



The financial ecosystem of the European audiovisual production

Summary of the discussions

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The financial ecosystem of the European audiovisual production

Summary of the workshop

Strasbourg, 8 December 2017

European Youth Centre
30 Rue Pierre de Coubertin
67000 Strasbourg
France

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Introduction

The way people enjoy audiovisual content is changing at an amazing speed, but one thing that remains unshaken is the fact that money still makes the (audiovisual) world go round. Such resources are to great extent public money, which comes directly from funding bodies or is “obtained” indirectly thanks to tax incentive schemes and other arrangements. Such promotion of audiovisual works is guaranteed under public policy measures and materialises through a series of legislative measures at European, national and regional levels.

The European Commission, as guardian of the EU treaties and defender of the general interest, has a duty to assess whether such provision of public money complies with EU law. In order to do so, in November 2013 the Commission adopted its Communication on State aid for films and other audiovisual works, which contains revised criteria for assessing the compatibility of member states’ support schemes for films and other audiovisual works with EU State aid rules.

Moreover, the Audiovisual Media Services Directive (“AVMS Directive”) imposes a number of promotion obligations on broadcasters and video-on-demand services. These obligations aim at strengthening the competitiveness of the European audiovisual industry and at promoting cultural diversity and heritage in Europe. Furthermore, certain countries have introduced investment obligations on broadcasters and video on-demand (VOD) services that go beyond the minimum requirements imposed by the AVMS Directive.

This workshop organised by the European Audiovisual Observatory aimed to discuss the financial ecosystem of audiovisual production in Europe with regard to direct and indirect support measures at European, national and regional levels, and was structured as follows:

- The first session of the workshop was devoted to setting the scene by presenting the ecosystem of content production in Europe and the different funding schemes in place.
- The second session explored the role of the state through direct public funding and tax incentives.
- The third session looked at the promotional obligations of European works stipulated by national legislative measures implementing the AVMS Directive. Each of these three sessions included at least one presentation, followed by a group discussion on the issues addressed.
- The fourth and final session allowed the participants to share their final thoughts with a brainstorming exercise, followed by a wrap-up discussion on



what still can be done in order to improve the audiovisual production ecosystem, at the European, national and regional levels.



Opening of the workshop

Tina Mulcahy, Executive Director of the European Youth Centre (EYC), welcomed the participants and thanked the European Audiovisual Observatory for organising such an event (held, once again, in the European Youth Centre). She then noted the mission of the EYC, which is to create a dynamic environment, and to gather young people and help to foster dialogue. She concluded with a brief presentation of the *No hate campaign*.

Susanne Nikoltchev, Executive Director of the European Audiovisual Observatory (EAO), welcomed everybody and introduced the mission and activities of the Observatory –to collect and share information on the audiovisual industry and legal framework. The Observatory has a broad geographic reach, as it goes beyond the European Union and even beyond Europe.

Maja Cappello, Head of the Department for Legal Information of the EAO, introduced the topic of the workshop, explaining that its aim was to allow for a free exchange of ideas on a set of issues that often lend themselves to strong debate.

Session 1 – Setting the scene

The first session of the workshop was chaired and introduced by Sophie Valais, Senior Legal Analyst at the European Audiovisual Observatory.

In 2005, the concept of “cultural exception” was introduced to the legal framework through the adoption of the UNESCO Convention on the Protection and Promotion of Diversity and Cultural Expressions. The Convention reaffirmed the sovereign right of States to pursue cultural policies. It also created the obligation on the signatory States to implement policies to protect and promote cultural diversity. Such a milestone was essential to safeguarding the entire approach to support systems for the whole European film industry.

But as years have passed, many changes have taken place in the audiovisual sector – mostly linked to the development of digital technologies, with new modes of production and distribution of films, new ways of consuming them, new global actors on the market and new business models. Nevertheless, one thing remains unchanged: the US film industry’s dominance. Despite a high production rate in the EU – 1,650 feature films a year were produced on average in the EU between 2012 and 2016 – US blockbusters still take the biggest slice of the cake at the box office, and only less than half of European films released in theatres achieved VOD releases in the EU.

The major part of public aid still goes to film production and to a lesser extent to TV production and the support schemes have gone from an approach mainly focused on the “promotion of culture” towards a broader approach focused on promoting both the diversity of films and the industry as a whole.

In terms of legal obligations, the challenge is now to have all operators contributing to the financing ecosystem and ensuring a level playing field in the industry among broadcasters and on-demand services.

This session discussed the objectives and tools of the EU funding and investment policy in respect of European production, and addressed the following questions:

- Are the culture- and the industry-oriented objectives really compatible with each other?
- How are the changes in the industry impacting the way financing and public support are conceived?

1.1. The Four Pillars of State support for film and audiovisual production

Francisco Cabrera, Senior Legal Analyst at the European Audiovisual Observatory, introduced the different State support schemes for the film industry and the policy objectives behind them, namely:

- Support from film funds. Each European country has set up film funds at the national and sometimes at the regional and/or local level. These funds provide financial support for, *inter alia*, the production of film and audiovisual works.
- Tax incentive schemes to entice investment into the production business.
- Television and VOD quotas. The Audiovisual Media Services Directive (AVMSD) contains rules for linear and non-linear audiovisual media services.
- Investment obligations.

Francisco Cabrera then gave a more in-depth presentation of the relevant provisions of the AVMS Directive, under which TV broadcasters have to reserve a majority proportion of their transmission time (excluding time allocated for news, sports events, games, advertising, teletext services and teleshopping) to European works (Article 16 of the AVMSD). In addition, 10% of their transmission time or 10% of their programming budget has to be devoted to independent works (Article 17 of the AVMSD).

The obligation in respect of VOD services is more flexible. Member states are free to choose which type of measure to comply with; such measures can consist of financial obligations or a minimum share in the catalogue or in prominence requirements. As the AVMSD allows member states to lay down more detailed or stricter rules with regard to services under their jurisdiction (provided that they respect the fundamental freedoms guaranteed by the Treaty), many member states go beyond the general obligation to impose obligations on broadcasters to finance the production of film and audiovisual works. The AVMS Directive is currently undergoing a revision process, which will be explored more in detail during session 3.

The Court of Justice of the European Union has already made clear that investment obligations in France¹ and Spain² do not constitute State aid and do not

¹ Case T-193/06, *Télévision française 1 SA (TF1) v Commission*, 13 September 2010, <http://curia.europa.eu/juris/document/document.jsf?docid=84414&doclang=en>. See Angelopoulos C., “Court of Justice of the European Union: *Télévision française 1 SA (TF1) v Commission*”, IRIS 2010-9/3, <http://merlin.obs.coe.int/iris/2010/9/article3.en.html>.

² Case C-222/07 *UTECA v. Administración General del Estado* (ECJ 5 March 2009), <http://curia.europa.eu/juris/document/document.jsf?docid=77509&doclang=en>. See Angelopoulos C., “Court of Justice of the European Communities: *UTECA v. Administración General del Estado*”, IRIS 2009-4/2, <http://merlin.obs.coe.int/iris/2009/4/article2.en.html>.

infringe EU law. Constitutional courts in member states have also been called on to provide interpretation concerning the compatibility of such obligations with fundamental principles of law (e.g. the freedom to conduct business and the principle of non-discrimination). In a judgment concerning Spain, the Constitutional Court explained that the right of economic freedom of broadcasters is not absolute.³ The objective of the Spanish investment obligation has been ruled constitutionally legitimate, and the measure adequate for the achievement of that objective. In Germany, the Federal Constitutional Court explained that the different branches of the audiovisual industry which exploit cinema films (such as cinema theatres, TV, and VOD services) form a homogeneous group bound by a close interest and a certain responsibility in financing the film industry. The only aspect that appeared critical in this case was that the obligation of TV companies to pay the levy to the FFA (the German film fund) was not clearly defined. This was rectified by an amendment to the Film Support Act (FFG) in 2010.⁴

1.2. The ecosystem of content production in Europe

Gilles Fontaine, Head of the Department for Market Information at the European Audiovisual Observatory, gave an overview of the ecosystem of audiovisual content production in Europe.

There is a vital difference between film and TV content in terms of business models, and in terms of rights management and production fees. When it comes to TV content, a distinction has to be made between “stock content” (scripted content, such as TV fiction, documentary, animation) and “flow content” (non-scripted content, such as news, sport, game shows, and talk shows).

With regard to the financing of TV production, four types of producer/broadcaster relationship can be identified, ranging from producer-driven to broadcaster-driven: a) pre-sold (when the broadcaster’s involvement comes only through the pre-acquisition of rights, without access to the property of the programme), b) co-production, c) commissioned production and d) in-house production (when the production is entirely made in-house by the broadcaster – from the creative concept through to the production itself). Some countries, such as the UK and Spain, have been following the model of in-house and commissioned production but are gradually opening to co-productions. Other

³ Sentencia 35/2016, de 3 de marzo de 2016. Cuestión de inconstitucionalidad 546-2010 (Judgment of the Constitutional Court of 3 March 2016, Question of unconstitutionality no. 546-2010), <https://www.boe.es/buscar/doc.php?id=BOE-A-2016-3401>

⁴ BVerfG ruling of 28 January 2014 (2 BvR 1561/12, 2 BvR 1562/12, 2 BvR 1563/12, 2 BvR 1564/12), http://www.bundesverfassungsgericht.de/entscheidungen/rs20140128_2bvr156112.html. See Zur M., “Germany: FFG Film Levy Consistent With Constitution”, IRIS 2014-3/11, <http://merlin.obs.coe.int/iris/2014/3/article11.en.html>

countries (such as France) are moving from the pre-acquisition model to the co-production model.

There is an on-going consolidation of the TV production sector under two different models: a vertical integration by broadcasters, and a horizontal concentration of independent production companies.

Gilles Fontaine then shared figures on the production and circulation of European audiovisual works in order to raise a series of questions:

- As direct spending for films are decreasing, is the growth of the number of films produced in Europe sustainable?
- As there is already a high level of TV fiction production in Europe, is TV content the next growth relay for the European audiovisual industry?
- Does the relatively low share of non-national audiovisual content in most European countries result from a lack of demand or from an overly limited range of programming on offer? Can video-on-demand help improve the circulation of European works?
- Even assuming that about 50% of theatre admissions to non-national European films are already generated outside Europe, can Europe do better?

1.3. Current Challenges for European Independent Film & TV content financing

Bertrand Moullier of Narval Media, talked about the market's role in financing audiovisual content. From the point of view of an independent producer, film financing depends on two main points: the theatrical release and the financing scheme. Initially, independent producers could rely on ancillary sources of revenues (such as sales of rights to broadcasters) or rely on the DVD market, to compensate for potential deficit in theatre income. Nowadays, producers depend more on pre-sales, as films are struggling to make it onto theatre screens, especially for films outside of the "mainstream" category. Moreover, Subscription VOD (SVOD) players have a different way of pricing products directly to consumers without having to spend the extra manufacturing costs demanded by the DVD market.

When Over-the-top (OTT) players entered the big production markets, they operated as strategic partners for creators of film/TV; however, they soon started making competitive offers to local pay-TV companies. Big players like Netflix and Amazon also oriented their market strategy towards generating their own content, and started operating as studios and competing with other production companies.

The question of whether OTT players are harming or helping the TV/film industry was raised. To balance the answer, Bertrand Moullier gave the example of *The Collection* – a hybrid co-production between France Television (the French public service broadcaster), BBC Worldwide, and Amazon. The three companies had an agreement to share the windows and responsibilities (including the premier window and catch-up),

worldwide distribution, and of course production costs. This shows the potential of hybrid deals in the value chain, as a way to help collaboration and creation rather than harming competition.

1.4. Discussion

The discussion started with a question from the independent producers on how commissioned productions work from a legal point of view. Gilles Fontaine and Bertrand Moullier clarified that there is no proper legal definition for this commercial practice. Nevertheless, this does not result into a legal void. Independent producers remain fully empowered, as they can negotiate intellectual property rights, licence fees (which do not have to correspond to 100% of the total cost of production), and the sharing of revenues from ancillary exploitation. From the regulator's perspective it was added that despite the fact that there is a legal pre-sales obligation for broadcasters in Italy, there is no legal definition of commissioned productions.

Sophie Valais of the EAO pointed out that some countries have taken different approaches to supporting TV and film by focusing on one over the other. This leads to the question if one is more interesting as an industry, or considered to have a higher cultural value than the other.

1.4.1. Which content do film funds support?

National funding institutions enriched the discussion providing various examples: In France, the wide scope of CNC's support scheme was highlighted - CNC supports all types of moving images creations: from feature films to video games, including TV productions, animation, documentaries, interactive works/VR.... CNC has also recently launched a new scheme to support creators of short videos meant for video-sharing platforms⁵; in Germany, the FFA is focusing on supporting cinema (in a large sense: from scriptwriting and production of films with theatrical release to theatres and distribution), since there are different support mechanisms on both regional and national level - meaning that what might not be covered by one funding institution will be covered by another. TV series, for example, are not funded by the FFA but can get support from the German Motion Picture Fund (GMPF) financed by the Ministry of Economics or some regional funds; in Lithuania, LKC supports mainly films due to its limited financial resources, since the actual schemes of TV funding are yet very small, but moving forward, including the funding of script writing for TV - this approach is meant to involve TV broadcasters into

⁵ Fonds d'aide aux créateurs vidéo sur Internet : <http://www.cnc.fr/web/fr/cnc-talent>

funding productions. Although, there is hope that under the new cinema law funding would improve.

For regional funding, more recently, financing of TV drama series and moving images has shifted parts of the financial resources.

For Eurimages, which is a co-production fund supporting exclusively cinematographic works, the choice to support only film is linked to the mandate of the institution itself. From the discussions raised during the revision of the *European Convention on cinematographic co-production*, which sets rules on co-productions across countries, many pointed out that extending the Convention, by reshaping it to cover other types of audiovisual co-production would be complicated, under the current definitions of the Convention.

1.4.2. Is TV production more challenging than film production, especially for independent producers?

Some producers highlighted the lack of resources as a challenge for film production. In Spain, for example, if the resources were to be shared with the funding of TV content, then the Spanish film industry would face serious difficulties. Independent producers were highly concerned about their role in an environment dominated by big companies. In Spain there are two big broadcasters, Mediaset and Antena 3, who created their own production companies, which are dominating the market. Despite investment obligations, there is little room for independent producers to create and compete under such conditions. So, what is the role of an independent producer, in the current landscape?

On the rising issue of how could producers raise funds, commercial broadcasters stressed on the need of some editorial input in order to help raising funds.

Representatives from the European Commission shared the example of the Creative Europe programme and its Media sub-programme to illustrate the European Commission's interest in TV production. Since 2014, the level of support to independent producers of TV programmes has increased for TV series. All of this under certain conditions regarding the exploitation of rights of broadcasters, which has to be limited to a certain number of years (7, 9, or 10 in some cases). Promotion measures of independent productions are envisaged by Article 17 of the AVMS Directive. The main criterion is the ownership of the production company. Nevertheless, as was highlighted very often during the discussion, it may prove difficult defining what an independent producer is, said the EAO's Sophie Valais.

1.4.3. The lack of production resources in Europe – facts and remedies

Commercial AVMS providers shared their views and illustrated them with examples. In Italy, Mediaset is a vertically integrated media company and has its own production company. As a consequence, not being an independent producer, it cannot have access to several State aid contributions nor benefit from tax incentive schemes. The financing of TV content is getting closer to how feature films used to be financed in the past, as broadcasters tend to seek national and European cooperation opportunities in order to compete with the US. Indeed, there is a need to find diverse sources of financing for European and national creations, as relying only on local and national resources would make it impossible to compete in a globalised environment.

As to the question of whether there is a place for European productions to obtain funding from non-European countries to finance high value productions, it was said that in the trend of financing TV series, the big value remains within the first broadcasting window, unless the production has a potential to travel to not only European but also non-European territories, bearing in mind the importance of features aimed at facilitating circulation such as the linguistic version of the work.

Public service broadcasters insisted on the importance of international co-productions to deliver big series, especially for the circulation of such works outside the national market.

Some regulators endorsed the comments made on the need to develop schemes to bring in additional money from outside Europe in order to be able to produce content and to reach audiences outside Europe. The animation industry is a bright example of looking beyond Europe, where there are opportunities that need to be supported. In Ireland, for example, funding does not distinguish between works aimed for theatrical and TV release.

1.4.4. Quality as cornerstone for financing

One public service broadcaster underlined the point that one of the current challenges is to ensure quality in order to enable efficient distribution.

For commercial broadcasters, there is a need to offer quality content to viewers. Quality is important as the business model of commercial broadcasters relies on advertising placement around broadcast content. This remark was endorsed by the film funds. It is indeed the broadcasters' need of advertising that makes them target a wider local audience. Some participants admitted that it is sometimes hard to reconcile creativity with the aim of reaching a wider audience.

Certain producers insisted on the need to define the film production industry as part of a supply economy rather than a demand economy. Unlike TV producers who try to guess what their viewers want to see – which is the reality dictated by their market – film producers are here to offer creative and diverse content. Producers from medium-size



companies and independent producers used to be a source of creativity. One of the ways to support creativity is to fund script writing, as the FFA does in Germany.

Many participants estimated that from an audience perspective, theatrical release is seen as a sign of quality, by contrast to TV drama films.

1.4.5. Are OTT players helping or harming the audiovisual industry?

Some independent producers considered new actors, like Netflix, as a new opportunity for independent producers, as they offer an additional entry to the market and offer a source of financing. Other producers reacted by recalling that while collaborating with players such as Netflix might seem appealing, it has nonetheless notable disadvantages. For example, the full coverage of production costs often comes at a high price, such as the cession of distribution rights by the independent producer.

On the other hand, one AVMS provider held that OTT were helping the audiovisual industry. Netflix, for example, has different financing models, and works with many independent producers: the major part of its financial resources still covers licence acquisition and the distribution of pre-existing works. The “one-payment full-acquisition of rights” model, which has been referred to, is not the only viable financing model for a sustainable industry.

Session 2 – The State leg: Direct public funding and tax incentives

The second session of the workshop was chaired and introduced by Francisco Cabrera, Senior Legal Analyst at the European Audiovisual Observatory.

When it comes to State aid, there are rules at the European level regulating the amount of money that a public body may grant to a film. These competition rules stem from the EU treaties and are further explained in the European Commission's Cinema Communication from 2013, including, *inter alia*, the following rules:

- Public aid provided to film production must be legal under the EU Treaty (i.e. it must not affect the internal market);
- The aid must be directed towards a cultural product, and member states must ensure that the content of the production that receives the aid is of a cultural nature, according to verifiable national criteria;
- The amount of the aid must in principle be limited to 50% of the production budget, except in the case of difficult and low-budget films.

The term “subsidy race” could be used to describe the competition among some member states to use State aid to attract inward investment from large-scale, mainly US, film production companies. In the Commission's view, this practice leads to a distortion of competition among European production locations. The film and audiovisual industry says there is no such race at all.

Territorial spending obligations are obligations imposed on producers whereby they have to spend a part of their production budget in a given country in order to receive public aid. This was one of the topics debated during the public consultation process leading to the adoption of the Cinema Communication.

2.1. Public funds and fiscal incentives in Europe

Julio Talavera, Film Industry Analyst at the European Audiovisual Observatory, stated the three main fiscal incentives schemes currently in use in Europe:⁶

Tax shelters are designed to attract investments from high-net-worth individuals or high-tax-paying firms who are permitted to deduct investments in qualifying productions from their tax liabilities – while still being able to realise any long-term profits arising from a project, although these would be subject to tax when received.

Rebates are driven by production spending rather than levels of investment – repaying productions a percentage of their qualifying budget items according to a clear set of regulations – and are funded directly from the State budget. The payment is normally made after the production expenditure has been completed and audited (although some systems accommodate partial earlier payments) and, of critical importance, typically some months after the nation's treasury has collected a range of taxes from the production activity itself.

Tax credits are similar to rebates in that they are designed to repay a percentage of qualifying production costs based on a pre-determined formula. However, rather than being paid from a demarcated fund, the incentive is instead deducted from the producer's tax liabilities when a corporate annual return is filed. Thus, the incentive will reduce the amount of tax due, and where excess is still available after the liabilities are cleared (which is normally the case), this is paid in cash.

When it comes to public funds, there were 270 public funds operating in the 35 European countries covered between 2010 and 2014. The average yearly income during the period is about EUR 2.53 billion, and most of the income comes from national or federal funds. This income saw an increase between 2010 and 2013, then a decrease in 2014 – meaning an overall stability over the entire period. When excluding France, almost 50% of the income of all European funds combined comes from governments and 45% from taxes and levies. (If we include France, 74% came from taxes and levies.)⁷ The levy on advertising went down as the broadcasters' revenues from TV advertisements went down.

Spend has increased, totalling EUR 2.29 billion over the same 2010-2014 period. Spending on feature film production and TV and theatre screening went up, and only spending on distribution went very slightly down.

⁶ For further references, see Jonathan Olsberg and Andrew Barnes, "Impact analysis of fiscal incentive schemes supporting film and audiovisual production in Europe", European Audiovisual Observatory, Strasbourg, 2014.

⁷ A levy is a tax on a particular industry for a particular purpose e.g. a tax on broadcasting to finance film and audiovisual funds).

2.2. Discussion

2.2.1. Is there a subsidy race?

The subsidy race is about productions that would tend to relocate in order to benefit from tax reduction, an issue which might be hard for legislators and public policy makers to tackle.

Film fund representatives disagreed on the subsidy race question. Some admitted that, to a certain extent, there is a subsidy race, which can only be a positive development. Lithuania is working on improving its tax incentive schemes and is examining schemes operated in other countries and looking at closer markets (such as Poland). It was said that the race is not only a matter of rates, since in theory aid intensity is set to a maximum of 50% (up to 100 % for difficult works) of the production budget by the Cinema Communication. In practice, the tax credit rates remain relatively close, between 20% and 30% of the production budget, across the member states. Also, the administrative process is an important criterion, as well as the possibility of combining different tax incentive schemes to serve the purpose of co-production on European level.

From the producers' side too, opinions varied. Some insisted on the need to have the possibility of combining schemes, especially in the case of high-budget feature films. The subsidy race can be an opportunity to uncover new local talents, which would help developing local industries. On the other hand, independent producers held a different view, arguing that there is no subsidy race, as most scriptwriters and directors create stories based in specific locations. This would speak against claims about producers relocating a film production in order to benefit from more attractive incentives schemes, which is not the case in respect of the majority of films shot.

Julio Talavera of the EAO cited his organisation's publication on the impact of fiscal incentive schemes supporting film and audiovisual production in Europe, emphasising that these fiscal schemes are mainly designed to attract non-European producers, rather than to stir competition between European countries.⁸

Film fund representatives added that in France there are two different tax credits: one for domestic productions and another for foreign producers. Developing good infrastructures can attract big studios and therefore improve the overall industry in the country.

One AVMS provider admitted that incentives do have an impact on decision-making, where to shoot scenes and where to set films. In spite of this fact, relocating a

⁸ Jonathan Olsberg and Andrew Barnes, "Impact analysis of fiscal incentive schemes supporting film and audiovisual production in Europe", European Audiovisual Observatory, Strasbourg, 2014.



production (including actors and crew) does affect the quality of the ultimate product, potentially lowering it and rendering it less attractive. So deciding to relocate or not is not only about costs. The representatives from the European Commission noted that from its side, the Commission is closely monitoring the so-called subsidy race, but for the moment has seen no need to intervene.

2.2.2. How do public policies help the audiovisual ecosystem?

One regulator stressed that without public funds and tax incentives, there will be no sustainable production ecosystem. Public funding and tax incentive schemes can revive the industry by creating new employment opportunities. Producers noted that in France, rules on tax credit for the animation production sector have been changed, which have allowed for the creation of 5,000 new jobs in a single year. Moreover, public funding and tax incentive schemes help to keep European talent in Europe and away from major American studios, which is vital for creativity. This concrete example shows how long-term strategies can be built.

International treaties also have a huge impact on potential co-production agreements, as producers insisted on the burden that might result from relatively outdated bilateral treaties which, under their current state, need to be reformed, as co-productions rely on the flexibility of the market.

2.2.3. Cultural vs. commercial content

Francisco Cabrera of the EAO launched a discussion on the apparent dichotomy between commercial and cultural content.

Commercial broadcasters challenged the binary classification of “cultural” programmes versus mass-market commercial programmes, as commercially successful programmes can also be cultural (as illustrated by some Danish and German examples). In the UK, the biggest part of European quotas is made up of national works. Nevertheless, successful non-British shows broadcast at primetime are getting huge audience share, despite constituting a small part of the quota allocated to European works. The competitiveness of the British market has helped broadcasters to be inspired by the success of the risk-taking initiatives of their counterparts, which in turn has helped European creations to “travel”. Some producers linked the binary definition of “cultural versus commercial content” to the way in which cultural products are consumed. Content is not viewed as it used to be in terms of viewers’ behaviour and the way that movies are consumed is different from TV series – here referring to “binge-watching”. Some AVMS providers disagreed with that analysis, suggesting that binge-watching is rather linked to the “intensity” felt by the viewer, and that it can still be compatible with cultural content.

Certain producers emphasised the role of public funding and financial obligations in creating cultural content. In France, there is an obligation aiming at covering different genres (such as documentary films) that are considered to constitute an important part of

cultural programmes. Such measures do not only help the financing ecosystem as a whole, but also cultural diversity. Building partnerships between public service broadcasters and producers is one way to promote cultural diversity and help rising talent, regulators suggested.

Representatives from the European Commission shared some reflections about the revision of the AVMS Directive – in particular regarding the question of whether or not to impose quotas in respect of non-national works. They admitted that the fact that the issue is very delicate and political has not helped the process of finding agreement.

2.2.4. How do public funds operate?

Participants then addressed the way films and audiovisual works are selected and how money is allocated, and how decisions can be challenged in the legal field.

Producers referred to France, where decisions are not made by the CNC's governing body but by a commission of professionals (directors, writer, producers and distributors), which respects rules regarding rotation and neutrality and has to abide by the strict rules on transparency. The same rules apply in Germany and in Lithuania. In Ireland, where funds are awarded by the regulator (BAI), the keyword is "transparency", as the names of the members of examination board – and the decision-making process itself – are made public. As regards the possibility of appeal, only the process itself can be appealed against (on the grounds that it was not conducted properly), but not the outcome. However, unsuccessful applications can still be submitted again for fresh examination in a new process. The fact that few queries are submitted proves the effectiveness of the system in place.

Representatives of several film funds noted that, at a European level, Eurimages seeks to support cultural diversity and only enters the funding process after national and regional funds have made their respective contributions. This reflects the broad type and quantity of works that it endorses. Decisions have evolved over time, as criticisms regarding geopolitical motivation have been addressed by Eurimages' member states. Members of the board of management, which awards grants, are randomly selected to participate in each round of decision-making, taking into account geographical diversity and gender balance. However, the wider diversity issue is not addressed. Members cannot engage in voting for a project in which their country is involved.

Several participants reacted to recent discussions within the industry about the need to introduce diversity within selection boards in order for this diversity to be reflected into the produced content, mentioning the creation of a gender working group within the EFADs.

2.2.5. The assessment of fiscal incentive schemes

Regarding the assessment of fiscal incentive schemes, EAO's analyst Julio Talavera noted that there is no European standard assessment system. Rather, assessments are undertaken at a national level, using a variety of methodologies. The global outcome of assessments shows a positive impact in all the different European countries where incentive schemes have been implemented – not only on the audiovisual and cinematographic industry, but also on the overall economy. Fiscal incentives do not constitute stand-alone remedies, and have to be viewed within a general strategy. Their effectiveness very much depends on the present infrastructure in the country in question, without which production costs would increase. Representatives from the European Commission added that the transparency of the various different procedures should be taken into account while assessing funding and fiscal incentives.

Session 3 – The industry leg: quotas and investment obligations

The third session of the workshop was chaired and introduced by Maja Cappello, Head of the Department for Legal Information of the European Audiovisual Observatory.

After looking at how the rules regarding the promotion of European works are implemented, the discussion was structured around two main questions:

- Which works shall be financed?
- Who is collecting the money and how are the amounts calculated?

3.1. The European and national framework regarding AVMS obligations

Sophie Valais, Senior Legal Analyst at the European Audiovisual Observatory, introduced the session by giving a presentation on the legal obligations imposed on audiovisual media services under the AVMS Directive, which may add up as an additional source of income for film funds, together with taxes, levies national lotteries, etc.

After noting the promotion obligations of European works in respect of both linear and non-linear audiovisual media services under the AVMS Directive, she gave an overview of the implementation of the Directive in the different EU member states:

- All member states have implemented the minimum requirement regarding the proportion of broadcasting time allocated to European works in linear services under Article 16 (50%), except France and Hungary which set higher a proportion (60%).
- In respect of the obligation under Article 17 to support independent productions, half of the member states have opted for the alternative of either a share in the broadcasting time or a financial contribution, as provided for by the Directive; the other half have opted for a share in broadcasting time (while France and Italy have opted for the obligation to make a financial contribution to productions).
- Article 13 offers three promotion alternatives in respect of on-demand services: (i) a financial contribution to the production and/or to the acquisition of rights, (ii) a minimum share of European works in VOD catalogues, or (iii) prominence obligations of European works in VOD catalogues.



Sophie Valais then presented the new obligations foreseen under the revision proposal of the Directive. Article 13(1), as formulated by the General Approach adopted on 23 May 2017, prescribes a minimum share in VOD catalogues of at least 30%, alongside a prominence obligation; and Article 13(2) gives member states the right to impose on on-demand services a financial contribution (via direct investment or through contributions to national funds) towards the production of European works. The Council of the European Union proposed the extension of the obligation of Article 13 to linear services specifically targeting the market of another country. Countries like France and Germany already have an obligation for targeting services to make a financial contribution to support film funds:

- France: the 2% tax on advertising revenues of VOD providers has been extended to services targeting France;
- Germany: the obligation on VOD providers has been extended to services targeting Germany - services with an annual turnover above EUR 500.000 are subject to a levy to the German film fund (in the amount of 1.8 to 2.5% of their turnover).

3.2. Discussion

3.2.1. Taxing OTT players and SVOD services

So far, only two member states have imposed financial contributions on targeting services. In Germany, the levy is imposed on the service's turnover. Apple and Netflix have challenged the European Commission's decision to approve this legal measure in Germany.⁹ The German Constitutional Court's ruling on the film levy obligation under the FFG¹⁰ considered that players in the same sector should be treated in the same way. In France, in addition to the charging of VAT on revenues deriving from subscriptions on the French market, VoD services (as well as video sharing platforms) are also subject to the "TSV" – tax on video. This tax is calculated and based on revenues made in France and figures are communicated by the operators (tax declaration). The relationship is based on trust, but fiscal oversight would be an option in the event that the figures submitted seemed very different from the market reality. This obligation aims at ensuring a level

⁹ European Commission, Commission decision of 1.9.2016 on the aid scheme SA.38418 - 2014/C (ex 2014/N) which Germany is planning to implement for the funding of film production and distribution, C(2016) 5551 final, 1 September 2016: <http://merlind.obs.coe.int/iris/2016/9/article5.en.html>.

¹⁰ BVerfG ruling of 28 January 2014 (2 BvR 1561/12, 2 BvR 1562/12, 2 BvR 1563/12, 2 BvR 1564/12): <http://merlind.obs.coe.int/iris/2014/3/article11.en.html>

playing field for different actors on the market – since local and domestic operators are already paying, the decision has been taken that big operators shall pay as well. Indeed, OTT players & video sharing platforms attract a greater audience in France and compete with traditional broadcasters and VOD services; the feeling is that they make money from subscriptions and advertising (especially advertising targeted at user-generated content), and should therefore contribute. This approach is rather political, to ensure equal treatment as a matter of principle, as this tax will probably not generate huge amounts of money.

Some producers mentioned the importance of cooperation across Europe, as they encouraged authorities from Germany and France to share their experience along with relevant data, in order to help inspiring other member states, for any potential similar schemes.

Representatives from the European Commission noted the purpose of the Directive, which is to make cross-border services possible. There is a need to maintain the country-of-origin principle. The Directive also covers the right of member states to take measures under EU law if they deem that any sort of circumvention has taken place. The reason why the proposed revision of the Directive does not mention video-sharing platforms in respect of the financial obligation under Article 13 is due to the fact that these platforms provide mostly user-generated content. Moreover, it would be very difficult to assess the amount of content uploaded every day.

To commercial broadcasters, the imposition of levies has several negative consequences. Levies would result in broadcasters reducing investments in European works thereby undermining one of the main goals of AVMSD. Levies would force broadcasters not to customise content anymore and raise fees for subscription services. Additionally, levies would disincentive broadcasters to enter new markets (especially where there is lower ability to scale). It also raises issues of fair competition. For example, why should a service offering only series, for example, and not feature films, be obliged to pay into a film fund? Especially problematic is the extension of levies to linear services. Arguments that say this will bring more level playing field ignore the fact that linear broadcasters are already subject to heavy regulation namely: 50% quota on EU works, 10% quota for independent producers, commercial communications, accessibility,... Levies will lead to a retreat behind borders resulting in closed national environments with less choice and media plurality. A lose-lose proposition for European viewers.

Representatives of OTT services challenged the financing approach of the FFG. In the case of video-sharing platforms, the law allows the imposition of levies on user-generated content that is very different from the content the law seeks to support (films and series). In the case of SVOD services such as Netflix which has different content formats – including many works of less than 58 minutes' duration, which thus fall below the legal threshold of German law – there is a one-off subscription fee giving access to the entire catalogue. This shows how difficult it is to assess the revenues generated by such SVOD services, and thus to determine the amount of the levy to be imposed on them. From an administrative perspective, it would be less cumbersome if such services were to pay only one tax to the member state of jurisdiction which would then distribute it among the other member states.

3.2.2. Taxing targeting services

Some producers intervened in respect of the issue of the country of establishment and services targeting other countries. The current rules seem to have opened the door for “forum shopping”. As an example, Altice Studio, a pay TV channel owned by SFR was mentioned, since it is established in Luxembourg but target France. Broadcasters also benefit from advertising revenues as they target other countries – for example, the animation broadcaster Cartoon Network is based in London but reaches the French market, among others. Highly concerned by this discussion, OTT services listed other reasons behind the choice of an establishment (not to mention the so-called “hubs”) – such as the capacity to attract qualified staff.

3.2.3. VOD: quota obligations in the AVMSD proposal

Representatives from the European Commission found the 30% share obligation in VOD catalogues proposed by the Council of the EU more challenging. The Commission’s initial proposal of 20% is more likely to be attained. Moreover, the Commission does not endorse the extension of Article 13(2) to linear services targeting other countries. Indeed, it would be difficult to assess the revenues from advertising which would then be taxed – this can be done in the case of non-linear services, but would be difficult to achieve in respect of linear services. Nothing in the directive prevents member states from applying stricter rules, as long as these rules comply with EU law. Some participants reflected on the amendment to Article 13(5) proposed by the European Parliament, which would provide an exemption to the quota obligations for thematic services. The conjunction of the mandatory nature of the exception and the very broad characteristics (“*the nature or theme*”) of the media service provider could undermine the overall objective of Article 13, which is to promote European works.

One AVMS provider clarified the flip side of having a high-investment obligation for works of “national expression”. For example, Netflix already invests nearly half of its revenues into new productions. National rules aimed at fostering an increase in investment obligations regarding works of national expression (20% in Italy, for example) would be unattainable. This increase would not only hurt the big players but also the national markets, as it would distort competition with smaller companies. Furthermore, this would only benefit larger markets and might drive service providers out of smaller markets, as they would struggle to comply with such an obligation. Broadcasters also agreed on the need to create a level playing field, rather than increase the obligations imposed on AVMS providers. The country-of-origin principle brings economy of scale opportunities, which facilitates the commissioning of content – especially for channels broadcasting in smaller countries or operating in a niche genre.

Session 4 - World cafe

Maja Cappello, Head of the Department for Legal Information of the European Audiovisual Observatory, chairing this panel, invited the participants to engage in group discussions inspired by a “world café” approach. Groups were organised as follows:

| | |
|------------------|---|
| Producers | <p>Table host: Emmanuel Joly</p> <p>Brainstormers: Jérôme Dechesne, Marisa Fernández Armenteros, Marc-Antoine Robert, Bertrand Moullier</p> |
| Funding schemes | <p>Table host: Susan Newman-Baudais</p> <p>Brainstormers: Marc du Moulin, Charlotte Appelgren, Julie-Jeanne Régnault, Bérénice Honold, Gerda Leonavičienė</p> |
| AVMS providers | <p>Table host: Marcel Boulogne</p> <p>Brainstormers: Michael Wagner, Masa Lampret, Adam Minns, Renate Dörr, Giovanni Altieri, Colin Bortner</p> |
| Media regulators | <p>Table host: Emmanuelle Machet</p> <p>Brainstormers: Giorgio Greppi, Ciarán Kissane, Robert Tomljenović, Vianney Baudeu, Abdeljalil Elhammoumi, Julie Mamou</p> |

At the end of the brainstorming session, the table host for each group summarised the main points of discussion.

The following table provides an idea of the main existing tools and remedies identified by the discussion and what each stakeholder deems possible to do with them (the blue cells with “Can/cannot”) and what they expect from each of the others (the white cells – to be read horizontally):

| | (1) Producers | (2) Media regulators | (3) AVMS providers | (4) Funding schemes |
|----------------------|---|---|--|--|
| Objectives and tools | <p>Objectives: Cinema feature films, TV fiction, and TV series do not have necessarily the same objectives and tools (different realities and markets).</p> <p>Feature films: difficult to be broadcast on TV - 28% (far below the 50% minimum quota stipulated by the AVMS Directive).</p> <p>More difficult to achieve presales. Having more films produced makes distribution of film more challenging.</p> <p>The current situation is better for TV series.</p> | <p>Objectives: To ensure the quality (a very subjective judgment), as well as diversity and pluralism. This can happen through monitoring and cooperation.</p> <p>Tools: To implement, monitor and inform (transparency).</p> | <p>Objectives: To increase investment, fair competition, level playing field.</p> <p>Fulfil their missions of informing, educating and entertaining.</p> <p>Tools: Need for commercial freedom but at the same time have to respect the promotion and investment obligations and quotas.</p> | <p>Objectives: To ensure sustainable production sectors, follow public policy strategies (which aim to promote talent and creativity, cultural diversity, gender equality, increase emphasis on audience building, and maximise scarce resources).</p> <p>Tools: Indirect funding and incentives can be effective and complementary if they are well designed.</p> |
| (1) Producers | <p>Can do</p> <p>NA</p> <p>Cannot do</p> <p>NA</p> | <p>Expectations</p> <p>To monitor the fulfilment of the promotional obligations in respect of European works (i.e. quotas and other financial obligations).</p> | <p>Expectations</p> <p>Having OTT players (e.g. GAFA) is an opportunity, which legitimises the need for them to contribute. Are they willing to become partners before the film is produced?</p> | <p>Expectations</p> <p>Maybe more flexibility will be needed.</p> <p>Long-standing bilateral agreements can be counterproductive, especially with regards to co-production.</p> |



| | (1) Producers | (2) Media regulators | (3) AVMS providers | (4) Funding schemes |
|----------------------|---|---|---|--|
| | | | Respect the promotion obligations of European works. | Are film funds ready to engage on the basis of the script? |
| (2) Media regulators | <p>Expectations</p> <p>To cooperate with broadcasters.</p> <p>To share data with regulators (difficult to collect data, especially in respect of independent producers).</p> | <p>Can do</p> <p>Work, collect and analyse the data provided to them by producers and service providers. Agree on the necessity of a gap analysis (e.g. the UK, where Ofcom and the government realised the lack of quality content in children programmes).</p> <p>Stimulate greater investments through funds, as in Ireland and Croatia.</p> <p>Cannot do</p> <p>Can only apply, not decide.</p> | <p>Expectations</p> <p>Broadcasters need to cooperate with producers.</p> <p>More transparency on the part of OTT and VOD, whose data are more difficult to obtain than those of traditional broadcasters.</p> | <p>Expectations</p> <p>Greater cooperation and coordination of policies with governments.</p> <p>Developing expertise on financial levies, which is more challenging for smaller markets.</p> |
| (3) AVMS providers | <p>Expectations</p> <p>Talent scouting more partnership in content creation and decision-making.</p> <p>Independent producers should not rely on the 10% allocated quota under Article 17 of the</p> | <p>Expectations</p> <p>Deliver an impact assessment of their actions, have more clarity in their approaches and ensure equal treatment; build collaboration over frontiers, have clarity of purpose, and be independent.</p> | <p>Can do</p> <p>Produce quality content, partner with independent producers, for public service broadcasters to open the world of the viewers not only with what they would like to see, also see other things.</p> | <p>Expectations</p> <p>To care about the commercial potential of the products, remain away from influence, have a bonus system when there is increase of export, invest more in the training of production crews.</p> |



| | (1) Producers | (2) Media regulators | (3) AVMS providers | (4) Funding schemes |
|---------------------|--|--------------------------------------|--|--|
| | AVMS Directive. They need real incentives to make quality products. | | <p>Cannot do</p> <p>Finance or schedule works which do not fit in with a channel's content, invest more than what is received, be present on markets where burdens would be too high.</p> <p>AVMS providers expect distributors to play a big role.</p> | |
| (4) Funding schemes | <p>Expectations</p> <p>More flexibility in the way they operate their companies.</p> <p>More audience-building through development, but also in the later stages.</p> | <p>Expectations</p> <p>NA</p> | <p>Expectations</p> <p>Public service broadcasters are critical partners for film funds. They need to maintain their faith and a level of investment in long-format fiction and documentaries despite the decrease in resources.</p> | <p>Can do</p> <p>Move away from project-based design towards audience-building aspect</p> <p>Cannot do</p> <p>To continue operating under the current regulatory environment is difficult. There is a need to modernise State aid schemes.</p> |



After each table host reported on the results of each group's respective brainstorming session, a final wrap-up discussion took place.

As regards the enforcement of promotion obligations, this was referred to a meeting with government representatives from the EU member states, during which there was a discussion on the need for methodological clarity in respect of how in practice to fulfil the prominence and quota requirements. The representatives from the European Commission underlined the importance of clarifying definitions in the future, as the challenge of enforcing quota obligations is linked to the difficulty of finding agreement among member states regarding services with low turnover that would be exempted from quota obligations.

As regards the modernisation of funding schemes and co-production agreements, representatives of film funds pointed to the need for cooperation between different funding bodies in order to identify the adjustments necessary to make the current schemes more successful. Regarding new funding perspectives, they labelled education as one of the fields that film funds can engage in, as there is a need to introduce audiovisual and film works to school curricula.



Closing of the workshop

Susanne Nikoltchev, Executive Director of the European Audiovisual Observatory, made some final observations by way of bringing the workshop to a close. She noted that the ecosystem of audiovisual production is very complex and has been discussed for years. Even the most common words, such as “culture” and “quality product”, are difficult to define because of subjective perceptions. Ms Nikoltchev added that many legal issues need to be pursued in detail, bearing in mind issues such as market realities and the challenge of adapting the legal instrument in order to render them more effective. She noted that one of the positive outcomes of this workshop was probably the realisation that many of the actors in the field have a lot in common, which will hopefully foster opportunities to strengthen ties and open up cooperation and fruitful exchanges. Lastly, she thanked the people involved for contributing to a very exciting workshop and for the lively discussions.

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