Body of European Regulators for Electronic Communications

BEREC

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

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

The DMA is proposing a list of obligations aiming at ensuring fair and contestable markets. Directly-applicable obligations provided apply to every *Core Platform Service* (CPS)[1] and are intended to make swift regulatory action possible. However, this approach has shortcomings both procedure-wise and content-wise (see below for details). Thus, BEREC believes that, in addition to directly-applicable obligations, *ex ante* principles and a set of remedies ("toolbox") could be included in the DMA proposal, and give the European Commission (EC) as the EU competent body the possibility to tailor them to reach the objective of the regulation. Moreover, BEREC also considers that, irrespective of its proposal on remedies tailoring other interested third parties, such as business users or alternative platforms, should be properly involved in the process to ensure transparency and fairness. This paper presents the rationale for this proposal and enforcement options, building on previous BEREC documents. [2]

Why there is a need for remedies-tailoring

Directly-applicable obligations are static and thus may not be future-proof, whereas regulation should be forward-looking, in particular in rapidly evolving markets. The possibility to update the obligations as designed in the DMA proposal is too lengthy to be able to keep pace with these developments[3] whereas the principles-based approach followed in the electronic communication sector allows the analysis, adoption and full implementation of the measures to appropriately reach the objectives faster (as shown below). Moreover, according to Article 10 of the DMA proposal, the update of the obligations is restricted to "new obligations addressing practices that limit the contestability of CPSs or are unfair *in the same way* as the practices addressed by the obligations laid down in Articles 5 and 6" of the DMA. This would mean that the list of obligations in the DMA would already need to cover all potentially detrimental practices, without the possibility for the EC to actually address *new* ones by means of an update. Thus, the DMA constrains the possibility to address unforeseen practices of the

[1] Identified pursuant to Article 3(7) of the DMA proposal.

[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.

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

previously defined types, newly emerging issues and, more generally, issues which may not be effectively addressed by the directly-applicable obligations.

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

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

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

How remedies-tailoring could be done

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

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

a) a set of ex-ante general principles,

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

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

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

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

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

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

- transparency (usually an obligation to publish a reference offer);

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

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

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

Remedies-tailoring in the context of the DMA

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

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

Directly-applicable obligations may initially be *applied* faster, since there would be no interactions with the stakeholders and no further analysis on how to tailor them to ensure effectiveness and proportionality. However, the enforcement discussions with the gatekeeper would be lengthy and not transparent vis-à-vis the stakeholders, *e.g.* gatekeeper, competitors and business users. Also, for certain measures, information gathering and structured input from stakeholders (via public consultation and other types of regulatory dialogue), which would benefit from the obligations placed on the gatekeeper, on the initial specification of these obligations is key to ensure future effectiveness. Thus, direct obligations may be applied fast, but there is a significant risk to be ineffective, and need a further intervention which would finally take longer.

In comparison, tailored remedies adapted to the specific situation from the outset may enter into force later than directly-applicable obligations, but would be more effective, since they

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

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

In this line, one key in which DMA regulation could benefit most from the experience of NRAs and BEREC is transparency: i) transparency of the process of developing regulation and ii) transparency as a remedy itself (Art. 69 EECC and above).The first is achieved with formal public consultations of draft decisions, letting all interested parties share their views and the latter is the concept of a reference offer as a tool which forms some basic clear rules and requirements of contracts, that can be checked for compliance in an objective way. For details regarding the elements of a reference offer we refer to the BEREC Guidelines on the minimum criteria for a reference offer[4]. These Guidelines provide NRAs with further principles on how to tailor the remedy of transparency.

Given the advantages of tailoring remedies BEREC proposes to introduce a new article in the DMA on “Tailoring remedies”. This article would give the EC the power to carry out a market investigation with the purpose of assessing whether the obligations as applied according to Articles 5 and 6 are insufficient to reach the objective of ensuring contestable and fair digital markets. In this case, the EC would have the power to tailor and impose additional remedies, whether behavioural or, when appropriate, structural, which would be applied following the principle of proportionality. This provision aims to ensure that the Regulation remains future-proof by giving the EC, from the outset, the power to carry out an assessment and adjust its regulatory intervention to address practices, which cannot be currently foreseen but which may have significant negative impact on the digital environment where gatekeepers are active.

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

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

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

The EC should be in charge of tailoring of remedies. Tailoring requires not only extensive assessment of competition problems, but also knowledge on the economic, technical and legal impacts of remedies on contestability and fairness. This analysis needs systematic and continuous data collection and monitoring. This is essential in regulated markets, where by means of objective, structured and easily-comparable data, the effects and effectiveness of an intervention can be measured and adapted when necessary. For the resource-consuming work of data gathering and market monitoring, BEREC proposes that national independent authorities should assist the EC, providing national data that can be especially useful for business users based in individual Member States.[5] In BEREC's view, such assistance to the EC shall be provided in the context of an Advisory Board, where NIAs shall cooperate among them on digital matters for the sake of consistency (see BEREC paper BoR (21) 93 as concerns the tasks and composition of such Board).

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

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

Due process

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

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

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

Value of the experience from NRAs and BEREC

NRAs have a long experience of tailoring effective and proportionate remedies as well as consulting with stakeholders, keeping electronic communication markets competitive and contestable. NRAs are familiar with such technical and data-driven regulation[6] and BEREC considers that this experience is particularly relevant in digital markets. With respect to this matter, we refer to the experience of BEREC, for example, in the ongoing work on data collection from OTT players (i.e. formulating guidelines on harmonized indicators for data collection at national level from such players, mainly NI-ICS and video-streaming services)[7] or the international roaming benchmark data reports.[8] BEREC already fosters the European harmonisation of the interpretation, design and enforcement and monitoring of regulation and therefore remedies e.g. by (1) developing and disseminating among NRAs regulatory best practices, such as common approaches, methodologies or guidelines, (2) providing assistance to NRAs on regulatory issues (3) delivering opinions on the draft decisions, recommendations and guidelines of the Commission (4) issuing reports and providing advice and opinions to the European Parliament and the Council.

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

[7] 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

[8] 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