



The promotion of independent audiovisual production in Europe

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Francisco Javier Cabrera Blázquez, Maja Cappello, Gilles Fontaine,
Julio Talavera Milla, Sophie Valais



Foreword

Independence is a much-loved concept, to a great extent akin to freedom. Young people aspire to it and countries celebrate it. In the cinema and audiovisual sector, the term *indie film* evokes images of unlimited creative freedom and rebels up in arms against the studio system, but also of art films with limited budgets and distribution. It is also true that yesteryear's punks may become today's moguls. A fitting example of this is Hollywood, which became the "Promised Land" of cinema when filmmakers initiated an exodus in order to liberate themselves from Edison's pharaonic grasp. Now it is a synonym for the major studio system.

But what is really behind the word *independence*? According to the Cambridge Dictionary, it is *the ability to live your life without being helped or influenced by other people*.¹ But in an interconnected sector such as the one in question here, is it really possible to achieve *total* independence? It is like anything else, as Woody Allen would argue. In film, like in real life, we are not *independent* as such; we are or we become independent *from something or somebody*. Parents telling you what to do, an invading country or a bank which holds a mortgage on your house, you name it. The concept of independence means different things depending on the context. Indeed, the cinema and audiovisual industries use different definitions. Legislation also varies the definition of the concept of independence depending on the aim pursued. The EU's Audiovisual Media Services Directive, for instance, speaks of independence *vis-à-vis* broadcasters. Interestingly, this means that, at least in theory, a big Hollywood studio production will be independent for the purposes of this directive.

This publication aims at providing an overview of many relevant issues concerning the independent production of films and audiovisual works in Europe, including market figures, international and national rules, interprofessional agreements and case law.

The first chapter attempts to set the scene, providing a definition of independent audiovisual productions and a historical background to the concept. It also explains the characteristics of independent production (the size of independent production companies, types of works concerned, and the issue of rights ownership), describes the role of independent production for cultural diversity and democracy and presents a TV fiction case study. The second chapter describes the international and European legal framework, most notably the quota provision included in the AVMSD but also the MEDIA sub-programme of Creative Europe. Chapter three gives an overview of how independent production is regulated at national level, with the focus on definitions, financial investment in independent production and quota obligations, and direct and indirect public funding for independent production. The chapter four describes examples of interprofessional agreements between producers and public service broadcasters of three selected countries (Germany, France and the UK). Chapter five deals with case law, and

¹ <https://dictionary.cambridge.org/dictionary/english/independence>.

presents two interesting court decisions from the CJEU and from France. The final chapter discusses the state of play, setting the accent on current and future challenges for the independent production sector.

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Strasbourg, May 2019

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Table of contents

Executive summary	1
1. Setting the scene	3
1.1. Definition and role of independent audiovisual productions.....	3
1.1.1. Historical background to the concept of independent production	3
1.1.2. Scope of the definition	5
1.2. Characteristics of independent production	7
1.2.1. The size of independent production companies	7
1.2.2. The types of works concerned	7
1.2.3. Ownership of rights	8
1.3. The role of independent production for cultural diversity and democracy	8
1.4. Sizing independent production: the TV fiction case study	9
1.4.1. Background: TV fiction production in the European Union	9
1.4.2. Approaching the market share of independent production	11
2. International and European legal framework	15
2.1. International legal framework	15
2.1.1. UNESCO	15
2.1.2. Council of Europe	15
2.2. EU legal framework.....	18
2.2.1. Audiovisual Media Services Directive	18
2.2.2. Creative Europe	22
3. National frameworks	27
3.1. Overview	27
3.1.1. Definitions	27
3.1.2. Financial investment in independent production and quota obligations.....	28
3.1.3. Direct and indirect public funding for independent production	31
3.2. Case study analysis.....	32
3.2.1. AT - Austria	32
3.2.2. BE - Belgium	33
3.2.3. DE - Germany	38
3.2.4. FI - Finland.....	41

3.2.5. FR - France	42
3.2.6. GB - United Kingdom.....	48
3.2.7. IE - Ireland.....	50
3.2.8. IT - Italy.....	52
3.2.9. NO - Norway	55
3.2.10. PT - Portugal.....	56

4. Interprofessional agreements..... 59

4.1. DE - Germany.....	59
4.1.1. Framework Agreement	59
4.2. FR -France.....	63
4.2.1. Agreement France Télévisions 2019-2022	64
4.3. GB - United Kingdom.....	65
4.3.1. Codes of Practice	65
4.3.2. Terms of Trade.....	66

5. Case law 73

5.1. Court of Justice of the European Union.....	73
5.2. France.....	75

6. State of play 77

6.1. A challenging changing landscape.....	77
6.1.1. Public support for independent production.....	77
6.1.2. The emergence of online platforms and OTT players	79
6.1.3. New technological innovations.....	80
6.1.4. New business models.....	82
6.2. Impact of illegal distribution on the film and TV programmes industry.....	84

7. Annex 87

Figures

Figure 1.	Breakdown of TV fiction production by format - 2017	10
Figure 2.	Quota obligation imposed on broadcasters – works by independent producers.....	31

Tables

Table 1.	Top 20 independent TV fiction producers - 2017 (3-13 episodes).....	13
Table 2.	Development: single project.....	23
Table 3.	Development: slate funding.....	24
Table 4.	TV programming	25
Table 5.	Definition of independent producer.....	87



Executive summary

The first chapter aims at setting the scene, providing a definition of independent audiovisual productions and a historical background to the concept. While the term *independent* usually refers to films produced outside the existing main production circuit at any one time, it has had different nuances over time. Since the times of the *Edison Trust* and the creation of the Hollywood studio system, it has referred to actors and directors who wanted to break free from the studio system, to issues of the vertical integration of Hollywood studios, and to art-house productions. In Europe, it has also had different connotations depending on the country over time, including independence (or rather the lack of it) from politics. With regard to the term “independent producer”, various definitions are currently used by associations and institutions across Europe. Before highlighting the role of independent production for cultural diversity and democracy, this chapter explains its characteristics: relatively small independent production companies, usually revolving around fiction and entertainment, with secondary rights an important definitional parameter. The chapter ends with a case study assessing the level of independent TV fiction production, which is in fact quite high: the majority of TV fiction titles (74%) and hours (60%) can be regarded as independent productions.

These figures are doubtless a result (at least to a certain extent) of the quota provision included in the EU’s Audiovisual Media Services Directive, which requires broadcasters to reserve at least 10% of their transmission time, excluding the time allotted to news, sports events, games, advertising, teletext services and teleshopping, or alternatively, at the discretion of the member state, at least 10% of their programming budget, for European works created by producers that are independent of broadcasters. This provision is described in detail in chapter two, which also presents the role of UNESCO and the Council of Europe in promoting cultural diversity, as well as the support provided by Creative Europe in this regard.

The third chapter gives an overview of how independent production is regulated at national level, with the focus on definitions, financial investment in independent production and quota obligations, and direct and indirect public funding for independent production. With regard to definitions, a more or less harmonised definition of “European works” is provided in the most part, whereas “independent production” is defined in fewer cases. Recital 71 of the AVMS Directive provides useful criteria for defining the independence of a producer vis-à-vis a broadcaster, but other criteria are also applied, such as the ownership of the rights in a film or TV programme, qualitative criteria, such as the producer’s actual editorial independence, or criteria related to the financial links between the producer and the broadcaster. This chapter also describes the financial investment obligations and the quota obligation of Article 17 AVMSD that are imposed on broadcasters in most EU countries. This extensive information is provided thanks to the



“Mapping of national rules for the promotion of European works”, carried out by the European Audiovisual Observatory for the European Film Agency Directors (EFADs) in 2018. But that is not all: many national film funds also provide selective and/or automatic support specifically for independent producers. In some cases, the condition for receiving grants under the various film fund schemes is that the beneficiary is an independent producer (e.g. Denmark and Portugal). However, the majority of film funds only impose the condition of being independent for certain schemes. It is often accompanied by the requirement that the independent producer is established (or has an operating establishment) in the country.

Public-service broadcasters (PSBs) deserve a separate chapter in this respect. Given their particular role, their market importance and the way they are financed, they have to comply with certain basic rules applying to contractual agreements between TV channels and independent producers. The fourth chapter describes examples of interprofessional agreements between producers and PSBs of three countries (Germany, France and the UK).

Chapter five deals with case law, presenting two interesting court decisions from the CJEU and from France, while the final chapter discusses the state of play: a challenging changing landscape, with digital transformation and increased competition for audiences. Topics discussed are public support for independent production, the disrupting role of online platforms and OTT players, new technological innovations and new business models, and the impact of illegal distribution on the film and TV programme industry.



1. Setting the scene

1.1. Definition and role of independent audiovisual productions

1.1.1. Historical background to the concept of independent production

1.1.1.1. The American approach

The origin of the term “independent production” is to be found in the origins of the cinema industry. It has had different nuances over time, with the term usually referring to films produced outside the existing main production circuit at each moment in history.

Since the end of the first decade of the 20th century most American film production has revolved around the Motion Picture Patents Company (MPPC), a trust of the main production and distribution companies as well as film stock suppliers based near New York. It was managed with an iron fist by American inventor and entrepreneur Thomas Alva Edison, who also held the patents of most motion picture cameras in the country. The so called *Edison Trust* did not leave room for independent production outside its circuit, threatening to sue anyone not using its patented cameras and allegedly tending to use mob-like intimidation tactics with those who tried to operate outside its control. This is why a group of producers fled to the other side of the country, as far away as possible from Edison, to be able to shoot films independently from MPPC. With cheap land and labour as well as a mild climate, the uninhabited piece of land on the outskirts of Los Angeles was destined to become the Mecca of the Movies. Independent producers started to establish themselves in Hollywood, developing what was later known as the *studio system* and *star system*.

Soon after, some actors and directors felt uncomfortable with the new system. In 1919 Charles Chaplin, Mary Pickford, Douglas Fairbanks and D.W. Griffith joined forces to establish United Artists, a new studio which confronted the *studio system* in the sense that actors were not forced to sign a long-term contract with the studio and therefore remained independent and were able to choose the projects they wanted to work on.



Independence was also an issue years later, when in 1948 the US Supreme Court ruled that the vertical integration of Hollywood studios did not comply with the country's anti-trust legislation, forcing them to split their production, distribution and exhibition activities into different independent companies.

It was notably during the 1970s that, not only in the US, the concept of independent production became blurred and often confused with that of art-house production, which referred works focusing more aesthetics than on commercial success and addressing topics and viewpoints other than, and often opposed to, those of mainstream productions. However, this merge of terms is often misleading, as many of the so-called independent productions of those years were in fact backed by the big Hollywood studios.

Nowadays, the concept of independent production (also known as *indie*) continues to be linked to the idea of producing outside the system of major studios, more precisely outside the Motion Picture Association of America² (MPAA) system, which currently includes the following companies: Walt Disney, Netflix, Paramount Pictures, Sony Pictures, Twentieth Century Fox, Universal Studios and Warner Bros. In this connection, the Independent Film & Television Alliance³ (IFTA) defines an independent film or television programme as a work “*financed primarily outside of the six major U.S. studios*”. According to its figures, independents account for approximately 70% of annual US production.⁴ Even according to MPAA, only 17% of the films released in the US/Canada in 2017 were produced by MPAA members and their subsidiaries. Moreover, the number of releases of independent films has increased by 38% over the last decade, while MPAA releases have decreased by 20% over the same period.⁵

When it comes to television and on-demand services, the term independent production has been used to refer to those productions where companies financially independent from majors, main networks or large on-demand providers have editorial and budgetary control over their projects.

1.1.1.2. The European approach

The concept of independent production has had different connotations depending on the country over time. At the beginning of the 20th century several big production companies flourished around Europe (such as Pathé in France, Gaumont in France and the UK, UFA in Germany and Cines in Italy). However, with the exception of UFA during the Nazi period, the concentration of production around “European majors” cannot be compared with that in the USA, so that independent production was less of a European concept during this period.

² <https://www.mpa.org/>.

³ <http://www.ifta-online.org>.

⁴ Ibid.

⁵ 2017 THEME Report, MPAA, https://www.mpa.org/wp-content/uploads/2018/04/MPAA-THEME-Report-2017_Final.pdf (page 23).



After World War II, the American majors extended their presence in most European countries, considerably increasing their share of Western European markets. Consequently, efforts were made to achieve certain independence in the sense of protecting and fostering a domestic industry on the grounds of preserving national cultural identities. In turn, in the Eastern European communist countries cinematography was in most cases a state monopoly, so it was virtually impossible to shoot, distribute or exhibit films outside the state-owned circuit. Conversely, in fascist countries, such as Portugal and Spain, cinema production remained a private activity, but the government had tight control over the content through censorship. In both cases, the concept of independent production was used (often a posteriori) to refer to those films which were able to circumvent censorship. As in the case of North America, the term independent became confused with art-house cinema from the 1970s onwards.

In the case of broadcasting, the history of this medium in Europe was initially linked to state monopolies with in-house production. Although some European countries had already begun to liberalise the broadcasting sector, the 1989 Television without Frontiers Directive sped matters up. At the same time, in the broadcasting sector there was a trend towards increased outsourcing and the commissioning of programmes from external, independent producers.

1.1.2. Scope of the definition

Even though there is no common definition of the “independent producer”, there are various definitions used by associations and institutions across Europe as mentioned below, whereas the definitions at national level, where adopted, are mentioned in Chapter 3.

1.1.2.1. European Coordination of Independent Producers (CEPI)

The European Coordination of Independent Producers (CEPI) was founded in 1990 and represents 18 European national associations of independent producers (including, among others, APT, MediaPro, Pact, USPA and Screen Producers Ireland). According to their Statutes,⁶ “*independent production is considered as not controlled, de facto or de jure, by a broadcaster and which can therefore maintain managerial independence and freedom to dispose of its production or which is recognised as an independent by the national Associations represented*”.⁷ Therefore, CEPI places the emphasis on the ownership of the production company when defining it as independent.

In CEPI’s view, an independent producer is in charge of finding sources of financing for the project, calculating and controlling the budget plan, dealing with copyrights, selecting scripts and key talent, looking for possible co-producers, negotiating

⁶ European Coordination of Independent Producers (CEPI), <https://www.cepi-producers.eu/about>.

⁷ CEPI Statutes, https://docs.wixstatic.com/ugd/d9e145_728e3b8c51b84db0a7e2d9b458fc65a8.pdf.



contracts and ensuring fair remuneration for those involved in the project, supervising the shooting and editing and being the primary point of contact for the broadcaster(s) involved.

1.1.2.2. EuroVoD

The European Federation of Independent Cinema VoD Platforms⁸ (EuroVoD) was created in 2010 and brings together on-demand platforms specialising in art-house, independent and European cinema (including, among others, Curzon, FilmIn, Universciné and Kinow), with a requirement of a minimum 40% of European titles in their catalogues. Although not defined in the organisation's statutes, the "*promotion of independent cinema of a highly artistic quality*" is among its objectives.⁹

1.1.2.3. European Producers Club (EPC)

The European Producers Club¹⁰ (EPC) is an association of Europe's independent film producers set up in 1993 with the objective to "represent the interests of independent producers before the main national and international political bodies and institutions" and ensure that "*the voice of independent film producers is heard in the European and international arenas*" and to "*promote, in a very real way, the idea of powerful and independent European cinema*".¹¹

1.1.2.4. Media sub-programme

The EU's *Creative Europe* MEDIA sub-programme, devoted to supporting the film, audiovisual and multimedia sectors in Europe, does not provide a definition of independent production. However, it establishes in Article 10 c) of the relevant Regulation¹² that the programme should support "*activities aiming to support European audiovisual production companies, in particular independent production companies, with a view to facilitating European and international co-productions of audiovisual works including television works.*" The Commission therefore puts special emphasis on independent production in its public support system.

⁸ <https://www.eurovod.org/>.

⁹ https://docs.wixstatic.com/ugd/bda96b_36019dddb8234632a93a4d6ed544f9f2.pdf.

¹⁰ <https://www.europeanproducersclub.org/>.

¹¹ <https://www.europeanproducersclub.org/membership>.

¹² Regulation (EU) No 1295/2013 of the European Parliament and of the Council of 11 December 2013 establishing the Creative Europe Programme (2014 to 2020) and repealing Decisions No 1718/2006/EC, No 1855/2006/EC and No 1041/2009/EC, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013R1295&from=EN>.



1.1.2.5. Eurimages

In the case of Eurimages, the Council of Europe's fund for the co-production and distribution of cinematographic and audiovisual works, independent production is a prerequisite for accessing support, as established in Article 5.4 of the Resolution¹³ setting up the fund: *"Aid for the co-production of films and audiovisual works shall be granted in respect of co-productions of works primarily intended for cinema showing and of co-productions of works primarily intended for broadcasting by television or cable distribution, where such work is produced by producers independent of the broadcasting agencies."*

1.2. Characteristics of independent production

1.2.1. The size of independent production companies

Although the size of independent production companies, both in terms of turnover and staff, may vary considerably from country to country and between film and audiovisual production, independent production companies in Europe are not comparable in size to telecommunication companies, broadcasters or other audiovisual media service providers. CEPI's Manifesto¹⁴ states that most of its members are small and medium size enterprises (SMEs), so one of the organisation's key missions is to *"support the development of a market in and outside Europe where SMEs can flourish and compete"* and to address the issue of the circulation of European works produced by SMEs in international markets.

The importance of SMEs in the European cultural and creative sectors is also acknowledged by the Creative Europe Programme in recital 17 of its Regulation, which states that the challenges for SMEs are even more acute when it comes to these sectors *"due to the intangible nature of many of their assets, the prototype profile of their activities, and their intrinsic need to take risks and experiment in order to innovate."*

1.2.2. The types of works concerned

Independent production usually revolves around fiction and entertainment, with AVMS, notably broadcasters, not outsourcing the production of news programmes and the coverage of events (sports, awards, concerts), i.e. programmes with a shorter shelf life. A plausible explanation would be, on the one hand, the desire to retain editorial control

¹³ Resolution (88) 15 setting up a European support fund for the co-production and distribution of creative cinematographic and audiovisual works "Eurimages", <https://rm.coe.int/setting-up-a-european-support-fund-for-the-co-production-and-distribut/16804b86e2>.

¹⁴ CEPI's Manifesto, <https://www.cepi-producers.eu/manifesto>.



over what are still considered the flagship programmes of generalist broadcasters, namely news programmes. On the other hand, the normally smaller size of independent producers would rule out the massive deployment of resources required in the coverage of events.

1.2.3. Ownership of rights

One of the characteristics of independent productions concerns the ownership of rights. In the case of audiovisual productions, one of the defining elements is whether or not the producer retains the secondary rights; that is to say the rights to exploit the film or audiovisual work throughout other distribution windows and in other markets beyond the initial distribution by the AVMS provider, which is usually limited in time and, in the case of broadcasting, in the number of retransmissions. However, the initial AVMS provider may have the so called right to *first negotiation*, that is to say the right to acquire secondary rights if matching any other offer received by the producer.

Moreover, as further explained in the case study in 1.4., when it comes to broadcasting there are two common models for the collaboration between production companies and broadcasters: the commissioning model, where the commissioning broadcaster retains the secondary rights, and the independent production model, where the producer retains these rights.

1.3. The role of independent production for cultural diversity and democracy

Independent production plays an important role in the promotion of cultural diversity. This is recognised by the UNESCO Convention on the Promotion of the Diversity of Cultural Expressions,¹⁵ which establishes that one of the rights of parties at the national level is to “*adopt measures aimed at protecting and promoting the diversity of cultural expressions within its territory*”, which includes, inter alia, “*measures aimed at providing domestic independent cultural industries and activities in the informal sector effective access to the means of production, dissemination and distribution of cultural activities, goods and services*” (Article 6 paragraph 2(c)).

As for democracy, according to the works of the Council of Europe’s Group of Specialists on Media Diversity (MC-S-MD)¹⁶ back in 2008, support for independent production is key “*to achieving the objective of plural sources and opinions which is central to*

¹⁵ UNESCO Convention on the Promotion of the Diversity of Cultural Expressions (2005) <https://en.unesco.org/creativity/sites/creativity/files/passeport-convention2005-web2.pdf>.

¹⁶ The role of independent productions in promoting cultural diversity, Report prepared by the Group of Specialists on Media Diversity (MC-S-MD), November 2008, <https://rm.coe.int/1680483b17>.



the rules of democracy". The Group therefore makes a direct connection between the plurality of sources, formats and viewpoints and "*democracy and the shaping of public opinion*."

In certain countries broadcasters, in particular those with a public service remit, have an obligation under national legislation to promote cultural diversity and invest heavily in independent audiovisual production. This vital role of public service broadcasters has been highlighted by the MC-S-MD: "*[O]ne should not neglect or underestimate the fundamental role played by broadcasters, and particularly those with a public service remit, in promoting cultural diversity and supporting independent audiovisual production. Such broadcasters are extensively engaged in supporting the production of cinematographic works and television programmes, contributing directly and indirectly to independent productions. Furthermore, they commission and acquire and broadcast a substantial proportion of independent productions, very often greatly exceeding the quota laid down by law*".¹⁷

In addition, as can be seen in the following section, some countries have stringent obligations for public service broadcasters regarding their contribution to support for independent cinematographic and audiovisual works.

1.4. Sizing independent production: the TV fiction case study

The European Audiovisual Observatory has tracked the production of TV fiction in the European Union since 2016. Assessing the level of independent TV fiction production is one of the focuses of the research but faces several hurdles.

1.4.1. Background: TV fiction production in the European Union

The European Audiovisual Observatory estimates¹⁸ that about 960 titles of TV fiction were produced in the European Union in 2017, representing over 19 000 episodes and 12 000 hours. TV films (1 or 2 episodes) and TV series 3-13 episodes (which can be regarded as high-end TV series) account for 82% of all titles produced,¹⁹ but TV series with more than 13 episodes account for 73% of all hours produced.

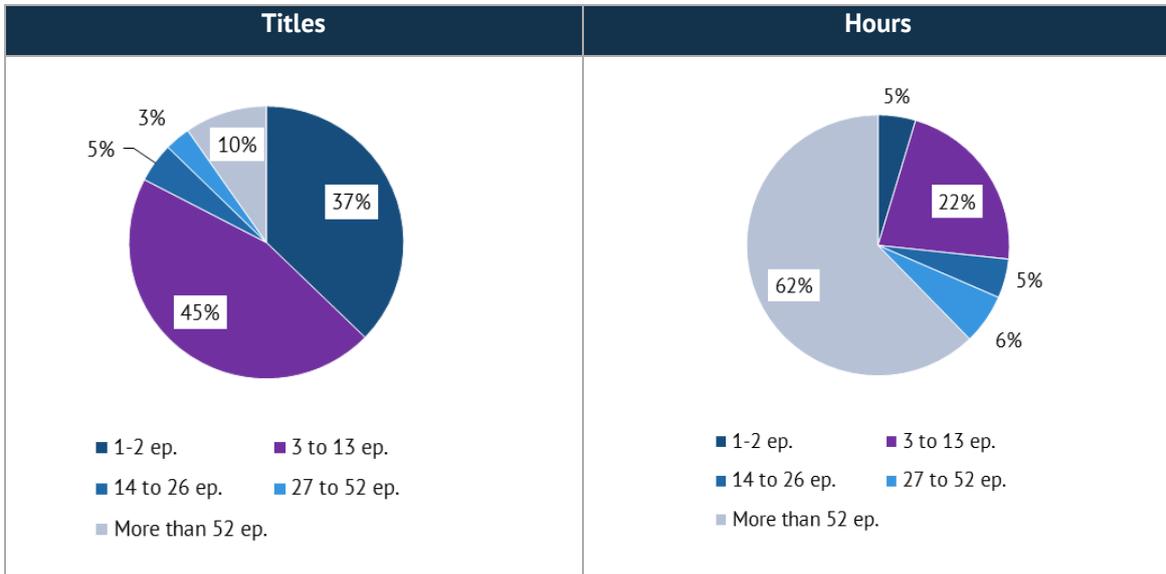
¹⁷ Op.cit.

¹⁸ Based on a sample of 92 TV channels (50 private and 42 public) from 22 European Union countries, and 7 pan-European or national subscription video-on-demand services.

¹⁹ TV series with more than 13 episodes accounting for the remainder.



Figure 1. Breakdown of TV fiction production by format - 2017



Source: European Audiovisual Observatory

Across all formats, Germany is by far the leading producer of TV programmes in terms of number of titles and hours. The largest countries are not necessarily among the top producing countries: the Netherlands, for instance, produced more original titles in 2017 than Spain or Italy, while Portugal and Poland produced more original hours than Spain, the United Kingdom or France.

The volume of TV fiction produced is strongly determined by the formats the countries focus on. Some countries focus mainly on long-running soaps or telenovelas (Slovenia, Greece, Romania, Bulgaria, Cyprus and Portugal), while others provide a significant platform for TV films (Germany and, to a lesser extent, Austria and France). Finally, some countries produce mainly high-end 3-13 episode TV series (Denmark, Sweden, the United Kingdom, Finland and Belgium).

The share of co-productions is much lower for TV fiction than for films. Only 9% of TV films and 9% of TV series with 3-13 episodes are co-productions.²⁰

²⁰ To be compared with about 22% for fiction feature films.



1.4.2. Approaching the market share of independent production

1.4.2.1. Diversity of national models

An analysis of the main producers of TV fiction immediately highlights the diversity of the European landscape. Among the top TV fiction production companies the following coexist:

- leading broadcasters, producing mainly for themselves (e.g. ARD, BBC);
- leading broadcasters, producing both for themselves and for non-affiliated third party broadcasters (e.g. RTL, ITV);
- large production companies with no equity relationships with a broadcaster, or at least with a broadcaster with no strong positions in Europe (e.g. All3Media, Mediawan).

TV content production has in fact followed two different historical models, which still structure the national TV fiction production sector to some extent:

- On the one hand, several countries have followed the same approach for TV content as for films, with a predominance of fully independent producers in charge of creativity input, collecting financial resources, producing the programme and retaining the secondary rights.²¹
- On the other hand, TV content production has developed in certain countries along the lines of the in-house production model (the programme is fully conceived, produced and exploited internally by the broadcaster) and the commissioning model (the programme is entrusted to a production company, which may be independent in terms of equity but does not retain IP rights).²²

The two different models have to be nuanced and seem to be evolving:

- In terms of genre: TV animation has proved to be too costly for one broadcaster to fully fund an animated series. Even in the “commissioning model” countries, co-productions between broadcasters have been developing, often with a key role allocated to a third-party producer.
- In terms of budgets: the new competition from international players (e.g. Netflix) has made it essential for broadcasters to increase the budgets of their TV fiction projects and therefore adopt, as in the case of TV animation, a co-production approach, which may or may not presuppose the intervention of a third party producer, independent or not.

²¹ A model sometimes referred to as “deficit financing”. For more details, see <https://www.britannica.com/topic/deficit-financing>.

²² A model sometimes referred to as “cost plus”.



1.4.2.2. Independent productions vs independent producers

In the context of structural differences between the production sectors in the various European countries, the reference to the usual criteria employed to determine an independent producer or an independent production (equity relationships, volume of production with a given broadcaster, retention of all or part of the intellectual property rights by the producer) is challenging:

- On the one hand, the control over the intellectual property rights (including the secondary rights) is governed by private contracts, and the European Audiovisual Observatory has no means of checking how (or to what extent) they are shared between the producer and the broadcaster. However, particularly in the case of public service broadcasters this is often regulated by agreements between the latter and the State or the producer's associations (see chapter 4).
- On the other hand, for the purpose of the methodology employed to produce this case study, the equity relationship can be assessed in a relative or absolute way: for example, a production by Newen, a subsidiary of the French broadcaster TF1 for France Télévision, another French broadcaster, can be regarded as independent (as there is no equity relationship between Newen and France Télévision) or not independent (because Newen, as a subsidiary of TF1, is not actually independent).

The figures gathered by the Observatory on the share of independent production therefore come up against the following limitations:

- They do not take into account the status of the IP rights.
- They follow the “relative approach”, considering all production by a broadcaster's production subsidiary for a non-affiliated third-party broadcaster as independent.

Therefore, for the purpose of this case study, TV fiction commissioned by a broadcaster from a non-controlled TV production company is regarded as independent – a dominant scheme in certain European countries.

1.4.2.3. An apparent oxymoron: large “independent production” groups prevail

Based on these circumstances, the share of independent TV production is high: the majority of TV fiction titles (74%) and hours (60%) can be regarded as independent productions. The share of independent productions is higher for 3-13 episode TV series (79% for both titles and hours), since a proportion of the long-running soaps or telenovelas is produced by the broadcasters themselves. Moreover, the independent production sector appears to be relatively concentrated, with the top 20 players accounting for 31% of titles and 55% of hours.



Table 1. Top 20 independent TV fiction producers - 2017 (3-13 episodes)

Rank	Company	Hours
1	EndemolShine	135
2	ITV	91
3	RTL	80
4	Sony	46
5	Akson Studio	45
6	Mediawan	43
7	ATM Grupa S.A.	38
8	Vivendi	38
9	JLA	35
9	All3Media (Discovery)	35
11	Neue Deutsche Filmgesellschaft	34
12	Banjay	31
13	TF1	30
13	Atresmedia Televisión	30
15	Beta Films	28
16	Bonnier	27
16	Time Warner	27
18	Lagardère	25
19	NBCUniversal	24
20	Elephant	23

Source: European Audiovisual Observatory



2. International and European legal framework

2.1. International legal framework

2.1.1. UNESCO

The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions²³ recognises the dual nature, both cultural and economic, of contemporary cultural expressions produced by artists and cultural professionals and recognises the sovereign right of states to maintain adopt and implement policies to protect and promote the diversity of cultural expression, both nationally and internationally.

According to Article 6 of the UNESCO Convention, each Party may adopt measures to protect and promote the diversity of cultural expressions within its territory. Among these measures, paragraph 2(c) includes “measures aimed at providing domestic independent cultural industries and activities in the informal sector effective access to the means of production, dissemination and distribution of cultural activities, goods and services”.

2.1.2. Council of Europe

2.1.2.1. The role of independent production in promoting cultural diversity

Culture is an essential component and a key factor for the effective delivery of the core mission of the Council of Europe to promote human rights, the practice of democracy and the rule of law. For the Council of Europe, promoting culture means advocating strong cultural policies and governance aimed inter alia at respect for identity and diversity as

²³ UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, 20 October 2005, http://portal.unesco.org/en/ev.php-URL_ID=31038&URL_DO=DO_TOPIC&URL_SECTION=201.html.



one of the bases for respectful and tolerant living together in an ever-more complex world.

In 2009, the Recommendation of the Committee of Ministers to member states on national film policies and the diversity of cultural expressions²⁴ already recognised that globalisation and digital technologies may be an opportunity or a threat, depending on whether public authorities are able to act swiftly and help to develop new business models for European film. Such business models should enable the film sector to realise its potential as a vector of diverse cultural expressions by stimulating creativity and increasing its market reach.

Concerning the importance of independent production in promoting cultural diversity, the Group of Specialists on Media Diversity (MC-S-MD) prepared in 2008 a report²⁵ which recognises the importance of the role played by independent producers for consolidation and fostering the genuine and free access of creators in a highly competitive field such as the audiovisual market. The report noted, however, that, in practice, their independence often seems to be undermined by a double system of constraints, both economic and editorial, concerning distributors – public and private – and financing schemes. It suggested that the debate on this matter would be greatly enhanced, in the medium and long term, by any further initiative fostering flexible and profitable methods of co-operation and exchange of information and know-how, such as a review or compendium of best practice cases in the matter. It also stated that many of the inherent difficulties involved could be successfully avoided through more flexible and less bureaucratic models of co-operation, such as regional co-production initiatives and boards, with special emphasis on the cinema industry. It refrained, however, from proposing the drafting of a recommendation or other similar legal instrument of the Council of Europe on the issue and proposed that the debate should continue and the development of the sector be constantly monitored at the level of an expert group.

2.1.2.2. European Convention on Transfrontier Television

Contrary to its EU counterpart, the Audiovisual Media Services Directive,²⁶ the European Convention on Transfrontier Television²⁷ does not include any concrete provision on independent production. However, it affirms the importance of broadcasting for the development of culture and the free formation of opinions in conditions safeguarding pluralism and equal opportunities among all democratic groups and political parties. It

²⁴ Council of Europe, Recommendation CM/Rec(2009)7 of the Committee of Ministers to member states on national film policies and the diversity of cultural expressions (Adopted by the Committee of Ministers on 23 September 2009 at the 1066th meeting of the Ministers' Deputies), https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805d07fe.

²⁵ Council of Europe, Group of Specialists on Media Diversity (MC-S-MD), "The role of independent productions in promoting cultural diversity," November 2008, <https://rm.coe.int/1680483b17>.

²⁶ See Chapter 2.2. of this publication.

²⁷ European Convention on Transfrontier Television Strasbourg, 5 May 1989 (text amended according to the provisions of the Protocol (ETS No. 171) which entered into force, on 1 March 2002), <https://rm.coe.int/168007b0d8>.



also expresses the desire to present an increasing range of choice of programme services for the public, thereby enhancing Europe's heritage and developing its audiovisual creation. This cultural objective should be achieved through efforts to increase the production and circulation of high-quality programmes, thereby responding to the public's expectations in the political, educational and cultural fields.

Article 10 concerns measures to achieve cultural objectives, notably a transmission quota for European works. It also includes an undertaking of the Parties to look together for the most appropriate instruments and procedures to support, without discrimination between broadcasters, the activity and development of European production, particularly in countries with a low audiovisual production capacity or restricted language area.

2.1.2.3. The promotion of co-productions

The Council of Europe promotes cinematographic co-productions through two instruments: the Convention on Cinematographic Co-production and the Eurimages fund.²⁸

2.1.2.3.1. Council of Europe Convention on Cinematographic Co-production

The Convention on Cinematographic Co-production is an instrument aimed at promoting the development of multilateral cinematographic co-productions, safeguarding creation and freedom of expression and defending the cultural diversity of the various countries that are party to the Convention. Initially adopted in 1992 under the name of European Convention on Cinematographic Co-Production,²⁹ it was later revised in 2017 and renamed as the Council of Europe Convention on Cinematographic Co-Production³⁰ in order to provide new flexibility in constructing co-productions and to reflect technological change and evolving industry practice, as well as to reflect the expansion of its scope to non-European countries. Despite its revision, the original Convention remains in force and will exist side by side with the revised one.³¹

²⁸ For more in-depth information on this topic see Cabrera Blázquez F.J., Cappello M., Enrich E., Talavera Milla J., Valais S., *The legal framework for international co-productions*, IRIS Plus, European Audiovisual Observatory, Strasbourg, 2018,

<https://rm.coe.int/iris-plus-2018-3-the-legal-framework-for-international-co-productions/168090369b>.

²⁹ European Convention on Cinematographic Co-Production (ETS No. 147, Strasbourg, 2 October 1992, <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/147>.

³⁰ Council of Europe Convention on Cinematographic Co-production (revised), 30 January 2017, <https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168069309e>.

³¹ Macnab G., "How the revised European co-pro treaty can benefit producers", <https://www.screendaily.com/features/how-the-revised-european-co-pro-treaty-can-benefit-producers/5114776.article>.



2.1.2.3.2. Eurimages

Eurimages³² is the cultural support fund of the Council of Europe. It promotes independent filmmaking by providing financial support to feature-length films, animation and documentary films. In doing so, it encourages co-operation between professionals established in different countries. Since being set up in 1989,³³ it has supported 1962 European co-productions for a total amount of approximately EUR 574 million.

Eurimages has four support schemes: feature film co-production, the promotion of co-production, theatrical distribution and exhibition. It promotes independent filmmaking through a number of collaboration agreements with various festivals and film markets and has also adopted a strategy to promote gender equality in the film industry. Concerning the co-production support scheme,³⁴ projects submitted must be co-productions between at least two independent producers, established in different member states of the Fund, of which at least one is a member state of the Council of Europe. Financial support may only be awarded to natural or legal persons governed by the legislation of one of the Fund's member states, whose principal activity consists in producing cinematographic works, and whose origins are independent of public or private broadcasting organisations or telecom companies. A production company is considered independent when less than 25% of its share capital is held by a single broadcaster or less than 50% where several broadcasters are involved.

2.2. EU legal framework

2.2.1. Audiovisual Media Services Directive

The EU's Audiovisual Media Services Directive (AVMSD)³⁵ is the EU main regulatory instrument for the audiovisual sector. It governs EU-wide coordination of national legislation on all audiovisual media, both traditional TV broadcasts and on-demand

³² <https://www.coe.int/en/web/eurimages/home>.

³³ See Council of Europe Resolution (88) 15 setting up a European support fund for the co-production and distribution of creative cinematographic and audiovisual works ("Eurimages"), Committee of Ministers, 26 October 1988,

<https://rm.coe.int/setting-up-a-european-support-fund-for-the-co-production-and-distribut/16804b86e2>.

³⁴ See Eurimages Regulations on support for co-production,

<https://rm.coe.int/eurimages-support-for-co-production-feature-length-fiction-animation-a/1680924826>.

³⁵ Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive, AVMSD), amended by Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018,

<https://eur-lex.europa.eu/eli/dir/2018/1808/oj>.



services. Among its many provisions, it includes a quota obligation for the promotion of independent production (Article 17 AVMSD).

2.2.1.1. From TwFD to AVMSD

Promotional obligations on linear (broadcasting) services have existed since 1989. Articles 4 and 5 of the Television Without frontiers Directive (TWFD)³⁶ provided that:

- member states must ensure, where practicable, that broadcasters reserve for European works a majority proportion of their transmission time, excluding the time allocated to news, sports events, games, advertising, and teletext and teleshopping services (Article 4 TwFD)
- they must also reserve at least 10% of their transmission time or 10% of their programming budget for European works from independent producers (Article 5).

These articles (as well as the corresponding recitals) remained unchanged in the revisions of 1997, 2007 (when the TWFD was renamed the AVMSD) and 2018. Only the numbering changed to 16 and 17.

2.2.1.2. Obligation to promote “independent production” (Article 17 AVMSD)

Article 17 AVMSD requires broadcasters (i.e. linear audiovisual media services) to reserve at least 10% of their transmission time, excluding the time allotted to news, sports events, games, advertising, teletext services and teleshopping, or alternately, at the discretion of the member state, at least 10% of their programming budget, for European works created by producers that are independent of broadcasters. This proportion should be achieved gradually, on the basis of suitable criteria, and must be achieved by earmarking an adequate proportion for recent works (i.e. transmitted within 5 years of their production).

2.2.1.3. Monitoring reports

According to Article 16(3) AVMSD, member states have to provide the Commission every two years with a report on the application of Article 17. These reports have to include a statistical statement on the achievement of the proportion referred to in Article 17 for each of the television programmes falling within the jurisdiction of the member state concerned, the reasons, in each case, for the failure to achieve that proportion and the measures adopted or envisaged in order to do so.

³⁶ Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities (amended by Directive 97/36/EC). No longer in force, see: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3A124101>.



On 3 March 1994, the European Commission published its first report³⁷ on the application of Articles 4 and 5 TwFD, which was presented together with the proposal to amend the Directive and gave a substantially positive evaluation of the compliance with the quotas and contained the first Guidelines on the monitoring in Annex 1. The second report³⁸ showed an improvement in the fulfilment of the reporting obligations, both in terms of the provision of data and of compliance with the rules. The third report³⁹ also contained an overall assessment of the period 1991-1996, and pointed to fully operational monitoring, which showed a significant increase both in channels and in promoted European works. The fourth report⁴⁰ showed that most member states had introduced stricter rules and that compliance with the quotas was more than satisfactory. The fifth report,⁴¹ which covered the first period regulated by the revised Directive, 97/36/EC, shows for the first time the general trends observed both at Community level and in the individual member states concerned. The sixth report⁴² showed that demand for national and European works, which had constantly increased over the previous decade, had reached a new peak in 2002, with almost 2/3 of all qualifying transmissions at Community level. The seventh report⁴³ confirmed the positive results of the previous reports, which was also the case with the eight report.⁴⁴ The ninth report,⁴⁵ which

³⁷ Communication from the Commission to the Council and the European Parliament on the application of Articles 4 and 5 of Directive 89/552/EEC "Television without Frontiers", COM(94) 57 final, 03 March 1994, <http://aei.pitt.edu/3114/1/3114.pdf>.

³⁸ Communication from the Commission to the Council and the European Parliament on the application of Articles 4 and 5 of Directive 89/552/EEC "Television without Frontiers", COM(96)302 final, 15 July 1996, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:51996DC0302&rid=3>.

³⁹ Third Communication from the Commission to the Council and the European Parliament on the application of Articles 4 and 5 of Directive 89/552/EEC "Television without Frontiers" for the period 1995-1996 including an overall assessment of application over the period 1991-96, COM (98) 199 final, 3 April 1998, <http://aei.pitt.edu/3113/1/3113.pdf>.

⁴⁰ Fourth Communication from the Commission to the Council and the European Parliament on the application of Articles 4 and 5 of Directive 89/552/EEC "Television without Frontiers" for the period 1997-8, COM (2000) 442 final of 17 July 2000, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52000DC0442&rid=3>.

⁴¹ Fifth Communication from the Commission to the Council and the European Parliament on the application of Articles 4 and 5 of Directive 89/552/EEC "Television without Frontiers", as amended by Directive 97/36/EC, for the period 1999-2000, : COM(2002) 612 final, 8 November 2002, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52002DC0612&rid=2>.

⁴² Sixth Communication from the Commission to the Council and the European Parliament on the application of Articles 4 and 5 of Directive 89/552/EEC "Television without Frontiers", as amended by Directive 97/36/EC, for the period 2001-2002, COM (2004) 524 final of 28 July 2004, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004DC0524&rid=5>.

⁴³ Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions - Seventh communication on the application of Articles 4 and 5 of Directive 89/552/EEC "Television without Frontiers", as amended by Directive 97/36/EC, for the period 2003-2004 COM(2006) 459 final of 14 August 2006, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52006DC0459&rid=3>.

⁴⁴ Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions - Eighth Communication on the application of Articles 4 and 5 of Directive 89/552/EEC "Television without Frontiers", as amended by Directive 97/36/EC, for the period 2005-2006, COM(2008) 481 of 21 July 2008, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52008DC0481&rid=9>.



concerned the first period covered by the newly revised Directive, 2007/65/EC, pointed to the substantial stability of European works, as against a decrease in the number of broadcasting channels together with the growth of new services.

After the adoption of the AVMSD, the first report⁴⁶ on the promotion of European works on EU television and On-Demand services, for the period 2009-2010 stated that despite the share of European independent works broadcast in the EU being well above the 10% proportion laid down in Article 17 of the AVMSD (an average of 34.1% in 2009 and 33.8% in 2010), independent works showed a moderate but steady downward trend initiated in 2006. Recent works also registered a slight decrease, with respectively 62.1% in 2009 and 61.8% in 2010 of the total volume of European independent works. For this reason, the Commission invited member states to reflect upon ways of reversing the declining trend in the broadcasting of independent works to help support the European independent production sector.⁴⁷

2.2.1.4. Monitoring guidelines

The European Commission has prepared a set of guidelines⁴⁸ to help member states in their duty to monitor the application of Articles 16 and 17 AVMSD. These guidelines were drawn up in the framework of the Contact Committee set up under Article 29 AVMSD. Their aim is to clarify certain definitions and thus avoid differences of interpretation which could lead to the Directive being implemented in different ways. They are also intended to enable all interested parties to clearly understand the manner in which the relevant provisions are implemented. The Guidelines as such have no mandatory legal force and are merely intended to clarify certain provisions of the Directive.

2.2.1.4.1. The concept of independence

Recital 71 of the AVMSD provides some criteria for the definition of “producers who are independent of broadcasters”. Member states should take appropriate account notably of:

⁴⁵ Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions - Ninth Communication on the application of Articles 4 and 5 of Directive 89/552/EEC, as amended by Directive 97/36/EC and Directive 2007/65/EC for the period 2007-2008, COM(2010) 450 final of 23 September 2010, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52010DC0450&rid=6>.

⁴⁶ Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - First Report on the Application of Articles 13, 16 and 17 of Directive 2010/13/EU for the period 2009-2010 Promotion of European works in EU scheduled and on-demand audiovisual media services, COM(2012) 0522 final, 24 September 2012, <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52012DC0522>.

⁴⁷ See also <https://ec.europa.eu/digital-single-market/en/avmsd-reports-european-works>.

⁴⁸ Revised Guidelines for Monitoring the Application of Articles 16 and 17 of the Audiovisual Media Services (AVMS) Directive of July 2011, http://ec.europa.eu/newsroom/dae/document.cfm?doc_id=6384. This is the third version of the Guidelines. It incorporates changes made necessary by certain provisions of Directive 2010/13/EU and by developments on the EU broadcasting market.



- the ownership of the production company,
- the amount of programmes supplied to the same broadcaster and
- the ownership of secondary rights.

The guidelines provide the following indicative criteria, which are not exhaustive:

- Who owns the production company?: The objective is to make sure that a broadcasting organisation does not hold too large a share of a production company's capital (and vice versa). The term "broadcaster" should be understood here as meaning the broadcasting organisation in its entirety, not each channel which comes under the organisation.
- How many programmes are supplied to the same broadcasting organisation?: The purpose of this criterion is to measure independence in terms of the amount of programming supplied, basing the analysis on a period long enough to allow conclusions to be drawn, and bearing in mind any special characteristics of the broadcasting organisation in question.
- Who holds the secondary rights?: This criterion enables the independence of a producer to be assessed in the event that all its rights, including secondary rights, have been bought by broadcasters, leaving the independent producer in a position where it cannot put together a catalogue of material with secondary rights which can be sold on other markets.

Other issues in the revised guidelines include the definition of "audiovisual media services", "European works", "relevant transmission time" and "reporting obligation".

2.2.2. Creative Europe

Creative Europe's MEDIA sub-programme⁴⁹ is the European Union's support programme for the film, television and digital media industries. With a budget of EUR 1.46 billion, it runs from 2014-2020 and aims to improve the quality of European content and help European films, programmes and projects perform better internationally. Creative Europe supports a wide range of audiovisual professionals, including producers, distributors and exhibitors as well as festivals, training providers and VOD services.

⁴⁹ https://eacea.ec.europa.eu/creative-europe/actions/media_en.



Table 2. Development: single project

Development: single project	
What does this funding support?	European independent production companies looking to develop a fiction, animation or creative documentary project with international potential.
Who is this funding for?	<p>Applicant companies must:</p> <ul style="list-style-type: none"> ■ be established in one of the countries participating in the MEDIA sub-programme and be majority owned by nationals from those countries ■ be registered for a minimum of 12 months and have audiovisual production as their main business activity ■ be independent – no more than 25% of the share capital can be held by a single broadcaster (50% when several broadcasters are involved) ■ own the majority of the rights to the project for which support is being sought. Applicants must also be able to demonstrate that they were either the sole production company (or the majority producer in a co-production) on an eligible project. <p>This project must:</p> <ul style="list-style-type: none"> ■ have been produced in the last five years ■ have been commercially released or broadcast in at least one country other than that of the applicant in the last two calendar years. <p>If the company does not have the required track record, the personal on-screen credit of the Chief Executive or one of the shareholders can be used. Only a credit as Producer is eligible, Executive Producer credits cannot be used.</p>
What types of projects are eligible?	<p>Projects must be intended for cinema release, television broadcast or commercial exploitation on digital platforms (e.g. multiple screen-based devices, interactive, linear and non-linear web-series and narrative, virtual reality projects).</p> <p>Projects intended for cinema release must have a minimum length of 60 minutes.</p> <p>Projects intended for television (one-off or series) or digital platforms (total user experience) must have a minimum length of:</p> <ul style="list-style-type: none"> ■ 90 minutes for fiction ■ 50 minutes for creative documentary ■ 24 minutes for animation. <p>The first day of principal photography of the submitted project must not be scheduled to occur within 8 months from the date of application.</p>
How much can be applied for?	<p>The non-repayable grants are awarded in lump sums:</p> <ul style="list-style-type: none"> ■ EUR 30,000 for fiction projects with a budget under EUR 1.5 million ■ EUR 50,000 for fiction projects with a budget over EUR 1.5 million ■ EUR 25,000 for creative documentary projects ■ EUR 60,000 for animation projects.

Source: Creative Europe Desk UK, <https://www.bfi.org.uk/sites/bfi.org.uk/files/downloads/bfi-creative-europe-funding-opportunities-producers-2017.pdf>



Table 3. Development: slate funding

<p>What does this funding support?</p>	<p>European independent production companies looking to develop 3 to 5 fiction, animation or creative documentary projects with international potential.</p>
<p>Who is this funding for?</p>	<p>Applicant companies must:</p> <ul style="list-style-type: none"> ■ be established in one of the countries participating in the MEDIA sub-programme and be majority owned by nationals from those countries ■ be registered for a minimum of 36 months and have audiovisual production as their main business activity ■ be independent – no more than 25% of the share capital can be held by a single broadcaster (50% when several broadcasters are involved) ■ own the majority of the rights to the project for which support is being sought. <p>Applicants must also be able to demonstrate that they were either the sole production company (or the majority producer in a co-production) on two eligible projects. These projects must:</p> <ul style="list-style-type: none"> ■ have been produced in the last five years ■ have been commercially released or broadcast in at least three countries outside of the UK in the last two calendar years. <p>If the company does not have the required track record then the personal on-screen credit of the Chief Executive or one of the shareholders can be used. Only a credit as Producer is eligible, Executive Producer credits cannot be used.</p>
<p>What types of projects are eligible?</p>	<p>Projects must be intended for cinema release, television broadcast or commercial exploitation on digital platforms (e.g. multiple screen-based devices, interactive, linear and non-linear web-series and narrative virtual reality projects).</p> <p>Projects intended for cinema release must meet a minimum length of 60 minutes.</p> <p>Projects intended for television (one-off or series) or digital platforms (total user experience) must meet a minimum length of:</p> <ul style="list-style-type: none"> ■ 90 minutes for fiction ■ 50 minutes for creative documentary ■ 24 minutes for animation. <p>Applicants can apply with 3 to 5 projects on the slate which can be a mixture of any of the categories above.</p> <p>The first day of principal photography of the submitted project must not be scheduled to occur within 8 months from the date of application.</p>
<p>How much can be applied for?</p>	<p>The total non-repayable grant awarded can range from EUR 70,000 to 200,000. This is capped at EUR 150,000 for slates that are only made up of documentaries. Each project on the slate can receive between EUR 10,000 to EUR 60,000.</p> <p>Companies can also apply for an additional EUR 10,000 to cover up to 80% of the production costs of a short film (max. 20 minutes) that involves emerging talent.</p>

Source: Creative Europe Desk UK, <https://www.bfi.org.uk/sites/bfi.org.uk/files/downloads/bfi-creative-europe-funding-opportunities-producers-2017.pdf>

**Table 4. TV programming**

What does this funding support?	European independent production companies looking to produce fiction, animation or creative documentary television programmes with the potential to circulate within the European Union and beyond.
Who is this funding for?	Applicant companies must: <ul style="list-style-type: none">■ be established in one of the countries participating in the MEDIA sub-programme and be majority owned by nationals from those countries■ be independent – no more than 25% of the share capital can be held by a single broadcaster (50% when several broadcasters are involved)■ have audiovisual production as their main business activity■ own the majority of the rights to the project.
What types of projects are eligible?	Programmes (one-off or series) must be intended primarily for the purposes of television exploitation and meet the following minimum durations: <ul style="list-style-type: none">■ 90 minutes for fiction■ 24 minutes for animation■ 50 minutes for creative documentaries. For drama series only, sequels or second and third seasons are eligible. The programme must be majority produced by companies established in countries participating in the MEDIA sub-programme and with a significant number of cast and crew who are nationals and/or residents of those countries. The exploitation rights licensed to the broadcaster have to revert to the producer after a maximum period of 7 years for a pre-sale or 10 years for a co-production.
How much can be applied for?	The non-repayable grants available depend on the type of production: <ul style="list-style-type: none">■ 12.5% of the eligible production costs (capped at EUR 500,000) for fiction or animation projects■ 20% of the eligible production costs (capped at EUR 300,000) for creative documentary projects■ co-produced TV drama series (minimum duration 6 x 45 minutes) with a minimum production budget of €10 million can apply for a grant of €1 million.

Source: Creative Europe Desk UK, <https://www.bfi.org.uk/sites/bfi.org.uk/files/downloads/bfi-creative-europe-funding-opportunities-producers-2017.pdf>

Creative Europe funds a selection of international co-production funds that accept applications from European professionals.⁵⁰ It also supports a wide range of training, festivals, markets and initiatives that promote European films, television programmes and video games.

⁵⁰ See Cabrera Blázquez F.J., Cappello M., Enrich E., Talavera Milla J., Valais S., *op.cit.* chapter 2.3.



3. National frameworks

3.1. Overview

3.1.1. Definitions

The promotion of independent production at EU level takes the form of obligations on broadcasters to allocate at least 10% of their transmission time to “European works created by independent producers”, or alternatively to invest at least 10% of their programme budget into “independent productions, created by producers who are independent of broadcasters”.⁵¹

At national level, a definition of “European works” is provided in the vast majority of cases.⁵² The definition is more or less harmonised, since it is contained in the AVMS Directive (although it offers member states the possibility of adapting it).⁵³ As to the concept of “independent production”, a definition is provided in fewer cases.⁵⁴ In line with recital 71 of the AVMS Directive, the criteria used to define the independence of a producer vis-à-vis a broadcaster are usually:

- the amount of shares that an AVMS provider holds in a production company (or vice versa);
- the level of turnover that a production company generates from contracts with a single AVMS provider (e.g. the quantity of programmes supplied to a single broadcaster).

Other criteria may also come into play, such as the ownership of the rights in a film or TV programme (including the duration of the rights granted to the broadcaster, the scope of the secondary rights reserved for the producer (shared ownership of rights, shares in a co-

⁵¹ Article 17 AVMSD. For more details, see Chapter 2 of this publication.

⁵² In 25 out of 31 countries (EU28, Iceland, Norway and Switzerland), the exceptions being Switzerland, Germany, the United Kingdom, Iceland, the Netherlands and Sweden. For more details about the definitions of European works in the 31 countries, see European Audiovisual Observatory, “Mapping of national rules for the promotion of European works”, February 2019, <https://rm.coe.int/european-works-mapping/16809333a5>.

⁵³ Ibid.

⁵⁴ In 23 out of 31 countries (EU28, Iceland, Norway and Switzerland), the exceptions being Austria, Switzerland, Cyprus, Germany, Denmark, Greece, Poland and Sweden. For more details, see “Mapping of national rules for the promotion of European works”, op. cit.



production or rights reserved for the producer, etc). Other more flexible approaches can also be found, which, inter alia, favours qualitative criteria, such as the producer's actual editorial independence (e.g. the ability to exercise control over the actors, production staff, equipment and facilities used in the production, etc). However, these are generally accompanied by other criteria related to the financial links between the producer and the AVMS provider.

3.1.2. Financial investment in independent production and quota obligations

3.1.2.1. Financial investment obligations in the case of independent production

Financial investment obligations are imposed on broadcasters in most EU countries.⁵⁵ Although the obligation usually concerns “European works created by independent producers”,⁵⁶ following the wording of Article 17 of the AVMS Directive, this is not always the case, as the investment obligation may apply to:

- Works by independent producers only (e.g. Flemish community of Belgium, Netherlands, Sweden and Slovenia) and sometimes by national independent producers (e.g. French community of Belgium);
- both European works and independent works, and sometimes even further sub-categories based on a specific genre (e.g. cinematographic works, animated works for children's education, etc) or works of national original expression (e.g. Italy and France);
- Independent production and works of national original expression (e.g. Denmark);
- National and European “creative” works (e.g. Portugal);
- National cinematographic works (e.g. Greece, Hungary and Latvia);
- Works by national authors and audiovisual works completed with the financial support of the State (e.g. Estonia);
- National works and independent production (e.g. Switzerland).

Furthermore, in over half of the countries considered in the “Mapping of national rules for the promotion of European works”, carried out by the European Audiovisual Observatory for the EFADs in 2018, the obligation is not mandatory but optional, which means that broadcasters can choose between the financial investment (direct contribution) and:

⁵⁵ EU28 + Iceland, Norway and Switzerland.

⁵⁶ Austria, Cyprus, Czech Republic, Finland, UK, Ireland, Island, Malta, Romania, Sweden, Slovakia.



- Reserving a percentage of their transmission time for independent works (in line with the obligation derived from Article 17 of the AVMS Directive);⁵⁷ in most cases, the percentage is that mentioned in Article 17 of the AVMS Directive (10%), with some exceptions, such as Finland (19%) and Slovakia (15% for the public broadcaster);
- paying a levy (indirect contribution), usually to the relevant film/audiovisual fund, as in the French Community of Belgium, Switzerland and Hungary, for example.

In around half of these cases, specific financial investment obligations are imposed on public broadcasters. These are usually higher than those imposed on private broadcasters (if any). In a few cases, only public broadcasters have financial investment obligations (Bulgaria, Flemish Community of Belgium, Latvia, the Netherlands, Poland and Slovenia). Only four countries impose mandatory financial obligations on both public and private broadcasters (Spain, France, Greece and Italy).

Financial investment obligations are also imposed on VOD services in around half of all cases. However, in the majority of these cases, the obligation concerns European works and not specifically works created by independent producers and it is not mandatory but:

- either only a transposition of the wording of Article 13 of the AVMS Directive, according to which VOD services “*shall promote where practicable and by appropriate means the production of and access to European works*”, or a similar formulation inspired by that provision; or
- VOD services can choose between the financial investment (direct contribution) and paying a levy (indirect contribution), usually to the relevant film/audiovisual fund; or
- VOD services can choose between the financial investment (direct contribution) and quotas for European works in their catalogues.

In only a few cases (Spain, France, Greece, Italy, Portugal and Denmark from 2020) are mandatory financial obligations imposed on VOD services. Among these countries, only Spain, France, and Italy provide for a financial investment obligation for VOD providers which specifically concerns works created by independent producers.

Other types of financial investment obligations are imposed on film and media providers,⁵⁸ through levies that also indirectly contribute to the promotion of independent production, since the beneficiary is usually the national/federal film/audiovisual fund, which will then provide funding for cinematographic and audiovisual works, including

⁵⁷ This is the case in Austria, Cyprus, Denmark, Finland, the United Kingdom, Ireland, Iceland, Malta, Romania, Sweden and Slovakia. For more details, see the “Mapping of national rules for the promotion of European works”, op. cit.

⁵⁸ Linear AVMS providers (broadcasters); non-linear AVMS providers (VOD services); distributors; theatres; the video industry; other potential players such as film distributors or Internet service providers.



works by independent producers. Levies may be imposed on broadcasters,⁵⁹ VOD services,⁶⁰ distributors,⁶¹ theatres,⁶² the video industry, etc. They may be mandatory or optional, which means that the AVMS provider can choose between a financial investment (direct contribution) and paying a levy (indirect contribution) to the relevant film/audiovisual fund. The amount due may be a percentage of their turnover or of their advertising revenues, a specific amount of the subscription fee (e.g. for distributors), a percentage of the price of a cinema ticket (e.g. for theatres), or a specific amount of each transaction (e.g. the video industry). In most cases, the beneficiary is usually the national/federal film/audiovisual fund, except for a few exceptions where it is the state budget (e.g. Austria or Norway).⁶³

3.1.2.2. Quota obligations in the case of independent production

The other method of promoting independent production pursuant to Article 17 of the AVMS Directive takes the form of the obligation for broadcasters to allocate at least 10% of their transmission time to “European works created by independent producers”. As a consequence of the transposition of this article, quotas for independent works are imposed on broadcasters in the vast majority of cases, including in the three non-EU countries covered, the exceptions being Germany, France and Italy.⁶⁴

The wording of Article 17 of the AVMS Directive⁶⁵ has generally been transposed without any significant modifications. However, in several cases, more detailed or stricter rules in this field have been adopted, either by:

- deleting the provision according to which quotas have to be fulfilled “*where practicable and by appropriate means*” and therefore making them mandatory for some or all broadcasters,⁶⁶ or by
- increasing the proportion to a higher percentage than 10% for some or all broadcasters,⁶⁷ or by
- removing the alternative regarding the programming budget offered by Article 17 of the AVMS Directive for some or all broadcasters.⁶⁸

⁵⁹ In around a third of the EU28, Iceland, Norway and Switzerland. For more details, see the “Mapping of national rules for the promotion of European works”, op. cit.

⁶⁰ In around a quarter of all cases, *ibid.*

⁶¹ In around a quarter of all cases, *ibid.*

⁶² In around a quarter of all cases, *ibid.*

⁶³ For more information, see “Mapping of national rules for the promotion of European works”, op. cit.

⁶⁴ *Ibid.*

⁶⁵ Article 17 AVMSD: “*Member States shall ensure, where practicable and by appropriate means, that broadcasters reserve at least 10 % of their transmission time, excluding the time allotted to news, sports events, games, advertising, teletext services and teleshopping, or alternately, at the discretion of the Member State, at least 10 % of their programming budget, for European works created by producers who are independent of broadcasters*”.

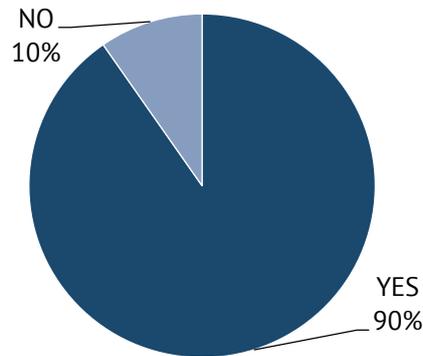
⁶⁶ Austria, Belgium, Bulgaria, Estonia, Spain, Finland, the United Kingdom, Greece, Croatia, Hungary, Latvia, Malta, the Netherlands, Norway, Poland, Portugal, Romania, Slovenia and Slovakia. For more information, see “Mapping of national rules for the promotion of European works”, op. cit.

⁶⁷ Bulgaria, Finland, Croatia, Hungary, Latvia and Slovakia.



In six cases, stricter rules apply to the public broadcaster (Austria, Croatia, Hungary, Latvia, Romania and Slovakia).

Figure 2. Quota obligation imposed on broadcasters – works by independent producers



Source: Analysis of the responses to the European Audiovisual Observatory standardised questionnaire.

3.1.3. Direct and indirect public funding for independent production

At national and regional levels, many national film funds also provide selective and/or automatic support specifically for independent producers. In some cases, the condition for receiving grants under the various film fund schemes is that the beneficiary is an independent producer (e.g. Denmark and Portugal). However, the majority of film funds only impose the condition of being independent for certain schemes. It is often accompanied by the requirement that the independent producer is established (or has an operating establishment) in the country.

⁶⁸ Belgium, Bulgaria, Estonia, Spain, Greece, Croatia, Hungary, Lithuania, the Netherlands, Norway, Poland, Portugal, Romania, Slovenia and Slovakia.



3.2. National examples

3.2.1. AT - Austria

3.2.1.1. Definitions

There is no precise definition of the concept of “independent production” in Austrian law. At most, section 11(2) of the Austrian Broadcasting Act (ORF-Gesetz, ORF-G)⁶⁹ stipulates that independent producers are defined as “independent from broadcasters”. However, the Act does not provide any other qualitative or quantitative criteria in order to measure this degree of independence. As regards European works, section 2(12) to 2(14) of the Audiovisual Media Services Act⁷⁰ provides a detailed definition of European works, based on the definition contained in the AVMS Directive.⁷¹

3.2.1.2. Financial investment in independent production and quota obligations

As in the AVMS Directive, Austrian law gives public broadcasters (section 11(2) of the Austrian Broadcasting Act) and private broadcasters (section 51 of the Audiovisual Media Services Act) the choice to reserve at least 10% of their transmission time (excluding the time allotted to news, sports events, games, advertising, teletext and teleshopping services) for European works created by producers who are independent from broadcasters, or alternatively 10% of their programming budget. The investment obligation may take the form of pre-acquisition obligations in the case of rights in European works from independent producers or co-productions. The law does not differentiate between cinema films and TV films/series. Whatever the type of obligations (transmission time or investment), they apply to both public and private broadcasters. However, for private broadcasters the obligation only applies “*where practicable and by appropriate means.*”

No specific obligation applies to the promotion of independent production by VOD providers. Although the public service broadcaster ORF must, where practicable and by appropriate means, reserve a majority proportion for European works (section 12 of the ORF Act), this obligation does not specifically apply to independent productions.

⁶⁹ Bundesgesetz über den Österreichischen Rundfunk / ORF-Gesetz ORF-G, (ORF Act), <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10000785>; https://www.ris.bka.gv.at/Dokumente/Erv/ERV_1984_379/ERV_1984_379.html (in English).

⁷⁰ Bundesgesetz über audiovisuelle Mediendienste / Audiovisuelle Mediendienste-Gesetz AMD-G (Audiovisual Media Services Act): <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20001412>; https://www.ris.bka.gv.at/Dokumente/Erv/ERV_2001_1_84/ERV_2001_1_84.html (in English).

⁷¹ For further details, see “European works mapping report”, Factsheet for Austria, <https://rm.coe.int/european-works-mapping/16809333a5>.



3.2.1.3. Public funding for independent production

Nearly all federal states in Austria have funding schemes. Most define themselves as gap financing in order to promote local (cultural and economic) resources and provide smaller budgets. The most important and largest regional fund is the Filmfonds Wien (Vienna) with an elaborate funding scheme and organisation, followed by smaller funds like Land Niederösterreich, Cinestyria, Cine Tirol and Carinthia Film Commission. In addition to these funding institutions, some federal states (like Burgenland, Vienna and Tirol) fund mainly individuals based on regulations for cultural funding in general, but they do not provide elaborate funding schemes or guidelines for film funding.

Being an independent production company with a permanent establishment or subsidiary in Austria is frequently a prerequisite for accessing the subsidies granted by these funding schemes. As an example, in relation to television programmes, the FERNSEHFONDS AUSTRIA⁷² (Austrian Television Fund) grants subsidies to independent producers and production companies with a view to improving the quality of television production and the capacity of the Austrian film industry, as well as ensuring the diversity of the cultural landscape. Television broadcasters participating in financing overall production costs may only acquire rights which are limited to a period of no more than five years and, in the case of multi-part productions, no more than seven years. The rights are also limited to the respective television broadcaster's intended transmission area.

3.2.2. BE - Belgium

3.2.2.1. Definitions

3.2.2.1.1. French Community

Article 1 34 of the Coordinated Decree on Audiovisual Media Services⁷³ defines an independent producer as a producer:

- “which has a separate legal personality from that of an AVMS provider;
- which does not have a direct or indirect share of more than 15% of the capital of an AVMS provider;
- which does not make more than 90% of its turnover during a period of three years of the sale of its productions to the same AVMS provider;
- whose capital is not held directly or indirectly for more than 15% by an AVMS provider;

⁷² <https://www.rtr.at/en/ffat/Fernsehfonds>.

⁷³ Décret coordonné sur les services de médias audiovisuels:
http://www.gallilex.cfwb.be/document/pdf/34341_017.pdf.



- whose capital is not held for more than 15% by a company which owns directly or indirectly more than 15% of the capital of an AVMS provider.”

The independent producer of the French Community is the producer established in the French-language region or in the bilingual region of Brussels-Capital that meets the criteria of the previous paragraph.”

In addition, the definition of a European work is based on the definition contained in the AVMS Directive and is provided under Article 1 26 of the Coordinated Decree on Audiovisual Media Services.⁷⁴

3.2.2.1.2. Flemish Community

The definition of an independent producer is broader as it does not include the criteria of the quantity of programmes sold to the same broadcaster during a specific period. In addition, in contrast to the French Community it refers exclusively to the degree of independence from the Flemish broadcaster and not to any AVMS provider. Accordingly, Article 2 11° of the Radio and Television Broadcasting Act⁷⁵ defines an independent producer as a producer:

- a) “of whom the legal personality is separate to that of a broadcaster;*
- b) who does not own (directly or indirectly) more than 15% of the capital of a Flemish broadcaster;*
- c) whose capital is not owned (directly or indirectly) for more than 15% by a company that owns (directly or indirectly) more than 15% of the capital of a Flemish broadcaster.”*

The definition of European works is provided Article 2 11° of the Radio and Television Broadcasting Act⁷⁶ and is based on the definition contained in the AVMS Directive.

⁷⁴ Ibid. For further details, see “European works mapping report”, Factsheet for Belgium, op. cit.

⁷⁵ Decreet betreffende radio-omroep en televisie van 27 maart 2009:

http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=nl&la=N&table_name=wet&cn=2009032749 and https://www.vlaamseregulatormedia.be/sites/default/files/mediadecreet_27_maart_2009_11.pdf; recent amendment to the Radio and Television Broadcasting Decree:

http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=nl&la=N&cn=2018062913&table_name=wet; English translation of the Radio and Television Broadcasting Decree,

http://www.vlaamseregulatormedia.be/sites/default/files/act_on_radio_and_television_broadcasting.pdf.

⁷⁶ Ibid.



3.2.2.2. Financial investment in independent production and quota obligations

3.2.2.2.1. French Community

The public service broadcaster RTBF has to invest an annual amount of at least EUR 7 200 000 in contracts with independent producers of the French Community.⁷⁷ Under its management contract, it must invest 70% of its annual commitment in scripted programmes (fiction, documentaries, etc), with a specific sub-quota (25% of its annual commitment) in TV series. This obligation is optional for private broadcasters, which are able to choose between the financial investment (direct contribution) and a levy (indirect contribution) to the film fund CCA. In case they choose the direct contribution, the annual amount will depend on their turnover from the previous year (between 0% and 2.2% of the turnover).⁷⁸ Local public broadcasters are exempt, as are private broadcasters under a certain threshold in terms of turnover. The investment may take the form of the pre-acquisition of rights or a co-production (or also a production order for RTBF). The investment scheme does not differentiate between broadcasters and VOD providers.

In addition, broadcasters must reserve 10% of their transmission time (excluding the time allotted to news, sports events, games, advertising, self-promotion and teleshopping) for European works created by producers independent from broadcasters. This proportion must include independent works from producers of the French Community (article 44 of the Coordinated Decree on Audiovisual Media Services).

The following are exempt:

- local broadcasters;
- broadcasters that by nature do not air European works (at least 80% of their airtime is not taken up by European works);
- broadcasters that use a language other than one of an EU member state and whose broadcasts are not intended for the public of EU member states;
- broadcasters whose transmission time consists of at least 80% of their own production.

⁷⁷ Article 12.3 of the Government order approving the management contract of the public service broadcaster RTBF (Arrêté du Gouvernement de la Communauté française portant approbation du quatrième contrat de gestion de la Radio-Télévision belge de la Communauté française pour les années 2013 à 2017 incluses), http://www.gallilex.cfwb.be/document/pdf/38527_002.pdf (coordinated).

⁷⁸ The turnover is defined as the amount of gross receipts, commissions and overpayments not deducted, linked to the insertion of advertising and sponsorship of the services, and all other gross revenues, without deduction, resulting from the provision of television services for remuneration, including gross revenues from any distributor of services or third parties for obtaining the television services and those generated by the programme content. For more details, see at Article 41 of the Coordinated Decree on Audiovisual Media Services, op. cit. See also EFADs mapping, Factsheet BE – French Community - National Summary, op. cit.



3.2.2.2.2. Flemish Community

According to the Flemish Radio and Television Broadcasting Decree⁷⁹ the public service media VRT must invest a minimum of 15% of its total income (excluding exchange deals, the Brussels Philharmonic and restructuring costs) in external production (defined broadly and includes both AV/radio/digital production and the facility sector). This percentage is due to rise from 15% in 2016 to a minimum of 18.25% by 2020, according to the management contract 2016-2020 (“Beheersovereenkomst”) concluded between the Government and the VRT. The investment obligation only applies to television production (TV fiction and non-fiction) and not to cinema films. The investment may take the form of the pre-acquisition of rights, co-productions or productions.

Until recently, there was no such financial investment obligation on the part of VOD providers. However, an amendment to the Radio and Television Decree was adopted in June 2018 and came into force in January 2019, creating an optional obligation: private VOD providers are now able to choose between a financial investment (direct contribution) and a levy (indirect contribution) to the Flanders Audiovisual Fund (article 157 of the Radio and Television Broadcasting Decree).⁸⁰ The direct contribution will be directed to “independent quality Flemish productions in series form produced in co-production with the public broadcaster of the Flemish Community and/or the television broadcasting organisation recognised and/or registered in Flanders, and for which the Flemish Government and the VAF conclude a management agreement”.⁸¹ The obligation will apply to VOD providers under the jurisdiction of an EU member state who target the public of the Flemish Community.

In addition, broadcasters must reserve at least 10% of their transmission time (excluding the time allotted to news, sports events, games, advertising, teletext and teleshopping services) for European works created by producers who are independent from broadcasters (article 155 of the Radio and Television Broadcasting Decree). A significant proportion of this majority must be devoted to Dutch-language European productions, but the percentage is not further defined.

As regards VOD providers, the amendment to the Radio and Television Decree that was adopted in June 2018 and came into force in January 2019 creates an obligation to reserve 30% of their catalogue for European works (article 157 of the Radio and Television Broadcasting Decree). This quota does not specifically apply to works from independent producers.

⁷⁹ Op. cit.

⁸⁰ Recent amendment to the Radio and Television Broadcasting Act, http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=nl&la=N&cn=2018062913&table_name=wet. English translation available at:

http://www.vlaamseregulatormedia.be/sites/default/files/act_on_radio_and_television_broadcasting.pdf.

⁸¹ http://www.ejustice.just.fgov.be/cgi/article_body.pl?language=nl&caller=summary&pub_date=14-04-03&numac=2014035376.



3.2.2.3. Public funding for independent production

In Belgium, film and audiovisual policies are mostly arranged on a regional and community level. Depending on the nature of the fund and the responsibility concerned, the following ministries and regions/communities are competent:

- the film funds: they are part of the cultural remit and are therefore included among the responsibilities of the different Communities in Belgium and fall within the remit of each Community's Minister of Culture;
- the media funds: they are also considered responsibilities of the Communities and fall within the remit of each Community's Media Minister;
- the economic funds: they are included among the regional responsibilities and fall within the remit of each region's Economy Minister.

In addition, the Belgian Tax Shelter is a tax incentive scheme designed to encourage the production of audiovisual and cinematographic works. A company that wishes to invest in supporting audiovisual production can, through this mechanism, benefit from an exemption from its taxable reserved profits up to 150% of the amount actually paid. In principle, only independent producers are eligible for this scheme. However, the requirement of independence is applied in a flexible way and production companies linked to broadcasters can be eligible under certain conditions, provided that they produce European works.⁸²

3.2.2.3.1. French Community

The film fund for the French Community is the Film and Audiovisual Centre (Centre du Cinéma et de l'Audiovisuel (hereinafter the "CCA"). Its purpose is to support and promote audiovisual works through various schemes, such as:⁸³

- support for the production of cinematographic works through the Film Selection Commission, and reinvestment premiums;
- aid for the promotion and distribution of films, assistance for audiovisual operators and promotion at the international level.

As a general rule, selective support is reserved for producers of audiovisual works, according to the criteria set out in the legal definition of an independent producer.⁸⁴

With regard to support for TV programmes, the Fonds FWB-RTBF⁸⁵ provides selective support for the development and production of TV series, and consists of

⁸² For further details, see "FAQ relatives au régime tax shelter pour la production audiovisuelle", at: http://www.audiovisuel.cfwb.be/index.php?eID=tx_nawsecuredl&u=0&g=0&hash=f6d8731690a957dcf8c4576f565f9c5f79b74f3d&file=fileadmin/sites/avm/upload/avm_super_editor/avm_editor/documents/FAQ_publicees_le_13_septembre_2017.pdf.

⁸³ For further details, see http://www.audiovisuel.cfwb.be/index.php?id=avm_cinema.

⁸⁴ Article 1 34° of the Coordinated Decree on Audiovisual Media Services, op. cit.

⁸⁵ Fonds RTBF Fédération Wallonie-Bruxelles, <https://www.rtbef.be/entreprise/>.



funding from both the Wallonia-Brussels Federation and the public broadcaster RTBF. Only independent producers based in Brussels or Wallonia are entitled to benefit from this fund.⁸⁶

Other schemes are for example Wallimage (for the Walloon Region), which provides production support by acting as a co-producer, and Screen Brussels (for the Brussel-Capital Region), which provides support for domestic productions and international co-productions.

3.2.2.3.2. Flemish Community

The cultural public funding body of Belgium's Flemish Community is the Vlaams Audiovisueel Fonds (VAF), which comprises three specialised funds:

- the VAF/Film Fund, which co-finances the production of individual films in various genres. The applicant has to be an independent audiovisual company that has its headquarters in Belgium and can demonstrate continuity of operations in Belgium;⁸⁷
- the VAF/Media Fund focuses on the co-financing of high-quality television series developed in co-production with a Flemish TV broadcaster. The VAF/Media Fund provides three types of grant: for writing, development and production. While the last two are reserved for independent producers, the first also applies to individual writers attached to an independent producer, subject to certain conditions in term of experience and the quality of previous projects;⁸⁸
- the VAF/Game Fund, which co-finances the development of video games.

Furthermore, Screen Flanders is an economic film fund that provides selective support for film and television and focuses on co-productions that will spend a sufficient amount of money in the Flemish region. As for the VAF, a prerequisite for accessing funding is that the producer is an independent commercial corporation established in Belgium.⁸⁹

3.2.3. DE - Germany

3.2.3.1. Definitions

There is no definition of the concept of “independent producer” in German law. Neither does it exist for the concept of “European work”.

⁸⁶ See more details in Mapping of Film Funding, Factsheet for Belgium, <https://rm.coe.int/mapping-of-film-and-audiovisual-public-funding-criteria-in-the-eu/1680947b6c>.

⁸⁷ Ibid

⁸⁸ Source CEPI.

⁸⁹ Article 2.1 of Screen Flanders Application Guidelines, op. cit.



3.2.3.2. Financial investment in independent production and quota obligations

3.2.3.2.1. Financial investment obligations in the case of independent productions

Television broadcasters shall contribute to securing German and European film and television productions as a cultural asset and as part of the audiovisual heritage.

Regarding the public service media ARD and ZDF, Article 6(4) of the Treaty states that “as part of its programming remit and taking into account the principles of efficiency and economy, public-service broadcasting is entitled to participate in film promotion in order to secure the quality and quantity of the programming procured, without any immediate return consideration being required.” This provision is partly reflected in practice with the conclusion of a voluntary agreement (“Film-Fernseh-Abkommen”) between ARD, ZDF and the German Federal Film Board (FFA – Filmförderungsanstalt)⁹⁰ which details the ways in which ARD and ZDF invest in various ways (pre-acquisition, co-production, production, etc) in audiovisual productions.

In addition, general television channels should comprise a significant proportion of own productions as well as commissioned and joint productions originating in the German-language regions and Europe as a whole. The same requirement relates to thematic channels as far as this is feasible regarding their focus in terms of content (Article 6(3) of the Interstate Treaty on Broadcasting and Telemedia).⁹¹

The obligation only applies to general television channels which are defined as broadcasting services of varied content with information, education, advice and entertainment forming a major part of the programming overall, and not special-interest channels.

The scheme does not differ between broadcasters and VOD providers.

3.2.3.2.2. Quota obligations in the case of independent production

As above-mentioned, Article 6(3) of the Interstate Treaty on Broadcasting and Telemedia provides that general television channels should comprise a significant proportion of own productions as well as commissioned and joint productions originating in the German-language regions and Europe as a whole. The same requirement relates to thematic channels as far as this is feasible regarding their focus in terms of content.

⁹⁰ Abkommen zwischen FFA und ARD und ZDF “Film-Fernseh-Abkommen” (Film Agreement): <https://www.ffa.de/download.php?f=52e4292973874b2b3a4e1b3acb22f27b&target=0>.

⁹¹ Staatsvertrag für Rundfunk und Telemedien (Interstate Treaty on Broadcasting and Telemedia), https://www.die-medienanstalten.de/fileadmin/user_upload/Rechtsgrundlagen/Rundfunkstaatsvertrag_RStV.pdf; in English at https://www.die-medienanstalten.de/fileadmin/user_upload/Rechtsgrundlagen/Gesetze_Staatsvertraege/Rundfunkstaatsvertrag_RStV_20_english_version.pdf.



3.2.3.3. Public funding for independent production

Public and audiovisual funding in Germany is quite significant and diversified, with numerous federal and regional film funds.⁹²

At federal level, the German Federal Film Board (Filmförderungsanstalt, hereinafter “FFA”) is the federal film funding institution in charge of supporting all German cinema interests. Through its different schemes, the FFA funds feature films at all stages of production and exploitation. It is also the central service structure for the German film industry, notably by administrating two other federal funding schemes:

- the German Federal Film Fund (Deutscher Filmförderfonds, hereinafter “DFFF”),⁹³ which provides financial aid based on an automated system to producers/co-producers of theatrical feature films. Eligibility requirements under this scheme do not refer to independent production;
- the German Motion Picture Fund (hereinafter “GMPF”), a stand-alone funding programme of the Federal Ministry for Economic Affairs and Energy (BMWi) provides support for innovative film and serial formats with high production costs and expenditure in Germany, in the form of non-repayable grants. Being an independent producer is not part of the eligibility requirements under this scheme either.⁹⁴

Moreover, the Federal Government Commissioner for Culture and the Media (Beauftragte/r der Bundesregierung für Kultur und Medien, BKM) is also responsible for its own film funding programme.⁹⁵ Outside of the FFA’s field of activity, the Kuratorium junger deutscher Film (Young German Film Committee, hereinafter “Kuratorium”), is the only film funding institution collectively supported by the federal states, with a view to promoting young talent. However, neither of these schemes focuses particularly on independent production.

At regional level, film funding schemes are available in almost every German region, with the aim of promoting the regional film culture or industry. Consequently, territorial spending obligations constitute the main criterion of eligibility applied in the selection process. However, some regional funds aim at promoting independent production. For example, in Bavaria the FFF (Film and Television Funding) supports the production of television films. Independent producers that can prove a financial

⁹² For further details, see “Film Funding mapping report”, Factsheet for Germany, op. cit.

⁹³ DFFF at a glance, 2017: <http://www.dfff-ffa.de/download.php?f=7745c06fc3ca6cc3427de26d0f8fd32c>.

⁹⁴ The GMPF guidelines are available in English at: https://www.bmwi.de/Redaktion/DE/Downloads/G/gmpf-aktualisierte-richtlinie-eng.pdf?__blob=publicationFile&v=4.

⁹⁵ Guidelines issued by the Federal Government Commissioner for Culture and the Media (BKM): “Incentive to strengthen the film Industry in Germany, 15 October 2018, available in English at:

<https://www.bundesregierung.de/resource/blob/973862/1538374/1591d14914d477ba4663f1d6d916d375/2018-10-15-dfff-richtlinie-engl-data.pdf?download=1>.



contribution by one or more television broadcasters are eligible for financial aid under this scheme.⁹⁶

3.2.4. FI - Finland

3.2.4.1. Definitions

Section 210 of the Electronic Communications Services Act 917/2014⁹⁷ defines an independent producer as follows:

“An independent producer means a producer of audiovisual programmes of whose share capital an individual audiovisual content service provider controls at most 25% or several providers at most 50%, and who, during the past three years, has produced no more than 90% of its programmes for the same provider.”

In addition, the definition of a European work is based on the definition contained in the AVMS Directive and is provided in Articles 3-5 of the Government Decree 1245/2014 on radio and television broadcasting.⁹⁸

3.2.4.2. Financial investment in independent production and quota obligations

Broadcasters must reserve 19% of their transmission time (excluding the time allotted to news, sports events, competitive entertainment programmes, advertising, teletext services and teleshopping) or alternatively 19% of their programming budget for European works created by producers independent from broadcasters.⁹⁹

VOD providers must promote the production and distribution of European works with the help of financial contributions to productions, programme acquisitions, enhanced visibility of European works or similar means.¹⁰⁰ However, there is no specific obligation concerning the promotion of independent productions.

⁹⁶ Source CEPI.

⁹⁷ Laki sähköisen viestinnän palveluista (Electronic Communication Services Act 917/2014), <https://www.finlex.fi/fi/laki/ajantasa/2014/20140917>, available in English at <http://www.finlex.fi/fi/laki/kaannokset/2014/en20140917.pdf>.

⁹⁸ Valtioneuvoston asetus televisio- ja radiotoiminnasta (Government Decree 1245/2014 on radio and television broadcasting): <https://www.finlex.fi/fi/laki/alkup/2014/20141245>. For further details, see “European works mapping report”, Factsheet for Finland, op. cit.

⁹⁹ Section 210 of the Electronic Communication Services Act 917/2014, op. cit.

¹⁰⁰ Section 209 of the Electronic Communication Services Act 917/2014, op.cit.



3.2.4.3. Public funding for independent production

There are three main funds providing film and audiovisual support in Finland:

- the Finnish Film Foundation¹⁰¹ (Suomen elokuvasäätiö, hereinafter “FFF”), which is the main fund operating in the country, offers funding for the professional production, distribution and exhibition of films. Support may be granted to a production company provided that it is a corporation registered in Finland that manages the commercial rights of the film in Finland. No other condition is imposed with regard to the independence of the production company;
- the Arts Promotion Centre Finland (Taiteen edistämiskeskus, “Taike”) is an agency operating under the Ministry of Education and Culture and funded by the state budget and lottery income. It awards grants to film artists and authors, as well as operational subsidies to legal entities.¹⁰² Although the funding schemes offered by Taike can benefit cinematographic and audiovisual works, they are not specific to film and audiovisual funding;
- the Centre for promoting audiovisual culture (Audiovisuaalisen kulttuurin edistämiskeskus, “AVEK”), which operates as part of the copyright society Kopiosto.¹⁰³ The Ministry of Education and Culture allocates funds from the budget, stemming mainly from copyright compensation for private copying.¹⁰⁴ Support is available for scripts, pre-production, production, post-production (production companies) and festivals.¹⁰⁵ Audiovisual production companies registered in Finland are eligible for support. There are no specific requirements concerning the independence of the production company.

3.2.5. FR - France

3.2.5.1. Definitions

Article 6 of Decree No.2010-747¹⁰⁶ defines an independent producer as follows:

¹⁰¹ <http://ses.fi/en/home/>.

¹⁰² Registered and legal communities such as associations, foundations, cooperatives, companies and municipalities.

¹⁰³ https://www.kopiosto.fi/kopiosto/kopiosto/kopiosto_lyhyesti/fi_FI/kopiosto_lyhyesti/.

¹⁰⁴ Paragraph 2 (a) of the Copyright Act (404/1961) (Tekijänoikeuslaki), <https://www.finlex.fi/fi/laki/ajantasa/1961/19610404>. An unofficial translation by the Ministry of Education and Culture is available at: <https://www.finlex.fi/fi/laki/kaannokset/1961/en19610404.pdf>.

¹⁰⁵ As AVEK is not a public fund (since it operates as part of a copyright society), it will not be further discussed in the factsheet.

¹⁰⁶ Décret n°2010-747 du 2 juillet 2010 relatif à la contribution à la production d'œuvres cinématographiques et audiovisuelles des services de télévision diffusés par voie hertzienne terrestre (Decree on the contribution to the production of cinematographic and audiovisual works by audiovisual media services distributed via terrestrial means), <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000022423813&dateTexte=20181009>.



“An independent producer is independent from a broadcaster if:

- 1) The broadcaster does not hold directly or indirectly more than 15% of the share capital or voting rights.*
- 2) The independent producer does not hold directly or indirectly more than 15% of the broadcaster’s share capital or voting rights.*
- 3) A shareholder or group of shareholders do not control the broadcaster and the producer at the same time.”*

In addition, articles 15, 31 and 34 (for audiovisual works) and 8 and 23 (for cinematographic works) of Decree No 2010-416¹⁰⁷ and articles 15, 30 and 42 (for audiovisual works) and 6 and 36 (for cinematographic works) of Decree No. 2010-747 set out under what specific conditions a cinematographic or audiovisual work can be eligible as an independent work.

The definition of a European work is based on the definition contained in the AVMS Directive and is provided Article 6 of Decree No. 90-66.¹⁰⁸

3.2.5.2. Financial investment in independent production and quota obligations

3.2.5.2.1. Financial investment obligations in the case of independent productions

As a general rule, broadcasters must invest at least 3.2% (3.5% for public broadcasters) of their previous year’s turnover in expenses contributing to the production of European cinematographic works, including at least 2.5% in works whose original language is French.¹⁰⁹ The expenses considered as contributing to the development of the production of cinematographic works are not only the traditional outlay for such an obligation (pre-acquisition, acquisition, co-production or production) but can also be the funding of screenwriting and development (for television works) and the adaptation of works for blind or deaf audiences (for cinematographic and audiovisual works). At least three-quarters of the expenses corresponding to pre-acquisition or co-production must be

¹⁰⁷ Décret n°2010-416 du 27 avril 2010 relatif à la contribution cinématographique et audiovisuelle des éditeurs de services de télévision et aux éditeurs de services de radio distribués par les réseaux n'utilisant pas des fréquences assignées par le Conseil supérieur de l'audiovisuel (Decree on the contribution to the production of cinematographic and audiovisual works by audiovisual media services that do not use frequencies assigned by the CSA), <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000022146189&dateTexte=20181009>.

¹⁰⁸ Décret n°90-66 du 17 janvier 1990 pris pour l'application de la loi n°86-1067 du 30 septembre 1986 et fixant les principes généraux concernant la diffusion des œuvres cinématographiques et audiovisuelles par les éditeurs de services de télévision (Decree on the principles for the transmission of cinematographic and audiovisual works by audiovisual media services), <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000342173&dateTexte=20181009>.

For further details, see “European works mapping report”, Factsheet for France, op. cit.

¹⁰⁹ Article 6 of Decree No. 2010-416 and article 3 of Decree No. 2010-747, op. cit.



devoted to the development of independent productions, according to the criteria related to the cinematographic work and the company that produces it.

A work shall be deemed to be covered by independent production if its terms of exploitation meet the following conditions:

1° The rights stipulated in the pre-acquisition contract have not been acquired by the broadcaster for more than two broadcasts and the duration of exclusivity of these rights does not exceed 18 months for each broadcast;

2° The broadcaster does not hold, directly or indirectly, the secondary rights or marketing mandates for the work for more than one of the following means of exploitation:

- a) operation in France, in theatres;
- b) operation in France, in the form of videograms intended for the private use of the public;
- c) operation in France, on a television service other than the one it operates;
- d) operation in France and abroad, on an online communication service;
- e) exploitation abroad, in theatres, in the form of videograms for the private use of the public and on a television service.

However, where the broadcaster devotes more than 85% of the pre-acquisition and co-production expenses to the development of independent production, the ownership of secondary rights or marketing mandates may relate to two of the exploitation terms mentioned above, but without allowing the terms defined in (c) and (e) to be combined. For the purposes of these conditions, secondary rights and marketing mandates held indirectly by a service provider are defined as those held by an undertaking controlled by the service provider or a person controlling it, within the meaning of Article L. 233-3 of the French Commercial Code. The classification of a work as an independent production is provided by the regulatory authority (CSA) after consulting the Centre national du cinéma et de l'image animée (CNC).

Broadcasters must also invest at least 15% of their annual turnover¹¹⁰ in expenses contributing to the development of the production of European audiovisual works or whose original language is French.¹¹¹ This proportion is at least 3.6% in the case of thematic broadcasters that focus on cinema.¹¹² Broadcasters are required by law to negotiate with the CSA an agreement which can set higher percentages, depending on the way they use media release windows (i.e. the sooner a service broadcasts a film the higher are its investment obligations). Part of the above-mentioned expenses must be devoted to

¹¹⁰ 14% for broadcasters not distributed via DTT.

¹¹¹ Services that reserve less than 20% of their transmission time to audiovisual works are exempt, unless their annual turnover exceeds EUR 350 000.000. For more details, see Article 11 of Decree No. 2010-416 and article 9 of Decree No. 2010-747, op. cit. For more details, see EFADs mapping – Factsheet for France, op. cit.

¹¹² 6% for broadcasters not distributed via DTT. See Article 27 of Decree No. 2010-416 and article 40 of Decree No. 2010-747, ibid.



the development of independent productions,¹¹³ including the number of co-production shares held by the broadcaster, its technical, financial and artistic control over the work, the negotiation of secondary rights and marketing mandates.

VOD providers are also subject to the following strict investment obligations with regard to independent productions:

- transaction VOD providers: at least 15% of their previous year's turnover must be devoted to expenses contributing to the development of the production of European cinematographic works, including 12% to works whose original language is French. The same proportion must be devoted to the development of the production of European audiovisual works;
- subscription VOD providers: at least 26% of their turnover must be devoted to expenses contributing to the development of the production of European cinematographic works, including 22% to works whose original language is French, when the service includes at least 10 cinema films released in theatres in the previous 22 months.¹¹⁴ The same proportion must be devoted to the development of the production of European audiovisual works.

The eligible expenses are not only the traditional outlay for such an obligation (pre-acquisition, co-production or production) but can also be the adaptation of works for blind or deaf audiences, or financial fees paid to rightsholders such as producers, distributors or authors.¹¹⁵ As for linear servicers, part of the above-mentioned expenses must be allocated to the development of independent productions. In particular, at least three-quarters of the expenses related to the pre-acquisition of rights and the investment in the co-production or production of cinematographic works must be devoted to independent production, according to the following list of criteria concerning the work and the company that produces it:¹¹⁶

1° When the exploitation rights are acquired exclusively, their duration must not exceed 12 months;

2° When the editor of a service does not hold, directly or indirectly, the secondary rights or marketing mandates for the work for more than one of the following means of exploitation:

- a) operation in France, in theatres;
- b) operation in France, in the form of videograms intended for the private use of the public;
- c) operation in France, on a television service;

¹¹³ Article 15 of Decree No. 2010-747, *ibid.*

¹¹⁴ These percentages are lower (21%/17%) when the service includes at least 10 cinema films released in theatres in the previous 22-36 months and similar to that applicable to transaction VOD providers (15%/12%) in other cases.

¹¹⁵ Article 7 of Decree No. 2010-1379, *op. cit.*

¹¹⁶ Article 9, *ibid.*



- d) operation in France and abroad, on an on-demand audiovisual service other than the one it operates;
- e) exploitation abroad, in theatres, in the form of videograms for the private use of the public and on a television service.

For the purposes of these conditions, secondary rights and marketing mandates held indirectly by an editor of service are defined as those held by an undertaking controlled by the editor of service or a person controlling it, within the meaning of Article L. 233-3 of the French Commercial Code.¹¹⁷

3.2.5.2.2. Quota obligations with regard to independent production

Broadcasters must reserve:

- at least 60% of their transmission time devoted to cinematographic works for European works, including at least 40% for works whose original language is French, and
- at least 60% of their transmission time devoted to audiovisual works for European works, including at least 40% for works whose original language is French.¹¹⁸

Derogations to the quotas for audiovisual works can be granted by the CSA to a service that undertakes specific commitments in terms of investment in audiovisual works whose original language is French and which are created by producers who are independent from broadcasters. However, the European quota cannot be lower than 50%.

As for VOD providers, no specific quota applies to independent production.

3.2.5.3. Public funding for independent production

The French audiovisual public funding landscape is characterised by one central national agency, the Centre National du Cinéma et de l'Image Animé (CNC) and 32 sub-national agencies (regions, departments, cities and towns).¹¹⁹ CNC funds are distributed to the sector in two main ways, automatic support and selective support, through more than 90 separate funding channels.¹²⁰

Some of these schemes are particularly focused on supporting independent production. For example the different selective schemes, such as the “advance on earnings” (“avance sur recette”), which was created by the CNC in 1960, with a view to

¹¹⁷ The criteria linked to the production company are set out at Article 10 of Decree No. 2010-1379 and detailed in section 1.2.4.1.

¹¹⁸ These quotas are higher for the public broadcaster France Télévisions: 70% and 50% respectively (Decree establishing the remit of France Télévisions). Articles 7 and 13 of Decree No. 90-66, op. cit.

¹¹⁹ For more details, see “European works mapping report”, Factsheet for France, op. cit.

¹²⁰ Several schemes propose funding not included in the scope of our study (such as support for video games or support for actions in favour of the cinematographic heritage), and will therefore not be mentioned in this factsheet or in the matrix.



helping young film-makers shoot their first films and support an independent cinema. The granting of this support is decided by the President of the CNC, based on the recommendation of a film commission composed of well-known personalities from the film sector.

Another example of support for independent production can be found in the SOFICAs (“Sociétés de financement de l’industrie cinématographique et de l’audiovisuel”, Film and audiovisual industry financing companies), which were created by Act No. 85-695 of 11 July 1985, with a view to raising private funds devoted exclusively to the financing of film and audiovisual production. SOFICAs are created either on the initiative of film and audiovisual professionals or by operators in the banking and financial sector. Since 2005, the SOFICAs have signed a professional charter with the CNC before each annual collection, defining the rules for investment in independent production. The charter provides, for example, that at least 50% of investments must be directed towards non-leveraged productions, i.e. works produced by companies that do not have capital ties with SOFICA or with any company to which SOFICA is attached, and for which no repurchase price has been agreed in advance.¹²¹

Another important scheme for independent production is provided by the Institute for the Financing of Cinema and Cultural Industries (Institut pour le Financement du Cinéma et des Industries Culturelles, IFCIC).¹²² The IFCIC guarantees, through a fund endowed by the CNC, short-term credits for the production and distribution of cinematographic and audiovisual works, as well as medium-term credits for more permanent needs of production and distribution companies. The IFCIC guarantee is intended for the financial institution to facilitate risk-taking: in the event of a company failure, the bank’s loss is shared with the IFCIC. Eligible operations for short-term credits include development, pre-production, filming and post-production expenditure. The IFCIC focuses its film production activities on “independent” films, which it defines according to the three following criteria:

- the delegated production is carried out by a company whose capital is not mainly held by a group;
- cash expenses are not covered by a co-production group;
- the film is not produced under a long-term agreement with a group, including the transfer of economic rights to that group.

¹²¹ For more details, see: https://www.cnc.fr/professionnels/aides-et-financements/multi-sectoriel/production/les-sofica_759536.

¹²² Institut pour le Financement du Cinéma et des Industries Culturelles, <http://www.ifcic.fr/>.



3.2.6. GB - United Kingdom

3.2.6.1. Definitions

Article 3(4) of the Broadcasting (Independent Productions) Order 1991¹²³ defines an independent producer as:

“a producer who:

- *is not an employee of a broadcaster;*
- *does not have a shareholding greater than 25% in a broadcaster;*
- *is not a body corporate in which a broadcaster has a shareholding greater than 25% or in which any two or more broadcasters together have an aggregate shareholding greater than 50%.”*

As to the European works, no definition of them is provided under UK law.

3.2.6.2. Financial investment in independent production and quota obligations

Broadcasters must reserve at least 10% of their transmission time (excluding the time allotted to news, sports events, games, advertising, teletext services and teleshopping programmes), or alternatively 10% of their programming budget, for European works created by producers who are independent from broadcasters.¹²⁴ Broadcasters launching new services are required to meet the quota within five years of the launch of the service and should demonstrate progress towards those targets during the five year transitional period. Broadcasters who consider that it would not be practicable to meet the quota can explain why to the regulatory authority Ofcom, which will advise whether any remedial measures are necessary.¹²⁵

Exempt services are those that:

- are not receivable in the European Union;
- comprise programming broadcast in a language other than a language of the European Union;
- serve a local or regional audience, and do not form part of a national network;

¹²³ The Broadcasting (Independent Productions) Order 1991, No. 1408, <http://www.legislation.gov.uk/ukxi/1991/1408/made>.

¹²⁴ Article 1 of Ofcom’s Guidance on compliance with Articles 16 and 17 of the AVMS Directive: https://www.ofcom.org.uk/_data/assets/pdf_file/0018/12942/av-media-services.pdf. Section 335 of the Communications Act 2003 empowers the Secretary of State to notify Ofcom of international obligations, which in turn creates a duty for Ofcom to amend licences to insert conditions securing compliance with them. In reliance on this power, Ofcom has inserted conditions in broadcast licences requiring licensees to comply with the obligations set out in the AVMSD, and has interpreted these obligations having regard to the obligations set out in its Guidance on compliance with Articles 16 and 17 of the AVMS Directive.

¹²⁵ Article 2 of the Guidance, *ibid*.



- are comprised wholly of news or sports event programming, games, teletext services or teleshopping.

3.2.6.3. Public funding for independent production

At the national level, the main form of film and audiovisual public funding in the country is tax relief (representing 71% of the total public funding source for film in 2015/2016). Introduced in the 2006 Finance Act, it offers tax relief on production expenditure for theatrical films that qualify as British through a cultural test, or as an official co-production. The incentive is worth 25% of qualifying expenditure and has no budget limit, with relief capped at 80% of core expenditure.¹²⁶ Similar incentives are available for high-end television and animation. In all cases, the work in question must be qualified as British and meet a minimum UK spend requirement. The certification is managed by the British Film Institute and the tax authorities manage final payment through the tax system.

The second most important form of film and audiovisual funding is the selective funding provided by the British Film Institute (BFI), the main operating fund in the country, which provides funding to projects every year derived from the National Lottery. It encompasses the BFI Film Fund, the BFI Network (a Talent Development Fund delivered across the UK nations and regions), and includes Development Funding, Production Funding, Documentary funding, International Co-production funding, Completion Funding and BFI Vision Awards.¹²⁷

At the regional and local level, film and audiovisual funding is mainly provided by the following funds: Creative Scotland, Film Cymru Wales, Northern Ireland Screen, Creative England, Screen Yorkshire (Yorkshire Content Fund), Northern Film Media, and Film London.

According to the BFI's criteria, an UK independent film is a UK film produced without creative or financial input from a major US Studio. Furthermore, the BFI's definition of a UK film is "A film which is certified as such by the UK Secretary of State for Culture, Media and Sport under Schedule 1 of the Films Act 1985, via the Cultural Test, under one of the UK's bilateral co-production agreements or the European Convention on Cinematographic Co-production; or a film which has not applied for certification but which is obviously British on the basis of its content, producers, finance, and talent; or (in the case of a re-release) a film which met the official definition of a British film prevailing at the time it was made or was generally considered to be British at that time".¹²⁸

¹²⁶ For further details, see at the British Film Commission website at <http://britishfilmcommission.org.uk/plan-your-production/tax-reliefs/>.

¹²⁷ BFI Statistical Yearbook 2018, p. 177 and <https://www.bfi.org.uk/sites/bfi.org.uk/files/downloads/bfi-statistical-yearbook-2018.pdf>.

¹²⁸ BFI 2018 Statistical Yearbook. BFI, 2018, p. 21, <https://www.bfi.org.uk/sites/bfi.org.uk/files/downloads/bfi-statistical-yearbook-2018.pdf>.



Generally, UK independent producers finance their projects by piecing together financing from disparate sources. These can include public funding and film tax relief (FTR), as well as commercial finance through the preselling of distribution rights to international territories or from equity or debt providers. Co-production partners may also supply finance, while a bank or other provider is likely to be engaged in order to generate cash flow elements such as presales contracts and FTR.¹²⁹

3.2.7. IE - Ireland

3.2.7.1. Definitions

There is no definition of independent producer but section 116 (12) and (13) of the Broadcasting Act¹³⁰ defines independent programme as follows:

“(12) In this section independent programme means a television or sound broadcasting programme made by a person who complies with the following conditions, namely:

(a) each of the following matters as respects the said programme is determined by him or her or by one or more persons on his or her behalf and over whose activities in respect of the determination of such matters he or she exercises control, namely:

- (i) the persons who are to participate in the said programme,*
 - (ii) the persons who are to be involved in the making of the said programme, and*
 - (iii) the equipment and facilities to be used in the making of the said programme,*
- (b) he or she is not a subsidiary of a broadcaster, and*
- (c) he or she is not a holding company of a broadcaster.”*

(13) For the purposes of the definition in subsection (12), where:

(a) two or more broadcasters hold shares in a body corporate or a holding company of a body corporate, or

(b) each of two or more broadcasters (being shareholders in a body corporate or a holding company of a body corporate) by the exercise of some power exercisable by it without the consent or concurrence of any other person can appoint or remove a holder of a directorship of the body corporate or, as the case may be, the holding company,

then, notwithstanding that the body corporate is not a subsidiary of any of these broadcasters, the body corporate is deemed not to comply with the condition specified in paragraph (b) of that definition if

- (i) the total number of shares held by the said broadcasters in the body corporate or, as the case may be, the holding company, or*
- ii) the total number of directorships of the body corporate or, as the case may be, the holding company that the aforesaid powers of the said broadcasters may be exercised in*

¹²⁹ The State of the UK Independent Film Sector, A study for PACT by Olsberg-SPI, 28 April 2017, <https://www.o-spi.co.uk/wp-content/uploads/2017/04/The-State-of-the-UK-Independent-Film-Sector.pdf>.

¹³⁰ Broadcasting Act 2009: <http://www.irishstatutebook.ie/eli/2009/act/18/enacted/en/print>.



respect of, is such that, were the said broadcasters to be regarded as one company, the body corporate would be a subsidiary of it, and

(I) RTE' is one of the said broadcasters, or

(II) there exists a business relationship between the said broadcasters that, in the opinion of RTE', is of such a kind as is likely to result in the said broadcasters acting in concert with one another in exercising their rights under those shares or in exercising the said powers.”

As to the definition of European works, Article 2 of the Statutory Instrument N°258 of 2010¹³¹ defines them, based on the definition included in the AVMS Directive.¹³²

3.2.7.2. Financial investment in independent production and quota obligations

Broadcasters must reserve, where practicable and by appropriate means, at least 10% of their transmission time (excluding the time allotted to news, sports events, games, advertising, teletext services and teleshopping), or alternatively 10% of their programming budget, for European works created by producers who are independent from broadcasters.¹³³

The public service media RTÉ must invest each year EUR 40 000 000¹³⁴ in an “*independent programme account*” whose purpose is the following: “*(i) commissioning the making of independent television or sound broadcasting programmes, (ii) procuring the formulation by persons of proposals for the commissioning by RTÉ of the making of the above programmes, and (iii) assisting the completion of independent television or sound broadcasting programmes the making of which has not been commissioned by RTÉ*”.¹³⁵

In addition, VOD providers must promote, where practicable and by appropriate means, the production of and access to European works. Such promotion could relate, inter alia, to the financial contribution made by such services to the production and rights acquisition of European works or to the share or prominence of European works in their catalogue.¹³⁶ However, there is no specific obligation concerning the promotion of or financial contribution to independent production by on-demand audiovisual providers.

3.2.7.3. Public funding for independent production

The main fund operating in Ireland is Fís Eireann/Screen Ireland (hereinafter, “Screen Ireland” or “FÉ/SI”), which is the national state body for the development of the Irish film, television and animation industries.

¹³¹ Statutory Instrument No. 258 of 2010: <http://www.irishstatutebook.ie/eli/2010/si/258/made/en/print>.

¹³² For further details, see “European works mapping report”, Factsheet for Ireland, op. cit.

¹³³ Article 15(1) of Statutory Instrument No. 258 of 2010, op. cit.

¹³⁴ As adapted annually on the basis of the Consumer Price Index since 2008.

¹³⁵ Section 116 of the Broadcasting Act 2009.

¹³⁶ Article 11(1) of Statutory Instrument No. 258 of 2010.



In addition, the Broadcasting Authority of Ireland (hereinafter, the “BAI”) administrates a funding scheme for television and radio programmes: the “Sound & Vision 3” scheme, which is funded through Irish television licence fees. Its main objectives are the promotion of high quality television programmes representing Irish culture, heritage and diversity; developing programmes in the Irish language; increasing the availability of these programmes; and fostering local and community broadcasting. Both broadcasters and independent producers are eligible to receive financial aid from the scheme.¹³⁷

3.2.8. IT - Italy

3.2.8.1. Definitions

Article 2 (1)(p)(1) and (2) of the Legislative Decree of 31 July 2005, as amended (TUSMAR Decree)¹³⁸ defines an independent producer as follows:

“European companies carrying out audiovisual production that are neither subsidiaries, nor related-companies to audiovisual media service providers subject to Italian jurisdiction and, alternatively: 1) do not reserve for a timeframe of three years more than 90% of the production for the same audiovisual media service provider; or 2) hold secondary rights.”

Furthermore, an ad hoc implementing regulation has been released by the Italian regulator, AGCOM, in a draft version and is currently subject to public consultation.¹³⁹ It sets out, first of all, a definition of “European independent producers”. In order for a producer to fall within this scope, two additional requirements have to be met: (i) being engaged in audiovisual production, and (ii) the lack of any relationship (including control or affiliation) with audiovisual media service providers subject to Italian jurisdiction. The fulfilment of these two conditions must be accompanied by compliance with one of the following conditions: (i) no more than 90% of the production may be allocated to the same provider of audiovisual media services, or (ii) the producer must be a secondary rights holder. The 90% threshold is calculated according to the overall amount of the revenues obtained by the producer as remuneration for the services offered to audiovisual media service providers.

As to the definition of European works, Article 2(1)(cc) of the TUSMAR Decree contains a definition based on the one in the AVMS Directive.¹⁴⁰

¹³⁷ Source CEPI.

¹³⁸ Decreto Legislativo 31 luglio 2005, n°177 (TUSMAR), e successive modifiche - Articolo 44-ter (Legislative Decree No. 177 of 31 July 2005, as amended - Article 44-ter), <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:2005-07-31:177!vig=> .

¹³⁹ “Public consultation on the draft regulation governing programming and investment obligations for European works and works of independent producers”, by Resolution No. 184/18/CONS.

¹⁴⁰ For further details, see “European works mapping report”, Factsheet for Italy, op. cit.



3.2.8.2. Financial investment in independent production and quota obligations

3.2.8.2.1. Financial investment obligations in the case of independent production

Private broadcasters must reserve at least 10% of their net annual revenues, as indicated in the income statement of the last annual financial reports available, to the production, pre-acquisition and acquisition of European works. For 2018 100% must be devoted to works by independent producers.

These revenues must be those obtained by the broadcaster from advertising, teleshopping, sponsorship, contracts and agreements with public and private entities, public financing and fee-based television offers for non-sports programmes for which it has editorial responsibility. This percentage is increased to 12.5% from 1 July 2019, five-sixths of which for independent producers, and to 15% from 2020 on, five-sixths of which for independent producers.

Private broadcasters are also subject to a specific sub-quota of 3.2% of their net annual revenues to be allocated to cinematographic works of Italian original expression produced by independent producers. This percentage is increased to 3.5% from 1 July 2019, 4% for 2020 and 4.5% from 2021.¹⁴¹

The public broadcaster RAI must allocate to the pre-acquisition, acquisition and production of European works a quota of no lower than 15% of overall annual revenues. For 2018, 100% is devoted to works by independent producers. To this end, revenues are those deriving from the licence fee (*canone*) and advertising, excluding those deriving from agreements with the public administration and sales of goods and services. This percentage is increased to 18.5% for 2019, five-sixths of which for independent producers, and to 20% from 2020 on, five-sixths of which for independent producers. No less than 5% of this quota must be allocated to animation works for children's education.

RAI is also subject to a specific sub-quota of 3.6% of its annual net revenues to be allocated to cinematographic works of original Italian expression by independent producers. This percentage is increased to 4% from 1 July 2019, 4.5% for 2020 and 5% from 2021.¹⁴²

As far as VOD providers are concerned, from 1 July 2019 they must promote the production of and access to European works, assigning an annual financial contribution to European works by independent producers, with particular reference to recent works, amounting to at least 20% of the net revenue raised in Italy, no matter whether the VOD provider is established in Italy or not.¹⁴³ According to the same timeline, a specific sub-quota of at least 10% of the net annual revenues generated in Italy must be reserved for works of Italian original expression produced by independent producers.¹⁴⁴

¹⁴¹ Article 44-ter, para. 1 of the TUSMAR.

¹⁴² Article 44-ter, para. 3 and 4, *ibid*.

¹⁴³ Article 44quarter(1), *ibid*.

¹⁴⁴ Article 44quarter(5), *ibid*.



Before 1 July 2019, VOD providers must reserve alternatively (i) at least 5% of the annual revenues derived from the delivery of on-demand content in the previous year for the production or purchase of rights in European works or (ii) a share of 20% of its catalogue for European works (the share is calculated in terms of hours, on an annual basis). VOD service providers which grant prominence to European works in accordance with the criteria set out in AGCOM Resolution No. 149/15/CONS are entitled to benefit from partial deductions from the investment or broadcasting quotas up to one-fifth of their amount.

3.2.8.2.2. Quota obligations in the case of independent production

Broadcasting quotas do not specifically apply to independent production in Italy, nor do the quotas applicable to VOD providers.

3.2.8.3. Public funding for independent production

At the national level, the main fund operating in the country is the Ministry for Cultural Heritage Activities – General Directorate for Film (hereinafter “Mibac”). It administers the Fund for the Development of Film and Audiovisual Investments (“The Fund”) which provides support in the form of tax credit schemes, automatic subsidies, promotion subsidies and selective subsidies for film production, distribution and promotion.

At the regional level, the entities responsible for supporting the film and audiovisual industry are divided between the film commissions and the regional funds. The former pursue objectives of public interest in the cinema and the audiovisual industry by providing free support and assistance to the relevant authorities for the film and audiovisual industry in the reference territory (e.g. logistical assistance, mapping of qualified manpower and service providers, etc). The latter consists of regional funds which offer selective schemes funding cinematographic and audiovisual works produced in the region. The schemes mainly focus on support for production activities. The main regional funds by support volume are in the Apulia Region (Apulia Film Fund 2018/2020 and Apulia Promotion Film Fund), the Piedmont Region (FIP Film Investment Piedmont), the Lazio Region (Lazio Cinema International and Lazio Cinema and Audiovisual Fund), and the Alto Adige Region (IDM Film Fund).¹⁴⁵

Independent production is mainly supported at state level through tax credits. At regional level, some funds, such as Lazio Cinema International and the Lazio Cinema and Audiovisual Fund have set different limits to the maximum amount that they can grant of the total production cost and to the number of projects per producer and per year that

¹⁴⁵ For more information, see European works mapping report, Factsheet Italy, op. cit.



they can support. The grant is given ex post and consequently cannot be used for the preparation and production phases.¹⁴⁶

3.2.9. NO - Norway

3.2.9.1. Definitions

Section 2.2 of the Regulation relating to broadcasting and audiovisual on-demand services¹⁴⁷ defines an independent producer as follows:

“A producer is to be regarded as an independent producer in relation to the first paragraph if:

a) A broadcaster does not own shares or interests in the production company representing more than 25 percent of the votes in the company. Where several broadcasters are co-owners of a production company, their shares must not constitute more than 50 percent of the votes in the production company. The same applies where a production company owns shares or interests in a broadcaster.

b) The producer does not sell more than 90 percent of its production over a three-year period to a single broadcaster, unless the producer produces only one programme or a series in the course of this period.

c) The producer holds secondary rights to its productions.”

As far as the definition of European works is concerned, section 2.3 of the above Regulation defines them on the basis of the definition contained in the AVMS Directive.¹⁴⁸

3.2.9.2. Financial investment in independent production and quota obligations

3.2.9.2.1. Financial investment obligations in the case of independent production

There is no investment obligation in Norway imposed on broadcasters or VOD providers.

¹⁴⁶ For more information on independent production in Italy, see Associazione Produttori Audiovisivi (APA), “La produzione audiovisiva nazionale: voltri economici, tendenze e sfide di un settore in rapido sviluppo”, 12 March 2019, <https://www.apit.it/wp-content/uploads/2019/03/apa-PER-OSPITI.pdf>.

¹⁴⁷ Forskrift om kringkasting og audiovisuelle bestillingstjenester (Regulation relating to broadcasting and audiovisual on-demand services), https://lovdata.no/dokument/SF/forskrift/1997-02-28-153#KAPITTEL_2. English version at <http://www.medietilsynet.no/globalassets/engelsk/180418-regulation-relating-to-broadcasting-and-audiovisual-on-demand-services.pdf>.

¹⁴⁸ For further details, see “European works mapping report”, Factsheet for Norway, op. cit.



3.2.9.2.2. Quota obligations in the case independent production

Broadcasters must reserve at least 10% of their transmission time (excluding the time allotted to news, sports events, games, advertising, teletext service and teleshopping) for European works created by producers independent from broadcasters.¹⁴⁹

VOD providers must promote the production of and access to European works when practicable and with appropriate means.¹⁵⁰ There is no specific obligation concerning the promotion of independent production by VOD providers.

3.2.9.3. Public funding for independent production

The Norwegian Film Institute provides various types of support for Norwegian films or Norwegian majority co-productions, based on a set of criteria linked to the contribution of the work to Norwegian culture. Eligible production companies must be independent audiovisual production enterprises, established in Norway or in another EEA country. The undertaking must be registered in the Norwegian business registration.

By independent audiovisual production undertaking is meant an undertaking which has audiovisual production as its main purpose and does not have the state as the principal owner or is not significantly associated with a broadcasting organisation. A substantial connection exists when a single broadcasting organisation has shares or voting rights of 25% or more in the production enterprise. When several broadcasting organisations are the owners, the limit is 50 percent.¹⁵¹

3.2.10. PT - Portugal

3.2.10.1. Definitions

Article 2(j) of Act No. 55/2012¹⁵² defines an independent producer as follows:

“Independent producer means a legal person whose principal activity is the production of cinematographic or audiovisual works, provided that the following requirements are met cumulatively:

¹⁴⁹ Section 2.2 of the Regulation relating to broadcasting and audiovisual on-demand services, op. cit.

¹⁵⁰ Section 2.1.a, ibid.

¹⁵¹ For further details, see the Norwegian Film Institute website, <https://www.nfi.no/eng/grantsfunding>.

¹⁵² Lei nº55/2012 da Princípios de ação do estado na proteção da arte do cinema e audiovisual (Law on Principles of State Action within the Framework for the Promotion, Development and Protection of Cinema and of Cinematographic and Audiovisual Activities), http://www.pgdlisboa.pt/leis/lei_mostra_articulado.php?nid=2041&tabela=leis&so_miolo. English version: Law No. 55/2012 on principles of State action within the Framework for the Promotion, Development and Protection of Cinema and of Cinematographic and Audiovisual Activities, http://www.ica-ip.pt/fotos/editor2/law_55_14_eng.pdf.



i) No more than 25% of the capital stock held, directly or indirectly, by a media service provider or no more than 50% in the case of several media service providers;

(ii) 90% limit of total income, or in the last fiscal year or accumulated in the last three fiscal years, for each media service provider.”

European works are defined Article 2(k) of Act No. 55/2012 on the basis of the definition contained in the AVMS Directive.¹⁵³

3.2.10.2. Financial investment in independent production and quota obligations

All broadcasters which include in their services feature and short films, television films, cinematographic creation documentaries or creative documentaries for television and television series, including fiction and animation, must participate in cinematographic and audiovisual production on the basis of annual investment obligations for the financing of scripts and for the development, production and co-production of national creative works, or purchasing rights for broadcasting and making available national and European creative works by independent producers.¹⁵⁴ Compliance with the direct investment obligations set out above must be achieved through direct investment in cinematographic works and in national audiovisual creative works by independent producers.¹⁵⁵

For private broadcasters, the investment amounts to 0.75% of annual revenues generated by the transmission of audiovisual commercial communications. Broadcasters that exclusively schedule pornographic works are exempt. For the public service broadcaster RTP, the investment amounts to 8% of annual revenues generated by the audiovisual contribution. This contribution corresponds in Portugal to the licence fee for the funding of the public service broadcaster and is paid monthly by every household via the energy bill (EUR 3.02 per month). 90% of these amounts must be invested in national works.

There are not actual obligations to invest in specific types of works, but RTP has must invest a “significant proportion” in cinematographic works. This “significant proportion” is specified in the Public Service Contract between RTP and the Portuguese State, which provides for a level of investment in cinematographic works of at least 25% of the total RTP investment. The investment by broadcasters may take the form of the pre-acquisition or acquisition of broadcasting rights or shares in a production or co-production (without affecting the independent nature of the production of the work) or of financial participation without being involved in the production.

¹⁵³ For further details, see “European works mapping report”, Factsheet for Portugal, op. cit.

¹⁵⁴ Article 14 of Act No. 55/2012, op. cit., and article 44 of Decree-Law No. 25/2018 on the Development and the Protection of Cinematographic and Audiovisual Activities (Decreto-Lei n°25/2018 apoio ao desenvolvimento e proteção das atividades cinematográficas e audiovisuais), <https://dre.pt/home/-/dre/115172414/details/maximized>.

¹⁵⁵ Article 14.4 of Act No. 55/2012, ibid.



With regard to promotion obligations, broadcasters must reserve at least 10% of their transmission time (excluding the time allotted to news, sports events, games, advertising, teleshopping and teletext) for European works created by producers independent from broadcasters.¹⁵⁶ Half of this quota must be reserved for works originally produced in Portuguese. VOD providers do not have to comply with any specific obligation concerning the promotion of independent productions.

3.2.10.3. Public funding for independent productions

The national film agency, the Portuguese Film and Audiovisual Institute (ICA) operates different types of support schemes for cinematographic and audiovisual works. Production support schemes, including programmes to support new talents and first works, cinema support programmes and audiovisual and multimedia support programmes are only available to independent producers.¹⁵⁷

The ICA is responsible for verifying compliance with the independent production requirement.¹⁵⁸ Independent producers benefiting from these support measures must not assign their rights, in their entirety, for at least five years from the date of the first exhibition or dissemination of the work. The non-recognition of a work as an independent production or the loss of such recognition will result in the reimbursement of the amounts of support received or, in the case of investment obligations, in their not being counted as mandatory investments, except when such non-recognition or loss of recognition as an independent work is not attributable to the beneficiary producers or those subject to investment obligations.¹⁵⁹

¹⁵⁶ Article 46 of Act No. 27/2007 (Lei n°27/2007 da Televisão e dos serviços audiovisuais a pedido (Television and On-Demand Audiovisual Services Act),

http://www.pgdlisboa.pt/leis/lei_mostra_articulado.php?nid=923&tabela=leis&so_miolo.

¹⁵⁷ Article 5.4 of Decree-Law No. 25/2018.

¹⁵⁸ Article 2(j) of Act No. 55/2012.

¹⁵⁹ Article 9 of the Law-Decree N° 25/2018.



4. Interprofessional agreements

Quotas, investment obligations and regulations on the independence of producers *vis-à-vis* broadcasters are important policy measures aimed at promoting independent production in the European audiovisual sector. However, film production is basically a private affair, and given that the customer is always right and big fish usually eat little fish, independent producers are often in a position of weakness in the negotiations with broadcasters.

Public-service broadcasters (“PSBs”) deserve a separate chapter in this respect. Given their particular role as a “public source of unbiased information and diverse political opinions”,¹⁶⁰ their market importance and the fact that they are financed to a great extent through public money, legislators feel the need to impose certain basic rules applying to contractual agreements between TV channels and independent producers.

This chapter presents recent examples of interprofessional agreements between producers and PSBs of three countries (Germany, France and the UK), highlighting thereby the role of the state in creating a legislative framework for these agreements.

4.1. DE - Germany

4.1.1. Framework Agreement

The relationship between film and audiovisual producers and the public service broadcasters ARD¹⁶¹ and ZDF¹⁶² is set out in a “Framework Agreement on contractual co-operation on joint film/television productions and comparable cinema co-productions”.¹⁶³

¹⁶⁰ See <https://www.coe.int/en/web/freedom-expression/public-service-media>.

¹⁶¹ The *Arbeitsgemeinschaft der öffentlich-rechtlichen Rundfunkanstalten der Bundesrepublik Deutschland* (ARD) is a joint organisation of Germany’s regional public-service broadcasters. <http://www.ard.de>.

¹⁶² <https://www.zdf.de>.

¹⁶³ This agreement was signed between ARD, ZDF and the German Producers’ Alliance, see *Eckpunktevereinbarung über die vertragliche Zusammenarbeit zu Film-/Fernseh-Gemeinschaftsproduktionen und vergleichbare Kino-Koproduktionen zwischen Arbeitsgemeinschaft der Rundfunkanstalten Deutschlands, Zweites Deutsches Fernsehen und Allianz Deutscher Produzenten – Film & Fernsehen*, 24. November 2015, https://www.produzentenallianz.de/wp-content/uploads/2018/11/Eckpunkte-Film-TV-Gemeinschaftsproduktionen_ARD-ZDF_DR.pdf.



The agreement lays down the basic conditions for drafting contracts for commissioned productions.

The Framework Agreement establishes two exploitation phases (Article 2). The duration of the first exploitation phase shall normally be five years from the first broadcast, but no later than 18 months from the date of contractual free TV availability, provided that the producer informs ARD/ZDF accordingly.

During the first exploitation phase, ARD/ZDF have the right to broadcast as often as they wish within the framework of all free-TV programmes they organise and co-host (including use in ARTE¹⁶⁴ pursuant to Article 5 of this Agreement).¹⁶⁵

This first exploitation phase will be seven years - with or without ARTE funding - if the ARD/ZDF funding share is:

- at least 45% for a budget of up to EUR 3 million;
- at least 35% for a budget of up to EUR 5 million;
- at least 30% for a budget of up to EUR 10 million; and
- at least 25% for a budget of over EUR 10 million.

If the total financial contribution of ARD/ZDF is less than 15% of the German share of the total production costs and less than EUR 150,000, a maximum of four broadcasts each plus one repetition within 48 hours is permissible within the licence period. In the digital programmes of ARD/ZDF, any number of programmes are still permitted. Alternatively, a shortening of the first exploitation phase to four years with unlimited broadcasts can be agreed. The second exploitation phase is optional and has a duration of three years (with or without exercising the option also for ARTE). The option must be exercised no later than twelve months before the end of the first use phase. When the option for the second use phase is exercised, an appropriate licence fee is agreed at normal market terms and conditions. With a corresponding agreement, the rights are transferred to ARD/ZDF. In such a case, the producer shall offer the corresponding ARD/ZDF rights to the co-producing broadcaster for the period after the end of the second exploitation phase.

¹⁶⁴ <https://www.arte.tv/en/>. ARTE (Association relative à la télévision européenne) is a Franco-German free-to-air television network that promotes cultural programming. It is made up of three separate companies: the Strasbourg-based European Economic Interest Grouping ARTE GEIE, plus two member companies acting as editorial and programme production centres, ARTE France in Paris (France) and ARTE Deutschland in Baden-Baden (Germany). As an international joint venture (an EEIG), its programmes focuses on audiences in both countries. See <https://en.wikipedia.org/wiki/Arte>.

¹⁶⁵ The granting by ARD/ZDF to ARTE of German television rights to productions not co-financed by ARTE in the first exploitation phase does not constitute a claim to revenue sharing by the producers. In the event that ARTE rights - even at a later date - are requested, are available and can be transferred by ARD/ZDF, the producer will receive 50% of the payment by ARTE, taking into account the previously agreed advance deduction costs. Free TV rights to joint productions may be exploited in all ARD/ZDF in-house and co-organised programmes, but ARTE rights of use will only be granted in the case of a financial contribution to ARTE.



Concerning Pay-TV rights, Article 6 establishes the following rules:

- Pay-TV exploitation prior to the first broadcast on free TV can take place if the pay-TV broadcaster has participated directly and demonstrably in the production of the production in the sense of a financing contribution and provided that pay-TV use does not cause any (or no substantial) postponement of the currently customary free TV exploitation (pay-TV exploitation no later than within the 18-month cinema pre-release period).
- Pay-TV exploitation prior to the first broadcast on free TV without a financial contribution from the pay-TV broadcaster may take place after prior consultation with ARD/ZDF and provided that pay-TV use does not affect any (or no significant) postponement of the currently customary free TV exploitation (pay-TV use no later than within the 18-month cinema pre-release period).
- Pay-TV uses outside ARD/ZDF's exploitation phases do not require coordination with ARD/ZDF.
- Pay-TV exploitation within ARD/ZDF's exploitation phases are possible as licence windows - after prior coordination with and approval by ARD/ZDF - provided that the ARD/ZDF's exploitation phases are extended according to the length of the pay-TV exploitation period.

Regarding non-exclusive television rights remaining with the producer for the Austrian and Swiss licence areas, they may be exploited for the first time at the earliest simultaneously with the first broadcast by ARD/ZDF.

The Framework Agreement defines different types of online rights and explains the rules applying to each of them:

- Free-VOD: ARD/ZDF have exclusive Free-VOD rights for and in their areas of use. The exploitation of the Free VOD rights for and in the areas of use of ARD/ZDF by the producer or third parties commissioned by it is excluded subject to the following regulations on programme advertising. The use by ARD/ZDF, however, can only take place in the form of streaming not intended for download and only to the following extent:
 - ARD/ZDF may make the work available to the public in German in their on-demand services within 7 days of the respective programme (first or repeat programme). ARD/ZDF are also entitled to make every production publicly accessible for a period of up to 4 weeks up to three times per exploitation phase, even without prior television broadcasting. ARD/ZDF may make the production available to the public in whole or in part within a tight time frame, but no earlier than 48 hours before the respective programme and only in compliance with the blocking periods of the FFG or the specifications issued by the FFA on the basis of the FFG, whereby in the case of first use, the use phase of the production begins at the latest when it is made available for retrieval. In addition, both parties are entitled, on a non-exclusive basis, to make the respective production in German available for retrieval for the purpose of advertising the production, in particular for programme advertising, in excerpts up to a maximum of 10 minutes, but not more than 25% of the total length of the



- production, even with the usual broadcasting lead time before the start of the period of use, but only if the FFG blocking periods or the FFA specifications issued on the basis of the FFG are observed. In the case of co-productions with ARTE and/or in the case of ARD/ZDF exploiting the rights for ARTE jointly with the producer, ARTE or ARD/ZDF shall also be entitled to the aforementioned rights with regard to the French language but only on a non-exclusive basis, unless otherwise agreed in individual contracts, also for use in on-demand services of ARTE;
- the acquisition of further Free-VOD rights requires a separate agreement with the producer;
 - the VOD offerings of ARD/ZDF shall only be made using geolocation, which excludes access outside the German-speaking countries (Germany, Austria, Switzerland and Liechtenstein, but not South Tyrol [Alto Adige]), insofar as this is not only partial use. This also applies in the case of use by ARTE with the additional proviso that access from France remains possible.
- Pay-VOD: The producer is entitled to exclusive Pay VOD rights within and outside the ARD/ZDF areas of exploitation, unless other provisions are made below and/or individual contractual provisions are made on the basis of these provisions. However, if ARD/ZDF's share of the production costs (in the case of international financing based on the German share) is at least 50%, the distribution of the Pay VOD rights, including VOD rental, will be regulated individually in the production contract on the understanding that, in this case, the Pay VOD rights in ARD/ZDF's licence area are in principle exclusively allocated to ARD/ZDF. The use of these rights by ARD/ZDF is carried out using geolocation. In such a case, the producer will receive a 50% share of the net proceeds from their distribution as well as advertising or sponsor-financed exploitations (minus distribution commissions of the subsidiaries engaged by ARD/ZDF). When using/assigning its remaining Pay VOD rights for exploitation outside ARD/ZDF's exclusive areas of use, the producer shall ensure that the use of geolocation in accordance with the principles set out in Article 9(1)(d) is protected against the possibility of retrieval in ARD/ZDF's exclusive areas of use in the German language and, in the case of ARTE's use in French, if exclusivity has been agreed, in accordance with the principles set out in Article 9 (1)(d).
 - Electronic-Sell-Through/Download-To-Own: VOD-EST/VOD-DTO is available to the producer in all phases of use for sole exploitation. The charges paid by consumers must be in line with market practice.
 - SVOD: The producer may only use or have used SVOD rights within the broadcaster's use phase of the 36 months after the start. Before the start of the TV exploitation phase, the producer is permitted to exploit the SVOD rights in compliance with the FFG blocking periods.
 - Exploitation of rights by third parties: A contracting party may license these rights to third parties for exploitation, taking into account the provisions of the Framework Agreement.



The agreed payment (co-production and licence share) is generally due as follows: 20% at the conclusion of the contract, 40% at the start of shooting, 30% at the rough cut acceptance, 10% at the final acceptance.

The Framework Agreement includes an obligation to use geolocation for the streaming of their respective programmes in accordance with the following provisions in Article 9 (1)(d) and Article 9 (2)(c).

This Framework Agreement was originally valid until 31 December 2016 and is automatically extended every year if it is not terminated in writing to all contracting parties 6 months before the end of the term.

4.1.1.1. Further voluntary obligations

On 1 January 2016 there came into force a so-called *Eckpunktevereinbarung 2.0* ("Framework Agreement 2.0")¹⁶⁶ between ARD and the German Producers' Alliance on voluntary obligations for balanced contractual conditions and a fair distribution of exploitation rights. For the first time, these obligations cover all genres - fiction, entertainment and documentation - in a voluntary commitment.¹⁶⁷ Some months later, ZDF also now committed itself, after consultations with the Producers' Alliance, to new "framework conditions for fair cooperation"¹⁶⁸ with television producers.¹⁶⁹

4.2. FR -France

Since 2010, the transfer of rights between independent producers and broadcasters in France are regulated by professional agreements and broadcasting licences. Relevant legislation specifies only that it is the licences (and *cahier de charges*) that determine the scope of the rights transferred by type of audiovisual works.¹⁷⁰

¹⁶⁶ See *Eckpunkte für ausgewogene Vertragsbedingungen und eine faire Aufteilung der Verwertungsrechte bei Produktionen für die Genres Fiktion, Unterhaltung und Dokumentation* (version in force since 1 January 2019), <https://www.produzentenallianz.de/wp-content/uploads/2019/02/ARD-Eckpunkte-2-0-20190101.pdf>.

¹⁶⁷ For more information see Beckendorf I., "ARD and Producers' Alliance negotiate "Framework Agreement 2.0", IRIS 2016-3/9, <http://merlin.obs.coe.int/iris/2016/3/article9.de.html>.

¹⁶⁸ See ZDF-, "Rahmenbedingungen einer fairen Zusammenarbeit", <https://www.produzentenallianz.de/wp-content/uploads/2018/11/ZDF-Rahmenbedingungen.pdf>.

¹⁶⁹ For more information see Beckendorf I., "ZDF agrees new guidelines with TV production companies, IRIS 2017-3/11, <http://merlin.obs.coe.int/iris/2017/3/article11.en.html>.

¹⁷⁰ See Article 14 of décret n° 2010-747 : « Prenant en compte les accords conclus entre les éditeurs de services et les organisations professionnelles de l'industrie audiovisuelle et des critères objectifs et transparents tels que le chiffre d'affaires de l'éditeur de services ou la nature de sa programmation, les conventions et les cahiers des charges déterminent l'étendue des droits cédés par genre d'oeuvres audiovisuelles. » ; Articles 29 and 43 of décret n° 2010-747 and Articles 14 et 30 of décret n° 2010-416 : « Prenant en compte les accords conclus entre les éditeurs de services et les organisations professionnelles de l'industrie audiovisuelle et des critères objectifs et transparents tels que les ressources totales nettes de l'éditeur de services ou la nature de sa programmation, les conventions déterminent l'étendue des droits



4.2.1. Agreement France Télévisions 2019-2022

On 21 December 2018, France Télévisions signed a new agreement¹⁷¹ with all the audiovisual producers' unions (SATEV, SPECT, SPFA, SPI, and USPA) for the period 2019-2022. This entered into force on 1 January 2019 and must be supplemented by 31 March 2019 with provisions on a number of additional subjects to be negotiated by then, in particular those concerning animation, which requires special treatment in the light of future developments in the distribution of works.

The agreement includes the following developments:

- Investments in creation:
 - France Télévisions' commitment of at least EUR 420 million per year in *oeuvres patrimoniales* (that is, fiction, creative documentaries, animation, recordings and recreations of live performances and video clips)¹⁷² will be secured through an amendment to its terms of reference (*cahier de charges*);
 - France Télévisions undertakes to maintain the minimum annual investment commitments by genre for the period 2019-2022;
 - the proportion of the investment that goes to independent production is increased from 75% to a minimum of 82.5% from 2019;
 - the proportion reserved for France Télévisions' subsidiaries will be increased from 12.5% to a maximum of 17.5% from 2019;
 - the so-called "flexible" dependent proportion of 12.5% is abolished from 2019;
 - over the period 2019-2022, France Télévisions' objective is to increase its investment in the production of *oeuvres patrimoniales* that are the subject of a first non-linear exploitation to at least EUR 50 million per year.
- Sharing the value:
 - the threshold for triggering co-production shares is reduced from 70% to 60%;
 - France Télévisions' level of revenue rights to the exploitation of pre-purchased independent works has been aligned with that of co-produced works, i.e. 50% of its share of financing in relation to the final cost of the work.
- General framework for the exploitation rights of works:
 - the exploitation rights of works are transferred to linear television services published by France Télévisions, or on-demand audiovisual sites and/or media published or co-published by France Télévisions, as well as offers

cédés par genre d'oeuvres audiovisuelles. ». For more information see also CSA, *Conclusions de la concertation sur la production audiovisuelle*, <https://www.csa.fr/Informer/Collections-du-CSA/Travaux-Autres-publications-rapports-bilans-etudes-d-impact/Divers/Conclusions-de-la-concertation-sur-la-production-audiovisuelle>.

¹⁷¹ See joint press release of France Télévisions, SATEV, SPECT, SPFA, SPI and USPA, 11 January 2019, <https://www.francetvpro.fr/corporate/communiqués-de-presse/23813821>.

¹⁷² See <https://www.csa.fr/Arbitrer/Promotion-de-la-production-audiovisuelle/Ou-est-ce-qu-une-oeuvre-cinematographique-et-audiovisuelle>.



- from third-party distributors lawfully incorporating France Télévisions' delinearised offering;
- the duration of the exclusive linear exploitation rights is 36 months for series and collections, and 30 months for individual items;
 - the duration of TVR and preview remains 7 days. However, it is extended for fiction and documentary series, insofar as France Télévisions will be able to give the public access to all episodes up to 7 days after the broadcast of the last episode;
 - the exclusivity period of France Télévisions' rights *vis-à-vis* SVOD operations has been extended. It is negotiated by mutual agreement within limits of 12 to 24 months for works whose financing from France Télévisions exceeds 65% for fiction, 55% for documentaries and 45% for live shows. It is 0 to 12 months below these thresholds;
 - for free non-linear exploitation, France Télévisions is granted a period of exclusivity for the duration of its linear rights;
 - France Télévisions may exploit non-linear works in its offerings, on a continuous or discontinuous basis, during the SVOD exclusivity period. The duration of these operations is linked to the level of financing of the work by France Télévisions (see above), from 6 to 9 months for the best financed works and from 0 to 6 months for others.

4.3. GB - United Kingdom

4.3.1. Codes of Practice

According to section 285 of the Communications Act 2003,¹⁷³ every licensed public service channel (BBC, ITV, Channel 4 and Channel 5) must draw up and from time to time revise a code of practice setting out the principles it will apply when agreeing terms for the commissioning of independent productions. These codes have to be approved by OFCOM,¹⁷⁴ the UK's communications regulator, which has to have in place Guidance to assist PSBs in drawing them up.¹⁷⁵

Each code¹⁷⁶ must ensure the following requirements:

¹⁷³ Communications Act 2003, c. 21, <https://www.legislation.gov.uk/ukpga/2003/21/contents>.

¹⁷⁴ <https://www.ofcom.org.uk/home>.

¹⁷⁵ Ofcom, Guidance for Public Service Broadcasters in drawing up Codes of Practice for commissioning from independent producers, 21 June 2007, https://www.ofcom.org.uk/_data/assets/pdf_file/0022/87052/statement.pdf.

¹⁷⁶ The codes of practice of each PSB are available on their respective websites, see: BBC, http://downloads.bbc.co.uk/commissioning/site/code_of_practice.pdf; ITV, <https://www.itv.com/documents/pdf/ITV-Commissioning-Code-of-Practice.pdf>; Channel 4.



- the existence of a reasonable timetable applied to negotiations for the commissioning of an independent production and for the conclusion of a binding agreement;
- sufficient clarity about the different categories of rights to broadcast or otherwise to make use of or exploit the commissioned production that are being disposed of;
- sufficient transparency about the amounts to be paid in respect of each category of rights;
- satisfactory arrangements about the duration and exclusivity of those rights;
- procedures in place for reviewing the arrangements adopted in accordance with the code and for demonstrating compliance with it. Those procedures must include requirements for the monitoring of the application of the code and for the making of reports to OFCOM;
- appropriate provisions made for resolving disputes arising in respect of the provisions of the code (by independent arbitration or otherwise).

These Codes of Practice create the framework within which more detailed commercial negotiations between PSBs and producers can take place. PACT,¹⁷⁷ the trade association representing the commercial interests of UK independent television, film, digital, children's and animation media companies, has concluded Terms of Trade with all PSBs. These Terms of Trade, introduced in 2003, are a framework of principles which govern the way the public service broadcasters do business with independent production companies, from programme commissioning to rights ownership.

4.3.2. Terms of Trade

4.3.2.1. BBC

The BBC Business Framework,¹⁷⁸ which represents the BBC's Terms of Trade were agreed with PACT on 16 October 2013 and updated in June 2017. It includes information about licence periods, exclusivity, distribution, funding and payments as well as additional materials.

The key principles applicable to all BBC independent commissions are the following:

<https://www.channel4.com/media/documents/commissioning/DOCUMENTS%20RESOURCES%20WEBSITES/CodeOfPractice.pdf>;

Channel 5,

<http://www.cdn3.channel5.com/wp-content/uploads/2016/01/07105728/Channel-5-Code-of-Practice-2012-approved-by-Ofcom-3-New-Logo-LB-7.7.17.pdf>.

¹⁷⁷ <http://www.pact.co.uk/>.

¹⁷⁸ <https://www.bbc.co.uk/commissioning/tv/articles/how-we-do-business>.



- Copyright in content commissioned in accordance with the BBC's Code of Practice shall remain vested in the producer who created it.
- In return for the payment of a licence fee, the BBC shall be granted a licence of public service rights.¹⁷⁹
- The producer shall be in control of licensing the rights in their content which are primarily and directly designed to generate secondary commercial revenues, subject to:
 - a period of exclusivity in favour of the BBC which is sufficient for the BBC to deliver its audience promise;
 - certain provisions to protect the value of the BBC's licence, reputation, and the investment it has made into the content and the content's brand; and
 - an appropriate share of revenue payable to the BBC.
- The BBC recognises that other stakeholders (for example the producer itself and any commercial distributors) may have invested in the content.
- In all publication, promotion, exploitation, and other use of or reference to the content, there will be appropriate attribution to the BBC and its brand.

The Business Framework lists the BBC's commitments under its Code of Practice, namely 1) the publication of a list of indicative tariff ranges applicable for different genres of programming¹⁸⁰ and Commercial Release Policies which set out the approach it will take to requests for consent to exploit the programme commercially on television and VOD services in the UK during the BBC's licence period. The BBC will publish a release policy setting out the general approach it will take to requests for consent to exploit the clips and extracts of the programme commercially on television and online services in the UK during the BBC's licence period. It will also publish the principles and guidelines it adopts from time to time when considering requests for consent to use the programme brand in connection with commercial websites, apps, and social media activity in or accessible from the UK.

The BBC has a standard contract¹⁸¹ to be used for commissioning individual independent producers in accordance with the Code of Practice and the Business Framework. The standard contract contains a series of provisions that describe the standard position the BBC will adopt in its commissioning agreement with independent producers. However, these may need to be varied to reflect any changes to the standard provisions which both parties wish to make.

¹⁷⁹ "BBC public service rights" are a list of irrevocable and royalty-free rights, including, *inter alia*, the exclusive right to broadcast, transmit, authorise the transmission of the programme and otherwise make available the programme in those television services whether now existing or developed in the future and provided by the BBC, as well as other rights related, *inter alia*, to the underlying material, festivals, publicity and trails. See the BBC's General Terms for the Production of Television Programmes by Independent Producers, page 3, http://downloads.bbc.co.uk/commissioning/site/BBC_General_Terms_2010.pdf.

¹⁸⁰ See http://downloads.bbc.co.uk/commissioning/site/tariff_prices_for_independents.pdf and <https://www.bbc.co.uk/commissioning/tv/childrens>.

¹⁸¹ <http://downloads.bbc.co.uk/commissioning/site/bbc-standard-ppa-special-terms-may-2017.pdf>.



The standard licence term granted to the BBC is five years from acceptance of full delivery of the programme (but can be modified).

The BBC shall be entitled for the period from seven days prior to the first linear broadcast of the programme ('the Preview') and up to 30 days following the broadcast to use the Programme in any online, interactive television or other new media services forming part of the BBC Public Services.

The BBC enjoys a period of exclusivity of rights as follows:

	In the UK	Ex-UK
DVD/DTO	Day 1 following either (i) 1st exercise of the BBC Public Service Rights for programmes commissioned for BBC Three (or relevant episode thereof), or 1st BBC transmission or 7 days following first BBC Public Service use of the relevant episode for Programmes commissioned other than for BBC Three, or (ii) 6 months from acceptance of Full Delivery, whichever is the earlier	
Linear Television	In accordance with the BBC's Programme Release Policy.	Day after either (i) 1st exercise of the BBC Public Service Rights of the relevant programme / episode commissioned for BBC Three, or 1st BBC transmission or 7 days following first BBC Public Service use of the relevant programme / episode commissioned other than for BBC Three, or (ii) 6 months from acceptance of Full Delivery, whichever is the earlier.
Commercial VOD (incl. catchup)		
Commercial Websites and Apps	<p>The BBC will be clear and transparent regarding its approach to consent, with the objective being to:</p> <ul style="list-style-type: none"> - enhance commercial opportunities for producers in the online environment, - ensure that the core public service propositions for the content are not undermined in the eyes of the licence fee payer and make it very clear to the audience what is provided by the licence fee funding, and what must be purchased or funded through commercial opportunities. <p>Consent will be granted in accordance with the published principles and guidelines that it adopts from time to time when considering requests for consent.</p>	
Library Sales	In accordance with the BBC's Library Sales Release Policy.	Day after either (i) 1st exercise of the BBC Public



		Service Rights of the relevant programme / episode commissioned for BBC Three, or 1st BBC transmission or 7 days following first BBC Public Service use of the relevant programme / episode commissioned other than for BBC Three, or (ii) 6 months from acceptance of Full Delivery, whichever is the earlier.
Merchandise/Books/Other	Day after either (i) 1st exercise of the BBC Public Service Rights of the relevant programme / episode commissioned for BBC Three, or (ii) 1st BBC transmission or 7 days following first BBC Public Service use of the relevant programme / episode commissioned other than for BBC Three, or (iii) 6 months from acceptance of Full Delivery, whichever is the earlier but without prejudice to any pre-existing series exploitation).	
Format Use	(a) New further programmes – commissioning right exclusive to BBC in UK during the BBC’s recommissioning option BBC consent over foreign version into UK during BBC licence unless BBC recommissioning option has expired and another UK broadcaster has commissioned further programmes	
Additional Material	See below.	

Source: <https://www.bbc.co.uk/commissioning/tv/articles/how-we-do-business>.

The BBC receives a standard share of back end revenue from all exploitation of the programme as follows:

- For exploitation in the UK by way of linear television and commercial VOD during the BBC’s licence period of rights released in accordance with the published Release Policy: 25%
- For exploitation of DTO/permanent digital ownership rights in the UK during the BBC’s licence period: 25%
- For all other exploitation of the programme: 15%



The Business Framework also includes rules on third party and producer investment into production and accounting of distribution revenues, further use payments and right to renew. It also contains provisions regarding additional material.¹⁸²

The Business Framework states that the BBC will have final editorial control over all BBC versions of programmes commissioned from independent producers including all associated online and interactive elements. All production and exploitation of all programmes will comply with applicable BBC guidelines (Articles 5 and 6).

The agreed licence fee will be the fixed price the BBC will pay for the programme after good faith negotiations between the parties. The BBC will agree either to cash-flow the agreed licence fee according to agreed stage payments, or it will pay the agreed licence fee upon delivery.

Standard stage payment	Entertainment	Drama	Factual
Receipt by BBC of signed agreement	15%	5%	15%
1st day of pre-production	10%	10%	10%
Commencement of principle photography	25%	20%	25%
Mid point of filming and viewing of rushes by BBC Editorial Representative	20%	25%	N/A
1st day of edit	10%	25%	20%
Approval of rough cut	N/A	N/A	10%
Approval of fine cut of episode 1	10%	5%	10%
Acceptance of tape delivery	5%	5%	5%
Acceptance of physical delivery (subject always to a cap of 100,000)	5%	5%	5%

Source: <https://www.bbc.co.uk/commissioning/tv/articles/how-we-do-business>.

¹⁸² This is material based on or related to the Programme and/or the Format (as defined in the General Terms) to include, by way of example only, material such as out-takes, behind the scenes footage, cast interviews, biographies, mini-episodes, highlight packages, preview packages, clips, applications and non-disc based games designed primarily to support and/or enhance the public service Programme offering etc (for the avoidance of doubt, this is not intended to include disc based/high production value commercial game propositions or other merchandising rights).



The Business Framework does not preclude the BBC and an individual independent producer from concluding an agreement covering a different range of provisions from those outlined above, should they both wish to do so in order to deliver (a) specific and demonstrable strategic project(s).



5. Case law

A search in our IRIS Merlin legal database¹⁸³ on court rulings concerning independent production turns up a surprisingly short list of items (and it could be argued that this is a good thing!). We have chosen three judgments, one from the Court of Justice of the European Union (CJEU) and two from a French court, which we consider particularly relevant for the purposes of this publication.

5.1. Court of Justice of the European Union

As we have explained in Chapter 4 of this publication, public service broadcasters have special obligations *vis à vis* third contracting parties. These obligations derive normally from specific legislative provisions contained in broadcasting or media laws or from their own public service contracts. A different matter is whether general public procurement laws also apply to them. To tender or not to tender, that is the question. For public service broadcasters it is of paramount importance to avoid as much red tape as possible in their dealings with independent producers.

In *Bayerischer Rundfunk v GEWA*,¹⁸⁴ the question to be resolved by the court was whether the *Landesrundfunkanstalten* (German public broadcasting bodies) were contracting authorities for the purposes of the application of the EU rules on the award of public contracts and whether they were therefore obliged to carry out tendering procedures when awarding contracts. This reference for a preliminary ruling related to the interpretation of the first condition of the third indent of the second subparagraph of Article 1(b) and Article 1(a)(iv) of Directive 92/50/EEC relating to the coordination of procedures for the award of public service contracts.¹⁸⁵

¹⁸³ <http://merlin.obs.coe.int/cgi-bin/search.php>.

¹⁸⁴ Judgment of the Court of Justice of the European Union (Fourth Chamber), 13 December 2007, Case C-337/06,

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=71713&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=9568988>. The case concerns a reference for a preliminary ruling under Article 234 EC by the Oberlandesgericht Düsseldorf (Germany), made by decision of 21 July 2006, received at the Court on 7 August 2006, in the proceedings *Bayerischer Rundfunk and others v GEWA Gesellschaft für Gebäudereinigung und Wartung mbH*.

¹⁸⁵ Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (no longer in force), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:31992L0050>.



Article 1(b) of Directive 92/50/EEC contains the definition of “contracting authorities” and of “bodies governed by public law”:

(b) contracting authorities shall mean the State, regional or local authorities, bodies governed by public law, associations formed by one or more of such authorities or bodies governed by public law.

Body governed by public law means anybody:

- established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, and*
- having legal personality and*
- financed, for the most part, by the State, or regional or local authorities, or other bodies governed by public law; or subject to management supervision by those bodies; or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities or by other bodies governed by public law.*

Article 1(a)(iv) of Directive 92/50/EEC excludes “contracts for the acquisition, development, production or co-production of programme material by broadcasters and contracts for broadcasting time” from the definition of “public service contracts”. The rationale behind this provision is explained in particular in Recital 25 of the preamble to Directive 2004/18/EC¹⁸⁶ which provides that:

“The awarding of public contracts for certain audiovisual services in the field of broadcasting should allow aspects of cultural or social significance to be taken into account which render application of procurement rules inappropriate. For these reasons, an exception must therefore be made for public service contracts for the purchase, development, production or co-production of off-the-shelf programmes and other preparatory services, such as those relating to scripts or artistic performances necessary for the production of the programme and contracts concerning broadcasting times. However, this exclusion should not apply to the supply of technical equipment necessary for the production, co-production and broadcasting of such programmes...”

In its judgment, the CJEU explained that according to the provisions of Article 1(b) there is financing, for the most part, by the state when the activities of public broadcasting bodies are chiefly financed by a fee payable by persons who possess a receiver, which is imposed, calculated and levied according to rules such as those applicable in Germany. However, if the activities of German public broadcasting bodies are indeed “financed by the state”, this does not mean there is direct interference by the state or by other public authorities in the award, by such bodies, of a contract such as the one at issue in the main proceedings. Finally, the court concluded that only the public contracts specified in Article 1(a)(iv) of Directive 92/50 are excluded from the scope of that directive.

¹⁸⁶ Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex:32004L0018>.



This judgment was important for German public service broadcasters, since Article 100a(2)(1) of the *Gesetz gegen Wettbewerbsbeschränkungen* (Restrains of Trade Act - GWB)¹⁸⁷ expressly excludes audiovisual services, such as the purchase, development, production or co-production of programmes, from the application of public procurement laws, so that the core area of the public service broadcasters' business operations does not fall within the ambit of German public procurement law.¹⁸⁸

5.2. France

An important rite of passage in the lives of most people is leaving their parent's nest to establish themselves in a new home of their own and meet their own needs, financial or otherwise. Until this rite is accomplished, no talk of real independence is allowed. The Paris administrative court of appeal must have thought something similar when it issued a decision on 10 November 2004 cancelling the approval - and the related right to public aid - given by the French National Film Centre (Centre national du cinéma et de l'image animée - CNC) to Jean-Pierre Jeunet's film *Un long dimanche de fiançailles*.¹⁸⁹

Under the French decree of 24 February 1999¹⁹⁰ on financial support of the film industry, feature-length films made by French companies or through international co-production were entitled to financial aid, provided they fulfilled the conditions laid down, particularly in relation to their commercial success in cinemas. In order to qualify for automatic support, films had to be granted production approval by the CNC Director General. The amount granted was paid into accounts opened at the CNC on behalf of the production companies concerned and could be used by the producers to invest in film production.

On 23 October 2003, the CNC granted approval for a new feature film to the company 2003 Productions, which was to produce the film. However, an association and a federation of independent producers, believing that the production company concerned was mainly American-owned, asked the courts to cancel the approval granted, as, according to Article 7 of the decree of 24 February 1999, in order to be eligible for financial aid the production company could not be controlled by one or more natural or legal persons domiciled in states outside the European Union.

In view of the capital shares in 2003 Productions, 32% of which were held by Warner Bros France, a subsidiary of the American firm Warner Bros Entertainment Inc, the

¹⁸⁷ *Gesetz gegen Wettbewerbsbeschränkungen (GWB)*, <https://www.gesetze-im-internet.de/gwb/>.

¹⁸⁸ See Beckendorf I., "Germany ARD publishes first report on programme producers", IRIS 2016-1/7, <http://merlin.obs.coe.int/iris/2016/1/article7.en.html>.

¹⁸⁹ See Blocman A. "Towards public film aid reforms", IRIS 2005-1/22, <http://merlin.obs.coe.int/iris/2005/1/article22.en.html>.

¹⁹⁰ *Décret n°99-130 du 24 février 1999 relatif au soutien financier de l'industrie cinématographique* (amended in 2008 and 2014), <https://www.legifrance.gouv.fr/affichTexte.do?sessionId=7CD9DEB4FB6A69BCBF10B9C31FE55BBF.tpdjo07v3?cidTexte=JORFTEXT000000575329&dateTexte=20111027#LEGIARTI000019566059>.



Court considered that "the creation of the company 2003 Productions had no other purpose than to enable the company Warner Bros France, 97% of which is owned by its American parent company, to obtain financial aid which [...] is reserved for the European film industry". The cancellation of approval meant that the producers were no longer entitled to the automatic support generated by the number of tickets sold in French theatres. This ruling was upheld on 31 May 2005 by the Paris Administrative Court of Appeal on the same grounds, namely that the producer was not European.¹⁹¹ This decision, which was in accordance with a previous ruling cancelling the approval granted to 2003 Productions for another film, *L'ex-femme de ma vie*, was widely criticised at the time, insofar as the film was shot in France by an entirely French crew and was expected to be released worldwide in French (arguing that the anticipated film support would have been spent on the production of other "French" films).

Interestingly though, a few weeks later, on 21 July 2005, the Paris Administrative Court of Appeal set aside the administrative court judgment cancelling the approval granted to the film *L'ex-femme de ma vie* on another ground.¹⁹² This time, the court dismissed the question of the nationality of the co-producer company, partially owned by an American company, and held that in the case of a co-production, although only the delegated producer is allowed to submit an application for approval on behalf of the other production company or companies, the approval granted to the delegated co-producer cannot be considered to be implicitly and necessarily granted to all co-producers of the work. This particularly applies when some of the co-producer companies have refrained from seeking approval (because they had no interest in doing so, because they did not meet the legal conditions for obtaining it, or because they only became involved in the production when approval had been granted to the last delegated co-producer). Rejecting the notion of global approval, the court noted that, in the instant case, a single decision on approval had been issued in respect of the film *L'ex-femme de ma vie* in favour of the companies Josy Films and ICE 3. This decision could not on its own be taken to constitute approval in respect of 2003 Productions, a co-producer of the film, which indeed had not requested approval. This rendered the nationality argument inapplicable.

¹⁹¹ For further details, see Blocman A., "Cancellation of approval for 'Un long dimanche de fiançailles' upheld", IRIS 2005-7/20,

<http://merlin.obs.coe.int/iris/2005/7/article20.en.html>.

¹⁹² For further details, see Marcangelo-Leos P., "Cancellation of investment approval for the film 'L'ex-femme de ma vie' invalidated on appeal", IRIS 2005-8/19,

<http://merlin.obs.coe.int/iris/2005/8/article19.en.html>.



6. State of play

6.1. A challenging changing landscape

The film and audiovisual sector is a complex and multi-faceted ecosystem that has undergone a period of significant changes in recent years. Some are permanent structural changes, such as digital transformation and increased competition for audiences, while others are more cyclical, such as the global financial crisis or the uncertainty surrounding new digital models.

In any event, these changes are having an impact on all parts of the value chain and raise new challenges for independent producers, particularly with respect to the financing of films and audiovisual works, which has become more complex. Technological innovations and structural changes in the market have also brought new opportunities and new sources of revenue for content owners, which may also benefit independent production.¹⁹³

6.1.1. Public support for independent production

The context of the digitisation of distribution channels and increased concentration and competition between market players is prompting them to change their strategies for investing in audiovisual content and ultimately undermines traditional sources of financing and revenue for independent films. Broadcasters tend to invest in fewer works, which they broadcast and rebroadcast, in order to optimise their investment. They are also becoming more risk-averse in their investment choices, which particularly affects independent films. Since pre-sales are often essential to demonstrate the commercial viability of a project and obtain production funding, such circumstances put independent films in a difficult position and may compromise their financing.¹⁹⁴

This loss of market value of independent films in international film deals has been highlighted by the industry in the UK,¹⁹⁵ which has estimated that there was a decline in

¹⁹³ Olsberg SPI Pact, The State of the UK Independent Film Sector, 28 April 2017, <https://www.o-spi.co.uk/wp-content/uploads/2017/04/The-State-of-the-UK-Independent-Film-Sector.pdf>.

¹⁹⁴ BFI Commission on UK Independent Film, <https://www.bfi.org.uk/sites/bfi.org.uk/files/downloads/bfi-commission-on-uk-independent-film-2018-07-18.pdf>.

¹⁹⁵ Olsberg SPI Pact, The State of the UK Independent Film Sector, 28 April 2017, op. cit.



international market value for UK independent films of about 50% from 2007 to 2015.¹⁹⁶ More recently, the BFI¹⁹⁷ pointed out that highly cautious international buyers were acquiring fewer films (and for lower sums) in response to an overall decline in DVD revenues and acquisition of independent films by broadcasters as audience behaviours change.

On the other hand, the theatrical market is mainly dominated by US majors productions, while the major online players, such as Amazon or Netflix, have so far concentrated their financing on a few domestic films by experienced directors in each country and take up only a limited amount of space in the pre-financing of films. (although this trend recently seems to be changing).¹⁹⁸

In this general context, the French Syndicat des Producteurs Indépendants (SPI), warns that behind the favourable macroeconomic figures for the sector there are real disparities and considerable drawbacks for independent production and diversity.¹⁹⁹ Public support is considered by the independent production sector as an essential condition of the independent film ecosystem and crucial to preserving a rich and diversified creation. This support for independent works must also keep pace with market developments in the sector and adapt to the disruption of internet consumption patterns.²⁰⁰

For example, the BFI points to the lack of public funding for the development for independent films in the UK. The significant time and cost – and the inherent risk – of developing viable and fully realised film projects, including the costs of acquiring the rights of adaptation of a book, and attaching writing talent are identified as potential obstacles in the development process, which make it increasingly difficult to package, finance and sell projects.²⁰¹ The BFI also reports on the difficulties that UK independent producers can have in finding financing for high-budget films (over GBP 10 million), without the participation of a US studio or major platform.²⁰² The funding of marketing campaigns, including by promoting innovation in the distribution space to reach younger audiences that cannot be reached through traditional international marketing campaigns, as well as the strengthening of exports are areas on which the BFI wishes to enhance support for independent films.

Other areas of focus for public support are also pointed out for the independent production sector such as support for research and innovation for SMEs to respond to the challenges raised by content digitisation and consumption patterns.

¹⁹⁶ Ibid.

¹⁹⁷ BFI Commission on UK Independent Film, op. cit.

¹⁹⁸ <https://www.theguardian.com/media/2018/oct/22/netflix-plans-to-raise-2bn-as-it-invests-in-new-content>;

¹⁹⁹ See press conference of the SPI on promoting funding to creation in a digital environment (“Promouvoir le soutien à la création dans un monde numérique”), 16 May 2018, <http://www.lespi.org/Conference-de-presse-du-SPI,1349>.

²⁰⁰ Cour des comptes, “Les soutiens à la production cinématographique et audiovisuelle: des changements nécessaires, rapport public thématique, April, 2014, <https://www.ladocumentationfrancaise.fr/var/storage/rapports-publics/144000197.pdf>.

²⁰¹ BFI Commission on UK Independent Film, op. cit.

²⁰² Ibid.



6.1.2. The emergence of online platforms and OTT players

The emergence and predominance of online platforms and OTT players driven by new technologies has prompted traditional audiovisual media services providers to adapt their strategies in order to remain relevant and competitive in the changing audiovisual landscape. In particular, the new context of enhanced competition resulting from the horizontal and vertical integration of online platforms and other media market players is obliging traditional audiovisual players to diversify their offerings of audiovisual content and distribute it on many different platforms, both online and offline, in order to reach their target audiences.

Online platforms and OTT services are characterised by economies of scales and network effects, that lead to increased concentration and competition. Although online advertising brings in considerable revenues, most of these revenues go to these services. In addition, most of the time online platforms are not subject to the same constraints as traditional audiovisual players in terms of taxes or media regulation, such as promotion obligations into European works and independent production.

Furthermore, the rise of OTT players and online distribution is challenging the position of traditional audiovisual players, as they are having an increasing impact on aggregation, distribution and access to audiovisual content, by acting as key intermediaries and online gatekeepers between them and their audience. In particular, search engines and social media have become important gateways for users to access media and new forms of intermediation are emerging.²⁰³

All these changes have a direct impact on independent production. They are challenging long-standing production financing partners, as traditional investors are becoming increasingly reluctant to take risks in their investment choices. They also raise important questions in terms of audience access, that oblige them to rethink certain specific formats of works or modalities of distribution, such as the release windows of films and audiovisual works across different media, in order to adapt to audience behaviour and expectations.

On the other hand, this changing landscape also brings new opportunities for independent producers, as the audiovisual market is also a fast growing one.²⁰⁴ According to predictions by PwC,²⁰⁵ the value of the global market for filmed entertainment will grow between 2018 and 2022 by 12% to USD 99 billion. The same trend can be observed in terms of audience with an ever-increasing number of households in Europe now having

²⁰³ Mediaroad – Vision paper, The future of media innovation, September 2018, <https://www.mediaroad.eu/vision-documents>.

²⁰⁴ See also “Content and digital innovation in a multi-platform world, Mediaroad and cepi.tv, Monaco, 18 June 2018, at: <https://www.mediaroad.eu/wp-content/uploads/2018/07/CEPI-Monaco-FOLLOW-UP.pdf>.

²⁰⁵ PwC Global Entertainment and Media Outlook 2018-2022, www.pwc.com/outlook.



access to one or more SVOD services, such as Netflix. As far as social media are concerned, YouTube has 1,5 billion users worldwide.²⁰⁶

According to the BFI,²⁰⁷ the big opportunity for independent production is to work more effectively in partnership with platforms and other major media market players. The major players – Facebook, Apple, Amazon, Netflix and Google – have a collective market capitalisation of just under USD 3.25 trillion and are investing increasing amounts of money in developing and producing content. Developing much stronger partnerships with them would be beneficial to all parties, according to the BFI. However, it also points out that building constructive partnerships with new digital actors can represent a clear challenge for the work of independent producers in the presence of well-established dominant platforms, unless new opportunities to work together are explored.

6.1.3. New technological innovations

While the “third industrial revolution” in the film and audiovisual industry was marked by the introduction of the first electronic computing systems in film production (from special effects in images, electronic film editing, to the use of television technologies in production and the digitisation of all processes), the so-called “fourth industrial revolution”, which relies heavily on big data and data-driven systems, introduced digitisation that encompasses the entire life cycle of a film: from capturing, processing, distribution, and storing to projecting films and audiovisual works.

These are not only production technologies, but about new narrative technologies – the so-called hybrid content – where traditional audiovisual genres are combined with software-based solutions. Furthermore, new digital solutions that are both more flexible and versatile are replacing locally installed media production facilities and require producers to adapt entire parts of the production workflow, which can be moved into the cloud. At the same time, smaller, mobile production equipment is offering higher bandwidth and better quality at a much lower cost. All types of infrastructure are being migrated to end-to-end Internet Protocol (IP) solutions (camera, studio, editing, etc.), resulting in new efficient workflows.²⁰⁸

The next wave of internet innovation will be driven by, amongst other things, the increasing sophistication of artificial intelligence, blockchain technologies, immersive

²⁰⁶ Statista, Global number of YouTube viewers 2016-2021, www.statista.com/statistics/805656/number-youtube-viewers-worldwide/.

²⁰⁷ BFI Commission on UK Independent Film, <https://www.bfi.org.uk/sites/bfi.org.uk/files/downloads/bfi-commission-on-uk-independent-film-2018-07-18.pdf>.

²⁰⁸ For a more in-depth look into the advancements of technology in the film industry over time, see “The impact of technology on the film industry, then and now”, infographic by Comcast Business, https://cbcommunity.comcast.com/docs/default-source/default-document-library/cb-film-then-and-now-infographic.pdf?sfvrsn=2c913fd4_2.



technologies,²⁰⁹ hybrid distribution models, and the availability of 5G mobile networks at scale.

In particular, automated processing based on artificial intelligence algorithms and big data analytics are being used to create tailored services and recommendation systems, which are becoming increasingly important to help consumers select what they are going to watch in a context of content overload.²¹⁰

On the exploitation side, the application of blockchain technologies has the potential to transform the way rights are exercised, by keeping a record of online transactions, thereby helping independent producers to retain more intellectual property rights over the films and content they produce, with significant and sustained asset value.²¹¹

At the creative level, immersiveness²¹² is becoming more and more important for audiovisual content impact consumption (notably with the use of head-mounted devices) and production (with new types of cameras and of content, with 360° videos) and is transforming traditional narrative processes and the related production of audiovisual content.²¹³

²⁰⁹ Immersive technology refers to technology that attempts to emulate a physical world through the means of a digital or simulated world, thereby creating a sense of immersion. Immersive technology enables mixed reality (source Wikipedia). “The next generation immersive media can be defined as a set of multi-modal immersive experiences. It includes the stimulation of all human senses: vision, sound, haptics, smell, proprioception, etc. It targets a perfect immersion in the experience, making it alive as real, and a perfect illusion for the user. Beyond the passive experience of watching a screen, the user is able to look around him/her and to interact with artistic content. It is not only about a two hour 360° videos, it may also be a 10 minute immersive artistic experience with adaptations and interactions with some character or objects. For more details, see Mollet, Ni., Danieau, F, Le Clerc, F., Dillon, T., “A workflow for next generation immersive content, <https://www.ibc.org/production/a-workflow-for-next-generation-immersive-content/1046.article>.

²¹⁰ For further details, please see Mediaroad – Vision paper, op. cit.

²¹¹ More info on bitcoin and blockchain

<https://www.pwc.com/us/en/industries/financialservices/fintech/bitcoin-blockchain-cryptocurrency.htm>.

²¹² Immersive technologies include: virtual reality (VR), a digital environment that replaces the user’s physical surroundings; augmented reality (AR), digital content that is superimposed over a live stream of the physical environment; mixed reality (MR), an integration of virtual content and the real world environment that enables interaction among elements of both; holography, the creation of a 3D image in space that can be explored from all angles; telepresence, a form of robotic remote control in which a human operator has a sense of being in another location (the user could, for example, guide the robot through a party or an office, stopping and chatting with people throughout the environment); digital twin, a virtual replication of some real-world object that connects to the object for information so that it can display its current status; FPV drone flights, use of an unmanned aerial vehicle (UAV) with a camera that wirelessly transmits video feed to goggles, a headset, a mobile device or another display so that the user has a first-person view (FPV) of the environment where the drone flies. Supporting technologies for immersive experiences include AR, MR and VR headsets, 3D displays, 3D audio, gesture recognition, spatial sensing, speech recognition, haptics, drones, cameras and omnidirectional treadmills. See also <https://whatis.techtarget.com/definition/immersive-technology>.

²¹³ Immersive and higher-quality content also require ever-growing bandwidth. At the same time, more and more content is accessed through IP. As a result, data-driven distribution is becoming increasingly important for delivery of audiovisual content in a multi-platform environment and to reduce distribution costs while ensuring a reliable service.



Last but not least, 5G networks are expected to improve mobile broadband in the coming years and to enable a variety of innovative uses for the audiovisual sector. The development of standards and the appropriate adoption of 5G will be essential in business-to-business environments in this regard, both for the future development of media distribution and for the deployment of new effective workflows in production environments.

All these technologies are likely to present opportunities for producers, distributors and exhibitors of independent films, including through the rapid analysis of audience data, the choice of a film and platform, and the ability for filmmakers to see data on revenues and usage from source in real time. It may even allow rightsholders to obtain direct and instant revenues for the use of the work. It is also arguable that for filmmakers who would otherwise have limited access to sufficient finance and distribution platforms of any scale there is a significant opportunity to connect to a growing, digitally connected global audience. There is also an opportunity to collaborate with, and learn from, the cinemas, platforms, and other intermediaries who broker the relationship with audiences.

However, for the independent production sector to take these opportunities, and especially for the SMEs of the sector, the challenge is all the more important as it will require additional resources to acquire new skills and a new digital literacy culture in order to adapt to these massive technological changes and to be able to compete.

6.1.4. New business models

The emergence of platforms and the introduction of new technological innovations, as well as the development of a diverse and digitally native generation of audiences and filmmakers are potentially challenging traditional business models in the independent production sector, while new models are still emerging. These new business models are characterised by the development of the so-called “long tail” for content,²¹⁴ according to which products that are in low demand or have a low sales volume constitute a market share that rivals or exceeds bestsellers and blockbusters. In fact, if there is a film that few people know about or are interested in, an online retailer can still afford to sell it because millions of small products add up to a large business for them. This means that a greater

²¹⁴ The use of the concept of the “long tail” in business was first used by Chris Anderson in a publication to the *Wired* magazine in October 2004. Anderson argues that products in low demand or that have a low sales volume can collectively make up a market share that rivals or exceeds the relatively few current bestsellers or blockbusters. The long tail is a potential market and the distribution and sales channels opportunities created by the internet often enables businesses to tap that market successfully. For more information on the “long tail” concept, please see at: Anderson, C., “The Long Tail: Why the Future of Business is Selling Less or More”. In the audiovisual sector, the long tail refer to the ability of consumers to find and use niche content. Filmmakers don’t have to compete for the limited retail space anymore, as SVOD providers like Netflix can upload as many movies as they want in an infinite showroom for immediate availability based on searches or browsing for almost any specific genre.



diversity of content is available and that niche content has a bigger share of overall consumption and revenues.

The long tail approach should thus in principle benefit the independent production sector as it opens up new distribution opportunities. However, it is important to remain cautious, because the long tail is above all a beneficial way of doing business for the major online retailers in the sector such as Amazon, Netflix, iTunes, etc, because the revenues it generates come through selling many different items and not one item like a film. From a film producer's point of view, a long tail strategy means several small and modest opportunities of recoupment and potentially revenues over a very long period of time.²¹⁵

We also see an increased supply of audiovisual content, which is becoming cheaper and cheaper to produce using mobile technologies and made available to a potentially global audience. This increased offer of audiovisual content also comes with the development of user-generated content, such as videos on YouTube that can be downloaded or streamed on a computer or mobile device and which compete for viewers viewing time. In addition, the widespread use of subscription-based models has put pressure on traditional revenue models, based on advertising revenues or licence fee for public service broadcasters. These changes are accompanied by an evolution of organizational structures, characterized by an increase in the number of micro-enterprises composed mainly of self-managed teams enabled by the online environment.²¹⁶

New business models appear in the audiovisual sector that merge several segments of the value chain (theatres, DVDs, VOD), with a view to responding to the increasingly rapid turn rate of films in cinemas. Such "direct-to-video" models, which already existed and were extensively used in the form of distribution on physical carriers in the traditional home entertainment market segment, are now taking advantage of the reduced cost of access to digital distribution. They illustrate the transition from a traditional vertical integration model to one that combines different margins by seeking direct access points to the consumer.²¹⁷

This shift in strategies has an impact on the way films and TV programmes are pre-financed and oblige producers to find new sources of financing with a number of significant implications. One of the main challenges for the sector is how to guarantee diversity of content and sustain levels of quality production in a landscape where advertising is under pressure and pay-models are not developing rapidly enough.

The question of the ownership of rights for secondary exploitation also becomes all the more important in order to maximise the value of rights and be able to adapt to

²¹⁵ "Is the Long Tail approach good for your film?", <http://www.shericandler.com/2013/09/27/is-the-long-tail-approach-good-for-your-film/>.

²¹⁶ See also Mediaroad – Vision paper, op. cit.

²¹⁷ See also Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, "Promoting cultural and creative sectors for growth and jobs in the EU?" http://www.europarl.europa.eu/registre/docs_autres_institutions/commission_europeenne/com/2012/0537/COM_COM%282012%290537_EN.pdf.



the digital market. This issue is particularly crucial for independent producers, especially in the context of the newly established 30% quota in the AVMS Directive destined to European online content that will increase the level of national/local production showcased by the new platforms. However, the element of secondary exploitation at this stage has been overlooked by platforms, which generally retain all rights and block secondary exploitation for independent producers.

On the other side of the value chain, consumers have access to more content, more quality anytime, anywhere, anyhow. Audiences' increasing appetite for films, characterised by the rise of pay-models and consumers' readiness to pay, means there are significant opportunities to grow revenues for all those involved in delivering films to audiences. However some issues are identified as barriers that impede independent films to reach a wider audience.²¹⁸ Films compete for screen and leisure time with social media, online video and gaming, and e-sports, particularly among young audiences,²¹⁹ while on the other hand, theatrical and online markets are dominated by major US studios productions, with single releases regularly occupying multiple screens, television and online. There is also a significant competition for audiences from the increasing volume and high production quality of high-end television.

Among the numerous challenges foreseen by the independent production sector, the question of how to engage with younger audience often comes up in discussions, especially how to find more innovative ways of reaching audiences with niche screenings (social media, discussion forums, etc.).

Another important challenge has to do with the need to modernise the standards arrangements covering the release and exploitation of films in different media ("release windows") to adapt to the changing landscape.²²⁰

On the production side, technological advances and content personalisation allow for the development of new formats and the opening up of opportunities for consumers as new widespread types of behaviour (e.g. binge watching, when full seasons are consumed in one go), and greater audience involvement are being made possible. However, as mentioned earlier, the significant opportunities offered by these advances also require the SMEs of the sector to devote more time and resources to research and innovation.

6.2. Impact of illegal distribution on the film and TV programmes industry

Technological advances have made it possible to make major progresses in the creation and distribution of audiovisual content, leading to an increased competitiveness in the

²¹⁸ BFI Commission on UK Independent Film, op. cit.

²¹⁹ Ofcom, *Adults' media use and attitudes*, April 2018, https://www.ofcom.org.uk/_data/assets/pdf_file/0011/113222/Adults-Media-Use-and-Attitudes-Report-2018.pdf.

²²⁰ See for example the BFI Commission on UK Independent Film's recommendations, op. cit.



sector. However, this development has also been accompanied by new forms of unauthorised access to copyright-protected material, posing new threats to the audiovisual industry as well as new legal challenges.

Two decades ago, Napster marked the beginning of unauthorised online file sharing on a large scale in the music sector. Since then, a lot of water has flowed under the bridge. New “peer-to-peer” (P2P) platforms adapted their software so that the indexing of available files was no longer available on central servers. These have themselves been developed by another technology, known as cyberlockers, which uses cloud storage hosted at locations that aim to be out of reach of copyright enforcement. With the proliferation of high-speed broadband services, live streaming piracy has become increasingly popular, with pirates developing professional looking linking sites that provide links to a series of illegal content streams, allowing viewers to bypass rightsholders (and sometimes even via dedicated technical devices/set-top boxes with pre-installed links to unauthorised content platforms, also referred to as “IPTV piracy”). While the availability of illegal pirate streams on social media and other platforms remains a major challenge for content producers and rightsholders, such a new illegal market also needs to be addressed urgently.

Based on an analysis of traffic carried out by Irdeto to the top ten live streaming linking sites during the first quarter of 2018, there were an average of 74 million global visits per month to these sites. In addition, according to the same sources, P2P piracy is still prominent around the globe and plays a central role in distributing content to the online piracy ecosystem. For example, web video sites source a significant proportion (28%) of their high-quality film and TV video content from P2P sites and Irdeto tracked more than 800 million monthly downloads between January 2017 and May 2018 through its P2P Business Intelligence tracker, which monitors global activity for more than 400 popular movie and TV titles.

As for the type of audiovisual content primarily concerned with online piracy, a report by Médiamétrie, ALPA and the CNC on the illegal consumption of videos in France in 2017 points out that more than half of all pirated films are American (54%). However, this French report showed that national films were also heavily affected by online piracy. Comedies, action films and fantasy films are the most pirated genres. Interestingly, the report shows that half of the pirated series are also available on free channels (44%). The price of the subscription or per download does not appear here as a determining criterion for illegal consumption. Users seem to favour a quick access to content. Finally, sport, especially football, is increasingly affected by piracy (10 to 20% of TV audience depending on content).

Online piracy has massive implications for the film industry, not only in terms of loss of income for the sector, but also in terms of loss of jobs. For smaller independent film and TV programmes, more infringing means less opportunities to recoup investments, and thus less film and TV productions.

From the film industry perspective (producers, film directors, distributors video providers), one way of addressing the illegal use of copyright content on the internet is through the continued development of legal alternatives through the offer of cinematographic and audiovisual works online, either directly to end-users or working in



cooperation with service providers or content aggregators deploying different business models. However, these new business models can only flourish in a digital environment that respects the rule of law and provides a level-playing field.

As a result, civil, administrative and criminal enforcement measures against end-users as well as intermediaries, i.e. platforms that knowingly host protected content for streaming or downloading by users or that knowingly provide links to unauthorised content, as well as massive awareness campaign remain critical tools to tackle online copyright infringement.



7. Annex

Table 5. Definition of independent producer

	Level
AT	No definition available.
BE FR	<p><i>“An independent producer :</i></p> <ul style="list-style-type: none"> ■ has a separate legal personality from that of an AVMS provider; ■ does not have a direct or indirect share of more than 15% of the capital of an AVMS provider; ■ does not make more than 90% of its turnover during a period of three years of the sale of its productions from the same AVMS provider; ■ does not have more than 15% of its capital held directly or indirectly by an AVMS provider, ■ does not have more than 15% of its capital held by a company which owns, directly or indirectly, more than 15% of the capital of an AVMS provider. <p><i>An independent producer from the French Community is one which is established in the French-language region or in the bilingual region of Brussels-Capital and meets the criteria of the previous paragraph.”</i></p>
BE NL	<p><i>“Independent producer: the producer:</i></p> <p><i>a) whose legal personality is separate from that of a broadcaster;</i></p> <p><i>b) who does not own (directly or indirectly) more than 15% of the capital of a Flemish broadcaster;</i></p> <p><i>c) whose capital is not owned (directly or indirectly) for more than 15% by a company that owns (directly or indirectly) more than 15% of the capital of a Flemish broadcaster.”</i></p>
BG	<p><i>“Independent Producer means a producer registered under the Commerce Act or under the legislation of a Member State of the European Union or of another State party to the Agreement on the European Economic Area that is organisationally and economically independent in its activity of a broadcaster and is subject to the following requirements:</i></p> <ol style="list-style-type: none"> <i>1. is not the owner of a radio or television operator or of a share in its property;</i> <i>2. a radio or television operator is not the owner of such an entity or of a share its property.”</i>
CH	No definition available.
CY	No definition available.
CZ	<p><i>“As an independent producer shall be considered any legal person or natural person that is not a television broadcaster and is not interconnected with a television broadcaster in property terms, or whose supply of works to a single television broadcaster does not exceed 90% of its total production over 3 years. A person interconnected with a television broadcaster in property terms shall be understood to mean a person holding voting rights or an ownership interest in the television broadcaster or a legal person in which a television broadcaster holds voting rights or an ownership interest.”</i></p>



DE	No definition available.
DK	No definition available.
EE	<p><i>“A European independent producer is:</i></p> <ol style="list-style-type: none"> 1) <i>a producer that holds the majority of shares or the majority of votes determined by the shares of a legal or natural person of a Member State or State party to the Convention;</i> 2) <i>a producer whose copyrights or rights related to the copyrights for the production transferred on the basis of the law or agreement are held by a legal or natural person of a Member State or State party to the Convention;</i> 3) <i>a producer that has produced its own audiovisual works for at least two audiovisual media providers during the last two years.”</i>
ES	<p><i>“A producer is someone, either a natural or legal person, that assumes the initiative, coordination and economic risks for making audiovisual content. An independent producer is someone, either a natural or legal person, that generates that content, on its own initiative or on request, and, against payment, makes it available to an audiovisual service provider with which it is not firmly linked in a common business strategy.</i></p> <p><i>It is presumed to be firmly linked when they are both part of the same group of companies, according to Article 42 of the Code of Commerce, or when there are fixed exclusivity agreements that restrict their freedom to enter into contracts with third parties.”</i></p>
FI	<p><i>“An independent producer means a producer of audiovisual programmes whose share capital cannot be controlled to the extent of more than 25% by an individual audiovisual content service provider or more than 50% by several providers and which, during the past three years, has produced no more than 90% of its programmes for the same provider.”</i></p>
FR	<p><i>“An independent producer is independent from a broadcaster if:</i></p> <ol style="list-style-type: none"> 1) <i>The broadcaster does not directly or indirectly hold more than 15% of the capital or voting rights.</i> 2) <i>The independent producer does not directly or indirectly hold more than 15% of the capital or of the voting rights of the broadcaster.</i> 3) <i>A shareholder or a group of shareholders do not control the broadcaster and the producer at the same time.”</i> <p>Furthermore, Articles 15, 31 and 34 (for audiovisual works) and 8 and 23 (for cinematographic works) of Decree No. 2010-416 and Articles 15, 30 and 42 (for audiovisual works) and 6 and 36 (for cinematographic works) of Decree No. 2010-747 provide details on the specific conditions under which a cinematographic or audiovisual work can be eligible as an independent work.</p>
GB	<p><i>“a producer who:</i></p> <ul style="list-style-type: none"> ▪ <i>is not an employee of a broadcaster;</i> ▪ <i>does not have a shareholding greater than 25% in a broadcaster;</i> ▪ <i>is not a body corporate in which a broadcaster has a shareholding greater than 25% or in which any two or more broadcasters together have an aggregate shareholding greater than 50%.”</i>
GR	No definition available.
HR	<p><i>“(1) An independent producer of audiovisual works (hereinafter: the independent producer) shall be a legal or natural person who meets the following conditions:</i></p> <ul style="list-style-type: none"> - <i>that he/she is registered for carrying on the activity of producing audiovisual works and his/her seat is in the Republic of Croatia or in one of the European Union Member States;</i>



	<p>- that he/she is not included in the organisational structure of the broadcaster;</p> <p>- that the television broadcaster may have no more than 25% of the producer's share capital or managerial or voting rights;</p> <p>- that he/she does not carry out more than one half of his/her annual production on the instructions of one individual television broadcaster.</p> <p>(2) An independent producer shall also be a legal or natural person who is registered for carrying on the activity of producing audiovisual works and has his/her seat in a third country, if European works have comprised the bulk of his/her audiovisual production in the last three years and if he/she also fulfils the conditions set out in paragraph 1, sub-paragraphs 2 and 3 of this Article.</p> <p>(3) An independent producer may not be a legal or natural person whose average financial share for covering the total expenses of a production or co-production in which he/she has participated in the last three years does not exceed 10%."</p>
HU	<p>"Independent production company shall mean a production company in which neither the media service provider concerned nor the owner with a qualifying holding in such a media service provider has a direct or indirect shareholding and neither any director, executive employee of the media service provider nor any of their close relatives is in a work-related relationship with or has an ownership share in such a production company."</p>
IE	<p>"(12) In this section, independent programme means a television or sound broadcasting programme made by a person who complies with the following conditions, namely:</p> <p>(a) each of the following matters as respects the said programme is determined by him or her or by one or more persons on his or her behalf and over whose activities in respect of the determination of such matters he or she exercises control, namely:</p> <p>(i) the persons who are to participate in the said programme,</p> <p>(ii) the persons who are to be involved in the making of the said programme, and</p> <p>(iii) the equipment and facilities to be used in the making of the said programme,</p> <p>(b) he or she is not a subsidiary of a broadcaster, and</p> <p>(c) he or she is not a holding company of a broadcaster."</p> <p>(13) For the purposes of the definition in subsection (12), where:</p> <p>(a) two or more broadcasters hold shares in a body corporate or a holding company of a body corporate, or</p> <p>(b) each of two or more broadcasters (being shareholders in a body corporate or a holding company of a body corporate) by the exercise of some power exercisable by it without the consent or concurrence of any other person can appoint or remove a holder of a directorship of the body corporate or, as the case may be, the holding company,</p> <p>then, notwithstanding that the body corporate is not a subsidiary of any of these broadcasters, the body corporate is deemed not to comply with the condition specified in paragraph (b) of that definition if</p> <p>(i) the total number of shares held by the said broadcasters in the body corporate or, as the case may be, the holding company, or</p> <p>ii) the total number of directorships of the body corporate or, as the case may be, the holding company that the aforesaid powers of the said broadcasters may be exercised in respect of,</p> <p>is such that, were the said broadcasters to be regarded as one company, the body corporate would be a subsidiary of it, and</p> <p>(I) RTE' is one of the said broadcasters, or</p> <p>(II) there exists a business relationship between the said broadcasters that, in the opinion of RTE', is of such a kind as is likely to result in the said broadcasters acting in concert with one another in exercising their rights under those shares or in exercising the said powers."</p>



IS	<i>“An undertaking which is also a separate legal person, independent of the media service provider concerned in the sense that it is not under its direct or indirect control, either individually or in partnership with others, and free to define its own commercial policy.”</i>
IT	<i>“European companies carrying out audiovisual production that are neither subsidiaries nor companies related to audiovisual media service providers subject to Italian jurisdiction and either 1) do not reserve, over a three-year period, more than 90% of their production for the same audiovisual media service provider or 2) hold secondary rights.”</i>
LT	<i>“Independent producer means a person who is not a shareholder of a provider of audiovisual media services or a broadcaster of radio programmes or a member of the management bodies thereof, or a person who is not linked with a provider of audiovisual media services or a broadcaster of radio programmes by employment and a service relationship, or a person that engages in a joint activity for the creation of audiovisual works or programmes and sells them freely or otherwise transfers them for public dissemination.”</i>
LU	<i>“Any natural person producing audiovisual works without exercising the activity of an audiovisual media service provider and any legal person producing audiovisual works without exercising the activity of an audiovisual media service provider and whose majority of shares are not controlled by an audiovisual media service provider.”</i>
LV	<i>“Independent producer – a private person who is not an electronic mass medium but is engaged in the production of films, advertising, individual radio or television broadcasts, or programmes.”</i>
MT	<i>“A producer independent of broadcasters means any person who: (a) is not an employee of a broadcaster (whether or not on temporary leave of absence); (b) does not have a shareholding in a broadcaster greater than 15%; Provided that a company shall not be considered as an independent producer if a broadcaster has a shareholding greater than 15% in such a company.”</i>
NL	<i>“Independent production is defined as a work that is not produced by: a. public service media; b. commercial media; c. a foreign broadcaster; d. a legal entity in which an institution referred to in a, b or c, whether or not by means of one or more subsidiaries, has an interest of more than twenty-five percent; e. a legal entity in which two or more institutions referred to in a, b or c, together with one or more of their respective subsidiaries, have an interest of more than fifty percent; f. a company in which an institution referred to in a, b or c, or one or more of its subsidiaries, as a partner is fully liable to creditors for its debts.”</i>
NO	<i>“A producer is to be regarded as an independent producer in relation to the first paragraph if: a) A broadcaster does not own shares or interests in the production company representing more than 25 percent of the votes in the company. Where several broadcasters are co-owners of a production company, the broadcasters’ shares must not constitute more than 50 percent of the votes in that company. The same applies where a production company owns shares or interests in a broadcaster. b) The producer does not sell more than 90 percent of its production over a three-year period to a single broadcaster, unless the producer produces only one programme or a series during this period. c) The producer holds secondary rights to its productions.”</i>
PL	No definition available.
PT	<i>“Independent producer means a legal person whose principal activity is the production of cinematographic or audiovisual works, provided that the following requirements are cumulatively met:</i>



	<p><i>i) Not more than 20% of the capital stock can be held, directly or indirectly, by a media service provider or, in the case of several media service providers, not more than 50%;</i></p> <p><i>(ii) A 90% limit of total income, in the last fiscal year or accumulated in the last three fiscal years, from each media service provider.”</i></p>
RO	<p><i>“A producer is independent of a broadcaster if its audiovisual production activity is financially supported to the extent of less than 25% by the same sources of programme services in which its production is aired and if it owns less than 25% of the capital of the company that finances the respective programme service.”</i></p>
SE	<p>No definition available.</p>
SI	<p><i>“22. Under this Act, an independent producer of audiovisual works is a legal or natural person that meets the following four conditions:</i></p> <ul style="list-style-type: none"> <i>- they are registered to produce audiovisual works and are established in the Republic of Slovenia or another European Union Member State;</i> <i>- they are not part of the organisational structure or legal personality of a television broadcaster;</i> <i>- a television broadcaster has not more than a 25% share in the equity of or management or voting rights in its property;</i> <i>- they make not more than half their annual production commissioned by an individual television broadcaster.</i> <p><i>23. An independent producer may also be a legal or natural person registered to produce audiovisual works and established in a third country if European works have accounted for a majority of their audiovisual production in the last three years and they meet the conditions referred to in the second and third indents of the previous paragraph.”</i></p>
SK	<p><i>“(1) An independent producer in the audiovisual field (hereinafter referred to as “independent producer”) is the producer of audiovisual works, registered in the list of independent producers, who meets the following conditions:</i></p> <ul style="list-style-type: none"> <i>a) he/she is not a broadcaster;</i> <i>b) he/she is not personally or materially connected with a broadcaster and</i> <i>c) the run-time of the audiovisual works originally produced by an independent producer for television broadcasting by one television broadcaster does not represent more than 90% of the total run-time of the audiovisual works, including cinematographic works produced by him/her.</i> <p><i>(2) An independent producer is also the producer of audiovisual works who is not personally or commercially connected with the broadcaster and is deemed to be an independent producer in the EU Member State or in the State which is a contractual party to the European Convention on Cross-Border Television.”</i></p>

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