Contribution ID: ecf59665-dab3-4232-a8f1-14a2b0015555
Date: 04/05/2021 13:12:09

Public Consultation BoR (21)34 Draft BEREC Report on the gatekeepers

Fields marked with * are mandatory.

General information

On 15 December 2020, the European Commission (EC) published a Digital Markets Act (DMA) proposal, introducing a series of rules for platforms acting as gatekeepers in the digital sector. In September 2020, BEREC proposed a regulatory model for an ex ante intervention in its response to the Digital Service Act Package (DSA) and the New Competition Tool public consultations.

During its 46th (virtual) plenary meeting (11 March 2021), the BEREC Board of Regulators has approved the draft BEREC Report on the ex ante regulation of digital gatekeepers (BoR (21) 34), which elaborates current BEREC's proposals in further detail and which is now open for public consultation. BEREC encourages all types of stakeholders, including civil society, consumers and citizens, to provide their views on the BEREC's proposals.

Your details

*Language of your contribution

English

*First Name

BEUC, the European consumer organisation

*Surname

BEUC, the European consumer organisation

*Email

competition@beuc.eu

Organisation name (in case you are replying on behalf of your organisation)

```
BEUC, the European consumer organisation
```

*Country of origin

```
Belgium
```

* ☑ I agree with the personal data protection provisions.

Practical details of the public consultation

Stakeholders are invited to comment and provide their views on the different chapters of the draft report following its structure:
Chapter 1 - Executive summary
Chapter 2 - Introduction
Chapter 3 - Previous work done by BEREC on digital environments
Chapter 4 - Objectives of the regulatory intervention
Chapter 5 - The scope of the regulatory intervention
Chapter 6 - Designation of gatekeepers
Chapter 7 - Regulatory measures for gatekeepers
Chapter 8 - Enforcement
Chapter 9 - Enhancing assistance from National Independent Authorities for an effective enforcement
Chapter 10 - Conclusions
Chapter 11 - Future work
Annex I: Two-Pager on effective definition of measures
Annex II: Two-Pager on dispute resolution
Annex III: Two-Pager on national support
Annex IV: Brief on ex-ante regulation

Stakeholders may also upload a document as a part of their contribution, see below.

In order to facilitate processing of the responses, the comments provided should clearly refer to the certain sections / subsections / paragraphs of the draft report.

Contributions should preferably be sent in English.

Stakeholder may submit their contributions **by 4 May 2021 close of business.**

In accordance with the BEREC policy on public consultations, BEREC will publish all contributions and a summary of the contributions, respecting confidentiality requests. Any such requests should clearly indicate which information is considered confidential.

Public consultation

Please indicate comments on Chapter 1- Executive summary and Chapter 2- Introduction

10000 character(s) maximum

Digital Markets play an ever more significant role in consumers' lives. Digital players, including the big platforms, have brought consumers many benefits. However, with the increase of power, the risk of its misuse with detrimental effects for consumers also increases, as seen in multiple enforcement cases against big tech. Monopolisation of services such as social networks and search tools can lead to locked-in consumers being deprived of meaningful choice. Existing EU tools are insufficient to deal with the risks that powerful platforms pose for consumers to stop this harmful trend. National measures would lead to fragmentation of the EU Single Market and are insufficient to deal with these global players. The proposed Digital Markets Act (DMA), together with the proposed Digital Services Act (DSA), are therefore important instruments to ensure that in future the online world better serves the interests of Europe's consumers.

Please indicate comments on Chapter 3 - Work done by BEREC on digital environments

10000 character(s) maximum

Please indicate comments on Chapter 4 - Objectives of the regulatory intervention

10000 character(s) maximum

BEUC supports the view of BEREC that ex ante regulatory intervention is necessary to promote competition to the benefit of not only business users, but also end-users.

Please indicate comments on Chapter 5 - The scope of the regulatory intervention

10000 character(s) maximum

First, BEREC considers that ideally NI-ICS should not be included in the list of core platform services, especially since they are already regulated under the EECC. Although it is important to consider potential legal overlap, we consider that NI-ICS should be included into the list of core platforms services. This would ensure that popular messaging apps operated by gatekeepers would be covered by the provisions of the DMA.

In addition, it would open the possibility to impose an interoperability requirement on those messaging apps to ensure genuine consumer choice in these services. The advantage of this approach is that such requirement would only be imposed on apps offered by gatekeepers while allowing rivals to offer new innovative products and services. This would promote contestability while ensuring innovation is not hampered.

To that end, Article 6 must include a new provision, in addition to Article 6 (1)(f), to ensure interoperability in relation to online communications such as instant messaging (although not a NI-ICS, the same conclusion could apply to social networking services so as to provide for genuine consumer choice). At present, consumers are locked-in to core platform services such as WhatsApp (or Facebook's social network). Due in particular to strong network effects, consumers cannot choose more privacy-friendly alternatives without sacrificing the networks of friends and other groups they have built up on a specific platform. Unless interoperability is mandated for these core services, it will be practically impossible for other service providers to gain a foothold and online communications services will remain neither contestable nor fair to consumers. Interoperability would enable new market entrants to offer users a real choice and allow users to choose their providers on the basis of their needs and preferences.
Whilst instant messaging services are also covered by the European Electronic Communications Code, including in the DMA an interoperability obligation only on gatekeepers has the advantage, from the contestability perspective, that it would enable rival start-ups to decide if this is favourable to them in terms of innovation (given that once requested it would be reciprocal between the start-up and the gatekeeper).

The Article 6 obligations are due to be specified in more detail by the Commission once the DMA is passed. This process should be used to impose technical interoperability requirements by means of defined Application Programming Interfaces (APIs) and/or standardised communication protocols and a set of core interoperable features.
The DMA must define a process to agree a set of core interoperable features for a given service, to avoid obstacles to innovation by ossifying functionalities, to counter incentives for gatekeeper companies to minimise the functionality standardised, and to avoid the risk of capture of the process by vested interests.

The European Commission's Multi Stakeholder Platform on ICT Standardisation, an expert advisory group where Member State and Commission representatives meet technical standards bodies four times each year, would be the right venue to plan standardisation support for interoperability requirements in digital markets. Or alternatively internationally agreed standards may be appropriate.
To ensure that end users are not locked-in to cloud storage services, the Commission should explore whether interoperability could also be required for these services.

Second, regarding the revision of the lists of core platform services, we also consider that to ensure the DMA is future proof, the lists should be revised and possibly updated at regular intervals or on an ad-hoc basis. This should be foreseen in the review clause of the Regulation.

Please indicate comments on Chapter 6 - Designation of gatekeepers

10000 character(s) maximum

First, in its draft report, BEREC suggests lowering the requirement in Article 33 from 3 to 1 Member States. Although this could enable Member States to raise issues to the Commission more quickly, only concerns with an impact on the Single Market should fall within the DMA.

In addition, Member States could also be given greater powers to oblige the Commission to open non-compliance proceedings. Under Article 33, three or more Member States would be entitled to request the Commission to open a market investigation into the designation of gatekeepers (under Article 15). This could be supplemented to give three or more Member States the right to call for the opening of a market investigation into new core platform services and practices to potentially be added to the DMA (under Article 17), a market investigation to establish systematic non-compliance (under Article 16) as well as an investigation into non-compliance by gatekeepers with the obligations under Articles 5 and 6.

Second, we support the idea that deadlines for both gatekeepers and the Commission should be short and binding.

Nonetheless, the proposed DMA appears to contain potential ambiguities or loopholes. There is apparently no time limit in the current proposal within which the Commission should open a market investigation under Article 15 for designating new gatekeepers or to identify core platform services following the 60-day gatekeeper designation decision deadline in Article 3. The DMA must be revised to make clear that any decision to open such a market investigation must be taken within the 60 days so as not to lead to indefinite delays. Furthermore, the deadlines in Article 15 must be made legally binding as is the case for all other deadlines in the DMA.

In addition, it is unclear in the current proposal when the Commission would use a market investigation to designate a gatekeeper pursuant to Article 3 (6), or to identify core platform services for a gatekeeper pursuant to Article 3(7). This must be clarified to avoid ambiguity and legal uncertainty.
It is further unclear whether the Commission would normally decide on the list of relevant core platform services for each gatekeeper within the 60-day deadline for designation of gatekeepers under Article 3(4). It must be made clear that this would be the default position.

The length of deadlines in the current proposal more generally favours gatekeepers rather than business or end users. The deadlines for the Commission to take decisions against gatekeepers/complete market investigations range from 12 to 24 months, or there is no deadline at all. By contrast, decisions on suspending Article 5 and 6 gatekeeper obligations where they would endanger the economic viability of the gatekeeper, or for exempting gatekeepers from such obligations for overriding reasons of public interest, must be taken within 3 months. It seems likely that where

gatekeepers fail to comply with their obligations, business users' economic viability could be equally (or perhaps even more) endangered and yet there is no deadline for a non-compliance finding (Article 25). If potential rivals to gatekeepers are driven out of business, consumers will have no choice but to use the gatekeeper's service, leaving them vulnerable to exploitation. Decisions under Article 25 must be made subject to a binding 6-month deadline.

Third, BEREC believes that being part of an ecosystems may reinforces the platform's gatekeeping roles. We consider that ecosystems may raise a further set of issues that should be fully considered when designing the obligations imposed on gatekeepers.

Please indicate comments on Chapter 7 - Regulatory measures for gatekeepers

10000 character(s) maximum

First, BEREC proposes to distinguish between directly-applicable obligations which i) would apply to all CPSs and ii) would apply only to specific CPSs. We consider that this distinction would not be appropriate in the context of the DMA and would only bring further complexity to an already complex proposal. The distinction between generally applicable obligations and obligations only imposed on specific core platform services would not necessarily bring swifter enforcement of the regulation or avoid litigation. The central benefit and the raison d'être of the DMA proposal is to impose a set of obligations on identified gatekeepers, in that context, sub-dividing the obligations currently contained in Articles 5 and 6 would add another layer of unnecessary complexity since the legislator would be forced to make a further assessment and decide which obligations apply to which core platform services. This would also reduce the general and broad applicability of the DMA and make it less-future proof.

Second, BEREC proposes to complement the directly-applicable obligations with remedies which would be designed and implemented on a case-by-case basis and applied to a single or a limited number of gatekeepers. Although we do not strictly oppose the idea of creating flexibility to future-proof the DMA, we stress that part of the rationale behind the DMA proposal is to avoid those lengthy case-by-case assessments, it would therefore be counter-productive to introduce this approach if it harmed the DMA's self-executing obligations. Additionally, a principles-based enforcement system in the DMA can create unnecessary frictions with competition law.

On the importance and the need for a self-executing DMA, experience in recent years has shown that EU competition law alone is not able to deal effectively with many of the challenges thrown up by digital markets, in particular due to the characteristics of these markets and the time required to investigate them. Therefore, regulation which can prevent problems arising before they cause consumer harm is essential to complement competition and consumer law enforcement.

The need for regulation to be self-executing and for this to proceed without delay is recognised in the DMA. The balance in the proposal between legal certainty on the one hand, and sufficient flexibility to deal with specific circumstances and future developments on the other, is appropriate. This applies both to the designation of gatekeepers (through qualitative and quantitative criteria and the Commission's decision-making powers) and to the mechanism of immediately applicable obligations and obligations susceptible of being further specified.

Gatekeepers are pushing for more flexibility in a bid to reduce the scope of their obligations and to delay the moment from which they need to comply. This must be resisted, however, as it would necessarily cause delay and encourage legal disputes and thereby undermine one of the key advantages of the DMA over competition law, namely swift and effective enforcement.

The balance between timely legal certainty and flexibility in the current DMA proposal as regards gatekeepers and their obligations must not be materially altered. Changes would enable stalling by gatekeepers to the detriment of consumers.

Third, BEREC raises the concern that the current DMA proposal mostly addresses issues that could be observed in the relationship between the gatekeepers and their business users. BEREC also suggests that the proposal should be reinforced to address certain inter-platform competition concerns, and to integrate some additional intra-platform competition concerns as well as certain end-users-only related issues.
We share BEREC's concerns regarding the current focus of the DMA on business users at the expense of end-users (i.e. consumers). We strongly support the suggestion made that certain end-users-only related issues should be addressed in the DMA.
The DMA is built on the twin objectives of contestability and fairness. However, the current proposal is heavily focussed on contestability and fairness for business users rather than end users.

This imbalance manifests itself both in terms of substance and procedure. End users must receive the same focus as business users in order to ensure a high level of consumer protection as required by the TFEU, since end users also include consumers. Where gatekeeper platforms operate in two-sided markets, the interests of consumers must be appropriately taken into account, equally with business users.
The rights afforded to business users could also lead to benefits to end users, for example if the DMA leads to the development of new or better services by business users, this should give end users more choice. Nevertheless, there are several areas where end user – consumer – interests should be taken into account directly.

It should also be made clear in Article 1(6) that the DMA is, in addition to the other EU law mentioned, also without prejudice to EU consumer protection law, notably the Unfair Commercial Practices Directive ("UCPD") and Unfair Contract Terms Directive.
BEUC's position paper (attached to our submission and available online at

https://www.beuc.eu/publications/beuc-x-2021-030_digital_markets_act_proposal.pdf) sets out further details over the possible changes that could be made to ensure sufficient focus on end-users.

Fourth, BEREC suggests some improvements to the updating process of the obligations laid down in Articles 5 and 6, namely, the role of national authorities should be strengthened in the updating process and the updating mechanism based in Article 10 seems to focus only on new practices which are unfair to business users.

We support the suggestion that national competent authorities can play an active role in the updating process since they would be able to contribute their knowledge and expertise. In addition, BEUC also shares the concern that Article 10 only takes into account business users and not end users. We strongly support and encourage a change to the phrasing of Article 10 to include practices that would be unfair to end-users.

Please indicate comments on Chapter 8 - Enforcement

10000 character(s) maximum

First, BEREC suggests that all actors – business users, (potential) competitors, but also civil society, standard-setting associations, and end-users – should participate in the regulatory dialogue to provide their views, experience and expertise.

As an organisation representing and promoting consumers' interests in the EU, we strongly support BEREC's suggestion to involve all relevant actors, especially civil society and end-users, in the regulatory process. This would ensure that all stakeholders, not just gatekeepers, have the ability to express their views and share their experience and to ensure that the DMA is enforced effectively.

In that context, Article 30 currently provides gatekeepers, or undertakings, or associations of undertakings concerned, with the right to be heard before the Commission adopts a decision in multiple types of proceedings. These decisions include the designation of gatekeepers, the specification of Article 6 obligations, suspensions/exemptions from obligations, market investigations, interim measures, non-compliance, commitments, etc.

Consumers or their representatives (and other interested third parties) must also have the right to be heard before such decisions are taken when their interests can be affected by such decisions. This is foreseen in the equivalent provisions under competition law for the hearing of parties where the Commission adopts similar decisions. There is no justification to deny consumers the right to be heard under the DMA, particularly as many gatekeepers operate in directly consumer-facing markets.

Denying other third parties the right to be heard would also be counter-

productive from the consumer perspective. If the dialogue on compliance with a particular obligation only takes the views of the gatekeeper into account, and not the intended third party beneficiaries of the obligations, the chances of effectively achieving the objectives of the relevant obligation in practice are likely to be materially reduced. The incentives of the gatekeeper will likely be to preserve its existing practices, and not promote contestability. Without the ability to check, using the expertise of third parties in the sector, that what the gatekeeper proposes will actually work for those it is intended to benefit, the DMA may miss its aims and that would not be in consumers' interests. Furthermore, guidance on the compliance dialogue process should be envisaged. Third parties including consumers should also have the right to submit formal complaints where they believe that gatekeepers are not in compliance with their obligations under the DMA.

Second, BEREC suggests introducing into the DMA the possibility for non-judicial dispute resolution mechanisms for business users and platforms competing with gatekeepers. BEREC believes that for the groups directly affected by the behaviour of the gatekeepers, it is crucial to have an easy access to a swift and effective dispute resolution mechanism. Indeed, dispute resolution can be seen as a private enforcement mechanism where plaintiffs monitor regulated actors' behaviour and bring the case to the regulator.

From our understanding, it appears that by this non-judicial dispute resolution mechanism, BEREC envisages a mechanism where a private actor—such as a business or end user—would lodge a complaint to the regulator which would be limited to issuing injunctions (and not sanctions), rather than a private arbitration mechanism. In addition, BEREC seems to suggest that national regulators could play an active role in this dispute resolution mechanism.

Although we consider it is essential for affected parties, be it business users, end users or rival platforms, to have the ability to raise issues and lodge complaints with the competent authority (the Commission in the DMA proposal) or with national regulators, we stress that enforcement of the DMA should remain solely at the EU level for cases falling within its scope. In this context, national regulatory authorities have an extremely useful and important role to play, namely as the first contact point for complainants that would consider it easier, faster, or more convenient to approach their national regulator rather than the European Commission. The national regulator would then be responsible for communicating the relevant and reasoned complaints to the Commission.

Please indicate comments on Chapter 9 - Enhancing assistance from National Independent Authorities for an effective enforcement

10000 character(s) maximum

First, we support BEREC's conclusion that the regulatory authority implementing and enforcing the DMA should be at the EU level.

Second, BEREC suggests that, along with the Digital Markets Advisory Committee (DMAC), it would be appropriate and beneficial to establish a specialised advisory body composed of representatives of National Independent Authorities (NIAs). Since information gathering will be crucial for effective intervention, BEREC thinks that NIAs could help in the data collection and the monitoring process, which could improve competition among platforms to the benefit of business users. Not only competition-related issues but also end-users' concerns can be spotted more rapidly at national level. To that end, BEREC considers that the structural involvement of established NIAs should be embedded in the DMA.

We support the exchange of information and expertise between NIAs and the competent authority for the enforcement of the DMA (the Commission). However, such a system, especially if institutionalised should not make decision-making and enforcement procedures more burdensome or lengthier.
In this context, one solution to enhance enforcement resources and expertise could be to allow the Commission to involve Member State enforcers in the Commission's enforcement actions. While the Commission would make the decision as currently proposed in the DMA, monitoring and the investigation of compliance could be supported by the inclusion of Member State authorities with particular expertise/experience with the issue at stake in the investigation team. Such monitoring could involve being the first point of contact for local consumers and business users to raise concerns or complaints on non-compliance by gatekeepers and information/data gathering at the national level where relevant.

Third, BEREC notes that concrete provisions regarding dispute resolution mechanisms for consumers are however missing in the DMA. BEREC considers that dispute resolution would be more efficiently carried out at the national level.. We consider that the provisions of the DMA must be enforceable in the national courts of the Member States by business users and consumers, including through collective redress. For the latter, the DMA proposal must indicate that the DMA is added to the annex of the Representative Actions Directive.

Please indicate comments on Chapter 10 - Conclusions

10000 character(s) maximum

For our views on the draft report, please see our written observation on each specific chapter.

We strongly agree with BEREC on the need for an ex ante regulatory tool to create contestable digital environments. The DMA proposal is a good start but some important changes are needed. to ensure that the final DMA optimally serves consumers.

The DMA should place greater emphasis on consumers' (end users) interests. This includes ensuring consumer choice of social network and instant messaging services through interoperability obligations. Where consumers are given rights and/or choices under the DMA, gatekeepers must present them neutrally. The DMA must include stricter rules to prohibit gatekeepers from circumventing their obligations through the use of 'dark patterns' (behavioural techniques and interface design) to influence consumers' choices.

The DMA must foresee a more effective system of enforcement at EU level. This includes the involvement of, all relevant actors and stakeholders in Commission decision-making to provide their views, experience, and expertise; this includes civil society and consumer organisations. The DMA could also foresee a greater role for Member State authorities in assisting Commission investigations.

To ensure efficient and smooth enforcement, it is essential to include reasonably short and binding deadlines in the DMA and effective enforcement measures from the first infringement by a gatekeeper to ensure swift compliance by gatekeepers with their obligations.

The DMA must be based on a set of self-executing directly applicable obligations. Integrating any case-by-case assessment risks undermining clear self-executing obligations and prohibitions, a key advantage of the DMA compared to competition law.

The DMA must also be enforceable by business and end users in Member States' courts, including through representative actions by consumers to obtain redress.

Please indicate comments on Chapter 11 - Future work

10000 character(s) maximum

We support the future work described by BEREC and strongly agree that further engagement should also be built with consumers' associations, as well as civil society and citizens.

Please indicate your comments on Annex I: Two-Pager on effective definition of measures

10000 character(s) maximum

Please indicate your comments on Annex II: Two-Pager on dispute resolution

10000 character(s) maximum

Please indicate your comments on Annex III: Two-Pager on national support

10000 character(s) maximum

Please indicate your comments on Annex IV: Brief on ex-ante regulation

10000 character(s) maximum

Please upload your file (max file size is 1MB)

9980eaea-f0c4-4097-be4b-c276d0612187/beuc-x-2021-030_digital_markets_act_proposal-compressed.pdf

Please specify which part of your response should be treated as confidential, if any.

None

THANK YOU FOR YOUR CONTRIBUTION

Contact

PC_gatekeepers_regulation@berec.europa.eu