

**TELEFONICA comments with regard to
BEREC BoR (13) 186**

Public Consultation on

**Draft review of the BEREC Common Position on geographical
aspects of market analysis (definition and remedies)
Analysis and Comments**

7 February 2014

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1. Introduction

Telefónica S.A. (hereinafter Telefónica) welcomes the opportunity to participate in this consultation on the Draft review of the BEREC Common Position on geographical aspects of market analysis (definition and remedies). Telefónica shares the intended BEREC objectives of updating the common principles for NRAs on how to deal with sub-national geographic markets and remedies in view of the relevant changes occurred since 2008.

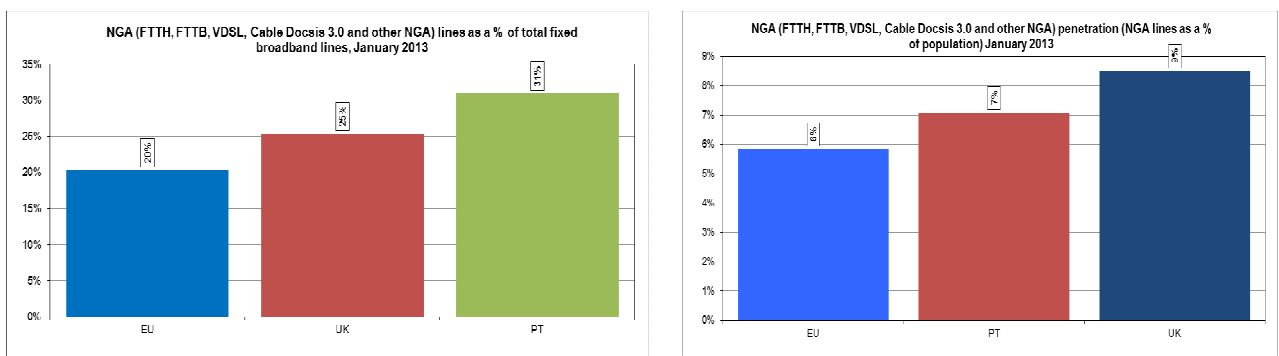
In Telefónica's opinion a geographically segmented regulation is a very rational approach as it allows compliance with the principle of minimum regulation, focusing it in only on those areas where competition is not yet effective.

Investment in fiber networks has begun to take place predominantly in more lightly regulated conditions than currently exist for copper networks. Open access to the duct infrastructure is allowing both the "copper incumbent" and alternative operators to make substantial investments in infrastructure. Cable companies across the EU have invested in fiber or upgrades to their networks that allow comparable broadband access speeds.

Future market reviews will need to take account of these developments and the likely emergence of LTE networks which may provide a further competitive constraint in some areas.

This consultation is therefore timely, as a common EU-wide view of the application of geographic segmentation in market analysis and remedies is critical to fostering future investments. Maintaining or reducing regulation in access markets facilitated by geographical segmentation will generate the **right incentives for investment**, required for the achievement of the objectives set out in the Digital Agenda.

Experience shows that where regulation has been lifted in certain geographic markets they have experienced more competition, not less. Examples of this can be found in the UK where, thanks to geographical segmentation, Ofcom was able to extend de-regulation to more areas, or in Portugal, where there is empirical evidence of the benefits for investment of such regulatory approach. NGA penetration is, in both countries, well above the European Average, as it can be seen in the following pictures



Source: Elaboration from E.C. Digital Agenda Scoreboard 2013. Broadband indicators

Further, Telefónica would like to highlight the following issues:

- Geographical aspects of market analysis should be **forward-looking**. The prospective time horizon needs to be considered, especially in sectors like electronic communications where technological change can rapidly alter the boundaries of markets over time.
- In the context of **new infrastructure deployment, when it is based on FTTH, ducts/in-building wiring access has been made available and alternative operators are deploying FTTH in a number of areas**, an obligation of regulated access on national basis imposed on the incumbent operator is not justified. It would imply an undue direct transference of the regulation

applied for the copper legacy network to the new one. This clearly and unfairly disfavor new network investments of investing operators, in contradiction to the objectives of promoting investment and healthy competition.

- In addition, from an end-users' perspective, services provided over non-fixed technologies (Wi-Fi, WiMAX, **mobile**) **may also be regarded as a substitute** for services over fixed infrastructures in a number of situations. From a forward-looking perspective, the current lack of substitution (services considered complements) must be re-assessed in light of broad mobile adoption by consumers and the envisaged widespread introduction of LTE technology. **LTE** is expected to be capable of distributing video content, supporting different QoS levels. In Telefónica's view, fixed data networks are increasingly subject to direct competitive pressure from mobile data networks and consequently mobile networks should be considered when assessing geographical segmentation.
- The independent networks with a local presence should be properly acknowledged in the market definition stage to allow for deregulation in competitive areas.
- Whilst common guidelines on geographic segmentation are highly desirable, it is also very important to recognize the different competitive situations and **peculiarities that could happen in different countries**, especially the level of granularity required in geographic analysis. The Guidelines should give enough flexibility for the NRAs to define the most adequate measures to be adopted, according to the particularities of their countries.

Geographical segmentation is a necessary approach to promote competition, achieve a more efficient use of infrastructure and is also a key factor for investment. Telefónica wishes to draw BEREC's attention to the urgency of adopting this revised common position, as regulation should already have been removed in a number of geographical areas.

In conclusion: **Telefónica strongly supports BEREC's effort to make a stronger case for geographically segmented markets and remedies and the NRAs flexibility to define them.**

In what follows Telefónica would like to submit its views about BEREC proposal in the hope that they will be acceptable to BEREC.

2. Current Situation

After fifteen years of liberalization a number of the most relevant changes have taken place. There has been a striking evolution in industry, technology and the way customers perceive and consume telecom services in a convergent environment. In this situation, the current regulatory framework must necessarily be updated to cope with this fundamental evolution that is taking place in telecommunications.

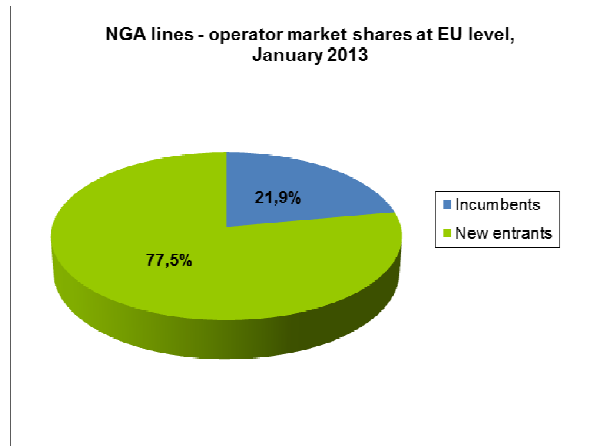
Telefónica wishes to draw the BEREC's attention on the following issues

2.1. Evolution of competition on different Access Technologies

Given the heterogeneous nature of different access deployments, detailed thought must be given to the definition of the geographic areas, especially when dealing with NGA deployment. Some relevant facts should be considered.

1. All **alternative operators**, based on wholesale regulated services, have been able to reach economies of scale based on direct access and bitstream services.

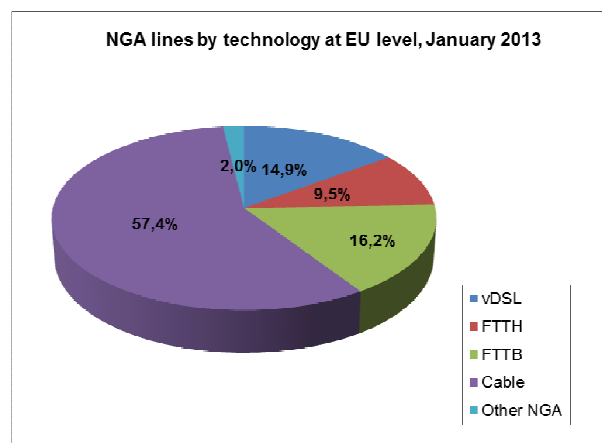
Moreover several **NGA alternative platforms** are already in place and developing. In fact, figures show that, when it comes to NGAs, new entrants are leading the race, as it can be seen in the following figure.



Source: E.C. Digital Agenda Scoreboard 2013. Broadband indicators

2. **Cable operators, not only of national scope, but regional too**, should be considered as key actors of the market, taking into account their current role (in some areas they have already the largest market share) and prospects (from the commercial point of view and technological evolution¹). Additionally we should not forget that many new NGA deployments carried out by network operators are consequence of the high level of competition imposed by cable operators. Not taking into account those facts would lead to a distorted analysis.

Relevance of cable operators for the NGA deployment is reflected in the following figure²



Source: E.C. Digital Agenda Scoreboard 2013. Broadband indicators

In fact, cable operators have a very important advantage, compared to other investors using the incumbent's duct network. A cable operator's NGA infrastructure is already deployed³, while all others have a higher hurdle for investment.

It is then disputable that the new FTTH investment of incumbent operators should be regulated, particularly in areas where cable has a high market share, and is the leader in NGA, and other operators are investing in FTTH using the regulated ducts and in-building wiring. A geographically segmented approach is vital in these areas.

1 In areas with cable footprint, Docsis 3.0. is now a strong competitor to the broadband services offered over fixed telecommunications networks. In fact, over 90% of European cable networks have been upgraded to Docsis 3.0. Moreover, Numericable in France is offering wholesale bitstream to Bouygues Telecom on commercial terms.

2 FTTH and FTTB have a combined share of 25.8% within NGA lines, and only 5.1% of all fixed broadband lines as opposed to 42% in Japan, 58% in South Korea and 9% in the US.

³ Once they have upgraded their networks with Docsis 3.0

It is probably a different case from other NGA deployments (VDSL, FTTC) where the incumbent may use part of the legacy network (copper) and in situations where physical copper unbundling becomes not possible or economically no viable. These different investment conditions demonstrate the need to undertake detailed analysis of the scope for infrastructure competition on a granular geographic basis. For example, cable operators have not always a national scope, but they are very important players in the geographic area where their network is deployed and exert a significant constraint on the incumbent operator in that area.

3. **LTE** must be viewed as a competitive platform competing with the fixed broadband services in a significant number of situations. In particular, this new technology could replace traditional broadband services up to now considered in fixed markets 4&5.

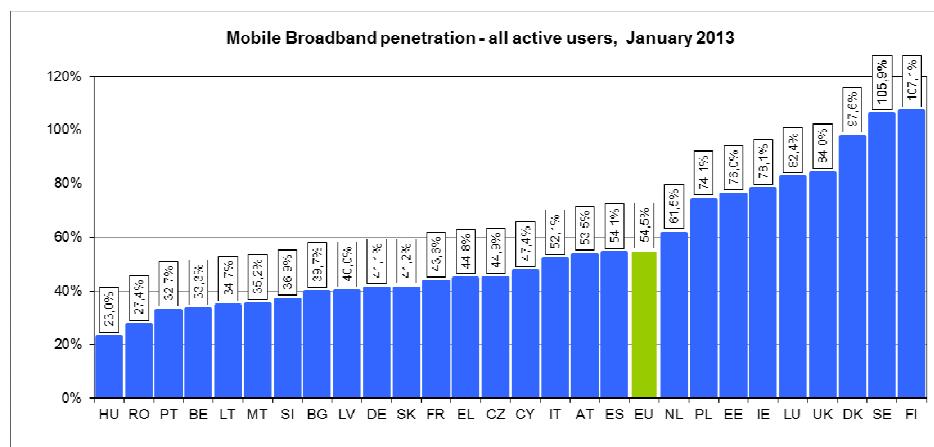
Although the deployment today is not massive, we should take a prospective approach and assume that for the period analyzed this technology will allow a ubiquitous offer in competition with the fixed network. We should not forget that fiber deployment is also under development. Competition between fixed and mobile broadband platforms will significantly increase across Member States. Such competition is already very strong in parts of Eastern Europe and in countries like Austria.

Outside Europe, we can mention Japan as an example where LTE is playing an essential role to discipline the market, and where indirect constraints apply on prices, forcing NTT to reduce FTTH service price⁴.

It is also possible to refer to the latest study from the GSMA Global LTE network from which we can highlight the following conclusions:

- According to a new study by GSMA Intelligence, by 2017, it is expected that LTE will account for about one in eight of global mobile connections. Nearly 500 LTE networks are forecast to be in service across 128 countries, roughly double the number of live LTE networks today.
- It is forecast that LTE networks will be available to half of the world’s population by 2017. In the United States, LTE networks already cover more than 90 per cent of the population, compared to 47 per cent population coverage in Europe and 10 per cent in Asia.
- The United States currently accounts for almost half (46 per cent) of global LTE connections; the United States, South Korea and Japan combined account for 80 per cent of the LTE total today.

This, in the context of the strong penetration of mobile broadband in Europe, as reflected in the following figure, suggests the strong impact LTE can have in the future.



Source: E.C. Digital Agenda Scoreboard 2013. Broadband indicators.

⁴ http://www.sopto.com/news_news_39/ntt_forced_by_lte_competitive_pressures_reduced_ftth_service_price.shtml

4. **WI-FI** current and expected standards (eg 802.11ac during this year) offers the potential to carry great volumes of traffic at a very high speed, allowing substitution for fixed broadband (as this has been the case in the Czech Republic (23))⁵. It can also compete with mobile services for nomadic use. All of that particularly considering the number of projects that are being promoted to create ever-widening areas covered by WI-FI, taking advantage of the low entrance barriers since it is not required to acquire licensed spectrum to offer services.

Whether WI-FI or LTE are substitutes to fixed broadband lines remains an issue to be decided by national regulatory authorities, bearing in mind that the pressure these technologies exert may differ across countries or geographic areas. Nevertheless, a failure to take them into account would in any case seriously underestimate the competitive pressures faced by the incumbents.

In conclusion, cable operators have already deployed Docsis 3.0 networks, which enable them to compete on equal terms with other NGAs, alternative operators can deploy (and in fact are deploying) their own fiber networks on equal terms with the operators traditionally considered incumbents (particularly when access to essential facilities as ducts has been regulated) and LTE and WI-FI constitute an alternative platform able to provide services competing with the fixed in a significant number of situations. Traditional copper networks also pose indirect constraints on NGA competition, especially when regulated prices for copper are set too low, impairing migration to NGA.

These developments are increasingly enhancing platform competition, and will draw a landscape characterized by a heterogeneous geographical mix of access technologies in which service levels and competitive conditions will vary by geographical location. It is very important that regulation does not create distortions between different technologies or platforms that are able to deliver substitutive services in a convergent environment.

Given the heterogeneous nature of these deployments of alternative infrastructures, detailed thought must be given to the definition of the geographic areas in any market analysis.

From this picture, with the onset of NGA deployment, Telefónica concludes that the moment has come to re-think the regulation applied to access and actively de-regulate services under Market 5 scope, and even progress in de-regulate services under Market 4 considering geographical segmentation.

2.2. On the assertions made by the BEREC

Telefónica would like to highlight the following conclusions reached by BEREC, in the understanding that they adequately grasp the conclusions drawn from the competitive dynamics in which we are currently engaged:

Executive Summary

“(7). Market 5 has generally been considered the market most likely to be susceptible to geographical segmentation, as the competitive pressure that local loop unbundling (LLU) may exert in this market (in addition to the indirect constraints that other technologies may exert at the wholesale level) often

⁵ Telefónica totally agrees with BEREC, 10 July 2012, BoR (12) 69 conclusions:

Concerning the inclusion of cable and Wi-Fi in the market definition, BEREC agrees with CTU reasoning to include cable and Wi-Fi in the relevant market based on the indirect constraints they exert on Telefónica. BEREC considers that CTU has provided sufficient evidence of the strength of these indirect constraints. However, BEREC wants to highlight that these conclusions regarding Wi-Fi are the result of the specific position of Wi-Fi within the Czech market.

Concerning the serious doubts expressed by the Commission regarding the geographic segmentation, BEREC considers that CTU has provided sufficient evidence of a geographic differentiation of competitive conditions in the relevant product market defined above. As consequence, defining sub-national markets is appropriate.

varies across a country. In Market 4, the development of own infrastructure (in particular, in the context of fibre roll-out) may lead to more than one network being rolled out in certain regions, but not necessarily throughout the whole country. As a result of this roll-out of alternative infrastructures, the competitive conditions might vary significantly not only in Market 5 but also in Market 4.”

Body of the Document

“(74) Overall, BEREC considers that retail markets should be examined in detail, having regard to the necessity of regulating the corresponding wholesale markets and to the estimation of the importance and scope of self-supply for these markets...”

“(156) in BEREC’s view the fact that operators are not providing a commercial wholesale offer should not of itself necessarily be deemed, per se, a signal of a non-competitive environment on the retail level.”

“(172)... the fact that some suppliers of business services prefer a single national supplier does not, in itself, imply a national market. If, for example, there are a sufficient number of operators which have their own network in the deregulated area and can buy regulated products elsewhere, then large businesses may be well served. A case-by-case analysis will be required in order to assess the ability of alternative operators focused on high-end customers to purchase wholesale service from different providers given the increase in transaction and IT costs.”

“(182) NGA roll-out may also lead to increased inter-platform competition, as already evidenced in some Member States. The roll-out of NGA networks by alternative operators, or the signing of co-investment agreements, could in this regard lead to increased infrastructure competition in some areas and thus, ultimately, to effective competition on the retail markets. This factor may in turn significantly influence the choices made by NRAs when deciding on the geographical segmentation of the market/remedies.”

2.3. Urgency of deregulatory measures under geographic segmentation.

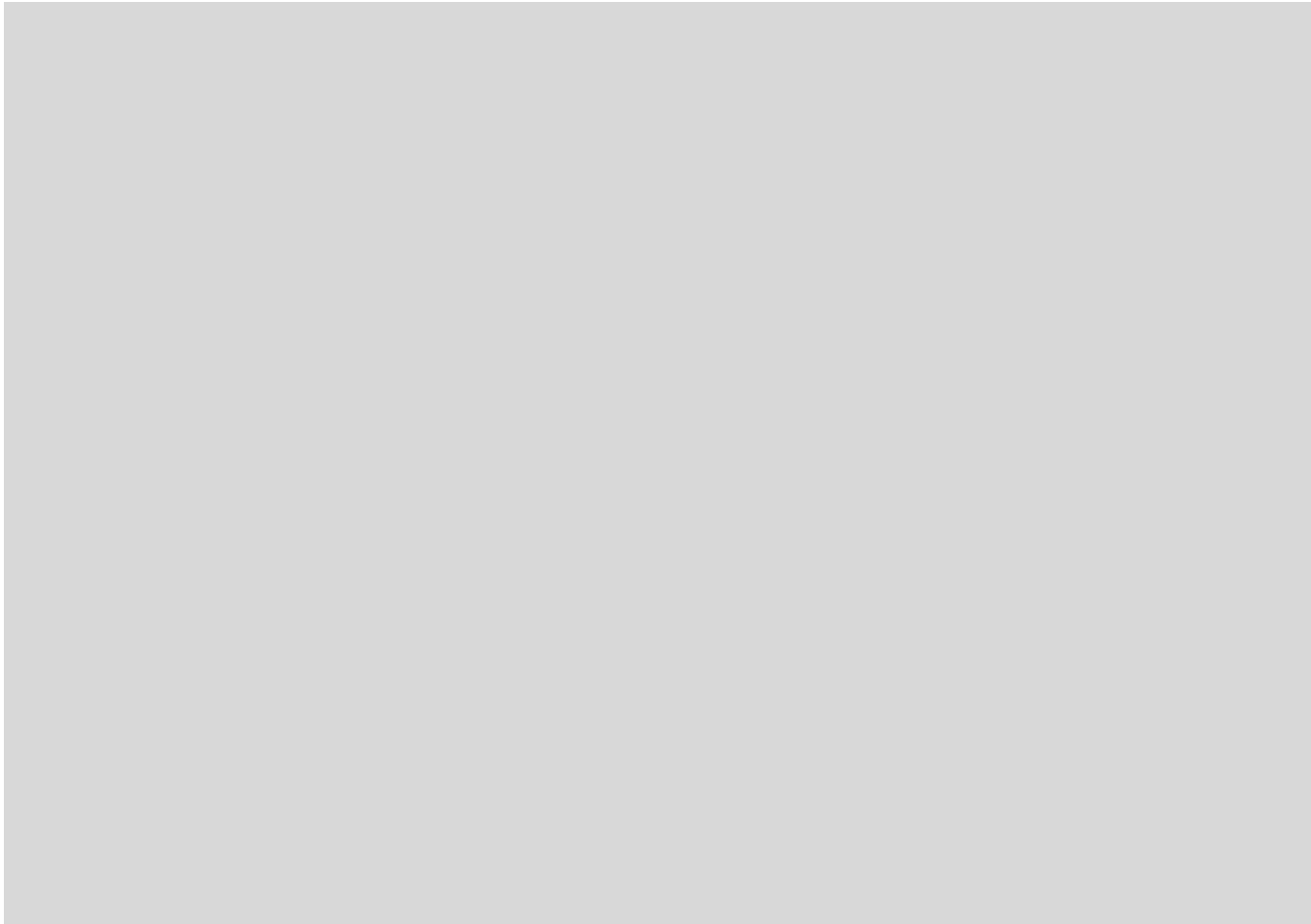
Telefónica considers that an urgent implementation of geographic segmentation is required in some countries, as heterogeneities are more than evident. In that order it is possible to bring out the case of Spain or the Czech Republic.

Spain:

The evolution of the market share of Telefónica in fixed broadband has been very different as a result of very different competitive pressures.

The next map shows the broadband market share of Telefónica in May 2013 in geographic areas (provinces).

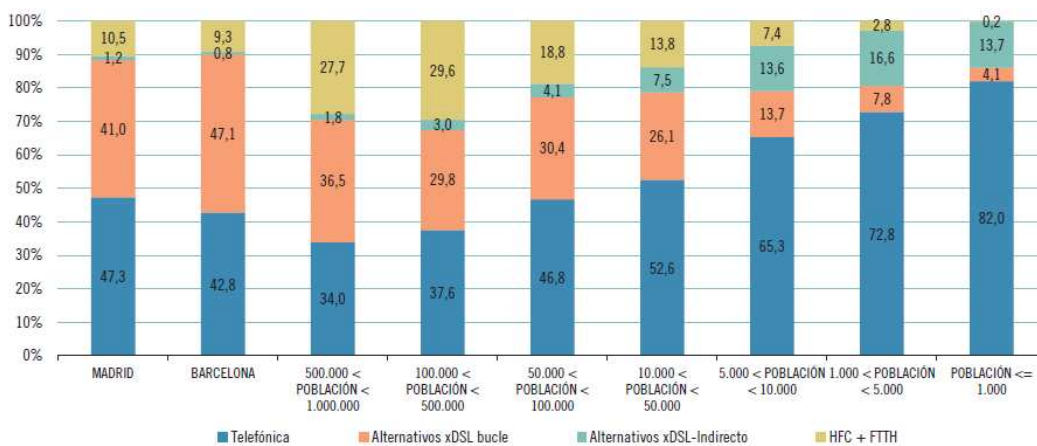
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Considering municipalities and their size, market shares may differ depending on it. See the following figure from the Spanish NRA (December 2012).” *Análisis geográfico de los servicios de BA y despliegue de NGA en España. Diciembre 2012*”:

GRÁFICO 3.1.1 CUOTAS DE ACCESOS POR TIPO DE OPERADOR Y MUNICIPIO



Fuente: CMT

From a network perspective, geographical differences on market shares are clear as reflected in the same document

TABLA 3.5.1

	Nº Centrales	% / Total de centrales	% accesos de banda ancha	Cuota de mercado de Telefónica banda ancha
Sin alternativos (con red propia)	5.637	74,7	14,4	80,7
Únicamente Cable	785	10,4	5,4	58,6
Únicamente operadores ULL	465	6,2	17,2	53,8
Con operadores de cable y ULL	658	8,7	62,9	38,5
TOTAL	7.545	100,0	100,0	

Czech Republic:

In the case of the Czech Republic, Telefónica considers it necessary to refer to the notification issued on May 2012 by the Czech national regulatory authority, Český telekomunikační úřad (CTU), concerning the Wholesale Broadband Access (WBA) reflecting the findings of CTU Market 5 analysis of 2012⁶.

CTU defined two geographic segments:

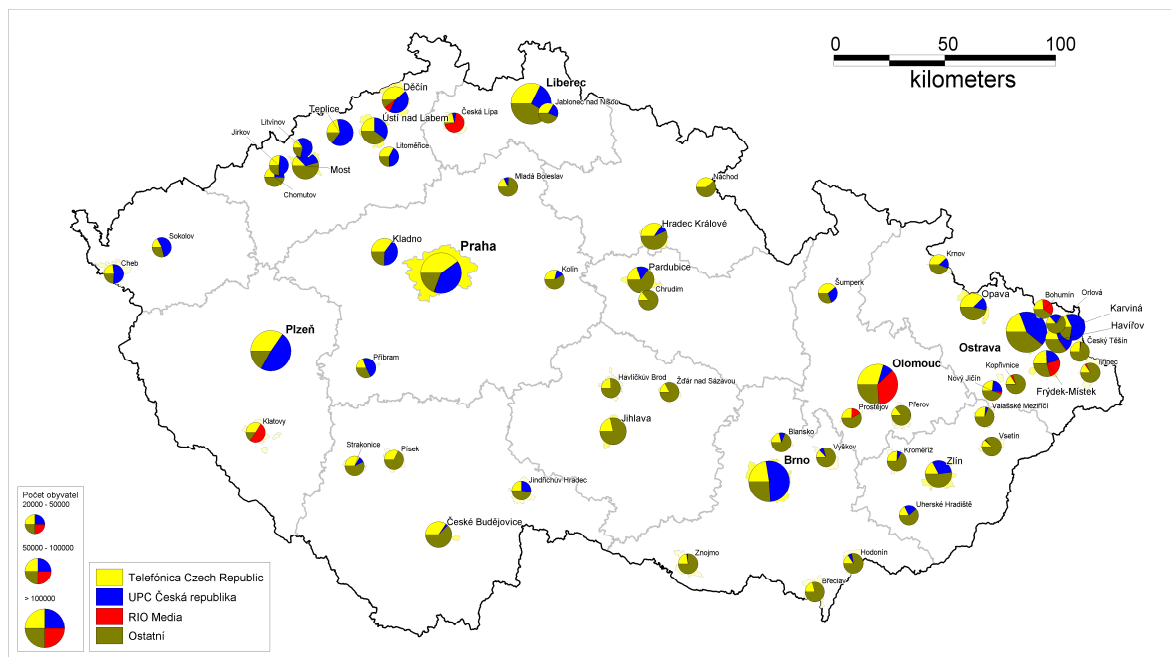
- **Segment A** – municipalities, where at least 3 technologies are available (CATV, xDSL, WI-FI or FTTx, xDSL, WI-FI) and the market share of Telefónica Czech Republic, a.s. does not exceed 40%
- **Segment B** – all other municipalities

Market shares in Segment A were as follows:

The Name of the Undertaking	Segment A
Telefónica Czech Republic, a.s.	28,28%
UPC Česká republika, a.s.	27,56%
T-Mobile Czech Republic, a.s.	2,56%
RIO Media, a.s.	2,41%
SMART Comp., a.s.	1,79%
PODA, a.s.	1,15%
Others	36,25%
In total	100,00%

In the following Map are depicted the market shares of individual companies in the segment A in municipalities with more than 20,000 population

⁶ http://www.ctu.cz/cs/download/art/oo/navrhy/oo_art-05-xx_2012-y_navrh_29_02_2012.pdf. See particularly pages 92 and 110-113.



Source: CTU Market 5 analysis of 2012

It is clear that, in the Czech Republic, cable operators exert strong competitive constraints on the incumbent. In fact, in regions where cable operators are present the average market shares of Czech Telefonica and Cable Operators are similar and less than 30%.

Taking all that into account in segment A, CTU found that no company has SMP and proposed the imposition of no remedies.

As stated in paragraph (23) BEREC concluded that CTU did provide sufficient evidence showing that significant differences in competitive conditions existed on the WBA market, so that it was appropriate to define sub-national markets to which different regulatory conditions should be applied. Nevertheless the European Commission vetoed the CTU draft decision, based on (in Telefonica’s opinion) insufficient ground.

This means that, today, is even more urgent to take measures on geographic segmentation, given the prolonged market distortion that the EC decision has caused.

These differences show that regulation should have been lifted in competitive areas, and the longer it takes to lift regulation, the longer the distortions are maintained.

3. Impact of the new Recommendation on relevant markets

Telefonica would like to highlight the following questions taking a look at current Commission draft:

3.1. Regarding Current Markets 4, 5 and 6

Telefonica considers important that BEREC’s Common Position addresses the following topics:

- According to the published EC’s draft proposal for the revision of the recommendation on relevant markets, it could be said that Local loop unbundling market (market 4) is redefined as WLA (Wholesale Local Access) to cover physical and non-physical (virtual) access functionally similar (new Market 3a). Current wholesale broadband access market (market 5) is also redefined as WCA (Wholesale Central Access) for products provided at a higher and more central layer in the network architecture (new market 3b). Leased lines Market (Market 6) will be redefined as Wholesale high-

quality access market (new Market 4) to include a wider range of access products in addition to leased lines.

It would be very helpful if this Common Position included some indications about how the conclusions reached over the current relevant markets could be exported to the new list. Nevertheless, Telefónica considers that this new list poses a number of new questions that should be specifically addressed (see next points)

- EC also proposes that the new market 4 (under which scope high-quality bit stream solutions could be regulated) should be, in principle, defined on a nationwide basis, whereas for market 3b geographical segmentation could apply.
- Special attention should be paid to the fact that a different treatment of geographical segmentation in the new markets 3b and 4 could create distortions, as there could be wholesale offers regulated in those markets that would de facto be substitutes (eg high-quality bit stream solutions under market 4 vs standard-quality bit stream solutions under market 3b).
- Leased lines terminating segments should be deregulated along speed ranges and geographies wherever possible. Trunk segments of leased lines should be expressly excluded. They are excluded in the current Recommendation; however in some Member States some routes are still regulated.
- In this regard, BEREC provides in its paper the experience reached in Belgium and the United Kingdom on the issue of geographical segmentation for the leased lines and concludes that for the terminating segments of leased lines, irrespective of the technology used to provide leased or dedicated capacity, geographical delineation could be relevant. Telefónica also considers very appropriate the statement made in paragraph (172) transcribed above.

3.2. Regarding Current Markets 1, 2, 3 and 7

Telefónica considers that the analysis carried out in the document is strongly related to Markets 4 and 5. In fact in paragraph (65) it is stated the following:

*“(65) For these reasons, **the focus is mainly on Markets 4 and 5**, although BEREC considers that geographical differences in competitive conditions may also be observed in other product markets, such as leased lines or fixed telephony markets.”*

(Emphasis included in the original text)

Telefónica agrees on the fact that markets 4 and 5 are the most relevant within the perspective of the network evolution. Nevertheless, it is essential to have an overall view of the impact of the whole set of regulatory measures on the retail market and avoid isolated analysis constrained to the boundaries set in any of the formally defined wholesale markets. From this perspective, it is necessary that the scope of deregulation achieved by geographical segmentation should reach all regulated markets, as the whole package of measures imposed on the incumbent operator under the scope of all the relevant markets have an influence on its competitiveness on the retail market.

According to the available information of the EC’s proposal for the revision of the relevant markets list, the retail market for access to fixed telephony (market 1) and the wholesale market for call origination on the fixed public telephone network (market 2) are removed from the list. Fixed and mobile termination markets (markets 3 and 7) are maintained on the list (new markets 1 and 2).

Based on this information, there is a presumption that the former markets 1 and 2 will be deregulated and with them obligations like carrier pre-selection and wholesale line rental, currently imposed.

Those are clearly legacy markets and remedies which are outdated, as it is recognized in the EC review. Anyway, Telefónica considers that a reference should be made in the BEREC Common position document to the extinction of those obligations.

In case an NRA deviates from this approach, geographical segmentation would also be required.

4. Choice of relevant geographical units and competition assessment

Key points of the recommendation are the choice of the geographical units for study and the way to assess whether they can be considered competitive or not. In this regard, Telefónica's view is the following.

4.1. Choice of Relevant Unit

On the choice of relevant units (administrative vs network topology- related geographical units) Telefonica believes that the following considerations should apply:

1. In considering homogenous conditions in **administrative units** (for example Municipalities) a forward-looking perspective should apply.

To assess whether this area **is competitive** or not, the **presence of alternative operators⁷ should be deemed valid**, as in a prospective view it would be fully covered, either by **fixed or mobile operators**. An administrative unit fulfilling the previous criterion (current presence of alternative operators on most of the administrative unit) should be considered as a homogeneous competitive area (not as in (88))

This last point deserves further comment. It is true that, in a first instance of competition introduction, within the same administrative unit, it could be possible to differentiate "islands" where competition is present and some related areas, where competition is not yet present. Nevertheless the great speed with which competition develops, once an operator begins its operations in a determined municipality, makes it necessary to assess its competitive potential beyond a mere snapshot. From that point of view, we could state that the whole municipality has a homogeneous character, due to the natural ability of the operators to extend their coverage to the whole area. Prices and Services sold by different operators can properly be adjusted within the boundaries of the municipalities. In fact, administrative boundaries are the relevant concept for customers.

2. In considering homogenous conditions **based on network deployments**, units large enough to be subject to an investment decision by an operator, when transparency and pragmatic constraints are fulfilled could be used. Small units could also be the election, even single premises as quoted in (90) where investments are incremental to current network built, which could be the case for FTTH deployments, not only leased lines. Anyway it should be up to the NRAs to define the most adequate measures network units, according to the particularities of their countries.

In any case, as competition progresses, the unit based on the network topology of the incumbent operator will probably be less adequate, and, with a prospective view, it will be even less in the future. However, this is an issue to be decided at national level.

4.2. Competition Assessment

About the factors listed by BEREC that should be evaluated by NRAs when deciding on the homogeneity of competitive conditions, Telefónica would like to make the following considerations:

a) Barriers to entry into the market

Telefónica's view is that this is the main factor to be considered in a forward looking vision. In the context of NGA deployment, whenever essential facilities are opened and available, facilitating economies of scale to all the players on equal terms, no obligations should be imposed. That would be the case with all network deployments based on FTTH, when ducts and in-building wiring are available. In this case, wherever operators are deploying new networks using these facilities, there are no barriers to entry for new players.

⁷ Beyond a certain coverage threshold

This case is different to network deployment based on FTTN. The scope of copper already deployed and the absence of alternative essential facilities as ducts could remain a barrier to entry, so regulation of active products would be deemed to remain necessary.

In any case, the consideration of barriers to entry has to be focused on barriers for geographic segments. Coherently, the criteria of replicability of infrastructure, capabilities, etc. need to be assessed in the local competition segment.

For example: In the Czech Republic, considering barriers in local or even regional context, there are no technical or administrative barriers for new WiFi providers. The technology is relatively cheap and spectrum unlicensed. The success of WiFi operators suggests that market barriers are also low.

b) Number of suppliers

In the consultation document some attention is paid to the consideration of what could be a proper minimum of operators required to deem an area as competitive. In this regard, for example, in paragraph (153) it is stated: “A market characterized by only two players (the incumbent operator and a cable operator) may thus be deemed to be not sufficiently competitive to justify the withdrawal of obligations”. And later in the conclusions: “(180)..... the presence of a sufficient number of operators (at least more than two) in a given area is a key factor to ensure effective competition....”

The argument often goes that a two-player market would be prone to collusion. Telefónica considers that this is not necessarily so. The characteristics of the two competitors must be examined to determine the probability of collusion. This is also a task that should be part of the market analysis, as opposed to a not very well substantiated requirement of at least three operators for a market to be competitive.

As a matter of fact, competition takes place in an area prone to attract investments by alternative operators. This ability is related to the values of socioeconomic and demographic indicators in the area, as competitors are always attracted by the expected return. From that point of view, it could be that the mere presence of an alternative operator, especially when analyzed prospectively, could ensure competition in that area. In line with that, Telefónica’s experience shows that, as soon as alternative operators are installed in an area, this area quickly becomes competitive. It should also be kept in mind that the situation is very different in a market where services are on the verge of expanding (as it is the case of NGAs) than in a market where services are stabilized. This geographic presence of alternative operators should be properly acknowledged in the market definition stage to allow for deregulation in competitive areas.

Telefónica considers, therefore, that regulation should be forward-looking, and more emphasis should be given in assessing the second of the three criteria test (prospective competition) taking fully into account the operators investment plans. That, coherently with the approach followed in the EU Guidelines for the application of State aid rules in relation to the rapid deployment of broadband networks (2013/C 25/01), where, in order to assess the public intervention, authorities should also verify operators’ future investment plans. It is also relevant that, in this context, it is recognized that the presence of two competing networks could be sufficient to ensure that there are no failures in competition. This, as transcribed below

(72) When in a given geographical zone there are or there will be in the near future at least two basic broadband networks of different operators and broadband services are provided under competitive conditions (infrastructure-based competition ⁽⁸⁷⁾), it can be assumed that there is no market failure.

Taking all that into account, Telefónica believes that it is not relevant in practice to set thresholds on the number of alternative operators that should be present in a given area to consider it as sufficiently competitive. Prospectively, **the key criterion that should be deemed valid for assessing future development of competition in an area is the absence of entry barriers, the presence of alternative infrastructure operators (looking also at their investment and coverage plans) and the ability to attract new competitors.** If the area has enough potential then it will attract the sufficient number of operators able to ensure effective competition.

In this sense, market developments, and possible concentration exercises, should be taken into account, so that the reduction in the number of operators does not affect that finding. In fact, as a result of a process of

consolidation, just one alternative operator could remain in a certain area and not for that reason it would lose potential to attract investments, and should be regarded with lack of competition. That would depend on the specific case.

Additionally, Telefónica also wants to draw BEREC's attention to the fact that the proper regulation balance between markets 4 and 5 regulation should be set.

According to the "ladder of investment" hypothesis, new entrant operators could start operation with the wholesale product requiring the minimum investment (usually they will resort to resale services). Afterwards they will progress climbing up the ladder towards the goal of having their own infrastructure via LLU (in the context of copper) or an alternative NGA platform, possibly making use of the essential facilities regulation. Once this stage of self-provision has been reached, a threshold has been crossed, and market 5 regulated services should be removed whenever the incumbent operator has developed its NGA not making use of any other element of its legacy network than the essential facilities⁸.

In the context of the "ladder of investment" hypothesis, it is important to bear in mind that, de-regulation, has an intrinsic value to speed up the process of evolution by progressively removing obligations as the different stages of the ladder have been reached, encouraging entrants to climb up towards the goal of self-provision. The facilities-based competition that will result as this regulatory approach will generate a sustainable competition environment, ultimately enabling the removal of access regulation or not increasing the existing one.

In competitive areas, where the facilities-based competition has been reached, different competitive situations, requiring different sets of remedies can be identified⁹. This topic will be the topic of the next point 4.3.

c) Market Shares of the SMP operator and the alternative operators

Telefónica considers important to clarify that a different market share may simply be the consequence of the best performance of the incumbent operator, within the context of the rules applicable to a fully competitive market.

In that order Telefónica does not share what is stated in (113). In fact, when it comes to new NGA deployments based on FTTH, similar considerations should apply than for the case of new mobile network deployments.

d) Price differences

Telefónica agrees with BEREC consideration that a national uniform price of the incumbent operator does not necessarily imply a national market. In fact, significant differences could exist between competitive and non-competitive areas despite a national uniform price of the incumbent operator.

Telefónica considers that when assessing price differences, the features on the products offered should be considered. As a matter of fact, for example, it is not the same to have 3Mb than to have 50Mb even if the price is the same for both products. Whenever products are considered in the same market, features should be assessed to review prices differences, including not only prices but also different promotions and product policies could be applied by operators, in different units.

In some scenarios, the effects of competition on the market even without price differences could be reflected as differences in market shares.

The Commission's Czech veto on Market 5 was, among other things, based on objections of insufficient proof of price differences and the homogeneity of geographic areas. While there is the obvious difference that Ofcom assessed a geographic area based on exchanges/LLU providers and CTU did

⁸ Assuming those essential facilities have been regulated.

⁹ It is strictly necessary to recognize the essential role being played by Cable Operators in the areas where they are already operating

municipalities/alternative infrastructures, in both cases the effects of price differences were reflected in the differences in market shares.

In that respect, we can refer to the Commission decision concerning case UK/2010/1123: Wholesale broadband access Market. On page 5, the Commission summarized Ofcom's approach as follows:

II.2.3. Additional criteria for defining the geographic markets Ofcom recognises the relevance of other elements such as barriers to entry, pricing and price differences. Ofcom concludes that the number of POs reflects operators' views on barriers to entry and that the effects of price and pricing differences are already accounted for when service shares are assessed and that therefore the number of POs and the exchange service shares taken together provide an effective and practical proxy for assessing the homogeneity of competitive conditions and are likely to incorporate the effects of other factors that affect competitive conditions.

e) Other criteria

Telefónica considers that other mentioned criteria as different geographical marketing/sales strategies or quality/functionality of the products should be given the due importance and not be just treated as informational criteria that might be looked at by the NRAs.

4.3. Competitive Situations and remedies

Competitive situations can be different, so, competitive areas can be divided into two categories to which different remedies could be applied, following the principle that their level should be the lowest possible to allow the development of competition.

Telefónica considers that, where an administrative area (for example municipality) has been deemed competitive, it is essential to define the proper proportional obligations that could be imposed. In this regard, experience shows that two different situations can be identified:

1. The area is fully competitive within the context of new networks deployed (FTTH, Cable, LTE) which could be associated with Situation 2 (retail conditions mainly driven by interplatform competition).

In this scenario, where there could be several NGA platforms, it makes no sense to impose obligations on just one of them for the sole reason of having been deployed by the operator whose market share in the provision of services over copper is the highest.

In this context, it is important to avoid the direct transfer of the regulation applied for the legacy network to the one that would be reasonable to apply to the new NGA, currently under construction, and which is not based on the legacy network, except for the civil infrastructures; assuming they are already opened. From that point of view, regardless the fact that Fibre and Copper are included in the same product market, it makes no sense to apply VULA/Fibre unbundling remedies in the same way that LLU was applied in the past for copper legacy networks. See also comments above on the existence of entry barriers when ducts are used by alternative fibre providers.

Where the incumbent operators build their NGA platforms making partial use of their copper legacy network, or the use of essential facilities is not in place, a market 5 service could be regulated as it could be the way to preserve competition, in a context in which the incumbent would not be starting from scratch, given that it is using a part of the legacy network that should also be available for other operators. That would be the case of FTTN configurations making use of vectoring.

Finally, a particular reference should be made to the agreements freely reached between operators to promote the development of new networks. Those agreements should be encouraged by the administrations and be given preeminence to regulation.

2. The area is fully competitive in the context of market 5 within Situation 1 (retail competition driven by wholesale access to the copper network and alternative infrastructures).

Telefónica considers that this situation occurs in the areas in which, besides the incumbent operator, a cable operator and at least one LLU operators can be found, taking into account that LTE could also be present as a fully substitutive platform for NGA services. In this scenario to keep LLU regulation, besides regulation on essential facilities, could be appropriate.

In any case, **provided that the incumbent operators are able to provide full LLU services, market 5 regulation should, disappear.** In support of this it is worth noting the following

- Experience shows that, once an alternative operator is co-located in an incumbent exchange, it quickly migrates customers from indirect access to services provided with unbundled loop; that is a very natural and logical trend to profit from the lower costs allowed by LLU. It means that bitstream services become redundant and should be de-regulated.
- Access regulation, in the context of the Digital Agenda, must promote competition based on infrastructures. From that perspective, service based competition allowed by resale wholesale services of the incumbent operator must be considered a stepping stone to achieve the objectives set by the Digital Agenda.

5. SMP analysis and remedies differentiation.

As stated above, adjusting regulation to the competitive conditions promotes investment and innovation. Geographically segmented regulation is a key element to enable the benefits of de-regulation in certain locations, in a context where it is not possible to de-regulate on national basis.

As BEREC states in point 7.1 there are two possible ways of dealing with geographical differences in competitive conditions across a national territory:

- Differentiate geographical markets at the market definition stage.
- Define just one national market and differentiate remedies to take into account geographical differences.

BEREC also recognizes that those two options should not be viewed as equals. Taking that into account, Telefónica considers that, whenever possible, the market segmentation approach should be taken, as it is the current way to achieve all the advantages and benefits that de-regulation could bring (promote investment, innovation and as a result improve the quality of service and consumer choice). A precise geographic delineation of markets will result in a rigorous SMP assessment and will allow to focus regulation on key inputs and players. Keeping regulation in competitive areas, even in the case that the remedies applied could be softened, would still distort competition in those areas.

As stated in point 7.2. When it comes to regulation, NRAs have to strike a balance between two types of regulatory risks:

- **Type 1 risks**, in which there is deregulation (or lighter regulation) where in fact regulation (or stronger regulation) would still be justified;
- **Type 2 risks**, in which there is regulation (or stronger regulation) where no (or lighter) regulation would be justified.

Telefónica considers that, in case of any doubt, the correct balance of risk is to always avoid type 2 risks, but be more willing to accept type 1 risks as a result, particularly where new network investments are ongoing. The rationale for this approach is as follows:

1. As a general principle, as BEREC also recognizes (paragraph 169) it is important to bear in mind that ex ante regulation should be imposed only where and when it is really needed.
2. In the current context, strongly marked by the need for investments to be made in order to achieve the objectives of the Digital Agenda, de-regulation should always be preferred to regulation, as it is the best way to promote investment.

Regulator's decisions should be aimed to maximize the amount of private investment in broadband infrastructure and, coherently, minimize impediments to it, with a maximum reliance on competitive forces and ex-post surveillance of the markets. Market access conditions should be designed as to avoid distortions of competition and to allow all competitors, including incumbent operators, to invest and innovate on equal basis in the global market place.

Capital is essential. In order to build the new networks, it is necessary to attract high levels of investment. Regulation can not constitute an element of risk for those investments. On the contrary, it should become catalyst. Dynamic efficiency of the market should be maximized, so that each agent can get the appropriate returns to reward the efforts and risks it has taken, so the needed capital can be attracted.

3. We must remember that there will always be an ex-post control under competition law, which provides further security should there be a type 1 risk envisaged. Also, the usual three year review of ex ante regulation provides sufficient scope for remedying a type 1 error if occurred. However, to remedy a type 2 error remains much more difficult.

6. Conclusions

- **Geographical segmentation is a necessary approach** to promote competition, achieve a more efficient use of infrastructure and is also a key factor for investment.
- The analysis carried out in this draft review should be used by the European Commission as a relevant input to be taken into account for the **new recommendation on relevant markets**.
- Geographical aspects of market analysis should be **forward-looking**. Dynamics of broadband markets may be affected by new networks deployments.
- To assess whether an area **is competitive** or not, the key criterion that should be deemed valid is the **absence of barriers to entry**.
- Cable operators (particularly regional ones) and in certain areas the competitive pressure of LTE mobile networks should be considered when assessing geographical segmentation of fixed markets.
- **Market segmentation should be prioritized to remedies differentiation**. The regional presence of independent networks should be properly acknowledged in the market definition stage to allow for deregulation in competitive areas.
- **Competitive situations can be different**.
 - In the context of NGA deployment, where there is competition, once essential facilities (as ducts) are opened and are being used by alternative players for FTTH deployment, no other obligation should be imposed, as all operators are able to undertake investments in new generation networks on equal terms.
 - When network deployment is based on FTTN, copper remains a barrier to entry, so some sort of regulation of active products would remain necessary, as market 4 services are unavailable.
 - In areas where retail competition is driven by wholesale access to the copper network and alternative infrastructures (fixed and mobile) obligations should be established at the lowest possible level (market 4 vs market 5).
- In case of doubt **de-regulation should be prioritized to regulation (Type 1 risks vs Type 2 risks)**.
- It should be given **maximum flexibility for the NRAs** to define the most adequate measures to be adopted, according to the particularities of their countries.