

TELEFÓNICA's position paper

Contribution to the Commission consultation on the Merger Control Regulation review

Telefónica welcomes this opportunity to share with the Commission some views about the current functioning of the Merger Control Regulation.

With regards the simplified procedure and referrals, as well as the threshold review, Telefónica has already provided its views in the reply to the questionnaire. However, there are still some proposals for the improvement of the current regime, based on Telefonica's experience in the last Merger Control cases in which it has been involved (mainly Phase 2 complex cases). Our proposals regarding procedural/technical issues are also outlined in the questionnaire (concentrated in Q27 and Q28), but we would like to share with the Commission other substantive issues which we invite the Commission to reconsider to improve the EU merger control regime.

First of all, Telefonica would like to highlight the importance of applying a broader approach based on total welfare standard by the Commission, as well as focusing not just on prices.

The Commission's analysis is too focus on price effects and does not take into account sufficiently other factors. In particular, the UPP test tends to do close-minded analysis (always theoretically leading to price increases) in a very short term, ignoring other non-price factors such as investments (which are very relevant in many industries as telecom); but also innovation, quality, privacy, first-in-class networks and data-related aspects -which have significant impact in the digital ecosystem- .

In the same sense, regarding the period used by the Commission to analyse transactions' effects (which usually considers scenarios in 2-3 year time), Telefonica believes that this period should be extended in those transactions whose business models imply investments cycles of 5-10 years period. In this kind of industries, such as the case of Telefonica as telecom, it is difficult to analyse transaction's effects and its possible impact in the current analysis made by the Commission, which remains then incomplete and/or unreliable.

Other aspect to be rethought by the Commission is the current standard of proof to analyse efficiencies. In Telefonica's point of view, companies make a huge effort to demonstrate the existence of efficiencies of their transactions (including thorough and costly economic reports by external experts). For giving a meaningful role to the efficiencies in the EU Merger Control regime, Telefónica considers that the Commission should take a more pragmatic approach about the required standard of proof for efficiencies. Moreover, dynamic efficiencies should also be considered.

In relation to the so-called "gap cases", so broadly applied in 4 to 3 mergers, there are also some improvements we invite the Commission to reconsider. Firstly, Telefonica thinks that the concepts of "Important Competitive Force" and "Close Competitors" should be considered as exceptions and they require robust theories of harm and strong evidence:

On the one hand, from Telefonica's point of view, a merging party should not be considered as ICF if its features whereby make it ICF (such as very low prices) are not significant or cannot be maintained over the time. Therefore, we propose that the Commission uses a higher standard of proof which ensures the feasibility or viability of an agent to be considered as an ICF. A so called maverick company which cannot maintain its strategy at a medium term due to high financial losses cannot be considered an ICF.

On the other hand, there is not continuity by the Commission in the usage of the methodology to analyse if the merging parties are close competitors or not. From Telefonica's experience in the last merger cases in which it has been involved, it has noted that in some cases the Commission prioritized the analysis of the diversion ratios (in particular, the MNP test) as the best method to determine whether the merging parties were close competitors; but in other cases, the Commission considered that the MNP data presented a number of limitations for the purposes of calculating diversion ratios, using by the contrary the Survey as the best way to determine if the merging parties were close competitors. Therefore, Telefonica believes that, in order to avoid legal uncertainty, the Commission should use a consistent methodology to be applied in all cases over the time.

Other aspect to be considered by the Commission is the application not only of structural remedies, but also behavioural remedies. The preference of the Commission for the structural solutions, following its own Guidelines, cannot make it to completely disregard behavioural ones when they can provide a satisfactory remedy.

Finally, and also related to the broader total welfare standard, Telefonica believes that the coordination between DGCOMP and other DGs should be improved when solving merger cases, taking also into consideration general principles of the Treaty and other Policies. Therefore, we propose a more effective inter-services consultation process, where other DGs are able to participate actively and give comments.