



**SATISFYING CONSUMER DEMAND FOR
AUDIOVISUAL CONTENT IN EUROPE**

A CONTRIBUTION TO THE EU COMMISSION'S *LICENSES FOR EUROPE*

**WORKING GROUP I ON CROSS-BORDER
ACCESS AND PORTABILITY OF SERVICES**

BY THE BRITISH SCREEN ADVISORY COUNCIL (BSAC)

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1. Introduction

- 1.1 In its 2010 Digital Agenda and 2011 Green Paper on Audiovisual Content, the EU Commission raised the profile of important issues in the areas where audiovisual markets and technology intersect. In particular, the Commission raised important questions about how Europe's audiovisual sector can meet ever-changing consumer demand as it evolves alongside technological capabilities. One core interest of the Commission is in market developments with regard to access to legitimate content services from across national borders and the ability for consumers to travel around the EU and view content lawfully acquired/subscribed by them in any one of its Member States. BSAC believes the questions deserve careful consultation with industry.
- 1.2 BSAC welcomes the Commission's 2013 *Licenses For Europe* initiative. We understand that these workshops with stakeholders have helped the Commission form a clearer sense of what industry-driven solutions Europe's audiovisual industries are deploying in order to adapt to new expectations and patterns of consumption. This paper constitutes BSAC's contribution to the discussion of issues that arose in *Licenses For Europe*, and specifically within Group I, which is concerned with *Cross-Border Access and Portability of Services*.
- 1.3 The paper is based on consultations within the BSAC membership. BSAC Members include not only all the segments in the UK audiovisual value chain, (including development, production, sales, acquisition and licensing of content), but also leading technology firms and ISPs whose growth relies in part on strategic alliances with the content production sector in the UK and across the EU.

1.4 The UK audiovisual content and services industry is the largest in the EU and a leading sector of the UK's creative industries, which government has identified as one of the areas of the national economy with the greatest potential for growth:

- made-for-TV content is seeing robust growth. The UK sector is now the fourth largest in the world in terms of the level of broadcasters' investment in original content, second only to the US in its export performance and world leader in the export of programme format sales
- overall revenues from the international sales of British programmes were £1.47 bn in 2011, a 9% increase on the previous year
- the UK TV industry collectively generated revenue of £11.8 bn in 2010, a 6.6% increase on 2009¹
- by last year, over 16 million households were able to access television-based VoD, and film production activity totalled £929m last year on 249 films wholly or part-produced in the UK
- British films also attracted a 32% market share at the box office
- online film revenues increased by 123% in 2012, reaching an estimated £123m²
- whilst the video games market has been undergoing a challenging business model transition to online, sales figures just short of £1.6 bn in 2012 still placed the UK's sector amongst the top three countries worldwide.

2. The European consumer in an era of unprecedented choice

2.1 At no time in the history of the audiovisual sector has the European consumer had a more abundant choice of content and services than she does today. The rapid growth of online, on-demand services, along with the resilience of linear broadcast consumption and the ongoing success of cinema multiplexes, result in unprecedented levels of choice. Not only is the range of product on offer greater than ever, but the consumer is increasingly self-empowered as to where, when and how she chooses to enjoy content. This rapid growth will continue inexorably for many years as broadcasters and other distributors (including new entrants to the distribution market), together with content owners, develop and market new and innovative offerings for consumers.

2.2 Increased competition in the content aggregation and distribution marketplace delivers the European consumer the choices to access premium content through a wide variety of pricing points with increasingly flexible content offers. The impact on pricing from increased competition supports greater cultural inclusion, as consumers across the entire socioeconomic spectrum are able to access the content they most want.

¹ <http://stakeholders.ofcom.org.uk/market-data-research/market-data/communications-market-reports/cmr11/uk/>

² BFI Statistical Yearbook 2013

2.3 European audiovisual content is distributed in cinemas, TV channels, DVDs, and through an increasing proliferation of on-demand audiovisual services, of which there are more than 3,000 across Europe:

- VoD turnover from cable and IPTV services reached €884.5m, a 26.7% increase on the previous year, while overall consumer spending on digital video by subscription grew by over 327% between 2011 and 2012, to €194m³
- According to the European Audiovisual Observatory, over 52% of the VoD services in Europe that are available in one country are established in another, whether on a cross-border basis or through bespoke releases of the same content in more than one Member State⁴
- Services offering more ‘niche’ product, such as EuroVoD, also operate on a cross-border basis. EuroVoD aims to develop and promote legal offers of art-house films on demand across Europe; it currently has eight member countries and intends to expand across the whole of Europe.

3. Cultural diversity and the Single Market

3.1 BSAC believes the Commission needs to balance together two essential EU constitutional principles in its dialogue with business stakeholders on the issues of cross-border access and consumption. On the one hand, the EU Treaty commits the Union to the progressive removal of barriers to intra-community trade in products and services and the achievement of the Single Market. On the other hand, the Treaty also enshrines the importance of culture in the development of the EU.⁵ Article 151 requires the EU institutions to respect and promote the national and regional diversity of Europe’s cultures.

3.2 Cultural diversity is a market reality for distributors of audiovisual content throughout Europe, including traditional broadcasters and online ‘over-the-top’ VoD services. Practitioners accept the fact that – unlike most manufacturing products and commodities – the audiovisual product is intensely culturally-determined. Adapting to this reality has required the development of a dynamic sector of local SMEs specialising in the marketing and distribution of films from outside the home culture, including European films. This industrial sector has built a valuable skillset in helping films and audiovisual works cross cultural barriers and trigger consumer interest. Moreover, audiovisual products – TV and film – are experience goods that require localisation in order both to appeal and be relevant to consumers in local markets. This involves significant cost and risk for the local distributor in return for which the distributor usually seeks to secure some degree of exclusivity. The exclusivity granted has the effect of enhancing and facilitating the market for investment in, and localisation of, audiovisual content. Without this the distributor would suffer free riding on his investment from competitors.

³ http://www.ivf-video.org/new/public/media/EU_Overview2013.pdf

⁴ Audiovisual Observatory MAVISE Database. Presentation given in Cannes, 19 May 2013

⁵ Entry into force of the Treaty of Maastricht

3.3 Whilst standardised pan-European distribution may be an attractive theoretical proposition, in practice it is a very difficult thing to achieve successfully. Economies of scale are not achievable as it would be unproductive to use one-size-fits-all marketing concepts and campaigns across all EU territories, due to the pronounced cultural differences. In order to launch an audiovisual product from another EU Member State, the local distributor cannot replicate the marketing campaign made by the distributor in the country whose market the content was principally made for. Bespoke release calendars, terms of business (such as with local exhibitors, broadcasters or online platforms) and marketing campaigns need to be deployed and tailored to each specific cultural context, in order for the content to attract local consumers and reimburse the considerable launch costs involved. A separate ‘signalling investment’ needs to be made for each cultural market in which the audiovisual product enters.⁶ The first to lose out from a standardized, pan-European approach to distribution would be the local consumer. These facts hold true whether one looks at European independent feature films, broadcast television series and the majority of documentaries, live sports and other factual content.

4. Exclusive territorial rights support the financing of European content

- 4.1 European feature films, as well as a growing proportion of high-end television, such as single drama, drama series and many documentaries, rely on a financing model that has adapted advantageously to the diversity of European cultures and fostered the circulation of content across national boundaries. A large proportion of new audiovisual projects will be financed through a patchwork of public sector funds, including tax breaks/credits, contributions by local distributors (including broadcasters) and private sector investment (such as banks and specialised investment firms). The producer will often initially attempt to ‘pre-sell’ rights in the film to domestic distributors and/or broadcasters in the country where the project originates. These distribution contracts may be used as collateral for a loan to contribute to the financing of the project.
- 4.2 The combination of local public sector funding and rights pre-sales will, in most cases, leave the project short of funds and not yet able to go into production. The producer may try to pre-sell rights to the project to distributors in other countries, generally through a sales agent. The sales agent will estimate likely acquisition prices from local distributors abroad. These estimates are based on factors such as the demand for that particular genre in the recipient culture, or consumer awareness of the cast and director.
- 4.3 If the sales agent is successful in pre-selling rights to the film in a particular country, the contracting distributor there may offer a minimum guarantee (‘MG’), i.e. it will guarantee eventual payment of a set amount of money back to the sales company, regardless of the film’s actual revenues in the distributor’s country. Pre-sales/MG contracts may then be used as collateral to raise further financing for the budget of the film.

⁶ *Study Concerning Multi-Territory Licensing For The Online Distribution of Audiovisual Works in the EU* – Kern European Affairs, June 2010

- 4.4 When deciding whether to offer an MG, a local distributor will consider risks and opportunities: whilst a minimum guarantee offer may help secure exclusive rights for her territory (against other competitors), this has to be set against risks such as the print, marketing and promotion costs. The financial outlay is justified only if the distributor has grounds to feel confident about the likely return on investment through the value of licensing all rights in that particular territory. The theatrical, home entertainment and TV markets in each European territory have their own unique cultural characteristics. For example, *The Inbetweeners Movie*, a theatrical feature based on Channel 4's hit series, was a success at the UK box office and went on to be a top video sales and rental title (the film ranked 6th in online rentals in 2012). With its references to British youth culture, the film was primarily designed for its home market and did not get wide distribution across Europe. Conversely, Ken Loach's films, with their serious social-realist themes, have traditionally found a more committed and enthusiastic audience in the French and Italian markets than in they have in the UK. The calculus of risk and opportunities has thus to be made for each film in relation to each specific culture and market.
- 4.5 Many producers build up long-term relationships with local distributors in particular European territories that will be willing to pay a premium to have first access to their films. This factor has been pivotal in the financing of films by many leading European film directors, including Pedro Almodovar, Wim Wenders, Michael Haneke, Paolo Sorrentino and François Ozon. Perhaps the most celebrated amongst Europe's auteur/directors, Ken Loach has relied on this complex mechanism to finance his projects over the past 20 years. His award-winning 2006 film, *The Wind That Shakes The Barley* (also Loach's most commercially successful film to date), was made for a (modest) budget of €6.5m. Closing the financing on this complex and risky project was made possible by the solid partnership established by Loach and his producer Rebecca O'Brien with France's Diaphana and Italy's BIM: these experienced local distributors were keen to put up risk money on this project because of their faith in the quality of the filmmakers' vision and their refined knowledge of the requirements of marketing the film to their local audiences.⁷ Similar cross-border creative and co-financing relationships exist in the high-end television production sector, where new content increasingly relies on the pre-sale of TV licenses to broadcast services in more than one Member State.

5. EU content financing and distribution are inextricably linked

- 5.1 Other EU national markets are central to the financing of independent film production in individual Member States: producers license rights across borders in order to raise production finance, and, in doing so, they increase cross-border distribution opportunities. Many projects are also designed for creative co-operation between film companies in several Member States (through co-production). This mechanism has evolved through necessity and pragmatic adjustment to Europe's socio-cultural reality. Technology itself, simply because it permits the pan-European circulation of content over broadband networks, will not reshape EU cultural fundamentals and create an integrated cultural experience.

⁷ Financing Plan for *The Wind That Shakes The Barley* in Appendix One of this document

5.2 The adoption of a regulated model in which content producers and services would have no choice, other than to license their films or television content on a pan-European basis, is not the answer. It would not serve the best interest of the EU consumer as it would destroy the economic and financial mechanism that supports the production of quality audiovisual products that European viewers currently enjoy.

6. EU cross-border business models are a growth area

6.1 BSAC observes that nothing in the current framework of EU and Member States copyright laws prevents producers and distributors from licensing audiovisual content on a pan-European, multi-territory basis, which can support new models offering features such as cross-border access to services and/or portability of individually-acquired/subscribed content. There are a number of services available in more than one territory and the trend is growing as the private sector gradually identifies market segments that are viable to exploit commercially and begin providing new options:

- Opportunities for consumers to access their national television services and content, while abroad, are increasing. For instance, through a Mediaset premium subscription, Italian nationals visiting London can download their favourite content before travelling and view it from any place, thereby individually curating their viewing experiences to their own taste of home grown fare while on the move
- Opportunities for consumers to carry or access paid-for/subscribed or free content while on the move within the EU, are also increasing: the BBC iPlayer was re-engineered this year to enable UK users to download their favourite programmes from the platform and consume them while away from the UK. New cloud-based services have also emerged that take advantage of the technology to offer users flexible options to use content while on the move: UltraViolet, a technology platform developed jointly by consumer electronics device manufacturers, content owners and several of the larger international film distributors, provides consumers with the ability to register UltraViolet-enabled films and TV content they have purchased in their personal cloud 'locker'. The content in a consumer's Ultraviolet library can be downloaded to a device before travelling or streamed to a connected device whilst on the move. Services are also appearing which allow consumers to register their existing DVD/Blu-Ray collection in their UltraViolet library.

6.2 These new business models use the very latest developments in technology to make content more flexibly available, including cross-border access options. They are the product of entrepreneurial risk-taking and experimentation by the professional content production, distribution and retail sectors whose role it is to study consumer behaviour and trial new means of satisfying demand. More and more such innovative offerings for consumers will emerge as demand leads to economically sustainable business models. BSAC believes it is vital to allow the industry to continue to develop market-led solutions to shifting patterns of use by the EU consumer.

- 6.3 The need for market-led experimentation is vital in order to ensure that the audiovisual industry's sustainability is not jeopardized. The technological and market challenges should not be underestimated: for many free-to-air services based on the licence fee and/or advertising, the deployment of cross-border access could prove prohibitively costly, owing to the considerable financial outlay required to implement requisite registration and verification systems. Additionally, more flexibility on geo-blocking would have to be set against the risk of potential losses in foreign distribution revenues and/or advertising income, a factor which could undermine Europe's competitiveness in content financing. The cost of proposing such flexible business models needs to be set against the actual demand and there is strong evidence that not every genre of content attracts cross-border demand on a scale sufficient to support viable businesses. For example, uefa.com, a website launched in 2006 to enable users to stream European Champion League football matches live, has been a stark disappointment for UEFA, for in spite of active promotion the site has been a loss-leader for the past six years, demonstrating that the underlying cross-border demand may not be sufficiently strong.
- 6.4 BSAC urges the Commission to be realistic about the opportunities for pan-EU distribution through broadband Internet VoD and other such services. The experience of BSAC Members shows that aggregation of content on a pan-European basis is both capital and labour intensive. There are many fixed costs, including the insertion of metadata, language versioning (such as dubbing and subtitling), encoding, the need for differentiated marketing and press for each language market (see paragraph 3.3), and legal compliance (including content classification).⁸ As discussed under Section 3, these investments need to be replicated for each language/cultural market in which the platform will offer its content to local consumers.
- 6.5 The high capital costs and the complex technological and compliance issues involved mean that pan-EU distribution may be a very difficult proposition for most market players, other than those that are already able to enjoy a high level of integration and scale. Large online video aggregators currently think twice about offers from smaller EU independents because their content is deemed too 'niche,' as it is seldom able to attract sufficient traffic. As one independent film distributor puts it bluntly, "under one million hits, you don't exist". Fewer and larger gatekeepers would drive up prices to the consumer, damage creativity and innovation in EU content production and restrict consumer choice. This would run the risk of confining content from Europe's smaller languages and cultures to a cultural ghetto. The less competition, the more costly it would be to make available and promote so-called 'niche' content to consumers. This outcome would be against the spirit and letter of Article 151(4) of the EU Treaty, which creates an obligation for the European institutions to preserve and promote cultural diversity (see paragraph 3.3).

⁸ There are over 20 encoding standards for the EU alone, each master costing between €800 to €1,500

- 6.6 High technical and compliance costs also combine with low revenues to make pan-EU distribution a difficult economic proposition for independent producers and distributors in Europe. The current cost of supplying a digital master for a leading branded online platform is between €800 and €1,500. At an average unit price of between €1 and €3 to the consumer on that platform, (rental or download-to-own), the supplier will need between 400 and 1,000 downloads just to recoup the cost of producing the master. Also, the sales/rental volume would have to hit critical mass before any reasonable return on investment may be expected.
- 6.7 BSAC believes the EU Commission should support the efforts of the business stakeholders that are choosing to introduce to the European marketplace new business models that meet the EU consumer's growing interest in flexible access to content, including cross-border portability and access. What stakeholders need is a set of practical incentives, not rigid regulation designed to drive the market in an ideologically-determined direction. The incentives should be designed so as to help smaller and mid-size market operators, in particular, to mitigate the financial risks involved in providing their content or services cross-border. BSAC believes that funds from Creative Europe could usefully be re-prioritised to support business ventures with pan-European components by offering to share in a number of technical costs, including the following:
- ✓ Encoding costs – the absence of common standards mean suppliers and aggregators sometimes have to encode in as many as 20 different standards in order to reach all EU markets
 - ✓ Language versioning – the costs of supplying dubbed and/or subtitled versions is a significant barrier for small and medium-sized businesses in the production and distribution sectors
 - ✓ Market research – the high risks involved in deploying any form of multi-territory licensing requires detailed knowledge of the economics and sociometrics of each language market. Research is costly and the so-called 'niche' players, who contribute so much to Europe's cultural diversity, rarely have the resources necessary to conduct it on the right scale
 - ✓ Content identification and registration – in order to stimulate licensing uses after the first cycle of exploitation of a work the Commission could helpfully support rights catalogue owners, who may wish to register their works, on a voluntary basis, in databases of their choice.

APPENDIX ONE

Footnote 7: Financing Plan for *The Wind That Shakes the Barley*

"The Wind that Shakes The Barley" (Working Title)

Preliminary Financing Plan 23.02.2005

£1 = Euro 1.45

<u>UK - Sixteen Films</u>	<u>£</u>	<u>Euro</u>	<u>%</u>
Section 48 (50%)	676,796.99	981,355.64	
SIS Investment	162,672.41	235,875.00	
IPS Share	172,504.45	250,131.45	
RBS Gap (25%)	116,021.90	168,231.75	
Total UK	1,127,995.75	1,635,593.84	25.00
<u>Ireland - Element Films</u>			
Irish Film Board Investment	206,896.55	300,000.00	
Ireland Location Subsidy	86,206.90	125,000.00	
Ireland Section 481	451,198.00	654,237.10	
Section 48 (25%)	338,398.50	490,677.83	
IPS Share	334,063.44	484,391.99	
RBS Gap (35%)	162,430.66	235,524.45	
Total Ireland	1,579,194.05	2,289,831.37	35.00
<u>Germany - EMC</u>			
Germany - NRW	248,275.86	360,000.00	
EMC Investment	54,224.14	78,625.00	
Section 48 (25%)	338,398.50	490,677.83	
IPS Share	168,680.59	244,586.85	
RBS Gap (20%)	92,817.51	134,585.39	
Total Germany	902,396.60	1,308,475.07	20.00
<u>Spain - Tornasol/Alta</u>			
Spain - Tornasol/Alta	172,413.79	250,000.00	
IPS Share	232,375.75	336,944.84	
RBS Gap (10%)	46,408.76	67,292.70	
Total Spain	451,198.30	654,237.54	10.00
<u>Italy - BIM/Bianca Films</u>			
Italy - BIM	344,827.59	500,000.00	
IPS Share	59,961.96	86,944.84	
RBS Gap (10%)	46,408.76	67,292.70	
Total Italy	451,198.30	654,237.54	10.00
Subtotal Co-Producers	4,511,983.01	6,542,375.36	100.00
BUDGET TOTAL	4,511,983.00	6,542,375.35	

<u>International Pre-Sales (IPS)</u>	<u>£</u>	<u>Euro</u>
Pathe - UK and Ireland	360,000.00	522,000.00
Irish TV3 pre-sale	100,000.00	145,000.00
France - Diaphana	386,206.90	560,000.00
Switzerland - Filmcoopi Zurich	55,172.41	80,000.00
Cineart - Belgium and Holland	66,206.90	96,000.00
Total Presales	967,586.21	1,403,000.00