

**Audiovisual Sector Coalition Position Paper**  
 on the European Commission Draft Regulation Applying the Country of  
 Origin Principle to Licensing of Certain Broadcasters' Rights Online  
**A Threat to Consumer Choice and Cultural Diversity in Europe**

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The European Commission's draft Regulation is bad for the European film and TV industries and bad for the European consumer. It proposes to extend the "Country of Origin" principle to certain online TV-services such as catch-up and simulcast by creating a 'legal fiction' that the service is only being made available in the Member State of establishment of the broadcaster, even when in fact, the service is accessible in all 28 Member States. This effectively removes the territorial nature of copyright and licensing on which the film and television industry in Europe relies to finance and distribute films and TV programmes and to satisfy consumer demand.

The European Commission insists that the draft Regulation will "only" affect limited forms of use which it considers 'ancillary' such as **catch-up TV**. This is a misconception. From a

commercial standpoint, there is nothing ‘ancillary’ about catch-up services; they are now primary to the reach of most broadcast content. In reality, catch-up is where a fast growing proportion of TV viewing is migrating in many EU markets: catch-up is many European viewers’ preferred access to TV programming, including in many instances film and drama. As a consequence, the financial value of primary television licenses is increasingly linked to catch-up services and the two sets of rights are negotiated in a single transaction.

The draft Regulation recognises that this *de facto* pan-European license would undermine commercial incentives for financing and distributing films and television works in Europe by providing in Recital 11 of the draft Regulation the possibility to limit the scope of the license by contract.

However, the contractual opt-out will be of little use to most producers and distributors in Europe: public service broadcasters have considerable negotiating power when pre-financing, acquiring or commissioning content from independent film and television producers. They would have little difficulty insisting on catch-up rights going beyond the territory licensed for the primary broadcasting rights – the producer would simply not have the commercial bargaining power to insist on the contractual opt-out.

The *de facto* pan-European license resulting from the draft Regulation would have a negative impact on the value of distribution rights in territories beyond the country of origin of the broadcaster, contrary to the European Commission’s commitment in its 2015 Communication<sup>1</sup>. It would also have a negative impact on right holders and their business partners’ ability to determine the release strategy for a work in each territory and across the different release platforms<sup>2</sup>.

In addition, the EU competition authorities are – in parallel – investigating contractual arrangements between right holders and broadcasters<sup>3</sup>. Their focus is on whether contractual clauses limiting the availability of a pay-TV service to a given territory infringes EU competition law. As a result, it is very likely that the contractual opt-out in Recital 11 could be severely limited by the application of EU competition law.

Thus, the draft Regulation would effectively result in the compulsory application of the country-of-origin principle to the licensing of catch-up services either by way of default business practice because the balance of power between public service broadcasters and producers or by application of EU competition law.

The financing and distribution of films and TV content in Europe relies on the licensing of exploitation rights on the basis of territorial exclusivity. This model is essential for the financing of new original films and TV programmes in Europe. This is recognized by multiple independent economic studies (see assessment referred to in Footnote 3 and attached hereto for ease of reference). The *de facto* imposition of a pan-European licence would encourage market concentration and the dominance of the few larger conglomerates able to tender for such pan-European licences.

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<sup>1</sup> [Towards a modern, more European copyright framework, COM \(2015\) 626 final](#).

<sup>2</sup> Release strategies vary from country to country due to important factors that influence the economic value of each version, market or territory: competition from local and international content will vary from country to country, and local holiday periods, traditions and other relevant elements also influence the optimal strategy for each work in each market.

<sup>3</sup> [Case AT.40023](#) - Cross-border access to pay-TV.

Pan-European licensing would have negative effects on creators, producers, distributors and broadcasters throughout Europe. Consumers are likely to pay a higher price for content and suffer the consequences of a loss of cultural diversity.

- > Producers and creators of film, television programmes, news and local content would see investments dwindle as they directly depend on broadcasters for the financing of this content<sup>4</sup>.
- > EU producers, distributors and broadcasters are dependent on territorial licensing in order to co-finance and offer films and television works with an international appeal. De facto pan-EU licensing would reduce opportunities for them to continue to do so. It would diminish their profit margins and impair their ability to reinvest revenues in new original content.
- > Consumers would have to pay more as prices would align with the spending power of the more affluent consumer markets in the EU. Additionally, many consumers, especially in smaller Member States, would suffer the consequences of less choice of content tailored to their language and/or national cultures/preferences/tastes as a result of concentration on the broadcasting/distribution side.

The negative impact of the draft Regulation on the overall European film and television sector needs to be carefully assessed. The Commission has failed to produce convincing evidence that the proposed Regulation is required<sup>5</sup>. Although the European Commission alleges that the current licensing framework results in high transaction costs, it has not corroborated this assertion with any facts or figures.

## Conclusion

The draft Regulation would have a negative impact on the film and television sector in Europe and as a result thereof, a loss of value and choice for European consumers. It will undermine the commercial freedom on which the success of the film and television sector depends. The current EU copyright system already allows online services to acquire rights on a local, regional or pan-European basis in a flexible manner. It enables the film and television sector to experiment with new models that address real market demand without jeopardizing financing and/or optimal distribution. This benefits consumers by guaranteeing them access to a wide diversity of film and television works.

The draft Regulation will not serve consumer interests as it will reduce consumer choice and increase prices, which cannot be the objective of the Digital Single Market. The draft Regulation's unwarranted impact would actually go against Europeans' strong attachment to their respective national and regional roots, their language and cultures, as they treat films and television works as a means of reinforcing the diversity of cultural and linguistic narratives and identities which make up Europe.

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<sup>4</sup> Broadcasters provide funding for over 80% of all original European TV content, [Culture and copyright in the digital environment](#), 4 February 2013.

<sup>5</sup> Audiovisual Sector Analysis / European Commission's Impact Assessment on the Proposed Regulation on Country of Origin for Online Transmissions.

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