Telefónica

Policy Brief

EU Draft Merger Guidelines

As part of the ongoing review of the EU Merger Guidelines, the Commission launched a second consultation on the draft Merger Guidelines, hereafter known as “Draft Guidelines”, where Telefónica shared its views welcoming the Commission´s efforts to drive a true change in its merger control policy that fosters scale, competitiveness, growth and innovation in the EU.

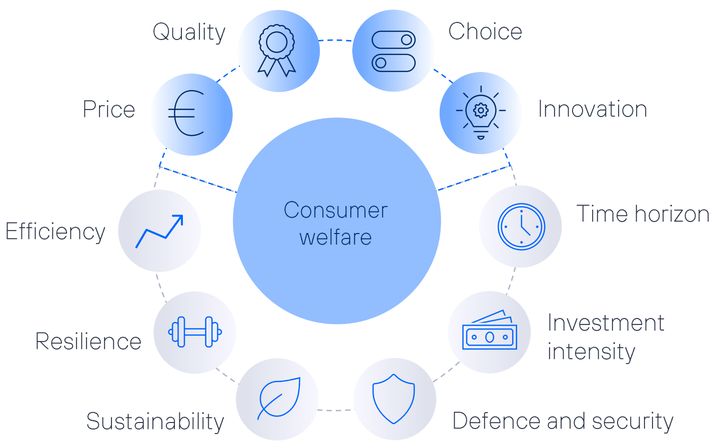
In this position paper, we share the key takeaways—focusing mainly on the areas where further improvements are still needed.

July, 2026

1. Recognition of the full concept of Consumer Welfare

Telefónica welcomes that the core element of its proposal, which is the full recognition of the parameters of consumer welfare in the merger assessment, is now reflected in the new draft Guidelines.

During the consultation, Telefónica has advocated for a technical approach grounded in well-established competition law parameters for assessing consumer welfare (i.e. quality, innovation and consumer choice, beyond short-term price effects).



The Commission now recognizes that the assessment of mergers should give adequate weight to price and non-price parameters, taking into account appropriate timeframes according to the characteristics of the markets and the sector.

Non-price competition can encompass a variety of parameters to the extent they are relevant for the competitive process in the markets at hand, including output and quality; also covering consumer choice, capacity, output, product features, investment, innovation, privacy, sustainability, resilience and security of supply.

2. A shift towards a more dynamic analysis is welcome, but the recognition of scale's benefits requires a supply-side lens

In line with Telefónica's proposal, the draft Guidelines place a strong emphasis on competitiveness objectives, acknowledging that due weight should be given to scale, innovation, investment and resilience as pro-competitive factors. However, the current framing appears to associate pro-competitive scale primarily with the ability to compete in global markets. This perspective risks overlooking the competitiveness of many European industries whose relevant markets—defined on a case- by- case basis—may be local, regional, national or cross border rather than global. Therefore, in its response, Telefónica has advocated for the recognition of scale in the relevant markets.

Similarly, Telefónica welcomes the clear shift towards a more dynamic analysis based on the incentives and ability of firms to innovate and invest as a result of the transaction. However, the draft Guidelines leave scope for the Commission to further strengthen its analysis by fully leveraging the dynamic efficiency economic theory, which would allow for a more comprehensive assessment of how firms operate, invest and innovate under real market conditions, and therefore better identify the circumstances in which scale is necessary to drive competitiveness.

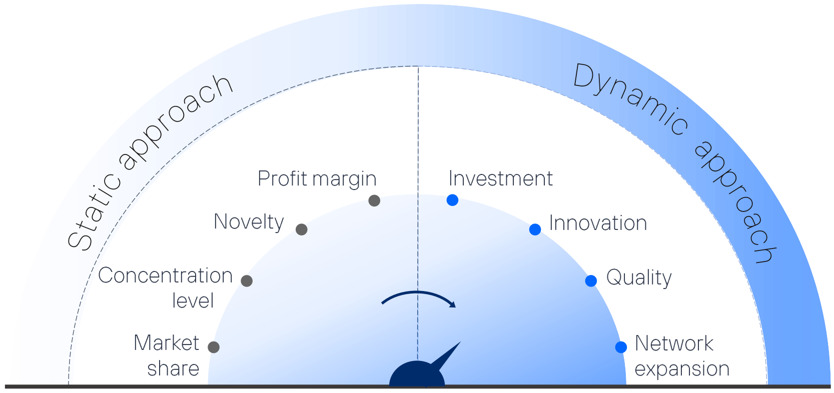
Telefónica proposes that the Commission:

- Takes a proper assessment of the supply side of markets, which involves a clear analysis and understanding of the function of production of each market and firms' capabilities.
- Considers performance improvement as a driver of competitiveness: taking into account productivity increases and not just how to share the current productivity. This approach encourages thinking in terms of market growth or 'growing the pie', instead of just redistributing what already exists among established players
- Considers profits and profitability driven by innovation and risk-taking as a desirable market outcome: in contrast to those stemming from monopoly power or reflecting inefficient market structure and extraction of consumer welfare.

3. Reconciling market power with the scale needed to drive investment, innovation and competitiveness

The draft Guidelines continue to rely on a largely static conception of market power, placing excessive weight on structural indicators such as market shares, concentration levels and, as a novelty, profit margins. While these metrics may provide initial signals, they do not, on their own, capture how competition takes place across all relevant parameters of competition, particularly in dynamic and investment-intensive markets.

A more forward-looking and economic-based approach is needed to distinguish genuine market power of firms from the scale required to compete in all the competition parameters, i.e. to compete effectively on investment, innovation, quality and, in the case of telcos, also network expansion. In sectors characterized by high fixed costs and long investment cycles, larger scale may be a precondition for effective competition rather than evidence of market power.



The assessment should therefore move away from an excessive reliance on static presumptions of market power and instead focus on the supply-side characteristics of the firms involved in the transaction.

Similarly, profitability should not be treated as a proxy for market power. High profits may reflect efficiency, successful innovation, risk-taking and the ability to recover substantial investments, particularly in capital-intensive industries. Market power concerns should arise only where profits stem from a lack of competitive constraints rather than from superior performance or the scale necessary to sustain investment and innovation.

4. "Theories of Harm" vs "Theories of Benefits"

Under the current proposal, the Commission would focus primarily on the identification of anticompetitive effects and potential "Theories of Harm", while leaving it to the merging parties to demonstrate any positive effects through efficiencies now framed under the new 'Theories of Benefits' concept. Then, the Commission would make a balancing exercise between harm and benefits within the SIEC assessment.

This proposal prevents the Commission from carrying out a holistic assessment of the actual loss of competition across all relevant parameters of competition before formulating its Theory of Harm.

Telefónica encourages the Commission to endorse the methodology proposed by the BRG's Report* :

- Step 1: Identify the relevant dimensions of competition that are relevant to the deal and the market characteristics around them.
- Step 2: Assess the so-called "direct strategic effects", stemming from the change of ownership. This step should be analysed by the Commission to help it form a view on the "Theory of Harm", conceptualized as the consequence of getting a net effect of the loss or gain of competition in all the dimensions affected by the deal and identified in Step 1.
- Step 3: Consider the potential efficiencies, the so-called "indirect strategic effects", such as investment and production costs, access to technologies, financing conditions or organizational capabilities. This step is compatible with the "Theory of Benefit" scenario proposed by the Commission as the parties are the best placed to show the benefits brought to consumers by the synergies of the deal.

In any event, if this approach is not adopted, the Commission should, at a minimum, clarify how the SIEC test would operate under the proposed Theory of Harm vs. Theory of Benefits framework. In particular, it should explain at what stage of the review process the parties will be able to advance efficiency arguments and how such arguments will be assessed. If the parties are required to present efficiencies at an early stage and the Commission rejects them, will they have a further opportunity to substantiate or refine those arguments later in the procedure? Greater procedural clarity would be essential to ensure legal certainty and preserve the parties' rights of defence.

*A Dynamic Framework for the Assessment of Horizontal Mergers, Boutin, Eymard and Williams (2026)

5. Symmetric treatment in the assessment of efficiencies vs harm and taking the "most plausible" counterfactual

Telefónica welcomes the recognition of dynamic efficiencies based on investment and innovation, taking appropriate timeframes to materialize according to the characteristics of the markets and the consideration for out-of-market efficiencies. In addition, the Commission make~~s~~ a revolutionary shift in the standard of proof for assessing harm and benefits, where it is intended now to be symmetrical under "the more likely than not". Nevertheless, Telefónica considers that the efficiencies section can be significantly improved.

Telefónica proposes the Commission to:

- Ensure that the evidentiary standard for harm and efficiencies is genuinely symmetrical, so that efficiencies are neither subject to a higher burden of proof (as the traditional three criteria of verifiability, merger-specificity and pass-on to consumers) nor treated as exceptional (consistent with the stated objective of the Commission to apply equivalent evidentiary requirements based on a robust and cogent body of evidence). To the very least, there is a clarification needed in the current draft Guidelines on how the announced symmetrical standard can coexist with the three criteria test.
- Guarantee equal treatment of long-term and short-term efficiencies, regardless of whether they are dynamic or direct, through evidential, procedural, and analytical tools that do not depend excessively on quantification. For this, it is key that the time horizon reflects economic reality by properly analyzing the supply side and characteristics of the market.
- Assess merger specificity against the most likely counterfactual or subsidiarily a counterfactual with a certain degree of likelihood and explicitly encompassing the possibility that the counterfactual is a no-alternative scenario, which remains a common benchmark in M&A practice.
- Recognise out-of-market efficiencies as relevant economic benefits contributing to the Union's competitiveness objectives.

6. Key takeaways and looking ahead

Telefónica welcomes the Commission's efforts to drive a meaningful evolution of EU merger control policy through the draft Guidelines, as well as its willingness to engage with stakeholders and take their views into account. This provides an important opportunity to develop a more dynamic, future-oriented and economically grounded framework that preserves effective competition in all its parameters while better reflecting today's investment, innovation and competitiveness challenges in the EU.

To further advance these objectives, Telefónica has proposed a number of targeted amendments and recommendations, including:

1. Ensure a cautious application of new Theories of Harm, together with clear and meaningful guidance on how the Theories of Benefits will apply in practice.
2. Focus the balancing exercise between Theories of Harm and Theories of Benefits on the competitive dimensions of each market with a clear methodology (as the one proposed by BRG) to carry out a holistic assessment of the actual loss of competition.
3. Strike an appropriate balance between static and dynamic assessment, based on a clear understanding of market and supply sector characteristics inspired by the dynamic efficiency economic theory**.
4. Recognize performance improvements arising from scaling-up as key driver of competitiveness. Profitability arising from innovation and risk-taking constitutes a desirable market outcome and should not be treated as indicative of market power.
5. Adopt a genuinely effects-based approach which gives equal weight to pro-competitive and anti-competitive effects, by removing structural presumptions of harm that are not supported by evidence but rather rely on static indicators.
6. Ensure that the evidentiary standard for harm and efficiencies is genuinely symmetrical, so that efficiencies are neither subject to a higher burden of proof nor treated as exceptional.
7. Guarantee equal treatment of long-term and short-term efficiencies; recognise out-of-market efficiencies; and aassess merger specificity against the most likely counterfactual or subsidiarily a counterfactual with a certain degree of likelihood.
8. Reduce complexity. The current draft Guidelines expands the scope of the market power and theories of harm chapter. This should not lead to even more complex merger procedures.

Finally, looking at future developments, Telefónica considers that, after having tackled such relevant evolution of the Merger Control Guidelines, the Commission should open the review of the Remedies Notice accordingly.

** See Telefónica's paper position "Dynamic Efficiency: the key to investment and innovation" https://www.telefonica.com/en/communication-room/blog/dynamic-efficiency-key-investment-innovation/

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