



ARTICLE 19 response to BEREC's public consultation on Work Programme 2021-2025

13 April 2020

Introduction and objectives

ARTICLE 19 welcomes the opportunity to provide comments on BEREC's Work Programme 2021-2025. We also welcome BEREC's openness and constructive engagement with civil society as shown in various forms. Hereby, we provide our comments on the BEREC document BoR (20) 43.

ARTICLE 19 supports BEREC's initiative to extend its multi-annual strategy to a period of 5 years. We agree that to align BEREC's strategy with the European Commission's mandate will help consistency among the work of the two bodies. However, we also suggest to maintain a sufficient degree of flexibility for ongoing adjustments, in order to guarantee that the longer term strategy does not create trade-offs in terms of the capacity, for BEREC, to modify its priorities along the term to respond to supervened needs.

I. Market, technological and policy developments

We welcome BEREC's commitment, for the period 2021-2025, to consider 'the impact of rapidly changing markets, new network technologies and expected policy developments in this period as well as the increasing cross-border nature of digital services' while shaping its strategy. Only an ongoing observation, analysis and assessment of these factors can ground adequate BEREC's action.

Furthermore, we agree with BEREC about the need to dedicate due attention to the integration of digital networks and technologies and to its impact on market structure and dynamics. In particular, we are convinced that this integration plays a key role in market convergence and market concentration, which both lead to new market structures with potential new forms of bottlenecks. We urge BEREC to look at the impact that these bottlenecks have not only on the entrance of new players in the market, but also on the capacity, for gatekeepers, to 'regulate' the market and behave unfairly towards consumers.

Finally, we welcome the attention that BEREC plans to dedicate to data-centric business models and to their possible impact on open internet and competition. We are convinced that BEREC has a key role to play in cooperating with other regulators, such as data protection and competition authorities, to shape proper regulatory remedies to modify or impose limits to business models which are not compatible with the EU values, objectives and standards with regard to open, fair and innovative markets and to users' fundamental rights.

II. High-level strategic priorities

Strategic priority 2: Supporting sustainable and open digital markets

With regard to strategic priority 2, we repeat the calls we made in our previous submissions¹.

Moreover, we welcome BEREC's approach that, apart from monitoring market developments, aims at concrete solutions. We are also glad to support BEREC's commitment to make sure 'that technological, economic, legal, and user protection perspectives are integrated in the design and practice of regulation'. In particular, we call

¹ See ARTICLE 19 response to BEREC's public consultation on Work Programme 2020, submitted on 5 November 2019.

BEREC to adopt a wide interpretation of ‘user protection’, which includes considerations about the impact of regulation on users’ human rights.

We recognise the role interoperability can have in increasing market contestability and supporting both competition and innovation, and therefore we welcome BEREC’s specific reference to this remedy. However, we strongly recommend BEREC to consider additional remedies, which could help to address the relevant market failures (i.e. excessive concentration or gatekeeping) and strengthen the impact of interoperability. One suggestion is to look at unbundling. Many digital markets are currently highly concentrated, with few players with high degree of market power, which compete by offering a bundle of services. The bundling of offers allows large platforms to create ecosystems, to impede market entry of potential competitors for the provision of each of the bundled services, and to lock in consumers. To impose the unbundling of these offers, coupled with interoperability requirements, would strongly lower down barriers to entry, make markets contestable again and, in turn, offer concrete alternatives to consumers.

Furthermore, we welcome BEREC’s initiative about a study on consumer behaviours toward digital platforms. In this regard, we call BEREC to dedicate due attention to the impact that the default settings used by service providers have on consumer behaviours. As confirmed *inter alia* by a recent research of the Competition and Market Authority², default settings of platforms with a high degree of market power play an enormous role in shaping consumers’ behaviours. Default settings can nudge consumers, or depending on the level of (lack of) transparency, go as far as to manipulate their choices. It is therefore clear that default settings can help establish standards in the market, for example in terms of transparency, data protection or choice. BEREC should consider intervening on default settings of big players as a way to improve market standards in the direction of open competition, transparency, fairness and consumers’ empowerment.

Strategic Priority 3: Empowering end users

With regard to the empowerment of end users, we recall what we already said in previous submission³ on this topic.

In addition, we stress the importance, for BEREC, to reflect on the vital role that end users’ choice plays for the establishment of sustainable and open digital markets. These markets should respond to and be oriented by end users rather than by a handful of dominant players. End user’s choice refers to the situation where the end users enjoys an optimal level of options from which to choose, and where worthwhile alternatives are not excluded from or impeded access to the market. To make choices implies also a certain degree of autonomy, which can be seen as the capacity of end users to freely evaluate alternatives. This, in turn, is grounded on at least three elements: the availability of sufficiently valuable alternatives, the freedom from coercion and manipulation, and a sufficient degree of information. We urge BEREC to consider the above elements as targets of its concrete action towards the empowerment of end users.

IV. Institutional and International cooperation

Institutional cooperation

Once again, we recall what stated in previous submissions⁴.

Furthermore, we acknowledge that BEREC approach is to concentrate on market failures. Nevertheless, we note that, ever more, failures in digital markets impact public interest objectives. Therefore, we call BEREC to take

² See: Competition and Market Authority, Market Study Interim Report, Online platforms and digital advertising, 2019, available at <https://www.gov.uk/cma-cases/online-platforms-and-digital-advertising-market-study> (latest access 13 April 2020).

³ See: ARTICLE 19 response to BEREC’s public consultation on Work Programme 2020, submitted on 5 November 2019.

⁴ See: ARTICLE 19 response to BEREC’s public consultation on Work Programme 2020, submitted on 5 November 2019.

into due account those public interest objectives in its action. We also encourage BEREC to do so by, among other, relying on a fruitful cooperation with other regulators and bodies that have specific knowledge and powers with regard to such public interest objectives.

We are convinced that BEREC possesses unique knowledge and expertise on economic concepts that could inform the action of other regulators and bodies dealing with digital markets. However, we believe that this exchange and assistance should be reciprocal, and that BEREC should also inform its action taking advantage of the knowledge and expertise of those regulators and bodies. In other words, economic principles and concepts have a role to play in informing the enforcement of various regulations and in shaping a number of policies. But the opposite is also true: non-economic principles and concepts, such as the protection of end users' fundamental rights, have to be taken into account while shaping and enforcing economic regulation for digital markets. What we ask does not imply the need for BEREC to acquire new competences or powers. It is simply a consequence of the convergence of a number of markets, which brings along a certain degree of convergence between regulations and between the public interest objectives that justify them.

Finally, we take this opportunity to suggest that one of the areas where the institutional cooperation between BEREC and other relevant institutions will be key to protect both sustainable and open markets and consumer's rights is the response to the Covid-19 pandemic. Part of the strategy to respond to the pandemic will rely on digital instruments and services, and will result in the establishment of a surveillance infrastructure. Part of it already exists, part will likely be set in the coming days, weeks and months. BEREC, in cooperation with other relevant institutions, has a role to play to make sure that this infrastructure will not be permanent, and that as soon as the emergency will be over this surveillance apparatus will be dismantled.

ABOUT ARTICLE19

ARTICLE 19 is an international human rights organisation, founded in 1987, which defends and promotes freedom of expression and right to information worldwide. It takes its mandate from the Universal Declaration of Human Rights, which guarantees the right to freedom of expression and information.

An increasingly important means of expression and to seek, receive, and impart information is through information and communication technologies such as the Internet. ARTICLE 19 has been promoting Internet freedoms for over 10 years and is active in developments of policy and practice concerning freedom of expression and the Internet through our network of partners, associates and expert contacts.