Digital Services Act

Telefónica's response to DG CNECT's consultation on the DSA Package: liability of intermediaries and digital platform regulation

September 2020

1. Executive Summary

Telefónica welcomes the European Commission´s initiative within the DSA Package to review and modernise the e-Commerce Directive in order to adequate it to the current Digital Single Market requirements, as well as its proposal to apply ex-ante rules on large platforms acting as gatekeepers, to ensure that digital markets remain fair and contestable.

The remainder of this paper outlines our response to the consultation in detail. In summary our views are:

Review E-Commerce Directive

- Any decision taken in this regard should take into account the need to open the scope of the new obligations to all service providers offering their content, goods or services within the European Union regardless of where they have their main establishment.

- Many definitions contained in the Directive do not meet anymore with the provisions foreseen in 2000 and this has raised uncertainties about service providers obligations that must be clarified and updated.

- The potential harmful effects of the social media platforms, that did not exist 20 years ago but today act as primary channels for content, is generating much public concerns.

- New active intermediaries whose hosting activity exceeds the mere technical, passive service, need to be identified in order to define their responsibilities over the content their users upload and exchange when using their services. However, existent exemptions regime for “mere conduits” under article 12, “caching” under article 13 and “passive hosting providers” under article 14 must be maintained.

- Maintain the prohibition on imposing a general monitoring obligation set out in Article 15 of the eCommerce Directive under the DSA, although targeted and pro-active measures to detect and remove illegal content should be considered.

- New enforcement regimes should be designed, emphasizing that notice-and-take-down mechanism should be the primary instrument in the removal of illegal content addressing hosting service providers. Reinforce the cascade of responsibilities in fighting illegal content. A new duty of care and enforcement regimes should be designed, emphasizing that notice-and-take-down mechanism should be the primary instrument in the removal of illegal content addressing hosting service providers. Blocking injunctions, issued by a competent authority, should only be considered as last resort, where action closer to the content owner has failed.

- Independent and reliable notifiers (the so-called "trusted flaggers"” could behelpful to identify the presence of illegal content online and ensure a more effective enforcement against such content and speed up the removal proces

- Open the scope of the new obligations to all service providers offering their content, goods or services within the European Union regardless of where they have their main establishment. Service providers established outside of the EU but offering their services in the Single European Market should therefore be obliged to have a "digital or legal representative".

- Blocking injunctions, issued by a competent authority, should only be considered as the last resort, where action closer to the content owner has failed.

Ex-ante rules for large platforms acting as gatekeepers

- DG CNECT's option 3b – a full ex-ante framework for a small number of platform markets, would be the best solution to deal with gatekeeping and market power problems in digital markets.

- Separately we have replied to DG COMP, on its parallel consultation on a New Competition Tool. In that response we show that there is no evidential justification for a horizontal NCT and that antitrust law should be updated to deal with digital platforms, rather than build a new layer of competition law. An ex-ante framework, such as proposed by DG CNECT, is a better alternative than an NCT in order to deal with market power problems in one sector, digital markets.

- We do not support bright line prohibitions or obligations to correct *market failures* under Option 3a, as we believe they would be static, disproportionate and, in some cases, not appropriate given the potentially diverse and dynamic nature of the few firms that would be subject to ex-ante regulation.

- However, we do support Option 1 – and believe that now is the time to introduce "digital neutrality", a set of *end user rights* equivalent to those created under the Open Internet Regulation. Otherwise, in the long run, the protections afforded to users at the network layer, will be undone by the market power of digital platforms that are now the main way content is distributed and viewed.

- The scope of the Platform-to-Business regulation will need to be widened to cover a range of problematic platforms like operating systems and advertising services. We propose a general definition of a digital platform to replace the existing definition.

- We draw on our experience of the telecoms regulatory framework and show that it can be readily adapted to asymmetrically regulate a small number of problematic platform markets, retaining a level of objectivity that we see as lacking in the current proposals which are based on the use of thresholds and/or regulating firms rather than markets.

- Finally, we propose an institutional set-up based on a "network of European and national regulators". This will be faster and cheaper to implement than waiting for the Treaty change required to create an agency. Unlike the set-up in telecoms, we foresee the Commission being at the heart of the network, rather than on the outside.

2. Review E-Commerce Directive

Background

Since the adoption of the eCommerce Directive (2000/31/EC of the European Parliament and of the Council) in 2000, the Digital Single Market has changed dramatically so a modernization of the Directive is necessary. Specifically, the entry of new service providers that do not meet the definitions of the eCommerce Directive, has raised uncertainties about their obligations that need clarification from European lawmakers. By way of example, social media platforms, which now act as primary channels for content, communication and commerce for millions of users and have a huge impact on public opinion in today's digital societies, did not exist when the Directive was drafted in the late 90ies and their specific responsibilities and obligations are not clearly defined. It is therefore not surprisingly that there is much public concern about the potentially harmful effects of these platforms, e.g. relating to the dissemination of illegal material (e.g. in breach of copyright rules, counterfeit goods or hate speech) and the role and responsibilities of the platform providers in enabling the dissemination of such material.

As stated by the President of the European Commission Ursula von der Leyen, the Commission´s new political guidelines for this new term are committed to "upgrade the Union's liability and safety rules for digital platforms, services and products, with a new Digital Services Act (DSA)". For this to happen, a set of principles that constitute the main pillars the digital economy should be maintained in the upcoming legislation (e.g. the limited liability regime for neutral online intermediary services and the prohibition of imposing a general monitoring obligation) while other aspects should be take into account to better reflect the reality and of today's services.

In this context, paragraph 48 of that Directive emphasised that "this Directive does not affect the possibility for Member States of requiring service providers, who host information provided by recipients of their service, to apply duties of care, which can reasonably be expected from them and which are specified by national law, in order to detect and prevent certain types of illegal activities". In other words, the European legislator already had in its analysis the relevance of this "duties of care", which could evolve into a more active collaboration, subject to legal obligations, of this typology of intermediaries.

It is therefore welcomed that on June 2nd the European Commission launched a consultation to start a process to re-open the eCommerce Directive specifically with a view to update the responsibility of the different intermediaries that share or host online content, goods or services.

Telefónica's initial positioning and key believes

We welcome the review of the eCommerce Directive as part of the Digital Services Act (DSA) package. We believe that the DSA represents a valuable opportunity to identify the obligations and exemptions of the various intermediaries involved in the digital landscape, as well as to strengthen the regulation of online content.

Telefónica is an integrated and diversified telecommunications group operating in Europe and Latin America which offers services and/or products such as mobile telephony, fixed-line telephony, very high capacity internet access, television and other digital services, depending on the location of the relevant subsidiary.

The principles that we consider essential for the revision of e-Commerce as part of the Digital Services Act are the following:

- **Keep the existent exemptions for passive intermediary services.** There should be no change to the responsibility and liability regime for "mere conduits" under article 12, "caching" under article 13 and "passive hosting providers" under article 14.

  The European Commission should preserve the underlying legal principle that passive online intermediaries should not be held liable for the acts of their users, since these digital services have no knowledge, control or management activity over the content their users upload and exchange when using their services.

  As an example, mere conduits like Internet Access providers are governed by strict Net Neutrality requirements that prevent them from blocking or throttling web traffic. Any intervention to block or restrict traffic is only permitted in tightly prescribed circumstances. Expanding responsibility and liability to such mere conduits like Internet Access Providers would contradict Net Neutrality obligations.

- **Redefine a new categorization of online service providers that play an active role as well as their responsibilities.** The DSA package should clarify and differentiate between the services offered by active and passive intermediaries and the role they play in today's digital society. Article 14 is not applicable where and when the hosting activity exceeds the mere technical, passive service. The Commission should re-open and amend article 14 of eCommerce Directive recognising the emergence of a new category of 'active' hosts who have actual knowledge, editorial functions and a certain degree of control of the content shown and uploaded users.

  It is necessary to update the concept of Information Society Service (ISS) to include digital providers, such as cyberlockers, content delivery networks, Domain Name Services (DNS), social media, search engines, collaborative economy platforms or online advertising services, among others. More precisely, this relates to active hosting service providers and other facilitators that have actual knowledge of, or exert control over, such content, for example by tagging, organizing, promoting, optimizing, personalizing, recommending, presenting or otherwise curating specific content.

  Without prejudice to this general rule, and under the full analysis of a context of intermediation activities based on technical complexity, in which the concepts of the 2000 Directive cannot be applied in 2020, it could be useful, in the general interest, to enable the mechanisms and tools that the digital environment itself can offer, to extend to all actors that directly or indirectly act in the digital content market (navigation facilitators, identification and location of resources, registration and resource management platforms, large storage and content deposit managers), those obligations that are in force for the Telecommunications sector.

  If a precise, clear and exhaustive distinction is not made as to which intermediaries act as a passive or active platform, it will be impossible to create a fair Level Playing Field.

  Therefore, building on the distinction between active and passive hosting providers established in the e-Commerce Directive and developed by the Court of Justice of the European Union, we suggest the following criteria to establish additional responsibilities beyond current provisions applicable to all hosting services providers:

  - Interaction with user-generated content - where platforms that have actual knowledge of, or exert control over, the respective activity or information. This may include tagging, organizing, promoting, optimizing, personalizing, recommending, presenting, or otherwise curating specific content.

- Impact - where the actual risk results from a specific online platform, such as the sharing of illegal user-generated content with a broad audience.
- Technical capabilities - where platforms possess the means to address the problem in the most expedient and proportionate manner. This may include the abilities to access users' specific content that is not public or remove content on a piece-by-piece basis.

- **Maintain the prohibition on imposing a general monitoring obligation** set out in Article 15 of the eCommerce Directive under the DSA. Nevertheless, active hosting service providers should be encouraged to take targeted and pro-active measures to detect and remove illegal content, without losing their liability exemption, as long as these measures are targeted and do not constitute general monitoring. Such solutions would use technical tools to make detection and enforcement of copyright infringements more effective while stopping short of general monitoring (e.g. solutions like *Smart Protection,* a technology-based anti-piracy platform that detects and removes pirated contents on the Internet by searching for infringements and requesting its removal in an automated and effective way.)

- **Reinforce the cascade of responsibilities in fighting illegal content.** In relation to active hosting service providers, a new duty of care and enforcement regimes should be designed**.** This duty of care should impose a responsibility to take reasonable steps to address the dissemination of illegal content, services and goods. Platforms that have effective control and knowledge of the content hosted and disseminated by their users should incorporate existing technological tools and instruments to automatically filter and identify illegal content. It is necessary to establish complementary mechanisms to the timely removal of illegal content, goods or services (take down) to prevent them from being reloaded on online platforms (stay down) after they have been removed.

  The DSA should reinforce the cascade of responsibilities in fighting illegal content, emphasizing that notice-and-take-down mechanism should be the primary instrument in the removal of illegal content addressing hosting service providers. It should happen as close to the source as possible.

  The consequence for failing to comply with obligations on removal of content should be to subject such online platforms to fines, in order to incentivise compliance, without removing the underlying liability exemption. However, in case of continuous breach of the obligation to remove the illegal content, such fines should increase (as per in the GDPR) resulting in the loss of the liability exemption provided to them under the current eCD, and should be held liable for the content posted by end users.

  Blocking injunctions, issued by a competent authority aiming at preventing access to illegal content, should only be considered as last resort, where action closer to the content owner has failed. When issuing blocking injunctions, public authorities should be obliged to cover internet access providers' resulting costs and indemnification against potential claims for the action taken as ordered should be foreseen.

- **Recognize the figure of "trusted flaggers".** In order to help better identify illegal content, goods and services online and to speed up the removal process "trusted flaggers" should be used. These

new entities could be public or private organizations, independent and duly accredited by the Member States.

Their role would be to identify illegal online content, goods and services in order to inform the competent national or European authorities of their existence and to have these administrative bodies order their removal, if the platform has not done so after direct notification of the "trusted flagger". The various national administrations should share their official list of trusted flaggers with the other Member States so that their actions are valid when they act at European level.

- **Open the scope of the new obligations to all service providers offering their content, goods or services within the European Union regardless of where they have their main establishment.** The country of origin principle is a cornerstone of the Single Market and should be maintained. However, the global nature of digital services creates relevant extraterritorial jurisdictional and enforcement challenges. To create a fair Level-Playing-Field to be able to compete on same grounds with non-EU platforms, it is important to assure that all platforms that promote, facilitate and give access to content, goods or services comply with new obligations, irrespective of the geographical location of their headquarter or physical assets like servers. Service providers established outside of the EU but offering their services in the Single European Market should therefore be obliged to have a "digital or legal representative" within the EU, similar to the solution established in GDPR. At the same time, also enforcement challenges inside the EU should be reviewed and improved.

The emergence of new digital services and platforms in recent years makes it urgent to update the legal framework on the liability of online intermediaries. The DSA offers an extraordinary opportunity to harmonise rules in all Member States, limit fragmentation and promote a fair and balanced digital single market for citizens and businesses. To this end, the new legislation should be based on rules that are proportionate, targeted and create a level playing field for all players offering their services in the European Union.

3. Ex-ante rules for large platforms acting as gatekeepers

3.1. Overlap between DG CNECT's proposal and DG COMP's proposal on the New Competition Tool

Simultaneously with this consultation, DG Competition has launched a consultation on a New Competition Tool (NCT)[1] and it is clear that there is a substantial overlap between the two approaches. The justifications for the NCT are either or both that:

(1) there are digital platform specific market failures that cannot be captured by existing competition law[2]; and/or

[1] https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12416-New-competition-tool

[2] *"scenarios where certain market characteristics (e.g. network and scale effects, lack of multi-homing and lock-in effects) and the conduct of the companies operating in the markets concerned create a threat for competition. This*

(2) that the economy in general is experiencing an increase in non-dominance related competition problems, that is evidenced by higher firm profits[3] and may occur not only in digital but also across industries.

Justification (1) would point to a sector specific NCT that would wholly overlap with DG CNECT's proposed option 3b, whereas justification (2) would imply a horizontal NCT without a dominance threshold, which would need to have clear interfaces with existing competition law and sector specific regulation.

Regarding justification (2); in Telefónica's response to DG COMP's proposals we show that the economic rationale for the NCT is contradicted by the very sources DG COMP seeks to rely upon. DG COMP conflates the concept of industry concentration with product market concentration, does not show a link between them nor with competitive intensity[4]. DG COMP also ignores the authors of the research papers referenced in the main source document supporting the IIA[5], when they diverge from DG COMP's narrative, for example that:

> *"Our results should, thus, not be interpreted as unambiguous evidence of reduced competition, and much less yet of a need for particular policy interventions."* [6]; or
>
> *"Many of the patterns are consistent with a more nuanced view where many industries have become "winner take most/all" due to globalization and new technologies rather than a generalized weakening of competition due to relaxed anti-trust rules or rising regulation."* [7].

Returning to justification (1), targeted ex-ante regulation is a better solution to solve identified competition problems in a sector where competition law has been shown to be "not enough". After all, that is one of the "three criteria" used to determine whether telecoms markets should be regulated ex-ante.

DG COMP has not done enough to justify the proposals for an NCT, in any form. During the term of this Commission, DG COMP must review general competition law and its effectiveness, as a number of elements expire during this mandate. It appears to Telefónica that the proposed NCT (particularly if horizontal in scope) would need to be justified based on the evidence of an enforcement gap in competition law more generally. A consultation, drawing on evidence from a review of the application of general competition law would be the place for DG COMP to make new proposals. The evidence base would need to be much more credible than that presented in its current IIA.

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applies notably to tipping markets. The ensuing risks for competition can arise through the creation of powerful market players with an entrenched market and/or gatekeeper position, the emergence of which could be prevented by early intervention."

[3] *"scenario where a market is not working well and not delivering competitive outcomes due to its structure (i.e. a structural market failure). These include (i) markets displaying systemic failures going beyond the conduct of a particular company with market power due to certain structural features, such as high concentration and entry barriers, consumer lock-in, lack of access to data or data accumulation, and (ii) oligopolistic market structures with an increased risk for tacit collusion, including markets featuring increased transparency due to algorithm-based technological solutions (which are becoming increasingly prevalent across sectors)."*

[4] As explained in one of the sources quoted by DG COMP "Industry Concentration in Europe and North America, Bajgar et al, January 2019 (OECD), footnote 3" https://www.sipotra.it/wp-content/uploads/2019/03/INDUSTRY-CONCENTRATION-IN-EUROPE-AND-NORTH-AMERICA.pdf

[5] https://data.consilium.europa.eu/doc/document/ST-15321-2019-ADD-1/en/pdf

[6] Industry Concentration in Europe and North America, Bajgar et al, January 2019 (OECD), paragraph 10.

[7] Increasing Differences Between Firms: Market Power and the Macro-Economy, Van Reenen 2018, London School of Economics, Centre for Economic Performance

If a horizontal instrument is finally proposed by DG COMP, it will have to deal with a number of boundaries with economic sector regulators. DG CNECT should develop its ex-ante proposals to address the problems in the digital sector, the proposals should not be moderated because the NCT *might* eventually provide an alternative solution. Any future NCT will have to interface with DG CNECT's ex-ante regime, in the same way it will have to interface with other sector specific regimes.

Returning to the subject of this consultation from DG CNECT, Telefónica supports both Option 1 and Option 3b working in tandem.

- Option 1 – some horizontal end user rights should be created through a set of obligations and prohibitions to create "digital neutrality", such that the "net neutrality" end user rights already granted at the network level of the value chain, are not undone at the platform level.

- Option 3b – we make extensive proposals on how to structure an effective regulatory framework.

3.2. Telefónica's comments on the proposals in DG CNECT's IIA

Introduction

Turning to the proposals of DG CNECT to tackle market failures in the digital sector using an ex-ante framework; we are able to draw on our extensive experience as a regulated firm in a sector with a well-developed ex-ante regime.

In our view, and in light of what has happened in the European telecoms market, an effective ex-ante regulatory framework should consist of four main elements: (1) criteria to identify digital markets (services) that may require regulatory intervention, (2) criteria to establish when intervention is needed and to which market agents or companies, i.e, to identify market failure; (3) the types of ex-ante remedies that can be imposed; and (4) the institutional arrangements needed to implement the framework. We shall discuss these elements in turn.

The telecoms sector has been regulated under an ex-ante regulatory framework for more than 20 years. There are many lessons that can be learned, in terms of what is effective as well as the pitfalls to be avoided.

The telecoms regulatory process is not novel, it has a basis in competition law. Identifying and analysing relevant markets, finding dominance (or not) and where there is a market failure, applying remedies. Importantly the problems identified in digital markets have their equivalents in telecom regulation, like non-transitory barriers to entry for example, allowing the experience of telecom markets to be an important source of inspiration when considering regulation of digital platforms.

Telefónica advocates using the telecoms framework as a starting point for the design of a framework for digital platforms. To be clear, we are not proposing simply copying the European Electronic Communications Code and replacing the definition of "electronic communications" with "digital platform", but rather to take the robust procedural and institutional framework as a starting point.

We believe that the structure and tools of the telecom framework can be adapted to address the specificities of the digital platform markets. However, if there are other solutions proposed, the telecoms framework is a very useful benchmark against which to measure their benefits and shortcomings.

A subsidiary benefit of a telecom-type approach for digital markets would be to place the whole ICT value chain on a comparable regulatory footing. Different layers of the value chain would be regulated in

broadly equivalent ways, removing the risk of arbitrary distortions of investment and value attribution between layers, caused by different regulatory approaches.

Identifying digital markets that require regulatory intervention

Scope of P2B should be revisited as it does not cover all the relevant platform markets

In its IIA, DG CNECT's option 3 sets out its proposed scope as follows:

> *"This option would provide a new ex ante regulatory framework, which would apply to large online platforms that benefit from significant network effects and act as gatekeepers supervised and enforced through an enabled regulatory function at EU level. The new framework would complement the horizontally applicable provisions of the Platform-to-Business Regulation (EU) 2019/1150, which would continue to apply to all online intermediation services. The more limited subset of large online platforms subject to the additional ex ante framework would be identified on the basis of a set of clear criteria…."* [our emphasis]

As written, the IIA might suggest that just a "subset" of firms which fall within the scope of "online intermediation services" would be subject to ex-ante regulation. However, this interpretation is not supported by the description of the impact of this option. For example, in relation to sub-option 3a, the IIA states:

> *"This option will explore both principles-based prohibitions that apply regardless of the sector in which the online platforms concerned intermediate (e.g. a horizontal prohibition of intra-platform 'self-preferencing'), as well as more issue-specific substantive rules on emerging problems associated only with certain actors, e.g. relating to operating systems, algorithmic transparency, or issues relating to online advertising services." [our emphasis]*

Neither operating systems, nor online advertising services fall within the scope of online intermediation services as currently defined in EU 2019/1150. As they are not in the superset they could not form a subset of activities subject to ex-ante regulation.

A proposal for an updated scope for P2B

The definition of the scope of any regulatory instrument is vital, to give clarity to those firms that might expect to be within the perimeter of regulation and, as importantly, those firms which should not expect to be subject to such a regulation.

In this case, we expect there to be a need to clearly define a platform service, as well as what is not considered a platform service. By way of example, in the Platform to Business (P2B) Regulation[8], Article 1(2) defines what is meant by an intermediary service whereas Article 1(3) clarifies that broad definition by explicitly excluding payment and advertising platforms, which facilitate transactions between end users, rather than play a role in bringing customers and sellers together.

Similarly, legislation could clearly identify where it applies and where it should not, especially with reference to other sector-specific regulation. For example, in the NIS Directive[9] on the security of network and information systems, Article 1(7) clearly states that where security provisions in sectorial regulation match or are higher than those set out in NIS, then the sector regime should prevail.

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8 https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019R1150&from=EN

9 https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016L1148&from=EN

Clarity over scope not only benefits firms by clearly identifying their regulatory risks and costs, it also benefits the regulatory institutions themselves. The Commission is seeking to regulate a small number of important platforms which, to date, have not been subject to ex-ante economic regulation. It follows therefore, that the definition of services subject to this regulation should be sufficiently clear; otherwise, there is a big risk that economic activities connected to or superficially similar to these, but already subject to ex-ante economic regulation, end up with another layer of asymmetric regulation and the consequent conflict of authorities.

Telefónica has drawn on academic literature[10] to create a single definition for online platforms that would enable ex-ante regulation to be targeted at a subset of important firms as described in the IIA. The proposed approach starts with a general description of platforms and narrows this down using a set of screening criteria.

Firstly, it defines a platform as *"Undertakings that connect individuals and organizations for a common purpose or to share a common resource"*[11]. Clearly this could apply to a wide range of industry actors, including telecoms operators.

Secondly, the platforms must function at the level of an industry (or ecosystem) such that they act as an intermediary. These ecosystems *"bring[ing] together individuals and organizations so they can innovate or interact in ways not otherwise possible, with the potential for nonlinear increases in utility and value (i.e. network effects)"* [12]. This screen removes websites that act as retail outlets, as they do not form an ecosystem based on network effects.

There are two types of industry platforms[13] :

- *"Innovation platforms usually create value by facilitating the development of new complementary products and services, sometimes built by the platform owner but mostly by third-party firms, usually without supplier contracts. Firms often capture and deliver value (monetize the platform) by directly selling or renting a product. In a few cases where the platform is free (e.g., Google Android), firms monetize the platform by selling advertising or other services.*

- *Transaction platforms usually create and deliver value by facilitating the buying and selling of goods and services or facilitating other interactions, such as enabling users to create and share content. The firms that own this type of platform primarily capture value by collecting transaction fees, charging for advertising, or both."*

Finally, we screen for the "digital" element that is of fundamental concern in this regulation, that these network effects rely on the use of data. Whether that be a social media platform using data to target advertising, or a mobile app store ranking apps based on purchasing data. This screen removes platforms, such as telecom operators, that do not use data driven network effects to deliver telecoms services.

These screening criteria lead to a new scope for P2B that would capture all the problematic platform services identified in DG CNECT's IIA, including those currently outside the scope of P2B[14]:

[10] Cusumano M., Gower A. & Yoffie D.B. (2018). The Business of Platforms. HarperCollins.
[11] Ibid p.18
[12] Ibid p.18
[13] Ibid p.24
[14] Specifically, Cusamano et al (2018) include Operating Systems under this definition of digital plataform. What is more, for the authors, OS are the paradigm of digital platform.

"Digital platforms which bring together individuals and organizations so they can innovate or interact in ways not otherwise technically possible, with the potential for nonlinear increases in utility and value due to network effects deriving from the use of data."

Objectively targeting regulation based on markets rather than firms

An approach that as a starting point identifies markets, rather than targets specific firms, provides a level of objectivity that we believe is important in the regulatory scheme for digital platforms.

When telecoms markets were first liberalised, the former monopolist incumbent operator would have been dominant on all relevant markets. It would have been easy to just list the incumbent firm in each EU Member State in the law, and then regulate them. However, any regulatory regime that seeks to introduce contestability, ie. reduce the market power of the dominant firm(s), must allow for its own success. More than half of the regulated telecoms markets identified back in 2002 are now sufficiently competitive not to be regulated. The structure of telecoms regulation allows "SMP/dominance" designation to be removed, or even given to another firm.

A description of problematic platforms that is designed around a handful of obvious targets today is not futureproof. It does not allow for the success of contestability caused by the action of regulation. Hence our effort to propose a generic definition of digital platforms as the kind of activity which seems bound to produce market problems, not only now but also in the future, when new businesses with the same features appear and eventually tip the market in their favour.

Furthermore, Europe's telecoms framework is accepted internationally, providing the basis for firms from outside the EU to enter its markets. It follows that a similar framework for digital platforms should not be seen as arbitrary or a restriction on international trade by these very same countries, even if the firms subject to this new digital regulation are established outside of the EU.

The telecoms framework first identifies markets that are susceptible to ex-ante regulation, using a criteria based test and then uses the Significant Market Power (SMP) test to find whether firms within this market have a position aligned with the dominance concept in competition law.

Objectively choosing which markets to tackle first

Again, the issue of objectivity arises when authorities have to decide which platform markets to regulate, once they have the power to do so. Should they start with the biggest, the one starting with "A" or the one that will create the least political backlash?

It may be helpful to authorities to have a list of markets to analyse at the outset, to avoid accusations that certain large firms are being targeted. This was the approach undertaken in telecoms back in 2002/3.

The European Commission and other authorities have already conducted ex-post analyses of a number of digital markets[15], making the construction of a "relevant digital markets list" relatively straight forward. These would provide a useful first group of markets that could be subject to ex-ante supervision going forwards. This also benefits authorities by reducing the scope for legal challenge on the grounds of market

[15] The EC has already defined the following digital markets in antitrust Cases: (i) Licensable smart mobile operating systems (OS); (ii) App stores for the Android mobile operating system; and (iii) non OS-specific mobile web browsers; (iv) Comparison Shopping services; (v) The general internet search services; (vi) The online search advertising intermediation; (vii) PC operating systems; (viii) Work group server operating systems; (ix) Streaming media players.

definition. As in telecom, the list of relevant markets can evolve and be periodically reviewed in light of changing technology and market developments.

Authorities would still be able to define additional markets for review, but must apply the same criteria based test in order to select the markets to go through the market definition process.

Which criteria, or criteria test to use to identify market failure and gatekeepers?

In the IIA, DG CNECT proposes a threshold test:

> *"The more limited subset of large online platforms subject to the additional ex ante framework would be identified on the basis of a set of clear criteria, such as significant network effects, the size of the user base and/or an ability to leverage data across markets."*

In essence this definition means if a platform is big, benefits from network effects (which is probably why it is big) and vertically integrated (which allows it to access the data to tip the market in its favour and become big), then at some threshold that firm must be problematic *per se*. This does not strike us as a particularly objective test.

By contrast the telecoms regulatory framework uses a set of well understood criteria to determine whether a market should be reviewed with a view to ex-ante regulation. These criteria are:

- presence of high and non-transitory structural, legal or regulatory barriers to entry;
- a market structure that does not tend towards effective competition within the relevant time horizon, having regard to the state of competition behind the barriers to entry; and
- competition law alone is insufficient to adequately address market failure(s) concerned.

A recent academic paper[16] supports Telefónica's view that the threshold for intervention should be more robust than that proposed by the Commission, not least to avoid the risk / accusation of over regulation. Given that many of the firms that may be subject to ex-ante regulation are not domiciled in the EU, avoiding accusations of over enforcement will be an important consideration.

> *"a regulatory threshold test should be onerous, as is the case in the electronic communications sector with the use of the Significant Market Power test where markets satisfy the "three criteria test" [….] As such, regulatory intervention would be less susceptible to the criticism that it constitutes an unnecessary additional burden which cannot satisfy a cost-benefit analysis and which would be susceptible to the generation of Type 1 errors."*[17]

The paper outlines a three criteria assessment whereby ex-ante regulation of a firm/market would require[18]:

> *"(i) the existence of market structures which are highly concentrated and non-contestable;*
>
> *(ii) the presence of digital gatekeepers which act as unavoidable trading partners;*
>
> *(iii) and, for the purposes of ex ante regulation, the lack of effectiveness of competition rules to address the identified problems in the market."*

[16] Designing an EU Intervention Standard for Digital Platforms - Peter Alexiadis & Alexandre de Streel, Robert Schuman Centre for Advanced Studies Research Paper No. 2020/14 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3544694

[17] Ibid p.35

[18] Ibid, abstract

Or to put that another way; digital gatekeeping features, market structure and competition law is not enough. Something that looks analogous to the telecoms three criteria test.

Where Telefónica diverges from the views expressed in that paper is on the application of the test. Alexiadis/de Streel make this test a quasi-combination of the market identification and market definition process, leading to the identification of a firm that may need to be regulated ex-ante. This may be because, in many cases, given the "tipped" nature of some digital markets, market shares are so high that the firm is synonymous with the market. However, we believe that the rigour of market definition and a finding of market power would provide additional protections that would ensure that the proposed regime were more defensible against accusations of regulatory overreach.

Market definition

The multi-sided nature of digital platform markets and the presence of services with a zero monetary price are often cited as creating a significant hurdle to market definition. As we have seen, the hurdles were eventually overcome by antitrust authorities and a number of infringements have been found, based on a set of defined markets. The basic economic concepts for market definition are no different for digital markets than they are for more traditional markets; rather the application of the concept must be adapted to address the peculiarities of some digital markets.

We show how some issues may be tackled when defining the product market, first on the demand substitutability, then with supply substitutability:

Demand substitution

One of the major market analysis tools is the SSNIP[19] test, based on the price applied to the product or services. This test cannot be used when there is no price. This problem has already been explored by some commentators[20] who have proposed to have a SSNIC test instead - a small but significant and non-transitory increase in costs (to customers)- for the zero-priced markets. If one of the costs for users is the data provided by them to the platform, then an increase in the data requested by the internet platforms could be used as a measure to define markets. If switching would not occur in the presence of higher costs to consumers, then the boundary conditions of the market can be better defined. Similarly, an alternative competitive vector might be quality (for example accuracy of a search), which would require that a SSNIQ test were undertaken instead.

A second factor to consider is the effect of "ecosystems" of products on switching costs. If a consumer is to switch away from a given platform, but must lose access to their data or contacts, then this creates a substantial switching barrier (that is why the argument "competition is just a click away" is a myth).

Similarly, whether a product or service bundle, rather than the stand-alone product should be defined as a relevant market is of decisive relevance when considering convergence and leveraging strategies on digital markets. In data driven markets, other forms of tying should also be analysed. For instance, there are a few large platforms which leverage their dominant position in one market (origin market) to enter rapidly in an adjacent market (target market) utilising "Data Policy Tying"[21] (data envelopment) to extract data resources in the target market to reinforce the dominance in the origin market. This may create both switching barriers (if the user cannot port the data to another service, which would be an inferior

[19] Small but Significant and Non-transitory Increase in Price

[20] John M. Newman "Antitrust in zero-price markets", http://ssrn.com/abstract=2474874

[21] Vertically integrated firms can require customers to allow parent companies or affiliates to share data between products from the same firm. GDPR creates a substantial barrier to competitive non-vertically integrated firms from achieving this effect through co-operation or partnering.

substitute without it) or a market entry barrier, if the overall volume of data held by the firm is the determinate of success or failure in the market.

There will also need to be an analysis of the geographic nature of demand to determine whether a market is national or European, which will have important consequences for the rest of the analysis and enforcement.

Supply substitution

In assessing the supply substitution in a relevant digital market, consideration needs to be given to the likelihood that another online platform might adjust or improve its product to compete. The 1997 Market Definition Notice[22] says that in general, *"When supply-side substitutability would entail the need to adjust significantly existing tangible and intangible assets, additional investments, strategic decisions or time delays, it will not be considered at the stage of market definition."*

One important aspect of digital platforms is the investment required to collect the data necessary to provide a similar quality product to the dominant firm. This would require many of the decisions highlighted in the paragraph above and so may not be such a relevant factor in digital market definition. It would be compounded if a competitor needed to source data from many different product markets, or have an extensive inventory of data sourced over time, in order to provide a competitive service.

Market failure must be demonstrated before intervening

A market power test is still important

A number of authorities[23] have suggested new intervention thresholds which try to describe the "market influence" of a single actor in an ecosystem, without having to pass the hurdle of a competition law dominance finding. There appears to be a belief that it is hard to find dominance based on economic tools that have historically been applied to the "real world" rather than the "digital world". This is obviously not true, because DG COMP has managed to define markets and find dominance of the main digital platforms in a number of cases.

The real issue with these cases has not been an inability to undertake the mechanics of market analysis but the time taken to understand the firms, their products, gather information and come to a considered view. The adversarial setting of antitrust, with the prospect of large fines, compounds these problems.

Again, when telecoms markets were regulated under the "new regulatory framework" in 2002/3, the Commission created market analysis guidelines that would be followed by NRAs. In the scheme we

[22] https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A31997Y1209%2801%29

[23] The **Furman Report** distinguishes three distinct forms of power by dominant platforms: i) the ability to control access and charge high fees; ii) the ability to manipulate rankings or prominence; and iii) the ability to control reputations.
The **French NCA** proposes to define the so-called "structuring digital platforms" according to three criteria: i) provide online intermediation services; have market power due to their size, financial resources, userbase and/or data, which allows them to control access to ("gatekeeper role") or significantly affect the operation of ("regulator role") the markets in which they are present; and iii) provide (unavoidable) services on which competitors, users and/or third parties depend for the economic activity.
The German draft Competition bill empowers the German Competition Authority to impose of ex-ante remedies to undertakings deemed with "paramount significance for competition across markets". To determine the paramount significance of a company, the following shall be taken into account: i) its dominant position on one or more markets; ii) its financial strength or its access to other resources; iii) its vertical integration and its activities on otherwise related markets; iv) its access to data relevant for competition; and v)the importance of its activities for third parties' access to supply and sales markets and its related influence on third parties' business activities.

propose, DG COMP could provide that knowledge transfer by providing a similar set of guidelines based on its previous digital platform antitrust case experience.

One particular challenge presented in the Google cases is the vertical nature of each market. Essentially the same or similar abuses (of self-preferencing) are found to be happening in a vertical product market, access to which is dominated by Google search. For each vertical market, DG COMP has to begin a new analysis due to the different structures and actors that are present and define this distinct product market.

Drafting new legislation for a sector where this phenomenon is already known to exist, affords policymakers the opportunity to address commonalities between markets and engineer-in administrative shortcuts that would allow for swifter decisions than we see in antitrust. This is not a problem with the mechanics or tools of market analysis, but a procedural problem.

The Significant Market Power test is not just about market shares

The SMP approach is akin to the dominance test in competition law, describing the attributes of a firm with market power such as:

SMP attributes	**Experience in some digital markets**
Very large and persistent market shares	Little change in advertising, OS, search and social media markets in the last 10 years.
Absence of countervailing buyer power	"take it or leave it" T&Cs / unavoidable trading partner or gatekeeper
Barriers to entry	Market tipping / "winner takes all" markets
Barriers to expansion	Legal barriers to data and data sources for non-vertically integrated competitors
Control of infrastructure not easily replicated	Access to data sources, big data infrastructure and control of access for others
Economies of scale	Big data scale economies

Assessing which firms have market power, in that they display these characteristics, allows ex-ante regulation to be asymmetrically targeted at only those firms which are the source of the market failure. The attributes that lead to the SMP finding may also identify what aspects of market power need to be overcome by remedies.

Potential competition

In the 1997 Market Definition Notice, analysis of this third source of competitive constraint is identified as only being needed *"at a subsequent stage, in general once the position of the companies involved in the relevant market has already been ascertained, and when such position gives rise to concerns from a competition point of view."* It is a question not of how the market is defined, but rather whether there are conditions conducive to entry that would lead to more competition.

Whilst many digital platforms claim they are only one innovation away from being substituted (the so-called "guy in the garage defence"), in reality it is the high barriers to entry to digital markets, once they have tipped in the favour of one firm, that have led to the concerns about market power in the first place. The evidence suggests that after an early period of creative destruction prior to 2005, the most relevant

internet platforms have been fairly stable for the last 15 years[24]. The "guy in the garage" is obviously having a hard time penetrating the moats of Big Tech.

Remedies

Updating the horizontal remedies on all firms subject to the Platform to Business Regulation (Option 1) : A first approach to Digital Neutrality

In its consultation, DG CNECT suggests that competition problems are already so acute that some bright line prohibitions might be applied universally to some large platforms (Option 3a). Telefónica believes that general prohibitions are an inflexible, static and inefficient way of correcting market failures, which could remove perfectly rational and efficient economic behaviours from the market, without justification in all cases. In addition, whilst prohibitions might be relatively easy to define, obligations might require a much greater level of specificity (case-by-case).

However, general obligations or prohibitions seem the correct approach in order to protect the rights of the users of such platforms in the same way that net neutrality protects electronic communications users. As is well known, NN obligations guarantee the rights of telco users to an Open Internet accessing the services and contents of their choice and running any application of their choice through any device without interference from network operators. In the words of the European Commission Net Neutrality, by ensuring that all internet traffic is treated equally, "*grants end-users the directly applicable right to access and distribute the lawful content and services of their choice via their Internet access service."*[25]

Such a right is meaningless if it is not mirrored at other levels of the digital value chain, whereby other agents cannot interfere with access and distribution of lawful content, applications and services on their platforms, given that this is now the main way that such content and services are shared or distributed. Moreover, digital industry platforms have generally more market power than telco operators such that consumers would not switch away from them, if there was interference with their content.

Specifically, NN obligations take the form, in the EU, of transparency and non-discrimination, and are implemented in the Open Internet Regulation. In response to the Commission's proposed "Option 1" in the IIA, we provide a proposal (See Annex 2) on what these kind of obligations would look like on specific platform types.

Remedies for firms with SMP in a relevant market

Telefónica believes that the standard used for evaluating the performance of electronic communications markets should be used for digital platform markets. That standard is perfect contestability. In consequence, regulatory remedies should be imposed in order to reduce or eliminate entry barriers to the markets. Note that a list of forbidden practices would not in principle make the market more contestable.

The types of markets that are likely to be subject to new regulation are more heterogeneous than telecom markets, so the imposition of remedies is likely to be more complex and diverse. However, in contrast, the number of firms likely to be subject to such remedies will be smaller than is the case in telecoms. For example, for ecosystem markets such as mobile operating systems, which is a traditional access bottleneck between one layer of the value chain and another, telecom remedies of access, reference offer and transparency could be quite effective.

[24] https://www.gsma.com/publicpolicy/wp-content/uploads/2016/09/GSMA2016_Report_TheInternetValueChain.pdf Figure 11, p.33

[25] https://ec.europa.eu/digital-single-market/en/policies/open-internet

In some digital markets where data is a key input, data access remedies may not be enough to lower entry barriers, because such markets are characterized by data-driven network effects. Furthermore, the scale of technological investments required to effectively compete with the dominant firm may require a "ladder of investment" approach, as in the telco market, in order to provide a path of incremental investments sustained with initial revenues, thus making the business case sustainable for a new entrant.

In Annex 1 we provide some digital market equivalents of traditional telecom remedies. There is nothing novel about what is going on in digital markets, the tools already exist to deal with the main problems at hand. They just need some adaptation and regulatory authorities that are willing to develop their application based on experience.

Remedies should also foster contestability in markets into which SMP is leveraged

In many cases, theories of harm related to digital platforms span both the (mainly) advertising markets where the platforms monetise data, but also the adjacent market where the platforms use services to gather data.

Dominance is leveraged through actions such as self-preferencing in search or tying the use of the dominant service to the use of a service in an adjacent market (e.g. tying of payment platforms to mobile OS or app store). The firm with SMP in the "origin market" is leveraging its market power, user base and resources to enter the "target market", often with a zero monetary price for the consumer.

The firm's objective may purely be to gather further data resources to reinforce the firm's dominance in its origin market. In so doing, the SMP firm changes the terms of trade in the target market, often making the market unsustainable for existing players and incontestable for new players[26]. It may be ambiguous whether consumers are better or worse off than the status quo in some target markets, but the loss of contestability means it is unlikely that entrepreneurs will find a way to compete with a better alternative.

Whilst such leveraged dominance is not new in competition law, its application in telecoms has generally been related to tying of one telecoms service to another. The novelty of digital markets will be defining remedies that maintain contestability in a diverse set of "target" markets that have been tied to the "origin" market of the digital actor in question.

In order to maintain contestability in target markets, the following remedies should be considered to be applied to SMP digital platforms: interoperability, non-discrimination, access to non-rivalrous data; accounting separation, prohibition of bundling/tying, "must carry" obligations on app stores, obligation to allow different app stores within the same OS, reasonable access, price control and structural separation.

Institutional set-up is key to effective enforcement

After evaluating the experience of the last 5 to 10 years of regulation (P2B, GDPR, AVMS, etc.), we are convinced that the success (or failure) of addressing digital markets depends mainly on effective enforcement based on an appropriate institutional set-up. Although counterintuitive, we think that this should have a major influence on the design of the ex-ante regulatory framework, rather than be an outcome of political negotiation with Parliament and Council.

In its consultation, DG CNECT recognises that the telecoms framework, with its network of regulators, is particularly suited to the design and harmonisation of effective remedies. These remedies have been

[26]See section 3 of Condorelli, D., & Padilla, J. (2020). Harnessing Platform Envelopment in the Digital World. Journal of Competition Law & Economics.

developed over time in an exploratory process to address market failures, with regulators in the network learning from the experience of others.

Telecoms markets differ from digital markets in an important respect. All regulated telecom markets are "national" in geographic scope. Therefore, there is an obvious justification for a national regulator to oversee application and enforcement of the regime in its territory. In the telecom setup, the Commission has a higher-level harmonising role, ensuring that the common framework is applied consistently, when national market differences are taken into account.

Amongst the digital platform markets there are a number that are global[27] or regional in scope; it follows that there is a much greater role for the Commission (DG CNECT) at the centre of a new digital regulatory set-up. This role would need to be much more than just harmonisation.

However, expanding the scope of the Commission's competence over national markets is unlikely to attract widespread Member State support. So, there would still be a need for national regulators to police national platform markets, as well as to provide "boots on the ground" in terms of information gathering and enforcement. National regulators will also have substantial analytical resources that could be harnessed in a more matrix organisation, like we see in many businesses.

Creating a new European agency at the centre is subject to substantial legislative, budgetary and political challenges, not least of which could be a Treaty change. Therefore, Telefónica believes that, whilst a European agency might be a longer-term goal, in order to give rapid effect to legislation, a "network of European and national regulators" would be the most efficient alternative. Unlike telecoms, the Commission would sit at the heart of the network, rather than on the outside.

Where markets are national, the relevant national authority (e.g. the telecoms regulator with its experience of SMP regulation and remedies setting) could take the lead, with the network of regulators creating harmonising guidelines to impose consistency where required, in both the dominance identification and the remedy imposition phase. Where markets are regional, the legislation would need to ensure that a single decision for Europe could be taken, potentially by DG CNECT, so that relevant remedies can be implemented once and quickly. The remedies at regional level should also be designed in agreement with the network of regulators. Regional decisions would require a single appeal right at EU level.

Using, as far as possible, existing regulatory agencies (obviously with increased mandates) would be the most cost-effective and fastest way to create more competition on digital markets. Telefónica recognises that the approach would need to differ from other "networks of regulators" such as those dealing with privacy or content, which lack expertise in economic regulation. A network of telecom regulators, which has traditionally dealt with national economic markets, granted a broader mandate to effectively regulate truly European digital markets is a viable option, especially if augmented with a greater role for DG CNECT in regional market regulation.

Finally, the ongoing costs of such a regime could be borne by the platforms themselves, in the same way that broadcasters and telecom companies fund those same regulators today.

In his recently published paper,[28] Professor Georgio Monti, sets out a framework for determining the optimum institutional set-up for a given regulatory challenge. We believe that the Commission would do well to evaluate a range of options based on such a framework. In his paper, Professor Monti explains how a network of regulators can be designed to achieve different policy goals (e.g. competition and

[27] The European element of the global market would be regulated as if it were a regional market, because of the limits of the EU's legal jurisdiction.

[28] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3646264

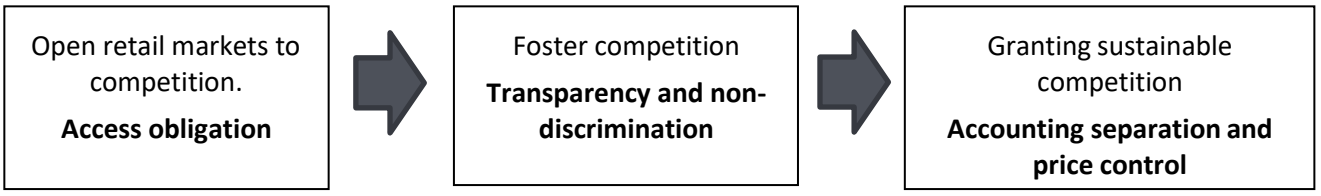
consumer protection) based on appropriate mechanisms of coordination, such as mutual consultation, joint work and developing joint rules. Our assessment is that a “network of European and national regulators” is the optimum outcome to address this institutional challenge.

ANNEX 1 : Remedies applied in the Telecom Sector that could be adapted to digital markets

The traditional ex-ante remedies applied in the Telecoms sector since 2002[29] that could be applicable to relevant digital markets are:

- **Access (Interoperability)**: obligations on operators to meet reasonable requests for access and use of specific network/associated facilities which denial would hinder the emergence of a sustainable competitive market at the retail level. Among this high-level provision, to highlight the obligation to provide wholesale services, granting open access to technical interfaces, protocols or key technologies indispensable for the interoperability of services as well as ensuring interoperability of end-to-end services to users.
- **Transparency:** in relation to interconnection and/or access, requiring operators to make public specified information (accounting information, technical specifications, terms and conditions for supply and use…). It could also be requested to publish a detailed *reference offer* for the mentioned information.
- **Non-discrimination:** the regulated operator shall apply equivalent conditions in equivalent circumstances to other undertakings providing equivalent services and provides services and information to others under the same conditions as it provides for its own services. Exceptions should be limited in scope and stipulated upfront in the regulation.
- **Accounting separation**: a vertically integrated company might make transparent its wholesale prices and its internal transfer prices in order to ensure compliance with the non-discrimination obligation and preventing unfair cross-subsidy.
- **Price control:** obligations relating to cost recovery and price controls, including obligations for cost orientation of prices and obligations concerning cost accounting system.

The application of the above-mentioned remedies for telecoms only to firms that enjoy significant market power in a given market, have ensured contestability and opportunities for third parties to compete on the merits in those markets in a process characterized as follows:



In order to understand the application of telecom remedies to digital services and its potential impact on competition, it should be reminded that remedies are mostly applied not in isolation but as group combining a set of them. The larger the set of remedies jointly applied, the wider effect on competition. It is also important to notice that during the last 2 decades telecom regulators have not had a static approach and have adapted the remedies imposed mainly focusing in those services with highest contribution to Operator's revenues, evolving their priorities according to technological evolution of the Sector.

[29] In 2002, the EC identified 18 relevant markets, 7 retailers and 11 wholesale. The last revision of the Notice on Relevant Markets in 2014 sets out 5 wholesale relevant markets that might be subject to ex-ante rules.

These remedies have been usually applied as a package of obligations leading to well-known regulatory interventions like copper unbundling (LLU), fixed and mobile termination price controls (MTRs/FTRs), MVNO access, roaming price controls, etc. It is feasible to apply similar remedies to digital markets in order to address market failures and therefore, it would make sense that, once a digital relevant market is identified and SMP is found, that the application of the equivalent digital remedies might also resolve digital asymmetries.

It is also important to notice that during the last two decades telecom regulators have not had a static approach and have mainly focused in those services with highest contribution to operator's revenues and evolved their priorities according to technological evolution of the Sector.

Once applied, remedies can be adjusted or removed to reflect the transition of the market towards a competitive state. Examples of this from telecoms include:

Case study 1

Access/interoperability as a remedy in telecom sector

A feasible application of the access/interoperability regulatory remedy in the digital chain, might be the obligation to grant access to App Store to any SW developer that commits with certain non-discriminatory and proportionate security/technical features. Such access obligation will remove entry barriers leading to a competing App Store in which different SW providers might fight to gain customer acceptance and thus becoming a dynamic ecosystem aiming to sell apps. That competition will enrich the final customer choice as there would be a wider set of apps available. Another example of potential access remedies would be allowing the development of a competing independent application store within the iOS ecosystem, or even a new mobile OS. The higher the technical complexity or the remedy translates into higher investments requirements and thus business risk, but if successful potentially leading to a higher market competition.

Another relevant application of the access remedy would be granting to third parties access to the profiling data of dominant OTTs. As targeted advertising represents the main source of income, then date becomes the most valuable asset from a competitive environment in the Digital Economy. Therefore, a remedy focused on access to non-replicable data in reasonable conditions is key to ensure contestability in those digital markets where there is structural and systematic market failure.

Finally, **interoperability** is the foundational base of telecommunication services. Therefore, together with the access remedy it should be ensured the interoperability of different services or products to guarantee competition across the Internet value chain. For instance: i) interoperability obligations that allow the cross-sectoral exchange of data; ii) the likelihood to provide services in different Operating Systems; iii) obligation to allow different App Stores within the same OS.

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Case study 2

Accounting separation and price control in telecom sector – MTRs

Mobile Termination Rate or MTRs is the regulated price a mobile network operator charges another for terminating a call in its own network. Mobile operators are obliged to offer this wholesale service to competing operators for them to be able to finish calls of their own customers when calling another operator's customers. As MTRs had a material impact in the price of mobile calls offered to customers, regulators have fixed prices to foster competition, setting price costs oriented. Regulators defined glidepaths to reduce MTRs progressively resulting in price reductions over 90% over the last 12 years. In certain situations, MTRs were set asymmetrically in order to ease take up of new entrants with low market share and then high potential termination costs.

In the digital world, this remedy could be equally applied over data, taking into account that data is the currency in the Digital Economy. Accounting separation would avoid the use of data gathered from one market to other markets, preventing cross subsidization. Same use could be applied for cross subsidies when offering new services to existing customers.

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In addition to the remedies taken from the Telecom Framework's experience, other ones should be considered in order to address specific issues on a given market:

- **Prohibition of bundling/tying**: a conduct banned under Art. 102 TFUE in Competition Law should be wisely extended as an ex-ante remedy to avoid these practices exerted by platforms which enjoy a dominant position in a specific market.

- **Zero price apps considered "must have"**: in order to boost the creation of new Operating Systems able to compete on the merits.

To facilitate the review analysis and definition of remedies, an additional obligation on Telecom Operators is to provide information regularly to national regulators on those aspects that range from market share, traffic, customer profile, customer usage, expends, fiscal information, etc. that if they were extended to digital players will help not only to understand the evolution of OTTs business but to guarantee a transparent application of regulatory obligations.

ANNEX 2 : Application of "digital neutrality" end user rights to different platform types

The following outlines how, conceptually, digital neutrality end user rights, mirroring Net Neutrality, would be applied to different platform services.

Search engines

Given the big influence of search results in consumer choice, the following obligations could be required:

- Non discrimination
  - Given the high impact of search results in user choice, search results should be based on publicly available criteria so that all advertisers have the same possibilities to get highly ranked in the search results.
  - To avoid undue influence in consumer choice, search results should also include some short of randomness, with identical searches leading to different results within similar ranked results
  - Paid advertising should be shown distinctly separate from native search results;
  - A reference offer for paid advertising, such that all advertising is charged at the same rate
  - The self-preferencing or systematically ranking higher a platform own ads or results should be considered a discriminatory practice banned by non-discriminatory obligations
- Transparency
  - Search users should be informed about the criteria to rank search results and on the conditions when such criteria might not be fully followed.
  - All advertisers, websites and information providers displayed on search results should have right to access the raking criteria of search results.
  - Search platform should only be allowed to use the publicly available criteria for search results ranking of its own products as having additional information will result in systematically outranking competitors and thus resulting in a discriminatory practice.

Application Stores

As the impact on consumer choice is similar to that of search engines, obligation and restrictions of search engines should be equally applied to application stores.

- Non discrimination
  - Avoid preferential treatment of own or affiliated apps in ranking results
  - Ensure end user choice of payment service to pay for apps – prohibition on tying of app store payment platforms for purchase of apps and in-app purchases;
  - Forbid abusive terms and conditions for third party apps.

Operating Systems

Similar to application stores, Operating Systems have a relevant and in some cases stronger influence on the applications / programs available for users, thus having the capability to restrict consumer choice.

- Non discrimination
  - Where apps are pre-installed, the user should be prompted to choose alternatives if they are available;

- Deletion of apps. All apps should have the same possibilities to be deleted. Self own apps by Operating Systems should have same treatment as third party apps: if their deletion is disabled, so should be third party apps.
- Access to APIs should be the same for third party apps and own apps.