

## AUDIOVISUAL SECTOR ANALYSIS

### EUROPEAN COMMISSION'S IMPACT ASSESSMENT ON THE PROPOSED REGULATION ON COUNTRY OF ORIGIN FOR ONLINE TRANSMISSIONS<sup>1</sup>



The Impact Assessment<sup>2</sup> on the proposed Regulation rests on fundamentally flawed assumptions, contradictions and unverified facts that expose the EC to the charge of a biased and politically motivated, rather than evidence-based policy agenda.

The three key takeaways for policy-makers are that:

1. There is no evidence to demonstrate the existence of a problem on which EU action could be warranted.
2. The EC ignores the potential pitfalls of the current proposals particularly as regards its impact on territorial licensing and cultural diversity.
3. A neutral and fact based evaluation of the retained option ("Option 2") and the status quo option ("Baseline") shows that the "baseline" scenario should have been retained.

<sup>1</sup> [Proposal for a Regulation of the European Parliament and of the Council 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> [Impact Assessment on the modernisation of EU copyright rules](#) SWD(2016)301.

## What should an Impact Assessment (thereafter “IA”) achieve?

IA’s are part of the better regulation obligations and are obligatory for all the European Commission’s initiatives that are likely to have significant economic, environmental or social impacts. As highlighted by the EC’s own guidelines:

*“Impact assessment is about gathering and analysing evidence to support policy making. In this process, **it verifies the existence of a problem** [bold added], identifies its underlying causes, assesses whether EU action is needed, and analyses the advantages and disadvantages of available solutions.”<sup>3</sup>*

**The IA accompanying the online transmissions proposal does not justify the initiative as it fails to deliver on any of these steps.**

### 1. Absence of verification of the existence of a problem

#### 1.1. Myth: High transaction costs

##### Identified problem/underlying causes according to EC

The identified problem to justify the application of the Country of Origin principle to ancillary online services to a broadcast is the “high transaction costs for the acquisition of rights for their online services when they are offered across borders”<sup>4</sup>.

But the IA acknowledges that the EC has no data to verify this assumption<sup>5</sup> and that even the stakeholder (the EBU, representing public broadcasters) most vocal 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, as compared to transaction costs in one jurisdiction:

*“However, despite requests, neither EBU nor the Association of Commercial Television in Europe (ACT) provided data on cross-border transaction costs for clearing online rights, as compared to transaction costs in one jurisdiction.”<sup>6</sup>*

Yet confusingly goes on to assert that:

*“These costs and the complexity of the task increase significantly if broadcasters want to make their online services available across borders.”*

##### Counterpoint(s)

In so doing, the Commission bases its proposed policy actions on an inexistent fact base and in the process chooses to ignore results of its own a commissioned study<sup>7</sup>. The [2014 CRA study](#) found only small or negligible transaction costs for broadcasters as the exclusive exploitation of rights for an audiovisual work are typically aggregated in the hands of a single licensing entity:

<sup>3</sup> [Better Regulation - Guidelines on Impact Assessment](#).

<sup>4</sup> [Impact Assessment](#), p. 24.

<sup>5</sup> IA, p. 21.

<sup>6</sup> IA, p. 20, footnote 70.

<sup>7</sup> [Economic Analysis of the Territoriality of the Making Available Right in the EU](#), Charles River Associates, March 2014, p.96, also invoked in the IA, p. 14, footnote 35.

*“Transaction costs faced by audiovisual service providers are alleviated by the fact that, unlike in the music industry, the exclusive exploitation rights in an audiovisual work are typically aggregated in the hands of a single licensing entity, the producer. The majority of the rights associated with the different inputs of creative contributors to the final audiovisual work are indeed acquired by the producer of that work who can then license ‘the majority of forms of exploitation of the audiovisual work, including on-demand uses, on an individual basis.’ As a consequence, service providers making an audiovisual work available online can clear the required exclusive rights in that work within a single transaction.”*

*“Since on-demand television services consist of an extension of the classical offer of broadcasters, the online rights that broadcasters need to acquire in order to make commissioned and acquired audiovisual productions available online are typically included in the original contract agreed between the producer and the broadcaster. The transaction costs associated with the addition of new clauses into the initial agreement are then arguably small or negligible since online rights clearance is typically included in a pre-existing transaction.”*

Absent any data that prove higher transaction costs for clearing rights on a cross-border basis, the EC chooses to highlight transaction costs public broadcasters would face when they clear rights *locally*<sup>8</sup>. Ironically, the proposed solution (applying the CoO principle) will not remedy these local transaction costs and therefore it is completely irrelevant to invoke them in this context.

Further the EC recognises that these (wrongly) assumed high transaction costs for cross-border rights clearance are not necessarily the main/only reason that determinate cross-border accessibility of TV and radio programmes<sup>9</sup>.

### Conclusion

**The entire IA is based on a false assumption. There is no evidence to demonstrate the existence of a problem on which EU action could be warranted.**

## 1.2. Myth: Proposal will facilitate complex rights clearance for news programmes

### Identified problem/underlying causes according to EC

The IA invokes that clearing rights for news programmes is particularly complex under the status quo because these rights (which underline an important part of broadcasters’ transmissions) have to be cleared in a short time-frame<sup>10</sup>.

### Counterpoints

The IA is confusing in that while making the above assertion it also admits that news programmes are typically the type of content that is not geo-blocked by broadcasters<sup>11</sup>.

News reporting is one of the common exceptions to copyright in the EU, and more broadly. **German Copyright law**, for example, § 50 of the copyright law provides for such an exception. Such exceptions already permit timely reporting of news and current affairs.

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<sup>8</sup> IA, p. 22.

<sup>9</sup> IA, p. 23.

<sup>10</sup> IA, p. 22 and 32.

<sup>11</sup> See for example IA, p. 24, footnote 86.

## Conclusion

As news programming is not geo-blocked in most cases, it entirely contradicts the assumption that transaction costs would be specifically high for these types of content and would therefore hamper the Digital Single Market.

### 1.3. Myth: Consumer demand is not being met

#### Identified problem/underlying causes according to EC

The Commission claims that there is “*consumer interest for content from other Member States*” citing a 2011 Eurobarometer survey in which 19% of Europeans indicated they were interested in receiving content from another EU country, as well as a 2015 Eurobarometer survey finding that 8% of respondents had tried to access content from an online service meant for users in another Member State<sup>12</sup>. The Commission also cited public consultation responses.

#### Counterpoint(s)

The finding that only 8% of Internet users tried to access content through online services meant for users in other Member States (5% for audiovisual content, 3% music, 2% sports and video games and 1% e-books) **in fact demonstrates low demand**, and does not support regulatory intervention.

Other findings of the **2015 Eurobarometer**<sup>13</sup> survey confirm this:

- 94% of respondents said they were able to find the audiovisual content they were looking for online.
- Out of the 95% of respondents who had not tried to access audiovisual content through online services meant for users in another Member State, 54% reported that they are not interested in this content and 51% that they have sufficient choice of content in their own country.

## Conclusion

The IA misrepresents data in order to fit its political goals.

## 2. Absence of a viable analysis of the advantages/disadvantages of solutions put forward

### 2.1. Myth: Contractual freedom is safeguarded - effects of competition law

#### Approach chosen by EC in its analysis on advantages/disadvantages

The IA fails to consider the preferred option together with the **application of the free movement of services principle and competition law**, therefore ignoring the practical effects of the preferred/pursued Option 2. The IA is explicit on this:

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<sup>12</sup> IA, p. 13.

<sup>13</sup> [Eurobarometer 411](#), August 2015.

*“As it is not possible to predict the future effects that the application of the free movement of services principle and competition law may have on the territorial licensing of rights, this IA does not attempt to assess impacts that the proposed intervention may have in combination with these rules”<sup>14</sup>*

### Counterpoint(s)

In this context, it should be noted that the draft regulation should not be viewed in isolation and that the issues described in this paper are exacerbated when the draft regulation is considered, in particular, in conjunction with the ongoing competition investigation of licensing arrangements between a major Pay TV broadcasters and major rightholders (Case AT.40023 - *Cross-border access to pay-TV*) and the sector inquiry into e-commerce launched by the EC on 6 May 2015 as part of the Digital Single Market strategy.

To the extent that following these or any future investigations by DG Competition, and/or the application of EU competition law and internal market rules more generally, limit rightholders’ contractual freedom and/or their ability to secure territorial licenses with geo-blocking provisions, the extension of CoO will effectively call into question territorial licensing, even if it is limited to ancillary services to a broadcast and seeks to safeguard contractual freedom (Recital 11).

If CoO would apply, right holders would not be able to fall back on the territorial limitation of copyright (because a license in the CoO automatically applies to the other 27 MSs) and would not be able to protect the territorial scope of the licence.

The EC commissioned **CRA study** clearly outlines the consequences of undermining/banning territorial licensing:

*Policy changes which reduce the effectiveness of territorial licensing entail a risk of undermining the associated efficiencies which do not appear to be justified by the possibility to reduce the risk of harm. Moreover, it has to be considered that if the ability to implement territorial restraints is hampered, firms might try to substitute these with alternative arrangements as different forms of vertical agreements are often substitutable”<sup>15</sup>*

*“A total ban on territorial licensing might decrease, rather than increase, consumer choice. This could happen along two dimensions. First, because the ability of the original rightholders to efficiently extract the rents generated by their content in the retail markets might decrease, they could have weaker incentives to invest in the production of new content which would then in turn decrease the availability of new content for consumers. Second, a scenario is possible where the price for access to content in some territories might increase (while it might decrease in other territories). This would be the case, for example, when a ban on territorial licensing limits the scope for price discrimination. If, as a result, prices become prohibitively high for some national markets, they might not be served. This suggests a cautious approach in implementing the objectives of Internal Market”<sup>16</sup>*

### Conclusion

**Policy cannot be made in a vacuum. As AV stakeholders have put forward on multiple occasions, without any pertinent responses from the EC, there are real concerns on how the proposal in combination with other measures could undermine the principle of territorial exclusivity. A**

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<sup>14</sup> IA, p. 28

<sup>15</sup> CRA, p. 126.

<sup>16</sup> CRA, p. 9.

principle that the EC has itself upheld as the cornerstone of the AV industry and for which there is no workable alternative.

## 2.2. Myth: the Proposal will uphold cultural diversity

### Approach chosen by EC in its analysis on advantages/disadvantages

The EC claims that “all proposed options take into account the implications of EU action for cultural diversity”<sup>17</sup> The IA reminds that “Article 167(4) TFEU provides that the EU shall take cultural aspects into account in its action under other provisions of the Treaties, in particular in order to respect and to promote the diversity of its cultures”.

### Counterpoints

Study after study from both industry and the Commission indicate the fundamental and irreversible harm to the industry and cultural diversity caused by weakening territoriality. As evidenced by the 2014 Charles River Associates economic study (on behalf of the European Commission ) 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.

In addition, the Oxera Study of May 2016 (and many other studies on the subject) also confirms that greater 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). It also shows that up to 37% of film and 48% of TV series could be put at risk. Less European content would be produced and consumers would have less access to content. More cross-border accessibility may be the result in the short term, but in the long run, the European audiovisual industry would see a reduction in production with a resulting negative effect also on cultural diversity. The IA entirely fails to address those risks.

### General conclusion

**The Commission’s Impact Assessment rests on fundamentally flawed assumptions, contradictions and unverified facts. The conclusions drawn are not only erroneous but fundamentally erode the AV sector’s economic model, access to works and consumers ‘choice. We believe that the European Commission is wrongfully presenting the Proposal as a merely facilitating measure (retaining contractual freedom) with a narrow scope (limited to broadcaster’s ancillary services), even though it is essential not to look at the Proposal in isolation but in conjunction with ongoing competition investigations and thus the effects on the entire audiovisual value chain.**

**The audiovisual sector believes that the Proposal will force cross border access in ways that will negatively affect consumer choice, impact jobs and growth, and inevitably erode cultural diversity.**

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<sup>17</sup> IA, p. 12.

## Signatories

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