



Position Paper on the Proposed Sat Cab Regulation

Why the EFADs strongly opposes Article 2 in the Proposal for a Regulation on certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes

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Digital opportunities and challenges are at the heart of the EFADs' priorities

The European Film Agency Directors (EFADs) share the European Commission's ambition in the Digital Single Market (DSM) strategy to support the competitiveness of European companies in the digital audiovisual market, to promote cultural diversity and facilitate cultural exchange through European works across borders. Cultural diversity and cultural exchange are the backbone of the European Union and are especially important in these times of significant social and political change. The EFADs have been working towards these objectives for years, particularly taking into account the opportunities presented by digital technology. Several members have been engaged in national initiatives to foster access and promotion of works and develop online distribution to the benefit of a wide range of audiences across the EU.

The EFADs insist on the need to ensure at European and national level the best conditions for financing, distributing and marketing European audiovisual works. It is therefore absolutely crucial that territoriality and contractual freedom are not undermined by any of the DSM proposals. The European Commission pledged in its DSM Strategy that it will "*ensure cross-border access to legally purchased online services while respecting the value of rights in the audiovisual sector.*"¹ This is clearly not the case with the proposed Regulation and we are extremely concerned by the extension of the Country of Origin principle to broadcasters' ancillary online services which could undermine territorial exclusivity. Our concerns are exacerbated by the link this proposal has with the Commission's DG Competition investigations, such as the one into cross-border access to pay-TV content (Case AT. 40023).

For European independent companies, territorial exclusivity is a precondition for the financing, distribution, and marketing of European works. Any erosion or elimination of this principle would have serious negative consequences for the creation and circulation of cultural diverse works across the EU. For example, it would profoundly affect the ability to finance European films and TV series and will negatively affect European co-productions in particular, which the European Commission seeks to facilitate in the framework of the MEDIA sub-programme.

For all these reasons the EFADs strongly urge the Members of the European Parliament and the Member States to **oppose Article 2 in its current form** and request its deletion along with corresponding Articles 1(a) and 5.

¹ European Commission. 6th May 2015. "A Digital Single Market Strategy for Europe." COM(2015) 192 final p. 8

No clear benefits of extending the Country of Origin principle

- The reasons for, and benefits of, extending the Country of Origin principle to broadcasters' ancillary online services such as catch-up TV is unclear. Current **copyright law does not prevent right holders from selling multi-territorial licenses**. In fact, broadcasters can already buy rights for multiple territories and a large amount of TV programmes (news, TV shows, etc.) produced and owned by broadcasters are already accessible across borders without any difficulties under the current regime (news, entertainment programmes and even sometimes features films or series).²
- In its Impact Assessment (IA) the European Commission identifies an issue of *"high transaction costs for the acquisition of rights for their online services when they are offered across borders."*³ At the same time the Commission states that they do not have the data to support this assumption. In reality, these **transaction costs** in the case of an audiovisual work **are low as the exclusive exploitation rights are usually held by the producer or licensee (sales agent or distributor)**.⁴ The Commission only highlights that transactions costs exist for clearing rights locally. The EFADs therefore do not understand **the problem the European Commission is trying to address**.
- The Commission's IA states that the extension of the Country of Origin principle takes into account the implications for cultural diversity.⁵ However, it is clear that undermining territorial exclusivity would mean fewer important cultural works and less access to those works across borders. **Cultural diversity would be severely weakened** by this Regulation which is in contradiction to Article 167 of the Treaty on the Functioning of the European Union⁶ and the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions.⁷

Clear risks to contractual freedom

- The extension of the Country of Origin principle would **erode the principle of territoriality**. Catch-up services are increasingly used by consumers to access content. These rights, which are negotiated at the same time as linear services, are sometimes not monetised and the online rights are often sold at no extra cost. It is doubtful that this will change under a proposal which will **undermine the bargaining power of producers, sales agents and distributors**.
- This will not lead to higher remuneration for producers or other right holders, on the contrary. In a situation where broadcasters would be able to get the rights to all 28 EU Member States by default, the right holders will be in a weaker negotiating position. In a context where funding for audiovisual works is more and more difficult to find and where TV channels remains key financiers⁸ it would therefore be difficult to resist demands for pan-European catch-up rights.
- Furthermore, the Commission's proposal needs to be evaluated in the light of the signals emerging from DG Competition. Our national film agencies are deeply concerned by **the Commission's sectoral**

² See for example the ARTE channel

³ Impact Assessment, page. 24

⁴ Charles River Associates. March 2014. Economic Analysis of the Territoriality of the Making Available Right in the EU.

⁵ Impact Assessment, page. 12

⁶ European Union. **13 December 2007**. "Treaty on the Functioning of the European Union" *Official Journal C 326*, 26/10/2012 P. 0001 - 0390

⁷ http://en.unesco.org/creativity/sites/creativity/files/convention2005_basictext_en.pdf

⁸ In France, broadcasters are involved in the financing of 70% of French films. The share of channels in the financing of works is on average 30% for cinema production and 70% for audiovisual fictions. Source: Bilan 2015, CNC - <http://www.cnc.fr/web/fr/bilans/-/ressources/9217573>

inquiry into the e-commerce section and, above all, the competition inquiry into Cross-Border Access to pay-TV content (Case AT. 40023). This could set a dangerous precedent and have a consequence on contractual practices by forbidding the use of contractual clauses that allow the introduction of geo-filtering.

- The impact of this case will not be restricted to the relationship between Sky UK and the studios but will also directly affect the licensing practices of Europe’s independent audiovisual companies and have a contagious effect across all platforms and media, regardless of the specific modes of distribution concerned. Therefore, the combination of an extension of the Country of Origin principle and prohibition of contractual clauses could lead to the **elimination of territorial exclusive licensing**, even if this is limited to broadcasters’ ancillary online services.

Clear consequences for cultural diversity and a negative economic impact on the sector

1. A decline in investment, less sales after production and fewer European works financed

- Territorial exclusivity encourages investment in production and the selling of rights for European works across borders in a high risk sector where only a minority of audiovisual works make a profit. It allows broadcasters and other platforms in the value chain to calculate the potential audience and to ensure a return on investment. These broadcasters will often invest before the production has even begun which is a vital source of investment which ensures the audiovisual work gets made. To maximise the audience, the release windows and timings of release will often vary from country to country based on decisions made on how to maximise the audience in the specific cultural and linguistic conditions in the territory.
- If contractual freedom is undermined and European audiovisual works are accessible on a pan-European basis then exclusivity cannot be guaranteed. Catch-up TV services periods vary from one country to another, from 7 days in certain countries to up to 30 days in the UK and Ireland.⁹ If a European audiovisual work is already available on one of these services on a pan-European basis then it is unlikely that other broadcasters and distributors will buy the rights to the work and build the audience in their territory. Without exclusivity there will be uncertainties in the value chain and it is doubtful that non-national European audiovisual works will be taken up by the big European broadcasters. The risks will be even higher for the smaller broadcasters abroad to buy the rights.
- The impact would be a **reduction in investment in European works before and after production, particularly from broadcasters located in Member States other than the country of origin.**¹⁰ This will also **negatively impact the value of rights** because few operators will be willing to pay what they used to pay considering the absence of real territorial exclusivity. Cross-border audiences for European audiovisual works are limited and whilst the original broadcaster may pay a larger amount for the license, this will not compensate for the loss of selling the rights to multiple broadcasters. This would **reduce the audience, lead to fewer diverse and quality audiovisual works being produced and circulated**, and ultimately **jeopardize the sustainability of the European audiovisual industry**.

⁹ For example, in countries such as Germany, Belgium, Cyprus, France, Greece and Italy the catch-up period is 7 days. In Germany, films and TV series that are coproduced with broadcasters are currently classified as own/commissioned productions and available in catch up services. Films and TV series that are bought by broadcasters (with no financing from them) are excluded from the scope of catch-up. These rules are being examined at the moment. German politicians and broadcasters aim at an unlimited catch-up period for all TV content (even online first shall be made possible – meaning catch-up without or prior to a satellite transmission).

¹⁰European Audiovisual Observatory. October 2016. “Films on television: Origin , age and circulation”.
www.obs.coe.int/documents/205595/264623/Films+on+television+2016+%28G.+Fontaine%29.pdf/21353830-fff0-467d-b133-87a2fc472bb1

2. A threat to the successful model of European co-production

- Undermining territoriality would **particularly affect co-productions** that are funded by private and public partners from different countries. In co-productions, investment from broadcasters is an important part of the budget (pre-financing). These works also travel better and therefore generate more sales in the different territories, based on the exclusive territorial exploitation. Especially in the case of co-productions between countries sharing the same language, there will be no incentive for more than one broadcaster to invest and take the risk because the exclusivity will not be guaranteed. Co-productions are an economic as well as cultural pillar of the European audiovisual sector and facilitate the cross border circulation of works. The current text will contradict and undermine all the efforts made by MEDIA to facilitate co-productions and their circulation in Europe.

3. A concentration of power in the hand of dominant players

- Moreover, contrary to what the Commission seems to believe, the elimination of effective territorial exclusivity will **not strengthen, but weaken competition**. Independent operators will be put in a weaker market position. The ability to provide cross-border services will benefit only a select number of large actors, who could afford to buy and offer high value audiovisual works on a pan-European basis and invest in large European marketing and promotion campaigns. As English is the most widely understood language throughout the European Union, focusing on this content would be the obvious business decision to reach the largest possible audience. There is a danger that smaller markets and less widely-spoken languages could be marginalised.

4. Less content available online and less access to culturally diverse content

- It is our view that the negative consequences of eroding or eliminating effective territoriality far outweigh the positive. European audiovisual works may be made available online on a pan-European basis in the home market, there will be no local players tailoring the release to the specific culture, language and national demand which will mean smaller audiences for audiovisual works across borders.
- This would be to the detriment of European consumers and citizens as it would result in **less choice and could lead to higher prices in some territories**.¹¹ The Oxera study illustrates that undermining territoriality is likely to affect European consumers and the audiovisual 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).¹²

For all these reasons, we recommend the exclusion of Article 2 from the Regulation and we will work closely with the European Parliament and Council to ensure cultural and linguistic diversity continues to flourish in Europe.

Annex – Recent examples

The Regulation on online transmissions of broadcasting organisations and retransmissions of television and radio programmes diminishes the investment upfront in the production as well as money generated by sales in the different territories for a wide range of European works. Here are recent examples of European cinema and TV productions that would be strongly affected by the new rules.

¹¹ Charles River Associates, March 2014, p. 2, 118.

¹² Oxera and O&O, May 2016. “The impact of cross-border access to audiovisual content on EU consumers.”



1. The Young Pope (Wildside, Sky Europe, HBO, Canal +, MediaPro) – 2016

A Sky/HBO/Canal + original series, produced by Wildside (IT) and co-produced by Haut et Court (FR) and MediaPro (ES). **The Young Pope** is a drama series from Academy Award-winning director, Paolo Sorrentino starring two-time Academy Award nominee Jude Law and Academy Award-winning actress Diane Keaton in the main roles.

Starting with Wildside's ongoing commitment to invest in the development of the highest quality original productions featuring world class talent both in front of and behind the camera, the first broadcaster on board was Sky Italia who committed at an early stage with a relevant financing contribution, both as a licensed broadcaster for the Italian territory and as co-producer of the series. Soon the affiliated broadcasters Sky UK and Sky DE also joined, through extensive licensing deals covering all rights in their Sky territories (UK, Ireland, Germany, Austria). The independent production company Haut et Court entered as the French co-producing counterpart, bringing also the important partner Canal+, renowned globally for its quality, originality and content innovation.

Wildside, Sky and Canal+ were joined on the project by HBO, producer of some of the most popular and critically acclaimed television of the 21st Century, including *Sex and the City*, *The Sopranos*, *The Wire*, *Game of Thrones* and *True Detective*, working for the first time on an Italian original production. In conclusion one last co-producer joined, the Spanish Media-company MediaPro, licensing the rights in Portugal and Spain.

2. Medici: Masters of Florence (Lux Vide, Rai, Wild Bunch) – 2016

Medici is a period drama set in Florence in the early 15th century, co-created by Frank Spotnitz ("The X-Files," "The Man in the High Castle") and Nicholas Meyer ("Star Trek II: The Wrath of Khan"), and starring Dustin Hoffman and Richard Madden ("Game of Thrones").

The first season of Lux Vide's production of *Medici* (eight episodes) was financed principally by the Italian public broadcaster RAI Radio Televisione Italiana, which acquired the exclusive Italian rights. In order to cover the balance of the direct production costs, Lux Vide turned to Wild Bunch, which acquired the French, UK and German rights to the first season for a certain period, and Wild Bunch was also appointed the series' sales agent for the certain territories putting up a minimum guarantee. Lux Vide financed the remainder of the cost of production out of its own resources, with a goal of recouping that investment from the international sales and supporting schemes (Italian tax credit scheme and regional funds).

The Series drew record viewers for its debut broadcast on Italy's Rai 1, according to Italian ratings compiler Auditel.

3. Grave - 2016

Grave is a recent French- Belgian co-production released in 2016, directed and written by Julia Ducournau (French). The feature film was nominated and awarded at the Cannes, Toronto, London and Sitges Festivals. The film was supported by two EFADs members, CNC (France) and the Centre du Cinéma et de l'Audiovisuel de la Fédération Wallonie-Bruxelles (Belgium). A significant amount of pre-financing came from both French and Belgian TV channels which represented 34% of the total budget. The film has been sold in all territories.