

**For a swift, effective and future-proof
regulatory intervention:
BEREC Opinion on the
European Commission's proposal
for a Digital Markets Act**

11 March, 2021

Overview

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.** In September 2020, BEREC shared its opinion on the DSA Package and the NCT public consultations¹, and a report on the *ex ante* regulation of digital gatekeepers is further detailing BEREC’s proposals².

While providing innovative services benefiting a large number of users and businesses, some digital platforms have been increasingly acting as gatekeepers with business users and end-users³, and as gateways to an overarching variety of goods, services and information, as well as to inputs and assets which are essential for the digital markets to thrive. BEREC welcomes the ***ex ante* asymmetric regulatory intervention towards these digital gatekeepers which 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.**

For any regulatory intervention to truly reach its objectives, **appropriate regulatory measures and enforcement are key.** In this line, BEREC puts forward a number of key proposals for a **swift, effective and future-proof regulatory intervention** aiming to:

- Create a framework to build **sound knowledge and detailed understanding** of the business models and technicalities of the sector(s),
- Ensure a **constant regulatory dialogue and repeated interactions with all types of relevant stakeholders,**
- Include – along with the directly-applicable obligations – **remedies to be tailored on a case-by-case basis,** for highly-technical, detailed and more intrusive measures,
- **Set up a dispute resolution mechanism** to minimise negative effects on competition and innovation,

¹ 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

² 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 . The report is open for public consultation until 4 May 2021 on BEREC website https://berec.europa.eu/eng/document_register/subject_matter/berec/public_consultations/9878-notice-for-the-launch-of-the-public-consultation-on-the-draft-berec-report-on-the-ex-ante-regulation-of-digital-gatekeepers

³ 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) EEC where “end-user” means a user not providing public electronic communications networks or publicly available electronic communications services.

- **Avoid overlaps with existing regulatory frameworks** on issues regarding number-independent interpersonal communication services, and
- **Establish an Advisory Board of National Independent Authorities to support the EU competent authority** in the effective enforcement of the regulation.

1. Scope and Objectives

1.1. Scope: digital gatekeepers & core platform services

BEREC welcomes an **asymmetric ex ante regulatory intervention** targeting specific digital gatekeepers in predefined Core Platform Services (CPS). BEREC also supports the swift and direct designation of gatekeepers by means of quantitative thresholds, to be complemented by a qualitative in-depth assessment when necessary. BEREC considers that such qualitative criteria could also be used for the identification of potential national gatekeepers within the EU framework.

Concerning the gatekeepers' features, BEREC believes that the platform's gatekeeping role can also be strengthened by being part of an **ecosystem** if it allows it to leverage its power onto additional services, or to have privileged/exclusive access to key inputs/assets further raising barriers to entry or expansion. This criterion could be explicitly considered in the relevant articles of the DMA regulation concerning the designation of gatekeepers and the corresponding regulatory measures, when appropriate.

As for the **scope of the intervention**, BEREC agrees that the DMA should not apply to markets related to electronic communications networks and services that are regulated under the European Electronic Communications Code (EECC). 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. NI-ICSs are already regulated under the EECC which aims at promoting competition, developing the internal market and protecting end-users' rights. Any legal overlap with the EECC should be avoided in order to ensure regulatory certainty for market players and consumers.

1.2. Objectives

BEREC strongly supports the DMA objective to ensure fair and contestable digital environments.

To create fair markets, the regulatory intervention will have to rebalance the relationships of the gatekeeper with its business users and end-users. While this is partly addressed by the current DMA proposal, BEREC considers that the gatekeeper's ability and potential incentives to limit business users' faculty to provide specific services and products should be more extensively addressed over the different CPSs.

To promote contestability, the DMA needs to establish a framework that enables and facilitates the potential for competitors to provide a CPS and/or expand over several CPSs.

To this end, regulatory measures such as interoperability, data portability and access to essential inputs/assets, such as relevant data, will be key. BEREC believes that such measures should be reinforced and/or extended to more CPSs than initially envisaged in the DMA proposal, and, most importantly, appropriately designed and tailored in order to be effective, proportionate and to create conditions for innovators and potential competitors to arise.

Moreover, ensuring an open access to information and digital services offered or intermediated by the gatekeepers is crucial. Since 2015⁴, BEREC members must ensure that the (access to the) Internet provided by electronic communications operators remains open, i.e. that users can access and distribute information and content, as well as use and provide applications and services of their choice. While under the Open Internet Regulation, the regulatory intervention is focused on the network layers (including also free choice of user equipment), 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. BEREC believes that the regulatory measures on specific digital platforms should ensure that **digital environments remain open** and develop as an engine of innovation, that users are sufficiently empowered and that their ability to access and/or provide content and applications is not hampered on the upper layers where these digital platforms operate.

In light of its experience in regulating highly-technical electronic communications markets, **BEREC believes that the DMA objectives can only be reached within a sound and enforceable regulatory framework**, as presented here below.

2. Enforcement: for a swift, effective and future-proof regulatory intervention

2.1. Continuous knowledge-building and regulatory dialogue

For any regulatory intervention to be effective, **sound knowledge and detailed understanding of the business models and technicalities of the sector(s) are crucial**. This is particularly true in highly-technical and fast-evolving sectors with significant information asymmetries. The DMA will have to provide an appropriate regulatory enforcement framework, capabilities, resources and tools in order to build such expertise.

Along with strong information gathering mechanisms, BEREC believes that knowledge should also be built and fostered through a **continuous regulatory dialogue and repeated interactions with all kinds of relevant potential stakeholders**, including the identified gatekeepers, business users, potential competitors, providers of complementary services, consumers associations and civil society. The DMA is currently only explicitly mentioning the dialogue with the concerned gatekeepers, without clear reference when it comes to other stakeholders. A more encompassing regulatory dialogue and interactions would contribute to comprehensive and more effective application of specific regulatory measures

⁴ Adoption of the Open Internet Regulation; Regulation (EU) 2015/2120

For instance, in the electronic communications sector, national regulatory authorities (NRAs) have set up, overseen and participated in **technical committees with stakeholders and/or experts** to collect relevant information needed to ensure an effective and efficient design of their intervention. A typical example is the implementation of number portability, a remedy which has proven to be successful in reducing end-users' switching costs among different providers and fostering competition on the merits. In order to correctly design this remedy, NRAs gathered experts' technical inputs by organising specific fora with stakeholders (e.g. operators and equipment vendors). It should however be stressed that, while such exchanges are key for an effective regulatory intervention in any market, they only pertain to information gathering and knowledge-building. The ultimate decisions about the design and enforcement of the measures must solely remain in the hands of the independent regulatory authority.

2.2. Swift and effective: directly-applicable obligations

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 gatekeeper practices which are considered to be detrimental.

Nevertheless, to ensure regulatory certainty and predictability, BEREC believes that the **scope of the application of such obligations should be further clarified**. To this end, BEREC proposes to detail in the regulation:

- First, a set of directly-applicable obligations which should directly apply to *all* gatekeepers across all CPSs, without any adaptation. An example of such an obligation is the transparency of terms and conditions towards business users and end-users;
- Second, a set of directly-applicable obligations only applying to gatekeeper(s) in a particular CPS. In the definition of such obligations, the specificities and technicalities of the CPS would be appropriately considered and integrated, allowing for a direct implementation. Examples of such obligations are prohibiting certain types of discrimination, prohibition of certain types of tying and bundling, and facilitating data portability. Based on BEREC experience in the electronic communications sector, it is key to adjust such measures to the context in which they are applied.

2.3. Proportionate and future-proof: tailored remedies

While directly-applicable obligations in the DMA are necessary, they are mainly built around practices that have already been identified or investigated by the EC and other competent authorities. This approach may thus prove to be too backward-looking: digital environments evolve quickly, and new concerns are likely to arise at the same pace. In order to correctly address them, flexibility in the design of the regulatory measures is also needed.

For complex regulatory measures, that are usually also more intrusive, the intervention should be appropriately tailored in order to be effective and proportionate. Along with the directly-applicable obligations, BEREC believes that the regulatory framework for digital gatekeepers should be complemented with the mandate to design remedies that should be tailored on a case-by-case basis in order to be fit for purpose.

Indeed, regulatory intervention in technology-intensive markets heavily relies on highly-detailed specifications in order to be concretely applicable. On top of this, the proportionality of some intrusive measures needs to be assessed to make sure that the gatekeeper's incentives to innovate are not hindered, and that the optimum level of intervention is reached. It is the task of the competent regulator to correctly define the remedy and find the appropriate balance between the benefits and the potential costs of the intervention. Examples of such measures include interoperability, access remedies, as well as specific non-discrimination and pricing remedies.

Similarly to other sectoral regulatory frameworks, BEREC strongly supports the addition of clear *ex ante* principles and objectives to the DMA proposal and of the ability for the EU competent authority to design the appropriate remedies to reach them.

2.4. Enforcement and monitoring

NRAs do *not only* define and enforce rules, but also have the ability and expertise to continuously monitor their effective application and compliance. They systematically collect information from market players concerning e.g. prices, coverage, quality of service, financial information, and use of regulated wholesale inputs. Such data are essential to assess the effectiveness of the intervention, fine-tune it when necessary, ensure its compliance and anticipate market evolutions and potential concerns. Like NRAs who rely on data collection (including crowdsourcing), analysis and publication to support their monitoring activities, the DMA should provide the (EU and national) competent authorities with the appropriate mandate to collect relevant data from gatekeepers and market players, to **continuously and actively monitor the digital services.**

In this line, BEREC supports a **data and fact-driven regulatory approach** and believes that the regulatory toolbox should include specific tools aimed at enhancing some types of information sharing (in compliance with legislations concerning data protection, competition law and business confidentiality in particular) with relevant stakeholders, such as the gatekeepers, potential competitors, business and end-users, as well as citizens, in order to **empower all of them to make well-informed decisions** and thus create fair, contestable and open digital environments.

2.5. Dispute resolution mechanism

BEREC agrees with the Commission's stance 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*"⁵.

In this line, **BEREC considers that it is essential to include a dispute resolution mechanism** in the DMA proposal.

⁵Recital 39 of the "Proposal for a regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act)" - COM/2020/842

Experience over two decades in the electronic communications sector has proven that such mechanisms are key to quickly solve grievances by business and end-users. Disputes can concern complex cases (e.g. prices, denial of access, or details on interfaces) for which NRAs must issue a binding decision within a very short timeframe (in general, up to four months) to solve them. **Swiftness, 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** are the key principles of effective dispute resolution mechanisms. Moreover, relevant information collected in the framework of such processes contributes to increasing knowledge of the market and the effectiveness of remedies and thus reducing information asymmetries. Decisions on specific cases can also help to prevent future misbehaviours and contribute to fairer markets.

The strong experience built in the electronic communications sector could inspire the establishment of similar mechanisms in the DMA, including disputes affecting more than one Member State⁶, as well as the sound national expertise on which the EU competent authority can rely on.

3. National expertise to support the EU intervention

Given the pan-European reach of the main digital gatekeepers, BEREC considers that the implementation and enforcement of the DMA should be at the EU level.

BEREC agrees that the *“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”*⁷ will be crucial and believes that this stance should be further reflected in the DMA regulation.

Implementing the regulation involves a wide variety of tasks, which require both sound expertise and appropriate resources. BEREC believes that the EU competent authority should rely on the valuable experience of National Independent Authorities (NIAs)⁸. In particular, **NIAs could support the EU authority with:**

- **Gathering of relevant national data**, i.e. collecting information from national actors (such as national business and end-users or competing platforms) in a harmonised manner, which would be aggregated to obtain a pan-European view, as it is done by the BEREC members (e.g. on the international roaming market);
- **Continuous monitoring of national markets and of compliance with the regulatory measures**: Digital gatekeepers interact with a large number of small and medium businesses which are predominantly national. The interactions and dialogue

⁶ Also addressed in the electronic communications sector via BEREC.

⁷ 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

⁸ The activities listed below (data collection, continuous monitoring, complaints and disputes handling) as well as remedies design are part of the everyday work of national regulatory authorities in the electronic communications sector. Very valuable and complementary experience can also be provided by authorities dealing with e.g. data protection, *ex post* competition law enforcement, the enforcement of the Platform-to-Business regulation, media regulation and consumer protection.

with these smaller business users will help monitoring market evolutions and complement the knowledge of the sectors;

- **Information and complaints desk:** NIAs can establish a dedicated information and complaints desk in each Member State. This would help lowering the barriers for business users and end-users to find relevant information about the regulation and to file complaints;
- **Dispute resolution for many cases.** 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.

To coordinate and harmonise the national support of the NIAs, BEREC believes that the setting of an independent Advisory Board of NIAs would more efficiently support the EU regulator with the tasks listed above. This Board would provide technical, independent expertise and guidance, thus contributing to an effective enforcement of the regulation for the benefit of businesses, consumers and society at large.