

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

11 March, 2021

Contents

1.	EXECUTIVE SUMMARY	3
2.	INTRODUCTION	5
3.	WORK DONE BY BEREC ON DIGITAL ENVIRONMENTS	7
4.	OBJECTIVES OF THE REGULATORY INTERVENTION	9
4.1.	Ensuring contestability in the digital environment.....	9
4.2.	Ensuring openness of the digital environment.....	10
5.	THE SCOPE OF THE REGULATORY INTERVENTION	11
5.1.	BEREC's comments	11
5.2.	Revision of the CPS list	12
6.	DESIGNATION OF GATEKEEPERS	13
6.1.	Introduction.....	13
6.2.	The DMA proposal.....	13
6.2.1.	<i>Thresholds – a quantitative procedure</i>	<i>13</i>
6.2.2.	<i>Qualitative procedure.....</i>	<i>14</i>
6.2.3.	<i>Review of gatekeeper status.....</i>	<i>14</i>
6.3.	Comments by BEREC	14
6.3.1.	<i>The quantitative identification procedure.....</i>	<i>14</i>
6.3.2.	<i>The qualitative identification procedure.....</i>	<i>15</i>
6.4.	Review of status	16
7.	REGULATORY MEASURES FOR GATEKEEPERS.....	16
7.1	Concerns	17
7.2	Regulatory measures.....	18
7.2.1	<i>Obligations set out in the DMA proposal</i>	<i>18</i>
7.2.2	<i>Preliminary assessment of the updating process of the gatekeeper's obligations under the DMA proposal.....</i>	<i>19</i>
7.2.3	<i>BEREC's proposal on the regulatory measures</i>	<i>20</i>
8.	ENFORCEMENT	24
8.1	A model for knowledge-building and definition of effective regulatory measures.....	24

8.2	A swift and effective regulatory framework.....	26
9.	ENHANCING ASSISTANCE FROM NATIONAL INDEPENDENT AUTHORITIES FOR AN EFFECTIVE ENFORCEMENT	28
9.1	Assistance by national independent authorities.....	29
9.1.1	<i>Information (data) gathering.....</i>	<i>29</i>
9.1.2	<i>Monitoring of the market and the competitive landscape.....</i>	<i>30</i>
9.1.3	<i>Market investigations and monitoring of compliance of gatekeepers with regulatory measures.....</i>	<i>31</i>
9.1.4	<i>Enforcement of regulatory measures</i>	<i>31</i>
9.1.5	<i>Dispute resolution for many cases</i>	<i>32</i>
9.2	An advisory board harmonising the support of NIAs	32
10.	CONCLUSIONS	34
11.	FUTURE WORK.....	35
	ANNEX I: TWO-PAGER ON EFFECTIVE DEFINITION OF MEASURES	37
	ANNEX II: TWO-PAGER ON DISPUTE RESOLUTION.....	39
	ANNEX III: TWO-PAGER ON NATIONAL SUPPORT	41
	ANNEX IV: BRIEF ON EX ANTE REGULATION.....	43

1. 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 with business and end-users¹, and thereby 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 of the DMA regulation, BEREC agrees that this should not apply to markets related to electronic communications networks and services. Thus, under the current circumstances, BEREC believes that the inclusion of number-independent interpersonal communications services (NI-ICS) among Core Platform Services (CPSs) should be considered with caution, and will carry out a thorough analysis on the matter. NI-ICSs are already regulated under the European Electronic Communications Code (EECC)² with the aim of promoting competition, developing the internal market and protecting end-users’³ rights. Any legal overlap should be avoided in order to reduce regulatory uncertainty for market players and consumers.

For any regulatory intervention to truly reach its objectives, appropriate regulatory measures and enforcement 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-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 explicitly set in the DMA proposal. This “open” regulatory dialogue will be crucial to design and enforce an effective intervention and reduce litigation.

As for the regulatory measures, BEREC welcomes the principle of directly-applicable obligations to address certain concerns, as they ensure a swift regulatory intervention and create a clear and common understanding of the gatekeeper’s practices which are considered to be detrimental. Nevertheless, to ensure regulatory certainty and predictability, BEREC

¹ BEREC is following here 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 Art.2 (14) 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 Here we refer to the terminology used in the EECC

believes that the scope of the application of such directly-applicable obligations should be further clarified and proposes to detail i) obligations which directly apply to all gatekeepers across all CPSs, without any adaptation and ii) directly-applicable obligations only applying to gatekeeper(s) in a particular CPS and adapted to its specificities.

This being said, while directly-applicable obligations are necessary, digital environments evolve quickly, and new concerns are likely to arise at the same pace. In order to correctly address them, some flexibility in the design of the regulatory measures is needed. For complex regulatory measures, that are usually also more intrusive, BEREC believes that the intervention should be appropriately specified and tailored in order to be effective and proportionate. Thus, along with the directly-applicable obligations, BEREC proposes to complement the regulatory framework with additional remedies that could be tailored on a case-by-case basis to be fit for purpose.

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 foster inter-platform competition for 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 put into focus the importance and necessity 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 EU competent authority 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 EU competent authority should rely on the valuable experience from National Independent Authorities (NIAs)⁴, in particular National Regulatory Authorities (NRAs), especially for tasks such as e.g. i) gathering of relevant national data (especially from national business users or end-users), ii) the real-time 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 EU competent authority 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

⁴ National Independent authorities refer to all 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.

and access to information and digital services offered or intermediated by the digital platforms is also crucial.

Under the Open Internet Regulation⁵, BEREC members must ensure that the (access to the) Internet provided by electronic communications operators remains open, i.e. that end-users (as defined in the EECC⁶) 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, and 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 will further work on this issue⁷, analysing the Internet value chain, including the upper layers, not covered as of today by the Open Internet Regulation. The aim 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.

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 goods and services.

Accordingly, BEREC welcomes the *ex ante* intervention proposed by the European Commission (EC) in the Digital Markets Act (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 Public Consultations on the Digital Services Act Package and the New

⁵ 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)

⁶ See footnote 1

⁷ See page 17 of BoR (20) 220, "BEREC Work-programme 2021", see https://berec.europa.eu/eng/document_register/subject/berec/annual_work_programmes/9728-berec-work-programme-2021

Competition Tool⁸ (see Chapter 3 for other reports). 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 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 proposed improvements laid out in this report which are aimed at making the regulatory intervention swifter, more effective and more future-proof. Along with this report, BEREC will proactively engage with the EU institutions to help to further improve the DMA proposal.

This report was originally scheduled for last year, as part of the 2020 BEREC work program, continuing the BEREC work on digital platforms and data economy. However, given the public consultations on the DSA Package and the NCT, and the publication of the DMA proposal, BEREC preferred to postpone the publication of this report in order to better tailor its feedback.

The report is organised as follows: Chapter 3 presents an overview of 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 (core platform services and designation of digital gatekeepers) is addressed in Chapter 5 and Chapter 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 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 four annexes focused on BEREC experience on different topics addressed in previous chapters (Annex I on the effective definition of regulatory measures via a regulatory dialogue, Annex II on dispute resolution mechanisms, Annex III on the support from national independent authorities and Annex IV on the *ex ante* regulatory framework which inspired BEREC's proposals on the DMA).

This report is open to public consultation with the aim of publishing the definitive version incorporating stakeholders' inputs. BEREC encourages all types of stakeholders, including civil society, consumers and citizens to provide their views on BEREC's proposals.

⁸ BoR (20) 138, "BEREC Response to the Public Consultations on the Digital Services Act Package and the New Competition Tool", 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

3. WORK DONE BY BEREC ON DIGITAL ENVIRONMENTS

Digital platforms (DPs) 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 DPs. First, DPs are a key part of the Internet value chain, as user experience when accessing Internet is conditioned not only by electronic communications services (ECSs), but also by digital platforms acting as gateway for users to content and applications. Second, DPs are supported by ECSs, and BEREC and ECS NRAs must ensure that digital platforms are well-supported by ECSs. Thirdly, some candidates for CPSs in the proposal, such as NI-ICS, are already regulated under the EECC. Lastly, BEREC considers that the solid and successful experience gained in encouraging market entry, 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 DPs regulation.

As for the work done on DPs, 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” (BoR (18) 35)⁹, 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”¹⁰ (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 DSA/NCT public consultation, providing its views on both proposals, and focusing on the questions on which its experience and expertise could be particularly relevant (now, the DMA).¹¹ Lastly, BEREC has also worked and is working on NI-ICS and published a Report on OTT services¹², a preliminary report on the harmonised collection of data from OTT operators¹³ (2019) and a report on the harmonised definitions for indicators regarding OTT services, relevant to electronic communications markets.¹⁴

⁹ BoR (18) 35, “BEREC report on the impact of premium content on ECS markets and the effect of devices on the open use of the Internet”, 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

¹⁰ BoR (19) 106, “BEREC Report on the Data Economy”, see https://berec.europa.eu/eng/document_register/subject_matter/berec/reports/8599-berec-report-on-the-data-economy

¹¹ BoR (20) 138, “BEREC Response to the Public Consultations on the Digital Services Act Package and the New Competition Tool”, 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

¹² BoR (16) 35, “BEREC Report on OTT services”, see https://berec.europa.eu/eng/document_register/subject_matter/berec/reports/5751-berec-report-on-ott-services

¹³ BoR (19) 244, “BEREC Preliminary report on the harmonised collection of data from both Authorised Undertakings and OTT operators”, 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

¹⁴ BoR (21) 33, “Draft 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

NRAs participating in BEREC have also prepared relevant reports on DPs, such as the ACM market study into mobile app stores¹⁵, the interim report by AGCOM in the context of the joint inquiry on Big Data issue by the Italian Competition, Data Protection and Communication Authorities¹⁶ and the final Big Data Inquiry and its policy conclusions¹⁷, the report by Arcep on “Devices, the weak link in achieving an open Internet”¹⁸, 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”¹⁹ and “Monitoring of digital communications platforms and gatekeepers of the open internet”²⁰. ANACOM also commissioned a report on OTT services²¹, examining the business economics of OTT services available in Portugal, likely trends, the corresponding impact on the electronic communications sector and the challenges faced in terms of regulation and public policy. 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 Germany²². Same as BEREC, many NRAs have also provided their views for the public consultations on the DSA/NCT²³.

BEREC is also currently working on two further studies relating to DPs. First, BEREC is preparing a study on consumer behaviour towards DPs as a means for communication, based on a comprehensive survey at EU level to better understand the issues in relation to consumer attitudes towards these platforms, such as multi-homing dynamics. This report is expected to be published in June 2021. BEREC has also started to work on the analysis of the Internet value chain, to get a comprehensive view on the interrelation of the different layers, from networks to digital platforms and any other piece of the complete chain, in order to identify main potential bottlenecks, and get a complete view on how user experience is configured by the different parts of the value chain. 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 in the beginning of 2022²⁴.

¹⁵ ACM (2019) “Market study into mobile app stores”, <https://www.acm.nl/sites/default/files/documents/market-study-into-mobile-app-stores.pdf>

¹⁶ 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>

¹⁷ 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>

¹⁸ ARCEP (2018) “Devices, the weak link in achieving an open internet”,

https://archives.arcep.fr/uploads/tx_gspublication/rapport-terminaux-fev2018-ENG.pdf

¹⁹ 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>

²⁰ 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>

²¹ ANACOM (2016) “Study on content and application services (OTT)”,

<https://www.anacom.pt/render.jsp?contentId=1381333&languageId=1>

²² BNetzA (2020) “Interim results – public consultation on digital platforms”, www.bundesnetzagentur.de/digitalisation-consultation

²³ 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>)

²⁴ BoR (20) 220, “BEREC Work-programme 2021”, see

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

Finally, over the next years BEREC will work on the different topics described in Chapter 11 (future work), 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 these issues in the final version of the report on digital platforms, and/or in separate reports.

4. OBJECTIVES OF THE REGULATORY INTERVENTION

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

1. Ensuring contestability in the digital sector by promoting competition among DPs (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 abuses of the intermediation power of digital gatekeepers, including the promotion of open digital environments beyond the network 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 the analysis of the specific regulatory measures in the proposal and its relationship with concerns on different areas identified by BEREC, aimed at addressing concerns identified in relation to fairness for business users and issues related to the protection of end-users' interests. BEREC is hereunder considering a number of high-level issues on two of the 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 based on wholesale level

inputs 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, thus enhancing competition on the merits.

In BEREC's view inter-platform competition can help improve the fairness of conditions offered to business users and end-users. On the one hand, intra-platform competition, with 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 enhance the ability of gatekeepers' competitors to challenge their position on (a) CPS(s) by market entry and expansion (e.g. interoperability, data portability and access remedies). 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 complex to design and implement and need appropriate tailoring. For this reason, a regulatory dialogue with all relevant stakeholders and constant monitoring to ensure effectiveness of the measures and their compliance 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'²⁵ 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 Internet²⁶, the Internet value chain reaches beyond the internet access service, and include a relevant number of DPs which are now in the scope of the DMA.

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 to specific applications or services on other levels of the value chain. Indeed, some DPs can

²⁵ Here the term "end-users" refers to the definition of the EECC, see footnote 1

²⁶ Ibid footnote 9

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 value chain, 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.

BEREC will continue to work on issues relating to an open internet and open digital environments²⁷, analysing the Internet value chain, 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 DSA/NCT public consultations, BEREC referred to these services as Areas of Business (AoBs), a concept which is very similar to the Core Platform Service (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).

5.1. BEREC’s comments

BEREC suggested in its response to the public consultation on the DSA package 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

²⁷ See page 17 of BoR (20) 220, “BEREC Work-programme 2021”, see https://berec.europa.eu/eng/document_register/subject_matter/berec/annual_work_programmes/9728-berec-work-programme-2021

of advertising services are identified by BEREC as well, however BEREC included them in the CPS general search, e-commerce and social media respectively where applicable.²⁸

BEREC agrees with the EC that the DMA shall not apply to markets related to electronic communications networks and services²⁹. In this line, BEREC believes that the inclusion of NI-ICS among the CPSs should be considered with caution. NI-ICS are electronic communications services, which, as such, are regulated under the EECC.

The EECC gives to NRAs the power to regulate the ECS sector having as objectives the promotion of competition, the development of the internal market and the protection of end users interest (points (b), (c) and (d) of Article 3(2) of the EECC). More precisely, the EECC does not only address NI-ICS under Article 61 EECC including detailed provisions on the treatment of interoperability for NI-ICS, as acknowledged by the DMA. As electronic communications services, they are subject to most of the provisions of the EECC including the overarching NRAs powers to monitor the evolution of the sector (e.g. information requests). The NI-ICS are also under the scope of the *ex ante* market analysis, as pointed out in the EC comments letter concerning the SMS-TR case FR/2014/1670. They are not only explicitly mentioned in most of the provisions regarding sectoral users' rights but the EECC foresee a periodic gap analysis of sectoral right to under Article 123 EECC and the possibility for Member States to include further transparency obligations in the contracts to address emerging issues under Article 102(7). Furthermore, NI-ICS are also subject to specialised dispute resolution mechanisms, both at the retail and the wholesale level. On the other hand, nowadays NI-ICS do not yet constitute a gateway for business users to reach its end-users as business users do not typically use NI-ICS but number-based interpersonal communications services (NB-ICS) to communicate with their customers.

BEREC will carry out a thorough analysis on the potential regulatory gap that would need to be addressed concerning the regulation of NI-ICS and will put forward some proposals accordingly. BEREC would like to stress that any legal overlapping should be carefully avoided in order to ensure regulatory certainty for market players and consumers.

5.2. Revision of the CPS list

BEREC recognises the need for 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 EU competent authority 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.

²⁸ 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 virtual assistants, which do not appear to be explicitly included in the DMA proposal may raise competition concerns or direct harm to end-users.

²⁹ See Article 1(3) and 1(4) in the DMA proposal

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 gatekeepers³⁰ 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.

6.2. The DMA proposal

The DMA proposes that the designation/identification of a gatekeeper is done on the basis of three cumulative qualitative criteria. According to Article 3(1), a provider of CPSs should be designated as gatekeeper if: (a) it has a significant impact on the internal market; (b) it operates a core platform service (CPS) which serves as an important gateway for business users to reach end users; and (c) enjoys an entrenched and durable position in its operations or it is foreseeable that it will enjoy such a position in the near future.

6.2.1. Thresholds – a quantitative procedure

Article 3(2) of the DMA proposal contains thresholds which enables direct identification of a CPS provider assumed to fulfil the three qualitative in Article 3(1).

- (a) The first threshold relates to the annual turnover of the undertaking to which the CPS provider belongs³¹ OR market value of the undertaking to which it belongs³² AND requires that the CPS provides its service in at least three Member States.
- (b) The second threshold relates to exceeding a minimum number of end-users³³ and business users of the provided CPS in the EU in the last financial year³⁴.
- (c) The third threshold relates to longevity; the (b) threshold related to number of users must be met in each of the last three financial years.

A CPS provider which meets these thresholds is to notify the EC thereof within three months. The EC shall thereafter, within 60 days of having received the notification, issue a formal decision on whether or not to designate that CPS provider as a gatekeeper.

³⁰ 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.

³¹ EUR 6.5 billion annual turnover in the EEA in the last three financial years.

³² Where the average market capitalisation or the equivalent fair market value of the undertaking to which it belongs amounted to at least EUR 65 billion in the last financial year.

³³ 45 million monthly active end users established or located in the EU.

³⁴ 10 000 yearly active business users established in the EU.

6.2.2. Qualitative procedure

The qualitative criteria can be used for two purposes: rebuttal of the direct identification presumption (as a part of the Article 3(2) notification by a CPS provider), or designating gatekeeping status to CPS providers not meeting the thresholds of the direct identification (following a market investigation). If a CPS provider which has met the quantitative thresholds in Article 3(2) presents sufficiently substantiated arguments that it does not meet the criteria listed in Article 3(1), the DMA proposal empowers the Commission to resort to a more qualitative assessment of whether the CPS provider could still be designated as a gatekeeper based on the more qualitative criteria in Article 3(6).

The Commission is able to conduct market investigations with the purpose of designating gatekeepers – either *ex officio* (Article 15(1)), or by being requested to do so by at least three Member States (Article 33(1)).

BEREC takes the position that the requirement of three or more Member States in Article 33 of the DMA proposal is not reasonable as the request for a market investigation by Member States is subject to reasonable grounds and a respective examination by the EC. If there are reasonable grounds, also one Member States should be entitled to request for a market investigation.

Within the process of identification based on qualitative criteria, the DMA proposal opens up for designation of emerging gatekeepers which are expected to enjoy a durable position in the future. Emerging gatekeepers will only have to adhere to a smaller set of obligations.

6.2.3. Review of gatekeeper status

The DMA proposal states that the Commission shall regularly review (i) whether the designated gatekeeper still satisfies the requirements laid out in 3(1), (ii) if there are new CPS providers that satisfy the requirements, and (iii) if the list of the relevant CPSs provided by the gatekeeper needs to be adjusted. Such a review is supposed to take place at least every two years or when there have been substantial changes in the circumstances on which the decision was based.

6.3. Comments by BEREC

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 DSA public consultation. There are however some issues that deserve mentioning.

6.3.1. The quantitative identification procedure

The quantitative identification procedure conceptually corresponds well with the proposals presented by BEREC in its response to the public consultation on the DSA Package and the NCT, although there are some differences.

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.³⁵

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.

BEREC also notes that the revenue as well as the valuation thresholds in (a) relate to the undertaking to which the candidate gatekeeper belongs, whereas the thresholds in (b) relates to the specific CPS.³⁶ BEREC suggested in its response to the DSA/NCT public consultations 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 considers that it is important to complement this approach with a qualitative assessment, as proposed by the EC.

6.3.2. The qualitative identification procedure

Many gatekeepers operate within digital ecosystems³⁷. As highlighted in its response to the DSA/NCT public consultation, BEREC believes that being part of an ecosystem reinforces the platform's gatekeeping role since it allows it 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 criterion, which is missing in the DMA proposal could be further considered when designating gatekeepers and 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 "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.

³⁵ 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.

³⁶ BEREC suggested in its reply to the consultation that relevant thresholds should be determined for each CPS.

³⁷ Ecosystems consists of at least two services directly benefitting from each other, while services within conglomerates do not necessarily share the same direct interdependencies.

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 State³⁸, which was considered in BEREC's response to the DSA/NCT consultation 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 regulatory 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 regarding the level of detail is the SMP guidelines³⁹ used in the ECS sector.

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). It states that the EC shall regularly (at least every two years or if there have been substantial changes in the circumstances on which the decision was based) review i) whether the designated gatekeeper still satisfies the requirements, (ii) if there are new CPS providers that satisfy the requirements and iii) if the list of the relevant CPS provided by the gatekeeper needs to be adjusted. BEREC also agrees on the importance of involving the national level in the review.

7. REGULATORY MEASURES FOR GATEKEEPERS

In its response to the public consultations on the DSA/NCT, BEREC identified current or potential concerns caused by digital gatekeepers that should be addressed to prevent as early as possible any unwanted irreversible effects on digital environments.

BEREC supports the need for an *ex ante* asymmetric intervention to address such concerns. However, for the regulatory intervention to be effective, BEREC proposes to clarify the scope of the directly-applicable obligations listed in Articles 5 and 6 of the DMA proposal, as well as to complement them with remedies based on clear *ex ante* principles and objectives.

First of all, in order to ensure regulatory certainty and efficiency, BEREC proposes to distinguish between directly-applicable obligations which i) would apply to all CPSs and ii) would apply only to specific CPSs. This approach would also help for a swifter enforcement of the regulation and avoid litigation.

Secondly, for highly complex and more intrusive measures, BEREC believes that the intervention should be appropriately tailored in order to be proportionate and effective. To this

³⁸ 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.

³⁹ 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)

end, BEREC proposes to complement the directly-applicable obligations with remedies which would be designed and implemented on a case-by-case basis and applied to a single or a limited number of gatekeepers. 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* regulatory framework.

The benefits of this approach would be i) to clarify for the gatekeepers which directly applicable obligations apply to them, taking into consideration the specificities of their CPS and ii) to better address complex or specific issues with tailored remedies on a case-by-case basis, as it is for example the case of ECS regulation in the EECC.

With regards to the types of concerns raised by digital gatekeepers, BEREC supports the objective of the EC to ensure that digital markets become contestable (i.e. that new competitors arise). In order to achieve this, regulatory measures concerning interoperability (not only among the gatekeeper and complementary service providers, but also among providers of the same CPS), as well as access and data portability will be crucial. Moreover, as explained in Chapter 4, BEREC believes that certain end-users' concerns should also be considered in the DMA framework.

7.1 Concerns

BEREC identified unfair practices in which gatekeepers have the ability and may have the incentive to engage⁴⁰ (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.

From BEREC's understanding, the current DMA proposal mostly addresses issues that could be observed in the relationship between the gatekeepers and their business users. However, BEREC believes that the DMA proposal should be reinforced to address certain inter-platform competition concerns, and to integrate some additional intra-platform competition concerns (i.e. with other business users), as well as certain end-users-only related issues.

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 (Article 6(h) 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 indirect network effects are only partially addressed in the current DMA proposal. In this regard, interoperability measures between the gatekeepers and other competing services should be provided for those cases in which they are deemed to be necessary and proportionate to achieve the set objective(s).⁴¹

Regarding intra-platform concerns, Table 1 below points that a significant number of concerns identified by BEREC so far are only partially covered by the DMA proposal. For example, BEREC believes that a gatekeeper has the ability and may have the incentive to reduce the ability of business users to launch bundle offers which would require business users to enter

⁴⁰ See BEREC response to the DSA PC, pages 13-14

⁴¹ In the EC sector a similar remedy (i.e. interconnection) has proven itself to be really useful to promote competition between the incumbent and alternative providers.

multiple markets to launch a competing offer. BEREC thinks that this tying and bundling concern (see concern #7 in Table 1) is only partially addressed by Article 5(e) and 5(f) regarding identification services, and Article 6(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 some obligations in the DMA proposal will eventually benefit end-users by tackling some business users' concerns, like the data portability obligation set out in Article 6(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. For 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 #1 in Table 1).

By directly addressing end-users' concerns, indirect benefits for business users would 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. Providing end-users with the tools and means to make well-informed choices is crucial for the development of alternative products and services and a fair evolution of the competitive dynamics.

Table 1 at the end of this section presents the concerns that BEREC has identified so far, and how those concerns are (partly) addressed⁴² in the current DMA proposal. This is based on BEREC's preliminary analysis and understanding of the 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 other directly-applicable obligations subject 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 directly-applicable obligations, as they enable a direct and quick intervention, bringing the 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 three aspects:

1. First, with regards to the list of obligations currently included in the DMA proposal, BEREC thinks that this list should potentially be extended to cover broader concerns, as expressed in the previous subsection.

⁴² BEREC realized that these concerns might not be fully covered by the DMA, but nevertheless these remedies help to solve them partly.

2. Second, it seems necessary to make sure that the DMA can anticipate any evolution of the gatekeepers' activities and to adapt to variations in concerns that will 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).
3. Third, while recognising their benefits, BEREC believes that directly-applicable obligations may have some limitations. For example, they may not be effective for solving complex problems where a case-by-case analysis is needed to issue detailed and pin-pointed remedies. This is notably the case when business models or technical specifications need to be considered, or for imposing complex and more intrusive obligations such as interoperability and access remedies (see next section 7.2.3).

7.2.2 Preliminary assessment of 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 directly-applicable obligations is a key element and ii) further flexibility in the choice and definition of the obligations/remedies needs to be considered (see section 7.2.3).

On point i), the DMA proposal already includes two mechanisms to update the gatekeeper's 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.

Although some details of the updating processes set out might need to be improved, it seems that these two approaches are in general adequate to enable a timely update of the directly-applicable obligations in the dynamic digital platform environment, while also ensuring legal clarity and predictability of the regulatory intervention.

In order to ensure an adequate regular updating, BEREC considers that the following issues should be taken into account (see further developments in Chapters 8 and 9):

- The role from national authorities should be strengthened in the updating process, as they are also in a good place to identify emerging challenges related to DPs, 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);
- 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.

7.2.3 BEREC's proposal on the regulatory measures

BEREC suggests that a different approach concerning the directly-applicable obligations and proposes to complement them with tailored remedies. As far as the directly-applicable obligations are concerned, BEREC believes that – in order to ensure regulatory certainty and predictability – the DMA should clarify their scope of application. BEREC thus proposes that:

- A first set of directly-applicable obligations should clearly apply to all gatekeepers pertaining to all CPSs without any adaptation, as for example transparency 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 DMA.
- A second set of directly-applicable obligations should clearly be targeting specific CPSs, and would only apply to every gatekeeper within the same CPS. This would enable the regulatory authority to define obligations which are correctly addressing the specific concerns of a specific CPS, and which could be more easily and effectively applied. The wording of each obligation should take into general account the principle of proportionality between the concern and the potential effect of the obligation for the groups of stakeholders concerned in the corresponding CPS (business users, end-users – if they are directly affected – and gatekeepers) but should not be adapted to each individual gatekeeper. Examples of such obligations are non-discrimination as to ranking, certain types of tying and bundling and data portability. A list of obligations to be adapted would be set out in the DMA. Each CPS would have a list of specific obligations set out in a dedicated EU-level act (for example a delegated act) to bring clarity on the obligations that gatekeepers should comply with, especially when those obligations would need to be updated.

While such directly-applicable obligations can swiftly address a set of concerns, BEREC believes that for highly-complex and more intrusive regulatory measures, the intervention should be appropriately tailored in order to be proportionate and effective. To this end, BEREC proposes to complement the directly-applicable obligations, where necessary, with remedies tailored to each gatekeeper that would be specified on a case-by-case basis. They would be tailored because of the need for detailing and proportionality assessment for each gatekeeper, including the specificities of the CPS(s) in which it has this status. Examples of such remedies are interoperability, all types of access remedies, as well as specific non-discrimination and pricing remedies. A list of potential remedies, depending on the issue considered, would need to be set out in the DMA. Tailored remedies should be set out in formal decisions by the EU competent regulatory authority for each individual gatekeeper. Such a regulatory framework has already been successfully implemented in the ECS sector for over twenty years. The legislator and EU competent authority will therefore be able to rely on a concrete experience from a regulated sector.

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

Table 1. Cross analysis of the concerns identified by BEREC and the obligations set out in the DMA

#	Concerns for DPs identified so far by BEREC	Addressed by the DMA proposal?	Comments
<i>Exclusionary conducts (practices that remove or weaken actual and potential competition, directly or indirectly harming business users and/or end-users)</i>			
1	Self-preferencing, e.g. unfairly favouring own products and services to the detriment of competing businesses. Examples: <ul style="list-style-type: none"> - unfair ranking/steering, - pre-installation and default settings of only one's own products/services. 	<i>Partially</i>	Article 6(d) forbids unfair ranking of services and products. However, it does not consider the impact of default settings on users' choice.
2	Preferencing of a specific third party. Unfairly favouring a third party's products and services to the detriment of competing businesses. Examples: <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. 	<i>Partially</i>	Article 6(d) forbids unfair ranking of some third parties (i.e. subsidiaries of the GK) but not all. Default settings of third-party's products/services does not seem addressed by the DMA proposal. Article 6(k) addresses discrimination issues in access conditions to application stores and not for other CPSs.
3	Unjustified denial of access (permanent or temporary) to the platform or functionalities on the platform necessary to conduct business. Examples: <ul style="list-style-type: none"> - denial of access to sell products or services via the DPs platform - denial of access to the DPs payment services. 	<i>Partially</i>	Article 5(c) ensures business users can promote their offers and conclude commercial contracts. Article 6(f) 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. .
4	<p>Imposing exclusionary terms and conditions for attaining and/or retaining access.</p> <p>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 delisting - unreasonable performance targets. 	<i>Partially</i>	Unfair delisting and unreasonable performance targets for example do not seem explicitly covered by DMA.
5	<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>	<i>Partially</i>	<p>Article 6(i) 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 Article 6(j) with search data. But other CPS do not seem addressed by DMA.</p>
6	<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.</p>	<i>Partially</i>	<p>Article 6(c) and Article 6(f) allow interoperability for third party applications and ancillary services but only for Operating Systems, not other CPS.</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,</p>	<i>Partially</i>	<p>Article 5(e) and Article 5(f) prevent a GK to tie users with its identification service and other CPS offered by the GK.</p> <p>Article 6(b) allows to uninstall preinstalled</p>

	in order to compete without objective justification.		applications which can be seen as a bundled offer. But other tying and bundling issues do not seem to be covered.
8	Unreasonably restricting the possibility for business users to provide information to its end-users through the platform. Example: stopping providers of complementary services from informing end-users about alternative avenues where their complementary service can be consumed/purchased.	Yes	Article 5(b) ensures business users can use alternative intermediation services to reach their users. Article 5(c) ensures business users can promote their offers.
9	Strategically and unreasonably denying business users' access to relevant information which would be essential for making their products/services interoperable with those of the GK's business users and thus to reach end-users on a market where the GK wants to remain exclusive.	No	Article 6(j) deals with access to search data, but only for direct competitors and not in a context of interoperability with the GK's platform.
10	Not allowing an end-user to access the platform on equal terms as other end-users	<i>Partially</i>	Article 6(k) deals with business users only, and CPSs other than app stores do not seem to be addressed.
<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.	<i>Partially</i>	Article 6(k) ensures fair Terms of Services for accessing to app stores but not for other CPSs.
12	Imposing unreasonable terms and conditions to end-users for access to the platform. Example: excessive gathering of end-user data.	<i>Partially</i>	Article 6(k) is about business users only.
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.	Yes	Article 5(a) forbids combining personal data sourced from different services without users' consent.

			Article 5(f) forbids requiring subscription to a CPS as a condition to access to another CPS
14	Refusing data portability and de facto locking end-users in (making it very difficult or impossible to switch platform).	Yes	Article 6(h) ensures effective portability of data.
<i>Transparency-related issues</i>			
15	Strategic use of unclear or incomplete terms and conditions towards business users.	<i>Partially</i>	Article 6(k) ensures fair Terms of Services for app stores but not for other CPSs.
16	Lack of transparency towards content providers (business users as well as end-users) as to the rules of ranking algorithms.	Yes	Article 6(d) 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 discusses how this framework should be designed 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 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 model 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 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 decrease of 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 benefiting business users dependent on the gatekeeper, (potential) competitors, and end-users using the services of the digital platform. When exclusively discussing tailored remedies and their effects with the concerned gatekeeper, the EU competent authority will only get a one-sided view on its effectiveness. For this reason, BEREC considers that, for the regulatory framework to be effective, it is essential that, next to the concerned gatekeepers, other stakeholders are part of the regulatory dialogue.

All actors – business users, (potential) competitors, but also civil society, standard-setting associations and end-users – should therefore participate in the regulatory dialogue to provide their views, experience and expertise. 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 needed (either by adjusting tailored remedies or by updating the directly-applicable obligations according to the processes set out in the Regulation). By doing so, the regulatory measures on gatekeepers can be effective immediately and unwanted irreversible effects and consequences can be avoided.

BEREC is of the opinion that building a regulatory framework to enable and ensure this open dialogue is essential to guarantee effectiveness of the regulatory measures. It should be underlined, however, that the involvement of all 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. BEREC wants to point out that decisions shall 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.

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 potential different results. For instance, the technical design of a regulatory measure affects its level of effectiveness. Therefore, an open 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.

Additionally, many of the regulatory measures will derive on 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 an open 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* 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 committees gathering stakeholders or experts to design obligations on e.g. interoperability or number portability remedies. 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. (See Annex I).

8.2 A swift and effective regulatory framework

In this section BEREC discusses what should be included in this framework to allow the EU competent authority to be able to intervene in a timely manner and with sound knowledge on the effectiveness of the intervention by allowing for broad stakeholder regulatory dialogue.

A regulatory framework for the DMA can consist of different tools which enable room for interactions between stakeholders and the EU and national competent authorities. Dedicated fora and committees with (technical) experts can be set up to facilitate this interaction (see example given above for number portability). Public consultations can contribute to taking into account the views of stakeholders about remedies that will be put in place. It is also important that low barriers will exist for stakeholders to contact the regulator in order to submit signals

and (in)formal complaints. This can be achieved by establishing a dedicated information and complaints desk in each Member State. In the digital environment, where both consumers and business users of all sizes are dependent on the online platforms, an easily approachable complaints desk (e.g. reducing language barriers) is crucial. BEREC is of the opinion that national independent authorities can play a supporting role in helping the EU authority in creating such easily approachable information and complaints desk (See Chapter 9).

Provisions regarding non-judicial, dispute resolution mechanisms for business users and platforms competing with gatekeepers are however missing in the DMA proposal. In BEREC's opinion, given the pervasiveness of gatekeepers' business (leading to a high number of stakeholders involved), the high complexity of the proposed regulation in the DMA and the conflicting objectives that consumers, business users, competitors and gatekeepers might have in the market, an easily accessible and effective dispute resolution mechanism should be put in place by the EU competent authority to maximize the success of DMA provisions' enforcement.⁴³

BEREC indeed believes that 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 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 mechanisms can thus act as a powerful mediation tool, helping the different parties to reach an agreement. 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 parties 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).⁴⁴ 40% of companies that sell products online do it through

⁴³ 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.

⁴⁴ 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

an online marketplace.⁴⁵ 88% of the business users state that they have encountered unfair trading conditions on large platforms”.⁴⁶

In order to be designated as gatekeeper, among other prerequisites, the digital platform is presumed to have 10.000 business users or more⁴⁷. It is therefore likely that a high number of disputes will be filed as soon as the regulation comes into force. 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. It is important to notice that in order to ease the access to dispute resolution mechanism, BEREC believes that those involving national actors should be enforced at the national level, as it would grant an easy accessibility in terms of language, procedures and physical proximity to dispute resolution for local end-users. In any case, a coordination mechanism and EU-level oversight would be needed to ensure harmonisation.

For monitoring whether the regularity 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.⁴⁸ 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 the previous chapter, BEREC discussed why a constant dialogue with all relevant stakeholders is needed to meet the goals of the DMA regulation and which elements should be included in this broad stakeholder regulatory dialogue. In this chapter, BEREC will show how NIAs could assist the EU competent authority and how this support could be put in place for the DMA enforcement to be truly effective.

⁴⁵ Eurostat (2019)

⁴⁶ Responses on New Competition Tool : <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12416-New-competition-tool/public-consultation>

⁴⁷ 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/>).

⁴⁸ See Articles 19, 20 and 21

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. 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*”⁴⁹ 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 EU competent authority. BEREC believes however that along with the DMAC, competent NIAs can play a very valuable role in assisting the EU competent authority.

In particular, BEREC considers that it would be appropriate and beneficial to establish a specialized advisory body composed of representatives of NIAs. The resources available through this advisory body of NIAs could complement and/or reinforce the EU competent authority and the effectiveness of the application of the DMA.

As addressed in Chapter 8, effectively implementing a regulation involves a structured regulatory dialogue and an efficient coordination mechanism between the EU competent authority and authorities at a national level like NRAs. National authorities have often already developed relevant expertise e.g. in information gathering, continuous monitoring of markets and innovations, design of regulatory measures, dispute resolution, enforcement and market investigations on which the EU authority could rely. The EU harmonisation of these tasks among NIAs could effectively be ensured by an advisory body.

9.1 Assistance by national independent authorities

9.1.1 Information (data) gathering

The EU competent authority will have the power to request information from (associations of) undertakings including access to databases and algorithms, conduct interviews, take statements and perform on-site inspections. As already explained in Chapter 8, in highly-technical markets, reducing information asymmetry is key to 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.

⁴⁹ 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

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 markets⁵⁰.

Systematic and continuous data collection by NIAs in relation to national business users located in their country should be harmonized and serve as a robust basis for monitoring activities at EU level (see 9.1.2 below). 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)⁵¹ or the international roaming benchmark data reports.⁵²

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 in an efficient way as explained above. Continuous monitoring of the digital platform environment would help in lowering the information asymmetry between the EU competent authority, 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.⁵³ Not only competition-related issues but also end-users' concerns⁵⁴ 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 EU authority 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

⁵⁰ 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.

⁵¹ 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

⁵² 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

⁵³ Since March 2020, Bundesnetzagentur 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.

⁵⁴ See for example <https://ec.europa.eu/digital-single-market/en/news/annual-country-reports-open-internet-national-regulators-2019>

national market players in the ECS sector.⁵⁵ They are therefore well-placed to use these skills to monitor gatekeepers' activities and their impact in the respective national footprints.⁵⁶

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 add to 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)

BEREC believes that NIAs could assist the EU competent authorities 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 17.⁵⁷ Thanks to 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.

⁵⁵ 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).

⁵⁶ 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.

⁵⁷ Moreover, BEREC underlines that Member States in Article 33 should include national authorities.

9.1.5 Dispute resolution for many cases

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.”⁵⁸

As addressed in Chapter 8, concrete provisions regarding dispute resolution mechanisms for consumers are however missing in the DMA. For business users, the P2B regulation⁵⁹ 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).

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 twofold:

- 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 administrative burden at EU level.

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 months⁶⁰). We refer to the two-pager in which the concrete example of dispute resolution mechanisms in ECS markets is presented (Annex II).

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. The above-mentioned common set of competences already existing in national authorities will be very valuable for a successful implementation of the regulation.

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

⁵⁸ Recital 39 of the DMA proposal

⁵⁹ 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)

⁶⁰ Up to six months under exceptional circumstances in some countries

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 EU competent authority 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.⁶¹

BEREC considers it preferable that such support is provided by independent authorities.⁶² 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 procedure, 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 advisory body role would consist in 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 opinion⁶³ within the integrated advisory body.

Such advisory body would best serve as a policy-oriented entity supporting the EU competent authority e.g. with regard to the definition of enforcement priorities or the review of provisions to keep up with the development of the digital environment but also in relation to specific economic, technical and regulatory matters. It could for example provide valuable support for the correct implementation of remedies (in particular in their technical dimensions) or similar questions that require already-existing skills, and a more in-depth knowledge of the sector, which would be built in their daily monitoring and data-gathering activities. Moreover, this advisory body 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.

BEREC would like to highlight that this proposed structure for cooperation is one of several viable alternatives. However, BEREC considers that a strengthened involvement of relevant NIAs should be a key pillar for any envisioned cooperation mechanism with the national level.

⁶¹ 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.

⁶² 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"

⁶³ Similar to the procedures in the ECS-framework where BEREC opinions are issued following phase II cases according to Article 33 of the EECC.

10. CONCLUSIONS

BEREC considers that the DMA proposal by the EC is a good starting point for the discussions by the different institutions involved in its final configuration. To contribute to the debate, this report puts forward 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 supports the notion of core platform services (CPS) which is very similar to the model of “Areas of Business” that BEREC developed in its response to the public consultations on the DSA Package and the NCT. Concerning the list of CPSs, BEREC agrees that this should not apply to markets related to electronic communications networks and services. Thus, under the current circumstances, BEREC believes that the inclusion of number-independent interpersonal communications service (NI-ICS) among the CPSs should be considered with caution, and will carry out a thorough analysis on the matter.

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 significant 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 criterion to consider when designating gatekeepers and 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 competition), ii) the inclusion of additional measures supporting intra-platform competition, as well as 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 proposed to detail i) obligations which should directly apply to all gatekeepers across all CPSs, without any adaptation and ii) directly-applicable obligations only applying to 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 some flexibility in the design of the regulatory measures is also needed. For highly-complex regulatory measures, that are usually more intrusive, the regulatory framework should be complemented with remedies to be tailored on a case-by-case basis in order to be fit for purpose.

Thus, 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 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 EU competent authority 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 central 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 can file complaints. Furthermore, BEREC is of the opinion that, given the large amount of business users involved, 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 NIAs can be very valuable. In particular, NIAs could be responsible for e.g. 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 EU authority 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 EU competent authority.

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 plans to engage 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 will also further develop the dialogue with other regulatory networks such as ERGA, the EDPB, the ERGP or 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.

In this line, BEREC is also planning to organise workshops on issues like market entry and enforcement, that are key to ensure a successful implementation of the DMA.

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 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 will further develop on its proposals for 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 ecosystem effects, including bundling and tying of services, considering their great relevance of 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 value chain. This ambitious work, although not strictly focused on digital platforms, that are also part of the value chain, 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 value chain 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 input from stakeholders on aspects not already considered and where BEREC could provide valuable input based on its experience.

ANNEX I: TWO-PAGER ON EFFECTIVE DEFINITION OF MEASURES

How to guarantee an effective intervention through specifications and continuous dialogue

A case for technical obligations design

For regulatory interventions **to be as effective as possible, provisions, obligations and tailored remedies need to be detailed and specified**. This is particularly true in highly technical environments, which is the case in the complex digital environment that the Digital Markets Act proposes to address. This can only be done efficiently by ensuring regular interaction with all relevant stakeholders. This involves not only the regulated actors, but **also other market players** (e.g., potential or effective competitors and business users in the first place, as well as consumer associations, and civil society) in order to benefit from a larger and more objective variety of data and information which can be compared and assessed. This regulatory dialogue can take **several forms** such as **information and data collection** by the regulator, participation in **dedicated fora**, and committees with e.g., technical experts, **public consultations**, and so on.

Specifying some obligations to reinforce the DMA's operability

The DMA proposal includes a rich set of obligations, some of which would be directly applicable with no further specification (Art. 5) and others which could be subject to further specification (Art. 6). Some of them, especially those requiring further technical specification, will need applying hands-on knowledge and concrete understanding of how such systems work. This is typically the case for obligations involving interoperability measures between applications and operating systems (Articles 6(c) and 6(f)), dynamic portability (Article 6(h)), and access to data (Article 6(i)). Moreover, **for more complex measures** such as interoperability and access, a **real tailoring based on a case-by-case assessment is necessary for the intervention to be effective**. A parallel can be drawn with some technical obligations that apply in the regulation framework for electronic communications services (ECS).

Technical remedies in ECS regulation

In the ECS sector, NRAs have been and are defining technical obligations and remedies to create the conditions for effective competition. The two-decade experience in this sector can be valuable to see how the technical specification of the regulatory intervention is done in practice.

Along with the objective of fostering interoperability, which is already set in the European Electronic Communications Code (EECC)⁶⁴, a variety of technical remedies have been effectively designed supported on a dialogue with all actors involved and based on detailed specifications:

- **Access** to the telecom physical network granted to service providers: electronic communications network providers give service providers access to parts of their networks which constitute a bottleneck to reach end-users;

⁶⁴ Cf. EECC, Article 61, Recitals 93 and 148.

- **Interconnection:** ECS providers give access to each other's networks in order to exchange information (e.g. voice, data) and allow end-to-end connectivity, including both physical interconnection and implementation of a set of protocols and procedures);
- **Number portability** among telephone network providers to the benefit of end-users and to encourage competition: it allows end-users to keep their phone number when switching providers, thereby reducing switching costs;
- Under specific conditions, **interoperability** between relevant providers of number-independent interpersonal communications services which reach a significant level of coverage and user uptake: the purpose is to ensure end-to-end connectivity among end-users.

To ensure the enforcement of those remedies, NRAs often set up and oversee permanent, regular or occasional **committees gathering stakeholders or experts to ensure the effectiveness and efficiency of the remedy**. Some remedies require a certain level of standardization e.g., on the technical conditions of access and interconnection, the exchange of information between players, and so on. Such standards can only be appropriately defined in a constructive dialogue between the regulator and the relevant stakeholders.

In some countries for instance, committees, chaired by the NRA and involving operators and when appropriate, local authorities, issue opinion 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 was actually imposed in voice termination markets.

This model of regulation allows the regulator to **identify issues quickly, and to intervene where necessary**. Furthermore, interactions with and among stakeholders is **essential for the application of the remedy** itself, by helping define standards where appropriate, or by contributing to designating the interfaces that should be opened, the technical specifications that should be disclosed, information that should be shared, the format to be used, procedures to follow, etc. Under certain circumstances, the regulator may also need to set up task-focused working group involving the different stakeholders.

ANNEX II: TWO-PAGER ON DISPUTE RESOLUTION

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

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.

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, irrespectively 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, Art. 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**⁶⁵. 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**.

A **similar approach**, properly adapted to the context of the digital services, 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.

⁶⁵ This would for example be the case of business users using premium rate phone numbers.

ANNEX III: TWO-PAGER ON NATIONAL SUPPORT

Assistance from national authorities for an effective enforcement

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. However, BEREC believes that for an effective regulatory enforcement the EU competent regulatory authority could rely on the expertise and support by National Independent Authorities (NIAs).

To this end, BEREC recommends that the advisory role of the Member States set out in the DMA, should be complemented with a specialised and independent assistance coming from NIAs. The experience with the institutional set-up and missions of national regulatory authorities (NRAs) within BEREC can provide a concrete example of how such harmonised coordination mechanisms could be put in place.

A continuous and more precise monitoring through constant dialogue

By continuously gathering relevant market information at the most appropriate scale (via general and standardised periodical data collection and through ad-hoc legal powers) and nourishing a dialogue with the stakeholders and civil society, NRAs reduce information asymmetries making them fit to serve the purpose of bringing benefits to businesses, consumers and society at large. Collected in a harmonised way, such relevant data are then consolidated and are key for monitoring markets at the EU level. A concrete example is the application of the international roaming EU regulation. In this context, NRAs collect information from relevant mobile operators by means of a predefined questionnaire designed by BEREC. Subsequently BEREC consolidates this information at EU-level view and shares this with the Commission via its international roaming benchmark data reports⁶⁶ twice a year.

A deep insight in the activities of stakeholders allows to adapt and tailor remedies

BEREC believes that NIAs could assist the Commission to improve the understanding and knowledge of the national contexts and specificities of different Member States.

NRAs design and monitor the enforcement of the roaming regulation (e.g., control if the roaming Fair Use Policy is correctly implemented) and fine-tune highly technical remedies in an effective and efficient way (e.g. retail & wholesale roaming guidelines).⁶⁷ They are also in charge of granting (or refusing) derogations, which allow operators to apply surcharges in very exceptional cases.

Proximity to the users leads to better complaints handling

⁶⁶ See for example BoR (20) 157 , “International Roaming BEREC Benchmark Data Report October 2019 - March 2020 & 2nd Western Balkan Roaming Report”, 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

⁶⁷ See for example BoR (17) 56, “BEREC Guidelines on Regulation (EU) No 531/2012, as amended by Regulation (EU) 2015/2120 and Commission Implementing Regulation (EU) 2016/2286 (Retail Roaming Guidelines)”, https://berec.europa.eu/eng/document_register/subject_matter/berec/regulatory_best_practices/guidelines/7005-berec-guidelines-on-regulation-eu-no-5312012-as-amended-by-regulation-eu-no-21202015-excluding-articles-3-4-and-5-on-wholesale-access-and-separate-sale-of-services

While the reach of digital gatekeepers is pan-European, most business users dealing with them are national SMEs – being this even more true for consumers. It is therefore likely that a high number of disputes will occur at national level that would need to be filed as soon as the regulation comes into force. For those businesses and consumers, it is crucial to benefit from a quick intervention of a skilled regulator, familiar with the market in question, without having to wait for the adoption of additional general rules. To ensure a timely and quick action, proximity of national regulators is a major advantage (e.g. language barriers do not occur), which is particularly important not to discourage e.g. SMEs to get in touch with the authorities.

In case of grievances by market operators, dispute resolution mechanisms are available to easily approach the NRA who is bound to find a settlement within a few months.

A technical expertise at EU level

The day-to-day actions (close monitoring, adaptation of remedies, complaints handling) highlighted above are examples of activities that should be elaborated and embedded in the DMA to give concrete shape to the overall framework the Commission has in mind.

BEREC believes there is room for a more comprehensive *structural* cooperation between the EU level and the Member States than what is foreseen in the currently proposed DMA. This could also lower the regulatory burden for the EU authority given the high number of actors potentially affected by the regulatory measures including business users and competing platforms. BEREC believes that the advisory role of Member States should be complemented with an independent and specialised advising role resulting from the coordination of NIAs via a technical independent advisory board.

With reference to the *ex ante* regulatory framework in the field of ECS, NRAs operating under the BEREC umbrella take care of the tasks as described above (information gathering, monitoring of compliance, etc.). As part of the BEREC procedures, topics are treated by specific and dedicated BEREC working groups in which experts from all European NRAs discuss - sometimes highly-technical - issues, exchange best practices. BEREC formulates guidelines and opinions (e.g. review of the roaming regulation, planned for 2021).⁶⁸

BEREC also points out that decisions deriving from this framework could also strongly benefit from taking into utmost account opinions by other leading European bodies dedicated to the enforcement of other relevant regulations (sector regulators, data protection, consumer protection, competition authorities and others - if applicable), in order not only to ensure full compliance with other EU law, but also to enlighten its own spectrum of actions.

⁶⁸ BoR (20) 96 , “BEREC Annual Reports for 2019”, See https://berec.europa.eu/eng/document_register/subject_matter/berec/annual_reports/9275-berec-annual-reports-for-2019

ANNEX IV: 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 measures⁶⁹ and regulations⁷⁰ 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 obligations⁷¹ it will impose in order to reach and reconcile these 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,

⁶⁹ E.g. *Interim* measures as enforced in *ex post* competition law

⁷⁰ E.g. Platform-to-Business Regulation

⁷¹ 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.

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 (BEREC⁷²) and supervised by the European Commission (EC).** BEREC is able to advise 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)⁷³, the Open Internet Regulation⁷⁴, and the Roaming Regulation⁷⁵. 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.

⁷² The Body of European Regulators for Electronic Communications

⁷³ 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)

⁷⁴ 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)

⁷⁵ 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)

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.⁷⁶

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 least⁷⁷ 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 (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 EEC) and include obligations such as transparency, non-discrimination, accounting separation, compulsory access or price control**. Other types of remedies can

⁷⁶ 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

⁷⁷ They can be revised earlier if the market changed significantly

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 2002⁷⁸, 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

⁷⁸ 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.

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 regulation⁷⁹, 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.

⁷⁹ 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)