

The proposed New Competition Tool:

Why do we need it and how should it work?



The EBU and its Members, Public Service Media (PSM) organizations from across Europe, would welcome a New Competition Tool to address structural competition problems that cannot be tackled under the EU competition rules.

1 Why do the EBU Members support the creation of a New Competition Tool?

EBU Members are bound by ‘universality’ obligations, which require them to reach all segments of the society they serve. Given that a vast amount of content is now consumed on online platforms, PSM rely on them to reach their audiences. Whilst the increasing use of platforms has many benefits, it also poses several challenges. EBU Members are concerned that a handful of platforms dictate how content markets work and that the EU competition rules are not adequate to address various structural problems. These problems may be linked to the conduct of certain (not necessarily dominant) companies or specific market characteristics, such as high concentration.

More particularly, the Commission currently takes action under Article 102 TFEU in order to address competition concerns arising from the conduct of a ‘dominant’ company. However, problems may arise from strategies of a non-dominant platform. As a result, PSM believe that there is a gap in the enforcement of Article 102 TFEU.

Moreover, intervention under Article 102 TFEU takes place *ex post*. However, in the case of markets that display systemic failures going beyond the conduct of a particular company due to certain structural characteristics (e.g. high entry barriers, customer lock-in), *ex ante* intervention may be needed to ensure that the consumer/citizen is not deprived of the benefits of competition.

Finally, based on the Commission’s Guidance on Article 102 TFEU (and the relevant case law), the Commission intervenes where the conduct concerned has already been

or is capable of hampering competition from competitors which are considered to be 'as efficient as the dominant undertaking'. However, the 'as efficient competitor test' is made complicated in digital markets by several effects, such as the existence of economies of scale, learning curve effects, or 'first mover' advantages.

2 What are the problems facing PSM in digital markets?

a. *Leveraging: Platforms with power in a core market apply repeated strategies to extend their position to other markets*

To fulfil their 'universality' obligations, PSM use platforms to reach their audiences. In doing so, they have noticed that leveraging strategies are very common in downstream markets where platforms operate. Such markets are mainly markets for the provision of (e.g. news, audiovisual) content to which a wide range of platforms that are powerful in other segments extend their market power. Those other segments include markets that have existed for several years as well as nascent markets.

Several concerns arise from leveraging strategies. For example, where platforms that hold market power in one market attempt to extend it to other markets, they have the ability and incentive to:

- Grant preferential treatment to their own services (self-preferencing). Self-preferencing can take various forms (e.g. prominent display, demotion of competing content, access to data).
- Remove logos and/or other distinctive features of their business users, including content providers (lack of brand attribution). As a result, the user is not in the position to assess who offers the content she consumes, and the content provider cannot establish a relationship with its audiences.

b. *Anti-competitive monopolization: Certain platforms expand rapidly due to their capacity to put competitors and business users at a disadvantage by imposing unfair business practices.*

The main source of the issues PSM have encountered in dealing with platforms is lack of bargaining power. Combined with the large user base platforms control and to which PSM need access, lack of bargaining power translates into accepting unfair contractual terms (on a 'take it or leave it' basis) and being subject to unfair practices. For example, in many cases:

- Platforms force EBU Members to grant a non-exclusive, sublicensable and royalty-free worldwide licence of their content.
- Platforms engage in retaliatory and bundling practices. Certain platforms bundle subscription-based and free services. If PSM do not agree to the distribution of their content through the subscription-based channel, they are not allowed to distribute their content for free.

- Platforms engage in unfair practices concerning monetization. For example, many PSM organizations are legally required to offer online content that is ad-free. However, platforms may place ads next to it without the authorization of the PSM organization concerned and in breach of media regulation.

c. Gatekeeper scenarios (gatekeepers control access to a number of customers and/or to a given input that cannot be reached otherwise)

PSM organizations are concerned that certain platforms abuse the ‘gatekeeping’ position they hold.

For example, platforms refuse to share data with business users that compete in downstream markets in order to grant to their own subsidiaries a strong competitive advantage. Data is a key input for PSM as it allows us to tailor our services to users and adapt to the evolving needs of our audiences. The refusal of platforms to provide data to PSM has an adverse impact on the ability of PSM to develop digital services and to understand content performance, which also impacts on the ability of PSM to commission the best and most relevant content.

In addition to an outright refusal to share data, certain platforms engage in other data-related practices that limit access to data. These include practices to limit the possibilities of data processing by business users on their own applications, even if such processing is carried out in compliance with applicable data protection regulation. For example, a platform may impede in-app tracking (even when it is compatible with the GDPR and the e-privacy rules) to prevent the transmission of data to the app owner. In the case of PSM, this practice impedes the ability to engage in audience measurement.

The above practices have significant effects on competition and the society at large. For example, as recent cases illustrate, self-preferencing prevents services of higher quality from reaching the consumer. For PSM, platforms’ preferential treatment of own services may restrict the consumption of public interest content. Bundling and retaliation restrict the fair and free flow of information, interfering with freedom of expression. Platforms’ refusal to grant access to data deprives the user of the benefits of competition, including a wide range of services to choose from. Platforms’ opportunistic interpretation of the GDPR may undermine data protection.

3 What should the Commission be able to do under the NCT?

a. The Commission should impose remedies to deal with structural competition problems

Drafting voluntary codes of conduct and best practices would be a lengthy exercise and entail high supervision costs. Moreover, there would also need to be a mechanism ensuring effective enforcement of such codes and practices. However, digital markets are moving at a fast pace, rendering non-binding recommendations to companies inadequate to resolve structural competition problems (e.g. ‘tipping’).

Imposing remedies on companies to deal with identified structural competition problems would be more effective than non-binding recommendations and proposals

to those same companies. However, the Commission must ensure that such remedies are well-designed and that an effective monitoring mechanism exists to ensure that they are implemented in an effective manner.

b. The Commission should be able to make legislative recommendations

Following a thorough investigation under the New Competition Tool, which would enable it to gain a deep understanding of the market under scrutiny, the Commission might find that certain issues would be best addressed by regulation. Many competition authorities across the EU have the power to make legislative recommendations where they find that regulation (or lack thereof) may prevent competition from flourishing.

4 What procedural safeguards should the NCT be subject to?

Application of the New Competition Tool will undoubtedly impact on the activities of a wide range of stakeholders. As a result, EBU Members are of the view that it must be subject to appropriate procedural safeguards. For example, competitors, suppliers or customers of the platforms under investigation should be given the opportunity to comment on the remedies that the Commission would consider imposing on the companies under scrutiny.

Moreover, we believe that the New Competition Tool should be subject to binding legal deadlines. Striking the balance between sound decision-making and quick resolution of the matter concerned might be challenging, but recent antitrust investigations that have lasted several years illustrate why the lack of deadlines may harm competition and the consumer.

Finally, we would strongly encourage the Commission to consider the relevant safeguards that exist in the UK regime, which envisages precise timescales, the publication of reports/working papers, and hearings with affected stakeholders.

5 Would the NCT be sufficient to address problems arising from platform practices?

In order to understand whether a conduct or transaction is harmful to competition, competition authorities must assess its effects on competition/the market as a whole. In other words, competition authorities do not assess its effects on individual competitors or customers. And yet, to ensure a well-functioning marketplace, those competitors or customers may merit protection even if there are no actual or potential effects on the competitive process. In view of the above, competition rules must be complemented with effective regulatory rules that promote fairness, to the benefit of competition. We strongly encourage the Commission to propose rules in the DSA package that would prevent platforms from engaging in abuses of economic dependence. Such rules would restrict platforms from exploiting business users that rely on them to reach consumers, thereby promoting competition and citizen welfare.