

# **BEREC Response to the Public Consultations on the Digital Services Act Package and the New Competition Tool**

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## EXECUTIVE SUMMARY

BEREC welcomes the public consultations of the European Commission (EC) on the Digital Services Act (DSA) and the New Competition Tool (NCT) which address important regulatory issues to be considered when regulating digital platforms (DPs). Finding a regulatory approach which ensures the right balance between flexibility, predictability and proportionality will be key, given the increasing importance of DPs and their role in the economy and society at large, both now and in the years to come.

There is a broad acknowledgment of the benefits brought about by DPs for innovation and consumers' choice. Through innovative business models, DPs have provided opportunities for small businesses and start-ups for access to and expansion into new markets across Europe. They have facilitated access for both business- and end-users to goods, services and data, and have provided a wide range of efficiencies by reducing transaction, search and distribution costs.

However, BEREC also recognises that there are increasing concerns over the entrenched power of some large DPs and the control they exert over an overarching variety of goods, services and information, as well as over inputs and assets which are crucial to fostering effective competition and innovation (e.g. data).

In order to address these concerns, BEREC considers that establishing a well-designed regulatory framework for DPs with Significant Intermediation Power (SIP) could allow for an efficient, proportionate, and predictable scheme for intervention.

It is important to stress that such ex-ante intervention would *not* be aimed at regulating all DPs, nor the internet as a whole, but at tackling specific concerns raised by DPs with SIP, in order to ensure that competition and innovation are encouraged, that end-users' rights are protected and that the digital environment is open and competitive.

The regulatory model presented by BEREC in its response to the DSA consultation should be considered as a first step on this path, a blue-print for a regulatory framework. BEREC aims to continue to contribute to the regulatory debate on DPs to further refine the details and to analyse the implications of its proposal. BEREC would like to stress its willingness to continue to work with the European institutions and other relevant stakeholders on this topic.

The regulatory challenges raised by DPs are not new to BEREC and have already been the subject of some recent reports, such as the *"BEREC report on the impact of premium content on ECS markets and the effect of devices on the open use of the Internet"* (BoR (18) 35)<sup>1</sup> where BEREC addressed issues concerning, among others, app stores, and the *"BEREC Report on the Data Economy"* (BoR (19) 106).<sup>2</sup> Furthermore, BEREC is currently working on a report on the economic analysis of digital platforms and has commissioned an external study on consumer behaviour towards DPs as a means for communication, both to be published in 2021.

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<sup>1</sup> Available at [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](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)

<sup>2</sup> Available at [https://berec.europa.eu/eng/document\\_register/subject\\_matter/berec/reports/8599-berec-report-on-the-data-economy](https://berec.europa.eu/eng/document_register/subject_matter/berec/reports/8599-berec-report-on-the-data-economy)

### BEREC response to the public consultation on the DSA Package

Throughout its response, BEREC focuses on the challenges and concerns raised by large *digital* platforms (rather than just “online” platforms), to also take account of the issues related to platforms not strictly providing online services, but which may still control and influence access to them.<sup>3</sup>

BEREC identifies both structural and behavioural concerns that can have negative effects on competition dynamics, users and society at large.

As for the structural issues, BEREC recognises that the control of some large DPs over a digital bottleneck and/or key inputs/assets provides them with SIP and therefore the ability to behave independently from their users (business users but also consumers), regardless of their behaviour. The fact that such DPs with SIP may represent an *unavoidable* gateway to access a wide variety of services on the Internet, or to reach other users, raises concerns as to their effect, even beyond their area(s) of business, on competition, innovation as well as users’ freedom of choice.

As for the behavioural concerns, BEREC identifies unfair practices which DPs with SIP have the ability and may have the incentive to engage in (e.g. *inter alia*, unfair denial of access to essential inputs/assets, refusal of proportionate interoperability, imposing unreasonable terms and conditions, etc. which become even more relevant in the context of ecosystems), and which should be prevented *ex ante*, given the potentially irreversible effects on competition (including the development of new services or ecosystems), innovation and users’ choice.

In order to address these concerns, BEREC recommends adopting a dedicated *ex-ante* regulatory framework, adapted to the specificities of the digital environment, for several reasons.

First of all, some of the identified concerns result from structural features, which should be addressed independently of any (potentially) unfair behaviour by the DP with SIP. In some circumstances, conditions for effective competition need to be created, or at least facilitated, in order to achieve efficient outcomes. *Ex-ante* asymmetric regulation, supported by an efficient regulatory toolbox, has proven to be effective to foster competition and contestability.

Secondly, an *ex-ante* regulatory framework is better suited to pursue a variety of different objectives which are not only competition-related but have a positive impact on users, the internal market and society at large. Along with fostering competition, pursuing multiple objectives – such as supporting an open internet or achieving the European internal market – within a single regulatory framework would ensure a more comprehensive and consistent intervention.

Thirdly, the difficulties in applying the current *ex-post* analytical framework and enforcement tools (e.g. defining relevant markets, need for recurring interventions to address structural issues, lengthy intervention procedures to tackle abusive practices in fast-evolving environments,) call for a different approach. A streamlined *ex-ante* intervention,

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<sup>3</sup> E.g. operating systems

complementing the current ex post intervention, appears to be more efficient for consistently solving competition problems in fast-moving digital environments.

Finally, a coherent regulatory framework would imply repeated interactions both with DPs with SIP and other stakeholders (business users, other relevant authorities, consumer associations, civil society representatives, etc.), allowing for an effective definition, implementation and monitoring of remedies, for reducing information asymmetries, as well as for adjusting the regulatory intervention to relevant developments.

BEREC and its members have considerable experience in applying ex-ante regulation in the sector for electronic communications services (ECS) to address structural competition problems, as well as broader societal concerns (e.g. open internet). Building on this, BEREC considers that its expertise can contribute to effectively designing a new dedicated regulatory model for DPs with SIP, for the benefit of European citizens and businesses.

BEREC proposes a streamlined process to identify the DPs with SIP and a model for ex-ante asymmetric regulation towards them.

First of all, BEREC recommends that specific Area(s) of Business (AoB – e.g., app stores, online search, OSs, voice assistants) should be defined. Such AoBs would be characterised, *inter alia*, by strong direct and indirect network effects, significant economies of scale and scope, barriers to entry and expansion, and high switching costs. The list of AoBs would allow for differentiating among services and set relevant corresponding thresholds (see below).

DPs with SIP would typically be active in one or more AoB(s) and would be identified based on a combination of criteria:

- First of all, the control over a digital bottleneck (i.e. over a gateway for which there is no relevant substitute) for a large amount of end-users, and/or being an unavoidable trading partner for a large amount of business users. This would result in controlling users' access to: (i) a relevant amount of services, goods and/or content, or (ii) the digital space where users share, sell or exchange services/goods/content; or (iii) another group of users; and/or (iv) key inputs or assets which are essential for competitors or providers of complementary services.

Moreover, the SIP can be strengthened by

- Strong financial resources and/or easy or privileged access to capital markets,
- The DP's organisation into an ecosystem allowing it to leverage its power onto additional services/businesses, and/or to have privileged or exclusive access to key inputs/assets from its different businesses, thus contributing to raising barriers to entry or expansion (e.g. by accumulation of data).

BEREC recognises the need to ensure swift intervention and regulatory predictability. To this end, the main identification process relies on a direct identification of DPs with SIP by means of reasonable and easily-observable absolute thresholds for each AoB (e.g. revenues, number of unique users, etc.) in order to quickly identify the large DPs who are legally presumed to have SIP without any further assessment by the competent body. The list of AoBs, the structural and specific criteria to assess the DP's SIP, as well as the absolute

thresholds for direct identification would be defined in (an) EU-level act(s) which should be regularly revised.

BEREC also recognises that some DPs active in one/some specific AoB(s) and presenting a combination of relevant structural and specific features, may not be large enough to meet the absolute thresholds set for distinctive AoB, but still be in a position to *de facto* exert a SIP. In order to tackle this SIP and as far as it is deemed strictly necessary to address the identified concerns, BEREC proposes an optional identification process in which the competent body may conduct individual SIP assessments *ex officio* or intervene based on complaints.

Irrespective of the identification process (direct or optional), all DPs with SIP should be subject to an asymmetric regulatory intervention consisting of (i) principle-based obligations and prohibitions (e.g. transparency and non-discrimination among business users, i.e. Option 3a of the DSA inception impact assessment), and, (ii) tailored and proportionate remedies when necessary (depending on the nature and the level of issues at stake, such remedies could include access to essential inputs and/or assets, e.g. some level of services interoperability through the use of open APIs or open standards and data portability). This would correspond to Option 3b of the DSA inception impact assessment.

Moreover, in order to be effective, BEREC supports a data-driven regulatory approach and believes that the regulatory toolbox should include specific tools aimed at enhancing information gathering and sharing with relevant stakeholders, in compliance with legislations concerning data protection and business confidentiality.

Finally, BEREC also makes an initial proposal for a potential governance model to implement the ex-ante regulatory intervention towards DPs with SIP.

First of all, there are number of important features which any regulatory authority with responsibility for regulating DPs with SIP should benefit from. Regulatory authorities should be independent, have relevant expertise in relation to ex-ante regulation and the ability to encompass multiple perspectives (i.e. technical, economic, legal, accounting and end-users' rights).

Moreover, in BEREC's view, the geographical scope (pan-EU, regional, meaning several EU countries, or national) of the concerns raised by DPs should determine which regulatory body/bodies is/are involved in defining the regulatory measures, as well as their enforcement. BEREC believes that there is a need for a specific regulatory authority at the European level, collaborating with a strong network of regulatory authorities represented in an Advisory Body. This would ensure a harmonised implementation of the regulatory framework for DPs with SIP.

The BEREC cooperation framework can be considered as a well-functioning reference model. BEREC and its member NRAs are well placed to effectively take on the roles of the Advisory Board and the National Regulatory Bodies as presented in the proposed institutional design. This would have the advantage of building on their valuable ex ante-experience and structure and would allow for a faster institutional set-up.

This being said, even though BEREC considers the proposed institutional design as a fully efficient option, this is one possible governance model among others. Irrespective of whether

the suggested model is adopted, BEREC believes that its proposed ex-ante regulatory framework for intervention (SIP assessment, the dedicated rules and tailored remedies) remains well-suited to address the identified concerns.

#### BEREC response to the public consultation on the NCT

Regarding the public consultation on the NCT, BEREC focuses on its interplay with the existing ECS regulatory framework, which has been successfully applied by BEREC members for over twenty years, as well as the interplay with the proposed ex-ante regulatory framework for DPs with SIP.

BEREC stresses that the ex-ante regulatory framework for ECS is already addressing most structural competition issues, as well as reaching a variety of broader objectives. The NCT, if implemented by the competent regulatory authority, could potentially serve as a complementary tool in exceptional cases not currently addressed by sectoral regulation. Nevertheless, attention should be paid to potential overlap between the ECS framework and the NCT since this could raise legal uncertainty and have serious implications for investments in a dynamic and competitive sector. In order to address this potential overlap, and following the principle of *lex specialis*, the regulatory framework for ECS should be the applicable legislation.

Moreover, BEREC believes that, given its two-decade experience in the sector, ECS regulatory authorities are in the best position (as they are already doing so) to carry out an analysis aimed at identifying structural competition concerns in the ECS markets which are not addressed by the current regulatory framework. If the need for further regulatory intervention is identified in this sector, then NRAs should be empowered with appropriate, necessary tools and competences in order to ensure an effective and consistent implementation of the sectoral regulatory framework. This could be done by a revision of the existing framework or by assigning the power of applying the NCT in the ECS sector to the competent NRAs, in order to avoid an overlap in competences between different authorities.

Similarly, the regulatory model for DPs with SIP proposed by BEREC is also designed to, *inter alia*, address structural and competition concerns in digital environments. Therefore, BEREC believes that the challenges identified in these environments could only be effectively targeted by an ex-ante intervention within a specific, consistent regulatory framework, rather than by a general-purpose ex-ante tool (e.g. NCT), which may not reach the same objective(s).

#### Final remarks

Finally, BEREC would like to stress its willingness to further build on the stable cooperation with the EC, and to continue to work with the European institutions and other relevant stakeholders on this topic.

BEREC is also currently working on a report on DPs which will develop the suggested ex-ante approach regarding DPs with SIP in further details. As always, any input from the European institutions and relevant stakeholders on BEREC's work in this topic will be welcome, and BEREC would also welcome the opportunity to share its experience and expertise.

## INTRODUCTION

BEREC welcomes the public consultations by the European Commission (EC) on the Digital Services Act (DSA) Package<sup>4</sup> and the New Competition Tool (NCT)<sup>5</sup> which address some of the key issues to be considered when regulating digital platforms (DPs)<sup>6</sup>.

BEREC recognises the benefits brought about by DPs for innovation and consumers' choice. DPs have created and/or enabled innovative business models, and have also provided opportunities for small businesses and start-ups for access and expansion in new markets across Europe. They have facilitated access by both business and end-users to goods, services and information, and provided a wide range of efficiencies by reducing transaction, search and distribution costs.

However, BEREC also recognises that there are increasing concerns over the entrenched power of large DPs and the control they exert over an overarching variety of goods, services, data and information, as well as over inputs and assets which are crucial to fostering effective competition and innovation.

BEREC and its members have a long and considerable experience in applying ex-ante regulation in the ECS sector to address structural competition problems, as well as certain societal concerns. Building on this, BEREC considers that its expertise can contribute to effectively designing a regulatory model for intervention towards DPs with SIP.

BEREC considers that establishing a specialised regulatory framework for DPs with Significant Intermediation Power (SIP) could allow for a well-designed, proportionate, and predictable scheme for intervention. Such ex-ante intervention would *not* be aimed at regulating the digital sector, nor the Internet as a whole, but at tackling specific concerns raised by DPs with SIP, in order to ensure that competition and innovation are encouraged, that end-users' rights are protected, and that the digital related environment is open and competitive.

The present document is structured as follows:

In *Section 1*, BEREC presents its views on some selected questions of the Public Consultation on the DSA Package, and proposes a model for intervention towards DPs with SIP.

In *Section 2*, BEREC presents its views on the New Competition Tool (NCT) and its interplay with both ECS regulation and the proposed regulatory framework for DPs with SIP.

The model proposed in *Section 1* is built on BEREC's experience gathered in ex-ante regulation in the ECS sector (that may be adjustable in many aspects to DPs), as well as on the insights and analyses on DPs carried out by some of its members in the last years. DPs and the digital economy have already been the subject of some recent BEREC reports, such

<sup>4</sup> <https://ec.europa.eu/digital-single-market/en/news/consultation-digital-services-act-package>

<sup>5</sup> <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12416-New-competition-tool/public-consultation>

<sup>6</sup> BEREC's response focuses on digital platforms (DPs), rather than online platforms, in order to also take account of the challenges raised by platforms not strictly providing online services but still controlling and influencing access to them, such as operating systems



as the “*BEREC report on the impact of premium content on ECS markets and the effect of devices on the open use of the Internet*” (BoR (18) 35)<sup>7</sup> where BEREC addressed issues concerning, among others, app stores, and the “*BEREC Report on the Data Economy*” (BoR (19) 106).<sup>8</sup>

BEREC is currently working on a report on DPs in which the outlined ex-ante framework will be elaborated and explained in further details. BEREC has also commissioned a study on consumer behaviour towards digital platforms as a means for communication, both to be published in 2021, and which will contribute to the understanding of DPs.

BEREC would like to stress its willingness to further build on the stable cooperation with the EC, and to continue to work with the European institutions and other relevant stakeholders on this topic. As always, any input from the European institutions and relevant stakeholders on BEREC’s work on this topic will be welcome, and BEREC would welcome the opportunity to share its experience and expertise.

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<sup>7</sup> Available at [https://bereg.europa.eu/eng/document\\_register/subject\\_matter/bereg/reports/8013-bereg-report-on-the-impact-of-premium-content-on-ecs-markets-and-the-effect-of-devices-on-the-open-use-of-the-internet](https://bereg.europa.eu/eng/document_register/subject_matter/bereg/reports/8013-bereg-report-on-the-impact-of-premium-content-on-ecs-markets-and-the-effect-of-devices-on-the-open-use-of-the-internet)

<sup>8</sup> Available at [https://bereg.europa.eu/eng/document\\_register/subject\\_matter/bereg/reports/8599-bereg-report-on-the-data-economy](https://bereg.europa.eu/eng/document_register/subject_matter/bereg/reports/8599-bereg-report-on-the-data-economy)

# 1. PUBLIC CONSULTATION ON THE DIGITAL SERVICES ACT PACKAGE

## Section III: What issues derive from the gatekeeper power of digital platforms?

### Main features of gatekeeper online platform companies and main relevant criteria for assessing their economic power

#### Question 2 (Section III; Main features of gatekeeper online platform companies and main relevant criteria for assessing their economic power)

Which characteristics are relevant in determining the gatekeeper role of large online platform companies?

In its response, BEREC will focus on digital platforms (DPs), rather than online platforms, to include platforms not strictly providing online services but which may still control and influence access to them (e.g. operating systems). BEREC considers that the “gatekeeper role” is not the only factor strengthening the power of large DPs. Given the main role of DPs as intermediary between several types of users (business users – including competitors and providers of complementary services – and end-users – mostly consumers), and between users and a variety of services/products, BEREC considers that DPs should be targeted based on their Significant Intermediation Power (SIP). Similarly to the assessment of significant market power in the ECS sector, SIP should be identified based on a combination of structural and specific criteria.

First of all, given the challenges in defining clear boundaries for relevant markets in which DPs operate, BEREC proposes to focus on the Area(s) of Business (AoB) in which DPs present structural/specific criteria. The list of AoBs should be laid down in (an) EU-level legal act(s) and should be subject to regular revision. An AoB could be e.g. e-commerce, app stores, online search, OS, voice assistants etc., and would be characterised by features such as:

- strong direct and indirect network effects,
- significant economies of scale and scope,
- significant barriers to entry and expansion relating to technical and/or legal aspects,
- high switching costs and/or consumer inertia.

Based on this, the identification of DPs with SIP would be based on a combination of structural and specific criteria, also defined in (an) EU-level legal act(s):

- First of all, the control over a digital bottleneck (for which there is no relevant substitute) for a large amount of end-users, and/or being an unavoidable trading partner for a large amount of business users. This would result in controlling users’ access:

- to services/goods/content; or to the digital space where users share, sell or exchange services/goods/content; or to another group of end-users, and/or
- to key inputs/assets which are essential in order to compete with the platform or to provide complementary services (e.g. non-replicable and essential usage data, or certain functionalities)

Moreover, the SIP can be strengthened by:

- Strong financial resources and/or easy or privileged access to capital markets,
- Being organised into an ecosystem allowing the DP to leverage its power onto additional services/businesses, and/or to have privileged/exclusive access to key inputs/assets from its different businesses, thus further raising barriers to entry or expansion (e.g. by accumulation of data).

BEREC considers that a combination of these criteria would provide some DPs with SIP and allow them to behave independently of their competitors, business users and end-users, thereby affecting (and possibly restraining) competition, and/or raising societal concerns.

**Question 3 (Section III; Main features of gatekeeper online platform companies and main relevant criteria for assessing their economic power)**

How could different criteria be combined to accurately identify large online platform companies with gatekeeper role?

In fast-evolving digital environments, timely intervention is key. BEREC would therefore support the implementation of a general streamlined process for SIP assessment. This being said, digital environments also call for a flexible and dynamic approach, taking account of specific circumstances.

BEREC's proposed model encompassing direct and optional identification of DPs with SIP aims at ensuring predictability and still leaves room for flexibility, when it is deemed strictly necessary to tackle the concerns raised by DPs with SIP (See Q9-13 below – Emerging issues).

As regards the direct identification process of DPs with SIP, BEREC suggests that reasonable and easily-observable absolute thresholds (e.g. revenues, number of unique users, etc.) for each AoB, are defined in (an) EU-level legal act(s), in order to quickly identify the large DPs who are presumed to have SIP. These thresholds may vary depending on the respective AoB and should be set at such a level that does not impact SMEs and/or small platforms which are less likely to have a negative impact on the AoB they are active in. These thresholds could be subject to the same regular revision as the definition of AoB. For a DP being active in a pre-defined AoB and meeting the identified thresholds for this AoB, the combination of criteria listed in Q2 above and the presence of SIP would be presumed without any further assessment by the competent body.

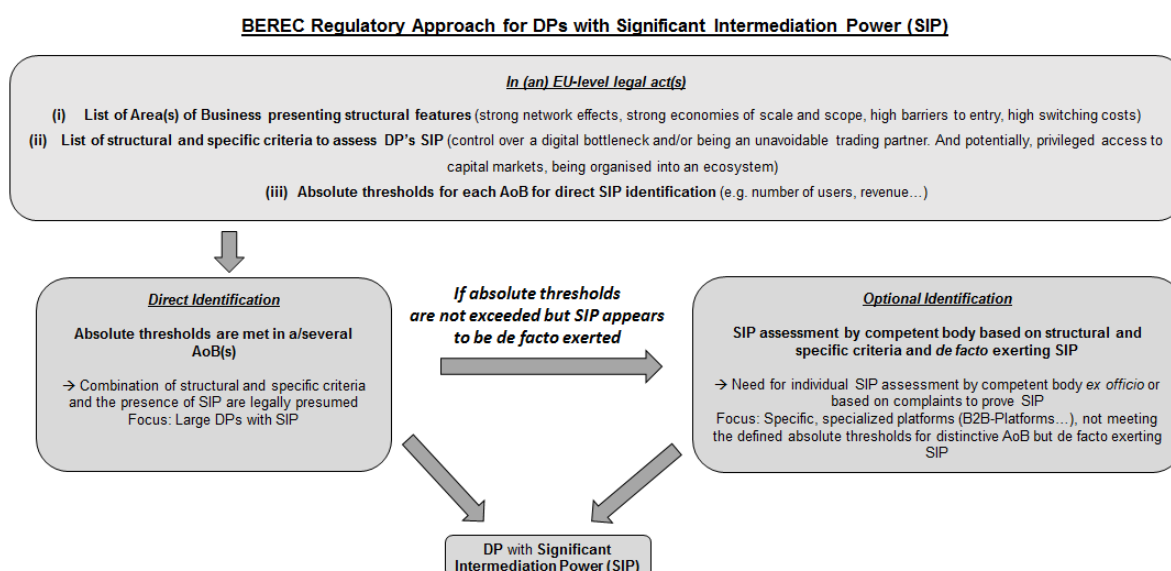
BEREC also recognises that some DPs active in one/some specific AoB(s) (for example B2B-platforms for certain industries) and presenting a combination of relevant structural and specific criteria, may not be large enough to meet the absolute thresholds set for distinctive AoB, but still be in a position to *de facto* exert a SIP. In order to tackle this SIP, which would

not be identified by the direct SIP identification process, and as far as it is deemed strictly necessary to address the concerns, BEREC proposes an optional identification process in which the competent body may conduct individual SIP assessments *ex officio* or intervene based on complaints.

BEREC believes that this double approach (direct identification of DPs with SIP based on absolute thresholds, as well as the possibility for an individual SIP assessment when strictly needed to tackle relevant concerns which would not be addressed by a direct SIP identification process) is better-suited to ensure timely intervention, regulatory predictability, and to enable digital environments to thrive.

Irrespective of the identification process, all DPs with SIP are targeted by ex-ante principle-based prohibitions and obligations and – if needed – by tailored remedies based on a case-by-case assessment conducted by the competent body.

The chart here below presents BEREC's SIP identification process.



**Question 5 (Section III; Main features of gatekeeper online platform companies and main relevant criteria for assessing their economic power)**

Do you believe that the integration of any or all of the following activities within a single company can strengthen the gatekeeper role of large online platform companies ('conglomerate effect')?

Yes.

Conglomerates offer (seemingly) independent goods/services. When goods/services are interrelated (e.g. by interoperability or by combining, monetising and using the data collected by the provision of existing and new goods/services), *ecosystem effects* are relevant.

Ecosystems can yield efficiencies (e.g. more data generating activities and users implying more efficient data collection/aggregation, facilitating new/improved services and increasing economies of scale/scope and network effects).

They can also entail negative aspects, requiring multi-market entry by competitors, stronger effects in case of unfair practices - see Q9 below -, affecting more business- and end-users.

For users, interrelated services may reduce transaction costs, but potentially also the incentive to venture outside the ecosystem (lock-in effect). These aspects may strengthen the DP's intermediation power, impacting terms and conditions, the type of information and the supply of goods/services offered.

## Emerging issues

### Question 9 (Section III; Emerging issues)

Are there specific issues and unfair practices you perceive on large online platform companies?

Concerns raised by a DP with SIP can be due to features which can be structural or behavioural (e.g. unfair practices). The suggestion put forward by BEREC is to propose a regulatory framework to tackle both kinds of features.

Structural features in relation to AoB are set forth under Q2 above (Main features of gatekeeper online platform companies); how to combine the relevant criteria in order to identify the DPs which should be targeted by an ex-ante intervention is presented in Q3 above (Main features of gatekeeper online platform companies).

BEREC recognises that DPs with SIP have the ability and may have the incentive to carry out certain practices and behaviours which may be harmful and should be prevented by ex-ante regulation complementing the current ex post intervention. These include:

1. Exclusionary conducts (practices that remove or weaken actual and potential competition, directly or indirectly harming business users and/or end-users):
  - a) Self-preferencing, e.g. unfairly favouring own products and services to the detriment of competing businesses. Examples: a) unfair ranking/steering, b) pre-installation and default settings of only one's own products/services.
  - b) Preferencing of a specific third party. Unfairly favouring a third party's products and services to the detriment of competing businesses. Examples: a) unfair ranking/steering for third parties products or services, b) pre-installation and default settings of that third party's products/services, c) discrimination in enforcing terms and condition without reasonable cause.
  - c) Unjustified denial of access (permanent or temporary) to the platform or functionalities on the platform necessary to conduct business. Example: a) denial of access to sell products or services via the DPs platform, b) denial of access to the DPs payment services.
  - d) Imposing exclusionary terms and conditions for attaining and/or retaining access. Examples: a) unfair blocking (e.g. the DP with SIP blocking certain functionalities offered by app providers/developers such as other payment services than the DP

with SIP's own without reasonable cause), b) unfair delisting, c) unreasonable performance targets.

- e) Unjustified denial of access to relevant data on reasonable terms where barriers to replication are high and non-transitory. Example: refusing access on fair, reasonable and non-discriminatory terms to the data that end-users allow the DP with SIP to share (refusal to deal).
  - f) Unjustified refusal of proportionate interoperability. Refusal might be legitimate where when it may compromise security or privacy or is excessively costly with respect to the benefits that may be achieved.
  - g) Tying and bundling (e.g. with the goods/services offered by the DP with SIP, and/or specific third-party business users) if the conduct e.g. reduces the ability of competitors to provide a specific service/good or requires them to enter multiple markets, or at least offer additional products or services, in order to compete and is not objectively justified.
  - h) 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.
  - i) Strategically and unreasonably denying business users' access to relevant information which would be essential for making their products/services interoperable with those of the DP with SIP's business user and thus to reach end-users on a market where the DP with SIP wants to remain exclusive.
2. Exploitative conducts (practices that are harming business users and/or end-users directly):
- a) 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.
  - b) Imposing unreasonable terms and conditions to end-users for access to the platform. Example: excessive gathering of end-user data.
  - c) Gathering and combining end-user data from all or various business units where the DP with SIP is active and other third party sources without consent.
  - d) Refusing data portability with the result of *de facto* locking end-users in (making it very difficult or impossible to switch platform).
3. Transparency-related issues:
- a) Strategic use of unclear or incomplete terms and conditions towards business users.
  - b) Lack of transparency towards content providers (business users as well as end-users) as to the rules of ranking algorithms.

These concerns could cause negative economic and/or other societal effects, as described in BEREC's response to Q11 and Q13 below.

Even though it is an M&A issue and not an issue to be regulated within the present context, it is worth mentioning that large DPs with significant financial resources may also use such funding to acquire/control significant stakes in promising competitors. If the stakes are used to suppress direct competition, negative effects may arise.

#### **Question 10 (Section III; Emerging issues)**

In your view, what practices related to the use and sharing of data in the platforms' environment are raising particular challenges?

By attracting more users and collecting large amounts of data and more relevant data, some DPs with SIP are able to improve the quality of their current products/services, easily provide new ones and acquire even more users (user feedback loop).

The analysis of increasing relevant user data can give DPs a better understanding of both users' needs and market trends. It will also reinforce their ability to engage in behaviours which protects them from inter-platform competition (such as acquiring or foreclosing nascent rivals) or intra-platform competition (such as imposing unfair – exclusionary or exploitative – terms and conditions, or denying access to data). End-user data can also be collected in an unfair and/or non-transparent way.

It is important to keep in mind that collecting data or being in control of large amounts of data is not an anti-competitive conduct in itself (unless it is excessive, see Q9 above, point 2b) but with that being said, large amounts of data and data-sharing between services might lead to an increase of barriers to entry and increase SIP, i.e. give more power to leverage.

In cases where barriers to entry do arise, there may be a risk for reduced innovation and competition from alternative actors, which might ultimately lead to reduced consumer choice (see also Q11 below). Also, a DP with SIP possessing large amounts of relevant data that constitute essential input is in a position to cause harm in relation to the provision of the goods/services where the DP has SIP (the conduct would be denying access to relevant non-replicable data). It could also cause harm in providing other (potentially currently non-existing) goods/services by leveraging its SIP into complementary services (e.g. by increasing the entry barriers, for the services where the DP has SIP – such as combining data from several different AoBs –, or for leveraging other goods/services) in a way that reduces consumer welfare.

#### **Question 11 (Section III; Emerging issues)**

What impact would the identified unfair practices can have on innovation, competition and consumer choice in the single market?

The unfair practices described in Q9 above may discourage or inhibit (potential) competitors and business-users from competing on the merits and may thus have negative effects on competition, innovation, and consumers' choice.

Potential unilateral anticompetitive conduct may take place within the same set of goods and/or services, through foreclosing access to inputs/assets or users or by leveraging SIP into other goods and/or services.

Digital services are driven by continuous and fast innovation. DPs with SIP may enable low transaction costs for innovators and thereby foster small-scale or incremental innovation that supports or complements their SIP. However, as discussed under Q9 above, DPs with SIP may also steer and impede innovation. Such potential harm to the competitive process and innovation might have a serious negative impact on business users and thereby reduce end-users' choice.

A DP with SIP has the ability and may have the incentive to exclude or impede any disrupting innovation that endangers its position (see the conducts discussed in response to Q9 above). By foreclosing competitors, the DP with SIP could reduce its own incentive to innovate while also protecting its position from potentially disruptive innovation. The wider the geographic scope of the DP with SIP, the greater the potential impact on competition and innovation.

Complementary services are not directly competing with the DP. For these services, it is less likely that they will undermine the DP's SIP by disruptive innovation and backward integration. Thus, the DP with SIP does not have the same incentive to foreclose as for (potentially) disruptive innovation. However, the DP with SIP may still engage in exclusionary conduct towards competing services if it decides to start supplying similar services itself or is already doing so. That may also relate to strategic information or data the DP with SIP has access to. Furthermore, the DP with SIP has the ability and may have the incentive to engage in exploitative conduct towards complementary services (e.g. excessive pricing). For the providers of complementary services that are exposed to the SIP of the DP, such exploitative conduct may reduce their return on investment and, consequently, the incentive to innovate. This type of conduct could be applied both when the DP with SIP offers similar services, and when the DP with SIP merely serves as an intermediary.

The power of a DP with SIP to act independently of users on one side of a platform might reinforce its ability and incentive to also act independently on the other side. The lack of competitive pressure from business users on the DP with SIP may allow the latter to set prices or terms and conditions to end-users that would not be viable in a competitive situation or vice versa – when end-users solely rely on the DP with SIP and business users must inevitably accept the terms and conditions set by the DP with SIP to access such end-users.

### **Question 13 (Section III; Emerging issues)**

Which are possible positive and negative societal (e.g. on freedom of expression, consumer protection, media plurality) and economic (e.g. on market contestability, innovation) effects, if any, of the gatekeeper role that large online platform companies exercise over whole platform ecosystem?

*For the economic effects of DPs with SIP, refer to the answers on questions Q10 and Q11 above.*



DPs are active in different parts of the internet value chain and rely on a well-functioning internet ecosystem, not only for offering their own services/products but also for the end-users consuming the offered services/products.

BEREC and NRAs play an important role in ensuring this by protecting end-users' rights and ensuring the uninterrupted operation of the internet ecosystem as an engine of innovation, e.g. through regulating the practices of ISPs under the Open Internet Regulation. As discussed before, DPs with SIP can also control access to significant amount of data, content, services and information and this can result in positive and negative societal effects.

#### Positive societal effects

In general, DPs contribute to the ability for people around the world to get in touch and communicate with each other in a very convenient way and at relatively low or even no additional monetary cost (e.g. social media platforms). Furthermore, DPs have made it easier to access information (e.g. by collecting online reviews and/or offering search engines etc.) which, when provided in a transparent manner, have empowered end-users and allowed them to make better-informed choices. DPs have also made it possible for SMEs to sell their products and/or services on these platforms. When the DP incorporates a more extensive offer and a fair ranking system to assist in finding products/services, these SMEs can reach a large number of end-users, thus reducing the search costs of end-users.

Finally, DPs have had a profound effect on digital engagement, media industry and facilitating access to digital content.

#### Negative societal effects

Some DPs (e.g. OSs, app stores, voice assistants) have become important gateways to access and provide services/products on the internet. They have the ability to choose and/or influence (i) the services/content/products available in the closed environment (or ecosystem) they control, and (ii) which functionalities (e.g. APIs) are available to business users on their platform and under which conditions. If this is done based on unfair or unreasonable conditions in an environment (or ecosystem) serving a large number of users and encompassing access to a variety of services across multiple AoBs, the control exercised can be used in a way that negatively affects consumer choice, freedom of expression and media plurality. This is also the case for ranking interfaces and algorithms, as these act as nudging instruments for which information is shown to end-users at all and/or in which order.

Moreover, excessive data collection beyond what is allowed by GDPR, can have a negative effect on consumer protection when combined with unclear and non-transparent terms and conditions on how this data is collected, combined and used. Especially since data is used by certain DPs with SIP as a means of (cross-)subsidising their services.

## Regulation of large online platform companies acting as gatekeepers

### Question 1 (Section III; Regulation of large online platform companies acting as gatekeepers)

Do you believe that in order to address any negative societal and economic effects of the gatekeeper role that large online platform companies exercise over whole platform ecosystems, there is a need to consider dedicated regulatory rules?

We fully agree

### Question 2 (Section III; Regulation of large online platform companies acting as gatekeepers)

Please explain

DPs with SIP play an increasingly influential role in the digital environment, and some structural features they possess and/or unfair practices they may engage in could raise economic and societal concerns that need to be addressed.

BEREC considers that a dedicated regulatory framework for DPs with SIP built on some important similarities with the ex-ante approach and expertise gained in the ECS sector could address such issues. There are several reasons to prefer a dedicated ex-ante regulatory framework.

First of all, some of the identified concerns result from structural features, which should be addressed independently of any potentially abusive behaviour by DPs with SIP. In this case, the application of ex-ante dedicated rules is well-suited. For instance, the control over a digital bottleneck and the resulting control over essential inputs/assets provides DPs with SIP's with a significant competitive advantage which could negatively affect inter- and intra-platform (or ecosystem) competition. In some circumstances, conditions for effective competition need to be created, or at least facilitated, in order to achieve efficient outcomes. Ex-ante regulatory frameworks have proven to be efficient to foster competition and contestability.

Moreover, an ex-ante regulatory framework is better-suited to pursue a variety of different objectives which have a positive impact on users and society at large. Along with fostering competition, multiple objectives – such as supporting an open internet or achieving the European internal market –, could be pursued within a specific regulatory framework, thus ensuring a more comprehensive and consistent intervention.

Secondly, the difficulties in effectively applying current ex-post analytical framework and enforcement tools call for a different approach. A streamlined ex-ante intervention appears to be more efficient for consistently solving structural problems in fast-moving digital environments.

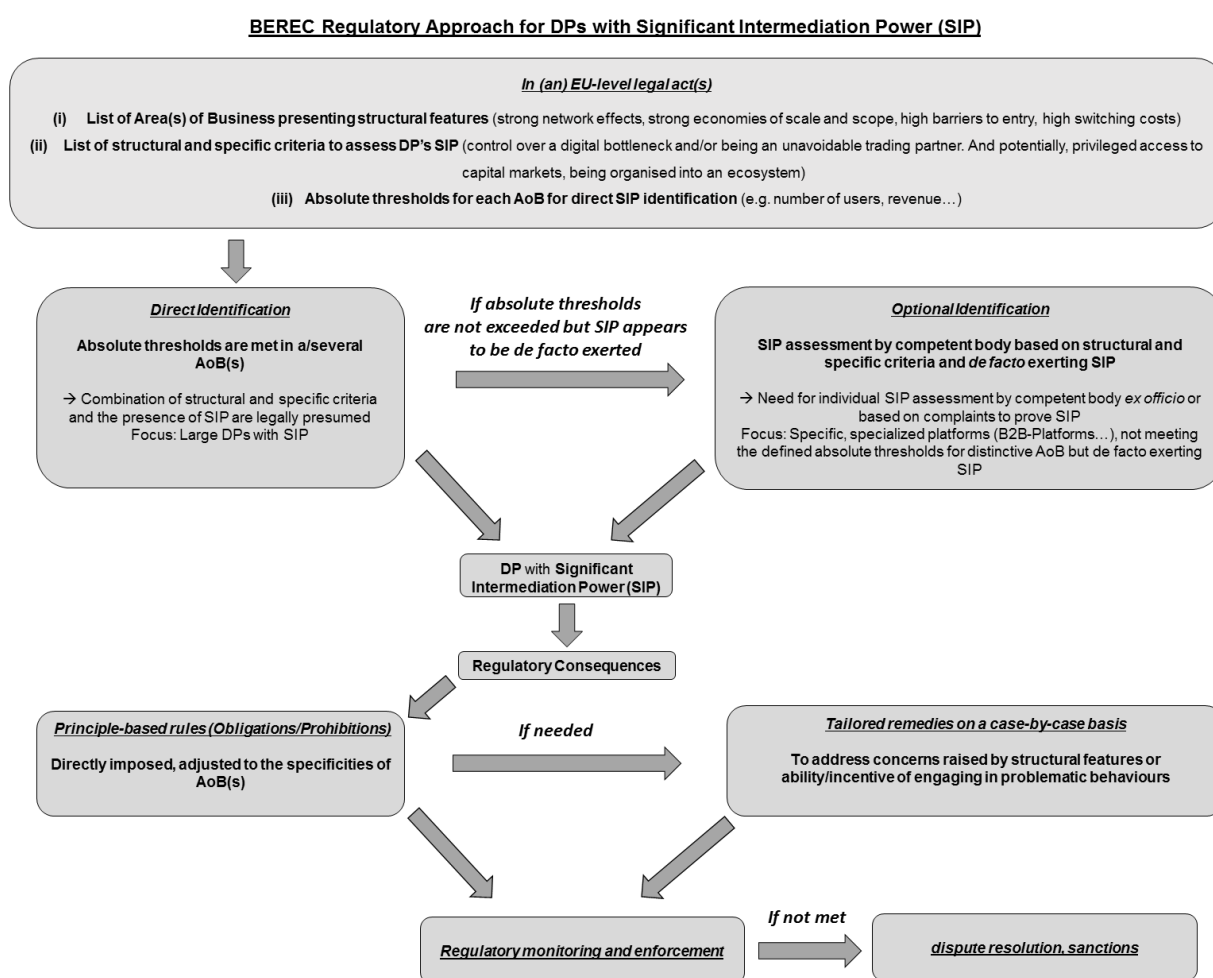
Finally, an ex-ante intervention within a regulatory framework would also imply repeated interactions with DPs with SIP and other stakeholders (business users, other relevant authorities, consumer associations, civil society representatives ...), allowing for an effective

definition, implementation and monitoring of remedies, as well as for regulatory adjustments according to relevant developments.

To take account of DP heterogeneity, but still quickly address the concerns, BEREC supports a combined approach including principle-based obligations and prohibitions, as well as tailored remedies applied on a case-by-case basis (respectively, option 3a and 3b of the DSA inception impact assessment).

The general obligations and prohibitions would be applicable to all DPs with SIP, and adjusted to the characteristics of the each AoBs in order to be effective. The case-by-case remedies would be applied according to a specific assessment, and in a proportionate manner.

The chart here below presents BEREC's regulatory model.



**Question 3 (Section III; Regulation of large online platform companies acting as gatekeepers)**

Do you believe that such dedicated rules should prohibit certain practices by large online platform companies with gatekeeper role that are considered particularly harmful for users and consumers of these large online platforms?

Yes.

**Question 4 (Section III; Regulation of large online platform companies acting as gatekeepers)**

Please explain your reply and, if possible, detail the types of prohibitions that should in your view be part of the regulatory toolbox.

Timely actions, as well as flexibility of the intervention, are crucial in order to be effective. DPs are fast-moving, innovative businesses that are constantly evolving over time. These characteristics require a regulatory framework which is quick and flexible: it should be adjustable to the business model, characteristics and conduct of each DP with SIP that is regulated, but should also adapt over time as well.

On their own, predefined obligations and/or prohibitions might be too inflexible to meet the heterogeneity of platform businesses and might risk over- or under-regulation. However, an intervention with sole case-by-case remedies might be quite time-consuming in the fast-moving digital environment.

Thus, BEREC proposes a combined approach of clearly defined principle-based prohibitions and obligations (See Q6 below), as well as complementary case-by-case remedies (See Q10 below).

As for the prohibitions, BEREC believes that a principle-based prohibition to unfairly discriminate among business users should be imposed on all DPs with SIP.

Similarly to the principle-based obligation (see Q6 below), such a prohibitions should be principle-based, and - in order to be effective - should be adjusted to the characteristics of the specific AoB and may need further specification and adaptations according to the context.

The same would be true for how these rules are applied and enforced in practice. An example hereof from the ECS sector is the prohibition for ISPs to technically discriminate between internet traffic with no objective reason (Open Internet Regulation). These prohibitions are applied to all ISPs, but enforced in a tailored manner.

Enforcement is a key and complex issue. One example from BEREC's experience in the ECS sector is in determining whether differences in treatment may be objectively justified. This is why clear principles on how and when certain prohibitions should be applied are necessary, which is especially important given that DPs are even more heterogeneous than ECS providers (see also Q24 below - Regulation of large online platform companies acting as gatekeepers).

As discussed in Q10 below, remedies imposed on a case-by-case basis may also be imposed on DPs with SIP, if deemed necessary to address the identified concerns (Q9 and Q13 above – Emerging issues). All interventions would need to be proportionate. In this context, case-by-case assessment is important in order to ensure that regulation is proportionate. As usual, due care should be taken not to disproportionately reduce the incentives to compete, internalise efficiencies, invest or innovate (for DPs with SIP and new entrants).

**Question 5 Section III; Regulation of large online platform companies acting as gatekeepers)**

Do you believe that such dedicated rules should include obligations on large online platform companies with gatekeeper role?

Yes.

**Question 6 (Section III; Regulation of large online platform companies acting as gatekeepers)**

Please explain your reply and, if possible, detail the types of obligations that should in your view be part of the regulatory toolbox.

BEREC considers that both principle-based obligations and case-by-case remedies should be part of the regulatory toolbox. The principle-based *ex-ante* obligations should be less intrusive as tailor-made remedies applied on a case-by-case basis (see answer to Q10 below). These general obligations would be imposed on all DPs with SIP and could include obligations on transparency, which would require the DP with SIP to make specific information easily available.

Such obligations would aim at achieving transparency towards regulatory authorities, business users and end-users. Moreover, the availability of information may also discourage the DP with SIP from engaging in abusive behaviours or, at least, make these more easily detectable.

A transparency obligation aimed at business users could for example require terms and conditions to be easily understandable, unambiguous and complete.

If it is combined with an access and/or interoperability remedy (See Q10 below), it could contain provisions to enable access and/or interoperability, such as technical specifications and expected developments. In addition to that, it could be explored whether in some cases, e.g. when transparency obligation is coupled with access remedy, some parts of the DP terms and conditions, or at least their amendments, may be approved by the competent regulatory body.

A transparency remedy could also include a description of which end-user data is collected and how it is used. There are two goals with this remedy. The first is to enable business users to more efficiently use a data access remedy. The second is to empower end-users, supporting one of the pillars mentioned in the European Data Strategy (COM(2020)66 final), that could be further explored in the context of the Data Act.

Similarly to principle-based prohibitions, BEREC would like to emphasize that, in order to be effective, principle-based obligations should be adjusted to the characteristics of the specific AoB where the relevant DP with SIP is active.

**Question 7 (Section III; Regulation of large online platform companies acting as gatekeepers)**

If you consider that there is a need for such dedicated rules setting prohibitions and obligations, as those referred to in your replies to questions 3 and 5 above, do you think there is a need for a specific regulatory authority to enforce these rules?

Yes.

**Question 8 (Section III; Regulation of large online platform companies acting as gatekeepers)**

Please explain your reply

The following institutional model could be seen as a possible option. In any case, BEREC believes that the proposed ex-ante regulatory framework (SIP assessment and dedicated rules and remedies) could be well-suited to address the identified concerns, independently of the institutional design of the intervention.

The experience with ECS ex-ante regulation shows how useful it is to have a detailed regulatory framework that is applied across the EU. The existence of dedicated rules could facilitate a consistent application of regulatory solutions. This would reduce regulatory fragmentation and encourage EU-level competition between DPs among other things.

There are number of important features which any regulatory authority with responsibility for regulating DPs with SIP should benefit from. Regulatory authorities at all levels should have relevant expertise in relation to ex-ante regulation, i.e. experience in monitoring and analysing markets, enforcement and refinement of remedies and benefitting from multiple perspectives (technical, economic, legal, accounting and consumer rights). Besides, regulatory authorities would need to be able to study a wide range of domains in which DPs operate and have a deep technical understanding of digital environments.

A regulatory authority should be independent (i.e. “independent of short-term political cycles, industry as well as other stakeholders’ pressures”<sup>9</sup>). This is the cornerstone in ex- ante economic regulation, aiming at ensuring the necessary stability of the regulation and an efficient intervention in the markets.

BEREC considers that the geographical scope of the DP with SIP is relevant in order to determine which regulatory body is involved in decision making on tailor-made remedies, as well as the enforcement of regulatory measures.

The majority of large DPs offers its services in multiple countries at a pan-EU scale, i.e. by being present in more than 3 Member States (MSs) (level 1). A minority may be active in a

<sup>9</sup> BEREC statement on the independence of the national regulatory authorities, BoR (20) 141

few, say 2 or 3 MSs (level 2), while other DPs may only operate in 1 MS (level 3). Each level requires a different approach. While BEREC assumes that the majority of issues will occur at level 1, serious concerns may also arise in relation to DPs with SIP operating only in 2 to 3 MSs or just at national level. This could e.g. concern specialized B2B supplier-platforms targeting SME manufacturers, comparative platforms offering telecommunication or energy contracts to consumers, specialized e-commerce platforms as well as real estate intermediaries that are usually operating at a national level. In addition, while expanding to a regional or pan-EU level, DPs with SIP initially focusing on a national scope may stick in the markets they serve to a differentiated national approach.

Similar to the approach used in ex-ante ECS regulation, BEREC considers that – also in line with jurisdiction rules applicable to competition matters – the jurisdiction should be determined based on the place of provision of the intermediation service regardless of whether the DP with SIP involved is established in a MS or outside the EU. This principle would also apply in order to determine the jurisdiction within the EU.

For level-1 cases (pan-EU), BEREC believes that determining case-by-case remedies, as well as checking compliance with the applicable rules (enforcement), would be best handled by an EU Regulatory Body (EURB), which should preferably be based on an already existing authority - e.g. the European Commission -, to benefit from its valuable experience. This would also allow for a faster set-up of the regulatory body.

This EURB should take its decisions in consultation with an independent Advisory Body (AB), composed of competent National Regulatory Bodies (NRBs). The AB has an important role to play, as it would serve as a forum for exchanging best practices facilitating cooperation between NRBs and also acting as a coordinator between the NRBs and the EURB. The existing well-functioning collaboration in the field of ECS amongst expert practitioners from the NRAs on the one hand and between the European Commission and BEREC on the other may serve as a good example for such a cooperation model.

BEREC considers it should be up to the MSs to nominate a competent national authority to function as the NRB. This could either imply creating a new authority or granting new competences to an existing authority.

A well-functioning cooperative model under the umbrella of the AB is key. Therefore, it is important to point out that the above-mentioned common set of competences for NRBs is necessary to allow for a successful coordination at the European level. The BEREC cooperation framework is a good-functioning reference model.

In order to lower the regulatory burden for the EURB, it is important to predefine cases and regulatory tasks without pan EU-implications, which could be directly addressed by the competent NRB, following the subsidiarity principle as would be the case for pure national cases or disputes with national actors not affecting pan-EU regulation. In such cases, the AB could play a role in identifying the level at which the issue occurs, in coordination with the NRBs and the EURB. Although DPs may be active in multiple MSs, these issues may not necessarily occur (to the same extent) in each of these MSs. Therefore, the level should actually be determined based on the number of MSs in which the issue occurs.

See further Q12 below.

**Question 9 (Section III; Regulation of large online platform companies acting as gatekeepers)**

Do you believe that such dedicated rules should enable regulatory intervention against specific large online platform companies, when necessary, with a case by case adapted remedies?

Yes

**Question 10 (Section III; Regulation of large online platform companies acting as gatekeepers)**

If yes, please explain your reply and, if possible, detail the types of case by case remedies.

BEREC has considerable hands-on experience in applying case-by-case tailored remedies to SMP operators in the ECS sector.

Building on this experience, BEREC believes that remedies should be proportionate and the least intrusive should be applied first. Moreover, regulators must be mindful of the impact of the overall regulatory burden on incentives to innovate.

Proportionality requires that when different DPs raise different structural problems for market entry, competition, investment and end-users' rights, this should be taken into account in remedy design and enforcement. Remedies can also differ among AoB, or according to the regulatory (economic or social) objectives to be pursued.

Remedies to be applied on a case-by-case basis could include e.g. access and interoperability obligations.

Concerning the access to key inputs (e.g. data) or assets (e.g. technical functionalities), proportionate access remedies could require the DP with SIP to make (part of) their services interoperable, either by opening, without unjustified restrictions, their application programming interfaces (APIs), or by imposing the use of open standards. By accessing key inputs or assets, business users could provide competing or complementary services/products to end-users.

Disproportionate and/or strategical denial of access to the digital environment that the DP with SIP is offering could negatively affect both business users (who could not reach end-users without access to the DP with SIP's environment) and consumers (e.g. denial of access to reach or share services/content/good). Access remedies could enhance competition, growth and innovation over several AoB (e.g. by creating a level-playing field for business users), thereby increasing end-users' choice, and the ability to communicate without unjustified interference.

In addition to that, ensuring user-friendly data portability procedures might be a good solution for increasing the ability of consumers to switch providers while keeping their valuable data. In order to make such procedures easily accessible and operational, highly technical regulation shaped and enforced by ex-ante regulators might be necessary.



Finally, BEREC also believes that the regulatory toolbox should be complemented with tools aimed at enhancing information gathering and sharing with stakeholders, in compliance with data protection legislation and business confidentiality. By applying to the supervision and enforcement regulatory tools mentioned in Q24 below and Q4 on Governance of digital services and aspects of enforcement, in compliance with GDPR, the forthcoming Data Act, and business confidentiality, the regulatory body could make relevant information provided by the DP with SIP, business users or other stakeholders easily available. Provided as open data, in a user-friendly format if possible, such information could help users make better-informed choices and guide, raise users' awareness and transparency.

**Question 11 (Section III; Regulation of large online platform companies acting as gatekeepers)**

If you consider that there is a need for such dedicated rules, as referred to in question 9 above, do you think there is a need for a specific regulatory authority to enforce these rules?

Yes

**Question 12 (Section III; Regulation of large online platform companies acting as gatekeepers)**

Please explain your reply

In level 2 cases, the NRB of the MS in which the issue primarily occurs should notify all of its EU counterparts (through the AB) while inviting NRBs of other impacted MSs to formally engage in the decision-making process.

Subsequently, a Joint Team (JT) could be put together, composed of staff of the concerned NRBs – taking into account their resource capacity. The initiating NRB may take the lead in setting up the JT and coordinating its activities. All involved NRBs need to reach a consensus expressed as "joint principles" in line with the common approach applied at the EU level, which should be transposed into the respective individual decisions of each involved NRB, taking into account local particularities. This would allow for adjusted decision-making and enforcement at the national level. Since level 2 cases transcend national interests and joint principles may serve as a precedent, it would be appropriate to implement a double lock veto of the EURB and the AB for harmonization purposes, similar to what exists in the field of ECS.

The double lock veto would e.g. pertain to questions related to:

- Whether a specific case needs to be considered at level 2 or rather at a pan-European level, which will determine how and by whom the case should be handled. This would in principle already be done at the beginning of the process (predefined case, see last § of Q8), but could have evolved since then.
- Whether or not "joint principles" issued by a JT are in line with the common approach determined at pan-European level. If not, the EURB and the AB could request the JT to revise their "joint principles" accordingly.

At level 3 (national level), decision-making is in the hands of the concerned NRB. However, the NRB is required to notify the EURB and the AB of its draft decision (similar to the arts. 32

and 33 EECC within the field of ECS). The EURB and the AB may e.g. judge that the case at hand is rather to be handled at level 1 or level 2. The NRB should take utmost account of the EURB's and AB's opinion.

NRBs are arguably well-placed to (pro)actively monitor the evolution of DPs within their AoBs in their respective national footprints and contribute to common positions and guidelines. NRBs may (co-) engage in the resolution of (local) disputes. Both types of activities should be coordinated by the AB. With reference to Q8 above, BEREC considers that a key requirement for success is the common set of competences NRBs should have.

The cooperation between NRAs under the coordination of BEREC can serve as a reference, which has proven successful in the field of ECS. In this respect, BEREC points out that among other contributions the many BEREC Common Positions and Guidelines, the implementation of arts. 32 and 33 EECC procedure and, not in the least, the work and investigations made by every-day practitioners that are close to the activities and subject matter at hand, has enabled an efficient and consistent application of ex-ante regulation in the field of ECS.

In order to also ensure a consistent application of ex-ante regulation towards DPs with SIP, BEREC and its member NRAs are in a good position to effectively take on the roles of AB and NRBs respectively. This governance model would have the advantage of benefitting from their valuable ex-ante experience and structure and of allowing for a faster institutional set-up. In this case, NRAs should ensure to extend their (technical) capabilities onto the wide variety of (digital) AoBs in which DPs operate.

As to the question at what level the regulatory oversight of DPs with SIP should be organised (Q14 below) does not allow for nuancing, BEREC prefers to clarify its answer (i.e. "Both at EU and national level") below.

As for the optional identification of targeted DPs with SIP, this could be done for

- level 1 by the EURB (based on information to be provided by NRBs among other sources), though a prior consultation should take place with the AB;
- level 2 by the JT of NRBs;
- level 3 by the NRB.

The respective bodies identified above should in general also be competent for decision-making on case-by-case remedies within these levels and could carry out the enforcement of the principle-based and tailored remedies. However, in line with which was mentioned at the end of Q8, enforcement on remedies for level-1 cases could, to the extent possible, be directly addressed by the competent NRB, following the subsidiarity principle. This could have the advantage of being more efficient and effective. In this regard, the application of the EU roaming regulation, as well the Open internet regulation, might serve as a good example.

General periodical data collection (as preparing clearly defined statistics or reports or studies) from important DPs with or without SIP should take place both at NRB and at EURB-level, taking into account the proportionality principle. The AB should coordinate the data collections, by providing templates and definitions that are applied in all MSs, aggregate at the EU level data collected at national level, e.g. as done by BEREC for international

roaming data.<sup>10</sup> Some of this information could be made public, respecting confidentiality rules. Obviously specific ad hoc information gathered from DPs with SIP related to specific concerns/conduct should not be made publicly available.

For clarification purposes, we summarise our proposal in the following table.

Level of issue	Optional identification of targeted DPs with SIP	Decision making on case-by-case remedies for targeted DP with SIP	Regulatory monitoring and enforcement of principle-based rules and tailored remedies	Other roles of NRBs
Level 1 Pan-EU	<b>EURB</b> (consults NRBs through AB)		<b>EURB/NRB(s)</b>	(Coordinated through AB) <ul style="list-style-type: none"> <li>Analyse the state of competition within the national AoB and contribute to identifying structural or specific issues</li> <li>Participate in dispute resolutions</li> <li>Contribute to common positions and guidelines of AB</li> </ul>
Level 2 2 or 3 MS	<b>Joint Team (JT) of NRBs</b> <ul style="list-style-type: none"> <li>⇒ Notification of JT draft decision to EURB</li> <li>⇒ Double lock veto by EURB and AB</li> </ul>		<b>NRB(s)</b>	
Level 3 1 MS	<b>NRB</b> <ul style="list-style-type: none"> <li>⇒ Notification of NRB case and draft decision to EURB and AB</li> <li>⇒ NRB to take utmost account of EURB opinion (and, where applicable AB opinion)</li> </ul>		<b>NRB(s)</b>	

### Question 13 (Section III; Regulation of large online platform companies acting as gatekeepers)

If you consider that there is a need for a specific regulatory authority to enforce dedicated rules referred to questions 3, 5 and 9 respectively, would in your view these rules need to be enforced by the same regulatory authority or could they be enforced by different regulatory authorities? Please explain your reply.

BEREC considers that even though these are different types of enforcement, the underlying principles are the same, which justifies that the same regulatory body should be responsible in both cases. In this respect, BEREC refers to the experience in the field of ECS where NRAs are effectively responsible for both types of enforcement in the application of the European ECS Framework (e.g. regarding end-users' rights/numbering/general authorisation

<sup>10</sup> See for example "International Roaming BEREC Benchmark Data Report October 2018 – March 2019" (BoR BoR (19) 174) Available at [https://berec.europa.eu/eng/document\\_register/subject\\_matter/berec/reports/8839-international-roaming-berec-benchmark-data-report-october-2018-8211-march-2019](https://berec.europa.eu/eng/document_register/subject_matter/berec/reports/8839-international-roaming-berec-benchmark-data-report-october-2018-8211-march-2019)

(general prohibitions/obligations) but also regarding the surveillance of national SMP operators (case-by-case basis).

This would also allow taking advantage of the resulting synergies and thus have a positive impact on the length of proceedings. In the same vein, in case two different regulatory bodies were competent, there would be a risk of overlapping regulation and/or a need to coordinate.

In any case, as explained in the reply to Q2 on Regulation of large online platform companies acting as gatekeepers, BEREC considers that the competent regulatory body should be determined depending on whether the case at hand occurs at (i) level 1 (more than three MS' involved), (ii) level 2 (two or three MS' involved) or (iii) level 3 (national impact only). In general, the EURB would be responsible for level-1 cases (with the option to delegate the enforcement to the NRBs on a case-by-case basis), while the JT of NRBs would be involved in level-2 cases and the respective NRBs for level-3 cases.

**Question 14 (Section III; Regulation of large online platform companies acting as gatekeepers)**

At what level should the regulatory oversight of platforms be organized?

☐ At national level

☐ At EU level

☒ Both at EU and national level.

☐ I don't know

**Question 15 (Section III; Regulation of large online platform companies acting as gatekeepers)**

If you consider such dedicated rules necessary, what should in your view be the relationship of such rules with the existing sector specific rules and/or any future sector specific rules?

Due to the heterogeneous nature of DPs and depending on the platform's activity and its impact on the functioning of other markets, DP regulators will undoubtedly have to take into account specific EU regulations that apply in various market sectors.

BEREC also considers that privacy rules have a clear and important economic impact within the digital environment. However, it should be noted that GDPR is essentially based on fundamental rights of individuals and not designed to solve economic issues. Nonetheless, remedies should take account of other existing EU regulations with respect to the digital landscape in order to ensure legal certainty.

In addition to this, it is also expected that the DSA Package will outline cooperation mechanisms with other authorities coping with digital ecosystems. The EURB, AB and NRBs should in any case coordinate their activities with other authorities responsible for defining or implementing sector specific rules, insofar as the respective rules might affect one another and insofar as the respective laws allow for such coordination. Providing for the possibility of cooperation between the AB and similar bodies or groups associating or coordinating

national bodies with other competences (e.g. ERGA or EDPB) also seems worth considering.

Regulatory flexibility will be important, especially in regards to level 2 and level 3 cases, whilst at the same it will be necessary to avoid regulatory uncertainty. A rigid stipulation of regulations which may be in conflict with measures stemming from the DSA Package may raise problems when regulating platforms with business profiles that were not foreseen by lawmakers. Also, with regards to the model of coordination of regulatory activities at national level, MSs should be in a position to allocate competences to the relevant bodies. Regulators responsible for individual sectors already exist, as well as those whose authority is not restricted to one sector.

Cross-sectorial cooperation between institutions at both national and European level should be envisaged at all stages of proceedings to determine the remedies to be imposed on the DPs with SIP and also their enforcement and monitoring. While monitoring the effectiveness of established regulatory intervention, the ability to consult on observed behaviour of DPs with SIP with bodies which have different competences and legal perspectives may help to decide whether it is necessary to maintain, amend or repeal imposed remedies.

**Question 16 (Section III; Regulation of large online platform companies acting as gatekeepers)**

Should such rules have an objective to tackle both negative societal and negative economic effects deriving from the gatekeeper role of these very large online platforms? Please explain your reply.

Many different features in the digital environment (see Q2 on Main features of gatekeeper online platform companies) can raise both economic and societal concerns (see Q11 and Q13 on Emerging issues). Based on the experience in regulating ECS, BEREC considers that the proposed rules can and should have the objective to address both types of effects.

The ex-ante experience in the ECS sector, aimed to reach a variety of objectives, shows that society can benefit from a holistic approach. In many cases, regulatory tools are used to reach several different objectives. For example, the EECC aims to cover several objectives, such as the development of the internal market, protection of end-users' rights, competition, deployment and take-up of VHCN and end-to-end connectivity.

In applying an ex-ante regulatory toolbox, NRAs have experience in using targeted regulation to achieve multiple effects. One example is number portability, which encourages competition, while at the same time, benefits consumers. BEREC thinks that this approach could be also applied to ex-ante regulation of DPs with SIP. In addition, it can sometimes be difficult to disentangle effects of a precise structural or specific societal feature. As an example, ensuring internet openness, an objective in the scope of the ECS regulatory framework, has both economic (i.e. on competition dynamics) and societal (i.e. freedom of choice, accessibility of public services, social inclusion or freedom of expression) implications.

When transposed to the digital environment, certain DPs with SIP may *de facto* act as a bottleneck for access and distribution of content and applications, however the upper parts of the value chain (i.e. beyond the network layer) for accessing content and

services/applications are not in the regulatory scope of the EECC. It is important to monitor this part of the value chain regarding potential threats to the open use of the Internet and its applications in the near future.

A holistic approach is also relevant for the data-intensive business models of some DP with SIP. Disproportionate data collection might be a signal of weak competition, especially in business models where no monetary price is paid for the service. Therefore, ex-ante remedies aimed at increasing competition - such as, for example, data portability or interoperability - might in some cases help to increase end-users' protection. By promoting the development of consumer-empowering tools, ex-ante regulations might do both: protect consumers and enhance competition. Therefore, BEREC believes that considering the holistic impact of DPs with SIP in the digital environment, the data-intensive business models used in this domain and the essential nature of some of the services they offer, ex-ante rules should consider the externalities between different objectives of public interest (competition, internet openness, end-users' rights, data protection) to be pursued.

**Question 19 (Section III; Regulation of large online platform companies acting as gatekeepers)**

Which, if any, of the following characteristics are relevant when considering the requirements for a potential regulatory authority overseeing the large online platform companies with the gatekeeper role:

☒ Institutional cooperation with other authorities addressing related sectors – e. g. competition authorities, data protection authorities, financial services authorities, consumer protection authorities, cyber security, etc.

☒ Pan-EU scope

☒ Swift and effective cross-border cooperation and assistance across Member States

☒ Capacity building within Member States

☒ High level of technical capabilities including data processing, auditing capacities

☒ Cooperation with extra-EU jurisdictions

☒ Other

**Question 20 (Section III; Regulation of large online platform companies acting as gatekeepers)**

If other, please specify?

All the characteristics above are relevant.

Firstly, institutional cooperation between the EURB/NRB and competition authorities would be required. The current cooperation scheme between NRAs and competition authorities can be considered as a good reference. Moreover, the complexity and variety of concerns related to DPs requires the adoption of a holistic approach. Hence, the establishment of collaboration channels (i.e. information flows, periodical meetings etc.) with other authorities would be positive for the consistency and effectiveness of DPs with SIP regulation. This

should not be restricted to competition authorities, but also to any other regulatory authority applying regulations that may overlap with the regulatory framework for DPs with SIP.

For instance, if the regulatory body for DPs imposes any data sharing obligation, provisions in the GDPR should be an element to be taken into account and coordinated with the data protection authorities (DPAs). In the ECS regulation, as a way of example, the EECC encourages collaboration among different competent authorities about issues such as (i) promotion of lawful content in ECN and services (art. 24.3); (ii) co-location and sharing of the network elements (art. 44.1); (iii) monitoring of retail tariffs within the scope of US obligations (art. 85.1); (iv) price comparisons for general users (art. 103); or (v) quality of service (art. 104).

In general, competition concerns and societal issues related to DPs with SIP are often similar across EU. In consequence, a pan-EU scope would in most cases be adequate for the regulatory body. However, there could be some areas where national-level enforcement of these measures is preferable (See answer Q12 above).

Swift and effective cross-border cooperation and assistance across MSs is crucial to ensure consistent and effective enforcement, and also to detect potential competition concerns. In this regard, the role of an AB can be very important. BEREC, with its role in ECS regulation across EU, provides a tested cooperation model that ensures a consistent application of a regulatory framework.

As discussed above, BEREC and its member NRAs are well placed to effectively take on the roles of AB and NRBs respectively. This governance model would have the advantage of benefitting from their valuable ex ante-experience and structure and of allowing for a faster institutional set-up.

As DPs are rapidly evolving, any regulatory body in charge of DPs regulation should be highly flexible and have the ability to adapt to new contexts and circumstances. The experience with ongoing market monitoring and the enforcement of ex-ante measures should be considered when selecting a potential regulatory body. Furthermore, both capacity building within MSs and the development of high-level technical capabilities are also key elements for carrying out the missions of a regulatory body in an efficient manner (see Q 24 below), next to economic skills and legal expertise.

**Question 21 (Section III; Regulation of large online platform companies acting as gatekeepers)**

Please explain if these characteristics would need to be different depending on the type of ex ante rules (see questions 3, 5, 9 above) that the regulatory authority would be enforcing?

These characteristics would in general be similar, regardless the adoption of a model based on principle based dedicated rules, a case-by-case scheme or a combination of these two approaches. See BERECs answer to Q13 on Emerging issues, Q3 and Q5 on Regulation of large online platform companies acting as gatekeepers.

**Question 22 (Section III; Regulation of large online platform companies acting as gatekeepers)**

Which, if any, of the following requirements and tools could facilitate regulatory oversight over very large online platform companies (multiple answers possible):

- ☐ Reporting obligation on gatekeeping platforms to send a notification to a public authority announcing its intention to expand activities
- ☒ Monitoring powers for the public authority (such as regular reporting)
- ☒ Investigative powers for the public authority
- ☒ Other

**Question 23 (Section III; Regulation of large online platform companies acting as gatekeepers)**

Other – please list

As explained in Q24 below, BEREC considers that supervision and enforcement tools such as information requests (with a corresponding obligation to respond), monitoring and inspection powers, reporting obligations and dispute resolution, can be suitable to ensure appropriate regulation of DPs with SIP. Such measures would allow the responsible regulatory body to gather, publish and share (in compliance with legislation concerning data protection and business confidentiality) relevant information with stakeholders and users with the aim of increasing user empowerment and adjusting regulatory measures, where necessary (data-driven regulation, see Q10 above). Moreover, BEREC believes that it is important to combine these tools with the complementary legal instruments needed to impose penalties in case of infringement of enforcement measures.

**Question 24 (Section III; Regulation of large online platform companies acting as gatekeepers)**

Please explain if these requirements would need to be different depending on the type of ex ante rules (see questions 3, 5, 9 above) that the regulatory authority would be enforcing?

Based on its considerable experience regulating the ECS sector, which shares some key structural features and competition concerns with DPs with SIP, BEREC considers that supervision and enforcement are fundamental to correctly assess the application of the combined approach of principle-based obligations/prohibitions and case-by-case ex-ante remedies on DPs with SIP. Moreover, prior to imposing any case-by-case remedy on DPs with SIP, it is important to monitor and understand the evolution in the use of these DPs by consumers and business users as well as technical and economic characteristics shaping these services. This allows for an adequate identification of economic and societal issues arising and to design appropriate and proportionate remedies to address these concerns.

The technical complexity of DPs, powered by highly-specialised technologies using big data, machine learning and artificial intelligence (AI), constantly expand DPs' data-driven capabilities, enriching their insights and control of the different domains covered by each platform (or its ecosystem where applicable). This high-tech environment is inherently associated with deep information asymmetries between DPs and users, competitors and public authorities. As a result, a highly technical regulatory body with significant powers and



skills in terms of information acquisition, monitoring and inspection of DPs is required, similar to the regulatory toolbox applied in the ECS framework.

Following regulatory intervention principles as in the ECS sector, BEREC considers that supervision and enforcement tools such as information requests, monitoring, inspection and dispute resolution powers of regulatory bodies and reporting obligations applied to DPs with SIP, combined with complementary legal instruments needed to impose penalties in case of infringements, are important. These powers could be clearly established in the legislative framework applicable to the DPs with SIP.

However, the appropriate regulatory body/ies should adequately modulate its application by depending on various aspects, as competition concerns, market dynamics, type of stakeholders involved, end- and business-users' interest and of ex-ante measures already in place, in order to avoid an ineffective, excessive or inefficient regulation. Reporting obligations to collect information would vary depending on these conditions. Different measures could be implemented, such as specific reporting about updates to the terms and conditions to enhance transparency towards business users, or providing information about how and what type of data is collected and exploited, in order to empower end-users, as well as relevant supervisory-related KPIs reporting (e.g. denials of access to business users, number of end-user/business user complaints). The experience of NRAs applying supervision and monitoring tools in the ECS sector can be as a good source for best practices for the regulatory framework towards DPs with SIP.

**Question 25 (Section III; Regulation of large online platform companies acting as gatekeepers)**

Taking into consideration the parallel consultation on a proposal for a New Competition Tool focusing on addressing structural competition problems that prevent markets from functioning properly and tilt the level playing field in favour of only a few market players. Please rate the suitability of each option below to address market issues arising in online platforms ecosystems. Please rate the policy options below from 1 (not effective) to 5 (most effective).

1. Current competition rules are enough to address issues raised in digital markets	1 (not effective)
2. There is a need for an additional regulatory framework imposing obligations and prohibitions that are generally applicable to all large online platforms with gatekeeper power	3 (sufficiently effective)
3. There is a need for an additional regulatory framework allowing for the possibility to impose tailored remedies on individual large online platforms with gatekeeper power, on a case- by-case basis	4 (very effective)
4. There is a need for a New Competition Tool allowing to address structural risks and lack of competition in (digital) markets on a case-by- case basis.	2 (somewhat effective)
5. There is a need for combination of two or more of the options 2 to 4.	5 (most effective)

**Question 26 (Section III; Regulation of large online platform companies acting as gatekeepers)**

Please explain which of the options, or combination of these, would be, in your view, suitable and sufficient to address the market issues arising in the online platforms ecosystems?

BEREC believes that the most suitable model would be an additional regulatory framework setting principle-based obligations/prohibitions for DPs with SIP, combined with possible specific tailor-made remedies based on case-by-case analysis (see also answers to Q4, 6, 10 above), thus an efficient combination of option 2 and 3.

BEREC favours this combined option because it calls for a regulatory framework which acts quickly and effectively rather than the mere enforcement of individual ex-ante measures. The ex-ante regulatory framework has historically proven to be very effective in monitoring evolving markets. In sectors where technical complexity and innovation is very strong, the ability to continuously share information between regulators and relevant players, ensures flexibility and timely interventions. Moreover, ex-ante regulation has proven successful in the ECS sector in achieving potentially conflicting objectives in the long term, such as competition on prices (static efficiency) and high levels of investment (dynamic efficiency). The ability to develop coherent and time-consistent regulatory schemes such as the “ladder of investment”, has allowed ECS markets to achieve both objectives in the long term. In the DP environment, a similar ex-ante approach could be equally effective. Therefore, BEREC favours a consistent ex-ante regulatory framework for DPs. Option 1 and 4 as standalone options are not considered.

As also explained in Q10 of this section, different DPs may raise different structural and behavioral problems for market entry, competition and investment. This might especially differ over different types of business. Therefore, general principle-based rules should be combined with tailor-made remedies for specific DPs with SIP.

If the regulatory proposals formulated by BEREC for DPs with SIP were adopted, BEREC considers that the NCT (option 4) should not overlap with this proposed ex-ante regulatory framework, and that the latter should be the applicable legislation (*lex specialis* principle). Like in the ECS sector, such a regulatory framework for DPs with SIP can be adapted in an efficient, tailored and consistent manner. It provides a scheme for predictable and timely intervention to address the identified competition problems, while creating the means to pursue a variety of objectives, in order to also address wider societal concerns. For a more elaborative view on the NCT, please see BEREC's position paper on the NCT public consultation.

## **Section VI: What governance for reinforcing the Single Market for digital services?**

### **Governance of digital services and aspects of enforcement**

**Question 4 (Section VI; Governance of digital services and aspects of enforcement)**

What information should competent authorities make publicly available about their supervisory and enforcement activity?

Publication of information resulting from supervision and enforcement activities towards DPs with SIP carried out by regulatory bodies at EU or/and national level is fundamental, both for transparency purposes regarding regulatory activity, and to share information with other sectorial-specific competent bodies and promote a common regulatory approach to foster the development of the European internal market.

Based on the experience from the ECS sector, where explicit obligations are set for publication of information and coordination mechanisms among NRAs, the European Commission and agencies (such as BEREC) are in place, a similar approach could be adopted in the regulatory framework for DPs.

Aside from periodic reports at both national and EU level with key data (AoB, geographical area of service provision, number of unique users, etc.) about the DPs with SIP, publication of regulatory measures and transparency about disputes resolution cases would be highly valuable. This information sharing would increase the transparency across competent regulatory bodies in the EU, helping to consolidate the internal market and increase consumer protection throughout the EU. Furthermore, the consultation and transparency mechanisms set out in the ECS regulatory framework prior to the adoption of regulatory measures, could be considered a good practice applicable to the DP with SIP's regulation.

Besides transparency *vis-à-vis* public bodies, asymmetry of information between DPs and business users and end-users is a key challenge. To tackle this information asymmetry, notwithstanding requirements on transparency set in the P2B regulation for all platforms<sup>11</sup>, BEREC advocates for promoting greater transparency for DPs with SIP, by means of information gathering and sharing with business users and end-users about the terms and conditions imposed (transparency obligation). By increasing their awareness about the type of data and use done by DPs with SIP, consumers can be empowered. Information sharing can also broaden and enhance the quality and innovation of the services offered to end-users. Fostering data-driven regulation by means of the publication of data, e.g. providing comparison tools, as well as the publication of information on complaints, best practices guidelines such as complaint and redress mechanisms for business users could be further considered.

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<sup>11</sup> 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

## 2. PUBLIC CONSULTATION ON THE NEW COMPETITION TOOL

Concerning the New Competition Tool (NCT), BEREC provides its views on the potential interplay between the NCT and (i) the existing ex-ante regulatory framework for electronic and communication services (ECS) and (ii) the ex-ante regulatory framework for digital platforms (DPs) under the DSA Package.

First of all, BEREC recognises that there may be a potential overlap with the established ex-ante regulation for ECS. If this is the case, BEREC believes that the *lex specialis* principle should be followed and that the specific regulatory framework should be the applicable legislation.

If implemented within an existing regulatory framework, the NCT could potentially serve as a complementary tool in exceptional cases not currently addressed by sectoral regulation. For instance, market investigations, as potentially considered under the NCT, may be used to gather relevant knowledge and adapt future regulation in a harmonised and coherent way. However, BEREC believes that this tool would be more efficient if carried out by the competent regulatory authorities (potentially in cooperation with competition authorities), who have the relevant experience in the field.

Secondly, concerning the regulatory intervention towards DPs, BEREC considers that the ex-ante regulatory framework proposed in its response to the public consultation on the Digital Services Act (DSA) Package is better suited to address structural and behavioural concerns raised by DPs with Significant Intermediation Power (SIP). Moreover, BEREC believes that this proposed regulatory framework is not interchangeable with the NCT, as the latter has a much broader scope than the ex-ante regulatory intervention considered in the DSA public consultation, even when the scope of the NCT is limited to digital services, which are in any case broader than DPs with SIP. Building on its expertise, BEREC believes that the regulatory framework for ECS has been successful because a well-defined scope and relevant criteria related to specific markets are set as a prerequisite for intervention. This approach is more difficult to be applied by a general tool with a broader scope.

### (i) The interplay with the existing ex-ante regulatory framework for ECS

The regulatory framework for ECS, extensively applied over the last twenty years, has proven successful in addressing structural problems and enabling a competitive and innovative ECS sector in Europe. For two decades, the framework has continued to evolve in order to address new concerns and regulation has been lifted in markets where it was no longer necessary.

Furthermore, this ex-ante regulatory framework – including the European Electronic Communications Code (EECC) and other relevant regulations, such as those on Open Internet and on Roaming –, is also successful because it is not only aimed at addressing structural competition issues, but also at reaching a variety of broader objectives (ensuring connectivity and internet openness, protecting end-users' rights, and so on), that can neither

be sufficiently or appropriately treated by ex-post competition law, nor by ex-ante measures imposed outside of a coherent regulatory framework.

In the ECS sector, the interplay between ex-ante regulation and ex-post competition law is well-defined. One of the conditions for imposing asymmetric regulation on operators with significant market power is that ex-post competition law would not be sufficient to address the identified competition problems.

If the ECS sector were to fall within the scope of the NCT, then this complementarity would also need to be ensured. A conflict between ECS regulation and the NCT could result in inconsistent application of ex-ante regulation, forum shopping by market actors and potential regulatory uncertainty on whom, how and under which circumstances a market actor is subject to regulation. This legal uncertainty could have serious implications for investment in a dynamic and competitive sector.

For this reason, BEREC considers that, if the NCT is to be implemented including the ECS sector in its scope, the principle of *lex specialis* should apply, and the regulatory framework for ECS should be the applicable legislation. This implies that any structural issue already considered in the ECS framework should be addressed applying this framework *only*. This framework is specialised for the ECS sector, allowing for a comprehensive and consistent application of tailored remedies, reaching a variety of objectives, setting a scheme for interactions with stakeholders and providing predictability and consistency throughout the EU.

Furthermore, BEREC believes that, given its two-decade experience in the sector, regulatory authorities for the ECS sector are in an optimal position (as they are already doing so) to carry out an analysis aimed at identifying structural competition concerns in the ECS markets which are not currently addressed by the EECC. If the need for further regulatory intervention was identified in this sector, namely structural competition issues which are not currently addressed by the EECC, then the NRAs, applying the subsidiarity principle, should be empowered with the appropriate, necessary tools and competences, in order to ensure an effective and consistent implementation of the EECC, adapted to the specific circumstances of their national markets. This could be done by a revision of the existing framework or by assigning the power of applying the NCT in the ECS sector to the NRAs in order to avoid an overlap in competences between different authorities.

In the past, BEREC has raised proposals to address structural issues in the context of the evolution of the EECC, specifically in relation to optimising the analysis of joint-dominance (based on tacit collusion also addressed in the EECC) or the consideration of unilateral effects<sup>12</sup>. If the NCT were implemented, BEREC considers that the most adequate legal framework to address these issues is the EECC and that these proposals should be considered as a complementary piece of the ex-ante regulatory framework to be applied by NRAs.

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<sup>12</sup> See “BEREC Report on oligopoly analysis and regulation”. BoR (15) 195. Available at [https://berec.europa.eu/eng/document\\_register/subject\\_matter/berec/reports/5581-berec-report-on-oligopoly-analysis-and-regulation](https://berec.europa.eu/eng/document_register/subject_matter/berec/reports/5581-berec-report-on-oligopoly-analysis-and-regulation) and “BEREC views on non-competitive oligopolies in the Electronic Communications Code” BoR (17) 84, available at [https://berec.europa.eu/eng/document\\_register/subject\\_matter/berec/press\\_releases/7041-press-release-on-berec-papers-on-the-review](https://berec.europa.eu/eng/document_register/subject_matter/berec/press_releases/7041-press-release-on-berec-papers-on-the-review)

BEREC is eager to work together with the EC in the definition of the scope of new ex-ante competition tools, both to avoid overlaps with the EECC, and to complement, if appropriate, the current regulatory framework in a consistent manner.

(ii) The interplay with the ex-ante regulatory framework proposed for DPs with SIP

The same reasoning applies to the proposed ex-ante regulatory framework for DPs with SIP. As detailed in the BEREC response to the public consultation on the DSA Package, BEREC considers that an ex-ante regulatory framework targeting DPs with SIP can address the structural and specific issues raised by these platforms.

If the regulatory proposals formulated by BEREC for DPs with SIP were adopted, BEREC considers that the NCT should not overlap with this proposed ex-ante regulatory framework, and that the latter should be the applicable legislation (*lex specialis* principle). As in the case for the ECS sector, such a regulatory framework for DPs with SIP can be adapted in an efficient, tailored and consistent manner. It provides a scheme for predictable and timely intervention to address the identified competition problems, while creating the means to pursue a variety of objectives and to address wider societal concerns.

Therefore, even if the NCT were to be implemented in a DP-related environment, BEREC considers that the tool should be included within the proposed regulatory framework and applied by the competent body, in order to avoid overlapping.