



# Territoriality and financing of audiovisual works: latest developments

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**Director of publication** – Susanne Nikoltchev, Executive Director

**Editorial supervision** – Maja Cappello, Head of Department for Legal Information

**Editorial team** – Francisco Javier Cabrera Blázquez, Julio Talavera Milla, Sophie Valais

**Research assistant** – Ismail Rabie

European Audiovisual Observatory

**Authors (in alphabetical order)**

Francisco Javier Cabrera Blázquez, Maja Cappello, Gilles Fontaine, Julio Talavera Milla, Sophie Valais

**Translation**

Marco Polo Sarl, Stefan Pooth

**Proofreading**

Jackie McLelland, Johanna Fell, Philippe Chesnel

**Editorial assistant** – Sabine Bouajaja

**Marketing** – Nathalie Fundone, nathalie.fundone@coe.int

**Press and Public Relations** – Alison Hindhaugh, alison.hindhaugh@coe.int

European Audiovisual Observatory

**Publisher**

European Audiovisual Observatory

76, allée de la Robertsau, 67000 Strasbourg, France

Tel.: +33 (0)3 90 21 60 00

Fax: +33 (0)3 90 21 60 19

iris.obs@coe.int

[www.obs.coe.int](http://www.obs.coe.int)

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# **Territoriality and financing of audiovisual works: latest developments**

**Francisco Javier Cabrera Blázquez, Maja Cappello, Gilles Fontaine, Julio Talavera  
Milla, Sophie Valais**





# Foreword

Four years ago, we published an IRIS *Plus* entitled “Territoriality and its impact on the financing of audiovisual works”. At the time, the legal question of territoriality was at the heart of the discussions at EU level for the audiovisual sector. The country of origin (COO) principle enshrined in the Audiovisual Media Services Directive (AVMSD) was challenged both by foreign-owned pan-European operators who were directing their services towards the European Union, and by EU-based operators who also had other member states as their target countries. More importantly, the principle of territoriality in copyright law was presented by certain stakeholders as an obstacle to accessing audiovisual works in the Digital Single Market strategy, and there were calls for its removal. In reply to this, the European audiovisual industry argued almost univocally that the removal of territoriality in copyright law would have a devastating effect on the way European films and other audiovisual works were financed, and would mainly benefit major platforms and lead to more concentration in the audiovisual sector, to the detriment of cultural diversity.

Much water has flowed under the bridge since the drafting of our 2015 publication: the AVMSD was revised and new regulatory instruments having an impact on EU copyright law (notably the Portability Regulation and the Sat-Cab Directive) were adopted. While the revision of the AVMSD includes a provision for the promotion of European works by non-linear services that introduces an exception to the COO principle, the copyright measures mentioned above do not seem to have impacted on the principle of territoriality in EU copyright law. And yet, the European audiovisual industry is worried that the European Commission, finding the copyright door closed, is trying to enter through the window of competition law. In particular, the European Commission’s investigation into possible restrictions affecting the provision of Pay-TV services in the context of film licensing agreements (the so-called Pay-TV case) and the judgment of the General Court confirming the Commission’s preliminary assessment has raised the industry’s fears to a new level.

The present publication builds upon and serves as an update to our 2015 IRIS plus on the same topic. It focuses in parallel on copyright and media regulation in order to take a closer look at the impact of the two leading concepts of “territoriality of copyright” and “country of origin” on the financing of audiovisual works in the digital single market. After setting the scene with background information on the European audiovisual sector (chapter 1), this IRIS Plus investigates the international and European (chapter 2) and national legal framework (chapter 3), before exploring the initiatives taken by the industry (chapter 4), European and national case law (chapter 5) and the state of play (chapter 6).

Strasbourg, November 2019

Maja Cappello  
IRIS Coordinator  
Head of the Department for Legal Information  
European Audiovisual Observatory



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## Executive summary

Territoriality is regarded as a cornerstone of the European audiovisual industry. From an economic standpoint, the financing model for the audiovisual and film industries in Europe relies on territorial exploitation. The pre-financing of works through the pre-sale of rights to broadcasters and distributors on a territorial basis is deemed crucial for film and audiovisual production by the European audiovisual industry. **Chapter 1** provides an in-depth look at the importance of territorial licensing for the financing of audiovisual works.

Territoriality also forms the basis of copyright law. At international level, multilateral cooperation addressing copyright protection was first introduced by the Bern Convention, which grants protection in the states party to the convention and is based on the territorial application of national laws. At EU level, copyright law remains a matter of national jurisdiction, within the framework of relevant international and EU law, and with respect to media regulation, the Audiovisual Media Services Directive is based on the country of origin (COO) principle, which applies to content delivered under the editorial responsibility of an audiovisual media service provider.

In line with significant technological development and changing market realities, the European Commission launched its Digital Single Market (DSM) strategy in 2015 with the aim of bringing down digital boundaries and enhancing cross-border access to content and services. **Chapter 2** presents an overview of the EU legal framework regarding the principles of territoriality and of the country of origin, and their impact on copyright and audiovisual media legislations. This includes the Portability Regulation of 2017 and the Directive on copyright and related rights applicable to certain online transmissions, adopted in 2019. The chapter also looks at the provisions contained in the AVMS Directive with regard to COO rules for audiovisual media services at EU level, as last revised in 2018.

**Chapter 3** is divided into two sections. The first section looks at the notions of authorship and ownership, and the processes of management and the transfer of rights for the purpose of rights clearance. It also explores the different aspects of the licensing procedures and the role of collective management in the audiovisual sector. The second section outlines the way the COO principle operates in practice in the financing of audiovisual works, with 3 practical examples from Belgium, France and Germany. Under the revision of Article 13 of the AVMS Directive, as an exception to the COO principle, member states were given the freedom to impose a financial contribution on targeting VOD service providers with a view to supporting the production of European works, provided that the same rule is applied to national players.

The principle of territoriality has been at the centre of various discussions involving European governing bodies and stakeholders on upcoming policy changes under the DSM. **Chapter 4** presents a general view of the industry's take on the above-mentioned legal developments and the discussions surrounding territoriality and the country of origin



principle, as expressed in several declarations and responses to Public Consultations by the European Commission.

**Chapter 5** presents a selection of decisions by the Court of Justice of the European Union (CJEU), showing the evolution of the Court's view on territoriality before and after the harmonisation of EU copyright legislation. It also puts in context the impact of the European Commission's decisions concerning the absolute exclusivity of territorial licences in the so-called Pay-TV case, and the compatibility of the extraterritorial extension of the German film levy to VOD services located outside Germany.

**Chapter 6** looks at the state of play and the potential impact of the legal developments described in the previous chapters on the audiovisual industry in Europe.



# 1. Setting the scene

## 1.1. Then and now

Less than four years have passed since, in 2015, the European Audiovisual Observatory published an IRIS Plus on the topic of territoriality.<sup>1</sup> Only some of the foreseeable legislative developments envisioned at that time have materialised (for further details, see chapter 2).

Back then, in early 2014, territoriality was already at the centre of the discussions through the public consultation conducted by the European Commission on the review of the EU copyright rules in the Internal Market (covering, *inter alia*, harmonisation; limitations and exceptions to copyright in the digital age; the fragmentation of the EU copyright market; and how to improve the effectiveness and efficiency of enforcement, while underpinning its legitimacy).<sup>2</sup> The Commission wanted to know whether stakeholders had faced problems when seeking to provide online services across borders and asked them to share their views as regards multi-territorial licensing and territorial restrictions. The Commission received more than 9 500 replies to the consultation,<sup>3</sup> in a context where the Commission's President Jean-Claude Juncker had announced his intention to "break down national silos" in copyright legislation, among other areas. In particular, he identified the Digital Single Market as one of the Commission's top ten priorities,<sup>4</sup> announcing his intention to achieve portability of content and cross-border access to legally purchased online services, as well as removing barriers to e-commerce across Europe.

In September 2016, the European Commission announced plans to enhance the scope of application of the principle of the country of origin (COO). After much heated political back and forth, a directive<sup>5</sup> saw the light in 2019, addressing just a fraction of the issues which it had initially intended to tackle (see 2.1.3.2). The discussion on portability was less heated, with the so-called Portability Regulation<sup>6</sup> entering into force on 1 April

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<sup>1</sup> Cabrera Blázquez F., Cappello M., Grece C., Valais, S., *Territoriality and its impact on the financing of audiovisual works*, IRIS Plus, European Audiovisual Observatory, Strasbourg, 2015.

<sup>2</sup> European Commission Public Consultation on the review of the EU copyright rules, Directorate General Internal Market and Services.

<sup>3</sup> European Commission Report on the responses to the Public Consultation on the Review of the EU Copyright Rules, Directorate General Internal Market and Services, July 2014.

<sup>4</sup> "Political Guidelines for the next Commission – A new Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change" 15 July 2014, [https://ec.europa.eu/commission/sites/beta-political/files/juncker-political-guidelines-speech\\_en.pdf](https://ec.europa.eu/commission/sites/beta-political/files/juncker-political-guidelines-speech_en.pdf)

<sup>5</sup> Directive (EU) 2019/789 of the European Parliament and of the Council of 17 April 2019 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, and amending Council Directive 93/83/EEC (Text with EEA relevance),

[https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L\\_.2019.130.01.0082.01.ENG](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2019.130.01.0082.01.ENG).

<sup>6</sup> Regulation (EU) 2017/1128 of the European Parliament and of the Council of 14 June 2017 on cross-border portability of online content services in the internal market (Text with EEA relevance)

<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:02017R1128-20170630>.



2018. Its goal is to guarantee EU citizens access to the content they bought or subscribed to back home when they travel or stay temporarily in another EU country (see 2.1.3.1).

The discussion on territoriality came back to the forefront during the preparatory work for the revision of the Audiovisual Media Services Directive<sup>7</sup> (AVMSD), which was preceded by a public consultation<sup>8</sup> launched by the Commission in July 2015 and a REFIT exercise<sup>9</sup> in October of that year. Eventually, the consolidated text of the revised AVMSD was published in the Official Journal of the European Union on 28 November 2018 (see 2.2.1.1.2). Following the new rules on territoriality, so far only Germany, France and the Flemish Community in Belgium have implemented new levies for VOD services established outside their territory but targeting their domestic audience (see 3.3.1).

## 1.2. Reminders on the financing of audiovisual works

Audiovisual works have two distinctive characteristics:

- Most of the costs to produce and exploit them are fixed costs: investments are made upfront, with a few exceptions (for example, some cast or crew members may accept that part of their remuneration is linked to the revenues generated by the work; marketing costs can be adapted based on the initial reception of the work).<sup>10</sup>
- Their exploitation is organised through two different schemes of exclusivity:
  - exclusivity by category of outlet: a film will not be available at the same time on pay television and free television<sup>11</sup>.
  - exclusivity by player: within the pay-TV outlet, only one pay-TV operator (in a given territory) will exploit a film<sup>12</sup>.

European audiovisual works have a third distinctive characteristic: in most cases, they are exploited in a limited number of territories for a series of reasons: a taste for local stories; the predominance of national players in each country; and the role of public funding schemes in supporting primarily national production.

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<sup>7</sup> Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities; <https://eur-lex.europa.eu/eli/dir/2018/1808/oj>.

<sup>8</sup> Public consultation on Directive 2010/13/EU on Audiovisual Media Services (AVMSD) - A media framework for the 21st century; <https://ec.europa.eu/digital-single-market/en/news/public-consultation-directive-201013eu-audiovisual-media-services-avmsd-media-framework-21st>.

<sup>9</sup> REFIT Evaluation and Impact Assessment of the EU Audiovisual Media Services Directive 2010/13/EU (AVMSD); <https://ec.europa.eu/digital-single-market/en/news/avmsd-review-process>.

<sup>10</sup> Another exception is the cost of printing copies of a theatrical film for its exhibition in cinemas. The cost has dramatically decreased with the digitisation of cinema exhibition.

<sup>11</sup> There is an exception to this principle: a film can sometimes be made available both in transactional video and on pay TV at the same time.

<sup>12</sup> There is an exception to this principle: a film can sometimes be made available on all transactional video services in the same country.



The combination of these characteristics (upfront investment coupled with the relatively low number of outlets (distributors) due to the exclusivity and predominance of national exploitation) turns the exploitation of European audiovisual works into a risk-intensive business.

The risk is mitigated in part by sharing it between several players through prefinancing. A producer presells the audiovisual work to some of its future outlets and uses the proceeds to cover the upfront investment. Only part of the future revenues of an audiovisual work can be anticipated in the form of prefinancing.

The European Audiovisual Observatory analysed the detailed financing plans for 445 European live-action fiction films - theatrically released in 2016 - from 21 European countries, which is estimated to cover 41% of the total number of European<sup>13</sup> fiction films on first release that year<sup>13</sup>. The study shows that 70% of European films produced in 2016 were partly financed by the presales of national distribution rights in the (co)producing /-financing countries as well as through multi-territory presales. The downstream players in the audiovisual work exploitation scheme accept their share of the risk, that is, to participate in the prefinancing of the work, if a) they value the exclusivity that they will be granted and b) the audiovisual work is recent enough to trigger significant revenues from the end market<sup>14</sup>.

The way risk is mitigated between players in the audiovisual work value chain differs by country and by category of works. Generally speaking, as regards European theatrical films, a producer follows the “Deficit financing” scheme: part of the upfront investment is mitigated by presales to distributors and broadcasters, by public funding<sup>15</sup> and, to a very limited extent, by private equity. The amount of prefinancing, however, does not cover the full cost of a work. The producer covers the remaining costs and keeps all exploitation rights which have not been presold to recoup its investment through future revenues.

The situation is more nuanced as regards TV content. For programmes with no future value<sup>16</sup>, the full cost must be recouped by the first and only exploitation. For other TV content (for example, TV series, animation, documentaries), there are two models:

- Deficit financing, as in the case of films. The producer funds part of the work and hopes to recoup this investment through future revenues.

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<sup>13</sup> Kanzler M., [Fiction film financing in Europe: A sample analysis of films released in 2016](#), European Audiovisual Observatory, 2018.

<sup>14</sup> Some distributors, however, may, in certain cases, agree to participate in the prefinancing for rights which are not core to the initial exploitation of an audiovisual work (for instance, second runs on television channels, foreign rights, etc.).

<sup>15</sup> Public funding is, by far, the first source of financing for European films: 29% of the cumulative financing volume, and 41% excluding French films; Source: Fiction film financing in Europe: A sample analysis of films released in 2016, Martin Kanzler, European Audiovisual Observatory, 2018, <https://rm.coe.int/fiction-film-financing-in-europe-2018/1680902fd9>.

<sup>16</sup> For example, game shows and talk shows.



- Cost plus: the cost of the programme is fully financed (including an agreed margin) by an audiovisual service provider. It is then up to the audiovisual service provider to exploit the programme, either for its own service or by selling it to other services.

Generally speaking, high-end TV series, animated TV series and documentaries tend to follow the theatrical film “Deficit financing” approach; long-running soaps or telenovelas, which are very focused on national tastes and therefore have little export potential, are more likely to be financed through the “Cost plus” approach.

### 1.3. Where territorial exploitation comes in

The European market remains primarily structured at the national level. The main European cinema distributors are active mainly on one territory; only a few television groups are significantly present outside their home country<sup>17</sup>. The breakdown of admissions to European films between national admissions (70% in 2017) and non-national admissions (30%)<sup>18</sup> also suggests that, when it comes to European works, audiences tend to favour national rather than European non-national content. However, this could be a classical “chicken-and-egg” situation: as cinema distributors or audiovisual service providers anticipate that there is little demand for European non-national works, they could tend not to make them available, thus limiting their audience potential<sup>19</sup>.

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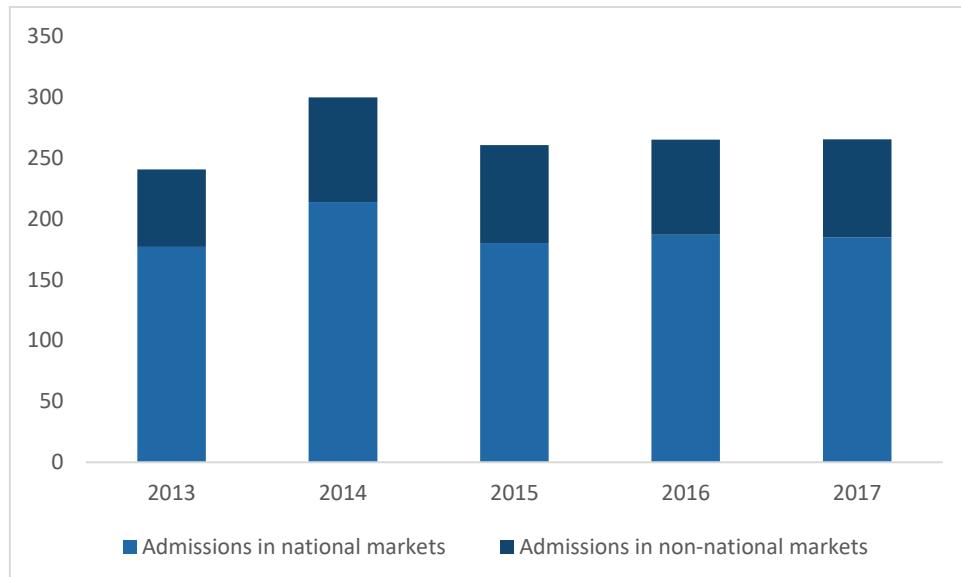
<sup>17</sup> Only the RTL Group has a really wide European coverage. Other examples with a more modest footprint include Mediaset, Nordic Entertainment and CEME.

<sup>18</sup> Source: LUMIERE database, European Audiovisual Observatory.

<sup>19</sup> One might note, for instance, the growing success all over Europe of Scandinavian TV series which were previously hardly distributed outside Scandinavia. Some Netflix original TV shows also seem to demonstrate that the potential audience for European non-national works may have been underestimated in the past or, at least, that it is growing rapidly.



**Figure 1. Breakdown of EU admissions to European feature films into national and non-national admissions**

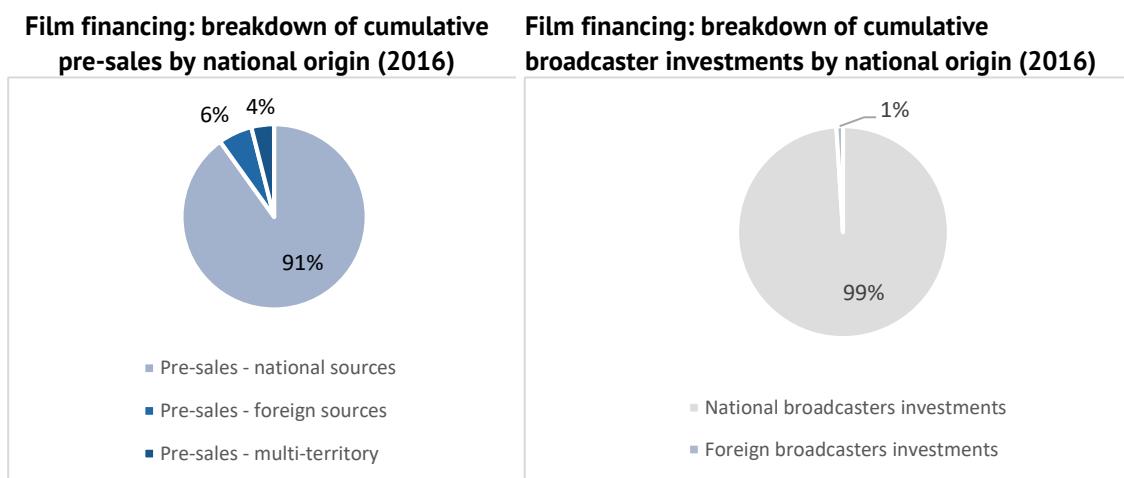


Source: European Audiovisual Observatory

Being active only in one or a limited number of countries, distributors or audiovisual service providers may therefore be interested in obtaining the rights in only one or several territories rather than at European level. The priority given to national works is reflected in the analysis of the financing structure for European films. According to the above-mentioned study carried out by the European Audiovisual Observatory, the anticipated future revenues through prefinancing by broadcasters or distributors represent, on average, 41% of a European film. National broadcasters account for 99% of the total volume of broadcasters' investments, and national presales account for 91% of the financing volume of other presales (excluding television).

Although these figures are averages<sup>20</sup>, they suggest that most of the presales relate to the national market, and that the rights for foreign territories are kept by the producer to recoup its investment in the film.

<sup>20</sup> The limit of the average as an indicator is that it does not reflect the heterogeneity of the sample. For example, only a very limited number of films could account for the vast majority of foreign pre-sales.

**Figure 2. Film financing**

Based on 445 sample films.

Source: European Audiovisual Observatory elaboration based on EFARNs' figures

The financing logic for most audiovisual works seems therefore to be the following: the downstream part of the value chain is able to commit to the prefinancing of audiovisual works up to a level determined by the value of the film on the domestic market. On average, this level of prefinancing leaves the producer with a level of investment (around 15% of the total film budget) that needs to be recouped through foreign sales.

Nevertheless, some TV series have attained European-wide distribution; however, they do not challenge the concept of territoriality as far as prefinancing is concerned:

- On the one hand, some TV series are commissioned by a broadcaster under the “Cost plus” model. Here, the broadcaster may indeed have retained all the European rights, but the TV series will still be marketed country by country to individual broadcasters.
- On the other hand, other, more expensive, high-end TV series are co-produced by several broadcasters from different European countries. These TV series are better financed, but as the cost increases, the producer still has to invest and therefore needs to recoup this investment through foreign sales, generally outside the co-producing countries.

On the whole, granting European rights to prefinancers does not seem likely to increase the amounts they are ready to commit for the prefinancing of works. Indeed, on the one hand, it would probably conflict with the dynamics of co-productions and, on the other hand, jeopardise future sales in territories which have not participated in the prefinancing of the work.

New players are, however, active on the fast-growing video-on-demand market at pan-European level and may be interested in obtaining the rights for all the territories in which they are present. Whilst the essentially national character of broadcasters is the main rationale for territoriality, one could invoke two reasons why the concept of territoriality might be disliked by these video-on-demand platforms:



- Firstly, non-national platforms might prefer, at least to a certain extent, to be freed from the necessity of offering different catalogues for each country.

But even if this were so, it is not certain that this need for a country by country approach is due to the fact that the rights may not be available for each territory. It might just as well be the consequence of the need to adapt each country catalogue to the taste of the local audience.

- Secondly, in terms of investment in programming, these platforms seem to focus on original production. At first glance they should therefore be able to hold and therefore favour European-wide licences especially in so far as they follow the “Cost plus” model (for example, fully financing a work). Yet looking deeper into the issue, it can be noted that the new platforms still only represent a small minority of the volume of original works produced each year. More importantly, they also make deals based on territoriality, for instance by co-producing with national broadcasters and retaining only rights for selected territories.

It therefore seems that territoriality is a concept that may also offer benefits to the business model of non-national video-on-demand service providers.





## 2. International and EU legal framework

### 2.1. Territoriality and copyright

The principle of territoriality in copyright law means essentially that, within the framework of international treaties and relevant EU directives, each country can regulate copyright in its own way. Therefore, copyright rules may vary from one member state to another. More importantly for the purposes of this publication, according to this principle, rightsholders have the right (but are not obliged) to grant territorial licences to different licensees in different countries.

The principle of territoriality has been challenged by some as an exception to the freedom to provide services as provided for in the EU treaties. Indeed, according to its opponents, this principle would raise transaction and enforcement costs for authors, rightsholders and users alike, since territorial fragmentation requires those wanting to offer content-related services across the European Union to secure multiple licences. Moreover, they consider that differences between national laws, particularly as regards limitations and exceptions, may lead to additional legal costs and legal uncertainty.<sup>21</sup> Finally, the use in concrete cases of copyright may raise competition issues. However, for many stakeholders in the audiovisual industry, the possibility of granting territorial licences is considered fundamental to the financing of European audiovisual works.

#### 2.1.1. The Single Market and the freedom to provide services

The EU Single Market is based on the so-called “four freedoms” included in the EU Treaties: the free movement of people, goods, services and capital. Of all these, the freedom to provide services (coupled with the right of establishment) is the most relevant one for the audiovisual sector.

Article 56 of the Treaty on the Functioning of the European Union (TFEU)<sup>22</sup> contains a general prohibition concerning restrictions on the freedom to provide services within the Union in respect of nationals of member states who are established in a member state other than that of the person for whom the services are intended. Article 49 TFEU contains a general prohibition on restricting the freedom of establishment of nationals of a member state in the territory of another member state. It is also prohibited to restrict the setting-up

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<sup>21</sup> See, for example, Research for CULT Committee – Film Financing and the Digital Single Market: its Future, the Role of Territoriality and New Models of Financing, January 2019, [http://www.europarl.europa.eu/RegData/etudes/STUD/2019/629186/IPOL\\_STU\(2019\)629186\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2019/629186/IPOL_STU(2019)629186_EN.pdf).

<sup>22</sup> Consolidated version of the Treaty on the Functioning of the European Union: <http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:12012E/TXT>.



of agencies, branches or subsidiaries by nationals of any member state established in the territory of any other member state.

The Services Directive (SD)<sup>23</sup> is the main EU legal instrument used to implement the freedom to provide services and the right of establishment. It aims at achieving the full potential of service markets in Europe by removing legal and administrative barriers to trade. However, the Services Directive does not apply to “audiovisual services, including cinematographic services, whatever their mode of production, distribution and transmission, and radio broadcasting” (Article 2(2)(g) SD).

With regard to copyright in general, the rules on the freedom to provide services included in Article 16 SD<sup>24</sup> do not apply to, among other things, copyright and neighbouring rights (Article 17 (11) SD), confirming thereby the principle of territoriality in copyright law. Moreover, member states are allowed to impose requirements with regard to the provision of a service activity for reasons of public policy, public security, public health or the protection of the environment (Article 16(3) SD). Recital 40 SD includes, among a long list of “overriding reasons relating to the public interest”, the protection of intellectual property, cultural policy objectives, the need to ensure a high level of education, the maintenance of press diversity and the promotion of the national language, as well as the preservation of national historical and artistic heritage.

The Services Directive also protects the rights of recipients of services. Article 20 SD prohibits discriminatory requirements based on the nationality or place of residence of the recipient of the service. Furthermore, member states shall ensure that the general conditions of access to a service, which are made available to the public at large by the provider, do not contain discriminatory provisions relating to the nationality or place of residence of the recipient. However, differences in the conditions of access are allowed where those differences are directly justified by objective criteria. According to the European Commission,<sup>25</sup> an objective reason that would justify the refusal of a service to consumers in a given territory is the lack of the required authorisation from the rightsholders for the territory in question. Other reasons, in particular those not related to copyright, would have to be justified on a case-by-case basis. But, as mentioned before, in its current version, the Services Directive does not apply to audiovisual and cinematographic services.<sup>26</sup>

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<sup>23</sup> Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32006L0123>.

<sup>24</sup> Article 16 SD lists the principles to be respected by member states when making access to or exercise of a service activity in their territory (non-discrimination, necessity and proportionality). It also includes a list of prohibited requirements for providers established in another member state.

<sup>25</sup> Commission Staff Working Document with a view to establishing guidance on the application of Article 20(2) of Directive 2006/123/EC on services in the internal market ('the Services Directive'), [http://ec.europa.eu/internal\\_market/services/docs/services-dir/implementation/report/SWD\\_2012\\_146\\_en.pdf](http://ec.europa.eu/internal_market/services/docs/services-dir/implementation/report/SWD_2012_146_en.pdf).

<sup>26</sup> See paragraph 6.1.1.2 of this publication for a description of the measures announced by the European Commission which could include a modification of the SD.



## 2.1.2. The principle of territoriality in copyright law

### 2.1.2.1. Territoriality of copyright and international treaties

The principle of territoriality in copyright law has a long history. Until the 19<sup>th</sup> century, the protection of copyright was a strictly national matter. A work protected in a given country was not necessarily protected elsewhere. This resulted in the unauthorised and unremunerated reprinting of, for example, books written by British authors in other European countries and especially in the United States.<sup>27</sup> Various attempts to curtail this problem were made at bilateral level during the 19<sup>th</sup> century,<sup>28</sup> but it was not until the adoption in 1886 of the Berne Convention for the Protection of Literary and Artistic Works<sup>29</sup> that a truly multilateral solution was introduced at an international level.

The Berne Convention is based on the principle of national treatment, expanding the territorial application of the regulatory framework to nationals of the contracting parties of the Convention. According to Article 5(2), the enjoyment and the exercise of the rights protected therein “shall be independent of the existence of protection in the country of origin of the work. Consequently, apart from the provisions of this Convention, the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed”. The Convention provides authors with a set of minimum rights which states have to recognise, extending thereby copyright protection to authors beyond the borders of their own countries.<sup>30</sup> Nevertheless, protection is awarded by each individual member state of the Convention for its sole territory.

At the beginning of the second half of the 20<sup>th</sup> century and in view of the emergence of new players on the global scene (in particular China), intellectual property (IP) issues entered into the field of trade negotiations. This first started at a bilateral level with the conclusion by the United States of a number of free trade agreements (FTAs) with some East-Asian and Eastern European States, in which the parties subscribed to a high level of IP protection in exchange for certain trade advantages.<sup>31</sup> Subsequently, the issue of the effective international protection of IP was introduced as part of the Uruguay Round of GATT<sup>32</sup> negotiations, as a response to the rising surge of pirated and counterfeit goods distorting international trade flows. When the WTO Agreement was concluded in Marrakesh

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<sup>27</sup> For a depiction of Charles Dickens's fight against the unauthorised publishing of his books in the United States, see, for example, Allingham P.V., “Dickens's 1842 Reading Tour: Launching the Copyright Question in Tempestuous Seas”, [www.victorianweb.org/authors/dickens/pva/pva75.html](http://www.victorianweb.org/authors/dickens/pva/pva75.html).

<sup>28</sup> See Drahos P., “The universality of intellectual property rights: origins and development”, [www.wipo.int/edocs/mdocs/tk/en/wipo\\_unhchr\\_ip\\_pnl\\_98/wipo\\_unhchr\\_ip\\_pnl\\_98\\_1.pdf](http://www.wipo.int/edocs/mdocs/tk/en/wipo_unhchr_ip_pnl_98/wipo_unhchr_ip_pnl_98_1.pdf).

<sup>29</sup> Berne Convention for the Protection of Literary and Artistic Works of 9 September 1886 (with amendments), [www.wipo.int/treaties/en/text.jsp?file\\_id=283698](http://www.wipo.int/treaties/en/text.jsp?file_id=283698).

<sup>30</sup> Triaille J-P., (ed.), “Study on the application of Directive 2001/29/EC on copyright and related rights in the information society”,

p. 46, <https://op.europa.eu/en/publication-detail/-/publication/9ebb5084-ea89-4b3e-bda2-33816f11425b>.

<sup>31</sup> Kur A., Dreier T., European intellectual property law, Text, cases & materials, (Edward Elgar, USA 2013).

<sup>32</sup> General Agreement on Tariffs and Trade, see paragraph 2.2.1.1. of this publication.



in 1994, the Agreement on Trade-Related aspects of Intellectual Property Rights (TRIPS) became an integral part of the Treaty.<sup>33</sup>

With the TRIPS, the standards of the internationally mandatory protection for IPRs were elevated to a much higher level than what had been prescribed by the Berne Convention and new obligations were imposed. In particular, the national treatment principle was endorsed by Article 3 of the TRIPS and complemented by the Most Favoured Nation Treatment (MFN), according to which, member states must extend trade benefits that were granted to certain trading partners to other parties to the Agreement as well. Part III of TRIPS contains a detailed description of the obligations of WTO member states to provide effective enforcement rules, regarding civil and administrative procedures, provisional measures, border measures and criminal proceedings.

Further treaties adopted at WIPO level, such as the WCT<sup>34</sup> and WPPT,<sup>35</sup> and agreements at international level that brought copyright and neighbouring rights into line with the demands of digitisation and the Internet were built on this principle of territoriality. The Court of Justice of the European Union (CJEU) has confirmed the principle in several judgments.<sup>36</sup>

### 2.1.2.2. Territoriality of copyright in the European Union

Although copyright law lies, in principle, with the member states, since the late 1980s, the European Union has engaged in harmonising certain aspects of copyright and related rights by introducing directives on several copyright-related issues,<sup>37</sup> the most relevant of which for the exploitation of audiovisual works is the directive on the harmonisation of certain aspects of copyright and related rights in the information society (InfoSoc Directive).<sup>38</sup> The InfoSoc Directive aims to adapt legislation on copyright and related rights to reflect technological developments and to transpose into EU law the main international obligations arising from the WCT and WPPT. It harmonises the rights of reproduction, distribution, communication to the public, as well as the legal protection of anti-copying devices and rights management systems. Another important piece of legislation is the Satellite and Cable Directive (SatCab Directive),<sup>39</sup> which aims to facilitate the cross-border transmission of audiovisual programmes, notably via satellite and retransmission by cable.

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<sup>33</sup> TRIPS is Annex 1 C to the WTO Agreement.

<sup>34</sup> WIPO Copyright Treaty (adopted in Geneva on 20 December 1996),  
[www.wipo.int/treaties/en/text.jsp?file\\_id=295166](http://www.wipo.int/treaties/en/text.jsp?file_id=295166).

<sup>35</sup> WIPO Performances and Phonograms Treaty (adopted in Geneva on December 20, 1996),  
[www.wipo.int/treaties/en/text.jsp?file\\_id=295578](http://www.wipo.int/treaties/en/text.jsp?file_id=295578).

<sup>36</sup> See Chapter 5 of this publication.

<sup>37</sup> See The EU legal framework ("acquis"), <https://ec.europa.eu/digital-single-market/en/eu-copyright-legislation>.

<sup>38</sup> 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,  
<http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex:32001L0029>.

<sup>39</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,  
<http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:31993L0083>.



EU law limits the principle of territoriality in copyright law only in respect of two aspects. Firstly, the SatCab Directive introduces the “country of origin” principle for communications to the public by satellite. Yet, the application of this principle can be (and usually is) overruled via contractual licensing practices and signal encryption techniques.<sup>40</sup> Secondly, the InfoSoc Directive introduces the “exhaustion” principle for the distribution right.<sup>41</sup> This principle applies only to the distribution of the work incorporated in a tangible article, that is, it does not apply, for example, to the right of communication to the public of works and the right of making available.<sup>42</sup> As a result, the territoriality principle mostly prevails and any service provider offering, for example, copyrighted works online in more than one member state will have to clear licences covering all of these countries. This is not a problem if all rightsholders involved in the creation of the work retain the required rights for all countries in question. Nothing in national or EU law precludes for example a film or a music producer from giving a multi-territorial licence for more than one country, as long as s/he holds these rights. This is the theory, of course. In practice, rights in audiovisual works are usually pre-sold by producers to national distributors in order to finance the production of the work in question and, in the case of musical works, rights are exercised by national collective management organisations (CMOs), which play a fundamental role.

In particular, rightsholders in musical works entrust the management of their rights to CMOs, which enter into reciprocal representation agreements with each other, so that each CMO can provide multi-repertoire licences in its territory of establishment.<sup>43</sup> At EU level, the adoption of the Directive on collective management<sup>44</sup> is the latest attempt to date to overcome national barriers to the free provision of copyrighted works online.<sup>45</sup> It aims to

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<sup>40</sup> See Hugenholtz P.B., "SatCab Revisited: The Past, Present and Future of the Satellite and Cable Directive" in "Convergence, Copyrights and Transfrontier Television", IRIS Plus, European Audiovisual Observatory, Strasbourg, 2009, <https://rm.coe.int/1680783415>.

<sup>41</sup> This principle, known as the “first sale doctrine” in US law, means that the right of distribution is exhausted by the first sale or other transfer of ownership of a copy of the work made by the rightsholder or with his consent (Article 4(2) InfoSoc Directive).

<sup>42</sup> See Article 3(3) and Recitals 28 and 29 of the InfoSoc Directive.

<sup>43</sup> As these agreements forbade collective management societies from granting EU-wide licences, the European Commission took an antitrust decision in 2008 prohibiting 24 European collecting societies from restricting competition by limiting their ability to offer their services to authors and commercial users outside their domestic territory. CISAC appealed to the General Court, which concluded that the Commission did not prove the existence of concertation between the collective management societies as regards the territorial scope of the mandates which they grant each other and that the parallel conduct of the collective management societies at issue was not the result of concertation, but rather of the need to fight effectively against the unauthorised use of musical works. See Judgment of the General Court (Sixth Chamber) of 12 April 2013, Case T-442/08, *International Confederation of Societies of Authors and Composers (CISAC) v European Commission*,

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=136261&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=357698>.

<sup>44</sup> Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market,

[http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L\\_.2014.084.01.0072.01.ENG](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2014.084.01.0072.01.ENG).

<sup>45</sup> The European Commission had already adopted in 2005 a recommendation on the management of online rights in musical works. The recommendation put forward measures for improving the EU-wide licensing of



improve the way all CMOs are managed by establishing common governance, transparency and financial management standards. Other objectives of the Directive are to set common standards for the multi-territorial licensing by authors' CMOs of rights in musical works for the provision of online services and to create conditions that can expand the legal offer of online music.<sup>46</sup>

The audiovisual industry is, however, not as well collectively organised as the music industry. In recent times, different solutions have been proposed to foster the digital Single Market for audiovisual works. Probably the most radical one consists of the introduction of a European Community copyright law. According to its proponents, this would be a “truly structural and consistent solution, which would immediately solve the disparate treatment of goods and services in the realm of copyright”.<sup>47</sup> A concrete application of this idea is the *European Copyright Code*,<sup>48</sup> which resulted from the Wittem Project, a collaboration project between certain copyright scholars in Europe.

The introduction of a single EU copyright title has received praise and criticism among stakeholders<sup>49</sup> and an appraisal of its opportunity and feasibility goes beyond the scope of this publication.<sup>50</sup> Nonetheless, among many other challenging questions, this proposal raises the issue of the competence of the European Union in copyright matters. Traditionally, the competence of the European Union for the harmonisation of copyright and related rights has been based on two main objectives: the proper functioning of the internal market and the improvement of the competitiveness of the European economy.<sup>51</sup> But since the adoption of the Treaty of Lisbon,<sup>52</sup> the European Union has had a specific competence regarding the protection of intellectual property rights. According to Article 118 TFEU, “[i]n the context of the establishment and functioning of the internal market, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish measures for the creation of European intellectual property rights to provide uniform protection of intellectual property rights throughout the Union and for the setting up of centralised Union-wide authorisation, coordination and supervision arrangements.” It has been argued that Article 118 TFEU would therefore empower the European Union not only to introduce Union-wide copyright titles, “but also for the

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copyright for online services. See Commission Recommendation 2005/737/EC of 18 May 2005 on collective cross-border management of copyright and related rights for legitimate online music services, <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32005H0737&from=EN>.

<sup>46</sup> See European Commission, “Directive on collective management of copyright and related rights and multi-territorial licensing – frequently asked questions”, [http://europa.eu/rapid/press-release\\_MEMO-14-79\\_en.htm](http://europa.eu/rapid/press-release_MEMO-14-79_en.htm).

<sup>47</sup> See Hugenholtz P.B. and others, “The Recasting of Copyright & Related Rights for the Knowledge Economy”, Final report, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2018238](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2018238).

<sup>48</sup> See <https://www.ivir.nl/copyrightcode/introduction/>.

<sup>49</sup> See Report on the responses to the Public Consultation on the Review of the EU Copyright Rules, p. 89, [http://ec.europa.eu/newsroom/dae/document.cfm?doc\\_id=60517](http://ec.europa.eu/newsroom/dae/document.cfm?doc_id=60517).

<sup>50</sup> For an in-depth criticism of the Wittem Project's Copyright Code see, for example, Ficsor F., “The hurried idea of a ‘European Copyright Code’ in the light of the EU’s (desirable) cultural and copyright policy”, <http://www.copyrightseesaw.net/uploads/fajlok/d9ce1c99e3014eedd61c16279356cb93.doc>.

<sup>51</sup> See Van Eechoud M., Hugenholtz P.B., Van Gompel S., Guibault L., Helberger N., “Harmonizing European Copyright Law - The Challenges of Better Lawmaking” (Kluwer Law International, 2009) p.11.

<sup>52</sup> Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12007L/TXT>.



simultaneous abolition of national titles, which would be necessary for such an initiative to take its full effect and remove territorial restrictions".<sup>53</sup>

The question remains as to whether the removal of the principle of territoriality in copyright law would have the desired effect of removing territorial restrictions. In the absence of copyright-related territorial barriers, rightsholders could still limit the scope of licences via contractual practices, as the case of satellite broadcasting shows.<sup>54</sup> Such licensing practices should however conform to EU competition rules.

## 2.1.3. Latest legislative developments

In recent times, some legislative developments to improve the circulation of works within the European Union have raised concerns among rightsholders about a dismantling of the principle of territoriality in EU copyright law.

### 2.1.3.1. Portability regulation

The Regulation on cross-border portability of online content services in the internal market (the "Portability Regulation")<sup>55</sup> was adopted on 14 June 2017 and came into force on 1 April 2018. It aims at ensuring that EU citizens who buy or subscribe to online content services in their home country are able to access this content when they travel or stay temporarily in another EU country.<sup>56</sup> According to Article 3 of the Portability Regulation, the provider of an online content service provided against payment of money must enable a subscriber who is temporarily present in a member state to access and use the online content service in the same manner as when in their member state of residence, including by providing access to the same content, via the same range and number of devices, for the same number of users and with the same range of functionalities.

In order to conciliate this aim with the principle of territoriality, on which EU copyright law is based, the Portability Regulation contains in its Article 4 a legal fiction whereby the provision of the service to a subscriber who is temporarily present in a member state, as well as the access to and the use of that service by the subscriber, will be considered as happening in the subscriber's member state of residence. Moreover, Article 7 foresees that any contractual provisions that are contrary to the Portability Regulation, be it between service provider and rightsholders or with subscribers, shall be unenforceable.

One year after its entry into force, on 9 July 2019, the European Audiovisual Observatory published for the European Commission a first feedback report on the

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<sup>53</sup> See Van Eechoud M., Hugenholtz P.B., Van Gompel S., Guibault L., Helberger N., see above note 84, p.353.

<sup>54</sup> See Hugenholtz P.B., "SatCab Revisited (...)".

<sup>55</sup> Regulation (EU) 2017/1128 of the European Parliament and of the Council of 14 June 2017 on cross-border portability of online content services in the internal market (Text with EEA relevance)

<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:02017R1128-20170630>.

<sup>56</sup> Digital Single Market – Portability of online content services,  
[https://europa.eu/rapid/press-release\\_MEMO-18-2601\\_en.htm](https://europa.eu/rapid/press-release_MEMO-18-2601_en.htm).



implementation of the new rules by free online video services.<sup>57</sup> According to this first feedback based on a sample analysis,<sup>58</sup> in the context of a fast-evolving digital market, the implementation of portability by free online video services is still at an early stage and is mainly led by public broadcasters. The first reactions received from the services which have implemented portability are rather positive, both in terms of usage and in terms of relations with rightsholders. The technical aspects linked to the implementation of the Portability Regulation (verification of the users' member state of residence and the security process required to check that only eligible users can access the service from abroad) are an important element in the decisions taken by free online video services. Finally, most free online video services have indicated that it is too early to identify needs for change in the Portability Regulation; a few of them stated that the identification and registration process should be simplified and that rightsholders should be better informed of the fact that the Regulation does not affect rights clearance or licensing fees.

#### 2.1.3.2. Directive on copyright and related rights applicable to certain online transmissions

While the Portability Regulation has not met with substantial opposition from the audiovisual industry, the Proposal of the Commission 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 has caused a backlash throughout the audiovisual industry.

The 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 (Regulation Proposal), adopted by the European Commission on 14 September 2016, proposed to introduce the principle of the country of origin (COO) for certain types of online transmissions of TV and radio programmes, such as simulcasting and catch-up services, with the goal of facilitating the licensing of content online by broadcasters and, ultimately, to increase cross-border access to broadcasters' online services in the Digital Single Market. It also introduced a mandatory collective management system for the clearance of rights for retransmissions of TV and radio programmes provided by means other than cable, on equivalent closed networks, with the objective of facilitating the use of programmes by third-party platforms.

Under the proposed rules, for the purpose of clearing rights for some online transmissions by broadcasters, the rights of communication to the public, making available and reproduction would be deemed to take place solely in the member state in which the broadcasting organisation is established. In this way, the broadcasting organisation would only have to clear the rights necessary for the member state in which it has its principal establishment. However, the licences granted under the COO principle would have to take

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<sup>57</sup> Jiménez Pumares M., First feedback from the implementation of the Portability Regulation by free online video services, European Audiovisual Observatory, Strasbourg, July 2019, <https://rm.coe.int/first-feedback-from-the-implementation-of-portability-regulation-by-fr/168095f331>.

<sup>58</sup> The analysis was based on desk research of the online offers of more than 50 free online video services and a questionnaire sent to more than 50 services which was filled in by a total of 25 services.



into account all aspects of such online services, including the audience and the language versions of the programmes.

In the end, after much political wrangling, the adopted text was turned into a directive<sup>59</sup> and, most importantly, significantly watered down. The adopted rules on the COO principle (Article 3) apply to all radio programmes, but only to television programmes that are: (i) news and current affairs programmes, or (ii) fully financed own productions of the broadcasting organisation. It expressly excludes from its scope the “broadcasts of sports events and works and other protected subject matter included in them”. Moreover, Article 3(3) provides that the COO principle shall be without prejudice to the contractual freedom of the rightsholders and broadcasting organisations to agree, in compliance with Union law, to limit the exploitation of such rights.

Articles 4 and 5 concern the retransmission of television and radio programmes and extend the system of mandatory collective management, which is currently applicable to cable retransmissions only, to retransmission services provided through other means (such as Internet Protocol television (IPTV), and satellite, digital terrestrial or online technologies).

Article 8 concerns the transmission of programmes through direct injection, and clarifies that when broadcasters transmit their programme-carrying signals by direct injection exclusively to distributors, and the latter transmit these to the public, there is an “act of communication to the public”, in which both the broadcaster and the distributors participate, and for which they need to obtain authorisation from rightsholders.

## 2.1.4. Territoriality and competition law

Title VII, Chapter 1, Section 1 TFEU contains the EU competition rules applying to undertakings. Article 101 TFEU contains a general prohibition on agreements between undertakings which restrict competition. This provision covers both horizontal and vertical agreements. A limited exception is provided for regarding agreements and other actions which contribute to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit. Article 102 TFEU prohibits the abuse of a dominant position, for example by imposing unfair purchase or selling prices, limiting production, markets or technical development to the prejudice of consumers, placing competitors at a competitive disadvantage or making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which have no connection with the subject of such contracts.

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<sup>59</sup> Directive (EU) 2019/789 of the European Parliament and of the Council of 17 April 2019 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, and amending Council Directive 93/83/EEC (Text with EEA relevance),

[https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L\\_2019.130.01.0082.01.ENG](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_2019.130.01.0082.01.ENG).



The Antitrust Regulation (AR)<sup>60</sup> implements Articles 101 and 102 TFEU. The Antitrust Regulation replaced the centralised notification and authorisation system by an enforcement system based on the direct application of Articles 101 and 102 TFEU in their entirety. According to Article 11(6) AR, the initiation of proceedings by the European Commission relieves the competition authorities of the member states of their competence to also apply EU competition rules to the practices concerned. Article 16(1) AR provides that national courts must avoid giving decisions which would conflict with a decision contemplated by the Commission in proceedings it has initiated.

The European Commission has traditionally defined the geographic scope of broadcasting markets for the licensing/acquisition of audiovisual TV content (film and other content) as national or relating to linguistically homogeneous areas.<sup>61</sup> Particularly as regards broadcasting rights to premium films, the market investigation in the *NewsCorp/BskyB* case<sup>62</sup> confirmed that these rights are only rarely negotiated simultaneously for different territories. According to stakeholders, broadcasting rights are generally negotiated and concluded on a country-by-country basis, with the only exceptions appearing to be licensing in relation to a linguistic area (for example rights for Germany, Austria and the German-speaking parts of Switzerland and Luxembourg) or in relation to areas with a particular common socio-cultural background (for example Scandinavia). Further factors mentioned by stakeholders which prevent cross-border negotiation/licensing include the availability of materials in each language; differences in the availability dates for content in different territories; and the fact that each country and region reflects local preferences in programming.

The fact that licensing agreements are generally concluded on a country-by-country basis does not mean that they cannot have anti-competitive effects and be considered as an obstacle to the completion of the Single Market. As the most outstanding example of this, the CJEU delivered a judgment in the so-called Premier League cases concerning the issuing of licensing restrictions granting broadcasters an exclusive live broadcasting right for Premier League matches on a territorial basis, generally corresponding to the territory of a member state.<sup>63</sup> Following this judgment, in 2012, the Commission conducted a fact-finding investigation to examine whether licensing agreements for premium pay-TV content contain absolute territorial protection clauses which may restrict competition, hinder the completion of the Single Market and prevent consumers' cross-border access to

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<sup>60</sup> Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty,  
<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32003R0001>. See also Commission Regulation (EC) No. 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty,

<http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32004R0773>.

<sup>61</sup> See Capito R., "EU" in Susanne Nikoltchev, Ed., IRIS Special: Converged Markets - Converged Power? Regulation and Case Law (Strasbourg, European Audiovisual Observatory, 2012),  
<https://rm.coe.int/1680783bf4>.

<sup>62</sup> European Commission, Decision D/C(2010) 9684, Case COMP/M.5932 - NewsCorp/BSkyB, 21 December 2010,

[http://ec.europa.eu/competition/mergers/cases/decisions/m5932\\_20101221\\_20310\\_1600159\\_EN.pdf](http://ec.europa.eu/competition/mergers/cases/decisions/m5932_20101221_20310_1600159_EN.pdf).

<sup>63</sup> This judgment is described in detail in Chapter 5 of this publication.



premium sports and film content.<sup>64</sup> In January 2014, the European Commission opened formal antitrust proceedings to examine certain provisions in licensing agreements between several major US film studios (Twentieth Century Fox, Warner Bros., Sony Pictures, NBCUniversal, Paramount Pictures) and the largest European pay-TV broadcasters, such as BSkyB of the UK, Canal Plus of France, Sky Italia of Italy, Sky Deutschland of Germany and DTS of Spain.<sup>65</sup> The Commission's aim was to investigate whether these provisions prevent broadcasters from providing their services across borders, for example by turning away potential subscribers from other member states or blocking cross-border access to their services. As a result of these antitrust proceedings, on 23 July 2015, the European Commission sent a Statement of Objections to Sky UK and six major US film studios: Disney, NBCUniversal, Paramount Pictures, Sony, Twentieth Century Fox and Warner Bros.<sup>66</sup>

After the Commission's Statement of Objections, events unfolded. In April 2016, Paramount offered commitments to address the Commission's competition concerns. The commitments were accepted and made legally binding in July 2016. In December 2018, the General Court of the European Union fully upheld the Commission's decision to accept commitments from Paramount (Case T-873/16 Groupe Canal+), confirming thereby that the Broadcaster and Studio Obligations contained in Paramount's film licensing contract with Sky infringed Article 101 TFEU by eliminating cross-border competition between pay-TV broadcasters. Finally, towards the end of 2018, Disney, NBCUniversal, Sony Pictures, Warner Bros. and Sky offered commitments aimed at addressing the Commission's concerns, which were made legally binding under EU antitrust rules in March 2019.<sup>67</sup>

Another recent Commission antitrust enquiry concerns the e-commerce sector.<sup>68</sup> This sector enquiry was launched on 6 May 2015 pursuant to Article 17 of Regulation 1/2003 and was carried out in the framework of the Commission's Digital Single Market strategy.<sup>69</sup> The Commission wished to gather data on the functioning of e-commerce markets so as to identify possible competition concerns, focusing particularly on potential barriers to cross-border online trade in goods and services, where e-commerce is most widespread (for example, electronics, clothing and shoes), as well as in digital content. The Commission acknowledged the existence of several reasons for the trend of trade between member states relating to the e-commerce sector, including language barriers, consumer

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<sup>64</sup> See Report from the Commission on Competition Policy 2012 (COM(2013) 257 final), Commission Staff Working document, 7 May 2013, SWD(2013) 159 final,

[http://ec.europa.eu/competition/publications/annual\\_report/2012/part2\\_en.pdf](http://ec.europa.eu/competition/publications/annual_report/2012/part2_en.pdf).

<sup>65</sup> See press release of the European Commission, "Antitrust: Commission investigates restrictions affecting cross border provision of pay TV services", 13 January 2014,

[http://europa.eu/rapid/press-release\\_IP-14-15\\_en.htm](http://europa.eu/rapid/press-release_IP-14-15_en.htm).

<sup>66</sup> See press release of the European Commission, "Antitrust: Commission sends Statement of Objections on cross-border provision of pay-TV services available in UK and Ireland",

[http://europa.eu/rapid/press-release\\_IP-15-5432\\_en.htm](http://europa.eu/rapid/press-release_IP-15-5432_en.htm).

<sup>67</sup> See the press release of the European Commission, "Antitrust: Commission accepts commitments by Disney, NBCUniversal, Sony Pictures, Warner Bros. and Sky on cross-border pay-TV services", [https://europa.eu/rapid/press-release\\_IP-19-1590\\_en.htm](https://europa.eu/rapid/press-release_IP-19-1590_en.htm). For more information on this case, see Chapter 5 of this publication.

<sup>68</sup> Commission Decision of 6 May 2015 initiating an inquiry into the e-commerce sector pursuant to Article 17 of Council Regulation (EC) No. 1/2003, C(2015) 3026 final,

[http://ec.europa.eu/competition/antitrust/ecommerce\\_decision\\_en.pdf](http://ec.europa.eu/competition/antitrust/ecommerce_decision_en.pdf).

<sup>69</sup> See paragraph 6.1.1.2 of this publication.



preferences and differences in legal frameworks between member states. However, it noticed indications that undertakings active in the e-commerce sector might be engaged in anti-competitive agreements, concerted practices or abuses of a dominant position.

In March 2016, the Commission published its initial findings on geo-blocking in an issues paper<sup>70</sup> and on 15 September 2016, the Commission published a Preliminary Report on the e-commerce sector inquiry setting out its initial findings.<sup>71</sup> A public consultation, which ended on 18 November 2016, followed the publication of the Preliminary Report. Interested stakeholders also expressed their views at the stakeholder conference organised by DG Competition in Brussels on 6 October 2016.

On 10 May 2017, the Commission adopted the Final Report on the e-commerce sector inquiry<sup>72</sup> and published the accompanying Staff Working Document which sets out the main findings of the e-commerce sector inquiry, taking into account the views and comments submitted by stakeholders during the public consultation.<sup>73</sup> Concerning digital content, the results of the sector inquiry confirmed that the availability of licences from content copyright holders is essential for digital content providers and a key factor determining the level of competition in the market. The report points to certain licensing practices which may make it more difficult for new online business models and services to emerge. However, any assessment of such licensing practices under the EU competition rules would have to consider the characteristics of the content industry. The sector inquiry also discovered that almost 60% of digital content providers who participated in the inquiry had contractually agreed with rightsholders to "geo-block". The Commission considers that any competition enforcement in relation to geo-blocking would have to be based on a case-specific assessment, which would also include an analysis of potential justifications for the restrictions that had been identified.<sup>74</sup>

## 2.2. Territoriality and audiovisual media services

In the case of media regulation, territoriality may take the shape of the country of origin principle or of the country of destination principle.

The principle of the country of origin ensures that any audiovisual media service originating from a provider established in one state can freely circulate across other states without the need for additional authorisation and compliance with the latter's rules. Any attempt to restrict such circulation would be against this principle, as would any imposition

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<sup>70</sup> See the press release of the European Commission, "Antitrust: e-commerce sector inquiry finds geo-blocking is widespread throughout EU", [https://europa.eu/rapid/press-release\\_IP-16-922\\_en.htm](https://europa.eu/rapid/press-release_IP-16-922_en.htm).

<sup>71</sup> See the press release of the European Commission, "Antitrust: Commission publishes initial findings of e-commerce sector inquiry", [https://europa.eu/rapid/press-release\\_IP-16-3017\\_en.htm](https://europa.eu/rapid/press-release_IP-16-3017_en.htm).

<sup>72</sup> Report from the Commission to the Council and the European Parliament, Final report on the E-commerce Sector Inquiry, 10 May 2017, COM(2017) 229 final, [https://ec.europa.eu/competition/antitrust/sector\\_inquiry\\_final\\_report\\_en.pdf](https://ec.europa.eu/competition/antitrust/sector_inquiry_final_report_en.pdf).

<sup>73</sup> See the press release of the European Commission, "Antitrust: Commission publishes final report on e-commerce sector inquiry", [https://europa.eu/rapid/press-release\\_IP-17-1261\\_en.htm](https://europa.eu/rapid/press-release_IP-17-1261_en.htm).

<sup>74</sup> For further information, see European Commission, "Sector inquiry into e-commerce", [https://ec.europa.eu/competition/antitrust/sector\\_inquiries\\_e\\_commerce.html](https://ec.europa.eu/competition/antitrust/sector_inquiries_e_commerce.html).



of further obligations on the providers from whom the audiovisual content originates. The opposite principle is that of the country of destination, according to which it is up to the country where the services are delivered to determine which rules are applicable and which bodies are competent for monitoring and enforcement.

EU rules show mixed approaches, depending on the horizontal rules that are at stake. In the case of audiovisual media services, the country of origin principle applies, whereas under the e-Commerce Directive, which applies to audiovisual content not falling under the editorial responsibility of an audiovisual media service provider but under the concept of information society services, the key principle is the country of destination.

At international level, it is mostly the principle of non-discrimination which determines the applicability of the regulatory framework of the country of destination. This principle takes the form of the Most-Favoured Nations (MFN) principle, according to which, independently of the origin of the service, every country has to apply the same juridical framework to any similar service derived from a provider stemming from another country.

## 2.2.1. Territoriality rules for audiovisual services at EU level

### 2.2.1.1. The Audiovisual Media Services Directive (AVMSD)

#### 2.2.1.1.1. As adopted in 2010

Article 13 and Articles 16-17 AVMSD oblige all audiovisual media service providers to reserve a certain amount of programming time or budget for European works. Based on the so-called “graduated approach”, the AVMSD differentiates these obligations according to the type of service. Whilst for linear programming<sup>75</sup> the obligations have been harmonised to a wider extent, member states have more discretionary powers when it comes to defining the obligation of on-demand services<sup>76</sup> to contribute to the promotion of European works.

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<sup>75</sup> Article 16(1) of the AVMSD: “Member States shall ensure, where practicable and by appropriate means, that broadcasters reserve for European works a majority proportion of their transmission time, excluding the time allotted to news, sports events, games, advertising, teletext services and teleshopping. This proportion, having regard to the broadcaster’s informational, educational, cultural and entertainment responsibilities to its viewing public, should be achieved progressively, on the basis of suitable criteria.

Article 17 of the AVMSD: “Member States shall ensure, where practicable and by appropriate means, that broadcasters reserve at least 10% of their transmission time, excluding the time allotted to news, sports events, games, advertising, teletext services and teleshopping, or alternately, at the discretion of the Member State, at least 10% of their programming budget, for European works created by producers who are independent of broadcasters. This proportion, having regard to the broadcaster’s informational, educational, cultural and entertainment responsibilities to its viewing public, should be achieved progressively, on the basis of suitable criteria. It must be achieved by earmarking an adequate proportion for recent works, that is to say works transmitted within 5 years of their production.”

<sup>76</sup> Article 13(1) of the AVMSD: “Member States shall ensure that on-demand audiovisual media services provided by media service providers under their jurisdiction promote, where practicable and by appropriate means, the production of and access to European works. Such promotion could relate, *inter alia*, to the



The crucial factor in determining which rules apply to which audiovisual media services is the definition of territorial jurisdiction – that is, which member state is allowed to regulate a given matter. For this purpose, the principle of the country of origin, which is at the heart of the AVMSD, is introduced with Article 2(1) AVMSD: “Each Member State shall ensure that all audiovisual media services transmitted by media service providers under its jurisdiction comply with the rules of the system of law applicable to audiovisual media services intended for the public in that Member State”.

Recital 33 helps with interpreting this article: “The country of origin principle should be regarded as the core of this Directive, as it is essential for the creation of an internal market. This principle should be applied to all audiovisual media services in order to ensure legal certainty for media service providers as the necessary basis for new business models and the deployment of such services. It is also essential in order to ensure the free flow of information and audiovisual programmes in the internal market.”

The criteria determining a member state’s jurisdiction are defined by the following paragraphs (Article 2(2-3) AVMSD), which must be considered in order of priority:

- the state where the media service provider has its head office and where the editorial decisions are taken (if the two coincide);
- if they do not coincide, the state where a significant part of the workforce involved operates;
- if a significant part of the workforce is split among the two, the state where the media service provider has its head office;
- if a significant part of the workforce operates in neither of the two, the state where the media service provider first began its activity in accordance with the law of that member state, provided that it maintains a stable and effective link with the economy of that member state.

In the case of media services originating in third countries, two further criteria are foreseen (Article 2(4)):

- the state where a satellite up-link used by the media service provider is situated;
- if none, the state to which the satellite capacity used by the media service provider appertains.

If none of these criteria are satisfied, according to Article 2(5) AVMSD, the residual criteria of establishment according to the TFEU are applicable. As clarified by Recital 40: “Articles 49 to 55 of the TFEU lay down the fundamental right to freedom of establishment. Therefore, media service providers should in general be free to choose the Member States in which they establish themselves”.

The abundance of criteria expresses a clear will to identify the one and only member state that exercises territorial jurisdiction over the concerned media service provider: “[i]n order to promote a strong, competitive and integrated European audiovisual industry and

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financial contribution made by such services to the production and rights acquisition of European works or to the share and/or prominence of European works in the catalogue of programmes offered by the on-demand audiovisual media service.”



enhance media pluralism throughout the Union, only one member state should have jurisdiction over an audiovisual media service provider and pluralism of information should be a fundamental principle of the Union” (Recital 34).

If the main purpose of the country of origin principle is to provide legal certainty in identifying the rules applicable to established media service providers, the need to ensure that services that comply with the provisions applicable to them can freely circulate in other member states is its corollary. This is explicated by Article 3(1) AVMSD: “Member States shall ensure freedom of reception and shall not restrict retransmissions on their territory of audiovisual media services from other member states for reasons which fall within the fields coordinated by this Directive.”

To counterbalance the risk that the service of a media provider established elsewhere but also received in another member state may engage in severe and repeated violations of the law of the receiving country, Article 3, paragraphs (2) to (6) foresees a specific procedure to handle such situations, thereby consequently restricting retransmission.

On the other hand, as this is a directive of minimum harmonisation, “Member States shall remain free to require media service providers under their jurisdiction to comply with more detailed or stricter rules in the fields coordinated by this Directive provided that such rules are in compliance with Union law” (Article 4(1) AVMSD). Again, the following paragraphs of the Article foresee a procedure to handle conflicts arising from cases of potential circumvention, that is, media services originating from other member states, but wholly or mostly directed towards the territory of another member state – in other terms, cases of abuse of law.<sup>77</sup>

Given their status as exception clauses, the procedures of Articles 3 and 4 have to be interpreted restrictively.<sup>78</sup> Regarding on-demand services, no parallel provision for the circumvention of stricter national rules exists; however, the general principles developed by the CJEU also apply to these services.

Due to their complexities, these procedures have been applied in only a handful of cases and most conflicts of jurisdictions are handled on an informal bilateral basis.<sup>79</sup>

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<sup>77</sup> The conditions for the application of circumvention procedures have been codified by the CJEU. See, for example, Case C-212/97, Centros Ltd v Erhvervs-og Selskabsstyrelsen [1999] ECR I-1459, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61997CJ0212>; Case 33/74, Van Binsbergen v Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid [1974] ECR 1299, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61974CJ0033>; Case C-23/93, TV10 SA v Commissariaat voor de Media [1994] ECR I-4795, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61993CJ0023>.

<sup>78</sup> See the CJEU on the requirement of interpreting the exception restrictively, for instance Case C-355/98, Commission v Belgium [2000] ECR I-1221: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61998CJ0355>, Case C-348/96, Calfa [1999] ECR I-11, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61996CJ0348>.

<sup>79</sup> For an overview of possible cases of conflict solved on an amicable basis, see the reports on the application of the AVMSD and the TVWF: <http://ec.europa.eu/digital-agenda/avmsd-application-reports>. See also the background paper prepared for the EPRA meeting in 2011, Donde M., “Terms of Reference Working Group 1: Jurisdiction”, [www.epra.org/attachments/portoroz-wg1-jurisdiction-introduction](http://www.epra.org/attachments/portoroz-wg1-jurisdiction-introduction).



### 2.2.1.1.2. The revision of 2018

On 28 November 2018, the consolidated text of the revised AVMSD was published in the Official Journal of the European Union.<sup>80</sup> This amended directive aims at taking into account the evolution of the market for audiovisual media services, new types of services sparked by technical developments, changes in viewing habits, and the growing importance of user-generated content.<sup>81</sup>

The new directive provides for a strengthening of the COO principle with more clarity on which member state's rules apply, on the aligned derogation procedures for both TV broadcasters and on-demand service providers, as well as on the possibilities for derogations in the event of public security concerns and serious risks to public health.<sup>82</sup>

A new Article 13 introduces enhanced obligations for VOD providers, who now have to secure at least a 30% share of European works in their catalogues and ensure prominence of those works. Concerning territoriality, Article 13 includes a paragraph whereby member states may require certain media service providers targeting audiences in their territories whilst established in other member states to contribute financially to the production of European works, including via direct investment in content or through a contribution to national funds, which shall be proportionate and non-discriminatory. In such a case, the financial contribution shall be based only on the revenues earned in the targeted member states. If the member state where the provider is established imposes such a financial contribution, it shall consider any financial contributions imposed by targeted member states. Any financial contribution shall comply with Union law, in particular with State aid rules.

The obligation imposed by Article 13 shall not apply to media service providers with a low turnover or a low audience. Member states may also waive such obligations or requirements where they would be impracticable or unjustified by reason of the nature or theme of the audiovisual media services. The Commission shall issue guidelines regarding the calculation of the share of European works referred to in paragraph 1 and regarding the definition of "low audience" and "low turnover" referred to in paragraph 6, after consulting the Contact Committee.

### 2.2.1.2. The e-Commerce Directive

As audiovisual content is delivered over electronic communications networks, the AVMSD might not apply to certain cases, notably because the criteria for editorial responsibility are

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<sup>80</sup> Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities, <https://eur-lex.europa.eu/eli/dir/2018/1808/oj>.

<sup>81</sup> See Council of the EU, *Less hate speech and more European content on video streaming services: Council adopts new EU rules*, <https://www.consilium.europa.eu/en/press/press-releases/2018/11/06/less-hate-speech-and-more-european-content-on-video-streaming-services-counciladopts-new-eu-rules/>.

<sup>82</sup> See European Commission, *Revision of the Audiovisual Media Services Directive (AVMSD)*, <https://ec.europa.eu/digital-single-market/en/revision-audiovisual-media-services-directive-avmsd>.



not fulfilled. In these cases, the rules might be determined by the so-called e-Commerce Directive.<sup>83</sup>

Again, as in the AVMSD, the COO principle is king. Article 3(1-2) of the Directive establishes that “1. Each Member State shall ensure that the information society services established on its territory comply with the national provisions applicable in the Member State in question which fall within the coordinated field. 2. Member States may not, for reasons falling within the coordinated field, restrict the freedom to provide information society services from another Member State.”

However, contrary to what happens in the AVMSD, Article 3 (3) of the e-Commerce Directive<sup>84</sup> lists the sectors where this principle is reversed in favour of the country of destination principle. This is the case for copyright, e-payments, consumer protection and commercial communications.<sup>85</sup> As a result, the issue of territoriality is treated differently according to the rights to be protected: in the case of copyright infringement, the competent member state is the country where the services are delivered, whereas in the case of content-related issues the member state of establishment has the right to intervene.

As in the AVMSD, specific procedures are foreseen in Article 3 (4) of the e-Commerce Directive in order to allow the country of reception to restrict retransmission on its territory in cases of severe violations concerning “the protection of minors, the fight against any incitement to hatred on grounds of race, sex, religion or nationality, and violations of human dignity concerning individual persons”.

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<sup>83</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) [2000] OJ L 17/1,

<http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32000L0031>.

<sup>84</sup> Article 3(3) of the e-Commerce Directive: “3. Paragraphs 1 and 2 shall not apply to the fields referred to in the Annex.”

<sup>85</sup> According to the Annex to the e-Commerce Directive:

“As provided for in Article 3(3), Article 3(1) and (2) do not apply to:

– copyright, neighbouring rights, rights referred to in Directive 87/54/EEC(1) and Directive 96/9/EC (2) as well as industrial property rights,

– the emission of electronic money by institutions in respect of which Member States have applied one of the derogations provided for in Article 8(1) of Directive 2000/46/EC(3),

– Article 44(2) of Directive 85/611/EEC(4),

– Article 30 and Title IV of Directive 92/49/EEC(5), Title IV of Directive 92/96/EEC(6), Articles 7 and 8 of Directive

88/357/EEC(7) and Article 4 of Directive 90/619/EEC(8),

– the freedom of the parties to choose the law applicable to their contract,

– contractual obligations concerning consumer contacts,

– formal validity of contracts creating or transferring rights in real estate where such contracts are subject to the mandatory formal requirements of the law of the Member State where the real estate is situated,

– the permissibility of unsolicited commercial communications by electronic mail.”



But, again, these procedures are particularly complex and time-consuming; thanks to, among other factors, the presence of a devoted network (the “CPC-Network”)<sup>86</sup> which deals with possible conflicts, the relevant cases have been very limited in number.<sup>87</sup>

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<sup>86</sup> The Consumer Protection Cooperation (CPC) network consists of authorities responsible for enforcing EU consumer protection laws to protect consumers' interests in EU and EEA countries. See [https://ec.europa.eu/internal\\_market\(scoreboard/performance\\_by\\_governance\\_tool/consumer\\_protection\\_cooperation\\_network/index\\_en.htm](https://ec.europa.eu/internal_market(scoreboard/performance_by_governance_tool/consumer_protection_cooperation_network/index_en.htm).

<sup>87</sup> Commission staff working document, “Online services, including e-commerce, in the Single Market”, SEC(2011) 1641 final, 11 January 2012, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011SC1641>.



### 3. National legal framework

#### 3.1. The rights clearance process in the EU audiovisual sector

##### 3.1.1. The specificities of the EU audiovisual sector

The audiovisual industry depends on copyright and neighbouring rights, which promote the creation of new media content, remunerate rightsholders, and operate as a tool to enable transactions between them and the agents operating in other parts of the value chain, such as distribution networks.

The EU audiovisual sector is characterised by its structural fragmentation, both cultural and at market level. Cross-border linguistic and cultural specificities require linguistic and/or cultural versioning<sup>88</sup> and dubbing, as well as significant advertising and marketing investments in order to target local audiences and create consumer demand for each film or audiovisual work. This fragmentation largely explains why European audiovisual content has been traditionally licensed primarily on a territorial basis. Each licensing contract requires negotiation on the size of the investment and on how the risks will be shared between distributors and rightsholders. There are few economies of scale or risk mutualisation in negotiating such contracts for multiple territories, except in the case of blockbusters and audiovisual productions designed for global audiences.

On the other hand, the pre-financing of audiovisual works requires the stakeholders from the territory for which these works are designed to be significantly involved. They consider territoriality as crucial in generating the predictable returns that are needed in order to obtain pre-financing. In most cases, the exploitation rights are pre-sold per territory and distribution platforms in order to generate revenue for the financing of the audiovisual work. According to rightsholders, these territorial pre-sales not only operate as an essential instrument for financing films, but they are also often a prerequisite for the recouping of producers' investments and the enrolment of other financiers or investors in the project.

The evolution of the European audiovisual market is driven by digital technologies, with new modes of access and consumption by users of audiovisual content and increased competition in the VOD market and requires stakeholders to adapt their strategies and business models, with a possible impact on the financing of films and on licensing practices. In the context of fierce competition characterised by the race for films and audiovisual

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<sup>88</sup> Audiovisual content is distributed through a wide spectrum of versions, allowing the consumer to get it within different time windows, under different formats and at different prices. Audiovisual "versioning" covers not only the quality differentiation, but also the means of access, the bundle of products gathered in the offer and the scope of usage granted to the consumer. For further details on the media marketing concept of "versioning" see Kea European Affairs, Mines Paris-Tech, Multi-Territory Licensing of Audiovisual Works in the European Union, Final report prepared for the European Commission, DG Information Society and Media, October 2010, p. 26, <https://op.europa.eu/en/publication-detail/-/publication/369b51d8-49a0-49c4-9404-5b34a503033c>.



content to attract and retain audiences, the acquisition of exclusive worldwide rights for long periods of time is, more than ever, becoming a competitive asset for broadcasters and platforms.

### 3.1.2. The specificities of audiovisual works

As summarised in a World Intellectual Property Organisation (WIPO) publication, “*Moviemaking is a collective endeavor organized by the producer and involving many brilliant creative talents: writers, directors and actors, cameramen, designers, editors, and so on. Economic success depends on matching ideas with talent, obtaining relevant intellectual property (IP) rights and using them to attract finance from commercial film distributors*”.<sup>89</sup>

Indeed, one of the specificities of audiovisual works – compared to, for example, musical works – is that they involve a potentially large number of holders of authors’ and neighbouring rights, as they are the result of the collaboration of two main groups of contributors: creative collaborators, which include authors and performers; and financing partners, which include film producers, broadcasters for their in-house productions, and others to whom producers may have transferred intellectual property (IP) rights.<sup>90</sup> Audiovisual works may also include pre-existing works, such as, for example, when the film script is based on an existing novel or when the audiovisual work includes pre-existing musical work(s). In these cases, the producer must first obtain all required authorisations (copyright documentation or “chain of title”).

There is no international standard, nor EU-harmonised statutory allocation of authorship and ownership of rights in audiovisual works. According to the guidance given to countries by the Berne Convention, the authors of an audiovisual work are the “*authors who have brought contribution to the making of the work*”.<sup>91</sup> According to EU law,<sup>92</sup> at least the following shall be regarded as authors or co-authors of an audiovisual work: the principal director, the author of the screenplay, the author of the dialogue, and the composer of music specifically created for use in the cinematographic or audiovisual work. Determining the authorship and initial ownership of audiovisual works may thus end up being a complex issue with different solutions in different countries.<sup>93</sup> In addition to diverging authorship and first ownership rules, the scope of rights owned by producers and authors may vary according to applicable national laws.

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<sup>89</sup> From Script to Screen: The Importance of Copyright in the Distribution of Films, Booklet No. 6, WIPO 2011, <https://www.wipo.int/publications/en/details.jsp?id=261&plang=EN>.

<sup>90</sup> Koskinen-Olsson, T., “Study on collective negotiation of rights and collective management of rights in the audiovisual sector”, study prepared for the WIPO COMMITTEE ON Development and Intellectual Property (CDIP), [https://www.wipo.int/edocs/mdocs/en/cdip\\_14/cdip\\_14\\_inf\\_2.pdf](https://www.wipo.int/edocs/mdocs/en/cdip_14/cdip_14_inf_2.pdf).

<sup>91</sup> WIPO – Guide to the Berne Convention, Article 14bis5 on Article 14bis, paragraph (2)(b) on Presumption of Legitimation.

[https://www.wipo.int/edocs/pubdocs/en/copyright/615/wipo\\_pub\\_615.pdf](https://www.wipo.int/edocs/pubdocs/en/copyright/615/wipo_pub_615.pdf).

<sup>92</sup> Directives 92/100/EC on rental and lending right and 93/98/EEC on the term of protection. For more details, please refer to Chapter 2 of this publication.

<sup>93</sup> For a full overview of the variety of solutions for audiovisual authorship across Europe, please refer to: CISAC Study, “Remuneration right for audiovisual authors, by Xalabarder R., 2017, pag. 13, <https://www.cisac.org/CISAC-University/Library/Studies-Guides/AV-Remuneration-Study>.



Despite the difficulties linked to different legal frameworks, the licensing process for audiovisual works is less complex than for music since commercial users of audiovisual works usually have to negotiate with only one party, who assumes financial responsibility for the film and concentrates all the commercial exploitation rights related to it: the producer. In most cases, audiovisual producers can therefore decide whether, for example, to license on a territorial or an international basis. This allows them to maximise revenues on behalf of all rightsholders that intervene in the process (film director, screenwriters, actors, etc.).

### 3.1.3. The rights clearance for audiovisual works

#### 3.1.3.1. The transfer of rights to the producer

The audiovisual producer, as a natural or legal person who takes the initiative and responsibility for the production of the audiovisual work and assumes financial responsibility for the risks incurred, must first have acquired all the necessary exploitation rights from authors and performers, and where appropriate, clear the rights attached to any pre-existing works used in the film (for example, a novel for the script or pre-existing music),<sup>94</sup> before being able to license the film to users.

The transfer of rights to the producer is agreed by the parties through an audiovisual production contract that is usually negotiated individually between the creative collaborator and the producer (the main exception being the rights attached to the musical works used in the film, where the intervention of a collective management organisation (CMO) has become the rule).<sup>95</sup> In practice, in the absence of a strong bargaining position of authors and performers vis-à-vis producers (reinforced by a presumption of transfer of rights to the producer in many countries),<sup>96</sup> current contractual practices like buy-out contracts (one-off payments for the transfer of rights) are often the rule in many European countries. Alternatively, contracts can be negotiated collectively between representative associations or professional guilds, as in some common law countries.<sup>97</sup> In other countries, some CMOs

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<sup>94</sup> In some jurisdictions, film producers are considered as “authors” of audiovisual works (for example, in the United States, the producer holds the copyright in an audiovisual work and is deemed as “the sole author”).

<sup>95</sup> For further details on the clearance of music rights, please see: Cabrera Blázquez F., Cappello M., Grece C., Valais, S., Territoriality and its impact on the financing of audiovisual works, IRIS Plus, European Audiovisual Observatory, Strasbourg, 2015, pag. 43 to 45, <https://rm.coe.int/168078347f>.

<sup>96</sup> In countries with co-authorship status, co-authors of audiovisual works are typically presumed to have assigned their rights of exploitation to the producer unless otherwise agreed upon. These presumptions can be rebuttable (iuris tantum) (where the transfer is subject to contractual arrangements to the contrary), or mandatory (where the transfer of rights takes place automatically when consent to the filmmaking is given by the author or performer). In some other jurisdictions, authors and performers must specify in the contract which rights they are transferring to the producers. Furthermore, the scope of such a presumption of transfer may vary under different national laws or apply differently to different co-authors.

<sup>97</sup> In countries where collective negotiations take place, the parties generally negotiate minimum standards that each individual contract must meet. An individual author or performer can use his or her bargaining power to negotiate better terms.



have managed to negotiate standard clauses to be included in production contracts to secure further remuneration for authors and performers through collective management.

There is therefore no single standard solution, and different countries have chosen different negotiation methods depending on their history, local infrastructure, etc. Regardless of the legal systems in force, production contracts play a major role in that they define the working relationship between authors, performers and producers and lay down the conditions for the transfer of exploitation rights to the producer as well as the remuneration for subsequent uses of the work or performance.

### 3.1.3.2. The licensing process of the audiovisual work to users

After this first rights clearance process, the producer is able to negotiate licensing agreements with third parties for the distribution and exploitation of the work in several formats and platforms. Different types of users can be involved in this process, depending on the respective release windows agreed upon. For example, for feature films, rights clearance processes generally involve theatres, physical (DVD, etc.) and its online equivalent ("electronic sell-through"), online pay-per-view, pay-TV, online subscription services, and free-to-air broadcasters.

#### 3.1.3.2.1. The specificities of the licensing of rights for the online transmission of digital content

As mentioned earlier, the main competitive factor in digital content markets is access to rights for attractive quality content. The availability of online rights is determined by the rightsholders' decision to license them and by the scope of the licence granted. Licensing agreements between rightsholders and digital content providers use specific concepts to precisely define the scope of the rights granted. The European Commission has identified several specificities in practice related to the licensing of rights for online distribution, as follows:<sup>98</sup>

- *Scope of licensed rights:* rights can be negotiated separately and split up into several components which may be licensed separately or all together to different content providers in different member states. The scope of the licensed rights, as determined by the licensing agreement, might vary as regards: (i) the technology used to distribute and access content, in terms of transmission, reception and usage technologies; (ii) the product release and/or the duration of the licensed rights; and (iii) the territorial scope. Bundling rights for the online transmission of digital content with rights in other transmission technologies is also common. For example, digital content providers report that online rights are most often licensed together with rights for mobile transmission, terrestrial transmission and satellite transmission.<sup>99</sup> This is also a way for rightsholders to protect their exclusive rights

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<sup>98</sup> See European Commission, Final report on the E-commerce Sector Inquiry, COM(2017) 229 final 10 May 2017, page 14 and following, [https://ec.europa.eu/competition/antitrust/sector\\_inquiries\\_e\\_commerce.html](https://ec.europa.eu/competition/antitrust/sector_inquiries_e_commerce.html).

<sup>99</sup> Ibid. p. 14.



and avoid a situation whereby different content providers may offer the same product.

- *Territorial scope:* Online rights to high-quality content such as films and TV fiction have been, to a large extent, traditionally licensed on a national basis or for the territory of a limited number of member states that share a common language. According to the E-commerce Sector Inquiry, the vast majority of digital content providers (68%) were using geo-blocking measures in 2017 to restrict access to their online digital content, and 59% of them were doing so because of contractual restrictions in agreements with rightsholders. Geoblocking was most common in agreements for TV series (74%) and films (66%), followed by sport events (63%).<sup>100</sup> The E-commerce Sector Inquiry also highlighted differences between member states and content sectors in the extent to which geo-blocking has been implemented in the European Union.<sup>101</sup>
- *Duration of licensing agreements:* Contract terms generally range from three to five years. Contractual relations tend to last longer, though, with an average duration of more than 10 or even 20 years, possibly due to clauses favouring their extension or renewal.<sup>102</sup>

### 3.1.3.2.2. Case study: the rights licensing process with regard to broadcasters

Broadcasters must, like any other users, acquire the rights attached to audiovisual works, such as TV programmes, fiction or documentaries, if they want to use them for broadcasting and ancillary services. They will do so either through their own productions or commissioned productions (as producer), or from independent producers. The licensing process with broadcasters, particularly for independent productions, involves five main aspects:<sup>103</sup>

- Forms of use or modes of exploitation: it refers to the “version” of the work from the country of origin (the original, dubbed and/or subtitled version); and the rights to (linear) broadcast (pay-TV, free-to-air, terrestrial, satellite, cable, retransmission, reproduction). Additionally, there may be the rights to online (simulcast) for “ancillary” services such as catch-up.<sup>104</sup> The rights to on-demand uses include the

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<sup>100</sup> As seen in Chapter 2 of this publication, Regulation 2018/302, which has been applicable in the European Union since 3 December 2018, bans unjustified geo-blocking and other forms of discrimination based on the customer’s nationality, place of residence, or establishment. The Regulation, however, excludes from its scope audiovisual services giving access to copyright-protected content such as films, series, or other content, as well as the broadcasting of sport events.

<sup>101</sup> Ibid. p. 15.

<sup>102</sup> Ibid.

<sup>103</sup> See the presentation given by Jan Bernd Nordemann, Honorary Professor, Humboldt University Berlin, and Partner at Boehmert & Boehmert Law Firm at the Workshop on “Online (re)transmission of TV programmes”, organised by the European Audiovisual Observatory in Brussels on 21 June 2017, <https://rm.coe.int/168078332c>.

<sup>104</sup> Licensing practices for broadcasters differ across the European Union in relation to the rights to on-demand uses for broadcasters. Some try to acquire at least the rights for ancillary uses such as catch-up (for example, for seven days after linear broadcasting), but do not always obtain them, while others try to acquire less limited on-demand rights.



right of “making available to the public” (free, pay-per-view, pay-per-channel, pay-per-bouquet, subscription per streaming or download) and the right to reproduction. Acquiring on-demand rights – even mere “catch-up” – becomes a fundamental challenge for the sector, as these are likely to become as important as linear rights (with the exception of “live” rights, for sport). The more broadcasters acquire extensive on-demand rights, the more they will be able to compete with non-linear on-demand services.

- Duration of the licence: it usually runs from three to ten years, with the possibility of licensing for a restricted usage time for ancillary catch-up services, for example, seven days after the linear broadcast.
- Quantity of use: for example, there may be a limit to the number of linear broadcasts within the licensing term.
- Exclusivity or non-exclusivity of the licence: this aspect is of particular significance. Linear broadcast rights are usually exclusive, while catch-up or on-demand rights often tend to be granted on a non-exclusive basis, as those rights may also be granted to other on-demand services.
- Territorial scope of the licence. Traditionally in the audiovisual sector, rights have been licensed for the broadcaster’s home country, and multi-territorial licences have been mainly granted for groups of countries with the same language. For satellite broadcast, the country of origin principle has been applied according to the SatCab Directive.<sup>105</sup>

### 3.1.4. The role of collective management in the audiovisual sector

In contrast to the music sector, where the vast majority of rights are collectively managed, there is no harmonisation of the collective management of rights in the audiovisual sector. In fact, contractual freedom and individual negotiations predominate in the audiovisual field with regard to the transfer of rights from authors and performers to producers. Collective rights management has been traditionally used to manage secondary exploitations (cable retransmission, rental educational uses, private copying,...) before being developed for broadcasting in many countries, in order to facilitate licensing processes. Voluntary collective licensing solutions may, however, have a greater role to play in the future, with the increasing importance of the online/on-demand exploitation of audiovisual works.

#### 3.1.4.1. The legal framework for collective management

Subject to national law provisions, rightsholders to an audiovisual work – including creative collaborators (authors and performers) and financing partners (producers,

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<sup>105</sup> For more details, please see Chapter 2 of this publication.



broadcasters for their in-house production..) – can join a variety of CMOs to collectively defend their interests. The model, role and functions of audiovisual CMOs may vary considerably across jurisdictions and countries. Their scope in terms of the representation of rightsholders and rights is diverse and reflects, to a large extent, the historical, economic, social and cultural specificity of the country.

The main groups of audiovisual CMOs include: the CMOs for audiovisual authors (for instance screenwriters and film directors); the CMOs for performers (for instance actors); the CMOs for film producers; and the CMOs jointly representing different categories of audiovisual rightsholders or types of works. They may intervene to authorise different types of uses: either *primary* exploitations (for example, cinema and television) or only subsequent uses after primary exploitation (sometimes referred to as *secondary* or *tertiary rights*).<sup>106</sup> The range of rights that are managed collectively on behalf of rightsholders also vary greatly from country to country. They may be exclusive or remuneration rights, unwaivable or not, inalienable or not, subject to mandatory or voluntary collective management.<sup>107</sup>

Table 1 below illustrates this variety of approaches by describing the different rights managed collectively in Europe on a voluntary or on a mandatory basis.

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<sup>106</sup> The distinction between primary and secondary or tertiary rights is becoming blurred in the current media landscape.

<sup>107</sup> In addition to the management of exploitation and remuneration rights, CMOs may represent authors and performers in the exercise of their moral rights on the audiovisual work or performance.

**Table 1. Descriptions of rights administered by audiovisual CMOs in Europe (voluntarily or on a mandatory basis)**

Right	Description
Cable retransmission right	Collectively administered all over Europe in application of the 1993 Cable and Satellite Directive.
Private copying	Private copying schemes are in place in most EU member states.
Broadcasting rights	Whether by law or agreement, broadcasting rights are collectively managed by a majority of CMOs representing audiovisual authors in the European Union. These rights generate a very important source of income for audiovisual authors.
Rental right	Subject to an unwaivable right to equitable remuneration according to the 1992 Rental and Lending Rights Directive, it is administered on a voluntary basis by some CMOs in the European Union.
Online/on-demand rights	Online/on-demand rights cover both the online transmission of broadcasting and new online services. Handling these rights makes it possible for audiovisual CMOs to adapt their agreements with broadcasters to include the online use of programmes. However, agreements with Internet players are still rare and the money collected for audiovisual authors for this group of rights is currently very low;
Other secondary uses	For example, public performance rights (broadcasting in hotels, bars, etc.), lending rights, educational uses and archive uses are collectively managed by a number of audiovisual CMOs in the European Union.
Theatrical exhibition	Theatrical exhibition is only collectively administered in Spain and Poland for audiovisual authors.

### 3.1.4.2. The process of the collective management of rights

As soon as an author who is a member of a CMO has completed a work, a process to ensure the management of the rights of that work begins. The process, led by the CMO, continues until the expiry of the author's rights in the work in question. Its core purpose is to ensure that the author receives his or her share from the work. The process involves the following steps:

- **Registration and documentation:** The author enters into a membership contract or non-exclusive licence agreement with the CMO. In many countries, rightsholders assign their rights to their local CMO while in others, they merely grant the local CMO a non-exclusive licence. After registration, the CMO researches and records the fundamental elements of the work (documentation stage), which will be necessary to organise an accurate distribution of royalties. All CMOs have exhaustive databases both of their members and of the repertoire they represent.



- Licensing: CMOs deal with the task of authorising the use of the author's work as the authorised representative of the author. A user who meets the conditions set by the CMO will be licensed to use a specific work or the entire repertoire the society represents. The major condition for use will be the payment of a royalty. This is generally set by negotiation between the CMO and the user or by reference to a standard tariff published by the CMO. In some cases, the tariff is prescribed by law or through the determination by a copyright court.<sup>108</sup>
- Collection and distribution of royalties: Once a CMO has granted a licence for the use of a work, its next task is to collect the royalties that the user has agreed to pay as well as the information on the actual use of the work by that user. Once the royalties are collected, the CMO is responsible for distributing the sums to its members or to the members of fellow CMOs in such a way that every author receives the share of the royalties to which she or he is entitled. A fee to cover the administrative costs of collection and distribution is generally deducted from the copyright royalties.<sup>109</sup>

### 3.1.4.3. Collective management and territoriality

Following the national treatment principle enshrined in the Berne Convention, in any given territory, foreign authors enjoy the same rights and are treated in the same way as nationals. Thus, within its territory, a CMO will apply the national legislation in the field of authors' rights to national and foreign creators alike. The International Confederation of Societies of Authors and Composers (CISAC)<sup>110</sup> fosters a global network of CMOs, within which this principle is upheld under the so-called "reciprocal representation agreements". Through this mechanism, CMOs can administer foreign repertoires in their respective territories, exchange information and pay royalties to foreign rightsholders.

In practice, the global use of audiovisual works requires vast amounts of information about works and uses to be exchanged internationally. For example, when a Japanese film is broadcast in Chile, the Japanese CMO which represents the Japanese authors of the work needs to receive the relevant information about its use in Chile from the Chilean CMO. A large part of the CISAC's work is to enhance this information exchange through its international network of member CMOs and by setting standards and rules. This includes establishing and managing the specifications for uniquely identifying creative works and their creators.

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<sup>108</sup> The scope of the representation mandate given by authors to their CMOs enables the latter to grant a wide range of licences for different uses and different users. One of the specificities of audiovisual works is that exploitation rights are generally centralised in the hands of the producer in order to facilitate the subsequent exploitation of the work.

<sup>109</sup> Although CMOs have developed modern databases and powerful computing systems, the task of accurate distribution is substantial as most of them handle millions of works and information about millions of uses, and considering that many works have more than one author and each can have numerous holders of their rights in different territories and for different uses.

<sup>110</sup> <https://www.cisac.org/>.



## 3.2. The country of origin principle in the financing of audiovisual works

Different types of measures have been introduced at EU member states' level in order to promote and finance European audiovisual works. These usually involve a mix of private sector money, public funding made up of levies and taxes imposed on various actors in the audiovisual sector and, as a complement to state support, financial investment obligations placed on TV and VOD providers. As mentioned in Chapter 2, Article 13(2) of the revised AVMSD has opened a first breach in the principle of territoriality by allowing member states that have put in place under their jurisdiction an obligation for media service providers to contribute financially to the production of European works, "including via direct investment in content and contribution to national funds," to also require such services targeting audiences in their territories, but established in other Member States to make such financial contributions (...)."

In practice, only Germany, France and the Flemish Community of Belgium have imposed, so far, a levy on VOD services which is also applicable to foreign VOD services targeting their domestic audience. However, in the Flemish Community of Belgium, the levy is not mandatory but optional, which means that VOD services can choose between contributing through a financial investment (direct contribution) and paying a levy (indirect contribution) to the film/audiovisual fund.

### 3.2.1. The “film levy” to the German Federal Film Board

The *Filmförderungsanstalt* (German Federal Film Board, FFA)<sup>111</sup> has the task of supporting the German film industry and the creative and artistic quality of German film-making. It is largely financed through the collection of a film levy from a variety of sources. As well as linear AVMS providers (free-to-air and public broadcasters), distributors, theatres, and video distributors, Article 153 of the *Filmförderungsgesetz* (German Film Law, FFG),<sup>112</sup> requires VOD providers (licence holders) that distribute feature films made for commercial purposes to pay a levy of 1.8% of their yearly turnover if their turnover from the exploitation of feature films exceeds EUR 500 000 per year (2.5% if their turnover exceeds EUR 20 million).<sup>113</sup>

The levy not only applies to VOD services with headquarters or subsidiaries in Germany, but also to foreign VOD providers targeting the German public with an offer in the German language. Those services have to contribute to the fund on the basis of

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<sup>111</sup> The FFA is Germany's national film funding institution and supports all the interests of German cinema. Apart from its duties as a funding body, the FFA is the central service structure for the German film industry. Its budget is financed via the so-called “film levy”, which is raised from, among others, cinemas, the video industry and television.

<sup>112</sup> Filmförderungsgesetz (German Film Law):

<https://www.ffa.de/download.php?f=a8aa7d2a4a9f9c74f714bc64b7d7e218&target=0>.

<sup>113</sup> See also, Mapping of national rules for the promotion of European works in Europe, European Audiovisual Observatory, Strasbourg, 2019, <https://rm.coe.int/european-works-mapping/16809333a5>.



revenues made in Germany. The obligation does not apply if these revenues are subject to a comparable financial obligation in the country of establishment of the service. The FFA is the authority in charge of gathering and controlling the amount due under the levy.

By decision of 1 September 2016, the European Commission confirmed the compatibility of this extraterritorial extension of the levy to VOD services located outside Germany with the Treaty on the Functioning of the European Union (TFEU) and declared the measure not contrary to Directive 2010/13/EU on audiovisual media services (AVMSD).<sup>114</sup> Following this decision, Netflix brought an action before the General Court of the European Union contesting these rules, arguing that the FFG violated the free movement of services, freedom of establishment and EU aid and tax regulations. In a judgment of 16 May 2018 (Case T-818/16), the General Court found inadmissible Netflix's application for the annulment of the European Commission's 2016 decision regarding the rules on foreign providers.<sup>115</sup>

### 3.2.2. The “video tax” in France

Since 1 January 2018, a 2% tax on the yearly turnover<sup>116</sup> (increased to 10% when the transaction concerns pornographic or violent works) has been payable for making available services to the French public which give them access to cinematographic or audiovisual works, upon individual request and by means of an electronic communication process.

As a reminder, the origins of this tax date back to 1993 in respect of actual videograms (VHS/DVD); in 2004, it was extended to French sites charging for video-on-demand (“VOD”); and in 2013, it was extended further to include pay video platforms established outside France for the portion of their turnover realised in France from their subscribers. In 2016, the French Parliament voted for a further extension, to include all platforms offering mainly free videos, whether they are established in France or elsewhere. In this case, the tax is applied to the platforms' advertising revenue. These last two extensions were submitted to the European Commission for examination and approval. By passing legislation on 29 December 2016 to amend its budget, the French Parliament incorporated in the base for the tax on the sale and rental of videograms (VHS/VOD) the advertising revenue of sites making videos available online either for free or against

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<sup>114</sup> As mentioned in Chapter 2 of this publication, Article 13(2) of the revised AVMSD later confirmed this possibility.

<sup>115</sup> Case T-818/16, Netflix International BV v. European Commission, Judgment of the General Court (Eighth Chamber), 16 May 2018, <http://merlin.obs.coe.int/redirect.php?id=19413>. See details of the decision of the Court in Chapter 5 of this publication.

<sup>116</sup> More specifically, for on-demand audiovisual media services, the tax is based on the amount, excluding value added tax, of the price paid for access to cinematographic and audiovisual works. The base for the tax does not include amounts paid by advertisers and sponsors for the circulation of their advertising and sponsorship messages on catch-up television services, which are already subject to a different tax. For free services, it is based on the amount of the sums (not including VAT) paid by advertisers and sponsors for the circulation of their advertising and sponsorship messages on the services in question to the taxpayers concerned or to the agencies handing the advertising and sponsorship messages. A flat-rate reduction of 4% is applied to these sums; the reduction is increased to 66% for services giving or allowing access to audiovisual content created by private users for the purpose of sharing and exchange within “communities of interest”.



payment, in favour of the Centre national du cinéma et de l'image animée (CNC) (under the new Article 1609 sexdecies B of the General Tax Code).

The tax is due from both the editors of on-demand audiovisual media services (for example, Netflix) and community platforms (for example, YouTube) if they allow access to audiovisual content. It applies whether or not the on-demand audiovisual content provider is established in France (Article 1069eB of the Tax Code). Thus, the tax is payable by any operator, wherever it is established, offering a service in France that gives or permits access, either for free or against payment, to cinematographic or audiovisual works or other audiovisual content.

For VOD providers, the tax is based on the amount, excluding value added tax (VAT), of the price paid for access to cinematographic and audiovisual works. The base for the tax does not include amounts paid by advertisers and sponsors for the circulation of their advertising and sponsorship messages on catch-up television services, which are already subject to a different tax. For free services, it is based on the amount of the sums (not including VAT) paid by advertisers and sponsors for the circulation of their advertising and sponsorship messages on the services in question to the taxpayers concerned or to the agencies handing the advertising and sponsorship messages. An abatement of 66% or EUR 100 000 applies to free services.<sup>117</sup> The tax is payable under the same conditions and according to the same procedures as those applicable to VAT. The proceeds of the tax are allocated to the CNC for the financing of support for the creation of new works.<sup>118</sup>

According to the CNC, the so-called “YouTube” and “Netflix taxes” introduced in 2018 have raised EUR 9.5 million, including almost EUR 8 million from the tax on paid platforms alone. The amount remains small compared to the approximately EUR 300 million in tax paid by television channels, but it is expected to increase with the rise of SVOD, the expected arrival of new players, and the possibility that this tax will be increased under the new audiovisual law under preparation.<sup>119</sup>

It should also be mentioned that, according to recent announcements by the French Minister of Culture, the next draft bill on audiovisual services will include financing obligations in the production of French and European works with regard to VOD platforms (from 16% of their turnover in France).<sup>120</sup> It will undoubtedly be very interesting to follow the exact wording of these obligations from the point of view of the territoriality principle and their implementation with regard to operators whose registered office is located in other member states.

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<sup>117</sup> Exemptions are granted for services whose audiovisual content is secondary, services whose main purpose is devoted to information, and services whose main purpose is to provide information relating to cinematographic and audiovisual works and their distribution to the public and to promote them, in particular by means of extracts or trailers.

<sup>118</sup> See also, Mapping of national rules for the promotion of European works in Europe, op. cit.

<sup>119</sup> <https://www.lesechos.fr/tech-medias/medias/video-a-la-demande-netflix-et-consorts-ont-double-leur-chiffre-d'affaires-en-france-en-2018-1017036>.

<sup>120</sup> Ibid.



### 3.2.3. The Flemish Community of Belgium

In Flanders, pursuant to a Flemish Decree of 29 June 2018,<sup>121</sup> an obligation for non-linear television organisations to participate in the production of Flemish audiovisual works on an annual basis was introduced in Article 157, paragraph 2 of the Flemish Media Decree.

This “incentive scheme” (stimuleringsregeling) applies both to non-linear television broadcasters that are established in the Flemish Community and to non-linear television broadcasters that are established in a member state of the European Union and offer non-linear television services aimed at the Flemish Community. A private non-linear television broadcaster can choose between two options for fulfilling its obligation: either a financial contribution to the (co-)production of Flemish audiovisual works; or an equivalent financial contribution to the Flemish Audiovisual Fund (Vlaams Audiovisueel Fonds, VAF). The latter contribution is spent by the VAF on Flemish, qualitative, independent co-productions in series form. Paragraph 3 requires non-linear broadcasters to provide the Flemish Media Regulator with a report on how the obligation has been met each year before 31 March. The Flemish Media Regulator will make this information public.

On 1 February 2019, a Decision was approved by the Flemish Government which provides more details on the obligatory participation of non-linear broadcasting organisations in the production of Flemish audiovisual works.<sup>122</sup> First of all, the Decision states that it is not applicable to non-linear television broadcasters whose annual turnover (which is specified in Article 4 of the Decision) is less than EUR 500 000. Additional exemptions might be applicable to actors (television broadcasters and service distributors) who are subject to other incentive schemes under Articles 154, 155, 156 and 184/1 of the Flemish Media Decree.

Every year (X), every non-linear television broadcasting organisation must inform the VAF, the Flemish Media Regulator and the Flemish Government by registered letter before 15 February of their chosen form of participation ((co-)production or payment to the VAF) and the amount of the contribution – which should be equal to 2% of the turnover two years previously (X-2) – or must provide the Flemish Media Regulator with evidence to prove that it does not fall within the scope of the decision (based on data from X-2). If the organisation fails to notify, it will be assumed that it has chosen a flat-rate contribution to the VAF, which amounts to EUR 3 million per year.

If an organisation chooses to participate by means of a financial contribution to original co-production projects, it must submit those projects to the Flemish Media Regulator who will assess their admissibility (based on a number of conditions detailed in

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<sup>121</sup> Decreet van 29 juni 2018 houdende wijziging van diverse bepalingen van het decreet van 27 maart 2009 betreffende radio-omroep en televisie (Decree of 29 June 2018 amending various provisions of the Decree of 27 March 2009 on radio broadcasting and television),

<http://www.ejustice.just.fgov.be/eli/decreet/2018/06/29/2018040490/staatsblad>.

<sup>122</sup> Besluit van de Vlaamse Regering betreffende de deelname van de particuliere niet-lineaire televisieomroeporganisaties aan de productie van Vlaamse audiovisuele werken (Decision of the Flemish Government on the participation of private non-linear television broadcasting organisations in the production of Flemish audiovisual works), <http://reflex.raadvst-consetat.be/reflex/pdf/Mbbs/2019/03/18/140890.pdf>.



Article 7 of the Decision – for instance, it must be an animation series, a documentary series or a fiction series) and decide on whether or not to authorise them.

If an organisation chooses to participate by means of a financial contribution to the VAF, it must transfer the amount at the latest by 30 April of that year. Paragraph 3 of Article 17 provides non-linear broadcasting organisations with the possibility of obtaining certain rights on productions that are realised with financial support from the VAF on the basis of the Decision, against payment of an additional financial contribution.<sup>123</sup>

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<sup>123</sup> See further details in Lievens, E., A 'Netflix tax' in Flanders? The participation of non-linear broadcasters in the production of Flemish audiovisual works? Iris Newsletter, European Audiovisual Observatory, <http://merlin.obs.coe.int/iris/2019/9/article6.en.html>.





## 4. Views from the industry

In a nutshell, the European audiovisual industry is becoming increasingly worried about the developments concerning the principle of territoriality in EU copyright law and has expressed its concerns almost univocally on different occasions.

Some of these concerns can be read in a letter by the Audiovisual Sector Coalition (“the Coalition”)<sup>124</sup> on the European Commission’s Proposal for a Regulation on Geo-Blocking.<sup>125</sup> According to the Coalition, Europe’s audiovisual sector relies heavily on the freedom to agree licences and contracts on a territorial basis in order to raise funding from production and distribution partners in several countries for the creation, production and distribution of new content. As far as the Coalition is concerned, territorial exclusivity not only allows for greater investment in the development and creation of new works, but also for the offer of films and audiovisual content to be tailored to the many different audiences across Europe, creating local markets for non-national content and promoting cultural and linguistic diversity, the result of which is more choice for European audiences. Regarding the objective of promoting cultural diversity, the Coalition recalled in its letter, among other things, the following elements:

- The European Parliament has repeatedly adopted resolutions by overwhelming majorities which recognise the specificities of the audiovisual sector in Europe and the importance of territoriality and contractual freedom for the financing and distribution of audiovisual content and for cultural diversity.
- Contractual freedom continues to be a crucial factor in determining the audiovisual sector’s ability to secure financing for new audiovisual content and is a key catalyst for cultural diversity.

Furthermore, in its submission to the Public Consultation on the European Commission’s Preliminary Report on the E-Commerce Sector Inquiry,<sup>126</sup> the Audiovisual Coalition strongly encouraged the European Commission to acknowledge the role of copyright as a fundamental right, and to take account of the evidence provided by the studies that have demonstrated that the commercial freedom to organise the financing and future distribution of each film and TV programme on a territorial basis, including on an exclusive basis, is indispensable in order to maintain the industry’s ability to finance film and television content in Europe. The Coalition recalled that most films and television content in Europe are most commonly partially financed through territorial co-production and/or pre-sales agreements with a wide diversity of future local distribution partners either

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<sup>124</sup> The Audiovisual Sector Coalition is an umbrella for organisations working across the audiovisual sector in Europe, and representing film and TV directors, commercial broadcasters, sports rightsholders, publishers, distributors, film and TV producers, and cinema exhibitors.

<sup>125</sup> Letter from the Audiovisual Sector Coalition on the European Commission’s Proposal for a Regulation on Geo-Blocking, 29 November 2019,

[https://99ff6266-dd25-42d5-a566-c2ad860fe46d.filesusr.com/ugd/7bf01a\\_fb8851dfc1734fea8f2b9ee64e525a2.pdf](https://99ff6266-dd25-42d5-a566-c2ad860fe46d.filesusr.com/ugd/7bf01a_fb8851dfc1734fea8f2b9ee64e525a2.pdf).

<sup>126</sup> Audiovisual Coalition submission to the Public Consultation on the European Commission’s Preliminary Report on the E-Commerce Sector Inquiry, 18 November 2016,

[https://99ff6266-dd25-42d5-a566-c2ad860fe46d.filesusr.com/ugd/7bf01a\\_1c36b0039edb425dabfbfad5c9a68faa.pdf](https://99ff6266-dd25-42d5-a566-c2ad860fe46d.filesusr.com/ugd/7bf01a_1c36b0039edb425dabfbfad5c9a68faa.pdf).



through out-put deals or single-title agreements. The overall cost of acquiring the distribution rights for any one territory is amortised across different distribution channels (cinema/physical carriers/online/various forms of television). In many instances, the distribution rights for individual territories are acquired by single entities which amortise the investment across the various distribution channels. Thus, it is important to preserve the possibility of striking agreements on territorial exclusivity in the same manner for the different distribution channels – different approaches to different distribution forms and/or rights would have a negative effect on the value of the rights and future recoupment opportunities. In addition, the fundamental costs of developing, producing, marketing and distributing films and television content are very high, and content development, production and distribution are risky investment propositions. The Coalition mentions a number of studies that would confirm that licensing on a territory-by-territory exclusive basis is essential to raising those massive upfront investments indispensable for the financing of films and audiovisual productions. With regard to exclusive licensing contracts, the Coalition considered them entirely consistent with the legitimate exercise of exclusive rights which are protected not only by EU law, but also through international treaties to which the European Union and its member states are party. The perceived/estimated value of the territorially exclusive rights in the various works would serve as the currency for producers when financing films and television works – and would enable future distributors of the same works to amortise their investments in creating a market for the said works in the various distribution channels adapted to each specific territory for cultural/linguistic specificities, social climate, tastes and cultural ‘zeitgeist’.<sup>127</sup>

With regard to portability issues, the Coalition expressed its support<sup>128</sup> for balanced measures to provide consumers with temporary access to online film and TV services to which they have legally subscribed when they are travelling throughout the European Union away from their habitual residence, while avoiding the risk that it would become compulsory to accept pan-EU licensing, either by accident or design. Their only caveat concerned measures that would interfere with the economic and legal system for financing and distributing audiovisual works and content in Europe for the benefit of consumers, that is, the ability to enter into exclusive, single-territory licences. In order to preserve the ability to apply territorial exclusivity, the Coalition presented a number of safeguards and principles:

- The obligation to ensure effective and robust authentication for the relevant online content services;
- Narrowing the definition of “temporarily present”;
- Addressing the service provider mandate;
- Allowing for a workable transition period;
- Referring to the three-step-test in order to ensure compliance with international law.

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<sup>127</sup> See also Cannes Declaration of the European Film Agency Directors (EFADs), Preserving territoriality to improve the circulation of European films and access to European culture, 22 May 2017, <http://www.efads.eu/wp-content/uploads/EFADs-Cannes-Declaration.pdf>.

<sup>128</sup> Making portability work: key principles for the film and audiovisual sector, 18 January 2016, [https://99ff6266-dd25-42d5-a566-c2ad860fe46d.filesusr.com/ugd/7bf01a\\_cd1d7aa5af08430699f1abc6c4b0b67.pdf](https://99ff6266-dd25-42d5-a566-c2ad860fe46d.filesusr.com/ugd/7bf01a_cd1d7aa5af08430699f1abc6c4b0b67.pdf).



As mentioned in Chapter 2 of this publication, the original Proposal of the Commission 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 has met with significant resistance throughout the audiovisual industry. With only a few exceptions, right from the beginning, the entire sector was against the introduction of the country-of-origin (“COO”) principle for certain types of online transmissions of TV and radio programmes.<sup>129</sup> Most members of the industry feared that it would be a first step towards the elimination of the principle of territoriality in copyright law on which they base their business models. Accordingly, they saw this proposal as an existential threat to the European audiovisual sector as well as a measure that would have a detrimental effect on diversity and creativity. They were particularly concerned about the interplay between this regulation and Competition Law decisions in this area, most notably the (then) much-awaited decision on the so-called pay-TV case.<sup>130</sup> According to the Coalition,<sup>131</sup> the underlying rationale for the introduction of the COO principle in the proposed Online Broadcasting Regulation (the “Regulation”) was highly questionable: first of all, there would be no meaningful demand for the cross-border availability of audiovisual content which would justify regulatory intervention, and they considered unsubstantiated the allegation that obtaining licences for copyright and related rights to make content available online across borders would be too burdensome. On the contrary, the erosion of territorial exclusivity would have a significant negative impact on cultural diversity, employment, sector sustainability and, ultimately, on consumer choice. Therefore, they urged European decision-makers to safeguard the territoriality of copyright by adopting the narrowest possible application of the COO principle – as an exception, not the default rule – limited to the licensing of ‘news and current affairs’ content, as well as preserving the narrow definition of ‘ancillary services’ proposed by the European Commission and the European Parliament.<sup>132</sup>

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<sup>129</sup> See *Online (re)transmission of TV programmes, Summary of the EAO workshop*, Brussels 21 June 2017, European Audiovisual Observatory, Strasbourg, 2017, <https://rm.coe.int/168078332d>.

<sup>130</sup> See Chapter 5 of this publication.

<sup>131</sup> See, for example, Joint Position on the Country-of-Origin Aspects of the Online Broadcasting Regulation, 15 February 2018,

[https://99ff6266-dd25-42d5-a566-c2ad860fe46d.filesusr.com/ugd/7bf01a\\_f0ed6b7065884b9b84086c34acce64e3.pdf](https://99ff6266-dd25-42d5-a566-c2ad860fe46d.filesusr.com/ugd/7bf01a_f0ed6b7065884b9b84086c34acce64e3.pdf).

<sup>132</sup> Along the same lines see EFAD letter on the “SatCab” Proposal - Recommendations for the Trilogues, <https://europeanfilmagencies.eu/en/news-publications/our-positions/104-european-film-agency-directors-efads-letter-on-the-satcab-proposal>. See also SAA comments on the EC’s proposal for a Regulation on the retransmissions of TV and radio programmes and certain online transmissions of broadcasters, 14 September 2016, <https://www.saa-authors.eu/file/322/download>. For SAA’s analysis of the final directive and the country of origin principle solution, see SAA, Broadcasting and retransmissions – from a bad proposal to a hopeful directive, [https://www.saa-authors.eu/en/blog/565-broadcasting-and-retransmissions--from-a-bad-proposal-to-a-hopeful-directive#.XdQIJXdFx\\_d](https://www.saa-authors.eu/en/blog/565-broadcasting-and-retransmissions--from-a-bad-proposal-to-a-hopeful-directive#.XdQIJXdFx_d).





## 5. Case law

### 5.1. Exclusive territorial licensing under the spotlight of EU courts and competition authorities

#### 5.1.1. From Coditel to Sportradar: territoriality reaffirmed

The Court of Justice of the European Union (CJEU) has, in several judgments, confirmed the principle of territoriality in copyright law. The first two of those judgments were made before the onset of the harmonisation process of copyright law in the European Union, namely in the Coditel cases,<sup>133</sup> which concerned territorial exclusivity in broadcasting from a competitive and internal market perspective.

Further judgments have later confirmed the principle of territoriality regarding the application of different copyright-related directives. In particular, in the Lagardère case (C-192/04),<sup>134</sup> the Court confirmed the territorial nature of certain remuneration rights harmonised under Directive 92/100/EEC on the rental right and lending right. In the Stichting De Thuiskopie case (C-462/09),<sup>135</sup> the CJEU delivered a preliminary ruling concerning the territorial implementation of the private copying exception included in Article 5(2)(b) of the InfoSoc Directive. In the Donner case (C-5/11),<sup>136</sup> the CJEU defined the scope of the concept of “distribution to the public”, under Article 4(1) of the InfoSoc Directive, from a territorial point of view. In the Sportradar case (C-173/11),<sup>137</sup> the CJEU

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<sup>133</sup> Judgment of the Court of 18 March 1980, Case C-62/79, SA Compagnie générale pour la diffusion de la télévision, Coditel, and others v Ciné Vog Films and others (Coditel I), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61979CJ0062>; and Judgment of the Court of 6 October 1982, Case C-262/81, Coditel SA, Compagnie générale pour la diffusion de la télévision, and others v Ciné-Vog Films SA and others (Coditel II), <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-262/81>.

<sup>134</sup> Judgment of the Court (Third Chamber) of 14 July 2005, Case C-192/04, Lagardère Active Broadcast v Société pour la perception de la rémunération équitable (SPRE) and Gesellschaft zur Verwertung von Leistungsschutzrechten mbH (GVL), <http://curia.europa.eu/juris/document/document.jsf?doclang=EN&text=&pageIndex=0&part=1&mode=lst&docid=60584&occ=first&dir=&cid=488130>.

<sup>135</sup> Judgment of the Court (Third Chamber) of 16 June 2011, Case C-462/09, Stichting de Thuiskopie v Opus Supplies Deutschland GmbH and Others: <http://curia.europa.eu/juris/document/document.jsf?docid=85089&doclang=en>.

<sup>136</sup> Judgment of the Court (Fourth Chamber) of 21 June 2012, Case C-5/11, Criminal proceedings against Titus Alexander Jochen Donner, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=124189&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=494654>.

<sup>137</sup> Judgment of the Court (Third Chamber) of 18 October 2012, Case C-173/11, Football Dataco Ltd and Others v Sportradar GmbH and Sportradar AG, <http://curia.europa.eu/juris/document/document.jsf?docid=128651&doclang=en>.



confirmed the principle of territoriality for the *sui generis* right related to the protection of databases.<sup>138</sup>

## 5.1.2. From the Murphy case to the Pay-TV case: territoriality revisited

The limits of the principle of territoriality in copyright law have been challenged in recent years by EU courts and competition services through the re-assessment of exclusive territorial licences for the distribution of copyright-protected content from an internal market and competition perspective.

### 5.1.2.1. The Murphy case concerning the satellite transmission of Premier League football matches

In 2011, the CJEU opened a first breach in the principle of territoriality concerning the satellite transmission of Premier League football matches in the Murphy judgment (also referred to as the “Premier League” judgment).<sup>139</sup> In this case, the Court held that a system of licences for the broadcasting of football matches, which granted broadcasters territorial exclusivity on a member state basis and which prohibited television viewers from watching the broadcasts with a decoder card in other member states, was contrary to EU law. In its ruling, the Court held, in relation to the system of territorial exclusive licence agreements put in place by the Football Association Premier League (FAPL), that clauses that forbid the broadcaster from supplying decoding devices that would enable access to the rightsholder’s subject matter (protected against use outside the territory under the licence agreement) constitute a restriction on competition as prohibited by Article 101 TFEU.

The Court recognised the right of the copyright owner to receive remuneration as part of the essential function of copyright, and pointed out that, in negotiating “appropriate remuneration,” the rightsholder was not prevented from asking “for an amount which takes into account both the actual audience and the potential audience in the Member State in which the broadcasts are also received.”<sup>140</sup> However, the Court held that the rightsholder in this case sought to receive remuneration that went beyond what was necessary to achieve the objective of protecting the copyright in question. The premium payment the Premier League received in exchange for the guarantee of an absolute territorial exclusivity

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<sup>138</sup> For further details on this case law, please see: Cabrera Blázquez F., Cappello M., Grece C., Valais, S., Territoriality and its impact on the financing of audiovisual works, IRIS Plus, European Audiovisual Observatory, Strasbourg, 2015, pag. 55 and following, <https://rm.coe.int/168078347f>.

<sup>139</sup>Judgment of the Court (Grand Chamber) of 4 October 2011, joined cases C-403/08 and C-429/08, Football Association Premier League Ltd and Others v QC Leisure and Others (C-403/08) and Karen Murphy v Media Protection Services Ltd (C-429/08),

<http://curia.europa.eu/juris/document/document.jsf?docid=110361&doclang=en>. For further details on the Premier League judgment, please refer to Cabrera Blázquez F., Cappello M., Grece C., Valais, S., Territoriality and its impact on the financing of audiovisual works, *op. cit.*

<sup>140</sup> Ibid., paragraph 112.



resulted, according to the Court, in artificial price differences which tended to restore the divisions between national markets.<sup>141</sup> However, partitioning markets with the sole aim of creating artificial price differences between member states and thereby maximising profits (price discrimination) is irreconcilable with the Treaty.<sup>142</sup>

Although the consequences of this judgment were initially limited to changes in contractual conditions introduced by the Premier League with regard to customers,<sup>143</sup> it seems to have marked a turning point in the application of the principle of territoriality, which would be reflected a few years later in other audiovisual fields.

### 5.1.2.2. The Canal+ Pay-TV case concerning film licensing contracts for Pay-TV

Three years after the Murphy case, the European Commission extended its review of the exclusive territorial licensing of copyright-protect content through the opening, in January 2014, of an investigation into possible restrictions affecting the provision of Pay-TV services in the context of film licensing agreements. The investigation resulted in the EU Competition services formally sending, in July 2015, a Statement of Objections to the then six major Hollywood studios (20<sup>th</sup> Century Fox, Warner Bros., Disney, NBCUniversal, Sony, and Paramount) and the broadcaster Sky UK on the cross-border provision of Pay-TV services.<sup>144</sup>

Traditionally, film copyright holders often license contents on a country-by-country basis (or to a few member states with a common language). According to the Commission's preliminary assessment, the bilateral contractual agreements between the studios and the broadcaster were in breach of Article 101 TFEU prohibiting anti-competitive agreements. The core of the problem was, in the Commission's view, the geo-blocking provisions contained in the licensing agreement between Sky UK and each of the six studios, under which Sky UK enjoyed absolute territorial exclusivity.<sup>145</sup> The Commission was concerned that these clauses would eliminate cross-border competition between Pay-TV broadcasters and lead to the artificial partition of the European Union's single market along national borders.

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<sup>141</sup> Ibid., paragraph 139.

<sup>142</sup> Ibid., paragraph 115.

<sup>143</sup> Licensees were no longer allowed to offer an optional English language feed to their consumers. They could only transmit Premier League matches with the commentary in the language of that country. The English language feed is now limited to UK and Irish licensees. Non-UK licensees were no longer allowed to transmit more than one live Premier League match on Saturday afternoons.

<sup>144</sup> European Commission, Antitrust: Commission sends Statement of Objections on cross-border provision of Pay-TV services available in the United Kingdom and Ireland, Press release 23 July 2015, [https://europa.eu/rapid/press-release\\_IP-15-5432\\_en.htm](https://europa.eu/rapid/press-release_IP-15-5432_en.htm).

<sup>145</sup> These clauses (a) required Sky UK to block access to the studios' films through its online Pay-TV services (so-called "geo-blocking") and/or through its satellite Pay-TV services to consumers outside its licensed territory (UK and Ireland); and (b) required some of the studios to ensure that broadcasters outside the UK and Ireland be prevented from making their Pay-TV services available in the United Kingdom and Ireland. Such clauses restrict the ability of broadcasters to accept unsolicited requests (so-called "passive sales") for their Pay-TV services from consumers located outside their licensed territory.



In April 2016, Paramount offered commitments to address the EU competition services' concerns covering both satellite broadcasting and online transmissions.<sup>146</sup> The Commission accepted the commitments and made them legally binding in July 2016.<sup>147</sup> More than two years later, in October 2018, Disney also offered commitments to the European Commission in response to the Pay-TV investigation.<sup>148</sup> In December 2018, the General Court delivered a judgment in the *Groupe Canal+ v. European Commission* case, dismissing the appeal brought by the main French Pay-TV broadcaster against the Commission's decision to make Paramount's commitments binding (Case T-873/16).<sup>149</sup> In that judgment, the General Court confirmed the Commission's preliminary assessment that the obligations of the broadcaster and the studios contained in Paramount's film licensing agreement with Sky violated Article 101 TFEU by eliminating cross-border competition between Pay-TV broadcasters. In particular, the General Court held that where the agreements concluded by the copyright owner contain clauses under which the owner is required to prevent broadcasters in the European Economic Area (EEA) from making "passive sales" to consumers outside the member state for which it grants them an exclusive licence, these clauses confer absolute territorial exclusivity and therefore infringe Article 101(1) TFEU.

Following the Murphy ruling, the General Court held that where a licence agreement is intended to prohibit or limit the cross-border provision of broadcasting services, it is deemed to have the purpose of restricting competition unless other circumstances falling within its economic and legal context justify the finding that such an agreement is not liable to impair competition.<sup>150</sup> As regards the economic and legal context of the relevant clauses, the General Court specified that the commitments made legally binding under the Commission's decision did not affect the granting of exclusive territorial licences as such, but aimed to put an end to absolute territorial exclusivity intended to eliminate all competition between broadcasters concerning works covered by these rights under a set of reciprocal obligations. In the direct follow-up to this judgment, in December 2018, the remaining studios and Sky UK proposed commitments.<sup>151</sup>

After a market test, in March 2019, the Commission considered that the commitments proposed by Disney, NBCUniversal, Sony Pictures and Warner Bros addressed its concerns and made them legally binding on the studios, as follows:

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<sup>146</sup> European Commission, Antitrust: Commission seeks feedback on commitments offered by Paramount Pictures in PayTV investigation, Press Release 22 April 2016, [https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/antitrust-commission-seeks-feedback-commitments-offered-paramount-pictures-pay-tv-investigation\\_en](https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/antitrust-commission-seeks-feedback-commitments-offered-paramount-pictures-pay-tv-investigation_en).

<sup>147</sup> Case AT.40023 - Cross-border access to Pay-TV, [https://ec.europa.eu/competition/antitrust/cases/dec\\_docs/40023/40023\\_5273\\_5.pdf](https://ec.europa.eu/competition/antitrust/cases/dec_docs/40023/40023_5273_5.pdf).

<sup>148</sup> European Commission, Antitrust: Commission seeks feedback on commitments offered by Disney in Pay-TV investigation, Press Release November 9, 2018, [https://europa.eu/rapid/press-release\\_IP-18-6346\\_en.htm](https://europa.eu/rapid/press-release_IP-18-6346_en.htm).

<sup>149</sup> Judgment of 12 December 2018, Case T-873/16, *Groupe Canal + SA v European Commission* (EU:T:2018:904), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=208860&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=11733088>.

<sup>150</sup> Ibid. paragraph 48.

<sup>151</sup> European Commission, Antitrust: Commission seeks feedback on commitments offered by NBCUniversal, Sony Pictures, Warner Bros, and Sky in Pay-TV investigation, Press release 20 December 2018, [https://europa.eu/rapid/press-release\\_IP-18-6894\\_en.htm](https://europa.eu/rapid/press-release_IP-18-6894_en.htm).



- When licensing its film output for Pay-TV to a broadcaster in the EEA, each committing studio will not (re)introduce contractual obligations that prevent such Pay-TV broadcasters from providing cross-border passive sales to consumers that are located in the EEA but outside of the broadcasters' licensed territory (no "Broadcaster Obligation");
- When licensing its film output for Pay-TV to a broadcaster in the EEA, each committing studio will not (re)introduce contractual obligations that require the studios to prevent other Pay-TV broadcasters located in the EEA from providing passive sales to consumers located in the licensed territory (no "Studio Obligation");
- Each committing studio will not seek to enforce or bring an action before a court or tribunal for the violation of a Broadcaster Obligation and/or Studio Obligation, as applicable, in an existing agreement licensing its output for Pay-TV.
- Each committing studio will not enforce or honour any Broadcaster Obligation and/or Studio Obligation in an existing agreement licensing its output for Pay-TV.

Similarly, in light of the results of this market test, the Commission was satisfied that the commitments offered by Sky addressed its concerns, and made them legally binding on Sky, as follows:

- Sky will neither (re)introduce Broadcaster Obligations nor Studio Obligations in agreements licensing the output for Pay-TV of Disney, Fox, NBCUniversal, Paramount Pictures, Sony Pictures and Warner Bros.; and
- Sky will not seek to enforce Studio Obligations or honour Broadcaster Obligations in agreements licensing the output for Pay-TV of Disney, Fox, NBCUniversal, Paramount Pictures, Sony Pictures and Warner Bros.

The commitments will apply throughout the EEA for a period of five years. They cover both online and satellite Pay-TV services and, to the extent that they are included in the licence(s) with a Pay-TV broadcaster, they also cover subscription VOD services. The commitments also contain a non-circumvention clause, as well as clauses on the review of the commitments and the appointment of a monitoring trustee. All current and future subsidiaries of the committing parties are covered by the commitments.<sup>152</sup> The commitments are without prejudice to rights conferred on the committing studios under the "Portability Regulation" or under copyright law. Neither do they affect the rights of the studios or a Pay-TV broadcaster to decide unilaterally to employ geo-filtering technology.<sup>153</sup>

After having market tested the above commitments, the Commission announced, in July 2019, the closing of the antitrust proceedings against Disney, NBCUniversal NBCUniversal, Sony Pictures, Warner Bros., Fox, Canal +, DTS Distribuidora de Televisión Digital, Promotora de Informaciones, S.A. (PRISA), Sky Deutschland and Sky Italia

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<sup>152</sup> This means that the commitments also apply to Fox after its acquisition by Disney, in March 2019.

<sup>153</sup> See, European Commission, Antitrust: Commission accepts commitments by Disney, NBCUniversal, Sony Pictures, Warner Bros, and Sky on cross-border Pay-TV services, Press release 7 March 2019, [https://europa.eu/rapid/press-release\\_IP-19-1590\\_en.htm](https://europa.eu/rapid/press-release_IP-19-1590_en.htm).



concerning cross-border access to Pay-TV in France, Spain, Germany and Italy, initiated five years earlier.<sup>154</sup>

## 5.2. From an absolute to a relative country of origin principle in relation to financial support for film production

By decision of 1 September 2016,<sup>155</sup> the European Commission confirmed the compatibility of the extraterritorial extension of the German film levy to VOD services located outside Germany with the Treaty on the Functioning of the European Union (TFEU) and declared the measure not contrary to Directive 2010/13/EU on audiovisual media services (AVMSD).

The Commission's decision first recalled that Article 107(3)(d) TFEU provides that "aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest" may be considered to be compatible with the internal market. The Commission noted that it had already found the current scheme compatible with Article 107 in its Decision SA.36753 (3 December 2013), and stated that "the extension of the range of possible beneficiaries to firms established elsewhere does not negatively affect the compatibility assessment under that Article".

Next, the Commission considered whether the levy violated Article 110 TFEU, which provides that "no Member State shall impose, directly or indirectly, on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products [or] any internal taxation of such a nature as to afford indirect protection to other products". The Commission decided that the new tax did not infringe Article 110, as "foreign video on demand providers may benefit also in practical terms equally from the funding", and "[the] scheme provides for effective means to allow the foreign VOD providers to apply for distribution aid in the same way as their German competitors".

Finally, the Commission examined whether the measures violated the AVMS Directive. In this regard, Article 2(2)(a) contains the country of origin principle, and provides that "media service providers under the jurisdiction of a Member State are ... those established in that Member State in accordance with paragraph 3". On the other hand, Article 13(1) concerns the promotion of European works and provides that member states must "ensure that on-demand audiovisual media services provided by media service providers under their jurisdiction promote, where practicable and by appropriate means, the production of and access to European works". Two interested parties argued that the tax would constitute a measure to promote access to European works, in violation of the country of origin principle. However, the Commission decided that the "validity of the

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<sup>154</sup> Closure of Proceedings, 26 July 2019,

[https://ec.europa.eu/competition/antitrust/cases/dec\\_docs/40023/40023\\_10719\\_5.pdf](https://ec.europa.eu/competition/antitrust/cases/dec_docs/40023/40023_10719_5.pdf).

See also Summary of Commission Decision of 7 March 2019,

[https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C\\_2019.132.01.0008.01.ENG&toc=OJ:C:2019:132:TOC](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_2019.132.01.0008.01.ENG&toc=OJ:C:2019:132:TOC).

<sup>155</sup> Commission Decision (EU) 2016/2042 of 1 September 2016 on the aid scheme SA.38418 – 2014/C (ex

2014/N), <https://eur-lex.europa.eu/legal-content/GA/TXT/?uri=CELEX%3A32016D2042>.



application of the tax to certain VOD providers which provide their services from locations outside Germany” did not violate the AVMS Directive. The Commission stated that “an interpretation according to which the country of origin principle” applies to the tax at issue would lead “to situations in which providers active on the same market are not subject to the same obligations”. Moreover, the Commission had regard to the proposed amendment to the AVMS Directive which clarified in particular that member states have the right to require providers of on-demand audiovisual media services targeting audiences in their territories but established in other member states, to make such financial contributions. The Commission decided that the proposal was “a clarification of what could already be possible under the Directive currently in force”.

Following this decision, Netflix, which had been providing services aimed at German viewers since 2014, brought an action before the General Court of the European Union contesting these rules, arguing that the FFG violated the free movement of services, freedom of establishment and EU aid and tax regulations.

In a judgment of 16 May 2018 (Case T-818/16),<sup>156</sup> the General Court found inadmissible Netflix’s application for the annulment of the European Commission’s 2016 decision regarding the rules on foreign providers.

The recent announcement by Netflix that it would start paying the film levy in September 2019 could mark the end of this longstanding dispute by suggesting that the company has decided not to take further legal action over German film subsidies. As mentioned above, according to Article 153(3) FFG, the film levy is worth 1.8% of the first EUR 20 million of annual revenue generated in Germany and 2.5% of annual revenue above EUR 20 million. Netflix reported a global revenue of around USD 15 billion in 2018. However, since figures for individual (national) markets are not published, it is difficult to calculate how much will be owed and effectively paid.

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<sup>156</sup> Case T-818/16, *Netflix International BV v. European Commission*, Judgment of the General Court (Eighth Chamber), 16 May 2018, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=202021&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=11715506>.





## 6. State of play

Much water has flown under the bridge since the drafting of our 2015 publication on the topic of territoriality and its impact on the financing of audiovisual works, and the present update bears witness to that.

### 6.1. The COO and the promotion of European works

As explained in Chapter 2 of this publication, according to Article 13 AVMSD, member states may oblige certain media service providers targeting audiences in their territory whilst established in another member state to contribute financially to the production of European works. The rationale behind this provision is that since the service provider generates revenues in the targeted member state, it has to contribute to the promotion of European works within that member state. It could be argued that the adoption of the revised AVMSD and the introduction of the provision included in Article 13 concerning targeting services has created a crack in the COO principle,<sup>157</sup> and, in fact, this provision has led to several discussions among stakeholders as to its possible impact and practical implementation. What remains to be seen is how this provision will operate in practice, also in terms of coordinating the accounting side of things among the national competent authorities, when it is transposed into the national law of each member state.

At the time of writing this publication, the most relevant news concerning this subject was the announcement by the French Minister of Culture that the next draft bill on audiovisual services would include financing obligations in the production of French and European works with regard to VOD platforms (from 16% of their turnover in France).<sup>158</sup> It will undoubtedly be very interesting to follow the exact wording of these obligations from the point of view of the territoriality principle and their implementation with regard to operators whose registered office is located in other member states.

Also, the announcement in February 2019 by Netflix that it would start paying the film levy in Germany could mark the end of a longstanding dispute by suggesting that the company has decided not to take further legal action over German film subsidies. As mentioned in Chapter 3 of this publication, according to Article 153(3) FFG, the film levy is worth 1.8% of the first EUR 20 million of annual revenue generated in Germany and 2.5% of annual revenue above EUR 20 million. Netflix reported a global revenue of around USD 15 billion in 2018. However, since figures for individual (national) markets are not made public, it is difficult to calculate how much will be owed and effectively paid.<sup>159</sup>

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<sup>157</sup> See, for example, Kenny R., Suter T., "An unravelling of the Digital Single Market", November 2016, <http://www.ccianet.org/wp-content/uploads/2016/11/The-New-AVMSD-An-Unravelling-of-the-DSM.pdf>.

<sup>158</sup> Ibid.

<sup>159</sup> See also Etteldorf, C., Concession in longstanding German film aid dispute: Netflix will pay film levy, IRIS newsletter 2019-4/9, European Audiovisual Observatory, Strasbourg, <http://merlin.obs.coe.int/iris/2019/4/article9.en.html>.



## 6.2. The principle of territoriality and the cross-border provision of audiovisual content

The different developments concerning the principle of territoriality in EU copyright law have proven to be far more controversial. As explained in Chapter 2 of this publication, while the Portability Regulation has not met with substantial opposition from the audiovisual industry, the Proposal of the Commission for a Regulation on the exercise of copyright applicable to online transmissions of broadcasting organisations and retransmissions of television and radio programmes caused a backlash throughout the audiovisual industry. The fact that the adopted text (now turned into a directive) was significantly narrowed in terms of scope has made it easier to accept by the audiovisual industry, which is more concerned by the effects of the so-called Pay-TV case.

One of the Commission's objectives in the Pay-TV case, according to the European Commissioner for Competition, Ms. Vestager, was to offer European consumers an increased choice of cross-border Pay-TV services to give them the opportunity to watch films and TV programmes that reflect their own cultural interest, without this choice being constrained by geographical blocking provisions in licensing agreements between the main film studios and Pay-TV channels.<sup>160</sup> Accordingly, the commitments made in this case mean that an Italian customer could now theoretically buy access to the main Hollywood films from Sky UK. It is also expected that such a scenario would increase competition between broadcasters, which can now give customers residing in other member states access to their services. However, it also presupposes that broadcasters wish to adapt their business models to offer their services to potential customers on a pan-EU level and that they acquire the corresponding exploitation rights from rightsholders.

It remains to be seen to what extent this will be the case in practice, in particular in view of the results of the last e-commerce sector inquiry carried out by the Commission in 2017. Indeed, according to the Final Report published in May 2017,<sup>161</sup> the key determinant for competition in the digital content market is the availability of the relevant (online) rights. Such availability is largely determined, under the principle of contractual freedom, by the rightsholders' decision on whether to license them and, if relevant, on their scope, as defined in the licensing agreements. On the other hand, it is worth mentioning that exclusivity is widely used in relation to licensed rights since access to exclusive content increases the attractiveness of the offer from digital content providers. The Commission itself has repeatedly reiterated that the use of exclusivity is not a problem in itself.<sup>162</sup> Furthermore, the Murphy and Pay-TV cases have clearly confirmed the possibility for rightsholders, when negotiating their rights, to take into account the actual and potential audience, not only in the country for which the exclusive licence has been granted (active

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<sup>160</sup> Celebrating European culture, Speech by Ms. Vestager, 24 January 2017, [https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/celebrating-european-culture\\_en](https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/celebrating-european-culture_en).

<sup>161</sup> European Commission, Final Report on the e-Commerce Sector Inquiry, 10 May 2017, [https://ec.europa.eu/competition/antitrust/sector\\_inquiry\\_final\\_report\\_en.pdf](https://ec.europa.eu/competition/antitrust/sector_inquiry_final_report_en.pdf). See chapter 2 of this publication.

<sup>162</sup> Ibid., paragraph 59, p. 14.



sales), but also in those where content is received (passive sales). This possibility naturally has an impact on the cost of purchasing these rights; this is also cited by the digital content providers who participated in the e-commerce sector inquiry as the first factor (as well as insufficient consumer demand for foreign content) for not making their services accessible in member states other than those in which they currently operate.<sup>163</sup>

Although it is difficult to anticipate to any further extent the practical impact of the Murphy and Pay-TV cases on the cross-border provision of audiovisual content, particularly in a market characterised by the emergence of new intermediaries and business models, it is nevertheless interesting to highlight the role that competition law has played in recent years in shaping the scope of the territoriality principle in the audiovisual sector.<sup>164</sup> As seen in Chapter 2 of this publication, the announced re-evaluation in 2020 of the geo-blocking Regulation 2018/302, to determine whether to include audiovisual services in its scope, should give more insight into the question of geo-blocking practices in the audiovisual field under current market developments.

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<sup>163</sup> European Commission, Commission Staff Working Document, Final Report on the e-Commerce Sector Inquiry, 10 May 2017, Table C. 7, page 234,  
[https://ec.europa.eu/competition/antitrust/sector\\_inquiry\\_swd\\_en.pdf](https://ec.europa.eu/competition/antitrust/sector_inquiry_swd_en.pdf).

<sup>164</sup> See Vezzoso, S., Geo-blocking of Audio-visual Services in the EU: Gone with the Wind?, 13 January 2019,  
[https://www.competitionpolicyinternational.com/geo-blocking-of-audio-visual-services-in-the-eu-gone-with-the-wind/#\\_edn11](https://www.competitionpolicyinternational.com/geo-blocking-of-audio-visual-services-in-the-eu-gone-with-the-wind/#_edn11).

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