Comments by Telefónica Deutschland on the

Green Paper on Digital Platforms as part of the Digital Strategy 2025

of the German Federal Ministry for Economic Affairs and Energy from May 2016

Contents

1. Level playing field

1.1. Principles

First of all, the economic success of digital platforms is by no means to be regarded as negative. OTT providers' services are a driving force for digitalisation and also promote the data-centred business models of telecommunications network operators.

WhatsApp overtook SMS/MMS in terms of traffic volume in Germany within four years and has long eclipsed it. The traffic volume in telephony is stagnating or even – in fixed line business – falling drastically at present, whereas OTTs are recording considerable growth.

For some time, Telefónica Deutschland has been pointing out the existing distortions of competition between network operators and OTT providers. Whereas network operators are subject to the strict regulations of the Telecommunications Act (TKG), these do not apply to OTT services providing substitute functionality. This means that the latter can base their services on business models that are not permitted for traditional network operators.

The need to create a level playing field has now been recognised by most stakeholders. For example, in its statement dated 15 July 2015 the German Federal Network Agency's Scientific Working Group for Regulatory Issues recognised the need for OTT-0 and OTT-1 services to be made subject to the same regulations as traditional telecommunications providers. The European Commission also follows this line of thinking and put forward specific proposals for how a level playing field can be established between traditional telecommunications services and OTTs for the first time on 14 September 2016 in its drafts for the amendment of the European legal framework for telecommunications. The current draft of the Green Paper also addresses this topic. This is to be welcomed in principle. However, the current considerations are often based on the wrong time frame. For example, the new regulations are to be established in the EU review, but this will not take effect until 2020. In view of the rapid technological development and the dynamic market development, this is too late.

Instead, the federal government must take action quickly here. In the first step, a clarification of terminology should be incorporated in the German Telecommunications Act (TKG) to the effect that OTT services that are functionally in competition with telecommunications services are also to be treated as such for regulatory purposes. This could be done quickly and in compliance with EU law.

Germany should be the pioneer of European development in this respect – there is no need to wait passively for decisions at a European level. Instead, the federal government has the opportunity to send a signal to Brussels (as formulated in section 5 of the Green Paper with regard to Germany taking initiative on the Merger Regulation). In the opinion of Telefónica Deutschland, the European Commission's current considerations with regard to expanding sector-specific consumer protection to all number-based OTT services are not sufficient to fulfil the scope of the harmonisation required. Ultimately, it cannot just be a matter of harmonising consumer law; regulation for the protection of public security and sector-specific data protection law should also be relevant to OTT services. Furthermore, from the consumer's perspective it is not particularly important whether a service is number based or identity based. The German federal government now has the opportunity to set a

strong example in Europe with regard to strengthening fair competition by putting OTT services with substitute functionality on the same footing as telecommunications services in the German Telecommunications Act (TKG).

When the telecommunications services provided by network operators and OTTs have been made subject to the same regulations by means of suitable definitions, then in a second step an update to the national legal framework can be developed systematically.

A platform provider's size alone does not justify a need for regulatory intervention. Rather, the key question in each individual case is whether any misuse can be discerned. Two characteristics of digital platforms are interesting in this context:

1. Lock-in effects: Many platform offers aim to retain their users by means of "lock-in effects". This is legitimate in principle: For example, a lock-in effect may arise from the fact that a provider has earned a positive customer rating on a sales platform and therefore does not want to change to a different sales platform. However, if lock-in effects arise due to a lack of interoperability or portability, then in individual cases it is necessary to examine the extent to which this gives rise to a need for regulation.

2. Transfer of market power to other market segments: If a platform provider transfers its market power to other market segments, then in individual cases it is also necessary to examine whether this necessitates government intervention.

The conflicts between the German Telemedia Act (TMG) and the German Telecommunications Act (TKG) discussed in section 2 of the Green Paper show that this current differentiation in the legal system seems worth reviewing, at least with regard to digital platforms. In view of increasing media convergence, it seems sensible to combine these two laws in a single piece of legislation in the medium term.

In the short term, however, equal legal and regulatory treatment of telecommunications network operators and OTTs should be ensured. The current situation, in which telecommunications network operators are subject to the TKG, whereas OTTs are subject to the regulations of the TMG – which are considerably laxer in many areas – prevents the creation of a level playing field. As such, the regulations of the TKG should in principle also be applicable to equivalent OTT offerings. A corresponding amendment of the definitions given in the TKG should therefore be undertaken in the near future.

1.2. Regulatory areas with major differences between OTTs and traditional telecommunications providers

1.2.1. Consumer protection

- In the TKG, there are a whole 25 sector-specific standards for consumer protection, including additional information duties, a legal limit on contract terms and regulations on changes in provider.
- OTTs are not subject to any comparable regulation. There is no change in provider, no arbitration board at the Federal Network Agency, no additional information or transparency duties (e.g. section 43 TKG).

- The principle of data portability should be supported as the comparable number portability in telecommunications has resulted in intensified competition. However, it is important to define what exactly is to be covered by data portability (customer master data, contacts, instant messages/e-mails, ratings, apps acquired, purchase transactions...?). The key criterion here should be cases in which a lack of data portability leads to lock-in effects.

1.2.2. Use of data

- There is also a huge imbalance in regulatory intensity when it comes to data protection.
- To take one example, telecommunications providers require written consent from the customer in order to use location data. For OTTs, a tick in a box is sufficient.

1.2.3. Loopholes in internal security

In the area of virtual telecommunications services (known as over-the-top services or OTTs), there are massive loopholes that have a negative effect on public security and also give rise to competitive advantages as a result of avoiding costs.

- In 2015, around 25% of all telephone calls in Germany were held using virtual telecommunications services such as WhatsApp, Facetime or Skype. While Germans sent around 39 million text messages per day last year, around 667 million WhatsApp messages per day were transported in German mobile communications networks.
- The operators of virtual communication services are increasingly relying on the use of effective end-to-end encryption. Without a legal basis that provides for monitoring measures by court order and obliges the operator of the virtual communication service to cooperate, it is not possible to monitor or provide information in the case of WhatsApp, Facetime, Facebook Messenger and other similar services. The reintroduced obligation to save traffic data is explicitly not sufficient for this purpose.
- Monitoring of communication in OTT-1 services on the basis of court orders or public prosecution orders is not currently possible in Germany. The federal government is called upon to close this gap.

2. Infrastructure

Telefónica Deutschland explicitly supports the German federal government's plan to advance the expansion of gigabit networks. However, the current focus on fixed line technologies should be expanded to include mobile internet access, too. The internet of the future will be mobile – with 5G, the Internet of Things, connected cars and other developments, connectivity regardless of location will be the norm. Some are already predicting that in the future there will be "the internet" and the special case of "the fixed line internet". Based on these premises, three success factors can be defined:

2.1. Fee regulation that promotes innovation

When it comes to the regulation of fees for mobile communications, theory and practice have been diverging for years. On the one hand, it has been recognised that regulation should be conducive to investment, and it has now also been acknowledged that in view of OTT competition there is no longer any need for regulation of mobile termination, for example (see also statement by the Scientific Working Group for Regulatory Issues dated 15 July 2016). In practice, mobile network operators have for years been subject to a growing degree of regulatory intervention that takes much-needed investment funds away from the market. For example, the stricter cost standard provided for in the 2016 fee approval procedure ("pureLRIC") blatantly conflicts with the objective of regulation that promotes investment and will lead to revenue losses in the hundreds of millions. A change in direction is urgently required here to prevent the mobile communications industry's investment capacity from being reduced.

2.2. Assignment of frequencies

The primary objective of radio spectrum assignment is to provide frequency resources for the development of mobile gigabit infrastructure – not to generate revenue for the state. Profit-maximising frequency auctions should therefore be avoided in future – Germany already has the highest frequency costs in Europe. In addition, the redistribution of auction proceeds to support the expansion of fixed line infrastructure not only distorts competition; it also fails to take account of the central role of mobile communications in the gigabit society. Mobile network operators will have to invest billions of euros of their own funds in the expansion of this infrastructure over the coming years. Any further withdrawal of funds would very clearly be an obstacle to the development of gigabit infrastructure. Greater European harmonisation or at least coordination on frequency issues, including with regard to terms that encourage investment, is highly desirable.

2.3. Access to dark fibre

As with wireline technologies, high-performance fibre-optic infrastructure is also required in mobile communications (mobile backhaul). Cost projections of up to €100 billion for nationwide FTTH infrastructure and estimates for the required subsidies in the tens of billions make it clear that it would be illusionary to develop parallel, competing fibre-optic infrastructures. Instead, the available resources must be used optimally from an overall economic perspective. This creates a paradigm shift from the current closed infrastructures towards cooperative approaches in which demanders are given access to dark fibre (at reasonable commercial conditions). If individual market participants oppose this, corresponding regulatory measures could be required, particularly with regard to companies with a dominant market position.

The high level of capital expenditure – and the government subsidies required in this context – make it clear that there will be no parallel nationwide FTTH infrastructures in Germany. Instead, this infrastructure should be used efficiently and be available to all interested network operators (dark fibre access). Use of fibre-optic infrastructure by multiple network operators also improves the business case, reduces gaps in coverage and lowers the subsidies required.

3. Regulatory framework

Telefónica Deutschland welcomes the considerations described in section 5 of the Green Paper regarding the modernisation of competition law. Trends towards concentration and economies of scale for digital platforms initially arise from the mechanisms of the underlying platform economy. However, if there are suspicions of misuse of a powerful market position, the state must have the ability to intervene.

Telefónica Deutschland shares the opinion that multi-sided platforms tend to produce monopolies or oligopolies with only a small number of competing providers due to their specific network effects. In this context, the current examination practice under antitrust law is facing significant challenges that make it difficult to ensure competition effectively. However, we believe that the existing tool set is still essentially suitable for countering violations of antitrust law. Only with regard to certain points is clarification by the legislators required in order to make the antitrust authorities' work more effective and above all faster. Telefónica therefore welcomes the current draft law for the ninth amendment to the German Act against Restraints of Competition (GWB), which now addresses the key aspects from a regulatory perspective.

Specific regulations for digital platforms – besides the planned changes in the ninth amendment to the GWB – are not necessary.

In our view, the right measures are being taken with the ninth amendment to the GWB:

a) The "free-of-charge services" criterion (section 18 (2a) of the GWB draft)

Because the delimitation of product markets is not currently geared to the digital business models of multi-sided platforms, it is difficult to define free-of-charge user relationships as a market. As a result, many platforms or parts of their business relationships do not fit into the antitrust evaluation scheme. A legal clarification that free-of-charge relationships are also to be regarded as a market is therefore logical and necessary in order to ensure that antitrust authorities are still able to act and to accelerate the prosecution of antitrust law violations by means of legal clarity. This is achieved by means of the clarifications in section 18 (2a).

b) New criteria for the examination of multi-sided markets (section 18 (3a) no. 1-5 of the GWB draft)

In order to effectively assess the competitive situation and consequently market power on multi-side platform markets, it is necessary to examine many more factors than just the market shares as usual in the offline world. Greater importance must be attached to the specific characteristics of the platforms. With the criteria introduced in section 18 (3a) no. 1–5, the draft expands the examination framework to this effect and addresses the key aspects for platforms. The fact that these points are now to be integrated in the law should therefore be welcomed. At the same time, this set of criteria is still flexible enough to enable the responsible authorities to conduct a specific examination of misuse.

In particular, it should be welcomed that section 18 (3a) no. 4 explicitly addresses access to data as a relevant criterion for determining market power. The existing data on a platform and access to this data may represent key indicators of market power. For example, exclusive access to data may give rise to immense competitive advantages for the platform and barriers to market entry for any competitors, thus preventing fair competition.

c) Expansion of merger control (sections 35–39)

In the digital economy, there are many cases of companies that have significant market potential but currently generate no (or only low) revenues. Market-leading companies can acquire these potential competitors at an early stage of their development before they attain the position of a serious competitor or in order to secure a dominant market position in neighbouring markets as well at an early stage. Acquisitions of companies with low or no revenues can take place without controls even if the buyer is a global market leader with revenues in the billions and the transaction volume reaches enormous dimensions. Both of these factors emphasise the conceivable relevance to competition of a transaction of this kind, meaning that an examination is necessary. In view of the reality of the digital economy, the expansion of merger control proposed in this draft is absolutely necessary. Using the transaction volume as the threshold for action is a clear and easily comprehensible parameter that is already common practice in other markets (such as the USA). The proposed threshold for the transaction volume of €350 million seems appropriate. This comparatively high sum ensures that only significant transactions are actually considered.

d) Exchange of information with authorities (section 50c of the GWB draft)

Procedural cooperation between antitrust authorities and data protection officers (with regard to data relevance) should also be welcomed.

In Telefónica's opinion, the Green Paper accurately presents the special features of digital platforms and the resulting problems for antitrust law.

4. Data protection

4.1. Big data

In itself, collecting large quantities of data is neither beneficial nor harmful; current systems and platforms automatically generate large quantities of data. The insights gained from analysing large quantities of data bring benefits for people, society and business. In this context, it is crucial for people to be able to retain control over their personal data and lead a self-determined digital life, with the key elements here being transparency and control.

If big data is to be successful, it must gain customers' trust and acceptance. To this end, it is important to provide transparency for users with regard to what data is collected and for what purpose. It also makes sense to give users the freedom to choose the extent to which their data is collected and marketed. Corresponding concepts have already been developed in various areas.

The General Data Protection Regulation established an extensive and far-reaching set of rules that will be directly applicable in Germany. Telefónica Deutschland does not currently see any need to define further regulations in addition to this. The principles for data protection law that have already been introduced in the General Data Protection Regulation must be applied and developed further. In addition, the possibilities of pseudonymisation and anonymisation should be researched and promoted further as they represent a good means of balancing personal rights and innovation. Discussion areas, such as the compatibility of individual data processing activities with one another

and balancing the interests of the different parties involved in data processing, should be used to promote public debate.

4.2. Control over data

Telefónica Deutschland agrees with the assessment that the principles of data minimisation and data avoidance are outdated in a digital ecosystem. With regard to the "commercialisation" of data, this addresses the complex questions of how adequate "consideration" for data use can be measured, how the criteria of "voluntariness" and "freedom to choose" are to be defined in the case of providing data, and what conclusions should be drawn from this with regard to price regulation. A cautious approach is advisable here to ensure that innovative business models are not impeded by preventive regulation. In this context, too, Telefónica Deutschland believes that digital business models can achieve lasting success only if they enjoy the trust and acceptance of customers. The goal should therefore be to give customers control of their data again. Here, too, voluntary measures are preferable to legal obligations.

The principle of data portability should be supported in view of the fact that the comparable number portability in telecommunications has resulted in intensified competition. However, it is important to define what exactly is to be covered by data portability (customer master data, contacts, instant messages/e-mails, ratings, apps acquired, purchase transactions, etc.). The key criterion here should be cases in which a lack of data portability leads to lock-in effects.

With regard to the topic of consent, two aspects should be taken into account. Firstly, the sensitivity of data is a subjective characteristic. Users can and should make their own decision on this. Ultimately, a person's assessment of data sensitivity will also be based on an individual, value-based judgement. User orientation should also apply to consent to the analysis of communication content. Not letting users decide for themselves could prevent useful applications in this context.

Standardised declarations of consent are undoubtedly a simple way of ensuring legal certainty. However, they may also have the effect of limiting innovation.

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5. Institutional: a digital agency as a competence centre?

The idea of pooling expertise institutionally is understandable and takes account of the increasing technological convergence, but it must not result in additional regulation. It would avoid issues of differentiation – for example, between telecommunications platforms and other digital platforms. There are three conditions that should be met if a digital agency of this kind is to become a model for success.

1. The emergence of on-top regulation or even double regulation must be avoided. For example, telecommunications consumer protection regulations have several redundancies and even contradictory provisions at European and national level, which results in a huge amount of additional expense for their implementation. The delimitation of this agency's responsibilities from those of antitrust and regulatory authorities also is not always entirely clear at present. The creation of a "one-stop-shopping agency" for issues relating to the digital economy therefore requires a clear delimitation of responsibilities.

2. To ensure that the digital agency does not act as a brake on the digital economy, but on the contrary as a driving force, there should be a focus on clearly defined core areas. One example of what should be avoided is the way in which the correct and necessary sector-specific telecommunications regulation has developed , with the focus of market regulation shifting from regulatory policy to process policy, along with an ever-increasing degree of intervention, through the vehicle of customer protection.

3. To enable a digital agency to provide impetus for a dynamic digital economy, it must be provided with the necessary economic and digital expertise and should also be given a close connection with the department of the federal government responsible for the digital economy. A digital agency should pool expertise as broadly as possible (at both federal and state level) and have a strong economic and regulatory focus.

Berlin, 30 September 2016