Body of European Regulators for Electronic Communications

BEREC

BoR (20) 138

BEREC Response to the Public Consultations on the Digital Services Act Package and the New Competition Tool

September, 2020

EXECUTIVE SUMMARY

BEREC welcomes the public consultations of the European Commission (EC) on the Digital Services Act (DSA) and the New Competition Tool (NCT) which address important regulatory issues to be considered when regulating digital platforms (DPs). Finding a regulatory approach which ensures the right balance between flexibility, predictability and proportionality will be key, given the increasing importance of DPs and their role in the economy and society at large, both now and in the years to come.

There is a broad acknowledgment of the benefits brought about by DPs for innovation and consumers' choice. Through innovative business models, DPs have provided opportunities for small businesses and start-ups for access to and expansion into new markets across Europe. They have facilitated access for both business- and end-users to goods, services and data, and have provided a wide range of efficiencies by reducing transaction, search and distribution costs.

However, BEREC also recognises that there are increasing concerns over the entrenched power of some large DPs and the control they exert over an overarching variety of goods, services and information, as well as over inputs and assets which are crucial to fostering effective competition and innovation (e.g. data).

In order to address these concerns, BEREC considers that establishing a well-designed regulatory framework for DPs with Significant Intermediation Power (SIP) could allow for an efficient, proportionate, and predictable scheme for intervention.

It is important to stress that such ex-ante intervention would *not* be aimed at regulating all DPs, nor the internet as a whole, but at tackling specific concerns raised by DPs with SIP, in order to ensure that competition and innovation are encouraged, that end-users' rights are protected and that the digital environment is open and competitive.

The regulatory model presented by BEREC in its response to the DSA consultation should be considered as a first step on this path, a blue-print for a regulatory framework. BEREC aims to continue to contribute to the regulatory debate on DPs to further refine the details and to analyse the implications of its proposal. BEREC would like to stress its willingness to continue to work with the European institutions and other relevant stakeholders on this topic.

The regulatory challenges raised by DPs are not new to BEREC and have already been the subject of some recent reports, such as the *"BEREC report on the impact of premium content on ECS markets and the effect of devices on the open use of the Internet"* (BoR (18) 35)[1] where BEREC addressed issues concerning, among others, app stores, and the *"BEREC Report on the Data Economy"* (BoR (19) 106).[2] Furthermore, BEREC is currently working on a report on the economic analysis of digital platforms and has commissioned an external study on consumer behaviour towards DPs as a means for communication, both to be published in 2021.

[1] Available at https://berec.europa.eu/eng/document_register/subject_matter/berec/reports/8013-berec-report-on-the-impact-of-premium-content-on-ecs-markets-and-the-effect-of-devices-on-the-open-use-of-the-internet

[2] Available at https://berec.europa.eu/eng/document_register/subject_matter/berec/reports/8599-berec-report-on-the-data-economy

BEREC response to the public consultation on the DSA Package

Throughout its response, BEREC focuses on the challenges and concerns raised by large *digital* platforms (rather than just "online" platforms), to also take account of the issues related to platforms not strictly providing online services, but which may still control and influence access to them.[3]

BEREC identifies both structural and behavioural concerns that can have negative effects on competition dynamics, users and society at large.

As for the structural issues, BEREC recognises that the control of some large DPs over a digital bottleneck and/or key inputs/assets provides them with SIP and therefore the ability to behave independently from their users (business users but also consumers), regardless of their behaviour. The fact that such DPs with SIP may represent an *unavoidable* gateway to access a wide variety of services on the Internet, or to reach other users, raises concerns as to their effect, even beyond their area(s) of business, on competition, innovation as well as users' freedom of choice.

As for the behavioural concerns, BEREC identifies unfair practices which DPs with SIP have the ability and may have the incentive to engage in (e.g. *inter alia*, unfair denial of access to essential inputs/assets, refusal of proportionate interoperability, imposing unreasonable terms and conditions, etc. which become even more relevant in the context of ecosystems), and which should be prevented ex ante, given the potentially irreversible effects on competition (including the development of new services or ecosystems), innovation and users' choice.

In order to address these concerns, BEREC recommends adopting a dedicated ex-ante regulatory framework, adapted to the specificities of the digital environment, for several reasons.

First of all, some of the identified concerns result from structural features, which should be addressed independently of any (potentially) unfair behaviour by the DP with SIP. In some circumstances, conditions for effective competition need to be created, or at least facilitated, in order to achieve efficient outcomes. Ex-ante asymmetric regulation, supported by an efficient regulatory toolbox, has proven to be effective to foster competition and contestability.

Secondly, an ex-ante regulatory framework is better suited to pursue a variety of different objectives which are not only competition-related but have a positive impact on users, the internal market and society at large. Along with fostering competition, pursuing multiple objectives – such as supporting an open internet or achieving the European internal market – within a single regulatory framework would ensure a more comprehensive and consistent intervention.

Thirdly, the difficulties in applying the current ex-post analytical framework and enforcement tools (e.g. defining relevant markets, need for recurring interventions to address structural issues, lengthy intervention procedures to tackle abusive practices in fast-evolving environments,) call for a different approach. A streamlined ex-ante intervention,

[3] E.g. operating systems

complementing the current ex post intervention, appears to be more efficient for consistently solving competition problems in fast-moving digital environments.

Finally, a coherent regulatory framework would imply repeated interactions both with DPs with SIP and other stakeholders (business users, other relevant authorities, consumer associations, civil society representatives, etc.), allowing for an effective definition, implementation and monitoring of remedies, for reducing information asymmetries, as well as for adjusting the regulatory intervention to relevant developments.

BEREC and its members have considerable experience in applying ex-ante regulation in the sector for electronic communications services (ECS) to address structural competition problems, as well as broader societal concerns (e.g. open internet). Building on this, BEREC considers that its expertise can contribute to effectively designing a new dedicated regulatory model for DPs with SIP, for the benefit of European citizens and businesses.

BEREC proposes a streamlined process to identify the DPs with SIP and a model for ex-ante asymmetric regulation towards them.

First of all, BEREC recommends that specific Area(s) of Business (AoB – e.g., app stores, online search, OSs, voice assistants) should be defined. Such AoBs would be characterised, *inter alia*, by strong direct and indirect network effects, significant economies of scale and scope, barriers to entry and expansion, and high switching costs. The list of AoBs would allow for differentiating among services and set relevant corresponding thresholds (see below).

DPs with SIP would typically be active in one or more AoB(s) and would be identified based on a combination of criteria:

- First of all, the control over a digital bottleneck (i.e. over a gateway for which there is no relevant substitute) for a large amount of end-users, and/or being an unavoidable trading partner for a large amount of business users. This would result in controlling users' access to: (i) a relevant amount of services, goods and/or content, or (ii) the digital space where users share, sell or exchange services/goods/content; or (iii) another group of users; and/or (iv) key inputs or assets which are essential for competitors or providers of complementary services.

  Moreover, the SIP can be strengthened by

- Strong financial resources and/or easy or privileged access to capital markets,

- The DP's organisation into an ecosystem allowing it to leverage its power onto additional services/businesses, and/or to have privileged or exclusive access to key inputs/assets from its different businesses, thus contributing to raising barriers to entry or expansion (e.g. by accumulation of data).

BEREC recognises the need to ensure swift intervention and regulatory predictability. To this end, the main identification process relies on a direct identification of DPs with SIP by means of reasonable and easily-observable absolute thresholds for each AoB (e.g. revenues, number of unique users, etc.) in order to quickly identify the large DPs who are legally presumed to have SIP without any further assessment by the competent body. The list of AoBs, the structural and specific criteria to assess the DP's SIP, as well as the absolute

thresholds for direct identification would be defined in (an) EU-level act(s) which should be regularly revised.

BEREC also recognises that some DPs active in one/some specific AoB(s) and presenting a combination of relevant structural and specific features, may not be large enough to meet the absolute thresholds set for distinctive AoB, but still be in a position to *de facto* exert a SIP. In order to tackle this SIP and as far as it is deemed strictly necessary to address the identified concerns, BEREC proposes an optional identification process in which the competent body may conduct individual SIP assessments *ex officio* or intervene based on complaints.

Irrespective of the identification process (direct or optional), all DPs with SIP should be subject to an asymmetric regulatory intervention consisting of (i) principle-based obligations and prohibitions (e.g. transparency and non-discrimination among business users, i.e. Option 3a of the DSA inception impact assessment), and, (ii) tailored and proportionate remedies when necessary (depending on the nature and the level of issues at stake, such remedies could include access to essential inputs and/or assets, e.g. some level of services interoperability through the use of open APIs or open standards and data portability). This would correspond to Option 3b of the DSA inception impact assessment.

Moreover, in order to be effective, BEREC supports a data-driven regulatory approach and believes that the regulatory toolbox should include specific tools aimed at enhancing information gathering and sharing with relevant stakeholders, in compliance with legislations concerning data protection and business confidentiality.

Finally, BEREC also makes an initial proposal for a potential governance model to implement the ex-ante regulatory intervention towards DPs with SIP.

First of all, there are number of important features which any regulatory authority with responsibility for regulating DPs with SIP should benefit from. Regulatory authorities should be independent, have relevant expertise in relation to ex-ante regulation and the ability to encompass multiple perspectives (i.e. technical, economic, legal, accounting and end-users' rights).

Moreover, in BEREC's view, the geographical scope (pan-EU, regional, meaning several EU countries, or national) of the concerns raised by DPs should determine which regulatory body/bodies is/are involved in defining the regulatory measures, as well as their enforcement. BEREC believes that there is a need for a specific regulatory authority at the European level, collaborating with a strong network of regulatory authorities represented in an Advisory Body. This would ensure a harmonised implementation of the regulatory framework for DPs with SIP.

The BEREC cooperation framework can be considered as a well-functioning reference model. BEREC and its member NRAs are well placed to effectively take on the roles of the Advisory Board and the National Regulatory Bodies as presented in the proposed institutional design. This would have the advantage of building on their valuable ex ante-experience and structure and would allow for a faster institutional set-up.

This being said, even though BEREC considers the proposed institutional design as a fully efficient option, this is one possible governance model among others. Irrespective of whether

the suggested model is adopted, BEREC believes that its proposed ex-ante regulatory framework for intervention (SIP assessment, the dedicated rules and tailored remedies) remains well-suited to address the identified concerns.

BEREC response to the public consultation on the NCT

Regarding the public consultation on the NCT, BEREC focuses on its interplay with the existing ECS regulatory framework, which has been successfully applied by BEREC members for over twenty years, as well as the interplay with the proposed ex-ante regulatory framework for DPs with SIP.

BEREC stresses that the ex-ante regulatory framework for ECS is already addressing most structural competition issues, as well as reaching a variety of broader objectives. The NCT, if implemented by the competent regulatory authority, could potentially serve as a complementary tool in exceptional cases not currently addressed by sectoral regulation. Nevertheless, attention should be paid to potential overlap between the ECS framework and the NCT since this could raise legal uncertainty and have serious implications for investments in a dynamic and competitive sector. In order to address this potential overlap, and following the principle of *lex specialis*, the regulatory framework for ECS should be the applicable legislation.

Moreover, BEREC believes that, given its two-decade experience in the sector, ECS regulatory authorities are in the best position (as they are already doing so) to carry out an analysis aimed at identifying structural competition concerns in the ECS markets which are not addressed by the current regulatory framework. If the need for further regulatory intervention is identified in this sector, then NRAs should be empowered with appropriate, necessary tools and competences in order to ensure an effective and consistent implementation of the sectoral regulatory framework. This could be done by a revision of the existing framework or by assigning the power of applying the NCT in the ECS sector to the competent NRAs, in order to avoid an overlap in competences between different authorities.

Similarly, the regulatory model for DPs with SIP proposed by BEREC is also designed to, *inter alia*, address structural and competition concerns in digital environments. Therefore, BEREC believes that the challenges identified in these environments could only be effectively targeted by an ex-ante intervention within a specific, consistent regulatory framework, rather than by a general-purpose ex-ante tool (e.g. NCT), which may not reach the same objective(s).

Final remarks

Finally, BEREC would like to stress its willingness to further build on the stable cooperation with the EC, and to continue to work with the European institutions and other relevant stakeholders on this topic.

BEREC is also currently working on a report on DPs which will develop the suggested ex-ante approach regarding DPs with SIP in further details. As always, any input from the European institutions and relevant stakeholders on BEREC's work in this topic will be welcome, and BEREC would also welcome the opportunity to share its experience and expertise.