

## RESPONSE TO THE PUBLIC CONSULTATION

### Commission Notice on the definition of the relevant market for the purposes of Union competition law

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#### 1. Executive summary

Telefónica welcomes the Commission’s review of its 1997 Market Definition Notice, and the public consultation on the Draft Market Definition Notice, hereinafter “the Draft Notice”.

The following lines express Telefónica’s views on the Draft Notice according to its experience operating in different markets of the European Union. In a nutshell:

- Telefónica welcomes the Commission’s acknowledgement of market definition as a necessary tool to contributing to the policy goals of preventing dependencies and increasing the resilience of the EU.
- Market definition should be a tool applied on a case-by-case basis. For the sake of legal certainty, Telefónica requests the Commission to clarify the instances in which market definition is not a mandatory step in all assessments under Union competition law.
- Telecommunication operators have increasingly been facing competitive constraints from digital players such as OTT (“Over-The-Top”) platforms providing streaming services over the internet and other verticals that rely on mobile and wireless networks. These players must be included in the market definition of certain telecommunications markets.
- It is important that market definition reflects both the demand and supply-side substitutions which operate to constrain behaviour. Potential competition should be part of market definition when it is likely to affect the structure of a market and to become an immediate competitive constraint that the undertakings involved face.
- Telefónica requests more clarity on the instances where the SSNIP test is an appropriate tool to be used in market definition.
- As to the hierarchy of evidence, it would be useful if the Commission provided guidance on the most relevant type of evidence according to the case.
- Finally, Telefónica welcomes the clarification that market shares are not the sole indicator of an undertaking’s strength in the market. However, the Commission should clarify the value that market shares have in these instances.

## 2. Introduction of the Notice

Telefónica welcomes the comprehensiveness of the Introductory section of the Draft Notice, which tackles most of the significant developments on the common market since 1997. The following points are of special relevance:

- Point 2: the specific mention of the purpose of competition policy as a tool to preserve well-functioning markets while addressing market failures and contributing to the twin green and digital transitions is very positive. Telefónica is committed to achieving a timely digital transition, and in this sense, market definition is a necessary tool that needs to take account of the level of interdependence between players in the internal market as well as of the competitive constraints headquartered outside the EEA. The Commission's acknowledgement of the importance of preventing dependencies and increasing the resilience of the EU will surely lead to more precise market definitions whilst contributing to the Union's policy goals.
- Point 7: market definition and market shares are not the sole indicator of competitive strength of players in the market and therefore, competition law analysis should always be applied on a case-by-case basis. For the sake of legal certainty, Telefónica requests the Commission to clarify the instances in which market definition is not a mandatory step in all assessments under Union competition law.
- Point 11: Telefónica welcomes that market definition will be based on the facts of the case according to the specific sector. The telecommunications sector has significantly evolved since 1997.
  - In the recent years, the telecommunications market has been facing competitive constraints from firms outside the sector, such as OTTs and verticals. These companies have irrupted in the sector through, *inter alia*, the acquisition of spectrum, and the provision of cloud services<sup>1</sup> and internet services via satellite<sup>2</sup>. Accordingly, the competitive pressure that these firms exert needs to be considered in market definition.
  - Similarly, the Audio-visual ("AV") sector in which Telefónica is active, has been facing increasing competition from new business models vertically integrated (OTTs and platforms such as Netflix, HBO, Disney +, and Amazon Prime). An accurate market definition in the AV sector should consider the competitive pressure that new business models exert in Pay-Tv and in the wholesale commercialisation of AV content and TV channels

Therefore, the Commission's acknowledgment that it is not bound to apply the definition of a relevant market from past decisions in future cases is especially relevant. Market definition should always be undertaken on a case-by-case basis as markets are continuously evolving.

- Point 13: Telefónica agrees with the fact that market definition shall not prejudice the outcome of the Commission's assessment under competition law. However, the Commission needs to provide further guidance on market shares. How reliant will market

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<sup>1</sup> See for example <https://www.businessinsider.es/teleco-proveedor-cloud-carrera-operadoras-espana-938613>.

<sup>2</sup> See for example SpaceX se asocia con Google para desarrollar internet por satélite (eleconomista.com.mx).

shares be when market definition is allegedly not a precise tool in a specific case? How does the fact that market definition does not prejudice the outcome of the competitive assessment reconcile with the need to calculate market shares?

- Point 14: more guidance as to what is considered an “*immediate competitive constraint*” in the relevant market<sup>3</sup> would be welcomed.
- Point 15: Telefónica agrees with the fact that market definition can differ, even when the same products and geography are concerned. Business decisions and competitive constraints are not only based on price, as parameter of competition. For example, telecommunications’ operators compete on price but also on investment.
- Point 16: an accurate market definition analysis should always include a forward-looking assessment, not only when as expressed in the Draft Notice, “*the case calls for it*”. For the sake of legal certainty, Telefónica requests the Commission to use a reliable benchmark to determine potential competition and whether there is sufficient probability that a new type of product or service is about to emerge on the market. According to the Notice, the Commission takes expected short-term or medium-term structural market transitions into account where they would lead to effective changes in the general dynamics of demand and supply within the period that is relevant for the Commission’s assessment. It would be desirable that the Notice gives further guidance on what the Commission means by short or medium term. As already stated, in the recent years, Telefónica has been facing competitive constraints from OTTs and verticals. These players have the potential to affect the general dynamics of demand and supply in telecommunications and AV markets, and therefore, they should be considered in the market definition phase.

### 3. Concept of the relevant market and general methodology

In general terms, Telefónica welcomes the update of section 2 of the Notice. First, the concept of product and geographic market remain consistent whilst there is an explicit recognition to temporal considerations (e.g., seasonality, peak/off-peak times).

As regards the general methodology for market definition:

- Point 25: it is important that any market definition reflects both the demand and supply-side substitutions which operate to constrain behaviour. Potential competition should be part of market definition when it is likely to affect the structure of a market and to become an immediate competitive constraint that the undertakings involved face. To this end, the Commission should introduce a benchmark<sup>4</sup> to assess whether potential competition should be considered in market definition as opposed to more remote competitive constraints. This assessment should also consider market-specific factors at play including whether increases

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<sup>3</sup> For example: a useful benchmark can be the internal documents of the parties. If their internal documents reflect that a potential competitive force from a different geographic or product market is part of the strategic decisions of the company, it should be deemed as an immediate competitive constraint and therefore, included in the market definition.

<sup>4</sup> For example: internal documents of undertakings operating in the market might point to potential competitors that are likely to become an immediate competitive constraint in the relevant product/geographic market.

in demand could reasonably make a potential competitor's entry more likely, timely and sufficient.

- Point 26: Telefónica agrees with the recognition of price discrimination between customer groups. For example, in the telecommunications sector, the customers of one product/geographic market can be willing to pay more for a differentiated service (e.g., more capacity).

As regards the General methodology for defining product markets:

- Point 29: the consideration of competitive parameters other than price, such as quality and innovation when defining product markets is positive. In this regard, sustainability, privacy, and consumer choice should also be considered in the assessment of the relevant product market.
- Points 31, 32 and 33: the explicit recognition of SSNIP test' limitations is welcomed. However, given that point 33 makes clear that the Commission is not under any obligation to apply the SSNIP test, Telefónica requests more clarity on the instances when the SSNIP test is an appropriate tool to be used in market definition. Likewise, the substitutability logics of the SSNIP test should be adapted with non-monetary indicators: apart from the SSNDQ test for quality, as referred in the footnote 47 of the Draft Notice. Other indicators might be considered such as attention, ("Attentional-SSNIP"), or changes in other non-monetary costs such as privacy (Small but Significant and Non-transitory Increase in Costs or "SSNIC").
- Point 33: the wording of this point suggests that the Commission will give the same value to empirical and qualitative evidence. For the sake of legal certainty, Telefónica would welcome further guidance on the hierarchy of the evidence.

#### **4. Process of defining markets**

Overall, Telefónica agrees with the Commission's parameters for defining relevant markets.

- Point 55: Telefónica agrees with the Commission's consideration of expected changes in substitution possibilities resulting from the change in competitive dynamics. However, changes in competitive dynamics do not only occur in "*rapidly evolving industries*". Telefónica believes that the Commission should consider changes in competitive dynamics in *all* the industries, especially in convergent markets (e.g., markets that interrelate and go in the same direction). Convergence is breaking traditional business silos:
  - The digital ecosystem is not the sum of multiple separate markets but a system with interrelations among layers. Product market definition should include convergent products and services into the same market regardless of the technology in which it is based. For instance, the SMP Guidelines recognise this issue when defining the product market: "*product substitutability between different services may arise through the increasing convergence of various technologies, which often allows operators to offer similar retail product bundles. The use of digital transmission*

*systems, for example, can lead to similarities in the performance and characteristics of network services using distinct technologies”<sup>5</sup>.*

- OTTs compete in the same market as traditional telecommunications operators, but through different types of technology<sup>6</sup>. Similarly, verticals are acquiring spectrum to supplement telecoms in niche areas. These services are substitutable for customers, regardless of the technology used to provide it.
- Point 71: to define geographic markets, the Commission considers the barriers and costs associated with supplying customers in different areas. In this sense, Telefónica believes that it is important to include the potential competition to define the geographic boundaries in a market. As regards the telecommunications sector, regulation generally determines the geographic market.
- Point 76: as to the hierarchy of evidence, it would be useful if the Commission provided guidance on the most reliable type of evidence according to the case. Empirical evidence shall be used when available, without prejudice to also relying on other types of evidence for the same case.
- Point 79: evidence extracted from internal documents should be considered on a holistic basis and any contradictory views should be weighted accordingly. Holistic interpretation of evidence should involve a consideration of (i) the seniority of employees/evidence creators; (ii) the age of the documentation; and (iii) the context of a document’s creation. Telefónica considers that it would be useful for the European Commission to give the opportunity to employees or experts of the companies to explain the content of these internal documents.

Last, Telefónica wishes to draw the Commission’s attention on third-party RFIs. It is important that the Commission better designs market definition RFIs in terms of targeted companies and information requested. This would avoid laborious procedures of collection and processing of information for companies. For example, RFIs are sometimes identical for customers and competitors and therefore, not tailored to the specific market participant being questioned. Thus, to the extent possible, RFIs should be short and self-explanatory.

## **5. Market definition in specific circumstances**

Telefónica welcomes a more detailed assessment of market definition in specific circumstances. In particular, the introduction of a sufficiently flexible definition for multi-sided platforms, and the greater emphasis given to “non-price elements”.

In addition, defining a product or service as a bundle, or as part of a wider product and service eco-system, can be of decisive relevance during the market assessment phase. This is the case of the convergence and leveraging strategies of digital players (i.e., gatekeeper platform

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<sup>5</sup> Communication from the Commission — Guidelines on market analysis and the assessment of significant market power under the EU regulatory framework for electronic communications networks and services, C/2018/2374.

<sup>6</sup> While OTTs provide services over the Internet, telecommunications operators provide their services over IPTV, copper or satellite

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operators who often single-home or use customer data to link different products and services, making it difficult for users to switch).

- Footnote 95: while the Commission considered whether the mobile retail market could be further split into sub-markets in the T-Mobile NL/Tele2 NL merger, in a different set of circumstances it may be possible for a market to be considered as broader than just mobile retail, especially given the growing trend of convergence and hybrid products. Telefónica agrees with the Commission in that market definition is only a point of departure and that market shares should not be the decisive factor for the determination of market power.
- Point 95: Telefónica welcomes the consideration that in the presence of multi-sided platforms, where separate markets have been defined for the products offered on each side of the platform, network effects and constraints from the other side of the platform may still be taken into account in the competitive assessment.
- Point 98: this paragraph should include dynamic competition resulting from fast-paced innovation, accumulation and monetisation of data, and conglomerate effects. This is particularly relevant for “zero-priced” markets, where consumers value *inter alia*, the level of data protection or the quality of the offer. The Draft Notice should consider such additional parameters to analyse the supply-side substitutability, speed of consumer habits and tipping.

## 6. Market shares

Telefónica welcomes the clarification that market shares are not the sole indicator of an undertaking’s strength in the market. It is therefore questionable whether defining a market based on an assessment of market shares can still consistently provide the basis for traditional market power assessments. On this basis, the Commission needs to provide further guidance on the importance of calculating market shares in every competition case<sup>7</sup>.

- Point 105: the Commission should also use other factors to assess the relative position of undertakings in the market. For example, the telecommunications market is infrastructure-based. Thus, apart from barriers to entry, access to specific assets and inputs, product differentiation and degree of substitutability, the Commission should also consider factors such as infrastructures.
- Points 104-107: Telefónica welcomes the explicit recognition of value, volume, and capacity as basis for the calculation of market shares.

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<sup>7</sup> Other factors such as competitive constraints, barriers to entry and conglomerate effects might be more appropriate measures.