

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

Privacy International

*Surname

Privacy International

*Email

privacyinternational.org

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

Privacy International

*Country of origin

Italy

*☒ 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

Privacy International (PI) welcome the opportunity to provide comments to BEREC's report on the proposed Digital Markets Act (DMA.) PI is an international charity, based in London, which campaigns against companies and governments who exploit individuals' data and technologies. PI employs specialists in their fields, including technologists and lawyers, to understand the impact of existing and emerging technology upon data exploitation and our right to privacy, including in relation to online platforms and the advertising technology ("ad tech") industry. PI has an established track record of engaging with competition regulators in Europe and around the world on issues that concern the intersection of data/privacy and competition laws.

PI welcomes the aim of the DMA to address some of the challenges posed by the way the current digital markets operate. However, we believe that the proposal put forward by the European Commission in December 2020¹ contains some shortcomings that need to be addressed, if the DMA were to be effective in tackling these challenges. PI initial assessment of the DMA proposal is available at: <https://privacyinternational.org/advocacy/4460/eu-digital-markets-act-needs-be-bolder-address-data-exploitation-digital-gatekeepers>

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

a) Protection of end users

PI agrees that protection of end users from potential abuses of gatekeepers should be among the fundamental objectives of the DMA.

The DMA proposal contains provisions that could benefit end users as they engage with services provided by gatekeepers. However, it falls short of its stated aim by not adequately addressing the negative effects of gatekeepers' practices on end users; and by not supporting the emergence of new platforms and competition among existing and new platforms, for the benefit of users.

PI is concerned that gatekeepers abuse their dominant position by exploiting individuals' personal data. Companies act as gatekeepers, for example by regulating how individuals access information on the web as well as which applications they can install on their devices and on which conditions. They can track and profile users across devices to predict and influence their behaviour. Through network effects, a vicious cycle is at play: because of

their market power, these companies collect and analyse vast amounts of data. The more data they collect, the better they become at profiling individuals and offering these profiles to businesses (such as advertisers), as well as using those profiles to improve the attractiveness of their own services. More businesses and users are therefore drawn to these services, reducing any individual user's choice or power to opt out of using these services and being subject to their associated data exploitation. Data exploitation negatively affect a range of fundamental human rights, from privacy/data protection to freedom of expression, as well as often leading to discrimination.

The DMA proposal rightly identifies how core platform services are characterised by the "dependence of both business users and end users, lock-in effects, a lack of multi-homing for the same purpose by end users, vertical integration, and data driven- advantages" (Recital 2). It also notes how "the combination of those features of gatekeepers is likely to lead in many cases to serious imbalances in bargaining power and, consequently, to unfair practices and conditions for business users as well as end users of core platform services provided by gatekeepers, to the detriment of prices, quality, choice and innovation therein" (Recital 4).

Despite these references to the negative effects on end users, the proposal fails to build a set of comprehensive substantive provisions to address these issues. We make specific suggestions on measures to better reflect the rights and interests of end users in the comments related to chapters 7 and 8. Additionally, PI supports the recommendation made by Article 19 and others to in relation to Article 5(1) (introduce an obligation for gatekeepers to respect automated consent signals (like Do Not Track) that are emitted by browsers or operating systems.) and Article 5(d) (extend the prohibition, for gatekeepers, to prevent or restrict business users from raising issues with any relevant public authority relating to any practice of gatekeepers, also to end users.)

b) promoting competition of existing and new platforms

PI also agrees with BEREC that "creating contestable environments is a key objective that needs to be ensured in the medium and long term, as promoting competition from alternative digital platforms competing with gatekeepers will have a positive impact on the concerns on fairness for business users and protection of end-users."

According to the executive summary of the Impact Assessment Report, the DMA proposal should "foster the emergence of alternative platforms, which could deliver quality innovative products and services at affordable prices" (p. 2).⁹ However, the proposal itself falls short on this promise. It seems to focus disproportionately on creating conditions for more competition of within an existing platform rather than on creating conditions for more platforms to enter these markets or giving end users more choice between platforms.

We agree with the submission by Article 19 and others that regulatory measures in the DMA should be reinforced, extended or added both to rebalance

the relationships among the gatekeeper and its business users and end-users, and to facilitate the possibility for competitors to enter a core platform service (CPS) market and/or to expand over several CPSs.

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

10000 character(s) maximum

Please indicate comments on Chapter 6 - Designation of gatekeepers

10000 character(s) maximum

Please indicate comments on Chapter 7 - Regulatory measures for gatekeepers

10000 character(s) maximum

PI agrees with BEREC that "the DMA proposal should be reinforced to address certain inter-platform competition concerns, and to integrate some additional intra-platform competition concerns (i.e. with other business users), as well as certain end-users-only related issues" and that "certain issues related to end-users should also be directly considered and reinforced" as they will also indirectly benefit business users.

Article 10

In relation to the proposed updating mechanism in Article 10 of the DMA proposal, PI agrees with BEREC's assessment that the provision "seems to focus only on new practices which are unfair towards business users. Neither harmful behaviours by gatekeepers directly affecting end-users nor new concerns on inter- platform competition (market entry) seem to be covered by point (a) of Article 10(1) of the DMA proposal." In particular, PI is concerned that the proposal fails to include 'end users'. There seems to be no rationale for such exclusion, given the overall objectives of the DMA to address limits to contestability and fairness. PI recommends the addition of 'end users' in Article 10(2) (a).

Article 6(1)(f) - Interoperability

PI agrees with BEREC's assessment that the interoperability provision in Article 6(1)(f) of the proposal is limited to ancillary services offered by business-users. As worded, this provision does not extend interoperability requirements to core services provided by gatekeepers. End users would not therefore benefit from increased competition in social media networks or other core platform services, which will remain firmly within the control of existing platforms. In fact, as noted in the open letter to the European Parliament by civil society organisations, which PI supported, "rather than fostering the emergence of new platforms, this provision has the potential to

increase the systemic dependence of business users and ancillary services' providers on the core platform, whose position remains uncontested and secured in its primary market(s)" (available at: <https://privacyinternational.org/advocacy/4348/interoperability-digital-markets-act-joint-letter-european-commission>).

A strong interoperability requirement would empower competing platforms to interoperate with dominant ones and increase genuine choice for European users including for services that better protect their rights.

The shortcomings of the current interoperability provision are highlighted in the Opinion of the European Data Protection Supervisor (EDPS) who recommends the DMA to introduce "minimum interoperability requirements for gatekeepers, with explicit obligations on gatekeepers to support interoperability, as well as obligations not to take measures that impede such interoperability". PI believes that interoperability between core services could help addressing the negative implications of users' lock-in and network effects.

Interoperability can operate at different levels. PI supports those interoperability measures that give end users more effective control of their data and that contribute to address the power imbalance between individuals and gatekeepers. PI recommends that Article 6(1)(f) is amended to include reference to core services, such by requiring gatekeepers to allow business users, end users, and providers of ancillary services access to and interoperability with the same operating system, hardware or software features that are available or used in the provision by the gatekeeper of any ancillary services or industry-standard features of its core platform services.

Article 6(1)(a)

PI is concerned that limiting this provision limits the obligation of gatekeepers to refraining from using data "in competition with business users". This risks being interpreted as allowing the use of such data, including personal data of end users, by the gatekeeper in other contexts where they do not compete with those business users. This could accordingly allow the gatekeeper to consolidate their power by exploiting data of users or abusing their position to expand their dominance. PI notes that para 43 of the recitals clarifies that "this obligation should apply to the gatekeeper as a whole, including but not limited to its business unit that competes with the business users of a core platform service". However, we believe it would be clearer to remove reference to "in competition with business users" in Article 6(1)(a).

Article 6(1)(i)

PI is concerned that this provision may allow for data sharing in ways that are not compatible with the GDPR, and may be interpreted to support the advancing of competition by relying on sharing of users' personal data which could be detrimental for data protection rights. For these reasons, we recommend that Article 6(1)(j) is amended to (a) delete reference to "aggregated or non-aggregated data" and limit the first sentence to "non personal data"; (b) clarify that any access and use of personal data must be compliant with the GDPR.

Article 6(1)(j)

PI shares the concerns expressed by the EDPS that “query, click and view data” is personal data “likely to be of a highly sensitive nature” and that sharing this information can lead to “a high risk of re-identification” whose impact could be very negative on users’ privacy. PI recommends that Article 6 (1)(j) provision is either deleted or amended to prohibit the sharing of the query, click and view data unless it is subject to demonstrably effective anonymisation that addresses the risks of re-identification.

Please indicate comments on Chapter 8 - Enforcement

10000 character(s) maximum

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

PI notes that nowhere in the DMA proposal is a role expressly envisaged for civil society, such as consumer organisations, digital rights, human rights organisations, etc., despite the fact that these organisations play a necessary role in protecting the rights and interests of users of digital services provided by gatekeepers.

This is a notable omission given that civil society and consumer rights organisations conduct many investigations exposing the abusive practices of companies in the digital markets; these organisations often represent individuals or groups of individuals negatively affected by companies' actions; and these organisations have developed technical and legal expertise to support users in protecting their rights and interests. (For example, in 2020 PI intervened and made several submissions before the European Commission's review of Google LLC's acquisition of Fitbit, Inc., highlighting the series of competition concerns that the transaction raised with regard to the markets of digital advertising, wearables and health-related markets. Further details available at: <https://privacyinternational.org/campaigns/googlefitbit-merger-not-our-watch>)

PI believes that the DMA cannot effectively provide end users of core platform services with "appropriate regulatory safeguards [...] against the unfair behaviour of gatekeepers" (Recital 7), without the meaningful involvement of the organisations that represent the views and interests of the end users.

PI recommends that the DMA include provisions to ensure that civil society organisations, such as digital rights and consumer organisations, are enabled to:

- a) make a request to the Commission for the opening of a market investigation when there are reasonable grounds to suspect that a provider of core platform services should be designated as a gatekeeper and of the process to review the status of gatekeepers;
- b) notify the Commission of suspected infringements covered by the DMA and share with the Commission any evidence in the context of their investigation;
- c) provide the Commission with information to open market investigations into new services and new practices.
- d) have a right to be heard before the Commission take decisions related to market investigations.

PI therefore recommends that Article 30 and Article 33 of the DMA proposal are amended to include right to be heard by civil society organisations and a right to request an investigation respectively.

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

10000 character(s) maximum

Please indicate comments on Chapter 10 - Conclusions

10000 character(s) maximum

Please indicate comments on Chapter 11 - Future work

10000 character(s) maximum

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)

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

THANK YOU FOR YOUR CONTRIBUTION

Contact

PC_gatekeepers_regulation@berek.europa.eu
