

- **The Digital Market Act proposal**
- **BEREC Report on the *ex ante* regulation of digital gatekeepers**

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Joint EMERG-BEREC Workshop, 4 November 2021

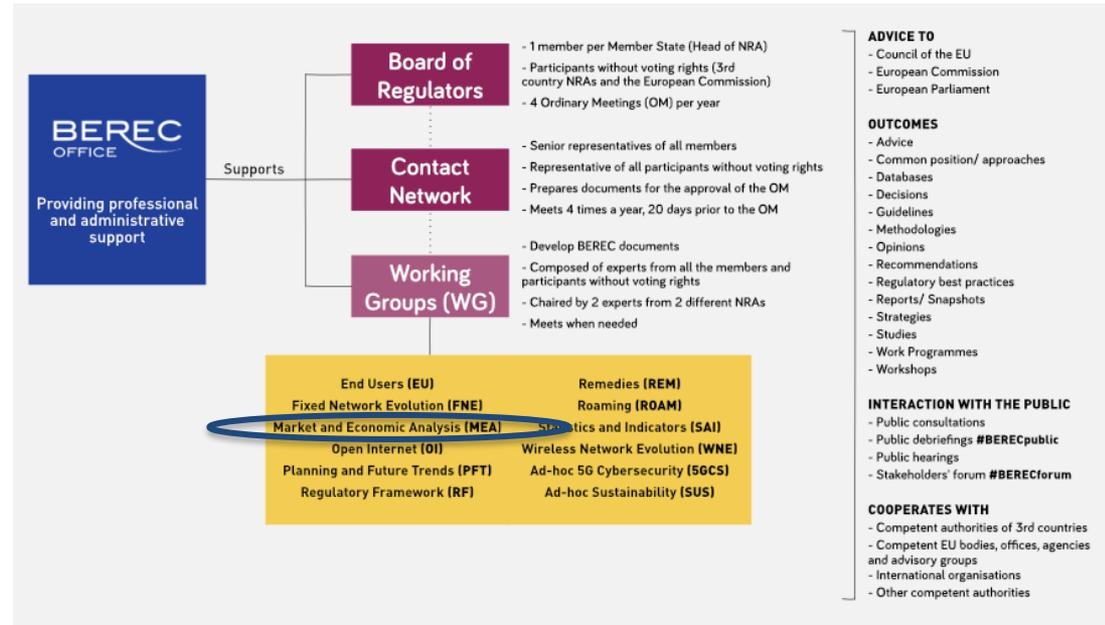
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The logo for BEREC (Body of European Regulators for Electronic Communications) features the word "BEREC" in a bold, sans-serif font. The letters "B", "E", "R", and "E" are dark blue, while the "C" is a dark red. A thin, dark blue curved line sweeps under the "C" and extends to the left, ending under the "B".

Who we are?

- Experts in Market Analysis from BEREC NRAs (30-40 experts)
- Co-chaired by Chiara Caccinelli (ARCEP) and Jorge Infante (CNMC)
- Focused on topics as:
 - SMP analysis
 - Market definition
 - Digital markets
 - Internet Ecosystems



The Digital Market Act proposal

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Relevant reports previous to the EC proposal

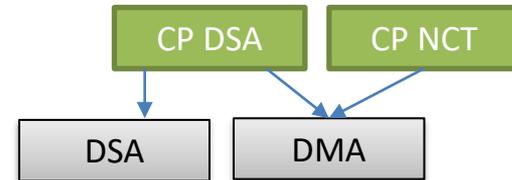
- Cremer Report: [“Competition policy for the digital era”](#) (March, 2019)
 - Commissioned by DG Competition to Jacques Crémer, Yves-Alexandre de Montjoye y Heike Schweitez (base of the public consultation)

- Furman report: [“Unlocking digital competition”](#) (March, 2019)
 - Commissioned by the UK government to an expert panel led by J. Furman, A. Fletcher, P. Marsden and D. McAuley

- Stigler report: [“Stigler Committee on Digital Platforms Report”](#) (Sept, 2019)
 - Prepared in the USA by the J. Stigler Center and led by F. Scott Morton and others.

EC Public consultations

- [Public consultation on the Digital Services Act Package](#) (Feb-Sept 2020)
 - Led by DG-CONNECT (2863 responses)
 - Includes both, aspects in the DSA and the DMA (ex ante)
- [Public consultation on the New Competition Tool](#) (June 2020)
 - Led by DG-COMP (188 responses)
 - Competition aspects (DMA)



The proposal

- [Proposal for a Regulation on Digital Markets](#) (15th December 2020)
- Geographical scope: European Union
- Material scope: Core Platform Services (CPSs) supplied to business users or end-users established in the EU
- Restricted to *digital gatekeepers* on these CPSs
- To be applied directly by the European Commission

Asymmetric ex ante regulation focused on actors operating core platform services acting as gatekeepers

Relation with other pieces of regulation

- EECC (art. 1.3):
 - Does not apply to market related to networks and other ECSs different to interpersonal communication services (ICS)
 - ICSs: without prejudice to powers for NRAs on art.61 EECC (interconnection)
- Compatibility with regulation in Member States (art. 1.5):
 - No additional obligations to ensure fair and contestable markets
- Compatibility with ex post regulation: without prejudice of application of 101 and 102 EUFT (art. 1.6)
- General (art. 1.7): no adoption by national authorities of decisions running counter a decision under the DMA

Core Platform Services (CPSs)

- Online intermediation services (APP Stores, marketplaces)   
- Online search engines   
- Online social networking services    
- Video-sharing platform services 
- Number-independent interpersonal communications services  
- Operating Systems  
- Cloud computing services  
- Advertising services supplied by providers of the previous CPSs

+ Others via market investigation (art 17)

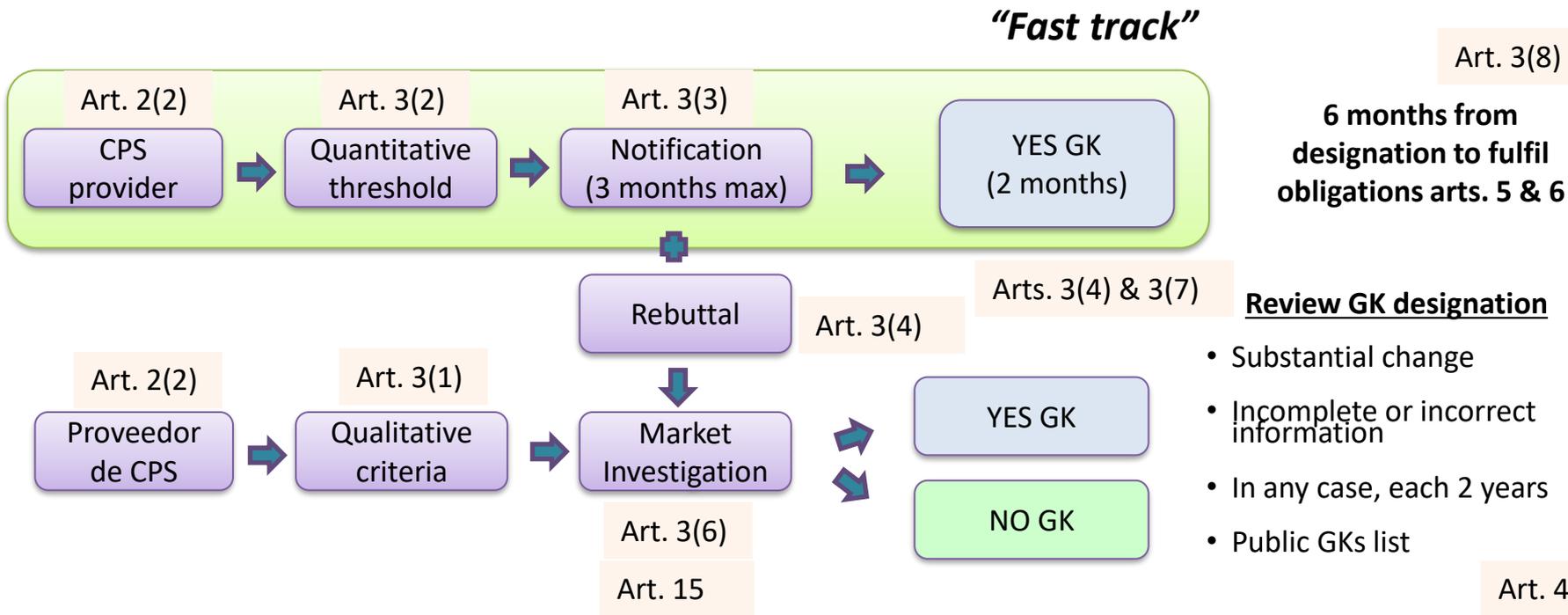
Gatekeepers designation (1)

- Criteria and thresholds for gatekeepers designation (arts 3(1) and arts 3(2))

	Qualitative criteria (a)	Quantitative thresholds (b)
1	Significant impact on the internal market	<ul style="list-style-type: none"> • Annual turnover in the European Economic Area (EEA) \geq€6.5bn in the last three years; or • average market capitalisation \geq€65bn in the last year; and • provides services in at least three EU member states.
2	Serves as an important gateway for business users to reach end users	<ul style="list-style-type: none"> >45m monthly active end users in the EU in the last year; and >10,000 yearly active business users in the EU in the last year.
3	Entrenched and durable position	Where the important gateway thresholds were met in each of the last three years.

- Market investigation [Art. 15] -> Qualitative designation GK (OK 3.1, not all 3.2; or GK rebuttal on quantitative thresholds)

Gatekeepers designation (2)



Obligations

- 18 obligations or prohibitions in arts. 5 and 6
 - Art 5: no further specification
 - Art 6: can be further specified following a dialogue between EC and the GK
 - In theory applicable to all CPSs, in practice part of them focused on specific CPS
- “Emerging” GKs: limited set to prevent tipping.
- The EC can open a market investigation to detect new “harmful” practices and extend the lists of obligations.
- Cases for exceptional suspension: economic viability in the EU, public health, public morality, public security.
- Additional obligation to inform of acquisition of other CPs or providers in the digital sector.

Obligations (1)

Art.	Obligation	Potential CPSs affected	Recent cases
5.a	Not to combine personal data from CPS with personal data from other services offered by the GK without end user consent	Facebook; Google Search; Amazon Store	(i) Facebook – German case ; (ii) Facebook – leveraging case ; (iii) Facebook – misleading information case
5.b	Prohibition of most favoured nation (MFN)/parity clauses	Booking; Expedia; Amazon Store; AirBnB	(i) Amazon e-books (ii) MFN cases (France , Italy and Sweden / Germany and Russia)
5.c	No anti-steering (allow contracts and promotion outside the platform)	Google & Apple app stores	(i) Apple – Music streaming case ; (ii) Apple – e-books/audiobooks case ; (iii) Apple – Epic games battle
5.d	Prohibition of preventing complaints	General	
5.e	To not require business users to use (or interoperate with) an identification service of the gatekeeper.	iOS; Google Android	Google – ad tech case
5.f	To not require users to subscribe to (or register with) gatekeeper’s CPS as a condition to access another CPS.	General	Google – ad tech case
5.g	Transparency on prices for advertisers and publishers	Facebook ads; Google ads	Google – Australian ad tech report ; CNMC

Obligations (2)

Art.	Obligation	Potential CPSs affected	Recent cases
6.1.a	To not use any data generated through the activities of its business users to compete with them.	Amazon Store, Facebook	(i) Facebook – leveraging case ; (ii) Amazon – Amazon Marketplace
6.1.b	Prohibition of self-preferencing (allow app uninstallation)	iOSs; Google Android; Microsoft Windows	(i) Microsoft – Internet Explorer case + fine for not fulfilling ; (ii) Google – Android
6.1.c	Allow side-loading	iOSs; Google Android; Microsoft Windows	(i) Apple – Music streaming case ; (ii) Apple – e-books/audiobooks case (i) Apple – Epic games (EEUU) + UK, UE and Australia
6.1.d	No self-preferencing in rankings	Google Search; Amazon Store; App stores	(i) Google Shopping case ; (ii) Amazon – Buy Box (I) Google – ad tech case ; (II) Google – french ad tech case
6.1.e	Prohibition of restricting switching (device neutrality)	iOSs; Google Android; Microsoft Windows	

Obligations (3)

Art.	Obligation	Potential CPSs affected	Recent cases
6.1.f	Allow business users and providers of ancillary services (e.g. payment services) to access (and interoperate with) the operating system or other hardware features (near-field-communication - NFC - technology) used by the gatekeeper to provide ancillary services.	iOSs; Google Android; Microsoft Windows	Apple - Mobile Payments – Apple Pay
6.1.g	Transparency on performance data for advertisers and publishers	Google; Facebook	Google – Australian ad tech report; CNMC
6.1.h	Provide effective portability of data generated by both business and end users	Google; Facebook	
6.1.i	Provide business users with real-time access to aggregated and non-aggregated data generated in the context of the CPS	Google; Facebook	
6.1.j	Provide to third-party search engines FRAND access to data that is generated by end users of the gatekeeper’s search engine.	Google Search; Microsoft Bing	
6.1.k	Apply FRAND access for business users to the GK’s app store.	iOS; Google Android	

Market investigations

- 3 cases:
 - GK designation (art. 15), qualitative assessment (art. 3(6))
 - Systematic non-compliance (3 decisions in 5 years, art. 16): may lead to structural remedies.
 - New CPSs or obligations (art. 17)
- 24 months

Digital Markets Advisory Committee

- Digital Markets Advisory Committee (DMAC): MSs to assist in decisions regarding non-compliance, interim measures, binding commitments, market investigations, and implementing acts. Non-binding decisions, but utmost account.

Next steps

- Amendments under negotiation in different EP committees (IMCO, ECON, ITRE)
- November 2021: vote of draft report by IMCO (Internal Market and Consumer Protection) committee
- December 2021: Vote of report by EP plenary
- On going discussion at the European Council (third draft)
- Trilogue EP-Council-EC
- Objective: To have it approved in the first half 2022.

BEREC Report on the ex ante regulation of digital gatekeepers

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BEREC thinking on the DMA

- **September 2020:** [BEREC Response to the EC Public Consultations on the Digital Services Act Package and the New Competition Tool](#)
- **March 2021:**
 - [“Draft BEREC Report on the *ex ante* regulation of digital gatekeepers”](#)
 - [“BEREC position paper on the European Commission’s proposal for a Digital Markets Act”](#)
- **June 2021:**
 - [“BEREC Report on the interplay between EECC and DMA concerning NI-ICS”](#)
 - [“BEREC proposal on remedies-tailoring and structured participation processes for stakeholders in the context of the Digital Markets Act”](#)
 - [“BEREC proposal on the set-up of an Advisory Board in the context of the Digital Markets Act”](#)
- **October 2021:**
 - [“BEREC Report on the *ex ante* regulation of digital gatekeepers”](#)
 - [“BEREC Report on the outcome of the public consultation on the Draft BEREC Report on the ex ante regulation of digital gatekeepers”](#)
- **Along 2021:** Meetings with EC, MEPs, EDPB, ERGA and ERPG.

Overview of BEREC's proposals

➤ Objectives:

- For contestable and fair digital markets: reinforce some regulatory measures
- Additional objective: digital environment must be open, users sufficiently empowered and their ability to access and/or provide content and applications not hampered even beyond the network layer

➤ Scope & GK designation:

- NI-ICS: For ECN/ECS, priority to EECC provisions. To be addressed by the DMA for issues not in the EECC. Cooperation mechanism needed among the EC, BEREC, the NRAs and/or the DMA Advisory Board.
- Ecosystem aspect: Should be considered when designating gatekeepers (non-cumulative criterion) and designing the corresponding regulatory measures
- Produce guidelines for gatekeeper designation under Article 3(6)

Overview of BEREC's proposals

➤ **Enforcement & regulatory measures (I):**

- Implement a structured participation of all types of stakeholders
- For more clarity, distinguish between obligations which i) would apply to all CPSs and ii) would only apply to specific CPSs.
- Gatekeeping OSs must refrain from imposing technical and commercial restrictions limiting access to key device functionalities.
- Vertical interoperability to be extended to all relevant CPSs.
- Horizontal interoperability to be imposed on certain CPSs for GK's key services and functionalities needed to provide competing services (not only ancillary services and as a tailored remedy).

Overview of BEREC's proposals

➤ **Enforcement & Regulatory measures (II):**

- Prohibit default settings favouring gatekeeper's services on some CPSs.
- Obligations on ranking to be extended to all CPSs where ranking occurs
- Fair and non-discriminatory conditions applied across all CPSs (not only to software application store) and add reference to "end-users"
- Impact of tying and bundling to be more extensively considered: tying prohibited per se, bundling potentially after an assessment.
- Directly address some issues affecting end-users even when business users and/or potential competitors are not concerned by the gatekeeper's practices

Overview of BEREC's proposals

➤ Enforcement & Regulatory measures (III):

- For unjustified denial of access, obligations to access the platform/its functionalities when needed to conduct business to be extended to all relevant CPSs (not only OSs).
- A new article should give additional powers to the EC to tailor remedies
 - 1) when there is a risk that harmful behaviours are not (effectively) addressed by the obligations in Articles 5 & 6 of the DMA proposal, and
 - 2) for more technical remedies (e.g. horizontal interoperability and access to key inputs/assets) which require proportionality considerations and where their effectiveness is highly dependent on the correct design of the intervention
- Set up a dispute resolution mechanism to minimise negative effects on competition and innovation

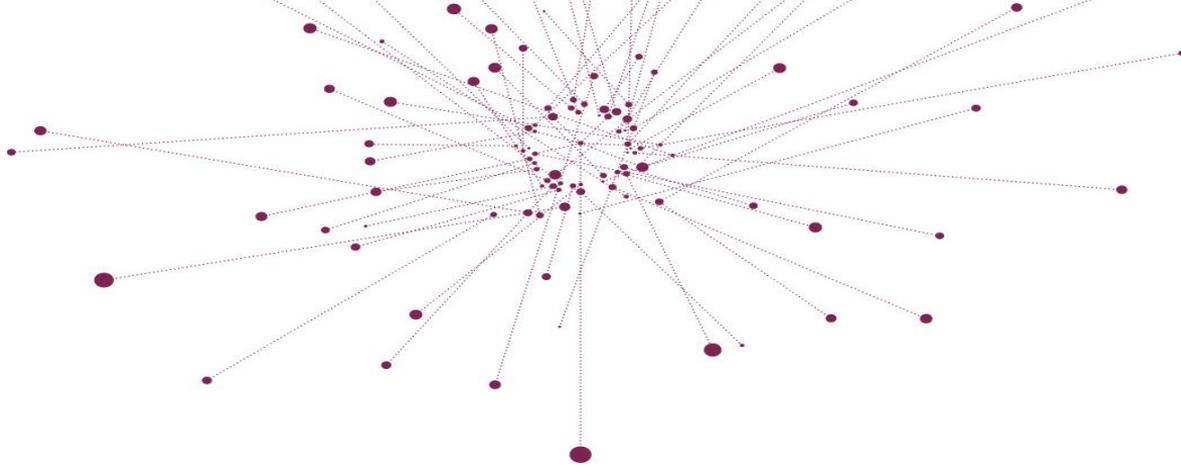
Overview of BEREC's proposals

➤ **Advisory Board**

- Create a technical and independent Advisory Board composed of national independent authorities from different sectors to complement the DMAC. It would
 - 1) Harmonise national support to the EC for
 - gathering of relevant data (from gatekeepers and national business users or end-users),
 - continuous monitoring of national markets and of compliance,
 - providing an information and complaints desk, iv) dispute resolution for many cases; and
 - 2) Be a body for reflection, debate and advice to the EC, EP and the Council at their request or on its own initiative.

Summary: main proposals from BEREC

- Reinforce measures for market contestability and empowering of end-users
- Avoid overlapping to ensure interplay with other regulations, need for coordination with BEREC and NRAs for NI-ICS.
- Interconnection and openness are very relevant, as well as ecosystem effect
- Structured regulatory dialogue with all actors
- On top of directly applicable obligations, add ex-ante principles to apply tailored remedies (as in telco regulation)
- Set-up dispute resolution mechanisms
- National independent authorities should support the EC in monitoring, enforcement, dispute resolution and remedies design (coordinated by an EU Advisory Board)



Thank you!

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