

AER RESPONSE TO THE NEW COMPETITION TOOL 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.

Online platforms could exploit their market power in this digital environment, leading to the damaging disaggregation of radio and audio content. In turn, these changes have the potential

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.

to negatively impact the European society and economy, by putting at risk listeners' trust in radio and the viability of quality content production. We therefore welcome the timely publication of the public consultation on the New Competition Tool (NCT) as we believe it can address the current underlying issues of EU Competition law in the digital world.

IDENTIFIED CHALLENGES

We recognise that the existing competition tools have managed to handle many issues through the application of Article 101 and 102 TFEU. However, a new competition tool can help by addressing the gaps in the current EU competition rules, especially in a digital context. Whilst it is undeniable that large online platforms bring great value to the digital economy, we observe that structural competition problems have developed from online markets.

There are a number of market features and elements that can explain the structural competition problem faced by commercial radio. The high degree of vertical integration, the information asymmetry on the listeners and the lack of access to data are some of these.

A few large platforms are now in a gatekeeping position, effectively controlling access to radio content to online listeners. This enables them to leverage their market power and increases the risk of exclusionary or exploitive behaviour. This can ultimately lead to market dynamics that are only determined by a gatekeeper, resulting in customers typically predominantly using one service provider or platform.

Repeated strategies carried out by online companies with market power to extend their market power to related markets also raises competition concerns. This is notably the case when large online platforms build on and exploit strong network effects as well as leverage their assets for entering audio markets.

We also observe oligopolistic market issues with high barriers to entry, strong incumbency for customers on best offers available in the markets or vertical integration into key assets of the vertical supply chain. These competition concerns may lead to innovative market players to disappearing, an increased lack of choice for consumers and insufficient competition on the market.

PROPOSED INTERVENTION

For radio businesses to remain viable in the online environment, their online audio feed needs to be accessible on all platforms and findable by all listeners.

We believe that Articles 101 and 102 TFEU are not suitable or sufficiently effective to address those market situations. Competition law suffers from limitations: the current tools may not be best suited today to tackle the issues confronted in the digital world. A New Competition Tool should enable the European Commission to intervene on an *ex ante* basis following structural risks, before any harm is observed on markets. Intervention should also be privileged when competition and the market do not fulfil their aims, e.g. when a structural lack of competition is observed.

The New Competition Tool would focus on structural competition problems and be applicable to all undertakings in a market, dominant and non-dominant companies. It shall be limited in scope to sectors and markets where structural competition problems are the most prevalent and/or most likely to arise. In this sense, we put forward two lists containing practices that we

consider should be prohibited to ensure a competitive digital environment for commercial radio.

- **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.

Further, the 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”).

We recommend the European Commission to be able to intervene in situations where structural competition problems may arise due to repeated strategies by companies with market power to extend their market position into related markets. It should be able to tackle structural Competition problems with behavioural and, where appropriate, structural remedies. Finally, we believe that the Commission should be able to recommend legislative action.

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