

The Consumer Voice in Europe

PUBLIC CONSULTATION ON THE REVIEW OF THE EU SATELLITE AND CABLE DIRECTIVE

BEUC's response



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EC register for interest representatives: identification number 9505781573-45



Co-funded by the European Union

Ref: BEUC-X-2015-116 - 16/11/2015

Summary

BEUC's believes that geo-blocking in the audiovisual sector should be addressed in Europe by means of a targeted reform of the Satellite and Cable Directive. The regulatory concept of this directive could be extended to the Internet and, if properly implemented, used to solve the problem of geo-blocking in online audiovisual services across the EU.

Currently consumers are prevented from accessing contents that are available in other member states and this has an important impact on the availability of online audiovisual services - especially in those countries where there are very limited offers – and on the quality and affordability of such offers.

BEUC's suggestion consist on the extension of the country of origin principle applied to distribution of audiovisual contents by means of satellite signals to cover audiovisual services offered online.

This exercise would bring benefits to consumers who will be able to access contents across the EU and will also help the European audiovisual industry to reach a wider audience without jeopardising pre-financing schemes based on the sale of territorial licenses.

What is important to highlight is that this model focuses on online distribution of content and seeks to integrate a concept already existing in EU Competition Law: the introduction of a ban to contractual and technical restrictions to unsolicited requests from individual customers living in other member states.

This means that consumers should be able to access audiovisual services, like Video-on-Demand platforms, available in other member states like "local" consumers and without further adaptations e.g. subtitling or dubbing, which are elements left to traditional licensing models.¹

¹ Our UK member Which? is not directly following this issue at this time and is thus not a signatory to this paper.

1. General remarks

BEUC welcomes the European Commission's consultation on the revision of the 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 (hereafter SatCab Directive).

BEUC believes that the review of this Directive represents a unique opportunity to address from a regulatory perspective the problem of online discrimination in the audiovisual sector, which is currently detrimental to consumers and restricts competition in the Digital Single Market.

Geo-blocking has become a prominent problem in the audiovisual sector with the development of information technologies that allow service providers to distribute content via multiple platforms. Geo-blocking is often achieved through the implementation of technical measures preventing consumers from accessing legal offers of audiovisual content available outside their country of residence, often identified by Internet Protocol (IP) address localisation mechanisms or the means of payment used for the purchase (e.g. identification of the country of issue of the credit/debit card).

In the online environment these restrictions find their origin in exclusive licensing practices that are applied on a country-by-country basis and therefore lead to an artificial fragmentation of the online environment. Consumers when looking for offers online do not distinguish whether the service is provided from a different member state and let alone understand that geo-locking is caused by such business practices.

Geo-blocking is detrimental to consumers and the single market for two main reasons:

- First, it does not allow consumers that do not have access to online audiovisual services in their countries to look for contents that available to consumers in other member states (e.g. a Lithuanian or Croatian consumer is currently not allowed to subscribe to a French or English Video-on-Demand platform)
- Secondly, the monopoly created by exclusive licensing practices, does not allow consumers that may find the desired audiovisual content through local distributors (e.g. cable or satellite operator) to look for better offers outside their own country (territory of exclusivity). This is aggravated by the fact that existing data reveal that consumers are not always satisfied with the contents provided locally.

This situation is not acceptable in a single market that should allow consumers to find more competitive and suitable legal offers of audiovisual content without virtual walls built up by right holders and distributors in order to maximise profits instead of actually addressing consumers' legitimate expectations around the consumption of audiovisual services provided online.

In this context it is important to underline the link between IPR enforcement and the availability of legal offers for consumers. Considering that the European Commission is now rolling out a new encompassing strategy to tackle Intellectual Property Right infringements, including unauthorised sources of copyrighted contents², 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**. One tool to achieve that is to

² European Commission's 2015 Digital Single Market and European Commission's 2014 IPR enforcement action plan.

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.

A recent EU observatory study shows that this is the way forward: 80% of consumers considered that affordable legal offers were better than downloading from unauthorised sources³. The music sector is a good example about how addressing consumers' expectations could help at reducing unauthorised downloading. Data provided by the same music industry showed that the introduction of streaming solutions of music offers in Norway has "virtually eliminated piracy" in that country⁴.

We acknowledge that the music sector is different from the audiovisual sector. Cross-border licensing of music has been already eased by the development of business models and with the harmonisation of multi-territorial licensing⁵, a path that has not been followed by the audiovisual sector.

The SatCab Directive partially solved the problem of cross-border access to satellite services through the country of origin principle despite the fact that technical restrictions are still in place. Nevertheless, BEUC considers that the SatCab model could be extended to the Internet and, if properly implemented, used to solve the problem of geo-blocking in online audiovisual services across the EU.

In practical terms, the extension of the country of origin principle to cover online distribution of content would imply that an online distributor should not be able to refuse to serve a consumer who tries to access the audiovisual service from another member states on grounds of contractual territorial exclusivity.

Such a reform would require an adaptation in current contractual practices between rightholders and local distributors of online service but the impact of this approach in the creative sector should not be overstated, for the following reasons:

- **The extension of the country of origin principle to online distribution will not prevent right holders from selling their content on a country-by-country basis.** This is because local adaptations of contents will be still necessary particularly for consumers that want to watch content with local subtitles or in their local language.

Additionally, this will apply only to online distribution so release windows of local adaptations and in traditional distribution like cinemas release will still be possible in order to address the needs and expectations of each domestic market. **This also means that a European studio will still be able to pre-sale the rights for the financing phase of local productions.**

- **The extension of the country of origin principle to online distribution does not need to amount to a pan-European licensing system.** It is important to make clear that the aim of the exercise is to prevent consumers from being blocked when trying to access contents online from another member states. Thus, the objective is to prevent contractual and technical restrictions to "passive sales"⁶ and not as a means to allow distributors to target consumers outside their territory of

³ IP Youth Scoreboard 2015, not yet published.

⁴ <http://www.musicbusinessworldwide.com/piracy-virtually-eliminated-norway/>

⁵ Directive 2014/26/EU

⁶ This is a concept of EU competition law, which means responding to unsolicited requests from individual customers without having the distributor to market or target the consumers' country.

exclusivity. Additionally, this approach is directed only to the audiovisual sector, thus other types of works are not affected.

- **The extension of the country of origin principle to online distribution will not affect Europe’s cultural and linguistic diversity.** It is unfounded to say that because consumers should be entitled to purchase the audiovisual contents they want across Europe, they will stop consuming local audiovisual services. Recent data reveals that consumption patterns in traditional distribution channels like cinema remain stable⁷ and local TV is still the most used medium to watch audiovisual contents.

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 in a 70%⁸ by Hollywood productions and one of the structural weaknesses of the European film industry is reaching a broader audience beyond their national borders⁹. Thus, addressing geo-blocking by banning restrictions to passive sales will be one important step to bring European works closer to consumers across the EU.

Although the European Commission’s questionnaire contains many important questions related to distribution of audiovisual content through different channels, BEUC decided to limit its response to questions 15 – 19 concerning the extension of the scope of the SatCab Directive to cover online distribution of audiovisual contents as this is the most relevant element of the Directive from a consumer viewpoint in terms of cross-border availability of legal offers.

In order to prepare our response, BEUC commissioned a study to Professor Hugenholtz (IVIR – University of Amsterdam), who provided guidance about the necessary adaptations to be done in the legislation for the extension of the SatCab model to the Internet.

⁷ European Audiovisual Observatory Yearbook 2012 – as quoted by European Commission in COM(2014) 272 final, p. 5

⁸ European Audiovisual Observatory, World Film Market Trends 2014

⁹ This is confirmed by the European Commission’s 2014 communication “European film in the digital era”, p. 3

2. BEUC answers to questions 15-19

III. Assessment of the need for the extension of the Directive

1. The extension of the principle of country of origin

15. Please explain what would be the impact of extending the "country of origin" principle, as applied to satellite broadcasting under the Directive, to the rights of authors and neighbouring right holders relevant for:

15.1. TV and radio transmissions by other means than satellite (e.g. by IPTV, webcasting).

The primary result of such an approach from a consumer perspective will be that consumers across the EU would be able to legally acquire audiovisual services offered online irrespective of whether the content have been exclusively licensed on a country-by-country basis. However, it must be noted that the online services 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. We refer to this point in our answer to question 19.1.

15.2. Online services ancillary to initial broadcasts (e.g. simulcasting, catch-up TV).

Some additional services like catch-up TV would require temporary acts of reproduction of the content. If these ancillary services are available to consumers in the primary market, there is no reason why they should not be made available to consumers that access the online service from a different member state. Logically, this would require certain adaptations in the copyright legislation, particularly on exceptions and limitations. We refer to this point in our answer to question 19.1.

15.3. Any online services provided by broadcasters (e.g. video on demand services).

As a result of the country of origin rule these services should also be made available to consumers outside the exclusive territory under the same conditions as local consumers. However, a distinction could be made in relation to national public broadcasters that operate under a mandate to not offer content audiences outside their national territories. In this regard, an opt-out system could be implemented for public broadcasters provided that certain conditions apply e.g. broadcasting services that are exclusively financed by state budget.

15.4. Any online content services provided by any service provider, including broadcasters.

As said before, the purpose of the country of origin would be to allow consumers to access online audiovisual services like the "locals" would do. This implies that most related services offered to consumers in the country where the act of communication to the public take place should be made available to consumers accessing from abroad, under the condition that such services are provided online.

16. Would such an extension of the "country of origin" principle result in more cross border accessibility of online services for consumers?

Yes. The main beneficiaries of such an approach would be European consumers, who will be able to access content available online in other member states. Currently, consumers

across member states do not have the same possibilities to access legal offers in terms of availability, affordability and quality:

- **Availability:** Because broadcasting rights are allocated on a territorial basis many consumers do not have access to audiovisual contents if the country in which they live is not economically attractive enough for right holders to grant distribution rights to local service providers. This happens very often with sport events and even films that are released only in some countries because there is no interest for a local distributors to make them available to consumers in other countries with the necessary local adaptations (e.g. subtitling or dubbing). Although this is a commercial decision, the problem comes when because of exclusive territorial licensing practices those consumers that have no access at all to legal offers in their country cannot even look for alternative legal sources available online to consumers in other member states. The extension of the country of origin model to online services will help at addressing from a regulatory perspective those commercial barriers preventing the so-called "passive sales".
- **Affordability:** Unsurprisingly, consumers consider pricing of legal offers to be an important element when deciding to get a subscription or purchase audiovisual contents. This does not mean - as usually stated by the creative industry - that consumers want everything for free. The evidence available, including surveys carried out by BEUC members, show that consumers are willing to pay for affordable legal offers. For example, our Spanish member OCU in a campaign "*España no es pirata*" (Spain is not pirate)¹⁰ stressed that the best tool to fight piracy is quality offers, which are still missing in the Spanish market. In this regard, only 6% of surveyed consumers said that they would not pay for a movie that it is still in the cinemas and only 8% said that they would not pay for a movie that was released last year¹¹. This is a non-scientific survey but it already gives an indication of Spanish consumers' attitude towards pricing of films.
- **Quality:** Linked to the previous point, many member states lack of quality audiovisual offers. Being online services or cable and satellite subscriptions, many consumers are not satisfied with the current offers that are made available locally. For example, a recent study reported that only 29% of consumers are satisfied with the quality and level of detail of the offers available in their current TV guide¹² and, according to a recent Consumer Market Scoreboard, TV subscription is the worst performing market in a number of countries like Denmark, Croatia, Portugal Finland and Sweden¹³.

This is confirmed, for example, by our Danish member that started a campaign in which over 11.000 consumers in Denmark signed-up to a collective complaint about the quality of pay-tv services. At least three out of four consumers pay for channels they do not watch and this is because the packages are designed in a way to force the consumer to pay more for premium services¹⁴.

¹⁰ Ref.: <http://www.ocu.org/consumo-familia/nc/noticias/la-culpa-de-la-pirateria>

¹¹ Ref.: <http://www.ocuconsumity.com/tecnologia/la-pirateria-se-combate-con-calidad/>

¹² This survey covered 40 countries included both EU and third countries, "TV & Media 2015 - The empowered TV & media consumer's influence" by Ericson ConsumerLab, p. 28 available at <http://www.ericsson.com/res/docs/2015/consumerlab/ericsson-consumerlab-tv-media-2015-presentation.pdf>

¹³ Consumer Market Scoreboard, 10th edition, June 2010

¹⁴ Ref.: <http://taenk.dk/tema/hvorfor-f-skal-vi-betale-for-noget-vi-ikke-ser>

In terms of repertoire, our Italian member Altroconsumo also reported concerns related to exclusive agreements between Netflix and Sky, which limited the availability of series like “*House of Cards*” in the catalogue of contents for Netflix subscribers in Italy¹⁵.

Allowing consumers to look for better offers of online services beyond their national borders will broaden choices and give them the possibility to decide the country and service provider from where to purchase audiovisual services. This will be particularly important for consumers living in countries with common cultural and language traditions, let alone for those consumers residing permanently in another member state who want to access content available in their “home” countries or those who want to discover other European productions.

16.1. If not, what other measures would be necessary to achieve this?

The enforcement of EU antitrust rules plays also an important role in this debate, particularly concerning contractual restrictions to the so-called “passive sales”. DG Competition is already investigating these clauses in the contracts between six Hollywood studios (Disney, NBCUniversal, Paramount Pictures, Sony, Twentieth Century Fox and Warner Bros) and SkyUK. Due to the importance of this case for the future of online distribution of audiovisual services, BEUC decided to get involved as an interested third party.

We are glad to see that the European Commission is putting consumers at the heart of EU competition policy, and this is a clear example about how enforcement of competition rules can ease cross-border access to legal offers.

However, this is not the first time competition law comes into play to address territorial restrictions stemming from exclusive licensing practices (e.g. *Premier League* case) or to order non-exclusive and non-discriminatory offers in merger controls (e.g. *SkyItalia* case) or in the case of the abuse of a dominant position in the market by refusing to grant a license in the form of a must-offer obligation (e.g. *Magill* case).

Against this background, it is important to note that EU competition law has its limits because antitrust enforcement operates generally on ex-post and on a case-by-case basis. Additionally, not all territorial restrictions and forms of geo-blocking would be able to be tackled via the competition rules.

Furthermore, initiatives like *Licences for Europe* have proved that self-regulation is not sufficient to address territorial discrimination in online distribution of audiovisual contents due to the economic interest of right holders to keep the single market fragmented¹⁶.

Thus, a regulatory solution is needed beyond enforcement of EU competition law and unsuccessful self-regulatory initiatives.

17. What would be the impact of extending the “country of origin” principle on the collective management of rights of authors and neighbouring right holders (including any practical arrangements in place or under preparation to facilitate multi territorial licensing of online rights)?

¹⁵ Ref.: <http://www.altroconsumo.it/hi-tech/telefono-internet-e-tv-digitale/news/netflix>

¹⁶ See BEUC’s letter addressed to Commissioner Barnier of 27 February 2013. Ref.: <http://www.beuc.eu/publications/2013-00138-01-e.pdf>

Removing the territorial aspect of communication rights for online distribution would probably affect collective rights management societies (CMOs). It has been argued that this could result into competition between national CMOs for EU-wide online licenses. However, the impact of the country of origin rule on collective management of rights should not be overstated. This is because the new Directive on collective rights managements¹⁷ already obliges CMOs to cooperate in offering multi-territorial licensing schemes. In the most likely scenario only a relative small number of large pan-European CMOs would compete for the online licensing market.

However, it is important to highlight that the country of origin model applied to online services would not prevent rightholders to continue selling their content in different member states for the purpose of local adaptations e.g. subtitling or dubbing so local distributors can continue tailoring offers to the needs and expectations of consumers in each domestic market. Thus, the impact of the country of origin on current business models in the film industry would not be as great as sometimes is assumed.

Some sectors like sports events may be affected because language barriers are less relevant and therefore might attract a wider pan-European audience. However, this should not be overstated either because the benefits of making sports events available to consumers across member states without always depending on contractual agreements between sport rights holders and local distributors would be greater.

This was put into evidence in the recent letter that BEUC wrote¹⁸ to the European Commission concerning exclusive licensing agreements between Rugby World and local distributors for the broadcasting of the Rugby World Cup 2015 matches. After BEUC's action, the organisers made available information concerning the possibility to watch the matches via Facebook when consumers are outside those countries in which the broadcasting rights have been granted on an exclusive basis to local distributors. This is a positive development in term of availability of content but this solution cannot be compared to a legal offer like those offered by broadcasters in terms of quality, convenience and consumer choice.

This case also raised questions as to why consumers in some countries in the EU are forced to get a cable or satellite subscription and often pay a premium package to watch the matches and not simply access those contents made available on-demand by distributors in other countries. After all it is a matter of consumer choice whether the consumer wants to watch a match via a cable operator or through a VoD (Video-on-Demand) platform and/or with Spanish, English or German commentaries, for example. Consumption decisions should not be imposed by outdated market structures that do not correspond with the consumers' expectations in the digital environment.

The extension of the principle of origin to online services will not be devoid of consequences and could affect some current contractual practices but it is important to not overstate the impact in the cultural and linguistic diversity. This is an argument very often put forward by right holders and operators to stop any developments at EU level towards facilitating cross-border access to content.

Service providers will not be forced to offer contents tailored to a market of 500 million consumers and cultural and language identities will not be affected. They can and should continue offering contents to a specific audience, European consumers are not homogenous and they will continue consuming affordable and quality audiovisual contents available in

¹⁷ Directive 2014/26/EU

¹⁸ Ref.: <http://www.beuc.eu/press-media/news-events/geo-blocking-audio-visual-sector-rugby-world-cup-2015>

their countries through multiple channels. The difference is that consumers should be able to decide what would be the online service that meet the best their own expectations and needs irrespective of whether it is offered in their countries or somewhere else in the EU.

18. How would the "country of origin" be determined in case of an online transmission? Please explain.

Extending the scope of the country of origin rule to the internet would require to adapt technology-specific definitions of article 1 of the Directive, which are currently relevant to satellite services.

In this regard, it is necessary to clarify what would be the place of act to communication to the public in online distribution. In the current text of the Directive the place of communication to the public is the member state where the signal originates (article 1(2)(b)), without prejudice to other contractual conditions that may apply taking into account the size of the footprint of the satellite broadcast e.g. number of countries reached.

When it comes to online distribution it is not always easy to identify the country of upload of the content provided by an internet-based service provider. Thus, it would be more appropriate to identify a different element that allows creating a legal fiction for the purpose of the act of communication to the public.

One proposal could be to replace the place of uplink approach by a rule focusing on the place of establishment of the entity under the control and responsibility of which the online communication occurs. This was suggested by professor Hugenholtz in the study commissioned by BEUC available in the annex to this response.

Additionally, the "place of establishment" approach could be foreseen by making reference to article 5 of the eCommerce Directive¹⁹, which requires that providers of information society services make available to recipients - and to competent authorities - information regarding its name and place of establishment. A similar requirement exists in the Consumer Rights Directive²⁰ under the pre-contractual information that the service provider must make available to the consumer before the conclusion of the contract.

Finally, it would be necessary to clarify that the content that is being transmitted online and accessed in another member states shall not be modified or adapted by intermediaries adding value to the content, for example in the form of advertising. In this regard, it must be noted that the country of origin rule would apply only to audiovisual contents provided "as is" and under the same conditions consumers of the country of establishment of the service provider would have access to the content. Thus, downstream intermediaries may not, without the permission of the local right holder, dub or add local languages subtitles to the content.

19. Would the extension of the "country of origin" principle affect the current level of copyright protection in the EU?

The extension of the country of origin principle would NOT affect the level of protection granted to right holders in the EU due to the establishment of standards of protection for intellectual property rights by the EU Enforcement Directive (IPRED)²¹. This framework

¹⁹ Directive 2000/31/EC

²⁰ Directive 2011/83/EC

²¹ Directive 2004/48/EC

already rules out the existence within the EU of “copyright heavens” where online content providers could seek lower levels of copyright protection.

Additionally, the European Commission is already working on a pan-European strategy for the enforcement of IPR rules that would consistently apply throughout the Union. However, some additional adaptation would be needed in the frame of the Copyright Directive, particularly concerning the harmonisation of exceptions and limitations (see next point).

19.1. If so, would the level of EU copyright harmonisation need to be increased and if so in which areas?

The extension of the country of origin would not be sufficient to guarantee its effective application to online distribution of audiovisual contents. Additional adaptations would be needed in the following areas:

1. Exclusion of ancillary rights of reproduction

An extended country of origin rule would need to accommodate acts of reproduction on the consumer’s side otherwise local right holders in different member states can invoke their reproduction rights to restrict the downloading of legally acquired content by consumers from a service provider of another member states.

A way to solve this this would be by introducing a mandatory exception permitting lawful users of audiovisual services offered online to download and view the content made available across member states in application of the country of origin rule. Another solution could be to extend the country of origin rule to any rights of reproduction directly ancillary to the use by consumers of the works communicated to the public by service providers.

2. Targeted harmonisation of exceptions and limitations

An extension of the country of origin rule to audiovisual contents offered online would require to apply full harmonisation to those exceptions and limitations that are most relevant to audiovisual services such as: teaching and research (article 5(3)(a)); media uses (article 5(3)(c)); quotation (article 5(3)(d)); incidental uses (article 5(3)(i)) and parody (article 5(3)(k)). This is because the exceptions and limitations that apply locally in each member states may differ significantly and therefore an act allowed in the form of an exception in one country, could amount to a copyright infringement in another country.

3. Preventing unjustified territorials restrictions by means of Digital Rights Management (DRM)

The effectiveness of the country of origin principle applied to online distribution also depends on preventing loopholes that would allow right holders and service providers to re-build digital walls and therefore re-introduce geo-blocking in audiovisual services by means of Digital Rights Management.

This is a problem in the current text of the SatCab Directive because the parties remain free to contractually agree on obligations to apply encryption or other technical means to avoid reception by the public of programme-carrying signals in countries for which the broadcast was not intended. This is recognised as problematic by the European Commission in its report on the application of the SatCab Directive²².

²² COM (2002) 430 final, p. 7

Therefore, the country of origin rule for online audiovisual services must be accompanied by a rule prohibiting unjustified restrictions of cross-border access to audiovisual services similar to the non-discrimination principle of article 18 TFEU and article 20 of the Services Directive. As said previously, some exceptions could be foreseen but it must be highlighted that exceptions to such a non-discrimination rule must be restrictive and as specific as possible to avoid abuses stemming from contractual agreements between right holders and distributors.

END.



This publication is part of an activity which has received funding under an operating grant from the European Union's Consumer Programme (2014-2020).

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