

**BEREC Report on the interplay between  
the EECC and the EC's proposal for a  
Digital Markets Act concerning  
number-independent interpersonal  
communication services**

10 June, 2021

## Table of Contents

1.	Executive summary .....	2
2.	Introduction and objectives .....	4
3.	Definition of Interpersonal Communication Services .....	5
4.	Regulation of NI-ICS in the EECC and the e-Privacy Directive.....	8
4.1.	Symmetric regulation in the EECC.....	9
4.2.	Asymmetric regulation in the EECC.....	12
4.3.	Interoperability (Art. 61 of the EECC).....	14
4.4.	Protection of privacy in the electronic communications sector (e-Privacy) .....	15
5.	NI-ICS in the DMA proposal .....	16
5.1.	The identification of NI-ICS as a CPS .....	16
5.2.	Designation of a NI-ICS provider as a gatekeeper.....	18
5.3.	Conclusion on the inclusion of NI-ICS in the DMA.....	21
6.	The scope of the DMA regarding ECSs (Art. 1 of the DMA proposal).....	22
7.	Considerations related to ICS definitions and the Digital Services Act (DSA)..	25

## 1. Executive summary

The European Commission (EC)'s proposal on the Digital Markets Act (DMA<sup>1</sup>) includes in its scope number-independent interpersonal communication services (NI-ICS), considering them as one of the Core Platform Services (CPSs) subject to regulation. As an electronic communication service (ECS), NI-ICS are also regulated under the European Electronic Communications Code (EECC) with the aim of promoting connectivity in the electronic communications sector, developing the internal market, as well as promoting the interest of European citizens.

This report presents an analysis of the definition of NI-ICS in the EECC, the regulation in the EECC and e-Privacy Directive, as well as the implications of regulating NI-ICS under the DMA. Additionally, BEREC shares some reflections for the Digital Services Act (DSA) derived from the analysis of the definition of NI-ICS.

NI-ICS are defined in the EECC as one of the Interpersonal Communication Services (ICS) that allow interpersonal communication among a limited number of persons. The definition of ICS excludes communications between and with machines, as well as communication services provided as an ancillary service. ECSs are in general interrelated and the competent national regulatory authorities (NRAs) cooperating in BEREC classify services according to their characteristics and the functionalities provided to the users.

The powers for NRAs under the EECC regarding NI-ICS include symmetric and asymmetric regulation. Regulatory enforcement also consists of market monitoring, information requests, (potentially cross-border) dispute resolution at the retail and wholesale level, protection of end-users' rights (including non-discrimination, obligations for information in contracts, transparency obligations, as well as information obligations related to quality of service). Since the transposition of the EECC was due in December 2020, it is too early to assess the impact of this regulatory intervention on NI-ICS.

While symmetric regulation applies to all market players regardless of market power, asymmetric regulation applies only to in particular operators with significant market power in markets characterised by high barriers to entry, not tending towards effective competition and when competition law alone is insufficient to address market failures. Asymmetric regulation includes a comprehensive set of obligations (e.g. access, cost accounting, price control, transparency and non-discrimination and also functional separation as a last resort measure) applied on a case-by-case basis under a proportionality approach.

Additionally, the EECC sets out procedures for identification of transnational markets (potentially pan European) by the EC, who must take utmost account of the opinion of BEREC.

---

<sup>1</sup> Proposal for a regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Market Act). Brussels, 15 December 2020. COM (2020) 842 Final.

This possibility could be particularly relevant for NI-ICS as those generally operate on a transnational level.

Interoperability for NI-ICS (among other ECSs) is regulated in the EECC under Article 61. While the competence to impose the obligation lies with NRAs, the power of initiative for the relevant provision Art. 61(2) sub c) EECC is under the EC remit who shall adopt implementing measures as a precondition to allow NRAs imposing interoperability obligations. These implementing measures, still to be elaborated, will also ensure that the obligation targeting NI-ICS is consistent across the EU. BEREC acknowledges the ongoing debate about interoperability of NI-ICS and is ready to provide its technical expertise on this matter by carrying out an analysis and, subject to the conclusions reached, advise the EC (including on the elaboration of the implementing measures) and other institutions.

The e-Privacy Directive also sets some relevant obligations for NI-ICS, protecting confidentiality of electronic communications data. The processing of electronic communications data is permitted only for a few limited permitted grounds recognised in the proposed Regulation or when end-user has given explicit consent which however does not affect the rights of other users. This implies that some of the data-related obligations in the DMA proposal for NI-ICS are already covered by the e-Privacy Directive.

The most used NI-ICS in the EU are supplied by providers offering other CPSs and various other services. In this way, CPSs provided by such players can benefit from leverage effects from both NI-ICS and various other services. NI-ICS are used for interpersonal communication, but some NI-ICS providers supply them jointly with other services such as advertising, online intermediation or payment services. The DMA proposal includes these services as separate CPSs, with result that a provider can be regulated separately in all CPS where it is deemed a gatekeeper, e.g. the NI-ICS CPS, the online intermediary CPS and the advertising CPS. However, some of the applicable obligations may address potential ecosystemic effects when the gatekeeper's presence on different CPSs is taken into account.

BEREC reiterates the relevance of ecosystem effects and considers that the DMA proposal could explicitly include a non-cumulative ecosystem criterion in the designation of gatekeepers, and the corresponding regulatory measures, when appropriate, to better reach the given objectives.

The designation of NI-ICS providers as gatekeepers may lead to a potential overlap with provisions applicable to NI-ICS in the EECC and other regulations. For this reason, an analysis on the interplay between the two regulatory frameworks is needed. BEREC considers the EECC and the DMA as principally complementary tools pursuing complementary objectives. One of the main policy objectives set out in the EECC framework is ensuring the promotion of competition in ECS markets, while the DMA is focused on contestability and fairness in the context of digital platforms and should especially focus on providers of digital services including NI-ICS only in relation to issues that cannot be tackled by the EECC provisions.

In order to avoid potential regulatory overlap and conflicting remedies, and ensure legal certainty, BEREC considers that the provision of electronic communications networks and

services should be addressed giving priority to measures within the existing regulatory framework (i.e. EECC).

BEREC also suggests a series of amendments to Article 1 in the DMA proposal to better address the potential overlap between the DMA and the EECC and with the aim of clarifying that the DMA does not and will not include any other ECS CPS than NI-ICS provided by gatekeepers, and that all powers in the EECC remain applicable for NI-ICS.

In order to address potential overlaps, a cooperation mechanism should be implemented among the EC (as future EU DMA regulator) and BEREC, the NRAs and/or the DMA Advisory Board proposed in the BEREC Opinion on the DMA<sup>2</sup>.

Finally, BEREC raises some considerations derived from the ICS definitions analysed in this report applicable to the DSA regulation regarding NI-ICS. BEREC is of the opinion that ICS (including NI-ICS) fall outside the definition of online platforms, as typically NI-ICS do not allow for publishing information to an unlimited group of recipients. When NI-ICS offer other functionalities for broadcasting, then only such functionalities should be subject to the DSA regulation.

## 2. Introduction and objectives

The EC's DMA proposal for the regulation on contestable and fair markets in the digital sector includes in its scope NI-ICS, considering these services as one of the CPSs subject to regulation.<sup>3</sup>

NI-ICS are also regulated under the EECC<sup>4</sup> with the aim of promoting competition, developing the internal market and protecting end-users'<sup>5</sup> rights.

In the BEREC Opinion on the DMA<sup>6</sup>, BEREC expressed that the inclusion of NI-ICS among CPSs should be considered with caution and legal overlap should be avoided, in order to

---

<sup>2</sup> "BEREC Opinion on the European Commission's proposal for a Digital Markets Act". BoR (21) 35. March, 2021. Available at [https://berec.europa.eu/eng/document\\_register/subject\\_matter/berec/opinions/9879-berec-opinion-on-the-european-commissions-proposal-for-a-digital-markets-act](https://berec.europa.eu/eng/document_register/subject_matter/berec/opinions/9879-berec-opinion-on-the-european-commissions-proposal-for-a-digital-markets-act)

<sup>3</sup> See article 2, paragraph 2, point (e) in the DMA proposal.

<sup>4</sup> Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (OJ L 321, 17.12.2018, p. 36–214)

<sup>5</sup> Art.2 (14) EECC defines "end-user" as a user not providing public electronic communications networks or publicly available electronic communications services. Please note that this definition of "end-user" differs from the one in the DMA. In the DMA "end-user" means any natural or legal person using core platform services other than as a business user (Article 2(16)) and "Business user" means any natural or legal person acting in a commercial or professional capacity using core platform services for the purpose of or in the course of providing goods or services to end users (Article 2(17)). When using "users" hereafter, BEREC refers to both end-users and business users.

<sup>6</sup> BoR (21) 35 BEREC Opinion on the European Commission's proposal for a Digital Markets Act. March, 2021. Available at [https://berec.europa.eu/eng/document\\_register/subject\\_matter/berec/opinions/9879-berec-opinion-on-the-european-commissions-proposal-for-a-digital-markets-act](https://berec.europa.eu/eng/document_register/subject_matter/berec/opinions/9879-berec-opinion-on-the-european-commissions-proposal-for-a-digital-markets-act)

reduce regulatory uncertainty for market players and consumers. To this end, the present report provides a further analysis on the inclusion of NI-ICS in the DMA and its interplay with the EECC.

The objectives of the report are the following. First, BEREC aims to analyse the definition of NI-ICS according to the EECC and the DMA (section 3). BEREC then provides an analysis of the powers of NRAs and the EC on NI-ICS in the EECC including a detailed analysis of Article 61 EECC on interoperability, as well as of the e-Privacy Directive (section 4), that covers some relevant issues on the use of data by NI-ICS providers. Third, this report analyses the implications of including NI-ICS as a CPS, as well as the potential designation as a gatekeeper for actors supplying NI-ICS (section 5). The fourth objective is to analyse the interplay between the *ex ante* regulatory framework for electronic communications service (ECS) and the DMA. To clarify this aspect and ensure an appropriate interplay between the ECS regulation and the DMA, BEREC proposes some amendments to the provisions of Article 1 in the DMA proposal and the inclusion of an additional Recital (section 6). Lastly, based on the definition of NI-ICS, BEREC also raises some reflections on the application of the DSA to such services (section 7).

### 3. Definition of Interpersonal Communication Services

One of the main updates of the EECC approved in December 2018 was the review of the definition of ECSs.

While the previous framework established a definition of ECSs consisting on the provision (wholly or mainly) of “conveyance of signals”, the EECC puts forward a new definition and taxonomy of the services that take into further consideration the functionality provided to the end-users.

The EECC defines ECSs as services normally provided for remuneration via electronic communications networks (ECNs) which encompasses the following types of services: (i) internet access service (IAS); (b) interpersonal communications services (ICS); and (c) services consisting wholly or mainly in the conveyance of signals such as transmission services used for the provision of machine-to-machine services and for broadcasting.

As explained in Recitals 14 et seq. of the EECC, this development responds, among other objectives, to the need to keep pace with technological developments and, in particular, to the substitution trend of traditional voice telephony and text messages (SMS) services by functionally equivalent online services.<sup>7</sup>

---

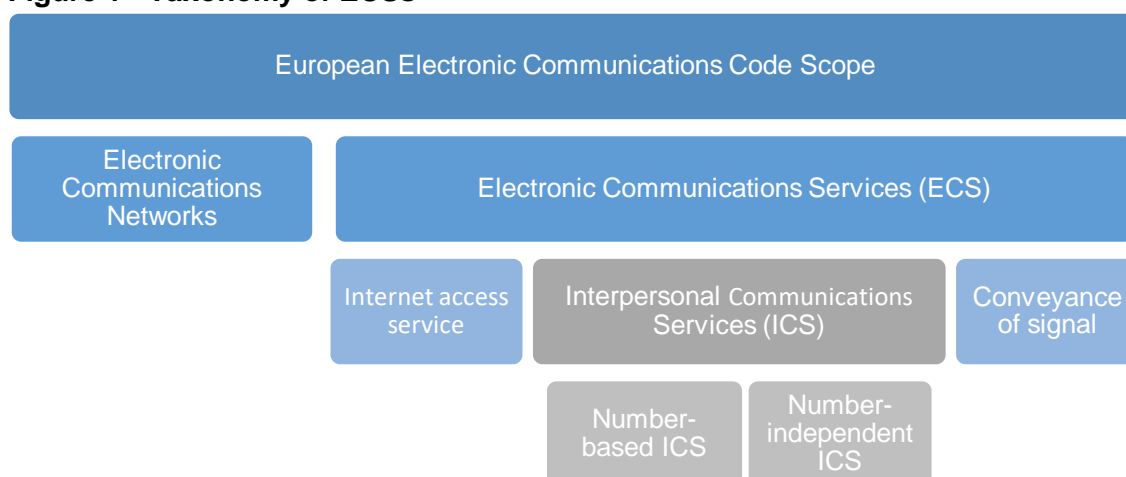
<sup>7</sup>The period for the transposition of the EECC ended in December 2020 and only a few countries have been able to meet this deadline. Therefore, it is still too early to fully assess the impact of the changes introduced by the EECC.

The new definition aims to shed more clarity on the boundaries of the regulatory intervention to ensure that end-users are equally protected when using services with the same functionalities, as well as balancing the playing field among the providers of functionally equivalent services.<sup>8</sup>

ICSs are defined under Art. 2 of the EECC as a service “normally provided for remuneration that enables direct interpersonal and interactive exchange of information via electronic communications networks between a finite number of persons, whereby the persons initiating or participating in the communication determine its recipient(s) and does not include services which enable interpersonal and interactive communication merely as a minor ancillary feature that is intrinsically linked to another service.” (text underlined by BEREC)

As shown in Figure 1, ICSs encompass two types of services: number-based ICS (NB-ICS) and number-independent ICS (NI-ICS). The difference being that NB-ICSs connect with publicly assigned numbering resources whereas NI-ICSs do not.

**Figure 1 - Taxonomy of ECSs**



The ECS and ICS definitions have some implications:

1. ICS exclude any connectivity service beyond communication among persons such as connectivity services underlying machine-to-machine and machine-to-person communications (e.g. consumer service chatbots or application-to-person, A2P-messaging). Those services belong to the “conveyance of signals” category.
2. Services provided as a minor ancillary feature of other main service are not considered as ICSs. The definition of a service as ancillary or principal depends, according to Recital 17 of the EECC, not on the features of the service itself but on the utility of the

---

<sup>8</sup> See BoR (16) 35 BEREC Report on OTT services, January 2016 for further information on this matter: [https://berec.europa.eu/eng/document\\_register/subject\\_matter/berec/reports/5751-berec-report-on-ott-services](https://berec.europa.eu/eng/document_register/subject_matter/berec/reports/5751-berec-report-on-ott-services)

service for the end-user. The example of an ancillary service provided in the EECC is a communication channel (e.g. a chat function) in online games. *Mutatis mutandis*, a chat function embedded in an online intermediation service could most likely be considered an ancillary service and not an ICS.

3. The definition also includes a criterion to delineate the borders between ICS and other services such as social networks or video sharing platforms: interpersonal and interactive exchange of information between a *finite number of persons*.<sup>9</sup>
4. The classification of the services is undertaken by the NRAs on a case-by-case basis by assessing when a service is ancillary or principal or the limitation or not of the number of persons it addresses to differentiate an ICS from a social network. NRAs are also regularly analysing new services and how those should be classified in a constantly changing sector where the boundaries among the services are many times blurred. Moreover, services may evolve and, in view of this evolution, their classification under any or other category may vary.
5. The different types of ECSs may sometimes overlap, particularly since all are provided, as any digital service, on underlying ECNs<sup>10</sup>. As an example, a NB-ICS also comprises the conveyance of signals albeit this aspect alone would not result in NB-ICS being classified under the respective category of Art. 2(4)(c) 'services consisting wholly or mainly in the conveyance of signals.

ICSs are available on a standalone basis, but are also in some Member States commonly commercialized in a bundle with other services. This is typically the case for the NB-ICS with IASs, but it also occurs with NB-ICS and NI-ICS services (e.g. Skype in/out, that is a NB-ICS and peer-to-peer Skype, classified as NI-ICS). It is also noted that a few large digital platforms offer both NB-ICS and NI-ICS<sup>11</sup>. Another example could be a messaging/VoIP system that allows both person-to-person communication (ICS) and person-to-machine communication (e.g. communication with a virtual assistant) which would be a conveyance of signal service, not an ICS. The same could apply to some cloud computing services that simultaneously comprise the provision of electronic communication services, networks and information society services.

6. Some ECS and NI-ICS are intertwined with other (non-ECS) services, such as social networks, online intermediation (payment, identification) and advertising services.
7. The boundaries of the markets for the purpose of asymmetric regulation are determined by means of a market analysis establishing the relevant services to be included in the market according to the substitutability test. That is, the concept of "services" is not equivalent to "markets" as markets may encompass different services.

---

<sup>9</sup> This issue is further analysed under section 7

<sup>10</sup> See recital 15 of the EECC

<sup>11</sup> E.g. Amazon Connect; Google RCS Message or Microsoft Operator Connect. (Teams))



In this sense, the definitions of services within Art. 2 EECC are not equivalent to markets.

To sum up, the classification of ECSs may require a case-by-case analysis of the features of the services and the utility of the service for the end-user. This analysis is not static and shall keep pace with the technical and market developments. In order to contribute to the development of an EU internal market, BEREC might adopt common approaches to the technical assessment of the services and the utility of the services for the end-user.

## 4. Regulation of NI-ICS in the EECC and the e-Privacy Directive

The EECC identifies in Art. 3 four general objectives pursued by the electronic communications regulation:

- a. promote **connectivity**, access to, and take-up of, very high-capacity networks by all citizens and businesses of the European Union (EU);
- b. promote **competition** in the provision of ECNs and associated facilities, including efficient infrastructure-based competition, and in the provision of ECSs and associated services;
- c. contribute to the development of the **internal market** by favouring the establishment and development of trans-European networks, the provision, availability and interoperability of pan-European services, end-to-end connectivity; and
- d. promote the **interests of the citizens** of the Union.

Those objectives are promoted by means of two types of rules: symmetric and asymmetric. While symmetric regulation may potentially be applied to all providers regardless of size and market power, asymmetric regulation is imposed only on those providers that have a position of particular strength in the market (i.e. a significant market power – SMP).

The EECC includes several provisions to ensure consistency of the measures adopted across the EU. Those include peer and EC review of draft measures to be adopted by National Regulatory Authorities (NRAs) in the context of *ex ante* market analysis, the adoption of BEREC Guidelines and Common Positions and the specific harmonization procedure foreseen under Art. 38 EECC, that allows for the EC intervention including the adoption of binding decisions in case of discrepancies in the implementation of the EECC.

The symmetric and asymmetric obligations applied (or potentially applicable) to NI-ICS under the electronic communications regulation are presented in the next section.

Some of these obligations<sup>12</sup> could be relevant also in the context of the DMA due to the potential overlap or, inspiration could be drawn when designing a new *ex ante* regulatory framework.

## 4.1. Symmetric regulation in the EECC

### **Market monitoring and information requests**

The constant surveillance of the sector developments by the NRAs is a basic tool to measure the effectiveness of the rules and detect emerging regulatory issues and, ultimately, serves for research leading to suggestions aimed at improving the regulatory framework. Through appeals, the courts review whether the rules have been correctly enforced.

These tasks imply a correlative obligation on all ECS providers, including NI-ICS, to supply all the relevant information needed to NRAs, BEREC and competent authorities to enable them to carry out their duties including the monitoring of the evolution of the services.

### **Dispute resolution at retail and wholesale level**

The EECC envisages that an out-of-court dispute resolution independent specialised body shall be established to solve disputes<sup>13</sup> between:

- a) any provider and consumers<sup>14</sup> (retail dispute resolution),
- b) providers of ECNs or ECSs,
- c) the above-mentioned undertakings and other undertakings benefiting from obligations of access or interconnection,
- d) providers of ECNs or ECSs and providers of associated facilities (wholesale dispute resolution).

In this context, the EECC allows to solve conflicts regarding NI-ICS both at the retail and wholesale level<sup>15</sup>.

Wholesale dispute resolution is one of the core competences of the NRAs defined in Art. 5 of the EECC. This “NRAs case law” provides not only for a swift enforcement of the sectoral rules but also allow to specify and clarify how those shall be applied.

---

<sup>12</sup> All rules applicable on NI-ICS apply also on NB-ICS as well as some additional ones specific for NB-ICS that are not included here for the sake of simplification but could be relevant in case of designating ICS as CPS such as the rules to facilitate switching of provider or on bundled services.

<sup>13</sup> Articles 25 & 26 EECC

<sup>14</sup> Member States may also extend access to this procedure to other end-users such as microenterprises and small enterprises.

<sup>15</sup> In the context of NI-ICS conflicts at the wholesale level are different than for traditional ECSs and may consist on issues related to access for business users, for example.

In both retail and wholesale cases, the EECC includes cooperation mechanisms in case of disputes involving parties in different Member States (cross-border disputes).<sup>16</sup>

Most of the advantages inherent to the conception of the out-of-court dispute resolution as an *ex ante* regulatory tool serving not only for regulatory enforcement but also both as an input and a way to finetune and develop the obligations imposed, are not present in the mediation system established in the Platform to Business (P2B) Regulation<sup>17</sup>. BEREC considers that the experience in the ECSs could provide valuable insights for the definition of a dispute resolution mechanisms in the context of the DMA.<sup>18</sup>

### **End-users' rights**

With regard to the end-users' rights, there are some preliminary considerations that deserve to be taken into account to fully understand those rules:

1. The definition of end-user under the EECC, contrary to the definition in the DMA, includes also business users.<sup>19</sup>
2. The sectorial end-users' rights described below apply to NI-ICS with the only exception of NI-ICS providers that are micro-enterprises and do not provide other ECSs.<sup>20</sup> However, this exception does not apply to the non-discrimination obligation (see below).
3. The EECC imposes an EU maximum harmonization of end-users' rights so that all EU citizens enjoy the same level of protection.

End-user sectoral obligations relevant for NI-ICS include:

- **Non-discrimination.**<sup>21</sup> NI-ICS providers shall not apply any different requirements or general conditions of access to, or use of, networks or services to end-users, unless such different treatment is objectively justified.
- **Content of contracts.**<sup>22</sup> The EECC regulates the information to be provided before being bound by the contract as well as the minimum information to be included in contracts with consumers, SME and non-profit organizations. In this regard, Member

---

<sup>16</sup> See article 27 EECC.

<sup>17</sup> Regulation 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services

<sup>18</sup> See BoR (21) 34, Draft BEREC Report on the *ex ante* regulation of digital gatekeepers, [https://berec.europa.eu/eng/document\\_register/subject\\_matter/berec/reports/9880-draft-berec-report-on-the-ex-ante-regulation-of-digital-gatekeepers](https://berec.europa.eu/eng/document_register/subject_matter/berec/reports/9880-draft-berec-report-on-the-ex-ante-regulation-of-digital-gatekeepers)

<sup>19</sup> According to the EECC, end-user means a user not providing public electronic communications networks or publicly available electronic communications services (Art. 2 (14) EECC). While in the DMA, "end-user" means any natural or legal person using core platform services other than as a business user (Article 2(16) DMA) and "business user" means any natural or legal person acting in a commercial or professional capacity using core platform services for the purpose of or in the course of providing goods or services to end users (Article 2(17) DMA).

<sup>20</sup> Article 98 EECC.

<sup>21</sup> Article 99 EECC.

<sup>22</sup> Article 102 EECC.

States may introduce additional provisions with regard to the content of contracts in order to address newly emerging issues.

- **Transparency, comparison of offers and publication of information.**<sup>23</sup> NI-ICS providers are obliged to publish relevant information on the terms and conditions of the services. This information may be supervised by the NRA or another competent authority (OCA) before its publication. The extent of information requirement may be reviewed by the EC by means of delegated acts. End-users should have access to at least one free independent comparison tool which enables them to compare and evaluate the main features of the different IAS providers, NB-ICS and, where applicable, NI-ICS.
- **Quality of service.**<sup>24</sup> NRAs may require NI-ICS, to the extent that they control at least some elements of the network either directly or by virtue of a service level agreement to that effect, to publish comprehensive, comparable, reliable, user-friendly and up-to-date information for end-users on the quality of their services and on measures taken to ensure equivalence in access for end-users with disabilities. NRAs may also require NI-ICS to inform consumers if the quality of the services they provide depends on any external factors, such as control of signal transmission or network connectivity. This information may be supervised by the NRA before its publication.

Further to the obligations included in the EECC, it is particularly relevant to consider the specific review procedure on end-users' rights. Art. 123 of the EECC tasks BEREC to monitor the market and technological developments regarding the different types of electronic communications services and to publish an opinion on such developments and on their impact on the application on end-users' rights. In particular, this opinion shall analyse:

- to what extent end-users of all ECSs are able to make free and informed choices, including on the basis of complete contractual information, and are able to switch easily their provider of ECSs;
- to what extent any lack of abilities referred to in the previous point has resulted in market distortions or end-user harm;
- to what extent effective access to emergency services is appreciably threatened, in particular due to an increased use of NI-ICS, by a lack of interoperability or technological developments;
- the likely cost of any potential readjustments of sectoral end-user rights obligations or impact on innovation for providers of ECSs.

In view of this opinion, the EC shall publish a report and submit a legislative proposal where it considers this to be necessary to ensure that the four general objectives of electronic communications regulation continue to be met.

The first of these reports is due by 21 December 2021. BEREC is currently analysing the need to review these obligations.

---

<sup>23</sup> Article 103 EECC.

<sup>24</sup> Article 104 EECC

## 4.2. Asymmetric regulation in the EECC

The ECS regulation regime also includes an *ex-ante* market intervention on operators with SMP that allows the achievement of the general objectives set for in Art. 3 of the EECC, in particular promoting competition and contributing to the development of the internal market.

The EECC allows the imposition of specific regulatory measures (“remedies”) on these providers adapted to address the competition problems identified following a market analysis. Those remedies may typically include the imposition of access, cost accounting, price control, transparency, non-discrimination and accounting separation (Art. 69-74 EECC). The EECC also includes functional separation and the possibility for the provider to offer commitments including the voluntary separation. In addition, NRAs may impose other access or interconnection obligations further to the ones explicitly included in the EECC.<sup>25 26</sup>

If the obligations according to Art. 69-74 EECC are insufficient to achieve the general objectives set in Art. 3 of the EECC, NRAs may impose obligations on SMP operators of retail services including price control and cost accounting measures to avoid excessive prices, inhibition of market entry, restrict competition by setting predatory prices, undue preference to specific end-users or the unreasonably bundling of services (Art. 83 EECC).

The *ex ante* regulatory task is undertaken by the independent NRAs. However, they must take into utmost account recommendations and guidance from the EC and BEREC in order to ensure the consistent application and harmonisation of the electronic communications’ regulatory framework across the EU.<sup>27</sup>

BEREC notes that while being within the scope of sectoral regulation and, thus, potentially subject to asymmetric (SMP) regulation<sup>28</sup>, the new Recommendation on relevant markets published in December 2020<sup>29</sup> does not include the provision of NI-ICS on the list of as a specific (separate) relevant market susceptible to *ex ante* regulation at the EU level. Nevertheless, although NRAs are not obliged to analyse market failures related to NI-ICS as it would have been the case if the EC had included such a market in its Recommendation, NRAs can still regulate a specific market which is not in the EC list if the “three criteria test” is met. The three criteria are:

---

<sup>25</sup> Following the procedure in Art. 68 of the EECC.

<sup>26</sup> Furthermore, and with a view to in particular promote the objective of connectivity, the EECC introduces two new remedies, the regulatory treatment of new very high capacity network elements for co-investment schemes (Art. 76/79) and the remedy for wholesale-only undertakings (Art. 80).

<sup>27</sup> The most relevant ones include the Recommendation on relevant markets, the SMP Guidelines, the Recommendation on non-discrimination and costing methodologies, Recommendation on NGN or the notice on the calculation of the cost of capital for legacy infrastructure.

<sup>28</sup> For instance, the EC has previously asked to include NI-ICS in the *ex-ante* market analysis as in the case FR/2014/1670 regarding wholesale SMS termination on individual mobile networks in France.

<sup>29</sup> Commission Recommendation of 18.12.2020 on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code.

- a) high and non-transitory structural, legal or regulatory barriers to entry are present;
- b) there is a market structure which does not tend towards effective competition within the relevant time horizon, having regard to the state of infrastructure-based competition and other sources of competition behind the barriers to entry;
- c) competition law alone is insufficient to adequately address the identified market failure(s).

BEREC recalls that the contribution to the development of the internal market includes a consistent application by taking into utmost account of BEREC guidelines and the EC's recommendations, the development of common rules and predictable regulatory approaches, by favouring the establishment and development of trans-European networks, the provision, availability and interoperability of pan-European services, and end-to-end connectivity (cf. Art. 3(2) sub c) of the EECC).

In this regard, BEREC is aware that NI-ICS providers generally operate cross-border and therefore may be considered as pan-European services. Although not applied till the moment, Art. 65 of the EECC sets out the procedure for the identification of transnational markets for the provision of pan-European networks or services at EU level. The EC identifies the markets after consultation with the stakeholders and taking into utmost account the analysis carried out by BEREC.<sup>30</sup> According to the same article, two or more NRAs may also jointly notify their draft measures regarding the market analysis and any regulatory obligations in the absence of a defined transnational markets, where they consider that market conditions in their respective jurisdictions are sufficiently homogeneous.

For the time being and despite the NRAs competences to impose *ex ante* regulation on any electronic communication's market including NI-ICS, no NI-ICS providers are being regulated in any EU Member State under the SMP regime. Although considered in market analyses, those have not so far lead to the imposition of asymmetric regulation on NI-ICS: while in some cases, the analysis concluded that competition issues were identified only on NB-ICS, in others, NB- and NI-ICS were considered substitutes and no SMP operator was identified. In spite of this, the current situation may change in future market reviews.

By including NI-ICS in the list of CPSs in the DMA proposal, the EC acknowledges that competition issues regarding those services may arise. BEREC is ready to provide its knowledge and expertise of applying asymmetric regulation to overcome competition problems, in particular in the field of SMP market analysis and *ex ante* imposition of tailored remedies to support the EC (as EU DMA regulator) in addressing these new emerging issues identified in the electronic communications sector.

---

<sup>30</sup> According with Art. 66 of the EECC, BEREC's analysis is without prejudice to any findings of transnational markets and to any findings of national or sub-national geographical markets by NRAs.

### 4.3. Interoperability (Art. 61 of the EECC)

Art. 61 of the EECC (see Art. 1(4) of the DMA proposal) regulates access, interconnection and interoperability for all ECNs and ECSs including both NB-ICS and NI-ICS. According to the proposal from the EC, the DMA is applied without prejudice this provision of the EECC<sup>31</sup>.

All ECN providers have the obligation and right to negotiate with each other interconnection for the purpose of providing publicly available ECSs to ensure provision and interoperability of services throughout the EU. In case that a provider refuses to negotiate in good faith, NRAs may intervene in the context of a dispute resolution. Also, when deemed necessary, NRAs or other competent authorities can intervene on their own initiative and impose an obligation of interoperability in the terms of Art. 61(2) sub a) and b) of the EECC.

In the case of NI-ICS, NRAs may impose obligations under Art. 61(2) sub c) of the EECC, requiring interoperability on NI-ICS providers, where *“end-to-end connectivity between end-users is endangered due to a lack of interoperability between interpersonal communications services, and to the extent necessary to ensure end-to-end connectivity between end-users, obligations on relevant providers of number-independent interpersonal communications services which reach a significant level of coverage and user uptake, to make their services interoperable”*.

This means that this interoperability obligation may be imposed on a case-by-case basis *only* on NI-ICS that have a significant level of coverage and user uptake.

Furthermore, Art. 61 sets out two conditions to allow NRAs or other competent authorities imposing interoperability on NI-ICS:

- a) The obligation shall be limited to the extent necessary to ensure interoperability of ICS and may include proportionate obligations on providers of those services to publish and allow the use, modification and redistribution of relevant information by the authorities and other providers, or to use and implement standards or specifications listed in Art. 39 (1) or of any other relevant European or international standards; and
- b) the EC, after consulting BEREC and taking utmost account of its opinion, has found an appreciable threat to end-to-end connectivity between end-users throughout the EU or in at least three Member States and has adopted implementing measures specifying the nature and scope of any obligations that may be imposed.

That is, even though the competence to impose the obligation lies with national authorities, the initiative to allow NRAs to adopt such decisions is under the EC remit and is subject to the EC implementing measures to ensure that the obligation imposed on NI-ICS is coherent across the EU. In addition, draft NRA measures in application of Art. 61 of the EECC are subject to notification to the EC under Article 32 and, in case of Art. 61(3) EECC (which does not apply to NI-ICS), Article 33 of the EECC that entail the peer NRAs review..

---

<sup>31</sup> This analysis is not exhaustive, focusing on the rules in Art. 61 that seem more relevant in the context of the DMA.

The imposition of interoperability obligations under Art. 61 EECC is without prejudice to measures on SMP operators according to Art. 68 EECC, as acknowledged in the same article of the EECC.

Thus, Art. 61(2) sub c) EECC constitutes a special case of asymmetric regulation within Art. 61 EECC as it is the only one that is addressing *only* providers that have a significant level of coverage and user uptake whereas all other provisions of Art. 61 EECC are symmetric obligations that may be imposed on undertakings subject to general authorisation.

Access, interconnection and interoperability are nowadays intrinsic to the correct and efficient functioning of electronic communication networks and services. Imposing such obligations entails an analysis of the impact on the sector, the problem aimed to be solved and the definition of its exact scope, on which undertakings to be imposed and the development of the technical standards to make it possible. BEREC acknowledges the ongoing debate with regard to interoperability of NI-ICS and is ready to provide its technical expertise on this matter by carrying out this analysis and, subject to the conclusions reached, advise the EC and other institutions.

#### **4.4. Protection of privacy in the electronic communications sector (e-Privacy)**

In addition to the general personal data protection regime, ECSs are subject to rules aimed to ensure the privacy of communications. Those sector specific rules are currently gathered under the e-Privacy Directive.<sup>32</sup> This Directive is currently under review by the EU co-legislators by means of the proposal for a Regulation on Privacy and Electronic Communications.<sup>33</sup> As explained in BEREC's Opinion in the context of the review of the e-Privacy Directive<sup>34</sup>, the general personal data protection regime, whose cornerstone in the EU is the General Data Protection Regulation (GDPR)<sup>35</sup>, aims to ensure the fundamental right stemming from Article 8 (1) of the Charter.

The GDPR applies to all services but, in the case of ECS, additional rules related to the privacy of communications apply as *lex specialis*. Those rules aim to ensure the fundamental right for respect of private life and confidentiality of communications, recognised in Article 7 of the Charter. While the two rights are similar and complementary, they are not the same.

---

<sup>32</sup> Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications)

<sup>33</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017PC0010&from=EN>

<sup>34</sup> [https://www.berec.europa.eu/eng/document\\_register/subject\\_matter/berec/download/0/6137-berec-response-to-the-ec-questionnaire-o\\_0.pdf](https://www.berec.europa.eu/eng/document_register/subject_matter/berec/download/0/6137-berec-response-to-the-ec-questionnaire-o_0.pdf)

<sup>35</sup> Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)



The e-Privacy rules protect the confidentiality of electronic communications data of both natural and legal persons. Furthermore, the e-Privacy rules also ensure the protection of terminal equipment. As for 21 December 2020, by virtue of the EEC definitions, the e-Privacy Directive applies to all ECSs, including NI-ICS. The proposed e-Privacy Regulation maintains this inclusion and will provide for modernisation of the rules on the processing of electronic communications data and on access to and storage of information of the end-user's terminal equipment. The definition of a service as ECS has a direct impact on the applicable secondary law (e-Privacy in addition to GDPR).

The electronic communications data under the proposed Regulation includes both electronic communications content and metadata.<sup>36</sup>

The general rule established in the proposed Regulation is that electronic communications data shall be confidential. Any interference with electronic communications data, including listening, tapping, storing, monitoring, scanning or other kinds of interception, surveillance and processing of electronic communications data, by anyone other than the end-users concerned, is prohibited.

The processing of electronic communications data would be permitted only for a few limited permitted grounds explicitly recognized in the proposed Regulation and when the end-user has given explicit consent and does not affect the rights of other users. Those permitted grounds for processing are different from the legal basis as included in the GDPR, which include for instance legal basis for processing of data for the performance of a contract or in case of the legitimate interest of the controller.

Therefore, in the case of NI-ICS, as subject to the e-Privacy regulation, data related obligations, such as the ones in Article 5 (a) or 6 (a) DMA, in principle would *de facto* not impose additional obligations for such services.

## 5. NI-ICS in the DMA proposal

### 5.1. The identification of NI-ICS as a CPS

The DMA proposal shall apply to CPSs provided or offered by gatekeepers to business users established in the EU and/or end users established or located in the EU.

---

<sup>36</sup> Electronic communications content means the content exchanged by means of electronic communications services, such as text, voice, videos, images, and sound. Electronic communications metadata is data processed by means of electronic communications services for the purposes of transmitting, distributing or exchanging electronic communications content; including data used to trace and identify the source and destination of a communication, data on the location of the device generated in the context of providing electronic communications services, and the date, time, duration and the type of communication.

According to Art. 2 (2) of the DMA proposal, NI-ICS are defined as CPS together with other different services such as online intermediation services or online search engines, among others.

Some of the currently most popular NI-ICS in Europe are provided by platform ecosystems<sup>37</sup>, that is by undertakings often active on other CPSs (e.g. social networks, online intermediation services, advertising, payment or identification services) as well as other online and digital services creating a network of interconnected services. Some examples of the connection among the services are their joint provision (in a bundle, tied or as ancillary/main service to other) or their use as platform to provide other services (e.g. providing advertising services) or as a source for input for the provision of other services (e.g. data).

Digital ecosystems may allow providers of a NI-ICS to benefit from leveraging effects and to strengthen the entrenched position of their services, for both NI-ICS and other services (e.g. tying/bundling of services and ancillary services, combination of data sets or privileged interoperability within a closed ecosystem).

The EECC defines NI-ICS by considering their use as a service for interpersonal communication among users. In case of the provision of other services to end-users or business users (e.g. social networks, advertising and online intermediation services, including payment or identification services), an assessment of the provision of interpersonal communication may be performed in order to determine the nature of the service considering the functionality approach provided by the EECC.

In the context of the DMA, some of the bundled services may be part of ecosystems around CPSs, where intermediation power in one market may be leveraged into other markets.<sup>38</sup> Also, vertical and horizontal integration raise barriers to entry and hinders the contestability of the markets. The DMA does not include an explicit approach for bundled products nor for ecosystems, but it can be inferred that some of the obligations in Articles 5 and 6 aim to address ecosystem issues (e.g. Art. 5(f) regarding tying).

Tying and bundling of NI-ICS with other services may create competitive concerns. As explained in section 4, the EECC empowers NRAs to make market and competition assessments in electronic communication markets. However, the imposition of remedies on other services provided jointly with the NI-ICS is not included in the scope of the EECC explicitly.

---

<sup>37</sup> See BoR (21) 89 BEREC Study on consumer behaviour and attitudes towards Digital Platforms. June, 2021. Available at [https://berec.europa.eu/eng/document\\_register/subject\\_matter/berec/reports/9965-analysing-eu-consumer-perceptions-and-behaviour-on-digital-platforms-for-communication-analysis-report](https://berec.europa.eu/eng/document_register/subject_matter/berec/reports/9965-analysing-eu-consumer-perceptions-and-behaviour-on-digital-platforms-for-communication-analysis-report)

<sup>38</sup> Bundles and ecosystems are different concepts. Although the explanatory memorandum of the DMA mentions “ecosystems” several times, this concept has not been included in the Regulation and there is no legal definition of it. In the present report, an ecosystem is defined as different types of services or products provided by the same entity across more than one CPS. It is therefore common for them to bundle offers, or to tie the use of one service/product to the use of another service/product.

## 5.2. Designation of a NI-ICS provider as a gatekeeper

The DMA establishes three cumulative criteria for the definition of a CPS gatekeeper provider (Art. 3 (1) DMA):

- a) it has a significant impact on the internal market<sup>39</sup>;
- b) it operates a core platform service which serves as an important gateway for business users to reach end-users; and
- c) it enjoys an entrenched and durable position in its operations or it is foreseeable that it will enjoy such a position in the near future.

Linked to these criteria, Art. 3(2) DMA introduces quantitative thresholds for each of them, above those a rebuttable presumption that the qualitative criteria are established. The thresholds aim to enable a fast designation process, operating as rebuttable presumptions of gatekeeper status.

Furthermore, if the CPS provider neither satisfies the thresholds nor the abovementioned criteria, the EC, according to Art. 15, may conduct a market investigation for the purpose of examining whether a provider of CPS should be designated as a gatekeeper taking into account qualitative criteria.

The designation process of NI-ICS provided by a gatekeeper depends on the evolution of business models, the utility provided to the users – and the definition of “business user”<sup>40</sup>. When it comes to the analysis of the second criterion to be designated as a gatekeeper, the DMA lacks clarity in the definition of business users and the assessment of offers providing several functionalities and services. This definition of business user in the DMA proposal covers not only the definition of business users according to the P2B Regulation,<sup>41</sup> but also includes business users using CPS “in the course of providing goods or services to end-users”.<sup>42</sup>

Furthermore, this second criterion does not only entail the use of business users but the service needs to be an important gateway for business users to reach end-users. It would, thus, require an analysis on the extend that business users rely on the NI-ICS to access their clients considering also other services such as other NI-ICS (including e-mail) or NB-ICS.

The summary of stakeholder feedback of business users in the “DMA support study” states: *“Currently new, but already existing players are entering the retail market. Social networks/applications are diversifying their activities as previously platform did. These*

---

<sup>39</sup> There is no definition of the concept of “significant impact on the internal market” in the DMA. BEREC notes that in the context of electronic communication regulation (Art. 32 EEC) and competition law the threshold for intervention is “affecting trade between Member States”, which does not require significant impact but only a probable appreciable effect. on the “affect trade concept”: [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004XC0427\(06\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004XC0427(06)&from=EN)

<sup>40</sup> Art. 3(1) (a) of the DMA.

<sup>41</sup> Regulation (EU) 2019/1150.

<sup>42</sup> Art. 2 (17) DMA.

platforms have started as content driven and are now integrating product sales in their offerings.”<sup>43</sup> Therefore, “[i]n the course of providing goods or services to end users” may cover different services along the “consumer purchasing process” of a NI-ICS<sup>44</sup> end-user. While their usage currently may be marginal, digital platforms’ business models are evolving rapidly. There are signs that certain NI-ICS providers are increasing their activities in other CPSs, with some of them already offering more than one service and others may follow.<sup>45</sup> NI-ICS that provide only interpersonal communication and do not provide other services may currently be unlikely to be designated as gatekeepers.

NI-ICS providers which are also active in other CPSs may be regulated in all CPSs where they are designated gatekeepers, provided that they meet the designation criteria. NI-ICS that are provided by platform ecosystems and provide additional services next to interpersonal communication might increasingly meet conditions for the designation in the future, if the end-users and business-users base they have built in one CPS can be “leveraged” to other CPSs (e.g. NI-ICS).

As indicated by the BEREC Opinion on the DMA<sup>46</sup>, considerations on the platform’s gatekeeping role when part of an ecosystem should be considered in the DMA proposal when appropriate. Belonging to an ecosystem can allow the gatekeeper to leverage their power onto additional services, and/or to have privileged/exclusive access to key inputs/assets and thus further raise barriers to entry or expansion. The DMA proposal could explicitly include a non-cumulative ecosystem criterion in the designation of gatekeepers and in the definition of the corresponding regulatory measures.

Given the *ex ante* regulation currently applicable to NI-ICS in the EECC<sup>47</sup>, the designation of a gatekeeper is a possible scenario which may lead to overlapping of remedies and, thus, deserves careful consideration in order to avoid conflicts on the application of different regulatory tools by different regulatory authorities. To this aim, the specific relation between the DMA and the EECC should be analysed even closer not only by looking at the legal definitions but also at the legal objectives and scope of applicable obligations.

---

<sup>43</sup> Digital Markets Act - Impact Assessment support study - Annexes, p. 470

<sup>44</sup> Similar purchasing processes might be possible within other CPS (e.g. Online social networking services or Video-sharing platform services).

<sup>45</sup> For example, (i) Awareness: users discovering products and services via advertising (in NI-ICS), via shared products from contacts in NI-ICS or business users starting conversations on NI-ICS; (ii) Consideration: researching product catalogues in NI-ICS, asking businesses for information via NI-ICS (possibly answered by Chat-Bots) or searching for a product; (iii) Purchase: purchase via an NI-ICS, via another service of the ecosystem, via another service by a different company, (automated) scheduling of appointments (e.g. with provider of physical services), payment and identification may be provided by the NI-ICS; (iv) Retention: customer communication (support) via NI-ICS; (v) Advocacy: Sharing of the product and services to contacts via NI-ICS.

<sup>46</sup> “BEREC Opinion on the European Commission’s proposal for a Digital Markets Act” BoR (21) 35. March, 2021. Available at [https://bereg.europa.eu/eng/document\\_register/subject\\_matter/bereg/opinions/9879-bereg-opinion-on-the-european-commissions-proposal-for-a-digital-markets-act](https://bereg.europa.eu/eng/document_register/subject_matter/bereg/opinions/9879-bereg-opinion-on-the-european-commissions-proposal-for-a-digital-markets-act)

<sup>47</sup> See section 4

In this respect, both the EECC and the DMA pursue the policy objective to promote fair competition and innovation by imposing remedies under certain conditions subject to market assessment and investigation. Nevertheless, the legal framework of electronic communications (Art. 3 EECC) promotes competition in the “provision of electronic communications services and associated services” and NRAs ensure, *inter alia*, that no discrimination is made in the treatment of providers of electronic communications networks and services. NRAs impose *ex-ante* regulatory obligations only to the extent necessary to secure effective and sustainable competition in the interest of end-users and relax or lift such obligations as soon as that condition is fulfilled. It can be derived that the main competition policy objective set out in the EECC framework is ensuring competition in ECSs markets.

Even in a possible scenario where providers of NI-ICS are designated as gatekeepers according to the DMA, competition remedies in the EECC and DMA may to some extent be seen as complementary tools pursuing complementary objectives. On the one hand, the EECC is concerned, among other issues, with competition between ICSs. On the other hand, the DMA is concerned with, among other things, harmonised rules ensuring contestable and fair markets where digital gatekeepers are present. Even though the overarching objectives of the two frameworks may in part be complementary, the remedies however to a large extent differ, since they are addressing specific concerns and practices which are considered to be detrimental. Thus, while sectoral regulation focuses on *ex ante* regulation of ECS (including NI-ICS) to promote connectivity, competition, the development of the EU internal market and the interest of the EU citizens in the context of ECS, the DMA should focus its action on NI-ICS providers in a broader context to tackle issues which are not already addressed by the EECC.

The obligations in the DMA are only applicable to well-defined gatekeepers. These are designated taking into account a number of quantitative and qualitative criteria. Since many gatekeepers operate within digital ecosystems, BEREC is of the opinion that this criterion should be further considered in the DMA, since being part of an ecosystem can reinforce the platforms gatekeeping role, since it allows it to leverage its power onto additional services.

In this line, provisions related to asymmetric regulation in the EECC (see section 4.3) could be imposed by NRAs *only* on those NI-ICS providers that reach a significant level of coverage and uptake by users in the case of Art. 61(2) sub c) EECC and privacy requirements set out in the upcoming e-Privacy Regulation (see section 4.4) upon all NI-ICS providers, independently of whether the DMA is applicable or not.

In order to ensure legal and regulatory certainty, BEREC recommends that careful analysis through case-by-case assessment should be carried out, and structured consultation mechanisms between the EC (as EU DMA regulator) and national authorities responsible of regulating ECSs should be set up, when the DMA remedies are imposed upon CPS that qualify at the same time as ECS or are subject to the e-Privacy Regulation.

In order to avoid conflicting remedies and overlapping of objectives, some normative mechanisms should apply. For instance, as a general principle, it should be clearly stated in the DMA that if the implementation of remedies under Articles 5 and 6 DMA involves NI-ICS as CPS, the EC must consult the competent authorities (NRAs, BEREC and/or the DMA

Advisory Board proposed by BEREC<sup>48</sup>) regarding the potential impact on markets of ECS. The consulted authorities shall issue a binding opinion. If a potential conflict with overlapping rules is found under the electronic communications framework – including the EECC and e-Privacy directive – then this sectoral framework should prevail.

### 5.3. Conclusion on the inclusion of NI-ICS in the DMA

DMA future regulation must focus on CPSs that feature common characteristics: strong network effects, economies of scale, lock-in effects and vertical integration. This is among others the case for online intermediation services online search engines and advertising.

Therefore, in BEREC's opinion, the EECC and the DMA should be complementary tools pursuing complementary objectives, as well as both addressing competition objectives.

On the one hand, the EECC and related sectoral regulation serve as the appropriate *ex ante* regulation tool to address, among other objectives, competition issues in the provision of ECSs. This includes issues of interoperability between NI-ICS (related to end-to-end connectivity), in terms of consumer/end-user rights (see section 4 for quality of service/connectivity, transparency, security and privacy of interpersonal communications) and competition in markets of electronic communications. On the other hand, many obligations<sup>49</sup> in the DMA proposal seem to aim at tackling ecosystem concerns such as preventing certain forms of leveraging of power from one CPS, to other CPS or other services. Problems relating to vertical integration in ECS markets are prevented by the EECC SMP regulation, but problems related to other types of ecosystems may be out of the scope of the EECC sectoral regulation.

In case of regulatory overlapping and possibly conflicting remedies, a cooperation mechanism among the EC, BEREC and the NRAs involved should be implemented in order to carry out an effective analysis. The promotion of competition in the provision of ECNs and ECSs should be addressed giving priority to measures within the existing regulatory framework (i.e. EECC).

Business models for NI-ICS are fast-evolving and very diverse. As NRAs and BEREC monitor the evolution of these services and have an understanding of the technical and market features and developments of NI-ICS, BEREC recommends that all DMA obligations regarding NI-ICS should be implemented in close cooperation with BEREC and/relevant national authorities, in order to conduct a preliminary and joint analysis of their impacts in the relevant ECS markets. Similarly, prior consultation and close cooperation is essential when setting out implementing rules for the enforcement of the DMA obligations. Such joint assessment on a case-by-case basis would aim at ensuring effective normative coordination

---

<sup>48</sup> See BEREC proposal on this Advisory Board in section 3 of the “BEREC Opinion on the European Commission's proposal for a Digital Markets Act” (BoR(21) 35) and section 9 of the “Draft BEREC Report on the *ex ante* regulation of digital gatekeepers” (BoR(21)34)

<sup>49</sup> It should be noted that the DMA proposal also includes obligations that are not related to ecosystem concerns.

between DMA remedies that are complementary to those set out in the electronic communications framework.

## 6. The scope of the DMA regarding ECSs (Art. 1 of the DMA proposal)

The scope of application of the DMA proposal is the digital sector and concretely applies to gatekeepers providing CPSs to business users established in the EU or end-users established or located in the EU. Given the inclusion of NI-ICS as a CPS, there is potentially some overlap with the electronic communications markets' regulation.

Art. 1 of the DMA proposal excludes ECNs and ECSs with the exception of markets "related to interpersonal communication services as defined in point (4)(b) of Article 2 of that Directive"<sup>50</sup> (Art. 1(3) (b) of the DMA). The inclusion of ICSs is "without prejudice to the powers and tasks granted to the national regulatory and other competent authorities by virtue of Article 61" of the EECC (Art. 1(4) of the DMA).

The DMA excludes the imposition on gatekeepers of "further obligations by way of laws, regulations or administrative action for the purpose of ensuring contestable and fair markets" (Art. 1(5) of the DMA).

Furthermore, it also states that "National authorities shall not take decisions which would run counter to a decision adopted by the Commission under this Regulation" (Art. 1(7) of the DMA).

Therefore, according to Art. 1 of the DMA, services related to ICSs, both NB-ICS and NI-ICS, would be within the scope of application of the DMA proposal. NRAs and OCAs would still be able to apply Art. 61 of the EECC on ICS providers designated as gatekeepers (Art. 1(4) of the DMA), but not other obligations aimed to ensure contestable and fair markets (Art. 1(5) of the DMA).

This might create legal uncertainty in the application of electronic communications regulation, since it becomes unclear to what extent NRAs could impose obligations, related to the objectives set in the EECC, on undertakings that are designated as gatekeepers under the DMA.

The approach taken with regard to electronic communication regulation contrasts with the treatment given to "other acts of Union law regulating certain aspects of the provision of services covered by this Regulation" (Recital 11, DMA proposal), such as the *ex post*

---

<sup>50</sup> BEREC notes that there is a material mistake in this reference in art. 1.3(b) of the draft DMA as ICS are in fact defined under art. 2(5) of the EECC.

competition rules and the P2B Regulation, whereby Art. 1(6) of the DMA<sup>51</sup> explicitly establishes their complementarity.

Similarly, in the case of the Audiovisual Media Services Directive (AVMSD)<sup>52</sup>, Recital 11 establishes the DMA as being complementary and without prejudice to this Directive, notwithstanding the fact that the DMA also considers video-sharing platform services as CPS.

In this respect, a number of considerations follow:

**About the reference to “markets related to interpersonal communication services” in Article 1(3) DMA**

1. As mentioned under section 4, Article 2 of the Code refers to services, not markets. In order to establish the boundaries of the market and the services included in it, a market analysis would be required. This approach is difficult to implement and it is at odds in the context of defining the scope of an Act. Thus, the interpretation of the expression “markets related to” to define the scope of the Regulation in Article 1(3) is unclear.
2. The meaning of ECSs “related to ICS” is unclear. As explained above, all ECSs are interrelated. This would be contradictory to the explicit exclusion of ECSs that are not ICS and introduces legal uncertainty with regard to the scope of the DMA.
3. While only NI-ICS are identified as CPS, the scope of the DMA in Art. 1(3) sub b) refers to ICS and, thus, includes both NB-ICS and NI-ICS. The reason to include both categories is not explained in the recitals of the DMA but it opens the possibility to define in the future also NB-ICS as CPS and, therefore, the identification of any electronic communications operator as gatekeepers. If so, this could raise uncertainty in ensuring the effective application of sectoral electronic communications regulation. BEREC notes that NB-ICS do not share some of the key features of the digital platforms and their provision has, typically, a national scope. Thus, their inclusion within the scope could be inconsistent with the subsidiarity principle.

**About the reference to “ensuring contestable and fair markets” in Article 1 (5) DMA**

There is no legal definition of what are the specific obligations aimed to ensure contestable and fair markets as referred to in Art. 1(5) of the DMA. As a consequence, the potential scope of these concepts can be very broad. It could be argued that most of the electronic

---

<sup>51</sup> “This Regulation is without prejudice to the application of Articles 101 and 102 TFEU. It is also without prejudice to the application of: national rules prohibiting anticompetitive agreements, decisions by associations of undertakings, concerted practices and abuses of dominant positions; national competition rules prohibiting other forms of unilateral conduct insofar as they are applied to undertakings other than gatekeepers or amount to imposing additional obligations on gatekeepers; Council Regulation (EC) No 139/2004/37 and national rules concerning merger control; Regulation (EU) 2019/1150 and Regulation (EU) .../.. of the European Parliament and of the Council”

<sup>52</sup> Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services



communication rules are in some way or other related to ensure contestable and fair markets in the provision of electronic communications (networks and) services.

Moreover, regulatory obligations tend to aim to achieve different objectives. An example is the rules in the EECC to facilitate end-users switching of providers, which is, at the same time an end-users' right and a tool to foster competition and allow market entry (i.e. contestability). Given the current wording of the proposed Article 1 (5) of the DMA, the imposition of such obligations by NRAs on ECS providers could be jeopardised, as such obligations are principally intended to facilitate contestability in ECS markets.

#### **About other regulatory powers in Articles 1(5) and 1(7) DMA**

The DMA acknowledges the powers and tasks granted to NRAs (and OCAs) under Art. 61 of the EECC but does not consider the many other powers and tasks those authorities have both on NB-ICS and NI-ICS, which are described in section 4 of this report. Since the proposed DMA does not contain provisions or, at least Recitals, positioning the DMA as complementary and without prejudice to the EECC, the sole reference to Article 61 of the Code might raise doubts on these other powers and tasks granted to NRAs and OCAs under the Code, particularly vis-à-vis ICS. As mentioned above, Recital 11 ambiguously omits a reference to the Code, whilst sectoral regulations for other CPSs (such as AVMSD) are specifically mentioned.

If NI-ICS were to fall within the scope of application of the DMA, in order to avoid overlapping, ensure legal certainty and the effective application of the electronic communication framework, BEREC strongly recommends the amendment of Art. 1 of the DMA in the terms of the following proposal:

### **Proposal for amendment of article 1 of the DMA**

Ensuring the application of the DMA without prejudice to the electronic communications sector specific rules as follows:

Art,1(3). *This Regulation shall not apply to markets:*

(a) ~~related to~~ *electronic communications networks as defined in point (1) of Article 2 of Directive (EU) 2018/1972 of the European Parliament and of the Council;*

(b) ~~related to~~ *electronic communications services as defined in point (4) of Article 2 of Directive (EU) 2018/1972 other than ~~those related to~~ number-independent interpersonal communication services as defined in point (4~~7~~) of Article 2 of that Directive.*

Art,1(4). ~~With regard to interpersonal communication services t~~ *This Regulation is without prejudice to the powers and tasks granted to the national regulatory and other competent authorities by virtue of Article 61 of Directive (EU) 2018/1972.*

In order to further clarify the interplay between the DMA and the sectoral ECS regulation, the following recital should be included:

**(10 a) Number independent interpersonal communication services also fall within the scope of Directive EU 2018/1972 of the European Parliament and of the Council that govern electronic communications networks and services. The provisions of that Directive apply to those number independent interpersonal communication services for the purposes set out in article 3 of this Directive, among others, the promotion of competition in the provision of electronic communication networks and associated facilities, including efficient infrastructure-based competition, and in the provision of electronic communications services and associated services.**

## **7. Considerations related to ICS definitions and the Digital Services Act (DSA)**

On 15 December 2020, together with the DMA proposal, the EC also published a proposal for a Digital Services Act (DSA)<sup>53</sup>, which includes rules for online intermediary services. The draft of the DSA proposes obligations and accountability rules for different providers of intermediary services depending on their role, size and impact in the online ecosystem. The scope of the DSA includes providers of network infrastructure (such as IAS providers), hosting service providers, and in particular “online platforms” (e.g. online marketplaces, social media platforms) for the content provided by their end-users (i.e. recipients of their services). Specific obligations would apply to very large online platforms, reaching more than 45 million users in Europe. Rules would also cover providers that offer services in the EU<sup>54</sup>, even if they are not

<sup>53</sup> Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC. COM (2020) 825 final.

<sup>54</sup> “To offer services in the Union” is defined in Article 2(d) of the DSA.

established in the EU. With regard to the DSA, BEREC supports the EC's ambition to create a safer digital space in which the fundamental rights of all users of digital services are protected.

However, BEREC believes that there is a need to clarify which services fall within the scope of the DSA proposal with regard to ICSs. The initial draft under Recital 14 of the DSA states that ICSs as defined in the EECC fall outside the scope of the DSA Regulation. Nonetheless, this approach seems not to have been replicated within the other recitals and articles of the DSA proposal. For example, Recital 27 gives examples of services that should be understood as falling within the scope of the DSA ("*Voice over IP, messaging services and web-based e-mail services*") which regularly classify as ICS. BEREC therefore proposes to clarify the scope of the DSA with regard to ICS, in particular as regards the wording in Recital 14 of the DSA Regulation.

If ICSs should fall within the scope of the DSA, they could be included in principle as "*intermediary services*" according to Art. 2 (f) or as "*online platforms*" according to Art. 2(h). The DSA defines under Art. 2(h) 'online platform' as

*"a hosting service which, at the request of a recipient of the service, stores and disseminates to the public information, unless that activity is a minor and purely ancillary feature of another service and, for objective and technical reasons cannot be used without that other service, and the integration of the feature into the other service is not a means to circumvent the applicability of this Regulation."*

The DSA further defines that "*disseminates to the public*" implies making information (provided by recipients of the service) available to "a potentially *unlimited* number of third parties" (Art. 2(i)).

Given this definition, BEREC is therefore of the opinion that ICSs fall outside the scope of the definition of "*online platforms*" of Art. 2(h) of the DSA, as ICSs are used for interpersonal communication between a *finite number* of persons, which is determined by the sender of the communication.<sup>55</sup> Thus, NI-ICS typically do not allow publishing information to an unlimited group of recipients (no "*dissemination of information to the public*").

BEREC has noticed recently that some NI-ICS offer functionalities that do not only allow communication between a limited number of persons (e.g. private person-to-person chat, closed groups) but also include "broadcasting" functions bundled with their services that allow to publish information or content to an unlimited group of recipients (e.g. through public groups or channels without limits on the number of recipients, cf. Figure 2). With regard to these combined or "hybrid" NI-ICS, BEREC proposes that specific further obligations of the DSA<sup>56</sup> should only apply to functions which allow "*dissemination of information to the public*" (e.g.

---

<sup>55</sup> See Art. 2 (5) and recital 17 of the EECC.

<sup>56</sup> This refers to obligations that go beyond the general DSA obligations for all providers of intermediary services (e.g. designation of legal representatives, establishment of a single point of contact etc.)

only to public channels) if NI-ICS are to be included in the scope of the DSA. This proposal could also be implemented by adapting the wording in Recital 14 of the DSA proposal.

BEREC has already worked on NI-ICS by publishing several reports on this topic<sup>57</sup>, and is available for further exchange with the EU institutions to help further improve both the DMA and DSA proposals.

---

<sup>57</sup> BoR (16) 35, “BEREC Report on OTT services”, see [https://berec.europa.eu/eng/document\\_register/subject\\_matter/berec/reports/5751-berec-report-on-ott-services](https://berec.europa.eu/eng/document_register/subject_matter/berec/reports/5751-berec-report-on-ott-services); BoR (19) 244, “BEREC Preliminary report on the harmonised collection of data from both Authorised undertakings and OTT operators”, see [https://berec.europa.eu/eng/document\\_register/subject\\_matter/berec/reports/8909-berec-preliminary-report-on-the-harmonised-collection-of-data-from-both-authorised-undertakings-and-ott-operators](https://berec.europa.eu/eng/document_register/subject_matter/berec/reports/8909-berec-preliminary-report-on-the-harmonised-collection-of-data-from-both-authorised-undertakings-and-ott-operators); BoR (21) 33, “Draft Report on the harmonised definitions for indicators regarding OTT services, relevant to electronic communications markets”, see [https://berec.europa.eu/eng/document\\_register/subject\\_matter/berec/reports/9877-draft-berec-report-on-harmonised-definitions-for-indicators-regarding-ott-services-relevant-to-electronic-communications-markets](https://berec.europa.eu/eng/document_register/subject_matter/berec/reports/9877-draft-berec-report-on-harmonised-definitions-for-indicators-regarding-ott-services-relevant-to-electronic-communications-markets).

Figure 2: Functions of “hybrid” NI-ICS

