

## **RTL Group comments on the European Commission's Preliminary Findings and the Preliminary Report on the E-commerce Sector Inquiry**

The European Commission invited stakeholders to submit comments on its Preliminary Findings of the E-commerce Sector Inquiry.

RTL Group has actively engaged in the E-Commerce Sector Inquiry and provided its response to the Questionnaires. We welcome the European Commission's invitation to submit comments to the Preliminary Findings and we will, as requested by the Commission, restrict our comments at this stage to a facts-based exchange.

### **Digital content providers: types of operators and business models**

The Preliminary Report identifies, for the purpose of the sector inquiry, different "types of operators" (para 601) and different categories of "business models" (para 604) to which it attaches specific definitions.

As regards broadcasters, the Preliminary Report lists two classes, namely public service broadcasters and commercial broadcasters. The definition of a commercial broadcaster is limited to a broadcaster which is funded primarily through advertising revenues (generally referred to as free to air broadcaster) and would thus exclude a pay-TV broadcaster.

We believe that the Preliminary Report should be refined and distinguish three distinct categories, namely public service broadcasters, commercial free to air broadcasters and pay-TV broadcasters. Each of these three types of operators pursues a distinct business model and competition authorities have traditionally distinguished between these three types of operators. The Preliminary Report contains a definition of a "subscription-based" business model but does not list a "pay-tv broadcaster" as one of the "type of operators". It seems to us that this omission was unintended, in particular in light of the ongoing case on cross-border access to pay-TV.

### **Business model of a commercial free-to-air broadcaster**

We acknowledge the Commission's statement that its definitions of "type of operators" and "business models" have the benefit of simplicity and are necessarily imprecise. Nonetheless, we believe that the reference to funding only, in the case of a commercial free to air broadcasters, falls short of an accurate description.

Commercial free to air broadcasters have an intrinsic business interest to ensure the widest distribution possible of their programmes. Technical reach, as distribution is referred to in business terms, is equally important irrespective of the distribution technologies used, be they offline or online. Free to air broadcasters have to ensure that they are present on as many platforms and as many devices as possible. Technical reach combined with actual audience translates into advertising revenue; actual audience is dependent on exclusive content: the more attractive content is offered exclusively, the higher advertising revenue will be. High advertising revenues in turn are needed to

pay for the cost of acquisition and production of new attractive programming for the benefit of the viewers.

We believe that a more refined definition of “commercial broadcaster” and “advertising funded” business model would be useful for the case-by-case assessment of potential competition issues such as the ones flagged in the Preliminary Report. Different conclusions may be reached for each type of broadcaster.

### **Potential competition issues in e-commerce in digital content**

The sector inquiry aims at identifying potential contractual restrictions originating from the contractual relationships between suppliers (right holders) and providers of online digital content services (licensees).

#### **Bundling of rights**

The Preliminary Report states that the preliminary results of the sector inquiry indicate that the rights for online distribution are often bundled together with other licensed rights. A preliminary finding of the sector inquiry is therefore that the scope of rights actually licensed to distribute digital content services tends to be broader than the minimum set of rights that would be necessary to provide online digital content services, and often encompasses other transmission and access technologies (para 629).

We believe that this preliminary finding does not apply to commercial free to air broadcasters as they aim to ensure the widest distribution possible on all transmission / access technologies. Viewers expect to be able to access commercial free to air broadcasts at any time on any of the transmission technologies available to them on any device, in and outside their home. This encompasses both offline and online distribution. Partial non-availability of commercial free to air broadcasts for viewers on some of the transmission and access technologies would reduce the viewer’s loyalty to the broadcaster’s free to air services and ultimately damage the commercial broadcasters’ business.

The explanation given above fits perfectly with the preliminary results of the sector inquiry (para 689) which show that rights for online transmission of content are to a large extent licensed together with the rights for other transmission technologies (such as satellite, cable or mobile).

The Preliminary Report, however, also states that *“Respondents have indicated that rights for online transmission are often included as part of a package of licensed rights regardless of whether the contracting party is actually active in online distribution of digital content or not”* (para 690 – emphasis added). We do not know the basis for such claims but want to highlight that such a practice does not apply to RTL Group. We therefore call on the Commission to clarify in the Final Report which type of operator is referred to.

The Preliminary Report states in its summary on bundling of rights that *“The widespread use of exclusivity in conjunction with the licensing of technology rights implies that both new entrants and existing operators which do not have access to specific technology rights might find it difficult to acquire online transmission rights depending on how such rights have been licensed (split up) and to*

*which company in a particular territory....Bundling of rights may not only negatively impact users in the sense of reducing the availability of content, but may also prevent other operators from competing specifically for online services.*" (emphasis added – page 218/219)

This statement is not applicable to commercial free to air broadcasters. As explained above, commercial free to air broadcasters need widest possible distribution which we do with add-on services such as the VOD options, M6 Play, RTL Now. Online only distribution (webcasting) of long form audiovisual content (eg films, television fiction, children television, non-fiction television – (=product categories in accordance with Preliminary Report on page 193/194) does not yet build the audiences that are necessary to build a sustainable advertising funded business. Online only audiovisual operators such as Amazon Prime and Netflix only offer paid services (subscription based or transaction-based) but have not (yet) engaged in pure advertising funded services.


#### **Geo-blocking of digital content services**

The Commission listed geo-blocking as one of the potential competition issues in e-commerce in digital content. Case AT.40023 regarding cross-border access to pay-TV is still pending. However, the Commission's acceptance of commitments offered by Paramount gives guidance on the Commission's position in relation to pay-TV.

The Commission made it clear that the assessment of potential competition issues would be made on a case-by-case basis, having regard to the characteristics of the specific product and geographic markets. We would like to reiterate the characteristics of commercial free to air broadcasters which we already have addressed in our submission to the Commission's Questionnaire and which are different from pay-TV:

"Territoriality" and "exclusivity" are "must have" ingredients for advertising funded services, in particular in relation to premium content. Both factors are essential to attract advertisers and charge them premium prices. Absent territoriality and exclusivity, commercial free-to-air broadcasters would no longer generate the same amount of advertising revenues and, as a consequence, would no longer be able to maintain the same level of high quality content. This would trigger a downward spiral with less revenue for the service, less attractive content, fewer own productions and ultimately lower quality for the viewer. We have therefore maintained that restrictions on cross-border access falls within the category of "justified geoblocking" as set out in para 2.3 DSM Communications of 6 May 2015. Maintaining the current restrictions is therefore for the benefit of the consumer who will continue to receive a high quality service for free.

Luxembourg, November 18<sup>th</sup>, 2016

A handwritten signature in blue ink, reading "Christa Hauptmann".

Dr. Christian Hauptmann  
Deputy General Counsel