

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

Vodafone

*Surname

Vodafone

*Email

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

Vodafone Group

*Country of origin

UK

* 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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Vodafone welcomes the publication of the BEREC report on the ex-ante regulation of digital gatekeepers, as a timely contribution to the legislative process, with Parliament and Council currently developing their respective positions on the Commission's proposal for a Digital Markets Act.

The legislative package (alongside the Digital Services Act) marks a watershed moment in the regulation of the digital sector and underlines the clear intent of the European Commission to reshape the regulatory environment for digital services in Europe to ensure safety, fairness and competition. Once adopted, these new rules will have a significant impact on large digital gatekeepers subjecting them to a host of new obligations designed to ensure safety and contestability in digital markets.

BEREC's experience in overseeing the application of ex ante regulation in the telecoms sector over the past decades makes it well placed to offer constructive input on the design and enforcement of ex ante regulation of digital gatekeepers. An ambitious and balanced DMA has the potential to lead the way, globally, in improving market dynamics in the field of digital services. We agree with BEREC that some improvements to the Commission proposals are needed to ensure the DMA can deliver on the twin objectives of fairness and contestability in digital markets.

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

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Vodafone recognises the work undertaken by BEREC in recent years on digital platform regulation, the data economy and contributions to the public consultation on the Digital Services Act/ex ante regulation of digital gatekeepers and New Competition Tool. NRAs across the BEREC membership have also been extremely active in recent years in advancing new concepts and policy recommendations for the regulation of digital platforms and in this regard we would specifically highlight the excellent work undertaken by both ARCEP and ACM on the mobile device ecosystem and the importance of ensuring device neutrality with regards to operating systems and third party service providers.

Through this body of work, BEREC has shown itself to be particularly well qualified to offer recommendations on the development of application of ex ante regulation in the digital platform space, in particular on how to define which platforms (gatekeepers) should be subject to ex ante regulation, what obligations should be considered and the appropriate division of labour between the European Commission and NRAs in enforcing, overseeing updating these laws over time.

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

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Vodafone agrees with the key objectives of the Digital Markets Act identified by BEREC, namely: ensuring contestability and fairness in digital markets, while establishing a high degree of protection for end-users from potential abuses of the intermediation power of digital gatekeepers. As expressed in our response to the public consultation on ex ante regulation of digital gatekeepers, we believe the time is right for a robust model of intervention. Concerns have arisen about the ability of traditional competition rules to address issues in relation to digital platforms, in particular when defining digital markets and identifying dominance in relation to data funded, multi-sided markets. In addition, competition law enforcement is often too time-consuming, resulting in irreversible foreclosure taking place before any remedies are implemented effectively. Remedies also tend to be specific to individual cases and difficult to apply more generally. We believe that the EU should take the lead in addressing the regulatory challenges posed by digital markets and that competition law and ex ante regulation need to evolve together to address these challenges.

Ex ante regulation is needed to fill the gaps that competition rules cannot address. The electronic communications sector can provide a suitable reference point for the type of intervention required to address market failures, through the use of an adapted “three criteria” test designed for digital gatekeepers. The types of platforms, the types of competitive harms identified, and the remedies used to address those harms need to be varied and flexible to fit the particular issues that arise. These could vary from the prohibition of discrimination to access to key capabilities or data, to even structural separation where more extreme cases of competitive harm have been identified to occur in a systematic manner. In turn, one could foresee the adoption of a system of listed prohibited practices, accompanied by a flexible set of remedies. Similar to the approach taken in relation to the electronic communications sector, the regime selected should reflect a principles-based approach which reflects sound economic criteria, allowing sufficient flexibility at the level of remedy selection to allow the pursuit of overriding public policy goals, while establishing legal certainty in the form of transparent decision-making and appeals mechanisms.

We would invite BEREC to additionally 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. Legislative action by the Commission is vital to prevent a proliferation of national gatekeeper laws that could distort and undermine competition and create uncertainty for businesses thereby making it more difficult to innovate and trade in the Single Market, and lead to gaps in enforcement that may further hamper the ability of smaller firms to scale and compete with the large digital platforms. Our view is that the harmonising objective of the DMA should be recognised as an up-front objective in BEREC’s report.

With respect to the objective of ensuring openness of the digital environment

we believe in the principle of equivalent rules for equivalent services, so that rules should be consistent all along the digital value chain. We agree with BEREC that new gatekeeping situations have emerged in various layers of the digital value chain other than at the connectivity layer and would therefore welcome a debate over the regulatory principles to apply to digital gatekeeper platforms who are able to exploit their bottleneck position in the digital stack to block or throttle access to content and applications. We believe that BEREC could add value in the debate concerning the role of platforms in the digital communications sector 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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Vodafone agrees with BEREC that the DMA identifies a relevant list of Core Platform Services (CPS) who should be subject to the gatekeeper designation criteria. Vodafone is of the view that the list of core platform services is a strong starting point for an asymmetric regulation, intending to capture only the largest digital platforms. This is important; as it would be disproportionate and counter-productive were the DMA to capture a wider range of European businesses who are actively attempting to inject competition into digital markets [but may be hindered in their ability to do so by certain conduct of the largest gatekeeper platforms]. We also welcome the clear statement that Electronic Communication Services are outside of scope, as these are already subject to an EU-wide ex ante regulatory framework. Correspondingly it is correct and necessary that Number Independent Interpersonal Communications Services are within scope, as these are subject to fewer/ less extensive obligations compared with number-based communications services under the European Electronic Communications Code.

On the latter point, we would strongly disagree with the assertion of BEREC that NI-ICS are sufficiently regulated under the Code and should therefore not be subject to 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 therefore not a reasonable alternative to the DMA regulatory framework.

We agree with BEREC on the need to periodically review which services may require ex ante regulation in view of the evolution of the services and that this task should be carried out by the EU competent authority, relying on support and input from national authorities via a predefined process. The input of national authorities in this process will be vital as they are often better placed to provide visibility of developments in the marketplace for digital services within their jurisdiction.

Please indicate comments on Chapter 6 - Designation of gatekeepers

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We agree with BEREC that the gatekeeper designation process described in the DMA is generally well thought through and carefully calibrated to capture only the largest services providers who occupy a strategic gateway position in these markets. 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.

Vodafone agrees with BEREC on the significance of ecosystem orchestrator power as another important qualitative criteria that could be considered relevant in designating digital gatekeepers and designing appropriate remedies. In our view this phenomenon is not sufficiently elaborated in the Commission's DMA proposal and more should be done to address the ability of digital platforms to exert their ecosystem orchestrator power to reinforce their gatekeeper role between and across adjacent markets (for example via privileged/exclusive access to key inputs/assets raising further barriers to entry or expansion). We agree with BEREC that this criterion, which is missing in the DMA proposal could be further considered when designating gatekeepers and the corresponding regulatory measures and that this could be achieved by allowing ecosystem orchestrator power to be taken into account as a relevant "other structural characteristic" (point (f) of Article 3(6)) whenever being part of an ecosystem plays a significant role in the ability to act as a gatekeeper. We do not, however, consider that being an ecosystem orchestrator should be added as an additional cumulative criteria in the designation process as this would risk excluding certain relevant CPS from the scope of the DMA.

One area where we do not agree with the BEREC report is the suggestion that to address negative effects on national markets the DMA should regulate platforms having a significant gatekeeping role but which are potentially only active in one Member State. In our view based on current market conditions and the objectives of the DMA to address gatekeepers with a significant impact on the single market, it would not be appropriate to regulate in one Member State. However BEREC should keep a watching brief on this area as gatekeeper platform business models and markets continue to evolve.

Please indicate comments on Chapter 7 - Regulatory measures for gatekeepers

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Vodafone strongly supports the list of regulatory measures applicable to digital gatekeepers (prohibitions and obligations) under Articles 5 and 6 of the DMA. In our view the primary impact of these new rules will be to strengthen the bargaining power of smaller firms in commercial negotiations

with the big tech companies, and to ensure that they are no longer subject to exploitative or unfair commercial practices and contractual terms. These new rules will also enable businesses like ours to be more innovative in the future, as we will have access to critical software/services necessary to compete (subject to some exceptions for security/privacy) and as a result of new obligations requiring large online platforms to take a non-discriminatory approach.

We would however support increased clarity and granularity under the DMA on how the proposed obligations and prohibitions should work in practice, in particular where they are subject to further specification under Article 6. In this regard we support the BEREC recommendation to introduce a distinction in the regulation between directly applicable obligations which i) would apply to all CPSs and ii) would apply only to specific CPSs. Such an approach may be helpful in detailing how each of the blacklist and greylist provisions should apply in specific circumstances, considering the specific business model and technical functionalities of the given CPS. It may also be beneficial for the Commission to adopt Codes of Conduct for each CPS that would group together Articles 5 and 6 obligations, alongside existing industry best practice and key learnings from DMA enforcement.

Furthermore we agree that Article 6 as currently drafted is insufficiently clear as to how obligations and prohibitions will apply in practice and would support BEREC's call for more tailored remedies, set out in formal decisions by the EU competent regulatory authority for each individual gatekeeper (borrowing from the experience of the telecoms sector).

We endorse 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 gatekeepers' 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.

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.

Please indicate comments on Chapter 8 - Enforcement

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Vodafone agrees that the enforcement of the DMA should allow for a regulatory dialogue that is clear and open to stakeholder input, without creating undue delays. 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 stages, timings, and an opportunity for stakeholders to comment on draft implementing measures would be key to greater legal certainty for all parties concerned.

With regards to dispute resolution, for the groups directly affected by the behaviour of the gatekeepers, it is crucial to have easy access to a swift and effective dispute resolution mechanism. However, we note that such processes need to be aligned with the objectives of the DMA and with existing processes established at the national and European level for example under the Platform to Business Regulation. While it may be appropriate for NRAs to play a role in dispute resolution, on account of the increased accessibility in terms of language, procedures and physical proximity to dispute resolution for local end-users we strongly believe that such procedures need to be harmonised and centralised where possible at the European level to avoid fragmentation in the enforcement of the DMA, with different outcomes in different Member States owing to a divergent dispute resolution process.

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

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The DMA is a highly centralised regulatory instrument and involves the creation of substantial new powers in the hands of the Commission. This is broadly appropriate owing to the scale and reach of the companies who will likely fall subject to the gatekeeper designation. As stated above, a harmonized approach is also key for European businesses to avoid fragmentation, inconsistency in the implementation of the DMA in different Member States.

However, Vodafone strongly agrees with BEREC that the DMA should include a more explicit and developed role for NRAs specifically in relation to information gathering, monitoring and market surveillance. NRAs can also play a role in communicating the concerns of businesses operating in their respective markets to the Commission (e.g. acting as a form of “complaints desk” on behalf of the Commission). This will be vital to ensure that the Commission has knowledge and visibility of developments across the Single Market, so that prohibited practices by digital gatekeepers do not slip through the net.

We therefore agree with BEREC recommendation to establish a specialized advisory body composed of representatives of NIAs. The resources available through this advisory body of NIAs could complement and/or reinforce the EU competent authority and the effectiveness of the application of the DMA, adopting some of the key features of the Digital Services Act.

Conversely, we disagree that Market Investigations can or should be run at the national level, as this would undermine the harmonizing intent of the DMA, and could lead to smaller (rather than trans-national) platforms also being drawn in. Similarly, we consider that dispute resolution should be handled by the Commission.

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 IV: Brief on ex-ante regulation

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

THANK YOU FOR YOUR CONTRIBUTION

Contact

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