

BEREC Report on the *ex ante* regulation of digital gatekeepers

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EXECUTIVE SUMMARY

On 15 December 2020, the European Commission (EC) published a proposal for a Digital Markets Act (DMA), introducing a series of rules for platforms acting as “gatekeepers” in the digital sector. BEREC strongly supports the EC’s ambition to create contestable and fair markets in the digital sector for the benefit of European citizens and businesses.

While providing innovative services benefiting a large number of users, some digital platforms have been increasingly acting as gatekeepers for business and end-users¹, and thereby as gateways to an overarching variety of goods, services and information, as well as to inputs and assets which are essential for the digital markets to thrive. An *ex ante* asymmetric regulatory intervention towards these 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.

As for the **scope**, the DMA proposal includes number-independent interpersonal communication services (NI-ICS) under the Core Platform Services (CPSs) subject to regulation. Being an electronic communication service (ECS), NI-ICS are also regulated under the European Electronic Communications Code (EECC)² with the aim of promoting competition in the provision of electronic communications networks and services, connectivity in the electronic communications sector, developing the internal market, as well as promoting the interest of European citizens. BEREC sees the EECC and the DMA as principally complementary tools pursuing complementary objectives. In order to ensure this complementarity and avoid potential overlaps, BEREC considers that the provision of electronic communications networks and services should be addressed giving priority to the measures within the existing regulatory framework (i.e. EECC) when applicable, and that a cooperation mechanism should be implemented among the EC (as future EU DMA regulator) and BEREC, the NRAs and/or the DMA Advisory Board proposed by BEREC.³

Concerning the **DMA enforcement**, for any regulatory intervention to truly reach its objectives, appropriate regulatory measures and enforcement procedures are key. In this report, BEREC puts forward a number of proposals for a swift, effective and future-proof regulatory intervention towards digital gatekeepers.

First of all, BEREC believes that sound knowledge and detailed understanding of the business models and technicalities of the sector(s) need to be built. This is even more true in highly-

¹ For the purposes of this report, BEREC is following the definition in the DMA. “End-user” means any natural or legal person using core platform services other than as a business user (Article 2(16)) and “Business user” means any natural or legal person acting in a commercial or professional capacity using core platform services for the purpose of or in the course of providing goods or services to end-users (Article 2(17)). When using “users” hereafter, BEREC refers to both end-users and business users. Please note that this definition of “end-user” differs from the one in Article 2 (14) of the EECC where “end-user” means a user not providing public electronic communications networks or publicly available electronic communications services.

² Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (OJ L 321, 17.12.2018, p. 36–214)

³ For further details on this topic, See 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”, 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

technical and fast-evolving sectors with significant information asymmetries. Along with strong information gathering mechanisms, a continuous, *structured* regulatory dialogue, public consultations and repeated interactions will have to be created with all kinds of relevant potential stakeholders (such as business users, potential competitors, consumers associations, civil society), and not only with the concerned gatekeepers, as it is currently mentioned in the DMA proposal. A structured regulatory dialogue will be crucial to design and enforce an effective intervention and reduce litigation.

As for the **regulatory measures**, BEREC welcomes the framework of the obligations in Articles 5 and 6 of the DMA proposal which are valuable to address certain concerns, as they address some problematic behaviours and create a clear and common understanding of the gatekeeper's practices which are considered to be detrimental. To ensure regulatory certainty and predictability, BEREC believes that the scope of the application of the obligations in Articles 5 and 6 could be further clarified and proposes to detail i) obligations which directly apply to all gatekeepers across all CPSs, without any adaptation and ii) obligations only applying to gatekeeper(s) in a particular CPS and adapted to its specificities.

Moreover, while these direct obligations are necessary, digital environments evolve quickly, and new concerns are likely to arise at the same pace. In order to correctly address them, additional powers in the design of the regulatory measures are needed to ensure that the DMA is effective and future-proof. Thus, BEREC proposes to *complement* the current DMA framework of obligations with additional powers allowing the EC as the DMA enforcer to impose remedies which would be designed and tailored to be more effective and to 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 imposed with the purpose of reaching the objectives of the Regulation, similarly to the ECS *ex ante* regulatory framework under the EEC. 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 interoperability⁴ and access to key inputs/assets – which require proportionality considerations and where their effectiveness is highly dependent on the correct design of the intervention. Such an approach would allow the EC to address unforeseen practices, newly emerging issues and, more generally, issues which may not be effectively addressed by the current obligations.

BEREC believes that this approach complementing the current DMA obligations is particularly valuable to swiftly intervene in case of unforeseen practices, newly emerging issues and, more generally, issues which may not be effectively addressed by other direct obligations. Moreover, for more technical regulatory measures, BEREC believes that it is key that the intervention is appropriately tailored in order to be proportionate and, most importantly, effective. One might argue that (directly-applicable) obligations all across the board might be a faster tool. However, BEREC would like to stress that the benefits of the regulatory intervention are not only a matter of applying measures fast, but essentially about making sure that they are quickly *effective* in reaching the given objectives.

⁴ See box 1 under chapter 7 for further details on interoperability measures

In order to reach the EC's objective of creating fair and contestable digital markets, BEREC believes that the regulatory measures in the DMA should be reinforced, extended or added to both rebalance the relationships of the gatekeeper with its business users and end-users, as well as to facilitate the potential for competitors to enter a CPS and/or expand over several CPSs. Contestability is a key objective for the medium and long term, and remedies aimed to lower barriers to entry and foster inter-platform competition in the different CPSs should be strengthened.

BEREC agrees with the EC's stance that it is important to safeguard the right of business users to raise concerns with any relevant administrative or other public authorities about unfair behaviour by gatekeepers. This highlights the importance and need of including dispute resolution mechanisms in the DMA proposal. Experience in the electronic communications sector has proven that such mechanisms are key to quickly solve grievances among operators. Such experience can provide valuable insights for the establishment of similar mechanisms in the DMA, including disputes affecting more than one Member State, as well as providing sound national expertise on which the EC as the DMA enforcer can rely on.

Furthermore, while supporting a regulatory intervention at the EU level when it comes to digital gatekeepers, BEREC agrees with the EC that close **cooperation with and between the competent independent authorities of the Member States** will be crucial. Implementing the regulation involves a wide variety of tasks, which require both sound expertise and appropriate resources. BEREC considers that the EC as the DMA enforcer should rely on the valuable experience from National Independent Authorities (NIAs)⁵, in particular National Regulatory Authorities (NRAs), for tasks such as e.g. i) gathering of relevant national data (especially from national business users or end-users), ii) continuous monitoring of national markets and of compliance with the regulatory measures, iii) providing an information and complaints desk, iv) dispute resolution for many cases. To coordinate and harmonise the national support of the NIAs, BEREC believes that an Advisory Board of NIAs should be set up. This Board would support the EC as the DMA enforcer with the tasks listed above and provide technical expertise and guidance, thus contributing to an effective enforcement of the regulation for the benefit of businesses, consumers and society at large.

Finally, BEREC would like to point out that even if contestability and fairness are paramount **objectives** of EU-level regulation towards gatekeepers, they do not address all challenges that users might encounter in the digital world. BEREC believes that ensuring an open provision and access to information and digital services offered or intermediated by the digital platforms is also crucial.

Under the Open Internet Regulation⁶, BEREC members must ensure that the (access to the) Internet provided by electronic communications operators remains open, i.e. that end-users

⁵ National Independent authorities refer to national bodies that are involved on *ex ante* or *ex post* regulation in relation to issues addressed in the DMA, such as national regulatory authorities for electronic communications, data protection authorities, competition authorities, consumer protection authorities and so on.

⁶ Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015 laying down measures concerning open internet access and amending Directive 2002/22/EC on universal service and users' rights relating to electronic

(as defined in the EECC⁷) can access and distribute information and content, as well as use and provide applications and services of their choice. While such regulatory intervention is focused on the network layer, digital platforms are nowadays predominantly active on the application layers and are able to restrict the access to specific applications, services, information or content on other levels of the value chain. Thus, BEREC believes that the regulatory action on specific digital platforms should also ensure that the digital environments are open and develop as an engine of innovation, that users are sufficiently empowered and that their ability to access and/or provide content and applications is not hampered on the application layers where these digital platforms operate. Furthermore, any approach to Open Internet should be coherent across the value chain, 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.

Considering the relevance of Internet openness, BEREC is currently working on this issue⁸, analysing the whole Internet ecosystem⁹, including the upper layers, not covered as of today by the Open Internet Regulation. One of the aims of this work is to detect potential bottlenecks and services (some of which are core platform services) where there are potential or actual risks of undue restrictions for any actor to access/provide content and applications.

communications networks and services and Regulation (EU) No 531/2012 on roaming on public mobile communications networks within the Union (OJ L 310, 26.11.2015, p. 1–18)

⁷ See footnote 1

⁸ See BEREC Work-programme 2021 (BoR (20) 163) page 17.

https://berec.europa.eu/eng/document_register/subject_matter/berec/annual_work_programmes/9728-berec-work-programme-2021

⁹ 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 the current report, the internet ecosystem refers to all related links, elements and services independently of ownership.

1. OVERVIEW OF BEREC'S PROPOSALS FOR THE *EX ANTE* REGULATION OF DIGITAL GATEKEEPERS

Objectives	For contestable and fair digital markets: reinforce some regulatory measures → See Chapter 7	
	Additional objective: digital environment must be open, users sufficiently empowered and their ability to access and/or provide content and applications not hampered even beyond the network layer → See Chapter 4	
Scope & GK designation	NI-ICS: For ECN/ECS, priority to EECC provisions. To be addressed by the DMA for issues not in the EECC. Cooperation mechanism needed among the EC, BEREC, the NRAs and/or the DMA Advisory Board. → See Chapter 5 & <u>BEREC report on DMA & EECC provisions on NI-ICS</u>	
	Ecosystem aspect: Should be considered when designating gatekeepers (non-cumulative criterion) and designing the corresponding regulatory measures → See Chapter 6 & Table 1	
	Produce guidelines for gatekeeper designation under Article 3(6) → See Chapter 6	
Enforcement	Implement a structured participation of all types of stakeholders → See Chapter 8	
	Regulatory measures Art. 5&6 DMA → See Chap. 7 & Table 1	For more clarity, distinguish between obligations which i) would apply to all CPSs and ii) would only apply to specific CPSs.
		Article 5(c): Gatekeeping OSs must refrain from imposing technical and commercial restrictions limiting access to key device functionalities.
		Articles 6(1)(c) & 6(1)(f): • Vertical interoperability to be extended to all relevant CPSs. • Horizontal interoperability to be imposed on certain CPSs for GK's key services and functionalities needed to provide competing services (not only ancillary services) (as a <i>tailored remedy</i>). • For unjustified denial of access, obligations to access the platform/its functionalities when needed to conduct business to be extended to all relevant CPSs (not only OSs).
		Article 6(1)(d): • Prohibit default settings favouring gatekeeper's services on some CPSs. • Obligations on ranking extended to all CPSs where ranking occurs.
		Article 6(1)(k): • Fair and non-discriminatory conditions applied across all CPSs (not only to software application store). • Add reference to "end-users".
		Impact of tying and bundling to be more extensively considered: tying prohibited <i>per se</i> , bundling potentially after an assessment.
	Regul. measures Tailored remedies → See Chapter 7	A new article should give additional powers to the EC to tailor remedies i) when there is a risk that harmful behaviours are not (effectively) addressed by the obligations in Articles 5 & 6 of the DMA proposal, and ii) for more technical remedies (e.g. horizontal interoperability and access to key inputs/assets) which require proportionality considerations and where their effectiveness is highly dependent on the correct design of the intervention.
	End-users	Directly address some issues affecting end-users even when business users and/or potential competitors are not concerned by the gatekeeper's practices → See Chapter 7
	Dispute resolution	Set up a dispute resolution mechanism to minimise negative effects on competition and innovation → See Chapter 8 & Annex II for the experience in the ECS sector
Advisory Board & national	Create a technical and independent Advisory Board composed of national independent authorities from different sectors to complement the DMAC. It would • harmonise national support to the EC for i) gathering of relevant data (from gatekeepers and national business users or end-users), ii) continuous monitoring of national markets and of compliance, iii) providing an information and complaints desk, iv) dispute resolution for many cases; and • be a body for reflection, debate and advice to the EC, EP and the Council at their request or on its own initiative. → See Chapter 9	

2. INTRODUCTION

Digital platforms have increasingly become a key tool to support the EU economy, as well as social interaction and participation by citizens. BEREC acknowledges the benefits brought by these platforms in terms of innovation, consumer choice and a wide range of efficiencies by reducing transaction, search and distribution costs for all actors involved in markets intermediated by these digital platforms. Nevertheless, BEREC also recognises the challenges and concerns raised by the entrenched intermediation power of some large digital platforms acting as gatekeepers in the provision/intermediation of a relevant number of content, goods and services.

Accordingly, BEREC welcomes the *ex ante* intervention proposed by the EC in the DMA published on 15 December 2020. This proposal is very timely and addresses the main concerns raised by digital gatekeepers.

This BEREC report builds on previous work done in the past few years, among which BEREC Response to the EC public consultations on the Digital Services Act (DSA) Package and the New Competition Tool (NCT)^{10 11}. It provides an initial analysis of the DMA proposal and puts forward some proposals to make the regulatory intervention towards digital gatekeepers more effective and fit for purpose.

BEREC's feedback relies on its two-decade experience on the application of *ex ante* regulation for opening the former monopolistic electronic communications markets to competition, while protecting end-users' right and ensuring openness at the network layer. Given the successful achievement of the objectives through its regulatory intervention, BEREC considers that such experience can be very valuable for the design, implementation and enforcement of the DMA.

In general, BEREC considers that the DMA proposal is a very good starting point for the design of the regulatory framework for digital gatekeepers. Many of the main proposals previously raised by BEREC are present in the current DMA proposal, such as the definition of certain services and products as a scope for intervention (e.g., "Core platform services" in the DMA corresponds with the "Areas of Business" in the BEREC proposal); an *ex ante* approach of the regulatory intervention; the quantitative thresholds to quickly designate gatekeepers combined with qualitative identification where needed; and the need for at least a set of directly-applicable obligations for a swift intervention.

This being said, BEREC believes that the DMA would benefit from the improvements proposed in this report which are aimed at making the regulatory intervention swifter, more effective and more future-proof. Along with this report, BEREC is proactively engaging with the EU institutions to help to further improve the DMA proposal.

The report is organised as follows: Chapter 1 gives a complete overview of BEREC's proposals in this report. Chapter 3 presents the previous work done by BEREC and NRAs in the field of digital platforms. Chapter 4 analyses the objectives that should be considered by the DMA. The scope of the regulatory intervention (CPSs and designation of digital gatekeepers) is

¹⁰ BoR (20) 138. See https://berec.europa.eu/eng/document_register/subject_matter/berec/others/9411-berec-response-to-the-public-consultation-on-the-digital-services-act-package-and-the-new-competition-tool

¹¹ See Chapter 3 for other reports

addressed in Chapters 5 and 6, and Chapter 7 presents the regulatory measures which should be implemented to reach the given objectives. Chapter 8 presents the key points to ensure that the enforcement will be effective and how dispute resolution mechanisms would work, and Chapter 9 complements it by identifying a series of tasks in which the EU regulator would be more efficiently supported by national independent authorities. Chapter 10 draws conclusions on the previous chapters and Chapter 11 focuses on BEREC future work on digital environments. Finally, this report also contains three annexes focused on BEREC experience on different topics addressed in previous chapters: Annex I on tailoring remedies for an effective enforcement and regulatory dialogue, Annex II on dispute resolution mechanisms in the ECS sector, and Annex III on the *ex ante* regulatory framework which inspired BEREC's proposals on the DMA.

A first draft of this report was opened to public consultation from 16 March to 4 May 2021. BEREC also organised two public workshops with stakeholders to gather their views and test and enrich its own proposals. The first workshop was organised on 28 April 2021 and focused on market entry¹², while the second one was organised on 18 May 2021 and focused on how to better include and integrate end-users in the DMA¹³.

The public consultation was particularly helpful. Stakeholders strongly supported most of BEREC's proposals, and confirmed the legitimacy and the relevance of BEREC's stance on these issues. In particular, most participants strongly supported the need to implement and enforce an effective asymmetric *ex ante* regulatory framework in order to tackle the economic and societal issues raised by gatekeepers. The public consultation also allowed BEREC to enrich and clarify its contribution, for instance concerning the regulatory measures and the involvement of all types of stakeholders in the regulatory process.

This final report incorporates all the input and suggestions for improvement provided by stakeholders, as well as BEREC additional reports and proposals on the DMA published in June 2021.¹⁴

BEREC has also published a report on the outcome of the public consultation on the draft for the present report summarising stakeholders' views and BEREC reactions to the proposals made by stakeholders.¹⁵

¹² Further details are available here:

https://berec.europa.eu/eng/events/berec_events_2021/278-berec-workshop-on-market-entry-in-the-context-of-the-digital-markets-act-dma The complete workshop recording is available at https://youtu.be/qpHp66_ihWI https://youtu.be/qpHp66_ihWI

¹³ Further details are available here:

https://berec.europa.eu/eng/events/berec_events_2021/281-berec-workshop-on-end-users-in-the-context-of-the-digital-markets-act-dma The complete workshop recording is available at <https://youtu.be/9kBlfBnLi6s> <https://youtu.be/9kBlfBnLi6s>

¹⁴ BoR (21) 85, BoR (21) 93 and BoR (21) 94

¹⁵ BoR (21) 130. See https://berec.europa.eu/eng/document_register/subject_matter/berec/reports/10042-berec-report-on-the-outcome-of-the-public-consultation-on-the-draft-berec-report-on-the-ex-ante-regulation-of-digital-gatekeepers

3. PREVIOUS WORK DONE BY BEREC ON DIGITAL ENVIRONMENTS

Digital platforms are not new to BEREC, but have already been in its regulatory focus in the last years. There are several reasons for the interest of BEREC on digital platforms. First, they are a key part of the Internet value chain, as user experience when accessing Internet is conditioned not only by ECSs, but also by digital platforms acting as gateway for users to content and applications. Second, it is part of BEREC and its member NRAs' missions to ensure that digital platforms are well-supported by electronic communications networks. Thirdly, some candidates for CPSs in the proposal, such as NI-ICS, are already regulated under the EECC. Lastly, BEREC considers that its solid and successful experience in encouraging market entry in the ECS sector, addressing structural and societal issues, and applying a complex and broad regulatory framework in a coordinated way across the EU, can be very valuable in the context of digital platforms regulation.

As for the work done on digital platforms, BEREC published in 2018, after a public consultation, a "Report on impact of premium content on ECS markets and the effect of devices on the open use of the Internet"¹⁶, where BEREC addressed issues on barriers to entry on operating systems, app stores and other parts of the Internet value chain.

BEREC also published in 2019 a "Report on the data economy"¹⁷ (also after a public consultation), where BEREC analysed economic properties of the data economy, its regulation and set a taxonomy of data in the context of the digital sector. Relevant aspects of ECS as a key supporting infrastructure for the data economy, as well as the impact of data economy on ECS competition are analysed in the report. BEREC also developed on the use of data analytics in NRAs activities.

In 2020, BEREC published its response to the EC public consultations on the DSA Package and the NCT, providing its views on both proposals, and focusing on the questions on which its experience and expertise could be particularly relevant (now, the DMA).¹⁸ Lastly, BEREC has also worked and is working on number-independent interpersonal communication services (NI-ICS) and published a Report on OTT services¹⁹, a preliminary report on the harmonised

¹⁶ BoR (18) 35. 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

¹⁷ BoR (19) 106. See https://berec.europa.eu/eng/document_register/subject_matter/berec/reports/8599-berec-report-on-the-data-economy

¹⁸ BoR (20) 138. See https://berec.europa.eu/eng/document_register/subject_matter/berec/others/9411-berec-response-to-the-public-consultation-on-the-digital-services-act-package-and-the-new-competition-tool

¹⁹ BoR (16) 35. See https://berec.europa.eu/eng/document_register/subject_matter/berec/reports/5751-berec-report-on-ott-services

collection of data from OTT operators²⁰ and a report on the harmonised definitions for indicators regarding OTT services, relevant to electronic communications markets.²¹

BEREC member NRAs have also prepared relevant reports on digital platforms, such as the ACM market study into mobile app stores²², the interim report by AGCOM in the context of the joint inquiry on Big Data issue by the Italian Competition, Data Protection and Communication Authorities²³ and the final Big Data Inquiry and its policy conclusions²⁴, the report by Arcep on “Devices, the weak link in achieving an open Internet”²⁵, where app stores and other core platform services such as operating systems are also addressed, and the RTR reports “The Open Internet: OS, Apps and App Stores”²⁶ and “Monitoring of digital communications platforms and gatekeepers of the open internet”²⁷. In addition, BNetzA has also recently published the interim result of the public consultation on business customers’ experiences with marketing and sales activities via digital platforms in Germany²⁸. Same as BEREC, many NRAs have also provided their views for the EC public consultations on the DSA Package and the NCT²⁹.

Moreover, BEREC commissioned a comprehensive empirical study on consumer behaviour towards digital platforms as a means for communication, based on a survey at EU level to better understand the issues in relation to consumer attitudes towards these platforms, such as multi-homing dynamics, that was published in June 2021.³⁰

²⁰ BoR (19) 244. See https://berec.europa.eu/eng/document_register/subject_matter/berec/reports/8909-berec-preliminary-report-on-the-harmonised-collection-of-data-from-both-authorised-undertakings-and-ott-operators

²¹ 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

²² ACM (2019) “Market study into mobile app stores”, <https://www.acm.nl/sites/default/files/documents/market-study-into-mobile-app-stores.pdf>

²³ AGCOM (2018) “Interim report in the context of the joint inquiry on “Big data” launched by the AGCOM deliberation No. 217/17 / CONS”.
<https://www.agcom.it/documents/10179/10875949/Allegato+4-9-2018/f9befcb1-4706-4daa-ad38-c0d767add5fd?version=1.0>

²⁴ AGCOM, AGCM, Data Protection Authority (2019) “Big Data Joint Inquiry: guidelines and policy recommendation”
<https://www.agcom.it/documents/10179/17633816/Allegato+10-2-2020+1581347457837/c4139504-3777-4674-ad6d-ac6b9d501608?version=1.0>

²⁵ ARCEP (2018) “Devices, the weak link in achieving an open internet”, https://archives.arcep.fr/uploads/tx_gspublication/rapport-terminaux-fev2018-ENG.pdf

²⁶ RTR (2019) “The Open Internet: OS, Apps and App Stores”,
<https://www.rtr.at/TKP/aktuelles/publikationen/publikationen/OffenesInternetApps2019.en.html>
<https://www.rtr.at/en/inf/OffenesInternetApps2019>

²⁷ RTR (2020) “Monitoring of digital communications platforms and gatekeepers of the open internet”,
<https://www.rtr.at/TKP/aktuelles/publikationen/publikationen/plattformen-monitoring-methoden.en.html>

²⁸ BNetzA (2020) “Interim results – public consultation on digital platforms”, www.bundesnetzagentur.de/digitalisation-consultation

²⁹ See for example, the one from CNMC
(https://www.cnmc.es/sites/default/files/editor_contenidos/Notas%20de%20prensa/2020/CNMC%20position%20paper%20on%20DSA%20and%20NCT.pdf), from Arcep (https://www.arcep.fr/uploads/tx_gspublication/consultation-DSA-reponse-ARCEP_sept2020.pdf), from ACM (<https://www.acm.nl/en/publications/acm-favourable-european-commissions-proposals-regarding-new-rules-online-economy>)

³⁰ “Analysing EU consumer perceptions and behaviour on digital platforms for communication. Analysis report”. BoR(21)89. June, 2011. See: https://berec.europa.eu/eng/document_register/subject_matter/berec/reports/9965-analysing-eu-consumer-perceptions-and-behaviour-on-digital-platforms-for-communication-analysis-report

The interplay between the DMA and the EECC concerning NI-ICS was also the subject of a report published in June 2021.³¹

In the same vein, and with the aim to further contribute to the debate on the DMA, BEREC published two short papers detailing its proposals to improve the DMA on the following issues: remedies tailored and structured dialogue with the stakeholders³², as well as on the set-up of an Advisory Board in the DMA.³³

In the second quarter of 2021, BEREC organised two public workshops in relation to the DMA where speakers from the European Parliament and the EC, and key stakeholders and academics were invited to share their views concerning market entry³⁴ (28 April 2021) and the empowerment of end-users in the context of the DMA (18 May 2021).³⁵

BEREC is also working on the analysis of the whole Internet ecosystem, to get a comprehensive view on the interrelation of the different layers, from networks to digital platforms and any other element of the complete ecosystem, in order to identify the main potential bottlenecks, and assess how user experience is configured by the different parts of this Internet ecosystem. This work will be enriched by workshops involving the main actors and stakeholders, and subject to a public consultation with the aim of publishing a report at the beginning of 2022.³⁶

Finally, over the next years BEREC will work on the different topics described in Chapter 11, with the aim of deepening the analysis on several issues that are addressed in this report. Depending on the evolution of the debate on the DMA proposal, the responses on the public consultation and the interest of different institutions and stakeholders on each topic, BEREC will further develop topical issues in future reports.

³¹ "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

³² "BEREC proposal on remedies-tailoring and structured participation processes for stakeholders in the context of the Digital Markets Act" BoR (21) 94. June, 2021. See: 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

³³ "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/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

³⁴ See https://berec.europa.eu/eng/events/berec_events_2021/278-berec-workshop-on-market-entry-in-the-context-of-the-digital-markets-act-dma. The complete workshop recording is available at https://youtu.be/qpHp66_ihWI

³⁵ See https://berec.europa.eu/eng/events/berec_events_2021/281-berec-workshop-on-end-users-in-the-context-of-the-digital-markets-act-dma. The complete workshop recording is available at <https://youtu.be/9kBlfBnLi6s>

³⁶ "BEREC Work Programme 2021". BoR (20) 220. See: https://berec.europa.eu/eng/document_register/subject_matter/berec/annual_work_programmes/9728-berec-work-programme-2021

4. OBJECTIVES OF THE REGULATORY INTERVENTION

As expressed by BEREC in its response to the EC public consultations on the DSA Package and the NCT, regulatory action on digital markets should focus on the following main issues:

1. Ensuring contestability in the digital sector by promoting competition among digital platforms (inter-platform competition),
2. Ensuring fairness for business users depending on gatekeepers for providing their products and services (intra-platform competition),
3. Protecting end-users from potential concerns arising from the gatekeeping power of digital platforms, including the promotion of open digital environments beyond the network layer and access services supplied by Internet service providers.

These objectives inter-relate and, as shown in the application of the EECC for ECSs, addressing each of them has a positive impact on the others. This is typically the case for competition-enhancing regulatory measures that allow for empowering consumers and protecting their interests. This allows for regulatory intervention addressing different issues at the same time, but also calls for a careful assessment of the side-effects of measures aimed at one of the objectives.

Reaching several objectives within the same regulatory framework is not new: for instance, the *ex ante* electronic communications regulation aims at creating the conditions for sustainable and effective competition, but also at promoting connectivity, strengthening the internal market, fostering efficient investments, ensuring that the internet remains open, protecting end-users' rights, and empowering consumers and citizens. BEREC believes that the DMA should also reconcile and reach the various objectives in a coherent and effective way.

Chapter 7 of this report is focused on proposing specific regulatory measures according to the concerns identified by BEREC in relation to fairness for business users, inter-platform competition and issues related to users' empowerment and the protection of end-users' interests.

In this chapter, BEREC will focus on two of the key regulatory objectives: ensuring contestability and openness of the digital environment.

4.1. Ensuring contestability in the digital environment

BEREC considers that creating contestable environments is a key objective that needs to be ensured in the medium and long term, as promoting competition from alternative digital platforms competing with gatekeepers will have a positive impact on the concerns on fairness for business users and protection of end-users. Indeed, inter-platform competition is useful to discipline gatekeepers from acting unfairly towards business users and end-users. Concrete experience can be drawn from the ECS sectors where competition on wholesale level has had a very positive impact on end-users' choice. It has also empowered end-users and provided complete and relevant information and means to take decisions on e.g. switching from one operator to another, and thus enhancing competition on the merits.

Beyond creating contestable markets, inter-platform competition can also help to indirectly improve the fairness of conditions offered to business users and end-users. Indeed, an increased number of business users operating in a sound competitive environment, can produce increased quantity and quality of services accessible to end-users on reasonable terms. As a consequence, this can also increase the chances for end-users to access more content and applications. Finally, this allows for empowering both sides to take informed decisions, fostering competition and innovation, and thus ensuring that all actors benefit from the full potential of the Internet and the digital services.

In this line, BEREC recommends paying special attention to regulatory measures aimed at inter-platform competition that lower barriers to entry and enhance market entry and expansion (e.g. interoperability, data portability and access remedies) and thus the ability of competitors to challenge the gatekeeper's position on (a) CPS(s). BEREC believes that it will be crucial to reinforce this intervention in the DMA proposal (see Chapter 7). Moreover, some regulatory measures are often highly technical and detailed, and thus must be carefully designed and implemented by tailoring and proportionality considerations. For this reason, a regulatory dialogue with all kinds of relevant stakeholders, constant monitoring to ensure effectiveness of and compliance with the measures, as well as dispute resolution mechanisms will be key (see Chapter 8).

4.2. Ensuring openness of the digital environment

The Open Internet Regulation applied by BEREC members for ECS establishes the end-users'³⁷ right to access and distribute information and content, use and provide applications and services, and use terminal equipment of their choice via their internet access service – irrespective of the end-user's or provider's location or the location, origin or destination of the information, content, application or service. A key objective of the regulation is to guarantee the continued functioning of the internet environment as an engine of innovation.

However, as explained in the BEREC report on the impact of premium content on ECS markets and the effect of devices on the open use of the Internet³⁸, the Internet ecosystem/value chain reaches beyond the internet access service, and includes a relevant number of digital platforms which are now in the scope of the DMA proposal.

BEREC would like to stress that even if contestability and fairness are paramount objectives of EU-level regulation towards gatekeepers, they do not address all challenges that users may encounter in the digital world.

BEREC believes that ensuring an open provision and access to information and digital services is also crucial. Under the Open Internet Regulation, BEREC members must ensure that the (access to the) Internet provided by electronic communications operators remains open. While such regulatory intervention is focused on the network layers, some digital platforms are nowadays predominantly active on the application layers and are able to restrict users' access

³⁷ Here the term "end-users" refers to the definition of the EECC, see footnote 1

³⁸ Ibid footnote 16

to specific applications or services on other levels of the Internet ecosystem. Indeed, some digital platforms can often act as digital bottlenecks (i.e. gateways for which there is no relevant substitute) for end-users to access content and applications, as well to business users to offer them. This is also recognised in the DMA proposal. In particular, BEREC agrees with the general idea of Recital 51 stating that “*Gatekeepers can hamper the ability of end-users to access online content and services including software applications*”.

BEREC believes that the regulatory action on these digital platforms should also ensure that the digital environments are open and develop as an engine of innovation, and that the users’ ability to access and/or provide content and applications is not hampered on the application layers where digital platforms operate. Furthermore, any approach to Open Internet should be coherent across the Internet ecosystem, avoid any uneven playing field and should ensure that the standard of protection established under Open Internet Regulation at the network layer is not lowered when addressing emerging threats.

In this line, BEREC considers that 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 will continue to work on issues relating to an open internet and open digital environments³⁹, analysing the Internet ecosystem, including the upper layers, not covered by the Open Internet Regulation, to detect potential bottlenecks and services in the value chain (some of which are core platform services) where there are potential or actual risks of undue restrictions for any actor to access/provide content and applications.

5. THE SCOPE OF THE REGULATORY INTERVENTION

While there are thousands of digital platforms offering their services to the citizens of the European Union, serious concerns have so far mainly arisen within the provision of a few specific types of platform services. In its response to the EC public consultations on the DSA Package and the NCT, BEREC referred to these services as Areas of Business (AoBs), a concept which is very similar to the CPS in the DMA proposal.

In its DMA proposal, the EC identifies eight CPSs where regulation may be necessary: (a) online intermediation services (incl. but not limited to marketplaces, app stores and sector specific intermediation services; e.g. mobility, transport or energy, as understood by BEREC), (b) online search engines, (c) social networking, (d) video sharing platform services, (e) NI-ICS, (f) operating systems, (g) cloud services, and (h) advertising services supplied by any provider of a CPS listed in points (a) to (g).

³⁹ See BEREC Work-programme 2021 page 17.

https://berec.europa.eu/eng/document_register/subject_matter/berec/annual_work_programmes/9728-berec-work-programme-2021

5.1. BEREC's comments

BEREC suggested in its response to the EC public consultations on the DSA Package and the NCT that a potential regulation should, at least initially, focus on the provision of a relatively limited set of services: (i) app stores, (ii) e-commerce, (iii) general search, (iv) operating systems and (v) social media. These are all included in the DMA proposal. Concerns regarding the provision of advertising services are identified by BEREC as well, however BEREC included those concerns implicitly in the CPSs general search, e-commerce and social media respectively where applicable as advertisement is regularly the monetized side of these platform services.⁴⁰

Concerning other services which are not currently addressed by the DMA but may need some further regulatory scrutiny, such as voice assistants and web browsers, BEREC is carrying out an analysis in the framework of its Report on the Internet ecosystem⁴¹, where their level of openness, the competition dynamics and their interaction with and influence on the different elements of the ecosystem will be assessed.

BEREC agrees with the EC that the DMA shall not apply to markets related to electronic communications networks and services, other than NI-ICS⁴². BEREC has published a separate report on NI-ICS⁴³ recognising that the EECC and the DMA are principally complementary tools and that, when needed, a careful analysis should be carried out in order to avoid regulatory overlaps between the DMA and the EECC concerning NI-ICS.

Moreover, the scope of the DMA in Article 1(3) point (b), also only refers to ICS and could therefore include both NB-ICS (Number-Based Interpersonal Communication Services) as well as NI-ICS. BEREC notes that this could affect regulatory certainty and the effective application of sectoral electronic communications regulation. As NB-ICS commonly do not share the key features of the digital platforms, and have typically been national in scope, BEREC notes that their (potential) inclusion as a CPS within the DMA would likely be inconsistent with the subsidiarity principle and with the aim of the DMA. Article 1 of the DMA should therefore be amended to better address the potential overlap of the DMA and the EECC with regard to NI-ICS⁴⁴. It should also clarify that the DMA does not and will not include any ECS CPS other

⁴⁰ BEREC has not analysed the need for regulation within the areas of mobility, transport and energy. Cloud services is another CPS not analysed by BEREC within the scope of this report. However, BEREC is set to produce a separate report on the Internet value chain, where any potential concerns that may advise cloud services inclusion in the list of CPS could be identified. Another topic for analysis, however not yet planned by BEREC, could be whether other services; e.g. web browsers and voice assistants, which do not appear to be explicitly included in the DMA proposal may raise competition concerns or direct harm to end-users.

⁴¹ See footnote 8

⁴² See Article 1(3) and 1(4) in the DMA proposal.

⁴³ 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.

⁴⁴ The amendments and their rationale are detailed in Chapter 6 of the above-mentioned report (BoR (21) 85).

than NI-ICS, as well as that the provisions in the EECC remain fully applicable, and is given priority, for regulating NI-ICS.

Moreover, in order to ensure the complementarity between the two regulatory frameworks (EECC and DMA) applying to NI-ICS, BEREC proposes that a structured cooperation mechanism should be implemented among the EC (as future EU DMA regulator), BEREC, the NRAs and/or the DMA Advisory Board⁴⁵ proposed by BEREC.

5.2. Revision of the CPS list

BEREC recognises the need to periodically review which services may require *ex ante* regulation in view of the evolution of the services. BEREC therefore agrees that the list of relevant CPSs should be revised by the EC as the DMA enforcer also relying on support by the national level according to a predefined process.

Before defining a CPS, it is necessary to consider the need for regulatory certainty to facilitate investment and continued innovation within such an important and dynamic sector. BEREC notes that regulation should be based on concerns that require regulatory measures, and that the requirements for identifying new CPSs or removing previously defined CPSs deserves clarification within Article 17 and/or Article 38 of the DMA. BEREC also notes that a market investigation could serve as an adequate tool for revising the CPS list which, together with the legislative process, could provide the relevant stakeholders sufficient possibilities to give input to the CPS designation, as well as allowing time to make any required adjustment.

6. DESIGNATION OF GATEKEEPERS

6.1. Introduction

The DMA proposal provides for an asymmetric regulation, i.e. its obligations can be applied only to certain CPS providers that can be designated as gatekeepers⁴⁶ for one or several of those CPSs by fulfilling the criteria in Article 3(1). The DMA proposal outlines both a quantitative procedure based on the CPS provider meeting a specified set of quantitative cumulative thresholds (Article 3(2)), as well as a qualitative procedure (Article 3(6)), opening up for adjustments of the quantitative results.

BEREC supports the existence of a quantitative and a qualitative identification procedure of the proposal, similar to the direct and optional identification procedure described in BEREC response to the EC public consultations on the DSA Package and the NCT. There are however some issues that deserve mentioning.

⁴⁵ See Chapter 9 on the Advisory Board.

⁴⁶ In its response to the public consultation on the DSA package, BEREC proposed to only regulate those CPS providers having significant intermediation power (SIP) within their CPS.

6.2. The quantitative identification procedure

The DMA proposal requires the CPS provider to self-assess whether it is active within a specific CPS and meets the thresholds. If so, it should notify the EC, which will then assign the gatekeeper status to the CPS provider through a regulatory decision. BEREC endorses a formal decision on gatekeeper status, although it is important that no further substantial delay is incurred.⁴⁷

BEREC's proposal furthermore did not include a threshold regarding the number of Member States in which CPSs have to be active, but rather that different thresholds could be considered depending on the scope of the provision of the service.

The definition of 'business user' is of utmost importance for the gatekeeper designation and BEREC believes that this could be further clarified in the DMA, for example in the case of NICS and social networking services. BEREC also notes that the revenue threshold, as well as the valuation thresholds, in (a) relate to the undertaking to which the candidate gatekeeper belongs, whereas the thresholds in (b) relate to the specific CPS. BEREC suggested in its response to the EC public consultations on the DSA and the NCT to consider defining thresholds that relate to the provision of each CPS.

Relating a threshold to the undertaking has both pros and cons. On the pros, it could be quite easily observable (especially if the undertaking provides more than one service), it would target CPS providers that may have privileged access to funds and it would reduce incentives to try to transfer revenues across services in order to evade regulation. In addition, it would ensure to focus on large companies enjoying a relevant market position via the configuration of ecosystems. On the cons, the revenue or valuation of the undertaking may not necessarily translate into gatekeeping power within a specific CPS. It may also provide incentives to divest CPSs, while keeping them indirectly integrated through vertical constraints or other contractual provisions, thereby maintaining the de facto gatekeeping power. Overall, a complete assessment of pros and cons for this issue needs further analysis.

BEREC in any case welcomes a direct identification procedure, since, with appropriate thresholds, it will provide a fast way of identifying entities presumed to have gatekeeper status. However, given the issues noted, BEREC supports the qualitative assessment complementing this approach, as proposed by the EC.

6.3. The qualitative identification procedure

Many gatekeepers operate within digital platform ecosystems⁴⁸.

⁴⁷ BEREC agrees on the need for clear and reasonable short deadlines for both, the relevant undertaking to notify and provide the information and the EU competent authority to take the decision. BEREC also agrees that there should be consequences for undertakings which do not comply with the notification and information duties within the set timeframe. Both aspects seem already to be dealt with in Article 3 (3) and Article 26 (2) (a) of the DMA proposal.

⁴⁸ The phrasing on p. 1 and para (14) (p. 18) in the DMA proposal suggests that an ecosystem consists of some set of services offered by a platform outside the scope of the CPS where the platform has 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.

In the context of the DMA and for the purposes of this report, BEREC considers that a platform ecosystem consists of different types of services or products provided by the same undertaking either across more than one CPS, or 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. Unless explicitly stated otherwise, where “ecosystem” is used in this Report, it is generally referring to such “platform ecosystems”.

As highlighted in its response to the EC public consultations on the DSA Package and the NCT, BEREC believes that being part of an ecosystem reinforces the platform’s gatekeeping role when it allows a platform to leverage its power onto additional services, or to have privileged/exclusive access to key inputs/assets raising further barriers to entry or expansion. This aspect, which is missing in the DMA proposal, could be further considered when designating gatekeepers (as a non-cumulative criterion) and designing the corresponding regulatory measures.

For instance, being part of an ecosystem is not explicitly included in Article 3(6), and BEREC considers that it should at least be taken into account as a relevant, non-cumulative criterion⁴⁹, “other structural characteristic” (point (f) of Article 3(6)) whenever being part of an ecosystem plays a significant role in the ability to act as a gatekeeper. BEREC believes the text should make this explicit.

Moreover, the designation process in Article 3(6), and perhaps most relevant point (a), does not contain any explicit provisions as to an alternative interpretation as regards the required number of Member States in which the CPS are provided. BEREC notes that this might potentially affect the possibility of effective regulation of digital platforms active in only one Member State⁵⁰, which was considered in BEREC’s response to the EC public consultations on the DSA Package and the NCT to address concerns raised by the gatekeeping role of digital platforms not meeting the thresholds.

BEREC would suggest issuing more precise guidelines by means of delegated acts or any other legal instrument regarding the gatekeeper designation criteria in Article 3(6), as well as criteria relating to emerging gatekeepers, to clarify how they should be interpreted more precisely and to set out best practices. Such guidelines should help to preserve the incentive for investment, innovation and competition. Although acknowledging very relevant differences in the analysis of significant market power and gatekeeper status, a successful example providing such guidelines in detail is the guidelines for the analysis of operators with significant market power (SMP Guidelines)⁵¹ used in the ECS sector. BEREC similarly considers it

⁴⁹ BEREC does not consider being part of an ecosystem should be a cumulative criterion as there are also non-ecosystem related concerns, and that the DMA should make this explicit. 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.

⁵⁰ BEREC interprets Article 3(6) in a way that these conditions may also be met when the provider of the core platform service is only active in two Member States.

⁵¹ Communication from the Commission - Guidelines on market analysis and the assessment of significant market power under the EU regulatory framework for electronic communications networks and services (C(2018) 2374)

important for the EC to issue detailed guidance on the designation of *emerging gatekeepers* as to not induce legal uncertainty.

6.4. Review of status

BEREC agrees that it is important to regularly revise the need for regulation and agrees with the proposed status review process set out in the DMA (Article 4). BEREC also agrees on the importance of involving the national level in the review.

BEREC also considers that the DMA should not impair the ability to regulate platforms active in fewer than three Member States. Furthermore, if there are reasonable grounds, a single Member State should be entitled to request a market investigation.

7. REGULATORY MEASURES FOR GATEKEEPERS

In its response to the EC public consultations on the DSA Package and the NCT, BEREC identified current or potential concerns caused by digital gatekeepers that should be addressed to prevent as early as possible any unwanted and irreversible effects on digital environments. BEREC supports the need for an *ex ante* asymmetric intervention to address such concerns. For this regulatory intervention to be effective, BEREC puts forward a set of proposals.

First of all, BEREC supports the obligations listed in Articles 5 and 6 of the DMA proposal, and would suggest to clarify their scope of application. In order to ensure regulatory certainty, BEREC believes it would be clearer to distinguish between obligations which i) would apply to all CPSs and ii) would only apply to specific CPSs. This approach would also help for a clearer enforcement of the regulation.

Secondly, in such fast-evolving environments, it will be crucial to ensure that the DMA is effective and future-proof. To this purpose, BEREC proposes to *complement* the current DMA framework with additional powers allowing the EC as the DMA enforcer to design and tailor the regulatory intervention accordingly. These additional powers would be legally formalised in the text of the Regulation where the list of remedies at the regulator's disposal, as well as clear *ex ante* principles, would be stated. Such remedies would be imposed with the purpose of reaching the objectives of the Regulation, similarly to the ECS *ex ante* regulatory framework under the EECC.⁵²

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. The DMA enforcer could carry out a market investigation, identify the concerns and swiftly adapt the regulatory intervention by imposing the remedies from the “toolbox” list and according to the *ex ante* principles, and ii) for more technical remedies – such as horizontal interoperability⁵³

⁵² 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”,

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

⁵³ See box 1 below for further details on interoperability measures

and access to key inputs/assets – which require proportionality considerations and where their effectiveness is highly dependent on the correct design of the intervention.

BEREC believes that these additional powers would provide a key added value to the DMA proposal, since it would allow to swiftly adapt the intervention and for an effective definition of some remedies. Moreover, the addition of the principles and the toolbox of remedies in the law would help creating legal certainty, so that investors, existing and future gatekeepers, as well as business- and end-users can foresee future regulation.

The benefits of these two proposals would be i) to clarify which directly applicable obligations apply to each CPS, taking into consideration its specificities and ii) to ensure that the regulatory intervention can be quickly adapted to the evolution of the digital environment and of the gatekeepers' practices and that it is tackling the concerns in an effective and proportionate manner.

7.1 Concerns caused by digital gatekeepers

In its response to the EC public consultations on the DSA Package and the NCT, BEREC identified unfair practices in which gatekeepers have the ability and may have the incentive to engage⁵⁴ (e.g., unfair denial of access to essential inputs or assets, refusal of proportionate interoperability, imposing unreasonable terms and conditions, etc, see Table 1 further below), and which should be prevented *ex ante*, given their potentially irreversible effects on competition, innovation and end-users' choice.

The current DMA proposal seems to mostly address issues that could be observed in the relationship between the gatekeepers and their business users. While this approach can solve many issues to improve fairness in the given CPSs, BEREC believes that regulatory measures favouring contestability should be reinforced to better allow for

1. Inter-platform competition, i.e. creating conditions for new competitors to arise,
2. Addressing additional concerns affecting business users (i.e. intra-platform competition),
3. Directly addressing some specific end-users related issues (i.e. when the gatekeeper's practices have negative effects on end-users but business users and/or potential competitors are not necessarily directly affected).

As for inter-platform competition, BEREC recognises that some obligations in the DMA proposal are aimed at creating conditions for facilitating switching among digital platforms. This is the case, for instance, of portability-related obligations (point (h) of Article 6(1) of the DMA proposal) which are aimed at reducing lock-in effects. Although such interventions constitute an important step in opening the digital environments, BEREC believes that concerns related to barriers to entry induced by very significant direct and indirect network effects are only

⁵⁴ See BEREC response to the DSA PC, pages 13-14. Available at https://berec.europa.eu/eng/document_register/subject_matter/berec/others/9411-berec-response-to-the-public-consultation-on-the-digital-services-act-package-and-the-new-competition-tool

partially addressed in the current DMA proposal. In this regard, regulatory measures such as interoperability, data portability and access to essential inputs/assets, such as relevant data, will be key. BEREC believes that such measures should be reinforced (e.g. data portability) and/or extended to certain other CPSs⁵⁵ than initially envisaged in the DMA proposal. Horizontal and vertical interoperability, for instance, should be both reinforced to ensure that the gatekeepers' services allow for interoperability for both complementary service providers *and* potential competitors, and extended to certain other CPSs, as detailed below. Moreover, such regulatory measures should take into account innovation considerations⁵⁶, be appropriately designed and tailored in order to be effective, proportionate to achieve the set objective(s)⁵⁷. This will be needed to create conditions for innovators and potential competitors to arise by addressing barriers to entry derived from the network externalities enjoyed by consolidated gatekeepers.

Regarding intra-platform concerns, Table 1 below shows that a significant number of concerns which were identified by BEREC are only partially covered by the DMA proposal. For example, BEREC believes that a gatekeeper has the ability and may have the incentive to launch bundle offers in a strategic way so as to require business users to enter multiple markets if they want to provide a competing offer. BEREC thinks that this tying and bundling concern (see concern #7 in Table 1) is only partially addressed by Articles 5(e) and 5(f) regarding identification services, and Article 6(1) point (b) which is only focusing on operating systems, by allowing to uninstall preinstalled applications (which can be seen as a bundled offer). BEREC believes that it would be appropriate to extend such obligations to other relevant CPSs.

As for end-users' concerns, BEREC recognises that the obligations in the DMA proposal will indirectly benefit end-users by tackling some business users' concerns, like the data portability obligation set out in Article 6(1) point (h) of the DMA proposal that, at least partially, addresses the lock-in effect on end-users (see concern #14 in Table 1 at the end of this chapter). Nevertheless, BEREC believes that certain issues related to end-users should also be *directly* considered and reinforced. As an example, BEREC believes that concerns related to self-preferencing go beyond the ranking of algorithms used by search engines and include more broadly default settings imposed by the gatekeeper that could affect the effective choice of end-users (see concern #4 in Table 1). BEREC thinks that default settings can be useful in many cases, but that they can in other cases unduly influence end-users in their choices. This can particularly be the case when the gatekeeper uses default settings to unduly give an

⁵⁵ Concerning NI-ICS, ECS regulators already have the powers to impose interoperability measures under Article 61(2) point (c) of the EECC. This is the case 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". See 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", Available at: 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

⁵⁶ See Box 1 below

⁵⁸ BEREC is aware that the P2B regulation already imposes transparency obligations on online platforms in relation to business users. BEREC proposes to also extend transparency obligations vis-à-vis end-users and is of the opinion that these transparency rules need to be expanded to all CPSs (see table 1 below).

advantage to its own services/products. Preference menus could be part of the remedies, but should be properly designed in order to actually improve effective choice of end-users.

An assessment of the effects of the gatekeepers' practices on end-users could be an additional and valuable start for analysis of the need for the regulatory intervention and would help to address the gatekeeper's practices which may have negative effects on end-users even when business users and/or potential competitors are not directly affected. Such an assessment could reach the conclusion that regulatory measures (e.g. interoperability) would need to be imposed if it is proportionate and necessary to reach the objective of the regulation. By directly addressing end-users' concerns, indirect benefits for business users may also be created. This is the case for instance when choices of alternatives to default search engines are presented to end-users in a non-discriminatory manner and – more generally – when end-users can make choices without undue restrictions by the gatekeepers (e.g. non-neutral presentation of options, lack of interoperability when appropriate/proportionate). Providing end-users with the tools and means to make well-informed choices is crucial for the development of alternative products and services, leading to increased inter-platform competition on the merits and a fair evolution of competitive dynamics.

Table 1 at the end of this chapter presents the concerns that BEREC has identified, and how those concerns are (partly) addressed in the current DMA proposal.

7.2 Regulatory measures

7.2.1 Obligations set out in the DMA proposal

The DMA proposal includes a list of directly-applicable obligations (Article 5 of the DMA proposal) and others susceptible to being further specified (Article 6 of the DMA proposal). Other articles, such as Articles 12 and 13 of the DMA proposal, also contain obligations with regards to the notification of concentrations and obligation of having profiling techniques audited which both aim to reduce asymmetry of information.

BEREC welcomes the principle of a set of obligations as proposed by the DMA. Such obligations enable for a direct and quick intervention, creating a clear and common understanding of the gatekeeper practices which are considered to be sufficiently likely to result in significant negative effects. This intervention can bring such potentially harmful behaviours to a stop and thus preventing the effects on competition from snow-balling, provided that there are no discussions on exceptions or lengthy court proceedings.

This being said, BEREC would like to highlight the following two aspects.

First, BEREC thinks that the regulatory measures in the DMA should be extended to cover broader concerns (i.e. inter- and intra-platform competition and those related to end-users as expressed in the previous subsection).

Second, it is necessary to ensure that the DMA can, to a higher degree, anticipate certain types of future potentially harmful practices of gatekeepers and swiftly adjust the regulatory intervention to the concerns that may arise in the mid and long-term, as technologies and

services will change over time, as well as the manner in which end-users interact with products and services (see next section 7.2.2).

Thus, while recognising their benefits and supporting their inclusion in the DMA, BEREC believes that the set of obligations in Articles 5 and 6 should be complemented by giving additional powers to the EC as the DMA enforcer to design and impose tailored remedies. This proposal aims at making the DMA both effective and more future-proof. Future-proof because it would allow for carrying out an assessment (e.g. a market investigation) to identify issues not (currently or effectively) covered by the current DMA obligations and for designing detailed and pin-pointed remedies. Effective, because the powers of remedy-tailoring will be particularly valuable for imposing specific technical remedies such as interoperability and access remedies which need both effective detailing and proportionality considerations (see next section 7.2.3). As explained above, the remedies at the regulator's disposal would be clearly listed in the text of the Regulation in order to ensure legal certainty.

7.2.2 The updating process of the gatekeeper's obligations under the DMA proposal

The obligations set out in Articles 5 and 6 of the DMA proposal are mainly built around practices that have already been identified or investigated by the EC or other relevant authorities. While having the merit of being designed on actual practices, this approach may prove to be backward-looking, and BEREC would like to put forward some proposals.

BEREC believes that in order to also tackle future potential concerns: i) the updating process of obligations in Articles 5 and 6 is a key element and ii) additional powers must be given to the EC to design tailored remedies (see section 7.2.3).

On point i), the DMA proposal already includes two mechanisms to update the obligations set out in Article 5 and 6 of the DMA proposal via either:

- delegated acts according to Articles 10 and 37 of the DMA proposal, and market investigations according to Article 17; or
- a legislative review of the DMA initiated by legislative proposals by the EC based on review evaluations to be conducted every three years according to Article 38 of the DMA proposal.

While the process for updating the obligations is valuable, BEREC believes that the possibility to address unforeseen practices, newly emerging issues and, more generally, issues which may not be effectively addressed by the current DMA obligations seems to be limited in the current proposal. Indeed, according to Article 10 of the DMA proposal, the update of the obligations is restricted to “new obligations addressing practices that limit the contestability of CPSs or are unfair in the same way as the practices addressed by the obligations laid down in Articles 5 and 6” of the DMA. This can be interpreted as the list of obligations in the DMA already covering all potentially detrimental practices, without the possibility for the EC to actually address *new* ones by means of an update.

Furthermore, the updating mechanism according to Article 10 of the DMA proposal seems to focus only on new practices which are unfair towards business users. Neither harmful behaviours by gatekeepers directly affecting end-users nor new concerns on inter-platform

competition (market entry) seem to be covered by point (a) of Article 10(1) of the DMA proposal.

In order to ensure an adequate regular updating process, BEREC considers that national authorities should play a role in giving input to the updating process, as they are also in a good place to identify emerging challenges related to digital platforms, e.g. with regard to the right to propose to the EC to conduct a new market investigation into new practices (relates to Article 17 of the DMA proposal). See further developments in this respect in Chapters 8 and 9.

7.2.3 BEREC's proposal on the regulatory measures

First of all, in order to ensure regulatory certainty and predictability, BEREC believes that the scope of application of the obligations in the DMA should be clarified. To this end, BEREC proposes that:

- A first set of directly-applicable obligations should clearly apply to all gatekeepers in all CPSs without any adaptation. This could concern for example transparency⁵⁸ of terms and conditions towards business users and end-users or the right of business users to raise issues with any relevant public authority relating to any practice of gatekeepers. Such obligations would most likely be set in the text of the DMA itself.
- A second set of directly-applicable obligations would clearly target specific CPSs, and therefore only apply to gatekeepers within the same CPS. This would enable the regulatory authority to directly list obligations in the law which are more effectively addressing the concerns of a specific CPS. Examples of such obligations are non-discrimination as to ranking, tying and data portability. Each CPS would have a list of specific adapted obligations set out in a dedicated EU-level act (e.g. a delegated act) to bring clarity on the obligations that gatekeepers should comply with, especially when those obligations would need to be updated.

Secondly, while obligations currently in the DMA can quickly address a set of concerns, BEREC believes that, in order to be future-proof, the DMA regulatory intervention should be complemented by giving additional powers to the EC to design and impose tailored remedies already set out in law.⁵⁹

As previously expressed, remedy-tailoring can be useful in many cases. This is particularly the case to swiftly intervene to address certain unforeseen practices, newly emerging issues and, more generally, issues which may not be effectively addressed by the current DMA obligations (i.e. to make the DMA more future-proof). Moreover, for more technical and detailed regulatory measures, the intervention should be appropriately tailored in order to be proportionate and, especially important, effective. The tailoring would imply an assessment which takes account of the specificities of the CPS(s) as well as of the gatekeeper. Examples of such remedies are interoperability, all types of access remedies, as well as specific non-discrimination and pricing

⁵⁸ BEREC is aware that the P2B regulation already imposes transparency obligations on online platforms in relation to business users. BEREC proposes to also extend transparency obligations vis-à-vis end-users and is of the opinion that these transparency rules need to be expanded to all CPSs (see table 1 below).

⁵⁹ Like SMP regulation in the EECC, see details above.

remedies. A list of potential remedies, depending on the issue considered (i.e. a “regulatory toolbox”), would need to be set out in the DMA, together with clear *ex ante* principles on how these remedies should be applied. Such measures should be set out in formal decisions by the EC as the DMA enforcer for each individual gatekeeper.

One might argue that sole (directly-applicable) obligations all across the board may be a faster tool. BEREC would like to stress that the benefits of the regulatory intervention are not only a matter of applying measures fast, but essentially about making sure that they are quickly *effective* in reaching the given objectives.

The same regulatory approach has already been successfully implemented in the ECS sector for over twenty years. NRAs specify, for example, principle-based remedies which are listed in the EECC (e.g. access) into detailed and tailored measures which fit the actual network and its technical characteristics. The legislator and EC as the DMA enforcer will therefore be able to rely on a concrete experience from a regulated sector.

Box 1. Interoperability measures to reinforce inter- and intra-platform competition

Interoperability is “*the ability of two or more systems or components to exchange information and to use the information that has been exchanged*”⁶⁰. Interoperability does not require interoperable systems or components to be uniform. “*Most of the time, a minimally invasive design approach focusing on interfaces or membranes can enable systems [...] to work together while still preserving their difference and variety*”⁶¹. In order to be interoperable, undertakings providing systems or components implement standards at the edge of their services and products in order to allow the exchange and use of information. Those standards are open (*i.e.* their technical specifications are public, without restriction of access or implementation). They may consist of *de facto* standards such as public APIs, or normalized standards (*i.e.* technical standards elaborated by Standard Setting Organizations applying open and fair processes).

From a regulatory perspective, enhancing the level of interoperability may be limited to ensuring that access to *de facto* standards is offered on non-discriminatory terms. Furthermore, the intervention may also imply that the Regulator promotes effective interoperability by imposing on gatekeepers the opening of their *de facto* standards or the implementation of normalized standards. In any case, interoperability obligations need to take into account innovation considerations,⁶² be appropriately designed and tailored in

⁶⁰ IEEE Standard Computer Dictionary: A Compilation of IEEE Standard Computer Glossaries, 1990, page 42. http://www.mit.jyu.fi/ope/kurssit/TIES462/Materiaalit/IEEE_SoftwareEngGlossary.pdf

⁶¹ John Palfrey and Urs Gasser, “*Interop: The Promise and Perils of Highly Interconnected Systems*”, 2012, page 107.

⁶² While horizontal interoperability (as defined below) may enable consumers of the gatekeeper and competing providers to realize joint network effects, it may also reduce incentives for innovation and the development of efficient standards for complementary services within an ecosystem. The risk particularly concerns innovation that relates to or depends on interfaces and (competing) standards of communications. See also Autorité de la concurrence and CMA (2014): The economics of open and closed systems.

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/387718/The_economics_of_open_and_closed_systems.pdf

order to be effective and proportionate to achieve the set objective(s), and to create conditions for innovators and potential competitors to arise, addressing barriers to entry.

The definition set above encompasses a large array of practices. It is important to distinguish between horizontal interoperability (imposed on the gatekeeper of a CPS for providers of similar, competing services) and vertical interoperability (imposed on the gatekeeper of a CPS for providers of complementary services to this CPS)⁶³.

BEREC believes that specific concerns raised by the gatekeepers can be addressed by different forms and levels of interoperability, when appropriate and proportionate.

Horizontal interoperability is imposed on the gatekeeper of a CPS to open specific functionalities, communications and data to providers of competing services and products. It is aimed at ensuring that the benefits of network effects are not captured by a single firm thus limiting the potential of competition and innovation, but – by enabling consumers of the gatekeeper and competing services to realise joint network effects – these benefits can affect different market players; they increase choice and create the conditions for competition on the merits. In the context of the DMA, horizontal interoperability remedies could be particularly relevant for online social networking services e.g. where end-user's costs of multi-homing when sharing content on several platforms (which are close substitutes) seem high.⁶⁴ Interoperability in this CPS would imply for instance that, when necessary, the gatekeeper effectively opens some of its interfaces (*i.e.* APIs), or implements normalized standards (integrating interfaces)⁶⁵, in order for other competing service providers to access and use some common functionalities such as posts, images, videos, comments, “likes” and access to the list of contacts. This would allow end-users to communicate across social networks and keep contact with their community, using the standard implemented by the gatekeeper but the (interoperable) service of their choice based on product differentiation beyond the interoperable standard, e.g. the terms and conditions, quality of service, level of privacy, etc. Such remedies would be technically feasible: some of the major digital platforms who are likely to be designated as gatekeepers under the DMA did offer different types and levels of interoperability in the past, and then decided to disable access to some functionalities⁶⁶. Horizontal interoperability may also bring similar benefits in other CPSs, such as cloud computing services. As of today, no horizontal interoperability obligation is provided in the DMA proposal. BEREC is of the opinion that without the inclusion of such measures in the regulatory toolbox for relevant CPSs, the DMA would be unlikely to create effective conditions for competitors to arise (inter-platform competition).

⁶³ For a distinction between vertical and horizontal interoperability, see. Wolfgang Kerber and Heike Schweitzer, “*Interoperability in the Digital Economy*”, JIPITEC, 39 para 1, 2017.

⁶⁴ CMA, Report “Online platforms and digital advertising market study”, Final Report, para 3.215, 01.07.2020.

⁶⁵ Such as XMPP (standard developed within the IETF for instant messaging) or Activity Pub (standard developed within the W3C and including a large set of functionalities commonly used for social networking).

⁶⁶ Facebook for example offered the “Publish Actions”-API, which enabled third-party applications to automatically publish posts to Facebook. CMA, Report “*Online platforms and digital advertising market study*”, Appendix J, para 47-49, 01.07.2020.

Vertical interoperability (also called *protocol interoperability* in the Crémer, Montjoye, Schweitzer Report⁶⁷) would be applied on the gatekeeper to ensure that complementary services can be provided on the CPS on fair and non-discriminatory conditions⁶⁸. Protocol/vertical interoperability addresses the situation in which an undertaking controlling a bottleneck determines to its (sole) benefit whether (and in which conditions) complementary services may be developed on the platform. Protocol/vertical interoperability gives complementors access to essential functionalities allowing the development of their services (usually through APIs) to complement those provided by the gatekeeper is aimed to promote competition on the merits on the platform (intra-platform competition). As of today, the DMA proposal includes such a remedy mainly for operating systems. Point (f) of Article 6(1) obliges the gatekeeper to give complementors access to features that are available or used in the provision by the gatekeeper of any of its ancillary services. BEREC is of the opinion that it would be useful to extend this obligation when appropriate and proportionate to certain other relevant CPSs on which complementors usually offer services to end-users. This could be the case for instance of social networks or online intermediation services, including software application stores, which have numerous complementors who rely on public APIs to develop and offer their services to end-users (e.g. advertising services, financial services, services of analysis, aggregators, gaming services, etc.).

The table below presents BEREC analysis on how the DMA addresses the different concerns in relation to gatekeepers identified by BEREC in its response to the EC public consultations on the DSA Package and the NCT.

Table 1. Cross analysis of the concerns identified by BEREC, the obligations in the DMA and the proposals by BEREC

#	Concerns identified by BEREC	In D M A ?	Comments and BEREC proposals
<i>Exclusionary conducts (practices that remove or weaken actual and potential competition, directly or indirectly harming business users and/or end-users)</i>			

⁶⁷ Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer, "Competition policy for the digital era", European Commission (2019)

⁶⁸ Some competition law cases resulting in the imposition of vertical-interoperability-related remedies: Commission, Microsoft case, Case COMP/C-3/37.792, 24.03.2004; Autorité de la concurrence, Google Advertising case, Case 21-D-11, 07.06.2021: acceptance of commitments.

1	<p>Unjustified denial of access (permanent or temporary) to the platform or functionalities on the platform necessary to conduct business.</p> <p><i>(This refers to the refusal to enter into an agreement without reasonable cause. As regards access in terms of interoperability, which is a more technical type of access, please refer to point 6.)</i></p> <p>Examples:</p> <ul style="list-style-type: none"> - denial of access to sell products or services via the digital platform - denial of access to the digital platforms' payment services. <p>Granting or denying access to their platform on discriminatory terms strengthen gatekeepers' ecosystem power.</p>	<p>Article 5(c) ensures business users can promote their offers and conclude commercial contracts.</p> <p>Point (f) of Article 6(1) allows providers of ancillary services (e.g. payment service providers) access and interoperability to the platform on the same conditions as the ones granted to the gatekeeper's ancillary services, but only in case the platform is an Operating System, and does not apply to other CPSs.</p> <p><i>P a r t i a l l y</i></p> <ul style="list-style-type: none"> • In case of unjustified denial of access, obligations to access the platform or functionalities on the platform which are necessary to conduct business should be extended to all relevant CPSs and not only OSs • The DMA proposal does not include obligations on OSs to refrain from imposing technical and commercial restrictions limiting access to key device functionalities (as mobile Internet, Voice over LTE or Wi-Fi, GPS, voice commands, etc.). This point should be made explicit. <p>An access remedy could be paired with an interoperability remedy (see line 2 below), a fair terms remedy, a non-discrimination remedy, etc., depending on the concerns to be addressed.</p>
2	<p>Unjustified refusal of proportionate interoperability. Refusal might be legitimate when it may compromise security or privacy or is excessively costly with respect to the benefits that may be achieved (not proportionate).</p> <p>Offering interoperability on discriminatory terms strengthen gatekeepers' ecosystem power. It causes network effects to occur at the ecosystem level instead of the market level.</p>	<p><i>P a r t i a l l y</i></p> <p>Points (c) and (f) of Article 6(1) allow interoperability for third party applications and ancillary services but only for Operating Systems, not other CPS.</p> <ul style="list-style-type: none"> • Obligations related to vertical interoperability could be extended to all relevant CPSs. This is different from horizontal interoperability which may only be relevant and proportionate on certain CPSs and

			<p>which would benefit competitors and users</p> <ul style="list-style-type: none"> Horizontal interoperability could be imposed on certain CPSs (e.g. social networking services) in a way that allows market contestability and the provision of competing services/products. This would concern GK's key services and key functionalities which are needed to reach this objective and would not be limited to ancillary services. This would be a tailored remedy: an assessment will thus ensure that it is correctly detailed and proportionate. <p>For NI-CS: ECS regulators already have the powers to impose interoperability measures to ensure end-to-end connectivity between NI-ICS under Article 61(2) point c) of the EEC, as well as by means of asymmetric regulation.</p>
3	<p>Unjustified denial of access to relevant data on reasonable terms where barriers to replication are high and non-transitory.</p> <p>Example: refusing access on fair, reasonable and non-discriminatory terms to data that end-users allow the GK to share not necessarily related to a specific business user (refusal to deal).</p>	<p>P a r t i a l l y</p>	<p>Point (i) of Article 6(1) allows a business user to access data generated by that business user and its end-users. However, other types of data could appear relevant in some cases to enable inter-platform competition.</p> <p>Article 5(g) deals only with advertisement data, and point (j) of Article 6(1) with search data. But other CPSs do not seem addressed by DMA.</p>
4	<p>Self-preferencing, e.g. unfairly favouring own products and services to the detriment of competing businesses. Examples:</p> <ul style="list-style-type: none"> - unfair ranking/steering, - pre-installation and default settings of only one's own products/services. <p>Those practices allow gatekeepers to strengthen their ecosystem.</p>	<p>P a r t i a l l y</p>	<p>Point (d) of Article 6(1) forbids unfair ranking of services and products. However, it does not consider the impact of default settings on users' choice.</p> <p>Article 2(18) refers to ranking in specific CPSs such as online intermediation services, online social networking and online search engines. However,</p> <ul style="list-style-type: none"> Obligations on ranking could be extended to all CPSs where ranking occurs, thus also including video-sharing CPS

			<ul style="list-style-type: none">The impact of default settings on end-users' choice should be taken into account (to avoid undue influence on end-users' choice). Some directly-applicable obligations could be introduced for specific CPSs (e.g. OS, online search engines, some online intermediation services such as app stores) and prohibit the preferencing of the services of the GK itself. The users would have the possibility to choose (e.g. window of choices). For other CPSs (e.g. social networking services) the regulatory measures on the default settings may need an assessment and tailoring
5	<p>Preferencing of a specific third party. Unfairly favouring a third party's products and services to the detriment of competing businesses. Examples:</p> <ul style="list-style-type: none">unfair ranking/steering for third-party's products or services,pre-installation and default settings of that third party's products/services,discrimination in enforcing terms and conditions without reasonable cause.	<p><i>Partially</i></p> <p>Point (d) of Article 6 (d) forbids unfair ranking of some third parties (i.e. subsidiaries of the GK) but not all.</p> <p>Point (k) of Article 6 (k) addresses discrimination issues in access conditions to software application store and not for other CPSs.</p> <ul style="list-style-type: none">Default settings of third-party's products/services does not seem addressed by the DMA proposal.Fair and non-discriminatory conditions should be applied across all CPSs	
6	<p>Imposing exclusionary terms and conditions for attaining and/or retaining access. Examples:</p> <ul style="list-style-type: none">unfair blocking (e.g., the GK blocking certain functionalities offered by app providers/developers such as other payment services than the GK's own without reasonable cause),unfair delistingunreasonable performance targets.	<p><i>No</i></p> <p>Unfair delisting and unreasonable performance targets for example do not seem explicitly covered by DMA.</p>	

7	<p>Tying and bundling (e.g. with the goods/services offered by the GK, and/or specific third-party business users) if the 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 without objective justification.</p> <p>Tying and bundling strengthen gatekeepers' ecosystem power. Tying particularly may tend to undermine competition on the merit.</p>	<p>Article 5(e) and Article 5(f) prevent a GK to tie users with its identification service and other CPSs offered by the GK.</p> <p>Point (b) of Article 6(1) allows to uninstall preinstalled applications which can be seen as a bundled offer.</p> <ul style="list-style-type: none"> • But other tying and bundling issues do not seem to be covered. • While tying should be prohibited <i>per se</i>, BEREC believes that bundles offers may also have positive effects and therefore deserve a specific assessment. To this end, BEREC proposes that bundling is addressed by tailored remedies. The appropriate regulatory measures addressing tying and bundling should apply to all relevant CPSs, even if the bundled/tied service/product does not meet the threshold in Article 3(2) point (b)
8	<p>Unreasonably restricting the possibility for business users to provide information to its end-users through the platform.</p> <p>Example: stopping providers of complementary services from informing end-users about alternative avenues where their complementary service can be consumed/purchased.</p>	<p>Article 5(b) ensures business users can use alternative intermediation services to reach their users.</p> <p>Article 5(c) ensures business users can promote their offers.</p>
9	<p>Strategically and unreasonably denying business users' or competing platforms access to relevant information which would be essential to provide services and products</p> <p>Such practices strengthen gatekeepers' ecosystem power. They benefit from economies of scale and scope as well as information asymmetries which cannot be duplicated by competitors.</p>	<p>Point (j) of Article 6(1) deals with access to search data, but only for direct competitors and not in a context of interoperability with the GK's platform.</p>

10	Not allowing an end-user to access the platform on equal terms as other end-users	P a r t i a l l y	<p>Point (k) of Article 6(1) deals with business users only, and CPSs other than app stores do not seem to be addressed.</p> <ul style="list-style-type: none"> • A reference to “end-users” should be added in point (k) of Article 6(1) • Fair and non-discriminatory conditions should be applied across all CPSs
<i>Exploitative conducts (practices that are harming business users and/or end-users directly)</i>			
11	Imposing unreasonable terms and conditions for business users for access to the platform (including aftermarkets), to data or to other essential inputs. Example: excessive pricing.	P a r t i a l l y	<p>Point (k) of Article 6(1) ensures fair Terms of Services for accessing to app stores but not for other CPSs.</p> <ul style="list-style-type: none"> • Fair and non-discriminatory conditions should be applied across all CPSs
12	Imposing unreasonable terms and conditions to end-users for access to the platform. Example: excessive gathering of end-user data.	P a r t i a l l y	<p>Point (k) of Article 6(1) is about business users only.</p> <ul style="list-style-type: none"> • A reference to “end-users” should be added in Article 6(k)
13	Gathering and combining end-user data from all or various business units where the GK is active and other third-party sources without consent. Such practices unduly strengthen gatekeepers’ ecosystem power. They benefit from economies of scale and scope as well as information asymmetries that cannot be duplicated by competitors.	Y e s	<p>Article 5(a) forbids combining personal data sourced from different services without users’ consent.</p> <p>Article 5(f) forbids requiring subscription to a CPS as a condition to access to another CPS</p>
14	Refusing data portability and de facto locking end-users in (making it very difficult or impossible to switch platform).	Y e s	<p>Point (h) of Article 6(1) ensures effective portability of data.</p>

	Where portability is granted on discriminatory conditions (e.g. self-preferencing), such practices will tend to unduly strengthen gatekeepers' ecosystems by locking-in end-users.		
<i>Transparency-related issues</i>			
15	Strategic use of unclear or incomplete terms and conditions towards business users.	<i>P a r t i a l l y</i>	Point (k) of Article 6(1) ensures fair Terms of Services for app stores but not for other CPSs. <ul style="list-style-type: none"> Fair and non-discriminatory conditions should be applied across all CPSs
16	Lack of transparency towards content providers (business users as well as end-users) as to the rules of ranking algorithms.	<i>y e s</i>	Point (d) of Article 6(1) ensures fairness of ranking algorithms when third-parties offer similar services or products with the GK's.

8. ENFORCEMENT

In this chapter, BEREC proposes some elements which are key for ensuring an enforceable regulatory framework. In section 8.1, BEREC explains why it is necessary that all relevant stakeholders are involved in the regulatory dialogue. In section 8.2, BEREC proposes to set up a dispute resolution mechanism for solving potential grievances in a limited timeframe for the intervention to be effective. Based on the experience from the ECS sector, examples are presented about technical knowledge-building, the set-up of a regulatory dialogue, as well as a dispute resolution mechanism, which can be useful in the context of the DMA.

Annexes I and II complement BEREC views on enforcement illustrating how this regulatory dialogue is needed for the appropriate definition of some regulatory measures and how dispute resolution mechanisms can be used to quickly address issues between the gatekeeper and its users.

8.1 A structured regulatory dialogue for knowledge-building and definition of effective regulatory measures

For a regulatory framework to be effective, sound knowledge and detailed understanding of the business models and technicalities of the sector(s) must be built up. Especially in highly technical sectors with significant information asymmetries, such as the digital environments, a

constant regulatory dialogue is needed to develop hands-on experience and knowledge. This can only be done in a framework fostering structured and regular interactions with all relevant types of stakeholders. Furthermore, this dialogue allows for a more robust and fine-tuned regulation and increased transparency of the decision-making process that ultimately leads to a swifter implementation and decreases litigation.

Digital platforms are operating in a multi-stakeholder environment. The regulatory measures to be implemented affect the concerned gatekeeper but are primarily aimed at creating fair conditions for business users dependent on the gatekeeper, lowering barriers to entry for (potential) competitors, and benefitting end-users using the services of the digital platform. If the specification of the obligations or the design of the remedies and their effects are only discussed and tested with the concerned gatekeeper, the EC as the DMA enforcer will only get a one-sided view on their effectiveness. For this reason, BEREC considers that, for the regulatory framework to be effective, it is essential that, next to the concerned gatekeepers, all actors – business users, (potential) competitors, standard-setting associations, end-users and civil society – are involved in the regulatory dialogue in a structured and efficient manner to provide their views, experience and expertise. Indeed, counterarguments, additional information and insights coming from all these stakeholders are fundamental to develop a sound and critical knowledge of the sector, to shape an effective intervention, to monitor its efficiency in real time, and to adjust the regulatory measures where needed⁶⁹. By doing so, the regulatory measures on gatekeepers can be effective immediately, thus ensuring the swiftness of the regulation, and unwanted and potentially irreversible effects can be avoided.

While this structured dialogue is essential to guarantee effectiveness of the regulatory measures, it should be underlined that the involvement of all kinds of stakeholders pertains to information gathering and knowledge-building and not to co-regulation. The final definition of the relevant provisions in the DMA with respect to the imposition of and the actual enforcement of the regulation would solely remain in the hands of the regulatory authority. By consulting the different parties and building hands-on expertise – while remaining the sole designer of the tailored remedies–, the regulatory authority can stay one step ahead and obtain a better-informed position to evaluate the regulation.

In the DMA proposal, a regulatory dialogue with the relevant gatekeepers is mentioned several times. In fact, according to recital 29, *“implementing measures that the Commission may by decision impose on the gatekeeper following a regulatory dialogue should be designed in an effective manner, having regard to the features of core platform services as well as possible circumvention risks and in compliance with the principle of proportionality and the fundamental rights of the undertakings concerned as well as those of third parties”*. In this line, and based on BEREC’s experience, the same regulatory measure can be implemented in different ways, with potentially different results. For instance, the technical design of a regulatory measure affects its level of effectiveness. Therefore, a structured regulatory dialogue is not only needed to get a comprehensive knowledge of the context where regulatory measures should be imposed, but also to reach the optimal effectiveness, minimising risks of circumvention.

⁶⁹ Either by tailoring additional remedies or by updating the obligations in Articles 5 and 6

Additionally, many of the regulatory measures will translate in a de-facto standardization of aspects related to the communication among different actors (business users/platforms, data sharing among platforms or even platforms/end consumers), so a dialogue with all types of actors involved is advisable to ensure its effectiveness with a comprehensive view. The EC refers to the dialogue aimed to ensure a correct tailoring and an adequate implementation of the regulatory measures of the DMA proposal. BEREC agrees with the EC that this dialogue is needed for this purpose.

The regulatory dialogue should start at an early stage, i.e. immediately when the regulation is in place in order to build the relevant and necessary knowledge to make any regulatory intervention fit for purpose. Such dialogue should be constantly fed, especially when regulatory measures needing further specification are being tailored. Before the regulation is in force and a formalised dialogue is put in place, BEREC believes the EU competent authority should already engage in formal and informal exchanges with all parties in order to make sure that the remedies under design would be as efficient as possible.

The dialogue should be maintained, so that the EU competent authority can monitor whether tailored remedies should be fine-tuned or if regulation might be softened. Regulatory dialogue is also needed to monitor compliance with regulatory measures, to assess whether action from the EU competent authority is needed, or even to detect the emergence of new situations that may trigger a market investigation. And, last but not least, constant dialogue with *all* types of stakeholders is also essential to build further knowledge about the core platform services; evolutions in the digital environments should be followed and information asymmetries should also be reduced.

Both BEREC and its members have hands-on experience with such a broad stakeholder regulatory dialogue; they can affirm that such an approach is key to ensure an efficient *ex ante* regulation. NRAs have a continuous and repeated dialogue with all types of actors of the sector (incumbent operators, alternative operators, consumers associations, local authorities, civil society, and so on). By doing so, the NRA reduces information asymmetries making its intervention fit for purpose for the benefits of businesses, end-users and society at large. For example, NRAs often set up and oversee permanent, regular or occasional committees gathering stakeholders or experts to design obligations and thus ensure the effectiveness and efficiency of the remedy. This is typically the case for e.g. interoperability or number portability remedies.

In some countries for instance, committees, chaired by the NRA and involving operators and when appropriate, local authorities, issue opinions on technical matters that the regulator may take into consideration. Stakeholders can give their opinion on the reference offers related to access or interconnection that the regulator imposes on the regulated actors to adopt where relevant, including details on exchange of information, protocols, etc. NRAs in general often carry out public consultations to receive feedback from all relevant stakeholders before decisions are made. Another example is given where industry groups are organised by the regulator to involve market players in regulatory changes. They are informed about potential changes and can give input to modify these changes. On a less formal basis, NRAs maintain constant interactions with stakeholders, collecting information and data on a regular basis and dialoguing with the sector. This is also the case for number portability where the obligation has

to be established and implemented by the different operators to make it possible. For example, some regulators organise techno-economic fora with operators and equipment vendors, seeking expert views and the required knowledge to effectively address the technical, economic and organizational issues this kind of technical remedy implies in stakeholders' ecosystem. This fruitful collaboration was key to successfully design the technical specifications of the number portability obligation including details interfaces, procedures, etc. In a similar manner, the technical specification for IP interconnection is often also agreed by operators in fora hosted by the NRA before the remedy is actually imposed in voice termination markets. This model of regulation allows the regulator to benefit from the expertise of the stakeholders, which might be crucial to set *de facto* standards where appropriate, or to specify the interfaces that should be opened, the type of information that needs to be shared along with data formats, etc. Other tools to collect stakeholders' views include the organisation of public consultations e.g. on remedies that will be imposed.

In the context of the DMA, such tools seem to be particularly valuable when adopting a decision pursuant to Articles 3, 7, 8, 9, 15, 16, and 17 of the DMA proposal. Formal public consultation foster transparency, efficiency, and participation letting all kinds of stakeholders express their views and inform the EC about potential problems and so improve final decisions.

BEREC's views on the need for a structured dialogue with all stakeholders have been endorsed by stakeholders participating in the public consultation of the draft for this report. Responses to the public consultation have generally shared BEREC's position that the benefits of the regulatory intervention are not just a matter of applying measures fast, but about making sure that they reach the given objectives within a reasonable timeframe.

Finally, BEREC wants to point out that decisions should also take opinions by the leading European bodies for the enforcement of other relevant regulations (sector regulators, data protection, consumer protection, competition authorities and others – if applicable) into utmost account, in order to ensure full compliance with other EU legislations.

8.2 A dispute resolution mechanism

Given the pervasiveness of gatekeepers' business (leading to a high number of stakeholders involved), highly-technical nature of the digital environments and the conflicting objectives that consumers, business users, competitors and gatekeepers might have in the market, BEREC believes that an easily accessible and effective dispute resolution mechanism should be put in place by the EU competent authority to maximize the effectiveness of DMA provisions' enforcement.⁷⁰ Indeed, non-judicial, dispute resolution mechanisms for business users and platforms competing with gatekeepers are however missing in the DMA proposal.

For the groups directly affected by the behaviour of the gatekeepers, it is crucial to have an easy access to a swift and effective dispute resolution mechanism. Indeed, dispute resolution

⁷⁰ BEREC is aware of the dispute resolution mechanism in the Platform to Business Regulation. However, given that the Platform to Business Regulation has a different scope than the DMA, a dispute resolution mechanism is also needed for the DMA.

can be seen as a private enforcement mechanism where plaintiffs monitor regulated actors' behaviour and bring the case to the regulator which will have the opportunity to first, enrich its knowledge on practices, and second, enforce regulation where relevant.

Similarly to the experience in the ECS markets (see Annex II), BEREC thinks that this procedure should be set within a tight timeframe to ensure a rapid response to the requester. If the request is considered admissible and justified, the regulator may issue injunctions (not sanctions) against an actor. Indeed, the goal is not to punish unlawful practices but to help building a sustainable market in the future. Dispute resolution mechanism can be conducted by an independent regulatory body that adopts an administrative decision having binding effects on the parties involved. 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 compared with voluntary agreement mechanisms and court proceedings. This agile, non-repression focused mechanism is more easily used by dependent smaller players. Dispute resolution makes it possible to build an efficient competitive market with economic players through "operationalized" regulation: it can help all parties (not only the two parties involved) to interpret the provisions of the regulation, and better understand how to apply them operationally on specific use cases. As such, the decisions taken in a dispute resolution mechanism often have a ripple effect shaping practices in the whole market.

An important point to consider is that while the reach of digital gatekeepers is pan-European, most business users dealing with them are national – being this even more true for consumers. There are more than 10.000 digital platforms in the EU, among which 90% are small and medium sized enterprises (SMEs).⁷¹ 40% of companies that sell products online do it through an online marketplace.⁷² 88% of the business users state that they have encountered unfair trading conditions on large platforms".⁷³ As an example, we should consider the fact that, on average, in order to be designated as gatekeeper, among other prerequisites, the digital platform has at least 10.000 business users or more⁷⁴. It is therefore likely that a high number of disputes may arise when the regulation comes into force (and could be seen as burdensome by a centralized EU regulator).

Considering the (potentially highly) technical nature of the disputes, BEREC is of the opinion that a dedicated mechanism that is able to deal with complaints should be created. Such a dispute resolution mechanism, which might include addressing disputes with end-users at national and cross-national level, will likely require additional resources to be allocated to the EU competent authority. NRAs have long experience with such a mechanism given that the ECS regulatory framework includes a dispute resolution procedure to solve grievances between operators.

⁷¹ See https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-services-act-ensuring-safe-and-accountable-online-environment/europe-fit-digital-age-new-online-rules-businesses_en

⁷² Eurostat (2019)

⁷³ Responses on New Competition Tool : <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12416-New-competition-tool/public-consultation>

⁷⁴ For instance, a potential gatekeeper such as Amazon has between 200.000 and 250.000 business users in Spain, Germany, Italy and France (<https://www.marketplacepulse.com/articles/amazon-has-three-million-active-sellers>). Besides, Facebook has 160 million business users worldwide (<https://about.fb.com/news/2020/05/state-of-small-business-report/>).

In addition, BEREC recognises that national actors (i.e., business-users operating in a single MS) may face barriers in contacting the EC directly to raise a complaint. Language barriers, procedures or lack of physical proximity may inhibit the ability of local business-users to raise issues.

From an operational viewpoint, BEREC would like to clarify that if parties want to raise a case before NIAs under the DMA, the dispute should satisfy the following criteria:

- be focused on issues treated by the DMA (i.e. contestability and fairness in the current proposal). Issues related to other legislations (GDPR, competition law, consumer protection law, P2B regulation, etc.) should rather 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 considers that NIAs could play an active role in supporting the EC in resolving disputes, in particular where national actors are involved. Participation of NIAs in this process could reduce the burden placed on the EC and improve the accessibility of dispute resolution mechanisms to national business-users. At the same time, a strong emphasis on co-ordination and EU level oversight – through the involvement the DMA Advisory Board – could ensure a harmonised approach (see chapter 9). There are several mechanisms which could be employed to minimise any risk of fragmentation. BEREC will discuss three of them in paragraphs below.

Under one approach, NIAs could predominantly act as the first point of contact with complainants, as they can verify if complaints fulfil the criteria specified above before conveying them to the EC for consideration. Under this approach, NIAs would provide a dedicated information and complaints desk in each MS to check if complaints qualify but would leave resolution of disputes solely to 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, a mixed approach could be applied. In this case, some straightforward disputes could be solved 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 national 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, under each of these approaches, where complaints arise which are beyond the scope of the DMA (e.g., GDPR, competition law, consumer protection law, P2B), NIAs could redirect these complaints to other competent authorities.

For monitoring whether the regulatory intervention put in place is effective or not, it is also important that the EU competent authority has the legal power/competence to collect all relevant data and information in an easy and efficient way. BEREC therefore supports that the EC has taken this into account in the DMA proposal.⁷⁵ These powers should be extended to national authorities if they get an assisting role in monitoring the effectiveness of the regulatory intervention.

Regulating a sector *ex ante* involves continuous work for a long period of time. In the next chapter, BEREC will present several tasks and missions which could be carried out at the national level in order to make sure that the regulatory measures would be implemented in an effective and efficient manner.

9. ENHANCING ASSISTANCE FROM NATIONAL INDEPENDENT AUTHORITIES FOR AN EFFECTIVE ENFORCEMENT

In this chapter, BEREC will present how NIAs could assist the EC as the DMA enforcer and how this support could be put in place for the DMA enforcement to be truly effective.

The exchange of information and expertise between NIAs and the EC should result in quick decision-making as well as a swift and effective enforcement in view of the objectives of the DMA.

Given the pan-European reach of the main digital gatekeepers, BEREC endorses that the regulatory authority implementing and enforcing the DMA should be at the EU level. A harmonized approach is also key for European businesses to avoid fragmentation and inconsistency in the implementation of the DMA in different Member States. BEREC believes that strengthening the internal market for digital services by setting out harmonised rules across the EU should be a crucial objective for the DMA. This is also the case of the EECC, which includes the pursuit of the internal market as one of the four overarching objectives of the regulatory framework.

⁷⁵ See Articles 19, 20 and 21

At the same time, BEREC thinks that “*close cooperation with and between the competent independent authorities of the Member States, with a view to informing its implementation and to building out the Union’s expertise in tackling fairness and contestability issues in the digital sector*”⁷⁶ should be further developed in the proposal.

In this context, the EC plans to establish an information exchange with Member States via the Digital Markets Advisory Committee (DMAC), which shall deliver opinions on certain individual decisions of the EC as the DMA enforcer. BEREC believes that, along with the DMAC, competent NIAs can play a very valuable role in assisting the EC based on technical independent expertise in NIAs.

Involving NIAs holding *ex ante* expertise and/or competence in the digital field (e.g. ECS regulators and/or data protection authorities) would provide for a real added value to the EC’s design and enforcement of the DMA in a cross-cutting manner. Next to in depth knowledge about these fields, national authorities have relevant expertise in e.g. information gathering, continuous monitoring of markets and innovations, design of regulatory measures, dispute resolution, enforcement and market investigations on which the EC could rely.⁷⁷

To coordinate this support, BEREC considers that it would be appropriate and beneficial to establish a specialized Advisory Board composed of representatives of NIAs (hereinafter the Advisory Board).

The resources available through the above-mentioned Advisory Board could, by complementing and/or reinforcing the staff of the EC as the DMA enforcer, enhance the effectiveness of the implementation of the DMA, and alleviate the burden on the EC.

The above would need implementing an efficient coordination mechanism between the EC as the DMA enforcer and authorities at a national level (like NRAs) in practice. Such coordination would be assured by an Advisory Board harmonising the support of NIAs, as described in section 9.2

9.1 Assistance by national independent authorities

9.1.1 Information (data) gathering

The EC as the DMA enforcer will have the power to request information from (associations of) undertakings including access to databases and algorithms, to conduct interviews, take

⁷⁶ See paragraph 409 of the Commission staff working document Impact Assessment Report accompanying the document.

Proposal for a regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector, SWD(2020) 363 final

⁷⁷ On 18 May BEREC organised a virtual workshop on End-users in the context of the Digital Markets Act. During this workshop, the representative of Article 19 as well as the representative of BEUC acknowledged the specific expertise from different regulatory bodies (competition authorities, data protection authorities, consumer protection authorities and other regulatory authorities) to assist the EC throughout different tasks (from designing the obligations during the legislative process to monitoring and enforcing them. According to Article 19: “A constant dialogue and exchange would help to avoid any conflicting approach, because the sector will be regulated by a number of different regulatory frameworks (GDPR, DSA, DMA, EECC).” During another virtual workshop held on 28 april 2021, related to Market Entry in the context of the Digital Markets Act, Cdiscount also stressed that coordination and cooperation mechanisms across Europe between competent national authorities in competition and data protection are needed, which is in line with the BEREC proposal.

statements and perform on-site inspections. This is key to reduce information asymmetry and build the necessary know-how for an appropriate and effective intervention.

In order to be effective, information from gatekeepers, other significant digital platforms and national business users across the EU should be gathered both systematically and continuously. This is essential in regulated markets, where by means of objective, structured and easily-comparable data, the effects of an intervention can be measured and adapted when necessary. Systematic data collection will incite gatekeepers to actually collect and keep track of the relevant data. It may not always be possible to ask for specific data *ex post* if the gatekeeper was not aware that specific data would be required at a certain point in time to assess the efficiency of the regulation. Adequate data on major developments in the market can also serve as a basis for the review of the regulation.

Data collected from market players (e.g. concerning prices or quality of service) can be complemented with a variety of other sources of data that are crowd-sourced – i.e. directly provided by the users – as well as data that is made publicly available. Telecom NRAs are familiar with such data-driven regulation and this experience will be particularly relevant in digital markets⁷⁸.

Systematic and continuous data collection by NIAs in relation to national business users located in their country⁷⁹ should be harmonized and serve as a robust basis for monitoring activities at EU level (see 9.1.2 below). In BEREC's view, such assistance to the EC shall be provided in the context of an Advisory Board, in which NIAs shall cooperate with respect to digital matters for the sake of consistency (see section 9.2 as concerns the tasks and composition of such Board).

With respect to this matter, we refer to the experience of BEREC, for example, in the ongoing work on data collection from OTT players (i.e. formulating guidelines on harmonized indicators for data collection at national level from NI-ICS and video-streaming services)⁸⁰ or the international roaming benchmark data reports.⁸¹

9.1.2 Monitoring of the market and the competitive landscape

Effective monitoring requires the availability of consistent qualitative and quantitative data that should be gathered as explained above.

⁷⁸ See for instance, Arcep's quantitative surveys and map-based tools for monitoring fixed and mobile connectivity: <https://en.arcep.fr/maps-data.html>. Data are both gathered by the NRA and crowdsourced and are made publicly available in a user-friendly format. The objective is to monitor markets, inform and empower users.

⁷⁹ Platforms that fall within the scope of the DMA can be active on a different level in different Member States. Gathering data on a national level would therefore be insightful.

⁸⁰ BoR (21) 33, "BEREC Report on the harmonised definitions for indicators regarding OTT services, relevant to electronic communications markets", see https://berec.europa.eu/eng/document_register/subject_matter/berec/reports/9877-draft-berec-report-on-harmonised-definitions-for-indicators-regarding-ott-services-relevant-to-electronic-communications-markets

⁸¹ BoR (20) 157, "International Roaming BEREC Benchmark Data Report October 2019 - March 2020 & 2nd Western Balkan Roaming Report", see https://berec.europa.eu/eng/document_register/subject_matter/berec/reports/9443-international-roaming-berec-benchmark-data-report-october-2019-march-2020-2nd-western-balkan-roaming-report

To keep pace with the developments in a constantly changing environment, continuous monitoring of relevant changes in dynamics as well as new technical and business models would help in lowering the information asymmetry between the EC as the DMA enforcer, the gatekeepers and competing platforms and would be essential in order to be able to anticipate and timely intervene in order to prevent unfair practices towards business users and end-users. BEREC thinks that NIAs could help in the monitoring process, which would eventually improve competition among platforms to the benefit of business users.⁸² Not only competition-related issues but also end-users' concerns⁸³ can be spotted more rapidly at national level.

This monitoring role could go along with the appointment of independent external experts and auditors which could assist the EU authority in monitoring the compliance of gatekeepers with the regulatory measures (see point 9.1.3 below) and provide specific expertise/knowledge to the EC pursuant to Article 24 of the DMA proposal.

In BEREC's opinion, it would be appropriate to "institutionalize" this responsibility and be explicit on the involvement of NIAs, since they have already developed the tools and expertise at the national level to (pro)actively monitor the evolution of the state of competition with national market players in the ECS sector.⁸⁴ They are therefore well-placed to use these skills to monitor gatekeepers' activities and their impact in the respective national footprints.⁸⁵

9.1.3 Market investigations and monitoring of compliance of gatekeepers with regulatory measures

The EC foresees three types of market investigations, respectively:

- To designate gatekeepers (Article 15)
- In cases of systematic non-compliance (Article 16)
- To add new services to the list of core platform services and/or detect practices that may limit the contestability of core platform services or may be unfair and which are not effectively addressed by the DMA regulation (Article 17)

⁸² Since March 2020, BNetzA is conducting a public consultation with business customers of digital platforms. Between March and August 2020, a total of 210 business customers reported on their experiences with marketing and sales activities via digital platforms in Germany. The interim results are available under the following link (www.bundesnetzagentur.de/digitalisation-consultation). By the end of 2020, already 317 business customers reported on their experiences and difficulties.

⁸³ See for example <https://ec.europa.eu/digital-single-market/en/news/annual-country-reports-open-internet-national-regulators-2019>

⁸⁴ NRAs already continuously analyze the telecommunication markets and are – as national players – well aware of national developments. At the retail level, we refer to pricing studies that compare national telecom prices or international studies that compare prices with other countries. A lot of NRAs also monitor qualitative aspects by analyzing e.g. coverage by mobile operators. On the wholesale level, NRAs monitor competition level e.g. via yearly and ad hoc questionnaires to market operators but also through complaint handling mechanisms (see point 4 below).

⁸⁵ BEREC at EU-level also closely monitors and reports on market developments in the electronic communications sector and publishes its annual report on sector developments in the EU. (https://berec.europa.eu/eng/document_register/subject_matter/berec/annual_reports/9275-berec-annual-reports-for-2019), especially chapters 2.4.2, 2.5.5., 2.6.7., 2.6.8, 2.6.9, 2.6.11.

BEREC believes that NIAs could assist the EC as the DMA enforcer in these market investigations in order to improve the understanding and knowledge of the national contexts and specificities of the different Member States. We refer to the need for a broad regulatory dialogue and also the possibility to turn to an information and complaint desk as explained in Chapter 8.

Similar to the ECS sector, NIAs can provide valuable help in monitoring compliance with regulatory measures. In this respect, BEREC suggests to extend the provisions of Article 33 to trigger an investigation according to Article 15 also to investigations according to Articles 16 and 17.⁸⁶ Through the monitoring and data-gathering tasks they could carry out, BEREC considers that NIAs would have the ability and knowledge to advise to trigger a market investigation into systematic non-compliance (Article 16) or into new services and new practices (Article 17).

9.1.4 Enforcement of regulatory measures

Relevant provisions in the DMA regarding the responsibilities of national authorities in enforcing the Regulation with regard to (pan-European) gatekeepers are dealt with in Article 1(7), which states that the Commission and the Member States shall work in close cooperation and coordination in their enforcement actions. BEREC agrees that enforcement can only be effective in the framework of a regulatory dialogue and efficient cooperation mechanism between the EU and the national level. In this regard, BEREC refers to the experience of its members in the field of ECS as regards enforcement which could also be useful for the enforcement of this Regulation.

9.1.5 Dispute resolution

The Commission states that in order “*to safeguard a fair commercial environment and protect the contestability of the digital sector it is important to safeguard the right of business users to raise concerns about unfair behaviour by gatekeepers with any relevant administrative or other public authorities.*”⁸⁷

As addressed in Chapter 8, concrete provisions regarding dispute resolution mechanisms for consumers are however missing in the DMA. For business users, the P2B regulation⁸⁸ includes some form of mediation as well as public bodies representing business users, but there remain issues which cannot (or only partially) be addressed when applying in the context of the DMA the mediation mechanism set out in the P2B regulation. BEREC considers that an effective dispute resolution mechanism will be key in such markets where the relationship between the gatekeeper and its business users is significantly unbalanced and where a swift intervention is needed to reduce the negative effect on competition dynamics (see Chapter 8 for more details).

⁸⁶ Moreover, BEREC underlines that Member States in Article 33 should include national authorities.

⁸⁷ Recital 39 of the DMA proposal

⁸⁸ Articles 12, 13 and 14 of Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services (OJ L 186, 11.7.2019, p. 57–79)

BEREC's experience with applying *ex ante* regulation for electronic communication services shows that conflicts often may arise in the practical implementation of obligations, and that dispute resolution mechanisms allow for a quick and effective application of the regulation by avoiding lengthy judicial procedures, which is critical in many cases. Such mechanisms already exist in the ECS *ex ante* regulatory framework where in case of grievances, telecom operators can easily approach the NRA to pursue a settlement within a short timeframe (i.e. generally up to four months⁸⁹). In this respect, we refer to the two-pager in which the concrete example of dispute resolution mechanisms in ECS markets is presented (Annex II) and to section 8.2 to see how such mechanisms could be applied in the context of the DMA.

The DMA proposal would also benefit from implementing a mechanism that would ensure its effective enforcement. Such a mechanism can be supported by the experience of NIAs that could act as initial contact point for national players and/or end-users or even, play a more active role in resolving disputes in an EU-harmonised manner. Chapter 8 above outlines various roles that NIAs could play in a dispute resolution mechanism to reduce the burden placed on the EC while ensuring a harmonised approach across Europe.

For many cases, dispute resolution would be more efficiently carried out at the national level. The added value of national assistance in this field is multiple:

- Barriers for raising complaints and signalling potentially unfair practices by gatekeepers must be kept as low as possible. For SMEs, the proximity of national regulators is a major advantage;
- To be designated as such, gatekeepers must have more than 10.000 yearly active business users. Given the relevance of the concerns addressed by the DMA, it is very likely that a significant number of disputes will be filed over the years. Many of these could be handled at national level, in a coordinated way with other NIAs and the EU authority. The use of resources at national level would also alleviate the regulatory burden at EU level.

The proposed Advisory Board would provide for support to the EC on the harmonization and grouping of dispute resolutions, acting as a coordination entity to facilitate the sharing of views and experiences.

9.1.6 Guarantee the coherence of overlapping and complementary regulation

Some national authorities have competencies that are complementary – and sometimes even overlapping – with the competences of the EC in the framework of the DMA. This is the case for NRAs in the field of electronic communications, that have the competence to regulate NI-ICS *ex ante* under the EECC⁹⁰, while such services are also considered as a CPS in the framework of the DMA. The powers for NRAs under the EECC regarding NI-ICS include

⁸⁹ Up to six months under exceptional circumstances in some countries

⁹⁰ No NRA has imposed such regulation.

symmetric and asymmetric regulation⁹¹. Regulatory enforcement also consists of market monitoring, information requests, (potentially cross-border) dispute resolution at the retail and wholesale level, protection of end-users' rights (including non-discrimination, obligations for information in contracts, transparency obligations, as well as information obligations related to quality of service).

Furthermore, some NRAs are progressively being assigned competences in the digital field, e.g. with regard to geo-blocking, data governance, electronic identification, monitoring digital platforms or artificial intelligence, which further suggests there is merit to involve them in the future DMA-related regulatory processes, in a similar manner to a collaborative model among different authorities at national level as far as "digital matters" are concerned.

This suggests it is worth considering a "joint-powers" approach in relation to digital matters, which can be justified by the suitability of such a model to maintain a comprehensive oversight of online actors and to select the most appropriate array of regulatory tools to use from across different sectors, with the aim of effective, coherent regulation and avoiding any unnecessary legal overlap.

9.2 An Advisory Board harmonising the support of NIAs

In order to give concrete shape to the overall cooperative framework the EC has in mind, BEREC considers that the structural involvement of established NIAs should be embedded in the DMA.

BEREC is of the view that the advisory power of Member States through the DMAC (a comitology procedure) is beneficial in some circumstances but could be enriched by complementary, specialised and *independent* expertise coming from NIAs. A more comprehensive structural support by Member States than what is foreseen in the currently proposed DMA would indeed be valuable. Collaboration from NIAs could lower the regulatory burden for the EC as the DMA enforcer given the high number of actors potentially affected by the regulatory measures including downstream or upstream business users and competing platforms.

BEREC recognises that such national support would need to be harmonised. This is however not new to regulated sectors where bodies or agencies at the EU level are ensuring regulatory consistency across countries. For instance, in the field of ECS, NRAs operating under the BEREC umbrella are already carrying out tasks such as information gathering, monitoring of compliance, etc. using standardised formats that can be aggregated to get a comprehensive view at the EU level. As previously highlighted, this is already done by BEREC for the international roaming market.⁹²

⁹¹ While symmetric regulation applies to all market players regardless of market power, asymmetric regulation applies only to in particular operators with significant market power.

⁹² See BEREC International Roaming compliance reports (e.g. BoR (13) 126), International Roaming BEREC benchmark data Reports (e.g. BoR (20) 157) or the BEREC reports on transparency and comparability of international roaming tariffs (e.g. BoR (19) 235), all of them regular reports EU-wide and built based on contributions from NRAs and operators.

BEREC considers it preferable that such support is provided by independent authorities.⁹³ This neutral advising role could complement the set-up currently proposed in the DMA. The DMAC is likely to consist of political representatives of Member States who do not necessarily have practical experience with *ex ante* regulation nor expert knowledge and experience with the day-to-day issues with the gatekeepers and its procedures, and its scope of action is defined by Regulation 182/2011 (comitology). Moreover, in absence of independent authorities' presence or role, there is a risk of mixing policy-oriented solutions proposed by political bodies with regulatory solutions proposed by regulators.

The role of the Advisory Body would consist of coordinating and harmonising tasks which are carried out at the national level while it would add quality to the process and speed up decision-making. Indeed, based on its experience, BEREC considers that it may be efficient and streamlined if national experts convene and issue a joint opinion⁹⁴ within the Advisory Board.

The Advisory Board can also serve as a body for reflection, debate and advice for the European Commission, the Parliament and the Council on issues related to the DMA. The Advisory Board could accordingly advise the European Parliament, the Council and the Commission, at their request or on its own initiative.

Thus, the Advisory Board would best serve as a technical and independent entity supporting the EC as the DMA enforcer. Moreover, this Advisory Board would guarantee a high level of independence in what is in essence a regulatory activity, and bring valuable experience in terms of first-hand knowledge of competitive dynamics at national level.

The Advisory Board would embody the technical expertise of its independent member authorities, together with their awareness about the activities of digital services at national level, playing a pivotal role in supporting the eventual EC's decision-making.

In this context, the Advisory Board may be responsible – *inter alia* – for the following tasks:

- Coordinated data collection and monitoring throughout the Union, including on enforcement;
- Informing the EC in relation to its decision-making and market investigations (e.g. helping the commission designate new gatekeepers as well as emerging gatekeepers pursuant to Article 15(4) of the DMA proposal);
- Raising awareness of specific concerns or issues emerging at national level;
- Ensuring that DMA decisions are coherent with other related regulation (e.g. electronic communication; media; data protection);
- Support the EC with respect to:
 - Technical implementation matters;
 - Checking compliance with the obligations defined at EU level;

⁹³ A regulatory authority should be independent (i.e. as in “independent of short-term political cycles, industry as well as other stakeholders’ pressures, aiming at ensuring the necessary stability of the regulation and an efficient intervention in the markets”

⁹⁴ Similar to the procedures in the ECS-framework where BEREC opinions are issued following phase II cases according to Article 33 of the EECC.

- Harmonization of dispute resolution procedures at national level;
- Issuing non-binding guidance and ad hoc opinions to ensure the implementation of the obligations in a harmonized manner;⁹⁵
- Market investigations and future reviews of the regulation.

Reference can be made to positive experiences with similar advisory bodies to the EC that are currently in place. In its own experience as such a body in the electronic communications field, BEREC has developed detailed procedures and functions in an overall bottom-up manner, which builds on the experience of national experts working collaboratively in working groups.

For about twelve years, BEREC has been providing the EC with consolidated technical input, based on the collective experience of the independent regulators of the electronic communications sector and which, with some refinement, works smoothly to inform the EC's decision-making related to promoting competition in the internal market, compatible with national specificities.

A statutory membership in the Advisory Board by NIAs would ensure the rootedness of the Board's action based on sound experience, which would foster consistent decision-making by pooling the relevant expertise to provide input to the EC's final decisions. This is, by the way, the logic inspiring also the draft regulation on a Digital Services Act, whose institutional governance builds on independent sector-specific Regulators, both at national level and within the European cooperation body (the "Digital Service Board").

At the same time, as digital tasks might be assigned to different NIAs in each Member State, all relevant inputs would be taken account of within the Advisory Board. To this end, a mechanism might be envisaged, whereby independent authorities with digital competences may all be involved in the Advisory Board's meetings *ratione materiae*.

Furthermore, the final Advisory Board's deliberations shall stem from proposals elaborated by working groups made up of national experts from all involved independent authorities, thus allowing a cross-sectoral composition and expertise (e.g., experts from telecom regulators, from data protection authorities, from media content regulators...).

As for its juridical form, BEREC suggests drawing inspiration from its own layout, which preserves operational flexibility and effectiveness, resulting from its nature as a Body without legal personality of EU law, supported by an EU Agency in the performance of its advisory tasks.

BEREC welcomes the initial proposal by the Rapporteur of the European Parliament's Committee on the Internal Market and Consumer Protection's (IMCO) that broadly goes in the same direction, addressing the set-up of a "*European High-Level Group of Digital Regulators in the form of an Expert Group, consisting of the representatives of competent authorities of all the Member States, the Commission, relevant EU bodies and other representatives of competent authorities in specific sectors including data protection and electronic*

⁹⁵ Related to technical specifications by the Advisory Board following the example of the EECC and the Open Internet Regulation that tasks BEREC in delivering guidelines on e.g. quality of service parameters (Article 104 of the EECC).

communications”⁹⁶. BEREC particularly welcomes the proposal that the High-Level Group would be composed of the Heads of the relevant competent authorities and supported by “*expert working groups building cross-regulator specialist teams that provide the Commission with high level of expertise*”.

BEREC would be committed to develop further ideas and concrete proposals in terms of institutional and operational layout, to contribute to shaping such cross-sectoral cooperation in an efficient and independent way.

10. CONCLUSIONS

BEREC strongly supports the EC’s ambition to create contestable and fair markets in the digital sector for the benefit of European citizens and businesses. . To reach this objective, BEREC puts forward in this report a number of key proposals for a swifter, more effective and more future-proof regulatory intervention towards digital gatekeepers.

As for the scope of the DMA regulation, BEREC highlights that NI-ICS are already regulated under the EECC. In order to ensure regulatory certainty and a consistent application of the two complementary regulatory frameworks, BEREC believes that a structured collaboration between the EC and regulatory authorities applying the EECC regarding the application of regulatory measures under the DMA on NI-ICS should be set up. BEREC’s position is presented in further details in the report on the interplay between the EECC and the DMA concerning NI-ICS in June 2021⁹⁷.

As for the designation of gatekeepers, BEREC supports the application of a quantitative and a qualitative identification procedure of the proposal and endorses a formal, and quick, decision on gatekeeper status. To address negative effects on national markets, BEREC recommends that the DMA does not restrict the possibility to regulate platforms having a gatekeeping role but which are potentially only active in one Member State. Concerning the ecosystem nature of many of the gatekeepers, BEREC thinks that this is an important aspect to consider when designating gatekeepers (as a non-cumulative criterion) and designing the corresponding regulatory measures.

As for the regulatory intervention, BEREC identifies unfair practices in which gatekeepers have the ability and may have the incentive to engage. In order to reach the EC’s objective of creating fair and contestable digital markets, BEREC believes that the regulatory measures in the DMA should be reinforced, extended or added to both rebalance the relationships of the gatekeeper with its business users and end-users, as well as to take measures lowering barriers for competitors to enter a CPS and/or expand over several CPSs. Thus, BEREC believes that the DMA proposal could be complemented with i) the integration of regulatory measures creating conditions for potential competitors to arise (i.e. enhancing inter-platform

⁹⁶ European Parliament, Committee on the Internal Market and Consumer Protection, “Draft report on the proposal for a regulation of the European Parliament and of the Council Contestable and fair markets in the digital sector (Digital Markets Act)” (COM(2020)0842 – C90419/2020 – 2020/0374(COD)), published on 01 June 2021

⁹⁷ “BEREC Report on the interplay between the EECC and the EC’s proposal for a Digital Markets Act concerning number-independent interpersonal communication services”

competition), ii) the inclusion of additional measures supporting intra-platform competition, as well as iii) provisions addressing end-users-related concerns.

As for the regulatory measures, BEREC welcomes the principle of directly-applicable obligations to address certain issues, but believes that the scope of the application of such obligations should be further clarified and proposes to detail i) obligations which should directly apply to all gatekeepers across all CPSs, without any adaptation and ii) directly-applicable obligations applying to all gatekeeper(s) in a particular CPS.

Since digital environments evolve quickly and new concerns are likely to arise at the same pace, BEREC believes that it is key to ensure that the DMA is more future-proof. Thus, BEREC proposes to *complement* the current DMA framework of obligations with additional powers to impose remedies which would be designed and tailored to address the identified concerns in an effective and proportionate manner. Such remedies would be defined in the law based on clear *ex ante* principles to be achieved in the scope of the regulatory objectives, similarly to the ECS *ex ante* asymmetric regulatory framework implemented in the EECC. BEREC believes that this approach complementing the current DMA obligations is particularly valuable to swiftly intervene 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 and access to key inputs/assets – which require proportionality considerations and where their effectiveness is highly dependent on the correct design of the intervention. Such an approach would allow the EC as the DMA enforcer to address unforeseen practices, newly emerging issues and, more generally, issues which may not be effectively addressed by the current obligations.

Moreover, BEREC believes that the regulatory measures on digital platforms should also ensure that digital environments remain open and develop as an engine of innovation, and that users' ability to access and/or provide content and applications is not unduly hampered on the application layers where digital platforms operate. Along with effective regulatory measures, BEREC is of the opinion that for the regulatory intervention to reach its objectives, a solid enforcement model will be key.

As a first step, BEREC believes that a constant regulatory dialogue with all kinds of relevant stakeholders is needed to develop hands-on experience and knowledge. Next to the concerned gatekeepers, other stakeholders will have to be involved in the regulatory dialogue. This will be essential to reach optimal effectiveness of the DMA, to monitor compliance with regulatory measures, to assess whether action from the EC as the DMA enforcer is needed and to detect the emergence of new situations that may trigger a market investigation.

This can be achieved by setting up dedicated fora and committees and organising public consultations, as well as by creating a national information and complaint desk in each Member State. This would help in lowering the barriers for business users and end-users to find information about the regulation and to file complaints. Furthermore, BEREC is of the opinion that, a dispute resolution mechanism is needed to support the effective enforcement of the DMA provisions.

Finally, while agreeing that the regulatory intervention should be at the EU level, BEREC identifies a series of tasks where support from National Independent Authorities (NIAs) can be very valuable. In particular, NIAs could be responsible for, among other issues, gathering

information and data about national business users and end-users, monitoring markets and competition dynamics, check compliance with the regulatory measures, provide dispute resolution mechanisms for many cases or support in market investigations. This would on the one hand allow for an efficient use of skills which are already existing, and on the other hand would reduce the regulatory burden for the EC given the high number of actors affected by the regulatory measures including business users and competing platforms. Thus, BEREC believes that along with the DMAC, an Advisory Board of NIAs should be set up to provide complementary, specialised and independent expertise to the EC as the DMA enforcer. BEREC's model which relies on specialised working groups composed of technical and independent experts can be a valuable source of inspiration to configure this Advisory Board.

11. FUTURE WORK

BEREC will continue working on the different issues regarding on the regulation of digital markets, starting from the topics already identified on this report.

As part of the plan for 2021, BEREC is engaging with the European Parliament, the Council of the European Union and the European Commission on relevant aspects of the proposal, and especially on the issues where BEREC experience can be used to improve effectiveness and operability of the DMA. BEREC has further developed the dialogue with other regulatory networks such as ERGA, the EDPB, the ERGP and will also engage with other organisations as the ECN to exchange views and take them into account. Moreover, considering the far-reaching impact of digital gatekeepers' services on businesses, consumers and society in general, BEREC believes that further engagement should also be built with consumers' associations, as well as civil society and citizens.

As addressed in Chapter 4, encouraging market entry and in general, inter-platform competition, is a key objective in the medium and long term, that can help to ensure that many concerns for both sides of the market (business users and end-users) are correctly addressed. For this reason, BEREC considers that, as highlighted in the workshop organised by BEREC on this topic, it is worth to take a closer look at this aspect of the DMA.

Similarly, and as addressed in previous chapters, enforcement is also key and, apart from organising workshops on this issue, BEREC has published additional proposals and will continue to do so in subject pertaining to enforcement, articulating the regulatory dialogue needed with all actors, as well as potential contributions from the national level to better design remedies, collect information and optimise the addressing of conflicts and disputes that in a natural way will arise when enforcing the regulation.

BEREC will also further contribute on issues related to ecosystem effects, including bundling and tying of services, considering their great relevance in the context of digital services and the organisation of the main gatekeepers into digital ecosystems covering several CPSs, as well as other relevant services.

Finally, as expressed in Chapter 3, BEREC has started to work on an analysis of the complete Internet ecosystem. This ambitious work, although not strictly focused on digital platforms, that are also part of the Internet ecosystem, will allow to get a comprehensive and integral view on the different core platform services, including cloud services and other services and key part

of the Internet ecosystem as web browsers or voice assistants, that are in many cases part of digital ecosystems.

This will be a continuous work that will be articulated, depending on the topics and the timing in separate pieces of work (reports, short papers, workshops) and/or as part of the review of this report.

BEREC also welcomes any additional input from stakeholders further than the very welcomed responses to the public consultation on this report on aspects not already considered and where BEREC could provide valuable input based on its experience.

ANNEX I: TAILORING REMEDIES FOR AN EFFECTIVE ENFORCEMENT AND REGULATORY DIALOGUE

BEREC proposal on remedies-tailoring and structured participation processes for stakeholders in the context of the Digital Markets Act ⁹⁸

While the DMA proposal sets a different framework of regulation and relations between all parties, some experience from the telecommunications markets regulation perspective can be applied to enrich discussions relating to the DMA adoption. BEREC would like to highlight and share these remarks below.

The DMA is proposing a list of obligations aiming at ensuring fair and contestable markets. Directly-applicable obligations provided apply to every *Core Platform Service* (CPS)⁹⁹ and are intended to make swift regulatory action possible. However, this approach has shortcomings both procedure-wise and content-wise (see below for details). Thus, BEREC believes that, in addition to directly-applicable obligations, *ex ante* principles and a set of remedies (“toolbox”) could be included in the DMA proposal, and give the European Commission (EC) as the EU competent body the possibility to tailor them to reach the objective of the regulation. Moreover, BEREC also considers that, irrespective of its proposal on remedies tailoring other interested third parties, such as business users or alternative platforms, should be properly involved in the process to ensure transparency and fairness. This paper presents the rationale for this proposal and enforcement options, building on previous BEREC documents.¹⁰⁰

Why there is a need for remedies-tailoring

Directly-applicable obligations are static and thus may not be future-proof, whereas regulation should be forward-looking, in particular in rapidly evolving markets. The possibility to update the obligations as designed in the DMA proposal is too lengthy to be able to keep pace with these developments¹⁰¹ whereas the principles-based approach followed in the electronic communication sector allows the analysis, adoption and full implementation of the measures to appropriately reach the objectives faster (as shown below). Moreover, according to Article 10 of the DMA proposal, the update of the obligations is restricted to “new obligations addressing practices that limit the contestability of CPSs or are unfair in the same way as the practices addressed by the obligations laid down in Articles 5 and 6” of the DMA. This would

⁹⁸ This annex corresponds to the “BEREC proposal on remedies-tailoring and structured participation processes for stakeholders in the context of the Digital Markets Act” (BoR (21) 94) published by BEREC in June, 2021. 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](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)

⁹⁹ Identified pursuant to Article 3(7) of the DMA proposal.

¹⁰⁰ BoR (21) 34, “Draft BEREC Report on the ex ante regulation of digital gatekeepers”, see https://berec.europa.eu/eng/document_register/subject_matter/berec/reports/9880-draft-berec-report-on-the-ex-ante-regulation-of-digital-gatekeepers

¹⁰¹ According to Article 17 of the DMA, the procedure requires a market investigation that could last up to 24 months, followed by the formal procedure for the adoption of delegated act. Once the practice is incorporated in the DMA, although the draft DMA is not explicit about it, the gatekeeper may many times require some additional time to comply with the new obligation (e.g. 6 months as in art 3(8) DMA). Finally, ensuring compliance following art 7 DMA may imply 3 to 6 additional months.

mean that the list of obligations in the DMA would already need to cover all potentially detrimental practices, without the possibility for the EC to actually address *new* ones by means of an update. Thus, the DMA constrains the possibility to address unforeseen practices of the previously defined types, newly emerging issues and, more generally, issues which may not be effectively addressed by the directly-applicable obligations.

Also, DMA obligations are defined in broad terms to be directly applicable to different CPSs and gatekeepers. In order to be effective and proportionate, (some) remedies (e.g. interoperability) need to be appropriately tailored, according to the specificities and technicalities of the undertaking or the services in question. Tailored remedies may in the longer term be more efficient and quicker to solve identified issues as they provide the necessary flexibility to adapt the regulatory measures to a specific gatekeeper, service or market situation. Additionally, they leave little room for interpretation and ease enforcement, adding predictability.

For all these reasons BEREC recommends a **complementary approach** of the directly-applicable obligations which are currently set out in the DMA proposal and *additional* tailored remedies which would ensure effectiveness and avoid any gap in the implementation of the DMA.

Secondly, it is crucial to provide transparency and allow the structured participation of all relevant parties providing their views, not only the regulated entities. This increases the acceptance of regulation, helps to ensure that the implementation of the obligations serves to achieve the objectives that it aimed for, and thus also contributes to a more effective implementation.

How remedies-tailoring could be done

BEREC generally supports the directly applicable obligations set out in the DMA proposal. As certain directly-applicable obligations may be relevant for only some CPSs, BEREC would suggest that the DMA includes a list setting out the obligations relevant for each CPS to enhance legal certainty.

Moreover, and as outlined above, BEREC suggests to complement this approach with:

- a) a set of ex-ante general principles,
- b) a set of general remedies (“toolbox”) that can be tailored using the ex-ante principles.

For both suggestions BEREC draws on the example in the context of the regulation of the electronic communication services and networks of the imposition of remedies on so-called SMP operators (significant market power). SMP regulation is asymmetric and similar to the DMA proposal focusing on a limited number of providers fulfilling certain characteristics as provided for in the European Electronic Communications Code (EECC).

As a reference, Article 68 of the EECC sets out the ex-ante principles for tailoring remedies, namely:

- proportionate;
- justified in the light of the objectives (as laid down in Article 3 of the EECC);
- based on the nature of the problem identified in the market analysis;
- imposed following consultation acc. to Articles 23 and 32 of the EECC.

The last bullet point guarantees a transparent procedure with a public consultation of all relevant parties, i.e. involving all types of relevant stakeholders.

The set of general remedies (“toolbox”) is provided for in Articles 69 – 74, 76 – 80 of the EECC, namely the following obligations:

- transparency (usually an obligation to publish a reference offer);
- non-discrimination and accounting-separation;
- access to civil engineering and access to, and use of, specific network elements and associated facilities;
- price control and cost accounting obligations;
- regulatory treatment of very high capacity network elements (and commitment procedure);
- functional separation and voluntary separation;
- for wholesale-only undertakings.

By applying the principles laid down in Articles 68 of the EECC, national regulatory authorities (NRAs) impose the general remedies of the toolbox on SMP operators and tailor them appropriately to the specific needs of the relevant market situation to address the problem identified in the market analysis. This approach to remedies-tailoring balances flexibility (necessary to adapt to a particular market situation) and certainty (all relevant parties are involved in the process and it is known which principles the NRAs use when choosing the most appropriate (combination of) remedies from the toolbox). Furthermore, the procedure is clearly set out in the law and guarantees a fair representation of all views.

Besides the SMP regulation, NRAs also have the power to impose ex-ante regulatory measures such as interconnection and interoperability on all operators according to Articles 61 of the EECC to ensure end-to-end connectivity. Again, the procedure is set out clearly and allows for the participation of all relevant parties when designing the obligations, leaving the final decision-making solely in the hands of the NRA.

Remedies-tailoring in the context of the DMA

As regards specification and updating of certain obligations, BEREC’s opinion is that there is a need for **ex ante principles** to be used to **tailor general remedies** such as access, interoperability and detailed non-discrimination. The general remedies and objectives should be sufficiently clear to give legal certainty and would still leave more room for the EU regulator to better adapt to evolving practices. Tailored remedies adopted through this mechanism would, very importantly, give the possibility to efficiently and proportionately solve specific and actual problems that may need detailed intervention, tailored to each gatekeeper.

One might argue that directly applicable obligations all across the board might be a faster tool. This point should be put into the right perspective. The benefits of the regulatory intervention are not only a matter of applying measures fast, but essentially about making sure that they are *quickly effective* and reaching the given objectives.

Directly-applicable obligations may initially be *applied* faster, since there would be no interactions with the stakeholders and no further analysis on how to tailor them to ensure effectiveness and proportionality. However, the enforcement discussions with the gatekeeper would be lengthy and not transparent vis-à-vis the stakeholders, e.g. gatekeeper, competitors and business users. Also, for certain measures, information gathering and structured input

from stakeholders (via public consultation and other types of regulatory dialogue), which would benefit from the obligations placed on the gatekeeper, on the initial specification of these obligations is key to ensure future effectiveness. Thus, direct obligations may be applied fast, but there is a significant risk to be ineffective, and need a further intervention which would finally take longer.

In comparison, tailored remedies adapted to the specific situation from the outset may enter into force later than directly-applicable obligations, but would be more effective, since they would allow for testing the proposed solutions with all stakeholders concerned in a well-designed formal consultation process, thereby providing transparency and the participation of all relevant parties. This would be supported with a target data collection and continuous market monitoring, further contributing to the reduction of information asymmetries. In order to reach the objectives of the DMA, the enforcement of a tailored remedy would be quicker because their effectiveness would be tested upfront. Moreover, the details of a tailored remedy would be transparent not only to the gatekeeper but also to stakeholders, and would allow for checking compliance in a more objective way, as it would be more specific and clear than a short general obligation allowing for different interpretations in many cases.

To illustrate how a problem of access for app providers to an app store could be remedied, the following remedies might be applied: access to sell on the app store (access to platform), fair terms, clear and transparent terms (including a reference offer, if needed) and non-discrimination. The tailored remedies, stemming from general remedies in legislation, would be consulted with all stakeholders concerned and amended if relevant. This proposal is inspired by how NRAs combine tailored remedies in SMP regulation in order to achieve healthy and functioning markets with regulatory certainty, investment incentives and innovation.

In this line, one key in which DMA regulation could benefit most from the experience of NRAs and BEREC is transparency: i) transparency of the process of developing regulation and ii) transparency as a remedy itself (Articles 69 of the EEC and above). The first is achieved with formal public consultations of draft decisions, letting all interested parties share their views and the latter is the concept of a reference offer as a tool which forms some basic clear rules and requirements of contracts, that can be checked for compliance in an objective way. For details regarding the elements of a reference offer we refer to the BEREC Guidelines on the minimum criteria for a reference offer¹⁰². These Guidelines provide NRAs with further principles on how to tailor the remedy of transparency.

Given the advantages of tailoring remedies BEREC proposes to introduce a new article in the DMA on "Tailoring remedies". This article would give the EC the power to carry out a market investigation with the purpose of assessing whether the obligations as applied according to Articles 5 and 6 are insufficient to reach the objective of ensuring contestable and fair digital markets. In this case, the EC would have the power to tailor and impose additional remedies, whether behavioural or, when appropriate, structural, which would be applied following the principle of proportionality. This provision aims to ensure that the Regulation remains future-proof by giving the EC, from the outset, the power to carry out an assessment and adjust its

¹⁰² BoR (19) 238, "BEREC Guidelines on the minimum criteria for a reference offer relating to obligations of transparency", see https://berec.europa.eu/eng/document_register/subject_matter/berec/regulatory_best_practices/guidelines/8899-berec-guidelines-on-the-minimum-criteria-for-a-reference-offer-relating-to-obligations-of-transparencys

regulatory intervention to address practices, which cannot be currently foreseen but which may have significant negative impact on the digital environment where gatekeepers are active.

Besides the more “structural” tailoring of remedies, directly-applicable obligations may also need technical specifications to be effective, e.g. data portability. Like the experience of number portability shows, it is key to gather information from all relevant parties when applying such a regulatory measure. These specifications may be interpreted differently by providers with conflicting interests, or they may not be correctly implemented by the gatekeeper (this may translate e.g. in an end-user not being able to migrate its data from the gatekeeper’s service to a competitor’s service). In order to minimise the negative effects that these situations would create on competition dynamics and innovation, and to ensure the effectiveness of the regulatory measures, BEREC proposes to set up a dispute resolution mechanism.

Support by National Independent Authorities (NIAs) for remedies-tailoring

The EC should be in charge of tailoring of remedies. Tailoring requires not only extensive assessment of competition problems, but also knowledge on the economic, technical and legal impacts of remedies on contestability and fairness. This analysis needs systematic and continuous data collection and monitoring. This is essential in regulated markets, where by means of objective, structured and easily-comparable data, the effects and effectiveness of an intervention can be measured and adapted when necessary. For the resource-consuming work of data gathering and market monitoring, BEREC proposes that national independent authorities should assist the EC, providing national data that can be especially useful for business users based in individual Member States.¹⁰³ In BEREC’s view, such assistance to the EC shall be provided in the context of an Advisory Board, where NIAs shall cooperate among them on digital matters for the sake of consistency (see BEREC paper BoR (21) 93 as concerns the tasks and composition of such Board).

Another possible way to support the EC in carrying out these tasks can be issuing non-binding guidelines related to technical specifications by the Advisory Board following the example of the EECC and the Open Internet Regulation that tasks BEREC in delivering guidelines on e.g. quality of service parameters (Article 104 of the EECC).

Finally, with regard to the dispute resolution mechanism, BEREC experience applying ex ante regulation for electronic communication services shows that conflicts usually arise on the practical implementation of obligations, and dispute resolution mechanisms allow for quick and effective application of the regulation avoiding lengthy judicial procedures, which is critical in many cases. The DMA proposal would also benefit from implementing such mechanism that would ensure its effective enforcement. Such a mechanism can be supported by the experience of NIAs that could act as initial contact point for national players and/or end-users, directly solving part of them, and applying harmonisation procedures via the Advisory Board and the EC supervision, thus also alleviating the burden for the EC on ensuring that the obligations are correctly applied.

Due process

¹⁰³ Platforms that fall within the scope of the DMA can be active on a different level in different Member States. Gathering data on a national level would therefore be insightful.

Independent of the tailoring of remedies, the EC could apply public consultation mechanisms as required by the electronic communications framework by NRAs as described above. Especially when adopting a decision pursuant to Articles 3, 7, 8, 9, 15, 16, and 17 of the DMA proposal this could be introduced. These formal procedures foster transparency, efficiency, and participation letting all kinds of stakeholders express their views and inform the EC about potential problems and so improve final decisions.

Additionally, instead of an implementing act, Article 36 in the DMA proposal could foresee Guidelines on a set of principles or elements that all agreements between gatekeepers and business users should contain. This is similar to the BEREC Guidelines on minimum criteria for a reference offer (see above) that is used in the regulatory framework for electronic communications. Introducing such a tool in the DMA framework should help to implement obligations of Articles 5 and 6 of the DMA proposal in a more effective manner.

Value of the experience from NRAs and BEREC

NRAs have a long experience of tailoring effective and proportionate remedies as well as consulting with stakeholders, keeping electronic communication markets competitive and contestable. NRAs are familiar with such technical and data-driven regulation¹⁰⁴ and BEREC considers that this experience is particularly relevant in digital markets. With respect to this matter, we refer to the experience of BEREC, for example, in the ongoing work on data collection from OTT players (i.e. formulating guidelines on harmonized indicators for data collection at national level from such players, mainly NI-ICS and video-streaming services)¹⁰⁵ or the international roaming benchmark data reports.¹⁰⁶ BEREC already fosters the European harmonisation of the interpretation, design and enforcement and monitoring of regulation and therefore remedies e.g. by (1) developing and disseminating among NRAs regulatory best practices, such as common approaches, methodologies or guidelines, (2) providing assistance to NRAs on regulatory issues (3) delivering opinions on the draft decisions, recommendations and guidelines of the Commission (4) issuing reports and providing advice and opinions to the European Parliament and the Council.

¹⁰⁴ On top of their monitoring activities, NRAs can rely on the collection (also via crowdsourcing), storage, processing, usage and publication of data to support their supervisory, analysis and detection activities and making stakeholders more accountable. Moreover, making valuable data available means empowering users and citizens to make well-informed choices and steer the market into the right direction.

¹⁰⁵ BoR (21) 33, "BEREC Report on the harmonised definitions for indicators regarding OTT services, relevant to electronic communications markets", see https://berec.europa.eu/eng/document_register/subject_matter/berec/reports/9877-draft-berec-report-on-harmonised-definitions-for-indicators-regarding-ott-services-relevant-to-electronic-communications-markets

¹⁰⁶ BoR (20) 157, "International Roaming BEREC Benchmark Data Report October 2019 - March 2020 & 2nd Western Balkan Roaming Report", see https://berec.europa.eu/eng/document_register/subject_matter/berec/reports/9443-international-roaming-berec-benchmark-data-report-october-2019-march-2020-2nd-western-balkan-roaming-report

ANNEX II: DISPUTE RESOLUTION IN THE CONTEXT OF ELECTRONIC COMMUNICATION SERVICES REGULATION

A timely and effective enforcement of regulatory measures: the benefits of dispute resolution mechanisms (DRM) in the ECS sector

As detailed in chapter 8, overall, the DMA proposal could benefit from the introduction of a dispute resolution mechanism (DRM), compatible with other existing mediation mechanisms (e.g., those in Regulation 2019/1150). This could indeed allow competitors, business and end-users of the gatekeeper to file their complaints at competent regulatory authorities and, ultimately, enable a **better enforcement of regulation**.

Indeed, experience in the ECS regulation shows that significant benefits can be produced by giving market players the possibility to access DRMs. This annex illustrates the model applied in the context of electronic communication services and experience and experience by NRAs applying the relevant provisions in the EECR regarding DRM.

Dispute resolution: a long-proven mechanism

Ex ante regulatory measures in the ECS markets are implemented through the adoption of highly technical regulatory remedies. Some measures are only applied to selected dominant companies aimed at ensuring access to non-replicable or essential assets for new entrants. Other measures are applicable to all market players, irrespective of their size and position in the market, mostly aimed at enabling end-users to be properly connected through different networks.

All remedies in the ECS regulatory framework have as a key objective the development of competition among providers, through the adoption of specific, highly-detailed measures setting prices for access or appropriate technical and economic conditions for interconnection, number portability or switching providers activities. Sometimes it implies drafting extensive regulatory documents (e.g., reference offers) detailing economic and technical conditions in order to increase transparency and the effectiveness of the obligations. However, given that such measures are **very complex** and can be **interpreted differently** by operators with conflicting interests, the ECS *ex ante* regulatory framework has provided National Regulatory Authorities (NRAs) with the possibility to apply a dispute resolution mechanism. This is a very different regulatory instrument than interim measures considered in *ex post* competition law, as it is structured in a different way as described below.

Since 2002, Article 20 of the EU Framework Directive, enables ECS providers to request NRAs to issue a **binding decision** aimed at resolving a dispute with another ECS provider in a short timeframe (in general, a maximum of four months). Moreover, such binding decisions can be issued in relation to all measures that could possibly be imposed according to the Directives concerning ECS markets. The main principles governing the implementation of dispute resolution mechanisms are **swiftness** (e.g. if there are mediation proceedings that can solve

the dispute in a shorter time, the NRA can decline a request for dispute resolution), **transparency** (e.g. the binding decision should be adequately motivated and made public) and **adherence** of the final decisions to **the general objectives of the EU Regulatory Framework** on ECS markets (e. g. ensuring fair competition, promoting investments etc..).

In some cases, such disputes can involve ECS providers from different Member States. For these cases, a special procedure is envisaged. Where the dispute affects trade between Member States, the competent NRAs shall notify the dispute to the supra-national coordination body (BEREC) in order to ensure a consistent resolution of the dispute. More precisely, BEREC shall issue an opinion inviting the concerned NRAs to take specific action in order to resolve the dispute or to refrain from action, in the shortest possible time frame, and in any case, within four months.

A tool to the benefit of competitors, business users as well as end-users

Dispute resolution mechanisms are **available for both ECS providers** – as described above – **and to end-users and business users**¹⁰⁷. Such disputes can be raised with respect to a variety of important competitive issues both in the wholesale market (as application of wholesale access or different interpretations of reference offers) and in the retail market, ranging from the availability of contractual information, the degree of transparency and comparability of connectivity offers, accessibility of ECS for end-users with disabilities, quality of service, contract termination policies, barriers to switching providers, etc. In conclusion, dispute resolution mechanisms have been proven to be a very **useful and effective enforcement tool for the regulation of ECS wholesale and retail markets**. NRAs indeed have the possibility to **swiftly solve specific problems** in these markets that are crucial to safeguard competition (e.g. unblocking switching mechanisms between providers), taking into account business and consumers' needs. Moreover, for businesses and consumers it is crucial to have the ability to benefit from a quick intervention of a **skilled regulator**, who has an in-depth knowledge of the market and the necessary powers to act, without having to wait for the adoption of additional general rules and **avoiding lengthy judicial interventions**.

As detailed in chapters 8 and 9 of the present report, a **similar approach**, properly adapted to the context of the digital services and under a co-ordinated and harmonised framework ensured by the DMA Advisory Board, could be advantageously used in the DMA enforcement and could **maximize its efficiency** towards preventing gatekeepers from imposing unfair conditions on competitors, business users, and end-users. For instance, business users (e.g. app developers in the context of 6 (1)f) or competing platforms (e.g. an alternative search engine using 6(1)j) may find that the obligation is not effective and raise a dispute. The regulator can intervene to settle it and impose a solution which would also have a positive impact on other business users or competing platforms. Such a dispute resolution mechanism could benefit by the experience of NIAs, which in addition of having an active role in resolving disputes, would thus also alleviate the burden for the EC on ensuring that the obligations are correctly applied.

¹⁰⁷ This would for example be the case of business users using premium rate phone numbers.

ANNEX III: BRIEF ON *EX ANTE* REGULATION

Brief on *ex ante* regulation and its application to the telecom sector

There is now a consensus about the need for an *ex ante* regulatory framework for digital gatekeepers in the EU, but the discussion about what this potential framework should look like is still open. While different models are possible, the **successful experience in the telecom sector represents a sound and valuable basis which can provide useful insights and concrete experience to build on.**

Indeed, over two decades, the telecom framework has opened monopolistic markets to new market players and constantly ensures that competition dynamics are effective and sustainable, and that efficient investments are made. Moreover, it combines several objectives: **creating the conditions for sustainable and effective competition, promoting connectivity, strengthening the internal market, fostering efficient investments, ensuring that the internet remains open, protecting end-users' rights, and empowering consumers and citizens.** Overall, by fostering competition, innovation and openness, this regime has allowed **electronic communications providers to become the backbone of the EU digital ecosystem.**

Ex ante regulatory framework: Goals and principles

***Ex ante* regulatory framework has a preventive objective:** interventions are implemented when specific economic and market characteristics require so, with the aim of promoting competition towards an open and competitive market. This is justified for instance in markets tending to be highly concentrated, or when private actors can exert a significant market power or enjoy an exclusive control over a gateway. *Ex ante* regulation is thus **implemented before and independently of an actual abusive behaviour with the aim to minimise the market players' incentive and ability to engage in such practices given their potentially irreversible effects** on competition, innovation and users' freedom of choice.

While it comprises several legislative texts and regulations, **an *ex ante* regulatory framework cannot be reduced to a set of measures¹⁰⁸ and regulations¹⁰⁹ applied *a priori*.** Indeed, in order to effectively address the structural issues mentioned here-above, the National Regulatory Authority (NRA) does not simply apply and enforce a legislative regime but is given the mandate, tools and resources to reach a variety of different objectives. The NRA selects and fine-tunes the regulatory obligations¹¹⁰ it will impose in order to reach and reconcile these

¹⁰⁸ E.g. *Interim* measures as enforced in *ex post* competition law

¹⁰⁹ E.g. Platform-to-Business Regulation

¹¹⁰ E.g. Access, transparency, non-discrimination, price control or accounting separation. This is particularly true when in a market analysis a player is found to have significant market power (SMP) on a relevant market susceptible to *ex ante* regulation.

objectives in a coherent and effective way. Moreover, by permanently gathering relevant information about the market and nourishing a dialogue with the stakeholders and civil society, the NRA can reduce information asymmetries making its intervention fit for purpose for the benefits of businesses, consumers and society at large.

Any regulatory intervention must also be proportionate. In order to **create the conditions for the market to thrive and to strengthen the incentives to innovate, an NRA only intervenes where it is strictly necessary, and follows a clear and predictable timing and rationale**. Still, while predictable, the regulatory action can also be adjusted when market conditions require so (e.g. regulation is progressively lifted following the development of competition dynamics), under predefined rules and procedures.

Ensuring that markets remain open, fair and competitive for the benefits of consumers and citizens is one of the main objectives of NRAs. Thus, within the *ex ante* framework, **the regulator has the possibility to solve issues *ex officio* or after a request from a market player**. Indeed, in case of grievances by any players in the market, **dispute resolution mechanisms are available to easily seize the NRA who is bound to find a settlement within a very short timeframe (in general, four-six months)**.

Moreover, while markets and market players can be national in scope, a consistent application of the regulatory framework at the European level is key. Thus, in the telecom sector, **national market analyses, legal applications, regulatory decisions and interventions are harmonised within a strong European network of coordination and cooperation (BEREC¹¹¹) and supervised by the European Commission (EC)**. BEREC is able to advice at all levels of the design (e.g., through opinions on review of the legislative framework), development (e.g., through guidelines) and implementation (e.g. through best practices) of the regulatory regime in Europe to foster the consolidation of the internal market.

Finally, in order to ensure that NRAs act within the perimeter determined by their legal framework, NRAs' processes and decisions are obviously **subject to democratic control** (e.g., by national parliaments) and to **review by national courts, the EC** (regarding market analysis) **and the EU judicial system**.

Ex ante regulation in practice: The telecom sector

In the telecom sector, the regulatory regime consists of, among other regulatory measures, the European Electronic Communications Code (EECC)¹¹², the Open Internet Regulation¹¹³, and

¹¹¹ The Body of European Regulators for Electronic Communications

¹¹² Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (OJ L 321, 17.12.2018, p. 36–214)

¹¹³ Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015 laying down measures concerning open internet access and amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services and Regulation (EU) No 531/2012 on roaming on public mobile communications networks within the Union (OJ L 310, 26.11.2015, p. 1–18)

the Roaming Regulation¹¹⁴. Such legislations are applied within the same legal framework, establish overarching objectives and provide the NRA with concrete means and tools to reach them in a predictable, consistent and effective manner.

All relevant characteristics of this regulatory framework are presented here below and have inspired BEREC's proposal for a swift, effective and future-proof intervention towards digital gatekeepers.¹¹⁵

Strictly necessary and with a clear rationale – In the telecom sector, **asymmetric remedies are only implemented on the market player(s) with significant market power and when effective and sustainable competition would not spontaneously emerge**. Such markets are defined according to three cumulative criteria: (i) the presence of high permanent and non-transitory entry barriers, (ii) the lack of tendency towards effective competition within a relevant time horizon and (iii) the fact that competition law alone would not adequately address the identified market failures. If all these criteria are fulfilled, the market is presumed to need continuous regulatory intervention until competition becomes effective and sustainable. Moreover, **beyond creating/fostering competition, telecom NRAs are also responsible for ensuring that the internet access remains open**. The Open Internet Regulation clearly defines the scope and means for NRAs to guarantee the continued functioning of the internet ecosystem as an engine of innovation, and to safeguard the ability of end-users to access and distribute information or run applications and services of their choice on the internet.

Predictable – In the telecom sector, **the analysis and review of competition dynamics is submitted to a process which is known by all stakeholders and which is revised at least¹¹⁶ every five years** to ensure that market dynamics and evolutions are taken into account. **Market reviews are subject to public consultations, are discussed with National Competition Agencies, reviewed by the European Commission and, in some cases, reviewed by other European NRAs to support the EC's investigations, in order to guarantee a sound analysis.**

Proportionate – All obligations imposed by NRAs follow the principle of proportionality, are implemented with the specific aim of reaching the defined objective, and **the least intrusive remedy is applied**. The remedies are designed to target either one, few, or all market players in the market according to the concern(s) to tackle. For instance, an **asymmetric intervention targets only one or very few operators** in order to create a level-playing field, address specific competition concerns and thus reach, the different objectives mentioned above

¹¹⁴ Regulation (EU) No 531/2012 of the European Parliament and of the Council of 13 June 2012 on roaming on public mobile communications networks within the Union (OJ L 172, 30.6.2012, p. 10–35)

¹¹⁵ BoR (20) 138, "BEREC Response to the Public Consultations on the Digital Services Act Package and the New Competition Tool", See here https://berec.europa.eu/eng/document_register/subject_matter/berec/others/9411-berec-response-to-the-public-consultation-on-the-digital-services-act-package-and-the-new-competition-tool
BoR (21) 34, "Draft BEREC Report on the ex-ante regulation of digital gatekeepers", see https://berec.europa.eu/eng/document_register/subject_matter/berec/reports/9880-draft-berec-report-on-the-ex-ante-regulation-of-digital-gatekeepers

BoR (21) 35, "BEREC Opinion on the Digital Markets Act", see https://berec.europa.eu/eng/document_register/subject_matter/berec/opinions/9879-berec-opinion-on-the-european-commissions-proposal-for-a-digital-markets-act

¹¹⁶ They can be revised earlier if the market changed significantly

(effective competition, efficient investment, developing the internal market for the benefit of European citizens). It allows for ambitious intervention while avoiding over-regulation. On the other hand, a **symmetric intervention targets all operators** if it is needed to tackle the issues at stake (e.g. the control over internet access by each provider as addressed by the Open Internet Regulation or interconnection remedies).

Principle-based rules and tailored remedies – **All regulatory interventions are framed in the law (i.e., in EECC) and include obligations such as transparency, non-discrimination, accounting separation, compulsory access or price control.** Other types of remedies can be added where appropriate. While self-executing rules are often too rigid and thus ineffective, **principle-based rules and tailored remedies can be designed to tackle the identified issue and adapted and adjusted to the characteristics of a specific market or market player.** This case-by-case assessment and enforcement is key to ensure that the intervention is proportionate, and effective.

Constant and active monitoring – **NRAs do not only define, apply and enforce rules, but have the ability to monitor them all along and in real time.** To monitor markets in an effective way, NRAs are empowered to systematically and periodically collect information from market players (e.g. prices, coverage, quality of services, financial information, etc.). Data collection can be done on a quarterly or annual basis and can in some cases be made publicly available. Through this dedicated data collection powers, NRAs design and monitor the enforcement and fine-tune highly-technical remedies in an effective and efficient way.

Data-driven – Regulators can rely on the **collection** (also via crowdsourcing), **storage, processing, usage and publication of data** to support their supervisory, analysis and detection activities and making stakeholders more accountable. Moreover, making valuable data available means **empowering users and citizens** to make well-informed choices and steer the market into the right direction.

Participatory – **NRAs nourish a continuous and repeated dialogue with all actors** of the sector (incumbent operators, alternative operators, consumers associations, local authorities, civil society, and so on). In highly-technical markets, **reducing information asymmetry** is key to build the necessary know-how for an appropriate and effective intervention.

Expertise – The regulators' decisions are based on the expertise and resources that support their day-to-day activities: **engineers, lawyers, economists, developers, data scientists that cooperate operationally.** Only dedicated skills, knowledge and resources can ensure the swift intervention needed in this context.

Swift intervention – NRAs offer a **dispute resolution mechanism** to solve grievances among operators. Operators can easily take the case to the NRA on a specific issue (e.g. denial of access to a specific product), and the NRA is bound to intervene in a tight timeframe (i.e. four-six months) to avoid letting potential negative effects on competition materialize. In this framework, relevant information and data can be collected by the NRA and they greatly contribute to reinforce its knowledge of the market.

Sanctions – The **ability of NRAs to impose penalties** in case of infringement is a key element of its toolkit. Beyond condemning wrongdoings, sanctioning procedures also play an important role for setting examples, providing deterrent effects and reputational incentives.

A strong and harmonised implementation across the EU – The telecom ex ante regulation takes place within a harmonised European framework. Since 2002¹¹⁷, BEREC, with its strong institutional statute, and following a long-term historical cooperation, brings together all European telecom NRAs, as well as the European Commission. Thanks to **continuous interactions** among national NRAs, BEREC allows for an effective and consistent application of the telecom regulatory framework throughout Europe. BEREC contributes to all levels of the design, development and implementation of the regulatory regime in Europe. Among other tasks (some of them being mandatory and fixed by the EU regulatory framework), BEREC:

- **issues guidelines and common positions** on several topics such as the application of the European framework by NRAs,
- **issues opinions** on internal market procedures for national measures. The Commission regularly requests BEREC to produce an opinion regarding the market analysis to nourish and inform its investigations. This procedure can lead to vetoing national decisions,
- delivers opinions on a variety of EU legal acts,
- **publishes reports** on technical matters,
- provides an active network to **share best practices**,
- **assists EU institutions** in its field of expertise,
- sets up and keeps registers, lists or databases.

In accordance with the BEREC regulation¹¹⁸, a work programme is established every year, after consulting the European Parliament, the Council and the Commission on their priorities, as well as other interested parties. Work-flows and topics are treated by specific and dedicated working groups where **experts from all European NRAs discuss, define and produce concrete deliverables**. These working groups cover all topics which are of relevance in the telecom sector and where **highly-technical knowledge** is needed. These include for instance the working groups on the regulatory framework, market and economic analysis, the open internet, statistics and indicators, fixed and wireless network evolution, remedies, planning and future trends, as well as sustainability. Eight official annual meetings are organised for these experts' WGs to regularly present the collective work to be voted and adopted by the NRAs' chairs.

¹¹⁷ BEREC was established in 2010 by the Regulation (EC) No 1211/2009 which was part of the Telecom Reform package. It replaced the European Regulators Group for electronic communications networks and services which was established as an advisory group to the Commission in 2002. BEREC's functioning and missions were further reinforced by Regulation (EU) 2018/1971 of the European Parliament and of the Council of 11 December 2018.

¹¹⁸ Regulation (EU) 2018/1971 of the European Parliament and of the Council of 11 December 2018 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Agency for Support for BEREC (BEREC Office), amending Regulation (EU) 2015/2120 and repealing Regulation (EC) No 1211/2009 (OJ L 321, 17.12.2018, p. 1–35)