

# TELEFÓNICA INPUT TO ITU COUNCIL WORKING GROUP ABOUT THE INTERNET OPEN CONSULTATION ON OVER-THE-TOP SERVICES

Telefónica welcomes the opportunity the ITU Council Working Group on International Internet-related Public Policy Issues brings to all the stakeholders to provide their views on the Over-The-Top service providers.

## SUMMARY

Telefónica believes that a healthy digital ecosystem needs a sound approach by policy makers based in a holistic view of the digital value chain to unleash the potential of all the stakeholders to thrive, contributing to create socioeconomic well-being.

Telefónica's belief is that healthy competition across all layers of the digital value chain is the best way to assure a sustainable digital ecosystem in where all the stakeholders are able to prosper and thrive.

Telefónica considers that the "same services, same rules, same taxes and same consumer protection" principle is the best way to stimulate competition on equal footing that underpins sustainability and provides the same opportunities for all the stakeholders regardless of their size or location at the core or at the edge of the digital ecosystem.

## ANSWERS

### 1. What are the opportunities and implications associated with OTT?

#### *OPPORTUNITIES*

Telefónica considers that over the top providers (OTTs) are playing an important role in the expansion of digitalization as relevant as the role played by telecom operators. Digitalization will drive major advances in the economy and society improving the lives of people in developed and emerging countries. OTTs and telecom operators are innovating in the provision of digital services and very high capacity wired or wireless networks that offer the necessary connectivity to underpin the digital transformation of our societies.

OTTs help to address the challenges of inequality lowering the barriers to entry and stimulating entrepreneurship, allowing people to engage globally with just a connection and a computer.

The global scale and reach of the services provided by OTTs, together with all the innovation in business models behind them has resulted in a sensitive increase of consumer choice and competition in the access and use of communication services, ultimately benefiting consumers and opening further roads for deregulation of communications services.

Their services are facilitating as well civic engagement empowering individuals and allowing them to participate in matters that were previously reserved to elites or to the few that had access to information.

### *IMPLICATIONS*

Telefónica considers that despite the advantages that the irruption of OTTs has brought to the society, there are a number of threats and challenges associated to them that must be taken into account by policy makers. These challenges create a need to rethink and redefine the model of economic growth and societal development, including the modernization of Public Policy and the regulatory framework.

OTTs business models, frequently articulated through online platforms that facilitate the exchange of value between consumers and producers in two sided markets, have resulted in market dynamics ruled by the “winner takes all” principle, at least for the main applications and services. It is clear that some of these platforms are acquiring dominant positions in different markets raising concerns about the way they operate and the possibility that they could be committing antitrust and consumer rights infringements. Some digital platforms benefit from “network effects” that arise because the platform’s value to each individual user grows with the number of other users who join the platform. These large network effects can diminish consumer choice and effective competition due to the lack of incentives to switching between platforms. It is difficult, in a given country or region, to find more than one leader in the most common applications, social networks, messaging services etc. Despite the theory saying that barriers to entry are relatively low, the network effects are so powerful that rarely a new competing player succeeds.

In the few cases this happens, mergers or purchases by the established OTTs simply leave the market as it is, without changes.

In particular, OTTs power of prescription, more important in the mobile market but also applicable to the fixed market, together with network effects challenges the foundational Internet paradigm of being an open platform. Internet is becoming an internet of silos, where the operating system, the type of handset and the application stores define what are the services and applications that Internet users can access. OTTs have therefore the capability to choose winners and losers in the digital world. In addition, as platforms usually integrate several vertical markets, the users may find themselves locked-in in a closed ecosystem. This is the case of some OTTs that bundle the device, the operating system, the app store and/or other services (communications, video, e-commerce...). Due to the vertical integration of the owners of these platforms, they usually compete with third parties in downstream markets, and they have the ability and the incentives to discriminate in favour of their own services in those markets. Due to increasing use of smartphones to access the Internet and commercial incentives for OTT players, the once open Internet, based on commonly agreed standards and interoperability, is transforming into closed, proprietary platforms.

Last but not least, the combination of global reach without local presence of the OTTs is challenging the way countries exercise their sovereignty. Governments are experiencing difficulties when trying to ensure the rule of law in the digital sphere - finding themselves in trouble to enforce national law, collect taxes or protect citizens’ privacy from global players. The “home country control” must be replaced by a “place of supply rule” that ensures that all companies comply with the legal framework of the country where they are providing their services.

## 2. What are the policy and regulatory matters associated with OTT?

We are witnessing a constant evolution in industry, technology and the way customers perceive and consume digital services, as well as the way they are produced. There is an ever-growing explosion of innovation. In this context, the digital world is constantly changing and it is expected to change much more in the future, maybe in directions that we cannot even foresee today.

The current legislative frameworks are not adequate to address this new reality. Legacy services categories have often become outdated and related service-specific rules are no longer fit for purpose. As a result of it, there are significant asymmetries in the rules applied to Telecom Operators (Telcos) and Internet-based service providers (OTTs) in areas such as: Privacy, Taxes, Data Protection, Universal Service Obligations, Competition law, interoperability, Portability (i.e. apps between operating systems), Consumer Protection, Access to Emergency Services, etc.

Besides, new internet services provided by OTTs have also brought new risks which also require new or adjusted rules. This refers to, e.g., new switching barriers, payment with personal data instead of money or challenges to consumer-friendly transparency. Gaps in consumer protection have also emerged due to a lack of law enforcement towards all market players, e.g. irrespective of their geographic location.

This has consequences in two respects:

- Consumers' protection standards are blurred. In particular, concerning transparency, consumer protection, privacy or well established standards such as emergency call functionality for voice.
- Telecom operators compete at a disadvantage. OTTs benefit from an asymmetric regulatory environment against Telecom operators, who have to face significant more costs and restrictions to develop services than OTTs, curtailing their ability to both compete directly and also to act as a competitive counterweight to the increasing market power of online platforms. The substantial limitations imposed on operators for commercial freedom is causing the loss of significant business opportunities.

Therefore, a new regulatory approach is needed for the regulation of digital services. It should be based on the recognition that the new digital world is much broader than the traditional communication services one, as it encompasses a plethora of services demanding a coherent framework. **Regulators should abandon the narrow "communication services" approach and re-focus in a new much broader direction, treating all digital services, including OTT services, in a similar way.**

New policies for the digital world should be guided by the principle "same services, same rules, same taxes, same consumer protection" to ensure a level playing field among all players in the digital value chain. This principle could be articulated through the following guidelines:

- **A common set of consumer protection standards for digital services:** The same consumer protection rules need to be applied to services that are substitutable from the consumers' point of view – in a technology-neutral way, irrespective of the provider or of the business model (be it services paid with money or personal data). This applies to transparency of terms and conditions

for contracts, tariff transparency, provisions on contract termination or modification, customer care and support, quality of service, etc.

- **Specific Telecom Financial burdens should be removed or equally applied to all players.**
- There should be a **consistent application of rules to all players** in issues such as privacy, consistent switching standards across the digital market, interoperability, application of competition law
- **Rely fundamentally on horizontal regulation**, having specific rules only where indispensable

Regarding online platforms from a regulatory perspective, their fast growing and dynamic nature suggests that a stringent and constraining ex ante regulation would not be advisable. **However, basic principles** applied to similar competitive concerns in the telecoms industry could provide a solid framework to address the bottlenecks that may be detected. Principles such as: Fair access, non-discrimination, non-unreasonable bundling or tying, transparency, technological neutrality, interoperability, portability and innovation fostering. Special mention should be made here to the Net Neutrality debate and the narrow interpretation pretending to promote Internet openness by applying the neutrality requirements only to access networks when anticompetitive discrimination may occur at other layers of the digital value chain. There is a need for a common vision on how to ensure an open and unrestricted Internet experience in relation to digital devices, content and applications, moving beyond the traditional focus on network operators into ensuring neutrality across the digital value chain.

### 3. How do the OTT players and other stakeholders offering app services contribute in aspects related to security, safety and privacy of the consumer?

The global reach of OTT results in a pervasive impact to all these aspects all around the world. Any decision they take or any change in the terms and conditions of the services they provide has an immediate impact worldwide.

Growth in security incidents has raised users' awareness about what data is extracted from their online activity and who has access to it including sensitive information like passwords or bank accounts. The response from OTTs has been a growing trend to encrypt data associated to the use of their applications.

While encryption can play a key role to keep information safe while being transmitted through Internet, some OTTs use it in a way that enhances their role of gatekeepers with some unintended consequences:

- Challenging Governments and Courts ability to duly intercept communications for legitimate purposes.
- Exempting themselves from such protection to develop their business models.

Furthermore, being global players traditionally OTTs have not been subject to local regulations particularly on data protection, privacy and security matters. In this sense, the General Data Protection Regulation (GDPR) established a positive and strong precedent in the EU in favour of the principle of territoriality, confirming that any player offering services to end users in the European Union is covered by the new rules. This important provision takes on board recent jurisprudence of the European Court of Justice<sup>1</sup> and tries to fill the gap of geographical scope. While this is an important step in the right direction, it is still to be seen how this provision will be enforced in practice. In any case, this a first step towards reaching a Level Playing Field and the application of the principles “same services, same rules, same consumer protection”.

Another important precedent towards reaching a Level Playing Field in these areas was the adoption in the EU of the Directive on Network and Information Security (NIS). Contemplating measures for a high common level of security of network and information systems across the European Union, the NIS Directive for the first time imposed basic security and notifications requirements on certain OTTs (cloud providers, online market places and search engines), obligations that telecom operators had been complying with for a long time. This will not only imply reaching a level playing field, but an enhanced level of cybersecurity across the whole value chain. This approach to privacy and security is especially relevant now that privacy, confidentiality, integrity and security are being questioned in the Internet ecosystem where the data collection and processing are in hands of a few global players.

Additionally, for many years Telefónica had stressed the lack of justification for a sector-specific privacy legislation for the e-communications sector, when there are such a broad range of online service companies collecting and processing even larger volumes of personal data. Against a background of global convergence and competition in innovative services, the co-existence of sector specific rules and general privacy rules is negative for both businesses and consumers, as consumers face inconsistent privacy experiences for functionally equivalent services. Within the ongoing debate on the proposed ePrivacy Regulation in the EU, the extension of the principle of confidentiality to all interpersonal communications is certainly a positive step for better privacy protection and for an equal level playing field of all players. However, other elements need to be improved in the future ePrivacy Regulation to achieve a real level playing field focusing on the privacy risks associated to a specific kind of personal data and not to a specific service. Data and not services should be the subject matter of regulation.

#### 4. What approaches might be considered regarding OTT to help the creation of environment in which all stakeholders are able to prosper and thrive?

Telefónica considers that it is necessary to assume that the world has deeply changed and there are no more sectors isolated from one another, but a blurred digital ecosystem where telecommunication

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<sup>1</sup> ECJ Ruling of 13 May 2014 on the “Right to be Forgotten” (Case C-131/12)

providers are just players of the same hyper-sector where OTTs have become the new dominant agents.

Telefónica thinks that healthy competition is the way to assure a sustainable digital ecosystem where all the stakeholders are able to prosper and thrive.

Same services must be subject to the same rules, taxes and level of consumer protection, which is the only way to underpin such healthy and sustainable digital ecosystem that assures same opportunities for all the stakeholders regardless its size or location.

To further foster competition in the digital ecosystem, openness and transparency is a must. Telefónica considers that light touch and sound regulatory approach must apply to all stakeholders.

A regulatory framework not guaranteeing a level playing field among all players will inevitably undermine the incentives to invest and innovate for the penalized agents (Telecom operators) while decreasing the competitive stimulus on the OTTs.

The focus on new bottlenecks in the digital value chain is already recognized by some regulators like ARCEP in its report "État d'internet en France<sup>2</sup>" considering that they can limit the freedom of Internet users to access any content, service or application of their choice through any device potentially hampering the development of innovative services harming consumers and competition.

The long duration of dominant positions observed in some markets (a quasi-monopoly in the search engines market for more than 12 years is a good example), together with the mentioned concern of the level playing field with regards to telco operators, would support the need for some kind of action. We certainly believe that competition policy cannot obviate these developments and needs to accommodate its tools to the new positions of dominance based on the massive collection and economic exploitation of data.

On the other hand, it is relevant to assure the effectiveness of competition controls. OTT mergers should also be scrutinized even if turnover thresholds are not matched because services are provided "for free" (freemium model). The new players in the digital ecosystem challenge the traditional competition policy tools when it comes to avoid pre-emptive mergers.

## 5. How can OTT players and operators best cooperate at local and international level? Are there model partnership agreements that could be developed?"

Telefónica believes that when the ecosystem grants the same opportunities to all the players, market dynamics evolve to provide the best results for cooperation.

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<sup>2</sup> [État d'internet en France](#)

Therefore, ensuring a fair level playing will provide the required foundations where partnerships will freely and efficiently arise.

Finally, Telefónica wants to remind its core belief that healthy competition is the way to assure a sustainable digital ecosystem in where all the stakeholders are able to prosper and thrive.