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### Research for CULT Committee - Film Financing and the Digital Single Market *its Future, the Role of Territoriality and New Models of Financing*

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STUDY

Requested by the CULT committee

# Research for CULT Committee – Film Financing and the Digital Single Market: its Future, the Role of Territoriality and New Models of Financing



**Culture and Education**



# Research for CULT Committee – Film Financing and the Digital Single Market: its Future, the Role of Territoriality and New Models of Financing

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## **Abstract**

This report studies the role of territoriality in film financing, the legal and market challenges territoriality faces as a key model for film financing and the consequences if EU policies were to reduce or mitigate the scope of territorial exclusivity in the audiovisual sector.

It provides information on Member States' and EU models of film financing, explores the challenges film financing faces from digital developments and evolving consumer behaviour and analyses possible alternatives to traditional methods of financing and policies to support this.

This document was requested by the European Parliament's Committee on CULT.

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## LIST OF ABBREVIATIONS

- ACT** Association of Commercial Television in Europe
- AVMSD** Audiovisual Media Services Directive
- BFI** British Film Institute
- CCA** Centre du Cinéma et de l'Audiovisuel / Film and Audiovisual Centre
- CEPI** European Coordination of Independent Producers
- CNC** Centre national du cinéma et de l'image animée / National Centre for Cinema and the Moving Image
- DSM** Digital Single Market
- EAO** European Audiovisual Observatory
- EFADs** European Film Agency Directors
- EIF** European Investment Fund
- EPC** European Producers Club
- FERA** Federation of European Film Directors
- FFA** Filmförderungsanstalt / German Federal Film Board
- FIA** International Federation of Actors
- FIAD** International Federation of Film Distributors' Associations
- FIAPF** International Federation of Film Producers Associations
- FSE** Federation of Screenwriters in Europe
- FWB** Fédération Wallonie-Bruxelles
- GBO** Gross Box Office
- ICAA** Instituto de la Cinematografía y de las Artes Audiovisuales / Film and Audiovisual Arts institute
- IFB** Irish Film Board



- IFTA** Independent Film & Television Alliance
- IVF** International Video Federation
- MG** Minimum Guarantee
- MPA** Motion Picture Association
- MPAA** Motion Picture Association of America
- NFF** Nederlands Film Fonds / Netherlands Film Fund
- NFTVF** Nordisk Film og TV Fond
- PISF** Polski Instytut Sztuki Filmowej / Polish Film Institute
- PSB** Public Service Broadcaster
- SFI** Swedish Film Institute / Svenska Filminstitutet
- SVOD** Subscription Video on Demand
- TFEU** Treaty on the Functioning of the European Union
- TVOD** Transactional Video on Demand
- UNIC** International Union of Cinemas
- VAF** Vlaams Audiovisueel Fonds / Flemish Audiovisual Fund
- VOD** Video on Demand

## **EXECUTIVE SUMMARY**

### **Background**

This report studies the role that territoriality plays in film financing in the EU today, what legal and market challenges territoriality faces as a key model for film financing and what the consequences might be for film financing in the future if EU policies were to further reduce or mitigate the scope of territorial exclusivity in the audiovisual sector.

A related aim is to provide information and analysis on Member States' and EU models of film financing, the challenges film financing faces from digital developments and evolving consumer behaviour, and to assess possible alternatives to traditional methods of financing and policies to support this.

### **Film finance: problem analysis**

The high upfront investments required for making a film and the large ex-ante uncertainty about its commercial success form the core challenge of film financing. Quality indicators such as reviews, recommendations and awards at festivals are unavailable until sometime after the production costs have been incurred. This implies that investors will partly rely on the reputation of a famous director, a stellar cast or other renowned parties involved in their decision whether or not to invest in a film.

Against this background, presale agreements which grant exclusive distribution rights for a certain distribution channel, time window and territory are a common way to finance a significant part of a film budget. To the extent distributors focus their operations on national markets – as is generally the case for broadcasters and cinemas – they are predominantly interested in exclusive rights within that market. Price discrimination between high-income and low-income countries and preventing other distributors from free-riding on their marketing efforts can also be reasons for a distributor to prefer selling rights on a territorial basis.

On average, European films are much less successful in attracting larger audiences than American films. While in Europe twice as many feature films are produced each year as in the US, the current market share of European films in Europe is typically 20 to 30% of admissions, TV broadcast, and TVOD and SVOD catalogues. This relatively weak position can, in part, be explained by language barriers and cultural differences in Europe. As a consequence, many European films miss out on economies of scale which can make them more dependent on territorial licensing than blockbusters.

### **Film financing policies in Europe**

Motivated by cultural, political and economic arguments, a wide variety of policies offer support to the film industry, both on a pan-European and on a Member State level. In 2014, the last year for which comprehensive data are available, direct support alone amounted to € 2.15 billion in the EU Member States, about € 4.20 per capita. Various types of project and various film-related activities are supported, both in a direct and in an indirect manner.

Direct support takes the form of a grant or loan, the latter under different degrees of softness. In 2014, recoupment rates were in the order of a mere 5%. While direct aid schemes show great similarities, the specific conditions for eligibility and fitnesses differ per scheme and per Member State. Some mandate a theatrical release of films in the supporting country and might impose requirements on the timing of distribution windows.

Indirect public support is offered through incentive schemes – cash rebates or tax credits – or schemes that aim to stimulate private capital investment by reducing the risks or offering tax benefits for investors. Moreover, broadcasters and other audiovisual media service providers are mandated in most Member States to invest in the film industry.

## **Legal challenges for film financing in the EU**

EU law aimed at removing national barriers to the Single Market has gradually diminished the role that territoriality plays in copyright. Furthermore, EU competition law sets strict limits on grants of territorial exclusivity, and prohibits clauses in broadcasting and pay television licences that prevent or restrict ‘passive’ sales to consumers/viewers in non-licensed territories. The freedom of right holders to preserve territorial exclusivity by way of contract is likely to become increasingly vulnerable to EU competition law, as territorial grants are no longer supported by underlying territorial rights.

## **Market challenges for current film financing practices**

The influence of TVOD and SVOD services on film distribution, and thus on film financing in Europe is growing rapidly and major global players are currently dominating the market. Such services challenge the traditional separation of windows for each type of exploitation and possibly jeopardise the presale model on which European film financing is based.

Audiences find it ever harder to understand that the film of their choice can be available in Europe, but not in their country. The rise of transnational cultures, facilitated by migration and digital media, is essential for the progress of Europe’s cultural diversity but the territorial division of the European film market works against it. With decreasing audiences for European films and arthouse cinemas failing to connect to younger audiences, the effectiveness of the European film financing system is under pressure.

These challenges, however, leave intact the fundamental conundrum of financing a film. Potential sources of funding remain unaltered even though their mix may vary between films and over time. No fundamentally new models of film financing have been identified, and changes in models are mostly gradual. Crowdfunding and product placement are interesting new developments, but of limited significance in financial terms and likely to remain so.

## **Stakeholder positions**

Industry stakeholders show a large degree of consensus. Their strongest arguments in favour of territoriality in film financing seem to be of a financial nature and lie in the role of territorial exclusivity for presale agreements.

The argument that territoriality stimulates cultural diversity in European film can be countered by the argument that it discourages transnational and pan-European cultural diversity and that it blocks European audiences from those same films.

### **Recommendations relating to territorial exclusivity**

If territorial exclusivity were considered to remain indispensable for the financing and exploitation of EU films, the European Commission could be tasked with codifying film-specific rules on exclusive territorial grants of rights in the form of an amended Commission Regulation, somewhat similar to the 'block exemptions' that allow exclusive territorial allocation of markets in technology licence agreements in well-defined situations.

An alternative to territorial licensing which the film industry can deploy without the need for legislative intervention is found in language exclusivity, i.e. exclusive grants of rights for distinct language versions of a film. Language exclusivity in audiovisual content distribution contracts may provide a more natural and legally more robust alternative for market segmentation along national borderlines.

### **Recommendations relating to film funding policies**

Combined with EU level schemes, national and subnational film financing policies complement each other in targeting all roles and actors in financing a film. No gaps in the support landscape were identified. Nevertheless, support schemes might be directed more actively towards connecting with younger age groups and transnational cultures. Research to monitor this might be a starting point to better understand these developments and to design optimal policies to reconnect with these groups.

In addition, regulation from funding bodies, broadcasters and in national laws that reinforces the traditional windowing system by mandating distribution via predetermined distribution channels, and even the duration of such windows, ought to be reconsidered. Flexibility for producers and distributors to choose an exploitation model as they see fit is crucial to succeed in the current dynamic market. Similarly, the development of a significant European VOD platform as a counterforce to the current dominance of platforms from outside the EU could be promoted.

A recurring theme is the large number of films that are made in the EU, in combination with the great dependency of films on support schemes and the disappointing commercial performance. More selective policies in awarding higher budgets for fewer films – including larger budgets for distribution, exhibition and promotion – would increase the chances for EU films to find the audience they deserve.



## 1. INTRODUCTION

The digital revolution of recent decades, which has brought affordable broadband access to consumers in large parts of Europe, is having a profound impact on audiovisual markets everywhere. While traditional outlet channels such as cinemas, terrestrial and satellite broadcasting and cable distribution remain important modes of film exploitation, a variety of online content services and platforms – increasingly aimed at audiences using mobile viewing devices – have in a relatively short time captured significant market share, with rental and sales of DVDs concomitantly decreasing. It is not hard to predict that the future of film distribution in the EU lies largely in the digital realm.

Since the internet knows no natural borders, this shift towards the digital domain has enabled new global players to enter European markets for film distribution, and has put existing business practices and models of film financing under enormous pressure. This development is exacerbated by concurrent EU policies aimed at removing legal obstacles to achieving the *Digital Single Market*. These market developments and policies pose serious challenges to the principle of territoriality in the law of copyright and neighbouring rights, which for many years allowed right holders and licensees to partition markets along national borderlines.

In the audiovisual sector, territoriality has thus far remained largely intact, despite a variety of EU and EC directives, regulations and initiatives that have mitigated the impact of territorially defined rights on the Internal Market. Territoriality is an inherent feature of copyright laws operating at the national level. Copyright creates exclusive rights of exploitation in works of literature, science and art. In the European Union, despite almost thirty years of harmonisation, copyright has remained essentially national law, with each of the Member States holding on to its own law on copyright and neighbouring (related) rights. The exclusivity that a copyright confers upon its owner is, in principle, limited to the territorial boundaries of the Member State where the right has been granted.

Since the exercise of territorial rights may pose obstacles to intra-European trade and services, from the 1990s onwards a variety of European policies and regulatory instruments have been deployed to reconcile territoriality with the evolving needs of the Internal (or Single) Market. However, such EU policies aimed at achieving a Digital Single Market might deeply affect current film financing practices that are considered by many stakeholders to be vital to the European audiovisual industry.

This raises the first central question of this study, what exactly is the role that territoriality plays in the complex business of film financing today, what legal and market challenges does territoriality face as a key model for film financing and what might be the consequences for film financing in the future if EU policies were to further reduce or mitigate the scope of territorial exclusivity in the audiovisual sector.

A related aim of this study is to provide information and analysis on Member States' and EU models of film financing; the challenges film financing faces from digital developments, evolving consumer behaviour and new cultural paradigms; and to present and analyse possible alternatives to traditional methods of financing and policies to support this.

To address these research questions and objectives, the study primarily used desk research: study of relevant policy documents and regulations, academic literature,

stakeholder publications and market data. This was supplemented with legal and economic analysis and was supported by a limited number of interviews with stakeholders. Most of these interviews have been conducted in person, while some have been conducted using videoconferencing technology or telephony. Insights from the interviews as well as a few case studies of film financing serve as illustrations in this report.

This study focuses on feature fiction films, even though many of the insights provided by this study also apply to other audiovisual productions such as documentaries and series and feature length documentaries are sometimes included in market data.

The structure of this report is as follows:

- Chapter 2 provides a brief analysis of the fundamental issues in film financing and how these issues are exacerbated for many EU film productions.
- Chapter 3 presents a typology of film support policies in Europe. Subsequently, it gives an overview of EU policies and a description of national and regional support policies in a representative set of Member States, while paying attention to the role and weight of various support schemes. The descriptions have been submitted to the various funding bodies for verification.
- Chapter 4 analyses the *legal developments* concerning territoriality in copyright law, the revised Audiovisual Media Services Directive (AVMSD), contract law and competition law and how they affect film financing in Europe.
- Chapter 5 describes and analyses the *market developments* that challenge existing models of film financing in the EU, such as changing viewing behaviour and the rise of online distribution platforms, the loss of younger age groups for arthouse cinema and online piracy. In addition, it looks into alternative financing models.
- Chapter 6 provides a description of key stakeholder positions on film financing, support policies and the role of territoriality.
- Chapter 7 synthesises the findings from the preceding chapters and formulates recommendations for policies that are consistent with foreseeable future developments.

A list of the interviewees and the organisations they represent is provided in Annex A.

## 2. FILM FINANCE: PROBLEM ANALYSIS

### KEY FINDINGS

- The high upfront investments required for producing a film and the large *ex-ante* uncertainty about commercial success form the core challenge of film financing. Reviews, recommendations and awards can serve as quality signals for distributors and consumers, but are only available after the production costs have been incurred.
- Against this background, presale agreements with minimum guarantees (MGs), which grant exclusive distribution rights for a certain distribution channel (theatrical, online, broadcast), time window and territory, are a common way to finance a significant part of a film budget.
- European films are on average much less successful in attracting larger audiences than American films. The current market share of European films in Europe is in the order of 20 to 30% of admissions, TV-broadcast, international TVOD and SVOD catalogues and promotion.
- Language barriers and cultural differences in Europe are a likely reason for this relatively weak position. As a consequence, many European films miss out on economies of scale which arguably makes them more dependent on territorial licensing than large blockbusters.
- Motivated by cultural, political and economic arguments, a wide variety of financial and non-financial film support policies exist in Europe.

This chapter provides a brief analysis of the fundamental issues in film financing and how these issues are exacerbated for many EU film productions.

### 2.1. Essentials of film finance

In order to understand the intricacies of film financing, it is useful to start from the general characteristics of films. Richard Caves (2000) is renowned for listing seven criteria that characterise the creative industries. At the top of the list is what he calls the “**nobody knows principle**”, which certainly applies to films: demand is intrinsically uncertain beforehand and not even easily understood afterwards.<sup>1</sup> Like most cultural goods, films are essentially **experience goods**, meaning that a consumer will only know if he or she really appreciates the film after having watched it. What sets films apart from music and videogames, however, is that films are mostly watched only once or twice. This implies that the uncertainty which the first-time consumption of an experience good necessarily involves occurs for almost every film a person considers watching.

There are several **quality signals** consumers can resort to, in order to cope with this uncertainty. **Reputations** of the actors and the director are one. The popularity of sequels

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<sup>1</sup> The other criteria are “art for art’s sake”, “motley crew”, “infinite variety”, “A list/B list”, “time flies”, “ars longa”.



in the film industry can also be understood against this background: sequels often have a similar cast, style and storyline. The same holds for branding such as 'Marvel', 'Walt Disney' or 'From the makers of'. Online communities created through social networks, such as the Facebook pages of famous directors and actors<sup>2</sup>, can also use reputations to promote new films. Second, **trailers** are a way to allow consumers to sample a film before deciding whether to watch it or not.

**Recommendations**, including word of mouth advertising and social networks, **reviews** by professionals and consumers and **awards** at festivals or other events are a third category that help reduce consumers' uncertainty before watching a film. Positive recommendations and word of mouth can be self-reinforcing and lead to positive consumption externalities: everyone wants to see the film that everyone is talking about. Negative reviews can have the opposite effect of curbing demand. Thus, recommendations and reviews fuel Caves's *nobody knows principle*. This helps explain why the marketing budgets for commercial films are typically half the production costs, but even expensive marketing campaigns are no guarantee of success.

From the producers' perspective, films require very high ex-ante investments as the whole process of production, rights clearance<sup>3</sup> and marketing must be financed during the process of creation, which can last several years. Budgets can reach some tens of millions of euros and financiers usually demand that the budget is secured before production starts. High fixed ex-ante costs and low costs of serving additional customers – low marginal costs in economic terms – lead to **significant** economies of scale. This is particularly true for online distribution: once a film has been made, the costs of serving 100 viewers or 100 million viewers in an online market are not fundamentally different. It implies that from a commercial perspective, films benefit from large markets, as the average costs of serving customers drop rapidly with market size. For an international blockbuster, even production costs of over a hundred million euros can be easily regained.

The high upfront investments required for producing a film and the *nobody knows principle* combined set the stage for the core challenge of film financing: commercial investors do not like downward risk and in order to invest in a risky project they require a higher expected return on their investment or collateral. The distribution rights of a film can serve as collateral, but prior to investment their value is as uncertain as the success of the film. Most of the quality signals mentioned above – recommendations, reviews, awards and even trailers – are not available before a film has been produced and the costs of production have been incurred. Therefore, they are of no use for financing a film ex-ante. This implies that investors will basically have to rely on the reputation of a famous director, a stellar cast or other renowned parties involved – 'bankable names' as it was called in one of the interviews – to decide whether or not to invest in a film and on what terms. Having reputable names on board makes financing a film much more feasible (e.g. (IVF/FIAPF/IFTA/MPA, 2015, p. 5 & 11). In this way, awards for previous films may pay off when financing a subsequent film. Also, investors could rely on the judgment of other investors and funding bodies and require their involvement in order to commit themselves.

In order to secure funding for a film, **presale agreements** ('presales') and **minimum guarantees** ('MGs') are a common construction. A presale agreement is a contract

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<sup>2</sup> On Facebook, for instance, Lars von Trier has over 290 thousand followers, Roman Polanski over 205 thousand followers and David Lynch over 1.27 million followers (per November 2018).

<sup>3</sup> E.g. the rights that have to be cleared when a film is based on an existing book.

between the producer and the distributor, whereby the distributor promises to pay the producer a fixed advance on expected revenues. The advance, called a *minimum guarantee* or *MG*, is paid upon the completion of the film. In exchange, the distributor is granted the right to sell or exhibit the content in a given territory and/or distribution channel. The contracting party may also be an agent, who sells the distribution rights to distributors at a later stage. Presales can count for anything from a small percentage to more than half of the budget of a film (IVF/FIAPF/IFTA/MPA, 2015, p. 6) and they can also form the collateral for a production loan from a bank (FIAD, 2017a, p. 6).<sup>4</sup>

Typical distributors for film are cinemas, broadcasters, Pay TV and video on demand (VOD) channels. Usually, they demand **exclusive rights** to their territory and/or distribution channel in order to reduce the risk that the value of their rights – which is already uncertain *ex-ante* – is undermined by competitors. For the same reason, presale agreements typically grant exclusive rights for certain timeframes, called ‘windows’, so as to minimise cannibalisation of higher-value windows by lower-value windows.

To the extent distributors focus their operations on national markets – as is generally the case for broadcasters and cinemas – they are predominantly interested in exclusive rights within their own territory. Their willingness to pay for rights outside their market is limited at best and from the perspective of the producer it will be more lucrative to sell such rights to other distributors. Apart from national operations of distributors, price discrimination between high-income and low-income countries can be an alternative reason for a producer to prefer selling rights on a territorial basis (see: Langus, Neven & Poukens, 2014, Ch. 3.3; Oxera and O&O, 2016). Also, vertical agreements involving territorial exclusivity may help distributors to reap the entire benefits of expenses on marketing, and to prevent others from free-riding on their efforts, which would lead to sub-optimal investment in marketing (see: Langus, Neven & Poukens, 2014, Ch. 3.2).

Territorial licensing for one window may ‘contaminate’ others, as distributors holding exclusive rights for a certain territory and distribution channel would want no competition from other distribution channels during their licensed time window. As long as windows are not synchronised across countries, this creates pressure to also license these other rights on a territorial basis.

Through exclusive windows, distributors can be certain that no-one else may distribute the film in the territory, on the platform or during the timeframe they have negotiated. At the same time, however, such exclusive deals entail the risk that content misses out on a substantial part of the potential audience. For instance, if the online distribution of a film is exclusively licensed to Netflix while only 30% of households have a Netflix subscription, 70% of the potential market (in terms of households) misses out on the online distribution window. As a result, MGs or other production investments have to be recouped from only part of the potential market, particularly when exclusive deals are made with platforms that are vertically integrated or have exclusive deals with network providers. Think, for instance, of cable networks or other triple-play providers that offer broadband, television and telephony in a combined offer and that have exclusive deals with a content platform such as HBO (Poort, 2015).

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<sup>4</sup> Other sources of financing are public money in the form of grants and loans from funding bodies, tax rebates and credits. These will be discussed in greater detail in Chapter 3. Other market-oriented sources of financing are investments from production companies, loans and private equity from other sources (in some cases crowd funding) and product placement. See also section 3.1.4.

Historically, cinema exploitation has been the most commercially attractive window, followed by the sale and rental of video cassettes and DVDs or Blu-ray discs and broadcasting. This has rapidly changed over recent years, as the market for physical carriers collapsed to make way for digital rental and sales – transactional video on demand (TVOD) – and particularly subscription video on demand (SVOD) such as Netflix and HBO. While SVOD still only accounted for 7% of total pay-service revenues in Europe in 2016, it generated 60% of the recorded growth in this segment, while the number of SVOD subscribers in Europe increased by 55% to 37.7 million in that year (EAO/European Audiovisual Observatory 2018a, p. 50, 60).

## 2.2. European films

European (EU) films are on average much less successful in attracting larger audiences than American films. In 2017, European films accounted for 27.5% of EU cinema admissions; European films produced in Europe with incoming US investment for another 3.7%, adding up to 31.2% in total. Between 2012 and 2017, this European share in EU cinema admissions varied between 27 and 34%, while US films accounted for between 63 and 70% of the market and the rest of the world for 2.6 to 3.2% (EAO, 2018b, p. 15).

In 2016, Bridget Jones's Baby was the only 'truly' European film that made it into the top 20 in terms of EU admissions.<sup>5</sup> On television, European films accounted for 28% of film broadcasts by 131 TV channels in 18 EU countries in the 2015-2016 season (EAO, 2018a, p. 55-57 and 18). In a selection of multi-country TVOD catalogues representing 47 country catalogues, the share of European films ranged from 17 to 30%, while in a slightly different selection of TVOD catalogues, European films had 23% of promotion. In 37 country catalogues for nine different SVOD services, this was 20% on average (EAO, 2018a, p. 20-25).

The relatively modest market share of European films in Europe is not for want of European productions. In 2017, a total of 1676 feature films were produced in the EU. About two-thirds of these were feature fiction: 1072 (EAO, 2018b, p. 17). European film production has gradually increased over the past years, with a 47% increase in the number of European feature films between 2007 and 2016 (EAO, 2018a, p. 8-10). In the US, 'only' 821 films were produced in that year (709 of these by non-MPAA members) (EAO, 2018b, p. 42). In other words: in their home market European films have half the market share of US films, even though there are twice as many European films. This implies that US films have on average four times as many admissions in the EU as domestic films.<sup>6</sup>

A likely reason for this relatively weak position of European films in the European market is the language barriers and cultural differences that exist within Europe. As a result, many European films do not circulate outside their domestic market. Co-productions between two or more European countries perform much better in this respect. They generate three times as many admissions as European purely national films and circulate almost twice as widely (EAO, 2018a, p. 10). In several interviews, the growing importance of international co-productions was underscored. Despite this trend, in 2016, European films generated 60% of their worldwide admissions in their respective domestic markets. About half of the remaining 40% of admissions were sold in other European countries while 19% were sold outside Europe (EAO, 2018a, p. 54 and 14). In the same year, 650 European films were

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<sup>5</sup> Leaving aside two European films produced with incoming US investment (*The Secret Life of Pets* and *The Jungle Book*).

<sup>6</sup> This calculation is very rough and does not take into account that not all US films reach the EU market.

screened outside Europe while about 5200 European films were on release in at least one European market: a ratio of one-to-eight. (EAO, 2018a, p. 8-10 and 54).

As a result, most European films do not benefit as much as US blockbusters, in particular, from the economies of scale that films potentially have: fixed costs can be spread over fewer admissions and other sales which raises the average costs per admission. This makes it harder for such films to recover their production costs and further enhances the financial risks for investors. To illustrate this: according to estimates by the British Film Institute, only 6.6% of UK independent films produced between 2003 and 2011 were profitable (Oxera and O&O, 2016, p. 3). To recoup investments from a smaller customer base, production budgets need to be smaller for a film to remain commercially sound. In many genres, smaller production budgets make it harder to compete with high-budget films and as a result 'European film' is often synonymous with 'arthouse film', having an intrinsically smaller audience.<sup>7</sup> This ties in with the findings in Kanzler (2018) that average production budgets for films tend to be larger in larger national markets within the EU and that the share of presales in the finance mix increases with the size of the national market, while the share of public funding decreases.

For films with a smaller budget, contracting a stellar cast and other bankable names is much more difficult. This implies that these quality signals for consumers and investors that could be available ex-ante are often out of reach, which complicates financing such films even further. Such films have to rely more than blockbusters on building their reputation via reviews, recommendations and awards, which are only available after a film has been made. Even larger European productions often lack the marketing power and budget to start a pan-European or even multi-country marketing campaign and only gain a reputation outside their producing or co-producing countries by being nominated or winning awards at festivals or through success in their home markets. This process may take over a year from a film's first release and is often a prerequisite for a film to start circulating in arthouse cinemas in other countries and for being licensed for other distribution channels in these countries. Unlike large blockbusters, for which theatrical releases have become ever more synchronised across territories<sup>8</sup>, smaller yet successful EU productions experience a fairly long time span during which territorial exploitation windows are out of sync. A failure to be able to grant territorial licences during this period could increase the risk of cannibalisation and by doing so erode distributors' willingness to invest in licences and the opportunities to recoup (part of) the investments.

A market outcome that would be the logical consequence of a lack of scale for many EU films, would be a lower production and distribution level for European films. However, many Member States, Regions within Member States and the European Commission and Parliament consider this an undesirable outcome for various reasons. From a cultural and political perspective, films are considered carriers of the cultural identity of Europe and its

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<sup>7</sup> This is likely aggravated by the fact that despite the presence of no less than 197 SVOD services in the EU by 2017, US-based companies that start from a US-centric catalogue dominate the market. In 2016, Netflix had 47% of all SVOD subscribers in the EU, followed by Amazon (20%) (EAO, 2018a, p. 60). Initiatives from European countries such as Salto (France), Freeview (UK) and ProSiebenSat1 so far have not been very successful in competing with these US giants. This is partly due to the fact that initiatives that originate from public broadcasters face competition law issues.

<sup>8</sup> To illustrate this: the average time between the US and UK cinema release for the top 100 films dropped from around a hundred days up to the year 2000, to just ten days in 2016. See: <<https://stephenfollows.com/changing-movie-release-patterns>>.

Member States, which deserves protection and promotion (e.g. Raad voor Cultuur, 2018).<sup>9</sup> From an economic perspective, a healthy film industry is considered important for the jobs, added value and incoming investment and tax revenues it generates for the local or national economy. National film industries have stressed this repeatedly (e.g. Oxford Economics, 2013; Berden et al. 2012). In addition, successful films may attract tourism – as *Lord of the Rings* is claimed to have done for New Zealand (e.g. Croy, 2004) and Harry Potter for London, or at least for King's Cross Station and other film locations in the UK – which is another source of economic benefits.

These cultural, political and economic arguments have resulted in a wide variety of film support policies in Europe, which will be the topic of the next chapter. It is important to realise that even the current modest market share of European films in Europe – in the order of 20 to 30% of admissions, TV-broadcast, international TVOD and SVOD catalogues and promotion – are no free-market outcome. They are partly the result of the financial support policies discussed in the next chapter, which have contributed to the fact that in the EU about twice as many feature films are produced as in the US, as well as of European and country-specific regulations concerning minimum share obligations for VOD catalogues and TV-broadcasts (EAO, 2018a, p. 40-41).

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<sup>9</sup> This is also acknowledged in the 2013 *Communication from the Commission on state aid for films and other audiovisual works*. See Section 3.1 for a more extensive discussion on this communication.

### 3. FILM SUPPORT POLICIES IN EUROPE

#### KEY FINDINGS

- Public support is offered to the film industry in various ways, both on a pan-European level and at Member State level.
- Direct support is provided through a variety of aid schemes available for different types of projects and different phases of the creation trajectory/value chain, but mostly for production. It is offered in the form of grants and loans, the latter under different degrees of softness, but in practice only a very small percentage of total funds provided are repaid.
- Indirect public support is offered through incentive schemes, or schemes that aim to unlock private capital by reducing the risks or offering tax benefits for investors.
- Broadcasters and other audiovisual media service providers are sometimes obliged to make mandatory investments in the film industry.

#### 3.1. Typology of film support policies

Before turning to existing policy approaches for film support at the pan-European level and at the national and regional level of Member States, this section provides a typology of support schemes and mechanisms for the financing of films.

The production budget of films in Europe usually comprises funding from a variety of sources, both public and private. As public support provides a considerable share of the total budget for most films in Europe, and in most instances functions as the most important element of film financing (Ravid, 2018, p. 44, see also Box 3.1 in this report), public support mechanisms will be the main point of focus in this section, but attention will also be paid to semi-public and private sources of financing. A schematic representation of the typology is provided at the end of the section, followed by a short description of a few case examples.

Public financial support for the production of films and other audiovisual works, due to its likeliness to affect trade and distort competition between Member States, can be regarded as a form of prohibited state aid pursuant to Article 107(1) TFEU. The European Commission, however, may exempt certain state aid from this prohibition. In the context of film support this exemption is based on Article 107(3)(d) TFEU, that under certain circumstances permits aid to promote culture where such aid does not affect competition and trading conditions to an extent contrary to the common interest. The criteria to assess eligibility for this exemption have been set out by the Commission, most recently in its 2013 *Communication from the Commission on state aid for films and other audiovisual works*, hereafter, "Cinema Communication". In short, state aid can be justified if the aid scheme complies a) with the general legality principle and b) with the specific compatibility criteria as set out in the Cinema Communication. Criteria are set, for example, in the context of territorial spending conditions, allowing film production support schemes to require that up to 160% of the aid amount awarded to the production is spent in the territory granting the aid, for example on equipment and staff. Other criteria include the condition that aid must be directed to a cultural product and that, with a view to

stimulating normal commercial initiatives, the aid intensity must in principle be limited to 50% of the production budget. The intensity, however, may be increased for 'difficult' audiovisual works, as well as for co-productions funded by more than one Member State and involving producers from more than one Member State. Lastly, it must be noted that under the General Block Exemption Regulation (GBER) certain types of state aid are declared lawful and schemes for audiovisual works of up to € 50 million per year are exempted from the prior notification requirement.<sup>10</sup>

This section provides a typology of the wide variety of aid mechanisms and conditions put in place in Europe to support the financing of films. Like the European film market itself, which amongst others is characterised by its fragmentation along linguistic and cultural lines, state support for film exists in a multitude of forms and is as such complex to capture (Murschetz, Teichmann & Karmasin, 2018, p. 5-7). The typology will be used in subsequent sections to describe existing policy approaches for film support in the selected countries and on the pan-European level.

### 3.1.1. Direct public support

Direct public support for the financing of films in Europe is provided through a wide variety of aid mechanisms and conditions, most importantly through several forms of grants and loans. The allotment of such support in Member States is usually administered by one or more funding bodies. A **funding body** can be defined as a legal entity responsible for the provision of public support to film or audiovisual projects, either ordered or assisted by public authorities. The entity of the funding body can be given the form of a government department or of an independent agency.

The various funding bodies that exist in Europe vary widely in scope and operations. In the first place, a distinction can be made on the basis of the **administrative level** on which a funding body operates. At a *supranational* level a funding body could involve several countries (pan-European) or be aimed at non-European countries (outreach), whereas *national/federal* funding bodies operate mainly at the level of the central or federal government. Lastly, there are funding bodies that operate at a *subnational* level, for example on a regional, community or local level.

In the second place, funding bodies differ in the **types of projects** they provide support for. The types of projects eligible for support vary widely per funding body and in most cases include support for feature films, high-end TV series, single works for TV, documentaries, animations and short films, whilst some funding bodies also provide support for multimedia productions, video games and/or web projects.

Finally, a distinction can be made between the **types of activities** for which a funding body provides support. These can include several phases of the creation trajectory and value chain of a film project. Support could be provided for the scriptwriting, development and production of a film, but also for the distribution, promotion and exhibition (cinema support) of a film once the project is finished.

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<sup>10</sup> Article 54, Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty.

### Financing of funding bodies

Funding bodies themselves are financed in a myriad of ways and there is no “European model” for financing film funds. Consequently, it is difficult to sum up the financing models of public film and audiovisual funding bodies on a pan-European level (Kanzler & Talavera, 2018, p. 164). Generally speaking, public sources account for the largest share of the income of funding bodies, followed by contributions from the television industry as well as taxes/levies on cinema exhibition. A significantly smaller share comes from, inter alia, national lotteries, repayments and copyright exploitation, and self-generated income (De Vinck, 2011, p. 281; Kanzler & Talavera, 2018, p. 164).

### Types of direct funding and support mechanisms

Funding bodies offer a wide array of automatic and selective aid schemes to the film and audiovisual industries, covering all stages of the value chain (Kanzler & Talavera, 2018). The ways in which funding bodies provide direct support for the financing of a film could take different forms and shapes and be dependent on multiple conditions and criteria.

An initial factor to assess is which entities are allowed to apply for aid under a scheme. A scheme could be open to national production companies only or could demand a domestic establishment of a production company. Secondly, a determination has to be made with regard to the types of projects and types of activities to which a specific scheme provides support. Subsequently, several conditions determine whether a film project is eligible for direct support under the specific scheme. Eligibility could, for example, be made dependent on a territorial minimum spending obligation or a cultural test. Under such a test, points are awarded based on, for example, the place where the film is set or the nationality of the director and screenwriter, to evaluate the eligibility of the project. Some support schemes demand that a large share of the project’s financing has already been confirmed or require proven market interest. Further, adjustments could be made as to what expenses qualify for support and a minimum amount of qualifying expenses may be required. In some instances, especially for productions with a larger budget, a funding body could as a condition for the granting of aid demand the production company provide a completion bond or guarantee. Under such a provision, a guarantee is required by a third party, usually an insurance company, that the project will be completed without running over budget or over schedule.

An important distinction to be made in the context of the above, is between schemes that are selective in character and schemes that are of an automatic nature. State aid granting criteria and procedures are **automatic** if they are based on conditions set forth by the applicable rules without involving any discretionary judgement by experts (Cambridge Econometrics 2008). Criteria and procedures for granting state aid are **selective** if they are based on conditions referring for example to the quality, originality, cultural value and other features of the work, as assessed by experts.

Once a project is eligible for financial aid under a scheme, an important characterisation can be made with regards to the financial conditions under which support is provided, usually depending on what is expected of the beneficiaries of the support granted (De Vinck 2011, p. 282-283). If support is provided by a funding body in the form of a **grant**, this support in general does not entail any obligations for reimbursement on the beneficiary’s part.



If, however, a funding body provides monetary support in the form of a **loan**, this support is usually accompanied by an obligation to in some way reimburse the granted amount. The means and ways of repayment, however, vary widely and may depend on several (contractual) conditions. Non-exhaustively, such adjustments could for example be reflected in the interest rate (or the lack of any interest obligations) or in whether there is a full or only a partial repayment obligation, effectively rendering part of the granted amount a form of grant (Talavera Milla et al., 2016, p. 14). Adjustments can be made in the form of a deferral of the position of the loan in the scheme of recoupment, effectively enhancing the risk of non-repayment to the funding body. Further, some funding bodies make use of a revolving mechanism in which a part of the amount paid back by a production company is reserved for subsequent productions by the same producer. Adjustments could also be made by giving a loan the form of an advance on receipts, rendering repayment conditional on the economic performance of the supported work (De Vinck, 2011, p. 283). In some instances, loans are provided under a repayment obligation limited to only a few years after theatrical release.

In the context of the above, it is important to make mention of the notion of **co-productions**. In a co-production, two or more producers agree to collaborate and pool their financial and other resources in order to produce a joint film project (Morawetz, 2009, p. 63). For cross-border film projects such agreements often rely on co-production treaties, on the basis of which a production that has its origin in two or more countries will qualify as a national film in both of the countries and could therefore be eligible for state support as described in this section from both of the signatory states (see also Box 3.1). Depending on the share of financing provided by each of the participants, a distinction can be made between the minority and the majority co-producer.

### 3.1.2. Indirect public support

Other than direct support provided in the form of grants or loans, public support could also be offered in an indirect manner, for example through fiscal incentive schemes or by the implementation of measures that aim to encourage private investment in film productions. The administration of indirect public support can also be in the hands of a funding body, but is in some instances administered directly by a government.

#### Incentive schemes

A growing number of Member States have in recent years introduced incentive schemes aimed at encouraging investment in films by production companies. As an indirect means of public film funding, these incentives in general serve two purposes. In the first place, these aim to attract and encourage foreign production companies to produce or post-produce in the respective country. In the second place, such schemes aim to incentivise domestic production companies to realise their films in their own country rather than abroad. (Castendyk, 2018, p. 598). Incentive schemes are in themselves not new and have been used for decennia to stimulate a variety of national industries. An early example of an incentive scheme especially designed for film was introduced in Ireland in 1987 (Flynn, 2018). The schemes were not always successful in the past, but thanks to more recent successes, many Member States have introduced such schemes.

Incentive schemes usually take the form of either a rebate or a tax credit. In the case of a **(cash) rebate**, a percentage of qualifying production expenditure is returned as cash to the production company. The payment is normally made after the production expenditure

has been completed and audited and, of critical importance, typically some months after the nation's treasury has collected a range of taxes from the production itself (Talavera Milla et al., 2016, p. 73). An incentive scheme in the form of a **tax credit**, operates similarly to a rebate but offers a reduction against corporate tax owed, or a refund where tax owed is less than the incentive amount. Tax credits can be transferable, i.e. sold to a third party to utilise, or refundable to the producer (Olsberg SPI, 2017).

Incentive schemes are often designed so as to apply automatically to a film which fulfils certain criteria. Compared to selective direct funding, which individually awards support to single films upon application, these schemes with their automatic application allow film producers to factor in a foreseeable amount of funding in the film planning and development phase (Cinema Communication).

Again, there are various elements and parameters in play that determine whether and for what amount a production could be eligible for support through an incentive scheme (Castendyk, 2018, p. 598). A state could for example impose restrictions with regards to the expenditure eligible under the scheme, or it could make the eligibility of a project dependent on a cultural test. In most Member States the issuance of a certificate, usually by a funding body, is required before a production company can make use of the facilities under a scheme. An important factor in the context of incentive schemes is the rate determining the amount of eligible expenditure that will be returned to a production company as a cash rebate or tax deduction. Finally, it is important to note that some Member States cap the total number of projects that could benefit from the scheme or maintain a cap on the total budget which can be allocated under the scheme per year.

### **Schemes aimed at unlocking private capital**

Complementary to incentive schemes aimed at encouraging investments by a production company, indirect public support could also be provided by measures that aim to unlock or encourage the investment of private capital in the production of a film.

Some Member States have a **tax shelter** aiming to incentivise investment by external parties. These schemes resemble incentive schemes for production companies, as they permit individuals or corporate entities to deduct investments in the production of qualifying films against their tax liabilities.

The investment of private equity can also be encouraged by offering a **guarantee facility** for private investors (Talavera Milla et al., 2016, p. 90). As a relatively new form of public support, the guarantee fund commits to covering (part of) the losses of the bank if the borrower fails to reimburse. The term can be used to refer to a government assuming a private debt obligation if the borrower defaults (Talavera Milla J. et al. 2016, p. 90).

### **3.1.3. Investment obligations for broadcasters and other players in the audiovisual value chain**

Public support in most Member States also comes in the form of an obligation for broadcasters and other players in the audiovisual value chain to invest in film and audiovisual content (Talavera Milla et al., 2016, p. 83). This investment obligation could either be direct or indirect and is usually defined by law or in the public service contract between the State and the Public Service Broadcaster. Directly, a party could be obliged to either pre-acquire the licensing rights to broadcast a production or to act as co-producer.

Indirectly, a broadcaster could be obliged to make financial contributions to national or subnational funding bodies, for example through taxes and levies payable to the fund. Some Member States have expanded the applicability of the latter obligations to private broadcasters, exhibitors, audiovisual services distributors or video publishers, as well as on-demand platforms.

#### **3.1.4. Market-oriented sources of film financing**

While public support usually makes for a significant share of the financing plan of a film, in almost all cases monetary support from semi-public and private sources also has to be secured. There are multiple ways in which these sources of finance can be obtained (e.g. Murschetz, Teichmann & Karmasin, 2018, p. 7). As already discussed in Section 2.1, **presales** of distribution rights with **minimum guarantees** usually raise a substantial portion of the budget. In a stylised illustration of typical funding mixes, Oxera and O&O (2016, p. 32) set EU plus non-EU presales at about 35% for local films and 55% for major international films.

In addition, a share of most production budgets for film and other audiovisual productions usually comes from the **production company's own investments**. In some cases, these contributions are set as a requirement to obtain public funding. Oxera and O&O set this share at about 15% for local films and 30% for major international films.

Thirdly, private investors and banks could invest in films. As was explained in Section 2.1, such investment is generally risky, in particular without collateral. Guarantee facilities aim to reduce this risk to convince private investors to supply debt and equity. Oxera and O&O set this share at about 20% for local films and 10% for major international films.

Lastly, and in addition to the sources for the financing of films set out above, for some films **sponsoring** or **product placement agreements**, **donations** and **crowdfunding**, as well as presales of rights for **derivative products such as games and merchandise** can form a, in most cases relatively small, share of the total production budget.

Box 3.1 provides a few short case examples of how all these different sources of financing work out in practice. Table 3.1 summarises the key elements of the typology of support policies.

### Box 3.1: Film Financing in Practice

#### FILM FINANCING IN PRACTICE

Most European films, in particular larger European co-productions, typically raise their production budget from twenty or more financing sources.<sup>11</sup> Usually, this includes direct support schemes – grants and/or loans – in each of the co-producing countries, incentive schemes in the co-producing countries, support from European funds such as Eurimages and, where applicable, international co-production funds (see Section 3.2). These receipts from support schemes are supplemented with presales and MGs from exclusive deals with distributors and broadcasters in the co-producing territories and beyond, and investments by the producers and by other private investors. The complexity of this financing puzzle is further enhanced by specific requirements by funding bodies and incentive schemes, in terms of obligations on territorial spending of production budget and obligations relating to the use and timing of exploitation windows (see Section 3.3). Once a film has been released and starts to generate revenues, most of these sources have their own specific recoupment conditions.

A recent study conducted by the European Audiovisual Observatory found that the median sample budget of a European live-action fiction film with a theatrical release in 2016 was € 2.07 million. The mean budget was € 3.17 million (Kanzler, 2018, p. 36). The findings in the study were based on a data sample comprising financing plans for 445 films from 21 European countries, which was estimated to cover 41% of the total number of European fiction films released in 2016. The study points out that budgets differ widely between countries, with average budgets being higher in larger markets. In a medium-sized European market – a market with 10 to 50 million admissions per year – the median budget for a fiction film amounted to € 1.6 million. In addition, the study suggests that international co-productions tend to have higher budgets than 100% national films.

Kanzler (2018, p. 49) finds that of a variety of financing sources, in line with the sources distinguished in Section 3.1, direct public funding and investments by broadcasters made for the two most important sources, representing 29% and 25% of the cumulative financing volume, respectively. Leaving out French films, direct public funding becomes by far the single most important financing source at 41%, while presales and producer investments follow at 16% and 15% respectively. Broadcaster investments contribute 11% and indirect public support in the form of incentive schemes accounts for 8%. In addition, the data analysis in the study suggests that there are structural differences in how films of different budget sizes are financed. In general, films with a budget of up to € 3 million depend to a higher degree on direct public support while films with higher budgets are financed with proportionally higher shares of pre-sales and broadcaster investments. Incentive schemes appear to be particularly important for films with a budget between € 1 million and € 10 million.

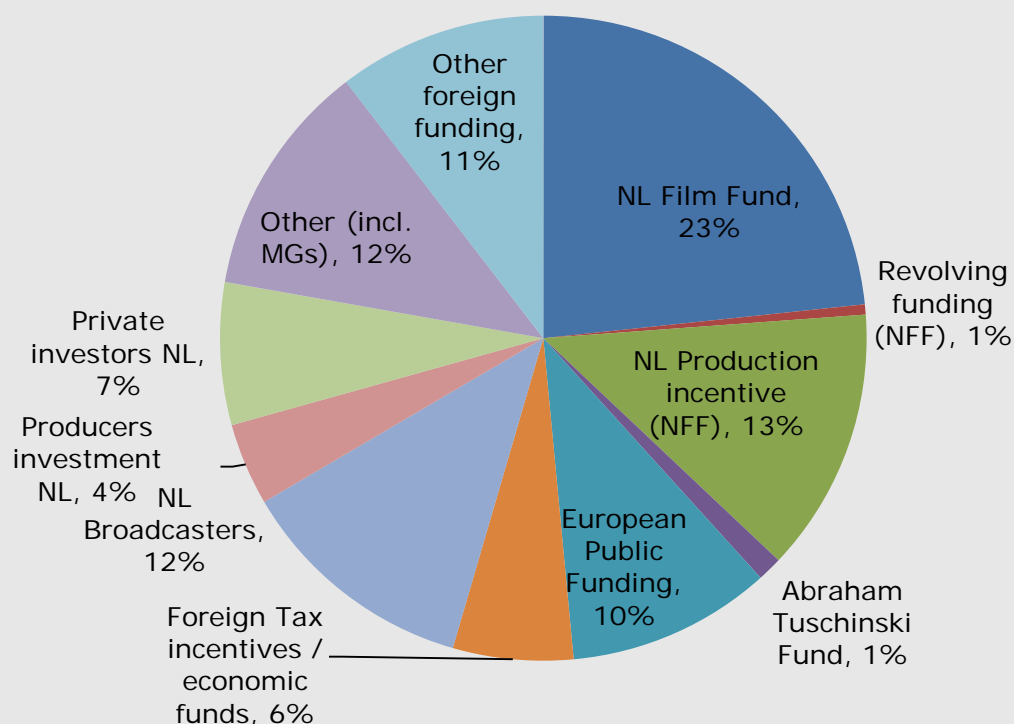
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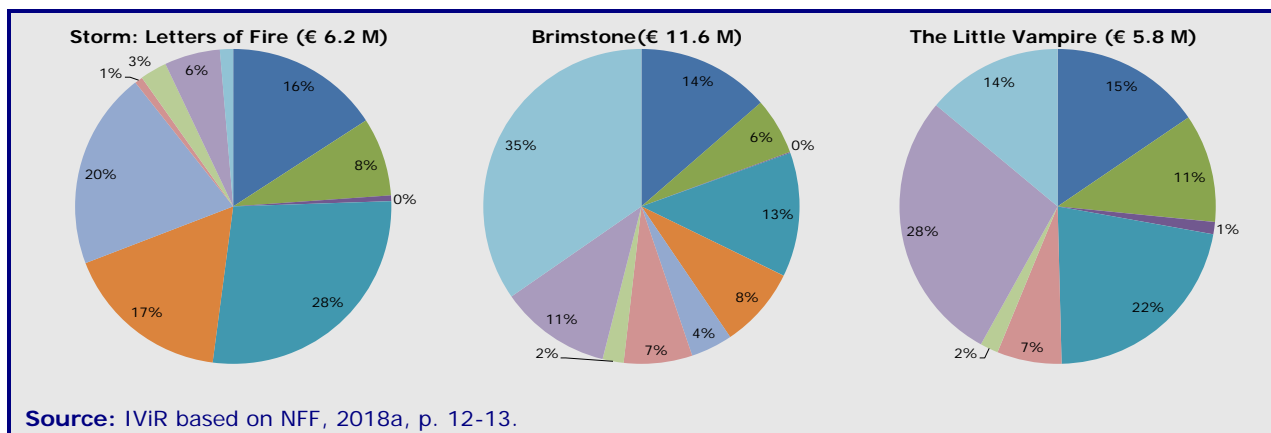
<sup>11</sup> On a confidential basis, detailed finance plans were obtained from a number of recent European co-productions with production budgets ranging from € 2.8 to 7.0 million involving producers in the Netherlands, Belgium (Flanders), Denmark, Germany, Hungary, Ireland and the UK. Insights in this text box are partly based on these plans but have been anonymised. The pie-charts presented are based on NFF (2018a).

Representative for a medium-sized European market, The Netherlands Film Fund (NFF) publishes relatively detailed information on the financing sources of the feature films it supports (NFF, 2018a, p. 12-13). The chart below depicts the breakdown of the financing of all 35 majority productions and co-productions released in 2017 with support from the NFF combined. On average, 23% of the budget came from direct support from the NFF, 1% from revolving funds that producers can receive from the NFF based on successful previous productions, a further 13% from the Netherlands Production Incentive administered by NFF, and 1% from the private Abraham Tuschinski Fund (see Section 3.3.9). Another 16% came from public funding in other European countries and production incentives and economic funds abroad, adding up to a 55% share for direct and indirect support. Dutch broadcasters financed 12%, leaving a third of the average budget to MGs, investments from producers, private investors and other foreign funding such as foreign co-producers and broadcasters.

The subsequent charts – that use the same colour coding – provide the breakdown of the financing for three international co-productions released in 2017. They illustrate that this breakdown can differ substantially from one feature film to the next, but in all three cases, direct support and incentives add up to more than 40% of the total budget. This agrees largely with the case studies published by IVF/FIAPF/IFTA/MPA (2015), in which ‘tax credits/subsidies’ are responsible for between 40% and 57% of the budget, alongside territorial presales and in some cases private equity.

**Majority (co)productions released in The Netherlands in 2017 (€73 million)**





**Table 3.1: Characteristics of film support policies**

General characteristics			
Administrative level:	Supranational / national / subnational		
Types of projects:	Feature film (fiction, animation and documentary) / TV series / TV single work / short films / multimedia productions / video games / web projects		
Types of activities:	Scriptwriting / development / production / distribution / promotion / exhibition		
Selection method:	Selective / automatic		
Eligibility criteria:	Cultural test / spending obligations / market interest / confirmed financing		
Direct public support			
Financing of funding bodies:	Public sources / contributions from broadcasters, cinemas & VOD services / national lotteries / repayments and copyright exploitation / self-generated income		
Type of financial aid:	Grant	Loan	
Indirect public support			
Incentive schemes	Schemes aimed at unlocking private capital		
- Cash rebates	- Tax shelters		
- Tax credits	- Guarantee facilities		
Investment obligations			
Applicability:	Public broadcasters / private broadcasters / exhibitors / audiovisual services distributors or video publishers / VOD services		
Direct (Pre-acquiring of licensing rights / Acting as co-producer)	Indirect (Taxes/levies payable to funding body)		
Market oriented sources of financing			
Presale of distribution rights	In-house financing	Third-party financing	Varia

Source: IVIR (2018)

### 3.2. Pan-European film support policies

From the end of the 1980s, a pan-European system for the financial support of film has emerged, most prominently at the level of the European Union on the one hand and at the level of the Council of Europe on the other. Although relatively small in terms of financial significance, their impact should not be underestimated as notable sources of film financing (Raats, Schooneknaep & Pauwels, 2018, p. 194). In addition to these European funds, several funds have emerged that cover financial support for films in sub-regions of Europe, e.g. the *Nordisk TV & Film Fond*.

### 3.2.1. European Union

	2016	2017
Population (in millions)	510.277	511.521
Admissions (in millions)	911.1	984.4
Market share European films	26.3%	27.5%
Gross Box Office (in € billions)	7.04	7.02
Number of feature fiction films produced	1 148	1 072

**Source:** Eurostat, EAO (2018b)

Film support policy in the European Union as implemented by the European Commission is built around three main policy instruments. Firstly – as set out in the previous section – the Commission applies rules of state aid to the ways in which Member States are allowed to shape their national and subnational financial support mechanisms. Secondly, the European Commission has put in place direct and indirect public support schemes that operate at EU level.

A third influential pillar of audiovisual policy is found in the Audiovisual Media Services Directive, a revision of which has recently been adopted by the European Parliament and the Council.<sup>12</sup> Under the current rules of the Directive, which apply until the revised Directive is transposed into national legislation, i.e. by 18 September 2020 at the latest, national film policy is, for example, shaped by the rules obliging Member States to ensure that broadcasters reserve a majority proportion of their transmission time for European works (Article 16). Additionally, Member States must ensure that broadcasters reserve either at least 10% of their transmission time, or alternatively at least 10% of their programming budget, for European works created by producers who are independent of these broadcasters (Article 17). Furthermore, Member States must ensure that on-demand audiovisual media services provided by media service providers under their jurisdiction promote the production of and access to European works. Such promotion could relate, inter alia, to the financial contribution made by such services to the production and rights acquisition of European works or to the share and/or prominence of European works in the catalogue of programmes offered by the on-demand audiovisual media service (Article 13).

#### Direct public support

Direct public support for the financing of films at EU level has over the last few decades been provided through the *MEDIA programmes*, a financial support scheme for audiovisual content. The original *MEDIA* programme was established in 1991. After several follow-up programmes (e.g. *MEDIA II*, *MEDIA Plus*) the *MEDIA* programme currently functions as a sub-programme of the broader *Creative Europe* programme. As such, it was established under Regulation (EU) nr. 1295/2013, hereafter ‘the Regulation’ or ‘the Creative Europe Regulation’, which became applicable on 1 January 2014 and runs until 31 December 2020.

The general objectives of *Creative Europe*, as established in the latest iteration of the programme, are twofold. First, *Creative Europe* aims to safeguard, develop and promote European cultural and linguistic diversity and to promote Europe’s cultural heritage (Article

<sup>12</sup> Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive). The revision of this Directive is discussed in more detail in Section 4.5 of this report.



3 of the Regulation). Second, the programme aims to strengthen the competitiveness of the European cultural and creatives sectors, in particular the audiovisual sector. Within these broader objectives, the programme formulates the specific objectives to reinforce the European audiovisual sector's capacity to operate transnationally and to promote transnational circulation. With regards to these objectives, priorities are defined for each of *Creative Europe's* sub-programmes (Article 9).

The overall budget for *Creative Europe* for the period 2014-2020, as provided for in the EU's multiannual financial framework, is € 1.46 billion, of which at least 56% or € 820 million has been earmarked for the *MEDIA* sub-programme. The budget allocation for each year per sub-programme is set out in annual work programmes, with the allocated budget for *MEDIA* in 2018 being € 112 million.<sup>13</sup> This comes down to € 0.22 cents per capita.

In order to achieve the priorities set out for the *MEDIA* sub-programme, various support schemes are put in place. These support measures cover a wide variety of activities, including support for training, development, television programming of audiovisual European works, market access and promotion, distribution, film festivals, cinema networks, online distribution and audience development and co-production funds.<sup>14</sup> On a regular basis, calls for proposals are opened in order for parties to apply for support under the *MEDIA* sub-programme. Each proposal is evaluated against several awarding criteria by independent experts appointed on a project basis by the executive agency. For most calls, the relevance and European added value of the project and the European and international distribution and marketing strategy play a significant role.

As an example, support under the development scheme is provided to feature fiction films, documentaries and animations intended for cinematic release as well as to projects intended primarily for the purposes of television or digital platform exploitation. Support can be provided to single projects, as well as to a slate of projects. Financing for the development of these projects is mainly dispensed in the form of a grant and therefore does not require any form of monetary pay-back. Each call specifies the maximum contribution available for a certain type of proposal. For example, the maximum financial contribution that may be awarded for the development of a single project fiction film under a 2018 call was € 30,000 if the estimated production budget was below € 1.5 million and € 50,000 for projects with an estimated production budget equal to or above € 1.5 million. Given these maximum amounts, the contribution from this development scheme can be only a few percent of the total production budget of a film.

### Indirect public support

In addition to the direct support schemes set out above, the Regulation establishing the *Creative Europe* programme for the period 2014-2020 also marked the introduction of the *Cultural and Creative Sectors Guarantee Facility*, which became effective as of June 2016.<sup>15</sup>

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<sup>13</sup> European Commission, 2018 annual work programme for the implementation of the Creative Europe Programme, C(2017)6002, p. 111.

<sup>14</sup> MEDIA overview, <[https://ec.europa.eu/programmes/creative-europe/media\\_en](https://ec.europa.eu/programmes/creative-europe/media_en)>.

<sup>15</sup> Financial guarantee facility for the cultural and creative sector, <<https://ec.europa.eu/digital-single-market/en/financial-guarantee-facility-culture-creative>>.

The Guarantee Facility is managed by the European Investment Fund (EIF, part of the European Investment Bank Group), on behalf of the European Commission. Under the 2018 budget, a total amount of € 25.5 million is allocated to the Facility.

Acknowledging the challenges SMEs in the cultural and creative sector encounter in securing financing for their projects, the Guarantee Facility as a self-standing financial instrument, is designed to unlock private capital by providing credit risk protection to financial intermediaries building portfolios of loans. The EIF selects financial intermediaries that can participate under the facility. Cultural and creative sector companies can subsequently apply to the facility by contacting a financial intermediary selected for a country. To encourage the creation of portfolios of loans to SMEs in the cultural and creative sectors, the facility will provide the financial intermediaries with guarantees to cover losses up to 70% for each loan and up to 25% at a guaranteed portfolio level.

An additional aim of the facility is to help the financial sector to improve its understanding of the cultural and creative sectors' specificities, through the availability of a capacity-building programme (Article 14.2 sub b). Under this programme, the EIF selects so-called capacity-building providers that help to improve the capacity of participating financial intermediaries to assess the risks associated with SMEs and micro, small and medium-sized organisations in the cultural and creative sectors and with their projects, including through technical assistance, knowledge-building and networking measures.

### Trends and developments

An implementation assessment of the *Creative Europe* programme was carried out in 2016, in which questions were raised as to the overall cost-efficiency of support and the aspect of financial concentration as a consequence of the number of supported schemes. Furthermore, the limited price range of the Guarantee Facility was highlighted (Dossi, 2016).

In the mid-term evaluation, the European Commission showed itself cautiously optimistic about the progress achieved under the *MEDIA* sub-programme.<sup>16</sup> It highlighted the enhancement of cross-border circulation of European films and audiovisual productions and the support provided to the development of about 400 new films per year, equivalent to 25% of Europe's production. At the same time, some of the weaknesses of the programme were pointed out, for example the growth in scope of the programme without an equivalent budget increase. According to the Commission, this has resulted in funding being spread too thinly among thousands of beneficiaries. This corroborates the observation heard in most of the interviews, that "too many films are made" competing for limited funds, cinema space and attention. In addition, the Commission pointed at the overgrowth of funding schemes and actions under the programmes.

Negotiations for a follow-up to the current *Creative Europe* programme for the period 2021-2027 are underway.<sup>17</sup> Part of the proposed new programme by the European Commission is

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<sup>16</sup> European Commission, *Report from the Commission to the European Parliament and the Council, Mid-term evaluation of the Creative Europe programme (2014-2020)*. COM(2018) 248 final.

<sup>17</sup> European Commission, *Proposal for a regulation of the European Parliament and of the Council establishing the Creative Europe programme (2021 to 2027) and repealing Regulation (EU) No 1295/2013*, COM (2018) 366 final.

a 27% increase of the overall budget from € 1.46 billion to € 1.85 billion. The *MEDIA* strand's budget would go from € 820 million to € 1.081 billion, an increase of 32%. The increased budget will, among other things, be spent on the international promotion and distribution of European works and innovative storytelling, including virtual reality.<sup>18</sup> Further, to increase findability and accessibility, the creation of a directory of European movies is proposed.

Another significant development can be found in the recently adopted revision of the Audiovisual Media Services Directive.<sup>19</sup> This revision, for example, includes increased obligations for on-demand services to promote European content in their catalogue. An elaborate discussion of the revised Directive's rules on film financing is provided in Section 4.5 of this study.

### 3.2.2. Council of Europe

Almost simultaneously with the emergence of policy to support film at the level of the European Union, similar support mechanisms have come to life within the framework of the Council of Europe.

#### Direct public support

Set up in 1989 as a Partial Agreement within the framework of the Council of Europe, *Eurimages* is the cultural support fund of the Council, aiming to promote European Cinema. *Eurimages* has five support schemes, namely: film co-production, theatrical distribution, exhibition, promotion and gender equality. Under the film co-production scheme, it provides support for fiction, documentaries and documentary feature films with a minimum length of 70 minutes. A main condition for eligibility is that projects submitted must be co-productions between at least two independent producers, established in different Member States of the fund. In addition, projects must meet several financial requirements. For example, at least half of the projected financing in each of the co-producing countries must be confirmed. Within the *Eurimages* framework, the Board of Management determines the fund's policy and the conditions on which financial support is awarded. The board is furthermore responsible for the decisions on the selection of the projects that are provided with support.

*Eurimages* has a total annual budget of € 26 million. This financial envelope derives essentially from the contributions of the Member States, as well as from returns on the loans granted.

*Eurimages* support under the co-production scheme takes the form of an interest-free loan provided as an advance on receipts, whereas support for theatrical distribution, exhibition and promotion is provided in the form of a grant. The support is allocated to each co-producer according to the proportion of his or her financial participation in the co-production. The supported amount is repayable from the first euro of each co-producer's

<sup>18</sup> European Commission, *EU budget: Reinforcing Europe's cultural and creative sectors*, Press release 30 May 2018.

<sup>19</sup> New rules for audiovisual media services approved by Parliament, <<http://www.europarl.europa.eu/news/en/press-room/20180925IPR14307/new-rules-for-audiovisual-media-services-approved-by-parliament>>; European Parliament / Legislative Observatory, 2016/0151(COD), <<https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2016/0151%28COD%29&l=en>>.

net receipts, at a rate equal to the percentage of *Eurimages'* share in the financing of the film.<sup>20</sup> Financial support shall not exceed 17% of the total production cost of the film and shall in no event exceed € 0.5 million.

### European Convention on Cinematographic Co-Production

Within the framework of the Council of Europe, the securing of funding for the production of films is furthermore encouraged by the *Convention on Cinematographic Co-production*.<sup>21</sup> By providing a platform to make cinematographic co-productions more systematic and easier to construct, the 1992 Convention has made it easier for entities to engage in bilateral and multilateral co-productions. Under conditions set out in the Convention such co-productions are assimilated with national films and thus entitled to the national support mechanisms granted to the latter.

A revised version of the Convention<sup>22</sup> came into force on 1 October 2017 to provide new flexibility in constructing co-productions and to reflect technological change and evolving industry practice. It is hoped this can be achieved by, for example, altering the maximum and minimum participation in co-productions and by opening up the Convention for non-European countries.<sup>23</sup>

#### 3.2.3. International co-production funds

In addition to support provided by the European Union and the Council of Europe, some supranational funding bodies have been brought into existence. These funding bodies can involve several countries (pan-European) or be aimed at non-European countries (outreach). International Co-production Funds can apply for funding through Creative Europe's *MEDIA* sub-programme.<sup>24</sup>

Notable examples of supranational funding bodies are the *Nordisk Film og TV Fond* and *Ibermedia*. The *Nordisk Film og TV Fond* supports feature fiction film, documentary and animation, as well as TV productions in the five Nordic countries. In 2017, the total amount of funding was approximately € 9.77 million, of which 77% was allocated to the production support of feature fiction film (NFTVF, 2018, p. 61). Nordic delegate producers, Nordic distributors and organisers of cultural initiatives can apply to the fund for top-up financing for a maximum of 10% of the budget. In order to be eligible for the selective production support scheme, national base funding and significant financing from at least one of the fund's partners must be confirmed. In addition, the project must be distributed in a minimum of two Nordic countries. Support is provided in the form of a loan, for which the fund is entitled to a share of the project's worldwide receipts (NFTVF, 2017, p. 7). Reimbursement starts when the project's worldwide receipts have reached an amount defined in advance.

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<sup>20</sup> Eurimages, *Regulations concerning co-production support for feature-length fiction, animation and documentary films*, January 2018, Article 7.

<sup>21</sup> European Convention on Cinematographic Co-Production, ETS no. 147.

<sup>22</sup> Council of Europe Convention on Cinematographic Co-Production (revised), CETS No. 220.

<sup>23</sup> Key changes of the revised Council of Europe Convention on Cinematographic Co-production, <<https://rm.coe.int/-the-council-of-europe-convention-on-cinematographic-co-production-rev/16808e4719>>.

<sup>24</sup> <[https://ec.europa.eu/programmes/creative-europe/media/international-coproduction-funds\\_en](https://ec.europa.eu/programmes/creative-europe/media/international-coproduction-funds_en)>

*Ibermedia* provides support for the development, co-production and distribution of Ibero-American (including Italy) projects. With a budget of around € 6.5 million, *Ibermedia* provides support to feature fiction film, documentary and animation, as well as to TV series and single works for TV. For a feature film project to become eligible for support a cultural test must be passed and financing for a share of the project must already be confirmed. Furthermore, a territorial spending obligation applies. Support is provided in the form of a loan.

### 3.3. Member State film support policies

The first section of this chapter provided a typology of support schemes and mechanisms for the financing of films in EU Member States, while Section 3.2 discussed pan-European film support policies. Shifting the focus to the national and regional level, it is observed that there are about two hundred public funding bodies in EU Member States. Up until 2014, comprehensive information on these funding bodies and their income, spend and activities was available in the European Audiovisual Observatory's KORDA database.<sup>25</sup> This database is no longer maintained or available, however, and as a result, no comprehensive, EU-wide data on national and regional support schemes is available.

For that reason, this section provides a description of support policies for the financing of film at the national and regional level in a representative set of Member States. For each of these Member States, a non-exhaustive list of currently available aid schemes and mechanisms is given, based on the typology as set out in Section 3.1. The descriptions in this section rely mainly on information available on the websites of the respective funding bodies. In addition, information retrieved from the OLFFI database has been used.<sup>26</sup> The descriptions have been submitted to the various funding bodies for verification.

To give a representative overview, respecting the differences in market size and amounts of support provided, the film policies of the following Member States are covered:

- BE – Belgium
- DE – Germany
- EE – Estonia
- ES – Spain
- FR – France
- GB – United Kingdom
- IE – Ireland
- LT – Lithuania
- LV – Latvia
- NL – The Netherlands
- PL – Poland
- SE - Sweden

Before these overviews per country, a summary is given of the most recent comprehensive EU-wide information that is available, for 2014.

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<sup>25</sup> <<http://www.intermediarte.org/lang/es/2010/05/30/korda-database-on-public-funding-for-film-and-audiovisual-works-in-europe/>>

<sup>26</sup> OLFFI database, <<https://www.olffi.com/>>.

### 3.3.1. Comprehensive overview for 2014

Kanzler & Talavera (2018) provide an overview of some key statistics on public film funding in EU Member States excluding Malta (but including a number of other European countries that are left out here). They accompany their overview with a few important caveats. First, they observe that the comparability of data is challenged by diverging definitions between and even within countries. Second, their data is not fully comprehensive and therefore aggregate data have to be considered estimates. Third, private funds, institutions and foundations as well as publicly funded banks and credit institutions are not included. Even more significant is that indirect support schemes such as fiscal incentive schemes are also excluded. In the country overviews later in this section, the major indirect support schemes are included.

**Table 3.2: Key information on film funding bodies in Member States (2014)**

Country	National/federal funds	Sub-national funds	Activity spend 2014 (mio.)	Activity spend per capita 2014
FR	2	40	€ 876	€ 13.28
DE	5	19	€ 393	€ 4.87
GB	2	8	€ 182	€ 2.83
IT	1	16	€ 107	€ 1.76
ES	1	15	€ 82	€ 1.76
AT	6	16	€ 80	€ 9.40
SE	2	19	€ 71	€ 7.36
NL	3	0	€ 63	€ 3.74
DK	1	3	€ 50	€ 8.89
BE	0	4	€ 46	€ 4.11
LU	1	0	€ 39	€ 70.95
PL	1	9	€ 30	€ 0.79
FI	2	1	€ 27	€ 4.95
IE	3	0	€ 24	€ 5.17
CZ	1	0	€ 10	€ 0.95
HU	2	0	€ 10	€ 1.01
LT	3	0	€ 10	€ 3.40
PT	1	0	€ 10	€ 0.96
HR	1	0	€ 9	€ 0.91
RO	1	0	€ 7	€ 0.35
SK	2	0	€ 7	€ 1.29
BG	1	0	€ 6	€ 0.83
EE	3	0	€ 4	€ 3.04
LV	2	1	€ 4	€ 2.00
SI	1	0	€ 3	€ 1.46
GR	1	0	€ 2	€ 0.18
CY	1	0	€ -	€ -
<b>TOTAL</b>	<b>50</b>	<b>151</b>	<b>€ 2,152</b>	<b>€ 4.20</b>

**Source:** Kanzler & Talavera (2018), Eurostat

Table 3.2 provides the number of national or federal and subnational funds per country. In all EU countries (except Malta) combined, there were 50 national or federal funds in 2014, plus 151 regional funds: 201 in total.

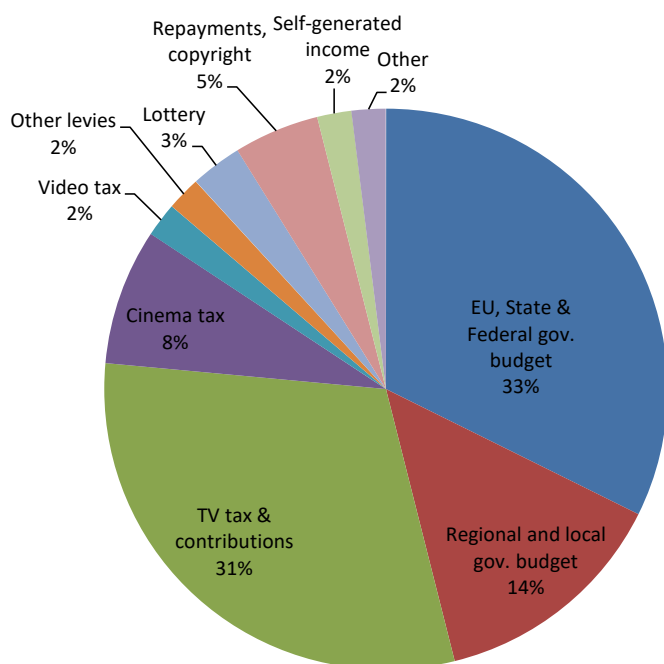
Countries in Table 3.2 are ordered by their activity spend in 2014. France spent the highest amount, followed by Germany and the United Kingdom. Together, funding bodies spent

€ 2.15 billion in 2014, which is an average of € 4.20 per capita. There are, however, substantial differences between countries: Luxembourg had the highest per capita expenditure, followed by France, Austria and Denmark.

Kanzler & Talavera (2018) also provide information on the sources of financing for the funds. This is summarised in Figure 3.1, based on averages for the years 2010-2014.<sup>27</sup> The pie chart shows that almost half of the funding originates from government budgets and about a third from TV taxes and contributions. Repayments and receipts from copyright comprise only 5% of total financing. This implies that, in financial terms, funding bodies mostly provide grants or loans that are hardly ever repaid.

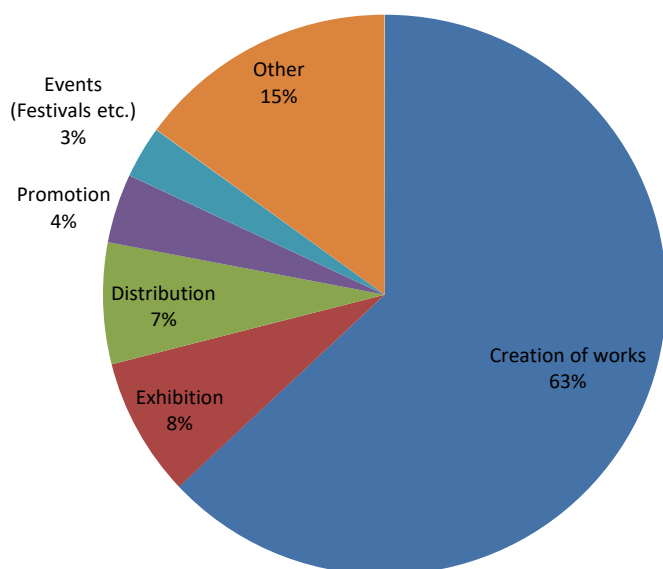
Finally, Kanzler & Talavera (2018), provide statistics on the cumulative activity spend by activity. Figure 3.2 summarises the distribution over the main categories, and shows that two-thirds was spent in the actual creation of works, while only 4% was spent on promotion.

**Figure 3.1 Sources of financing of funding bodies**



**Source:** Kanzler & Talavera (2018)

<sup>27</sup> The breakdown in this chart includes € 147 million spent in six non-EU countries in Europe, most notably Norway (€ 65 million) and Switzerland (€ 63 million).

**Figure 3.2 Activity spend by funding bodies**


**Source:** Kanzler & Talavera (2018). 'Other' includes money spent on training, structural funding, audience development, film archives/heritage, media literacy, video games and multimedia.

### 3.3.2. Baltic States

	EE-Estonia		LT-Lithuania		LV-Latvia	
	2016	2017	2016	2017	2016	2017
Population (in millions)	1.316	1.316	2.889	2.848	1.969	1.950
Admissions (in millions)	3.3	3.5	3.7	4.1	2.5	2.5
Market share national films	10.5%	8.0%	19.0%	21.4%	7.4%	7.8%
Gross Box Office (in € millions)	17.67	19.40	17.72	20.20	12.21	12.86
National funding bodies	2		1		2	
Subnational funding bodies	2		0		0	
Co-production agreements	6		1		1	
Number of feature films produced (100% National / maj. co-prod. / min. co-prod. / documentary)	20 (7 / 2 / 3 / 8)	18 (3 / 3 / 5 / 7)	13 (6 / 4 / 0 / 1)	11 (8 / 2 / 1 / 2)	20 (3 / 2 / 1 / 14)	20 (2 / 2 / 3 / 13)
Feature films produced per million inhabitants	15.20	13.68	4.50	3.86	10.16	10.26
Minimum share of EU Works in VOD catalogues	No minimum share obligation		50%		No minimum share obligation	

**Source:** Eurostat, EAO (2018a/2018b), Marché du Film & OLFFI (2018), Baltic Films (2018)



## Direct public support

The public support scheme for film culture in **Estonia** as approved by the European Commission runs until December 2018 and is carried out by two agencies.<sup>28</sup> All the funds used to grant aid under the scheme are derived from the State budget. The support granted under the scheme, which is financed mainly by the Ministry of Culture, was € 12.5 million in 2017, which comes down to € 9.48 per capita (Baltic Films, 2018, p. 2). For 2018, the overall budget of the scheme is estimated at € 11 million.

The *Eesti Filmi Instituut* or *EFI* (*Estonian Film Institute*) is the main grantor of aid to the financing of films. The institute provides script and development support as well as production support. Furthermore, support is provided for distribution, training, events and activities, and film-related research work and digitalising. In 2017, the budget of the fund amounted to € 9.6 million, of which € 6.4 million or 67% was allocated to production support. Production support is available for the production of a full-length feature film (65 minutes or longer), short film, documentary film or animation film. Applications are assessed from an artistic, cultural and viability point of view. The recipient of the support is required to spend at least 50% of the allocated support on economic activity in Estonia. In the case of a minority co-production, the percentage of allocated support required to be spent on economic activity in Estonia is 100%. Support is provided in the form of a grant.

Public support in Estonia is furthermore provided directly by the Ministry of Culture and the *Eesti Kultuurkapitali*, an Estonian cultural endowment fund which also provides support for filmmaking in Estonia. It derives over half of its income from a tax on gambling, while the remaining income is chiefly sourced from a tax on alcohol and tobacco (Newman-Baudais, 2011, p. 29).

In **Lithuania** the *Lietuvos Kino Centras* or *LKC* (*Lithuanian Film Centre*) is the funding body on the national level responsible for the provision of public support to the film industry. Besides allocating support, the *LKC* also initiates and implements its own film promotion activities and film education activities, as well as film heritage restoration and digitisation activities. In 2017, the fund's budget constituted € 4.62 million, which comes down to € 1.62 per capita (Baltic Films, 2018, p. 4). Of this amount, € 3.51 million, or 76%, was allocated to support for film production. The budget for 2018 is € 6.42 million, of which € 4.12 million will be allocated to production support.

The *LKC* provides support for the development, production, promotion and distribution of audiovisual works. This includes support for feature-length fiction films, documentary and animation as well as for interactive projects and short films. The maximum amount of production support for a full-length feature film is € 725,000, which is provided in the form of a grant. Submitted projects are subject to a cultural test and to assessments of the project's quality and originality and the track records of the director and producer. Not more than 20% of state funding allocated to film production may be used outside Lithuania. In the case of a co-production in which the Lithuanian company acts as the minority co-producer, 100% of the financial grant should be spent in Lithuania.

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<sup>28</sup> Commission Decision SA.37526 (2013/N) – Estonia - Support of the audiovisual sector in Estonia

State support for the film industry in **Latvia** is provided by the *Nacionālais Kino Centrs* or *NKC (National Film Centre of Latvia)* and the Culture Capital Foundation. The support granted by these institutions totalled € 10.5 million in 2017, which comes down to € 5.36 per capita (Baltic Films, 2018, p. 3). For 2018, the overall budget of the scheme is estimated at € 6.2 million.

The *NKC*, which is a state agency under the responsibility of the Ministry of Culture, implements the State's cultural policy in the field of film and administers the State budget intended for the film industry. It provides support to the development and production of feature fiction films, documentary and animation, as well as to short films. Eligibility requirements for production support include, among other things, the passing of a cultural test and a minimum territorial spending obligation of 65% with regards to the financing granted. Support is provided in the form of a grant.

### Indirect public support

Since 2016, **Estonia** has run an incentive scheme in the form of a cash rebate. The scheme, under a minimum budget requirement, provides support to the production and post-production of feature films, documentary and animation as well as to animation series and high-end TV drama. The level of support granted is determined by the amount of the Estonian production costs that are both eligible and directly spent on parties that are subject to Estonian taxation, multiplied by 20%, 25% or 30%.

In addition to the rebate mechanism at the national level, two regional film funds (*Viru Film Fund* and *Tartu Film Fund*) have recently been set up to offer rebates for eligible expenditure incurred in the respective areas.

Unlike the other Baltic States, **Lithuania** does not offer an incentive scheme in the form of a rebate. To encourage and facilitate private investment in the production of films, the Lithuanian government in January 2014 introduced the Lithuanian Film Tax Incentive, which is administered by the Lithuanian Film Centre. Under the scheme, a tax shelter of up to 20% of qualifying expenses is offered in the form of a reduced corporate income tax to local investors. The incentive is available for the production of feature films, TV dramas, documentary and animated films under the conditions of a cultural test and minimum local spending of at least 80% of eligible film production costs. The total amount of eligible spend in Lithuania has to be no less than € 43,000. Finally, at least three days of shooting have to take place in the Republic of Lithuania.

In operation since 2013, **Latvia** through the Latvian Co-Financing Fund offers a cash rebate up to 25% on eligible expenses to feature films, animations and documentary, which are fully or partly shot in Latvia. To be eligible for support under the scheme, a feature film or animation must have a total budget of at least € 711,436 and the production company must have access to at least 50% of the total film production costs on the date of the submission of the project. In 2018 an amount of € 2 million is available for support through the scheme. In addition, under the Riga City Council Financing Programme, a rebate is offered to projects with the storyline set in Riga or with a noteworthy (at least 20% screen time) portrayal of Riga in the story.

## Investment obligations for broadcasters and other players in the audiovisual value chain

**Estonia** and **Lithuania** lack a legal obligation for broadcasters and other parties to invest in film and audiovisual content.

In **Latvia**, the public service broadcaster *Latvijas Televīzija* is legally required to enter into an agreement with the national funding body to lay down a procedure under which it has a duty to allocate a share of its budget to the co-production and procurement of national films.

None of the Baltic States legally requires on-demand audiovisual media services to make financial contributions to film and audiovisual content (Cabrera Blázquez et al., 2016, pp. 52, 60 & 62).

### Trends and Developments

In **Estonia**, the Government is looking into an option to introduce into law a levy obligation for cinemas, broadcasters and providers of VOD services.<sup>29</sup>

An adjustment of the tax incentive scheme for film production in **Lithuania** for the period 2019-2023 is set to be adopted by the Lithuanian Parliament in December 2018. Under the adjusted scheme, the current rate of up to 20% of qualifying expenses will be increased to 30%.

### 3.3.3. BE – Belgium

	2016	2017
Population (in millions)	11.311	11.352
Admissions (in millions)	19.4	19.6
Market share national films	9.6%	8.4%
GBO (in € millions)	156.2	161
National funding bodies	0	
Subnational funding bodies	5	
Co-production agreements	12	
Number of feature films produced (100% National / maj. co-prod. / min. co-prod. / documentary)	82 (16 / 21 / 28 / 17)	89 (14 / 22 / 38 / 15)
Feature films produced per million inhabitants	7.25	7.84
Minimum share of EU Works in VOD catalogues	No minimum share obligation	

**Source:** Eurostat, EAO (2018a/2018b), Marché du Film & OLFFI (2018)

### Subnational level direct public support

Direct public support for the financing of films through funding bodies in Belgium is divided along the lines of the regional administrative levels. Each of the three regions – Flanders, Wallonia and the Brussels-Capital Region – has its own regional funding body administering the public support for films. For each region, a distinction can be made between economic funds, which allot funding through a selective system based on economic criteria, and cultural funds, where the funds are awarded through a selective system based mainly on cultural criteria.

<sup>29</sup> This development was mentioned to the researchers by a representative of the Estonian Film Institute.

In the Flanders region, the funding body responsible for the administration of support based on cultural criteria is the *VAF/Film Fund*, a subdivision of the *Vlaams Audiovisueel Fonds* or *VAF (Flanders Audiovisual Fund)*. The *VAF/Film Fund* receives an annual grant from the Flemish Government, which constitutes 100% of the funding body's income. In 2017, the support provided by the funding body amounted to € 18.6 million, of which € 11.7 million was allocated to production support (VAF, 2018a, p. 13). Support is provided by the fund to feature-length fiction films, documentaries, animations and experimental films as well as to medium-length and short films. The fund provides support in the scriptwriting and development phase as well as in the production phase of a project. Selective support for the production phase of a feature-length fiction film is capped at € 750,000 per project. For applications concerning foreign films, financing must be completed for at least 50% or there must be a production support commitment from the lead territory's selective film fund. Production support is provided in the form of a loan, which is recoupable from the net receipts (VAF, 2018b, article 10). Repayments are conditional and due only if and when earnings are received. The repayment obligation is proportional to the VAF's share in the total finance plan of the project and exists only once the producer's own contribution has been recouped. Additional support by the *VAF/Film Fund* is provided in the form of the so-called *impulspremie*, which operates as a revolving mechanism earmarking recouped funds for new productions by the same production company. VAF also provides premiums for screenwriters, directors and producers whose films were a success on an international level and for screenwriters and directors whose films reached over 125,000 viewers in Belgian movie theatres. All these *impulspremies* are to be invested in new productions.

Support based on economic criteria in the Flanders region is administered by *Screen Flanders*, which provides support to feature fiction films, documentary and animation, as well as to TV series and single works. The amount of support granted is dependent mainly on a territorial spending obligation and capped at € 400,000 per project. The aid is granted in the form of advances repayable on net receipts. Repayments are conditional and due only if and when earnings are received. The support provided amounted to € 4.5 million in 2017 (VAF, 2018a, p. 76).

In the Fédération Wallonie-Bruxelles, the *Centre du Cinéma et de l'Audiovisuel* or *CCA (Film and Audiovisual Centre)* administers film support based on cultural criteria. The *CCA* is in large part financed by a grant from the Wallonia-Brussels Federation. A significantly smaller share – approximately 4% – of the funding body's income is derived from recoupment. In 2017, the funding body's budget totalled an approximate € 25 million, of which € 9.5 million was allocated to the support of film (CCA, 2018, p. 9). The funding body provides support to feature fiction film, documentary and animation, as well as to short films, film intended for TV and TV series. In the realm of features, support is provided to all stages of the creation trajectory, from scriptwriting to distribution. A 100% territorial spending obligation applies and a cultural test must be passed. For the production of a feature fiction film, support is provided in the form of a loan, with a maximum amount of € 430,000 per project (FWB, 2018, article 8). A separate scheme is available to minority co-productions, in which case 30% of the financing must be confirmed before submitting.

Support based on economic criteria in the Wallonia region is administered by *Wallimage*, which provides support to feature fiction, documentary and animation, but also to TV series and new media. *Wallimage* has an annual budget of € 5 million, which it grants to projects with confirmed financing, under a minimum territorial spending obligation of € 300,000,

representing a minimum of 150% of the requested support amount (Wallimage, 2016). Projects must pass a cultural test and the support is capped at € 500,000 per project. The fund's investment is granted in two parts which take the form of a loan with interest for up to 50% of the investment, and a contribution of capital for at least 50% of the investment, giving *Wallimage* co-ownership of the tangible and intangible rights to the audiovisual work funded and a share in the takings it generates.

In the absence of a funding body providing support on cultural selection criteria, *Screen.Brussels* provides support on economic selection criteria for the Brussels-Capital region. The fund, allocating a budget of € 3 million per year, is open for application to feature film (fiction/documentary/animation), TV series and new media projects. *Screen.Brussels* provides support in the form of a loan under a territorial spending obligation of 150% of the support granted. The fund subsequently participates in the project as co-producer. For feature film, 40% of the financing of the project must already be confirmed.

### **Indirect public support**

Since 2003, Belgium has had an incentive scheme in place at the national level in the form of a tax shelter, aiming to unlock the investment of private capital in the production of films.<sup>30</sup> The scheme, which is administered by the Belgian Ministry of Finance, is available to Belgian productions as well as to international co-productions with Belgium that meet certain criteria. The scheme is open for investments in audiovisual productions in the broadest sense: feature films, documentary and animation, as well as high-end TV series, single works for TV and short films. Upon the signing of a framework agreement between the investor and the producer, and after the issuance of a certificate by the Ministry, a tax benefit of up to 42% can be provided to the investor under the scheme. Further requirements relate mainly to which production and exploitation expenses qualify under the scheme and to the tax value of the certificate as issued by the Ministry.

### **Investment obligations for broadcasters and other players in the audiovisual value chain**

The Flemish government concludes multi-annual management agreements with the *Vlaamse Radio- en Televisieomroeporganisatie (VRT)*, the Flemish public broadcaster, determining that the VRT must participate in independent Flemish audiovisual productions, e.g., feature films, TV drama and documentary.<sup>31</sup> In addition, other providers of audiovisual services are required by law to invest either directly or indirectly in the production of audiovisual works.<sup>32</sup> There is currently no obligation in the Flemish community for providers of on-demand audiovisual media services to invest in film and audiovisual content.

In the French-speaking community, both broadcasters and providers of on-demand services are obliged to contribute between 1.4 and 2.2% of their annual turnover to the production of audiovisual works (Cabrera Blázquez et al., 2016, p. 50). This contribution can take the form of a co-production or the pre-purchase of audiovisual works. This contribution can also take the form of a contribution paid to the CCA. The amounts of direct investments for public broadcaster *Radio-Télévision Belge de la Fédération Wallonie-Bruxelles (RTBF)* are

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<sup>30</sup> <https://www.belgiumfilm.be/film-financing/tax-shelter>

<sup>31</sup> Management agreement 2016-2020 between the Flemish Community and the VRT.

<sup>32</sup> Decree on radio broadcasting and television of 27 March 2009, article 184/1

defined within a multi-annual management agreement with the government, the latest being concluded for the period 2013-2017.

### Trends and developments

In anticipation of the revision of the Audiovisual Media Services Directive, in autumn 2018 the Flemish government was on the brink of introducing an obligation for on-demand service providers to invest directly or indirectly 2% of their annual revenue in the production of Flemish audiovisual works.<sup>33</sup>

In the French-speaking community, a management agreement between RTBF and the government for the period 2018-2022 is currently being negotiated.<sup>34</sup>

#### 3.3.4. DE – Germany

	2016	2017
Population (in millions)	82.176	82.522
Admissions (in millions)	121.1	122.3
Market share national films	22.7%	23.9%
GBO (in € millions)	1023.0	1056.1
National funding bodies		3
Subnational funding bodies		16
Co-production agreements		24
Number of feature films produced (100% National / maj. co-prod. / min. co-prod. / documentary)	256 (82 / 41 / 43 / 90)	247 (80 / 27 / 34 / 106)
Feature films produced per million inhabitants	3.12	2.99
Minimum share of EU Works in VOD catalogues	No minimum share obligation	

Source: Eurostat, EAO (2018a/2018b), Marché du Film & OLFFI (2018)

State film support in Germany is organised on federal, regional and local levels. In 2017, support at the national and subnational levels – including incentive schemes – totalled € 338.04 million, which comes down to € 4.10 per capita (FFA, 2018, p. 11).

#### National level direct public support

The *Filmförderungsgesetz* or *FFG* (Film Support Act) is the legal basis for the provision of film support on a federal level in Germany. Under this act the *Filmförderungsanstalt* or *FFA* (German Federal Film Board) is the main funding body at the federal level. Pursuant to the Film Support Act, financing for the *FFA* is provided through a film levy, obligating companies that exploit feature films to pay a legally binding proportion of their revenues to the funding body. This obligation applies to cinemas, video distributors and VOD operators as well as to public and private broadcasters. In 2017, the *FFA* was allocated a budget of € 76.92 million (or € 0.93 cents per capita), of which € 31.1 million was earmarked for feature film funding, including documentary (German Films, 2017, p. 6).

The *FFA* provides support to feature films – including fiction, documentary and animation – and short films at all stages of production and exploitation: from script development through production to distribution, sales and video distribution. Further support is made available for the funding of cinemas or the preservation of the film heritage. Moreover,

<sup>33</sup> Decree amending various provisions of the Decree of 27 March 2009 concerning radio broadcasting and television, 29 June 2018, article 157.

<sup>34</sup> <[https://www.rtbef.be/info/belgique/detail\\_contrat-de-gestion-de-la-rtbf-divise-le-parlement-de-la-federation-ne-pesera-pas-sur-le-futur-contrat-de-gestion?id=9812950](https://www.rtbef.be/info/belgique/detail_contrat-de-gestion-de-la-rtbf-divise-le-parlement-de-la-federation-ne-pesera-pas-sur-le-futur-contrat-de-gestion?id=9812950)>.

specific aid schemes are available for German-French co-productions as well as for the development of German-Italian co-productions.<sup>35, 36</sup>

In the context of production, the *FFA* provides two support mechanisms. Both schemes are open for applications to German producers or producers located in Germany for German film projects and international co-productions with a running time of at least 79 minutes. A cultural test applies and the final version of the film should be either produced or dubbed in German. Moreover, there are certain holdout periods that need to be observed after the theatrical release of a subsidised film in Germany (Paragraph 53, *Filmförderungsgesetz 2017*). Under the first support mechanism, funding is provided through a selective, project-based scheme, where a selection commission has to be convinced of the ways in which a project enhances the quality and profitability of German film. Additional requirements include the own contribution of 5% of the budget by the producer. Project funding is granted in the form of an interest-free, limited recourse loan of up to € 1 million. The amount granted must be repaid once the producer's proceeds from the exploitation of the film exceed 5% of the accredited production costs, with 50% of such proceeds to be used for repayment. If the producer provides more than 5% of the budget, more favourable repayment terms may be agreed with the *FFA*. The repayment obligation terminates ten years after theatrical release. In 2017 a total amount of € 13.79 million was provided by the *FFA* for project-based support (*FFA, 2017, p. 4*).

Secondly, the *FFA* provides so-called 'reference film funding', which functions as a retroactive support measure to production companies for success in admissions, film awards and at festivals. Based on the total number of reference points, which are calculated from the cinema tickets sold domestically and the success at nationally and internationally significant film festivals and awards, funding is provided in the form of a grant. The grant must be used within three years of the award for the production or release of new productions. The *FFA* may grant up to € 2 million per project as reference funding.

Further, the *FFA* as of December 2015 also administers a funding programme of the Federal Ministry for Economic Affairs and Energy, the *German Motion Picture Fund* or *GMPF*. With an annual budget of € 10 million, *GMPF* accepts applications for production funding of internationally co-produced theatrical film and of high-end TV series. The concept is designed to promote Germany as a filmmaking centre, in particular in comparison with other European countries. The Federal Government uses the *GMPF* in order to provide funding for innovative serial formats and digital filmmaking, with a special focus on promoting innovation (*German Films, 2017, p. 7*). Applicants must pass a cultural test and the total production cost in the case of an application for a film project must be at least € 25 million of which at least 40% must be spent in Germany. Support is provided in the form of a grant.

In addition, the *Beauftragte der Bundesregierung für Kultur und Medien* or *BKM* (Federal Government Commissioner for Culture and the Media) also provides direct support to the film industry. Under this programme, selective aid is provided to feature films,

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<sup>35</sup> FFA German-French Co-Productions, <<https://www.ffa.de/german-french-co-productions.html>>.

<sup>36</sup> FFA German-Italien Co-Production Fund, <<https://www.ffa.de/german-italien-co-production-development-fonds.html>>.

documentary and animation, as well as to short films, via several grant schemes and prizes. In 2017, the *BKM* provided support totalling € 90.21 million.

### **Subnational level direct public support**

On the lower administrative levels, a significant amount of support for the film industry is provided by regional funding bodies (German Films, 2017, p. 6). Almost all of Germany's *länder* have their own funding institutions, with some of the larger ones being *Film- und medienstiftung NRW (North Rhine-Westphalia)*, *Medienboard Berlin-Brandenburg* and *Filmfernsehfonds Bayern/Bavaria*. In 2017, the combined budget of the eight largest regional funding bodies amounted to € 161.31 million (German Films, 2017, p. 7). Support is usually granted solely to German co-produced projects and under a territorial spending obligation. A project's promised cultural and economic regional effects are in most cases important selection criteria. Financial support as provided by these bodies usually takes the form of a loan that has to be repaid out of any producer's profit. The overall repayment rate, however, is assumed to be below 10% (Bomnüter, 2018, p. 301).

### **Indirect public support**

Established in 2007, the *Deutscher Filmförderfonds* or *DFFF* (German Federal Film Fund) is an indirect public support measure of the Federal Government Commissioner for Culture and the Media (*BKM*) to strengthen the film industry in Germany. The *BKM* has tasked the *FFA* with the implementation and administration of the measure. Its annual budget for 2017 is € 50 million.

The scheme is open to both national and co-produced feature length film, documentary and animation intended for theatrical release. At least one final version of the film has to be in the German language; a dubbed or subtitled version will meet this requirement. In the case of a feature film, a minimum budget of € 1 million is required and at least 25% of the budget must be spent in Germany. Further, a cultural test applies and windowing requirements must be taken into account. Support is provided in the form of a rebate, usually amounting to 20% of the qualifying German spend. In most cases funding is disbursed upon completion of production.

An additional incentive mechanism has been introduced under the name *DFFF II*, aimed specifically at production service providers such as production studios or visual effects service providers with responsibility for commissioned films or film sequences.

### **Investment obligations for broadcasters and other players in the audiovisual value chain**

In addition to the film levy, which – pursuant to the German Film Law – obliges cinemas, video distributors and VOD operators and broadcasters to contribute to the *FFA*, Germany also has a direct investment obligation for its public service media to invest in the film industry. This obligation is laid down in an agreement between the broadcasters and the *FFA*.

In 2016, Germany expanded the obligation to contribute to the *FFA* to VOD service providers located outside Germany. VOD service providers not established in Germany will be subject to the film levy in respect of income that they derive from selling services on German language websites to customers in Germany – provided that these transactions are not subject to any comparable financial contribution to the promotion of cinematographic



works by a film funding institution in the service's country of origin (Cabrera Blázquez et al., 2016, p. 52).

### Trends and developments

The latest amendment of the *Filmförderungsgesetz* (Film Support Act) entered into force on 1 January 2017 and is valid for five years. Under the revised FFG, film subsidies will be concentrated on fewer films, focusing on films with a greater chance of success (Beckendorf, 2017).

A significant budget increase took place in 2018 in the context of the *Deutscher Filmförderfonds* (DFFF), with the budget being raised from € 75 million to € 125 million, an increase of almost 67% (Bomnüter, 2018). The increased budget is likely to be spent on DFFF II, the mechanism aimed at international and visual effects heavy productions.

#### 3.3.5. ES – Spain

	2016	2017
Population (in millions)	46.440	46.527
Admissions (in millions)	102.0	100.2
Market share national films	18.5%	17.0%
GBO (in € millions)	602.4	598.9
National funding bodies		1
Subnational funding bodies		5
Co-production agreements		20
Number of feature films produced (100% National / maj. co-prod. / min. co-prod. / documentary)	254 (98 / 23 / 13 / 130)	247 (15 / 80 / 32 / 120)
Feature films produced per million inhabitants	5.47	5.31
Minimum share of EU Works in VOD catalogues		30%

Source: Eurostat, EAO (2018a/2018b), Marché du Film & OLFFI (2018)

#### National level direct public support

Direct public support to the film industry on the national level in Spain is administered by the *Instituto de la Cinematografía y de las Artes Audiovisuales* or *ICAA* (The Ministry of Culture's *Film and Audiovisual Arts Institute*). An autonomous body within the Ministry of Culture, the *ICAA* is exclusively financed from government funds. In 2017, the amount of support provided by the fund totalled approximately € 71.68 million, which comes down to € 1.54 per capita (*ICAA*, 2018, p. 46).

The *ICAA* is tasked with providing support to Spain's cinematographic and audiovisual activities in its three facets: production, distribution and viewing. The *ICAA* provides support to the production of feature fiction film, animation and documentary, as well as to short films, predominantly through two separate schemes. In 2017, the amount of support provided through the schemes totalled around € 35 million. Eligibility for each of the schemes requires the passing of a cultural test. Under the first scheme, which is of a general nature based on a points system, selective support of up to € 1.4 million is provided in the form of a loan under a territorial spending obligation. Under the second scheme, support is provided through a selective system to projects of particular cinematographic, cultural or social value or in which new producers are involved. Again, a territorial spending obligation is included. In addition, financing for the project must in part be confirmed. Other than under the general scheme, support is provided in the form of a grant of up to € 0.5 million.

In addition to these schemes, € 32.4 million was allocated in 2017 through a scheme for production funding for movies released in theatres, which provides *ex post* support, based on a minimum number of box office tickets sold. This scheme will cease to exist in 2019.

### **Subnational level direct public support**

Besides direct public support provided at the national level, several regional level funding bodies also offer direct financial aid to the film industry in Spain, for example at the level of autonomous communities or at the municipal level.<sup>37</sup> Support by these funding bodies is usually provided under a regional spending obligation or minimum number of shooting days in the region.

### **Indirect public support**

Two separate incentive mechanisms in the form of a tax credit for foreign and Spanish productions respectively provide indirect public support for the film industry in Spain.<sup>38</sup>

Under the scheme open to foreign films and television series a production company is entitled to tax relief of 20% of the costs incurred in the Spanish territory, provided that the eligible costs equal at least € 1 million. The amount of this tax relief may not exceed € 2.5 million per production. Under specified conditions an even higher percentage of 40 and 35% tax relief is offered to productions for which costs have been incurred in the Canary Islands and Navarre respectively.

Under the scheme open to Spanish productions and international co-productions, a producer is entitled to tax relief of 20% on the first million euros of the base deduction, and 18% on the excess over this amount, with a maximum of € 3 million per production. Eligibility is dependent on the passing of a cultural test and accompanied by a territorial spending requirement.

In order to unlock and encourage private investment in the audiovisual industry, several mutual guarantee schemes are available in Spain. *CREA SGR*, for example, as a financial non-profit entity facilitates access to credit for small and medium-sized businesses in the creative and cultural sectors.<sup>39</sup> These mutual guarantee schemes are, in turn, guaranteed by the *Compañía Española de Reafianzamiento* (CERSA) – an entity attached to the Spanish Ministry of Economy, Industry and Competitiveness – which has signed a guarantee agreement with the *European Investment Fund (EIF)* to participate as one of the financial intermediaries under *Creative Europe's Cultural and Creative Sectors Guarantee Facility*.

### **Investment obligations for broadcasters and other players in the audiovisual value chain**

In Spain, all providers of television media services with State or Autonomous Community coverage, including on-demand service providers, are required by law to make a contribution of 5% of the annual revenue of the previous year to the funding of cinematographic films, films and series made for television, documentaries and animated

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<sup>37</sup> <<http://www.shootinginspain.info/en/production-grants>>.

<sup>38</sup> <<http://www.mecd.gob.es/cultura-mecd/en/areas-cultura/cine/industria-cine/coproducir-espa/incentivos-fiscales.html>>/

<sup>39</sup> <<http://creasgr.com/>>

films and series (Cabrera Blázquez et al., 2016, p. 53). This contribution is 6% for public service audiovisual media providers with State or Autonomous Community coverage. The funding of these audiovisual works may take the form of direct participation in their production or acquisition of the rights to exploit such works. Of the contribution, 60% (75% for a PSB) must be allocated to cinematographic film.

### Trends and developments

In 2016, audiovisual services providers invested a total of 269.12 million euros in European audiovisual works, which marked an increase of almost 50% over the previous year (Spanish Film Commission, 2018). The increase was ascribed mainly to an increase in investments in TV series during the year.

#### 3.3.6. FR – France

	2016	2017
Population (in millions)	66.730	66.989
Admissions (in millions)	213.1	209.4
Market share national films	35.8%	37.4%
GBO (in € billions)	1.39	1.38
National funding bodies		2
Subnational funding bodies		24
Co-production agreements		56
Number of feature films produced (100% National / maj. co-prod. / min. co-prod. / documentary)	283 (125 / 55 / 59 / 44)	300 (147 / 38 / 72 / 43)
Feature films produced per million inhabitants	4.24	4.48
Minimum share of EU Works in VOD catalogues	60% EU (40% FR)	

Source: Eurostat, EAO (2018a/2018b), Marché du Film & OLFFI (2018)

#### National level direct public support

France is known for its extensive and complex film aid mechanisms, arguably making up one of the systems most supportive of the national cinema industry in Europe (Messerlin & Vanderschelden, 2018). The main funding body operating at the national level in France is *Le Centre national du cinéma et de l'image animée* or *CNC (National Centre for Cinema and the Moving Image)*. The CNC is a government agency, under the authority of the Ministry of Culture. The funding body is financed mainly by three taxes allocated to the CNC: a tax on movie theatre admissions (TSA), a tax on publishers and distributors of television services (TST) and a tax on video and Video-on-Demand (TSV) (CNC, 2018, pp. 208-209).

The *CNC* has a broad field of work, including regulation; support for the film, television, video, multimedia and technical industries; promotion of film and television for distribution to all audiences; and preservation and development of the national film heritage. In 2017, the amount of support provided by the fund totalled approximately € 799.3 million, of which € 371.2 million was allocated to the support of cinema (CNC, 2018, p. 207). This comes down to € 5.54 per capita spent on cinema support.

Within the field of film, *CNC* support is provided to feature-length fiction films, documentary and animations as well as to short films. Through a wide range of support schemes, the *CNC* provides support for several phases of the creation trajectory and value chain of a film project. Support can be provided for scriptwriting, development and production, as well as for distribution and exhibition. Production support is provided through both automatic and selective mechanisms. Both mechanisms are accessible only upon the passing of a cultural test and subsequent certification by the *CNC*. Of the € 371.2 million of support granted in

2017, € 86.4 million was allocated on an automatic basis to the production of film (CNC, 2018, p. 210).

Under the automatic scheme, support for the production of films is provided through a revolving mechanism, based on the film's success at the French box office, and also in video stores and TV sales. In calculating a film's success, the project's score on the cultural test (which indicates the 'Frenchness factor' of a movie) is taken into account (Film France, 2017, p. 22). The support granted is intended to be reinvested in the producer's next French-qualified project.

Under the selective scheme, support is provided to the production of feature fiction films, documentary and animation. The scheme is open to French-speaking projects only and applications are judged by a commission on cultural and artistic qualitative criteria. Support is provided in the form of an interest-free loan, repayable from the receipts of the film. The actual repayment levels, however, are estimated at around 10%. In 2017, € 47.8 million was allocated through the scheme.

Selective support is moreover provided through a mechanism dedicated to international co-productions, *Aide aux cinémas du monde*.<sup>40</sup> The scheme is open to foreign feature-length film projects from all over the world that are seeking support from French co-producers. Under a spending obligation for the French production company of at least 50%, support is provided in the form of a grant. In addition to the general mechanism for the support of international co-productions, specific aid schemes are available under a territorial spending obligation for German-French, French-Canadian, French-Portuguese, French-Greek and French-Tunisian co-productions (Marché du Film & OLFFI, 2018).<sup>41</sup>

Direct public support on a supranational level is provided by the *Fonds Images de la Francophonie* to the production of feature-length fiction and animation in the Francophonie.<sup>42</sup> Projects are selected through a selective mechanism and aid is provided in the form of a grant.

### **Subnational level direct public support**

In addition to the public support provided in France on the national level, direct public support is provided by a wide variety of funding bodies that operate at the lower administrative levels, for example by regions, departments and cities. Each of these funding bodies has defined its own support policy, in which cultural criteria often play a prominent role. Most of their investment goes to French-speaking movies but some are open to non-French projects (Film France, 2017, p. 24). Some of the more prominent subnational funding institutions are: *Île-de-France*, *Nouvelle-Aquitaine* & *Provence-Alpes-Cote d'Azur*.<sup>43</sup>

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<sup>40</sup> CNC, Aide aux cinémas du monde: <[https://www.cnc.fr/web/en/funds/aide-aux-cinemas-du-monde\\_190870](https://www.cnc.fr/web/en/funds/aide-aux-cinemas-du-monde_190870)>.

<sup>41</sup> Additional information about the schemes can be found here: CNC, Aides au cinéma: <<https://www.cnc.fr/professionnels/aides-et-financements/cinema>>.

<sup>42</sup> <[http://www.imagesfrancophones.org/fonds\\_francophone.php](http://www.imagesfrancophones.org/fonds_francophone.php)>.

<sup>43</sup> For a complete overview see: Ciclic, <<http://www.ciclic.fr/panorama>>.

## Indirect public support

For domestic or co-productions France offers an incentive scheme in the form of a tax credit called *credit d'impôt cinéma*.<sup>44</sup> The scheme, which is administered by the CNC, is open for cinematographic works, including fiction, documentary and animation, which qualify for automatic direct financial production support. Requirements are in place with regards to the language of the work, the location where it is carried out and its contribution to the development of French and European film creation, as well as its diversity.

Upon issuance of a prior accreditation by the CNC, the scheme can result in a reduction for a production company in payable corporate tax or the payment of the difference between the amount of corporation tax and the tax credit calculated if the latter is higher. The tax credit normally equals 30% of the total eligible expenditure and is capped at € 30 million per project.

For international productions, an incentive mechanism called *Tax Rebate for International Productions (TRIP)* was introduced in 2009.<sup>45</sup> Administered by CNC, the scheme offers a rebate of 30% on the eligible expenditure incurred in France. The mechanism is available to feature films as well as to TV works of fiction not receiving any traditional French State support. Other conditions for eligibility include a cultural test, a minimum of five shooting days in France and a minimum spend of € 250,000 of qualifying expenditure in France or at least 50% of the production budget, whichever is lowest. The incentive is capped at € 30 million per project.

Indirect support for the financing of films in France is furthermore provided by a scheme aiming to make it easier for companies active in the cultural and creative sectors to obtain bank financing. Administered by the *Institut pour le Financement du Cinéma et des Industries Culturelles (IFCIC)*, two types of debt financing are provided to such companies: loan guarantees and loans.<sup>46</sup> IFCIC guarantees take the form of a participation in risk in which IFCIC shares the final capital risk of the credit transaction with the bank. IFCIC has been selected by the *European Investment Fund (EIF)* to participate as one of the financial intermediaries under *Creative Europe's Cultural and Creative Sectors Guarantee Facility*. Since July 2017, with support of the Guarantee Facility, European TV producers (located outside of France) are also eligible for IFCIC's guarantee.

Another form of indirect support for the production of films in France is provided through the so-called *Soficas*, private funds that offer tax write-offs to investors and invest the money generated into film and television projects through the provision of interest-bearing loans (Film France, 2017, p. 23).

## Investment obligations for broadcasters and other players in the audiovisual value chain

In addition to the taxes paid to the CNC, most broadcasters in France are obliged by law to invest at least 15% of their net annual revenue directly in EU and FR language audiovisual works, either as pre-buys or by acting as co-producer. The TV channel's contribution

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<sup>44</sup> <[https://www.cnc.fr/professionnels/aides-et-financements/cinema/production/credit-dimpot-cinema\\_132769](https://www.cnc.fr/professionnels/aides-et-financements/cinema/production/credit-dimpot-cinema_132769)>.

<sup>45</sup> <<https://www.cnc.fr/web/en/tax-rebate>>.

<sup>46</sup> IFCIC, <<http://www.ifcic.eu/>>.

usually makes for more than a third of the financing of French-initiative films (CNC, 2018, p. 88).

VOD services in France are also required by law to directly devote a percentage of their net annual revenues from the previous financial year as an expenditure contribution to the development of the production of both European cinematographic works and original French-language works.<sup>47</sup>

### Trends and developments

The tax on video and VOD (TSV), used to finance the *CNC*, has recently been expanded to VOD services that are not established in France.

#### 3.3.7. GB – United Kingdom

	2016	2017
Population (in millions)	65.383	65.809
Admissions (in millions)	168.3	170.6
Market share national films	34.9%	37.4%
GBO (in GBP billions)	1.23	1.28
National funding bodies		1
Subnational funding bodies		7
Co-production agreements		13
Number of feature films produced (100% National / maj. co-prod. / min. co-prod. / documentary / Inward)	296 (151 / 9 / 15 / 56 / 63)	212 <sup>48</sup> (100 / 5 / 8 / 30 / 69)
Feature films produced per million inhabitants	4.52	3.22
Minimum share of EU Works in VOD catalogues	No minimum share obligation	

Source: Eurostat, EAO (2018a/2018b), Marché du Film & OLFFI (2018)

The most important source of public film funding in the United Kingdom is the tax relief system. Of the total funded amount of GBP 523 million (or € 610.85 million) in 2015/2016, GBP 338.4 million (or € 445.46 million) was provided through tax relief. Overall support in 2015/2016 came down to GBP 7.99 or € 9.3 per capita (BFI, 2017, p. 226).

#### National level direct public support

In the United Kingdom, direct public support to the film industry at the national level is provided by the *British Film Institute* or *BFI*. This funding body is a charity governed by a Royal Charter and provides support to film development, production, distribution, export promotion, talent development, education, skills development, audience development including film heritage and market intelligence and research. The *BFI* is responsible for the distribution of the income it is provided by the National Lottery. An additional, but smaller, source of income comes from grant-in-aid from the Department for Culture, Media and Sport. In 2015/2016, the *BFI* spent a total of GBP 82.8 million (BFI, 2017, p. 227).

In assessing film projects for selective development and production film funding, the *BFI* looks at five priorities: talent development and progression, cultural or progressive impact, risks in form and content, difference in perspective, talent and recruitment, and the

<sup>47</sup> European Audiovisual Observatory AVMSDatabase, <<http://avmsd.obs.coe.int/cgi-bin/search.php>>.

<sup>48</sup> Decline due to exclusion of film productions with budgets below GBP 500,000.

creation of work UK-wide.<sup>49</sup> Through its production support scheme, financial aid is provided for the production of feature-length fiction and animation films with a production budget between GBP 250,000 and GBP 15 million (BFI, 2018a). A film must qualify as a British film, either by passing a cultural test or through one of the UK's official co-production treaties; or through the European Convention on Co-Production. Aid provided through the fund is recoupable and provided under a completion guarantee. Some of the recouped funds may be earmarked for the benefit of the filmmakers to use for future filmmaking activities.<sup>50</sup> The *BFI* will require a proportionate share of financier net profits. Further, the BFI requires the production company to assign a share of all rights in the finished film to the *BFI*. The *BFI* holds these rights in perpetuity and licenses them back to the production company to make and exploit the film. A share of the production funding scheme's budget is allocated to international co-productions in which a UK producer acts as the minority co-producer.<sup>51</sup>

### Subnational level direct public support

In the four nations that make up the United Kingdom, additional direct public support is provided by regional level funding bodies: *Creative England*, *Creative Scotland*, *Ffilm Cymru Wales* and *Northern Ireland Screen*. Through various, mostly selective, schemes these funds provide both recoupable and non-recoupable support to audiovisual works in a broad sense and across the creation trajectory of these works. In most schemes, support is offered on the condition of the passing of a cultural test and/or confirmed financing or provable market interest. A territorial spending obligation usually applies.

Direct public support is furthermore provided by a number of other regional and local funding bodies, e.g. *Film London* and *Screen Yorkshire*.

### Indirect public support

As highlighted above, the tax relief system is the single largest source of public funding for film in the UK. The United Kingdom runs a variety of tax relief mechanisms aimed at the creative sector.<sup>52</sup> Under these mechanisms, which are administered by HM Government, a 25% payable cash rebate of UK qualifying expenditure is offered. Tax reliefs are in place for film intended for theatrical release, as well as for high-end television programmes, animation, children's television programmes and video games. Each of the relief schemes has its own set of conditions for eligibility. In the realm of film, a project must either pass a cultural test or qualify as an official co-production and must have a minimum of 10% of total core expenditure spent on UK qualifying production costs. There is no cap on the amount which can be claimed.

In addition to the tax relief system, there are two tax shelter mechanisms that aim to encourage private investment in the production of film. Not aimed solely at film production, *SEIS* (*Seed Enterprise Investment Scheme*, for lower budget projects) and *EIS* (*Enterprise*

<sup>49</sup> BFI production funding, <<https://www.bfi.org.uk/supporting-uk-film/production-development-funding/production-funding>>.

<sup>50</sup> BFI Locked Box, <<https://www.bfi.org.uk/supporting-uk-film/production-development-funding/filmmaker-benefits-bfi-locked-box>>.

<sup>51</sup> BFI international co-production funding, <<https://www.bfi.org.uk/supporting-uk-film/production-development-funding/international-co-production-funding>>.

<sup>52</sup> <<https://www.bfi.org.uk/film-industry/british-certification-tax-relief/about-tax-relief>>.

*Investment Scheme*, for a larger budget in excess of GBP 150,000), offer investors tax relief of 50% and 30% respectively.

### Investment obligations for broadcasters and other players in the audiovisual value chain

In the UK, the film production arms of the two main public service broadcasters, the BBC (BBC Films) and Channel 4 (Film4) are important sources of public funding. Alongside the Charter establishing the BBC, a framework agreement with the Secretary of State for Digital, Culture, Media and Sport obliges the BBC to allocate a share of the funding it receives to the production and promotion of film.

At present, the United Kingdom does not have an obligation for providers of on-demand services to provide financial support to the national film and television industry in the form of mandatory investments.

### Trends and developments

As part of its strategic plan for the period 2017-2022, the *BFI* made a commitment to look more deeply at the UK independent film sector (BFI, 2016). The Commission's report for the *BFI* sets out proposals and recommendations to both industry and the Government to enable UK independent film to grow and achieve greater success. Under these recommendations, the Government is advised to broaden and maximise the tax relief system and to secure the UK's continued participation in the successor programme to Creative Europe after Brexit, in return for appropriate funding, to ensure the UK continues to access the substantial benefits that membership of the programme brings.

#### 3.3.8. IE – Ireland

	2016	2017
Population (in millions)	4.726	4.784
Admissions (in millions)	15.8	16.1
Market share national films	4.3%	2.4%
GBO (in € millions)	108.9	114.0
National funding bodies		1
Subnational funding bodies		0
Co-production agreements		5
Number of feature films produced (100% National / maj. co-prod. / min. co-prod. / documentary)	29 (6 / 10 / 4 / 9)	N/A
Feature films produced per million inhabitants	6.13	N/A
Minimum share of EU Works in VOD catalogues	No minimum share obligation	

Source: Eurostat, EAO (2018a/2018b), Marché du Film & OLFFI (2018)

### National level direct public support

*Fís Éireann/Screen Ireland (FÉ/SI)* is the funding body at the national level in Ireland responsible for direct support across the film, television and animation sectors. Support is provided to feature fiction film, documentary and animation, as well as to TV series and single works and short films. For each of these types of project, support can be provided for development and production as well as in the distribution phase. Income for *Screen Ireland* is provided predominantly through a grant in the State budget, which in 2017 totalled approximately € 14.1 million, or € 2.95 per capita (IFB, 2017).



In the production phase, funding for fiction feature film is provided through two separate schemes: one aimed at Irish productions and the other at co-productions in which an Irish production company acts as minority co-producer. Both schemes are of a selective nature and are provided under an extensive list of conditions (Fís Éireann/Screen Ireland, 2018). For example, financing must be confirmed (condition B), a completion bond may be required (condition C) and it is mandatory that the funding granted is fully incurred on Irish costs (condition D). Further it is worth mentioning that *FÉ/SI* under condition H requires viable theatrical windows for all projects, especially those involving support by a broadcaster. In the case of feature films, *FÉ/SI* requires a twenty-four-month theatrical window from the date of the first theatrical screening. Aid provided by *FÉ/SI* is offered in the form of a limited-recourse loan, recoverable from a share of revenues from the exploitation of the project and also entitling *FÉ/SI* to a share of net profits.

### **Indirect public support**

As one of the first countries in Europe, Ireland in 1997 introduced an indirect public support measure, in the form of a fiscal incentive mechanism, in Section 481 of the Taxes Consolidation Act. The scheme, which was changed from a tax shelter to its current form in January 2015, entails a tax credit with a rate of up to 32% of the lower of all eligible expenditure, 80% of the total cost of production or € 70 million.<sup>53</sup> The scheme, which operates without an annual cap or limit on the total funding of the programme, is open for investment in feature films (fiction, documentary and animation), as well as in TV series and single works for TV. The scheme is available to production companies in the film and film production industry provided certain conditions, as laid out in statute and regulations, and as specified in the film certificate, are met. Broadcasters are excluded from availing themselves of Section 481. Among the conditions are a cultural test, a minimum amount of local spending and a minimum number of shooting days. In 2016 a total of 76 projects availed themselves of Section 481, of which 17 were feature films and 19 were TV dramas. This marked a growth of 13% compared to the year before.

### **Investment obligations for broadcasters and other players in the audiovisual value chain**

Ireland has no legislative or regulated commitment from the national public broadcaster to spend a minimum amount on locally produced films (Screen Producers Ireland, 2016). It is worth reiterating in this regard that in the provision of direct public support *FÉ/SI* demands viable theatrical windows for all projects, especially if a project involves financial support by a broadcaster.

On-demand audiovisual media services are required to promote the production of and access to European works. Such promotion could relate, inter alia, to the financial contribution made by such services to the production and rights acquisition of European works. This does not, however, entail an obligation for these providers to financially support the national film and television industry in the form of mandatory investments.

### **Trends and developments**

In its strategic plan for the period 2016-2020, the *Irish Film Board*, the predecessor of *Fís Éireann/Screen Ireland (FÉ/SI)*, pleaded that all options in relation to sources for increased

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<sup>53</sup> <<https://www.screenireland.ie/filming/section-481>>.

funding should be explored. This could include the deployment or redeployment of existing resources, such as public service broadcaster funding and new sources of funding through contributions from online channel delivery services (Irish Film Board, 2016, p. 14).

The Section 481 Tax Relief has recently been extended until December 2024.<sup>54</sup>

In 2015, *Screen Producers Ireland*, an association representing independent film, television, animation and digital production companies, proposed the introduction of legislation or a regulated commitment from the national public broadcaster to spend a minimum amount on locally produced films (Screen Producers Ireland, 2016, p. 2).

### 3.3.9. NL – The Netherlands

	2016	2017
Population (in millions)	16.979	17.082
Admissions (in millions)	34.2	36.0
Market share national films	12.3%	12.0%
GBO (in € millions)	287.7	301.9
National funding bodies	1	
Subnational funding bodies	1	
Co-production agreements	8	
Number of feature films produced (100% National / maj. co-prod. / min. co-prod. / documentary)	82 (19 / 10 / 21 / 32)	87 (19 / 10 / 25 / 33)
Feature films produced per million inhabitants	4.83	5.10
Minimum share of EU Works in VOD catalogues	No minimum share obligation	

Source: Eurostat, EAO (2018a/2018b), Marché du Film & OLFFI (2018)

#### Direct public support

The main funding body operating at the national level in the Netherlands is the *Nederlands Filmfonds* or *NFF* (*Netherlands Film Fund*). The funding body is tasked with encouraging Dutch film in a broad context and offers support to the development, production and distribution of feature fiction films, documentary and animation, as well as to short and experimental films. Moreover, the fund offers support to related activities such as festivals, gatherings, training, publication and research. *NFF* is fully funded by a subsidy received from the Dutch Ministry of Education, Culture and Science. In 2017, the fund supported films and activities to a total of € 54.5 million, or € 3.19 per capita (*NFF*, 2018a, p. 9). Of the support provided, roughly € 29.4 million, or 54%, has been allocated to development and production. This is excluding the support provided through the incentive mechanism, which in 2017 amounted to € 22.4 million.

Financial support is provided predominantly through the fund's *Screen NL* programme, which includes a variety of selective aid schemes. In the context of production, film commissioners can decide to contribute a maximum amount of € 500,000 to debuting film directors and € 600,000 to film directors who want to realise a second or following feature film for theatrical release. A territorial spending obligation of 100% of the support granted applies and a completion bond may be required. Support is provided in the form of a loan, which must be repaid from income obtained from the exploitation of the film production

<sup>54</sup> <<https://www.irishtimes.com/business/economy/regional-film-production-wins-new-incentive-as-tax-relief-is-extended-1.3655927>>.

(NFF, 2018b, Article 5). The *NFF* usually takes a deferred position in the scheme of recoupment and the recouped amounts are reserved through a revolving mechanism for new projects by the same producer. In addition, the *NFF* can award a so-called matching contribution to production companies that have achieved large box office success, i.e. more than 150,000 admissions, in the five years preceding a new application.

Support is furthermore provided through a scheme aimed at co-productions where the Dutch producer acts as minority co-producer. Under this scheme a territorial spending obligation also applies.

The fund runs a separate programme, *New Screen NL*, to provide support to new talent and to the development and production of low-budget fiction film, experimental film and (animated) short film.

In addition to the support provided through the *NFF*, the Dutch government also provided approximately € 13.41 million of support to other film institutions, including several film festivals and the national museum for film (NFF, 2018a, p. 56). The Dutch government also contributes to the annual budget of the *Stichting Co-productiefonds Binnenlandse Omroep* or *CoBO*, a fund which, among other things, provides support to co-productions between the public broadcaster and independent film producers. The fund's total income of € 11.2 million is furthermore derived from the collection of fees abroad for the exploitation of the Dutch public broadcaster's copyrights.

### **Subnational level direct public support**

Established in 2016, the ***Limburg Film Fund*** provides selective financial support to the production of films in the province of Limburg under a 100% territorial spending obligation and a minimum number of shooting days in the region.

### **Indirect public support**

Besides the provision of direct support, the *NFF* is also responsible for the operation of the Netherlands Film Production Incentive, which was introduced in 2014. Of the total support provided by the funding body in 2017, € 22.4 million was allocated through the incentive mechanism (NFF, 2018a, p. 9).

Under the scheme, production companies can apply for a cash rebate of up to 30% of eligible production costs that are demonstrably and directly spent on parties that are subject to Dutch taxation. A cash rebate of 35% may be obtained where at least 75% of the digital production costs of a feature film are spent on parties subject to Dutch taxation and 25% in the case of a feature-length documentary and feature-length animated film (10% is sufficient for a Dutch minority co-produced feature-length animated film). A 35% cash rebate may also be obtained if no other Dutch state aid forms part of the financing of the film production. The scheme is open to applications for feature films and feature-length animated films with a production budget of at least € 1 million and to feature length documentaries with a production budget of at least € 250,000. The maximum award is € 1.5 million per application and the maximum award per production company is € 3 million per year in total. The budget for films in 2017 as well as in 2018 is capped at € 19.25 million, of which at least 70% is for international co-productions. In 2017 a pilot was introduced which expands the scheme to high-end TV series, offering a rebate of up to 30%. The budget for TV series is capped at € 10 million.

### Investment obligations for broadcasters and other players in the audiovisual value chain

The Public Service Media *Nederlandse Publieke Omroep* or *NPO* in the Netherlands is obliged by law to allocate 16.5% of its funding to the production of European works. Based on the broadcaster's policy plan, an additional agreement is conducted between the broadcaster and the Ministry of Education, Culture and Science, determining how the budget is allocated. The production of film takes a predominant place in this budget.

In exchange for a reduced VAT rate on cinema tickets, Dutch cinemas and film distributors have obligated themselves to contribute to the production of mainstream films. Support is provided by the *Abraham Tuschinski Fonds*, to which the cinemas and distributors make a monetary contribution. The obligation is laid down in a covenant between the Dutch Ministry of Education, Culture and Science, the *Netherlands Film Fund* and trade associations of producers, exhibitors and distributors.

In the Netherlands there is currently no obligation for providers of on-demand services to support the national film and television industry in the form of mandatory investments.

### Trends and developments

In a report in early 2018, the Dutch *Raad voor Cultuur* (Council for Culture), an advisory body to the government, pleaded for the introduction of a levy obligation for on-demand services (Raad voor Cultuur, 2018).

Until the end of 2017, the *Netherlands Film Fund* operated a scheme of a semi-automatic nature, the so-called *suppletieregeling*. Under this scheme, support was provided to mainstream films that managed to attract more than 150,000 visitors. The scheme has, in part, been replaced by the selective matching contribution scheme described above. Moreover, to keep up with the loss, the contribution on the basis of the VAT covenant by the film distributors and exhibitors to the *Abraham Tuschinski Fonds* has been increased.

#### 3.3.10. PL – Poland

	2016	2017
Population (in millions)	37.967	37.973
Admissions (in millions)	52.1	56.6
Market share national films	25.0%	23.4%
GBO (in € millions)	229.8	254.7
National funding bodies	1	
Subnational funding bodies	12	
Co-production agreements	5	
Number of feature films produced (100% National / maj. co-prod. / min. co-prod. / documentary)	54 (39 / 1 / 6 / 8)	71 (36 / 6 / 13 / 16)
Feature films produced per million inhabitants	1.42	1.87
Minimum share of EU Works in VOD catalogues	20%	

Source: Eurostat, EAO (2018a/2018b), Marché du Film & OLFFI (2018)

### **National level direct public support**

Set up under the Polish Cinematography Act of 2005, the *Polski instytut sztuki filmowej* or *PISF (Polish Film Institute)* is the main funding body responsible for the provision of direct public support to films at the national level in Poland.<sup>55</sup> The funding body, which as an independent government agency acts under the authority of the Ministry of Culture, provides support to feature fiction film, documentary and animation. The funding body's revenue arises from a variety of sources, most notably cinema admission taxes and levies paid by broadcasters and operators of digital platforms and cable television.<sup>56</sup> Additional funding comes from the State budget. The total budget for 2018 amounts to a total of € 48.9 million, which comes down to € 1.29 per capita. The budget has to be allocated within four operational programmes: film production (including screenwriting, development and production); film education and dissemination of film culture; development of cinema infrastructure; and promotion of Polish film abroad.

Of the total budget, approximately € 24 million is earmarked for support for the production of films (Film Commission Poland, 2018, p. 4). Support is provided through two separate selective schemes, where eligibility depends on a creative and artistic evaluation of the project. The first scheme is open to domestic and international co-productions in which a Polish producer acts as majority co-producer. When applying for support, the producer's own contribution must amount to no less than 5% of the total expected cost of the project. A proof of market interest is also required. The maximum amount of support for a full-length feature film under the scheme is set at approximately € 950,000 and a territorial spending obligation of at least 80% applies.

Under almost identical conditions, a second scheme is available for co-productions with a Polish minority co-producer. For bilateral co-productions, the Polish contribution must be at least 20% of the total budget. For multilateral co-productions the Polish contribution must be at least 10% of the total budget. The maximum amount of support provided to a project is currently set at around € 470,000.

Under both schemes, support is provided in the form of a loan, to be reimbursed if the film makes a profit, applicable to the first six years after the film's premiere.

### **Subnational level direct public support**

In recent years, several regional film funds came into existence in Poland, with a total of twelve funds operative in 2018 (Film Commission Poland, 2018, p. 6-7). Eligibility for funding by these regional funds is in most cases dependent on the production having a link to the region and tied to an obligation to spend a percentage of the support granted within the region.

### **Indirect public support**

Unlike many other Member States, Poland does not currently provide indirect public support to the film industry through an incentive scheme. As discussed below, this is, however, likely to change in the near future.

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<sup>55</sup> Polish Act on Cinematography of 30 June 2005; <<http://en.pisf.pl/film-law>>.

<sup>56</sup> Polish Act on Cinematography of 30 June 2005, Articles 18 and 19.

## Investment obligations for broadcasters and other players in the audiovisual value chain

In addition to taxes paid to the *Polish Film Institute*, public broadcasters in Poland are also required by law to earmark at least 1.5% of their annual proceeds from subscriptions from television owners for film production purposes.<sup>57</sup>

Poland does not have an obligation for providers of on-demand services to provide financial support to the national film and television industry in the form of direct mandatory investments.

### Trends and developments

In the autumn of 2018, the Polish parliament approved legislation implementing a 30% cash rebate for qualifying productions, to be administered by the Polish Film Institute.<sup>58</sup> The scheme is expected to become operative in the first quarter of 2019. The annual budget is expected to be around € 47.6 million.

#### 3.3.11. SE – Sweden

	2016	2017
Population (in millions)	9.851	9.995
Admissions (in millions)	17.8	16.9
Market share national films	15.8%	17.2%
GBO (in € millions)	204.16	N/A
National funding bodies		1
Subnational funding bodies		4
Co-production agreements		5
Number of feature films produced (100% National / maj. co-prod. / min. co-prod. / documentary)	54 (16 / 6 / 7 / 25)	68 (18 / 7 / 13 / 30)
Feature films produced per million inhabitants	5.48	6.81
Minimum share of EU Works in VOD catalogues	No minimum share obligation	

**Source:** Eurostat, EAO (2018a/2018b), Marché du Film & OLFFI (2018)

### National level direct public support

The *Svenska Filminstitutet* (*Swedish Film Institute* or *SFI*) is the main funding body for the allocation and granting of public support to the film industry on the national level in Sweden. The Swedish Film Institute is tasked with encouraging Swedish film in a broad context. With the entry into force of a new Film Bill in January 2017, the Film Institute is solely financed by tax money from the State. The Institute in 2017 allocated a total amount of around SEK 400 million (or € 41.84 million) to the film industry. This comes down to around € 5.29 per capita. Of the total amount of support provided, SEK 315 million (or € 32.95 million), approximately 78%, has been allocated to production support.

The *Swedish Film Institute* provides support to a broad range of activities, including the production and distribution of films, and to cinemas and festivals.<sup>59</sup> Production support as provided by the *SFI* encompasses short film, documentary film, feature-length fiction film

<sup>57</sup> Polish Act on Cinematography of 30 June 2005, Article 19.7.

<sup>58</sup> <<http://en.pisf.pl/news/financial-incentives-for-audiovisual-production-in-poland>>.

<sup>59</sup> <<http://www.filminstitutet.se/en/funding/funding-from-the-swedish-film-institute/>>.

and low budget films.<sup>60</sup> In the first instance support is provided through a support scheme open for national productions or co-productions in which Sweden is the majority country. A separate scheme is run for co-productions where Sweden is the minority country. Under the selective schemes a film commissioner assesses, among other things, the project's originality and craftsmanship as well as its international potential. For Swedish minority co-productions market interest will have to be shown and a territorial spending obligation applies.

In addition to the selective support schemes, the *SFI* also operates a market support scheme, which supports high-quality films with strong box-office potential on the Swedish film market. By prioritising box-office potential among quality and other criteria, the *SFI* hopes to create predictability in the awarding of funding, which may facilitate private investment in Swedish film. Furthermore, the *SFI* provides *ex post* box-office related support in order to facilitate financing for new Swedish film.

Under all of the aforementioned schemes, the *SFI* is entitled to a repayment in the form of a share of the producer's revenue from all exploitation windows and the whole world. The repayment obligation starts when the producer's total revenue reaches 135 percent of pre-approved private equity and 100 percent on sold licences and minimum guarantees. Repayment is made with a share corresponding to the total amount of the production cost of the aid. The producer shall report all revenues to *SFI* annually. The repayment obligation ends when the aid has been repaid, but no later than five years after the film's premiere.

In 2017, funding by the *Swedish Film Institute* represented 28.7% of the average financing for feature-length fiction films with production funding (*SFI*, 2018, p. 14). Other funds (e.g. regional, international and foreign funds) represented 20.5% of the average financing.

### **Subnational level direct public support**

On the lower administrative levels, direct public support in Sweden is provided by a quartet of regional funding institutes. The provision of support by these funding bodies is usually linked to a territorial spending obligation.

### **Indirect public support**

Unlike many other countries described in this report, Sweden does not have an incentive scheme in place in the form of a rebate or tax credit. In recent years some parties, including regional funding bodies, argued for the introduction of an incentive mechanism in Sweden.<sup>61</sup>

The use of foreign (tax) incentive schemes in 2017 on average accounted for 3.2% of the financing for feature-length fiction films with production funding (*SFI*, 2018, p. 14).

### **Investment obligations for broadcasters and other players in the audiovisual value chain**

According to Swedish law, any party broadcasting television by any means other than via cable shall ensure that at least 10% of the annual broadcast time or at least 10% of the

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<sup>60</sup> <<http://www.filminstitutet.se/sv/sok-stod/filminstitutets-stod/produktionsstod/>>.

<sup>61</sup> See for example: Olsberg SPI, 2015.

programme budget is made up of programmes of European origin produced by independent producers.<sup>62</sup>

No obligation currently exists in Sweden for providers of on-demand services to financially support the national film and television industry in the form of mandatory investments.

### Trends and developments

For many years, Sweden's film funding policy and the remit of the Film Institute were based on a so-called Film Agreement between the State and various stakeholders. The latest agreement was signed in 2013. This agreement provided for increased resources and greater technological neutrality and introduced new support for drama series. The Film Agreement ended in 2016 with the entry into force of a new Film Bill on January 2017. The bill marks a significant change in Swedish film policy and places the overall responsibility for the funding of films completely on the government.

## 3.4. Discussion

As this chapter illustrates, a wide variety of support schemes and other regulations to support the financing of films exist at the pan-European level and on a Member State level. In 2014, the last year for which comprehensive data are available, direct support alone amounted to € 2.15 billion in the EU Member States, about € 4.20 per capita.

Section 3.1 presented a typology of film support policies and most of the countries that were studied in this chapter have deployed a combination of complementary policies: they provide both direct support in the form of grants and loans, which are commonly selective, and indirect support in the form of cash rebates and tax credits, which are most often automatic. Such indirect support schemes aim to encourage film producers to invest in productions and usually to spend their production budget in the local economy.

Some countries have additional schemes in place to encourage the provision of private equity or debt by other investors. In addition, broadcasters and other players in the audiovisual value chain such as VOD platforms are required in various countries to contribute financially to funds, to co-produce or to license national and European content. Combined with the schemes at the EU level, such as the *Creative Europe* programme, the *Cultural and Creative Sectors Guarantee Facility* and *Eurimages*, such policies complement each other in targeting all roles and actors in a film's finance plan. Moreover, many countries have subnational support policies to supplement the national schemes.

Various types of projects and various film-related activities (from scriptwriting to exhibition) are supported, both in a direct and in an indirect manner. The largest share of the financial support is spent on the actual *production* of films. While the direct aid schemes in general show great similarities, the specific conditions for eligibility and minutiae differ per scheme and per Member State. Some schemes mandate a theatrical release of films in the supporting country and might impose requirements on the timing of distribution windows.

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<sup>62</sup> European Audiovisual Observatory AVMSDatabase, <<http://avmsd.obs.coe.int/cgi-bin/search.php>>.

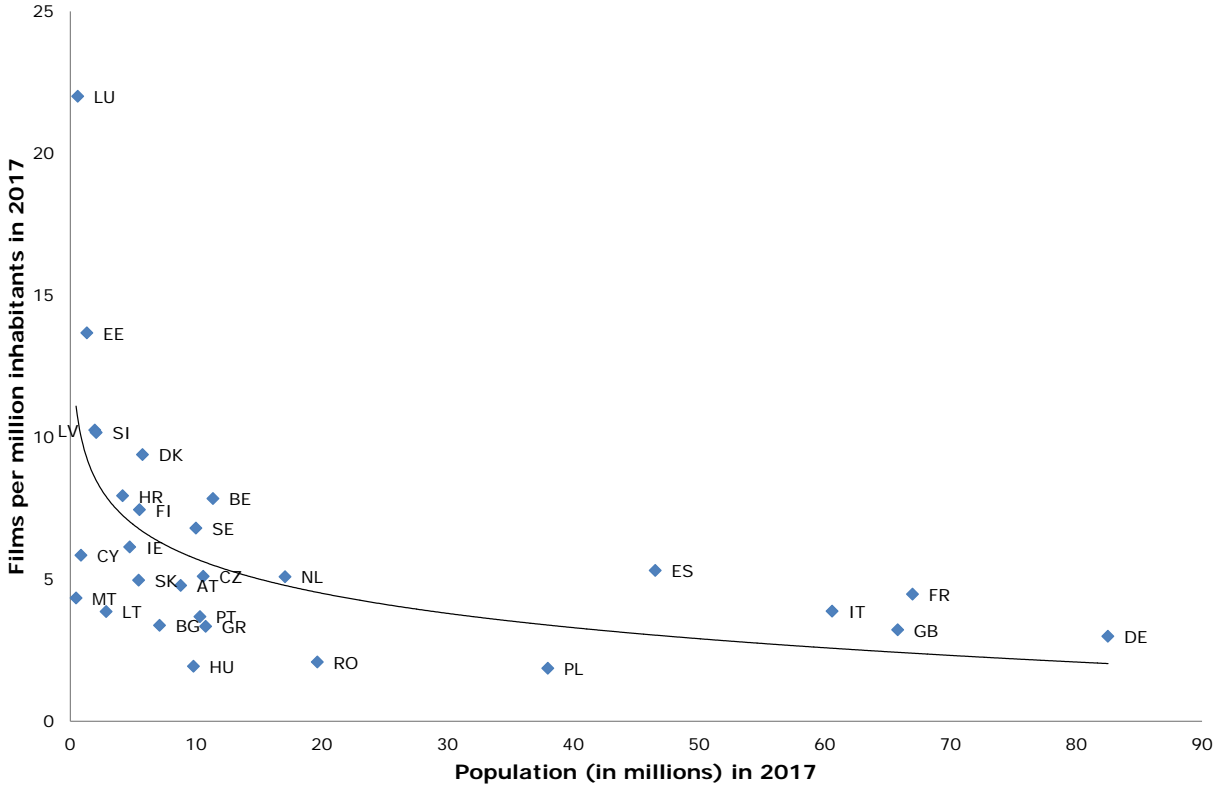


Direct support takes the form of a grant or loan. The non-commercial nature of such loans shows in the favourable conditions under which they are offered, e.g. deferred or without interest. Recoupment rates are generally low: in 2014, a mere 5% of total funding body income in the EU was derived from repayments and copyright revenues. This implies that most loans are *de facto* grants.

Over the last decades, most Member States have furthermore drawn up measures to support the film industry in an indirect manner, for example through incentive schemes to encourage production companies to invest or through schemes aiming to unlock private capital. With Poland on the verge of introducing a cash rebate scheme, Sweden remains the only important exception in this context: it has no incentive scheme. Making for an additional source of public financing, the important role that broadcasters and other audiovisual media service providers play in the financing of films is in the majority of Member States reinforced by mandatory direct or indirect investment obligations in the film industry. A growing number of Member States have expanded the applicability of the latter obligations to providers of VOD services, while other Member States – e.g. Estonia, the Netherlands, Belgium and Ireland – are currently looking into the possibility of introducing such obligations.

As observed in Chapter 2, European film production is diverse and plentiful, but relatively unsuccessful in terms of its market share in cinema admissions, TV broadcasts, international TVOD and SVOD catalogues and profitability. The wide variety of support schemes that exist have not led to a more proportional performance in terms of viewership. Contrarily, many stakeholders agree that the large number of EU films that are made each year makes it harder for each individual film to reach an audience.

**Figure 3.3 Number of films per million inhabitants decreases with population size**



Source: IViR based on Eurostat, EAO (2018b)

Figure 3.3 illustrates this, by showing that in the EU the smaller the population of a Member State, the larger the number of films produced per million inhabitants. This goes against the economies of scale that were argued to exist for films (Chapter 2), since economies of scale would suggest that larger home markets are able to sustain a proportionally larger number of films. Thus, the opposite trend in Figure 3.3 illustrates how national film funding policies counteract market forces. It might also suggest that larger markets reach a saturation point for feature films in annual numbers.

This issue is aggravated by empirical work in Kanzler (2018, p. 57), which shows that the weight of direct public funding in film financing decreases with increasing market size. The study shows that, while accounting for only 24% of total financing in the four large sample markets, direct public funding accounted for 45% in medium-sized markets and 58% in small sample markets. Thus, smaller markets tend to produce a larger number of films per capita, which require a larger share of public funding.

The relatively modest position of EU films in terms of market share may be exacerbated by specific regulations in law or the conditions of support schemes that mandate specific time windows and channels for the exploitation of films. From this perspective, removing such regulations and focussing public support on a smaller number of productions with larger budgets, including budgets for marketing and cross-border travel may be the way to improve the viewership and commercial performance of EU films.



## 4. LEGAL CHALLENGES FOR FILM FINANCING IN THE EU

### KEY FINDINGS

- The role of territoriality in copyright law is gradually being diminished by EU law aimed at removing national barriers to the Single Market. Examples are the rule of Union-wide exhaustion of the distribution right, the Portability Regulation and the country of origin rules for satellite broadcasting (the Satellite and Cable Directive) and online simulcasting (proposed Online Broadcasting Regulation).
- EU competition law sets strict limits for grants of territorial exclusivity, and prohibits clauses in broadcasting and pay television licences that prevent or restrict 'passive' sales to consumers/viewers in non-licensed territories.
- The freedom of right holders to preserve territorial exclusivity by way of contract is likely to become increasingly vulnerable to EU competition law, as territorial grants are no longer supported by underlying territorial rights.
- For situations in the film sector where territorial exclusivity remains indispensable, the European Commission could create specific competition law rules in the form of 'block exemptions'.
- *Language exclusivity* – i.e. exclusive grants of rights for distinct language versions of a film – could provide a practical and legally more robust alternative to territorial licensing.

As Chapter 2 of this report demonstrated, despite the rapid growth of online trans-frontier audiovisual content services and the growing relevance of European co-productions for films, territorial grants of rights still play an important role today in Europe in securing funding for film production. Financing of audiovisual works, in particular feature films, is a complex business that traditionally involves the procurement of funding from multiple public and private sources, including film funds, content distributors, broadcasters acting as co-producers, private equity funds and other private investors, banks and sponsors. Initiating a feature film production usually requires huge up-front investments that are partly covered by 'presales' of distribution or broadcasting rights from film producers to film distributors and broadcasters operating primarily within national markets.

Territorial exclusivity allows distributors and broadcasters to invest in and advertise theatrical releases or broadcasts specifically geared towards local audience markets, without having to fear competition from concurrent offers of the same film in theatres, or by way of broadcasting or online services. Moreover, films are often produced in tandem with national public or private broadcasters acting as co-producers, whereby co-producing broadcasters are granted exclusive broadcasting rights for their own national territories. Larger film productions are often the product of wide-ranging trans-European co-production agreements involving multiple distributors and/or broadcasters, whereby distribution or broadcasting rights are 'split up' following territorial boundaries. Another important source of film financing are the publicly financed film funds that operate at the national level in many Member States, and which sometimes expect that rights in subsidised films are secured by national broadcasters or distributors (see Chapter 3 in this report). Private

investors also often require transfers of territorially defined rights as collateral for film production loans.

This chapter describes the role and meaning of territoriality in copyright law, and the way EU law has in the past tried to reconcile territoriality with the needs of the Internal Market (Section 4.1); discusses recent and future regulatory challenges to territoriality in copyright (4.2); examines limits to territorial grants of rights set by EU competition law (4.3); queries to what extent film licensing contracts may still include territorial clauses despite regulatory intervention (4.4); queries the possible impact of the revised Audiovisual Media Services Directive on territoriality (4.5); and finally presents a possible alternative to territorial exclusivity in the audiovisual realm (4.6).

#### **4.1. Territoriality and the Internal Market**

Copyright creates exclusive rights in works of literature, science and art. In the European Union, despite nearly thirty years of harmonisation of copyright, copyright has remained essentially national law, with each of the Union's 28 Member States having its own national law on copyright and neighbouring (i.e. related) rights. The exclusivity that a copyright confers upon its owner is, in principle, limited to the territorial boundaries of the Member State where the right has been granted. As a consequence, copyright owners in the EU are protected not by a single European Copyright Regulation, but by a 'bundle' of 28 parallel copyrights. An audiovisual work will, for example, be protected in Germany under the rules of the German *Urheberrechtsgesetz*, whereas the same film will be protected in France under the *Code de la propriété intellectuelle*. Since copyright's exclusive rights are generally transferable or licensable, either in whole or in part, a direct consequence of territoriality is that rights in a copyright protected work can be 'split up' into multiple territorially defined national rights, which may be owned or exercised for each national territory by a different entity. This explains why film distributors or broadcasters may concurrently own exclusive rights to the same film for different Member States, for example Germany and France.

It goes without saying that the grant or exercise of territorially defined rights poses a potential conflict with the norms and ambitions of the Internal Market. The inherent tension between territorially limited grants of rights and the principles of the Internal or Single Market are particularly apparent in the practice of 'geo-blocking' access to audiovisual services from Member States where rights have not been cleared. Since the exercise of territorial rights may pose obstacles to intra-European trade and services, from the 1990s onwards a variety of European policies and regulatory instruments have been deployed to reconcile territoriality with the evolving needs of the Internal or Single Market.

For example, the rule of exhaustion of the distribution right, also known as the "first sale rule", which was initially developed by the Court of Justice and later codified in the Information Society Directive<sup>63</sup>, has removed undue market fragmentation by allowing physical goods incorporating copyright works to be resold without permission of the copyright owner after their initial authorised sale in a Member State. As a consequence, DVDs incorporating audiovisual works that have been sold in a Member State under licence

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<sup>63</sup> Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

from a local right holder may be parallel imported into another Member State without permission of the right holder in that state.

Another noteworthy measure, particularly designed for the audiovisual industry, is the Satellite and Cable Directive<sup>64</sup> that determines that satellite broadcasting is a relevant act for copyright purposes only in the country of origin of the broadcast signal. Article 1(2)(b) of the Satellite and Cable Directive establishes a country of origin rule for acts of satellite broadcasting. Communication to the public by satellite is a relevant act only in the Member State where the signals originate (Hugenholtz, 2009). A broadcasting organisation will therefore need to acquire licences only from right holders in the Member State of origin of the signal. However, the Directive does not rule out licence fees and other contractual conditions taking into account the size of the footprint (*i.e.* number of countries reached) of the satellite broadcast. On the contrary, Recital 17 instructs the parties concerned to “take account of all aspects of the broadcast, such as the actual audience, the potential audience and the language version”.

## 4.2. Recent regulatory challenges to territoriality

The European Commission has identified ‘unjustified’ geo-blocking and other forms of geographical discrimination as an obstacle to attaining the Digital Single Market in multiple policy documents<sup>65</sup>, and the European Parliament has also on several occasions expressed its concern about these practices.<sup>66</sup> A European Parliament study published in 2013 (Schulte-Nölke et al., 2013)<sup>67</sup> distinguishes two types of geographical discrimination: ‘geo-blocking’<sup>68</sup> – *i.e.* refusal to sell – and ‘geo-relocation’ or ‘geo-filtering’ – *i.e.* conditioning of sales or re-routing of services. Both practices are based on the geographical location of the consumer. In the area of audiovisual services both types of geographical restriction occur (Gomez & Martens, 2015).

With the Portability Regulation<sup>69</sup> that was adopted in 2017, the EU has effectively put an end to the practice of geo-relocation in the audiovisual realm. The Portability Regulation ensures that European consumers travelling across the EU will have continued access to the online content services to which they have subscribed in their home countries. The Regulation obligates operators of subscription-based online audiovisual services such as Netflix to provide migrant subscribers access to the content catalogues they have subscribed to in their country of residence, whenever travelling in Europe. Since the making available to a travelling subscriber of movies, for which the rights have not been licensed in the country where the subscriber is temporarily located, would normally amount to

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<sup>64</sup> Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission.

<sup>65</sup> See European Commission Directorate General Internal Market and Services, 2014, p. 6-7; President Juncker of the European Commission, 2014; European Commission, 2015b.

<sup>66</sup> See European Parliament, 2007, par. 30: “it is unacceptable that certain entrepreneurs who supply goods or provide services and content via the internet in several Member States deny consumers access to their website in certain Member States and force consumer to use their websites in the State in which the consumer is resident or whose nationality he or she holds”.

<sup>67</sup> See furthermore: Helberger, 2007.

<sup>68</sup> Geo-blocking, <<https://en.wikipedia.org/wiki/Geo-blocking>>: “Geo-blocking is the practice of restricting access to content based upon the user’s geographical location”; See also European Commission, 2015a, p. 21.

<sup>69</sup> Regulation (EU) 2017/1128 of the European Parliament and of the Council of 14 June 2017 on cross-border portability of online content services in the internal market.

copyright infringement, the Regulation provides that the provision of the service “shall be deemed to occur solely in the subscriber’s Member State of residence”. The Regulation thus allows Netflix and similar audiovisual content providers to offer content to its subscribers, based solely on licences secured in the country of residence of its subscribers.

In 2018, EU Regulation 2018/302 was adopted, which prohibits “unjustified geoblocking”.<sup>70</sup> However, “audiovisual services, including services the principle purpose of which is the provision of access to broadcasts of sports events and which are provided on the basis of exclusive territorial licenses”, are excluded from the scope of this Regulation, so the Regulation is of limited consequence for the film industry.

The proposed Online Broadcasting Regulation (European Commission, 2016a) poses another challenge to territorial exclusivity in the audiovisual realm. The proposal, which was originally tabled by the European Commission in 2016, aims at extending the Satellite and Cable Directive’s *country of origin* rule to radio and television broadcasts offered by broadcasting entities over the internet simultaneously with their terrestrial broadcasts, and to “ancillary services”, such as catch-up platforms. Under current law, broadcasters wishing to simulcast their broadcasts over the internet require licences from all relevant right holders in all countries where the broadcasts are made available. According to the Explanatory Memorandum that accompanies the Commission’s proposal: “This requires a complex clearance of rights with a multitude of right holders. Often, the rights need to be cleared in a short time-frame, in particular when preparing programmes such as news or current affairs. In order to make their services available across borders, broadcasting organisations need to have the required rights for the relevant territories and this increases the complexity of the rights’ clearance.” (European Commission, 2016a, p. 2). The Impact Assessment study preceding the proposal identifies the “territoriality of copyright” as a major obstacle to rights clearance (European Commission, 2016b, p. 14), as a result of which the number of rights to be cleared is multiplied. Moreover, in many cases, rights in broadcast programmes, such as films or television series, are granted to broadcasters on the basis of territorial exclusivity. In many cases the transaction costs involved in acquiring all the necessary permissions from all the national right holders concerned are so high that broadcasters choose to limit access to their broadcasts online by way of geo-blocking technology (European Commission, 2016b, p. 23).

If adopted in its initial form, broadcasters wishing to simulcast their broadcasts over the internet across the EU would require licences only in their country of establishment. The proposal has been criticised, notably by right holders as unduly affecting exclusive territorial grants of rights and thereby undermining customary film financing practices. In response to this criticism, the scope of the proposed Regulation was narrowed down in the course of the discussions in the European Parliament. Following substantive amendments by the JURI Committee, the proposal was adopted in first reading by the European Parliament on 12 December 2017 (European Parliament, Committee on Legal Affairs,

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<sup>70</sup> Regulation (EU) 2018/302 of the European Parliament and of the Council of 28 February 2018 on addressing unjustified geo-blocking and other forms of discrimination based on customers’ nationality, place of residence or place of establishment within the internal market and amending Regulations (EC) No 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC.

2017). The negotiations on the proposal at an inter-institutional level are currently ongoing.<sup>71</sup>

The ultimate challenge to territoriality in copyright lies in the more distant future. Whereas the EU has employed a variety of regulatory instruments, such as the exhaustion rule and the country of origin principle, to overcome some of the obstacles to the Internal Market that territorially exercised rights entail, the final step towards a truly unified European copyright law has yet to be taken. Such unification might, one day, be shaped as a general *EU Copyright Regulation* that would provide for unitary copyright protection across the Union, replacing existing national copyright laws.<sup>72</sup>

In recent years, the idea of unification is gradually gaining support, both in scholarly and in political circles. For example, at the end of 2014 the *European Copyright Society*, a society of professors, sent a public letter to the European Commission urging it to start a unification project (European Copyright Society, 2014). A year later, at the end of 2015, the European Commission committed itself to the idea of unitary copyright in an official Communication to the Council and the European Parliament (European Commission, 2015b). In doing so, the Commission recognised that the road to a European Copyright Regulation is still a long and complex one. According to the Commission, the introduction of unitary copyright should be accompanied by the designation of an exclusively competent Union court "to avoid inconsistent jurisprudence leading to more fragmentation". But "these difficulties should not lead to the abandonment of this vision as a long-term objective". If adopted, a truly unified EU copyright law would, by definition, do away with nationally defined territorial rights, since national copyright laws would cease to exist. Instead, a unified EU copyright law would apply homogeneously in the entire territory of the Union.

#### **4.3. Limits to territorial grants of rights by EU competition law**

Apart from specific regulatory intervention, territorial grants of rights might also run afoul of the general rules of EU competition law, notably Articles 101 (anti-trust) and 102 (abuse of dominance) of the TFEU – formerly Articles 81 and 82 of the EC Treaty. Over the years, the European Commission, which is tasked with competition oversight, and the European Court of Justice have produced extensive case law on the issue. In a string of cases concerning the interface between intellectual property law, competition law and the EC Treaty's Internal Market freedoms, the Court has developed the doctrine that the application of competition law and the economic freedoms should not affect the "specific subject matter" of the intellectual property right concerned (Triaille, 2013, p. 180). This doctrine has led the Court in the past to accept certain contractual restrictions to competition and to the freedom of circulation of goods and services.

In the landmark case of *Coditel II*, which was decided by the Court in 1982, the Court held that an exclusive territorial grant of copyright in respect of a film does not per se amount to infringement of anti-trust law, but that such a contract may well violate competition law "if it has as its object or effect the restriction of film distribution or the distortion of

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<sup>71</sup> See Legislative train schedule DSM, <<http://www.europarl.europa.eu/legislative-train/theme-connected-digital-single-market/file-jd-regulation-on-online-transmissions>>

<sup>72</sup> Article 118 TFEU has created an express EU competence for such unification.



competition on the cinematographic market”.<sup>73</sup> In its decision the Court expressly took account of the specific economic characteristics of the film industry in Europe:

“The characteristics of the cinematographic industry and of its markets in the Community, especially those relating to dubbing and subtitling for the benefit of different language groups, to the possibilities of television broadcasts, and to the system of financing cinematographic production in Europe serve to show that an exclusive exhibition licence is not, in itself, such as to prevent, restrict or distort competition.” (para. 16)

Whether or not a territorial grant of rights amounts to an infringement of anti-trust law must therefore be assessed in light of the “specific characteristics” of the cinematographic market.

In its more recent *Premier League* decision of 2011, the European Court of Justice held that an exclusive pay television licence agreement that obliges the pay television broadcaster not to supply decoding devices to users outside the territory covered by that licence agreement infringes Article 101 TFEU.<sup>74</sup> This decision is in line with general EU competition law<sup>75</sup>, which distinguishes between “active” and “passive” sales to consumers in Member States not covered by a territorial licence. Whereas competition law does allow a licensor to oblige a licensee not to actively seek customers outside the licensed territory, a licensee may not be prevented from “passively” selling to such consumers. In other words, a territorial broadcasting licence will never be absolute.

Following the *Premier League* decision, commentators have questioned whether the Court’s reasoning would also apply to the film sector (Cabrera Blázquez, 2005, p. 55 ff.). Whereas the economics of broadcasting sports and films are clearly not identical, the Court’s decision in *Premier League* has inspired the European Commission to start investigations into possibly anti-competitive licensing practices involving films licensed to pay television platforms. The investigation focuses on licensing contracts entered into by a number of major film studios and Sky UK Limited (and subsidiaries). So far, this has led to commitments by Paramount and Disney to remove or no longer enforce restrictions in their licensing contracts that prevent pay television providers from responding to unsolicited (“passive”) requests from consumers outside the licensed territory.<sup>76</sup>

If similar restrictions were to be imposed on the film producers with regard to online audiovisual streaming services, the implication might be that the film producers could no longer oblige their licensees to “geo-block” consumers residing outside the licensed territory.

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<sup>73</sup> Judgment of 6 October 1982 in Case 262-81, *Coditel v Ciné Vog Films* (ECR 1982, p. 3381).

<sup>74</sup> Judgment of 4 October 2011 in Joined Cases C-403/08 & C-429/08, *Football Association Premier League Ltd and Others v QC Leisure and Others; and Karen Murphy v Media Protection Services Ltd* (ECR 2011, I-9083).

<sup>75</sup> See e.g. article 4(b)(i) of Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices.

<sup>76</sup> Commission Decision of 26 July 2016 relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement. Case AT.40023 - Cross-border access to pay-TV.

#### 4.4. Freedom of contract and territorial exclusivity

The gradual abolition of state-based territoriality in copyright law in the EU does not necessarily spell the end of exclusive grants of rights with territorial effect. Even if territoriality can no longer be fully based in national copyright law, freedom of contract, i.e. the freedom of parties to govern their own actions by contract, persists. Based on freedom of contract, a film producer and a distributor might still agree on a territorially restricted exclusive licence. For example, the introduction of the country of origin rule to satellite broadcasting in the Satellite and Cable Directive has not put an end to the practice of territorially restricted licensing in the field of satellite broadcasting. The Directive does not prevent the owners of copyright in a film from contractually obliging a satellite broadcaster to apply encryption or other technical means so as to avoid reception by the general public of programme-carrying signals in countries for which the broadcast is not intended. Thus, territorial exclusivity is still achieved, notwithstanding the clear aim of the Directive to create an internal market for trans-frontier satellite broadcasting (European Commission, 2002, p. 7).

This issue has re-emerged during the ongoing discussions surrounding the proposed 'Online Broadcasting Regulation'. For this reason, Article 2b of the proposed Regulation, as amended by the European Parliament in first reading, provides that pursuant to freedom of contract the practice of setting territorial limits to grants of rights may continue despite the introduction of a limited country of origin rule:

"Paragraphs 1 and 2 are without prejudice to the principles of territoriality and contractual freedom under copyright and any right provided under Directive 2001/29/EC. On this basis, the parties shall be entitled to continue agreeing on the introduction of limits on the exploitation of the rights referred to in paragraph 1, provided that any such limitations are in compliance with Union and national law."

And Recital 11 of the proposal as amended states:

"It is necessary to recall that through the principle of contractual freedom and in order to support existing licensing models, such as exclusive territorial licensing, which enables the financing mechanism vital to audiovisual production, optimal distribution and the promotion of cultural diversity, it is necessary to continue limiting the exploitation of the rights affected by the principle of country of origin laid down in this Regulation provided that any such limitations of the exploitation of those rights are in compliance with national and Union law."

While the amended text of the Regulation by the European Parliament clearly expresses its desire to preserve the practice of territorial licensing in the audiovisual realm<sup>77</sup>, notwithstanding the introduction of a limited country of origin rule, both proposed Article 2b

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<sup>77</sup> This desire is expressed most clearly in European Parliament, Committee on Culture and Education (2017). Recital 11 as amended by that committee reads: "Through the principle of contractual freedom *and in order to support existing licensing models, such as exclusive territorial licensing, which make the financing mechanisms that are vital to audiovisual production as well as the optimal distribution and promotion of cultural diversity possible, it should be possible to continue limiting the exploitation of the rights affected by the principle of country of origin laid down in this Regulation, especially as far as certain technical means of transmission, such as geo-blocking and geo-filtering, or certain language versions are concerned, provided that any such limitations of the exploitation of those rights are in compliance with Union law.*"

and the accompanying Recital are conditioned on the assumption that contractual grants of territorial exclusivity “are in compliance with Union and national law”. What is meant here, inter alia, is that such contractual clauses are not immune to the application of EU competition law. In other words, territorial exclusivity in licensing agreements must still comply with the general rules of Articles 101 and 102 TFEU, as applied by the Commission and interpreted by the CJEU.

The question therefore remains whether exclusive territorial grants of rights will stand the test of competition law in cases where the EU legislature has partly abolished the underlying territorial copyright. Since existing cases and case law in this field concern situations where territorial grants are supported by territorial rights – see the *Coditel II* and *Premier League* cases discussed above – it is hard to predict how the European Court would assess a case where territorial exclusivity would be solely based on contract.

In its landmark *Coditel II* decision<sup>78</sup> the European Court deemed a territorial grant of copyright potentially justified by reference to Article 36 of the EC Treaty (now Article 36 TFEU). Under this provision, restrictions to trade may be justified on grounds of “the protection of industrial and commercial property”, a term which includes copyright. Whether the Court would accept purely contractual territorial exclusivity in a situation where the EU legislature has purposefully removed – in whole or in part – the underlying territorial right seems questionable, particularly where such exclusivity would keep intact the Internal Market fragmentation that the EU legislature wanted to remove.

In our opinion, a more reliable way of preserving territorial grants of rights in the audiovisual field would be to task the European Commission with codifying film-specific rules on exclusive territorial grants of rights in the form of an amended Commission Regulation, somewhat similar to the ‘block exemptions’, i.e. generic exemptions to the EU competition rules, that allow exclusive territorial allocation of markets in technology licence agreements in well-defined situations.<sup>79</sup> One could, for example, imagine an exemption that would allow a distributor territorial exclusivity in respect of films produced in the EU, for a limited duration of, say, two or three years following the film’s release. This would be in line with current practices in the exploitation of the more successful European films, as explained in Section 2.2.

The economic justification for such a generic exemption to the EU rules on anti-trust, as required by Article 101(3) TFEU<sup>80</sup>, could be found in the “special economic characteristics” of the cinematographic industry that were expressly recognised by the European Court in *Coditel II*. If it can be established that temporary territorial exclusivity serves as an

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<sup>78</sup> Judgment of 6 October 1982 in Case 262-81, *Coditel v Ciné Vog Films* (ECR 1982, p. 3381).

<sup>79</sup> Commission Regulation (EU) No 316/2014 of 21 March 2014 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements. Note as well Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, which prohibits clauses in vertical distribution contracts prohibiting passive sales outside the exclusive territory.

<sup>80</sup> Article 101(3) TFEU allows exemptions in the case of “any agreement or category of agreements between undertakings [...] which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not: (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question”.

indispensable incentive to national film production without unduly distorting competition in the European marketplace, arguably such an exemption might stand the test of Article 101(3) TFEU.

#### **4.5. The revised Audiovisual Media Services Directive**

The recently revised Audiovisual Media Services Directive<sup>81</sup> applies the country of origin principle to national rules concerning the content of television broadcasting and other “audiovisual media services” within the coordinated fields, chiefly rules on transparency, advertising, protection of minors and European production quota. Under the provisions of the Directive, Member States are prevented from taking any measures which would prevent the re-transmission, in their territory, of television broadcasts coming from another Member State, for reasons falling within the coordinated fields.<sup>82</sup> For example, a ‘receiving’ Member State may not impose any local advertising standards on a television broadcast originating from another Member State.

Since copyright falls outside the fields coordinated by the Directive, its direct impact on territorial sales or licensing of audiovisual works is very limited. Nevertheless, the rules of the Directive may have an indirect effect on copyright law, as the European Court of Justice has on several occasions interpreted copyright notions in light of the Audiovisual Media Services Directive and its predecessor, the Television without Frontiers Directive.<sup>83</sup>

The Audiovisual Media Services Directive does address territoriality by allowing Member States to prevent pay television providers from acquiring territorially exclusive rights as regards the broadcasting of “events which are regarded by that Member State as being of major importance for society”<sup>84</sup> (for example, Champion League football games), but this provision, which was not subject to revision, has no obvious ramifications for the film industry and its financing.

The provisions of the revised Directive do however have immediate relevance for national rules on film financing. Besides the provisions set out in Section 3.2.1, Member States under the revised Directive must ensure that media service providers of on-demand audiovisual media services under their jurisdiction secure at least a 30% share of European works in their catalogues and ensure prominence of those works (Article 13(1)). The existing obligations for normal broadcasters to reserve a majority proportion of their transmission time for European works (Article 16(1)), and at least 10% of their programming budget for European works created by producers who are independent of

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<sup>81</sup> Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities. The new directive was signed on 14 November 2018, entered into force on 18 December 2018. Member States have until 18 September 2020 to transpose the new rules into national legislation.

<sup>82</sup> Article 3(1) of the revised Directive provides: “Member States shall ensure freedom of reception and shall not restrict retransmissions on their territory of audiovisual media services from other Member States for reasons which fall within the fields coordinated by this Directive.”

<sup>83</sup> Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (repealed). See, for example, *Lagardère Active Broadcast v Société pour la Perception de la rémunération équitable (SPRE) and Others*, ECJ 14 July 2005, case C-192/04, ECR [2005] I-07199, referring to ECJ 2 June 2005, case C-89/04, ECR [2005] I-04891.

<sup>84</sup> Article 14(1) of the revised Directive.

broadcasters (Article 17), have remained intact. In addition, the revised Directive in Article 13(2) broadens the possibility for Member States to require media service providers under their jurisdiction to contribute financially to the production of European works, including via direct investment in content and contribution to national funds. A Member State may extend these obligations to service providers based in other Member States if these foreign providers specifically target audiences in their territory.

#### **4.6. An alternative to territorial exclusivity: language exclusivity**

What is often overlooked in European discussions concerning territoriality is that curbing territoriality in copyright does not spell the end of exclusive grants of rights in respect of language markets. For example, the country of origin rule enshrined in the SatCab Directive or the future Online Broadcasting Regulation applies only to the version of the audiovisual work initially broadcast. If a satellite broadcaster based in Germany acquires a licence to broadcast and simulcast a James Bond movie in the dubbed German-language version, only this version may be broadcast and simulcast to audiences across the EU. Licences for other language versions (e.g. French, Spanish, Italian or Dutch) may still be granted to local distributors on an exclusive basis. Therefore, the extension of a country of origin rule to forms of online broadcasting does not affect market partitioning and price discrimination based on language versions. Even if territoriality in copyright were, in the distant future, to be completely abolished by way of an EU Copyright Regulation that replaces national copyright laws, exclusive grants of rights in different language versions would likely remain completely legal.

The European Union has 24 official languages, almost as many as its Member States, but with language areas not primarily defined by national borderlines. Language exclusivity in audiovisual content distribution contracts may therefore provide a 'natural' alternative for market segmentation and price discrimination along strictly defined national territorial borderlines. Most likely, since the principles of cultural and language diversity are deeply rooted in the European Union, and language regions are distinct from national territories, no conflict with freedom of competition or any of the other Internal Market freedoms would arise.

Exclusive language rights could be granted either in dubbed (synchronised) versions or in versions subtitled in a specific language. Such translated versions qualify under copyright law both as adaptations of the original audiovisual work, and as derivative works subject to copyright protection in their own right, notwithstanding the rights in the original film. An exclusive grant to distribute, broadcast or make available a film in a specific language version could therefore co-exist with other exclusive grants for other language versions or for the film in its original version, regardless of the territories concerned. Since film markets in Europe are intrinsically separated by language (Cabrera Blázquez 2015: 59), all these versions might be concurrently, and exclusively, licensed and exploited within the same territories.

A potential challenge to language exclusivity might however come in the not too distant future from automatic captioning, subtitling or dubbing tools. With the rise of artificial intelligence has come increasingly powerful translation software that might one day be built into smart televisions or other viewing devices. Although robotic translation could probably never compete with human actor dubbing, this technology might still negatively affect exclusive language rights. Nonetheless, when assessing this alternative model it is

important to realize that market separation by way of territorial grants of rights is also vulnerable to circumvention, as is demonstrated by consumer practices applying virtual private networks and other technical measures to circumvent 'geo-blocks' aimed at ensuring territorial exclusivity.<sup>85</sup>

Admittedly, grants of language exclusivity could never entirely substitute for territorial grants of rights. Clearly, replacing territorial exclusivity by language exclusivity would not work in co-production agreements between producers or broadcasters operating in Member States sharing the same language, such as Germany and Austria. Assuming that territorial partitioning of rights in this scenario would be ruled out, the co-producers in this situation would become joint right holders for the entire German-language area. While the co-producers could contractually agree to allocate first broadcasting rights to (public) broadcasters operating in each country, grants of downstream rights in the German-language version to distributors or online platforms would require the consent of both co-producers. Rights in other language versions (e.g. English or French) could however be allocated, granted and exercised separately.

In sum, a shift from territorial to language exclusivity would not be without technical challenges and contractual consequences. Nevertheless, moving away from territorial grants of rights to language-based grants would not be a radical departure from current licensing practices in the film industry. Indeed, the fact that territorial modes of licensing in this field have remained prevalent despite Europe's economy's gradual shift towards a Single Market can be largely explained by existing linguistic differences that largely, albeit not entirely, overlap with state borderlines (Cabrera Blázquez et al., 2015, pp. 58-59).

Arguably, the practical disadvantages of a shift towards language exclusivity would be outweighed by the legal robustness of this alternative model. While grants of territorially exclusive rights will become increasingly vulnerable, under any scenario, to the combined challenges of further unification and EU competition law, this model would be legally far more robust.

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<sup>85</sup> See <<https://en.wikipedia.org/wiki/Geo-blocking#Circumvention>>.



## 5. MARKET CHALLENGES FOR CURRENT FILM FINANCING PRACTICES

### KEY FINDINGS

- The influence of SVOD services on film distribution, and thus on film financing in Europe is growing rapidly and the major players are worldwide giants that dominate the market. VOD services play an inducing role in changing release strategies, challenging the traditional separation of windows for each type of exploitation.
- Connected audiences find it ever harder to understand that the film of their choice can be available in Europe, but not in their country.
- The rise of transnational cultures, facilitated by migration and digital media is essential for the progress of Europe's cultural diversity but the territorial division of the European film market works against it.
- With decreasing audiences for European films and cinemas failing to connect to younger audiences, the effectiveness of the European film financing system is under pressure.
- These challenges do not change the fundamental conundrum of financing a film, and the potential sources of funding remain unaltered. New and emerging models of financing such as crowdfunding and product placement are interesting but so far of limited significance in financial terms. Language exclusivity could serve as an alternative to territorial exclusivity if territoriality in copyright were to be abolished.

Clearly, consumer behaviour in relation to film consumption has changed dramatically over the past decades against the backdrop of digitisation. This and other developments in the EU audiovisual sector have already been the subject of earlier research (e.g. KEA European Affairs, 2010, p. 39-55; Cabrera Blázquez et al., 2015, pp. 12-17). This chapter provides a description of developments in film consumption from legal distribution channels over the past years, as well as a description of the evolution of illegal consumption. Subsequently, it analyses the impact of these trends in consumer behaviour on the film industry, in particular on financing. In addition, it looks into alternative financing models.

### 5.1. The rise of non-EU on-demand distribution platforms

Online distribution allows consumers to see films at any time and usually also on any screen they choose. There are two major segments in the market for paid-for online distribution, also known as the pay on-demand market: Transactional video on demand (TVOD) and subscription video on demand (SVOD). TVOD allows the consumer to buy or rent an audiovisual work and can be seen as a substitute for physical video/DVD. Examples of TVOD platforms are iTunes, Microsoft Film & TV and Google Play. SVOD requires a subscription fee, which gives access to a catalogue of audiovisual works (Crece, 2017).



SVOD is a relatively new service with a dearth of predecessors in the physical world.<sup>86</sup> Examples are Netflix, Amazon Video, Hulu and HBO Go.

In comparison with the total pay TV market, SVOD is still relatively small. In 2016, SVOD revenues were only 10% of those of traditional pay TV. However, a comparison with the cinema gross box office shows a different perspective: Total SVOD revenues – including those for TV series and other audiovisual content types – add up to 54.6% of the cinema gross box office in 2016. Moreover, the average annual growth rate of SVOD between 2011 and 2016 was 43.2%, while pay TV grew a mere 2.9% and cinema only 1.8% per year during the same period.<sup>87</sup> The main players on the European SVOD market are Netflix and Amazon with a joint market share of 67%, while SKY, until Brexit the largest European SVOD service, accounts for only 4% of the market (Crece, 2017). It is obvious that the influence of SVOD services on film distribution and thus on film financing in Europe is growing rapidly and that the major players are large companies operating on a worldwide basis.

There are about 200 active SVOD services in Europe, but there are no European SVOD services with a large international presence. Some reach across parts of Europe, like for instance C More and SF Kids (Scandinavian countries), RTL (Belgium, Luxemburg, Netherlands and Germany) or AXN Now (Hungary, Poland and Romania).<sup>88</sup> On a national scale, there are examples of TV companies teaming up with one another to form a large SVOD platform, like Salto (France Television, TF1 and M6) in France (Libération, 2018) and Freeview Play (BBC, ITV, Channel 4, Channel 5 and UKTV) in the United Kingdom<sup>89</sup>, while the German ProSiebenSat.1 has teamed up with US company Discovery to build a new German TV streaming platform (Pöltz & Busvine, 2018). Earlier attempts to form large national on-demand alliances like Germany's Gold, backed by ProSiebenSat, ARD and ZDF<sup>90</sup> and Kangaroo, a joint venture between BBC, ITV and Channel 4 in the UK<sup>91</sup> were opposed by national anti-trust regulators.

SVOD and TVOD bring new opportunities for national online services offering dedicated libraries to interested audiences. By cooperating with similar services in other European countries they can exchange rights to content and know-how. The EU-supported EUROVOD for instance, is an association for European VOD platforms specialising in arthouse, independent and European cinema. By working together across national borders, they can extend their libraries and increase their influence in a territorially fragmented market, but territorially licensed rights could stand in the way of such developments.<sup>92</sup> On a pan-European scale, Europe does not currently present competition to the worldwide giants that dominate the market. Fragmentation of the EU online film market is not helpful in this.

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<sup>86</sup> Except of course Netflix, which started as a website where people could rent a fixed amount of physical videotapes for a flat fee.

<sup>87</sup> Mavise database <<http://mavise.obs.coe.int>>.

<sup>88</sup> Mavise database <<http://mavise.obs.coe.int>>.

<sup>89</sup> Freeview, <[www.freeview.co.uk/about-us](http://www.freeview.co.uk/about-us)>.

<sup>90</sup> Bundeskartellamt 2013. *Plans for ARD/ZDF online platform "Germany's Gold" abandoned*. Press Release. Bonn, Bundeskartellamt.

<sup>91</sup> Competition Commission 2009. *'Project Kangaroo' Final Report*. London: Competition Commission.

<sup>92</sup> Information on the performance of EUROVOD is not available.

Despite the increasing competition from new SVOD services, the market for pay TV is still growing at a modest rate. Apparently, consumers consider SVOD subscriptions an addition to more traditional pay TV services such as live TV and online rental, and not as a mere substitute. However, younger people appear to spend much more time watching on-demand content than older people, who spend more time watching linear TV. A small but growing number of particularly young people 'cut the cord', i.e. cancel their TV subscription and only consume audiovisual content online via fixed and mobile broadband networks. A few statistics can illustrate this:

- In the UK, the share of viewing time spent on live and recorded TV in 2016 was 48% for 16-24 year olds and 86% for 45-54 year olds. On on-demand content and short video such as YouTube, on the other hand, 16-24 year olds spent 47% of their viewing time and 45-54 year olds spent 11% (Ofcom, 2016, p. 13).
- In France, the average time spent on traditional TV content was 93% in 2016. For online non-TV content such as YouTube, this was 6% and on SVOD a mere 1%. For 15-24 year olds, however, these numbers were 76% traditional TV, 20% online non-TV and 3% SVOD (Lefilliâtre, 2017).
- In Germany, 14-29 year olds spend less than half as much time on traditional TV compared with the group of 50 years and older. 14-29 year olds spend 60% more time on internet TV and 3 times as much time on online video compared with the whole population (Orde & Durner, 2018, p. 32).

The youth that grew up with digital media are likely to persist in their preference for online content, causing the digital on-demand market to grow at the cost of traditional media.

## 5.2. Online piracy<sup>93</sup>

The launch of Napster in 1999 is considered by many to be the start of large-scale unauthorised online file sharing, commonly referred to as *online piracy*. Napster – a legitimate for-pay music service since 2004 – began as the first globally used platform for exchanging music files without the authorisation of copyright holders. This was two years before the launch of iTunes in 2001, the first platform to sell music digitally and per track. After its shutdown in 2001, Napster was succeeded by many technically more refined platforms and sharing protocols such as Morpheus, Gnutella, LimeWire, eMule and BitTorrent. Such platforms and protocols generally do not store copyright-protected content on a central server but facilitate direct *peer-to-peer* ('p2p') exchanges among users (peers) to avoid liability and vulnerability. This exchange started off with music, but, as soon as growing internet bandwidth allowed, films, series and games followed suit.

A different technology, known as *cyberlockers* – such as Megaupload and Rapidshare – makes use of cloud storage hosted at locations that aim to be out of reach of copyright enforcement. Just like authorised supply via platforms such as Netflix, unauthorised supply has more recently expanded to streaming, enabling users to enjoy content without permanently downloading it. Popcorn Time is a popular example of such a service for films and series. In some cases, *unauthorised streaming* is carried out via dedicated technical devices/set-top boxes with pre-installed links to unauthorised content platforms. A related

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<sup>93</sup> This section is partly based on Chapter 2 in Poort et al. (2018).

use of copyright-protected material that is generally considered unauthorised is *streamripping*, whereby software tools, browser plugins or special websites are used to store music or audiovisual content offline for later replay.

As internet connectivity and bandwidth grew, so did online piracy. But more recently, there is evidence that online piracy is declining, at least in some EU countries, since the advent of legal streaming services such as Spotify and Netflix. Poort et al. (2018) compare the percentage of the internet population downloading films and TV series in 2014 and 2017 for a number of EU countries.<sup>94</sup> They find that piracy levels for audiovisual content decreased for each country except Germany, which had the lowest piracy rate to start with and remained stable.

When online piracy took off around the turn of the century, the recorded-music industry and, later, the film industry were quick to blame it for lost revenues. In a 2005 study for the Motion Picture Association, LEK Consulting wrote, "Piracy is the biggest threat to the U.S. motion picture industry" and claimed that in 2005 the major US studios lost \$ 6.1 billion to piracy, 38% of which took place online (LEK, 2005). Nevertheless, the empirical question of the effect of piracy on legal sales has proven to be cumbersome, and in past years a substantial body of academic literature has emerged on the effect of the unauthorised sharing of copyright works, but no general consensus was reached.

Most of the earlier contributions focus on the music industry. A smaller number of studies deal with the effect on films – e.g., Bounie, Bourreau & Waelbroeck (2006), Hennig-Thurau, Henning & Sattler (2007) and Rob & Waldfogel (2007). In a literature review, Smith and Telang (2012) conclude that "the vast majority of the literature ... finds evidence that piracy harms media sales". However, most of this evidence suggests a much smaller effect than a one-to-one displacement of sales by illegal copies, and quantitative estimates vary substantially. In a meta-analysis of the empirical literature up until 2013, Hardy, Krawczyk and Tyrowic (2015, p. 2) write "In total, for the final analysis we have identified as many as 40 studies (with more than 600 estimates) of which 4 argue in favour of a positive effect of 'piracy' on sales, 21 demonstrating the opposite, 6 finding no relationship whatsoever and 5 finding the direction of the link dependent on the type of content or analyzed sample. In addition, in most of the papers, at least some of the specifications were insignificant." Thus, a democratic vote would yield a narrow majority for a negative effect, but in a more rigorous meta-analysis, Hardy et al. conclude that, as a whole, the literature fails to reject the hypothesis of no effects on sales.

How can it be that this relationship between unauthorised consumption of works and sales, which seems obvious at first glance, is so elusive and hard to establish in practice? A likely explanation is that closer scrutiny paints a more diverse picture. Unauthorised distribution and consumption of works can affect legal consumption in several different ways, some of which have a negative impact on sales, some positive and some neutral. The most prominent positive effect is known as the *sampling effect*: consumers are introduced to new actors and genres and this creates new demand. On the downside, the most prominent effect is obviously *substitution*: a consumer refrains from buying specific content legally after having acquired or consumed it from an illegal source. Neutral effects with respect to sales occur when file sharing meets the demand of consumers with insufficient willingness

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<sup>94</sup> France, Germany, the Netherlands, Poland, Spain, Sweden and the UK.

to pay, consumers who have demand for a work that is not on offer, or for a work of a specific technical quality or file type that is not legally available.

Against this background, it is less of a surprise that the findings of empirical studies on the relationships between online piracy and legal consumption of content vary widely. Moreover, the strength of the different effects varies *within* content types: the sampling effect is likely to be weaker for famous artists and blockbuster films from which consumers generally know what to expect. Moreover, popular and recent content is more likely to be on offer legally, whereas older and niche content may be unavailable or out of commerce. If so, consumption of such content from illegal sources cannot displace legal acquisition for that specific title.

Watson, Zizzo and Fleming (2015) mention the long-tail distribution of pirated content, and the net displacement effect may be different further down this tail than in the head of the distribution. Indeed, one study finds indications that blockbuster films suffer more from the substitution effect, whereas less well-known productions may even benefit as the opposing sampling effect prevails (Peukert, Claussen & Kretschmer, 2013). A similar notion was confirmed in one of the interviews, in which the interviewee stated that the arthouse content it curated was rarely or not available via illegal channels.

In an analysis for blockbuster films, Poort et al. (2018, p. 16) find significantly negative effects of film piracy on legal consumption and estimate the aggregate displacement ratio of illegal views on legal views is between -0.20 and -0.46. This would mean for every 10 blockbuster films watched illegally, between 2 and 5 fewer blockbusters are watched via legal channels. As the number of illegal views is small in comparison with the number of legal views, this translates into a maximum *sales loss* of about 4.1% of all legal blockbuster views. For arthouse content, this displacement effect is likely to be smaller.

Nevertheless, piracy is likely to have affected film distribution even without having displaced it to a large extent: consumers are less and less accepting towards long time windows between release dates in different countries, and towards the non-availability of content on the platform of their choice. Moreover, the threat – or from a consumer perspective the option – of piracy is not unlikely to have eroded the price level of certain formats.

### 5.3. Cracking windows

As discussed in Chapter 2, existing models of film exploitation reserve timeframes (windows) for each type of distribution. Such exploitation usually takes place on a territory-by-territory basis, meaning that for the same film a different release strategy may be used for each territory. Distribution platforms for films are e.g. theatrical (cinema), DVD, TVOD, SVOD and Pay TV. The sequence and the length of the timeframe for each platform is part of a distribution plan that can be adjusted according to the market potential of each individual film.<sup>95</sup>

This allows distributors to price discriminate, starting with the platform that generates the highest revenue per view, usually cinema. The sequence of exclusive windows is designed

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<sup>95</sup> A co-financing party like a broadcaster may negotiate a favourable position in the order of exploitation windows.

to allow each platform to maximise revenues. Release windows can positively or negatively influence each other's success, and consumers may choose to view the film on a lower priced platform. When a lower priced window becomes available too early, it may cannibalise revenues for an earlier window. When a lower priced window becomes available too late, the effect of the marketing campaign for the first release of the film or of word-of-mouth may have ebbed away, reducing the potential audience for that window. Since distribution rights are usually sold on a territorial basis, release plans are often adapted to the specific market in each country, e.g. depending on local audience taste and whether the film is nationally produced or foreign. A national distribution plan can be cannibalised when a film becomes available on an international TV service or online platform, while or before the film is available in the first exploitation windows.

In some European countries, the duration of release windows is regulated either by national law or through regulations connected to national or regional film support. E.g. France<sup>96</sup>, Bulgaria<sup>97</sup> and Portugal<sup>98</sup> have specific legislative measures for release windows, and Austria<sup>99</sup>, Germany<sup>100</sup> and possibly Latvia and Spain<sup>101</sup> have rules for release windows in production support regulation. In addition, regulations related to production support may require a cinematic release. These models of film exploitation are challenged by the reshuffle of European release windows following the increasing role of online distribution.

In their analysis on exploitation windows, Ranaivoson, De Vinck and Van Rompuy (2014) distinguish three release strategies that have been experimented with throughout the world and that oppose the traditional sequence of release windows: Day-and-date strategies, premium VOD and reverse windowing:

- Day-and-date means that a film is released on different platforms or markets at the same time. The term used to refer to a simultaneous theatrical release in different territories, but nowadays it usually refers to releases in cinemas and on VOD platforms at the same time.
- Premium VOD means the same as day-and-date, but the VOD price is higher as long as the film is also in theatres.
- Reverse windowing, also known as Ultra-release, means that a film is released on VOD before it is released in theatres.

A day-and-date strategy may be chosen in combination with an online marketing campaign through social networks. With audiences that are used to choosing which content to watch where and when they want, capitalising on the online buzz created on simultaneous channels can increase total revenues. For contemporary audiences, seeing a film people are currently talking about has a higher social value than seeing the exact same film four months later (Koljonen, 2015, p. 8).

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<sup>96</sup> Accord interprofessionnel du 6 juillet 2009, based on articles L. 231-1 à L. 233-1 of the Code du Cinéma et de l'Image Animée.

<sup>97</sup> Article 45 of the Film Industry Act.

<sup>98</sup> Article 61 of Decreto-Lei n.º 227/2006 de 15 de Novembro.

<sup>99</sup> §11a of the Austrian Filmförderungsgesetz and specific filmfunding guidelines

<sup>100</sup> §53-§58 of the German Filmförderungsgesetz.

<sup>101</sup> Ranaivoson, De Vinck & Van Rompuy (2014), p. 21.

A similar motivation lies at the basis of the Dutch Picl project that started in 2016 and may be seen as premium VOD.<sup>102</sup> Films that are screened in participatory arthouse cinemas can be viewed through the Picl platform during the exact same period and for the price of a cinema ticket. People who are not able to travel to their local cinema during the relatively short screening windows for arthouse film can order the film from the cinema website and watch it at home, while the revenues still go to the cinema. In this way, arthouse cinemas maximise the effect of their marketing efforts.

A successful example of reverse windowing is the release of the film *Melancholia* by Lars von Trier in the US in 2011. The film was released on VOD a month before it appeared in the theatres. It made \$ 3 million in the theatres and \$ 2 million on VOD, which was more than the revenues for Von Trier's earlier successes *Breaking the Waves* and *Dancer in the Dark* (Ranaivoson, De Vinck and Van Rompuy, 2014).

New release strategies can cause tension among stakeholders in the film industry, notably between VOD channels and cinemas, who may feel that their platform is being ignored and that they are excluded from revenues.<sup>103</sup> A recent example is the controversy between Netflix and the Festival de Cannes about festival rules introduced in 2017, requiring films to be screened in French theatres before they are eligible for the festival's competitions. Two films, *The Meyerowitz Stories* by Noah Baumbach and *Okja* by Bong Joon-ho, both largely financed by Netflix, were selected for the 2017 Cannes competition. The Federation of French Cinemas (FNCF) objected, stating that an online-only release for films would "call into question their nature as a cinematographic work". The festival decided to introduce a new rule to become effective in 2018, requiring competition entries to be released in French cinemas (Donadio, 2017). Under French law, SVOD services such as Netflix must wait 36 months after a film's theatrical release before they are allowed to stream a film on VOD. Of course, this would directly conflict with the day-and-date release strategy Netflix uses for its films and would undermine Netflix's willingness to invest in feature films targeted at the French market.

When the festival persisted in 2018, Netflix decided to withdraw all its movies from the festival, including double Oscar winner Alfonso Cuarón's film *Roma*, which later won the Golden Lion for best film at the Venice Film Festival and is the Mexican Oscar submission for the 2019 best foreign film. A few months later, when Netflix launched *Roma* simultaneously on its VOD platforms and in cinemas in a set of countries, various larger cinema chains such as Pathé and Vue decided to boycott it.<sup>104</sup> This confrontation between protective policies aimed at stimulating national film and preserving cultural diversity and the reality of new distribution models promoted by powerful market players, illustrates the dynamics of the ongoing developments in European film distribution.

Ranaivoson, De Vinck & Van Rompuy (2014) mention 45 individual examples of alternative release strategies for films between 2006 and 2013. There is a great diversity in new distribution models, depending on type of film and the financing and distribution partners of the producer. The film industry appears to be going through a dynamic phase of

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<sup>102</sup> Picl, <[www.picl.nl](http://www.picl.nl)>.

<sup>103</sup> Cinemas don't always cooperate and sometimes they even boycott releases that go against traditional time windows. See e.g. Lang (2015) and recent developments around Alfonso Cuarón's film *Roma*.

<sup>104</sup> HP/De Tijd (2018). Netflix zal zich moeten aanpassen aan bioscoopzalen. <<https://www.hpdetijd.nl/2018-12-13/netflix-zal-eeen-toontje-lager-moeten-zingen/>>.

experimentation with release strategies and VOD services playing an inducing role. It can lead to conflict and it challenges the traditional separation of windows for each type of exploitation. These developments may jeopardise the security of the presale model on which European film financing is based.

## 5.4. Challenges to territorial online distribution

Online territorial distribution is challenged by a variety of factors. The most notable are: efforts from the European Commission to stimulate the creation of a Digital Single Market, changed audience expectations, the interest of filmmakers, new ways of finding audiences online and the increasing transnational character of European culture. This first challenge was discussed extensively in Chapter 4, the others are discussed below.

### 5.4.1. Changed audience expectations

Ever since films have been available in the online environment, audiences no longer depend on the offer of their local cinemas or the stock of their local video/DVD shop. People have become more and more used to actively searching online for the availability of content of interest and may find a film they want to see in a local cinema or on an online TV or VOD platform. Some might look for it on illegal platforms. For audiences that have become used to an online offer from shops from all over Europe, where they can compare products and prices in their own language and currency, it becomes natural to expect that they can see the film of their choice at the moment and on the screen of their choice. In addition, demand for films is created through social networks, the screening of a film at a festival, awards won at renowned festivals, reviews on online film websites and news about new releases anywhere in the world (Gubbins, 2014, p. 35). Audiences interested in film can get information from anywhere on the internet and they will find it ever harder to understand that the film can be available in Europe, but not in their country.<sup>105</sup>

### 5.4.2. New ways of finding audiences

The internet has brought new ways of reaching audiences. Marketing in an online world is no longer directed at common interests of predefined groups, but at the common interests from millions of idiosyncratic, individual and often inconsistent tastes, which are aggregated into potential audiences (Gubbins, 2012, p. 6). To illustrate this, a metaphor can be used, based on the common premise that taste for humour differs significantly around the world and that comedy travels less well than other film genres (e.g. Higson, 2015, p. 141). If, on a territorial basis, it would appear that French humour is less appreciated by the German audience, a distributor may not acquire the German distribution rights for a certain French comedy. On an individual basis, however, there may be many people in Germany who do appreciate French humour. The group may be too small to release the comedy in German cinemas, but it may be large enough to release a German online version of the film simultaneously with the cinematic release in other European countries. As a result, the film would find a larger audience and the audiences of both European countries would no longer be separated by national borders. Online marketing is not bound by national borders and audiences can be found in internationally shared interest, history or culture.<sup>106</sup> An example

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<sup>105</sup> The convenience of localised language versions is of course a secondary issue, that may be solved once the film is available in a certain country.

<sup>106</sup> See in this context also the recommendation in KEA European Affairs (2010, p. 201): "The EC should support the European audiovisual sector in developing and implementing innovative marketing and branding strategies to reach new audiences".

of a new way to find audiences can be found in online distribution channels initiated by film festivals like Tribeca and Sundance, and more recently the International Film Festival Rotterdam.<sup>107</sup> Within the abundant offer of audiovisual content on the internet, festivals can play a guiding role for an international audience with a shared cultural interest.

#### 5.4.3. The interest of filmmakers

The mere fact that a distributor does not expect to find an audience big enough to justify the investment of a distribution licence, doesn't mean that there are no audiences for a film in a certain European Member State. For filmmakers, it can be detrimental for their film not to reach these audiences. Territorial distribution can stand in the way of arthouse filmmakers who want to build a reputation by reaching the largest possible audience. More established filmmakers may also choose to reach audiences for their film in as many territories as possible. For double Oscar winning Mexican director Alfonso Cuarón, this was the reason to team up with Netflix on his film *Roma*. Netflix has distribution platforms in countries throughout the world and in all but a few European countries, and has the market power to negotiate distribution rights for all or most European countries, bypassing territoriality issues. "A film like this", Cuarón said, "in Spanish, indigenous, in black and white and a drama, not a genre movie, we know it would have huge difficulty just finding space to be shown in theaters". Producer David Linde added that even though the film was shot on 65mm, which can only be fully appreciated in cinemas, in this day and age audiences want to be able to see the movie on the terms they want, whether in a cinema or on a smartphone. "We want the movies to be seen in theaters, but we also want it to be seen by millions of people." (Roxborough, 2018). A similar motivation was voiced by a producer in one of the interviews, who decided to grant a platform a multinational licence for the same amount a different platform offered for the domestic market only.

#### 5.4.4. Transnational cultures

Many stakeholders in the film industry defend the position that territorial licensing plays a key role in supporting cultural diversity in Europe (see Chapter 6.2.2). European media culture however is changing. The increasing influence of the European and global economy has made Europeans more dependent on one another and political issues on a European scale have demanded international responses. These developments are likely to have caused an increasing European awareness in the European population. European media culture is also strongly influenced by increased cultural mobility and increased digital connectivity. Bondebjerg & Novrup Redvall (2015, p. 10) discern two aspects to the European and global dimension of new media culture: an intrinsic aspect that relates to forms of multiculturalism in Europe which partly follow new migration patterns; and an extrinsic aspect that has to do with both the rise of international co-production and with the accessibility of a broad and global offer of information and cultural products through digital networks.

Migration has increasingly shaped large groups throughout Europe that share a common culture across national borders. According to Eurostat<sup>108</sup>, 20.4 million European born citizens were living outside their country of birth and 36.9 million born outside the EU were living in an EU Member State in 2017. The population of first, second and third generation citizens with a Moroccan background living across Europe is estimated at 4 to 4.5 million

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<sup>107</sup> IFFR Unleashed, <[iffr.com/nl/iffr-unleashed](http://iffr.com/nl/iffr-unleashed)>.



(De Bel-air, 2016a). A total of 4.6 million citizens have first, second and third generation Turkish roots (De Bel-air, 2016b) and there are 2.3 million Chinese immigrants across Europe (Latham & Bin Wu, 2013). Of course, there are many more European citizens with non-European cultural roots. These numbers may be relatively small compared to the total European population of over 500 million, and the influence of migration on European film may need to be further explored, but migrant cinema has been part of European film culture for a long time. Well-known examples are British Asian films like *East is East* (1999) and *Bend it like Beckham* (2002), and Turkish German films by director Fatih Akin. Algerian and Moroccan film ('beur cinema') has been a phenomenon in French cinema since the 1960s (Larsen 2018, p. 170). Danish cinema has changed since the 1980s from ignorance about migrant cultures to "one of the single most important forums in Danish society for discussions of citizenship and ethnicity" (Hjort 2005, p. 269). Larsen (2015, p. 187) suggests that the development of migrant cinema may be challenged in some countries by the national interpretation of the 'culture test', which is required by the European Commission to allow state aid for films.<sup>109</sup>

International co-production in Europe and globally connected digital media have connected European culture more than ever. Migrants throughout Europe with a shared history are part of new transnational cultures. Native Europeans dealing with issues of migration and the redefinition of their national cultures as a multicultural one are part of new transnational cultural discussions. The increasing transnationality of European culture is further strengthened by the combination of digital connectivity with common political, social and cultural interests, especially among the younger and most connected generations. These developments influence the concept of European cultural diversity and they challenge the idea of national cinema.

The territorial division of the European film market seems to favour a more nationally and locally defined European cultural diversity and may hamper the dynamics of cultural diversity on a transnational scale, as it excludes some European audiences from access to European films.

## **5.5. Related challenges for European film**

Certain developments create challenges for European film, but are not directly related to the territoriality of the European film market. The most prominent are: Europe producing a growing number of films for which it is increasingly difficult to find audiences, cinemas presenting European arthouse film failing to connect to younger audiences and doubts about the effectiveness of the protective character of the film financing system in Europe. They are mentioned in this chapter because they are part of the many interrelated facets of the total condition of European film. If any changes were to be made to the territorial character of the European film market, it would have an effect on all of these facets.

### **5.5.1. More European films for smaller audiences**

Between 2012 and 2016, the number of feature films produced in Europe increased by 15.7% from 1873 to 2167, while the number of films produced in the US increased by 8.4% from 728 to 789 in the same period. The estimated market share in cinema

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<sup>108</sup> <<https://bit.ly/2CcRzeX>> (Eurostat).

<sup>109</sup> Cinema Communication, Article 52, sub 1.

admissions for European feature films dropped by 2.5 percentage points between 2012 and 2016 from 29.3% to 26.8%, while the market share for US films increased by 5.2 percentage points from 62.3% to 67.5% (EAO, 2017). The combination of an increasing number of European films and a decreasing market share means that, on average, European films have become less successful in finding audiences, and that an increasing number of European films find no audience at all. It puts pressure on the opportunities for European films to be screened in cinemas. The amount of time allocated to each film is decreasing. This development is especially harmful for arthouse films, which usually have low marketing budgets making them heavily dependent on word-of-mouth to find their audience (Koljonen, 2016, p. 15). This competition for screen space is aggravated by the requirements from many European public financiers that films have a theatrical release in Member States where public financing was acquired.

### **5.5.2. Possible loss of younger audiences for European film in cinemas**

Comparative research on the development of the popularity of European cinema for different age groups does not seem to be available. However, there are indications that the interest of younger audiences for independent film in European cinemas is falling. For instance, in the United Kingdom, admissions for 15-24 year olds dropped by 8% and for 25-34 year olds by 21% between 2010 and 2016, while admissions for older age groups increased (British Film Institute 2018b). In Germany, admissions for 16-24 year olds dropped by 43% and for 25-39 year olds by 26% between 2009 and 2014, while admissions for 50+ year olds increased (GFK 2015). European arthouse cinemas generally experience a trend towards older audiences. Europa Cinemas, a network of cinemas focusing on European films, carried out a survey in 2017 among its members in 26 European countries. The biggest concern of the respondents was the failure to connect to younger audiences. 80% found it a strong concern or the most serious challenge. By comparison, the second biggest concern, the dominance of Hollywood, scored 65% (Gubbins & Judah, 2017, p. 9-10). Monitoring the popularity of European film for different age groups and on different platforms might help to interpret these developments.

### **5.5.3. Pressure on the European film financing system**

According to Murschetz, Teichmann & Karmasin (2018), policy makers in Europe who support their national film sector as an essential part of their cultural identity see themselves confronted with a fundamental dilemma: "On the one side, their schemes represent the vision to strengthen artistic talent and creativity, safeguard cultural diversity, foster cultural integration, and improve the economic wealth of the film industry and its stakeholders at large. On the other side, however, they face a legitimacy crisis as their schemes are perceived as being inefficiently allocated, unfairly distributed, and bureaucratically organised, and, worse so, they are said to help little to adapt to future changes needed to get film media adapt to changing market needs."

At the heart of this dilemma lies the hybrid nature of film as both an economic and a cultural good. When growing numbers of European films are produced that find it increasingly difficult to find audiences, and when young audiences move away from European film, the balance between economic and cultural motives seems to be lost. This was illustrated by Figure 3.3 in Chapter 3, which showed that – contrary to economic logic – the smaller the population of a Member State, the larger the number of films produced per million inhabitants.

In France, the volume of subsidies increased strongly between 2000 and 2012, resulting in a thriving film industry and an increase in the number of French films and their diversity, but over the same period, the attractiveness of French film for French audiences has declined (Messerlin & Vanderscheiden, 2018). This could indicate that a saturation point has been reached for European film in many EU countries, but it may also mean that the European film financing system has not found the answer to the changes in the behaviour and expectations of audiences that have occurred over the last decades. These changes have been initiated by a combination of online developments and the rise of new international companies that dominate the film market with new business models that seem to successfully appeal to European audiences.

## 5.6. Crowdfunding as an alternative financing model

Crowdfunding refers to financing projects by a large number of supporters. It can be described as a subtopic of crowdsourcing, which involves tasks that are outsourced to a large community through an open call (Röthler & Wenzlaff 2011).

In principle, crowdfunding is not a new concept. Some earlier examples are Alexander Pope's translation of Homer's *Iliad* in 1714, Mozart's performance of his three piano concertos in Vienna in 1783 and Joseph Pulitzer's action for the pedestal of the Statue of Liberty in 1885.<sup>110</sup> Each raised the funds for their project by addressing an unnumbered group of sympathisers. New horizons for crowdfunding were brought by the digital revolution and crowdfunding is usually defined as a way to enable fundraisers to collect money from a large number of people via online platforms.<sup>111</sup>

There is little known research on the influence of crowdfunding on European film financing. Reports by Röthler and Wenzlaff (2011) and De Voldere and Zeko (2017) focus on the industries of European cultural and creative sectors as a whole, while Breat, Spek and Pauwels (2018) analyse a business model for film in the relatively small Flemish-speaking part of Belgium.

What is certain is that crowdfunding is on the rise. The total market in Europe for all sectors grew from € 1.2 to 7.7 billion between 2013 and 2016 – an average annual growth of 95% (Cambridge Centre for Alternative Finance 2018, p. 21).<sup>112</sup> The most important determinants for a successful crowdfunding campaign are the size of personal networks, communication skills and the time and resources to build and sustain a strong and attractive online campaign. Non-financial benefits of crowdfunding can include social engagement in the funded project, the possibility of building new audiences for present and future projects and publicity through contributors that become ambassadors for the project they funded.

There are many forms of crowdfunding, depending on the type of platform and the purpose of the funding, but crowdfunding schemes are usually classified according to the reward given to contributors. De Voldere and Zeko (2017) discern the following models:

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<sup>110</sup> <<https://www.kickstarter.com/blog/kickstarter-before-kickstarter>>.

<sup>111</sup> <[https://ec.europa.eu/growth/tools-databases/crowdfunding-guide/what-is/explained\\_en](https://ec.europa.eu/growth/tools-databases/crowdfunding-guide/what-is/explained_en)>.

<sup>112</sup> The UK accounts for 73%, or € 5.6 billion of this volume. Without the UK, the percentage of average annual growth between 2013 and 2016 is 85%.

- *Donation based*: An altruistic donation of usually small amounts of money without anything more in return than a thank you, or a mention of a name on a website.
- *Reward based*: A donation against a non-financial reward at a later date. Examples are CDs, DVDs, downloads, updates, a mention of a name in the credits or even an appearance as an extra in a film in exchange for a large contribution.
- *Peer to peer lending*: A loan against a financial reward which can have the form of a returned loan with interest and/or revenue sharing or a symbolic return payment.
- *Equity based*: An investment in return for a share in a business or product. Investments can be small (micro-equity) or substantial.

Unsurprisingly, this replicates the various roles 'traditional' financing sources can take: grants, MGs, loans and equity investment. For crowdfunding, the reward based model is the most popular by far among European cultural and creative projects: 88% used this model between 2013 and 2016. 8% used the donation based model and 2% used peer to peer lending. The remaining 2% are taken by equity based models and a small number of 'other' models. Not all crowdfunding campaigns reach their goals: between 2013 and 2016, 19% of all campaigns with peer to peer lending models were successful. Donation based campaigns scored 41%, reward based campaigns 51% and equity based campaigns 56%. Despite its high success rate, equity based crowdfunding does not seem to be very popular. This may be due to the fact that equity crowdfunding was not authorised in the US until the second quarter of 2016<sup>113</sup> and that it may have different legal and tax issues in each European national jurisdiction (De Voldere and Zeko 2017). It may be interesting to further explore the possibilities and challenges of equity crowd funding for film.

Between 2013 and 2016, crowdfunding for film, TV and radio made up 33% of the campaigns in the cultural and creative sectors, raising € 71 million (De Voldere and Zeko 2017). The most European crowdfunding projects by far are launched through the US Kickstarter platform. Kickstarter's statistics show that crowdfunding campaigns for films have occasionally raised more than a million dollars in the US<sup>114</sup>, while the highest amounts raised in Europe were a few hundred thousand. However, the average amount raised for film and video on Kickstarter lies between USD 1,000 and 10,000, suggesting that the influence of crowdfunding on European feature film budgets remains very modest so far.<sup>115</sup> Breat, Spek and Pauwels (2018) conclude that for a small territory like Flanders with a culturally and linguistically limited market size, crowdfunding can only be valuable in combination with other means of financing.

Apart from being a contribution in the financing mix of a film, however, crowdfunding may act as an additional criterion for the selection of film projects by public funders. This may democratise the selection process and make budget allocation more transparent. Matching crowdfunded budgets with public funds may enhance the engagement of local communities with the process of film production. The influence of crowdfunding on European film financing may increase in the future and developments in equity based models may lead to new financing models. A targeted policy approach may benefit from further research.

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<sup>113</sup> On 16 May 2016, title III of the Jumpstart Our Business Startups (JOBS) Act, Public Law 112-106 [H.R. 3606] became effective, regulating crowdfunding.

<sup>114</sup> These high amounts are probably due to the high population and the popularity of film in the US.

<sup>115</sup> Kickstarter, <[www.kickstarter.com/help/stats](http://www.kickstarter.com/help/stats)>.

## 5.7. Changing and alternative film financing models

As highlighted in the previous chapters, films in the EU derive their funding from a wide variety of sources. Direct support schemes such as grants and loans and indirect support by way of cash rebates or tax credits generally make up a considerable part. For international co-productions, such funding is often received from each of the co-producing countries. This is supplemented with investments from producers, co-producers and other parties, and presales with MGs. Box 3.1 illustrates that the mixture of these sources can be quite different for each individual film.

The market challenges for current film financing practices and the related developments in the European film sector that were discussed in this chapter are likely to affect the mixture of financing sources for European films. The influence of large, non-European on-demand distribution platforms on film financing models will be severe. They are expected to challenge and change the role of distributors, cinemas and broadcasters. The clash between Netflix and the Cannes Festival and cinemas that was described earlier in this chapter is exemplary of this. Strong cooperation of European VOD platforms may provide a European counterweight to the dominance of non-European VOD platforms.

VOD platforms may increase their contribution to European film production by acquiring rights or by investing in European content. They may be required to do so by the Revised Audiovisual Media Services Directive which may also require them to hold a certain amount of European works in their catalogues. European filmmakers may find new ways to reconnect with young audiences through digital networks, possibly in combination with an increase in equity crowdfunding and other types of crowdfunding. A reshuffle of exploitation windows may lead to new agreements or even vertical integration between stakeholders – e.g. cinemas cooperating or integrating with VOD platforms instead of clashing to maintain their preferred position – and a renewed appreciation of different platforms for different types of experience. The forming of transnational European cultures may lead to a more common European forum and a more common identity for European film. To be able to measure and monitor these changes in detail, studies of financing plans for large numbers of European films such as Kanzler (2018) would have to be continued over a longer period of time.

Nevertheless, these changes – however disruptive some of them may be for industry stakeholders and for the exploitation and financing of films – do not change the fundamental conundrum of financing a film, particularly in Europe: financing has to be secured in the face of fundamental uncertainty about demand in a highly competitive environment, and the potential sources of funding remain unaltered, even though their mix may vary between films and over time. Crowdfunding, discussed in the previous section, is an interesting new development, but so far of limited significance in financial terms, and as long as many European films struggle to find an audience, it is unlikely to become a large share of the finance mix of an average film.

Another phenomenon worth mentioning is product placement, where consumer goods and services appear in films or are mentioned in them. A famous example is the Mini Cooper car appearing in the 2003 remake of *The Italian Job*. *James Bond* films are also well-known for their product placement. Brookey & Zhang (2018) observe that in product placement cash deals are rather rare. More commonly, “barter deals are arranged where the product manufacturer provides a crosspromotional advertising and marketing campaign” (p. 141).

Nevertheless, Brookey & Zhang (2018) state that some expect product placement will become an important source of film financing in the future and that subsequently more cash-based deals will be made. Like other sources of finance, such deals will depend on the market potential of films.

In view of the large ex-ante investments required to make a film, presales are expected to remain an important part of the finance mix. As discussed in Chapter 4, if territorial grants of copyright were to no longer be valid, either by operation of EU competition law or as a result of further unification of copyright, exclusive presales of rights in distinct language versions would likely still remain legal and might become a viable alternative for financing presales.

Oxera and O&O (2016) briefly touch upon this issue in the context of enforcing dubbing to ensure that audiovisual content is only attractive for the language market it is licensed for. This would certainly raise the costs and alter the viewing experience in countries where subtitling is more common than dubbing, such as the Nordic countries, the UK, Ireland and the Netherlands, and could lead to non-availability of “more avant-garde content” in some lower-income countries (Oxera and O&O, 2016, p. 67). However, Oxera and O&O seem to overlook the fact that in the current situation such content is often unavailable as well, as a result of territorial licensing and the failure of right holders to grant licences for smaller markets. If territoriality in copyright were to be completely phased out, access to original language versions in currently unserved markets would improve for those willing and able to view the original version.

For the majority of the population that would prefer the subtitled or dubbed version – depending on the country’s tradition in this respect – not much would change if presales licences based on territorial exclusivity were to be replaced by licences based on language exclusivity. The current model that allows films to travel on a country-by-country basis after gaining a reputation at festivals could continue to exist, even if there might be some practical changes required where language regions are distinct from national territories. As discussed in Chapter 4, it would also affect co-production agreements between co-producers in the same language area, but this would not present an unsurmountable obstacle to such agreements.

The risk of transnational ‘arbitrage’ – consumers accessing films targeted for lower-income Member States at lower prices – seems greatest for English-language films, including US productions, in this scenario of language exclusivity. However, following Brexit the majority of consumers most likely to consider employing such arbitrage – the native English-speaking British population – will no longer be part of the Internal Market. In other countries, except Ireland, such arbitrage is likely to remain limited in scope.



## 6. STAKEHOLDER POSITIONS

### KEY FINDINGS

- Reactions of different stakeholders show a large degree of consensus. There is little difference between positions and arguments, and opposing positions on certain subjects have not been found.
- The strongest stakeholder arguments in favour of territoriality in film financing seem to lie in the essential role of territorial exclusivity for presale agreements.
- The argument that territoriality stimulates cultural diversity in European film can be countered by the argument that it discourages transnational and pan-European cultural diversity and that it blocks European audiences from those same films.
- In a market going through severe changes, adaptations to the current legal framework should allow for a diversity of financing and distribution models.

### 6.1. The main stakeholders in and around the film industry

The process of filmmaking involves many parties with different interests and backgrounds. Of course, there are the filmmakers such as screenwriters, directors, actors, set builders, editors, music composers and many more. But bringing a film from the script to the screen also involves financiers who pay for the film to be produced long before there are revenues, sales agents who sell the film and distributors who bring the film to distribution platforms such as cinemas, television and online VOD platforms. Parties like distributors, broadcasters and VOD platforms can also take part in the financing of the film. Most of these stakeholders are organised on national, European and sometimes worldwide levels in order to promote their interests.

European Commission publications, decisions, proposals, impact assessments and sector inquiries with relevance to the role of territoriality for European film financing provoked reactions from stakeholder organisations, as did relevant regulations by the Parliament and Council. Quite often, joint letters and position papers were drawn up by a group of organisations which were in some cases supported by private parties (inter alia Bundesliga and Premier League), national film organisations and individual film professionals.

The general subjects under discussion were the creation of a Digital Single Market for the audiovisual industry in Europe; reform of the European copyright rules; state aid for national film and other audiovisual productions; cross-border access to pay TV and portability of online content services in the European online market; the review of the European Satellite and Cable Directive; the modernisation of the Audiovisual Media Services Directive and the proposal for a Regulation on addressing geo-blocking. In order to bring the stakeholders' reactions within the realm of this research, their positions and arguments relating to territoriality and new models of film financing were arranged in three categories: film financing, the interest of consumers and cultural diversity and current challenges for European film. The most active stakeholders are:



- Association of Commercial Television in Europe (ACT) <sup>(1) (2)</sup>
- CREATIVITY WORKS!, a coalition of organisations, federations and associations representing Europe's cultural and creative sectors
- EUROCINEMA, an association of cinema and television producers <sup>(1) (2)</sup>
- EUROPA DISTRIBUTION, European network of independent film distributors <sup>(2)</sup>
- European Coordination of Independent Producers (CEPI) <sup>(1) (2)</sup>
- European Film Agency Directors (EFADs)
- European Producers Club (EPC) <sup>(2)</sup>
- Federation of European Film Directors (FERA) <sup>(2)</sup>
- Federation of Screenwriters in Europe (FSE) <sup>(1) (2)</sup>
- Independent Film & Television Alliance (IFTA) <sup>(2)</sup>
- International Federation of Actors (FIA) <sup>(2)</sup>
- International Federation of Film Distributors' Associations (FIAD) <sup>(1) (2)</sup>
- International Federation of Film Producers Associations (FIAPF) <sup>(1) (2)</sup>
- International Union of Cinemas (UNIC) <sup>(1) (2)</sup>
- International Video Federation (IVF) <sup>(1) (2)</sup>
- Motion Picture Association of America (MPAA) <sup>(1) (2)</sup>

<sup>(1)</sup> *member of CREATIVITY WORKS!*

<sup>(2)</sup> *contributor to joint documents*

## 6.2. Positions of stakeholders

Reactions of different stakeholders show a large degree of consensus. There are few differences between positions and arguments. Some stakeholders may focus on a specific area, such as FERA, which stresses the importance of remuneration for authors, who are at the heart of the European cultural industry. Other stakeholders rarely, or never, publish positions or reactions to policy papers, although they do endorse joint documents. Opposing positions on certain subjects have not been found.

To support their positions, stakeholders often refer to two fairly recent studies that address the issue of territoriality for audiovisual content – one by Charles Rivers Associates commissioned by DG Markt (Langus, Neven & Poukens, 2014), and the other by Oxera and O&O (2016) commissioned by a group of stakeholders in the international audiovisual industry. Langus, Neven & Poukens (2014) are overall very critical of restricting territoriality. Their primarily economic arguments centre around price discrimination, transaction costs and vertical agreements involving territorial exclusivity which may help distributors to reap the entire benefits of expenditure on marketing, and to prevent others from free-riding on their efforts. They note that vertical agreements as well as price discrimination can lead to both a reduction and an enhancement of social welfare, but clearly give more weight to the latter and the arguments in favour of territoriality.

As possible alternatives to territoriality, Langus, Neven & Poukens (2014) formulate three policy scenarios under a 'country of origin' principle. They prefer a scenario which provides full freedom of contract to license along national borders and to impose geographical restrictions based on the country of residence of the final consumers. However, the report admits that this solution may pose a conflict with general EU Internal Market principles and competition law.

Oxera and O&O (2016) focus primarily on the role of territoriality for price discrimination and windowing – with window durations that differ significantly between Member States. They seek to quantify the effects of ‘unrestricted cross-border access’ to find an annual loss of consumer surplus up to € 9.3 billion, an annual loss of producer revenue up to € 8.2 billion and a decrease in content produced of up to 48%.

### **6.2.1. Arguments related to financing**

In general, stakeholders defend the position that territoriality is essential for European film financing. According to EFADs, the whole ecosystem of audiovisual film financing is based on the territoriality principle, which should be regarded as a crucial tool to create a balance in negotiations between the supply side and the demand side. The territoriality principle helps secure creative risk taking (EFADs, 2015a, p. 4). FIAD, FIAPF, IFTA and IVF (2010, p. 1) hold that “... right holders’ contractual freedom and exclusive right to choose the terms of distribution of the copyright work, including the distribution channel and the territorial scope of the rights licensed, is crucial to maximising revenues from audiovisual content”.<sup>116</sup>

The importance of territoriality for presales is stressed in a joint document: “... licensing on a territory-by-territory exclusive basis is essential to raising (the) massive upfront investments indispensable for the financing for films and audio-visual productions”. (ACT et al. 2016, p. 2). EU stakeholders find support for this position in a statement by the Motion Picture Association of America (MPAA): “Contractual freedom to license on a territorial basis and respect for international copyright norms are of paramount importance to the audiovisual sector, where the exclusive rights to authorize/prohibit the distribution of creative works through licensing is the basis for recouping substantial upstream production costs, often through pre-sales of exploitation rights.” (MPAA, 2017, p. 35). If territoriality within Europe were to be abolished, it would lead to “less engagement of private investors in pre-sales, dramatically reducing the number of works created”. (EFADs, 2015b, p. 1). These arguments are mainly in line with the more theoretical economic discussions in Langus, Neven & Poukens (2014) and were confirmed in our interviews with independent European producers.

### **6.2.2. Consumers and cultural diversity**

Most stakeholders point out that territorial licensing in Europe finds a basis in the differences in cultures, history, languages and audience preferences that exist between regions and Member States. ACT argues that distributors need knowledge of local market cultures and that exclusive territorial distributions allows them to develop such knowledge (ACT, 2014, p. 5). EFADs stresses that success of European film depends mainly on the adaptation of promotion, communication and marketing activities to the local audience and that territorial licensing is crucial to ensure cultural diversity (EFADs, 2015b, p. 2). In a joint statement, representatives from the European film industry<sup>117</sup> hold that territorial licensing actually stimulates the creation of foreign markets for national films by encouraging individualised promotion and distribution plans to appeal to culturally distinct audiences across Europe (FIAPF et al, 2016, p. 1).

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<sup>116</sup> See for similar statements: CEPI (2015, p. 4) and ACT (2014, p. 4).

<sup>117</sup> Signed by more than a hundred individuals representing companies and organisations from the European film industry, including most of the stakeholder organisations.

UNIC (2015, p. 1) underlines that territoriality makes it possible to vary release dates for films across Europe taking into account local conditions, such as “different release densities (some countries release more local films than others), different holidays, weather conditions, varying market conditions and a variety of further factors (broadband proliferation, etc.)” and illustrates the argument with the example of EU box office hit *Intouchables* (France, 2011), “which was strategically released at different times across EU territories to benefit from the word-of-mouth that had already emerged in other countries (the film was released in Estonian theatres seven months after its initial French release. It was brought to the big screen in the UK nine months after the French release). The film ultimately attracted 18.5 million visitors to cinemas outside of France.” Note that this example of international word-of-mouth is not fully consistent with arguments for localised marketing.

Some stakeholders contend that, rather than constituting a barrier to the dissemination of films amongst European audiences, territorial licensing actually stimulates it because co-financing distributors have an incentive to distribute the film in those countries for which they have acquired the exclusive distribution rights (IFTA, 2014, p. 4). This argument may be valid for the co-producing countries, but for audiences in many other European countries, territorial licensing will imply that they won't have access to the film.

EFADs argues that without territorial licensing Europe's cultural diversity would be in danger: “Territorial licensing is crucial to ensure cultural diversity. Removing it would imply a dangerous standardization of creation because only the biggest and strongest audiovisual actors would survive.” (EFADs, 2015b, p. 2). EFADs also predicts that European cultural diversity would be endangered and less widely spoken languages would be marginalised because the “select number of large companies that could afford to buy and offer high value films on a pan-European basis”, would focus on the largest possible audience with English language films (EFADs, 2016, p. 4). In a joint letter<sup>118</sup>, stakeholders argue that, if the country of origin principle were to apply to online services, national players like broadcasters “would no longer be able to obtain exclusive licenses from producers for content with international appeal. The only winners would be large international platforms, which are not necessarily best suited to promote the European cultural industries and European cultural diversity and respond to the needs of local audiences.” (FIAPF et al., 2017, p. 5). These stakeholders seem to overlook that if this were to actually happen, it would open new market opportunities for services catering to the needs of local audiences with films in less widely spoken languages and a culturally diverse catalogue.

### **6.2.3. Response to current challenges**

In this chapter, we take note of answers to challenges that were addressed in the position papers, letters and other documents produced by the stakeholders. These documents were written in response to documents from the European Commission, Parliament and Council relating to the territoriality of European film financing, and not in response to challenges for European film. This chapter therefore does not represent a complete overview of the reactions from the stakeholders to these challenges.

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<sup>118</sup> The letter was signed by ACT, CEPI, Eurocinema, Europa Distribution, FERA, FIAD, FIAPF, FSE, IFTA, IVF, MPA, UNIC joined by Deutsche Fußball Liga, Europa International, International Federation of Actors, LaLiga, Mediapro, Premier League, Spitzenorganisation der Filmwirtschaft and Verband Privater Medien.

In answer to the rise of international on-demand distribution platforms, FIAD, FIAPF, IFTA and IVF reacted in 2010 with the argument that “The contractual freedom granted to right holders to license their content the way they choose does not constitute an obstacle to the launch of innovative services available across borders.” (FIAD et al., 2010). Territoriality is not mandatory and leaves room for alternatives, as UNIC points out: “If sufficient cross-border demand exists – and if film producers or distributors wish to not work with a local partner to promote the film in a foreign country – they can already today release it on a pan-European VOD platform.” (UNIC, 2015).

In response to changing commercial and market conditions, a joint document holds that the industry is adapting without legislative intervention. “Where there is demonstrable and sustainable consumer demand, the market is responding appropriately and positively for all involved.” (ACT et al., 2015).<sup>119</sup> Independent producers interviewed also held the view that territoriality doesn’t stop new developments. Referring to technological changes and new players who are dominating the market with new business models, EFADs suggests that, in order to integrate these parties in the existing European system and have them contribute to European film culture, the fundamentals of the entire film financing system may have to be rethought (EFADs, 2017).<sup>120</sup> If any legislative action were to be taken to change the current legal framework, it should be gradual and decided in close cooperation with stakeholders. In a time of significant adaptation and change, any ‘big bang’ approach that would put the whole sector at risk should be avoided (EFADs, 2015c). Most of the independent producers that we interviewed prefer to have choice if they want to finance and distribute a particular film on a territorial or a pan-European basis. FIAD (2017b) supports that view and maintains that “any measures introduced should remain voluntary (...) and not undermine the principle of territoriality which is the cornerstone of financing in the audiovisual sector”.

### 6.3. Conclusion

The strongest arguments in favour of territoriality in film financing seem to lie in the essential role of territorial exclusivity for presale agreements, without which financing of most European films would not be possible within the current model. Although film financing and the role of distributors are changing, and new models are emerging, it is unclear when and if these models will become a realistic alternative for all European films. The arguments relating to culture seem a lot weaker. One could argue that a unification of the European market, in combination with the growing transnationality of European culture, would take away most arguments relating to the need for localised marketing approaches aimed at cultural differences. The argument that cultural diversity is stimulated by territoriality can be countered by the argument that territoriality blocks some European audiences from European films and that it discourages the rise of transnational and pan-European cultural diversity in Europe. A strong defence of territoriality is that it is a matter of choice for producers and distributors and if alternatives become interesting enough, it doesn’t stand in the way of pan-European licences. It seems obvious that drastic changes to territorial exclusivity will have severe consequences for the European film industry, while at the same time the changes that are happening in the film market call for flexibility, an open mind and willingness to reconsider all aspects of European film financing.

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<sup>119</sup> The document was signed by ACT, CEPI, EURO CINEMA, FERA, FIAD, FIAPF, FSA, IFTA, IVF, MPA, UNIC, joined by Eurocopya, International Federation of Actors and Uni Global Union.

<sup>120</sup> This point was kindly clarified for the researchers by Peter Dinges, president of EFADs.



## 7. SYNTHESIS AND RECOMMENDATIONS

In the previous chapters of this report we have discussed a number of economic and legal issues vital to film financing in the EU. In particular, we examined the role that territoriality plays in film financing, the legal and market challenges to territoriality as a key model for film financing and the consequences of EU policies that would reduce or mitigate the scope of territorial exclusivity in the audiovisual sector. The preceding chapters also described and analysed Member States' and EU models of film financing, the challenges posed by digital developments and changing consumer behaviour, and presented possible alternative models of financing. This final chapter concisely synthesises the findings from the preceding chapters and formulates recommendations for policies that are consistent with foreseeable future developments.

### 7.1. Territoriality and models of financing

As the preceding chapters demonstrate, **European films** are on average far **less successful in attracting large audiences than American films**. Despite the fact that twice as many feature films are being produced annually in Europe as in the US, the 2017 market share of European films in Europe was typically between 20 and 30% of admissions, TV broadcast, international TVOD catalogues, SVOD catalogues and promotion. In 2016, "Bridget Jones's Baby" was the only European film in the top 20 in terms of EU admissions. **Language barriers** and **cultural differences** that exist in Europe are a **likely reason** for this relatively weak position. They cause many European films to miss out on economies of scale and make them **more dependent on direct and indirect public funding**. Moreover, Chapter 3 showed that, on average, EU Member States that are smaller in terms of population produce more films per capita, while recent empirical work by Kanzler (2018) demonstrates that films in these countries have smaller average budgets and rely more heavily on public funding.

For films with a smaller budget, it is more difficult if not impossible to contract a well-known director or famous actors – bankable names – that may serve as an important quality signal both to the public and to financiers. Not only does this make solving the financing puzzle more difficult, it also makes such films **more dependent on building their reputation via festivals and awards**, which are only available after a film has been made. Even larger European productions often lack the marketing budget to start a pan-European campaign. They gain a reputation outside their producing or co-producing countries by being nominated or winning awards at festivals or through success in their home markets, and only then can they successfully grant licences for theatrical and other distribution channels in other EU Member States. **This process may take more than a year from a film's first release.**

Thus, smaller yet successful EU productions experience a fairly long time span during which territorial exploitation windows are out of sync. This differs from the trend for large blockbusters, for which theatrical releases have become ever more synchronised across territories. For smaller productions, a failure to be able to grant market-specific licences during the first two or three years after their first release could increase the risk of cannibalisation across windows and distribution channels. This would erode distributors' willingness to invest in licences and the opportunities to recoup part of the investments. As a consequence, **drastic and sudden changes to territorial exclusivity will have**

***significant effects on the European film industry in general and the practice of financing European films in particular.***

At the same time, the changes that are happening in the film market – such as the turbulent growth and dominance of VOD platforms from outside the EU and changing viewing behaviour, particular in younger age groups – call for flexibility, an open view and willingness to reconsider all aspects of European film financing. Despite shifts in the value chain that these changes bring about, they have not changed the fundamental puzzle of financing a film, particularly in Europe: financing has to be secured in the face of demand uncertainty in a highly competitive environment. Also, the potential sources of funding have remained the same, even though their mix may vary between films and over time.

***No profoundly new models of film financing have been identified*** in this report; changes and differences are mostly gradual. This observation ties in with the conclusions by Kanzler (2018), who studied the financing plans for 445 films from 21 European countries. ***Crowdfunding*** and ***product placement*** are interesting and relatively new developments, but so far of ***limited significance financially***. In fact, the different flavours of crowdfunding that are distinguished can be mapped onto the more traditional sources of finance: grants, loans and equity. Moreover, just like revenues from presales, these new sources of potential financing scale with the audience a film can aspire to reach. As long as many European films struggle to find larger audiences, crowdfunding and product placement are unlikely to form a large share of the finance mix of an average film.

Notwithstanding the important role territorial licensing continues to play for financing EU films, the legal analysis in Chapter 4 has shown that the role ***territoriality*** plays ***in copyright is gradually pushed back by EU law aimed at removing national barriers to the Single Market***. Furthermore, EU competition law sets strict limits on grants of territorial exclusivity, and prohibits clauses in broadcasting and pay television licences that prevent or restrict ‘passive’ sales to consumers/viewers in non-licensed territories. The freedom of right holders to preserve territorial exclusivity by way of contract is likely to become increasingly vulnerable to EU competition law, as territorial grants are no longer supported by underlying territorial rights.

This report recommends two different legal approaches that might help preserve current financing models for EU films as much as possible:

- The first approach would be for the European Commission to create specific competition rules regarding exclusive territorial grants of rights in the film industry, in the form of a Commission Regulation similar to the existing ***‘block exemptions’*** that allow territorial allocation of markets in technology licence agreements in well-defined situations. One could imagine an exemption that would allow a distributor ***territorial exclusivity*** in respect of films produced in the EU, for a duration of, say, ***two or three years following the first release of a film***. This would be in line with current practices in the exploitation of the more successful European films. Yet it would also stimulate the pan-European availability of EU films via online platforms after this period without cannibalising the market potential and exploitation channels in the first two or three years.
- A second approach, which requires no legislative intervention but a change in licensing practices, would be to rely more on language exclusivity. Even if, due to the combined

impact of copyright unification and EU competition law, exclusive territorial grants of copyright were someday no longer valid, exclusive grants of rights in different language versions would likely remain completely legal. **Exclusive grants of rights for distinct dubbed or subtitled language versions of a film** could provide a practical and legally more robust alternative to territorial licensing, albeit not without potential challenges due to the possible future proliferation of automatic translation tools and the need to revisit co-production agreements between countries sharing the same language, as discussed in Section 4.7. Although a shift to language exclusivity as a basis for market segmentation in licencing contracts would require certain changes to the prevailing financing model of EU films, these changes would be evolutionary rather than revolutionary, and would not require legislative or regulatory intervention. The European Union has 24 official languages, and language areas largely – albeit not fully – coincide with territorial areas. Language exclusivity in audiovisual content distribution contracts may therefore provide a ‘natural’ alternative for market segmentation along national borderlines.

## 7.2. Funding bodies

As Chapters 3 and 5 of this study demonstrated, a **wide variety of financial and non-financial film support policies** exist on the pan-European and Member State level, as well as on a regional level. In 2014, the last year for which comprehensive data are available, direct support alone amounted to € 2.15 billion in the EU Member States, about € 4.20 per capita.

Support is provided both in a direct and in an indirect manner. **Direct support** takes the form of a **grant or loan**, but the repayment conditions on loans are generally very soft and recoupment rates are low: in 2014, only 5% of total funding body incomes in the EU derived from repayments of previous loans and copyright revenues. Most Member States deployed a combination of complementary policies to provide support to various types of project and various film-related activities. The largest share of the financial support is usually spent on the actual *production* of films. While the direct aid schemes in general show great similarities, the specific conditions for eligibility and fitnesses differ per scheme and per Member State. Several schemes mandate a theatrical release of films in the supporting country and might impose requirements on the timing of distribution windows.

In addition, many Member States support the film industry in an **indirect** manner, for example through **incentive schemes** – tax credits and cash rebates – or through schemes aiming to unlock private capital by reducing the risks or offering tax benefits for investors. Making for an additional source of public financing, the important role that **broadcasters and other audiovisual media service providers** play in the financing of films is in the majority of Member States reinforced by mandatory direct or indirect investment obligations in the film industry.

Combined with the schemes at the EU level, such as the **Creative Europe** programme with its *Cultural and Creative Sectors Guarantee Facility* and the Council of Europe **Eurimages framework**, film financing policies complement each other in targeting all roles and actors in a film’s finance plan. Moreover, many countries have subnational support policies to supplement the national schemes. Hence, no missing links or gaps in the support landscape were identified.



Nevertheless, in view of the challenges described in Chapter 5, support schemes might be directed more actively towards **connecting arthouse films with younger age groups** – and their preferred modes of consumption – and transnational cultures. Research to monitor and analyse the popularity of European films in different age groups and cultures and on different platforms might be a helpful starting point to better understand these developments and to design optimal policies to reconnect with these groups.

Next, it was observed in Sections 3.3 and 5.3 that various funding schemes, as well as festivals, public broadcasters and national laws reinforce the traditional windowing system by **mandating distribution via predetermined distribution channels and even the duration of such windows**. This reinforces the dependence of EU film financing on the territorial grant of licences. As producers prefer to preserve the ability to grant territorial licences as a matter of choice and claim that the current system does not stand in the way of pan-European licences, regulations that do stand in the way of such pan-European licences ought to be **reconsidered** by Member State legislators, funding bodies, festivals and public broadcasters. Flexibility in choosing the optimal exploitation model and – if needed – adapting it along the way, is crucial to succeed in the current dynamic market.

In a similar vein, the development of a **significant European VOD platform** as a counterforce to the current dominance of platforms from outside the EU could be **promoted**. Competition law assessments of initiatives within and across EU Member States to form such platforms should consider the global competitive environment, within which EU platforms are currently insignificant.

A recurring theme – both in the literature, and in the interviews and the data – is the large number of films that are made in the EU, in combination with the great dependency of films on support schemes and the disappointing commercial performance. Contrary to economic logic, smaller Member States in terms of population produce more films per capita, which – unsurprisingly – require a larger average share of public funding. More selective support policies in awarding **higher budgets for fewer films** would increase the opportunities for EU films to find the audience they deserve.

Lastly, given that even larger European productions struggle to find the marketing power and budget to start a pan-European or even multi-country marketing campaign, funding bodies both at Member State level and at the European level could be encouraged to shift the priority in their existing film financing policies from primarily providing support to the actual production of films to activities in the field of **distribution, exhibition and promotion**.

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## ANNEX A. LIST OF INTERVIEWEES

**Table A.1: List of interviewees and the organisations they represent**

ORGANISATION	ROLE(S)	NAME AND FUNCTION
European Film Agency Directors Association (EFADs)	Association of funding bodies	Peter Dinges, President
IFFR Unleashed	Distribution platform	Melissa van der Schoor, Manager Digitale Distributie
Lumière	Producer, distributor, distribution platform	Marika Muselaers, Co-CEO / Content & Strategy
Netherlands Film Fund	Funding body	Doreen Boonekamp, CEO
Opus Film	Producer	Ewa Puszczynska, Producer / Head of Development
Pandora Film Production	Producer	Christoph Friedel, Producer
Picl	Distribution platform	Anke Diejen, Managing Director
Savage Film	Producer	Bart Van Langendonck, Founder / Producer
Screen Ireland	Funding body	James Hickey, Chief Executive
Topkapi Films	Producer	Frans van Gestel & Arnold Heslenfeld, Producers / Founding Partners
Warner Bros. Entertainment Nederland B.V	Producer, distributor	Hajo Binsbergen, Managing Director

**Source:** IVIR (2018)





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This report studies the role of territoriality in film financing, the legal and market challenges territoriality faces as a key model for film financing and the consequences if EU policies were to reduce or mitigate the scope of territorial exclusivity in the audiovisual sector.

It provides information on Member States' and EU models of film financing, explores the challenges film financing faces from digital developments and evolving consumer behaviour and analyses possible alternatives to traditional methods of financing and policies to support this.

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