orange™

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European Commission

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Dear Director-General, dear Roberto,

First let us warmly thank you for the new initiative regarding the Digital Compass which should pave the way to a new approach supporting the further development of VHCN in Europe. As you know to achieve these objective we need to be able to invest much more and benefit of a smart regulatory framework. Therefore we take the opportunity of this letter to draw your attention on several issues of paramount importance on both the competitive and investment friendly environment in particular regarding the implementation of the European Communications Code objectives and more specifically on the following issues.

- The process of market analysis flawed by the diverging ways regulators are implementing the competitive assessments which lead *in fine* to overestimate or underestimate significant market power (SMP) and impose or withdraw inappropriately its related obligations;
- The implementation of the economic replicability test (ERT), in particular as the European Commission is currently reviewing the NGA and Non-Discrimination and Costing Methodology Recommendations;
- The growing impact of media/TV rights on competition in broadband markets, not considered by the framework of market analysis which remain limited to basic telecommunications despite quantitative evidences of convergence of both services in some countries, and the way this should be taken into account within the European framework.

On the first point, we wanted to flag the diverging approaches in the way competitive pressure is assessed in the two major countries where fibre is deployed in the EU, thanks to our intensive investments. In particular we wanted to underline that on one hand, while the competition from infrastructures is strong on a large part of the French territory with 4 players owning a FTTH network on currently 12.1 m households and nearly 20 m households in 2023 (at the end of the recently adopted market analysis), no change has been contemplated within those areas which are benefitting from high level of competition given the extended choice available to customers, However, existing remedies are being maintained upon Orange.

Protection of commercial interests, Art 4(2)

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On the second point, we wanted to come back on the main comments made by Orange in the course of the review of the Recommendations on NGA and Non-discrimination and Costing methodologies. In particular, we expressed our concerns regarding the ERT and its treatment of wholesale access price promotions, in particular if nationwide regulation is maintained (as in France), and if the underlying regulation is to support co-investment/cofinancing. Without appropriate implementations, ERT would have counterproductive consequences, as not providing the incentive for investment while ensuring replicability. In addition, it is essential that when there are multiple bottlenecks, the right parameters are effectively taken into account in order to ensure the right competitive conditions.

This is in particular the case of **convergent markets** - should they include **mobile or media services**. In particular, the costing of premium football TV content in convergent bundles in Spain has proven inadequate, enabling Telefónica´s discriminatory growth and without guaranteeing full recovery of costs. We invite you to have a much closer look at the growing impact of media/TV rights on the broadband market competition. This impact is particularly strong where, as in Spain, the SMP telecommunications operator is also the dominant operator in the Pay TV market and is bundling at retail level broadband, mobile and Premium TV services including football. The Recommendation on Relevant markets has just been released and does not give a straightforward solution to such a situation that will certainly develop further. One option would be to make sure that regulators make a better use of the Code enabling them to intervene in related markets. We have put in an attachment some additional element on this very sensitive issue.

We would be very happy to discuss these different sensitive issues at your best convenience, together with the new ambition expressed in the Digital Compass to secure resilient and green VHC digital networks which require to develop a new deal between operators and public authorities in order to adapt and streamline the way regulation is implemented.

Personal data

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Annex 1 – Overview of the retail market in Spain

In the Spanish market, 90% of broadband is sold within convergent packages and 5P bundles have become now a critical and major segment of it. Currently, 50% of the broadband residential connections are bundled with television and, after acquisition of DTS by Telefonica in 2014, satellite TV offers no longer exist in Spain and Pay TV is mainly distributed over broadband.

In this market context, the incumbent in Spain holds a strong dominant position in both the broadband and Pay TV markets – 60% of 5P market, 60% of Pay TV and some 90% of football customers are retained by Telefónica – and is the owner of main Premium content rights, particularly football. Privileged access to football contents by Telefónica explains the stronghold of Telefónica in 5P.

Despite TEF/DTS 2014 merger remedies, competition is not effective in Premium 5P bundles and Telefónica has reinforced dominance in 5P by bundling Football in Fusión convergence offers capturing 65% of the growth of a 5P market that has more than doubled since 2014. The merger remedies adopted have generated strong and increasing competitive distortion, with Orange remaining as the sole competitor providing football, after Vodafone´s exit, and at a great distance from Telefónica (see Annex 2 for further detail).

CNMC Spanish market analysis disregards 5P market evolution and the impact of football, the deficient existing remedies, the distortions in costs of content in the ERT and, furthermore, ignores the lack of remedies after June 2023 despite Telefónica Premium content exclusivity deals.

While TV is sold together with broadband, and key premium content as football is only available within telecoms-TV convergent packages, the absence of a correct analysis of Telefónica's dominance in 5P prevents from taking the adequate remedies in the broadband and related Pay TV access markets in Spain. Rather, increasing deregulation affecting 2/3 of the Spanish market may result in eliminating existing ex ante nationwide ERT scrutiny.

These issues seem critical for us in the perspective of performing market analyses and adopting remedies which allow operators willing to invest to compete on a fair basis. There is a need to broaden the focus on this new reality and take steps to regulate a fair access to essential TV content in markets where such contents are exclusive to a dominant company, and more when this company is also dominant in the telecommunications market.

Annex 2 – Football rights remedies in Spain

TEF/DTS 2014 merger remedies, extended until 2023, provide for **wholesale access remedies to Premium content** and **ex post replicability guarantees for competitors on top of existing ex ante ERT obligations** in the broadband market aimed exclusively at guaranteeing non-discriminatory wholesale broadband access prices.

In the case of Football wholesale remedies, pricing is based on a **cost sharing formula** – 75% cost shared on the basis of TV customers with or without Football, 20% on the basis of broadband customers and 5% on the basis of coverage – that resulted in a fixed amount per operator (**CMG**) covering a number of subscriptions valued at a **Cost Per Subscriber** (**CPA**); subscriptions exceeding that threshold are payable additionally at the CPA price.

Protection of commercial interests, Art 4(2)

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However, competitors have not been able to benefit from low CPAs, because of the **burden for competitors to growing in TV that the CMG cost sharing formula** imposes, as 75% of the CMG cost is apportioned on the basis of TV customer share, either with or without Football, at the end of the previous season.

On the one hand, growth in TV without football imposes a great cost to competitors that are obliged to choose either to compete in TV without football (Vodafone) or in TV with football (Orange). On the other hand, if the TV with football option is chosen, as is the case with Orange, due to difficulties to compete with football TV bundles, great asymmetry in TV share with Telefónica persists. [redacted]

Protection of commercial interests, Art 4(2)

Low CPAs have permitted Telefónica to retain Premium customer TV base from DTS and to grow at no cost, generating an unsurmountable gap with competitors, that are constrained due to the CMG formula.

In addition to Telefónica´s enduring and growing cost advantage, neither have **aggressive promotions** been properly accounted for in replicability tests. [redacted]

Protection of commercial interests, Art 4(2)

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However, so far, 6 years after approval of the Telefónica/DTS merger remedies, no ex post replicability analysis results have been published. The eventual ascertainment of such a squeeze might neither result in alleviating competitors from high Football costs over the last years as the remedies just foresee further lowering CPAs deeper down.