

# Merger Control Guidelines review:

A catalyst for innovation  
and growth in Europe?

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# 1.

## Executive Summary

Telefónica advocates for a fundamental revision of the European merger control framework. The current revision of the Merger Control Guidelines is a great opportunity for the Commission to materialise the objectives of the 2024-2029 mandate focused on the support of innovation, resilience, and growth of the European economy. This paper summarises Telefónica's proposal for the revision of the Merger Control Guidelines.

**The new Guidelines must properly reflect all dimensions of consumer welfare** | The upcoming revision of the EU Merger Guidelines faces a complex challenge: integrating new policy objectives such as resilience, efficiency, innovation, and security, into a framework historically centered on preserving market structures and controlling price effects.

The traditional static efficiency approach, focused largely on demand-side factors and price-cost relationships, has proven too limited to capture the full scope of consumer welfare, particularly as it neglects supply-side dynamics and broader welfare indicators. To ensure a technical analysis of all the new objectives of merger control, the Commission should introduce in the analysis all the parameters of consumer welfare: price, quality, innovation, and consumer choice.

**A comprehensive analysis demands a shift in the current economic approach** | A modernised economic approach to competition policy should move beyond static, price-based analysis to one that recognises how firms operate, invest, and innovate under real market conditions. This involves examining the supply-side production functions, risk, and uncertainty, and aligning competition assessments with the realities of business decision-making.

By focusing on innovation, investment cycles, productivity growth, and legitimate profits as signals of efficiency and risk-taking, merger control analysis can better capture the dynamic processes that drive long-term welfare, resilience, and sustainable economic growth.



**Telefónica's technical proposal for the analysis of concentrations** | Telefónica proposes that the Commission incorporates all dimensions of consumer welfare, grounded in the dynamic efficiency economic approach, across all stages of the analysis.

- This includes **assessing pre and post-merger competition** not only in price but also in quality, innovation, and choice, while considering related factors such as sustainability and resilience, and a comprehensive supply-side analysis of firms' production functions and capabilities.
- **Efficiencies** should be evaluated across all competition dimensions under a feasible standard of proof equivalent to that applied when demonstrating a loss of competition, with timelines aligned to investment and innovation cycles and case-specific counterfactual analyses supported by expert input. Assessments should account for rivalry-enhancing effects and out-of-market benefits, reflecting broader EU objectives.
- Where post-merger incentives are uncertain, investment-related **remedies** may be appropriate to ensure the merged entity leverages its scale and capabilities to promote competitiveness, sustainability, resilience, and strategic autonomy, following precedents such as the Vodafone/Hutchinson case in the UK.

In summary, the merger control should holistically integrate dynamic efficiency, multiple dimensions of consumer welfare, and broader economic benefits to act as a genuine catalyst for innovation and growth in Europe.



## 2.

### Background and context

Telefónica has long advocated for a comprehensive review of the European merger control framework, starting with its foundation: the EU Merger Control Regulation. After more than two decades in force, a thorough reassessment of both its substantive and procedural aspects is long overdue.

Although the opportunity to revise the Regulation itself was not seized on this occasion, Telefónica welcomes the clear signals of reform from the Commission for the mandate 2024-2029. Both the Mission Letter addressed to Executive Vice-President Teresa Ribera and the Competitiveness Compass explicitly call for a revision of the Merger Guidelines, a process that the European Commission is currently undertaking.

#### A mandate to support innovation, resilience and growth

In the Mission Letter<sup>1</sup>, the President of the EU Commission gives the clear mandate to the Executive VP of Clean, Just and Competitive Transition to modernise EU's competition policy in order to support European companies to innovate, compete and grow. In addition, it includes the express mandate to review the Horizontal Merger Control Guidelines to *"give adequate weight to the European economy's more acute needs in respect of resilience, efficiency and innovation, the time horizons and investment intensity of competition in certain strategic sectors, and the changed defence and security environment"*.

The 2025 Competitiveness Compass<sup>2</sup> also highlights that a fresh approach, better geared to common goals should be reflected in revised guidelines for assessing mergers *"so that innovation, resilience and the investment intensity of competition in certain strategic sectors are given adequate weight in light of the European economy's acute needs"*.

To support the goals the Commission is seeking to achieve in the revision of the Merger Guidelines two steps are primary and essential. First, it is necessary that the Commission considers the full concept of consumer welfare: price, quality, choice and innovation in all the stages of the merger control assessment. The second step is a sine qua non condition to achieve the first: it is necessary to change the economic theory underpinning merger control analysis.



### 3.

## **Starting from the basics: the new guidelines must properly reflect all dimensions of consumer welfare**

The task entrusted to the Executive Vice-President Teresa Ribera and DG Competition for the current mandate is undeniably complex, as it involves revisiting the framework for merger control by integrating new objectives such as resilience, efficiency, innovation, and the new defence and security landscape – some of which, until now, have not been considered as essential elements of the Commission’s merger control assessment.

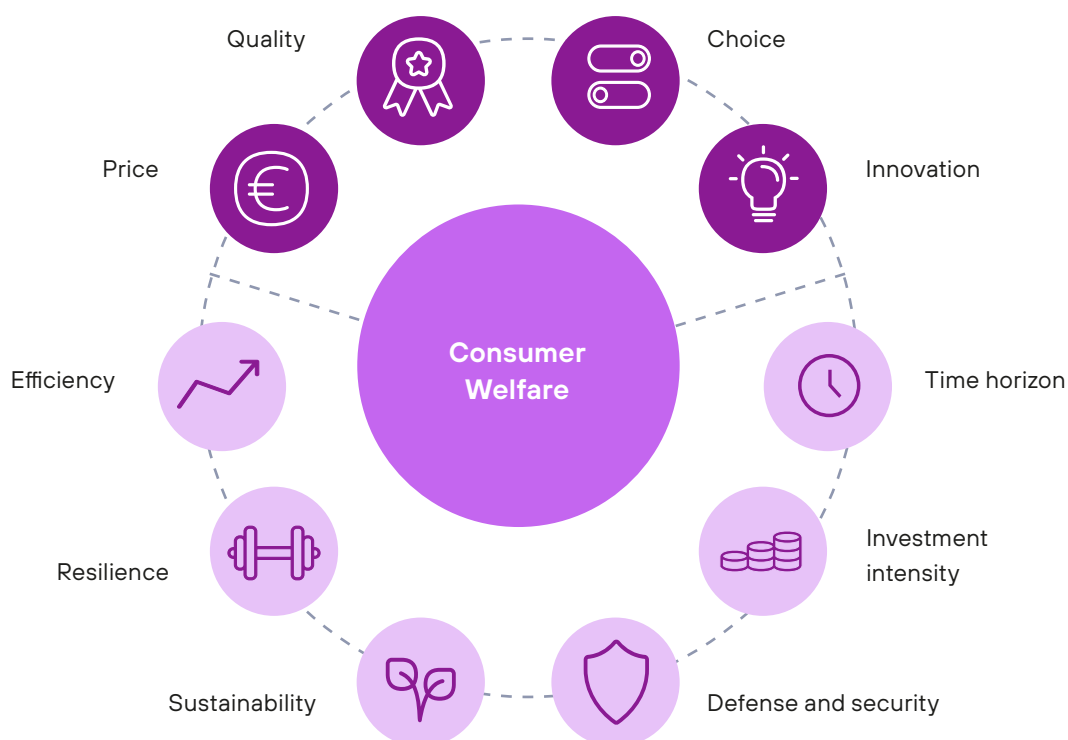
Traditionally, the Commission has assessed mergers with a narrow focus of preserving market structures, primarily through the lens of price effects under a static efficiency approach. While this approach has offered a clear set of KPIs and a well-defined methodology, it has led to an interpretation of competition almost exclusively in terms of price-cost relationships, and demand-side factors, neglecting analysis of the supply side. As a result, it presents significant limitations when attempting to incorporate broader objectives, particularly because it is not compatible with consumer welfare parameters beyond prices.

To ensure that the objectives outlined in the Mission Letter are effectively incorporated into the merger control process, Telefónica proposes that the Commission adopts a technical approach rooted in the traditionally accepted competition parameters that measure consumer welfare – parameters that the Commission has formally endorsed.

Objectives such as resilience, sustainability, efficiency, investment intensity, and strategic autonomy as part of defence and security, should be analysed insofar as they are reflected, on a case-by-case basis, within the dimensions of price, quality, innovation, and consumer choice, parameters that should be evaluated throughout all stages of the merger review.



**Figure 1. Consumer Welfare dimensions and indicators**



Such a holistic assessment is difficult to achieve under the traditional static efficiency approach currently applied by the Commission. A comprehensive evaluation of consumer welfare requires moving beyond a narrow focus on price effects to include broader indicators of market performance and consumer benefit. Therefore, the Commission should adopt an approach capable of capturing the dynamic dimensions of competition. Elements such as innovation, quality, and consumer choice often have a deeper and more lasting impact on welfare than price alone. As such, a shift in the underlying economic approach is not merely desirable — it is essential.

# 4.

## A comprehensive analysis of all dimensions of consumer welfare demands a shift in the current economic approach

An alternative to the static efficiency model for understanding markets is the dynamic efficiency approach. Although there is not a synthetic definition, this approach considers that competition occurs across all dimensions of a product or service – not just price. This view is clearly more consistent with the empirical evidence and with the experience of most customers, who normally value goods and services based on different dimensions.

Telefónica's economists have been exploring how competition policy can better enable and safeguard dynamic competition. After years of analysing antitrust economics, they have concluded – alongside many other scholars – that the dynamic efficiency approach offers the most effective framework for incorporating the four key parameters of consumer welfare into the competition analysis<sup>3</sup>. This approach provides a pathway to achieving the broader objectives set out in the Mission Letter. A dynamically competitive market will naturally contribute to the Commission's objectives, to the extent that these objectives are demanded and valued by society.

How can this approach be implemented? It is not an easy question; however, Telefónica contends that the following considerations should be taken into account:

**Figure 2. A shift in economic approach to competition policy: integrating dynamic efficiency into competition policy**



This change of approach would in turn be reflected in all stages of merger control procedure and so the analysis of the transaction effects, efficiencies, and eventual remedies should also take into consideration all aspects of consumer welfare and not just prices.

# 5.

## What role should **investment** and **innovation**, **sustainability**, **competitiveness** and **resilience** play in the new guidelines?

### 5.1 Investment and innovation to enhance productivity

Traditionally, investment and innovation have been assessed in merger evaluations using the same criteria applied to price-cost considerations under the static efficiency framework. This approach assumes a state of perfect competition as the ideal for social welfare, as it would theoretically maximize the efficient allocation of existing products and technologies.

However, investment and innovation inherently involve changes to a specific set of products, services and technologies, introducing uncertainty and requiring the application of new processes and knowledge. Consequently, analysing them through purely static lens overlooks these dynamic elements and risks missing key aspects of their impact.

To ensure that investment and innovation are properly analysed in the Commission's assessments, it is essential to examine the supply side of companies and sectors for the following reasons<sup>6</sup>:

- **Industry-specific dynamics:** investment and innovation processes vary significantly across industries and technologies, requiring tailored analytical approaches.
- **Firm-level heterogeneity:** companies possess distinct capabilities, skills, and resources that shape their innovation and investment strategies.
- **Uncertainty and risk:** these processes are inherently uncertain and risky, making it impossible to define optimal decisions in advance. Instead, firms often rely on trial-and-error approaches.
- **Beyond market structure:** most importantly, market structure is just one of many factors influencing investment and innovation.

Competition plays an important role in creating incentives for companies to invest and innovate. Therefore, the Merger Guidelines should be able to introduce a full analysis of investment decisions and innovation processes by analysing the production function of the involved firms in all the stages of merger investigations.

In particular it should address the key question: does the merger create sufficient conditions for competition in innovation and investment?



## 5.2 Scaling up: a key driver of competitiveness and resilience

Mergers are pursued by companies with the objective to enhance their **competitiveness** by combining synergies, reducing costs, improving access to financial resources, and leveraging economies of scope.

For many firms, mergers are critical to their long-term viability, especially for those with high fixed costs. In such cases, it becomes crucial to conduct a thorough **analysis of the production function of each sector**, as it directly affects companies' ability to scale up within the relevant markets and to become more competitive.

For example, in the telecommunications sector, the take-up is the production function. For network operators to operate and deploy a network it is necessary to ensure a minimum take up – a certain number of customers within the network. When telecom companies decide to merge, the objective is often to achieve greater scale – i.e., increased take-up – in the relevant markets. This expansion of the customer base enables higher returns on investment, which can then be reinvested in further innovation and network development. Depending on the specific case, relevant markets may be local, regional, national, European, or even global.

**Resilience** is a competitive parameter when customers value it as a feature of products or services – specifically, the ability to maintain service continuity. It refers to the capacity to withstand, adapt to, and recover from disruptive events while maintaining core functions. In such cases, companies compete by investing in the resilience of their offerings to meet customer expectations. Its relevance varies by sector, production function, and the criticality of products or services.

Digital infrastructure resilience is crucial. In telecommunications, resilience is vital for ensuring the uninterrupted delivery of essential services. Both consumers and society value reliable networks, and operators compete to meet these expectations by maintaining service even in challenging conditions. Achieving resilience requires long-term investment and strategic planning; anticipating and absorbing shocks ensures sustainable performance. Greater scale supports resilience by enabling organizations to exploit economies of scale, whereas smaller companies often struggle to maintain service quality under extreme conditions.

Effective competition should drive improvements across all dimensions of consumer welfare, including quality, innovation, and resilience. However, resilience depends on meaningful network investment, not merely the number of market players. Operators that rely on business models based on mandatory access without significant investment do not enhance resilience, illustrating that artificial competition fails to strengthen market robustness or meet strategic objectives.



### 5.3 Sustainability and clean technologies: a merger control aligned with the green transition

The environmental impact of a product or service is an inherent attribute of its quality and a key driver of future innovation. Although sustainability has not generally been viewed as a parameter of competition, consumers increasingly value more sustainable products and services. In response, companies like Telefónica are progressively embedding sustainability into their core strategies, often investing, innovating, and competing to deliver more sustainable offerings.

Sustainability should therefore be a key element in the Commission's assessment at every stage of the merger control process – either as a parameter of competition when companies compete on sustainability, or as part of the comprehensive consumer welfare analysis when sustainability contributes to the quality and innovation of a product or service.

Sustainability efficiencies have the particularity of benefitting not only the consumers present in the relevant markets of the merger but also many other consumers and citizens in a society as well as the environment itself. In the revision of the Guidelines, the Commission should consider these beneficial out-of-market efficiencies. Telefónica has articulated a proposal to analyse and quantify sustainability efficiencies.



# 6.

## Telefónica's technical proposal for the assessment of concentrations

Based on all the above explained principles and competitive dynamics, Telefónica proposes incorporating the full concept of consumer welfare – grounded in the economic approach of dynamic efficiency – throughout all stages of merger control review.

- 1. Initial review and assessment of loss of competition:** the Commission needs to assess the pre-merger and post-merger conditions for competition in price but also in quality, innovation and choice. This would involve conducting a comprehensive analysis of the supply side of companies and sectors, i.e. an analysis of what is their function of production and their capabilities for competing pre and post-merger.

There is an essential question to be asked: will the merger ensure adequate conditions for competition to exist in price, quality, choice and innovation – including related factors such as sustainability and resilience?

The Commission will need to trade off the loss of competition in one or more parameter in the pre-merger situation against the post-merger enhancement of competition in other parameters.

- 2. Efficiencies:** the Commission should analyze efficiencies considering also all dimensions of competition and the features of the supply side in each case, under a standard of proof which makes feasible the recognition of efficiencies.
  - a.** It is essential that the **standard of proof** of the parties to demonstrate efficiencies is equivalent to that of the Commission when proving the “loss of competition”.
  - b.** The **timeframe** to proof efficiencies needs to be realistic and consistent with the characteristics of the supply side of companies in terms of investment and innovation cycles.
  - c.** The Commission needs to acknowledge that the **counterfactual analysis** is not always possible, especially in situations relating to investment and innovation where it is not possible to anticipate market outcomes. Therefore, such analysis should be case-specific, bearing in mind that contractual alternatives are not always less restrictive or capable of generating the same efficiencies as the merger. To ensure a comprehensive analysis, the Commission should involve experts specialised in the evaluation of efficiencies – such as financial economists or management consultants – who possess the analytical tools to model and forecast market scenarios with rigour and precision.



**d.** Efficiencies assessment should also consider all dimensions of consumer welfare. Similar to the approach taken by the CMA, the Commission should consider **rivalry-enhancing efficiencies** which follow from greater ability and incentives of the merged companies that induce them to act as stronger competitors to their rivals – for example, by reducing their marginal costs giving them the incentive to provide lower prices, more innovative services or a better quality, range or services<sup>7</sup>.

**e.** Last, the Commission should consider **out-of-market efficiencies** that indirectly benefit a broader spectrum of consumers, beyond those directly affected by the merger. This consideration is essential to assess key objectives of the Commission, such as resilience, innovation and sustainability. Mergers can generate efficiencies and positive spillover effects across objectives and interconnected sectors of the economy, ultimately benefiting a wider range of consumers and contributing to broader systemic improvements.

- 3. Remedies:** the merger would generally enhance the parties' scale, capabilities, and incentives to compete across all dimensions of consumer welfare. However, where the Commission has doubts regarding the parties' post-merger incentives, it is appropriate to consider **investment-related remedies**.

Such remedies can help ensure that the merged entity channels its increased investment capacity – resulting from synergies – towards key EU objectives, including competitiveness, sustainability, resilience, and strategic autonomy. In this context, the CMA's decision in the Vodafone/Hutchinson case<sup>8</sup> in the UK sets a positive precedent, introducing an investment remedy that is monitored by the sectoral regulator, i.e. OFCOM.



**Figure 3. Telefónica's technical proposal for the assessment of concentrations**





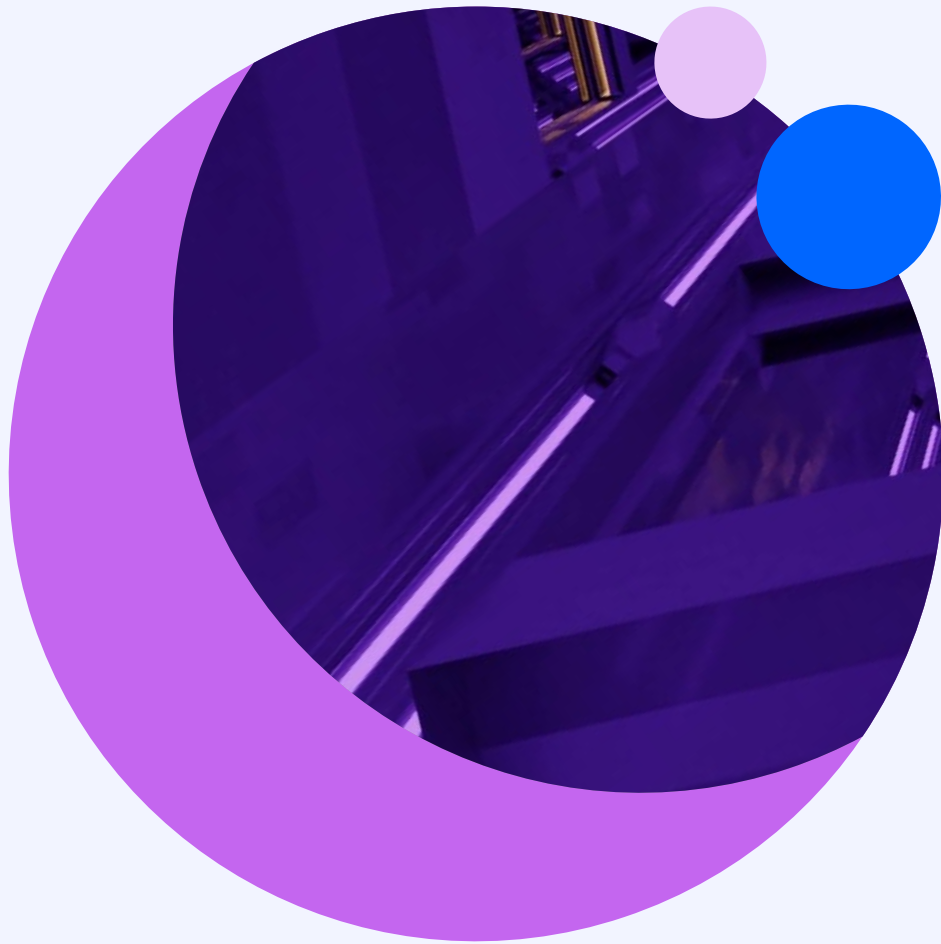
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