

ACT COMMENTS ON THE EC'S PRELIMINARY FINDINGS ABOUT THE PRELIMINARY FINDINGS OF THE E-COMMERCE SECTOR INQUIRY

OVERVIEW

In the Preliminary Report on the E-commerce Sector Inquiry, the European Commission (EC) has identified the question whether some of the current licensing practices in the audiovisual sector may make it more difficult for new online business models and services to emerge and for new or smaller players to enter the market or expand their activities into other markets, in particular cross-border due to geo-blocking requirements. According to the preliminary findings the EC believes this may be particularly true when online rights are sold exclusively on a per Member State basis.

The Association of Commercial Television in Europe (ACT) – representing leading commercial broadcasters in 37 European markets – have enthusiastically embraced the many opportunities offered by online distribution: streamed, simulcast, on-demand, OTT, download and play, or catch-up. And we continue to innovate, with companies exploring possible 'portability' models allowing subscribers to access content while abroad for limited periods of time.

THE IMPORTANCE OF CONTRACTUAL FREEDOM

The EC appears to be questioning a number of elements of contracts freely entered into by licensors and licensees in the audio visual sector, without producing any credible evidence of consumer detriment. The three elements of particular significance appear to be:

- "Absolute" territorial protection
- Duration of Exclusivity
- Bundling of broadcast and online rights

We deal with each of these in turn below.

"Absolute" Territorial Protection

It appears that the EC is looking in particular at what it calls "absolute territorial exclusivity". It appears that the EC does not question the permissibility of parties selling rights exclusively on a per Member State basis when the contract only prohibits the licensee from engaging in "active sales" outside of their territory, but could potentially have an issue with clauses that restrict parties from engaging in "passive sales¹".

Clearly there is extensive CJEU case law around the interaction between IP rights and competition law which we do not propose to highlight here but which is relevant to this issue.

¹ Passive sales generally mean sales in response to unsolicited requests from individual customers including delivery of services to such customers. Sales that result from advertising or promotion aimed to customers in one's own territory/in nonexclusive territories but that also reaches customers in other distributors' (exclusive) territories or customer groups are considered also considered passive sales by the EC.

However, on the narrow point, the distinction between active and passive sales is even harder to make in an online environment than in the analogue world. On the internet most sales are “passive”, meaning that they are in response of unsolicited requests. This is reinforced by the important role of search engines leading to passive sales and the guidelines’ interpretation that general advertising and promotion on the Internet amount to passive sales². Absent the possibility for right holders to impose geoblocking on their licensees, exclusivity would be an illusory concept. The result of this is that a ban on absolute territorial protection would, in practice, amount to something close to a ban on effective territorial licensing with hugely negative implications for consumers, European cultural and linguistic diversity and the European audio visual sector.

We also believe that **restricting broadcasters’ ability to acquire licenses on an “absolute” exclusive territorial basis would restrict rather than enhance competition** and make it more difficult for new or smaller players to enter/stay in the market.

These concerns are effectively confirmed by the EC in the Impact Assessment of the Proposal for a Regulation of the European Parliament and the Council laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes:

“Options which, in addition to establishing the CoO rule, would prohibit contractual arrangements concerning territorial exploitation of content were discarded. Such options could de facto result in pan-European licences. Many operators, including SMEs, may not have financial means to acquire pan-European licences. If the market does not have a possibility to adapt to changes gradually such options could push smaller operators out of this segment of the market. Also, such options may impact the way how the creative, especially AV, content is financed and distributed.”³

Duration of Exclusivity and Bundling

The issue of exclusive territoriality is linked to two specific points raised in DG COMP’s preliminary findings: the duration and bundling of licenses. Investment, innovation and choice in the audio-visual market are driven by exclusivity. Enormous sums of money and significant risk are staked on content, most of which will fail but some of which is successful. For content investors such as broadcasters it is fundamentally important to be in a position to control the periodic successes via exclusivity to earn a return over time, and pay for those programmes that were not successful.

It is unrealistic to believe that broadcasters will continue to be able to invest millions in a specific programme if they are only able to hold the rights for one or two series, or face competition from online streaming of the same programme the broadcaster has invested in at the same time as it is broadcast. The effect of such an approach will be to massively reduce investment in original EU content to the detriment of EU audiences generally. Moreover, the market evidence shows that existing arrangements have not impeded market access as the success of Netflix, Amazon and other new broadcast market entrants demonstrate over time. As DG COMP will know from this investigation, there are a lot of rights and a lot of high end programme producers, writers etc willing

² Guidelines on vertical restraints, para 51

³ IA, p. 27.

to produce high-quality content if broadcasters or distributors are prepared to take a risk on a commission.

MAJOR RISKS FOR CONSUMERS, CULTURE AND CONTENT INVESTMENT

Contrary to the EC's stated intentions the elimination or erosion of "absolute" territorial licensing runs a severe risk of significantly impacting **consumer choice, cultural and linguistic diversity and European content investment, undermining the purpose of the EC which is to broaden access to content.** Neither free nor pay online content services, whether from broadcasters or other digital content platforms, will be able to offer content to specific national EU markets: instead, they will be forced to offer their content across an EU market of 500m people.

These propositions are supported by the most detailed report on the economic consequences of undermining territorial licensing which has yet been produced by any party, which was published in May this year and which has been provided to the EC⁴. That report found that changes to copyright and other initiatives at the EU level could result in substantially lower levels of investment in TV and film content, with consumer welfare losses worth up to €9.3bn a year, as a result of those consumers losing access to content they currently enjoy, being charged more, or being priced out completely. Ensuring that copyright can continue to be licensed on a territorial and exclusive basis therefore remains a crucial policy objective that should underlie how any legislative changes and non-legislative interventions are developed

The unintended consequences of the proposed developments are likely to be as follows.

- Faced with a series of lower-fee non-exclusive pan-EU deals with a host of national platforms, rights owners to high-value content (sport, films, high-end drama and entertainment) will either sell rights on a pan-EU basis, which smaller national platforms will be unable to pay or withhold content from online distribution until exclusive national windows have expired across the EU (resulting in less content being available online in Europe).
- If rights move to a pan-EU model they are unlikely to be acquired by local domestic operators. Instead the main beneficiaries will be larger content aggregators who offer content in the main European languages, particularly English. There is a real risk that smaller markets and less-widely spoken languages will be marginalised, leading to a reduction in consumer choice online as their consumers are serviced increasingly by pan-EU international platforms. National online offerings would be impoverished, only being able to secure content rights with no wider international appeal – digital innovation will decline as online rights become harder to secure.
- As rights are increasingly sold to pan-EU platforms for pan-EU distribution, multi-territory funding for European production will decline. This will mean fewer European productions and a greater market share for large-scale, global content produced outside of the EU.

⁴ See "The impact of cross border access to audiovisual content on EU consumers" published by economic consultancy Oxera and media consultancy Oliver & Ohlbaum in May 2016 at <http://crossborderaccessreport.eu/>

FOUR SPECIFIC AREAS AT RISK

EU entertainment production. As TV production values have risen to cinematic quality, broadcasters have sought to spread the risk via either co-productions or pre-sales in different EU markets. Pan-EU distribution would make such European productions very difficult to finance, as the pre-finance market relies on a broadcaster being able to secure exclusivity to distribute in their home market. ITV Studios' Titanic illustrates the dual role of presales and co-funding in financing content: it was co-funded by, and presold to ITV Studios and 7 other European broadcasters.

Compelling online content services. Broadcasters are able to offer their viewers a full range of programmes through national online catch-up services. If pan-EU distribution becomes compulsory then premium content, such as high-end drama and sports rights, is likely to be withdrawn from these services in order to preserve revenues from broadcast distribution in other European markets.

At risk: news and local programming. News and local programming is expensive to produce and is financed thanks to the return that broadcasters get from high-value content. In a scenario where only larger content aggregators would be able to acquire rights to high-value content, the ability for local broadcasters to invest in news and local programming will be seriously affected.

At risk: EU-wide availability of football. Currently European football leagues licence their rights in their home country and also across the EU, at different prices which reflects different levels of demand: the result is the widespread availability of matches across the EU. De facto pan-EU distribution will undermine this model with, for example, national platforms securing pan-EU distribution rights in order to maintain exclusivity.

In the light of the above, it appears that restricting broadcasters' ability to acquire licenses on an "absolute" exclusive territorial basis would have a detrimental impact as it would:

- a) restrict rather than enhance competition;
- b) favour large content aggregators who offer content in the main European languages on a pan-European basis,
- c) make it more difficult for new or smaller players to enter or stay in the market; and
- d) raise prices for content for many people in Europe.

This would result in an impoverished content offer. Viewers would no longer be offered content tailored to their own specific and local tastes in their preferred language.

THE NEED FOR LEGAL CERTAINTY

Finally, it is imperative that, having launched the e-commerce sector inquiry involving the review of tens of thousands of documents, the EC now publish a final report about what it has found and what it plans to do (and not do) next. Failure to do so will create widespread market uncertainty for years whilst reserving DG COMP the power to intervene at a moment's notice. In Member States, where the relevant competition authority undertakes a Market Investigation, a line is drawn under it upon its completion and critically everyone can work out where they stand. For legal clarity and market certainty DG COMP should abide by these same standards.

ABOUT THE ACT

The Association of Commercial Television in Europe represents the interests of leading commercial broadcasters in 37 European countries. The ACT member companies finance, produce, promote and distribute world class content and services on a range of platforms benefiting millions of Europeans.

For more information please visit www.acte.be