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Final report on the E-commerce Sector Inquiry

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C. E-COMMERCE IN DIGITAL CONTENT

(1) Digital content that is protected by copyright law, similar to other copyright-protected works, does not enjoy unitary protection in the EU. Instead, national copyright laws are applicable in each of the 28 Member States.[1] Copyright protection is "territorial" in the sense that exclusive rights are enforced under the national laws of each Member State.

(2) In order to provide online services that include copyright protected content, a digital content provider must generally obtain a licence from the holders of the copyrights in such content, such as film producers or record labels. Rights in broadcasts of sports events are licensed in a similar way, as in some Member States such broadcasts also benefit from certain protection under the national copyright laws.

(3) With respect to digital content, the sector inquiry aims at identifying potential contractual restrictions originating from the contractual relationships between suppliers (right holders) and providers of online digital content services (licensees).

1. Characteristics of respondents

1.1 Digital content providers

1.1.1 Types of operators

(4) While operators were asked to describe their activities, the markets in which they operate, and their competitors, they were not asked to categorise their activities or business model.

(5) However, for the purposes of this Report, the Commission has sought to identify the principal activity of operations ("type of operator") and the main business model ("business model") of the respondents. While such definitions have the benefit of simplicity, they are necessarily imprecise. A sizeable proportion of respondents might fall within more than one definition, and some of them might only imperfectly fit in any single definition.

(6) The following definitions were used in relation to the type of operators:

(a) **Public service broadcaster:** A broadcaster which is funded mainly, if not fully, through public funds, including regional broadcasters;

[1] National copyright laws are however harmonised to a large extent by several EU Directives, such as 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; 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; Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, and Directive 2011/77/EU of the European Parliament and of the Council of 27 September 2011 amending Directive 2006/116/EC on the term of protection of copyright and certain related rights.

(b) **Commercial broadcaster:** A private sector broadcaster which is funded primarily through non-public funds, typically through advertising revenues raised by selling slots during programmes;

(c) **Online audiovisual operator:** Any other type of broadcaster or operator providing music or audiovisual content, in part or in full doing so through online services (including paid services, both transaction- and subscription-based, and free online services);

(d) **Fixed line PSTN and cable operators:** An electronic communications operator using a traditional switched telephone network ("PSTN") or a cable network ("cable"), and which also provides digital content as part of its offer;

(e) **Mobile operator:** An electronic communications operator using a mobile network, and which also provides digital content as part of its offer;

(f) **Portal/Web TV operator:** An operator of an internet portal or channel offered online;

(g) **Publisher:** An operator which is predominantly operating in the print media sector and which also offers digital content online; and

(h) **Other:** Any operator not fitting into any of the categories listed above.

(7) Table C. 1 provides the proportion of each of the categories above in the sample of respondents.

Table C. 1: Digital content provider respondents classified according to type of operation

Type of operator	Number of respondents	Proportion in sample
Commercial broadcaster	79	28%
Online audiovisual operator	53	19%
Public service broadcaster	50	18%
Fixed line PSTN operator	21	8%
Portal / Web TV	17	6%
Fixed line cable operator	17	6%
Publisher	16	6%
Mobile operator	15	5%
Other	10	4%
Total	**278**	**100%**

1.1.2 Business models

(8) A broad spectrum of revenue generating business models of digital content providers are covered by the sector inquiry. As in the previous section, the definitions are necessarily imprecise.[2]

(9) The following definitions of categories of business models are used for the purposes of the sector inquiry:

(a) **Publicly funded: An operator which receives most of its revenues from public funds;**

(b) **Advertising-funded:** An operator which receives most of its revenues from selling advertising space or time;

(c) **Subscription-based:** An operator which receives most of its revenues from selling services for a subscription fee;

(d) **Transaction-based:** An operator which receives most of its revenues from selling services on the basis of individual payments for each item accessed;

(e) **Packager of content:** An operator which earns most of its revenues on the basis of licensing fees from channels or otherwise packaged content to other digital content providers. These operators provide digital content services directly to users only as a small part of their activities;

(f) **Hosting online operator / device:** An operator which derives most of its revenues from sales of hosting software / devices, or from agreements with digital content providers (e.g. a revenue-sharing agreement) selling their services to users via hosted software programmes (e.g. applications or "apps", or channels), or from advertising, or from a combination of all these elements. The hosting environment can be created through online applications, such as video portals (e.g. YouTube), or through hardware devices, such as online video streamers (e.g. Roku).

(g) **Other:** An operator which does not fit in any of the categories above.

(10) Table C. 2 provides the proportion of each of the categories above in the sample of respondents.

[2] Several respondents have business models which fall within more than one of the categories used. In this case, the type of business model chosen is the one that appears to be the predominant one or the original one.

Table C. 2: Digital content provider respondents classified according to business model

Type of business model	Number of respondents	Proportion in sample
Advertising-funded	77	28%
Subscription-based	78	28%
Publicly funded	49	18%
Packager of own content	36	13%
Transaction-based	21	8%
Other	7	3%
Hosting online operator	6	2%
Hosting device	4	1%
Total	**278**	**100%**

1.1.3 Size of activities

(11) Digital content provider respondents include different businesses, in terms of overall turnover[3]:

(a) Very large companies: annual revenues above EUR 500 million;

(b) Large companies: annual revenues between EUR 10 million and 500 million;

(c) Medium companies: annual revenues between EUR 500 000 and 10 million; and

(d) Small companies: annual revenues below EUR 500 000.

(12) Table C. 3 provides the average worldwide turnover of respondents in each category. Table C. 4 then provides the average proportion of turnover from online activities in relation to worldwide turnover. Both tables also provide the number of respondents in each category.

Table C. 3: Average turnover of digital content providers by size and by year (million EUR)

Category	Number of companies	2010	2011	2012	2013	2014
Very large	59	3,545.70	3,548.02	3,534.95	3,444.42	3,584.23
Large	101	144.78	144.04	134.47	141.69	120.46
Medium	61	4.50	4.63	4.68	3.92	3.42
Small	32	0.25	0.18	0.17	0.17	0.17
Total	**253**	**1,042.20**	**971.99**	**940.30**	**897.49**	**887.03**

[3] A smaller sample of 253 respondents provided adequate information on turnover. The respondents providing partial or inaccurate information were excluded from the tables in this section.

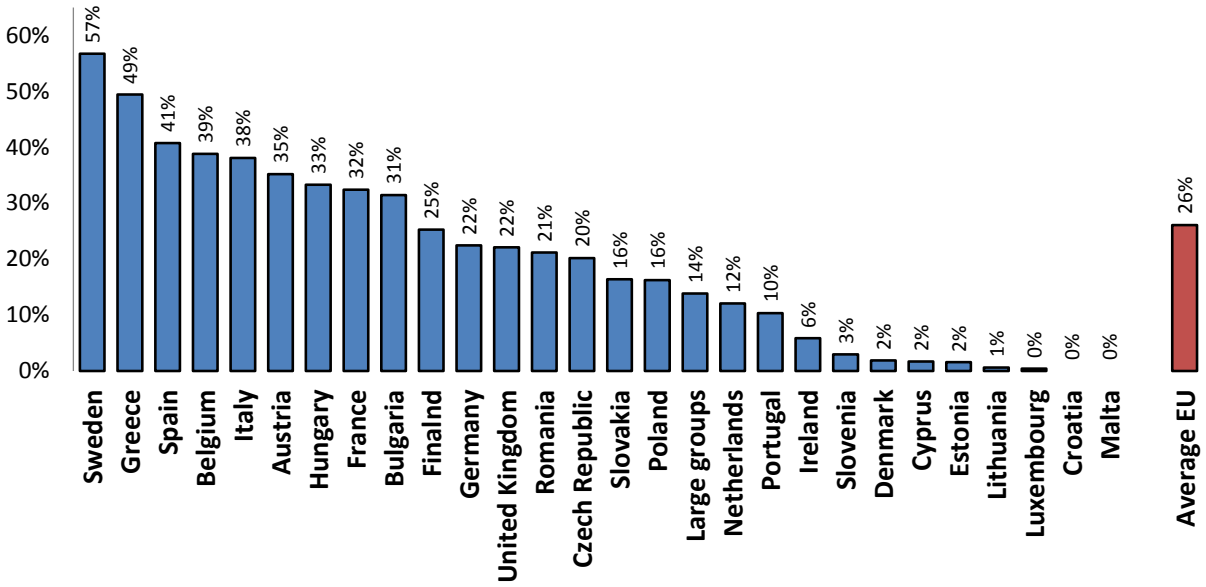
Table C. 4: Online turnover as a proportion of total turnover for digital content providers, average by size and by year

Category	Number of companies	2010	2011	2012	2013	2014
Very large	59	9%	10%	12%	12%	10%
Large	101	15%	18%	16%	17%	19%
Medium	61	40%	41%	41%	41%	38%
Small	32	55%	43%	51%	50%	56%
Total	**253**	**23%**	**25%**	**26%**	**26%**	**26%**

(13) The sector inquiry thus covers companies with worldwide turnovers ranging from less than EUR 1 000 to more than EUR 39 billion in 2014. Overall, digital content provider respondents generate about 26 % of their overall turnover from online activities. This percentage tends to grow as the size of the company decreases.

(14) Figure C. 1 shows the distribution of respondents by Member State, ranked in decreasing order of importance of online turnover as a proportion of overall turnover.

Figure C. 1: Online turnover as a proportion of total turnover for digital content providers, average by Member State in 2014



1.1.4 Revenue breakdown and advertising revenues

(15) Digital content service providers were asked to provide a breakdown of their revenues stemming directly from the distribution of content, both online and non-online, for the year 2014. Table C. 5 provides the proportions of revenues generated by digital content providers for each of several activities.[4]

[4] Subscription, transactional, advertising and subsidies are used in this section with the same meaning as in section C.1.1.3 Size of activities.

Table C. 5: Proportion of total revenues generated through different channels for all digital content providers in 2014

Online sub-scription	Non-online sub-scriptions	Online trans-actional	Non-online trans-actional	Online advertising	Non-online advertising	Other online	Other non-online	Public subsidy
26%	14%	15%	8%	17%	11%	2%	4%	2%

(16) Online distribution of content represents a significant part of business for the respondent digital content providers. Among the potential revenue sources, the sale of advertising slots either online (i.e. as banners or equivalent) or within the digital content provided (as a "standard" advertising slot within a programme) is an important revenue stream for more than a third of respondents (figure C. 2). Such revenues are particularly important for more than half of publishers and commercial broadcasters offering digital content services, but this revenue stream is also important for portals / Web TV operators and for online audiovisual operators (figure C. 3).

Figure C. 2: Proportion of all digital content providers generating advertising revenues

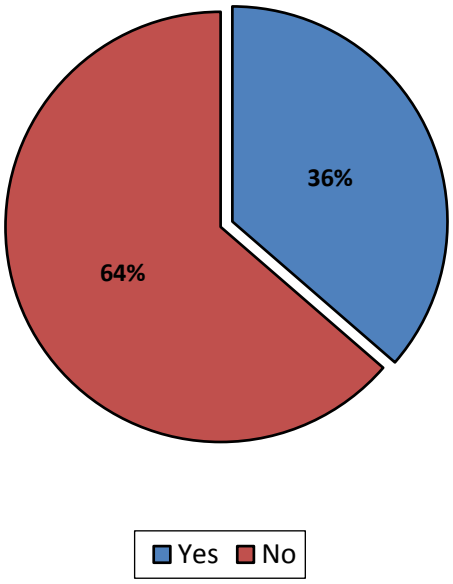
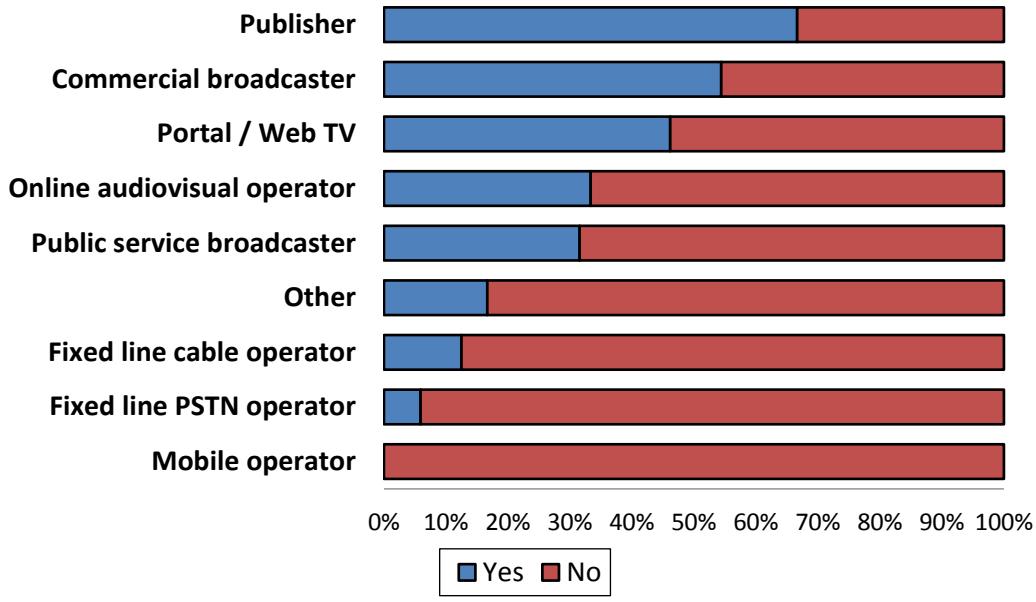
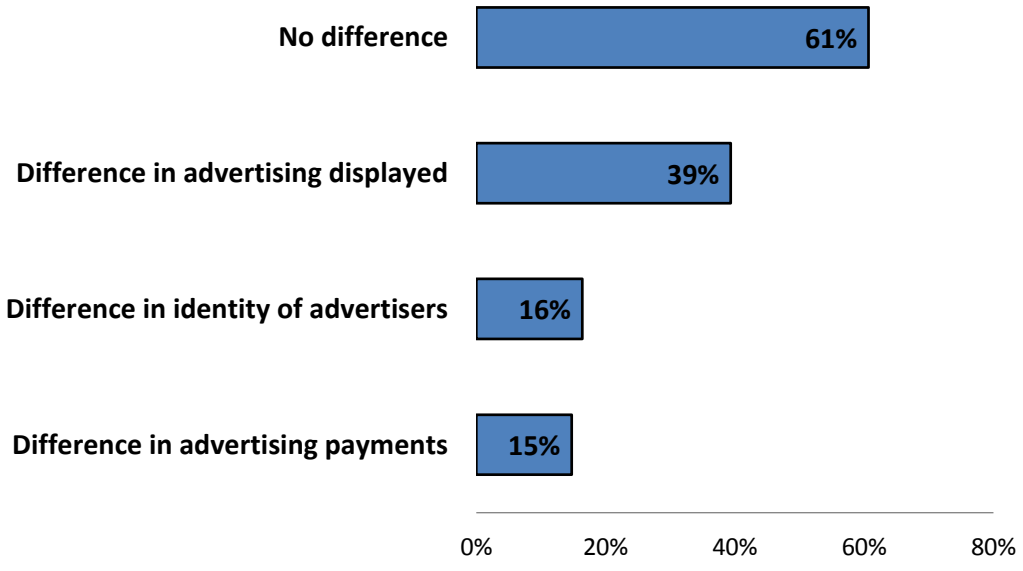


Figure C. 3: Proportion of digital content providers generating advertising revenues by type of operator



(17) Respondents generating advertising revenues were asked to specify whether they adopted different strategies depending on the Member States where they operate (Figure C. 4).

Figure C. 4: Proportion of digital content providers adopting different advertising strategies in different Member States



(18) The figure shows a relatively high degree of location-specific differentiation in advertising. Even though the identity of advertisers does not differ for most respondents, almost 40 % indicate advertisement content changes depending on the Member State. This proportion is particularly high for commercial broadcasters (52 % of respondents change the advertisements displayed) and publishers (50 %).

1.2 Right holders

1.2.1 Types of right holders

(19) Respondent right holders include both smaller / national operators along with a number of players with a significant cross-border / international presence, and new entrants as well as established operators. In particular, three main categories of respondents can be identified:

(a) Rights holders that are active in the production of digital content;

(b) Media agencies, i.e. intermediaries in charge of the commercial exploitation of rights which have been licensed to them by right holders; and

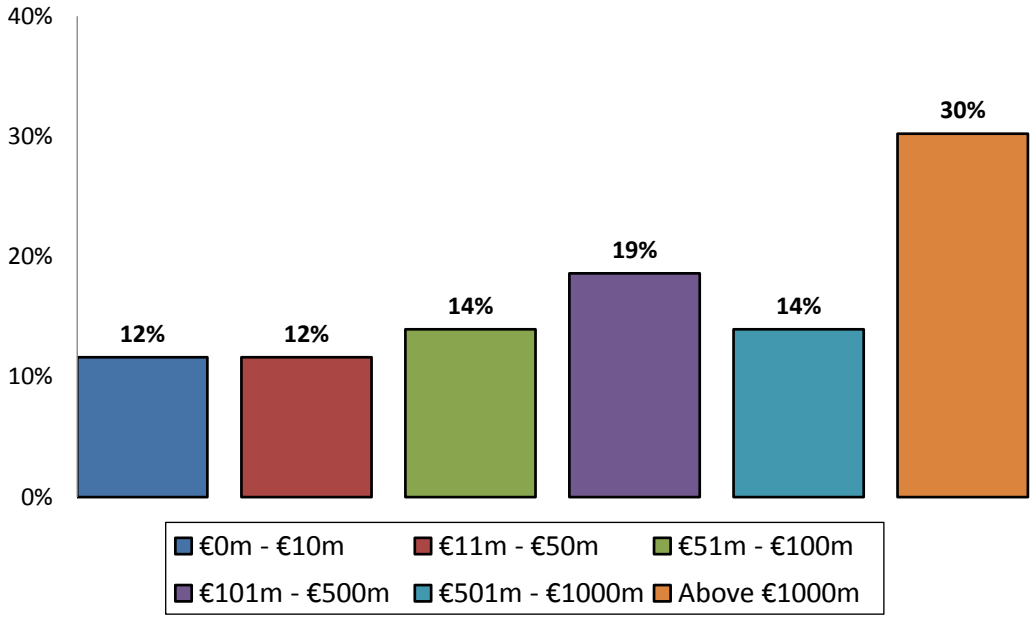
(c) Vertically-integrated right holders, active both upstream as producers of content, and downstream as providers of digital content to consumers.

1.2.2 Size of activities of right holders

(20) As follows from table A. 3 above, 53 right holders submitted information and licensing agreements in reply to the sector inquiry. Forty-four of those respondents submitted data concerning their global turnover in 2014. As stated above, the questionnaire to right holders was sent to companies and associations of different sizes.[5] This is reflected by the submitted data, which indicate that the global turnover of this type of respondent ranges from less than EUR 10 million to above EUR 1 000 million in 2014. 30 % indicated that their global turnover in 2014 was above EUR 1 000 million. Right holders in fiction and children TV had the highest turnover figures, followed by right holders in sports, and then music.

[5] The associations contacted mainly include certain sports leagues and organisations.

Figure C. 5: Global turnover figures for 2014 – All right holders (in million EUR)



1.3 Types of content

(21) As part of the sector inquiry, the Commission asked respondents to provide copies of their licensing agreements and to reply to a set of questions aiming at gauging the key terms and conditions of those agreements.

(22) Digital content providers were asked to provide agreements with the 30 most important suppliers (if applicable) for each of identified product categories. Right holders were asked to provide the eight most valuable agreements overall (again, if applicable) for each of the identified product categories. For both categories of respondents, the importance of suppliers or value of agreements was defined on the basis of the total level of payments resulting from the agreement, or payable to the supplier, for the year 2014.

(23) Digital content providers were asked to distinguish between the following categories of products when ranking the importance of their suppliers:

(a) **Films**: Feature films and motion pictures;

(b) **Sports**: Sports events and sports programmes, including commentaries;

(c) **Television fiction**: Television comedy, drama and animation series or programmes;

(d) **Children television**: Television programmes and series aimed at children, excluding feature films;

(e) **News**: Television news and current affairs programmes and series;

(f) **Non-fiction television**: Television content other than films, television fiction, children's programmes, news and sports events; and

(g) **Music**: Recorded music, excluding music contained in audiovisual content such as background music in films and television programmes.

(24) Right holders were asked to distinguish between the following product categories when ranking the value of agreements:

(a) **Sports**: A sports event, such as a football match, or a set of sports events, such as a football season, which is the object of a broadcast production or productions;

(b) **Television fiction**: Television series, comedy, drama, or entertainment programmes, excluding feature films;

(c) **Children television**: Television programmes and series aimed at children, excluding feature films[6]; and

(d) **Music:** Recorded music, excluding music contained in audiovisual content such as background music in films and television programmes.

Summary

The sector inquiry focused on the online provision of audio-visual and music products. At the retail level, a total of 278 digital content providers, both national operators in only one Member State, large groups operating in more than one Member State, and hosting operators were questioned. These respondents submitted information in relation to 6 426 licensing agreements covering films, sports, television fiction and non-fiction, children television, news and music products. A total of 53 right holders replied and submitted information in relation to 282 licensing agreements covering television fiction and children television, sports and music products.

2. MARKET TRENDS AND LICENSING PRACTICES

(25) The information provided during the sector inquiry suggests that online transmission has changed the way digital content is accessed and consumed by users. This section outlines the main trends observed and discusses the most prevalent licensing practices.

2.1 Market trends in the provision of online digital content services

(26) Online transmission of digital content is providing new business opportunities to both established operators and new entrants.

[6] Television fiction and children television programmes were grouped together in the results from the data submitted by right holders.

(27) As observed by several respondents to the sector inquiry as well as to the public consultation, online distribution allows for lower transmission costs per user compared to established technologies, such as, for example, terrestrial transmission. Online transmission also provides more flexibility and scalability than traditional technologies, such as, for example, satellite transmission. Finally, online transmission allows digital content providers to create user interfaces that can be accessed on multiple devices in a seamless way and are easily adaptable.

(28) One of the insights emerging from the sector inquiry is that online transmission is fuelling innovation and experimentation in digital content markets, resulting in a variety of service offerings and business models.

2.2. Licensing practices

(29) One of the key determinants for competition in digital content markets is the scope and the availability of the relevant rights for distribution of digital content. The online distribution of digital content at the retail level requires licensing of a minimum set of rights in order to lawfully market the product – typically including the right to transmit via internet, broadband or cable technologies, and to allow users to stream or download the product via a receiving device.

(30) Over time, complex licensing practices have developed. They reflect the desire on the part of right holders to exploit the rights they hold to the fullest extent possible as well as the need for digital content providers to offer attractive content in order to be competitive, in line with consumer demand and reflecting the cultural diversity within the European Union.

(31) In order to analyse the competitive landscape in digital content markets it is therefore important to understand how rights are commonly licensed. Rights can be split up in different ways and can be licensed, either on an exclusive or a non-exclusive basis, for a certain territory and / or in relation with certain transmission, reception and usage technologies. While there are in principle no predefined ways to split rights or to bundle them, the main distinctions commonly used unsurprisingly reflect the attractiveness and value of the product to which the licence applies.

(32) The results of the sector inquiry suggest that there are three main distinctions in terms of scope of the relevant rights which are commonly used in licensing agreements:

(a) **Technology and usage rights:** These include the technologies that the digital content providers may lawfully use to transmit the content and allow the user to receive it, including the modalities of access;

(b) **Release and duration rights**: These refer to the "release window or windows", i.e. the period of time during which the digital content provider is lawfully entitled to offer the product; and

(c) **Geographic rights**: These relate to the geographic area or areas in which the digital content provider may lawfully offer the product.

(33) Rights may be licensed using any type of combination of the above mentioned distinctions on an exclusive or non-exclusive basis.

(34) While the focus of the sector inquiry is to understand market conditions and business models in relation to online digital content services, the results of the sector inquiry indicate that the rights for online distribution are often bundled together with other licensed rights. The scope of rights actually licensed to distribute digital content services tends to be broader than the minimum set of rights that would be necessary to provide online digital content services, and often encompasses other transmission and access technologies.

(35) Licensing agreements typically do not allow for the unrestricted use of the licensed rights but come with explicit terms and conditions. Contractual restrictions are therefore not the exception but the norm in digital content markets.

3. THE SCOPE OF LICENSED RIGHTS: TECHNOLOGIES

3.1 Definitions and data set

(36) As part of the sector inquiry, the Commission asked respondents to provide copies of their licensing agreements and to reply to a set of questions aiming at identifying the key terms and conditions of those agreements.

(37) Digital content providers were asked to provide agreements for the 30 most important suppliers (if applicable) for each of the product categories covered by the sector inquiry. Right holders were asked to provide the eight (again, if applicable) most valuable agreements overall. For both categories of respondents, the importance of suppliers or value of agreements was defined on the basis of the total level of payments under the agreement for the year 2014.

(38) Through the responses to the questionnaires, the Commission received a unique data set encompassing more than 6 800 licensing agreements from both digital content providers and right holders.

(39) Respondents were asked to define the scope of rights licensed by them, in the case of right holders, or to them, in the case of digital content providers.

(40) For the purposes of this Report, the analysis of the technology and usage scope of rights relies on the following categories[7]:

[7] The categories used are often they are the result of an interpretation of specific clauses in agreements and are therefore not precise. Nonetheless they can help in making sense of a vast set of information and in identifying patterns, in particular for technology and usage rights, which are often referred to in licensing agreements.

(a) Rights relating to transmission technologies: rights allowing the digital content provider to use specific technologies to transmit the content to the user, whether encrypted or not encrypted, and irrespective of the specific devices that may be used to input the signal into the distribution stream or to receive the signal by the user. Transmission technologies include the following:

- Online transmission: rights allowing any transmission of the content using TCP/IP[8] and / or related switched-packet protocols which are used for communications between computers, servers or networks over the Internet. Agreements indicating "streaming" or "broadband" as transmission modalities were included in this category;

- Cable transmission: rights allowing any transmission of the content using a signal which is carried by means of cable, wire or other fibre-based network;

- Fixed telephone network transmission: rights allowing any transmission of the content using a signal which is carried at least partly over a traditional PSTN[9] telephone network;

- Mobile transmission: rights allowing any transmission of the content using a signal which is carried by means of a mobile telephone network or local wireless networks (e.g. Wi-Fi, Wi-MAX), regardless of the standard or hardware used;

- Satellite transmission: rights allowing any transmission of the content using a signal which is carried by means of satellites and which can be received by users;

- Terrestrial transmission: rights allowing any transmission of the content using a signal which is carried by means of terrestrial antennae relaying analogue or digital broadcasting signals at suitable frequency ranges;

- Unrestricted transmission: rights allowing transmission of the product by any technology;[10] and

[8] TCP ("Transmission Control Protocol") / IP ("Internet Protocol") were the first networking protocols to communicate over the internet, in particular for exchanging data by providing specification on how it should be structured in packets, addressed, transmitted, routed and received.

[9] PSTN stands for publicly switched telephone network, and is used to refer to traditional copper-based telephone networks (as opposed to, for example, cable networks or fibre-optic networks). Transmission over this type of network typically entails using a "local loop" that is at least partly not upgraded to fibre, i.e. the last part of the line connecting the network to the user's premises is made of copper.

[10] The "unrestricted" category is used together with any other technologies that might be specified in the licensing agreement and does not replace them. For example, if an agreement contains a license covering "all

- Other: rights allowing transmission of the product using technologies different from those listed above.

(b) Rights relating to reception technologies: these rights specify the devices or technologies that the user is allowed to use to access the content. They include the following:

- TV set: rights allowing reception using a standard TV set;
- IPTV: rights allowing reception using a "connected" TV set, i.e. a TV set capable of receiving and decoding online signals;
- Hosting/streaming device: rights allowing reception using a hardware device that can stream digital content and / or host proprietary or third party applications that deliver services to users, including access to digital content products;[11]
- Computer: rights allowing reception using computer hardware, including PC desktops and laptops;
- Tablet: rights allowing reception using a tablet;
- Proprietary set-top box: rights allowing reception using a proprietary hardware device, typically provided by the digital content provider as part of the service;
- Unrestricted: rights allowing reception using any device or technology;[12] and
- Other: rights allowing reception using devices or technologies different from those listed above.

(c) Ancillary and usage rights: these rights specify the modalities of access by users, or access possibilities offered by digital content providers. They include the following:

- At home use: rights allowing users to access the content at their home premises;
- Mobile use: rights allowing users to access the content while mobile, for example through mobile handsets;

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transmission technologies, including online", the rights are registered as covering both "unrestricted" and "online" technologies. This results in combined percentages exceeding 100 %.

[11] Examples of such devices include online media streamers and hosting devices such as Roku, Amazon Fire TV, Chrome TV, Apple TV, and game consoles such as the PlayStation or Xbox.

[12] See footnote 11 for an indication of how the "unrestricted" category was calculated.

- Catch-up use: rights allowing users to record and replay the content, regardless of the frequency or period of access allowed and regardless of the type of recording technology or device;

- Multi-screen use: rights allowing users to access the content simultaneously on more than one device in the same location, regardless of the type of device;

- Multi-home or second device out of home: rights allowing users to access the content simultaneously on more than one device in different locations, regardless of the type of device;

- Download to own / rent: rights allowing users to download the content, for an unlimited or a limited period of time;

- Streaming: rights allowing users to access the content via streaming;

- Pay/free: rights allowing digital content providers to offer the content either with payment, regardless of the type of relationship with the user, or without payment;

- Available on subscription/on demand: rights allowing digital content providers to offer the content on the basis of either a subscription by the user, or a piece-meal payment for each item accessed;

- Encryption required: requiring digital content providers to use encryption technologies when providing the content to users;

- Portability out of home/out of Member State: rights allowing users to port the content out of their home premises, or out of the Member State of residence;

- Business premises: rights allowing digital content providers to offer the content to commercial users in their business premises;

- Unrestricted: rights allowing digital content providers to offer the content without any restriction in relation to the modalities of access by users;[13] and

- Other: rights allowing digital content providers to offer, or users to access, the content on the basis of modalities distinct from those listed above.

(41) The analysis of the **temporal scope of rights (i.e. release windows)** is complex, as release windows are defined differently by different right holders and for different types

[13] See footnote 11 for an indication of how the "unrestricted" category was calculated.

of content. For the purposes of this Report, release windows will be presented taking as the starting point the "first release" of each product.

(42) For content produced for television, this means typically the first broadcast on television in the EU or in a specific Member State, unless the product is first made available in the EU through online distribution, in which case "first release" refers to the first availability through online distribution. For films, the first release is typically the first theatrical release in the EU or in a specific Member State. For sports events, the "first release" is normally the live broadcast of the event.[14]

(43) For all types of content, rights relating to release windows will mainly be presented by distinguishing between the different periods of time during which digital content providers are allowed to offer such content. Hence, for example "1 – 30 days" refers to rights that allow digital content providers to offer the content in the period ranging from 1 to 30 days after its first release.

(44) Finally, the analysis of the **geographic scope of the licensed rights** refers to the Member State(s) in which the rights allow digital content providers to lawfully offer to transmit, and users to receive, the product or service.

(45) In the results presented in the following sections, where a figure or table includes certain rights, it means that such rights are among those that have been licensed to the respondents. For example, a table indicating that 80 % of agreements include online transmission must be read as indicating that right holders have licensed online transmission rights to digital content providers in 80 out of 100 agreements.

(46) The majority of licensing agreements submitted by digital content providers and right holders contain complex definitions of the scope of certain technologies that licensees (i.e. digital content providers) and users are allowed to use. The licensed rights are often split up along different transmission technologies such as satellite, terrestrial, online or mobile; reception technologies such as TV set, computer, tablet; or usage technologies such as streaming or download.

(47) On the one hand, splitting up rights in order to allow a variety of digital content providers to offer their services by using different technologies may increase competition in digital content markets. On the other hand the granting of exclusive rights for certain transmission technologies such as online may make it more difficult for new entrants, smaller operators, or other market participants to obtain the rights to the service they want to deliver.

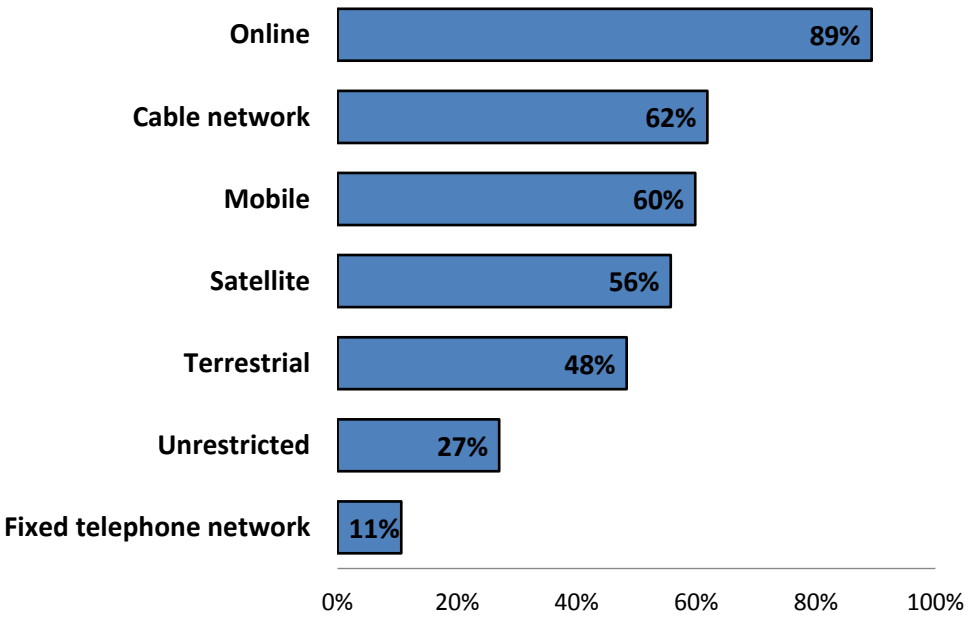
[14] These definitions are illustrative and used for the purposes of this Preliminary Report. For example, the simulcast of a product (i.e. simultaneous transmission) using terrestrial, cable and online transmission qualifies as a "first release" for the purposes of this Preliminary Report – and is therefore also referred to as such throughout the text. However, this is a different "first release" window compared to the theatrical release of a film, or the live broadcast of a sports event.

(48) Most licensing agreements specifically define the transmission methods which digital content providers are allowed to use, as licensees of the rights conferred to them.

(49) The majority of the licensing agreements submitted by right holders[15] include specific provisions relating to online transmission or include online transmission among the licensed transmission technologies (see figure C. 6). Almost 90 % of the examined licensing agreements grant digital content providers the right to offer online the specific content covered by the agreement.

(50) What is interesting about this finding is the fact that online transmission is specifically mentioned in the agreements, which points to its growing importance.

Figure C. 6: Proportion of agreements including specific transmission technology rights – All agreements submitted by right holders



(51) Interestingly, the third most widely mentioned transmission technology in the agreements is mobile transmission. As explained in paragraph (692) above, mobile transmission does not relate solely to mobile telephone networks but any transmission allowing users to access content while being mobile (including, most importantly, on mobile devices used in closed perimeters, such as through Wi-Fi networks). This reflects the increasingly important role of mobile devices in media consumption.

(52) Cable, satellite and terrestrial transmission are the most widely licensed among more traditional transmission technologies.

[15] Respondents were asked to provide the information per agreement with each supplier (right holder). Therefore while at the level of each individual respondent the information obtained is per supplier, over the whole sample, there may be duplication of suppliers across respondents. The results are therefore interpreted based on the number of contractual relationships or agreements.

(53) Only slightly more than a quarter of agreements include unrestricted transmission rights, meaning that they confer to digital content providers the right to use any transmission technology, either explicitly (i.e. by specifying that all transmission technologies are allowed) or implicitly (i.e. by not mentioning any transmission right, thereby not restricting the scope of the rights to a specific transmission technology).

(54) Licensing with regard to specific transmission technologies tends to differ between types of content.

(55) First, for children TV, television fiction and films (figure C. 7, figure C. 8, figure C. 9 respectively) licensed transmission technologies are in most cases explicitly defined, and they tend to include a high proportion of online, mobile and terrestrial technologies.

Figure C. 7: Proportion of agreements including specific transmission technology rights – Children TV agreements submitted by digital content providers

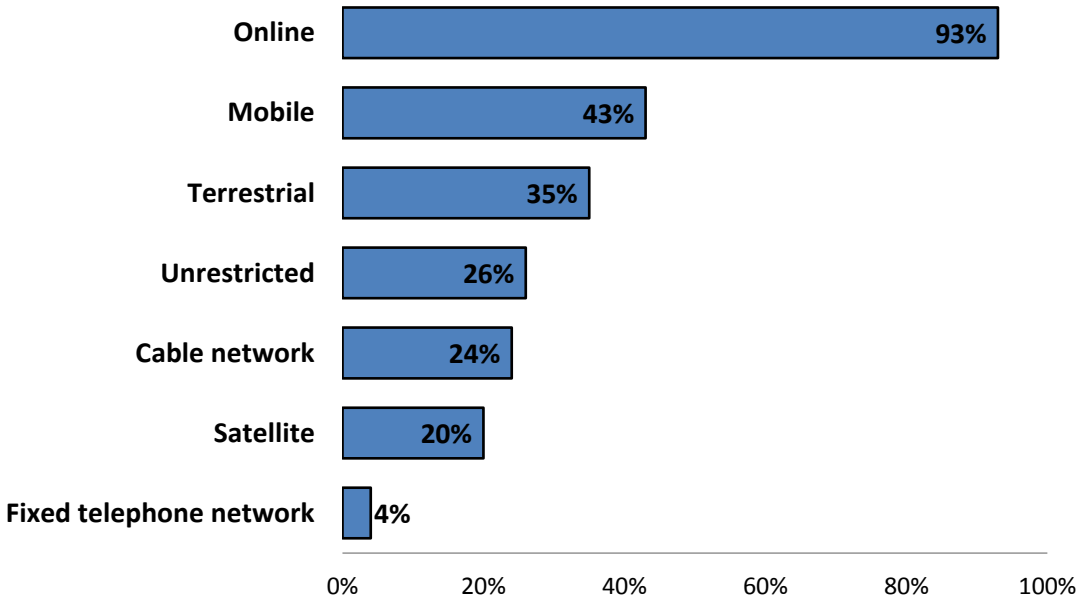


Figure C. 8: Proportion of agreements including specific transmission technology rights – Television fiction agreements submitted by digital content providers

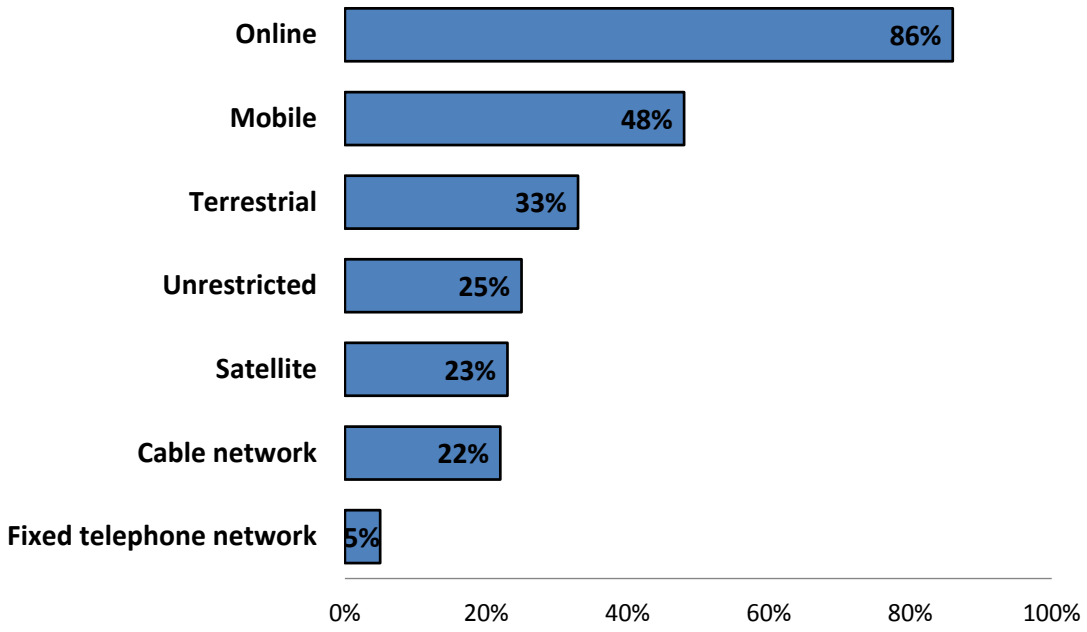
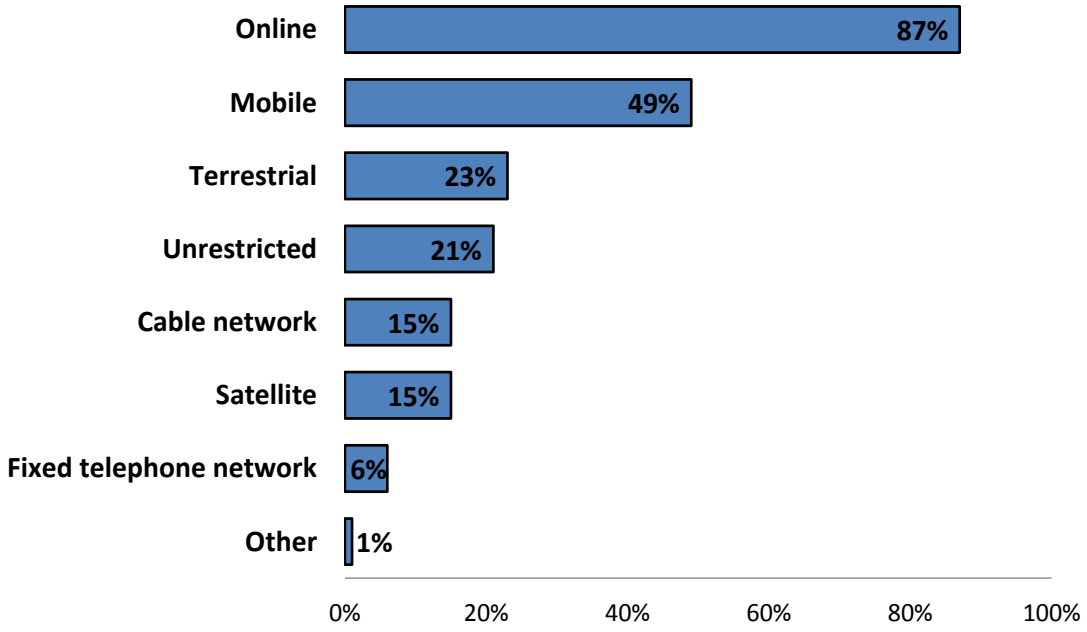


Figure C. 9: Proportion of agreements including specific transmission technology rights – Film agreements submitted by digital content providers



(56) Second, for news and non-television fiction, a sizeable minority of agreements include unrestricted rights as well as terrestrial rights. This is likely due to the fact that the majority of productions in these two product categories are from established national broadcasters, which often use terrestrial technology. The figures for these types of content are in figure C. 10 to figure C. 11.

Figure C. 10: Proportion of agreements including specific transmission technology rights – News agreements submitted by digital content providers

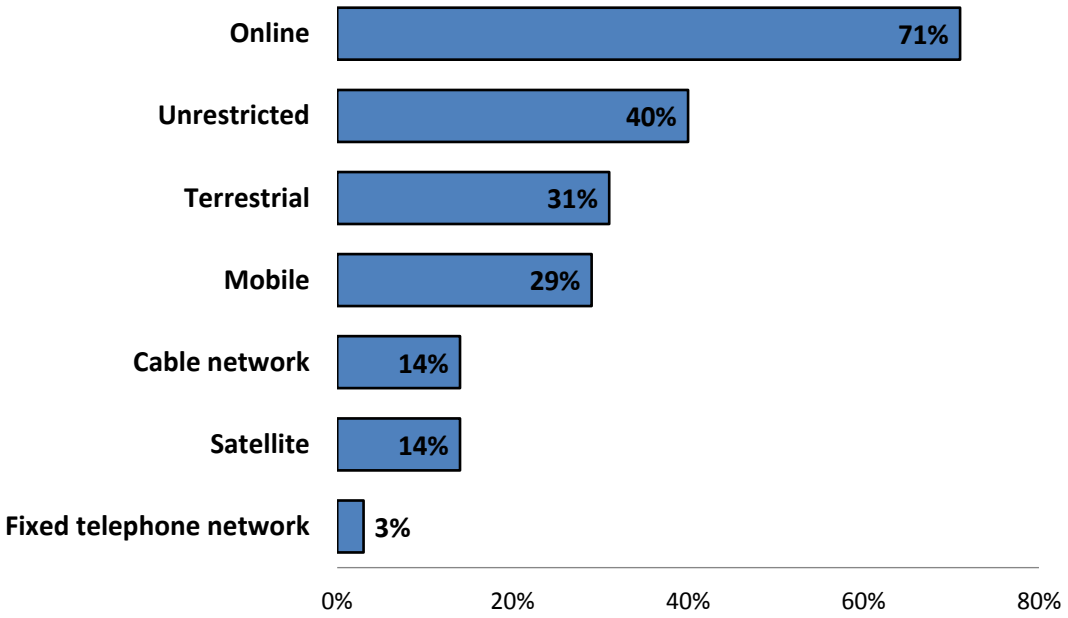
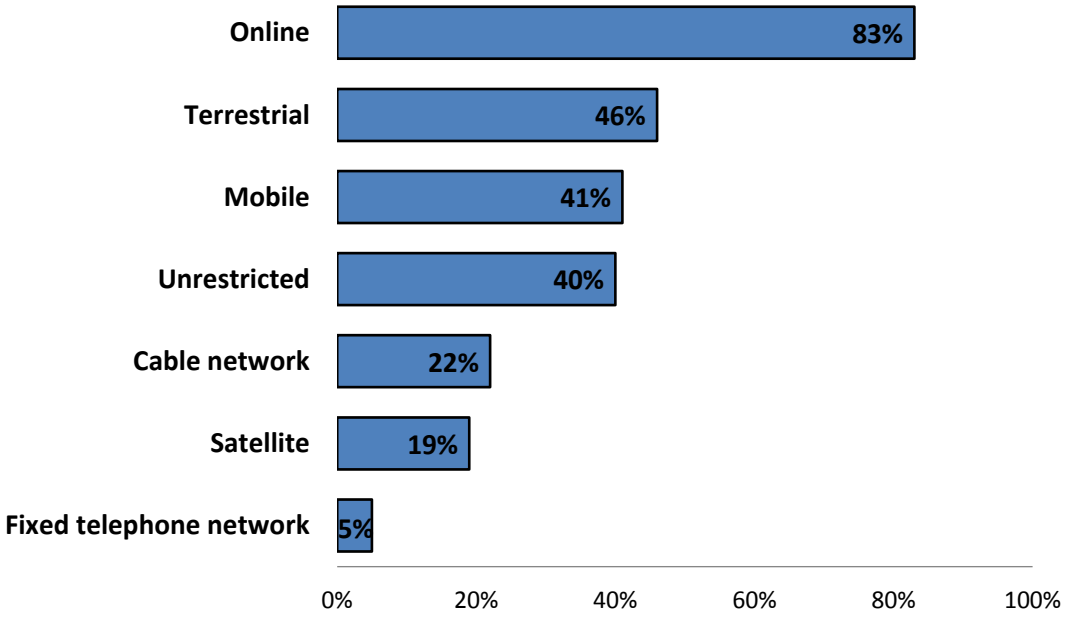


Figure C. 11: Proportion of agreements including specific transmission technology rights – Non-Television fiction agreements submitted by digital content providers

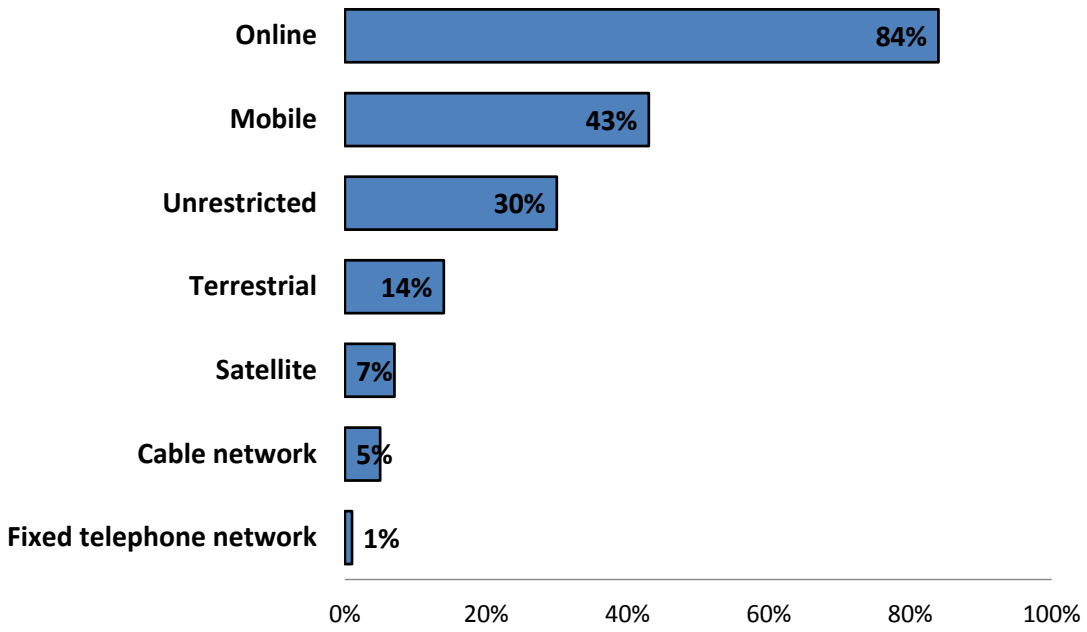


(57) Third, for music, most types of transmission technologies are not specified in the agreements. With the exception of online and mobile transmissions, all other types of transmission technologies are either rarely mentioned or implicitly licensed (as reflected by the "unrestricted" category).

(58) This likely reflects the prevalence of online distribution for music products, which are now commonly consumed online or on mobile devices through streaming or

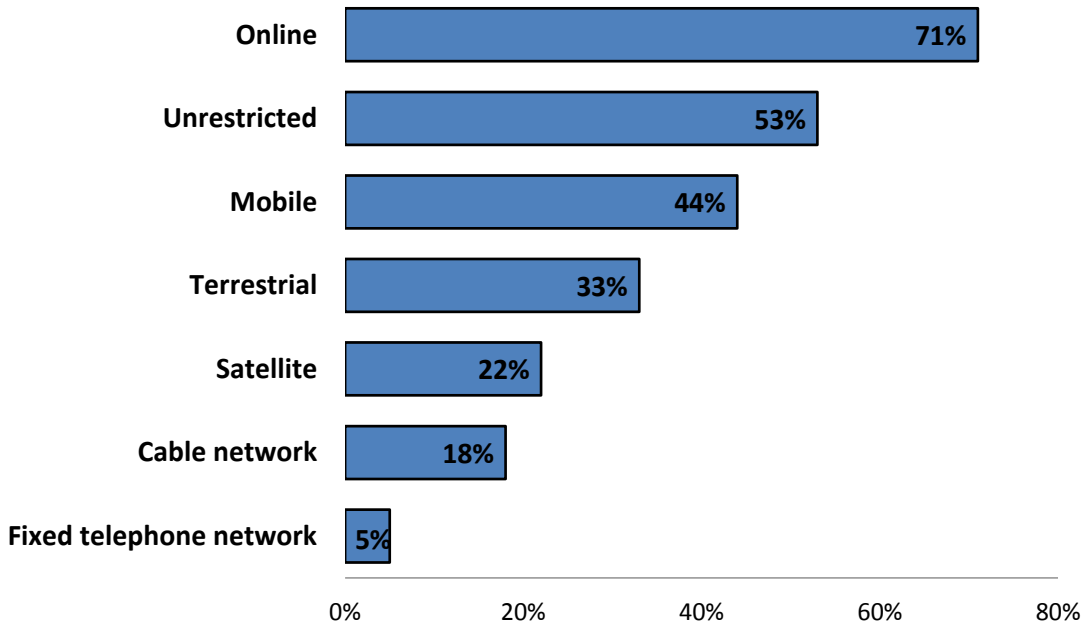
transaction-based downloading models. Responses to the public consultation also indicated that music products tend to be consumed on different platforms and that music licensing agreements typically include a lower number of technology restrictions than is the case for audiovisual products.

Figure C. 12: Proportion of agreements including specific transmission technology rights – Music agreements submitted by digital content providers



(59) Finally, for sports, the agreements are characterised by a higher proportion of unrestricted rights as well as a higher degree of specificity as regards licensed transmission technologies (figure C. 13).

Figure C. 13: Proportion of agreements including specific transmission technology rights – Sports agreements submitted by digital content providers

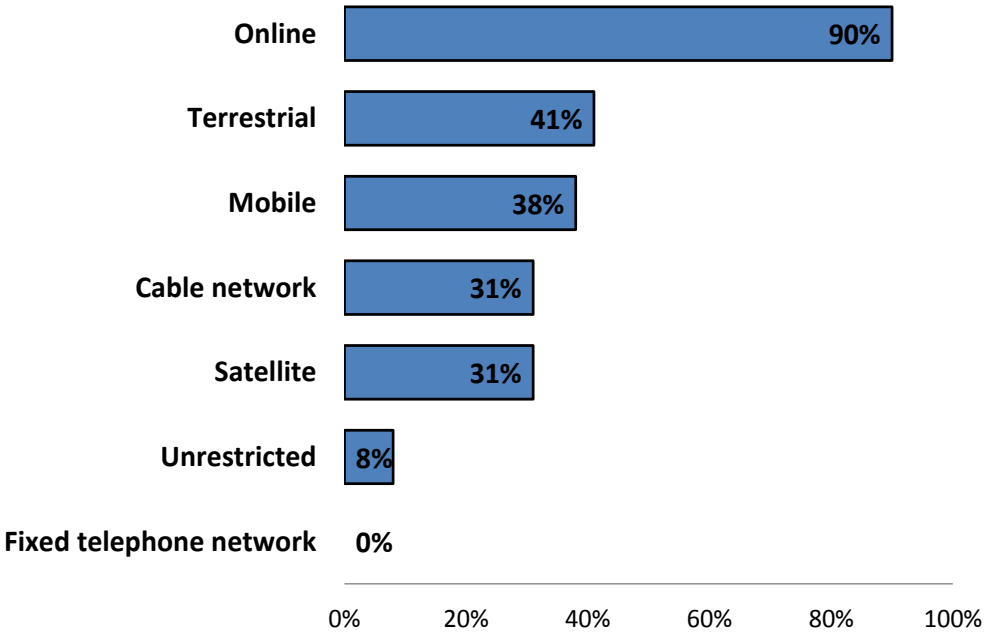


(60) Differences emerge also with regard to different types of operators.

(61) Public service broadcasters and commercial broadcasters tend to have a high proportion of agreements including rights relating to terrestrial transmission, mobile transmission, and a relatively high proportion of unrestricted transmission rights. For commercial broadcasters a sizeable proportion of agreements include rights on cable transmission as well.

(62) For mobile operators, (figure C. 14) the proportion of agreements that contain unrestricted transmission rights is smaller.

Figure C. 14: Proportion of agreements submitted by digital content providers including specific transmission technology rights – Mobile operators



(63) The results of the sector inquiry indicate that online audiovisual operators have, on average, more detailed clauses in relation to transmission rights, as reflected by the relatively high proportion of agreements including at least one or more licensed transmission technologies. This category includes pay-TV providers as well as large online-only providers.

(64) At the other extreme, publishers and fixed network telecommunications operators (including both PSTN and cable operators) seem to typically conclude less specific agreements as regards transmission rights. This is likely due to the fact that most of these operators tend to be active in well-delineated geographic areas, which coincide with the size of their network.

(65) Finally, web TVs and portals have the greatest proportion of agreements including unrestricted transmission rights, with 67 % of agreements including such rights. This is in line with the fact that most of these operators produce their own content, which is then licensed within the same group or show user-generated content.

3.2. The scope of reception technology rights

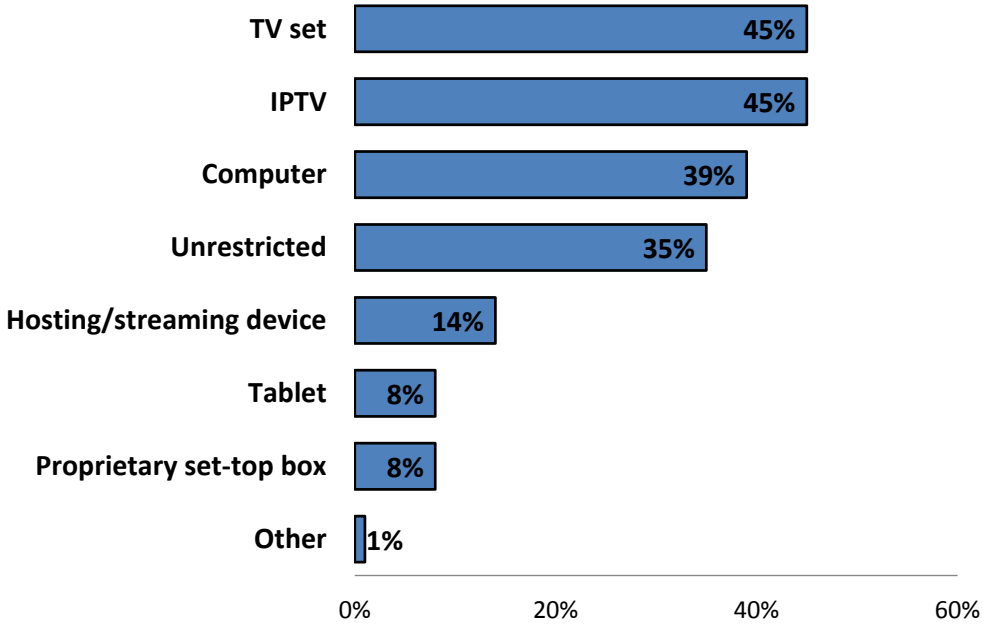
(66) Contractual restrictions on reception technologies in agreements between right holders and digital content providers translate into restrictions on the types of services they can offer to users, and can be reflected in usage restrictions in agreements between digital content providers and users.

(67) In terms of reception technologies specifically or implicitly included in the licensing agreements of digital content providers, TV sets come on top when looking at the aggregated data (figure C. 15), both in their traditional form as well as in the more

recent "connected TV" variety. However computers of all types are also specifically mentioned in a substantial number of agreements (although still in the minority).

(68) Slightly more than a third of the agreements do not impose clear limits on the type of reception technology to be used by users of the services provided by digital content providers. However two thirds pre-define, and hence impose restrictions on, the type of device used to receive the transmission.

Figure C. 15: Proportion of agreements including specific reception technology rights – All agreements submitted by digital content providers

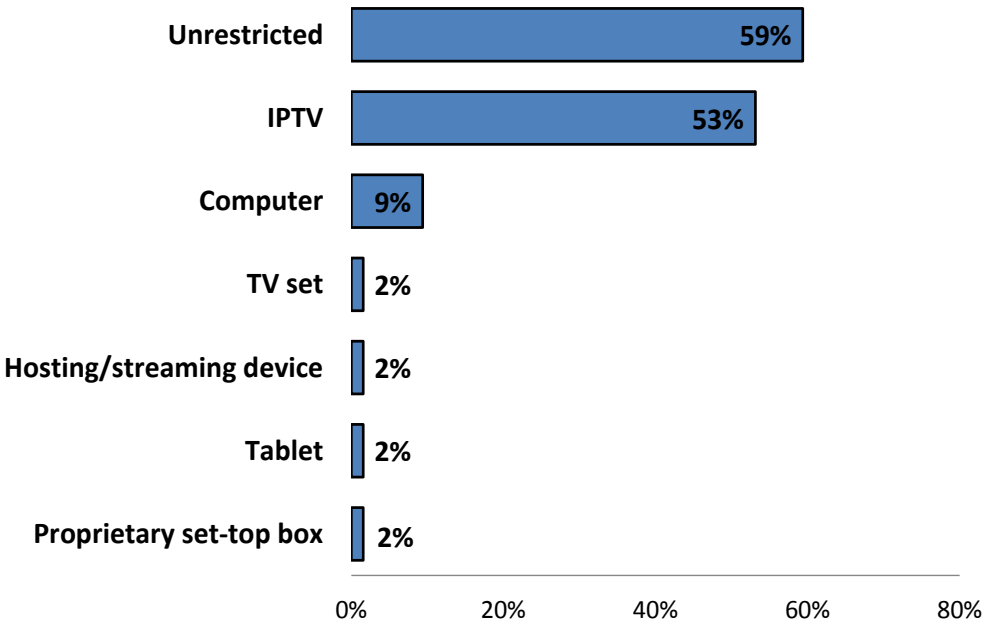


(69) The aggregate figures are representative of most types of content, with relatively significant variations only for films, music and news. In particular, film agreements are more specific about reception technologies. Music and news agreements are comparatively less specific. For these two latter types of agreements, it is comparatively more frequent that digital content providers allow users to receive content on any device.

(70) Finally, sports agreements include wider possibilities for digital content providers to allow users to receive content using any device, in line with the results in paragraph (711).

(71) In terms of reception technologies specifically or implicitly included in the agreements submitted by sports right holders (figure C. 16), two results are noteworthy. First, connected TV sets are by far the most used reception technology with most other technologies being barely mentioned, except for computers. Second, unrestricted reception rights are used in the majority of agreements. This result is in line with what has been found in relation to digital content providers' sports agreements.

Figure C. 16: Proportion of agreements including specific reception technology rights – Sports right holders



(72) In terms of types of digital content providers, cable operators and online audiovisual providers have the most specific restrictions in terms of reception technologies in their agreements (figure C. 17 and figure C. 18 respectively).

Figure C. 17: Proportion of agreements submitted by digital content providers including specific reception technology rights – Cable operators

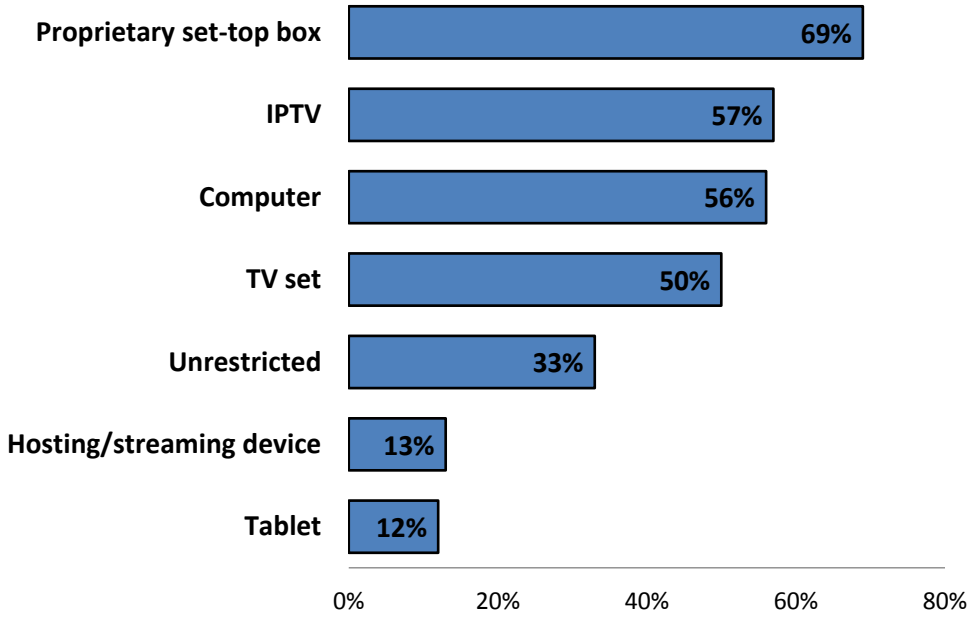
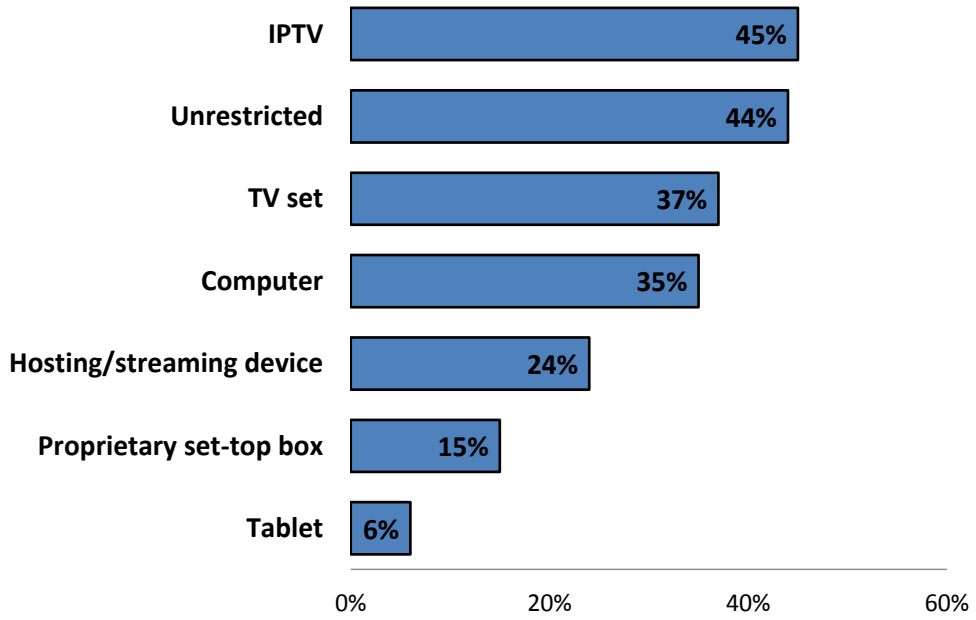


Figure C. 18: Proportion of agreements submitted by digital content providers including specific reception technology rights – Online audiovisual operators

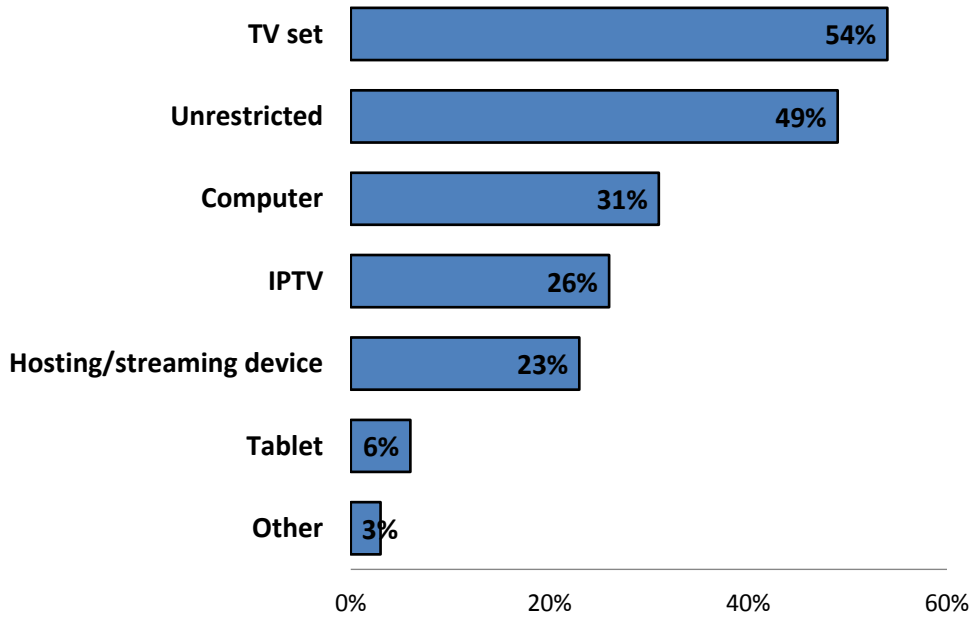


(73) In particular, most cable operators conclude agreements with right holders which limit the service to the use of set-top boxes, which almost always are designed to run on the specific cable operator's network. The agreements also define which devices can be used to access content after the set-top box has received and decoded the signal.

(74) Online audiovisual operators conclude agreements that allow the use any device in slightly less than half of the cases. This is probably due to the fact that many operators in this category are seeking to provide a comprehensive, unrestricted service to users, who favour having the freedom to choose where and when to access content.

(75) Public service broadcasters (figure C. 19) have the greatest proportion of agreements that do not specify which reception technologies can be used.

Figure C. 19: Proportion of agreements submitted by digital content providers including specific reception technology rights – Public service broadcasters



3.3 The scope of ancillary and usage rights

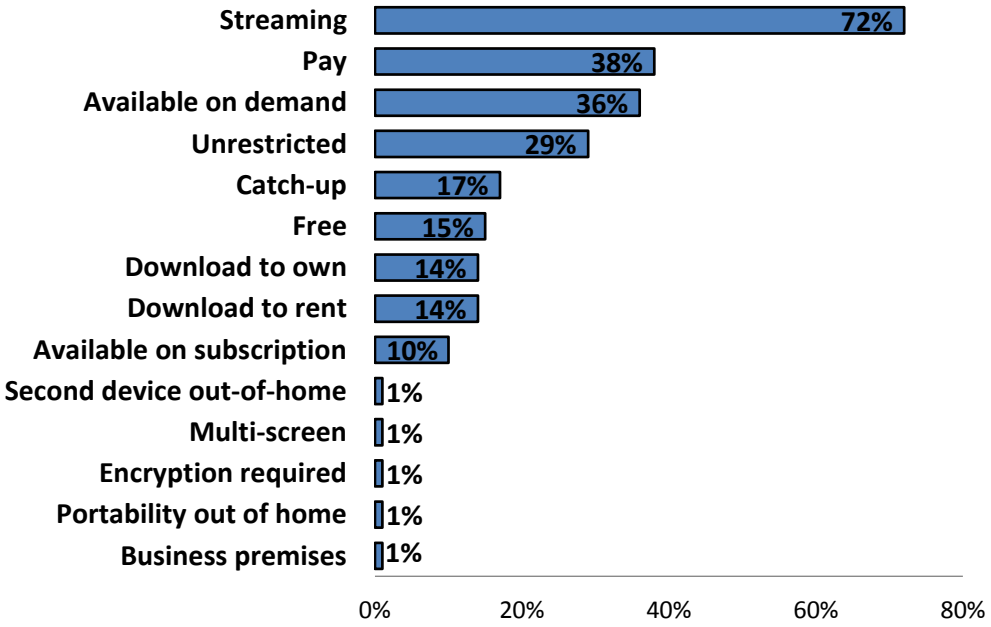
(76) Figure C. 20 provides an overview of the ancillary and usage rights (and of the corresponding technologies) for all agreements submitted by digital content providers.[16] As can be seen from the figure, and again unsurprisingly given the focus of the sector inquiry on online distribution, providing content through streaming is mentioned in almost three quarters of agreements.

(77) Alternative distribution models for online content, such as "download to own" or "download to rent", are less frequent in the submitted agreements. This indicates that the streaming model is by now the prevalent one when it comes to accessing digital content online.

(78) Almost 4 out of 10 agreements relate to paid services. This, in principle, means that digital content providers are contractually required to offer the relevant content through a paid service. By contrast, only 15 % of agreements relate to services that are free of charge. Less than one third of the agreements allow digital service providers to use the distribution model of their choice when allowing users to access the digital content they offer. Figure C. 20 indicates that on demand is the most widely used business model with more than one third of all agreements including this possibility for digital content providers, compared to subscription models, which are mentioned in 1 out of 10 agreements.

[16] As explained in footnote 13 many of the technologies listed can be combined.

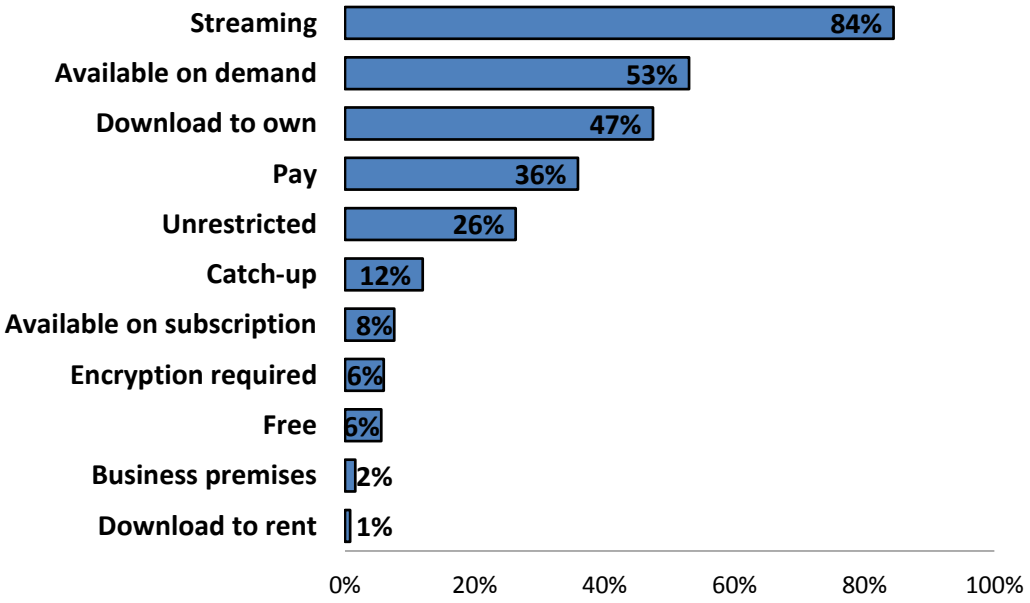
Figure C. 20: Proportion of agreements including specific ancillary and usage rights – All agreements submitted by digital content providers



(79) Similarly to what can be seen from the agreements submitted by digital content providers, the scope of licensing rights in the agreements submitted by right holders is defined precisely (figure C. 21).

(80) In particular, on demand and download to own restrictions are frequently used and streaming remains by far the most used distribution model, even to a greater extent than seen in the agreements submitted by the digital content providers. More than a third of agreements specify that the buyer of rights has to offer paid services, and just over a quarter of agreements impose no restrictions on the business model of the digital content provider. Compared to digital content providers' agreements, a significantly lower proportion of agreements submitted by right holders specify that the service can be offered free of charge.

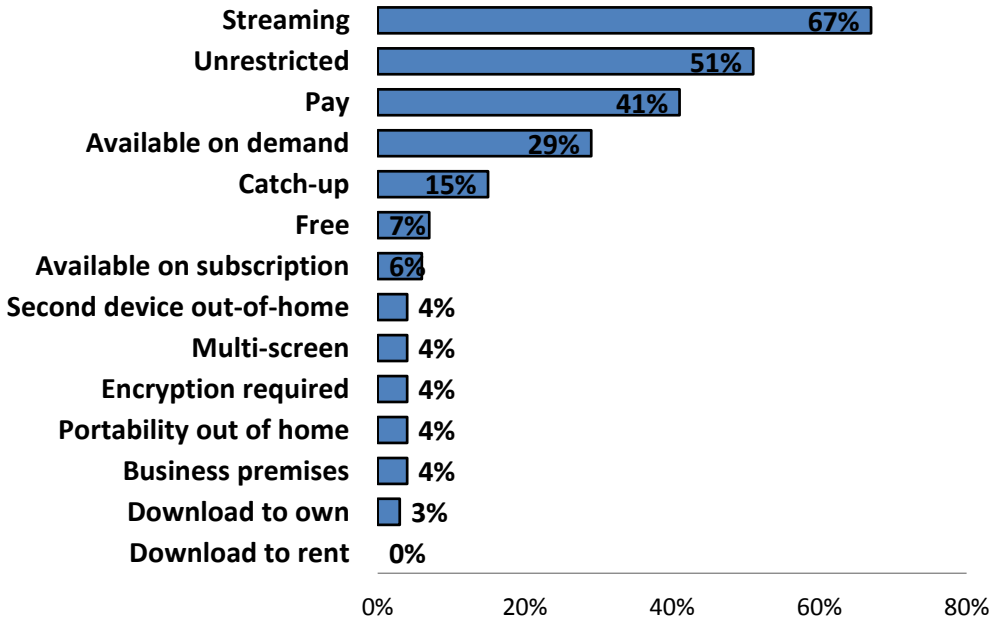
Figure C. 21: Proportion of agreements including specific ancillary and usage rights – All agreements submitted by right holders



(81) When looking at the different types of products, most restrictions are found in television fiction, film and sports agreements. In particular, both film and television fiction agreements include the possibility for operators to require payment and to operate an "on demand" model in relatively significant proportions. For both types of agreements, digital content providers are allowed to offer content for download to own and download to rent to a greater extent than the average.

(82) On the one hand, sports agreements are detailed in terms of the type of licensed ancillary rights (figure C. 22). On the other hand, more than half of the agreements give content providers the freedom as regards the type of service they may offer, or how the content can be accessed by users.

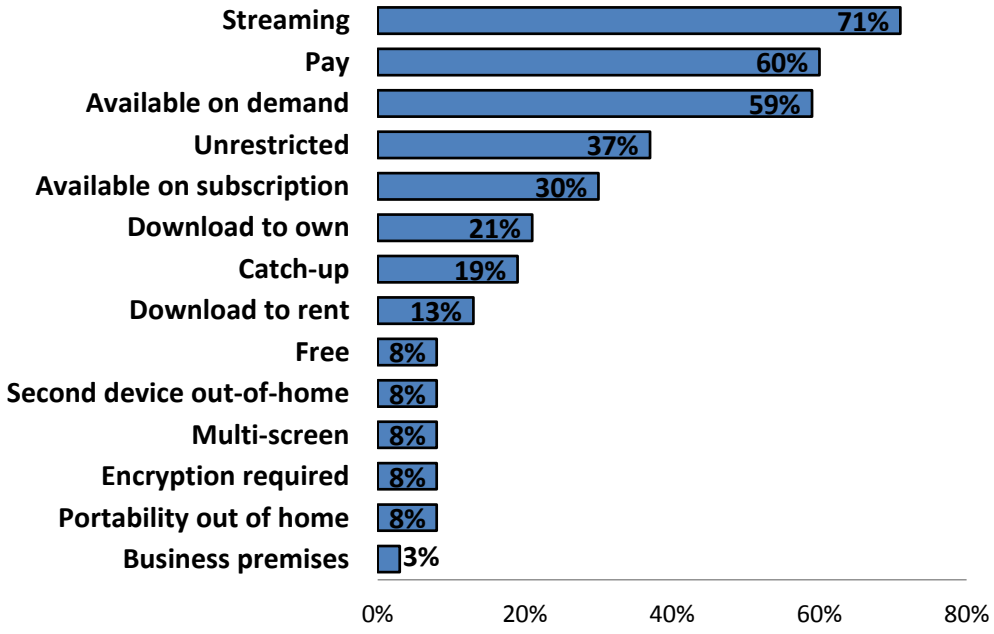
Figure C. 22: Proportion of agreements including specific ancillary and usage rights – Sports agreements submitted by digital content providers



(83) Licensing agreements of music right holders have a markedly lower level of specificity. Streaming is specifically mentioned in a majority of these agreements and paid services are specified in almost 30 % of agreements.

(84) Online audiovisual operators conclude licensing agreements containing the greatest number of restrictions with regard to ancillary and usage rights (figure C. 23). Fixed line PSTN operators and mobile operators conclude agreements that include a lower number of usage restrictions.

Figure C. 23: Proportion of agreements submitted by digital content providers including specific ancillary and usage rights – Online audiovisual operators



(85) Publishers (i.e. print media businesses offering digital content, for example on their web sites) have one of the lowest proportions of restrictions related to paid services, as well as a relatively high proportion of restrictions relating to on demand and subscription content. This is consistent with the way print media web sites monetise their content, with a combination of subscription and advertising revenues.

3.4 Exclusive technology rights

(86) The licensing of technology rights is often coupled with exclusivity.[17]

(87) Right holders were asked to indicate which types of technologies were licensed exclusively, out of a list of pre-defined transmission and usage technologies. The figures below show the proportion of agreements submitted by right holders including exclusive rights for each of transmission (figure C. 24) and usage (figure C. 25) technologies.

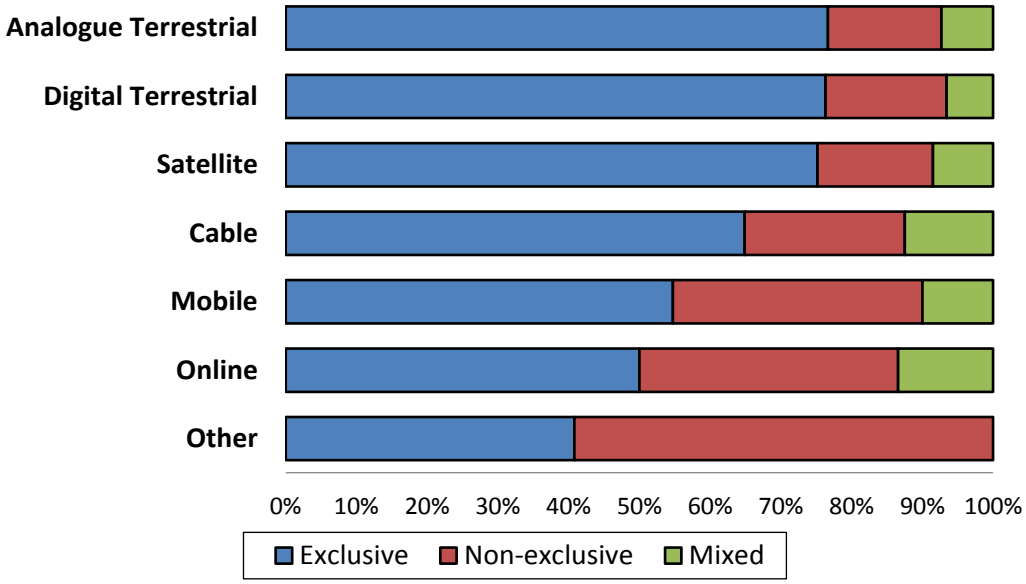
(88) Overall, the results confirm that technology rights are precisely defined in licensing agreements in order to license them exclusively.

(89) All of the technologies identified are licensed exclusively in at least half of the agreements submitted by right holders, except for the "other" category of transmission technologies. The use of exclusivity is likely to be more frequent than those proportions

[17] As noted in section C.3.1 , licensing of technology rights means licensing of the rights to economically exploit certain content through the use of a specific technology.

suggest, as "mixed" exclusivities are often almost equivalent to full exclusivities, with a few exceptions.[18]

Figure C. 24: Proportion of agreements including exclusive transmission technology rights – All agreements submitted by right holders



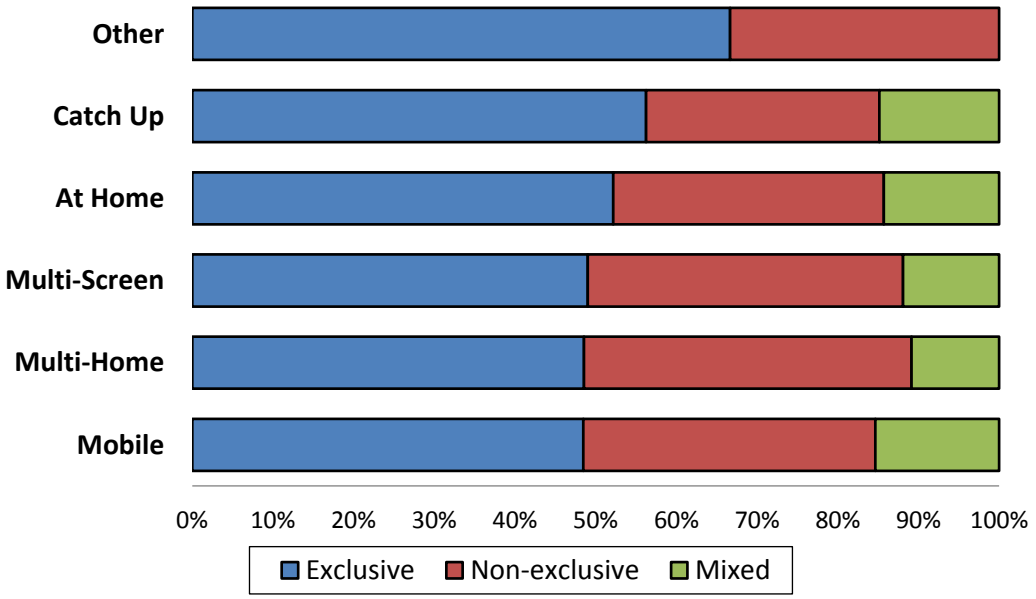
(90) In terms of transmission technologies, exclusive licensing is mainly used for terrestrial and satellite rights, and, to a slightly lesser extent, for cable and mobile rights.

(91) Online rights are less often licensed on an exclusive basis, with about half of the agreements including exclusive online transmission rights. Online transmission also has the highest proportion of agreements including non-exclusive rights, together with mobile transmission (and excluding other technologies).

(92) In terms of ancillary / usage rights, more than half of agreements are exclusive. A large part of the "other" category includes unrestricted rights or other types of rights, such as the right to offer the content to business users. However there were relatively few respondents selecting the "other" category, hence the importance of this result should not be overestimated.

[18] A large number of right holders respondents failed to indicate in what sense the exclusivity was "mixed." Those who did so often indicated that exclusivity was limited only in relation to certain release windows, for example when the products are delivered through VOD or SVOD services.

Figure C. 25: Proportion of agreements including exclusive ancillary and usage technology rights – All agreements submitted by right holders



(93) The results set out in figure C. 25 confirm that exclusivity is widely used in relation to transmission and usage technologies.

(94) Several respondents argued that exclusive rights across technologies are an important driver of competition and significantly increase the attractiveness of content services. Some respondents also pointed out that limiting technology exclusivity, or limiting the range of exclusive technology rights, for a product might *de facto* lead to a non-exclusive offer of that product, as the same product would end up being available on services using different technologies.

(95) The Commission considers that the use of exclusivity in licensing technology rights is not problematic in and of itself. Any assessment of such licensing practices under EU competition rules would have to take into account the characteristics of the content industry, the legal and economic context of the licensing practice and / or the characteristics of the relevant product and geographic markets.

3.5 Bundling of rights

(96) The results of the sector inquiry show that rights for online transmission of content are to a large extent licensed together with the rights for other transmission technologies (such as satellite, cable or mobile).

(97) Respondents have indicated that rights for online transmission are often included as part of a package of licensed rights regardless of whether the contracting party is actually active in online distribution of digital content or not.

(98) Consequently, most respondents were not able to provide a separate value of the online rights covered by a licensing agreement. Several of them have indicated that the value

of online rights is minimal in comparison to other rights covered by the licensing agreements.

3.5.1 Prevalence of bundling of rights

(99) Figure C. 26 and figure C. 27, below, show that in 79 % of the licensing agreements submitted by digital content providers and in 89 % of the agreements submitted by right holders, online rights are licensed together with rights in other transmission technologies.

Figure C. 26: Proportion of licensing agreements that contain only online rights respectively online rights together with rights in other transmission technologies – All agreements submitted by digital content providers

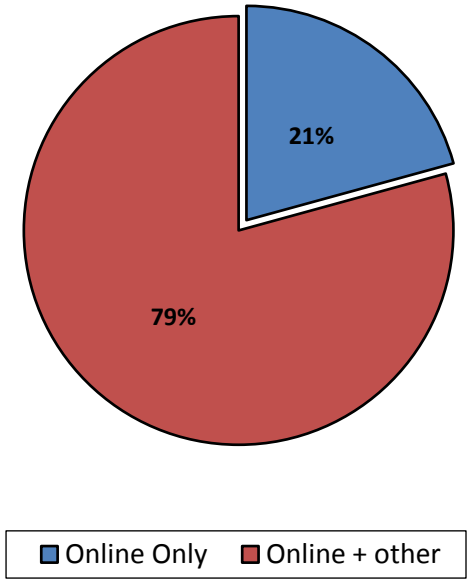
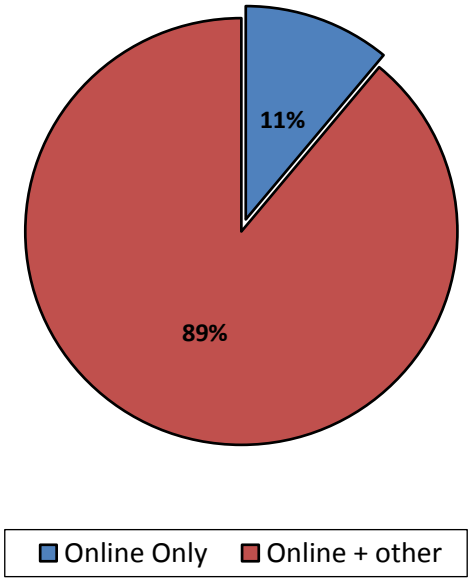
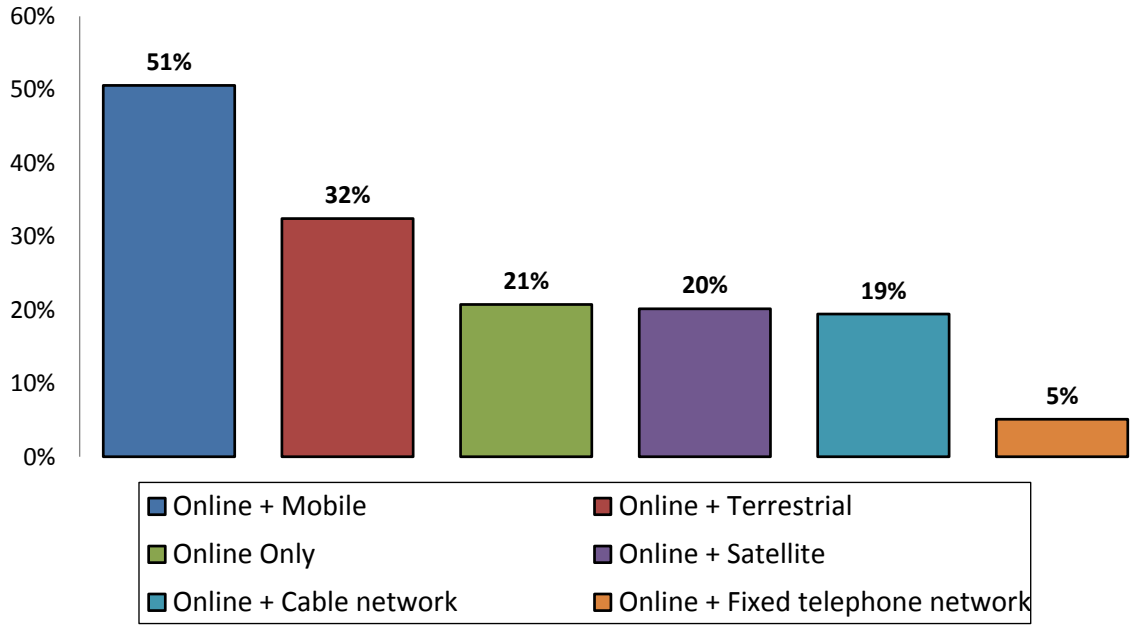


Figure C. 27: Proportion of licensing agreements that contain only online rights respectively online rights together with rights in other transmission technologies – All agreements submitted by right holders



(100) According to the results presented in figure C. 28 below, online rights are most often licensed together with rights for mobile transmission, terrestrial transmission and satellite transmission.

Figure C. 28: - Proportion of agreements containing different combinations of online rights with rights in transmission technologies other than online – All agreements submitted by digital content providers



3.5.2 Bundling of rights

(101) Bundling rights for online transmission with rights in other transmission technologies can represent an effective strategy for content providers, to the extent that it allows them

to offer the same products across a wider range of services and devices. Also, as indicated by some respondents, it might be in line with the remit of certain operators, such as public service broadcasters, in particular to allow them to offer their services across as wide a range of technologies as possible. Bundling of rights is not problematic in and of itself.

(102) However bundling online rights with other rights may limit the availability of a varied offer of digital content services to users and may lead to a restriction of output, in particular where the online rights are not, or only partly, exploited by the licensee. Bundling of rights may also hinder both existing operators and new entrants from competing and developing new innovative services, which in turn may reduce consumer choice.

Summary

The precisely defined scope of technology rights licensed to digital content providers has wide-ranging implications for their operations, including their business model, the service they can provide, and the reception infrastructure they can use. The practice of splitting rights according to technologies, including the modalities for offering and accessing the service, leads to a complex patchwork of licensed rights, often in the same Member State, the structure of which is highly dependent on existing commercial relationships between right holders and digital content providers. The widespread use of exclusivity in conjunction with the licensing of technology rights implies that both new entrants and existing operators which do not have access to specific technology rights might find it difficult to acquire online transmission rights, depending on how such rights have been licensed (split up) and to which company in a particular territory.

Moreover, rights for online transmission of digital content are to a large extent licensed together with the rights for other transmission technologies. Agreements submitted by digital content providers indicate that online rights are the most often licensed together with rights for mobile transmission, terrestrial transmission and satellite transmission. Bundling of rights may not only negatively impact users in the sense of reducing the availability of content, but may also prevent other operators from competing specifically for online services.

The Commission considers that the use of exclusivity and / or bundling in licensing technology rights is not problematic in and of itself. It needs to be assessed taking into account the characteristics of the content industry, the legal and economic context of the licensing practice and / or the characteristics of the relevant product and geographic markets.

4. THE SCOPE OF LICENSED RIGHTS: TERRITORIES

4.1 Introduction

(103) The results of the sector inquiry show that online rights are to a large extent licensed on a national basis. Online rights are often licensed bundled with rights for the distribution of content via other transmission technologies. The territorial scope of online and

offline rights is therefore often the same, as offline rights are traditionally licensed on a national basis.

(104) Moreover, right holders have indicated in their responses that their business models are built on licensing of rights on a national basis. This allows them to extract the highest possible value from the rights in terms of revenues.

4.2 The territorial scope of online rights

(105) The fact that online rights are in the large majority of cases licensed on a national basis is confirmed by the replies and the licensing agreements submitted by digital content providers. According to figure C. 29 below, 57 % of the online rights licensed under all the licensing agreements submitted by content providers, and independently of the content category, type of operator and type of business model, were licenced for the territory of one Member State only.

(106) Figure C. 29 also shows that online rights are to a non-negligible extent (21 %) obtained for territories covering between two and four Member States. Digital content providers that are distributing content using other transmission technologies than online transmission and that have decided to expand their commercial activities beyond the territory of one Member State only, have often chosen to enter neighbouring countries with the same or similar language. This is also true for online rights when those are licensed for a territory covering more than one Member State. The results of the sector inquiry show that the Member States which are often grouped together and for which both online and other rights are often licenced together, are (i) the territories of France and the French speaking parts of Belgium and Luxembourg, (ii) the UK and Ireland, (iii) Germany and Austria, (iv) the Benelux countries, (v) the Nordic countries, and (vi) the Czech Republic and Slovakia.

(107) The replies and licensing agreements submitted by rights holders confirm the conclusions drawn from the analysis of the replies and licensing agreements submitted by digital content providers that online rights are mainly licensed nationally or for a territory covering between two and four Member States. As figure C. 30 below shows, an almost equal number of the licensing agreements submitted by right holders cover the territories of either one Member State (35 %) or two to four Member States (40 %).

(108) Online rights are to a lesser extent licensed on a pan-EU level. The replies from both digital content providers and right holders show that this is in particular true for the categories of content that may contain premium content products, such as sports, films and fiction TV (see figure C. 29 and figure C. 30 below). According to figure C. 29, 15 % of all examined agreements submitted by digital content providers cover the territories of all the 28 Member States. The number is almost the same, 13 %, for the agreements submitted by right holders (figure C. 30). Figure C. 31 and figure C. 32 below indicate that the extent to which rights are licensed on a pan-EU basis varies between different content categories.

Figure C. 29: Proportion of agreements including rights licensed for a certain territorial scope – All agreements submitted by digital content providers

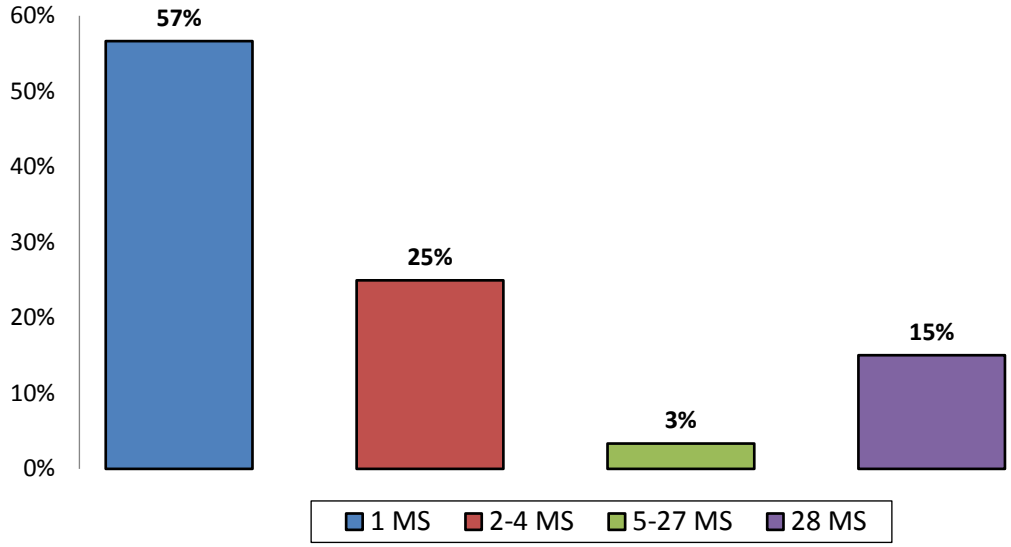
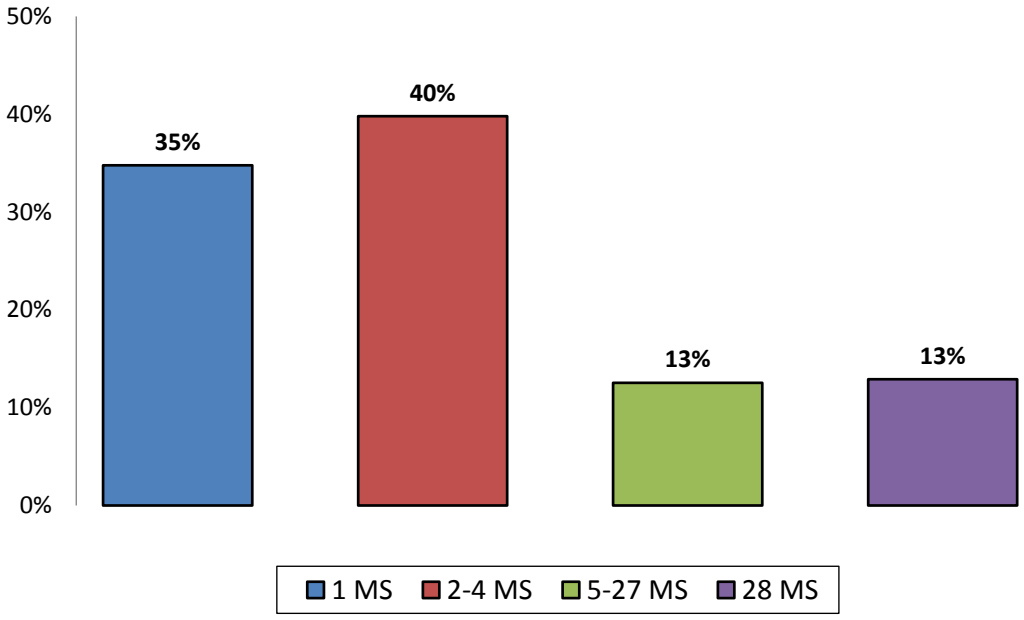


Figure C. 30: Proportion of agreements including rights licensed for a certain territorial scope – All agreements submitted by right holders



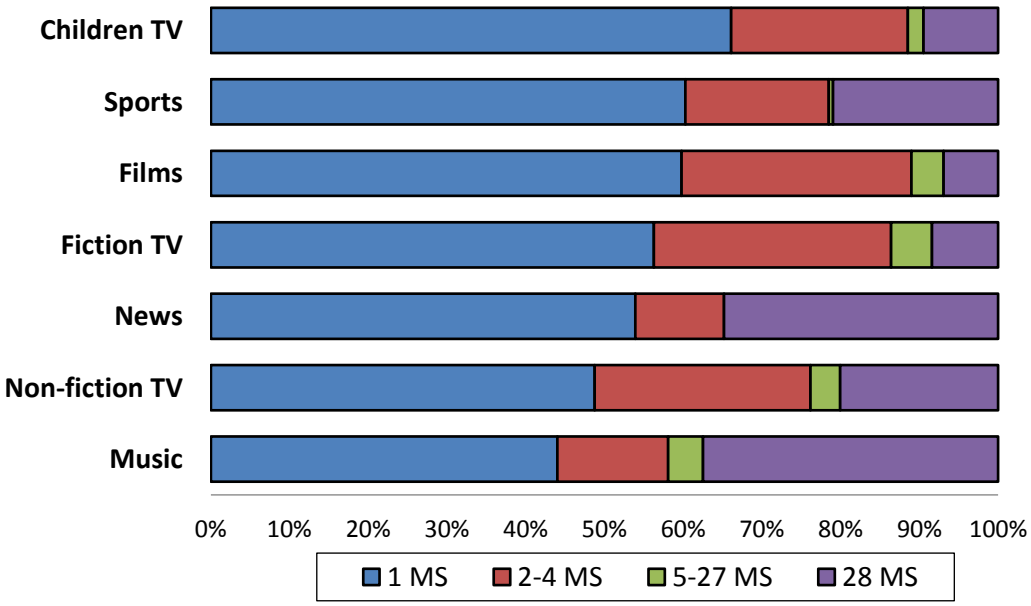
4.2.1 The territorial scope of online rights in relation to different types of digital content

(109) Figure C. 31 below indicates that in relation to all the defined content types, 45 % or more of the rights covered by the licensing agreements submitted by digital content providers are licensed for the territory of one Member State only. This confirms the prevalence of territorial licensing (i.e. licensing on a per Member State basis). Licensing of rights on a national basis is particularly prevalent in relation to content types that may contain premium products, such as sports (60 %), films (60 %) and fiction TV (56 %).

(110) According to figure C. 31, music and news are the content categories for which rights are most often licensed on a pan-EU basis (38 respectively 35 %), followed by sports (21 %) and non-fiction TV (20 %). This may be the result of the scope of the commercial activities of certain digital content providers in these sectors. Another relevant factor is the interest in and consumer demand for specific content, based on cultural and linguistic differences.

(111) The fact that both news and sports at the same time to a rather large extent are licensed on a national basis (54 respectively 60 %), may be explained by the fact that news and sports broadcasts are often both produced and distributed by content providers, that operate on a national basis (such as public service broadcasters). Furthermore, some of this type of content is of only national interest.

Figure C. 31: Proportion of agreements including rights licensed for a certain territorial scope – All agreements submitted by digital content providers – By product type



(112) The licensing agreements submitted by right holders show differences in the territorial scope of rights depending on the type of content that is covered by the agreements. As follows from figure C. 32 below, while 67 % of the rights licensed by music right holders cover 28 Member States and only 22 % cover one Member State, the results are rather different in relation to right holders that license sports and / or fiction and children TV content.

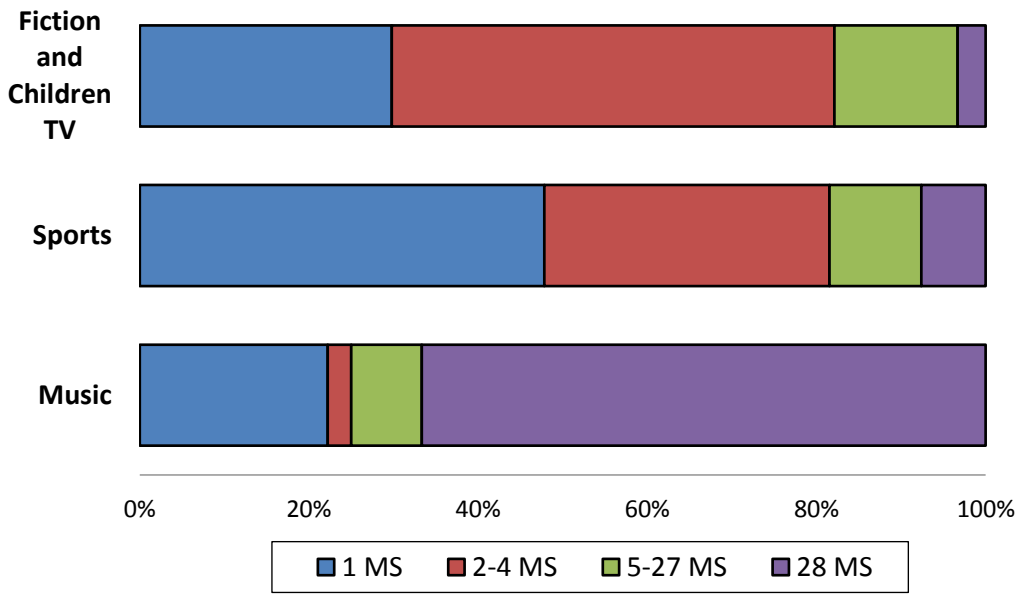
(113) A majority of the licensing agreements submitted by sports rights holders (48 %) covers the territory of one Member State only, and only a minor part of such agreements (8 %) provide licenses on a pan-EU basis. These figures confirm the results of the analysis of the licensing agreements submitted by digital content providers, in the sense that rights in sports are most often licensed on a national basis. As explained above, the two sets of results can however not be compared in absolute terms since the two data sets are different. In the agreements submitted by digital content providers, there is also a rather

high percentage (34 %) of rights licensed for a territory covering between two and four Member States.

(114) Figure C. 32 moreover shows that the territorial scope of around 30 % of the licensing agreements submitted by fiction and children TV rights holders cover the territory of one Member State only and only 3 % of the agreements have a pan-EU scope.

(115) Around half of the licensing agreements (52 %) of fiction and children TV rights holders that were examined in the course of the sector inquiry cover a territory of between two and four Member States. This corresponds largely to the replies submitted by digital content providers, as follows from figure C. 31 above.

Figure C. 32: Proportion of agreements including rights licensed for a certain territorial scope – All agreements submitted by right holders - By product type



4.2.2 The territorial scope of online rights in relation to different types of digital content providers

(116) Figure C. 33 below shows the territorial scope of the licensing agreements submitted by digital content providers in relation to the different identified types such operators. Agreements which exclusively or to a large extent cover the territory of only one Member State between right holders and each type of operator are agreements between mobile operators (100 %) fixed line cable operators (94 %) and fixed line PSTN operators (84 %). This can be explained by the fact that the business models of these operators as well as the infrastructures used by them for the distribution of content are generally national in scope.

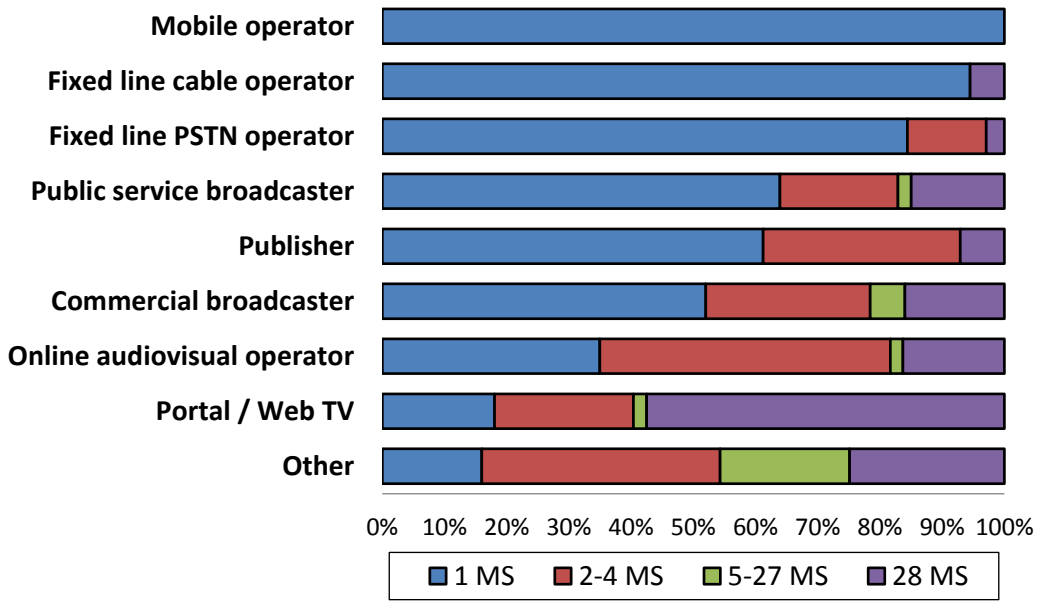
(117) Public service broadcasters, which traditionally operate on a national basis, to a large extent obtain the rights in digital content on a per Member State basis. 64 % of the agreements submitted by public service broadcasters cover the territory of one Member State only.

(118) Commercial broadcasters mainly obtain online rights on a national basis (52 %) and to some extent also for the territories of two to four Member States (26 %). This may be explained by the differences in size and type of the activities pursued by the commercial broadcasters that responded to the sector inquiry. Some of these operators offer their content services on a regional basis. The fact that a non-negligible number of rights (16 %) were obtained on a pan-EU basis may relate to the specific content covered. It seems from the results that "older" or "non-premium" content, in relation to which there may not be an interest in licensing on an exclusive, national basis at a premium price, may be offered on a pan-EU basis.

(119) The operators that obtain the most online rights on a pan-EU level (58 %) are the portal/web TV operators that only have online activities.

(120) Online audiovisual operators predominantly obtain online rights on a regional level, for the territories of two to four Member States (47 %), but also to a rather large extent for the territory of one Member State (35 %). A smaller percentage of the agreements (16 %) including rights that are licensed to online audiovisual operators have a pan-EU scope. This variety in territorial scope of the licensing agreements, may be explained by the fact that this is a heterogeneous group of operators which includes both operators that mainly pursue their commercial activities in one Member State only (e.g. because they have traditionally been distributing content on a national basis via other transmission technologies than online, such as operators offering paid services), as well as operators whose activities are EU-wide in scope (such as pure online operators).

Figure C. 33: Proportion of agreements including rights licensed for a certain territorial scope – All agreements submitted by digital content providers- By type of operator



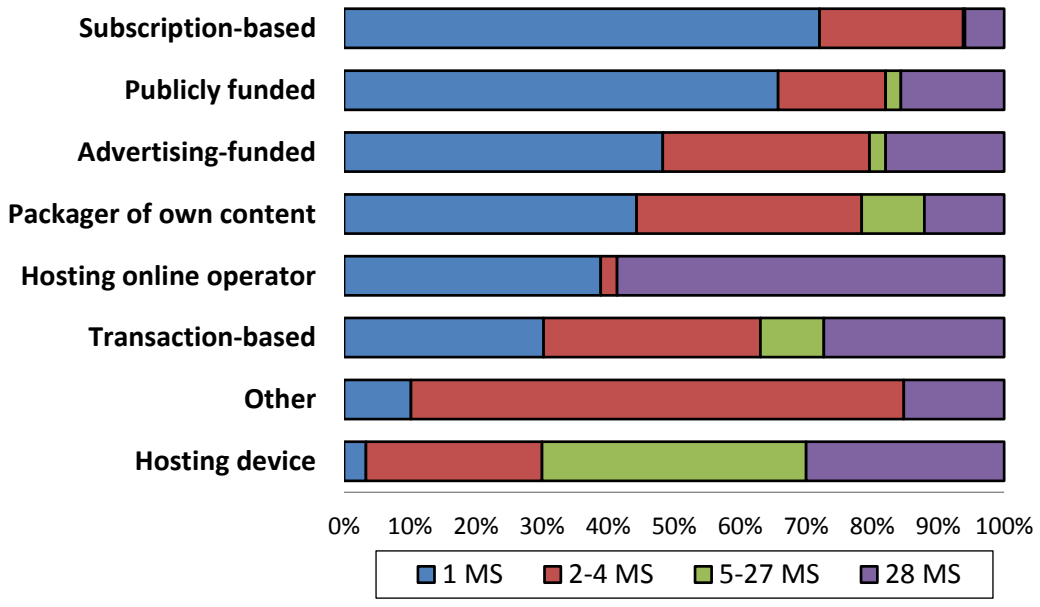
4.2.3 The territorial scope of online rights in relation to the different business models used by digital content providers

(121) Figure C. 34 below shows the territorial scope of the submitted licensing agreements by type of business model used by the different digital content providers. The responses and licensing agreements submitted by hosting online operators show that online rights are to a large extent licensed to them on a national basis, despite the fact that the services provided by these operators often can be accessed and used by users in most of the Member States.

(122) Online rights are licensed mainly on a national basis also to content providers operating on the basis of a subscription-based business model (72 %), such as mobile operators, fixed line cable operators and fixed line PSTN operators. Figure C. 34 thus confirms to a large extent the results shown in figure C. 33 above in relation to these types of operators, i.e. that they mainly obtain rights on a national basis. Packagers of own content is another category of distributors that mainly obtain rights on a per Member State basis. These results suggest that rights holders typically tend to license rights on a national basis.

(123) The business model "hosting online operator" is by far the category in relation to which most of the online rights are licensed on a pan-EU basis (59 %). This category is followed by hosting devices (30 %) and transaction-based business models (27 %). The latter business model includes distributors whose commercial activities are specifically tailored to online distribution, such as so-called Over The Top (OTT) operators. These operators are often online-centric and can deliver their services via media streamers, hosting devices, videogame consoles and increasingly often directly to hosting-capable connected TV sets.

Figure C. 34: Proportion of agreements including rights licensed for a certain territorial scope – All agreements submitted by digital content providers - By type of business model



4.3 Exclusive territorial rights

(124) As for technology rights, exclusivity is often also used in association with a territorial scope of the licensing agreement.

(125) Right holders were asked to indicate for each of the covered territories, whether the rights were licensed on an exclusive or non-exclusive basis.

(126) In the analysis that follows, rights can be exclusive, non-exclusive, or mixed. The "mixed" category covers instances in which the exclusivity may not apply to all territories, e.g. right holders may have granted exclusive rights to digital content providers only for certain of the Member States covered by an agreement but not in all of them.

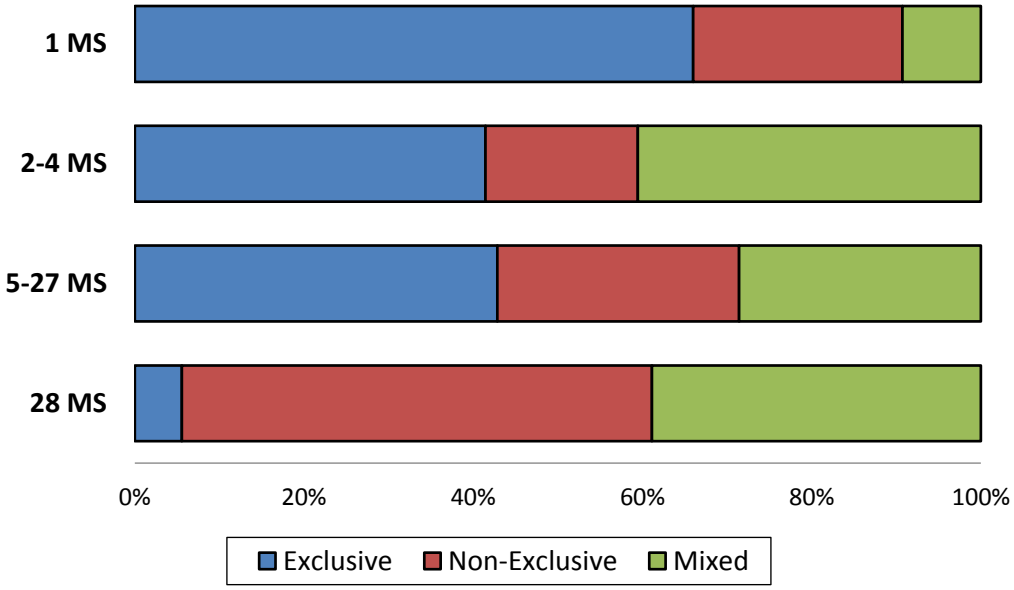
(127) Conversely, the "exclusive" category refers to instances in which the right has been conferred in full to a digital content provider that has also been granted exclusivity, for all territories. The "mixed" and "exclusive" categories thus provide an idea at the extent to which territorial exclusivity is used, as can be seen in figure C. 35 below.

(128) Figure C. 35 below shows that rights are most often exclusive when they are licensed for the territory of one Member State only. In those cases, 66 % of the submitted agreements were licensed on an exclusive basis.[19]

(129) At the same time, figure C. 35 shows that non-exclusive rights tend to be licensed on a pan-EU basis.

[19] It may seem contradictory that 12 % of the agreements that concern one Member State only include "mixed" rights. The replies show that these most often relate to the situation where an agreement covers one Member State, as well as other non-Member States and that the rights are licensed exclusively for some of the territories covered by the agreement but not for all.

Figure C. 35: Proportion of agreements including exclusive / non-exclusive rights licensed for a certain territorial scope – All agreements submitted by right holders



4.4 Reasons for non-availability of content across borders

(130) Online rights are in the large majority of cases licensed on a national basis or for the territory of a few Member States only. On the basis of all licensing agreements submitted by digital content providers, and independently of content category, type of operator and type of business model, 57 % of the online rights licensed on the basis of these agreements cover the territory of one Member State only. The content licensed through those agreements is thus not available to users in other Member States who seek to access it through that specific digital service provider.[20]

(131) In order to understand why some providers of digital content services make their services accessible to users that are located only in one Member State or in a limited number of Member States, respondents that replied that their services were not available in certain Member States were asked to provide the reasons for their reply.

(132) They were asked to rate eleven different reasons[21] on a scale between 1 and 5, where 1 indicates that the reason has no influence at all and 5 that the reason is decisive for their choice not to enter certain national markets. In their reply, respondents could indicate

[20] The same content could of course be available to users in other Member States through other providers.

[21] The reasons given in the questionnaire were the following: cost of obtaining information about consumer protection laws; costs of complying with consumer protection laws; other compliance costs (e.g. tax laws); cost of purchasing content for those territories; content is not available to purchase in those territories; appropriate language versions are not available for those territories; cost of preparing appropriate language versions for those territories; user interface translation costs; costs of adapting business model to obtain revenue from users in those territories (e.g. by seeking advertisers in those territories); inadequate infrastructure (e.g. broadband speed) in those territories and insufficient consumer demand.

more than one reason as having no influence at all respectively as being decisive for the decision to provide digital content services in a specific Member State.

(133) The respondents were also given the option to indicate if there were other reasons than the ones given that were relevant for their decision to make content available or not in other Member States. Some respondents provided explanations for their replies, of which examples are given below. Table C. 6 shows the proportion of respondents that considered the given factors to be of highest importance (i.e. they rated the factor with a 4 or a 5 on a scale of 1 to 5) when being asked to rank the reasons why they do not make their content services accessible in some Member States.

Table C. 6: The most important factors for a digital content provider not to make its services accessible in Member States other than those in which it currently operates

Other	68.9%
Cost of purchasing content for those territories	67.1%
Content is not available to purchase in those territories	54.3%
Costs of adapting business model to obtain revenue from users in those territories	46.6%
Insufficient consumer demand	39.7%
Cost of preparing appropriate language versions for those territories	35.6%
Appropriate language versions are not available for those territories	31.1%
User interface translation costs	20.3%
Other compliance costs (eg tax laws)	13.9%
Inadequate infrastructure (eg broadband speeds) in those territories	13.0%
Costs of complying with consumer protection laws	10.1%
Costs of obtaining information about consumer protection laws	2.8%

(134) The highest proportion of respondents indicated that there are "other" reasons than those listed in the questionnaire for digital content providers not to make their services accessible in other Member States. However, the replies show that some of the respondents did not explain what these other reasons are or that they actually indicated one of the given reasons in their reply under the option "other" reasons, such as that the content is not accessible for purchase in some territories. Other respondents provided reasons linked to the specific business choices of the company in question, such as the size of the business and the focus of the business model on specific territories. A few respondents invoked the competitive landscape as a reason for not making their services accessible in certain Member States, as well as costs for marketing and advertising.

(135) Besides the "other" category, a majority of the content providers indicated that the most important reason for not making content accessible in other Member States, out of the eleven reasons that were given in the questionnaire, is the cost of purchasing content for territories in which the digital content provider is not yet active. In particular, smaller operators or operators in smaller Member States indicate that they have limited their activities to one or a few Member States, since it would be too expensive to acquire the rights for other territories. Therefore, they can only make their services available in a limited number of Member States and are thus prevented from offering subscribers the possibility to access and use their services from other Member States.

(136) The second most important of the given reasons (besides the "other" category) for not making content accessible in other Member States was that the rights in the content are not available for licensing for (some or all) of the territories of those Member States. In this respect, respondents state that some right holders make the licensing of their content conditional upon the fact that the digital content provider undertakes to apply geo-blocking, or that they would need to pay higher fees in order to make some content available without geo-blocking. Respondents also explain that the business models of some right holders do not allow the digital content providers to offer portability of their services. Some respondents moreover indicate that the rights in certain content are limited to specific language versions, which are only interesting for consumers in certain Member States.[22]

(137) Some content providers moreover indicate that they would be interested in extending the reach of their digital content services, also by providing cross-border services, but that they encounter difficulties in acquiring the necessary rights.

(138) Table C. 7 below shows which of the given factors were considered by the respondents to be of least importance (i.e., the respondents rated the factor with 1 or 2 on a scale of 1 to 5) when being asked to explain why they do not provide content services in some Member States.

[22] The categories "cost of purchasing content" and "content is not available for purchase" are somewhat related but look at different things. High costs of purchasing certain content can dissuade a potential buyer from entering into a licensing agreement with the holder of the rights to that content even when those rights are available for purchase.

Table C. 7: The least important factors for a digital content provider not to make its services accessible in Member States other than those in which it currently operates

Costs of obtaining information about consumer protection laws	81.7%
Other compliance costs (eg tax laws)	80.6%
Costs of complying with consumer protection laws	78.3%
Inadequate infrastructure (eg broadband speeds) in those territories	69.6%
User interface translation costs	59.4%
Appropriate language versions are not available for those territories	56.8%
Cost of preparing appropriate language versions for those territories	50.7%
Insufficient consumer demand	43.8%
Costs of adapting business model to obtain revenue from users in those territories	34.2%
Content is not available to purchase in those territories	30.9%
Other (please specify)	24.6%
Cost of purchasing content for those territories	20.0%

(139) As indicated in the table above, the costs for obtaining information in order to comply with the law, such as tax laws, as well as the costs for complying with consumer protection laws are the least important reasons for not making content services available in certain Member States. Other content providers also consider that infrastructure-related issues, such as the fact that the infrastructure in certain Member States is inadequate for example in terms of broadband speed, are not relevant for their choice to make their services accessible or not by users in those Member States.

4.5 Catalogue differences

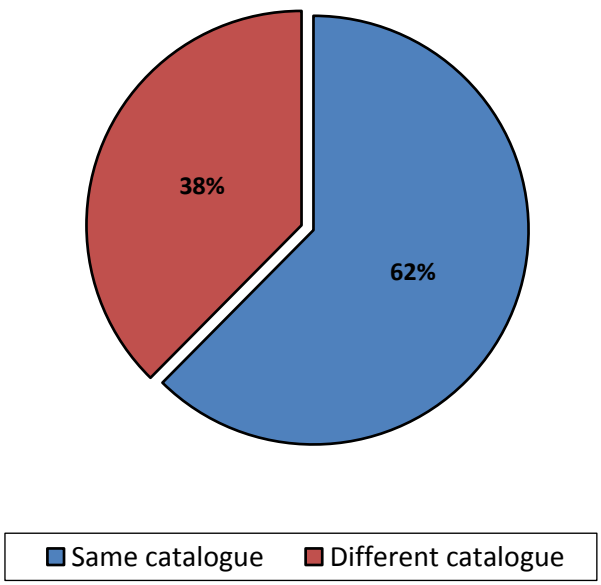
(140) Digital content providers that make their services available in two or more Member States do not necessarily offer the same catalogue of content to users in each of those Member States. On the contrary, it is rather common that the content available to users in one Member State differs from that available to users in other Member States.

(141) In this respect, respondents were asked whether there are any differences in the catalogue of content that they offer to users in different Member States.

(142) Of the 129 digital content providers that indicate in their reply to the sector inquiry that their services is available in at least two Member States, 117 replied to the question

whether they offer different catalogues of content in the different Member States where they make their services available. As follows from figure C. 36 below, 38 % of those 117 respondents indicate that there were differences in the catalogue of content offered in each Member State.

Figure C. 36: Proportion of respondents whose catalogues of content services differ between the Member States and whose services are accessible in more than one Member State



(143) Catalogue differences may have different reasons when it comes to different content categories. General reasons for catalogue differences are differences in consumer taste and demand, as well as the relevance or not of certain content for certain territories. Some respondents also indicate that the need to negotiate with a multitude of right holders in order to be able to offer the same content in several Member States, which implies too important financial investments and resources.

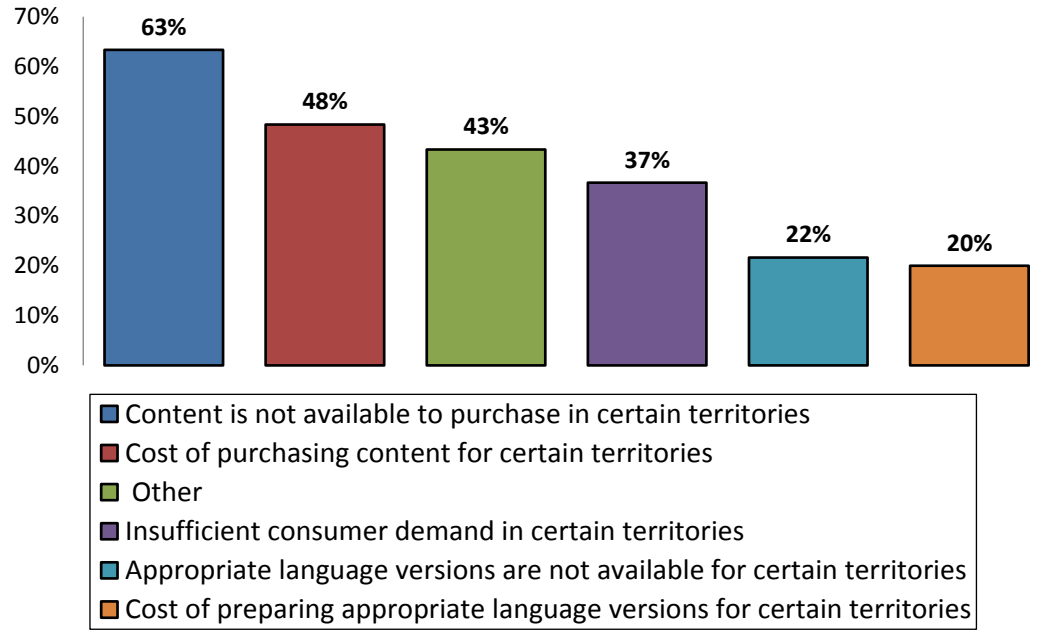
4.6 Reasons for catalogue differences

(144) Respondents were asked to provide the reasons for them offering different catalogues in different Member States. They were asked to choose between 5 given reasons or to choose "other" and if so to explain that choice. Figure C. 37 below shows that the main reason given by respondents for providing different catalogues to users in different Member States is that the rights in certain content are not available for licensing in respect of certain territories. The second main reason that was provided is the cost of licensing the content for certain territories.

(145) Some respondents to the questionnaire further explain the reasons why content may not be available to purchase or licence in certain territories. According to these respondents, the fact that rights are licenced on an exclusive basis to only one or possibly a few distributors that might distribute using different technologies in each Member State, makes it difficult for other operators or potential competitors to obtain the rights in

order to enter certain Member States or certain market segments in those Member States.

Figure C. 37: Reasons provided by digital content providers to catalogue differences between Member States - EU 28



(146) Several respondents (43 %) indicated that there were "other" reasons than those given in the questionnaire why they offer different catalogues of digital content in different Member States. Examples of reasons put forward are that rights are licensed on a national basis and may differ from one Member State to another as well as the existence of territorial restrictions based on contractual clauses.

(147) Catalogue differences may depend on the fact that right holders may have licensed the same content to another digital service provider, or that they may not hold the same rights in each Member State. Digital content providers have explained that to obtain the rights enabling them to offer the same catalogue in all the Member States in which they are active may require a too important investment in terms of cost and resources.

(148) Some respondents have also referred to the difficulty to compete in certain territories with other digital content providers in order to obtain access to content that is licenced on an exclusive basis. Moreover, the volume and cost of a certain content package are mentioned as important parameters on the basis of which digital content providers compete for specific titles that are part of the package.

4.7 Reasons provided by right holders why online rights are not licensed for certain territories

(149) There may be several reasons why a right holder chooses not to licence the online rights in certain content to digital content providers in some Member States. Obvious reasons include the commercial strategies and choices of right holders. This may result in online

rights for a certain territory not being available because the right holder has already licensed them on an exclusive basis to someone else.

(150) Some right holders explain that a pan-EU distribution arrangement with one distributor is less valuable both for the original right holder and subsequent licensors in the distribution chain, in terms of viewership and revenues, than licensing on a territorial basis to a couple of digital content providers. Therefore, they prefer to licence on a territorial basis.

(151) Other respondents explain that they may choose not to license in certain Member States because of the commercial and territorial scope of the activities pursued by certain digital content providers with whom they may have long standing relationships. Where these digital content providers mainly distribute the licensed products in one or two Member States, they will not ask for a licence with a broader geographical scope. Some right holders also indicate that certain territories are not covered by a specific licensing agreement for a product because the rights were pre-sold in those territories.

(152) Other reasons mentioned are linked to consumer preferences and also the fact that productions are targeting certain territories for linguistic reasons (e.g. that dubbed versions do not exist). Moreover, certain territories may not have been offered to a certain digital content provider because the right holder had a more interesting offer for those territories from another provider.

(153) Several respondents pointed out that territorial licensing is a key part of current business practices, and that it plays an important role in the funding of content.

4.8 Geo-blocking of digital content services

(154) In order to limit the online transmission of digital content to certain Member States and to implement (exclusive) territorial licensing agreements, digital content providers have recourse to geo-blocking measures.[23]

4.8.1 Existence and extent of geo-blocking

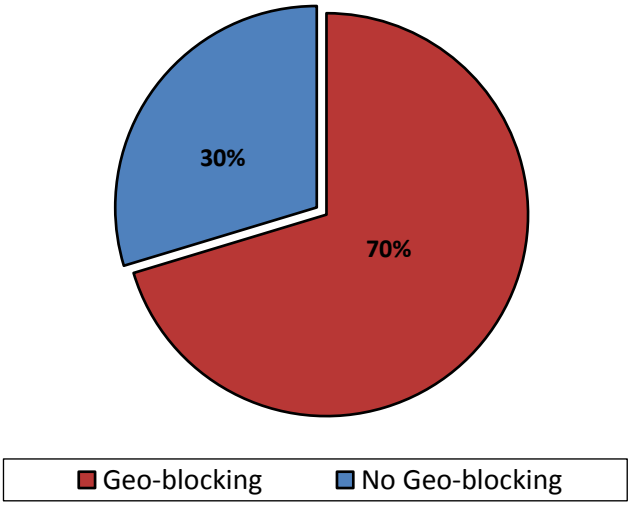
(155) In order to determine whether geo-blocking in relation to digital content takes place, digital content providers were asked to specify whether they had put in place technical measures to monitor the user's location in order prevent access to their services.

(156) The responses to these questions were aggregated so that any respondent indicating the use of at least one technical measure was considered as carrying out geo-blocking, and this aggregated number of respondents carrying out geo-blocking was divided by the

[23] As mentioned above (see footnote **Error! Bookmark not defined.**), in the framework of the sector inquiry, the Commission published in March 2016 its initial findings on geo-blocking in an Issues paper (See SWD(2016) 70 final). The initial findings of the Issues paper are confirmed by the Preliminary Report. However, as the Commission received some of the responses only after the data extraction date for the Issues paper, certain figures have been slightly modified.

total number of respondents, providing the percentage of respondents that actively geo-block. As can be seen from figure C. 38, geo-blocking is widely used across the EU.

Figure C. 38: Proportion of respondents implementing at least one type of geo-blocking measure – EU 28

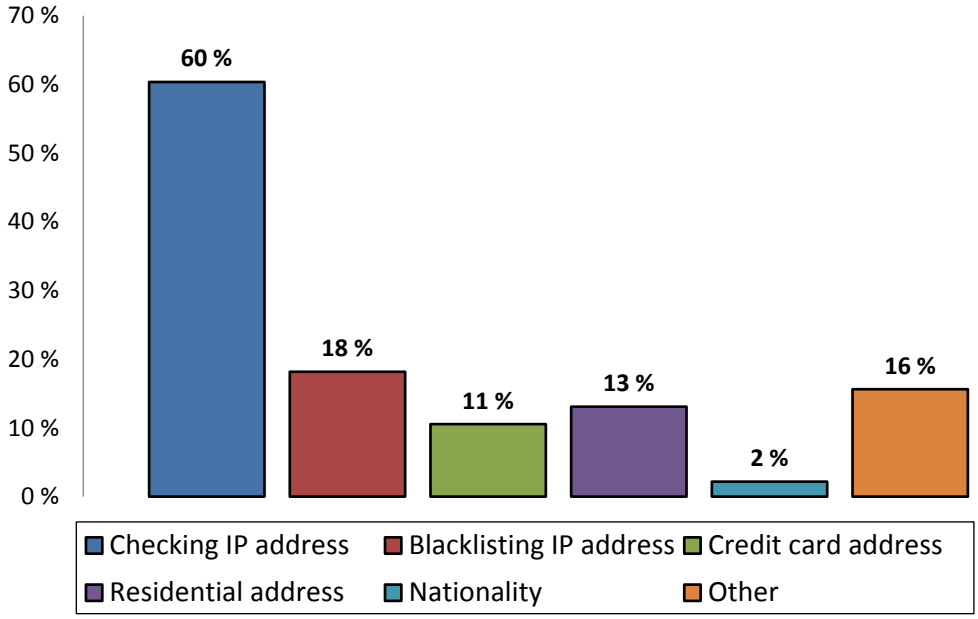


(157) Respondents were asked about the technical means used to implement geo-blocking to prevent access to their offer by users located in Member States other than the one where the service provider is established.

(158) As figure C. 39 shows, most respondents use IP address verification which is the prevalent form of technical implementation by a wide margin.[24]

[24] The relatively high proportion of respondents that answered "Other" is due to two reasons. First, technical measures that were genuinely different from the options provided were specified by some respondents, together with the indication of such means, including for example the use of telephone area codes or the use of content encryption to enable geo-blocking. However the majority of the respondents specifying "Other" indicate that they use a combination of the methods listed, or that they provide more than one service and geo-blocking applies only to a sub-set, or do not specify what technical measure they use.

Figure C. 39: Technical measures used to implement geo-blocking – Average proportion of all respondents – EU 28



(159) The EU average masks a relatively high degree of variation, both across Member States and across types of operators.

(160) In particular, geo-blocking measures are reported to be used more widely in certain Member States. While no clear pattern emerges from the data, only in Estonia (33 %) and Italy (46 %) do less than half of respondents in Member States use such measures.[25]

(161) By contrast, more than half of the respondents use such measures in Spain (65 %) and the Netherlands (67 %), while more than three quarters of respondents use such measures in France (81 %), the UK (83 %), Denmark (86 %) and the Czech Republic (87 %).

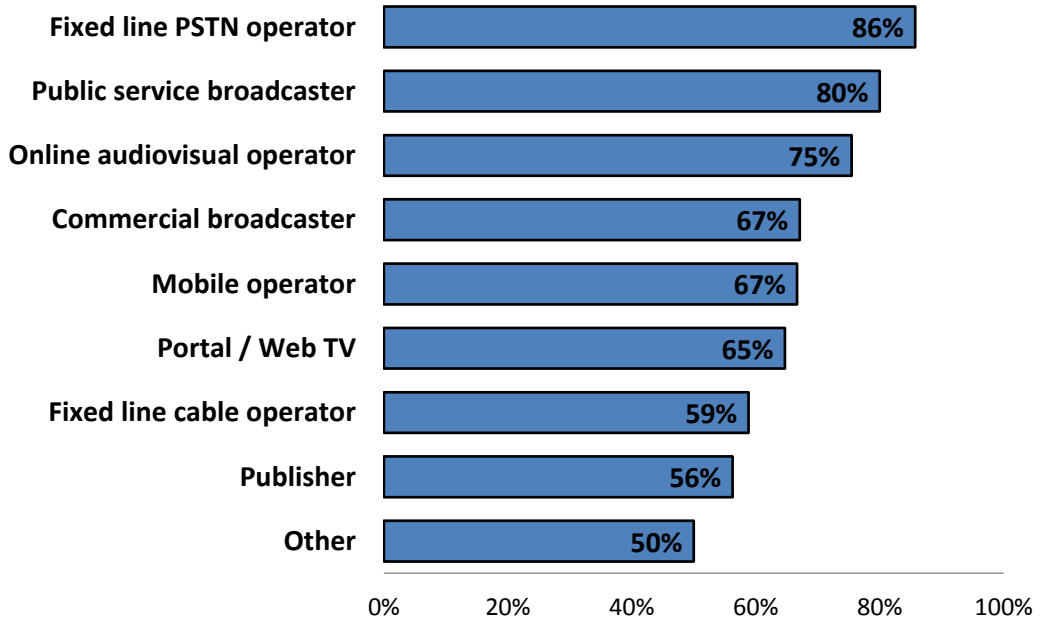
(162) The gathered data indicate a relatively wide degree of variation also across respondents, independently of their geographic establishment, as illustrated by figure C. 40.

(163) For example, online audiovisual operators and fixed telephony operators make on average a more extensive use of geo-blocking than commercial broadcasters do. A high proportion of public service broadcasters implement some form of geo-blocking.

(164) Fixed line cable operators resort less to geo-blocking than other fixed line communications providers, but this may be partly a result of the fact that subscribers typically need to be physically connected to the specific cable network to receive a complete service, in which case geo-blocking might be unnecessary.

[25] The results may also be affected by the different size of the respondent sample in each of the Member States.

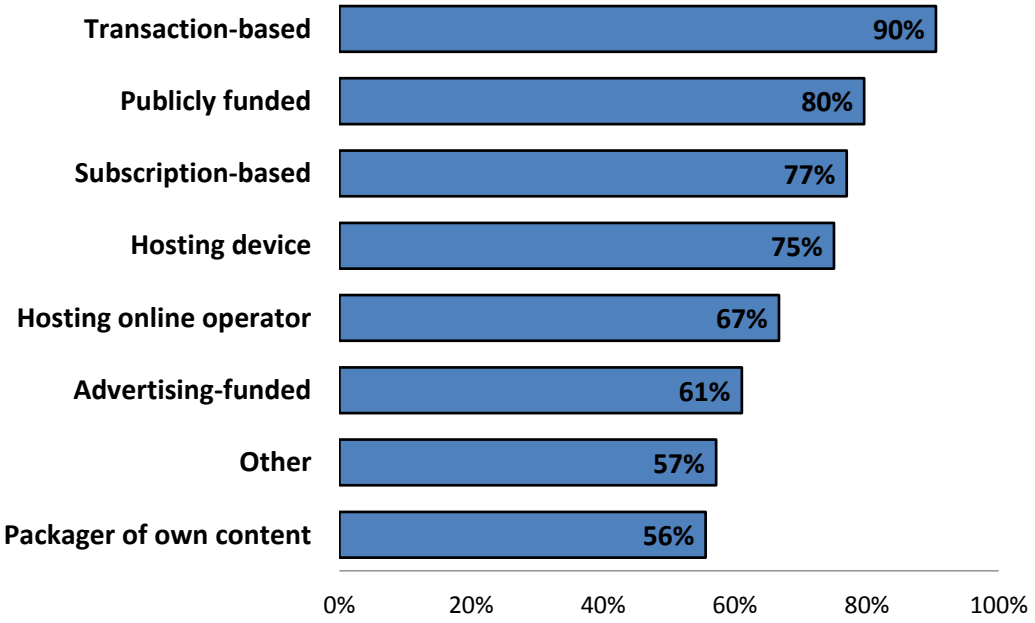
Figure C. 40: Proportion of digital content provider respondents implementing at least one type of geo-blocking by type of operator – EU 28



(165) Similarly, there is also high variation in the extent to which technical geo-blocking measures are deployed when looking at the different types of business models. Figure C. 41 presents data that indicate that the average majority of respondents offering paid services, regardless of whether they are offered pursuant to a transaction- or a subscription-based model, deploy technical geo-blocking measures aimed at limiting cross-border access.

(166) Conversely, operators that adopt a business model centred on advertising sales, as well as those which earn most of their revenues from selling packaged content (possibly to retailers, rather than directly to users), make on average less use of geo-blocking than other operators.

Figure C. 41: Proportion of digital content provider respondents implementing at least one type of geo-blocking by business model – EU 28



4.8.2 Geo-blocking required by licensing agreements

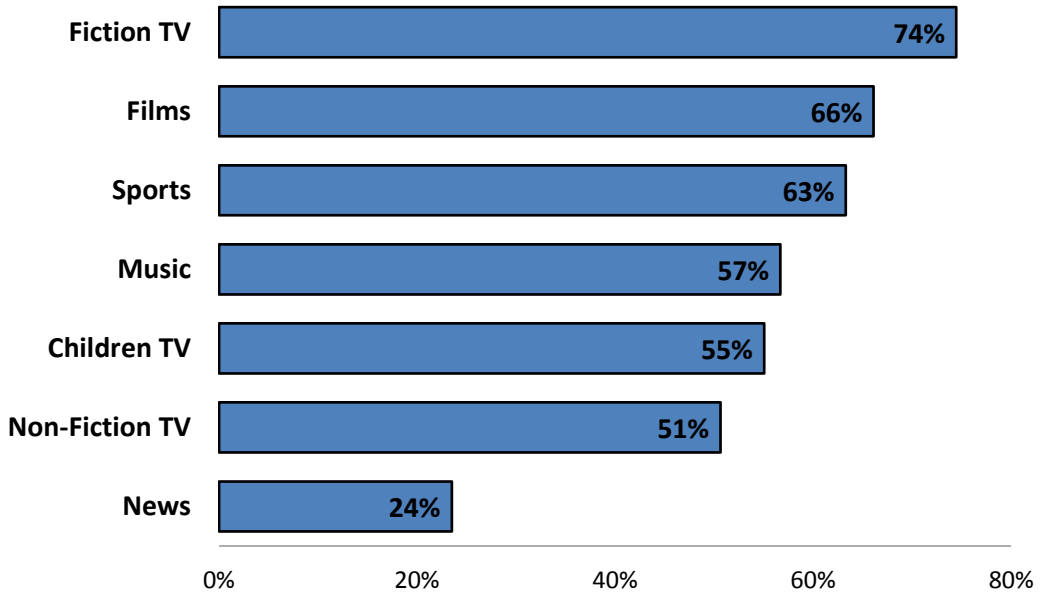
(167) Respondents were asked whether the licensing agreements they have in place with right holders include the requirement to apply geo-blocking measures to prevent access from users located in Member States other than those where the respondent was providing the service.

(168) In particular, the agreements were sub-divided into seven types of products (see paragraphs (673) and onwards) and respondents were asked to include information on the 30 largest suppliers of content for each of these categories.

(169) All agreements that included a requirement for digital content providers to geo-block their service were subsequently aggregated, regardless of the technical implementation of geo-blocking. The extent to which geo-blocking is required as a proportion of the total number of agreements and by category of digital content[26] is reported in figure C. 42.

[26] Respondents were asked to provide the information per supplier. Therefore, while at the level of each individual respondent the information obtained is per supplier, over the whole sample, there may be a duplication of suppliers across respondents. One could in this case consider the above results as being based on the number of "contractual relations" or "agreements."

Figure C. 42: Proportion of agreements requiring providers to geo-block by category – Average for all respondents – EU 28



(170) For example, 74 % of all licensing agreements with suppliers of television fiction submitted by digital content providers require them to geo-block. Licensing agreements for TV drama and TV series, and films and sports events, include requirements to geo-block more often than licensing agreements for other digital content categories.

(171) However the average results mask a high degree of variation.

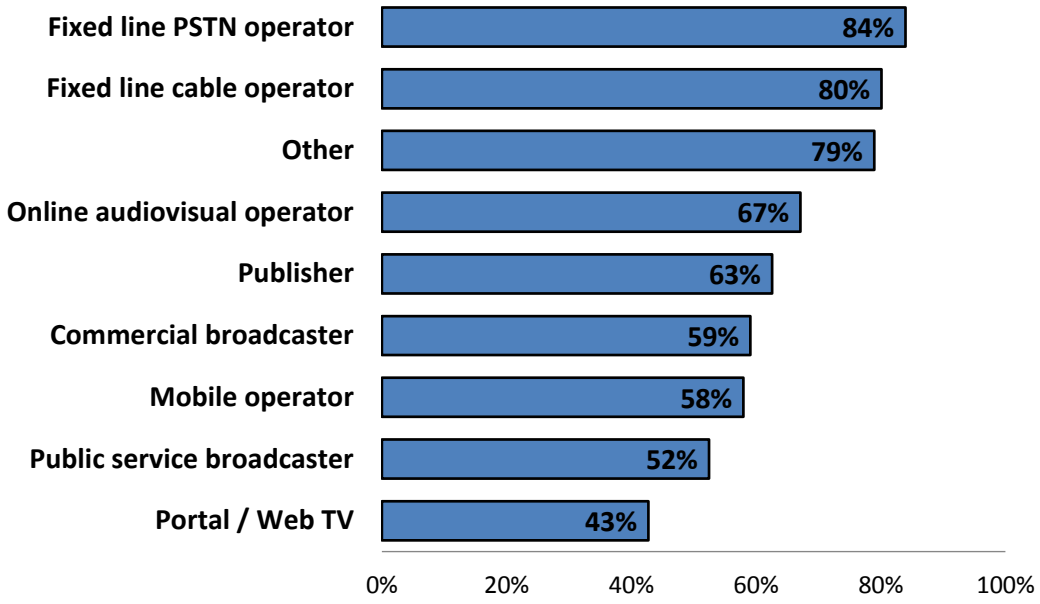
(172) First, respondents in several Member States highlight differences in the prevalence of contractual geo-blocking requirements compared to the average. Agreements on the licensing of digital content such as films, sports and TV series are not in every Member State the ones where the highest degree of geo-blocking is contractually required.

(173) Second, there is a high degree of variation in the extent to which geo-blocking is required for the same category of content. This seems to point to the existence of different business models or different market characteristics.

(174) Looking at the contractual restrictions for each type of operator, figure C. 43 can shed further light on the differences. In particular, fixed line operators have the highest proportion of agreements requiring geo-blocking. Compared to figure C. 40, public service broadcasters face fewer contractual restrictions than it would appear from the extent to which they resort to geo-blocking. This might be linked to the fact that a large part of the digital content they offer is produced by them and licensed intra-group, and thus may not need to impose geo-blocking contractually as a measure to restrict access. Another reason why they then resort to geo-blocking unilaterally may be that they do not have the full range of rights needed to engage in online retransmission of their programmes.

(175) Overall, 59 % of digital content providers are contractually required to geo-block by their suppliers, i.e. right holders.

Figure C. 43: Proportion of agreements requiring digital content providers to geo-block by type of operator



4.8.3 Geo-blocking measures used to restrict cross-border access and portability

(176) Access and portability restrictions are for the purpose of this Report defined as technical geo-blocking measures which restrict the ability of users to access and use content from outside the territory of their Member State.

(177) Respondents were asked whether the technical measures that they apply have any impact on:

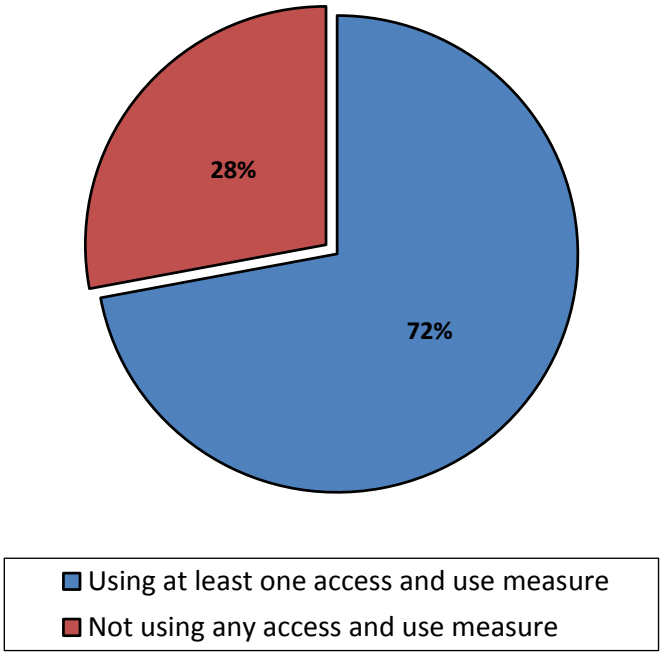
(a) The user's ability to play previously downloaded content in certain territories;

(b) The catalogue of content and / or services available to a given user in different territories; and

(c) The ability of an existing user to access the service in different territories.

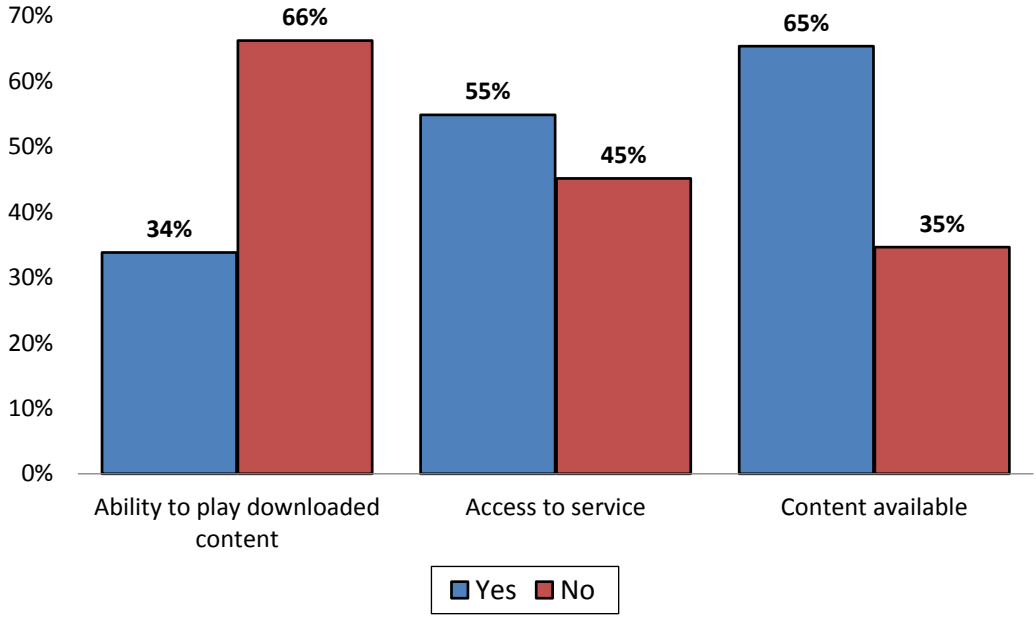
(178) As follows from figure C. 44 below, the replies by digital content providers indicate that access and portability restrictions are frequently used. 112 of the respondents to this question, corresponding to 72 %, indicate that they apply at least one of the three above-mentioned types of restrictions. 44 respondents, corresponding to 28 %, state that they do not apply any of the three above-mentioned access and portability restrictions.

Figure C. 44: Proportion of digital content providers that use technical geo-blocking measures to restrict users' access to and use of digital content



(179) The most common restriction consists of limiting the catalogue of content and accessible services in different Member States. A majority of respondents (65 %) to the above-mentioned question indicate that geo-blocking measures are used to restrict the content and services made available in different Member States, which leads to different content catalogues being offered to users in different territories. A number of respondents also indicate that the restrictions in place affect the ability of an existing user to access the service from certain territories (55 %). A restriction of the users' possibility to play previously downloaded content in certain Member States is less frequently used. 34 % of the respondents indicate that they use technical geo-blocking measures to restrict a user's ability to play previously downloaded content in certain territories.

Figure C. 45: Proportion of content providers that use technical geo-blocking measures to restrict users' access to and portability of digital content – Per type of restriction



4.8.4 Restrictions on access and use in the terms of service for users

(180) In addition to being asked whether they use geo-blocking measures to prevent or restrict access to and use of digital content, digital content providers were also asked whether they restrict users' possibilities to e.g., access content or to play downloaded content in some Member States, through their terms of service.

4.8.4.1 Unilateral restrictions on access and use in the terms of service for users

(181) As regards unilateral restrictions imposed on users by digital content providers through their terms of service, digital content providers were more precisely asked whether their terms of service contain any provisions concerning:

(a) The user's right to access content in certain territories;

(b) The user's right to play downloaded content in certain territories;

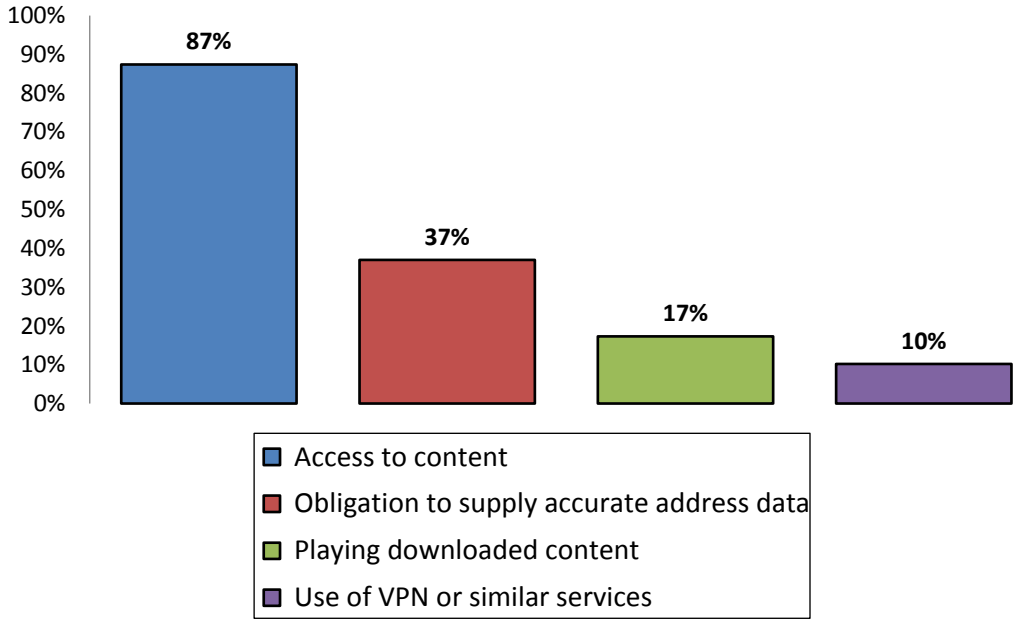
(c) The user's right to access content through VPN and other services that can make it difficult to determine the user's location; or

(d) The user's obligation to supply accurate address data when signing up for an account or a subscription.

(182) As follows from figure C. 46 below, 87 % of the respondents to that question replied that their users' terms of service contain restrictions as to the users' possibility to access content. In addition, around a third (37 %) of the respondents requires the user to supply accurate data when signing up for an account or a subscription.

(183) 10 % of digital content providers do moreover restrict users' right to access content through VPN or other similar services. The replies received to the questionnaires show that some digital content providers do out of their own initiative restrict or prohibit their users to deploy VPN or similar services, and not because they are required to do so by right holders.

Figure C. 46: Proportion of digital content providers that restrict users' access to and use of digital content through their terms of service – All digital content providers



(184) Some respondents have indicated that they have received questions and comments from right holders or other distributors of content concerning the effectiveness of the technical measures they use to ensure that content is not accessed outside the territory or territories for which they hold a licence. Comments were received both during the negotiations of the licensing agreements and thereafter, and both orally and in writing.

4.8.4.2 Contractual restrictions on access and use in the terms of service for users

(185) Digital content providers were also asked whether their terms of service contain access and use restrictions because the licensing agreements with right holders require them to include such provisions in their terms of service. In particular, respondents were asked to indicate whether they were required to include provisions in their terms of service concerning one or more of the following issues:

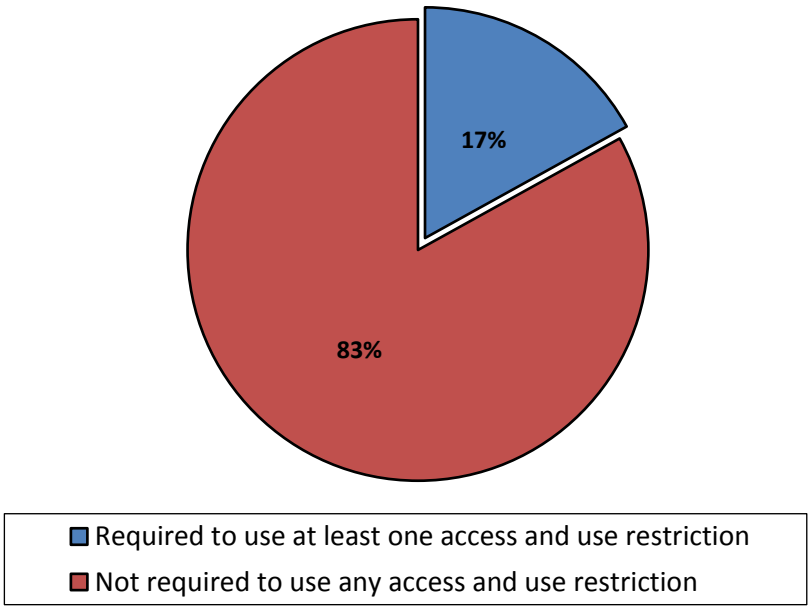
(a) The Member States in which users can access content;

(b) The Member States in which users can play downloaded content; and

(c) The possibility for users to access content through VPN or similar services that can make it difficult to determine the location of the user.

(186) According to figure C. 47 below, 83 % of the licensing agreements submitted by digital content providers require them to include at least one of the above-mentioned restrictions in their terms of service.

Figure C. 47: Proportion of licensing agreements requiring digital content providers to include provisions on access and use in their terms of services – All agreements submitted by digital content providers



(187) According to figure C. 48 below, almost all respondents (93 %) indicated that they are required on the basis of the licensing agreements that they have concluded with right holders to include provisions in their terms of service concerning the Member States in which users may access the content. It is in general less common that the licence agreements require the digital content providers to indicate to the users in which Member States downloaded content may be played. In 22 % of the submitted agreements digital content providers are required to indicate in their terms of service where the users may play downloaded content.

(188) A small minority of respondents (3 %) have replied that right holders require on the basis of the licensing agreements that their terms of service must contain rules concerning the users' access to content via VPN or similar services. Such provisions are only required in relation to the following types of content: fiction TV, children TV, films and music. Figure C. 48 indicate that they are the most common in relation to fiction TV (5 %) and film (6 %) content, but still remain rare.

(189) Figure C. 49 shows that the most frequent restriction throughout all content types is a restriction of the Member States in which the user can access digital content. Restrictions as to the Member States in which users can play downloaded content are overall less frequent and are present mainly in agreements concerning films, sports, fiction and children TV content.

Figure C. 48: Proportion of licensing agreements requiring digital content providers to include provisions on access and use in their terms of services – All agreements submitted by digital content providers

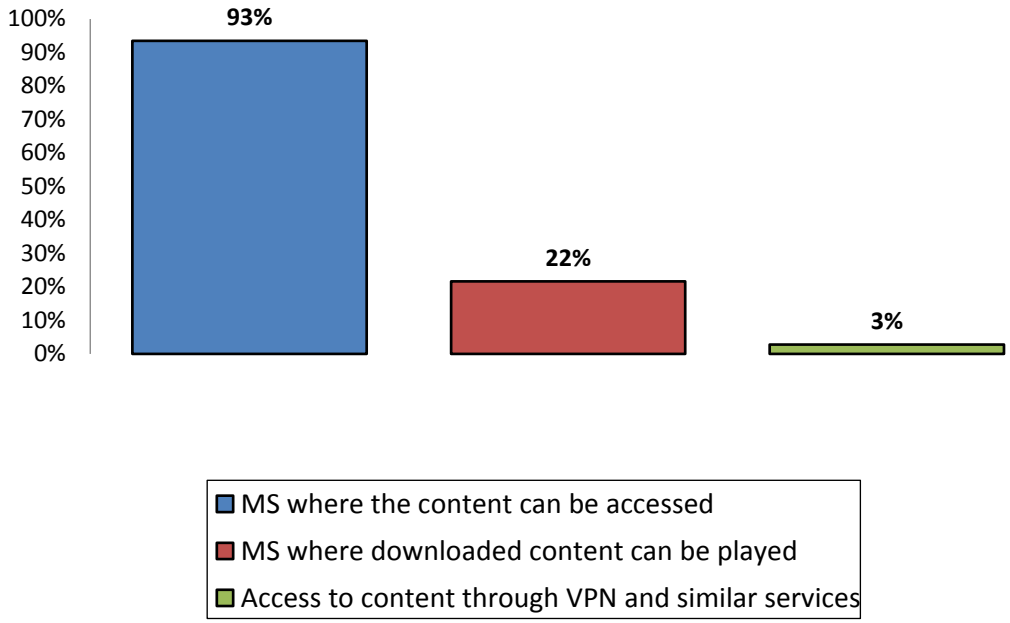
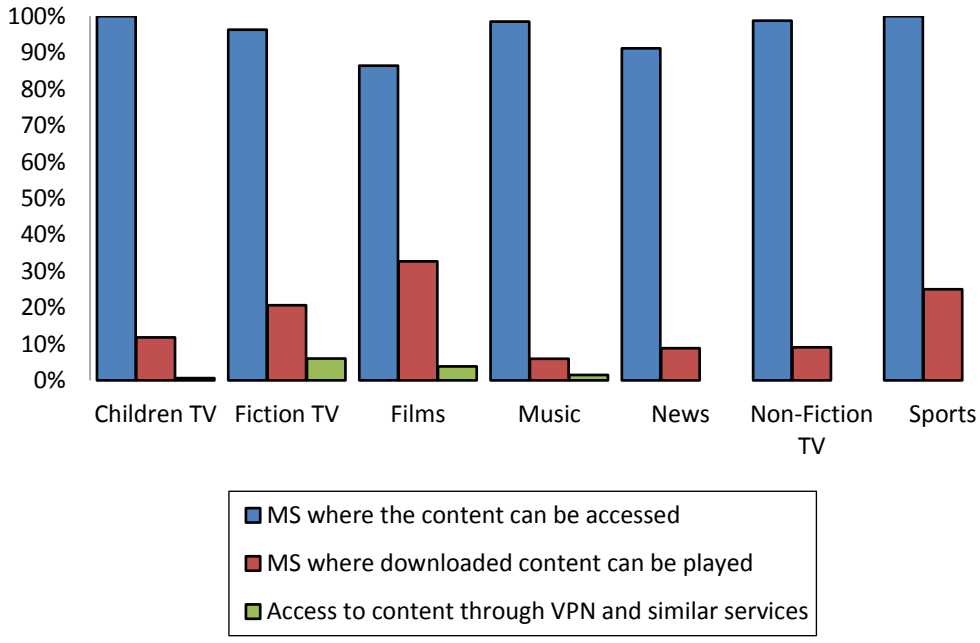


Figure C. 49: Proportion of agreements requiring digital content providers to include provisions on access and use in their terms of services – Agreements submitted by digital content providers by type of content



4.9 Contractual provisions concerning monitoring, sanctions and compensation in relation to geo-blocking

(190) In order to monitor the application and implementation of technical geo-blocking measures, right holders include clauses in licensing agreements in order to verify or audit the way such measures are applied or whether they meet the required standards of geo-blocking. Some agreements also enable right holders to impose sanctions or ask for

compensation in the event the digital content provider does not comply with technical geo-blocking measures or with the provisions defining the territorial scope of the licensing agreement.

(191) It follows from the sections below that a large majority of the submitted agreements include both monitoring clauses and provisions on sanctions and compensation.

4.9.1 Monitoring provisions

(192) As regards the use of clauses enabling right holders to monitor the implementation and use by digital content providers of technical geo-blocking measures, digital content providers were asked whether their licensing agreements with right holders contain such provisions as well as provisions requiring them to take certain actions to keep the right holder informed of the use of geo-blocking measures. Digital content providers were more precisely asked whether the licensing agreements contain provisions requiring them to:

(a) Inform the right holder of specific technical geo-blocking measures and methods used;

(b) Submit data to the right holder concerning the use of technical measures;

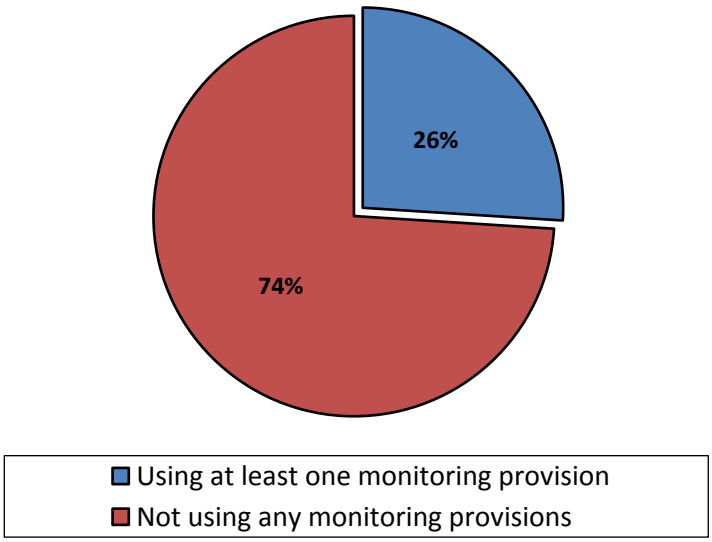
(c) Allow the right holder to audit the technical measures used;

(d) Change the technical measures that the right holder finds insufficient.

(193) In addition to the above options, respondents could also reply that there were "other" types of provisions and were asked to explain their reply.

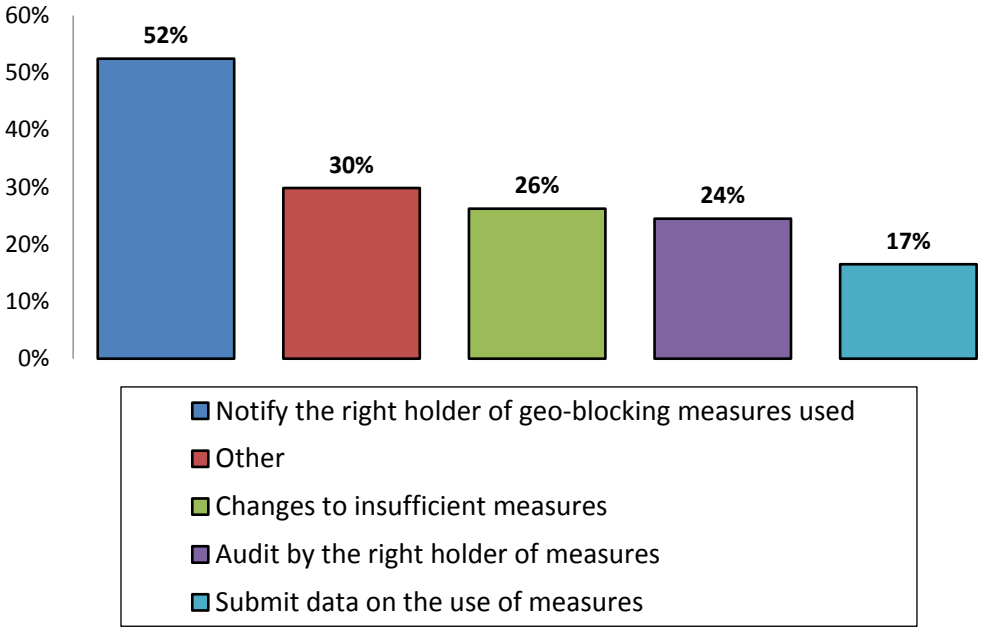
(194) As stated above, monitoring provisions are frequent features of licensing agreements. According to figure C. 50 below, 74 % of the licensing agreements submitted by digital content providers contain at least one of the above-mentioned monitoring provisions.

Figure C. 50: Proportion of licensing agreements that include at least one monitoring provision – All agreements submitted by digital content providers



(195) It follows from figure C. 51 below that the most common monitoring provision that can be found in the licensing agreements submitted by digital content providers is an obligation to notify the right holder of the specific methods or measures used to geo-block. 51 % of these agreements contain such an obligation. The second most common requirement that is present in 32 % of the agreements, is the obligation to allow the supplier to audit the technical geo-blocking measures used.

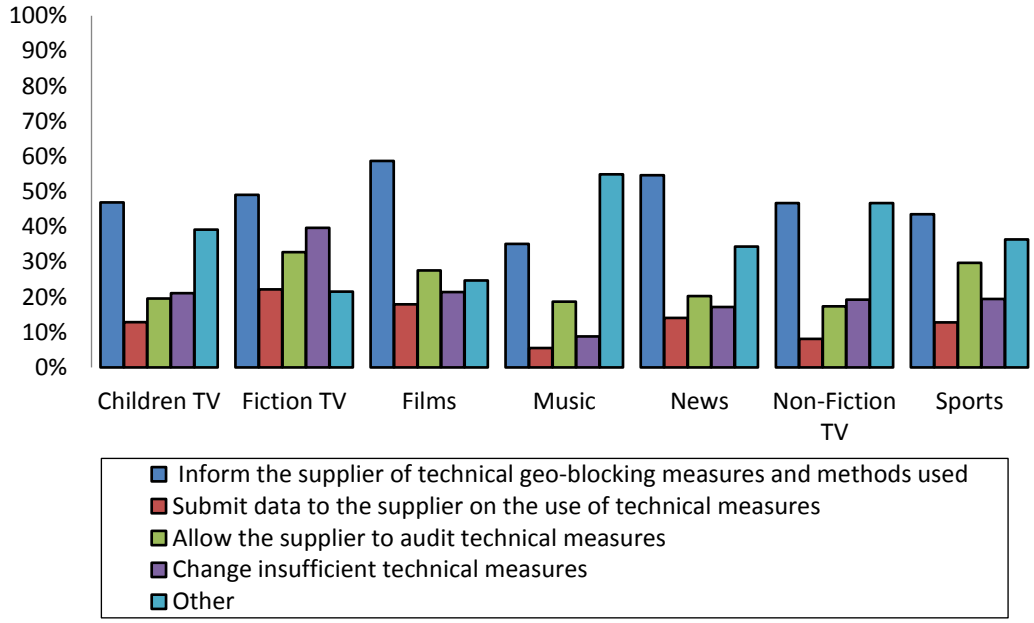
Figure C. 51: Proportion of different monitoring provisions contained in licensing agreements – All agreements submitted by digital content providers



(196) Figure C. 52 below shows that all the content types that were covered by the questionnaire to digital content providers contain all the four monitoring provisions. The

most common one is however the obligation to notify the right holder of the specific methods or measures used to geo-block. Except for music content, around half of the licensing agreements contain such a provision. The second most common requirement, throughout all the seven content categories, is the obligation to allow the supplier to audit the technical measures used.

Figure C. 52: Proportion of licensing agreements that contain monitoring provisions - Agreements submitted by digital content providers - Per content type



(197) Many respondents in each of the content categories have however replied that the licensing agreements contain "other" provisions concerning monitoring. Several respondents indicate that the licensing agreements oblige them to inform the right holders of any unauthorised use of content or any breach of its security and copy control systems, of use of hacking or other pirating software or any other means of circumventing geo-blocking measures as well as the number of catch-up users, the number of views that last for a certain minimum time. Other agreements provide that both contracting parties are obliged to inform each other of any transmissions of content outside the licenced territory.

(198) Respondents also indicate that some agreements enable right holders to technical audits of the digital content providers' services and functions such as storage, hosting, security, performance, display and delivery. Certain agreements moreover give right holders the right to inspect and review the digital content providers' facilities and security systems.

(199) Certain licensing agreements provide that the technical geo-blocking measures used must be the latest on the market and shall be at least as efficient as those used by the digital content provider to protect other right holders' content. Some agreements moreover provide for an obligation to regularly review the effectiveness of geo-blocking technologies used and to upgrade them where necessary. In order to change the

permitted technical geo-blocking measures or other security solutions used, the right holder's written consent is often required.

4.9.2 Sanctions and compensation for non-compliance with territorial and geo-blocking clauses

(200) In addition to monitoring provisions, licensing agreements may also provide for a right for the right holders to request that the digital content providers suspends distribution of content and/ or to ask for compensation in the event the digital content provider does not comply with technical geo-blocking measures or with the provisions defining the territorial scope of the licensing agreement.

(201) The Commission asked digital content providers whether their current agreements with right holders contain provisions allowing the right holder to request that distribution of content is suspended in the following situations:

(a) with immediate notice if the digital content provider does not comply with territorial clauses;

(b) with immediate notice if the digital content provider does not comply with technical geo-blocking measures;

(c) after agreed verification if the digital content provider does not comply with territorial clauses;

(d) after agreed verification if the digital content provider does not comply with technical geo-blocking measures.

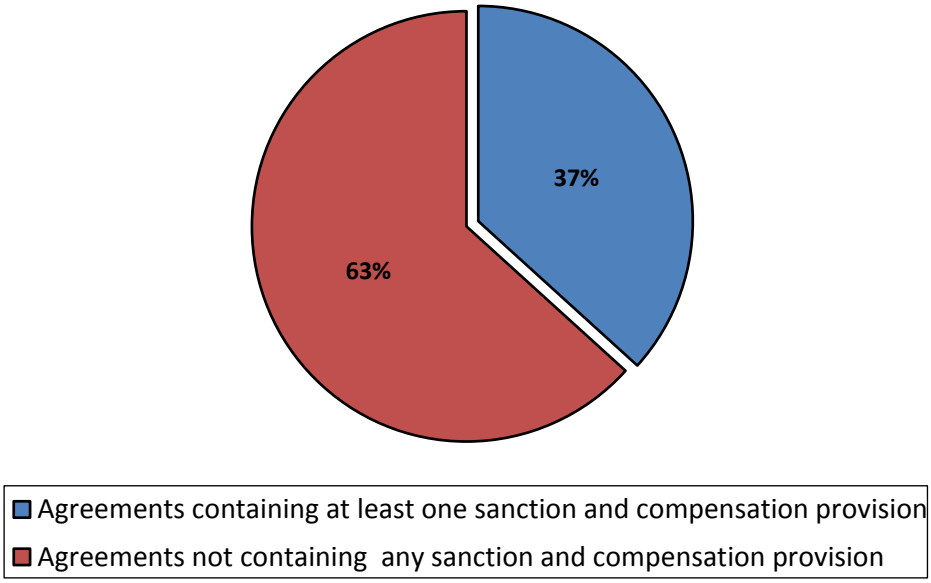
(202) Digital content providers were also asked whether their current agreements with right holders contain provisions allowing the right holder to ask for compensation in the following cases:

(a) if the provider does not comply with territorial clauses;

(b) if the provider does not comply with technical geo-blocking measures.

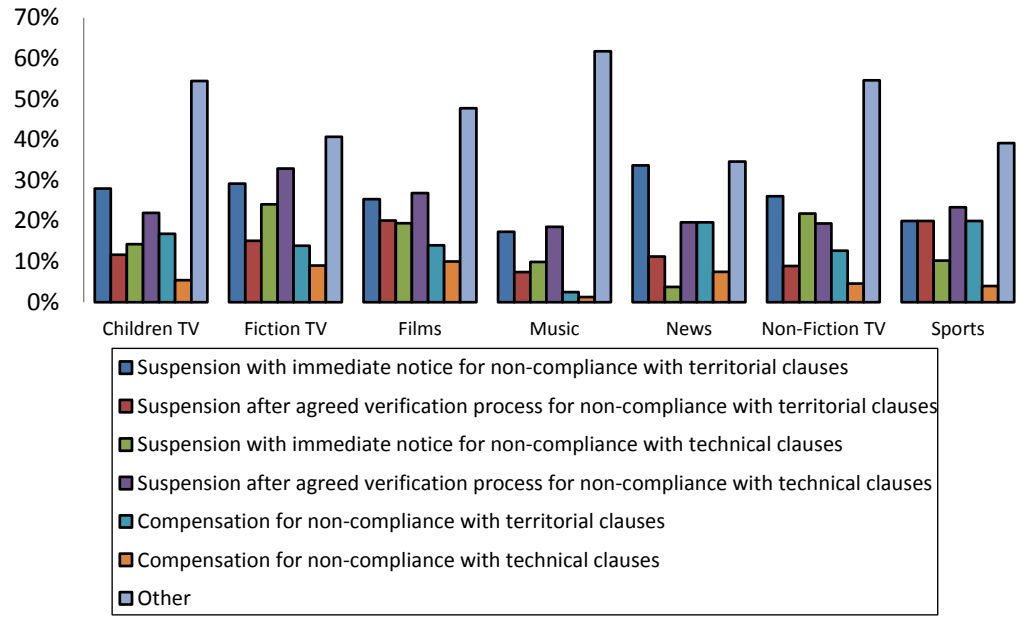
(203) According to figure C. 53, a majority of the licensing agreements submitted by digital content providers (63 %) contain at least one of the above-mentioned provisions.

Figure C. 53: Proportion of licensing agreements that contain at least one provision on sanctions and compensation – Agreements submitted by digital content providers



(204) Figure C. 54 below shows that the provisions on sanctions and compensation contained in the licensing agreements with right holders vary depending on the type of content. However, the most common provisions according to the respondents are those that provide for the suspension of the licensing agreement with immediate notice where the digital content provider has not respected territorial restrictions, and those that provide for suspension for non-compliance with technical restrictions, after an agreed verification process has been completed. Suspension of the distribution of certain titles or products may occur when the right holder becomes aware the title or product has been distributed in a territory not covered by the licensing agreement, for example following complaints from digital content providers in other territories.

Figure C. 54: Proportion licensing agreements that contain provisions on sanctions and compensation – Agreements submitted by digital content providers – Per content type



(205) As follows from figure C. 54, a rather large proportion of the respondents indicate, for each of the content types represented in that figure, that their agreements contained "other" types of provisions concerning verification, sanctions and compensation than the given ones.

(206) Respondents explained that such "other" types would be provisions allowing right holders not only to suspend the distribution of content but also to terminate the agreement in case of breach of the contractual obligations. Respondents indicate that in such cases, the agreement often provides for a possibility for the digital content provider to remedy the breach within a certain time-period before the right holder has the right to terminate it.

(207) Respondents also indicate that provisions that provide for compensation do in general apply to any breach of the agreement and are not limited to non-compliance with territorial restrictions or technical geo-blocking measures. The amount of compensation to be paid to the right holder in such cases seems to vary largely. A couple of respondents indicate that the amount would equal the licensing fees to be paid on the basis of the agreement during the remaining duration of the agreement.

(208) Exclusive licensing on a territorial basis does not raise a competition concern in and of itself. However, when coupled with contractual restrictions on cross-border passive sales, it might be detrimental to competition. Any assessment of these licensing practices under EU competition rules would have to take into account the characteristics of the content industry, the legal and economic context of the licensing practice and / or the characteristics of the relevant product and geographic markets.

4.10 Use of VPN and IP routing services

(209) The Commission contacted several providers of VPN[27] and IP routing services. These services are typically used by individuals and / or organisations that seek to achieve a higher level of privacy in their communications on the internet.

(210) VPN and IP routing services are in principle capable of masking, hiding or replacing the real IP address of the user that makes use of them. It is therefore possible that users may use these services to bypass geo-blocking by digital content providers. Many VPN or IP routing services are established outside of the EU and most of them make use of infrastructure (i.e. mainly servers and leased lines) that are located around the world.

(211) Virtually all respondents to the VPN questionnaire pointed out that they do not collect any type of information on the identity or location of users, nor do they monitor the content of the communications between the user and any other user or service provider.

(212) The 9 VPN and IP service providers that responded have between 20 000 and more than 100 000 regular users in the EU, a large majority of whom access their services regularly (between every day and three times a week). Most respondents pointed to substantial growth rates in the number of users.

(213) Three respondents said that up to 20 % of the traffic generated by users on their service is likely to relate to video, audio or audio-visual streaming, while two said it was between 21 and 40 % and one between 61 and 80 %. It is not possible, however, to determine the extent to which such traffic relates to accessing commercial digital content services.

Summary

A majority of online digital content seems to be made available to users prevalently on a national basis, or for a territory covering two to four Member States, in the latter case when they share a common language. The main reasons why digital content providers do not make their services available in other territories are the cost of purchasing content for territories in which the digital content provider is not yet active, and that the rights for the content is not available for licensing in some territories. Digital content providers that make their services available in two or more Member States do not necessarily offer the same catalogue of content in each of those Member States. The main indicated reason for differences in catalogue between different Member States is that the same rights are not always available for licensing in all the Member States where the digital content provider is active.

Geo-blocking is widely used by respondents across the EU. 70 % of digital content provider respondents restrict access to their online digital content services from other Member States. However responses suggest relatively large differences in the extent to which geo-blocking is

[27] Virtual Private Network, i.e. an encrypted communication channel that can be established between two computers or IP-based devices.

used both between different types of business models and between Member States. In some Member States only a minority of respondents use geo-blocking while in others the majority of respondents do so. Geo-blocking also appears to be more used by certain operators than others. Geo-blocking appears to result from contractual restrictions in licensing agreements between digital content providers and right holders. Almost 60 % of digital content provider respondents are contractually required by right holders to geo-block, and the majority of licensing agreements submitted include such requirements for all product types, except for news products. Geo-blocking is most prevalent in agreements for films, sports and TV series.

Most digital content providers are also required to include restrictions in their terms of service concerning the Member States in which users may access content. Licensing agreements do moreover enable right holders to monitor digital content providers' use of geo-blocking measures or compliance with territorial restrictions, or to impose sanctions and ask for compensation where such measures or territorial restrictions are not complied with.

Exclusive licensing on a territorial basis does not raise a competition concern in and of itself. However, when coupled with contractual restrictions on cross-border passive sales, it might be detrimental to competition. Any assessment of these licensing practices under EU competition rules would have to take into account the characteristics of the content industry, the legal and economic context of the licensing practice and / or the characteristics of the relevant product and geographic markets.

5. THE SCOPE OF LICENSED RIGHTS: RELEASE WINDOWS

(214) The release of many content products is staggered across different release periods (so-called "windows" or "windowing"). The importance of the release window system and holdback clauses is confirmed both by the right holders' and digital content providers' responses.

(215) Release windows are contractually enforced through the so-called "holdback clauses" which preclude the distribution over certain transmission technologies until certain period of time has passed. As will be further explored in section C.6, this is an additional dimension of exclusivity, i.e. temporal exclusivity. The length of each release windows is a matter of complex agreements between right holders and digital content providers.

(216) In particular, this complex mechanism entails that the value of any window is reduced if the following window is scheduled earlier. In other words, windowing is a pricing strategy and price tends to decrease as the product gets older.[28]

(217) The analysis of the release windows is complex, as windows are defined differently by different right holders and for different types of products. For example, in some

[28] There are significant exceptions to this rule, in particular for products that become "classics" or those that acquire a new lease of life when rediscovered by larger numbers of users. Such products can command higher prices, relative to products having an equivalent life span, despite (or more appropriately, in this case, thanks to) their longevity.

instances (e.g. output deals), release windows differs according to the type of transmission technology (basic TV, SVOD, catch up) as well as the type of products. Licensing agreements may include multiple release windows, each of which governed by different rules.

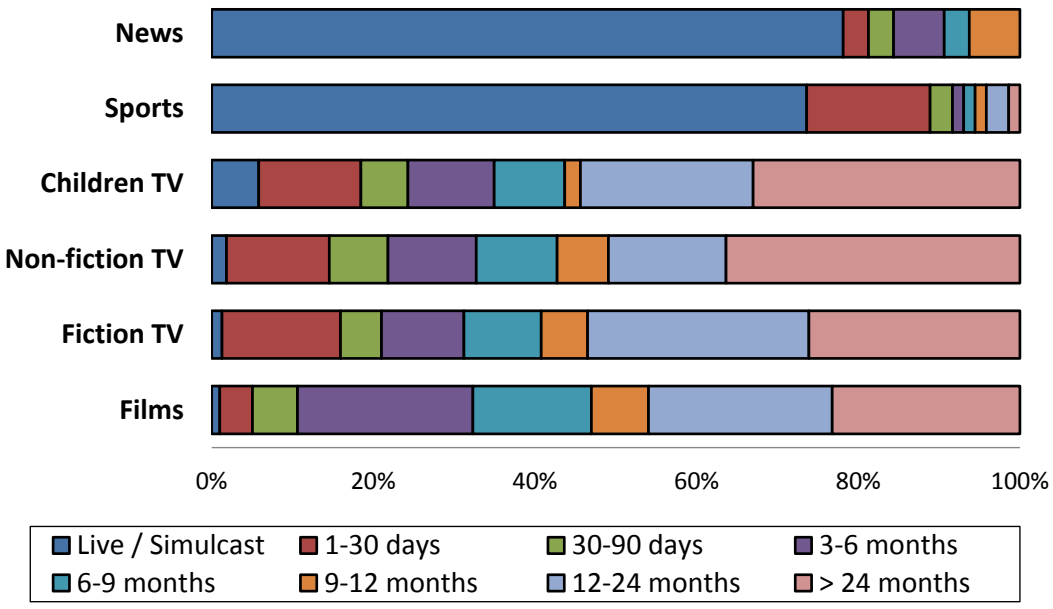
(218) It is also difficult to provide an overview of the different types of release windows given that they are subject to change and may differ between Member States. For most fiction products (i.e. films and television fiction) the pay per view (or video on demand) window tends to open between 3 and 6 months after the first commercial release of a product (i.e. the first time the product is commercialised in a given licensed territory), while the pay-TV window tend to open between 6 and 12 months after the first release. Normally, between 12 and 24 months after its first release the content might already have lost a relatively large part of its commercial value and, therefore, only at this point it is normally released on free-to-air TV.

(219) For other types of products, windowing can be different. In particular, sports and news products tend to loose attractiveness for users immediately after their first release, which tends to be the live broadcast of the sports event or news programme.

(220) Figure C. 55 shows the typical holdback periods applied to online content, according to the type of content. Holdback periods are pervasive in licensing agreements.

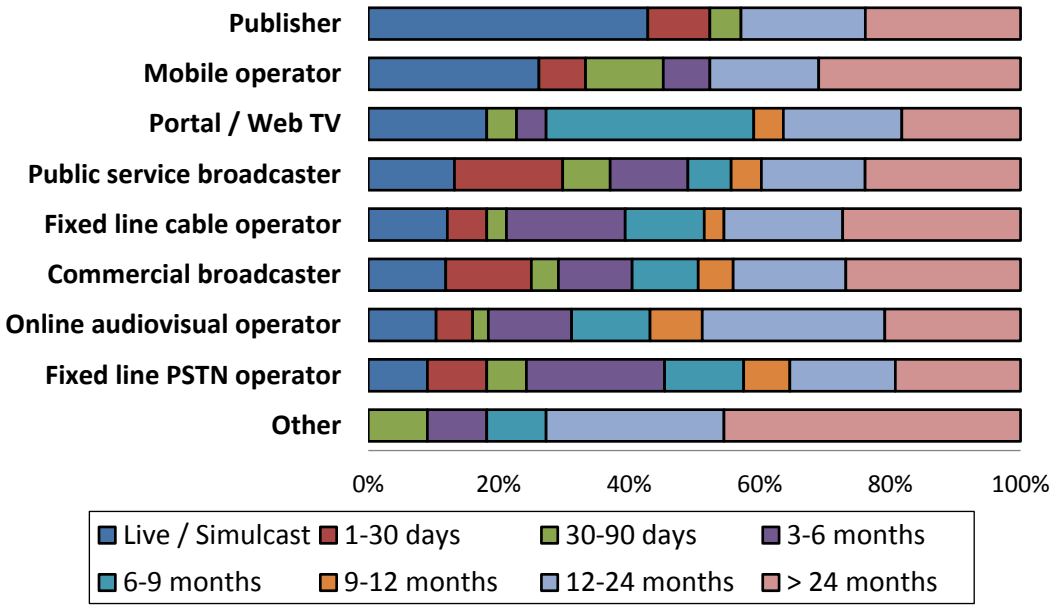
(221) The characteristics of each product determine the release windows. For news and sports products, as can be expected, live or simulcast releases are the most prevalent way to exploit the licensed right. For the other types of products, release windows are more rigidly defined, with increasingly shorter durations of the first windows.

Figure C. 55: Proportion of agreements including specific holdback periods by product type – All agreements submitted by digital content providers



(222) The same conclusion can be drawn if the data is broken down according to the type of operator, rather than the type of content (figure C. 56). Agreements concluded by all types of operators contain the release windows system.

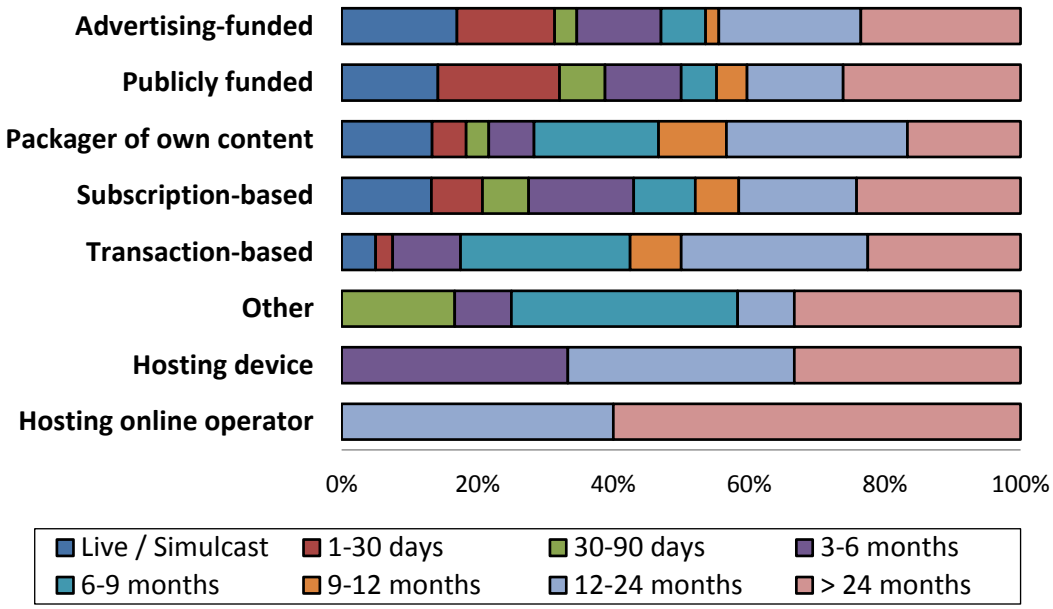
Figure C. 56: Proportion of agreements including specific holdback periods by type of operator – All agreements submitted by digital content providers



(223) Figure C. 56 above shows for each type of operator the proportion of agreements including given release windows. In this regard publishers seem to have the highest percentage of agreements including rights for the first release window. The smallest percentage of agreements including rights for first and second release windows concerns online audiovisual operators and fixed line telephone operators. This reflects their type of offer, centred on paid products for which the release window opens normally between 3 and 9 months after the first release.

(224) The breakdown of the data according to the digital content provider's business models also confirms the importance of the release windows system (figure C. 57). Only hosting online operators do not seem to be particularly restricted by windowing. This might be explained by the fact that a large part of the content they offer is user-generated, and that the relevant rights may have not been acquired in advance from right holders due to that fact.

Figure C. 57: Proportion of agreements including specific holdback periods by business model – All agreements submitted by digital content providers



Summary

The release of many content products is staggered across different release periods (so-called "windows" or "windowing"). Release windows are contractually enforced through the so-called "holdback clauses" which preclude the distribution over certain transmission technologies until certain period of time has passed.

6. EXCLUSIVE RIGHTS IN CONTENT IN LICENSING AGREEMENTS BETWEEN RIGHT HOLDERS AND DIGITAL CONTENT PROVIDERS

(225) As indicated in paragraph (683), rights may be split up or bundled and can be conferred to licensees with or without exclusivity.

(226) As outlined above, exclusivity is often used in association with the licensing of technology rights (limiting transmission, reception or usage technology rights, as seen in section C.3), of territorial rights (section C.4) and of release window rights (section C.5). However, one of the most important uses of exclusivity is in relation to the licensed product itself,[29] i.e. in relation to whether or not digital content providers are entitled to offer the licensed product (content) exclusively.

(227) Both right holders and digital content providers may have incentives to contract with each other on an exclusive basis. Since users will tend to attach greater value to a provider that is in a unique position to offer a specific product, exclusivity is used by

[29] Exclusivity is always about a given product, i.e. a given audiovisual or music product. However, as explained further below, it can also refer to territorial, technology, timing of release, or other dimensions of the economic use of the product.

digital content providers as a means to differentiate their offerings from that of their competitors in order to compete for a wider audience. This is all the more true when the product in question is in high demand. Right holders conversely may have an interest to license their rights on an exclusive basis to extract higher revenues for their content.

(228) The fact that exclusivity may or may not be used when licensing online rights does not necessarily imply that the offline rights are licensed on the same basis although online rights are normally licensed along with offline rights. It is possible, and indeed a widespread practice, for different transmission technology rights to be licensed on different terms as regards exclusivity.

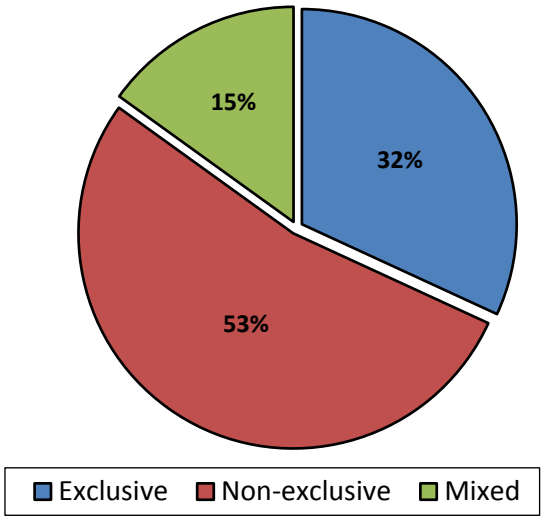
(229) Digital content providers have been asked to describe their licensed online rights as exclusive or not. In the analysis that follows, rights can be exclusive, non-exclusive, or mixed. The "mixed" category refers to rights that are in some cases exclusive, and in others non-exclusive, at the same time. This category covers for example instances in which the licensed right have been split by the right holder into several components and exclusivity has not been attached to all.

(230) For example, the exclusivity might not cover all types of transmission technologies (e.g. exclusive rights may concern satellite broadcasting while online broadcasting may be non-exclusives) and / or all territories (e.g. digital content providers may be granted exclusivity only in certain Member States).

(231) Conversely, the "exclusive" category refers to instances in which the licensing right has been conferred in full to a digital content provider that has also been granted exclusivity, for all territories and all technologies. In light of that the "mixed" and "exclusive" categories in the figures provide an idea on the extent to which licensors have control over the licensed products – and conversely the extent to which the products to which the rights refer will not be available to other providers. Therefore, in the following paragraphs the reference to agreements with a certain degree of exclusivity will include both "exclusive" and "mixed" licensed rights.

(232) The following figures show the overall proportions of licensing agreements containing different degrees of digital content product exclusivity across the whole EU. About half of the agreements contain some degree of exclusivity, pointing to the fact that exclusivity in different forms is widespread in the exploitation of online rights (figure C. 58).

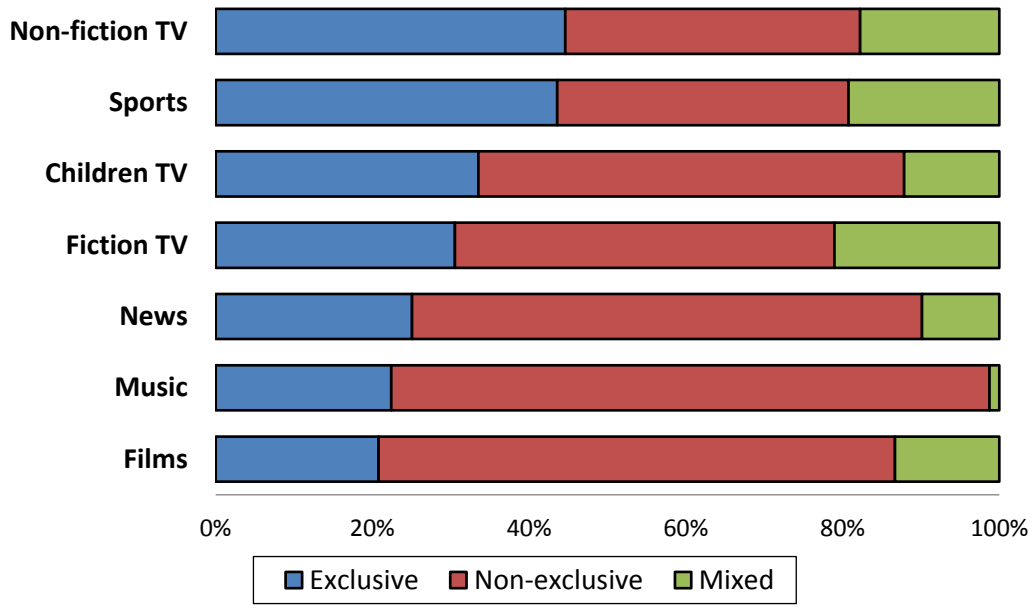
Figure C. 58: Proportion of agreements including exclusive product rights – All agreements submitted by digital content providers



(233) The pervasiveness of exclusivity is also confirmed when looking at types of content and types of service providers.

(234) With regard to the type of product, figure C. 59 shows that exclusivity is granted in a significant proportion of agreements for all product types.

Figure C. 59: Proportion of agreements including exclusive rights – All agreements submitted by digital content providers by product type



(235) The highest proportion of licensing agreements containing some degree of exclusivity is in sports and non-fiction TV agreements. The smallest proportion of exclusive

agreements can be found in music agreements, while the highest degree of exclusivity can be found in sports agreements, which normally include products considered premium content along with television fiction and so-called first-release films.

(236) In this respect, it might seem surprising that exclusivity does not seem to be prevalent in licensing of online rights of films to a greater extent. However as the data concerns online licensing only, it is not excluded that non-online rights in films may be licensed on an exclusive basis. In addition, and more importantly, while this category includes premium content, it nonetheless contains (predominantly) library products which are of lower value and, therefore not licensed on an exclusive basis.

(237) Exclusivity can also be analysed with regard to the type of operator (figure C. 60) as well as by business model (figure C. 61).

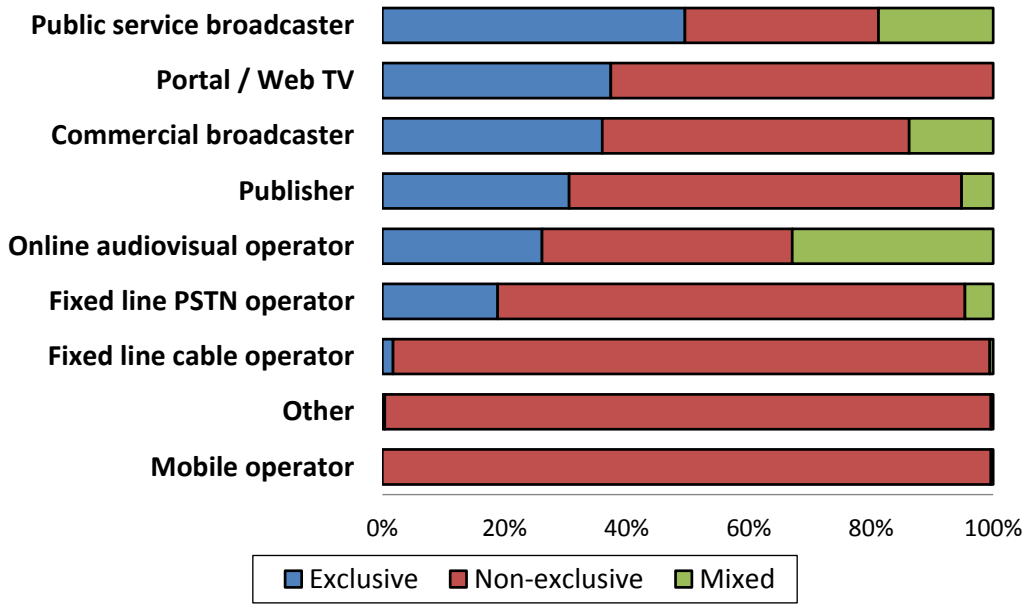
(238) Some degree of exclusivity is found for all types of operators, with the notable exception of mobile operators and fixed line cable operators. This might indicate that electronic communications operators have more difficulty in accessing exclusive rights than other types of operators when it comes to online rights.

(239) The opposite applies to public service and commercial broadcasters, which both have the highest proportion of agreements including some degree of exclusive rights (69 % and 50 % respectively). That can be explained by the fact that these broadcasters often simulcast on their websites content that they broadcast on-air. This content may be either externally acquired normally under exclusivity clauses or more often internally produced. In the former case, broadcasters may be exclusive licensees offline. The exclusivity which characterises the offline rights is therefore reflected in the commercial exploitation of the online rights.

(240) A small proportion of agreements (36 %) containing some degree of exclusivity is reported by publishers (e.g. online content distributed by magazines and newspapers through their own websites). A large part of the content these operators put online is not produced by them. Such content is widely available online and therefore more widely distributed on a non-exclusive basis.

(241) Finally more than half of the agreements of online audiovisual operators contain exclusive rights. As explained in section C.1.1.1 Types of operators this category is defined broadly, including any other type of audiovisual operator only or partly offering online services. In particular, it covers different operators such as pure online distributors and operators having paid offers for which exclusivity may play an important role.

Figure C. 60: Proportion of agreements including exclusive rights – All agreements submitted by digital content providers by type of operator



(242) Figure C. 61 below, which shows the proportion of agreements containing different degrees of exclusivity by business model of respondents, seems to broadly confirm the results of the analysis discussed above with regard to types of operators. Exclusivity plays a particular role in licensing agreements of both publicly- and advertising-funded broadcasters.

(243) Operators that package own content have the highest proportion of exclusive and mixed agreements (66 %) after publicly funded operators (i.e. public service broadcasters). Packagers tend to focus their operation on packaging channels (e.g. thematic channels), which are then licensed to other operators. The content that they package can be either internally produced or externally acquired normally under exclusivity clauses (or both).

(244) Conversely, the data show that agreements submitted by hosting device operators (such as media streamers or videogame consoles) are characterised by non-exclusive online rights. The same applies to hosting online operators (for which only a small proportion of agreements is exclusive). There may however be different explanations for this result.

(245) For hosting device operators, online rights seem to be mainly related to on demand products. This type of offer is getting more available across different transmission technologies, and can include both products released in the first windows of exploitation (e.g. films available to rent or buy immediately after the theatrical release or TV series just released), or older products, or, at times, live events available on a pay per view basis. However the offer is strongly dependent on the availability of territorial rights, so that the range of products tends to vary substantively between Member States.

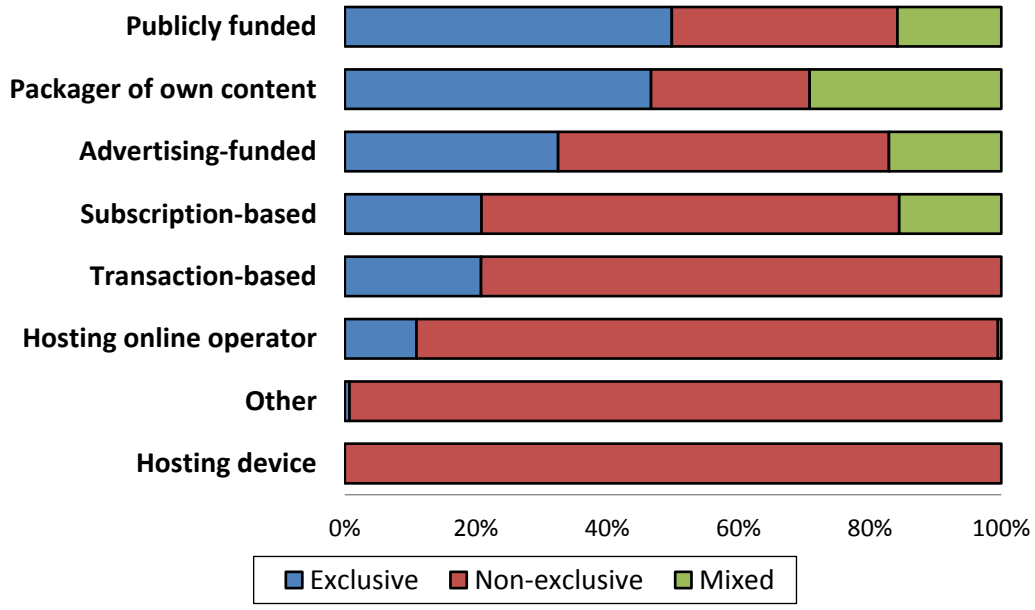
(246) Online hosting operators seem to mainly focus on library products and their offers tend not to include significant proportions of exclusive products.

(247) The results for mobile transmission rights might be seen as difficult to reconcile with section C.3.4 on technology rights exclusivity, where a significant proportion of the agreements submitted by right holders include exclusive rights to mobile transmission (figure C. 24).

(248) The likely explanation is that whilst mobile operators may not be granted exclusive rights to mobile transmission, right holders may grant them to other digital content providers.

(249) The Commission considers that the use of exclusivity is not problematic in and of itself. It needs to be assessed taking into account the characteristics of the content industry, the legal and economic context of the licensing practice and / or the characteristics of the relevant product and geographic markets.

Figure C. 61 – Proportion of agreements including exclusive rights – All agreements submitted by digital content providers by their business model



Summary

Exclusivity is often used in association with the licensing of technology rights (limiting transmission, reception or usage technology rights) and of territorial rights. Exclusivity is also used in relation to the licensed product itself, i.e. in relation to whether or not digital content providers are entitled to offer the licensed product (content) exclusively. Exclusivity in different forms is widespread in the exploitation of online rights.

The Commission considers that the use of exclusivity is not problematic in and of itself. It needs to be assessed taking into account the characteristics of the content industry, the legal and economic context of the licensing practice and / or the characteristics of the relevant product and geographic markets.

7. DURATION OF LICENSING AGREEMENTS AND CONTRACTUAL RELATIONSHIPS

(250) The duration of the licensing agreement or of the contractual relationship between a right holder and a content service provider is, together with the technological and territorial scope of the agreement or relationship a key component of licensing of rights in content.

(251) The Commission asked right holders to provide information about the duration of both agreements and contractual relationships and for information about the use of renewal clauses as well as clauses giving the contracting party the right to a first renegotiation of an agreement.

7.1 Duration of on-going licensing agreements

(252) In relation to on-going licensing agreements, right holders were asked to indicate the duration (in months) of each of the eight most valuable agreements that were submitted to the Commission in the course of the sector inquiry.

(253) Figure C. 62 below indicates that a non-negligible number, i.e. 14 %, of the submitted licensing agreements were concluded for a duration of between 5 and 10 years. Another 9 % of the submitted agreements were concluded for a time period of beyond 11 years. A few respondents have moreover indicated that their agreements were concluded for a period of 20 years or beyond.

(254) The results of the sector inquiry also show that the average duration of the licensing agreements varies depending on the digital content category concerned. As follows from figure C. 63 below, the average duration of the submitted licensing agreements in music is shorter than the average duration of the agreements concerning rights in sports as well as fiction and children TV.

Figure C. 62: Duration of licensing agreements - Proportion of all agreements submitted by right holders

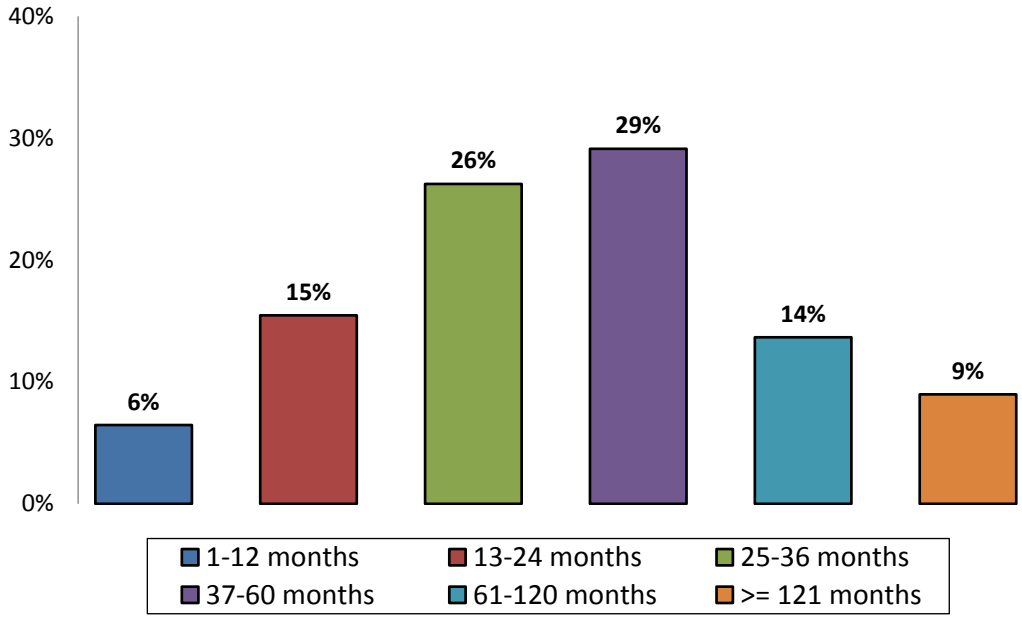
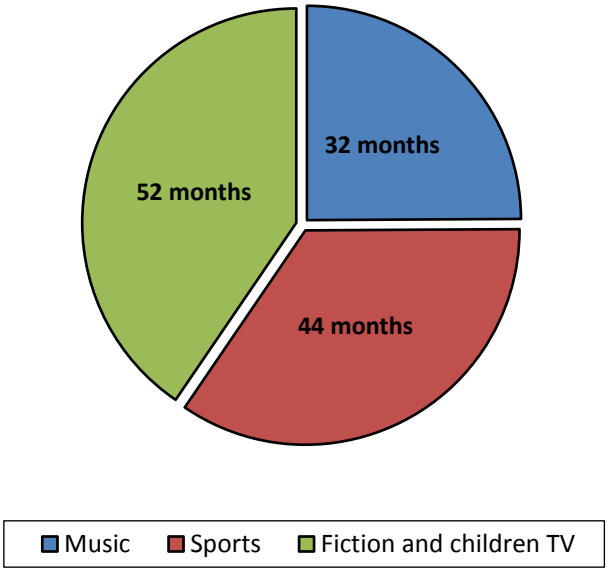


Figure C. 63: Average durations of the submitted licensing agreements - All agreements submitted by right holders - Per genre

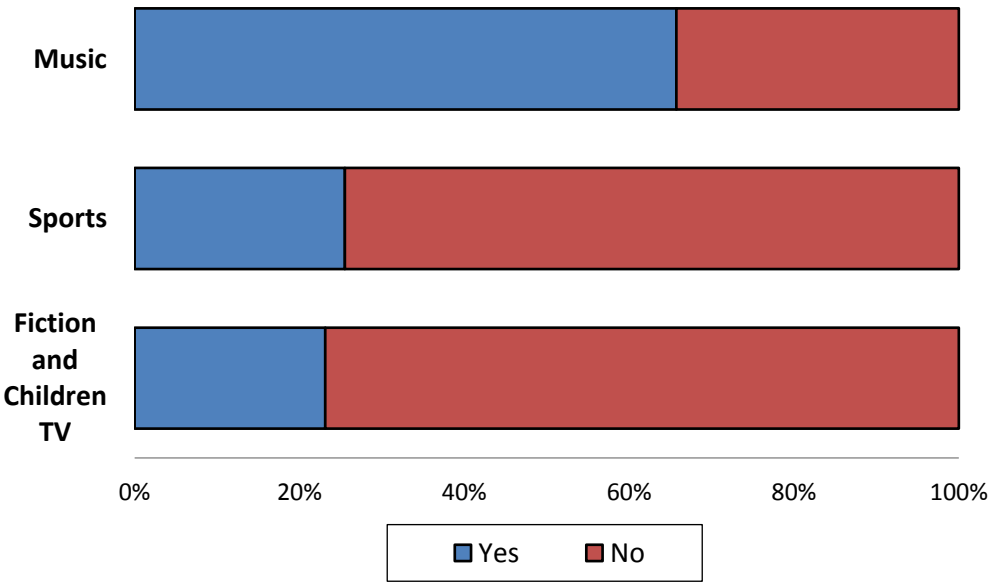


7.2 First time agreements

(255) In order to obtain information about the extent to which right holders are contracting with new contracting parties, right holders were asked whether it was the first time they had concluded a licensing agreement with a specific contracting party.

(256) Figure C. 64 below shows that the responses from music right holders indicate that a large number (66 %) of all the submitted licensing agreements were first time contracts. The number of respondents holding rights in sports content and in TV content that replied that it was the first time they had concluded a licensing agreement with their contracting party is much lower. Around 23 % of right holders in fiction and children TV content and 26 % sports right holders indicated that the submitted licensing agreements had been concluded with a new contracting party.

Figure C. 64: Proportion of first time agreements between the contracting parties – All agreements submitted by right holders – Per genre



7.3 Length of the existing contractual relationships

(257) Right holders were also asked to indicate, in relation to the licensing agreements that were not identified as first time agreements, since when they were having a contractual relationship with the specific contracting party.

(258) Figure C. 65 below shows the average length of the contractual relationship between a right holder and its contracting party. The replies submitted by right holders indicate that the average contractual relationship between right holders and their contracting parties are longer in the sports[30] as well as fiction and children TV sectors, than in the music sector.

(259) Figure C. 65 shows that music products are to a larger extent than sports and fiction and children TV content licenced to new contractual parties with whom the right holder started a contractual relationship between 1 and 5 years ago. 42 % of the submitted licensing agreements concerning music rights were concluded with contracting parties with whom the contractual relationship started between 1 and 5 years ago. The corresponding figures for sports are 4 % and for fiction and children TV 29 %.

(260) The results of the sector inquiry also show that the contractual relationships in the sectors sports and fiction and children TV are on an average longer than in the music sector. According to figure C. 65 below, over 70 % of all the contractual relationships in the sports and fiction and children TV sectors have lasted for at least 6 years. As regards licensing of rights in music content, it follows from the submitted data that the longest

[30] The Commission acknowledges that, within the sport sector, the length of contracts is not strictly relevant for sports rights which are licensed via competitive tender process and for a term usually not exceeding three years.

contractual relationships are between 11 and 15 years long. These correspond to 25 % of all submitted agreements from music right holders. Figure C. 65 also shows that for licensing agreements submitted by sports right holders and right holders in fiction and children TV that 21 % of the contractual relationships in the sports sector and 21 % of the contractual relationships in fiction and children TV, have been on-going for more than 20 years ago. Some respondents indicate that they have had contractual relationships with the same provider of content for over 70 years (i.e. before the existence of digital content).

Figure C. 65: Average length of the contractual relationship - All agreements submitted by right holders - Per genre

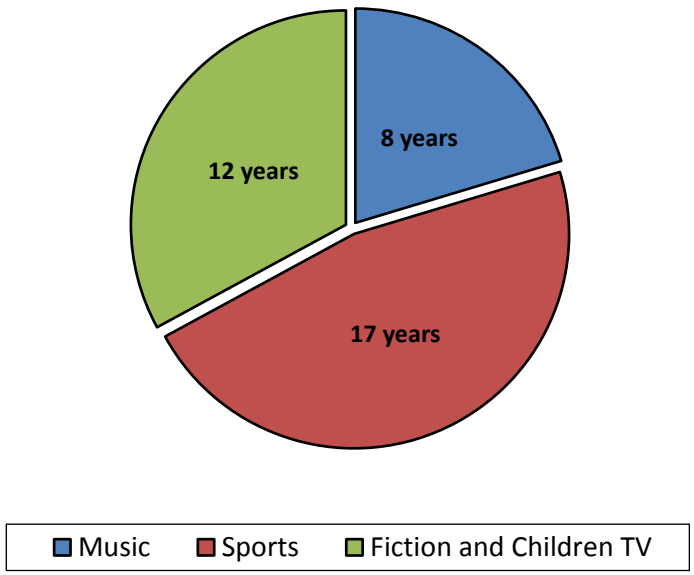
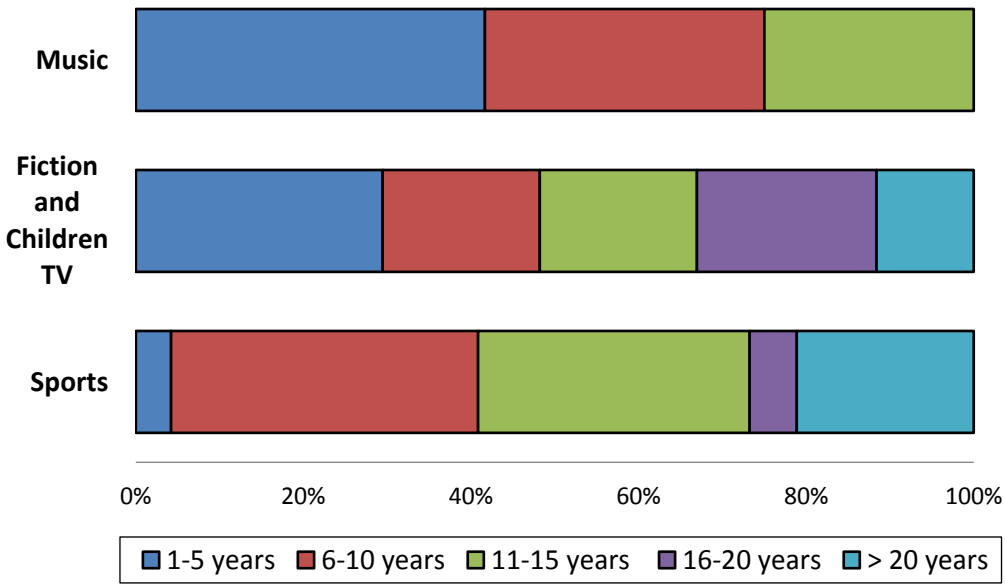


Figure C. 66: Proportion of agreements by length of the contractual relationship - All agreements submitted by right holders – Per genre



7.4 Renewal clauses and rights of first refusal

7.4.1 Right of first refusal

(261) The right of first refusal is a contractual right that gives its holder the option to enter a business transaction, according to specified terms, before the other contracting party is entitled to enter into a transaction with a third party.

(262) Where such a right exists in relation to the licensing of rights in digital content, it allows the digital content service provider to choose whether to prolong an existing contract, e.g. to obtain the rights in future episodes of the TV-series covered by existing agreements with the same right holder.

(263) It follows from figure C. 67 below that almost a fifth of all the licensing agreements submitted by right holders contain the right of first refusal. According to figure C. 67, none of the agreements regarding licensing of music rights contain the right of first refusal.[31] The right of first refusal is rather common in agreements on fiction and children TV (27 %) and it also exists in agreements licensing sports rights but is less frequent in these types of agreements (3 %).

(264) Some respondents which replied that their agreements do not contain any right of first refusal did however mention that their agreements do instead contain the right of first (re)negotiation. This right offers the digital content provider a possibility to negotiate exclusively with the right holder before the latter can negotiate with third parties. In contrast to the right of first refusal, the right of first negotiation does most often not provide for an option to conclude a transaction on already defined terms.

[31] Figure C. 68 does therefore not include any results for music.

Figure C. 67: Proportion of the submitted licensing agreements that contain the right of first refusal - All agreements submitted by right holders

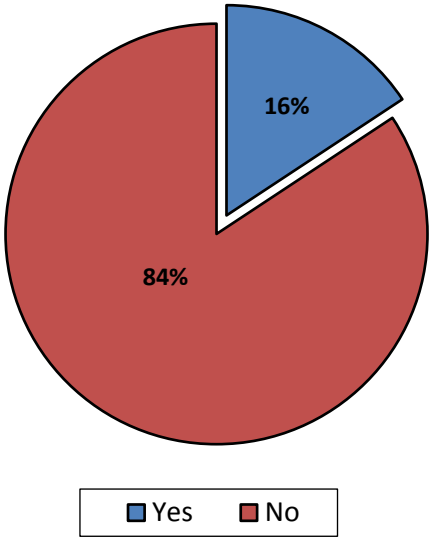
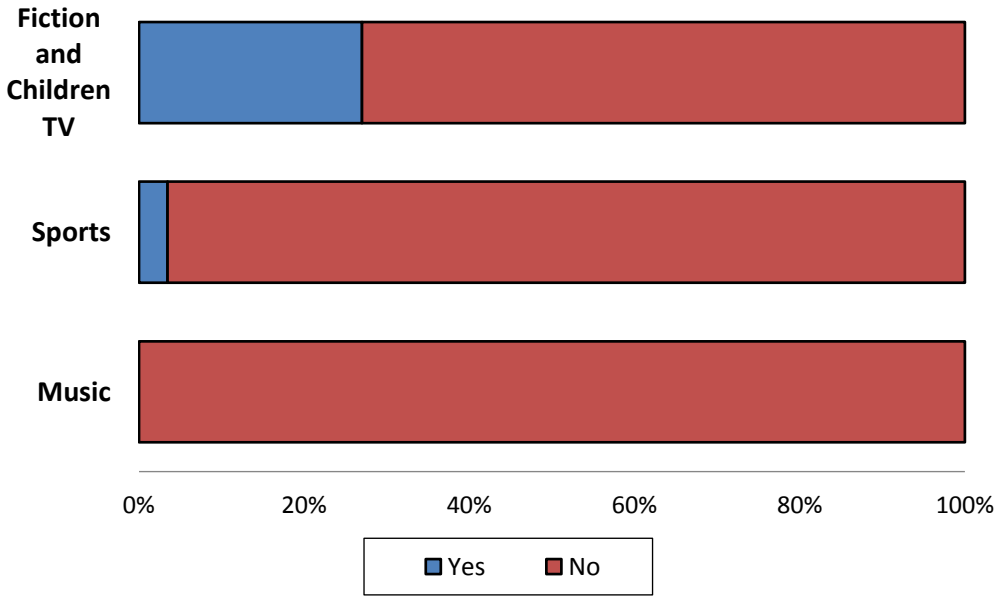
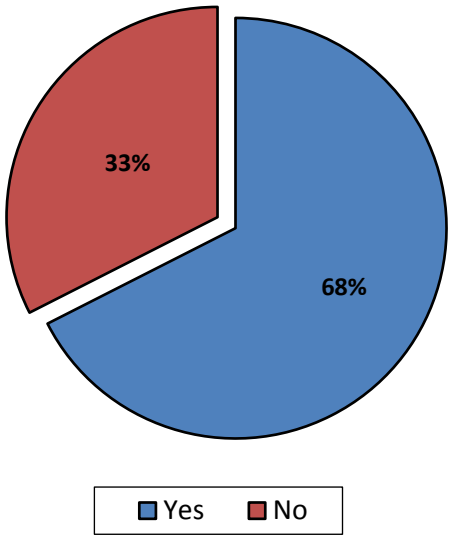


Figure C. 68: Proportion of agreements providing for a right of first refusal – All agreements submitted by right holders - Per genre



(265) Figure C. 69 below shows to what extent the right of first refusal contained in licensing agreements was actually exercised. According to figure C. 69, the right was exercised in relation to 33 % of all the submitted licensing agreements that provide for that right. As regards licensing agreements concerning rights fiction and children TV content, the right was exercised on the basis of 65 % of the agreements that provide for such a right.

Figure C. 69: Proportion of agreements on the basis of which the right of first refusal was exercised - All agreements submitted by right holders



7.4.2 Renewal clauses

(266) An automatic renewal clause is a clause that would typically stipulate that an agreement will automatically renew at the end of each term for a further defined period unless one of the parties to the agreement gives notice of termination.

(267) Right holders were asked whether the submitted agreements had been renewed on the basis of an automatic renewal clause.

(268) According to the responses that are presented in figure C. 70 below only a minority, 6 %, of the agreements had been renewed on the basis of such a clause. Figure C. 71 shows that it is mostly the licensing agreements submitted by music right holders (corresponding to 24 % of the submitted licensing agreements in music) that were renewed on the basis of an automatic renewal clause.

(269) Renewal clauses can relate to agreements potentially or actually including licences for a large number of products, or agreements for valuable products, or, as it often happens, a combination of the two. So-called output deals would frequently imply that a right holder licences all its rights to a digital content provider over the course of several years.

Figure C. 70: Proportion of agreements that were renewed on the basis of an automatic renewal clause – All agreements submitted by right holders

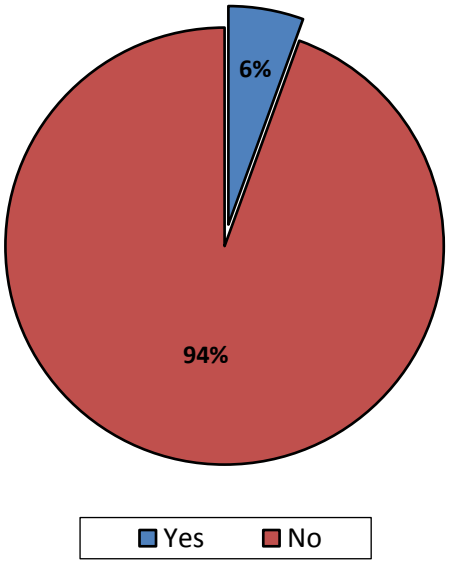
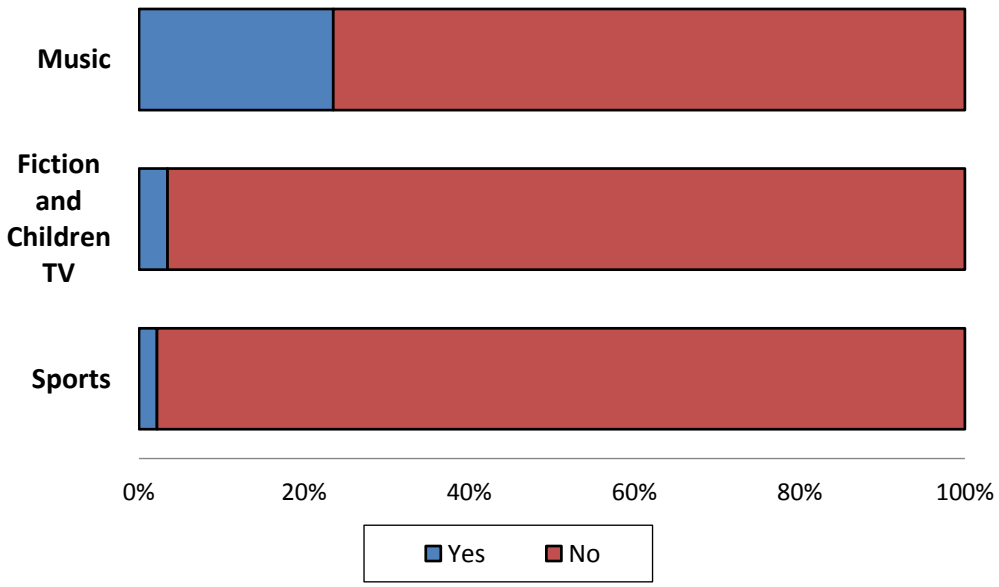


Figure C. 71: Proportion of agreements that were renewed on the basis of an automatic renewal clause – All agreements submitted by right holders – Per genre



7.5 Matching offer rights

(270) Both the licensing agreements submitted by right holders and by digital content providers sometimes contain clauses providing for a matching offer right. This right, which is often exercised when the duration of a certain agreement comes to an end, enables the digital content provider to match an offer made by a third party competitor, or make a higher offer. Where an agreement contains a matching offer right and the

right holder receives an offer from a third party for the rights covered by the right, the right holder must first inform its existing contracting party of the third party offer in order to enable the contracting party to make a matching offer which the right holder then has to accept.

(271) The scope of matching offer rights may differ from one licensing agreement to another. Such a right may apply to the rights in a certain product or in future versions of a product covered by an existing agreement or to rights in different products. The use of matching offer rights increases market transparency, since it allows the contracting party to know who its competitors are, and also price transparency, since at least the beneficiary of the right will know what his third party competitor has offered. The use of matching offer rights may constitute a way to extend the duration of an existing agreement or a contractual relationship.

Summary

Licensing agreements are often concluded for rather long durations and contracting parties often renew existing agreements. Such renewal of licensing agreements is sometimes done on the basis of specific clauses such as automatic renewal clauses and clauses providing for a right of first negotiation, a right of first refusal or a matching offer right. The fact that contracting parties often decide to contract again or renew or extend existing licensing agreements instead of contracting with new parties, leads to long term contractual relationships. This is likely to make it more difficult for new players to enter the market, or for existing operators to expand their current commercial activities into e.g. other transmission means such as online, or to other geographical markets.

8. PAYMENT STRUCTURES IN DIGITAL CONTENT LICENSING AGREEMENTS

(272) The metrics and concepts underlying the payments requested by right holders for the acquisition of the right to commercially exploit a specific product and offer it as part of a digital content service are one of the key elements in the commercial relationship between upstream suppliers/right holders and downstream digital content providers and can have substantive repercussions on how downstream markets are structured and operate.[32]

8.1 Definitions and data set

(273) This section will make use of the data set described in section C.6 in part A, i.e. a set of more than 6 800 agreements provided by both digital content providers and right holders.

[32] This section focuses exclusively on wholesale payments by digital content providers to rights holders. Retail payments by users to digital content providers are not relevant, except where they are used as a metric in the licensing agreement (for example, when a licensing agreement refers to subscription or transaction volumes).

(274) For online rights, respondents were asked to describe what type of payments their agreements contained. In particular, each class of respondents had the possibility to choose among the categories indicated below (with multiple responses allowed):

(a) **Digital content providers**:

- Flat fee per content: A single, fixed price for a single product;
- Flat fee per package of items: A single, fixed price for a bundle of products;
- Fixed fee per download/stream: A single, fixed price per sale;
- Variable fee per download/stream: A multiple, variable price per sale;
- Fixed fee per subscriber: A single, fixed price per subscriber;
- Variable fee per subscriber: A multiple, variable price per subscriber;
- Minimum guaranteed return per content: A minimum payment to be made for each type of product, regardless of the level of sales, subscribers or other performance metrics;
- Minimum guaranteed return overall: A minimum payment to be made per bundle of products, regardless of the level of sales, subscribers or other performance metrics; and
- Other: Any other type of payment mechanism.

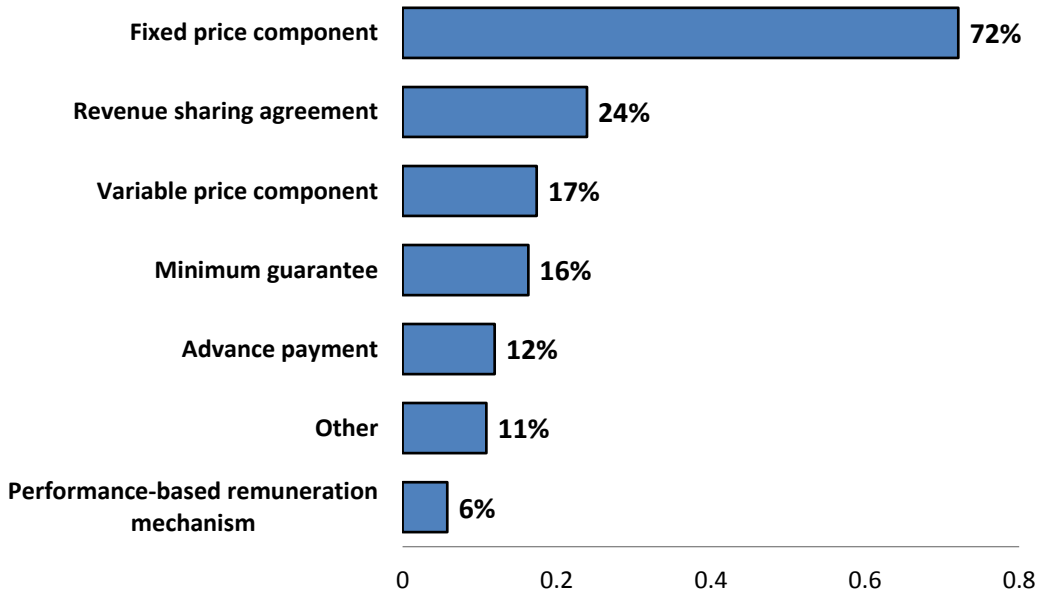
(b) **Right holders**:

- Advance payment: A payment upfront, regardless of the type of payment and independent of the buyer's performance;
- Minimum guarantee: A minimum payment to be made per bundle of products, regardless of the level of sales, subscribers or other performance metrics;
- Variable price component: A multiple, variable price element;
- Fixed price component: A single, fixed price element;
- Revenue sharing agreement: A payment proportional to the level of revenues generated by selling the specific product;
- Performance-based remuneration mechanism: A payment based on metrics linked to the sale or other type of performance of the specific product; and
- Any other: Any other type of payment mechanism.

8.2 Payment structures for online rights: Overall, by product type and by type of operator

(275) Fixed price components and revenue sharing agreements are the most recurring forms of payment for online rights sold by right holders (figure C. 72).

Figure C. 72: Proportion of agreements including each specific payment mechanism – All agreements submitted by right holders



(276) When looking at the different types of products in the agreements submitted by digital content providers, and similarly to what was reported in figure C. 72 in relation to technology rights, the structure of payments for television fiction and film products is the most complex.

(277) Most of the television fiction agreements (figure C. 73) require digital content providers to pay fixed fees per bundle of products or per individual products. The typical metric used is an entire season of a TV series, or an individual episode, depending on the business model adopted by the digital content provider.

(278) Film agreements (figure C. 74) are even more complex. A significant proportion of agreements include different types of payment for the rights needed to offer online digital content services. The most used are flat fees per film but also variable fees per download / stream and fixed fees per download / stream.

(279) Online transmissions and online business models have led to the introduction of new payment models allowing digital content providers, and ultimately users, to buy per product access to content (in terms of streams or downloads) or bundles (again in terms of streams or downloads, but often on the basis of a "light" subscription model, i.e. a subscription relationship with no fixed duration and that users can terminate and re-activate without any penalties).

Figure C. 73: Proportion of agreements including a specific payment mechanism – Fiction TV agreements submitted by digital content providers

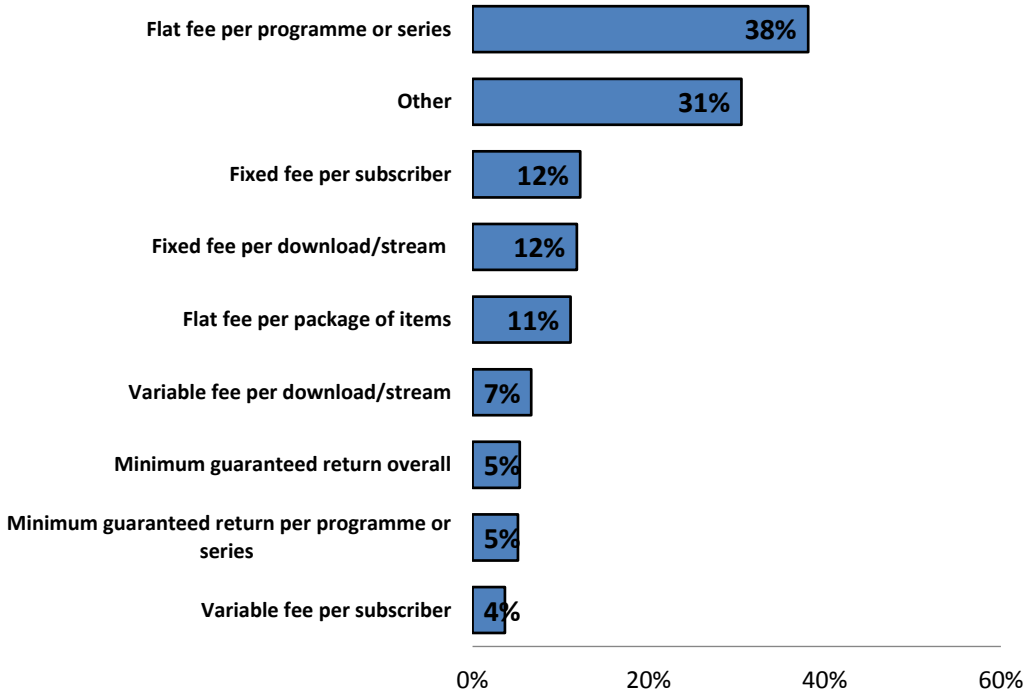
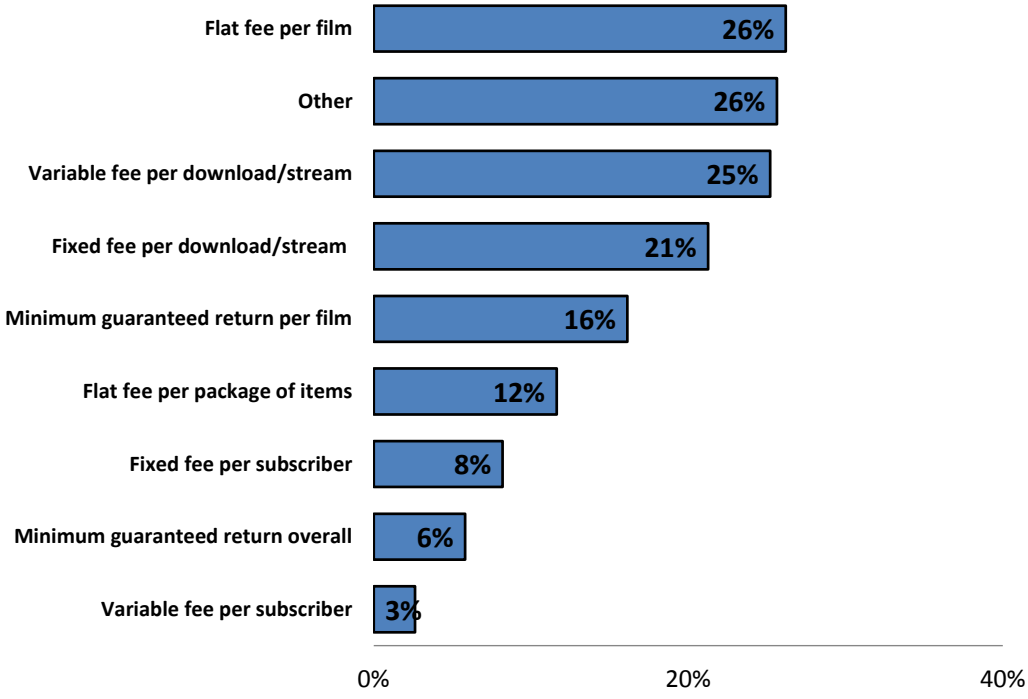


Figure C. 74: Proportion of agreements including a specific payment mechanism – Film agreements submitted by digital content providers



(280) A significant minority of respondents indicated that their agreements contain flat fees per packages of products – typically in the form of so-called "output deals", where a bundle of current and sometimes future products are licensed on the basis of pre-defined

payment criteria, which include, among other types of payments, a minimum guaranteed return for each product or a minimum fee for the bundle.

(281) A large part of respondents used the "other" category to specify that online rights are sold in full or in part as a bundle with other rights. However in almost the totality of these cases it was confirmed that the payment structure for the bundle of rights includes the top categories mentioned in figure C. 74, i.e. fixed fees or flat fees.

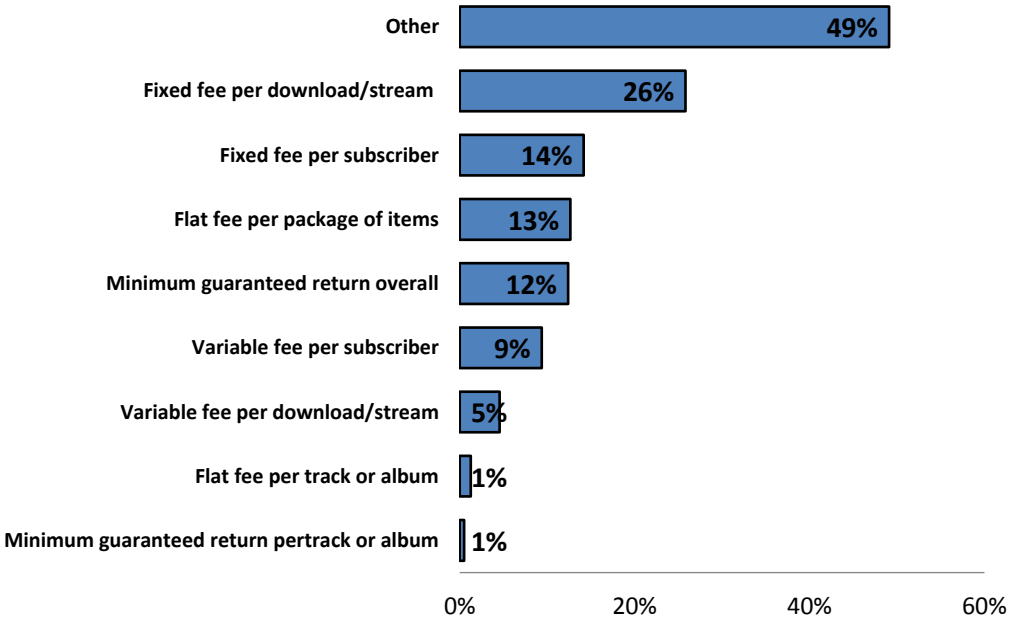
(282) A large part of respondents also used the "other" category to explain how different payment mechanisms applied to different content services – for example variable fee payments per unit for downloading and a revenue share for other types of video on demand (e.g. streaming), possibly in combination with minimum guaranteed prices. Other respondents clarified that the revenue sharing agreement for their on demand service is calculated on net revenues and not on gross revenues.

(283) A substantial minority of respondents explained that their payment structure is more complex than the categories mentioned in the questionnaires. In particular, some agreements require digital content providers to pay a figure which is the greater one between two or more figures that were the result of different calculation methods and often rely on different metrics. For example, digital content providers may be required to pay the greater between a combination of fixed fees per subscriber / per sale and a guaranteed minimum payment.

(284) Another substantial minority pointed to the use of so-called "ladder" of payment, where fixed fees per subscriber, or per sale, change at certain thresholds, which are specified in the agreements. Normally the higher the threshold, the lower the fixed fee per subscriber or per sale but typically only in respect of the particular rung of the ladder (i.e. contributions are not lowered for the totality of subscribers / sales but only in respect of those attained in excess of the threshold).

(285) Music agreements have the largest proportion of "other" types of payment (figure C. 74). When looking at the explanations provided is becomes clear almost the entirety of these responses refer to the use of "greater of" formulas mentioned above.

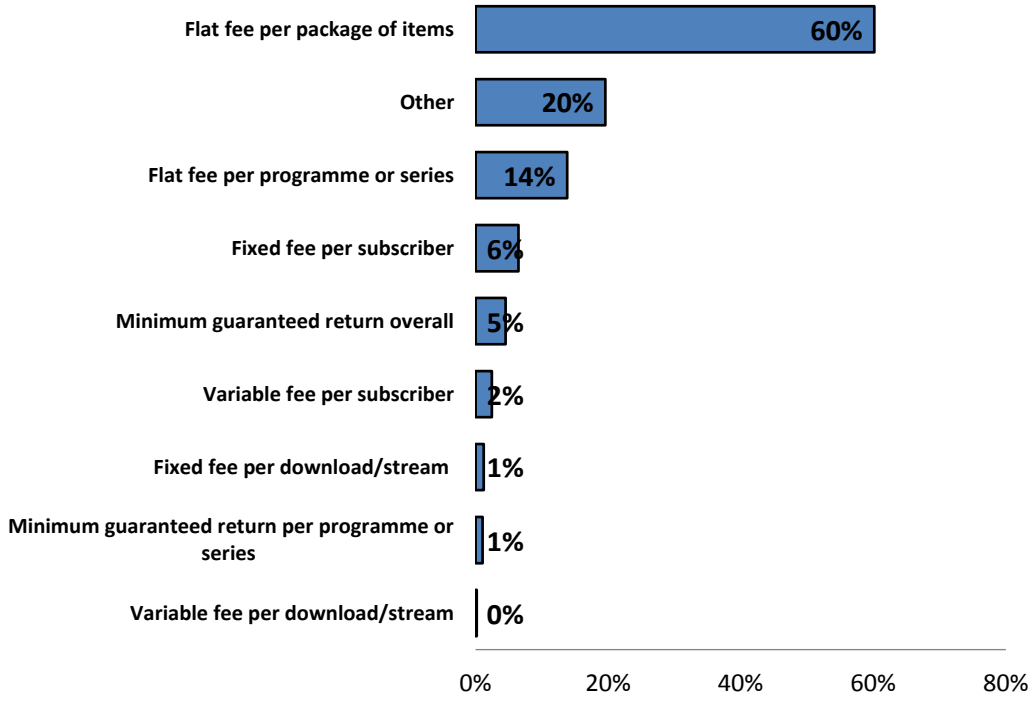
Figure C. 75: Proportion of agreements including a specific payment mechanism – Music agreements submitted by digital content providers



(286) "Greater of" formulas in music agreements may compare, for example, a pre-determined share of the revenues, a per-subscriber minimum payment, a fixed or variable rate per use (download, stream or play), and even revenue shares based on the level of market share of the digital content provider. The greater of the resulting payments will be the consideration to be paid to right holders.

(287) Finally, sports agreements have a proportionately far larger use of flat fee per package of products, typically in the form of the license to produce and distribute digital content for an entire sports event, including individual matches or other types of sub-events.

Figure C. 76: Proportion of agreements including a specific payment mechanism – Sports agreements submitted by digital content providers



(288) When looking at the types of operators, commercial and public service broadcasters are the ones whose agreements include the largest proportion of flat fees per content (figure C. 77 and figure C. 78 respectively).

(289) At the same time, cable and mobile operators are the ones that conclude agreements including the largest proportions of minimum guarantees, in particular both on specific products and on overall revenues (cable operators, figure C. 79), and on overall revenues (mobile operators, figure C. 80).

Figure C. 77: Proportion of agreements including a specific payment mechanism – Agreements submitted by commercial broadcasters

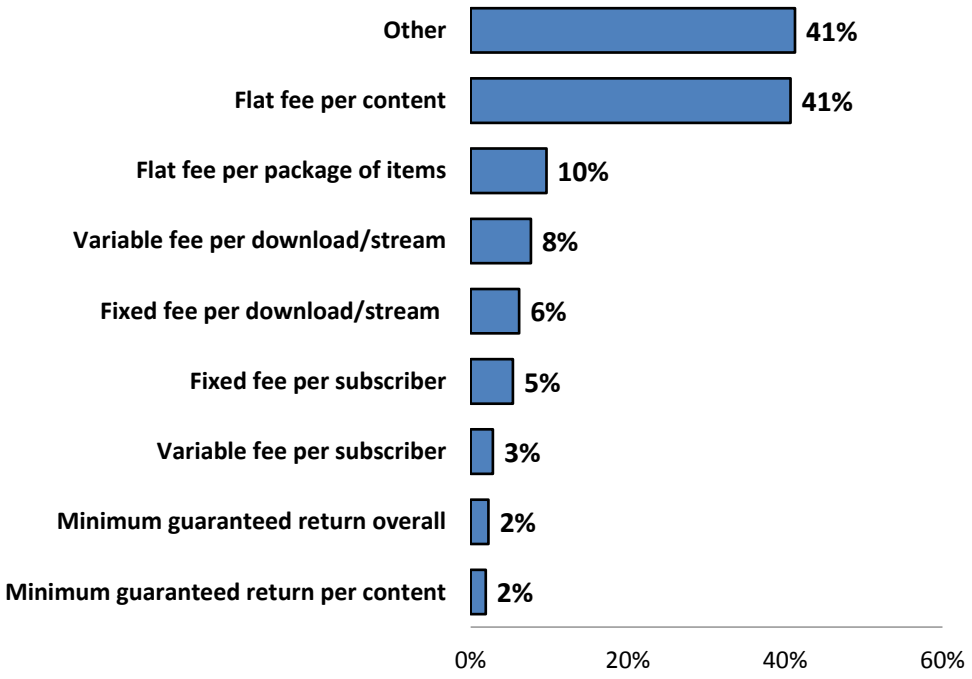


Figure C. 78: Proportion of agreements including a specific payment mechanism – Agreements submitted by public service broadcasters

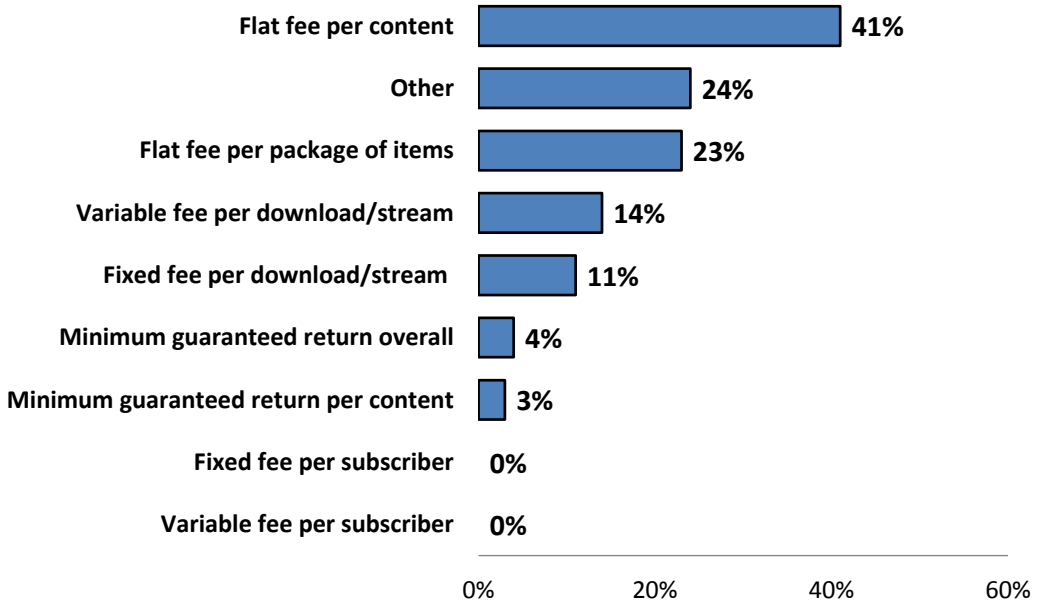


Figure C. 79: Proportion of agreements including a specific payment mechanism – Agreements submitted by cable operators

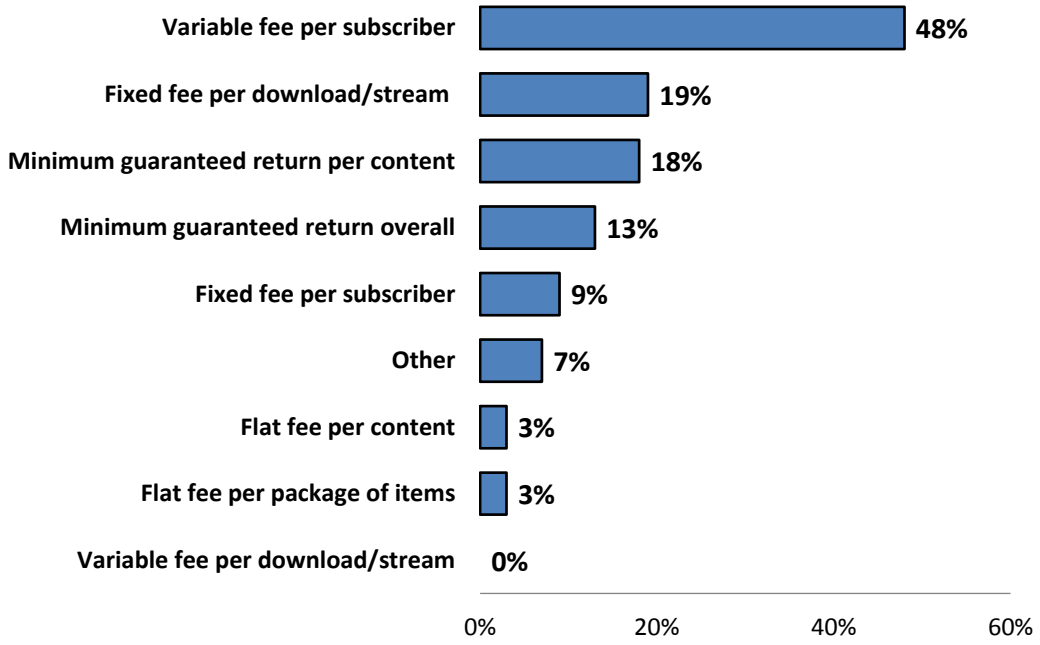
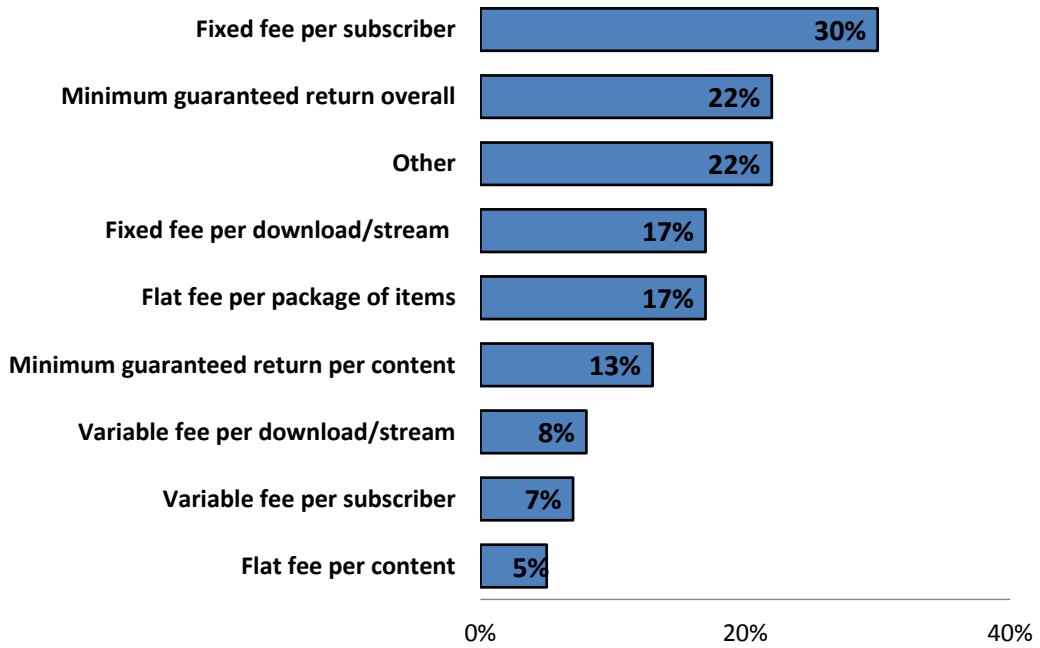


Figure C. 80: Proportion of agreements including a specific payment mechanism – Agreements submitted by mobile operators



8.3 Payment structures: combinations of specific payment mechanisms

(290) Often combinations of the payment mechanisms described in section C.8.1 above are used.

(291) In particular, advance payments are used together with fixed price components in more than 1 out of 10 agreements. Minimum guarantees, on the other hand, are often used together with revenue sharing agreements (in slightly less than 10 % of the agreements), but also with variable and fixed price components (7 % of the agreements each). Table C. 8 shows the most frequent combinations of two separate payment mechanisms in the agreements provided by right holders.

Table C. 8: Combinations of two separate payment mechanisms in the same agreement – All agreements submitted by right holders

Combinations of specific payment mechanisms	Frequency
Advance Payment - Fixed price component	11%
Variable price component - Fixed price component	10%
Minimum guarantee - Revenue sharing agreement	9%
Variable price component - Revenue sharing agreement	8%
Minimum guarantee - Variable Price component	7%
Minimum guarantee - Fixed price component	7%

(292) The extent to which minimum guarantees are used in conjunction with other mechanisms becomes clearer when looking at combinations of three mechanisms (table C. 9).

Table C. 9: Combinations of three separate payment mechanisms in the same agreement – All agreements submitted by right holders

Combinations of specific payment mechanisms	Frequency
Minimum guarantee - Variable price - Fixed price component	7%
Variable - Fixed price component - Performance based remuneration mechanism	7%
Minimum guarantee - Variable price - Performance based remuneration mechanism	6%
Minimum guarantee - Variable price - Revenue sharing agreement	6%
Minimum guarantee - Fixed price price - Performance based remuneration mechanism	5%
Minimum guarantee - Fixed price price - Revenue sharing agreement	5%
Minimum guarantee - Variable price - Other	4%
Variable - Fixed price component - Revenue sharing agreement	4%

(293) Less than 10 % of agreements use three payment mechanisms. Within this group of agreements combinations of minimum guarantees with variable and / or fixed prices, and with revenue sharing or performance sharing mechanisms are most prevalent.

8.4 Level of payments

(294) In terms of the level of the payments there is a relatively high degree of variation between product types, and within each product type.

(295) Right holders were asked to provide the total amount of considerations paid for each of the agreements submitted, for the period 2011 to 2014. Table C. 10, table C. 11 and table C. 12 provide the results for television programmes, sports and music right holders respectively. Only agreements including, in full or in part, the licensing of online rights were included.

(296) Agreements provided by sports right holders contain the highest figures in terms of total amount of considerations paid by digital content providers. However some of the agreements provided were not with digital content providers but with specialised production houses or intermediaries, such as media rights agencies. Hence the total amounts provided might not include all payments received by sport right holders.

(297) At the opposite end, music right holders seem to typically conclude licensing agreements with lower levels of payments.

Table C. 10: Total amount of considerations paid per year – Average, minimum and maximum of the agreements submitted by television fiction and children television right holders, million EUR

Year	Average	Max	Min
2011	7.88	16.52	0.67
2012	10.42	28.09	0.54
2013	8.57	32.08	0.04
2014	6.08	36.90	0.01
2015	8.46	44.03	0.03

Table C. 11: Total amount of considerations paid per year – Average, minimum and maximum of the agreements submitted by sports right holders, million EUR

Year	Average	Max	Min
2011	22.60	66.45	0.93
2012	32.52	158.85	1.09
2013	40.57	193.65	0.39
2014	40.93	260.01	0.22
2015	31.22	207.16	0.20

Table C. 12: Total amount of considerations paid per year – Average, minimum and maximum of the agreements submitted by music right holders, million EUR

Year	Average	Max	Min
2011	0.11	0.28	0.02
2012	0.73	1.94	0.06
2013	1.60	5.20	0.05
2014	3.47	13.42	0.06
2015	6.22	22.12	0.08

Summary

The payment mechanisms which determine the amounts digital content providers have to pay right holders for the licensed online rights are highly complex. There is a variety of different payment mechanisms at play in most licensing agreements, with fixed prices, minimum guarantees and advance payments being used extensively. It seems that online transmissions and online business models have led to the introduction of new payment models allowing digital content providers, and ultimately users to buy on a per product basis for access to content (in terms of streams or downloads) or bundles of content (again in terms of streams or downloads under subscription models for users). However, the information provided during the sector inquiry also points to the widespread use of minimum guarantees and fixed / flat fees, often in conjunction with advance payments, which might make it more difficult for new entrants to gain a foothold in the market.

9. FINANCING OF DIGITAL CONTENT PRODUCTS

(298) Both digital content providers and right holders were asked to provide data on costs of producing digital content, as well as information linking such costs to the revenues generated through licensing. While the low response rate to the financing questions both from right holders and digital content providers makes it difficult, if not impossible, to identify a prevalent trend, the following issues can be observed.

(299) Right holders were asked to describe their sources of financing and, particularly, to indicate, for their most valuable products the total production costs and any considerations or payments that they might have received from third parties including public funds.

(300) In the first place, many right holders indicated that they are not in the position to provide this information as they exploit the distribution rights acquired from independent production companies. With regard to sports, for instance, right holders explained that they could not provide any indication of the production costs as they do not produce the event, rather they purchase the broadcast and the related rights from a third party.

(301) Amongst the right holders that were able to provide information, some indicated that all their production is self-financed. In a few instances self-financing is accompanied by certain production incentives, e.g., tax incentives, granted by public authorities at national/local level both outside and within the EU.

(302) In some instances third party financing covers more than a half of the production costs, while in others only a minor portion. One right holder indicates that all production costs of a number of its products were fully covered by third parties. Regarding the type of third party funding, in one instance private equity has been indicated amongst the sources of financing. For the rest, production costs seem to be covered by digital content providers, e.g. broadcasters.

(303) Digital content providers were asked to indicate the total amount that they have invested in co-financing or co-production of content in each of the years 2012-2014 and to explain how they take decisions regarding whether to co-finance or co-produce certain content.

(304) The responses to these financing questions by digital content providers are few. Table C. 13 and table C. 14 below show the average proportion of co-financing / co-production out of the total content budget by type of operator and by business model in the years 2012-2014.

(305) As shown by table C. 13 publishers and fixed line cable operators have the highest percentages of content budget invested into co-financing/co-production, followed by public service broadcasters. This may be explained by the fact that publishers and fixed line cable operator do not have their own content and they may therefore fully rely on third party productions.

(306) Co-financing / co-production are important means to secure rights also for public service broadcasters that invest a non-negligible part of their content budget in it. This is confirmed also by the results of the analysis with regard to publicly funded operators in table C. 14 below.

(307) In table C. 14 below, it is interesting to note that transaction-based operators have the highest percentages of content budget invested into co-financing / co-production. This is somewhat surprising given that digital content providers using such business model normally operate on a revenue sharing basis.

Table C. 13: Average co-financing / co-production investment as a proportion of total content budget, by type of operator and by year

Type of operator	2012	2013	2014	Aggregate 2012-2014
Commercial broadcaster	6.50%	4.97%	8.33%	6.60%
Fixed line cable operator	42.24%	41.05%	38.38%	40.55%
Fixed line PSTN operator	0.31%	0.19%	0.25%	0.25%
Mobile operator	3.59%	2.25%	2.30%	2.71%
Online audiovisual operator	9.03%	9.28%	10.20%	9.50%
Other		18.45%	28.71%	23.58%
Portal / Web TV	3.36%	4.02%	3.06%	3.48%
Public service broadcaster	18.56%	22.12%	19.04%	19.90%
Publisher	100.00%	100.00%	100.00%	100.00%
Average	**14.26%**	**15.07%**	**15.41%**	**14.91%**

Table C. 14: Average co-financing / co-production investment as a proportion of total content budget, by business model and by year

Business model	2012	2013	2014	Aggregate 2012-2014
Advertising-funded	16.26%	15.94%	18.20%	16.80%
Hosting device		18.45%	28.71%	23.58%
Hosting online operator	11.04%	8.03%	3.45%	7.50%
Packager of own content	3.23%	1.22%	3.81%	2.75%
Publicly funded	15.67%	19.70%	16.22%	17.20%
Subscription-based	13.88%	13.72%	12.95%	13.51%
Transaction-based	50.45%	50.64%	50.61%	50.57%
Average	**14.26%**	**15.07%**	**15.41%**	**14.91%**

(308) As regards the decisions whether to co-finance or co-produce certain content, digital content providers explain that this is made on a case-by-case basis taking into account different considerations including the likely return, cultural significance and creative quality.

(309) In particular, some respondents point out that the process is not profit-driven and that the decision as to whether to co-finance / co-produce a certain production depends first and foremost on its content. In particular, co-production / co-finance allow a programme supply which is more targeted to the national audience.

(310) In relation to the amount of money to invest in the co-production / co-financing, a key consideration is the likely return on the investment. That return depends on the rights obtained in exchange for the co-financing arrangements and is the result of the negotiations between the different parties involved. For example a respondent indicates that since the costs of entering into a co-finance or co-production arrangements is greater than acquiring third party content, it will seek to acquire exclusive rights to recoup the investment in the project. In this regard another respondent points out that co-productions are a means to obtain a larger scope of rights and exclusivity.

(311) Some digital content providers also indicate that co-financing and co-production arrangements may also be used to ensure compliance with investment obligations or local content requirements (e.g. obligations to invest in independent production).

(312) A number of respondents to the public consultation on the Preliminary Report underlined that the ability to seek distribution advance payments is crucial to securing the necessary investment in high quality output, given the high production costs, high failure rate of products. Several respondents pointed out that alternative payment structures (e.g., per-subscriber fees) might make future revenues too uncertain to invest in production of high quality content.

Summary

The low response rate to the financing questions both from right holders and digital content providers makes it difficult, if not impossible, to identify a prevalent trend. For example, many right holders indicate that they are not in the position to provide this information as they exploit the distribution rights acquired from independent production companies. In some instances third party financing covers more than a half of the production costs, while in others only a minor portion. The decision whether to co-finance or co-produce certain content is made on a case-by-case basis taking into account different considerations including the likely return, cultural significance and creative quality. A number of respondents to the public consultation on the Preliminary Report underlined that the ability to seek distribution advance payments is crucial to securing the necessary investment in high quality output, given the high production costs, high failure rate of products. Several respondents pointed out that alternative payment structures (e.g., per-subscriber fees) might make future revenues too uncertain to invest in production of high quality content.

D. KEY FINDINGS

1. KEY FINDINGS: GOODS

(313) This Report identifies the key features of e-commerce that have a substantial effect on distribution strategies (1.1) and that may give rise to potential barriers to competition (1.2).

1.1 Key features of e-commerce with a substantial effect on distribution strategies

1.1.1 Price transparency leading to an increase in price competition

(314) Online price transparency is a feature that strongly affects the behaviour of buyers and sellers. 53 % of respondent retailers track the online prices of competitors, and 67 % of those also use automatic software programmes for that purpose. 78 % of the retailers that use software to track prices subsequently adjust their own prices based on those of their competitors.

(315) While price is a key parameter of competition for retailers, product quality and brand image are key for manufacturers. Increased price competition at the retail level results in manufacturers adopting a variety of business strategies in order to better control the distribution quality and the image and positioning of their brands.

1.1.2 Free-riding

(316) Customers can switch swiftly between online and offline sales channels. Many customers use the pre-sales services offered by one sales channel (such as product demonstration, personal advice in a brick and mortar shop or search for product information online) but then purchase the product on the other sales channel. In such cases the costs of pre-sales services become difficult to recoup ("free-riding").

(317) Creating a level-playing field between offline and online distribution channels by finding a solution to free-riding, thereby preserving the investments in high-level pre-sale services, is a consideration that is claimed by stakeholders to play an important role in generating some of the observed market trends and restrictions.

1.1.3 Increased direct retail activities by manufacturers

(318) With a view to both reaping the benefits of online sales and better controlling distribution, many manufacturers have opened their own online shops in the last 10 years. The product category with the highest proportion of manufacturers active in retail is cosmetics and healthcare. As a result, in the last decade, many retailers have found themselves competing against their own suppliers.

1.1.4 Expansion of selective distribution

(319) In the last 10 years, as a reaction to the growth of e-commerce, 19 % of respondent manufacturers introduced selective distribution systems for the first time and 67 % of

the respondent manufacturers that already used selective distribution introduced new selection criteria.

(320) Selective distribution is used by manufacturers to keep a certain level of control over the distribution of their products, in particular high-end and new product lines. The results of the sector inquiry do not suggest that the Commission's general approach to qualitative and quantitative selective distribution, as set out in the Vertical Guidelines, needs to be changed.

(321) At the same time, a large majority of the manufacturers using selective distribution exclude pure online players from their selective distribution network for at least part of their products, via the requirement for the retailer to operate at least one brick and mortar shop. Promoting the quality of services via brick and mortar shops can bring additional value to customers and is therefore generally covered by the VBER. However, in some cases brick and mortar shop requirements essentially aim at shielding products from price competition by pure online players, without enhancing competition on other parameters than price. In those cases brick and mortar requirements may be unjustified and may not warrant an exemption under the VBER.[33] In this regard paragraph 176 of the Vertical Guidelines points out that, where the requirement to operate a brick and mortar shop does not bring about sufficient efficiency enhancing effects to counterbalance a significant reduction in (intra-brand) competition, the benefit of the VBER is likely to be withdrawn.

(322) As a result, while generally covered by the VBER, certain requirements to operate at least one brick and mortar shop which are not linked to justified brand image or distribution quality concerns may – where appreciable anticompetitive effects occur – need further scrutiny in individual cases.

(323) Several retailers pointed to a lack of transparency and objectivity of the selection criteria used by the manufacturers to choose the members of their distribution network. Manufacturers have no legal obligation to publish the selection criteria. Manufacturers that provide upon the retailer's request a minimum level of information allow the retailer to identify the reason for a refusal to be admitted to the selective distribution network or for an exclusion from that network.

1.2 Potential barriers to competition

1.2.1 Cross-border sales restrictions

(324) The findings of the sector inquiry show that 38 % of the retailers use geo-blocking in order to restrict cross-border online sales. While most of the geo-blocking measures are based on the unilateral decision of retailers, nearly 12 % of retailers report that they

[33] For instance, several retailers point to selective distribution systems where the operation of one brick and mortar shop in an entire Member State or region was sufficient to qualify as an authorised distributor, without any further link to actual (qualitative or quantitative) requirements.

have contractual cross-border sales restrictions in at least one of their product categories. The product category in which the highest proportion of retailers experience cross-border sales restrictions is clothing and shoes, followed by consumer electronics.

(325) Contractual cross-border sales restrictions have multiple forms and are not always written in agreements, but may also be communicated orally.

1.2.2 Restrictions on the use of marketplaces

(326) 20 % of the manufacturers report that they sell products directly to buyers via marketplaces. 14 % started to do so in the last 10 years as a reaction to the growth of e-commerce.

(327) The importance of marketplaces as a sales channel varies significantly depending on the size of the retailers, the Member States as well as the product categories: 61 % of the respondent retailers do not use marketplaces for their sales, and only 4 % responded that they were selling solely via marketplaces. Marketplaces are more important as a sales channel for smaller and medium-sized retailers with a turnover below EUR 2 million while they are of lesser importance for larger retailers with a higher turnover. The importance of marketplaces as an online sales channel differs significantly from one Member State to another with a high proportion of retailers using marketplaces in Germany (62 %) and the United Kingdom (43 %) compared to substantially smaller proportion in Austria (13 %), Italy (13 %) or Belgium (4 %). In terms of product categories, marketplaces are most relevant for retailers selling clothing and shoes and consumer electronics.

(328) 18 % of retailers report to have marketplace restrictions in their agreements with their suppliers. The prevalence of marketplace restrictions varies a lot between Member States. The Member States with the highest proportion of retailers having marketplace restrictions in their distribution agreements are Germany (32 %) and France (21 %). Marketplace restrictions encountered in the sector inquiry range from absolute bans to restrictions on selling on marketplaces that do not fulfil certain quality criteria.

(329) The findings do not show that marketplace bans would generally amount to a de facto prohibition to sell online. The findings do also not indicate that marketplace bans can – at this stage – be said to be aimed at restricting the effective use of the internet as a sales channel. The importance of marketplaces differs significantly between Member States, product categories and size of retailers concerned. Overall, the retailers' own online shops remain an important online sales channel and more than half of the respondent retailers sell via their own online shop only. The differences between Member States, product categories and sizes of retailers confirm that the potential impact of marketplace restrictions on competition needs to be assessed on a case-by-case basis.

(330) Without prejudice to the forthcoming judgment of the Court of Justice in Case C-230/16, *Coty Germany vs. Parfümerie Akzente GmbH*, the findings of the sector inquiry

indicate that (absolute) marketplace bans should not constitute hardcore restrictions within the meaning of Article 4(b) and Article 4(c) of the VBER.

(331) This does not mean that marketplace bans are generally compatible with European competition law. The Commission or a National Competition Authority may decide to scrutinise marketplace bans in agreements falling outside the application of the VBER, either because the market share thresholds in Article 3 of the VBER are exceeded or because the agreements contain any of the listed hardcore restrictions in Article 4 of the VBER. The Commission or a National Competition Authority may also decide to withdraw the benefit of the VBER if in a particular case the marketplace bans restrict competition within the meaning of Article 101(1) TFEU and are incompatible with Article 101(3) TFEU.

1.2.3 Restrictions on the use of price comparison tools

(332) The preliminary findings of the sector inquiry indicate that the use of price comparison tools is widespread with 36 % of retailers reporting that they supply data feeds to price comparison tool providers in 2014. While certain manufacturers consider price comparison tools as beneficial for their business, increasing their brand's visibility, a substantial number of them see price comparison tools rather critically as they further enhance competition on price, rather than on other features.

(333) 9 % of retailers report that they have agreements with manufacturers which contain some form of restriction in their ability to use price comparison tools. The proportion of retailers affected by price comparison tool restrictions is highest in Germany (14 %), Austria (13 %) and the Netherlands (13 %). The price comparison tool restrictions encountered in the sector inquiry range from absolute bans to restrictions based on certain quality criteria.

(334) Absolute price comparison tool bans that are not linked to quality criteria may make it more difficult for (potential) customers to find the retailers website and may thereby limit the (authorised) distributor's ability to effectively promote its online offer and generate traffic to its website.

(335) Absolute price comparison tool bans therefore potentially restrict the effective use of the internet as a sales channel and may amount to a hardcore restriction of passive sales under Article 4 b) and 4 c) of the VBER. Restrictions on the usage of price comparison tools based on objective qualitative criteria are generally covered by the VBER.

1.2.4 Pricing restrictions

(336) Resale price maintenance is one of the practices manufacturers and retailers may make use of in response to the increased online price competition and, in particular, to the high online price transparency and low search costs for customers, allowing them to swiftly compare prices.

(337) By observing a minimum retail price, both manufacturers and retailers may minimise the impact of quick online price erosion, thereby protecting both the level of the wholesale price the manufacturers can ask for the product, and the profit margins retailers can expect.

(338) At least a third of the retailers in each product category covered by the sector inquiry reports to receive some form of price recommendations from manufacturers.

(339) Agreements that establish a minimum or fixed price (or price range) are a hardcore restriction within the meaning of Article 4(a) of the VBER and a restriction of competition by object under Article 101(1) TFEU.

(340) Non-binding pricing recommendations or maximum resale prices are covered by the VBER as long as the market share thresholds are respected and they do not amount to a minimum or fixed resale price as a result of pressure from or incentives offered by the parties involved in the vertical relationships.

(341) Nearly 30 % of manufacturers indicate that they systematically track the prices of their products sold via independent retailers. Others do so in a targeted manner (on certain products, key markets). 67 % of the respondent manufacturers use manual tracking, while nearly 40 % make (also) use of price-tracking software to track prices. Almost a third of respondent retailers report that they normally comply with the price indications given by the manufacturers while slightly more than a quarter say that they do not comply.

(342) Increased price transparency through price monitoring software may facilitate or strengthen collusion between retailers and thereby impact competition.

(343) While manufacturers often voice their intention to create a level-playing field between online and offline sales channels, taking into consideration potential differences in cost levels, dual pricing (setting different wholesale prices depending on the sales channel) is rarely considered as a viable option due to the risk that a dual pricing strategy could be in breach of Article 101(1) TFEU.

(344) Charging different (wholesale) prices to different retailers is generally considered a normal part of the competitive process. Dual pricing for one and the same (hybrid) retailer is generally considered as a hardcore restriction under the VBER. The Report points to the possibility of exempting dual pricing agreements under Article 101(3) TFEU on an individual basis, for example where a dual pricing arrangement would be indispensable to address free-riding.

1.2.5 Other types of restrictions to sell or advertise online

(345) The information obtained in the sector inquiry shows that some retailers are restricted in their ability to sell (some) products of certain manufacturers via the internet at all. Contractual provisions that either explicitly or de facto prohibit a retailer to use the

internet as a method of marketing are restrictions by object under Article 101(1) TFEU and hardcore restrictions within the meaning of Article 4(b) and 4(c)[34] of the VBER.

(346) The results of the sector inquiry suggest that some retailers may be limited in their ability to use or bid on the trademarks of certain manufacturers in order to get a preferential listing on the search engines paid referencing service (such as Google Adwords) or are only allowed to bid on certain positions. Such restrictions typically aim at preventing the websites of retailers from appearing (prominently) in the case of usage of specific keywords. This may be in the interest of the manufacturer in order to allow its own retail activities to benefit from a top listing and / or keep bidding prices down.

(347) On the one hand, given the importance of search engines for attracting customers to the websites of retailers and improving the findability of their online offer, such restrictions could raise concerns under Article 101 TFEU if they were to restrict the effective use of the internet as a sales channel by limiting the ability of retailers to direct customers to their website.

(348) On the other hand, restrictions on the ability of retailers to use the trademark/brand name of the manufacturer in the retailer's own domain name are unlikely to raise concerns under Article 101 TFEU as they help avoiding confusion with the manufacturer's website.

1.2.6 The use of data in e-commerce

(349) All marketplaces and the majority of price comparison tools collect data for different purposes. Retailers also gather a considerable amount of both personal and anonymous data. Data are used for a wide variety of purposes, e.g. to complete and invoice transactions, for marketing, to improve business performance, to prevent fraud and to comply with legal obligations.

(350) The collection of a large amount of data is becoming increasingly important in e-commerce.

(351) On the one hand, such "big data" may allow the companies to become more efficient and provide a better and more targeted, individualised offering for customers.

(352) On the other hand, the collection and the use of data may impact competition. For example, the exchange of competitively sensitive data between marketplaces and third party sellers or manufacturers and retailers may lead to competition concerns where the same players are in direct competition for the sale of certain products or services.

[34] See judgment in Pierre Fabre Dermo-Cosmétique SAS vs. Président de l'Autorité de la concurrence EU:C:2011:649, paragraphs 53 et seq and Vertical Guidelines, paragraph 52.

2. KEY FINDINGS: DIGITAL CONTENT

2.1 Licensing of rights: A key factor for competition in online digital content services

(353) Securing attractive digital content is essential for digital content providers that wish to maintain or improve their competitive position, as emphasised by virtually all respondents. That was largely acknowledged also by stakeholders in their comments to the public consultation. While online transmission offers the possibility to innovate the provision of access to products and services, demand for digital content services is ultimately driven by demand for the content offered. From this perspective, the main driver of competition remains the same: attractive content.

(354) Digital content providers effectively translate users' demand for certain services into a wholesale demand for the rights that enable them to make the content available to users.

(355) The terms on which rights are licensed to digital content providers are therefore one of the most important drivers of competition. However, online distribution of content and demand for online rights does not seem to have altered the way in which right holders license their rights.

(356) Right holders often split up their rights in several components and monetise each of them separately, with a view to maximising their value over the entire life cycle of the content.

(357) The following specific issues in relation to the licensing of rights in digital content emerge from the responses to the sector inquiry.

2.2 Contractual restrictions in relation to transmission technologies, timing of releases and territories

(358) Rights can be and are licensed using any type of combination along technologies, release windows and territories. Moreover, exclusivity can be attached to all, none or only parts of the licensed rights.

(359) The licensing agreements between right holders and digital content providers therefore define the main parameters of competition as regard the online distribution of digital content.

(360) The results of the sector inquiry show that contractual restrictions, in terms of licensed transmission technologies, timing of releases and licensed territories, are the norm in digital content markets.

(361) In order to offer online services, digital content providers need to secure licences to a minimum set of rights to market the content. This set of rights typically includes the right to transmit online via digital technology; the right to allow users to access the content via a receiving device; and the right to use certain technologies to deliver the content, such as streaming.

(362) Whether such online rights are available depends on several factors, including the specific content, its commercial history, the specific release window sought, and the specific territory where the digital content provider wishes to operate.

(363) This means that it may be difficult for new entrants to secure licenses to provide digital content online, regardless of whether they already provide other content (offline) or are active in other geographic markets, with the notable exception of music content.[35]

(364) As regards territorial contractual restrictions, rights are often licensed on a national basis. While the Commission does not question the practice of territorial licensing in itself, the results of the sector inquiry show that a large majority of digital content providers are required by rights holders to restrict access to their online digital content services for users from other Member States by means of geo-blocking. Moreover, many of these agreements contain clauses enabling the right holder to monitor the implementation of technical geo-blocking measures, suspend distribution, or as a final resort, terminate the licensing agreement or ask for compensation, where the measures are not implemented and used in accordance with the rights holders' requirements.

2.3 Duration of the agreements

(365) New entrants and smaller operators wishing to grow their digital content businesses may find it difficult to obtain licenses also because of the relatively long and stable exclusive contractual relationships between right holders and established digital content providers.

(366) Right holders tend to have relatively long-term agreements with digital content providers. Digital content providers seeking to enter a certain market or expand their existing commercial activities in a market may therefore face difficulties in accessing rights that are the object of long-term exclusive licensing agreements between their competitors and right holders.

(367) This may be exacerbated by certain contractual clauses that are part of the licensing agreements, such as first negotiation clauses, automatic renewal clauses and other similar clauses. Explicit or implicit (re)negotiation clauses may affect the possibilities of possible new entrants and smaller operators wishing to grow their online digital content businesses.

2.4 Payment structures

(368) The widespread use of advance payments, minimum guarantees and fixed / flat fees (per bundle of programmes, or independently of the number of programmes) implies that smaller digital content providers or new entrants may have to pay the same amount as larger incumbents for the equivalent rights, and often they may have to do so upfront.

[35] This concern seems to apply less to music products than all other products on which the sector inquiry sought evidence. This is due to the fact that music products tend to be licensed with fewer restrictions and less reliance on exclusive licensing.

(369) Without the possibility of making their financial contributions to right holders dependent on their size, their user base or the number of products they distribute, new entrants and smaller operators may be at a disadvantage compared to established digital content providers when attempting to secure attractive rights for digital content. For example, a new entrant wishing to adopt an innovative business model might not be in a position to make a competitive bid for the rights, if faced with widespread licensing practices requiring the use of payment mechanisms that might not suit their chosen business model.

(370) However, the variety of payment mechanisms found in the agreements submitted also suggests that some degree of experimentation takes place. For example, for some types of products and release windows (e.g. films, television fiction and non-fiction offered on demand in the earliest windows), revenue sharing and performance-based payment mechanisms (e.g. where payments are proportionate to the number of subscribers or users accessing the content) seem to be more widely used than alternatives. A range of digital content providers, such as hosting devices providers, hosting online services providers, online audiovisual operators or fixed line operators, appear to be in a position to offer exactly the same content (e.g. the same films or television fiction or television non-fiction products) for rent or for sale, in streaming or download modalities.

(371) Such arrangements, where several digital content providers are able to acquire the rights to the same content on a non-exclusive basis, favour competition downstream, increase choice for users, and make use of the possibilities offered by online transmission. However, such arrangements seem to be used only in a handful of Member States.

(372) The use of certain payment methods such as minimum guarantees and advance payments can in certain situations allow right holders to share risks more efficiently for products that may have, on an individual basis, a high risk profile, given their uncertain prospects of success at the time of the investment.

2.5 Impact of licensing practices

(373) The availability of the relevant rights for online distribution of digital content is one of the key determinants of competition among digital content providers. There are a number of important factors that determine the availability of rights, such as the (technological, temporal and territorial) scope of rights as defined in the licensing agreements between right holders and digital content providers, the duration of the licencing agreements and the widespread presence of exclusivity. The right holder is the ultimate decision maker on whether, and if yes in what form, to license the rights.

(374) The results of the sector inquiry raise the question of whether certain licensing practices may make it more difficult for new online business models and services to emerge and for new or smaller players to enter existing markets or to grow and expand their activities into other markets. This may be particularly true when online rights are sold exclusively on a per Member State basis or bundled with (unused) rights for other transmission technologies.

(375) Some respondents, for example some fixed and mobile electronic communications operators, voiced concerns in this respect, suggesting that the impact of some or all of the licensing practices described above hamper their ability to obtain licenses, and as a consequence limit their possibility to compete effectively in providing online digital content services.

(376) Some respondents identify in particular the way online rights in digital content are split up or bundled, the prevailing payment mechanisms, and the stability of existing commercial relationships between right holders and incumbent content providers, including provisions such as matching or automatic renewal clauses, as key factors that, when combined, ultimately put them at a competitive disadvantage, especially when market power is present at different levels of the supply chain. Other respondents indicate that current licensing practices, in particular the fact that rights are often licensed on an exclusive basis, effectively allow only large-scale incumbents to act as the only distributors, in particular allowing them to secure the most attractive content. They also claim that opportunities for new entrants exist only in fringe or niche markets, i.e. in relation to products that are widely available on a non-exclusive basis, such as library products.

(377) Regarding exclusive licensing, the results of the sector inquiry point to complex licensing practices, whereby exclusivity may be granted in different forms (such as in relation to territory, technology and time), as well as complex payment mechanisms. It also emerges clearly that certain types of (attractive) content are crucial for the ability of digital content providers to attract users and become or remain competitive.

(378) The Commission considers that the use of exclusivity is not problematic in and of itself. Exclusive licensing practices must be assessed taking into account the characteristics of the content industry, the legal and economic context of the licensing practices and / or the characteristics of the relevant product and geographic markets.

(379) An important element of the assessment of exclusive licensing is the presence of market power at different levels of the supply chain. The results of the sector inquiry also offer insights on other aspects of licencing of digital content that are relevant for the assessment of possible foreclosure of digital content providers, such as the scope and duration of licensing agreements, as well the structure of payments.

(380) The availability of online rights depends on whether and how the rights have been split up by right holders, the extent to which they may have been bundled with other rights, and on the duration of both specific licensing agreements and contractual relationships, which in general tend to be long-term. Moreover, the choice of fee structure may in some cases increase the fixed cost of entry for digital content providers. However, the structure of payments and their level may serve other purposes, such as optimal risk sharing and streamlining of incentives along the supply chain.

(381) At the same time, the information provided during the sector inquiry also shows that multiple business models and a great diversity of licensing practices are available and

indeed used, which can cater for the needs of both right holders and digital content providers.

(382) Any assessment of licensing practices under EU competition rules would have to take into account the characteristics of the content industry, the legal and economic context of the licensing practice and / or the characteristics of the relevant product and geographic markets.