

TELEFÓNICA'S PROPOSAL FOR AN APPROACH TO ONLINE PLATFORMS: NEW BOTTLENECKS FRAMEWORK

Annex document to Telefónica's comments to the
questionnaire of

EUROPEAN COMMISSION'S PUBLIC CONSULTATION ON THE
REGULATORY ENVIRONMENT FOR PLATFORMS, ONLINE
INTERMEDIARIES, DATA AND CLOUD COMPUTING AND THE
COLLABORATIVE ECONOMY

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EXCECUTIVE SUMMARY

- Broadly speaking, enjoying a service or an application provided over the Internet requires the interaction of a number of other services, provided by different platforms
- Some of these platforms have become indispensable for users to enjoy their Internet experience and for services and applications to reach end-users
- Restrictions by a single platform of this kind in any of the layers could foreclose access to end users, thus becoming a bottleneck and harming consumer choice
- Outdated Regulatory framework keeps focus on access infrastructure and related services, not addressing the relevant bottlenecks at higher layer platforms operating in the Internet
- A precise online platform definition could help to identify agents potentially introducing bottlenecks, though this approach would not result fit for purpose
 - Diverse nature and types of online platforms make very difficult to find a precise and adequate definition which could serve as a starting point for a regulatory analysis
 - In a highly dynamic market with fast changing business models, a precise definition of online platforms could leave out of its scope many agents behaving as such but not complying with the definition
- New approach should then focus rather than on providing an online platform definition, on addressing enduring bottlenecks: identify them and implement solutions
- Basic principles applied to similar competitive concerns in the telecoms industry could provide a solid framework to address bottlenecks
 - Fair access, non-discrimination, non unreasonable bundling or tying, transparency, technological neutrality, interoperability, portability and innovation fostering
- It should be further assessed whether an ex-post or ex-ante regulatory model best addresses problem solving in the proposed bottleneck framework. As a general principle, targeted ex post action -with refreshed tools and procedures to tackle the specific problematic raised in the digital ecosystem- should be preferred when problems arise in order to avoid harming innovation in the global marketplace. However, the right balance needs to be stroke between supporting innovation and protecting consumer choice and competition from demonstrated enduring bottlenecks.

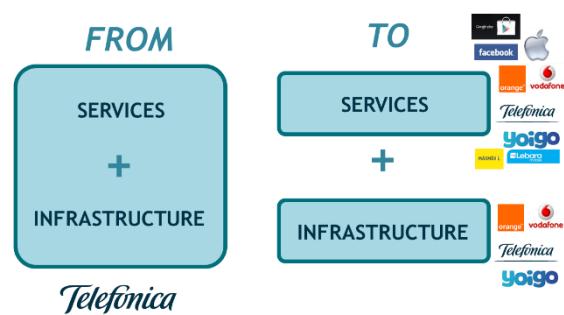
- The aim should be to ensure that all the elements of the value chain remain competitive and open, so as to ensure consumer will benefit.
- Upon the regulatory model selected, a review of current roles of the European and or National Competition and Regulatory institutions should be carried out. Proposed framework would probably require the adaptation of the current institutional setting to supervise its adequate implementation. This proposal does not provide a solution for this institutional setting. However, it should be pointed out that global and dynamic nature of Internet platforms should require innovative forms to address the jurisdictional issues.

FOREGROUND

Setting the scene

The evolution to a Digital world has resulted in a disruptive transformation of the telecommunication industry. Whereas communication services provided to customers were vertically integrated with access to the network, this is no longer the case.

Early liberalization of the sector implied new agents coming into play offering same communication services that could be independently purchased from the access service, while some of these agents deployed new network infrastructures. All these resulted in increased customer choice not only for the communication services but also for access service.



The real disruptive revolution arrived with full development of Internet ecosystem as we know it today. A new breed of Internet based services were developed by the newly arrived agents. These new services, some of which are communication services while many others not, were fully decoupled from the access and transport service supported by the network infrastructure layer, being provided at higher layer levels, e.g. on top of the Internet Access Service. As such, possibilities and choice have significantly increased for customers, who can now use multiple communications services and also many other different kind of services.

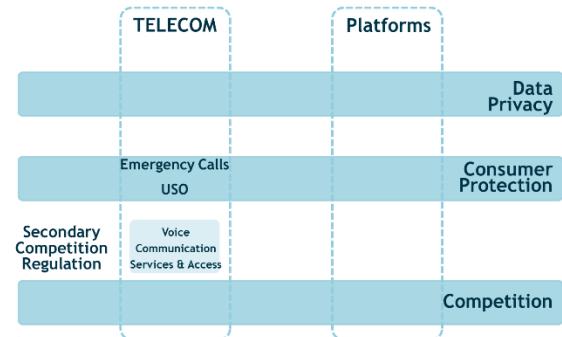
The regulatory framework has not evolved accordingly. While regulation defines obligations for the electronic communication services, including access services (e.g. Internet Access Service) provided closer to the network layers, Internet based communication services, which are provided on top, are not subject to such rules. Additionally, the regulatory framework has neither been able

to grasp the new competitive dynamics introduced by these higher layer services, both communications and non-communications services, and has kept same obligations for network providers when offering services. As a result, current regulatory framework has become outdated by implementing normative discriminatory asymmetries.

CURRENT REGULATORY FRAMEWORK

Where we are now

Regulatory framework is currently based on a set of horizontal rules affecting all sectors, namely Consumer protection, Privacy and Competition Law. This horizontal approach is complemented by a set of sector specific regulation. For example, the electronic communications services (ECS) framework which covers specific aspects related to competition as well as aspects related to privacy, security and consumers rights. One particular form of regulation on ECS providers (which could be described as a “competition regulation” as long as it analyses and regulates competitive processes) refer to the access to their networks.



New market players, such as the case of online platforms, are only subject to horizontal rules even when competing with players subject to sector specific regulation.

This latter framework has not reflected however the service decoupling from the access to the network taking place throughout the telecommunication industry, neither the emergence of new global players controlling specific bottlenecks in some market layers which are extending their scope to all the ecosystem fully changing market dynamics.

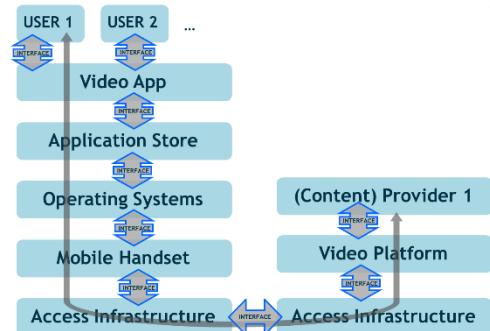
The split between services and infrastructures and the explosion of platforms running over the Internet, make necessary a change of regulatory mind-set. This new approach should take into consideration the interaction among all ecosystem players to detect new bottlenecks.

PROPOSED BOTTLENECKS FRAMEWORK

Platform definition and the new approach

Internet ecosystem works as a group of platforms, one built on the top of services provided by another, commonly referred as the Internet value chain. These platforms interact across layers (devices, OS, app store, apps, services, etc.) with end users and / or simultaneously with other platforms through a group of services or interfaces.

Services provided to end users are the result of the interaction of different platforms through the interfaces they have implemented; to provide a specific service, some platforms may be indispensable to deliver the end-to-end user experience and should be considered essential platforms. Consequently, essential platforms involved in the provision of a given service represent a route to reach end-users.



As providers of an access route, essential platforms have the ability to foreclose access to users thus becoming a bottleneck.

Example:

- Application stores unilaterally define the terms and conditions all Apps have to comply with in order to be included in their platform. The Application Store may decide not to allow an App to be included as for example be negatively affecting the App Store revenue streams (AppGratis offered discounts on paid Apps; since App Stores charge a fee on price paid for Apps, providing discounts on Apps will diminish revenues for the AppStore). Though the App would still have other Application Stores to include their App in, a share of the market will remain vetoed for the denial of access by one Application Store platform based on discriminatory / anti-competitive practice.

PLATFORM DEFINITION

Internet users' experience or Internet service is the result of a group of services provided one on top of another by different online platforms operating at different layers in some cases even vertically integrated. All these services, and thus online platforms, are needed to provide such Internet experience. Some of these platforms providing these services may represent an unavoidable or indispensable defile to reach end users in which case it becomes an essential platform: restrictions by a single essential platform in any of the layers could foreclose access to end users, thus becoming a bottleneck.

Ideally, a definition of online platforms should aim to identify all agents with the potential to become bottlenecks and act as gatekeepers in the Internet.

What is then an online platform?

An online platform could be referred as an undertaking, operating a hardware / software infrastructure through which services are provided to end users, other market agents, or even other platforms, over the Internet. Different platforms, depending upon the layer they operate at and on their business model, will have different and sometimes even unique characteristics that evolve overtime to better match market dynamics and customer demands. Thus, providing a more precise definition for these platforms could fall short of business evolutions over time, leaving out of its scope some agents as they evolve their business proposition over time to match market dynamics and customers' demands.

Having a broad future-proof definition, as the one given above, would avoid rigid approaches and would facilitate identifying all agents across the Internet ecosystem with the potential to become a digital bottleneck.

For example, although this still needs to be clarified, we found that the proposed definition of online platforms provided by the European Commission in the framework of its consultation may not cover the concerns raised around vertically integrated Operating Systems which occur when some device makers vertically integrate devices, operating systems and application stores.

What approach should we then take regarding online platforms?

As a narrow online platform definition would not be fit for purpose, it seems far more sensible and relevant to focus policy action on identifying and addressing specific and enduring digital bottlenecks in the Internet value chain (within the broad scope of agents included in the given broad definition of platforms) by providing the means to: identify and analyse the bottlenecks, determine the conditions under which intervention may be warranted, determine principles to treat the competitive concerns, find potential solutions, and implement them.

THE PLATFORM APPROACH PROPOSAL

According to the platform framework we are proposing, a platform or a group of platforms could be considered essential in the sense that it results indispensable in gaining access to end users. Without their participation other users, providers and/or platforms would have no possibility at all to gain access to the users participating in such platforms, as they provide a unique access route to those users. As such, essential platforms can become enduring bottlenecks able to apply restrictions that eventually foreclose access to end users. In other cases, a given undertaking may be in such a position that is able to hinder the capacity of users to switch to an alternative platform, e.g. it is in a position to control the portability of relevant digital assets, thus hindering competition and consumer choice.

Examples of these bottlenecks are present in specific App Stores, Operating Systems or search engines whose position in the Internet value chain make them essential platforms.

Basic regulation and competition principles traditionally applied to similar competitive concerns (enduring bottlenecks) in the telecoms industry could provide a solid framework for the purpose of identifying and classifying most common restrictions applied at bottlenecks:

1. Access denial: either by directly denying access to the platform to a user, group of users or other platform or by imposing unfair conditions to access the platform which virtually deny entry to the platform
2. Discrimination: unjustified application of different conditions to similar situations or similar conditions to different situation, favouring a particular user, provider, competitor, group of users or other platform.
3. Unreasonable bundling or tying: bundling or tying of services provided by group of platforms built on top of each other or within the platform that result in the exclusion from the market of other platforms or potential users of the platform.
4. Lack of Transparency: implementation of practices limiting users access to information on the services provided allowing them to take informed decisions and thus resulting in increased customer choice
5. Lack of Technological Neutrality: favouring or imposing restrictions on specific technologies resulting in a market foreclosure for the benefit of the agent owning the platform or partners.
6. Lack of interoperability: lack of implementation of interfaces enabling interactions with alike platforms and so impeding users' switching
7. Lack of portability: impediments to transfer a Relevant Asset for the user managed by the platform which results in a significant barrier for users to switch among alike platforms. Relevant Asset could be defined as data, content, identifier or any other feature the users of the platform would be unwilling to lose if changing to a platform or one without which the user will be not consider changing to a different platform; thus is an asset that if not able to be ported when migrating to a similar platform will represent a significant barrier for switching. Examples could be the telephone number in the case of network infrastructure platforms, certain Applications in a mobile handset / Operating System, purchased content (ebooks, videos...) in a content platform, etc...
8. Innovation foreclosure: restrictions preventing the emergence of new services, business models that would result in the benefit of end users and enhanced competition.

The existence of digital bottlenecks is the crucial element to identify the need for intervention. These bottlenecks could be found due to the vertical integration of some platforms, sometimes even called platforms of platforms.

The solutions to eliminate each bottleneck will depend on the type of platform and the restrictions applied. Each case shall require specific solutions which could be found from the set of tools generally applied in the telecoms industry: obligation to provide access, to apply fair conditions, not to discriminate, to apply a FRAND standard, to interoperate, to facilitate the portability, not to bundle specific services or interfaces under certain circumstances, etc.

The identification of a full set of restrictions which could cause competitive concerns and the eventual remedies to be applied is relevant to guarantee the due legal certainty for not chilling investments. Application of obligations should take into account that investment and innovation incentives of all players along the value chain should be promoted.

A NEW REGULATORY APPROACH

Ex-ante or Ex-post approach?

Highly dynamic digital markets might be vulnerable to ex-ante regulation due to the effects it could have on innovation and investments. Thus, a more flexible approach should be considered and Competition Law would be preferable when workable and sufficient. Interventions would then be limited to anticompetitive practices or abuse of market dominance, where end routes to users are blocked by an essential platform. In such cases competition authorities would determine how such restrictions should be addressed, taking into consideration the need for refreshed tools which could manage specific features of the Internet ecosystem such as the two-sided nature of business-models, the provision of supposedly “free” services, the existence of non-physical barriers to entry (network effects, closed ecosystems, etc), the role of personal data and privacy as a new competitive dimension, etc. On the other hand, to prevent permanent damage to fair competition and consumer choice, the need for faster procedures, adapted to the dynamic nature of the Internet ecosystem, and for dispute resolution solutions should also be tackled.

Nevertheless, ex-ante regulation cannot be completely disregarded and even if residual, should be considered when Competition Law is not workable or sufficient, which could be specially the case if, or meanwhile, refreshed tools or procedures are not developed.

In the case of enduring bottlenecks where the Competition Law approach would not be able to end with blocking of routes to end users, the corresponding bottlenecks should be regulated by an ex-ante model. For example, if the access to an app store considered an essential platform is not guaranteed through Competition Law -because the procedures are not fast enough or because the

analysis of dominance is not properly adapted to the Internet environment- then, obligations in order to provide access under determined conditions could be adopted. Another example would be the case of vertically integrated platforms favouring their own services provided downstream, where not being Competition Law fast and effective enough, ex ante obligations intended to ensure non-discrimination could also be adopted.

In general terms, when a specific essential platform has been found to be an enduring bottleneck blocking routes to users and/or impeding consumer choice, and Competition Law is not able to solve it, a set of solutions in the form of ex ante obligations could be imposed. The obligations should be based on the same principles for all essential platforms and will aim to guarantee a competitive market.