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To:	COMP DIGITAL CONTRIBUTIONS
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Subject:	Call for contributions - Shaping competition policy in the era of digitisation
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Dear Sir or Madam,

Bertelsmann welcomes the opportunity to contribute to this consultation.

Bertelsmann SE & Co KGaA is a media services and education Company that operates in about 50 countries around the world. It includes the broadcaster RTL Group, the trade book publisher Penguin Random House, the magazine publisher Gruner & Jahr, the Music Company BMG, the service provider Arvato, the Bertelsmann Printing Group, the Bertelsmann Education Group, and Bertelsmann Investments, an international Network of funds. Please find our thoughts below.

Today, global digital platforms, such as Amazon, Google, Facebook, shape – and often dominate – the digital economy. They also expand faster into the direction of media companies than vice versa. This results in an unprecedented concentration of market power in the hands of these digital platforms as de facto gatekeeper, which requires fair and proportionate regulation of all market players to achieve a level playing field. However, current legislation in key international markets is fragmented, outdated and does not reflect consumer interests and international market realities in the digital environment. It is time for digital platforms to take full responsibility, reflecting their market power, daily mass reach and influence on societies – and legislators must establish appropriate rules and standards with a holistic mindset.

The public value created by content companies must correlate to the economic value returned to them in order to ensure a healthy, pluralistic media ecosystem with diversity in voices, products, services and business models. For our high-quality content and services to thrive, we need to be able to capture a fair share of the data and advertising economy.

1. **Appropriate accountability of all players reflecting consumer and business realities:**

   Liability for online content is regulated by legislation pre-dating the existence of many US platforms and their businesses[1]. Digital platforms have long ceased to be mere providers of technological infrastructure. Platforms do not just enable consumers and media companies to distribute and communicate their content – they also influence content in their news feeds via algorithms – all too often with the predisposition towards more radical, sensationalist content. Recent events have demonstrated that algorithm-driven platforms are highly vulnerable towards disinformation online, manipulated content and fraud. New business models of digital platforms expand into curating content – which is regulated at a much higher level for content/media companies – especially broadcasters. There is a significant mismatch between the value that digital platforms draw from (user generated) content and the revenue returned to the content providers.
   We need a newly tiered liability regime, reflecting the massive impact of

digital platforms on consumers, society and the whole value chain, and which ensures that the de facto curating activities of digital platforms entail the same kind of liability.

For Example

In Germany, media and press companies enjoy freedom of the press – in their reporting, media companies must respect the personal rights of people and companies, which, like freedom of the press, have constitutional status. The balancing of these interests is reflected in media regulation, which, for example, legally obliges press companies to maintain journalistic due diligence. This obligation stems from State Press Acts and from the Interstate Broadcasting Treaty.

Breaching these duties leads to extensive sanctions. If, for example, negligent research leads to an article containing false claims about a person, the person concerned can sue the publisher and editor for damages. Depending on the severity of the breach, they are entitled to injunctive relief, retraction, or even monetary compensation. Furthermore, all State Press Acts and the Interstate Broadcasting Treaty enshrine the claim to counterstatement. This claim gives the person concerned the right to have their account of an event disseminated, irrespective of the truthfulness of the account in the article they are disputing.

Finally, the majority of German publishing houses have made a voluntary commitment to respect the German Press Council Press Code when reporting in their media. The German Press Council Complaints Rules give every citizen the right to file complaints about violations of the Press Code. In the event of an infringement, the Press Council will issue a note, a censure, or a public reprimand. The latter are published by the Press Council at http://www.presserat.de/ pressekodex/uebersicht-der-ruegen/ and as a rule also by the publisher concerned.

Beyond special media law regulations, journalists and publishers are also subject to sanctions under general criminal law. Regarding publications, those are about utterance offences such as slander and defamation, as well as delicts in the field of image publication. Whereas in the context of research, those are delicts which violate the integrity of data or are undermining administrative enquiries or proceedings. As a result, media and press companies are subject to extensive regulation regarding compliance with journalistic standards.

2. Fair access to data:

Asymmetrical access to data and a lack of transparency harms consumers, the diversity of the media landscape and the digital economy. Consumption of media content generates valuable data, which should be accessible to the media companies financing such content. The ever-increasing concentration of aggregated user data in the hands of a few digital platforms would be further reinforced by the ePrivacy Regulation as currently envisioned. Global digital platforms have built data ecosystems allowing them to easily obtain consent in exchange for access to their services. Similarly, media companies should remain free to make access to their editorial content conditional on the right to collect and process the data of their users. Furthermore, the concept of central privacy settings in browsers and devices would strengthen the gatekeeper role of digital platforms – but consumption of media needs to be independent of browsers and devices.
The global digital platforms are, by far, the biggest collectors and

processors of data in the digital economy. We need a more balanced framework that recognizes the contribution of media companies to the data ecosystem and ensures fair access to data and freedom of business model, while protecting consumer privacy and trust.

For Example

The draft ePrivacy Regulation currently under debate stipulates a general obligation to obtain user consent. This consent rule would result in a drastic reduction of targeted advertising, causing that the offer can no longer be maintained with advertising revenues. Without advertising revenue, free professional journalism in the digital world would be at risk.

The ePrivacy Regulation would strengthen the influence of large US platforms at the expense of providers of journalistic content. By means of default settings in browsers, apps and operating systems, the regulation under discussion would exclude third-party cookies. This turns browser operators into powerful “gatekeepers”.

To combat abuse and fraud on the Internet, the option to recognise Internet access devices is needed. The ePrivacy Regulation lacks a legal basis for a “anti fraud solution” based on the recognition of Internet access devices, i.e. a clause that would permit the collection of hardware and software data or the use of cookies for fraud prevention and combating abuse. Unless such a legal basis is provided, this effective form of fraud prevention especially in eCommerce would become impossible. Opt-in is not a viable solution because fraudsters simply would not give their consent.

The draft ePrivacy Regulation stipulates that users would have to be given comprehensive access to an online offer, even if users do not consent to receiving customised advertising. Since users would have to be given full access to the site in any case, there would generally be negligible motivation to opt in and consent to the collection and processing of data. However, only customised advertising based on these methods enables a vendor to provide an online offer free of charge.

The advertising industry’s budgets would be shifting to offers that can still use targeting – with “login giants” as the main beneficiaries. Thereby the ePrivacy Regulation would primarily serve to strengthen major US platforms such as Google and Facebook.

3. **Efficient and agile enforcement of modern competition and antitrust rules to reflect market realities:**

   The current competition and antitrust law in Europe (and the US) does not reflect the realities of the digital ecosystem. The mechanics of the platform economy, notably the so-called network effect, fuel rapid growth of platform companies to unprecedented size, market power and influence on public opinion. Antitrust law and enforcement of it must take into account these effects even before the tipping point has been reached and – if too late – provide for effective means to prevent platforms from an abuse of such market power and from other anti-competitive behaviour.
   It should be made easier for media companies to engage in mergers and new forms of cooperation in the media sector – otherwise, competition with US platforms remains impossible. The success of

video-on-demand platforms depends on their ability to offer the widest possible selection of content, from various media companies.
We need dynamic enforcement of the current materiality rules, as well as procedural rules that can be adapted quickly, to reflect the rapidly changing market conditions and their effect on competition and on consumers.

For Example

The project by big commercial TV players to form a neutral technology platform comprising all TV broadcasters of Germany for a onestop catch-up TV service was prohibited by the German Cartel Office a few years ago (2011/12) – de facto a free ride for Amazon and Netflix in the German market.

Another striking example of the outdated and narrow approach to market definitions stems from the analogue print market – only the readers market of women's magazines is in itself divided into five separate markets – quickly leading to "assumed market dominance" – which does not reflect the user's approach to consuming media in the current environment. On the other hand, the European Commission unproblematically approved Facebook's take-over of Whatsapp showing a very hands-off approach towards digital platforms.

A final example of the completely outdated view on markets is the German law on media concentration, which in fact is solely aimed at corporations such as Bertelsmann – since it focuses on broadcasting only.

4. **Fair share of the advertising market to finance content investments:**

   Media companies produce and curate creative content and high-quality journalism responsibly and hence ensure creative diversity, brand safety and consumer trust. For many (or most) media companies, this is primarily financed by advertising revenues. Advertising bans or restrictions on media companies make competition with US digital platforms more difficult.
   In order to achieve a level-playing field in accessing the digital advertising markets we need more flexibility in advertising regulation – and this needs to be applicable to all players equally, no matter how consumers receive the content, via TV or via digital platforms.

For Example

Viewers and politicians expect RTL to interrupt its regular programming for Breaking News in certain situations, and to report live on events of special news value. From a business perspective, this means lost advertising revenue, as in this context, the broadcasting of commercials booked for regular programmes is neither permitted nor desirable. The AVMS Directive does not allow the broadcaster to make up for lost revenue from booked commercials at a later hour, so it penalizes the broadcaster with the hourly limit. By doing so, the directive practically provides an incentive for private broadcasters to keep broadcasting their entertainment programming during breaking news situations instead of acting as socio-politically desired.

If a broadcaster like RTL shows a full-length feature film for children (without advertising due to the interruption ban), it is denied the right to refinance the film in the hours before or after with additional advertising income. This hits the broadcaster even harder because such films are associated with high licensing

costs. From a re-financing viewpoint, the lack of flexibility in broadcasting commercials makes it extremely difficult for a commercial TV channel to broadcast high-quality children‘s films.

Especially at the start of a new, self-produced series whose success is particularly important to both the producer and the broadcaster, and which they want to establish among viewers, it can make sense to show as little advertising as possible in the first few episodes in order to introduce the plot. This decision by the broadcaster is punished with an immediate loss of revenue during primetime, since he cannot “make up” the unused advertising air time at a later hour. This makes it much more difficult to refinance a series involving major investment.

5. **Fair balance of rules for digital platforms and media companies:**

   The asymmetry in regulation of digital platforms is most obvious in comparison with the highly regulated landscape for broadcasters (at EU and national level). Linear audiovisual media services (broadcasts) are still facing special regulation as far as advertising restrictions, including programme-related obligations (regional windows, third party content) are concerned. As long as these obligations remain in place, a fair balance for more rights towards media platforms has to be re-established by means of access, findability and signal integrity. And as a baseline we always require strong and robust copyright and neighbouring rights protection. Furthermore, to achieve a level playing field with digital platforms in their broader role as intermediaries and bottleneck for all types of content, questions of transparency and non-discrimination need to be addressed. Digital platforms have become the touch point for billions of consumers to access and explore media content. Access to such content takes place via search or recommendation engines and social media platforms. The platforms actively influence what is presented to their users and how it is presented. Therefore, the digital platforms have become powerful intermediaries who stand between the content providers and their audiences. In addition, digital platforms are setting (and frequently changing) the technical standards in the digital marketplace other market players have to adhere to – this makes fair competition impossible.

   The rights of media companies on audiovisual platforms should therefore be enhanced to redress the imbalance resulting from their (high) special regulatory obligations in order to achieve a level playing field towards platforms. Tech standards set by digital platforms alone as a result of their market power should be subject to monitoring and regulation to ensure non-discriminatory access to such standards and transparency.

For Example

Although RTL’s linear programmes and the content offered by a digital platform such as Youtube can be viewed on the same screen, we are subject to much stricter regulatory standards. Broadcasting is one of the most heavily regulated sectors in Europe. This is particularly evident in the fields of advertising and duties of care for the user (protection of minors, consumer protection).

According to the current legal situation, television broadcasters can only serve a stand-alone commercial before a programme in exceptional cases. At the same time, the advertising market demands this mechanism both online and in television broadcasting, as it is common practice on all online platforms (such

as Youtube). Television broadcasters are unable to appropriately satisfy this demand, and thus have a competitive disadvantage. Therefore, in the future, the exception should become the rule in order to enable to serve stand-alone commercials. It is even more important to make the permitted advertising volume more flexible. The windows envisaged by the EU, which would allow for a flexible shifting of the advertising volume to a respective share of 20%, can be described as a step in the right direction.

In addition, it should not be allowed to overlay broadcast content with third-party content without the broadcaster's consent – this applies to both advertising and media content. If content is overlaid or replaced with advertising and the revenue does not benefit the broadcaster, it deprives private broadcasters of their financial basis. Via so-called recommendations, users of the broadcasting programme are to be directed to a video-on-demand service. This is a misuse of the role of the gatekeeper in order to gain a competitive advantage.

6. **Fair taxation:**

   The current de facto tax advantage of digital platforms, involving significantly different levels of taxation for them in key international markets, needs to be further addressed by policymakers. A level playing field needs to be achieved with a comprehensive tax policy response coordinated at international level.
   We need a new tax framework that understands and reflects the nature of global digital business models and avoids unfair double-taxation to other players as collateral damage of tax initiatives. It is essential that governments and businesses work together to develop an efficient tax framework to harmonize international tax rules.

For Example

Bertelsmann CEO Thomas Rabe has criticized the EU‘s digital tax plan. He argued that a three percent levy on digital advertising revenues, as proposed by the European Commission, could result in a „double taxation“ of European corporations like Bertelsmann, which already pay a considerable amount of taxes on their European earnings.

Financial Times

New European tax plans targeting digital revenue could exacerbate the existing competition problems presented by American tech companies, Bertelsmann SE & Co. KGaA chief executive Thomas Rabe said Tuesday. If Bertelsmann, Europe‘s biggest media company by revenue, also had to pay the charges on digital revenue, „I would find this quite inappropriate,“ Mr. Rabe said. „We are paying direct taxes already...in all the countries where we operate,“ Mr. Rabe added. „We would be effectively taxed twice“ in Europe, he said.

Dow Jones

The German media giant Bertelsmann has criticized the European Commission‘s plans for a digital tax. The company‘s CEO Thomas Rabe said that was in favor of creating a level playing field between his company and US tech companies. However, the idea of three percent tax charge on revenues generated from digital services would not only apply to the so-called GAFA, but

to all companies. This would effectively lead to double taxation of Bertelsmann's digital activities, Rabe said.

Les Echos

Kind regards,

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[1] e.g. Section 230 of the US-Communications Decency Act of 1996, EU E-Commerce Directive of 2000, US Digital Millennium Copyright Act of 1998, EU Directive on the harmonisation of certain aspects of copyright and related rights in the information society of 2001).