

Developing a Legal Instrument for Drama Series International Co-Production: Case Studies, Legal Precedents & Recommendations

(full report)

A report commissioned by the Council of Europe and Eurimages

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Manuscript completed in July 2022

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How to cite:

“Report commissioned by the Council of Europe, Eurimages, *Developing a Legal Instrument for Drama Series International Co-Production: Case Studies, Legal Precedents & Recommendations*, report prepared by Christopher Meir, Universidad Carlos III de Madrid 2022”

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The Last Socialist Artefact – poster
 source: Kinorama

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Arcadia - still photo
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I. Executive Summary

This report is intended to assist in the development of a legal instrument that can be used to support drama series co-production among member states of the Council of Europe (CoE).

The report begins by providing case studies of five recent drama series co-productions drawn from across the Council of Europe's member-states. These are *The Last Socialist Artefact* (a co-production between creative producers in Croatia, Serbia, Slovenia and Finland), *Bad Banks* (Germany and Luxembourg), *Arcadia* (Belgium, Holland and Germany), *Sequía* (Spain and Portugal), and *Transport* (Finland, Belgium and an investment from the Nordic 12 consortium). A brief production study of each series helps to illustrate the complexities of contemporary drama series co-production, thereby setting the stage for the exploration of legal issues that follows. The report then analyzes the Council of Europe's Convention on Cinematographic Co-Production and asking what, if anything, would have to be modified in the document in order to make it a viable legal instrument for television co-producers. The report concludes that most of the Convention could be utilized in such a way in its current form, but that there are at least four changes that would need to be made to make the document as a whole usable in this way and fit for purpose considering the realities of contemporary television production. These are:

- The definition of the eligible work, which is currently described as “a cinematographic work” or simply “a film” that is “intended to be released in cinemas.” This would need to be changed in order to accommodate works that are series and, given their industrial contexts, that are not intended to be seen in cinemas.
- Investment thresholds for qualifying co-productions that may not work in practice if applied to television co-productions. Those established in the Convention may be impossible for small nations working with larger ones, for example. A new set of thresholds and/or new manners of evaluating applicants may need to be contemplated

to avoid this passage presenting difficulties for producers from smaller European countries.

- The stipulations regarding co-ownership of the completed film are found to be archaic and unduly specific to film production. New requirements must be created in order to ensure that minority co-producers share in the ownership of co-produced works.
- Implicit and explicit definitions of authorship in the Convention are based on the director as the de facto author of the co-produced work, reflecting an assumption that is specific to the film industry. These need to be changed in ways that are in keeping with the working practices of the television industry.

The report then goes on to analyze other legal instruments that have been used to support television co-production among CoE member-states. These all come from Canada, an observer state to the CoE and a nation which holds 32 treaties with CoE members that include language which is more open to forms of audiovisual co-production than the Convention. These treaties, and others, have allowed Canadian producers to participate in over 100 television co-productions in the last five years, many of which have involved partners from CoE member-states. The report thus analyzes the language found in these treaties as a potential model for a new legal instrument to follow.

Having examined case studies in contemporary drama series co-production and surveyed existing legal instruments of different kinds and, the report concludes with the following recommendations:

- That much of the language of the Convention can be transposed to a new legal instrument to support television co-production without major alterations. Similarly, the legal procedures described in the Convention can be usefully applied to the evaluation of drama series co-productions.

- That the definition of the eligible work found in the Convention should be changed. One possible solution would be to create a definition that resembles that found in the Canadian co-production treaties analyzed in the report. Otherwise, no model definition for drama series can be found in existing legal instruments in the audiovisual sector.
- That either the thresholds set for minimum investments by minority partners be lowered across the board or that the procedures for evaluating financial investments in a co-production be modified so as to allow the competent authorities the discretion to calculate the budgets in terms that are most favorable to applicants who may be in danger of not reaching the investment thresholds currently stipulated in the Convention. This recommendation is based in part on the needs of smaller and less wealthy European countries in particular.
- That the definition of co-ownership be made more sophisticated so that by statute minority co-producing partners will be entitled to ownership stakes in the international sales and ancillary rights of co-produced series and so that creative producers in general – and not the commissioning broadcasters or platforms – retain these rights.
- That the key creative role in series co-production be considered as that of the creative producer or the lead creative production company. The nation in which this company is domiciled would thus help to determine the nationality of a co-produced series in some circumstances. Furthermore, this role should be weighted most heavily when evaluating the creative contributions made to a co-production using the new instrument's points system. That points system should also reflect the importance of writers to the nationality of any given production. In whatever system is agreed upon by Eurimages and industry stakeholders the weighting given to directors should be lowered from the levels seen in Appendix II of the Convention.

II. Introduction

Co-production in various forms has been a fundamental part of the European film industry since at least the 1920s, and since the 1960s has been legally codified using a series of bilateral international treaties between some European countries. These treaties were later supplemented by the Council of Europe's Convention on Cinematographic Co-Production, which was created in 1993 and which provided a legal instrument to support official multilateral and bilateral (when treaties were not already in place) co-productions between the Council's member-states. To date, however, no such Council of Europe legal instrument has been created to support the co-production of drama series, and furthermore, few bilateral instruments exist that can be used for this purpose.

The need for such an instrument has grown more acute in recent years as the global screen industries have in quick succession seen the rapid ascension of powerful streaming services such as Netflix, Amazon Prime Video and others, as well as an accompanying boom in serial drama which is in often either produced by the platforms themselves or is trying to compete with the increasingly high-budget series made by and for the platforms. This in turn, has spurred European broadcasters to further explore co-production as both a production and a marketing strategy, leading to collaborative ventures such as the Nordic 12, the Alliance, and the EBU Drama Initiative. These formal collaborations come in addition to the vast amount of non-recurring co-production between producers and broadcasters throughout the Council of Europe's catchment area.

In part due to these trends, Eurimages has begun exploring the possibility of expanding its mandate to support European cinematic co-production to also include television series co-production. This report constitutes part of the research required expand that mandate, seeking as it does to lay the legal groundwork necessary for "official" – that is to say, legally recognized by Council of Europe member-states – co-production of serial works intended primarily for broadcast on television or for availability on streaming services. In order to do so, the report first begins with a set of case studies of contemporary European drama series co-productions, case studies which vividly remind us of the many complexities involved in such production. The

report then analyzes the legal instrument that underpins film co-production in CoE member-states: the aforementioned Convention on Cinematographic Co-Production. The analysis will then turn to existing legal instruments among CoE member-states and affiliates that have been used to support television co-production; as we will see, these all involve CoE observer and Eurimages member state Canada, a nation which has a prolific track record when it comes to co-production of all kinds. Finally, the report concludes with a series of recommendations for how to resolve key issues that may arise in the creation of the legal instrument in light of the report's findings.

III. Case Studies in European Television Co-Production

In order to highlight the complexities of drama series co-production in Europe, and to provide tangible examples that can be used to help understand what is at stake in the creation of the legal instrument under discussion in this research, the report begins with five case studies of recent co-produced series. Care has been taken here to select case studies not only from different geographical parts of Europe, but also from works which are collectively reflective of the different economic scales of production across the continent.

In the context of the larger report these case studies will be used as empirical data collection to bridge the observations made about existing legal instruments found above and the recommendations put forth in the section which concludes the report. For this reason, analyses of the case studies will be informational but will also highlight significant issues such as: the usage of existing legal instruments and working practices from the film industry as guides for television co-production; questions of authorship and key creative figures; hypothetical calculations of investment and creative participation in the production by national participants; and other key themes. As anyone working in the television production industry will attest, every co-produced series is different and there are therefore no “one-size-fits-all” solutions to the challenges faced by European television producers, but by observing patterns which recur in different ways across the industry, the hope is that Eurimages can at least craft an instrument that will address the most pressing issues facing those working in this sector.

Case Study I: *The Last Socialist Artefact* (2021)¹

Relevant Facts:

<i>Duration:</i>	6 episodes of 52 minutes each
<i>Budget & breakdown:</i>	Cca. €2.3 million
<i>Lead Creative Producer (nationality, corporate Independence):</i>	Kinorama (Croatian, 100% independent)
<i>Minority Co-Producers:</i>	Perfo Productions (Slovenia) SENSE Production (Serbia) Citizen Jane Productions (Finland)
<i>Commissioning Broadcasters and Financial Contributions:</i>	HRT - €1.2 million Croatian public service broadcaster Voyo - €180,000 Slovenian commercial on-demand broadcaster PTC - €180,000 Serbian public service broadcaster
<i>Soft Money Sources:</i>	HAVC The Croatian Audiovisual Centre Creative Europe Co-Development Fund and Television Programming Funds
<i>Sales Agent/Distributor:</i>	ARC Content GmbH



The Last Socialist Artefact is a character-driven drama that centers on attempts to revive a Communist-era factory in a remote and economically depressed Croatian village in the present day. Coming back to life along with the factory are the new owners and the people of the village, who had sunken into economic squalor and emotional despondency before the events depicted in the series. The series was made for approximately €2.3 million, a total that is by some distance at the high-end of the local industrial scale in the Balkan region, approximately double the average budget for a Croatian drama series of this length, for example.

Croatian production company Kinorama acted as the main creative entity on the project. Kinorama's founder and CEO Ankica Tilić acted as a producer on the series and was credited

¹ The content of this case study was derived from an interview with Ankica Tilić, producer.

as its co-creator (along with Dalibor Matanić, who directed all the episodes in the series). In this role, Tilić acquired the source material and oversaw the creative development of the series, including hiring Matanić and all the credited writers. The tandem of Tilić and Matanić subsequently divided the creative and production duties that are typically performed by showrunner figures in other national television industries, including overseeing the writing team and the physical production of the series.

The series was developed, packaged and financed in ways that closely resemble the production practices of the film industry. As is often seen in contemporary European television drama, lead production company Kinorama was very experienced in the film industry (specializing in transnational co-productions) and had only recently begun producing series. In putting together the project, Kinorama made use of its network of habitual collaborators, including the series' three co-producers, SENSE Production, Perfo Productions and Citizen Jane Production, the first two of which were able to attract broadcasters in their home territories to the project in ways which recall the pre-selling of distribution rights to local partners in the film world. Moreover, in the course of producing the series, Kinorama also made extensive use of its network of actors and technicians with whom the company had previously worked on film projects.

Given its track record as a production company, it is perhaps not surprising to note that Kinorama used contract templates from previous film co-productions to craft the legal foundations for the production. Moreover, the pursuit of soft money awards from Creative Europe by Kinorama was done in ways that recalled the company's extensive experience in soliciting funding from Creative Europe and other European institutions for its film projects.

Even if the series was made using film co-production legal frameworks as a guide and using creative partnerships and practices developed mainly in the film industry, the minority partners in *The Last Socialist Artefact* would have hypothetically, under Article 6 of the Convention, risked receiving no or limited access to national production incentives. This is because the contributions of the minority co-producers were each less than 20% of the series' overall budget (SENSE and Perfo with their respective national broadcast partners each contributed €180,000 to the production, approximately 8% of the budget). One possible solution to this problem would

be to calculate contributions excluding soft monies, such a methodology would make the equity portion of the budget about €1.56 million. In such a calculation, the contribution of each of the minority partners would constitute about 12% of the budget and thus still be beneath the 20% threshold stipulated in Article 6. Citizen Jane Productions, the Finnish co-producers, would have definitely been deemed a financial partner only as their contribution was in-kind labor on scenes shot in Finland.

This financing scenario thus suggests that co-productions involving small countries may present technical challenges for a legal instrument that is intended to serve all of the Council of Europe's member states. The relative scale of production investment among the nations involved here means that some nations will likely only ever be able to contribute small portions of production budgets led by larger and wealthier nations. Such can be seen especially in the case of the Slovenian partners in this project. In the end their contribution was already under 20%, but it should be noted that their contribution in this case (€180,000) was exceptionally large in the context of Slovenian television, with typical investments in drama production being about a third of this figure (€60,000, a sum that would have hypothetically meant Slovenia's contribution would not meet the 5% requirement stipulated in Article 6.1 of the revised Convention). While in this particular case the effects of this failure to meet the relevant thresholds would have been a moot point given that the production did not benefit from production incentives from co-producing nations, it is nonetheless important to remember that such a scenario could occur in future productions.

Sales and exploitation rights for the series were divided between the commissioning broadcasters and Kinorama. HRT and Voyo received exploitation rights for their respective national territories for a fixed term of seven years. In addition to Serbian domestic rights, PTC also received sales and distribution rights for a number of neighboring territories such as Montenegro and Bosnia-Herzegovina. Kinorama retained all remaining sales and distribution rights as well as the underlying intellectual property. The ability to retain these rights and the promise of greater creative freedom were incentives for Kinorama to utilize the co-production finance model, as opposed to producing solely with HRT and/or a global streaming platform.

Case Study II: *Bad Banks* (2018-2020)²

Relevant Facts:

<i>Duration:</i>	12 episodes of 52 minutes each divided into two seasons of 6 episodes each
<i>Budget & breakdown:</i>	S1: €8.2 million, S2: €9.9 million
<i>Lead Creative Producer (nationality, corporate Independence):</i>	Letterbox Produktion (Germany) 100% owned by the Hamburg Studio Group, a consortium of <u>television production companies</u>
<i>Minority Co-Producers:</i>	Iris Productions (Luxembourg)
<i>Commissioning Broadcasters and Financial Contributions:</i>	ZDF/ARTE Co-Commissioned the series and contributed a combined: €4.2 million to S1 (approximately 51% of the overall budget) €5.7 million to S2 (approximately 58% of the overall budget).
<i>Soft Money Sources:</i>	The Luxembourg Film Fund Hessen Film und Medien The German Motion Picture Fund
<i>Sales Agent/Distributor:</i>	Federation Entertainment (France)



Bad Banks is a thriller set in the world of high finance, and in which the action moves back and forth between Germany and Luxembourg. The series boasts high production values, well-known stars (such as Paula Beer) and was distributed around the world, including a release as a Netflix original series in some markets, though Netflix had no role in the creation or financing of the series.

In legal terms, the series was consciously modeled on film co-production practices. The two production companies involved – Letterbox Produktion and Iris Productions – used the 2003 Germany-Luxembourg film co-production treaty as a guide for how to structure the contractual arrangements underpinning the production and to assure that the series would be eligible for production incentives in both countries. As soft monies from the two co-producing countries constituted a large percentage of the production budget for the series, *Bad Banks* is a clear case of the importance of official co-production for getting high-end series made in Europe.

This official co-production was undertaken in spite of the fact that the treaty in question makes no mention of television series productions, demonstrating a degree of flexibility in the existing

² The content of this case study was derived from an interview with Katarzyna Ozga.

implementation of European film co-production legal instruments. As a production modeled on existing legal instruments, the two national partners adhered to the requirements stipulated in the treaty that the minority partner provide at least 20% of the budget for each season of the series. This was done by Iris Productions, which successfully obtained €1.9 million in soft money from the Luxembourg Film Fund for each season. Letterbox for its part obtained the broadcaster commissions from ZDF and ARTE along with soft money from Germany and minimum guarantees from sales agent Federation, a company which did not participate creatively or as an equity partner in the production.

Given the emphasis on proportional financial investment found in this report, it should be noted that if – as was suggested in the preceding case study – partner participation was to be calculated based solely on broadcaster commissions and sale agent fees, the series would not qualify as an official co-production as the Luxembourg contribution consisted completely of soft money contributions from the Luxembourg Film Fund. It will therefore be recommended at the conclusion of this report that competent authorities be given the discretion to calculate the budgets in different manners in different production scenarios.

In terms of income from international sales, Letterbox and Iris divided global sales territories on a basis that was approximately proportional to the 80%/20% split in investment but Letterbox maintained ownership of the underlying intellectual property upon which the series is based (and therefore all ancillary rights). In creative terms, the series also adhered to the letter and spirit of the co-production treaty by having the cast and crew made up of approximately 80% German citizens and 20% Luxembourgish nationals. Shooting days were also divided proportionally between Germany and Luxembourg.

In almost every conceivable way, *Bad Banks* thus demonstrates that existing legal frameworks from the film co-production can in some cases be transferred wholly to the television co-production industry. One significant discrepancy that was encountered, however, revolved around the figure considered to be the series' author. Oliver Kienle acted as the showrunner figure on the series and was recognized as the chief creative figure by the German legal system, but the Luxembourg Film Fund considered the director as the key creative role. In this case, the directors of the episodes for both seasons were both German nationals and so there was not a major legal problem that developed from this difference in institutional opinion, but it is nonetheless a reminder of the need to reconcile existing legal instruments from the world of cinema with the realities of television production.

Though Kienle was the main individual creative agent involved in the series, Letterbox Produktion was the lead production company. As such, Letterbox initiated the project and hired Kienle as well as all the writers and episode directors. The company also maintained control of the underlying intellectual property.

Case Study III: *Arcadia* (2023)³

Relevant Facts:

<i>Duration:</i>	8 episodes of 48 minutes each. Series is intended to be a returning series.
<i>Budget & breakdown:</i>	Cca. €8 million , €5 million of which from broadcaster commissions, remainder from soft money sources and tax incentives
<i>Lead Creative Producer (nationality, corporate Independence):</i>	jonnydepony (Belgium) 100% independent of external shareholding
<i>Minority Co-Producers:</i>	Big Blue (Holland)
<i>Commissioning Broadcasters and Financial Contributions:</i>	€2 million VRT (Belgian public service broadcaster) €2 million NPO (Dutch public service broadcaster) €1 million ARD (German public service broadcaster)
<i>Soft Money Sources:</i>	The Flanders Audiovisual Fund The Belgian Tax Shelter Screen Flanders Belga Films Fund The Netherlands Production Incentive
<i>Sales Agent/Distributor:</i>	N/A



In terms of content, **Arcadia** is a science fiction series based in the near future dealing with life in an algorithm-governed society. It was filmed in Dutch and Flemish dialect and features a cast of actors from Belgium and Holland and a crew mainly from Belgium.

The financing of *Arcadia* was built around a multi-lateral contribution of three public service broadcasters based in Belgium, the Netherlands and Germany. By co-commissioning the series in this way, and through the endeavors of the producers obtaining soft monies and tax incentives, each broadcaster involved was able to obtain the linear and domestic rights for their home territories for a relatively small amount of the overall budget. Calculating based on the series' overall budget, VRT and NPO contributed

³ The content of this case study was derived from interviews with Elly Vervloet and Helen Perquy.

25% each to the total whereas ARD contributed 12.5%. But if we remove the soft monies from the financing equation, the percentages will change markedly, with VRT and KRO-NCRV (NPO) contributing 40% each of the equity financing for the series while ARD provided 20%. Given such a financing plan, the case for excluding soft monies from the calculation of co-producer investment is clear: under Article 6 of the Convention, ARD's contribution to the overall production budget would be under 20% and therefore the project would risk losing access to German incentives. If these calculations were done before the infusion of soft monies however, ARD's contribution would meet the 20% threshold needed to ensure automatic access to Germany incentives. (In this specific case, however, it would be a moot point as the production did not access German production incentives, but the potential differences should be noted nonetheless.)

Another observation to be drawn based on this financing plan is that since VRT and KRO contributed equally to the production, the series would theoretically be considered equally Belgian and Dutch under the provisions of the Convention going solely by financial investments but adapting the Convention's provisions on director nationality determining the project's nationality to the lead creative producers in question, the project would be considered Belgian for legal purposes. This is also in keeping with the subject matter of the series and its production locations.

The creative producers in this case were jonnydepony, a small independent production company which in this case provided creative services such as writing and showrunning, while also arranging much of the financing and supervising physical production. The division of exploitation rights on the project left jonnydepony with all sales rights outside of the home countries of the three commissioning broadcasters as well.

Case Study IV: *Sequía* (2022)⁴

Relevant Facts:

<i>Duration:</i>	8 episodes of approximately 75 minutes each
<i>Budget & breakdown:</i>	Approximately €5 million
<i>Lead Creative Producer (nationality, corporate Independence):</i>	Atlantia Media (Spain) 100% independent of external shareholding
<i>Minority Co-Producers:</i>	Coral Media (Portugal)
<i>Commissioning Broadcasters and Financial Contributions:</i>	€3.25 million RTVE (Spanish public service broadcaster) 75% of production budget €1.75 million RTP (Portuguese public service broadcaster): 25% of production budget
<i>Soft Money Sources:</i>	-
<i>Sales Agent/Distributor:</i>	RTVE's in-house sales and distribution arm



Sequía is a crime/mystery thriller set in the Spanish city of Cáceres, near the border with Portugal, where evidence of a murder that took place in the 1990s comes to light, sparking an investigation that involves police and other characters from both countries. It was written and filmed in both Spanish and Portuguese with cast and crew coming from both countries.

The series was a bi-lateral co-production between the flagship public service broadcast channels of Spain and Portugal. Despite the geographical proximity between the two nations, this was the first fiction series to be co-produced by the two broadcasters. Despite this lack of experience collaborating with one another and despite not using any formal legal instrument as a guide, the co-production in this case closely adhered to the normative co-production practices found in the world of cinema and those which are called for in the Convention. The Spanish partners led the production in terms of financing and creative input whereas the Portuguese played a relatively minor but still important role in both. In this case, the financial contribution of RTP was still significant enough to avoid theoretically falling below the 20% threshold stipulated in Article 6 of the Convention for minority partners.

Beyond satisfying the letter of the law as regards current film co-production regulations, the series was also a co-production that was faithful to the spirit of those same policies. Creative

⁴ The content of this case study was primarily derived from an interview with RTVE commissioning editor Mar Díaz Martínez.

contributions from the partners were closely aligned with the respective financial contributions from each country. The cast, the crew, the shooting days and even the language used in the series' scripts ended up being divided approximately 75%/25% between Spanish and Portuguese elements. Moreover, at the level of content, the series reflects on the historical and cultural ties between the two nations and depicts the great deal of transnational personal mobility that characterizes quotidian realities in border areas such as the province of Cáceres.

Besides these representations of shared culture between the two countries, each broadcast partner was able to diversify their production slates in important ways with this particular co-production. For RTVE, the series gave it the opportunity to set one of its flagship drama series in a region that is not often seen in Spanish television fictions. Indeed, before the series was developed into a Portuguese co-production, the intention was to set it in Galicia, a province which is frequently used as a setting for crime fiction. For RTP, this was an opportunity to pursue an editorial line in high-end series production that the network uses to distinguish itself from domestic commercial rivals – which tend to prioritize longform telenovela-like serial fiction – and to do so in a cost-effective fashion.

Like all other aspects of the series, the sales and distribution rights for the series were divided proportionally between RTVE and RTP. Rights to sell and distribute the series in the Lusophone world belong to RTP, whereas RTVE's sales and distribution subsidiary manages those and all other sales and retains the rights to all other territories. The underlying intellectual property, however, belongs to RTVE as the main commissioning entity, making this the only case study in which intellectual property rights remained with a commissioning broadcaster instead of a creative producer.

In terms of creative authorship, Atlantia Media was the main creative producer, having originated the idea for the series and provided the key personnel that oversaw its development and artistic direction. These personnel included Joaquín Llamas, who acted as head writer and producer on all the episodes and additionally as director on several. Llamas is an equity partner in Atlantia Media.

Case Study V: *Transport* (2022)⁵

Relevant Facts:

<i>Duration:</i>	8 episodes of approximately 50 minutes each
<i>Budget & breakdown:</i>	Cca. €5.3 million , of which €3.1 million came from broadcaster commissions and sales agent minimum guarantees. The remaining €2.1 million came from soft money sources in Finland, Scandinavia and Belgium, as well as Creative Europe.
<i>Lead Creative Producer (nationality, corporate Independence):</i>	Tekele Productions (Finland) 100% independent of external shareholding
<i>Minority Co-Producers:</i>	jonnydepony (Belgium)
<i>Commissioning Broadcasters and Financial Contributions:</i>	€2 million – YLE (Finnish public service broadcaster) €500,000 - Nordic 12 Consortium (Initiative from five public service broadcasters based in the Nordic countries): €360,000 – Streamz (Belgian private SVOD service)
<i>Soft Money Sources:</i>	The Belgian Tax Shelter Screen Flanders Belga Films Fund The Finnish Film Foundation Business Finland Creative Europe Development Fund and TV Programming Fund
<i>Sales Agent/Distributor:</i>	REInvent Studios (Minimum guarantee of €200,000)



Transport is a crime series which follows various lines of investigation into the illegal use of horses in the European food supply. Storylines depict how gangs use transnational movement of capital and livestock between different parts of Europe to carry out their activities.

⁵ The content of this case study was derived from interviews with Miia Havisto and Helen Perquy.

Despite the involvement of the Nordic 12 co-production consortium – a group of partners to which I will return shortly – *Transport* was constructed initially as a bi-lateral co-production between a Finnish creative producer (Tekele) and a Belgian co-producer (jonnydepony). Tekele built the financing package around support from public service broadcaster YLE, which would ultimately pay €2 million to commission the series, a sum that would represent 38% of the total budget, and 65% of the equity portion of the budget (i.e. the budget excluding soft monies). Additionally, Tekele sourced approximately €1.1 million in soft money from Finnish sources, plus soft money from Scandinavian (the Nordic Film and TV Fund) and European (Creative Europe) sources.

Tekele acquired the series at the treatment stage, when the story required action to take place in the Benelux region of Europe. Once Tekele began holding talks with potential co-producers, their desire to work with jonnydepony in Belgium helped to make the creative decision to set the relevant parts of the story in that country. When jonnydepony joined the project, the company was able to add commissioning funds from a Flanders-based streaming service as well as soft money from Belgium. In total, the contribution from Streamz (the Flemish SVOD service) was €360,000, some 7% of the overall budget and 12% of the equity portion of the budget. Here the difference in calculations is very significant as the second calculation puts the Belgian contribution to the production over the 10% threshold specified in Article 6.2 of the Convention (if we consider this a bilateral co-production), thus leaving open the possibility of eligibility for national production incentives. Jonnydepony was then able to attract an additional €450,000 in soft monies from national sources in Belgium, about 9% of the total series budget. This financing would not have been available to the producers if the terms of the Convention for bilateral co-production were applied.

While the contributions from Belgian sources thus constituted a substantial portion of the budget (16%), this may be misleading for the financial capacity of Belgian producers going forward. Put crudely, jonnydepony outperformed expectations and due to the disparities in scale between the Scandinavian industry and that of Flanders in Belgium (where jonnydepony is based) Tekele had initially expected only a third of the total that the Belgian company ultimately attracted to the production, approximately 5% of the budget. If that had been the case, it would have presented difficulties for considering the series an official co-production as

defined in legal terms in the Convention. This may be a scenario that has to be taken into account when crafting the legal instrument intended to support television series co-production. In addition to the contributions from territories in which co-production partners are based, the series benefitted from the support of the Nordic 12 initiative. This initiative brings together public service broadcasters from five Nordic countries – Denmark, Finland, Norway, Sweden, and Iceland – to pool resources to help co-produce a total of 12 series annually that are then licensed exclusively to those broadcasters for at least one year on both their linear and VOD services. The contribution from this consortium amounted to approximately 9.4% of the series overall budget, and about 16% of its budget excluding soft monies. It also ensured that the series circulated widely enough to make it eligible for Creative Europe co-production support. This financial contribution, however, came without any creative contributions from the other four countries who are members of the group, making the investment resemble a pre-sales arrangement more than co-production per se, making its exact status under a hypothetical legal instrument modeled on the Convention difficult to determine.

The work of Tekele and jonnydepony in financing the series meant that the budget could be assembled without early contributions from sales agents. In the end, the producers were able to attach Danish sales agents REInvent Studios to the project, but the latter company did not take an equity position in the series and only made minor creative interventions in its production, those being script notes.

The limited role that REInvent made in the series left more long-term international rights in the hands of Tekele. In addition to all rights outside of Flanders (where jonnydepony ultimately holds exploitation rights) and Finland (where YLE has local rights), Tekele retained all sales rights, including Nordic rights after the first 12 months after the series' release in the Nordic 12 nations. Moreover, Tekele has retained all rights pertaining to remakes and spinoffs, with YLE having first refusal to commission any of these.

In creative terms, the series featured a head writer/showrunner that was a Finnish national (Auli Mantila), and there would be thus no disputing the nationality of the project based on whether the creative production company or the showrunner was considered the central creative figure on the production.

IV. Legal Precedents

The Council of Europe Convention on Cinematographic Co-Production (Revised, 2017)

With these case studies of contemporary drama series co-production in mind, we can now turn to the analysis of some existing legal instruments for the co-production of audiovisual works in Europe. The Council of Europe's Convention on Cinematographic Co-Production – referred to henceforth as simply “the Convention” – is one of the cornerstone documents in the European film policy regime. As such, it has helped to support innumerable film co-productions since 1993 when it came into force. It is therefore very logical to begin the process of developing a legal instrument to support the co-production of television series with a careful study of this very influential instrument.⁶

Perhaps due to the growing convergence between production and co-production practices in the European film and television industries, it is easy to see the ways in which the model provided by the Convention can be adapted into a legal instrument for the official co-production of series. The underlying business models of contemporary multilateral and bilateral series co-productions closely resemble those of the independently produced films that the Convention was created to support. Such series typically involve at least one independent producer and a number of commissioning broadcasters, sales agents and in some cases streaming platforms, with additional buyers of the finished work acting much like distributors do in the film model. Moreover, series are now often financed and distributed in ways that closely resemble independent films, right down to pre-sales to selected markets as a way to raise production finance.

Many of the producers and sales agents involved in the contemporary television industries, including several that were consulted for this research, are veterans of the film industry and

⁶ It should be noted at the outset that all the analysis below refers to the 2017 revised version of the Convention.

are very familiar with the Convention and its conditions. Such can be seen in the ways in which many producers, including the relevant producers in Case Studies I, II and V, used the Convention as a guide in assembling the financing for the series discussed below. The spirit of the Convention's call for co-production and creative collaboration underpins these series and others, and in several cases, producers also attempted to adhere to the letter of the Convention when it came to questions such as creative collaboration that was directly proportional to financial investment, a key legal tenet of the document.

While in fundamental terms, the scope and ambition of the Convention is thus well-suited to the development of a legal instrument that can assist series producers, there remain some instances in which terminology and definitions of eligible productions would have to be creatively adapted to meet the needs of series producers. The relevant sections of the Convention are discussed below and later in the report recommendations will be provided for how to address the problems identified in this section.

Article 3: Defining the Eligible Works

One of the most pressing problems with the way the Convention is currently written resides in the definition it provides for the works that are eligible for co-production status. Article 3 of the Convention establishes the interchangeable usage of “cinematographic work” and “film” as the key terms of reference for the Convention as a whole. Moreover, paragraph 3.a includes language which refers to eligible works as having been “intended to be shown in cinemas”. Such language was included in the 2017 version of the treaty for the express purpose of limiting the types of works eligible for co-production status due to the rapid growth in new forms of audiovisual production.⁷ Given the contemporary need to expand this definition in order to support a broader range of productions, the language of this definition must be reconsidered, as does the related reference to the intended outlet for the productions in question.

Article 6: Investment Thresholds

Article 6 of the Convention explicitly sets out the financial terms for eligible co-productions to qualify for national production incentives in all co-producing nations. As such, paragraph 6.1 sets a maximum of 80% for a single nation and a minimum of 5% in multilateral co-productions, with the provision that partners whose contributions are less than 20% face the risk of not obtaining full access to national incentives. Paragraph 6.2 sets out the conditions for bilateral co-productions at 90%/10% with the same caveat that contributions under 20% face additional scrutiny for national incentives.

Given the complexity of television co-productions in general and the disparities in scale between European nations, encountered equally in the case studies presented here and in other productions throughout Europe, there may be some need to reconsider these benchmarks. In the recommendations section of this report, some suggestions for how to do this are detailed, but for now it is important to note that one suggestion will involve calculating financial investment based on equity investments (that is to say, excluding soft money contributions) in cases where that would help the production gain official co-production status. For this reason, several of the case studies previously discussed proposed different methodologies for evaluating the financial participation of the nations involved.

Article 7: Ownership Rights

Article 7 describes the ownership rights that should be given to each co-producing partner involved in a film production. The wording of this article in its current form is somewhat vague, referring to “tangible and intangible rights” to the completed work. In the explanatory report explaining the 2017 revisions made to the Convention, the author claims that this phrase was intended to ensure “joint ownership of all the rights necessary to the production, distribution and exploitation of the cinematographic work” on behalf of the co-producing parties.⁸ Given the importance of ensuring the retention and equitable division of exploitation and intellectual property rights in the contemporary television industries, it would be in the best interests of all parties involved in the creation of the new legal instrument to more clearly specify what kinds

⁸ “Explanatory Report to the Council of Europe Convention on Cinematographic Co-production (revised)”, *Council of Europe Treaty Series*, no. 220, p. 6, paragraph 32.

of rights are being referred to in this clause as well as which parties involved in the production of the eligible work should be retaining said rights.

The proliferation of VOD platforms and the growing market for international sales has led to a boom in the sales and distribution of series beyond their home country and well beyond the initial broadcasts of series on television. Moreover, the exploitation of intellectual property rights has become an important part of the television business, with ancillary revenues from the sales of format rights, remake rights, spinoffs, etc. presenting lucrative opportunities to producers. Given these developments, more can be done to ensure that independent creative producers retain these rights and share them in a manner that is proportional to their creative contributions to the series in question. The recommendations section of this report deals with this issue in more depth.

Designations of Authorship – Article 13.2 and Appendix II

A vital part of the rationale for official co-production is to receive national status for quota reasons, an issue that has itself become very important with the boom in streaming services in Europe that are now subject to quota restrictions of various sorts. Article 13 lists the criteria for evaluating the national status of a co-produced work, settling on three methods for doing so. The first two of these (13.a and 13.b) would translate to the television world in a fairly straightforward manner, but 13.c would not. This clause states that in cases where 13.a and 13.b did not produce a clear country to align the production with, that the nationality of the film's director would be taken into account as the deciding factor that determined the nationality of the production. As such, clause 13.c is reflective of the institutional weighting given to the ideas of authorship that dominate the film world, namely that directors are the authors of films.

This is not the only part of the Convention that is reflective of such an assumption, however. Appendix II, which is concerned with the criteria for assessing the creative participation of each co-producing partner, also weighs the director most highly of all the creative roles, a weighting

that was increased in the 2017 revision of the Convention explicitly because of the director's prized role in film production.⁹

In the television industry, however, the director does not occupy such a prominent position in the creative production of series, nor in their critical reception. Instead, the main creative role is often perceived to be that of the “showrunner”, a writer/producer who oversees all creative and budgetary aspects of a series, including supervising the directors or taking on that role themselves. It is true that in recent years numerous auteur directors from the film world have made television series – such as Paolo Sorrentino having made *The Young Pope*, for example – but in these cases the directors in question often take on the showrunner role.

That said, not every television industry in Europe uses the showrunner figure (opting instead for “creators” or “head writers”), and few industries anywhere in the world have a recognized legal credit for this figure specifically. Instead, showrunners are often credited as executive producers, creating some difficulty for attempts to codify exactly who to count as the main creative agent on a co-produced series. The recommendations section of this report will contain some suggestions for how to go about this, but whatever role is established as the main creative one, that role will have to be factored into redrafting Article 13.c as well as Appendix II of the Convention. Indeed, the latter section of the Convention may require a more extensive redrafting in consultation with stakeholders to ensure that the assumptions built into this assessment corresponds with the realities of television production.

⁹ Explanatory Report to the Council of Europe Convention on Cinematographic Co-production (revised)”, *Council of Europe Treaty Series*, no. 220, p. 10, paragraph 64.

Other Bilateral Treaties among Council of Europe and Eurimages Members

The Convention is the most prominent legal instrument for film co-production among CoE member-states, but there are also numerous bi-lateral co-production accords that exist among member-states. By and large, however, few of these currently accommodate television production. Nearly all refer explicitly to “films” or “cinematographic works”, or other terms which closely recall the language of the Convention.

A notable exception to this practice is found in the treaties signed by Canada, a Council of Europe observer state and a member state of Eurimages. Canada is among the most prolific nations in the world when it comes to creating and signing legal instruments to support official co-production with 57 treaties or memoranda of understanding (MOUs) currently in effect.¹⁰ These include numerous treaties with numerous CoE member-states.

Among the treaties signed with CoE partners, an important departure in the definition of eligible works can be found. This language, which is found in a very standardized form in Canadian treaties with 31 CoE member-states,¹¹ defines the eligible works not as “cinematographic works” but instead as an “audio-visual co-production” and goes on to describe the eligible work as “a project, irrespective of length and format, produced for exploitation in theatres, on television or for any other form of distribution.” This definition also includes a degree of additional flexibility by stating that “New forms of audio-visual production and distribution will be included in the present Agreement by exchange of notes” between the competent authorities of the nations involved.

¹⁰ A complete list of these can be found on Telefilm Canada’s website at: <https://telefilm.ca/en/coproduction/international-treaties>

¹¹ These are Austria, Belgium, Bulgaria, Bosnia-Herzegovina, Croatia, Czechia, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israel, Latvia, Luxembourg, Malta, Montenegro, the Netherlands, North Macedonia, Norway, Poland, Romania, Serbia, Slovenia, Sweden, Switzerland and Ukraine.

Such an open definition of eligible co-productions has made the Canadian legal instruments useful for classifying television series as official co-productions, and indeed Canadian producers have used the instruments in this fashion with great frequency. Over the last five years, for example, Canadian producers have participated in 116 official television co-productions (many of which have been with CoE member-states), a figure that nearly equals the number of official film co-productions in which they have participated during that same period (136).¹²

The Canadian legal instruments thus provide a useful model for developing a definition of an eligible work that could accommodate television production. In respect to other problems identified above in the Convention, however, there are not such clear precedents that can be followed. The Canadian instruments still refer to directors as the key authorial figures and they are silent about dividing rights and ownership in ways that are increasingly necessary in the contemporary television industry.

V. Recommendations

Having thus surveyed the existing policy landscape in Europe as well as a number of case studies in recent European series co-production, this section of the report will now offer recommendations based on the analyses carried out throughout the report. These recommendations are intended to inform the creation of a legal instrument by the CoE, one which may or may not replace or supplement the existing Convention.

As was discussed earlier in the report, much of the Convention is very useful for expressing the ambitions and rationale for supporting co-production among CoE nations. Moreover, many of the procedures outlined in the document could transfer very easily to the television industry. However, there would be some aspects of the convention which would need to be either redrafted or replaced in order to make it fit for purpose to support television co-production. More specifically, changes need to be made in the following areas:

¹² Figures from official data published by Telefilm Canada: <https://telefilm.ca/en/coproduction/statistics-on-coproduction>

Definition of the Eligible Works

The definition of eligible works in the Convention as “cinematographic works” or “films,” “intended to be released in cinemas” is too narrow to accommodate television series. It is therefore recommended that the new legal instrument define the eligible work in more open terms. While the exact phrasing should be left to the drafting committee, there is a useful precedent available in the wording found in Canada’s co-production treaties with numerous CoE member-states. This language – which refers to eligible works as “audio-visual productions” and “a project, irrespective of length and format, produced for exploitation in theatres, on television or for any other form of distribution” – has been used to support over 100 television co-productions and could logically function in a similar capacity for all CoE members.

Eurimages may, however, want to consider the reservations expressed in the explanatory report that accompanied the 2017 revision of the Convention that held that “audio visual works” was too vague to be practical in legal terms.¹³ Some consideration should be given to this concern, as a more precise definition may be desirable for all stakeholders. In any case, there is no legal definition that could be found that could act as a precedent for “drama series”, the kind of eligible work that is being targeted in the new legal instrument.

Calculating Financial Investment and Participation

Whereas the examples found in Case Studies II (*Bad Banks*) and IV (*Sequía*) suggest that television co-productions can fit comfortably within the financial parameters described in the Convention, other case studies call this easy compatibility into question.

The disparities in scale between the television industries in different CoE member-states, combined with the complexity of contemporary television series financing mean that a strict application of the Convention’s prescribed minimum financial investment may make it difficult

¹³ “Explanatory Report to the Council of Europe Convention on Cinematographic Co-production (revised)”, *Council of Europe Treaty Series*, no. 220, p. 3, paragraph 14.

especially for smaller countries to reach the threshold for minimum participation. This was seen in Case Study I (*The Last Socialist Artefact*) in which the Slovenian and Serbian investments were below the 20% thresholds which would have insulated them from the risk of exclusion from national support schemes. Making the case more urgent is the fact that their investments in this case were relatively large by their national standards, suggesting that in future productions may face even more difficulty complying with these guidelines. Similar problems could be seen in Case Study V (*Transport*) wherein the Belgian contribution was larger than expected yet still below the 20% threshold required for bilateral co-production partners.

One recommendation that logically flows from these observations is to offer the possibility of calculating contributions based solely on financing from private sources, namely from broadcaster commissions, pre-sales and minimum guarantees from sales agents, generating a version of the production budget that could be termed “equity investments” or “private investments”. When applicable, the case studies presented above offered hypothetical calculations of this kind which would have affected the percentages of investment from minority partners.

An unfortunate consequence of such a methodology for calculating budgets and investment shares would be to exclude the soft monies contributed to co-productions by minority partners. This in turn would adversely affect producers such as Iris Productions, the Luxembourgish partner found in Case Study II (*Bad Banks*), which provided over 20% of the budget for the series but which did so using soft money contributions from national sources.

Given these complexities and the extent to which strictly regulating this aspect of co-production financing risks adversely affecting producers from small European countries (and therefore undermining the drive for cultural diversity in European television), it is recommended that the legal instrument includes language that allows the national competent authorities to use EITHER a methodology that includes soft monies OR one which excludes such funds, at their discretion and according to the calculations that will be most inclusive of all co-producing partners.

Requirements for Ownership of Co-Produced Series

As was discussed above, the current language found in Article 7 of the Convention is in part archaic given technological advances in the storage of films and television series and moreover not fit for purpose for television series. There is also a potential problem in the vagueness of references to “tangible and intangible rights” which the Article states that co-producers should share. Surveying the complexity of the co-productions analyzed in the case study section and reflecting on the growing importance of international sales rights and ancillary rights, it is recommended that the CoE closely consider providing more sophisticated guidelines as to the ownership rights of co-producing partners.

The proportional division of exploitation rights found in Case Studies I (*The Last Socialist Artefact*) and II (*Bad Banks*) are ideal arrangements for benefiting all partners and the CoE could consider including language in its new version of Article 7 that mandates such proportional division. The CoE could also go even further and require that similar proportional division among creative producers apply to ancillary rights such as sequels, spinoffs, remakes and other kinds of rights not contemplated here, be a condition of official co-production status. Such a requirement would ensure that all commercial returns are equitably distributed between all CoE partner nations and that moreover, the creative producers involved have their interests protected from larger companies involved in the making of the eligible works, companies such as sales agents, broadcasters or the operators of local, regional or international streaming platforms.

Reassessing Creative Roles on Eligible Works

A final aspect of the Convention that should be reconsidered during the creation of a legal instrument to support series co-production is the weighting given to different artistic roles involved in the production of the eligible work. As noted above, Article 13.2 and Appendix II set out the various ways in which national creative contributions can be measured. In so doing, they both put a great deal of emphasis on the nationality of the director, with Article 13.2 even allowing this facet of the production to decide the overall nationality of a co-production.

All scholarly writers, policy-makers, and all the industrial respondents consulted for this research agree that directors do not play as an important of a role in television production as they do in film production. This fact alone suggests that the new legal instrument will have to provide a different weighting of the various creative roles involved any given television series co-production.

The consensus among respondents was that writers are more significant, but that creative producers – whose work combines budgetary management and creative oversight – were the most important figures of all. While this is often assigned to figures with the de facto title of showrunner, this is not always the case in different national industries. Even in cases where showrunners are used, they are seldom credited as such and instead typically take executive producer credits and are employed by creative production companies.

Given these circumstances, it is recommended the lead creative production company be considered the primary creative agent in the new legal instrument and that the nationality of that company be based on the nation in which that company is domiciled. This would mean that the CoE would likely have to include language that requires this company be identified in the application process. The nationality of this company would help to decide the nationality of a production in situations such as those outlined in Article 13.2 of the Convention and could help resolve quandaries that could be presented by the equal investments of Dutch and Belgian partners in the case of Case Study III (*Arcadia*) for example.

As for the specific weightings given to writers, directors, producers, and other artisans outlined in Appendix II of the Convention, it is recommended that producers and writers be weighted most heavily but that the rest of these roles be assessed by stakeholder consultation. It should be noted in this regard that many respondents voiced a hope that the CoE remove this Appendix altogether so as to simplify the application process for co-production status. Doing so, however, would remove any legal manner to assess creative contributions from co-producing nations.

Appendix: Respondents

The following industry professionals were consulted for this research. They are listed here in alphabetical order, along with the companies they represent and the date upon which they were interviewed.

Name	Company	Date
Mar Díaz Martínez	Radio Television Española (RTVE)	20 May 2022
Miia Haavisto	Tekele	27 May 2022
Katarzyna Ozga	Iris Productions	13 May 2022
Helen Perquy	jonnydepony	20 May 2022
Ankica Tilić	Kinorama	13 May 2022
Elly Vervloet	Vlaamse Radio en Televisieomroep (VRT)	16 May 2022