

Position Paper  
on the European Commission Proposal  
on Regulation on certain online transmissions of broadcasting  
organisations and retransmissions of television and radio  
programmes (Revisited Sat/Cab)

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*The International Federation of Film Distributors' Associations (FIAD) represents national organisations of film distribution companies whose main activity is the release of cinematographic works in cinemas. Film distributors are the lynchpin of the film value chain, helping to connect filmmakers with finance and finished films with wide-ranging audiences; effective distribution is vital to Europe's diverse film culture and film industry in an era of abundant media supply. FIAD's members operate in 15 countries where they cover 90 to 100 percent of the theatrical market.*

## Introduction

FIAD shares the ambition of the European Commission to improve the circulation of European films, taking advantage of the online opportunities in order to build an audience for non-national European content. After all, this is distributors' daily job. While we share this ambition, we are not convinced by the benefits of the Proposal for a Regulation regarding online transmissions published on 14<sup>th</sup> of September, which can in fact have major, negative consequences for the future of the European film distribution sector, the whole AV industry value chain and ultimate European citizens. The European audiovisual sector employs more than 1 million people across the EU and generates more than €97bn a year.<sup>1</sup> While this Commission has put emphasis on Better Regulation principles, it seems that they are not applied in practice. The proposed Regulation is not underpinned with real evidence, but rather flawed assumptions, contradictions and unverified facts, exposing a politically motivated, rather than evidence-based policy making. There is no evidence to demonstrate the existence of a problem on which EU action could be justified, while on the contrary the proposal ignores the significant damaging effects on territorial licensing and cultural diversity.

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<sup>1</sup>[Oxera study 2016 - The impact of cross-border access to audiovisual content on EU consumers](#)

The Commission's Impact Assessment (IA) justifies the application of the Country of Origin principle to ancillary online services to broadcasting through the “*high transaction costs for the acquisition of rights for their online services when they are offered across borders*”. Nevertheless, the IA acknowledges that neither the EC, nor any stakeholder has any data to verify this assumption. According to a study undertaken Charles River Associates for the European Commission in 2014 there are only “arguably small or negligible” transaction costs for broadcasters and other service providers.<sup>2</sup>It is surprising to us that even the European Broadcasting Union, representing public broadcasters, the most vocal player in calling for EC action in this field, has not been able to provide any data on cross-border transaction costs for clearing online rights. It is surprising that public funded EBU members are the only ones experiencing problems in the field, while the rest of the AV industry can properly operates ensuring content delivery to European citizens.

FIAD urges the European Parliament and the Council to **reject Article 2** that introduces the Country of Origin principle for simulcasting and catch-up TV. Those services are not considered ancillary in the digital era. Their inclusion in the Regulation **undermines contractual freedom**, devalues/cannibalises the rights of rightholders and thus **the principle of territoriality** which is key for content funding. The Regulation also produces other negative externalities such as less diversity, less quality, less investment in content, less consumer access and choice, more piracy.

1. **No real benefits** of extending the Country of Origin principle
2. **Real risks** to contractual freedom
3. **Negative consequences** for cultural diversity and harmful economic impact on the sector.
  - **Decline in investment**, so **fewer European works** financed
  - **Overall, less access to culturally diverse content** and indeed less content available online
  - **Threat to European co-production**
  - **Few dominant players** in the market

<sup>2</sup>[Economic analysis of the territoriality of the making available right in the EU, Charles Rivers Associates, March 2014, p. 96.](#)

## Extension of country of origin to catch up → de-value of rights

Contractual freedom, which is essential to the entire pre-financing system employed by the film sector, has been “preserved” in Recital 11, meaning that the country of origin could be extended to catch-up services if the rightsholder agrees. In theory, this would allow the producers to sell by territory, platform and even language so that they can attract multiple investors who provide the financing necessary for the production.

However, in this case contractual freedom is an illusion and therefore makes the recital redundant. Consumers' viewing habits have altered and more and more are turning to online services, which means that catch-up services have become a primary right, rather than ancillary one. In practice, this means that catch-up services are linked to the primary right and thus there is no incentive to negotiate them separate. Thus, in reality the primary television licenses are increasingly negotiated in bundles which include catch-up services. Due to the weak bargaining power, producers cannot prevent this and in practice catch-up is not monetized separately. Therefore, it will be almost impossible for the producer to resist demands for pan-European catch up rights. It is no longer the producer's decision which rights he/she sells, but it will be de facto the broadcaster who will get them all.

If the financial value of primary television licenses includes catch-up services it **undermines contractual freedom and investment in the film sector**. The financing and future distribution of each film on a territorial basis is indispensable to finance European films and to ensure their best possible promotion and distribution in each individual market.

We believe that right holders' contractual freedom and their exclusive right to choose the terms of distribution, meaning also including the territorial scope, are crucial. Without this freedom to negotiate, many European films would not exist at all.

## The legislation does not operate in isolation

Not only contractual freedom is a myth for many producers, but **Sky UK case poses even bigger threat to principle of territoriality and contractual freedom**. The extension of the country of origin principle to ‘catch up’ together with the inquiry carried out by DG Competition could limit the contractual freedom, consequently eroding the entire pre-financing system. The implications could go well beyond the narrow confines of this specific case and have negative consequences for the entire sector. Such a decision could affect the European sector as a whole and set a precedent that could have a contagious effect on the market. Co-productions which are the primary source of funding for European films would be rendered virtually impossible.

Contractual clauses preventing or limiting response to unsolicited requests are part of a territorial system which is the foundation of the European audiovisual sector and is crucial for the production and distribution of audiovisual works.

The European film distribution industry is mostly made up of small and medium sized enterprises, each with marketing and distribution expertise to work within a specific national context. Tailored advertising and marketing strategies are required, and the timing of release is based on specific national factors, events and developments. Territorial release is necessary to guarantee revenues to meet the investment and it also maximises the exposure by keeping in mind local demand, sensitivities and culture.

The Regulation will harm consumers by undermining the financing and distribution of culturally diverse content, especially tailored local content. The costs of tailoring it to each market are too high and no territoriality means even higher risk and **less investment** by national distributors. Fewer local distributors investing in these films would mean a **less diverse offer for European citizens** and **less quality**. Whilst the audience could access the online service in another country, consumers will not be aware of the existence of this content and it will not be available in their language. Smaller markets will be marginalised as the film will not be provided with the dubbing and subtitling. So without the local film distributors the European films will be confined to the home market thus limiting the audience for these films. In fact, this means **less consumer access** to tailored local content.

Moreover, consumers would have to buy content at the price of the most “popular market”, which practically means the market where the content was the most expensive. As a consequence, the loss of tailored local offerings at tailored price points may actually lead to more piracy as consumers attempt to access illegal content outside the “popular market” in order to be able to watch their favourite programmes which would have become more expensive to purchase legally<sup>3</sup>.

### Example of effect of extending country of origin to catch up and simulcasting

#### Case study 1

A Romanian distributor releases a Romanian film. Some months later it will be available on Romanian catch up TV and simulcast online during the broadcasts.

<sup>3</sup>As evidenced by the 2014 Charles River Associates economic study (on behalf of the European Commission<sup>13</sup>) policy changes to limit right holders' ability to license content on a territory-by-territory basis could negatively affect social welfare and might decrease, rather than increase, consumer choice. The Oxera Study 20 of May 2016 (and many other studies on the subject<sup>21</sup>) confirms that compelling cross-border access to AV content and services is likely to adversely affect European consumers and the AV 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).

A Belgian distributor would like to release the film in Belgium, but Romanian speaking citizens can already access the film on the Romanian catch up TV and via simulcasting.

### **Consequence:**

The distributor wanted to release the film in Belgium because he calculated the Romanian community as part of his audience. Since it is already available online for part of his audience the Belgian distributor will have less return on investment and in the end he might choose not to release and commercialise the film.

This devaluation of rights is likely to lead to distributors not wanting to pay as much for the rights, or deciding not to buy them at all because the investment does not weigh up against the potential revenue. This results in less financing of films.

Furthermore, distributors in certain territories would not want to invest in promotion because the risk of people watching it elsewhere would be too high. This results in less circulation, particularly theatrical releases, but also subsequent online distribution.

**The result is less access, less circulation and less availability of films.**

## Conclusions

The International Federation of Film Distributors' Associations (FIAD) would like to stress that it is deeply concerned with any proposed measures which would force restrictions on contractual freedom and territoriality. This would seriously undermine the future growth and prosperity of the European audiovisual industry and would furthermore be detrimental to Europe's cultural diversity and therefore to Europe's citizens and consumers.

We live in an era where everybody pursues short terms gains. Applying the country of origin principle to online services might result in more cross-border accessibility in the short term, but in the long run, it will **destroy the European audiovisual industry and transforms the EU into an area of uniform content consumption**, mostly coming from the US; a punch to European cultural diversity and against the principles of the UNESCO Convention on cultural diversity.

It will not bring benefits for public service broadcasters as stated in the Impact Assessment and could in fact undermine the principle of territoriality for content bought from third parties such as feature films because of the impact on contractual freedom.

### **About Territoriality**

Territoriality means that rights holders hold a distinct exclusive right in each country and have the contractual freedom to license it to different distribution channels. The

extension of the country of origin principle to simulcasting and catch up TV means that copyright would only have to be cleared in one EU country in order to be shown on these platforms. This might sound as a good thing, but it is not. Territoriality contributes directly to the financing of, for example, feature films through the pre-sale of rights. Films are risky investments, which involve very high fixed costs and unit production costs, as well as important marketing costs and therefore require the intervention of numerous players of different sizes and expertise along the value chain. At the development stage of a film it is a common practice for producers – or sales agents or local territorial distributors – to pre-sell rights to major television broadcasters, distributors/publishers by platform, language and/or territory as a way to obtain financing at a very early stage of the project. The pre-sale of rights makes it possible to cover high up-front production costs and often forms the collateral for a production loan from a bank.

Under a territorial pre-sales agreement, a distributor in a particular territory agrees to pay an advance against a negotiated royalty (or a flat price) upon completion and delivery of the film. Pre-sales are often associated with licensing on a territory-by-territory basis, as financial advances are secured against exclusive local distribution rights before the film enters into production. This exclusivity provides the distributor with the possibility of recoupment on each investment.