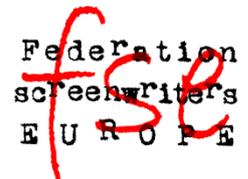


## Letter from the Audio-Visual Sector Coalition

on the proposed Regulation extending the application of the Country of Origin principle to certain online transmissions by broadcasting organisations and retransmissions of television and radio programmes

**Why the provisions on Country-of-Origin must be deleted and why compromises on scope of services/content covered are harmful to the entire audiovisual eco-system in Europe**



Brussels, 27 September 2017

We, the undersigned organisations working across the audiovisual sector in Europe, represent film and TV directors, screenwriters, performers and other creators, skilled professionals, producers, distributors and publishers of film and television content, and cinema operators. We would like to reiterate our strong opposition to any legislative initiative which would erode the territoriality of copyright and remove the commercial freedom of rights owners to achieve a return on their investment. The audio-visual sector in the EU relies on copyright, underpinned by fundamental principles of EU law, including in particular the commercial freedom to finance and distribute films and TV programmes and to satisfy consumer demand for culturally diverse audio-visual content and services.

We have repeatedly underlined that the imposition of the “**Country-of-Origin**” principle, on certain ancillary online TV-services, such as catch-up and simulcast, by the Proposed Regulation<sup>1</sup> **would remove 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**. Extending legislation developed for a specific technology more than two decades ago (satellite distribution in the early 1990s) is simply not fit for purpose for the flexible, fast and technology-driven online environment.

The same concerns apply to attempts to mitigate the harmful impact of the Proposed Regulation by reducing the scope of application of the default Country-of-Origin principle to so-called ‘commissioned’, ‘fully-financed’, ‘co-’ or ‘own’ productions. While such amendments to Article 2 of the Proposed Regulation would arguably limit the scope of application of the Country-of-Origin principle, they would still negatively affect many productions and cannot cure the fundamental harm caused by removing the territorial nature of copyright.

All audio-visual productions that are so-called ‘commissioned’, ‘co-produced’, ‘fully-financed’ by the broadcaster and/or ‘own’ productions of the broadcaster would be caught by the Country-of-Origin principle and this would severely diminish the producer’s capability to continue to run a viable business creating audiovisual content.

Very little television programming is developed and produced without commissioning of some kind. Moreover, co-productions and/ or commissioned content **often involve a split of the distribution rights between the broadcaster and the producer as part of the contractual arrangements governing the sharing of responsibilities, financing and future recoupment**. Whilst the production budget of a commissioned production may appear to be ‘fully’ financed by the broadcaster(s), there are many cases where the producer retains certain distribution rights, as the outcome of the negotiation with the commissioning broadcaster(s), including broadcast rights for territories outside the primary license. Underlying rights, such as format rights, are in most cases owned by the producer or a third party. Retained distribution rights are actively exploited by the production company or a designated international distributor. The activity generates additional revenue and ensures optimal distribution and exploitation of the content in other EU markets. In many cases, this exploitation makes up the margin for the producer. Applying the Country-of-Origin principle to such cases would expropriate these retained exclusive rights from producers, thereby undermining their capability to recoup their original pre-production investments in the creative development of commissioned productions. The ability to recoup these investments is pivotal in building the ability of the EU’s production SMEs to underwrite development activities on future projects, many of which may not be ultimately commissioned or “fully financed” by broadcasters and therefore require a higher financial risk-taking by the producer.

Furthermore, there are instances where the division of rights becomes part of the financing plan irrespective of whether the producer actually acts as a co-producer or works on a production for hire or ‘entreprise’/contract basis.

**It is important to realise that producers and distributors of audiovisual content must be free to agree full exclusivity as to time/ window, territory and platform in order to both raise financing and to recoup investments<sup>2</sup>**. However, the practical impact of application of the Country-of-Origin

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<sup>1</sup> Proposal for a Regulation laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes COM(2016) 594 final

<sup>2</sup>Producers sell territorial/language exclusivity; time exclusivity (also sometimes referred to as windows or chronology – rights which are granted time exclusivity early in the film’s release often come at a premium price); and distribution channel exclusivity to finance film production and ensure the optimal distribution to consumers. Each title has its own business model and producers and distributors will either agree on exclusivity over specific

principle to certain online services by broadcasters (and thus allowing transmitting audiovisual works into other territories) would mean that the producer is no longer in position to grant full exclusivity to the distributors in the territories it has retained. The retention of certain territories by producers is invariably a vital component of the financing plan – without which many TV productions and films in the EU would not get made. If the Country-of-Origin principle were to apply to these productions, the producer of these productions (having retained certain territorial rights) would have to inform potential distributors in other territories that they would not have full exclusivity in their country and that consumers in their territories would be able to watch the content via the online services of a broadcaster in another country. This would de facto undermine the ‘premium’ or ‘premiere’ value of the first broadcast of the production by broadcasters and distributors in other EU countries, whose exclusivity would thus be eroded. The inevitable impact of this erosion of territorial exclusivity is a **devaluation of the monetary value of the rights, which would result in lower acquisition prices. In turn, the decline in licensing income would result in reduced revenues, with attendant decline, resulting in a decrease of funds available for the financing of new productions. In essence, this development would jeopardise the competitiveness of Europe’s audiovisual content industry, with fewer opportunities to recoup investments via distribution and less opportunities to have so-called ‘commissioned’, ‘fully financed’, ‘purchased’, co- and/or ‘own’ productions circulating inside the EU.** Potential distributors, who are also key funders, will be dis-incentivized and deterred from investing. Thus, the effect will not only be a reduction in price, but in many cases licences will not be sold at all.

**Moreover, the terms ‘fully financed’, ‘commissioned’, ‘purchased’ or ‘own’ productions are not harmonized legal terms – nor should they be. In each Member State these concepts differ, depending on local regulations, terms of trade, and basically the commercial viability of each individual project. Each production project has its own tailor-made financing plan, adapted to creative, commercial and regulatory requirements and its own structure of working terms, producer’s fee, division of exploitation rights (primary/secondary exploitation, territories, platforms, etc.) and even contributions in-kind where the budget is cut to the bare bones and the producer must offer in-kind contribution to complete the project.**

**For these reasons, any attempt to narrow the scope of application of the Country of Origin, rather than deleting the principle as such from the Proposed Regulation, would thus leave EU audiovisual content exposed to the default rule in the Proposed Regulation i.e., “buy a license for one Member State, get the rest of the EU on top.”**

**The Commission’s assertion, despite the shortcomings of its Impact Assessment that the Proposed Regulation will only provide for a default rule which private parties would be free to contract around is unfortunately an empty promise.** The market reality is that right holders do not have the necessary bargaining power in negotiations with major broadcasters to obtain such an opt-out from the application of Country-of Origin licensing.

In addition, we are deeply concerned that **the Proposed Regulation’s assurance of commercial freedom to license content is a hollow assertion.** There is a fundamental interaction between the ongoing DG Competition pay-TV investigation as well as DG Competition’s e-commerce sector enquiry<sup>3</sup> and the Proposed Regulation. The Commission itself has recently publicly acknowledged this link in

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distribution rights, e.g. cinema, DVD, online and broadcasting, or over all types of distribution so that the future distributor can off-set marketing costs and possible losses on one distribution channel against better income from other distribution channels.

<sup>3</sup> <https://chillingcompetition.com/2017/06/15/copyright-reform-against-the-background-of-pay-tv-and-murphy/>.

several instances, while denying it in other fora. A reference in the body of the Proposed Regulation<sup>4</sup> that the Country-of-Origin principle shall not undermine contractual freedom will not provide protection if either of these investigations results in prohibiting full territorial exclusivity. In fact, any such provision is expressly subordinated to other EU law rules, including competition law and policy, which the Proposed Regulation cannot overrule.

It is often argued that the Proposed Regulation will “only” affect limited forms of licensing referred to as ‘ancillary’ such as catch-up TV. This is a misconception: from a commercial standpoint, there is nothing ‘ancillary’ about catch-up services which are now 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 the licensing of catch-up services** and the two sets of rights are **negotiated in a single transaction**, and this often at the financing stage of a film or TV programming. It also means that if Country-of-Origin licensing is applicable to certain online rights (and the content thus accessible from other territories), then the value of other distribution rights (and online rights) for those other territories will decrease - in the case of a split rights’ deal between broadcaster and producer, those rights (e.g. international) retained by the producer will be of less or no value.

It is clear that in the market place **catch-up services are seen as key services from both a strategic point of view given changes in consumer behavior and in light of increasing competition from VOD and SVOD services**. In the future, catch-up services are likely to be increasingly editorialized in a manner similar to linear services (and may even include premium content which may or not be available on the linear service). By including catch-up services as part of the concept ‘ancillary services’ and subjecting them to Country-of-Origin licensing - even if limited to so-called ‘commissioned’, ‘fully financed’, ‘purchased’ or ‘own production’ works - the Proposed Regulation will put at risk the value of the rights on all platforms and territories.

**We therefore urge you to reject the various attempts at compromises in favour of a full recognition of the importance of encouraging a thriving and culturally diverse audiovisual sector in the EU. We urge you to reject and delete the proposed extension of the Country-of Origin principle and, accordingly, to delete Articles 1a, 2 and 5 and the accompanying recitals (8 – 11, 15) from the Proposed Regulation to ensure that the audiovisual sector can continue to grow and provide employment for European audiovisual creators and skilled professionals.**

We thank you for your kind consideration of the above. We renew our interest in having an opportunity to discuss these matters with you in further detail at your earliest convenience.

Sincerely yours,

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<sup>4</sup> As for instance in Article 2(1b) new of the EP CULT Opinion.

## Signatories

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