

Arcep's contribution to the public consultation on the DSA Package and the New Competition Tool

An asymmetric ex-ante regulation of structuring digital platforms for open digital infrastructures

Arcep strongly welcomes the initiative and the public consultation launched by the European Commission **to specifically address the issues raised by major structuring digital platforms**. Arcep has provided a full answer detailing in particular why it supports an asymmetric *ex ante* regulation, namely option 3b, partly combined with option 3a, of the Commission's inception impact assessment.

The internet has developed as a common good. It was built as an open network by and for the multitude (citizens, innovators, academics, undertakings, organizations,...), with no one, neither public nor private, limiting communication or innovation. In Europe, this fundamental characteristic of the internet is enshrined, at least at the network level, in the Open Internet Regulation.

However, notwithstanding the benefits they have brought for society as a whole, there is now a general consensus that **some big platforms have become structuring for the internet** (*inter alia*, some search engines, social networks and operating systems). They are unavoidable gateways controlling and deciding if and how users from every side of the "markets" can access and share contents and services online. **This situation affects users not only within these platforms' closed ecosystems, but more importantly on the internet at large and even beyond.**

Arcep shares the opinion of the European Commission that **the control exerted by these platforms raises several strong concerns** for the European economy and society. From an economic point of view, recent reports argue that these situations present significant negative externalities, lead to market failures and call for an intervention. In the long run, this is likely to have a negative impact on consumer welfare, competition and innovation (*e.g.* not only blocking competing or complementary services, but also using their position to accumulate key inputs or assets, constituting additional barriers to entry for innovators when access is denied). From a broader perspective, this also raises crucial concerns regarding citizens' ability to access and share contents (including information), products, and services online. This situation tends to undermine their freedoms of choice and expression.

In this context, it is crucial to ensure that digital infrastructures continue developing as common goods and to preserve the original generative dimension of the internet¹, based in particular on its decentralized architecture. **To this end, Arcep supports the set-up of a regulatory framework based on an agile ex-ante asymmetric intervention. This would imply defining and applying tailored remedies towards specific structuring digital platforms which have an impact on the whole digital ecosystem, across sectors².** This approach is **best suited to avoid constraining the whole internet while ensuring its openness and maximizing opportunities** for every citizen and economic player.

A dedicated regulatory framework for structuring platforms built on some important similarities with the *ex-ante* approach and expertise gained in electronic communications would present the following characteristics:

- **it may address the large range of concerns raised by structuring digital platforms:** economic as well as societal, behavioral as well as structural. Indeed, the current European *ex-post* competition framework is not fully fitted to that aim;

¹ Jonathan L. Zittrain, "The Future of the internet, And How to Stop It", Yale University Press & Penguin UK, 2008, page 70: "Generativity is a system's capacity to produce unanticipated change through unfiltered contributions from broad and varied audiences".

² Arcep has already published several papers on this topic. Cf. Report: "Devices, the weak in achieving an open internet", February 2018, (https://www.arcep.fr/uploads/tx_gspublication/rapport-terminaux-fev2018-ENG.pdf); Note, "Plateformes numériques structurantes, éléments de leur caractérisation", December 2019, (<https://en.arcep.fr/news/arcep-speaks/view/n/tse-digital-economics-conference-january-2020-toulouse.htm>).

- *ex-ante* regulation is a **repeated game** between the regulatees and the regulator and day-to-day interactions with the stakeholders **reduce the asymmetry of information**;
- the availability of an **ad-hoc regulatory toolbox including remedies** such as transparency, non-discrimination, access, interoperability and some forms of separation (such as accounting separation) enables to act in a **proportionate, targeted, adapted and coherent manner**;
- *ex-ante* regulation can be **real-time** regulation when it is required to act immediately and in a timely manner;
- in certain circumstances, it may **set or facilitate conditions** to open a sector to competition or foster an open digital environment (like **building solution** for portability or sharing);
- it provides the **technical and economic expertise** and knowledge (in all its dimensions) required.

The combination of these aspects, associated with the power to resolve disputes, would allow a regulator to **monitor and impose in real time, when appropriate, and in a proportionate manner** (*i.e.* without over regulating), **adequate solutions to the issues raised by structuring platforms. This would provide the efficiency and responsiveness necessary for the digital age.**

This type of regulation has already been successful in the telecommunication sector which shares some core economic and technical characteristics and objectives, as it helped not only to open a sector to competition, but also to ensure its openness and foster accessibility for everyone. It could serve as an inspiration to build the future regulation (*inter alia*, by adapting the telecom “market analysis approach” into a new multi-criteria definition of structuring players) which will contribute to shaping a virtuous digital environment.

Lastly, the multitude should be strongly involved in the development of the proposed regulation. To enhance user’s empowerment and competition between platforms, **this framework should involve new tools reducing asymmetrical information and supporting a data-driven regulation.** It would entail for instance collecting data and providing the most relevant information to citizens and businesses to steer the market into the right direction.

In parallel, the *New competition tool* proposal published by the Commission mentions several suggestions that would involve changing Competition Law to take into consideration and address structural concerns. Firstly, when these structural concerns are encountered in sectors where a dedicated regulatory framework is already in place or required, such as in the electronic communications sector notably, the dedicated (potentially enhanced) sectorial regulatory framework should prevail over the potential applications of the NCT (notably its options 3 and 4). Secondly, concerning the benefit it could provide to address digital platforms challenges, the above-mentioned development tends to support that a potential NCT would not be sufficient and that a whole new *ex ante* regulatory framework would rather be necessary.

To sum things up, it is now time for a **digital regulatory framework for the multitude and by the multitude** that would be consistent with the path the EU has taken for decades: a third way for a digital society which preserves innovation and freedoms. It could set an example for other parts of the world.

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Appendix: Detailed Response to the Public Consultation on the DSA Package

1. General

- Q1 P28³: *To what extent do you agree with the following statements?*

Consumers have sufficient choices and alternatives to the offerings of online platforms.	Fully disagree
It is easy for consumers to switch between services provided by online platform companies and use same or similar services provider by other online platform companies (“multi-home”).	Fully disagree
It is easy for individuals to port their data in an useful form for alternative service providers outside of an online platform.	Fully disagree
There is sufficient level of interoperability between services of different online platform companies.	Fully disagree
There is an asymmetry of information between the knowledge of online platforms about consumers, which enables them to target them with commercial offers, and the knowledge of consumers about market conditions.	Fully agree
It is easy for innovative SME online platforms to expand or enter the market.	Fully disagree
Traditional businesses are increasingly dependent on a limited number of very large online platforms.	Fully agree
There are imbalances in the bargaining power between these online platforms and their business users.	Fully agree
Businesses and consumers interacting with these online platforms are often asked to accept unfavourable conditions and clauses in the terms of use/contract with the online platforms.	Fully agree
Certain large online platform companies create barriers to entry and expansion in the Single Market (gatekeepers).	Fully agree
Large online platforms often leverage their assets from their primary activities (customer base, data, technological solutions, skills, financial capital) to expand into other activities.	Fully agree
When large online platform companies expand into such new activities, this often poses a risk of reducing innovation and deterring competition from smaller innovative market operators.	Fully agree

³ These numberings and page numbers refer to the section and question numbers assigned by the Commission and the pages on which the questions occur when the full questionnaire is printed.

2. Determining the gatekeeper role

- Q1 P30: Which **characteristics are relevant in determining the gatekeeper role of large online platform companies**? Please rate each criterion identified below from 1 (not relevant) to 5 (very relevant):
 - Large user base: 5/5
 - Wide geographic coverage in the EU: 3/5
 - They capture a large share of total revenue of the market you are active/of a sector: 3/5
 - Impact on a certain sector: 3/5
 - They build and exploit strong networks effects: 5/5
 - They leverage their assets for entering new areas of activity: 5/5
 - They raise barriers to entry for competitors: 5/5
 - They accumulate valuable and diverse data and information: 5/5
 - There are very few, if any, alternative services available on the market: 5/5
 - Lock-in users/consumers: 5/5
 - Other: 5/5
- Q2 P31: *if you replied "other", please list (3000 characters)*

The structuring platforms are the ones that act as « points of control » on the internet: not only at the economic level but also technically. The legal definition of structuring platforms could be: **“online platforms or operating system providers, which are able to significantly limit the ability of users to exercise an economic activity or to communicate online, notably due to their importance as intermediaries.”**

The platforms which would be subject to *ex-ante* regulation would meet a combination of the following criteria:

- The platform cannot be circumvented because it has a **“bottleneck-power”** (essential control and influence over the relationship between end-users, competitors or complementors). These platforms have the power to decide who can access the data, contents or services in their ecosystems as well as the users they have gathered, and on which conditions;
- It has a certain **size** in terms of the number of unique users of the platform. In practice, given the transnational nature of the structuring platforms, the relevant scope has to be set according to the targeted audience of the platform. For instance “users within the European Union” can be relevant for a general platform targeting European citizens at a global scale whereas some platforms might choose a more local approach (some countries in Europe for example) and might need to be addressed with a smaller-scale indicator). The consolidated turnover of the group to which the platform belongs could also be a relevant proxy;
- The platform is integrated into an **ecosystem** controlled by the group to which it belongs and can benefit from even stronger network externalities among the services it provides. Moreover, this ecosystem makes it possible to leverage its power from one business sector to another. Technically, digital platforms organized in ecosystems have created walled-off environments within the web/the internet.
- The platform is an essential gateway to a set of digital content and services (**gatekeeper**). Notably, via the implementation of algorithms ranking public information, they control the access and its conditions to a significant portion of the internet;

- The platform controls large quantities of high-quality **data**. These data are also difficult to access (or replicable) by potential competitors or complementors of the platform (for instance: large web indexes, public interest data...);
- In the case where **advertising** activities are somehow linked to the platform, the platform's market shares on the advertising market are significant (used as a proxy for the attention of users that the platform is likely to generate);
- Easy or privileged access to capital markets/financial resources.

Economically, some structural features lead to market failures and negative externalities which need to be addressed.

- Q3 P31: *Please explain your answer. How could different **criteria** be combined to accurately identify large online platform companies with gatekeeper role? (3000 characters)*

The term gatekeeper does not fully capture the nature or the role of the platforms that need to be looked at. The term "structuring platform" is better suited. Indeed, while every intermediary has a form of gatekeeping power within its services, it seems more interesting to acknowledge the specific power that allows some large platforms to structure, for many (if not all) of their sides, the access and the use condition of key contents and services, impacting not only their services but the internet at large. As stated by the BEREC the expression "*significant intermediation power*" is suitable. However, the term *structuring* is also relevant as it stresses the fact that some large platforms have become technically essential to access and share contents and services on the internet.

To determine which platforms are structuring and should fall within the regulatory framework, the following process should be carried out:

First step:

It would first be necessary to define what is meant by digital platforms. There should be a focus on their role as intermediaries, simultaneously serving different types of users (e.g. users providing contents/services and users looking for contents or services).

We should consider the following definition composed of two alternative points:

- Information society services in the sense of the Directive 2015/1535 providing
 - ranking or referencing of contents/goods/services provided by third parties (app stores, marketplaces, search engines, ...) or,
 - a digital place for selling/sharing/providing goods/services (app stores, marketplaces, browsers, social media, ...),
- Operating systems and related software (e.g. virtual assistants) which run on devices and enable access to above-mentioned information society services.

The first part of the definition concerning online platforms is largely inspired from the definition set in the French Consumer Code.

Second step:

Once defined as such, it should be assessed whether platforms correspond to at least two criteria in order to determine if they can be regarded as structuring according to the definition set in the question above (*cf.* question 2). If this is the case, they would be considered to be falling within the framework of the regulation].

As a result of this approach, platform operators that are limited to a single area of business should not be concerned (insofar as they are indeed limited to said activities and are not *de facto* structuring).

- Q4 P31: *Do you believe that the integration of any or all of the following activities within a single company can strengthen the gatekeeper role of large online platform companies ('conglomerate effect')? Please select the activities you consider to strengthen the gatekeeper role: (QCM)*
 - ✓ online intermediation services (i.e. consumer-facing online platforms such as e-commerce marketplaces, social media, mobile app stores, etc., as per Regulation (EU) 2019/1150 - see glossary)
 - ✓ search engines
 - ✓ operating systems for smart devices consumer reviews on large online platforms
 - ✓ network and/or data infrastructure/cloud services digital identity services
 - ✓ payment services (or other financial services) physical logistics such as product fulfilment services data management platforms
 - ✓ Online advertising intermediation services
 - ✓ other. Please specify in the text box below.

- Q5 P32: *Other – please list: (1000 characters)*

One of the most striking features of the digital platforms seems to be the return of strong conglomerate strategies and their ability to dominate new digital markets or sectors with leveraging effects. Such platforms are able to combine the network effects and the vertical integration of their service (self-preferencing, discriminatory practices) to preempt new markets and strengthen their gatekeeper and bottleneck roles. This trend can be explained in particular by the strategic interest of these platforms in leveraging their presence on several businesses' segments through the creation of ecosystems that include a hardly contestable market where the company is largely dominant. They also profit from large economies of scope in the creation of new products and services, notably due to the large amount of data they have, as developed in the answer to the question 10 below.

3. Issues raised by DPs

3.1. Unfair practices

- Q9 P33: *Are there **specific issues and unfair practices** you perceive on large online platform companies? (5000 characters)*

We perceive two types of issues on companies operating structuring platforms. First, there are structural issues in the digital environments they are active in. Those issues are not sufficiently addressed by competition law which tends to intervene mainly to tackle behavioral issues. Second, partly by means of these structural features, they have ability and incentive to engage in unfair behaviors.

Concerning the structural issues brought by platforms we are referring to the questions 11 and 13.

Concerning the behavioral issues, the BEREC's stance should be endorsed, which is that structuring platforms, when they adopt unfairly the following practices, tend to raise issues notably regarding:

1. Exclusionary conducts:
 - a. Self-preferencing. e.g. unfairly favouring own products and services to the detriment of competing businesses.

- b. Preferencing of a specific third party e.g. unfairly favouring a third party's products and services to the detriment of competing businesses.
 - c. Unjustified denial of access (permanent or temporary) on reasonable terms to the platform or functionalities on the platform necessary to conduct business.
 - d. Imposing exclusionary terms and conditions for attaining and/or retaining access.
 - e. Unjustified denial of access to relevant data on reasonable terms where barriers to replication are high and non-transitory.
 - f. Unjustified refusal of proportionate interoperability. Refusal might be legitimate where when it may compromise security or privacy or is excessively costly with respect to the benefits that may be achieved.
 - g. Tying and bundling (e.g. with the goods/services offered by the digital platforms (DP) with significant intermediation power (SIP), and/or specific third-party business users) if the conduct e.g. reduces the ability of competitors to provide a specific service/good or requires them to enter multiple markets, or at least offer additional products or services, in order to compete and is not objectively justified.
 - h. Unreasonably restricting the possibility for business users to provide information to its end-users through the platform.
 - i. Strategically and unreasonably denying business users access to relevant information which would be essential for making their products/services interoperable with those of the DP with SIP business user and thus to reach end-users on a market where the DP with SIP wants to remain exclusive.
2. Exploitative conducts: (practices that are harming business users and/or end-users directly)
- a. Imposing unreasonable terms and conditions for business users for access to the platform (including aftermarkets), to data or to other (essential) key inputs. Example: excessive pricing.
 - b. Imposing unreasonable terms and conditions to end-users for access to the platform. Example: excessive gathering of end-user data.
 - c. Gathering and combining end-user data from all or various business units where the DP with SIP is active and other third-party sources without consent.
 - d. Refusing data portability in order to de facto lock in end-users (making it very difficult or impossible to switch platform).
3. Transparency-related issues:
- a. Strategic use of unclear or incomplete terms and conditions towards business users.
 - b. Lack of transparency towards content providers (business users as well as end-users) as to the rules of ranking algorithms.
- Q10 P33: *In your view, what **practices related to the use and sharing of data** in the platforms' environment are raising particular challenges? (5000 characters)*

Three main issues can be identified concerning the use and sharing of data by the companies operating structuring platforms. First, benefiting from scale effects, those companies tend to take advantage of the data they accumulate to expand their structural power to other sectors and services. Second, they tend to structure their ecosystems as walled-gardens, determining who can access the data they uploaded by their end-users and on which terms and conditions. Finally, structuring platforms have sometimes access to non-replicable key inputs and/or facilities which gives a technical advantage impossible to overcome for potential competitors.

Concerning the first issue we are referring to our answers to the questions 4 and 5 concerning the 'conglomerate effect'. The situation developed in those answers can lead to two effects regarding innovation in specific areas of business: (1) aggregating high-value data used to train IA algorithm allows operators of structuring platforms to reinforce their position in markets or enter new market with a disproportionate competitive advantage; (2) acquiring innovative small businesses allows

operators of structuring platforms to limit their capability to compete and to deprive consumers from this innovation so as to not cannibalize traditional businesses of structuring platforms.

Concerning the second issue, many academics and World Wide Web inventor Tim Berners Lee have raised concerns that the practice of raising technical walls preventing other services from having access to the data that some structuring platforms host could threaten the web as we know it. The web is supposed to be an open environment allowing everyone to communicate with each other and develop new applications over it without restriction. Some structuring platforms, particularly within mobile OS ecosystems, which have become technically unavoidable, have the power to depart from the founding principles of the web, blocking access to data or setting conditions for their access. Hence, they have the capacity to control not only the activities of their users but also the activities of their competitors and complementors (whether they are content or service providers) which have to abide by their terms. Finally, the control they have on data has also as a consequence to reinforce the lock-in effect for their users who will have to abandon not only their community but also an important part of the data, content and information they have uploaded and exchanged on the platform if they want to leave the service.

Concerning the third issue, non-replicable key assets such as major search engines' Index or important sets of data which are not uploaded by end-users (e.g. data essential to train algorithms), those assets may give companies which own them an incontestable position. A set of rules and standards should be established to determine on which conditions companies should be forced to give access to those essential assets. It seems that the '*refusal to deal*' approach set by the Commission and the European Court of Justice in the context of competition law is not flexible enough especially when the foreclosure it causes impacts potential substitutable services.

As it will be developed in the part dedicated to remedies, obligations such as portability, sharing of data, access could be very effective to address these issues.

Eventually, the regulation should provide a framework allowing citizens, innovators, academics, undertakings or organizations to access data of general interest in order to develop solutions benefiting the multitude. It could for instance concern the access to data to develop innovative services (as it has already been implemented in the banking or transport sector), to carry out research or to monitor structuring platforms' behaviors.

- Q11 P33: ***What impact would the identified unfair practices can have on innovation, competition and consumer choice in the single market? (3000 characters)***

The impact of features related to the structuring power of digital platforms must be added to the impact of the unfair practices listed in Q9. Some of them have already been express in a report by Arcep: "*Devices, the weak in achieving an open internet*", February 2018, (https://www.arcep.fr/uploads/tx_gspublication/rapport-terminaux-fev2018-ENG.pdf).

On competition, they add structural barriers to entry while having the capacity and incentives to raise them. They distort competition dynamics and influence market outcomes by preferencing their own services or a specific third party. They are able to impose unfair terms and conditions to capture most of the value created.

In this context, structuring platforms may have fewer incentives to innovate in the medium-long term. Innovation would probably be incremental rather than disruptive. Indeed, disruptive innovations could threaten the services/products that these platforms are currently providing. They would have very limited incentive to cannibalize them. It has already been observed how such disruptive innovations by competitors are being hampered and hindered by strategical mergers and acquisitions. They have the ability to buy and integrate future innovations (innovators of tomorrow are the same as the innovators of yesterday). They can deny the access of some key inputs/assets to third parties which can hinder innovation. They also could distort innovation by taking advantage of these key assets and of their gatekeeper position when disrupting other sectors.

On consumer choice, structuring platforms represent an *unavoidable* gateway to access very large and overarching services and content in the Internet, or to reach other users online. This position allows them to decide which products or services are provided to the consumers. They are able to impose default choices.

3.2. Positive & negative societal and economic effects

- Q13 P33: Which are possible **positive and negative societal** (e.g. on freedom of expression, consumer protection, media plurality) **and economic** (e.g. on market contestability, innovation) **effects, if any, of the gatekeeper role** that large online platform companies exercise over whole platform ecosystem? (3000 characters)

Companies operating platforms have brought very useful services to the economy and society.

However, some platforms have acquired such a structural power that it has raised incontestable economic and societal issues. Certain platforms and their ecosystems have become unavoidable to access a large variety of contents and services on the internet. Those structuring platforms have become *gatekeepers* not only within their services, but for the internet at large. This situation tends to be problematic when platforms undermine the generative dimension of the internet.

It is closely related to the internet openness, which is threatened by these players. The internet openness is a founding principle for having a common infrastructure from which derives fair competition, a better ground for innovation and the protection of societal and democratic values (freedom of expression, freedom of choice, media pluralism, freedom of enterprise, etc.). However, these players have become unavoidable and closed focal points of the information society. Their position enables them to significantly influence the ability of users to access and put online contents, information and services freely without counter-power (e.g. through their algorithmic environments, structuring platforms services such as video-sharing platforms, social networks or vocal assistants influence which information, contents and services their users may access) they influence which contents. It is especially true for OSs which are essential to connect to the internet.

Furthermore, besides the internet openness issues, the most discussed concerns are the competitive ones. They are often divided into three sets: those on the platform that encompass the “*bottleneck*”, the “*gatekeeper*” and the *de facto* regulator situation; those between platforms related to network and ecosystem effects; and finally, those related to the switch to other services for the benefit of these actors that relate to the leverage effects of data or their financial power. Some of these characteristics may favor behavioral issues the implementation of unfair practices in the sense of competition law and be apprehended by the latter. However, other issues, such as the conditions for the formation of monopolies or the creation of a structuring position, are not covered by abuse of a dominant position, cartels or concentrations and are therefore not covered by competition law as it stands.

Finally, the economics of these platforms raises questions beyond the issues mentioned above: relations with global economic activity, the attention economy, or privacy issues. Effective competition, while it may incidentally address these broader issues, through the establishment of a plural and rich landscape of players offering users a real choice, is nevertheless not always sufficient.

4. Regulatory intervention - Rules/obligations/prohibition

4.1. Need for an intervention

- Q1 P34: Do you believe that in order to address any negative societal and economic effects of the gatekeeper role that online platform companies exercise over whole platform ecosystems large, there is a **need to consider dedicated regulatory rules (QCM)**

I fully agree.

- Q2 P34: *Please explain (3000 characters)*

Structuring platforms play an increasingly influential role in the digital environment, and some structural features they possess and/or unfair practices they may engage in could raise economic and societal concerns that need to be addressed.

A dedicated regulatory framework for structuring platforms built on some important similarities with the ex-ante approach and expertise gained in the ECS sector could address such issues. There are several reasons to prefer a dedicated ex-ante regulatory framework.

First of all, some of the identified concerns result from structural features, which should be addressed independently of any potentially abusive behaviour by structuring platforms. In this case, the application of ex-ante dedicated rules is well-suited. For instance, control over a digital bottleneck and/or over essential inputs/assets provides structuring platforms with a significant competitive advantage which could negatively affect inter- and intra-platform (or ecosystem) competition. In some circumstances, conditions for effective competition need to be created, or at least facilitated, in order to achieve efficient outcomes. Ex-ante regulatory framework has proven to be efficient to foster competition and contestability.

Moreover, an ex-ante regulatory framework is better-suited to pursue a variety of different objectives which have a positive impact on users and society at large. Along with fostering competition, multiple objectives – such as supporting an open internet or achieving the European internal market –, could be pursued within a specific regulatory framework, thus ensuring a more comprehensive and consistent intervention.

Thirdly, the difficulties in effectively applying current ex-post analytical framework and enforcement tools call for a different approach. A targeted ex-ante intervention able to act in real time appears to be more efficient to solve problems in fast-moving digital environments.

Finally, an ex-ante intervention within a regulatory framework would also imply repeated interactions with structuring platforms and other stakeholders (business users, other relevant authorities, consumer associations, ...), allowing not only a reduced asymmetry of information but also an effective definition, implementation and monitoring of remedies, as well as regulatory adjustments according to relevant developments.

Such dedicated rules must take into account platforms heterogeneity but still quickly address the concerns. Thus, a combined approach including principle-based obligations and prohibitions as well as tailored remedies applied on a case-by-case basis (respectively option 3a and 3b in the DSA inception impact assessment) should be supported. The general obligations and prohibitions would be applicable to all identified structuring platforms and applied according to their characteristics in order to be effective. The case-by-case remedies would be applied according to a specific assessment, and in a proportionate manner.

4.2. Prohibitions

- Q3 P34: *Do you believe that such **dedicated rules should prohibit certain practices** by large online platform companies with gatekeeper role that are considered particularly harmful for users and consumers of these large online platforms? YES/NO*

YES

- Q4 P34: *Please explain your reply and, if possible, detail the types of prohibitions that should in your view be part of the regulatory toolbox. (3000 characters)*

We recognize the need for a new, more streamlined approach to address specific issues (e.g. fostering competition and the openness of the internet). Predefined prohibitions should be considered by nature inflexible and possibly difficult to implement in an efficient manner given the

heterogeneity of the platforms and their business models. Applying a homogenous prohibition-based regulation could prove problematic generally speaking.

However, it seems that very specific practices, because they are harmful in themselves when carried out by structuring platforms, should be prohibited by principle and not on case by case basis:

- Prohibition of self-preferencing: PNS operators should provide service providers with information and services under the same conditions and with the same quality as those they provide for their own services, or those of their subsidiaries or partners;
- Prohibition of discrimination between third parties: SNP operators should apply equivalent conditions in equivalent circumstances to undertakings providing equivalent services. Exceptions could be possible after justified request to the regulator.

- Q5 P34: Do you believe that such **dedicated rules should include obligations on large online platform companies with gatekeeper role?** YES/NO

YES

- Q6 P34: Please explain your reply and, if possible, detail the types of obligations that should in your view be part of the regulatory toolbox. (3000 characters)

As it has been stated in the question concerning prohibitions, most of time remedies should be applied on case by case basis, following a thorough assessment to determine whether the remedy is proportionate, that is to whether the remedy is the least intrusive to solve the situation.

However, it can be considered that some less interventionist remedies should be applied horizontally to every structuring platform. The purpose would be to set a fairer environment for every player.

- **Transparency:**
 - Terms and conditions: companies operating structuring platforms should respect a notice period of X weeks in the modification of their terms and conditions (except under exceptional circumstances). They should also clearly post changes to their terms and conditions. These terms and conditions should be structured and accessible in an automated way to allow actors to access, synthesize and compare them;
 - API documentation: companies operating structuring platforms should provide comprehensive documentation of their public APIs;
 - Explainability of algorithms: companies operating structural platforms should indicate to users (end-users and companies) the main variables that led to these referencing results;
 - Accessibility of algorithms: companies operating structural platforms should provide controlled access to allow the behavior of their recommendations/ranking/referencing algorithms to be studied by independent regulators or academics;
 - Data driven regulation: companies operating structuring platforms must regularly provide a certain number of indicators (to be defined) to the regulator to enable the regulator to monitor their practices and to make data available in open data;
- **Non-discrimination among business users:** structuring platforms should apply equivalent conditions in equivalent circumstances to business users providing equivalent services.
- **Conflict management:** companies operating structuring platforms should clearly put forward an internal complaints feedback system, indicate the possibilities of dispute resolution via the regulator and indicate if there is an existing feedback system with the regulator.

Dispute resolution: it allows an actor who is unable to reach an agreement with another or who considers himself wronged in a commercial relationship to refer the dispute to the regulator to settle it quickly. It may concern a wide variety of issues related to the scope of competence given to a regulator. Regulatees would have to abide by the decision issued.

4.3. Type and scope of intervention

- Q9 P35: Do you believe that such **dedicated rules should enable regulatory intervention against specific large online platform companies, when necessary, with a case by case adapted remedies?** YES/NO

YES

- Q10 P35: *If yes, please explain your reply and, if possible, detail the types of case by case remedies (3000 characters)*

The regulatory body should have the possibility to impose specific remedies on a case-by-case basis in order to reach the objectives set by the lawmakers (e.g. fostering competition and the openness of the internet). Similarly to what is provided by the EC regulatory framework, the regulatory body, relying on its expertise in the sector, would determine, carrying out a thorough proportionality test, which remedy or bundle of remedies should be applied and how.

The following set of remedies should be provided in the new framework:

- **Non-discrimination**/prohibition of self-preferencing: structuring platforms can provide third parties with services and information under different conditions and with different quality than those they provide for their own services, or those of their subsidiaries or partners. Imposing, where necessary, a non-discrimination obligation prohibiting self-preferencing practices would ensure a level-playing field.
- **Access**: Structuring platforms can negatively influence competitive dynamics and the openness of the upper layers of the internet through their access decisions. When a structuring platform controls access to essential inputs/assets (including functionalities or data of general interest), or a large range of users, potentially over several areas of business, the impossibility or denial for a competitor or a complementor to access them can hinder the competitive process and foreclose digital environments. On the one hand, economies of scope and indirect network effects would solely be retained and internalized by the structuring platforms. On the other hand, denial of access can prevent third-parties from proposing complementary services/good which may need to be interoperable with those provided by the structuring platform.
 - **Interoperability**: to impose access, the regulatory body could notably force structuring platforms to make a part of their services horizontally or vertically interoperable, either by opening up their APIs without unjustified restrictions, or by imposing the use of open standards (e.g. as defined by ITU). It would allow complementors and competitors to access data, contents, functionalities and users. Furthermore, it would also allow every user to benefit from a greater freedom of choice, freedom of expression, and to regain control over their data, notably by using interoperability as a **dynamic portability tool**.
- **Separation**: where non-discrimination, access or interoperability are not sufficient to address concerns, they can be accompanied or replaced by separation remedies. Separation reduces the capacity or incentives of platforms to promote their own services and go beyond a simple framework of practices. Besides legal, functional or total separation which should be applied as last resort measure, separation related to accounting may give visibility to regulatory bodies and ensure the application of another remedy.

- Q16 P36: *Should such rules have an **objective to tackle both negative societal and negative economic effects** deriving from the gatekeeper role of these very large online platforms? Please explain your reply. (3000 characters)*

Such rules have indeed the merit to serve multiple objectives and should do so regarding the nature and level of issues raised. *Ex-ante* regulation can be entrusted with a larger set of goals and objectives which constitute its standard of intervention.

Ex-ante regulatory intervention usually does not have as sole objective to promote competition. For instance, at the European level, the telecommunication regulatory framework provides that the main objectives of NRA consist in promoting connectivity and access to, and take-up of, very-high capacity networks, promoting competition, contributing to the development of the internal market, promoting the interest of citizens of the Union (according to article 3 of the EECC), and to guarantee the openness of the internet (Open Internet Regulation 2015/2120). We find also standards related to specific disposals, such as the objective of ensuring end-to-end connectivity of electronic communication services (*cf.* art 61 of the EECC). By way of comparison, the French Post and Electronic Communications Code (CPCE) lists some twenty objectives to which ARCEP must refer in the context of its telecommunications regulation. Some of these objectives go beyond competition considerations such as territorial planning, internet neutrality or the development of investment innovation.

The future regulatory framework, in the same way, should aim to tackle both societal and competitive negative effects. To be effective, it requires the regulatory body to have a deep knowledge of the sector and a good technical expertise in order to understand the implications of the situation it encounters and of the remedies it will apply.

The remedies presented allow taking care of a large part of the issues which have been identified above. Hence, when assessing whether to impose remedies, the regulatory could weigh the necessity intervene in order to reach the societal and economic objectives which have been set in its standard of intervention.

- Q25 P39: *Taking into consideration the parallel consultation on a proposal for a New Competition Tool focusing on addressing structural competition problems that prevent markets from functioning properly and tilt the level playing field in favour of only a few market players. Please rate **the suitability of each option** below to **address market issues arising in online platforms ecosystems**. Please rate the policy options below from 1 (not effective) to 5 (most effective). QCM*
 - 1. Current competition rules are enough to address issues raised in digital markets: 1/5
 - 2. There is a need for an additional regulatory framework imposing obligations and prohibitions that are generally applicable to all large online platforms with gatekeeper power: 3/5
 - 3. There is a need for an additional regulatory framework allowing for the possibility to impose tailored remedies on individual large online platforms with gatekeeper power, on a case-by-case basis: 5/5
 - 4. There is a need for a New Competition Tool allowing to address structural risks and lack of competition in (digital) markets on a case-by- case basis: 2/5
 - 5. There is a need for combination of two or more of the options 2 to 4: 5/5
- Q26 P40: *Please explain which of the options, or combination of these, would be, in your view, **suitable and sufficient to address the market issues arising in the online platforms ecosystems**. (3000 characters)*

The best option is a cumulative combination of options 2 and 3 of the previous question.

A dedicated regulatory framework targeting the main structuring actors is better suited to address the issues of the digital world. The technical aspects, the constant interaction needed and the possibility to pursue several objectives are indeed strong reasons.

A second key point is the ability of the framework to come up with tailored remedies to address the most relevant issues on a case-by-case basis. The structuring platforms are so heterogeneous and large that dedicated remedies seem the best suited.

Option 4 is not to be dismissed (as its perimeter is much larger than the sole digital world) but lacks some of the aspects mentioned. Nevertheless, if the 3a+3b options of the DSA are available as a coherent regulatory framework, they might prove more efficient and avoid a complex articulation between frameworks that have yet to prove compatible.

5. Regulatory intervention – Enforcement and Institutional design

5.1. Institutional design

5.1.1. Need for a specific regulatory authority

- Q7 34: *If you consider that there is a need for such dedicated rules setting prohibitions and obligations, as those referred to in your replies to questions 3 and 5 above, do you think there is a need for a **specific regulatory authority** to enforce these rules? YES/NP*

YES

- Q8 P35: *Please explain your reply (3000 characters)*

As presented in Q26 P33, technical aspects and constant interaction are two main drivers for an efficient enforcement in the digital world. Under such conditions, a dedicated regulatory authority, benefiting from the adequate level of expertise and knowledge, seems better suited to follow the implementation of prohibitions and obligations. This regulatory body should be equipped with a specific set of skills (traditionally found in ex ante regulation), including monitoring (through data collection) and imposing obligations, whether they are horizontal obligations or tailored remedies resulting from case by case analysis. If the EU level is the main one to identify major structuring platforms and define general obligations, EU level and national level are complementary and should be articulated (*cf.* our answer to Q15, complement to Q14).

That being said, several valuable options could be envisaged for such a body, including it being the Commission or a new or an existing EU body. Although it is ultimately decisive, the choice of the regulatory body in charge at the EU level should not obscure the importance of the characteristic it needs to encompass and the overall regulatory framework suggested.

- Q11 P35: *If you consider that there is a need for such dedicated rules, as referred to in question 9 above, do you think there is a need for a **specific regulatory authority to enforce these rules**? YES/NO*

YES

- Q12 P35: *Please explain your reply (3000 characters)*

For the same reasons as in Q8 P28, technical aspects and constant interaction are two main drivers for an efficient decision making and enforcement in the digital world. It would allow the regulatory body (or bodies considering EU and national levels) in charge of implementing the regulation to assess problems and impose, in a timely manner, appropriate and proportionate remedies. Under such conditions, a dedicated regulatory authority seems better suited to carry out analysis and to define, on a case-by-case basis, proportionate remedies that should be imposed in order to solve the

problems identified. A specific regulatory authority would also be the most efficient to follow the implementation of case-by-case remedies and the decisions issued after dispute resolution proceedings. EU and national levels are to be strongly articulated, with the relevant level of control for harmonization's sake as well as legal security.

- Q13 P35: *If you consider that there is a need for a specific regulatory authority to enforce dedicated rules referred to questions 3, 5 and 9 respectively, would in your view these rules need to be **enforced by the same regulatory authority** or could they be enforced by different regulatory authorities? Please explain your reply. (3000 characters)*

For the purpose of achieving the task devoted to the EU level (see question 14 and 15), a single body would make sense:

- Technical understanding would be shared;
- Global and coherent measures would be taken as the objectives are very much aligned.

It would also facilitate the interactions between the structuring platforms and the regulator by having less institutional actors to deal with.

(cf. our answer to Q15, complement to Q14).

- Q14 P35: **At what level** should the regulatory oversight of platforms be organised? QCM

Both at EU and national level.

- Q15 P35: *If you consider such dedicated rules necessary, what should in your view be the **relationship of such rules with the existing sector specific rules and/or any future sector specific rules**? (3000 characters)*

The suggested regulatory framework will undoubtedly have to consider specific EU regulations that apply (and will apply) in the digital sector. A certain level of regulatory and institutional coordination, at EU level, member state level would most certainly be required.

Complement to Q14:

Due to the physical and geographical nature of the Electronic Communications networks, the European EC regulatory framework provides for a national intervention (under the control of the EC and with a strong coordination within Berec). However, digital services are often provided at a global scale; in such a situation, a coherent framework has to be set up at an EU level. It should rely on a coordinated architecture involving an EU body and national competent authorities.

On the one hand, it seems relevant that some decisions, and in particular the identification of the main digital platforms with significant intermediation power, are made at an EU level. On the other hand, as local actors (including users, competitors or complementors, innovators) may be involved and as national situations may vary, it seems also relevant that some monitoring and dispute resolution are done by a regulatory authority at a national level.

The problem analysis and definition of remedies could involve both EU and national levels.

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This may require an adequate cooperation scheme with the competent authorities of the Member States.

- Q19 P36: Which, if any, of the following **characteristics** are relevant when considering the requirements for a potential regulatory authority overseeing the large online platform companies with the gatekeeper role: (QCM)
- ✓ Institutional cooperation with other authorities addressing related sectors – e.g. competition authorities, data protection authorities, financial services authorities, consumer protection authorities, cyber security, etc.
- ✓ Pan-EU scope
- ✓ Swift and effective cross-border cooperation and assistance across Member States
- ✓ Capacity building within Member States
- ✓ High level of technical capabilities including data processing, auditing capacities
- ✓ Cooperation with extra-EU jurisdictions
- ✓ Other
- Q20 P36: If other, please specify (3000 characters)

The regulatory body/ies in charge of enforcing the future regulation should have powers related to dispute resolution. It would allow an actor who is unable to reach an agreement with another or who considers himself aggrieved in its relationship with a platform to refer the dispute to the regulator in order to settle it quickly (Cf. EC framework where NRA must issue a decision within 4 months as provided by Article 26 of the EECC).

- Q9 P57: In your view, what **governance structure** could ensure that multiple national authorities, in their respective areas of competence, supervise digital services coherently and consistently across borders? (3000 characters)

The subsidiarity principle should leave the Member States assign relevant remits to competent authorities (as long as they fulfill the required characteristics) and the key point in the governance structure will be the efficient coordination between EU and the national levels.

- Q1 P55: Based on your own experience, how would you **assess the cooperation in the Single Market** between authorities entrusted to supervise digital services? (5000)

Arcep's experience concerning the cooperation in the Single Market between authorities is mainly drawn from its relationship with the European Commission and its participation to BEREC.

BEREC was established by Regulation (EC) 1211/2009 and reformed by Regulation (EU) 2018/1971. It has in particular the following tasks:

- to assist and advise the European Parliament, the Council and the Commission;
- to assist and advise the NRAs and cooperate with the NRAs, upon request or on its own initiative, on any technical matter;
- to issue opinions, in particular on draft national measures relating to internal market procedures and the resolution of cross-border disputes, and on EC's drafts;
- to issue guidelines on the implementation of the EU regulatory framework, or on issues raising cross-border issues or issues of Community interest;
- to issue recommendations and disseminate regulatory best practices to the NRAs.

In general, BEREC fulfils a coordination role between NRAs. This is, for example, the case in the context of the application of the so-called Open Internet Regulation (2015/2120). BEREC's Open

Internet Working Group enables each NRA to report on the practices of operators in their countries and to exchange and discuss with their counterparts on the assessment of how these practices should be dealt with from a regulatory point of view. This allows a harmonized position to emerge along the way.

The mechanism thus involves both the European Commission and the different regulators which form a Board which has the power to take positions that shall be taken into utmost account by NRAs.

The BEREC allows a strong cooperation between NRAs and with the European Commission. This cooperation improves regulation by harmonizing the different approaches adopted by NRA (while taking into consideration the peculiarities of every situation) and by exchanging on the technical issues that the different NRAs may encounter.

5.2. Regulatory toolbox

- Q22 P37: Which, if any, of the **following requirements and tools** could facilitate regulatory oversight over very large online platform companies (multiple answers possible): (QCM)
 - ✓ Reporting obligation on gatekeeping platforms to send a notification to a public authority announcing its intention to expand activities
 - ✓ Monitoring powers for the public authority (such as regular reporting)
 - ✓ Investigative powers for the public authority
 - ✓ Other

- Q23 P37: Other – please list (3000 characters)

Firstly, it should be noted that, by nature, some remedies facilitate regulatory oversight (e.g. accounting separation)

Additionally, data driven regulation that empowers users should be considered.

The digital environment is characterized by a rapid evolution of technologies, which generates permanent innovation both in terms of uses and in business models. Moreover, the business models of some platforms are characterized by opacities and complexities that are not present (or differently present) in the “physical world” (personalization of content, recommendation algorithms, etc.). Regulatory bodies might add on to their toolbox “data-driven regulation” or “user empowering” tools aiming at increasing the information set provided to users – in compliance with GDPR and the forthcoming Data Act – and enabling choice in order to fulfill specific objectives. Instead of prescribing a certain behavior for economic actors, it is a matter of creating a network of information and incentives to reduce information asymmetries and increase the impact of regulator's action by mobilizing users and their relay (consumer associations, etc.). Under such conditions, this tool would naturally be complemented with a power of collecting information where the specificity of users would be better reflected.

Those remedies might vary from the data collection and sharing with independent experts (e.g. academics) to carry out informed research and with users to provide them with the information/tools to make informed choices and change their behavior, to the development of comparison tools aiming at facilitating platforms switching thanks to the information end-users benefit from, or “name and shame” / “name and shine” scoring systems for services provided by companies operating structuring platforms.

Finally, while only structuring platforms would fall within the ex-ante remedies, in our opinion, the future framework should stipulate that the monitoring tools concern every platform above a specific threshold (e.g. number of users for instance). It would allow the regulatory body to have a better understanding of the sector and to foresee its potential evolutions. It would allow the regulatory

body to identify the platforms which are about to become structuring and to decide whether or not it is relevant to act.

- Q4 P56: *What **information should competent authorities make publicly available** about their supervisory and enforcement activity? (3000 characters)*

Two natures of information should be made available:

- Data or information that contribute to the regulation itself (*cf.* data driven regulation mentioned in Q 23)
 - Any information regarding its regulating activities that could contribute to enlighten European institutions for transparency and accountability matters.
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- Q5 P56: *What **capabilities – type of internal expertise, resources etc.** - are needed within competent authorities, in order to effectively supervise online platforms? (3000 characters)*

Effectively regulating structuring platforms will require to better understand regulatee's activities and the sector as a whole. Hence, it will be essential that the regulatory body in charge of regulating structuring platforms benefits from a high level of technical expertise. For instance, implementing a supervisory regime with a "data-driven regulation", involves a program of building expertise around data collection (database engineers, "DevOps"), data storage (handling large amount of data), data representation (geomatic experts, data scientists, data analysts). Traditional set of skills found within sectorial regulators would also be needed (including economics, law, statistics, accounting, IT and network engineering).