

## Proposal for a fallback TVOD service for publicly funded AV works

*Proposal submitted by the COMMUNIA Association for the Public Domain for the Stakeholder dialogue on cross-border availability and access to audiovisual content across the EU organised by the European Commission's Directorate General for communications networks, content and technology.*

(1) This document describes a proposal to ensure the EU wide availability of publicly funded audiovisual works produced in the European Union through a transactional video on demand (TVOD) service. The proposal has been drafted as a contribution to the European Commission's stakeholder dialogue on access to and availability of audiovisual content across the EU and is intended for further discussion in this context.

(2) The proposal developed in this document aims to overcome the widespread reality of geo-blocking online access to AV productions, which we see as a negative externality of territorial copyright licensing that is underpinning much of the European AV production value chain. **This proposal does not intend to change the territorial nature of exclusive rights and the exclusive territorial licensing practices that are built upon this reality.**

(3) The proposal has been developed with publicly funded cinematographic AV works in mind. Cinematographic works provide the most urgent and compelling use case. However, this does not mean that other types of works — such as documentaries or TV series — cannot be included in the scope of the proposed service at a later stage. For the purpose of the initial discussion, we propose to keep the focus on cinematographic works that have received public funding for production or distribution.

### The importance of public funding

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(4) Why are we proposing to focus on works that have received public funding? There are two reasons for this:

(5) Public funding plays a significant role in the production of AV works. The importance of public funding for European AV productions is clearly shown in a 2020 study by the European Audiovisual Observatory on films released in 2018. According to this study, public funding is the most important source of funding for AV productions in the EU (the 26% share of "Direct public funding" shown in the table below is likely to be even higher in reality, since "Broadcaster investments" will also partially be investments by publicly funded broadcasting organisations):

**Table 12. Breakdown of cumulative financing volume by source (2018)**

Ranked by percentage share; based on all 568 sample films

Rank	Financing source	Amount in MEUR	% share
1	Direct public funding	473.8	26%
2	Broadcaster investments	379.1	21%
3	Producer investments (excl. broadcasters)	300.7	17%
4	Pre-sales (excl. broadcasters)	270.1	15%
5	Production incentives	269.9	15%
6	Private equity cash investments	38.0	2%
7	Debt financing	16.4	1%
8	In-kind investments	7.6	0%
9	Other financing sources	40.0	2%
	<b>Total sample</b>	<b>1 795.6</b>	<b>100%</b>

Source: European Audiovisual Observatory (2020), Fiction film financing in Europe: A sample analysis of films released in 2018

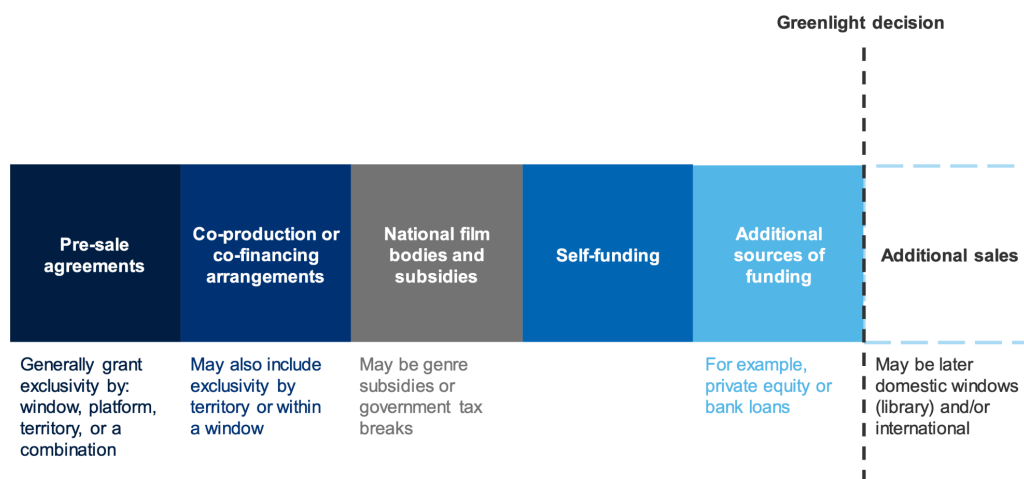
(6) Public funding comes with a strong moral imperative to ensure that the publicly funded results can be enjoyed by the public. **As a general principle, works funded with public money should be available to the public. At the very minimum, this means that it must be ensured that no part of the public is excluded from obtaining lawful access to works created with public funds.** For the purpose of this proposal, we consider this requirement met when individual members of the public have the ability to obtain access to a work against the payment of a fee.

(7) From the above it follows that AV works that receive public funding for production or distribution should be legally available to anyone in the EU under reasonable conditions. In the current situation this is not the case. While AV works are increasingly available online to the public in some member states through VOD services that have been licensed for distribution in these member states, these services usually geo-block access by members of the public from other member states for which they do not have the distribution rights.

## The importance of exclusive territorial licensing

(8) Geo-blocking is ultimately the result of the specifics of the funding model for AV productions, which — in its current state — depends on the producers' ability to grant exclusive territorial licences to raise funding from co-producers and pre-sales based on exclusive territorial licences to distributors. Income from pre-sales and co-productions makes up another significant share of the overall production costs of AV productions and geo-blocking is essential to guarantee territorial exclusivity in practice.

(9) A 2020 study by the consulting company Oxera conducted “for a group of AV businesses active in Europe” clearly shows the importance of both pre-sales and co-production revenues for the financial sustainability of AV productions:



Source: Oxera (2020), The impact of including AV in the EU Geoblocking Regulation: evidence from industry

(10) What it also shows (see the above illustration from page 29) is that for "typical productions" there is a clear cut-off date — the green-light decision — until when funding needs to be secured. The Oxera report argues that the ability to grant separate exclusive licences per territory is essential to ensure that productions get green-lighted. It also clearly shows that once a production has been green-lighted, the dynamics around funding change. Additional revenue is much less dependent on selling exclusive territorial licences.

(11) This brings us to the central contradiction at the heart of the stakeholder dialogue on access to and availability of audiovisual content across the EU: **while territorial exclusivity is essential to securing production funding, it is also detrimental to the cross-border availability of works once they have been brought to the market.** So how can we resolve this issue for publicly funded works (and possibly other works as well)?

## A fallback TVOD service

(12) To resolve this contradiction, we propose to explore the possibility of setting up a not-for-profit TVOD platform that can provide access to publicly funded AV productions in those EU member states where the works are not available via individually licensed online distribution channels.

(13) The purpose of this service would be to ensure EU-wide availability of publicly funded AV works by providing a single distribution mechanism for territories “without economic potential”. This single distribution mechanism would offer the ability to generate additional revenue for rightholders after attempts to reach commercial distribution agreements have been exhausted. **The service would operate on the basis of standardised multi-territorial licensing agreements, respecting the existing practice of territorial licensing agreements.**

(14) This platform would provide access (against a fee) from all unlicensed member states **after a specific milestone in the distribution of publicly funded works has been passed** (for example x months after the VOD release in the first member licensed member state, or x months after the cinema release or a combination of these factors).

(15) In its initial iteration, access would be provided to the films in their original version, i.e without subtitles or dubbing (although it should also be possible to provide subtitles for other languages). Availability of the works should not be conditional on the existence of subtitles — in a later stage it is imaginable that subtitling could be provided as a service of the platform based on demand indicators.

## Geo blocking to increase access

(16) The platform would geo-block access from those member states where other licensed online distribution channels exist. Ideally, it would point members of the public attempting to access a work from a member state where another online distribution channel exists to that channel.

(17) The platform would need to be dynamic in the sense that access to works is removed if works become available via another distribution channel in a member state. Conversely, access should be enabled when a work is no longer available via other distribution channels in a member state. This would also ensure that the platform can serve as an EU-wide online archive of publicly funded AV productions.

### Before:

- Available based on exclusive territorial licensing agreements
- Not available (geo blocked)



### After:

- Available based on exclusive territorial licensing agreements. Access to fallback TVOD service is geo-blocked
- Available via fallback TVOD service



## Incentives for participation

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(18) So why would producers of AV works want to make their works available via this fallback TVOD service? In general, we should assume that — **once funding for a work has been secured and their own efforts to find additional distribution partners have been exhausted** — AV producers still have an incentive to make their works available to the widest possible public and generate incidental additional revenues.

(19) In addition, this should also work because it is a valuable service that would strengthen the European AV sector as a whole and deliver on the cultural diversity objectives of the EU. It would also meet the need to build digital public services with a clear European identity. As such, this proposal is very much aligned with both the objectives of the current stakeholder dialogue and the broader ambitions of the EU related to a digital environment that supports European values and contributes to digital sovereignty.

(20) On a more practical level setting up such a platform will only be possible if there are strong incentives for all stakeholders to make such a service viable. Such incentives could come in the form of making public production and distribution funding — by the EU media programme and possibly by national film funding bodies — conditional on a commitment to make the funded productions available via the service after pre-defined conditions have been met.

## Institutional setup

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(21) The service would need to be operated by a dedicated non-profit entity. The operation of this entity should be funded by the EU for a meaningful pilot period — at least four years. During this pilot period, 100% of the revenue generated (minus transaction costs) should be passed on to the producers of the works. After a successful pilot, EU funding could be gradually reduced and the service should transition to a model where its own operational costs are recovered via deductions from the fees passed on to rightholders.

(22) One possible source of funding could be to implement the proposal in the form of a multi-country project under the digital transformation heading of the Recovery and Resilience Facility. The project fits in the European Union's strategic ambition to create digital services that are based on European values and contribute to digital sovereignty. There are analogies to Europeana, which was launched as a response to the Google books project. The proposed VOD service should be seen as a European answer to the increasing market power of US streaming services.

(23) There is also reason to believe that a single European service that offers a high quality catalogue of European AV works would become a destination for film enthusiasts. This would require some form of curation on a national level, which could be done by national film heritage institutions or national film funders. National film funding bodies and national film heritage institutions and associations of producers should therefore be considered key stakeholders that have a place in the governance structure of the operator entity.

## Questions to explore

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(24) There are a number of open questions that should need to be explored to further evaluate the feasibility of the proposed service:

- European Commission (with Member States): Explore funding sources (as a multi-country project under the Recovery and Resilience Facility?, EUIPO surplus?) for setting up and operation during the pilot phase of the service.
- European Commission (with AV stakeholders): Identify possible host organisations for the service. Develop more detailed concept note including financial viability study.
- Media programme: Explore feasibility of making pan-europea availability after a certain milestone a funding requirement.
- National film funders: Explore if they are willing/able to set up the same conditions for the production funding that they provide.

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