

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

Open-Xchange AG

*Surname

Open-Xchange AG

*Email

open-xchange.com

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

Open-Xchange AG

*Country of origin

Germany

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

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We agree that there could be an overlap between the Electronic Communications Code (EECC) and the new Digital Markets Act in the regulation of number-independent interpersonal communication services (NI-ICS). However, we are strongly in favour of including NI-ICS within the scope of the Digital Markets Act, for the following reasons.

While the market for NI-ICS in Europe shows significant signs of market failure, with one operator dominating the scene, the regulation of NI-ICS in the EECC, while recent and yet to be fully tested, has not shown significant effects on this situation. The avenue of a case-by-case, ex post intervention by national regulators seems to be too slow and ineffective to address a service which in just a few years went from nothing to being possibly the most widely used ICS in Europe.

More importantly, there is a very high degree of integration between NI-ICS and other core platform services and especially social media, in terms of dominant companies (Facebook dominates both NI-ICS and social media), of integrated functionalities and apps, and of customer data profiling and merging. Indeed, the distinction between NI-ICS and social media is likely to disappear altogether in a very short timeframe.

We also challenge BEREC's assessment that "business users do not typically use NI-ICS but number-based interpersonal communications services (NB-ICS) to communicate with their customers". In our experience, especially SMEs are rapidly moving towards keeping consumer relationships on social media and NI-ICS, which are easier to use, more direct and more affordable than telephony-based customer relationship services. Increasingly, people book restaurants or contact local shopowners - or even traditional big business CRM platforms - via "chat" services; this trend was boosted by the Covid-19 pandemic and can only grow on in the future.

All in all, there are much stronger commonalities in dominant players, market dynamics and functionalities between NI-ICS and other core platform services, than there are between NI-ICS and number-based ICS. Thus, we think that it makes more sense to regulate NI-ICS as part of the broader set of Internet-based over-the-top services, than to do so as part of traditional telephony and connectivity services.

Please indicate comments on Chapter 6 - Designation of gatekeepers

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We take the opportunity to share with BEREC our concerns on how the gatekeeper definition could play out for many core platform services which are not built to differentiate between business users and consumers.

Social media like Twitter or Facebook, for example, generally have "users"; while many businesses open a Twitter account or a Facebook profile to communicate, and while these companies have specific promotions and documentation for business use of their standard features, there is no such thing as a "business Twitter account", formally different from a standard Twitter account. It is thus unclear how the requirement to have "at least 10'000 business users" will ever be measured. Moreover, all core platform services that, like social media, also offer advertising as a monetization channel for the platform owner, also have advertisers as business users. It is thus also unclear which business users should be counted, whether the advertisers or the businesses that use the platform to communicate, or both.

This gets even more difficult for platforms that do not have advertising, like most NI-ICS services. Indeed many businesses use Whatsapp to communicate, but how do you tell and count which accounts are associated with a business? All the platform knows is a contact name and a username or number.

We are concerned that these ambiguities could be used to subtract some of these services from the scope of the new law. We would thus suggest that, for core platform services listed at points (b) to (g) of Article 2(2), the qualitative and quantitative requirement on the number of business users should not apply, and these services should be considered gatekeepers only because of the sheer number of users in general.

Please indicate comments on Chapter 7 - Regulatory measures for gatekeepers

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We share and commend BEREC's emphasis on interoperability as a basic mechanism to open up markets and promote consumer choice and competition, and agree on the view that the current provisions in the DMA draft are insufficient.

We suggest that the interoperability provision in Article 6(1)(f) should be extended to the core platform services - not just to ancillary services - and should recognize the right to interoperability to all end-users, including consumers, and not just to business users. Alternatively, a broader provision recognizing interoperability to all users could be introduced separately, as a new point in Article 6(1), either for all core platform services or, as a minimum, for social media and NI-ICS.

We hope that BEREC will support this amendment proposal.

Please indicate comments on Chapter 8 - Enforcement

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

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

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

Our response is not confidential.

THANK YOU FOR YOUR CONTRIBUTION

Contact

PC_gatekeepers_regulation@bereg.europa.eu
