



Cannes Declaration European Film Agency Directors

Preserving territoriality to improve the circulation of European films and access to European culture

22 May 2017

In the context of the 70th edition of the Cannes Film Festival and the European Film Agency Directors (EFADs) plenary meeting, the EFADs would like to highlight its concerns with the actions being taken at European Union level which could affect cultural diversity, contractual freedom and territorial exclusivity.

The EFADs brings together the Directors of European Film Agencies in 31 countries in Europe (EU, Iceland, Norway and Switzerland). We represent government or government associated public bodies, responsible for national funding for the audiovisual sector and advising or regulating on all aspects of audiovisual policies. In total, the EFADs' members and their governments fund around three billion Euros every year through subsidies and tax reliefs to foster the creation, production, promotion, distribution, and exhibition of European audiovisual and cinematographic works. The purpose of the EFADs and its members is to promote and preserve cultural diversity of the audiovisual sector in Europe and to act in the public interest.

The European Commission published its Digital Single Market Strategy in May 2015, which outlined future proposals with the objective of improving the circulation and access to European audiovisual works.¹ While the EFADs share the Commission's overall ambitions of increasing the circulation of films and access to the benefit of audiences and businesses across Europe, the film agencies are **concerned by certain proposals which would completely undermine contractual freedom and territorial exclusivity**. This would threaten cultural diversity at a time in European history when diversity of expression is under renewed pressure.

This includes the draft regulation which applies a **country of origin principle to certain online transmissions** (simulcast, catch-up and preview) of broadcasting organisations, adopted by the Commission on 14 September 2016.² It also includes the Commission's **competition investigation into cross-border access to pay-TV** launched in January 2014,³ and subsequent statement of objections sent to Sky UK and several large US studios in July 2015,⁴ and the **sector inquiry into e-commerce** launched on 6 May 2015.⁵

Furthermore, the possible inclusion of audiovisual services in a review clause of the geo-blocking regulation, even though it has no immediate impact, worries the EFADs and its members. Indeed, it creates uncertainty concerning the future of territorial licencing.⁶

¹ European Commission. 6 May 2015. "A Digital Single Market Strategy for Europe." COM(2015) 192 final

² European Commission. 14 September 2016. "Proposal for a Regulation on certain online transmissions of broadcasting organisations and retransmissions" 2016/0284 (COD)

³ European Commission. 13 January 2014. "Cross-border access to pay-TV." Case AT. 40023

⁴ European Commission. 23 July 2015. "Antitrust: Commission sends Statement of Objections on cross-border provision of pay-TV services available in UK and Ireland." Press Release IP/15/5432

⁵ European Commission. 6 May 2015. "Antitrust: Commission launches e-commerce sector inquiry." Press Release IP/15/4921

⁶ European Commission. 25 May 2016. "Proposal for a Regulation on addressing geo-blocking and other forms of discrimination." 2016/0152 (COD)

The EFADs are concerned about the impact of these initiatives, which are likely to:

- 1. Weaken the negotiating positions of European producers, sales agents and distributors.** The country of origin principle will make it even more difficult for these parties to resist demands for pan-European catch-up rights from broadcasters, thereby **undermining their ability to sell their rights territory-by-territory.**
- 2. Make it impossible for the European independent audiovisual sector to use contractual clauses** which enforce territorial exclusivity. If the Statement of Objections in the competition investigation were upheld, it would set a **dangerous precedent and lead to a contagion effect** which would affect the licensing and financing practices of the European independent audiovisual sector, not just the parties involved.
- 3. Prohibit the use of geo-blocking to support exclusive distribution arrangements.** Should the Commission consider, after 3 years, that the audiovisual sector should be included in the scope of the geo-blocking regulation, this would make enforcement of territorial exclusivity impossible and mean, de facto, the end of territorial licencing. In the meanwhile, players of the European audiovisual industry would have to deal with this sword of Damocles.
- 4. Weaken the exclusivity previously granted:** a broadcaster will have the possibility to distribute works on a market were other operators have negotiated the rights.
- 5. This would lead to the following consequences:**
 - (a) Severe weakening of European culture and cultural diversity**
 - (b) Diminished investment in European audiovisual works: no incentive to invest in production or distribution without the guarantee of an exclusive window of exploitation**
 - (c) Reduction in the value of rights for European audiovisual works: no incentive to buy the rights after production without the guarantee of an exclusive window of exploitation**
 - (d) Decline in the number of productions, particularly European and international co-productions, that massively rely on funds and investment from different countries**
 - (e) Weakened competition in the online marketplace because of the advantages given to dominant players through their capacity to buy Pan-European licences**
 - (f) Less circulation of European works across borders and smaller audiences without the investment and expertise of local distributors and broadcasters**

The EFADs would like to note:

- 1. Article 167 of the Treaty of the Functioning of the European Union** which states that the European Union “**shall contribute to the flowering of the cultures of the Member States, whilst respecting their national and regional diversity.**”⁷
- 2. Article 3 of the Treaty of the European Union** which states that the European Union shall **respect the Member States’ rich cultural and linguistic diversity.**

⁷ European Union. 13 December 2007. “Consolidated Version of the Treaty on the Functioning of the European Union.” Official Journal C 326, 26/10/2012 P. 0001 - 0390

3. The commitment in the **Digital Single Market Strategy** published in May 2015 to ensure cross-border access to legally purchased online services whilst **“respecting the value of rights in the audiovisual sector.”**⁸
4. The **EU principles of subsidiarity and proportionality** in **Article 5 of the Treaty of the European Union**. The choice of a Regulation as a legal instrument in this area is highly debatable.⁹
5. The **Better Regulation Guidelines** and evidence based policy. The Impact Assessment failed to cover the “existence, scale and consequences of a problem and the question whether or not Union action is needed” and to provide the indispensable “quantitative and qualitative analyses” required.¹⁰
6. **Charter of fundamental rights of the European Union**. The **Right to Property** (Article 17) and the **Freedom to Conduct a Business** (Article 16) are considerably undermined by the proposal.¹¹

THREFORE the EFADs call on the European Commission, the European Parliament and the Council to:

1. **Preserve contractual freedom and territorial exclusivity.** This specific model of financing in the European audiovisual sector is fundamental to the creation, promotion and circulation of Europe’s cultural diversity to the benefit of European audiences. It is the foundation of the audiovisual sector, reducing the risk of investment and sharing the costs across different players who decide the best way to promote and tailor a film to each specific market in order to build the audience.
2. **Delete the Country of Origin principle in the draft Regulation.** The country of origin principle in the Satellite and Cable Directive cannot be simply transposed to the online environment. The Directive was developed specifically for satellite and it is not fit for purpose in the fast-moving online environment.
3. **Take full account of all the potential detrimental effects of the Sky case (Case AT.40023) on the European audiovisual industry and cultural diversity, and refrain from adopting any decision that will harm the sustainability and efficiency of the financing and distribution of works, weaken local broadcasters, and benefit mainly big players at the expense of smaller European players.**
4. **Remove audiovisual services entirely from the geo-blocking regulation.** As stated by the European Commission, “the financing of the audiovisual sector widely relies on a system based on territorial exclusivity, which as such cannot be considered as unjustified geo-blocking.”¹²

⁸ European Commission. 6 May 2015. “Communication A Digital Single Market Strategy for Europe,” COM (2015) 192 final. 2.4 Better access to digital content.

⁹ European Union. 13 December 2007. “Consolidated Version of the Treaty on the European Union” Official Journal C 326, 26/10/2012 P. 0001 - 0390

¹⁰ European Commission. 19 May 2015. “Better Regulation Guidelines.” Commission Staff Working Document. SWD(2015) 111 final

¹¹ European Union. 26 October 2012. “Charter of fundamental rights of the EU.” C 326/391

¹² European Commission. 6 May 2015. “Questions and Answers – Digital Single Market Strategy,” Fact Sheet MEMO/15/4920

5. Instead, focus on initiatives that will make a real difference, such as:
- (a) Ensuring the exposure, visibility and promotion of European works on on-demand services in line with the new provisions of the Audiovisual Media Services Directive**
 - (b) Improving enforcement against the unauthorised use of copyright protected works**
 - (c) Developing and promoting legal offers in the different Member States through initiatives such as the European Union Intellectual Property Office's Agorateka and voluntary codes of practice**
 - (d) Facilitating data transparency of individual film performance on VoD services**
 - (e) Strengthening the supporting initiatives which foster European creation and circulation, increase the budget of the current and future Creative Europe MEDIA programme and ensure it focuses on the needs of the European audiovisual sector and audiences, such as film education and media literacy initiatives**
 - (f) Building, with local distributors, the audience and appetite for a variety of European audiovisual works, and support their promotion and audience building activities at the national and European level**