

July 2014

EU NEGOTIATIONS ON ‘TTIP’ AND THE EXCLUSION OF AUDIOVISUAL SERVICES: EBU POLICY NOTE

Public interests of major importance are at stake in the TTIP negotiations. This is particularly sensitive for the audiovisual sector at a time when the European Commission is considering the implications of technological convergence in the media; and when European cultural and audiovisual services are facing increasing competition from new, often global, players on the market.

The present note gives indications on the European audiovisual sector’s specificities and interests in the context of these negotiations. It explains why the audiovisual sector has been and continues to be excluded from EU free trade negotiations. It points out some specific aspects to be taken into account in this regard in the context of the negotiations on TTIP.

It therefore respectfully calls on the EU and Member States to make sure that the negotiating mandate assigned to the European Commission is thoroughly respected to ensure a clear and broad exclusion of audiovisual services from a future agreement.

SECURING EU AND NATIONAL CULTURAL POLICIES

A European way that has proved successful

According to recent findings by the European Commission the European audiovisual market is highly successful. Its TV market is the second largest regional market in the world, after the US¹. Up to now, it has delivered significant benefits for Europe.

The US and Europe have very different traditions, approaches and concepts as regards policies and regulations for the audiovisual sector, and more generally, policies to protect and promote cultural and linguistic diversity and media pluralism, including through public service media.

The right to promote culture is enshrined in Article 167 of the Lisbon Treaty. Based on the subsidiarity principle, Article 167 aims at bringing the common cultural heritage to the fore whilst respecting Member States’ national and regional diversity, excluding any harmonisation of laws and regulations of the Member States on this basis.

This principle is also enshrined in the 2005 UNESCO Convention² on the protection and the promotion of the diversity of cultural expressions, signed by the EU and 133 States, which recognises the

¹Green paper of 2011 on the *Online Distribution of Audiovisual Works in the European Union: Opportunities and Challenges Towards a Digital Single Market*, http://ec.europa.eu/internal_market/consultations/docs/2011/audiovisual/green_paper_COM2011_427_en.pdf, p 5

In particular, the report indicates that the EU TV market grew by 12% between 2006 and 2010, with over half of that growth occurring between 2009 and 2010 to reach an annual turnover of €84.4 billion in 2010. Western Europe is the largest IPTV market, accounting for 40% of global subscribers in 2010. The European share of the global TV market remained stable at around 29% in 2010. EU TV viewing is higher than the global average, and also showed the greatest increase globally over 2009-2010.

² <http://www.unesco.org/new/en/culture/themes/cultural-diversity/diversity-of-cultural-expressions/the-convention/convention-text/>

sovereign right of Member States to formulate and implement cultural policies and measures for the protection and promotion of cultural diversity.

Unlike other countries with which the EU has concluded FTAs to date, the United States has not ratified the UNESCO Convention.

With regard to trade negotiations under the GATS, the EU ‘Seattle mandate’ ensures that the Union and the Member States maintain the possibility to preserve and develop their cultural and audiovisual policies. As a result, the EU has systematically excluded or carved out the European audiovisual sector from any commitment in its trade agreements, including in bilateral FTAs such as most recently in the CETA with Canada.

This has greatly contributed to maintaining and further developing a strong audiovisual sector in Europe, with high levels of creativity and investment in original content that is culturally, democratically and socially important.

Continued success largely depends on current and future EU regulatory principles.

Generally speaking, the EU has assiduously built up over time a number of measures that sustain and define its public policies, such as the EU’s “precautionary principle” approach to regulation on environment, health or other fields, labour standards, the provision of services of general interest or the preservation and fostering of cultural diversity. These measures constitute a considerable part of its social market and its identity. They are necessary to develop the European economic, social and cultural frameworks.

Similarly, the European audiovisual industry relies not only on financial support mechanisms, but also, significantly, on regulatory mechanisms at EU and national level. The EU and US audiovisual models are so different economically, legally and culturally, that it is not only very difficult, if not inconceivable, to imagine any regulatory, financial or policy convergence between the US and the EU in this area; it would also be extremely dangerous to the survival of the European audiovisual model.

Audiovisual policy measures in the EU today convey certain obligations to providers of audiovisual services vis-à-vis European consumers, for example as regards the promotion of distribution and production of European audiovisual works, or give them certain rights, for example as regards news access³.

By discussing commitments under the regulatory pillar of the future agreement, US stakeholders may seek guarantees against regulatory hurdles by introducing market access and national treatment commitments or regulatory disciplines in the future agreement: companies offering audiovisual content over the internet (e.g. Netflix, YouTube or iTunes) may seek to avoid any obligation to support European audiovisual production and distribution; to challenge existing quotas and programming obligations promoting European works under the terms of the AVMS Directive and national legislation; or to access subsidies and production support schemes on a non-discriminatory basis (e.g. through the MEDIA programme and national/regional funding schemes) at European and national levels. No equivalent support mechanisms exist in the US.

One may also conceive that US companies investing in cable and broadband networks might seek guarantees against ‘must-carry’ obligations in application in Europe.

Besides, some US companies have openly challenged the principles of net neutrality and the ability for the regulator to intervene in the area.

³ See Audiovisual Media Services Directive (AVMSD) 2010/13/EU

Ensuring universal access to, and easy findability of, audiovisual media content of particular value remains very important for society in the digital environment. This has become one of the central issues in last year's consultation on the Commission Green Paper "Preparing for a Fully Converged Audiovisual World", which paves the way for a reflection on media regulation that is on the agenda of the European Commission for 2015. Media freedom and pluralism are other important public policy objectives at stake in those reflections.

For all these reasons, European financial and regulatory measures should be carefully safeguarded and by no means pulled down under the pressure of a particular partner in bilateral negotiations. On the contrary, it is paramount not to pre-empt a future democratic debate in Europe which will help shape the European media regulatory framework for the next decades.

- ⇒ *The EU and its Member States' ability to secure the right to maintain and develop European and national cultural and audiovisual policies and exclude those policies from any commitment in the agreement, as expressed in the negotiating mandate, is paramount.*
- ⇒ *The regulatory sovereignty of the EU and its Member States over their policies is key for the future of the media sector in particular, which is not only an important economic market, but also touches on social, cultural and other public policies.*
- ⇒ *As a consequence of the EU negotiating mandate, a clear exclusion of audiovisual services should apply to all relevant chapters of the agreement, including its horizontal provisions. Furthermore, it should not be bound to the regulatory framework at a specific point in time.*
- ⇒ *Importantly, such exclusion should be combined with a positive list approach, not only for market access, but for liberalisation commitments in general.*

DEFENDING THE ECONOMIC INTERESTS OF THE SECTOR, MEDIA PLURALISM AND CULTURAL DIVERSITY

Resisting and reducing trade imbalances in the audiovisual sector

In the field of cultural industries, in particular audiovisual services, the EU and the US today have antagonistic interests. European audiovisual industries, including in the electronic and internet fields, will not benefit from trade liberalization with the US. On the contrary, they will be severely hit.

In terms of market access, recent analysis⁴ by the European Commission shows the relative global market share of the US audiovisual industry growing compared to the EU's. This trend is combined with a clear trade imbalance between the EU-US audiovisual services respective markets: in 2010, the US exported \$ 7.5 billion of such services to the EU; the corresponding amount in the other direction was \$ 1.8 billion⁵. Over that same year 2010, the market share of EU films in the US was 6.5%. In 2011, the average market share for US films in EU countries was 61.4%.⁶

⁴<http://ftp.jrc.es/EURdoc/JRC69435.pdf>, p 98

⁵*Trade in commercial services, Key developments in 2011: a snapshot*, WTO
http://www.wto.org/english/res_e/statis_e/its2012_e/its12_trade_category_e.htm

⁶Idem

Today, the US audiovisual market has an in-built competitive advantage over the EU market. It is more uniform - culturally and linguistically-, leading to increased economies of scale and higher investment capabilities on average. Moreover, whilst the EU is the primary export market for US films, the majority of EU Member States export within the EU. In this context, European audiovisual industries expect growth of their market to come from supportive policies, including in terms of investment in online content services and network infrastructure, and increased trade *within* the EU internal market.

For these reasons, trade liberalization would only offer opportunities for the US to make further inroads into the European market, but not vice versa. Rather, audiovisual industries in Europe need a strong and forward-looking strategy to foster their competitiveness on the global market.

These elements tend to indicate that the interests of the European cultural and audiovisual sector and cultural diversity cannot be served by bilateral negotiations with the US partner.

Fighting adverse effects on media pluralism and cultural diversity

In the mid-term, EU-US liberalization would support an oligopolistic, standardized film market driven by the dominant US business model based on higher production costs combined with over-investment in international star casting and in promotion in order to minimize the risks not to recoup investment and in the end increase the profits of a small number of big players over smaller production and distribution companies.

The good performance of the audiovisual market in the EU has been achieved on the basis of cultural diversity, which is essential for its branding. At the same time, it still suffers from the existence of technological barriers, the complexity of some copyright licensing processes, diverse provisions relating to release windows, lack of trust in payment methods or other hurdles within the EU internal market. The performance of this market risks being quickly challenged, in particular in the digital environment, in case of trade liberalization with the bigger and more unified audiovisual US market.

Similar trends would soon be observed in adjacent areas such as the telecom sector, for which the internal EU market has not yet been fully achieved in practice: e.g. by contrast, Liberty Global, a fully vertically integrated US cable network and media company already active in some 10 EU countries, has clearly developed a pan-European strategy to acquire media companies and large cable operators in Member States, as has already happened in Belgium, Germany, Poland and the UK.

As an increasing number of players seek to control access to converged devices used for media services, US companies in adjacent sectors to the audiovisual industry are incentivised to challenge or limit the exclusion or carve out of audiovisual services from EU FTAs. This would only give giant US Internet service and content providers further inroads into the European digital sector.

Moreover, global mobile and internet traffic, largely driven by audiovisual content services offering streaming, download-to-own or rent VOD or other services, is expected to further grow significantly in the coming years. This makes the above mentioned challenges for the European economy all the more important.

In that respect, it is important to recall that the notion of 'digital products', promoted by the US and used for example in its FTA with South Korea, is not acceptable and must not be introduced in the TTIP: it risks gradually covering the major part of audiovisual services as digitization progresses. The introduction of this notion, and application of the 'non-discrimination' principle to it, would therefore risk enabling the United States to challenge the audiovisual policies of the European Union and its Member States.

- ⇒ *In order to support their audiovisual economy, including in the mobile and internet environments, the EU and Member States should give priority to supporting their markets and foster an EU digital strategy and investment policy that fully meets the needs of the sector. This should be run independently from, and outside the scope of investment protection provisions in the TTIP.*
- ⇒ *The definition of audiovisual services that has been used by the EU until now in the context of trade negotiations is appropriately based on the principle of technological neutrality.*
- ⇒ *The exclusion of audiovisual services from the TTIP provided by the mandate is broad and future-proof. With respect to bundled services, insofar as they include audiovisual services, the exclusion must also apply to commitments taken for adjacent sectors - including telecommunications, ICT or distribution services.*
- ⇒ *In view of US trade policy in other FTAs, any introduction of the notion of “digital products” under TTIP should be strongly resisted.*
- ⇒ *As a complement to the exclusion, and in order to fully implement the objectives of the mandate, a generic (horizontal) clause in the TTIP agreement would also be needed to safeguard the freedom of the Parties, including EU Member States, to take measures (in particular those of a regulatory or financial nature) with the objective of protecting or promoting cultural diversity or media freedom or pluralism, or preserving or developing the capacity of audiovisual and media services to serve the democratic, social and cultural needs of each society.*

This issue is imperative to EBU members, the vitality of the broader cultural sector and the 500 Million European citizens who enjoy diverse, high quality audiovisual services.

The EBU will happily contribute its expertise of this complex sector whenever required in the negotiations in order to secure the best outcome for Europe.

ANNEX

Considerations on classification of audiovisual services in a context of technological convergence

Audiovisual services, including public service media services, will continue developing within the digital environment over the next years. Given the fast mutations and convergence of media technologies and services on the one hand, and the long duration of trade agreements on the other hand, a flexible approach towards audiovisual services that is neither restrictive nor bound by any definitions used for regulatory purposes is needed.

We would therefore like to point out the following:

- Encompassing linear and non- linear audiovisual services, which is ensured by the definition traditionally used in the trade context⁷, is essential.
- *In addition, it must be noted that this definition is broader than the definition in the Audiovisual Media Services Directive.* Unlike the Directive, it includes radio, cinema projection services, motion picture production, sound recording and other services.
- The classification of services also needs to *be future proof, i.e. not only cover services currently in use, but also new services that will develop over time*: 10 years ago, who could have anticipated that social platforms or streaming would be part of today's media landscape? The classification that has been used by the EU until now in the context of trade negotiations is appropriately based on the principle of technological neutrality.
- Concepts and definitions for audiovisual services must *not be bound to a particular technology, or to a particular distribution platform*. This includes inter alia offline/online distribution, free of charge/pay services, professional/user-generated content and user interfaces for disseminating audiovisual content.
- Equally paramount is to *cover those audiovisual services which are bundled together with other services*: for example, audiovisual content services bundled with telecom services, or digital distribution services as part of e-commerce activities.
- Finally, the notion of 'digital products' promoted by the US and used for example in its FTA with South Korea, would risk covering an important part of audiovisual services. The introduction of this notion, and the 'non-discrimination' principle that would be attached to it, would severely challenge the policies of the EU and its Member States in the audiovisual sector and contradict the exclusion of audiovisual services provided by the mandate. For that reason *any introduction of the notion of "digital products" under TTIP shall be rejected*.

⁷ The WTO Services Sectoral Classification List of July 1991 (document MTN.GNS/W/120) lists the following services in Subsector D "Audiovisual Services" under "Communication Services":

- a. Motion picture and video tape production and distribution services
- b. Motion picture projection service
- c. Radio and television services
- d. Radio and television transmission services
- e. Sound recording
- f. Other