Body of European Regulators for Electronic Communications

BEREC

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BEREC Report on the outcome of the public consultation on the Draft BEREC Report on the *ex ante* regulation of digital gatekeepers

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Contents

INTRODUCTION

This report summarises the responses provided by the stakeholders during BEREC's public consultation on the "Draft BEREC Report on the *ex ante* regulation of digital gatekeepers",[1] as well as BEREC's views on the issues raised by the respondents. The Draft report was opened to public consultation from 16 March to 4 May 2021.

16 respondents contributed to the public consultation, namely:

1. The App Association (ACT)
2. The European Consumer Organisation (BEUC)
3. Computer & Communications Industry – Europe (CCIA)
4. Confindustria Radio Televisioni (CRTV)
5. Duck Duck Go, Inc. (DuckDuckGo)
6. European Broadcasting Union (EBU)
7. European Telecommunications Network Operators' Association (ETNO)
8. Facebook
9. GSM Association (GSMA)
10. MVNO Europe
11. Open-Xchange AG (Open-Xchange)
12. Privacy International
13. Telefónica
14. Vodafone Group
15. One confidential contribution (One stakeholder)
16. A group of civil society organisations: Amnesty International, ARTICLE 19, British Institute of International and Comparative Law, Civil Liberties Union for Europe (Liberties), Electronic Frontier Foundation, Open Society European Policy Institute (ARTICLE 19 et al.)

Comments, observations and recommendations raised by the respondents are summarised here below, and BEREC's views are presented in separate boxes. The report is organised following the sections of the Draft Report submitted to public consultation.

This Report on the outcome of the public consultation complements the final BEREC Report *ex ante* regulation of digital gatekeepers[2], which includes the amendments presented here below. Both reports are being published simultaneously.

[1] BoR (21) 34, "Draft BEREC Report on the *ex ante* regulation of digital gatekeepers". See https://berec.europa.eu/eng/news_consultations/Closed_Public_Consultations/2021/8300-public-consultation-on-the-draft-berec-report-on-the-ex-ante-regulation-of-digital-gatekeepers

[2] BoR (21) 131, See https://berec.europa.eu/eng/document_register/subject_matter/berec/reports/10043-berec-report-on-the-ex-ante-regulation-of-digital-gatekeepers

1. COMMENTS ON EXECUTIVE SUMMARY AND INTRODUCTION

ACT disagrees with the notion that gatekeeping per se is harmful and BEREC's subsequent conclusion that an ex-ante asymmetric regulatory intervention towards gatekeepers like the Digital Markets Act (DMA) is necessary. According to **ACT**, the DMA could further assess other practices that require trade-offs between various costs and benefits that affect the wider ecosystem at a later stage and on a case-by-case basis after the EC conducts further research. One possible option to achieve this, according to **ACT**, is a principle-based grey-list of practices that regulators could develop further as it is applied to different gatekeepers.

ARTICLE 19 et al. endorse the majority of BEREC's feedback about the EC's proposal for a Digital Markets Act (DMA). However, **ARTICLE 19 et al.** disagree that the DMA should not apply to messaging platforms such as WhatsApp, Telegram or Signal.

DuckDuckGo welcomes the addition of "open internet" principles as a founding principle of the DMA, in particular the recognition that the neutrality of devices as "platforms" is as important as the neutrality of networks.

ETNO and **GSMA** concur with BEREC that some improvements to the Commission proposals are needed to make the DMA a success and make some additional proposals addressed in the following chapters.

Facebook agrees with BEREC that the applicability of the DMA to markets related to electronic communications networks and services, including number-independent interpersonal communications services ("NI-ICS"), should be treated with utmost caution.

MVNO Europe agrees with BEREC that an ex ante asymmetric regulatory intervention towards digital gatekeepers is necessary to ensure that competition and innovation are encouraged, that end-users' interests are protected and that the digital environment is open and competitive.

Privacy International welcomes the aim of the DMA to address some of the challenges posed by the way the current digital markets operate. However, **Privacy International** believes that the proposal put forward by the European Commission contains some shortcomings that need to be addressed, if the DMA were to be effective in tackling these challenges (see feedback from **Privacy International in the next chapters)**.

Overall, **Telefónica** welcomes and supports BEREC's views expressed in the Report on the Digital Markets Act (DMA) and hopes that most of BEREC's specific proposals are taken into consideration in the co-legislative procedure to fill the gaps in the Regulation, mainly seeking for legal certainty, effectiveness, predictability and governance. The DMA is probably the right instrument to address, in the application layer, the lack of equivalent user protection to that in the Open Internet Regulation (see also comments on Chapter 4).

Vodafone welcomes the publication of the BEREC report on the *ex ante* regulation of digital gatekeepers, as a timely contribution to the legislative process, with Parliament and Council currently developing their respective positions on the Commission's proposal for a Digital

Markets Act. **Vodafone** agrees with BEREC that some improvements to the Commission proposals are needed to ensure the DMA can deliver on the twin objectives of fairness and contestability in digital markets.

BEREC's response:

BEREC thanks all stakeholders for having provided their input in the public consultation process, which has helped to improve the final version of the report.

On the views expressed by **ACT** regarding the need of *ex ante* regulation for gatekeepers, BEREC maintains its views expressed in the draft report, as well as in BEREC Opinions and response to the EC public consultations on the Digital Services Act (DSA) Package and the New Competition Tool (NCT)s, on the general model in the DMA proposal and specifically the need to apply *ex ante* regulation to these actors, that can lead to fairer, open and more contestable digital markets. BEREC however concurs with **ACT** on the need for certain practices of a tailored intervention after an investigation (see chapter 7 of BEREC final Report). However, BEREC thinks that these tailored remedies (to be applicable under general *ex ante* rules and principles) should complement and not substitute the obligations under Articles 5 and 6 of the DMA proposal.

Regarding the application of the DMA to NI-ICS, the report subject to public consultation was stating that the inclusion of NI-ICS in the DMA should be considered with caution, as expressed by **Facebook.** In the meantime, BEREC published a report on the interplay between the EECC and the DMA concerning NI-ICS[3] in June 2021, which clarifies BEREC's position on this subject. While acknowledging that NI-ICS are listed among the core platform services (CPSs) in the DMA, BEREC presents the legal provisions which are already applicable to NI-ICS under the European Electronic Communications Code (EECC), and calls for a structured dialogue to be set up among the EU regulatory authority applying the DMA (the EC according to the DMA proposal), and the regulatory authorities for electronic communication services and BEREC in order to ensure regulatory certainty and predictability.

On the general comments from several stakeholders regarding the application of the openness principles at the application layer, these points are addressed below in the responses under Chapter 4. Moreover, BEREC is preparing a report on the Internet Ecosystem expected for Q1 2022, where this subject will be further analysed and addressed.

[3] "BEREC Report on the interplay between the EECC and the EC's proposal for a Digital Markets Act concerning number-independent interpersonal communication services" BoR (21) 85. June, 2021. See: https://berec.europa.eu/eng/document_register/subject_matter/berec/reports/9966-berec-report-on-the-interplay-between-the-eecc-and-the-ec8217s-proposal-for-a-digital-markets-act-concerning-number-independent-interpersonal-communication-services

2. COMMENTS ON CHAPTER 3 - WORK DONE BY BEREC ON DIGITAL ENVIRONMENTS

ACT appreciates the thorough work BEREC has done on digital environments in the past. **ACT** notes that in its 2018 report "on the impact of premium content on ECS markets and the effect of devices on the open use of the Internet"[4], BEREC criticised app stores for topics like content censorship, arbitrary ranking, and unfair terms and conditions. **ACT** would like to point this out as an inaccurate perception of the app ecosystem and that the implementation of the P2B regulation resolved existing issues.

Facebook has followed BEREC and National Regulatory Authorities (NRAs) in their work in these markets very closely and strongly supports BEREC's statements that a close and continuous working relationship between NRAs, BEREC and other stakeholders is needed to better understand these highly complex "platform markets". And though platform and traditional telecommunication markets are closely related to one another, the differences between the two ecosystems in terms of competitive dynamics, consumer experience and innovation are significant.

According to **Telefónica**, it would be of utmost importance that the enforcement of the DMA could leverage on the expertise of BEREC and NRAs.

Vodafone recognises the work undertaken by BEREC in recent years on digital platform regulation, the data economy and contributions to the public consultation on the Digital Services Act/ex ante regulation of digital gatekeepers and New Competition Tool.

According to **Vodafone**, BEREC is well qualified to offer recommendations on ex ante regulation, what obligations should be considered and the appropriate division of labour between the European Commission and NRAs in enforcing, overseeing updating these laws over time.

BEREC's response:

On the views from **ACT** regarding the position taken by BEREC on app stores in previous reports, BEREC would like to note that most of the issues that BEREC had identified in the 2018 "Report on the impact of premium content on ECS markets and the effect of devices on the open use of the Internet" and reiterated in the draft report subject to this public consultation, are also recognised as relevant and addressed in the DMA proposal. BEREC shares the EC's views that many of the concerns raised by app stores acting as gatekeepers cannot be effectively tackled by the P2B regulation and that an additional and asymmetric ex ante intervention on them is needed.

[4] "BEREC report on the impact of premium content on ECS markets and the effect of devices on the open use of the Internet" BoR (18) 35. March, 2018. See:.
https://berec.europa.eu/eng/document_register/subject_matter/berec/reports/8013-berec-report-on-the-impact-of-premium-content-on-ecs-markets-and-the-effect-of-devices-on-the-open-use-of-the-internet

BEREC agrees with **Facebook** on the relevant differences between the electronic communication services sector and the digital platform sector. However, BEREC agrees with **Vodafone** and **Telefónica** that the experience and expertise accumulated regulating ex ante ECSs is valuable for many of the aspects involved in the regulation of digital platforms and considers that its concrete proposals can contribute to further improving the DMA and support the EC in applying and enforcing this regulation.

BEREC has updated this chapter including references to new reports and proposals published after that the draft version for this report was opened to public consultation.

3. COMMENTS ON CHAPTER 4 - OBJECTIVES OF THE REGULATORY INTERVENTION

ACT believes BEREC should consider adding innovation and consumer welfare to the list of objectives, which are just as important to the functioning of the online platform economy as fairness and contestability.

ACT has concerns that the DMA proposal underestimates the interdependencies of the online platform economy, and smaller actors will become collateral of this oversight. Mandating changes to the business models of gatekeepers will send ripple effects throughout the platform economy felt most strongly by the smallest actors.

ACT believes BEREC's analysis insinuates that there is no competition between platforms. App stores, for example, compete fiercely to attract the most developers, which in turn attract the most customers.

ACT agrees the standard of protection under the Open Internet Regulation should not be lowered. However, **ACT** believes that the statement BEREC expresses support for in Recital 51 "Gatekeepers can hamper the ability of end-users to access online content and services including software applications" is misleading, since gatekeepers ensure that online spaces are secure. **ACT** argues that platforms and their business users are an essential part of the internet value chain and mandating changes to their business models could risk destroying the well-functioning aspects of the platform economy.

ARTICLE 19 et al. strongly agree with BEREC on the need to guarantee the **openness** principle throughout the digital environment, which brings the need to have open-internet type requirements for the application layer, in addition to the network layer.

ARTICLE 19 et al. support the objectives for regulatory intervention spelled out by BEREC in section 4 of its draft Report. In particular, **ARTICLE 19 et al.** strongly endorse the third objective (protection of **end-users**), which unfortunately is the most neglected by the DMA proposal.

BEUC supports the view of BEREC that ex ante regulatory intervention is necessary to promote competition to the benefit of not only business users, but also end-users.

DuckDuckGo welcomes the addition of "open internet" principles as a founding principle of the DMA, in particular the recognition that the neutrality of devices as "platforms" is as important as the neutrality of networks.

ETNO and **GSMA** agree with BEREC that the DMA should create competitive and innovative markets that deliver superior results for citizens in Europe and worldwide, namely by ensuring contestability in the digital sector, fairness for business users of online gatekeepers, and protecting end-users from abuses.

ETNO and **GSMA** invite BEREC to take note of another crucial objective of the DMA, which is strengthening the internal market for digital services by setting out harmonised rules across the EU.

ETNO and **GSMA** agree that the DMA should strive to address a gatekeeper's unfair practices against its competitors, even if said competitors are not necessarily its business users.

Concerning the objective "Ensuring **openness** of the digital environment", **ETNO**, **GSMA** and **Vodafone** believe that rules should be consistent all along the digital value chain. **ETNO**, **GSMA** and **Vodafone** believe that BEREC could add value in the debate concerning the role of platforms in the digital communications market and supports BEREC's work in this area.

MVNO Europe welcomes BEREC's reminder that the approach to the Open Internet should be coherent across the value chain. **MVNO Europe** however believes that the recital 51, along with Article 6(1) point (e) of the DMA proposal, should not only target technical but also commercial restrictions that distort the level playing field, and must explicitly prevent distortions on markets for electronic communications (incl. for Internet access services). **MVNO Europe** asks BEREC to include this point explicitly in its final Report.

MVNO Europe believes that more emphasis should be placed on the ability of end users to actually access and use all the features available via the operating system of the gatekeeper, and this regardless of the electronic communications service provider (not only internet access service provider) they have chosen. In addition, **MVNO Europe** would like to emphasise that device manufacturers and providers of operating systems should not be able to impose restrictions on mobile operators/service providers, on app developers, and on end-users, which **limit access to key device functionalities** (e.g. the generation of mobile technology, mobile Internet, Voice over LTE or Wi-Fi, GPS, voice commands, etc.) for purely commercial reasons.

Privacy International agrees that protection of end users from potential abuses of gatekeepers should be among the fundamental objectives of the DMA.

Privacy International is concerned that gatekeepers abuse their dominant position by exploiting individuals' personal data and makes specific suggestions on measures to better reflect the rights and interests of end users in the comments related to chapters 7 and 8.

Privacy International states the DMA seems to focus disproportionately on creating conditions for more competition within an existing platform rather than on creating conditions for more platforms to enter these markets or giving end users more choice between platforms.

Telefónica agrees with BEREC that the DMA should pursue the three objectives mentioned in Chapter 4. And further states that making the criteria to identify gatekeepers and the accompanying regulatory measures dependant on the pursued objectives would be instrumental in providing predictability and clarity. Therefore, adding the objective of an Open Internet beyond the network layer would also impact the list of regulatory measures (see also comments on Chapter 7) and calls for a closer look to the criteria to identify gatekeepers that threaten the Open Internet.

Telefónica considers that at present the structure of the DMA does not lead to a coherent approach to achieving these objectives, in that all the obligations would apply to gatekeepers above the threshold, whereas it might be more appropriate to allocate "fairness" oriented obligations and those to protect end users in a different way, like symmetric obligations.

Vodafone agrees with the key objectives of the Digital Markets Act identified by BEREC.

In **Vodafone**'s view the harmonising objective of the DMA should be recognised as an up-front objective in BEREC's report.

MVNO Europe agrees that an **ex ante asymmetric** regulatory intervention towards digital gatekeepers is necessary to ensure that competition and innovation are encouraged, that end-users' interests are protected and that the digital environment is open and competitive.

BEREC's response:

Concerning the comment by **ACT** on the need to add innovation and consumer welfare to the list of the DMA objectives, BEREC believes that these will be reached by the overarching objectives of creating fair and contestable markets, as well as by protecting end-users' interests and ensuring that digital environments remain open and develop as an engine of innovation.

On the points raised by **ACT** regarding competition among (or perhaps between) app stores to attract developers, BEREC thinks that the competition among them appears to be far from "fierce" like ACT mentions. On the contrary, the issues raised by BEREC in its 2018 report appear to be confirmed by the current competition dynamics which call for an *ex ante* regulatory intervention to reach fairness and contestability. BEREC thus supports the EC's approach in the DMA proposal.

BEREC does not agree with **ACT**'s argument that mandating changes to the business models of gatekeepers will send ripple effects throughout the platform economy, and finally be detrimental for the smallest actors. As expressed in its response to the public consultation on the DSA Package (now DSA/DMA) and in its BEREC Opinion on the DMA, BEREC very much supports the asymmetric regulatory intervention of a limited number of digital gatekeepers which have been identified based on a set of thresholds and criteria demonstrating the powerful role and power that they exert in the CPS where they are active. The obligations of the DMA, and the tailored remedies proposed by BEREC, aim at proportionately addressing the practices which are considered to negatively affect competition dynamics and fairness in the digital environments. Thus, BEREC believes that the DMA can benefit end-users by creating open digital environments, as well as conditions for small and big actors to provide new and innovative services and products.

Finally, BEREC does not agree with **ACT** that Recital 51 of the DMA proposal is misleading. By means of the control exerted by a gatekeeper over a digital bottleneck, this becomes an unavoidable gateway to access a wide variety of services on the Internet, or to reach other users, raising concerns as to their effect, on competition, innovation as well as users' freedom of choice. Moreover, BEREC agrees that platforms and their business users are an essential part of the internet ecosystems, but does not believe that the asymmetric ex ante regulatory intervention proposed for the DMA would risk destroying the well-functioning aspects of the platform economy. On the contrary, such an intervention will create fair and contestable conditions to ensure that competition and innovation are encouraged, that end-users' interests are protected and that the digital environment is open and competitive.

Concerning **Telefónica**'s suggestion that different thresholds should be set according to the objectives, BEREC believes that this approach may be challenging in practical terms since the boundaries between different objectives are often blurred and the regulatory intervention should aim at addressing all of them in a coherent and consistent way.

BEREC welcomes the strong support given by **ARTICLE 19 et al., DuckDuckGo, ETNO, GSMA, Telefónica and Vodafone** to its proposal to guarantee the openness principle throughout the digital environment. BEREC is currently working on a Report on the internet ecosystem to analyse how the openness and competition dynamics of different elements on both the application and network layers and the interaction among them which will further feeds BEREC's position on this matter. BEREC welcomes the support shown by **ETNO**, **GSMA** and **Vodafone** who believe that BEREC could add value in the debate concerning the role of platforms in the digital environment and who support BEREC's work in this area.

Regarding **MVNO Europe's** suggestion to specify in Recital 51 and in Article 6(1) point (e) of the DMA that restrictions distorting the level playing field are not only technical but can also be commercial, BEREC agrees that commercial terms and conditions should not hamper the ability of end-users to switch among services and that the distortions on markets for electronic communications (incl. for Internet access services) should be prevented. Similarly, BEREC agrees that also device manufacturers and providers of operating systems which hold a gatekeeper position should not be able to impose restrictions on mobile operators/service providers, on app developers, and on end-users, which limit access to key device functionalities (e.g. the generation of mobile technology, mobile Internet, Voice over LTE or Wi-Fi, GPS, voice commands, etc.) for purely commercial reasons. BEREC is reinforcing these points in Chapters 4 and 7.

BEREC also welcomes the strong endorsement given by **ARTICLE 19 et al., BEUC and Privacy International** to its recognition of the importance of protection of end-users' interests in the digital environment. BEREC agrees that the current DMA proposal is often only indirectly addressing concerns which are related to end-users only, and puts forwards in Chapter 7 of this final report some proposals for a better integration of end-users in the DMA and for ensuring end-users' empowerment and reinforcing their freedom of choice.

BEREC agrees with **ETNO and GSMA** that strengthening the internal market for digital services by setting out harmonised rules across the EU is key. To this end, BEREC supports that the DMA is enforced at the EU level. Moreover, in Chapter 9 of its final report BEREC proposed to set up an Advisory Board to coordinate and harmonise the support by National

Independent Authorities (NIAs) that BEREC believes to be necessary for the effective and efficient enforcement of this regulation.

Concerning the proposal by **Telefónica** that the criteria to identify gatekeepers and the accompanying regulatory measures should depend on the pursued objectives, and that adding the objective of an Open Internet beyond the network layer calls for a closer look to the criteria to identify gatekeepers that threaten the Open Internet, BEREC believes that any approach to Internet openness should be coherent across the value chain and the internet ecosystem, avoid any uneven playing field and ensure that the standard of protection established under Open Internet Regulation at the network layer is not lowered when addressing emerging threats. BEREC will keep working on this matter in its Report on the Internet ecosystem which is expected be opened to public consultation in Q1 2022.

4. COMMENTS ON CHAPTER 5 - THE SCOPE OF THE REGULATORY INTERVENTION

ETNO and **GSMA** agree with the list of CPSs included in the DMA proposal, but request more in depth guidelines on objective criteria for including new CPS as to increase regulatory certainty. **CCIA** argues that the inclusion of services within a CPS should be based on functional equivalence. **ACT** notes that while it is necessary to revise the list of relevant CPSs, it cannot be done too frequently as that could reduce regulatory certainty. **Facebook** asserts that it should be possible to argue that a CPS as a whole, and not only a gatekeeper candidate, does not fulfil the requirements laid out in Article 3(1) of the DMA proposal. **DuckDuckGo** suggests including browsers in the list of CPSs.

BEREC's response:

BEREC agrees that the digital sector is dynamic and that the list of CPSs may require revision in the future. Since regulation should be based on problems which need regulatory measures, BEREC believes that it may be useful to explicitly include the possibility of removing CPSs in Article 17 and Article 38 of the DMA, as the evolution of the digital sector may not only imply the addition of CPSs, but also their removal. Regarding the statements of **ETNO**, **GSMA**, **CCIA** and **ACT**, BEREC considers that the Commission, through market investigations, will find the CPSs where there are problems which need regulatory measures and therefore may warrant a revision of the CPS list.

BEREC is of the opinion that the market investigations combined with the legislative process could serve as adequate tools for establishing and updating the list of CPSs, and provide both the prospective gatekeepers and other stakeholders sufficient time to make any necessary adjustments in order to adhere to the regulation.

During the market investigation process, the EC as the DMA enforcer may gather input from relevant third parties, including – but not limited to – potential GK(s), for the definition of a potential new CPSs in way that is similar for amending the list of relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation. Contrary to the suggestion by **Facebook,** BEREC does not believe that the CPS list, once

defined, should be able to be challenged by stakeholders, as the market investigation should be robust enough and would also take into consideration input from stakeholders.

As regards the specific inclusion of web browsers as a CPS suggested by **DuckDuckGo**, BEREC is currently analysing the potential concerns related to web browsers in its Report on Internet ecosystem.[5]

On the issue of some electronic communication services (ECS) being regulated through both the EECC and the DMA, several stakeholders have rendered their opinions. **ETNO**, **GSMA** and **Vodafone** state that NB-ICS (Number Based Interpersonal Communication Services) are regulated by the EECC and therefore should not be included in the list of CPSs, whereas NI-ICS (Number Independent Interpersonal Communication Services) are only regulated by Article 61 in the EECC, which is not sufficient to address all of the concerns within the scope of the proposed DMA.

To reduce the risk of regulatory overlaps, **ACT** does not consider it necessary to include NI-ICS as a CPS, whereas **ARTICLE 19 et al.**, on the contrary, consider it necessary to include NI-ICS as a CPS, and argue that any overlap could be solved through adequate coordination of the DMA and the EECC. **CRTV** also expresses the view that the provision of NI-ICS should be included as a CPS in the DMA to address concerns in this area that are not regulated through the EECC. **BEUC** agrees with the inclusion of NI-ICS as a CPS in the DMA as it would only be gatekeeper NI-ICS that would be subject to regulation under the DMA, suggesting that this would promote both competition and innovation. **Telefónica** considers the regulation of NI-ICS to be more efficient within the DMA (both with regard to the scope and obligations), which will create more of a level playing field in comparison to the regulation of NB-ICS in the EECC. **Open X-change** also supports the inclusion of NI-ICS in the DMA as it finds closer links between NI-ICS and other CPSs than between NI-ICS and NB-ICS, even hypothesizing that the distinction between NI-ICS and social media could disappear over time. **Open X-change** does not agree with BEREC's statement in the draft report that business users do not use NI-ICS in an extensive way, stating that especially SMEs are relying more and more on NI-ICS to manage customer relations. **Facebook** states that the interplay of the DMA/EECC as regards NI-ICS should be treated with the outmost care, and that NRAs should be given the opportunity to regulate NI-ICS before including them as a CPS.

BEREC's response:

BEREC agrees with **ETNO**, **GSMA** and **Vodafone** that NB-ICS should not be included in a future CPS list. BEREC would also like to highlight that while only NI-ICS are identified as a CPS in the DMA, the scope of the DMA in Art. 1(3) sub b) refers to ICS and, thus, includes both NB-ICS and NI-ICS. The reason to include both categories is not explained in the recitals of the DMA but it does not exclude the possibility to define in the future also NB-ICS as a CPS and, therefore, the identification of any electronic communications operator as gatekeeper. If so, BEREC considers that this could raise uncertainty in ensuring the effective application of

[5] For the purposes of the "Report on the Internet Ecosystem", an internet ecosystem is defined as the complete internet value chain including all links and elements (e.g. devices, internet access service and applications) and the technical and economic interactions between them. Unlike the definition of platform ecosystems in section 6.3 of BEREC Report on the *ex ante* regulation of digital gatekeepers, the internet ecosystem refers to all related links, elements and services independently of ownership.

sectoral electronic communications regulation. BEREC also notes that NB-ICS do not share some of the key features of the digital platforms and their provision has typically been on a national scope. Thus, their inclusion within the scope of the DMA would be inconsistent with the subsidiarity principle. BEREC believes that the scope of the DMA in the context of the identification of CPSs deserves clarification.

BEREC notes the opinion of **Open X-change** on the prevalence of NI-ICS business users. Monitoring by BEREC and NRAs of the developments of these services is key, and BEREC has developed indicators on business user of NI-ICS to be published in a "Report on the harmonised collection of data regarding OTT services, relevant to electronic communication markets".[6]

In this line, BEREC is proposing amendments in its report on the interplay between the EECC and the DMA concerning NI-ICS[7]. On the topic of including NI-ICS as a CPS, BEREC acknowledges the DMA proposal to address within its scope those issues which are not covered by the EECC, as mentioned by **CRTV**. As it is the case for other legislations, regulatory overlaps should however be avoided. In order to avoid regulatory overlaps especially when the DMA remedies are imposed upon NI-ICS, BEREC also agrees with **ARTICLE 19 et al.**, and partly agrees with the reply given by **Facebook**, that potential regulatory overlaps must be solved through structured coordination. In order to ensure legal certainty, BEREC considers that the provision of electronic communications networks and services should be addressed giving priority to measures within the existing regulatory framework (i.e. EECC). In the above-mentioned report, BEREC therefore suggests amendments to Article 1 in the DMA proposal to better address the potential overlap between the DMA and the EECC on the NI-ICS aspect. This is being done with the aim of clarifying that the DMA does not and will not include any other ECS CPS than NI-ICS, and that all powers in the EECC remain applicable for regulating NI-ICS.

5. COMMENTS ON CHAPTER 6 - DESIGNATION OF GATEKEEPERS

As regards the combination of a quantitative and a qualitative designation process, **ACT, ETNO** and **GSMA and one other stakeholder** approve the use of both, to identify gatekeepers. **CCIA** and **one other stakeholder** do not consider the suggested quantitative thresholds in the DMA proposal to be a robust and reliable identifier of gatekeeping power. **Telefónica** suggests keeping the quantitative thresholds, but not necessarily the qualitative ones. Similarly, **GSMA, ETNO** and **Vodafone** consider that gatekeeper designation should be done through a cumulative three criteria test (size, gateway and enduring position). **One**

[6] BoR (21) 127. See https://berec.europa.eu/eng/document_register/subject_matter/berec/reports/10041-berec-report-on-harmonised-definitions-for-indicators-regarding-over-the-top-services-relevant-to-electronic-communications-markets

[7] BoR (21) 85, "BEREC Report on the interplay between the EECC and the EC's proposal for a Digital Markets Act concerning number-independent interpersonal communication services", see https://berec.europa.eu/eng/document_register/subject_matter/berec/reports/9966-berec-report-on-the-interplay-between-the-eecc-and-the-ec8217s-proposal-for-a-digital-markets-act-concerning-number-independent-interpersonal-communication-services

stakeholder notes that while there is a possibility to challenge the presumption of being a gatekeeper, if having surpassed the thresholds, it could still entail having to spend significant resources to do so for the corresponding actor designated as a gatekeeper.

BEREC's response:

BEREC agrees with the EC on the use of both quantitative and qualitative thresholds. It renders a possibility of a nuanced regulation, considering the different characteristics of gatekeepers. BEREC supports the process laid out in the DMA proposal, including the possibility to rebut the quantitative gatekeeper presumption following a qualitative analysis. Presumed gatekeepers are not obliged to rebut, should they choose to forfeit this possibility.

On the topic of the level of the quantitative thresholds, **GSMA, ETNO** and **Vodafone** consider that thresholds should be set as to only capture the largest platforms and thus to reduce the risk of overenforcement. **ACT** and **one stakeholder** both think that the thresholds should relate to the specific CPS.

Open X-change notes that a threshold on the number of business users requires a definition of what constitutes a 'business user', especially regarding NI-ICS and in relation to monetization through advertisement.

Both **ACT** and **Telefónica** ask to remove the possibility to regulate emerging gatekeepers, to increase legal certainty.

On the issue of legal certainty, **CCIA, Telefónica** and **ACT** call for detailed guidance papers on the qualitative aspects of the gatekeeper designation process.

BEREC's response:

Concerns the comments of **GSMA, ETNO** and **Vodafone** on quantitative thresholds set at a level where they only capture the largest and most influential platforms in each CPS, BEREC considers that the levels proposed in the cumulative criteria for the definition of a gatekeeper in Art. 3 (2) of the DMA proposal could constitute a good initial reference. To this end, the definition of 'business user' is of utmost importance for the gatekeeper designation, and therefore BEREC agrees with **Open X-change** that more clarity on this aspect is needed and is adding this point in the final Report.

On the point of relating the quantitative thresholds only to the specific CPS, as put forward by **ACT** and **one stakeholder**, BEREC argues in its report that there are pros as well as cons for such an approach. BEREC refers to its report on digital gatekeepers[8] for the list of arguments.

Contrary to **ACT** and **Telefónica,** BEREC considers that regulation may also be necessary for emerging gatekeepers and does not believe that the possibility to do so creates legal uncertainty. On the contrary, BEREC is of the opinion that the existence of clearly defined criteria increases legal certainty for all market players. However, BEREC considers it important to provide detailed guidance on the interpretation of the specified criteria for designating a

[8] BoR (21) 131, See https://berec.europa.eu/eng/document_register/subject_matter/berec/reports/10043-berec-report-on-the-ex-ante-regulation-of-digital-gatekeepers

platform as an emerging gatekeeper, as highlighted in its report. In this line, BEREC welcomes the endorsement from **CCIA, Telefónica** and **ACT** on the point that detailed guidance is needed on the qualitative analysis of gatekeeper designation.

The importance of ecosystems has been discussed by several stakeholders. **One stakeholder**, and to some extent also **Telefónica**, suggest that being part of an ecosystem should be a necessary and cumulative criterion for being defined as a gatekeeper. **BEUC** and **Vodafone** suggests having a similar position to BEREC, as expressed in the BEREC draft report, that any issues relating to ecosystems should also be considered when determining the relevant obligations that apply to an undertaking with gatekeeper designation. **ACT** on the other hand does not consider that being part of an ecosystem reinforces any gatekeeping power.

BEREC's response:

Due to the relevance of ecosystem effects, BEREC considers that the DMA proposal could explicitly include a non-cumulative ecosystem[9] criterion in the designation of gatekeepers, and the corresponding regulatory measures, when appropriate, to better reach the objectives of the Regulation.

Contrary to **Telefónica** and **one other stakeholder**, BEREC would propose that this criterion to be non-cumulative, as the regulatory intervention should target digital platforms with a gatekeeping role even if they are not part of an ecosystem. Indeed, certain non-ecosystem related concerns needing to be addressed can be raised by very strong market players regardless of whether they are integrated into ecosystems. BEREC agrees with **BEUC** and **Vodafone** that issues relating to ecosystems should be addressed by corresponding regulatory measures, when appropriate, to better reach the given objectives. BEREC does not agree with the statement by **ACT** that being part of an ecosystem may not reinforce the gatekeeping power. BEREC finds that there are concerns which relate specifically to being an ecosystem, in which case the gatekeeping power is reinforced.[10]

BEREC finds that a sufficiently descriptive definition of what constitutes an ecosystem is needed. The phrasing on page 1 and para (14) (page 18) in the DMA proposal suggests that an ecosystem consists of some set of services offered by platforms outside the scope of the CPS where they have gatekeeper status, but the list of definitions in Article 2 of the DMA proposal does not contain any formal definition of what constitutes an ecosystem. BEREC therefore proposes that a definition of what constitutes an ecosystem should be included. BEREC's suggestion of an ecosystem definition, in the context of the DMA and for the purposes of this report, is the following: "*A platform ecosystem consists of different types of services or products provided by the same undertaking either across more than one CPS, or*

[9] Where there are cumulative criteria, all the criteria must be met in order to designate a gatekeeper. A non-cumulative criterion, on the other hand, helps tip the scale towards gatekeeper designation, but does not preclude from gatekeeper designation those who do not meet it.
In the present context, a non-cumulative ecosystem criterion that is met, would help tipping the scale towards gatekeeper designation (provided of course that all the existing cumulative criteria are already met). A market player who meets the cumulative criteria will still be designated gatekeeper even if it does not meet the non-cumulative ecosystem criterion.

[10] A list of concerns can be found in the left column of the table in Chapter 7 of the final report on digital gatekeepers. Concerns which relate specifically to ecosystems are marked as such.

where the provision of these or other services/products is giving a significant advantage to the undertaking. *This could be the case e.g. by bundling offers, sharing common inputs (such as data), or tying the use of one service/product to the use of another service/product".* This definition has been integrated in the Report.

CCIA, regarding the required geographic scope of the activities by the gatekeeper, notes that to not reduce the incentives for nascent competitors to expand their business, it should be possible to identify gatekeepers active in fewer than three Member States. **Vodafone** on the other hand does not consider a platform active in fewer than three Member States to have any impact on the internal market, and should therefore not be subject to the proposed regulation.

BEREC's response:

BEREC suggests in its draft report that some conducts could be problematic even if the platform is only active within a single Member State. For the reasons expressed in the report, BEREC therefore agrees with **CCIA** that the DMA should not restrict the possibility to regulate platforms having a gatekeeping role that are active in fewer than three Member States.

6. COMMENTS ON CHAPTER 7 - REGULATORY MEASURES FOR GATEKEEPERS

CPS-specific obligations and tailor-made remedies

ACT, **DuckDuckGo**, **ETNO**, **GSMA**, **Vodafone** and **One stakeholder** supports the BEREC recommendation to introduce a distinction in the regulation between directly applicable obligations which i) would apply to all CPSs and ii) would apply only to specific CPSs. **BEUC**, however, considers it would bring further complexity to an already complex proposal.

Vodafone strongly supports the list of regulatory measures applicable to digital gatekeepers (prohibitions and obligations) under Articles 5 and 6 of the DMA. However, **Vodafone** also supports increased clarity and granularity on how the proposed obligations and prohibitions should work in practice.

Furthermore, **Vodafone** agrees that Article 6 as currently drafted is insufficiently clear as to how obligations and prohibitions will apply in practice and would support BEREC's call for more tailored remedies (borrowing from the experience of the telecoms sector). This call is also supported by **ACT**, **DuckDuckGo**, **ETNO**, **GSMA** and **Telefónica**.

Regarding the obligations proposed in the DMA, **ACT** notes that they already cover a very broad range of concerns. Therefore, **ACT** does not agree with BEREC that this list should be extended.

One stakeholder calls for further clarification of the scope of the directly-applicable obligations listed in Articles 5 and 6 of the DMA proposal.

According to **Facebook**, companies should be given the opportunity to demonstrate the net positive effects of behaviour that may fall under one of the Article 5 and 6 provisions - especially for practices that are capable of improving services for consumers. For Article 6

provisions, Article 7(5) could provide an obligation for the Commission to take into account efficiencies brought forward by companies during the specification process.

Telefónica states that most of obligations set in Article 6 are targeted to a specific CPS and cannot be directly applicable to the rest of the services subject to this Regulation. However, it may be in the first implementation of the DMA obligations, that most of the expertise and knowledge resides in the firms being regulated rather than with the authorities. In order not to delay the application of obligations, it would be prudent for the authority to specify remedy solutions to be optional.

Telefónica considers it would be helpful to clarify in the regulation how the decisions on the different proposed measures need to relate to the achievement of the objectives of the regulation.

ARTICLE 19 et al. agree with BEREC about the need for ex ante principles and clearly spelled out regulatory objectives to guide all relevant actors, and especially national and European enforcers.

CRTV states that it is not very clear how "a set of directly-applicable obligations only applying to gatekeeper(s) in a particular CPS" can effectively work. CRTV considers that the obligations have to be certain and easily applicable, in order not to risk creating different interpretations and consequent disputes.

Speed of enforcement

Regarding proposed remedies which would be designed and implemented on a case-by-case basis and applied to a single or a limited number of gatekeepers, **BEUC** does not strictly oppose the idea of creating flexibility to future-proof the DMA. BEUC however adds that the proposal should avoid lengthy case-by-case assessments, as such an approach would therefore be counter-productive if it harmed the DMA's self-executing obligations. Additionally, a principles-based enforcement system in the DMA can create unnecessary frictions with competition law, according to BEUC.

ETNO and **GSMA** propose a shorter timeframe under Article 17 (conclusions of a market investigation tool to be issued within 12 months instead of 24 as proposed by the Commission) and to include additional obligations, which might be necessary to make sure that the Regulation remains flexible and adaptable.

BEREC's response:

CPS-specific obligations and tailor-made remedies

BEREC's draft Report distinguishes between directly-applicable obligations and the design of potential additional tailor-made remedies. As argued by, **ACT, DuckDuckGo and Telefónica**, BEREC agrees that this distinction would indeed bring clarity for all stakeholders, including the gatekeepers, and will specially improve the effectiveness of the regulatory intervention.

Facebook considers that companies should be given the opportunity to demonstrate the net positive effects of behaviours that may fall under one of the Articles 5 and 6 provisions. BEREC does not share this view and welcomes the approach chosen by the EC, and supported by

several stakeholders (**ETNO/GSMA, Telefónica, Vodafone**) concerning Art. 5 and 6. Indeed, the concerns that these articles address are based on practices that are sufficiently likely to negatively affect competition dynamics and end-users' interests. For this reason, BEREC estimates that such practices should be addressed by obligations, some of which are self-executing, while others are susceptible to be further specified.

BEREC would also like to stress that the current DMA framework of obligations should be *complemented* with additional powers allowing the EC as the DMA enforcer to impose remedies which would be designed and tailored to be more effective and address the identified concerns in a proportionate manner. The list of remedies at the regulator's disposal, as well as clear *ex ante* principles, would be formalised in the law, and would be imposed with the purpose of reaching the objectives of the Regulation, similarly to the ECS *ex ante* regulatory framework under the EECC. The EC as the DMA enforcer would use these powers i) when there is a risk that harmful behaviours are not (effectively) addressed by the obligations in Articles 5 and 6 of the DMA proposal and ii) for more technical remedies – such as horizontal interoperability[11] and access to key inputs/assets – which require proportionality considerations and where their effectiveness is highly dependent on the correct design of the intervention. This complementary approach is meant to ensure that the DMA is more future-proof and fit for purpose in such fast-evolving digital environments. Such an approach would allow the EC as the DMA enforcer to address certain unforeseen practices (not already covered by Articles 5 and 6), certain newly emerging issues and, more generally, issues which may not be effectively addressed by the current obligations. The remedies list in the DMA would help achieve legal certainty, so investors and existing and potential future gatekeepers, as well as business- and end-users can foresee future regulation.

Moreover, BEREC deems that the success of its above-mentioned proposed approach also depends on the creation of a structured regulatory dialogue with repeated (formal and informal) interactions with different types of relevant stakeholders. This would enable the EC as the DMA enforcer to gather the feedback needed to ensure the effectiveness of the regulatory intervention and to reduce information asymmetries.[12]

Concerning **Telefónica**'s suggestion that it would be helpful to clarify in the regulation how the decisions on the different proposed measures need to relate to the achievement of the objectives of the regulation, BEREC believes that for the additional remedies (that BEREC is proposing on top of the obligations listed in Articles 5 and 6), the DMA could take inspiration from the ECS regulatory framework where the law defines both clear *ex ante* principles (e.g. proportionate, based on the nature of the problem identified in the assessment, imposed following relevant consultations etc.) and the list of potential remedies to be tailored in order to reach the given objectives.

Speed of enforcement

[11] Sex box 1 under chapter 7 for further details on interoperability measures

[12] For further details see BoR (21) 94, "BEREC proposal on remedies-tailoring and structured participation processes for stakeholders in the context of the Digital Markets Act", available at https://berec.europa.eu/eng/document_register/subject_matter/berec/others/9964-berec-proposal-on-remedies-tailoring-and-structured-participation-processes-for-stakeholders-in-the-context-of-the-digital-markets-act

As regards the **BEUC**'s concerns about lengthy case-by-case assessments, the **ETNO/GSMA** proposal to shorten the timeframe under Article 17, and the proposal of **Telefónica** to specify obligations of Article 6 to be optional, BEREC would like to clarify that it welcomes the principle of a set of obligations as proposed in the DMA, since they enable a direct and quick intervention, creating a clear and common understanding of the gatekeeper practices which are considered to be detrimental. Secondly, while such obligations can quickly address a set of concerns, BEREC believes that, in order to be more future-proof, DMA regulatory interventions should include the possibility for the EC to design and impose tailored remedies. This would be particularly valuable to address unforeseen practices, newly emerging issues as well as to effectively design the regulatory measures according to the specificities of the CPS(s) in which the gatekeeper is active. Chapter 7 of the final report has been updated accordingly.

Interoperability

According to **ARTICLE 19 et al.,** interoperability is a key instrument to deliver various objectives which are relevant for the DMA: market contestability, innovation, and end-users' empowerment, therefore provide the following suggestions with regards to the obligations contained in Art. 6:
- Article 6(1) point (c) should contain guarantees to avoid abuses of the "integrity carve-out" to prevent third party services.
- Article 6(1) point (f) should be amended to: (i) include interoperability among CPSs, (ii) make clear that the requirements apply to all platform functionalities, not only those already offered by gatekeepers to business users, and (iii) extend the right to interoperability to end-users.

ETNO and **GSMA** also believe that the **interoperability** obligations should not be limited to ancillary services only, but to any unconnected services offered by the gatekeeper.

Open-Xchange shares BEREC's position on **interoperability** and agrees on the view that the current provisions in the DMA draft would be insufficient to secure interoperability.

Vodafone also concurs that **interoperability** between the gatekeepers and other competing services should be further promoted.

BEREC's response:

On the **ETNO/GSMA** proposal that interoperability obligations should not be limited to ancillary services only, but to any unconnected services offered by the gatekeeper, BEREC agrees that interoperability with ancillary services is insufficient, and that interoperability measures should ensure that the gatekeepers' services allow for interoperability for both complementary service providers as well as potential competitors, which seems to be corroborated by **Vodafone**. Horizontal interoperability should be applied as a tailored remedy, adapted to the specificities of the CPS and the gatekeepers and be proportionate to achieve the objectives of the regulation.

On **Open-Xchange and ARTICLE 19 et al.** suggestions that the interoperability provision in Article 6(1) point (f) should recognize the right to interoperability to all platform functionalities, not only those already offered by gatekeepers to business users, and to end-users and not just to business users, BEREC agrees that interoperability should be extended to key platform

functionalities, which are key to provide services and products in a given CPS (cf. Chapter 7 of BEREC's report) as well as to certain CPSs.

BEREC added an extensive part on interoperability in Chapter 7 of its final report.

NI-ICS

Open-Xchange suggests that the interoperability provision in Article 6(1) point (f) should be extended to the CPSs – not just to ancillary services – and should recognize the right to interoperability to all end-users and not just to business users. Alternatively, a broader provision recognizing interoperability to all users could be introduced separately, as a new point in Article 6(1), either for all CPSs or, as a minimum, for social media and NI-ICS.

ACT has concerns that requiring broad **interoperability** and uncontrolled access could hinder platforms' ability to keep malicious actors out.

BEREC's response:

On the specific topic of interoperability of social media and NI-ICS raised by **Open-Xchange**, BEREC highlights that interoperability measures cannot be addressed in the same way for these two CPSs. As far as NI-ICS are concerned, Art. 61 of the EECC regulates interoperability for NI-ICS. In particular, NRAs may impose obligations on NI-ICS under Art. 61(2) sub c) of the EECC, requiring interoperability on NI-ICS providers that have a significant level of coverage and user uptake, where "end-to-end connectivity between end-users is endangered due to a lack of interoperability between interpersonal communications services, and to the extent necessary to ensure end-to-end connectivity between end-users, obligations on relevant providers of number-independent interpersonal communications services which reach a significant level of coverage and user uptake, to make their services interoperable".

Since the DMA would also apply to NI-ICS, BEREC believes that a cooperation mechanism should be implemented among the EC (as the DMA enforcer) and BEREC, the NRAs and/or the DMA Advisory Board (as proposed in the BEREC Opinion on the DMA) to ensure legal and regulatory certainty concerning the obligations and remedies to be imposed on NI-ICS[13]. As far as interoperability of social media is concerned, BEREC details in its final report what type of interoperability would be relevant and valuable for different cases.

On **ACT**'s concern that broad interoperability could raise security issues, BEREC thinks that interoperability measures envisaged by the DMA should be designed taking account of these aspects.

Update of the DMA

ACT does not believe that delegated acts are an adequate way to update obligations. **ACT** advises that the DMA specifies that newly added obligations cannot substantially modify the

[13] Please see BEREC Report on the interplay between the EECC and the EC's proposal for a Digital Markets Act concerning number-independent interpersonal communication services (BoR (21) 85) for further details

objective, scope, and purpose of the DMA. In particular, the EC should be required to include the viewpoints of all interested parties and consult them on its findings before presenting them.

Facebook considers to be an important flaw that the DMA does not anticipate the removal of regulatory obligations once competent regulators find that a sufficient level of 'market contestability' and 'fairness' has been achieved.

BEREC's response:

ACT is of the opinion that the list of obligations should not be extended and that the objective of the DMA should remain unchanged. BEREC generally believes that any additional obligation should fit into the framework and objectives established by the co-legislators, but this is not incompatible with an adaptation of the regulatory intervention. It is in the interest of all parties to have a regulation which is future-proof and fit for purpose. On the point related to new obligations, BEREC considers that the EC as DMA enforcer and related competent authorities should engage in continuous market monitoring and data gathering and have the possibility to, through a delegated act (as stated in the DMA proposal) to adjust the list of obligations and remedies when needed to reach the given objectives.

Facebook estimates that the DMA does not consider the removal of regulatory obligations once competent regulators find that a sufficient level of 'market contestability' and 'fairness' has been achieved. In this regard, BEREC would like to point out that i) the current provisions of Articles 5 and 6 tackle mostly general unwanted behaviours, ii) the DMA proposal already opens the possibility to re-assess the gatekeeper status on a regular basis, which would imply in any case the removal of the obligations related to this status and iii) in BEREC's proposal, some additional remedies which are to be tailored by the EC as the DMA enforcer (i.e. not the directly-applicable obligations currently set in Article 5 and 6) would be adjusted according to the evolution of practices in order to be future-proof and fit for purpose. In general, BEREC agrees that regulatory measures should be aimed at addressing those problems which need an ex ante regulatory intervention.

Scope of the DMA

According to **CCIA,** to protect the open market economy, Article 5 obligations should be limited to those practices where there is unambiguous likelihood of significant harm regardless of the context in which they occur, which would increase legal certainty.

MVNO Europe would recommend BEREC to also express concerns concerning the obligation defined in Article 6(1) point (e) of the DMA proposal in its final report. And proposes to modify the text of Article 6(1) point (e) to ensure that end-users will be able to select the electronic communications network/service provider of their choice and enjoy the full functionality of the electronic communications services they choose to utilise.

EBU considers that, in line with the 2019 EU P2B Regulation, the ban on self-preferencing should apply to ranking and other settings as well as to access and conditions for the use of technical functionalities and interfaces. **EBU** also calls for other core platform services such as video-sharing platforms to be included in the definition of ranking, given the key role that they play for media consumption.

ETNO, **GSMA** and **Vodafone** appreciate BEREC's concerns related to bundling and tying. They further state that the prohibition at Art. 5(f) should be extended to any other unconnected service or product, not only other core platform services.

BEREC's response:

CCIA considers that Article 5 obligations should be limited to those practices where there is unambiguous likelihood of significant harm regardless of the context in which they occur. In this regard, BEREC is of the opinion that all obligations proposed in Articles 5 and 6 are justified and address a sufficiently high likelihood of significant negative effects.

On the proposal from **MVNO Europe** that end-users should be able to select the electronic communications network/service provider of their choice and enjoy the full functionality of the electronic communications services they choose to utilise, BEREC has integrated this point under Chapter 4 of its final report and will further analyse this issue within its Report on the internet ecosystem.

On the proposal by **EBU** that the ban on self-preferencing should apply to ranking and other settings as well as to access and conditions for the use of technical functionalities and interfaces, BEREC agrees in principle but prefers to refer to non-discriminatory access to and interoperability with technical functionalities and interfaces, rather than self-preferencing.

On the proposal by **EBU** to include other CPSs such as video-sharing platforms in the definition of ranking, BEREC agrees that obligations on ranking should be applied to all CPSs where ranking occurs. A reference has been added in Table 1 of Chapter 7 in the final report.

On the proposal from **ETNO/GSMA and Vodafone** that the prohibition at Art. 5(f) should be extended to any other unconnected service or product, not only to other core platform services, BEREC links this proposal with bundling and tying concerns, where the consumer can clearly distinguish different services in bundled offers, while it might be less clear for tied offers. BEREC refers to tying and bundling in Table 1 of Chapter 7 in the final report. Concerning the point raised here, BEREC believes that this needs to be addressed on a case-by-case basis, as "unconnected service" is too vague to be subject of a general obligation.

Compatibility with other European legal frameworks

BEUC thinks it should also be made clear in Article 1(6) that the DMA is, in addition to the other EU law mentioned, also without prejudice to EU consumer protection law, notably the Unfair Commercial Practices Directive ("UCPD") and Unfair Contract Terms Directive.[14]

BEREC's response:

The concerns raised by **BEUC** about the compatibility of the DMA with other legal frameworks regarding competition, consumer protection and personal data protection, fall outside the scope examined by BEREC in its report on the interplay between the DMA and the EECC.

[14] BEUC's position paper sets out further details over the possible changes that could be made to ensure sufficient focus on end-users. See https://www.beuc.eu/publications/beuc-x-2021-030_digital_markets_act_proposal.pdf

Data collection

EBU states that gatekeeper platforms should altogether be prevented from combining data in order to effectively reduce their data power.

ETNO, **GSMA** and **Vodafone** endorse BEREC's view that the DMA proposal should be reinforced to address certain inter-platform competition concerns. For instance, Art. 6(1) should benefit contestability more broadly, by also covering the data of the gatekeepers' competitors that are not necessarily its business users.

EBU supports the proposal to grant business users access to meaningful data related to their own content and services that appear on platforms, but warns against any loophole such as 'nudging' end users into refusing to share personal data with business users.

BEREC's response:

On the proposal from **EBU** that gatekeeper platforms should altogether be prevented from combining any data in order to effectively reduce their data power, BEREC thinks that Article 5(a) which applies to all gatekeepers for all CPSs and which concerns the combination of "personal data sourced from these core platform services with personal data from any other services offered by the gatekeeper or with personal data from third-party services", seems to be an adequate and proportionate obligation, provided (as the article itself specifies) that the end-user has been presented with the specific choice and has given consent in the sense of "any freely given, specific, informed and unambiguous indication of the data subject's wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her" (Article 4(11) of the GDPR (2016/679).

On the proposal from **ETNO/GSMA and Vodafone** that Art. 6(1) should benefit contestability more broadly, by also covering the data of the gatekeepers' competitors that are not necessarily its business users, BEREC cannot take a stance on the matter since it is unclear what kind of data the respondents are referring to (e.g. publicly available data? Competitors' data which the gatekeeper has exclusive/privileged access to? Others?). In case of exclusive/privileged access to such data by the gatekeepers, BEREC believes that this is a typical example of remedies which would need to be tailored to be effective and proportionate.

On **EBU**'s concern that end-users might be deterred from sharing personal data with business users, BEREC agrees that end-users' choice to share personal data with business users should not be affected or steered by the gatekeeper.

Standards

ETNO and **GSMA** propose adding an obligation tackling problematic behaviour related to standardisation and intellectual property.

Privacy International recommends that Article 6(1) point (f) is amended to include reference to core services, such by requiring gatekeepers to allow business users, end users, and providers of ancillary services access to and interoperability with the same operating system, hardware or software features that are available or used in the provision by the gatekeeper of any ancillary services or industry-standard features of its core platform services.

ETNO and **GSMA** agree with BEREC that data portability obligations as reflected in Art. 6(1)(h) are essential to facilitate switching. These measures could support the launch of interoperable, secure and open solutions based on mobile hardware for a European e-Identity. It is essential for European developers of eID solutions that the market is not foreclosed in this regard.

BEREC's response:

ETNO/GSMA and Privacy International find that the implementation of remedies should favour industry standards. In this regard, BEREC agrees in principle to favour the implementation of "open interfaces and standardized solutions, where appropriate and proportionate, to ensure innovation."

On the proposal from **ETNO/GSMA** to promote interoperable, secure and open solutions based on mobile hardware for a European e-Identity that would help users to switch between service providers, BEREC agrees with the principle and welcomes initiatives favouring users' switching among service providers.

Default settings

ACT does not believe that default settings are harmful to consumers, as consumers have come to expect certain functionalities from their devices upon purchase.

In **DuckDuckGo**'s view, gatekeepers should not be able to set as default, including by way of pre-installation, a core platform service (CPS) on another core platform service (should it be their own platform or a third-party platform). Preference menus should be a prominent remedy in the regulator's toolbox.

BEREC's response:

On default settings, BEREC believes that, while they may be useful in some cases (e.g. users with disabilities or users specifically preferring not to choose), these must be designed in a way that keeps or enhances users' ability to make free and informed choices, which means that by their choice it should be possible to change default settings. Preference menus should be part of the remedies, and should be properly designed in order to provide actual and effective choice to end-users.

End-users

Concerning end users, **ACT** agrees with BEREC that they should be considered in the DMA.

BEUC shares BEREC's concerns regarding the current focus of the DMA on business users at the expense of end-users (i.e. consumers). BEUC strongly supports BEREC's proposal that certain end-users-only related issues should be addressed in the DMA.

In addition, **BEUC** also shares the concern that Article 10 only takes into account business users and not end users. BEUC also strongly supports a rephrasing of Article 10 to include practices unfair to end-users.

Privacy International agrees with BEREC that "certain issues related to end-users should also be directly considered and reinforced" as they will also indirectly benefit business users.

To better protect end-users' rights **ARTICLE 19 et al.** proposes some improvements of articles 5(1), 6(1)(c) and 6(1) point (k). Concerning Article 5(d), ARTICLE 19 et al. think that it should be extended to ensure that end-users, as well as business users, can raise any issue or complaint before any relevant public authority about any practice of gatekeepers.

Privacy International recommends the addition of 'end users' in Article 10(2) point (a).

BEREC's response:

BEREC welcomes the support by **ACT, BEUC, ARTICLE 19 et al. and Privacy international** on its proposal to better include and protect end-users' interests in the DMA.

Concerning **ARTICLE 19 et al**.'s proposal to extend Article 5(d) to ensure that end-users, as well as business users, can raise any issue or complaint before any relevant public authority about any practice of gatekeepers, BEREC highlighted in Annex 2 that in the ECS sector dispute resolution mechanisms are available for ECS providers but also to both end-users and business users. The DMA could also benefit from such mechanisms. However, given the high number of end-users involved, BEREC believes that it would be valuable if they were represented by relevant associations.

Strengthening inter-platform competition

In particular, **ARTICLE 19 et al.** agree that regulatory measures in the DMA should be reinforced, extended or added both to rebalance the relationships among the gatekeeper and its business users and end-users, and to facilitate the possibility for competitors to enter a core platform service (CPS) market and/or to expand over several CPSs.

Moreover, **ARTICLE 19 et al.** believe that more contestability and the protection of end-users' rights are two strictly interrelated objectives that are mutually reinforcing, and should be treated as such. In fact, intra-platform competition is useful mainly to discipline gatekeepers from acting unfairly towards business users, while inter-platform competition is useful to discipline gatekeepers from acting unfairly towards business users and end-users.

Privacy International agrees with BEREC that "the DMA proposal should be reinforced to address certain inter-platform competition concerns, and to integrate some additional intra-platform competition concerns (i.e. with other business users), as well as certain end-users-only related issues" and that "certain issues related to end-users should also be directly considered and reinforced" as they will also indirectly benefit business users.

BEREC's response:

BEREC welcomes the support by **ARTICLE 19 et al. and Privacy International** on its proposal to strengthen, extend or add some regulatory measures to reinforce inter-platform and intra-platform competition, as well as better protect end-users' interests. Chapter 7 of the final report has been adapted to take account of relevant input given by stakeholders on this point.

Tying and bundling

ARTICLE 19 et al. endorse BEREC's observation that the concerns related to tying and bundling are only partially addressed in the DMA. Articles 5(e), 5(f) and 6(1) point (b) point at important use-cases, but there are others which need to be tackled as they have a strong impact on the contestability and fairness of a number of digital markets.

ACT considers that while gatekeepers may have the ability and/or incentive to reduce the ability of business users to launch bundle offers, this is not an issue in the app economy. **ACT** believes the DMA appropriately addresses tying and bundling concerns and Articles 5(e), 5(f) and 6(1) point (b) should not be extended to other CPSs.

EBU suggests that the DMA should also address other forms of unfair bundling practices. For example, some gatekeeper platforms force business users to offer content on the gatekeepers' premium (subscription-based) service as a condition to make that content equally available on the general (free) service - with no room for negotiation.

ETNO and **GSMA** consider the EC should have a right to issue non-binding guidance for gatekeepers that specify their obligations under Article 5. In the same vein, **ETNO** and **GSMA** state that the EC should have the possibility to specify the remedies laid down in Article 6 on its own initiative as it designates a provider of core platform services with gatekeeper status.

Facebook also proposes to introduce provisions that allow the EC to issue guidance. Guidance on specific obligations could provide greater clarity to companies, especially if preceded by consultations.

ARTICLE 19 et al. and **Privacy international** make some amendment proposals for Article 6(1).

Vodafone agrees with BEREC that data portability obligations as reflected in Art. 6(1)h are essential to facilitate switching.

BEREC's response:

Concerning tying and bundling, BEREC does not agree with **ACT** that this is generally not an issue in the app economy. BEREC believes that tying has negative effects *per se*. This can be the case for bundling if this conduct e.g. reduces the ability of competitors to provide a specific service/good or disproportionately raises barriers to entry by requiring to enter multiple markets simultaneously, or at least offer additional products or services, in order to compete. BEREC agrees with **ARTICLE 19 et al. and EBU** that the concerns that these practices raise are only partially addressed by the DMA and makes some proposals in Chapter 7 of the final report.

On the issue raised by **ETNO and GSMA** about the right of issuing non-binding guidance to gatekeepers from the EC, BEREC does not consider it necessary to have it explicit in the DMA regulation, and would like to stress the need to create a structured dialogue with all stakeholders as expressed in the Report.

The detailed proposals from **ARTICLE 19 et al**. and **Privacy International** have been analysed and taken into account when applicable in Chapter 7 of the final Report.

7. COMMENTS ON CHAPTER 8 - ENFORCEMENT

In general, the vast majority of stakeholders welcome BEREC's focus on open regulatory dialogue. However, different stakeholders highlight different aspects of it.

ARTICLE 19 et al., BEUC, and **Privacy International** highlight the need to involve consumer associations, digital rights groups, democracy and press freedom groups, as well as other parts of civil society. **ACT**, **CRTV**, **DuckDuckGo**, **ETNO**, **GSMA**, **MVNO Europe** and**, Telefónica** share the same opinion that all relevant stakeholders should be involved, not only the concerned gatekeepers. **Telefónica** specifically mentions also the involvement of NIAs.

ACT calls for an inclusion in the DMA of a specific provision for regulatory dialogue. **Telefónica** supports that the interaction with stakeholders needs to be structured, i.e. formalised in specific procedures. **Vodafone** points out that stakeholders´ participation under the DMA should not create undue delays and should consider a detailed implementation and compliance process, with clear stages and timings.

Facebook highlights the need of a constructive dialogue between the regulator and gatekeepers to ensure that the objectives of the DMA provisions are met from the beginning while reducing non-compliance risk for companies. For this purpose, Facebook proposes a list of amendments for a more participatory approach, such as involvement of stakeholders on a consultation for Art. 5 and 6 on obligations, on decisions under Art. 7

ACT, **DuckDuckGo**, **ETNO**, **GSMA**, **Telefónica** and **Vodafone** state that relevant stakeholders should be involved in the obligations definition and enforcement process to ensure that the specific obligations are effective in addressing the market problems they target. **ETNO** and **GSMA** refer to the established market testing mechanism that is used for remedies in competition law, and propose to use it in the context of market investigations for systematic non-compliance (Article 16) and commitments offered by the gatekeeper (Article 23). **ARTICLE 19 et al., BEUC,** and **Privacy International** argue that end-users and civil society organisations must also have the right to be heard under Article 30.

DuckDuckGo calls for broader stakeholder participation in the gatekeeper designation procedure. **ARTICLE 19 et al.** and **Privacy International** also argue that civil society organisations should have the right to request the opening of a market investigation under Article 33.

ARTICLE 19 et al., BEUC and **DuckDuckGo** call for formal participation in the dialogue on compliance. They consider third parties should also have the right to submit formal complaints where they believe that gatekeepers are not in compliance with their obligations under the DMA.

BEREC's response:

All the participants are in line with BEREC view on the importance of having a regulatory dialogue in place that involves all relevant stakeholders. Several stakeholders endorse BEREC's position on that a wider and structured regulatory dialogue is important and that it should include all types of relevant stakeholders, instead of what is currently foreseen in the DMA proposal. Furthermore, BEREC agrees with stakeholders that the regulatory dialogue mechanism should not lead to unnecessary delays of the implementation of the remedies. As highlighted further above (see responses in Chapter 7 of the final report), BEREC believes that the benefits of the regulatory intervention are not just a matter of applying measures fast, but even more importantly, about making sure that they reach the given objectives. Therefore, BEREC maintains its views that it would be very valuable to carry on a regulatory dialogue with all relevant stakeholders within the DMA (e.g. in Article 30), as multiple stakeholders have suggested.

ARTICLE 19 et al. support BEREC's suggestion to establish complaint desks at a national level. **ACT**, too, believes that it would facilitate access to authorities and for SMEs. **Telefónica** also agrees the dedicated information and complaints desk in each MS would be of huge benefit to the EU authority and other stakeholders.

Telefónica further considers that NIAs can play a supporting role for the EU authority to monitor compliance, suggesting that NIAs can also help by creating an easily approachable information and complaints desk as well as a dispute resolution system. According to **Telefónica**'s view, some disputes can be easily resolved on a local level, while persistent or recurrent problems can be escalated to the EU authority to ensure a harmonised approach for widespread problems. Moreover, **Telefónica** argues that a national dispute resolution system will also reduce the number of judicial processes, especially when a NIA can act as arbitrator and clear timelines are included in the procedure.

With regard to the non-judicial dispute resolution, **BEUC** states that NRAs have an extremely useful and important role to play, as the first contact point for complainants. The national regulator would then be responsible for communicating the relevant and reasoned complaints to the EC, according to BEUC.

ACT, however, is unsure if a separate dispute resolution mechanism under the DMA is necessary, if platforms have access to the EU authority via the regulatory dialogue, and platforms provide their own dispute resolution mechanisms to consumers and business users. Moreover, ACT suggest to be careful against potential regulatory overlaps, as the P2B regulation has already introduced a form of mediation.

According to **MVNO Europe** and **Vodafone**, for the groups directly affected by the behaviour of the gatekeepers, it is crucial to have easy access to a swift and effective dispute resolution mechanism. However, **Vodafone** believes that such procedures need to be harmonised and centralised where possible at the European level to avoid fragmentation in the enforcement of the DMA across different MSs.

MVNO Europe expresses that dispute resolution must not lead to a compromise or "give and take", but must result in fast and unequivocal decisions which effectively solve grievances that business operators have towards digital gatekeepers.

CRTV considers the inclusion of a **dispute resolution mechanism in the DMA** acceptable, however, maintains also that it is necessary to give to the parties the possibility of raising problematic issues before national courts without excessive constraints.

BEREC's response:

Some issues raised by **ACT and CRTV** on the relationship between the dispute resolution mechanism proposed by BEREC call for a clarification. **ACT** argues that there might be a regulatory overlap between mediation procedures established in the P2B Regulation, while **CRTV** suggests that there should not be overlap with the work of national courts. BEREC would like to clarify that the proposed dispute resolution mechanism to be included in the DMA is inspired by the experience in the ECS sector (see Annex II). This model is significantly different from a mediation mechanism, which is voluntary and based on the reciprocal will of the two parties involved to solve a dispute. Moreover, mediation is a private activity which does not involve public authorities. On the contrary, the dispute resolution mechanism proposed by BEREC can be concluded by an administrative decision having binding effects on the parties involved. Mediation and dispute resolution should not be seen as substitutes, but rather complementary tools. Indeed, the deterrent effect of having a NIA eventually taking a binding decision should incentivize parties to reach a voluntary agreement through mediation. This is even more true when the dispute is taking place between parties with very unbalanced bargaining power. This kind of mechanism is an alternative to court proceedings, as it should be faster – in order to be compatible with the timing needed by business processes. The cost element is another important factor to consider when comparing voluntary agreement mechanisms and court proceedings, whereby the former may be cheaper. In the model proposed by BEREC, parties are always free to initiate a new procedure before judicial courts on the same substantial issues treated in the dispute resolution before the NIA. In that case, the dispute resolution process is interrupted, so there is a clear distinction that should not create overlaps.

Vodafone, Telefónica and BEUC discuss on different grounds the ability of such a mechanism to efficiently solve disputes in a coherent manner across the EU. In particular, **BEUC** underlines the importance of having an enforcement mechanism at the EU level when the case at hand has an EU-wide scope, and **Vodafone** believes that such procedures need to be harmonised and centralised where possible at the European level, to avoid fragmentation in the enforcement of the DMA, with different outcomes in different Member States owing to a divergent dispute resolution process. BEREC would like to clarify that, in order to be eligible for an administrative binding decision under the DMA, a case should satisfy the following criteria:

- be focused on contestability and fairness issues treated by the DMA. Issues related to other bodies of law (GDPR, competition law, consumer protection law, P2B, etc.) should be handled by the competent authorities;

- be remedy-specific, meaning that they should be precisely related to the (implementation of) obligations and remedies imposed according to DMA, applicable to a certain CPS provider, duly designated as GK; and

- be presented by an eligible/qualified actor, such as a business user, a qualified organisation (e.g. consumer associations) or a sufficiently large number of end-users.

BEREC recognises the concerns raised by **Vodafone** about the potential for fragmentation or a lack of harmonisation where national authorities play an active role in solving local disputes. BEREC agrees that the risk of fragmentation should be minimised and believes that strong cooperation and co-ordination mechanisms among NIAs should be defined and put in place under the DMA Advisory Board that BEREC proposes to set up[15]. BEREC foresees multiple options to arrange this in Chapter 8 of the final report.

Firstly, as proposed by BEUC, NIA's could predominantly act as the first point of contact, as they can verify if complaints fulfil the criteria specified above before conveying them to the EC for its consideration. Under this approach, NIAs would provide a dedicated information and complaints desk in each Member State to check if complaints qualify, but would leave resolution of disputes solely to the EC. In their role, NIAs would be a more convenient point of contact than the EC for some complainants to raise their issues (e.g. language, distance or procedural barriers especially for SMEs) or to communicate informally, while at the same time reducing the administrative burden faced by the EC. Where appropriate, similar cases could be grouped to resolve disputes efficiently. A benefit of this approach is that with all disputes being resolved centrally, the risk of fragmentation or of a lack of harmonisation is reduced considerably.

To take account of the potentially significant number of cases to be handled throughout Europe to address the problems experienced by business users, an alternative approach could entail NIAs resolving disputes (or a subset of disputes) at a national level but in an EU-harmonised manner. There are several possible approaches which could be employed to ensure harmonisation, such as harmonised principles, detailed guidelines, or indeed, national decisions could be subject to review or approval by the Advisory Board (also involving the EC).

Thirdly, and along the lines proposed by Telefónica, a mixed approach could be applied. Under this approach, some straightforward disputes could be resolved at the national level (with review from the Advisory Board) while complex or transnational disputes could be escalated to the EC. It may be reasonable to consider that as experience is developed, some disputes which are dealt with by the EC, would establish precedent, which could subsequently be applied by NIAs in solving local cases (subject to review of the Advisory Board). Under this approach, key disputes could be resolved centrally by the EC and the Advisory Board could ensure that any disputes resolved at the national level are harmonised with existing precedent while reducing the burden on the EC.

Regardless of which approach is applied, BEREC considers that close co-ordination between NIAs and the EC will be crucial to resolve disputes effectively, underscoring the key role of the Advisory Board being proposed. Relatedly, where complaints arise which are beyond the

[15] See BoR (21) 93, "BEREC proposal on the set-up of an Advisory Board in the context of the Digital Markets Act", https://berec.europa.eu/eng/document_register/subject_matter/berec/others/9963-berec-proposal-on-the-set-up-of-an-advisory-board-in-the-context-of-the-digital-markets-act

scope of the DMA (e.g., GDPR, competition law, consumer protection law, P2B), NIAs could redirect these complaints to other competent authorities.

Finally, **ACT** argues that if there are platform-owned dispute resolution mechanisms in place and SMEs have the ability to access the regulatory dialogue, adding a separate dispute resolution mechanism would not be efficient. Moreover, it might overlap with mediation in P2B Regulation. On this matter, BEREC would like to clarify that the mediation mechanism in the P2B Regulation is only applicable to transparency measures which are addressed by that Regulation and must be grounded on the contractual relationship between the business user and the platform. The DMA is different, as it imposes obligations (e.g. interoperability, data portability, etc.) that are not part of contracts and are therefore not currently addressed by the P2B Regulation. As far as the platform-owned dispute resolution mechanism is concerned, it might be possible that ACT is referring to the internal complaint-handling mechanism mentioned by the P2B Regulation. What BEREC is proposing is a separate dispute resolution mechanism that can help in swiftly solving disputes regarding the implementation of the regulatory measures imposed according to the DMA, in an effective, transparent and informed way by an independent regulatory body.

8. COMMENTS ON CHAPTER 9 - ENHANCING ASSISTANCE FROM NATIONAL INDEPENDENT AUTHORITIES FOR AN EFFECTIVE ENFORCEMENT

BEUC, ETNO/GSMA and **Vodafone** agree with BEREC and the EC that, given the pan-European reach of the main digital gatekeepers, the regulatory authority implementing and enforcing the DMA should be at the EU level.

DuckDuckGo, CCIA, ETNO/GSMA, EBU, Facebook and **Vodafone** argue that the EC should ensure sufficient resources to undertake all of its tasks under the DMA and to ensure effective enforcement. **Facebook** is concerned that the number of staff currently foreseen is very likely to be insufficient and refers to the various resource-consuming market investigations. **Vodafone** suggests the EC should adopt some of the key features of the DSA in order to complement / reinforce the EU competent authority and the effectiveness of the application of the DMA. **DuckDuckGo** states the EC's hiring target (80 full time equivalents) should be substantially increased, much closer to, for instance, the 600+ staff of the UK Competition and Markets Authority.

Facebook highlights that the EU should also ensure that the European Courts have sufficient resources to adjudicate disputes arising under the DMA.

ACT, BEUC, ETNO/GSMA, MVNO Europe welcome BEREC's suggestion for developing closer cooperation between the EU and the Member States as well as between Member States. **BEUC** however warns that the exchange of information should not make decision-making and the enforcement procedure more burdensome or lengthier.

BEREC's response:

On the proposal of **DuckDuckGo** on the need of supplementary resources, BEREC agrees that a more in-depth analysis needs to be carried out on the resource requirements for the EC to carry out the tasks envisaged by the DMA. BEREC notes that the involvement of NIAs with several supporting tasks (information gathering, monitoring, market investigation tasks, dispute resolution, etc.) could alleviate the burden at EU level.

On the suggestion of **Facebook** to ensure that the European Courts have sufficient resources, BEREC would like to stress that in order to have a quick enforcement an (effective) dispute resolution mechanism will be key which should resolve most of the issues and would therefore avoid as much as possible (long) proceedings before the courts.

On the last point of **BEUC**, BEREC welcomes arguments for an efficient framework that is as quick as possible to address market shortcomings resulting from gatekeeping. The benefits of the exchange of information and expertise between NIAs and the EC should not hamper quick decision-making and enforcement procedures but is deemed a key tool with which to ensure that the enforcement is quickly effective and reaches the given objectives.

ACT, BEUC, CRT, DuckDuckGo, ETNO/GSMA, MVNO Europe, Telefónica, Vodafone agree with BEREC that NIAs could competently assist the EU authority with several tasks. **Telefónica** emphasizes that by taking advantage of NIA expertise and resources the EC will gain substantial effectiveness.

DuckDuckGo is in favour of including formal avenues of participation in the gatekeeper designation procedure;

ACT, BEUC, CRTV, MVNO Europe, Telefónica, Vodafone) are in favour of data collection by NIAs. **CRTV** states that Art. 9(2)(b) DSA should give the relevant national authority the right to request not only the information already collected but also all the data in their availability (as already provided for by the eCommerce Directive, Art. 15(2));

ACT, BEUC, DuckDuckGo and **Vodafone** see a role for NIAs to monitor **markets;**

ACT, DuckDuckGo, Telefónica see a role for NIAs to assist in designing remedies;

BEUC, CRTV, DuckDuckGo, Telefónica agree that the EC should collaborate with NIAs for conducting investigation of compliance of remedies. **BEUC, CRT, DuckDuckGo** suggest to include to include MS authorities with particular expertise/experience with the issue at stake in the investigation team;

According to **BEUC** and **DuckDuckGo** these authorities could be the first point of contact for local consumers' and business users' concerns;

Vodafone disagrees that Market Investigations can or should be run at the national level, as this would undermine the harmonizing intent of the DMA, and could lead to smaller (rather than trans-national) platforms also being drawn in;

Regarding the enforcement, **DuckDuckGo, Facebook, ETNO** / **GSMA** believe this would be best undertaken at EU level. According to **BEUC**, **DuckDuckGo** and **Vodafone,** the

enforcement framework should also give a supporting role to competent national authorities (competition, regulatory and/or data protection authorities depending on the country) given their breadth of experience in tackling big tech power and their resources and connection with local markets;

CCIA stresses that the body responsible for enforcement of the DMA should operate independently outside political influence;

BEUC wants the DMA to be enforceable in the national courts by business users and consumers, including through collective redress. **BEUC** considers the DMA must indicate that the DMA is added to the annex of the Representative Actions Directive.

BEREC's response:

On the proposal of **CRTV,** BEREC thinks that, since the DSA builds on the rules of the e-commerce directive, such a request would fall within the scope of the DSA and not that of the DMA, that is the scope of the BEREC report.

On the suggestion of EBU to allow business users to request the launch of a market investigation, BEREC agrees this might be part of the potential triggers to launch a market investigation. However, it should be clear that there needs to be more reflection on the formal burden of proof and barriers in order to avoid too many market investigations (requests).

On the opinion of **Vodafone,** BEREC agrees that the EC should lead the Market investigations. As BEREC argued in the draft report (cfr 9.1.3.), NIAs could play an assisting role to the EC in market investigations.

On the opinion of **CCIA**, BEREC refers to the role that the proposed Advisory Board, which would only consist of national independent authorities, could play in carrying out several tasks[16] in the DMA framework.

On the opinion of **BEUC** on national courts, BEREC proposes effective dispute resolution mechanisms, which should resolve most of the issues while stressing that it would be crucial that those national dispute resolution mechanisms need to be harmonized at the EU level.

DuckDuckGo, **Telefónica** and **Vodafone** support BEREC's suggestion to establish a specialized Advisory Board composed of representatives of NIAs. **DuckDuckGo** and **Telefónica** do not think the DMAC is the right forum to address more practical and technical issues.

ACT states that BEREC seems well-positioned to lead the set-up of such a body as it has already carried out similar tasks in the past. **Facebook** also welcomes BEREC's suggestions to make use of BEREC's expertise and capabilities.

[16] https://berec.europa.eu/eng/document_register/subject_matter/berec/others/9963-berec-proposal-on-the-set-up-of-an-advisory-board-in-the-context-of-the-digital-markets-act

9. COMMENTS ON CHAPTER 10 – CONCLUSIONS

As conclusions on chapter 10 draw on previous chapters, most of the respondents have abstained from raising comments on this chapter. The issues addressed by **ACT** and **BEUC** in their response for this chapter have been already addressed in previous sections.

10. COMMENTS ON ANNEXES I-III

Only **ACT** and **Telefónica** provided views on the annexes. In any case, the three annexes were developing on specific issues already addressed in different chapters and comments and suggestion on them have been addressed in the corresponding chapters.

Regarding annex I (effective definition of measures), **ACT** and **Telefónica** support the need for tailor-made complex remedies in consultation with all stakeholders. **ACT** further endorses BEREC's suggestion of regular interactions with all stakeholders and an early-stage regulatory dialogue, and also welcomes the idea of regular interaction between stakeholders for the exchanges of best practices, the definition of standards, and technical specifications.

On annex II (dispute resolution), **ACT** and **Telefónica** both consider that dispute resolution mechanisms can be very useful regulatory tools and welcomes BEREC's suggestion for dispute resolution on the national level. **ACT,** has concerns related to regulatory overlap, as the P2B regulation has already introduced a form of mediation. It is unsure if a separate mechanism is necessary if platforms have access to the EU authority via the regulatory dialogue, and platforms provide their own dispute resolution mechanisms to consumers and business users. ACT would welcome further clarification from BEREC on this recommendation.

Regarding annex III on national support**, ACT** and **Telefónica** endorse BEREC's proposal to complement the advisory role of the Member States with specialised and independent assistance from NIAs and both agree with the reasons listed in Annex III as to why such a structural involvement could be valuable for the DMA.

BEREC's response:

BEREC thanks **ACT** and **Telefónica** for their valuable comments on the annexes, as well for the support to the proposals expressed by BEREC in these annexes and the corresponding chapters.

Regarding the issues raised by **ACT** concerning the potential overlap between the P2B mediation mechanism and the BEREC proposal for a dispute resolution mechanism, BEREC considers both mechanisms as complementary and refers to chapter 8 of this summary report and of the final report on the *ex ante* regulation of digital gatekeepers, as this issue was also raised in this chapter by **ACT**.

Most of the issues addressed by BEREC in these annexes has been further elaborated on the proposals published by BEREC in June 2021 regarding the set-up of an Advisory Board in the context of the Digital Markets Act (BoR (21) 93) and remedies-tailoring and a structured

participation processes for stakeholders in the context of the Digital Markets Act (BoR (21) 94).

Taking into account feedback received, the new version for some of the chapters and the proposals published by BEREC in June 2021, BEREC has reorganised the annexes, substituting former Annex I (two-pager on effective definition of measures) by the BEREC proposal on remedies-tailoring and structured participation processes for stakeholders in the context of the Digital Markets Act[17]. The two-pager on dispute resolution (former and current annex II) has been shortened and specifically focuses its application under the EECC. BEREC position on former Annex III (two-pager on national support) has been clarified and detailed in chapter 9 ("Enhancing assistance from National Independent Authorities for an effective enforcement"), that also includes the proposals raised by BEREC on its paper on the set-up of an Advisory Board in the context of the Digital Markets Act.[18] Former Annex III has therefore been deleted. Former Annex IV remains unchanged and now becomes Annex III.

[17] "BEREC proposal on remedies-tailoring and structured participation processes for stakeholders in the context of the Digital Markets Act". BoR (21) 94. June 2011. See: https://berec.europa.eu/files/document_register_store/2021/6/BoR__(21)_94_BEREC_proposal_on_remedies-tailoring_and_structured_participation_processes_for_stakeholders_in_the_context_of_the_DMA_(clean).pdf

[18] "BEREC proposal on the set-up of an Advisory Board in the context of the Digital Markets Act". BoR (21) 93. June 2021. See: https://berec.europa.eu/files/document_register_store/2021/6/BoR_(21)_93_BEREC_proposal_on_the_set-up_of_an_Advisory_Board_(clean).pdf