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

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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

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

GSMA

*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

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We also welcome the Commission’s initiative to create a harmonised ex-ante instrument targeted at the providers of Core Platforms Services designated as gatekeepers via the Digital Markets Act (DMA). Current legislative instruments are not sufficient to ensure contestable and fair markets in the digital economy.

Telecommunications operators are both business partners and customers of online platforms. Furthermore, we strive to compete with gatekeepers in our core business and other activities, such as in cloud computing. Our relationship with online platforms is manifold and includes inter alia the use of online advertising, operating systems incorporating aspects of the device hardware and software, or app stores. Additionally, devices connected through our networks often provide access to the platforms in question. More in general, telecoms have a vital interest in Europe’s digital prosperity and sovereignty which require a healthy and competitive digital platforms sector.

An ambitious and balanced DMA has the potential to lead the way, globally, in improving market dynamics in the field of digital services. We concur with BEREC that some improvements to the Commission proposals are needed to make the DMA a success.

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

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

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We share concerns about unfair and anticompetitive conducts by a few large digital platforms, which stifle opportunities for competitors and ultimately have a chilling effect on innovation and diminish consumer choice. We agree with BEREC that the DMA should create competitive and innovative markets that deliver superior results for citizens in Europe and worldwide, namely by ensuring contestability in the digital sector, fairness for business users of online gatekeepers, and protecting end-users from abuses.

We invite BEREC to take note of another crucial objective of the DMA, which is strengthening the internal market for digital services by setting out harmonised rules across the EU.

Regarding the first objective highlighted in the report ("Ensuring contestability in the digital environment") we very much agree that, to truly stimulate fair competition in digital markets, the DMA should strive to address a gatekeeper's unfair practices against its competitors, even if said competitors are not necessarily its business users. Leveraging the crucial assets of gatekeepers, such as their data monopolies, would be particularly effective to redress the balance for gatekeepers and their competitors and promote healthier inter-platform competition.

Concerning the objective "Ensuring openness of the digital environment", we believe that rules should be consistent all along the digital value chain, so that the same problems be subject to similar solutions. New gatekeeping situations have emerged in various layers of the digital value chain other than connectivity; this calls for a debate over the regulatory principles to apply to major players that exert a bottleneck along the digital stack with a relevant impact on the ability of internet users to access any content and run any application or service of their choice through any device. We believe that BEREC could add value in the debate concerning the role of platforms in the digital communications market and we support BEREC's work in this area, i.e. studying consumer behaviour and attitudes towards digital platforms, monitoring the effects of the internet value chain, and undertaking economic analysis of digital markets.

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

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We strongly support that the scope of the Regulation should focus on digital markets where online platforms are present and operate as, or may turn into gatekeepers. We believe that the DMA accurately includes in the scope the relevant core platform services to whom regulatory intervention is needed to ensure fairness and contestability in digital markets when certain gatekeeping criteria are met.

Telecom operators are already subject to an ex ante regulatory framework designed to promote competition, enshrined in the EECC. The application of additional, overlapping ex-ante rules would be unjustified for services already subject to general authorisation under that regime. For this reason, regulated electronic communications networks and services have been explicitly exempted from this Regulation as indicated in Article 1(3).

However, we are concerned that this exemption lacks sufficient clarity in its application to Interpersonal Communication Services (ICS). It is then critical to define precisely the services that should fall under the scope of the DMA. Number-based ICS already fall under a broad range of sector-specific competition rules required by the general authorisation regime (e.g., ensuring interoperability, removing switching barriers; additional regulation at the national level). Therefore, it should be clarified that these services should fall outside of the scope of the DMA, to avoid redundancy with applicable sector-specific regulation. Article 1(3)(b) of the DMA should however clarify that only those ICS that do not use phone numbers – as defined in Article 2(7) of the EECC – fall within the scope of the DMA.

Contrary to number-based ICS, number-independent ICS are exempted from most EECC provisions; importantly they are not subject to the general authorisation regime. Article 1(4) excludes communication services that do not use phone numbers from interoperability obligations in the DMA. Consequently, gatekeepers would continue to fall only in Article 61 of the EECC, which does not address situations of dominance and is only applicable in the unlikely event that telecoms do not offer their communication services any longer. This EECC provision is no reasonable alternative to the DMA.

Regarding the revision of the CPS list, we recognise that the Commission should continuously monitor markets, which may result in proposals to adjust the list of core platform services through a legislative review. We very much concur with the report's statement that "Before defining a CPS, it is necessary to consider the need for regulatory certainty to facilitate investment and continued innovation within such an important and dynamic sector". However, the justification that substantiates the extension in scope in the Commission proposal seems arbitrary to the extent that the Commission does not establish economic and objective criteria to justify the inclusion of the proposed core platforms services via amendment to the Regulation. This lack of objective criteria carries considerable legal uncertainty particularly for new services which could potentially be subject to the DMA Regulation by means of the market investigation.

We do appreciate that the new regulatory regime introduced by the DMA will require time for the Commission and all parties involved to learn and adapt, and that the Regulation could be reviewed in the future based on the acquired experience; nonetheless, in order to avoid undesired and unwarranted spill-over effects from the onset, a mechanism based on sound criteria for the review of the CPS list is essential.

Please indicate comments on Chapter 6 - Designation of gatekeepers

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We believe that the mechanism to designate a gatekeeper is an essential element of the proposed Regulation and should be carefully calibrated taking into account the considerable impact on the businesses concerned and the broader implications for the digital economy. To achieve this objective, we deem necessary that the gatekeeper designation is based on a sound cumulative three criteria test that includes size, gateway and enduring position of the given core platform service. We support the existence of quantitative thresholds that specify the qualitative identification procedure of the proposal.

Thresholds related to a provider's annual turnover or market capitalisation should be sufficiently high to exclusively cover very large platforms where most of the structural competition problems are identified and thus to reduce type 1 errors, i.e., over-regulation. Therefore, we see the risk for undertakings which do not pose the same type of issues as the actual gatekeepers being captured by the provisions.

Please indicate comments on Chapter 7 - Regulatory measures for gatekeepers

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In our contributions prior to the release of the DMA proposal, we supported a framework based on a case-by-case assessment and application of tailored remedies, which would allow dynamic adjustments and that would be proportionate to the nature and the seriousness of the specific threats to competition and contestability in a targeted market.

In light of the proposed Regulation, we broadly support the sets of prohibitions and obligations for gatekeepers put forth in Articles 5 and 6 of the DMA.

We stand behind BEREC's view that the DMA proposal should be reinforced to address certain inter-platform competition concerns. For instance, Art. 6(1) - which bars gatekeepers from using non-public data about the activities of business users or their end users to compete with those business users - should benefit contestability more broadly, by also covering the data of the gatekeeper' competitors that are not necessarily its business users

We agree with BEREC that data portability obligations as reflected in Art. 6 (1)h are essential to facilitate switching, e.g. between cloud services. We also concur that interoperability between the gatekeepers and other competing services should be further promoted and that assurances of equal treatment between the gatekeeper's own services and third party services should be strengthened. These measures could support the launch of interoperable, secure and open solutions based on mobile hardware for a European e-Identity. It is essential for European developers of eID solutions that the market is

not foreclosed in this regard.

We particularly appreciate BEREC's concerns related to bundling and tying. The prohibition of tying in Art. 5(f) addresses situations where one core platform service (the tying service) is provided conditional on the use of another core platform service (the tied service). Nevertheless, strategic tying of services to lock users into a gatekeeper's ecosystem could be pursued through any combination of the offerings in the gatekeeper's portfolio. Competition law identifies that abuse of dominance may result from tying of any unconnected service and the same approach should be followed. Hence, the prohibition at Art. 5(f) should be extended to any other unconnected service or product, not only other core platform services. This will have the effect of removing the ability of gatekeepers to leverage market power from their core platform service, and so will prevent them from tipping adjacent markets in their favour.

For the same reasons as above, we believe that the interoperability obligations should not be limited to ancillary services only, but to any unconnected services offered by the gatekeeper.

As BEREC points out in the report, some concerns may only be partially addressed by the list of obligations put forth in the draft Regulation. We note that the proposal currently does not address some problematic behaviour related to standardisation and intellectual property. We would propose adding an obligation tackling these critical behaviours.

Regarding the updating process of the gatekeeper's obligations under the DMA proposal, we believe that the future-proof character of the DMA is safeguarded through the market investigation foreseen in Article 17 which allows the Commission to expand the scope of the DMA to new harmful practices emerge over time. However, we consider that the processes provided in Article 17 could be lengthy and non-efficient for digital activities which are fast-moving. More specifically, a shorter timeframe (conclusions of a market investigation tool to be issued within 12 months instead of 24 as proposed by the Commission) to include additional obligations might be necessary to make sure that the Regulation remains flexible and adaptable.

Please indicate comments on Chapter 8 - Enforcement

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We agree with BEREC that a constant regulatory dialogue is needed to develop hands-on experience and knowledge in highly sophisticated and complex sectors, and that a framework fostering structured and regular interactions with all relevant stakeholders is key.

It is essential that a strong list of obligations in Articles 5 and 6 is supported by an equally sound and practical remedy setting process guaranteeing that gatekeepers correctly implement the measures to comply with the obligations set out in this Regulation within a clear timeframe. A detailed implementation and compliance process, with clear timing stages, and an opportunity for stakeholders to comment on draft implementing measures would be key to greater legal certainty for all parties concerned.

More specifically, relevant stakeholders such as the gatekeeper's competitors and its affected business users should be involved in the remedy development process to ensure that the specific obligations are effective in addressing the market problems they target. The DMA proposal does not contemplate this step, as according to Art. 7(2) the dialogue is exclusively between the Commission and the gatekeeper platform concerned. In our view, the Commission's preliminary findings or proposed draft obligations should be subject to input by stakeholders, either through a targeted or a public consultation before they are finalised. The well-established market testing mechanism that is used for remedies in competition law could inform this process, and could also be used in the context of market investigations for systematic non-compliance (Art. 16) and commitments offered by the gatekeeper (Art. 23). In this case, any possible delay in implementation of the measures would be offset by advantages in terms of greater robustness and effectiveness of the remedies.

We are also convinced that the DMA should facilitate a swift and effective regulatory framework. For instance, the Commission should have a right to issue non-binding guidance for gatekeepers that specify their obligations under Article 5. While not affecting the self-executing nature of these remedies, guidelines that clarify and harmonise the interpretation of Art. 5 obligations would greatly benefit all the parties involved.

In the same vein, the Commission should have the possibility to specify the remedies laid down in Article 6 on its own initiative as it designates a provider of core platform services as gatekeeper. This prerogative would give more legal certainty to gatekeepers, which would receive from the onset guidance to swiftly implement measures that are compliant with their regulatory requirements.

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

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We believe that the imposition, supervision and enforcement of this new framework would be best undertaken at EU level, since gatekeepers operate in global ecosystems and competition concerns arising in digital markets have an important cross-border dimension.

The EC should be adequately resourced, and vested with investigative powers to collect relevant information from digital firms and fully appreciate the competitive dynamics of digital ecosystems. Nevertheless, as the effects of platforms' abusive conducts may differ across Member States, or emerge only in single Member States, an effective coordination with national competent authorities remains crucial for an effective oversight.

Please indicate comments on Chapter 10 - Conclusions

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Please indicate comments on Chapter 11 - Future work

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

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

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

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

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THANK YOU FOR YOUR CONTRIBUTION

Contact

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