Details of MASMOVIL's internal document describing MASMOVIL's strategy].[982] Pricing under MVNO agreements however is typically based more closely on data consumption, which disincentivises MVNOs from offering larger data packages in mobile subscriptions. Indeed, in pointing out the lack of comparability between NRAs on the one hand and MVNO agreements on the other hand, the Parties indicate that NRAs often come with upfront volume commitments, which allow for more predictability, including for the access seeker, whereas MVNO agreements typically do not, since they claim "*as often MVNOs have less traffic*" which in turn impacts "*the financial conditions offered to the MVNO*."[983] The Commission notes that it may be the financial conditions offered to MVNOs that result in them having less traffic than MNOs, including partial MNOs that complement their coverage with NRAs.

---

978 Form CO, Table 51 and paragraph 727.

979 Response to questionnaire Q1 to competitors, question E.2, Doc ID 2834.

980 Minutes of call with Digi of 29 November 2022, paragraph 17, Doc ID 1846.

981 MásMóvil internal document dated 10 February 2020, ID MM-00931525, Doc ID 2661-8144.

982 MásMóvil internal document dated 10 February 2020, ID MM-00931525, Doc ID 2661-8144.

983 Response to RFI 32, question 7: "*In the case of NRAs, the access seeker typically undertakes important minimum purchase commitments (in terms of traffic volumes per year and revenues) which gives more predictability to the host operator. These commitments are usually less important in MVNO agreements, as often MVNOs have less traffic. However, some large MVNOs could undertake important volume/revenue commitments. In addition, for smaller MVNOs, usually minimum purchase commitments are not included in the contracts which impacts predictability for the host operator and therefore the financial conditions offered to the MVNO*."

(1025) Second, MVNOs are reliant on the quality of their host network to provide services and therefore are not able to differentiate their retail services from those of the host MNO as regards quality or technical innovation. This is further exacerbated by the fact that the MNOs all have mobile offerings that include 5G whereas currently no MVNO has a 5G offering. This is the case notably for Avatel, which indicated that it "*tried to seek access to the 5G network from both, Telefonica and Orange, but for the time being, neither operator provided any offer at any price for 5G access*.[984] The same is true for white label operators such as Finetwork, which notes that "*currently, MNOs do not offer 5G network access as part of their wholesale mobile network access agreements to access seekers/MVNOs, as none of the 3-4 MNOs wants to be the first one offering 5G in wholesale deals*."[985] Digi likewise does not currently offer 5G to its customers, although it notes that its current MVNO agreement does permit it to offer 5G services to a part of the overall retail mobile market, subject to conditions, namely to "*residential customers (individuals and SoHo customers), but not to develop special 5G services for business purposes or to cover big enterprises or industrial needs …[subject to] Digi investing in the necessary equipment*."[986] In any event, Digi's MVNO agreement (even if permitting a 5G offering) does not enable it to differentiate its retail services from those of the host MNO as regards quality or technical innovation.

9.4.3.4.3.3.1. MNOs/FNOs do not have an incentive to offer attractive wholesale terms

(1026) In negotiations between MNOs/FNOs and access seekers, the incentives of both sides are misaligned. Since the former are vertically integrated and operate at both retail and wholesale level, there is a risk that they will lose some of their retail subscribers to the access seekers they host. This is often referred to as "cannibalisation". The risk of cannibalisation means that MNOs/FNOs face a trade-off when bidding for contracts to supply access seekers. On the one hand, hosting access seekers generates wholesale profits for the MNO/FNO. On the other hand, access seekers can cannibalize the retail business of the host MNO/FNO as well as induce a lower retail market price due to potentially increasing retail competition.

(1027) If the MNO/FNO and the access seeker target different customer segments in the retail market, the risk of cannibalisation is lower, and MNOs/FNOs may be more inclined to provide wholesale access to the access seekers with a different profile than that of the MNO/FNO, i.e. where the access seeker in question may target niche customer groups (such as international communities or IoT services). [Details of MASMOVIL's internal documents describing Digi's target customers].[987]

(1028) On the mobile side, the wholesale market for access and call origination services is currently dominated by two players only, Telefónica and Orange. Telefónica had a market share of 70%-80% in 2022, which in fact is almost entirely accounted for by Digi, while Orange has a share of less than 20% in 2022 (although this likely understates to a large degree Orange's wholesale activities as it also host around [50-60]% of MásMóvil's traffic under an NRA agreement,[988] which is not captured by these shares).[989] MásMóvil and Vodafone, each with a share of less than 5% by

984 Minutes of call with Avatel of 10 March 2022, paragraph 16, Doc ID 3069.
985 Minutes of call with Finetwork of 2 February 2023, paragraph 22, Doc ID 2471.
986 Minutes of meeting with Digi of 25 April 2023, paragraph 13, Doc ID 3273.
987 MásMóvil internal document dated 10 February 2020, ID MM-00931525, Doc ID 2661-8144.
988 **[Details of the Parties' commercial agreements]**.
989 Annex RFI 37 Q1.

value and volume in 2022,[990] and have not made any material market share gains in the four years from 2019 to 2022.

(1029) The Parties do not dispute that Vodafone has not been a particularly active player in the wholesale market in the past, but submit that it will be in the future, irrespective of the Transaction. Echoing the Parties' view, Vodafone—possibly as a result of its challenging position in Spain—has indicated that it "*will then have strong incentives (in fact it will have no alternative but) to aggressively compete in both the wholesale and the retail markets in order to gain scale to enable network investments*."[991] The Commission considers that while Vodafone is indeed likely to have the ability to compete for MVNO customers, it is thus very uncertain, even in view of strong statements such as the above, whether Vodafone will in fact do so in a way that would enable MVNOs to effectively compete with it and with other MNOs in the market.

(1030) On the fixed internet side, the wholesale market for broadband access services is currently dominated by two players only, Telefónica and Orange (**[70--90]**% combined in 2022). Telefónica had a market share of **[40-50]**% by volume and **[60-70**]% by value, while Orange has a share of **[20-30]**% by volume and **[20-30]**% by value in 2022. MásMóvil has a share of less than **[0-5]**%, and Vodafone had a negligible position and is included among "Others",[992] which is largely as a result of its increasingly "*obsolete HFC technology*"-based fixed network.[993] Despite statements that it "*will then have strong incentives (in fact it will have no alternative but) to aggressively compete in ... wholesale ... markets*",[994] Vodafone is unlikely to be a credible player in the wholesale broadband access market until it is able to upgrade its network from HFC to FTTH (see Section 9.4.3.4.2.4 above).

(1031) The wholesale markets in Spain are concentrated Orange and Telefónica have a significant degree of market power. This is reflected in the wholesale terms and conditions Spanish access seekers are able to secure, and the fact that—as outlined in the previous section—many access seekers do not offer mobile services outside of the regions where they can also offer fixed (and therefore FMC) services as indicated below, as standalone mobile services would not offer sufficient margins in view of the wholesale terms. In addition, most smaller operators do not have wholesale broadband access from either Orange or Telefónica today. While Digi does have wholesale access to Telefónica's FTTH network, it charges a higher price for retail fixed internet services in areas where it relies on Telefónica's fixed network compared to areas where it has rolled out its own fixed network, suggesting that it needs to pass on the high wholesale access cost charged by Telefónica in order to remain viable since, **[Details of MASMOVIL's internal document describing MASMOVIL's strategy]**.[995]

(1032) Consequently, access seekers' bargaining position vis-à-vis MNOs/FNOs in the Spanish market is particularly weak, and host MNOs/FNOs such as Telefónica generally do not have an incentive to offer attractive wholesale conditions, at least to MVNOs/FVNOs that could develop into a competitive threat. **[Details of**

990 Annex RFI 37 Q1.
991 Position Paper, "Vodafone's views on the proposed transaction", 28 February 2023 (Doc ID 2414).
992 See Annex RFI 37 Q1.
993 Response to questionnaire Q1 to competitors, question E.16, Doc ID 2865.
994 Position Paper, "Vodafone's views on the proposed transaction", 28 February 2023 (Doc ID 2414).
995 MásMóvil internal document, ID MM-00098679, Doc ID 2671-22450, slide 39.

MASMOVIL's internal document describing Telefonica's competitive pressure][996].

9.4.3.4.3.3.2. Wholesale access terms limit mobile access seekers' ability to compete on price

(1033) With regard to retail pricing, while the majority of access seekers (i.e. excluding white label operators such as Finetwork) are in principle free to design their own tariff plans, they are constrained by the wholesale pricing they receive from their host MNO. Access seekers expressed concerns that already pre-Transaction wholesale pricing is not competitive enough to enable competitive retail offerings. Accordingly, and as further explained below, access seekers exert limited competition on pricing by MNOs pre-Transaction, and following the Transaction, the greater concentration levels will be expected to only further reduce the constraint exercisable by access seekers.

(1034) For example, Avatel indicated that it "*struggles to get profitable wholesale agreements at a price that would allow it to be able to operate nationally and to offer competitive prices*." It further clarified that even though it has a nationwide MVNO agreement, in view of retail customers preferences for convergent offers (i.e. FMC bundles), coupled with the high mobile wholesale price under its MVNO agreement, "*Avatel does not offer standalone mobile in the areas in which it is not present with its fixed network because its wholesale mobile agreement with Telefónica would not allow Avatel to have a profitable margin in order to provide nationwide services*"[997].

(1035) **[Details of MASMOVIL's internal documents describing MASMOVIL's strategy]**".[998] Even though no non-MNO offers 5G services today, respondents to the Commission's market investigation indicated that 5G was either "*essential*" or "*relatively important*" today, whereas in the next 3-5 years, the vast majority said it would be "*essential*" to be able to offer 5G services.[999]

(1036) The access seekers' inability to offer attractive mobile data packages, or 5G services, significantly reduces their competitive strength in relation to prices given the steadily increasing demand for data and next generation technologies, which leads tariff plans to become increasingly data centric. It is expected that the market for 5G, large data bundles and unlimited data propositions will continue to grow, thereby putting pressure on the lower-end segment of the market in particular, which is where Digi, Finetwork and other non-MNOs tend to focus. **[Details of MASMOVIL's internal documents regarding tariff price increases]**."[1000] Overall, this slide points to a trend of increasing data requirements and an ability to increase wholesale prices, even there is an expectation that such price increase may be partially mitigated through lower wholesale costs per GB.

(1037) In the future, it will become even more critical for access seekers to be able to compete on 5G and large data bundles to gain customers and exert some competitive pressure on prices in the market. As one of the main MVNOs that responded to the market investigation indicated "*In 3 years, most customers in all the Spanish market and in all segments (from low-cost to high-cost, from pre-paid to post-paid) will*

996 MásMóvil internal document dated 10 February 2020, ID MM-00931525, Doc ID 2661-8144.

997 Avatel call minutes, paragraphs 9 and 13, Doc ID 3069.

998 MásMóvil internal document, ID MM-00175220, Doc ID 2670-66885.

999 Responses to questionnaire Q1 to competitors, questions D.A.A.35 and D.A.A.37.

1000 MásMóvil internal document, ID MM-00175220, Doc ID 2670-66885.

demand 5G services."[1001] Similarly, the Parties' internal documents note that **[Details of MASMOVIL's internal document describing the impact of data allowance]**.[1002] **[Details of MASMOVIL's internal document describing the impact of data allowance]**.[1003] This means that Digi and other MVNOs would be particularly vulnerable to changes in their wholesale costs or conditions, as they focus primarily on the low-cost end of the market and, as the Parties' note, **[Details of MASMOVIL's internal document describing Digi and MVNO's margins]**.[1004] This point was echoed by a non-MNO respondent to the Commission's in-depth market investigation which noted their future growth was heavily dependent on being able to secure attractive wholesale terms: "*future expansion heavily depends on being able to close attractive wholesale deals - both on mobile and on fixed networks (>75% of our new clients join on FMC bundles)*."[1005]

(1038) Wholesale contracts can even be designed in a way to discourage access seekers from competing aggressively with regard to medium-sized to large data bundles. In fact, **[Details of MASMOVIL's internal document describing MASMOVIL's strategy]**.[1006] This point is further clarified in the Parties' explanation of the differences between NRAs and MVNO agreements, in which they concede that "*often MVNOs have less data traffic*"[1007] relative to MNOs, such as MásMóvil, that complement their networks with NRAs. In this regard, Digi pointed out to the Commission that the agreements between NRAs and MVNOs differ since they "*cover different needs in different situations / context*". MVNOs agreements are always exclusive in nature, unlike NRA agreements, and unidirectional since MVNOs "*do not have the possibility to offer their own deployment to the other counterparty operator, since they do not have it*". Therefore, MVNOs do not have flexibility and are "*completely dependent on the cost paid to the host MNO*".[1008]

(1039) In light of the above, the Commission considers that MVNOs' ability to compete, in particular as regards 5G services and large data packages, which are expected to become increasingly important in the coming years, is severely constrained by their dependency on wholesale access terms from the larger, vertically integrated, operators. No non-MNO has a 5G offering in Spain today whereas all MNOs offer 5G. Moreover "*most MNOs' second brands competing in the low-end market have incorporated 5G to their offers*,"[1009] thereby further putting Digi, Finetwork and other non-MNO operators that also operate at the low-end of the market and do not offer 5G at a further disadvantage.

(1040) Indeed, pre-Transaction, the main operators, including the Parties, Vodafone and Telefónica all announced inflation-related price increases, and smaller players in the market indicated that they expect "*that repricing up may continue to be the trend after the Transaction*".[1010] This further suggests that the Parties and other MNOs do not feel constrained by pricing pressure from access seekers pre-Transaction.

1001 Response to questionnaire Q1 to competitors, questions D.A.A.36, DOC ID 2834.
1002 MásMóvil internal document, ID MM-00175220, Doc ID 2670-66885.
1003 Response to questionnaire Q1 to competitors, question D.A.A.6, Doc ID 2834.
1004 MásMóvil internal document, ID MM-00098679, Doc ID 2671-22450, slide 39.
1005 Response to questionnaire Q3 to wholesale customers, question B.3, DOC ID 3320.
1006 MásMóvil internal document ID MM-00931525, Doc ID 2661-8144.
1007 Response to RFI 32, paragraph 7.4.
1008 Digi submission, 22 June 2023, *MNOs and MVNOs bargaining position to obtain access to mobile networks*, Doc ID 3618.
1009 Response to questionnaire Q1 to competitors, question D.A.A.36, Doc ID 2773.
1010 Minutes of prenotification call with Finetwork dated 2 February 2023, paragraph 26, Doc ID 2471.

9.4.3.4.3.3.3. Mobile access seekers have limited ability to compete on product differentiation and innovation

(1041) Network quality (including network coverage) is one of the most important competitive parameters after price in the Spanish market, including in the retail mobile telecommunication services market.[1011] However, in addition to difficulties related to designing attractive retail tariffs, access seekers have very limited ability to differentiate their retail services from those of the host MNO as regards quality and coverage.

(1042) This is because MVNOs obtain access to a host MNO's mobile network through a wholesale access agreement. The MNOs' decisions regarding network investments and roll-out greatly influence the performance of the MVNOs mobile services and affect the user experience, including by providing different levels of network reliability, coverage and speed. Full MVNOs have some scope of differentiation through value-added services.[1012] However, the great majority of MVNOs in Spain operate as light MVNOs and are much more constrained in this regard, and white label operators are still further constrained.[1013] In fact, light MVNOs (and white label operators) do not have any means to differentiate themselves with regard to network quality and coverage.

(1043) In addition, MVNOs do not always have access to all technologies and services available in the MNO's network. Notably in Spain, all non-MNOs responding to the Commission's market investigation, that focus on the retail mobile market (including Digi, Finetwork, Avatel, Adamo and PTV/Procono), do not currently have 5G included in their retail offerings.[1014]

(1044) New technologies such as 5G have already been launched by each of the Spanish MNOs for their own subscribers only, and will only be offered with a significant delay to hosted MVNOs, if at all, and then likely only subject to other onerous conditions (e.g. higher wholesale prices compared to 4G). For example, Finetwork, which relies on wholesale mobile access from Vodafone, indicated that "*5G access has been repeatedly requested and has been systematically denied… on the basis of the inexistence of any other low-end oriented independent operator having access to 5G*".[1015] Similarly, Adamo, which relies on wholesale mobile access from **[Details of MASMOVIL's commercial agreements]**[1016]. **[Details of MASMOVIL's commercial agreements]**.[1017] **[Details of MASMOVIL's commercial agreements].**[1018]

1011 Form CO, paragraph 486-487, and Figure 19.
1012 See for example Commission decisions of 27 November 2018 in case M.8792 – T-*Mobile NL/Tele2 NL*, paragraphs 651 et seq.
1013 Form CO, paragraph 736: "*there are 42 full MVNOs/MVNEs hundreds of light MVNOs, and more than 800 white label brands in the Spanish market*."
1014 For completeness, the Commission notes that Digi's MVNO agreement with Telefónica enables it to offer 5G to residential mobile customers but that this is "*dependent on Digi investing in the necessary equipment. Consequently, for the time being, Digi's customers do not have 5G access*." See Minutes of meeting with Digi of 25 April 2023, paragraph 13, Doc ID 3273.
1015 Response to questionnaire Q3 to wholesale customers, Questions D.B.2 and D.B.21, Doc ID 3407.
1016 Adamo's response to questionnaire Q3 to wholesale customers, Questions D.B.11, Doc ID 3320.
1017 Avatel's response to questionnaire Q3 to wholesale customers, Questions D.B.21, Doc ID 3298.
1018 Adamo's response to questionnaire Q3 to wholesale customers, Questions D.B.21, Doc ID 3320.

(1045) Indeed, Vodafone began offering 5G services in June 2019, while Telefónica, Orange, and MásMóvil started offering 5G in mid-2020,[1019] whereas some three years later, as of January 2024, no MVNO in Spain offers 5G services.

(1046) Finally, if an MVNO could buy wholesale access from more than one MNO, and thus rely on so called multi-sourcing, it could have the possibility to improve its service offer from its host MNO. However, multi-sourcing is not used by Spanish MVNOs as they are generally subject to an exclusivity obligation with respect to their host MNO. The Parties' themselves note that exclusivity provisions (with narrow exceptions, e.g. for areas where there is no coverage available) are "*common practice among wholesale mobile contracts in Spain, including the existing wholesale mobile agreements between OSP and MÁSMÓVIL*".[1020]

9.4.3.4.3.4. Competitive constraint by MVNOs unlikely to be exerted post-Transaction

9.4.3.4.3.4.1. General assessment

(1047) As described above, already pre-Transaction access seekers' ability to compete in the market for retail supply of FMC bundles in Spain is limited in several aspects. The Commission considers that the ability of access seekers to compete with the Parties, Telefónica, and Vodafone crucially depends on the access conditions that they obtain at the wholesale level, conditions that are controlled by the MNOs. Already pre-Transaction, MVNOs' ability to compete against MNOs is limited by the existing wholesale access conditions. Furthermore, MVNOs have limited bargaining power to negotiate better wholesale access conditions. Finally, most MVNOs are small niche players, with a small presence on the market and little ability to differentiate themselves from MNOs.

(1048) In addition, while some of these players are growing and/or rolling out their own FTTH networks, they remain very small (e.g. with a subscriber share of around **[0-5]**% of Avatel and **[0-5]**% or less for all others as of 2022), and are unlikely to be able to roll out their own networks or obtain access on conditions that would enable them to effectively constrain the JV following the Transaction.

(1049) The Commission considers that all the aforementioned factors currently limiting access seekers' competitiveness would remain after the Transaction. Therefore, post-Transaction access seekers and smaller retail fixed internet providers would remain unable to compete effectively against the Parties, Telefónica, and Vodafone. Furthermore, the expected increase of mobile data usage and growing importance of 5G is likely to further limit MVNOs' competitiveness after the Transaction.

(1050) The Commission's view is supported by non-MNOs' responses to the market investigation.

9.4.3.4.3.4.2. Specific assessment of the constraint likely to be exerted by Digi post-Transaction

(1051) The Parties strongly submit that the Commission underestimates and mischaracterises the position of Digi on the market (see section 9.4.2.1.1). The Commission considers that despite Digi's growth in recent years, and own FTTH network roll-out, the competitive constraint exerted by Digi would be limited.

1019 European 5G Observatory, *Telefónica, Orange and MASMOVIL launched their 5G networks*, 11 September 2020, available at: https://5gobservatory.eu/telefonica-orange-and-masmovil-launched-their-5g-networks/, Doc ID 5662.

1020 Form RM, paragraph 15.

(1052) First, Digi does not consider itself to be in a position to compete at the same level as Orange or MásMóvil, since it is much smaller, depends on the much larger MNOs to provide mobile services in Spain, on a standalone basis or as part of FMC bundles[1021] In this respect, Digi pointed out that MVNOs have limited control over the quality of service and pricing they can offer to their customers, which can make it difficult to offer differentiated or innovative services and limit their ability to compete with MNOs.[1022] Furthermore, in Digi's view, MVNOs may face challenges in scaling their business due to their dependence on their host MNO. As an MVNO's business grows, it may require more network capacity and resources, which can increase their dependency on their host MNO.[1023]

(1053) In general, dependence on MNOs is a view shared by others. Non-MNOs that responded to the market investigation similarly considered that "*access to large catalogue or beneficial conditions is challenging for smaller operators [and that they can face an] inability to access new technologies - e.g., MNOs not willing to offer 5G access on wholesale agreements*".[1024] Therefore, while entry as an MVNO or white label may be possible in the market of retail supply of mobile telecommunication services, what remains critical are the terms of such entry. Without sufficiently attractive terms, such players cannot be expected to exert a meaningful competitive constraint in the market. And indeed, as the Parties in their submissions themselves mention, multiple MVNOs have exited the market in recent years,[1025] including as many as **[Details of the Parties' commercial agreements]**MVNOs hosted by the Parties that have exited or are discontinuing their MVNO agreements in 2023.[1026]

(1054) Digi, which is "*1/7 of MásMóvil size and 1/12 of Orange size … does not consider itself close competitors of the Parties …[and while it may be] the largest of the small players in Spain… Digi depends on the much larger MNOs to provide mobile services in Spain (as it needs to obtain access to the MNOs mobile network by means of an MVNO agreement or similar), and since the market is mainly convergent (making it necessary to offer both fixed and mobile services to compete), Digi considers it is not able to compete at the same level of said MNOs*." In this context, Digi also notes that currently it does not offer FMC bundles including Pay-TV,[1027] which the MNOs are able to offer, thus limiting its attractiveness as an alternative to Orange or MásMóvil to a portion of the customers for the retail supply of mobile telecommunication services.[1028]

(1055) Second, while the Parties submitted market share forecasts for Digi for the market of supply of mobile access services (including FMC bundles) based on 2022 net adds,

1021 Non-confidential minutes of the call with Digi of 29 November 2022, paragraph 14, Doc ID 1846.
1022 Response to questionnaire Q1 to competitors, question D.A.A.4, Doc ID 2834.
1023 Response to questionnaire Q1 to competitors, question D.A.A.4, Doc ID 2834.
1024 Response to questionnaire Q1 to competitors, question D.A.A.4, Doc ID 2940.
1025 See, Form CO, Table 130: Overview of MVNO exit since 2017.
1026 See also Article 6(1)(c) Response, paragraph 473: *"…some of the MVNOs have either terminated their wholesale agreements as of 2023 or not renewed agreements upon expiration in 2023 with either OSP or MASMOVIL … This applies to the following MVNOs: Fibracat, Quattre, Jetnet, Oceans, Bluephone, Joi and Momo*."
1027 Non-confidential minutes of the call with Digi of 29 November 2022, paragraph 11, Doc ID 1846.
1028 Digi has however indicated that it "*intends to start to offer pay TV services in Spain in the short to medium term*." See Digi Response to the Remedies Market Test, 21 December 2023, page 8, Doc ID 5423. The Commission notes moreover that, unlike Orange, "*MASMOVIL does not offer its own pay-TV services but is only a commercial agent of … third-party platforms … [and that its] TV offers are limited to packages of basic pay-TV channels and thematic/niche content provided by several platforms*" (emphasis added) (Form CO, paragraph 1123).

the Commission does not consider that these market share forecasts based on historic data are appropriate to describe Digi's future position, because they ignore any reactions by competitors that may affect Digi. This is corroborated by an internal document of MásMóvil presentation assessing the competitive potential of "Small Operators" **[Details of MASMOVIL's internal documents describing MASMOVIL's strategy]**.[1029]

(1056) Third, while Digi may have adopted an aggressive pricing strategy in Spain, its offering remains confined to the low-end of the market (as the Parties' internal documents referred to above corroborate), and does not at present have an offer including 5G or Pay-TV services.

(1057) Fourth, Digi is entirely reliant on wholesale mobile network access. As Digi stated itself "*Digi does not have a mobile network, does not own spectrum, and in mobile services (therefore, in convergent packages too) needs to rely completely on other operators*."[1030]

(1058) In Digi's view, "*by holding spectrum (even if it is only in some bands) and being able to invest in broader sense, the other MNOs are more open to giving wholesale access—and on better terms all else being equal—compared to a situation where the access seeker has no spectrum holdings*."[1031]

(1059) It would also be difficult for Digi to reduce that reliance by attempting to become a network operator. In that respect, it indicated that "*the regulations adopted for the different spectrum auctions in the past required obligations, warranties and commitments attainable for the existing network operators, but practically impossible for a new entrant to comply with. ... Last year, there was an auction for the 700 Mhz spectrum (the band needed for 5G), but Digi explains that only this band is not enough for any operator to technically develop its own (5G) mobile network and be able to offer mobile services (operators need to combine spectrum in low and medium frequencies so as to be able to offer good quality and good network coverage*)."[1032]

(1060) Fifth, while Digi indeed recently reported that its own fixed network has grown to 6.5 million BUs, this remains around [...] of Orange's FTTH network of [Orange's fixed network footprint][1033] and [MASMOVIL's fixed network size].[1034]

(1061) In addition, while Digi appears to be continuing to roll out its own FTTH network, the Parties' projections about its growth are speculative and appear to contradict the Parties' own internal documents. In a MásMóvil presentation assessing the competitive potential of "*Small Operators*" **[Details of MASMOVIL's internal documents describing MASMOVIL's strategy]**.[1035] Another MásMóvil internal document, from February 2020, noted that **[Details of MASMOVIL's internal documents describing MASMOVIL's strategy]**,[1036] while a report prepared by an external adviser for MásMóvil in October 2022 in relation to the Transaction predicts

[1029] MásMóvil internal document, ID MM-00201059, Doc ID 2667-12028.
[1030] Minutes of meeting with DIGI of 25 April 2023, paragraph 12, Doc ID 3273.
[1031] Minutes of the meeting with Digi of 7 June 2023, paragraphs 6,7, and 10, Doc ID 3583.
[1032] Minutes of call with Digi of 29 November 2022, paragraph 12, Doc ID 1846.
[1033] Form CO, footnote 982 ("OSP's FTTH footprint reaches [Orange's fixed network footprint] as of the end of 2022").
[1034] See Article 6(1)(c) Decision, paragraph 439 ("**[...]**").
[1035] MásMóvil internal document, ID MM-00201059, Doc ID 2667-12028.
[1036] MásMóvil internal document, ID MM-00931525, Doc ID 2661-8144.

that **[Details of MASMOVIL's internal documents describing MASMOVIL's strategy]**.

Figure 67 [Details of MASMOVIL's internal documents describing MASMOVIL's strategy]

[...]

Source: [Details of MASMOVIL's internal documents describing MASMOVIL's strategy]

(1062) Today, for the more than 75% of the Spanish market that Digi provides retail fixed internet services via wholesale access to Telefónica's fixed network, Digi charges a higher price compared to the areas (covering less than 25% of the Spain market) where it owns its own network. This is likely because, as one small fixed operator and non-MNO indicated, "*towards smaller operators (i.e. with a relatively small customer base) Telefonica only offers wholesale fixed network access at regulated prices (and selectively or tactically in non-regulated areas),* [Parties' commercial agreements with Telefónica]"[1037] By contrast, [MASMOVIL's commercial agreements]. According to Digi, this was as a result of "*taking the remedies from the Orange/Jazztel transaction was a relevant step for MásMóvil to enhance its competitive position. But the real turning point for MásMóvil was transitioning from an MVNO to an MNO, after purchasing in 2016 Xfera Móviles, S.A. (operating under the brand name Yoigo, and the 4th MNO in Spain, which already had in place an NRA to complement its own network) …[and which]… allowed it to become the 4th convergent operator in Spain*".[1038]

(1063) In addition, such agreements are typically only concluded for a number of years. For example, Vodafone, which would be well placed to answer in its position as an MNO, indicated that "*fixed and mobile wholesale access agreements are typically signed for a period between 3 and 5 years*."[1039] Indeed, Digi indicated that "*its current MVNO agreement with Telefónica expires in [CONFIDENTIAL: the near future]*".[1040]

(1064) Sixth, an analyst report from March 2022, when the Transaction was announced, [Details of Orange's internal documents describing Orange's strategy]'' Finally, it suggested that [Details of Orange's internal documents describing Orange's strategy]. [1041] The Commission indeed notes that despite having expressed a willingness to participate in spectrum auctions, and having done so in other countries where it is active (e.g. Romania) or planning to enter (e.g. Belgium and Portugal), to date Digi has not succeeded in becoming a network operator in Spain, which is likely due to the difficulties meeting the spectrum auction requirements for a new entrant.[1042] In Digi's view, proposed regulatory changes related to mobile spectrum in Spain "*will make practically impossible for a new entrant to become an MNO to access the Spanish mobile market for a long time, up to 2038-2040.*"[1043] Notably, "*in its view the proposal to extend the spectrum licenses [of each of the current MNOs] makes it practically impossible to bid for spectrum before 2040 (a very long period in which DIGI will be at the will of the 3 MNOs wholesale offers, while being direct competitors with them in the retail market), while the proposed spectrum cap*

1037 Non-confidential minutes with Finetwork 2 February 2023, paragraph 13, Doc ID 2471.

1038 Digi submission, 22 June 2023, *MNOs and MVNOs bargaining position to obtain access to mobile networks*, Doc ID 3618.

1039 Response to RFI 1 to Vodafone, 2 June 2023, Q 12, Doc ID 3639.

1040 Minutes of meeting with Digi of 7 June 2023, paragraph 13, Doc ID 3583.

1041 **[Details of Orange's internal documents describing Orange's strategy]**.

1042 Non-confidential minutes of a call with Digi of 29 November 2022, paragraph 12, Doc ID 1846.

1043 Minutes of meeting with Digi of 7 June 2023, Annex 1, Doc ID 3583.

increase will mean that at that point, it is unlikely that any player other than the three largest players (Telefonica, Vodafone and the resulting entity from Orange/MásMóvil transaction, if approved) would successfully acquire spectrum."[1044]

(1065) Seventh, even if Digi was able to receive a renewed wholesale offer from Telefónica (or an offer from Vodafone), such offer would be unlikely to contain better or equal pricing conditions compared to the terms that Digi has today, notably because in the previous negotiations Digi received counteroffers from all other MNOs in the market, including both Orange and MásMóvil, which helped it to obtain the most favourable terms possible at that moment: "*Even though Digi has a wholesale access agreement with Telefónica, this agreement is the result of renegotiations during which competitive pressure was exercised by the other MNOs, including Orange and MásMóvil. During these renegotiations, Digi has received alternative offers from other players in the wholesale access market (including Orange, MásMóvil and Vodafone). Digi considers that this competitive tension helped to have better terms agreed with Telefónica".*[1045]

(1066) [Details of MASMOVIL's internal documents describing MASMOVIL's strategy][1046] Taken together, these suggest that Orange would not be likely to offer attractive wholesale conditions to Digi after the experience of giving [Details of the Parties' wholesale agreements] wholesale conditions to MásMóvil which fostered the latter's growth and competitive strength in the past.

(1067) In view of Digi's further growth in the intervening years (and arguably greater competitive potential as a result), and the signing of the Transaction (which further aligns Orange and MásMóvil), these statements are likely to be even more true today than they were in 2020. In fact, in an Orange internal document drafted in February 2022 by Jean-Francois Fallacher, the Orange Spain CEO at the time, outlining a non-exhaustive list of strategic benefits of the Transaction for Orange, one of the reasons listed as "[Details of Orange's internal documents describing Orange's strategy]".[1047]

(1068) Eighth, MVNOs are typically subject to exclusivity clauses.[1048] The exclusivity provisions prevent MVNOs from multi-homing or from a gradual migration to a new host, which also decreases their bargaining power vis-a-vis MNOs, both pre- and post-Transaction, and "*makes them completely dependent upon the commercial motivation and willingness of an [i.e. one] MNO to provide them access under reasonable pricing and conditions*".[1049] By contrast "*Under an NRA, the MNO-access seeker normally does not have exclusivity obligations. For example, it can deal with a particular MNO to gain access in a particular area or for particular situations, while obtaining access from another MNO for other areas or situations*",[1050] as is notably the case for MásMóvil today where it relies on NRAs with [Details of MASMOVIL's commercial agreements]. In this regard, Digi noted

1044 Minutes of meeting with Digi of 7 June 2023, paragraph 4, Doc ID 3583.
1045 Minutes of prenotification call with Digi dated 29 November 2022, paragraph 17, Doc ID 1846.
1046 MásMóvil internal document dated 10 February 2020, ID MM-00931525, Doc ID 2661-8144.
1047 **[Details of Orange's internal documents describing Orange's strategy]**.
1048 See Minutes of prenotification call with Digi dated 29 November 2022, paragraph 6, Doc ID 1846.
1049 Digi submission, 22 June 2023, *MNOs and MVNOs bargaining position to obtain access to mobile networks*, Doc ID 3618.
1050 Digi submission, 22 June 2023, *MNOs and MVNOs bargaining position to obtain access to mobile networks*, Doc ID 3618.

that it "*would be open to mix providers of wholesale depending on the region, and provided no exclusivity obligations are required by the MNOs*" (emphasis added).[1051]

(1069) Ninth, as Digi is the largest and fastest growing MVNO/FVNO in Spain, the JV would have a reduced incentive to offer wholesale access services to Digi, particularly on terms which enable it to compete effectively in the retail market. Digi considers that with the new position of the JV in the market its (new) strategy on or appetite for offering wholesale access at commercial attractive rates may change negatively for MVNOs. Rather, the JV would have an incentive to limit cannibalisation effects due to additional churn from MásMóvil to Digi. In Digi's view, following the Transaction "*there is no backstop to prevent the MNOs from not offering reasonable wholesale prices. In other words, MVNOs will have to rely on the will of the (vertically integrated) MNOs to offer good wholesale conditions, to be able to compete with the same MNOs at a retail level. The proposed concentration will reduce to 3 the number of MNOs, which, in turn, will increase the likelihood of coordination, as none of them will have any incentive to offer MVNOs wholesale conditions that will boost or leave intact the MVNOs' ability to compete on the retail market. Yet, Vodafone has concluded very few MVNO agreements and it is publicly known that wholesale offers to MVNOs is not part of their business model in Spain. MVNOs will therefore face mainly a duopoly made of Telefonica and the result of the proposed concentration, for the conclusion of MVNO agreements*" (emphasis added).[1052]

(1070) The Commission therefore considers that, as a result of the Transaction, the JV would have fewer incentives to offer wholesale access services to Digi.

(1071) In fact, the Transaction increases the retail business of the JV which will benefit from a larger customer base and an increased brand portfolio at the retail level. Therefore, a greater proportion of the business acquired by a mass-market MVNO will be from the JV and the retail losses resulting from the non-MNO finding a host will be higher. Hence, wholesale terms which were profitable (accounting for the cannibalisation effect at the retail level) in a stand-alone scenario for either party will be less profitable for the JV post-Transaction. This would reduce the incentives to offer commercially competitive MVNO terms to such operators (mainly in terms of wholesale rates, but also of access to new technologies etc.). Hence, the different market position of the JV at the retail level relative to the Parties on a standalone basis may induce the JV to compete less aggressively at the wholesale level. Notably, the merger would result in a material increase in the downstream base of sales (compared to the standalone base of sales of the Parties separately). In the retail FMC market, the JV would become the largest operator in Spain (by volume and revenues). It would have a 2022 market share materially above [30-40]%.[1053] In fact, the JV's share would be [40-50]% by volume, with an increment of [10-20]%, and [30-40]% by value, with an increment of [10-20]%. The JV's gross add share in 2022 was similarly high, at [40-50]%.

(1072) The vast majority of respondents to the market investigation that expressed a view indicated that Orange and MásMóvil may have less incentive to offer such access and/or increase wholesale prices following the Transaction.[1054]

1051 Minutes of prenotification call with Digi dated 29 November 2022, paragraph 19, Doc ID 1846.

1052 Response to questionnaire Q3 to wholesale customers, Questions D.B.11, Doc ID 3360.

1053 See Non-Horizontal Merger Guidelines, paragraph 25.

1054 Responses to questionnaire Q1 to competitors, question D.B.A.5.

(1073) One such respondent noted that "*adding [MásMóvil's] downstream market share to Orange's existing market share will reduce the post-merger company's incentive to offer wholesale mobile access on competitive terms"*[1055] while another similarly considered that "*Orange/MásMóvil will not have incentive in anyone else entering their mobile network apart from their own brands or small or niche competitors (to cover a niche they may not reach with their general offer) [since] Orange/MásMóvil will control the largest retail share between them together and their brands*"[1056]

(1074) In particular, the JV will have an incentive to protect its retail market position by weakening MVNOs and FVNOs that compete nationally and for a broad spectrum of retail FMC customers, such as Digi, as opposed to those that target niche or more limited segments of the market (such as ethic customer groups, pre-pay only customers, or rural regions of Spain). MVNOs that are active nationally and which offer FMC bundles, such as Digi, *"will have to rely on the will of the (vertically integrated) MNOs to offer good wholesale conditions, to be able to compete with the same MNOs at a retail level …[and post-Transaction, in Digi's view] none of them will have any incentive to offer MVNOs wholesale conditions that will boost or leave intact the MVNOs' ability to compete on the retail market*.[1057]

(1075) Tenth, the Commission considers that a deterioration in Digi's wholesale access conditions is likely to further weaken Digi's ability to compete.

(1076) The Commission notes that access seekers' retail margins are narrow, especially in relation to data, and therefore any increase in wholesale price would have a very significant impact, further reducing the limited competitive impact of access seekers. The Commission also notes that access costs represent a significant proportion of the access seekers' costs and are the largest cost per user for an access seeker is the wholesale access cost.[1058] Wholesale access is an essential input for access seekers to provide mobile services, and therefore also FMC services. The Commission also notes that the wholesale market for access and call origination services is not regulated in Spain and thus access seekers are dependent upon effective wholesale competition to achieve wholesale terms which allow them to be competitive on the market for supply of FMC bundles.

(1077) It is the Commission's view that Digi, faced with an increase in its wholesale prices, may be forced to eventually increase its retail prices. Digi itself indicated that "*the reduction from four to three MNOs will negatively impact on the competition pressure between the different MNOs than can provide the wholesale mobile access and …the ability of MVNOs, as DST, to negotiate wholesale access agreements at reasonable prices and conditions has direct negative impact on the ability of MVNOs to offer competitive services in the retail market, as well as to provide multiple-play bundles. This is also reflected in the quality and price of services for end*

[1055] Response to questionnaire Q1 to competitors, question D.B.A.6, Doc ID 2865.

[1056] Response to questionnaire Q1 to competitors, question D.B.A.6, Doc ID 2834.

[1057] Response to questionnaire Q3 to wholesale customers, question, Questions D.B.11, Doc ID 3360.

[1058] See by analogy Commission decisions of 27 November 2018 in case M.8792 – *T-Mobile NL/Tele 2 NL*, paragraph 738. An access seeker that responded to the Commission's Phase II market investigation indicated that "*the cost for mobile wholesale services form the largest cost block in our profit and loss statement. Therefore a change in future wholesale conditions would not only affect our ability to compete effectively in the market but could put into question the business model of independent operators in total. From our insight into other players' economics - gained through our extensive M&A activity - we know that this should not only hold true for Adamo but for many of the local operators*" (emphasis added). See also Response to questionnaire Q3 to wholesale customers, question D.B.11, Doc ID 3320.

consumers." (emphasis added).[1059] A further access seeker that responded to the market investigation similarly considered that "*market concentration penalizes the option for network access through wholesale agreements due to reduced number of option available [with the result that] smaller operators will tend to be marginalized and eventually will be crowded out of the market*.[1060] In a MásMóvil presentation assessing the competitive potential of "*Small Operators*" dated 31 October 2022, and shared with senior MásMóvil executives including Pablo Friere, MásMóvil observed that while Digi has seen "*significant growth during the last 2 years … It will be difficult to maintain this trend given the profitability constraints [notably because Digi's] mobile operating model [is] dependent on TEF [i.e. Telefónica, and Digi has] weak financials due to aggressive pricing and increasing cost structure*".[1061]

(1078) Therefore, the Commission considers that Digi's dependency on wholesale access will negatively impact its ability to compete with the MNOs on the downstream retail market for the supply of FMC bundles.

(1079)

9.4.3.4.3.4.3. Conclusion

(1080) In light of the above, the Commission concludes that it is unlikely that post-Transaction Digi, individually or in aggregate with any of the other small players would have the ability to counteract the likely anti-competitive effects of the Transaction.

9.4.3.4.4. The Parties are close competitors

(1081) The Commission considers, contrary to the Parties' argument as set out in Section 9.4.2 above, that the Parties are close competitors, based on a number of elements. The elements of the market investigation that support the finding that the Parties are close competitors on the retail mobile and fixed internet markets (as detailed in section 9.4.3.1.4. and 9.4.3.2.4. above), apply also to FMC bundles. Given the popularity of convergent offers in Spain,[1062] the Parties' closeness on fixed and mobile markets extends also to the possible FMC market.

9.4.3.4.4.1. Diversion ratios

(1082) Diversion ratios indicate that the Parties are close competitors. The number portability data indicates that customers lost by Orange switch most often to [...]. For each year in the period 2019-2022, the largest proportion of requests for number transfer from another player that Orange received relate to [...]. More than [30-40]% of all requests Orange received 2019-2022 are requests for number transfer to [...]. Second largest proportion of requests were from [...] and the third from [...] customers. [...].[1063]

(1083) Vice versa, customers lost by MásMóvil switch most often to [...], but [...]comes second. For 2021 and 2022, MásMóvil group received most requests from [...], second most from [...], more than [20-30]% of all requests, and third, from [...].

1059 Response to questionnaire Q1 to competitors, question E.2, Doc ID 2834.

1060 Response to questionnaire Q3 to wholesale customers, question E.A.6, Doc ID 3407.

1061 MásMóvil internal document, ID MM-00201059, Doc ID 2667-12028.

1062 See e.g., Form CO, paragraphs 2152 and 2154.

1063 MásMóvil's market shares implied by diversion ratios presented in Tables 38 and 39 are [30-40]% in 2021 and [20-30]% in 2022. These market shares are higher than those provided by the Parties', presented in Table 7. Implied market shares have been calculated as follows, taking 2022 as an example: MS=[MASMOVIL's market share by diversion ratios].

(1084) **Table 44** and **Table 45** demonstrate that Orange and MásMóvil are and remain close competitors in the retail market for the supply of FMC bundles. The difference between the diversion ratios from 2019 to 2022 demonstrates that, not only for every year MásMóvil has been the main destination of **[...]** customers, but also, that the diversion ratio has consistently remained above [30-40]% with only a small decrease of [0-5]% from 2019 to 2022. Conversely, market trends also demonstrate that [...] is one of the main destinations of MásMóvil customers with a diversion ratio above [20-30]% for 2021 and 2022.

Table 44 Number of port-outs and diversion ratios from Orange to the destination groups in the retail market for the supply of FMC bundles

		2019		2020		2021		2022	
Donor Group	Destination group	Port-outs	Diversion ratios	Port-outs	Diversion ratios	Port-outs	Diversion ratios	Port-outs	Diversion ratios
Orange brand	MásMóvil	[300,000-400,000]	[30-40]%	[300,000-400,000]	[30-40]%	[200,000-300,000]	[30-40]%	[200,000-300,000]	[30-40]%
	Vodafone	[200,000-300,000]	[20-30]%	[200,000-300,000]	[20-30]%	[200,000-300,000]	[20-30]%	[...]	[20-30]%
	Telefónica	[200,000-300,000]	[20-30]%	[200,000-300,000]	[20-30]%	[100,000-200,000]	[10-20]%	[100,000-200,000]	[10-20]%
	Digi	[0-50,000]	[0-5]%	[0-50,000]	[5-10]%	[50,000-100,000s]	[5-10]%	[100,000-200,000]	[10-20]%
	Others	[0-50,000]	[0-5]%	[0-50,000]	[0-5]%	[0-50,000]	[0-5]%	[0-50,000]	[0-5]%
	Total	[900,000-1,000,000]	100,0%	[800,000-900,000]	100,0%	[700,000-800,000]	100,0%	[700,000-800,000]	100,0%

Source: Response to RFI 18 Q6 and Q7 – Diversion ratios by segment and the Commission's assessment

Table 45 Number of port-outs and diversion ratios from MásMóvil to the destination groups in the retail market for the supply of FMC bundles

		2021		2022	
Donor Group	Destination group	Port-outs	Diversion ratios	Port-outs	Diversion ratios
MásMóvil	Orange	[100,000-200,000]	[20-30]%	[100,000-200,000]	[20-30]%
	Vodafone	[200,000-300,000]	[30-40]%	[200,000-300,000]	[30-40]%
	Telefónica	[100,000-200,000]	[10-20]%	[100,000-200,000]	[10-20]%
	Digi	[50,000-100,000]	[10-20]%	[100,000-200,000]	[10-20]%
	Others	[0-50,000]	[0-5]%	[0-50,000]	[0-5]%
	Total	[600,000-700,000]	100,0%	[600,000-700,000]	100,0%

Source: Response to RFI 18 Q6 and Q7 – Diversion ratios by segment

(1085) In the Article 6(1)(c) Response, the Parties provide an alternative calculation to diversion ratios based on the OSP survey data from OSP.[1064] This analysis is based

1064 Article 6(1)(c) Response, Annex 6(1)(c) 2.9a.

on a flawed premise that the parties need to be particularly close, which has now been rejected by the Court of Justice in the *CK Telecoms* case.

(1086) [Details of Orange's internal documents describing Orange's strategic data].

(1087) The Parties also provide brand-to-brand diversion ratios based on [Details of Orange's internal documents describing Orange's strategic data]. The Commission considers that group-level is the correct metric to describe closeness of the Parties. The Transaction internalizes the competition between all brands of the Parties equally such that the incentive and ability to increase prices depends on the total re-capture options of switching customers to any brand of the Parties.

(1088) Table 5 of Annex 6(1)(c) 2.9 of the Parties Article 6(1)(c) Response demonstrate that MásMóvil group is the [...] operator to which customers of Orange and Jazztel brands switch. Further, depending on the year during the period 2019 to 2022, MásMóvil group is the [...] operator to which customers from Simyo brand would switch.

(1089) Conversely, Table 6 of Annex 6(1)(c) 2.9 of the Parties Article 6(1)(c) Response shows that OSP group is the **[...]** operator to which customers of Yoigo and MásMóvil brands switch during the time period 2019 to 2022.

(1090) The Parties also provided linear forecasts of diversion ratios until 2025. The Commission considers that historic data has sufficiently demonstrated that diversion ratios fluctuated in non-linear patterns, as well as are subject to non-predictable reactions of market participants such that linear forecasts are inappropriate to describe future market positioning of any brand.

9.4.3.4.4.2. The Parties' Tariff Comparison and Hedonic Pricing Analyses

(1091) The Parties submitted the Tariff Comparison and Hedonic Price Analyses to support the argument that the Parties are not close competitors (i.e., they are not closer to each other than other operators) and that neither Party can be considered an ICF as result of an aggressive pricing strategy.[1065] These arguments are unfounded.

(1092) First, the Parties' analysis is based on a flawed premise with regard to closeness of competition and the definition of ICF. As confirmed by the Court of Justice in CK Telecoms, closeness of competition does not require that the Parties are each other's closest competitors. Furthermore, there can be more than one ICF and an ICF does not have to compete particularly aggressively in terms of price.[1066]

(1093) Second, there is a wide body of evidence supporting the Commission's conclusion that the Parties are close competitors in the retail market for the supply of FMC based on diversion ratios (Section 9.4.3.4.4.1), internal documents and the results of the market investigation (Section 9.4.3.4.4.3). In addition, there is a wide body of evidence supporting the Commission's conclusion that MásMóvil is an ICF (Section 9.4.3.4.5).

(1094) Third, Parties' Tariff Comparison and Hedonic Pricing Analyses are methodologically flawed. As further discussed in Section 9.4.3.1.4.2 above, both analyses omit important and relevant tariff attributes and do not take into account non-price responses and quantities. In addition, the Tariff Comparison Analysis artificially divides tariffs in configurations, which leads to biased comparisons.

[1065] Response to the SO, paragraph 318 et seq, Article 6(1)(c) Response, Annex 6(1)(c) 2.1a, Annex 6(1)(c) 2.2a.

[1066] See section 9.4.1 on the applicable legal framework.

(1095) Fourth, the Parties' Tariff Comparison and Hedonic Pricing Analyses do not support the conclusions attributed to them by the Parties. As further discussed in Section 9.4.3.1.4.2 above, the analyses do not allow the conclusion that similar priced tariffs are closer or that cheaper tariffs are more competitive, because important tariff characteristics are omitted.

9.4.3.4.4.3. Internal documents and the results of the market investigation support that the Parties are close competitors

(1096) The Parties' internal documents corroborate the view that the Parties are in close competition with one another. They indicate that the Parties treat each other as benchmark competitors against whom they measure their performance (section 9.4.3.4.4.3.1) and that the Parties closely compete in the different sections of the market (section 9.4.3.4.4.3.2).

9.4.3.4.4.3.1. The Parties treat each other as benchmark competitors against whom they measure their performance

(1097) [Details of Orange's internal documents describing Orange's benchmark of other operators' brand][1067] [Details of Orange's internal documents describing Orange's benchmark of other operators' brand]:

Figure 68 [Details of Orange's internal documents describing Orange's strategy]

[...]

Source: [Details of Orange's internal documents describing Orange's strategy]

Figure 69 [Details of Orange's internal documents describing Orange's strategy]

[...]

Source: [Details of Orange's internal documents describing Orange's strategy]

(1098) Conversely, MásMóvil also effectuates periodic analysis of the mobile market, in which Orange's brands are the benchmark to which MásMóvil measures its performance.[1068] As MásMóvil recognizes in internal documents [Details of MASMOVIL's internal documents describing MASMOVIL's strategy].[1069] Further, as internal documents of MásMóvil recognize [Details of MASMOVIL's internal documents describing MASMOVIL's strategy].[1070] As can be seen in different internal documents, as the board meeting minutes of April 2022, its benchmark competitors are:

Figure 70 [Details of MASMOVIL's internal documents describing MASMOVIL's strategy]

[...]

Source: [Details of MASMOVIL's internal documents describing MASMOVIL's strategy].

(1099) The Commission considers that the fact that in the same documents, the Parties, in addition to each other, discuss and monitor also Telefónica and Vodafone does not exclude the fact that the Parties compete closely. Rather, in a concentrated market such as the Spanish one, monitoring of all major players seems to be a regular and prudent business practice.

1067 [Details of Orange's internal documents describing Orange's strategic data].

1068 See documents submitted to RFI 1, e.g., Q53.10, Q53.13, Q53.19, Q53.28, Q53.30, Q53.35, Q53.49, and to RFI 15: e.g. Q1.88 or Q1.91.

1069 MásMóvil internal document – ID MM-00076065, Doc ID 2663-76065.

1070 MásMóvil internal document: ID MM-00277496, Doc ID 2664-18699.

9.4.3.4.4.3.2. The Parties closely compete in the different sections of the market

(1100) The Commission notes that operators in Spain, and MásMóvil in particular, operate with many brands focusing on different segments of the market (high-end/mid-end/low-end) and serving different customer needs. Both Orange and MásMóvil provide mobile telecommunication services on a standalone basis as well as part of multiple-play bundles with different add-ons, including Pay-TV The evidence in internal documents shows that the Parties have similar business strategies in the provision of retail mobile telecommunications services to private customers in Spain, with brands focusing on the different segments of the market. This is supported by the views of market participants, as well as by the Parties' internal documents.

(1101) As evidenced by the Parties' internal documents, the high-end of the market would comprise offers for mobile telecommunication services with the highest amount of data offered (unlimited data) and FTTH speed (more than 600 Mbps). The mid-end of the market would comprise those offers for retail mobile telecommunications with approximately offering more than 25 GB of data and 300 Mbps of speed. Lastly, low-end offers in the retail mobile telecommunication market would comprise those offers with less than 15 GB of data and 300 Mbps of speed:

Figure 71 [Details of Orange's internal documents describing Orange's strategy]

[...]

Source: [Details of Orange's internal documents describing Orange's strategy]

(1102) As regards the high-end segment of the market comprising the offers with highest internet speed and highest data, it is important to note that for mobile telecommunication services offered as part of multiple-play bundles, the Parties distinguish bundles with Pay-TV and/or football, which entails an additional level of segmentation (premium bundles with TV and/or football). In the premium segment, the Commission considers the Parties to be close in the premium part of the market with Pay-TV content, as both Orange and MásMóvil offer multiple-play bundles with Pay-TV. With regards to the premium segment of the market including Pay-TV football content, the Commission considers that MásMóvil is not active in this market.

Figure 72 [Details of MASMOVIL's internal documents describing MASMOVIL's strategy]

[...]

Source: [Details of MASMOVIL's internal documents describing MASMOVIL's strategy]

(1103) The internal documents of the Parties indicate that both of them consider that [Details of the Parties' internal documents describing the Parties' strategies]. Lastly, Simyo and República Movil would compete in the low-end of the market.

(1104) In this regard, MásMóvil considers that it [Details of MASMOVIL's internal documents describing MASMOVIL's strategy].[1071] KKR, one of the co-owners of MásMóvil, considered, [Details of MASMOVIL's internal documents describing MASMOVIL's strategy]:

[1071] Internal documents - *MásMóvil Long form recom_v5.pdf*, ID MM-00612974, Doc ID 2669-90024.

Figure 73 [Details of MASMOVIL's internal documents describing MASMOVIL's strategy]

[...]

Source: [Details of MASMOVIL's internal documents describing MASMOVIL's strategy]

(1105) [Details of MASMOVIL's internal documents describing MASMOVIL's strategy].

(1106) According to internal documents of MásMóvil, [Details of MASMOVIL's internal documents describing MASMOVIL's strategy][1072] [Details of MASMOVIL's internal documents describing MASMOVIL's strategy].[1073]

(1107) According to internal documents of Orange [...], [Details of Orange's internal documents describing Orange's strategy]. Internal documents of Orange [Details of Orange's internal documents describing Orange's strategy].

Figure 74 [Details of MASMOVIL's internal document describing MASMOVIL's strategy]

[...]

Source: [Details of MASMOVIL's internal document describing MASMOVIL's strategy]

Figure 75 [Details of MASMOVIL's internal document describing MASMOVIL's strategy]

[...]

Source: [Details of MASMOVIL's internal document describing MASMOVIL's strategy]

(1108) As explained above in Section 7, price is the most important parameter of competition on the Spanish market for the supply of retail mobile telecommunication customers. The Commission finds that Orange and MásMóvil compete closely on the main parameter of competition that is price in the different segments of the market.

(1109) Indeed, as it can be seen in the internal documents quoted above, Yoigo and Orange brands have similar price points for the mobile-only and FMC average tariff prices in the high-end segment of the market, with price points closer to each other than to other competitors such as Vodafone. MásMóvil and Jazztel brands also compete closely on price in the mid-end part of the market.

(1110) As mentioned in the previous paragraphs and as shown by Orange's internal documents, [Details of Orange's internal documents describing Orange's strategy].

Figure 76 [Details of MASMOVIL's internal document describing MASMOVIL's strategy]

[...]

Source: [Details of MASMOVIL's internal document describing MASMOVIL's strategy]

(1111) [Details of MASMOVIL's internal documents describing MASMOVIL's strategy]:

(1112) The respondents to the market investigation confirmed that Orange and MásMóvil are close competitors. First, a strong majority of respondents to the market investigation consider that Orange and MásMóvil compete against each other in the retail FMC market.[1074]

(1113) In this regard, some operators note that "*both Orange and particularly MásMóvil have played an important role in exerting competitive constraints upon each*

[1072] Internal documents of the Parties, *20.05.2022 Mandarina - Commercial DD update KKR.pptx* ID MM-00612147, Doc ID 2669-89197.

[1073] Internal documents of the Parties – *20.05.2022 Mandarina - Commercial DD update KKR.pptx* ID MM-00612147, Doc ID 2669-89197.

[1074] Responses to questionnaire Q1 to competitors, question D.A.A.1.

other"[1075] and that "*Both [OSP and MásMóvil] provide retail multiple-play bundle services to the same segments of the market",[1076]* other players signal that "*both companies provide the same sort of services to enable end-user mobile connectivity services*",[1077] and that "*both companies have offers covering most of the ranges of the market, with different brands and services approach*".[1078] These findings are in line with the Commission's findings in the internal documents of the Parties.

9.4.3.4.4.4. Conclusion

(1114) In light of the above, the Commission concludes that Orange and MásMóvil are close competitors in the FMC market.

9.4.3.4.5. The important role played by MásMóvil on the market

(1115) The Commission considers that MásMóvil exerts significant competitive pressure on other FMC service providers and has acted as an ICF and in any event is an important competitive constraint on the retail FMC bundles market in Spain and would likely to continue to be an important competitive constraint in the absence of the Transaction. The Transaction would thus reduce competitive pressure that exists on the market because of the important role that is played by MásMóvil.[1079]

(1116) MásMóvil's importance on the mobile and fixed markets translates into strength on the retail FMC bundles market. In fact, given the popularity of the convergent offers in Spain,[1080] its strength on the mobile and fixed internet retail markets is in large part due to the popularity of its convergent offers.

(1117) The elements of the market investigation that support a finding that MásMóvil is an important competitive constraint on the retail mobile and fixed internet markets, apply also to FMC bundles. The market shares of MásMóvil have been similarly growing on this possible narrower market and respondents to the Phase I market investigation described MásMóvil in similar terms: first and foremost as fast-growing and an aggressive player.[1081] In terms of net adds, MásMóvil featured **[...]** net adds in both 2020 and 2021.[1082] In 2022, **[...]**. As market investigation respondents explained, MásMóvil is "*a challenger in all the retail markets during the past five years"* which *"having pushed down prices through its low-cost approach to offering has been forcing down overall market price levels for all operators*."[1083]

(1118) As indicated above, MásMóvil, operates 18 different brands at different price positions targeting a broad range of demographics and customer segments, includes 5G, and also includes Pay-TV services via Agile TV. [Details of MASMOVIL's internal documents describing MASMOVIL's strategy][1084] This multi-brand strategy allows it to effectively target various customer segments.[1085] Consequently, it has been able to offer not only 'bare' multiple-play bundles at the low-end of the market,

1075 Response to questionnaire Q1 to competitors, question D.A.A.2, Doc ID 2834.
1076 Response to questionnaire Q1 to competitors, question D.A.D.2, Doc ID 2834.
1077 Response to questionnaire Q1 to competitors, question D.A.A.2, Doc ID 3624.
1078 Response to questionnaire Q1 to competitors, question D.A.D.4, Doc ID 2877.
1079 See Horizontal Merger Guidelines, recital 25.
1080 See e.g. Form CO, paragraph 2152 and 2154.
1081 Response to questionnaire Q1 to competitors, question D.A.D.11.
1082 Net adds calculated using the number of SIM cards reported in RFI 18 Q1.a – Market shares by segment - retail the residential only, bundles FMC sheet submitted in response to RFI 18.
1083 Adamo's response to questionnaire Q1 to competitors, question E.12, Doc ID 3624.
1084 MásMóvil PE presentation to lenders (Feb 2020), slide 5, ID MM-00933576, Doc ID 2661-10195.
1085 See e.g. MásMóvil Long form recom_v5.pdf, slide 8; ID MM-00612974, Doc ID 2669-90024.

but also premium convergent offers, [Details of MASMOVIL's internal documents describing MASMOVIL's strategy].[1086]

Figure 77 [Details of MASMOVIL's internal documents describing MASMOVIL's strategy]

[...]

Source: [Details of MASMOVIL's internal documents describing MASMOVIL's strategy].

(1119) MásMóvil's large network of stores across Spain further contributes to its strength on the market. [Details of MASMOVIL's internal documents describing MASMOVIL's strategy][1087] [Details of MASMOVIL's internal documents describing MASMOVIL's strategy].

Figure 78 [Details of MASMOVIL's internal documents describing MASMOVIL's strategy]

[...]

Source: [Details of MASMOVIL's internal documents describing MASMOVIL's strategy]

(1120) In view of the above elements, taken as a whole, the Commission considers that the Transaction may result in the elimination of an ICF and in any event reduce competitive pressure by eliminating an important competitive constraint from the Spanish retail mobile services market .

9.4.3.4.6. Any entry would not be likely, timely and sufficient

(1121) The Commission considers that any potential entrants on the retail market for FMC bundles would face significant barriers to entry. Any threat to entry would not be sufficiently likely, strong and timely to discipline the JV.

(1122) The Commission's findings in relation to barriers to entry on mobile and fixed retail markets apply (as detailed in sections 9.4.3.1.6 and 9.4.3.2.6 respectively) in equal measure to FMC bundles.

(1123) Any potential entrants on the FMC market would need to overcome barriers to entry both as regards provision of mobile and fixed services. Operators who lack direct and immediate access to the inputs (i.e., network or network access) needed to bundle convergent services would not be able to provide FMC bundles and to compete on this market.

9.4.3.4.7. Buyer power

(1124) According to the Horizontal Merger Guidelines, the competitive pressure on a supplier is not only exercised by competitors but can also come from its customers. Even firms with very high market shares may not be in a position, post-merger, to significantly impede effective competition, in particular by acting to an appreciable extent independently of their customers, if the latter possess countervailing buyer power. Countervailing buyer power in that context should be understood as the bargaining strength that the buyer has vis-à-vis the seller in commercial negotiations due to its size, its commercial significance to the seller and its ability[1088].

(1125) The Commission's findings in relation to buyer power on mobile and fixed retail markets apply in equal measure to FMC bundles. The Commission does not consider that private customers have any countervailing buyer power vis-à-vis the JV to offset the anti-competitive effects of the Transaction given the fragmented nature of their

1086 MásMóvil internal document, ID MM-00306117, Doc ID 2664-47320.
1087 MásMóvil internal document, ID MM-00306117, Doc ID 2664-47320.
1088 Horizontal Merger Guidelines, paragraph 64.

demand. They do not negotiate their FMC offers on an individual basis and their individual subscription value would be of no material commercial significance to the JV.

(1126) Equally, regardless of the exact degree of customer loyalty, while customers may be able to switch multiple-play provider without too much difficulty, this is unlikely to afford customers a significant degree of buyer power. In fact, if following the Transaction the JV and the other operators would lack the incentives to vigorously compete and would likely raise prices, customers could switch FMC provider, but would be unable to negotiate better terms with any providers.

(1127) Furthermore, during the market investigation, no market participant raised any countervailing buyer power of customers.

(1128) The Commission therefore concludes that buyer power does not constitute a countervailing factor that would offset the likely anti-competitive effects of the Transaction in relation to the provision of retail FMC bundles.

9.4.3.4.8. Expected negative impact of the Transaction

(1129) As set out in the Horizontal Merger Guidelines, the larger the increase in the sales base on which to enjoy higher margins after a price increase, the more likely it is that the merging firms will find such a price increase profitable despite the accompanying reduction in output.[1089]

(1130) This is especially important when assessing the potential impact of the Transaction as based on evidence from the market investigation and the Parties' own submissions price is the main parameter of competition in retail telecommunication markets in Spain, with Spanish retail consumers being particularly price sensitive. In the Form CO, the Parties submit that *"in Spain, price has taken on a primary importance in customer's choice".* [1090] The Parties refer to a CNMC Consumer survey indicating that price is one of the main factors that customers identify as influencing their choice of operator. [1091] Moreover, when asked to rank a list of alternative parameters of competition, "price" was ranked first more than any other parameter, notably by around 80% of respondents,[1092] with one such respondent further outlining that *"price and promotions are key drivers in the Spanish market."*[1093].

(1131) With this in mind, the Commission used data provided by the Parties to estimate to what extent the Transaction would be likely to lead to price increases, and the likely magnitude of any such increases. If diversion ratios between the Parties' brands as well as contribution margins are high, the incentive to increase price after internalising the competition between the Parties is also high.

(1132) The GUPPI provides a first measure of the extent to which the JV has an incentive to raise price. Alternatively, the Compensating Marginal Cost Reduction (CMCR) asks what level of marginal cost reduction is required for each of the JV's products to exactly offset the incentive to raise price.[1094] GUPPIs and CMCRs, which the Commission similarly referred to in several past merger decisions involving the

1089 Horizontal Merger Guidelines, paragraph 27.
1090 Form CO, paragraph 480.
1091 Form CO, paragraph 479 – 486.
1092 Responses to questionnaire Q1 to competitors, question D.A.A.5.
1093 Response to questionnaire Q1 to competitors, question D.A.A.6, Doc ID 2773.
1094 See Annex A, Section 2.1.

telecoms sector,[1095] have been computed using the Parties' diversion ratios based on MNP data, the Parties' contribution margins, and average revenue per user (ARPU) as measure of the Parties' average retail prices.[1096] From the contribution margins proposed by the Parties[1097], the Commission excluded certain cost items that were not considered to vary directly with the number of subscribers.[1098] As set out in Annex A, which forms an integral part of this Decision, the exclusion of these items is appropriate in view of the insufficiency of the explanations, and/or lack of evidence provided by the Parties that these costs are truly variable, nor have the Parties' shown that these items were universally accepted by the Commission in past merger decisions involving the telecoms sector.

(1133) **Table 46** below suggests that the Transaction would lead to substantial GUPPIs in the retail market for the supply of FMC bundles of [10-20]% for Orange and [10-20]% for MásMóvil based on 2022 data. The marginal cost reduction (relative to prices) needed to prevent upward pricing pressure (CMCR) is [20-30]% for Orange and [20-30]% for MásMóvil based on 2022 data.

Table 46 GUPPI and CMCR in the retail market for the supply of FMC bundles

	Orange	MásMóvil
GUPPI	[10-20]%	[10-20%]%
CMCR (relative to prices)	[20-30]%	[20-30]%

Source: Commission assessment (Annex A, Section 2.3.1.)

(1134) Moreover, even if the Commission did not question, and accepted in full, the contribution margins submitted by the Parties, the likely price effects would in any event be substantial. Accepting the Parties' margin figures in full, which would not be appropriate for the reasons outlined, the GUPPI would remain substantial, [10-20]% and [10-20]% for Orange and MásMóvil respectively, and the CMCR would likewise be sizeable, [10-20]% and [10-20]% for Orange and MásMóvil respectively. [1099] Likewise, even if the Commission uses diversion ratios based on the [Details of Orange's internal documents describing Orange's strategy] instead of MNP data, as submitted by the Parties, the likely price effects would not materially change.

(1135) Therefore, the Commission concludes that the Transaction will lead to substantial upward pricing pressure in the market for retail supply of FMC bundles to the detriment of consumers.

(1136) Consistent with the above, in the course of the Phase I market investigation, many market participants indicated that the Transaction would have a negative impact on the market. The majority of competitor respondents that expressed a view considered that the Transaction would have a negative impact, in terms of increases in prices and/or decreases in quality of services provided, on the retail market for FMC bundles in Spain.[1100] Respondents highlighted that negative effects on the mobile or

1095 See for example Commission decisions of 27 November 2018 in case M.8792 – *T-Mobile NL/Tele2 NL*, Annex A, paragraph 20 et seq.

1096 See Annex A, Section 2.2.

1097 See Response to RFI 25.

1098 As explained in Annex A, Section 2.2.2, this concerns cost items related to [Parties' own methodology to estimate contribution margins].

1099 See Annex A, Section 2.3.2.

1100 Responses to questionnaire Q1 to competitors, question E.11.

fixed retail markets would have a spill-over effect on the convergent market.[1101] This could also be connected to the negative effects of the Transaction on the wholesale market - in the words of one of the competitor respondents: "the negative effects of the Transaction on the supply of fixed wholesale services will have detrimental effects on competition in in the retail supply of FMC bundles - since suppliers of retail FMC bundles will face higher fixed wholesale prices (and / or worse wholesale terms) and, consequently, also in the mobile market."[1102]

The Commission's own assessment and the views of market participants are further corroborated by the Parties' own internal documents.

(1137) Notably, in an Orange internal document drafted in February 2022 by Jean-Francois Fallacher, the Orange Spain CEO at the time, outlining a non-exhaustive list of strategic benefits of the Transaction for Orange, one of the reasons given in favour of the Transaction was because [Details of Orange's internal documents describing Orange's strategy][1103] [Details of Orange's internal documents describing Orange's strategy].[1104] [Details of Orange's internal documents describing Orange's strategy].[1105]

(1138) In the context of the Commission's review of the Transaction the Parties have avoided claiming that the Transaction would not lead to a price increase, limiting themselves to pointing out that "*the Parties have not explored revenue synergies during the due diligence process.*"[1106] However, internal discussions in relation to pitches toward lenders and rating agencies paint a more concrete picture in this regard. [Details of Orange's internal documents describing Orange's strategy][1107] [Details of Orange's internal documents describing Orange's strategy]:

– [Details of Orange's internal documents describing Orange's strategy].

(1139) In light of the above, the Commission has come to the view that the Transaction would be expected to have a negative impact, and lead to substantial upward pricing pressure, in the market for retail supply of FMC bundles to the detriment of consumers.

9.4.3.4.9. Efficiencies

(1140) The Commission considers that the negative effects stemming from the Transaction are not likely to be outweighed by efficiencies, as further discussed in Section 9.6.

9.4.3.4.10. Conclusion

(1141) Based on the above, the Commission has come to a view that the Transaction would significantly impede effective competition in a substantial part of the internal market as a result of non-coordinated anti-competitive effects on the hypothetical retail market for FMC bundles in Spain (and the hypothetical market segment for the retail supply of FMC bundles without premium Pay-TV football content).

1101 Responses to questionnaire Q1 to competitors, question E.2.
1102 Response to questionnaire Q1 to competitors, question E.12, Doc ID 2773.
1103 **[Details of Orange's internal documents describing Orange's strategy]**.
1104 **[Details of Orange's internal documents describing Orange's strategy]**.
1105 Orange internal document, ID ORANGE-EC-RFI22-00906388, Doc ID 2687-96915.
1106 Form CO, paragraph 1446.
1107 Orange internal document, ID ORANGE-EC-RFI22-00778378, Doc ID 2687-26129.

9.4.3.5. Retail supply of fixed telephony services

(1142) The Transaction leads to a horizontally affected market in the overall market for the retail supply of fixed telephony services, where the Parties' combined market share is [30-40]% in value, and [30-40]% in volume.

(1143) The Commission considers that the Transaction does not raise horizontal concerns in the market for the retail supply of fixed telephony services in Spain for the following reasons.

(1144) First, Telefónica will remain the market leader post-Transaction with a market share of [40-50]% in volume and [40-50]% in value. Further, Vodafone will remain as alternative retail supplier of fixed telephony services, with a market share of [10-20]% in volume and [20-30]% in value.

(1145) Furthermore, the Commission notes that the CNMC has found that the fixed telephony retail market has been declining in Spain for years.[1108] In 2021, there was an overall decrease in terms of penetration rate per household. Almost four out of ten Spaniards do not make calls using landlines, whereas online calls see more frequent users (13.4% use landlines at least weekly while 27.2% use the online services in the same period). The daily use of landlines has decreased in 2021 to a 6.9%. During the Phase I market investigation, respondents confirmed this market declination.[1109]

(1146) Moreover, the retail supply of fixed telephony services on a standalone basis, that is to say not in a bundle with fixed internet services, is both for Orange and MásMóvil negligible part of their respective business. Indeed, a mere [10-20]% of Orange's fixed telephony services have been purchased on a standalone basis, whereas the figure for MásMóvil is even lower with a [5-10]%.

(1147) Finally, the respondents to the market investigation did not raise any concerns with respect to the impact of the Transaction on the market for the retail supply of fixed telephony services. On the contrary, they confirmed the Parties' view that the fixed telephony market is declining in Spain.[1110] Some respondents note that "*Fixed telephony has been increasingly displaced over the past years, especially driven by the decommissioning of copper lines, and substituted by newer technologies. The transaction is not expected to have any relevant effects on this trend*"[1111] and "*the use of fixed telephony will keep declining over time, the merger should not have an impact on this market trend*"[1112].

9.4.3.5.1. Possible segmentations of the retail supply of fixed telephony services market by local/national calls and international calls

(1148) The Transaction leads to a horizontally affected markets in the possible segmentations of the retail supply of fixed telephony services market by local/national calls and international calls.

9.4.3.5.1.1. The possible segmentation of the retail supply of fixed telephony services market by local/national calls

(1149) The Commission considers that the Transaction does not raise horizontal concerns in this possible segmentation of the market for the following reasons.

1108 CNMC's Telecommunications and Audiovisual Sectoral Economic Report 2021, Doc ID 5719.

1109 Responses to questionnaire Q1 to competitors, question D.A.C.1.

1110 Responses to questionnaire Q1 to competitors in Spain, question E.8.

1111 Responses to questionnaire Q1 to competitors in Spain, question E.8, Doc ID 3624.

1112 Responses to questionnaire Q1 to competitors in Spain, question E.8, Doc ID 2834.

(1150) First, the market structure post-Transaction would not significantly change, as the increment brought about by MásMóvil appears marginal (with market shares of [10-20]% in value and [10-20]% in volume) due to MásMóvil's limited presence in this market.

(1151) Second, as noted in Section 9.4.3.5, the Commission notes that the CNMC has found that the fixed telephony retail market has been declining in Spain for years.[1113] In 2021, there was an overall decrease in terms of penetration rate per household. During the Phase I market investigation, respondents confirmed this market declination.[1114]

(1152) Lastly, as noted in Section 9.4.3.5, the respondents to the market investigation did not raise any concerns with respect to the impact of the Transaction on the market for the retail supply of fixed telephony services. On the contrary, they confirmed the Parties' view that the fixed telephony market is declining in Spain.[1115]

9.4.3.5.1.2. The possible segmentation of the retail supply of fixed telephony services market by international calls

(1153) First, the market structure post-Transaction would not significantly change, as the increment brought about by MásMóvil appears marginal (with market shares of [5-10]% in value and [10-20]% in volume) due to MásMóvil's limited presence in this market.

(1154) Second, as noted in Section 9.4.3.5, the Commission notes that the CNMC has found that the fixed telephony retail market has been declining in Spain for years.[1116] In 2021, there was an overall decrease in terms of penetration rate per household. During the Phase I market investigation, respondents confirmed this market declination.[1117]

(1155) Lastly, as noted in Section 9.4.3.5, the respondents to the market investigation did not raise any concerns with respect to the impact of the Transaction on the market for the retail supply of fixed telephony services. On the contrary, they confirmed the Parties' view that the fixed telephony market is declining in Spain.[1118]

9.4.3.5.2. Possible segmentations of the retail supply of fixed telephony services market by customer type (residential and non-residential)

(1156) The Transaction leads to a horizontally affected markets in the possible segmentations of the retail supply of fixed telephony services market by customer type (residential and non-residential).

9.4.3.5.2.1. The possible segmentation of the retail supply of fixed telephony services market by customer type - residential customers

(1157) The Commission considers that the Transaction does not raise horizontal concerns in this possible segmentation of the market for the following reasons.

(1158) First, post-Transaction there will be alternative retail supplier of fixed telephony services for residential customers as Telefónica will remain post-Transaction with a market share of [30-40]% in volume and [30-40]% in value, and Vodafone will

1113 CNMC's Telecommunications and Audiovisual Sectoral Economic Report 2021, Doc ID 5719.
1114 Responses to questionnaire Q1 to competitors, question D.A.C.1.
1115 Responses to questionnaire Q1 to competitors in Spain, question E.8.
1116 CNMC's Telecommunications and Audiovisual Sectoral Economic Report 2021, Doc ID 5719.
1117 Responses to questionnaire Q1 to competitors, question D.A.C.1.
1118 Responses to questionnaire Q1 to competitors in Spain, question E.8.

remain as alternative retail supplier, with a market share of [10-20]% in volume and [10-20]% in value.

(1159) Second, as noted in Section 9.4.3.5, the Commission notes that the CNMC has found that the fixed telephony retail market has been declining in Spain for years.[1119] In 2021, there was an overall decrease in terms of penetration rate per household. During the Phase I market investigation, respondents confirmed this market declination.[1120]

(1160) Lastly, as noted in Section 9.4.3.5, the respondents to the market investigation did not raise any concerns with respect to the impact of the Transaction on the market for the retail supply of fixed telephony services. On the contrary, they confirmed the Parties' view that the fixed telephony market is declining in Spain.[1121]

9.4.3.5.2.2. The possible segmentation of the retail supply of fixed telephony services market by customer type – non-residential customers

(1161) First, Telefónica will remain the market leader post-Transaction with a market share of [40-50]% in volume and [40-50]% in value. Further, Vodafone will remain as alternative retail supplier of fixed telephony services, with a market share of [20-30]% in volume and [20-30]% in value.

(1162) Second, as noted in Section 9.4.3.5, the Commission notes that the CNMC has found that the fixed telephony retail market has been declining in Spain for years.[1122] In 2021, there was an overall decrease in terms of penetration rate per household. During the Phase I market investigation, respondents confirmed this market declination.[1123]

(1163) Lastly, as noted in Section 9.4.3.5, the respondents to the market investigation did not raise any concerns with respect to the impact of the Transaction on the market for the retail supply of fixed telephony services. On the contrary, they confirmed the Parties' view that the fixed telephony market is declining in Spain.[1124]

9.4.3.6. Retail supply of M2M services

(1164) The Transaction leads to a horizontally affected market in the overall market for the retail supply of M2M services, where the Parties' combined market share is [30-40]% by value, and [30-40]% by volume.

(1165) The Commission considers that the Transaction does not raise horizontal concerns in the market for the retail supply of M2M services in Spain for the following reasons.

(1166) First, the market structure post-Transaction would not be affected, as the increment brought about by MásMóvil appears marginal (with market shares of [0-5]% in volume and [0-5]% in value) due to MásMóvil's limited presence in this market.

(1167) Second, post-Transaction, Telefónica and Vodafone will remain as alternative retail suppliers of M2M services, with market shares of [30-40]% by volume and [30-40]% by value for Telefónica and [20-30]% by volume and [20-30]% by value for Vodafone.

1119 CNMC's Telecommunications and Audiovisual Sectoral Economic Report 2021, Doc ID 5719.
1120 Responses to questionnaire Q1 to competitors, question D.A.C.1.
1121 Responses to questionnaire Q1 to competitors in Spain, question E.8.
1122 CNMC's Telecommunications and Audiovisual Sectoral Economic Report 2021, Doc ID 5719.
1123 Responses to questionnaire Q1 to competitors, question D.A.C.1.
1124 Responses to questionnaire Q1 to competitors in Spain, question E.8.

(1168) In this context, the Commission considers that the Transaction is unlikely to significantly impede effective competition in the relevant market.

9.4.3.7. Wholesale market for access and call origination services to mobile networks (including M2M services)

(1169) The Transaction leads to a horizontally affected market in the overall market for the wholesale market for access and call origination services to mobile networks, where the Parties' combined market share is [20-30]% by value, and [20-30]% by volume.

(1170) The Commission considers that the Transaction does not raise horizontal concerns in the market for the wholesale market for access and call origination services to mobile networks in Spain for the following reasons.

(1171) First, the market structure post-Transaction would not significantly change, as the increment brought about by MásMóvil appears marginal (with market shares of [0-5]% in volume and in value) due to MásMóvil's limited presence in this market.

(1172) Second, post-Transaction, Telefónica will remain as an alternative wholesale supplier of access and call origination services to mobile networks, with market shares of [70-80]% by volume and [70-80]% by value.

(1173) During of the market investigation, the Commission received a complaint considering that the Transaction would lead to horizontal non-coordinated effects in the market of wholesale market for access and call origination services to mobile networks which would affect M2M retail providers in the market.

(1174) As explained in Section 8.8, the market for wholesale market for access and call origination services for mobile networks hosts different MVNOs providing retail mobile and M2M services.

(1175) The Commission notes that M2M retail services are offered in Spain by operators which use their own mobile networks (Orange, Telefónica and Vodafone), MVNOs with wholesale agreements with MNOs for mobile networks in Spain, and different operators using commercial agreements under Sponsored Roaming.

(1176) With regards to M2M services specifically, the Commission also considers that the Transaction does not raise competition concerns in the market for wholesale access of mobile networks, and the complaint is thus unfounded for a number of reasons.

(1177) First, again it should be pointed out that the market structure post-Transaction would not be significantly altered, as the increment brought about by MásMóvil appears marginal. Further, for the particular case of M2M services, as noted by the CNMC in its recent Decision CFT/DTSA/265/22, there are possible supply alternatives from the commercial point of view in order for operators to provide M2M services that can replace wholesale access to MNO networks.

(1178) Second, as noted by the CNMC in its recent Decision CFT/DTSA/265/22, there are other commercial alternatives, such as "*Sponsored Roaming*", that allow third operators to provide retail M2M services without entering into a wholesale agreement with a national MNOs in order to access its network.

(1179) "*Sponsored roaming*" consists of the offer of a foreign operator to use the roaming agreements that the foreign operator has in order for a third operator to provide its retail M2M services. Thus, allowing a third operator to market SIM cards in Spain with the International Mobile Subscriber Identity (IMSI) of that foreign operator and thus have access to the networks established in Spain. Sponsored Roaming for M2M services is protected under the Roaming Regulation, which includes the obligation to give access to all available technologies, and it is subject to commercial negotiations by two roaming partners in a wholesale roaming agreement. As noted by the CNMC, the use of solutions based on roaming agreements, including permanent roaming, is standard practice in the market for the provision of M2M communications services in Spain. It is common that M2M operators that provide services to terminals in Spain (with and without access to their own network) operate through a "Sponsored Roaming" or through roaming agreements with Spanish operators using SIM cards from other countries. The use of this scheme allows them to choose for each terminal the network that offers the best coverage at any given time, thus increasing the coverage footprint of their service.

(1180) In this context, the Commission considers that the Transaction is unlikely to significantly impede effective competition in the relevant market.

(1181) In light of the above, the Commission considers that the Transaction does not raise competition concerns as to its compatibility with the internal market for access and call origination services to mobile networks.

9.4.3.8. Wholesale market for the supply of broadband access services

(1182) The Transaction leads to a horizontally affected market in the overall market for the wholesale market for supply of broadband access services, where the Parties' combined market share is [30-40]% by value, and [20-30]% by volume.

(1183) The Commission considers that the Transaction does not raise horizontal concerns in the wholesale market for the supply of broadband access services in Spain for the following reasons.

(1184) First, the market structure post-Transaction would not be significantly altered, as the increment brought about by MásMóvil appears to be marginal (with market shares of [0-5]% in volume and [0-5]% in value) due to MásMóvil's limited presence in this market.

(1185) Second, post-Transaction, Telefónica will remain as an alternative wholesale supplier for supply of broadband access services, with market shares of [40-50]% by volume and [60-70]% by value.

(1186) In this context, the Commission considers that the Transaction is unlikely to significantly impede effective competition in the relevant market.

9.4.3.9. Wholesale market for the supply of international roaming services

(1187) The Transaction leads to a horizontally affected market in the overall market for the wholesale market for supply of broadband access services, where the Parties' combined market share is [30-40]% by value, and [30-40]% by volume.[1125]

(1188) The Commission considers that the Transaction does not raise horizontal concerns in the wholesale market for the supply of international roaming services in Spain as the market structure post-Transaction would not be significantly altered, as the increment brought about by MásMóvil appears to be marginal (with market shares of [0-5]% in value and [5-10]% in volume) due to MásMóvil's limited presence in this market.

(1189) In this context, the Commission considers that the Transaction is unlikely to significantly impede effective competition in the relevant market.

1125 The Parties would have a market share by volume of [20-30]% when calculated by data volume, of [20-30]% when calculated by voice traffic, and of [30-40]% when calculated by SMS volume.

9.5. Vertical effects

9.5.1. Legal framework

(1190) According to the Non-Horizontal Guidelines,[1126] non-coordinated effects may significantly impede effective competition as a result of a vertical merger principally if such a merger gives rise to foreclosure. Foreclosure occurs where actual or potential competitors' access to supplies or markets is hampered or eliminated as a result of the merger, thereby reducing those companies' ability and/or incentive to compete.[1127] Foreclosure may discourage entry or expansion of competitors or encourage their exit.[1128]

(1191) The Non-Horizontal Guidelines distinguish between two forms of foreclosure. Input foreclosure occurs where the merger is likely to raise the costs of downstream competitors by restricting their access to an important input. Customer foreclosure occurs where the merger is likely to foreclose upstream competitors by restricting their access to a sufficient customer base.[1129]

(1192) Foreclosure may also take more subtle forms, such as the degradation of the quality of input supplied. In its assessment, the Commission may consider a series of alternative or complementary possible strategies.[1130]

(1193) In assessing the likelihood of an anticompetitive foreclosure scenario, the Commission examines, first, whether the JV would have, post-merger, the ability to substantially foreclose access to inputs or customers, second, whether it would have the incentive to do so, and third, whether a foreclosure strategy would have a significant detrimental effect on competition. In practice, these factors, which are cumulative, are often examined together as they are closely intertwined.[1131]

(1194) The Commission's assessment below will focus on vertical effects in the form of input foreclosure. In Section 9.5.2, the Commission will assess the risk of input foreclosure in relation to the upstream market for wholesale supply of access and call origination services on mobile networks, i.e. wholesale mobile network access, and the each of the downstream markets for the retail supply of mobile telecommunications services, multiple-play and FMC bundles. In Section 9.5.3, the Commission will assess the risk of input foreclosure in relation to the upstream market for wholesale supply of broadband access services and each of the downstream markets for the retail supply of fixed internet access services, multiple-play and FMC bundles.[1132]

1126 Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings ("Non-Horizontal Merger Guidelines"), OJ C 265, 18.10.2008, p. 6-25.

1127 See Non-Horizontal Merger Guidelines, paragraph 18.

1128 See Non-Horizontal Merger Guidelines, paragraph 29.

1129 See Non-Horizontal Merger Guidelines, paragraph 30.

1130 See Non-Horizontal Merger Guidelines, paragraph 33.

1131 See Non-Horizontal Merger Guidelines, paragraph 32.

1132 The Commission's vertical assessment in Section 9.5.2 and Section 9.5.4 focuses on downstream markets for which wholesale mobile access is an input, namely retail mobile services and FMC bundles. Wholesale mobile network access is an input for retail mobile services. These can be included in FMC bundles but are not invariable included in multiple-play bundles, since fixed-only multiple-play bundles (e.g. fixed internet and/or fixed telephony and/or TV services) are also a possibility. FMC bundles account for the vast majority (**[80-90]**%) of broader hypothetical market for multiple-play bundles, so the reasoning set out in this section could also be said to apply to the broader hypothetical downstream market for multiple-play bundles overall. For simplicity, this section mainly refers to retail mobile

(1195) In addition, the Commission will assess the risk of foreclosure in relation to (i) wholesale supply of call termination services on mobile networks and retail supply of mobile telecommunications services and FMC bundles (Section 9.5.4), (ii) wholesale supply of call termination services on fixed networks and retail supply of fixed internet services and multiple-play bundles (Section 9.5.5), (iii) wholesale supply of international roaming services and retail supply of fixed internet access services, retail mobile telecommunications services and FMC bundles (Section 9.5.6), and (iv) wholesale mobile network access and call origination services and retail supply of M2M services (Section 9.5.7).

9.5.2. Foreclosure of wholesale mobile network access and call origination services to competing providers of retail mobile telecommunication services, multiple-play bundles and FMC bundles

(1196) MNOs supply wholesale access and call origination services which enable MVNOs to provide their own retail mobile services. In Spain, the four MNOs that provide these wholesale services are also currently providing retail mobile services.

(1197) The Transaction results in a vertically affected markets between the wholesale access and call origination services upstream and the markets for retail supply of mobile telecommunications services and the hypothetical markets for the retail supply of multiple-play bundles and FMC bundles downstream. [1133]

9.5.2.1. Input foreclosure concerns

9.5.2.1.1. The Parties' views

(1198) In the Form CO and Article 6(1)(c) Response, the Parties submit that the Transaction does not raise any competition concerns as a result of vertical effects for the following main reasons.

9.5.2.1.1.1. Ability

(1199) In the Form CO, the Parties consider that the JV will not have the ability to foreclose access to wholesale mobile network access and call origination services post-Transaction for the following reasons.

(1200) First, the Parties submit that the JV will not have a significant degree of market power on the market for wholesale supply of mobile network access and call

services and FMC bundles. Conversely, Section 9.5.3 and Section 9.5.5 below, in relation to foreclosure of wholesale broadband access services, refer mainly to the downstream market for retail fixed internet services, and the hypothetical downstream market for multiple-play bundles, since all multiple-play bundles invariably have wholesale broadband access as an input, even if the vast majority of multiple-play bundles are in fact FMC bundles. The Commission's vertical assessment on the hypothetical downstream markets for multiple-play bundles as well as FMC bundles also includes in each hypothetical market the possible segment of multiple-play and FMC bundles without premium Pay-TV football content.

1133 The Commission's vertical assessment in Section 9.5.2 and Section 9.5.4 focuses on downstream markets for which wholesale mobile access is an input, namely retail mobile services and FMC bundles. Wholesale mobile network access is an input for retail mobile services. These can be included in FMC bundles but are not invariable included in multiple-play bundles, since fixed-only multiple-play bundles (e.g. fixed internet and/or fixed telephony and/or TV services) are also a possibility. FMC bundles account for the vast majority ([**80-90**]%) of broader hypothetical market for multiple-play bundles, so the reasoning set out in this section could also be said to apply to the broader hypothetical downstream market for multiple-play bundles overall. For simplicity, this section mainly refers to FMC bundles. The Commission's vertical assessment on the downstream markets for multiple-play bundles as well as FMC bundles also includes in each market the possible sub-segment of bundles without premium Pay-TV football content.

origination services, and the market share increment in comparison to OSP's current market share is very limited. In any event, Telefónica will maintain its position as the unthreatened number one in this market.[1134]

(1201) Second, the Parties submit that the Transaction will not change the number of suppliers on the market for wholesale supply of mobile network access and call origination services. The creation of the JV will thus have no meaningful impact on the market.[1135]

(1202) Third, the Parties submit that the presence of the other two MNOs, Telefónica and Vodafone, will restrain the JV's ability to deny or degrade access for future contracts, by offering access seekers a viable alternative to the JV should this be the case. The JV would thus in this aspect be in a similar position to that of OSP pre-Transaction.[1136]

(1203) Fourth, the Parties point to the positive impact on competition of the deregulation of the market for wholesale access and call origination services in 2017.[1137]

(1204) Fifth, the Parties submit that the demand side has sufficient bargaining power in order to discipline any attempt by the JV to worsen the conditions for its downstream customers. MVNOs can negotiate and switch between different MNOs without significant difficulties or time-consuming processes and with a limited impact on their customer base.[1138]

(1205) Sixth, the Parties submit that the JV will not be able to worsen the conditions for its current customers pursuant to existing wholesale agreements.[1139]

(1206) In the Article 6(1)(c) Response, the Parties made the following additional arguments in relation to ability to foreclose.

(1207) First, they point out that OSP's wholesale mobile market share fell below 20% in 2022, which is prima facie evidence of a lack of market power.[1140]

(1208) Second, with respect to Vodafone as a competitor and alternative supplier in the upstream market, they point out that Vodafone is competing vigorously for MVNO customers, and consider that it will continue to do so post-Transaction, including because Vodafone has significant and expanding spare capacity on its mobile network allowing it to expand its wholesale presence.[1141]

(1209) Third, the Parties indicated that, as regards several of their MVNO customers, they are bound by agreements until 2025 or 2026, which prevent them from unilaterally modifying the price or the quality of service, with no ability to foreclose these customers.[1142]

(1210) Fourth, the Parties point out that the MNOs are still in the process of deploying 5G, which explains in their view why it is not yet included in the offers of MVNOs to their own retail mobile (and FMC) customers. They submit however that once 5G is

1134 Form CO, paragraphs 1611-1614. Article 6(1)(c) Response, paragraphs 394-415.
1135 Form CO, paragraphs 1615-1620.
1136 Form CO, paragraphs 1621-1633.
1137 Form CO, paragraph 1647.
1138 Form CO, paragraphs 1634-1646.Article 6(1)(c) Response, paragraphs 424 and 430.
1139 Form CO, paragraphs 1648-1650.
1140 Article 6(1)(c) Response, paragraph 397.
1141 Article 6(1)(c) Response, paragraph 417 and 421.
1142 Article 6(1)(c) Response, paragraph 434.

sufficiently mature, MVNOs will demand and obtain access, [Details on the wholesale agreements concluded by the Parties].[1143]

9.5.2.1.1.2. Incentive

(1211) In the Form CO, the Parties consider that the Transaction will not result in any incentives for the JV to materially restrict or degrade its offers in relation to wholesale mobile services offered to its customers. On the contrary, the JV will have an increased incentive to compete more effectively for the provision of wholesale access, in particular against Telefónica.

(1212) First, the Parties submit that the Transaction will not reduce the available network capacity of the JV compared to OSP's current capacity, but should increase it. The Transaction will enable the JV to invest in more advanced mobile infrastructure, e.g. the incremental rollout of 5G, which will bring incentives to market its spare capacity and provide wholesale access to recoup the investments faster. The JV will also have an incentive to obtain new sources of wholesale revenue from other MVNOs, since MásMóvil currently is OSP's main source of wholesale revenue.[1144]

(1213) Second, the Parties submit that, given the competitive nature of the wholesale market, the JV will retain strong incentives to offer wholesale services (like OSP today). The Parties consider that wholesale access is a key component in the Orange Group's and OSP's current business model, as well as an important element in the recoupment of OSP's heavy investments in the deployment of its mobile network.[1145]

(1214) On a more general note, the Parties submit that the provision of wholesale access drives significant revenue opportunities for the MNOs, and that the wholesale market will keep growing. The Parties consider that the loss of wholesale revenue, as a consequence of a foreclosure strategy, will not necessarily be recaptured in the retail market.[1146] Furthermore, demand for new types of wholesale products will emerge with the development of and rollout of 5G.[1147]

(1215) Third, the Parties submit that the Transaction will not change the incentives of rival suppliers in a way that could lead to partial or total foreclosure of downstream customers.

(1216) The Spanish wholesale market is highly competitive, and there is a lack of transparency regarding the outcome of wholesale access negotiations. The other wholesale suppliers would not be able to notice if one of them attempted to foreclose input, and thus would still view the deviating supplier as a competitor and consequently treat it as such.

(1217) Fourth, Vodafone's significant investments in 5G and Telefónica's track record of being a strong competitive force on the wholesale market, are both factors neutralizing any incentive to foreclose downstream customers from wholesale access.[1148]

(1218) In the Article 6(1)(c) Response, the Parties made the following further arguments:

1143 Article 6(1)(c) Response, paragraphs 436-443.
1144 Form CO, paragraphs 1666-1672.
1145 Form CO, paragraphs 1673-1675.
1146 Form CO, paragraphs 1676-1685; Article 6(1)(c) Response, paragraphs 449-452.
1147 Form CO, paragraphs 1686-1688.
1148 Form CO, paragraphs 1689-1702.

(1219) First, the Parties pointed out that the Commission's analysis in the Article 6(1)(c) Decision rests on the assumption that, following the hypothetical full foreclosure by the JV, the hosted MVNOs would be unable to switch to another wholesale mobile access provider and would therefore be forced to exit the market.[1149] The Parties consider that the Commission's assumption that foreclosed players would exit the market is unrealistic, rather they would switch to a rival. [1150]

(1220) Second, the Parties also submit that the Article 6(1)(c) Decision lacks any evidence or analysis to support a partial foreclosure claim.[1151]

(1221) Third, the Parties presented an alternative vertical analysis under which they assume that MVNOs foreclosed by the JV would switch to another MNO (e.g., Telefónica or Vodafone). According to the Parties alternative model, such foreclosure would not be profitable even in the case of a [40-50]% increase in the wholesale price charged to such MVNOs by such other MNOs and assuming up to [70-80]% of that would be passed on to retail customers.[1152]

(1222) Fourth, the Parties submit that Commission's assessment in the Article 6(1)(c) Decision failed to take into account the fact that the Parties each host several MVNOs pre-Transaction with different positionings relative to the JV's own brands, which weights against the Commission's arguments that the JV would have an incentive to foreclose such operators.[1153]

9.5.2.1.1.3. Effects

(1223) In the Form CO, the Parties consider that a hypothetical foreclosure strategy by the JV would not materially affect the degree of effective competition in the downstream retail mobile and convergent markets.

(1224) First, they point out that the most aggressive players on the retail mobile and convergent markets (e.g., Digi and Avatel), are currently operating under wholesale agreements with other suppliers, thus rendering them unaffected by the Transaction.[1154]

(1225) Second, and on a more general note, the Parties consider that any harm or worsening of conditions brought about by the JV would be constrained by the competitiveness of the other wholesale suppliers (i.e. Vodafone and Telefónica), rendering the JV unable to raise its rivals' costs at the retail level. Any foreclosure strategy strived after by the JV would thus have no impact on the competitiveness of the retail market.[1155]

(1226) In the Article 6(1)(c) Response, the Parties submit in addition that:

(1227) First, the contractual arrangements in place with the existing customers of the Parties protect them from any possible foreclosure, including via price increases, for at least the remaining duration of those agreements.[1156]

(1228) Second, regarding their respective current (or potential future) MVNO customers, the Parties submit that the contracts of such MVNOs do not expire all at the same time,

1149 Article 6(1)(c) Response, paragraph 453.
1150 Article 6(1)(c) Response, paragraphs 453-458.
1151 Article 6(1)(c) Response, paragraph 460.
1152 Article 6(1)(c) Response, paragraphs 458 and 468-483.
1153 Article 6(1)(c) Response, paragraphs 461-467.
1154 Form CO, paragraphs 1703-1704.
1155 Form CO, paragraphs 1705-1706; Article 6(1)(c) Response, paragraphs 500-502.
1156 Article 6(1)(c) Response, paragraph 488.

and as a result their MVNO customers will not decide to renegotiate their contracts at the same time. It follows that any foreclosure of such players could not happen at the same time, thereby significantly reducing any negative impact of such foreclosure.[1157]

9.5.2.1.2. The Commission's assessment

9.5.2.1.2.1. Ability

(1229) For the reasons set out below, the JV would have the ability to engage in input foreclosure by foreclosing access to wholesale mobile network access and call origination services for non-vertically integrated operators in the downstream retail markets for the provision of mobile telecommunication services and FMC bundles.

(1230) This is notably because, as set out in more detail below, (i) wholesale mobile network access is an important input for non-integrated retail operators; (ii) the JV would have a significant degree of market power in the upstream market for wholesale mobile network access; (iii) there are multiple forms of foreclosure that the JV could engage in; and (iv) access seekers would have limited available counterstrategies if the JV engaged in input foreclosure.

9.5.2.1.2.1.1. Wholesale mobile network access to wholesale mobile network access and call origination services is an important input

(1231) Input foreclosure may raise competition problems only if it concerns an important input for the downstream product. This is the case for example, when the input concerned (a) represents a significant cost factor relative to the price of the downstream product, or (b) irrespective of its cost, where the input is a critical component without which the downstream product could not be effectively sold.[1158]

(1232) Wholesale mobile network access is not only an important cost component but also a critical input without which retail mobile telecommunication services, or retail FMC bundles, could not be offered.

(1233) First, operators without their own mobile network, i.e., virtual operators or MVNOs, can only provide competing retail services in Spain if they first enter a wholesale mobile network access agreement, or MVNO agreement, with a MNO, such as Orange or MásMóvil. This is not contested by the Parties, and indeed, as outlined in the Commission's decision in *T-Mobile NL/Tele2 NL*, "*MVNOs depend on wholesale access conditions of their host MNO*".[1159] As such, wholesale mobile network access is a critical input without which retail mobile telecommunication services and retail FMC bundles cannot be provided. In Spain, virtual operators such as Digi, Avatel and Finetwork rely 100% on wholesale access to the mobile networks of their host MNOs without which they would not be able to provide retail mobile telecom services, or retail FMC bundles.

(1234) Second, it is clear from the Parties' own ARPU[1160] data that wholesale mobile network access is also an important cost component for the provision of downstream services, representing approximately [40-50]% of the average price of retail mobile

1157 Article 6(1)(c) Response, paragraphs 489 and 493-494.

1158 See Non-Horizontal Merger Guidelines, paragraph 34.

1159 Commission decision of 27 November 2018 in case M.8792 – *T-Mobile NL/Tele2 NL*, recital 590.

1160 ARPU stands for average revenue per user (i.e. end customer), and is typically represented as a monthly euro amount. According to Annex RFI 18 Q3, monthly ARPUs are calculated as total revenue in the given period divided by number of months (i.e., 12 months for 2019, 2020, 2021, and 2022), then divided by number of end of period subscribers (SIM cards or fixed lines).

telecommunication services in 2022.[1161] The conclusion is similar in the case of retail FMC bundles, where a comparison of Orange's wholesale and retail ARPUs shows that wholesale access revenues accounts for approximately [20-30]% of its retail FMC revenues in 2022.[1162]

(1235) In addition to wholesale mobile network access, wholesale broadband access is a similarly important input for virtual retail operators, for the reasons set out in more detail in Section 9.5.3 below. It is increasingly important for virtual operators to have access to both inputs in order to effectively compete, given the high and increasing penetration of FMC bundles compared to standalone services (i.e., standalone mobile or internet subscriptions) in Spain. In this regard, the CNMC noted in its March 2023 referral request that "*the increasing penetration of converging fixed-mobile offers in the residential segment in Spain hampers the expansion of smaller or specialised operators in the provision of a single type of service.*"[1163]

9.5.2.1.2.1.2. Significant degree of market power of the JV in the upstream market

(1236) For input foreclosure to be a concern, the vertically integrated firm resulting from the merger must have a significant degree of market power in the upstream market.[1164]

(1237) Contrary to the Parties' argument outlined in Section 9.5.2.1 above, this is the case here where Orange is, and the JV will, remain the number two player in the market for wholesale mobile network access, with a combined share of [20-30]% by volume and [20-30]% by value in 2022.[1165,1166] The largest player in this market, Telefónica, holds a share of [70-80]% by volume and [70-80]% by value in 2022. The Commission notes that the Parties' combined share may in fact materially understate their position as providers of wholesale services. This is notably because Orange's standalone share, which the Parties point out in their Article 6(1)(c) Response fell below 20% in 2022, does not include the substantial wholesale revenues (EUR [...] in 2022[1167]) pursuant to the National Roaming Agreement with MásMóvil, which was over [0-5] times larger than the combined total of its remaining mobile wholesale revenues in 2022 (EUR [...][1168]) as it argues that providing wholesale access to other MNOs does not fall within the relevant wholesale market definition.[1169]

(1238) The Parties further submit, as set out in Section 9.5.2.1 above, that the Transaction will not bring about a change in the number of suppliers for existing and potential customers. The Commission notes that MásMóvil indeed has a relatively limited standalone share in this market (less than [0-5]% in 2022), although it was nonetheless considered to be an active competitor in this market by the vast majority

1161 See Annex RFI 18 Q3. By comparing retail and wholesale mobile ARPU figures it can be seen that in the case of Orange its wholesale mobile ARPU (€ **[...]** per subscriber per month) was [30-40]% of its retail mobile ARPU ([€business secret] per subscriber per month) in 2022. Similarly, MásMóvil's wholesale mobile ARPU (€ [...] per subscriber per month) was [30-40]% of its retail mobile ARPU (€ [...] per subscriber per month) in 2022.

1162 See Annex RFI 18 Q3. Orange's combined wholesale mobile and fixed ARPU (€ **[...]**/SIM/LINE) was [20-30]% of its retail FMC ARPU (€ [...]/SIM) in 2022. This may be understating the cost as it does not account for FMC customers with more than one mobile SIM card as part of their subscription.

1163 Referral request pursuant to Article 9 of the Merger Regulation from the Spanish NCA, the CNMC, dated 1 March 2023, pages 18-19.

1164 See Non-Horizontal Merger Guidelines, paragraph 35.

1165 See Non-Horizontal Merger Guidelines, paragraph 25.

1166 SO Reply, Annex 2.3.

1167 RFI 41 Response, paragraph 16.2.

1168 Annex RFI 37, Q1.

1169 RFI 32 Response, paragraph 5.1.

of respondents that expressed a view in response to the Commission's Phase I market investigation.[1170]

(1239) This market is already oligopolistic pre-Transaction, and will become increasingly oligopolistic (even if by a relatively small increment) post-Transaction with only three remaining alternative providers, and no new entrants expected in the foreseeable future. The Commission's observation is consistent with the Non-Horizontal Merger Guidelines, which points out that when competition in the input market is oligopolistic, as it is in this case, a decision of the JV to restrict access to its inputs reduces the competitive pressure exercised on remaining input suppliers, which may allow them to raise the input price they charge to non-integrated downstream competitors,[1171] or indeed to refuse access as well.

(1240) Furthermore, and by contrast to the JV and Telefónica, Vodafone has a limited position in this market. In fact, Vodafone itself "*considers that it is in a very weak position ... with a c. [5-10]% (and declining) share of mobile wholesale network access (far behind Telefonica (c. [50-60]%) and Orange (c. [30-40]%)).*"[1172] This is largely corroborated by the market share data submitted by the Parties which shows that Vodafone's volume share has declined year on year between 2019 and 2022, and stood at [0-5]% by volume and [0-5]% by value in 2022. Between 2021 and 2022, Vodafone lost [5-10] percentage points in volume and [0-5] percentage points in value. These market shares confirm that post-Transaction, Vodafone would be a distant third player in the upstream market for wholesale mobile network access services, far behind Telefónica and the JV.[1173] Vodafone did however highlight to the Commission that it has strong incentives to win wholesale customers to grow its business, gain the scale necessary to invest in its 5G network to "*to avoid being marginalised by its two significantly larger rivals*".[1174] However, there is no evidence that Vodafone's stated intention to boost its position in this market has stopped the decline in its market share. In addition, it remains to be seen whether Vodafone's position in the market for wholesale mobile network access will materially change following completion of the sale of Vodafone Spain to Zegona, which was announced on 31 October 2023.[1175] Even though Zegona has stated that it intends to "*revive Vodafone Spain's wholesale business activities*"[1176], it also acknowledged that providing wholesale services was a lower priority for Vodafone up to now with the result that total, i.e. both fixed and mobile, wholesale revenues "*made up only approximately 4 per cent (unaudited) of Vodafone Spain revenue in the financial year ended 31 March 2023*"[1177].

(1241) As new MNOs operators are unlikely to enter the market of wholesale mobile network access due to the extremely high barriers to entry and the fact that MVNOs typically have very little bargaining power due to their small size relative to the

---

1170 Responses to questionnaire Q1 to competitors, question D.B.A.1.

1171 Non-Horizontal Merger Guidelines, paragraph 38.

1172 Minutes of prenotification call with Vodafone dated 20 December 2022, paragraph 5, Doc ID 2455.

1173 Article 6(1)(c) Response, paragraph 395.

1174 Vodafone observations on the non-confidential SO summary dated 14 July 2023, Doc ID 4564.

1175 See Vodafone Press Release, available at: https://www.vodafone.com/news/corporate-and-financial/sale-of-vodafone-spain, Doc ID 5643; and Zegona press release, available at:https://www.zegona.com/~/media/Files/Z/Zegona/press-release/2023/23-10-31-zegona-acquistion-of-vodafone-spain.pdf, Doc ID 5646.

1176 Minutes of meeting with Zegona of 10 January 2024, Doc ID 5491.

1177 See https://www.londonstockexchange.com/news-article/ZEG/general-meeting-further-info-re-the-transaction/16189475, Doc ID 5667.

MNOs.[1178] One MVNO active in Spain noted that "*There are several barriers that make it very difficult for new entrants to entry [sic] and to compete … [including the fact that] … access to radio spectrum is necessary for mobile telecommunications providers to offer services …[whereas] in Spain, currently all the spectrum has been allocated in the different bands necessary for the four MNOs (Telefónica, Orange, Vodafone and MásMóvil)*".[1179] It noted further that for access seekers "*reaching a national roaming agreement or a full MVNO agreement, under reasonable conditions, with the MNOs is quite difficult, since there are no regulatory backstops that prevent the MNOs from offering not reasonable or not competitive wholesale conditions. And it will become more difficult if there are less MNOs offering wholesale mobile access*."[1180]

(1242) Finally, during 2019-2022 Orange has consistently had a very high contribution margin (of **[...]**[1181]) in the provision of wholesale mobile network access, which is a further indication that Orange already has appreciable market power in the market for this important input. The Transaction will eliminate an ICF or at least an important competitive constraint in this market. Accordingly, the JV will have an ability to increase contribution margins even further (e.g., by raising prices) thereby further strengthening the JV's market power compared to Orange's market power pre-Transaction.

(1243) Therefore, based on the above, it cannot be excluded that the Transaction may strengthen the market power of the JV on the upstream market.

9.5.2.1.2.1.3. Multiple forms of foreclosure possible

(1244) The Non-Horizontal Merger Guidelines outline that input foreclosure may occur in various forms. For example:

– The JV may decide not to deal with its actual or potential competitors in the vertically related market (total input foreclosure – refusal to supply), and/or

– It may decide to raise the price it charges when supplying competitors and/or to otherwise make the conditions of supply less favourable than they would have been absent the merger (partial input foreclosure – raising rivals' costs), and/or

– It may engage in more subtle forms of foreclosure, such as the degradation of the quality of input supplied,[1182] including for example by not offering access to the newest technologies (e.g. 5G) or only doing so under onerous conditions that would hamper the ability of the access seeker to compete (partial input foreclosure – access degradation).

(1245) The above examples are not exhaustive, nor are they mutually exclusive. Moreover, since the wholesale mobile access market is not subject to regulation in Spain, MNOs are free to refuse to provide wholesale access or set prices at will and differentiate between access seekers. The JV could conceivably refuse access to one virtual operator entirely, raise the wholesale price for another and subject yet a different access seeker to more onerous (non-price) terms. One respondent to the Phase I market investigation referred to past examples of such conduct, namely that "*MNOs … blocked, hindered or demanded not reasonable conditions to access their*

[1178] Responses to questionnaire Q1 to competitors, question D.A.A.4, Doc ID 2834.
[1179] Responses to questionnaire Q1 to competitors, question D.A.A.4, Doc ID 2834.
[1180] Responses to questionnaire Q1 to competitors, question D.A.A.4, Doc ID 2834.
[1181] Annex RFI 18 – Q2.
[1182] Non-Horizontal Merger Guidelines, paragraph 33.

mobile network”,[1183] which shows an ability to also engage in such forms of foreclosure post-Transaction.

(1246) Another market participant referred to the fact that, [Details of the Parties' commercial agreements], “*Currently, MNOs do not offer 5G network access as part of their wholesale mobile network access agreements to access seekers/MVNOs*”[1184] despite the fact that they offer 5G as part of their own retail mobile and FMC offerings. Telefónica mentioned that “*Telefónica's network operators may use or have access to 5G in the future*”.[1185] In the same vein, the Parties explained that “*Once 5G is sufficiently mature, MVNOs will demand and obtain access [Details of the Parties' wholesale agreements]*”.[1186] The Parties pointed out that they [Details of the Parties' wholesale negotiations with MVNOs]”.[1187] The Parties further point out that they [Details of the Parties' commercial negotiations with MVNOs]”.[1188]

(1247) [Details of the Parties' commercial negotiations with MVNOs regarding the access to 5G services] In the Commission's view the JV would therefore have the ability to engage in this, more subtle, form of input foreclosure following the Transaction, either through refusing 5G access or offering it only at particularly onerous terms in order to give its own downstream operations a competitive advantage. Even if there are a number of providers that compete in retail mobile and FMC markets today without offering 5G, it is generally accepted that 5G will become increasingly important in the coming years, and it will therefore become increasingly difficult, in particular for virtual operators, to compete if they cannot offer 5G, or cannot do so at prices comparable to MNOs. The fact that ability to offer 5G is a competitive advantage on the Spanish market over operators who do not offer 5G is supported by all market participants who expressed a view in the course of the market investigation.[1189] One MVNO that responded the Commission's Phase II market investigation highlighted that “*getting access to any new features from your [host] mobile [network access] provider is extremely complex even though this services are already available to the Clients of [that host] mobile [network access] provider*”.[1190]

(1248) Under the 700 MHz spectrum auction conditions, there is a requirement on Telefónica to have “*all municipalities with more 20k inhabitants and airports … covered by 5G before 2025*.[1191] There is a similar obligation for Orange and Vodafone, which were also awarded 700 MHz band spectrum, to cover all municipalities of over 50,000 residents by 5G by June 2025. These coverage obligations do not come with corresponding obligation to provide wholesale MVNO access, even though, as one market participant indicated, “*in 2024-2026, 5G will be mature in terms of equipment and smartphones as the network equipment and chipset are ready*.”[1192]

(1249) The JV would therefore have the ability to engage in many forms of input foreclosure following the Transaction.

1183 Response to questionnaire Q1 to competitors, question D.B.A.4, Doc ID 2834.
1184 Minutes of prenotification call with Finetwork dated 2 February 2023, paragraph 22, Doc ID 2471.
1185 Response to RFI 1 to Telefónica, 2 June 2023, Q 6, Doc ID 3634.
1186 Article 6(1)(c) Response, paragraphs 436-443.
1187 Article 6(1)(c) Response, paragraph 351.
1188 Article 6(1)(c) Response, paragraph 439.
1189 Responses to questionnaire Q3 to wholesale customers, question D.A.2.
1190 Response to questionnaire Q3 to wholesale customers, questionD.B.21, Doc ID 3320.
1191 Minutes of prenotification call with Telefónica dated 14 December 2022, paragraph 28, Doc ID 1830.
1192 Minutes of prenotification call with Telefónica dated 14 December 2022, paragraph 28, Doc ID 1830.

9.5.2.1.2.1.4. Limited available counterstrategies for access seekers

(1250) The JV's ability to engage in input foreclosure would be constrained if access seekers were likely to have the ability to deploy effective and timely counter-strategies, such as sponsoring the entry of new suppliers upstream.[1193] However, all respondents to the market investigation that expressed a view indicated that they did not expect there to be any new entrants in the market for the provision of wholesale mobile network access in the coming 3 to 5 years in Spain.[1194] This is notably because it is necessary to hold spectrum rights to be able to offer wholesale mobile network access services, which can only be acquired from an existing MNO, i.e. the Parties, Vodafone and Telefónica, or via a spectrum award from the Spanish Government. Proposed regulatory changes by the Spanish Government, whereby "*that most of the spectrum rights currently held by the Spanish MNOs would not expire now in 2030-2031, but would be extended for further years [i.e. rather than being re-auctioned]… will make practically impossible for a new entrant to become an MNO to access the Spanish mobile market for a long time, up to 2038-2040*" according to one MVNO active in Spain.[1195]

(1251) In addition, and contrary to the Parties' argument as set out in Section 9.5.2.1 above, MVNOs have limited bargaining power in view of their small scale relative to MNOs, unlike MásMóvil which can rely, at least partially, on its own mobile network, and can (and does) additionally offer reciprocal access to its own network assets. According to the Parties, the largest MVNO, Digi, had **[...]** mobile SIM cards at the end of 2022, compared to over **[...]** for the JV,[1196] i.e., the JV's mobile customer base is over **[5-10]** times larger than the largest MVNO. The other MNOs, Vodafone, and Telefónica are also larger by several orders of magnitude than Digi and other virtual operators in terms of SIM cards.

(1252) The Parties' argument, set out in Section 9.5.2.1 above, that access seekers are protected from the risk for input foreclosure due to their existing wholesale agreements can be given only limited weight because such contracts are typically renegotiated every few years and, as the Parties' themselves acknowledge, "*MVNOs switch their MNO supplier either at the end of the contract terms or through contractual provisions that allow for early termination, to obtain better conditions*".[1197] In addition, MVNOs and access seekers that responded to the Commission's in-depth market investigation confirmed that wholesale mobile contract are conducted for a duration of 3 years approximately[1198] and Vodafone, an MNO, similarly indicated that "*Fix and Mobile wholesale access agreements are typically signed for a period between 3 and 5 years*".[1199] Even if, in the short term, certain MVNOs may be able to rely on existing wholesale agreements, as one access seeker that responded to the market investigation pointed out, "*competition pressure between MNOs help the MVNOs (whose bargaining position is much weaker than the one of the MNOs) negotiate or maintain reasonable terms with the existing MNOs*."[1200] As was noted above, there are suggestions that the Transaction may have already resulted in an increased reluctance by MNOs to engage with virtual operators

1193 Non-Horizontal Merger Guidelines, paragraph 39.
1194 Responses to questionnaire Q1 to competitors, question D.B.A.7.
1195 Email of Digi dated 5 June 2023, Doc ID 3573.
1196 Annex RFI 20, Q1.b.
1197 Form CO, para. 1634.
1198 Responses to questionnaire Q3 to wholesale customers, question D.B.14.
1199 Response to RFI 1 to Vodafone, question 12(a), Doc ID 3639.
1200 Responses to questionnaire Q1 to competitors, question E.2, Doc ID 2834.

in relation to wholesale access. One virtual operator in Spain informed the Commission that "*MásMóvil indicated the negotiations can wait until the outcome of the Transaction is known and [its wholesale] contract is still valid for more than 1 year [and further noted that it perceived an] apparent reluctance of the other three MNOs in the market (i.e., Telefónica, Vodafone and Orange) to offer wholesale access pending the outcome of the Transaction*".[1201] This contradicts the Parties' argument in the Article 6(1)(c) Response that virtual operators are protected by their contracts which have expiry dates in 2025 or later, since virtual operators seek to renew contracts well ahead of expiry date for business certainty, in this case a contract expiring "*more than 1 year*" into the future, i.e. late 2024 or early 2025.

(1253) In the absence of bargaining power by access seekers, the loss of a credible competitor at wholesale level will therefore be expected to increase the ability of the JV to engage in input foreclosure.

(1254) This is because the wholesale mobile market in Spain can be characterised as oligopolistic pre-Transaction, and will become even more so following the Transaction with only two alternative providers to the JV.

(1255) As noted in Section 9.5.2 above, the Parties submit that Telefónica and/or Vodafone would have every incentive to compete vigorously for wholesale customers, and would therefore constrain the JV's ability to engage in input foreclosure. This has been confirmed by Telefónica and Vodafone.[1202] However, as set out in the Non-Horizontal merger guidelines, where competition in the input market is oligopolistic, as in this case, a decision of the JV to restrict access to its inputs reduces the competitive pressure exercised on remaining input suppliers, which may allow them to raise the input price they charge to non-integrated downstream competitors.[1203]

(1256) This appears to be particularly likely in Spain in view of the more active role played by the merging parties in the wholesale market, compared to Telefónica and Vodafone. As one respondent to the Phase I market investigation indicated, "*Vodafone and Movistar [i.e. Telefonica], have not played a really active role in the last 5 years and feel comfortable with the small number of MVNOs they have in their network.*"[1204]

(1257) There are also indications that, even since the Transaction was announced Orange may have become less open to offering wholesale access. In this regard, an MVNO active in Spain considered that "*there are already signs that [the JV] may wish to foreclose access to a potential new mavericks (emerging alternative challengers, including Finetwork). This is because there is a perception in the industry in the last year (when merger plans started) that Orange is already starting to restrict access to smaller players and is less willing to engage in wholesale access negotiations*."[1205] This appears to be further corroborated by the indication from a second virtual operator, currently relying on MásMóvil, which referred to the "*apparent reluctance of the other three MNOs in the market (i.e., Telefónica, Vodafone <u>and Orange</u>) to*

1201 Minutes of meeting with Adamo, 16 October 2023, paragraph 4, Doc ID 5453.
1202 Response to RFI 1 to Telefónica, 2 June 2023, Q 12, Doc ID 3634; Response to RFI 1 to Vodafone, 2 June 2023, Q 14, Doc ID 3639.
1203 Non-Horizontal Merger Guidelines, paragraph 38.
1204 Responses to questionnaire Q1 to competitors, question D.B.A.4, Doc ID 2913.
1205 Minutes of prenotification call with Finetwork dated 2 February 2023, paragraph 24, Doc ID 2471.

offer wholesale access pending the outcome of the Transaction" (emphasis added).[1206]

(1258) For the reasons set out above, the JV would have the ability to engage in input foreclosure by foreclosing access to wholesale mobile network access and call origination services for non-vertically integrated operators in the downstream retail markets for the provision of mobile telecommunication services and FMC bundles.

9.5.2.1.2.2. Incentive

(1259) For the reasons set out below, the JV would have the incentive to engage in input foreclosure by foreclosing access to wholesale mobile network access and call origination services for non-vertically integrated operators in the downstream retail markets for the provision of mobile telecommunication services and FMC bundles.

(1260) This is notable because, as set out in more detail below, (i) the financial gains in downstream retail markets from such foreclosure would significantly outweigh upstream losses, irrespective of the precise input foreclosure strategy adopted, and (ii) the high increment and high combined retail share of the JV, in addition to high retail margins, are further indicators of an incentive to foreclose.

9.5.2.1.2.2.1. Gains from foreclosure would significantly outweigh losses post-Transaction

(1261) As explained in the Non-Horizontal Merger Guidelines, the incentive to foreclose depends on the degree to which foreclosure would be profitable.[1207] This depends on the taking into account not only the profits of the JV's upstream division, but also of its downstream division. Essentially, the JV faces a trade-off between the profit lost in the upstream market due to a reduction of input sales to (actual or potential) rivals and the profit gain, in the short or longer term, from expanding sales downstream or, as the case may be, being able to raise prices to consumers. The trade-off is likely to depend on the level of profits the JV obtains upstream and downstream. In addition, the incentive for the integrated firm to engage in input foreclosure further depends on the extent to which downstream demand is likely to be diverted away from foreclosed rivals and the share of that diverted demand that the downstream division of the integrated firm can capture.[1208]

(1262) The Commission notes that in the present case, both of the Parties are already vertically integrated pre-merger. However, MásMóvil has only a partial mobile network, which it used for approximately business secret]of its mobile traffic, and it relies on wholesale access via an NRA, [Details of the Parties' wholesale agreements], for the remainder of its mobile traffic. Furthermore, the Parties have high combined market shares on the downstream markets, i.e. the market for the retail supply of mobile services ([40-50]% with an increment of [20-30]% by volume in 2022) and the market for the supply of FMC ([40-50]% with an increment of [10-20]% by volume in 2022).[1209]

(1263) At the request of the Commission, the Parties prepared a comparison of potential wholesale sales losses and retail sales gains from a foreclosure strategy.[1210]

1206 Minutes of meeting with Adamo, 16 October 2023, paragraph 4, ID 5453.
1207 Non-Horizontal Merger Guidelines, paragraphs 40.
1208 Non-Horizontal Merger Guidelines, paragraph 40.
1209 Annex RFI 37, Q1.
1210 Response to RFI 8, Table 6 and Response to RFI 14, Table 2.

(1264) As indicated in **Table 47**, the weighted average diversion ratio from MVNOs hosted on the OSP network to OSP was [5-10]% in 2021, [...] the diversion ratio implied by market shares. To the contrary, the retail diversion ratio from MVNOs hosted on the OSP network to MásMóvil was [20-30]%, [...] the diversion ratio implied by market shares. The Transaction would increase the diversion to the JV to [20-30]% (from [5-10]%), an increase of [200-300]%. For MVNOs hosted on the MásMóvil network, the diversion ratio would increase from [30-40]% to [40-50]%, an increase of [20-30]%.

(1265) Therefore, the Transaction would increase the Parties' incentive for an input foreclosure strategy.

Table 47: Effect of total foreclosure strategy in terms of customer switching (2021)

Orange MVNO customers	Hosted Subscribers	Diversion ratios (FMC market)			Subscribers Won		
		DR to OSP	DR to MM	Combined	OSP	MM	Combined
Total / average*	[600,000-700,000]	[5-10]%	[20-30]%	[20-30]%	[50,000-100,000]	[100,000-200,000]	[100,000-200,000]

MásMóvil MVNO customers	Hosted Subscribers	Diversion Ratios			Subscribers Won		
		DR to OSP	DR to MM	DR combined	OSP	MM	Combined
Total / average*	[100,000-200,000]	[5-10]%	[30-40]%	[40-50]%	[0-50,000]	[0-50,000]	[50,000-100,000]

Source: Response to RFI 14, Table 2, Commission's assessment.
SUMA is a MVNO enabler owned and controlled by OSP.
Average diversion ratios represent the subscriber weighted average.

(1266) In addition, as set out below in **Table 48**, a foreclosure strategy would become profitable following the Transaction.

(1267) A brief description of the methodology followed by the Commission in calculating the figures in **Table 48** is set out below:

- By multiplying the Parties' respective 2021 FMC ARPUs by the number of expected subscribers won by each of them, they estimated the expected revenue gains, both pre-Transaction and post-Transaction, based on a total foreclosure strategy.[1211]
- In both scenarios, the upstream revenue losses, i.e. wholesale mobile revenues, are assumed to be the same. While both scenarios, downstream revenue gains would outweigh upstream revenue losses (see **Table 48** below), following the Transaction, the revenue gains of a foreclosure strategy would in fact increase more than **[...]** compared to a pre-Transaction scenario, in view of the significantly higher proportion of switching customers that would choose the JV in such a scenario. This was calculated by the Parties based on the retail FMC market diversion ratio between each MVNO and the JV.[1212]

1211 The Commission understands that ARPU is defined as average revenue per subscriber per month (Annex RFI 18, Q3). Therefore, the gained and lost revenues are per month.

1212 Response to RFI 18, Tables 1 and 2.

– To compute the lost upstream profits, the Commission has multiplied the lost upstream revenues with OSP's percentage contribution margin in the mobile wholesale market.[1213]

– To compute the gained downstream profits, the Commission has multiplied the gained downstream revenues with OSP's percentage contribution margin in the retail FMC market.[1214]

Table 48: Comparison of potential monthly 2021 wholesale losses with retail gains (Pre-Transaction vs Post-Transaction). [1215]

2021, EUR (monthly)	Pre-Transaction	Post-Transaction	Difference
Loss upstream revenue	[...]	[...]	[...]
Gained downstream revenue	[...]	[...]	[...]
Net Revenue Gain/Loss	[...]	[...]	[...]
Loss upstream profits	[...]	[...]	[...]
Gained downstream profits	[...]	[...]	[...]
Net Profit/Loss	[...]	[...]	[...]

Source: Response to RFI 14, Tables 2 and 3, Commission's assessment

(1268) The Parties submit that "*it is not credible to assume that ... all of the MVNOs currently hosted on the Parties network would exit the market [as]these MVNOs would be hosted by other providers of mobile wholesale services* ".[1216]

(1269) In the Article 6(1)(c) Response, further to the Parties' view that it is unrealistic to assume that there would be an exit from the market by foreclosed MVNOs and access seekers, they presented an alternative vertical analysis conducted with the following, alternative assumptions. First, all MVNOs or access seekers would be foreclosed by the Parties. Second, none of them would exit the market but rather switch to another MNO (e.g., Telefónica or Vodafone). Third, the Parties' model assumes—in a worst case scenario—a wholesale price increase of up to [40-50]%, [70-80]% of which would be passed on to MVNOs end customers. The Parties conclude that under such assumptions a total foreclosure strategy by the Parties would not be profitable.[1217]

(1270) First, it is correct that the Commission's quantitative assessment only assesses a total foreclosure scenario, and indeed assumes that all customers of the foreclosed access seeker would switch to non-foreclosed retail operators, in proportion to diversion ratio data provided by the Parties. However, it is nonetheless indicative of an

1213 The Commission applies the same contribution margin to OSP and MM, as MM's wholesale margin is not reported separately. According to Annex RFI 18, Q2, sheet "Adjusted PL – OSP segment", OSP's contribution margin in the wholesale mobile market was ([...] in 2021.

1214 The Commission applies the same contribution margin to OSP and MM, as MM's retail FMC margin is not reported separately. According to Annex RFI 18, Q2, sheet "Adjusted PL – OSP segment", OSP's contribution margin in the FMC market was **business secret]** in 2021. Thereby the Commission conservatively assumes that the FMC contribution margin also includes any margins OSP may make from intra-company wholesale agreements. The Commission will verify this assumption in its in-depth investigation.

1215 The Commission uses the total revenues submitted by the Parties in RFI 14, Tables 2 and 3 but notes that there are some minor discrepancies to the revenues computed according to the formulas suggested by the Parties in these tables.

1216 Response to RFI 8, paragraph 28.4.

1217 Article 6(1)(c) Response, paragraphs 458 and 468-483.

incentive to engage in input foreclose even in a scenario where such MVNOs would not exit the market. This is for two reasons in particular.

(1271) As explained in Section 9.5.2.1.2.1 above, the JV, rather than outright refusing wholesale access, may decide to raise the price it charges or to otherwise make the conditions of wholesale access less favourable than they would have been absent the merger, or it may engage in more subtle forms of foreclosure, such as the degradation of the quality of wholesale access relative to that which is made available to its own downstream operations, e.g. refusal to include wholesale access to 5G.[1218]

(1272) It can be expected that if a total foreclosure strategy is profitable, then a partial foreclosure strategy is likely to also be profitable.[1219] Notably, partial foreclosure is likely to be profitable because the Parties would be able to recapture some lost upstream sales in the downstream market, which in turn provides incentives to raise prices upstream.

(1273) In addition, from an economic assessment standpoint, all else being equal, it can be expected that a total foreclosure strategy compared to a partial foreclosure strategy would not significantly change the ratio with which retail customers would switch from foreclosed MVNOs to the JV.[1220] As such, it is to be expected that the relative gains and losses would remain largely the same between these various different foreclosure strategies, i.e., if total foreclosure is profitable, as demonstrated in **Table 48** above, then partial foreclosure would also be profitable, and vice versa, all else being equal.[1221] In other words, whilst total foreclosure would encourage more switching away from foreclosed MVNOs (and therefore provide more gains in absolute terms to the JV), whether the gains outweigh the losses depends on the gains and losses per retail customer and the ratio of switching to the JV versus non-foreclosed retail players, which would be similar between total and partial foreclosure strategies. Hence the direction of profitability would be the same between these different foreclosure strategies. As such, the analysis of benefits and costs of foreclosure proceeds with each benefit and cost in turn, and noting in each instance whether the different foreclosure strategies available to the JV would not significantly impact the analysis.[1222]

(1274) Contrary to the Parties' assertion in the Article 6(1)(c) Response, it is not necessary for the Commission to quantify precisely the gains and losses associated every individual possible alternative variation of input foreclosure. Indeed, it is not even required for the Commission to quantitatively demonstrate that input foreclosure would be profitable, for example due to insufficient data, in which case the Commission may do so based on qualitative evidence, as it has done in many past cases.[1223] In this case, the Commission has, in a conservative approach and based on

1218 Indeed, **[Details of the Parties' commercial agreements]**.

1219 By analogy, see Commission decision of 22 January 2022 in case M.10262 – *Meta (formerly Facebook) / Kustomer*, recital 316, where the Commission reached a similar conclusion.

1220 By analogy, see Commission decision of 22 January 2022 in case M.10262 – *Meta (formerly Facebook) / Kustomer*, recital 316, where the Commission reached a similar conclusion.

1221 By analogy, see Commission decision of 22 January 2022 in case M.10262 – *Meta (formerly Facebook) / Kustomer*, recital 316, where the Commission reached a similar conclusion.

1222 By analogy, see Commission decision of 22 January 2022 in case M.10262 – *Meta (formerly Facebook) / Kustomer*, recital 316, where the Commission reached a similar conclusion.

1223 See for example Commission decisions of 22 January 2022 in case M.10262 – *Meta (formerly Facebook) / Kustomer*, recital 310; of 15 May 2023 in case M.10646 – *MICROSOFT / ACTIVISION BLIZZARD*, recital 716 et seq.

available data, assessed quantitatively, the form of input foreclosure that would result in the greatest level of upstream losses, namely a total input foreclosure of all of the Parties' current mobile wholesale customers. The Commission further assumes, again conservatively, that the JV would only recapture a portion of the foreclosed firms retail customers, in line with diversion ratio data provided by the Parties. From this, it is reasonable to assume that less severe forms of foreclosure, such as increasing wholesale costs or quality degradation, which would, all else being equal, result in less upstream losses (and less corresponding downstream gains), would similarly be profitable.

(1275) The Parties' alternative model provided with the Article 6(1)(c) Response rather rests on assumptions that the Commission considers to be unrealistic.

(1276) Notably, it assumes that no MVNO or access seeker would exit the market in the event that the JV refused access, i.e. that they would be immediately made an offer by Vodafone or Telefónica or both. This is not supported by evidence and in fact even contradicted by statements from an access seeker that is currently seeking to renegotiate a wholesale agreement with MásMóvil, which referred to the "*apparent reluctance of the other three MNOs in the market (i.e., Telefónica, Vodafone <u>and Orange</u>) to offer wholesale access pending the outcome of the Transaction*".[1224]

(1277) Separately, the Parties' arguments in Section 9.5.2.1.1 that the JV would have the incentive to obtain new sources of wholesale revenue from other MVNOs and access seekers since MásMóvil is currently a significant source of wholesale revenue for Orange (EUR **[...]** in 2022[1225]) is not credible in view of several points.

– <u>First</u>, MásMóvil's mobile customers on Orange's network today would remain there post-Transaction,

– <u>Second</u>, the additional mobile customers currently served on MásMóvil's own network (**[...]** of its mobile traffic) would be moved to the JV's network in circumstances where "**[...])**"[1226] resulting in increased capacity on Orange's existing network (and the JV's future network) being utilised for the JV's own customer base, which will be the largest of any operator in Spain, and

– <u>Third</u>, Orange's revenues in the wholesale mobile market in 2022 (EUR **[...]**[1227]), even when taken together with its additional EUR **[...]** from MásMóvil under the **[...]** are dwarfed by MásMóvil's downstream retail mobile revenues in 2022 (EUR **[...]**[1228]), which would be gained by the JV as a result of the Transaction. It is therefore incorrect to state that MásMóvil is a significant source of wholesale revenue.

9.5.2.1.2.2.2. High combined retail market share and high retail margins

(1278) As further explained in the Non-Horizontal Merger Guidelines,[1229] the incentive to foreclose actual or potential rivals may also depend on the extent to which the downstream division of the integrated firm can be expected to benefit from higher price levels downstream as a result of a strategy to raise rivals' costs. The greater the

1224 Minutes of meeting with Adamo, 16 October 2023, paragraph 4, Doc ID 5453.
1225 RFI 41 Response, paragraph 16.2
1226 Form CO, footnote 442.
1227 Form CO, paragraph 120.
1228 SO Reply, Annex 2.3.
1229 See Non-Horizontal Merger Guidelines, paragraph 25.

market shares of the JV downstream, the greater the base of sales on which to enjoy increased margin.

(1279) First, the merger would result in a material increase in the downstream base of sales (compared to the standalone base of sales of the Parties separately).[1230]

– In the retail mobile market, the JV would become the largest operator in Spain (by volume and revenues). It would have a 2022 market share materially above 30%.[1231] In fact, the JV's share by volume would be [40-50]%, with an increment of [20-30]%.

– Similarly, in the possible retail market for FMC bundles, the JV would become the largest operator in Spain by volume. It would have a 2022 market share by volume of [40-50]%, again materially above 30%[1232], with an increment of [10-20]%.

(1280) The Non-Horizontal Merger Guidelines point out that in addition to the overall size of the JV's base of sales, the extent to which the JV can price discriminate downstream may be taken into account.[1233] This statement envisages a scenario where the same input may be important for more than one downstream market, and where the JV may only be active in one such market, but it can also apply to a scenario where the downstream market involves different segments, e.g. based on price.

(1281) In Spain, MásMóvil is active at retail level "*through a wide variety of brands [23 in total*[1234]*], such as Yoigo, MásMóvil and Virgin, as well as digital-focused brand Pepephone, regional brands Euskaltel, R., Guuk, Embou and Telecable and international customers brands Llamaya, Lebara, Lycamobile*." There are many "*differentiating factors between the different MÁSMÓVIL brands*" including qualitative aspects such as broadband and mobile data speeds and download limits, but also "*significant differences in the ARPU of the various services offered by MÁSMÓVIL's brands*".[1235] MásMóvil's brand-level ARPUs range from EUR **[...]** to EUR **[...]** per month for mobile customers, and from EUR **[...]** to EUR **[...]** per month for FMC customers.[1236] While Orange operates just three separate brands in Spain, its brand-level ARPUs range from EUR **[...]** to EUR **[...]** per month for mobile customers, and from EUR **[...]** to EUR **[...]**per month for FMC customers.[1237]

(1282) The fact that the JV will own a continuum of brands offering retail mobile and FMC bundles at a range of price points will therefore give it not only greater ability but also greater incentive to engage in price differentiation to the extent that may maximise the benefits from input foreclosure. Contrary to the Parties' point in the Article 6(1)(c) Response, this continuum of brands is a further indication that the JV would likely have a greater incentive to engage in input foreclosure compared to the pre-Transaction situation, notably as Orange only operates under three separate brands pre-Transaction.

1230 More information regarding market shares can be found in Section 9.2.
1231 See Non-Horizontal Merger Guidelines, paragraph 25.
1232 See Non-Horizontal Merger Guidelines, paragraph 25.
1233 Non-Horizontal Merger Guidelines, footnote 39.
1234 Form CO, Table 51.
1235 Form CO, paragraph 612-613.
1236 See Annex RFI 10 Q1.
1237 See Annex RFI 10 Q1.

(1283) Indeed, the vast majority of respondents to the Phase I market investigation that expressed a view indicated that Orange and MásMóvil may have less incentive to offer such access and/or increase wholesale prices following the Transaction.[1238]

(1284) One such respondent noted that "*adding [MásMóvil's] downstream market share to Orange's existing market share will reduce the post-merger company's incentive to offer wholesale mobile access on competitive terms*"[1239] while another similarly considered that "*Orange/MásMóvil will not have incentive in anyone else entering their mobile network apart from their own brands or small or niche competitors (to cover a niche they may not reach with their general offer) [since] Orange/MásMóvil will control the largest retail share between them together and their brands*".[1240]

(1285) Finally, according to the Non-Horizontal Merger Guidelines, the higher the downstream margins, the higher the profit gain from increasing market share downstream at the expense of foreclosed rivals.[1241] The 2022 contribution margins of Orange and MásMóvil were**[...]**% and **[...]**% respectively on an overall basis.[1242] The Commission notes that these margins are high and therefore serve as a further indication of an incentive to engage in input foreclosure following the Transaction.

(1286) For the reasons set out above, the Commission has come to the conclusion that the JV would have the incentive to engage in input foreclosure by foreclosing access to wholesale mobile network access and call origination services for non-vertically integrated operators in the downstream retail markets for the provision of mobile telecommunication services and FMC bundles.

9.5.2.1.2.3. Effects

(1287) For the reasons set out below, even if the Parties may have the ability and the incentive to engage in input foreclosure following the Transaction, foreclosing wholesale mobile network access for non-vertically integrated operators would not have a significant detrimental effect on competition in the downstream retail markets for the provision of mobile telecommunication services and FMC bundles.

(1288) This is notably because, as set out in more detail below the targets of foreclosure (i.e. MVNOs, virtual operators or simply as access seekers), do not play a sufficiently important role in the downstream markets in view of

(1) Their small share of the relevant downstream markets, even when considered collectively,

(2) Their limited ability to exert pricing pressure on MNOs in the relevant downstream markets, and

(3) Their limited ability to differentiate themselves from their host MNOs and their typical focus on niche and low-end segments of the relevant downstream markets.

1238 Responses to questionnaire Q1 to competitors, question D.B.A.5.

1239 Responses to questionnaire Q1 to competitors, question D.B.A.6, Doc ID 2865.

1240 Response to questionnaire Q1 to competitors, question D.B.A.6, Doc ID 2834.

1241 Non-Horizontal Merger Guidelines, paragraph 41.

1242 Annex RFI 18 – Q2. Orange provided a further breakdown of its contribution margins in the retail mobile market (**[...]**%) and the retail FMC market (**[...]**%), which the Commission notes are broadly similar, if slightly higher, than its overall margin. While a similar breakdown was not provided for MásMóvil, the Commission assumes, in the absence of more granular data, that MásMóvil's overall contribution margin is likely to be broadly indicative of its contribution margin in individual retail markets..

(1289) As outlined in the Non-Horizontal Merger Guidelines, significant harm to effective competition normally requires that the foreclosed firms play a sufficiently important role in the competitive process on the downstream market. The higher the proportion of rivals which would be foreclosed on the downstream market, the more likely the merger can be expected to result in a significant price increase in the downstream market and, therefore, to significantly impede effective competition therein. Despite a relatively small market share compared to other players, a specific firm, may play a significant competitive role compared to other players, for instance because it is a particularly aggressive competitor.[1243]

(1290) As a starting point, it is appropriate to consider that the targets of foreclosure are not only those access seekers currently relying on wholesale mobile network access from one of the Parties, but all access seekers in the Spanish market. This is because, first, as outlined in the Non-Horizontal Merger Guidelines, when competition in the input market is oligopolistic, a decision of the JV to restrict access to its inputs reduces the competitive pressure exercised on remaining input suppliers, which may allow the remaining input suppliers to also raise the input price they charge to non-integrated downstream competitors.[1244]

(1291) First, according to market share data provided by the Parties[1245], access seekers account for a small proportion of the downstream retail mobile and FMC markets. This has increased over the four-year period 2019 to 2022, but only marginally.

(1292) This is clear from market share data provided by the Parties:

– Retail mobile services: access seekers[1246] collectively had a share of [5-10]% by value and [5-10]% by volume in 2022 (compared to [0-5]% by value and [5-10]% by volume in 2019). This represents an increase of only [0-5] percentage point per year. By contrast, in 2022, the Parties, Telefónica and Vodafone collectively accounted for [90-100]% of the market by value and [90-100]% by volume.

– Retail FMC bundles: access seekers[1247] collectively had a share of [5-10]% by value and [5-10]% by volume in 2022 (compared to [0-5]% by value and [0-5]% by volume in 2019). This represents an increase of only around [...] per year. By contrast, in 2022, the Parties, Telefónica and Vodafone collectively accounted for [90-100]% of the market by value and [90-100]% by volume.

(1293) The above shows that such players have a very limited presence in the market, accounting for less than [10-20]% of the overall mobile and FMC markets—and only [5-10]% of each market in value terms—even when considered collectively.

(1294) Moreover, even when considered collectively, access seekers do not appear to have grown significantly in the four years from 2019 to 2022 for which data is available (the Parties having not provided data for 2023).

(1295) The above reasoning applies *a fortiori* to access seekers when considered on an individual basis, including in the case of Digi, which is the largest of the access seekers with a 2022 share in the retail mobile market of [0-5]% by value and [5-10]% by volume, and in the retail FMC bundle market of [0-5]% by value and [0-5]% by

1243 Non-Horizontal Merger Guidelines, paragraph 48.
1244 Non-Horizontal Merger Guidelines, paragraph 38.
1245 Annex RFI 37, Q1.
1246 Digi, Finetwork, PTV, Adamo, Avatel and “other competitors”.
1247 Digi, Finetwork, PTV, Adamo, Avatel and “other competitors”.

volume. Digi notably pointed out in this regard that while it may be "*the largest of the small players in Spain …[it is only]… "1/7 of MásMóvil size and 1/12 of Orange size.*[1248]

(1296) Second, access seekers, including Digi, do not appear to exert significant competitive pressure in terms of pricing behaviour on MNOs pre-Transaction.

(1297) Indeed, pre-Transaction, the MNOs in Spain, namely the Parties, Vodafone and Telefónica all announced inflation-related price increases, and smaller players in the market indicated that they expect "*that repricing up may continue to be the trend after the Transaction*". This is despite the fact that some virtual operators, notably Digi, did not increase prices.

(1298) This further suggests that the Parties and other MNOs do not feel constrained by pricing pressure from access seekers, including Digi, pre-Transaction.

(1299) Third, as outlined in Section 9.4.3.1.3 above, access seekers' and MVNOs' role in the downstream retail markets for mobile services and FMC bundles is limited by their inability to differentiate themselves from their host MNOs in terms of quality or offering.

(1300) Since their access conditions are controlled by the MNOs, this limit the range of services that they can offer, the customer segment they can address, and the prices they can offer.

(1301) Even if access seekers are growing, all of them, including Digi, have significantly smaller subscriber bases than MNOs (e.g. MásMóvil, and *a fortiori* than the other three MNOs, which are all larger). As a result, these smaller players do not have material bargaining power when negotiating wholesale access conditions with MNOs.[1249] As one market investigation respondent indicated "*MVNOs … bargaining position is much weaker than the one of the MNOs*".[1250]

(1302) Perhaps for this reason, Digi indicated that it "*does not consider itself close competitors of the Parties…*" In this context, Digi also notes that currently it does not offer FMC bundles including Pay-TV,[1251] which the Parties and the other MNOs are able to offer, thus limiting its attractiveness as an alternative to Orange or MásMóvil to a sizeable portion of retail mobile customers and retail FMC bundle customers.[1252]

(1303) Similar limitations apply to the offerings of many other MVNOs and access seekers in Spain, which typically focus on niche customer segments (as opposed to the entire relevant downstream markets), as further outlined in in Section 9.4.3.1.3 above.

(1304) The Commission considers that all the aforementioned factors currently limiting MVNOs' and access seekers' competitiveness would remain after the Transaction, with the result that the Commission considers that such operators do not play a

---

1248 Non-confidential minutes of the call with Digi of 29 November 2022, paragraph 11, Doc ID 1846.

1249 See Non-Horizontal Merger Guidelines, paragraph 50.

1250 Response to questionnaire Q1 to competitors, question E.2, Doc ID 2834.

1251 Non-confidential minutes of the call with Digi of 29 November 2022, paragraph 11, Doc ID 1846.

1252 Digi has however indicated that it "*intends to start to offer pay TV services in Spain in the short to medium term*." See Digi Response to the Remedies Market Test, 21 December 2023, page 8, Doc ID 5423. The Commission notes moreover that, unlike Orange, "*MASMOVIL does not offer its own pay-TV services but is only a commercial agent of … third-party platforms … [and that its] TV offers are limited to packages of basic pay-TV channels and thematic/niche content provided by several platforms*" (emphasis added) (Form CO, paragraph 1123).

sufficiently important role in the competitive process on the downstream markets for retail mobile services and retail FMC bundles.

(1305) For the reasons set out above, the Commission concludes that foreclosing wholesale mobile network access for non-vertically integrated operators would not have a significant detrimental effect on competition in the downstream retail markets for the provision of mobile telecommunication services and FMC bundles.

9.5.2.1.3. Conclusion on input foreclosure of wholesale mobile network access and call origination services to competing providers of retail mobile telecommunication services, multiple-play bundles and FMC bundles

(1306) Based on the above, the Commission has come to the conclusion that the Transaction is not likely to result in a significant impediment to effective competition as a result of vertical effects, namely input foreclosure in relation to the upstream market for wholesale supply of access and call origination services on mobile networks, which is an important input for the downstream market for the retail supply of mobile telecommunication services and the hypothetical downstream markets for the retail supply of multiple-play bundles and FMC bundles in Spain.

(1307) While a deterioration of the access conditions of MVNOs and other access seekers at the wholesale level following the Transaction would have a negative impact on their ability to compete at retail level, the Commission considers that the total or partial foreclosure of such operators would be unlikely to have the effect of resulting in a significant impediment to effective competition in the retail supply of mobile telecommunication services, multiple-play bundles and FMC bundles in Spain. This is because of the limited competitive constraint that MVNOs and other access seekers exert pre-Transaction on the MNOs and in the relevant retail mobile, multiple-play and FMC markets overall, notably in view of their small size and their focus on more niche (and typically lower cost/lower quality) segments of the market.

9.5.2.2. Customer foreclosure concerns

(1308) The Commission considers that, for customer foreclosure to be a concern, the vertical merger must involve a company which is an important customer with a significant degree of market power in the downstream market.[1253] In this regard, the Commission notes that MásMóvil holds a market share of [20-30]% on the downstream market for the retail supply of mobile telecommunication services and [10-20]% for the retail supply of FMC bundles by volume in 2022.

(1309) MásMóvil combines its own mobile infrastructure with [Details of the Parties' commercial agreements].[1254] Currently, approximately [...] of the mobile data traffic is operated through the networks of [Details of the Parties' commercial agreements]and, due to the increased uptake in 5G, this is expected to increase to around [...].[1255] On this basis, MásMóvil could be seen as an important wholesale customer for the MNOs in the downstream markets.

(1310) MásMóvil and Orange have concluded different national mobile wholesale agreements [Details of the Parties' commercial agreements].[1256] [Details of the Parties' commercial agreements].[1257]

1253 Non-Horizontal Merger Guidelines, paragraph 60.
1254 Form CO, paragraph 951.
1255 Article 6(1)(c) Response, paragraph 351.
1256 Form CO, Table 36.

(1311) Therefore, the Commission considers that there is no merger-specific change that could raise customer foreclosure concerns in relation to the vertical relationships between the Parties' activities on the market for the wholesale supply of access and call origination services on mobile networks (upstream) and the markets for the retail supply of mobile telecommunication services and FMC bundles (downstream).

(1312) In addition, no market participant raised concerns to the Commission with regards to any customer foreclosure strategy during its market investigation.

(1313) On the basis of the above, the Commission considers that the Transaction will not change the Parties' ability and incentive to engage in any customer foreclosure strategy in relation to the vertical relationships between the Parties' activities on the market for the wholesale supply of access and call origination services on mobile networks (upstream) and the markets for the retail supply of mobile telecommunication services and FMC bundles (downstream).

9.5.3. Foreclosure of wholesale supply of broadband access services to competing providers of retail fixed internet services, multiple-play and FMC bundles and FMC bundles

(1314) The Transaction results in vertically affected markets between the market for the wholesale supply of broadband access services upstream and the Parties' activities in the downstream markets for the retail supply of fixed internet access services and multiple-play bundles (which comprises fixed-only bundles and FMC bundles, with FMC bundles accounting for the vast majority of multiple-play bundles) downstream.[1258]

9.5.3.1. Input foreclosure concerns

9.5.3.1.1. The Parties' views

(1315) In the Form CO and Article 6(1)(c) Response, the Parties submit that the Transaction does not raise any input foreclosure concerns for the following main reasons.

9.5.3.1.1.1. Ability

(1316) In the Form CO, the Parties consider that the JV will not have the ability to foreclose access to wholesale broadband services post-Transaction for the following reasons.

(1317) First, the Parties submit that the JV will not have a significant degree of market power on the market for wholesale supply of broadband access, and the increment to the Parties' market shares is very limited. Notably, Telefónica's position as the market leader in this segment of services will remain.[1259]

(1318) Second, the Parties submit that the Transaction will not reduce the number of suppliers on the market of wholesale access to fixed broadband services, and the overall structure of the market will not change since MásMóvil has no significant activities on the wholesale level.[1260]

[1257] Form CO, Table 134.

[1258] The Commission's vertical assessment in Section 9.5.3 and Section 9.5.5 below, in relation to foreclosure of wholesale broadband access services, refer mainly to the hypothetical downstream market for multiple-play bundles as these invariably have wholesale broadband access as an input, even if the vast majority of multiple-play bundles are in fact FMC bundles. The Commission's vertical assessment on the downstream markets for multiple-play bundles as well as FMC bundles also includes in each market the possible sub-segment of bundles without premium Pay-TV football content.

[1259] Form CO, paragraphs 1496-1500.

[1260] Form CO, paragraphs 1501-1505.

(1319) Third, the Parties submit that several providers of wholesale access to fixed broadband services will remain post-Transaction, as is the situation today, notably Telefónica and Vodafone. The Parties note that these smaller players are experiencing steady growth in terms of wholesale revenues. The Parties also consider that the offering of national wholesale coverage does not necessarily confer competitive advantage, since both FNOs and FVNOs choose wholesale provider according to their specific strategies and needs.[1261]

(1320) Fourth, the Parties submit that FVNOs have enough bargaining and countervailing buyer power to drive competition between the various suppliers of wholesale access in the same area, by leveraging different FNOs against each other. The Parties also submit that the wholesale fixed market is dynamic with low entry barriers as the conditions under the Spanish framework (e.g. access to public funding) facilitates efficient rollout of FTTH infrastructure. In that regard, a large number of network operators have entered the market and will continue to expand in the coming years.[1262]

(1321) Fifth, the Parties submit that the absence of regulation shows that there is strong competition for 70% of the population. The Spanish regulator has increasingly expanded the area in which Telefónica is exempt from providing other operators with wholesale access to its infrastructure.[1263]

(1322) Lastly, the Parties submit that the JV will not have the ability to partially or totally foreclose contracts with existing customers. Existing wholesale access agreements are typically concluded for a mid-to-long term duration, and the Parties are bound by the contractual obligations therein, limiting any foreclosure strategy attempt and protecting their contractual counterparts.[1264] In particular, the Parties consider that the terms and duration of the two fixed contracts between OSP and Vodafone make it simply impossible for OSP to engage in foreclosure.[1265]

(1323) In the Article 6(1)(c) Response, the Parties made the following additional arguments in relation to ability to foreclose.

(1324) First, they point out that the overlap between the owned fixed networks of the Parties are very limited.[1266] In this regard, they indicate that MásMóvil has divested (between 2019 and 2022).[1267]

(1325) Second, the Parties submit that the Commission wrongly dismiss Vodafone's current and future role in the wholesale fixed market.[1268] In particular, the Parties submit that Vodafone has upgraded its HFC network to DOSCIS 3.1, is exploring selling or entering into partnerships with investors on its HFC network which would allow further development of its fixed network, and is competing for wholesale fixed customers, and actually does provide wholesale access to several access seekers on non-reciprocal basis to both its FTTH and HFC network.

(1326) Third, the Parties consider that in addition to Telefónica and Vodafone, several other operators (e.g., Adamo, Onivia and Avatel) are active on the Spanish wholesale

---

1261 Form CO, paragraphs 1506-1517.
1262 Form CO, paragraphs 1523-1536 and Article 6(1)(c) Response, paragraph 558.
1263 Form CO, paragraphs 1537-1541 and Article 6(1)(c) Response, paragraphs 386-389.
1264 Form CO, paragraphs 1542-1558.
1265 Article 6(1)(c) Response, paragraphs 565-573.
1266 Article 6(1)(c) Response, paragraph 521.
1267 Article 6(1)(c) Response, paragraphs 517 and 523.
1268 Article 6(1)(c) Response, paragraphs 535-544.

broadband access services market, albeit with a more limited/regional FTTH/FHC coverage than the bigger FNOs.[1269]

9.5.3.1.1.2. Incentive

(1327) In the Form CO, the Parties consider that the JV will not be incentivized to foreclose or restrict access to or otherwise degrade the fixed wholesale services offered post-Transaction, but rather have incentives to compete more effectively on the market for the following reasons.

(1328) First, the Parties submit that, given the competitive nature of the wholesale market, the Transaction will not impact the JV's incentives to offer wholesale broadband access services. The provision of wholesale access drives significant revenue and the Spanish market has seen an increasing trend of FNOs granting access over the last few years. The addition of MásMóvil's limited network infrastructure will not bring about a change to OSP's current incentive of granting wholesale access in order to recoup infrastructure investments.[1270]

(1329) Second, the Parties submit that any loss of wholesale revenues as a consequence of a foreclosure strategy will not necessarily be recaptured in the retail market, since access seekers will have viable wholesale access alternatives in the other suppliers. In addition, the wholesale market will continue growing, further strengthening the incentives of FNOs to offer access in order to capture wholesale revenues.[1271]

(1330) Third, the Parties submit that the Transaction does not affect the incentives of the JV compared to OSP. The integration of MásMóvil will not result in any reduction of the spare capacity available today on OSP's fixed network, but it will result in the loss [Details of Orange's wholesale revenues] of wholesale revenue, creating incentives to obtain new wholesale revenues on the market.[1272]

(1331) Fourth, the Parties submit that the Transaction allows efficiencies, synergies and cost savings enabling investments not available to the Parties on a standalone basis, e.g. in rural areas and in areas where the users today have limited choice and are dependent on only one operator.[1273]

(1332) Fifth, the Parties submit that the Transaction cannot change the incentives of rival suppliers in a way that could lead to partial or total input foreclosure. This is mainly due to the competitiveness of the Spanish wholesale market and the complex, infrequent and non-transparent negotiation process between wholesale suppliers and access seekers. The other wholesale suppliers would not be able to notice if one of them attempted an input foreclosure strategy, and thus would still view the deviating supplier as a competitor and treat it as such.[1274]

(1333) In the Article 6(1)(c) Response, the Parties made the following additional arguments in relation to incentives:

(1334) First, the Parties pointed out that the Commission's analysis in the Article 6(1)(c) Decision rested on the assumption that, following the hypothetical full foreclosure by the JV of Vodafone, Vodafone would be unable to switch to another supplier of

1269 Article 6(1)(c) Response, paragraphs 545-556.
1270 Form CO, paragraphs 1560-1565.
1271 Form CO, paragraphs 1566-1575.
1272 Form CO, paragraphs 1579.
1273 Form CO, paragraphs 1580-1586.
1274 Form CO, paragraphs 1587-1595.

wholesale fixed services for the affected hosted subscribers.[1275] The Parties also submit that the Article 6(1)(c) Decision does not provide any other evidence or analysis to support a partial foreclosure claim.[1276]

(1335) Second, the Parties recalled that Telefónica is, and will continue to be, mandated to provide wholesale fixed access in regulated areas at the regulated price.[1277]

(1336) Third, the Parties presented an alternative vertical analysis conducted by Compass Lexecon under which Vodafone would switch to another FNO (e.g., Telefónica or other smaller wholesale suppliers) in the event of the JV refusing to provide access[1278]. According to this model, such a foreclosure strategy would not be profitable even in the case of an up to [40-50]% increase in the wholesale price charged to Vodafone and assuming up to [70-80]% of that would be passed on to retail customers.[1279]

9.5.3.1.1.3. Effects

(1337) In the Form CO, the Parties consider that a hypothetical foreclosure strategy by the JV would not materially affect the degree of effective competition in the downstream retail fixed and convergent markets.

(1338) First, the most aggressive retail fixed and convergent players (e.g., Digi), are currently operating under wholesale agreements with other suppliers, thus rendering them unaffected by the Transaction.[1280]

(1339) Second, and on a more general note, the Parties consider that any harm or worsening of conditions brought about by the JV would be constrained by the competitiveness of the other wholesale suppliers, rendering the JV unable to raise its rivals' costs at the retail level. Any foreclosure strategy strived after by the JV would thus have no impact on the competitiveness of the retail market.[1281]

(1340) In the Article 6(1)(c) Response, the Parties made the following additional arguments related to effects.

(1341) First, the Parties submit that the contractual arrangements in place with their respective existing customers protect them from any possible price increase during at least the duration of the agreement.[1282]

(1342) Second, the Parties submit that the wholesale contracts do not expire at the same time and that fixed access seekers will not decide to renegotiate their contracts at the same time, so foreclosure could not happen at the same time.[1283]

9.5.3.1.2. The Commission's assessment

9.5.3.1.2.1. Ability

(1343) For the reasons set out below, the JV would have the ability to engage in input foreclosure by foreclosing access to wholesale broadband services for non-vertically

[1275] Article 6(1)(c) Response, paragraphs 581-596.
[1276] Article 6(1)(c) Response, paragraph 594.
[1277] Article 6(1)(c) Response, paragraphs 609-610.
[1278] Article 6(1)(c) Response, paragraph 592.
[1279] Article 6(1)(c) Response, paragraphs 601-610.
[1280] Form CO, paragraphs 1605-1606.
[1281] Form CO, paragraphs 1607-1608.
[1282] Article 6(1)(c) Response, paragraph 488.
[1283] Article 6(1)(c) Response, paragraphs 489 and 493-494.

integrated operators[1284] that are active in the downstream markets for the provision of retail fixed internet services and the hypothetical retail market for multiple-play bundles.[1285]

(1344) This is notably because, as set out in more detail below, (i) wholesale broadband access is an important input for non-integrated retail operators, (ii) the JV would have a significant degree of market power in the upstream market for wholesale broadband access (iii) there are multiple forms of foreclosure that the JV could engage in, and (iv) access seekers would have limited available counterstrategies if the JV engaged in input foreclosure.

9.5.3.1.2.1.1. Wholesale broadband access services is an important input

(1345) Input foreclosure may raise competition problems only if it concerns an important input for the downstream product. This is the case for example, when the input concerned (a) represents a significant cost factor relative to the price of the downstream product, or (b) irrespective of its cost, where the input is a critical component without which the downstream product could not be effectively sold.[1286]

(1346) Wholesale broadband access is not only an important cost component but also a critical input without which retail supply of fixed internet access services or retail multiple-play services could be offered.

(1347) First, operators without their own fixed network, i.e., virtual operators or FVNOs, can in principle only provide competing retail services in Spain if they first enter a wholesale broadband access agreement, or FVNO agreement, with an FNO, such as Orange. This is because, as Vodafone indicated, "*there are large barriers to entry to this market given the high fixed costs associated to deploying a fixed network*."[1287]

(1348) While some access seekers, such as Digi, Avatel, Adamo, or Finetwork, have partial own FTTH networks, these are concentrated in certain regions or cities, so wholesale access is still required to compete and offer retail services on a nationwide basis, as Orange and MásMóvil do pre-Transaction. As such, wholesale broadband access is a critical input without which retail supply of fixed internet access services and retail multiple-play bundles cannot be provided on a national basis in competition with the Parties.

(1349) In Spain, many players have partial or regional FTTH networks, which they complete to a lesser or greater extent through wholesale broadband access.

1284 Including operators that may have limited partial own fixed FTTH networks, as such own networks would need to be complemented with wholesale broadband access for an operator with a national or near-national fixed network in order for the non-virtually integrated operator in question to be able offer retail fixed services outside its own limited footprint, and notably to be able to offer retail fixed internet services and multiple-play bundles nationally in Spain, as each of the Parties do pre-Transaction.

1285 The Commission's vertical assessment focuses on downstream markets for which wholesale broadband access services is an input, namely retail fixed internet services and multiple-play bundles. FMC bundles account for the vast majority ([Share of FMC bundles based on the Parties' internal estimates]) of broader market for multiple-play bundles, so the reasoning set out in this section could also be said to apply to the narrower downstream market for FMC bundles, since they, by definition, include a fixed internet component For simplicity, this section mainly refers to multiple-play bundles overall (which also includes fixed-only multiple-play bundles), while section 10.2.2 above, in relation to foreclosure of wholesale mobile network access, refers mainly to FMC bundles.

1286 See Non-Horizontal Merger Guidelines, paragraph 34.

1287 Response to questionnaire Q1 to competitors, question D.B.B.16, Doc ID 2773.

– *Digi (c.* [50-60]%). The Parties' estimate that [50-60]% of Digi's fixed customer base are hosted on Telefónica's fixed network[1288]

– *Vodafone (c.* [40-50]%). According to the Parties' data, roughly [40-50]% of Vodafone's fixed customer base may also be served on third party networks, of which, "approx. [30-40]% … ([1-2 million] customers) … are hosted on Telefónica's fixed network"[1289] and approximately [10-20]% (or [0.5-1 million] customers[1290]) are hosted on Orange's fixed network. Indeed, Vodafone itself confirmed that it is "*already a wholesale access taker in fixed (with c. [30-40]% of its fixed customers served on the basis of wholesale access)*"[1291]

– *Orange (c.* [40-50]*%)*. In 2021, Orange served almost [40-50]% of its retail fixed customers customer via third party FTTH networks, primarily that of [...] ([20-30]%).[1292] Since the Parties have not provided an update for 2022, the Commission considers that the percentage has not changed between 2021 and 2022.

– *MásMóvil (c.* [70-80]%). In 2021 more than [70-80]% of MásMóvil's retail fixed customers (i.e., broadband and/or multiple-play customers) were served via third party networks, mainly that of [...] ([30-40]%) followed by [...] ([20-30]%), which the Parties recalled in the Article 6(1)(c) Response.[1293]

(1350) Second, it is clear from the Parties' own ARPU data that wholesale broadband access is also an important cost component for the provision of downstream services, representing approximately [30-40]% of the average price of retail supply of fixed internet access services in 2022.[1294] The conclusion is similar in the case of retail multiple-play bundles, which accounts for [Share of FMC bundles based on the Parties' internal estimates]) of the broader market for all multiple-play bundles, where a comparison of Orange's wholesale and retail ARPUs shows that wholesale access revenues (i.e. both mobile and fixed wholesale access combined) accounts for approximately [20-30]% of its retail FMC revenues in 2022.[1295]

(1351) In addition to wholesale broadband access services, wholesale mobile network access is a similarly important input for virtual retail operators, for the reasons set out in more detail in Section 9.5.2 above. It is increasingly important for virtual operators to have access to both inputs in order to effectively compete, given the high and

1288 SO Reply, paragraph 258.

1289 Form CO, paragraph 1431.

1290 Response to RFI 8, Table 4, Doc ID 457.

1291 Minutes of prenotification call with Vodafone dated 20 December 2022, paragraph 12, Doc ID 2455.

1292 Form CO, Table 32.

1293 Article 6(1)(c) Response, paragraph 523.

1294 See Annex RFI 18 Q3. By comparing retail and wholesale mobile ARPU figures it can be seen that in the case of Orange its wholesale mobile ARPU ([...] per fixed line per month) was [30-40]% of its retail fixed internet/broadband ARPU ([...] per fixed line per month) in 2022. Similarly, MásMóvil's wholesale fixed ARPU ([...]per fixed line per month) was [20-30]% of its retail fixed internet/broadband ARPU ([...]per fixed line per month) in 2022. The [...] percentage in the case of MásMóvil may be explained by the fact that MásMóvil currently has mainly concluded reciprocal wholesale agreements with other players, which likely explains the lower wholesale ARPU compared to Orange.

1295 See Annex RFI 18 Q3. Orange's combined wholesale mobile and fixed ARPU ([...]/SIM/LINE) was [20-30]% of its retail FMC ARPU ([...]/SIM) in 2022. This may be understating the cost as it does not account for FMC customers with more than one mobile SIM card as part of their subscription. The Parties did not provide ARPUs separately for a broader market for all multiple-play bundles.

increasing penetration of multiple-play bundles compared to standalone services (i.e., standalone mobile or internet subscriptions) in Spain. In this regard, the CNMC noted in its March 2023 referral request that "*the increasing penetration of converging fixed-mobile offers in the residential segment in Spain hampers the expansion of smaller or specialised operators in the provision of a single type of service.*"[1296]

9.5.3.1.2.1.2. Significant degree of market power in the upstream market

(1352) For input foreclosure to be a concern, the vertically integrated firm resulting from the merger must have a significant degree of market power in the upstream market.[1297]

(1353) Contrary to the Parties' argument outlined in Section 9.5.3.1 above, this is the case here where Orange is, and the JV will, remain the number two player in the market for wholesale broadband access, with a combined share of over 30% by volume in 2022.[1298]

(1354) While the largest player in this market will remain Telefónica, with a 2022 share of c. [40-50]% by volume and [60-70]% by value, it is important to recall also that Telefónica is subject to regulatory obligations to grant access to its fixed infrastructure in certain, mainly rural, areas covering approximately 30% of the Spanish population,[1299] which may overstate its position relative to the Parties.

(1355) The Parties further submit, as set out in Section 9.5.3.1 above, that the Transaction will not bring about a change in the number of suppliers for existing and potential customers on the market for wholesale supply of broadband services.

(1356) The Commission notes that while MásMóvil may have a limited standalone share in this market (c. [0-5]% by volume in 2022), and has divested parts of its wholesale fixed network, it is nonetheless considered to be an active competitor in this market by all respondents that expressed a view in response to the Commission's Phase I market investigation.[1300]

(1357) This market is already oligopolistic pre-Transaction, and will become increasingly oligopolistic (even if by a relatively small increment) post-Transaction with only two remaining alternative providers (see below in relation to Vodafone), and no new entrants, at least not of sufficient scale, expected in the foreseeable future. The Commission's observation is consistent with the Non-Horizontal Merger Guidelines, which points out that when competition in the input market is oligopolistic, as it is in this case, a decision of the JV to restrict access to its inputs reduces the competitive pressure exercised on remaining input suppliers, in this instance, Telefónica, which may allow them to raise the input price they charge to non-integrated downstream competitors,[1301] or indeed to refuse access as well.

1296 Referral request pursuant to Article 9 of the Merger Regulation from the Spanish NCA, the CNMC, dated 1 March 2023, pages 18-19.

1297 See Non-Horizontal Merger Guidelines, paragraph 35.

1298 Article 6(1)(c) Response, paragraph 511. While market shares are below 30% by value, they are nonetheless above 30% by volume, at both upstream and downstream level. As noted in paragraph 25 of the Non-Horizontal Merger Guidelines, the Commission is unlikely to find concern in non-horizontal where the market shares post-merger of the new entity in each of the markets concerned is below 30 %, which is not the case in here.

1299 Form CO, paragraph 656.

1300 Responses to questionnaire Q1 to competitors, question D.B.B.1 and D.B.B.2.

1301 Non-Horizontal Merger Guidelines, paragraph 38.

(1358) According to the Parties, MásMóvil "*own fixed [FTTH network covers only [...],*"[1302] and relies primarily on the fixed networks of other operators. "*MÁSMÓVIL adds to its own FTTH footprint [...] accessed via IRU as of end of 2022,*"[1303] i.e., a total of c. [...] households ("HHs") / building units ("BUs").

(1359) As one MNO/FNO active in Spain outlined, "*IRU agreements are common in the Spanish market. Typically, the user has to contribute towards 50% of the network investment costs …and, in exchange, it benefits from a long-term irrevocable right of use of the network under owner economics conditions, thereby enabling effective wholesale competition*" (emphasis added).[1304] The same MNO/FNO separately submitted that "*Through its IRU agreements and its own network footprint, MásMóvil is currently capable of offering wholesale fibre access services to at least [...]–[...] [...] of the HH in nonregulated areas (in which there are around 19 million households in total (Source: CNMC Wholesale Local and Central Access Resolution, 2020)).*"[1305]

(1360) While a review of MásMóvil's IRUs shows that not all of them [Details of the Parties' commercial agreements], for a substantial majority of the BUs covered by these IRUs [Details of the Parties' commercial agreements].[1306] While in the Article 6(1)(c) Response, the Parties submit that MásMóvil has been progressively divesting its fixed network, which makes it a less credible wholesale provider, the Commission consider this argument to be overstated since such divestments have tended to be to non-vertically integrated operators in exchange for long-term rights of access and use, including [Details of the Parties' commercial agreements]. Such sale-and-leaseback operations are relatively common in the industry, with the operator selling the network typically ensuring that it retains materially all of the rights over the network that it had as owner, [Details of the Parties' commercial agreements].[1307]

(1361) As such, the views expressed above do appear to be broadly corroborated by details of MásMóvil's IRU agreements and accordingly it appears to be the case that *"the Transaction removes MásMóvil as an independent fixed network operator and a potential wholesale fixed access provider, reducing the number of credible post-Transaction wholesale fixed access providers in a significant proportion of non-regulated areas (that is, competitive areas) from three to two.*"[1308]

(1362) In concrete terms, MásMóvil currently has [...]access seekers on its fixed network, [Details on MASMOVIL's customers])[1309] and [Details on MASMOVIL's business strategy][1310] Aside from this, the Parties submit that [Details on MASMOVIL's business strategy][1311] and [Details on MASMOVIL's business strategy].[1312]

(1363) Furthermore, and by contrast to the JV and Telefónica, Vodafone has a negligible position in this market. In fact, Vodafone itself "*considers that it …[has a]…*

1302 SO Reply, paragraph 369.
1303 Response to RFI 20, paragraph 4.1
1304 Minutes of prenotification call with Vodafone dated 20 December 2022, paragraph 7, Doc ID 2455.
1305 Position Paper, "*Vodafone's views on the proposed transaction*", 28 February 2023, footnote 3, Doc ID 2414.
1306 Annex RFI 20 Q4d. **[Details** of the Parties' commercial agreements]
1307 See Annex RFI 20 Q4d.
1308 Position Paper, "*Vodafone's views on the proposed transaction*", 28 February 2023, footnote 3, Doc ID 2414.
1309 Form CO, paragraph 127 and Article 6(1)(c) Response, footnote 478.
1310 Response to RFI 19 (revised), paragraph 1.2.
1311 Response to RFI 19 (revised), paragraph 1.2.
1312 Article 6(1)(c) Response, paragraph 524.

negligible position … in fixed wholesale network access."[1313] In its market investigation response, Vodafone notes that "*Vodafone is not a credible provider because its network is mostly HFC and its FTTH network is much smaller than Telefonica's, Orange's or MásMóvil's*"[1314] and its "*cable network will soon be obsolete in the eyes of wholesale access seekers (and in fact this is already the case for many access seekers) and therefore not a credible competitive constraint on the JV or Telefónica, for 7.4 million households, Telefónica and Orange/MásMóvil will effectively be the only providers of wholesale fixed services*"[1315].

(1364) A virtual operator that responded to the market investigation corroborated this, noting that "*FTTH networks will be reduced to two (Vodafone fixed network is an obsolete HFC technology)*"[1316] and indeed in the market share data provided by the Parties, Vodafone's share in the wholesale market for broadband access services is included as part of "*Other competitors*", suggesting indeed that it has a negligible position in this market.[1317]

(1365) In addition, Vodafone pointed out that the merged entity would have the ability to worsen terms in the market of wholesale broadband access services because "*(i) access to fibre networks is essential to compete at the retail level and building/upgrading own infrastructure is costly (ii) Vodafone currently relies on wholesale access deals to serve … its own fixed clients, but this share is expected to grow significantly in the medium term as Vodafone will increasingly rely on FTTH access.* "[1318]

(1366) In response to the Commission's Phase II market investigation, Vodafone further considered that "*to compete in the Spanish market in the next years it will be essential to provide retail fixed services over FTTH networks: On the one hand because of the commercial pressure to upgrade available speeds to support evolution of an increased demand of throughput. On the other hand because of customers' negative perception of HFC vs. FTTH.*"[1319] Furthermore, it remains to be seen whether Vodafone's position in the market for wholesale mobile network access will materially change following completion of the sale of Vodafone Spain to Zegona, which was announced on 31 October 2023.[1320] Even though Zegona has stated that it intends to "*revive Vodafone Spain's wholesale business activities*"[1321], it also acknowledged that providing wholesale services was a lower priority for Vodafone up to now with the result that total, i.e. both fixed and mobile, wholesale revenues "*made up only approximately 4 per cent. (unaudited) of Vodafone Spain revenue in the financial year ended 31 March 2023*".[1322]

1313 Non-confidential minutes of prenotification call with Vodafone dated 20 December 2022, paragraph 5, Doc ID 2455.
1314 Response to questionnaire Q3 to wholesale customers, questionD.B.4, Doc ID 3463.
1315 Response to questionnaire Q1 to competitors, question D.B.B.4, Doc ID 2773.
1316 Response to questionnaire Q1 to competitors, question E.16, Doc ID 2614.
1317 Annex RFI 14 Q9_Q20.
1318 Response to RFI 1 to Vodafone, 2 June 2023, Q 15, Doc ID 3639.
1319 Response to questionnaire Q3 to wholesale customers, question D.A.13, Doc ID 3463.
1320 See Vodafone Press Release, available at: https://www.vodafone.com/news/corporate-and-financial/sale-of-vodafone-spain, Doc ID 5643; and Zegona press release, available at: https://www.zegona.com/~/media/Files/Z/Zegona/press-release/2023/23-10-31-zegona-acquistion-of-vodafone-spain.pdf, Doc ID 5645.
1321 Non-confidential minutes of meeting with Zegona of 10 January 2024, Doc ID 5491.
1322 See https://www.londonstockexchange.com/news-article/ZEG/general-meeting-further-info-re-the-transaction/16189475, Doc ID 5667.

(1367) While the Parties in the Article 6(1)(c) Response state that the Vodafone network has been upgraded (to DOCSIS 3.1) and is competitive with the predominately fibre networks of Orange as a result, Zegona, following the announcement that it had agreed to acquire Vodafone Spain, contradicted the Parties' position when it publicly stated that it is considering "*a sale of the [Vodafone fixed] network to an outside investor*" and that an upgrade of this network to "*full fibre*" would likely be required.[1323]

(1368) Finally, Orange has a very high contribution margin (**[...]**[1324]) in the provision of wholesale broadband access services, which is a further indication that already Orange has appreciable market power in the market for this important input. The Transaction will eliminate an ICF or at least an important competitive constraint in this market. Accordingly, the JV will have an ability to increase contribution margins even further (e.g. by raising prices) thereby further strengthening the JV's market power compared to Orange's market power pre-Transaction.

(1369) Therefore, based on the above, it cannot be excluded that the Transaction may strengthen the market power of the JV on the upstream market.

9.5.3.1.2.1.3. Multiple forms of foreclosure possible

(1370) The Non-Horizontal Merger Guidelines outline that input foreclosure may occur in various forms. For example:

– the JV may decide not to deal with its actual or potential competitors in the vertically related market (total input foreclosure – refusal to supply) , and/or

– it may decide to raise the price it charges when supplying competitors and/or to otherwise make the conditions of supply less favourable than they would have been absent the merger (partial input foreclosure – raising rivals' costs), and/or

– it may engage in more subtle forms of foreclosure, such as the degradation of the quality of input supplied,[1325] including for example by not offering access to the newest technologies (e.g. FTTH) or only doing so under onerous conditions that would hamper the ability of the access seeker to compete (partial input foreclosure – access degradation).

(1371) The above examples are not exhaustive, nor are they mutually exclusive. Moreover, since 70% of the wholesale broadband access market in Spain has been deregulated, FNOs are free to refuse to provide wholesale access or set prices at will and differentiate between access seekers. Second, and in any event, only Telefónica, and not the JV, is subject to regulatory access obligations, and there only in relation to 30% of the population, and in rural areas. The JV could conceivably refuse access to one virtual operator entirely, raise the wholesale price for another and subject yet a different access seeker to more onerous (non-price) terms. The majority of the market participants who expressed a view in the course of the market investigation indicated that they have experienced, or are aware of, fixed network operators denying or delaying access to certain wholesale services.[1326] One access seeker also pointed out that "*Offering a high price is similar to denying access*"[1327]. With respect

1323 See https://www.digitaltveurope.com/2023/11/23/zegona-mulls-network-sale-or-merger-for-vodafone-spain/, Doc ID 5660.
1324 Annex RFI 18 – Q2.
1325 Non-Horizontal Merger Guidelines, paragraph 33.
1326 Responses to questionnaire Q3 to wholesale customers, question D.B.22.
1327 Response to questionnaire Q3 to wholesale customers, question D.B.22, Doc ID 3298.

to Orange's conduct following the Transaction, one respondent to the market investigation indicated the "*Orange used to actively and voluntarily offer wholesale access to its FTTH footprint …[but now]… seems less willing to keep offering wholesale FTTH access to retail competitors, once MásMóvil combination has been announced. Their stance towards wholesale FTTH price looks more conservative.*"[1328]

(1372) This suggests that the JV would therefore have the ability to engage in wholesale price increases and many forms of foreclosure short of refusal post-Transaction.

9.5.3.1.2.1.4. Limited available counterstrategies for access seekers

(1373) The JV's ability to engage in input foreclosure would be constrained if access seekers were likely to have the ability to deploy effective and timely counter-strategies, such as sponsoring the entry of new suppliers upstream.[1329] Even if there may be new entrants or expansion by existing small players in the market for the provision of wholesale broadband access in the coming years in Spain,[1330] this will mainly be limited to situations where "*regional operators may expand their current footprint*"[1331] but it is not expected that they would expand to such an extent that they would represent a credible alternative to the JV's (or Telefónica's) networks. As one access seeker indicated "*there may be wholesale neutral FTTH players but almost all of them on rural or low-density areas*"[1332] So even with potential expansion of such rural or regional FTTH networks, the wholesale market, particularly in urban non-regulated areas, which are the most economically attractive areas to offer retail services, and at overall national level, is expected to remain "*as it is today :There will only be one additional credible provider to Orange at a national level being Telefonica for urban areas*".[1333]

(1374) In addition, and contrary to the Parties' argument as set out in Section 9.5.3.1 above, FVNOs have limited bargaining power in view of their small scale relative to FNOs, unlike MásMóvil which can rely, at least partially on its own fixed network and IRUs, has a large customer base to negotiate with, and can (and does) additionally offer reciprocal access to its own network assets. According to the Parties, the largest virtual operator, Digi (which has a partial FTTH network) had approximately 840k fixed subscribers at the end of 2022, compared to over 7 million for the JV,[1334] i.e., the JV's fixed customer base is around 8.5 times larger than the largest virtual operator. The other FNOs, Telefónica and Vodafone, are also larger by several orders of magnitude than Digi and other virtual operators in terms of fixed line subscriptions.

(1375) Contrary to the Parties' argument in Section 9.5.3.1 above, the fact that some fixed access seekers such as Digi and Avatel may currently have wholesale agreements with third parties does not remove the ability to engage in input foreclosure since such agreements are typically renegotiated every few years. FVNOs and access seekers that responded to the Commission's in-depth market investigation confirmed that wholesale mobile contract are conducted for a duration of 3 years

[1328] Response to questionnaire Q1 to competitors, question D.B.B.2, Doc ID 2940.
[1329] Non-Horizontal Merger Guidelines, paragraph 39.
[1330] Responses to questionnaire Q1 to competitors, question D.B.B.15.
[1331] Response to questionnaire Q1 to competitors, question D.B.B.16, Doc ID 2865.
[1332] Response to questionnaire Q1 to competitors, question D.B.B.4, Doc ID 2940.
[1333] Responses to questionnaire Q1 to competitors, question D.B.B.6, Doc ID 2865.
[1334] Annex RFI 20, Q2.c. This number has been confirmed by Digi and was the same for March 2023 (Non-confidential minutes of a call with Digi of 25 April 2023, Doc ID 3273).

approximately[1335] and Vodafone, an FNO, similarly indicated that "*Fix and Mobile wholesale access agreements are typically signed for a period between 3 and 5 years*".[1336] Even if, in the short term, certain fixed access seekers may be able to rely on existing wholesale agreements, well ahead of expiry date, virtual operators seek to renew contracts for business certainty, and typically seek offers from different wholesale providers to obtain the best possible terms. In the course such negotiations with wholesale providers, fixed access seekers emphasised that counteroffers by alternative network operators play an important role in the negotiation process for wholesale broadband agreements.[1337] As was noted above, there are suggestions that the Transaction may have already resulted in an increased reluctance by FNOs to engage with virtual operators in relation to wholesale access. One access seeker pointed out that "*the Transaction would reduce the incentives Orange/MásMóvil will have to provide wholesale fixed network (broadband) access through its FTTH network at competitive prices …[and]… favours to foreclose smaller operators, especially in areas where Telefónica's is the only competing network*."[1338]

(1376) In the absence of bargaining power by access seekers, the loss of a credible competitor at wholesale level will therefore be expected to increase the ability of the JV to engage in input foreclosure.

(1377) This is because the wholesale broadband access market in Spain can be characterised as oligopolistic, with only three effective alternative providers today, and an effective "*fixed wholesale duopoly*"[1339] post-Transaction. In this regards, according to the majority of the market participants who expressed a view in the market investigation, Telefónica and Orange/MásMóvil are the two credible providers of wholesale broadband access services.[1340] As one virtual operator indicated "*FTTH networks will be reduced to two (Vodafone fixed network is an obsolete HFC technology), that could drive increases in wholesale prices*."[1341] This was also confirmed by Orange in its own internal documents, [Details on Orange's internal documents describing Orange's strategy][1342]

(1378) As noted in Section 9.5.3.1 above, the Parties submit that Telefónica (and Vodafone) would have every incentive to compete vigorously for wholesale customers, and would therefore constraint the JV's ability to engage in input foreclosure. However, as set out in the Non-Horizontal merger guidelines, where competition in the input market is oligopolistic, a decision of the JV to restrict access to its inputs reduces the competitive pressure exercised on remaining input suppliers, which may allow them to raise the input price they charge to non-integrated downstream competitors.[1343] This appears to be particularly likely in Spain in view of the fact that "*the Transaction will likely result in a de facto duopoly between the JV and Telefonica in the wholesale [broadband access services] market.*"[1344] [Details on Orange's internal

1335 Responses to questionnaire Q3 to wholesale customers, question D.B.14.
1336 Response to RFI 1 to Vodafone, question 12(a), Doc ID 3639.
1337 Response to questionnaire Q3 to wholesale customers, question D.B.6, Doc ID 3360.
1338 Responses to questionnaire Q1 to competitors, question E.16, Doc ID 2834.
1339 Non-confidential minutes of prenotification call with Vodafone dated 20 December 2022, paragraph 29, Doc ID 2455.
1340 Response to questionnaire Q3 to wholesale customers, question D.B.4.
1341 Responses to questionnaire Q1 to competitors, question E.16, Doc ID 2865.
1342 [Details on Orange's internal documents describing Orange's strategy].
1343 Non-Horizontal Merger Guidelines, paragraph 38.
1344 Responses to questionnaire Q1 to competitors, question E.2, Doc ID 2773.

documents describing Orange's strategy][1345] [Details on Orange's internal documents describing Orange's strategy] [1346] [Details on Orange's internal documents describing Orange's strategy].

(1379) For the reasons set out above, the JV would have the ability to engage in input foreclosure by foreclosing access to wholesale broadband services for non-vertically integrated operators that are active in the downstream market for the provision of retail fixed internet services and the hypothetical downstream retail market for multiple-play bundles.

9.5.3.1.2.2. Incentive

(1380) For the reasons set out below, the JV would have the incentive to engage in input foreclosure by foreclosing access to wholesale broadband services for non-vertically integrated operators that are active in the downstream markets for the provision of retail fixed internet services and the hypothetical retail market for multiple-play bundles.

(1381) This is notably because, as set out in more detail below, (i) the financial gains in downstream retail markets from such foreclosure would significantly outweigh upstream losses, irrespective of the precise input foreclosure strategy adopted, and (ii) the high increment and high combined retail share of the JV, in addition to high retail margins, are further indicators of an incentive to foreclose.

9.5.3.1.2.2.1. Gains from foreclosure would significantly outweigh losses post-Transaction

(1382) As explained in the Non-Horizontal Merger Guidelines, the incentive to foreclose depends on the degree to which foreclosure would be profitable.[1347] This depends on the taking into account not only the profits of the JV's upstream division, but also of its downstream division. Essentially, the JV faces a trade-off between the profit lost in the upstream market due to a reduction of input sales to (actual or potential) rivals and the profit gain, in the short or longer term, from expanding sales downstream or, as the case may be, being able to raise prices to consumers. The trade-off is likely to depend on the level of profits the JV obtains upstream and downstream. In addition, the incentive for the integrated firm to engage in input foreclosure further depends on the extent to which downstream demand is likely to be diverted away from foreclosed rivals and the share of that diverted demand that the downstream division of the integrated firm can capture[1348].

(1383) The Commission notes that in the present case, Orange is already vertically integrated pre-merger, and the JV will be vertically integrated. As outlined in Section 10.2.3.2.1 above, MásMóvil has a [...] fixed network footprint of [...] which it complements with [...], i.e., a total of [...]. In addition, MásMóvil has [Details of the Parties' commercial agreements].[1349]

(1384) At the request of the Commission, the Parties prepared a comparison of potential wholesale sales losses and retail sales gains from a foreclosure strategy.[1350] Taking the most extreme form of foreclosure, an outright refusal to provide wholesale access, the model assumes that all 2021 wholesale broadband access revenues would

1345 [Details on Orange's internal documents describing Orange's strategy].
1346 [Details on Orange's internal documents describing Orange's strategy].
1347 Non-Horizontal Merger Guidelines, paragraph 40.
1348 Non-Horizontal Merger Guidelines, paragraph 40.
1349 Annex RFI 20 Q4d.
1350 Response to RFI 8, Tables 3 and 4

be lost (total foreclosure). The Parties' assessment is based on wholesale broadband access services to Vodafone. In that regard, the Parties submit that Vodafone represents [0-0.5 million] lines served via Bitstream agreements and [Details of the Parties' commercial agreements] on OSPs fixed broadband network.[1351]

(1385) The Parties' exercise does not assume that all customers of foreclosed virtual operators would switch to one of the Parties. It is accepted that some would switch to other downstream rivals. Projected customer and revenue gains in the retail market are based on expected switching using retail diversion ratios between each of the Parties and operators hosted on their fixed networks. The Parties' analysis focuses on Orange's wholesale agreements with Vodafone only as they consider this to be sufficiently representative on the basis that the "*inclusion of additional smaller fixed operators hosted by OSP is unlikely to alter the results regarding hypothetical incentives to foreclose*".[1352] The hypothetical gains and losses were calculated by the Parties themselves using mobile number portability data, which the Parties consider to be "*the best approximation to FMC diversions*"[1353] and take the assumption that "*hosted FVNO subscribers purchase fixed-mobile bundled services (i.e., FMC packages) and that any retail subscriber switching would only switch to another FMC package.*"[1354] The Commission considers the focus on FMC bundles to be a reasonable approximation of the overall hypothetical market for multiple-play bundles, in view of the fact that "*FMC bundles in Spain ... represent more than 80% of the retail fixed line market in 2021*".[1355]

(1386) As indicated in **Table 49**, the average diversion ratio from fixed access seekers hosted on OSP's network to OSP was [20-30]% in 2021, above the diversion ratio implied by market shares. The retail diversion ratio from fixed access seekers hosted on the OSP network to MásMóvil was [30-40]%, also above the diversion ratio implied by market shares. The Transaction would increase the diversion to the JV to [60-70]%, an increase of [100-200]%.

(1387) Therefore, the Transaction would increase the Parties' incentive for an input foreclosure strategy.

Table 49: Effect of total foreclosure strategy in terms of customer switching (2021)

OSP FVNO customers	Hosted Subscribers	Diversion ratios (FMC market)			Subscribers Won		
		DR to OSP	DR to MM	Combined	OSP	MM	Combined
Total / average	[400,000-500,000]	[20-30]%	[30-40]%	[60-70]%	[100,000-200,000]	[100,000-200,000]	[300,000-400,000]

Source: Response to RFI 8, Tables 3 and 4, Commission's assessment.

(1388) In addition, as set out below in **Table 50**, a foreclosure strategy would become profitable following the Transaction.

1351 Response to RFI 8, paragraph 22.2.

1352 See Response to RFI 8, footnote 23. The Parties' have not included MásMóvil in their analysis on the basis that MásMóvil currently only hosts operators on its fixed network on the basis of reciprocal long-term IRUs.

1353 Response to RFI 8, footnote 25. Indeed, the Parties consider that mobile number portability data is a reasonable proxy for switching of multiple-play bundles overall, since in addition to those bundles including retail fixed internet services, the vast majority (c. 89%) will include retail mobile subscriptions.

1354 Response to RFI 8, footnote 24.

1355 Response to RFI 8, footnote 24.

(1389) A brief description of the methodology followed by the Commission in calculating the figures in **Table 50** is set out below:

– By multiplying the Parties' respective 2021 FMC ARPUs by the number of expected subscribers won by each of them, they estimated the expected revenue gains, both pre-Transaction and post-Transaction, based on a total foreclosure strategy.[1356]

– In both scenarios, the monthly upstream revenue losses, i.e., wholesale broadband access services revenues, are assumed to be the same. While in both scenarios, downstream revenue gains would outweigh upstream revenue losses, following the Transaction, the revenue gains of a foreclosure strategy would in fact increase by more than a factor of two (([200-300]%) compared to a pre-Transaction scenario, in view of the significantly higher proportion of switching customers that would choose the JV in such a scenario. This was calculated by the Parties based on the retail FMC market diversion ratio between Vodafone and the JV.[1357]

– To compute the lost upstream profits, the Commission has multiplied the lost upstream (monthly) revenues with OSP's percentage contribution margin in the wholesale broadband access services market.[1358]

– To compute the gained downstream profits, the Commission has multiplied the gained (monthly) downstream revenues with OSP's percentage contribution margin in the retail multiple-play market.[1359]

(1390) As can be seen in **Table 50** below, a total foreclosure strategy would not be profitable pre-Transaction, but would become profitable post-Transaction.

Table 50: Comparison of potential monthly wholesale losses with retail gains (Pre-Transaction vs Post-Transaction)

2021, EUR (monthly)	Pre-Transaction	Post-Transaction	Difference
Loss upstream revenue	[...]	[...]	[...]
Gained downstream revenue	[...]	[...]	[...]
Net Gain	[...]	[...]	[...]
Loss upstream profits	[...]	[...]	[...]
Gained downstream profits	[...]	[...]	[...]
Net Profit / Loss	[...]	[...]	[...]

Source: Response to RFI 8, Tables 3 and 4, Commission's assessment

(1391) The Parties also submit that "*it is not credible to assume that, should the Parties no longer provide wholesale fixed services, Vodafone (or other fixed access seekers) would no longer be able to supply its services for the relevant subscribers …[as]…*

1356 The Commission understands that ARPU is defined as average revenue per subscriber per month (Annex RFI 18, Q3). Therefore, the gained and lost revenues are per month.

1357 Response to RFI 8, Tables 3 and 4.

1358 In Annex RFI 18, Q2, [Details of Orange's internal documents describing Orange's strategy]. In any case, the Commission notes that even taking the higher, inherently incorrect, wholesale margin figure of [100-200]% would not change the overall conclusions that a total foreclosure strategy would not be profitable pre-Transaction, but would become profitable post-Transaction.

1359 According to Annex RFI 18, Q2, [Details of Orange's internal documents describing Orange's strategy].

these operators would be hosted by other providers of fixed wholesale access services (given the various options available) rather than merely exit the market".[1360]

(1392) In the Article 6(1)(c) Response, further to the Parties' view that it is unrealistic to assume that there would be an exit from the market by foreclosed fixed access seekers, they presented an alternative vertical analysis conducted with the following, alternative assumptions: First, all fixed access seekers would be foreclosed by the Parties. Second, none of them would exit the market but rather switch to another fixed network (e.g., Telefónica). Third, the Parties' model assumes—in a worst case scenario—a wholesale price increase of up to [40-50]%, [70-80]% of which would be passed on to fixed access seekers' end customers. The Parties conclude that under such assumptions a total foreclosure strategy by the Parties would not be profitable.[1361]

(1393) First, it is correct that the Commission's quantitative assessment only assesses a total foreclosure scenario, and indeed assumes that all customers of the foreclosed access seeker would switch to non-foreclosed retail operators, in proportion to diversion ratio data provided by the Parties. However, it is nonetheless indicative of an incentive to engage in input foreclose even in a scenario where such fixed access seekers would not exit the market. This is for two reasons in particular.

(1394) As explained in Section 9.5.2.1.2.1 above, the JV, rather than outright refusing wholesale access, may decide to raise the price it charges or to otherwise make the conditions of wholesale access less favourable than they would have been absent the merger, or it may engage in more subtle forms of foreclosure, such as the degradation of the quality of wholesale access relative to that which is made available to its own downstream operations. In this regard, as one competitor submitted, the "*retail gains arising from this recapture of customers (higher than absent the transaction due to an increase in the market share) would outweigh losses associated to a 10% wholesale price increase*."[1362]

(1395) It can be expected that if a total foreclosure strategy is profitable, then a partial foreclosure strategy would also be profitable.[1363] Notably, partial foreclosure is likely to be profitable because the Parties would be able to recapture some lost upstream sales in the downstream market, which in turn provides incentives to raise prices upstream.

(1396) In addition, from an economic assessment standpoint, all else being equal, it can be expected that a total foreclosure strategy compared to a partial foreclosure strategy would not significantly change the ratio with which retail customers would switch from foreclosed fixed access seekers to the JV.[1364] As such, it is to be expected that the relative gains and losses would remain largely the same between these various different foreclosure strategies, i.e., if total foreclosure is profitable to the extent demonstrated in **Table 50** above, then partial foreclosure would also be profitable. In other words, whilst total foreclosure would encourage more switching away from foreclosed fixed access seekers (and therefore provide more gains in absolute terms to the JV), whether the gains outweigh the losses depends on the gains and losses per

---

1360 Response to RFI 8, paragraph 22.4.

1361 Article 6(1)(c) Response, paragraphs 458 and 468-483.

1362 Responses to questionnaire Q1 to competitors, question D.B.B.10, Doc ID 2773.

1363 By analogy, see Commission decision of 22 January 2022 in case M.10262 – *Meta (formerly Facebook) / Kustomer*, recital 316, where the Commission reached a similar conclusion.

1364 By analogy, see Commission decision of 22 January 2022 in case M.10262 – *Meta (formerly Facebook) / Kustomer*, recital 316, where the Commission reached a similar conclusion.

retail customer and the ratio of switching to the JV versus non-foreclosed retail players, which would be similar between total and partial foreclosure strategies. Hence the direction of profitability would be the same between these different foreclosure strategies. As such, the analysis of benefits and costs of foreclosure proceeds with each benefit and cost in turn, and noting in each instance whether the different foreclosure strategies available to the JV would not significantly impact the analysis.[1365]

(1397) Contrary to the Parties' assertion in the Article 6(1)(c) Response, it is not necessary for the Commission to quantify precisely the gains and losses associated every individual possible alternative variation of input foreclosure. Indeed, it is not even required for the Commission to quantitatively demonstrate that input foreclosure would be profitable, for example due to insufficient data, in which case the Commission may do so based on qualitative evidence, as it has done in many past cases.[1366] In this case, the Commission has, in a conservative approach and based on available data, assessed quantitatively, the form of input foreclosure that would result in the greatest level of upstream losses, namely a total input foreclosure of all of the Parties' current mobile wholesale customers. The Commission further assumes, again conservatively, that the JV would only recapture a portion of the foreclosed firms retail customers, in line with diversion ratio data provided by the Parties. From this, it is reasonable to assume that less severe forms of foreclosure, such as increasing wholesale costs or quality degradation, which would, all else being equal, result in less upstream losses (and less corresponding downstream gains), would similarly be profitable.

(1398) In such a scenario, the foreclosure strategy, even if not forcing an exit would nonetheless raise access seekers' costs, which may in turn be forced to pass on such input price increases, resulting in a portion of their retail customers switching away. This, in turn, may also result in their exit from the market, even if not with the same immediacy as in a total input foreclosure scenario. In view of retail-level diversion ratios, the JV would still gain a material portion of such switching customers.[1367]

(1399) The Parties' alternative model provided with the Article 6(1)(c) Response rather rests on assumptions that the Commission considers to be unrealistic.

(1400) Notably, it assumes that no fixed access seeker would exit the market in the event that the JV refused access, i.e. that they would be immediately made an offer by Telefónica. This is not supported by evidence and in fact even contradicted by statements from [Details of Orange's internal documents describing Orange's strategy].[1368] [Details of Orange's internal documents describing Orange's strategy].[1369]

(1401) Separately, the Parties' arguments in Section 9.5.3.1.1 that the JV would have the incentive to obtain new sources of wholesale revenue from other fixed access seekers

1365 By analogy, see Commission decision of 22 January 2022 in case M.10262 – *Meta (formerly Facebook) / Kustomer*, recital 316, where the Commission reached a similar conclusion.

1366 See for example Commission decisions of 22 January 2022 in case M.10262 – *Meta (formerly Facebook) / Kustomer*, recital 310; of 15 May 2023 in case M.10646 – *MICROSOFT / ACTIVISION BLIZZARD*, recitals 716 et seq.

1367 Non-Horizontal Merger Guidelines, paragraph 42.

1368 [Details of Orange's internal documents describing Orange's strategy].

1369 [Details of Orange's internal documents describing Orange's strategy].

since MásMóvil is currently a significant source of wholesale revenue for Orange (EUR [...] in 2022[1370]) is not credible in view of several points, notably:

– First, MásMóvil's fixed internet (and multiple-play) customers on Orange's network today would remain post-Transaction, i.e. there would be no additional capacity freed up on the JV network following the Transaction, and

– Orange's wholesale broadband revenues from [Details on Orange's customers] in 2021 (EUR [...][1371]) is dwarfed by MásMóvil's retail fixed internet revenues in 2021 ([...][1372]) [1373]), which would be gained by the JV as a result of the Transaction.

9.5.3.1.2.2.2. High combined retail market share and high retail margins

(1402) As further explained in the Non-Horizontal Merger Guidelines, the incentive to foreclose actual or potential rivals may also depend on the extent to which the downstream division of the integrated firm can be expected to benefit from higher price levels downstream as a result of a strategy to raise rivals' costs. The greater the market shares of the JV downstream, the greater the base of sales on which to enjoy increased margin.

(1403) First, the merger would result in a material increase in the downstream base of sales (compared to the standalone base of sales of the Parties separately).

– In the retail fixed internet market, the JV would become the largest operator in Spain by volume. It would have a 2022 market share by volume of [30-40]%, materially above 30%,[1374] with an increment of [10-20]%. The JV's residential[1375] gross add share in 2022 was even higher, [40-50]%, which suggests that it would capture more switching customers than market shares would suggest.

– Similarly, in the hypothetical retail market for multiple-play bundles (i.e., fixed-only and FMC bundles), the JV would become the largest operator in Spain by volume. It would have a 2022 market share by volume of [40-50]%, again materially above 30%,[1376] with an increment of [10-20]%. The JV's gross add share in 2022 (in FMC bundles[1377]) was similar, [40-50]%, which suggests that it would capture over [40-50]% of switching customers, broadly in proportion to market shares.

(1404) The Non-Horizontal Merger Guidelines point out that in addition to the overall size of the JV's base of sales, the extent to which the JV can price discriminate downstream may be taken into account.[1378] This statement envisages a scenario where the same input may be important for more than one downstream market, and where the JV may only be active in one such market, but it can also apply to a

1370 Form CO, Table 107.
1371 Form CO, paragraph 121.
1372 Annex RFI 37, Q1.
1373 SO Reply, Annex 2.3.
1374 See Non-Horizontal Merger Guidelines, paragraph 25.
1375 The Parties did not provide gross adds for retail fixed internet overall (i.e., residential and business customers). See Annex RFI 14 Q9_Q20.
1376 See Non-Horizontal Merger Guidelines, paragraph 25.
1377 The Parties did not provide gross adds for residential multiple-play bundles overall, but the Commission considers gross adds for FMC to be a suitable proxy as the vast majority of multiple-play bundle subscriptions are FMC subscriptions. See Annex RFI 14 Q9_Q20.
1378 Non-Horizontal Merger Guidelines, footnote 39.

scenario where the downstream market involves different segments, e.g. based on price.

(1405) In Spain, MásMóvil is active at retail level "*through a wide variety of brands [23 in total*[1379]*], such as Yoigo, MásMóvil and Virgin, as well as digital-focused brand Pepephone, regional brands Euskaltel, R., Guuk, Embou and Telecable and international customers brands Llamaya, Lebara, Lycamobile*." There are many "*differentiating factors between the different MÁSMÓVIL brands*" including qualitative aspects such as broadband and mobile data speeds and download limits, but also "*significant differences in the ARPU of the various services offered by MÁSMÓVIL's brands*".[1380] MásMóvil's brand-level ARPUs range from EUR [...] to EUR [...] per month for multiple-play customers.[1381] While Orange operates just three separate brands in Spain, its brand-level ARPUs range from EUR [...] to EUR [...] per month for multiple-play customers.[1382] The Parties did not provide ARPUs for standalone retail fixed internet services, but the Commission calculated that for fixed only bundles, which can be taken as an approximation in the case of MásMóvil as it does not offer TV services, some MásMóvil brands had 2021 ARPUs as [...] as EUR [...] per subscriber per month.[1383]

(1406) The fact that the JV will own a continuum of brands offering retail fixed internet and multiple-play bundles at a range of price points will therefore give it not only greater ability but also greater incentive to engage in price differentiation to the extent that may maximise the benefits from input foreclosure. Contrary to the Parties' point in the Article 6(1)(c) Response, this continuum of brands is a further indication that the JV would likely have a greater incentive to engage in input foreclosure compared to the pre-Transaction situation, notably as Orange only operates under three separate brands pre-Transaction.

(1407) In addition, the Parties confirmed that Orange itself engages, to a limited extent, in differentiated pricing charging a higher price in areas where it relied on high priced wholesale access ("*[Orange's pricing strategy]*"[1384]).

(1408) Indeed, the vast majority of respondents to the Phase I market investigation that expressed a view indicated that Orange and MásMóvil may have less incentive to offer such access and/or increase wholesale prices following the Transaction.[1385]

(1409) One such respondent noted that "*Post transaction, the JV would have an incentive to worsen wholesale access conditions as it will have a significantly larger retail market share and will therefore be able to reabsorb a larger share of customers switching away from the access seekers (following a retail price increase or worse retail conditions – resulting from worse wholesale conditions).*"[1386] while another similarly considered that they "*we do not foresee that they [Orange and MásMóvil] will be incentivized to enhance competitiveness in the wholesale market, where they*

1379 Form CO, Table 51.
1380 Form CO, paragraph 612-613.
1381 See Annex RFI 10 Q1.
1382 See Annex RFI 10 Q1.
1383 Annex RFI 14 Q9_Q20. This was calculated by dividing Xfera residential fixed only bundle revenues by lines in 2021.
1384 Response to RFI 20, paragraph 3.3.
1385 Responses to questionnaire Q1 to competitors, question D.B.B.9.
1386 Responses to questionnaire Q1 to competitors, question D.B.A.10, Doc ID 2773.

already have a remarkable market share …[in addition to having]…a remarkable market share at retail level."[1387]

(1410) Finally, according to the Non-Horizontal Merger Guidelines, the higher the downstream margins, the higher the profit gain from increasing market share downstream at the expense of foreclosed rivals.[1388] The 2022 contribution margins of Orange and MásMóvil were 45% and 37% respectively on an overall basis.[1389] The Commission notes that these margins are high and therefore serve as a further indication of an incentive to engage in input foreclosure following the Transaction.

(1411) For the reasons set out above, the Commission concludes the JV would have the incentive to engage in input foreclosure by foreclosing access to wholesale broadband services for non-vertically integrated operators that are active in the downstream market for the provision of retail fixed internet services and the downstream hypothetical retail market for multiple-play bundles.

9.5.3.1.2.3. Effects

(1412) For the reasons set out below, even if the Parties may have the ability and the incentive to engage in input foreclosure following the Transaction, the Commission has come to the conclusion that foreclosing access to wholesale broadband services for non-vertically integrated operators would not have a significant detrimental effect on competition in the downstream market for the provision of retail fixed internet services or the downstream hypothetical retail market for multiple-play bundles.[1390]

(1413) This is notably because, as set out in more detail below the targets of foreclosure, (i.e. FVNOs, virtual operators, fixed access seekers or simply as access seekers), do not play a sufficiently important role in the downstream markets in view of:

(1) Their small share of the relevant downstream markets, even when considered collectively,

(2) Their limited ability to exert pricing pressure on larger fixed network operators in the relevant downstream markets,

(3) The lack of wholesale broadband access of many smaller fixed operators pre-Transaction,

(4) The fact that Digi may rely on its own fixed network to shield itself, at least partly, from the effects of an input foreclosure strategy, and

(5) The typical focus of smaller fixed network operators and access seekers on low-end segments of the relevant downstream markets, and their inability to differentiate themselves from their the larger fixed network operators in terms of quality or offering.

1387 Responses to questionnaire Q1 to competitors, question D.B.A.10, Doc ID 2877.

1388 Non-Horizontal Merger Guidelines, paragraph 41.

1389 Annex RFI 18 – Q2. Orange provided a further breakdown of its contribution margins in the retail fixed internet/broadband market (**[20-30]**%), the retail multiple-play market (**[40-50]**%), and the retail FMC market (**[40-50]**%), which the Commission notes, at least for multiple-play and FMC, which account for the vast majority of retail broadband subscriptions in Spain, are broadly similar, if slightly higher, than its overall margin. While a similar breakdown was not provided for MásMóvil, the Commission assumes, in the absence of more granular data, that MásMóvil's overall contribution margin is likely to be broadly indicative of its contribution margin in individual retail markets.

1390 Non-Horizontal Merger Guidelines, paragraph 47.

(1414) For the avoidance of doubt, the Commission includes among fixed access seekers smaller fixed operators that may today only be active within a certain region of Spain, but not nationally, either based on their own (limited) network footprint or based on access to a small or regional fixed network.

(1415) As outlined in the Non-Horizontal Merger Guidelines, significant harm to effective competition normally requires that the foreclosed firms play a sufficiently important role in the competitive process on the downstream market.[1391] The higher the proportion of rivals which would be foreclosed on the downstream market, the more likely the merger can be expected to result in a significant price increase in the downstream market and, therefore, to significantly impede effective competition therein. Despite a relatively small market share compared to other players, a specific firm, may play a significant competitive role compared to other players, for instance because it is a particularly aggressive competitor.[1392]

(1416) As a starting point, it is appropriate to consider that the targets of foreclosure are not only those access seekers currently relying on wholesale fixed network access from one of the Parties, but all access seekers in the Spanish market. This is because, first, as outline in the Non-Horizontal Merger Guidelines, when competition in the input market is oligopolistic, a decision of the JV to restrict access to its inputs reduces the competitive pressure exercised on remaining input suppliers, which may allow the remaining input suppliers to also raise the input price they charge to non-integrated downstream competitors.[1393] Indeed, an Orange internal document discussing the benefits of the Transaction consider one such benefit as being [Details of Orange's internal documents describing Orange's strategy]".[1394]

(1417) <u>First</u>, according to market share data provided by the Parties[1395], smaller fixed network access seekers account for a small proportion of the downstream retail fixed internet and multiple-play markets. This has increased over the four-year period 2019 to 2022, but only marginally.

(1418) This is clear from market share data provided by the Parties:

- Retail fixed internet services: smaller fixed network access seekers[1396] collectively had market share by value of [5-10]% and by volume of [10-20]% in 2022 (compared to [0-5]% by value and [0-5]% by volume in 2019). This represents an increase of less than [0-5] percentage point by value per year and less than [0-5] percentage points by volume per year. By contrast, in 2022, the Parties, Telefónica and Vodafone collectively accounted for [90-100] % of the market by value and [80-90]% by volume.
- Retail multiple-play bundles: smaller fixed network access seekers[1397] collectively had a market share of just [5-10]% by value and [5-10]% by volume in 2022 (compared to [0-5]% by value and [0-5]% by volume in 2019). This represents an increase of less than [0-5] percentage point by value per year and less than [0-5] percentage points by volume per year. By contrast, in

[1391] Non-Horizontal Merger Guidelines, paragraph 48.
[1392] Non-Horizontal Merger Guidelines, paragraph 48.
[1393] Non-Horizontal Merger Guidelines, paragraph 38.
[1394] [Details of Orange's internal documents describing Orange's strategy].
[1395] Annex RFI 37, Q1.
[1396] Digi, Finetwork, PTV, Adamo and Avatel.
[1397] Digi, Finetwork, PTV, Adamo, Avatel and "other competitors".

2022, the Parties, Telefónica and Vodafone collectively accounted for [90-100]% of the market by value and [90-100]% by volume.

(1419) The above shows that such players have a very limited presence in the market, accounting for around [10-20]% or less of the overall retail fixed internet and multiple-play bundles markets—and even less of each market in value terms—even when considered collectively.

(1420) Moreover, even when considered collectively, they do not appear to have grown from 2019 to 2022 (the Parties did not provide data for 2023).

(1421) The above reasoning applies *a fortiori* to such operators when considered on an individual basis, including in the case of Digi, which is the largest of such access seekers with a 2022 share in the retail fixed internet market of [0-5]% by value and [0-5]% by volume, and in the retail multiple-play bundle market of [0-5]% by value and [5-10]% by volume. Digi notably pointed out in this regard that while it may be "*the largest of the small players in Spain …[it is only]… "1/7 of MásMóvil size and 1/12 of Orange size.*[1398]

(1422) Second, access seekers, including Digi, do not appear to exert significant competitive pressure in terms of pricing behaviour on the large fixed network operators, notably the Parties and Telefónica, pre-Transaction.

(1423) Indeed, pre-Transaction, the Parties and Telefónica (as well as Vodafone) announced inflation-related price increases, and smaller players in the market indicated that they expect "*that repricing up may continue to be the trend after the Transaction*".[1399] This is despite the fact that some smaller fixed operators, which rely heavily on wholesale fixed broadband access services, notably Digi, did not increase prices.

(1424) This further suggests that the Parties and Telefónica (and also Vodafone) do not feel constrained by pricing pressure from smaller fixed access seekers, including Digi, pre-Transaction.

(1425) Third, many smaller providers of retail fixed internet services and retail multiple-play bundles are unable to obtain wholesale broadband access today from large wholesale broadband access providers (e.g. Orange or Telefónica), which means they cannot compete on a national basis.

(1426) As outlined in Section 9.4.3.2.3 above, Avatel, Finetwork, Adamo, and PTV/Procono are only active regionally and solely or predominantly based on their own fixed network footprint. Avatel indeed pointed out to the Commission that it "*only operates where it has deployed its own FTTH network and today serves approximately 15% of the Spanish population*". In its view, "*the current pricing of the fixed wholesale access market keeps challengers from competing*".[1400] This view was echoed by another fixed access seeker in response to the Commission Phase II market investigation, which consider that it is "*not possible to reach wholesale agreements that allow Finetwork to effectively compete in urban and metropolitan areas. Movistar and Orange are the only two companies with large FTTH networks that might enable real competition. The Transaction process will drive market concentration and will likely damage market competition because it may eliminate*

1398 Non-confidential minutes of the call with Digi of 29 November 2022, paragraph 11, Doc ID 1846.

1399 Non-confidential minutes of prenotification call with Finetwork dated 2 February 2023, paragraph 26, Doc ID 2471.

1400 Non-confidential minutes of meeting with Avatel of 6 June 2023, paragraphs 6 and 16. Doc ID 3773.

incentives for those two companies voluntarily granting access to their FTTH networks at prices that foster true competition, esp. on the low-end segment.”[1401]

(1427) Therefore, even if the Transaction may increase the ability and incentive to engage in input foreclosure, as concluded above, this would not have a significant detrimental impact on competition in the downstream markets as it would not impact the status quo, namely that most smaller fixed operators and fixed access seekers (Avatel, Finetwork, Adamo, and PTV/Procono) do not have access to national fixed networks (e.g. of Orange or Telefónica) and therefore do not compete nationally in the retail fixed internet and multiple-play markets pre-Transaction.

(1428) Fourth, Digi, which “*provides its services combining its own FTTH broadband network and Telefónica’s NEBA offer (covering the whole Spanish territory, including regulated and non-regulated areas*)”[1402] does not consider that input foreclosure in the market for the supply of wholesale broadband access following the Transaction will have a material negative effect on its ability to provide retail fixed internet and multiple-play services, even if “*after the Transaction the fixed networks of Orange and MásMóvil together would become the 2nd biggest fixed network with national coverage [i.e. after Telefonica], and … alternatives from other providers [aside from Telefonica] are limited in territory, and don’t have national coverage*.”[1403]

(1429) The Commission considers that the likely reason is that Digi has been rolling out its own FTTH network relatively quickly in Spain. The Parties, in the SO Reply, contend that “*Digi’s owned footprint, that will soon reach more than 9 million BUs, will be larger than MÁSMÓVIL’s owned footprint … even when considering MÁSMÓVIL’s IRUs*”.[1404] Based on public information referred to in the SO Reply, the Commission considers that this projection appears to be plausible, which would also mean that Digi’s own FTTH network would be the third largest in Spain, and larger than Vodafone’s total network (See Table 2 above), which is in any event mainly composed of more outdated HFC technology.

(1430) Indeed, Digi itself indicated that “*since 2018, DIGI has been offering fixed broadband services with a national footprint based on its own FTTH network and complemented with a wholesale indirect access NEBA agreement to access Telefonica’s FTTH network. In that regard, in certain areas of Spain, DIGI offers its broadband and fixed services through its own FTTH network, which DIGI carries on extending*” (emphasis added).[1405]

(1431) As a result, even if the Parties may have the ability and the incentive to engage in input foreclosure following the Transaction, the Commission considers that Digi’s own FTTH network roll-out would, by contrast to other (smaller) fixed access seekers referred to above, shield it to a substantial degree from the negative impact of an input foreclosure strategy in the market for the wholesale supply of broadband access services, and as a result it would not have a significant negative impact on Digi’s ability to continue operating in the downstream markets for the retail supply for fixed internet services and multiple-play bundles.

1401 Response to questionnaire Q3 to wholesale customers, question D.A.13, Doc ID 3407.

1402 Response to questionnaire Q3 to wholesale customers, question D.A.13, Doc ID 3360.

1403 Response to questionnaire Q3 to wholesale customers, question D.A.13, Doc ID 3360.

1404 SO Reply, paragraph 79.

1405 Digi Spain Telecom S.L.U.’s answer to the Remedies Market Test (M.10896 – Orange / MásMóvil / JV), 21 December 2023, page 8, Doc ID 5423.

(1432) Fifth, as outlined in Section 9.4.3.2.3 above, the role of smaller fixed network operators, including fixed network access seekers, in the downstream retail markets for fixed internet services and multiple-play bundles is limited by their inability to differentiate themselves from the larger fixed network operators in terms of quality or offering.

(1433) Indeed, Digi indicated that it "*does not consider itself close competitors of the Parties…*" In this context, Digi also notes that currently it does not offer multiple-play bundles including Pay-TV,[1406] which the Parties (as well as Telefónica and Vodafone) are able to offer, thus limiting its attractiveness as an alternative to Orange or MásMóvil to a sizeable portion of retail fixed customers and retail multiple-play bundle customers.[1407]

(1434) Avatel considers that the "*low-end segment*" of the market, including the multiple-play bundles market is defined by reference to the fact that it includes "*services without pay-TV services … According to Avatel, Digi is only active in the low-end segment of the Spanish telecommunication market, as it operates under a single brand and does not offer any pay-TV services*."[1408]

(1435) Following the Transaction, the greater concentration levels will be expected to only further reduce the constraint exercisable by such smaller fixed network operators and fixed network access seekers.

(1436) This further suggests that pre-Transaction none of the smaller fixed network operators and fixed network access seekers, not even Digi, are able to differentiate themselves from the larger fixed network operators in terms of quality or offering.

(1437) In light of the above, even if the Parties may have the ability and the incentive to engage in input foreclosure following the Transaction, the Commission concludes that non-vertically integrated and smaller fixed network operators do not play a significant competitive role in the Spanish market compared to other players within the meaning of paragraph 48 of the Non-Horizontal Merger Guidelines pre-Transaction and that foreclosing access to wholesale broadband services for such operators would not have a significant detrimental effect on competition in the downstream market for the provision of retail fixed internet services or the hypothetical downstream retail market for multiple-play bundles.

9.5.3.1.3. Conclusion on input foreclosure of wholesale supply of broadband access services to competing providers of retail fixed internet services, multiple-play bundles and FMC bundles

(1438) Based on the above, the Commission considers that the Transaction is not likely to give rise to a significant impediment to effective competition as a result of vertical effects, namely input foreclosure in relation to the upstream market for wholesale supply broadband access services, which is an important input for the downstream market for the retail supply of fixed internet services and the hypothetical downstream retail markets for multiple-play bundles and FMC bundles in Spain.

1406 Non-confidential minutes of the call with Digi of 29 November 2022, paragraph 11, Doc ID 1846.

1407 Digi has however indicated that it "*intends to start to offer pay TV services in Spain in the short to medium term*." See Digi Response to the Remedies Market Test, 21 December 2023, page 8, Doc ID 5423. The Commission notes moreover that, unlike Orange, "*MASMOVIL does not offer its own pay-TV services but is only a commercial agent of … third-party platforms … [and that its] TV offers are limited to packages of basic pay-TV channels and thematic/niche content provided by several platforms*" (emphasis added) (Form CO, paragraph 1123).

1408 Non-confidential minutes of meeting with Avatel, 16 January 2024, paragraph 6, Doc ID 5575.

(1439) While a deterioration of the conditions of access at the wholesale level following the Transaction would have a negative impact on the ability of virtual operators and other access seekers to compete at retail level, the Commission considers that in view of the limited competitive constraint that such operators exert pre-Transaction, the total or partial foreclosure of wholesale access to such operators is unlikely to materially change the competitive dynamics of the retail fixed internet, multiple-play bundle and FMC bundle markets in Spain and accordingly would not result in a significant impediment to effective competition.

(1440) In the case of Digi, since it appears to be rolling out a relatively large own FTTH network, it would be shielded to a certain extent from the negative impact of total or partial foreclosure of wholesale broadband access. Accordingly, looking at the overall market for the retail supply of fixed internet services and the overall hypothetical downstream retail markets for multiple-play bundles and FMC bundles in Spain, the Commission concludes that input foreclosure in relation to the upstream market for wholesale supply broadband access services would not result in a significant impediment to effective competition.

9.5.3.2. Customer foreclosure concerns

(1441) The Commission considers that, for customer foreclosure to be a concern, the vertical merger must involve a company which is an important customer with a significant degree of market power in the downstream market.[1409] [10-20]% on the downstream market for the retail supply of fixed internet services and [10-20]% for the retail supply of multiple-play bundles by volume in 2022.

(1442) MásMóvil combines its own fixed infrastructure with different [Details of the Parties' commercial agreements] agreements with [Details of the Parties' commercial agreements] (primarily) as well as with [Details of the Parties' commercial agreements] to access their FTTH networks.[1410] The Commission considers that MásMóvil could be seen as an important wholesale customer for the FNOs in the downstream markets.

(1443) MásMóvil and Orange have concluded different fixed wholesale agreements ([Details of the Parties' commercial agreements].[1411] [Details of the Parties' commercial agreements].[1412] As there is nothing to suggest that MásMóvil would move away from these agreements absent of the Transaction, it can be considered MásMóvil would probably keep its various wholesale agreements with Orange.

(1444) With respect to Confidential information – Details of the Parties' commercial agreements] mentioned above, [Details of the JV's business strategy].[1413] Therefore, the Commission considers that there is not any merger-specific change that could raise customer foreclosure concerns in relation to the vertical relationships between the Parties' activities on the market for the wholesale supply of broadband access services (upstream) and the markets for the retail supply of fixed internet services and multiple-play bundles (downstream).

(1445) In addition, no market participant raised concerns to the Commission with regards to any customer foreclosure strategy during its market investigation.

[1409] Non-Horizontal Merger Guidelines, paragraph 60.
[1410] Form CO, paragraph 641.
[1411] Form CO, paragraph 594.
[1412] Form CO, paragraph 594.
[1413] Form CO, Table 134.

(1446) On the basis of the above, the Commission considers that the Transaction will not change the Parties' ability and incentive to engage in any customer foreclosure strategy in relation to the vertical relationships between the Parties' activities on the market for the wholesale supply of broadband access services (upstream) and the markets for the retail supply of fixed internet services and multiple-play bundles (downstream).

9.5.4. Foreclosure of wholesale supply of call termination services on mobile networks to competing providers of retail mobile telecommunications services, multiple-play and FMC bundles

(1447) The vertical relationships consist of the Parties' upstream activities on the market for the wholesale supply of call termination services on mobile networks and the Parties' activities in the downstream markets for the markets for the retail supply of mobile telecommunications services and FMC bundles (including multiple-play bundles and fixed only bundles).

(1448) First, with regards to a possible input foreclosure strategy, the Commission notes that the market for the wholesale supply of call termination services on mobile networks is regulated in Spain. In January 2018, the CNMC approved the latest review of the call termination market in individual mobile networks in Spain, which included:

- establishing that each MNOs and full-MVNOs has significant market power in the provision of voice call termination services in its respective network;
- maintaining the non-discrimination and transparency general obligations applicable to all MNOs and MVNOs providing call termination services on their mobile networks, as well as cost accounting obligations imposed on the three main MNOs (Telefónica, OSP, Vodafone); and
- reducing the applicable maximum prices from 1.09 c€/min to different annual rates decreasing from 0.70 c€/min in 2018 to 0.64 c€/min in 2020 and to 0.55 c€/min in 2022.

(1449) Furthermore, as established by Article 75 of the European Electronic Communications Code, the Commission has adopted, on 18 December 2020, a delegated act setting Eurorates, i.e., a single Union-wide fixed termination rate for fixed and mobile networks, applicable since 1 January 2022.[1414]

(1450) In previous decisions, the Commission found that this regulatory context, and in particular the existence of Eurorates was sufficient to prevent European telecommunications operators active on the wholesale market for call termination on mobile telephony networks from discriminating.[1415]

(1451) Accordingly, the Commission considers that, in the present case, *ex ante* regulation excludes any vertical foreclosure scenario arising from the Transaction as the Parties will not have any ability to foreclose. Furthermore, the Parties' incentives to foreclose will not change as the competitive conditions prevailing before the

1414 Commission Delegated Regulation (EU) 2021/654 of 18 December 2020 supplementing Directive (EU) 2018/1972 of the European Parliament and of the Council by setting a maximum Union-wide mobile voice termination rate and a single maximum Union-wide fixed voice termination rate, C/2020/8703, OJ L 137, 22 April 2021, page 1.

1415 Commission decisions of 28 July 2021 in case M.10153 – *Orange/Telekom Romania Communications*, paragraph 522; of 26 October 2020 in case M.9963 – *Iliad/Play Communications*, paragraphs 79-81.

Transaction are similar to the competitive conditions that would result from the Transaction on the upstream market (the Parties will continue to have a 100% market share on their individual mobile network). In any event, the JV will have no incentive to foreclose access to mobile call termination services as they will continue to require mobile termination services from rival mobile operators to ensure that their customers can receive calls from other networks. Any attempt to foreclose could therefore lead to retaliation measures.

(1452) Second, with regards to a possible customer foreclosure strategy, the Commission notes that, in light of the characteristics of the upstream market for the wholesale supply of call termination services on mobile networks which result in each network being defined as a distinct product market, there are no upstream wholesale supply of call termination services on mobile networks that could possibly be foreclosed. Furthermore, during the market investigation, no market participant raised concerns with regards to any customer foreclosure strategy.

(1453) In light of the above, the Commission considers that the Transaction does not raise a significant impediment to effective competition within the meaning of Article 2(3) of the Merger Regulation as a result of the vertical relationships between the Parties' activities on the market for the wholesale supply of call termination services on mobile networks (upstream) and the markets for the retail supply of mobile telecommunications services and FMC bundles (downstream).

9.5.5. Foreclosure of wholesale supply of call termination services on fixed networks to competing providers of retail fixed internet services, fixed telephony, multiple-play and FMC bundles

(1454) The vertical relationships between the Parties' activities consist of the Parties' upstream activities on the market for the wholesale supply of call termination services on fixed networks and the Parties' activities in the downstream markets for the retail supply of fixed internet services, and multiple-play bundles. The markets are vertically affected within the meaning of the Merger Regulation, as the Parties' combined market share is above [30-40]% on the upstream market and the downstream markets.

(1455) First, with regards to a possible input foreclosure strategy, the Commission notes that the market for the wholesale supply of call termination services on fixed networks is regulated in Spain by the CNMC.[1416] This regulation at national level ensured that access to call termination is granted on reasonable conditions and that rates remain reasonable and non-discriminatory.

(1456) Furthermore, as established by Article 75 of the European Electronic Communications Code, the Commission has adopted, on 18 December 2020, a delegated act setting Eurorates, i.e., a single Union-wide fixed termination rate on fixed and mobile networks, applicable since 1 January 2022.[1417]

1416 CNMC Resolution approving the definition and analysis of the wholesale markets for call termination on fixed networks, ANME/DTSA/003/18/M1-2014.
The last review of the fixed network termination markets undertaken by the CNMC was carried out in July 2019. The CNMC approved reducing the price (0.0817 euro cents per minute in force until then) by 0.0643 euro cents as of August 2019; 0.0593 euro cents per minute in 2020 and 0.0545 euro cents per minute in 2021.

1417 Commission Delegated Regulation (EU) 2021/654 of 18 December 2020 supplementing Directive (EU) 2018/1972 of the European Parliament and of the Council by setting a maximum Union-wide mobile

(1457) In previous decisions, the Commission found that this regulatory context, and in particular the existence of Eurorates was sufficient to prevent European telecommunications operators active on the wholesale market for call termination on fixed networks from discriminating.[1418]

(1458) Accordingly, the Commission considers that, in the present case, *ex ante* regulation excludes any vertical foreclosure scenario arising from the Transaction as the Parties will not have any ability to foreclose.

(1459) Furthermore, the Parties' incentives to foreclose will not change as the competitive conditions prevailing before the Transaction are similar to the competitive conditions that would result from the Transaction on the upstream market as the Parties will continue to have a [90-100]% market share on each of their respective individual fixed network.

(1460) In any event, the Parties will have no incentive to foreclose access to fixed call termination services as they will continue to require fixed termination services from rival fixed operators to ensure that their customers can receive calls from other networks. Any attempt to foreclose could therefore lead to retaliation measures.

(1461) Second, with regards to a possible customer foreclosure strategy, the Commission notes that, in light of the characteristics of the upstream market for the wholesale supply of call termination services on fixed networks which result in each network being defined as a distinct product market, there are no upstream wholesale suppliers of call termination services on fixed networks that could possibly be foreclosed. Furthermore, during the market investigation, no market participant raised concerns with regards to any customer foreclosure strategy.

(1462) In light of the above, the Commission considers that the Transaction does not raise a significant impediment to effective competition within the meaning of Article 2(3) of the Merger Regulation as a result of the vertical relationships between the Parties' activities on the market for the wholesale supply of call termination services on fixed networks (upstream) and the markets for the retail supply of fixed telephony services,[1419] fixed internet services and multiple-play bundles (downstream).

9.5.6. Foreclosure of wholesale supply of international roaming services to competing providers of retail fixed internet access services, retail mobile telecommunications services, multiple-play and FMC bundles

(1463) The vertical relationships between the Parties' activities consist of the Parties' upstream activities on the market for the wholesale supply of international roaming services and the Parties' activities in the downstream markets for the retail supply of fixed internet access services, mobile telecommunications services, and FMC bundles. The markets are vertically affected within the meaning of the Merger Regulation, as the Parties' combined market share is above [30-40]% on the upstream and downstream markets.

---

voice termination rate and a single maximum Union-wide fixed voice termination rate, C/2020/8703, OJ L 137, 22 April 2021, page 1.

1418 Commission decisions of 28 July 2021 in case M.10153 – *Orange/Telekom Romania Communications*, paragraph 504; of 26 October 2020 in case M.9963 – *Iliad/Play Communications*, paragraph 112.

1419 The conclusions also hold for the potential segmentations of the fixed telephony services by customer type (residential and non-residential) and local/national and international calls, as the market conditions do not significantly differ from the overall fixed market, due to the strong presence of bundled fixed telephony services in Spain, as explained in Section 9.4.3.5.

(1464) First, with regards to a possible input foreclosure strategy, the Commission notes that the wholesale market for international roaming services is regulated by the European Regulation on roaming on public mobile communications networks within the Union. In particular, the European Regulation requires MNOs to grant all reasonable requests for access which may be necessary to allow the access seeker to provide a roaming service (and relevant ancillary services) of reasonable quality and specification, charged at a fair and reasonable price. Thus, the Commission considers that the JV will not have the ability to foreclose competing providers of mobile telecommunications services in Belgium as the wholesale market for international roaming services is subject to ex ante regulation.

(1465) In previous decisions, the Commission found that this regulatory context, and in particular the existence of Eurorates was sufficient to prevent European telecommunications operators active on the wholesale market for call termination on fixed networks from discriminating.[1420]

(1466) Accordingly, the Commission considers that, in the present case, ex ante regulation excludes any vertical foreclosure scenario arising from the Transaction as the Parties will not have any ability to foreclose. Furthermore, the Parties' incentives to foreclose will not change as the competitive conditions prevailing before the Transaction are similar to the competitive conditions that would result from the Transaction on the upstream market, as the Targets are not active on the upstream market.

(1467) Second, with regards to a possible customer foreclosure strategy, the Commission notes that during the market investigation, no market participant raised concerns with regards to any customer foreclosure strategy.

(1468) In light of the above, the Commission considers that the Transaction does not raise a significant impediment to effective competition within the meaning of Article 2(3) of the Merger Regulation as a result of the vertical links arising from the relationships between the market for the wholesale supply of international roaming services (upstream), and the markets for the retail supply of fixed internet access services, retail mobile telecommunications services and FMC bundles (downstream).

9.5.7. Foreclosure of wholesale mobile network access and call origination services to competing providers of retail M2M services

(1469) This section assesses the risk of input foreclosure with regard to the wholesale mobile network access to competing providers of retail M2M services.

(1470) The vertical relationships between the Parties' activities consist of the Parties' upstream activities on the market for the wholesale mobile network access and the Parties' activities in the downstream markets for the retail supply of M2M services. The markets are vertically affected within the meaning of the Merger Regulation, as the Parties' combined market share is above [30-40]% on the upstream markets.

(1471) First, with regards to a possible input foreclosure strategy, the Commission notes that the wholesale market for M2M in Spain is regulated under Law 11/2022 "*Ley General de Telecomunicaciones*", which transposes the European Electronic Communications Code.[1421] The Commission also notes that there are no wholesale

[1420] Commission decisions of 28 July 2021 in case M.10153 – *Orange/Telekom Romania Communications*, paragraph 527 and of 26 October 2020 in case M.9963 – *Iliad / Play Communications*, paragraph 62.

[1421] As Noted by the CNMC in its decision CFT/DTSA/265/22 ALAI IOT, Resolución del conflicto de acceso a tecnologías IoT interpuesto por Alai, page 9.

access obligations for concession holders in any of the bands in which this type of technology is provided.

(1472) For input foreclosure to be a concern, the Parties must have a significant degree of market power and a significant influence on the conditions of competition in the upstream market and the downstream market.

(1473) With regard to the upstream market, it entails the wholesale access to mobile networks, which currently has a single MVNO which requests wholesale access of MNOs networks in Spain to provide its M2M services.

(1474) Nevertheless, as it will be explained below, access to the MNOs networks is not a necessary input in order for an operator in the market to be able to provide retail M2M services in Spain, as there are there are possible supply alternatives both from the technical and commercial point of view.

(1475) With regard to the downstream market, Telefónica is the market leader in the provision of M2M services with a share of [30-40]% in 2022, followed by Orange and Vodafone with market shares of [30-40]% and [20-30]%, whereas MásMóvil has a negligible market share of [0-5]%. The three Spanish MNOs are the main providers of M2M services in an overall concentrated market. Each of the MNOs active on this market is likely to have some degree of market power but not a significant degree of market power in light of the existence of at least two alternative suppliers with strong positions.

(1476) The Commission notes that the provision of M2M services benefits from the largest possible coverage footprint and network availability (multinetwork availability) in order to provide connectivity to all the client's terminals. For this purpose, a MVNO active in the market of M2M services could resort to enter into wholesale agreements with MNOs in Spain in order to access its mobile networks to provide retail M2M services.

(1477) However, in order to ensure the largest multinetwork coverage, such an operator would need to ensure access to different networks in Spain. Currently, in Spain a single operator is active in the retail market of M2M services using wholesale mobile agreements, Alai. Alai is currently operating in the M2M market under two wholesale agreements, one with Orange and one with MásMóvil. Under the wholesale agreement with MásMóvil, Alai had also access to Orange’s and Telefónica’s networks, due to the NRAs that MásMóvil has with Orange and Telefónica.[1422] However, on October 2022, MásMóvil communicated to Alai its intention to cease to provide access to Telefónica’s network, as the agreement is not by considered by MásMóvil to be financially viable. Alai submits that following the Transaction, MásMóvil will cease to offer access to Telefónica’s network.

(1478) The Commission concludes in this regard that access to third-party networks by the Parties is a matter which is not related to the Transaction. Access to third-party networks is a commercial decision of the Parties. In any case, the Commission considers that the competent authority to ascertain this matter is the CNMC in its capacity as National Regulatory Authority in charge of telecom regulation in Spain, which has recently decided on this matter imposing an obligation to MásMóvil to provide an offer to Alai at market prices.[1423]

[1422] Alai’s Non-confidential submission of 21st July 2023.
[1423] CNMC decision of 27 July 2023, CFT/DTSA/297/22.

(1479) With regard to access to the Parties' own networks, the Commission concludes that the Transaction would not lead to an ability, incentive nor effect to foreclose the market of retail supply of M2M services.

9.5.7.1. Ability

(1480) As noted by the CNMC in its recent Decision CFT/DTSA/265/22, there are possible supply alternatives both from the technical and commercial point of view in order for operators to provide M2M services that can replace wholesale access to MNO networks.

(1481) IoT services require connectivity, which can be offered by both mobile and fixed technologies. The choice of technology will depend on the specific characteristics of the service required by the user and the availability of the different solutions in the locations where the device is located.

(1482) With regard to M2M services offered thorough wireless technologies, such services can be provided under a wide variety of technologies, which will depend on the intended use of M2M services (NB-IoT, LTE-M SIGFOX, LoRaWAN or WIZE technologies).

(1483) Therefore, as recently concluded by the CNMC, in the Spanish market for M2M services, to offer a service throughout the national territory, even if LPWAN solutions of mobile operators in their proprietary use bands or Sigfox technology, may be the best positioned to guarantee the service in a general way, not all M2M services require LPWAN technologies, and therefore, it cannot be concluded that the impossibility of accessing LPWAN technologies on private bands is an insurmountable barrier for an operator to compete in the M2M market.

(1484) As noted by the CNMC in its recent Decision CFT/DTSA/265/22, there are other commercial alternatives, such as "*Sponsored Roaming*", that allow third operators to provide retail M2M services without entering into a wholesale agreement with a national MNOs in order to access its network.

(1485) "*Sponsored roaming*" consists of the offer of a foreign operator to use the roaming agreements that the foreign operator has in order for a third operator to provide its retail M2M services. Thus, allowing a third operator to market SIM cards in Spain with the International Mobile Subscriber Identity (IMSI) of that foreign operator and thus have access to the networks established in Spain. Sponsored Roaming for M2M services is protected under the Roaming Regulation, which includes the obligation to give access to all available technologies, and it is subject to commercial negotiations by two roaming partners in a wholesale roaming agreement.

(1486) As noted by the CNMC, the use of solutions based on roaming agreements, including permanent roaming, is standard practice in the market for the provision of M2M communications services in Spain. It is common that M2M operators that provide services to terminals in Spain (with and without access to its own network) operate through a "Sponsored Roaming" or through roaming agreements with Spanish operators using SIM cards from other countries. The use of this scheme allows them to choose for each terminal the network that offers the best coverage at any given time, thus increasing the coverage footprint of their service.

(1487) Given the existence of alternative credible suppliers of wholesale M2M services, which are able to satisfy the requirements of M2M services providers in terms of price, quality and coverage, the Commission considers that the Transaction would not have the ability to foreclose its downstream rivals with regard to M2M services.

9.5.7.2. Incentive

(1488) The Commission concludes that post-Transaction the JV will not have an incentive for the Parties to foreclose the market for wholesale supply of access to mobile networks in a way that would impede M2M operators to compete in the market.

(1489) The Parties' activities do not overlap in the retail market for M2M services, as MásMóvil's presence is negligible in the retail market of M2M services, with less than [0-5]% of market. Further other operators only hold a market share of [0-5]%, and only one operator provides retail M2M services on the basis of wholesale agreements for accessing mobile networks, whereas the rest of other operators rely on Sponsored Roaming.

9.5.7.3. Effects

(1490) The Commission concludes that foreclosing wholesale mobile network access for non-vertically integrated operators would not have a significant detrimental effect on competition in the downstream retail markets for the provision of M2M services.

(1491) This is notably because, mobile network access seekers (also referred to as MVNOs, virtual operators or simply as access seekers), do not play a sufficiently important role in the downstream markets in view of its small size (representing a [0-5]% of the market).

(1492) As outlined in the Non-Horizontal Merger Guidelines, significant harm to effective competition normally requires that the foreclosed firms play a sufficiently important role in the competitive process on the downstream market. The higher the proportion of rivals which would be foreclosed on the downstream market, the more likely the merger can be expected to result in a significant price increase in the downstream market and, therefore, to significantly impede effective competition therein. Despite a relatively small market share compared to other players, a specific firm, may play a significant competitive role compared to other players, for instance because it is a particularly aggressive competitor.[1424]

(1493) In the case of the retail M2M services, mobile network access seekers hold collectively a market share of [0-5]% of the retail market for M2M services in Spain. As such, these smaller players are unlikely to have material buyer power when negotiation wholesale access conditions with MNOs.

(1494) In view of the their very limited presence in the market, accounting for less than [0-5]% of the overall M2M services markets, even when considered collectively, and the fact that they do not appear to have grown significantly in the past years from 2020 to 2022 for which data is available, suggests that such players may not play a sufficiently important role in the competitive process within the meaning of the Non-Horizontal Merger Guidelines on the relevant downstream markets, namely retail M2M services in Spain.

(1495) For the reasons set out above, the Commission has therefore come to the conclusion that foreclosing wholesale mobile network access for non-vertically integrated operators would not have a significant detrimental effect on competition in the downstream retail markets for the provision of M2M services.

[1424] Non-Horizontal Merger Guidelines, paragraph 48.

9.5.7.4. Conclusion

(1496) In light of the above, the Commission considers that the Transaction does not raise a significant impediment to effective competition within the meaning of Article 2(3) of the Merger Regulation as a result of the vertical links arising from the relationships between the market for the wholesale supply of mobile network access (upstream), and the markets for the retail supply of M2M services (downstream).

9.5.8. Conclusion on vertical effects

(1497) In light of the above, the Commission has come to the conclusion that it is more likely than not that the Transaction will not raise a significant impediment to effective competition within the meaning of Article 2(3) of the Merger Regulation as a result of the vertical relationships between the Parties' activities.

9.6. Efficiencies

9.6.1. Introduction

(1498) Based on the results of the market investigation, the Commission has come to the conclusion that only a small share of the efficiency claims submitted by the Parties satisfies the cumulative test of verifiability, merger-specificity and benefits to consumers. In particular:

(a) **Timeliness.** The time horizon where efficiencies are taken into account as timely, and therefore capable of meeting the criteria of benefit to consumers, can be taken to be 4 years (2023-2026).[1425]

(b) **Cost synergies (excluding elimination of double marginalisation ("EDM")).** The Commission concludes that variable cost savings related to the elimination of wholesale costs due to FTTH densification can in principle be accepted, subject to corrections. As regards other claimed cost savings related to the Parties' network business and claimed cost savings related to the Parties non-network business, the Commission maintains the conclusion that the Parties have failed to demonstrate that these cost savings meet the cumulative tests of verifiability, merger-specificity and benefit to consumers.

(c) **Cost synergies related to EDM.** The Commission concludes that variable cost savings from EDM related to FTTH wholesale access services can be accepted, subject to corrections. Cost savings from EDM related to [Details on the wholesale agreements concluded by the Parties] fail the cumulative test of verifiability, merger-specificity and benefit to consumers.

(d) **Incremental FTTH and 5G roll-out.** Based on the Parties' submissions, the Commission maintains its conclusion that the Parties have failed to demonstrate that the claimed efficiencies from the roll-out of FTTH and 5G meet the cumulative test of verifiability, merger-specificity and benefits to consumers.

1425 The cost synergy model submitted by the Parties in the Notification (Form CO, Annex 11) considered that cost synergies would start to accrue in the beginning of 2023. In the SO Reply the Parties assumed that the cost synergies would start to accrue in mid-2023 and moved certain integration costs to the future (SO Reply, Annex 8.1, paragraph 10). In line with this approach, the Commission considers that cost synergies considered in 2023 would now start to accrue in 2024. For comparison with the SO and the SO Reply, the timeline is not adjusted.

(1499) The Commission therefore concludes that the Transaction generates the following efficiencies as discussed in the subsections below:

(a) Taking into account integration costs, the claimed **cost savings (excluding EDM)** amount to net variable cost increases of ca EUR [...] over the relevant timeframe of 4 years (2023-2026). These cost increases generate an incentive to increase prices over and above the upward pricing pressure from the elimination of competition between the Parties.

(b) The claimed **cost savings related to EDM** amount to net cost savings of ca EUR [...] per year (based on 2022 revenues and margins). This yearly amount would be realized over a period of 4 years (2023-2026). All cost synergies have to be appropriately discounted.[1426]

(c) No (qualitative or cost) efficiencies related to **incremental FTTH roll-out** or **incremental 5G roll-out**.

(1500) In any event, the Commission considers that even if all the Parties' efficiency claims would be accepted in full, *quod non*, they would be insufficient to outweigh the significant impediment to effective competition, and notably the substantial likely price effects, generated by the Transaction in the relevant markets.

(1501) This Section is structured as follows: Section 9.6.2 sets out the legal framework. Section 9.6.3 presents the Parties' views on efficiencies. In particular, it outlines the Parties' views on cost savings excluding EDM (Section 9.6.3.1), cost savings related to EDM (Section 9.6.3.2), incremental FTTH roll-out (Section 9.6.3.3) and incremental 5G roll-out (Section 9.6.3.4). Section 9.6.4 contains the Commission's assessment. A section on general considerations (Section 9.6.4.1) is followed by sections on cost savings (excluding EDM) (Section 9.6.4.2), cost savings related to EDM (Section 9.6.4.3), incremental FTTH roll-out (Section 9.6.4.4) and incremental 5G roll-out (9.6.4.5) and the Commission's overall conclusion on efficiencies (Section 9.6.4.6).

9.6.2. Legal framework

(1502) Under Article 2(1)(b) of the Merger Regulation the Commission must take account of "*the development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition*" in the appraisal of a concentration. In that regard, the Merger Regulation clarifies that "*it is appropriate to take account of any substantiated and likely efficiencies put forward by the undertakings concerned. It is possible that the efficiencies brought about by the concentration counteract the effects on competition, and in particular the potential harm to consumers, that it might otherwise have and that, as a consequence, the concentration would not significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position.*"[1427] and provides that the Commission "*should publish guidance on the conditions under which it may take efficiencies into account in the assessment of a concentration.*"[1428]

(1503) As explained in the Horizontal and Non-Horizontal Merger Guidelines, the Commission considers any substantiated efficiency claim in the overall assessment

[1426] See Section 9.6.4.1.3 below.
[1427] Council Regulation (EC) 139/2004, recital 29.
[1428] Council Regulation (EC) 139/2004, recital 29.

of a merger.[1429] It is for the Parties to provide in due time all the relevant information necessary for the assessment of the efficiency claims.[1430] For the Commission to take account of efficiency claims, the efficiencies have to be verifiable, merger-specific and to benefit consumers:[1431]

(a) Efficiencies are **verifiable** if the Commission can be reasonably certain that the efficiencies are likely to materialize. The more precise and convincing the efficiency claims are, the better they can be evaluated.

(b) Efficiencies are **merger-specific** when they are a direct consequence of the notified merger and cannot be achieved to a similar extent by less anti-competitive alternatives.

(c) Efficiencies should be substantial, timely and **benefit consumers** in those relevant markets where competition concerns have been identified, so that consumers will not be worse off as a result of the merger. Consumers can benefit from cost-savings if these are passed-on in the form of lower prices, or from new or improved products or services.

9.6.3. The Parties' view

(1504) According to the Parties, the Transaction will generate efficiencies in the form of:[1432]

– **Cost synergies** net of integration costs of [...] spread over the 10-year period from 2023 to 2032 concerning the Parties' network and non-network business.[1433]

– **Elimination of double margins** ('EDM') of EUR [...] per year based on 2022 margins.[1434]

– **Incremental roll-out of FTTH** to [...] BUs by 2026 for an incremental investment of EUR [...].[1435]

– **Incremental roll-out of 5G** to [...] sites for an incremental investment of EUR [...].[1436]

(1505) In the Form CO, the Parties submit that the claimed efficiencies satisfy the cumulative test of verifiability, merger-specificity and benefits to consumers.[1437]

(1506) In the Article 6(1)(c) Response, the Parties challenge the Commission's finding in the Article 6(1)(c) Decision that the claimed efficiencies fail the cumulative test of verifiability, merger specificity and benefit to consumers:

1429 Horizontal Merger Guidelines, paragraph 77, Non-horizontal Merger Guidelines, paragraph 21.

1430 Judgement of 13 July 2023, C-376/20 P, CK Telecoms, paragraphs 238-239, 243. Horizontal Merger Guidelines, paragraph 87.

1431 Judgement of 13 July 2023, C-376/20 P, CK Telecoms, paragraph 225; Horizontal Merger Guidelines, paragraphs 79-88.

1432 Form CO, Section 9, Article 6(1)(c) Response, SO Reply, Section C.

1433 The Form CO, Table 142 considers net cost savings of EUR **[...]** to EUR **[...]**. The Article 6(1)(c) Response, paragraph 618 gives net cost savings of EUR **[...]**. The SO Reply, paragraph 412 considers net cost savings of EUR **[...]**.

1434 The Form CO, paragraph 2555 and Table 143 does not list expected cost savings from EDM. The Article 6(1)(c) Response, paragraph 618 and Table 23 and the SO Reply, paragraph 455 et seq, estimate that the cost savings from EDM would amount to EUR **[...]** based on the margins from FTTH wholesale agreements and transmission wholesale agreements between the Parties in 2022.

1435 Form CO, paragraph 1582, Article 6(1)(c) Response, paragraph 618.

1436 Form CO, paragraph 2538, Article 6(1)(c) Response, paragraph 618.

1437 Form CO, paragraph 2544.

(a) As regards **verifiability**, the Parties claim that the Article 6(1)(c) Decision is wrong to claim that the cost savings estimated in the Synergies Model, and validated by [Advisor], submitted as part of the Form CO, are not verifiable.[1438] The Parties emphasize that they are fully committed to all synergies. In particular, the cost savings (excluding EDM) would form part of the evaluation of the Transaction, which was approved [Details of the Parties' internal documents describing the Parties' strategies].[1439]

(b) The Parties also claim that demand projections were taken into account for the computation of some of the synergies and integration costs. For the rest, the Parties would have remained prudent by estimating efficiencies based on their existing customer base.[1440] The Parties also maintain that some of their variable cost savings derive from wholesale arbitrate rather than increased bargaining power.[1441] With regard to EDM, the Parties maintain that the JV would be able to access Orange's network at marginal cost rather than at current intra-company transfer prices.[1442]

(c) As regards **merger-specificity**, the Parties claim that the Commission's dismissal of merger-specificity would lack any engagement with the detailed explanations provided by the Parties on why each of the efficiencies is merger specific.[1443] In this respect, the Parties add submit that while the Article 6(1)(c) Decision assumes that the Parties would have the option to choose between any type of contract or agreement, the commitment to existing contractual arrangements creates a natural hurdle to switching or radically revising their terms. Moreover, they claim that they have established in the Form CO that there are no viable, less anti-competitive options available to achieve the same benefits as with the Transaction.[1444]

(d) As regards benefits to consumers, the Parties claim that the incremental roll-out would result in additional coverage and quality and more choice at the retail and wholesale level would foster competition to the benefit of Spanish consumers and businesses.[1445] Regarding fixed cost savings, in the Form CO, the Parties submit that these would remove investment constraints and allow the Parties to invest in FTTH and 5G roll-out. In the Article 6(1)(c) Response, the Parties maintain that the Article 6(1)(c) Decision erroneously dismisses benefits from the cost efficiencies.[1446]

(e) As regards timeliness, the Parties contest the Commission's conclusion that a timeframe of 2 years can be considered timely and maintain that "*[i]n this particular case, a period of at least five years is the appropriate framework for the assessment of the efficiencies*" given that the telecommunication section is characterized by long-term agreements and typically has long investment

[1438] Article 6(1)(c) Response, paragraph 633.
[1439] Article 6(1)(c) Response, paragraph 620.
[1440] Article 6(1)(c) Response, paragraph 622.
[1441] Article 6(1)(c) Response, paragraph 623.
[1442] Article 6(1)(c) Response, paragraph 624.
[1443] Article 6(1)(c) Response, paragraph 626.
[1444] Article 6(1)(c) Response, paragraph 676.
[1445] Article 6(1)(c) Response, paragraph 627.
[1446] Article 6(1)(c) Response, Section D. II c).

cycles.[1447] The Parties therefore claim that a period of at least five years is the appropriate framework to assess efficiencies.[1448]

(f) The Parties claim that the Article 6(1)(c) Decision puts too much weight on the fact that certain cost savings relate to multiple markets. Given that the vast majority of the Parties' activities are on FMC, the cost savings would benefit all of their customers. In any event, the missing attribution would not have any meaningful effect on the Commission's assessment.[1449]

(g) As regards fixed cost savings, the Parties maintain that these cost savings would increase their ability to invest. Investment decisions would be strongly correlated with the availability of financial resources and the overall profits of a company including in network roll-out.[1450] Furthermore, the Article 6(1)(c) Decision ignores that most of the cost savings can clearly be attributed to an affected market and questions the variable nature of cost savings without further explanation and wrongly dismisses fixed cost savings.[1451]

(1507) In the SO Reply, the Parties assert that the SO makes a number of fundamental errors:[1452]

(a) The Parties are of the view that the SO assesses the claimed efficiencies in a timeframe which is still too short and ignores specifics of long investment cycles in the telecommunications industry.[1453]

(b) The Parties consider that the SO's conclusion that the Transaction would result in cost increases instead of cost savings is absurd.[1454] In that regard, the Parties claim that the SO incorrectly nets integration costs from cost savings, that the notion of discounting future cost savings is conceptually flawed and that the SO erroneously dismisses too many cost saving items as not variable. That said, in Annex 8.1 of the SO Reply, the Parties present a "*conservative*" scenario, where some cost synergies are reclassified from variable to fixed.[1455]

(c) The Parties maintain that the network investment plans are verifiable and binding for both Parties and result in significant benefits.[1456]

(d) The Parties claim that it would not be strictly necessary to allocate efficiencies to the relevant markets.[1457]

(e) The Parties are of the view that the SO fails to engage on substance with the arguments submitted by the Parties in the Article 6(1)(c) Response as well as subsequent submissions and meetings and thus infringes the Parties' fundamental right to be heard.[1458] In that regard, the Parties claim that the SO's assessment of the claimed network efficiencies is extremely limited, that the

---

1447 Article 6(1)(c) Response, paragraph 626.
1448 Article 6(1)(c) Response, paragraph 693.
1449 Article 6(1)(c) Response, paragraphs 695-696.
1450 Article 6(1)(c) Response, paragraph 625.
1451 Article 6(1)(c) Response, paragraph 688.
1452 SO Reply, paragraphs 416 et seq.
1453 SO Reply, paragraphs 417 et seq.
1454 SO Reply, paragraphs 423 et seq.
1455 SO Reply, paragraphs 441.
1456 SO Reply, paragraphs 442 et seq.
1457 SO Reply, paragraphs 445 et seq.
1458 SO Reply, paragraphs 448 et seq.

SO repeats arguments of the Article 6(1)(c) Decision and fails to acknowledge the Parties' rebuttal.

9.6.3.1. Cost savings (excluding EDM)

(1508) In the Form CO, the Parties submit that the Transaction would generate variable and fixed gross cost savings of EUR [...] to [...] over a ten-year period from 2023 to 2032. After the subtraction of integration costs, they claim that this would result in variable and fixed net cost savings of EUR [...] to [...].[1459] The parties submit that the cost savings would arise in network and non-network business areas, including cost savings specific to the mobile business and the fixed business and cost savings generated across both the mobile and fixed businesses.[1460] The Parties submit that this would include:[1461]

(a) **Network-related synergies**. In the **fixed network**, the Parties expect net savings of EUR [...] relating to FTTH consolidation and EUR [...] - [...] from FTTH deployment. In the mobile network, they expect net savings of EUR [...] from operations and maintenance (O&M) consolidation, EUR [...] from site consolidation and EUR [...] from spectrum consolidation. In the transmission network, they expect net savings of EUR [...] from synergies in mobile backhaul, EUR [...] in fixed backhaul and EUR[...] in the backbone network.

(b) **Non-network related synergies**. In **sales and marketing**, the Parties expect net savings of EUR [...] relating to customer CAPEX, EUR [...] relating to saved commissions, EUR [...] from marketing, EUR [...] – [...] from sales and distribution, EUR [...] – [...] related to handsets and EUR [...] to customer premises equipment (CPE). In relation to customer care the Parties expect net savings of [...] – [...] related to customer process, EUR[...] related to credit and collections, EUR [...] related to installations and EUR [...] related to CPE refurbishment. In general expenses, the Parties expect net savings of EUR [...] related to leasing, EUR [...] related to supply and EUR [...] related to other general expenses. In addition, the Parties expect net savings of EUR [...] related to IT. Finally, the Parties expect net savings of EUR [...] – [...] related to personnel.

(1509) The remainder of this chapter gives a brief overview of the Parties' claimed cost synergies and integration costs and the Parties' arguments with regard to verifiability, mergers-specificity and benefits to consumers (to the extend they were not already covered in the introduction). The Parties' cost synergy claims are described in detail (for 84 cost savings and integration cost items) in **Annex B**, which forms an integral part of this Decision.

9.6.3.1.1. Network synergies

9.6.3.1.1.1. Fixed network

(1510) In the Form CO, the Parties submit that the Transaction would generate cost savings in relation to the optimisation, replacement or removal of the Parties' FTTH wholesale contracts with third parties.[1462]

1459 Form CO, Section 9, paragraph 2534 and Form CO, Section 9, Table 142.

1460 Form CO, Section 9, paragraph 2547.

1461 Form CO, Section 9, Table 142. The derivation of the individual cost synergy items is explained in the Form CO, Annexes 9-11.

1462 Form CO, Annex 9, paragraph 8 et seq.

(a) **FTTH deployment** would generate variable cost savings by migrating subscribers served via wholesale contracts with [Details of the Parties' commercial agreements] to the newly rolled-out FTTH network of the JV in areas where the Parties are already present (densification areas) and in areas where the Parties are not yet present (new municipalities). These cost savings where not only applied to the Parties' existing subscribers on [Details of the Parties' commercial agreements] network footprint, but also to new subscribers the Parties hope to obtain following the planned FTTH roll-out.[1463] In addition, the Parties claim cost savings related to the activation and deactivation of subscribers on third party networks (aperiodics & transmission) and acknowledged variable integration costs from FTTH deployment and from migrating subscribers.

(b) **FTTH consolidation** would allow the JV to move [Details on the wholesale agreements concluded by the Parties] to Orange's network. There, these customers could be [Details on the Parties' cost structure]. MásMóvil customers not overlapping with Orange's network would be migrated to Orange's [Details on the wholesale agreements concluded by the Parties] where they could be served [Details on the wholesale agreements concluded by the Parties]. In addition, Orange would migrate some customers [Details on the wholesale agreements concluded by the Parties]. Related to FTTH consolidation, the Parties also claim that they can generate fixed cost savings from [Details on the wholesale agreements concluded by the Parties].[1464]

(1511) In the Form CO, the Parties claim that Spanish consumers will profit significantly from the investment both from FTTH and 5G coverage and speed. The Transaction will induce of a greater choice in consequences of the investments, which would impact competitive pressure on quality and prices for the whole country and every citizen.[1465] These statements were repeated in the SO Reply.

(1512) In the Article 6(1)(c) Response, the Parties contest the Commission's conclusion that the claimed cost synergies related to **FTTH consolidation** are not **verifiable**.[1466]

(a) First, related to cost saving from integrating [Details of the Parties' commercial agreements] customer from the [Details of the Parties' commercial agreements], Parties claim that they remained conservative by including a small increment in customer projections instead of relying on "future demand projection". As for the other cost savings, the Parties claimed they opted for a conservative approach of rely on current demand to mitigate uncertainty.

(b) Second, with regard to the migration of [Details of the Parties' commercial agreements] customer to [Details of the Parties' commercial agreements] network, the Parties explained that the price of EUR [Details of the Parties' commercial agreements] correspond to the intra-company transfer price and does not represent [Details of the Parties' commercial agreements] marginal cost.

(c) Third, related to the migration of [Details of the Parties' commercial agreements] customer served under [Details of the Parties' commercial

1463 Response to RFI 24, paragraph 6.1. et seq.
1464 Form CO, Annex 9, paragraph 8 et seq.
1465 Form CO, paragraph 2559.
1466 6(1)(c) Response, paragraphs 635-637.

agreements]. The Parties claim that absent the Transaction [...] would not have incentive to move its customers to other agreements, and on the other hand [...] would have no incentive to share its [Details on the wholesale agreements concluded by the Parties] to [...] as they would be independent competitors.

(d) Fourth, with regard to the avoidance of [Details of the Parties' commercial agreements], the Parties claim it depends on [Details of the Parties' commercial agreements], therefore it would not be impacted by future demand projections.[1467]

(1513) In the Article 6(1)(c) Response, the Parties contest the Commission's conclusion that the claimed cost synergies related to **FTTH deployment** are not **verifiable**.[1468] With regard to customer migrating from [Details on the wholesale agreements concluded by the Parties], the Parties claim that it is stem from [Details on the wholesale agreements concluded by the Parties]. The Parties clarified that MásMóvil's customer will only have lower prices simply because [Details on the wholesale agreements concluded by the Parties] and not because they would receive a discount based on increased bargaining power due to more traffic.

(1514) In the Article 6(1)(c) Response, the Parties contest the Commission's conclusion that the claimed cost synergies related to fixed network are not **merger-specific**.[1469]

(a) First, the Parties claim that [Details of the MASMOVIL's commercial negotiations].

(b) Second, [Details of the Parties' commercial agreements and their potential unilateral termination].

(c) Third, with regard to [Details of the Parties' commercial agreements] customers served under [Details of the Parties' commercial agreements], the Parties claim there are no other alternatives that enable the savings of the Transaction.

(d) Fourth, the Parties reiterate that the only options will be the [Details of the Parties' commercial agreements], and an [Details of the Parties' commercial agreements], and other alternatives will be speculative.

(1515) In the SO Reply, the Parties contest the Commission's conclusion that the claimed cost synergies related to **FTTH deployment** are not **verifiable**:

(a) First, the Parties submit that the SO's claim that the wholesale marginal cost would be uncertain, is generic and unfounded. The Parties "*explained that the cost of providing service after the deployment of the network includes some incremental costs of maintenance and capacity set-up, which would logically decrease (on a unitary cost basis) as the number of subscribers on the network increases*" [1470] .

(b) Second, the Parties claim that in any event "on average the expected cost of providing service to customers will be the same as the cost of providing service in the current network"[1471] which represent EUR [Details of the Parties' commercial agreements] per month.

1467 6(1)(c) Response, paragraph 661.
1468 6(1)(c) Response, paragraphs 639-643.
1469 6(1)c Response, paragraphs 675-681.
1470 SO Reply, Annex 8.1, paragraph 17.
1471 SO Reply, Annex 8.1, paragraph 17.

(c) Third, the Parties submit that the level of uncertainty from the deployment cost has no bearing on the cost of providing the service.[1472]

(1516) In the SO Reply, as regard of Parties' view on **FTTH consolidation** merger-specificity, the Parties agree with the Commission conclusion but highlight that a potential [Details of the Parties' commercial agreements].[1473]

(1517) **Adjustments to FTTH deployment cost synergies.** In the SO Reply, the Parties challenge the Commission's adjustments to the Parties' claimed cost savings and reclassify variable integration costs as sunk:

(a) **Wholesale cost savings.** As regards cost savings from migrating subscribers served via wholesale contracts to the newly deployed FTTH network, the Parties maintain that these cost savings should not only be applied to the Parties' existing subscribers but also to subscribers they expect to gain, following the incremental FTTH roll-out. In that regard, the Parties submit that they would also gain new customers in the deployment areas absent the transaction.[1474]

(b) **Aperiodics & transmission cost savings.** The Parties claim that these cost savings from the activation and deactivation "*would have be paid to [Details of the Parties' synergies based on Parties' cost structure] for subscribers switching to a different footprint based on the usual churn*" and consider that these costs therefore should not be considered to be sunk.[1475]

(c) **Integration costs related to network deployment and migration costs.** The Parties claim that network deployment costs represent CAPEX investment for deploying new lines, and will be related to capacity expansion that is sunk regardless of the calculation based on number of BUs. As regard of migration cost, the Parties claim they are sunk as they relate to the one-off costs of changing equipment for MásMóvil's and Orange's customers. They explain that they only depend on the number of migrated customers at the time of the integration but become sunk post-integration, and do not affect short-term pricing incentive post-integration.[1476]

(1518) **Adjustments to FTTH consolidation cost synergies.** In the SO Reply, the Parties challenge the Commission's adjustments to the Parties' claimed cost savings related to FTTH consolidation and reclassify variable integration costs as sunk.

(a) **Wholesale cost savings.** The Parties accept the SO's adjustments of the migration costs from the [Details of the Parties' synergies based on Parties' cost structure] to the [Details of the Parties' synergies based on Parties' cost structure], that correct a clerical mistake in the Parties' cost synergy model (Form CO, Annex 11).[1477]

(b) **Aperiodics & transmission cost savings.** The Parties claim that these cost savings from the activation and deactivation "*would have be paid to [Details of the Parties' synergies based on Parties' cost structure]for subscribers*

1472 SO Reply, Annex 8.1, paragraph 18.
1473 SO Reply, Annex 8.1, paragraph 12.
1474 SO Reply, Annex 8.1, paragraph 21.
1475 SO Reply, Annex 8.1, paragraph 10.
1476 SO Reply, Annex 8.1, paragraph 10.
1477 SO Reply, Annex 8.1, paragraph 10.

switching to a different footprint based on the usual churn" and consider that these costs should not be considered to be sunk.[1478]

(c) **Integration costs from discounts.** [Details on the wholesale agreements concluded by the Parties] From the JV's perspective this [Details on the wholesale agreements concluded by the Parties] would represent a one-off opportunity cost that should be considered to be a sunk cost that would not affect the JV's pricing incentives. [Details on the wholesale agreements concluded by the Parties] This would reduce the integration costs from [...] to [...]. As regards migration costs, the Parties consider that these costs are related to the one-off installing of new equipment for migrated customers and should be considered to be sunk.[1479]

9.6.3.1.1.2. Mobile network

(1519) With regard to **O&M consolidation**, the Parties claim that most of the cost savings come from [Details on the wholesale agreements concluded by the Parties], therefore [Details on the Parties' business strategy].[1480]

(1520) With regard to the consolidation **of mobile sites**, the Parties claim that they can generate fixed cost savings by [Details on the Parties' business strategy].[1481]

(1521) With regard to the **sale of mobile spectrum**, the Parties claim that a statutory cap on spectrum holdings would force the JV to sell spectrum post-Transaction. This sale would generate fixed cost savings.[1482]

(1522) In the Form CO, the Parties claim that the Transaction generates variable cost savings related to **O&M consolidation**, **consolidation of mobile sites** and the **sale of mobile spectrum**.[1483]

(a) First, with regard to verifiability, the Parties claim that [Details of MASMOVIL's commercial agreements]. On the other hand, [Details of Orange's commercial agreements] contract does not depend directly on the amount of network traffic, and adding [Strategic information on traffic migration] traffic generates low incremental O&M costs and therefore a reduction in O&M costs for the Parties.

(b) Second, with regard to merger-specificity, the Parties claim [Details on the wholesale agreements concluded by the Parties] The parties claim that even if [Details on the wholesale agreements concluded by the Parties], the incremental cost of additional O&M will be small and lower than any other contract obtain from third party providers.

(c) Third, with regard to fixed cost savings, related to [Details on the Parties' business strategy] and O&M consolidation (arise from the need for future CAPEX), the Parties claim that [Details on MASMOVIL's business strategy] on a standalone basis. With regard to fixed cost savings, the Parties claim they

1478 SO Reply, Annex 8.1, paragraph 10.
1479 SO Reply, Annex 8.1, paragraph 10.
1480 Form CO, Annex 9, paragraph 19.
1481 Form CO, Annex 9, Table 3.
1482 Form CO, Annex 9, Table 3.
1483 Form CO, Annex 9, paragraphs 19-28.

will not exceed the spectrum cap absent the Transaction and do not need to sell it.[1484]

(1523) In the Article 6(1)(c) Response, the Parties contest the Commission's conclusion that the claimed cost synergies related to O&M consolidation are not verifiable. They claim that they do not expect to [Details on the Parties' business strategy] and that [Details on the Parties's business strategy]. The Parties also reiterate that the cost saving from [Details on MASMOVIL's business strategy] is essentially variable[1485] and in the RFI 24 Response, the Parties acknowledge that [80-90]% of the cost savings is variable.[1486]

(1524) In the Article 6(1)(c) Response, the Parties contest the Commission's conclusion that the claimed cost synergies related to mobile network are not merger-specific.[1487] The Parties claim it is highly speculative to imply that [Details on the wholesale agreements concluded by the Parties] or that [Details on the wholesale agreements concluded by the Parties]. Moreover, the spectrum consolidation would not be achievable with other types of agreement as Parties would have no reason to sell it.

(1525) In the SO Reply, the Parties contest the Commission's conclusion that the claimed cost synergies related to O&M consolidation are not merger-specific:[1488]

(1526) First, the Parties claim that O&M consolidation savings stem from [Strategic information on traffic migration] and therefore that no agreement could substitute for the Transaction, for a cost as low as relying on [Strategic information on traffic migration] own network.

(1527) Second, the Parties claim that "*highly speculative whether MÁSMÓVIL would obtain contractual conditions similar to OSP given its very different network assets*".

(1528) Adjustments to mobile network cost synergies. In the SO Reply, the Parties challenge the Commission's adjustments to the Parties' claimed cost savings and reclassify variable integration costs as sunk:

(a) With regard to O&M mobile consolidation, the Parties consider that on a conservative basis, only [20-30]% of the cost savings may be considered to be variable.[1489]

(b) With regard to integration cost related to site consolidation, the Parties claim they constitute a one-off CAPEX investment related to site capacity expansion. Therefore, these integration costs would be sunk and would not affects the JV's pricing behaviour.[1490] The Parties acknowledge that on a conservative basis it could be considered that integration costs related to additional O&M and energy costs resulting from [Details on the Parties' business strategy] and not affecting pricing incentive. This would amount to EUR [...] over the period from 2023 to 2032.[1491]

1484 Form CO, Annex 9, Table 3.
1485 Article 6(1)(c) Response, paragraph 645.
1486 Annex RFI 24 Q3 & Q4, sheet Template, column AC.
1487 Article 6(1)(c) Response, paragraph 682.
1488 SO Reply, Annex 8.1, paragraphs 31, 32.
1489 SO Reply, Annex 8.1, paragraph 26. RFI 38 Response, sheet "Conservative variable savings", col O.
1490 SO Reply, Annex 8.1, paragraph 27-28.
1491 SO Reply, Annex 8.1, paragraph 29.

9.6.3.1.1.3. Transmission

(1529) With regard to the Parties' transmission networks, the Parties submit that the Transaction would generate variable and fixed cost savings related to mobile backhaul, fixed backhaul and backbone.

(1530) With regard to mobile backhaul, the Parties claim that variable cost savings could be achieved by [Details on the Parties' business strategy] or [Details on the Parties' business strategy]. As regards mobile backhaul, the Article 6(1)(c) Decision noted:

(a) In the response to RFI 11 Q7a, the Parties explained that MásMóvil currently sources [Details of MASMOVIL's commercial agreements with other operators and their pricing terms].

(b) In the response to RFI 11 Q7b, the Parties explained that [Details of Orange's commercial agreements with other operators, their network coverage, and pricing terms].

(c) The Parties point out that [Details of MASMOVIL's commercial agreements].

(1531) In the Article 6(1)(c) Response, the Parties reject the Commission's conclusion and consider that [Strategic information on traffic migration]. As regards the greater load on Orange's network, the Parties claim that some capacity adjustments may be needed that were already integrated in (variable) integration cost related to the consolidation of the mobile network. These integration costs for the site consolidation synergy would also take into account demand projections. With regard to the merger-specificity the Parties maintain that the mobile backhaul savings will result [Details on the Parties' business strategy], and that no agreement could be a substitute for the Transaction in that respect.[1492]

(1532) In the SO with respect to benefit to consumers, the Commission considered that the Parties have not verified the variable nature of the cost savings. In the SO Reply, the Parties estimated that [Details on the wholesale agreements concluded by the Parties] and is considered variable on a conservative basis.[1493] With regard to the **merger specificity**, first the Parties respond that no agreement can substitute and allow for a cost as low as offered with the Transaction. Second the Parties claim it is "*highly speculative whether MÁSMÓVIL would obtain similar contractual conditions to OSP given its very different network assets*" and that the assessment of whether an alternative is realistic should take into account that a "*less profitable alterative in the counterfactual than the status quo is not a "realistic" alternative*"[1494].

(1533) With regard to **fixed backhaul**, the Parties likewise claim variable cost savings that could be achieved by [Details on the Parties' business strategy] . In addition, the Parties claim fixed cost savings and acknowledge fixed and variable integration costs related to fixed backhaul, [Details on the Parties' business strategy]. As regards fixed backhaul, the Article 6(1)(c) Decision noted:

(a) MásMóvil sources [Details of MASMOVIL's commercial agreements with third parties including pricing terms].

(b) [Details of Orange's own network and its commercial agreements with third parties including pricing terms].

1492 Article 6(1)(c) Response, paragraph 683.
1493 SO Reply, Annex 8.1, paragraph 39.
1494 SO Reply, Annex 8.1, paragraphs 42-43.

(c) The Parties acknowledge that MásMóvil [Details of MASMOVIL's commercial agreements]. Nevertheless, they maintain that [Details on the wholesale agreements concluded by the Parties] should be considered to be variable.

(1534) In the Article 6(1)(c) Response, the Parties reject the Commission's conclusion. They submit that following the Transaction, [Details on the Parties' business strategy]. Furthermore, although MásMóvil is still using [Details on the wholesale agreements concluded by the Parties] under its contract, the Parties consider that on a forward-looking basis these savings could also be considered variable. In that regard, the Parties also point out that there are (fixed and variable) integration costs needed to extend Orange's fixed backhaul network. With regard to the **merger-specificity** the Parties maintain that there are no less anti-competitive alternatives to the Transaction when arguing that they would not be able to achieve similar variable cost savings absent the Transaction[details on the wholesale agreements concluded by the Parties][1495].

(1535) In the SO, the Commission considered that the Parties have not established the variable nature of the claimed cost related to **fixed backhaul**. In the SO Reply, the Parties claim that it is likely that MásMóvil would use [Details on the wholesale agreements concluded by the Parties] of the contract, and left open the variable nature of the cost saving.[1496]

(1536) With regard to the **backbone**, the Parties also claim that variable cost savings could be achieved by [Details on the Parties' business strategy]. In addition, the Parties claim fixed cost savings and acknowledge fixed integration costs related to the backbone, [Details on the Parties' business strategy]. As regards the backbone, the Article 6(1)(c) Decision noted:

(a) The Parties claim that further variable cost savings could be achieved through [Details on the Parties' business strategy].

(b) In the response to RFI 11 Q7a, the Parties explain that MásMóvil's main provider for backbone [Details of MASMOVIL's commercial agreements and its pricing terms].

(c) In the response to RFI 11 Q7b, the Parties explain that [Details of Orange's commercial agreements and its pricing terms for transmission].

(1537) In the Article 6(1)(c) Response, the Parties reject the Commission's conclusion. In that regard, the Parties maintain that the backbone synergy consists of migrating [Details on the Parties' business strategy]. With regard to the merger-specificity the Parties maintain that there are no less anti-competitive alternatives to the Transaction when arguing that they would not be able to achieve similar variable cost savings absent the Transaction [Details on the wholesale agreements concluded by the Parties].[1497]

(1538) In the SO, the Commission considered that the Parties have not established the variable nature of the claimed cost, related to **backbone**. In the SO Reply, the Parties claim that it is likely that MásMóvil would use [Details on the wholesale agreements

1495 Article 6(1)(c) Response, paragraph 683.
1496 SO Reply, Annex 8.1, paragraph 40.
1497 Article 6(1)(c) Response, paragraph 683.

concluded by the Parties] of the contract, and left open the variable nature of the cost saving.[1498]

(1539) In the SO Reply, with regard to **mobile backhaul**, **fixed backhaul** and **backbone,** first the Parties claim that no agreement can substitute and allow for a cost at as low as the reliance on Orange's own network. Second, the Parties claim it is "*highly speculative whether MÁSMÓVIL would obtain similar contractual conditions to OSP given its very different network assets*" and that the assessment of whether an alternative is realistic should take into account that a "*less profitable alterative in the counterfactual than the status quo is not a "realistic" alternative*"[1499].

9.6.3.1.2. Non-network synergies

9.6.3.1.2.1. Sales and Marketing

(1540) In the Form CO, the Parties claim that the Transaction generates variable cost savings related to customer CAPEX and commissions and equipment (handsets and CPEs)[1500] and fixed cost savings related to marketing (advertising and media expenditure) and sales and distribution.[1501]

(a) With regard to **customer CAPEX,** the Parties claim that absent the Transaction, customers that would migrate from Party to the other will not need new installation, or new CPE or change of SIM card, therefore it is paid per customer and variable.

(b) With regard to **commissions**, the Parties claim that the Transaction remove the commissions paid to telesales channels and are paid on a customer basis, therefore variable.

(c) With regard to **equipment (handsets and CPE),** Parties will apply best contractual conditions to the other Party and as equipment are paid per customer, they are variable cost synergies.

(d) With regard to **marketing (advertising and media expenditure)**, the Parties claim it comes from the consolidation of these expenditure and the negotiation of better contractual terms on volume discounts.

(e) With regard to **sales and distribution**, the Parties claim it comes from optimization of Parties' joint commercial footprint (closing stores where they overlap), and result in fixed integration costs.

(1541) In the Article 6(1)(c) Response, the Parties contest the Commission's conclusion that the claimed cost synergies related to Sales and Marketing are not **verifiable**.

(a) With regard to **customer CAPEX** and **commissions**, the Parties contest the Commission's conclusion, without raising any specific arguments.

(b) With regard to **equipment (handsets and CPE)**, the Parties maintain that the investigation of the 20 top handsets would be representative, as these would represent approximately [40-50]% of all handsets in volume and [40-50]% in value. Furthermore, the Parties consider that the claimed cost saving is not related to bargaining power but to arbitrage opportunities, based largely on [Details of the Parties' commercial agreements] better conditions. Furthermore,

---

1498 SO Reply, Annex 8.1, paragraph 40.
1499 SO Reply, Annex 8.1, paragraphs 42-43.
1500 Form CO, Annex 9, Table 2.
1501 Form CO, Annex 9, Table 3.

the Parties maintain that gross adds are the appropriate metric for cost savings related to CPE, as the number of needed CPEs would depend on the number of new subscribers and not on traffic.

(1542) In the Article 6(1)(c) Response, the Parties contest the Commission's conclusion that the claimed cost synergies related to Sales and Marketing are not **merger-specific**.

(a) With regard to **customer CAPEX** and **commissions**, the Parties the Commission's conclusion without raising specific arguments.

(b) With regard to **equipment (handsets and CPE)**, the Parties maintain that "*OSP's procurement is done at the Orange Group level, hence OSP would have no incentive to enter into any kind of purchasing agreement with much smaller operators such as MÁSMÓVIL, as the addition of MÁSMÓVIL does not materially change its bargaining power vis a vis providers.* ***[Details of Orange's commercial agreements]****. Therefore, other types of agreements are not realistic alternatives to achieve the savings generated by the Transaction. This applies to all of the synergies arising from extending OSP's better conditions and greater bargaining power with providers to MÁSMÓVIL's procurement (such as savings on handsets and CPEs, installation and CPE refurbishments, and IT).*"[1502]

(1543) In the Article 6(1)(c) Response, the Parties contest the Commission's conclusion that the claimed cost synergies related to Sales and Marketing do not **benefit consumers**.

(a) With regard to **customer CAPEX** and **commissions**, the Parties contest the Commission's conclusion without raising any specific arguments.

(b) With regard to the procurement of **equipment (handsets and CPE)** the Parties maintain that these costs vary directly per subscriber.[1503]

(1544) In the SO Reply, the Parties contested that cost synergies related to Sales and Marketing are not **verifiable**:

(a) With respect to **customer CAPEX** and **commissions**, the Parties contest they represent cost savings related to cross-churn and claim they are not only based on the number of existing customer but also on the expected future switches between the Parties. However, they consider that the variable nature question can be left open.[1504]

(b) With respect to **equipment (handset and CPE)**, the Parties maintain that their analysis based on nearly half of the handset in terms of value and volume is consider representative. The Parties submit that the driver of this synergy is not increasing in bargaining power but to extent contract conditions from one Party to another. They explain that it is not clear why demand projections would be less speculative than gross add forecasts.

1502 Article 6(1)(c) Response, paragraph 685.
1503 Article 6(1)(c) Response, paragraph 697 et seq.
1504 SO Reply, Annex 8.1, paragraph 49.

(1545) In the SO Reply, the Parties contested that cost synergies related to Sales and Marketing are not **merger-specific**:

(a) With regard to **customer CAPEX** and **commissions**, the Parties refer to previous submissions where they explain why no other agreements short of full integration allow for the elimination of these costs.[1505]

(b) With respect to **equipment (handset and CPE)**, first the Parties claim that an agreement with Orange does not mean that a similar agreement would have been available for MásMóvil absent the Transaction. Second, they consider that the SO fail to demonstrate what incentive other MNOs would have to conclude a joint purchasing agreement with MásMóvil.[1506]

9.6.3.1.2.2. Customer Care

(1546) In the Form CO, the Parties claim that the Transaction generates variable cost savings related to **customer care processes, credit and collections, installation costs** and **CPE refurbishment**. The Parties claim cost synergies arise from the adoption of [Details of the Parties' commercial agreements] on MásMóvil customer care processes, credit scoring and bad debt, installations, and proportion of refurbished CPEs.[1507]

(1547) In the Article 6(1)(c) Response, the Parties contest the Commission's conclusion that the claimed cost synergies are not **verifiable**.

(a) In relation to **customer care processes**, the Parties maintain that these costs would relate to the number of customers handled. The more customers a company has, the more calls to the customer services it would have to handle, and the more sales services it would have to provide. [Details on MASMOVIL's cost structure].[1508]

(b) In relation to credit and collections, the Parties similarly maintain that these costs are variable as they would relate to the number of customers handled: the more customers a company has, the higher the incidence of bad debts and therefore the higher the costs for credit collections.[1509]

(c) In relation to **installation costs** and **CPE refurbishments**, the Parties maintain that installations and CPEs (and therefore CPE refurbishments) are costs that are generated on a per-customer basis. The more customers a company acquires, the more installations it will have to perform and the more CPEs it will have to refurbish after some time.[1510]

(1548) In the Article 6(1)(c) Response, the Parties contest the Commission's conclusion that the claimed cost savings are not **merger-specific** and maintain that other types of agreements are not realistic alternatives to achieve the savings generated by the Transaction. This would also apply "*[Details of the Parties' commercial agreements and potential synergies].*"[1511]

1505 SO Reply, Annex 8.1, paragraph 51.
1506 SO Reply, Annex 8.1, paragraph 53.
1507 Form CO, Annex 9, Table 2.
1508 Article 6(1)(c) Response, paragraph 668.
1509 Article 6(1)(c) Response, paragraph 669.
1510 Article 6(1)(c) Response, paragraph 670.
1511 Article 6(1)(c) Response, paragraph 685.

(1549) In the Article 6(1)(c) Response, the Parties contest the Commission's conclusion that the claimed cost synergies do not benefit consumers, however without raising arguments specific to **customers care processes**, **credit and collections**, **installations** and **CPE refurbishment**.

(1550) In the SO Reply, the Parties contested that cost savings related to customer care are not **verifiable**: [1512]

(a) With regard to **customer care processes**, first the Parties submit that the cost synergies are variable and vary in proportion to the number of individual subscribers. Second, the Parties claim that [Details on the wholesale agreements concluded by the Parties]. Third, the Parties claim that only the payment structure matters and not the way these KPIs are met.

(b) With regard to **credit and collections**, the Parties claim that they only relied on bad debt and that in RFI 18 and RFI 24 they have showed that [Parties' information on debt ratio].

(c) With regard to **installation** and **CPE refurbishment**, the Parties claim that the installation cost depend on the typology of installation and that [Details on MASMOVIL's cost structure]. Moreover, the unitary cost across installation would decrease by applying [Details of the Parties' commercial agreements] better conditions.

(1551) In the SO Reply, the Parties contested the Commission's view that customer care are not **merger-specific**. First, the Parties claim that the SO does not say what incentive other MNOs or from other Member States would have to conclude an agreement or joint venture with MásMóvil.[1513] Second, the Parties does not understand why the Commission focus on MásMóvil's incentive to share its best practices and not Orange's incentive (that you would none except for full integration).[1514]

9.6.3.1.2.3. General expenses, Personnel expenses and IT

(1552) In the Form CO, the Parties claim fixed cost synergies (and fixed integration costs) related to **general expenses, personnel expenses** and **IT**.[1515]

(a) With regard to **general expenses**, the Parties claim fixed cost savings (and fixed integration costs) related to leasing, supply and other general expenses. In that regard, [Parties' information on personnel expenses].

(b) With regard to **personnel expenses**, the Parties claim fixed cost savings (and fixed integration costs) related to [Parties' information on personnel expenses].

(c) With regard to **IT**, the Parties claim fixed cost savings related[Parties' information on personnel expenses]. The Parties also acknowledge fixed integration costs related to the consolidation of IT systems.

(1553) In the Article 6(1)(c) Response the Parties submit that the fixed cost savings related to general expenses, personnel expenses and IT are **verifiable**[1516] and **merger-specific**.[1517] They also assert that the claimed fixed cost savings would **benefit**

1512 SO Reply, Annex 8.1, paragraph 58.
1513 SO Reply, Annex 8.1, paragraph 61.
1514 SO Reply, Annex 8.1, paragraph 62.
1515 Form CO, Annex 9, Table 3.
1516 Article 6(1)(c) Response, paragraph 672 et seq.
1517 Article 6(1)(c) Response, paragraph 686 et seq.

consumers due to an increased ability to invest.[1518] No additional arguments were raised in the SO Reply.

9.6.3.2. Cost savings related to EDM

(1554) In the Form CO, in addition to the cost savings listed in the Synergies model (Annex 11) and assessed by [Advisor] (Annex 10), the Parties claim that the Transaction would result in the elimination of double margins ("EDM") in payments between Parties. The Parties claim that these payments correspond to variable cost savings. They claim that these payments amounted to EUR [...] in 2021 and at least EUR [...] in 2022[1519]. These cost savings correspond to [Details of the Parties' commercial agreements].[1520]

9.6.3.2.1. Verifiability

(1555) In the Form CO, the Parties explain that MásMóvil's overall net savings from EDM represent an equivalently large loss from OSP and therefore are not included in the Synergies Model (Annex 11). However, the Parties maintain that "*where payments are variable in nature or entail a variable component – as is the case of these payments –, in economic terms any removal of double margins has the same effect on pricing incentives as an effective variable cost saving, corresponding to the difference between: (i) the relevant wholesale price per unit of traffic that one Party pays to the other absent the JV; and (ii) the incremental cost of using the network to obtain the same access after the JV*."[1521]

(1556) The Parties claim that the Article 6(1)(c) Decision erroneously claims that the EDM cost savings are not verifiable.[1522] They provide an overview of the associated wholesale margins which will be internalised and eliminated following the Transaction and the associated wholesale prices charged by the access provider and the number of customers served under the wholesale contracts at issue in 2022.[1523] In addition, they add that even though the Article 6(1)(c) Decision is correct in noting that prices per line per month [Details on the wholesale agreements concluded by the Parties], it is not clear why this observation should undermine the verifiability of the cost savings associated with the EDM.[1524] Finally, they claim that the Article 6(1)(c) Decision to refer to the price charged by OSFI to OSP and ignores the fact that this price is an intra-company transfer price which as such does not correspond to the marginal cost of [Details on the Parties' business strategy], and is therefore not relevant for assessing EDM-related efficiencies and the related impact on the JV's post-Transaction pricing.[1525]

(1557) In the SO Reply, the Parties contest the Commission's decision that cost savings related to transmission EDM are not verifiable. The Parties claim that [Details of the Parties' commercial agreements].[1526]

1518 Article 6(1)(c) Response, paragraph 700 et seq.
1519 Form CO, Section 9, Table 143.
1520 Form CO, Annex 9, paragraph 53. According to the Parties, these payments exclude up-front payments and one-off penalties.
1521 Form CO, Annex 9, paragraph 55.
1522 Article 6(1)(c) Response, Section D. III. a).
1523 Article 6(1)(c) Response, paragraphs 710 – 711.
1524 Article 6(1)(c) Response, paragraph 713.
1525 Article 6(1)(c) Response, paragraph 715.
1526 SO Reply, paragraphs 463-464.

9.6.3.2.2. Merger-specificity

(1558) In the Form CO, regarding merger-specificity, the Parties submit that similar cost savings could not be achieved by other means. In particular, the Parties consider that [Details on the wholesale agreements concluded by the Parties].[1527]

(1559) In the Article 6(1)(c) Response, the Parties claim the Decision to incorrectly relying on generic and abstract claims to dismiss the merger-specificity of the EDM cost savings.[1528] They criticise the Article 6(1)(c) Decision for considering that the Parties acknowledge that new IRU contracts would be a valid alternative to [Details of the Parties' commercial agreements]. They claim that whether an IRU would be a valid alternative to a specific [Details of the Parties' commercial agreements] depends on specific circumstances of each agreement and the negotiations leading up to that agreement. The Parties add that, absent the Transaction, [Details on the wholesale agreements concluded by the Parties].[1529] They claim the Transaction is the best option for the Parties and their customers, because it will allow for the elimination of the entire margin on those customers. However, [Details on the wholesale agreements concluded by the Parties] would not be a realistic alternative to the Transaction, as the Parties would have no mutual interest to [Details on the wholesale agreements concluded by the Parties].[1530]

(1560) In the SO Reply, the Parties consider that the Commission's assessment of merger-specificity for Fixed EDM is based on wrong reasoning. They claim that [Details of the Parties' commercial agreements]. Moreover, the Parties claim that the merging firms have already entered into several agreements and "*identified which contractual arrangement would deliver the largest mutual benefits and that no alternative arrangement can be presumed to deliver higher benefits to both Parties in current market conditions – as otherwise they should have entered into this alternative arrangement in the first place*".[1531] The Parties reiterate that [Details of the Parties' commercial agreements] cannot be brought forward as they would need to renegotiate the terms of the agreement.[1532]

9.6.3.2.3. Benefit to consumers

(1561) In the Form CO, with regard to benefits to consumer, the Parties submit that EDM has been accepted in the Commission's decisional practice and that EDM would offset any potential impact of the Transaction on prices in the affected markets.[1533]

(1562) In the Article 6(1)(c) Response, the Parties claim that the Article 6(1)(c) Decision erroneously dismisses consumer benefits from EDM.[1534] The Parties claim that the Article 6(1)(c) Decision erred by relying on a timeframe of only two years. Furthermore, they add that the Decision disregards that EDM are at par with variable cost savings.[1535] In addition, they submit the Article 6(1)(c) Decision ignores the fact that most of the cost savings can be clearly attributed to an affected market and they submit that too much weight is put on the fact that certain cost savings relate to

1527 Form CO, Annex 9, paragraphs 60-61
1528 Article 6(1)(c) Response Section D. III. a)
1529 Article 6(1)(c) Response, paragraph 720.
1530 Article 6(1)(c) Response, paragraph 720.
1531 SO Reply paragraphs 460.
1532 SO Reply paragraphs 458-461.
1533 Form CO, Annex 9, paragraph 67-69.
1534 Article 6(1)(c) Response, Section D. III. b).
1535 Article 6(1)(c) Response, paragraphs 681 and 720.

multiple markets.[1536] They claim that the Article 6(1)(c) Decision ignores the point that the cost savings from EDM will benefit the majority of the Parties' customers, given that the vast majority of the Parties' retail activities are in the market for FMC bundles.[1537]

9.6.3.3. Incremental FTTH roll-out

(1563) In the Form CO, the Parties submit that the Transaction will result in an incremental roll-out of FTTH to an additional [0-5 million BUs] covering [0-5,000 municipalities] including:

(a) FTTH deployment. FTTH roll-out to [0-5 million BUs] in [500-1,000 municipalities] where none of the Parties is currently present. This would mostly concern municipalities with less than 5,000 inhabitants. The Parties explain that there is currently a limited choice of operators in these municipalities, with Telefónica being present in approximately [60-70]% of these municipalities and other operators being present in approximately [40-50]% of these municipalities.[1538]

(b) FTTH densification. FTTH roll-out to [0-5 million BUs] in municipalities where the Parties are present but would densify their current network. This would include (over and above the Parties' existing roll-out plans):

– [0-5 million] additional BUs in [500-1,000 municipalities] with less than [0-100,000 inhabitants] where the Parties currently rely primarily on access of Telefónica and other operators. The densification would reduce the Parties' dependency on Telefónica and other operators.[1539]

– [0-5 million] additional BUs in [0-500 municipalities] with more than [0-100,000 inhabitants] where no regulated wholesale access is available as there are three or more FTTH inhabitants are present. However, there would be areas or buildings in these municipalities where only one fibre network is available. [Parties' current FTTH network].[1540]

(1564) The Parties claim that the additional FTTH roll-out would bring [Details of the JV's business strategy for the roll-out of 0-5 million additional BUs].[1541]

(1565) As regards the timing, the Parties project to roll-out to [0-5 million additional BUs].[1542]

(1566) The Parties submit that they "*[Details of the JV's business plan strategy]*."[1543] Thus, the Transaction will result in an [Details of the JV's business strategy].[1544]

(1567) In the SO Reply, the Parties submit that the SO's assessment of the claimed network efficiencies is extremely limited and largely duplicated between sections on the incremental FTTH roll-out and 5G roll-out.[1545]

1536 Article 6(1)(c) Response, Section D. III. c) ii).
1537 Article 6(1)(c) Response, paragraph 729.
1538 Form CO, paragraph 2576.
1539 Form CO, paragraph 2580.
1540 Form CO, paragraph 2580.
1541 Form CO, paragraph 2595, 2598, Article 6(1)(c) Response, paragraph 731.
1542 Form CO, paragraphs 2572.
1543 Form CO, paragraph 2537.
1544 Form CO, paragraph 2537.
1545 SO Reply, paragraph 518.

9.6.3.3.1. Verifiability

(1568) In the Form CO, the Parties submit that the incremental roll-out plan has been developed in conjunction with [Advisor].[1546] The roll-out plan was also taken into account in the Synergy assessment by [Advisor][1547] (Annex 11) and has been presented to banks when the Parties sought financing of the Transaction. Therefore, the claim the FTTH plans would meet the Commission's standard of verifiability.[1548]

(1569) In the Article 6(1)(c) Response, the Parties claim that the Article 6(1)(c) Decision erroneously finds that the claimed FTTH roll-out is not verifiable for the following reasons.[1549]

(a) First, they claim that the Article 6(1)(c) Decision wrongly assumed that the Parties' joint and standalone FTTH roll-out plans are non-binding.[1550] In this respect, the Parties submit that the Article 6(1)(c) Decision ignores that the joint FTTH roll-out plans following the Transaction were approved [Details of the Parties' internal documents describing the Parties' strategies].[1551][Details of the Parties' internal documents describing the Parties' strategies].[1552] [Details of the Parties' internal documents describing the Parties' strategies].[1553]

(b) Second, they allege that the Article 6(1)(c) Decision misuses isolated statements from the [Advisor] report and draws the wrong conclusion as to the certainty of the Parties' FTTH deployment plan.[1554]

(c) Third, they claim that the Article 6(1)(c) Decision puts excessive weight on speculative statements from the market investigation which are factually wrong.[1555]

(1570) In the SO Reply, the Parties maintain that the Commission wrongly concluded that the claimed efficiencies related to incremental FTTH roll-out are not verifiable.

(a) First, the Parties maintain that board approvals are typically considered as relevant evidence for verifiability in the Commission's decisional practice. As regards the specific example for revisions of Orange's standalone network plan mentioned in the SO, the Parties consider that the investments [Details of the Parties' internal documents describing the Parties' strategies]. [Details of Orange's internal documents describing Orange's strategy and governance bodies].[1556]

(b) Second, the Parties maintain that the JV's FTTH roll-out plan had already been approved [Details of the Parties' internal documents describing the Parties' strategies]. In that regard, the Parties submit that both the JV Business Plan and the [Advisor] report would include the incremental FTTH roll-out plan. It would be irrelevant that the JV Business Plan is at a higher abstraction level than the detailed network planning undertaken at a later stage by technical

1546 Form CO, Annex 12, p 15-18.
1547 Form CO, Annex 10, p 17-19.
1548 Form CO, paragraph 2581-2582.
1549 Article 6(1)(c) Response, Section D. V. a).
1550 Article 6(1)(c) Response, Section D. V. a) i).
1551 Article 6(1)(c) Response, Section D. V. a) i) b).
1552 Article 6(1)(c) Response, paragraph 739.
1553 Article 6(1)(c) Response, Section D. V. a) i) b).
1554 Article 6(1)(c) Response, Section D. V. a) ii).
1555 Article 6(1)(c) Response, Section D. V. a) iii).
1556 SO Reply, paragraph 468-470.

teams. [Details of the Parties' internal documents describing the Parties' strategies and the timing of the approval].[1557]

(c) Third, the Parties consider that the SO would misinterpret quotes from the Parties' board minutes. [Details of MASMOVIL's internal documents describing MASMOVIL's strategy]. [Details of Orange's internal documents describing Orange's strategy]. [Details of the Parties' internal documents describing the Parties' strategies].[1558]

(d) Fourth, the Parties maintain that the finding that the CAPEX amount included in the JV Business Plan is lower than in the Article 6(1)(c) Response would not put into question the certainty of the incremental FTTH roll-out of the size and amount presented in the Form CO and the Article 6(1)(c) Response. [Details of the JV's business strategy regarding the financing of the roll-out].[1559]

(e) Fifth, the Parties maintain that their commitment to their incremental FTTH roll-out plans would not be undermined by the fact that detailed network deployment plans would be decided by technical and operational teams. [Details of the JV's business strategy on decision-making of the roll-out].[1560]

(f) Sixth, the Parties claim that the SO would ignore evidence by external experts. In that regard, the Parties maintain that the FTTH network investments were evaluated [Details of the Parties' internal documents describing the Parties' strategies].[1561]

(g) Seventh, the Parties claim that they would have a track record of delivering promised synergies. Since 2016, MásMóvil would have completed six acquisitions, all of which would have achieved the efficiency target.[1562] In particular, [Details on the synergies generated by MASMOVIL's past acquisitions of Pepephone, Yoigo, Llamaya, Lebara, and Euskaltel].[1563]

9.6.3.3.2. Merger-specificity

(1571) In the Form CO, the Parties submit that they have limited FTTH roll-out plans absent the Transaction:

(a) [Details of MASMOVIL's internal documents describing MASMOVIL's strategy to roll out additional FTTH footprint and to renew existing wholesale agreements].[1564] [Details of MASMOVIL's internal documents describing MASMOVIL's strategy to roll out additional FTTH footprint and to renew existing wholesale agreements].[1565]

1557 SO Reply, paragraph 472 et seq.
1558 SO Reply, paragraph 476 et seq.
1559 SO Reply, paragraph 480 et seq.
1560 SO Reply, paragraph 485-486.
1561 SO Reply, paragraphs 487-488.
1562 SO Reply, paragraphs 489 et seq.
1563 SO Reply, paragraphs 489 et seq. The Parties refer to a bank presentation by Orange and MásMóvil submitted as Annex RFI 9 Q23a.1 (slide 42). The presentation (slide 42) lists MásMóvil's acquisitions and the claimed synergies, based on MásMóvil's estimates ("*Source: Company*"). An update of this slide is submitted as Annex 8.2. of the SO Reply 8.2.
1564 Article 6(1)(c) Response, paragraph 229.
1565 Form CO, paragraphs 2561-2566.

(b) [Details of Orange's internal documents describing Orange's strategy to roll out additional FTTH footprint].[1566]

(c) In addition, the Parties do not consider it plausible, that they would be able to secure public funding for further deployments, since most municipalities are already served by at least one FTTH provider.[1567] In the response to RFI 11, [Details of the Parties' internal documents describing the Parties' strategies].[1568]

(1572) In the Article 6(1)(c) Response, the Parties claim that the Article 6(1)(c) Decision fails to consider the evidence for merger-specificity of the incremental FTTH roll-out.[1569]

(a) First, they claim the Article 6(1)(c) Decision fails to take account of the evidence provided for an increased incentive of the Parties to invest in FTTH post-Transaction.[1570] They claim to have proven that the Transaction will result in a higher incentive to invest in FTTH as a result of a significant reduction in the incremental costs. In addition, they add that the Transaction would lead to variable cost savings including the internalisation of the margin that would otherwise be included in [Details of the Parties' commercial agreements], resulting in the elimination of double margins and thus further improving the Parties incentive to invest. [1571]

(b) Second, they submit that the Article 6(1)(c) Decision wrongly considers that the incremental FTTH roll-out can be achieved by means other than the Transaction.[1572] In this context, the Parties add that the Article 6(1)(c) Decision is wrong to claim that FTTH roll-out by other operators would preserve the claimed efficiencies.[1573] The Parties relying on incremental FTTH roll-out by other operators does not preserve the claimed efficiencies and does not bring the same consumer benefits, as any roll-out by such third operator is uncertain and it would in any event result in one network less.[1574]

(c) In addition, they submit that the Article 6(1)(c) Decision is wrong to assume that the Parties can rely on FTTH co-deployment.[1575] They add that the Article 6(1)(c) Decision ignores evidence provided in the Form CO when referring to co-deployment as a potential alternative and claim the Article 6(1)(c) Decision to be wrong [Details of the Parties' commercial agreements].[1576]

(1573) In the SO Reply, the Parties claim that the SO wrongly assumes that the Parties would have more ability and incentive to invest in FTTH roll-out, absent the Transaction.[1577]

1566 Form CO, paragraphs 2567-2569.
1567 Form CO, paragraphs 2584-2588.
1568 Form CO, paragraph 2589.
1569 Article 6(1)(c) Response, Section D. V. b).
1570 Article 6(1)(c) Response, Section D. V. b) i).
1571 Article 6(1)(c) Response, paragraph 760 - 761.
1572 Article 6(1)(c) Response, Section D. V. b) ii).
1573 Article 6(1)(c) Response, Section D. V. b) ii) a).
1574 Article 6(1)(c) Response, paragraphs 764 – 765.
1575 Article 6(1)(c) Response, Section D. V. b) ii) b).
1576 Article 6(1)(c) Response, paragraph 770.
1577 SO Reply, paragraphs 492 et seq.

(a) First, the Parties claim that the SO ignores the business reality of the industry and "*there can be no question the Transaction will unlock a business case for the incremental FTTH network investments*"[1578]. The Parties claim it will unlock significant investment capital and free cash flow which would increase the ability and incentive to invest.[1579]

(b) Second, the Parties claim that the SO ignores the Parties' evidence as to why FTTH co-deployment is not a viable alternative to the Transaction. The Parties consider that relying on past arrangements will be flawed. They claim that [Details of the JV's business plan].[1580] [Details of the JV's business plan].[1581]

(c) Third, the Parties claim that the SO still misunderstands the nature of a financial lease agreement and mistakes it for an alternative roll-out plan. They submit that [Details of the JV's business plan].[1582]

9.6.3.3.3. Benefit to consumers

(1574) In the Form CO, Parties submit that the incremental rollout will result in substantial benefits in terms of speed and coverage. The rollout will benefit users *"that currently do not have access to FTTH"*[1583], or *"that currently mainly only have access to a sole fibre provider"*[1584], thus *"the additional network rollout by the Parties will also increase competition"*[1585] in the retail market[1586]. In addition, the Parties submit that the Transaction would result in an improvement in service quality, enable additional use cases for private and business customers, and benefit end customers through increased competition on the wholesale level. The Transaction would also accelerate the switch-off of legacy technology (copper and HFC) and deployment of fiber in line with the EU's "Digital Agenda for Europe" and the Spanish government's "Digital Infrastructures and Connectivity Plan".[1587]

(1575) In the Article 6(1)(c) Response, the Parties claim that the Article 6(1)(c) Decision downplays the significant consumer benefits resulting from incremental FTTH roll-out for the following reasons.[1588]

(a) First, they claim that the Decision dismisses the benefit of greater choice and in so doing contradicts its own theory of harm.[1589]

(b) Second, they add that the Article 6(1)(c) Decision downplays the significance of increased FTTH coverage and speed brought about by the Transaction.[1590] They claim that downplaying the significant benefits on FTTH roll-out from the Transaction has no substantial basis. In addition, they submit that they have proven the significant consumer benefits resulting from the incremental FTTH

[1578] SO Reply, paragraph 494.
[1579] SO Reply, paragraph 495.
[1580] SO Reply, paragraphs 496-498.
[1581] SO Reply, paragraph 501.
[1582] SO Reply, paragraph 501.
[1583] Form CO, paragraph 2595.
[1584] Form CO, paragraph 2596.
[1585] Form CO, paragraph 2596.
[1586] Form CO, paragraphs 2595 – 2596.
[1587] Form CO, paragraphs 2592-2598.
[1588] Article 6(1)(c) Response, Section D. V. c).
[1589] Article 6(1)(c) Response, Section D. V. c). i).
[1590] Article 6(1)(c) Response, Section D. V. c) ii).

roll-out enabled by the Transaction, in particular increased coverage, increased quality and increased choice for consumers.[1591]

(c) Third, they claim that by considering only the first two years following the Transaction in its assessment of the FTTH efficiencies, the Article 6(1)(c) Decision contradicts the Commission's precedents, its own assessment in this case and market reality in the telecommunications sector. They add that the bulk of incremental roll-out is projected to happen [Details of the JV's business plan], which is why they claim they have to be considered as timely in light of the Commission's precedents in the telecommunications sector.[1592]

(d) Fourth, they claim that the Article 6(1)(c) Decision does not acknowledge the quantification of incremental FTTH network investment.[1593] In this respect, they highlight that they have quantified the amount of incremental investment in FTTH by investment amount and the number of incremental BUs.[1594]

(1576) In the SO Reply, the Parties consider that the SO try to dismiss and downplays the significant consumer benefits by the incremental FTTH roll-out.[1595]

(a) First, the Parties claim that they are not required to quantify the effects of the claimed efficiencies. They claim that a description of pass-through rates is not required for efficiencies to be identified under the HMG and the Merger Regulation, because "*the incremental network investments result in new and improved products, services and technologies (FTTH) for consumers and a significant positive impact on consumers is clearly visible*".[1596] The Parties claim that the increases of bandwidth would be valuable for consumers in the Hedonic Pricing Analysis and the Article 6(1)c Response and show that "*the value of fixed-only and FMC tariffs with higher broadband speeds is higher than the value of tariffs with lower broadband speeds, which is consistent with placing a high valuation on bandwidth*".[1597]

(b) Second, the Parties acknowledge that the incremental FTTH roll-out will bring benefits only for two categories of consumers but claim that this proportion of consumers is not small, and occurred in underdeveloped areas.[1598]

(c) Third, the Parties claim that the SO would fail to engage on the benefits of greater choice resulting from the incremental FTTH roll-out. This would directly contradict the preliminary conclusion in the SO that "*the removal of MÁSMÓVIL as a network operator from the market is critical*".[1599]

(d) Fourth, the Parties claim that the benefits of the incremental FTTH roll-out will be nation-wide as the competition occurs at national level.[1600]

(e) Fifth, the Parties claim the incremental roll-out should not be discounted given that the network investments will be realized shortly after the Transaction, by 2026 at the latest.[1601]

1591 Article 6(1)(c) Response, paragraph 782.
1592 Article 6(1)(c) Response, paragraph 786 – 787.
1593 Article 6(1)(c) Response, Section D. V. c) iv).
1594 Article 6(1)(c) Response, paragraph 789.
1595 SO Reply, paragraphs 502 et seq.
1596 SO Reply, paragraph 507.
1597 SO Reply, paragraph 508.
1598 SO Reply, paragraphs 510-512.
1599 SO Reply, paragraph 513.
1600 SO Reply, paragraph 514.

(f) Sixth, the Parties claim that the consumer benefits of the incremental FTTH roll-out will materialise in the retail fixed internet and FMC bundles, and should be allocated in full in a similar way that the Commission consider the potential negative effects.[1602]

9.6.3.4. Incremental 5G roll-out

(1577) In the Form CO, the Parties submit that the Transaction will result in an incremental roll-out of 5G amounting to approximately business secret] 5G carriers by 2025, including approximately [...] in high-band 3.5 GHz. The deployment is expected to reach a 5G population coverage of [90-100]% by 2025 and a population coverage in 3.5 GHz of [50-70]% by the same year.[1603]

(1578) They further submit that the Transaction would lead to an incremental 5G network coverage of [0-10]percentage points ([10-20]pp for 3.5 GHz) compared to the standalone deployment by the Parties by 2025:[1604]

(a) [Details of Orange's 5G roll-out plans].[1605]

(b) [Details of MASMOVIL's 5G roll-out plans].[1606]

(c) Alongside the benefits on the national level, the incremental deployment will specifically improve 5G coverage in rural areas, where it will cover [70-90]% of the population, [Details of the JV's business plan].

(1579) The Parties plan to invest a total of approximately EUR [...] in 5G roll-out between 2023 and 2025. By contrast, absent the Transaction the Parties would only invest roughly EUR [...]. Therefore, the Transaction will lead to an increase infrastructure investments of about EUR [...].[1607]

(1580) In the SO Reply, the Parties submit that the SO's assessment of the claimed network efficiencies is extremely limited and largely duplicated between sections on the incremental FTTH roll-out and 5G roll-out.[1608]

9.6.3.4.1. Verifiability

(1581) In Article 6(1)(c) Response, the Parties claim that Article 6(1)(c) Decision to erroneously finds that the claimed efficiencies are not verifiable for the following reasons.[1609]

(a) First, it wrongly assumes that the Parties have not committed to their joint and standalone 5G roll-out plans.[1610] They claim that the joint and standalone 5G roll-out plans described in the Form CO are binding. [1611] In addition, the 5G roll-out plan following the Transaction has been approved by both Parties at board level.[1612]

1601 SO Reply, paragraph 515.
1602 SO Reply, paragraph 517.
1603 Form CO, paragraph 2599.
1604 Form CO, paragraphs 2613-2614.
1605 Form CO, paragraph 2608.
1606 Form CO, paragraph 2602.
1607 Form CO, paragraph 2618.
1608 SO Reply, paragraph 518.
1609 Article 6(1)(c) Response, Section D. V. a).
1610 Article 6(1)(c) Response, Section D. V. a) i).
1611 Article 6(1)(c) Response, paragraph 797.
1612 Article 6(1)(c) Response, paragraph 800.

(b) Second, the Article 6(1)(c) Decision puts too much weight on the fact that the Synergy Model, the [Advisor] Report and the [Advisor]Report do not mention incremental 5G roll-out.[1613] They claim that the approval of the investment dedicated to incremental 5G roll-out by both Parties at board level is sufficient evidence of the binding nature of the commitment by the Parties. [1614]

(c) Third, the Article 6(1)(c) Decision wrongly claims that the Parties' projections of mobile transmission cost savings do not take account of increased mobile traffic due to incremental fibre roll-out.[1615]

(d) Fourth, the Article 6(1)(c) Decision puts too much weight on 5G demand forecasts.[1616] They claim that the Article 6(1)(c) Decision draws attention to the Parties' demand forecasts, which are subject to considerable uncertainty, to support its finding that a certain level of uncertainty is also associated with the Parties' 5G roll-out plan following the Transaction. They claim however that the uncertainties considered by the Commission are irrelevant for the purposes of assessing MásMóvil's standalone 5G roll-out plan or the Parties' 5G joint roll-out plan following the Transaction.[1617]

(1582) In the SO Reply, the Parties submit that the assessment of verifiability is limited and that the Commission does not bring arguments specific to 5G roll-out but duplicates the arguments used for the FTTH roll-out.[1618]

9.6.3.4.2. Merger-specificity

(1583) In the Form CO, the Parties submit that the Transaction provides the ability and incentive to invest in additional 5G deployment. The cost savings brought by the Transaction, as well as inter-company adjustments, will increase the combined business' financial position, allowing for more CAPEX investments.[1619]

(1584) The Parties also consider that 5G investments are in large part fixed at the site level, meaning that the investments per specific site is largely independent of the traffic volume. The site consolidation and optimisation enabled by the Transaction will make it more economical to upgrade a site to 5G. Furthermore, [Details of the JV's business plan].[1620]

(1585) In the Article 6(1)(c) Response, the Parties claim that the Decision fails to consider the evidence for merger-specificity of the incremental 5G roll-out.[1621]

(a) First, they claim the Article 6(1)(c) Decision fails to take account of the evidence provided for an increased incentive of the Parties to invest in 5G post-Transaction.[1622] They consider that they have proven that the significant incremental 5G deployment enabled by the Transaction is merger specific because the Transaction will provide the ability and incentive to invest in this additional roll-out as the Transaction allows the Parties to overcome the financial constraints that today prevent either Party from making such an

1613 Article 6(1)(c) Response, Section D. V. a) ii).
1614 Article 6(1)(c) Response, paragraph 810.
1615 Article 6(1)(c) Response, Section D. V. a) iii).
1616 Article 6(1)(c) Response, Section D. V. a) iv).
1617 Article 6(1)(c) Response, paragraph 813 - 814
1618 SO Reply, paragraph 519.
1619 Form CO, paragraphs 2619-2625.
1620 Form CO, paragraphs 2626-2628.
1621 Article 6(1)(c) Response, Section D. V. b).
1622 Article 6(1)(c) Response, Section D. V. b) i).

incremental 5G deployment.[1623] In addition, they claim that the Article 6(1)(c) Decision's claim that the Parties have not provided evidence for their financial constraints and [Details on the Parties' financial situation], which according to the Parties ignores the evidence provided in the Form CO to this effect.[1624]

(b) Second, they submit that the Article 6(1)(c) Decision wrongly considers that the incremental 5G roll-out can be achieved by means other than the Transaction.[1625] In addition, they claim the Article 6(1)(c) Decision to be wrong to assume that Parties could rely on other forms of contractual co-operation.[1626] More precisely, the Parties submit that the Article 6(1)(c) Decision is wrong to assume that a RAN sharing agreement between the Parties is a real alternative to the Transaction, which is only possible between operators having similar network coverage and spectrum and thus investment incentives, which they claim is not the case for MásMóvil and OSP.[1627]

(1586) In the SO Reply, the Parties submit that the Commission does not bring arguments on ability to invest specific to 5G roll-out, assumes wrongly that the Transaction would lead to investment disincentives and ignores evidence that Parties have used all other available forms of cooperation.[1628]

(a) First, the Parties claim that the SO uses arguments from FTTH roll-out for 5G roll-out. They claim that [Details of the JV's business plan]. [1629] The Parties reiterate that a **[Details** of the JV's business plan] is not available for mobile network deployment.[1630]

(b) Second, the Parties contest that the Transaction would result in a reduced customer base because of upward pricing pressure, but that they would rather continue to compete fiercely for new consumers. Every operator would have an incentive to grow its business and expand its customer base. [Details of the Parties' internal documents describing the Parties' strategies].[1631]

(c) Third, the Parties reiterate that they have exhausted all form of available cooperation with each other and third parties, including [Details of the JV's business plan]. Telefónica's response to the Commission's market investigation would confirm that "*the Parties increased network investment as a result of the Transaction which will most likely bolster investments by other operators*". The Parties also reiterate that [Details of the JV's business plan] for mobile network deployment is not an alternative rollout plan.[1632]

9.6.3.4.3. Benefit to consumers

(1587) In the Form CO, the Parties submit that the increased network coverage and significant network improvements brought by the Transaction will enable higher

1623 Article 6(1)(c) Response, paragraph 821.
1624 Article 6(1)(c) Response, paragraph 823.
1625 Article 6(1)(c) Response, Section D. V. b) ii) and Section D. V. b) ii) a
1626 Article 6(1)(c) Response, Section D. V. b) ii) b).
1627 Article 6(1)(c) Response, paragraph 830, Section D. V. b) ii) c)., paragraph 832 and 830.
1628 SO Reply, paragraph 520 et seq.
1629 SO Reply, paragraph 522.
1630 Article 6(1)(c) Response, §833. SO Reply paragraph 523.
1631 Form CO, §§52 et seq. SO Reply, paragraphs 524-526.
1632 SO Reply, paragraphs 529-532.

connection speeds and allow for more advanced 5G use cases for both consumer and business customer preferences.[1633]

(1588) The incremental 5G coverage will increase available options in the wholesale market for operators, especially those focused on rural areas with no 5G access or with Telefónica as the only available option, and those operators that offer business connectivity services (e.g., logistic players). Lastly, the Parties submit that the Transaction will address the EU's and Spanish governments 5G roll-out agendas, and support environmental goals by reducing energy consumption.[1634]

(1589) In the Article 6(1)(c) Response, the Parties claim that the Article 6(1)(c) Decision is wrong to claim that the incremental 5G roll-out does not result in substantial and timely consumer benefits.[1635] The Parties submit the following:

(a) First, the Article 6(1)(c) Decision wrongly assumes that the incremental 5G roll-out [Details of the JV's business plan regarding the 5G network coverage].[1636] They claim that it is their clear intention to [Details of the JV's business plan regarding the 5G network coverage] with their incremental 5G roll-out. They add that because network coverage data is not publicly available in Spain that the Parties are not able to quantify [Details of the JV's business plan regarding the 5G network coverage] as a result of the Transaction.[1637][1638] Second, the Parties add that the Article 6(1)(c) Decision disregards quality improvements.[1639] More precisely, the Parties claim the Decision to ignore evidence provided on other quality dimensions, namely network coverage and network reliability.[1640]

(b) Second, the Article 6(1)(c) Decision disregards quality improvements.[1641] More precisely, the Parties allege that the Decision ignores evidence provided on other quality dimensions, namely network coverage and network reliability.[1642]

(c) Third, the Article 6(1)(c) Decision ignores the benefit of reduced energy consumption.[1643]

(d) Fourth, the Article 6(1)(c) Decision erroneously dismisses any benefits after year two post-Transaction.[1644]

(e) Fifth, the Article 6(1)(c) Decision ignores the quantification of incremental 5G network investment in terms of number of incremental sites and carriers

(1590) In the SO Reply, the Parties claim that the SO dismisses wrongly the consumer benefits of the incremental 5G roll-out, as it will only benefit to a small proportion of consumers.[1645]

1633 Form CO, paragraphs 2629-2635.
1634 Form CO, paragraphs 2639-2640.
1635 Article 6(1)(c) Response, Section D. V. c).
1636 Article 6(1)(c) Response, Section D. V. c) i).
1637 Article 6(1)(c) Response, paragraph 837.
1638 Article 6(1)(c) Response, paragraph 842.
1639 Article 6(1)(c) Response, Section D. V. c) iii).
1640 Article 6(1)(c) Response, paragraph 842.
1641 Article 6(1)(c) Response, Section D. V. c) iii).
1642 Article 6(1)(c) Response, paragraph 842.
1643 Article 6(1)(c) Response, Section D. V. c) iv).
1644 Article 6(1)(c) Response, Section D. V. c) v).
1645 SO Reply, paragraphs 533 et seq.

(a) First, the Parties claim that they provided quantitative evidence of the incremental 5G roll-out in terms of the investment amount and number of incremental sites and that in any event, they are not required to provide quantitative evidence regarding the investment amount and number of incremental mobile sites and carriers, and more particularly to the pass-through rates.[1646]

(b) Second, the Parties claim that the increase in population coverage of [0-10] percentage points should not be considered as small as it represents more than [...] people.[1647]

(c) Third, the Parties claim that customers of mobile networks are not static and therefore the increase in mobile coverage benefits all mobile customers whether the incremental roll-out take place in their place of residence or not.[1648]

(d) Fourth, the Parties claim that "*[Details of the JV's business plan]*"[1649]

(e) Fifth, the Parties claim that the incremental 5G roll-out will enable more advanced use cases for a larger part of the population. .[1650]

(f) Sixth, the Parties claim that all these benefits are nation-wide and that the effects should not be discounted as the investments will be realized shortly after the Transaction.[1651]

(g) Seventh, with regard to reduction of energy consumption, the Parties claim it is not required to provide quantitative description of pass-through rates for efficiencies. They claim that "*the Horizontal Merger Guidelines acknowledge the possibility of out-of-market efficiencies*".[1652]

(h) Eight, the Parties explain that they are not required to allocate the efficiencies to markets as consumer benefits of incremental 5G roll-out will materialize for retail mobile and multiple-play bundles. Therefore, they claim the benefits should be allocated fully to both markets.[1653]

9.6.4. The Commission's assessment

9.6.4.1. Application of the legal framework to this case

(1591) This section sets out a number of general points related to the application of the legal framework that are relevant for several of the Parties' efficiency claims. Section 9.6.4.1.1 concerns merger-specificity, Section 9.6.4.1.2 concerns timeliness, Section 9.6.4.1.3 the discounting of efficiency gains, Section 9.6.4.1.4 the market where efficiencies are realized and Section 9.6.4.1.5 the pass-on of fixed cost savings to consumers.

1646 SO Reply paragraphs 535-536.
1647 SO Reply, paragraph 538.
1648 SO Reply, paragraph 539.
1649 SO Reply, paragraph 540.
1650 SO Reply, paragraphs 541.
1651 SO Reply, paragraph 542-543.
1652 SO Reply, paragraphs 545-546.
1653 SO Reply, paragraphs 547-548.

9.6.4.1.1. Less anti-competitive alternatives to the Transaction

(1592) The Parties submit that the claimed cost efficiencies and FTTH/5G roll-out efficiencies are merger-specific, because alternative contractual arrangements would have to be mutually beneficial,[1654] and the Parties have exhausted all potential forms of cooperation with each other and with third parties.[1655]

(1593) As explained in the Horizontal Merger Guidelines, *"[efficiencies are merger-specific if] there are no less anti-competitive, realistic and attainable alternatives of a non-concentrative nature (e.g. a licensing agreement, or a cooperative joint venture) or of a concentrative nature (e.g. a concentrative joint venture, or a differently structured merger) than the notified merger which preserve the claimed efficiencies. The Commission considers only alternatives that are reasonably practical in the business situation faced by the merging parties having regard to established business practices in the industry concerned*" (emphasis added).[1656]

(1594) Less anti-competitive alternatives can be "*realistic and attainable*" even if they are not as profitable for the Parties as the Transaction. Otherwise, less anti-competitive alternatives would often be considered not attainable simply because the anti-competitive effects of a merger are highly profitable.

(1595) For a less anti-competitive alternative to be "*reasonably practical*", it is sufficient that it brings positive added value to the Parties, taking into account the business case faced by each of them and having regard to established business practices in the industry concerned.[1657] However, the Commission should not consider relevant how such value is distributed between the Parties, nor if the Parties could achieve higher values through the Transaction.[1658]

(1596) Less anti-competitive alternatives can be considered to be "*established business practices in the industry concerned*" if there are specific examples where the Parties or their competitors resorted to these alternatives. Having said that, alternatives of a concentrative or non-concentrative nature may also be reasonably practical *inter alia* if they are reasonably similar to established business practices and/or if they are used in related industries or markets. For example, agreements used to roll-out one type of network in one market might also be used to roll-out other types of networks in other markets. Likewise, agreements for the joint procurement of one type of product or service might also be used to procure other types of products or services.

9.6.4.1.2. Efficiencies have to be timely

(1597) In the Form CO, the Parties submitted efficiencies that would be realized within a timeframe of ten years (2023-2032). In the Article 6(1)(c) Decision, the Commission considered that this timeframe is too long and that a timeframe of two years can be considered to be timely.[1659] In the Article 6(1)(c) Response, the Parties contested this

[1654] Article 6(1)(c) Response, paragraph 676, 721; SO Reply, paragraph 460.
[1655] Article 6(1)(c) Response, paragraph 721; SO Reply, paragraph 460, 497, 527.
[1656] Horizontal Merger Guidelines, paragraph 85.
[1657] See Horizontal Merger Guidelines, paragraph 85, Commission decisions of 2 July 2014, M.7018 *Telefónica Deutschland/E-Plus*, paragraph 1125; of 1 September 2016, M.7758 *Hutchison 3G Italy/Wind/JV*, paragraphs 1573, 1593 et seq.
[1658] Commission decision of 2 July 2014, M.7018 *Telefónica Deutschland/E-Plus*, paragraph 1137.
[1659] Article 6(1)(c) Decision, paragraphs 528 et seq.

preliminary conclusion.[1660] In the SO, the Commission considered a timeframe of 3-4 years (2023-2026) to be timely.[1661]

(1598) In the SO Reply, the Parties argue that a longer a timeframe such as a ten-year timeframe is appropriate. They argue that investment decisions are typically made considering longer time frames and that the telecommunication sector is characterized by long-term agreements.[1662]

(1599) Upon further review of the Parties' arguments, the Commission concludes that for the purpose of the assessment of the Transaction, efficiencies realized within a timeframe of four years (2023-2026) can be considered to be timely.

(a) First, according to the Commission's practice, "*the assessment of the benefit to consumers from efficiencies and the competitive harm that might result from the merger should consider the same period of time. The harm arising from a merger might already impact consumers shortly after the merger. This implies that in order to be considered as a balancing factor the efficiencies must be timely*".[1663]

(b) Second, the Commission considers that the time-horizon of efficiencies must be assessed in the relation to the industry in which the merger occurs. In that regard, the Commission notes that a time horizon of 3-4 years has been accepted in previous telecom cases.[1664]

9.6.4.1.3. Efficiencies have to be discounted when aggregated or compared over time

(1600) The Commission considers that efficiency claims that, if accepted, would only arise with a delay of several years, must be appropriately discounted in assessing whether such claimed efficiencies can be sufficient to outweigh harm, in particular if such harm arises already in the short term.

(a) First, as explained in the Horizontal Merger Guidelines, "*the later the efficiencies are expected to materialise in the future, the less weight the Commission can assign to them*."[1665] With regard to the Parties' argument in the SO Reply that the assessment of timeliness ensures the appropriate alignment if pro-competitive and anti-competitive effects with no need for mathematical discounting,[1666] the Commission notes that independent of the assessment whether efficiencies are timely, efficiencies that materialise later in the future but still within the timeframe considered as timely, can be assigned less weight.

(b) Second, in *Hutchison 3G UK/Telefónica Ireland* the Commission computed the net present value of claimed efficiencies realized in the future.[1667] In the SO

[1660] Article 6(1)(c) Response, paragraph 691.

[1661] SO, paragraph 1062.

[1662] SO Reply, paragraph 417 et seq. Similar arguments were made in Vodafone's observations on the non-confidential SO summary dated 14 July 2023, Doc ID 4564.

[1663] Commission decision of 27 November 2018 in case M.8792 – *T-Mobile NL/Tele2 NL*, paragraph 892, also see Horizontal Merger Guidelines, paragraph 83.

[1664] See for example Commission decisions of 1 September 2016 in case M.7758 – *Hutchison 3G Italy/Wind/JV*, paragraphs 1391 and of 27 November 2018 in case M.8792 – *T-Mobile NL/Tele2 NL*, paragraph 892.

[1665] Horizontal Merger Guidelines, paragraph 83.

[1666] SO Reply, paragraph 433.

[1667] Commission decision of 28 May 2014, in case M.6992 – *Hutchison 3G UK/Telefónica Ireland*, paragraph 751, Table 35.

Reply, the Parties argue that a net present value computation was needed in that decision because efficiencies were calculated over an infinite horizon. However, the Parties' cost synergy model would consider a ten-year time frame rather than an infinite time horizon.[1668] The Parties' argument seems to imply that discounting would not be appropriate because their model does not consider an infinite time horizon. This argument is clearly unfounded: In Table 142 of the Form CO and subsequent submissions, the Parties' have presented claimed cost synergies aggregated over several years. Under these circumstances, it is business practice and economically and financially correct to discount future cost synergies. This applies not only in case of an infinite time horizon but also in case of a finite time horizon.

(c) The later efficiencies are expected to materialise in the future, the less weight the Commission can assign to them.[1669]

(d) Third, as explained in the Horizontal Merger Guidelines, the relevant benchmark in assessing efficiency claims is that consumers will not be worse off as a result of the merger.[1670] Therefore discounting should in principle be done from the perspective of consumers. In the SO Reply, the Parties argue that the WACC cannot be considered a reasonable approximation for the discount rate as for consumers an appropriate discount factor should reflect their time preferences.[1671] However, where consumers' discount factor is unknown, the Commission considers that the Parties' discount factor, that is the Parties' weighted average cost of capital (WACC), may be applied in the alternative.

(e) Fourth, in the Form CO (paragraph 2625), the Parties estimate a WACC of approximately [5-10]%. In internal documents, the Parties seem to consider a slightly lower WACC. In one document, the WACC is assumed to range from [5-10]% to [5-10]%.[1672] The Commission therefore considers on that basis that an interest rate of [5-10]% is appropriate to discount the Parties' claimed cost synergy savings. This would give rise to a discount factor of ca [90-100]% in 2024, [80-90]% in 2025 and [80-90]% in 2026.[1673] These discount factors would have to be applied to compute the discounted net cost savings generated by the Transaction. The Commission considers that it is for the Parties to provide the necessary data as regards discounted cost savings.

(1601) In a year-by-year comparison of efficiency induced cost savings and likely anti-competitive effects as conducted by the Commission on the other hand discounting of efficiencies and anti-competitive effects is not necessary. This is because it is not an assessment of a long time period where different efficiencies and likely anti-competitive effects would need to be discounted differently depending on their time of materialization.[1674]With regards to the Parties' argument in the SO Reply that in a comparison between price effects and efficiencies it would be incorrect to discount

---

1668 SO Reply, paragraph 433.

1669 Commission decision of 28 May 2014, in case M.6992 – *Hutchison 3G UK/ Telefónica Ireland*, paragraph 765.

1670 Horizontal Merger Guidelines, paragraph 79.

1671 SO Reply, paragraph 436.

1672 ORANGE-EC-RFI22-00472320, 190722_Project Kili_Citi FO Valuation Materials_vF.pdf, of 19 July 2022, Doc ID 2685-22546, p 21.

1673 The discount factor is equal to $d_t = 1/(1+i)^t$ for interest rate i and period t.

1674 See Annex A, Section 3.

only efficiencies,.[1675] the Commission notes that it is not necessary to discount efficiencies in a year-by-year comparison.

9.6.4.1.4. Efficiencies have to be realized in the relevant markets

(1602) As explained in the SO, the Commission considers that efficiencies can only be taken into account to the extent they are realized in those relevant markets where the merger leads to anti-competitive harm.

(1603) In the Article 6(1)(c) Response, the Parties claimed that the Article 6(1)(c) Decision puts too much weight on the fact that certain cost savings relate to multiple markets. In that regard, the Parties submit that the link between cost savings and relevant markets would be straightforward. Given that the vast majority of the Parties' activities are on FMC, the cost savings would benefit all of their customers. In the SO Reply the Parties maintain that efficiencies benefitting several markets should be considered in full for each of those markets.[1676] In any event, the missing attribution would not have any meaningful effect on the Commission's assessment.[1677]

(1604) These arguments are not valid:

(a) First, as explained in the Horizontal Merger Guidelines, "*the relevant benchmark in assessing efficiency claims is that consumers will not be worse off as a result of the merger. For that purpose, efficiencies should ... benefit consumers in those relevant markets where it is otherwise likely that competition concerns would occur*".[1678]

(b) Second, the Parties acknowledge that not all cost savings concern FMC. Indeed, the Parties indicated that: "*Savings arising in the mobile network area will benefit all customers purchasing mobile services from the Parties, either mobile-only or FMC. Savings in the fixed network area will benefit all customers purchasing fixed services from the Parties, either fixed-only or FMC. Savings arising in non-network business areas will benefit all customers, because most of these areas support the entirety of the business*." [1679] It is therefore necessary to allocate the claimed cost savings to the relevant markets. The Commission considers that this may be done on a pro-rata basis based on the Parties' number of subscribers.

(c) Third, the Commission recalls that it is for the Parties to provide all the relevant information needed to establish that the claimed efficiencies are likely to be realized.[1680] Therefore, as a matter of principle, it is for the Parties to allocate the claimed cost savings to the relevant markets. The Parties have failed to do so.

9.6.4.1.5. Efficiencies related to fixed cost savings are unlikely to benefit consumers

(1605) The Commission concludes that the claimed fixed cost savings do not benefit consumers. Therefore, it can be concluded that the claimed fixed cost savings fail the cumulative test of verifiability, merger-specificity and benefit to consumers.

1675 SO Reply, paragraph 432.
1676 SO Reply, paragraph 446.
1677 Article 6(1)(c) Response, paragraphs 695-696.
1678 Horizontal Merger Guidelines, paragraph 79.
1679 Article 6(1)(c) Response, paragraphs 695-696.
1680 Horizontal Merger Guidelines, paragraph 87.

(a) First, as explained in the Horizontal Merger Guidelines and the Commission's decisional practice in previous telecom cases, fixed cost savings are unlikely to be passed on to consumers in the form of lower prices, as they do not directly affect firm's pricing decisions.[1681]

(b) Second, the Parties have not established that the claimed fixed cost savings would increase their ability to invest in FTTH and 5G roll-out. Based on the Parties' internal documents, the Commission considers that the Parties are financially sound undertakings with good access to capital (both in the form of debt and equity). In that regard, the Commission also notes that Orange could reduce dividend pay-outs for the purpose of financing incremental investments.[1682] Even if the Parties were financially constrained, they could finance FTTH and 5G network deployment via a financial lease agreement, where the network functions as collateral. A financial lease network agreement is a financing scheme between a network operator and a financial entity. The network operator typically deploys and manages the infrastructure, while the finance entity assumes the network CAPEX and cedes the usage rights for an extended period (of 10 years or longer) to the network operator for a recurrent fee.[1683]

(c) *In the first place*, as explained by the Parties, [Details of Orange's financial lease agreement]. The Parties explain that [Details of Orange's financial lease agreement].[1684] Therefore, it is feasible to finance network deployments of the same order of magnitude as the claimed incremental investment in FTTH roll-out (EUR [...]) and 5G roll-out (EUR [...]) via [Details of the JV's business plan].

(d) *In the second place*, the Commission considers that the Parties' argument that "*[a] financial lease is only available if the underlying deployment plan is profitable*",[1685] confirms that the Parties have the ability to invest in FTTH and 5G roll-out if they have the incentive to invest.

(e) Third, the Parties have not established that the claimed fixed cost savings would increase their incentive to invest in FTTH and 5G roll-out. As highlighted in the Article 6(1)(c) Decision, the Parties' incentive to invest in FTTH and 5G rollout depends on the incremental revenues and incremental costs generated by such incremental investments and not on the overall level of profit.[1686]

(f) Fourth, as discussed in Sections 9.6.4.4. and 9.6.4.5. below, the Commission concludes that the incremental FTTH and 5G roll-out efficiencies fail the cumulative test of verifiability, merger-specificity and benefit to consumers.

(g) In any event, even if the roll-out efficiencies were to be accepted, and even if they were only possible as a result of the claimed fixed cost savings, accepting

1681 Horizontal Merger Guidelines, paragraph 80 and Commission decisions of 19 May 2015 in case M.7421 – *Orange/Jazztel*, paragraphs 732-750; of 27 November 2018 in case M.8792 – *T-Mobile NL/Tele 2 NL*, paragraphs 893-899.

1682 For Orange's dividend distribution history, see https://www.orange.com/en/finance/investors/share-and-consensus.

1683 Form CO, 2589.

1684 Form CO, paragraph 2568, FN 1505.

1685 Article 6(1)(c) Response, paragraph 773.

1686 Article 6(1)(c) Decision, paragraph 538.

such fixed cost savings as valid efficiency claims would result in double counting, because the benefit to consumers would already be accounted for by the claimed FTTH and 5G roll-out efficiencies.

(1606) Related to the assessment of pass-on, the SO Reply submits that it would be incorrect to net variable integration costs from variable cost savings, because "*all integration costs [...] are sunk once integration has been achieved*".[1687] Variable but sunk integration costs would be very different from variable cost savings in nature and impact on pricing incentives. Furthermore, even if sunk integration costs were relevant for pricing, they would have to be taken into account on an amortised basis and not in their entirety as and when they are incurred. Failing that, at least a distribution over time consistent with the timeframe of the investment would need to be made. These arguments are incorrect and either unfounded or no longer relevant.

(a) First, the SO Reply incorrectly reports the Parties' statements in the Response to RFI 11. In the Response to RFI 11 the Parties submitted that "*[Synergies estimate based on the Parties' cost structure].*"[1688]

(b) Second, in Annex B, which forms an integral part of this Decision, the Commission has assessed the Parties' cost synergy and integration costs claims on an item by item basis, based on the submissions made by the Parties and has found that the integration costs identified as variable in the Response to RFI 11 are largely not sunk. However, upon review of the Parties' arguments in the Response to the SO, the Commission has reclassified certain integration costs related to site consolidation as fixed. In that regard the Parties' arguments have been addressed and are no longer relevant. That said, the variable integration costs not found to be sunk are still sizeable and reduce the claimed cost synergies in the first years following the Transaction.

(c) Third, the argument that variable integration costs should not be taken into account when they accrue, but should be amortized or spread over time disregards the nature of the Parties' pricing incentives. In particular, direct variable costs affect the Parties' pricing incentives because they accrue on a per-subscriber basis and they have to be taken into account when they accrue.

9.6.4.2. Cost savings (excluding EDM)

(1607) The Parties' cost synergy claims in the Form CO are based on Compass Lexecon's calculations (Annex 9) building on the Parties' cost synergy model prepared in due diligence (Annex 11) and an evaluation of this cost synergy model conducted by [Advisor] (Annex 10). In course of this review, [Advisor] suggested modifications to certain cost items that were added in Annex 9 as ranges, whereas Annex 11 was not updated.

(1608) In Phase I, the Commission asked for clarifications regarding the Parties' cost synergy claims in RFI 18. In Phase II RFI 24, the Commission identified *84 cost synergy and integration cost items* and requested further explanations regarding their computation. The Parties were also requested to provide documentary evidence regarding the variable nature of these cost items. Finally, the Commission asked the Parties to update their cost synergy model (Annex 11) based on suggestions made by [Advisor] (Annex 10) and to provide best estimates where the Parties' cost synergy submission in the Form CO included different scenarios. **Annex B**, which forms an

1687 SO Reply, paragraph 425-426.

1688 Response to RFI 11, paragraph 4.2.

integral part of this Decision, reviews the Parties' Response to RFI 24 (and RFI 18) and the SO Reply.

(1609) In this section, the Commission reviews the Parties' cost synergy claims. The claims are grouped as network synergies related to the Parties' (i) fixed network, (ii) mobile network and (iii) transmission networks, and non-network synergies related to (i) sales and marketing, (ii) customer care, and (iii) general expenses, personnel expenses and IT.

(1610) The claimed cost synergies are described in detail in **Annex B**, which forms an integral part of this Decision.

9.6.4.2.1. Network synergies

9.6.4.2.1.1. Fixed network

(1611) With regard to the fixed network, the Parties claim variable and fixed cost savings (and integration costs) related to **FTTH deployment** and **FTTH consolidation**. The Commission made the following adjustments to the Parties cost synergy claims related to the Parties' fixed networks further discussed in **Annex B**, which forms an integral part of this Decision:[1689]

(a) **Timeliness**: As discussed in section 9.6.4.1.2., the Commission considers efficiencies accruing within a timeframe of four years (2023-2026) to be timely. Therefore, cost synergies (and integration costs) materialising in later years are not taken into account. Rather than creating net cost savings of EUR [...][1690] (2023-2032), the claimed synergies related to FTTH deployment and FTTH consolidation then generate (undiscounted) net cost increases[1691] of EUR [...][1692] (2023-2026).

(b) **FTTH deployment (wholesale cost savings):** As regards cost savings from migrating subscribers served via wholesale contracts to the newly deployed FTTH network, it turned out that these cost savings were also applied to subscribers the Parties currently do not have but expect to gain following the incremental FTTH roll-out.[1693] As these subscribers would not be gained absent the incremental FTTH roll-out, cost savings related to these subscribers are not merger-specific. Therefore, the Commission applied these cost savings only to the subscribers the Parties expect to migrate in densification areas. As indicated in Table 2 of Annex B, which forms an integral part of this Decision, and in the Form CO, this reduces the sum of the (undiscounted) net cost savings from EUR [...] to EUR [...] in the timeframe of 2023-2026.

(c) **FTTH deployment and consolidation (aperiodics & transmission):** These costs include the activation and deactivation of subscribers on [Details of MASMOVIL's commercial agreements] network. For subscribers the Parties do not yet have, these cost savings are not merger-specific. For their existing subscribers, these cost savings are also not merger-specific, because activation

1689 See Annex B, Section 2.1.2.1.
1690 See Annex B, Table 14.
1691 Note that in the Tables in Annex B, cost savings (that is, cost decreases) are represented by positive numbers while integration costs and dyssynergies (that is, cost increases) are represented by negative numbers. This is in line with the Form CO (Annex 9-11) and the Response to RFI 24 and facilitates trade-offs between cost savings and integration costs to compute net cost savings. Where net cost savings are negative, these are denoted as net cost increases in this Decision.
1692 See Annex B, Table 15.
1693 See Annex B, paragraph 11.

costs are already incurred (i.e., they are sunk) and because deactivation costs would result from the migration of these customers to the newly deployed network. Therefore, the Commission deletes cost savings related to the activation and deactivation of subscribers.[1694] As indicated in Table 2 of Annex B, which forms an integral part of this Decision, and in the Form CO, this reduces the sum of the (undiscounted) net cost savings from EUR [...] to EUR [...] in the timeframe 2023-2026.

(d) **Integration cost related to network deployment and migration costs**: These integration costs depend on the number of migrated customers or number of BUs and are variable. Therefore, they are not sunk and need to be net from the cost savings.

(e) **Adjustment to FTTH consolidation integration costs:** Due to the planned migration of subscribers from [Details on the wholesale agreements concluded by the Parties] to [Details on the wholesale agreements concluded by the Parties, the Parties expect to [Details on the wholesale agreements concluded by the Parties]. In the SO Reply, the Parties submit that [Details on the wholesale agreements concluded by the Parties] would relate to and should be distributed over the period [Details on the wholesale agreements concluded by the Parties]. This would reduce the (undiscounted) integration costs from FTTH consolidation within the relevant four year period from 2023 to 2026 from EUR [...] to EUR [...]. The Commission accepts this adjustment.

(1612) As regards the Parties' cost synergy claims related to the **fixed network**, the Commission concludes that only the variable cost savings related to **FTTH consolidation** meet the cumulative test of verifiability, merger-specificity and benefit to consumers for the reasons set out below. Over a four year period (2023-2026) these synergies generate (undiscounted) net cost increases of EUR [...].

9.6.4.2.1.1.1. Verifiability of claimed variable cost savings

(1613) The Commission concludes that variable cost savings related to **FTTH consolidation** are verifiable. The Parties have explained the computation of these cost savings in the response to RFI 24. The Parties also submitted the wholesale contracts forming the basis of these cost savings.

(1614) As regards cost synergies related to **FTTH deployment**, for the purpose of this Decision, the Commission made some adjustments with regard to the claimed wholesale cost savings and savings in aperiodic costs explained above. However, as explained in the Article 6(1)(c) Decision, there was also some uncertainty with regard to the Parties' marginal costs of serving customers on the newly deployed network and as regards the integration cost incremental from FTTH roll-out that were not fully explained by the Parties' Response to RFI 24 (see section 9.6.4.4.1. on the verifiability of incremental FTTH roll-out). In fact, the Commission cannot verify the exact amount that will be deployed and therefore the cost it will generate. As regards the integration costs from incremental FTTH roll-out, the Parties stated in the response to RFI 24 that these costs are 100% variable, whereas in the Article 6(1)(c) response, they suggest that these costs are average costs per customer that include fixed investments in O&M and transmission.[1695] Therefore, the Commission

[1694] See Annex B, paragraph 11.
[1695] Article 6(1)(c) Response, paragraph 638, Annex RFI 24, Q3 & Q4.

concludes that the claimed cost savings (and integration costs) are not verified. In any event, these cost savings are also not merger-specific (see section below)

9.6.4.2.1.1.2. Merger-specificity of claimed variable cost savings

(1615) As regards **FTTH deployment**, the Commission notes that the claimed variable cost savings are conditional on the incremental FTTH roll-out planned post-Transaction, as they relate to wholesale cost savings from the migration of customers to the newly deployed network. As the Commission considers that the incremental FTTH roll-out fails the cumulative test of verifiability, merger-specificity and benefit to consumers (see section 9.6.4.4.), it follows that the cost savings (and integration costs) related to FTTH deployment are also not merger-specific.[1696]

(1616) Upon review of the Parties' arguments in the Article 6(1)(c) Response and the Response to RFI 24, the Commission concludes that variable cost savings related to **FTTH consolidation** are merger-specific. The Commission considers that there are no less anti-competitive alternatives to the Transaction. In the Article 6(1)(c) Decision, the Commission considered that the conclusion of an [Details on the wholesale agreements concluded by the Parties] could be an alternative way to reduce wholesale costs and noted that [Details of MASMOVIL's business plans]. In the Article 6(1)(c) Response the Parties suggested that operators are committed to existing contractual arrangements and that the conclusion of new wholesale agreements would require the consent of both parties to this agreement. As discussed in the section on EDM (see section 9.6.4.3.), the Parties also claim that for MásMóvil, [Details of MASMOVIL's business plans]. In the SO Reply, the Parties claim that [Details of MASMOVIL's commercial agreements]. As this lies outside the timeframe of four years where efficiencies are considered timely, the Commission considers that [Details on the wholesale agreements concluded by the Parties] would not be a less anti-competitive alternative.[1697]

9.6.4.2.1.1.3. Benefit to consumers of claimed variable cost savings

(1617) Upon review of the Parties' arguments, the Commission concludes that, the claimed variable cost savings, including those related to **FTTH deployment** and **FTTH consolidation** – to the extent they are found to be verifiable and merger-specific – are likely to benefit consumers. In that regard, the Commission notes that wholesale cost savings and savings in aperiodic costs would accrue per customer. Therefore, they can be considered direct variable costs that would be directly passed on to consumers.

9.6.4.2.1.1.4. Fixed cost savings fail the cumulative test of verifiability, merger-specificity and benefit to consumers

(1618) Related to **FTTH consolidation**, the Parties claim fixed cost savings related to [Details on the wholesale agreements concluded by the Parties].

(1619) For the purpose of this Decision, the Commission considers that it can be left open whether these fixed cost savings (and fixed integration costs), including fixed cost savings related to **FTTH consolidation** are verifiable and merger-specific, because

[1696] As explained in Section 9.6.4.4., the Commission concludes that the incremental FTTH roll-out is not verifiable because the Parties' roll-out plans are not binding and the Transaction does not increase the Parties' ability or incentive to roll-out more FTTH. The incremental roll-out is not-merger specific, because there are less anticompetitive alternatives to the Transaction. Finally, the Commission concludes that the Parties overstate the benefit to consumers from the incremental roll-out.

[1697] SO Reply, Annex 8.1, paragraph 12.

fixed costs would in any event not be passed-on to consumers as explained in Section 9.6.4.1.5. In the first place, fixed cost savings do not affect the Parties pricing incentives and therefore are unlikely to be passed on in the form of lower prices. In the second place, and contrary to the Parties' arguments, the claimed fixed cost savings are unlikely to affect the Parties' incentives to invest in incremental network roll-out.

(1620) Therefore, it can be concluded that the claimed fixed costs synergies fail the cumulative test of verifiability, merger-specificity and benefit to consumers

9.6.4.2.1.1.5. Conclusion on cost synergies related to the fixed network

(1621) As regard the Parties' cost synergy claims related to the fixed network, the Commission concludes that only the variable cost savings related to FTTH consolidation meet the cumulative test of verifiability, merger-specificity and benefit to consumers. As indicated in Table 20 of Annex B, which forms an integral part of this Decision, these synergies generate (undiscounted) net variable cost increases of EUR [...] over a four year period (2023-2026).

9.6.4.2.1.2. Mobile network

(1622) With regard to the mobile network, the Parties claim variable and fixed cost savings (and integration costs) related to **O&M consolidation**, **consolidation of mobile sites** and the **sale of mobile spectrum**. The Commission made the following adjustments to the Parties' cost synergy claims related to the Parties' mobile networks further discussed in **Annex B**, which forms an integral part of this Decision:[1698]

(1) Timeliness: As discussed in the section 9.6.4.1.2., the Commission considers efficiencies accruing within a timeframe of four years (2023-2026) to be timely. Therefore, cost synergies (and integration costs) materialising in later years are not taken into account. This reduces the (undiscounted) net cost savings from EUR [...] (2023-2032) to EUR [...] (2023-2026).[1699]

(b) Variable **integration costs related to mobile site consolidation are reclassified as fixed costs**. While these costs were classified as variable in Annex RFI 11 Q4, the Parties consider in the SO Reply that these costs would be one-off CAPEX investments related to [Strategic information on traffic migration]. They maintain that these costs would be sunk and would not affect the Parties' short-term pricing incentives post-integration. In that regard, the Parties also submit the costs of network expansion would only to some extend depend on the number of customers "in the sense that the number of mobile sites would have to be increased once capacity is reached" and the relationship between O&M costs and traffic "is not strictly direct". The Commission notes that costs related to network operation and expansion are not sunk, as mobile sites can be resold (to recoup network deployment costs and with the effect of saving future energy and maintenance costs). However, the Commission concurs with the Parties' argument that these integration costs do not vary directly with the number of subscribers and therefore should not be considered incremental. Therefore, the Commission concludes that these integration costs should be considered to be fixed costs.

[1698] See Annex B, Section 2.2.2.
[1699] Annex B, Tables 14 and 15.

(1623) Upon review of the Parties' arguments, the Commission concludes that the claimed cost synergies related to the Parties' **mobile networks** fail the cumulative test of verifiability, merger-specificity and benefit to consumers.

9.6.4.2.1.2.1. Verifiability of claimed variable cost savings

(1624) As regards **O&M consolidation**, the Commission noted in the SO that the variable integration costs related to the consolidation of mobile sites can be considered to be verifiable. In the response to RFI 24, the Parties claim that [80-90]% of the costs from [Details of MASMOVIL's commercial agreements] are variable.[1700] [Details of MASMOVIL's commercial agreements].[1701] Furthermore, in the response to RFI 24 no documentary evidence was provided to support the claimed costs savings. Finally, in the SO Reply, the Parties re-evaluated the variable part of the cost saving at [20-30]%.[1702] The Commission cannot verify the exact size of the claimed variable cost savings. However, the verifiability of these cost savings can be left open, as they are not merger-specific (see section on merger-specificity below).

(1625) Upon review of the Parties' arguments in the Article 6(1)(c) Response, the response to RFI 24 and the SO Reply, the Commission concludes that the variable integration costs related to the **consolidation of mobile sites** can be considered to be verifiable.

(a) First, the Parties have explained the computation of these variable integration costs in the response to RFI 24.[1703] These integration costs account for an indicative increase in the average data consumption per customer on [Strategic information on traffic migration].[1704]

(b) Second, the Parties have an incentive to consolidate their mobile sites in areas where their networks overlap to generate fixed cost savings. The variable integration costs follow directly from this consolidation.

9.6.4.2.1.2.2. Merger-specificity of claimed variable cost savings

(1626) As regards **O&M consolidation**, the Commission considered in the SO that the Parties did not establish why MásMóvil would not be able to switch to an O&M contract similar to Orange's contract, [Details of Orange's commercial agreements].[1705] The Commission considers that this conclusion is still valid and rejects the merger-specificity of variable cost savings from O&M consolidation.

(1) The Parties consider that MásMóvil [Details on the wholesale agreements concluded by MASMOVIL]. However, [Details of Orange's commercial agreements]. Additionally, the Parties argue in the SO Reply that it "*is highly speculative whether MÁSMÓVIL would obtain contractual conditions similar to OSP" and that "profitability must be inherent in the assessment of whether given alternative is "realistic"*".[1706] In that regard, the Commission notes that the less anti-competitive alternatives can be "*realistic and attainable*" even if they are not as profitable for the Parties as the Transaction, see section 9.6.4.1.1. above. The Parties also explained that the underlying cost of

[1700] Annex RFI 24, Q3-Q4, Item 19.
[1701] MASMOVIL's [O&M contract] [Details of MASMOVIL's commercial agreements] was submitted as Annex RFI 18 Q12.042.
[1702] SO Reply, Annex 8.1, paragraph 26. RFI 38 Response, sheet "Conservative variable savings", col O.
[1703] See Response to RFI 24, paragraph 29.3 and Annex B.
[1704] Article 6(1)(c) Response, paragraph 652.
[1705] Article 6(1)(c) Decision, paragraph 505.
[1706] SO Reply, Annex 8.1, paragraph 32.

the O&M services depends on[Details of the Parties' commercial agreements].[1707] Therefore, the claimed variable cost savings could also be generated in a standalone scenario by moving to an O&M contract [Details of the Parties' commercial agreements].

(1627) As noted in the SO , the Commission considers that the variable integration costs related to the **consolidation of mobile sites** are merger-specific. In particular, as submitted by the Parties, although [Details on MASMOVIL's business strategy], it will have an incentive to do so following the Transaction.[1708] The variable integration costs follow directly from this mobile site consolidation.

9.6.4.2.1.2.3. Benefit to consumers of claimed variable cost savings

(1628) Upon review of the Parties' arguments, the Commission concludes as regards **O&M consolidation** that, as noted by the Commission in SO, the variable nature of the claimed variable cost savings from [Details of MASMOVIL's commercial agreements] was uncertain (see section on verifiability above). In any event, as the cost savings from O&M consolidation are not considered to be merger-specific, the benefit to consumers from these claimed cost savings can be left open.

(1629) As regards variable integration costs from the consolidation of mobile sites, the Parties explain in the response to RFI 24 that integration costs related to [Strategic information on traffic migration] should be considered to be variable, as these costs would depend on the size of [Strategic information on traffic migration] and would therefore be incremental.[1709] In the SO Reply, the Parties have explained it represents one-off CAPEX and OPEX that are sunk and do not affect pricing incentives.[1710] The Commission therefore concludes that these integration costs are not variable.

9.6.4.2.1.2.4. Fixed cost savings fail the cumulative test of verifiability, merger-specificity and benefit to consumers

(1630) Upon review of the Parties' arguments, the Commission concludes that it can be left open whether these fix cost savings are verifiable and merger-specific, because they would in any event not be passed-on to consumers as explained in Section 9.6.4.1.5. In the first place, fixed cost savings do not affect the Parties pricing incentives and therefore are unlikely to be passed on in the form of lower prices. In the second place, and contrary to the Parties' arguments, the claimed fixed cost savings are unlikely to affect the Parties' incentives to invest in incremental network roll-out. .

(1631) Therefore, it can be concluded that the claimed fixed cost synergies (and fixed integration costs) fail the cumulative test of verifiability, merger-specificity and benefit to consumers.

9.6.4.2.1.2.5. Conclusion on cost synergies related to the mobile network

(1632) The Commission concludes that all other claimed cost synergies related to the Parties' mobile networks fail the cumulative test of verifiability, merger-specificity and benefit to consumers.

[1707] Response to RFI 11, Q6a and Annex 9, paragraphs 20-24.
[1708] Form CO, Annex 9, Table 3.
[1709] Annex RFI 24, Q3&Q4, Items 20-34 and Response to RFI 11 Q4.
[1710] SO Reply, Annex 8.1, paragraph 27-28.

9.6.4.2.1.3. Transmission

(1633) The Commission made the following adjustments to the Parties cost synergy claims related to the Parties' transmission networks, as further discussed in **Annex B**, which forms an integral part of this Decision:[1711]

(a) **Timeliness:** As discussed in section 9.6.4.1.2., the Commission considers efficiencies accruing within a timeframe of four years (2023-2026) to be timely. Therefore, cost synergies (and integration costs) materialising in later years are not taken into account. This reduces the (undiscounted) net cost savings from EUR [...] (2023-2032) to EUR [...] (2023-2026).[1712]

(b) **Adjustments related to the transmission network.** Upon review of Parties' arguments, the Commission does not make any adjustments related to the size of the cost synergies.

(1634) Upon review of the Parties' arguments, the Commission concludes that the claimed cost synergies related to the Parties' **transmission networks** fail the cumulative test of verifiability, merger-specificity and benefit to consumers.

9.6.4.2.1.3.1. Verifiability of claimed variable cost savings

(1635) Upon further review of the Parties' arguments, the Commission considers that the Parties have not verified the variable nature of cost savings related to **mobile backhaul**, as mobile backhaul costs do not vary directly with the number of subscribers:

(a) <u>First</u>, operators in retail telecom markets compete for individual subscribers. Therefore, operators' pricing decisions are driven by contribution margins. Contribution margins are based on direct variable costs that vary directly with the number of individual subscribers (as opposed to bigger increments of subscribers).[1713]

(b) <u>Second</u>, as acknowledged by the Parties with regard to MásMóvil's leased lines, [Details on MASMOVIL's cost structure]., "*[Details of MASMOVIL's commercial agreements]*." [1714]

(c) <u>Third</u>, the Parties acknowledge that [Details on the wholesale agreements concluded by the Parties].[1715] [Details on the wholesale agreements concluded by the Parties]. Even if costs related to mobile backhaul were accepted as variable, only volumes [Details on the wholesale agreements concluded by the Parties] could be accepted as variable. In the SO Reply, the Parties submit that MásMóvil estimates that [30-40]% of their [Details on the wholesale agreements concluded by the Parties], or EUR [...], correspond to [Details on the wholesale agreements concluded by the Parties].[1716].The Commission notes that the argument confirms a sizeable amount of MásMóvil's payments related to mobile backhaul is [Details on the wholesale agreements concluded by the Parties]. Additionally, the Commission notes that the share of payments related to [Details on the wholesale agreements concluded by the Parties] is based on

1711 See Annex B, Section 2.3.2.
1712 See Annex B, Tables 15 and 16.
1713 See for example Commission decision of 27 November 2018 in case M.8792 – *T-Mobile NL/Tele2 NL*, paragraph 810 and Annex A, paragraphs 129 et seq.
1714 Response to RFI 24, paragraph 36.3.
1715 Response to RFI 24, paragraph 36.3.
1716 SO Reply, Annex 8.1, paragraph 39.

MásMóvil's internal estimates and that the Parties did not provide additional evidence for this claim.[1717]

(d) Fourth, as acknowledged by the Parties, MásMóvil's mobile backhaul costs include [Details of MASMOVIL's commercial agreements].[1718] Even if costs related mobile and were accepted as variable, [Details of MASMOVIL's commercial agreements]. However, the size of these [Details on the wholesale agreements concluded by the Parties] is unclear.

(1636) Therefore, the Parties have not verified their claim[1719] that these cost savings are 100% variable. In any event, even if these cost savings were accepted as verifiable, this would not change the Commission's assessment as they are also not merger-specific (see section 9.6.4.2.1.3.2.).

(1637) As regards **fixed backhaul** and **backbone**, upon review of the Parties' arguments that left open the variable nature of the cost savings, the Commission concludes that these costs are not variable. In any event, even if these cost savings were accepted as verifiable, this would not change the Commission's assessment as they are also not merger-specific (see section 9.6.4.2.1.3.2.).

9.6.4.2.1.3.2. Merger-specificity of claimed variable cost savings

(1638) As explained in the Horizontal Merger Guidelines, *"[efficiencies are merger-specific if] there are no less anti-competitive, realistic and attainable alternatives of a non-concentrative nature (e.g. a licensing agreement, or a cooperative joint venture) or of a concentrative nature (e.g. a concentrative joint venture, or a differently structured merger) than the notified merger which preserve the claimed efficiencies. ... The Commission considers only alternatives that are reasonably practical in the business situation faced by the merging parties having regard to established business practices in the industry concerned*" (emphasis added).[1720]

(1639) The Commission considers that variable cost savings related to mobile backhaul, fixed backhaul and the backbone are not merger-specific:

(a) First, the Parties consider that MásMóvil's leased lines are priced based [Details of MASMOVIL's commercial agreements]and therefore constitute variable costs (which the Commission rejects, see section 9.6.4.2.1.3.1.), whereas Orange's leased lines are based [Details of Orange's commercial agreements], and therefore constitute fixed costs. In that regard, the Commission considers that dark fibre and capacity agreements are also available to MásMóvil. Therefore, there exist less anti-competitive alternatives to the Transaction to generate the claimed variable cost savings.

(b) Second, concerning the Parties' argument that less anti-competitive agreements would be less profitable and that "*profitability must be inherent in the assessment of whether any alternatives are "realistic"*"[1721], the Commission

1717 In Annex RFI 24 Q3 & Q4, the Parties provided excerpts from [Details on the wholesale agreements concluded by the Parties]. However, these excerpts did not include [Details on the wholesale agreements concluded by the Parties] mentioned in the response to RFI 24, paragraph 36.3.. In the SO Reply, Annex 8.1 (paragraph 39) the Parties submit that MasMóvil estimates that [30-40]% of their [Details on the wholesale agreements concluded by the Parties] correspond to [Details on the wholesale agreements concluded by the Parties] but do not submit any additional evidence in this regard.

1718 Response to RFI 11 Q7a.

1719 See Annex RFI 24, Q3 & Q4.

1720 Horizontal Merger Guidelines, paragraph 85.

1721 SO Reply, Annex 8.1, paragraphs 43.

considers that less anti-competitive alternatives can be "*realistic and attainable*" even if they are not as profitable for the Parties as the Transaction, see section 9.6.4.1.1. above. Otherwise, less anti-competitive alternatives would often be considered not attainable simply because the anti-competitive effects of a merger are highly profitable. Moreover, the Commission does not consider relevant how the value generated by the less-anticompetitive alternative is distributed between the Parties, nor if the Parties could have achieved higher values through the Transaction.[1722]

9.6.4.2.1.3.3. Benefit to consumers of claimed variable cost savings

(1640) Upon review of the Parties' arguments, and for the reasons set out above (in the section on verifiability), the Commission considers that the claimed cost savings related to **mobile backhaul, fixed backhaul** and the **backbone** are not variable, as they do not vary directly with the number of subscribers. Therefore, the Commission concludes that it is unlikely that these cost savings are passed on to consumers. In any event, even if these cost savings were accepted as variable, they would also be rejected as not being merger specific (see section 9.6.4.2.1.3.2.).

9.6.4.2.1.3.4. Fixed cost savings fail the cumulative test of verifiability, merger-specificity and benefit to consumers

(1641) Upon review of Parties' arguments, the Commission considers that it can be left open whether these fixed cost savings related to **fixed backhaul** and the **backbone** are verifiable and merger-specific, because they would in any event not be passed-on to consumers as explained in Section 9.6.4.1.5. In the first place, fixed cost savings do not affect the Parties pricing incentives and therefore are unlikely to be passed on in the form of lower prices. In the second place, and contrary to the Parties' arguments, the claimed fixed cost savings are unlikely to affect the Parties' incentives to invest in incremental network roll-out.

(1642) Therefore, it can be concluded that the claimed fixed cost synergies (and fixed integration costs) fail the cumulative test of verifiability, merger-specificity and benefit to consumers.

9.6.4.2.1.3.5. Conclusion on cost synergies related to transmissions

(1643) The Commission concludes that the claimed cost synergies related to the Parties' **transmission networks** fail the cumulative test of verifiability, merger-specificity and benefit to consumers.

9.6.4.2.2. Non-network synergies

9.6.4.2.2.1. Sales and Marketing

(1644) The Commission made the following adjustments to the Parties cost synergy claims related to sales and marketing further discussed in **Annex B**, which forms an integral part of this Decision:[1723]

(a) **Timeliness:** As discussed in the section above, the Commission considers efficiencies accruing within a timeframe of four years (2023-2026) to be timely. Therefore, cost synergies (and integration costs) materialising in later

1722 Commission decision of 2 July 2014, M.7018 – *Telefónica Deutschland/E-Plus*, paragraph 1137.

1723 See Annex B, Section 3.1.2.

years are not taken into account. This reduces the claimed net cost savings from EUR [...] to [...] (2023-2032) to EUR [...] to [...] (2023-2026).[1724]

(b) **Adjustments on sales and distribution:** the Parties considered that [Details on the Parties' business strategy]. [Advisor] proposed to increase this to [...]. In RFI 24, the Commission asked the Parties to indicate which scenario they consider to be most likely. However, in the response to RFI 24, the Parties retained both scenarios, without indicating which scenario they consider to be most likely. The Commission therefore retains [Advisor]'s scenario where [5-15]% of the stores will be closed as the most likely scenario, increasing the cost synergies to EUR [...] and increase the integration cost to EUR [...].[1725] Upon review of the Parties' arguments, the Commission concludes that the claimed cost synergies related to sales and distribution fail the cumulative test of verifiability, merger-specificity and benefit to consumers.

9.6.4.2.2.1.1. Verifiability of claimed variable cost savings

(1645) With regard to **customer CAPEX** and **commissions** upon review of the Parties' arguments, the Commission concludes that these cost savings cannot be considered to be variable, as they do not concern reductions of variable costs, but reductions of cross-churn between the Parties. Therefore, they should be considered to be fixed cost reductions that are unlikely to benefit consumers. [1726]

(1646) With regard to **equipment (handsets and CPE)**, upon review of the Parties' arguments, the Commission concludes that the claimed variable cost savings related to **equipment (handsets and CPE)** are not verifiable, for the following reasons, and in any event, even if these cost savings were accepted as variable, they would not be merger-specific (see section on merger-specificity below):

(a) First, the Commission found that by stating the value or volume shares of the top 20 handsets - which both are below [50-60]%[1727] - the Parties had not demonstrated that their approach to computing cost savings related to handsets on the basis of an "*[a]nalysis with TOP20 handsets*" was representative.[1728]

(b) Second, the Commission agrees with [Advisor] questioning the plausibility of the claimed cost savings and notes that "*the merger process is unlikely to have a significant impact on [Orange]'s handset prices, given their high bargaining power with suppliers is unlikely to be boosted further by [MásMóvil]*".[1729] Regarding the Parties' argument that the driver of the synergy is not increasing buyer power but [Details of the Parties' synergy assessment], the Commission notes that this is a semantic argument and that [Advisor] notes the merger is unlikely to impact handset prices. [1730]

(c) Third, regarding Orange's better contractual conditions with CPE providers, the Commission considers that [Advisor]'s observation in which the Transaction is unlikely to improve the bargaining power of Orange for handsets, applies to CPE as well.

1724 See Annex B, Tables 15 and 16. These figures take into account adjustments proposed by Analysys Mason, described in the paragraphs below.

1725 Annex B, Table 10.

1726 Commission decision of 1 September 2016 in case M.7758 – *H3G Italy/Wind/JV*, paragraph 1399.

1727 Article 6(1)(c) Response, paragraph 667.

1728 Form CO, Annex 11, sheet "Other Synergies", rows 162.

1729 Form CO, Annex 10, p 35.

1730 SO Reply, Annex 8.1, paragraphs 50.

(d) Fourth, the computation of CPE efficiencies depends on forecasted gross adds.[1731] This projection is speculative, as the projected cost savings do not rely on "future demand projections".[1732] With regard to the Parties' argument in the SO Reply that "*it is not clear why demand projections would be less speculative than gross add forecasts*"[1733], the Commission notes that the Parties have not provided the underlying data or methodology of the gross add forecasts provided by the Parties advisors.

9.6.4.2.2.1.2. Merger-specificity of claimed variable cost savings

(1647) As regards **customer CAPEX** and **commissions**, the Commission concludes that these cost savings are not merger-specific. As explained in section 9.6.4.2.2.1.1., cost savings related to cross-churn between the Parties do not represent variable cost savings, as they do not reduce the variable cost of acquiring a new customer but the volume acquired customers. Therefore, they should be considered to be fixed cost reductions that do not benefit consumers.[1734] With regard to the Parties' argument that these cost savings would be merger-specific, because no other agreements short of full integration would allow to eliminate these costs,[1735] the Commission notes that cost reductions, which merely result from anti-competitive reductions in output, cannot be considered as efficiencies benefiting consumers.[1736] This anti-competitive effect from the elimination of competition between the Parties is considered in the Commission's assessment of horizontal non-coordinated effects above.[1737]

(1648) As regard the procurement of **equipment (handsets and CPE)**, upon review of the Parties' arguments, the Commission concludes that the claimed variable cost savings are not merger-specific:

(a) First, as explained by the Parties, [Details of Orange's commercial agreements].[1738] This demonstrates that there are "*less anti-competitive, realistic and attainable alternatives*" to the Transaction.

(b) Second, with regard to the argument that Orange would have no incentive to enter into any kind of purchasing agreement with much smaller operators such as MásMóvil, the Commission notes that MásMóvil would not necessarily have to conclude a joint purchasing agreement with Orange, but could also conclude it with other operators, including MNOs in other member states. With regard to the Parties' arguments in the SO Reply that other MNOs would not have an incentive to conclude a joint purchasing agreement with MásMóvil,[1739] the Commission notes that joint purchasing agreements exist in the telecoms industry and that it is for the Parties to demonstrate that such an agreement would not be realistically attainable by MásMóvil. Moreover, the Commission does not consider relevant how the value generated by the less-anticompetitive

[1731] Form CO, Annex 11, sheet "Other Synergies", rows 148-153.
[1732] Reply to RFI 18, paragraph 14.1.
[1733] SO Reply, Annex 8.1, paragraph 50.
[1734] Commission decision of 1 September 2016 in case M.7758 – *H3G Italy/Wind/JV*, paragraph 1399.
[1735] SO Reply, Annex 8.1, paragraph 51.
[1736] Horizontal Merger Guidelines, paragraph 80, Commission decision of 1 September 2016 in case M.7758 – *H3G Italy/Wind/JV*, paragraph 1399.
[1737] See Section 9.4.3 above.
[1738] Article 6(1)(c) Response, paragraph 685.
[1739] SO Reply, Annex 8.1, paragraph 53.

alternative is distributed between the Parties, nor if the Parties could have achieved higher values through the Transaction.[1740]

(c) Third, with regard to the Parties' argument that there is no incentive for Orange to conclude such an agreement absent the Transaction, the Commission notes that this does not imply that MásMóvil does not have such an incentive either. In that regard, the Commission also notes that less anti-competitive alternatives can be "*realistic and attainable*" even if they are not as profitable for the merging parties as the merger at issue. Otherwise, less anti-competitive alternatives would often be considered not to be attainable simply because the anti-competitive effects of a merger are highly profitable. Moreover, as outlined above, the Commission does not consider relevant how the value generated by the less-anticompetitive alternative is distributed between the Parties, nor if the Parties could have achieved higher values through the Transaction.[1741]

9.6.4.2.2.1.3. Benefit to consumers of claimed variable cost savings

(1649) As regards **customer CAPEX** and **commissions**, upon review of the Parties' arguments, the Commission concludes that these cost savings cannot be considered to be variable, as they do not concern reductions of variable costs, but reductions cross-churn between the Parties (see section 9.6.4.2.2.1.1.).[1742] Therefore, these cost savings cannot be considered to benefit consumers.

(1650) As regards the procurement of **equipment (handsets and CPE)**, the Commission notes that these costs were accepted as variable in the computation of contribution margins (Annex A, Section 3.1.2). Therefore these cost savings would have to be accepted to benefit consumers to the extent they are found to be verifiable. However, the Commission considers that it can be left open to what extent the claimed cost savings benefit consumers, because in any event they are not merger-specific (see section 9.6.4.2.2.1.2.).

9.6.4.2.2.1.4. Fixed cost savings fail the cumulative test of verifiability, merger-specificity and benefit to consumers

(1651) Upon review of the Parties' arguments, the Commission considers that it can be left open whether these fix cost savings related to **marketing**, **sales and distribution** are verifiable and merger-specific, because they would in any event not be passed-on to consumers as explained in Section 9.6.4.1.5. In the first place, fixed cost savings do not affect the Parties pricing incentives and therefore are unlikely to be passed on in the form of lower prices. In the second place, and contrary to the Parties' arguments, the claimed fixed cost savings are unlikely to affect the Parties' incentives to invest in incremental network roll-out.

(1652) Therefore, it can be concluded that the claimed fixed cost synergies (and fixed integration costs) fail the cumulative test of verifiability, merger-specificity and benefit to consumers.

1740 Commission decision of 2 July 2014, M.7018 – *Telefónica Deutschland/E-Plus*, paragraph 1137.

1741 Commission decision of 2 July 2014, M.7018 – *Telefónica Deutschland/E-Plus*, paragraph 1137.

1742 Commission decision of 1 September 2016 in case M.7758 – *H3G Italy/Wind/JV*, paragraph 1399.

9.6.4.2.2.1.5. Conclusion on cost synergies related to sales and marketing

(1653) The Commission concludes that the claimed cost synergies related to **sales and marketing** fail the cumulative test of verifiability, merger-specificity and benefit to consumers.

9.6.4.2.2.2. Customer Care

(1654) The Commission made the following adjustments to the Parties cost synergy claims related to **customer care** further discussed in **Annex B**, which forms an integral part of this Decision:[1743]

(a) **Timeliness**: As discussed in section 9.6.4.1.2., the Commission considers efficiencies accruing within a timeframe of four years (2023-2026) to be timely. Therefore, cost synergies (and integration costs) materialising in later years are not taken into account. This reduces the claimed net cost savings from EUR [...] to [...] (2023-2032) to EUR [...] to [...] (2023-2026).[1744]

(b) **Adjustments on customer processes**: The Parties claimed a certain amount of OSP's call centres personnel cost, and [Advisor] find that the Parties overestimated the amount by including its own call centres, leading to an overestimation of [5-10]% of the synergy. The Commission therefore retains the amount of synergy estimated by [Advisor]. Second, the Parties estimated that [30-40]% [Details of the JV's business plan] and [Advisor] proposed a second scenario of [40-50]%. In RFI 24, the Commission asked the Parties to indicate which scenario they consider to be most likely. In the response to RFI 24, the Parties considered [Advisor]'s calculations reasonable and adjusted the number of Orange's call centres accordingly, but left the percentage of achievable [Details of the JV's business plan] open. The Commission therefore retains the Scenario proposed by [Advisor], as the most likely scenario. This amounts to claimed cost savings of EUR [...].[1745]

(1655) Upon review of the Parties' arguments, the Commission concludes that the claimed cost synergies related to **customer care** fail the cumulative test of verifiability, merger-specificity and benefit to consumers.

9.6.4.2.2.2.1. Verifiability of claimed variable cost savings

(1656) As regards claimed cost savings related to **customer care processes**, upon review of the Parties' arguments, the Commission concludes that these cost savings are not verifiable, because the variable nature of these cost savings is not verified.[1746]

(a) <u>First</u>, as mentioned in the section above, the Commission considers that operators in retail telecom markets compete for individual subscribers. Therefore, operators' pricing decisions are driven by contribution margins (based on direct variable costs) that vary directly with the number of individual subscribers (as opposed to bigger increments of subscribers).[1747] Therefore, the Parties would need to show that cost savings related to customer care processes vary directly with the number of subscribers.

1743 See Annex B, Section 3.2.2.

1744 See Annex B, Tables 15 and 16. These figures take into account adjustments proposed by **[Advisor]**, described in the paragraphs below.

1745 See Annex B, Table 12.

1746 See Annex A, paragraph 22.

1747 See for example Commission decision of 27 November 2018 in case M.8792 – *T-Mobile NL/Tele2 NL*, paragraph 810 and Annex A, paragraphs 129 et seq.

(b) Second, the Parties provided contracts with call centre providers to demonstrate that [Details on the wholesale agreements concluded by the Parties]. However, upon review of these contracts the Commission considers that they do not establish that [Details on the wholesale agreements concluded by the Parties]. The Parties did not provide data that would prove that these contracts are variable, however as discussed in Annex A, which forms an integral part of this Decision, these contracts foresee [Details on the wholesale agreements concluded by the Parties].[1748]

(1657) As regards cost savings related to claimed cost savings related to **credit and collections**, upon review of the Parties' arguments, the Commission concludes that these cost savings are not verifiable, because their size and likelihood remain uncertain. As highlighted by [Advisor]. "*[Details of the JV's business plans]*". In the SO Reply the Parties argue that they showed that OSP's bad debt ratio is more favourable than MásMóvil's.[1749] In that regard the Commission agrees with [Advisor] that "*[Details of the JV's business plans]"*.[1750] As regards the Parties' argument in the SO Reply, that [Advisor] already adjusted the claimed synergy downwards,[1751] the Commission notes that the size of [Advisor]'s adjustments in that regard were not motivated by case specific facts or with reference to previous cases[1752] In any event, even if these costs were accepted to be verifiable, they would still not be considered merger-specific (see section on merger-specificity below).

(1658) Upon further review of the Parties' arguments, the Commission concludes that the claimed variable cost savings related to **installations** and **CPE refurbishment** may be considered to be direct variable costs. However, the Commission concludes that these cost savings remain unverifiable, because their size and likelihood remain uncertain.

(a) First, as noted in the SO,[1753] MásMóvil [Details on MASMOVIL's cost structure].[1754] In the SO Reply, the Parties submit that the installation costs would depend on the typology of the installation (e.g., exterior, interior, new poles, reused poles, etc.). [Details on MASMOVIL's cost structure]. Furthermore, as explained the synergy consists in decreasing the unitary cost across all installation types by applying the more favourable conditions from [Details of Orange's commercial agreements].[1755] However, as is clear from Section 3.2.1.3 of Annex B, which forms an integral part of this Decision, the claimed cost savings related to installations have been computed as the difference between the unitary installation costs of each of MásMóvil's brands and the average installation costs of [Details of Orange's commercial agreements], multiplied with each brands' gross adds. Moreover, the unitary costs of MásMóvil's brands were computed by dividing the total installation Capex per brand by their gross adds. [Details of Orange's commercial agreements].[1756] This indicates that the Parties calculation does *not* account for

1748 See Annex A, paragraph 22.
1749 SO Reply, Annex 8.1, paragraph 58.
1750 Form CO, Annex 10, p 39.
1751 SO Reply, Annex 8.1, paragraph 58.
1752 Form CO, Annex 10, p 39.
1753 SO, paragraph 1178.
1754 Response to RFI 24, paragraph 65.1 and Annex RFI 24 Q3 & Q4, Item IDs 69 to 75.
1755 SO Reply, Annex 8.1, paragraph 59.
1756 Response to RFI 24, paragraphs 65.1-65.2.

the differences in installation type that are responsible for [Details on MASMOVIL's cost structure].[1757]

(b) Second, with regard to CPE refurbishment, [Advisor] found "*[Details of Orange's commercial agreements]*",[1758] as further discussed in Section 3.2.1.4 of Annex B, which forms an integral part of this Decision.

(c) Third, even if these claimed cost savings would be accepted to be verifiable (*quod non*), they would still not be considered to be merger-specific (see section on merger-specificity below).

9.6.4.2.2.2.2. Merger-specificity of claimed variable cost savings

(1659) As explained in the Horizontal Merger Guidelines, *"[efficiencies are merger-specific if] there are no less anti-competitive, realistic and attainable alternatives of a non-concentrative nature (e.g. a licensing agreement, or a cooperative joint venture) or of a concentrative nature (e.g. a concentrative joint venture, or a differently structured merger) than the notified merger which preserve the claimed efficiencies. The Commission considers only alternatives that are reasonably practical in the business situation faced by the merging parties having regard to established business practices in the industry concerned*" (emphasis added).[1759]

(1660) Upon review of the Parties' arguments, the Commission concludes that the claimed variable cost savings related to **customers care processes**, **credit and collections**, **installations** and **CPE refurbishment**, are not merger-specific.

(a) First, as regards "*established business practices in the industry concerned*", the Commission notes that the claimed cost savings largely refer to [Details of Orange's commercial agreements]. In that regard, the Commission notes that MásMóvil would not necessarily have to conclude a customer care agreement or joint venture with Orange, but could also conclude agreements with other operators (including international operators) to gain scale and to implement the indicated best practices or to increase bargaining power. The Commission notes with regard to the Parties' arguments in the SO Reply that the Parties failed to demonstrate why other MNOs would not have an incentive to conclude a joint purchasing agreement with MásMóvil.[1760]

(b) Second, with regard to the Parties' argument that Orange would have no incentive or interest to share its best practices or internal processes with a competitor, the Commission notes that this does not imply that MásMóvil does not have such an incentive either. In that regard, the Commission notes that less anti-competitive alternatives can be "*realistic and attainable*" even if they are not as profitable for the merging parties as the merger at issue. Otherwise, less anti-competitive alternatives would often not be attainable simply because the anti-competitive effects of a merger are highly profitable. Moreover, the Commission does not consider relevant how the value generated by the less-anticompetitive alternative is distributed between the Parties, nor if the Parties could have achieved higher values through the Transaction.[1761].

1757 For example, [Details on MASMOVIL's cost structure], see Response to RFI 24, file "*M.10896 - Annex RFI 24 Q45.b - 20220422_Master_Synergies_Customer_Ops_v01.xlsx",* sheet "Installations", row 25.

1758 Form CO, Annex 10, page 41.

1759 Horizontal Merger Guidelines, paragraph 85.

1760 SO Reply, Annex 8.1, paragraph 61.

1761 Commission decision of 2 July 2014, M.7018 – *Telefónica Deutschland/E-Plus*, paragraph 1137.

9.6.4.2.2.2.3. Benefit to consumers of claimed variable cost savings

(1661) Upon review of the Parties' arguments, the Commission concludes that the claimed variable cost savings related to **customer care processes** are not direct variable costs that vary directly with the number of subscribers (see section on verifiability above) and therefore do not benefit consumers.

(1662) Upon further review of the Parties' arguments, the Commission concludes that the claimed variable cost savings related to **credit and collections**, **installations** and **CPE refurbishment** may be considered to be direct variable costs that vary directly with the number of subscribers. However, it can be left open whether these cost synergies benefit consumers, because in any event they are not verifiable (see section on verifiability above) and not merger-specific (see section on merger-specificity above).

9.6.4.2.2.2.4. Fixed cost savings fail the cumulative test of verifiability, merger-specificity and benefit to consumers

(1663) Upon review of the Parties' arguments, the Commission concludes that it can be left open whether these fixed integration costs related to **customer process** and **credit and collections** are verifiable and merger-specific, because they would in any event not be passed-on to consumers as explained in Section 9.6.4.1.5. In the first place, fixed cost savings do not affect the Parties pricing incentives and therefore are unlikely to be passed on in the form of lower prices. In the second place, and contrary to the Parties' arguments, the claimed fixed cost savings are unlikely to affect the Parties' incentives to invest in incremental network roll-out.

(1664) Therefore, it can be concluded that the claimed fixed integration costs fail the cumulative test of verifiability, merger-specificity and benefit to consumers.

9.6.4.2.2.2.5. Conclusion on cost synergies related to customer care

(1665) The Commission concludes that the claimed cost synergies related to **customer care** fail the cumulative test of verifiability, merger-specificity and benefit to consumers.

9.6.4.2.2.3. General expenses, Personnel expenses and IT

(1666) The Commission made the following adjustments to the Parties' cost synergy claims related to **general expenses**, **personnel expenses** and **IT** further discussed in **Annex B**, which forms an integral part of this Decision:[1762]

(a) **Timeliness:** As discussed in section 9.6.4.1.2., the Commission considers efficiencies accruing within a timeframe of four years (2023-2026) to be timely. Therefore, cost synergies (and integration costs) materialising in later years are not taken into account. Rather than net cost savings of EUR [...] to [...] (2023-2032) the claimed efficiencies then lead to net cost increases of EUR [...] to [...] (2023-2026).[1763]

(b) **Adjustments on personnel expenses**: The Parties claim that they could achieve [5-10]% of synergy regarding personnel expenses. [Advisor] proposed two scenarios in this regard, [5-10]% or [5-10]% of Orange's and MásMóvil's expenses. In RFI 24, the Commission asked the Parties to indicate which scenario they consider to be most likely. However, in the response to RFI 24,

[1762] See Annex B, Section 3.3.2.

[1763] See Annex B, Tables 15 and 16. These figures take into account adjustments proposed by [Advisor], described in the paragraphs below.

the Parties retained both scenarios, without indicating which scenario they consider to be most likely. The Commission therefore retain the [5-10]% scenario, increasing the cost synergies of [50-100 million] and increasing the integration cost of [0-50 million].[1764]

(1667) Upon review of the Parties' arguments, the Commission concludes that it can be left open whether these fixed costs related to **general expenses, personnel expenses** and **IT** savings are verifiable and merger-specific, because they would in any event not be passed-on to consumers as explained in Section 9.6.4.1.5. In the first place, fixed cost savings do not affect the Parties pricing incentives and therefore are unlikely to be passed on in the form of lower prices. In the second place, and contrary to the Parties' arguments, the claimed fixed cost savings are unlikely to affect the Parties' incentives to invest in incremental network roll-out.

(1668) The Commission therefore concludes that the claimed fixed cost synergies (and fixed integration costs) fail the cumulative test of verifiability, merger-specificity and benefit to consumers.

9.6.4.2.3. Conclusion on the Parties' cost synergy claims (excluding EDM)

(1669) Upon review of the Parties' arguments, the Commission concludes that only claimed variable cost savings related to FTTH consolidation and variable integration costs related to the consolidation of mobile sites can be considered to meet the cumulative test of verifiability, merger-specificity and benefit to consumers.

(1670) As regards the other claimed cost synergies related to the Parties' **network business** and **non-network business**, the Commission concludes that these claimed savings fail the cumulative test of verifiability, merger-specificity and benefit to consumers.

(1671) As indicated in **Table 51** below, the Commission considers that the claimed cost synergies amount to net variable cost increases of EUR [...] over a timeframe of four years (2023-2026).[1765] These net variable cost increases would generate an additional upward pricing pressure, over and above the pricing pressure from the elimination of competition between the Parties.[1766]

Table 51 Variable cost savings and variable integration costs (2023-2026) accepted by the Commission.

	Variable cost savings and variable integration costs (2023-2026) (EUR million)				
	2023	2024	2025	2026	total
variable gross savings	[...]	[...]	[...]	[...]	[...]
variable integration costs	[...]	[...]	[...]	[...]	[...]
variable net savings	[...]	[...]	[...]	[...]	[...]

Source: Response to RFI 24, SO Reply, Commission assessment.

1764 See Annex B, Table 14.

1765 As mentioned above, negative net cost savings amount to net cost increases, in line with the Parties' approach in the Form CO and the Response to RFI 24.

1766 Also see Article 6(1)(c) Decision, paragraph 528.

(1672) In any event, the Commission considers that even if the Parties claimed variable cost synergies (excluding EDM) were accepted in full, they would not be sufficient to outweigh the anti-competitive harm generated by the Transaction.

(1673)

9.6.4.3. Cost savings related to EDM

(1674) In the SO, the Commission preliminary concluded that only the claimed variable cost savings from EDM FTTH wholesale access services meet the cumulative test of verifiability, merger-specificity and benefit to consumers. As regards cost savings from EDM related to transmission network agreements the SO preliminary concluded that these fail the cumulative test of verifiability, merger specificity and benefits to consumers.

9.6.4.3.1. Verifiability

(1675) With regard to **FTTH wholesale access services**, the Commission considers that the claimed cost savings related to EDM are verifiable.

(a) First, as noted in Article 6(1)(c) Decision, the size of the claimed margins was missing in the Form CO. In the Article 6(1)(c) Response, the Parties submitted the number of subscribers affected by the claimed cost savings from EDM and the size of the eliminated margins.[1767] Therefore, the Parties have specified the size of the claimed cost savings from EDM.

(b) Second, the Parties have verified the size of the margins. As regards Orange, the FTTH wholesale margin considered in the Article 6(1)(c) Response (**[70-100]**% in 2022) is roughly in line with the wholesale margins submitted in the response to RFI 25 ([70-100]% in 2022).[1768] As regards MásMóvil, the wholesale margin considered in the Article 6(1)(c) Response ([70-100]% in 2022) is higher than the wholesale margin submitted in the response to RFI 25 ([70-100]% in 2022). However, [MASMOVIL's wholesale margins]. As the claimed EDM under this contract is only EUR [...], the Commission considers that it can be left open whether MásMóvil's margin would have to be adjusted.

(1676) With regard to [Details of the Parties' commercial agreements], the Commission considers that the claimed variable cost savings related to EDM are not verifiable, as they do not vary directly with the number of subscribers.[1769] Therefore, the size and the likelihood of the claimed cost savings can be left open.

(a) First, the Commission considers that operators in retail telecom markets compete for individual subscribers. Therefore, operators' pricing decisions are driven by contribution margins, that are based on direct variable costs. Direct variable costs vary directly with the number of individual subscribers (as opposed to bigger increments of subscribers).[1770] As acknowledged by the Parties with regard to MásMóvil's leased lines, [Details of the Parties' commercial agreements]." [1771]

[1767] Article 6(1)(c) Response, Table 23.
[1768] Annex RFI 25, Q4.1 (OSP).
[1769] Also see Section 9.6.4.2.1.3.1 on the verifiability of variable cost savings related to the Parties' transmission networks.
[1770] See for example Commission decision of 27 November 2018 in case M.8792 – *T-Mobile NL/Tele2 NL*, paragraph 810 and Annex A, paragraphs 129 et seq.
[1771] Response to RFI 24, paragraphs 36.3.

(b) Second, as regards the Parties' arguments in the SO Reply that [Details of the Parties' commercial agreements][1772], the Commission notes that the Parties do not provide evidence to back up their claim and the Commission concludes that these costs do not constitute direct variable costs as set out in the Annex A which forms an integral part of this Decision.[1773]

(c) Third, the Parties acknowledge that "*[Details of the Parties' commercial agreements]*".[1774] The Parties have not reported the extent of this [Details of the Parties' commercial agreements].[1775]

(d) Fourth, as acknowledged by the Parties, [Details of the Parties' commercial agreements].[1776] These costs do not vary with the number of subscribers.

(e) Fifth, the Commission considers that the same argument applies to the Parties [Details of the Parties' commercial agreements].

9.6.4.3.2. Merger-specificity

(1677) Upon further review of the Parties' arguments, the Commission considers that the claimed cost savings from EDM related to **FTTH wholesale access services** can be considered to be merger-specific for the reasons set out below.

(a) First, in *Orange/Jazztel*, the Commission considered that one possibility to reduce incremental costs would be to commit to pay a fixed wholesale fee that is determined for a period of several years in advance in return for a low variable wholesale fee. At the time, the Parties to that Transaction submitted that wholesale contracts with a high setup fee and low variable costs were very uncommon in Spain.[1777]

(b) Second, the statements in the *Orange/Jazztel* merger were made in relation to mobile wholesale contracts between Orange and Jazztel. Furthermore, it is possible that the relevant wholesale markets changed since the *Orange/Jazztel* decision. Indeed, Indefensible Right of Use (IRU) agreements are now common in Spain. In the Article 6(1)(c) Response, [Details of the Parties' commercial agreements].[1778] In that regard, the Parties emphasise that [Details of the Parties' commercial agreements].[1779] If this is to be accepted, the possibility to conclude an [Details of the Parties' commercial agreements]would be outside the timeframe of four years (2023-2026) where efficiencies are considered timely for the purpose of the Transaction.

(c) Third, as explained by the Parties, bitstream agreements involve a high monthly fee, whereas hybrid bitstream agreements involve an upfront fee and a lower monthly fee. Indefeasible Right of Use (IRU) agreements involve an even higher upfront fee and a very low monthly fee per line. For example, [Details of Orange's commercial agreements].[1780] In that regard, the Parties consider that highest cost savings could still be achieved by the Transaction,

1772 Response to the SO, paragraphs 463.
1773 See Annex A, Section 2.2.2.
1774 Response to RFI 24, paragraph 36.3.
1775 [Details on the wholesale agreements concluded by the Parties].
1776 Response to RFI 11 Q7a.
1777 Commission decision of 19 May 2021, M.7421 – *Orange/Jazztel*, paragraphs 741 to 743.
1778 Article 6(1)(c) Response, paragraphs 720 to 721.
1779 Article 6(1)(c) Response, paragraph 721 and SO Reply, paragraph 461.
1780 Form CO, Annex 9, paragraph 60.

because there the entire wholesale margin could be eliminated.[1781] The Parties also confirm that the [Details of the JV's business plans].[1782]

(1678) With regard to transmission network agreements, the Commission concludes it can be left open whether the claimed variable cost-savings related to EDM are merger-specific, because in any event, they are not verifiable and do not benefit consumers (see section on verifiability above and section on benefit to consumers below).

9.6.4.3.3. Benefit to consumers

(1679) With regard to **FTTH wholesale access services**, the Commission considers that the claimed cost savings related to EDM benefit consumers.

(a) First, as explained in the Horizontal Merger Guidelines, variable cost savings are more likely to be passed on to consumers.[1783] Accordingly, the Commission has accepted cost savings related to EDM in previous telecom cases where these cost savings were found to be verifiable and merger specific and expected passed on to consumers in a timely manner.[1784]

(b) Second, the Commission considers that the costs related to FTTH wholesale access services vary directly with the number of subscribers, based on the Article 6(1)(c) Response and the wholesale agreements submitted by the Parties.

(1680) With regard to **transmission network agreements**, the Commission considers that the claimed variable cost savings related to EDM do not benefit consumers, as they do not vary directly with subscribers (also see section 9.6.4.3.1.). Fixed cost savings are generally not passed on to consumers as explained in Section 9.6.4.1.5. In the first place, fixed cost savings do not affect the Parties pricing incentives and therefore are unlikely to be passed on in the form of lower prices. In the second place, and contrary to the Parties' arguments, the claimed fixed cost savings are unlikely to affect the Parties' incentives to invest in incremental network roll-out.

9.6.4.3.4. Conclusion on the Parties' cost synergy claims related to EDM

(1681) As regards the Parties' claimed variable cost synergy claims related to EDM (from wholesale access services), the Commission concludes that an amount of ca EUR [...] per year (based on 2022 revenues and margins) can be accepted as meeting the cumulative test of verifiability, merger-specificity and benefit to consumers, as indicated in **Table 52** below. This yearly amount can be accepted for a period of four years (2023-2026), subject to appropriate discounting.

(1682) In any event, even if the Parties' claimed variable cost synergies related to EDM were accepted in their entirety, the Commission concludes that they would not be sufficient to outweigh the significant anti-competitive effects, and notably the substantial likely price effects, generated by the Transaction in the relevant markets.

[1781] Article 6(1)(c) Response, paragraph 719.
[1782] Article 6(1)(c) Response, paragraph 715.
[1783] Horizontal Merger Guidelines, paragraph 80.
[1784] See Commission decisions of 19 May 2015 in case M.7421 – *Orange/Jazztel*, recitals 732-750; and of 27 November 2018 in case M.8792 – *T-Mobile NL/Tele 2 NL*, recital 893-899.

Table 52 The Parties' EDM claims (2022), with Commission adjustment.

Wholesale agreement	Duration	Territory owner	Revenue (MEUR)	Margin (%)	EDM (MEUR)
[...]					[...]
[...]	[...]	[...]	[...]	[...]	[...]
[...]	[...]	[...]	[...]	[...]	[...]
[...]	[...]	[...]	[...]	[...]	[...]
[...]	[...]	[...]	[...]	[...]	[...]
[...]	[...]	[...]	[...]	[...]	[...]
[...]					[...]
[...]	[...]	[...]	[...]	[...]	[...]
[...]	[...]	[...]	[...]	[...]	[...]
[...]					[...]
[...]					[...]

Source: Compass Lexecon analysis of the Parties' data, corrected by the Commission. MM refers to MásMóvil, OSP refers to Orange.

9.6.4.4. Incremental FTTH roll-out

(1683) The Commission concludes that the Parties' efficiency claims related to incremental FTTH roll-out fail the cumulative test of verifiability, merger-specificity and benefits to consumers, for the reasons set out below.

9.6.4.4.1. The claimed efficiencies are not verifiable

(1684) The Commission concludes that the Parties' efficiency claims related to incremental FTTH roll-out are not verifiable, in particular for the following reasons.

(a) [Details of the JV's business plans].

(b) With regard to the Parties' argument in the Form CO, that their roll-out plans have been developed in cooperation with [Advisor] and assessed by [Advisor], the Commission notes that [Advisor] found regarding FTTH densification that there is [Details of the JV's business plans]. As regards FTTH deployment, [Advisor] noted that there is [Details of the JV's business plans]."[1785] These statements do not support the conclusion that the Parties are committed to the claimed FTTH roll-out plan.

(c) The Commission also notes that in the Commission's Phase I market investigation, several market participants expressed doubt as to whether the merger would give the Parties' the incentive to invest in their network infrastructure, with one access seeker noting that "*it is unclear whether Orange and MásMóvil would invest more in their fixed and mobile networks post-*

[1785] Form CO, Annex 10, paragraph 19.

Transaction, as it will likely be highly leveraged and will have to comply with stringent debt covenants."[1786]

(d) In addition, the Commission questions the incentive to invest in incremental FTTH roll-out related to the Transaction. In that regard, the Commission noted that profits of incremental investments depend only on incremental revenues and incremental costs, and not the overall level of the Parties' profitability (also see section on merger-specificity below).

9.6.4.4.1.1. The incremental FTTH roll-out plans are not binding

(1685) In the Article 6(1)(c) Response, the Parties consider that they have [Details of the Parties' internal documents describing the Parties' strategies]", that "*the joint FTTH roll-out plan following the Transaction is covered by the JV Business Plan*" and by analogy "their standalone roll-out plans are likewise binding" for similar reasons.[1787] There are a number of elements contradicting these claims, as discussed below. In the SO Reply, the Parties submit that the SO would disregard clear evidence for verifiability provided by the Parties.[1788] These arguments are similarly unfounded, as also discussed below.

(a) First, the term "JV **Business Plan" is misleading, it does not outline the JV's combined FTTH and 5G roll-out plans,** [Details of the Parties' internal documents describing the Parties' strategies]. As explained by the Parties during pre-notification, "there is no such joint document [as a JV business plan outlining such roll-out]. During the Transaction negotiations, the Parties developed a high-level integrated financial business plan for the JV (the "JV Business Plan"), which took into account [Details of the Parties' internal documents describing the Parties' strategies]**.[1789] However, this document, referred to as the JV Business Plan "*for better reference, does not include details on*** *[Details of the Parties' internal documents describing the Parties' strategies] and will be presented together with Section 9 [of the Form CO]*"[1790] **The document referred to is in fact a short, high-level presentation with little to no detail on the extent of FTTH roll-out,** [Details of the Parties' internal documents describing the Parties' strategies].[1791] **The argument in the SO Reply, that it would be irrelevant that the "**JV Business Plan" "*is at a higher abstraction level than the detailed network planning undertaken at a later stage by the technical teams*",[1792] does not contradict the Commission's conclusion that the "JV Business Plan" did not contain detailed incremental FTTH roll-out plans.

(b) Second, and contrary to the Parties' claims, [Details of the approval of the JV's business plans by MASMOVIL's board].[1793] [Details of the approval of the JV's business plans by MASMOVIL's board][1794] [Details of the approval of the JV's business plans by MASMOVIL's board].

1786 Non-confidential minutes of a call with Finetwork of 2 February 2023, paragraph 25, Doc ID 2471.
1787 Article 6(1)(c) Response, paragraphs 737-739.
1788 Response to the SO, paragraphs 464 et seq.
1789 Response to RFI 1, question 75(c), paragraph 75.4.
1790 Response to RFI 1, question 75(c) and Annex RFI 1 Q75.
1791 See Annex RFI 1 Q75.
1792 SO Reply, paragraph 473.
1793 Response to RFI 4, Q 42.
1794 SO Reply, paragraph 473 et seq.

(c) Third, in any case, the Parties have not satisfactorily demonstrated that the consideration or approval by the board of directors of a high-level investment plan, such as the so-called JV Business Plan, in relation to FTTH or 5G roll-out, means that the detailed incremental roll-out efficiency claims set out in the Form CO in this case can be accepted as being binding and therefore verifiable. This is because the Parties themselves acknowledge, "*[Details of the JV's business plans]*."[1795] Contrary to the Parties' argument in the SO Reply, it is not "*irrelevant*" that the "JV Business Plan" *"[Details of the JV's business plans]*".[1796] These statements simply confirm that the Parties have not committed to detailed FTTH roll-out plans and that the benefits from increased FTTH roll-out are uncertain.

(d) And even the presentation of a roll-out plan in one board meeting will not prevent it from being revised in a later board meeting. By way of analogy, "[Details of Orange's internal documents describing Orange's standalone strategy for 5G roll-out]"[1797]. "[Details of Orange's internal documents describing Orange's standalone strategy for 5G roll-out]".[1798]

(e) [Details of Orange's internal documents describing Orange's standalone strategy for 5G roll-out].[1799]

(f) Fourth, [Details of the financing of the JV's business plans],[1800] [Details of the financing of the JV's business plans],[1801] [Details of the financing of the JV's business plans]. The argument in the SO Reply that "*[Details of the financing of the JV's business plans]*"[1802] is not backed up by supporting evidence and is contradicted by the incentive assessment outlined above.

(g) Fifth, the Parties' have already changed the budget allocated for their combined FTTH roll-out plan due to higher cost estimates, in order to stick to the number of households in their incremental FTTH roll-out efficiencies submission in the Form CO. [Details of the JV's business plans and internal documents].[1803] Rather than showing that the claimed roll-out plans in the Form CO are binding, these elements instead show how easily roll-out plans and associated CAPEX budgets can be changed at a later stage, even in the case of board approvals of prior plans. The argument in the SO Reply, that the increased budget allocation would be clear evidence that the Parties are determined to keep the envisaged roll-out in terms of volume is unfounded.[1804] As outlined above, these adjustments were made during the merger proceedings, when the verifiability of the Parties' efficiency claims was already under scrutiny.

1795 Form CO, footnote 1540.
1796 SO Reply, paragraph 473 and 485 et seq.
1797 Form CO, paragraph 2606.
1798 Response to RFI 4, Q20.
1799 Response to RFI 4, Q20.
1800 Article 6(1)(c) Response, paragraph 804.
1801 See Annex 6(1)(c) 5.7a Minutes of the meeting of the Board of Directors of Orange SA on 20 July 2022: « *La priorité est clairement le désendettement afin de permettre à la joint-venture d'être prête pour une éventuelle introduction en bourse deux ans après le closing* ».
1802 Reply to the SO, paragraph 479.
1803 Annex 6(1)(c) 5.6, Minutes of the meeting of [MASMOVIL's internal document].
1804 SO Reply, paragraph 480 et seq.

(h) Sixth, far from making a firm commitment, [Details of the JV's business plans and internal documents][1805] [Details of the JV's business plans and internal documents].[1806] [Details of the JV's business plans and internal documents]. In the SO Reply, the Parties point out that [Details of MASMOVIL's internal documents describing the approval of the JV's business plan].[1807] [Details of MASMOVIL's internal documents describing the approval of the JV's business plan]. Furthermore, [Details of the approval of the JV's business plans][1808] [Details of the approval of the JV's business plans][1809] [Details of the approval of the JV's business plans].[1810]

(i) Seventh, the SO Reply argues that the synergy assessment was also evaluated [JV's business plans]and that the incremental FTTH deployment was critically evaluated by [JV's business plans]. Moreover, the [Advisor] report and other analyses would have been completed prior and outside the merger control process and would constitute "*pre-merger external experts' studies on the type and size of efficiency gains*" under paragraph 88 of the HMG.[1811] These arguments are unfounded. In the first place, [Details of the JV's business plans].[1812] In the second place, [Advisor] itself confirmed that "*[Details of the JV's business plans]*",[1813] thereby confirming that the FTTH roll-out plans are subject to change. In the third place, as is evident from the Form CO, the Analysys Mason report has been prepared for the purpose of the Transaction at the request of the Parties and therefore cannot be regarded as a "*pre-merger*" study within the meaning of paragraph 88 of the HMG.[1814] Furthermore, in Annex B, which forms an integral part of this Decision, the Commission has reviewed the Parties' cost synergy model and the [Advisor] report and has shown that the [Advisor] report has often not confirmed the Parties' synergy estimates.

(j) Eighth, the SO Reply argues that the Parties can demonstrate a track record of delivering promised synergies, which would be relevant evidence to the assessment of efficiency claims according to the HMG.[1815] These arguments are unfounded. In the first place, while "*historical examples of efficiencies and consumer benefit*" can be relevant evidence for the assessment of efficiency claims, the HMG clarify that this is only one of many potentially relevant factors.[1816] The Commission's efficiency assessment is based on a wide body of consistent evidence, with individual elements not being decisive. In the second place, contrary to the claim in the SO Reply, the Parties have not demonstrated a track record of delivering promised synergies. With regard to MásMóvil, the Parties merely list claimed run-rate savings following past acquisitions without explaining the underlying methodology or data.[1817] The

1805 Annex 6(1)(c) 5.6, Minutes of the meeting of [MASMOVIL's internal document].
1806 Annex 6(1)(c) 5.8, page 3 : « [Details of Orange's internal documents describing Orange's strategy] ».
1807 SO Reply, paragraph 476.
1808 SO Reply, paragraph 478.
1809 See Annex RFI 1 Q75.
1810 Response to RFI 4, Q20.
1811 SO Reply, paragraph 487.
1812 Form CO, footnote 1540.
1813 Form CO, Annex 10, page 19.
1814 Form CO, paragraph 2546.
1815 SO Reply, paragraph 489 et seq.
1816 HMG, paragraph 88.
1817 SO Reply, paragraph 488 et seq, Form CO, Annex RFI 9 Q23a, SO Reply, Annex 8.2.

cost synergy claims with regard to past Orange transaction come without any reference.[1818] These cost synergy claims are therefore likely to suffer from the same methodological shortcomings documented in Section 9.6.4 above. It is also worth mentioning that the claimed synergies were prepared to obtain funding from banks for the Transaction and subsequently updated for the SO Reply.[1819] Therefore, it was clearly in the Parties' interest to present their track record in a positive light. In the third place, the Parties' examples do not concern (FTTH) network roll-out and do not claim, let alone demonstrate, consumer benefit, as required by paragraph 88 of the HMG.

(1686) On the basis of the above, the Commission's view is that the Parties' have not shown the efficiency claims based on incremental roll-out of FTTH networks are binding, and accordingly they have also not demonstrated that they are verifiable.

9.6.4.4.1.2. The Transaction does not increase the ability or incentive to roll-out FTTH

(1687) Upon review of the Parties' arguments, the Commission concludes that the Transaction does not change the Parties' ability or incentive to invest in incremental FTTH roll-out:

(a) First, the Commission considers that the Parties have the ability to invest absent the Transaction. In that regard, Commission considers that the Parties are financially sound undertakings with access to capital (both in the form of debt and equity). Furthermore, as discussed in Section 9.6.4.1.5, the Parties can also finance network deployment via financial lease agreements. Therefore, it is possible to finance FTTH deployment if such deployment is profitable.

(b) The SO Reply submits that the Commission's conclusion that "*the Parties are financially sound undertakings with access to capital*" has not be been backed up by any quantitative evidence and does not taken into account the argument that network investment decisions in the telecommunication industry would be based on overall profit considerations at the entity level and not at the group level.[1820] In particular, investment decisions within Orange would be based on [Details of Orange's strategy].[1821] The SO Reply also argues that the Transaction would unlock significant investment capital and free cash flow which would translate into an increased ability and incentive to invest.[1822] These arguments are unfounded. In the first place, as outlined in Section 9.6.2, it is for the Parties to demonstrate the claimed efficiencies. However, the Parties have not demonstrated, on the basis of evidence, that they would be unable to obtain funding for network roll-out. In the second place, the argument that investment decisions would be linked to overall financial performance concern the incentive to invest – discussed below – and not the ability to invest.

(c) Second, as regards the incentive to invest, the Commission recalls that the Parties maintained in the Form CO and the Response to RFI 25 that investment in FTTH roll-out accrues per BU, that is, per household. In the stand-alone scenario, connecting an additional BU to the network of Orange would allow Orange to migrate one of Orange's own subscribers connected via wholesale

---

1818 SO Reply, paragraph 491.
1819 Form CO, Annex RFI 9 Q23a, SO Reply, Annex 8.2.
1820 SO Reply, paragraphs 493 et seq.
1821 SO Reply, paragraph 493 and Art 6(1)(c) Response, paragraphs 758.
1822 SO Reply, paragraph 495.

access to Orange's newly deployed network or to gain an additional subscriber from a rival (e.g. [Details of the Parties' internal documents describing the Parties' strategies]). Similarly, connecting an additional BU to the network of MásMóvil would allow MásMóvil to migrate one of MásMóvil's own subscribers connected via wholesale access to MásMóvil's newly deployed network or to gain an additional subscriber from a rival (e.g. [Details of the Parties' internal documents describing the Parties' strategies]). In the merger scenario, the Parties' benefits from migrating their customers to their own network would be unchanged. Their benefit from gaining additional subscribers from third parties (e.g. [Details of the Parties' internal documents describing the Parties' strategies]) would be unchanged as well. However, the Parties would lose the benefit from gaining an additional subscriber from either [Details of the Parties' internal documents describing the Parties' strategies]. Therefore, the Transaction does not increase the Parties' incentive to invest in incremental FTTH roll-out and may actually reduce this incentive in areas where both Parties compete pre-Transaction.

(d) The SO Reply argues that "*the abstract argument that a loss of competition between the Parties would result in a lower incentive to invest in FTTH roll-out is flawed*" and claims that the Parties would need economies of scale to have the ability and incentive to invest more in FTTH.[1823] These arguments are unfounded. In the first place, the Commission's incentive assessment is not abstract, but assesses FTTH roll-out incentives at the BU level. The SO Reply fails to engage with this detailed assessment. In the second place, the argument that economies of scale would be needed to have an incentive to invest does not contradict the Commission's assessment but rather confirms it: a loss of competition between the Parties leads to higher prices and a lower number of subscribers, thereby reducing the Parties' incentive to invest in incremental FTTH roll-out.

9.6.4.4.1.3. Conclusion on the verifiability of the claimed incremental FTTH roll-out plans

(1688) Based on the above, the Commission maintains the conclusion that the Parties' 5G roll-out plans are not verifiable.

9.6.4.4.2. The claimed efficiencies are not merger-specific

(1689) The Commission concludes that he Parties' efficiency claims related to incremental **FTTH roll-out** are not merger-specific.

(a) First, it is for the Parties to show that there are no less anti-competitive alternatives to the Transaction. In that regard, the , the Commission considers that the Parties could rely on less anti-competitive alternatives such as FTTH roll-out by third parties, network co-deployment, and financial lease agreements.

(b) Second, incentive to invest in FTTH roll-out depends on the incremental revenues and incremental costs generated by such incremental investments and not the Parties' overall level of profit (see Section 9.6.4.4.1 above on verifiability).

1823 SO Reply, paragraph 495.

(1690) The Parties' arguments in the Article 6(1)c Response and the SO Reply related to the merger-specificity of incremental FTTH roll-out are unfounded.

(a) First, as regards the argument that the claimed efficiencies related to incremental FTTH roll-out cannot be achieved by less anti-competitive means,[1824] [Details of the Parties' internal documents describing the Parties' strategies] that there exist realistic and attainable less-anti-competitive alternatives to the Transaction.[1825] In that regard, the Commission notes that MásMóvil and Orange would not necessarily have to conclude an agreement with each other, but could also conclude agreements with other operators.

(b) Second, as regards the argument that such an investment would be not as attractive for either Party standalone or through another form of co-operation,[1826] less anti-competitive alternatives can be "*realistic and attainable*" even if they are not as profitable for the merging parties as the merger at issue. Otherwise, less anti-competitive alternatives would often not be attainable simply because the anti-competitive effects of a merger are highly profitable. Moreover, the Commission does not consider relevant how the value generated by the less-anticompetitive alternative is distributed between the Parties, nor if the Parties could have achieved higher values through the Transaction.[1827]

(c) Third, as regards the argument in the SO Reply, that the SO would wrongly claim that the Transaction would not increase the ability and incentive to invest in additional FTTH deployment, the Commission has explained in Section 9.6.4.4.1.2 above that the Transaction does not increase the ability and incentive to invest and might actually decrease the incentive to invest.

(d) Fourth, the SO Reply argues that the SO would have ignored the Parties' evidence why FTTH co-deployment is not a viable alternative to the Transaction. In that regard, the Parties reiterate that all alternative co-operation mechanisms would have been exhausted, that the SO failed to show that co-deployment would be viable, that if the same standard of proof was to be applied in all cases, not a single efficiency claim related to deployment could satisfy the merger-specificity test and that most of the incremental FTTH roll-out would be planned in [Details on the JV's roll-out plans], and therefore unsuited for co-deployment.[1828] These arguments are unfounded. In the first place, as explained in Section 9.6.4.4.1.2 above, the incentive to invest in incremental FTTH roll-out is not be increased by the transaction and might even decrease. In the second place, as explained in Section 9.6.2 above, it is for the Parties to demonstrate the claimed efficiencies. In the third place, efficiencies have to be assessed against the objective standard set out in Section 9.6.2 above. There is no guarantee that at least some deployment efficiencies would have to be accepted. In the fourth place, as regards the argument that network deployment would be planned mostly in [Details on the JV's roll-out plans] the Commission has already recalled in Section 9.6.4.4.1.1 that the detailed roll-out plans are decided by the Parties' technical and operations teams.

1824 Article 6(1)(c) Response, paragraph 762 et seq.
1825 Form CO, paragraph 422 et seq.
1826 Article 6(1)(c) Response, paragraph 763.
1827 Commission decision of 2 July 2014, M.7018 – *Telefónica Deutschland/E-Plus*, paragraph 1137.
1828 SO Reply, paragraph 496 et seq.

(e) Fifth, the SO Reply also submits that the SO would misunderstand the nature of a financial lease agreement and would mistake it for an alternative roll-out plan.[1829] These arguments are unfounded. As explained in the SO, the Parties' claim that a financial lease agreement is only available if the underlying deployment plan is profitable confirms that the Parties have the ability to invest, if they have the incentive to invest.[1830] In that regard, the Commission has demonstrated in Section 9.6.4.4.1.2 above that the incentive to invest in incremental FTTH roll-out is not be increased by the transaction and might even decrease.

9.6.4.4.3. The Parties overstate the benefits to consumers from incremental FTTH roll-out

(1691) The Commission maintains that the Parties overstate the benefits to consumers from incremental FTTH rollout. In that regard, the Commission notes that (i) the Article 6(1)(c) Response and the SO Reply misunderstand the framework for the assessment of benefits to consumers, (ii) the claimed incremental FTTH roll-out would only benefit a small proportion of retail consumers and (iii) qualitative efficiencies have to be quantified in terms of willingness to pay, which has not been done.

9.6.4.4.3.1. Framework for the assessment of benefits to consumers

(1692) The claimed incremental FTTH roll-out would mainly concern BUs where other FTTH operators are already present.[1831] In the Article 6(1)(c) Response and the SO Reply, the Parties consider that the Commission dismisses the benefit of greater choice and in so doing contradicts its own theory of harm and downplays the significance of increased FTTH coverage and speed brought about by the Transaction.[1832]

(1693) The Parties' position is based on a misunderstanding of the applicable standard for assessing whether efficiencies derived from a transaction will be passed on to consumers.

(a) First, the relevant standard for the assessment of qualitative efficiencies is the benefits these efficiencies give to consumers. Article 2(1)(b) of the Merger Regulation foresees that in the appraisal of concentrations the Commission takes account of "*the development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition.*" As explained in recital 29 of the Merger Regulation, it is possible that "*efficiencies brought about by the concentration counteract the effects on competition, and in particular the potential harm to consumers*". Furthermore, the Merger Regulation foresees that the Commission "*should publish guidance on the conditions under which it may take efficiencies into account in the assessment of a concentration.*" [1833] In that regard, the Horizontal Merger Guidelines maintain that "*[t]he relevant benchmark in assessing efficiency claims is that consumers will not be worse off as a result of the merger. For that purpose, efficiencies should be substantial and timely, and should, in*

[1829] SO Reply, paragraph 499 et seq.
[1830] SO, paragraph 1078.
[1831] SO, paragraph 1252 and Article 6(1)(c) Decision, paragraph 578 et seq.
[1832] SO Reply, paragraphs 502 et seq, Article 6(1)(c) Response, paragraph 776.
[1833] Regulation EC 139/2004, recital 29.

principle, benefit consumers in those relevant markets where it is otherwise likely that competition concerns would occur."(emphasis added)[1834]

(b) Second, the Commission considers that in telecom markets, increased network competition can benefit consumers in the form of lower prices and/or higher quality at the same prices. However, the Transaction also removes one independent network operator from the market. With [MASMOVIL's fixed network footprint][1835], MásMóvil's current FTTH network over which it has 'owner economics' is several times bigger than the claimed incremental roll-out of [...] BUs. Indeed in an Orange internal document listing the 'internal' strategic rationales for the Transaction, one of the reasons listed was to "*[Details of Orange's internal documents describing Orange's strategy]*"[1836]

(c) Third, the Parties claim an incremental roll-out of FTTH to [...] BUs by 2026, of which ca [Details of the JV's business plans].[1837] Therefore, it is only for these BUs that the incremental FTTH roll-out increases FTTH coverage and speed as claimed by the Parties. In that regard, it is for the Parties to quantify to what extent these qualitative efficiencies benefit consumers (as further discussed below).

(d) Fourth, in areas where a network of equivalent quality is already in place, it is necessary to establish that the incremental roll-out (i.e. overbuild) is likely to put downward pressure on prices (or generate further competition on quality), and to the extent possible to quantify this in order to enable the Commission to assess to what extent this may offset any anti-competitive effects, such as upwards pricing pressure. In that regard, the Commission notes that the Parties and most of their rivals (including Telefónica) set retail prices on a national level and do not offer bundles with lower retail prices on their own FTTH network footprint (where retail subscribers can be served at marginal costs of network operation) than in areas where they rely on wholesale access (and retail subscribers are served at wholesale prices).[1838] As explained in the competitive assessment (Section 9.4 above) the Commission concludes that the Transaction generates upward pricing pressure on the national market for the retail supply of fixed internet services and the hypothetical market for multiple-play bundles.

9.6.4.4.3.2. Qualitative efficiencies must be quantified in terms of consumers' willingness to pay

(1694) In SO Reply, the Parties submit that "*a quantitative description of pass-through rates is not required for efficiencies to be recognised under the EUMR*".[1839] The Parties also claim that they have quantified the incremental FTTH roll-out because they "*quantified the amount of incremental investment in FTTH by investment amount and the number of incremental BUs.*"[1840] Finally, the Parties submit that the incremental network investment would result in new and improved products, services and technologies (FTTH) for consumers and that a significant positive impact for

---

1834 Horizontal Merger Guidelines, paragraphs 79-81.
1835 Form CO, paragraph 12.
1836 [Details of Orange's internal documents describing Orange's strategy].
1837 Form CO, paragraph 2595, 2598. The planned incremental FTTH roll-out would be completed by 2026, see Form CO, paragraph 2572.
1838 See Table 2 above.
1839 SO Reply, paragraph 506 and Article 6(1)(c) Response, paragraph 790.
1840 SO Reply, paragraph 505 and Article 6(1)(c) Response, paragraph 789.

consumers would be clearly visible. EU and national policies would target FTTH roll-out because it is beneficial to consumers.[1841] The Commission considers that these arguments are not valid and that the Parties have failed to quantify the qualitative efficiencies from incremental FTTH roll-out.

(a) First, as explained in the Horizontal Merger Guidelines, "*[t]he more precise and convincing the efficiency claims are, the better the Commission can evaluate the claims. Where reasonably possible, efficiencies and the resulting benefit to consumers should therefore be quantified. When the necessary data are not available to allow for a precise quantitative analysis, it must be possible to foresee a clearly identifiable positive impact on consumers, not a marginal one.*"[1842] It is therefore not true that there is no need to quantify qualitative efficiencies, in particular if data is available, as appears to be the case here with the Parties' conjoined studies, referred to in litera (c) below.

(b) Second, qualitative efficiencies can be accounted for in terms of consumers' willingness to pay for quality. In this respect, the Commission notes that there are internal documents of the Parties that evidence this. In particular, [Details on the Parties' internal documents].[1843] The Parties' argument that a positive impact would be clearly visible,[1844] does not change the fact that they have quantified consumers' willingness to pay for broadband speeds in the ordinary course of business.

(c) Third, according to the report carried out for the European Commission, almost 90% Spanish households were covered by FTTP networks in 2021, which was the second highest (after Latvia) of 31 European countries surveyed, and well above the EU average of around 50%.[1845] In those circumstances, Parties' own internal documents note that "*[Details of MASMOVIL's internal documents describing MASMOVIL's business strategy]*."[1846] The SO Reply states that the SO would wrongfully argue that increases of bandwidth would not be valuable to consumers is unfounded. The quote from the Parties' document would come from a study from 2018 and it would not be appropriate to draw from a five-year-old study and conclusions on consumer preferences as of today. The Parties' Hedonic Pricing Analysis would show that the value of fixed-only and FMC tariffs with higher broadband speeds is higher than the value of tariffs with lower broadband speeds, which would be consistent with placing a high valuation on bandwidth.[1847] These arguments are unfounded. In the first place, [Details of the Parties' internal documents describing the Parties' strategies].[1848] Therefore the Parties cannot argue that this evidence would be outdated. In the second place, the Parties' Hedonic Pricing Analysis does not account for the demand for tariffs with different characteristics and therefore

---

1841 SO Reply, paragraph 507.

1842 Horizontal Merger Guidelines, paragraph 86.

1843 See for example "RV: Mas preguntas de antitrust, PREGUNTA 3.pptx" (7/9/2022), slide 1 (ID MM-00304340, Doc ID 2664-45543).

1844 SO Reply, paragraph 507.

1845 "*Broadband Coverage in Europe 2021*" published on 28 July 2022. See https://digital-strategy.ec.europa.eu/en/library/broadband-coverage-europe-2021, Doc ID 5648.

1846 See "*KILI – Outstanding Input for the Competitive Assessment*" on 4 August 2022, paragraph 4.8 (ID MM-00257569, Doc ID 2667-68538).

1847 SO Reply, paragraph 508.

1848 See "*KILI – Outstanding Input for the Competitive Assessment*" on 4 August 2022, paragraph 4.8 (ID MM-00257569, Doc ID 2667-68538).

cannot be used to argue to what extend consumers value higher broadband speeds. As further discussed in Section 9.4.3.1.4.2, the Parties' Hedonic Pricing Analysis also omits relevant tariff characteristics and suffers from a number of methodological shortcomings.

(d) Fourth, with regard to the argument that the incremental network investment would result in new and improved products, services and technologies (FTTH), the HMG recognize that consumers may benefit from "*new or improved products or services*" resulting from the "*efficiency gains in the sphere of R & D and innovation*" and the "*develop[ment] of a new product*".[1849] In that regard, the Commission notes that the Parties neither claim to have invented or developed FTTH, nor that they would be the first to deploy FTTH in the relevant markets, nor that they would deploy FTTH for the first time. The claimed incremental FTTH roll-out would only benefit a limited proportion of consumers.

(1695) The claimed incremental FTTH roll-out is unlikely to outweigh the adverse effects brought about by the merger, as it would benefit only a small share of the consumers affected by the Transaction.

(a) First, as explained in Section 9.4 above, the Transaction is likely to lead to anti-competitive effects, including substantial upward pricing pressure, in the overall retail market for the supply of fixed internet access services and the overall retail market for the supply of multiple-play bundles. These likely anti-competitive effects would be nationwide, potentially impacting all retail fixed internet customers in Spain, i.e. **[...]** households in 2022, and possible a greater number as the retail fixed internet customer base has been growing by about [...] customer per year since 2019, based on data provided by the Parties. The argument in the SO Reply, that the Commission would fail to engage on the benefits of greater choice resulting from incremental FTTH roll-out is unfounded. As explained in Section 9.6.4.4.3.2, it is upon the Parties to quantify the consumer benefits from the claimed incremental FTTH roll-out in terms of consumers' willingness to pay.

(b) Second, the Parties claim an incremental roll-out of FTTH to [0-5 million] BUs by [year],[1850] of which [Details of the JV's business plan].[1851] Furthermore, the Parties expect to supply under [Details of the Parties' internal estimates] on the rolled-out network by [year],[1852] "*[Details of the Parties' internal estimates]*"[1853] o[Details of the Parties' internal estimates][1854]. However, the size of the overall market for the retail supply of fixed internet access was [...] in 2022,[1855] while the number of BUs with FTTH access is at least [25-30 million] BUs.[1856] Therefore, only a small share of consumers would benefit from the incremental FTTH roll-out (i.e. the number of BUs with FTTH access would increase by [0-5]% , and [0-5]% of the retail fixed internet customers in

1849 HMG, paragraph 81.
1850 The planned incremental FTTH roll-out would be completed by **[year]**, see Form CO, paragraph 2572.
1851 Form CO, paragraph 2595, 2598.
1852 This concerns [0-5 million] BUs from FTTH deployment and [0-5 million] BUs from FTTH densification, see Annex RFI 24 Q1a, sheet "Fixed_A", rows 76 and 101.
1853 Response to RFI 24, paragraph 6.1 and 10.1.
1854 Annex RFI 37 Q1, sheet "*Fixed broadband – overall*".
1855 6(1)(c) Response, Annex 2.3, Market shares per segment.
1856 According to the Form CO, paragraph 12, MásMóvil can currently supply FTTH to [...].

Spain would take up the Parties' service on the basis of such additional roll-out).[1857] In the SO Reply, the Parties argue that the claimed efficiencies would not be small, because they would benefit more than [...] of consumers and would in particular impact underdeveloped areas where the need is particular pronounced and at the same time the deployment costs are the highest.[1858] These arguments are unfounded. In the first place, as explained in this paragraph above, the claimed incremental FTTH roll-out would mainly concern BUs that are already connected to fibre and only a small share of BUs – [...] rather than more than [...] as claimed by the Parties – that do not have access to fibre already. In the second place, the claim that the incremental roll-out would benefit in particular underdeveloped areas where deployment costs are higher is inaccurate. The majority of the claimed incremental FTTH roll-out concerns [Details of the JV's business plans].[1859] With regard to FTTH deployment in [Details of the JV's business plans],[1860] [Details of the JV's business plans].[1861]

(c) Third, as explained in the Article 6(1)(c) Decision, the anti-competitive harm brought about by the Transaction affects consumers in different relevant markets and the Parties have not allocated the claimed efficiencies from incremental FTTH roll-out to the relevant market, notably to the markets for retail fixed internet or retail multiple-play bundles. In the SO Reply, the Parties argue that the incremental FTTH roll-out would have nation-wide effects, as the improved network coverage and quality would expert competitive pressure on competitors and competition would occur at national level.[1862] However, the Parties' argument omits that the Transaction results in the elimination of an independent network operator. Therefore, the first order effect of the Transaction is an appreciable reduction of network competition, that would not be outweighed by the claimed incremental FTTH roll-out, even if it were found to be verifiable and merger-specific (*quod non*).

9.6.4.4.3.3. Timeliness and Discounting

(1696) As explained in Section 9.6.4.1.2. above, the Commission considers for the purpose of the present Transaction that only efficiencies realized within a timeframe of four years post-Transaction (2023-2026) can be considered to be timely, including because the Transaction is expected to have a significant anti-competitive impact during this period. Keeping in mind that the Parties expect to complete the incremental FTTH roll-out by [year], future efficiencies would also have to be appropriately discounted. In the SO Reply, the Parties argue that it would be wrong to discount the benefits of incremental FTTH roll-out, as these investments would be realised shortly after the Transaction and at the latest by [year].[1863] These arguments

1857 That is, [...] and [...].
1858 SO Reply, paragraph 510-512.
1859 FTTH densification concerns [70-80]% of the claimed incremental FTTH roll-out ([0-5 million] BUs). This concerns [0-5 million] BUs in municipalities with [Details of the JV's business plans] and [0-5 million] BUs in municipalities [Details of the JV's business plans], see Form CO, paragraph 2580 and Reply to RFI 24, paragraph 8.1.
1860 FTTH deployment concerns [20-30]% of the claimed incremental FTTH roll-out ([0-5 million] BUs) and is focused on municipalities with [Details of the JV's business plans], see Form CO, paragraph 2576.
1861 Response to RFI 24, paras 11.1-11.3.
1862 SO Reply, paragraph 514.
1863 SO Reply, paragraph 515.

are unfounded. As explained in Section 9.6.4.1.3., efficiencies have to be discounted when aggregated or compared over time. Furthermore, as discussed in Section 2.1.1.1 of Annex B, which forms an integral part of this Decision, the Parties do not consider that rolled-out fibre connections would be immediately used by consumers. Based on penetration curves reflecting past roll-outs, the Parties expect that customer take-up would increase over time. In FTTH densification areas, [5-10]% of the new fibre connections would be used by [year]and [20-30]% by [year]. In FTTH consolidation areas, [5-10]% of the new fibre connections would be used by [year]and [10-20]% by [year].[1864]

9.6.4.4.3.4. Conclusion on benefits to consumers from incremental FTTH roll-out

(1697) The Commission considers that the Parties have failed to establish that the incremental FTTH roll-out would benefit consumers in a manner that would be substantial enough to outweigh the anti-competitive harm brought about by the Transaction, notably in the market for retail fixed internet services and multiple-play bundles.

(1698) In any event, even if the Commission were to accept that the incremental FTTH roll-out would benefit a consumer in such a roll-out area, the Commission also notes that the incremental roll-out would only benefit a small sub-set of the Parties' fixed internet and multiple-play customers. Meanwhile, the vast majority of fixed internet and multiple-play customers affected by the Transaction would not benefit from the claimed FTTH roll-out efficiencies.

9.6.4.4.4. Conclusion on the Parties' efficiency claims related to incremental FTTH roll-out

(1699) The Commission considers that the claimed efficiencies related to **incremental FTTH roll-out** fail the cumulative test of verifiability, merger-specificity and benefit to consumers.

(1700) In any event, the Commission considers that even if the Parties' claimed efficiencies related to incremental FTTH roll-out were accepted in full, they would not be sufficient to outweigh the anti-competitive harm generated by the Transaction, in particular, in view of the limited size of the claimed incremental FTTH roll-out relative to the overall size of the market.

9.6.4.5. Incremental 5G roll-out

(1701) The Commission concludes that the Parties' efficiency claims related to incremental 5G roll-out fail the cumulative test of verifiability, merger-specificity and benefits to consumers, in particular for the reasons set out below.

9.6.4.5.1. The claimed efficiencies are not verifiable

(1702) The Commission concludes that the Parties' efficiency claims related to incremental FTTH roll-out are not verifiable for several reasons:

(a) The Parties have not committed (e.g., through the agreement of the Parties' respective boards of directors or equivalent bodies), and their standalone roll-out plans absent the merger are equally non-binding.[1865]

1864 Response to RFI 24, paragraphs 6.1 and 10.1, Form CO Annex 11, tab "fixed", rows 72 and 94, Annex RFI 24 Q1a, tab "fixed_AM" rows 75 and 100.

1865 Article 6(1)(c) Decision, paragraph 591.

(b) The 5G roll-out plans were not developed in conjunction with [Advisor] or verified by [Advisor].[1866]

(c) The Commission also considers that the Parties' demand forecasts are subject to considerable uncertainty. For example, MásMóvil expects that based on handset renewal rates, the share of handsets compatible with 5G would grow to [70-80]% by [year]. Therefore, absent the transaction, its mobile traffic on other operators' networks would grow to approximately [80-90]% by [year]. However, the Parties admit that they "[Details of the JV's business plans]."[1867] In that regard, the Commission also highlighted that the Parties' claimed cost savings related to mobile transmission did not factor in increased capacity needs from incremental 5G roll-out.[1868]

(d) Several market participants expressed doubt as to whether the merger would give the Parties' the incentive to invest in their network infrastructure, as the JV would likely be highly leveraged and would have to comply with stringent debt covenants.[1869]

(e) In addition, the Commission questioned the incentive to invest in incremental 5G roll-out related to the Transaction and noted that profits of incremental investments depend only on incremental revenues and incremental costs, and not the overall level of the Parties' profitability. In that regard, the Commission considered that it is therefore for the Parties to show that the profitability of the incremental investments increases with the Transaction, (also see section on merger-specificity below).[1870]

9.6.4.5.1.1. The incremental 5G roll-out plans are not binding

(1703) In the Article 6(1)(c) Response, the Parties consider that "[Details of the JV's business plans]" , that "[Details of the JV's business plans]" and by analogy that "[Details of the JV's business plans]" for similar reasons.[1871] In the SO Reply, the Parties argue that the SO would duplicate the assessment of incremental FTTH roll-out and would fail to bring forward any arguments which would be specific to 5G deployment.[1872]

(1704) There are a number of elements contradicting these claims.

(1705) First, the terms "*JV Business Plan*" is misleading, it does not outline the JV's combined FTTH and 5G roll-out plans, nor was it approved by their respective boards. As explained by the Parties during pre-notification, the so-called "JV Business Plan" is in fact a short, high-level presentation and does not cover 5G roll-out. The Parties acknowledge that "*there is no such joint document [as a JV business plan outlining such roll-out]. During the Proposed Transaction negotiations, the Parties developed a high-level integrated financial business plan for the JV (the "JV Business Plan"), which took into account the Parties' standalone business plans, certain economic adjustments and the calculated synergies"*. However, this document, referred to as the JV Business Plan *"for better reference, does not include details on the 5G investment plan [of the JV, but is instead] part of the integration*

[1866] Article 6(1)(c) Decision, paragraph 591.
[1867] Article 6(1)(c) Decision, paragraph 592, Form CO, paragraph 2602.
[1868] Article 6(1)(c) Decision, paragraph 591.
[1869] Article 6(1)(c) Decision, paragraph 593.
[1870] Article 6(1)(c) Decision, paragraph 596.
[1871] Article 6(1)(c) Response, paragraphs 800-801 and 806-807.
[1872] Response to SO, paragraphs 518-519.

planning and efficiencies workstreams and will be presented together with Section 9 [of the Form CO]" (emphasis added).[1873]

(1706) Second, and contrary to the Parties' claims, this so-called "JV Business Plan" [Details of the JV's business plans]. The Parties accept that [Details of the JV's business plans and internal documents] (emphasis added).[1874]

(1707) Third, in any case, the Parties have not satisfactorily demonstrated that the consideration or approval by the board of directors of a high-level CAPEX investment plan, such as the so-called JV Business Plan, means that the detailed incremental roll-out efficiency claims set out in the Form CO in this case can be accepted as being binding and therefore verifiable. This is in particular because, as the Parties themselves acknowledge, "*[Details of the JV's business plans based on internal documents]". Rather "[Details of the JV's business plans].*"[1875]

(1708) Moreover, even the presentation of a roll-out plan in one board meeting will not prevent it from being revised in a later board meeting. By way of analogy, Orange presented a standalone 5G roll-out plan [Details of Orange's internal documents describing Orange's strategy][1876]. Orange outlined that [Details of Orange's standalone 5G roll-out plans based on Orange's board minutes].[1877]

(1709) Orange also notes that [Details of Orange's internal documents describing Orange's strategy].[1878]

(1710) Fourth, [Details of Orange's internal documents describing the Parties' strategy],[1879] [Details of Orange's internal documents describing the Parties' strategy],[1880] [Details of Orange's internal documents describing the Parties' strategy].

(1711) Fifth, the Parties' have already changed the budget allocated for their combined FTTH roll-out plan due to higher cost estimates, in order to stick to the number of households in their incremental FTTH roll-out efficiencies submission in the Form CO. [Details of Orange's internal documents describing the Parties' strategy]. [Details of Orange's internal documents describing the Parties' strategy].[1881] [Details of Orange's internal documents describing the Parties' strategy]. [Details of Orange's internal documents describing the Parties' strategy].

(1712) Sixth, far from making a firm commitment, [Details of the Parties' internal documents describing the Parties' strategy][1882] [Details of Orange's internal documents describing Orange's strategy][1883] [Details of Orange's internal documents describing Orange's strategy].

(1713) Finally, *the* argument in the SO Reply that the Commission's assessment would fail to bring forward arguments specific to 5G deployment is unfounded. The internal documents discussed in this Section are clearly also relevant for the assessment of

1873 Response to RFI 1, question 75(c) and Annex RFI 1 Q75.
1874 Response to RFI 4, Q 42.
1875 Form CO, footnote 1540.
1876 Form CO, paragraph 2606.
1877 Response to RFI 4, Q20.
1878 Response to RFI 4, Q20.
1879 Article 6(1)(c) Response, paragraph 804.
1880 See Annex 6(1)(c) 5.7a, Minutes of the meeting of [Details of Orange's internal documents describing Orange's strategy].
1881 Annex 6(1)(c) 5.6, Minutes of the meeting of [MASMOVIL's internal document].
1882 Annex 6(1)(c) 5.6, Minutes of the meeting of [MASMOVIL's internal document].
1883 Annex 61c 5.8, page 3: [Details of Orange's internal documents describing the Parties' strategy].

the claimed efficiencies related to incremental 5G deployment and demonstrate the non-binding character of these claimed deployment plans.

(1714) On the basis of the above, the Commission's view is that the Parties' have not shown the efficiency claims based on incremental 5G roll-out set out in the Form CO are binding, and accordingly they have also not demonstrated that they are verifiable.

9.6.4.5.1.2. The Transaction does not increase the ability or incentive to roll out 5G

(1715) Upon review of the Parties' arguments, the Commission concludes that the Transaction does not change the Parties ability or incentive to invest in incremental 5G roll-out:

(a) First, the Commission considers that the Parties have the ability to invest. As outlined in Section 9.6.4.4.1.2, the Commission considers that the Parties are financially sound undertakings with access to (debt) capital. Therefore, it is possible to finance FTTH deployment if such deployment is profitable. The argument that the SO would not bring any arguments on ability to invest which are specific to 5G is unfounded.[1884] The considerations in Section 9.6.4.4.1.2 regarding the ability to invest clearly also apply to 5G deployment.

(b) Second, the Commission notes that the Parties have not claimed that the Transaction would increase their incentive to invest in incremental 5G roll-out. The incentive to invest in 5G roll-out depends on the incremental revenues and incremental costs generated by such incremental investments and not the Parties' overall level of profit.[1885] For similar reasons as with regard to incremental FTTH roll-out (Section 9.6.4.4.1.2 above) the Commission considers that the Transaction does not generate an incentive to invest in incremental 5G roll-out.

(c) Third, in the competitive assessment of the relevant markets, the Commission concludes that the Transaction would lead to anti-competitive effects in the form of upward pricing pressure. These higher prices are likely to reduce the Parties' customer base and therefore lead to an additional investment disincentive. In the SO Reply, the Parties argue that it would be speculative to assume that upward pricing pressure would result in a reduced customer base, that every operator would have the objective to grow its business and expand its customer base and that there would therefore be no disincentive to invest, but rather an increased incentive to invest.[1886] These arguments are unfounded. In the first place, the analytical framework of price competition with differentiated products set out in Section 2.1 of Annex A, which forms an integral part of this Decision, clearly implies that merging parties (and third-party rivals) have an incentive to increase prices and thereby take into account decreased demand. In the second place, a decreased customer base implies a decreased incentive to invest in network roll-out. If anything, the Transaction therefore decreases 5G deployment incentives.

[1884] SO Reply, paragraph 521 et seq.

[1885] Article 6(1)(c) Decision, paragraph 596.

[1886] SO Reply, paragraph 524 et seq.

9.6.4.5.1.3. Conclusion on the verifiability of the claimed incremental 5G roll-out plans

(1716) Based on the above, the Commission maintains the conclusion that the Parties' incremental 5G roll-out plans are not verifiable.

9.6.4.5.2. The claimed efficiencies are not merger-specific

(1717) The Commission concludes that the Parties' efficiency claims related to incremental FTTH roll-out are not merger-specific. It is for the Parties to show that there are no less anti-competitive alternatives to the Transaction. In that regard, the Commission considers that the Parties could rely on wholesale access from third parties (including Virtual Active Sharing (VAS), National Roaming agreements (NRA) and Radio as a Service (RaaS) Network sharing agreements),[652] RAN-sharing and network co-deployment agreements,[653] and financial lease agreements to increase 5G network coverage and to attract additional 5G customers.[1887]

(1718) Upon review of the Parties' arguments in the Article 6(1)(c) Response and the SO Reply, the Commission maintains the conclusion that the efficiency claims related to incremental **5G roll-out** are not merger-specific.

(a) First, the Parties' reliance on wholesale access (and hence 5G roll-out by third parties), RAN sharing agreements and network co-deployment demonstrate that there exist "*less anti-competitive, realistic and attainable alternatives*" to the Transaction.[1888] In that regard, the Commission notes that MásMóvil and Orange would not necessarily have to conclude an agreement with each other, but could also conclude agreements with other operators. The SO Reply argues that the Parties have exhausted all available forms of cooperation with each other and third parties and that the Commission has failed to engage with the evidence and explanations by the Parties why alternative co-operations for 5G roll-out are not available.[1889] However, as explained in Section 9.6.4.1.1., for a less anti-competitive alternative to be "*reasonably practical*", it is sufficient that it brings positive added value to the Parties.[1890] It is not relevant how such value is distributed between the Parties nor if the Parties could achieve higher values through the Transaction.[1891] The Parties have not demonstrated that alternative forms of cooperation would not generate positive added value or that the Transaction would generate more added value. To the contrary, as outlined in Section 9.6.4.5.1.2, the Transaction is likely to reduce 5G deployment incentives, because upward pricing pressure reduces the Parties (and rivals) demand.

(b) Second, as regards 5G roll-out by third parties, the Commission notes that the Parties did not explain why the 5G roll-out plans of third parties should be more uncertain than their own roll-out plans. It is worth mentioning that the Parties' argument, that migrating MásMóvil's traffic from third party networks to Orange's network does not negatively impact the investment incentives of these third parties would also be inconsistent with any claims (as made by the Parties in the context of incremental FTTH roll-out preliminarily rejected by

---

1887 Article 6(1)(c) Decision, paragraph 596.

1888 Form CO, paragraph 428 et seq.

1889 SO Reply, paragraph 527 et seq.

1890 See Horizontal Merger Guidelines, paragraph 85, Commission decisions of 2 July 2014, M.7018 – *Telefónica Deutschland/E-Plus*, paragraph 1125; of 1 September 2016, M.7758 – *Hutchison 3G Italy/Wind/JV*, paragraphs 1573, 1593 et seq.

1891 Commission decision of 2 July 2014, M.7018 – *Telefónica Deutschland/E-Plus*, paragraph 1137.

the Commission) that combining their customer bases would increase their incentive for incremental network roll-out. In the SO Reply, the Parties submit that they do not have insights on roll-out plans of other market participants. At the same time, they also submit that the market investigation would have confirmed that "*the Parties increased network investment as a result of the Transaction which will most likely bolster investments by other operators*".[1892] These statements are contradictory, as they at the same time imply that the Parties do and do not know rival's 5G deployment plans. Furthermore, the quotes cited from the Parties concern statements from analysts' reports from a Telefónica position paper and not MNO's assessment.[1893] Finally, the Parties do not engage with the Commission's incentive assessment with regard to the Parties' traffic on third-party networks.

(c) <u>Third</u>, as discussed in Section 9.6.4.1.5 above, the Commission considers that financial lease network agreements ensure that the Parties have the ability to finance network roll-out, if such a roll-out is profitable. Even if past examples concern the roll-out of FTTH networks, there is no reason why this should not apply to 5G roll-out as well. In the Response to the SO, the Parties submit that a financial lease agreement is not an alternative rollout plan and that financial lease agreements would not be available for mobile network deployment. However, the Parties fail to engage with the Commission's conclusion that external funding for 5G roll-out is available if such a roll-out is profitable.

9.6.4.5.3. The Parties overstate the benefit to consumers from incremental 5G roll-out

(1719) The Commission concludes that the Parties overstate the benefit to consumers from incremental 5G roll-out. In that regard, the Commission (i) recalls the framework for the assessment of benefits to consumers, and notes that (ii) the claimed incremental 5G roll-out would likely only benefit a small proportion of retail consumers and (iii) qualitative efficiencies have to be quantified in terms of willingness to pay, which has not been done.

9.6.4.5.3.1. Framework for the assessment of benefits to consumers

(1720) In assessing the claimed efficiencies related to incremental 5G roll-out, it is necessary to recall the relevant standard in the benefit to consumers test:

(1721) <u>First</u>, the relevant standard for the assessment of qualitative efficiencies is the benefits these efficiencies give to consumers. Article 2(1)(b) of the Merger Regulation foresees that in the appraisal of concentration the Commission takes account of "*the development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition.*" Further, it is possible that "*efficiencies brought about by the concentration counteract the effects on competition, and in particular the potential harm to consumers*". Furthermore, the Merger Regulation foresees that the Commission "*should publish guidance on the conditions under which it may take efficiencies into account in the assessment of a concentration.*" [1894] In that regard, the Horizontal Merger Guidelines maintain that "*[t]he relevant benchmark in assessing efficiency claims is that <u>consumers will not be worse off as a result of the merger</u>. For that purpose, efficiencies should be*

[1892] SO Reply, paragraphs 529-531.
[1893] SO Reply, paragraph 531, FN 588.
[1894] Regulation EC 139/2004, recital 29.

substantial and timely, and should, in principle, benefit consumers in those relevant markets where it is otherwise likely that competition concerns would occur."[1895]

(1722) Second, the Commission considers that in telecom markets, increased network competition can benefit consumers in the form of lower prices (e.g. through having greater choice) and/or higher quality (e.g. for example in the form of higher speed or coverage). However, while the Parties claim that the Transaction would give rise to incremental 5G roll-out, the Transaction would also remove one independent network operator. As noted in Section 7 above, MásMóvil (i) holds 175 MHz in mobile spectrum licenses, i.e. around 60% of the amount of in-use spectrum of the other three MNOs, (ii) has [...] mobile sites, [Details on the Parties' business strategy][1896] and (iii) MásMóvil's own network covers [80-90]% of the population in 3G and 4G and [5-10]% with 5G. In that regard, the Commission recalls that "*it is for the notifying parties 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*."[1897]

(1723) Third, according to the Parties, Orange plans to cover [70-90]% of the Spanish population with 5G in 2025 under its standalone plans and [80-100]% under the merger scenario. Telefónica currently covers approximately [80-90]% of the Spanish population with 5G and plans to cover [90-100]% by [year]. Thus, even if the Parties' were able to cover [Details on the JV's roll-out plans], which they are not able to demonstrate, their 5G coverage could not go logically much beyond the 5G coverage of Telefónica,[1898] [Details of MASMOVIL's commercial agreements].[1899]

(1724) Fourth, in areas where a network of equivalent quality is already in place, it is necessary to establish that the incremental roll-out (i.e. overbuild) is likely to put downward pressure on prices or generate further competition on quality, and to the extent possible to quantify this in order to enable the Commission to assess to what extent this may offset any anti-competitive effects, such as upwards pricing pressure. In that regard, the Commission notes that the Parties set retail prices on the national level and do not offer cheaper plans in regions where they have their own 5G network footprint.[1900]

(1725) Fifth, where the Parties consider that the incremental 5G roll-out would decrease energy consumption, the Commission notes that it is for the Parties to show that this is a qualitative efficiency that generates tangible benefits for mobile consumers affected in the relevant markets. In the SO Reply, the Parties submit that they provided the benefits of reduced energy consumption in purely quantitative terms such as reduction in energy consumption per year and reduction in CO_2 emission per years and that the HMG would acknowledge the possibility of out-of-market efficiencies.[1901] However, as stated in the HMG and further discussed in

1895 Horizontal Merger Guidelines, paragraphs 79-81.
1896 Form CO, footnote 442: [Details on the Parties' business strategy].
1897 Horizontal Merger Guidelines, paragraphs 87.
1898 6(1)(c) Decision, paragraphs 581to 582.
1899 Form CO, paragraph 2095. See also Form CO, footnote 1313 ("*[Details of the Parties' business plans]*").
1900 See Response to RFI 20 Q3(a), in which the Parties confirm that they do not engage in differentiated pricing in Spain today depending on whether or not they rely on wholesale fixed broadband access in a particular area, save for Orange in respect of a negligible sub-set of customers. While not specific to mobile services, this conclusion would appear to hold *a fortiori* for mobile services, in particular given that Orange does not rely on third parties for wholesale mobile network access.
1901 SO Reply, paragraphs 544-546.

Section 9.6.4.1.4, "*the relevant benchmark in assessing efficiency claims is that consumers will not be worse off as a result of the merger. For that purpose, efficiencies should ... benefit consumers in those relevant markets where it is otherwise likely that competition concerns would occur*".[1902] The Parties have not attempted to quantify the claimed benefits of reduced energy consumptions for the consumers in the relevant markets.

9.6.4.5.3.2. Qualitative efficiencies have to be quantified in terms of consumers' willingness to pay

(1726) In the SO Reply, the Parties submit that they have "*have provided quantitative evidence of the incremental 5G roll-out in terms of the investment amount and the number of incremental sites and carriers*" and that they would not be required to quantify pass-through rates for efficiencies to be recognized under the EUMR. This would in particular be the case for new products, services and technologies such as 5G.[1903] These arguments are unfounded.

(1727) First, as explained in the Horizontal Merger Guidelines, *"[t]he more precise and convincing the efficiency claims are, the better the Commission can evaluate the claims. Where reasonably possible, efficiencies and the resulting benefit to consumers should therefore be quantified*."[1904]

(1728) Second, qualitative efficiencies can be accounted for in terms of consumers' willingness to pay for quality, as quality improvements that lead to a shift in the demand curve become equivalent to analysing competition in quality adjusted prices with reduced marginal cost. Indeed, internal documents prepared by the Parties in the ordinary course of business consider, *inter alia*, consumers' willingness to pay for 5G network services.[1905]

(1729) Third, with regard to the argument that the Transaction would bring about new products, services and technologies such as 5G,[1906] the HMG recognize that consumers may benefit from "*new or improved products or services*" resulting from the "*efficiency gains in the sphere of R & D and innovation*" and the "*develop[ment] of a new product*".[1907] In that regard, the Commission notes that the Parties neither claim to have invented or developed 5G, nor that they would be first to deploy 5G in the relevant markets, nor that they would deploy 5G for the first time. As regards the argument that the incremental 5G roll-out would enable more advanced 5G use cases for a larger part of the population,[1908] the Parties have not demonstrated that these 5G use cases would not be enabled by Telefónica's 5G deployment plans and have not quantified the benefit to consumers of these use cases in terms of consumers' willingness to pay.

9.6.4.5.3.3. The claimed incremental 5G roll-out would only benefit a limited proportion of consumers

(1730) The claimed incremental 5G roll-out is unlikely to outweigh the adverse effects brought about by the merger, as it would likely benefit only a small share of the consumers affected by the Transaction.

1902 Horizontal Merger Guidelines, paragraph 79.
1903 SO Reply, paragraph 535.
1904 Horizontal Merger Guidelines, paragraph 86.
1905 See for example [MASMOVIL's internal document].
1906 SO Reply, paragraph 535.
1907 HMG, paragraph 81.
1908 SO Reply, paragraph 541, Article 6(1)(c) Response, paragraph 794, Form CO, paragraphs 2632 et seq.

(1731) First, as explained in Section 9.4 above, the Transaction is likely to lead to anti-competitive effects, including substantial upward pricing pressure, in the overall retail market for the supply of mobile telecommunication services and the market for the supply of FMC bundles. These likely anti-competitive effects would be nationwide, potentially impacting all mobile customers in Spain, i.e. ca [...] SIM cards in 2022, based on data provided by the Parties.[1909]

(1732) Second, the Parties claim an incremental roll-out of 5G to achieve a population coverage of 97% in 2025, versus a population coverage of [80-100]% in [year], versus a population coverage of [70-90]% in the standalone scenario, "*[Details of the JV's business plans]*".[1910] The Commission considers that population coverage is a relevant metric for 5G roll-out, because 5G consumers will want to have 5G coverage in their place of residence. Thus, even if the Parties would only rely on their own mobile network, the claimed incremental 5G roll-out would only affect a small share of all mobile customers. In the SO Reply, the Parties argue that an increase in population coverage of [...] percentage points would not be small and would correspond to more than [...] people.[1911] Furthermore, mobile customers would not be static but would move across the country and would benefit from uninterrupted 5G coverage.[1912] However, these arguments to not change the Commission's conclusion that the incremental 5G roll-out is small compared to the overall population and that 5G consumers will want to have 5G coverage in their place of residence.

(1733) Third, the Commission recalls that MásMóvil supplements the coverage of its own network via wholesale agreements with Orange [Details on the wholesale agreements concluded by the Parties]*k.*[1913] As MásMóvil is today also relying on [Details on the wholesale agreements concluded by the Parties].[1914] The argument in the SO Reply, that MásMóvil's customers would benefit from [Details on the wholesale agreements concluded by the Parties] in any event, as [Details on the wholesale agreements concluded by the Parties][1915] misrepresents the Commission's conclusion that the claimed incremental 5G deployment would not improve 5G network coverage for MásMóvil's customers compared to the standalone scenario.

(1734) Fourth, the argument in the SO Reply that the Parties' incremental 5G roll-out would reduce [Details on the wholesale agreements concluded by the Parties] and would allow for more competition in wholesale, thereby reducing other operators' dependency on [...]as well,[1916] is unfounded. The first order effect of the Transaction is a reduction from 4 to 3 mobile network operators, which is an appreciable reduction of network competition. As outlined in Section 9.4. above, this is likely to result in appreciable price increases in the affected retail markets.

1909 See Annex RFI 37 Q1.
1910 Form CO, paragraph 2538.
1911 SO Reply, paragraph 538.
1912 SO Reply, paragraph 539.
1913 Form CO, paragraph 627-628 and Table 36.
1914 As of the end of 2022 MásMóvil's 5G population coverage [Details MASMOVIL's network size] was [70-80]% (Form CO, FN 547) and Orange's 5G population coverage on its own network was [70-80]% (Form CO, paragraph 17).
1915 SO Reply, paragraph 540.
1916 SO Reply, paragraph 540.

(1735) Fifth, as explained in the Article 6(1)(c) Decision, the anti-competitive harm brought about by the Transaction affects consumers in different relevant markets and the Parties have not allocated the claimed efficiencies from incremental FTTH roll-out to the relevant market, notably to the market for retail mobile services or the market for retail FMC bundles. In the SO Reply, the Parties submit that the allocation of efficiencies to a given market would not be strictly necessary and that the benefits should be allocated to both the market for retail mobile services and retail multiple-play bundles in full.[1917] However to avoid double counting, the claimed efficiencies have to be allocated to the relevant markets. In that regard, the Commission notes that the SO Reply did allocate claimed cost synergies to relevant markets according to subscriber numbers, as further discussed in Section 3 of Annex A, which forms an integral part of this Decision.

9.6.4.5.3.4. Timeliness and Discounting

(1736) As explained in Section 9.6.4.1.2. above, the Commission considers for the purpose of the present Transaction that only efficiencies realized within a timeframe of four years post-Transaction (2023-2026) can be considered to be timely, including because the Transaction is expected to have a significant anti-competitive impact during this period. As explained in Section 9.6.4.1.3., the Commission also considers that efficiencies have to be discounted when aggregated or compared over time. In the SO Reply, the Parties argue that it would be wrong to discount the benefits of the claimed incremental 5G roll-out, as the network investments would be realised shortly after the Transaction.[1918] However, if consumers were to benefit from the claimed incremental 5G roll-out on an ongoing basis (*quod non*), discounting would still be needed in case of intertemporal comparisons.

9.6.4.5.4. Conclusion on benefits to consumers from incremental 5G roll-out

(1737) The Commission considers that the Parties have failed to establish that the incremental 5G roll-out would benefit consumers in a manner that would be substantial enough to outweigh the likely significant anti-competitive harm brought about by the Transaction, notably in the market for retail mobile services or the market for retail FMC bundles.

(1738) In any event, even if the Commission were to accept that the incremental 5G roll-out would benefit a consumer in a manner that was sufficient to outweigh the negative effects of the Transaction, the Commission also notes that the incremental rollout would likely only benefit a small sub-set of the Parties' mobile and FMC customers. Meanwhile, the vast majority of mobile and FMC customers affected by the Transaction would not benefit from the claimed 5G roll-out efficiencies.

9.6.4.6. Conclusion on efficiencies

(1739) Upon review of the Parties arguments on efficiencies in the Form CO, the Article 6(1)(c) Response, the SO Reply and other submissions, the Commission concludes as follows:

(a) Only a certain share of the efficiency claims based on cost synergies and EDM have been demonstrated as being verifiable, merger-specific and likely to benefit consumers. However, taking such efficiencies into account does not alter the Commission's conclusion that the Transaction would significantly

[1917] SO Reply, paragraph 548.
[1918] SO Reply, paragraph 543.

impede effective competition in each of the relevant markets discussed above, and such cost synergies would notably fall far short of offsetting the substantial price effects that the Commission considers to be likely to result from the Transaction.

(b) That the claimed efficiencies based on incremental FTTH and 5G roll-out have not been demonstrated as being verifiable for the reasons outlined above. In any event, even if they were to occur, any benefits in terms of improved quality or competition would only be expected to materialise in the medium term, and even then, would only benefit a small sub-set of retail customers in Spain. On the other hand, the significant negative impact on competition, and notably the substantial likely price effects, would be felt by retail customers across the entire Spanish market immediately following the Transaction, and notably in the initial four years.

9.7. Conclusion

(1740) For the reasons set out above, the Commission has come to the view that the Transaction would significantly impede effective competition in a substantial part of the internal market within the meaning of Article 2(3) of the Merger Regulation as a result of horizontal non-coordinated effects in (i) the market for the retail supply of mobile telecommunication services in Spain, (ii) the market for the retail supply of fixed internet access services in Spain, (iii) the hypothetical market for the retail supply of multiple-play bundles (and the narrower hypothetical market segment for the retail supply of multiple-play bundles without premium Pay-TV football content) in Spain and (iv) the hypothetical market for the retail supply of FMC bundles (and the narrower hypothetical market segment for the retail supply of FMC bundles without premium Pay-TV football content) in Spain.[1919]

10. COMMITMENTS

10.1. Analytical framework

(1741) When a concentration raises competition concerns, the merging parties may seek to modify the concentration in order to resolve those competition concerns and thereby obtain clearance for the merger.[1920]

1919 The Commission considers that is not necessary to reach a conclusion as regards the Transaction's ability to significantly impede effective competition in the internal market within the meaning of Article 2(3) of the Merger Regulation as a result of horizontal coordinated effects in these markets in view of the conclusion that they would significantly impede effective competition in any event as a result of horizontal non-coordinated effects. Moreover, as set out in Section 10 below, since the Final Commitments will fully remove the significant impediment to effective competition as a result of horizontal non-coordinated effects, the Final Commitments can also be expected to remove any negative effects on competition as a result of horizontal coordinated effects. This is in particular because horizontal coordinated effects, involving an increased possibility for the remaining players to tacitly coordinate their activities would have been, in large part, due to the fact that the Transaction may result in the elimination of an ICF and in any event eliminate an important competitive constraint from relevant the Spanish retail markets, namely MásMóvil. The Final Commitments put Digi in a position to compete efficiently as an MNO against the three other MNOs on the basis of a similar hybrid model to that used by MásMóvil today, and on this basis, they would also address any horizontal coordinated effects that may have otherwise resulted from the Transaction.

1920 Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (the "Remedies Notice"), OJ C 267, 22.10.2008, p.1, paragraph 5.

(1742) Under the Merger Regulation, the Commission must show that a concentration would significantly impede effective competition in the internal market, or in a substantial part of it. It is then for the notifying party/parties to the concentration to propose appropriate commitments.[1921] The Commission only has the 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 to effective competition in all relevant markets in which competition concerns were identified.[1922]

(1743) The commitments must eliminate the competition concerns entirely and must be comprehensive and effective in all respects. The commitments must also be proportionate to the competition concerns identified.[1923] Furthermore, the commitments must be capable of being implemented effectively within a short period of time as the conditions of competition on the market will not be maintained until the commitments have been fulfilled.[1924]

(1744) 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.[1925]

(1745) In order for the commitments to comply with those principles, commitments must be capable of being implemented effectively within a short period of time.[1926] However, where the parties submit remedies proposals that are so extensive and complex 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.[1927]

(1746) Regarding the form of acceptable commitments, the Merger Regulation leaves discretion to the Commission as long as the commitments meet the requisite standard.[1928] 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.[1929]

1921 Remedies Notice, paragraph 6.
1922 Remedies Notice, paragraph 9.
1923 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*" (Case T-177/04 easyJet v Commission [2006] ECR II-1931, paragraph 133).
1924 Remedies Notice, paragraphs 9, 10, 11, 63 and 64.
1925 Remedies Notice, paragraph 12.
1926 Remedies Notice, paragraph 9.
1927 Remedies Notice, paragraphs 13, 14 and 61 et seq.
1928 Case T-177/04 easyJet v Commission [2006] ECR II-1913, paragraph 197.
1929 Remedies Notice, paragraph 19.

(1747) Under the Merger Regulation, the commitments must be submitted to the Commission within not more than 65 working days from the day on which proceedings were initiated.[1930] Where parties subsequently modify the proposed commitments after the deadline of 65 working days, the Commission will only accept these modified commitments where it can clearly determine — on the basis of its assessment of information already received in the course of the investigation, including the results of prior market testing, and without the need for any other market test — that such commitments, once implemented, fully and unambiguously resolve the competition concerns identified and where there is sufficient time to allow for an adequate assessment by the Commission and for proper consultation with Member States.[1931]

(1748) It is against that background that the Commission analysed the proposed commitments in this case.

10.2. Procedure

(1749) In order to remove competition concerns arising from the Transaction described in Section 9 above, on 12 December 2023 the Parties submitted commitments modifying the Transaction as well as the Form RM (the "**Initial Commitments**").

(1750) In parallel, the Parties informed the Commission that they had entered into binding long form agreements on 11 December 2023, namely (1) a Spectrum Transfer Agreement; and (2) an NRA Option Agreement (together the "**New MNO Agreements**") with Digi, which they presented as the potential taker of the remedy.

(1751) In parallel, the Parties appointed an Independent Adviser, in order to provide independent advice and assistance to the Commission with its assessment of (1) the adequacy of the commitments to restore effective competition in Spain following the completion of the Transaction, and (2) the suitability of the proposed purchaser for the divestment businesses ("**Independent Adviser Mandate**"). The Independent Adviser that was appointed has personnel with decades of experience working in the telecoms sector, which was important for the Commission to ensure that they had the know-how to properly assess Digi's network roll-out plans in light of the Initial Commitments package (and notably the amount of Divestment Spectrum) offered by the Parties. The Independent Adviser delivered a report to the Commission on 15 January 2024 (the "**Independent Advisor Report**").

(1752) The Independent Adviser Mandate also contains certain safeguards regarding the Independent Adviser's independence, for instance regarding conflicts of interest and remuneration. Those safeguards mirror the safeguards that are normally included in commitments for monitoring trustees. The Independent Adviser's role is limited to providing advice and assistance to the Commission. The decision on the adequacy of the commitments and the suitability of any purchaser is taken independently by the Commission.

(1753) The Commission launched a market test of the Initial Commitments on 12 December 2023[1932], seeking responses from market participants and telecom regulators, namely the national regulatory authorities of Spain, Portugal, Italy, France, Belgium, the Netherlands and Romania. The Commission also sought the views of Digi, as the proposed purchaser, of the Initial Commitments. In addition, the Commission

[1930] Remedies Notice, paragraph 88.
[1931] Remedies Notice, paragraph 94.
[1932] Questionnaire Q4 on remedies.

received a number of ad-hoc submissions from market participants in respect of the Initial Commitments.

(1754) Based on the results of the market test, and the Independent Adviser Report, and its own assessment, the Commission considered that the Initial Commitments did not entirely eliminate the competition concerns identified in Section 9 above.

(1755) The Commission informed the Parties of the results of the market test during a state of play meeting on 11 January 2024. In this meeting, the Commission also provided the Parties with its assessment of the Initial Commitment in light of the outcome of the market test and the Independent Advisor Report.

(1756) Following the feedback received from market participants in the market test and the Independent Advisor Report, the Parties submitted a revised set of commitments on 30 January 2024 (the "**Final Commitments**").

(1757) The Final Commitments are annexed to this Decision, as Annex C, and form an integral part thereof.

(1758) Although submitted after the legal deadline for remedies, the Commission concludes, on the basis of its assessment of information already received in the course of the investigation, that the Final Commitments resolve the competition concerns without the need for any other market test.

10.3. Description of the Initial Commitments

(1759) The Initial Commitments consist of a:

(1) A commitment to divest spectrum (“Divestment Spectrum”); and

(2) A commitment to enter an optional national roaming agreement (“Optional NRA”) (together “**New MNO Commitment**”).

(3) The Parties name Digi as the remedy taker (the “New MNO”).

Divestment Spectrum

(1760) Under the Commitments the Parties commit to divest of a total of 60 MHz of spectrum across three (mid and high) frequency spectrum bands:

– 2x10 MHz spectrum bloc on the 1,800 MHz frequency currently held by MásMóvil,

– 2x10 spectrum bloc on the 2,100 MHz frequency currently held by MásMóvil, and

– 20MHz spectrum bloc on the 3,500 MHz frequency currently held by MásMóvil.

(1761) The Parties commit to transfer the ownership of all the rights of the Divestment Spectrum to the New MNO as soon as possible once the transfer of spectrum has been approved by the Spanish Ministry in charge of such approval. After the transfer of the Divestment Spectrum to the New MNO, the New MNO will be able to effectively use the Divestment Spectrum as soon as MásMóvil completes the technical and operational migration of MásMóvil’s customers from the Divestment Spectrum (“**Technical Migration**”), which will occur on a phased basis in accordance with the following dates:

– [Clause detailing the Technical migration of MASMOVIL’s customers – the transfer of all the use of the Divestment Spectrum will take place by no later than 2025].

– [Clause detailing the Technical migration of MASMOVIL's customers – the transfer of all the use of the Divestment Spectrum will take place by no later than 2025].

– [Clause detailing the penalties to be paid by the JV if the Technical Migration has not been finalised before the agreed date].

Optional National Roaming Agreement

(1762) The Parties commit that the JV will enter into the Optional National Roaming Agreement ("NRA") with the New MNO which will provide the New MNO with a binding offer for capacity-based NRA.

(1763) The pricing under the NRA Option would be capacity-based. i.e., based on the Network Capacity Usage of the New MNO. Defined tranches of capacity of the JV's network will be available to the New MNO at defined annual fees.

(1764) The NRA would cover all technologies (2G, EDGE, 3G, LTE, 4G, 5G NSA and 5G SA) and all mobile spectrum frequencies used by the Parties and available at any time to any client of the JV in the JV's mobile network. It also includes an obligation to negotiate in good faith terms of access to any new technology implemented in the JV's mobile network (e.g. 6G). The NRA Option will cover all data, voice, and messaging services.

(1765) Digi would have the right to exercise the NRA Option with an opt-in mechanism until at the latest on [a date in 2025-2026]. No penalty would be payable if the New MNO does not trigger the option by such date, or if Digi were to (having not triggered the option by such date) decide to enter into an alternative national roaming agreement with another MNO. If exercised, the NRA Option will offer National Roaming Services until [2033-2038]. The NRA Option will terminate automatically if the New MNO fails to exercise (i.e., notify the technical integration) the NRA Option by [a date in 2025-2026] or, once the NRA Option has been exercised, fails to notify the Commercial Launch Date by [a date in 2026].

10.4. Results of the market test

(1766) The results of the Market Test were broadly positive , with a majority of respondents that expressed a view considering that the New MNO Commitments would be sufficient to enable effective competition on a lasting basis in the markets of retail supply of mobile telecommunication services, retail supply of multiple-play bundles services and retail supply of FMC bundles.[1933] However, respondents also identified a number of shortcomings in each of the elements of the New MNO Commitment which needed to be addressed for the New MNO Commitment to effectively remove those concerns.

(1767) The results of the market test, including the Independent Advisor Report, are described in more detail below.

[1933] The New MNO Commitment does not address the market of retail supply of fixed internet services as Digi has been rolling out its own fixed network in Spain and is expected to have a larger network than MásMóvil soon. In that regard, Digi's own FTTH network would be the third largest in Spain, and larger than Vodafone's total network. Furthermore, given the high penetration of FMC bundles in Spain, the New MNO Commitment will also indirectly improve Digi's position in the market of retail supply of fixed internet services.

10.4.1. Divestment Spectrum

(1768) The market test focused on whether market participants considered that the Divestment Spectrum (in terms of amount, frequency bands, and any other parameters market participants considered relevant) was sufficient for Digi to operate and compete with the JV and the other MNOs in Spain on a lasting and comparable basis to MásMóvil today (and in so doing, address the significant impediment to effective competition identified in the four retail markets identified in Section 9.4.3 above, namely (i) the retail market for mobile telecommunications services in Spain; (2) the retail market fixed internet services in Spain; (3) the hypothetical retail market for multiple-play bundles in Spain and (4) the hypothetical retail market for fixed-mobile convergent bundles in Spain. The Independent Adviser Report also considered the sufficiency of the Divestment Spectrum.

(1769) First, the proposed purchaser, Digi, indicated that in its view the "*Divestment Spectrum ... of 60 MHz ...is sufficient for a full MVNO like DIGI to restore post-transaction the competition on the markets identified by the Commission's Statement of Objections*" (emphasis added).[1934] More specifically, Digi indicated that the "*divested blocks in the medium frequency bands (1,800 MHz and 2,100 MHz) play a crucial role to provide consumers with good coverage and capacity ... [while] the 20 MHz in the 3,500 MHz frequency band are strategically important for the future development of the network and specially for new technologies like 5G, and for future traffic growth needs*."[1935]

(1770) Digi further set out a list of specific benefits of the 40 MHz of medium band spectrum including in the Divestment Spectrum, as set out in **Figure 7947** below.

Figure 79 Advantages of medium-frequency band spectrum

In particular, medium-frequency bands:

1. Offer a balanced compromise between coverage and capacity in the networks;
2. Have better outdoor propagation and indoor penetration capabilities than higher frequency bands (3,5, 6 or 24 GHz). These improved capabilities enhance coverage and quality of service in urban and suburban areas;
3. Are well-suited for handling increased data traffic, meeting the demands of mobile applications;
4. Are optimal for the deployment of 4G networks to provide competitive products in terms of bandwidth and to absorb an important part of the traffic in the short term (on the other hand, 3,500 MHz are optimal for the deployment of new technologies, as 5G and 6G networks, and for data traffic capacity increase especially on the long term);
5. Are ready for future technology refarming to 5G and6G; and
6. Are using significantly smaller antennas, compared to those used in the lower frequency bands, hence using significantly lower space on mobile towers and making the colocation of existing TowerCos much easier.

Source: Digi Response to the Remedies Market Test, 21 December 2023, page 2

1934 Digi Response to the Remedies Market Test, 21 December 2023, page 2, Doc ID 5423.
1935 Digi Response to the Remedies Market Test, 21 December 2023, page 2, Doc ID 5423.

(1771) Overall, Digi considered that "*the remedy as operated by DIGI would offer a suitable alternative to restore competition in the short term on these markets ... [in particular because] ... the Divestment of Spectrum and the NRA Option elevates DIGI as an MNO. This position ensures that DIGI will be able to better control its cost structure and to continue to provide mobile services in competition against the other MNOs*."[1936]

(1772) Second, the Independent Adviser Report observed that "*in relation to the adequacy of the scope of the divested spectrum [i.e. 60 MHz], we are of the view that it appears sufficient to allow DIGI to deliver on its proposed business plan. In addition, our model suggests that the spectrum would enable DIGI to manage its own traffic (other than in areas out of DIGI's RAN and due to poor indoor coverage quality) until [redacted: year], when increased traffic would lead to higher congestion overflow. However, this overflow is likely to be dwarfed by inefficiencies resulting from sub-optimal allocation between DIGI's network and the NRA's underlying network. For the same reason, our model suggests that additional capacity has limited impact on data capture, at least until [redacted: year]. Better data capture could also be achieved with the use of micro cells and more efficient technology*."[1937]

(1773) The Independent Adviser Report observes that, as is the situation of MásMóvil pre-Transaction, "*the lack of availability of radio channels in the low Frequency Bands (700 MHz, 800 MHz and 900MHz Frequency Bands) entails for DIGI the need to foresee the use of the National Roaming services [not only in areas where Digi would not roll out its own network, but] also in some overlapping areas between DIGI's own coverage and the National Roaming coverage, in order to maintain the same "Indoor Coverage" found in the actual mobile radio footprints*."[1938]

(1774) The Independent Adviser Report further outlined its view on possible options that would be open to Digi in the event of "*a more aggressive business scenario than [the one envisaged by] DIGI's remedy business plan BP with substantially greater traffic*". These include (i) "*Upgrade of the antenna systems of the Radio Base Stations by adopting more performing solutions*" (ii) "*Offload over Wi-Fi of the indoor mobile traffic*", (iii) "*Acquisition of new frequency spectrum by participating in future auctions*" and/or (iv) "*Addition of micro (femto, nano) cells outdoor or indoor for the sub-areas with higher consumption*."[1939]

(1775) Third, the responses to the market test were rather mixed on the question of whether the Divestment Spectrum was sufficient for Digi to operate and compete in Spain on a lasting and comparable basis to MásMóvil pre-Transaction. Almost two thirds of respondents declined to express a clear view in either direction, including the other MNOs, Vodafone and Telefónica.[1940]

(1776) Of the respondents that did express a clear view either way, a majority indicated that the amount of Divestment Spectrum was insufficient, some of these were either not well substantiated, more nuanced than their answer would suggest[1941], or their view

1936 Digi Response to the Remedies Market Test, 21 December 2023, page 7, Doc ID 5423.
1937 Independent Adviser Report, page 4, Doc ID 5403.
1938 Independent Adviser Report, page 31, Doc ID 5403.
1939 Independent Adviser Report, page 34, Doc ID 5403.
1940 Response to questionnaire Q4 on remedies, question C.1.
1941 See for example, response to questionnaire Q4 on remedies, question C.2, Doc ID 5217. This respondent, a tower company, indicated that "*It seems appropriate the frequency bands included in the divestment but the 60Mhz spectrum divestment standalone does not seem to be sufficient for Digi to be*

was based on the need to invest in network roll-out and associated cost, which the Commission has assessed separately by considering Digi's business plan and the Independent Adviser's Report, which the market participants have not seen. There were also several substantiated responses indicating the opposite or providing a more nuanced view.

(1777) Some of the more substantiated responses that considered the Divestment Spectrum was sufficient are set out below.

- The Spanish National Regulatory Authority, the telecom regulatory division of the CNMC, indicated that it considered that:
  - Overall, "*the spectrum divestiture proposed by Orange and MasMóvil (60 MHz) is sufficient for DIGI to address concern raised by the operation in that regard, enabling DIGI to operate and compete with the JV and other MNOs in Spain on a lasting basis, thereby replacing in MasMóvil in comparable terms*"[1942].
  - More specifically as regards the 40 MHz of medium-frequency band spectrum, the CNMC considered that "*The total spectrum that Digi will inherit in medium bands seems sufficient for Digi to be able to roll out a 4G network both in terms of extension and of capacity, at least for Digi's current customer base. As the customer base increases and, consequently, the associated traffic, it is considered that the New MNO Agreement, including the NRA Option, will provide an opportunity to absorb the potential surplus, offering a quality comparable to that currently offered by Masmóvil with a larger customer base*."[1943]
  - As regards high-band spectrum (3.5 GHz) and a potential future 5G network, the CNMC further pointed out that, in its view, "*spectrum is not considered to be the limiting factor … The frequencies transferred to Digi in the 3.5 GHz band (20 MHz bandwidth) may be used alone or in combination with the remaining 40 MHz available in the medium band (in case all spectrum would be dedicated to 5G, using carrier aggregation). Moreover, the New MNO Agreement must be considered as a whole, that is, with the NRA Option. As a result, Digi will be in the position of offering the 5G technology with the same quality as the JV's mobile network*."[1944]
- A further respondent, a provider of hosting services to mobile network operators in Spain (a 'tower company'), indicated that while it "*does not have such specific knowledge to provide the reasoned assessment required to respond … according to the existing precedents in the sector, 60 MHz would be a reasonable amount to allow a new player to efficiently enter into the market as new mobile network operator in the market, provided that the spectrum*

competitive as 1) it may take some time for Digi to develop the infra required to operate that spectrum and 2) it would still have a relevant gap in spectrum holdings in high capacity (i.e. 3.500MHz) vs. other players and compared to Masmovil current situation, potentially jeopardizing Digi's ability to compete in 5G. However, when complemented with a scalable and attractive NRA, will probably allow to Digi to be competitive."

[1942] Response to questionnaire Q4 on remedies, question C.1, Doc ID 5321. See also Complementary letter to the CNMC'S reply to the Market Test on the Commitments in Case M.10896, Doc ID 5466.

[1943] Response to questionnaire Q4 on remedies, question C.4, Doc ID 5321.

[1944] Response to questionnaire Q4 on remedies, question C.8, Doc ID 5321.

transfer is accompanied by sufficient obligations and/or incentives on the new entrant to roll out its own mobile network."[1945]

– Finally, an MVNO hosted on Orange's network considered that "*Digi has been competing and growing strong so far, so this new [Divestment Spectrum] assets should help them grow even further. The amount of spectrum is probably not enough to carry all their traffic in certain areas, but still will allow them to compete on a lasting basis*."[1946]

(1778) A number of other responses, mainly access seekers, suggested that the amount of Divestment Spectrum was insufficient for example because it would only be sufficient for a network covering densely populated areas, or due to the relatively small amount of 3.5 GHz spectrum, which is designated for 5G services, notably when compared to the other MNOs in Spain. Several of these responses are set out below:

– An access seeker active in Spain considered that with the Divestment Spectrum Digi "*will only be competitive in the most populated areas of Spain, but Digi will need to acquire additional spectrum bands beyond the 60MHz to provide equivalent service in other areas*."[1947]

– Another access seeker took a more broadly negative view, considering that: "*60 MHz is not enough to develop in Spain a real MNO in Mobile. If EC wants to keep current level of competition the level of Spectrum taken should be much higher*"[1948]

– In a similar vein, a further access seeker active in Spain considered that the Divestment Spectrum would not be sufficient because "*due to the characteristics of the spectrum given to Digi, relying massively in [sic] a NRA agreement with the JV or a third party will be mandatory*."[1949]

– A tower company active in Spain observed that "*it seems appropriate the frequency bands included in the divestment but the 60Mhz spectrum divestment standalone does not seem to be sufficient for Digi to be competitive as … it would still have a relevant gap in spectrum holdings in high capacity (i.e. 3.500MHz) vs. other players and compared to MásMóvil current situation, potentially jeopardizing Digi's ability to compete in 5G*".[1950]

(1779) National Regulatory Authorities from Member States other than Spain generally opted not to take a firm position on the basis that they lacked market specific knowledge but did point to a number of factors they considered to be relevant to the assessment. Some of the main responses are set out below:

– The Italian National Regulatory Authority, AGCOM, suggested that "*the amount of divested spectrum could be compared with the amount owned by other operators,*", further pointed out that "*the quality of spectrum bands change according to the bands …[noting in particular that] … spectrum in the bands under 1 GHz [i.e. low band spectrum] ensure*

1945 Response to questionnaire Q4 on remedies, question C.2, Doc ID 5279.
1946 Response to questionnaire Q4 on remedies, question F.10, Doc ID 5227.
1947 Response to questionnaire Q4 on remedies, question C.2, Doc ID 5237.
1948 Response to questionnaire Q4 on remedies, question C.2, Doc ID 5130.
1949 Response to questionnaire Q4 on remedies, questions C1 and C.2, Doc ID 5223.
1950 Response to questionnaire Q4 on remedies, question C.2, Doc ID 5217.

higher indoor penetration [i.e. than spectrum in medium or high frequency bands] and could be used for 5G application[s]".[1951]

– The Romanian National Regulatory Authority, ANCOM, pointed out that "*As a matter of principle, meeting the same mobile demand with less spectrum needs more sites and cells, whilst using an extensive fibre network helps backhauling cell sites to high capacities*."[1952]

10.4.2. Optional National Roaming Agreement

(1780) The views of Digi and the respondents to the remedies market test as well as the Independent Advisor Report with respect to the Optional NRA are described below.

(1781) First, Digi considered that the Optional NRA will enable Digi to provide services with national coverage comparable to all MNOs in the market in urban as well as rural areas throughout the country, and to access all technologies (current and future) which will bolster the competitiveness of its network.[1953]

(1782) With respect to the capacity usage-based pricing model, Digi considered that this mechanism is designed to urge Digi to roll out its own network efficiently and in a timely manner to avoid any price increase (i.e., prioritizing the development of its own network).[1954]

(1783) Second, the Independent Advisor Report, in a section entitled "*Incentives to exploit the Divestment Spectrum*" pointed out that "*The acquisition of the Divestment Spectrum supports DIGI's transformation from a MVNO to a MNO with the capability to handle part of its traffic on its own mobile network with a completely fixed cost structure*." The report points out however that Independent Advisor has "*not analysed whether the NRA agreement could have been structured in a way that would have incentivised DIGI to expedite the reduction of its reliance on the NRA (at least for coverage unrelated to the low frequency bands)*".[1955]

(1784) The Independent Adviser Report also considered that the NRA Option would allow Digi to "*have part of its traffic in National Roaming either with Telefonica, Vodafone or the JV (the latter, if DIGI chooses to exercise the NRA Option in the remedy package*"[1956]

(1785) Third, respondents to the market test had mixed views on the Optional NRA.

(1786) On the one hand, Telefónica, which currently provides mobile and fixed wholesale access to Digi through its network, has a negative view of the Optional NRA.[1957] Telefónica considered that the NRA is not needed, and Digi already has the means and ability to compete on equal footing with all the JV and other competitors in Spain through its existing agreement with Telefónica.[1958] The other MNO in Spain, Vodafone and its potential purchaser (Zegona), also both considered that the NRA

1951 Response to questionnaire Q4 on remedies, question C.2, Doc ID 5189.
1952 Response to questionnaire Q4 on remedies, question C.4, Doc ID 5161.
1953 Digi Response to the Remedies Market Test, 21 December 2023, page 3, Doc ID 5423.
1954 Digi Response to the Remedies Market Test, 21 December 2023, page 3, Doc ID 5423.
1955 Independent Adviser Report, page 59, Doc ID 5403. E.g. Regarding (i) the penalty incremental periods in case the JV has not been able to finalise the Technical Migration in one or more provinces due to quality of services issues, (ii) the timelines for Digi to notify the JV of the start of the Technical Integration, or (iii) the language regarding the commercial launches of new technology in the top 20 cities in Spain in the agreements or that international roaming is not in scope of the commitments.
1956 Independent Adviser Report, page 31, Doc ID 5403.
1957 Response to questionnaire Q4 on remedies, Doc ID 5287.
1958 Response to questionnaire Q4 on remedies, question D.8, Doc ID 5287.

would distort the wholesale market and give Digi an artificial competitive advantage.[1959]

(1787) On the other hand, most of the respondents who expressed their views considered that the structure of the New MNO Commitment, divestment of mobile spectrum and an Optional NRA, was appropriate to resolve the competitive concerns.

(1788) In that respect, most respondents considered that the optional NRA will provide the ability and incentive for Digi to complete on an equal footing with the JV and other MNOs in Spain in areas where it will not rely, or will not fully rely, on its own mobile network.[1960] In particular the CNMC considered, on the basis of the capacity cap as well as the price structure based on the annual fee, that "*The pricing foreseen by the NRA Option provides the incentives and most likely the ability for Digi to compete on an equal footing with the parties to the transaction*".[1961]

(1789) The respondents also considered that the [10-15] year duration of the Optional NRA will be sufficient to enable Digi to compete on a lasting basis and an equal footing with the JV and other competitors in Spain.[1962] As Adamo pointed out, such duration will allow Digi to have a clear time-plan regarding mobile network deployment and investment efficiencies.[1963]

(1790) The respondents to the market test had differing opinions with respect to the question of how the terms of the NRA could affect Digi's incentives to roll-out its own network. In that regard, the number of respondents considering the terms of the NRA would have a negative impact on Digi's incentives to roll-out was equal to the number of respondents considering the terms would have a positive impact.[1964]

(1791) Finally, most of the respondents considered that the optional NRA, based on the terms as set out in the Initial Commitments, is capable of being replicated by other MNOs in Spain.[1965] In particular the CNMC indicated that Telefónica and Vodafone can provide third party operators with alternative NRAs.[1966] This view is also shared by the Italian National Regulatory Authority, AGCOM[1967], as well as the Tower Companies Axion and Cellnex[1968].

(1792) However, some competitors of the Parties raised doubts as to whether the other MNOs would be willing to replicate the agreement and bring more competition to the market.[1969]

(1793) With respect to the timeline, the vast majority of respondents who expressed their views considered that the deadline for triggering the NRA Option, i.e. [a date in 2025-2026], allow sufficient time for Digi and other MNOs (i.e. either Vodafone or Telefónica) in Spain to agree an alternative NRA should they wish to do so.[1970] Indeed, Vodafone indicated that it "*estimates that negotiations of this nature [i.e. of*

1959 Response to questionnaire Q4 on remedies, question D.2, Doc ID 5300, Doc ID 5273.
1960 Responses to questionnaire Q4 on remedies, question D.7.
1961 Response to questionnaire Q4 on remedies, question D.8, Doc ID 5321.
1962 Responses to questionnaire Q4 on remedies, question D.11.
1963 Response to questionnaire Q4 on remedies, question D.12, Doc ID 5223.
1964 Responses to questionnaire Q4 on remedies, question D.9.
1965 Responses to questionnaire Q4 on remedies, question D.1.
1966 Response to questionnaire Q4 on remedies, question D.2, Doc ID 5321.
1967 Response to questionnaire Q4 on remedies, question D.2, Doc ID 5189.
1968 Response to questionnaire Q4 on remedies, question D.2, Doc ID 5217 and Doc ID 5279.
1969 Response to questionnaire Q4 on remedies, question D.2, Doc ID 5212 and Doc ID 5130.
1970 Response to questionnaire Q4 on remedies, question D.3.

an NRA] would normally take in the region of 6-9 months. On the face, therefore, there could well be sufficient time for Digi and other MNOs in Spain to agree an alternative NRA should they wish to do so."[1971] Telefónica similarly considered that "*the deadline for triggering the NRA Option, [a date in 2025-2026], allows sufficient time for Digi and other MNOs in Spain to agree to an alternative NRA should they wish to do so*"[1972]

(1794) Lastly, several respondents to the market test pointed out that the clause related to the access to new technologies should be further described in the final commitments.[1973]

10.4.3. Suitability of Digi as a purchaser

(1795) With regard to the suitability of Digi as the remedy taker, both the Independent Advisor Report as well as the respondents to the market test expressed a positive view.

(1796) First, the Independent Adviser Report assessed Digi's financial position both on group level as well as in Spain (i.e., its revenues and profitability performance, balance sheet, debt profile, financial covenants, cash flows, credit ratings, and investment research).[1974]

(1797) The Independent Adviser Report also assessed (i) Digi's business plan for the implementation (i.e. investment and commercialization) of the remedy with projections until 2030 and (ii) Digi's business plan excluding the remedies with projections until 2030.[1975]

(1798) Overall, the Independent Adviser concluded that "*DIGI is on an ambitious growth path that requires significant funding. As the company prioritises debt over equity and has to operate with relatively low loan covenant thresholds, this can only be achieved with adequate operational performance. Based on its recent track record, and the current and future operating cash flows generated on its two main markets (Romania and Spain), the financial risk appears to be limited, even with the additional capex investments required by the remedy*".[1976]

(1799) Second, the vast majority of respondents who expressed a view considered the New MNO to be independent of and unconnected to the Parties[1977], as well as having sufficient financial resources[1978] and proven relevant expertise[1979] to acquire the Divestment Commitments and roll out its own mobile network on that basis.

(1800) In particular with regard the expertise of Digi, the respondents based their analysis on the fact that Digi already rolled out its own fixed infrastructure as well as its activities in other European countries. Onivia pointed out that "*Digi is a solid company with long term success tracking from a technical and commercial position in the Spanish market. Also, good and success tracking as an MNO in Romania and is in the process of rolling out a mobile network in Belgium and in Portugal*".[1980] Alai also considered that Digi's experience "*is considered sufficient due to its*

1971 Response to questionnaire Q4 on remedies, question D.4, Doc ID 5300.
1972 Response to questionnaire Q4 on remedies, question D.4, Doc ID 5287.
1973 Response to questionnaire Q4 on remedies, question D.6, Doc ID 5223 and question D.16 Doc ID 5279.
1974 Independent Adviser Report, pages 11-20, Doc ID 5403.
1975 Independent Adviser Report, pages 5, 18, 23, 20-29, Doc ID 5403.
1976 Independent Adviser Report, page 4, Doc ID 5403.
1977 Responses to questionnaire Q4 on remedies, question E.1.
1978 Responses to questionnaire Q4 on remedies, question E.3.
1979 Responses to questionnaire Q4 on remedies, question E.5.
1980 Response to questionnaire Q4 on remedies, question E.6, Doc ID 5198.

current international presence in different markets, its ambition for growth, and its relevant performance in the Spanish market over the last 12 years".[1981]

(1801) Third, the majority of the respondents to the Market Test that expressed a view considered that Digi would have the ability and incentive to maintain and develop its own mobile network on the basis of the Commitments as a viable and active competitive force in the Spanish market. Some respondents questioned Digi's incentives to roll out a 5G network, considering that the relatively limited amount of divested spectrum in the 3.5 GHz band[1982], notably compared to the other MNOs.

10.4.4. Other points raised by the market test

(1802) In addition to their views on the Divestment Spectrum and the Optional NRA, Digi and the Independent Advisor have raised other points during the remedies market test.

– First, Digi also pointed out to the Independent Advisor that the Initial Commitments are also subject to more authorisations by the Spanish Government that what are envisaged in the Initial Commitments.[1983]

– Second, the Independent Advisor identified some minor deviations between the New MNO Agreements and the Commitments, which should be addressed in the final version of the New MNO Agreements or the Commitments.[1984]

– Third, the majority of respondents that expressed a view in response to the market test considered that Digi would not require any additional assets to be able to compete on a lasting basis in Spain, in an equivalent manner to MásMóvil pre-Transaction.[1985] For example, the telecom regulatory division of the CNMC indicated that "*Digi has an extensive FTTH footprint ... so no additional fixed network assets would be needed*."[1986] A small fixed wholesale provider active in Spain added that, in its view, "*mobile assets were the most relevant, ...[and it]... does not consider additional assets would produce any additional benefit*".[1987] In addition, a tower company noted that while Digi "*will need not only active equipment but also mobile telecom infrastructure ... in order for DIGI to become a meaningful MNO within the Spanish market with the ability to appropriately compete on a lasting basis therein ... neutral TowerCos, appear as a reliable partner to help achieve its objectives, in an efficient and sustainable manner. This is the case, for instance, in Portugal where DIGI and Cellnex have reached an agreement to host DIGI's new mobile network.*"[1988]

10.5. Commission's assessment of the Initial Commitments

10.5.1. Introduction

(1803) At the outset, the Commission recalls that to be acceptable, the proposed commitments must be capable of rendering a concentration compatible with the internal market as they prevent a significant impediment to effective competition in

---

1981 Response to questionnaire Q4 on remedies, question E.6, Doc ID 5263.
1982 Responses to questionnaire Q4 on remedies, questions C.8 and E.7.
1983 Independent Adviser Report, page 60, Doc ID 5403.
1984 Independent Adviser Report, pages 54-57, Doc ID 5403.
1985 Response to questionnaire Q4 on remedies, question F.9.
1986 Response to questionnaire Q4 on remedies, question F.10, Doc ID 5321.
1987 Response to questionnaire Q4 on remedies, question F.10, Doc ID 5223.
1988 Response to questionnaire Q4 on remedies, question F.10, Doc ID 5279.

all relevant markets in which competition concerns were identified. In the present case, the commitments needed to eliminate the competition concerns identified by the Commission with respect to horizontal non-coordinated effects on (1) the retail market for mobile telecommunications services in Spain; (2) the retail market fixed internet services in Spain; (3) the hypothetical retail market for multiple-play bundles in Spain and (4) the hypothetical retail market for fixed-mobile convergent bundles in Spain.

(1804) Moreover, pursuant to paragraph 15 of the Remedies Notice, structural commitments are preferable from the point of view of the Merger Regulation's objective, in as much as such commitments prevent, durably, the competition concerns which would be raised by the merger as notified, and do not, moreover, require medium or long-term monitoring measures.

(1805) In this respect the Commission considers that the Commitments are structural in nature, and have the objective of creating a fourth MNO capable of compensating for the loss of competition deriving from the Transaction (namely the elimination of MásMóvil as an independent MNO and important competitor operating in Spain).

(1806) They are thus capable, in principle, of removing the competition concerns identified by the Commission. Indeed, in light of the results of the Market Test, the Commitments included the divestment of the essential inputs necessary for the operation of an MNO business, namely the transfer of licences to use spectrum band(s) that are essential for rolling out a mobile network.

(1807) As further set out in paragraph 9 of the Remedies Notice, structural commitments can only be deemed to be capable of rendering the concentration compatible with the internal market if they eliminate the competition concerns entirely and are comprehensive and effective from all points of view. Paragraph 10 of the Remedies Notice further points out that this is only the case if the structural commitments result in new commercial structures that will be sufficiently workable and lasting to ensure that the significant impediment to effective competition will not materialise.

(1808) The Initial Commitments comprise a combination of a structural element, namely the Divestment Spectrum, and a non-structural element, namely the NRA Option. For the reasons outlined below, the Commission considers that—despite some inconsistencies compared to the MNO Agreements and points that required further clarification—the Initial Commitments are likely to be broadly sufficient to remove entirely and in an effective manner the competition concerns identified in the relevant markets.

10.5.2. Divestment Spectrum

(1809) As the aim of the Commitments is to replicate the competitive constraint being exerted by MásMóvil pre-Transaction in the four retail markets outlined in Section 9 above, it is relevant as a starting point to consider the basis on which MásMóvil provides services in those markets, namely its mobile network assets and associated agreements.

(1810) First, MásMóvil has [...]MHz of mobile spectrum, which is less than [50-60]% the amount of spectrum held by any of the other three MNOs: Telefónica (305 MHz), Orange (305 MHz) and Vodafone (285 MHz).[1989] Also, unlike the other three MNOs, MásMóvil does not have any low band spectrum, i.e. spectrum below 1 GHz (namely 700 MHz, 800 MHz or 900 MHz).

(1811) MásMóvil has a mobile network of around [...] sites[1990], primarily concentrated in more densely populated areas, compared to around 18,000-22,000 sites[1991] in the case of the other three MNOs, each of which has a nationwide network. In terms of coverage, MásMóvil's own network, i.e. with its [...] sites (excluding national roaming), covers less than [20-30%] of the Spanish territory:

– [20-30%]% of the territory of Spain for 3G services ([80-90%]% of the Spanish population);

– [20-30%] of the territory of Spain for 4G services ([80-90%] of the Spanish population); and

– [0-5%]% of the territory of Spain for 5G spectrum usage ([5-10%] of the Spanish population).[1992]

(1812) In order to be able to provide retail mobile services (including as part of multiple-play and FMC bundles), outside of its own network footprint and to compensate for the lack of indoor coverage within its own network footprint, MásMóvil relies on a [Details of the Parties' commercial agreements].[1993]

(1813) The Parties pointed out that MásMóvil [Details on MASMOVIL's business strategy and on the wholesale agreements concluded by the Parties].[1994]

(1814) The Parties further point out that MásMóvil had "[Details of MASMOVIL's 5G roll-out plans][1995]. They indicate that MásMóvil "[Details of MASMOVIL's 5G roll-out plans][1996]

(1815) While the Commission did observe ,[1997] observe [Details on MASMOVIL's 5G deployment plans].[1998] MásMóvil ultimately opted not to participate in the 700 MHz auction as it considered [Details on MASMOVIL's decision not to participate in the 700 MHz auction][1999] and [Details on MASMOVIL's decision not to participate in the 700 MHz auction][2000] [Details on MASMOVIL's decision not to participate in

1989 Form CO, paragraph 497. Note that this excludes 26 GHz band spectrum, which has been allocated to Telefónica, Orange and Vodafone, but which is not yet in use by any operator due to limited current use cases. It is expected to be useable for 6G in the future.

1990 Form CO, Table 29.

1991 Telefónica (21,000), Vodafone (19,100), Orange (17,973, of which 11,962 sites shared with Vodafone). See Form CO, Table 29 and Footnote 442.

1992 Form CO, paragraph 124.

1993 Form CO, paragraph 589. For completeness, MásMóvil also has an [Details of MASMOVIL's commercial agreements].

1994 Letter of Facts Response, paragraph 9. See also Form CO, paragraph 10.

1995 Letter of Facts Response, paragraph 23. See also Form CO, paragraph 1616.

1996 Letter of Facts Response, paragraph 27-28. See also Form CO, paragraph 2602.

1997 Letter of Facts Response, paragraph 30.

1998 Letter of Facts, paragraph 13.

1999 Letter of Facts, paragraph 13.

2000 Letter of Facts, paragraph 13.

the 700 MHz auction]. Indeed, [Details on MASMOVIL's 5G deployment plans][2001] [Details on MASMOVIL's 5G deployment plans].

(1816) The Commission observes that MásMóvil's [Details on MASMOVIL's business strategy]. MásMóvil's own network is of itself insufficient to carry 100% of its mobile traffic, notably in view of the absence of low-band spectrum, as such spectrum is better adapted for MásMóvil roll-out in rural and less populated areas, and, as pointed out by the Italian National Regulatory Authority, AGCOM, "*spectrum in the bands under 1 GHz [i.e. low band spectrum] ensure higher indoor penetration [i.e. than spectrum in medium or high frequency bands]*".[2002] As such, even in those more populated areas where MásMóvil has rolled out a network, its own network coverage needs to be partly supplemented by wholesale access in view of the greater indoor coverage offered by low-band spectrum. Indeed, as with MásMóvil today, for reasons related to "*Indoor coverage*" (due to lack of low band spectrum) the Independent Advisor Report considered that "*the need to use National Roaming services will continue to be mandatory in some areas of overlap between DIGI's own coverage and National Roaming coverage*."[2003]

(1817) On the other hand, MásMóvil has the ability to rely on its own network for a [Details on MASMOVIL's mobile network traffic] of its mobile traffic. According to a MásMóvil internal document, [Details on MASMOVIL's mobile network traffic and its business strategy, and on the wholesale agreements concluded by the Parties][2004] [Details on MASMOVIL's mobile network traffic and its business strategy, and on the wholesale agreements concluded by the Parties][2005] [Details on MASMOVIL's mobile network traffic and its business strategy, and on the wholesale agreements concluded by the Parties].

(1818) As such, the Commission considers that the Divestment Spectrum, in order to put Digi in a position to replicate the constraint exerted by MásMóvil, should be at least sufficient to enable Digi to capture a comparable percentage of its total mobile traffic on its own network to that which MásMóvil captured on its own network in 2021 and prior years, i.e. sufficiently before the Transaction was announced, which was approximately [40-60]% or more of its total mobile traffic.

(1819) In this regard, Zegona, which has agreed to acquire Vodafone Spain, "*considers that with the currently proposed remedy, Digi would have an incentive to roll out its own mobile network, but possibly only to serve perhaps <u>maximum half of its mobile traffic</u> via its own network*"[2006] (emphasis added).

(1820) The Independent Adviser, in preparing its report, modelled various data capture scenarios on the basis of the Divestment Spectrum (i.e. 60 Mhz), and indicated the expected mobile data capture on Digi's own network under each scenario. For example, by [redacted: Year between 2026 and 2030], the Independent Adviser estimates data capture of up to 67% on Digi's own network under "*optimal management*", and would range from 33% to 54% under various "*sub-optimal*" data

2001 Letter of Facts Response, paragraph 28.
2002 Response to questionnaire Q4 on remedies, question C.2, Doc ID 5189.
2003 Independent Adviser Report, pages 38-38, Doc ID 5403.
2004 MásMóvil S&P – BRP discussion, September 2021, ID MM-00173533, Doc ID 2670-65198, page 13.
2005 Letter of Facts, paragraph 19.
2006 Minutes of meeting of 10 January 2024 with Zegona, paragraph 8, Doc ID 5491.

allocation scenarios (ranging from 50% to 75% data capture in Digi's own network in those areas where its network would overlap with that of the JV).[2007]

(1821) On the basis of the above, as well as the projection by Digi that the Divestment Spectrum, and notably the 40 MHz of medium band spectrum are "*optimal ... to absorb an important part of the traffic in the short term*", the Commission considers that it does appear to be the case that the Divestment Spectrum will allow Digi to capture around half of its mobile traffic on its own network, comparable to MásMóvil's network management strategy [details on MASMOVIL's business strategy.

(1822) The Commission further considered whether the Divestment Spectrum would remain sufficient in future years, assuming Digi's customer base continues to grow. That is a critical assumption, assessed by reference to Digi's retail market growth rate in recent years and its business plan provided to the Commission, since the Initial Commitments do not provide for the divestment of any retail customer contracts or brands and Digi, as of 2022, was less than one quarter of the size of MásMóvil ([...] million vs [...] million mobile customers), only [...] the size of the JV (which would have had over [...] million mobile customers).

(1823) As outlined in Section 10.4 above, the results of the market test were somewhat mixed on this point. For example, the CNMC indicated that "*(60 MHz) is sufficient ... enabling DIGI to operate and compete with the JV and other MNOs in Spain <u>on a lasting basis</u>"* (emphasis added). When considering the 40 MHz of medium band spectrum, the CNMC indicated that it took a slightly more nuanced view, noting that it *"seems sufficient for Digi to be able to roll out a 4G network both in terms of extension and of capacity, <u>at least for Digi's current customer base</u>. As the customer base increases and, consequently, the associated traffic, it is considered that the New MNO Agreement, including the NRA Option"*[2008] (emphasis added).

(1824) The Parties, in a submission dated 13 January 2024 to the Independent Adviser, project that from 2027 to 2030 Digi would pay EUR [...] per year in "NRA Cost", whereas this would increase by EUR [...] to EUR [...] as of [a date in 2030-2031], and further increase as of [a date in 2034-2035].[2009] The same submission modelled the level of "*NRA Cost*" in scenarios involving different volumes of spectrum being divested, including 70 MHz and 90 MHz. Under the Parties' model, Digi's reliance on the NRA (and its use of its own network) would remain the same until 2031 irrespective of whether it has 60 MHz of spectrum or 90 MHz of spectrum. In the latter scenario, Digi's reliance on the NRA would remain constant until 2035 according to the Parties' model, suggesting it would absorb more traffic in its own network, while other costs (such as annual spectrum fees) would be higher in such a scenario.

(1825) The Independent Adviser Report similarly projected that Digi could face "*Congestion Overflow, i.e. the traffic moved to the NRA's underlying network for reasons other than lack of indoor coverage*" of up to "*9.8.4%"*[2010] as of [redacted: year between 2027 and 2030], with the result that "*the data capture by DIGI's RAN*

[2007] Independent Adviser Report, TABLES- ANNEX_6 woS&T-rev01, Doc ID 5403.

[2008] Response to questionnaire Q4 on remedies, question C.1 and C.4, Doc ID 5321. See also Complementary letter to the CNMC's reply to the Market Test on the Commitments in Case M.10896, Doc ID 5466.

[2009] Parties' submission of dated 13 January 2024 to the Independent Adviser.

[2010] Independent Adviser Report, TABLES- ANNEX_6 woS&T-rev01, Doc ID 5403.

would as a result decrease". It further observed that "*in the years following 2030 … a simple traffic extrapolation would, everything else held equal, lead to decreased data capture by DIGI's network and increased congestion overflow*." The Independent Adviser Report qualified these projections by pointing out that "*those percentage values [of congestion overflow] are* <u>*upper limit values*</u> *reached under optimal management but as explained in Annex 6, those values are* <u>*likely to be lower*</u> *due to the potential sub-optimal allocation of traffic to the NRA's underlying network even when DIGI's RAN is available*" (emphasis added).[2011]

(1826) The Independent Adviser Report further outlined a number of available "*solutions to manage possible capacity problems*", including (i) "*Upgrade of the antenna systems of the Radio Base Stations by adopting more performing solutions*" (ii) "*Offload over Wi-Fi of the indoor mobile traffic*", (iii) "*Acquisition of new frequency spectrum by participating in future auctions*" and/or (iv) "*Addition of micro (femto, nano) cells outdoor or indoor for the sub-areas with higher consumption*."[2012]

(1827) The Commission notes that solutions (i) and (iv) would require additional investment that may not be borne by other MNOs with greater levels of spectrum. Solution (ii) would only apply to customers that also have a fixed internet subscription with Digi and also only as regards mobile data traffic (and not mobile voice or SMS traffic). Solution (iii) is further discussed below.

(1828) The Parties point out that "*the overall concept of the remedy was to create a hybrid operator which would rely both on its own network and on the NRA. The NRA was not designed as a "second best fall-back" solution but as an instrument of equal importance for Digi's competitiveness. … The remedy package of 60 MHz coupled with an aggressively priced NRA therefore more than replicates the basis on which MÁSMÓVIL has been competing so far and would have competed is the absence of the Transaction*."[2013] While the Commission agrees that the purpose of the remedy is to create a hybrid operator which would rely both on its own network and on the NRA, it should also not be required to rely to a materially greater extent on the NRA than MásMóvil. While "*an aggressively priced NRA"* may indeed compensate for less spectrum, an NRA is a non-structural arrangement whereas under the Remedies Notice, it is important that any structural commitments, such as the Divestment Spectrum in this case results in "*new commercial structures …[that]… will be sufficiently workable* <u>*and lasting*</u> *to ensure that the significant impediment to effective competition will not materialise*"[2014] (emphasis added). If that were not the case, a remedy involving "*an aggressively priced NRA"* but zero mobile spectrum would be sufficient under the Remedies Notice to ensure that the significant impediment to effective competition will not materialise.

(1829) Specifically with regard to the amount of Divestment Spectrum, the Commission recalls the views expressed by certain National Regulatory Authorities including the Italian NRA, AGCOM, which suggested that "*the amount of divested spectrum could be compared with the amount owned by other operators*"[2015] and the Romanian

2011 Independent Adviser Report, pages 33, TABLES- ANNEX_6 woS&T-rev01, Doc ID 5403.

2012 Independent Adviser Report, page 34, Doc ID 5403.

2013 RFI 42 Response, paragraphs 1.15-1.16.

2014 Commission Remedies Notice, paragraph 10.

2015 Response to questionnaire Q4 on remedies, question C.2, Doc ID 5189.

NRA, ANCOM, which pointed out that "*as a matter of principle, meeting the same mobile demand with less spectrum needs more sites and cells*."[2016]

(1830) The Divestment Spectrum includes 40 MHz of medium band spectrum 20 MHz in the 1.8 GHz frequency band and 20 MHz in the 2.1 GHz frequency band. By way of comparison, MásMóvil has an additional 10 MHz in each of those bands, i.e. 30 MHz in the 1.8 GHz frequency band and 30 MHz in the 2.1 GHz frequency band (60 MHz of medium band spectrum in total). In the 3.5 GHz band, the Divestment Spectrum includes 20 MHz, whereas MásMóvil has 80 MHz in this frequency band.

(1831) The Parties however note that [Details on MASMOVIL's mobile network traffic and its business strategy].[2017]

(1832) Taking the above statement at face value,[2018] the Commission notes as follows:

– First, that Digi would acquire 10 MHz less spectrum in the 1.8 GHz band compared to what MásMóvil actually uses today. While this may be sufficient for Digi's current purposes, given its customer base is roughly one quarter the size of MásMóvil's, in principle the remedy should also enable Digi to grow to a comparable size without necessarily needing to increasingly depend on wholesale access to third party networks.

– Second, while the amount of spectrum in the 2.1 GHz would be comparable to what MásMóvil uses today, it cannot be excluded that MásMóvil may have used the remaining 10 MHz in this frequency band in future years absent the Transaction. Indeed, as outlined in the Letter of Facts, the Commission considers that MásMóvil has opted for commercial reasons to leverage its assets to obtain the best possible balance between relying on and investing in its own mobile network and relying on wholesale access to third party networks[2019], [details on MASMOVIL's mobile network traffic and its business strategy],[2020] [details on MASMOVIL's mobile network traffic and its business strategy]. [2021]

– Third, the Divestment Spectrum also only includes 20 MHz of spectrum in the 3.5 GHz band, which is materially less than the 80 MHz held by MásMóvil. However, [details on MASMOVIL's 5G deployment plans][2022] [details on MASMOVIL's 5G deployment plans].[2023] [details on MASMOVIL's 5G deployment plans].

(1833) In conclusion, even though the Commission may retain some doubts as to whether the Divestment Spectrum, of itself, would be sufficient to remove the significant impediment to effective competition on a lasting basis, in particular in the medium frequency bands, when considered together notably with (i) the NRA Option (given

2016 Response to questionnaire Q4 on remedies, question C.4, Doc ID 5161.
2017 Parties` submission of 18 January 2024 entitled "Voluntary submission following the State of Play meeting dated 11 January 2024", page 2.
2018 [Details on MASMOVIL's mobile network traffic and its business strategy on the use of specific spectrum bands]
2019 Letter of Facts dated 24 August 2023, paragraph 19.
2020 MásMóvil S&P – BRP discussion, September 2021, ID MM-00173533, Doc ID 2670-65198, page 13.
2021 MásMóvil S&P – BRP discussion, September 2021, ID MM-00173533, Doc ID 2670-65198, page 13.
2022 Parties` submission of 18 January 2024 entitled "Voluntary submission following the State of Play meeting dated 11 January 2024", page 2.
2023 Mark up of draft Form RM submitted on 8 December 2023.

the hybrid model of MásMóvil that the remedy is intended to replicate) and (ii) the pre-Transaction growth trajectory of Digi, the Commission considers that the Initial Commitments will remove entirely and in an effective manner the competition concerns identified in the relevant retail markets.

(1834) Further, the Commission understands that, in addition to the technical solutions outlined in the Independent Adviser Report, there may be spectrum auctions organised in the coming years, notably in the 600 MHz band, the 1.5 GHz band and the 6 GHz band. While these auctions have yet to be publicly announced, the Commission understands that the Ministry has confirmed to the Parties that such auctions would take place between 2026 and 2031.[2024] These auctions would have a particular relevance for Digi, as a new fourth MNO with less spectrum than the other MNOs, in particular in view of the Ministry's announced plans to extend by 10 years and free of charge (except for annual spectrum fees) the licenses for all of the mobile spectrum[2025] currently auctioned to the Spanish MNOs, which would move their current expiry date in 2030 to 2040,[2026] and thereby mean there may not be auctions for these spectrum frequency bands before 2040.

(1835) It would thus be for the Ministry to decide whether it may be necessary or appropriate for ensuring competition in the long term to organise those auctions in such a way as to guarantee a certain portion of spectrum for the fourth and smallest MNO, which typically has less financial resources than the more-established MNOs, as indeed was done recently in a number of other EU Member States, for example in Belgium, Czechia, Germany and Portugal.

10.5.3. Optional National Roaming Agreement

(1836) First, the NRA is an opt-in mechanism in the hands of the New MNO exclusively, which can decide to exercise the option or not until [a date in 2025-2026] without any penalty. In other words, should Digi decide to continue with Telefónica or conclude an NRA with another MNO, it is free to do so. The Commission considers it essential that the NRA remains an option for the New MNO in order to ensure and maintain the competitive dynamics on the wholesale mobile network access and call origination services between MNOs in which the Commission has found that the Transaction does not raise competition concerns as to its compatibility with the internal market.

(1837) Currently, Digi has an MVNO agreement with Telefónica and operates on its mobile network until 30 September 2026. The Commission deems it important that the New MNO has the possibility but also sufficient time to negotiate an alternative NRA should Digi wish to enter into an NRA agreement with other MNOs in Spain. Based on the results of the market test and Digi's submission[2027], the Commission concludes that the terms of the Commitments allow enough flexibility to the New MNO.

[2024] Response to RFI 43, page 4: 1.5 GHz band auction (estimated in 2025-2026), 6 GHz band auction (estimated in 2026-2027), and 600 MHz band auction (Estimated as of 2031).

[2025] With the exception of the 700 MHz and the 26 GHz frequency band licenses, which were already granted for the maximum 40-year period, until 2061 and 2063 respectively.

[2026] Note that it was necessary for each MNO to apply for such extension. All MNOs, including MásMóvil and Orange, have done so. See RFI 32, paragraphs 13.1-13.2 ("*These extension requests apply to all of MASMOVIL's and OSP's spectrum holdings, except for the 700MHz and 26 GHz bands*"). As a result, the license extension requests also apply to the Divestment Spectrum.

[2027] Digi Response to the Remedies Market Test, 21 December 2023, pages 3-4, Doc ID 5423.

(1838) Second, the Commission considers it to be of paramount important that a balance is found between ensuring that the Optional NRA is sufficiently competitive to provide the New MNO with the incentives to compete effectively with the other MNOs, but also to ensure that it is sufficiently incentivised to roll out its own network rather than relying on the NRA in the medium to long term.

(1839) In that regard, until end of 2026, Digi will continue to rely on its MVNO Agreement with Telefónica and will launch the pre-commercial phase of its own mobile network on this basis. Once the New MNO will get the Divestment Spectrum, it will launch its own mobile network complemented by an NRA (with the JV or with another MNO).

(1840) The pricing mechanism for the Optional NRA included in the New MNO Commitment is capacity-based. When the New MNO first launches its own mobile network, it would depend on the JV for the provision of its retail services. The Commission considers that the capacity-based cost structure is set at a level that gives the New MNO an incentive to complete its own network and keep the traffic of its customers to its own network.

(1841) Third, as pointed out by Digi to the Independent Advisor[2028], a ministerial authorisation shall be requested by the JV to the Spanish Ministry in order to conclude the Optional NRA between the two MNOs (i.e. Digi and the JV). This Commission considers that this request shall be included in the New MNO agreement.

(1842) Fourth, the Commission considers particularly relevant that the Optional NRA covers all technologies as well as the possibility for Digi to request access to future new mobile technology generations (such as 6G). In that regard, although the clause on access to new technologies does not contain a clear obligation on what happens if the JV refuses to provide access, the Commission notes that the Commitments offer sufficient safeguards to Digi in the event of a dispute concerning a request for access to a new technology. In such a case, Digi (and the Parties) would have the possibility to use the Fast-Track Dispute Resolution procedure foreseen in Section D of the Commitments.

(1843) Fifth, and lastly, the Commission agrees with the Independent Advisor Report on the minor deviations between the New MNO agreement and the Commitments, which should be addressed in the final version of the New MNO agreement or the Commitments.[2029]

10.6. Digi as a fix-it first purchaser of the Commitments

10.6.1. The Parties' view on Digi as a fix-it first purchaser

(1844) As noted above in recital 1749, the Parties informed the Commission that they had entered into binding long form agreements on 11 December 2023 consisting of (1) a Spectrum Transfer Agreement; and (2) an NRA Option Agreement (together the "New MNO Agreements") with Digi.

(1845) First, the Parties submit that Digi is independent and unconnected to the Parties. Digi Spain is controlled at 93.58% by Digi Communications N.V., which is ultimately owned by Zoltán Teszári. The Parties and Digi (or its ultimate shareholders) do not have any structural link.

2028 Independent Advisor Report, page 60, Doc ID 5403.
2029 Independent Adviser Report, pages 54-57, Doc ID 5403.

(1846) Second, the Parties submit that Digi has the financial resources, proven relevant expertise, and ability and incentive to maintain and develop as the New MNO.

(1847) The Parties consider that Digi has the necessary financial resources to continue growing in Spain. They pointed out that the New MNO has robust investment capacity, as illustrated by its significant fixed roll-out plans. In particular, Digi signed a EUR 300 million funding agreement with Abrdn in March 2023 to deploy 2.5 million FTTH BUs in Andalucía and a EUR 100 million additional term loan facility with RCS & RDS S.A., ING Bank N.V. and Banco Santander in June 2023 that will be used to finance further FTTH roll-out.[2030]

(1848) In addition, the Parties submit that Digi has the required technical expertise to successfully deploy its own mobile network in Spain, as it has substantial experience rolling out and operating mobile networks in other EU Member State (i.e. Romania, Belgium, and Portugal).[2031]

(1849) Third, the Parties consider that Digi as the New MNO would not raise *prima facie* competition concerns and that no risk of delay in the implementation of the Commitments.[2032]

10.6.2. The Commission's assessment of Digi as a first-it fix purchaser

(1850) Based on the submissions of the Parties[2033] as well as the Independent Advisor Report[2034], the Commission considers that Digi complies with the standard purchaser requirements detailed in the Remedies Notice in terms of independence, financial resources, and the absence of prima facie competition concerns.

(1851) First, the Commission finds that Digi is independent of and unconnected to the Parties based on the Independent Advisor Report and the replies to the market test described above in Section 10.4.3.

(1852) Second, the Commission considers that Digi possess the financial resources, proven relevant expertise and has the incentive and ability to roll-out its own mobile network in the Spanish market as a viable and active competitive force in competition with the Parties and the other MNOs.

(1853) In that regard, as indicated in Section 10.4.3, the Independent Adviser Report assessed Digi's financial position both on group level as well as in Spain.[2035] The Independent Adviser Report also assessed Digi's business plan until 2030.[2036]

(1854) Overall, the Independent Adviser concluded that "*DIGI is on an ambitious growth path that requires significant funding. As the company prioritises debt over equity and has to operate with relatively low loan covenant thresholds, this can only be achieved with adequate operational performance. Based on its recent track record, and the current and future operating cash flows generated on its two main markets (Romania and Spain), the financial risk appears to be limited, even with the additional capex investments required by the remedy*".[2037]

2030 Form RM, paragraph 56.
2031 Form RM, paragraph 59.
2032 See Form RM, paragraph 64 where the Parties indicated that "*The Commitments will be implemented within a short period of time after the clearance of the Transaction*".
2033 Form RM submitted by the Parties on 30 January 2024.
2034 Independent Adviser Report, Doc ID 5403.
2035 Independent Adviser Report, pages 11-20, Doc ID 5403.
2036 Independent Adviser Report, pages 5, 18, 23, 20-29, Doc ID 5403.
2037 Independent Adviser Report, page 4, Doc ID 5403.

(1855) Third, the Commission considers that the Transaction is neither likely to create new competition problems, nor give rise to the risk that the implementation of the New MNO Commitments will be delayed.

(1856) In this respect, the Commission notes that Digi is currently active in the mobile telecommunications sector in Spain as a MVNOs and already owns its own relatively large fixed (fibre) network. Digi began operating in Spain in 2008 as a mobile-only player. In 2017, Digi started building its own FTTH network and has since then been serving all customers with offers comprising mobile, fixed internet and telephony services combined in 3P and 4P bundles under one single brand. Digi has steadily been growing and gained market share over the years. Today, Digi is the largest and fastest-growing MVNO and became the fifth largest operator in Spain. Going forward, "*Digi intends to start to offer pay TV services in Spain in the short to medium term.*"[2038] However, its position today remains significantly more limited than the MNOs, with market shares of [5-10]% in the market for the retail supply of mobile telecommunication services, [5-10]% in the market for the retail supply of multiple-play bundles, and [0-5]% in the market for the retail supply of FMC bundles by volume in 2022.

(1857) The Commitments will further reinforce Digi's position in the mobile telecommunication sector in Spain, but given its limited market shares in the affected markets, the Commission considers that the Commitments will not create new competition problems. On the contrary, it will contribute to intensify competition post-Transaction.

(1858) Finally, whilst certain regulatory approvals would be required in order to fully implement the Final MNO Commitment, the Commission considers that Digi can reasonably be expected to obtain all necessary approvals from the relevant regulatory authorities for the acquisition of the business to be divested. Indeed, Digi indicated that it "*does not anticipate any significant administrative hurdles that would cause delays in terms of permits for the deployment of the mobile network in Spain*".[2039]

10.7. Description of the Final Commitments

(1859) The Final Commitments contain a small number of language changes and clarifications, primarily aimed at addressing the points raised by the market test set out in Section 10.4.4 above, in particular:

– Including language that the Parties would undertake all steps required of them to request the relevant authorisations from the Ministry, as the authority in charge of setting and managing the radio spectrum in Spain, including notably with respect to (i) the transfer of the Divestment Spectrum, including for splitting of the spectrum license that MÁSMÓVIL holds for the frequency blocks of the Divestment Spectrum (as the blocks of the Divestment Spectrum do not match the spectrum blocks that were auctioned) and the issuance by SETID of new spectrum rights for the frequency blocks of the Divestment Spectrum; and (ii) the use by JV of frequency blocks of the Divestment Spectrum during the period of the Technical Migration.

– Aligning the Final Commitments more closely with the wording of the New MNO Agreement that were signed on 11 December 2023 between Digi [Commercial terms of the New MNO Agreement].

2038 Digi Response to the Remedies Market Test, 21 December 2023, page 8, Doc ID 5423.
2039 Digi Response to the Remedies Market Test, 21 December 2023, page 7, Doc ID 5423.

10.8. Commission's assessment of the Final Commitments

(1860) The Commission considers the Final Commitments address the residual points raised in the market test, as outlined in Section 10.4.4 above.

(1861) The Commission further considers that the terms of the New MNO Agreements are compliant with the Final Commitments.

(1862) On the whole, the Commission considers that the Final Commitments eliminate the competition concerns identified with respect to (1) the retail market for mobile telecommunications services in Spain; (2) the retail market fixed internet services in Spain; (3) the hypothetical retail market for multiple-play bundles in Spain and (4) the hypothetical retail market for FMC bundles in Spain.

- First, the majority of respondents that expressed a view in response to the market test considered that the Final Commitments will fully address the identified competition concerns in the retail markets for (i) mobile services (ii) fixed internet services (iii) multiple-play bundles and (iv) FMC bundles in Spain and will ensure that the conditions of competition in those markets are at least as competitive as before the Transaction.[2040]
- Second, the "*Divestment of Spectrum and the NRA Option elevates DIGI as an MNO*" …[from its current MVNO business model, and puts Digi]… "*in a position to compete efficiently as an MNO against the three other MNOs*",[2041] on the basis of a similar hybrid model to that used by MásMóvil today. As a result the Commission considers that the Final Commitments, in the first instance, eliminate the competition concerns identified with respect to the retail market for mobile telecommunications services in Spain.
- Third, the Commission considers that the Final Commitments also eliminate the competition concerns identified with respect to the markets for fixed internet services, multiple-play bundles and fixed-mobile convergent bundles in Spain, without the need for additional assets. This is because of the highly convergent nature of retail telecom markets in Spain, described in Section 7.1 above, the customer profile of MásMóvil, and the fixed network assets of Digi, as described further below.
  - The number of standalone offers in the retail market for standalone fixed internet services in Spain is negligible (less than 4%[2042]). In other words and based on 2022 data from the CNMC, 96% of fixed internet lines in Spain were sold as part of multiple-play bundles.
  - With respect to post-paid mobile lines, 85% were sold as part of a bundled offer in Spain in 2022, i.e. as part of FMC bundles. [2043]
  - Specifically in the case of MásMóvil, whose competitive constraint and potential the commitments aim to replicate, in 2022 the vast majority of its retail fixed internet customers (([70-80%]) and an even greater majority of its overall multiple-play bundle customers ([80-90%]) also had retail mobile subscriptions with MásMóvil, i.e. as part of FMC

2040 Responses to questionnaire Q4 on remedies, question F.20.
2041 Digi Response to the Remedies Market Test, 21 December 2023, pages 6 and 8, Doc ID 5423.
2042 Form CO, paragraph 1206.
2043 CNMC 2022 report – Telecommunications and Audiovisual Sector Economic Report 2022, of 18 July 2023, pages 53-55.

bundles. By contrast, a minority of MásMóvil's mobile customers ([30-40%]) subscribed to mobile services as part of FMC bundles (i.e. ([60-70%]) % had standalone mobile subscriptions).[2044] This shows that while the vast majority of MásMóvil's fixed internet customers were also mobile customers, the converse was not true. This suggests that MásMóvil may have leveraged its relatively stronger position in mobile, including thanks to its mobile spectrum and mobile network assets, to gain customers in the fixed internet, multiple-play bundle and FMC bundle markets.

– Digi has a relatively large, fixed broadband (fibre) network in Spain, which it continues to build. In that regard, Digi pointed out that "*DIGI has already its own fixed network …[and]… since 2018, DIGI has been offering fixed broadband services with a national footprint based on its own FTTH network …which DIGI carries on extending … and complemented with a wholesale … access Telefonica's FTTH network*."[2045] Indeed, the CNMC echoed this point noting that "*Digi has an extensive FTTH footprint … so no additional fixed network assets would be needed*."[2046]

10.9. Conclusion

(1863) In the light of the above, the Commission considers the Final Commitments are capable of rendering the Transaction compatible with the internal market as it will prevent a significant impediment to effective competition in all relevant markets in which competition concerns were identified, namely:

(a) the market for the retail supply of mobile telecommunication services in Spain,

(b) the market for the retail supply of fixed internet access services in Spain,

(c) the hypothetical market for the retail supply of multiple-play bundles (and the narrower hypothetical market segment for the retail supply of multiple-play bundles without premium Pay-TV football content) in Spain, and

(d) the hypothetical market for the retail supply of FMC bundles (and the narrower hypothetical market segment for the retail supply of FMC bundles without premium Pay-TV football content) in Spain.

(1864) Moreover, the Commission considers that the MNO Agreements, namely the Spectrum Divestment Agreement and the NRA Option Agreement, between the Parties and Digi are compliant with the Final Commitments and that Digi is a suitable purchaser of the Final Commitments within the meaning of the Remedies Notice.

11. CONDITIONS AND OBLIGATIONS

(1865) 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 vis-à-vis the Commission with a view to rendering the concentration compatible with the internal market.

2044 Annex RFI 37, Q1.
2045 Digi Response to the Remedies Market Test, 21 December 2023, page 9, Doc ID 5423.
2046 Response to questionnaire Q4 on remedies, question F.10, Doc ID 5321.

(1866) 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.

(1867) In accordance with the basic distinction described above in this Section 11 (1865)as regards conditions and obligations, this Decision should be made conditional on the full compliance by the Parties with the Section B (including Schedules 1 and 2 of the commitments submitted by the Parties on 30 January 2024 and all other Sections should be obligations within the meaning of Article 8(2) of the Merger Regulation. The full text of the Commitments is attached as an Annex to this Decision and forms an integral part thereof.

HAS ADOPTED THIS DECISION:

Article 1

The notified operation whereby Orange S.A. and by Lorca JVCo Limited would acquire within the meaning of Article 3(1)(b) and 3(4) of the Merger Regulation joint control of a newly founded JV combining Orange Espagne S.A.U. and MÁSMÓVIL Ibercom S.A.U. is hereby declared compatible with the internal market and the functioning of the EEA Agreement.

Article 2

Article 1 is subject to the conditions set out in Section B (including Schedules 1 and 2) of Annex C.

Article 3

Orange S.A. and by Lorca JVCo Limited shall comply with the obligations set out in the Sections C to G of Annex C.

Article 4

The Commission approves Digi Spain Telecom, S.L.U. as a suitable purchaser of the commitments set out in Annex C.

Article 5

The Commission approves the terms of the Spectrum Transfer Agreement and NRA Option Agreement into by or on behalf of Orange S.A. and/or by Lorca JVCo Limited, on the one hand, and Digi Spain Telecom, S.L.U., on the other hand, on 11 December 2023, as being compliant with the commitments set out in Annex C.

Article 6

This Decision is addressed to:

Orange S.A.
111, Quai du Président Roosevelt,
92130, Issy-les-Moulineaux,
France

Lorca JVCo Limited
1 Bartholomew Lane,
London, England, EC2N 2AX,
United Kingdom

Done at Brussels, 20.2.2024

For the Commission

(Signed)
Margrethe VESTAGER
Executive Vice-President

M.10896 – Orange/MásMóvil/JV

Article 8 Decision

Annex A – Quantitative Analysis

Contents

1. INTRODUCTION

(1) As discussed in Section 9.4 of the Decision, the Commission has carried out a quantitative analysis to assess the likely change in pricing incentives resulting from the elimination of horizontal competition between Orange and MásMóvil. This Annex contains the details of this analysis.

2. QUANTIFICATION OF THE LIKELY PRICE EFFECTS OF THE TRANSACTION

2.1. Measures of merger effects

(2) As set out in the Horizontal Merger Guidelines, the larger the increase in the sales base on which to enjoy higher margins after a price increase, the more likely it is that the merging firms will find such a price increase profitable despite the accompanying reduction in output.[1]

(3) The Commission's quantitative assessment of likely price effects rests on the standard analytical framework of Bertrand-Nash competition with differentiated products.[2] In this framework diversion ratios capture the relative closeness of substituion between the Parties, whereas the margins capture the absolute intensity of competition. If diversion ratios between the Parties' brands as well as margins are high, the incentive to increase price after internalising the competition between the Parties is also high.

(4) The **Gross Upward Pricing Pressure Index (GUPPI)** provides a first measure of the extent to which the merged entity has an incentive to unilaterally raise price.[3] Denoting the Parties as firms i and j, respectively, the GUPPI of firm i is given by

$$GUPPI_i = D_{ij} * m_j * \frac{p_j}{p_i},$$

where $D_{ij} = -\left(\partial q_j/\partial p_i\right)/(\partial q_i/\partial p_i)$ is the diversion ratio from firm i to firm j, $m_j = (p_j - c_j)/p_j$ is the margin of firm j, and p_j and c_j are the prices and the marginal costs of firm j respectively.

(5) The **Compensating Marginal Cost Reduction (CMCR)** asks what level of marginal cost reduction is required for each of the merged entity's products to exactly offset the incentive to raise price.[4] In other words, the quest is establishing at what level of

1 Horizontal Merger Guidelines, paragraph 27.

2 Commission decision of 11 May 2016 in case M.7612 – *Hutchison 3G UK/Telefonica UK*, Annex A, paragraph 7.

3 Commission decision of 11 May 2016 in case M.7612 – *Hutchison 3G UK/Telefonica UK*, Annex A, paragraph 20 et seq. Also see Valletti, T., & Zenger, H. (2021). Mergers with differentiated products: Where do we stand? Review of industrial organization, 58, 179-212 and Salop, S.C., & Moresi, S. (2009). Updating the Merger Guidelines: Comments. Georgetown Law Faculty Publications and Other Works 1662.

4 Commission decision of 11 May 2016 in case M.7612 – Hutchison 3G UK/Telefonica UK, Annex A, paragraph 24 et seq. See Valletti, T., & Zenger, H. (2021). Mergers with differentiated products: Where do we stand? Review of industrial organization, 58, 179-212 and Werden, G. J. (1996). A robust test for consumer welfare enhancing mergers among sellers of differentiated products. Journal of Industrial Economics, 44(4), 409–413.

marginal costs will the pre-merger price still be a Bertrand-Nash equilibrium post-merger. Expressed relative to revenues, the CMCR of firm i can be computed as:[5]

$$CMCR_i = \frac{GUPPI_i + D_{ij} * D_{ji} * m_i}{1 - D_{ij} * D_{ji}}.$$

(6) As with the computation of the GUPPI, the CMCR only requires information for the merged entity's products at the pre-merger price and diversion ratios between the merging parties products. This is because at pre-merger prices the post-merger first order conditions for non-merging firms equate to zero. CMCR also requries no specific assumption on the shape of the demand function as prices change.

(7) Although GUPPIs are sometimes used to approximate required marginal cost efficiencies, CMCRs provide a better indication for the required marginal cost reductions, because they take account of the fact that a marginal cost reduction of product i will, via an increase in the margin of product i, also have a feedback effect on the first order conditions for other products. This effect is ignored in approximations based on GUPPI. As the informational requirement for both approaches are the same, CMCRs are to be preferred as a benchmark for required marginal cost efficiencies.

(8) Quality improvements can also be accounted for, as CMCRs measure critical efficiencies not only in terms of compensating marginal cost reductions, but also in terms of compensating (uniform) quality improvements, in terms of consumers' willingness to pay for quality.[6] However, in order to be taken into account in the Commission's quantitative assessment, the claimed efficiencies must satisfy the cumulative conditions of verifiability, merger-specificity and benefit to consumers set out in the Horizontal Merger Guidelines.[7]

(9) In the Reply to the SO, the Parties assert that the analysis of pricing incentives in the SO would be unsuited as evidence to support a SIEC finding, for a number of reasons.[8] They argue that a number of additional factors such as the nature of demand in the market or efficiencies generated by the merger would need to be taken into account to arrive at reliable indications of effects of a merger on prices. In this regard the Parties refer to Commissions previous usage of calibrated merger simulation analyses in Phas-II investigations.

(10) The Commission disagrees with the Parties' statements in the Reply to the SO, and considers GUPPIs and CMCRs are appropriate tools for the quantitative assessment of the likely price effects of the Transaction for the reasons set out below:

(11) *First*, the Commission's preliminary finding of a SIEC in the SO relies on a number of factors, which, taken separately, are not necessarily considered to be decisive.[9] The

5 Valletti, T., & Zenger, H. (2021). Mergers with differentiated products: Where do we stand? Review of industrial organization, 58, 179-212.

6 Valletti, T., & Zenger, H. (2021). Mergers with differentiated products: Where do we stand? Review of industrial organization, 58, 185.

7 Horizontal Merger Guidelines, paragraph 76 et seq; Also see Commission decision of 11 May 2016 in case M.7612 – *Hutchison 3G UK/Telefonica UK*, Annex A, paragraph 36 and Opinion of Advocate General Kokott of 20 October 2022, C-376/20 *CK Telecoms*, paragraph 150 et seq.

8 Reply to the SO, paragraph 388 et seq.

9 Horizontal Merger Guidelines, paragraph 26.

quantitative assessment of likely price effects is only one of these factors assessed by the Commission in the SO.[10]

(12) *Second*, as regards the Parties argument that the usage of GUPPI and CMCR would be unsuited to derive price effects of a merger the Commission notes that it is well-established in the economic literature that pricing pressure tools and calibrated merger simulation are mathematically closely-related.[11]

a. Recent economic literature confirms that pricing pressure tools are good predictors of likely price effects in horizontal mergers.[12] Calibrated merger simulation computes the equilibrium price effects of a horizontal merger, taking into account the reactions of rivals.[13]

b. Both pricing pressure tools, such as those used in the SO, and calibrated merger simulations rely on the same key inputs, namely diversion ratios and margins. Calibrated merger simulations require in addition assumptions about the functional form of demand and require data from rivals.14 Therefore, from a practical perspective, pricing pressure tools can be computed with less assumptions using the merging parties' data.

2.2. Calibration of parameters

2.2.1. Diversion ratios based on MNP/FNP data

(13) On the Commission's request, the Parties submitted diversion ratios based on Mobile Number Portability (MNP) and Fixed Number Portability (FNP) data collected by the Spanish CNMC.[15]

(14) The Commission considers MNP/FNP data to be a reliable source of customer switching behavior and hence closeness of competition, as it covers actual switching events between network operators.[16]

---

10 Other factors assessed by the Commission in the Statement of Objections include market shares (Sections 9.4.3.1.1, 9.4.3.2.1, 9.4.3.3.1, 9.4.3.4.1), the competitive constraint from other MNOs and MVNOs (Sections 9.4.3.1.2, 9.4.3.1.3, 9.4.3.2.2, 9.4.3.2.3, 9.4.3.3.2, 9.4.3.3.3, 9.4.3.4.2, 9.4.3.4.3) closeness of competition (Sections 9.4.3.1.4, 9.4.3.2.4, 9.4.3.3.4, 9.4.3.4.4) and the important role played by MásMóvil on the relevant markets (Sections 9.4.3.1.5, 9.4.3.2.5, 9.4.3.3.5, 9.4.3.4.5).

11 Valletti, T., & Zenger, H. (2021). Mergers with differentiated products: Where do we stand?. Review of industrial organization, 58, 179-212.

12 Miller, N. H., Remer, M., Ryan, C., & Sheu, G. (2017). Upward pricing pressure as a predictor of merger price effects. International Journal of Industrial Organization, 52, 216-247.

13 When firms compete in prices, a price increase lowers the competitive pressure on rivals. For this reason, the rivals' best response to a unilateral price increase by the merging parties is to increase price as well. As a result, competitor reactions – if anything – worsen the anti-competitive effect of a merger. See for example Davis, P., & Garcés, E. (2010). Quantitative techniques for competition and antitrust analysis. Princeton University Press, p. 53, 408.

14 Valletti, T., & Zenger, H. (2021). Mergers with differentiated products: Where do we stand?. Review of industrial organization, 58, 179-212.

15 Annex RFI 18, Q7.

16 See Commission decisions of 28 May 2014 in case M.6992 – *Hutchison 3G UK/Telefonica Ireland*, Annex I, paragraph 83, of 11 May 2016 in case M.7612 – *Hutchison 3G UK/Telefonica UK*, Annex A, paragraph 49, 70 et seq and Opinion of Advocate General Kokott of 20 October 2022, C-376/20 *CK Telecoms*, paragraph 119.

(15) Table 1 below displays the diversion ratios based on MNP/FNP port-out data in the relevant markets.

Table 1: The Parties' diversion ratios based on MNP/FNP data (2022).

Donor Group	Destination Group	Mobile	Fixed internet	Multiple-play[17]	FMC
Orange	MásMóvil	[30-40]%	[30-40]%	[30-40]%	[30-40]%[18]
MásMóvil	Orange	[20-30]%	[20-30]%	[20-30]%	[20-30]%

Source: Annex RFI 18, Q7 (RFI 10 Q9), sheet "Port-outs, Mobile, OSP", row 8, sheet "Port-outs, FBB, OSP", row 8, sheet "Ports, FMC, OSP", row 8 and 14, sheet "Port-outs, Mobile, MM", row 8, sheet "Port-ins, FBB, OSP", row 8, sheet "Ports, FMC, MM", row 8, and the Commission's assessment,

2.2.2. *Contribution margins*

(16) In the Commission's decisional practice contribution margins have been considered to be the most appropriate measure of margins.[19] Contribution margins are calculated by subtracting from revenues the direct variable costs that vary in direct proportion to the number of subscribers.[20] The Commission has assessed the variable nature of cost items included in the contribution margins on a case-by-case basis, based on documentary evidence (e.g. quantitative data or contracts) provided by the merging parties.

(17) The Parties have proposed to include in the contribution margins the following cost categories: interconnection and roaming costs, content, subscriber acquisition and retention costs, customer access connectivity costs, handset and hardware costs, bad debt, customer care and taxes other than income taxes.[21]

(18) In that regard, the Commission notes that the Parties have refused to provide documentary evidence for the majority of included cost items.[22] Where documentary evidence was provided, this was limited to samples of contracts with third parties such as service providers. However, the Parties did not summarize the relevant features of submitted contracts and did not establish that the submitted contracts accounted for all of the costs included in the relevant cost item.

(19) The Commission considers that Parties have not demonstrated the variable nature of some of these cost categories to a sufficient degree. This concerns in particular (i)

---

17 Portability data for multiple-play is not available. The Commission has instead used portability data for FMC as a proxy.

18 The Commission calculcated the diversion ratio from Orange to MásMóvil in FMC as the sum of port-outs from Orange brand and Jazztel brand to MásMóvil group divided by the sum of port-outs from Orange brand and Jazztel brand.

19 Commission Decision of 27 November 2018 in case M.8792 – *T-Mobile NL/Tele2 NL*, Annex A, paragraph 129.

20 See for example Commission decisions of 19 May 2015 in case M.7421 – *Orange/Jazztel*, Annex A, paragraph 93; of 11 May 2016 in case M.7612 – *Hutchison 3G UK/Telefónica UK*, Annex A, paragraph 87; and of 2 July 2014 in case M.7018 – *Telefónica Deutschland/E-Plus*, paragraph 694 and of 27 November 2018 in case M.8792 – *T-Mobile NL/Tele2 NL*, Annex A, paragraph 129.

21 Response to RFI 25, paragraph 6.4 and Annexes RFI 25 Q4.1 (OSP) and Q4.2 (MM).

22 Response to RFI 25, paragraph 6.1. Contrary to the Parties claims, the Commission did not agree to limit the provision of evidence to those cost categoreis not listed as variable of direct costs in the Commission's precendent. In that regard, the Commission notes that the variability of costs is specific to the merging parties and has to be assessed on a case-by-case basis.

content costs, (ii) certain customer acquisition and retention costs (SAC/SRC) not directly related to subscriber numbers (channel support, logistics), (iii) certain costs related to customer care (in particular call centre costs), (iv) brand and operating taxes and (v) transmission costs/leased lines. Consequently, these cost items have been excluded from the Parties' contribution margins.

(20) With regard to **content costs**, the Parties explain that Orange's costs for "*Content*" relate to [Details of Orange's costs]. Masmovil's lists costs concerning [Details of MASMOVIL's costs and contracts].[23] The Commission considers that these costs are not variable and rejects them with the exception of MásMóvil's content costs related to [Details of MASMOVIL's costs and contracts]:

a. *First*, the costs mainly concern TV content including football rights. Football rights in particular are typically acquired for a number of years for a fixed payment and hence independent of subscriber numbers. In the Annex 7.1 of the Response to the SO, the Parties argue that non football content costs are paid on a per-subscriber basis and are thus fully variable.[24] The Parties submitted a contract between MásMóvil and Agile TV that seems to forsee payments by MásMóvil per subscriber. The Commission thus updated the preliminary conclusion with regard to costs related to "*Agile service discount (TV)*" (ID C.1.2.1.2) and considers them as direct variable costs.

b. *Second*, the Parties have not provided documentary evidence (e.g. in the form of quantitative data) to establish that the claimed cost items (other than ID C.1.2.1.2) vary directly with the number of subscribers. [25] In case of one submitted contract in the Reply to the SO with regards to Orange's OTT costs, it does not establish the amount of fixed and variable costs.[26]

(21) With regard to **SAC/SRC costs**, the Parties have included cost items related to channel support (OSP) and logistics (MM).[27] The Commission considers that these costs are not variable:

a. *First*, with regard to "*Channel support*", Orange explains that these costs [Details of Orange's costs].[28] Therefore, these costs are clearly not linked to [Details of Orange's costs].

b. *Second*, with regard to SAC/SRC "*Logistics*", MasMovil explains that this concerns [Details on MASMOVIL's costs and contracts][29] In the Annex 7.1 of the Reply to the SO the Parties contested the Commission's decision regarding these costs and claim that costs related to the distribution of handsets and Sim cards are fully variable. In this regard the Parties refer to a contract between MásMóvil and [Details on MASMOVIL's contracts]. [30] The Commission notes that not all services listed in this contract regard end consumers and that it

23 Annex RFI 25 Q4.1 (OSP) cost item C.1.2.1.1 and Annex RFI 25 Q4.2 (MM) cost item C.1.2.1.2 and C.1.2.1.3.

24 Annex 7.1 Response SO, paragraph 2.

25 Reply to the SO, Annex 7.3.3.

26 Reply to the SO, Annex 7.3.3.

27 Annex RFI 25 Q4.1 (OSP) cost item C.1.3.1.14 and Annex RFI 25 Q4.2 (MM) cost items C.1.3.1.11, C.1.3.1.18 and C.1.3.1.23.

28 Annex RFI 25 Q4.1 (OSP) cost item C.1.3.1.14

29 Annex RFI 25 Q4.2 (MM) cost items C.1.3.1.11 and C.1.3.1.18.

30 Reply to the SO, Annex 7.3.4.

remains unclear how these costs relate to the price list annexed to the end of the document. Therefore, the Commission maintains the conclusion that these logistics costs are fixed.

c. *Third*, with regard to "*Capitalised FBB installation costs*", MásMóvil explains that these costs are related to [Details on MASMOVIL's costs and contracts].[31] In that regard, the Parties submitted contracts with service providers and claim to establish that [Details of the Parties' commercial agreements].[32] However, this category includes the cost item "*Installations & logistics*". To deduct logistics costs from installation costs, this cost item is reduced to [...]% of the submitted value.[33] In the Annex 7.1 of the Reply to the SO the Parties contested the Commission's decision and claim the cost item "*Installations & logistics*" is fully variable as it does not include any component related to logistics. The Commission notes that the invoice for the installation of FBB submitted by the Parties does not constitute sufficient evidence for their claim for a number of reasons.[34] Among others it is not clear what services were provided and positions were clearly aggregated. Therefore, the Commission maintains the conclusion that logistic costs should be excluded from this cost item.

d. *Fourth*, the Parties have not provided evidence (e.g. in the form of quantitative data) to establish that the claimed cost items vary directly with the number of subscribers.

(22) With regard to **customer care**, the Parties have included cost items related in particular to call centres and after sales services. Orange claims with regard to "*Internal platforms (labour)*", "*Internal platforms (non labour)*" and "*External Platforms (CRM – Clúster SAC)*", that these costs are [Details of Orange's costs].[35] MásMóvil includes [Details on MASMOVIL's costs].[36] To support their claims, the Parties provide samples of contracts with call centre providers. However, the Commission considers that the Parties have not sufficiently substantiated the variable nature of the cost items and rejects them in their entirety:

a. *First*, while the Parties claim that call centre costs vary with call volumes, this does not automatically imply that call centre costs vary with subscriber numbers.

b. *Second,* the contracts do not establish unambigously that call centre costs vary directly with call volumes. Orange's contract with [Details of Orange's commercial agreements]actually seems to be the specification of a tendering process. [Details of Orange's commercial agreements].[37] Similarly, MásMóvil's contracts [Details on MASMOVIL's contracts].[38] In the Annex 7.1 of the Reply to the SO the Parties contested the Commission's decision and claim that customer care costs vary with the number of subscribers. In this regard the Parties argue that OSP's total customer count [Details of Orange's customer numbers]. The Commission notes that two observations are not sufficient to establish that

---

31 Annex RFI 25 Q4.2 (MM) cost items C.1.3.1.23.
32 Response to RFI 25, FN 2 and Annexe RFI 25 Q6.1.
33 SO, Annex B, paragraph 17c.
34 Annex SO Response 7.3.6.
35 Annex RFI 25 Q4.1 (OSP) cost items C.1.4.2.1, C.1.4.2.2 and C.1.4.2.3.
36 Annex RFI 25 Q4.2 (MM) cost items C.1.4.2.4, C.1.4.2.5, C.1.4.2.6 and C.1.4.2.7.
37 Annex RFI 25 Q6.6.
38 6(1)(c) Response Annex 5.1 and 5.2.

customer care costs are directly affected by subscriber numbers and therefore maintains the conclusion that these costs do not constitute direct variable costs.

c. *Third*, in previous decisions the Commission has rejected the variable nature of call centre costs because call volumes only weakly correlated with call centre costs.[39]

d. *Fourth*, the provided contracts only concern external call centre providers and are not informative about the cost structure of Orange's internal platforms, which account for [...]% of the costs within the category in 2022.[40]

e. *Fifth*, the provided contracts are also not informative about the cost structure of Masmovil's costs related to "*Collection expenses*". In the Annex 7.1 of the Reply to the SO the Parties claim that these cost are related to payments made to banks, and are null in 2022. The Commission notes that the Parties do not submit additional evidence and maintains the conclusion that these costs do not constitute direct variable costs.

(23) The Parties also have included **brand fees and taxes** in the contribution margins. With regard to *"Brand and operating taxes*", Orange maintains that these relate to [Details of Orange's costs].[41] With regard to *"Taxes other than income taxes*" and *"TV Tax Euskaltel 19/20*", Masmovil maintains that these relate to [Details on MASMOVIL's costs].[42] The Commission considers that the Parties have not substantiated the variable nature of these cost items and rejects them in their entirety:

a. *First*, the Commission notes that value added taxes (VAT), that vary directly with revenues, are generally not considered to be cost items and are already substracted from undertaking's revenues. Taxes other than VAT are cost items that are generally not taken into account in measures such as Operating Income, Earnings Before Interest and Taxes (EBIT) and Earnings Before Interest, Taxes, Depreciation and Amortization (EBIDTA). In the Annex 7.1 of the Reply to the SO the Parties report that in relation to operating taxes they are subject to a number of taxes such as a "*Municipal charge on the use of the public domain*" [Details of the Parties' costs]. However, the Parties admit that some taxes also partially or fully relate to the number of antennae or mobile sites, which do not vary directly with the number of subscribers. Furthermore, the Parties do not indicate which costs relate to which tax.[43] Therefore, the Commission concludes that these costs do not constitute direct variable costs.

b. *Second,* taxes (other than VAT, which is deducted from revenue) have generally not been taken into account in the computation of contribution margins in the Commission's precedents.[44]

---

39 Commission decision of 11 May 2016 in case M.7612 – *Hutchison 3G UK/Telefónica UK*, Annex A,

40 See Annex RFI 25 Q4.1 (OSP).

41 Annex RFI 25 Q4.1 (OSP), cost item C.1.5.1.2.

42 Annex RFI 25 Q4.2 (MM), cost items C.1.5.1.2 and C.1.5.1.3.

43 Reply to the SO, Annex 7.1, paragraph 5.

44 See for example Commission decisions of 19 May 2015 in case M.7421 – *Orange/Jazztel*, Annex A, paragraph 93; of 11 May 2016 in case M.7612 – *Hutchison 3G UK/Telefónica UK*, Annex A, paragraph 87; and of 2 July 2014 in case M.7018 – *Telefónica Deutschland/E-Plus*, paragraph 694.

c. *Third,* the Parties have not provided an exhausting description or evidence (e.g. in the form of quantitative data) demonstrating that these cost items vary directly with the number of subscribers.

(b) With regard to **transmission costs and leased lines** Orange has included the cost item "*Total Leased Lines (includes IFRS16 adj)*" related to [Details of Orange's costs].[45] Masmovil has included [Details on MASMOVIL's costs and contracts].[46] The Parties maintain that these costs vary with active subscribers. The Commission considers that these costs are not direct variable costs and rejects them in their entirety.

a. *First*, in Response to RFI 24 and clarified in the Annex 7.1 of the Reply to the SO the Parties acknowledged with regard to [Details on MASMOVIL's contracts]. In that regard the Parties explained that [Details on MASMOVIL's contracts].[47] In the Annex 7.1 of the Reply to the SO the Parties claim that "*Variable Transmission*" costs relates to [Details on MASMOVIL's costs and contracts]. However, the Parties do not provide evidence to back up their claim. Therefore, the Commission concludes that these costs do not constitute direct variable costs.

b. *Second*, the Commission understands that Orange's "*Total Leased Lines*" [Details of Orange's costs].[48] However, the Parties do not demonstrate on the basis of evidence that these costs vary with the number of subscribers (or users). In any event, the Commission also considers that this cost item is not sufficiently verified, as the claimed costs are higher in the possible retail market for the supply of FMC bundles market ([...] in 2022) than in the wider possible retail market for the supply of multiple-play bundles ([...] in 2022) and the retail market for the supply of fixed internet access ([...] in 2022).

c. *Third,* the Parties have not provided documentary evidence (e.g. in the form of quantitative data) demonstrating that these cost items vary directly with the number of subscribers.

(24) The adjustments to Orange's and MásMóvil's variable costs are computed by substracting the identified cost items from the Parties' total direct costs for each relevant market. Then the difference of revenues and total direct costs is divided by revenues. In that regard, the Commission notes that the individual revenues and cost items submitted by Orange do not add up to the total revenues and direct costs.[49]

(25) Table 2 below summarizes the contribution margins based on the accepted cost items and compares them to the contribution margins submitted by the Parties in the Reply to the SO.[50] The table indicates that the Commissions' contribution margins are only slightly above the revised contribution margins considered by the Parties in the Reply to the SO.

45 Annex RFI 25 Q4.1 (OSP), cost item C.3.1.1.1.
46 Annex RFI 25 Q4.2 (MM), cost item C.1.3.2.8.
47 Annex RFI 24, paragrap 36.2.
48 Annex RFI 25 Q4.1 (OSP), cost item C.3.1.1.1.
49 Annex RFI 25 Q4.1 (OSP).
50 Reply to the SO, Annex 7.1 and 7.2.

Table 2: The Parties' adjusted and unadjusted contribution margins (2022).

Group	Mobile	Fixed internet	Multiple-play ([51])	FMC
Commissions adjusted margins (post-Reply to the SO)				
Orange	[50-60]%	[60-70]%	[50-60]%	[50-60]%
MásMóvil	[40-50]%	[30-40]%	[40-50]%	[40-50]%
Parties' margins (Reply to the SO, Annex 7.1. and 7.2)				
Orange	[40-50]%	[40-50]%	[40-50]%	[40-50]%
MásMóvil	[40-50]%	[20-30]%	[30-40]%	[40-50]%

Source: "Cash contribution margin (%)", Response to RFI 25, Annex Q4.1 (OSP), sheet "Margins OSP"and Annex Q4.2 (MM), sheet "Margins MM", Replay to the SO, Annex 7.1 and 7.2, Commission adjustment.

2.2.3. *ARPU as proxy for price*

(26) In line with previous decisions, the Commission has used the average revenue per user ('ARPU') as the relevant proxy for prices.[52]

(27) ARPU proxies the average monthly expenditure of an average customer of the mobile operators. It is hence the appropriate basis to compute percentage increases of the prices paid by consumers.

(28) The use of ARPU implies that usage is assumed to be exogenous and that customers choose between brands, i.e. that the customer chooses the provider with the most convenient offer given his or her exogenous needs. In the Commission's view, it is appropriate to work with this simplifying assumption, as consumption is taking place more and more within the bundle due to the large and increasing bundle sizes.

(29) Table 3 summarizes the ARPUs used in the Commission's assessment of pricing incentives. According to the Parties, these ARPUs were computed by dividing the total revenues based on the Parties' profit and loss statement divided by the average number of subscribers (*AOP – average over period*).[53] On closer inspection, the Commission considers that the Parties' (hardcoded) ARPU in retail markets are not based on total revenus, but on "*total service revenues related to own subscribers*" divided by the average number of subscribers times 12 months to give the ARPU per month.[54]

(30) The retail ARPUs therefore exclude termination revenues and total handset/hardware revenues.[55] This is in line with the Commission's decisional practice, where it was considered that revenues related to mobile termination rates should be excluded from ARPUs as they were considered to be unrelated to the customers' payments. Furthermore, it was considered that upfront payments for handset revenues should be

---

51 MásMóvil's multiple-play contribution margin is not available. The Commission has instead used MásMóvil's FMC contribution margin as a proxy.

52 Commission decision of 27 November 2018 in case M.8792 – *T-Mobile NL/Tele2 NL*, Annex A, paragraph 118 et seq.

53 Response to RFI 25, paragraph 5.3.

54 Annexes RFI 25 Q4.1 (OSP) item R.1.1.0.0/("*Active subscribers AOP*"*12) and RFI 25 Q4.2 (M) item R.1.1.0.0/("*Active subscribers AOP*"*12)

55 Annexes RFI 25 Q4.1 (OSP) and RFI 25 Q4.2 (MM) revenue items R.1.2.0.0 and R.1.3.0.0.

excluded from the monthly expenditure and should only be included in the computation of the margins.[56]

Table 3: The Parties' ARPUs (2022).

Group	Mobile	Fixed internet	Multiple-play	FMC
Orange	[0-25]	[25-50]	[50-75]	[50-75]
MásMóvil	[0-25]	[25-50]	[25-50]	[25-50]

Source: "ARPU based on P&L (monthly)", Response to RFI 25, Annex Q4.1 (OSP), sheet "Margins OSP", row 131 and Annex Q4.2 (MM), sheet "Margins MM", row 140.

2.3. Results

2.3.1. Main specification

(31) Table 4 summarizes the GUPPIs and CMCRs in the relevant markets based on the contribution margins resulting from the Commission's adjustment of variable costs, including the additional adjustment after the Parties' Reply to the SO. As indicated, the Transaction leads to substantial price effects on the relevant markets.

Table 4: GUPPIs and CMCRs (2022) with Commission's adjusted margins.

GUPPI / CMCR	Group	Mobile	Fixed internet	Multiple-play	FMC
GUPPI	**Orange**	[10-20]%	[10-20]%	[10-20]%	[10-20]%
	MásMóvil	[10-20]%	[10-20]%	[10-20]%	[10-20]%
CMCR	**Orange**	[10-20]%	[10-20]%	[20-30]%	[20-30]%
	MásMóvil	[10-20]%	[20-30]%	[20-30]%	[20-30]%

Source: The Commission's assessment based on the Parties' diversion ratios, adjusted contribution margins including adjustments after the Response to the SO and ARPUs (Tables 1-3 above).

2.3.2. Sensitivity scenarios

(32) Table 5 is a sensitivity scenario based on the Parties' contribution margins that were submitted in their Reply to the SO. This sensitivity scenario suggests that even if the Parties' contribution margin estimates were accepted, results would not materially change.

(33) In the Reply to the SO, the Parties submitted diversion ratios based on OSP's survey data for the retail markets for mobile telecommunication and FMC bundles. Table 6 is a sensitivity scenario based on the Parties' diversion ratios using OSP's survey data with the Commission's adjusted and the Parties unadjusted contribution margins submitted in the Response to the SO. The sensitivities based on diversion ratios using survey data for the calculations yield similar results as stated in the SO, and do not alter the conclusions by the Commission.

[56] Commission decision of 27 November 2018 in case M.8792 – *T-Mobile NL/Tele2 NL*, Annex A, paragraphs 121-122.

Table 5: Sensitivity scenario of GUPPIs and CMCRs (2022) with Parties' margins.

GUPPI / CMCR	Group	Mobile	Fixed internet	Multiple-play	FMC
GUPPI	Orange	[10-20]%	[5-10]%	[10-20]%	[10-20]%
	MásMóvil	[10-20]%	[10-20]%	[10-20]%	[10-20]%
CMCR	Orange	[10-20]%	[10-20]%	[10-20]%	[10-20]%
	MásMóvil	[10-20]%	[10-20]%	[10-20]%	[10-20]%

Source: The Commission's assessment based on the Parties' diversion ratios, unadjusted contribution margins from the Response to the SO and ARPUs (Tables 1-3 above). [57]

Table 6: Sensitivity scenario of GUPPIs and CMCRs (2022) with OSP survey data.

		Mobile		FMC	
GUPPI / CMCR	Group	Commission's adjusted margins (post-Reply to the SO)	Parties' margins (Reply to the SO, Annex 7.1. and 7.2)	Commission's adjusted margins (post-Reply to the SO)	Parties' margins (Reply to the SO, Annex 7.1. and 7.2)
GUPPI	Orange	[10-20]%	[10-20]%	[10-20]%	[5-10]%
	MásMóvil	[10-20]%	[10-20]%	[10-20]%	[10-20]%
CMCR	Orange	[10-20]%	[10-20]%	[10-20]%	[10-20]%
	MásMóvil	[10-20]%	[10-20]%	[10-20]%	[10-20]%

Source: The Commission's assessment based on the Parties' diversion ratios with OSP's survey data, adjusted and unadjusted contribution margins after the reply to the SO and ARPUs (Tables 1-3 above). [58]

3. WEIGHTING OF COST SYNERGIES (INLCUDING EDM) AGAINST THE ANTI-COMPETITIVE EFFECTS OF THE TRANSACTION

(34) In the Reply to the SO, Annex 7.2, the Parties have proposed a methodology for the weighting of the claimed cost synergies (including EDM) against the anti-competitive effects (CMCR) of the Transaction (**"cost synergy trade-off"**).

(35) Table 7 below reports the CMCR and net variable cost synergy claims (including EDM) submitted in the Reply to the SO.[59] This is contrasted with the Commission's preferred CMCR specification.[60] As indicated, even when accepting the Parties' CMCR and cost synergy claims (*quod non*), the claimed cost synergies are not sufficient to outweigh the CMCR in all but one of the relevant markets. In the relevant market for the retail supply of fixed internet access services, the Parties' claimed cost synergies are above the CMCR for MásMóvil. However, the claimed cost synergies are insufficient to outweigh the CMCR for Orange in the fixed internet market and for both Parties in all other relevant markets. Therefore, even by the Parties' admission in the Reply to the

57 Annex SO Response 7.1, Annex SO Response 7.2.

58 Annex SO Response 2.1, Annex SO Response 2.2, Annex SO Response 7.1, Annex SO Response 7.2.

59 Reply to the SO, Table 7.

60 SO, Annex A, Table 4.

SO, the claimed cost synergies (including EDM) are insufficient to outweigh the likely anti-competitive price effects of the merger. Moreover, the Commission's CMCRs reported in the SO are above the Parties' claimed cost synergies.

Table 7: Weighting of cost savings against likely anti-competitive effects, based on the Parties' net cost synergy claims (including EDM) with [Advisor] and Commission adjustments.

	Relevant market	Commission's CMCR (post-Reply to the SO)	Parties' CMCR (Reply to the SO)	Net variable cost synergies (2026-2027) (Reply to the SO)
Orange	Mobile	[10-20]%	[10-20]%	[0-5]%
	Fixed internet	[10-20]%	[10-20]%	[0-5]%
	Multiple-play	[20-30]%	[10-20]%	[0-5]%
	FMC	[20-30]%	[10-20]%	[0-5]%
MásMóvil	Mobile	[10-20]%	[10-20]%	[0-5]%
	Fixed internet	[20-30]%	[10-20]%	[10-20]%
	Multiple-play	[20-30]%	[10-20]%	[10-20]%
	FMC	[20-30]%	[10-20]%	[5-10]%

Source: CMCR: Tables 4-5 above. Cost synergies: Reply to the SO, Annex 7.2 (sheet "CMCR"). CMCR and cost synergies are expressed relative to 2022 price.

(36) The Parties' approach is based on a number of assumptions that are not in line with the Commission's assessment:

a. The Parties compute a "run-rate" of the average cost synergies in the years 2026 and 2027. This is outside the relevant timeframe of four years (2023-2026) considered to by timely for the purpose of this Transaction in the SO.[61] The Commission considers it appropriate to compare the CMCR with the net variable cost synergies in each year of the four years in the relevant timeframe.

b. The Parties only include gross variable cost savings in their assessment and disregard variable integration costs. This is contrary to the Response to RFI 11, where the Parties classify certain integration costs as variable.[62] The Commission considers it appropriate to compute net variable cost savings from gross variable cost savings and variable integration costs, as indicated in the SO.

c. The Commission preliminarily concluded in the SO that gross cost savings do not pass the cumulative test of verifiability, merger-specificity and benefit to consumers.[63] These gross cost savings were nevertheless included in the Parties' cost synergy trade-off.[64]

(37) Table 8 shows CMCR and the Parties' net cost synergy claims (including EDM) relative to prices with [Advisor] and Commission adjustments. As can be seen, net cost synergies (including EDM) are between -[0-5]% to +[5-10]% of revenue. Thus, they fall clearly short of compensating likely price increases in all relevant markets.

61 Reply to the SO, Annex 7.2, sheet "Synergy allocation".
62 Annex RFI 11 Q4
63 See SO Annex B and Table
64 Reply to the SO, Annex 7.2, sheet "Synergy allocation".

(38) Table 9 shows CMCR and the Parties' net cost synergy claims (including EDM) that have been preliminarily accepted as verifiable, merger-specific and benefitting consumers in the SO. As can be seen, net cost synergies (including EDM) are one or two magnitudes lower relative to the entries in Table 7 or even turn negative (implying a net cost increase).

Table 8. Weighting of cost savings against likely anti-competitive effects, based on the Parties' net cost synergy claims (including EDM) with [Advisor] and Commission adjustments.

	Relevant market	Commission's CMCR (post-Reply to the SO)	Net variable cost synergies (including EDM)			
			2023	2024	2025	2026
Orange	Mobile	[10-20]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%
	Fixed internet	[10-20]%	-[0-5]%	-[0-5]%	-[0-5]%	-[0-5]%
	Multiple-play	[20-30]%	-[0-5]%	-[0-5]%	-[0-5]%	-[0-5]%
	FMC	[20-30]%	-[0-5]%	-[0-5]%	-[0-5]%	-[0-5]%
MásMóvil	Mobile	[10-20]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%
	Fixed internet	[20-30]%	[0-5]%	[0-5]%	[0-5]%	[5-10]%
	Multiple-play	[20-30]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%
	FMC	[20-30]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%

Source: CMCR: Table 4 above. Cost synergies: Reply to the SO, Table 7 above and Commission assessment. CMCR and cost synergies are expressed relative to 2022 price.

Table 9. Weighting of cost savings against likely anti-competitive effects, based on the Parties' net cost synergy claims (including EDM) accepted as verifiable, merger-specific and benefitting consumers.

	Relevant market	CMCR 2022 (post-Reply to the SO)	Net variable cost synergies (including EDM)			
			2023	2024	2025	2026
Orange	Mobile	[10-20]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%
	Fixed internet	[10-20]%	-[0-5]%	[0-5]%	[0-5]%	[0-5]%
	Multiple-play	[20-30]%	-[0-5]%	[0-5]%	[0-5]%	[0-5]%
	FMC	[20-30]%	-[0-5]%	[0-5]%	[0-5]%	[0-5]%
MásMóvil	Mobile	[10-20]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%
	Fixed internet	[20-30]%	-[0-5]%	-[0-5]%	-[0-5]%	[0-5]%
	Multiple-play	[20-30]%	-[0-5]%	-[0-5]%	-[0-5]%	[0-5]%
	FMC	[20-30]%	-[0-5]%	-[0-5]%	-[0-5]%	[0-5]%

Source: CMCR: Tables 4 above. Cost synergies: Reply to the SO, Table 7 above and Commission assessment. CMCR and cost synergies are expressed relative to 2022 price.

(39) The Commission concludes that the weighting of cost savings against anti-competitive effects strengthens its finding that the likely anti-competitive price increases resulting from the Transaction cannot be compensated by efficiencies.

M.10896 – Orange/MásMóvil/JV

Article 8 Decision

Annex B – The Parties' cost synergy claims (excluding EDM)

Contents

1. INTRODUCTION

(1) This Annex complements the Decision by describing the cost synergies and integration costs (absent EDM) claimed by the Parties, in the Form CO and by outlining the Commission's adjustments of the Parties' related to factual errors and the selection of the most plausible scenario where the Parties had submitted different scenarios.

(2) The Parties claimed cost synergies (and integration costs) related to their fixed networks, mobile networks and transmission networks ("**network synergies**") and to sales and marketing, customer care, general expenses, personnel expenses and IT ("**non-network synergies**") further described below.

(3) The Parties' cost synergy claims are based on Compass Lexecon's calculations (Form CO, Annex 9) building on the Parties' Cost Synergy model prepared in due diligence (Form CO, Annex 11) and an evaluation of this Synergy model conducted by [Advisor] (Form CO, Annex 10). [Advisor] uses [...] to refer to MásMóvil and [...] to refer to Orange.

(4) In the Response to RFI 11, the Parties have described each cost synergy and integration cost according to their nature, either fixed or variable/incremental. To that end, they explained how each item was consistent, in particular by describing the structure of Másmóvil's and Orange's contracts with third parties.

- (a) In Annex RFI 11 Q4, the Parties submitted a classification of integration costs between variable/incremental and fixed.
- (b) In Annex RFI 11 Q6, the Parties explained the differences of the contracts that Másmóvil and Orange concluded with O&M service providers.
- (c) In Annex RFI 11 Q7, the Parties explained how Másmóvil's and Orange's mobile, fixed backhaul and backbone contracts is structured.

(5) In the Response to RFI 18, the Parties have described their revenues for wholesale supply and fixed broadband services, the ownership and control structure of OFSI, and explained why the Parties did not rely on demand projections to estimate their growth but on other methods.

- (a) In Annex RFI 18 Q2, the Parties have described their revenues for wholesale supply and fixed broadband services.
- (b) In Annex RFI 18 Q4, the Parties explained the ownership and control structure of OFSI, the assets held by OFSI and the services provided and prices charged to OESP and external customers.
- (c) In Annex RFI 18 Q14, the Parties explained they did not prepared detailed projections for the total demand for mobile and fixed services. The Parties used projections of increase in market size for cost synergies related to the FTTH deployment, and for the integration cost they relied on an indicative increase in the average data consumption based on recent market trends.

(6) In RFI 24, the Commission identified *84 cost synergy and integration cost items* ("**Items**") and requested further explanations regarding their computation. In addition, the Notifying Parties were asked to provide documentary evidence regarding the size and the variable nature of the claimed cost savings and integration costs. In the Response to RFI 24, the Parties detailed for each Item what it represents, the nature, the size, and the reasons it constitutes a cost synergy or integration cost following the merger.

(a) In Annex RFI 24 Q1a and Annex RFI 24 Q3 & Q4 the Notifying Parties updated their Cost Synergy Model (Annex 10) with the adjustments made by [Advisor].

(b) In Annex RFI 24 Q3 & Q4, column AC, the Notifying Parties summarized their claims regarding the verification and the variability of the claimed cost savings.

(7) In the Reply to the SO, the Parties have responded to the Commission's arguments on verifiability criteria, merger-specificity and benefit to consumers and submitted additional documents.

(a) In the Reply to the SO, Annex 8.1, the Notifying Parties present a "conservative" scenario where some cost synergies are reclassified from variable to fixed.

(b) In RFI 38 Response, the Notifying Parties updated their Cost Synergy Model taking into account some adjustments made by the Commission.

2. NETWORK SYNERGIES

2.1. Fixed network

2.1.1. The Notifying Parties' cost synergy claims

2.1.1.1. FTTH deployment

(8) Related to FTTH deployment, the Notifying Parties submit the following cost synergies and integration costs (Item 1 – Item 7):

a. **Item 1** (***Annex 11, fixed, rows (74-75)*73*0.012***) concerns claimed variable cost savings in wholesale fees in [Details on the wholesale agreements concluded by the Parties], resulting from moving the Notifying Parties' customers from wholesale contracts with [...]to their own network.[1] Item 1 is computed as difference between the Parties average wholesale price of [...] (row 75)[2] and Orange's marginal cost on their own network of [...] (row 74)[3], multiplied with the expected number of affected subscribers (row 73) multiplied with 12 months (row 77). The number of affected subscribers is computed as the cumulative number of deployed BUs (row 73)[4], including migrated subscribers and customers they are expected to gain, times the penetration percentage (row 72), that is the Parties' subscribers in the newly deployed BUs, based on a penetration curve derived from similar deployments in the past ([Details on the estimated penetration rates]).[5] The Commission understands that the penetration includes the Notifying Parties' existing subscribers migrated from [...]footprint (cf Item 4) and new subscribers (gross ads) on the densification footprint. The Notifying Parties argue that the cost

1 Form CO, Annex 9, paragraph 8.

2 The price of [...] is the average wholesale price the Parties' pay to [Details on the wholesale agreements concluded by the Parties], where MásMóvil's [Details on the wholesale agreements concluded by the Parties] and ORANGE [Details on the wholesale agreements concluded by the Parties], cf Response to RFI 24, paras 5.1, 5.2.

3 Response to RFI 24, paragraph 5.3.

4 The Notifying Parties' Cost Synergy Model considers a cumulative roll-out of [0-5 million] BUs [Details on the Parties' roll-out plans] (row 81).

5 Response to RFI 24, paragraph 6.1-6.3, Form CO, Annex 11, fixed, row 72.

savings are variable, as "*[w]holesale costs are [Details on the wholesale agreements concluded by the Parties] as per relevant contracts*".[6]

b. **Item 2** (***Annex 11, fixed, rows 76*73*0.012***) concerns claimed variable cost savings from "*Other savings (aperiodics & transmission)*". The aperiodic costs refer to savings of [...] on the costs for activation and deactivation in [...]'s footprint. The transmission cost is equal to [Details on the wholesale agreements concluded by the Parties].[7] The unitary cost savings are again multiplied with the number of affected subscribers (row 73) times 12 months (row 77). The Notifying Parties argue that the cost savings are variable, as fees are on [Details on the wholesale agreements concluded by the Parties].[8]

c. **Item 3** ***(Annex 11, fixed, row 84)*** concerns variable integration costs related to FTTH deployment in [Details on the wholesale agreements concluded by the Parties]. Item 3 is computed by multiplying the unitary cost per BU (row 83) with the number of rolled-out BUs per year (row 82). [Advisor] (Annex 10) notes that "*there is some uncertainty in the probable deployment costs*" and suggests to increase the cost per BU from [...] to [...].[9] The Notifying Parties argue that these costs are variable, as they accrue "*on a per-BU basis*".[10] In the Reply to the SO, the Parties claim the cost item represents a "*CAPEX investment from deploying new lines on new and existing network*". Therefore, the Parties claim it should be considered sunk as it is related to capacity expansion and the size of the footprint.[11]

d. **Item 4** ***(Annex 11, fixed, row 87=85*86/1000)*** concerns variable integration costs related to the migration of the Notifying Parties' customers from [...] network to the newly deployed network of the Notifying Parties. Item 4 is computed by multiplying the unitary cost per customer with the number of migrated customers. The unitary cost of [...] (row 85) consists of [Details on the the Parties' cost structure] (other synergies, row 238 estimate Orange's installation cost as EUR [...] per gross add) and [Details on the Parties' cost structure] (other synergies, row 151 and 152 estimate CPE costs as [...] and [...] per gross add respectively).[12] The number of migrated customers (row 86) is based on "*(i) the number of customers of the Parties in [Details on the wholesale agreements concluded by the Parties], (ii) the roll-out pace that enables the customers to be migrated to the new FTTH, (iii) churn (lost and acquired customers) in the footprint affected, and (iv) the migration efficiency, which in turn is based on the experience of past migration campaigns*".[13] In that regard the Notifying Parties explain that they expect to migrate about [...] of the customers in the footprint in [...] years and that customer migration depends on the approval of customers.[14] The Notifying Parties argue that these costs are variable, as they accrue "*on a per-BU basis*".[15] In the Reply to the SO, the Parties claim it represents a one-off cost of changing equipment and

6 Annex RFI 24 Q3 & Q4, sheet Template, column AC.
7 Response to RFI 24, paragraph 7.1-7.2.
8 Annex RFI 24 Q3 & Q4, sheet Template, column AC.
9 Form CO, Annex 10, page 18, Response to RFI 24, paragraph 8.3.
10 Annex RFI 24 Q3 & Q4, sheet Template, column AC.
11 Reply to the SO, Annex 8.1, paragraph 10.
12 Response to RFI 24, paragraph 9.1.
13 Response to RFI 24, paras 9.2.
14 Response to RFI 24, paras 9.3-9.4.
15 Annex RFI 24 Q3 & Q4, sheet Template, column AC.

should be considered sunk as it does not affect the joint venture's pricing incentive and only the number of migrations.[16]

e. **Item 5 (*Annex 11, fixed, rows (96-97)*95*)** concerns claimed variable cost savings in wholesale fees in new municipalities, where the Notifying Parties do not have a network yet (new deployment). Item 5 is computed as difference between the Notifying Parties average wholesale price per line per month (row 96) and Notifying Parties' unitary cost on their own network (row 97), multiplied with the expected number of affected subscribers (row 95) times 12 months (row 109). The Notifying Parties' average wholesale price on [...]'s footprint is estimated to be [...] from [...] and [...] from [...] onwards, based on the assumption that with the Transaction [Details on the wholesale agreements concluded by the Parties].[17] As regards the unitary costs in the new network, the Notifying Parties submit that the unitary cost of O&M and Transmission decrease as the number of customers increases over time. [Details on the Parties' business strategy].[18] The number of affected subscribers is again based on a penetration curve derived from similar deployments, as in Item 1 ([Details on the estimated penetration rates]).[19] The Notifying Parties argue that the cost savings are variable, as "*[w]holesale costs are on [Details on the wholesale agreements concluded by the Parties] as per relevant contracts*".[20]

f. **Item 6 *(Annex 11, fixed, row 98*95)*** concerns claimed variable cost savings from "*Other savings (aperiodics & transmission)*". The aperiodic costs refer to savings of [...] on the costs for activation and deactivation in [...]'s footprint. The average transmission cost is equal to [...] in new municipalities and depends on the relative share of NEBA and VULA.[21] The unitary cost savings are again multiplied with the number of affected subscribers (row 96) times 12 months (row 101).[22] The Notifying Parties argue that the cost savings are variable, as fees are on a per line basis.[23]

g. **Item 7 *(Annex 11, fixed, row 107=106*105)*** concerns variable integration costs related to FTTH deployment in [Details on the Parties' business strategy]. Item 7 is computed by multiplying the unitary cost per BU (row 106) with the number of rolled-out BUs per year (row 105).[24] As regards the unitary cost of […] per BU, the Parties explain that the deployment cost is higher in [Details on the Parties' business strategy], because new fibre headers have to be installed. Furthermore, the Notifying Parties explain that the cost depends on the mix of indoor, facade and pole installation. As regards the effect of roll-out in [Details on the Parties' business strategy],[25] the Notifying Parties clarify that [Details on the Parties' business strategy] [Advisor] (Annex 10) considers the unitary costs to be reasonable, but notes that "*there is some inherent uncertainty associated with potential new deployments*" and that "*in due time,*

16 Reply to the SO, Annex 8.1, paragraph 10.
17 Response to RFI 24, paragraph 10.5.
18 Response to RFI 24, paragraph 10.6.
19 Response to RFI 24, paragraph 10.1.
20 Annex RFI 24 Q3 & Q4, sheet Template, column AC.
21 Response to RFI 24, paragraph 7.1-7.2.
22 Response to RFI 24, paragraph 10.1.
23 Annex RFI 24 Q3 & Q4, sheet Template, column AC.
24 The Notifying Parties' Cost Synergy Model considers a cumulative roll-out of [0-5 million] BUs in [Details on the cost synergy model of the Parties] (row 104).
25 Form CO, paragraph 2576.

it will be up to the NewCo to determine the viability of the business case in each of the municipalities, and choose the ones with the most favourable outcome".[26] The Notifying Parties argue that these costs are variable, as they accrue "*on a per-BU basis*".[27] In the Reply to the SO, the Parties claim it represents a "*CAPEX investment from deploying new lines on new and existing network*". Therefore Parties claim it should be considered sunk as it is related to capacity expansion and the size of the footprint.[28]

2.1.1.2. FTTH consolidation

(9) Related to FTTH consolidation, the Notifying Parties submit the following cost synergies and integration costs (Item 8 – Item 18):

a. **Item 8** ***(Annex 11, fixed, row (114*115)*(117-118)*0.012)*** concerns the savings from [Details on the wholesale agreements concluded by the Parties][29] [Details on the wholesale agreements concluded by the Parties]. It is computed by multiplying the number of BUs (row 114) by the Másmóvil penetration percentage (row 115), to obtain the number of migrating customers per year. The latter shall be multiplied by [Details on the wholesale agreements concluded by the Parties], and multiplied by 12 months. According to the Parties, the penetration rate "*remain [...], which is conservative as it assumes ([Details on the estimated penetration rates]). This rate increases slightly to [...] in [...] and subsequently to [...] from [...] onwards to reflect expected growth in the market*"[30]. Moreover, the Parties claimed that [Details on the wholesale agreements concluded by the Parties][31] and "[t]*he price under the [Details on the wholesale agreements concluded by the Parties] is [...] for the entire period". Finally, the Parties claimed that the "wholesale fees are on [Details on the wholesale agreements concluded by the Parties]*"[32]. [Advisor] "*find the rationale for this synergy to be robust (…)* [and] *have not identified any major issues that would prevent this migration – one minor aspect where we believe there could be some risk, is on the customer migrations from [Details on the wholesale agreements concluded by the Parties] to [Details on the wholesale agreements concluded by the Parties], however we understand these would be treated as "massive" migrations, which would result in negligible costs"*[33].

b. **Item 9** ***(Annex 11, fixed, row (121*(122-12.5)*0.012)*** concerns the dis-synergy from [Details on the wholesale agreements concluded by the Parties]. Item 9 is calculated by multiplying the number of customers from the agreement (row 121), to the unitary cost difference between [Details on the wholesale agreements concluded by the Parties] (row 122) and [Details on the wholesale agreements concluded by the Parties], and multiplies it to the 12 months. The Parties claimed that [Details on the wholesale agreements concluded by the Parties][34] and was "*estimated by [Advisor] (…) and is*

[26] Form CO, Annex 10, page 19, Response to RFI 24, paragraph 8.3.
[27] Annex RFI 24 Q3 & Q4, sheet Template, column AC.
[28] Reply to the SO, Annex 8.1, paragraph 10.
[29] Form CO, Annex 9, paragraph 10.
[30] Response to RFI 24, paragraph 12.1.
[31] Response to RFI 24, paragraph 12.2.
[32] Annex RFI 24 Q3 & Q4, sheet Template, column AC.
[33] Form CO, Annex 10, page 21.
[34] Response to RFI 24, paragraph 13.1.

calculated as [Details on the wholesale agreements concluded by the Parties]"[35]. As regards the unitary dys-synergy for years [...] that continues to be [...] is "because the price reduction would be obtained only in the event that [Details on the wholesale agreements concluded by the Parties][36]. Finally, the "*wholesale fees are on [Details on the wholesale agreements concluded by the Parties]*"[37].

c. **Item 10** ***(Annex 11, fixed, row 125)*** concerns [Details on the wholesale agreements concluded by the Parties], due to the migration of Másmóvil customers to Orange. The Parties claimed that "ORANGE would be able to accommodate Másmóvil's customers without capacity expansion is due to the fact that both [Details on the wholesale agreements concluded by the Parties] and [Details on the wholesale agreements concluded by the Parties] customers are installed in [Details on the wholesale agreements concluded by the Parties]. The assumption (…) is that the migration from [Details on the wholesale agreements concluded by the Parties] to [Details on the wholesale agreements concluded by the Parties] is an administrative migration keeping the customer in the existing [...] *infrastructure, thus not requiring any capacity expansion*"[38]. The Parties have submitted this synergy as fixed and [Advisor] confirmed the [...] savings[39].

d. **Item 11** ***(Annex 11, fixed, row 129=-500*4.25*2*12/1000)*** concerns the integration cost from migrating Másmóvil customers from [Details on the wholesale agreements concluded by the Parties] to [Details on the wholesale agreements concluded by the Parties]. The Parties claimed it comes from [Details on the wholesale agreements concluded by the Parties][40]. Moreover, "[t]*here is no migration cost from transferring Másmóvil's customers from the [Details on the wholesale agreements concluded by the Parties] to [Details on the wholesale agreements concluded by the Parties] because these customers are already hosted by [Details on the wholesale agreements concluded by the Parties]*"[41]. [Advisor] reported that "there could be some risk, is on the customer migrations from [Details on the wholesale agreements concluded by the Parties] to [Details on the wholesale agreements concluded by the Parties], however we understand these would be treated as "massive" migrations, which would result in negligible costs ([…])[42]. The Parties claimed that it represents a [Details on the wholesale agreements concluded by the Parties][43]. In the Reply to the SO, the Parties claim it represents a one-off opportunity cost in [...] and therefore should be considered sunk as it does not affect the joint venture's pricing incentive.[44]

e. **Item 12** ***(Annex 11, fixed, row 138*(139-140)*0.012)*** concerns the savings from migrating Orange customers served [Details on the wholesale agreements concluded by the Parties] to Másmóvil's [Details on the wholesale agreements

35 Response to RFI 24, paragraph 13.2.
36 Response to RFI 24, paragraph 13.3.
37 Annex RFI 24 Q3 & Q4, sheet Template, column AC.
38 Response to RFI 24, paragraph 14.1.
39 Form CO, Annex 10, page 21.
40 Response to RFI 24, paragraph 15.1.
41 Response to RFI 24, paragraph 15.2.
42 Form CO, Annex 10, page 21.
43 Annex RFI 24 Q3 & Q4, sheet Template, column AC.
44 Reply to the SO, Annex 8.1, paragraph 10.

concluded by the Parties] with other providers.. Item 12 is calculated by multiplying the number of Orange's customers (row 138) by the unitary cost price difference between Orange (row 139) and Másmóvil (row 140). The Parties have submitted that approximately [...][45] are concerned and the "*Synergies Model uses a blended price of [...] to approximate the average per-line prices under Másmóvil's alternative agreements*"[46]. As regards the inability of Orange to been able to negotiate better contractual terms, the Parties mentioned that it is [Details on the wholesale agreements concluded by the Parties]"[47]. [Advisor] "*agree[s] with the rationale of this synergy*"[48]. The Notifying Parties argue that the cost savings are variable, as fees are [Details on the wholesale agreements concluded by the Parties].[49]

f. **Item 13** ***(Annex 11, fixed, row 138*(([...])*0.012) concerns claimed variable cost savings from "Other savings (aperiodics & transmission)". The aperiodic costs refer to savings of [...] on the costs for activation and deactivation in [...]'s footprint***. The transmission cost is equal to [Details on the wholesale agreements concluded by the Parties].[50] The unitary cost savings (row 142) are multiplied with the number of affected subscribers (row 138), times 12 months. The Notifying Parties argue that the cost savings are variable, as fees are on [Details on the wholesale agreements concluded by the Parties].[51]

g. **Item 14** ***(Annex 11, fixed, row 138*([...]))/1000))*** concerns the migration cost [Details on the wholesale agreements concluded by the Parties]. The item is calculated by multiplying the migration cost of [...] per customer by the number of customer (row 138). According to [Advisor], "[Orange] has [...] customers and these would be migrated to [...]'s network, comprising up to [...] different wholesale agreements"[52] and the Parties claimed that "*the migration cost per customer is [Details on the Parties' cost structure]*[53] and is a *"cost [Details on the wholesale agreements concluded by the Parties]"*[54]. In the Reply to the SO, the Parties claim it represents a "*one-off cost of installing new equipment for Orange's customers that migrate to Másmóvil's footprint*" and should be considered sunk as it does not affect the joint venture's pricing incentive and only the number of migrations.[55]

h. **Item 15** ***(Annex 11, fixed, row 158*155*0.012)*** concerns the savings in wholesale fees from migrating customers of [Details on the wholesale agreements concluded by the Parties] to [Details on the wholesale agreements concluded by the Parties]. Item 15 is calculated by multiplying the number of Másmóvil customers (row 158), by the unitary saving (row 156-157), times the 12 months. According to the Parties, *"[t]his migration [Details on the*

45 Form CO, Annex 9, page 6.
46 Form CO, Annex 9, page 6.
47 Response to RFI 24, paragraph 16.3.
48 Form CO, Annex 10, page 10.
49 Annex RFI 24 Q3 & Q4, sheet Template, column AC.
50 Response to RFI 24, paragraph 7.1-7.2.
51 Annex RFI 24 Q3 & Q4, sheet Template, column AC.
52 Form CO, Annex 10, page 22.
53 Response to RFI 24, paragraph 18.2.
54 Annex RFI 24 Q3 & Q4, sheet Template, column AC
55 Reply to the SO, Annex 8.1, paragraph 10.

wholesale agreements concluded by the Parties][56] and represents approximately [...] customers.[57] The Notifying Parties argue that the cost savings are variable, as "*fees are on [Details on the wholesale agreements concluded by the Parties]*"[58], and that "*the assumption of constant customers was considered in order to simplify the exercise*"[59]. As regards [Advisor], they "overall agree it is reasonable to expect that the customers which [Details on the wholesale agreements concluded by the Parties], are indeed migrated to [...]'s network (…) [w]e note that the synergy assumes that [Details on the wholesale agreements concluded by the Parties][60].

i. **Item 16** ***(Annex 11, fixed, row 159*155*0.012)*** concerns claimed variable cost savings from "*Other savings (aperiodics & transmission)*". The aperiodic costs refer to savings of [...] on the costs for activation and deactivation in [...] footprint. The transmission cost is equal to [Details on the wholesale agreements concluded by the Parties].[61] The unitary cost savings (row 159) are multiplied by the number of affected subscribers (row 155), times 12 months. The Notifying Parties argue that the cost savings are variable, as fees are on [Details on the wholesale agreements concluded by the Parties].[62]

j. **Item 17** ***(Annex 11, fixed, row 155/1000*(160.0))*** concerns the migration cost from [Details on the wholesale agreements concluded by the Parties] to Orange agreement. This integration cost is calculated by multiplying the [...] of migration cost per customer, to the number of customers (row 155) in [...]. The Notifying Parties argue that the cost savings are variable, as fees are on [Details on the wholesale agreements concluded by the Parties].[63] In the Reply to the SO, the Parties claim it represents a one-off cost of installing new equipment and should be considered sunk as it does not affect the joint venture's pricing incentive and only the number of migrations.[64]

k. **Item 18** ***(Annex 11, dys-synergies, row 22)*** concerns the increase contract prices by [...], between [Details on the wholesale agreements concluded by the Parties]. Item 18 is calculated by multiplying the number of guaranteed customers by the price increase ([...]). [Advisor] spotted a miscalculation for 2023 and 2024 that has been corrected by the Parties.

2.1.2. The Commission's assessment

(10) **Table 1** lists the claimed cost synergies and integration costs related to the Parties' **fixed network**. **Table 2** lists the claimed cost synergies and integration costs after the Commission's adjustments (i.e. data corrections) further outlined below.

(11) The Commission's assessment of the claimed cost synergies and integration costs related to the Parties' **fixed network** with regard verifiability, merger-specificity and benefit to consumers is outlined in the Decision, Section 9.6.4.2.1.1. **Table 1** lists the Commission's assessment per Item. **Table 3** displays the undiscounted negative

56 Form CO, Annex 9, paragraph 10.
57 Form CO, Annex 9, paragraph 10.
58 Annex RFI 24 Q3 & Q4, sheet Template, column AC.
59 Response to RFI 24, paragraph 19.1.
60 Form CO, Annex 10, page 23.
61 Response to RFI 24, paragraph 7.1-7.2.
62 Annex RFI 24 Q3 & Q4, sheet Template, column AC.
63 Annex RFI 24 Q3 & Q4, sheet Template, column AC.
64 Reply to the SO, Annex 8.1, paragraph 10.

net variable cost savings of [...] over a 3-4 year period (2023-2026), related to the Parties' fixed network accepted by the Commission.

(12) The Commission made several adjustments regarding the size of the cost synergies:

(a) As regards **Item 1**, the Parties claimed that this synergy is based on the cumulative number of BUs that includes migrated subscribers and customers they are expected to gain and therefore some subscribers that the Parties would not gain in the standalone scenario. The Commission considers that the cost saving should only be applied to the cumulative number of migrated customers. In the Reply to the SO, the Parties claim that the cost synergy will not only apply to the Parties's current subscribers but also to the customer they expect to gain following the incremental FTTH roll-out. In that regard the Parties argue that a decrease in the number of customers would be inconsistent with the Commission's characterization of MásMóvil as an ICF. With regard to the FTTH deployment, the Parties argue that the counterfactual, i.e. no FTTH deployment, is in contradiction with the Commission's claim in the SO that FTTH deployment is non-merger specific.[65] The Commission maintain that the synergy should only be applied to the customer that will migrate and not customer that they are planning to gain, as the Commission cannot verify the number of potential new consumers that will benefit from it. Moreover, absent the Transaction, Parties could separately or together find better wholesale contract deals, achieve cost synergies and deployed FTTH, aligned to the merger-specific claim. Therefore, Item 1 is reduced from [...] to [...], over the period 2023-2032.

(b) As regards **Item 2**, related to aperiodics & transmission cost synergy, the Commission considers that these cost savings should only be applied to migrated customers. Secondly, as regards to the cost synergies related to aperiodics & transmission **(Item 2, Item 6, Item 13** and **Item 16**), the Commission understands that the subscribers are already present on [...]'s footprint and therefore the costs for activation are sunk. In the Reply to the SO, the Parties argue that these items represent costs that would have to be paid to [...] for customers switching to a different footprint based on the usual churn, and therefore are not sunk.[66] The Commission maintain their original assessment which takes into account the synergies from the transmission, which correspond respectively to [...], [...], [...] and [...] cost synergies, over the period 2023-2032.

(c) As regards the size of **Item 8**, and as the unitary cost price under the [Details on the wholesale agreements concluded by the Parties], the Parties have claimed that it will remain at EUR [...] and therefore will constitute an integration cost of [...], as [Details on the wholesale agreements concluded by the Parties]. In the Reply to the SO, the Parties agreed with the Commission and therefore the cost synergy is reduced from [...] to [...] over the period 2023-2032.[67]

(13) In the Reply to the SO, the Parties have proposed adjustments with regard to the integration cost calculation. As regard **Item 11**, the Parties recalculate the size of the integration cost that was submitted by the Parties as [Details on the wholesale

[65] Reply to the SO, Annex 8.1, paragraph 21.
[66] Reply to the SO, Annex 8.1, paragraph 10.
[67] Reply to the SO, Annex 8.1, paragraph 21.

agreements concluded by the Parties]. The Parties re-estimated the integration cost from only mid-2023 which reduces the total cost from [...] to [...].[68] The Commission accepts the modifications made by the Parties.

(14) As regards the other cost synergies and integration costs (**Item 3 - Item 5, Item 7, Item 9 – Item 12, Item 14, Item 15, Item 17, and Item 18**), the Commission does not make any adjustment and the size of these cost savings can be left open.

Table 1. Summary of claimed of cost savings and integration costs related to the Parties' fixed networks.

Synergy / Integration cost description			ID	S/I	V	Commission adjustments to data	Verifiability	Merger-specificity	Benefit to consumers
Level 2	Level 3	Level 4							
FTTH deployment	Densification	Savings in wholesale fees	1	S	[90-100]%	yes	no	no	yes
		Other savings (aperiodics & transmission)	2	S	[90-100]%	yes	no	no	yes
		Network deployment cost	3	I	[90-100]%		no	no	yes
		Migration cost	4	I	[90-100]%		no	no	yes
	New municipalities	Savings in wholesale fees	5	S	[90-100]%		no	no	yes
		Other savings (aperiodics & transmission)	6	S	[90-100]%	yes	no	no	yes
		Network deployment cost	7	I	[90-100]%		no	no	yes
FTTH consolidation	[Details on the wholesale agreements concluded by the Parties]	[Details on the wholesale agreements concluded by the Parties]	8	S	[90-100]%		yes	yes	yes
		[Details on the wholesale agreements concluded by the Parties]	9	S	[90-100]%		yes	yes	yes
		[Details on the wholesale agreements concluded by the Parties]	10	S	[05]%		yes	yes	no
		[Details on the wholesale agreements concluded by the Parties]	11	I	[90-100]%		yes	yes	yes
	[Details on the wholesale agreements concluded by the Parties]	[Details on the wholesale agreements concluded by the Parties]	12	S	[90-100]%		yes	yes	yes
		Other savings (aperiodical & transmission)	13	S	[90-100]%	yes	yes	yes	yes
		Migration cost	14	I	[90-100]%		yes	yes	yes
	[Details on the wholesale agreements concluded by the Parties]	Savings in wholesale fees	15	S	[90-100]%		yes	yes	yes
		Other savings (aperiodical & transmission)	16	S	[90-100]%	yes	yes	yes	yes
		Migration cost	17	I	[90-100]%		yes	yes	yes
	M&A clause	[Details on the wholesale agreements concluded by the Parties]	18	S	[90-100]%		yes	yes	yes

Source: Annex 9-11, Response to RFI 24, Annex 8.1 Reply to the SO, and Commission adjustments.
**ID: cost item; S/I: cost synergy (S) or integration cost (I); V: share of costs Parties' argue to be variable (%);*

[68] Reply to the SO, Annex 8.1, paragraph 10.

Table 2. Claimed cost savings and integration costs related to the Parties' fixed network, following the Commission's data adjustments (2023-2026, EUR million).

Synergy / Integration cost description: Level 2	Level 3	Level 4	ID	S/I	V	2023	2024	2025	2026	Total
FTTH deployment	Densification	Savings in wholesale fees	1	S	[90-100]%	-	[...]	[...]	[...]	[...]
		Other savings (aperiodics & transmission)	2	S	[90-100]%	-	[...]	[...]	[...]	[...]
		Network deployment cost	3	I	[90-100]%	[...]	[...]	[...]	[...]	[...]
		Migration cost	4	I	[90-100]%	-	[...]	[...]	[...]	[...]
	New municipalities	Savings in wholesale fees	5	S	[90-100]%	[...]	[...]	[...]	[...]	[...]
		Other savings (aperiodics & transmission)	6	S	[90-100]%	[...]	[...]	[...]	[...]	[...]
		Network deployment cost	7	I	[90-100]%	[...]	[...]	[...]	[...]	[...]
FTTH consolidation	[Details on the wholesale agreements concluded by the Parties]	[Details on the wholesale agreements concluded by the Parties]	8	S	[90-100]%	-	-	-	[...]	[...]
		[Details on the wholesale agreements concluded by the Parties]	9	S	[90-100]%	-	-	-	[...]	[...]
		[Details on the wholesale agreements concluded by the Parties]	10	S	[0-5]%	-	-	-	-	-
		[Details on the wholesale agreements concluded by the Parties]	11	I	[90-100]%	[...]	[...]	[...]	-	[...]
	[Details on the wholesale agreements concluded by the Parties]	[Details on the wholesale agreements concluded by the Parties]	12	S	[90-100]%	[...]	[...]	[...]	[...]	[...]
		Other savings (aperiodical & transmission)	13	S	[90-100]%	[...]	[...]	[...]	[...]	[...]
		Migration cost	14	I	[90-100]%	[...]	-	-	-	[...]
	[Details on the wholesale agreements concluded by the Parties]	Savings in wholesale fees	15	S	[90-100]%	-	-	-	[...]	[...]
		Other savings (aperiodical & transmission)	16	S	[90-100]%	-	-	-	[...]	[...]
		Migration cost	17	I	[90-100]%	-	-	-	[...]	[...]
	M&A clause	[Details on the wholesale agreements concluded by the Parties]	18	S	[90-100] %	[...]	[...]	[...]	[...]	[...]
Total						[...]	[...]	[...]	[...]	[...]

Source: Annex 9-11, Response to RFI 24, Annex 8.1 Reply to the SO, and Commission adjustments.
**ID: cost item; S/I: cost synergy (S) or integration cost (I); V: share of costs Parties' argue to be variable (%);*

Table 3. Summary of variable cost savings and integration costs related to the Parties' fixed networks, accepted by the Commission (2023-2026, EUR million).

Synergy / Integration cost description			ID	S/I	V	2023	2024	2025	2026	Total
Level 2	Level 3	Level 4								
FTTH deployment	Densification	Savings in wholesale fees	1	S	[90-100]%	-	-	-	-	-
		Other savings (aperiodics & transmission)	2	S	[90-100]%	-	-	-	-	-
		Network deployment cost	3	I	[90-100]%	-	-	-	-	-
		Migration cost	4	I	[90-100]%	-	-	-	-	-
	New municipalities	Savings in wholesale fees	5	S	[90-100]%	-	-	-	-	-
		Other savings (aperiodics & transmission)	6	S	[90-100]%	-	-	-	-	-
		Network deployment cost	7	I	[90-100]%	-	-	-	-	-
FTTH consolidation	[Details on the wholesale agreements concluded by the Parties]	[Details on the wholesale agreements concluded by the Parties]	8	S	[90-100]%	-	-	-	[...]	[...]
		[Details on the wholesale agreements concluded by the Parties]	9	S	[90-100]%	-	-	-	[...]	[...]
		[Details on the wholesale agreements concluded by the Parties]	10	S	[05]%	-	-	-	-	-
		[Details on the wholesale agreements concluded by the Parties]	11	I	[90-100]%	[...]	[...]	[...]	-	[...]
	[Details on the wholesale agreements concluded by the Parties]	[Details on the wholesale agreements concluded by the Parties]	12	S	[90-100]%	[...]	[...]	[...]	[...]	[...]
		Other savings (aperiodical & transmission)	13	S	[90-100]%	[...]	[...]	[...]	[...]	[...]
		Migration cost	14	I	[90-100]%	[...]	-	-	-	[...]
	[Details on the wholesale agreements concluded by the Parties]	Savings in wholesale fees	15	S	[90-100]%	-	-	-	[...]	[...]
		Other savings (aperiodical & transmission)	16	S	[90-100]%	-	-	-	[...]	[...]
		Migration cost	17	I	[90-100]%	-	-	-	[...]	[...]
	M&A clause	[Details on the wholesale agreements concluded by the Parties]	18	S	[90-100]%	[...]	[...]	[...]	[...]	[...]
Total						[...]	[...]	[...]	[...]	[...]

Source: Annex 9-11, Response to RFI 24, Annex 8.1 Reply to the SO, and Commission adjustments.
**ID: cost item; S/I: cost synergy (S) or integration cost (I); V: share of costs Parties' argue to be variable (%);*

2.2. Mobile network

2.2.1. The Notifying Parties' cost synergy claims

2.2.1.1. O&M consolidation

(15) Related to O&M consolidation, the Notifying Parties submit the following cost synergies and integration costs from transferring traffic to Orange's network and [Details on the Parties' business strategy]. (Item 19 – Item 24). All the items below are calculated with respect to the same structure, substracting Másmóvil's current costs for 2021 to Másmóvil's costs within the JV that remain each year. The Parties claimed "[s]ince the cost structure of OSP's O&M activities is essentially fixed in nature, adding MASMOVIL's traffic will not increase their costs, while it would

obviously save [Details on the wholesale agreements concluded by the Parties][69]. As regard of the possibility for Másmóvil to obtain a better contract absent of Transaction, the Parties claimed that [Details on the wholesale agreements concluded by the Parties][70]. [Advisor] "find it reasonable that [Details on the Parties' business strategy][71]. However, in the Reply to RFI 18, the Parties state that they "*did not entail relying on future demand projections*"[72]. As regards the Item 20 - Item 24, the Parties have claimed that they are fixed cost synergies[73].

a. **Item 19 *(Annex 11, mobile, row 82-91)*** concerns [Details on the wholesale agreements concluded by the Parties][74]. According to the Parties, [Details on the wholesale agreements concluded by the Parties][75]. In the Form CO, Parties claimed that [Details on the wholesale agreements concluded by the Parties][76]. Furthermore, the Parties acknowledged that Orange [Details on the wholesale agreements concluded by the Parties]. Costs in these contracts are respectively related to [Details on the wholesale agreements concluded by the Parties] [77]. In the Reply to the SO, the Parties claim that part of the cost saving is not directly based on the number of customer and re-estimated the variable part at [20-30]%.

b. **Item 20 (Annex 11, mobile, row 83-92)** concerns returning Microwaves ("MW") link spectrum fee paid. According to the Parties, "the payments (…) correspond to a fixed tax payment not linked to the traffic or number of customers"[78].

c. **Item 21 *(Annex 11, mobile, row 84-93)*** concerns [Details on the Parties' business strategy]. According to the Parties, "for items 21 to 24: there is a ramp-up, which assumes that [50-60]% *of the efficiencies are realised in 2023, and then full efficiencies per year are realised from 2024 onwards*"[79].

d. **Item 22 (Annex 11, mobile, row 85-94)** concerns [Details on the Parties' business strategy].[80]

e. **Item 23 *(Annex 11, mobile, row 86-95)*** concerns [Details on the Parties' business strategy]. [81]

f. **Item 24 *(Annex 11, mobile, row 87-96)*** concerns [Details on the Parties' business strategy][82]. [Advisor] "*find this synergy to be reasonably justified"[83]*.

[69] Response to RFI 24, paragraph 22.4.
[70] Article 6(1)(c) Response, paragraph 646.
[71] Form CO, Annex 10, page 15.
[72] Reply to RFI 18, paras 14.1.
[73] Annex RFI 24 Q3 & Q4, sheet Template, column P.
[74] Response to RFI 24, paragraph 22.1.
[75] Response to RFI, Q6a.
[76] Form CO, Annex RFI 24 Q3 & Q4, sheet Template, column P.
[77] Form CO, Annex 9, paragraph 20-24.
[78] Response to RFI 24, paragraph 24.1.
[79] Response to RFI 24, paragraph 22.5.
[80] Response to RFI 24, paragraph 22.1.
[81] Response to RFI 24, paragraph 22.1.
[82] Response to RFI 24, paragraph 22.1.
[83] Form CO, Annex 10, page 15.

2.2.1.2. Site consolidation

(16) Related to Site consolidation, the Notifying Parties submit the following cost synergies and integration costs (Item 25 – Item 34). As regards cost synergies and integration cost (Item 25 – Item 27, Item 29), related to rent and energy, the Parties claimed that they represent fixed cost savings from [Details on the Parties' business strategy] and [Details on the Parties' business strategy]. As regards integration cost (Item 28, Item 30 – Item 32), related to CAPEX, the Parties initially claimed it represents variable costs. In the Reply to the SO the Parties argue that "*because [Details on the Parties' business strategy]*" these costs are sunk and do not influence Parties' pricing incentive. [84] As regard of integration cost related to Item 33 and Item 34, the Parties claim they represents the increment carrier CAPEX and OPEX for maintenance with the JV.[85]

a. **Item 25** ***(Annex 11, mobile, row 48-51)*** concerns the cost synergy related to the rent. It is calculated by subtracting the gross rent, "*correspond to the rental fees of Másmóvil's mobile sites in 2021, when Másmóvil had [...] mobile sites*[86]", (row 48) to the committed rent, "*based on Másmóvil's rental fees for the sites*[87]*"* (row 51). According to the Parties it represents a fixed synergy cost[88]. [Advisor] "*find the calculation of expected rent and energy cost savings to be reasonable"*[89].

b. **Item 26** ***(Annex 11, mobile, row 49-52)*** concerns the cost synergy related to energy, and is calculated from the gross energy (Másmóvil's mobile cost in 2021) (row 49), minus the committed energy (row 52), calculated from "*assum[ing] that the number of Másmóvil's sites [Details on the Parties' business strategy] as of [2020-2023]*[90]". According to the Parties it represents a fixed synergy cost[91].

c. **Item 27** *(Annex 11, mobile, row 57)* concerns the synergy cost from integrating Másmóvil's mobile sites in Orange's network. The Parties explained that it represents [Details on the Parties' business strategy][92]*"*. It is calculated from "*the average cost (including rent fees and energy costs) for a mobile site in 2021 (...) [and the] committed rents*[93]". According to the Parties it represents a fixed synergy cost[94].

d. **Item 28** *(Annex 11, mobile, row 63)* concerns the low band [...] sites CAPEX integration cost, in the remaining [...]Másmóvil mobile sites where [Details on the Parties' business strategy][95]. Based on expert view, cost depends on the number of Másmóvil's sites incorporated into the JV's network, therefore

84 Article 6(1)(c) Response, paragraph 661. Reply to the SO, Annex 8.1, paragraph 27.
85 Reply to the SO, Annex 8.1, paragraph 27.
86 Response to RFI 24, paragraph 25.1.
87 Response to RFI 24, paragraph 25.2.
88 Annex RFI 24 Q3 & Q4, sheet Template, column K.
89 Form CO, Annex 10, page 14.
90 Response to RFI 24, paragraph 26.3.
91 Annex RFI 24 Q3 & Q4, sheet Template, column K.
92 Response to RFI 24, paragraph 28.1.
93 Response to RFI 24, paragraph 28.2.
94 Annex RFI 24 Q3 & Q4, sheet Template, column K.
95 Response to RFI 24, paragraph 29.3.

related to customers/traffic[96]. [Advisor] found that "[Details on the Parties' business strategy] – *we find this calculation and its results to be reasonable*"[97].

e. **Item 29** (Annex 11, mobile, row 64) concerns the costs for [Details on the Parties' business strategy][98]". The Parties consider that this integration cost can be considered fixed, as it relates to [Details on the Parties' business strategy][99].

f. **Item 30** (Annex 11, mobile, row 67) represents, according to the Parties, the "*investment for carrier expansions required to accommodate Másmóvil's traffic into Orange's network [and] have been calculated on the basis of the expected traffic evolution together with Orange's network dimensioning criteria*[100]".

g. **Item 31** *(Annex 11, mobile, row 68)* concerns the "*investment required to [Details on the Parties' business strategy]*[101]".

h. **Item 32** *(Annex 11, mobile, row 69)* concerns the "*[Details on the Parties' business strategy]*[102]".

i. **Item 33** ***(Annex 11, mobile, row 72)*** concerns the "*[Details on the Parties' business strategy]*"[103].

j. **Item 34** ***(Annex 11, mobile, row 73)*** concerns the "*increase in OPEX due to incremental energy for carriers expansions (...) calculated on the basis of the expected traffic evolution together with ORANGE's network dimensioning criteria*"[104].

2.2.1.3. Spectrum consolidation

(17) Related to Spectrum consolidation, the Notifying Parties submit the following cost synergies and integration costs (Item 35 – Item 37):

a. **Item 35** ***(Annex 11, mobile, row 116)*** is explained by the Parties as "*not a synergy, it is cost to [Details on the Parties' business strategy] (...) it corresponds to the part of the spectrum which does not exceed the current caps*"[105]. It worth EUR [...] in [...] [Details on the Parties' business strategy].Therefore, it is considered by the Parties as a fixed cost synergy.

b. **Item 36** ***(Annex 11, mobile, row 117)*** concerns the cost synergy from Másmóvil's annual payment for the extra surplus that will be sold after the Transaction, as it will exceed the cap set by the Ministry[106]. It is considered by the Parties as a fixed cost synergy.

---

96 Annex RFI 11 Q4 page 2.
97 Form CO, Annex 10, page 14.
98 Response to RFI 24, paragraph 29.3.
99 Annex RFI 24 Q3 & Q4, sheet Template, column K.
100 Response to RFI 24, paragraph 29.3.
101 Response to RFI 24, paragraph 29.3.
102 Response to RFI 24, paragraph 29.3.
103 Response to RFI 24, paragraph 29.3.
104 Response to RFI 24, paragraph 29.3.
105 Response to RFI 24, paragraph 30.1.
106 Form CO, Annex 9, page 26.

c. **Item 37** ***(Annex 11, mobile, row 123)*** represents the integration cost from the excess spectrum. The Parties claimed it is a fixed integration cost[107]. [Advisor] agreed that "the spectrum fees associated with these bands will be saved (…) [and] consider find that there is a risk that [Details on the Parties' business strategy] (…) [and] propose that a scenario in which only [...] of the expected value of the spectrum ([...][108]".

2.2.2. The Commission's assessment

(18) **Table 4** lists the claimed cost synergies and integration costs related to the Parties' **mobile network**. **Table 5** lists the claimed cost synergies and integration costs (there were no data corrections).

(19) The Commission's assessment of the claimed cost synergies and integration costs related to the Parties' **mobile network** with regard verifiability, merger-specificity and benefit to consumers is outlined in the Decision, Section 9.6.4.2.1.2. **Table 4** lists the Commission's assessment per Item. The Commission concludes that there are no variable net cost savings related to the Parties' mobile network.

Table 4. Summary of claimed cost savings and integration costs related to the Parties' mobile networks.

Synergy / Integration cost description		ID	S/I	V	Adjustment to the Parties's data	Verifiability	Merger-specific	Benefit to Consumers
Level 2	Level 3							
O&M consolidation	O&M: NOC & FLM	19	S	[20-30]%		no	no	left open
	OPEX – MW	20	S	[0-5]%		no	no	left open
	CAPEX – Infra Radio	21	S	[0-5]%		no	no	left open
	CAPEX – IP Core	22	S	[0-5]%		no	no	left open
	CAPEX – O&M	23	S	[0-5]%		no	no	left open
	CAPEX – CORE VAS	24	S	[0-5]%		no	no	left open
Site consolidation	Synergy Rent	25	S	[0-5]%		yes	yes	no
	Synergy Energy	26	S	[0-5]%		yes	yes	no
	Add sites	27	S	[0-5]%		yes	yes	no
	Low band new sites CAPEX	28	I	[0-5]%		yes	yes	no
	[Details on the Parties' business strategy]	29	I	[0-5]%		yes	yes	no
	CAPEX Expans.	30	I	[0-5]%		yes	yes	no
	Capex Equipment reuse	31	I	[0-5]%		yes	yes	no
	[Details on the Parties' business strategy]	32	I	[0-5]%		yes	yes	no
	[Details on the Parties' business strategy]	33	I	[0-5]%		yes	yes	no
	OPEX Energy increase (ZN)	34	I	[0-5]%		yes	yes	no
Spectrum consolidation	Estimated 10MHZ (80MHz 3,5GHz)	35	S	[0-5]%		yes	yes	no
	Spectrum fees rest	36	S	[0-5]%		yes	yes	no
	Integration cost (non-recurrent revenue)	37	S	[0-5]%		yes	yes	no

Source: Annex 9-11, Response to RFI 24, Annex 8.1 Reply to the SO, and Commission adjustments.
**ID: cost item; S/I: cost synergy (S) or integration cost (I); V: share of costs Parties' argue to be variable (%);*

107 Annex RFI 24 Q3 & Q4, sheet Template, column K.

108 Form CO, Annex 10, page 16.

Table 5. Claimed cost savings and integration costs related to the Parties' mobile network following the Commission's data adjustments (2023-2026, EUR million).

Synergy / Integration cost description – Level 2	Level 3	ID	S/I	V	2023	2024	2025	2026	Total
O&M consolidation	O&M: NOC & FLM	19	S	[20-30]%	[...]	-	[...]	[...]	[...]
	OPEX – MW	20	S	[0-5]%	[...]	-	[...]	[...]	[...]
	CAPEX – Infra Radio	21	S	[0-5]%	[...]	[...]	[...]	[...]	[...]
	CAPEX – IP Core	22	S	[0-5]%	[...]	[...]	[...]	[...]	[...]
	CAPEX – O&M	23	S	[0-5]%	[...]	[...]	[...]	[...]	[...]
	CAPEX – CORE VAS	24	S	[0-5]%	[...]	[...]	[...]	[...]	[...]
Site consolidation	Synergy Rent	25	S	[0-5]%	-	[...]	[...]	[...]	[...]
	Synergy Energy	26	S	[0-5]%	-	[...]	[...]	[...]	[...]
	Add sites	27	S	[0-5]%	-	-	[...]	[...]	[...]
	[Details on the Parties' business strategy]	28	I	[0-5]%	[...]	[...]	[...]	-	[...]
	[Details on the Parties' business strategy]	29	I	[0-5]%	[...]	[...]	[...]	[...]	[...]
	CAPEX Expans.	30	I	[0-5]%	[...]	[...]	[...]	[...]	[...]
	Capex Equipment reuse	31	I	[0-5]%	[...]	[...]	[...]		[...]
	[Details on the Parties' business strategy]	32	I	[0-5]%	-	-	[...]	[...]	[...]
	[Details on the Parties' business strategy]	33	I	[0-5]%	[...]	[...]	[...]	[...]	[...]
	OPEX Energy increase (ZN)	34	I	[0-5]%	[...]	[...]	[...]	[...]	[...]
Spectrum consolidation	Estimated 10MHZ (80MHz 3,5GHz)	35	S	[0-5]%	-	-	[...]	-	-
	Spectrum fees rest	36	S	[0-5]%	-	-	[...]	[...]	[...]
	Integration cost (non-recurrent revenue)	37	S	[0-5]%	-	-	[...]	-	[...]
Total					[...]	[...]	[...]	[...]	[...]

Source: Annex 9-11, Response to RFI 24, Annex 8.1 Reply to the SO, and Commission adjustments.
**ID: cost item; S/I: cost synergy (S) or integration cost (I); V: share of costs Parties' argue to be variable (%);*

2.3. Transmission

2.3.1. The Notifying Parties' cost synergy claims

2.3.1.1. Mobile and fixed transmission

(20) Related to mobile backhaul and fixed transmission, the Notifying Parties submit the following cost synergies and integration costs (Item 38 – Item 43):

a. Item 38 ***(Annex 10, transmission, row 50)*** concerns cost savings by [Details on the Parties' business strategy]. Savings are achievable [Details on the Parties' business strategy], and [Details on the Parties' business strategy].[109] The Parties claimed that "*MásMóvil currently [Details on the wholesale agreements concluded by the Parties]*[110]", [Details on the wholesale agreements concluded by the Parties]. The Parties point out that MásMóvil has already [Details on the wholesale agreements concluded by the Parties] and submit that costs for [Details on the wholesale agreements concluded by the Parties] would constitute variable costs.[111] [Advisor] agreed on the estimation of this synergy, expects to see the first savings in [...], and that the integration cost related to this synergy is calculated in the site consolidation synergy.[112] As regards the nature of this synergy, the Parties claimed that *"[t]hese contracts are [Details on the wholesale agreements concluded by the*

[109] Response to RFI 24, paragraph 34.3.
[110] Article 6(1)(c) Decision, paragraph 508.
[111] Form CO, Annex 9, paragraph 34-35.
[112] Form CO, Annex 10, page 26.

Parties]."[113] In the Reply to the SO, the Parties have re-evaluated the variable size of the cost synergy at [30-40]%.

b. **Item 39** ***(Annex 10, transmission, row 60)*** concerns the cost synergy from [Details on the wholesale agreements concluded by the Parties]. Item 39 is calculated according to [Details on the wholesale agreements concluded by the Parties]. The Parties claimed that [Details on the wholesale agreements concluded by the Parties], while [Details on the wholesale agreements concluded by the Parties]. With the Transaction, Másmóvil [Details on the wholesale agreements concluded by the Parties].[114] The Parties claimed that [Details on the wholesale agreements concluded by the Parties]. However, the Parties explained that [Details on the wholesale agreements concluded by the Parties][115] and [Details on the wholesale agreements concluded by the Parties].[116] As regards the nature of this synergy, the Parties claimed that*"[t]hese contracts are indeed variable in the medium to long-term (...) [h]owever, this relationship is not one of direct proportionality because capacity has to be acquired in steps (...) the extent of capacity needed depends on usage more than on subscriber numbers.*"[117] [Advisor] agrees with the claimed synergy.[118] In the Reply to the SO, Parties claim that [Details on the wholesale agreements concluded by the Parties] and accepted to left open the question of variable nature of this item.[119]

c. **Item 40** ***(Annex 10, transmission, row 61)*** represents [Details on the wholesale agreements concluded by the Parties], regarding the fixed backhaul. The Parties claimed it should be considered as a variable synergy cost as [Details on the wholesale agreements concluded by the Parties].[120] In the Reply to the SO, the Parties claim that [Details on the wholesale agreements concluded by the Parties] and accepted to left open the question of variable nature of this item.[121]

d. **Item 41** ***(Annex 10, transmission, row 62)*** concerns the investment to expand capacity in order to accommodate Másmóvil's traffic **in Orange's network. According to the Parties, this investment "*will lead in fact to an excess in capacity.*** *[Details on Orange's business strategy]."* **[122] Item 41 represents in total** [...] **cost synergy and the "*Parties identified that this synergy is similar in nature to ite*** *m 45 and 46, which are considered fixed*[123]."

e. **Item 42** ***(Annex 10, transmission, row 66)*** concerns the integration cost from "*a one-off CAPEX investment in equipment and professional services at the*

113 Response to RFI 24, 36.2.
114 Form CO, Annex 9, paragraph 37.
115 Article 6(1)(c) Response, paragraph 653.
116 Article 6(1)(c) Response, paragraph 654.
117 Response to RFI 24, 36.2.
118 Form CO, Annex 10, page 27.
119 Reply to the SO, Annex 8.1, paragraph 40.
120 Response to RFI 24, paragraph 37.1, 37.2, RFI 11 Response, paragraph 7.a.
121 Reply to the SO, Annex 8.1, paragraph 40.
122 Response to RFI 24, paragraph 38.1.
123 Response to RFI 24, paragraph 38.3.

time of the migration of the customers under each contract"[124]. According to the Parties, it is a fixed integration cost.[125]

f. **Item 43** ***(Annex 10, transmission, row 67)*** concerns the **integration cost from the excess of capacity that Orange will incur with its contract with** [Details of Orange's commercial agreements].**[126] Item 43 is calculated by the Parties by "*(i) considered Másmóvil's leased lines in headends that Orange has connected using its contract with [Details of Orange's commercial agreements]; then (ii) calculated on how many of these the Másmóvil lines can be added at no cost under the capacity included in Orange's existing*** *contract; and finally (iii) for the Másmóvil lines that do not fit in the extensions indicated above (180), the Parties calculated their cost on the basis of the prices in the Orange contract*"[127]. The Parties have considered this Item as a variable integration cost.[128] In the Reply to the SO, **the Parties claim that** [Details on the wholesale agreements concluded by the Parties] **and accepted to left open the question of variable nature of this item.[129]**

2.3.1.2. Backbone

(21) Related to the backbone, the Notifying Parties submit the following cost synergies and integration costs (Item 44 – Item 47):

a. **Item 44** ***(Annex 11, transmission, row 75)*** concerns the savings cost from [Details on the Parties' business strategy], which will correspond to [...] as a result of the Transaction.[130] Item 44 is calculated based on [Details on the wholesale agreements concluded by the Parties]. According to the Parties, Másmóvil's contract structure consists in [Details on the wholesale agreements concluded by the Parties][131] Moreover, the Parties claimed that Orange [Details on the wholesale agreements concluded by the Parties] dark fibre agreements and on a fixed basis[132]. As a result, the Parties claimed the cost synergy to be variable. [Advisor] agrees with the claimed synergy and finds the rational and calculation reasonable.[133] In the Reply to the SO, the Parties claim that [Details on the wholesale agreements concluded by the Parties] and accepted to left open the question of variable nature of this item.[134]

b. **Item 45** ***(Annex 11, transmission, row 77)*** concerns the elimination of [Details on the wholesale agreements concluded by the Parties].[135] The Parties claimed that it represents a fixed cost savings of [...].[136]

c. **Item 46** ***(Annex 11, transmission, row 78)*** concerns the cost synergy from the cost avoidance of the future CAPEX investments that Orange planned (absence of Transaction), in order "*to accommodate Másmóvil's traffic in*

124 Response to RFI 24, paragraph 39.1.
125 Annex RFI 24 Q3 & Q4, sheet Template, column M.
126 Response to RFI 24, paragraph 40.1.
127 Response to RFI 24, paragraph 40.3.
128 Annex RFI 24 Q3 & Q4, sheet Template, column L.
129 Reply to the SO, Annex 8.1, paragraph 40.
130 Response to RFI 24, paragraph 41.1.
131 Form CO, Annex 9, paragraph 41, 42.
132 Article 6(1)(c), paragraph 656.
133 Form CO, Annex 10, page 28.
134 Reply to the SO, Annex 8.1, paragraph 40.
135 Response to RFI 24, 42.1.
136 Annex RFI 24 Q3 & Q4, sheet Template, column K.

Orange's network, an investment to expand capacity is required. The capacity expansion will result in a capacity excess.[137]" It is calculated based on *"(i) [Details on the wholesale agreements concluded by the Parties], and (ii) the CAPEX investments to upgrade capacity that Orange had already planned*"[138]. It represents [...] for all period and [Advisor] mentioned that it could be seen as a lower integration capex.[139] The Parties claimed that this cost synergy is fixed.[140]

d. **Item 47** ***(Annex 11, transmission, row 83)*** concerns the integration cost related to the migration of Másmóvil's traffic to Orange's network (Item 44). The Parties claimed that Orange's backbone network [Details of Orange's commercial agreements][141]." The Parties claimed it represents a fixed integration cost.[142]

2.3.2. The Commission's assessment

(22) **Table 6** lists the claimed cost synergies and integration costs related to the Parties' **transmission** per item. **Table 7** lists the claimed cost synergies and integration costs (there were no data corrections).

(23) The Commission's assessment of the claimed cost synergies and integration costs related to the Parties' **transmission** with regard verifiability, merger-specificity and benefit to consumers is outlined in the Decision, Section 9.6.4.2.1.3. **Table 6** lists the Commission's assessment per item. The Commission concludes that there are no variable net cost savings related to the Parties' transmission network.

137 Response to RFI 24, paragraph 43.1.

138 Response to RFI 24, paragraph 43.2. The synergy starts in 2025 with a value of EUR [...], calculated on the basis of [Details on the wholesale agreements concluded by the Parties]. In [...] the savings are higher, [...], in correspondence to [Details on the wholesale agreements concluded by the Parties]. The remaining years are aligned with [Details on the wholesale agreements concluded by the Parties] and their accommodation in ORANGE's network. As [Details on the wholesale agreements concluded by the Parties], expansions are launched in ORANGE's network, reflected in the integration costs, and CAPEX avoidance is enabled by the resulting surplus capacity in ORANGE's network.

139 Form CO, Annex 10, page 28.

140 Annex RFI 24 Q3 & Q4, sheet Template, column K.

141 Response to RFI 24, 44.2. ORANGE's network experts confirmed that no extension of current fiber contracts is necessary.

142 Annex RFI 24 Q3 & Q4, sheet Template, column M.

Table 6. Summary of claimed cost savings and integration costs related to the Parties' transmission networks.

Synergy / Integration cost description Level 2	Level 3	ID	S/I	V	Adjustment to the Parties's data	Verifiability	Merger-specific	Benefit to Consumers
Mobile backhaul	Total mobile BH synergy	38	S	[30-40]%		no	no	no
Fixed backhaul	[...] FIX BH – Savings	39	S	[0-5]%		no	no	no
	[Details on the wholesale agreements concluded by the Parties]	40	S	[0-5]%		no	no	no
	[...] FIX BH CAPEX 0 Saving	41	S	[0-5]%		no	no	no
	Transformation cost CAPEX	42	I	[0-5]%		no	no	no
	Transformation cost OPEX	43	I	[0-5]%		no	no	no
Backbone	[...] BB OPEX 0 Savings	44	S	[0-5]%		no	no	no
	[...] BB CAPEX – Savings	45	S	[0-5]%		no	no	no
	[...] BB CAPEX – Savings	46	S	[0-5]%		no	no	no
	Transformation cost	47	I	[0-5]%		no	no	no

Source: Annex 9-11, Response to RFI 24, Annex 8.1 Reply to the SO, and Commission adjustments.
**ID: cost item; S/I: cost synergy (S) or integration cost (I); V: share of costs Parties' argue to be variable (%);*

Table 7. Claimed cost savings and integration costs related to the Parties' transmission networks following the Commission's data adjustments (2023-2026, EUR million).

Synergy / Integration cost description Level 2	Level 3	ID	S/I	V	2023	2024	2025	2026	Total
Mobile backhaul	Total mobile BH synergy	38	S	[30-40]%	-	-	-	[...]	[...]
Fixed backhaul	[...] FIX BH – Savings	39	S	[0-5]%	-	-	-	[...]	[...]
	[Details on the wholesale agreements concluded by the Parties]	40	S	[0-5]%	-	-	-	[...]	[...]
	[...] FIX BH CAPEX0Saving	41	S	[0-5]%	-	-	[...]	-	[...]
	Transformation cost CAPEX	42	I	[0-5]%	-	-	[...]	[...]	[...]
	Transformation cost OPEX	43	I	[0-5]%	-	-	[...]	[...]	[...]
Backbone	[...] BB OPEX 0 Savings	44	S	[0-5]%	-	-	-	[...]	[...]
	[...] BB CAPEX – Savings	45	S	[0-5]%	-	[...]	[...]	[...]	[...]
	[...] BB CAPEX – Savings	46	S	[0-5]%	-	-	[...]	[...]	[...]
	Transformation cost	47	I	[0-5]%	-	-	[...]	[...]	[...]
Total					-	[...]	[...]	[...]	[...]

Source: Annex 9-11, Response to RFI 24, Annex 8.1 Reply to the SO, and Commission adjustments.
**ID: cost item; S/I: cost synergy (S) or integration cost (I); V: share of costs Parties' argue to be variable (%);*

3. NON-NETWORK SYNERGIES

3.1. Sales and Marketing

3.1.1. The Notifying Parties' cost synergy claims

3.1.1.1. Customer CAPEX

(24) Related to Customer CAPEX, the Notifying Parties submit the following cost synergies **(Item 48 – Item 49)**. The Parties claimed that fixed and mobile customer CAPEX savings are merger specific because the "*Transaction will remove the need for these payments [*new CPE, new installation …], *since the Parties' customers will now become the combined entity's customers",* and only a full integration could lead to these savings[143]. The Parties claimed that CAPEX savings is a variable synergy as

143 Form CO, Annex 9, page 16, Table 2: Summary of cost savings variable synergies in non-network business areas.

it is per-customer basis. [144] Advisor] adjusted the unitary cost by taking into account that [...] of the CPE will be refurbished. As regards, or the ramp-up, [Advisor] found that a "level of [...] of all intra—group migrations may be too conservative (…) [and] may be reasonable to assume a slightly more aggressive ramp—up (leading to an increase of [...] in this synergy)*"*.[145] In the Reply to the SO, with regard to customer CAPEX and commission (Item 48- Item 52), the Parties claim savings are based on the expected stitches between the Parties and accept that on a conservative basis the variable nature can be left open.[146]

a. **Item 48** ***(Annex 11, other synergies, row 69=64*67*68/1000)*** concerns the customer fixed CAPEX savings related to the cross-churn between Orange and Másmóvil. Item 48 is calculated by multiplying three elements: the total fixed port flows, the blended unitary cost and the ramp-up. Regarding the first element, it comes from the sum of Orange to Másmóvil fixed ports (row 61) and Másmóvil to Orange fixed ports (row 62), multiplied by the percentage of switchers between the Parties that are porting their fixed, which represents **[50-60]**% line (row 63). As regards the blended unitary costs, it comes from the sum of the product of the number of fixed ports and the unitary cost (CPE + Installation), for both companies and then divided by the total number of fixed ports. Finally, these two components are multiplied by the ramp-up and, divided by 1000.[147] The Parties have estimate this synergy cost as fully variable[148]. The Parties explained that the [50-60]% of switchers that are porting their fixed is a conservative hypothesis (according to several information)[149]. As for the estimation of the unitary cost, the Parties have followed [Advisor] estimation with [...] (CPE and installation). Considering also their report, they have adjusted upward their ramp-up, which increase their synergy of [...].

b. **Item 49** ***(Annex 11, other synergies, row 79=74*77*78/1000)*** concerns the customer mobile CAPEX cost savings. Item 49 is calculated following the same structure as for the fixed customer CAPEX. The Parties have estimate this synergy cost as fully variable[150]. The Parties have estimated that [...] of mobile switchers port their numbers[151] and that "*[90-100]% of the SIM synergy could be captured within the first year by implementing similar tools and processes*".[152]

3.1.1.2. Commissions

(25) Related to Commissions, the Notifying Parties submit the following cost synergies (Item 50 – Item 52). The Parties claimed it exists some cost synergy from avoiding

144 Form CO, Annex 9, page 16, Table 2: Summary of cost savings variable synergies in non-network business areas.
145 Form CO, Annex 10, page 31.
146 Reply to the SO, Annex 8.1, paragraph 49.
147 Form CO, Annex 11, Other synergies.
148 Annex RFI 24 Q3 & Q4, sheet Template, column J.
149 Response to RFI 24, paragraph 45.3. There is a high percentage of switchers that do not port the original number, and a high percentage of cases in which: (i) MNOs only offer FBB without fixed telephone offer and (ii) there is an inter-brand movement without port, whereby the time the current operator learns about the movement and reaches the client to make a counter-offer, the new operator has already installed the new equipment.
150 Annex RFI 24 Q3 & Q4, sheet Template, column J.
151 Response to RFI 24, paragraph 46.3.
152 Response to RFI 24, paragraph 46.4.

commissions paid to telesales channels for subscribers, and that commissions are on paid on a [Details on the estimated cost savings].[153]

a. **Item 50** ***(Annex 11, other synergies, row 97= (88+92)*96/1000)*** concerns the synergy from the reduction of the fixed commissions paid in the telesales channel with the migration from Orange to MásMóvil. Item 50 is calculated by multiplying the potential flows to synergize and, by the blended unitary commission, divided by 1000. The potential flows to synergize represents the sum of the Orange to MásMóvil fixed potential flows to synergize (number of fixed ports/ports share of total fixed lines movements fixed gross adds (telesales outbound), row 85/86*87), and MásMóvil to Orange fixed potential flows to synergize (row 89/90*91). The blended unitary commission is calculated from the sum of each company's potential flows to synergize times the unitary price, and divided by the total potential flows to synergize (row (94*88+95*92)/93)[154]. According to the Parties, the percentage of fixed gross adds acquired through telesales channels, for both Orange and MásMóvil comes from an approximation based of fixed gross adds in 2020 and 2021 (resp. [...] and [...] for MásMóvil and [...] and [...] for Orange)[155]. As regards the commission cost for MásMóvil's telesales channel, the Parties explained it is based on the average monthly unit cost for 2021, and only includes the values of the [...] commission. Moreover, Orange's commission cost are based on unit cost for 2021.[156]

b. **Item 51** ***(Annex 11, other synergies, row 111=110*107/1000)*** is related to cost synergies for mobile commissions and are calculated the same manner as the previous structure. As regards the fact that MásMóvil has a [Details on MASMOVIL's commissions] telesales commission for mobile gross adds than Orange, the Parties explained that [Details on MASMOVIL's commissions] in Másmóvil's commission it "*results from an increase in commercial efforts to migrate/capture customers to convergent packages. Másmóvil's fixed offer does not have the attractive features that Orange or Telefónica have (which can include a strong TV package & Football), therefore the commercial push to attract subscribers needs to be stronger*[157]". The Parties have estimated this synergy cost as fully variable[158].

c. **Item 52** ***(Annex 11, other synergies, row 114=-113*(107+93)/1000)*** concerns the negative synergy from the total cost of loyalty. The Parties explained that "*commissions to this channel will be reduced, following the reduction in the commercial effort of outbound activity between the Parties. However, [Details on the Parties' business strategy]*[159]. Item 52 is calculated from the sum of the potential flows to synergize for the mobile and fixed commissions (row 107 + row 93), multiplied by the average [Details on the Parties' cost structure] per subscriber (row 113) and, divided by 1000. The average [Details on the Parties' cost structure] was estimated at [...] by the Parties but then reviewed

153 Form CO Annex 9, page 16, Table 2: Summary of cost savings variable synergies in non-network business areas.
154 Form CO, Annex 11, Other synergies.
155 Response to RFI 24, paragraph 47.1, 47.2, 47.3.
156 Response to RFI 24, paragraph 47.5.
157 Response to RFI 24, paragraph 49.1, 49.2.
158 Annex RFI 24 Q3 & Q4, sheet Template, column J.
159 Response to RFI 24, paragraph 50.2.

according to [Advisor] adjustment at [...][160]. The Parties have estimated this synergy cost as fully variable[161].

3.1.1.3. Marketing and Sales and Distribution

(26) Related to Marketing, Sales and Distribution, the Notifying Parties submit the following cost synergies and integration costs (Item 53 – Item 55):

a. **Item 53** ***(Annex 11, other synergies, row 125*126)*** concerns synergies from marketing expenditure and, the combined expenditures from both Parties ([...] from ORANGE and [...] from Másmóvil)[162]. The Parties explained that they were "*identify[ing] expenditures on which volume discounts could potentially be obtained*[163]". Item 53 is calculated from multiplying Másmóvil's synergizable marketing expense (row 125) by the percentage of synergy (row 126), estimated at [...] by the Parties (and "*only due to price improvements in the terms with suppliers due to economies of scale and the application of best prices between both companies*"[164]). This represents [...] savings on the total marketing expenditure of the Parties and has been validated by [Advisor].[165] The Parties have estimate this synergy cost as fixed[166].

b. **Item 5*4 (Annex 11, other synergies, row 135*134/1000)*** [scenario 1: [Details on the estimated cost savings]] [scenario 2: [Details on the estimated cost savings] concerns synergies from the optimization of the Parties' joint commercial footprint (sales and distribution). It is calculated by [Details on the estimated cost savings]. Item 54 represents [Details on the Parties' commercial footprint]. The Parties have mentioned to *"not [have] perform[ed] a store geo-located overlap analysis, as the footprint and performance data of each store were not shared during the due diligence.* [Details on the Parties' commercial footprint][167]". As regards the average cost per store, the Parties claimed it is a conservative estimation and includes personnel expenses, rent, supplies, utilities and maintenance.[168] [Advisor] found the estimation of number of stores not very intuitive and [Details on the estimated cost savings], they preferred to [Details on the estimated cost savings]. *[but] detailed data on the store performance was apparently not available"* and picked a simplified approach of [...] of the stores.[169] The Parties have opted for [Advisor] [Details on the estimated cost savings] and claim this synergy cost as fixed[170].

c. **Item 55** [scenario 1: [Details on the estimated cost savings]] [scenario 2: [Details on the estimated cost savings]] *(Annex 11, other synergies, row 134*139)* concerns the integration cost from the compensation cost incurred from [Details on the estimated cost savings].[171] Item 55 is calculated from [Details on the estimated cost savings] The Parties claimed that the cost

160 Form CO, Annex 10, page 32.
161 Annex RFI 24 Q3 & Q4, sheet Template, column J.
162 Response to RFI 24, paragraph 51.2.
163 Response to RFI 24, paragraph 51.3.
164 Response to Article 6(1)(c) Decision, paragraph 673.
165 Form CO, Annex 10, page 33.
166 Annex RFI 24 Q3 & Q4, sheet Template, column J.
167 Response to RFI 24, paragraph 52.2.
168 Response to RFI 24, paragraph 52.4.
169 Form CO, Annex 10, page 34.
170 Annex RFI 24 Q3 & Q4, sheet Template, column J.
171 Annex RFI 11, Q4, p.3.

"reflect [Details on the estimated cost savings][172]. [Advisor] has adjusted the integration costs upwards to [...] in total. The Parties consider that this integration costs is fixed[173] and represents therefore [Details on the estimated cost savings].

3.1.1.4. Equipment

(27) Related to Equipment (CPE and handset), the Notifying Parties submit the following cost synergies (Item 56 – Item 57). As regards both the CPE and handset, the Parties claimed that they will consolidate their volumes with *"(i) apply Orange's better contractual conditions with CPE providers; and (ii) select the better conditions with handset providers between each Party".* As regards the merger-specificity, the Parties claimed that Orange would have had no incentive to offer more favourable conditions to Másmóvil absent of the transaction and that the synergies are considered as variable costs because the Parties pay equipment suppliers on a per-consumer basis. [174]

a. **Item 56** ***(Annex 11, other synergies, row 155= ((152*150)-(151*150))/1000)*153)*** concerns the saving cost of CPEs. Item 56 is calculated by subtracting the product of MÁSMÓVIL's average cost of a new purchased CPE, (row 152) and its new gross adds (row 150), and the product of Orange's average cost of a new purchased CPE, (row 151) and Másmóvil new gross adds (row 150). This product is after divided by 1000 and multiplied by the ramp-up ratio (row 153) that is at [...] in 2023 and [...] for the following years. As regards the number of units taken into account, the Parties claimed that the number of internalized switchers of fixed lines is part of the total units[175] and that it includes an approximation of [...] gross adds customer for Másmóvil over the period 2023-2032.[176] The Parties explained that Orange's average CPE cost is calculated from the sum of the total CPE purchased in 2021 and divided by the total number of purchased CPEs[177]. Regarding Másmóvil's average CPE cost it is estimated from the average cost per brand.[178] [Advisor] estimated that Orange' CPE are cheaper and slightly more advanced on average and validated the estimation. [179] The Parties have estimate this synergy cost as variable[180].

b. **Item 57** ***(Annex 11, other synergies, row 162*161*163)*** concerns the cost saving from handsets equipment. Item 57 is calculated from the multiplication of the total equipment purchasing (Orange and Másmóvil, (row 161) with the percentage of synergy (row 162) and the ramp-up ratio (row 163). The Parties have estimated [0-5]% of synergy based on [...] because it would represents " [...] *of total handsets in volume and* [...] *in value (as of 2022) [and] sufficiently representative pool to estimate this synergy".* Moreover they explained that the cost savings come from the ability to arbitrage between better contracts.[181]

---

172 Response to RFI 24, paragraph 53.1.
173 Annex RFI 24 Q3 & Q4, sheet Template, column J.
174 Form CO, Annex 9, page 17, Table 2.
175 Response to RFI 24, paragraph 54.3.
176 Response to RFI 24, paragraph 54.4.
177 Response to RFI 24, paragraph 54.8.
178 Response to RFI 24, paragraph 54.9.
179 Form CO, Annex 10, page 36.
180 Annex RFI 24 Q3 & Q4, sheet Template, column J.
181 Article 6(1)(c) Response, paragraph 667.

According to [Advisor] "*the merger process is unlikely to have a significant impact on* [...]*'s handset prices, given their high bargaining power with suppliers is unlikely to be boosted further by* [...]*"*. The Parties have answered to [Advisor]comments by saying that they were only considering price/volume effect and that negotiation strategy with vendors could bring more synergies s.[182] The Parties have also agreed that [5-10]% of synergies in MásMóvil handset equipment purchasing considered by [Advisor]seemed reasonable (instead of the [...] implied by the Parties calculation). The Parties have estimate this synergy cost as fully variable [183]. In the RFI 38, Parties have included [Advisor] more generous scenario, however the Commission accept the original scenario of [...].

3.1.2. The Commission's assessment

(28) **Table 8** lists the claimed cost synergies and integration costs related to the Parties' **sales and marketing. Table 9** lists the claimed cost synergies and integration costs after the Commission's adjustments (i.e. data corrections) further outlined below.

(29) The Commission's assessment of the claimed cost synergies and integration costs related to the Parties' **sales and marketing** with regard verifiability, merger-specificity and benefit to consumers is outlined in the Decision, Section 9.6.4.2.2.1. **Table 8** lists the Commission's assessment per Item. The Commission concludes that there are no variable net cost savings related to the Parties' sales and marketing.

3.1.2.1. Adjustments made to the Parties' cost synergy submission

(30) As regards savings from [Details on the Parties' business strategy] (Item 54, Item 55), the Parties considered that [Details on the Parties' business strategy]. [Advisor] evaluated differently [Details on the estimated cost savings] and therefore two scenarios: assuming approximately [Details on the estimated cost savings] or [Details on the estimated cost savings]. The Commission decided to retain [Advisor] scenario [Details on the estimated cost savings], is the most likely scenario, increasing the cost synergies of [...] and increase the integration cost of [...].

182 Response to RFI 24, paragraph 55.3.
183 Annex RFI 24 Q3 & Q4, sheet Template, column J.

Table 8. Summary of claimed cost savings and integration costs related to sales and marketing.

Synergy / Integration cost description		ID	S/I	V	Adjustment to the Parties's data	Verifiability	Merger-specific	Benefit to Consumers
Level 2	Level 3							
Customer CAPEX	Customer fixed CAPEX savings	48	S	[0-5]%		no	no	no
	Customer mobile CAPEX savings	49	S	[0-5]%		no	no	no
Commissions	Fixed commissions savings	50	S	[0-5]%		no	no	no
	Mobile commissions savings	51	S	[0-5]%		no	no	no
	Loyalty cost	52	S	[0-5]%		no	no	no
Marketing	25% synergy on MM's 'synergizeable marketing expense (OPEX)'	53	S	[0-5]%		left open	left open	no
Sales and distribution	[Details on the Parties' business strategy]	54	S	[0-5]%	yes	left open	left open	no
	Integration cost	55	I	[0-5]%	yes	left open	left open	no
Equipment	CPEs	56	S	[90-100]%		no	no	left open
	Handsets	57	S	[90-100]%		no	no	left open

Source: Annex 9-11, Response to RFI 24, Annex 8.1 Reply to the SO, and Commission adjustments.
**ID: cost item; S/I: cost synergy (S) or integration cost (I); V: share of costs Parties' argue to be variable (%);*

Table 9. Summary of claimed cost savings and integration costs related to sales and marketing, following the Commission's data adjustments (2023-2026, EUR million).

Synergy / Integration cost description		ID	S/I	V	2023	2024	2025	2026	Total
Level 2	Level 3								
Customer CAPEX	Customer fixed CAPEX savings	48	S	[0-5]%	-	[...]	[...]	[...]	[...]
	Customer mobile CAPEX savings	49	S	[0-5]%	[...]	[...]	[...]	[...]	[...]
Commissions	Fixed commissions savings	50	S	[0-5]%	[...]	[...]	[...]	[...]	[...]
	Mobile commissions savings	51	S	[0-5]%	[...]	[...]	[...]	[...]	[...]
	Loyalty cost	52	S	[0-5]%	[...]	[...]	[...]	[...]	[...]
Marketing	25% synergy on MM's 'synergizeable marketing expense (OPEX)'	53	S	[0-5]%	-	[...]	[...]	[...]	[...]
Sales and distribution	[Details on the Parties' business strategy]	54	S	[0-5]%	[...]	[...]	[...]	[...]	[...]
	Integration cost	55	I	[0-5]%	[...]	[...]	-	-	[...]
Equipment	CPEs	56	S	[90-100]%	[...]	[...]	[...]	[...]	[...]
	Handsets	57	S	[90-100]%	[...]	[...]	[...]	[...]	[...]
Total					[...]	[...]	[...]	[...]	[...]

Source: Annex 9-11, Response to RFI 24, Annex 8.1 Reply to the SO, and Commission adjustments.
**ID: cost item; S/I: cost synergy (S) or integration cost (I); V: share of costs Parties' argue to be variable (%);*

3.2. Customer Care

3.2.1. The Notifying Parties' cost synergy claims

3.2.1.1. Customer process

(31) Related to Customer process, the Notifying Parties submit the following cost synergies and integration costs (Item 58 – Item 64). The Parties have claimed that savings from customer process come from the "*adoption of Orange's best practices across the whole organization, leading to: (i) an increase in Másmóvil's automation of customer care processes (...); and (ii) an increase in Másmóvil's level of*

offshoring (...) to Orange's level [...][184]". As regards to the merger-specificity, the Parties claimed that for "*Másmóvil it would not be profitable on a standalone basis to adopt Orange's levels of automation or offshoring, because its volumes of customer processes are not large enough to generate the economies of scale (...). Similarly, Orange is able to obtain better conditions from external customer service providers than Másmóvil*". The Parties submit that these synergies would constitute variable cost savings, as costs would increase with the customer base. [185] As regards the methodology used to obtain these synergies, the Parties estimated a [...] price improvement across the areas of expenditure, based on interviews with experts in the telecommunication industry. [186]

a. **Item 58 *(Annex 11, other synergies, row (173+180)** [...])* concerns cost savings from call centres, used for customer service, sales, technical support, or other business purposes[187]. Item 58 is obtained from the sum of Orange and Másmóvil call centres OPEX (resp. row 173 and row 180, and multiplied by the [...] improvement expected. [Advisor]'s report excludes call centres owned and operated by ORANGE (because already efficient), which results in an annual synergy of [...].[188]

b. **Item 59 *(Annex 11, other synergies, row*** *[...]****(174+181))*** concerns cost savings from retention platforms (call centres dedicated to retaining customers and making them offers to make them stay with the brand).[189] Item 59 is calculated by summing Orange and Másmóvil retention platforms OPEX (resp. row 174 and row 181), and multiplied by the [...] improvement expected.

c. **Item 60 *(Annex 11, other synergies, row*** *[...]****(175+182))*** concerns cost savings from after sale services (activities and support services that business provide to customers after a purchase).[190] Item 60 is obtained from the sum of Orange and Másmóvil after sale services OPEX (resp. row 175 and row 182), and multiplied by **the** [...] **improvement** expected.

d. **Item 61 *(Annex 11, other synergies, row 176***[...])* concerns cost savings from call centre personnel (similar to Item 58). Item 61 is obtained by multiplying ORANGE call centre personnel (row 176) by [...].

e. **Item 62 (Annex 11, other synergies, row 188=177*186*187**) [scenario 1: [Details on the estimated cost savings]] and [scenario 2: [Details on the estimated cost savings]] concerns cost savings from offshore resources. Item 62 is calculated from the multiplication of Másmóvil customer process OPEX (row 177), the percentage of synergy for offshore resources (row 186), and the percentage of synergy of cost saving (row 187). The Parties claimed used a "price difference between comparable providers (…) to calculate potential cost savings between inshore and offshore. The agreed-upon price difference to be used in the calculation was [...], which is the difference in the average price

184 Form CO, Annex 9, page 17, Table 2: Summary of cost savings variable synergies in non-network business areas.
185 Form CO, Annex 9, page 17, Table 2: Summary of cost savings variable synergies in non-network business areas.
186 Response to RFI 24, paragraph 56.4.
187 Response to RFI 24, paragraph 56.1.
188 Form CO, Annex 10, page 38 and Response to RFI 24, paragraph 56.5.
189 Response to RFI 24, paragraph 56.1.
190 Response to RFI 24, paragraph 56.1.

Orange had with their providers in [...]"*191* . The Parties claimed that synergy from offshore resource represents [30-40]%[192], however [Advisor] mentioned that it could be seen as conservative and suggested [40-50]% of synergy.[193] Therefore, the Commission assumed that [40-50]% of synergy from offshore resources is reasonable, and therefore choose the first scenario (upper bound).

f. **Item 63** ***(Annex 11, other synergies, row 193= (189-190)*191*192*182/183)*** concerns cost savings from automatism IVR (Interactive Voice Response) improvement. Item 63 is calculated by multiplying the subtraction of Orange and Másmóvil level of automatism (resp. row 189 and row 190), to Másmóvil number of estimated care calls (row 191), and its cost per care call (row 192), multiplied to Másmóvil after sale services (row 182) and divided by its value in 2021 (row 183). The Parties have evaluated the level of automatism as the IVR answered calls that do not end up with an agent (number of customers not transferred to an agent minus the customers who call back) and represents [...] for Másmóvil and [...] for Orange.[194] Moreover, they evaluated [...] number of estimated care calls and costing [...], and "that these figures [Details on the estimated cost savings], *as it was not possible to predict with sufficient accuracy at that time the possible changes in this data*"[195].

g. **Item 64** ***(Annex 11, other synergies, row [...]*(1-row 4))*** concerns the integration costs from moving more of Másmóvil's customer processes off-shore, in line with Orange's best practices.[196] Item 64 is calculated by multiplying the percentage of first year translation, [...] (row 4), to [...]. The Parties claimed that "*[...] was determined by identifying the key expenses associated with the customer process synergy. This includes: [Details on the estimated cost savings], revising the service model and transferring it to an offshore location with the assistance of a third party, increasing capacities to ensure optimal customer experience during and after consolidation, deploying a team offshore to oversee and manage the entire transition process*[197]". The Parties claimed it represents a variable integration cost.[198]

3.2.1.2. Credit and collections

(32) Related to Credit and Collections, the Notifying Parties submit the following cost synergies and integration costs (**Item 65 – Item 68**). As regards debt ratio, debt collection and credit scoring, [Advisor] find that [Details on the estimated cost savings]. Therefore, [Advisor] did not conclude that "*while we agree it is possible that some best practices are shared between the companies to improve [...]bad-debt ratios, we find it may be complex to achieve this while reducing expenditure in credit scoring and debt collection*".[199] According to their estimation, they reduced to potential synergy of [20-30]% [...]. As regards the merger-specific criteria, the Parties claimed that MásMóvil could only achieve savings from credit scoring and bad debt by applying Orange's model, but could not be realized absent of

191 Response to RFI 24, paragraph 57.1.
192 Form CO, Annex 11, other synergies, row 186.
193 Form CO, Annex 10, page 38.
194 Response to RFI 24, paragraph 58.1, Foonote 17.
195 Response to RFI 24, paragraph 58.2.
196 Form CO, Annex RFI 11, Q4, p.3.
197 Response to RFI 24, paragraph 59.1.
198 Annex RFI 24 Q3 & Q4, sheet Template, column M.
199 Form CO, Annex 10, page 39.

Transaction because it is not commercialized. [200] The Parties claimed that these synergies and integration costs are variable as it depends on the number of customer and incident of bad debt.[201]

a. **Item 65** ***(Annex 11, other synergies, row 210= ((205+206)*207)*208)*** concerns cost synergy related to credit scoring. Item 65 is calculated by multiplying Orange and MásMóvil'total credit score OPEX (resp. row 205 and row 206), to the percentage of synergy they could achieve together (row 207), and to the ramp-up ratio (row 280). The Parties claimed that the main driver of this synergy is the increase in volume which will create a [10-20]% reduction is this expenses, due to negotiation, ([10-20]% calculated based on previous project with similar suppliers)[202].

b. **Item 66** ***(Annex 11, other synergies, row 219= ((214+215)*216)*217)*** concerns cost synergy related to collection expenses. Item 66 is calculated by multiplying Orange's and MásMóvil's collection expenses OPEX (resp. row 214 and 215), to the percentage of synergy (row 216) and the ramp-up ratio (row 217). The Parties claimed that the [10-20]% of synergy estimated follows the same rationale as for the previous item.

c. **Item 67** ***(Annex 11, other synergies, row 229= (225-(223/224)*226)*227)*** concerns cost synergy related to bad debt. Item 67 is calculated by subtracting MásMóvil's bad debt CAPEX (row 225) to the product of MásMóvil's customer revenue (row 226) and the ratio of Orange's bad debt CAPEX (row 223) and customer revenue (row 224), and multiplied by the ramp-up ratio (row 227). The parties claimed that [Details on the estimated cost savings]. [203] The Parties explained that Orange has a bad debt ratio of [...] and MásMóvil of [...], and that the "[...] percentage point difference suggests that MásMóvil's process for collecting bad debt [Details on the Parties' cost structure][204]".

d. **Item 68** ***(Annex 11, other synergies, row 223)*** concerns integration cost related to the "*costs for the integration of the collections and scoring systems of both Parties, which involves adapting the credit storing systems and implementing common collection processes to extend the best practices on credit and collection to the full customer bases from both Parties*[205]". In total the integration cost represents [...], and was "*estimated on the basis of interviews with experts in the telecommunications industry and their previous experience in similar integrations.*[206]" The Parties considered it represents a fixed integration cost.[207]

3.2.1.3. Installations

(33) Related to Installations, the Notifying Parties submit the following cost synergies and integration costs (Item 69 – Item 75). As regards the installations savings, the Parties claimed without the size and scale brought by the Transaction, they could not apply Orange's better practices and relationships to MásMóvil customer base, and

200 Form CO, Annex 9, Table 2, page 18.
201 Response 6(1)C, paragraph 669.
202 Response to RFI 24, paragraph 60.2, 60.3, 60.5.
203 Form CO, Annex 9, Table 2, page 18.
204 Response to RFI 24, paragraph 63.1.
205 Annex RFI 11, Q4 page 3.
206 Response to RFI 24, paragraph 64.3.
207 Annex RFI 24 Q3 & Q4, sheet Template, column M.

that MásMóvil could not obtain similar conditions (limited bargaining power compared to Orange[208]).[209] The Parties claimed that these costs are variable because they depend on a customer-basis ("*the more customer a company acquires customers, the more installations they will have to perform, and the more CPEs they will have to refurbish after some time*"[210]). As regards the methodology to estimate these synergies, all items are calculated as follows: multiplying brand's gross adds to the difference between Orange's installation unit cost in 2025 and the brand's AS-IS installation cost. The Parties calculated their brand's installation costs "*by dividing the total installation Capex of each brand by their Gross Adds in 2021, resulting in a unique installation cost for each brand for Másmóvil*[211]", and Orange installation cost from their brand average cost (all brand of Orange Group).[212] As regards the brand's gross adds, the Parties explained that "*advisors estimate that annual gross adds account for [...] across the seven brands. This is strictly an advisor hypothesis of future forecasts*"[213] [Advisor] found the claimed synergies reasonable.[214]

a. **Item 69 *(Annex 11, other synergies, row 241= (239-H238)*240)*** concerns MásMóvil's cost synergies for AS-IS installations. The Parties explained that Másmóvil cannot achieve Llamaya installation cost ([...]) absent of the Transaction because each brand depends on its own footprint type ([Details on MASMOVIL's cost structure]) and suppliers (each has particular characteristics that lead to different price). Moreover, the Parties claimed that they could not achieve the same conditions as Orange because they have a lower bargaining power.[215]

b. **Item 70 *(Annex 11, other synergies, row 244= (242-H238)*243)*** concerns YOIGO's cost synergies for AS-IS installations.

c. **Item 71 *(Annex 11, other synergies, row 247= (245-H238)*246)*** concerns MÁSMÓVIL's cost synergies for AS-IS installations.

d. **Item 72 *(Annex 11, other synergies, row 250= (251-H238)*252)*** concerns PEPEPHONE's cost synergies for AS-IS installations.

e. **Item 73 *(Annex 11, other synergies, row 253= (251-H238)*252)*** concerns LLAMAYA's cost synergies for AS-IS installations.

f. **Item 74 *(Annex 11, other synergies, row 256= (254-H238)*255)*** concerns EUSKALTEL's cost synergies for AS-IS installations.

g. **Item 75 *(Annex 11, other synergies, row 259= (257-H238)*258)*** concerns TELECABLE's cost synergies for AS-IS installations.

3.2.1.4. CPE refurbishment

(34) Related to CPE refurbishment, the Notifying Parties submit the following cost synergies (Item 76):

208 Response to RFI 24, paragraph 65.5.
209 Form CO, Annex 9, Table 2, page 18, page 19.
210 Article 6(1)(c) Response, paragraph 670.
211 Response to RFI 24, paragraph 65.1.
212 Response to RFI 24, paragraph 65.2.
213 Response to RFI 24, paragraph 65.
214 Form CO, Annex 10, page 40.
215 Response to RFI 24, paragraph 65.4.

a. **Item 76** ***(Annex 11, other synergies, row 274=268*271*272/1000)*** concerns cost synergies related to CPE refurbishment. Item 76 is calculated by the cost difference between a new CPE for Másmóvil and refurbishing a CPE for Orange (row 271), multiplied to the refurbishing ratio difference (in %) of the two companies (row 268), and multiplied to Másmóvil gross adds (row 272). Similarly to the installation savings, the Parties claimed that this synergy could not be achieve absent of the Transaction and that this cost are variable.[216] [Advisor] found the percentage of refurbished CPEs reasonable but also [Details on the Parties' cost synergy assessment][217]".

3.2.2. The Commission's assessment

(35) **Table 10** lists the claimed cost synergies and integration costs related to the Parties' **customer care. Table 11** lists the claimed cost synergies and integration costs after the Commission's adjustments (i.e. data corrections) further outlined below.

(36) The Commission's assessment of the claimed cost synergies and integration costs related to the Parties' **customer care** with regard verifiability, merger-specificity and benefit to consumers is outlined in the Decision, Section 9.6.4.2.2.2. **Table 10** lists the Commission's assessment per Item. The Commission concludes that there are <u>no</u> net variable cost savings related to the Parties' customer care.

3.2.2.1. Adjustments made to the Parties' cost synergy submission

(37) As regards the cost synergies from offshore resources (**Item 62**), first, the Parties claimed a certain amount of Orange's call centres personnel cost, and [Advisor] find that the Parties overestimated the amount by including its own call centres, leading to an over estimation of [5-10]% of the synergy. The Commission therefore conservatively decided to retain the amount of synergy estimated by [Advisor]. Second, the Parties estimated the offshore resource synergy at [30-40]% and [Advisor] proposed two scenarios regarding, either [30-40]% or [40-50]% of the offshore resource synergy. In the Response to RFI 24, the Parties considered [Advisor]'s calculations reasonable and adjusted the number of Orange's call centres accordingly, but left the percentage of achievable offshoring open. The Commission therefore retain the upper bound scenario, [40-50]%, as the most likely scenario. In total, the Commission evaluated the increase in cost synergy of [...].

[216] Form CO, Annex 9, Table 2, page 19, and Article 6(1)(c) Response, paragraph 670.
[217] Form CO, Annex 10, page 41.

Table 10. Summary of cost savings and integration costs related to the Parties' customer care.

Synergy / Integration cost description		ID	S/I	V	Adjustment to the Parties's data	Verifiability	Merger-specific	Benefit to Consumers
Level 2	**Level 3**							
Customer process	Call Center	**58**	S	[90-100]%		no	no	no
	Retention platforms	**59**	S	[90-100]%		no	no	no
	After Sale services	**60**	S	[90-100]%		no	no	no
	Call center personnel	**61**	S	[90-100]%		no	no	no
	Offshore resources	**62**	S	[90-100]%	yes	no	no	no
	Automatism IVR improvement	**63**	S	[90-100]%		no	no	no
	Integration cost	**64**	I	[0-5]%		no	no	no
Credit and Collections	Credit scoring synergy	**65**	S	[90-100]%		no	no	left open
	Collection expenses	**66**	S	[90-100]%		no	no	left open
	Bad debt	**67**	S	[90-100]%		no	no	left open
	Integration cost	**68**	I	[0-5]%		no	no	no
Installations	MM synergy	**69**	S	[90-100]%		no	no	left open
	Yoigo synergy	**70**	S	[90-100]%		no	no	left open
	Pepephone synergy	**71**	S	[90-100]%		no	no	left open
	Llamaya synergy	**72**	S	[90-100]%		no	no	left open
	Euskaltel synergy	**73**	S	[90-100]%		no	no	left open
	R synergy	**74**	S	[90-100]%		no	no	left open
	Telecable synergy	**75**	S	[90-100]%		no	no	left open
CPE refurbishment	CPE refurbishment synergy	**76**	S	[90-100]%		no	no	left open

Source: Annex 9-11, Response to RFI 24, Annex 8.1 Reply to the SO, and Commission adjustments.
**ID: cost item; S/I: cost synergy (S) or integration cost (I); V: share of costs Parties' argue to be variable (%);*

Table 11. Summary of cost savings and integration costs related to customer care, following the Commission's data adjustments (2023-2026, EUR million).

Synergy / Integration cost description		ID	S/I	V	2023	2024	2025	2026	Total
Level 2	Level 3								
Customer process	Call Center	58	S	[90-100]%	-	[...]	[...]	[...]	[...]
	Retention platforms	59	S	[90-100]%	-	[...]	[...]	[...]	[...]
	After Sale services	60	S	[90-100]%	-	[...]	[...]	[...]	[...]
	Call center personnel	61	S	[90-100]%	-	[...]	[...]	[...]	[...]
	Offshore resources	62	S	[90-100]%	-	[...]	[...]	[...]	[...]
	Automatism IVR improvement	63	S	[90-100]%	-	[...]	[...]	[...]	[...]
	Integration cost	64	I	[0-5]%	[...]	[...]	-	-	[...]
Credit and Collections	Credit scoring synergy	65	S	[90-100]%	[...]	[...]	[...]	[...]	[...]
	Collection expenses	66	S	[90-100]%	[...]	[...]	[...]	[...]	[...]
	Bad debt	67	S	[90-100]%	[...]	[...]	[...]	[...]	[...]
	Integration cost	68	I	[0-5]%	[...]	[...]	-	-	[...]
Installations	MM synergy	69	S	[90-100]%	-	[...]	[...]	[...]	[...]
	Yoigo synergy	70	S	[90-100]%	-	[...]	[...]	[...]	[...]
	Pepephone synergy	71	S	[90-100]%	-	[...]	[...]	[...]	[...]
	Llamaya synergy	72	S	[90-100]%	-	[...]	[...]	[...]	[...]
	Euskaltel synergy	73	S	[90-100]%	-	[...]	[...]	[...]	[...]
	R synergy	74	S	[90-100]%	-	[...]	[...]	[...]	[...]
	Telecable synergy	75	S	[90-100]%	-	[...]	[...]	[...]	[...]
CPE refurbishment	CPE refurbishment synergy	76	S	[90-100]%	-	[...]	[...]	[...]	[...]
Total				.	[...]	[...]	[...]	[...]	

Source: Annex 9-11, Response to RFI 24, Annex 8.1 Reply to the SO, and Commission adjustments.
**ID: cost item; S/I: cost synergy (S) or integration cost (I); V: share of costs Parties' argue to be variable (%);*

3.3. General expenses, Personnel expenses and IT

3.3.1. The Notifying Parties' cost synergy claims

3.3.1.1. General expenses

(38) Related to General expenses, the Notifying Parties submit the following cost synergies and integration costs (Item 77 – Item 80):

a. Item 77 ***(Annex 11, other synergies, row (281*282)*284)*** concerns the MásMóvil building rental synergy from [Details on the Parties' business strategy]. The Parties have claimed that [Details on the Parties' business strategy][218]. [Advisor] has verified the "*main lease contract (…) can indeed be [Details on the Parties' business strategy] (…) [and] currently represents [...] of [...]'s annual leases*"[219]. They also made "*[a]n adjustment of [...] to the proposed synergy has been made to reflect the following factors: – the synergy plan assumes that [Details on the Parties' business strategy] (…) – it is*

[218] Response to RFI 24, paragraph 67.2.
[219] Form CO, Annex 10, page 45.

uncertain that [Details ***on the Parties' business strategy]***"[220]. The Parties have considered the adjustment made by [Advisor] and claimed that this cost synergy is fixed[221].

b. **Item 78** ***(Annex 11, other synergies, row 288)*** concerns the "*cost of [Details on the Parties' business strategy]*"[222] which represents according to the Parties a "t*op-down estimate of [Details on the Parties' business strategy] based on the previous experience of the working group (...), as well as common practice [Details on the Parties' business strategy]*"[223]. The Parties have claimed that it represents a fixed integration cost[224].

c. **Item 79** ***(Annex 11, other synergies, row (292*293)*295)*** concerns the supplies expenses such as "*electricity ([...]), cleaning services ([...]), community services ([...]), and furniture ([...])"*[225] and As regards the *[...] saving assumption, they claimed that it is a "top-down estimate based on the previous experience of the working group, taking into account the fact that [Details on the Parties' business strategy]"*[226]. [Advisor] reported that "*substantiated evidence on how the [...] savings estimate was derived was not provided during the review process"*[227]. The Parties have claimed that it represents a fixed synergy cost[228].

d. **Item 80** ***(Annex 11, other synergies, row (303+304)*306*308*** concerns other general expenses synergies that "*includes a wide set of general services and functions, such as consulting & professional services, legal services, outsourcing, external personnel and general expenses*"[229]. [Advisor] notes "*that substantiated evidence on how the [...] savings have been derived was not provided during the review process"*[230]. The Parties have claimed that it represents a fixed synergy cost[231].

3.3.1.2. Personnel expenses

(39) Related to Personnel expenses, the Notifying Parties submit the following cost synergies and integration costs (Item 81 – Item 82):

a. **Item 81** [scenario 1: personnel expenses OPEX, [...]] (Annex 11, other synergies, row ((316+317)*319*321) (Annex RFI 24 Q1a – [Advisor] – KILI synergies, (344+345)*347*354) and [scenario 2: personnel UPSIDE, [...]] (Annex RFI 24 Q1a – [Advisor] – KILI synergies, (362*346)*354) concerns the fixed synergies from the personnel expenses. They arise from [Details on the Parties' business strategy]". The Parties have come up with two scenarios, considering in the first case a [5-10]% reduction in the combine personnel cost (based on previous merger experience of the Parties)[232], and [Advisor]

220 Form CO, Annex 10, page 45.
221 Annex RFI 24 Q3 & Q4, sheet Template, column K.
222 Annex RFI 11, Q4, p.3.
223 Response to RFI 24, paragraph 68.1.
224 Annex RFI 24 Q3 & Q4, sheet Template, column K.
225 Response to RFI 24, paragraph 69.1.
226 Response to RFI 24, paragraph 69.2.
227 Form CO, Annex 10, page 46.
228 Annex RFI 24 Q3 & Q4, sheet Template, column K.
229 Response to RFI 24, paragraph 70.1.
230 Form CO, Annex 10, page 47.
231 Annex RFI 24 Q3 & Q4, sheet Template, column K.
232 Form CO Form CO, Annex 10, page 49.

evaluated a second scenario with a [10-20]% reduction ([Details on the estimated cost savings] in similar previous cases)[233]. The first scenario is calculated based on the sum of Orange' personnel expenses (row 316, "[...]-Personnel expenses (OPEX)") and [...] personnel expenses (row 317, "Mostra - Personnel expenses (OPEX)"), multiplied by the synergies expected (row 319, "% Synergy"), and multiplied by the ramp-up ratio (row 321, "Ramp-up ratio"). The second scenario is calculated by multiplying the total personnel expenses from Orange and Másmóvil mentioned previously multiplied by the [...] synergies (row 362, "UPSIDE proportion of personnel costs being considered in synergy"), and multiplied by the ramp-up ratio (row 321, "Ramp-up ratio"). As regards to the first scenario, the Notifying Parties argue these synergies represents a "*[5-10]% reduction on the combined personnel costs of the Parties as of 2023, based on previous merger experiences of the Parties*".[234] According to [Advisor],, "*there could be some room for an upside (…) [and] [Details on the estimated cost savings] would result on c. [10-20]% cost savings*"[235]. In Response to RFI 24 Q53b, the Parties did not choose between the lower bound scenario (included in Annex 11) and the upper bound scenario (suggested in Annex 10). The Commission follow [Advisor] adjustment and the lower upper scenario as the most likely scenario, representing [...] over the period 2023-2032.

b. **Item 82** [scenario 1: Personnel expenses Integration cost, [...]] *(Annex 11, other synergies, row (-325*3.5) for 2025)* and [scenario 2: UPSIDE integration costs, [...]] *(Annex RFI 24 Q1a – [Advisor] – KILI synergies, row F369+G369+H369)* concerns the integration cost from personnel expenses (retraining and restructuring). There are two scenarios following the previous reasoning and calculation with [...] or [...] cost synergies. The first scenario represents the personnel expenses synergy in 2025 (row 323, *"4.9.4 TOTAL Personnel expenses synergy (OPEX)"*), multiplied by 3.5. The second scenario represent the sum of the first scenario integration cost and the upside integration costs of 2023, 2024, and 2025 (row 369, *"UPSIDE integration costs"*). They are calculated as follow: in 2023 it is the upside synergies (row 367, *"UPSIDE synergies"*), multiplied by 3.5; in 2024, it is the integration cost of the previous year additional by the current synergies; in 2025 it is the same process. The Notifying Parties explained that multiplying the synergy costs 3.5 "*is in turn based on the experience of the working teams (…) in similar deals in telecoms and related industries in the EU, as well as based on a high-level estimation of severance payments under current Spanish labour law*"[236], and "with a range of 3 to 4 of OPEX improvement"[237]. [Advisor] corrected upward the integration cost by up to [...] leading to [...]. According to the Parties, achieved this result because "*increasing the synergy to [...] of staff costs would lead to additional synergies of [...] in 2025, which [is] multiplied by the factor of 3.5*"[238]. In Response to RFI 24 Q53b, the Parties did not choose between the lower bound scenario (included in Annex 11) and the upper bound scenario (suggested in Annex 10). Following the previous item,

233 Form CO, Annex 10, page 49.
234 Article 6(1)(c) Response, paragraph 673.
235 Form CO, Annex 10, page 49.
236 Response to RFI 24, paragraph 72.1.
237 Response to RFI 24, paragraph 72.2.
238 Response to RFI 24, paragraph 72.4.

the Commission consider [Advisor] scenario as the most likely which lead to [...] integration costs.

3.3.1.3. IT

(40) Related to IT, the Notifying Parties submit the following cost synergies and integration cost (Item 83 – Item 84):

a. **Item 83 *(Annex 11, other synergies, row ((334*335)*337)*339)*** concerns mainly the synergies from renegotiations with IT services providers. They are calculated from the multiplication of the Másmóvil IT Opex (row 334, *"[...]-IT OPEX"*) and the amount synergizeable (row 335, *"% synergizeable OPEX"*), multiplied by the percentage of synergy (row 337, *"% Synergy"*), and finally multiplied by the ramp-up ratio (rows 339, *"Ramp-up ratio"*). As regards the IT Opex synergies, the Parties' original assessment was limited to Másmóvil's IT expenses and followed the [Advisor] results that includes "*Orange's expenses as well", the "[t]otal savings are calculated as a [...] cost reduction in Másmóvil's costs that fall within the scope of the contracts that would obtain better conditions (about [...] of total IT OPEX costs)*"[239].

b. **Item 84 *(Annex 11, other synergies, row 349)*** concerns the cost of consolidating IT systems and execution of business initiatives (e.g., IT developments to achieve customer CAPEX synergies, among others) of both Parties. According to the Parties, they are "*due to the need of consolidating IT systems, execute business initiatives that the Parties would have to incur to achieve the cost savings in IT expenses*"[240].

3.3.2. The Commission's assessment

(41) **Table 12** lists the claimed cost synergies and integration costs related to the Parties' **general, personnel and IT expenses**. **Table 13** lists the claimed cost synergies and integration costs after the Commission's adjustments (i.e. data corrections) further outlined below.

(42) The Commission's assessment of the claimed cost synergies and integration costs related to the Parties' **general, personnel and IT expenses** with regard verifiability, merger-specificity and benefit to consumers is outlined in the Decision, Section 9.6.4.2.2.3. **Table 12** lists the Commission's assessment per Item. The Commission concludes that there are <u>no</u> net variable cost savings related to the Parties' general, personnel and IT expenses.

3.3.2.1. Adjustments made to the Parties' cost synergy submission

(43) As regards to personnel expenses cost synergies and integration costs (**Item 81, Item 82**), the Parties claim that they could achieve [5-10]% of synergy regarding personnel expenses. [Advisor] proposed two scenarios in this regard, [5-10]% or [5-10]% of Orange's and MásMóvil's expenses. The Commission retain [Advisor] scenario with [10-20]% of synergy, increasing the cost synergies of [...] cost synergies and increasing the integration cost of [...]

(44) As regards cost synergies and integration costs (**Item 77 – Item 80, Item 83, Item 84**) related to general and IT expenses, the Commission does not make any adjustment and the size of these cost savings can be left open.

---

239 Form CO, Annex 10, page 43.

240 Response to RFI 24, paragraph 74.1.

Table 12. Summary of cost savings and integration costs related to the Parties' general, personnel and IT expenses.

Synergy / Integration cost description			ID	S/I	V	Commission adjustments to data	Verifiability	Merger-specificity	Benefit to consumers
Level 2	Level 3	Level 4							
General Expenses	Leasing	MM Building rental synergy	77	S	[0-5]%		left open	left open	no
		Integration cost	78	I	[0-5]%		left open	left open	no
	Supply	MM General expenses synergy	79	S	[0-5]%		left open	left open	no
	Other general expenses	Other G&A expenses synergy	80	S	[0-5]%		left open	left open	no
Personnel expenses	Personnel expenses	Redundancies	81	S	[0-5]%	yes	left open	left open	no
		Integration cost	82	S	[0-5]%	yes	left open	left open	no
IT	IT	MM IT Opex synergy	83	S	[0-5]%		left open	left open	no
		Integration cost	84	I	[0-5]%		left open	left open	no

Source: Annex 9-11, Response to RFI 24, Annex 8.1 Reply to the SO, and Commission adjustments.
**ID: cost item; S/I: cost synergy (S) or integration cost (I); V: share of costs Parties' argue to be variable (%);*

Table 13. Summary of cost savings and integration costs related to general, personnel and IT expenses following the Commission's data adjustments (2023-2026, EUR million).

Synergy / Integration cost description			ID	S/I	V	2023	2024	2025	2025	Total
Level 2	Level 3	Level 4								
General Expenses	Leasing	MM Building rental synergy	77	S	[0-5]%	-	-	[...]	[...]	[...]
		Integration cost	78	I	[0-5]%	[...]	[...]	[...]	-	[...]
	Supply	MM General expenses synergy	79	S	[0-5]%	-	[...]	[...]	[...]	[...]
	Other general expenses	Other G&A expenses synergy	80	S	[0-5]%	-	[...]	[...]	[...]	[...]
Personnel expenses	Personnel expenses	Redundancies	81	S	[0-5]%	[...]	[...]	[...]	[...]	[...]
		Integration cost	82	S	[0-5]%	[...]	[...]	[...]	-	[...]
IT	IT	MM IT Opex synergy	83	S	[0-5]%	-	[...]	[...]	[...]	[...]
		Integration cost	84	I	[0-5]%	[...]	[...]			[...]
Total						[...]	[...]	[...]	[...]	[...]

Source: Annex 9-11, Response to RFI 24, Annex 8.1 Reply to the SO, and Commission adjustments.
**ID: cost item; S/I: cost synergy (S) or integration cost (I); V: share of costs Parties' argue to be variable (%);*

4. CONCLUSION

(45) **Table 14** summarizes the cost synergies and integration costs claimed by the Parties, with [Advisor] adjustments. Where the Parties proposed two scenarios in Response to RFI 24, these are still included. In total the Parties estimated that the Transaction would generate gross cost savings of [...] to [...] over a ten-year period from 2023 to 2032. After the subtraction of integration costs, this would result in net cost savings of [...] to [...].[241] **Table 15** summarizes the Parties' claimed cost synergies (and integration costs) after [Advisor] adjustments, when only a 4 year period into account (2023-2026).

(46) **Table 16** again summarizes the claimed cost synergies and integration costs taking into account [Advisor] adjustments. Where the Parties proposed two different scenarios in Response to RFI 24, the Commission selected the scenario proposed by [Advisor] as the more likely scenario. Moreover, **Table 16** includes the Commission's corrections to the Parties' data. **Table 17**, displays a summary of the

241 Form CO, Section 9, paragraph 2534 and Form CO, Section 9, Table 142, and Annex 10.

(adjusted) cost synergies per year. The adjustments applied by the Commission are again summarized (again) below:

- *First*, as regards to cost synergies and integration cost related to FTTH deployment and consolidation, [Advisor] made adjustment an upward adjustment of size of unit capex (**Item 3**), leading to an increase in the integration cost of [...], over the period areas (**Item 1**) at [...], over the period 2023-2032. Moreover, with regards to the aperiodics & transmission cost synergy, the Commission 2023-2032. [Advisor] re-evaluated upward the level of dyssynergies for M&A clause at [...], over the period 2023-2032. The Parties re-evaluated downward the size of the integration cost related to migrating customers from [Details on the wholesale agreements concluded by the Parties] to the [Details on the wholesale agreements concluded by the Parties] (**Item 11**), at [...] for the period 2023-2032. The Commission re-evaluated the size of the savings in wholesale fee for the densification re-evaluated the related items at [...], [...], [...]and [...] for respectively (**Item 2**, **Item 6**, **Item 13** and **Item 16)**, over the period 2023-2032. Then, with regards to the cost saving from migrating customer from [Details on the wholesale agreements concluded by the Parties] to [Details on the wholesale agreements concluded by the Parties] contract, the Commission re-evaluates the size downward at [...], over the period 2023-2032.
- *Second*, as regards the integration cost related to the spectrum (**Item 37**, [Details on the Parties' business strategy]), [Advisor] re-evaluated the size downward at [...] over the period 2023-2032.
- *Third*, as regards to customer capex synergies, [Advisor] corrected the size of the synergies regarding of the effect of refurbished CPEs (Item 48) and loyalty actions **(Item 52)**, and reduced it from respectively [...] and [...], over the period 2023-2032. As regards savings from [Details on the Parties' business strategy], [Advisor] evaluated differently the number of [Details on the Parties' business strategy] **(Item 54 and Item 55)** and therefore it lead to two scenarios, where the Commission decided that the upper bound scenario is the most likely scenario, leading to increase of [...] of integration cost and increase of [...], over the period 2023- 2032. As regards the handset equipment **(Item 57)**, [Advisor] re- evaluated the size of the synergy by reducing it of [...], over the period 2023-2032.
- *Fourth*, As regards customer process, [Advisor] proposed two scenarios regarding the offshore resources **(Item 62)**, and the Commission decided that the upper bound scenario is most the likely, leading to an increase of [...], over the period 2023-2032. Moreover, [Advisor] made adjustments regarding bad debt synergies **(Item 67)**, and corrected it downward leading to a reduction of [...], over the period 2023-2032.
- *Fifth*, as regards to leasing synergies, [Advisor] corrected downward the size of the site that [Details on the Parties' business strategy] (Item 77), leading to reduction of [...], over the period 2023-2032.
- *Finally*, as regards to personnel expenses cost synergies and integration costs (**Item 81, Item 82**), [Advisor] proposed two scenarios to evaluate the percentage of synergy. The Commission concludes that the upper bound

scenario is the most likely scenario, which represent [...] of cost synergies and [...] of integration cost, over the period 2023-2032.

(47) **Table 18** represents **Table 17** with adjustment based on the time period accepted by the Commission, from 2023 to 2026 (4 years). **Table 19**, represents a summary of the cost synergies adjusted for the 4 years.

(48) **Table 20** corresponds to the cost synergies accepted by the Commission, which implied Items that have the cumulative criteria of being verifiable, merger-specific and benefiting consumers. **Table 21** represents the cost synergies accepted by the Commission per year.

Table 14. Cost savings submitted by the Parties, corrected with [Advisor]adjustments (2023-2032, EUR million).

	Category	Synergy	Total net savings	Gross variable savings	Gross fixed savings	Integration costs
Network synergies	Fixed network	FTTH Deployment	[...]	[...]	-	[...]
		FTTH Consolidation	[...]	[...]	-	[...]
	Mobile network	O&M consolidation	[...]	[...]	[...]	-
		Site consolidation	[...]	-	[...]	[...]
		Spectrum consolidation	[...]	-	[...]	-
	Transmission	Mobile backhaul	[...]	[...]	-	-
		Fixed backhaul	[...]	[...]	[...]	[...]
		Backbone	[...]	[...]	[...]	[...]
Non-network synergies	Sales and marketing	Customer CAPEX	[...]	[...]	-	-
		Commissions	[...]	[...]	-	-
		Marketing	[...]	-	[...]	-
		Sales and distribution	[...]	-	[...]	[...]
		Equipment (CPE)	[...]	[...]	-	-
		Equipment (handsets)	[...]	[...]	-	-
	Customer care	Customer process	[...]	[...]	-	[...]
		Credit and collections	[...]	[...]	-	[...]
		Installations	[...]	[...]	-	-
		CPE refurbish	[...]	[...]	-	-
	General expenses	Leasing	[...]	-	[...]	[...]
		Supply	[...]	-	[...]	-
		Other general expenses	[...]	-	[...]	-
	Personnel expenses	Personnel	[...]	-	[...]	[...]
	IT	IT	[...]	-	[...]	[...]
TOTAL			[...]	[...]	[...]	[...]

Source: Form CO, Table 142, and adjustments suggested by [Advisor](Form CO, Annex 10).

Table 15. Cost savings submitted by the Parties, taking into account a 4 year period (2023-2026, EUR million).

	Category	Synergy	Total net savings	Gross variable savings	Gross fixed savings	Integration costs
Network synergies	Fixed network	FTTH Deployment	[…]	[…]	-	[…]
		FTTH Consolidation	[…]	[…]	-	[…]
	Mobile network	O&M consolidation	[…]	[…]	[…]	-
		Site consolidation	[…]	-	[…]	[…]
		Spectrum consolidation	[…]	-	[…]	-
	Transmission	Mobile backhaul	[…]	[…]	-	-
		Fixed backhaul	[…]	[…]	[…]	[…]
		Backbone	[…]	[…]	[…]	[…]
Non-network synergies	Sales and marketing	Customer CAPEX	[…]	[…]	-	-
		Commissions	[…]	[…]	-	-
		Marketing	[…]	-	[…]	-
		Sales and distribution	[…]	-	[…]	[…]
		Equipment (CPE)	[…]	[…]	-	-
		Equipment (handsets)	[…]	[…]	-	-
	Customer care	Customer process	[…]	[…]	-	[…]
		Credit and collections	[…]	[…]	-	[…]
		Installations	[…]	[…]	-	-
		CPE refurbish	[…]	[…]	-	-
	General expenses	Leasing	[…]	-	[…]	[…]
		Supply	[…]	-	[…]	-
		Other general expenses	[…]	-	[…]	-
	Personnel expenses	Personnel	[…]	-	[…]	[…]
	IT	IT	[…]	-	[…]	[…]
TOTAL			[…]	[…]	[…]	[…]

Source: Form CO, Table 142, and correction from [Advisor], Annex 10.

Table 16. Cost savings with [Advisor] and Commission's adjustment (2023-2032, EUR million)

	Category	Synergy	Total net savings	Total net variable savings	Gross savings		Gross integration costs	
					Variable	Fixed	Variable	Fixed
Network synergies	Fixed network	FTTH Deployment	[…]	[…]	[…]	-	[…]	-
		FTTH Consolidation	[…]	[…]	[…]	[…]	[…]	-
	Mobile network	O&M consolidation	[…]	[…]	[…]	[…]	-	-
		Site consolidation	[…]	-	-	-	-	[…]
		Spectrum consolidation	[…]	-	-	[…]	-	-
	Transmission	Mobile backhaul	[…]	[…]	[…]	[…]	-	-
		Fixed backhaul	[…]	-	-	[…]	-	[…]
		Backbone	[…]	-	-	[…]	-	[…]
Non-network synergies	Sales and marketing	Customer CAPEX	[…]	-	-	[…]	-	-
		Commissions	[…]	-	-	[…]	-	-
		Marketing	[…]	-	-	[…]	-	-
		Sales and distribution	[…]	-	-	[…]	-	[…]
		Equipment (CPE)	[…]	[…]	[…]	-	-	-
		Equipment (handsets)	[…]	[…]	[…]	-	-	-
	Customer care	Customer process	[…]	[…]	[…]	-	-	[…]
		Credit and collections	[…]	[…]	[…]	-	-	[…]
		Installations	[…]	[…]	[…]	-	-	-
		CPE refurbish	[…]	[…]	[…]	-	-	-
	General expenses	Leasing	[…]	-	-	[…]	-	[…]
		Supply	[…]	-	-	[…]	-	-
		Other general expenses	[…]	-	-	[…]	-	-
	Personnel expenses	Personnel	[…]	-	-	[…]	-	-
	IT	IT	[…]	-	-	[…]	-	[…]
TOTAL			[…]	[…]	[…]	[…]	[…]	[…]

Source: Form CO, Annex 9-11, Response to RFI 24, Reply to the SO, Response to RFI 38 and Commission adjustment.

Table 17. Cost savings with [Advisor]and Commission's adjustment, per year (2023-2032, EUR million).

	2023	2024	2025	2026	2027	2028	2029	2030	2031	2032
Variable gross savings	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Variable integration costs	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Variable net savings	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Fixed gross savings	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Fixed integration costs	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Fixed net savings	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Total net savings	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]

Source: Form CO, Annex 9-11, Response to RFI 24, Reply to the SO, Response to RFI 38 and Commission adjustment.

Table 18. Cost savings taking into account a 4 year period (2023-2026, EUR million).

	Category	Synergy	Total net savings	Total net variable savings	Gross savings		Gross integration costs	
					Variable	Fixed	Variable	Fixed
Network synergies	Fixed network	FTTH Deployment	[...]	[...]	[...]	-	[...]	-
		FTTH Consolidation	[...]	[...]	[...]	-	[...]	-
	Mobile network	O&M consolidation	[...]	[...]	[...]	[...]	-	-
		Site consolidation	[...]	-	-	[...]	-	[...]
		Spectrum consolidation	[...]	-	-	[...]	-	-
	Transmission	Mobile backhaul	[...]	[...]	[...]	[...]	-	-
		Fixed backhaul	[...]	-	-	[...]	-	[...]
		Backbone	[...]	-	-	[...]	-	[...]
Non-network synergies	Sales and marketing	Customer CAPEX	[...]	-	-	[...]	-	-
		Commissions	[...]	-	-	[...]	-	-
		Marketing	[...]	-	-	[...]	-	-
		Sales and distribution	[...]	-	-	[...]	-	[...]
		Equipment (handsets)	[...]	[...]	[...]	-	-	-
		Equipment (CPE)	[...]	[...]	[...]	-	-	-
	Customer care	Customer process	[...]	[...]	[...]	-	-	[...]
		Credit and collections	[...]	[...]	[...]	-	-	[...]
		Installations	[...]	[...]	[...]	-	-	-
		CPE refurbish	[...]	[...]	[...]	-	-	-
	General expenses	Leasing	[...]	-	-	[...]	-	[...]
		Supply	[...]	-	-	[...]	-	-
		Other general expenses	[...]	-	-	[...]	-	
	Personnel expenses	Personnel	[...]	-	-	[...]	-	[...]
	IT	IT	[...]	-	-	[...]	-	[...]
TOTAL			[...]	[...]	[...]	[...]	[...]	[...]

Source: Based on Table 16 above, only taking into account a 4 year period (2023-2026) as timely.

Table 19. Cost savings per year, taking into account a 4 year period (2023-2026, EUR million).

	2023	2024	2025	2026	2027	2028	2029	2030	2031	2032
Variable gross savings	[...]	[...]	[...]	[...]	-	-	-	-	-	-
Variable integration costs	[...]	[...]	[...]	[...]	-	-	-	-	-	-
Variable net savings	[...]	[...]	[...]	[...]	-	-	-	-	-	-
Fixed gross savings	[...]	[...]	[...]	[...]	-	-	-	-	-	-
Fixed integration costs	[...]	[...]	[...]	[...]	-	-	-	-	-	-
Fixed net savings	[...]	[...]	[...]	[...]	-	-	-	-	-	-
Total net savings	[...]	[...]	[...]	[...]	-	-	-	-	-	-

Source: Based on Table 16 above, only taking into account a 4 year period (2023-2026) as timely.

Table 20. Cost savings accepted by the Commission as verifiable, merger-specific and benefiting consumers (2023-2026, EUR million).

	Category	Synergy	Total net savings	Total net variable savings	Gross savings (m)		Gross integration costs	
					Variable	Fixed	Variable	Fixed
Network synergies	Fixed network	FTTH Deployment	-	-	-	-	-	-
		FTTH Consolidation	[...]	[...]	[...]	-	[...]	-
	Mobile network	O&M consolidation	-	-	-	-	-	-
		Site consolidation	-	-	-	-	-	-
		Spectrum consolidation	-	-	-	-	-	-
	Transmission	Mobile backhaul	-	-	-	-	-	-
		Fixed backhaul	-	-	-	-	-	-
		Backbone	-	-	-	-	-	-
Non-network synergies	Sales and marketing	Customer CAPEX	-	-	-	-	-	-
		Commissions	-	-	-	-	-	-
		Marketing	-	-	-	-	-	-
		Sales and distribution	-	-	-	-	-	-
		Equipment (handsets)	-	-	-	-	-	-
		Equipment (CPE)	-	-	-	-	-	-
	Customer care	Customer process	-	-	-	-	-	-
		Credit and collections	-	-	-	-	-	-
		Installations	-	-	-	-	-	-
		CPE refurbish	-	-	-	-	-	-
	IT	IT	-	-	-	-	-	-
	General expenses	Leasing	-	-	-	-	-	-
		Supply	-	-	-	-	-	-
		Other general expenses	-	-	-	-	-	-
	Personnel expenses	Personnel	-	-	-	-	-	-
TOTAL			[...]	[...]	[...]	[...]	[...]	[...]

Source: Based on Table 18 above, only taking into account cost synergies accepted as verifiable, merger-specific and benefiting consumers.

Table 21. Cost savings, per year, accepted by the Commission as verifiable, merger-specific and benefiting consumers (2023-2026, EUR million).

	2023	2024	2025	2026	2027	2028	2029	2030	2031	2032
variable gross savings	[…]	[…]	[…]	[…]	-	-	-	-	-	-
variable integration costs	[…]	[…]	[…]	[…]	-	-	-	-	-	-
variable net savings	[…]	[…]	[…]	[…]	-	-	-	-	-	-
fixed gross savings	-	-	-	-	-	-	-	-	-	-
fixed integration costs	-	-	-	-	-	-	-	-	-	-
fixed net savings	-	-	-	-	-	-	-	-	-	-
total net savings	[…]	[…]	[…]	[…]	-	-	-	-	-	-

Source: Based on Table 18 above, only taking into account cost synergies accepted as verifiable, merger-specific and benefiting consumers.

Case COMP/M.10896 – Orange/MASMOVIL/JV

COMMITMENTS TO THE EUROPEAN COMMISSION

30 January 2024

Pursuant to Article 8(2) of Council Regulation (EC) No. 139/2004 (the "**Merger Regulation**"), Orange S.A. ("**Orange**") and Lorca JVCo Limited ("**Lorca**") (together the "**Parties**") hereby enter into the following commitments (the "**Commitments**") *vis-à-vis* the European Commission (the "**Commission**") with a view to rendering the combination of the two Spanish telecommunications operators Orange Espagne, S.A.U. ("**OSP**") and Masmovil Ibercom, S.A.U. ("**MASMOVIL**") in a joint venture that will be 50/50 owned and jointly controlled by Orange and Lorca (the "**Transaction**") compatible with the internal market and the functioning of the EEA Agreement.

The Commitments shall take effect upon the date of adoption of the Commission's decision pursuant to Article 8(2) of the Merger Regulation to declare the Transaction compatible with the internal market and the functioning of the EEA Agreement (the "**Decision**") (the "**Effective Date**").

This text shall be interpreted in light of 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 purposes of the Commitments, the following terms shall have the following meaning:

Capacity Fee: fee to be paid by the New MNO to the JV under the NRA Option.

Closing: the completion of the Transaction whereby the Parties create the JV as set forth in the Framework Agreement.

Commercial Launch Date: the date of the commercial launch of the National Roaming Services under the NRA Option.

Commission: European Commission.

Commitments: the undertakings subscribed by Orange and Lorca before the Commission and detailed in the present document.

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 Monitoring Trustee's objectivity and independence in discharging its duties under the Commitments.

Decision: Decision of the Commission declaring the Transaction in case M.10896 compatible with the internal market and the functioning of the EEA Agreement.

Divestment Spectrum:

- the 4x5 MHz spectrum block […] on the 1,800 MHz frequency currently held by MASMOVIL;

- the 2x10 MHz spectrum block […] on the 2,100 MHz frequency currently held by MASMOVIL; and

- the 20 MHz spectrum block […] on the 3,500 MHz frequency currently held by MASMOVIL.

Effective Date: the date of the adoption of the Decision.

Framework Agreement: the Framework Agreement entered into by the Parties on 22 July 2022 in relation to the combination of their telecommunications and ancillary businesses in Spain.

JV: the new entity resulting from the Transaction as set for the in the Framework Agreement.

Lorca: company owning (before Closing) 100% of MASMOVIL, incorporated under the laws of the United Kingdom, with its registered office at 1 Bartholomew Lane, London, England, EC2N 2AX, registered with the Companies House under company number 12497729.

MASMOVIL: Masmovil Ibercom, S.A.U. and its subsidiaries, incorporated under the laws of Spain, with its registered office at Avenida de Bruselas, 38, 28108 Alcobendas (Madrid), CIF nº A-20609459.

Merger Regulation: Council Regulation (EC) No. 139/2004.

[Defined Fee]: has the meaning given in Schedule 2.

MNO: mobile network operator.

Monitoring Trustee: one or more natural or legal person(s) who is/are approved by the Commission and appointed by the Parties, and who has/have the duty to monitor the Parties' compliance with the conditions and obligations attached to the Decision.

National Roaming Services: wholesale national roaming services to be provided by the JV to the New MNO if the New MNO activates the NRA Option.

Network Capacity Usage: actual monthly level of usage of the JV's mobile network by the New MNO, calculated according to the formula provided in paragraph 22.

New MNO: Digi Spain Telecom, S.L.U., a *Sociedad Limitada Unipersonal* incorporated under the laws of Spain, having its registered office at Calle Francisca Delgado 11, 28108, Alcobendas (Madrid), Spain and registered in Madrid in the Trade Register under no. T.23.521, F.112, Section 8, H. M-421.936, Inscripción 5.

New MNO Agreements: the binding agreements to be entered into by the Parties and the New MNO comprising the Spectrum Divestment Agreement and the NRA Option.

NRA Option: agreement between the Parties and the New MNO providing the New MNO with a binding offer for a national roaming agreement with the JV.

Orange: company owning (before Closing) 100% of OSP, incorporated under the laws of France, with its registered office at 111, Quai du Président Roosevelt, 92130, Issy-les-Moulineaux, and registered with the RCS Paris under number 380 129 866.

OSP: Orange Espagne, S.A.U., company incorporated under the laws of Spain, with its registered office at Paseo del Club Deportivo (parque empresarial La Finca) 1- EDIF 7 y 8, Pozuelo de Alarcón, 28223, Madrid, Spain.

OSS: operations support systems.

Parties: the Parties to the Transaction (*i.e.*, Orange and Lorca).

Remedies Notice: Commission notice on remedies acceptable under Council Regulation (EC) No. 139/2004 and under Commission Regulation (EC) No. 802/2004.

Schedule: the schedules to these Commitments describing in more detail the Spectrum Divestment Agreement (Schedule 1) and NRA Option (Schedule 2).

SETID: Secretary of State for Telecommunications and Digital Infrastructures in Spain.

Spectrum Divestment Agreement: agreement between the Parties and the New MNO organising the transfer of the Divestment Spectrum to the New MNO.

Technical Migration: technical and operational migration of MASMOVIL's customers from the Divestment Spectrum as set forth in paragraph 8.

Transaction: combination of OSP and MASMOVIL in a JV that will be 50/50 owned and jointly controlled by Orange and Lorca, according to the terms and conditions agreed in the Framework Agreement entered into on 22 July 2022.

Working Day: refers to the calendar followed by the city of Madrid in Spain. For the avoidance of doubt, this shall exclude public holidays observed by the city of Madrid and exclude Saturdays or Sundays.

Section B. Description of the Commitments

2. The Parties commit to:

- Divest to the New MNO the Divestment Spectrum, and
- Enter into a binding agreement with the New MNO which provides the New MNO with a binding offer for a national roaming agreement on the terms described below (the ***NRA Option***).

3. The Parties shall be deemed to have complied with the Commitments upon the Parties having:

(a) entered into the following agreements with the New MNO:

(i) The Spectrum Divestment Agreement;

(ii) The NRA Option;

(together the ***New MNO Agreements***);

(b) transferred and made available the Divestment Spectrum to the New MNO in accordance with the dates indicated in paragraph 8; and

(c) if the New MNO exercises the NRA Option, complied with the terms set out in the NRA Option for the full duration of the NRA Option, i.e., until [2033-2038], subject only to termination at an earlier date by the New MNO.

4. The Transaction shall not be implemented before the Parties have entered into the New MNO Agreements with the New MNO and the Commission has approved the New MNO Agreements.

5. In order to maintain the structural effect of the Commitments, the Parties 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 New MNO's activities in relation to the Divestment Spectrum, unless, following the submission of a reasoned request from the Parties showing good cause and accompanied by a report from the Monitoring Trustee, the Commission finds the structure of the market has changed to such an extent that the absence of influence over the New MNO's activities in relation to the Divestment Spectrum is no longer necessary to render the proposed concentration compatible with the internal market.

B.1. The Spectrum Divestment Agreement

6. The Parties commit to transfer the ownership of all the rights of the Divestment Spectrum to the New MNO as soon as possible as of Closing once the transfer of spectrum has been approved by the Spanish Ministry in charge of such approval. The JV shall undertake all the steps required from the Parties to request such authorisation as soon as possible after the Effective Date, and in any case no later than […]. In addition, the JV shall undertake all the steps required from the Parties to request to the relevant Spanish Ministry authorisations with respect to (i) the transfer of the Divestment Spectrum, […] and the issuance by SETID of new spectrum licences for the frequency blocks of the Divestment Spectrum; and (ii) the use by JV of frequency blocks of the Divestment Spectrum during the period of the Technical Migration.

7. After the transfer of the Divestment Spectrum to the New MNO, the New MNO will be able to effectively use the Divestment Spectrum as soon as MASMOVIL completes the Technical Migration of its customers which will occur on a phased basis[1] in accordance with the following dates:[2]

   - [Clause detailing the Technical migration of MASMOVIL's customers – the transfer of all the use of the Divestment Spectrum will take place by no later than 2025]

   - [Clause detailing the penalties to be paid by the JV if the Technical Migration has not been finalised before the agreed date]

8. Further details of the Spectrum Divestment Agreement are set out in **Schedule 1**.

B.2. The NRA Option

9. The Parties commit that the JV will enter into the NRA Option with the New MNO which will provide the New MNO with a binding offer for capacity-based national roaming services (***National Roaming Services***) on the basis of the terms set out below. The Parties also commit to request approval of the Spanish Ministry in charge of such approval for the NRA Option and make best efforts to obtain such approval.

10. The New MNO will have the right to exercise the NRA Option with an opt-in mechanism (i.e., to express its option to enter into the national roaming agreement) in the period starting the day after Closing and ending at the latest on [a date in 2025-2026].[3] Should the New MNO not exercise this right by [a date in 2025-2026], the NRA Option will automatically terminate, with no penalty for the New MNO.

11. Should the New MNO exercise the NRA Option and notify the JV for the start of the Technical Integration, then the JV will implement the technical integration of the National Roaming Services and allow the New MNO to carry out the commercial and technical testing, and prepare the commercial launch of the National Roaming Services within the following time periods:

[1] The Commitments in Decision dated 1 September 2016, COMP/M.7758, *Hutchison 3G Italy / Wind / JV*, also provided for a phased approach – where […] since the date of the decision was the agreed timeline for the transfer of the relevant spectrum blocks. In the present case, […].

[2] […].

[3] […]

- [Clause detailing the timeline for the commercial launch of the National Roaming Services]

12. In addition, the New MNO may request to carry out technical and commercial testing for a limited number of lines, as determined by the New MNO, but for no longer than […] . If requested, this technical and commercial testing should start after the finalisation of the Technical Integration. However, it may be conducted during the […] granted to the JV to prepare the commercial launch.

13. The deadline for the Commercial Launch Date is no later than [a date in 2026].

Scope of the National Roaming Services

14. The National Roaming Services will include all technologies (2G, EDGE, 3G, LTE, 4G, 5G NSA and 5G SA) and all mobile spectrum frequencies used by the Parties and available at any time to any client of the JV in the JV's mobile network. For avoidance of doubt, any international roaming services are outside the scope of the Commitments.

15. The NRA Option will cover all data, voice, and messaging services.[4]

16. The New MNO will have the right to access the JV's mobile network with no limitations in terms of usage and capacity. The JV will apply non-discriminatory terms to each individual service, in particular, meaning that the New MNO's residential customers should be treated equally to the JV's residential customers in all relevant aspects, including terms of quality of service. Likewise, if applicable, the New MNO's business customers would be treated equally to the JV's business customers in all relevant aspects, including terms of quality of service.[5]

17. To enable the New MNO to optimise its network costs, the NRA Option will also require the JV to assist the New MNO in implementing a technical solution that will ensure that the New MNO's customers do not connect or do not stay connected to the JV's mobile network in the areas where the New MNO has deployed its own mobile network.

18. The New MNO will have the right to request access to any new technology implemented in the JV's mobile network, including possible new mobile technology generations (such as 6G) within [6 - 18 months] following the commercial launch of such new technology in the JV's mobile network[6] or as soon as any such new technologies are available to any wholesale customer of the JV, whichever is the earliest. [Clause detailing the terms and conditions for the commercial launch of new technologies], the New MNO and the JV will negotiate in good faith reasonable and nondiscriminatory terms. […].

Duration

19. If exercised, the NRA Option will offer National Roaming Services until [2033-2038]. The NRA Option will terminate automatically if the New MNO fails to exercise (i.e., notify the technical integration) the NRA Option by [a date in 2025-2026] or, once the NRA Option has been exercised, fails to notify the Commercial Launch Date by [a date in 2026].

Capacity-Based Fees

20. The pricing under the NRA Option will be capacity-based, i.e., based on the Network Capacity Usage of the New MNO. Defined tranches of capacity of the JV's network will be available to the New MNO at defined annual fees. In accordance with the fee grid set out in Schedule 2, the MNO will pay [details on fees]. The NRA Option will not include any capacity cap. For the avoidance of doubt, and

[4] Any traffic management, transit and termination for international voice, international roaming and value-added services are excluded from the scope of the NRA Option. The JV will deliver all traffic for these services to the New MNO, which will be solely responsible for the performance of these services.

[5] […].

[6] […].

as set out in paragraph 22 below, capacity usage will be calculated exclusively by reference to the volume of customers and traffic in the JV's network.

21. The capacity usage of the New MNO will be calculated as a proportion of […] in […] and a proportion of […] in […], as set out below:

- [Clause detailing the calculation of the capacity usage]

22. The Capacity Fee is subject to the [Defined Fee] set out in **Schedule 2**.

Minimum rollout incentive

23. To incentivise the New MNO's own mobile network deployment resulting from the Spectrum Divestment Agreement, until the New MNO's own network reaches certain thresholds, the yearly Capacity Fee (after the application of the [Defined Fee] , if applicable) is increased by [0-10]%.

- [Clause detailing the increase of the yearly capacity fee linked to failure to meet roll-out targets of a certain number of macro nodes by the New MNO within pre-defined timeframes][7]

Resale

24. The New MNO will be allowed to resell mobile services to wholesale customers. Conditions of such resale are set out in **Schedule 2**.

Section C. Monitoring Trustee

I. Appointment procedure

25. The Parties shall appoint a Monitoring Trustee to carry out the functions specified in paragraph 35 of these Commitments. The Parties commit not to close the Transaction before the appointment of a Monitoring Trustee.

26. The Monitoring Trustee shall:

(i) at the time of appointment, be independent of the Parties;

(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.

27. The Monitoring Trustee shall be remunerated by the Parties in a way that does not impede the independent and effective fulfilment of its mandate.

Proposal by the Parties

28. No later than two (2) weeks after the Effective Date, the Parties shall submit the name or names of one or more natural or legal persons whom the Parties propose to appoint as the Monitoring Trustee to the Commission for approval.

---

7 […].

29. The proposal shall contain sufficient information for the Commission to verify that the person or persons proposed as Monitoring Trustee fulfil the requirements set out in paragraph 27 of these Commitments and shall include:

(a) the full terms of the proposed mandate, which shall include all provisions necessary to enable the Monitoring Trustee to fulfil its duties under these Commitments; and

(b) the outline of a work plan which describes how the Monitoring Trustee intends to carry out its assigned tasks.

Approval or rejection by the Commission

30. The Commission shall have the discretion to approve or reject the proposed Monitoring Trustee(s) and to approve the proposed mandate subject to any modifications it deems necessary for the Monitoring Trustee to fulfil its obligations. If only one name is approved, the Parties shall appoint or cause to be appointed the person concerned as Monitoring Trustee, in accordance with the mandate approved by the Commission. If more than one name is approved, the Parties shall be free to choose the Monitoring Trustee to be appointed from among the names approved. The Monitoring Trustee shall be appointed within one (1) week of the Commission's approval, in accordance with the mandate approved by the Commission.

New proposal by the Parties

31. If all the proposed Monitoring Trustees are rejected, the Parties shall submit the names of at least two (2) more natural or legal persons within one (1) week of being informed of the rejection, in accordance with paragraphs 26 and 31 of these Commitments.

Monitoring Trustee nominated by the Commission

32. If all further proposed Monitoring Trustees are rejected by the Commission, the Commission shall nominate a Monitoring Trustee, whom the Parties shall appoint, or cause to be appointed, in accordance with a Monitoring Trustee mandate approved by the Commission.

II. Functions of the Monitoring Trustee

33. The Monitoring Trustee shall assume its specified duties and obligations in order to ensure compliance with the Commitments and monitor the implementation of the Commitments. The Commission may, on its own initiative or at the request of the Monitoring Trustee or the Parties, give any orders or instructions to the Monitoring Trustee in order to ensure compliance with the conditions and obligations attached to the Decision.

Duties and obligations of the Monitoring Trustee

34. 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) monitor compliance by the Parties with the conditions and obligations attached to the Decision, as described in Section B of these Commitments;

(iii) propose to the Parties and inform the Commission about such measures as the Monitoring Trustee considers necessary to ensure the Parties' compliance with the conditions and obligations attached to the Decision;

(iv) act as a contact point for any requests by third parties in relation to the Commitments;

(v) provide to the Commission, sending the Parties a non-confidential copy at the same time, the following:

a. a written report in relation to the Technical Migration, to be provided within […] calendar days of the end of every […] from the appointment of the Monitoring Trustee until the Technical Migration has been completed;

b. if the NRA Option is exercised, a written report in relation to the implementation of the Technical Integration, the technical testing and the commercial launch of the National Roaming Services, to be provided within […] calendar days of the end of every […] from the date on which the NRA Option is exercised until the Technical Integration has been completed.

(vi) in addition to these periodic reports, promptly report in writing to the Commission, sending the Parties a non-confidential copy at the same time, if it concludes on reasonable grounds that the Parties are failing to comply with the Commitments;

(vii) assume the other functions assigned to the Monitoring Trustee under the conditions and obligations attached to the Decision.

III. Duties and obligations of the Parties

35. The Parties shall provide and shall cause their advisors to provide the Monitoring Trustee with all such co-operation, assistance and information as the Monitoring Trustee may reasonably require to perform its tasks. The Monitoring Trustee shall have full and complete access to any of the JV's books, records, documents, management or other personnel, facilities, sites and technical information necessary for fulfilling its duties under the Commitments and the Parties shall provide the Monitoring Trustee upon request with copies of any document. The Parties shall make available to the Monitoring Trustee one or more offices on their premises and shall be available for meetings in order to provide the Monitoring Trustee with all information necessary for the performance of its tasks.

36. The Parties shall indemnify the Monitoring Trustee and its employees and agents (each an "**Indemnified Party**") and hold each Indemnified Party harmless against, and hereby agree that an Indemnified Party shall have no liability to the Parties for, any liabilities arising out of the performance of the Monitoring 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 Monitoring Trustee, its employees, agents or advisors.

37. At the expense of the Parties, the Monitoring Trustee may appoint advisors (in particular for corporate finance or advice in relation to the telecoms sector, including of a technical nature, or telecoms regulation in Spain), subject to the Parties' approval (this approval not to be unreasonably withheld or delayed) if the Monitoring 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 Monitoring Trustee are reasonable. Should the Parties refuse to approve the advisors proposed by the Monitoring Trustee, the Commission may approve the appointment of such advisors instead, after having heard the Parties. Only the Monitoring Trustee shall be entitled to issue instructions to the advisors. Paragraph 35 of these Commitments shall apply *mutatis mutandis*.

38. The Parties agree that the Commission may share Confidential Information proprietary to the Parties with the Monitoring Trustee. The Monitoring Trustee shall not disclose such information and the principles contained in Article 17 (1) and (2) of the Merger Regulation apply *mutatis mutandis*.

39. At any point in time during its mandate the Monitoring Trustee shall be entitled to seek the expert advisory opinion of the *Comisión Nacional de los Mercados y la Competencia* ("**CNMC**") on specific issues concerning: (i) the Spanish regulatory framework for fixed telecommunications, (ii) market conditions in the Spanish retail fixed and mobile telecommunications markets, (iii) the

authorisation by the Spanish Ministry in charge of such approval of the transfer of the Divestment Spectrum (pursuant to the Regulation on the Use of the Radioelectric Public Domain approved by Royal Decree 123/2017, 24 of February 2017) and, where relevant, any implications of such authorisations regarding the release of the Divestment Spectrum, and (iv) questions regarding the laws and regulations applicable to the Commitments. To this end, the Monitoring Trustee shall be entitled to share Confidential Information proprietary to the Parties with the CNMC (including its competition division and its telecoms regulatory division), provided that the Monitoring Trustee provides the Parties and the Commission with prior notice and a reasonable opportunity to make representations before sharing such information with the CNMC.

40. The Parties agree 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 of the identity and the tasks of the Monitoring Trustee.

41. Until 1 October 2036, the Commission may request all information from the Parties that the Commission considers to be reasonably necessary to monitor the effective implementation of these Commitments.

IV. Replacement, discharge and reappointment of the Monitoring Trustee

42. If the Monitoring Trustee ceases to perform its functions under the Commitments or for any other good cause, including the exposure of the Monitoring Trustee to a Conflict of Interest:

    (a) the Commission may, after hearing the Monitoring Trustee and the Parties, require the Parties to replace the Monitoring Trustee; or

    (b) the Parties may, with the prior approval of the Commission, replace the Monitoring Trustee.

43. If the Monitoring Trustee is removed according to paragraph 43 of these Commitments, the Monitoring Trustee may be required to continue in its function until a new Monitoring Trustee is in place to whom the Monitoring Trustee has effected a full hand over of all relevant information. The new Monitoring Trustee shall be appointed in accordance with the procedure referred to in paragraphs 26-33 of these Commitments.

44. Unless removed according to paragraph 43 of these Commitments, the Monitoring Trustee shall cease to act as Monitoring Trustee only after the Commission has discharged it from its duties after the Commitments with which the Monitoring 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 D. Fast Track Dispute Resolution

I.Scope

45. In the event that there is a dispute between the Parties and the New MNO as to the implementation of the Commitments described in Section B (including the relevant provisions of the annexes), the New MNO shall have recourse to the following dispute resolution mechanism (the "**Fast Track Dispute Resolution Mechanism**") for the sole purposes of resolving matters of fact in relation to the implementation of these paragraphs of the Commitments.

II.Pre-Dispute escalation

46. Should the New MNO wish to avail itself of the fast-track dispute resolution procedure, it shall send a written request to that effect (the "**Request**") to the Parties, with a copy to the Monitoring Trustee, setting out in detail the reasons leading it to believe that the Parties have not properly implemented the

Commitments. If the Parties wish so, they shall provide a response ("**Response**") by no later than 10 calendar days following the receipt of the Request, with copies to the Monitoring Trustee.

47. Within a reasonable period of time not exceeding 10 calendar days after receipt of the Request, the New MNO and the Parties 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 10 calendar days, the CEOs of the Parties and the New MNO may seek to resolve the matters in dispute within an additional 10 calendar days from expiry of the initial 10 calendar days period.

48. The Monitoring Trustee shall present to the New MNO and the Parties with its own proposal (the "**Monitoring Trustee Proposal**") for resolving the dispute within 5 calendar days after receipt of the Request by the Monitoring Trustee, specifying in writing the action(s), if any, to be taken by the Parties in order to ensure compliance with the Commitments *vis-a-vis* the New MNO, and be prepared, if requested, to facilitate the settlement of the dispute. To the extent that the Parties and the New MNO have settled a dispute on the basis of the Monitoring Trustee Proposal and the Parties comply with such settlement, the Parties shall be deemed not to be in breach of the Commitments.

49. If the Parties and the New MNO have failed to resolve their differences under the process set out above, and provided that the CEOs of the Parties and the New MNO have not resolved the matters in dispute within 20 calendar days of the matter being escalated to them in writing by either party, the dispute resolution procedure below shall apply upon written notice by one party to the other provided such notice is given within 10 calendar days of the end of the 20 calendar days period specified in this paragraph.

III. Dispute Resolution Procedure

50. The Parties and the New MNO shall appoint a panel of experts (the "**Expert**") to determine any matter pursuant to paragraph 46 above.

51. This panel shall comprise:

(a) one expert appointed jointly by the Parties;

(b) one expert appointed by the New MNO; and

(c) one expert appointed by the two experts so appointed provided that if they fail to appoint the third expert within 15 working days from their appointment, either the Parties or the New MNO may request the Monitoring Trustee to appoint the third expert, provided that each person so appointed shall be an independent, suitably qualified and experienced expert.

52. The process shall be conducted in private and shall be confidential but under supervision of the Monitoring Trustee. The language of the process shall be English and optionally Spanish.

53. The Expert shall act on the following basis:

(a) the expert shall act fairly and impartially;

(b) each party shall submit to the Expert its brief and its submission in relation to the matter in dispute within 5 working days of the Expert's appointment;

(c) the Expert shall decide the procedure to be followed within 5 working days of their appointment, which may be the rules of arbitration of the Spanish Court of Arbitration (*Corte Española de Arbitraje*);

(d) the Parties and the New MNO shall assist and provide such documentation as the Expert reasonably requires to consider the matters referred to it in accordance with paragraph 46 by the New MNO;

(e) decisions of the Expert shall be based on majority votes of the panel;

(f) the Expert's determination in relation to any matter pursuant to paragraph 46 shall be given within a maximum period of 1 month of the Expert's appointment;

(g) the Expert's determination in relation to any matter pursuant to paragraph 46 shall (save for manifest error or fraud) be final and binding on the Parties and the New MNO;

(h) any challenge to the Expert's determination in accordance with clause 54(g) shall be made in the courts of Spain;

(i) each party shall carry out the actions required to comply with the obligations set out in the Expert's determination in relation to any matter pursuant to paragraph 46 within any time-limits specified by the Expert; and

(j) the Expert shall determine how and by whom the costs of the determination in relation to any matter pursuant to paragraph 46 including the fees and expenses of the Expert are to be paid.

54. The Commission shall be allowed and enabled to participate in all stages of the fast-track dispute resolution procedure by:

(a) receiving all written submissions (including documents and reports, *etc*.) made by the Parties and the New MNO to the procedure;

(b) receiving all documents exchanged by the Expert with the Parties and the New MNO to the procedure;

(c) filing any written submissions; and

(d) being present at the hearing(s) and being allowed to ask questions to the Parties and the New MNO.

55. The Expert shall forward, or shall order the Parties and the New MNO to forward, the documents mentioned to the Commission without delay.

56. The Monitoring Trustee shall receive copies of:

(a) all submissions made by the Parties and the New MNO in relation to the matters they wish to have resolved by the Expert, on the day when these have been submitted to the Expert;

(b) all other documentation provided by the Parties and the New MNO, on the day when these have been submitted to the Expert; and

(c) the determination made by the Expert, on the day when the determination has been provided to the Parties and the New MNO.

57. Following the final transfer of the Divestment Spectrum in accordance with these Commitments the dispute procedure set out above shall only apply for the NRA Option. The Fast Track Dispute Resolution Mechanism is without prejudice to any other rights and remedies that may be available to the New MNO or the Parties as the case may be in respect of any breach of the Commitments Agreement. For the avoidance of doubt, the Expert shall have no authority to determine any liability

(including any damages or other remedy) in relation to matters subject to the Fast Track Dispute Resolution Mechanism and any dispute on liability between the Parties and the New MNO shall be governed solely by the terms of the Commitments Agreement.

Section F. The review clause

58. The Commission may extend the time periods foreseen in the Commitments in response to a request from the Parties or, in appropriate cases, on its own initiative. Where the Parties request an extension of a time period, they shall submit a reasoned request to the Commission no later than one (1) 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 Parties. Only in exceptional circumstances shall the Parties be entitled to request an extension within the last month of any period.

59. The Commission may further, in response to a reasoned request from the Parties 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 Parties. 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

60. The Commitments shall take effect upon the Effective Date.

Duly authorised for and on behalf of Orange S.A. and Lorca JVCO Limited

[signed]

SCHEDULE 1

Additional Details of the Spectrum Divestment Remedy

The 3,500 MHz spectrum

1. To ensure that the 3,500 MHz spectrum will be optimally used by the New MNO, the JV assumes the following obligations until at least ten (10) years after the Technical Migration has been finalised in accordance with paragraph 7 above:[8]

    - [Clause detailing the technical obligations of the JV regarding its own 3,500 MHz spectrum (e.g. the applicable frame structure)after the Technical Migration, and financial penalties in case of non-compliance]

Economic terms

2. The full price that the New MNO would pay for the Divestment Spectrum is EUR [0-200] million, according to the following payment schedule:

    - [Clause detailing the payment schedule for the Divestment Spectrum]

3. [Clause detailing possible price increase].

Lock-up period

4. During the first ten (10) years after the Technical Migration has been finalised, the New MNO will not be able to sell or cede the Divestment Spectrum. This guarantees that the New MNO retains ownership of the Divestment Spectrum in the long term. […].

---

8 In today's mobile networks, the traffic between the user's device and the mobile station (uplink) and vice versa (downlink) is generally asymmetric, with users downloading more than uploading.

To enhance flexibility and improve spectrum efficiency, Time Division Duplex ("**TDD**") mode is becoming increasingly prevalent and significant. TDD uses the same frequency for both uplink and downlink communications, employing a frame that comprises various time slots for these communications. By adjusting the duration of these time slots, network performance can be customised to meet diverse requirements, ensuring the best possible user experience.
Synchronisation in TDD mobile networks involves parameters that guarantee that adjacent networks send and receive data from mobile devices simultaneously, minimising interference. Therefore, achieving successful synchronisation requires agreement on essential parameters, including:

- a shared clock reference for synchronisation phases;
- a shared frame structure;
- a time reference (start of the frame); and
- a frame format.

Several TDD formats are considered within the 3,500 MHz range. However, the format chosen and agreed upon by MNOs is DDDSU, which is compatible with 5G. The DDDSU frame structure provides the optimal balance for performance, particularly in scenarios requiring coexistence between 5G NR systems.

SCHEDULE 2

Additional Details of the NRA Option

Economic terms

1. Starting from the Commercial Launch Date, the New MNO will pay a monthly Capacity Fee equal to the applicable yearly Capacity Fee for a given interval of Network Capacity Usage divided by twelve, as set out in **Table 1** below.

Table 1: Yearly Capacity Fee per Interval of Network Capacity Usage

[…]

2. [Clause detailing the levels of Network Capacity Usage for the NRA Option and their associated fee][9]

3. [Clause defining the fees to be paid by the New MNO under the NRA Option]

Resale

4. The New MNO will be allowed to resell mobile services to wholesale customers subject to the following conditions:

    - [Clause detailing the resale conditions granted to the New MNO][10]

Early termination

5. Once the NRA Option has been exercised and before the New MNO`s notification for Technical Integration, the New MNO will have the right to early terminate the NRA Option with at least 30-days' notice without compensation or damages for early termination. After the notification for the start of the Technical Integration, the New MNO will have the right of early termination subject to compensation to the JV of:

    - [Clause detailing the compensation to be paid by the New MNO in case of early termination]

    [Clause outlining the applicable notice period].

[9] […].

[10] […].