

Telefónica's response to the Public consultation on the Draft BEREC Report on the ex-ante regulation of digital gatekeepers

May 4, 2021

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

Overall, Telefónica welcomes and supports BEREC's views expressed in the Report on the Digital Markets Act (DMA) and hopes that most of BEREC's specific proposals are taken into consideration in the co-legislative procedure to fill the gaps in the Regulation, mainly seeking for legal certainty, effectiveness, predictability and governance. In filling all these gaps, we are of the view, as stated by BEREC throughout the Report, that the Telecoms Framework and the way NRAs apply ex-ante regulation to telecom operators should inspire the establishment of similar procedures for the design, implementation and enforcement of the DMA.

The objective of the Open Internet Regulation is to maintain a dynamic and diverse internet ecosystem, where users can access any service and content of their choice and where the provision of content and applications is not hampered by a specific player of the internet value chain. The Open Internet Regulation only guarantees this freedom on the network layer, while potential restrictions on the application layers are outside of the current scope of the Open Internet Regulation. The provisions of the Open Internet Regulation are focused and drafted with the network layer in mind, therefore simply widening the scope of the Open Internet Regulation would not be effective to address the problems in the application layer. By contrast, it might have spill-over effects to other agents that should not be further regulated with the specific measures aimed at ensuring freedom in other different layers of the Internet. For those reasons, the DMA is probably the right instrument to address, in the application layer, the lack of equivalent user protection to that in the Open Internet Regulation (see also comments on Chapter 4).

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

The BEREC Report rightly points to the interdependence of ECS and the provision of services by Digital Platforms (DP). This interdependence of the services leads to multiple business interactions between DP and ECS providers, which may involve complex business negotiations. To achieve a more balanced bargaining power in such negotiations it would be helpful if the different agents along the internet value chain were subject to a similar asymmetric ex ante framework.

The summary of the reports by BEREC and NRA is illustrative of the accumulation of gained experience and knowledge on Digital Platform markets by those authorities. It would be of utmost importance that the enforcement of the DMA could leverage on the expertise those authorities (see also comments on Chapter 7-9).

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

To establish an effective regulatory framework, it is necessary to spell out from the outset which are the objectives the regulation pursues. BEREC rightly points to the fact that “Reaching several objectives within the same regulatory framework is not new”. In view of the recent experience of competition cases and other complaints and conflicts around digital platform services and behaviour, we think it is appropriate to tackle many of those in the DMA. In particular, we agree with BEREC that the DMA should pursue the three objectives mentioned in Chapter 4: 1. Ensuring contestability by promoting inter-platform competition; 2. Ensuring fairness for business users depending on gatekeepers ; and 3. Protecting end-users including the promotion of the Open Internet beyond the network layer and access services. The DMA predictability and clarity would benefit if the structure of the regulation would be articulated around the three objectives. This means that the criteria to identify gatekeepers and the accompanying regulatory measures would also depend on the pursued objective. Therefore, adding the objective of an Open Internet beyond the network layer would also impact the list of regulatory measures (see also comments on Chapter 7) and calls for a closer look to the criteria to identify gatekeepers that threaten the Open Internet.

However, at present the structure of the DMA does not lead to a coherent approach to achieving these objectives, in that all the obligations would apply to gatekeepers above the threshold, whereas it might be more appropriate to allocate “fairness” oriented obligations and those to protect end users in a different way. In the EECC, consumer protection and net neutrality are symmetric obligations, whereas market power is only addressed above the SMP threshold.

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

A fundamental difference between Number Based ECS and Number Independent ICS in the EECC is that the former are subject to a general authorisation regime, whereas the latter are not. This authorisation regime comes with several interconnection and switching obligations as well as consumer protection measures which apply only to NB ICS, creating an un-level playing field between competing services. We note that some provisions of the EECC open the door to impose a limited set of obligations to NI ICS, which could cause an overlap with potential obligations under the DMA, as NI ICS are considered a Core Platforms Service. Therefore, we support BEREC's initiative to study potential overlaps.

Nevertheless, we also see important differences of dealing with NI ICS under the EECC or the DMA, which speak in favour of leaving the NI ICS within the scope of the DMA as in the original EC proposal. An advantage of dealing with NI ICS under the DMA scope is that obligations and prohibitions will apply across the whole European Union – indeed, the major reason for not applying the EECC to NI ECS in the first place was their regional nature and the lack of an obvious regulatory authority.

Whilst it is theoretically possible for there to be remedies applied to NI ICS under the EECC, it would need to be initiated by an individual NRA, and a priori would only be applicable to the Member State in question. This opens the door to potential divergent approaches between Member State for services with a regional scope. Another advantage of the inclusion of NI ICS

within the scope of the DMA is that the range of potential obligations and prohibitions more relevant to these services than those in the EECC.

Finally, it seems that the objectives of the DMA are somehow different to the EECC framework. In consequence, obligations under this regime will not presumably solve the issues DMA intends to address. Again, if the DMA dealt with its key objectives of contestability and fairness (and the Open Internet if desired) in a more systematic way, it would assist in allocating obligations to NI ICS under the DMA that would increase alignment of regulatory treatment of NB ICS under the EECC.

Please indicate comments on Chapter 6 – Designation of gatekeepers

In Telefonica's view the merit of the criteria-based approach to designate gatekeepers (Quantitative procedure) resides in the transparency and legal certainty it provides, once the criteria are defined.

By contrast, including a possibility to designate a company as *emerging* gatekeeper after a market investigation even when the thresholds of the criteria are not reached (Qualitative procedure) creates exactly the problem the Commission seeks to avoid by using a quantitative threshold in the first place. If a firm has not met the quantitative threshold then by definition the decision to select the firm for regulation anyway is subjective and open to likely protracted legal challenges.

Furthermore, it is unclear why failure to reach a threshold that relates to size and scale (market power), should then lead to obligations being imposed that are about ensuring contestability – specifically A6(1)e – switching, A6(1)f – interoperability and A6(1)h – data portability (switching).

Although we are not in favour of the qualitative procedure, if this possibility remains, we agree with BEREC that the qualitative criteria “digital ecosystem” is a valid addition to the criteria listed in article 3(6). We also support the suggestion of BEREC to issue guidelines regarding the gatekeeper designation criteria of article 3(6). The latter could substantially increase legal certainty and predictability on the gatekeepers' designation while at the same time decrease the risk of overenforcement.

Please indicate comments on Chapter 7 - Regulatory measures for gatekeepers

From our long experience with the EECC, we do not doubt about the fact that the proposed regulatory measures (in particular those of article 6) can only be effective when are be tailored to the specific platform on a case by case basis. Indeed, we also agree with BEREC that most of obligations set in Article 6 are targeted to a specific CPS and cannot be directly applicable to the rest of the services subject to this Regulation. The design of effective ex ante remedies is a resource and knowledge intensive task, where the effectiveness resides in the details. This implies several things. First the mode of compliance with a “high level” obligation must be specified at a technical level, taking into account the specificities of the particular platform and the needs of the potential beneficiaries of the obligation, i.e. the potential entrants, the business and end-users. This, in turn, implies the need for technical expertise from the regulated firm, the potential beneficiaries and regulatory authorities. Such expertise might reside already today

in some national authorities. We also support BEREC's suggestion to set out the tailored remedies in a formal decision.

However, it may be in the first implementation of the DMA obligations, that most of the expertise and knowledge resides in the firms being regulated rather than with the authorities. In order not to delay the application of obligations, it would be prudent for the ability for the authority to specify remedy solutions to be optional. In this way, the authority could in the future specify solutions having learnt from previous experience¹.

BEREC expresses several concerns about the draft list of regulatory measures and proposes to reinforce some measures (e.g. interoperability to foster inter-platform competition) or to extend measures to a broader range of CPS (e.g. on tying or on self-preferencing). We think it would be helpful to clarify in the regulation how the decisions on the different proposed measures need to relate to the achievement of the objectives of the regulation. This will probably help the process of setting and adapting regulatory measures over time, as the initial list never can be perfect, and will also reduce the litigation risk about the proportionality of a measure. A clearer alignment between measures and objectives can also be instrumental for BEREC's suggestion to update the scope measures to foster inter-platform competition and consumer protection.

Please indicate comments on Chapter 8 - Enforcement

The success of an ex ante regulatory framework rests on the effectiveness of its implementation. This may only be achieved by the proper design of regulatory measures, subsequent close monitoring of its compliance and a swift complaint handling and resolution mechanism.

Designing effective regulatory measures is an exploratory process with feedback loops nurtured by experience to improve the measures over time. Therefore, we support BEREC's suggestion that the interaction with stakeholders need to be structured, i.e. formalised in specific procedures, already in the measure specification phase. As mentioned above, the input of potential beneficiaries is paramount for effective measure design, moreover other stakeholders, such as National Independent Authorities (NIA) which already have an accumulated knowledge, should also be heard.

Organising a kind of market test of regulatory measures might indeed prolong the process of imposing and implementing a regulatory measure. However, we are convinced that the advantages of an effective regulatory measure design far outweigh the disadvantages of a delay, especially when clear deadlines are maintained in the consultation process. Having in mind the technical complexity and the important impact of the regulatory measures on the regulated firm, a delay of three to six months to achieve an effective regulatory measure is a better solution than a situation where after several years of having a regulatory measures in place nothing has changed vis a vis the objectives of the regulation.

Effective monitoring of the market and of the enacted regulatory measures needs a constant dialogue and interaction between the regulated firm, the beneficiaries of the regulatory measures and regulatory authorities. Without doubt National Independent Authorities can play a supporting role in helping the EU authority to monitor compliance. Taking advantage of their

¹ Annex I illustrates well how over two decades experience was build up enabling effective definition of measures.

experience and proximity to the market players. To enable NIAs in monitoring compliance we support BEREC's proposal to extend powers of information gathering to NIA.

An efficient complaint handling and resolution mechanism must be easily accessible for big and small market players and citizens. Therefore, we agree with BEREC that the establishment of a dedicated information and complaints desk in each Member State will be of huge benefit. This will not only reduce the barriers for stakeholders to submit formal or informal complaints, thanks to proximity and languages issues, it will also reduce the administrative burden of the central EU Authority, which need to focus its resources to the strategic decisions around gatekeeper designation and regulatory measures. We agree with the idea that national independent authorities can play a supporting role in helping the EU authority by creating such an easily approachable information and complaints desk and dispute resolution system. Some disputes will be easily resolved on a local level, while persistent or recurrent problems can be escalated to the EU authority and to ensure a harmonised approach for widespread problems. Moreover, a national dispute resolution system will also reduce the number of judicial processes, especially when a NIA can act as arbitrator and clear timelines are included in the procedure.

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

To articulate the input of Member States in the DMA, the EC's draft regulation proposes the establishment of a Digital Markets Advisory Committee (DMAC). We see the merit in the DMAC as a mean to give necessary political support to the strategic decisions of the EU Authority on gatekeeper designation and regulatory measures imposition.

Nevertheless, we do not think the DMAC is the right forum to address more practical and technical issues, nor would it be a way to fully take advantage of the national expertise and resources of the National Independent Authorities, including the NRAs. Therefore, we support BEREC's suggestion to establish a specialized advisory body composed of representatives of NIAs to deal with technical matters rather than with more political or strategic decisions. Such an advisory body will contribute to the harmonisation of the implementation, as represented NIA would be enabled to support the central authority in the technical specification and implementation of the regulatory measures.

As already mentioned above, we think an ex ante regulatory framework for digital platforms will gain substantially effectiveness when taking advantage of NIA expertise and resources in the information (data) gathering, design of regulatory remedies, monitoring compliance, complaint handling and dispute resolution. And to assure the continuous monitoring of the digital platform environment and an effective complaint handling and dispute resolution mechanism we support the need to "institutionalize" these responsibilities by embedding them in the DMA procedures.

Please indicate comments on Chapter 10 - Conclusions

No comment

Please indicate comments on Chapter 11 - Future work

To achieve the three objectives of competitive markets, fairness and consumer protection a comprehensive understanding of the whole Internet value chain is paramount. Therefore, Telefonica welcomes the initiatives of BEREC to organise Workshops on the various topics related to the DMA such as remedy design and enforcement. We also strongly support BEREC's work on articulating the regulatory dialogue and on the analysis of the complete Internet value chain, including ecosystem effects.

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

Telefonica supports the need to tailor made complex remedies in consultation with all stakeholders [see above Chapter 7]

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

Telefonica supports setting up national Dispute resolution mechanism to avoid lengthy judicial processes [see above Chapter 8]

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

Telefonica supports setting up body of Member State Authorities to get involved with the EU competent authority in a structured and formal way with monitoring (information gathering), remedy design (adapt and tailor remedies), complaints handling and dispute resolution [see above Chapter 9]

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

No comments