facebook

Facebook's comments to the draft BEREC Report on ex ante regulation of digital gatekeepers,

Facebook welcomes BEREC's work on "ex-ante regulation of digital gatekeepers" and has the following observations on the Draft BEREC Report.

1. Executive summary of the BEREC report and the interplay between the European Electronic Communications Code and the Digital Markets Act

Regarding the scope of the proposed Digital Markets Act ("DMA") regulation, Facebook agrees with BEREC that the applicability of the DMA to markets related to electronic communications networks and services, including number-independent interpersonal communications services ("NI-ICS")[1], should be treated with utmost caution. As BEREC rightly points out, NI-ICS are already regulated under the European Electronic Communications Code ("EECC"). The EECC, which was required to have been transposed in EU Member States by December 21, 2020[2], brings NI-ICS into scope of the European communications regulatory framework, as espoused in the EECC, for the first time. Facebook agrees with BEREC that any legal overlap between the EECC and DMA should be avoided in order to reduce regulatory uncertainty for market players and consumers. Facebook also believes that national regulatory authorities ("NRAs") are well placed to enforce the EECC. As the EECC imposes regulation on NI-ICS for the first time, it would be prudent to take account of the experience of NRAs and BEREC following a representative period of enforcement before considering implementing new and (potentially) overlapping obligations on NI-ICS through the DMA or other legislative proposals.

Regarding the DMA, Facebook agrees with BEREC that sound knowledge and detailed understanding of the business models and technicalities of the sector(s) is needed. As BEREC points out, these sectors are highly technical and fast-evolving. Facebook respectfully adds that these markets are also characterised by innovation and that the way value is created by each of these platforms is diverse, complex, multi-sided, and should be assessed carefully before intervening. To prevent potential harm being caused to the development of and competition

[1] As defined in Article 2(7) of Directive 2018/1972 (the European Electronic Communications Code or EECC): "'number-independent interpersonal communications service' means an interpersonal communications service which does not connect with publicly assigned numbering resources, namely, a number or numbers in national or international numbering plans, or which does not enable communication with a number or numbers in national or international numbering plans;"

[2] Facebook notes that, for the most part, transposition has been delayed in EU Member States.

between these important platform ecosystems, the positive and negative effects of interventions should be assessed carefully to avoid harmful effects on competition and consumers. This type of complex balancing exercise is not new to NRAs and BEREC, as this has been one of the cornerstones of the EU regulatory framework for telecommunications markets in the EU. NRAs and BEREC have a lot of experience with ex-ante regulation and multiple decades of experience with in-depth assessments of the (economic) effects of regulation, what it means for innovation, (dynamic) competition and consumer harm. And though the platform economics and competition related to NI-ICS differ from the traditional telecommunications markets, we believe that BEREC's experience with regard to the development and application of a principles- and evidence-based assessment, can greatly contribute to an effective regulatory framework under the DMA. Still, we would like to point out that the relevance and effectiveness of remedies common in the electronic communications sectors is not transferable to digital platforms without further assessment of the business model to which it is applied.[3]

Facebook agrees with BEREC that (quoting BEREC here) "*along with strong information gathering mechanisms, a continuous, structured regulatory dialogue, and repeated interactions will have to be created with all kinds of relevant potential stakeholders (such as business users, potential competitors, consumers associations, civil society), and not only with the concerned gatekeepers*"[4]. Facebook would like to echo the observation that a clear understanding of the markets is needed, including the various ways in which value is created by platform ecosystems.

2. Previous work done by BEREC on digital environments

Facebook is aware of previous work done by BEREC and NRAs related to "digital markets" and platform ecosystems. As BEREC in various studies has pointed out, traditional telecom markets and platform markets are closely related, and often complementary in nature, with traditional telecommunication services typically offering (network) connectivity in a highly standardised ecosystem, and with platforms offering a wide range of services and applications on top of these networks. The nature of these different categories of services has been reflected in much of BEREC's work and in EU legislation, such as the Open Internet Regulation[5], the BEREC guidelines on Open Internet, and most recently with the EECC. Competitive dynamics between

[3] See discussion in Kretschmer, Tobias and Werner, Sven, Regulating Platforms as Utilities? A Business Model Perspective (March 18, 2021). Available at SSRN: https://ssrn.com/abstract=3807310 or http://dx.doi.org/10.2139/ssrn.3807310

[4] See section 2.1 of the BEREC Report (page 3).

[5] Regulation 2015/2120: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015R2120&from=EN

the different categories of services vary significantly. Traditional telecommunications services are typically offered by a relative small number of players (fixed operators, MNOs) with high barriers to entry (given fixed networks being hard to replicate, and given scarcity of available resources such as spectrum, which is needed to offer mobile services), whereas platform and application markets are characterized by a broader range of players, generally lower barriers to entry, often offering services at a (quasi-) global scale. Some of these platforms are expected to fall within the scope of the DMA as "core platform services" ("CPS").

Facebook has followed BEREC and NRAs in their work in these markets very closely and we have actively contributed to numerous BEREC consultations such as the consultation on the data economy, and several consultations on the Open Internet Regulation and the accompanying BEREC Guidelines[6]. We have also participated in multiple events organised by BEREC and NRAs, and we highly appreciate the open dialogue NRAs and BEREC have with their stakeholders.

As BEREC points out in its draft Report, we strongly support BEREC's statements that a close and continuous working relationship between NRAs, BEREC and other stakeholders is needed to better understand these highly complex "platform markets". And though platform and traditional telecommunication markets are closely related to one another, the differences between the two ecosystems in terms of competitive dynamics, consumer experience and innovation are significant. A clear understanding of how these platforms work, the multi-sided nature of many platforms and the way value is created by these platforms should be reflected when discussing regulation.

3. Regulatory design of the DMA

The DMA is a significant and highly novel proposal that will sit at the centre of the EU's regulatory framework for digital markets and technologies and shape these markets for a considerable period in the future. It is not only an important measure for a company like Facebook, but also for the EU's ambitious plans in the digital economy. The DMA truly is exceptional in that it is a completely novel way of regulating large companies that provide / engage in certain digital activities, rather than the more conventional approach to date of looking at regulation of markets more broadly. Its reliance on well-established concepts of

[6] BoR (20) 112: https://berec.europa.eu/eng/document_register/subject_matter/berec/regulatory_best_practices/guidelines/9277-berec-guidelines-on-the-implementation-of-the-open-internet-regulation

competition law or other regulatory frameworks such as electronic communications is minimal, at best. This increases the need for clarity, legal certainty, and accountability.

As Facebook has engaged in constructive conversations with various stakeholders throughout the last months, it has become clear that questions on the regulatory design of the DMA are, and should be, a key part of the conversation. That is because the regulatory design will matter greatly in the practical operation of the DMA, including by laying out the framework for interactions between the regulator and companies falling within its scope. This in turn will be a crucial element for companies' compliance efforts, which will ultimately impact the DMA's ability to meet its objectives.

With this submission, Facebook seeks to meaningfully contribute to this conversation and to make a range of suggestions which Facebook believes would greatly help in the practical applicability of the DMA. Facebook is fully aware of the political aim for the DMA to work efficiently and swiftly. While time-consuming processes are not in Facebook's interest, there will be a need to make sure some provisions will not be applied in a disproportionate way that would unduly increase legal uncertainty and ultimately hinder innovation and reduce consumer benefits. Facebook views the following suggestions as the start of a wider dialogue and looks forward to discussing these further with various stakeholders.

4. Some suggestions for improving the DMA's regulatory design

4.1. A framework with more avenues for regulatory dialogue would benefit both the regulator and the companies in scope

Constructive dialogue between the regulator and companies would allow the regulator to ensure that the objective of the DMA provisions are met from the beginning while reducing non-compliance risk for companies. For Facebook, meeting the DMA's regulatory obligations will be the overarching priority. The DMA not only includes very strong enforcement measures, but it is also likely to lead to significant compliance efforts. It is in Facebook's interest to make sure that these compliance efforts meet the regulatory requirements from the very beginning. As currently proposed, the DMA does not provide for an adequate framework for an effective dialogue between the regulator and the gatekeepers. In particular, it does not envisage any consultative procedure for Article 5 provisions and the regulator is under no obligation to answer to a gatekeeper's specification request under Article 7(7) for Article 6 provisions.

Facebook believes that a more participatory approach - that would lead to better outcomes for

both the regulator and the companies it is seeking to regulate - based on more opportunities for dialogue, can be achieved through:

A. Protected 'first attempt' for Article 5 provisions. Currently there is no consultative procedure for Article 5 provisions even though some provisions will involve important product design decisions Facebook believes could merit from an exchange with the regulator. This gap could be addressed in two different ways. First, Article 7(2) could be extended to Article 5 provisions and be made a necessary step before the Commission can take enforcement action under Article 25 (see sub-Point 2 below).

Second, companies could file their good faith compliance measures for each Article 5 provision with the regulator which would trigger an 'in compliance presumption' unless the regulator objects to it within a specified timeframe. If it objects, the company would get a chance to address that objection through a change in its compliance measures. This process could be part of the commitments procedure under Article 23. If the regulator does not object within the specified timeframe, the company is presumptively compliant. The regulator can always object to compliance measures down the line and order proceedings under Article 23, but then the company should not be subject to fines nor should a potential non-compliance decision count for the purposes of a systemic non-compliance investigation under Article 16(3).

B. A decision under Article 7(2) for Article 6 provisions should be a necessary step before the Commission can take action under Article 25. This form of procedural sequencing would allow for a regulatory dialogue as suggested in Recital 58, and for companies to ensure compliance without facing enforcement action against their good faith compliance measures. This would also prevent the Commission from treating gatekeepers inconsistently when applying Article 16 on systematic non-compliance, if some gatekeepers go through an Article 7(2) process and others not. This would not prevent the Commission to take action under Article 25 if a gatekeeper does not comply with the measures specified in a decision pursuant to Article 7(2). Article 7(3) would have to be amended accordingly.

C. The consultative process for Article 6 provisions should be improved. Whenever a company asks for clarification under the Article 7(7) process, the Commission should be obligated to provide an answer. Currently it does not have to do so, which leaves companies in compliance uncertainty even though they have explicitly signaled that

uncertainty to the Commission under an Article 7(7) request. We trust that the Commission would be motivated to avoid uncertainty, and that it is likewise in the Commission's interest to provide an answer.

D. The Commission should be required to refrain from opening any enforcement proceedings for non-compliance pending the outcome of an Article 7(7) request. The Article 7(7) process currently is a key element in facilitating regulatory dialogue, as laid out in Recital 58. That process, however, could be seriously undermined if companies find themselves exposed to enforcement action while they seek guidance from the Commission.

E. Introduce provisions that allow the Commission to issue guidance. Guidance on specific obligations could provide greater clarity to companies, especially if preceded by consultations with gatekeeper companies and other affected parties. This would also contribute towards a more transparent and harmonised application and understanding of the DMA, and could serve in enabling the Commission to ensure application of the DMA is able to reflect existing and future market developments.

4.2. The introduction of an efficiency defense would mitigate unintended consequences and lead to more proportionate outcomes

Currently the DMA imposes a list of self-executing obligations and prohibitions on companies. There are no provisions that would be applied on a case-by-case basis, i.e. "greylist" obligations, as they were termed in the run-up to the DMA. The suspension and exemption processes, in Articles 8 and 9 respectively, are the only two avenues available to suspend the applicability of provisions in whole, or in part. Both articles may only take effect on the basis of very narrow grounds. In the current DMA proposal, gatekeepers cannot justify that a given behaviour prohibited by the DMA actually has economic advantages for business users and/or end users, that on balance is positive for the market and leads to increased consumer welfare.

Likewise, companies do not have the possibility to demonstrate that a given practise is pro-competitive in that it generates value and innovation and is incapable or unlikely to have any anticompetitive effects or reduce market contestability in a particular instance and should hence not apply. Admittedly, while it may not make sense to subject every provision to an efficiency defense (which would also reduce administrative burden for the regulator), companies should be given the opportunity to demonstrate the net positive effects of

behaviour that may fall under one of the Article 5 and 6 provisions - especially for practices that are capable of improving services for consumers. For Article 6 provisions, Article 7(5) could provide an obligation for the Commission to take into account efficiencies brought forward by companies during the specification process (similar to existing processes that exist for example, under the EU's merger regime[7]).

4.3. Exemptions from obligations should also be granted on grounds of objective justifications

Related to the point above, the DMA currently does not allow companies to be exempted from obligations on grounds of objective justifications, such as protecting users from harm or service integrity. Facebook believes that such objective justifications could usefully be introduced in Article 9. Importantly, as a company requests an exemption, it should be protected from a finding of non-compliance under Article 25, at least for as long as the Commission is assessing this request. For Article 6 provisions, Article 7(5) could also provide an obligation for the Commission to take into account any objective justifications brought forward by companies. Alternatively, objective justifications could be introduced within specific obligations, in that a company could justify a given practise for a specific purpose such as protecting its users from harm. For example, Article 5(a) should still allow companies to use and combine data for safety, integrity, and security purposes such as identifying behaviour that poses safety risks across services, or applying protection measures across services (e.g. removing an account that has shared child sexual abuse material from all services owned by the company).

4.4. In determining that a CPS should not fall in scope despite meeting the quantitative thresholds, greater consideration should be given to the competitive environment

It should be clarified that Article 3(4) allows companies to argue that a CPS (and not only a gatekeeper) should not fall in scope of Article 3(7) because they do not meet the requirements of Article 3(1), despite meeting the quantitative thresholds in Article 3(2). In coming to a decision on gatekeepers, the Commission is asked to consider the various elements in Article 3(6). This should apply *mutatis mutandis* to a decision on CPSs as well. These elements largely relate to the size and scale of the gatekeeper/CPS and miss an important consideration: an assessment of the CPS's competitive position in the market. Introducing this element is important since a CPS could be a relatively 'large' service, but still operate in an environment of dynamic competition and competing against more established players. The DMA should be careful in not chilling competition coming from these kinds of challenger CPSs. Equally

[7] Regulation 139/2004 as amended: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32004R0139&from=EN

important, the applicability of obligations and enforcement against a CPS that is pending an Article 3(4) review should be suspended for the period of the review.

4.5. EU-wide regulatory coherence will be critical to ensure DMA's objectives

The DMA is a complex piece of regulation that will require companies to undertake careful balancing and compliance exercises. At the same time it is a harmonization measure based on Article 114 of the Treaty on the Functioning of the European Union ("TFEU")[8]. Against this background, the possibility to apply additional national competition rules as enshrined in Article 1(6) needs to be critically assessed, not least because those rules might well seek to impose obligations on gatekeeper companies that deviate from those in the DMA.

4.6. It is unclear if and when regulatory obligations are to be removed

Other asymmetrical regulatory regimes such as the EU electronic communications regulatory regime (as contained in the EECC) operate under the premise that they should be ultimately removed once competition in a given market has been restored. The idea is that competition law would be sufficient as a 'background regime' to ensure a competitive market. The DMA does not anticipate the removal of regulatory obligations once competent regulators find that a sufficient level of 'market contestability' and 'fairness' has been achieved. Facebook considers this to be an important flaw in the current approach, which needs to be addressed so as to explicitly provide for removal of regulatory obligations. In order to do that, the proposal would have to more closely define when the two objectives, market contestability and fairness, are met.

4.7. The operation of the DMA will require a well-resourced regulator

It is in regulatees' interest to engage with a well-staffed regulator who has the necessary resources and technical capabilities to oversee and advise on the applicability of the obligations across a considerable number of CPSs provided by a diverse group of gatekeeper companies. Although this is important in any regulated sector, it is especially relevant in digital markets, characterized by very short innovation cycles. Facebook is concerned that the number of staff currently foreseen is very likely to be insufficient. This is particularly critical as on top of compliance specifications and enforcement, the regulator will also be responsible for resource-consuming processes such as the various market investigations. We welcome BEREC's

[8] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012E/TXT&from=EN

suggestions to make use of BEREC's expertise and capabilities, without losing sight of the regulation to be harmonised and centrally enforced.

4.8. There are various ways in which due process and the level of accountability could be improved

The following is a non-exhaustive list of suggestions:

1. Companies should be given more time to respond to preliminary findings. Companies are subject to extremely short timelines to respond to any preliminary findings. In contrast to the Commission's open-ended timelines under Article 25, companies must respond to any preliminary findings (which, given the markets and issues involved, are likely to be very detailed and complex) within 14 days pursuant to Article 30. That number should be extended to at least four weeks, with potential for further flexibility as might be needed to reflect specific circumstances [and where it can be reasonably demonstrated that the relevant company is working to cooperate with the Commission on providing the relevant information].

2. Right to be heard prior to Article 8 and 9 decisions. Article 30 DMA specifically refers to the right for an undertaking to be heard prior to the Commission adopting a decision under Articles 8 and 9. However, Articles 8 and 9 do not set out any requirement for the Commission to provide preliminary findings to the gatekeeper. There needs to be a procedural safeguard for companies to address the Commission's arguments for having rejected a company's request under Articles 8 and 9.

3. Companies' rights of defence during interim measures proceedings. While Article 30 refers to the companies' right to be heard and access to file in relation to any preliminary findings (and specifically refers to Article 22), Article 22 does not in turn require the Commission to provide any preliminary findings to the gatekeeper regarding the need for interim measures.

4. The Commission's power to conduct a market investigation into systemic non-compliance (Article 16) should be clarified:

a. As long as the Article 7(2) process remains optional for the Commission, Article 16 is at risk at being applied unfairly as some companies may benefit from an Article 7(2) decision while others could be subject to immediate Article 25

enforcement action, counting as a 'strike' for the purposes of Article 16(3). For that reason, an Article 7(2) decision should be a necessary step before any enforcement action under Article 25 (see also Points 4.1.A. and 4.1.B. above).

b. (i) Should a company collect three 'strikes' for non-compliance in relation to three different CPSs or in relation to three different provisions and (ii) should a company collect three 'strikes' for the non-compliance without any regard to the gravity of those infringements, there will be a legitimate question of this measure's proportionality to the non-compliance at stake.

c. There should be a causal link and a significance test between the established non-compliance and the gatekeeper having further strengthened or extended its position. The absence of a causal link and significance test would punish companies for having competed on the merits by e.g. having served users with more attractive and/or innovative products.

With these suggestions Facebook hopes to meaningfully contribute to the ongoing discussions on the DMA's regulatory design, the interplay with other legislative files such as the EECC, and looks forward to continuing the dialogue with BEREC, the relevant EU institutions and other stakeholders.

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