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OPERATING EUROVISION AND EURORADIO

EBU'S COMMENTS ON THE KEY FINDINGS OF THE EUROPEAN COMMISSION'S PRELIMINARY REPORT ON THE E-COMMERCE SECTOR INQUIRY

Executive Summary

The EBU is the world's leading association of public service media ("PSM"), comprising 73 members located in 56 countries worldwide. The EBU welcomes the European Commission's invitation to provide its views on its Preliminary Report on the E-Commerce Inquiry as an interested stakeholder.

In summary, the EBU wishes to make the following key comments:

- Free-to-air ("FTA") PSM content primarily addresses national audiences. The decision whether to make its content accessible on a cross-border basis in order to promote media pluralism and cultural diversity is determined by the broadcaster's public service remit as organised and defined by the relevant EU Member State. This is in line with the subsidiarity principle applicable to public service broadcasting under the Amsterdam Protocol to the Treaty. There is generally no mechanism (e.g. subscription) for access to FTA content and no mechanism for non-residents to contribute to the licence fee (or equivalent) that funds the national PSM. Commercially-funded PSM is financed by advertising/sponsorship, which is generally targeted exclusively at the national audience. This is because advertising is overwhelmingly traded on a country-by-country basis for linguistic, cultural and product reasons.

- Due to the public service remit it is obliged to fulfil, PSM is often bound to acquire rights on a national basis. Furthermore, the cost of acquiring a pan-European (or multiple territory) right would be prohibitive for PSM; only global media conglomerates have sufficient means to refinance the cost of such a right.

- The EBU and its Members welcome the fact that the Report acknowledges the importance of territoriality of rights for broadcasting.

- Content rights are often acquired as a package covering all transmission technologies because PSM has a universality mission. PSM has a duty towards its audience to ensure access to PSM content in a technologically neutral manner. This is especially important in order to reach younger audiences. If rights acquisition were limited to one or only a few platforms, PSM would be unable to fulfil its public service remit.

- The duration of rights agreements must be treated on a case-by-case basis, taking all relevant factors into account, including the cost of acquisition and the nature of the content concerned.

More generally, the EBU notes that the application of competition law in the broadcasting rights markets must be approached very carefully to ensure that it does not ultimately harm consumers rather than protect them. With respect to this Inquiry, it is vital to ensure that any intervention in the digital content markets to make it easier "*for new players to enter the market, or for existing operators to expand their current commercial activities into e.g. other*

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transmission means such as online, or to other geographical markets",[1] does not ultimately assist only those global media conglomerates that can afford pan-European rights, to the ultimate detriment of competition and European consumers. With respect to the need for antitrust intervention in order to facilitate market entry, evidence shows that existing arrangements have not been an impediment to access as demonstrated by the success of Spotify, Netflix, Amazon, Discovery, BT Sport and others.

1. Free-To-Air PSM is Different

FTA PSM is significantly different from other operators when deciding whether to make content accessible cross-border. As opposed to other providers that may decide to expand into the markets of other Member States in order to maximise profit, FTA PSM addresses the residents of the Member State which it is meant to serve. Cases where FTA PSM content is accessible to residents of other Member States occur in neighbouring territories (usually within the same linguistic group) as a result of overspill and/or in territories where nationals of the Member State concerned reside. In such cases, the cross-border provision of content is not driven simply by commercial interests; it is a decision that promotes media pluralism and cultural diversity.

Moreover, as noted by the Report, there are a number of different categories of digital content providers, based on business model and principal activity.[2] In the context of this Inquiry, the FTA PSM model is different from other providers identified in the Report for two main reasons: first, it has a national remit of activities organised and defined by the Member State; second, the majority of FTA PSM is publicly funded by a licence fee or similar national public funding mechanism.

a. FTA PSM is bound by a national public service remit

According to the Amsterdam Protocol, it is for the Member States to provide for the funding of PSM for the fulfilment of *the public service remit "as conferred, defined and organised by each Member State"*. If the remit explicitly prevents PSM from making its content accessible cross-border, the restriction derives from public law rather than a private agreement, and therefore antitrust law (Article 101 TFEU) would not be applicable.[3]

b. FTA PSM is funded by the national resident

The remit may allow FTA PSM to make its content accessible cross-border.

In principle, restrictions agreed between content providers and rights holders may be assessed under Article 101 TFEU. According to the Court of Justice of the EU in the *Karen Murphy* case, the key question when considering whether there is a copyright justification

[1] Commission Staff Working Document (2016). *Preliminary Report on the E-commerce Sector Inquiry*, p. 268. Retrieved from: http://ec.europa.eu/competition/antitrust/sector_inquiry_preliminary_report_en.pdf Antitrust intervention in traditional broadcasting markets was also driven by the objective to ensure market entry. See, for instance Commission decision *UEFA Champions League* (Case COMP/C.2-37.398) [2003] OJ L 291/25, paragraph 171, which reads as follows: "*[The proposal submitted by the party to the antitrust proceedings] should enhance the possibility for more broadcasters, including small and medium-sized companies, to obtain [premium sports] content*". However, as the examples below demonstrate (see, for instance, unbundling remedies in the *Premier League* case), antitrust intervention has not managed to ensure market entry.
[2] *Supra* n. 1, pp. 186-7.
[3] A PSM may not privately agree anything with a content provider that is in conflict with its public service remit.

under Article 101 TFEU for an absolute territorial restriction is whether the rights holder is adequately remunerated.[4] In this case, which involved a pay-tv operator, Sky was deemed adequately remunerated for its Greek broadcasts when the decoder card for such Greek broadcasts was purchased in Greece by a UK resident and there was no justification to prevent this cross-border (passive) sale.[5]

For *publicly-funded PSM*, however, the issue is different because there are currently no mechanisms in place for non-residents to pay the PSM licence fee (or equivalent). In cases where PSM simply streams its online service with publicly available access, it does not receive any remuneration from foreign customers accessing that service. Taking into account the national purpose, role and organisation of PSM, as well as the discretion afforded to Member States under the Amsterdam Protocol, it would be disproportionate and against the principle of subsidiarity to oblige Member States to set up a mechanism to levy and enforce a licence fee from people resident in another country. Indeed, such a development would undermine the public model of PSM because it would only be feasible by using some kind of subscription system.

As regards *commercially-funded PSM*, PSM could not receive adequate remuneration for its online (free-to-use) content abroad, because advertising/sponsoring is generally sold to target the national audience (e.g. due to language restrictions, different consumer preferences and different product availability). Advertisers would not pay more simply for the possibility that the online service could be accessed by unintended (and unquantifiable) non-residents.

In addition to the difficulty of refinancing the cost of the rights, both commercially-funded and publicly-funded FTA would also face considerable extra costs of serving a new territory, including technical, distribution, and regulatory (compliance with local libel and privacy laws) costs in the event they were obliged to provide their content cross-border.

c. FTA PSM does not involve a contractual relationship between the broadcaster and the viewer

The "passive sales" principle[6] does not apply to FTA PSM because there is no private contract between viewer and broadcaster for FTA content. Indeed, the viewer has no commercial relationship with the broadcaster at all. Rather, the viewer (as a resident of the relevant country) pays a licence fee (or other public contribution) to a central fund, which is used by the PSM as its annual budget. The content is then provided nationally for free, with open access to all citizens. This means that there is no "passive sale" that could be made to a non-resident individual.

For the above reasons, it is clear that FTA PSM is objectively different from other content providers and rights holders in the digital content sector and stands outside the concerns of the Commission's e-commerce Inquiry. Nevertheless, the EBU welcomes the finding of the European Commission that there are multiple business models and a great diversity of practices, thereby acknowledging the need to assess licensing arrangements on a case-by-case basis instead of condemning them a priori. The EBU also welcomes the opportunity to

[4] Joined cases C-403/08 and C-429/08, *Football Association Premier League v QC Leisure and Karen Murphy v. Media Protection Services Limited* [2011] ECR I-09083, paragraphs 107-121.
[5] Ibid., paragraph 17.
[6] Commission Notice. *Guidelines on Vertical Restraints*. [2010] OJ C130/01, paragraph 51: "protection of exclusively allocated territories or customer groups must […] permit passive sales to such territories or customer groups".

make some general comments about the three main issues identified in the Report that could raise competition concerns in digital content markets, namely "bundling" of content rights, territorial restrictions, and the duration of licensing agreements.

2. Bundling rights for online transmission of content with rights for other transmission technologies

In the Report, the term "bundling" is used to refer to licensing practices whereby rights for the online transmission of content are licensed together with the rights for other transmission technologies.[7]

PSM is obliged under the terms of its public service remit to ensure wide availability or "universality". This means that PSM must secure carriage of the public service on as many devices and platforms as possible to ensure cross-platform availability and consistency of offer to audiences. Given the proliferation of devices, platforms and standards, platform neutral rights also avoid wasted resources on the administration of rights clearance.

Existing EU case law

By defining practices whereby rights for the online transmission of content are licensed together with the rights for other transmission technologies as bundling, the Report does not appear to be in line with established case law and relevant decisional practice. More particularly, the Commission Guidance on Article 102 TFEU explains that bundling is "*the offering of **two distinct products** sold jointly in fixed proportions*" [emphasis added].[8] The Guidance further explains that action under Article 102 TFEU would be justified if the bundled products belong to separate product markets.[9]

In suggesting that bundling rights for different transmission technologies is a practice that could raise competition concerns, the Commission appears to assume that transmission via cable, satellite, online, etc. constitute distinct services, fulfilling different needs, and thereby belonging to separate product markets, i.e. that they do not compete with each other. However, on numerous occasions, the Commission has not distinguished between terrestrial, satellite, cable and other means of transmission.[10] For example, in *Newscorp/BSkyB*, it found that content distributors consider the different means of delivery to be substitutable from the viewers' point of view. The Commission concluded that *different distribution modes are part of the same product market* for the retail distribution of content to consumers.[11] In our view, this approach would also be more in line with the EU law principle of platform neutrality.

[7] Ibid., paragraph 689.
[8] Communication from the Commission. *Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings* [2009] OJ C 45/02.
[9] Ibid., paragraphs 51 *et seq*.
[10] See, for instance, Commission decision of 27 May 1998 in Case IV/M.993 – *Bertelsmann/Kirch/Premiere*, paragraph 21; Commission decision of 2 April 2003 in Case COMP/M.2876 - *Newscorp/Telepiù*, paragraphs 40. and 47; Commission decision of 18 July 2007 in Case COMP/M.4505 - *SFR/Télé 2*, paragraph 40; and Commission decision of 25 June 2008 in Case COMP/M.5121 - *Newscorp/Premiere*, paragraph 20.
[11] Commission decision of 21/12/2010 in Case No COMP/M.5932 - *News Corp/ BskyB*, paragraph 104.

Ineffectiveness of certain unbundling remedies

The Report further notes that "*splitting up rights in order to allow a variety of digital content providers to offer their services by using different technologies may increase competition in digital content markets*".[12] Whilst "unbundling" remedies can be effective in supporting new market entry, the EBU notes that they have often fallen short of achieving that objective in the broadcasting rights markets.

In the *Premier League* case, for example, although the FA Premier League committed to divide the rights for the 2004-2007 seasons into four packages of matches, all packages were ultimately acquired by one broadcaster.[13] Following this, the competent UK authority introduced the "no single buyer" rule, whereby no single broadcaster could buy all packages of rights. Following the next auction, Setanta acquired the less attractive package, which proved to not be commercially viable and Setanta left the market.[14]

Moreover, it is important to note that Europeans consume content in many different ways. For example, they may watch a film on their TV sets or their tablets. As a result, "bundling" allows them to consume content using the hardware device and/or technology that best suits their needs. Without "bundling", a consumer might be forced to pay for the same content more than once. The harm to consumer welfare that "unbundling" remedies may cause is illustrated by the *Premier League* case; following the acquisition by Setanta of one of the Premier League packages, consumers on Sky's satellite platform had to purchase an additional subscription.[15]

Undermining the exclusivity model

Splitting up rights on the basis of transmission technology will undermine the exclusivity model, according to which broadcasters commission and acquire content (that attracts viewers) and rights holders are successfully able to fund production and distribution of the programme or event in the first place, benefitting audiences with high quality and culturally diverse content. For premium content, it could lead to a spiralling of rights prices in a "race" for exclusivity over all platforms, thereby foreclosing national FTA broadcasters or other parties like smaller VOD providers entirely from the market. It would also prevent broadcasters from scheduling programmes across platforms, such as linear transmission plus a catch-up window – which audiences expect.

For example, in its guidance on commissioning from independent producers, the UK national regulator Ofcom makes clear that it expects there to be a separate window for primary public service transmission rights for a specified initial period on both a linear and on-demand

[12] See *supra* n. 1, paragraph 642.
[13] Commission decision *Joint Selling of the Media Rights of the FA Premier League* (*FAPL*) (CaseCOMP/C.2/38.173) [2006] OJ L 176/104, paragraph 11.
[14] It should be noted that BT has recently entered the market for the acquisition of rights to premium sports; in 2015, it purchased two packages to Premier League matches. However, the remedy led to a significant price increase, which in some way must fall on consumers, and did not prevent the incumbent party from acquiring the majority of packages (the remaining five), meaning that a new entrant, including an entrant with significant financial resources at its disposal, may not necessarily manage to exercise effective competitive constraints on the incumbent party. UK consumers are required to purchase two different subscriptions to have full access to the televised matches of the national football championship.
[15] Ofcom (2009). *Pay TV Phase Three Document: Proposed Remedies*, paragraph 1.86. Retrieved from: http://stakeholders.ofcom.org.uk/binaries/consultations/third_paytv/summary/paytv_condoc.pdf. This has also been the outcome of more recent rights auctions in the UK. See *supra* n. 14.

basis, prior to separate windows for exploitation by other distributors following this window.[16] This approach has supported a thriving broadcast and independent production ecosystem.

It is well established that the exercise of the exclusive right to reproduce a work that enjoys copyright protection does not in itself raise competition concerns; antitrust intervention that reduces the scope of exclusivity may be justified only under certain restrictive conditions set by the Courts.[17]

3. Territorial restrictions

As noted by the Report, digital content rights are normally licensed on a country-by-country basis.[18] It is established case law that it is not anticompetitive to grant an exclusive territorial licence to a content provider.[19] There are clear reasons for this, based on "specific market conditions" which the Commission has committed to carefully consider in its competition law assessments:[20]

From the perspective of rights holders

PSM is vital to investment in European programmes, and (co-)produce, commission and acquire programmes with a certain package of rights. PSM may support European film production, and commercial subsidiaries invest in PSM-commissioned productions and return dividends to the public service, which is central to supporting PSM's public service mission[21].

Assembling funding for European films and high quality television productions is challenging and inextricably linked to flexibility around territoriality. It frequently depends on putting together funding from multiple co-producers and distributors, public funds, and/or some private investment, from different countries. A territorially exclusive agreement for a certain period helps manage risk around the investment, making new productions viable.

As a rule, the production of quality content requires significant investment in terms of funds, time, facilities and other resources. Moreover, digital audiovisual content is a product that is subject to a highly uncertain consumer demand; the success of a film or a TV series depends on viewer preferences that are not easy to predict. Therefore this is a high-risk market with low demand predictability; short product lifecycles; low substitutability; and a short, focused marketing burst at time of launch. While for most products the socially optimal price is considered to be its marginal cost, it would be impossible to recover programme and film

[16] Ofcom Statement, 21 June 2007. *Guidance for Public Service Broadcasters in drawing up Codes of Practice for commissioning from independent producers*, paragraphs 4.16-4.19 and Annex 1 (the Guidance) paragraphs 19, 20 and 37. Retrieved from: https://www.ofcom.org.uk/__data/assets/pdf_file/0022/87052/statement.pdf.
[17] See, for instance, ECJ, Joined Cases C-241/91 P and C-242/91 P, *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd. v. Commission* [1995] ECR I-743, paragraphs 27 et seq.
[18] *Supra* n. 1, paragraph 697.
[19] See Case 262/81, *Coditel SA, Compagnie générale pour la diffusion de la télévision, and others v Ciné-Vog Films SA and others ("Coditel II")*, EU:C:1982:334.
[20] See, for instance, Commission Notice. *Guidelines on Vertical Restraints*. [2010] OJ C130/01, paragraph 125 and Communication from the Commission. *Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings* [2009] OJ C 45/02, paragraph 13.
[21] The Commission has recognised that PSBs may have commercial activities and that these may form an important source of financing for PSB activity across the EU. See Communication from the Commission on the application of State aid rules to public service broadcasting [2009] OJ C 257/01, paragraphs 57, 82 and 93.

production costs on this basis. This requires differential pricing, which is recognised and enabled through the copyright and licensing regime, including the ability to choose to licence and offer services on different territorial bases and on different platforms in different windows within each territory. In fact, this flexibility allows producers and distributors to experiment with different release combinations in a way that balances financing demands with evolving audience expectations and the opportunities provided by new technologies.

In the event that rights holders are prevented from exclusively licensing the content they produce on a country-by-country basis, the cumulative value of the rights concerned would be significantly reduced in terms of both viewership and revenues because the flexibility to design optimum distribution in each territory would be lost.[22] Many productions would either be of lower quality (e.g. sports events) or simply would not be made at all (in particular, independent European film, investigative journalism documentaries that examine life in the EU, or nature programmes, which develop and invest in cutting edge cameras and filming techniques).

From the perspective of licensees

Most respondents to the Commission's Inquiry stated that the cost involved in purchasing content for other territories is excessive. In fact, this is the most important reason why a digital content provider would decide not to make its services accessible in Member States other than those in which it currently operates.[23] The cost of a pan-European or multiple territory right would be prohibitive for most national FTA broadcasters.

Some projection of potential audience may be made, but in general if broadcasters wish to provide their content in a neighbouring country, they must acquire the rights for that entire territory. In addition, the service provider must pay all the other costs associated with doing business in a new territory, e.g. libel law issues; consumer provisions; customer service. Only a few global conglomerates have the financial resources to purchase rights for multiple territories or the whole of the EU; any obligation on European PSM to offer their content on a multiple-territory or pan-European scale would therefore create a severe distortion of competition in the European markets.

For the above reasons, European broadcasters should continue to be able to decide for themselves whether to make their content accessible on a cross-border basis.[24] The EBU welcomes the fact that the Report acknowledges the importance of the territorial selling of rights, emphasising in addition to some of the above concerns, cultural traditions (which render consumer preferences heterogeneous across the EU), linguistic barriers (and the costs that a digital content provider would need to incur to overcome them), and regulatory differences.[25] Indeed, the Commission has long acknowledged such specificities: linguistic,

[22] See *supra n*. 1, paragraph 742. The EBU notes that the Commission outlines that vertical restraints, including exclusive distribution arrangements, can have positive effects, and in particular that an absence of vertical restraints "*can lead to a sub-optimal level of investment and sales*". In particular, the investment required in digital content clearly meets the Commission's criteria for identifying a genuine hold-up problem, i.e. that the investor may not commit the necessary investments before particular supply arrangements are made. See Commission Notice. *Guidelines on Vertical Restraints*. [2010] OJ C130/01, paragraph 107(d) and (h).
[23] Ibid., Table C.6.
[24] For more information on the adverse effects of breaking down the territorial exploitation of rights on competition, innovation and the European consumer see, for instance, Oxera and O&O (2016). *The impact of cross-border access to audiovisual content on EU consumers*. Retrieved from: http://www.oxera.com/getmedia/5c575114-e2de-4387-a2de-1ca64d793b19/Cross-border-report-(final).pdf.aspx.
[25] *Supra* n. 1, p. 227.

regulatory and cultural differences have traditionally determined the definition of the relevant geographic market in antitrust and merger cases affecting media markets.[26] If territorial exclusivity were lost, there would be no incentive for licensees to offer lower prices in markets of less demand, harming smaller and newer providers and reducing consumer access to fresh European content in a way that is adapted to the local audience (e.g. language versioning).

With respect to territoriality, it bears noting that, in addition to competition enforcement, the EU copyright framework also needs to fit the market reality described above. More specifically, copyright legislation must ensure an easy rights clearance process. The EBU welcomes the proposal for a Regulation laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions that the Commission published in September 2016.

4. Long duration of licensing agreements

Finally, the Commission appears to be concerned about the fact that in many cases rights are licensed "*for rather long durations*".[27] According to the Commission, long term contractual arrangements "*are likely to make it more difficult for new players to enter the market, or for existing operators to expand their current commercial activities into e.g. other transmission means*".[28]

The EBU would note that there are no hard and fast rules in this area under competition law and that a wide range of options on duration and payment structures should remain open to rights holders and content providers in order to ensure continued investment in high quality programmes for EU audiences. The extent to which duration will raise issues will depend on, among other matters: the level of investment involved; the level of uncertainty surrounding that investment and the importance of the content to platforms. Therefore, it is important to assess duration on a case-by-case basis; there is no arbitrary duration that determines whether or not a contract has a foreclosure effect.

Factors to be taken out in such an assessment include, for example, whether significant investment into an event or production is required on behalf of the licensee, including to build a brand and an audience over time; whether the content is a "must have" premium product; whether the contract includes all revenue models (e.g., FTA vs. pay); and (in relation to sports) how often the relevant event takes place. Depending on the assessment of such factors, a long duration may be deemed "indispensable" to achieve the objectives pursued by the agreement concerned, in line with Article 101(3) TFEU.

Similarly, the Commission appears to have concerns about "*the widespread use of minimum guarantees and fixed/flat fees, often in conjunction with advance payments*" which the Commission considers "*might make it more difficult for new entrants to gain a foothold in the market.*"[29]

[26] This has been established since the early years of the Commission's decisional practice. See, for instance, See MSG Media Service (footnote 5), paragraph 46, and Commission Decision 96/346/EC, RTL/Veronica/Endemol, OJ L 134, 5.6.1996, p. 32, paragraph 25.
[27] *Supra* n. 1, p. 268.
[28] Ibid., paragraph 842 and p. 268.
[29] Ibid., p.279.

The Commission rightly acknowledges that the "*payment mechanisms which determine the amounts digital content providers have to pay rights holders for the licensed online rights are highly complex*" and that "*there is a variety of different payment mechanisms at play in most licensing agreements*".[30] The wide variety of payment mechanisms, including advance and flat-fee payments, should be understood in their overall market context. We have set out above why the producer's ability to seek distribution advances is crucial to securing the necessary investment in high quality output. As regards the terms of payment, the investment is required ahead of production (not after production) in order to generate the best value for money and therefore selling in advance in order to raise upfront investment is important. It is not practical to wait until a programme has been broadcast or distributed to gauge the level of funding - the funding must be decided and applied upfront or the programme would not be made.

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[30] Ibid., p.278.