Discussion Paper

Digital Agency and Antitrust 4.0 - Germany's future coalition government proposes competition law update to tackle challenges of the digital economy

Abstract

Germany's leading parties have agreed a coalition deal to form a government. The parties have published a draft agreement, which advocates wide ranging changes to the existing competition law regime, fuelled by recent experiences of Germany's regulators and competition authorities with digital and platform markets. Plans include a general overhaul of competition law to tackle challenges of the digital economy, and the speeding up of antitrust procedures particularly through greater use of interim measures. Other plans, in particular with regard to platform markets, include the further development of competition oversight to stop the abuse of market power, and the revision of market definition tools. Furthermore, the parties plan public funding to support fibre rollout, the use of spectrum licence conditions to tackle coverage, a move from ex-ante regulation towards an open access model through co-investment for fibre, and the formation of a "Digital Agency" regulator. Companies should consider how they can help shape the implementation of the ambitious plans and how best to prepare themselves for new digital sector inquiries as well as to take advantage of the opportunities presented.

Introduction

Germany's Conservatives (CDU/CSU) and Social Democrats (SPD) published on 7 February 2018 a draft coalition agreement,[1] setting out their agenda for the next four years. The agreement reveals plans to overhaul existing competition rules to tackle challenges of the digital economy.

"We need a modernisation of competition law in relation to digitisation and globalisation of the business world. We want to complement the competition law for digital business models", the parties wrote.[2]

In this discussion paper, we summarise the key government proposals and provide a short commentary.

Public funding of fibre rollout

The parties call for a "*combined effort of telecommunication providers and the*

[1] Available at https://www.ndr.de/nachrichten/koalitionsvertrag22

[2] Draft Coalition agreement, paragraph 2736 ff.

state" to support nationwide roll-out of fibre.[3] Public funding of investment projects, said to be in the scale of 10 to 12 billion € over the coming years, is to be funded from licence fees expected from the 3G and 5G spectrum auctions. It will be restricted to projects providing fibre, with a particular focus on investments in rural areas.

In recent years, a number of countries have offered public funding to support fibre rollout, although they are constrained by state-aid rules including showing that commercial deployment is not viable in the areas to be covered and that the funds are allocated using a competitive selection procedure.

In our view it will remain a challenge to achieve effective competition for tenders as the incumbent operator is often much better placed to extend broadband given their existing infrastructure. The future government may be left with few credible bidders and end up either rejecting the incumbent's offer (as in the UK) or imposing terms and conditions which the incumbent rejects (as in Ireland where eir recently pulled out of their national broadband plan).

Moving from ex-ante regulation to ex post enforcement

As regards private investment into fibre, the parties advocate a move from ex-ante regulation applied to the copper network, towards ex post competition law enforcement of non-discriminatory access:

"In order to facilitate the construction of such [fibre] networks, we will rely on a model of discrimination free access (in the sense of open access), instead of a detailed ex-ante regulation as used previously for the copper network. We want to use this model first for cooperation agreements, and then further expand it. The regulator will ensure that competition prevails and will conduct ex-post controls in cases of disputes", the parties wrote.[4]

In our view, such a shift towards an open access model through co-investment offers the potential to avoid or reduce protracted regulatory debates over discriminatory access, particularly relating to tricky quality of service issues. Where investments are expected to only be marginally profitable, ex-ante regulation of returns to avoid monopoly pricing may also be less relevant.

However, having an upfront regulatory contract on future access regulation may be useful to create greater clarity on the future approach to such new investments. It would benefit both investors and access seekers to know how and when regulation would be applied for new network investments.

Spectrum and coverage

Aiming for increased 5G coverage and the reduction of blackspots, the parties want to ensure that spectrum allocation by the regulator reflects coverage needs particularly in rural areas.

The parties propose to allow mobile operators to agree on national roaming through changes in telecommunications and antitrust law.[5]

Network sharing and national roaming can make economic sense, particularly in areas where operating multiple networks would be inefficient. National pricing and competition in urban areas may be sufficient to ensure competitive prices. However, were national roaming to be imposed (rather than voluntary chosen by the operators) there would be significant risk of undermining operators' incentives to rollout. This could lead to less competition and ultimately less coverage.

[3] Draft Coalition agreement, paragraph 1639 ff.

[4] Draft Coalition agreement, paragraph 1654 ff.

[5] Draft Coalition agreement, paragraph 1670 ff.

Turning to the allocation of new spectrum, the draft agreement proposes to combine the issuing of licences with an obligation to close existing black spots: *"The default rule must be: new frequencies only against nationwide coverage"*, the parties wrote.[6] The coverage obligations are to be supervised by the regulator, who will penalise violations.

A danger of requiring universal coverage is that there will be some localised areas that are technically very difficult (or prohibitively expensive) to cover. As such, much depends on what degree and form of coverage the parties have in mind. Generally, coverage obligations will work best if (i) they are included as part of the sale of spectrum licences rather than imposed on investors later; and (ii) are framed to require coverage to a certain percentage of the population rather than specific areas, where the percentage required takes into account the exponentially increasing cost of covering the last areas.

As part of this new supervision, the government will instruct the regulator to develop a app-based notification system, whereby subscribers can report black spots. The resulting data is then to be aggregated and published, and further analysed in a periodic review by the regulator. In our view, this may turn out to be a useful data source for customers choosing between operators and would help plan for coverage extensions to address the blackspots. The investment case to remedy specific blackspots and whether there is a case for government support could then be examined

New "Digital Agency"

To assist the government in its new digital agenda, the parties are considering the establishment of a new "Digital Agency". This agency could act as a subordinate authority, supporting the broader government plans. This digital agency could assist with telecommunication and platform regulation, or market screening.[7]

In our view, the rapid development of digital services and the data economy does require a shift in the traditional focus of competition policy, such as away from short-term pricing effects (noting that many users pay no price to access key digital services) to give greater attention to quality, privacy and innovation. However, it is doubtful that a new Digital Agency regulator is needed. Existing competition law and the general economic and legal expertise within the German competition authority and regulator are apt to address issues in digital services, although they can usefully be supplemented by technical experts familiar with the data economy. A danger associated with a specific industry regulator is one of inconsistent regulation being imposed on some players and not others, thereby distorting competition. There is also a risk that creating an agency to be responsible for platform regulation creates 'work' for this new regulator to do. And hence there is the risk that regulation will increase above and beyond what is necessary or what would occur under a cross-sectoral competition regulator.

Antitrust Law 4.0

The draft coalition agreement further proposes a new regulatory regime for the digital economy. The parties state that, where necessary, they plan to modernise antitrust law to create excellent regulatory conditions for the German and European digital economy. The parties acknowledge a need to create an environment in Germany and Europe that allows digital companies to grow successfully and to a size to compete internationally.

The draft coalition agreement expresses a general commitment to reduce existing barriers and create a *"level playing field, including the rights of employees and*

[6] Draft Coalition agreement, paragraph 1678 ff.

[7] Draft Coalition agreement, paragraph 1712 ff.

consumers", a process for which it will demand the participation of the platforms (although it is not entirely clear how this will be achieved in practice).[8] To facilitate necessary reforms, the parties propose a committee, dubbed "Antitrust 4.0", and aim to harmonise relevant laws for the digital economy.[9]

To achieve this, the future government advocates a series of changes: (i) a review of the market definition exercise, (ii) intensified market screening and further development of competition oversight to stop the abuse of market power, and (iii) faster antitrust procedures, particularly through greater use of interim measures.

(i) Revised Market definition

The future government calls for a revision of the definition of the relevant market, to take into account the development of platform economies.[10]

In our view, the specific features of digital and platform markets have implications for the practical application of existing market definition tools. Regulators will need to exercise the flexibility they already have to find appropriate procedures for defining markets and take an open approach to different types of evidence. There are no compelling reasons why authorities should dispense with a formal market definition stage just because of shortcomings of some of the more prominent tools (e.g. the SSNIP test).

(ii) Intensified market screening

The parties further plans to intensify market observation/screening, arguing that besides general competition rules a more *"competent and active systematic market screening"* is needed. For this, the government is willing to hire specialised staff for the regulators and competition authorities to guarantee the necessary skillset. In addition, the draft agreement calls for a further development of the current tools for controlling abusive practices.

(iii) Faster antitrust procedures and greater use of interim measures

The draft agreement also includes plans to speed up antitrust procedures: *"We want to fasten the procedures in general competition noticeably without restricting constitutional guarantees",* the parties state.[11] A key part of this will be to make greater use of interim measures.

"Preliminary intervention should be facilitated for the competition authority even before the main proceedings have been concluded in order to effectively prevent irreparable damage to competition. [...] The competition authority must be able to quickly and effectively stop abuse of market power, especially in rapidly changing markets. To do so, we will further develop competition oversight, in particular with regard to abusive behaviour of platform companies."

Imposing interim measures can be an important tool for competition authorities and regulators to prevent further and more permanent harm. The greater use of appropriate interim measures was also a key recommendation of a recent CEG report, "Resetting competition policy frameworks for the digital ecosystem".[12] However, it may not always be easy to assess potential harm in digital markets. Implementing an interim measure may at times be over-protective and can harm firms that do not actually infringe competition law.

[8] Draft Coalition agreement, paragraph 1952 ff.
[9] Draft Coalition agreement, paragraph 2777 ff.
[10] Draft Coalition agreement, paragraph 1947.
[11] Draft Coalition agreement, paragraph 2765 ff.
[12] Available at https://www.gsma.com/publicpolicy/wp-content/uploads/2016/10/GSMA_Resetting-Competition_Report_Oct-2016_60pp_WEBv2.pdf.

Conclusion

Germany's draft coalition agreement advocates significant changes to the existing competition law regime, fuelled by recent experiences of Germany's regulators and competition authorities with digital and platform markets. The government's plans to speed up competition law procedures, including through the use of interim measures, are welcomed.

Other policy suggestions, such as linking new spectrum to a nationwide coverage obligation, or the potential establishment of a Digital Agency, will need to be carefully implemented and will surely be subject to much debate in the competition law community.

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