

## **BEREC proposal on the set-up of an Advisory Board in the context of the Digital Markets Act**

This paper intends to provide BEREC's views and ideas as regards the possible features of the prospective governance of digital markets in the context of the future DMA Regulation, with the intention of contributing to the ongoing discussions within the EU legislative process.

The paper develops on the merits of establishing an Advisory Board to the European Commission (EC), composed of national independent authorities (NIAs) with relevant and cross-sectoral expertise to support the EC in the enforcement of the DMA Regulation, and complement the Digital Markets Act Committee (DMAC).

The document is a follow up of and builds on the BEREC's Opinion on the Digital Markets Act<sup>1</sup>, as well as on the BEREC draft Report on the *ex ante* regulation of digital gatekeepers<sup>2</sup>, further elaborating on an institutional layout proposal based on the experience gained by BEREC and its member NRAs in more than 20 years applying *ex ante* regulation and contributing to the digital internal market.

In this respect, BEREC is glad to see that the recent proposal by the European Parliament's Committee on the Internal Market and Consumer Protection's Rapporteur broadly goes in the same direction, addressing the set-up of a "*European High-Level Group of Digital Regulators in the form of an Expert Group, consisting of the representatives of competent authorities of all the Member States, the Commission, relevant EU bodies and other representatives of competent authorities in specific sectors including data protection and electronic communications*"<sup>3</sup>. As for the operations of such design, BEREC also welcomes the proposal of this High-Level Group being composed of the Heads of the relevant competent authorities and supported by "*expert working groups building cross-regulator specialist teams that provide the Commission with high level of expertise*".

Being organized in a very similar manner, BEREC could serve as a concrete example of how this Group could be set up and work in practice.

### **Reasons in favor of setting up an Advisory Board to the EC**

The draft DMA Regulation targets digital platforms providing determinate services ("core platform services") and fulfilling the criteria to qualify them as "gatekeepers". According to those criteria,

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<sup>1</sup> BoR (21) 35, "BEREC Opinion on the European Commission's proposal for a Digital Markets Act", see [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>2</sup> BoR (21) 34, "Draft BEREC Report on the *ex ante* regulation of digital gatekeepers", see [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>3</sup> European Parliament, Committee on the Internal Market and Consumer Protection, "Draft report on the proposal for a regulation of the European Parliament and of the Council Contestable and fair markets in the digital sector (Digital Markets Act)" (COM(2020)0842 – C90419/2020 – 2020/0374(COD)), published on 01 June 2021

gatekeepers are large platforms with, in most cases, a global footprint requiring an EU centralized regulation.

The draft DMA Regulation envisages the central role of the EC and an inter-governmental Committee<sup>4</sup> (DMAC), pursuant to Regulation EU 182/2011 (comitology procedure). Besides the mentioned Committee – playing a role limited to the exercise of the EC’s implementing powers - no further national intervention in support of the EC seems to be envisaged for the enforcement of the DMA provisions.

This is not consistent with the EU legislative trend consolidating in other segments of the digital economy, where national intervention is being envisioned in the markets where harm is caused (e.g., draft regulation on a “Digital Services Act”).

BEREC concurs with the draft DMA approach whereby the implementation of the future regulatory framework for digital services is placed under the EC’s responsibility. Added to that, BEREC also sees merit in providing support from NIAs to the enforcement of the DMA by means of an Advisory Board.

This proposal is based on previous practical experiences in the implementation of sector regulation with strong cross-border dynamics such as roaming or open internet, which have proven to be successful. These rules are designed at the EU level but monitored and enforced by national authorities coordinated by means of an EU body.

Such Advisory Board is recommended for the following reasons:

#### **Acknowledge the impact of the DMA on smaller players**

Gatekeepers implement practices that impact the activities of smaller digital players with a national or local footprint as well as business users that are in most cases SMEs and consumers. NIAs constantly interact with local players and users, thanks to their activities of market monitoring, data collection, design of regulatory remedies (including public consultations), dispute resolutions etc. Such interactions can also benefit from the proximity to market players and consumers, which avoid the occurrence of language barriers.

#### **Allow constant monitoring with sufficient granularity**

Digital markets are in constant change. To keep pace with these developments, constant monitoring, including the collection of information and data, and regular exchange with all actors involved is needed. This allows supervisory authorities to follow relevant changes in dynamics as well as new technical and business models, allowing them to build a sound knowledge of digital markets and therefore a proper basis for an effective and proportionate regulatory intervention. NIAs are well placed to carry out this task in a harmonized way - especially when it comes to small players - following common criteria agreed by the Advisory Board.

#### **Ensure sufficient specialized resources with the relevant technical expertise supporting the enforcement of the DMA by the EC**

The assistance of NIAs would enable the EC to keep the necessary contact with and regular overview of the markets in the bottom-up perspective that has proven very effective in the electronic communications field. The 80 FTEs to be foreseen by the EC for the enforcement of the DMA, as foreseen in the DMA impact assessment report, would benefit from this assistance.

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<sup>4</sup> Such Committee is required, in view of art. 129.3 TFUE, as a mechanism for control by the Member States of the EC’s exercise of implementing powers such as the implementing acts envisaged in article 36 of the draft DMA Regulation.

Setting up an Advisory Board comprising of NIAs empowered with tasks relevant for the digital environment would provide the EC with a repository of technical experience in applying *ex ante* frameworks, together with a thorough knowledge of digital dynamics developing at national level, while retaining the decision-making powers firmly in the hands of the EC with respect to transnational subjects.

### **Ensure that EC decisions are built on existing and sound experience**

BEREC holds that involving in a cross-cutting manner all NIAs holding *ex ante* competences in the digital field in the EC's decision-making concerning the DMA Regulation implementation would provide for a real added value to the process, by making available national expertise to the EC (see below).

### **Support the EC in dispute resolution procedures**

As expressed in the BEREC opinion on the DMA<sup>5</sup>, BEREC considers that it is essential to include a dispute resolution mechanism in the DMA proposal to ensure that the obligations are effective<sup>6</sup>. Given the relevance of the concerns addressed by the DMA, it is very likely that a significant number of disputes will be filed over the years. Many of these could be handled at national level, in a coordinated way with other NIAs and the Commission, or NIAs could act as filters for the identification of the disputes to be brought in front of the Commission. The use of resources at national level would also alleviate the administrative burden at EU level. The proposed Advisory Board would provide for support to the EC on the harmonisation of dispute resolutions, acting as a coordination entity to facilitating the sharing of views and experiences.

### **Guarantee the coherence of complementary regulation**

Some national authorities have competencies that are complementary – and sometimes even overlapping - with the competences of the EC in the framework of the DMA. This is the case for National Regulatory Authorities in the field of electronic communications (NRAs) that regulate *ex ante* number independent interpersonal communications services (both, a CPS and an electronic communication service), the underlying infrastructure used by digital platforms to provide their services, as well as other related services in the digital ecosystem.

Furthermore, some NRAs are progressively being assigned competences in the digital field, e.g. with regard to geo-blocking, data governance, electronic identification, monitoring digital platforms or artificial intelligence, which further suggests there is merit to involve them in the future DMA-related regulatory processes, in a similar manner to a collaborative model among different authorities at national level as far as “digital matters” are concerned. This approach suggests it is worth considering a “joint-powers” approach in relation to digital matters, which can be justified by the suitability of such a model to maintain a comprehensive oversight of online actors and to select the most appropriate array of regulatory tools to use from across different sectors, with the aim of effective, coherent regulation and avoiding any unnecessary legal overlap.

The Advisory Board concept put forward by BEREC, comprised of NIAs, would allow for the design of the future digital governance, building on the sound independence prerogatives of its members and this would complement the inter-Governmental control mechanism provided by the DMAC by providing an independent technical point of view, ultimately supporting the EC's decision-making.

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<sup>5</sup> BoR (21) 35, see footnote 1

<sup>6</sup> BoR (21) 34, see footnote 2, Section 9.1.5 and Annexes

## Tasks of the Advisory Board to the EC

The Advisory Board should have the technical expertise of its independent member authorities, together with their awareness about the activities of digital services at national level, playing a pivotal role in supporting the eventual EC's decision-making. In this context, the Advisory Board may be responsible – *inter alia* – for the following tasks:

- coordinated data collection and monitoring throughout the Union, including on enforcement;
- informing the EC in relation to its decision-making and market investigations;
- raising awareness of specific concerns or issues emerging at national level;
- ensuring that DMA decisions are coherent with other related regulation (e.g. electronic communication; media; data protection);
- support the EC in technical implementation matters;
- support the EC in checking compliance with the obligations defined at EU level;
- support harmonization of dispute resolution procedures at national level;
- support the EC in issuing non-binding guidance and ad hoc opinions to ensure the implementation of the obligations in a harmonized manner;
- support the EC on market investigations and future reviews of the regulation.

## Features of the Advisory Board to the EC

In setting up an Advisory Board, reference shall be made to positive experiences with similar advisory bodies to the EC currently in place. In its own experience as such a body in the electronic communications field, BEREC has developed detailed procedures and functions in an overall bottom-up manner, which builds on the experience of national experts working collaboratively in working groups. Such a model might be a good approach to contribute to the effective functioning of the proposed Advisory Board.

BEREC has provided the EC with consolidated technical input, based on the collective experience of the independent regulators of the electronic communications sector for about 12 years and, with some refinement, works smoothly to inform the EC's decision-making related to promoting competition in the internal market, compatible with national specificities.

A statutory membership in the DMA Advisory Board by NIAs would ensure the rootedness of the Board's action based on sound experience, which would foster consistent decision-making by pooling the relevant expertise to provide input to the EC's final decisions. This is, by the way, the logic inspiring also the draft regulation on a "Digital Services Act", whose institutional governance builds on independent sector-specific Regulators, both at national level and within the European cooperation body (the "Digital Service Board").

At the same time, as digital tasks might be assigned to different NIAs in each Member State, all relevant inputs would be taken account of within the Advisory Board. To this end, a mechanism might be envisaged, whereby independent authorities with digital competences may all be involved in the Advisory Board's meetings *ratione materiae*.

Furthermore, the final Advisory Board's deliberations shall stem from proposals elaborated by working groups made up of national experts from all involved independent authorities, thus allowing a cross-sectoral composition and expertise (e.g., experts from telecom regulators, from data protection authorities, from media content regulators...).

As for its juridical form, BEREC suggests drawing inspiration from its own original and innovative layout, which preserves operational flexibility and effectiveness, resulting from its nature as a Body without legal personality of EU law, supported by an EU Agency in the performance of its advisory tasks.

In welcoming the proposal in the draft report by the IMCO's Rapporteur, which suggests creating a High-Level Group of Digital Regulators, BEREC would be committed to develop further ideas and concrete proposals in terms of institutional and operational layout, to contribute to shaping such cross-sectoral cooperation in an efficient and independent way.