



Comments on the Preliminary Report on the E-commerce Sector Inquiry

21 November 2016

The association of European Film Agency Directors (EFADs) welcomes the opportunity to comment on the recent findings published by the European Commission on the e-commerce sector inquiry. The findings on e-commerce in digital content are of interest to the EFADs.

The EFADs brings together the Directors of European Film Agencies in 31 countries in Europe (EU, Iceland, Norway and Switzerland). We represent government or government associated public bodies, in charge of national funding for the audiovisual sector and with the responsibility to advise or regulate on all aspects of national and European audiovisual policies. In total, the EFADs members and their governments fund around three billion Euros every year through subsidies and tax reliefs with a view to fostering the creation, production, promotion, distribution, and exhibition of European audiovisual and cinematographic works.

The EFADs shares the European Commission's ambition in the Digital Single Market strategy to support the competitiveness of European companies in the digital audiovisual market, to promote cultural diversity and facilitate cultural exchange via European works across borders. Cultural diversity and cultural exchange are the backbone of the European Union and are especially important in our times of social and political change. The EFADs believes these objectives are crucial, particularly taking into account the opportunities presented by digital technology. Several members have been engaged in national initiatives to foster access to works and develop online distribution to the benefit of a wide range of audiences.

At the same time, we hold concerns about the findings in the Preliminary Report that agreements between suppliers and digital content providers "may restrict competition in the Single Market in breach of EU antitrust rules"¹ and the current competition inquiry into Cross-Border Access to pay-TV content (Case AT. 40023)². These inquiries could set a dangerous precedent by making recommendations which could lead to the undermining of contractual freedom which is absolutely crucial to the European independent film sector and for the creation of and access to Europe's cultural diversity for people across the EU. As the European Commission addresses in parallel the challenge of creating a fair Digital Single Market and increasing consumers' access to creative content, an isolated investigation of contractual agreements might lead to undesirable effects.

Overview: The EFADs' concerns about the competition inquiries

In the Preliminary Report on e-commerce and the competition inquiry into Cross-Border Access to pay-TV content (Case AT. 40023), the Commission fails to recognise the dangerous precedent that these two

¹ http://europa.eu/rapid/press-release_IP-16-3017_en.htm

² http://europa.eu/rapid/press-release_IP-15-5432_en.htm

inquiries could set. The EFADs are a formal third party in the latter case.³ The EFADs would like to highlight that the impact of the e-commerce inquiry may set a worrying precedent and directly affect the licensing practices of Europe's independent film companies and have a contagious effect across all platforms and media, regardless of the specific modes of distribution concerned, and the financing of European works and co-productions.

First, both investigations would allow for passive sales thus undermining contractual freedom which is a vital pillar of territorial exclusivity. One of the areas the Preliminary Report fails to consider is connecting the "contractual restrictions" with the exclusive rights which are protected by EU and international law. These contractual restrictions provide a way for right holders to enforce their contracts with digital content providers and thereby limit the scope of their rights.

Secondly, the competition inquiries must be viewed in the wider EU policy context. The Commission's recent proposal for a Regulation on online transmissions would establish a Country of Origin principle which could undermine a second key pillar of territorial exclusivity for broadcasters' ancillary online services. Right holders are currently able to sell their rights territory-by-territory, deciding in which territories they are sold. If the Statement of Objections in the pay-TV case were upheld, thereby undermining contractual freedom, then the Country of Origin principle in the draft Regulation would take this away and give the licensee all the territories by default. The negotiating positions of producers, sales agents and distributors could be weakened making it difficult for them to resist demands for pan-European catch-up rights for which right holders are rarely remunerated. In a context where funding for audiovisual works is more and more difficult to find and where TV channels remain key financiers,⁴ it would therefore be difficult to resist demands for pan-European catch-up rights.

Thus, in combination the Regulation and competition inquiries could lead to full pan-European licenses thereby eliminating territorial exclusivity. This would have serious consequences for the European sector, culture, and citizens. Therefore, we see a clear danger in an isolated competition inquiry. However, we agree with the Preliminary Report that restrictions by territory must be subject to a "case by case" assessment, using criteria such as the "presence of market power at different levels of the supply chain" and the "specific product" rather than judging them to be illegal by object.

The importance of contractual freedom

In the preliminary findings, the Commission mentions that competition in the digital content market is shaped by "the scope and availability of relevant rights for distribution of digital content." The Report also states that 'little substantive evidence was provided on the importance of pre-sale arrangements to fund new products by respondents, in relation to the products included in the sector inquiry'.⁵ One of the areas the Preliminary Report fails to consider is the benefits of territorial exclusivity **for investment in the European independent film sector, competition, co-productions, and consumer's access to Europe's culturally diverse works**. The Report does not provide a complete analysis of the full consequences of eroding or eliminating territorial exclusivity if contractual clauses are found anti-competitive.

Any erosion of the exclusive licensing system would create considerable uncertainty in the value chain which would reduce investment in the European film industry making it far less competitive worldwide. Furthermore, it is important to recognize the particular structure of the European film industry. It mostly

⁴ In France, broadcasters are involved in the financing of 70% of French films. The share of channels in the financing of works is on average 30% for cinema production and 70% for audiovisual fictions. Source: Bilan 2015, CNC - <http://www.cnc.fr/web/fr/bilans/-/ressources/9217573>

⁵ Footnote n.349 of the Preliminary Report

consists of independent companies which cannot afford to finance and distribute films on a pan-European basis. Independent companies would be excluded from a future audiovisual business resulting in a less competitive European marketplace and a significant reduction in the range of works available to audiences across the EU.

Undermining territorial exclusivity would also endanger consumer choice and cultural diversity which are two central policy objectives of the European Union and which are also at the heart of our work. Whilst the European Treaties outline rules on competition, Article 167 states that the Union “shall contribute to the flowering of the cultures of the Member States” and “take cultural aspects into account in its action under other provisions of the Treaties, in particular in order to respect and promote the diversity of its cultures.”⁶ Cultural diversity is also protected by the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions to which the European Union is a party.⁷ It is therefore imperative that DG Competition take these consequences of abolishing effective territoriality into account.

1. A decline in investment, less sales after production and fewer European works financed

Territorial exclusivity encourages investment in production and the selling of rights for European works across borders in a high risk sector where only a minority of audiovisual works make a profit. It allows broadcasters, distributors and other platforms in the value chain to calculate the potential audience and to ensure a return on investment. These actors will often invest before the production has even begun which is a vital source of investment which ensures the audiovisual work gets made. To maximise the audience, the release windows and timings of release will often vary from country to country based on decisions made on how to maximise the audience in the specific cultural and linguistic conditions in the territory.

The Preliminary Report fails to recognize that if contractual freedom is undermined and services are accessible on a pan-European basis then exclusivity cannot be guaranteed and the risks and uncertainties in the value chain increase. If a European audiovisual work is already available online on a pan-European basis then it is unlikely that broadcasters and distributors will buy the rights to the work and build the audience in their territory. Without exclusivity it is doubtful that non-national European audiovisual works will be taken up by the big European broadcasters. The risks will be even higher for the smaller broadcasters abroad to buy the rights.

The outcome would be a reduction in investment in European works before and after production. This outcome would also undermine the value of rights because few operators will be willing to pay what they used to pay. Cross-border audiences for European audiovisual works are limited and whilst the original broadcaster may pay a larger amount for the license, this will not compensate for the loss of selling the rights to multiple broadcasters and distributors. This would reduce the audience, lead to fewer diverse and quality audiovisual works being produced and circulated, and ultimately jeopardize the sustainability of the European audiovisual industry.

2. A threat to the successful model of European co-production

Undermining territoriality would particularly affect co-productions that are funded by private and public partners from different countries. In co-productions, investment from broadcasters and distributors is an important part of the budget (pre-financing). These works also travel better and therefore generate more sales in the different territories, based on the exclusive territorial exploitation. Especially in the case of co-productions between countries sharing the same language, there will be no incentive for more than one broadcaster or distributor to invest and take the risk because the exclusivity will not be guaranteed. Co-

⁶ European Union. December 2017. “Consolidated version of the Treaty of the European Union and the Treaty on the Functioning of the European Union”. *Official Journal C 326*, 26/10/2012 P. 0001 – 0390. Article 167

⁷ http://en.unesco.org/creativity/sites/creativity/files/convention2005_basictext_en.pdf

productions are an economic as well as cultural pillar of the European film sector and facilitate the cross-border circulation of works.

3. A concentration of power in the hand of dominant players

Moreover, contrary to what the Preliminary Report, the elimination of effective territorial exclusivity will not strengthen, but weaken competition. Independent operators will be put in a weaker market position. The ability to provide cross-border services will benefit only a select number of large companies, who could afford to buy and offer high value films on a pan-European basis. As English is the most widely understood language throughout the European Union, focusing on this content would be the obvious business decision to reach the largest possible audience. There is a danger that smaller markets and less widely-spoken languages could be marginalised, further endangering European cultural diversity.

4. Less content available online and less access to culturally diverse content

It is our view that the negative consequences of eroding or eliminating effective territoriality far outweigh the positive. Whilst European audiovisual works may be made available online on a pan-European basis in the home market, there will be no local players tailoring the release to the specific culture, language and national demand which will mean smaller audiences for audiovisual works across borders.

This would be to the detriment of European consumers and citizens as it would result in **less choice and could lead to higher prices in some territories**.⁸ The Oxera study illustrates that undermining territoriality is likely to affect European consumers and the audiovisual industry in the short term (up to €9.3bn welfare loss per annum) and the medium to long term (up to €4.5bn welfare loss per annum).⁹

In conclusion, the e-commerce sector inquiry and the competition inquiry into Cross-Border Access to pay-TV content (Case AT. 40023), taken together, could set a dangerous precedent which could undermine territorial exclusivity. Moreover, it is also evident that this Preliminary Report fails to recognise key consequences of finding contractual clauses anti-competitive on the audiovisual sector. We would recommend that DG Competition provides a full analysis of all the consequences of this e-commerce sector inquiry and the competition inquiry into pay-TV and their overlap with the current legislative proposals in the context of the Digital Single Market strategy. With parallel legislative proposals ongoing, these inquiries could have unforeseen and undesirable effects.

⁸ Charles River Associates, March 2014, p. 2, 118.

⁹ Oxera and O&O, May 2016. "The impact of cross-border access to audiovisual content on EU consumers."