

Meeting with Amazon Brussels, 1 February 2018

Background note

Amazon's activities in the EU and its relationship with cultural and creative sectors

Amazon started as an online bookstore but soon diversified, selling DVDs, VHSs, CDs, video and MP3 downloads/streaming, software, video games, electronics, apparel, furniture, food, toys and jewellery. The company also produces consumer electronics—notably, Kindle e-book readers, Fire tablets, Fire TV and Fire Phone — and is a major provider of cloud computing services. The company has invested over EUR 20 billion in Europe since 2011 and has over 50,000 full-time employees.

Regarding more in particular the cultural and creative sectors, over 990,000 European companies and creative professionals rely on different Amazon products and services. As a matter of fact, such products and services make Amazon a leading player in several markets across the EU:

- In the **audio-visual market**, Amazon is among the main players on the video on-demand services market (set to become the main element of the AV market worldwide in the coming years and thus to play a crucial role for the promotion, production and circulation of European works). Its prime Video Instant service has been available since December 2016 in every EU country and 200 countries worldwide. Amazon uses its prime Video Instant service as an addition to its prime one day delivery service, with additional music, gaming and e-book services included in the subscription. Like other competitors on this market (e.g. Netflix), Amazon has started investing in digital original productions, thereby opening a new financing source for programming (according to the AV Observatory, in 2015 Amazon and Netflix spent on programming more than all German audiovisual players combined).
- In the **book market**, Amazon dominates the online distribution of physical books in most countries. Even in France, the platform represents around 2/3 of online sales. Amazon clearly dominates also the e-book segment of the market (which in Europe captures an average of 5% of the total book market) even if its market share varies across countries, with the largest markets being UK (79%), Germany (43%) and Spain (40%). Amazon designs and markets a series of e-readers, **Amazon Kindle**, which enables users to browse, buy, download and read e-books, and other comparable digital content (magazines, newspapers etc.) via wireless connection to the e-book Kindle Store which, as of December 2017, was reported to have nearly 5.9 million e-books available in the United States.
- Concurrently with the release of the first Kindle device, Amazon launched **Kindle Direct Publishing**, used by authors and publishers to independently publish their books directly to Kindle and Kindle Apps worldwide. Authors can upload documents in several formats and charge between USD 0.99 and USD 200.00 for their works. These documents may be written in 34 languages. In 2016,

Amazon also added a paperback option which uses print-on-demand technology with the goal of offering digital and print to self-publishers. Amazon has been promoting to its authors the capability of publishing both e-books and paperbacks through the same platform. In 2014, Amazon released the **Kindle Scout** platform that promotes new works by allowing readers to nominate e-books to be published by Kindle Press. As of November 2016, 197 books had been published through this program.

- In the **music market**, the Amazon music (formerly Amazon MP3) service functions both as online music store for digital purchases and as a music streaming platform. Prime Music, a service offering unlimited streaming of a limited music catalogue, has been available to Amazon prime service subscribers in several countries since mid-2014. Music Unlimited, a full-catalogue streaming service, has been available as an additional or standalone subscription since late 2016. These services compete with Spotify and Google Play music on the digital music distribution market.
- In 2016, Amazon launched **Amazon Inspire**, a hub for educators to exchange lesson plans and other Open Education Resources. The platform remained for over one year an invitation-only private beta and opened in July 2017 to all US teachers. At that time, teachers could download resources but not yet share them with colleagues. This limitation was due to a controversial issue at the opening of the beta version in 2016: when Amazon launched the platform, it received complaints as some users uploaded material that was covered by copyright, which meant that the platform did not have a system in place to review the uploaded content.

Digital Single Market (DSM) Initiatives of relevance to Amazon

Revision of the Audiovisual Media Services Directive

While TV broadcasters will continue to be obliged to broadcast a share of at least 50% of viewing time of European works (including national content), new rules will apply to video on-demand (VoD) services providers like Amazon. The latter will need to ensure a minimum share (“quota”) of European content in their catalogues and should give a good visibility (“prominence”) to European content in their offers.

The revised Directive will also allow Member States to impose financial contributions (direct investments or levies allocated to national film funds) to VoD services in their jurisdictions, as well as, under certain conditions, to those established in a different Member State but targeting their national audiences. By creating a level playing field for the promotion of European works, these new rules will lead to a broader and more diverse offer for Europeans. This will have a positive impact on cultural diversity and bring more opportunities for European creators.

The general approach agreed on the file by the Council on 23 May last year confirms and further strengthens the Commission’s proposal. It notably mandates a requirement on these services to offer and promote at least 30% of European content in their catalogue. This quota is higher than the one proposed by the Commission (20%), in line with the demand of several Member States. Since the EP also proposes to raise the quota to 30%, this is likely to be the end result of the on-going triologue negotiations.

Geo-blocking

The aim of the Regulation on unjustified geo-blocking, proposed by the Commission in May 2016, is to ensure that consumers seeking to buy products and services in another EU country, whether online (for example through Amazon's stores) or in person, are not discriminated against in terms of access to prices, sales or payment conditions unless this is objectively justified for reasons such as VAT.

The approach is a gradual one and keeps the digital music and e-books out, as recommended by these sectors. For copyright-related online content services other than audio-visual services (excluded from the outset to mirror the scope of the Services Directive), the possible inclusion within the ban on geo-blocking will be assessed on the occasion of the first periodic review of the Regulation. The issue of the inclusion of this type of services was a major stumbling block in the negotiations between the co-legislators who could finally reach a political agreement on 20 November. They have agreed to exclude digital services giving access to non-audiovisual copyright-protected content from the scope of the geo-blocking ban, subject to a review clause (deadline 24 months) and a commitment by the Commission to carry out a thorough review, including on the non-AV services and sectors outside of the scope of Services Directive, which are also excluded from the scope of the Regulation. The agreement therefore is aligned with the initial Commission proposal.

As a result, Amazon will no longer be able to geo-block access to its services and stores unless they can justify such practice as far as the sectors covered by the new legislation are concerned. These include the online sale of physical books. For the latter, however, the new Regulation provides for an essential safeguard for the book ecosystem: it expressly stipulates that the ban on geo-blocking shall not prevent traders from complying with fixed book price policies existing in member countries in accordance with EU law. Fixed book price policies are in fact used at national level as a tool to support a diversified network of selling points, which is especially important for smaller book publishers and therefore the sustainability of a diverse cultural offer.

Amazon can instead continue to apply geo-blocking measures in the e-book shops it runs within the EU,¹ but this does not seem to necessarily imply a negative impact for consumer since, as evidenced by the study commissioned for the Parliament during the legislative process, despite the fragmentation of the market, consumers' choice is not severely restricted due to high availability of same e-book titles across Amazon's EU shops and cultural and linguistic differentiation within the EU.

Copyright reform

The copyright reform includes a number of measures which are of special relevance to services provided by Amazon.

¹ While the US store is universally accessible without any restriction based on the residence of customers, in the EU 6 shops are accessible only to domestic residents plus those of 4 neighbouring countries (French and Dutch shops can also be accessed by residents of Belgium, while the German shop can also be accessed by the residents of Austria. The UK e-book shop can be accessed by Irish residents while the shop in Luxemburg can also be accessed by German residents. The Italian shop sells books to Italian residents only).

Firstly, the **online content portability Regulation**, which was part of the first package of copyright reform proposed by the Commission, was finally adopted last year by the co-legislators. The Regulation aims to broaden the accessibility of these services for travellers within the EU and targets those services where the application of copyright rules is most relevant. These include notably video and music subscription services like Amazon prime, who are now able to provide cross-border portability to consumers without having to acquire licences for other territories. The effects of the new Regulation are expected to be further boosted since the new roaming rules have been in force. Since mid-June 2017, consumers are supposed to pay domestic prices for mobile internet, subject to fair use, irrespective of where they are travelling in the EU.

Secondly, in the second copyright reform package proposed in September 2016 by the Commission, the **draft Directive on copyright in the DSM**² includes measures to increase the availability of European AV works on VoD platforms. In particular, the draft Directive provides for a negotiation mechanism, which will need to be set up at national level, to facilitate the licensing of audiovisual works on video-on-demand platforms and to overcome possible contractual blockages.

Despite the growing popularity of on-demand services like Amazon's, relatively few European audiovisual works are available on VoD platforms. Less than half (47%) of EU films released in cinemas between 2005 and 2014 are available on at least one VoD service. Moreover, European audiovisual works are often not available on platforms outside their home country; around half of EU films are available in only one country and 80% of EU films are available in three European countries or less on VoD services. This is partly explained by difficulties, including contractual ones, in acquiring the rights. The Commission wants therefore to facilitate negotiations to increase the availability of EU works on VoD platforms.

Amazon, as an online intermediary, might be less positive on the other hand on the measures proposed in the draft Directive to address the "value gap" issue, i.e. the massive mismatch between the growing consumption of protected creative content online and the difficulty for right-holders from creative sectors to negotiate and conclude agreements for the online exploitation of their content with certain digital services (e.g. YouTube) where such content is uploaded by users without right-holders' control, with a significant impact on the online service providers.

The proposal will push these user-upload services to cooperate with right-holders, so that their contractual relationship can be developed on a fairer basis. In practice, this would be an obligation to put in place content recognition technologies to either authorise the use of content where agreement is reached, or to remove it when their legitimate owners do not want their content to be on the platforms (Article 13). Recital 38 clarifies the legal context in which Internet platforms operate, including the articulation with the e-Commerce Directive regime on limited liability for digital intermediaries and the activity of communication to the public (subject to copyright licensing). In this way, the legislative proposal strikes a balance between different interests. It imposes obligations on platforms with large amounts of copyright protected content, which can be expected, due to their role on the content market,

² Instead, the Broadcasters' Regulation proposal, which provides for the extension of the country of origin rule for certain online services, is not meant to cover video-on-demand services such as Amazon prime, but only broadcasters' ancillary online services, mainly simulcasting and catch-up.

also to have certain responsibilities. It also introduces safeguards for businesses and users.

EDiMA, the trade association representing online platforms and innovative companies, including Amazon EU, has been very vocal against the Commission proposals on this point and further proposals to strengthen them in the Parliament and the Council, out of concern over the weakening of the E-Commerce Directive framework, which is regarded as a cornerstone to be preserved for the development of innovative services in the online sector.

Taxation in the digital economy

In this area there are issues with the lack of a level playing field and the need for all players (including internet giants like Amazon) along the value chain to pay their fair share. Last September, as part of the initiatives to support the completion of the Digital Single Market, the Commission launched a new EU agenda to ensure that the digital economy is taxed in a fair and growth-friendly way. The **Communication on a fair and efficient tax system in the DSM** sets out the challenges Member States currently face when it comes to acting on this pressing issue and outlines possible solutions to be explored ahead of a Commission proposal in 2018. All of the Commission's work rests on the simple principle that all companies, big and small, must pay tax where they make their profits.

In this connection, the action of the Commission has brought some concrete results as far as Amazon is concerned, also through **competition policy enforcement**. In particular, last October the Commission, following an investigation of the tax treatment in the two Amazon group EU-based companies started back in 2014, concluded that Luxembourg granted undue tax benefits of around EUR 250 million to Amazon. This is illegal under EU State aid rules because it allowed Amazon to pay substantially less tax than other businesses. Luxembourg must now recover the illegal aid.

Antitrust case on business practices by Amazon in the e-book sector and Commission plans on business-to-business practices of online platforms

In June 2015 the Commission opened a formal antitrust investigation into certain business practices of Amazon in the distribution of e-books. The investigation focused on some clauses in Amazon's contracts with publishers (so-called **parity clauses**) which shield Amazon from competition from other e-book distributors, e.g. clauses granting it the right to be informed of more favourable or alternative terms offered to its competitors and/or clauses imposing to offer terms and conditions at least as good as those offered to its competitors.

The Commission expressed concerns that such clauses may make it more difficult for other e-book distributors to compete with Amazon by developing new and innovative products and services and as a result reduce choice for consumers. Amazon has sought to address the Commission's concerns by offering not to enforce, introduce or to change the terms of its agreements with publishers. It has further amended its proposal following feedback received from interested parties on the suitability of Amazon's originally proposed commitments.

Last May the Commission concluded that the amended final version of the commitments offers a timely, effective and comprehensive solution to the competition concerns it had identified. It will help ensure that innovation for e-books by publishers

and other third parties can benefit companies other than Amazon and protect effective competition for e-books to the benefit of consumers.

Beyond specific competition cases, the Commission is currently preparing a package of measures to address unfairness issues in online platforms to business relations as announced in its DSM mid-term review of May 2017. This intervention (planned for adoption by the College on 25 April) is set to focus on transparency and redress measures, with a strong monitoring dimension. In fact, at this stage the intervention will not go as far as setting full-fledged rules prohibiting a well-defined set of unfair clauses or practices, but will include an important review clause, as well as the establishment of an expert group with observatory capacity.

This design thus implements a two-step approach tackling well documented issues in the first instance, while gathering additional evidence on future and emerging issues in parallel.

Educational initiatives of relevance to Amazon

Digital Education Action Plan

As a direct follow-up to the Commission's Communication on Strengthening European Identity through Education and Culture and the recent discussions at the Gothenburg summit (17 November), the Commission adopted a Digital Education Action Plan on the 16th January, in time for its presentation during the Education Summit. The Plan is part of the Future of Learning package (together with the Council Recommendation on Key Competences and the Council Recommendations on common values). With the package, launched on 17 January, the Commission took the first step towards a European Education Area by 2025.

The plan sets out how the Commission, over the coming three years, will support Member States' work in ensuring that education systems make good use of digital technologies and are prepared for future change. It will also set out measures to support teachers and learners in developing the competences they need to live, work and thrive in the digital age.

Education needs to ensure that all citizens have the right digital skills, knowledge and attitudes to take part in today's society and economy. The digital transformation has accelerated dramatically with artificial intelligence, the Internet of Things and big data, and these developments require education systems to adapt and adjust in new ways.

Today 44% of European adults have an insufficient level of digital skills. They are essentially excluded from the opportunities of the digital world. But even the so-called "digital natives" coming of age today lack digital competences: 25% of 14 year olds have only low or no digital literacy. One in five schools is lacking broadband connection. Their students and teachers will not be able to meaningfully use the Internet for education.

The Action Plan addresses therefore the following priorities:

1. Making better use of digital technology for teaching and learning;
2. Developing relevant digital competences and skills for the digital transformation;
3. Improving education through better data analysis and foresight.

The Commission will monitor the follow-up of the Digital Education Action Plan, with 11 actions being implemented between 2018 and 2020.

Two actions in particular could be of relevance for Amazon: the creation of a Europe-wide platform for digital and higher education and the launch of artificial intelligence pilots in education.

The creation of a Europe-wide platform for digital and higher education will be supported by Erasmus+ and will serve as a one-stop-shop, offering online learning, blended mobility, virtual campuses and exchanges of best practices among higher education institutions. The online platform will host existing EU, national or regional platforms and their activities, with the purpose to expand them, scale them up at European level and create network effects. It will be organised and monitored to ensure innovative, relevant and constantly updated material.

Contributors

