

The Consumer Voice in Europe

## PROPOSAL FOR A REGULATION ON ONLINE BROADCASTING

Position paper



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## Why it matters to consumers

Consumers are increasingly interested in accessing online audio-visual content such as films, TV shows, sport events or documentaries from providers across the EU. This is because consumers often do not have enough legal offers locally or simply because the content of their choice is not available in the consumers' country. A recent survey from our German member vzbv showed that 70% of German consumers would like to subscribe to foreign offers for sports, films and TV series. The demand for foreign content is even higher among young people. However, due to outdated copyright laws and anticompetitive practices, providers are prevented from offering content across borders. In Europe's Digital Single Market, it is fundamental that there are clear rules to facilitate the acquisition of broadcasting rights so more content can easily circulate across the EU in benefit of all consumers and citizens.

## Summary

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BEUC welcomes the European Commission's 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<sup>1</sup>.

This proposal sets the grounds to facilitate the clearance of rights by broadcasting organisations and therefore enables them to provide greater choices of content to consumers across the EU. By introducing the country-of-origin principle for the transmission of copyrighted content, it creates the conditions for a real Single Market of content whilst respecting the principle of contractual freedom and territorial licensing practices.

However, BEUC would like to suggest some elements to improve the current text of the Commission's proposal, namely:

- To extend the application of the country of origin principle to all online services (e.g. live TV and catch-up services) from broadcasting organisations and to online video-on-demand platforms.
- The system of mandatory collective management for the rights in retransmission should also apply to over-the-top (OTT) retransmission services.
- The proposal should include a provision prohibiting any contractual restrictions to passive sales of online audio-visual services.
- Member States should have the possibility to allow, under certain conditions, for the extension of licenses concluded by collective management organisations (CMOs) to rights holders of the same category of works as those covered by the CMO.

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<sup>1</sup> COM(2016) 594 final

## 1. General comments

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BEUC welcomes the European Commission's 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.

Consumers are demanding greater access to audio-visual content services across the European Union. However, they often encounter difficulties when trying to find and access services available in other countries.

### 1.1. Facilitating cross-border availability of content is good for consumers and competition

BEUC believes that this proposal represents a unique opportunity to address, from a regulatory perspective, the problem of lack of cross-border access in the audio-visual sector, which is currently detrimental to consumers and restricts competition in the Digital Single Market.

The lack of cross-border availability of content has become a prominent problem for consumers in the audiovisual sector, even when the technology allows service providers to distribute content via multiple platforms.

According to a recent report<sup>2</sup> of DG Competition, 82% and 62% of public and commercial broadcasters respectively use at least one type of discriminatory behaviour for their online services. The European Commission's Impact Assessment for the proposed regulation provides further data about the differences among member states availability of cross-border online transmissions by public and private broadcasters.

For example, SVT (Sweden) geo-blocks its simulcasting TV services (they are available only in Sweden) while LTV (Lithuania) does not geo-block most of its simulcasting services, except for certain international entertainment. Mediathek, the livestream channel of ZDF (Germany), is geo-blocked and cross-border access is allowed only to selected programmes and the BBC (UK) channels BBC1, BBC2, BBC4 online services (BBC iPlayer) are available only in the United Kingdom while BBC World News online services are available in other MS.

From the commercial broadcasters, TV4 Play (Sweden) geo-blocks online simulcasting TV services except live TV news; TV3 (Lithuania) news and own production is not geo-blocked but international entertainment programmes are geo-blocked; RTL TV Now (Germany) makes simulcasting services available only locally while live TV News are available internationally (paid services) and ITV (UK) free online services are only available for individuals located in the United Kingdom, Channel Islands or Isle of Man, however, ITV offers ITV Essentials, a paid service which provides a selection of programmes available only in 11 Member States<sup>3</sup>.

This situation is detrimental to consumers and the Single Market for two main reasons.

- First, it prevents consumers who often do not have access to a range of online audio-visual services in their countries to look for offers in other Member States (a Lithuanian or Croatian consumer for instance is currently not allowed to subscribe to an online audio-visual service-provider in France or the UK).

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<sup>2</sup> Initial findings from the European Commission's eCommerce Sector Inquiry published in March 2016

<sup>3</sup> Impact Assessment, Part 2/3, page 81

- Secondly, the monopoly created by exclusive licensing practices, does not allow consumers who may find the desired audio-visual content through local distributors (e.g. cable or satellite operator) to look for better offers outside their own country (territory of exclusivity). This is all the more a problem because existing data reveal that consumers are not always satisfied with the content provided locally and would like to access foreign films or TV programmes.

Over 11,000 Danish consumers signed-up to a collective complaint initiated by our member organisation Danish Consumer Council about the quality of pay-TV services. At least three out of four Danish consumers are paying for channels they do not watch. This is often because basic pay-TV packages are designed to push the consumer to pay more for premium services such as sports and films<sup>4</sup>. Additionally, a recent survey from our German member vzbv also shows that 70% of German consumers would like to subscribe to foreign offers for sports, films and TV series.<sup>5</sup>

The current situation is not acceptable in a Single Market. Consumers should be allowed to look outside their home market for legal audio-visual content offers of their choice without virtual walls built up by rights holders and distributors.

Additionally, it is important to bear in mind that the best and most effective way to tackle piracy is by providing consumers with affordable and quality legal offers. A recent study<sup>6</sup> from the Observatory of the European Intellectual Property Office (EUIPO) shows that this is the way forward: 80% of consumers considered that affordable legal offers were better than downloading from unauthorised sources. This study also shows that one of the main drivers for youngsters to turn to piracy is lack of availability.

One tool to achieve that is to ease the availability of offers across the EU so consumers can decide from which country and service provider buy contents according to their own preferences.

Finally, the European Parliament in its 2015 copyright resolution also echoed the need to adopt adequate solutions for better cross-border accessibility of services and copyright content for consumers<sup>7</sup>.

## **1.2. Contractual freedom or territorial licensing models remain untouched**

The European Commission's proposal does not preclude territorial licensing practices in the distribution of audio-visual content across the European Union.

BEUC recognises the importance for content producers to sell their products on a territorial basis since this allows the development of legal offers that can be better tailored to the expectations of most consumers in each domestic market.

When evaluating the impact of the proposed country-of-origin principle to online services the following points should be considered:

- Territoriality will continue to play a key role in the European online audio-visual market because the country-of-origin principle will not prevent rights holders from selling their content on a country-by-country basis. This is because local adaptations

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<sup>4</sup> Ref.: <http://taenk.dk/tema/hvorfor-f-skal-vi-betale-for-noget-vi-ikke-ser>

<sup>5</sup> Ref.: [http://www.vzbv.de/sites/default/files/digital\\_content\\_without\\_borders\\_factsheet\\_vzbv.pdf](http://www.vzbv.de/sites/default/files/digital_content_without_borders_factsheet_vzbv.pdf)

<sup>6</sup> Ref. : <https://euipo.europa.eu/ohimportal/en/web/observatory/ip-youth-scoreboard>

<sup>7</sup> EP Resolution of 24 June 2015 on the implementation of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (2014/2256(INI)), §9

of contents will still be necessary particularly for consumers that want to watch content with subtitles in their local language.

- Secondly, the extension of the country-of-origin principle to online distribution does not amount to a pan-European licensing system. It is important to make clear that the aim of the proposed regulation is to enable broadcasters to give access to content to consumers from another Member State without having to go through costly and inefficient clearing procedures.
- Thirdly, the extension of the country-of-origin principle to online distribution will not affect Europe's cultural and linguistic diversity. It is wrong to assume that because consumers should be able to access content from other Member States, they will stop consuming local audio-visual services. Recent data reveals that consumption patterns in traditional distribution channels like cinema remain stable and local TV is still the most used medium to watch audio-visual content. According to a recent survey from the European Commission from 2015, a clear majority of respondents (62 per cent) only wish to watch films or series that have either audio or subtitles in their country's language<sup>8</sup>.

On the contrary, Europe's cultural diversity will be strengthened because consumers will be able to discover other European cultures just through one click. The European market is already dominated by Hollywood productions and one of the structural weaknesses of the European film industry is the lacking ability to reaching a broader audience beyond national borders<sup>9</sup>. Thus, addressing copyright rules to facilitate the clearance of rights will be an important step to bring European works closer to consumers across the EU.

### **1.3. The proposal and the ongoing European Commission's competition investigation on cross-border access to pay-TV services do not overlap**

The current proposal and the ongoing European Commission anti-trust pay-TV case<sup>10</sup> in which BEUC is an interested-third party are both important steps to improve the circulation of and access to content in the Single Market and, ultimately, they will help in addressing geo-blocking practices.

However, it is important to highlight that these measures do not overlap but complement each other. While the European Commission's proposal addresses the question of acquisition and clearance of rights for transmission and retransmission of online services in a Single Market, DG Competition's cross-border pay-TV case only deals with the use of licensing agreements between Hollywood production studios and pay-TV providers which contain clauses to prohibit passive sales.

Consequently, while the new legislation will bring legal clarity from a regulatory perspective, the European competition case will only lead to a decision concerning the validity of a *specific* anti-competitive contractual term. This administrative decision will not regulate by any means the acquisition or clearance of copyright.

For this reason, BEUC urges the EU legislator to continue advancing on the European Commission's proposal and not wait for the conclusion of the competition case.

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<sup>8</sup> Flash Eurobarometer 411 on 'Cross-border access to online content', 2015, p. 81

<sup>9</sup> This is confirmed by the European Commission's 2014 Communication "European film in the digital era", p 3

<sup>10</sup> Case AT.40023 – Cross-border access to pay-TV

## 2. Specific comments

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### 2.1. Scope of application (Article 1, (1) a)

The current proposal applies the country of origin principle to online services from broadcasting organisations.

The primary result of this approach from a consumer perspective will be that consumers across the EU would be able to access certain audio-visual content offered online irrespective of whether or not the content has been exclusively licensed on a country-by-country basis. This is contingent upon the fact that the online content shall be accessed “as is” and under the same conditions as for consumers in the primary market. This means without further adaptations or modifications by downstream intermediaries.

While this extension is positive in itself, we regret the lack of ambition regarding the services covered by the scope of this proposal.

First, the extension of the CoO principle only applies to certain *ancillary* online services from broadcasting organisations which are subordinated to the initial broadcast. This is for example the case of services providing access to television and radio programmes in a linear manner simultaneously to the broadcast as well as services giving access to programmes within a defined time-period after the broadcast (e.g. catch-up). On the other hand, services which are not subordinated to the initial broadcast (e.g. webcasting and video-on-demand services) are not included in the scope.

BEUC believes that all online services from broadcasting organisations, irrespectively of whether they are ancillary or not to the initial broadcast, should also be made available to consumers located outside of the exclusive territory. The objective of public broadcasters to disseminate their content to the widest possible audience requires them to be able to make the best use of available technology most commonly used by consumers.

Furthermore, BEUC does not support the exclusion of the application of the CoO to video-on-demand services provided by platforms (e.g. Netflix, Hulu, Amazon Prime, iTunes). Their inclusion would significantly contribute to the increase of consumers’ choice as these platforms are extremely popular among consumers.

The European Commission in its Impact Assessment stated that it is too early to apply the CoO to platforms and that it would be more appropriate to follow a gradual approach<sup>11</sup>. BEUC considers that if the legislation is meant to be future proof, targeting platforms distributing content online is of major importance. This is particularly relevant if we consider that consumers are already using these channels to access content as shown by a survey done by our Belgian member Test-Achats/Test-Aankoop Belgian consumers (between 18 and 64 years old) use mainly online stores and streaming platforms to watch content online<sup>12</sup>.

Thus, it is unfortunate that the European Commission is not looking beyond current market structures of public and private broadcasters instead of seeking to also develop a framework that will help the development of legal services provided by online platforms.

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<sup>11</sup> European Commission’s Impact Assessment, part 1/3, page 27

<sup>12</sup> Test-Aankoop, Budget&Droit 247, July/August 2016

### BEUC's recommendation

**To extend the application of the country of origin principle to all online services from broadcasting organisations and to online video-on-demand platforms.**

## 2.2. Mandatory collective management for the rights in retransmission (Article 1, (1) b)

The proposal unsurprisingly extends the system of mandatory collective managements provided in the SatCab Directive<sup>13</sup> to Internet Protocol television (IPTV) retransmission services and other retransmissions provided over 'closed' electronic networks. This system is intended to facilitate the clearance of rights for retransmissions.

While we understand such approach, we strongly regret that it is not applicable to over-the-top (OTT) retransmission services. This would mean that if the transmission is initiated by a broadcasting organisation, an OTT will not be able to retransmit that content while enjoying from the protection of the country of origin principle and from a reduction in the transaction costs for the clearance of rights. The obligation for OTTs to individually negotiate license agreements with right holders and content producers of all the content they retransmit is too burdensome and risks hindering innovation.

Furthermore, the exclusion of these services from the Regulation also risks causing legal fragmentation within the EU as some Member States (Denmark, Finland and Sweden) have already successfully extended their collective licensing systems to retransmissions by all means, including OTTs.

### BEUC's recommendation

**The system of mandatory collective management for the rights in retransmission should also apply to over-the-top's (OTT) retransmission services.**

## 2.3. Contractual freedom and restrictions to cross-border "passive sales"

As it was previously mentioned, BEUC acknowledges the possibility for content producers to sell their products on a territorial basis since this allows the development of legal offers that could be better tailored to the expectations of consumers in each domestic market.

However, the "freedom of contract" should not be used by rights holders and incumbent content providers to create territorial monopolies by means of absolute exclusive licensing practices and geo-blocking technologies. These restrictions create an environment where it can be difficult for new innovative services to flourish and for consumers to have access to a wide variety of competitive quality offers.

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<sup>13</sup> Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission

In the *Premier League*<sup>14</sup> ruling, the European Court of Justice confirmed that contractual clauses restricting passive sales in satellite services by prohibiting broadcasters from effecting any cross-border provision of services (“*absolute territorial exclusivity*”) are against Article 101(1) TFEU.

The criteria used in this case should also apply by analogy to online distribution of content as the grounds for the decision can be transposed to these services.

Therefore, BEUC supports the inclusion of a provision in the Regulation specifically preventing the possibility for rights holders to contractually restrict “passive sales” in the context of this Regulation<sup>15</sup>. In practice, this provision should prevent rights holders and other content producers from imposing any contractual restriction to unsolicited requests from consumers who are trying to access online services falling under the scope of this Regulation. Without jeopardising right holders’ contractual freedom to negotiate on a territorial basis, such a provision would guarantee the safeguard of competition law enforcement in what regards passive sales.

#### **BEUC’s recommendation**

**The proposal should include a provision prohibiting any contractual restrictions to passive sales of online audio-visual services.**

#### **2.4. Extended collective licensing**

BEUC supports the inclusion of a provision enabling Member States to extend licenses concluded by collective management organisations (CMOs) with online platforms to right holders of the same category of works as those covered by the relevant CMO. This provision should also clarify the conditions for the application of extended collective licensing as ruled by the CJEU in the *Soulier and Doke*<sup>16</sup> case (e.g. equal treatment, transparency of information on the exploitation of the works, possibility of the rights holder to exclude the application of the license).

Under such system, CMOs will be authorised to extend license agreements to rights holders who, not being a member of the CMO, do not benefit from the conditions of the license agreement. This rule will ensure that specific works (e.g. audio-visual content which is still protected by copyright but no longer commercially distributed) can continue to be legally distributed and that consumers are not deprived from it.

#### **BEUC’s recommendation**

**To give to Member States the possibility to extend licenses concluded by collective management organisations (CMOs) to rights holders of the same category of works as those covered by the CMO, under certain conditions.**

<sup>14</sup> Joined cases, C-403/08 and C-429/08, *Football Association Premier League and Others* [2011] ECR I-09083, §139 - 146

<sup>15</sup> This was the approach followed by IMCO’s rapporteur (MEP Julia Reda) in her draft opinion

<sup>16</sup> C-301/15, *Soulier and Doke* [2016], ECLI:EU:C:2016:878



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