

AER RESPONSE TO THE DIGITAL SERVICES ACT PACKAGE PUBLIC CONSULTATION

ABOUT US

The Association of European Radios (AER) is the Europe-wide trade body for commercial radio, representing the interests of companies operating over 5,000 commercial radio stations to the EU Institutions. AER promotes the development of commercially-funded radio broadcasting in Europe, by ensuring a fair and sustainable economic framework for radio so it can continue to thrive.

To lead the audio revolution, commercial radios in Europe have 6 key policy priorities:

1. **Media pluralism** – support a strong, independent and high-quality choice of media;
2. **Access** – secure future access to radio, both on-air and online;
3. **Competition** – ensure fair competition with public broadcasters and digital services;
4. **Advertising** – prevent unnecessary advertising restrictions and protect consumers;
5. **Promotion** – promote the value of Europe’s creative industries;
6. **Copyright** – support an efficient, affordable and fair copyright regime for radio.

BACKGROUND

Radio content is a mix of music, news, entertainment and talk. It is still today the most widely consumed medium worldwide¹. Commercial radio stations are accessible to a wide variety of listeners on a local and national level. As content creators and trustworthy news providers, they are unique companions to Europeans who constantly identify radio as the most trusted medium in Europe². They bring added value to both the economy and society, and are key in supporting media pluralism.

Radio innovates and develops its content to answer listeners’ demands, and is increasingly present on a multitude of platforms, from analogue to digital, and online. A growing proportion of radio listening is now done on internet connected devices. These online platforms control the access to radio content, changing the way audio is presented to listeners. The increasing reliance on large online platforms in the future is a threat to radio’s independence and integrity. Any undue interference of radio content by online platforms indeed puts at risk listeners’ ability to access to radio.

The growing role played by large online platform in the European economy also hinders radio’s economic viability. Advertising revenues are shifting online, making it harder to generate revenues for local radio advertising. Some of the most significant access routes to market for radio are being effectively owned and controlled by large online platforms. They are thus able to act as gatekeepers to radio content and valuable audience data. The unregulated expansion of large online platforms is putting pressure on radio and audio businesses, limiting the funding of their trustworthy and valued radio content and services.

¹ United Nations Statement on World Radio Day 2020, <https://www.un.org/en/observances/radio-day>

² Radio is the most trusted in Europe according to Europeans. Latest report: Standard Eurobarometer n°92, November 2019.

These changes have the potential to negatively impact the European society and economy, by putting at risk listeners' trust in radio and the viability of quality content production.

AER welcomes the timely publication of the public consultation on the Digital Services Act Package (DSA) and urges the European Commission to consider the adoption of a meaningful *ex ante* regulatory framework to address the growing dominance of large online platforms.

RECOGNISING THE VALUE OF RADIO

Commercial radio provides significant social and public value. It reaches large audiences for long periods of time with a mix of music, news, entertainment and talk. This is highly-valued by audiences with radio found to be the most trusted medium in Europe. Commercial radio stations ensure their listeners are protected from harmful content by following journalistic standards and strict national regulatory frameworks.

Given its influential role, radio is tightly regulated at national level and overseen by independent regulators, but free of state control or interference. In contrast, large online platforms evolve in an environment that is largely unchecked and unregulated.

- **The best tool against disinformation**

Recent elections have shown the power of online disinformation on shaping citizens' voting choices. Echo chambers and filter bubbles generated by algorithmic means lead online users to be only confronted with news and information they already believe in or like. The COVID-19 pandemic has confirmed the systemic issue surrounding the spread of disinformation online, and the life and death impact this can have on users. This demonstrates that the fight against online disinformation cannot be left to self-regulation adopted by online platform alone and that a sensible **co-regulatory framework** must complement these private efforts.

Commercial radio plays a key role in providing trustworthy information to European listeners, by analogue, digital and online means. Due to its nature of a one-to-many medium, radio is impervious to filter bubbles or echo chambers. Commercial radio stood out during the COVID-19 crisis by reaching even more listeners than before and by remaining robust, dedicating more airtime to news updates and helping the local community³.

- **Free of misleading advertising**

Advertising on radio is strictly regulated at European and national level, complemented by self-regulation. It ensures advertising spots on radio do not harm or mislead listeners.

By acting as gatekeepers to radio content, large online platforms have the ability to add or substitute advertising selected by radio stations on their own feed. This creates a risk of listener exposure to misleading and harmful advertising, at the expense of radio stations.

The unregulated expansion of large online platforms is putting pressure on radio businesses, limiting the funding of their trustworthy and valued audio content and services. Furthermore, there is an information asymmetry⁴ to the detriment of radio stations. Enhanced **transparency**

³ Read more about commercial radio in times of COVID-19 in the AER special bulletins, <http://www.aereurope.org/category/coronavirus/>.

⁴ Competition & Markets Authority, Online platforms and digital advertising, Market study final report, 1 July 2020,

and accountability of large online platforms with regard the use of advertising by intermediaries is paramount with this regard.

- **Content creators and holders of intellectual property rights**

Commercial radios invest in and produce quality content that they disseminate on a wide array of platforms for their listeners. Content broadcasted and content produced by commercial radios benefit from respectively neighbouring rights and copyright protection.

The commercial radio industry is aware of large online platforms giving online users access to radios stations' feed without the prior authorisation and/or knowledge of radio stations. This poses issues of copyright breach of radios' feed and risks of interference of radio stations' editorial independence.

To avoid further interferences onto the feed of commercial radio stations, we call for the **integrity of the content** broadcasted by radio stations to be upheld online when (re)transmitted by online platforms. The **enforcement of radios' intellectual property rights** online is paramount to support radio stations' efforts dedicated to original content production. Moreover, a private copying levy on radio content downloads from specific devices (*i.e.* smartphone, tablet, computer) should be introduced to support the significant investments that radio operators make in content production, and to reflect the value that radio brings to society.

THE RESPONSIBILITIES OF ONLINE PLATFORMS

Online platforms bring great value to the digital economy: they enable listeners to have access to their favourite radio station on a multi-platform basis at no cost. However, commercial radio increasingly depends on these platforms to reach their listeners, effectively putting both radio operators and their listeners at the mercy of the online platforms' own commercial interests. Their growing importance in the European economy and society must therefore be reflected in the adoption of an adequate regulatory framework that clarifies the duties that online platforms have in relation to the third-party radio stations or content that they distribute. In the future, **commercial radio stations and their listeners should not rely solely on community standards and internal guidelines adopted by online platforms for the basis of decisions affecting their content.**

- **Introducing clear provisions**

The spread of illegal (including copyright infringing) and harmful content online is by definition borderless. The DSA should thereby address any issue with this regard with an extensive scope so it applies to online platforms that are not established in the EU, on the basis of their services being targeted at users in the EU.

The removal of illegal (including copyright infringing) and harmful content from online platforms is key to ensure the effective protection of listeners and consumers. Commercial radio should be able to request the removal of their content from specific platforms. The reappearance of

https://assets.publishing.service.gov.uk/media/5efc57ed3a6f4023d242ed56/Final_report_1_July_2020_.pdf.

this content should be prevented with effective so-called notice-and-stay-down-procedures as recognised by the Court of Justice of the European Union (CJEU)⁵.

In addition, obligations imposed onto online platforms to minimise risks for listeners must be targeted in the right way to avoid any **secondary control** operated by online platforms on commercial radio, in addition to the one already carried out by national media regulators.

- **Effective application of the E-Commerce Directive**

The **country-of-origin principle**, as the cornerstone of E-Commerce Directive (ECD)⁶, should remain as it is. In that sense, radio content should only be subject to the national law of its country of broadcast.

The interpretation of the CJEU⁷ allowing for a distinction between **the passive and active role that platforms play** is worth maintaining. It enables the recognition of the active role that an online platform can play with regards to the dissemination of content, in which case the platform would not benefit from the liability exemption granted by the ECD.

The current legal framework does not preclude service providers from taking **proactive measures** against illegal activities. Article 15 of the ECD read together with recital 47 allows service providers to carry out specific monitoring, and this, without losing their liability shield. Further, the monitoring of specific cases could be applicable even to services considered as passive⁸.

The introduction of a **Good Samaritan** principle offering an additional liability exemption merely based on good faith and voluntary efforts⁹ is not an effective solution. It would weaken the current provisions of the ECD which already require services, even when considered passive, to observe a duty-of-care¹⁰.

LARGE ONLINE PLATFORMS ACTING AS GATEKEEPERS

Increasing distribution on connected devices like smart speakers or social media networks presents threats to radio broadcasters as their services are **mediated through powerful platform operators** who are “*gatekeepers*” to the audiences through their control of the platform and devices. **This also puts at risk listeners’ ability to enjoy unfettered access, free at the point of use, to radio over the long term.**

Moreover, commercial radio operators have no or limited **access to the data** collected on their listeners by connected platforms or third-party radio aggregators. As a result, they lack the full range of data insights they require to innovate in the service and content they offer.

⁵ CJEU (Third Chamber), Judgment *Eva Glawischnig-Piesczek v Facebook Ireland Limited*, 3 October 2019, Case C-18/18, ECLI:EU:C:2019:821.

⁶ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market.

⁷ CJEU (Grand Chamber), Judgment *L’Oréal SA and Others v eBay International AG and Others*, 12 July 2011, Case C-324/09, ECLI:EU:C:2011:474.

⁸ CJEU (Third Chamber), Judgment *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)*, 24 November 2011, Case C-70/10, ECLI:EU:C:2011:771, and CJEU (Third Chamber), Judgment *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog NV*, 16 February 2012, Case C-360/10, ECLI:EU:C:2012:85.

⁹ ERGA, Position Paper on the Digital Services Act, 2020, https://erga-online.eu/wp-content/uploads/2020/06/ERGA_SG1_DSA_Position-Paper_adopted.pdf

¹⁰ Recital 48 of the E-Commerce Directive.

Finally, this is amplified by the growing **disparity in the advertising market** share between radio and large online platforms, and the latter's ability to generate revenue by free riding on the content investments made by radio operators.

- **Identification of large online platforms acting as gatekeepers**

The role of designating large online platforms acting as gatekeepers which would be subject to *ex ante* regulation would sit best with the European Commission. It should base its decisions on **several criteria**, such as the large user base of an online platform, its capacity to exploit strong networks effects, its accumulation of data and its power to raise barriers to entry for competitors, and specific thresholds (*e.g.* turnover/assets/market share). Alternatively, consideration could be given to designating individual platforms which have "*strategic market status*", *i.e.* platforms that are in a position of enduring market power/control over a strategic gateway market with the consequence that they enjoy a powerful negotiating position resulting in a position of business dependency.

- **Examples of large online platforms acting as gatekeepers**

As business users of large online platforms, commercial radio operators encounter specific issues with the following large online platforms acting as gatekeepers:

- Third-party radio aggregators:

Large online aggregators typically **do not own radio stations** themselves and distribute licenced radio stations often without the latter's specific knowledge or permission.

These online aggregators benefit from a gatekeeper position by effectively positioning themselves as **one-stop shop** portals for radio content. As the radio content services of these online platforms are widely available online, and often available by default on connected devices and in-car infotainment systems (and therefore available to listeners without the latter having to take any action), listeners are more likely to use these services than the services provided by licenced radio stations. This in turn weakens licenced radio stations' ability to access their audiences directly.

- Connected platforms, including smart speakers, voice assistants and smartphones:

Radio stations have **no visibility of or control over** how voice requests are managed by providers of smart speakers and voice assistants. Moreover, there is **no transparency** regarding how responses are ranked by the online platforms, or which radio stations listeners are directed to. Voice requests for particular radio stations will typically generate a single response, and this may give an undue advantage to platforms operating smart speakers and/or voice assistants, where such platforms are seeking to "*self-preference*" their own unlicensed radio-like stations, or radio stations with whom they have entered into exclusive distribution agreements.

There is a risk that, in future, large online platforms in a gatekeeping position could adopt **self-preferencing practices** in relation to their own unlicensed radio-like services. This could lead to market exclusion for licenced radio stations, and prevent audio listeners from accessing the radio stations of their choice (at no cost), as they are currently able to do.

Finally, in its recently announced "Internet of Things" sector inquiry¹¹, the European Commission has rightly established that providers of smart speakers and voice assistants are

¹¹ Commission Decision of 16.7.2020 initiating an inquiry into the sector for consumer Internet of Things related products and services pursuant to Article 17 of Council Regulation (EC) No 1/2003 (HT.5752), https://ec.europa.eu/competition/antitrust/loT_decision_initiating_inquiry_en.pdf

collecting a significant amount of data. The data they collect is an important contributing factor to their market power.

- Connected cars

Car manufacturers increasingly incorporate radio and audio services into their on-board (connected) infotainment systems. A significant proportion¹² of radio listening occurs in-car, making it a hugely important platform for radio broadcasters to reach their audiences. Commercial radios provide companionship, trusted news, entertainment and real time traffic information to drivers. As the market for connected car develops, radio broadcasters' ability to **maintain a front and centre position on drivers' dashboards** is increasingly at risk of being undermined by the unprecedented bargaining power that connected platform providers are able to wield, and their ability to use this to insist on the exclusivity of their own platforms in cars. Regulated prominence for licensed radio stations in car dashboards is therefore needed.

- Search engines (including through vocal assistance):

Search engines constitute gateways to many services available online. Self-preferencing, which voice assistants facilitate, is detrimental to consumer choice and the viability of radio.

Furthermore, online search engines, including the search feature on app stores, may not provide proper brand attribution to business users, ultimately leading to the poor recognition and prominence / findability of licenced commercial radio stations. This is linked to said platforms' failure to provide listeners with accurate search results when users request a specific radio service or brand affiliated with it.

- Social media providers

The presence of commercial radio stations on social media networks allows for greater listener engagement. The increasing importance of social media providers has the potential to be a threat to radio and audio businesses if they act as gatekeepers of their content. Listeners access to commercial radio stations should not be mediated by third-parties applying their own (commercial) community standards, the application of which may constitute a perilous and unnecessary second layer of control.

CHALLENGING THE ROLE OF LARGE ONLINE PLATFORMS ACTING AS GATEKEEPERS

- **Proposed intervention**

We encourage the European Commission to table legislative safeguards that go further than those contained in the Platform-to-Business Regulation (P2B)¹³. A DSA merely mirroring the P2B would lose its value.

We recommend to depart from a traditional *ex post* enforcement to **adopt an *ex ante* regulation of large online platforms**. AER supports an *ex ante* regulatory framework which

¹² E.g. 50% in Finland or 25% in the United Kingdom.

¹³ Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services, L 186/57, 11.7.2019.

includes the prohibition of certain unfair trading practices¹⁴. Such practices should be listed in a principles-based list of obligations and prohibited practices, and (complementary) sector specific lists of obligations and prohibited practices, including a list of prohibitions and obligations specifically relevant to the digital audio sector. This would go hand in hand with the case-by-case approach proposed by the Commission.

Building on the Commission's proposed policy option 3 (in its inception impact assessment), we have identified a number of practices that should be prohibited. Large online platforms should also be compelled to follow and adopt commitments to ensure a fair-trading environment online.

- **Practices prohibited in a principles-based list should include:**
 - The imposition of “take it or leave it” terms and conditions;
 - Discrimination (or self-preferencing) by a platform in favour of its own services or any other services;
 - Refusal to provide algorithmic transparency;
 - Abuse of smaller competitors by taking advantage of their user base;
 - The collection and use of customer data without prior authorisation;
 - Refusal to share datasets which are necessary to compete;
 - Leveraging its market power to enter other markets, e.g. by using the data collected on its actual user base.

- **Practices prohibited in an audio specific list should include:**
 - Preventing radio operators with a national broadcast licence from accessing the services of online platforms;
 - Manipulating voice requests to redirect listeners to their own competing services;
 - Charging a fee to carry licenced radio broadcasters' services on their platforms;
 - Placing restrictions on the data they make available to licenced radio broadcasters.

This audio specific list should also impose must carry and due prominence obligations on designated connected listening platforms. The must carry obligation would require designated connected listening platforms to carry audio services free of charge from a list of radio operators with a broadcast licence. The due prominence obligation would require designated connected listening platforms to give ‘must carry’ stations a reasonable position on electronic programme guides (EPG) – this is particularly important on voice activated devices (using a “voice EPG”).

- **Enforcement powers**

Besides monitoring and investigative powers, a dedicated regulatory body operating at EU level, working closely with Member State regulatory bodies should be granted with enforcement powers.

For more information, please contact the AER office in Brussels at aer@aereurope.org.

¹⁴ The European Commission' Inception Impact Assessment on the Digital Services Act package: Ex ante regulatory instrument for large online platforms with significant network effects acting as gate-keepers in the European Union's internal market.