

The EBU's comments on the Commission's Preliminary Report on the IoT Sector Inquiry

About the EBU

The European Broadcasting Union is the world's leading alliance of public service media. The EBU has 115 member organizations in 56 countries who operate nearly 2,000 television, radio and online channels and services and reach an audience of more than one billion people in 160 languages.

The EBU and its Members welcome the opportunity to reply to the Commission's Preliminary Report on the IoT Sector Inquiry. For the purposes of the inquiry, we focus our remarks on voice assistants/radio services.

1. Introduction

The internet has brought about innovative ways of reaching and interacting with citizens. Public Service Media (PSM) offer their diverse content beyond their own digital channels and services, and use the opportunities provided by global online platforms to engage with the audiences they serve. PSM acknowledges that the IoT sector and, more particularly, voice assistants are introducing significant changes in how content is consumed. In line with market developments ('the future is mobile') and the principle of technology neutrality (PSM must be present on all platforms to reach all segments of society), PSM seeks to be present on those platforms in order to reach its audiences.

The IoT sector is not evolving in a manner that would render it competitive in the future. As a large number of respondents to the Commission's consultation noted, the sector has significant entry barriers, the main obstacle being the inability to compete with Google, Amazon and Apple.¹ Those platforms 'have built their own ecosystems within and beyond the consumer IoT sector by combining their own and integrating third-party products and services into an offering with a large number of users'.² Clearly, this situation does not only affect competing companies, but also the business users of the aforementioned gatekeeper platforms. More particularly, due to the market power they hold, those platforms dictate the rules of the game. Business users, including PSM, have no bargaining power and are subject to unfair practices, ranging from self-preferencing to the imposition of stringent technical requirements.

2. The EBU and its Members' request

Platform regulation is undergoing a paradigm shift in the EU (and beyond). It is now acknowledged that the 'light-touch' transparency requirements set by the E-Commerce Directive and the platform-to-business (P2B) Regulation are not sufficient to level the playing field in digital markets.

¹ European Commission (2021). Preliminary Report on IoT Sector Inquiry, p. 7

² Ibid.

We believe that, for platform regulation to be effective, it should be technology neutral. It should further be sufficiently flexible to grasp the fast moving pace at which digital markets evolve. Given the practices which we outline below and the increasing popularity of IoT devices (and their supporting software), it should be clear that gatekeeper voice assistants should fall under the scope of both the P2B Regulation and the upcoming Digital Markets Act. The information the Commission has collected in the context of its sector inquiry supports our request.

3. Concerning practices that are unfair and distort competition in adjacent and downstream markets where voice assistants are active

The clarification that voice assistants fall under the scope of the P2B Regulation and the DMA (see Section 4 below) has major practical implications, which are related to how PSM (attempt to) reach their audiences through those platforms.

a. Lack of transparency: Ranking and appropriate brand attribution

In relation to the P2B Regulation, voice assistants should disclose the main parameters determining ranking as per the requirements set in Article 5. The *Google Shopping* decision plainly demonstrates how ranking may affect content consumption.³

Throughout the process of adoption of the P2B Regulation, EBU Members have expressed concerns over **lack of transparency with respect to ranking, which is exacerbated in the environment of voice assistants**; the latter provide only one reply to a user's query. We are taking the opportunity to note that the DMA proposal correctly defines 'ranking' as 'the relative prominence given to goods or services [...] whatever the technological means used for such presentation, organisation or communication'.⁴ Such a broad definition captures cases where a platform does not necessarily provide a list of results in response to a user's query.

EBU Members have also expressed concerns over **lack of brand attribution, which is addressed by Article 3(5) of the P2B Regulation. Voice assistants often refrain from referring to the provider that offers the content end users access**. This has various implications. As regards the realm of competition law and competition-based regulation, lack of brand attribution prevents business users from establishing a direct relationship with their audiences. In other words, lack of brand attribution prevents business users from competing effectively (e.g. for users' attention) with platforms that carry their services. However, lack of brand attribution further prevents end users from assessing the trustworthiness of the content they consume. This is an aspect that significantly affects quality of service, which should be considered against the background of the spread of disinformation and the EU's commitment to protect media pluralism.

³ Commission Decision of 27 June 2017 relating to proceedings under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the Agreement on the European Economic Area (Case AT.39740, Google Shopping), C(2017) 4444 final

⁴ 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 (P2B Regulation), 2019 O.J. (L 186) 57, Article 2(18)

In the light of the above, **the EBU and its Members expect that both the Commission and the national authorities entrusted with the implementation of the Regulation will closely monitor whether voice assistants comply with their transparency obligations.**

b. Preferential treatment: Default settings, default content and exclusivity deals

EBU Members are also concerned about the preferential treatment in which voice assistants may engage.

One way in which such preferential treatment is manifested is through default settings. Similar to other vertically integrated providers, certain voice assistant providers have entered into adjacent and/or downstream markets, including audio markets. In order to promote their own services, such as applications, they pre-install their offers. This makes it difficult (if not impossible) for other providers to reach the user base voice assistants control. In many cases, it is not possible to un-install the gatekeeper's services. Where this is possible, it is reminded that these markets suffer from 'default bias' (i.e., users stick to the default settings of their devices). Such biases are well documented in the Commission's Impact Assessment Report supporting the DMA proposal⁵ and recent competition decisions.⁶

Similar self-preferencing practices are also manifested in content markets where gatekeepers are active. EBU Members are aware of instances where, in response to a user's query, voice assistants have only provided the content which they themselves have produced.

We are taking the opportunity to note that, as the DMA proposal currently stands, the prohibition of self-preferencing is restricted to ranking. As our point on default settings illustrates, **self-preferencing can take many different forms that does not concern how products are 'listed'**. For this reason, our position is that the definition of self-preferencing should build on the P2B Regulation and capture 'settings' other than ranking, including default settings.⁷

c. Refusal to share data

EBU Members have noticed that in many cases 'gatekeeper' voice assistants conclude exclusivity deals with content aggregators. This adds another layer between content providers, such as PSM, and their audiences. As a result of those exclusivity deals, both 'gatekeeper' voice assistants and content aggregators enjoy significant bargaining power and not much can be negotiated. Aside from the obvious concerns over how the market will evolve due to those exclusivity arrangements (a recent telling example is the Commission's decision in *Google AdSense*⁸), one problematic practice that arises from this market dynamic is the refusal of both voice assistants and content aggregators to grant to PSM access to data.

⁵ European Commission, Impact Assessment Report Accompanying the Document Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector, *SWD(2020) 363* final, paragraphs 73 et seq.

⁶ Commission Decision of 18 July 2018 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement (Case AT.40099, Google Android), C(2018) 4761 final, paragraph 781.

⁷ 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 (P2B Regulation), 2019 O.J. (L 186) 57, Article 7(3)(b)

⁸ Commission Decision of 20 March 2019 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement (Case AT. 40411, Google Search (AdSense), C(2019) 2173 final

It is trite to say that data is a valuable input in digital content markets. In the case of PSM, data enables it to tailor content to the ever-evolving needs of the audiences that funds it (e.g. by ensuring that public monies are spent on content that fulfils the PSM remit, by providing personalised services, ensuring that each audience member makes the most out of the PSM offering). In other words, refusal to share data adversely affects the ability of PSM to deliver its public service mission.

We believe that the practices set out in points 3.b. and c. above vividly illustrate why there should be no doubt as to whether ‘gatekeeper’ voice assistants should fall under the scope of the DMA.

d. Undue control over PSM content

We have already mentioned that there exist significant imbalances in bargaining power between ‘gatekeeper’ voice assistants and their business users, including PSM. An example which we find concerning relates to the ability of the former to control the content that reaches the audiences. EBU Members have reported that certain voice assistants assess PSM content before it is made available on their platforms. This is particularly problematic in the case of PSM, which is subject to strict regulation and oversight by expert regulators at the national level. Neither voice assistants nor any other ‘gatekeeper’ platform should exercise a second layer of control over PSM content.

4. Voice assistants are Online Intermediation Services (OIS) and they should be acknowledged as such by the appropriate regulatory rules

As the Commission is aware, the P2B Regulation distinguishes between OIS and search engines. It is currently not clear from the text whether voice assistants would qualify as search engines or OIS. For example, the Regulation notes that OIS *‘could also be provided by means of voice assistant technology’*.⁹ However, it also lays down that *‘the definition of online search engine used in this Regulation should be technology-neutral. In particular, the definition should be understood to also encompass voice requests’*.¹⁰ The Ranking Transparency Guidelines, which the Commission has recently published, imply that voice assistants qualify as search engines.¹¹

Whether voice assistants fall under one or the other category has significant practical implications; search engines are only bound by Articles 5 (duty to disclose the main parameters determining ranking) and 7 (duty to disclose whether they engage in differentiated treatment) whereas OIS providers are bound by more onerous substantive and procedural obligations.

The EBU and its Members believe that voice assistants fulfil all three criteria set by the P2B Regulation that define an OIS (they are information society services within the meaning

⁹ 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 (P2B Regulation), 2019 O.J. (L 186) 57, Recital (11)

¹⁰ Ibid., Recital (13). See also Article 2(5): “‘online search engine’ means a digital service that allows users to input queries in order to perform searches of, in principle, all websites, or all websites in a particular language, on the basis of a query on any subject in the form of a keyword, voice request, phrase or other input, and returns results in any format in which information related to the requested content can be found.”

¹¹ Guidelines on ranking transparency pursuant to Regulation (EU) 2019/1150 of the European Parliament and of the Council, 2020 O.J. (C 424) 1, paragraph 119

of the EU rules that define this term; they perform an ‘intermediation’ function; they are provided on the basis of contractual relationships between the platform and its business users)¹² **and that this should be properly acknowledged by the appropriate regulatory rules.** Those rules clearly include those that will form the Digital Markets Act.

Compared to the P2B Regulation, the Digital Markets Act has a distinct advantage. Though it is based on the definitions of search engines and OIS set out in the P2B Regulation, it does not cherry pick a set of duties for search engines; if an obligation is relevant to how gatekeeper search engines operate, it will apply. In a Recital interpreting the prohibition of self-preferencing in ranking, which would apply to both OIS providers and search engines, the DMA proposal explains that ranking applies to all forms of relative prominence, including ‘voice results’.¹³

However, there still seems to be some ambiguity. In presenting the results of the IoT sector inquiry, Commission Executive Vice-President Margrethe Vestager appears to have implied that voice assistants are currently not covered by the DMA proposal and that, in the light of the inquiry results, this might need to be re-visited.¹⁴ The leading lawmaker steering the DMA through the European Parliament has recently proposed that the DMA text be amended to state that the Commission may *soon* need to assess whether to add voice assistants as ‘core platform services’.¹⁵

In order to enhance legal certainty and to ensure that the DMA builds on the P2B Regulation acquis (rather than put it into question), we propose that the DMA explicitly mention that voice assistants are OIS, thereby qualifying as ‘core platform services’.

The EBU and its Members will continue to monitor the developments concerning the Commission’s IoT Sector Inquiry and remain available to provide any additional information that would enable the Commission to gain a better understanding of practices that affect PSM.

¹² 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 (P2B Regulation), 2019 O.J. (L 186) 57, Article 2(2)

¹³ European Commission, Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (DMA Proposal), COM(2020) 842 final, Recital (49)

¹⁴ European Commission, Speech of 9 June 2021, Statement by Executive Vice-President Margrethe Vestager on the initial findings of the Consumer Internet of Things Sector Inquiry, https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_21_2926

¹⁵ European Parliament, Committee on the Internal Market and Consumer Protection, Draft Report on the proposal for a regulation of the European Parliament and of the Council Contestable and fair markets in the digital sector, Amendment (65), https://www.europarl.europa.eu/doceo/document/IMCO-PR-692792_EN.pdf