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## AER POSITION ON THE DIGITAL MARKETS ACT (DMA)

### 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. The AER's mission is to promote the development of commercially-funded radio broadcasting in Europe, by advocating for a fair and sustainable economic regulatory framework for radio, which will, in turn, allow commercial radio to continue to deliver significant public value and, beyond that, support media plurality, improve social cohesion and promote European culture.

### Background

Radio content reaches 85% of European citizens each week with a mix of music, news, entertainment and talk that brings great economic, societal and cultural value to a wide variety of Europeans on a local and national level

To remain relevant to its listeners, commercial radio has innovated, developed its content and presence in an extremely competitive digital environment. In addition to linear radio broadcasting (FM, AM and DAB), radio listeners can now access the radio content of their choice, and benefit from a personalised listening experience, via voice enabled connected listening platforms, including smart speakers, tablets, and in-car infotainment systems.

### Identified Challenges

The quid pro quo of commercial radio innovating and adapting to changing consumer behaviour is that radio is increasingly dependent on large online platforms' "core platform services"<sup>1</sup>. Voice enabled connected listening platforms, also known as digital voice assistant platforms, act as gateways to reach listeners, effectively putting both radio operators and their listeners at the mercy of the online platforms' own commercial interests. The challenges and risks that the growing dominance of these online platforms pose to commercial radio are significant, and must be adequately addressed via the proposed Digital Markets Act (DMA).

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<sup>1</sup> Article 2(2) of the European Commission's Proposal for a Digital Market Act, 2020/0374 (COD)

Indeed, Europe's commercial radio sector has been calling upon the Commission to ensure that none of the risks associated with gatekeepers arises, so that listeners can continue to discover and enjoy unfettered access, free at the point of use, to radio over the long term.

The DMA proposal, with its much-needed ex-ante regulatory approach, represents a unique opportunity for EU lawmakers to tackle the growing challenges that digital platforms with gatekeeper status pose to the radio sector, at a time when these platforms are increasingly taking control of large parts of the digital audio ecosystem.

Subject to certain clarifications, the obligations and prohibitions set out in articles 5 and 6 of the DMA proposal should be able to help preserve the contestability of the digital audio ecosystem.

## Recommendations

The following clarifications are required from a radio standpoint:

1. Clarify that digital voice assistant platforms enjoying gatekeeper status constitute core platform services;
2. Ensure the findability of commercial radio services and content by listeners online, including via digital voice assistant platforms;
3. Prevent digital voice assistant platforms enjoying gatekeeper status from self-preferencing their own radio-like services, at the expense of the commercial radio services that they distribute;
4. Prevent digital voice assistant platforms enjoying gatekeeper status from being allowed to limit or restrict access to third party radio services (for example, by invoking any internal community guidelines), or charge for carriage.
5. Prevent digital voice assistant platforms enjoying gatekeeper status from inserting sponsorship or advertising around third party content services without the express consent of the radio operator.

## In Detail

### 1. Scope

**It is essential that the scope of the regulation remains tightly focused**, as proposed by the Commission<sup>2</sup>. We believe that any broadening of the scope would only serve those who oppose the proposed regulation or disagree with the opportunity of introducing it. Hence, the DMA should aim at regulating a small number of large digital platforms that are unavoidable gateways between digital service providers and their large user base. After all, it is the conduct

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<sup>2</sup> Without prejudice to the Commission's powers to identify gatekeepers pursuant to article 3 paragraph 6 of the DMA.

of a few large digital platforms that threatens the contestability and fairness of digital markets and the DMA should focus on such platforms.

The AER calls on the EU institutions to **clarify that digital voice assistant platforms enjoying gatekeeper status constitute core platform services which fall within the scope of the DMA**. As the role and importance of DVAs will likely increase in the future, we consider that it is necessary to advocate for an explicit reference.

## **2. Discoverability & self-preferencing**

The DMA Proposal must **ensure the findability of commercial radio's content and services by listeners online, including via digital voice assistant platforms**. It is paramount that radio content can be easily found and discoverable by users of platforms. This includes ensuring that users are accurately and impartially directed to the content they have requested via the platform's electronic programme guide (EPG) or voice activated ranking services (instead of being directed to the platforms' own, competing, services). Moreover, platforms should provide transparent information on the algorithms which underpin the discoverability of the content they carry.

Related to this, **the DMA must prevent gatekeeper's capacity to self-preference their own services, including any radio-like services of selected third parties, at the expense of the commercial radio services that they distribute**. This risk is increased by the fact that DVAs will typically generate a single response to a voice request made by a user, unlike the hundreds of results that a user could find on a typical search page.

Whilst the DMA Proposal includes provisions that seek to prevent self-preferencing practices by core platform service providers (Article 6(1)(d) and Recitals 48 and 49), **AER calls for an explicit reference to DVAs to be incorporated into in Recitals 48 and 49, to clarify that such rules should also be applicable to DVAs**

## **3. Access & Non-discrimination**

The DMA Proposal must **prevent gatekeepers from restricting listeners' access to commercial radio's content and services online**. This includes clarifying that platforms enjoying gatekeeper status shall not be allowed to limit or restrict access to third party radio services, or charge for carriage.

Whilst the Proposal sets out an obligation to apply "fair and non-discriminatory conditions of access for business users," this only applies to one category of CPSs, namely the app stores. However, given the nature of gatekeeping platforms and DVAs, which act as gateways to specific services, we call for an extension of the scope of Article 6(1)(k) to cover CPSs other than app stores and to explicitly include DVAs, requiring them to apply fair and non-discriminatory conditions of access to all business users.

It is imperative that the appropriate balance is struck between the gatekeepers' freedom to conduct their business and ensuring the fairness and contestability of the digital markets in which they are present.

#### 4. Advertising

The ability of online platforms to generate revenues by free riding on the content made by radio operators is detrimental to commercial radio's viability. It is **essential to clarify that platforms enjoying gatekeeper status cannot insert sponsorship or advertising around any third party radio content that they distribute, without the express consent of the content provider**. Furthermore, where a radio service has consented to the insertion, by an online platform, of sponsorship or advertising around its radio content then said radio service must receive a fair share of any advertising revenue generated by such activity.

In our view, this can happen in two ways, either add this obligation as a separate obligation under Article 6(1) or amend Article 6(1)(k) to also include this obligation.

#### 5. Data sharing & Sherlocking

As per Article 6(1)(a) of the DMA Proposal, platforms enjoying gatekeeper status must "*refrain from using, in competition with business users, any data which is generated through the activities of said business users*" including from their customers, via these platforms. Business users would include the radio broadcaster companies who use these platforms and this obligation would apply to any DVA platform enjoying gatekeeper status.

It follows from the above that **DVA platforms must provide the third party radio services they distribute with unlimited access to and use of all of the data they have collected from or generated in relation to said radio services**. This must be done free of charge, on a continuous and real-time basis. Furthermore, gatekeeper platforms should not be allowed to use this data for their own services, unless they have obtained prior consent from a radio station to do so. Platforms should not be allowed to circumvent these data sharing obligations through special agreements or by just using radio aggregators or other intermediaries (e.g. TuneIn).

In its current form, the Regulation connects the obligation to share the data to the gatekeeper's capacity to obtain user consent for data sharing. However, it should be made clear that if the gatekeeper does not obtain consent from end users to share their data with its business users, the gatekeeper must also not use such data itself.

While this provision constitutes a step in the right direction to prevent "sherlocking" practices by gatekeeping platforms, including DVAs, it will not be sufficient to prevent gatekeepers from using business and end user data they have gathered thanks to their gatekeeping role. This data can provide them with unparalleled market intelligence, allowing the identification of successful services or products offered by the business users and the subsequent development of competing services or products by the gatekeeper. This is because Article 6(1)(e), in its current form, would allow gatekeepers to use such data if they are made publicly available. In order to, therefore, provide an effective solution to the problematic practice of platforms unduly competing with their business users thanks to the data insights which have obtained through their gatekeeper role, the reference to "any data not publicly available" should be removed. Otherwise, gatekeepers may be incentivized to circumvent article 6(1)(a) by making certain data which would normally not be publicly available, publicly available (where privacy rules permit) – which coupled with the economies of scale and scope and the

network effects these gatekeepers enjoy – would still unfairly favour gatekeepers over their business users.

## 6. Timeframe for investigations and proceedings

Timely intervention in digital markets that are at risk of tipping, such as the digital audio market, is key. Several articles of the Regulation touch upon timeframes. In our view, if we want the Regulation to have a meaningful impact some of these timeframes should be shortened. Specifically:

- **Article 3.8:** the regulatory dialogue between the Commission and the gatekeeper in order to specify the measures for compliance with the obligations is due to last 6 months, but it should be **reduced to 4 months** in order to ensure that business users of the gatekeeper and eventually end-users are not exposed to the harmful conduct for longer period. Every day counts for businesses and end users alike.
- **Article 16:** the timeframe for market investigations into systematic non-compliance, currently set at 12 months, should be **reduced to 6 months**. The Commission is set to launch market investigations after at least three non-compliance or fining decisions against a gatekeeper in relation to any of its core platform services within a period of five years prior to the launch of market investigation for systematic non-compliance. This means that the gatekeeper has already demonstrated harmful conduct to the detriment of business repeatedly and for a long time and the Commission is already aware of the problem. We should not prolong a harmful situation.
- **Article 17:** if the DMA wants to ensure that digital markets remain fair and contestable, then the timeframe for market investigations in order to add new services to the list of core platform services or adding new practices (in Article 5 or 6) should be **reduced to 12 months**. The Commission should be able to act swiftly to ensure and stop gatekeepers from practices that harm their business users and 2 year is far too long.
- **Article 25:** a specific timeframe for the adoption, by the Commission, of non-compliance decisions should be introduced. We believe that such decisions should be delivered in **no more than 12 months** after the initiation of the proceedings by the Commission (as described in Art. 18).

Finally, it is critical that the Commission retains the power to adopt interim measures (Art. 22) when there is prima facie finding of infringement of Articles 5 and/or 6. It is a security net for the businesses to not be irreversibly harmed by the conduct and practices of gatekeepers while the Commission's investigations are ongoing. We call on the European Parliament and the Council to resist any attempts to water down this article.

## Conclusion

The Association of European Radios **welcomes and supports the DMA Proposal**, which with some targeted amendments will be a much-needed tool to prevent designated gatekeepers from taking advantage of their size, their strong market position and the

dependency of the business users that rely on their platforms to provide their products or services to end users.

With the adoption of our proposed clarifications to the DMA, radio service providers, who play a critical role in delivering media pluralism, trusted news, and cultural enrichment within the digital ecosystem, at a time when fake news is rife online, will stand a better chance of being treated fairly by gatekeeper platforms, including app stores, digital voice assistants, online search engines, operating systems, online social networking services. Moreover, with our proposed improvements, we are confident that the contestability of the digital audio ecosystem will be greatly improved, to the benefit of competition, innovation and ultimately consumers. We invite the EU co-legislators, European Parliament and the Council, to act swiftly and decisively so that radio can benefit from the regulatory safeguards that it requires, over the long term.

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