

Business of TV

TV squares up to the EU

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Plans for a Digital Single Market are being resisted by industry bodies including Pact and the Motion Picture Association. Kate Bulkley examines how the Brexit vote could affect the outcome

The Brexit vote comes at an awkward time for the British TV industry, which is in a standoff with the European Commission. In dispute is a key EC goal that could have a

significant impact on how independent producers finance and sell TV content across Europe.

EC president Jean-Claude Juncker wants to apply his Digital Single Market (DSM) philosophy to television programming sales. But UK programme-makers, and Hollywood studios, are very much against it.

A report released during the Cannes Film Festival in May crystallised the TV and film production sectors' opposition to the idea.

The report, from consultancies Oxera and Oliver & Ohlbaum, argues against the idea of erasing territorial rights exclusivity, a traditional way of funding film and high-end TV productions, and has broad-based support. Funders include Pact, the Motion Picture Association (MPA), Sky, Germany's Constantin Film, Entertainment One and 21st Century Fox.

They claim that the cost of such a change would hit producers and consumers negatively, substantially reduce the volume of TV and film content being made and raise the consumer cost. That is the opposite of what the EC purports to want.

Lost revenues

The report puts the full economic impact on production revenues alone at up to €8.2bn (£6.8bn) a year. TV output volume could be reduced by up to 48%, it says, and film production by up to 37%. Producers stand to lose an estimated €9.3bn (£7.7bn) in revenues a year, the report concludes.

The shock Brexit vote, meanwhile, poses another potential threat to the industry. Chariots Of Fire producer and former Channel 4 deputy chair Lord Puttnam says leaving Europe will have a wholly negative impact on how co-production finance is raised. Speaking at a Broadcasting Press Guild breakfast last week marking the publication of his co-authored report with Goldsmiths – A Future for Public Service Broadcasting – Puttnam said Brexit means “cutting ourselves off from a most important funding source”; one that has contributed about £140m in co-production funds over the past decade.

He warned that not being able to tap into European co-production money would make UK producers “more reliant on big money coming from America and making all the

compromises that go with it”.

Puttnam is concerned about what message exiting the EU sends to talent, both in front of and behind the camera. “We have had an extraordinary net inflow of gifted people into the UK – Spanish, Italian, French and German – because we were the pivot on which the creative industries were operating throughout Europe. We will no longer be that pivot,” he said.

“The very best of them will end up in Paris, Berlin or wherever they can find funding for their projects. So I think we are on the cusp of seeing the biggest growth business Britain has had for six or seven years enter a quite serious decline, and that’s tragic. Not only that, but our own best people will move too.”

But Pact chief executive John McVay warns against over-reacting to the effects of Brexit. He says the UK creative industries are already getting organised to make sure they have “a seat at the table” about how the exit from Europe is negotiated.

“We are still in Europe and we still get all the benefits, with likely two years after Article 50 is invoked before we actually leave,” says McVay, who was in the Remain camp. “It’s not yet clear what that is going to look like. If we are still in the trade block, then we will still be subject to the EU; if we are not, then our content is still subject to EU law in the EU, so there is an opportunity to get the best deal on that.”

McVay says there is an opportunity to address how UK tax credits could be revamped post-Brexit, and how to divvy up any monies from the European Media Programme funds if they are returned to the UK.

“Brexit doesn’t necessarily mean that all co-production money from Europe will disappear. There is a lot still to be negotiated,” he says. “Anyone saying it’s all going to hell in a handcart is scaring investors, and that isn’t doing any of us any favours.”

The DSM plan aims to lower regulatory barriers to move the 28 national European markets into one by the end of this year; Britain’s EU exit would take that down to 27. Juncker’s goal is to create pan-European telecoms networks, digital services that cross borders and “innovative European start-ups”.

Given that the DSM and the idea of erasing borders is a key

plank of Juncker's EC presidency, it is difficult to argue against, and Brexit will only reduce the UK's ability to influence him on these matters.

The areas of the DSM plan that will have the biggest impact on the media are those designed to make cross-border e-commerce easier: ending "unjustified geo-blocking" and a "modern, more European copyright law", including wider access to content online and across borders, allowing Europeans who travel to other countries to access their home market content (often called 'portability').

Massive intrusion

McVay, who gave evidence for the Oxera/O&O report, says: "We don't want Eurocrats to tell us our business. Removing our right to trade our property is a massive intrusion. Our balance of trade is positive into Europe and the Commission must work with, not against, the industry to deliver audiences."

Some observers says Juncker's philosophy is to be admired – he claims to want a better deal on everything for European consumers, rich or poor. He wants easy access to all content and he believes that banning territory-by-territory sales will give consumers across the EU better access to the programming they want to watch.

Juncker's opponents say TV and film need to be an exception to such pan-European consumer thinking, because their value is based on the ability to tailor content to markets rather than one-size-fits-all thinking.

High-end film and TV is ambitious and expensive and cannot be funded by one broadcaster alone, they say.

Deficits on big-budget productions like the BBC's *Poldark*, or BBC Worldwide's *The Collection*, are filled by co-producing or pre-selling to broadcasters in other territories that will pay for exclusive rights' windows, while the likes of Sky's *The Last Panthers* drew from the EU's Media Desk Fund. Different countries place a different value on certain programming, none more so than sport. The French Open tennis championship at Roland Garros, for example, is a national sporting treasure in France, where it is watched in great numbers. Other European nations have a more local interest, depending on how well their players are performing. For British tennis fans, it's all about Andy Murray; in Romania, the focus is on Simona Halep.

This year, Eurosport was broadcasting nine separate language feeds from the tournament, with presenters from all the different countries adding their own commentary. “If you have a homogenised feed going across all of Europe, then you’re not serving the different markets,” says Eurosport chief executive Peter Hutton.

Juncker’s argument for DSM is based partly on a desire to allow EU citizens to watch programming from their home country while travelling around Europe. Some of his MEP colleagues even brought the problem to his attention because they would find themselves in Brussels for extended amounts of time, unable to access TV or films from their home countries.

The issue of ‘taking your content with you’ has become separated from the central DSM argument. Some proponents of the proposals are now trying to carve out what is called ‘content portability’ as a separate right: a Sky subscriber on holiday in France, for example, should be able to access all of their TV while abroad without infringing copyright laws. Most broadcasters and pay-TV operators don’t have a huge issue with this, though there will be cost and authentication issues around setting up and paying for validation technology. And how long should a consumer be able to claim ‘temporary residence’ in another country for access to their content? A few weeks? A few months?

“The issue of portability and access to content you have paid for is one thing,” says Discovery Networks International president JB Perrette. “But the concept that everything has to be mandated to be licensed everywhere at the same time is not in the best interests of the viewer, who still wants to have great local content.”

Some observers see portability as paving the way to the EU’s bigger goal of ending territorial exclusivity. “We have to be careful that portability does not become the Trojan horse for the ending of territoriality,” says one TV distributor who does not want to be named.

Far from promoting a better deal for consumers, critics of the plan say the end of regional rights sales could end up rewarding only the bigger players, including digital platform giants like Netflix, Google and Amazon. Bigger TV and film studios, especially US ones, would be able to strike one mega, pan-European deal, they say, but mid-sized Indies

could lose out.

“A lot of our clients’ deficit financing is pre-sales to European territories,” says Jane Hyndman, group general counsel for media advisory and rights management business Compact Media. “The major studios will always be okay, but how will a smaller indie with a couple of BBC series grow its business if it can’t pre-sell?”

Juncker says he is pro-consumer and the principle of everyone paying the same. He also believes a digital European champion will come out of the woodwork once the DSM is in place – a European giant that will set market rates throughout the continent; one TV superpower to rule them all on price.

Some think Vivendi or Sky could emerge to be that champion, but others are less sure, calling for normal market forces to be allowed to work. These are the same market forces that have already prompted vast increases in OTT and SVoD services in all European markets, many of which are homegrown and cater to local tastes.

Pact is fighting hardest against DSM in its current form because it believes the UK has the most to lose – many indies have mastered how to create cross-border funding deals that fund distinctive, highly marketable TV, it says. There are a lot of moving parts that fall under the DSM proposals. The EC has indicated that it will issue legislative proposals around copyright and possible reform to the Satellite and Cable directive, which could allow expansion of the country-of-origin rule, this autumn. The latter could also impact licensing on a territory-by-territory basis. Plus there is the ongoing investigation into a possible breach of competition rules by Sky and the Hollywood studios over the geographic licensing of content under their output deals.

Contractual freedom

“There are multiple approaches under consideration that could limit the flexibility to license content on a territorial basis,” says Stan McCoy, head of the MPA in Brussels. “It’s a challenge for us to try to keep our eyes on all these proposals and to remind the EC institutions of the importance of contractual freedom in the audiovisual sector.” Is there a compromise in the offing? Some argue that the EC will consider an ‘audiovisual exception’ of some sort, but

this will likely take a lot more lobbying. Post-Brexit, the UK will have less of a voice, if any. 'Exception' options on the table include the idea of making content available cross-territory only after some exclusive windowing, thereby creating a sort of European digital content bank that any EU citizen could access. Programming would be offered across borders, but only after a period of territorial exclusivity. To counter the EC's concern that some programmes don't ever make it to smaller countries because the numbers don't stack up for domestic broadcasters, perhaps it could set up a fund to pay for dubbing/subtitling and make the shows available from this central European digital content bank. The TV and film industries mostly seem to think the current system is working well – "if it ain't broke, don't fix it," says Independent Film & Television Alliance chair, and partner at GFM Films, Michael Ryan.

Which brings us back to Brexit and the recent vote for Britain to opt out of the EU. It doesn't give the UK the strongest hand to help shape the DSM rules for TV and film, which is a shame as it will have to work with them regardless. But the good news is that negotiating the UK's departure from the EU will take time, which means there will be plenty of opportunities to ask what a post-Brexit world will look like.