

## **Response to public consultation on Draft BEREC Report on ex ante regulation of digital gatekeepers BoR (21)34**

**4 May 2021**

### **Introduction**

We, a group of civil society organisations with expertise on matters related to competition in the digital economy and with the mission of defending human rights and democracy online, welcome the opportunity to provide comments to the BEREC draft Report on ex ante regulation of digital gatekeepers BoR (21)34. We applaud BEREC's openness and constructive engagement with civil society as a matter of good practice to ensure our expertise and perspective are included in BEREC's policy work throughout the process. Hereby, we provide our comments to BEREC's draft Report, with a number of additional recommendations regarding EU regulation of digital markets.

As a starting point, we endorse the majority of BEREC's feedback about the European Commission's proposal for a Digital Markets Act (DMA). However, as an important general comment, we disagree that the DMA should not apply to messaging platforms such as WhatsApp, Telegram or Signal (defined as "number-independent interpersonal communications services" in the European Electronic Communications Code, EECC). It is important that these services fall within the scope of the DMA as they are an important element in the ecosystem of digital gatekeepers. We are convinced that the regulatory uncertainty which could arise from the overlap between the EECC and the DMA can be remedied with adequate coordination and dialogue among enforcers.

We also welcome BEREC's prioritisation of the DMA in its 2021 workplan. The DMA is a groundbreaking initiative that will play a key role in shaping today's and tomorrow's EU digital environment. BEREC's views are important to bring much-needed technical and historical expertise to the discussion. Furthermore, it is necessary to avoid conflicts between the DMA and existing rules and frameworks that target players in the internet value chain. On the contrary, synergies should be sought, and consistency ensured with regards to regulatory principles and objectives. Here again, BEREC's expertise and role in the implementation of the EECC, as well as its work around so-called Over The Top (OTT) players and the internet value chain constitute an extremely valuable body of knowledge that needs to be made accessible for, and taken into due account by the EU's co-legislators.

In the following sections, we provide additional comments and suggestions, mostly derived from concrete use – cases which we, as civil society organisations, are familiar with and exposed to.

### **I. Open and inclusive dialogue**

We welcome BEREC's focus on the need to ensure an 'open dialogue' with regards to the implementation and enforcement of the DMA. As mentioned by BEREC, we stress that this dialogue should not be limited to regulators and gatekeepers, but should be open to all kinds of relevant stakeholders, including consumer associations, digital rights groups, democracy and press freedom groups, and other parts of civil society. As the DMA will have a strong impact on end-users' rights, on democracy, and on the digital public sphere, it is important that end-users and civil society organisations are provided adequate space and meaningful channels to contribute their views to the debate. Moreover, providing proper mechanisms for end-users and civil society to participate will give greater legitimacy to the new regulatory regime

stemming from the DMA, and it will enrich the regulator’s evidence base and improve the quality of its analysis.

We believe that this inclusion should concern both the assessment of current conducts and gatekeeping positions, and the assessment of future developments and evolutions. A constant and inclusive dialogue is necessary to overcome the strong asymmetry of information in digital markets, and for regulators and other stakeholders to build a better knowledge of market and societal dynamics and practices.

In terms of concrete steps towards this inclusion, we support BEREC’s suggestion to establish complaint desks; however, we believe that further actions need to be taken. On the one hand, as seen in other sectors and with other regulatory frameworks, to assemble a complaint might be a highly complex operation, especially when strong information asymmetries are in place. On the other hand, end-users and civil society’s involvement should not be limited to complaints, but embrace wider aspects and steps in the application of the DMA.

As a concrete example, we refer to BEUC’s proposal in order to guarantee consumers or their representatives and other civil society organisations’ (and other interested third parties) the right to be heard before decisions are taken when their interests can be affected by such decisions<sup>1</sup>. Consumers’ rights to be heard is a well established practice in various EU frameworks, for example the competition framework with regards to the hearing of parties where the Commission adopts similar decisions.<sup>2</sup> Therefore, we argue that Article 30 of the DMA should enlarge the category of stakeholders that can be heard in the proceeding in order to include end-users and civil society organisations. There is no justification to deprive these categories of such a right, particularly because, as mentioned, many gatekeepers’ behaviours have a direct impact on end-users’ rights and on important societal dynamics. We also argue that civil society organisations should have the right to request the opening of a market investigation under Article 33 when they consider that there are reasonable grounds to suspect that a provider of core platform services should be designated as a gatekeeper.

Furthermore, and as BEUC rightly explains, ‘if the dialogue on compliance with a particular obligation only takes the views of the gatekeeper into account, and not the intended third-party beneficiaries of the obligations, the chances of effectively achieving the objectives of the relevant obligation in practice are likely to be materially reduced. The incentives of the gatekeeper will likely be to preserve its existing practices, and not promote contestability. Without the ability to check, using the expertise of third parties in the sector, what the gatekeeper proposes will actually work for those it is intended to benefit, the DMA may miss its aims and that would not be in consumers’ interests<sup>3</sup>. The lack of detailed involvement of third parties in the Google Shopping competition case at the remedy stage appears to have led to a situation where Google’s conduct has not been effectively remedied, now 10 years after the case was started.<sup>4</sup>

---

<sup>1</sup> See BEUC, Digital Markets Act Proposal, Position Paper, 2021, [https://www.beuc.eu/publications/beuc-x-2021-030\\_digital\\_markets\\_act\\_proposal.pdf](https://www.beuc.eu/publications/beuc-x-2021-030_digital_markets_act_proposal.pdf).

<sup>2</sup> Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, Official Journal L 1, 04.01.2003, p.1-25 (Chapter VIII) and its implementing regulation, Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, Official Journal L 123, 27.04.2004, p. 18-24 (Chapter V).

<sup>3</sup> See BEUC, Digital Markets Act Proposal, cit.

<sup>4</sup> See, among others: European Parliament Report on Competition Policy—*Annual Report 2019*, para 43 <[https://www.europarl.europa.eu/doceo/document/A-9-2020-0022\\_EN.pdf](https://www.europarl.europa.eu/doceo/document/A-9-2020-0022_EN.pdf)>; Financial Times, ‘Google antitrust remedy delivers few changes for rivals’ <https://www.ft.com/content/b3779ef6-b974-11e7-8c12-5661783e5589>; Search Engine Land, ‘Google EU shopping rivals complain antitrust remedies aren’t working’, 31 January 2018, <<https://searchengineland.com/google-eu-shopping-rivals-complain-antitrust-remedies-arent-working-290859>>; ZDNet, ‘Google accused: Now over 40 rivals

Similarly, in the Google Android competition case, the remedy imposed has not been effective in terms of making the search market contestable 6 years after the case was started. Google still has a more than 90% market share in search.

Finally, we hereby endorse the comments and proposals submitted to this public consultation by Privacy International with regards to Chapter 8 of the Draft BEREC Report.

## **II. Strengthening inter-platform competition**

We welcome and support BEREC's call for the introduction of more contestability measures and more end-users focus in the DMA. In particular, we agree that regulatory measures in the DMA should be reinforced, extended or added both to rebalance the relationships among the gatekeeper and its business users and end-users, and to facilitate the possibility for competitors to enter a core platform service (CPS) market and/or to expand over several CPSs.

Moreover, we believe that more contestability and the protection of end-users' rights are two strictly interrelated objectives that mutually reinforce, and should be treated as such. In fact, intra-platform competition is useful mainly to discipline gatekeepers from acting unfairly towards business users, while inter-platform competition is useful to discipline gatekeepers from acting unfairly towards business users and end-users.

Contestability translates into choice for end-users, and choice for end-users supports contestability. If end-users have choice, this creates space and incentives for new players to tap into the existing (currently locked-in) user bases of gatekeepers. That reduces barriers to entry for new players considerably, notably in markets with traditionally strong network effects.

An efficient instrument to achieve the above benefits is interoperability. Full mandatory interoperability (with regards to both core and ancillary services) for gatekeepers bears the potential to facilitate the creation of completely new markets and to incentivise innovation. With an ability to plug new digital products and services into (or on top of) gatekeepers, new players are empowered to innovate as an iteration of existing tools instead of having to build the same or similar core services and having to convince millions of users to either multi-home or switch.

We bring two concrete examples to better clarify our argument. On social media platforms, mandatory interoperability would have the dominant platform allow different providers of content curation, both server-side (like the Block Party App for Twitter) or client-side systems on users' devices. To enable these alternatives would allow for the emergence of specialised content curation systems built to protect users against specific types of online threats like sexual harassment, political disinformation, or grooming. With the appearance and availability of different systems, users could have the possibility to choose the solution that best fits their needs. Furthermore, interoperability would lead to a more decentralised environment in content curation, and thus diminish the power that only a handful of players currently hold on the free flow of information in society.

The second example concerns the market for user interfaces and tracking-free apps: there is no technical reason why users can only see their Facebook or YouTube content with the official apps. Full interoperability could create a new market for third party apps through which users could use those services that

---

call for crackdown on Google Shopping', 29 November 2019, <https://www.zdnet.com/article/google-accused-now-over-40-rivals-call-for-new-eu-crackdown-on-google-shopping/>.

offer better user interfaces, no dark patterns, less tracking of users, faster loading speeds, and new functionalities. We note that platforms' positions on the above are mixed: Twitter, for example, is relatively open in this regard, which is why there are numerous third-party apps for Twitter on the market already today.<sup>5</sup>

### **III. Towards an open digital environment**

We strongly agree with BEREC on the need to guarantee the openness principle throughout the digital environment, which brings the need to have open-internet type requirements for the application layer, in addition to the network layer. As highlighted by BEREC, we believe that to guarantee an open Internet for all and the respect of end-users' rights, in particular freedom of expression, it is key to detect potential bottlenecks at the application layer too. In fact, these bottlenecks could translate to a potential or actual risk of undue restrictions, for both business users and end-users, to access or to provide content and applications. In other words, if left unaddressed, these bottlenecks will maintain the control of the flow of information and communications in our societies in the hands of a handful of private companies.

A clear example is the case of the Parler app in the aftermath of the US Capitol riot, in January 2021. Amazon Web Services, the web's dominant cloud-based storage platform, decided to discontinue the provision of its cloud hosting services to Parler because, it stated, calls for violence propagating across the social network violated its terms of service and said it was unconvinced that the service's plan to use volunteers to moderate calls for violence and hate speech would be effective.<sup>6</sup> As a result, the app became entirely unable to operate and went offline overnight, and its users were deprived of that channel of communications. On that occasion Amazon, acting as a communications bottleneck, was able to make unilateral decisions about the availability of a service not only in the market where it operates (in this case: cloud services), but also in those where their clients operate (in this case: social networks), and did so in a context of lack of clarity and legal uncertainty.

This dynamic cannot exist in an open, free and non-discriminatory internet environment, and we need human rights-based rules for how key providers of our democracies' communications infrastructure take such decisions, and what they can or cannot do. This is not the only case where an application service is blocked by other actors in different parts of the value chain or the Internet stack. Apps stores are, for example, a typical case of a bottleneck too, and definitely deserve more attention.

### **IV. The DMA's objectives need to be better specified and widened to include protection of end-users**

We support the objectives for regulatory intervention spelled out by BEREC in section 4 of its draft Report. In particular, we strongly endorse the third objective, which unfortunately is the most neglected by the DMA proposal, that is 'Protecting end-users from potential abuses of the intermediation power of digital gatekeepers, including the promotion of open digital environments beyond the network and access services supplied by Internet service providers'<sup>7</sup>.

The DMA seems to have chosen the approach of directly benefiting business users and indirectly end-users; however, the opposite needs to be done too. As we suggest in section II, end-users' empowerment

---

<sup>5</sup> See for example, Joey Hindi, '10 best Twitter Apps for Android', 14 April 2021, available at: <https://www.androidauthority.com/best-twitter-apps-for-android-2-311752>.

<sup>6</sup> See, among others, BuzzFeedNews, 'Amazon Will Suspend Hosting for Pro-Trump Social Network Parler', 9 January 2021, <https://www.buzzfeednews.com/article/johnpaczkowski/amazon-parler-aws>.

<sup>7</sup> Draft BEREC Report BoR (21)34, section 4, page 9.

is crucial to trigger and support inter-platform competition. When end-users have power to choose and are more in control of the applications and services they want to use, more space is freed for inter-platform competition too. As a result, it is fundamental that the DMA directly addresses and reinforces its action with regards to a number of issues related to end-users choice, such as default settings, tying and bundling practices, and the lack of interoperability. An open, free, innovative and diverse digital environment needs to look at all these components, and failing to address one would undermine the achievement of the objective.

With regards to the regulatory objectives, the DMA proposal appears vague, and it relies on broad concepts. This approach leaves wide space for interpretation, and might lead to divergent enforcement. As one of the goals of the DMA is to avoid fragmentation at national level, we agree with BEREC about the need for ex ante principles and clearly spelled out regulatory objectives to guide all relevant actors, and especially national and European enforcers.

We believe that, in clarifying the regulatory principles that must guide the enforcement of the DMA, legislators could draw inspiration from the Open Internet Regulation<sup>8</sup>, and in particular from its first recital. Indeed, we are convinced that the DMA should contribute to the objective to protect end-users and simultaneously guarantee the continued functioning of the ‘internet ecosystem as an engine of innovation’. In fact, the latter can only be guaranteed through a holistic approach to inter-platform and intra-platform competition, the protection of end-users’ rights and the removal of obstacles to an open digital environment.

We take this opportunity to provide examples of specific measures that the DMA could include in its effort to better protect end-users’ rights:

- Art. 5(1) should introduce an obligation for gatekeepers to respect automated consent signals (like Do Not Track) that are emitted by browsers or operating systems.
- Article 5(d) should be extended to ensure that end-users, as well as business users, can raise any issue or complaint before any relevant public authority about any practice of gatekeepers.
- Art 6(1)(c) should provide guarantees to avoid abuses of the “integrity carve-out” in a way that prevents interoperability.
- Art. 6(1)(k) should explicitly be extended to non-profit / FOSS software projects to be treated fairly and without discrimination just like their “business user” counterparts.

## **V. Tying and bundling**

Tying and bundling are practices commonly used by CPSs to entrench their position of power and expand it to related markets. Among others, tying and bundling practices can make market entry more difficult (by requiring to enter multiple markets simultaneously) and lock-in end-users in ecosystems.

We endorse BEREC’s observation that the concerns related to tying and bundling are only partially addressed in the DMA. Articles 5(e), 5(f) and 6(b) point at important use-cases, but there are others which

---

<sup>8</sup> Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015 laying down measures concerning open internet access and amending Directive 2002/22/EC on universal service and users’ rights relating to electronic communications networks and services and Regulation (EU) No 531/2012 on roaming on public mobile communications networks within the Union (Text with EEA relevance) *OJ L 310, 26.11.2015, p. 1–18*.

need to be tackled as they have a strong impact on the contestability and fairness of a number of digital markets.

One example is hosting and content curation services. CPSs usually offer them as a bundle, and this practice has helped to keep third-party providers for content curation out of the market and has contributed to lock in users, who will not look for the content curation service outside of the platform. This scenario is undesirable as it has a negative impact on competition, innovation, end-users' rights and, to a certain extent, also to broader public objectives of media diversity. This bundling strategy is also one of the main reasons why gatekeeping social media companies today have enormous power of the flow of information in society. We suggest that the DMA should contain the obligation, for social media gatekeepers, to unbundle hosting and content curation, and to allow third-party players to provide content curation on their platforms<sup>9</sup>.

## **VI. Interoperability**

As mentioned in previous sections of this submission, interoperability is a key instrument to deliver various objectives which are relevant for the DMA: market contestability, innovation, and end-users' empowerment. We have already provided some examples where interoperability should be introduced or expanded. Hereby recall specific suggestions with regards to the obligations contained in Article 6.

- Article 6(1)(c) should contain guarantees to avoid abuses of the “integrity carve-out” to prevent third-party services.

- Article 6(1)(f) should be amended to: (i) include interoperability among CPSs, (ii) make clear that the requirements apply to all platform functionality, not only those already offered by gatekeepers to business users, and (iii) extend the right to interoperability to end-users.

## **Conclusions**

Finally, we welcome BEREC's suggestion to build further engagement with consumers' associations, as well as civil society and end-users to work around the DMA and relevant issues. We are happy to state our willingness to engage and contribute to the discussions and we remain at disposal to clarify the content of this submission.

## **Signatories**

Amnesty International

ARTICLE 19

British Institute of International and Comparative Law

Civil Liberties Union for Europe (Liberties)

Electronic Frontier Foundation

Open Society European Policy Institute

---

<sup>9</sup> For more information about the proposal to unbundle hosting and content curation on social media platforms, see: ARTICLE 19, Why Decentralisation of Content Moderation Might Be the Best Way to Protect Freedom of Expression Online, <https://www.article19.org/resources/why-decentralisation-of-content-moderation-might-be-the-best-way-to-protect-freedom-of-expression-online/>, 30 March 2020.