



# DEUTSCHE TELEKOM'S PRIORITIES FOR THE GERMAN EU COUNCIL PRESIDENCY

Deutsche Telekom AG  
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# 1 INTRODUCTION

Germany has assumed the EU Council Presidency in a critical phase for the EU. The coronavirus pandemic is one of the greatest challenges the EU has ever faced. Europe will have to contend with the pandemic's socio-economic impacts for a long time to come.

The effort to minimize the economic damage, and address the threat of job and prosperity losses in EU countries, calls for unprecedented levels of financial support. The German EU Council Presidency faces the difficult task of keeping the EU unified, and acting in solidarity, as it tries to chart a course that can enable the EU to emerge from the crisis stronger than ever. With this paper, Deutsche Telekom aims to provide input for the German Presidency's agenda.

In doing so, we focus on four principles:

- **Prioritizing and advancing digitalization**
- **Safeguarding sovereignty in key strategic sectors**
- **Fostering competitiveness**
- **Strengthening values and reinforcing the rule of law**

## 2 PRIORITIZING AND ADVANCING DIGITALIZATION

### 2.1 The multiannual financial framework

At their summit meeting in July, EU leaders agreed on a comprehensive package to address the impacts of the coronavirus pandemic. The plan comprises an economic stimulus package worth EUR 750 billion. It will be provided in addition to funding from the new Multiannual Financial Framework (MFF) 2021–2027 that amounts to EUR 1074 billion. The German EU Council Presidency has the important task of preparing the financial basis for the post-pandemic period.

The current crisis has shown us just how important connectivity and digitalization are for our economies and societies. Ongoing network rollout and modernization, along with digitalization of educational institutions, hospitals and public administrations, will require enormous investments.

The latest proposals do not fully reflect the lessons learned from the Corona pandemic in terms of a vital push for digitalization and massive investments in the future. Funding for the "Digital Europe" and "Horizon Europe" programs, and for the "Connecting Europe Facility" (CEF) should have been significantly higher. Both the stimulus package and the budget should provide more funding specifically targeted for efforts to safeguard Europe's digital sovereignty – such as building a European cloud infrastructure with underlying terabit connectivity. In addition, funding from the European stimulus package should be used to jump-start the establishment and expansion of European software platforms. In this area, Europe now finds itself having to play

catch-up in the international competition with the world's leading platform companies. Currently, data of some 500 million Europeans are processed and monetized outside of Europe. This situation has to change. The post-pandemic recovery package needs to be applied towards sustainable growth and forward-looking investments – investments that will help enable Europe to catch up with the U.S. and China in key technological areas.

## 2.2 Promoting connectivity

The crisis has highlighted the extent to which stable, secure and high-performance digital infrastructures are backbones of our economies and societies. During the long "lockdown" clamped on our public life and on much of our economies, the central role that connectivity plays for our societal cohesion and the proper functioning of our economies came to the fore like never before.

Fortunately, our telecommunications networks have successfully managed the significant traffic increases that have occurred during the pandemic. At the same time, it has become obvious that, in the medium term, the only way to meet growing bandwidth demand will be to expand fiber-optic infrastructures (Fiber to the Home; FTTH). While this will call for major investments, end-users are unlikely to be willing to foot the bill for those investments. What's more, the ten largest global internet companies that account for 80% of traffic in telecommunications networks have not been contributing financially to the expansion of those networks. They have failed to contribute even though they profit the most from efficient infrastructures and their business models depend on the perfect functioning thereof. It is therefore high time to correct this imbalance and to begin exploring ways for such companies to make adequate financial contributions.

A state-of-the-art, widely available digital infrastructure, built around 5G technology and fiber-optic networks, is the basis we need in order to realize Europe's real potential for growth in digital technologies – and it is the basis we need in order to emerge from the crisis. Europe's economies and societies need a "digitalization boost" – enabled by suitable investments at the EU, national and regional level.

The EU Commission estimates that the task of achieving its connectivity goals for a European Gigabit Society by 2025<sup>1</sup> will call for investments in the size of EUR 500 billion<sup>2</sup>. By way of comparison: In the years 2017 through 2019, European telecommunications companies invested a total of nearly EUR 140 billion<sup>3</sup>. And they did so even though the capital earnings from such investments have declined continuously over the past few years, as a result of decreasing revenues<sup>4</sup>. To meet the enormous challenges they face, European telecommunications companies

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<sup>1</sup> These goals include providing all European households, in both urban and rural areas, with internet access of at least 100 Mbps, upgradable to gigabit speeds. In addition, all structures and facilities of special socioeconomic importance, such as schools, hospitals and businesses, are to have gigabit-speed access by 2025 (at the latest) with equally fast upload and download speeds.

<sup>2</sup> "Mid-Term Review on the implementation of the Digital Single Market Strategy," Communication of the European Commission, COM/2017/0228 final.

<sup>3</sup> Analysys Mason research: Telecoms capex: worldwide trends and forecasts 2017-2026; [www.analysismason.com/Research/Content/Regional-forecasts/telecoms-capex-forecast-rdms0/](http://www.analysismason.com/Research/Content/Regional-forecasts/telecoms-capex-forecast-rdms0/)

<sup>4</sup> ETNO Annual Report, The State of Digital Communications 2020, <https://etno.eu/library/reports/90-state-of-digi-2020.html>

need a regulatory framework that allows them to invest while at the same time being able to keep their operations financially sustainable and to stay competitive at international level.

With regard to making lasting improvements in the framework for network investments, we see a need for action in the following areas:

### 2.2.1 Frequency policy

The success of 5G technologies is tied directly to spectrum awards for mobile broadband networks. Since Member States differ widely in their frequency awarding, a new initiative for a better-harmonized, investment-friendly EU spectrum policy is needed. Such an initiative should aim at establishing best practices, in the following ways:

- Frequency awards should not place those companies at a disadvantage that have already invested billions in infrastructures - compared to companies just now seeking to enter the market. In addition, valuable spectrum should not be artificially restricted through spectrum set-asides – through reservations that take spectrum away from network operators invested in the sector.
- Regulatory interventions in the competitive mobile communications market, such as mandatory opening of networks for third parties (for example for national roaming), are not justified. What's more, they are tantamount to penalties for past investments. Ultimately, such interventions have the effect of reducing network investments, especially in regions that are less attractive economically.
- We should avoid all artificially induced scarcities, and exorbitant, fixed minimum rates or fees, that tend to inflate spectrum prices.

Therefore, the Council should call on the Commission to develop recommendations for appropriate and fair frequency auctions in Europe.

### 2.2.2 Facilitations in connection with network expansion

Deutsche Telekom is moving full speed ahead with its 5G expansion. Since mid-July, half of all Germans can benefit from the new ultra-high-performance network – in both urban and rural areas. Deutsche Telekom invests more in infrastructure than any other European telecommunications company. Additional financial relief for network operators could help accelerate the expansions of state-of-the-art fiber-optic and 5G networks that are now needed. For this reason, the Council should request the Commission to develop an ambitious proposal for a revised EU Broadband Cost Reduction Directive.

The upcoming reform should have a scope that extends beyond the current directive's regulatory area, and it should accomplish the following:

- speed up the approval process for network expansion – and make the relevant procedures less bureaucratic, wherever possible.

- further facilitate the build-out of networks on public property, by helping to make public property routinely available for communications infrastructures and, ideally, available free of charge to network operators;
- facilitate new approaches that promote Fiber to the Home (FTTH) connections for buildings and residences (i.e. connections that take the fiber-optic infrastructure from the property boundary to the home); installation of such connections is still time- and cost-intensive.

### 2.2.3 Regulation of 5G and fiber-optic networks

The regulatory and anti-trust-law framework for the expansion of fiber-optic and 5G networks needs to be improved.

- The Commission and national authorities should make use of all available options for refraining from regulating access – for example, in cases in which voluntary access offerings are available. All market participants who invest in new mobile and fiber-optic networks should be treated equally, from a legal and regulatory standpoint (symmetric approach).
- In areas that are economically less attractive, network expansions can often be achieved more effectively and efficiently via cooperation between network operators. By lowering the costs for all participating network operators, such cooperation achieves higher network coverage for all customers, without having an adverse effect on competition.
- In 2015, the Council and the European Parliament issued Regulation (EU) 2015/2120 laying down measures concerning open internet access (Open Internet Regulation), with the aim of protecting end users' rights. That aim is now dimming as a result of a biased interpretation by the Body of European Regulators for Electronic Communications (BEREC). Network slicing, a core element of 5G architectures, is a technique that enables existing network capacities to be used more efficiently - BEREC's guidelines in contrast call for equal treatment of all traffic as a principle and allow differentiation only as an exception, which puts network slicing under a negative suspicion. Hence, the guidelines have led to extensive legal uncertainty and might lead to negative impacts on investments in 5G and on exploitation of the full potential of this forward-looking technology.

The Council should make it clear, to the Commission and the Member States, that it expects the available regulatory and anti-trust-law flexibility to be used in the interest of efficient, continuing network expansion.

## 2.3 A green path out of the crisis

Digitalization plays a central role in the European Green Deal, the environmentally friendly transformation of the European economy planned by the EU Commission. ICT solutions can provide enormous energy savings in many different sectors, and can facilitate a significant increase in resource efficiency – for example, through "smart" solutions for mobility, production, cities and housing.

Any disproportionate burdens on the ICT sector that adversely impact this "enabling effect" should be avoided. In addition, development and use of innovative ICT solutions that contribute to energy efficiency and resource efficiency – for example, in the area of mobility – should be promoted.

The coronavirus pandemic should be seen as an opportunity to intensify efforts on key priorities set before the crisis began. The enormous burden of debt that the recovery package will place on future generations is an obligation for all of us to spend the money wisely to promote sustainable, innovative growth.

Political initiatives for improvement of sustainability can profit from relevant experience gained in the business sector. New EU proposals should give companies flexibility in how to best achieve binding goals. Companies such as Deutsche Telekom are already pursuing many of the approaches currently being discussed in the Green Deal and have relevant expertise in areas such as circular economy (as applied to electronic devices, for example), energy-efficiency increase for networks and data centers, and transparency with respect to investors and customers.

All important market players have to step up and take responsibility. Binding rules are required in those areas in which only concerted action, by many market players, can lead to effective solutions. This is relevant to the energy consumption of networks, for example, which depends centrally on traffic volume resulting from the use of digital services provided via the internet, and can hardly be influenced by network operators. Political initiatives that seek to address the growing energy consumption of networks must thus take an integrated approach that also takes account of providers of digital services and end-users.

### **3 SAFEGUARDING SOVEREIGNTY**

The Corona pandemic has highlighted the world's global interdependencies and the vulnerabilities they entail. There have been shortages of medicines and medical equipment. Supply chains have collapsed, crippling entire industries in the process. The pandemic has provided a startling reconfirmation of the pre-pandemic insight that Europe needs to become more independent both in key technologies and in areas that serve the population's basic needs.

Openness and free global trade must continue to be among the central principles for which the European Union stands. But such principles should not lead to dependencies in areas of strategic importance for European innovation – areas such as high-performance computing, quantum computing, chip and software development. Europe must preserve its ability to function on the basis of its own resources, and it must remain able to protect its economic and social model in competition with the U.S. and Chinese systems.

### 3.1 Cloud infrastructure

Europe is competitive in generating industrial data – i.e. in areas such as the Internet of Things (IoT) and Industry 4.0. On the other hand, the majority of data storage, use and analysis that takes place in connection with this data is carried out by non-European companies. And it is carried out on the basis of a cloud infrastructure in which European providers have only a marginal share. According to estimates, Europe will have a 5% market share in this area as of 2021, while companies located in the U.S. and China (Amazon, Microsoft, Google, IBM, Alibaba) will hold the other 95%.<sup>5</sup>

This dependence creates enormous competitive imbalances, and thus leads to losses of investing power in Europe. In addition, it creates weaknesses with regard to the protection and security of European data: When governments, the public sector and the majority of European industry store most of their data – including partly sensitive data – in clouds provided by U.S. providers, this data is potentially exposed to access based on foreign jurisdiction legislation.

The European data strategy is providing the right impetus in this regard. In addition to promoting voluntary data exchange, it is focusing on the underlying digital infrastructure– by establishing a European cloud federation. In the long term, this approach is the only way to reduce Europe's technological dependencies in this area.

We especially welcome the European Commission's declared intention to promote synergies with the Gaia-X cloud initiative. During its EU Council Presidency, Germany should take the opportunity to move such synergies a significant step forward. In essence, this is about the establishment of an open, trustworthy data ecosystem in Europe.

The following two aspects are central to the establishment of a European cloud federation:

- The existing cloud capacities of European companies need to be inter-connected on the basis of an open technology approach, in the interest of building a competitive, secure and trustworthy data infrastructure.
- In the interest of achieving data sovereignty, a suitable reference architecture needs to be installed that will serve as a clear framework for data use and control. This framework should also include: a binding certification system, to ensure compliance with security standards; interoperability specifications and additional requirements that can be applied as necessary in keeping with the criticality of shared data (such as restriction to cloud services that rule out the possibility of access based on foreign jurisdiction legislation ).

The introduction of a marketplace for cloud services can improve European companies' access to data, with a view to moving projects forward in areas such as artificial intelligence (AI) and Industry 4.0 – and, therefore, to scaling up such efforts in Europe and enhancing European innovation.

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<sup>5</sup> Jefferies (2017), Forrester (2017).



To be a success, such a project needs to be supported by creating initial demand from Europe's public sector. For this reason, the reference architecture for the cloud services should become the basis for future public tenders on projects for data exchange and use.

With regard to the pertinent planned financing, the effort to establish a cloud federation (for example, in the context of instruments such as CEF or Digital Europe) also needs to be aimed at improving terabit-speed connectivity for high-performance computing in the European Union. This is the only way to make the best possible use of synergies.

### 3.2 EU / Germany data strategy – Creating incentives for voluntary B2B / B2G data exchange

Non-personal (industry) data is still a largely unused resource. To enable the development of data-driven business models, companies need to be provided with a trustworthy, secure platform for data procurement, exchange and processing. In addition, they need access to suitable analytical tools and data-driven insights. In this area, industry-developed services (data marketplaces; see below) can make key contributions to an effective data use.

Companies need incentives for developing use of as-yet-unshared data – especially in the B2B area. Consequently, a number of measures is needed for improving voluntary data sharing, and for assuring the legal and technical availability of data. Such measures, which need to be implemented within the EU data strategy, include:

#### 3.2.1 Promoting data marketplaces

Data marketplaces such as Deutsche Telekom's Data Intelligence Hub (DIH)<sup>6</sup> can play a key role in advancing sharing of data between companies. In areas such as "smart city" and logistics, there is great potential to improve linking and combination of data from a widely diverse group of actors. For example, real-time traffic control, for the achievement and enforcement of air-quality standards in large cities, will no longer be feasible without "smart data".

Through data marketplaces such as DIH, which function as data trustees, companies can share and use such data directly, and non-centrally. In the process, the platforms reduce the complexity of data acquisition, and they optimize data provision and analysis for companies, with resources such as AI-based analytical tools. In connection with the establishment of "EU data spaces," the EU Commission should make use of these existing data marketplaces by integrating industry-led solutions from the start.

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<sup>6</sup> <https://dih.telekom.net/en/>

### 3.2.2 Advancing interoperability/standardization

One obstacle that is hindering greater inter-sectoral data exchange is a lack of standardization and a consistent description of industry data. In many cases, data has no "language" in common. For this reason, the German EU Council Presidency should support the EU Commission in setting up EU-wide conditions that establish harmonized requirements with regard to technical specifications for B2B data sharing (e.g. standardization/interoperability and a harmonized description of industry data (metadata)).

### 3.2.3 Reinforcing the open data approach

Currently, many administrative processes are still inefficient in the public sector because they are not digitalized and because they lack adequate capacities for the constantly growing volume of data handled by public administrations. In many cases, such processes make little use of state-of-the-art IT systems' (cloud services, AI systems) potential to boost productivity and enhance coordination.

Both businesses and public administrations would profit from greater use of the open data approach. Via provision and combination of data from public sources, useful forecasts and analyses can be prepared on areas such as traffic flows and the development of new solutions in the health-care sector.

For this reason, we welcome the German government's plans to establish public administrations as pioneers for, and drivers of, greater data use and data provision.

Private-sector data can also play a role in improving data availability in the public interest. An example of this is seen in the current cooperation between private companies and government agencies, and the EU Commission, for provision of aggregated, anonymized data to help fight the Covid-19 pandemic.

In general however, access to data of private companies should remain voluntary, based on contractual agreements. Any business government cooperation needs to aim for benefits on both sides, which should also be reflected in adequate compensation of the business side's expenses for data processing and analysis. States should not become "competitors" for existing commercial initiatives for data provision and analysis in markets. Existing incentives for data storage and processing should not be jeopardized.

## 3.3 Cybersecurity – 5G infrastructure

5G and cloud infrastructure make up the future backbones of the European economy and need a corresponding legislative and security-policy framework that is harmonized EU-wide. The EU toolbox for 5G security is a good basis for such a framework. It avoids a ban of individual regions and equipment suppliers and it formulates objective requirements, in line with the criticality of the specific network components involved. In addition, the toolbox calls upon Member States and

operators to reduce dependencies and to facilitate efficient competition in the area of network equipment.

The market for radio access network equipment is currently dominated by three companies that together serve approximately 75% of the market. What's more, each of the three manufacturers' network components are based on proprietary interfaces and cannot be combined with the other companies' products. Such incompatibilities create dependencies known as "vendor lock-in", in which network operators rely on a single vendor to supply all components of the radio access system in a single and inseparable set per base station. Such a lock-in situation should be avoided under both security and efficiency considerations.

Proper adoption of the Open Radio Access Network (Open RAN) concept can alleviate some of these concerns. With Open RAN, the closed "black box" solutions provided by incumbent manufacturers would be "disaggregated", i.e. replaced with a set of individual modules with fully open interfaces. This approach is expected to make it possible for critical infrastructure modules in the access network to be provided by different manufacturers, and for components of different manufacturers to be combined as needed. Such a step would reduce the dependency on individual manufacturers and would increase overall network resilience in Europe.

However, the process of establishing Open RAN as a standard for future network generations, providing legal certainty for operators and manufacturers alike, calls for a unified roadmap at EU level. The German Council Presidency should thus support the EU-wide adoption and implementation of open and interoperable interfaces in the radio access network, and it should request the EU Commission to prepare appropriate supporting measures.

### 3.4 Cybersecurity

The German EU Council Presidency can also chart a course for more-effective cybersecurity policies. This should include efforts to close existing gaps in the Directive on security of network and information systems (NIS Directive) and the EU Cybersecurity Act (CSA), and to harmonize electronic identity (eID) standards as part of amendment of the eIDAS Regulation.

In its upcoming amendment, the NIS Directive should be revised to ensure that security requirements and liability provisions also apply to computer hardware and software manufacturers. At present, the NIS Directive does not cover the entire digital value chain. As a result, such suppliers are exempt from the Directive's risk-management requirements (such as obligations to report security incidents, backed up by suitable liability provisions and penalties). Inclusion of new security requirements in the NIS – covering necessary aspects such as regular updates, application of the "security by design" principle, obligations to report security incidents, and binding certification of components of critical infrastructures – would significantly enhance cybersecurity only if the requirements also apply to computer hardware and software manufacturers whose products are deemed to be equally security-relevant.

In addition to the revision of the NIS Directive, the CSA, with which a basis for a European certification system has been created, should be upgraded into a binding instrument that – in particular – covers security-critical products and services in the areas of software and IoT. Among other effects, such certification could enhance the security of open interfaces (Open RAN).

At present, various national eID systems co-exist in the EU. This multiplicity of systems should be overcome with a view to strengthening trust in digital services of private European providers. An EU-wide standard for an accepted public electronic identity (eID) is needed. As part of the revision of the eIDAS Regulation, therefore, it should be ensured that all Member States transpose options for trans-boundary electronic identification throughout the entire European Single Market. Consumers should have full control over their own data, and they should be able to access their data securely in order to use desired digital products and services.

## 4 FOSTERING COMPETITIVENESS

Europe needs to build on its strengths and consolidate its resources. We need a European industry policy oriented to competition, open markets, world-leading research and technology, and a strong Single Market that eliminates barriers and bureaucracy. In the global "battle of the systems," Europe needs to show that its value-based economic and social model is a competitive advantage – not a stumbling block. Efforts to eliminate existing obstacles in the Single Market need to have priority.

Such efforts must include a reform of existing competition rules. In many areas – and especially in digital markets – effects of scale are indispensable to global competitiveness. Germany, working together with France, has placed itself at the forefront of a debate on needed reforms of European competition law. The German EU Council Presidency must move forward energetically on this effort and on other measures aimed at leveling the playing field for European companies.

### 4.1 Reforming competition law

To keep pace with the challenges resulting from increasing digitalization and globalization, the EU competition law must be amended in the following ways: (i) adapt merger control to market realities; (ii) facilitate cooperation aimed at combining resources to achieve scale; and (iii) tighten checks on market-power abuses in concentrated platform markets.

Consolidation in European markets should be enabled, and mergers should be facilitated. In particular,

- more dynamic and more global perspectives must be applied to the ways in which markets are defined in merger control procedures;
- static and dynamic efficiencies, manifested as lower costs and more effective use of resources, for example, must be given greater weight in merger control procedures. Standards of proof for merging companies should be on level with the EU Commissions own standards of proof.

- In the interest of legal certainty, the European legal framework for merger control should be adapted to the current decision-making practice of the European Court of Justice<sup>7</sup>, which has significantly tightened requirements – also with respect to the EU Commission's burden of proof – for rejections of mergers.
- With respect to acquisitions of start-ups by large platforms, merger control should assign to the platforms the burden of proof for showing that an acquisition is not anti-competitive. In addition, competition authorities should introduce ex-post control in those cases in which platforms systematically buy up start-ups, in the framework of an overall strategy to eliminate effective competition.

Where companies seek to cooperate with other companies, competition policy should not hinder their efforts, and it should offer them more legal certainty. The following measures should be taken to this end:

- Provide greater discretionary latitude, as part of revision of the Guidelines for the assessment of horizontal cooperation agreements. This applies especially to cooperative efforts for expansion of digital infrastructures and to joint development of key technologies.
- Provide options to seek early approval by notifying authorities about cooperation arrangements. This should take place in the framework of a voluntary notification procedure designed to rapidly provide legal certainty. Such a procedure should be subject to tight deadlines and should entail reduced requirements for providing information.
- Finally, lower the barriers, under anti-trust law, both for cooperation aimed at standardization and for the implementation of such cooperation. For example, the burden of proof should be shifted in the case of cooperation aimed at innovation. This means that, in case of doubt, the relevant cooperation would be assumed to be pro-competitive.

## 4.2 Preventing unfair competition in platform markets

Many digital platform markets are subject to strong concentration tendencies. Such tendencies should be countered by improving existing abuse control in the framework of anti-trust law, and by the separate creation of a clearly defined, specific ex-ante intervention competency in the framework of the planned Digital Services Act. The reform of competition law with regard to digital markets should focus on the following aspects:

- In anti-trust cases, the measure normally used to determine a company's market power is its market share. With respect to platform markets, the usefulness of that measure is limited, because such markets are highly dynamic. For this reason, the criteria for interventions on the part of competition regulators need to be adjusted. For example, the criteria could focus on a platform's number of users in relationship to all internet users of a country or of the EU as a whole.
- Specific abuses in digital markets, such as a provider's giving special preference to its own services, or a provider's exploitation of market power for purposes of excessive data collection and processing, with a view to generation of new business models, need to be followed more closely. Such abuses should be countered with new measures such as data-

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<sup>7</sup> <https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-05/cp200065en.pdf>

access requirements, or requirements to establish interoperability. Such measures should be available in addition to the standard instruments for controlling abuse, such as termination of certain practices, transparency requirements and non-discrimination requirements.

- Overall, abuse control must become faster and more agile in the rapidly developing digital platform markets. The necessary speed boosts for such control could be achieved via a two-phase model, with defined deadlines, similar to the model used for merger control.

In addition to reforms of ex post competition law, specific, ex-ante regulation of digital platforms is required as envisaged in the scope of the Digital Services Act. This should aim at preventing and addressing competition problems before they can create lasting damage. The German EU Council Presidency should support the European Commission's plans in this area and seek to move them forward, focusing on the following core elements:

- Establishing suitable institutional structures, at the national and European levels, for (i) continuous, competent market observation, and for (ii) effective enforcement of new laws.
- Focusing on large, system-relevant platforms. Easy-to-apply high intervention thresholds (see above) are needed. Intervention thresholds based on specific market shares have proven to be too complex to apply, as a result of the difficulty of delimiting dynamic platform markets.
- Any exceeding of defined intervention thresholds should automatically trigger mandatory “Do’s & Don’ts” - such as non-discrimination, data-access or interoperability requirements and unbundling of products, services and content. Further measures should be applied on a case-by-case basis, if necessary.

### 4.3 Fast-tracking modernization of state aid law

Without efficient state aid, the political aim of achieving complete-coverage service with gigabit-speed-capable fixed and mobile networks will remain out of reach. The Broadband State Aid Guidelines dating from 2013 are no longer appropriate, in light of today's increased demands for fixed and mobile network services, and of today's technological possibilities, since those Guidelines are oriented to basic-level services. Furthermore, those Guidelines lead to additional regulation of network expansions that tends to discourage both subsidized expansion and operators' own network investments.

- Therefore, the German EU Council Presidency should support rapid execution of the revision of the Broadband State Aid Guidelines that the EU Commission has announced for early 2021.
- The aim of such efforts must be to ensure that state aid for further network expansion, including both private and subsidized expansion, is applied more efficiently and with considerably streamlined procedures. In particular, this should include elimination of pertinent requirements that exceed already applicable sector-specific regulatory requirements.

## 4.4 Institutional reforms

Internal and external checks and balances in competition law procedures need to be strengthened. In particular, this should be achieved via provision of additional specialized resources, allowance of greater independence, enhanced transparency, a stronger ombudsman role and a general acceleration of procedures.

Within the European Commission, state aid procedures, which basically involve industry policy, should not fall under the responsibility of DG Competition. Instead, they should belong to DG GROW working in coordination with DG Trade.

## 4.5 ePrivacy

The Commission's proposal for an ePrivacy Regulation (ePR) has been discussed at the Council level since early 2017. Unlike the General Data Protection Regulation (GDPR), the proposal includes very strict requirements pertaining to processing of communications data. Processing for purposes other than communication would – according to the initial Commission proposal – only be permitted with the user's prior consent or only provided that the data is anonymized.

Consequently, there is a risk that the GDPR's horizontal rules for data protection, which are aimed at ensuring a level playing field within Europe, could be jeopardized by widely differing sector-specific rules.

To date, Germany's position has been that the ePR should allow metadata processing only for statistical purposes, in addition to consent-based services. Following through on this position would mean blocking to a large extent data-based business models in the communications sector. European telecommunications service providers would thus fall further behind when competing with global internet companies.

While App providers would be able to process GPS-based location data under the GDPR's more-flexible rules, telecommunications service providers would not be able to process mobile location data under the same legal regime. Such asymmetric regulation of comparable data is not justified, and it should be prevented by aligning the ePR closer to the GDPR.

In the area of artificial intelligence, in particular, European industry needs to be able to process large quantities of data. Technical solutions such as pseudonymisation under the GDPR would help balance the need for privacy protection with the aim of developing the economic and societal potential of big-data applications in the communications sector.<sup>8</sup>

Therefore, the German EU Council Presidency should actively follow up on and support re-introducing the principle of compatible further processing (in line with Art. 6 (4) GDPR), which

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<sup>8</sup> Cf. in this regard to the work of the "Focus Group on Data Protection" (Fokusgruppe Datenschutz), which, in the framework of Germany's 2018 "Digital Summit" (Digitalgipfel), is developing minimum technical standards for legally watertight use of pseudonymization, as a basis for developing a pertinent code of conduct (<https://www.de.digital/DIGITAL/Redaktion/DE/Textsammlung/di-gital-gipfel-plattform-sicherheit-schutz-vertrauen-fg3.html>)

would allow the further processing of metadata subject to sufficient safeguards and thus find a good balance between adhering to user's privacy and enabling data-driven innovation in the telecommunications sector.<sup>9</sup>

## 5 STRENGTHENING VALUES AND THE RULE OF LAW

Germany should use its Presidency as an opportunity to comprehensively uphold efforts to strengthen the rule of law in the EU. This includes a report by the EU Commission on the situation of the rule of law in every Member State. The EU needs to sharpen its teeth to effectively make sure that the rule of law is respected in all member states and that deficits can be sanctioned. This can be achieved through making better use of the mechanisms provided by the European Treaties. This applies both to proceedings pursuant to Art. 7 of the Treaty on the Functioning of the European Union and to cases brought before the European Court of Justice. In addition the German EU Council Presidency should push for a mechanism that makes EU funding dependent on compliance with the bloc's rule of law standards.

If it is to emerge from the crisis stronger than ever, the EU must strengthen its foundation as a community of values and solidarity. For this reason, a focus should be placed on the following initiatives through the end of the year:

### 5.1 eEvidence

The proposed regulation on cross-border access to e-evidence, for law-enforcement and judicial authorities, is to be finalized under the German EU Council Presidency. This proposed regulation is not compatible with the principle of separation of powers and the protection of fundamental rights. The purposes of the proposed e-evidence regulation are to facilitate and streamline cross-border investigations, and to make better use of options for gathering and preserving evidence in the digital age.

In general, these are worthy, important aims. However, efforts toward these aims must not lead to violation of fundamental principles such as the court-decision requirement. This is especially important in a time in which perspectives on the concept of the "rule of law" are tending to drift apart in the EU.

Where an EU Member State requests data access in a different Member State, the request should be granted only after a national, juridical authority or court in the EU Member State in which the data access is to take place has provided explicit consent. In addition, the well-established principle of "dual criminality" must continue to apply, in order to ensure that German companies and authorities do not find themselves serving as a "long arm" for other EU Member States seeking to impose inappropriate penalties.

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<sup>9</sup> Cf. Art. 6 (2) of the Austrian Presidency's proposal of September 20, 2018, which we continue to support: Consumers should have a right of objection (opt-out); companies have to provide information about planned processing, with reference to the principles of the GDPR; profiling is explicitly prohibited. Companies would be required to apply pseudonymization procedures.



In the discussion regarding a general approach in the Council of ministers, the German government has already expressed its strong reservations regarding the EU Commission's proposal for an e-evidence regulation. The German Council Presidency should work for the adoption of a regulation that meets the highest rule-of-law standards.

## 5.2 Review of the e-Commerce Directive within the Digital Services Act

The battle against illegal content on the internet is one of the central challenges facing European policymakers. In this regard, the review of the e-Commerce Directive, in the framework of the Digital Services Act, can contribute significantly to legal certainty, to strengthening the Digital Single Market, and to users' trust. Beyond the update of provisions on online intermediaries' liability for illegal content, new rules governing disinformation (including fake news) are considered.

Any tightening of existing rules, including new liability obligations, must be confined in scope to those services with which problems have occurred, and which "actively" manage the content of their customers. This particularly refers to services such as social media and e-commerce platforms. Other, neutral intermediaries – such as providers of internet-access or cloud services – should continue to be exempted from liability. Due to the stringent security standards applied in cloud services, such providers normally have neither control over, nor access to, specific content of their customers. Therefore, provisions requiring them to monitor customer data would undermine trust and cause significant damage. In addition, the updates of consumer protection rules that are planned along with the liability updates should be proportionate and innovation-friendly. Furthermore, in the interest of facilitating cross-border services provision, full harmonization of rules should be sought, in keeping with the pattern followed in other EU consumer protection regulations.

## 5.3 Preventing the dissemination of terrorist content online

The proposed Regulation on preventing the dissemination of terrorist content online, which is currently being discussed, is closely related to the e-Commerce Directive's liability rules. As *lex specialis*, it specifies responsibilities in addressing terrorist content. While this focus is correct and important, it is also necessary to prevent collateral damage for services that have virtually no relevance to the issue of disseminating terrorist content. It must be ensured that any general rules applying to all hosting providers do not lead to conflict between a) the stringent security standards that European cloud providers ensure for their customers and b) any new obligations in the coming Digital Services Act. The German EU Council Presidency should thus work to ensure that no cloud services in which the provider has neither control over, nor access to specific customer content, fall within the scope of the proposed regulation. Such security standards are key for ensuring customers' trust in the use of cloud services. Restricted exclusions, applying only to "infrastructure clouds," would be inadequate.

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