

WHY AUDIOVISUAL SERVICES MUST BE EXCLUDED FROM THE SCOPE OF THE EU-US FREE TRADE AGREEMENT (FTA)

Prepared by Centre National du Cinema, CNC, Paris 18.3.2013

1. The audiovisual sector is one

Audiovisual services consist of services related to the production, distribution, transmission and exhibition of motion pictures, video, television-radio, sound recording and other audiovisual content.

Digital technologies have brought new ways of providing these services over electronic networks, such as video on demand and streaming of music, movies and television programs and other interactive works.

As a result **the audiovisual sector consists of offline and online, linear and non-linear services. But all these services give access to the same creative content:** although they use different technologies they all belong to the audiovisual services sector.

To protect this specific sector **the EU made no commitment in the audiovisual sector in the GATS negotiations and it has systematically excluded audiovisual services from the scope of the bilateral free trade agreements it has negotiated since then.**

However today, given the massive offensive interests **US companies** (Google, Apple, Amazon, Netflix etc.) have in the “online” audiovisual sector, these companies are pushing for **online audiovisual services to be treated differently from offline audiovisual services and for online services to be liberalized due to their international, dematerialized, cross-border nature.**

This position is **contrary to the long-standing European principle of technological neutrality**, which was the basis for the extension of the Television without Borders directive to non-linear audiovisual media services (AVMS directive). Moreover the distinction between online and offline audiovisual services is **artificial** in practice since it's the same content that is being distributed through different channels.

To make things more concrete, what would be the consequences of trade liberalization in the audiovisual services sector?

2. The European audiovisual sector has nothing to gain from trade liberalization – Market access for European films will not be eased by trade liberalization measures.

- In 2010 the US exported to Europe 7.5M\$ of audiovisual services whereas the EU only exported 1.8M\$ in the US.

- Europe is the first export market for the US, whereas most of the EU Member States' exports are located within the EU.
- In 2010 the market share for European films in the US stood at 6.5%.
- The average market share of US movies in Europe was 61.4% in 2011 and it reaches more than 90% in some European countries.

These figures are not positive for Europe. However the difficulties the EU finds in exporting audiovisual goods and services will not be solved by increased trade liberalization.

The US has already entirely liberalized their audiovisual sector – all existing discriminatory barriers were removed at the time of GATS. The unbalanced market situation persisted and became worse, since it is the consequence of industrial and cultural patterns that a FTA cannot address. For instance, European films are disadvantaged by the specific US classification of works and dubbing requirements. The small number of art house movie theatres is another barrier preventing European cinema from reaching audiences in the US, whilst the level of investment capacity of the US networks makes it almost impossible for European TV programs to compete.

Therefore, European audiovisual exports won't benefit from trade liberalization.

On the contrary, opening up the market for audiovisual services to trade liberalization would reinforce the US domination over the European market and seriously undermine a sector which relies on discriminatory support and regulation policies.

3. The European audiovisual sector has much to lose from trade liberalisation

A. The European audiovisual sector needs public policies.

Left only to the market, many European works would not even exist because of the high level of investment required and the limited domestic audience.

Therefore, since markets alone may not create space for the desired variety of cultural expression, the EU and its Member states have implemented a number of policy measures aimed at correcting possible market failure by promoting cultural diversity. The rationale behind these measures is based on both cultural and industrial considerations. They have the primary cultural aim of ensuring that the national and regional cultures and their creative potential are expressed in the audiovisual media of film and television. On the other hand, they aim to generate the critical mass of activity that is required to create the dynamic for the development and consolidation of the industry through the creation of soundly based production undertakings and the development of a permanent pool of human skills and experience.

These policies, whether they are regulatory or supportive using subsidies, are all based on one principle: they are **discriminatory, in favour of European works and companies.**

For example, at the European level, the **Audiovisual Media Services directive (AVMS)** sets up a general framework regarding linear and non-linear services to ensure a harmonized European market where broadcasters and on-demand audiovisual services are subject to a minimum set of common rules. Among these rules, articles **13 and 16 foresee that Member States must ensure that not only television broadcasters but also on-demand audiovisual media services finance and promote European works** including a proportion of independent works. **MEDIA**, the European Union's support programme for the film, television and new media industries, offers a variety of **funding schemes, each targeting different areas of the audiovisual sector**, including schemes for producers, distributors, sales agents, organisers of training courses, operators in new digital technologies, operators of video-on-demand (VoD) platforms, exhibitors and organisers of festivals, markets and promotional events.

At the national level, **Member States implemented a wide range of support measures** for the production of films, TV programmes and other audiovisual works. Altogether, Member States provide an estimated €3 billion of film support per year. This funding is provided through over 600 national, regional and local schemes.

These policies have been successful in **nurturing the development of a prosperous European audiovisual industry.** The EU has become one of the largest producers of films in the world. The EU cinema industry produced 1,285 feature films in 2011 compared to 817 in the US, or 1274 in India (2010). In 2011, there were 963 million cinema admissions¹ in Europe. In 2008, the European audiovisual market for filmed entertainment was valued at € 17 billion². Over one million people are employed in the audiovisual sector in the European Union³. More generally, cultural services represent 4.5% of EU GDP and employ 8 million people. Those services have been resilient in the current economic crisis.

B. Trade liberalization would mean the end of discriminatory regulation and support policies.

In a nutshell, the core principles of trade liberalization are the following:

- Free market access: this means that no quotas to protect European or national works would be allowed.

¹ Source: *Focus 2012 – World film market trends*, European Audiovisual Observatory, May 2012

² PWC Global Entertainment and Media Outlook 2009-2013, June 2009, p. 193.

³ Study by KEA European Affairs, 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. 21, <http://www.keanet.eu/docs/mtl%20-%20full%20report%20en.pdf>.

- National treatment: a foreign company must benefit from the same treatment as a national company (this implies no discriminatory subsidies, no limitation on foreign capitalistic participation).
- Most favored nation clause: when two States have agreed on granting each other a preferential treatment, they have to grant this treatment to all the other countries. This is contrary to the operation of co-production agreements.

In a free trade agreement, a Party can choose to either:

- Exclude a sector from the scope of the negotiations. This means that the negotiations have no impact on the regulation of the sector;
- Include the sector but make reservations in order to protect the existing legislation (discriminatory regulations and subsidies). This “freezes” the existing regulations and prevents Member States from adapting their regulations in a more discriminatory way if necessary;
- Include the sector and liberalize it partially or totally, removing all discriminatory regulations and subsidies.

Should the EU liberalize the whole audiovisual sector, all discriminatory regulations and subsidies would have to be removed, and the whole European audiovisual industry would be jeopardized, not being able to overcome the **structural weaknesses that derive from a fragmented domestic market**.

Alternatively should the EU or only a few Member States liberalize part of the audiovisual sector only, this would also have disastrous effects:

- ⇒ It would **undermine the capacity of the EU and its Member States to regulate and support a sector that is subject to continuous technological change**. Indeed taking commitments in the audiovisual sector has a “stand still” effect. In other words, it freezes the regulation. In a sector where it is impossible to know what new technologies will bring in the future, freezing the regulation is a major loss for the EU and its Member States’ right to regulate.
- ⇒ Secondly it would put the European industry in an **unfair competition with US companies** which, as it is stated in all data reflecting international trade in the audiovisual sector, have a structural advantage due to their large domestic market. **Opening audiovisual services to trade liberalization would reinforce the US domination over the European market.**
- ⇒ Thirdly, if on-demand services were liberalized, US video on demand (VOD) suppliers would be given the possibility to supply services to European consumers without being subject to the obligations that derive from the AVMS directive, particularly regarding the financing and promotion of European works. In this situation **EU VOD suppliers could argue that they have to comply with obligations**

which don't apply to their competitors. In the end this would advocate in favor of less regulation and the abandonment of Europe's objectives to preserve and promote cultural diversity. To avoid this situation, there shall be no distinction between linear and on-demand audiovisual services.

For all these reasons, the EU and its Member States have always excluded audiovisual services from the scope of their agreements on trade in services. Given the unbalanced EU-US trade relations in the audiovisual sector it would be counterproductive if not a non-sense to change this long-standing policy.

The EU regulation of the sector, notably the AVMS directive, is binding on all member States, who therefore need to preserve their capacity to promote European works on linear and non linear services.

From a trade perspective the audiovisual sector must be considered as a whole (offline and online, linear and non-linear services), and excluded from the scope of EU trade agreements.