

**IMT School for Advanced Studies, Lucca
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The State as a promoter of cinema in Italy and France

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Abbreviations

AGCM: *Autorità garante della Concorrenza e del Mercato* (Independent Antitrust Authority)

AGCOM: *Autorità per le garanzie nelle Comunicazioni* (Independent Authority of the audio-visual sector)

ANICA: *Associazione Nazionale Industrie Cinematografiche Audiovisive Multimediali* (Association of cinematographic, audio-visual and multimedia industries)

APA: *Associazione produttori audiovisivi* (Audio-visual producers association)

Art.: article

AVMS: audio-visual media services

AVOD: advertising-based video on demand

CCIA: *Code du cinéma et de l'image animée* (Cinema and animated image code)

CNC: *Centre National du cinéma et de l'image animée* (National center for cinema and animated image)

CSA: *Conseil Supérieur de l'Audiovisuel* (Superior council of audio-visual)

CUSFTA: Canada-United States free trade agreement

DGC: *Direzione Generale Cinema* (General directorate for cinema)

EEC: European Economic Community

EU: European Union

Ff.: following

Fig.: figure

GATS: General agreement on trade in services

GATT: General agreement on tariffs and trade

GBO: gross box office

Let.: letter

ORTF: *Office de radiodiffusion-télévision française*

OTT: Over the top

Par.: paragraph

Rai: *Radiotelevisione Italiana*

SMAD: *services de médias audiovisuels à la demande* (SVOD)

SVOD: subscription video on demand

Tab.: table

TRIPS: Agreement on trade related aspects of intellectual property rights

Tusmar: *Testo Unico della Radiotelevisione* (Consolidated broadcasting act)

TVOD: transactional video on demand

TWF: Television without frontiers

UK: United Kingdom

US: United States

WTO: World trade organization

WWI: World War I

WWII: World War II

Vita and publications

EDUCATION

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- 2020 Ghent University, Ghent, Belgium.
Conference: *"Screening Censorship Conference: New Histories, Perspectives, and Theories on Film and Screen Censorship"* .
Lecture: *"Scissors for images: movie cuts and the Italian legislation on film censorship and classification"*.
- 2019 LYNX, Lucca, Italy.
Winter School: *"Being on the Border: History and Theory of Cut in Humanities and Social Science"*.
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- 2019 Acri-Aedon, Rome, Italy.
Seminar: *"Le regole dello spettacolo tra cultura ed economia"*
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- 2018 AIPDA, Reggio Calabria, Italy.
Conference: *"Arte Cultura e Ricerca Scientifica. Costituzione e Amministrazione"*.
Lecture: *"Dalla censura alla classificazione: il cinema dà l'addio a Madama Anastasia?"*.
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Seminar: *"Museums: from reform to its implementation"*.
Lecture: *"Autonomous Special Museums"*.

PUBLICATIONS

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- 2020 “Dalla censura alla classificazione delle opere: il cinema da l’addio a Madama Anastasia?”. *Rivista trimestrale di diritto pubblico* 2 (2020).
- 2019 “Le finestre cinematografiche in Italia e in Francia al tempo di Netflix”. *Aedon* 3 (2019).
- 2018 “I musei speciali autonomi: il caso delle Gallerie Nazionali di Arte Antica”. *Aedon* 1 (2018)
- 2017 Book review of Antonio Taormina “*La formazione al management culturale*” *Economia della cultura* 1 (2017).

Abstract

The research aims to reconstruct why, how, and with what effects the Italian State promotes its film industry, in a comparative perspective with France. [Chapter I](#) reconstructs the Italian and French States' history as promoters of cinema and how progressively other government levels became relevant in the matter. [Chapter II](#) focuses on the film industry organization today; it considers how the industry has been 'shaken' by the disruptive market entrance of the global digital providers and the outbreak of the Covid-19 pandemic, and how it is affected by State's regulation. [Chapter III](#) reconstructs the action of the two States aimed at promoting the industry through economic aid. [Chapter IV](#) analyses how they promote cinema through regulating the behaviour of audio-visual media service (AVMS) providers—both the linear (traditional broadcasters) and the non-linear ones (digital platforms).

Introduction

In his programmatic speech to the Senate before the confidence vote, Italian Prime Minister Mario Draghi highlighted how «it would be a mistake to protect all economic activities indifferently», and that «the choice of which activities to protect and which to guide towards change is the difficult task that economic policy will have to face in the coming months»¹. In a country trying to recover from a deep sanitary and economic crisis, there is the need to make choices. The State should direct public support to those sectors able to generate economic and social growth in the long run and drive the country towards the goals today at the heart of the national and European political agenda.

The audio-visual sector is an interesting case study of an industry to be financed—investigating why and how to do it. Indeed, said industry has intense relations with many other markets: an (either positive or negative) shock there spreads significantly to the rest of the economy. This connection explains why audio-visual is the Italian industry that boasts the highest multiplier, second only to the construction sector's one²: for every demanded euro of audio-visual services and products, production in the entire Italian economy grows almost double, i.e., of 1.98 €³.

The most recently available data show that, in addition to the 61,000 jobs it directly generates, the audio-visual industry induces 112,000 jobs in other sectors⁴. Moreover, it employs more under-50s workers than the

¹ DRAGHI, M., *Programmatic speech to the Senate*, February 17th, 2021 («sarebbe un errore proteggere indifferentemente tutte le attività economiche...la scelta di quali attività proteggere e quali accompagnare nel cambiamento è il difficile compito che la politica economica dovrà affrontare nei prossimi mesi»).

²ANICA and CENTRO STUDI CONFINDUSTRIA, *Industria italiana del cinema e dell'audiovisivo: l'impatto per l'occupazione e la crescita del paese*, 2019.

³ *Ibidem*.

⁴ *Ibidem*.

national average: 77% against 73%⁵. Considering the only production department, it appears that a quarter of the employees of the audio-visual industry are under-30⁶. This is significant for Italy, the European country that holds the sad record of the highest percentage of young people neither in employment nor in education or training⁷. Even the percentage of females working in the audio-visual industry is above the national average: 39% against 36%⁸—another significant evidence, considering that Italy is among the European countries with the lowest women’s employment rate⁹.

However, the audio-visual industry is not only a great economic engine: it also produces a relevant cultural impact, more challenging to measure and express in quantitative terms. Audio-visual works represent means of artistic expression, education, and social communication. They ‘mirror’ and ‘shape’ societies¹⁰, orienting their values and behaviours as they take part in creating the national identity. They also participate in defining the perception of a country abroad and, for this reason, may contribute to attracting foreign businesses and investments and developing tourism.

Despite the audio-visual industry’s capacity to generate a significant impact for the entire country system, the State’s support in its favour caused little attention among the Italian legal scholars. Not much research is available on the matter. This work attempts to address this lack of analysis and generate greater interest in the topic. It focuses on the Italian State as a promoter of cinema—the segment of the audio-visual sector that includes works intended for cinema theatres—and

⁵ *Ibidem*.

⁶ *Ibidem*.

⁷ EUROSTAT, *Statistics on young people neither in employment nor in education or training*, 2020.

⁸ ANICA and CENTRO STUDI CONFINDUSTRIA, *Industria italiana del cinema*.

⁹ EUROSTAT, *Women’s employment rate increasing, but remains lower than men’s*, 2020.

¹⁰ As noted by the EUROPEAN COMMISSION, in its *Communication on State aid for films and other audiovisual works* (2013/C 332/01).

seek to reconstruct why, how, and (in the limits that befit a jurist) with what effects the Italian State promotes its film industry, in a comparative perspective with France.

France, the cinema's birthplace, is used as a benchmark comparative country because it occupies a recognized place in this sector. Indeed, it has gained a reputation for the unique and complex system of State support devised over time and is a reference for non-French film operators and policymakers. Despite being presented as in a continuous crisis—and therefore in need of always-increasing support—data suggest that the French one is the most profitable European film industry. Indeed, it achieves the best results in the metrics traditionally used to understand the film industry's health: the number of films produced and their average cost; the admissions and gross box office (GBO) in cinema theatres; the national market share; the number of theatres and screens; the extent of internationalization (number of co-productions and circulation capacity of national films abroad), and the participation and prizes in film festivals.

Given the lack of legal literature and the awareness that the mere analysis of laws gives a limited knowledge of reality, this work was built keeping a constant dialogue with audio-visual operators, experts, and representatives of the State's promotion action¹¹. I am deeply grateful for their support, which I have often perceived as an expression of a desire to contribute to developing scientific research on this topic; poorly analysed by scholars, it has often generated interest and discussion within public opinion, mainly based on the limited knowledge made available by the medias.

When answering the question 'what do you do?' in these years of research, rarely my most varied interlocutors have not expressed their opinions on the matter. They have often highlighted the erroneous object of the State promotion action. Some have argued that the Italian State finances too niche works that have little-to-no demand, which often even comes from the wealthiest and more educated part of the society— that

¹¹ Among them: Claudia Angrisani; Ernesto Apa; Matilde Bernabei; Nicola Borrelli; Francesca Cima; Carlo Degli Esposti; Giovanni Gangemi; Simone Gialdini; Iole Maria Giannattasio; Giorgio Greppi; Nicola Maccanico; Francesca Medolago Albani; Daniela Monterossi; Alberto Pasquale; Chiara Sbarigia; Riccardo Tozzi; Bruno Zambardino.

is to say, the State action generates a regressive redistribution effect. Others have claimed, on the opposite, that the State finances too 'commercial' films, arguing that public money should neither support operators that do not need help because of their strength, nor operators that do not deserve aids because their works do not have any 'artistic' or 'cultural' merit.

The desire to generate cultural and economic impact makes the State action in cinema promotion particularly challenging and thus liable for criticisms. Questions that would be appropriate to any general business-support action by the State become particularly pressing in the case of the film industry. What balance should be chased between supporting large companies to continue producing successful products and helping the small and medium-sized ones to enter the market and grow? And what about the trade-off between specific support for a few and generalized support for many? Or between the need to not compromise the industry's freedom—therefore following the market's direction—and that to 'orient' it consistently with the goals of State cultural policies? In the case of the film industry, the answers to these questions determine the balance between the necessity to promote the sector's industrial growth and the one of increasing cultural pluralism.

The first need calls for support to companies likely to generate many jobs and large expenses, have good return on investments and financial solidity, and compete at the international level. Hence, the goal to promote the growth of the sector's industrial basis implies strengthening the already strong operators. The second goal—cultural pluralism—requires instead the State to 'alter' the directions the market would autonomously take, extending the support to many operators, and in particular the most fragile ones. The State, to guarantee the diversity (and the 'quality') of the supply, should enable the realization of films whose making would otherwise be difficult on the free market, thus supporting productions with cultural merit and helping the new entrants' access.

Once having replied to the several questions related to aids' targets, a problem of policy assessment arises. The lack of monitoring data on the impact of the Italian State aids to the cinema—a lack actually concerning

the overall Italian State support to the industrial sectors¹²—can be perhaps explained, among others, by the difficulty to apply to a cultural industry the rules generally outlined to measure the impact of State incentives to a generic sector¹³. How to measure the actual achievement of cultural goals? What are the possible indicators to verify the supported industry's ability to contribute to the affirmation of national identity, the regeneration and social inclusion, and the country's civil and cultural growth? Precisely because of these complexities, this research adopts a multidisciplinary approach, combining the analysis of the limited law literature available with the sources of industrial and political economics and film culture.

Concerning the law, this work touches many branches. First, the study of the State's action promoting cinema cannot disregard the constitutional law principles. The Constitution provides indeed the legal basis for the State action—its art. 9(1) establishes that public powers should promote the development of culture—and indicates what the primary goal of the promotion should be and how it should occur. Indeed, art. 9(1) must be read in conjunction with art. 33(1), declaring the art's freedom. There had been an extensive debate about balancing these two dispositions: how can State-driven culture development not conflict

¹² As pointed out, among others, by GIAVAZZI, F. ET AL., *Rapporto alla Presidenza del Consiglio: Analisi e raccomandazioni sui contributi pubblici alle imprese*, 2012.

¹³ According to economic theory, public aids are efficient in the presence of several conditions. First, there must be a market failure: the market should be unable to achieve socially desirable goals on its own. For example, this can happen if the market equilibrium in the absence of public incentives generates a sub-optimal production of a particular good; the well-being of society as a whole would improve if a greater quantity of that good were produced. Two other conditions are needed for the incentive to be efficient. First, the incentive produces benefits (for example, increased employment and productivity) higher than costs. Among the costs to consider, those incurred by the public administration to manage the incentive and by the industry to interact with the public administration. Other costs come from the business devoting itself not only to its entrepreneurial activity but also to obtaining the incentive, with a possible reduction of the overall economy's growth. Second, the incentive must have an additional effect: it must finance activities that the industry would not carry out in the absence of incentives or that it would carry out to a more limited extent. See, among others, GIAVAZZI, F. ET AL., *Rapporto alla Presidenza del Consiglio*, but also BELLINI, N., *Stato e industria nelle economie contemporanee*, Donzelli, 1996.

with the need for the same culture to self-determination¹⁴? However, said question has, over time, been resolved in the sense of the two dispositions «integration in a statement of a unitary nature [...]: that is, in the affirmation that the democratic State should protect the free development of culture»¹⁵. In essence, art. 33 would indicate how the public intervention should occur (without compromising the natural evolution of culture) and the first reason for the intervention itself¹⁶. The public power must ensure that the negative freedom of expression—i.e., the abstract, potential freedom of expression guaranteed by the absence of State limitations—can be compensated by the positive one—i.e., the effective ability to express themselves¹⁷. Therefore, the promotion of culture should act as a mean to make effective the right of access to and to produce culture, ensuring a 'substantive' rather than merely 'formal' equality—as required by art. 3 of the Constitution.

As well as aspects of constitutional law, the study of the State promotion of cinema leads to deal with European law issues. The Member States do

¹⁴ The extensiveness of the debate stemmed from the experience of fascism, which had shown how State incentives for culture may end up in making cultural expressions an instrument for pursuing State's interests. On the influence that the experience of fascism had on the subsequent formulation of constitutional principles relating to the relations between politics and culture, among others: S. MERLINI, *La "politica culturale" della Repubblica e i principi della Costituzione*, in *Diritti, nuove tecnologie, trasformazioni sociali. Scritti in memoria di Paolo Barile*, Cedam, 2003, 507 ss. The author points out that these principles represent above all the rejection of a model, precisely the one proposed by fascism.

¹⁵ Cit. SPAGNA MUSSO, E., *Lo Stato di cultura nella Costituzione italiana*, Morano, 1961, 56 («integrazione in una enunciazione a carattere unitario [...]: cioè, nell'affermazione che l'ordinamento statale democratico attraverso la loro accettazione tutela lo sviluppo libero della cultura»).

¹⁶ As clearly pointed out by AINIS, M., *Cultura e politica. Il modello costituzionale*, Cedam, 1991, 114, «A public action in the culture field is needed to make culture free. This means that in the founding fathers' opinion, cultural expression is not free, without the support of public administration» («l'intervento pubblico sulla cultura serve a renderla libera. Ciò significa che a giudizio dei costituenti l'espressione culturale non è libera, senza il supporto dell'amministrazione pubblica»).

¹⁷ A clarification of the two possible ways of understanding the concept of freedom is due to Norberto Bobbio. He highlighted how the evolution from the negative to the positive conception occurred in correspondence with the transition from a liberal doctrine to a more markedly socialist one (BOBBIO, N., *Politica e cultura*, Einaudi, 1955, 272 ss.).

not have indeed 'full sovereignty': to comply with the EU competition law, national systems of cinema promotion must respect the European rules on State aids—rather light in the context of culture.

The analysis also involves administrative law—think of the organizational structure of the State promotion and the procedures for the aids' granting. It also leads to deal with fiscal law, which is at the heart of the State promotion of cinema. This is true for Italy, which grants the most funding through fiscal incentives, and even for France. Here, taxation encourages the localization of shooting in France, favour private investments and is at the basis of the complex working of the fund managed by the *Centre National du cinéma et de l'image animée* (CNC). Finally, the public law of the economy is relevant, in particular to verify whether and in what terms State action to promote cinema differs from that to promote other industrial sectors without an equally evident cultural dimension. The analysis will point out that the action of the Italian State of cinema promotion does not appear to be too far from that of promoting industry in general—as regards both the tools used and the limits of the intervention.

The work is organised into four chapters. [Chapter I](#) reconstructs the French and Italian States' history as promoters of cinema and how progressively other government levels have become relevant in the matter. It starts from France to then analyse Italy. Such a separation is due to the difficulty of telling the history of the two States as promoters of cinema together: the historical periods in which the most significant changes occurred and the circumstances that led to them sharply differ in the two countries. However, these days, common phenomena are shaking the effectiveness of the equilibria gained over time in the two countries: first, the appearance and continuous growth of global digital platforms; second, the crisis generated by the Covid-19 pandemic, which had strongly affected the audio-visual industry by freezing projects in the shooting phase, shutting cinemas down, and cancelling festivals and events—pushing some enterprises to the edge of bankruptcy. These two events generated the need for an evolution of the State support by requiring modifications and enhancements of the traditional instruments, and even by establishing new forms of support.

The other government levels have progressively become relevant for two reasons. First, higher government levels began to scrutinize the State measures of cinema promotion at the end of World War II (WWII). The promotional measures were inconsistent with the principles of free trade and services established at the European and international levels. Whether cultural products and services should be treated differently from other goods and services became the object of a complex and lasting debate. In this context, upon particular pressure from France, the concept of 'cultural exception' emerged and later evolved in that of 'cultural diversity', somehow excluding cultural matters from the wind of liberalisation. Second, since the second half of the 20th century, European and territorial autonomies' actions of support were added to the State's ones. Therefore, today various regulatory levels coexist in impacting the same policy area in both countries, making it relevant to understand whether they overlap or coordinate.

[Chapter II](#) focuses on the organization of the film industry today. It reconstructs the current state of the production, distribution and exhibition phases, highlighting the different players and interests involved and how the State's regulatory activity affects them. Indeed, the film industry's organization does not depend only on its operators' free decisions: the two States limit their economic freedom to pursue the collective interest of the promotion of culture. Some of the issues raised in this chapter may seem relevant to audio-visual operators' internal business relationship only, by no means related to the State and the public sector. However, how those internal relationships are organised strongly affects whether or not the State's objectives can be achieved. The behaviour of private operators is essential to the very realization of the goals pursued through the State promotional legislation—as noted since 1971 by Donatello Serrani, who criticizes the juridical literature's one-sided view on public aids, focusing very much on public power, public administration and State, and very little on private operators¹⁸.

¹⁸ SERRANI, D., *Lo stato finanziatore*, Franco Angeli, 1971, p. 171 («A chi guardi panoramicamente la letteratura giuridica che, in Italia, si è occupata degli ausili pubblici a privati non può sfuggire l'impressione che essa ha avuto, ed ha tuttora, una visione sostanzialmente unilaterale del fenomeno. Visione unilaterale nel senso che nei discorsi dei giuristi sugli ausili c'è molto potere pubblico, pubblica amministrazione, Stato e molto poco soggetto privato. Il quale rimane sempre sullo sfondo, la sua posizione nel rapporto risultando estremamente sfumata, come

[Chapter III](#) analyses the State's actions to promote the industry through economic aid. First, the range of the State's actions is presented, i.e., the limits they should respect to comply with the European Commission's principle for protecting competition within the internal market. The focus then shifts to the two States' administrative organization in promoting cinema and the origin of their resources devoted to the sector; and to the types of support instruments adopted. The analysis will show that each instrument is in charge of limiting the problems opened by the others, and that France and Italy found a different balance between the necessity to promote the growth of the sector's industrial basis and that to increase cultural pluralism.

[Chapter IV](#) analyses the State's actions to promote cinema by regulating AVMS providers' behaviour. Since the years of the public broadcaster monopoly in France and since the 1990s in Italy, the two States have been requiring providers to meet content and investment quotas in national and European independent production. This way, the two States ensure financial resources and opportunities for distribution to national works. Also, by shifting cinema support from direct public intervention to providers' intermediation, the States seek to keep the film industry more close to the market: providers are likely more committed than ministerial commissions in funding products successful with the audience. The analysis of the quota instrument will be technical, because of the nature of the instrument itself is technical. However, such a technicality is not an end in itself: the details of the Italian and French legislation on quotas conceal precious indications on how the two States promote their film industries by regulating the behaviour of providers.

The whole research will show that France has devised a very sophisticated system to promote its film industry over time. However, the analysis will rarely suggest adopting the French instruments to address the yet-to-be-solved problems that affect Italy. In most cases, there is no reason to suppose that the French means could prove effective in Italy, uprooted from the French institutional architecture.

se—in molti e rilevanti casi—la sua presenza e il suo comportamento fossero solamente eventuali e non essenziali alla realizzazione stessa del fine pubblico che sostanzia l'attività di ausilio»).

Chapter I – The history of the State as a promoter of cinema and the rising relevance of other government levels

1. Overview

This first chapter is about the history of the French and Italian States as promoters of cinema and how progressively other government levels became relevant in the matter. It appears difficult to understand the system in place today without knowledge of yesterday.

The analysis is carried out in a way that first the case of France is presented ([par. 2](#)), then that of Italy ([par. 3](#)). This is because it proved challenging to tell the history of the two States as promoters of cinema together. Indeed, the historical periods in which the most significant changes occur and the circumstances generating them differ in the two countries.

Both the States initially addressed the cinema sector with mere security and public order intent, adopting a safety and censorship framework. They began to develop a promotional legislation at the end of World War I (WWI), given the crisis of the national film industries. Initially, the aim was only to limit the competition from abroad by restricting the import of American films. Over time, measures of direct support in favour of the national film industries appeared.

The French State developed its system of cinema promotion slowly. Its main features were established—based on a previous extensive activity of study and reflection ([par. 2.1.](#)) — at the end of WWII ([par. 2.2.](#)). First, an independent agency under the authority of the Ministry of culture was put in charge of elaborating and implementing State actions concerning cinema. Second, the principle that who benefits from today's works should contribute to financing future creation was established. Subsequent legislation will confirm these two principles, continuously adapting them only to address technological and market evolutions ([par. 2.5.](#)). They still exist today and make the French system the most envied by European cinematographic operators.

The Italian system of cinema promotion on the other hand, was developed by the fascist regime, which led to refined mechanisms of support, strictly linked to means of control over contents ([par. 3.1.](#)). After the liberalization, the Republican legislator adopted a system based on the same measures invented during fascism, only repealing their most authoritative features ([par. 3.2.](#)).

During the 1950s-1960s ([par. 2.3.](#) and [par. 3.3.](#)), both States began to pay attention to the cultural and artistic dimension of the sector. In addition to promoting the economic growth of the film industry, they sought to favour the emergence of new talents and the realisation of works considered worthy and filled with cultural and artistic merit.

The '80s and the '90s represented the period of the greater distance between France ([par. 2.4.](#)) and Italy ([par. 3.4.](#)). The outbreak of private broadcasters generated a process of progressive fall in cinema theatres' admissions in both countries. The French State promptly reacted: thanks to complex and sophisticated regulation, it transformed television from the main cinema's enemy to its leading new promoter. On the other side, the Italian legislator did not intervene to regulate the relationship between cinema and television. Perhaps to staunch and mask this absence, it exponentially increased the funding for the film industry, leading to a collapse of the system in the early 2000s.

Hence the Italian 2004 reform, by which the State tried to empower producers, some of who were not risking their capital, but rather betting with public money. However, not all of the good intentions pursued were achieved, and disincentives arose ([par. 3.5.](#)). A new turning point occurred in 2016, when an organic reform about all the aspects of the relationship between the sector and the State was adopted, showing the emergence of a first-time long-term overall vision ([par. 3.6.](#)).

To these days, the effectiveness of the equilibriums gained over time are shaken by the same phenomena both in Italy and France: the emergence of global digital operators, in continuous and exponential growth, and the Covid-19 pandemic ([par. 4.](#)).

Over time, the State ceased to be the only public actor relevant in the matter of cinema promotion. First ([par. 5.](#)), higher government levels began to scrutinize the State measures of cinema promotion at the end of

WWII. The promotional measures were inconsistent with the principles of free trade and services that were being established at the European and international level. Whether cultural products and services should be treated differently from other goods and services became the object of a complex and lasting debate. In this context, upon particular pressure from France, the concept of 'cultural exception' emerged and later evolved in that of 'cultural diversity', somehow excluding cultural matters from the winds of liberalization. Still today, the Italian and French States can adopt measures to support their national film industry because of a 'consent' granted by the European and international governments levels.

Second ([par. 6](#)), since the second half of the 20th century, EU and territorial autonomies actions of support added to the State's ones. Therefore, various regulatory levels coexist, impacting the same policy area in both countries, making it relevant to understand whether they overlap or coordinate.

2. France

2.1. The broadening of State intervention: from public order to promotion

The French State developed its system of cinema promotion slowly. The first measures related to cinema date back to the end of the nineteenth century and had fiscal and safety goals. As far as the firsts are concerned, cinema exhibitors had to pay the poverty tax, a 10% addition to the price of tickets levied to finance hospitals by the health and social security services¹⁹. Safety rules on the entrepreneurs of cinematographic²⁰ were adopted following the catastrophe of *Bazar de la Charité*²¹, which made the public authority aware of the risks posed by the projection of moving pictures.

Soon enough, rules on censorship were added to those for safety. Following the projection of the filming of a quadruple capital execution in the town of Béthune, the Ministry of the Interior established that film screenings could only take place after authorization from the mayors²². To ensure uniform decisions throughout the country, the Decree of July 1919 on the «control of cinematographic films» established a centralized system of preventive censorship. According to it, «no films, other than those reproducing facts or current events, can be shown in public if they

¹⁹ See ABEL, R., *Encyclopedia of early cinema*, Routledge, 2004, p. 257.

²⁰ Among the other things, exhibitors were required to unwind the film into a slitted metal case; prevent spectators from smoking; keep at hand two buckets of water, etc. See *ibidem*.

²¹ A charity bazaar organized in 1897 in Paris and in which 120 people died in a fire caused by a projectionist.

²² By a circular of January 11th, 1909, the Minister stated his instructions in these words: «I believe it is essential to radically ban all public cinematographic shows of this kind, likely to provoke demonstrations disturbing public order and tranquillity» («*J'estime qu'il est indispensable d'interdire radicalement tous spectacles cinématographiques publics de ce genre, susceptibles de provoquer des manifestations troublant l'ordre et la tranquillité publics*»). Thus reported, among others, by TRIOLLET, C., *Censure et Cinéma en France*, Lettmotif, 2020, p. 27.

and their title have not been approved by the Minister of Public Instruction and Fine Arts»²³.

The French State ceased to address the sector with a mere control attempt and began to protect it at the end of WWII—when «the first battle in the Franco-American war over culture erupted»²⁴. The national film industry was in crisis, weakened in terms of resources, facilities, and capitals—and the United States (US) was producing many movies that were ‘invading’ the national market.

Like other European countries, France tried to protect its national industry by introducing the instrument of quotas. Initially, they represented a merely numerical restriction on the number of American films that could be imported into the country. Later, the instrument was further refined, requiring the US to import and distribute a French film for every seven movies exported to France²⁵.

Interestingly, quotas were adopted despite the opposition of theatre exhibitors, who were screening a large number of very profitable popular American films²⁶. The opposition also came about because many movie theatres were built during this period, and the small number of French films produced could not meet the subsequent increase in domestic demand. However, quotas continued to be used for a long time. They were repealed only at the end of WWII. At that moment, French doors indeed opened to American films in return for a proportion

²³ «Aucun film cinématographique, à l'exception des films reproduisant des faits ou des événements d'actualité, ne peut être représenté en public, si ce film et son titre d'ont obtenu le visa du ministre de l'Instruction publique et des Beaux-arts ». Thus reported, among others, by PITHON, R., "La censure des films en France et la crise politique de 1934", *Revue historique* 1 (1977): 105-130, p. 108.

²⁴ WALKLEY, S. E. *To what extent can France continue to defend the cultural exception in the digital age?*, University of Warwick, 2016, p. 126.

²⁵ Decree of February 18th, 1928.

²⁶ MESSERLIN, P. and PARC, J., "The real impact of subsidies on the film industry (1970s–present): lessons from France and Korea", *Pacific Affairs* 90.1 (2017): 51-75.

of France's war debt being cancelled²⁷. Still, while accepting not to restrict American imports, France specified minimum quotas for French films to be screened in national theatres (one week each month)²⁸.

The appearance of sound films triggered other protectionist measures in the early 1930s. In 1932, France limited the possibility of projecting foreign films in their original language (they could be shown only in five theatres in Paris and five in the provinces). At the same time, it prohibited the import of foreign films already dubbed into French and limited the number of import visas for dubbing them in France²⁹.

In addition to quotas and dubbing instruments, the legislator did not adopt other significant measures in this phase. However, during the Popular Front's years (1936-1938), an intense activity of study on the reasons for the crisis of the national cinema grew, starting a reflection on the State's role on the matter. Several parliamentary study reports were made, including the Petzche Report of 1935 and that of Guy de Carmoy of 1936³⁰. This way, France inaugurated an approach that will be

²⁷ See the Blum-Byrnes Agreement, a document dealing with film issues annexed to the Washington Agreement of May 28th, 1946, which aimed at settling the debt owed by France to the USA.

²⁸ The French failure to secure better terms provoked massive public protests by French film operators. They claimed that the established quotas were not proportionate to the volume of production of the growing French film industry. They noted that the on-going increase in the number of French films produced would have necessarily come at the great cost of reducing their screen time. It is exactly what happened, with producers and exhibitors trying to squeeze a number of French films in an ever-smaller space, thus rapidly removing films from screens to make room for other works. Eventually, negotiations on quotas were reopened and the 1948 Caffery-Schuman Agreement will increase to five weeks every quarter the screen-time quota for French films. For the whole discourse, see WALKLEY, S. E., *To what extent*, p. 83.

²⁹ For more information, ULFF-MÖLLER, J., *Hollywood's film wars with France: film-trade diplomacy and the emergence of the French film quota policy*, University Rochester Press, 2001, pp. 122 ff.

³⁰ The first one, which brought to the attention of the government the financial crisis of the national film industry, expressed the need to centralize in a single service the attributions related to the cinema dispersed in various ministries. Indeed, it considered such fragmentation of competencies one of the main reasons for the ineffectiveness of the first forms of State intervention. The report proposed entrusting the management of a national film support fund to a *comité technique*, made up of representatives of both the professionals

consistent over time and is still relevant today for the national film industry: when faced with a problem, the State instructs the drafting of a study report, which is presented to the Parliament and that grounds the legislative changes adopted.

In his programmatic speech of 1937, the Minister of Education Jean Zay enumerated the causes for the crisis of French cinema, based on the data resulting from the previously mentioned reports³¹. First, the lack of administrative centralization represented a crucial issue. Indeed, in this first phase, the cinema depended on three different ministries simultaneously³², and the coordination of the Presidency of Council was more theoretical than real³³. Other causes were the financial deficit of the market³⁴, the overabundance of foreign productions, the excessive taxation—which made French cinema «*le cinéma le plus imposé du*

and the State. The committee should also have been in charge of analysing the film industry and publishing an annual report on it; making recommendations to the heads of the film industry's companies and giving advice to the government on 'cinematographic matters'. The subsequent Guy de Carmoy Report, a sort of counter-offensive of professional organizations, reaffirmed the problem of a lack of central action. However, it did not share the conclusions of the Petsche Report: it proposed the establishment of a single professional body that did not include any State participation. It envisaged entrusting the administrative authority only in a somewhat subsidiary way, where the film profession itself would not have managed to find an agreement. For further information on the reports: BERTIN-MAGHIT, J. P., *De l'exception française*, in *Le front populaire et le cinéma français*, ed by Créton, L. and Michel, M., Théorème 27, Presses Sorbonne nouvelle, 2017, pp. 73-77.

³¹ *Ibidem*.

³² The General Directorate of Fine Arts of the Ministry of National Education for the administrative matters; the Ministry of Foreign Affairs the purchase of foreign films and for the exhibition of French films abroad; and the Ministry of Trade for the issues related to film exportation.

³³ BELLUCCI, L., *Cinema e aiuti di Stato nell'integrazione europea: un diritto promozionale in Italia e in Francia*, Giuffrè, 2006.

³⁴ According to the Petsche Report, there were only 75 M French-speaking spectators worldwide, while the spectators of Anglo-Saxons films were 225 M. In 1933, of the 137 foreign films screened beyond the Atlantic, only 17 came from France. Thus reported by BERTIN-MAGHIT, J. P., *De l'exception française*.

monde»³⁵—and the inability to find enough financing. For this reason, producers were used to undertaking the preparation of films despite having obtained only a small part of the necessary resources. Finally, the widespread fraud of exhibitors, who were adopting ‘price wars’ and favouring foreign productions (despite quotas), was also among the list of reasons for the crisis.

After three years of discussion, in March 1939, the Government presented the Project of Law Zay. The outbreak of war did not make it possible to adopt its measures: the project remained so. However, Zay’s proposal and the study reports on which it relied became the foundations of the regulations adopted by the subsequent legislators. First, that of the brief authoritarian experience of Vichy (1940-1944): the measures taken at that time were still limited³⁶; however, «Vichy worked unwittingly to achieve part of the Popular Front’s ‘program’, at least its projects [...] Vichy has more prolonged/resumed than contradicted the film policy of its exact ideologically opposite.»³⁷. Second, even the legislator of the post-WWII period relied on Zay’s proposals. It

³⁵ In spite of modest reductions in 1935, the various administrative taxes were responsible for reducing exhibitors’ revenues by nearly 40%. See *ibidem*.

³⁶ The main innovations during the Vichy era were the centralization of the administrative structure in charge of the cinema and the establishment of greater control over the operators’ activities. New support measures were also introduced. Among them: grants to production companies having already realized films of an educational or patriotic nature, contributions in the form of loans, and forms of preferential access to credit. Indeed, Law no. 2110/1941 of May 19th authorized the Credit National Bank to use State funds to grant to production companies loans of particularly favourable rate (5%, repayable over three years). This way, the State ceased to only discriminate on US imports and began to create measures to support domestic films directly. Unlike what happened in Italy during the Mussolini regime, the Vichy one did not establish public bodies acting as economic operators in the film industry. The propaganda of the regime was realized mainly by private companies run by people close to the government. For more information on the Vichy era, see BELLUCCI, L., *Cinema e aiuti di stato*, pp. 114 and ff., and PERLO, N., *Le droit public du cinéma en Italie en France*, Presses Universitaires d’Aix-Marseille, 2012, pp. 119 ff.

³⁷ BERTIN-MAGHIT, J. P., *De l’exception française* («Vichy travailla sans vouloir à la réalisation d’une partie sinon du “programme” du Front populaire, du moins de ses projets [...] On peut dire en effet que dans les grandes lignes Vichy a beaucoup plus prolongé ou repris la politique de son exact oppose idéologique du film qu’il ne l’a contredite»).

established the key features of the French State system of cinema promotion, on which the contemporary framework still relies.

2.2. The aftermath of WWII: establishing the pillars of the contemporary cinema promotion

In the post-WWII period two innovations were made: the creation in 1946 of the *Centre National du Cinéma* (CNC) (i) and the establishment in 1948 of the *taxe spéciale additionnelle* (TSA) (ii). This way, two fundamental principles were introduced. First, the public body in charge of regulating and financing the film industry sector is an independent agency. Second, most of the resources funding the film industry come from taxing the operators who benefit from the distribution of films.

i. The CNC. The CNC, in charge for elaborating and implementing government policies on cinema, was established in 1946³⁸ as a separate agency under the authority of the Ministry of Information. It was formed by the merger of the public and private bodies of cinematography created during the Vichy Government. Indeed, Vichy had limited the dispersion of competences among many entities by centralizing the administrative organization in charge of cinema in a two-headed system³⁹.

The merger of the public and private bodies explained the initial double nature of the CNC, both corporate and administrative. Its governance reflected this dual-status; it was made of a general directorate supported by two collegial bodies: the *Conseil Paritaire*, in charge of expressing the positions of the cinema professionals, and composed by representatives

³⁸ Law no. 2360/1946 of October 25th.

³⁹ The public body had been established in 1942 and assigned to all the functions exercised by the ministries during the Third Republic (Law no. 476/1942 of April 11th). Called Cinema's Service in the beginning, it was later replaced by the General Directorate of Cinema (Law no. 581/1942 of May 30th). Instituted a few years later (Decree of December 2nd, 1942), the private body had replaced professional groups and trade unions and been in charge of framing the sector's activities and foreshadowing future regulation. In the beginning, it was represented by the Organizing Committee of the Film Industry. At the end of the WWII, the Committee was repealed and replaced by the Professional Office of Cinema.

of producers, distributors, exhibitors, and technical industries, as well as of trade unions; the *Conseil Administratif*, entrusted with defending the general interests, and made up of representatives from the various administrative departments concerned. This way, during the first years of the CNC, the State and the professionals shared cinema governance. However, starting with the repeal of the *Conseil Paritaire* in 1953, the CNC's administrative character progressively increased, to the detriment of its corporate nature. Consequently, the organization started to function more and more like a traditional administration, and cinema policies returned more systematically to the State. Nevertheless, such an evolution did not provoke the disappearance of the professionals' instances in the CNC's decision-making process.

Interestingly, following the evolving perception of the role of cinema, the CNC moved from one ministerial authority to another during its first years of existence⁴⁰. In the years the CNC was founded, cinema was politically conceived as a form of information, not to say propaganda—a perception inherited from the war years, that explains why the CNC was attached to the Ministry of Information. Only one year after, the legislator entrusted the CNC to the Ministry of Youth and Arts and Letters⁴¹. Such a connection lasted only a few months and was too fleeting to testify a new political vision—even if the legislator expressly refers in several points to 'cinematographic art'⁴². The CNC was then placed under the authority of the Minister of Industry and Trade in 1947⁴³. Following the new conception developed by André Malaraux of the binary value of cinema, the CNC was finally attached to the newly formed Ministry of Cultural Affairs in 1959⁴⁴. Indeed, there was a turning point in French policies in those years: the State began to pay attention to the artistic and cultural dimension of the sector, besides the economic one.

⁴⁰ As noted in *Étude 309*, in *Lamy Droit des médias et de la communication*, Lamy, 2007, p. 309-12.

⁴¹ Decree no. 627 / 1947 of April 5th.

⁴² As noticed in *Étude 309*, pp. 309-12.

⁴³ Decree no. 2157 / 1947 of November 13th.

⁴⁴ Decree no. 212 / 1959 of February 3rd.

ii. The TSA. Two years after the establishment of the CNC, the legislator adopted the Law «of temporary aid for the film industry»⁴⁵, that provided the resources by which the CNC could develop its action. Aimed at coping with the crisis of national cinema and Hollywood's domination, the Law introduced a tax on box office receipts for a three-years period. Instead of entering the general government budget, the TSA's proceeds were absorbed by a special fund (the *Fonds de soutien*), managed by the CNC. The latter used the resources thus gained to build new theatres and improve the safety, hygiene and technical conditions of existing ones, and to support the production of new films. The aid for production was called 'automatic' because the amount that producers received for their next film depended on the box office's success of their previous film.

Interestingly, the US sharply criticized the establishment of the TSA—introduced to be temporary and then made permanent by subsequent legislation⁴⁶. They noted indeed that the tax was levied on cinema owners based on their income with no consideration for the nationality of the films projected, while only French producers had access to the support mechanism. Since most of the box office revenue was coming from American films, the mechanism turned Hollywood—so far, the main enemy of French cinema—into its main supporter. Indeed, an exhibitor could project nothing but American films and still be required to pay a percentage of its income into the Fund supporting the French film industry. As one writer will observe, «without the United States and their sources of direct or indirect financing, there would already be no French cinema»⁴⁷.

⁴⁵ Law no. 1474/1948 of September 23rd.

⁴⁶ See art. 1 of Law no. 53-684/1953 of August 6th, which replaced the 1948 *fonds special d'aide temporaire* with the *fonds de développement de l'industrie cinématographique*.

⁴⁷ FOREST, C., *Economies contemporaines du cinéma en Europe: L'improbable industrie*, CNRS, 2001, p. 38.

2.3. The '50s: focusing on the artistic and cultural dimensions of cinema

During the 1950s, there was a turning point: «*le deuxième temps de la politique du cinéma*»⁴⁸. Under the guidance of André Malraux, France began to devise measures aimed at satisfying many non-economic criteria, including access to theatres in rural areas and support of quality filmmaking, while continuing to strengthen the sector's industrial base⁴⁹. The transfer of the CNC's governance from the Ministry of Industry to the newly formed Ministry of Culture was emblematic of the new trends.

A first attention to the cultural and artistic dimension of cinema was expressed in 1953, when the legislator made permanent the fund temporarily introduced in 1948. On that occasion, in addition to introducing measures to empower producers⁵⁰, the legislator provided that a minimum percentage of the CNC's fund (10 M of francs) had to be used to finance «*films français de nature à servir la cause du cinéma français ou à ouvrir des perspectives nouvelles à l'art cinématographique ou à faire connaître les grands thèmes et problèmes de l'Union française*»⁵¹.

Following the same path, in 1959 the legislator introduced the advances on receipts (*avance sur recette*)⁵², loans without interests that represent a

⁴⁸ BENHAMOU, F., *Les Dérèglements de l'exception culturelle. Plaidoyer pour une perspective européenne*, Seuil, 2006.

⁴⁹ For further information about this period, VEZYROGLOU, D. and PÉTON, G., *La politique française du cinéma au moment du rattachement du Centre national de la cinématographie au ministère des Affaires culturelles, 1957-1962*, in *Le cinéma: une affaire d'État. 1945-1970*, ed. by Vezyroglou, D., La Documentation Française, 2014, pp. 27-57.

⁵⁰ Unlike the 1948 framework, the producer had to justify a personal financial investment of at least 10% of the film's budget to be eligible for support. Moreover, the 1953 law established that producers could not use State automatic aid to produce a new film if there were not yet satisfied privileged creditors from the previous work.

⁵¹ Art. 10 of Law no. 648/1953.

⁵² Art. 7 of Decree no. 733/1959 of June 16th. For more information about the genesis of the advance against receipts, see GIMELLO MESPLOMB, F., *La qualité comme clef de voûte de la politique du cinéma: retour sur la genèse du régime du soutien financier sélectif à la production*, in *Le cinéma: une affaire d'État*, pp. 57-75.

cornerstone of French cinema that continues to this day⁵³. Like its predecessor of 1953, the advance on receipts was designed to enable the support of films considered worthy because of their artistic and cultural value by committees chaired by the President of the CNC and made up of prominent cultural figures. Given funding decisions depended on the judgments of the committee members', and thus were not automatic, the advance was called a 'selective' aid.

The new instrument was meant to balance the automatic aid, that had proven to create disincentives if adopted in the absence of other instruments. Indeed, it rewarded the producers of commercially successful films, enabling them to make new films, without taking into account the quality of their activity. Moreover: the films of first-time directors were de facto rejected from the system⁵⁴.

In addition to the advance on receipts, the legislator also introduced the rating '*cinéma d'Art et d'Essai*' in those years and the State began to recognize tax reductions to theatres projecting mainly films with particular artistic and cultural value. In addition to the percentage of art films screened, the other criteria for official designation as an art-house theatre were the number of visits by filmmakers, the number of debates among critics, distribution of pedagogic materials, etc.⁵⁵.

To conclude on the 50s, it is worth noticing that another significant innovation was the codification of the legislation on cinema adopted up to that time: from 1956, the reference text became the *Code de l'industrie cinématographique*⁵⁶, which changed its name over time, until it acquired the current one of *Code du cinéma et de l'image animée* (CCIA).

⁵³ See [par. 5.1.2. of Chapter III](#).

⁵⁴As noted by BENHAMOU, F. "Entre économie de marché et économie administrée." *Esprit* 10 (2006): 63-74, p. 66.

⁵⁵ For further information, PINTO, A., *L'Art et essai ou la « politique de la qualité » dans les salles de cinéma (1949-1961)*, in *Le cinéma: une affaire d'État*, pp. 185-194.

⁵⁶ Decree no. 158/1956 of January 27th.

2.4. The '80s: the outbreak of private televisions

In the 1980s, there was a new turning point. The private television outbreak happened in those years, exacerbating the process of progressive fall in theatres' admissions, which already began during the years of public broadcaster monopoly. France promptly intervened to counteract this trend: it tried to transform television, the new main cinema's enemy, into its leading new promoter—as it did in the past through the adoption of the TSA with the USA, the French cinema's 'traditional enemy'. Indeed, the legislator subordinated the assignation of broadcasting frequencies, a scarce resource at the time, to the compliance with several commitments for television to promote cinema⁵⁷.

First, in 1984 the legislator required private televisions to pay to the CNC a tax proportionate with their revenue (the tax on televisions' services, TST)⁵⁸. As noted, « Until the early 1980s, the TSA was more than adequate to fund the various programmes operated by the CNC. However, with cinema attendance falling to around half the level seen in the previous decade as a result of a decline in the standard of French cinemas and more people preferring to stay at home and watch television, the amount raised was no longer sufficient to support the

⁵⁷ This way, the State extended to private televisions the rules already applied to the public broadcaster. Indeed, France's attempts to regulate television to protect cinema date back to the 1970s, when the public broadcasting monopoly was still in place—the *Office de Radiodiffusion-Télévision Française* (ORTF). The relevant text is the Cooperation Convention signed on March 26th, 1971, by the Minister for Cultural Affairs and the ORTF's General Director, to be applied between 1972 and 1975. The Convention required ORTF to abide by several rules. First, ORTF was required not to directly compete with theatres: it could not devote more than 10% of its broadcasting time to films, and it had to reduce their broadcasting during the days and times usually devoted to cinema. Second, ORTF had to transmit, among all the movies broadcasted, «the highest possible number of the French films», i.e. not fulfil its palimpsests with mainly American films, but contributing to the promotion of national culture. Finally, the ORTF was asked to contribute with 5M of francs per year to the funding of the film industry, and to increase by 10% annually the price paid to broadcast movies. Refer to COMMISSION DES AFFAIRES CULTURELLES. *Avis n° 67 présenté au Sénat par M. George Lamoussé sur le projet de loi de finances pour 1973, 1972.*

⁵⁸ See art. 36 of the Finance Act for 1984 and Act Law no. 1179/1983 of December 29th.

industry»⁵⁹. Moreover: the introduction of a tax on the broadcasters' revenue appeared to be the most appropriate way to supplement the CNC's Fund. As televisions were gaining resources from the distribution of cinematographic works, they had to take part in financing movies too, as theatres were already doing. Note how the TSA and the TST combination resulted in French cinema being financed by its two rivals: US cinema, its traditional main enemy, and French television, its new one.

Second, the legislator inserted in the 1986 Act Law «Freedom of Communication»⁶⁰, the Title «Development of cinematographic creation». Its art. 70 established the core principle on cinema promotion by televisions. First, it reiterated that televisions broadcasting cinematographic works must contribute to their funding, principle implemented by introducing investment quotas. This way, televisions began to directly invest a percentage of their revenues in the creation of new films, besides indirectly financing them through the TST payment. Second, art. 70 established several rules that limited the editorial freedom of televisions. They could not broadcast more than a fixed number of movies each year; broadcast movies in days and times in which usually people attended theatres; broadcast movies before a specific amount of time had elapsed from their first day of theatre distribution. Finally, televisions had to reserve the most of their transmission time to French and European works. The goal was to prevent them from supplying most programming with American films⁶¹.

During the 1980s, the State also amplified its support to the film industry. It increased the amount of automatic and selective aids and established new bodies to encourage private investment in the sector: the Institute for the Financing of Cinema and the Cultural Industries (IFCIC) in 1983 and the Companies for the financing of the film and

⁵⁹ WALKLEY, S. E. *To what extent*, p. 102.

⁶⁰ Act. Law no. 1067 / 1986 of September 30th.

⁶¹ See. DANARD, B. and LE CHAMPION, R., *Les programmes audiovisuels*, La Découverte, 2014, p. 22.

audio-visual industry (SOFICA) in 1985—still existing today⁶². The State also transferred substantial resources to theatres in these years, encouraging their modernization to make them competitive against television. Finally, the French efforts to maintain a flourishing film industry included also seeking means of reviving theatrical attendance: by developing initiatives of cinema education within schools, the State tried to raise the demand for cinema and even to enhance the demand's quality⁶³.

2.5. New millennium, new phase (*deferment*)

Between the late 1980s and early 2000s, there were no significant innovations. The State mainly adapted its film policy to accommodate changes in the sector, continually extending the typology of actors taxed and funding the CNC programs to cover the new forms of distributions of audio-visual works in light of technological evolution. This way, the system's fundamental principle has remained unchanged: who profits from today's works should contribute to financing the future creation.

While the legislator has enlarged the types of operators taxed, the CNC expanded those of supported activities, thus ensuring the redistribution of the sums collected among the new contributors. Indeed, the CNC's Fund has progressively began to support works other than those intended for cinema theatre. In 1986, the *Fonds de soutien* was renamed the *Compte de soutien financier de l'industrie cinématographique et de l'industrie des programmes audiovisuels*, given the CNC began to subsidy both film and television production. In 1994, the CNC extended the support to the DVD/Blu-Ray and then also to the works intended for the Internet. In 2009, it took the name of *Centre National du Cinéma et de l'image animée*, thus testifying the extension of its scope of activities⁶⁴.

⁶² See [par. 5.2.2. of Chapter III](#).

⁶³ For more information, BUCHSBAUM, J., *Exception taken: How France Has Defied Hollywood's New World Order*, Columbia University Press, 2017, pp. 196 ff.

⁶⁴ Ordinance no. 901/2009 of July 24th, modifying the CCIA.

During the second decades of the 2000s, France entered a new phase, still ongoing. As shown, since the 80s, the State has made televisions the main funders of the national film industry. This occurrence has begun to look troublesome. The amount of televisions' investment in the creation of new films is proportionate to their income. Since their income is decreasing, the resources for the new creation are shrinking as well (- 20 % in the last 6 years⁶⁵). This situation is because of televisions' difficulty adapting to market changes and reacting to competition from the new foreign digital operators. Some of the latter are global players with growing market shares and a financing capacity incomparable with French televisions. However, despite their increased importance, they are still not fully subject to cinema promotion obligations.

All the regulatory changes recently adopted in France and those currently under discussion have a twofold intent. First, to ease the constraints on traditional televisions, so that they can return to a growth situation, and compete more easily with new entrants. Second, they aim at increasing the obligations for digital operators, making them the new leading supporter of national cinema. This way, besides equality, the State seeks to keep the CNC's fund level constantly adequate.

⁶⁵ COMMISSION DE LA CULTURE, DE L'ÉDUCATION ET DE LA COMMUNICATION, *Avis n° 143 présenté au Sénat par M. Jérémy Bacchi sur le projet de loi de finances pour 2021, 2020*, p. 14.

3. Italy

3.1. Cinema and Fascism

Like the French one, the Italian State firstly addressed cinema merely with regards to security and public order⁶⁶. As with other industrial sectors, the Italian State began to promote the film industry only in the years after WWI⁶⁷, when the early predominance of European cinema fell, and Hollywood became the new centre of filmmaking.

The Italian measures took the contours of proper promotional legislation during fascism⁶⁸. The first significant law was adopted in 1927⁶⁹, under

⁶⁶ Initially, the industry was subject to the general public security rules (Law no. 3270/1858 of November 13th). According to them, a license released by the local prefectures was necessary to carry out all entertainment activities. The legislator established a specific censorship system for cinema only in 1913, when provided for the first time that all films must obtain a State authorization before being screened (Law no. 785/1913 of June 25th and Royal Decree no. 532/1914 of May 31st). Interestingly, such a special form of censorship was established under the request of film producers: they pointed out that the general rules affected legal certainty, as films received unequal treatment depending on the geographical area of projection. Consequently, they called for the establishment of a single central office in charge of examining all films and granting the authorization. The Italian Film Union also offered to bear the office operation costs by paying a fee proportional to the footage of the examined film. This explains why the Minister of Finance proposed the law instituting cinema censorship, presented as a fiscal measure.

⁶⁷ Indeed, it was mainly at the end of the WWI that the Italian State began to adopt measures to promote national industries, while the legislation of support between the Unification of Italy and WWI had not been particularly rich (if one excludes the case of the railway industry). See SERRANI, D., *Lo Stato finanziatore*, pp. 31 and 32.

⁶⁸ An extensive scientific literature on the relationship between fascism and cinema is available, focused on both the supportive legislation and the censorship one. See, among others: ARGENTIERI, M., *L'occhio del regime*, Bulzoni, 2003; CANNISTRARO, P. V., "Il cinema italiano sotto il fascismo", *Storia contemporanea* 3 (1972): 413-463.; CANNISTRARO, P. V., *La fabbrica del consenso: fascismo e mass media*, Laterza, 1975; CARABBA, C., *Il cinema del ventennio nero*, Vallecchi, 1974; GILI, J.A., *Stato fascista e cinematografia: repressione e promozione*, Bulzoni, 1981; MANETTI, D., *Un'arma poderosissima: industria cinematografica e Stato durante il fascismo, 1922-1943*, Franco Angeli, 2012; ORSI BATTAGLINI, A., *L'intervento economico statale per il cinema*, in *Intervento pubblico e libertà di espressione nel cinema, nel teatro e nelle attività musicali*, ed. by Istituto per la documentazione e gli studi giuridici, Giuffrè, 1974, pp. 3-121.

⁶⁹ Act no. 1121 / 1927 of June 16th. The fascist provisions in favour of cinema adopted before 1927 were modest, to be mentioned only for completeness purposes. First, the Royal Decree

the insistence of cinema operators, who were calling for economic encouragement from the State⁷⁰. Like France, Italy tried to protect the national industry by limiting the competition from the US through the introduction of quotas—generating many protests from theatre exhibitors, interested in screening many more profitable popular American films (like their French colleagues). However, while France used quotas to limit the importation of foreign films, Italy used them to ensure a minimum percentage of national films programmed in cinema theatres. According to the institute of *programmazione obbligatoria* (mandatory programming), Italian exhibitors had indeed to allocate 10% of the daily projection time to national movies during the period between October 1st and June 30th of each year.

Through this first tool, the fascist State proved ready to grant aid in return for a certain degree of control over contents and expressed values. To benefit from the mandatory programming, a film had to meet «sufficient requirements of artistic dignity and good technical execution»⁷¹. The committee responsible for censorship was in charge of verifying that these standards were met. The result was the institution of a refined State mechanism that provided opportunities for initiatives in the cinematographic sector in exchange for a product consistent with

no. 606/1920 of May 13th, which established the Council for the cinematographic industries within the Ministry of Industry, Trade and Labor. Composed of representatives of cinema operators, it was in charge of giving opinions, making studies and proposals in the field of cinema's promotion. Second, the Royal Decree no. 1883/1921 of December 4th, which endorsed the Ministry of Industry to award each year a gold medal, among the different companies active in the film sector, to the one that «will have produced, during the year, the longest films... duly approved... and with the lesser percentage of cut footage. In the case of parity, preference will go to the company that will have dealt with educational, patriotic or propaganda topic» («avrà prodotto, durante l'anno, il più lungo metraggio di pellicole...debitamente approvate...e nello stesso tempo avrà avuto in correlazione la minor percentuale di metraggio tagliato. A parità di condizioni sarà preferita la ditta che avrà trattato argomenti istruttivi, patriottici o di propaganda dell'arte e per l'economia italiana»).

⁷⁰ MANETTI, D., *Un'arma poderosissima*, p. 60.

⁷¹ Art. 5 of the Law («sufficienti requisiti di dignità artistica e di buona esecuzione tecnica»).

the interests of the regime: the legislation to support movies and the one to censor them became organically and inseparably tied together⁷².

In addition to the mandatory programming, intensified overtime⁷³, the legislator then established another measure to limit competition from the US: the dubbing fees⁷⁴. Foreign producers were prevented to dub in their countries the film they wanted to distribute in Italy. They were compelled to dub them in Italy and to pay a dubbing fee of IT L 25,000 per movie. According to some, such an approach was also driven by the appealing possibility to ‘control’ the dialogues and make them conform to the fascist ideology⁷⁵.

However, neither compulsory programming, nor dubbing fees succeeded in discouraging the import of American films⁷⁶. A suggestive hypothesis is that the fascist State did not achieve a severe opposition to the US production as a conscious choice: the regime found the spread of American cinema convenient, considering it more capable than the national films to exert a numbing effect upon the critical consciousness of the population⁷⁷. In fact, fascism was mostly interested in movies of evasion and entertainment (the so-called ‘*telefoni bianchi*’)—such as the American ones. The functioning of the censorship system seems to prove this evidence; the State did not use it to push filmmakers to celebrate the governments and its values, but mainly to promote the realization of

⁷² See, ARGENTIERI, M., *L'occhio del regime*, p. 76, CARETTI, P., *Diritto pubblico dell'informazione: stampa, radiotelevisione, teatro e cinema*, Il mulino, 1994, p. 257 and ORSI BATTAGLINI, A., *L'intervento economico statale per il cinema*, p. 11.

⁷³ Law no. 1414/1933 of October 5th and its implementing Royal Decree no. 1301/1934 of July 20th required indeed exhibitors to project an Italian movie for every three foreign films screened; in any case, they had to show at least three national films per quarter in the period from October 1st to June 30th.

⁷⁴ Law no. 1414/1933.

⁷⁵ MANETTI, D., *Un'arma poderosissima*, p. 76.

⁷⁶ Thus reported, among other, by ORSI BATTAGLINI, A., *L'intervento economico statale per il cinema*, p. 20.

⁷⁷ *Ibidem*.

optimistic and happy-ending movies—besides avoiding the diffusion of critics to the regime.

In the thirties, State intervention began to be refined: to the measures aimed at limiting foreign competition, the State added the first of direct support to the national industry. Initially, they included the *contributi sugli incassi*, automatic payments for film production based on a film's box office success. However, introduced in 1931⁷⁸, they were repealed only two years after and replaced by the quality awards⁷⁹. The latter were selectively attributed to films considered to have «qualities of artistic dignity and technical execution» by a committee composed of representatives of the fascist power. This way, the aid ceased to be mainly based on market trends⁸⁰, rewarding those more able to satisfy the audience's demand; it began to be anchored on State discretionary assessments.

The replacement of automatic contributions by quality awards reflected the beginning of a new phase, which can be identified as the 'Freddi years'. With clear and authoritative ideas about what the relationship between the State and the cinema should be, Freddi tried to 'intervene in the film production from the inside'—still, only partially succeeding.

Under his proposal, the regime created a centralized body responsible for State policy concerning cinema: the General Directorate for Cinema, established in 1934 within the Under-Secretary of State for Press and Propaganda. Freddi, appointed as the new institution's first general director, had expressed the need to create «a unified and totalitarian body, in charge of directing—without the possibility of escaping—all the cinematographic activities, and having the authority, competences, and instruments to regulate, inspire, direct, control and, when necessary, reward or punish all forms, events, initiatives, and results of the Italian cinema»⁸¹. Such a central body was meant to supervise the entire Italian

⁷⁸ Law no. 918/1931 of June 18th.

⁷⁹ Royal Law Decree no. 1414/1933 of October 5th.

⁸⁰ The adverb 'mainly' is used because automatic aid could benefit only films considered having «sufficient requirements of artistic dignity and good technical execution».

⁸¹ FREDDI, L., *Il cinema*, L'Arnica, 1949, p. 48, vol. I («Un organismo integrale e totalitario, a cui facessero capo senza possibilità di evasione tutte le attività del cinema e che avesse l'autorità, la

film industry, overcoming the previous situation, in which «the State had been concerned with the fate of Italian film production and had sought to provide generous and timely provisions to it. The industry, although benefiting from State measures, had acted instead autonomously, completely detached from the interests of the nation, absolutely indifferent to all the duties inherent in the matter and arising from the aids received»⁸². According to Freddi, it had become necessary to allow the State to intervene in the film production from within, to be part of the cinematographic work from the very beginning⁸³.

Following these convictions, during Freddi's years there was an attempt to create a 'State cinematography'. The State did not limit itself to promote the industry but entered directly in it through State bodies active in all the phases of films' life cycle. In addition to the already existing Luce Institute⁸⁴, several other institutes thus became operational

competenze e i mezzi per regolare, ispirare, dirigere, controllare e, quando necessario, premiare o punire tutte le forme e tutte le manifestazioni, tutte le iniziative e tutti i risultati rientranti nel campo della cinematografia italiana».

⁸² *Ibidem*, p. 217 («In sostanza lo Stato si era dimostrato preoccupato delle sorti della produzione cinematografica italiana e aveva cercato di provvedere con disposizioni generose e tempestive; l'industria invece, pur beneficiando dei provvedimenti dello stato, aveva continuato ad agire per conto proprio, completamente avulsa dagli interessi della nazione, assolutamente indifferente a tutti i doveri inerenti alla materia trattata e derivanti dagli aiuti ricevuti»).

⁸³ «As an industry whose activity directly involves the dignity, responsibility and moral interest of the State—and not only the moral, given the vast state contributions granted—, it is necessary for the State to intervene directly, embedding the solution of the authoritative and severe sign of his will and control. The State—any State—must control (explicitly or indirectly, depending on its nature) this formidable social weapon [...]». *Ibidem*, p. 44, vol. I («Trattandosi di un'industria la cui attività coinvolge direttamente la dignità, la responsabilità, l'interesse morale -e non soltanto morale, per i vasti contributi concessi- dello Stato, era ormai necessario che lo Stato intervenisse direttamente, imprimendo alla soluzione il segno autorevole e severo della sua volontà e del suo controllo. Lo Stato -qualunque Stato- ha il dovere di controllare (in modo esplicito o indiretto, a seconda della sua natura) quest'arma sociale formidabile [...]»).

⁸⁴ The Luce Institute took origin from the private group Film Education Union, created in 1923 to produce educational films. From 1924, it began to receive State funding, being progressively placed under government control. It had propaganda purposes, being in charge of the monopolistic production of documentaries and newsreels celebrating Mussolini. Since 1926, all exhibitors were compelled to screen a Luce newsreel or documentary before every projection (art. 1 of Royal Decree no. 1000/1926 of April 3rd).

in this period (such as the National Film Industry Association—ENIC⁸⁵—and Cinecittà⁸⁶).

However, the ambitious attempt to create a totalitarian cinema was arranged but never actually put into practice: for Mussolini there was no need to make the film industry a State monopoly. Under the pressure of cinema operators, he opted for a hybrid system. Private enterprises were allowed to shoot and exhibit films outside the State-owned circuit, provided they operated under the regime's tight control⁸⁷. Moreover, it does not seem that the State asked filmmakers to celebrate its values during Freddi's years; it continued indeed to mainly require them to

⁸⁵ The ENIC, a joint-stock company whose capital was subscribed by the Luce Institute, was set up in 1935. Its primary responsibility was to manage theatres, but it was also involved in films' production (activity reduced with the creation in 1941 of the company Cines) and distribution. For a short period, it had a monopolistic competence regarding the purchase, import, and distribution of foreign films. For more information, PERLO, N., *Le droit public du cinéma*, pp. 147 ff. and BELLUCCI, L., *Cinema e aiuti di stato*, p. 68.

⁸⁶ Cinecittà was created in 1937 and was initially privately owned (by the producer Carlo Roncoroni and other financiers). The government entirely purchased it only in 1938. Contrary to Freddi's wishes, Cinecittà mainly rented its equipment and scenarios to outside production companies instead of producing its own films.

⁸⁷ See, among others: ORSI BATTAGLINI, A., *L'intervento economico statale per il cinema*, pp. 55 ff.; CANNISTRARO, P. V., "Il cinema italiano sotto il fascismo", p. 432; TORRI, B., "Il gruppo cinematografico pubblico", *Città & Regione* (4) 1979, p. 40. Note that the State cinematographic bodies were not wound up in the post-war era: unions and professionals managed to ensure their survival. They maintained that they represented the capital structural unit able to favour the Italian film industry's renewal and contain the overwhelming power of the American one. However, despite being significant from an economic standpoint, State measures supporting these bodies were isolated and contradictory, unable to promote their restart. Indeed, overwhelmed with debts, they almost always bore the weight of a disproportionate workforce compared to the effective tasks, and often functions. These conditions lead to the dismantling of the public system lead by ENIC and to the creation of the *Ente Autonomo di Gestione per il Cinema*, called upon to set a framework concerning the public participation in the film industry (Decree of the President of the Republic no. 575/1958 of May 7th). For more information about the State cinematographic bodies, see, among others: ZACCARIA, R., "Cinematografia (disciplina amministrativa)". *Digesto delle discipline pubblicistiche* (1989); ZACCARIA, R., *Le strutture pubbliche della cinematografia in Italia*, in *Intervento pubblico*, pp. 155-225.; FRAGOLA, A., *La legislazione italiana sulla cinematografia: aggiornamento al 1° gennaio '82*, Alberto Carisch, 1982; BARBATI, C., *Istituzioni e spettacolo: pubblico e privato nelle prospettive di riforma*, Cedam, 1996.

incentivize a process of social relief through a positive and reassuring representation of Italian life and interpersonal relationships⁸⁸.

Besides the creation of the General Directorate for Cinema and that of State cinematographic bodies, these years were characterized by an increase in State resources, leading to the majority of private producers being placed under the regime's requirements⁸⁹. In addition to increasing the obligations to screen national films⁹⁰ and the entity of dubbing fees⁹¹, the regime launched a dedicated credit system for the cinema⁹², as it also did for several other sectors⁹³. In 1935, it established indeed within the *Banca Nazionale del Lavoro* a special section for film credit, in charge of managing a fund financed by the State and the Bank to grant direct loans with convenient interests to film production. A committee composed mainly of representatives of the Fascist power had to examine the loans' requests, taking into account «the peculiar characteristics, above all ethical, of the film»—besides the film companies' economic and financial soundness.

⁸⁸ As noted by BELLUCCI, L., *Cinema e aiuti di Stato*, p. 121 («fatta eccezione per alcuni film di propaganda, anche in seguito a questo mutamento il regime non domanda agli autori di celebrare i suoi fausti, ma un certo quietismo; chiede di favorire il processo di distensione sociale, tramite una rappresentazione positiva e rassicurante della vita italiana e dei rapporti interpersonali»).

⁸⁹ Thus reported by CANNISTRARO, P. V., "Il cinema italiano sotto il fascismo.", p. 433 and 434.

⁹⁰ Law no. 1083/1935 of June 13th extended the obligation to the entire year and to all the exhibitors, while it was first applied only to the theatres of first and second vision established in the most important cities. The following Ministerial Decree of July 15th, 1937 modified the proportion to be respected between the number of Italian and foreign film projected (from 1 to 3, to 1 to 2) and increased the number of Italian films to be shown each quarter (from 4 to 5).

⁹¹ Law no. 861/1937 of April 29th raised the tax from IT L 25,000 to 50,000 for each foreign film.

⁹² Law no. 1143/1935 of June 13th and its Royal implementing Decree no. 2504/1935 of November 14th.

⁹³ During this period, indeed, the State, in addition to reorganizing the credit system for the agricultural sector (1927), launched a dedicated credit system for, among others, public utility companies (1924), the shipping sector (1928), and the touristic one (1937). See SERRANI, D., *Lo stato finanziatore*, p. 37.

In 1938, the Government promulgated the so-called Alfieri Law⁹⁴, under the name of the Minister for Popular Culture at the time. Its adoption marked the end of the hegemony of Freddi, who resigned from the direction of the General Directorate for Cinema shortly after⁹⁵. The approach of the Alfieri Law was indeed 'liberal'—as the reintroduction of the contributions to productions⁹⁶, i.e. measures not based on State discretionary assessments⁹⁷, seems to prove. Still, a significant political control apparatus continued to complement such a 'liberal openness'⁹⁸.

To conclude on this period, it is worth noting that the fascist initiatives allowed for an expansion of the economic dimension of the Italian cinema, whose presence in the European and world market significantly increased compared to that of the 1920s. In 1925, Italian production represented 1.8% of the European and 0.4% of the world ones. In 1938, it respectively represented 12.3% and 4.3%, reaching 23.6% and 8.2% in 1942. The film industry experienced an economic expansion phase within Italy: spectators, cinemas, and investments all increased⁹⁹.

3.2. After the Liberation: dismantling and rebuilding the promotion schemes

The first text on the matter of cinema after the liberation, a 1945 Decree¹⁰⁰, appeared as «a trumpet blast, a hymn to freedom»: the first article bursts

⁹⁴ Law no. 458/1938 of January 18th, converting Law Decree no. 1061/1938 of June 16th.

⁹⁵ See MONTINI, F. and NATTA, E., *Una poltrona per due: Cinecittà tra pubblico e privato*, Effata Editrice, 2007, pp. 18 ff.; PERLO, N., *Le droit public du cinéma*, p. 166, and WAGSTAFF, C., *Italian neorealist cinema: An aesthetic approach*, University of Toronto Press, 2007.

⁹⁶ As said, they had been introduced in 1931 and repealed shortly after.

⁹⁷ For an analysis of the Alfieri Law, BELLUCCI, L., *Cinema e aiuti di Stato*, pp. 92 and ff.

⁹⁸ For an exhaustive list of all the controls to which production companies were subjected, see ORSI BATTAGLINI, A., *L'intervento economico statale per il cinema*, p. 47.

⁹⁹ See MANETTI, D., *Un'arma poderosissima*, pp. 160 ff.

¹⁰⁰ Lieutenant Legislative Decree no. 678/1945 of October 5th.

like «a cry of victory»¹⁰¹, stating that the activity of film production is free.

In addition to the most authoritarian measures adopted by fascism¹⁰², the Decree abolished the majority of the support instruments¹⁰³. This way, it testified to the perception that cinematographic ‘freedom’ occurs if the State does not intervene. Fascism’s long authoritarian experience made it difficult to imagine State support without the risk of creating a State culture, compliant with the government’s interests. Interestingly, in those years, despite the presence of limited funding, the damages to film studios and the lack of technical equipment, the Italian production knew a new and energetic vital impulse, delivering works of art such as “*Rome città aperta*”, “*Sciuscià*”, “*Paisà*” and “*Ladri di biciclette*”, which get an enthusiastic recognition around the world¹⁰⁴.

¹⁰¹ CHIARINI, L., *Cinema quinto potere*, Laterza, 1954, p. 44 («il primo provvedimento dopo la liberazione [...] sembra uno squillo di tromba, un inno alla libertà. Dopo un preambolo lungo una pagina di riferimenti a decreti, leggi e regolamenti dal 1923 al 1943, tutto il «ventennio», irrompeva l'articolo primo come un grido di vittoria [...]).

¹⁰² Among them: the obligation to obtain a ministerial authorization for the exercise of production activities; that for exhibitors to screen Luce’s newsreels and documentaries; that to present film screenplays to the censorship committee before shooting—while the censorship on films already realised was confirmed.

¹⁰³ First, the Decree repealed the compulsory programming and dubbing fees—following the desire of the American winners to pour their films onto the Italian market. As a result, American cinema ‘invaded’ Italy in those years. If between 1945 and 1950, 400 American films a year had been on average distributed in the country, they became about 5000 at the beginning of the ‘50s (see CORSI, B., *Con qualche dollaro in meno: storia economica del cinema italiano*, Editori Riuniti, 2012, p. 43). Second, the Decree also repealed the measures of direct promotion of the national industry. The only instruments confirmed, albeit exceptionally and temporarily, were the automatic contributions to production and the credit system.

¹⁰⁴ As noted, neorealism fully corresponds to the limited production possibilities of the Italian cinema at that time. Directors turned their films on the road, overcoming the difficulties and the insufficiency by the thrust of a reality rich in human values and tragically exploded after the long period of fascism and the lack of freedom of expression that had characterized it. See BIZZARRI, L., “Cinema senza industria”, *Il Ponte* 8-9 (1957): 1370-1388, p. 1371 («Nell'immediato dopoguerra, i cineasti italiani, reagendo al lungo periodo della dittatura fascista e alla mancanza della libertà d'espressione che l'aveva caratterizzata, si dedicarono alla ricerca di nuove e valide forme di espressione, sotto la spinta di una realtà esplosa tragicamente e ricca di valori umani. Il neorealismo corrisponde pienamente alle limitate possibilità produttive della nostra cinematografia in quel momento: mancavano solidi finanziamenti, le attrezzature erano

Starting in 1947, the State gradually reconstituted a system of support¹⁰⁵. It was based mainly on the institutions and measures invented during fascism, freed only of their most authoritative features. First, the legislator inherited a centralized administrative structure: it established the Central office for Cinematography, in charge of coordinating all public actions related to the film industry. It was set within the Presidency of Council, and thus within an eminently political body.

Second, the legislator took over the contributions to production and the credit system¹⁰⁶, and also the dubbing fees and the compulsory programming. In the beginning, all national films were able to benefit from the compulsory programming¹⁰⁷. Therefore, the support was meant for the entire industry, without any sort of content requirement. However, the principle that only works with «sufficient requirements of artistic dignity and good technical execution» could be admitted to the benefit was soon reintroduced. It was established by the 1949 'Andreotti law'—under the name of the Undersecretary to the Presidency of the Council in charge of directing the Central office for Cinematography at the time¹⁰⁸. To temper the exhibitors' pressing opposition¹⁰⁹, the

scadenti, i teatri di posa dovevano essere riorganizzati: non restava che girare sulla strada, superando le difficoltà delle ricostruzioni sceniche e l'insufficienza delle attrezzature»).

¹⁰⁵ The laws by which the legislator reconstituted a support system were three: Law no. 379/1947 of May 16th, Law no. 958/1949 of December 29th and Law no. 897/1956 of July 31st.

¹⁰⁶ Indeed, exceptionally and temporarily established by the 1945 Decree, the credit system and the contributions to production were confirmed and further refined. Concerning the latter, producers received a payment equal to 10% of their films' box office. In the beginning, the producers of films considered of «special artistic value» according to a technical committee (composed of both public officials and film industry representatives) could also receive an additional payment of 8% of the film's box office (art. 7 of Law no. 379/1947). The 1956 law unified the percentage of contributions to production to a single extent of 16%. However, while eliminating the additional payment for films with special artistic value, the law introduced quality awards of a fixed amount for producers of particularly meritorious works.

¹⁰⁷ Art. 7 of Law no. 379/1947.

¹⁰⁸ Art. 18 of Law no. 958/1949.

¹⁰⁹ ORSI BATTAGLINI, A., *L'intervento economico statale per il cinema*, p. 83.

legislator recognized them 20% of the tax rights collected on tickets sold for films admitted to compulsory programming (so-called *abbuoni*)¹¹⁰.

As far as the dubbing fees are concerned, they acquired a new configuration. Non-national films spoken in Italian could be projected in Italian theatres only after the payment of IT L 5,500,000 to the special section for cinema within the *Banca Nazionale del Lavoro*¹¹¹. The payment represented a deposit: the sum was repaid after ten years, without interest. Given that a modest deposit was of no obstruction to the currents of importation, the goal was no longer to hinder the distribution of foreign films. The instrument rather became a form of direct support to national production; the amounts deposited were indeed used to finance a special fund to grant loans to national production.

To conclude on this period, note that according to some, in addition to the administrative structure and the instruments of support, the legislator also took back from the fascist apparatus the existence of a link between the instruments of support and those of control¹¹². The persistence of an authoritative approach seems to be testified by the 'timid' reinstatement of the censorship on screenplays: the legislator established indeed that it was up to the producers to submit the script to the State approval¹¹³. Moreover: in this period, despite the entry into force of the Italian Constitution, whose art. 21 affirms that censorship is admissible only to prevent the diffusion of films contrary to sexual decency, cases of censorship little compatible with a democratic configuration continued to occur¹¹⁴.

¹¹⁰ Art. 14 of Law no. 958/1949.

¹¹¹ Art. 29 of Law no. 897/1956.

¹¹² Among others, see BRUNETTA, G. P., *Il cinema italiano contemporaneo: Da "La dolce vita" a "Centochiodi"*, Laterza, 2014, p. 26, according to whom in this phase the State continued to use the instrument of selective support to control content productions («*il meccanismo dei premi continua a essere un formidabile strumento di controllo e alleanza tra governo e industria*»).

¹¹³ Art. 14 of Law no. 379/1947 of May 16th.

¹¹⁴ For instance, the case of "*Umberto D*" by Vittorio De Sica, telling the tales of a man whose pension erogated by the State is insufficient: Andreotti defined it «a disservice done to the country» («*un pessimo servizio reso alla patria*») and invited the director to adopt «a healthy

3.3. The establishment of the Ministry of Culture and the 1965 Corona Law

In 1959, the General Directorate of Entertainment within the newly established Ministry of Tourism and Entertainment acquired the State's competencies related to the film industry¹¹⁵. This way, the absolute authority of the Presidency of the Council on cinema ceased. To assist the new Directorate, the legislator gradually set up many advisory and consulting bodies comprising experts, representatives of other administrations, and concerned categories. Such an approach (common to State organisation promoting other industrial sectors¹¹⁶) made the administrative apparatus «*elefantiaco*»¹¹⁷, weighing it and compromising its activities.

The State also adopted a new law: the 'Corona law'¹¹⁸, from the name of the Ministry of Tourism and Entertainment at the time, that reformed the rules regarding State intervention in the film industry more consistently with the Italian Constitution. Promulgated in 1965, the Corona law became the reference text of the sector for almost forty years.

Its first article declared that the State while recognizing the «economic and industrial importance» of cinema, considered it «a means of artistic expression, cultural development, and social communication». Like France, Italy began to pay greater attention to the artistic and cultural dimensions of the cinema. However, the Corona Law ended up confirming support measures for the entire industry, while introducing new corrections to grant greater aid to productions considered worthy, artistically and culturally speaking. According to some, the space left to the selective instrument remained limited because Italian operators were

and constructive optimism» («*un ottimismo sano e costruttivo*»). See ANDREOTTI, G., "Piaghe sociali e necessità di redenzione", *Libertas* 28 (1952), 5 ss.

¹¹⁵ Art. 2 and 5 of Law no. 617/1959 of July 31st.

¹¹⁶ As noted by SERRANI, D., *Lo Stato finanziatore*, p. 63.

¹¹⁷ ORSI BATTAGLINI, A., *L'intervento economico statale per il cinema*, p. 92.

¹¹⁸ Law no. 1213/1965 of November 14th. For its comprehensive analysis, see PEREZ, R., "La nuova disciplina della cinematografia", *Rivista trimestrale di diritto pubblico* (1966): 978 ss.

suspicious of the evaluations carried out by public bodies; marked by the experience of fascism and the following Andreotti's 'regime', they knew that political interests and clientelism could quickly transform a means of promoting quality into an instrument of abuse and discrimination¹¹⁹.

First, the Corona Law confirmed the mandatory programming, which could benefit only films of «sufficient artistic, cultural, or spectacular qualities»¹²⁰. Exhibitors who only screened films eligible for compulsory programming continued to benefit from the *abbuoni*. However, the benefit was higher for exhibitors charging low entry prices or screening films either with the certificate of quality¹²¹, or realized explicitly for children. The object was to compensate exhibitors for the increased risk they faced by screening this type of film, likely to be less commercially successful but considered commendable by the State.

The legislator continued to recognize contributions proportionate to the films' box office. However, the payment was no longer reserved to the production companies: directors and authors of screenplays could benefit from a percentage. In order to cope with the disadvantages of this aid, which ended up rewarding the very films that make the highest profits, and therefore those less in need of support, the legislator established 80 prizes of IT L 40 M¹²². They awarded films admitted to the compulsory programming and that had received the certificate of

¹¹⁹ PERLO, N., *Le droit public du cinéma*, p. 289, who reports that the space left to the selective instrument by the Corona Law was limited compared to that provided by the Project of Law Zanchi of 1963, which had been strongly criticized by the association representing the film industry.

¹²⁰ See art. 5. The existence of these requirements was assessed by the 'Committee of Experts', made up of cinema operators and public officials appointed by the Ministry of Tourism and Entertainment after consulting the 'Permanent Commission for cinematography' (art. 46). The Commission, set up within the Ministry and composed of representatives of various ministries and the cinema sector, was in charge of examining the film industry's general problems (art. 3).

¹²¹ Art. 8. The certificate of quality was issued by the Minister under the advice of the Committee of film experts (art. 48).

¹²² Art. 9.

quality. In this case too, directors and authors received a percentage of the aid.

With regard to credit, the legislator abolished the dubbing deposit, increased the endowment fund of the autonomous film credit section, and established new special funds. Among these, the one granting loans to films inspired by artistic and cultural purposes and produced with the economic participation of authors, directors, and actors. It also established that the *Ente Autonomo di Gestione per il Cinema* could take care of the printing of the copies of these films and their distribution costs¹²³.

By means of all of these instruments, the State granted considerable resources to the national film industry. The results in the short term were remarkable, with a sharp increase in Italian productions and a growth in the market shares of national titles¹²⁴. «However, it was an ephemeral success, devoid of industrial bases and a strategic vision of the future structure of the media»¹²⁵. Soon television would appear, and the cinema would face a deep crisis.

3.4. The '80s and the '90s: costs without reforms

During the '80s and '90s, the French and Italian approaches were the most dissimilar. Like in France, in Italy the outbreak of television and private broadcasters generated a progressive fall in theatres' admissions. However, the Italian legislator, whether incapable or careless, provided no answers. Despite the transformations in process and the heated debate, it intervened neither to regulate the relationship between cinema and television **(i)**, nor the cinema industry **(ii)**.

i. The relationship between cinema and television. The relationship between cinema and television already evolved over the course of the monopoly of the State's owned *Radiotelevisione italiana* (Rai). At first, it

¹²³ Art. 12. On the *Ente Autonomo per il cinema*, see footnote n. 87 of this Chapter.

¹²⁴ CUCCO, M. and MANZOLI, G., *Il Cinema di Stato*, Il Mulino, 2017, p. 23.

¹²⁵ *Ibidem*, p. 23 e 24 («Si trattava però di un successo effimero, privo di basi industriali e di una visione strategica del futuro assetto dei media»).

came down to a «mutual indifference» (1955-1965), then it turned into a «more dramatic competition» followed by «the beginning of a limited form collaboration» (1965-1975)¹²⁶. The liberalization process led to «a sort of step back in the caution that was usually applied to Italian cinema»¹²⁷, and caused instead the two media to overlap.

With no broadcasting laws, the situation was chaotic until the emergence of a duopoly dominated by Rai and the private television Fininvest in the late 1980s. Televisions engaged a front-facing competition with cinemas, broadcasting many films (mainly American), sometimes even before their first release in theatres¹²⁸. During the years of Rai's monopoly (1954-1976), public television used to broadcast a hundred films a year on average¹²⁹. In 1977 that share exceeded 200 films, reaching 400 in 1981 and about 1,300 in 1987. If in 1955 the representative Italian used to go to the cinema 16 times a year, he or she went to theatres only twice in 1985. Immediately after the end of the monopoly, there were 6.476 operating theatres, compared to the 3,249 active ones at the beginning of the 1990s. Moreover, even though televisions were distracting spectators from theatres and taking advantage of the distribution of cinematographic works, they were not contributing to finance new films¹³⁰.

The legislator will establish the first basic rules on the position of televisions vis-à-vis the cinema only in 1990, with the 'Mammì' Law¹³¹, given the need to transpose the principles laid down by the EEC in the

¹²⁶ Cit. MACCHITELLA, C. and LOPEZ, G., *Cinema e televisione: quale futuro?*, in *Sogni, industria, tecnologia, mercato*, ed. by Alberto, A. and Macchitella, C., Marsilio, 2005, pp. 167-180, p. 167 and 168.

¹²⁷ BARBERA, A., *Cavalcarono insieme: 50 anni di cinema e televisione in Italia*, Mondadori Electa, 2004 («L'avvento delle televisioni private cambia di colpo tutte le regole del gioco, portando alla moltiplicazione indiscriminata dell'offerta filmica e facendo compiere una sorta di passo indietro rispetto alle cautele con cui il cinema era stato trattato in precedenza»).

¹²⁸ PERLO, N., *Le droit public du cinéma*, pp. 343.

¹²⁹ For these data, see MONTELEONE, F., *Storia della radio e della televisione in Italia: un secolo di costume, società e politica*, Marsilio, 2013, p. 483 ss.

¹³⁰ MACCHITELLA, C. and LOPEZ, G., *Cinema e televisione*, p. 168.

¹³¹ Law no. 223/1990 of August 6th.

meantime¹³². On that occasion, it will provide for a minimum time period to separate the first release of films in the theatre and their television appearance; it will also require televisions to broadcast a minimum percentage of national film and to participate in their funding¹³³.

ii. The cinema industry. As far as the film industry is concerned, the rules introduced in 1965 continued to hold—although they had proved to be effective when the media landscape was very different. Perhaps to staunch and mask the absence of both a reform of the State promotional system and a regulation on the relations between cinema and television, the government exponentially increased the funding for the film sector in the '80s. Instead of the often advocated 'reforms without costs', Italy faced 'costs without reforms'.

There were a plethora of funds, whose objectives often overlapped, since they financed the same activities¹³⁴. To the already existing funds (whose endowments were increased), the legislator added a fund for the adaptation/renewal of cinema theatres¹³⁵ and another one for the promotion of Italian cinema abroad¹³⁶. Act Law no. 163/1985 of April

¹³² See [par. 6.1.1. of this Chapter](#).

¹³³ Law no. 223/1990 of August 6th. Note that the Mammi Law will establish the prohibition to broadcast movies forbidden to minors during peak hours, when minors are more likely to watch them. This provision will strongly affect the rules of film production and also compromise the integrity of several works. In order to sell their works to broadcasters at a good price, distributors and producers will distort films to be presented to the ministerial committee in charge of rating, removing the parts likely to lead to bans on minors. Indeed, the price that televisions are willing to pay to broadcast a film depends on how much they can earn from the sale of advertising space during its transmission. Obviously, revenues are limited in the case of programs that cannot be broadcasted during peak hours. Since this period, it will also emerge « [...] the tendency of all TV networks to eschew films with thematic and linguistic excess which may not be appreciated by sections of the television public» (BARILE, P. and RAO, G., "Trends in the Italian mass media and media law", *European Journal of Communication* 2 (1992): 261-281, p. 274).

¹³⁴ As noted by PERLO, N., *Le droit public du cinéma*, p. 450.

¹³⁵ Law no. 378/1980 of July 23rd.

¹³⁶ Law no. 182/1983 of May 10th.

30th also introduced new fiscal measures in favour of the film industry¹³⁷—thus following the tendency, already applied in the incentive systems for other industrial sectors, to adopt indirect aid, easier to manage.

The 1985 law seemed to anticipate an organic reform. It introduced a significant change: to overcome the dispersion of State support in favour of the general entrainment sector, it established the Unified Fund for the Performing Arts ('FUS'), meant to incorporate all the existing funds dedicated to cinema, opera, music, dance, theatre, drama and circus. In the intentions of the 1985 legislator, this innovation was meant as part of a broader reform framework to be implemented through subsequent laws. However, the Law of 1985, the mother law of entertainment, did not produce daughter laws.

The following cinema Law of 1994¹³⁸ was certainly not a comprehensive reform of the 1965 Corona Law; it only produced a series of amendments and additions¹³⁹, with two main innovations. First, it abolished the obligation to show national films in cinema theatres and recognized special tax incentives to the exhibitors that autonomously reserved a percentage of their projection time to the Italian production¹⁴⁰. Second, the Law innovated the film credit system¹⁴¹: it recognized for the first time that institutions other than the *Banca Nazionale del Lavoro* could participate to the credit; this way, it overcame the monopoly of the first and opened to competition. To help overcome the difficulties in

¹³⁷ First, it established the tax shelter—a tax exemption of 70% of the operators' profits used to produce new Italian films or restructure, renew, and technologically improve theatres (art. 7). Second, the Law introduced a fiscal mechanism to promote funding from outside the film industry: it provided for a tax exemption of the amounts donated to public and non-profit associations operating in the entertainment sector (art. 12).

¹³⁸ Law no. 153/1994 of March 1st, converting Law Decree no. 26/1994 of January 14th.

¹³⁹ CARETTI, P., *Diritto pubblico dell'informazione*, p. 295 («Anziché di fronte ad una compiuta riforma della vecchia legge del 1965 siamo dunque di fronte ad una serie di modifiche e integrazioni della medesima [...]»).

¹⁴⁰ Art. 24(4). It recognized an exception from the entertainment tax to the exhibitors who reserved at least 25% of their transmission time to national film in each quarter. The amount of the exemption was set according to the 'artistic and cultural quality' of the films screened: the more significant the quality, the higher the fiscal benefit.

¹⁴¹ Art. 14.

accessing credit for films of 'national cultural interest', the 1994 law also established the new Guarantee Fund¹⁴². If the producers were unable to repay the loan received through the films' proceeds within two years, then the State intervened and covered 70% of the loan (90% in the case of films of first and second-time director). The producer who did not repay the remainder within five years, was unable to receive any other loan or State benefit for the following three years.

The operation of the guarantee fund was sharply criticized because likely to take any responsibility off both the bank and the cinema operator while transferring the entrepreneurial risk to the State¹⁴³. Given the possibility of relying on a substantial non-repayable public contribution, credit institutions and producers were not risking their capital but gambling with State's money. Therefore, the Law did not incentivize them to make a careful assessment of the risk of the projects they invested in—as proven by the very poor performance of the cultural interest films¹⁴⁴. The Guarantee Fund's mechanism could have been justifiable for high risk films struggling to find resources on the free market, but with cultural and artistic ambitions. However, it appeared inadequate because adopted for the great part of the works. This way, the majority of funding supported projects not bound to make repayments to the State¹⁴⁵.

¹⁴² Indeed, the 1994 Law made the distinction between films that were of 'national productions' and of 'national cultural interest', establishing different supportive regimes for each of them. The firsts were those made by a company that was registered, held the majority of its capital stock, did most of its business, and paid taxes in Italy. The seconds were those thus considered by the newly established 'Advisory Committee for Cinema', in charge of establishing the classification by considering the artistic talent involved.

¹⁴³ See, among others: CUCCO, M. and MANZOLI, G., *Il Cinema di Stato*, and SALVEMINI, S., *Il cinema impresa possibile. La sfida del cambiamento per il cinema italiano*, Egea, 2002, pp. 132 and ff.

¹⁴⁴ According to CUCCO, M. and MANZOLI, G., *Il Cinema di Stato*, p. 45, 94% of the films of cultural interest financed by the State between 1994 and 2002 did not even make up for the amount invested in their production. Moreover: 11% of these films have not been completed or have not found a distribution channel.

¹⁴⁵ For data on the matter, see TETI, E., COLLINS, A., and SEDGWICK, J., *Government Failure: The Ineffectiveness of Italian State Subsidies to Film*, in *Handbook of State aid for Film*, Springer, 2018, pp. 333-365, p. 341.

By all of the instruments referred, and in the absence of structural reforms, «the State resources allocated to films of national cultural interest increased significantly during the 1990s [...], leading to a collapse of the system in the early 2000s [...]»¹⁴⁶—when the ‘Urbani Decree’ was adopted¹⁴⁷.

3.5. The early 2000s: shifting the focus from worthy films to worthy film companies

As mentioned, the 1994 Law did not help to consolidate the industrial dimension of the cinema, since it did not promote the development of its operators’ entrepreneurial capacity. Under its application, State funding had mainly been non-repayable, directed at projects unable to achieve positive market results. At the end of the ‘90s, the opinion that the system was in need of a reform was increasingly shared.

As noted, two events symbolically underlined this evidence¹⁴⁸. First, in June 2000, the Association of Independent Authors and Producers (API) called for lowering State’s contributions to 50% of a film production cost and for the funding to be granted only to producers who already gathered the remaining 50%. The goal was to limit welfarism and increase the weight of private investment, in order to drive companies in the film industry to act in accordance with a market-oriented logic. Second, in February 2004, the Ministry of Culture convened representatives of the various cinema categories and informed them that State resources to film production were over. They were supposed to be partly self-supporting through the repayment of loans, which was often not the case. To temporarily address the problem, the Government adopted the ‘Save the cinema’ Law Decree, which exceptionally allocated € 80 M to the industry¹⁴⁹—while waiting for the Urban Decree to become operational. The latter deeply reformed State funding for

¹⁴⁶ CUCCO, M. and MANZOLI, G., *Il Cinema di Stato*, p. 27.

¹⁴⁷ Legislative Decree no. 28/2004 of January 22nd.

¹⁴⁸ CUCCO, M. and MANZOLI, G., *Il Cinema di Stato*, p. 45.

¹⁴⁹ Law Decree no. 72/2004 of March 22nd.

cinema¹⁵⁰. The main idea was to continue support the sector but taking into consideration the merits of the production company, besides those of the projects.

State aids to film production continued to be automatic and selective. By the first, the State aimed at promoting the general development and economic growth of the film industry, stimulating the activities of those able to achieve positive commercial results¹⁵¹. Selective aids, to take into account the artistic and cultural merits, consisted of contributions to films of cultural interest, quality awards¹⁵², and aid to screenplays¹⁵³.

The main innovation concerned the contributions to films of cultural interest. First, the Decree limited the maximum percentage of public funding at 50% of the film cost (raised to 90% for films by first-time and second-time directors)¹⁵⁴. Also, it subordinated the funding to the

¹⁵⁰ For an in-depth analysis of the mechanisms established by the Urbani Decree, see CUCCO, M. and MANZOLI, G., *Il Cinema di Stato*, pp. 54 and ff., and CARETTI, P., *Diritto pubblico dell'informazione*, pp. 303 and ff. It is worth noticing that some provisions of the Urbani Decree were declared contrary to the Italian Constitution. The Constitutional Court noted indeed that they had been adopted in the absence of a necessary prior consultation with the State-Regions Conference. Therefore, they were contrary to art. 117 of the Constitution, under which the promotion of culture is a matter of concurrent competition between the State and the regions (see footnote 211 of this Chapter). See Judgment of the Constitutional Court of July 19th, 2005, Case no. 285.

¹⁵¹ Automatic aids continued indeed to be 'success-linked subsidies' given to companies based on the box office results of previous productions. Producers were required to use the aid to repay the loan previously gained by the State and to produce other films. See art. 10 of the Urbani Decree and the implementing ministerial decrees.

¹⁵² They were awarded by the General Directorate for Cinema to films selected by a jury appointed by the Ministry and made up of five eminent personalities of culture. They were given to no more than 14 films per year and amounted to €250,000, to be divided between the producer, the director, the author of the screenplay, the cinematographer, the art director, and the film editor. See art. 13(9) and art. 17(3) of the Urbani Decree, and its implementing ministerial decrees.

¹⁵³ They were recognized to a maximum of 20 film projects per year of particular cultural or social importance. The contribution could not be more than €35,000 per title, to be divided between the screenplay author and the production company. If the production company did not undertake the project within two years, the funding was withdrawn (except for the percentage granted to the author). See art. 13(8) of the Urbani Decree.

¹⁵⁴ Art. 13(2).

producer's acquisition of the remaining resources¹⁵⁵. This way, the legislator tried to overcome the previous welfarism, dismissing the role of the State as the only risk-taker. Second, the State introduced a reference system, consisting in evaluating the success of the activities previously carried out by the producer and the cast involved in the project¹⁵⁶. It aimed at reducing the arbitrariness of the committees in charge of selecting which films to fund, whose decisions had often generated criticism on the use of public resources. Provided that a certain degree of subjectivity remained, the introduction of objective parameters to be taken into account greatly reduced it.

Moreover, the reference system's main idea was to anchor the financial support not only to the quality of the idea but also to the possibilities of its actual realization, distribution, and ability to meet an audience. To this extent, the spirit of the Urbani Decree had been rather revolutionary: it intervened in a country where the formal celebration of the films' artistic value disguised a worrying lack of attention to the entrepreneurial and economic structure of their production and distribution¹⁵⁷.

However, some of the good intentions were not achieved. State funding continued to be non-repayable during the application of the Urbani Decree¹⁵⁸. Such a result may have depended on the limited production budget of the titles funded. The economic history of cinema shows that the products with the greatest chance of success are those that have had

¹⁵⁵ *Ibidem*.

¹⁵⁶ Art. 8 and the implementing ministerial decrees. More precisely: as to the producer, a ministerial committee was in charge of verifying: i). the quality of its previous films (measured by their participation in festivals and prizes won, etc.); ii). the stability of its activity (number of years of activity, of films already produced and released in the theatres, level of repayment of State loans, etc.); iii). its commercial capacity (average box office of its previous films and revenues from their rights sold abroad etc.). Concerning the project, the committee was in charge of assessing, besides the script quality, the past performance of the technical and artistic team involved in the film (participation to festivals, awards won, economic performance, etc.).

¹⁵⁷ CUCCO, M. and MANZOLI, G., *Il Cinema di Stato*, p. 59.

¹⁵⁸ For the data, see *ibidem*, p. 81.

high production and marketing budgets. Despite this, the films' unit average cost was rather low during the application of the Urbani Decree, while the number of produced films increased¹⁵⁹. The legislator limited State funding to 50% of the film's cost and pushed producers to find additional funding from the private sector; however, it did not take sufficient action to make this path viable¹⁶⁰.

To conclude about the Urbani reform, it should be noted that the reference system produced disincentives, since it ended up rewarding mostly the same operators. To reach higher scores, producers resorted to actors and authors who had already participated in festivals, won awards, and taken part in successful films¹⁶¹. This way, the system helped those who already had success, i.e., the ones presumably having more opportunities to find sources of financing in the market on their own.

This way, the State generated a conservative effect, that reduced the incentives to innovate and diversify, in turn jeopardizing the emergence of new talents: a result in stark contrast to the constitutional ratios for public support to culture.

3.6. The first organic act: looking for a new approach

In 2016, the Italian State adopted the Act Law no. 220/2016, showing a long-term overall vision for the first time. The reform did not only update the 2004 film support regulations to cope with the changes that occurred over time and the arisen problems. It more broadly acted in a coordinated way on the whole system of State rules affecting the sector,

¹⁵⁹ See fig. 11, in [par. 5 of Chapter II](#).

¹⁶⁰ In the beginning, the State established only one instrument to favour private investments: the product placement (see footnote n. 252 of [par. 3.1. of Chapter II](#)). The State will seek to attract further private resources with the 2008 Finance Act, which will introduce new fiscal benefits (see [par. 4.2 of Chapter III](#)).

¹⁶¹ CUCCO, M. and MANZOLI, G., *Il Cinema di Stato*, p. 62.

seeking to give the Italian film industry «a more functional and less wasteful regulatory framework»¹⁶².

The 2016 Act reformed direct and indirect State aids, the system of AVMS providers programming and investment obligations, that of film censorship (transformed into a system of content classification to protect minors exclusively¹⁶³), and even the system of working relations in the film and audio-visual sector. More generally, the legislator has been concerned with redefining the scope of responsibilities and functions of ministries, related bodies, and independent institutions involved in the film industry's governance as a whole. Aware of regulating a sector that evolves faster than others considered its special connection to technology, the Act has mainly established the fundamental principles, requiring secondary sources of their declination. This approach has generated criticism: some claimed that this way of proceeding would have deprived the Parliament of the possibility of making important choices¹⁶⁴; others noted that the high number of secondary sources would have been likely to generate antinomies¹⁶⁵. Still, one should recognize that the approach adopted has the merit to allow to change the rules when deemed necessary easily. This is an important result considered that the audio-visual sector evolves faster than others because of its special connection to technology.

Concerning the State promotional action, the main innovation is that the support has been extended to the entire audio-visual sector—as was already the case in France. In addition to works intended for cinema theatres, the aid became available for those intended for television and the internet, and even to video games. This way, the State showed

¹⁶² TETI, E., COLLINS, A., and SEDGWICK, J., *Government Failure*, p. 345.

¹⁶³ See GIUSTI, M. "Dalla censura alla classificazione delle opere: il cinema dà l'addio a madama Anastasia?." *Rivista trimestrale di diritto pubblico* (2020): 515-542. and RAMAJOLI, M. "Cinema e libertà: dalla censura preventiva al movie rating sistem." *Aedon* 1 (2018).

¹⁶⁴ ZAFFANELLA, A. "Il sostegno finanziario dello Stato al cinema e la disastrosa attuazione della "Costituzione culturale"". *Rivista dei media* 1 (2018): 332 ss.

¹⁶⁵ CONTALDO A. and PELUSO F. «Il settore cineaudiovisivo alla luce delle recenti normative anche secondarie: un primo focus di orientamento sulla riforma c.d. Franceschini». *Diritto d'autore* 2 (2018): 147 ss.

awareness that the merits of a product are now less dependent on the commercial practices adopted to enhance it on the market¹⁶⁶.

Another significant change is the establishment of the new 'Fund for the development of investment in the film and audio-visual sector', which overcame the multiplicity of different financing sources. It functions based on a mechanism aimed at generating a link between the level of the annual State expenditure and the film industry's turnover. However, its actual endowment cannot be inferior to a pre-established amount. Interestingly, a minimum percentage of the new Fund should be devoted to funding initiatives of cinema education within schools¹⁶⁷: the State seeks to raise the demand for the product supported, and even to enhance the quality of the demand.

To conclude on the major innovations, the 2016 reform established that each year an impact evaluation of the newly established measures must be carried out and presented to the Parliament by the Ministry of Culture¹⁶⁸ (as well as an annual report of the Independent Antitrust Authority on the state of competition in the film distribution department—the AGCM¹⁶⁹). It shows awareness that only the *ex post* evaluation can tell if the choices taken were appropriate and should therefore continue to be followed. Such a novelty should overcome—at least with regards to the film industry—one of the main problems that have generally characterized the Italian State's intervention in support of the industry. As noted in 2012, «the only available assessments of the incentives granted in decades of public transfers to businesses are the result of either academic work or analysis by the Bank of Italy. It is significant and worrying that there are no (except for very rare cases) evaluations by the administrations that provide and manage the

¹⁶⁶ Proof of that is the fact that most of the Italian leading production companies engage both in the television and cinematographic sectors (see for instance Wildeside, Palomar and Cattleya); on top of that, some of them also produce web series (Indigo Film) and operate in commercial and branded content works (Indiana Productions).

¹⁶⁷ Art. 27, lett. i).

¹⁶⁸ Art. 12(6).

¹⁶⁹ Art. 31(4).

incentives; it suggests that the evaluation does not enter the decision-making process in which new aids are assigned»¹⁷⁰.

4. The shared contemporary challenges: the upheavals caused by the OTTs and the Covid-19 pandemic (*deferment*)

In the contemporary era, both the Italian and the French film industries have been shaken by the disruptive entrance on the market of the AVMS non-linear providers (i) and the outbreak of the Covid-19 pandemic (ii).

i. The AVMS non-linear providers

The AVMS non-linear providers have revolutionized a series of working dynamics cemented for decades. Known as Over The Top (OTT), these providers are the Transactional Video-On-Demand (TVOD, online services where the user pays for a single content, such as iTunes of Apple), the Subscription Video-On-Demand (SVOD, subscription-based online services, such as Netflix, Amazon Prime and Disney+) and the Advertisement Video-On-Demand (AVOD, free online services with advertisements, as YouTube).

In fast and continuous growth, OTTs players changed the traditional paradigms of the audio-visual industry. First, while each actor had a specific identified role (author, producer, publisher, distributor, etc.) in the creative chain in the past, some OTTs have concentrated many

¹⁷⁰ GIAVAZZI, F. ET AL., *Rapporto alla Presidenza*, p. 21 («Le uniche valutazioni disponibili degli incentivi concessi in decenni di trasferimenti pubblici alle imprese sono il risultato o di lavori accademici o di analisi della Banca d'Italia. È significativo e preoccupante che non esistano (tranne rarissimi casi) valutazioni da parte delle amministrazioni che li erogano e li gestiscono, il che suggerisce che la valutazione non entri nel processo decisionale in cui si assegnano nuovi contributi»). The same problem is also highlighted in ONIDA, F. and VIESTI, G., *Una nuova politica industriale in Italia: investimenti, innovazione, trasferimento tecnologico*, Passigli editori, 2016, p. 53, where it is noted that, among the limits about the Italian State industrial policy, there is the lack of «una continuativa capacità di valutazione dei processi e dei loro effetti, che possa portare ad imparare dall'esperienza e a migliorare continuamente nel tempo. [...] per ottenere risultati da politiche industriali così sofisticate, ma anche così importanti, non basta disegnare un bando e allocare finanziamenti perché tutto funzioni. Occorre una volontà politica costante nel tempo e una sofisticata capacità, necessariamente centrale, di accompagnamento, analisi, raccordo, valutazione [...]».

different functions within the same entity, thus revolutionising the traditional equilibria. Moreover: OTTs have freed the audience from the constraints of television programming schedules, and have proven to be able to continuously improve and tailor their services on their users' tastes. The big SVOD operators (such as Netflix¹⁷¹ and Amazon¹⁷²) celebrate indeed their capacity to gain an in-depth knowledge of their customers' practices, hence having a significant competitive advantage over traditional market players.

In addition to the traditional paradigms of the industry, OTTs are also affecting the State action of cinema promotion. Indeed, some of their characteristics have rendered obsolete and ineffective some support instruments devised by national legislators over time. Moreover, for a

¹⁷¹ Netflix was founded in 1998 by computer mathematician Reed Hastings. Initially, it was a service of physical rental of DVDs and VHS sent based on online orders—the first step to constructing a database that indicates customers' preferences, helping the company recommend products to them. Soon it was transformed into an unlimited subscription service. Only in 2007, the SVOD service added to the rental of films. Progressively, in addition to the distribution chain, Netflix has integrated itself vertically and has begun to produce original content. The first outcome were the two series "*Lilyhammer*" (2012) and "*House of Cards*" (2013). With a deep knowledge of its audience's preferences, Netflix realised two seasons of "*House of Cards*" right away, breaking the norm of releasing a pilot to assess a product's potential before undertaking the realization of additional episodes. With the release of "*House of Cards*", Netflix broke another unwritten rule: consistent with the policy of giving greater flexibility to its audience, it released the first season of the show at once—whereas so far, between one episode and the other, there had usually been one week—thus inaugurating the binge-watching practice. For an analysis of Netflix history and its functioning mechanisms, see, among others: COLLIN, A, *NETFLIX & Cie - Les coulisses d'une (r)évolution*, Armand Colin, 2018, JENNER, F. M., *Netflix and the Re-invention of Television*, Springer, 2018 and MARRAZZO, F., *Effetto Netflix: Il nuovo paradigma televisivo*, Egea, 2016.

¹⁷² The SVOD service of Amazon is Prime Video. It is included among the advantages recognized to who pays the yearly subscription to the membership program Amazon Prime, launched in 2005. Note that the audio-visual is the only area in which Amazon, traditionally a distributor, comes up with the supply chain to produce its programs, thus entering into competition with its suppliers. Since 2010, Prime Video started distributing its original content, on top of releasing works from other production companies, indeed.

long time, some of these players have undermined the application of the promotional laws of many countries.

In several European countries, legislators require providers to participate in production funding, either through contributions to support national funds or through direct investments in contents. Here, these compulsory contributions represent the very pillar of State support policies; indeed, they cover a large proportion of the funding for film production.

Some of the OTTs are known to operate in those and other countries while establishing themselves in one country only, the one with lighter financial obligations and that do not require this type of compulsory contribution. It is the case, for example, of Netflix, operating in the majority of the European countries, albeit having been headquartered for a long time only in the Netherlands; Amazon Prime Video, based in Luxembourg, and Google Play, based in Ireland.

It is the so-called practice of ‘jurisdiction shopping’, by which providers look for the optimal location, or even for a delocalization from the country of ‘natural’ establishment. In this way, they can exploit the most favourable jurisdiction concerning the regulatory conditions to supply the economic activity they exercise and are able to escape the more stringent requirements of the many other States in which they nevertheless provide their services. Indeed, according to the reasons of the internal market, providers must respect only the law of the country in which are established, as harmonized by the law of the EU, and not all the laws of the countries in which they provide their services—as established since 1989¹⁷³.

This way, Italy and France, which are among the countries which imposed stricter requirements than the harmonization EU standards do, have seen several aspects of their regulation circumvented by the new operators. At stake is national lawmakers' ability to maintain industry players' commitment to national production funding.

This evidence, however, is being overcome. Among the other reasons, this is because the European law, since 2018, has provided for a

¹⁷³ See footnote 194, in [par. 6.1.1. of this Chapter](#).

derogation from the country of origin principle. This way, it has allowed the Member States to impose an investment in the creation of new European works to audio-visual operators that target their audiences without being established there. Moreover, Netflix is establishing secondary offices in European countries further to the Netherlands.

i. The outbreak of the Covid-19 pandemic

In addition to the presence of global and delocalized digital operators, the French and Italian systems of cinema promotion have recently been 'shaken' by the Covid-19 pandemic. It generated the need for stronger support from the States, which increased funding, and also adopted new dedicated measures—including, in Italy, a TVOD service distributing Italian cultural products whose physical enjoyment had been compromised¹⁷⁴.

Indeed, the outbreak of the pandemic and the subsequent containment provisions have strongly affected the two film industries, with the freezing of projects in the shooting phase, the closure of cinema, and the cancellation of festivals and events, pushing some enterprises to the edge of bankruptcy.

Concerning some aspects, the pandemic has proven to be an opportunity in Italy. Indeed, it has tragically shown how Italian workers of the entrainment and performing art sectors could not access fundamental social security tools, such as unemployment benefits, sickness, and maternity. Indeed, they were not adapted to the non-traditional business models and forms of employment in the sector. In light of this, the Italian State—while trying to ensure the recovering of the sector—has adopted the Law Decree no. 73/2021 of May 25th, which has reformed social security instrument for cultural and creative industries, leveraging the emergency to address old problems that had not been handled until now.

¹⁷⁴ The project, 'Itsart', was promoted by the Ministry of Culture and the Cassa Depositi e Prestiti and realized through the involvement of the already existing TVOD service Chili.

5. State promotion of cinema under scrutiny at higher government levels—from cultural exception to cultural diversity

At the end of the WWII, the measures of cinema promotion adopted by the national States began to fall under the scrutiny of superior government levels. They were at odds with the principle of free trade of goods and services that were being established both at the European and international level. France played a fundamental role in the matter. It fought more than any other country for the idea that cultural products and services should be treated differently from the non-cultural ones. This way, it contributed to the emergence of the concept of cultural exception, then evolved into that of cultural diversity. Still today, said concept justifies State measures of cinema promotion, admissible because of a 'consent' granted by superior government levels.

The 'trade versus culture' debate began in the forum of the General Agreement on Tariffs and Trade (GATT)¹⁷⁵. Adopted in 1947, the GATT aimed at removing obstacles to physical products trade through three principle: most favoured nation, market access and national treatment. The cinema industry received special status and explicitly derogated from this last principle, that consists in preventing the countries from adopting any program that would increase the competitiveness of a domestic product at the expense of a foreign one, thus prohibiting the

¹⁷⁵ The scientific literature on this debate is extensive; see, among others: BERNIER, I., *Trade and Culture*, in *The World Trade Organization: Legal, Economic and Political Analysis*, ed. by Appleton, A. E. and Plummer, M. G., Springer, 2005, pp. 2331-2377; BUCHSBAUM, J. *Exception taken*; BURRI, M., *The European Union, the World Trade Organization and Cultural Diversity*, in *Cultural Governance and the European Union: protecting and promoting cultural diversity in Europe*, ed. by Psychogiopoulou, E., Palgrave Macmillan, 2015, pp. 195-209; BURRI, M., *Trade versus Culture: The Policy of Cultural Exception and the WTO*, in *The Palgrave handbook of European media policy*, ed. by Donders, K. et al., Palgrave Macmillan, 2013, pp. 479-492; FOOTER, M. E. and GRABER, C. B., "Trade liberalization and cultural policy", *Journal of International Economic Law* 3.1 (2000): 115-144; SCHÉRE, L., "The Culture War: A Look at the Cultural Exception Principle in International Trade Law", *Fordham International Law Journal* 40 (2016): 565-582; WALKLEY, S. E. *To what extent*.

granting of advantages to national industries not also available to the foreign ones¹⁷⁶.

Indeed, despite US lobbies against trade restrictions and upon particular pressure from France, the GATT ended up including Article IV, 'Special Provisions Relating to Cinematograph Films'. Being «the sole exception in the GATT to the principle of national treatment»¹⁷⁷, this article authorized the contracting parties to temporarily maintain the obligation for cinema's exhibitors to reserve a minimum proportion of the total projection time for films of national origin. The general ban on quantitative restrictions on imports, such as contingent quotas, was instead preserved, and all other forms of protection were prohibited.

However, the GATT came into being as a provisional agreement articulating only basic rules; the organization pursued its aim of opening up domestic markets through the 'negotiation rounds', during which the areas of intervention were extended. The 'trade versus culture' debate became significant during the Uruguay Round. Launched in 1986 and concluded in 1994, it mainly attempted to extend the principles of free trade to services, applicable under GATT only to goods¹⁷⁸.

During the Uruguay Round years, a similar debate (should cultural products and services be treated differently from other goods and services?) was active within the European Economic Community (EEC). In principle, State aids to the cinema should have been fall in the general

¹⁷⁶ Concerning instead the two other principle: that of the most favoured nation prevented the countries to offer preferential trade privileges to one nation and not to others; that of market access obliged GATT members to increase access to domestic markets over time and not to reduce access below that time limits. For more details, BUCHSBAUM, J. *Exception taken*, pp. 75 ff.

¹⁷⁷ BALASSA, C., *An "economic" approach toward the trade and culture debate: The US position*, in *International Cultural Policies and Power*, ed. by Singh, J., Springer, 2010, pp. 84-100, p. 86.

¹⁷⁸ The round would have ended with the Marrakesh Agreement, which would have established the World Trade Organization (WTO), adopted a new version of the GATT, reached for the first time an agreement on trade in services, the General agreement on trade in services (GATS), and adopted the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).

prohibition of State aid—affirmed since the Treaty of Rome of 1957¹⁷⁹. As audio-visual works were already traded between countries, national aids could affect trade and distort the competition between the Member States. The audio-visual works that received support were likely to develop a competitive advantage over those that do not. However, since the Treaty of Rome, the EEC tried to balance the internal market and competition policy goals with other public interests and established exceptions to the general ban on State-aid. The culture was included among these exceptions by the Maastricht Treaty of 1993: it introduced in Art. 87, which contained the ban on State aids, the new letter d): according to it, «aid to promote culture and heritage conservation» are compatible with the internal market, provided they do «not affect trading conditions and competition in the Community to an extent that is contrary to the common interest»¹⁸⁰. This way, the EU partially shared the French argument that State aids to cinema do not create a significant distortion of competition within the internal market, since European films are rarely in competition with each other, but rather with North American films; and that, in any case, «the circulation of films in the European Union is only possible if they can, in the first place, exist on their national market»¹⁸¹.

Beyond recognizing to Member States the possibility to maintain forms of aid to their national film industries, the Maastricht Treaty provided for the first time the EU with a subsidiary competence in the cultural

¹⁷⁹ Art. 87 of the Treaty of Rome.

¹⁸⁰ The conditions under which State aid «do not affect trading conditions and competition to an extent that is contrary to the common interest» have been clarified over time by the European Commission during its examination activity. See [par. 2 of Chapter III](#).

¹⁸¹ AMIEL, O., *Le financement public du cinéma dans l'Union européenne*, Presses Universitaires d'Aix-Marseille, 2006, who is quoting CNC, *Rapport du groupe de travail sur le cinéma face au droit de la concurrence*, 2003. Note that the reasoning developed by the EU since 1993 is the same of today. According to the Commission Communication on State aid of 2013, the presence of films coming from the different Member States is essential to «ensure that their culture and creative capacity can be expressed, and the diversity and richness of European culture reflected». To this extent, State support is fundamental: «left purely to the market, many of these films would not have been made». This is because of a combination of the high investment required and the European audio-visual market's weaknesses. Among these, the fact that European audio-visual works have a limited audience and that most European audio-visual players are small-medium size enterprises.

field. Indeed, it recognized the EU the power to carry out actions to support, coordinate, or supplement the Member States activities in the field¹⁸². This way, the EU obtained a title to conduct a joint action to defend the Member States' measures of cinema promotion during the Uruguay Round. Therefore, after having established a cultural exception within its internal market, the EU flighted for the same principle to be applied internationally.

However, the EEC was not entirely united in this approach initially. Germany and Britain were somewhat reluctant, while France was very proactive. It managed at the end to shape the EU discourse concerning Hollywood's dominance of the audio-visual industry—to the extent that during the Uruguay Round years, the EU added protectionist measures for the European products on top of those already active in the Member States for national works¹⁸³.

During the European (French)-American battle on trade versus culture, the two sides stressed both economic and ideological reasons in favour of their arguments. The cultural proponents sought to exempt any cultural product or service from the principles of the negotiated WTO Agreements. However, the audio-visual one was the sector that generated most concerns, «to the extent that the term 'culture' became synonymous with the word 'audio-visual'»¹⁸⁴.

The relevance given to the film industry seems to come both from other cultural services being less tradable and from the sensitivities in the media sector being the highest. Despite the small value in economic terms of the French audio-visual industry at the time, the perception of the ability for films to convey ideals and value conferred great public importance to the sector. France claimed the public's right to benefit from a diversified supply, including the most 'fragile' and less-demanded products, stressing the risk for a *laissez-fair* approach to lead to the lack of the national and European films and to an 'invasion' of the

¹⁸² Art. 128(2) of the Maastricht Treaty of 1993.

¹⁸³ See [par. 6.1.1. of this Chapter](#).

¹⁸⁴ FOOTER, M. E. and GRABER, C. B., "Trade liberalization and cultural policy", p. 119.

American ones¹⁸⁵. This phenomenon might have ended up as a form of 'cultural imperialism', regarded as an attack on European ideals¹⁸⁶.

The American negotiators dismissed the French concern about a potential loss of identity and interpreted the French position as an attempt to economically protect its national market by hindering access for US films, due to their higher capacity to intercept consumers' tastes and demand. According to the US, opening up to competition would have strengthened European filmmakers by forcing them to make successful films and to learn how to raise funds for future productions. However, the French were not interested in dismantling a regime that had ensured funding and reduced failure risk. The US showed a different conviction on how to safeguard the rights of the audience. What the market offers freed from restrictions corresponds to that which there is a demand for. What is not provided by the market in the absence of State incentives should disappear because not requested by consumers.

There were many possible solutions to solve the conflict. First, to exclude the audio-visual industry from the final agreements through a cultural exemption¹⁸⁷. Second, to bring the audio-visual industry into the GATT under certain conditions. Third, to include no reference to culture at all.

¹⁸⁵ Indeed, even with the protectionist measures whose maintenance was debated, there was already a significance and growing US trade surplus with Europe in the film industry. According to the data reported by BUCHSBAUM, J. *Exception taken*, p. 86, the Europeans saw their domestic market share of theatrical revenue drop from 30% to 16% in the decade before the Uruguay Round (1982-1992), while the US share in the top five European markets (France, Germany, Italy, Spain, Great Britain) rose from 70% to 83%.

¹⁸⁶ BUCHSBAUM, J., *Exception taken*, p. 60, reports that Jacques Delors, President of the European commission, during the *Assises européennes de l'audiovisuel*, said: «culture is not a piece of merchandise like others... we cannot treat culture as we treat *frigidaires* or even cars. *Laissez-faire*, the market, they are not sufficient. Thus, one can say without hypocrisy: no protections and no *laissez-faire*. To our American friends, who just several days before these *Assises* have brought action through Gatt [...], I would like to pose simply one question: do we have the right to exist? Have we the right to perpetuate our traditions, our patrimony, our languages?».

¹⁸⁷ As it happened in 1992 with the Canada-US Free Trade Agreement (CUSFTA), which granted a broad 'cultural exemption' to Canada—namely the right to maintain quotas, government subsidies, tax incentives, and other similar measures. For more information on the CUSFTA, see SCHÉRE, L., "The Culture War", pp. 580 ff.

This latter is the solution that ultimately prevailed: cultural products are neither explicitly included, nor excluded, and the sector's status remained undefined. It was still asserted, even if vaguely, that culture is different from other goods and services.

Not explicitly allowing for measures promoting culture put the industry under the constant pressure of further liberalizations, and caused the cultural exception proponents to look for solutions outside the WTO¹⁸⁸. Indeed, in the early 2000s, the discourse moved within the United Nations Educational, Social and Cultural Organization (UNESCO), and eventually led to the adoption of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions in 2005.

This way, the debate has undergone a substantial transformation, moving from the cultural exception's rhetoric towards the slogan of cultural diversity. The latter was considered by various activists and policymakers a better-sounding expression. Instead of giving the idea of defending national protectionist prerogatives, cultural diversity would argue for a larger perspective on culture, upholding a gentle cultural hybridity against the threats of standardization represented by US mass cultural production¹⁸⁹.

The Convention identifies cultural diversity as a positive response to cultural standardization and affirms «the sovereign rights of States to maintain, adopt and implement policies and measures that they deem appropriate for the protection and promotion of the diversity of cultural expressions on their territory» (art. 1, let. h)—thus implying the legality of State aid to national cinemas. The cultural exception thus becomes the instrument through which to pursue the new objective of cultural diversity¹⁹⁰.

¹⁸⁸ As noted by BURRI, M., *Trade versus Culture*, p. 485.

¹⁸⁹ BUCHSBAUM, J., *Exception taken*, p. 160.

¹⁹⁰ As declared during a discussion on the WTO at the National Assembly by Catherine Trautmann, French Minister of culture at the time: «The notion of cultural diversity does not replace that of exception. There is neither a semantic shift concealing an occult reality, nor an abandonment. Quite simply, these two notions are not placed on the same level. By cultural diversity, it is a question of clarifying the aim pursued in the negotiation. The cultural exception is the means, in my view non-negotiable, of achieving the objective of

However, although succeeding in demonstrating the broad international consensus on cultural diversity as a desired goal, the UNESCO Convention did not result in a new cultural trade regime. Its article 20(2) establishes indeed that «nothing in this Convention shall be interpreted as modifying the Parties' rights and obligations under any other treaties to which they are parties».

6. Cinema promotion at the non-State level

The State has historically been the first level of government to promote the film industry; however, it is not the only one anymore: progressively, regional and European support added to the State one.

In addition to partially allowing the Member States to support their national film industries and fighting for the maintenance of such a support at the international level, the EU provides indeed its own programs of aid. Their goals appear less challenging than the State ones, since they are less composite: the main one is to allow a better circulation of the audio-visual products from the different Member States, both within Europe and outside.

Local support appears less challenging than the State one, too, again because of the goals pursued. Unlike the State, territorial autonomies promote the film industry mainly to obtain local economic development, not being interested in the artistic and cultural 'merits' of the products actually supported.

cultural diversity [...]» (*«La notion de diversité culturelle ne se substitue pas à celle d'exception. Il n'a ni glissement sémantique dissimulant une réalité occulte, ni a fortiori abandon. Tout simplement, ces deux notions ne se placent pas sur le même plan. Par diversité culturelle, il s'agit d'explicitier la finalité poursuivie dans la négociation. L'exception culturelle est le moyen, à mes yeux non négociable, d'atteindre l'objectif de la diversité culturelle [...]»*). Thus reported by WALKLEY, S. E., *To what extent*, p. 16.

6.1. Promoting cinema at the European level

The Treaty of Rome of 1957 contained no provisions for culture. After all, it was an economic document, which came with provisions of free-market orientation, encouraging a reduction in State intervention. However, the need for European action in the cultural field has been recognized over time¹⁹¹. As anticipated, the EU received a legal basis for cultural actions by the Maastricht Treaty of 1993; its art. 128(2) called upon the EU to carry out actions to support, coordinate, or supplement the action of the Member States. This way, while legitimizing the EU action in the cultural field, the Treaty reconfirmed the continued primary competence of the Member States.

Basically, the Member States' cultural autonomy should be guaranteed because the EU can neither replace national audio-visual policy activities, nor compete with them. The EU is authorized to intervene only on actions that cannot be performed optimally by the Member States, because they are unable to achieve certain goals on their own, and/or because the EU intervention would ensure added value—still, only if the consequences of inaction are undesirable.

Still today, by virtue of articles 6 and 167 of TFEU, the EU has a subsidiary competence in the cultural field, based on which it promotes the sector in two ways¹⁹²: by making the behaviour of audio-visual media services providers consistent with the European audio-visual industry growth goal ([par. 6.1.1.](#)); and by providing the industry with direct financial aid ([par. 6.1.2.](#)).

¹⁹¹ This is in line with what happened with regard to the general industrial sector; indeed, it has progressively become evident how « the purely «negative» action consisting in the removal of barriers was not sufficient and that more positive action was needed in the Community to make it possible to fully integrate European industry and fully exploit the continental dimension». See DASTOLI, P. V. and VANNUCCINI, S., *L'Europa e le politiche industriali*, in *Una nuova politica industriale in Italia*, 2016, pp. 21-32, cit. p. 22 («Il bisogno di una politica industriale europea è emerso tuttavia quando è diventato evidente che l'azione puramente «negativa» di rimozione di barriere non era sufficiente e che occorreva un'azione più positiva nella Comunità per rendere possibile la piena integrazione dell'industria europea e lo sfruttamento pieno della dimensione continentale»).

¹⁹² For a comprehensive read on European Media policies, DONDERS, K. ET AL., *The Palgrave handbook of European media policy*.

6.1.1. Regulating AVMS providers to ensure the growth of the European industry (deferment)

European indirect promotion through regulatory actions date back to 1989, when the EEC adopted the ‘Television Without Frontiers’ (TSF) Directive¹⁹³—which is still today (albeit modified and currently under the name of ‘Audio-Visual Media Service’ Directive) the pillar of European audio-visual policy.

The Directive was adopted before the entry into force of the 1993 Maastricht Treaty, and therefore in a time when the EEC lacked a competence in the cultural field. The EEC adopted indeed the Directive based on the economic value of the sector, under arts. 57(2) and 66 of the Treaty of Rome: it classified television broadcasts as services and intervened to ensure their free circulation¹⁹⁴.

¹⁹³ Directive 89/552/EEC of October 3rd, 1989. The nickname «Televisions Without Frontiers» was inspired by the name of the Italian television program «Games without frontiers», previously hosted by Ettore Andenna, then a member of the European Parliament and a proponent of the Directive. See PELLICANÒ, F., *La tutela delle opere europee e della produzione indipendente*, in *La regolamentazione dei contenuti digitali, studi per i primi quindici anni dell'autorità per le garanzie nelle comunicazioni (1998-2013)*, ed. by Apa, E. and Pollicino, O., Aracne, 2015, pp. 347-380, p. 347.

¹⁹⁴ Although the Court of Justice had recognized the principle of free movement of television services since 1974 with the ‘Sacchi case’ (Judgement of the Court of April 30th, 1974, Case no. 155/73), the different rules in force in the Member States were hampering the creation of a common broadcasting market. The Directive thus sought to harmonize those aspects of national legislation that may have represented obstacles for intra-Community trade. It introduced minimum standards (regarding advertising, teleshopping and sponsoring, protection of minors, etc.) by which any television program could freely circulate, provided it fulfilled the Directive’s requirements. That is, as long as television programs complied with the law of the originating Member State, as coordinated by the Directive, no obstacle, no restriction on reception nor retransmission could be put forward by the receiving Member State—with the exclusion of exceptional cases. It is the country-of-origin principle, without which the single market would not exist: suppliers providing services in different Member States must comply only with the law of the country in which they are established—as harmonized by the EEC law—and not with those of all the countries in which they provide services. However, the Directive only lays down the minimum rules needed to guarantee the freedom of transmission in broadcasting. Member States may require providers under their jurisdiction to comply with more detailed/stringent rules, provided their accordance with the EEC law (art. 3 of the Directive). For more details on the country of origin principle, CAGGIANO, G., *Paese di*

The Directive did actually more than just favouring the development of a common legal framework to guarantee the free circulation of audiovisual services. The aim was not only creating a single European audiovisual market, but also making it large and strong: as a Recital of the Directive affirms, «of sufficient size for television productions in the Member States to recover necessary investments».

To pursue this goal, the EEC sought to increase the demand for European works by requiring televisions to broadcast a minimum percentage of them. It also sought to develop new resources for the European production by allowing the Member States to require the broadcasters under their jurisdiction to help finance European works produced independently from broadcasters. The target was to discriminate against the non-European countries, «which clearly meant the US, as its programs or films were the only ones threatening to compete with European works»¹⁹⁵. Indeed, the Directive was adopted when public service broadcaster monopolies were abolished and private televisions appeared, generating an increasing demand for content, mostly satisfied with cheaper US works¹⁹⁶. Therefore, during the Uruguay Round's years, the EEC added to the State aid to national film industries measures supporting the European industry as a whole. Not surprisingly, the establishment of quotas for European works generated many criticisms from the US, which objected against the protectionist nature of the instrument¹⁹⁷.

origine, libera circolazione e giurisdizione, in *La nuova televisione europea: commento al "Decreto Romani"*, ed. by Zeno-Zenovich, V., Maggioli, 2010, pp. 33-47.

¹⁹⁵ BUCHSBAUM, J., *Exception taken*, p. 65.

¹⁹⁶ DE VINCK, S. and PAUWELS, C., *Beyond Borders and into the Digital Era: Future-proofing European-level Film Support Schemes*, in *European Cinema and Television: Cultural policy and everyday life*, ed. by Bondebjerg, I. et al., Palgrave Macmillan, 2015, pp. 102-123.

¹⁹⁷ The USA invoked indeed the 1974 GATT, alleging its infringement by the provision of quotas. The EEC rejected the claim. First, it replied that television programs were not subject to GATT, since they are not services but goods. Second, it affirmed that the ultimate aim of quotas was to promote European culture and identity and not realize mere economic protectionism. Therefore, already at that time, in defending its decision, the EEC essentially invoked the concept of cultural exception—even though it was not yet competent in the cultural field. The scientific literature on the American criticisms following the adoption of the TSF Directive and on the EEC reply is extensive; for more

Over time, the EU legislator amended the 1989 Directive on several occasions. However, still today the European legislator use quotas to push providers active in Europe (both traditional televisions and digital platforms) to participate promoting European productions.

Unlike the EU promotion through investments, the one realized through regulation affected the French and Italian State systems of cinema promotion, since national laws should implement the principles established at the European level. Therefore, European rules on the matter will be extensively analysed in [Chapter IV](#), devoted to the Italian and French State system of quotas for European and national works.

6.1.2. Investments in activities undervalued by the State

The European instruments of direct support date back to the end of the '80s. They are two: Eurimages and Media. The first, introduced in 1988, is the cultural support fund of the Council of Europe¹⁹⁸, financed by the contributions of the countries' members and the repayment by the beneficiaries of the aid of the loans received¹⁹⁹. Media was instead introduced in 1991; in 2014, it ceased to exist as a stand-alone programme and was integrated into Creative Europe, the European Commissions' framework programme for supporting cultural sectors. Following the principle of subsidiarity, both Eurimages and Media were established to stimulate activities that individual States would not be able to carry on

details, see, among other: BUCHSBAUM, J. *Exception taken*; DONALDSON, J. D., "Television without frontiers: The continuing tension between liberal free trade and European cultural integrity", *Fordham International Law Journal* 20 (1996): 120-160; ROSS, B. L., "I Love Lucy, but the European Community Doesn't: Apparent Protectionism in the European Community's Broadcast Market", *Brooklyn Journal International Law* 16 (1990): 529-560; WALKLEY, S. E. *To what extent*.

¹⁹⁸ As it is well known, the Council of Europe is an international organisation that differs from the EU; the fund managed by the Council of Europe is addressed in the same paragraph about the support provided by the EU for interest of simplification.

¹⁹⁹ Note that, since 2020, the support takes the form of non-refundable grants when the amount received by the recipient project is under € 150 000. In the case of higher amounts, the aid continues to take the form of soft loans, repayable on the basis of the revenues generated by the supported project. See the Resolution adopted by the Committee of Ministers on September 9th, 2020 amending the Resolution setting up Eurimages of October 26th, 1988.

with greater efficiency and effectiveness and to offer types of assistance undervalued at the national level, seeking to foster an added value.

The weaknesses of the European market are historically located outside the production phase, the activity traditionally most supported by the Member States. European players produce an ever-expanding number of films yearly, with numbers that dwarf the US output²⁰⁰. The main problem is that the audience for the European films is narrow. First, the number of national viewers is limited, since the majority of European countries are much less populated than the US and the countries whose audio-visual markets are on rise (China, South Korea, Japan, India and Mexico). Second, the national limited audiences is not compensated by encountering foreign audience: it is difficult for European films to cross national borders and circulate in other Member States and outside EU. European films are released in only four European countries on average²⁰¹, while US films tend to be released in 10 European countries on average²⁰², and the most successful of them manage to encounter a global audience.

Since its origin, Eurimages has aimed to offset the weaknesses of the European industry by increasing its possibilities to find markets beyond national and European borders. To this extent, Eurimages uses circa 90% of its resources to provide loans without interests for the creation of independent European co-productions²⁰³. Indeed, co-productions circulate almost twice and generate three times as many admissions as purely national productions²⁰⁴. This seems to occur for at least two reasons. First, co-productions have a natural transnational aspect. Second, they usually have more backing in terms of economic resources:

²⁰⁰ See CREATIVE EUROPE MEDIA, *Media Monitoring Report 2017: Reaching audience across borders*, 2018, p. 7.

²⁰¹ *Ibidem*.

²⁰² *Ibidem*.

²⁰³ For the concept of independence, see [par. 3.2. of Chapter II](#).

²⁰⁴ EUROPEAN AUDIOVISUAL OBSERVATORY, *Film production in Europe: production volume, co-production and worldwide circulation*, 2017, p. 3. Although co-productions accounted for only 24.2% of overall film production volume in Europe over the period 2010-2015, they generated 50.3% of overall attendance for European films during the same period.

official co-productions²⁰⁵ are entitled to the benefits granted to national films in each of the countries participating in the co-production. This is particularly significant when considering that the average production cost of a European film is €M 3,2²⁰⁶, while an American film costs between \$M 80 to \$M 85—a figure that can triplicate or even quadruplicate in the case of blockbusters²⁰⁷.

The Media programme also aims to increase the capacity of circulation of European works. Since its origin, it has provided support for a wide range of activities. Among them, training programs to promote the acquisition and improvement of skills and competences by audio-visual professionals, knowledge sharing and networking initiatives; development, distribution and promotion of European works (for example by facilitating their access to professional audio-visual trade events, markets and international festival); promotion within Europe of non-national European works (for example by supporting a European cinema operators' network screening a significant proportion of non-national European films); programs of technological improvement. In any case, more than a half of the Media's budget is devoted to international distribution.

When considering the persisting fragmentation and lack of cross-borders circulation of European films, one can doubt the impact realized by Eurimages and Media: «[...] while the seeds of pan-European awareness may have been sown, claiming that Media and/or Eurimages have contributed to the realization of a European single audio-visual or film market would be stretching it too far»²⁰⁸. These results could stem from the fact that the budget of Eurimages and Media is limited compared to the scale of the European audio-visual industry²⁰⁹.

²⁰⁵ They are those realised accordingly to the European Convention on Cinematographic Co-Production of the Council of Europe, signed in 1994 and updated in 2017.

²⁰⁶ EUROPEAN AUDIOVISUAL OBSERVATORY, *Fiction film financing in Europe: a sample analysis of films released in 2017, 2019*, p. 6.

²⁰⁷ CUCCO, M., *Economia dei film. Industria, politiche, mercati*, Carocci, 2020, p. 30.

²⁰⁸ DE VINCK, S. and PAUWELS. C., *Beyond borders and into the digital era*, p. 106.

²⁰⁹ See footnote n. 245 of [par. 3.1. of Chapter II](#). Note that, among the reasons why the Eurimages funding are limited there is the fact that the self-fuelling mechanism of the fund

However, the situation would have been probably worse in absence of Eurimages and Media: if they did not succeed in significantly augmenting the circulation of European works, they probably helped to prevent it from shrinking even more.

6.2 Promoting cinema locally: an opportunity for economic development

The State no longer has exclusive competence in film promotion even within national borders. In France, the legislator has established that all levels of governments (State, regions, departments, and municipalities) should participate in developing culture since the beginning of the '80²¹⁰. In Italy, art. 9 of the Constitution entrusts with the task of promoting culture the 'Republic', term that encompasses all government levels. It follows that the promotion of culture, and therefore of cinema, is a task directed to all of them. More precisely, it should be considered a matter of concurrent legislative competences: State laws are in charge of determining the fundamental principles of cinema promotion, while the Regions have the power to promulgate specific laws applicable in their territory²¹¹.

did not properly take place: the works that receive funding are not always able to pay back what they obtained. CUCCO, M., *Economia dei film*, p. 177.

²¹⁰ Act Law no. 8/1983 of January 7th. Note that, however, there are no specific regulatory provisions relating to the local support to the film and audio-visual industry, not even in the CCIA. In their absence, local aids to the film industry fall within the common framework governing economic intervention by local authorities, established in the *Code général des collectivités territoriales* (CGCT) See LE ROY, M., "Cinéma", *JurisClasseur Administratif* 267 (2019), and INSPECTION GÉNÉRALE DES FINANCES and INSPECTION GÉNÉRALE DES AFFAIRES CULTURELLES, *Évaluation de politique publique: le soutien à l'économie du livre et du cinéma en region*, 2017.

²¹¹ This is because of Title V of the Constitution, which provides the detailed distribution of competences between the State and the Regions (as amended by Constitutional Law no. 3/2001 of October 18th). Indeed, under its art. 117(3), the cultural activities are a matter of concurrent competences, and the Constitutional Court established that the 'cinema' (matter not expressly regulated) should be considered part of them. See Judgment of the Constitutional Court of July 21st, 2004, Case no. 255 and 256. However, note that the State had recognized to the Regions some competences in the audio-visual sector before 2001.

Given their competences on the matter, both the French and Italian regions progressively began to provide aid to the film industry. Today, in most cases they look at the sector as a potential economic opportunity rather than a tool for cultural development. Indeed, the main goal they consider in promoting cinema is attracting national and international productions to their territories to obtain local economic development and growth.

The economic benefits arising from the presence of film productions are many: the expenditure on local goods and services made by the film crew; the impact on domestic employment; the development of professional competencies; the promotion of the region's image and cultural heritage, increasing the international brand awareness of the country, in turn fostering tourism²¹². Given these results can occur while supporting any kind of audio-visual work, the regions have anticipated the State rapidly adopting measures of support for all types of products: not only the cinematographic ones, but also those used to be considered for a long time less 'meritorious', such as tv series, works for internet and commercials.

The Italian and French regions have progressively devised two instruments to attract productions in their territories: Film Commissions and direct film funds. The film Commissions were established on the

²¹² It is the 'movie tourism' phenomenon, which occurs when an audio-visual product gives visibility to a territory and stimulates people to visit it. According to CUCCO, M., *Economia dei film*, pp. 212 and ff., Italian Regions' tend to overestimate the perception of such a phenomenon: although it exists, it happens in limited cases (in Italy, the most important ones occurred from the television series "*Il commissario Montalbano*", "*Don Matteo*", "*Elisa di Rivombrosa*" and the films "*La passione di Cristo*", "*Benvenuti al sud*" and "*Chiamami col tuo nome*"). The author points out that the over-dimensioning of the movie tourism phenomenon risks creating disincentives. Among these, the refusal to make regional locations available for the shooting of works unsuitable for generating tourist effects because likely to spread a negative image of the region. Think of the controversies raised by the film "*La bella addormentata*" by Marco Bellocchio (2012) and the series "*Gomorra-La serie*" (2014). The first, inspired by the story of Eluana Englaro, led to a temporary closure of the Friuli-Venezia Giulia Film Commissions. According to the Regional Council of the Friuli, the Film Commission was responsible for supporting the production of a film that links the region's image to the issue of euthanasia. The second provoked many debates for associating the image of Naples with organized crime. Hence, the reiterated refusal of local governments to grant the locations needed for filming, overcome only after a long negotiation with the production company.

early '50s' US experience and are usually public offices operating within local administrations²¹³. They do not provide production companies with direct funding, rather having the role of production facilitators. They provide indeed both in pre-production and during shooting time free support of a logistical nature, usually regardless of any qualitative evaluation of the projects helped²¹⁴.

In addition to the Film Commissions' services, some regions have also progressively began to support production companies that choose their territory as a location with direct funding, normally given without qualitative assessments. However, the production company must respect several conditions: among others, a minimum percentage of shooting must be realized in the region; a minimum percentage of workers must be local; the local expense made by the production company must be superior to the received aid. These conditions are grounded on the idea that the aid should ensure a positive local economic impact, which should in turn be verifiable and accountable—granting a positive final balance for the region. Film Commissions works differently: they provide support to anyone, under the uncertain hope that the aided productions will spend in the territory more than the Film Commission costed to the local administration.

6.2.1. The coordination (or lack thereof) with the State

In France, there has always been an attempt to coordinate the activities of audio-visual support carried out by the local authorities and the State. The first Regions' action in the industry, which dates back to the mid-

²¹³ CANOVA, L., FABBRI, T., MEDOLAGO ALBANI, F. and VERSACE, A., *L'evoluzione del sostegno pubblico all'audiovisivo*, in *L'industria della comunicazione in Italia. 1987-2008: le trasformazioni dell'industria della comunicazione in Italia*, Guerini e Associati, 2008, pp. 275-302, p. 278.

²¹⁴ Among the services Film Commissions offer, there might be a discharge of administrative paperwork for shooting or possible authorizations needed; grading and fees negotiation for hotels/restaurants/set catering; crew offices and working spaces; assistance in location scouting etc.

80s²¹⁵, was developed under the State's stimulus. Given the crisis of the French film industry after the outbreak of private televisions, the State intervened to multiply the sources of cinema funding. In addition to creating new instruments to incentivize private investments²¹⁶, it recognized to territorial autonomies the power to adopt initiatives to support the sector. Compared with private investors, territorial autonomies were more likely to ensure the State with greater control over the use of resources and higher capacity to align the initiatives to its goals. In essence, the actions of territorial autonomies in this first phase were products of State programmes²¹⁷. Progressively, territorial autonomies stopped to merely apply ministerial circulars and became capable of determining and implementing their own form of support, becoming real public partners of the central State in cinema promotion. Still, while French regions acquired more autonomy, coordination with the central State continues to exist.

Regarding the activities of the Film Commissions (called *commissions locales* or *bureaux d'accueil des tournages*) central coordination is ensured by the *Commission Nationale du film France*, which is the first entity that foreign productions interested in shooting in France should address²¹⁸. It is a non-profit-making association under the Ministry of Culture's authority, financed by the CNC²¹⁹. Forms of coordination with the central State are also provided for the regional funds. The coordination

²¹⁵ Indeed, the first regional Funds were set up in 1985 (Aquitaine) and 1986 (Midi-Pyrénées). See COUR DES COMPTES, *Les soutiens à la production cinématographique et audiovisuelle : des changements nécessaires*, 2014, p. 40, footnote no. 51.

²¹⁶ The SOFICA and the IFCIC, see [par. 2.4. of this Chapter](#).

²¹⁷ For the whole discourse, refer to PERLO, N., *Le droit public du cinéma*, p. 411 and ff. The support was mainly granted to theaters, cinema promotion activities and education programmes.

²¹⁸ The Film France's role of ensuring coordination among the activities carried out at local levels is clearly reflected in its governance: its board of directors includes representatives of central and local administrations and institutions (such as the CNC, several Ministries and associations of territorial autonomies); qualified professionals, such as film and television producers; representatives of the network of local film commissions. See the Film France's Statute.

²¹⁹ CNC, *Bilan*, 2019, p. 270. The *Commissions locales* normally receive funding by the CNC only during their first three years of existence, instead.

is guaranteed by the *Conventions de coopération cinématographique et audiovisuelle*, adopted since the '90s and whose achievement is necessary for local-self governments to obtain State contributions to their funds. The agreements, that last three years, must be realized between each territorial autonomy involved and the State, represented by the CNC and the Regional Directorates of Cultural Affairs (DRAC, the services of the French Minister of Culture in each region of France)²²⁰. The agreements aim to structure a coherent support policy based on the specificities of each local area, engaging all French levels of government in a systematic consultation and exchange of information²²¹. They indicate the types of aid adopted by the local government, their amounts and the conditions of eligibility, and the CNC's and DRAC's economic contribution to the local funds²²².

Concerning the matter of coordination, the Italian case is different. As in France, the support provided by territorial autonomies has increased overtime. Italian regions' interest on the matter was initially limited, and they offered some financial help just to local festivals, film reviews, and film libraries. They began to broaden the range of their action at the end of the '90s, when they noted that the audio-visual production could have significant impact on local economy, in addition to intangible cultural

²²⁰ The DRAC began to take part in the agreement since 2000. Before their presence was not necessary, since the CNC had its own regional delegations.

²²¹ As affirmed by the CNC, *Bilan*, 2019, p. 269, the agreements are an instrument of dialogue, negotiation, and execution of joint actions. They have a triple concern: coherence of the undertaken actions, transparency, and traceability of the deployed funding.

²²² Since 2001, the CNC contribution to regional funds is based on a pre-established mechanism concerning aid to production. Provided that the regional fund has an endowment not inferior to a certain amount, the adopted ration is «1 euro of CNC for 2 euro of the region». In short, for every two euros devoted by the region to film production, the CNC provided the regional fund with one euro. However, there is an established limit to the contribution of the CNC to production activities, set at a maximum of € 2 M each year. Concerning aids for activities other than production, the contribution of the CNC depends on a case by case. For more information, see COUR DES COMPTES, *Les soutiens à la production cinématographique*, pp. 40 and ff., and INSPECTION GÉNÉRALE DES FINANCES and INSPECTION GÉNÉRALE DES AFFAIRES CULTURELLES, *Évaluation de politique publique*.

benefits²²³. The institution of film commissions²²⁴ and film funds²²⁵ have progressively led to the relocation of the productions' activities, historically settled almost exclusively in Rome for films and in Milan for televisions and advertising. Indeed, Italian producers and directors have seized with increasing reactivity the opportunity to use new and various locations with both logistic and economic incentives.

Despite the great vivacity of the local actions, the phenomenon developed with totally spontaneous and poorly coordinated methods and processes. Indeed, the local film funds and Film Commissions were developed without a clear regulatory framework and without a proper connection with the central State, implying the risk of unproductive overlaps and compromising an efficient use of public resources²²⁶—a trend that generally belongs to Italian industrial policies²²⁷.

²²³ CUCCO, M., *Economia dei film*, pp. 205 and 206.

²²⁴ The first film commission was founded in Emilia Romagna in 1997 and currently almost all regions have one. They have different juridical and organizational forms. Most are foundations of participation that operate thanks to a fund financed by the constituent members (among which is always the region, often municipalities and provinces), following the guidelines lines they established; others are offices within the region—in this case, they tend to be a direct extension of the regional councillors to tourism, culture, or productive activities; others are in-house companies, regional agencies, or private associations that have an agreement with local and regional authorities. The most important Italian film commission are grouped into a national association, the Italian Film Commission, which in charge of carrying out a dialogue to define shared solutions.

²²⁵ Film funds have been developed since 2003; the first case is that of the Friuli-Venezia Giulia (CANOVA, L. ET AL, *L'evoluzione del sostegno pubblico all'audiovisivo*, p. 289). In the majority of the cases the funds are managed by the film commissions their self, and not by the territorial autonomies that instituted them—as it tend to happen in the other European countries.

²²⁶ For further information, *Il senso del cinema e dell'audiovisivo per i territori*, 2013, research report carried out by the Fondazione Rosselli for the Institute Luce-Cinecittà with the supervision of the General Directorate for Cinema.

²²⁷ See CAMPANINI, L., *Dimensione e caratteristiche aggregate degli incentivi alle imprese in Italia*, in *Una nuova politica industriale*, pp. 33-36, cit. p. 34 and 35 («L'intervento multilivello che caratterizza la politica industriale, in modo via via più pervasivo, comporta talvolta misure in sovrapposizione e con effetti di reciproco spiazzamento [...] Sembra mancare un comune quadro di riferimento di strategie e obiettivi unitari e convergenti»)

A partial change of paradigm occurs with the 2016 Act. The latter maintains a centralist approach, unlike what happens today in many other industries supported by the public sector²²⁸. However, it officially acknowledges the fundamental roles acquired by the regions in supporting the audio-visual sector. Indeed, it recognizes Italian regions as effective 'places' for the audio-visual sector's government²²⁹ and provides basic rules to ensure forms of coordination and avoid ineffective overlapping²³⁰. Still, nothing is specified about the 'competition' between regional funds and State's ones. This confirms the parallel nature of local and central aids. However, such a stratification of funding between different government levels should be at least monitored by the new National Coordination of Film Commissions²³¹. It operates within the General Directorate for Cinema (DGC) of the Ministry of Culture, and it is composed by the Cinema General Director, a representative of the Film Commission of each region or province, and a representative of each region or province that finances at least one film commission. The institute is in charge of carrying out analyses and proposals to harmonize and make more effective the State and regional actions; monitoring the outcome of territorial policies; and proposing coordinated actions to promote Italian production abroad.

²²⁸ As noted by AVERARDI, A., "Gli ausili pubblici al settore cinematografico tra eccezione culturale e regole di mercato", *Munus* 1(2019): 259-287, p. 282.

²²⁹ See art. 4 of the 2016 Act, dedicated to the role of the regions in the audio-visual sector.

²³⁰ See Decree of the Minister of Culture no. 63/2018 of January 25th, which specified the provisions established by art. 4 of the 2016 Act. It provides some guidelines and parameters that the regions should follow. First, it calls for the goals and definitions adopted by the territorial autonomies to be consistent with the 2016 Act. In short, the State wants the regions to consider the aid that exists at the central level and the definitions established by the State, while implementing their forms of support. Second, the Decree establishes that the regions should respect the publicity and transparency principles in allocating funds, pursue the simplification and rationalization of procedures, ensure certainty in the timing of aid disbursement, and monitor and control the use of resources.

²³¹ As noted by SAU, A., "La legge n. 220 del 2016: quale spazio per le autonomie locali?", *Aedon* 1 (2018). The new institute has been established by the Decree no. 63/2018.

Chapter II – Players, interests and State regulation in today's film industry

1. Preliminary remark

This chapter focuses on the organization of the film industry today. It takes into account how the industry has been 'shaken' by the disruptive entrance on the market of the global digital providers and the Covid-19 pandemic, as well as how it is affected by the regulatory activity of the State.

Indeed, the film industry's organization does not depend only on the free decisions of its operators: the Italian State (like the French one) limits their economic freedom in order to pursue the collective interest of the promotion of culture referred to in art. 9 of the Italian Constitution. This is in accordance with the following art. 41. of the Constitution, which recognizes that «private economic enterprise shall be free» (par. 1), but also provides that «it may not be carried out against the common good» (par. 2), and that «the law shall provide for appropriate programmes and controls so that public and private-sector economic activity may be oriented and coordinated for social purposes» (par. 3)²³².

Some of the issues raised in this chapter may seem relevant to the internal business relationship of audio-visual operators only, by no means related to the State and the public sector. However, how those internal relationships are organised strongly affects whether or not the objectives of the State can be achieved. The behaviour of private

²³² This way, the Constitution seems to assume that the social destination of the economic activity is not guaranteed in the absence of State intervention (as noted by GALGANO, F. "La libertà di iniziativa economica privata nel sistema delle libertà costituzionali." *Trattato di diritto commerciale e di diritto pubblico dell'economia*, ed. by Galgano, F. (1977): 516 ss., p. 514: «la norma costituzionale mostra qui di muovere dalla premessa che, in mancanza di programmi e di controlli, che la indirizzino e la coordinino, non può dirsi garantita la destinazione sociale dell'attività economica»). Therefore, it seems to suggest that the State can carry out an «operational planning» of private economic activity to direct it towards social utility purposes («pianificazione operativa», expression used by BALDASSARRE, A. "Iniziativa economica privata". *Enciclopedia del diritto*, XII (1971): 582-609, pp. 582 and ff., p. 598).

operators is essential to the very realization of the goals pursued through the State promotional legislation—as noted since 1971 by Donatello Serrani, who criticizes the juridical literature’s substantially one-sided view on the phenomenon of public aids, focusing very much on public power, public administration, and State and very little on private operators²³³.

2. Questioning the tradition: current quakes in the three phases of a film life cycle (*deferment*)

The traditional scheme identifies three interrelated phases in the film industry’s organisation, chronologically ordered:

1. production, which consists of all the activities aimed at creating a film ([par. 3](#));
2. distribution, which deals with the promotion of the film and its placing in cinema theatres;
3. and exhibition, during which the film is actually released in theatres and meet the public for the first time. Indeed, according to the traditional scheme, the cinematographic work is the one distributed in cinema theatres first, only appearing on other distribution channels after a certain time is elapsed.

The laws on cinema promotion of the Italian and French States incorporate this premise: in order to obtain State aids to the cinema, a work should be ‘mainly’ intended for the distribution in theatres ([par. 4](#)); if this is not the case, the applicant should apply for other types of aids, such as those for television or web works—similar to those for cinema but less conspicuous.

However, the principle that cinema theatres should be the first exploitation channels of cinematographic works is currently under discussion for both practical and conceptual reasons ([par. 5](#)). Among the practical, the evidence that the current state of the distribution and exhibition sectors makes access to cinema theatres difficult for many films funded by State aid to the cinema in Italy. Among the more

²³³ SERRANI, D., *Lo stato finanziatore*, p. 171.

conceptual reasons, there is the argument that linking the definition of cinema to theatre exploitation is an approach that confuses the product with the vehicle that brings it to the public.

Such an argument emerged following the strategies of SVOD providers. Some of them combine the entire traditional audio-visual value chain within the same company: production, distribution, and consumption. Among the contents they produce, there are not only series but also feature films. Although not conceived for theatres and directly distributed online, some of these films have been considered 'cinematographic' by a part of the industry; they managed to participate in cinematographic festivals and awards network.

The Covid-19 pandemic has accelerated the on-going transformations, exacerbating the debate; due to the forced closure of theatres, the Italian and French State allowed producers and distributors to seek agreements with online platforms and televisions' distributors, instead of postponing releases. This way, although having been financed through State aid to the cinema, some films were directly distributed in first view online and on TV.

3. The production phase and the drawbacks of a 'small-is-good' approach

As anticipated, the first phase of the film industry is the production one, which consists of all the activities aimed at creating a film²³⁴. In Europe, this phase is the one in which the largest number of audio-visual companies are active. In Italy, more than 72% of the audio-visual companies operate in the production sector (6.85% in the distribution

²³⁴ It can be broken down into four sub-stages: development, pre-production, production, and post-production. During the development phase, the film project's idea is developed into a screenplay and the producer can estimate the film's budget, evaluating the expected costs and the likely return on the investments, resulting in a go/no-go decision. In the case of a positive decision, the process continues in the pre-production stage, during which most of the time the producer raises funds for the realization of the film. The pre-production stage is followed by the production one, during which the film is shot, and by the post-production stage, in which the editors cut and edit the film, adding sound, visual and special effects, voice-overs, songs, music scoring, colour correction, and other details.

department, and 20.58% in the exhibition one)²³⁵. Possibly because the production phase tends to be organized around single projects and is not subject to barriers to the entrance²³⁶.

Many Italian and French production companies are undercapitalized (i.e. small in size, employed, and turnover), with low investment potential, difficulty in risk management, and unable to operate according to a medium-long-term strategy²³⁷. By elaborating the data reported in 2020 by the Italian Audio-visual producers association (APA) concerning the Italian case²³⁸, it appears that 72% of the production companies have a turnover of less than €100,000 per year; only 1,8% of them have an annual turnover of more than €5 M²³⁹. Moreover: more than 95% of enterprises employ no more than ten people; only 0.8% of them have more than 50 employees.

The ‘fragmentation’ of the production department is partly due to the fact that the cultural purpose of the State action led to traditionally granted aids for the implementation of specific projects rather than as structural support for companies. In other words, the European States

²³⁵ See UNIVERSITA' CATTOLICA and PTSCLAS S.P.A., *Valutazione di impatto della legge cinema e dell'audiovisivo. Anni 2017-2018*, 2019, p. 61.

²³⁶ BAGNASCO, A. M., *Il settore cinematografico*, in *I mercati dei media 2019*, ed. by Ardizzone, A. et al., FrancoAngeli, 2019, pp. 43- 115, pp. 58 and ff.

²³⁷ For Italy, see *ibidem*; for France, BOUTONNAT, D., *Rapport sur le financement privé de la production et de la distribution cinématographiques et audiovisuelles*, 2018.

²³⁸ See APA, *Rapporto statistico nazionale core filiera audiovisiva (cinema e televisione)*, 2020.

²³⁹ Note that most of their revenues of the production department do not come from cinematographic works but from other types of audio-visual contents. In 2019, the three top companies active in the film and audio-visual production sector were Cattleya, Wildside, and Palomar. Audio-visual series generated €89 M out of the €110 M Cattleya's total revenues. Even in Wildside's case, most of the revenue came from television productions (€69,471 M), followed at a proper distance from the cinematographic ones (€7,010 M). As a confirmation of the current trend, the TV / Fiction production represented the predominant business area also for Palomar. See TORLASCHI, V. "Produzioni: facciamo i conti". *Box office: il mondo del cinema e il suo business* (2020), pp. 16 and ff.

have focused more on the meritoriousness of specific work rather than on that of the companies in charge to carry them out.

This approach is consistent with the European Commission's principle that State aid must benefit cultural products²⁴⁰, and the presence of many companies should also reflect positively in the culturally diverse output. However, the focus on single meritorious work risks compromising the consolidation of the audio-visual companies and the sector's industrial basis, drifting towards a natalist policy of enterprises and medium-low budget films, having a limited capacity to penetrate abroad and sometimes failing to find a public even in the country of origin²⁴¹.

The most important Italian production companies, those that seek to compete at an international level, show the exigence of industrial strengthening. Indeed, in recent years the market of Italian production companies—which new players continue to join—has grown along two evolution lines: the aggregation between national companies; the entry of foreign groups that aim at an extended and increasingly global

²⁴⁰ See [par. 2 of Chapter III](#).

²⁴¹ See BAGNASCO, A. M., *Il settore cinematografico*, p. 48. However, the limited international penetration of Italian films does not depend only on many companies' undercapitalization. There are several reasons why Italy is the last country among the most important European markets in terms of national films' international box office results. The UK achieves the best results (mostly due to films realized in collaboration with the American Studios, however), followed by France, Germany, and Spain. Actually, Italy exports a higher number of films than Spain; however, the average international audience reached by Italian films abroad is half than the Spanish ones. The first reason is that Italian movies have an intrinsic shortfall compared to the other big markets. France, Germany, UK, and Spain share their language with other European and/or extra European countries, therefore exporting their work with greater ease. Italy instead can only rely on the Italian speaking area of Switzerland. Second, the movies with high commercial international success tend to be art-house films dealing with 'universal' values, and Italy produces many comedies strongly tied to the local context, having as leading characters national television celebrities. However, even when considering art-house films, the primary market for Italian works is the domestic one. The films of the Italian director Luca Guadagnino represent a peculiar case. They generally obtain modest success in Italy and a great one abroad. In the case of "*Call me by your name*", only \$3,2M out of its total revenues (\$41,8M) came from the distribution in Italian theatres (*ibidem*, p. 236). For more information on all the discourse, SCAGLIONI, M., *Cinema made in Italy. La circolazione internazionale dell'audiovisivo italiano*, Carocci, 2020.

control²⁴². This second trend could prove to be problematic in the long term: it could result in transferring to foreign companies the ownership of works produced in Italy—and thanks to the Italian State funding. Think of the highly successful Italian series “*Montalbano*”: the risk is that the commercial benefits deriving from its exploitation will enrich, instead of the Italian society Palomar, the French group Mediawan²⁴³.

Another characteristic of many European production companies is that they do not operate in phases other than production, i.e. in the distribution and the exhibition departments. On the matter, the European case is very different from that of the Hollywood studios, the most common producers from the US, all headquartered in Los Angeles (Columbia, Paramount, Universal, Walt Disney, and Warner Bros). One of the reasons for their success is that they have all been involved in vertical integration processes: through purchases and mergers of companies, they began to operate in other sectors beyond production. This way, the studios increased their control over the economic environment in which they operate, eliminating/containing the costs of negotiations between the different phases of a film's life cycle. All the films they produce manage to be distributed and released in cinema theatres without encountering obstacles, given that these results do not depend on actors other than the studio themselves.

²⁴² In 2014, the Italian Leone Film Group acquired the Italian production company Lotus. In 2015, the British Fremantle Media acquired the Italian company Wildside. In 2015, the Italian animation company Rainbow purchased fellow animation company Bardel Entertainment, and in 2017 Rainbow acquired a majority stake in Iven S.p.A., which owns the production company Colorado Film. In 2016, the Italian production companies DryMedia and Magnolia SPA merged into a single entity, Banijay Italia. In 2017, the British ITV Studio acquired a majority stake (51%) in Cattleya. The French Federation Entertainment did the same concerning Fabula Pictures in 2018. In 2019, it was the turn of Palomar: French Group Mediawan took a majority stake (72%) in it.

²⁴³ See the previous footnote.

3.1. Funding production: public and private resources

To realise their films, Italian and French producers have multiple funding sources. Sometimes they can find themselves in a pre-financing economy rather than in an exploitation one, recovering their investments before the film is actually produced and distributed. This state of affairs raises concerns about the potential risk that producers merely focus on a logic of continually making new films, being uninterested in their works' commercial success. However, this risk seems to be less significant than it may appear. The economic failure of a film may not lead to losses in the short term for producers. However, it generates losses in the long one, making it more difficult to find resources to produce new works. This is also true for public resources, as the entity of some State aids granted to producers depends on the success of their previous film; moreover, the entity of other State aids is based on the film production costs, which decrease if private investments decrease.

Once clarified this crucial point, it is possible to present the different funding sources for cinematographic works. In Europe, the most significant are the public ones, that accounted for 26% of total financing in 2019²⁴⁴. They include those coming from the Council of State and the EU—quite limited actually²⁴⁵; from national States; and territorial

²⁴⁴ EUROPEAN AUDIOVISUAL OBSERVATORY, *Yearbook 2019/2020: key trends*, 2020, p. 8. However, the same study shows that there are notable differences among individual countries. The weight of direct public funding decreases with increasing market size and vice versa. Direct public funding represents only 21% of total financing in France, UK, Germany, Spain and Italy; it accounts for 43% in medium-sized and 54% in small sample markets. In general, films with a budget of up to €3 M depend on a higher degree on direct support. Those with higher budgets finance their production with proportionally higher percentage of pre-sales and broadcaster investments.

²⁴⁵ Eurimages has a total annual budget of approximately € 27.5 M and Media funds for 2014-2020 was € 820 M, i.e., € 108M per year. This accounts for just 0.1% of the overall European audio-visual production value, estimated at almost € 134 B in 2015 (*Creative Europe Media Monitoring Report*, p. 19). However, Media Funds have been significantly increased for the period 2021-2027. Focusing on the Italian case, the elaboration of the data reported overtime by ANICA, *Tutti i numeri del cinema italiano*, shows that in the years 2013-2018, Media and Eurimages contributed to Italian cinematographic productions through € 0.2 M and € 1.8 M per year, respectively. These numbers represent just 0.08% and 0.7% of the overall funding for the national film production.

autonomies²⁴⁶. Concerning Stare resources, note that production is the phase that has traditionally obtained the most support²⁴⁷. This for two reasons. First, production in Europe is generally the most expensive phase²⁴⁸. Second, the production phase is the one in which the nature and quality of the film are determined: it is the most appropriate phase in which to intervene for a State pursuing cultural purposes²⁴⁹.

Among the private resources, the most important are the resources of the producer himself (18% of the total financing in 2019²⁵⁰) and the resources from the pre-sale of the film's distribution rights (15%²⁵¹).

²⁴⁶ In Italy, between 2013 and 2018, the Regions contributed with an average of € 7.8 M per year to the production of 100% Italian or coproduced with Italy cinematographic works. This way, the Regions covered on average 9% of the annual costs in this regard (elaboration by the author of the data provided overtime by ANICA, *Tutti i numeri del cinema italiano*). It is not easy to assess the percentage of the cost of production of cinematographic works covered by French Regions. However, it is clear that the resources provided by the French regions to the overall audio-visual sector, and those provided by the State to encourage the regions' commitment, are growing. The overall commitments established in the 17 agreements realized by the Regions and the State amounted to €158 M in 2019. Of these €158 M, €33.4 M were provided by the CNC, € 9.1 M by the DRAC and €115.7 M directly by the regions. In the last fifteen years, the State's commitment (CNC+DRAC) increased fourfold (it was €10.1 M in 2004). Over the same period, local and regional authorities' commitments increased threefold (it was €35.5 M in 2004). All partners combined, commitments increased 3.5 times between 2004 (€45.6 M) and 2019 (€158 M). See CNC, *Bilan*, 2019, pp. 270 and 271.

²⁴⁷ Note that the particular attention given to the production phase is not only a State approach. Concerning Italy, one can say the same about the regions, which do not fund the distribution phase. Since they are not co-producers and do not hold the film's rights, they do not obtain economic advantage from the more extensive circulation of the films supported (if one excluded the film tourism effect). Furthermore, supporting distribution would mean granting resources that would be spent outside the local territory, in contrast with the regional logic of cinema support. See CUCCO, M., *L'architettura di politiche a sostegno dell'export cinematografico*, in *Cinema made in Italy*, pp. 55-75, p. 59.

²⁴⁸ It is different in the US, where the distribution budget of the blockbusters can sometimes be higher than the production one (CUCCO, M., *Economia dei film*, p. 42).

²⁴⁹ As noted by CUCCO, M., *L'architettura di politiche a sostegno dell'export cinematografico*, p. 58.

²⁵⁰ EUROPEAN AUDIOVISUAL OBSERVATORY, *Yearbook 2019/2020*, p. 8.

²⁵¹ *Ibidem*, which also shows that the significance of pre-sales as a financing source increases with the market size. Pre-sales tend to carry most weight in large markets, where they

Although the film does not exist in this stage yet, it may already have been sold to distributors, indeed. These cases mainly happen when distributors believe that the work is promising because of highly successful actors, for example. The pre-sale practice, risky for distributors, is very convenient for the producer, ensuring the film access to the distribution market. Other possible private resources are those coming from one or more co-producers, from the practices of product placement²⁵² and crowdfunding²⁵³.

Finally, producers can benefit from private resources invested in the film industry because of the State. First, private operators sometimes invest in the sector because of a State encouragement action (such as the offer of tax incentive programs or State guarantee). Second, both Italy and France require AVMS providers under their jurisdiction to invest a part of their revenues to fund the production of new national and European works—thus implementing European rules²⁵⁴. In the past, these obligations only applied to traditional televisions (whose investments account for 24% of total financing in Europe in 2019, representing the second major source of funding after public resources²⁵⁵). Today, digital platforms are also asked to meet investment quotas.

Through all the sources of funding listed, European players produce an ever-expanding number of films yearly, with numbers that dwarf the US output (**figure 1**). The 'big five' (France, UK, Germany, Italy, and Spain) produce the vast majority of them (**fig. 2**).

accounted for 17% in 2017, compared to only 10% in medium-sized and 6% in small sample markets.

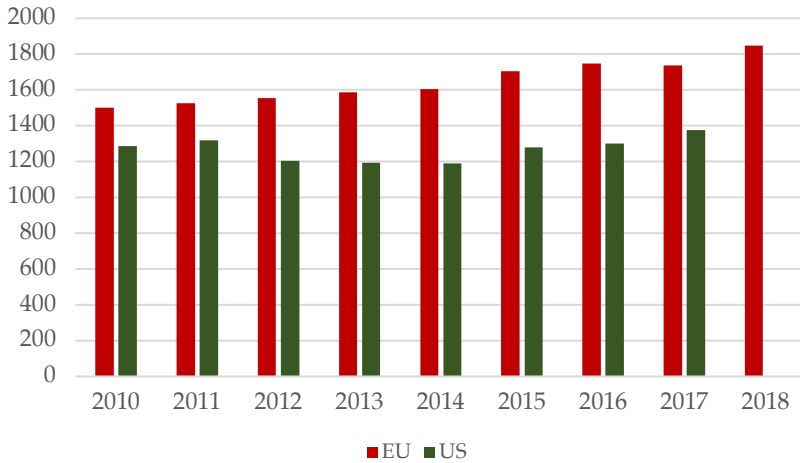
²⁵² Also known as embedded marketing, product placement is a marketing technique where a production company incorporates into a film references to specific brands or products (such as automobiles or consumer electronics) with specific promotional intent and in exchange for compensation. Commonly adopted since the 1980s in the US, product placement has become a common form of funding also in Europe since the 2000s, when the European and national legislators legitimized it. It was before prohibited to protect consumers.

²⁵³ Usually realized through the internet, crowdfunding consists of raising many small amounts of money from many people.

²⁵⁴ As anticipated in [par. 6.1.1. of Chapter I](#) and will be further explained in [Chapter IV](#).

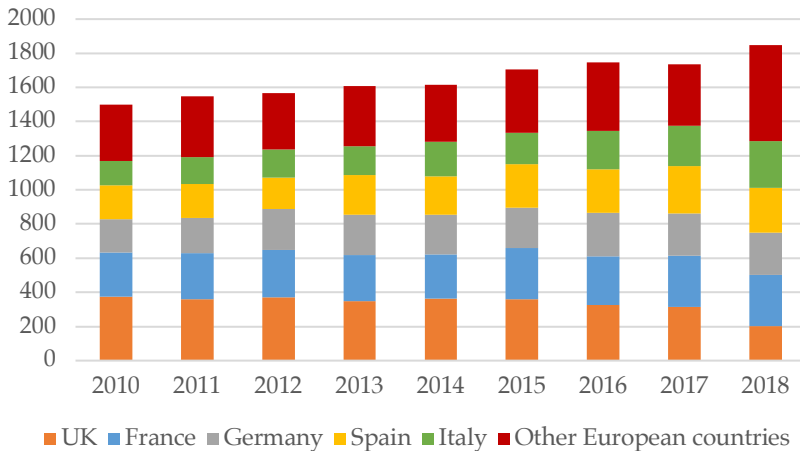
²⁵⁵ EUROPEAN AUDIOVISUAL OBSERVATORY, *Yearbook 2019/2020*, p. 8.

Fig. 1. Number of European and American films produced during the period 2010-2018



Source. Annual reports of the European Audiovisual Observatory of Strasbourg (EAO) "World film market trends"

Fig. 2. Number of films produced by the big five during the period 2010-2018



Source. Annual reports of the EAO "World Film Market Trends"

3.1.1. *The potential of funding cinema through web-based giants*

As just mentioned, investment obligations apply to both linear and non-linear providers. Moreover, by derogating to the country-of-origin principle, the European legislator has allowed the Member States to apply investment quotas also to providers that target their territories without being established there²⁵⁶. This way, international digital platforms active in Europe are prevented from eluding their duty to promote local independent productions. The forced involvement in the production of independent²⁵⁷ European and national content of operators such as Netflix and Amazon appears simultaneously a precious source of opportunities and a reason for disquiet and concerns.

First of all, their involvement should ensure significant resources for creating new works, compensating for the reduction of the resources invested by traditional televisions. The level of investment of each operator is based on the level of its revenues. Those of broadcasters dropped during the pandemic, despite their increased audiences; indeed, the drop had to do with the contraction of advertising spending, which is not linked to the audience's level but to that of economic prosperity²⁵⁸. On the contrary, the revenues of the paid VOD market (SVOD and TVOD) skyrocketed during the lockdown, which exacerbated their trend of fast and continuous growth. Indeed, in Europe, the VODs' turnover has multiplied thirty times over the course of ten years: their revenues increased from €388.8 M in 2010 to € 11.6 B in 2020²⁵⁹. The SVODs mainly drove this trend, exploding from €12 M of

²⁵⁶ See [par. 4 of Chapter IV](#).

²⁵⁷ For the concept of independence, see [par. 3.2. of this Chapter](#).

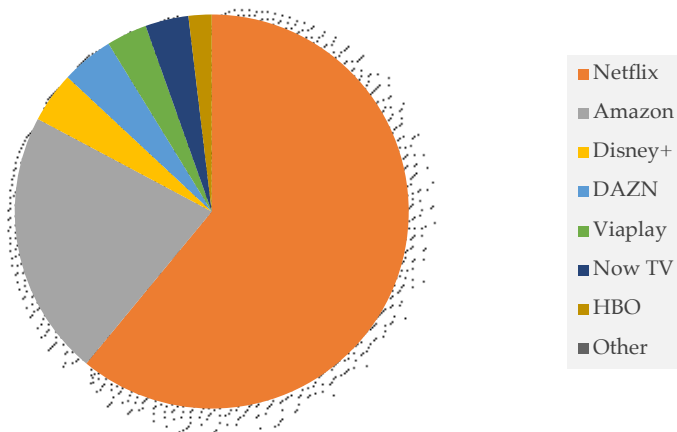
²⁵⁸ For more information about the all Europe, EUROPEAN AUDIOVISUAL OBSERVATORY, *The European audio-visual industry in the time of COVID-19*, 2020. For the specific case of France, CONSEIL SUPÉRIEUR DE L'AUDIOVISUEL, *Effets de la crise sanitaire sur le secteur audiovisuel*, 2020.

²⁵⁹ EUROPEAN AUDIOVISUAL OBSERVATORY, *Trends in the VOD Market in the EU28*, 2021.

revenues in 2010 to € 9.7 B in 2020, with a compound annual growth rate of 95% —while the revenues of TVODs rocketed from € 377 to €1.87 B²⁶⁰.

Although the VOD market is booming in Europe, non-European players still dominate it: the growth is mainly driven by global tech companies of the American entertainment industry (while European companies excel in the traditional sectors, such as television). The major operators are Netflix and Amazon, which still own a significant part of the SVOD European market (respectively 39% and 29% of the subscribers, and 55% and 19% of the revenues²⁶¹)—as **fig. 3** and **4** show. However, the equilibrium is set to evolve through the consolidation of new players. Today the situation appears indeed much more fluid than just a few years ago, with European media groups launching their services and new international operators entering the market. Among them, Disney+, which raised more than 60 M of subscriptions in its first nine months, a milestone that it took Netflix about eight years to reach²⁶².

Fig. 1 SVOD revenues by company in Europe



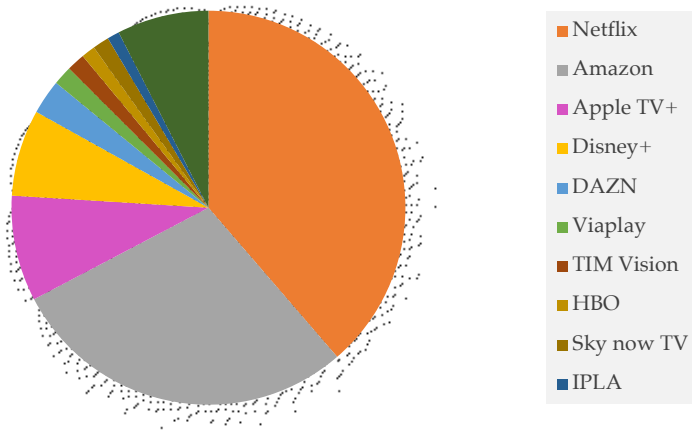
Source. EAO, "Trends in the VOD Market in the EU28", 2021.

²⁶⁰ *Ibidem.*

²⁶¹ *Ibidem.*

²⁶² See PASQUALE, A., *L'audiovisivo ai temi della pandemia: chi perde, chi vince, chi (forse) pareggia*, in *Cinema & Covid... Ieri, oggi... E domani?*, Bianco e nero, Edizioni Sabinae, 2020, p. 47.

Fig. 4 SVOD subscribers by company in Europe



Source. EAO, "Trends in the VOD Market in the EU28", 2021.

Besides likely bringing new significant resources, the forced involvement of global SVOD operators in the production of national and European works might represent an occasion for European and national authors to enter a global market. In the past, it was essential to realize a coproduction to market a product beyond national borders. Today, it is enough to sell a French or Italian work to operators such as Netflix and Amazon to reach a substantial part of the globe²⁶³. Moreover: producing for global digital platform might represent an occasion for national operators to trying out little-explored genres. Think of the fantasy series by Netflix Italia "Luna Nera" (2019) and "Curon" (2020).

At the same time, the forced involvement of global digital operators generates several concerns from national authors and producers, and consequently from the State, that seeks to protect them. First, some SVODs—following the model of the vertically integrated majors—tend

²⁶³ The OTT market as a whole (SVOD, TVOD and AVOD) allows, on average, European cinematographic works to reach three additional territories than the cinema releases footprint. EUROPEAN AUDIOVISUAL OBSERVATORY, *Yearbook 2019/2020*, p. 21.

to acquire all the commercial exploitation rights of the work they contribute to funding, thus depriving producers of the possibility of exploiting their works in different markets.

Second, the way the contents offered by SVODs are fruited is likely to generate suffering from authors and directors. Consider the case of Martin Scorsese, asking Netflix consumers not to watch his film *"The Irishman"* on mobile phones, and the triumphant statement that announced that 26 M of subscribers watched 70% of the film—a result that certainly would not be considered 'triumphant' in the case of theatrical distribution, being hard to imagine a traditional distributor who rejoices that only one out of three spectators left cinema theatres during the screening of its film²⁶⁴.

Finally, concerns stem from the use that Netflix makes of algorithms, which seems likely to reduce the diversification of the demand (and therefore of the supply)—a fundamental goal for the State action of cinema promotion. Indeed, OTT analyse user data not only to produce what their customers demand but also to learn which products to recommend them, relying on their previous consumption. This mechanism risks ending up in a 'vicious loop' that pushes consumers to watch products on a pattern of similarity and consistency, likely to compromise the public's inclination to novelties.

Indeed, the ability of OTT to increase the diversity of supply is somehow questionable today. The initial belief was that they could have ensured a greater diversity of contents because of their business characteristics and unlimited space. This belief was consistent with the 'long tail theory'²⁶⁵. Its premise is that goods with low demand or low sales volumes can collectively make up a significant market share, which sometimes rivals or exceeds bestsellers and blockbusters. Millions of small products add up to large businesses, shortly. According to the theory, digital businesses could successfully tap into the 'long tail'

²⁶⁴ Thus reported by QUINTON, J. M. "Ce que le XXe siècle nous enseigne sur Netflix", *Slate* (2020).

²⁶⁵ For more information on the long tail theory, refer to ANDERSON, C., *The Long Tail: Why the Future of Business is selling less of more*, Hachette Books, 2006.

market, thanks to the reduction in costs for storage and distribution offered by the digital era. Applied to the audio-visual sector, the long tail implies that an online retailer can afford to sell films that few people know about or are interested in.

However, there seem to be more concerns than evidence regarding the long tail theory to this day. Among the concerns, the evidence that this model can function only if the expenditure for audio-visual consumption increases as a whole, or the fact that the grouping of content can have an important side effect, namely the loss of value of the content itself and its tendency to drown in the pile much more easily²⁶⁶. The accumulation of titles, the flexibility on prices that tend to depreciation, risk making the value attributed to single products

²⁶⁶ Indeed, «The behaviour of a large number of buyers indicates a flight from the abundance [...] risks associated with the profusion and the difficulty of making choices»—as noted by BENHAMOU, F., *Les dérèglements de l'exception culturelle*, pp. 259 e 260 («Le comportement d'une large part des acheteurs dénote une fuite devant l'abondance [...] risques liés à la profusion et la difficulté d'opérer des choix»). The possible perverse effect of overabundance—i.e. its ending up in reducing choices instead of expanding them—seems to show that the degree of diversity offered, i.e. the menu of choices that actors can potentially benefit from, does not go hand in hand with the degree of actual diversity, i.e. the 'quantity' of diversity actually present, whatever the obstacles that prevent from enjoying it (on the matter, see VAN DER WURFF, R. and CUILEBURG, J. V., "Impact of moderate and ruinous competition on diversity: The Dutch television market", *The Journal of Media Economics* 14.4 (2001): 213-229). It seems to be the reason why BENHAMOU, F., *Ibidem*, pp. 271 e 272, affirms that «there is a tension between promoting diversity through means of protection, which may lead to confinement in tradition, and openness to cultural exchanges, which may lead to a partial loss of cultural identity. Diversity reveals an original ambiguity: diversity, which is the basis for the protection and promotion of local products, implies a certain closure, even though diversity, known as the possibility to access the widest variety of products, would seem to encourage openness». («Il y a une tension "entre promotion de la diversité sous la forme de protections, au risque de conduire à des formes d'enfermement dans la tradition, et ouverture aux échanges culturels, au risqué de la perte d'une part de l'identité culturelle. La diversité revêt une ambiguïté originelle: la diversité, fondement de la protection et de la promotion des produits locaux, implique une certaine fermeture, tandis que la diversité, conclue comme la possibilité de l'accès à la plus large variété de produits, inciterait à l'ouverture»). Interestingly, in the awareness of the consumers' difficulty to make choices in a context of abundance, Netflix is seeking to enlarge the number of its users in France by launching a linear channel, Direct. It offers the same content available on the platform, but it is organized in a palimpsest form: users watch what is scheduled when they access the service.

volatile, thus generating the opposite effect of the long tail model: instead of giving value to niche products that risked staying in the obscurity, the overall offer is devalued. To avoid this sort of risk, in the last years some operators have shown reduced interest towards the accumulation of titles and the ostentation of a rich catalogue in favour, on the contrary, of offering refined products exclusively, like original productions and films that have not been released in theatres²⁶⁷.

3.2. Enhancing freedom and diversity: the special attention to independent producers

The last aspect to consider with regard to the production phase is the distinction between independent producers and producers that depend on AVMS providers. Indeed, the Italian and the French States provide most of their funding to independent producers, as the EU also does²⁶⁸.

The European legislator establishes the key elements concerning the definition of an independent producer, providing three criteria that the Member States should take into account while providing such a definition²⁶⁹:

1. the first criterion is the ownership of the production company: an independent producer cannot be connected or controlled by an AVMS provider, which should not hold too large a share of the production company's capital;
2. the second criterion is the number of programmes supplied to the same provider: a producer cannot be considered independent if it supplies the almost totality of its products to the same provider;

²⁶⁷ For all these concerns on the long tail theory, see CUCCO, M., *Economia del film*, p. 137 and ff.

²⁶⁸ For an analysis of the definition of an independent producer adopted in countries other than Italy and France, see EUROPEAN AUDIOVISUAL OBSERVATORY, *Mapping of national rules for the promotion of European works in Europe*, 2019. For a historical background of the concept of independence in the audio-visual industry, see EUROPEAN AUDIOVISUAL OBSERVATORY, *The promotion of independent audio-visual production in Europe*, 2019.

²⁶⁹ See Recital 71 of the AVMS Directive. Note that the European legislator provided such criteria only in 2010. Indeed, neither the 1989 Directive nor the subsequent ones define what an independent producer is.

3. the third criterion refers to the ownership of the secondary rights, i.e. the rights to exploit a work throughout other exploitation channels and in other markets beyond the initial distribution by the AVMS provider. The latter should indeed cease after a certain time and /or number of retransmissions. Consequently, AVMS providers cannot meet their investment quotas in independent production by acquiring the ownership of the works they contribute to financing; they should acquire only a license to exploit them.

By these three criteria, the EU legislator wants to avoid the consolidation of vertical and integrated relationships between producers and AVMS providers investing in national production. Such an approach certainly makes the market weaker—given the inability of not vertically integrated producers to autonomously access the distribution market. However, it should ensure the players' heterogeneity and freedom, avoiding the market to be characterized only by a few large production companies connected to the AVMS providers and producing the contents said providers require. The players' heterogeneity and freedom should, in its turn, ensure the development of less standardized production and preserve rich and diversified creations²⁷⁰. This way, the final benefit should be of consumers.

3.2.1. Independence between Italy and France

The definition of independence is challenging at the moment²⁷¹. The thorniest issue concerns the ownership of secondary rights. Indeed, the acquisition of content and its control over time and across different geographical areas represents one of the major challenges to the today's

²⁷⁰ Indeed, «the underlying assumption is that the diversity of the audio-visual players ensures that of the products»—as noted by BENHAMOU, F., *Les dérèglements de l'exception culturelle*, p. 229 («L'hypothèse sous-jacente est que la diversité des structures conditionne en retout celle des produits eux-mêmes»).

²⁷¹ For the definition of independence in European countries others than Italy and France, see EUROPEAN AUDIOVISUAL OBSERVATORY, *The promotion of independent audio-visual production in Europe*, 2019.

competition. It is essential to find a balance between the interests of producers and those of providers.

On the one hand, it is necessary to avoid producers being deprived of the possibility to exploit their works. This concern animated the Italian legislator, which recently included for the first time the ownership of secondary rights among the criteria to be taken into account to define independence—in an unsatisfactory way, however (i.). On the other hand, it is necessary to avoid the opposite scenario, i.e. an excessive limitation of the providers' right to exploit the independent works they financed. This concern is current in France, where the legislator traditionally regulates in detail the rights on independent works that broadcasters can acquire in a way considered by many parties too unbalanced in favour of producers (ii.).

The issue of secondary rights is currently highly debated also because some global digital platforms tend to retain the entire rights' ownership of the works they distribute—as anticipated. Such an approach could prove problematic for the other players. Producers would not gain revenues from selling the work to other providers if one of them held it exclusively; providers different from global digital platforms would not have the possibility to distribute the work; finally, consider the position of consumers: not everyone subscribes to a service such as Netflix; even those who do not should have the opportunity to see the work.

i. The Italian case. Before 2017, the Italian legislator defined the independence of producers taking into account only two out of the three criteria established by European Law: the ownership of the production company and the number of programmes supplied to the same broadcaster; no reference was made to the ownership of secondary rights²⁷².

²⁷² See art. 2, par. 1, lett. p) of the version of the Legislative Decree no. 177/2005 of July 31st, the Consolidated broadcasting act ('Tusmar'), before the reform realized by the Legislative Decree no. 204/2017 of December 17th, adopted based on the delegation granted by art. 34 of the 2016 Act («*Gli operatori di comunicazione europei che svolgono attività di produzioni audiovisive e che non sono controllati da o collegati a emittenti, anche analogiche, o che per un*

Nevertheless, since 1998 the legislator recognized such rights and established some rules on the matter. It stated that the repartition of the exploitation rights needed to be regulated by the private autonomy, through codes of self-regulation of the providers. However, it limited the scope of the contractual autonomy by putting the Italian Independent Regulatory Authority of the audio-visual sector (AGCOM) in charge of laying down some criteria to be respected by the codes²⁷³. It also provided a principle that AGCOM needed to respect while establishing the criteria, namely the proportion between the extension of broadcasters' exploitation rights and their financial contribution to realizing the work concerned²⁷⁴. Besides establishing the criteria, AGCOM was also responsible for controlling that providers' code of practice complied with them.

Despite this protection, Italian independent producers claimed that broadcasters tended to buy the almost totality of their works' exploitation rights. Such an approach prevented producers from profiting from their works on alternative markets, making them unable to consolidate their business and generating a sub-capitalization phenomenon²⁷⁵.

periodo di tre anni non destinino almeno il 90 per cento della propria produzione ad una sola emittente, anche analogica»).

²⁷³ Art. 3(4) of Law. no. 122/1998 of April 30th regulated for the first time the issue of secondary rights. It established that «Independent producers are granted quotas of residual rights resulting from the temporal limitation of the rights acquired by broadcasters, following the criteria established by the Communications Guarantee Authority». This way, it implied that providers had to comply with quota obligations by leaving residual rights to independent producers. AGCOM implemented this provision first with resolution no. 185/2003 and then, in light of the change in the technological and market framework, with resolution no. 60/2009. For more information on the provisions on residual rights and the regulations adopted by AGCOM before the 2017 reform, see: PELLICANÒ, F., *La tutela delle opere europee e della produzione indipendente*, p. 371 ss.; SAMMARCO, P., *La produzione audiovisiva europea*, in *La nuova televisione europea*, pp. 59-72.; COGO, A., "I diritti residuali". *Annali italiani del diritto d'autore, della cultura e dello spettacolo* (2010): 215-243.

²⁷⁴ The Authority established the criteria with resolution no. 30/11/CSP, approved on February 3rd, 2011.

²⁷⁵ AGCOM, *Indagine conoscitiva sul settore della produzione audiovisiva*, 2015.

Given this state of affairs, the Italian legislator, while reforming in 2017 the rules on the providers' participation in national and European production²⁷⁶, took the opportunity to update the definition of independent producers, including the ownership of secondary rights among the requirements to be taken into account²⁷⁷. However, such a requisite is indispensable only if other provisions are not met (see **table (tab.) 1**).

In addition, the State does not establish what secondary rights actually are. It still considers them a matter for free negotiation between producers and providers²⁷⁸. Hence, the concern of Italian producers: since the ownership of the not-defined secondary rights is not indispensable for a producer to be considered independent, the risk remains that large digital platforms will fulfil their obligations to invest in independent production by acquiring the entire ownership of the exploitation rights on the financed works. Moreover: the risk is that broadcasters, to remain competitive, will follow the same approach.

It is true that the Italian State provides significant financial aids to those who can qualify as independent producers. This way, independent producers should have a greater negotiating capacity at the discussing tables with broadcasters and platforms, expecting to maintain rights on their works: AVMS providers understandably expect to acquire the independent works' entire ownership if they are their leading investors; it should not be the case if producers—thanks to the State—manage to significantly participate in the funding of the work. However, it is not sure that the approach of the Italian State will prove effective: producers

²⁷⁶ See [par. 3.2. of Chapter IV](#).

²⁷⁷ The new definition is established by art. 2, par. 1, lett. p), of the Legislative Decree no. 177/2005 (Tusmar) and will be further specified by the AGCOM. Indeed, art. 44*quinquies*, par. 1, lett. a) of the Tusmar establishes that it is up to said Authority to specify the definition. At the moment, the principles established by the AGCOM are not still operational. The relevant provision is art. 3 of Annex B to AGCOM Resolution no. 421/19/CONS of October 17th, 2019, which is, however, still subject to public consultation. It should amend the regulation adopted by deliberation no. 595/19/CONS, already amended by deliberation no. 24/19/CONS.

²⁷⁸ Note that providers are no longer required to comply with the criteria established by AGCOM, since they have been repealed.

might accept a divestment of their rights in exchange for the purchase of their works at a particularly advantageous price. The risk would be an enrichment of the individual (the producer) rather than of companies, which are those that generate welfare and jobs and therefore legitimize the support of the State. Hence, the evidence of what is said at the beginning of this chapter: for the public interest to be realized, a certain private behaviour is necessary.

Finally, it is worth noting that Italy, through the 2017 reform, added additional criteria to those dictated by the European legislator. Indeed, it provides that cannot be considered independent who plays a 'merely executive' role, i.e. who does not maintain managerial independence and freedom to dispose of its production (**tab. 1**)²⁷⁹.

ii. The French case. The French case (looked at with envy by Italian producers) is different. The French definition aimed at ensuring both what in France is called the 'capitalistic independence', i.e. the independence of the production company from the provider, and the 'commercial independence', i.e. that of the work from the provider (**tab. 1**)²⁸⁰.

The 'capitalistic independence' occurs when the producer is not linked to the provider in a way likely to establish a lasting community of interest. Under the 'commercial independence' principle, the producer must instead hold secondary rights' ownership; they are precisely regulated by the law, which establishes the rights that providers can retain and for how long (**tab. 1**). These principles make the definition very protective for producers and demanding for providers to employ independent productions. They significantly limit the extent, duration,

²⁷⁹ See art. 6-ter of the scheme of AGCOM Resolution.

²⁸⁰ In France, the fundamental principles regarding the concept of independent production are established by arts. 71 and 71-1 of Act Law no. 1067/1986. The first concerns the independence in the cinematographic sector, the second that in the audio-visual one. Both articles provide that Council of State's Decrees shall lay down detailed provisions. Concerning the definition of independence in the cinematographic sector, the relevant provisions are arts. 6 and 36 of Decree no. 747/2010 of July 2nd; arts. 8 and 23 of Decree no. 416/2010 of April 27th; art. 21 of Decree 793/2021 of Jun 22th. For the definition of independence in the audio-visual sector, the relevant provisions are arts. 15 of Decree no. 747/2010, 15 of Decree No 416/2010 and 21 of Decree 793/2021.

and territoriality of the rights providers can acquire on the works they had had to fund under the law²⁸¹.

This is why broadcasters claim that the revenues generated in the event of successful work are negligible: the consequences of commercial failures are significant: they do not have the possibility of mitigating them by exploiting the works overtime or across territories and media. Simultaneously, the revenues generated in the event of successful work are negligible, still because its exploitation rights are exceedingly narrow and overly limited in time. According to many, what was justified yesterday by the need to promote a strong production sector, is no longer justified today, the situation of producers having improved vis-à-vis broadcasters²⁸².

All that given, it was proposed to limit the definition to that of capital independence without establishing principles concerning the contractual negotiations on the distribution of rights. It was meant to refer to professional agreements or private negotiations between individual providers and producers²⁸³—as in Italy. However, the proposal was not adopted, and the commercial criterion was maintained.

²⁸¹ In the audio-visual sector, some claim that the overly short time of their rights could lead, for example, to no longer having the rights to the first seasons of a television series while broadcasting the next.

²⁸² For all the discourse, see COMMISSION DES AFFAIRES CULTURELLES ET DE L'ÉDUCATION, *Rapport d'information présenté par Mme Aurore Bergé en conclusion des travaux de la mission d'information sur une nouvelle régulation de la communication audiovisuelle à l'ère numérique*, 2018, p. 78 ff.

²⁸³ See, among others: AUTORITÉ DE LA CONCURRENCE, *Avis 19-A-04 du 21 février 2019 relatif à une demande d'avis de la Commission des affaires culturelles et de l'éducation de l'Assemblée nationale dans le secteur de l'audiovisuel*, 2019, p. 98 («la définition d'œuvre indépendante doit être revue et limitée à la notion d'indépendance capitaliste, afin de permettre que les éditeurs finançant l'œuvre puissent négocier directement avec le producteur l'ensemble des droits de diffusion [...]») and COMMISSION DES AFFAIRES CULTURELLES ET DE L'ÉDUCATION, *Rapport d'information*, p. 115 (Proposition 26: «Maintenir, dans la loi, le principe d'un taux de recours à la production indépendante, en limitant sa définition à l'absence de lien capitaliste et en laissant plus de place aux accords professionnels ou de gré à gré pour la définition des droits et des mandats»).

Tab. 1 The definition of independence in Italy and France

Italy	France
<p>Producers have to meet these two conditions to be independent:</p> <ul style="list-style-type: none"> a) they must carry out an activity of audio-visual production; b) there must be no relationship (including control or affiliation) with AVMS providers. <p>In addition, they have to fulfil one out of two of the following requisites:</p> <ul style="list-style-type: none"> c) they must be a secondary rights holder; d) no more than 90% of their production may be allocated to the same provider for three consecutive years (to be calculated considering the total revenues the producer obtains as a remuneration for the services offered to the provider). <p>Since it represents one of two requirements that must occur alternatively, the ownership of secondary rights is not indispensable for a producer to be recognized as independent. Provided it fulfils the first two conditions (a and b), the producer has to own the secondary rights (c) only if it allocates more than 90% of its production to the same provider for more than three consecutive years (d).</p>	<p>A cinematographic producer is independent of a provider if:</p> <ul style="list-style-type: none"> a) the provider does not hold, directly or indirectly, more than a certain percentage of the production company's share capital or voting rights — depending on the type of providers; b) the producer does not hold, directly or indirectly, more than a certain percentage of the provider's share capital or voting rights — depending on the type of providers; c) the shareholder or group of shareholders do not control the providers and the producer at the same time. <p>A cinematographic work is independent if its terms of exploitation meet the following conditions:</p> <ul style="list-style-type: none"> a) the broadcaster has not acquired the rights stipulated in the pre-acquisition contract for more than two broadcasts. The duration of exclusivity of these rights does not exceed 18 months for each broadcast. Concerning non-linear providers: if the exploitation rights are acquired exclusively, their duration must not exceed 12 months; in addition: the non-linear provider must not hold, directly or

In any case, a producer cannot be considered independent if it plays a 'merely executive' role. It is merely executive the producer who does contribute less than 5% of the total cost of the work and who does not carry out the following minimum activities: choosing the story and acquiring the related rights to realize and exploit the work; entrusting of the task of drafting the script; carrying out of inspections to identify the shooting locations; selecting key talents, such as actors and director, and the other leading members of the cast; elaborating and controlling the budget plan.

- indirectly, any producer shares and must not personally take or jointly share the initiative and the financial, technical, or artistic responsibility of the film's realization;
- b) the provider does not hold, directly or indirectly, the secondary rights or marketing mandates for the work for more than one of the following means of exploitation:
- 1) in France, in theatres;
 - 2) in France, in the form of DVD/Blu-ray;
 - 3) in France, on a television service other than the one it operates;
 - 4) in France and abroad on an online communication service other than the one it operates;
 - 5) abroad in theatres, in the form of DVD/Blu-ray and on television services.

However, if the provider devotes more than 85% of the pre-acquisition and co-production expenses to the development of independent production, the ownership of secondary rights may relate to two of the exploitation terms mentioned above, but without allowing those defined in 3) and 5) to be combined.

Source. For Italy: art. 2, par. 1, lett. p), of the Tusmar and art. 3 of Annex B to the scheme of AGCOM Resolution no. 421/19/CONS of October 17th, 2019. For France: arts. 71 and 71-1 of the 1986 Act Law and its implementing Council of State's Decrees, and EUROPEAN AUDIOVISUAL OBSERVATORY, The promotion of independent audio-visual production in Europe, 2019.

4. Exploitation of the cinematographic work and the State rules

Once produced, the cinematographic work should continue its life cycle in the distribution phase. The 'system of windows' regulates the order in which the different distribution channels follow one another and the time that must elapse between the availability of the work on one channel and its appearance on the next²⁸⁴.

This regulation aims to maximize the film's profits, taking advantage of the possibility to offer it at different times, prices, and modalities to intercept a demand heterogeneous in preferences and purchasing power. First, the system should avoid that those willing to pay more still consume the film in a cheaper version. A consumer ready to pay a cinema ticket price should not see the movie at home by renting a DVD, for example. Second, the windows organization should ensure that even those with a limited capacity of expenditure or who are less interested in the film consume it, thanks to the offer of cheaper fruition modalities.

The sequence of windows is generally ordered on a scale of decreasing economic importance to meet these goals. This is why cinema theatre is the first distribution channel, traditionally: it is considered the one that produces the highest per capita revenue in the shortest time. According to the sequence typically adopted in Europe²⁸⁵, the following channels are home entertainment ones. First, the physical channel (DVD and Blu-ray), second, the digital one (TVOD). Then, the distribution proceeds to pay-tv, followed by the SVOD. Lastly, the exploitation of the works ends in free television and the AVOD.

²⁸⁴ For an in-depth examination of the principles underlying the release windows system, see RANAIVOSON, H., et al., *Analysis of the legal rules for exploitation windows and commercial practices in EU member states and of the importance of exploitation windows for new business practices — A study prepared for the European Commission*, 2014, and PASQUALE, A., *Finestre aperte o finestre chiuse?*, in *Netflix e oltre*, ed. by Pasquale, A., Bianco e nero, Edizioni Sabinae, 2019, pp. 51-62.

²⁸⁵ See EUROPEAN AUDIOVISUAL OBSERVATORY, *The theatrical – TVOD window. A sample analysis*, 2019.

If the windows' sequence relates to their capacity to produce revenues, their optimal exclusive duration depends on the impact that the distribution on one channel may generate on the following. If consumers perceive the different channels as substitutes, the success of a channel risks eroding the revenues of the others; if they perceive them as complementary, the success of a film on one channel may strengthen its success in other markets. The first hypothesis suggests adopting a long interval between the different windows, preventing close or simultaneous releases. The second supports the adoption of 'closer' windows instead²⁸⁶. On average, the cinema window has an exclusive duration of 3/5 months in Europe²⁸⁷. Consequently, the exploitation of a film on channels other than theatres can begin only several months after its first theatrical release.

Not everywhere the film industry autonomously regulates the issue of windows. In the past, the European legislator established rules on the matter²⁸⁸. To protect cinema theatres, the TWF Directive of 1989 imposed a two-year holdback period between the first release of a film in cinemas in one of the Member States and its broadcasting on TV. However, the Directive recognized rights-holders and broadcasters the possibility of derogating from the two years through an agreement. This possibility soon became the rule: waiting for two years turned out to be a loss of opportunity both for producers, since films lasted on average in theatres only a few weeks, and for broadcasters, willing to pay higher amounts

²⁸⁶ Note that even the need to limit piracy may suggest adopting close windows: if the time that elapse between the presence of work on a channel and its appearance on the following is very long, the probability that piracy anticipates the legal offer increases.

²⁸⁷ See EUROPEAN COMMISSION, *Analysis of the legal rules*, p. 5.

²⁸⁸ For a detailed analysis of the main European regulatory steps on the windows topic, see: EUROPEAN AUDIOVISUAL OBSERVATORY, *Media Windows in flux. challenges for audiovisual media chronology*, 2008; GIUSTI, M. "Le finestre cinematografiche in Italia e in Francia al tempo di Netflix." *Aedon* 3 (2019); MANSANI, L., "Le finestre di utilizzo delle opere audiovisive", *Annali italiani del diritto d'autore, della cultura e dello spettacolo* 18 (2009): 308-319.

to distribute films earlier. In light of this situation, in 1997, the EU ceased to impose a form of media chronology and began to consider it as a matter to be regulated by private autonomy. Still today, the AVMS Directive, replacing the TWF one, follows the same approach.

However, this development did not compromise the Member States' possibility of introducing a system of windows via national legislation. The TWF Directive at the time and the AVMS Directive today aim to achieve only the minimum harmonization needed to ensure the free movement of audio-visual services; the Member States retain the right to require providers under their jurisdiction to observe stricter rules.

Free to decide autonomously, the States did not follow a common path. It is possible to identify three models. In the first, which includes most countries, national legislators have not imposed any constraint, considering windows a matter to be settled through agreements between the audio-visual professionals. In the second model, operators have to respect rules on windows in order to obtain public funding for cinema. It is what happens in Italy and Germany, Austria, the Netherlands, and Switzerland. In the third model, adopted by only a few States, the law regulates the system of cinema windows for all operators, not only those benefiting from State funding. It is the case of France.

4.1. The link between windows rules and State aid in Italy

Until recently, the film industry itself entirely regulated the system of windows in Italy²⁸⁹. The State established rules on the matter of windows only in 2018, when it modified the requirements according to which works can qualify as cinematographic and hence access public funding

²⁸⁹ Actually, in the past, the Italian State had regulated the issue of cinema windows. It adopted the first rule on the matter in 1990: to comply with EEC's Law, the Mammi Law no. 223/1990 established that two years should elapse from the first release of a film in the theatres and its appearance on TV. However, broadcasters were allowed to distribute a film after only one year if they had co-produced it. In any case, the parties could derogate from the rules through agreements. Subsequently, following the indications from the EEC, the Italian State left the matter to the free autonomy of the parties.

for cinema²⁹⁰. The State established indeed that all works funded by State aid to cinema must be distributed first in theatres and cannot circulate simultaneously or in a short time in other channels²⁹¹.

The principle that a work funded by State aid to the cinema should have a theatrical distribution already applied. The 2016 Act defines the cinematographic work as the one mainly intended for theatres, providing that the detailed definition shall be laid down by a Decree of the Minister of culture²⁹². The choice to prohibit the work's simultaneous or close distribution on other platforms was instead a novelty—not required by the Decree previously into force²⁹³.

The State introduced these prohibitions to respond to the disagreement of exhibitors. They complained against the adoption of distribution strategies inconsistent with the market practice of windows autonomously respected by the industry, traditionally (fig. 5). The *casus belli* is the film "*Sulla mia pelle*" by Alessio Cremonini, produced by Netflix and financed by State aid to the cinema. After having been presented at the 75th Venice International Film Festival, the film was distributed simultaneously in cinemas and online on Netflix. This way, Netflix violated the market rule that requires about three years between

²⁹⁰ See Decree of the Minister of Cultural Heritage and Activities no. 531/2018 of November 29th.

²⁹¹ The Decree establishes two further requirements that must be applied jointly so that the work can qualify as cinematographic. First, the work must be «conceived, designed, produced and distributed, from an artistic, technical, productive, financial and promotional viewpoint for priority viewing in cinemas». Second, the work must be programmed in cinemas for at least 60 single screening within three months from the first release. In the specific case of documentaries and short films, the minimum screening threshold is reduced to 15 in the three months period.

²⁹² See art. 2, par. 1, lett. b), of the 2016 Act.

²⁹³ See Decree no. 303/2017 of July 14th. It, defined cinematographic works as those «conceived, designed and produced, from an artistic, technical, productive and financial viewpoint, to be used mainly for public viewing in cinemas». In particular, it recognized the cinematographic nature of a work in the presence of at least one of the following requirements: a) the work was distributed in at least 20 cinemas for at least seven consecutive days; b) the work participated in one of the film festivals, national or international, identified by the regulations in force; c) the rights of the work were sold for its cinematographic distribution in at least one non-Italian speaking foreign country.

the release of a film in cinemas and its appearance on SVOD platforms (fig. 5).

As a response to the disagreement of exhibitors, worried that such distribution strategies were likely to compromise the traditional social role of theatres and erode their revenues, the State modified the definition of cinematographic work within the scope of State funding. It established that all works funded by State aid to the cinema must be distributed first in theatres and cannot circulate on other channels before 105 days from their first theatrical release—a time period consistent with that of the traditional practice of the industry(fig. 5), this way made binding through law.

However, the State, on the same occasion, provided two exceptions in which the holdback period of 105 days can be reduced²⁹⁴. The first concerns films scheduled for no more than three days, other than Friday, Saturday, Sunday, and public holidays. Such films are the 'event films', which do not aim at massive and widespread distribution in theatres. According to the Decree, they can circulate on other channels after only ten days from their first theatrical release. The second exception is designed instead for works that, despite having planned a medium-sized release, do not find a sufficient audience to postpone exploitation on other platforms²⁹⁵. They can circulate on other channels after only sixty days from their first theatrical release. However, to benefit from the two exceptions and not lose State aids, the operators must respect a 'strict' principle: during the programming period at the cinema, the future availability of the works on other channels cannot be advertised.

Therefore, although with a clear historical anti-Netflix genesis, the Italian rules do not penalize SVOD providers: they can realize 'event' releases in theatres and take advantage of the exception that allows for shortened windows. Still, they are in any case allowed to distribute the films online in the times they prefer simply renouncing to State aid for cinema (yet they are free to access those for other audio-visuals).

²⁹⁴ Art. 2, par. 1, lett. b), 2), i) and ii) of the Decree no. 531/2018.

²⁹⁵ More precisely, the works concerned are those programmed in less than 80 theatres and that got less than 50,000 spectators after the first 21 days.

According to an estimate presented by the associations of the sector²⁹⁶, the majority of the Italian films should be able to take advantage of the shortened windows provided by the exceptions, while the general rule should have a limited scope of application: it should be applied only to about a quarter of Italian films; however, they are the ones that together produce 90% of the box office generated by national productions (Tab. 2).

Tab. 2 Rule and exceptions on cinema windows in Italy, with estimation of the number of the involved films.

	ALL FILMS	“EVENT FILMS”	UNSUCCESSFUL FILMS
Duration of the theater-only window	105 days*	105 days*	60 days**
Duration of the theater-only window	Around 1 out of 4 Italian films (90% of box office revenues produced by Italian films)		Around 3 out of 4 Italian films

*Same as previous market practices; **Lower than previous market practices

This estimation shows that the State rules on windows have a double ratio. On the one hand, they push the industry to overcome the traditional rules concerning the less profitable films. Since they manage to stay in theatres only a few weeks (even a few days in some cases), the State wants to avoid that they have to wait a long time before circulating

²⁹⁶ Based on Cinetel data, the associations carried out an analysis of the Italian films distributed in cinemas between January 1st, 2017, and October 31st, 2018. The analysis showed that of the 434 Italian films distributed in that period (all funded by the State), only a hundred films exceeded 50,000 admissions in the first three weeks of programming. However, these films generated 90% of exhibitors' revenue on Italian titles. See AGCM, *Relazione annuale sullo stato della concorrenza nel settore della distribuzione cinematografica*, 2019, p. 27.

elsewhere. It would mean losing the promotional effect of the theatrical release, and therefore reducing the films' potential profitability. On the other hand, the Italian rules seek to 'block' the most profitable Italian titles in theatres, thus responding to the demand of exhibitors. However, note that the most profitable films distributed in Italy do not have to respect the exclusive cinema windows. Indeed, the rules apply only to works that benefit from State aids to the cinema, i.e. only to the Italian ones²⁹⁷. The American titles, those that generate the most of the box office²⁹⁸, are not subject to them.

However, despite the limited scope of application of the general rule and the fact that the exceptions are to be welcomed, Italian rules raise some concerns. In addition to being based on an unproven assumption²⁹⁹ and liable to encourage piracy³⁰⁰, they are likely to restrict the competitive pressure. Indeed, they limit the operators' freedom in their content distribution—as highlighted by the AGCM. The limitation of competition is clearly to the detriment of consumers: the rules do not consider the interests of the final recipients of the film in enjoying it wherever they want, whenever they want. However, the limitation of competition may paradoxically end up damaging even theatres in the long terms. The competitive pressure exerted by the OTTs led indeed to the realization of virtuous initiatives by exhibitors. «In particular, those [...] aimed at valorising and diversifying the experience of the consumer in the cinemas (in terms of reception, comfort, cleanliness, quality of the audio, and video) form the other modalities of fruition»³⁰¹. The transformations underway could turn into a valuable opportunity for renewal. Seizing these opportunities is more difficult once the law

²⁹⁷ Indeed, State aids regulated by the 2016 Act are provided only for national works. The only measures that apply to foreign films are the international tax credit, aimed at attracting film and audio-visual investments to Italy (see [par. 5.3.2. of Chapter III](#)).

²⁹⁸ See fig. 11, in [par. 5 of this Chapter](#).

²⁹⁹ See the following [par. 4.4. of this Chapter](#).

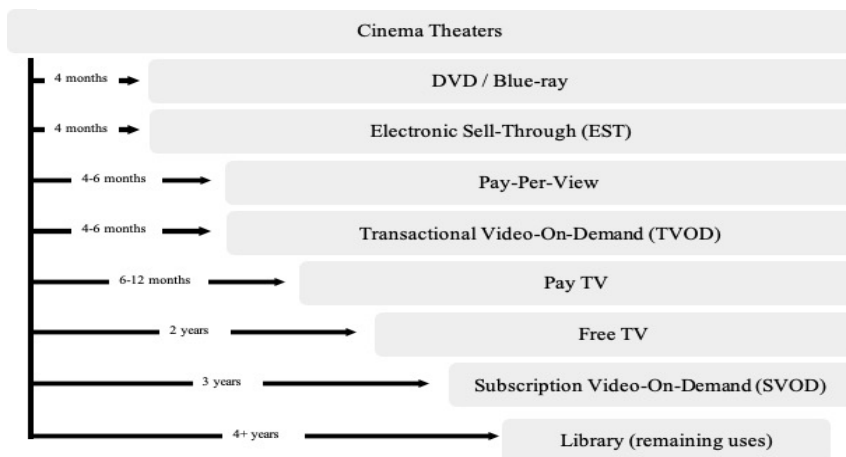
³⁰⁰ Indeed, the exclusive cinema windows may induce those who do not have close availability of theatres to illegally source films for whose consumption they are unwilling to wait.

³⁰¹ See AGCM, *Relazione annuale*, p. 32.

crystallizes the rules and they are unable to evolve according to the market agreement freely.

However, note that the Italian State established rules only about the time that must elapse between films' availability in theatres and elsewhere. All other windows continue to be regulated by market practice (fig. 5) and are free to develop autonomously.

Fig. 5 Commercial market practice on cinema windows in Italy.



Source. AGCM, "IC41-Indagine conoscitiva sul settore audiovisivo", 2016, and "Relazione annuale sullo stato della concorrenza nel settore della distribuzione cinematografica", 2019

According to the commercial practice developed over time, the first distribution channel is cinema theatre. After the first theatrical release, the film is distributed on home video channels. They include purchases/rentals both through physical support (DVD/Blue-Ray) and online (Electronic Sell-Through, EST). They are non-term channels: after an initial period in which the availability of the film is exclusive, home-video sales and rentals continue in parallel with television exploitation. After about 4-6 months from the first theatrical release, the film is distributed by pay-per-view TV offers and by TVOD. These windows usually are non-exclusive and have a limited duration, typically of three months. The following channels are pay and free TV, which tend to be exclusive. The former (pay-TV) starts typically 6-12 months after the first release of the work in cinema, the

latter (the free one) after about 24 months. The exploitation continues on the SVOD, a window typically placed in the third year after the first release of the film and maintained for variable periods—exclusive or not depending on the agreements. Finally, exhausted the previous windows, and in any case 4-5 years from the first release in cinema at the latest, the film is part of the distribution company's library and is subject to different types of use.

4.2. The link between windows rules and the AVMS providers' investment obligations in France

The French case is very different. Even in France, the works that benefit from State aids for cinema should be intended for theatrical distribution³⁰². However, once released in French theatres, all films, whether or not funded by State aid to the cinema, are obliged to respect the *chronologie des medias*, which regulates the sequence and duration of all the exploitation channels of a film following its theatrical release.

In the past, the State entirely regulates the *chronologie des medias*³⁰³. To implement the evolution of European law and the principle of preference for self-regulation, it subsequently limited the scope of regulation. It began to directly regulate only the time that must elapse between the screening of a film in theatres and its distribution via DVD/Blu-ray³⁰⁴. An agreement between the representatives of the film industry's professional organizations regulates the other windows. However, the principles of the agreement are binding. By a ministerial decree, the State gives legal force to them and extends their application to all operators³⁰⁵. This way, even those who did not participate in the drafting of the rules must observe them.

³⁰² See art. 211-5 of the Regulation on State aid adopted by the CNC and attached to the CCIA.

³⁰³ The general principles were established by the 1986 Act, which provided that secondary sources of law should lay down detailed provisions.

³⁰⁴ See art. L. 231-1 of the CCIA.

³⁰⁵ See arts. L. 232-1, L. 233-1, L. 234-1 and L. 234-2 of the CCIA.

The French *chronologie des médias* is peculiar also because it aims to push AVMS providers to increase their investment in the national and European film industry: the sooner a provider distributes a cinematographic work, the higher its investment obligations. The agreement currently in force was adopted in 2018, precisely because of the need to find a new balance in the support to film production by the different types of AVMS providers—as well as to make the different windows shorter and more flexible, thus adapting the system to the evolution of consumption patterns³⁰⁶.

The agreement previously into force dated back to 2009, before the disruptive entry on the French market of the global digital players (Netflix, for example, began operating in France in 2014). Since these players today have a financial capacity incomparable with that of traditional operators, the new agreement seeks to stimulate their investments in national and European production. It offers indeed SVOD providers that agree to increase their contribution to the national film industry reduced holdback periods to exploit films on their platforms. More precisely, the 2018 agreement³⁰⁷ overcome the principle that SVOD could offer a cinematographic work on their platforms only three years after its first screening in cinemas. The term of 3 years continues to apply only to 'non-virtuous' operators. It is reduced to 30 months for 'average virtuous' operators and 17 months for the 'very virtuous' ones (**tab. 3**). However, the conditions provided for SVODs to take advantage of these reduced terms (which continue in any case to be very long) appear burdensome and cumbersome (**tab. 3**). The 'opportunities' do not seem a compelling incentive to stimulate their support to the French film industry.

³⁰⁶ See COMMISSION DE LA CULTURE, DE L'ÉDUCATION ET DE LA COMMUNICATION. *Rapport d'information présenté par Mme Catherine Morin-Desailly sur la chronologie des médias*, 2017.

³⁰⁷ For an in-depth analysis of the 2018 agreement, see: LE ROY, M., "Nouvelle chronologie des médias: une évolution précaire", *Légipresse* (2019): 170-174; MONTELS, B., "Un an de droit de l'audiovisuel", *Communication Commerce électronique* 6 (2019).

Until June 2021, Netflix and other operators could easily undermine the effectiveness of the intervention —only apparently likely to penalize web giants. Indeed, since the rules on the *chronologie des médias* apply only to films released in cinemas, operators such as Netflix —that are not only distributors but also producers of original content—could easily overcome them by simply skipping theatrical release and distributing their films directly online. This is why the French response to the technological upheavals appeared substantially rigid in the windows mater, expression of an anachronistic protectionist approach.

However, foreign SVODs are today obliged to fund French cinematographic works —intended as those primarily distributed in theatres. Indeed, the French State reformed the investment obligations of non-linear providers and extended them even to operators that target the French audience without being established in France³⁰⁸. This way, some of the conditions that SVOD had to respect only to take advantage of shortened windows have become compulsory.

Hence, the need for a reform of the windows system: once SVOD are obliged to fund French cinematographic works, they should have the possibility to exploit said works under acceptable times. Moreover, beyond the regulation concerning SVOD, even the other windows regulated by the 2018 agreement are still excessively rigid, inadequate for today's film industry—even if made shorter and more flexible compared to 2009³⁰⁹ (tab. 3).

Given the essential need for reform and the industry's difficulties to reach a shared solution, the State set a deadline for the renegotiation of the professional agreement. If this deadline passes without an agreement

³⁰⁸ See [par. 3.1. of Chapter IV](#).

³⁰⁹ According to MARC LE ROY, "Nouvelle chronologie des medias", p. 172, «The new media timeline contains no revolution. In reality the long awaited agreement brings about only limited evolutions, which merely prolong an old system» («*La nouvelle chronologie des médias ne contient aucune révolution. En réalité l'accord longtemps attendu n'apporte que des évolutions limitées qui ne font que prolonger un système ancien*»).

being reached, the government will temporarily determine the length and terms of release windows that are not established in law³¹⁰.

Tab. 3 The French media chronology: a comparison between the 2018 and the 2009 agreements.

		DVD/ Blu-ray e TVOD	Pay TV		SVOD	Free TV and non- cinematographic Pay-TV channels	AVOD
			First window	Second window			
«Virtuous» operators	Ordinary term	4	8	17	17/30	22	44
	Derogation*	3	6	15	15/28	20	42
«Non virtuous» operators	Ordinary term	4	18	24	36	30	44
	Derogation*	3	16	22	34	28	42
Previous terms (2009 agreement)	Ordinary term	4	10	24	36	30	48
	Derogation**	3	8	22	36	22	48

*If the film made less than 100,000 admissions in theatres during the first four weeks

**If the film made less than 200 admissions in theatres during the fourth week

Under the current agreement, only ‘non-virtuos’ SVOD can offer a cinematographic work on their platforms only three years after its first screening in cinemas.

To take advantage of the intermediate window of 30 months, SVOD providers must conclude an agreement with the professional organizations of the film industry. Simplifying, this agreement should establish at least the following conditions: a) the destination by the provider of at least 21% of its previous yearly turnover to the funding of European works, including at least 17% to the funding of the French ones; b) the destination of at least 60% of its catalogue to European works, including 40% to the French ones; c) the reservation of a ‘substantial’ part of the catalogue’s home page to these works; 4) the payment of a contribution to the CNC.

To use the shortest 17-months windows, SVOD players have to: a) sign an agreement with the professional organizations of the film industry providing the platform’s commitment to pre-finance, finance (in

³¹⁰ See art. 28 of the Ordonnance no. 1642/2020 of December 21st.

accordance to a clause of diversity) and distribute European and French works; b) pay a contribution to the CNC; c) sign an agreement with the CSA; d) not exploit a work exclusively for more than five months, in the case other providers (free-to-air services or 'mediumly virtuous' SVOD) pre-financed or purchased the same work.

In addition to increasing OTT's contribution to the film industry, the 2009 agreement was amended to make the different windows shorter and more flexible, thus adapting the system to the evolution of consumption patterns. Only the DVD/Blu-ray's window has been confirmed: the rule continues to be that a cinematographic work can be distributed through these physical media only after four months from the first day of the work's distribution in theatres. All the other windows have been shortened.

Pay-tv channels having an agreement with the film industry' organizations can distribute films eight months after their first screening in the theatres (instead of after the tenth). If they do not respect specific commitments regarding the diffusion of works of original French and European expression and the financing of the sector, the window is extended to 18 months. Pay-tv without an agreement with the film industry's organizations can broadcast cinematographic works after 17 months (instead of 24). The term is increased to 24 months if the broadcasters are 'not virtuous'. Free TV and non-cinema pay-tv channels are instead allowed to broadcast films after 22 months if they invest at least 3.2% of their turnover in European film production. Otherwise, they will have to wait 30 months. In the case of works that have not been purchased by pay-tv for a second broadcasting or by SVOD providers, the period of 22 months is reduced to 19 months. This provision aims to avoid periods in which works are not available on any channel (conditions which could encourage piracy). Finally, for AVOD platforms, the new term is of 44 months (instead of 48).

Finally, the current agreement provides for larger flexibility for the exploitation of titles with limited success. All windows are reduced by about two months if the distribution concerns films that during the first four weeks of programming have made less than 100,000 admissions in the theatres. The agreement of 2009 provided instead for a reduction of windows only in the case of films that had made less than 200 admissions during the fourth first week at the cinema.

4.3. The two approaches and the unproven assumption lying behind both: are theatres and online platforms really substitutes?

Despite being both among the few European States to regulate windows, Italy and France adopt different approaches. Italy requires only a minimum time to elapse between the release of a film in cinemas and its circulation on other channels. The sequence of the other windows and their duration remain unregulated: they can freely evolve according to the industry's practices. Moreover, the Italian rule has a limited scope of application, since the 105-day principle applies to a quarter of Italian films only: thanks to the exceptions, the less profitable Italian titles can benefit from shortened windows, thus circulating quickly through other channels. France directly regulates just the elapsed time between the first release of a film in the theatre and its circulation by DVD/Blu-ray. However, it gives force of law to the rules established by the industry on the matter. This way, French law regulates both sequence and duration of all the windows of cinematographic works. The rules apply to every film distributed in theatres, whether or not it received State aids.

It is interesting to note that the different approaches grounding exceptions in the two countries show a different conception of the State's role. The Italian rules apply only to works that benefit from State's aid for cinema: operators are left unrestricted if they renounce to use public resources for cinema. In France rules apply *erga omnes*, following a specular principle: the higher the operators' contribution to the industry, the lower the State's constraints. The legislator established indeed a complex system of incentives that rewards active support to the national and European industry.

Both the Italian and French rules currently in force were adopted in response to changes in the industry that followed the entry of new operators with disruptive technologies. Italy adopted towards digital providers an approach that guarantees flexibility, despite the apparent protectionist premises. On the opposite, France does not appear willing to update its policy on windows. It is rather trying to integrate digital players into a system based on rules from the 1980s. Such an approach could prove to be ineffective, but France's attempt to defend its traditional schemes can be understood when considering that they have

always led to satisfactory results for the national film industry and the solidity of the cinema theatres market³¹¹. The new players entered indeed in an efficient, strong and well-regulated system. Still, the State is aware of the need to review the rules to find a balance between the interests of traditional operators and those of the SVOD providers.

Despite their differences, the Italian and French systems show the same concern: they are both based on an unproven assumption. With the prohibition to distribute the cinematographic work simultaneously—or within a short time—in theatres and elsewhere, the two seem to assume that theatres and other channels (online platforms in particular) are perfect substitutes. As intuitive as it may be, this view does not find empirical confirmation to date. There appear to be no analysis showing that those who attend cinema theatres would stop doing so if films were simultaneously available online or elsewhere. On the contrary: a study on the American market shows that the biggest cinemagoers are also the biggest users of Netflix (tab. 4).

Tab. 4 Relationship between annual movie theatre attendance and weekly streaming.

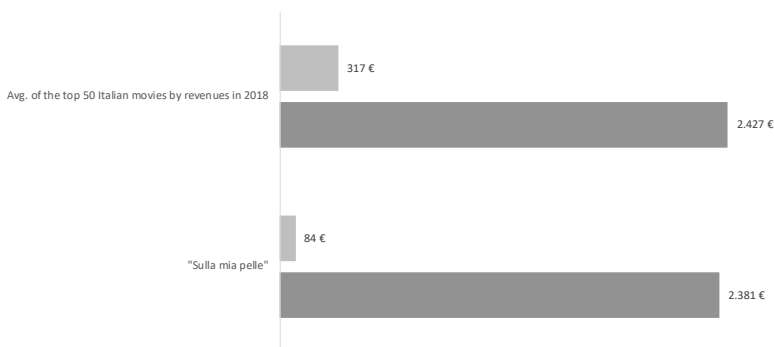
		Number of cinema admissions in one year			
		From 1 to 2 times	From 3 to 5	From 6 to 8	9 or more
Hours spent on streaming platforms per week	From 1 to 3 hours	39%	30%	18%	15%
	From 4 to 7 hours	28%	33%	30%	26%
	From 8 to 14 hours	18%	20%	26%	28%
	15 or more hours	15%	18%	26%	31%
	Number of responses	460	511	323	439
Hourly streaming media		7 hours / week	8 hours / week	10 hours / week	11 hours / week

Source: EY for National Association of Theatre Owner, “The relationship between movie theatre attendance and streaming behaviour”, 2018

³¹¹ See fig. 7, in this paragraph.

Consider the case that gave rise to the protest that led to the Italian rules. We do not have official data on the total box office receipts from *"Sulla mia pelle"*—defined as ‘surprising’ by the newspapers, despite the limited number of theatres in which it was available, given the refusal of many exhibitors to show it. The only official data available is that the film, during its first weekend at the cinema, grossed an average of € 2,381 per copy. Such a result is significant, being in line with the average one of the first fifty Italian films in 2018 in terms of the box office (fig. 6). In the case of *"Sulla mia pelle"*, such a result occurred despite the dual distribution channel.

Fig. 6 Comparison for average revenue per copy and number of distributed copies during the first weekend between *"Sulla mia pelle"* and the top 50 Italian movies by revenues in 2018.



Source: elaboration by the author data provided by ANEC in its *"CineNotes"*

It may be that the controversy over this film's distribution, as well as the strong social impact of the story it tells³¹², might have contributed to promoting its viewing in cinemas. But it also may be that, for some consumers, the experience of going to the cinema is not replaceable with

³¹² The movie, which later won four prestigious Italian cinematographic prizes (the 'David di Donatello'), is about the last days of Stefano Cucchi, a young roman boy who died shortly after having been arrested.

other modes of fruition. This could explain why some works gained a big success at the cinemas even though consumers were aware that the same works would have been available soon on less expensive channels. It is what happened with the theatrical release of the first episodes of the third season of the television series "*Gomorra*", and even with the series "*De André-Principe libero*"—screened at the cinema to promote their subsequent distribution respectively on Sky and Rai.

Following the Covid-19 pandemic, there are new helpful data to shed more light on the substitutability between different types of consumption. Indeed, given the forced closure of theatres, both Italy and France allow for works funded by cinema aid to be directly distributed on other channels³¹³. Moreover: the Italian State reintroduced the exclusive cinema window at the reopening of theatres but temporarily reduced its duration from 105 to 30 days³¹⁴. Therefore, the industry adopted (and is still adopting) experiments with alternative release strategies, the best way to further increase the knowledge of the impact of the different methods of release on the actors concerned³¹⁵.

³¹³ For France, see art. 911-2 of the Book IX of the CNC's Regulation. Actually, the French State adopted two different solutions: one for the films already in theaters at the moment of the beginning of the lockdown; one for films whose release was planned after. Concerning the firsts, art. 17 of the Emergency Law no. 290/2020 of March 23rd allows the President of the CNC to reduce the official period of four months between the release in theatres and the distribution via DVD/Blu-Ray. The producers of the second type of films were instead recognized the right to ask the CNC President to distribute their works immediately on TVOD services without returning the already obtained State aid to the cinema. For Italy, see the Ministerial Decree of May 4th, 2020, which allowed operators to distribute directly online or in television works funded by cinema aid. It is worth notice that, before the entry into force of said Decree, the rules on media chronology generated a competitive advantage for US films compared to the Italian ones. Since the rules apply only to titles that gained State funding to the cinema, only Italian films could not meet the public during the first period of forced closure of theaters; the American ones managed to be immediately distributed online or on television.

³¹⁴ Indeed, all Italian cinematographic works distributed in theatres between May 2021 and December 2021 can be distributed online or on television after 30 days of their first theatrical release (see the Ministerial Decree of April 4th, 2021). This way, the Italian State seeks to ensure a more fair competition between Italian and foreign films.

³¹⁵ For more information about the peculiar distribution strategies adopted during the pandemic and their results, Aa. Vv., *Cinema & Covid... Ieri, oggi... E domani?*.

Some of the data already disclosed seem to reinforce the hypothesis of the lack of a substitutability relationship. Some products designed for cinemas did not have a significant success online. It seems to be the case of the much-awaited “*Mulan*”, directly diffused on Disney+ through a hybrid distribution strategy³¹⁶. Cinema theatres may still be the most attractive medium for some visually rich products and only theatre exploitation likely allows to amortize the cost of production of big-budget American blockbusters. This could be the reason why some American distributors decided to postpone the distribution of long-awaited titles, waiting for the reopening of theatres rather than opting for online distribution. Other films released simultaneously online and in theatres achieved positive results on both the channels. It is the case of “*Wonder Woman 1984*”, released on the HBO platform Max and in American theatres. Despite the double distribution, the film grossed unexpected amounts at the box office—at least for pandemic times, considering that only 35% of cinema theatres were reopened and operated at limited capacity³¹⁷.

The results of the European exhibition market provide further evidence of the unlikelihood of the substitutability phenomenon. Of course, 2020 was a tragic year (figs. 8 and 9): being people confined to their homes and cinemas closed, exhibitors have been strongly hit by the crisis³¹⁸. The European box office remained small even after the first re-opening. Among other reasons, this was because of the lack of appealing titles: the pandemic caused a shortage of American titles in the worldwide market,

³¹⁶ Indeed, the film was made available to subscribers to the SVOD platform Disney+ only under the payment of an extra. As noted by NIOLA, G., *Gli studios hanno ancora bisogno delle sale?*, in *Cinema & Covid... Ieri, oggi... E domani?*, p. 34, it is impossible to know precisely the results of “*Mulan*”, defined by Disney ‘quite good but not so good’.

³¹⁷ Thus reported, among others, by RUBIN, R. “Box Office: ‘Wonder Woman 1984’ Debuts to Robust (for a Pandemic) \$16.7 Million”, *Variety* (2020).

³¹⁸ Focusing on the data starting from March 8th, the first day of national cinemas' closure, the Italian market decreased by 93% compared to 2019, both in admissions and gross box office (GBO). Considering the entire year, GBO and admissions decreased respectively more than 71.3% (€M 182.5) and 71% (€M 29) compared to 2019. The UK market decreased by -76% compared to 2019, Spain by -72%, France and Germany by -69%. TORLASCHI, V. “Un box office da dimenticare”, *Box office: il mondo del cinema e il suo business* (2021).

due to the initial inability to shoot new films and to the fact that some of the titles that were to be released during the lockdown were not available at the reopening. Some had already been distributed elsewhere—such as the already mentioned Disney's *"Mulan"*. Others, for which theatres were confirmed as the first channel, were postponed several times in the US and, consequently, in Europe³¹⁹.

However, the exhibition market's tragic results in 2020 cannot be read as the acceleration of an already on-going phenomenon. On the opposite, the 2019 and the beginning of 2020 were particularly positive: European exhibition market was proven not only to survive but also to grow in an era of digital platforms expansion (figs. 7 and 8)³²⁰. The data disclosed by the European Audiovisual Observatory show that the trend of GBO and admissions has actually been growing in the European market as a whole in the last thirty years (figs. 7 and 8). Television did not compromise the practice of going to the cinema, nor does the rapid rise of the internet³²¹. The generally positive trend is confirmed when focusing on the big five (figs 9 and 10). However, it is worth to notice that positive and negative years take turns, and the results of a period

³¹⁹ Among the several films postponed, think to the Marvel's *"Black Widow"* with Scarlett Johansson, the last 007, significantly titles *"No time to Die"*, *"The French Dispatch"* by Wes Anderson and the highly-anticipated *"West Side Story"* by Steven Spielberg.

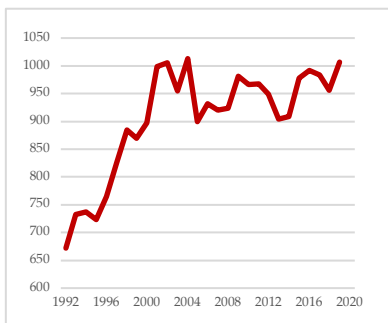
³²⁰ In 2019, the growth was primarily driven by a strong year-on-year performance in Germany (+12.6%), Italy (+14.2%), France (+6.0%), and Spain (+4.7%). Out of the five major EU markets, only the UK registered a decline compared to 2018, still registering the second-highest admissions level since the 1970s. It is worth noticing that the positive results of 2019 in Italy's case are partly dependent on the industry's initiative 'Moviement', aimed at ensuring the release of appealing titles during the summer, a period traditionally 'black' for the Italian cinema theatres. This way, the industry sought to ensure consistent revenues throughout the year and avoiding overcrowding of titles during peak periods, likely to generate cannibalization effects (AGCM, *Relazione annuale sullo stato della concorrenza nel settore della distribuzione cinematografica*, 2020, pp. 28 and ff.). It is worth noticing that the Italian exhibition market was growing even in the first month of 2020: revenues were 20% higher compared to 2019.

³²¹ The European Audiovisual Observatory—that in 2013 was reasoning about the bad results of the European exhibition market in 2012 in this terms «it does seem that cinemas are suffering as a result of the big rise in the number of films available on television and the internet [...]»—did not propose similar explanation after 2013. The reasons behind the years with results below the average are quite always the lack of American blockbusters or attractive national titles.

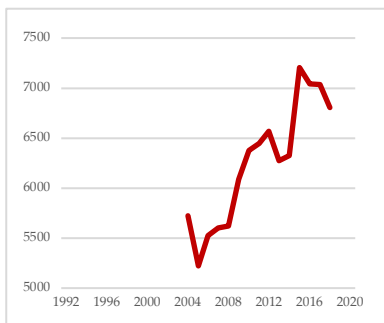
may differ a lot in one country compared to another. France is the market that achieves the most satisfactory results, followed by UK and Germany. Together with Spain, Italy is the one that achieves the worst results. Still, the Italian spikes (positive or negative) seem to be mainly due to the presence or lack of highly attractive titles, rather than to long-term trends. For example, the notable trend of 2010 was mostly due to successful blockbusters and the local light-hearted comedy “*Benvenuti al sud*” by Luca Miniero; the 2016 growth was mostly due to the breakout success of one film comedy, “*Quo Vado?*” with Checco Zalone, which became the most successful Italian film of all time.

Fig. 7 Admissions and GBO of European cinema theatres during the period 1992-2020.

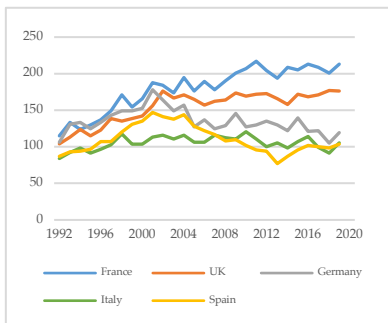
Panel A. *European Admissions 1992-2020*



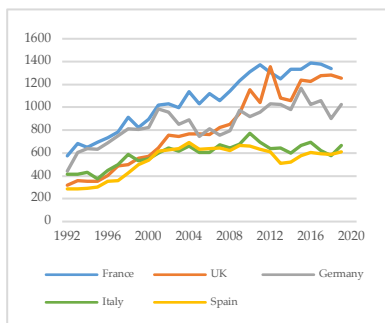
Panel B. *European GBO 1992-2020*



Panel C. *Admissions in the big five 1992-2020*



Panel D. *GBO in the big five 1992-2020*



Source. Annual reports “World Film Market Trends” of EAO. Data in millions of euro.

5. The phases of distribution and theatrical exhibition: the limits of linking the definition of cinema to theatres exploitation

Despite the inappropriateness to consider cinema theatres a failed market, linking the definition of a cinematographic work to its exploitation in theatres is problematic for several reasons in Italy. They depend on the current state of the distribution and exhibition phases.

First, many European companies are only active in the production phase: they cannot distribute their works autonomously, and therefore they often outsource this stage. They need to find a distributor, which acts as an intermediary between production and exhibition, and contributes to make the film likely to intercept an audience—facing to this end a wide range of marketing decisions, such as how to title the film and organize the advertising campaign.

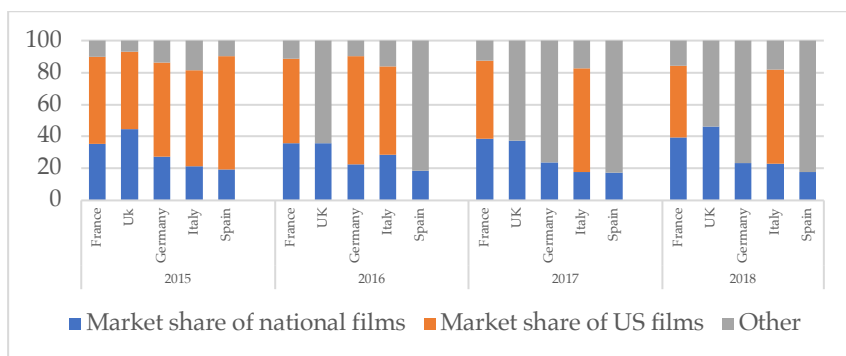
There are consolidated relations between some producers and distributors; sometimes, a producer interacts with its distributors since the very moment of the film project's conception. However, this is not the case for many Italian producers, for which to find a distributor is not a foreseen conclusion—the reason why the pre-purchase of film distribution rights could be very useful. Indeed, while the European production market comprises many actors, the distribution one is highly concentrated, controlled by a few companies with a strong influence on films' supply³²². This is particularly true in the Italian film industry,

³²² As said, only 6,85% of the audio-visual companies operate in the distribution market in Italy. At a national scale, there are three types of distributors. First, the independent ones, such as Lucky Red, Notorious Pictures, and Leone Film Group. Second, the distributors having vertical relations with broadcasters: 01 Distribution, integrated with Rai, Medusa Film, with Fininvest, and Vision Distribution, with Sky. The first and the second tend to gain together circa half of the Italian distribution companies' total admissions. Finally, Italian branches of US major (such as Warner Bros, 20th Century Fox, Universal and The World Disney Company), which tend to have an aggregate share of almost 60% of the Italian distribution market. For more information about the Italian distribution market, see the annual reports on the matter of the AGCM. Even in France, the French branches of US majors hold most of the distribution market share. In 2019, consistently with the previous years, Walt Disney Company, Warner Bros, Universal Pictures International, Sony Pictures

traditionally described as a sandglass, whose narrow neck is represented precisely by distributors³²³.

However, even if a producer manages to find a distributor, it is not sure that the distributor will find an agreement with an exhibitor. Among the other reasons, this is because exhibitors find more profitable to screen American films. Although less numerous than national titles, American films generate indeed most of the box office—not only in Italy but in all the big five, as **fig. 9** shows. Even in France, where national productions usually have the highest capacity to reach an audience³²⁴, the surplus of US' titles is evident.

Fig. 8 Composition of the national market share in the cinema theatres of the big five during the period 2015-2018



Source. EAO, annual reports "World Film Market Trends".

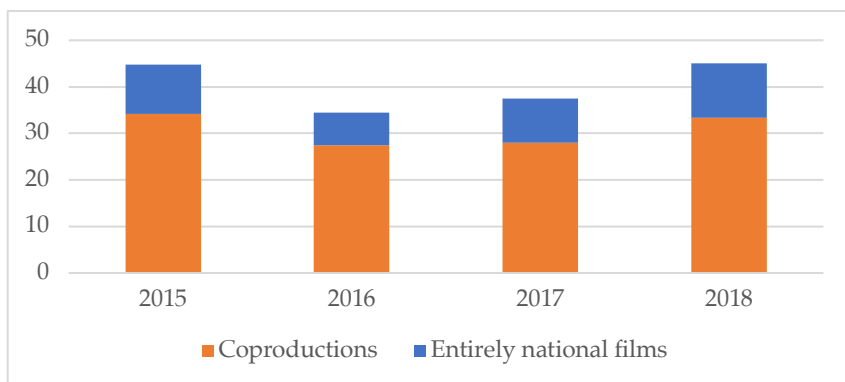
Home Entertainment achieved alone 50% of the total distribution revenues, despite the presence in the same year of 142 active distributors. See CNC, *Bilan*, 2019, p. 51.

³²³ However, note that television companies' forced involvement in film production contributes to favour access to cinema for many Italian titles. The two main operators of Italian television (Rai and Mediaset) are indeed both vertically integrated, meaning that they produce films (Rai through Rai Cinema and Mediaset through Taodue) and handle their distribution not only on television but also in movie theatres (as well as online, Rai through RaiPlay and Mediaset through infinities).

³²⁴ On the matter, note that there are concerns for the future. Data show that the audience for French films is mainly the elderly public, while French productions do not significantly intercept young people, i.e., the public of the future. In 2019, more than 60% of French film audiences were aged 50 and over. See CNC, *Bilan*, 2019, p. 68 e 69.

UK only achieves results that are similar to the French ones (and, often, even better). However, this is because the share of UK films supported by American studios' commitment is larger than in the other big fives. Indeed, the UK's national market share is mainly due to the success of films made in collaboration with the US production network, while entirely domestic films have marginal results (fig. 9).

Fig. 9 Composition of the national market share in the UK: entirely British and 'British-American' films during the period 2015-2018



Source. EAO, annual reports "World Film Market Trends".

Both the Italian and French States provide, in light of this evidence, incentives for exhibitors committed to program national and European films, as well as for operators committed to distribute them. France also favours theatres' access to fragile films considered worthy through two instruments that do not find an Italian counterpart: the *Mediateur du cinéma* and the *engagements de programmation and diffusion*. The first, whose presence «illustre parfaitement la volonté de la puissance publique de ne pas laisser le monde du cinéma sous l'empire de la simple loi du marché»³²⁵,

³²⁵ LE ROY, M., "Cinéma". The Cinema Mediator was created by Law no. 652/1982 of July 29th. Since 2009, the CCIA rules its activity (arts. from L. 213-1 to L. 213-8). The Mediator was considered an independent administrative authority until the implementation of Law no. 55/2017 of January 20th, which considerably reduced the number of independent administrative authorities and did not consider the Mediator to be one of them. Ar. 24 of

allows the State to intermediate between distributors and exhibitors, affecting their relationship. It is indeed in charge of conciliating disputes on films' access to cinemas arising between distributors and exhibitors that opt for appealing to it rather than the judges. It also actively participates in the industry's regulation, since it can prescribe, in the event of conciliation's failure, the appropriate measures to end the dispute—e.g., it may order a distributor to provide a film to a theatre to ensure a wider diffusion of works and preserve the supply's diversity. The second instrument was devised since the creation of multiplexes³²⁶ and still influences the programming strategies of the strongest exhibitors,³²⁷ by forcing them to program French and European works, as well as art-house and limited audience films. It is up to the operators to formulate the commitments (to be renewed every three years³²⁸) they

said Law nevertheless calls for the insertion of an art. L. 213-6-1 in the CCIA specifying that the Mediator for cinema makes decisions «without receiving instructions from any other authority».

³²⁶ Note that, despite representing only 11.3% of existing theatres, multiplexes make 60.2% of the total box office revenue. CNC, *Bilan*, 2019, p. 75

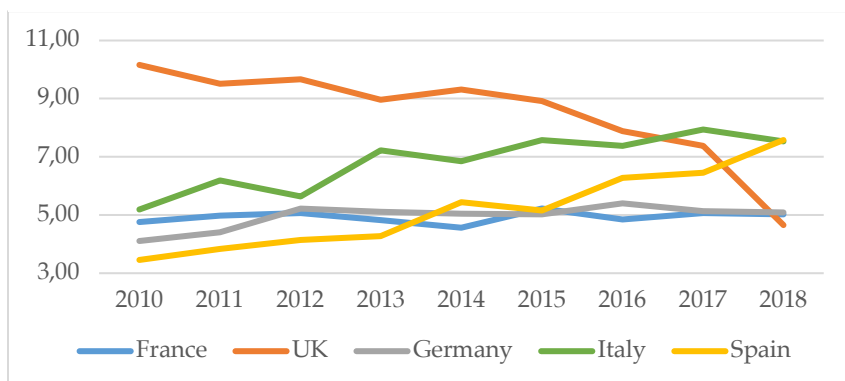
³²⁷ The CNC's President draws up annually the list of operators required to respect programming commitment and notifies each of them of the registration decision. Typically, operators required to meet programming commitments are any theatre with at least six screens (and therefore not only the multiplexes, defined as those with at least eight screens); all operators that, taking into account all their theatres, collect alone at least 25 % of the admissions of their operational area, provided that they had made at least 0,5 % of the box office of such an area during the previous year.

³²⁸ According to the last professional agreement approved by the CNC's President (which dates to May 13th, 2016): a) at least 40% of movie theatre screenings should be dedicated to European works, with a particular focus on those realized by independent producers and those '*peu diffusées*'; b) each theatre cannot have more than two copies of the same movie and cannot reserve to the same work more than 30% of the weekly screen time; c) vertically integrated groups must screen a minimum number of movies released in less than 16 Paris' theatres, showing them for at least 2 weeks, regardless of their box office performance; d) each theatre should program each year a certain number of films distributed by distributors with less than 2 M admissions on average in the previous 3 years; e) each theatre must screen short movies and organize evenings devoted to the screening of works other than cinema, such as a concerts, opera, etc. According to Marc Le Roy, «*Les résultats de cette réglementation semblent sans appel*» (LE ROY, M., "Cinéma"): even though producers complain about non-compliance with the commitments, the market share of national films in France is one of the highest in the world—excluding that of countries with national film screen quotas (such as Brazil, Greece and South Korea). However, the programming commitment system is not perfect. Perhaps surprisingly, multiplexes defend it while

intend to follow, which are then notified to the Cinema Mediator, that has to verify if they are appropriate³²⁹, while the President of the CNC is in charge of their final approval.

However, the introduction of the additional instruments applied in France would probably not be effective and conclusive to ensure access to cinema theatres of all the Italian films funded by State aid to the cinema. Indeed, the Italian cinematographic market is saturated, showing a steadily increasing ratio between the produced films and the screens, the highest among the big five in the recent years (fig. 10).

Fig. 10 Produced films for every 100 screens in the big five during the period 2010-2018



Source. Elaboration by the author on data provided by the EAO in its annual reports "World Film Market Trends". For Italy, from 2012 on: Cinetel, "I dati del mercato cinematografico". EAO provided indeed non-reliable data for Italy after 2012, whose behavior looked irrational.

It is not by chance that many Italian titles that managed to get access to theatres remained programmed shortly—often not long enough for the

arthouse theatres complain about it. Indeed, such a system leads big operators to screen low-budget movies, the ones usually exhibited by smaller theatres. This way, multiplexes become a greater competitive threat to smaller theatres.

³²⁹ The Cinema Mediator is also in charge of monitoring the implementation of the programming commitments each year and, if necessary, to formulate observations and recommendations to the President of the CNC.

audience to become aware of their existence. Exhibitors are indeed often forced to make room for incoming films by dismantling the previous ones (or by moving them to smaller theatres or to less-attractive time schedules).

In Italy, asking for a mandatory theatrical distribution to all films funded by the State aid to the cinema could be appropriate in the case of solving all these difficulties. This can be achieved in two cases, both aimed to ensure a number of screens sufficient to show all the funded products for an adequate time³³⁰: either increasing the theatres or decreasing the number of produced films.

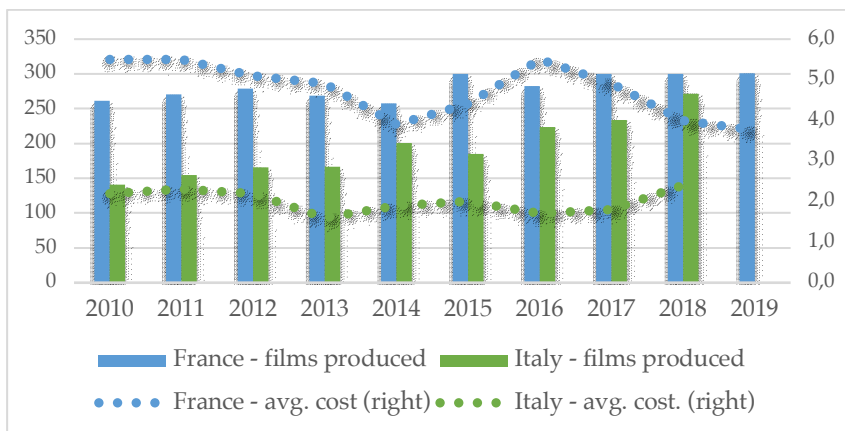
The first path is the one actually undertaken by the 2016 Act³³¹. Still, its adequacy is not easily assessable, since many analyses foreseen that theatres will be progressively less 'cultural hubs', while continuing to be important for the release of event-movies, such as American blockbusters and art films, likely to win prizes. Therefore, it may be inefficient and not forward-looking to invest public money in theatres, especially trying to push them to screen national films.

The second path—producing less films—appear more appropriate. It would useful not only to facilitate theatres access but also because overproduction may generate underinvestment (*fig. 11*). Both in France and in Italy, the increase of the number of films produced was not always followed by an increase in the overall investments, ending up in a decrease of works' average costs, which may in turn compromise films' chances to encounter an audience. Indeed, the history of cinema shows that the higher the production and marketing budgets, the higher the chances of success.

³³⁰ Some even believe that the State should manage its own circuit of theatres to ensure the theatrical distribution of the funded films—provided it keeps require a theatrical distribution for all of them.

³³¹ See [par. 6 of Chapter III](#).

Fig. 2 Number of yearly produced films by Italy and France and their average production cost during the period 2010-2020



Source. CNC, annual reports “Bilans”, and Anica, annual reports “Tutti i numeri del cinema italiano”. Data in millions of euro.

However, a reduction of the films realized is unlikely to happen. Reducing the number of financed works could jeopardize the State’s goals of helping the emergence of young new talents and of pursuing diversity in the supply. Moreover, if there is no space in cinema theatres for the large number of works produced each year, other distribution markets have a huge need for national products. It is the case of digital platforms, that are required by law to fund and diffuse quotas of national and European works.

All that given, it seems that keeping asking for theatrical distribution of cinematographic works is an inefficient and possibly industry-harmful way to proceed; and the path to make it sustainable is not easily viable.

Finally, it is worth to notice that there exist also conceptual arguments against linking the cinematographic nature of a work to its theatrical release. They emphasize the risk of confusing the product with the vehicle that brings it to the audience, which seems to be an outdated approach. To date indeed, the quality of audio-visual works is less

influenced by their primal distributional channel: a work intended for cinema does no longer appear to be more meritorious than the others; there is a growing body of examples of high-quality products with no ambition of a theatrical release. Some of them were recognized by a part of the industry itself as having cinematographic nature despite not being intended for theatrical release, and they participated in film festivals and won awards. It is the case, for example, of 'Roma' by Alfonso Cuarón, which was awarded with the *Leone d'Oro* at the 2018 Venice Film Festival³³² despite having been produced by Netflix for its platform, and simultaneously distributed both online and in the cinemas for a short time³³³.

Moreover, if products not intended for cinemas are considered cinematographic, theatres are now multi-purpose containers. With a view to renewal, in addition to films, they exhibit previews of television series and concerts, works challenging to be defined 'cinematographic'.

³³² Opposite to that of Venice was the position of Cannes. In 2017 the films produced by Netflix "Okja" by Bong Joon-ho and "The Meyerowitz Stories" by Noah Baumbach participated in the Festival. To not have to wait 36 months before being allowed to exploit them in its platform, Netflix distributed these films directly online in France, skipping theatrical release. As said, the rules on the media chronology in France apply only to films released in cinemas. In response to the huge controversy sparked by Netflix's strategy, the Festival's board of directors modified the rules: it added the obligation of theatrical release to the requirements for admission to the cinematographic competition. It is interesting to know that near to Cannes's position, is that of Spielberg's, according to whom: «once you commit to a television format, you are a TV movie [...] You certainly, if it is a good show, deserve an Emmy, but not an Oscar. I do not believe films that are just given token qualifications in a couple of theatres for less than a week should qualify for the Academy Award nomination». Thus, reported by NYREN, E. "Steven Spielberg Doesn't Think Netflix Movies Deserve Oscars", *Variety* (2018), and GLEIBERMAN, O. "Steven Spielberg vs. Netflix: A Preview of the War for Cinema's Future", *Variety* (2019).

³³³ Interestingly, Cuarón, in response to the criticisms raised by the distribution of his film, brought the audience back at the centre of the debate. Replying to a reporter at the Golden Globe ceremony in 2019, he pointed out that through its widespread distribution, Netflix allowed many consumers to see his work. According to the director, many would not have been able to watch the film, had Netflix not been involved. Because of its characteristics, the film would probably have received limited theatrical distribution. «How many theatres do you think a Mexican film in black and white, in Spanish that is a drama without stars—how big of release do you think it will be in a theatrical release? [...]». For a more in-depth look at the story, CRESPI, A., *Tutte le strade (informatiche e non) portano a Roma. Alfonso Cuarón and the debate around his film, in Netflix e Oltre*, pp. 108-113.

The paradox that arises in leaving the definition of cinema to theatres' exploitation is clear in some of the provisions of the 2018 Italian Decree about windows. Think about the ban on event films screening during the weekend; or the prohibition, during their screening in theatres, to promote works that would be subsequently available on other channels. These rules were introduced to avoid the possibility for a product using theatres just for the promotion of its later availability on other channels to be considered 'cinematographic', therefore accessing State aids.

All that given, it seems preferable to support works regardless of the choice of their distribution channel; and to support channels (cinema theatres) independently of the works that they convey. Therefore, at least for funding purposes, the State should cease to identify audio-visual works based on the channels they exploit to reach their public, and find new and more reliable criteria. According to several audio-visual operators, a possible criterion should be the 'size' of the work: State aids should be consistent with the budget and the reference market of the works applying for support (high budget work for the international market, low budget work merely for the national one).

Chapter III – State organization, resources and means to promote cinema

1. Overview

After highlighting the characteristics of today's film industry due to both the free choices of its operators and State's regulation, it is possible to analyse the State action promoting the industry through economic aid. They are significant both in Italy and France, consistently with the fact that the two States consider the film sector capable of generating a significant positive impact for the entire country's system.

Indeed, given that the audio-visual industry has intense relations with many other markets, a shock (positive or negative) to the audio-visual sector spreads significantly to the rest of the economy. The audio-visual is the Italian industry that boasts the highest multiplier, second only to that held by the construction sector³³⁴: for every demanded euro of audio-visual services and products, production in the entire Italian economy grows almost double, i.e., of 1.98 €³³⁵. In addition to the 61,000 jobs it directly generates, the audio-visual industry indirectly induces 112,000 jobs in other sectors³³⁶. Significantly, the percentage of people under 50 directly working within the sector is higher than the national average: 77% instead of 73%³³⁷—an important evidence for Italy, the European country that holds the sad record of the highest percentage of young people neither in employment nor in education or training³³⁸. Even the percentage of females working in the audio-visual industry is above the national average: 39% instead of 36%³³⁹—another significant

³³⁴ ANICA and CENTRO STUDI CONFINDUSTRIA, *Industria italiana del cinema*.

³³⁵ *Ibidem*.

³³⁶ *Ibidem*.

³³⁷ *Ibidem*.

³³⁸ EUROSTAT. *Statistics on young people neither in employment nor in education or training*.

³³⁹ ANICA and CENTRO STUDI CONFINDUSTRIA, *Industria italiana del cinema*.

evidence, considering that Italy is among the European countries with the lowest women's employment rate³⁴⁰. However, the audio-visual industry is not only a great economic engine: it also produces a relevant cultural impact, more challenging to measure and express in quantitative data. Audio-visual works represent means of artistic expression, education, and social communication. They 'mirror' and 'shape' societies, orienting their values and behaviours as they take part in the creation of the national identity. They also participate in defining the perception of a country abroad and, for this reason, may contribute to attracting foreign businesses and investments and developing tourism.

[Par. 2](#) sets out the range of the State's actions promoting the industry through economic aid. Italian and French States do not have indeed 'full sovereignty': to comply with the EU competition law, national systems of cinema promotion must respect the European rules on State aids (actually rather light in the context of culture).

[Par. 3](#) presents a comparative overview of the administrative organization of the two States in promoting cinema. The range of State activities is similar in the two countries, but the characteristics of the competent institutions are remarkably different. The proposal to adopt the French model in Italy, establishing an independent agency for managing aids for the film industry—as the CNC—did not pass.

[Par. 4](#) focuses on the origin of State resources devoted to cinema. While the French State supports the sector mostly with the proceeds of taxes on cinema operators, the Italian resources come from the State's general budget. However, the 2016 reform took partial inspiration from the French system, introducing a mechanism to parametrize the annual State support with the industry's turnover.

The focus then shifts on the instruments the two States adopt to promote the cinema. In Italy, the 2016 Act and its implementing ministerial decrees regulate them. In France, they are governed by the CNC's Regulation (RGA), attached to the CCIA. The CNC has great autonomy:

³⁴⁰ EUROSTAT. *Women's employment rate increasing, but remains lower than men's.*

the law does neither specify aid's general orientation, nor how the CNC should contribute to the industry's strengthening³⁴¹.

Both the States aid all the three phases of a film life cycle—production, distribution and exhibition—as well as activities likely to contribute to the sector's promotion. [Par. 5](#) investigates aids to production, the most supported phase, whose aids' characteristics and procedural mechanisms shape those of the other stages, to which [par. 6](#) is devoted.

The fact that the two States pursue many, heterogenous goals in promoting cinema (sometimes challenging to balance) is the reason why the types of instruments adopted are numerous³⁴². While Italy relies mainly on indirect and horizontal instruments, most of the French support is provided through direct and vertical aid. These different approaches testify the different balance between promoting industry's economic growth increasing cultural pluralism the two States found ([par. 7](#)).

³⁴¹ As noted in the impact analysis annexed to the Project of Law no. 2488/2019 of December 5th, p. 433 («*Aucune disposition particulière ne précise dans la loi quelle est l'orientation générale de la politique des aides et comment le Centre national du cinéma peut contribuer, dans l'exercice de sa mission, à la structuration de la filière*»).

³⁴² The high variety of instruments is particularly true for France: the multitude of existing aids makes it a real challenge to acquire systematic knowledge. According to the CNC's website, sixty-six aids to the cinema are currently in operation. However, many other aids simultaneously support cinematographic and other types of audio-visual works.

2. The range of State's action: compatibility between State aid to the cinema and the EU internal market

As the Treaty of Maastricht in 1992, the TFUE today establishes that State aids to the audio-visual industry should not fall under the prohibition foreseen by art. 107(1). Although likely to distort competition within the internal market, they are exempted from this ban because of art. 107(3)(d). It foresees that State aid to promote culture may be compatible with the internal market, provided they «do not affect trading conditions and competition in the Union to an extent that is contrary to the common interest».

However, neither the Treaty of Maastricht at the time nor the TFUE today specified the conditions under which State aid to the film industry «do not affect trading conditions and competition to an extent that is contrary to the common interest»—a clause extremely vague and subject to a broad range of interpretation. The European Commission progressively clarified its meaning during its examination activity. According to article 108 (3) of the TFUE, Member States have indeed to notify any plans to grant or alter aid in all economic sectors to the Commission, which is entitled to check their compatibility with the EU law.

The Commission's control (around 20 decisions per year³⁴³) began to take shape following a 1998 decision on a French aid to film production³⁴⁴. On

³⁴³ COMPETITION DIRECTORATE-GENERAL OF THE EUROPEAN COMMISSION, *State aid rules for films and other audio-visual works*, 2014.

³⁴⁴ EUROPEAN COMMISSION, Decision of July 29th, no. 3/1998, *Soutien à la production cinématographique*. The Commission censured the French automatic aid to film production because it was recognised only to producers who agreed to spend more than 85% of the film budget in France. The Commission recognized that the imposition of a minimum expenditure in the country granting the aid could help create the industrial environment necessary for audio-visual cultural creation. However, it established that the Member States had to allow the producer to spend abroad at least 20% of the film's production budget. Nevertheless, the Commission did not ask France to reduce the expenditure requirement immediately. To prevent France from being subject to stricter principles than those followed by the other States, the Commission authorized the French scheme for two years. Over this period, the Commission wanted to check whether other countries were complying with the rule. However, the Commission did not conclude its examination

that occasion, the Commission set out four specific criteria to be respected by State aid to the cinema. Based on those criteria, the Commission officially set out for the first time its method of assessing State aid to the cinema through the 'Cinema Communication' of 2001³⁴⁵.

Today, the 2013 Communication establishes the basic rules to be followed by national authorities³⁴⁶. It pursues the same approach of the 2001 Communication while responding to many trends that emerged over time³⁴⁷. When it assesses aid for the film industry, the Commission first verifies whether the aid respects the 'general legality' principle, which applies to any State aids, not only to those for the film industry. To respect it, the aid scheme should be free of clauses that contradict the provisions of the EU Treaty beyond State aid³⁴⁸. Second, the Commission

within the time limit set and, at the French Government's request, extended the temporary authorization to six years. For a more detailed analysis of the decision, BELLUCCI, L., *Cinema e aiuti di Stato*, p. 285 ss. and FOÀ, S. and SANTAGATA, W., "Eccezione Culturale e diversità culturale. Il potere culturale delle organizzazioni centralizzate e decentralizzate", *Aedon* 2 (2004).

³⁴⁵ Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions on certain legal aspects relating to cinematographic and other audio-visual works (2002/C 43/04). The assessment criteria of the 2001 Communication were meant to remain valid until June 2004. However, the Commission extended their validity three times thereafter (in 2004, 2007, and 2009).

³⁴⁶ Indeed, in 2011, the Commission launched a review of the 2001 Communication criteria, which were ten years old at the time. In November 2013, the Commission concluded the revision process and adopted a new Communication.

³⁴⁷ The main change is the enlargement of the scope of activities to which the rules apply. The 2001 Communication focused only on aid to film production, although the Member States were providing support also for the distribution and the exhibition phases. The 2013 Communication concerns instead aid to all the three phases of a film life cycle. For an exhaustive analysis of the reasons calling for a new communication and the positions expressed by the actors involved in the discussion, see EUROPEAN AUDIOVISUAL OBSERVATORY, *The new cinema communication*, 2014. For a detailed analysis of the new Communication, see ORSSICH, I., "State Aid for Films and Other Audio-Visual Works", *European State Aid Law Quarterly* 13.4 (2014): 698-706.

³⁴⁸ It follows that eligibility conditions and award criteria of State aid to the cinema cannot generate discrimination on the grounds of nationality. The aid cannot be reserved only to national citizens, for example. In addition, State aid cannot compromise the free movement of goods, services, workers and capital, etc.

verifies if the aids respect the four specific criteria established since 2001 for film production.

1. The first is **the cultural test criterion**, under which the aid must benefit a cultural product. The Commission's scrutiny on the matter had been controversial with the Member States³⁴⁹. To limit the disputes, and in line with the subsidiarity principle, the 2013 Communication states that the Member States should ensure that the content aided is cultural according to their national criteria. The Commission can solely verify whether the States adopted a verification mechanism to avoid a manifest error. Such a verification mechanism may consist of establishing a list of cultural elements to be fulfilled by the work or requiring a committee to select products to fund based on cultural considerations.
2. The second is **the aid intensity criterion**, which aims to stimulate normal commercial initiatives inherent in a market economy. It requires limiting the aid intensity to 50% of each film's production budget. Such a rule has two implications. First, the Member State cannot bear more than 50% of the cost of film production alone. Second, while adding to those of territorial autonomies, State aid cannot lead the project to be supported by public resources for more than 50% of its production cost³⁵⁰. However, the amount of public aid can reach up to 100% of the production cost in the case of 'difficult' and 'low budget' works; 60% in the case of co-production.

³⁴⁹ On the matter, see the *Déclaration commune des 15 organismes publics européens en charge du cinéma sur la nécessité des aides nationales*, a statement resulting from the discussion between European national film agencies, undertaken by the CNC and the British Film Council. The statement highlights the fallacy of a clear distinction between 'commercial' and 'cultural' work, stating that every film is both the result of commercial activity and a culture's expression.

³⁵⁰ Indeed, the Communication specifies that, in determining whether the maximum aid intensity is respected, the total amount of national public support shall be considered, regardless of whether it is provided from local or State resources. The funds awarded directly by EU programmes are instead out of consideration, as even those provided by AVMS providers to meet their investment quotas in national and European production. Indeed, the EU Court of Justice stated that these types of support, established by the States but financed by providers, are not considered public aid. See Judgement of the Court of Justice of the EU of July 5th, 2009, Case C-222/07, *Unión de Televisiones Comerciales Asociadas (UTECA)/Administración General del Estado*.

This way, the Commission seeks to facilitate the more fragile works and those likely to increase the circulation of European production³⁵¹.

3. The third is **the criterion of territorial spending obligations**. Said obligations occur when operators have to spend a part of the film budget in the Member State that grants the aid to benefit from it. According to the Commission, these requirements may help develop the national film industries by ensuring infrastructure and know-how within national borders. However, they also affect trading conditions and competition within the EU. For this reason, the Commission had set out to limit these obligations since 1998, while deciding on the French aid to film production. The Commission's intention with the 2013 Communication was to reduce territorial spending obligations significantly, if not eliminate them. However, «during the public consultation on the Cinema Communication, many Member States and in particular the film producers ardently defended the high level of possible territorial restrictions. [...] Yet the main stakeholders were concerned that without guaranteed local economic benefits, it would have been difficult to convince governments and parliaments to agree to make public funds available for film production»³⁵². Consequently, the new Communication confirmed the possibility to adopt territorial spending obligation; however, the Member States have to respect stricter principles on the matter³⁵³.
4. The last is **the aid supplements criterion**, which prevents reserving aids for specific filmmaking activities or individual parts of the

³⁵¹ On the higher ability of coproduction than entirely national films to cross national borders, [par 6.1. of Chapter I](#).

³⁵² EUROPEAN COMMISSION, *State aid rules for films and other Audiovisual works*.

³⁵³ According to the new Communication, Member States may require, as an eligibility criterion, the expenditure of a minimum of the production budget in their territory. However, the obligation cannot go beyond 50% of the production budget. To get more than 50% of the production budget spent domestically, a State must increase its support (this stems from the new provision that it may require that 160% of the aid granted is spent in its territory). This way, the Commission seeks to overcome the previous situation, where a Member State giving one single euro of aid to a film project could impose the expenditure of 80% of its production budget in its territory. In any case, it is confirmed that the producer must be free to spend at least 20% of the film budget in the other Member States.

production value chain, requiring that the aid contributes to the work's overall budget. This way, the Commission wants operators to be free to decide which budget items to spend outside the Member State that grants the aid.

As noted, these four criteria entail rather faint obligations for the Member States, which have a remarkable autonomy to decide whether to introduce support measures for the audio-visual sector, in which volume and how. Moreover, the Commission rarely raises objections in practice. It tends to qualify aid to the cinema as 'compatible with the Treaty', adopting flexibility «rather surprising for who knows the rigidity of application of the regulation on State aid in other fields»³⁵⁴.

Different aspects of the Italian and French aids to the film industry confirm these observations. First, despite the cultural test criterion, some types of aid provided by the two States seem to rely on the premise that the film industry is cultural in and of its own. To verify if the work is 'culturally eligible' to said aids, the two States adopt criteria so vague that it is difficult to imagine projects unable to satisfy them.

A further element that shows the flexibility of the European control is linked to the aid intensity criterion. As said, the Commission establishes that the amount of public aid should be limited to 50% of each film's production cost but that it can reach up to 100% of it in the case of 'difficult' and 'low budget' works. Following the subsidiarity principle, it is up to each Member State to provide a definition of difficult and low budget film. According to Italian law, among the works to be understood as difficult and that can be entirely funded by the public sector, there are those with a production cost lower than €2.5 M³⁵⁵. The average cost of Italian films is lower than this figure. It follows that the

³⁵⁴ BRUTI LIBERATI, E., "La regolazione promozionale del cinema, dell'audiovisivo e dello spettacolo dal vivo tra logica di mercato e "diversità" culturale", *Rivista della regolazione dei mercati* 2 (2019).

³⁵⁵ Among the others works to be intended as difficult and low budget, there are works funded through selective aids and defined not capable of attracting private resources and films distributed in less than 400 screens at the same time. See art. 4 of the ministerial implementing Decree no. 70/2021 of February 5th.

Italian State could potentially bear the full cost of many Italian films without violating European principles³⁵⁶.

To conclude, it is worth noting that the EU has relaxed the constraints during the pandemic to allow the States to mobilize substantial resources supporting domestic industries in the face of the crisis³⁵⁷.

3. The administrative organization: the CNC and the DGC

There is no general directorate for cinema within the French Ministry of Culture. Since 1946, the institution in charge of elaborating and implementing State policies concerning cinema is the CNC, a separate agency under the authority of the Ministry of Culture with financial and regulatory autonomy and legal personality³⁵⁸. Its President shall report to a Board of directors made up, for the majority of its members, of representatives of the State; a deputy and a senator appointed by the Permanent Committee on Cultural Affairs of their respective assemblies; members of the Council of State, the Court of Cassation and the Court of Auditors; representatives of the CNC's staff³⁵⁹.

The CNC's primary task is provide aid for the audio-visual industry. However, it exercises several other functions³⁶⁰. It participates in elaborating legislative draft and regulatory text about the industry and it observes and studies the sector, providing dossiers and reports. Thanks to this activity, there are many detailed data on State's actions

³⁵⁶ The French case is different. The public sector cannot bear more than 60% of the production costs of difficult works (first and second-time director works) and low-budget works (not more than € 1,25 M). The threshold is increased to 70% if the works do not benefit from the tax credit. See art. 211-17 of the CNC's Regulation.

³⁵⁷ See the Communication from the Commission Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak of March 19th, 2020.

³⁵⁸ See art. 111-1 of the CCIA.

³⁵⁹ See art. 112-1 of the CCIA.

³⁶⁰ For their exhaustive list, see arts. L. 111-2 and 111-3 of the CCIA.

and their impact in France—while these resources are limited in Italy. The CNC also cooperates with regional authorities to ensure the consistency of the support from different government levels and plays a role in shaping the French position on European and international negotiations. Finally, the CNC is in charge of monitoring the application of regulations by the audio-visual actors; of collecting, conserving, restoring, and enhancing the film heritage; of managing the audio-visual register³⁶¹; fight against the counterfeiting of audio-visual works, reporting the counterfeiting offense and acting as a plaintiff in court³⁶².

Over time, the CNC lost its double corporate-administrative nature³⁶³. However, it is still today *«une véritable administration de concertation»*³⁶⁴: professionals' instances did not disappear from its decision-making process. For example, any change in the CNC's regulatory framework is preceded by a study report commissioned to a professional responsible for gathering opinions from all actors concerned. Cinema professionals take also part in CNC's committees responsible for allocating selective aids. Moreover: the CNC contributes to the achievement of inter-professional agreements, reconciling the often-contradictory interests of different professional groups. Concerning several issues, the French State—for the medium of the CNC—is more a facilitator than a direct regulator.

During the discussion on the project of law of what will be the Italian 2016 reform, there was the proposal to establish an independent agency in charge of promoting cinema within the Ministry of culture—the *Centro nazionale del cinema e delle espressioni audiovisive*, outlined looking at the French CNC. The aim was to make the State's action in the industry more responsive and agile by freeing it from the general limitations of the Italian public administration: bureaucratic red tapes, limited ability to interact with companies, lack of qualified personnel, etc. However, the

³⁶¹ As in Italy, the register's function is to ensure the publicity of the agreements concerning the production, distribution, and exploitation of French audio-visual works. The rights resulting from unregistered acts cannot be enforced against third parties.

³⁶² See art. L. 111-2(6) of the CCIA and art. L. 331-3 of the Code of Intellectual Property.

³⁶³ See [par. 2.2. of Chapter I](#).

³⁶⁴ Cit. *Étude* 309, pp. 309-24.

Parliament abandoned the project: the State functions concerning the film industry continue to be exercised by the General Directorate for Cinema (DGC) within the Ministry of Culture, which has been responsible on the matter since 1998³⁶⁵.

Without financial and regulatory autonomy, the Italian DGC exercises similar functions to the CNC. First, it allocates aids to the audio-visual industry and carries out inspections and controls on the aid beneficiaries. It contributes to coordinating the support granted by different government levels by hosting the National Coordination of Film Commissions and takes part in defining the Italian position within European and international institutions. It manages the public film register and promotes study and analysis on the audio-visual sector. Finally, it carries out the administrative activities related to the movie-rating system to protect minors—that in France are carried out by the Ministry of culture, outside the CNC.

Although it did not introduce an independent agency, the 2016 reform innovated the State organization of cinema promotion. Indeed, it established the Higher Council for Cinema and Audio-visual, an advisory and scientific body³⁶⁶. Eleven members compose it: eight

³⁶⁵ Unlike France, where the same organization has been responsible for State action concerning the cinema since 1946, many different institutions took turns until 1998 in Italy. As said in [par. 3.1. of Chapter I](#), the first centralized body specifically responsible for State actions related to the film industry was established in 1934: the General Directorate for Cinema within the Under-Secretary of State for Press and Propaganda. In the early post-war years, the Central office for Cinematography, established within the Presidency of Council, acquired the competencies related to the State's action in the film industry. In 1959, the General Directorate of Entertainment within the newly established Ministry of Tourism and Entertainment substituted the Central Office. On April 18th, 1993, a referendum of the Regions' initiative repealed the law instituting the Ministry of Tourism and Entertainment. The following Decree of the President of the Council of Ministers of August 2nd, 1995 established within the Presidency of Council the Department of Entertainment, which acquired the repealed Ministry's competencies, offices, and staff. In fact, the abolishment of the Ministry was in no way attributable to the overcoming of the public interests of which it was in charge (as noted by BARBATI, C., *Istituzioni e spettacolo*, p. 7). Subsequently, the Ministry of Cultural Heritage and Activities, established in 1998, acquired the functions, financial and staff resources of the Department of Entertainment.

³⁶⁶ Art. 11 of the 2016 Act. The Council is in charge of analysing the film and audio-visual sector and monitoring and evaluating public actions on the matter; formulating proposals

personalities of the audio-visual sector of «particular and proven professional qualification and skills also in the legal, economic, administrative and management fields», appointed by the Minister; three members chosen by the Minister from a shortlist proposed by the most representative professional associations of the industry. This way, like the CNC, even the DGC should lead a regular exchange with the professionals.

4. The provenances of State's resources for the cinema

The resources through which a State funds its film industry can come from different sources. Depending on the choices made, the system may be more or less acceptable for tax-payers and also more or less capable of ensuring consisting financing to the industry. In most countries, the resources come from the State's general budget.

Others countries adopted different approaches. The UK, for example, funds the cinema mainly through lottery proceeds. This system assures considerable financing to the industry but shows 'regressivity traits': the revenue from taxes primarily paid by the poorest (the lottery players) sustains a cultural product the wealthiest consume more.

The French model is probably the most complex and sophisticated. The State sustains the cinema mostly with revenues from taxes on cinema operators: it imposes people outside the industry to contribute to its funding only to a limited extent. However, the French system is inconsistent with the 'equalization principle': the film industry's revenues do not support worthy sectors other than cinema.

The Italian State asks all citizens to support cinema since it finances the industry through its general budget. However, the 2016 reform took partial inspiration from the French system, introducing a link between the cinema's turnover and the annual State's expenditure in its favour.

about them; giving assistance regarding the formulation of the Italian position on audio-visual matters at the European and International level; giving opinions on the criteria for allocating resources and on the conditions for their granting; organizing consultations with representatives of the sectors and other stakeholders.

4.1. The French fund: State's (and not industry's) money

In France, most of State resources devoted to the film industry do not come from the State's general budget but from the proceeds of taxes on the operators who benefit from the distribution of audio-visual works. The principle, which remained unchanged since 1948, essentially states that who gains an economic advantage from today's works must contribute to creating the future ones. In derogation from the universality budgetary principle³⁶⁷, revenues from taxing operators such as theatres exhibitors, broadcasters and DVD retailers do not enter the State's general budget. They are directly absorbed by the fund of the CNC, which then redistributes the sums among the audio-visual operators.

Thanks to this system, the film industry's financing is free from the constraints of the ordinary budgetary procedure: the resources for cinema neither depend on each year's condition of the State's budget nor on the governments' sensitivity to cultural issues. Their level relies on the sector's health: the more revenue it generates, the more resources it will receive. The system also allows for a better acceptance of the tax levy: the tax burden does not affect all citizens, but exclusively those who will benefit from the money collected.

However, the French approach generates several concerns from other parts, in particular the US. Since the Uruguay Round, they have criticized the French system as anticompetitive. Indeed, the French State taxes a part of the value created by all audio-visual works distributed in France, including the foreign ones. However, the proceeds of these taxes finance the creation of new French and European works only. While European Law explicitly prevents discrimination based on nationality

³⁶⁷ The 'principle of universality' covers two rules. First, there must not be compensation between revenue and expense. Second, income cannot be allocated to specific expenses. The allocation of taxes to institutions other than the State deprives the Parliament to vote on public expenses. The Parliament had certainly decided said allocations on its own and can, in principle, question them or change the tax parameters at any given moment. However, this rarely happens in practice. See ECALLE, F., *Les taxes affectées*, on *FIPECO-Site d'informations sur les finances publiques*, 2018.

within the internal market, there is no law imposing to recognize the same benefit to non-European operators.

However, the Americans' request to abolish or open up to all the CNC's aid was not followed up³⁶⁸. France did not comply with said request stating that its support scheme is industry-driven and not government-operated³⁶⁹. Since the amount collected directly goes to the CNC, bypassing the general government budget, the French State does not finance the cinema with public money. It would limit itself to a regulatory function by imposing a forced loan on cinema operators and then proceeding through the CNC to redistribute the money thus saved. According to this interpretation, France would have one of the lowest support programs for cinema in Europe.

Such a depiction has been continuously reaffirmed. According to two French authors of a 1979 study on the film industry, «one cannot say it often enough, the French cinema is neither aided nor subsidized. It benefits from a system of self-financing that it has invented, for which Parliament has made a law»³⁷⁰. Pascal Kamina, one of the French greatest experts on public law of cinema, affirms that «State support for the film industry does not consist, as sometimes affirmed, in public subsidies (as exists in some countries), but in the redistribution to the market players of the revenues made by films during their exploitation in the various distribution channels»³⁷¹. According to the film economist Laurent Creton, «For the most part, the measures supporting the film and audiovisual sector do not depend on the State budget [...]. There is a

³⁶⁸ WALKLEY, S. E. *To what extent*, p. 122.

³⁶⁹ *Ibidem*, p. 121

³⁷⁰ ROUX, J. and THEVENET, R., *Industrie et commerce du film en France*, Editions scientifiques et juridiques, 1979, p. 128.

³⁷¹ KAMINA, P. "Cadre administratif. Régime juridique des activités cinématographiques". *JCl. Propriété littéraire et artistique*, Fasc. 1075 (2019) («Le soutien financier de l'État à l'industrie cinématographique ne consiste pas, comme on le pense quelquefois, dans des subventions publiques au cinéma (comme il en existe dans certains pays), mais dans la redistribution - automatique ou sélective - aux acteurs du marché des recettes réalisées par les films lors de leur exploitation sous différents modes. Cette épargne forcée est versée sur un compte spécial du trésor, le compte de soutien, géré par le CNC»).

mandatory savings system for professionals [...]»³⁷². For Dominique Boutonnat, the current President of the CNC, «the ingenuity [of the French system] is that it does not cost the taxpayer anything—or almost nothing [...]»³⁷³.

Such a representation is not entirely acceptable. The funds given to the film industry by the CNC (worth to be remembered, an institution under the Ministry of culture) may not represent a direct monetary cost for the State but are an opportunity cost for sure. The State accepts losing the sums allocated to the CNC from its general budget, hence agreeing not to use them to finance something other than the audio-visual industry. This also derogates from the equalization principle, under which the most profitable activities should contribute to support the most vulnerable ones. Therefore, the resources of the CNC should be considered public aid. It is not by chance that the French subsidy schemes must meet the criteria established by the European Commission, and any change or future development of the system has to be notified. Another evidence shows the public nature of these aids: on some limited occasions, the State broke the system's principles using the CNC's funds to finance expenses in areas other than cinema.

4.1.1. *The categories of taxed operators*

Over time, France continuously extended the actors taxed to cover the new forms of distributions of audio-visual contents in light of technological evolution. Currently, three taxes finance the CNC's Fund: the tax on box office (TSA), the tax on televisions' services (TST), and the video tax (TSV), the only one collected by the General Directorate for Public Finance of the Ministry of Economic Affairs and Finance, which

³⁷² CRETON, L., *L'économie du cinéma en 50 fiches*, Armand Colin, 2020, P. 126 («Les mesures d'aide au cinéma et à l'audiovisuel ne sont donc, pour l'essentiel, pad dépendantes du budget de l'État : ce sont des taxes parafiscales internes à ces filières qui alimentent le fonds. Pour les professionnels, il s'agit d'un système d'épargne obligatoire destiné à moderniser, à dynamiser et à promouvoir: on accumule des droits utilisable pour produire un film ou pour rénover une salle»).

³⁷³ BOUTONNAT, D., *Rapport sur le financement privé*, p. 195 («L'ingéniosités du dispositif est qu'il n'en coute rien au contribuable -ou presque rien [...]»)

then transfers it to the CNC—retaining the 2.5% as operating expenses³⁷⁴. On the contrary, the TSA and TST proceeds are paid directly to the CNC's accounting agent³⁷⁵.

The TSA, introduced in 1948, is the most ancient tax. The CCIA discipline it³⁷⁶, subjecting movie theatres to a levy of 10.72% of the tickets' price³⁷⁷. Still today, most of the TSA comes from American movies since domestic films generate a limited part of the box office³⁷⁸. In light of this, the system brings the domestic producers to hope US films perform well: the more the audience, the more the French movie industry's future money.

The TST was established in 1984. Cinema attendance was falling, and more and more people started to prefer television over theaters: the TSA was no longer adequate to fund the CNC's programs. Given televisions were benefiting from the exploitation of films for cinema, the legislator decided to force them to participate in financing the future creation. Note that the TSA and the TST combination resulted in national cinema being financed by its two rivals: US cinema and French television.

Since 2008, the TST ceased to regard only televisions editors: the State extended it to telecommunications operators that distribute audio-visual contents, including internet access providers and mobile telephone operators. Therefore, the TST currently consists of two parts: the tax on television services applicable to broadcasters (TST-E) and the one applicable to distributors (TST-D)³⁷⁹.

³⁷⁴ See art. 1609 sexdecies B of the Tax Code in connection with art. L-116-1 of the CCIA.

³⁷⁵ The TSA monthly, the TST monthly or quarterly, depending on the periodicity of the operators' declaration of the value-added tax. See arts. L-115-5 and 115-10(1) of the CCIA.

³⁷⁶ See arts. from 115-1 to 115-5.

³⁷⁷ The levy is multiplied by 1.5 times for pornographic works and incitement to violence prohibited to minors.

³⁷⁸ See fig. 8 in [par. 5 of Chapter II](#).

³⁷⁹ Arts. from 115-6 to 115-13 of the CCIA governed both. Broadcasters established in France that during the previous year programmed at least one works eligible for the CNC's aid are subject to a levy of 5,15% of their yearly turnover. The TST-D applies to distributors

To the TSA and the TST, the Finance Act for 1993 added the TSV, which applies to DVD and Blu-ray retailers. This way, the State accounted for the increased consumption of movies at home, enlarging the set of contributors to the CNC's Fund. Since 2004, the TSV has also applied to French non-linear AVMS providers. The subsequent regulation extended the tax even to non-linear operators that offer audio-visual contents in France without being established there: in 2016, the legislator extended the TSV to the foreign SVOD ('Netflix Tax') and to the foreign AVOD ('YouTube tax')³⁸⁰. This way, France began to apply funding commitments to digital players that usually exploit the difference in regulatory regimes between countries to minimize their tax burden³⁸¹.

The constant adjustments allowed to secure increasing resources for the film industry. As noted, «from 1981 until the present French subsidies to the film industry have continuously increased with no notable sign of reversing»³⁸². As a result, in 2014, the subsidies were more than three times (in real terms) than in the 1970s³⁸³. However, at the same time, the scope of CNC has gradually extended to support works other than films for cinema theaters, such as works designed for television, internet etc.

4.1.2. Too much money? The 2007-2011 inflation and the correctives

On several occasions, French control bodies criticized the high level of the CNC's resources: in the absence of correctives, the French system

established in France, and its percentage depends on their turnover: 0,5% of the turnover between €10 M and € 250 M; 2,10% of the turnover between €250 M and €500 M; 2,80% of the turnover between €500 M and €750 M; 3,5% of the turnover over €750 M.

³⁸⁰ Law no. 1918/2016 of December 29th.

³⁸¹ Still, taxes on digital operators that offer contents in France without being established there entered into force only in 2018. The measures were notified to the European Commission, which approved them only in July 2017.

³⁸² MESSERLIN, P. and PARC, J., "The real impact of subsidies on the film industry ", 60.

³⁸³ *Ibidem*.

does not ensure a proportion between the level of State aids and the audio-visual industry's actual needs.

The increase of CNC resources happened in particular between 2007 and 2012, when the Fund rose from € 512 M to € 749 M (+46%)³⁸⁴. This occurrence mostly depended on the entry into force of the TST-D, whose proceeds rose from €94 M in 2008 to €279 M in 2012³⁸⁵. As noted by the Council for statutory contributions, «the result was an increase in the CNC's resources that was unrelated to its needs»³⁸⁶. Criticisms also came from the Court of Auditors³⁸⁷: it pointed out that between 2002 and 2012, the volume of direct State aids to the audio-visual industry increased by 88%; this way, France alone concentrated two-thirds of the aids to the film industry provided by all the EU Member States³⁸⁸.

The Court also remarked that the increase of the CNC's budget had led to a kind of 'inflation' within the audio-visual industry. It noted macro-economic evidence pointing to this direction, such as that the average cost of French film production realized between 2002 and 2012 increased

³⁸⁴ See COUR DES COMPTES, *Les soutiens à la production cinématographique*, p. 24.

³⁸⁵ *Ibidem*.

³⁸⁶ See CONSEIL DES PRÉLÈVEMENTS OBLIGATOIRE, *Les taxes affectées: des instruments à mieux encadrer*, 2018, p. 98 («Il en était résulté une augmentation des moyens du CNC sans rapport avec ses besoins»).

³⁸⁷ COUR DES COMPTES, *Les soutiens à la production cinématographique*, p. 19.

³⁸⁸ *Ibidem*, p. 12. As the Court had already affirmed in the past, while analysing the financing of the CNC, «Beyond taking as irrefutable that a sector's dynamism entails the need to allocate always more public money to it and to make this allocation a public policy's priority of a higher rank, the justification for the continued increase of the aids to the audio-visual industry is still to be given». Thus reported by the COMMISSION DES FINANCES, *Rapport d'information fait au Sénat par M. Aymeri de Montesquiou sur l'enquête de la Cour des comptes relative à la gestion et au financement du Centre national du cinéma et de l'image animée*, 2012, p. 19 («Sauf à tenir pour irrefutable l'idée selon laquelle le dynamisme d'un secteur emporte la nécessité de lui affecter toujours plus d'argent public et donc d'en faire une priorité de politique publique d'un rang supérieur à toutes les autres priorités gouvernementales, la justification de cette augmentation continue des aides reste à établir »).

more than the general rate of inflation³⁸⁹. This result was mainly due to an increase in the remuneration of actors³⁹⁰.

Because of the parafiscal systems' faults and the need for more resources for the general budget of the State, the Parliament introduced some correctives measures in 2013. It prevented public institutions that directly received taxes' proceeds to obtain more than a pre-established cap each year, requiring them to return the exceeding sums to the State's general budget. However, despite its prosperous financial situation, the CNC ended up being one of the few institutions partially exempted from applying the new rule³⁹¹. Indeed, only the TST-D product was subject to a ceiling (€229 M per year). This way, the recommendation of the Council of statutory contributions, which had asked for a ceiling to all the CNC resources, was not followed³⁹².

However, the State broke the CNC's financing logic, based on the exclusive allocation to the institution of the revenues from TSA, TST, and TSV: it levied on the CNC's Fund, given the need to support the austerity program introduced after the 2007 global crisis³⁹³. Since 2008, the

³⁸⁹ Respectively, + 23 % and + 26 %, while the general prices increased of +17%. COUR DES COMPTES, *Les soutiens à la production cinématographique*, p. 75.

³⁹⁰ Indeed, in disregard of transparency, their compensations were often presented as fees paid for 'image rights', registering an increase of 119% in the early 2000s (*ibidem*, p. 77). A well-known French film producer reported that the salary of French actors ranged from €500.000 to €2 M when they performed in French films, whereas they ranged from €50.000 to €200.000 when the very same actors performed in foreign films (MARAVAL, V. "Les acteurs français sont trop payés!". *Le Monde* (2012)). Note that, faced with these findings, the CNC Board of Directors introduced a cap to the actors' remuneration in 2014, preventing productions that pay 'excessive compensations' to benefit from its programmes of aid (see arts. 211-44, 211-105 and 211-128 of the CNC's Regulation, as modified by the resolution of the CNC's Board of Directors November 24th, 2014).

³⁹¹ Art. 46 of Finance Act for 2012.

³⁹² For more information, see COMMISSION DES FINANCES, *Rapport d'information fait au Sénat par M. Aymeri de Montesquiou*.

³⁹³ The Finance Act for 2011 imposed an exceptional €20 M withdrawal on the CNC's Fund; that for 2013 detracted €150 M from it; that for 2014 €90 M. The State also asked the CNC to support some expenses (worth around €64 M) previously assumed by the Ministry of Culture. See COUR DES COMPTES, *Les soutiens à la production cinématographique*, p. 26.

Minister of Culture also stopped covering part of the CNC's operating by providing it with a subsidy of around € 2.1 M per year.

4.1.3. *The current situation and the search for new balances*

Thanks to the correctives adopted, the TST revenues started to diminish after 2011 and settled on relatively stable levels in the following years. They began to shrink again from 2017, with a peak in 2020, due to decreasing advertising resources following the lockdown due to the pandemic (fig. 12). Still, the TST continued to be by far the primary source of the CNC fund, contributing to its financing for 72%-to-78% between 2009 and 2019. However, forecasts suggest that resources from traditional televisions will progressively continue to decrease. In the face of this evidence, the Parliament decided to support broadcasters by reducing their levy in 2020 (from 5.65% of the yearly turnover to 5.15%³⁹⁴).

The second leading source of the CNC fund is the TSA (fig. 12). Given the positive attendance to French movie theaters³⁹⁵, its proceeds remained constant—except for 2020, due to the forced closure of theatres and the State's decision to exempt exhibitors from the TSA's payment during the most affected months.

³⁹⁴ See art. 193 of the Finance Act for 2020. The Act also established that television services focused on information and broadcasting exclusively programs they autonomously produce do not have to pay the TST.

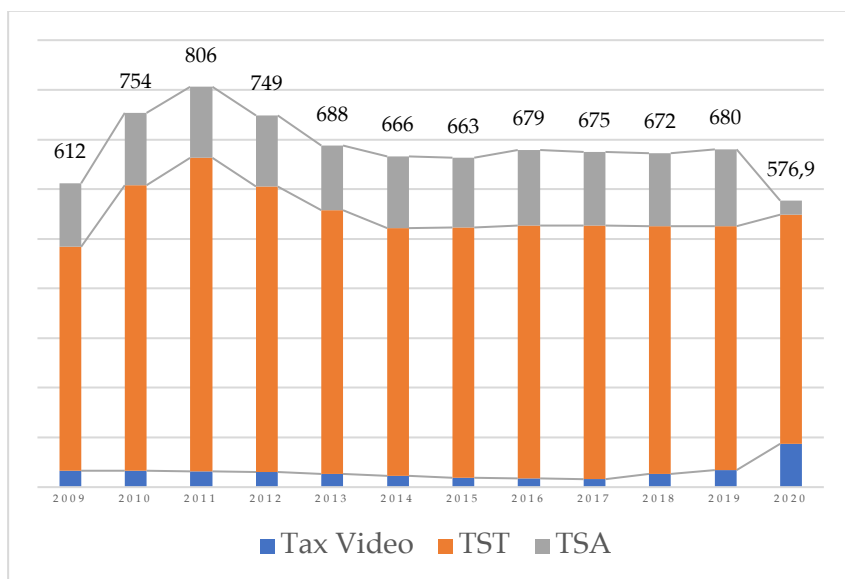
³⁹⁵ See fig. 7 of [par. 4.4. of Chapter II](#). Note that, before the pandemic, there was a discussion about the opportunity to increase the tax applied to exhibitors. Many parts consider indeed that cinema theaters (particularly the most important of them) contribute too little to the new creation, of which they are the first to benefit in the context of the media chronology. The aid they receive from the CNC tends to be more or less equal (if not even smaller) to the tax proceeds they pay, indeed (see COMMISSION DES AFFAIRES CULTURELLES ET DE L'ÉDUCATION, *Rapport d'information présenté par Mme Aurore Bergé*, p. 64). A proposal was to extend the TSA tax base, taking into account, besides the revenues from selling tickets, those from activities such as advertising and selling foods and beverages. They represent a significant percentage of the resources of major groups, indeed (See KOPP, P., *Le cinéma à l'épreuve des phénomènes de concentration: menace sur la filière indépendante du cinéma français*, Centre d'économie de la Sorbonne, 2016, p. 39).

The last source of funding is the TSV, which has remained constant over the last years, given that the non-linear operators' resources compensated for the continuous decrease of those from the DVD and Blu-ray market (**fig. 12**). In 2019, the TSV's proceeds recorded a first significant growth (+33% on 2018): the application of the tax also to foreign SVOD operators began to have effects. A significant increase also occurred in 2020, given the digital market's growth during the pandemic. In the years to come, the TSV contribution to the CNC's fund is expected to continue its increase, due to both the SVOD market's growth and the rise of the tax rate on them. Indeed, while reducing the obligations on traditional televisions, the Parliament increased the ones on digital operators in 2020 (from 2% to 5.15% of the turnover). This way, besides fiscal equality, it sought to keep the CNC's fund level constantly adequate. The strength of the OTT's contribution should indeed compensate for the reduction of that of traditional televisions and retailers of physical contents.

Still, in the year 2020, the increase of the TSV proceeds does not compensate for the reduction of the TSA and TSV (**fig. 12**). To fill the CNC's financial hole and to allow it to sustain the industry during the crisis³⁹⁶, the State broke the system's financial autonomy, transferring resources from its general budget to the CNC (**tab. 5**).

³⁹⁶ All the measures adopted in France to support the audio-visual industry in response to the Covid-19 pandemic are collected in the Book IX attached to the CNC's Regulation.

Fig. 12. The proceeds of the taxes financing the CNC's fund during the period 2009-2020.



Source. CNC "Bilans" and Commission de la culture, de l'éducation et de la communication "Avis n° 143 présenté au Sénat par M. Jérémy Bacchi sur le projet de loi de finances pour 2021", p. 7. Data in millions of euro.

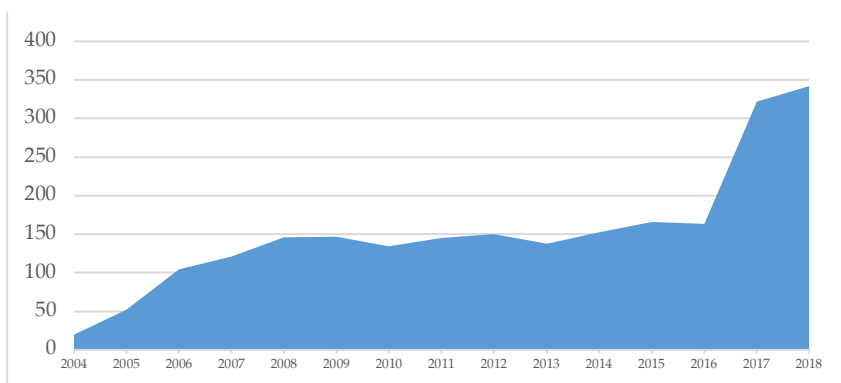
Tab. 5 CNC's budget in 2020 and 2021.

	2020 budget	initial 2020 estimations	new 2021
Net resources of the CNC	694,4	603,1	692,1
<i>Of where, coming from the TSA, TST and TSV</i>	675,5	588,9	667,9
State funding due to the pandemic		100	165
Total resources	694,4	703,1	857,2

Source. Commission de la culture, "Avis n° 143", p. 9. Data in millions of euro. Data in millions of euro.

It is worth to note that the CNC's fund does not give an exhaustive representation of State's funding for the film industry, since it finances only direct aids. The indirect ones are financed by the State's general budget. Even the resources granted indirectly have progressively increased over time (fig. 13). Indeed, the legislator progressively introduced new types of indirect aid. To the tax credit for attracting private investments in the film industry (established in 1985³⁹⁷) and the one for film producers (2004³⁹⁸), the legislator added those for the production of audio-visual works (2004³⁹⁹) and videogames (2008⁴⁰⁰) and a tax credit for attracting foreign production companies (2009⁴⁰¹). The increase was also due to the legislator repeatedly enhancing tax credits to raise their competitiveness on foreign fiscal incentives.

Fig. 13. Evolution of the State fiscal expenditure in favour of the audio-visual industry during the period 2004-2020 in France.



Source. CNC "Bilans", Court de Comptes "Les soutiens à la production cinématographique et audiovisuelle : des changements nécessaires", 2014, and Commission des finances, de l'économie générale et du contrôle budgétaire "Rapport d'information sur l'application des mesures fiscales à l'assemblée nationale par Joel Giraud and Cendra Motin", 2018. Data in millions of euro.

³⁹⁷Art. 40 of Law no. 695/1985 of July 11th.

³⁹⁸ Budget Law for 2004.

³⁹⁹ *Ibidem*.

⁴⁰⁰ Law no. 309/2007 of March 5th.

⁴⁰¹ Budget Law for 2009.

4.2. The Italian Fund: a partial adoption of the French model

Before the 2016 reform, the State funding for the cinema came from several sources in Italy. The leading one was the FUS, financed yearly by the general budget through the Finance Act⁴⁰² and meant to incorporate all the State funds for cinema, music, dance, and theater⁴⁰³. The FUS's overall budget for the entire entertainment sector was relatively constant during the period 2010-2016: € 407 M per year, on average⁴⁰⁴. The funding allocated to the cinema also remained relatively constant in those years: € 76,8 M per year, on average—around 19% of the FUS's total budget⁴⁰⁵ (as **fig. 14** shows).

State resources for the film industry also came from the special tax credit fund, managed by both the Ministries of Economy and Culture. Tax credits were introduced in 2007 as a temporary measure for the three years 2008-2011⁴⁰⁶—with an annual budget of €M 80—then extended after its expiration and finally made permanent in 2013⁴⁰⁷. The 2013 legislator also made the incentive available to producers of television and web-TV works, in addition to the cinematographic ones. On that

⁴⁰² See [par. 3.4. of Chapter I](#).

⁴⁰³ Until 1988, each sector received a fixed percentage of the FUS, as determined by art. 1 of the law establishing the FUS (42% for opera, 31% for music and dance, 25% for cinema, 15% for prose theatre and 1.5% for circuses). Since 1988 these quotas were abolished, and the Ministry of Tourism and Entertainment acquired the task of establishing the Fund's annual percentages allocation to the different sectors. In exercising this task, the Ministry should obtain the advice of the 'National Council of Entertainment', instituted by the same Law establishing the FUS and called to represent all sectors concerned.

⁴⁰⁴ CORTE DEI CONTI, *La gestione delle risorse del fondo unico per lo spettacolo destinate al settore cinematografico (anni 2010-2016)*, 2019, pp. 15 and ff. For a comprehensive view of the evolution of the FUS resources from 1985 to 2016, see OSSERVATORIO DELLO SPETTACOLO, *Relazione sull'utilizzo del Fondo Unico per lo Spettacolo e sull'andamento complessivo dello spettacolo*, 2016.

⁴⁰⁵ *Ibidem*.

⁴⁰⁶ Budget Law for 2008. The same law also introduced the tax shelter (experiment already adopted for the entire entertainment sector during the years 1986-1991). However, the legislator reconfirmed only tax credit and not also the tax shelter at their expiry.

⁴⁰⁷ Law Decree no. 91/2013 of August 8th, converted by Law no. 91/2013 of August 8th.

occasion, the annual budget for tax credit was increased to €M 110, then raised to €M 115 in 2015⁴⁰⁸.

In addition to the resources provided by the FUS and the tax credit fund, other sources of funding were flowing into the film industry—established by special and extraordinary provisions; among them, a percentage of the proceeds from the lottery. As pointed out by the Court of Auditors, «the different origin of the resources allocated to the film industry compromised the readability of the overall State expenditure in the sector and represented an obstacle to assessing the effectiveness of the support action [...]»⁴⁰⁹.

The 2016 reform overcame the presence of a multiplicity of different financing sources, offering an overall and unified vision of the State's support to the sector. Indeed, it established a new fund, which finances both direct and indirect aids⁴¹⁰. The reform also anchored the extent of the resources to defined parameters: it established that the fund should have a minimum annual endowment. This way, the industry is partially secured from the yearly negotiations on expenditures carried out during the adoption of the Budget Law, as well as from changes in governments' sensitivity to culture.

Initially, the minimum level of the Fund was € 400 M. However, in 2020, the State, besides supporting the industry during the pandemic by providing the Fund with additional resources⁴¹¹, also established a

⁴⁰⁸ Stability Law for 2016.

⁴⁰⁹ CORTE DEI CONTI, *La gestione delle risorse*, p. 37 («La diversa provenienza delle risorse destinate al sostegno del settore, da un lato, ha costituito un elemento di poca leggibilità dell'onere pubblico complessivo sopportato dal bilancio statale per il cinema, e, dall'altro, un obiettivo ostacolo per la valutazione dell'efficacia dell'azione di sostegno con riferimento alla complessiva strategia finanziaria di intervento nel settore»).

⁴¹⁰ Art. 13 of the 2016 Act. Its management is regulated by the Decree of the President of the Council of Ministers (DPCM) May 20th, 2017. The percentage of the fund allocated to each different type of aid is established each year by one or more ministerial decrees.

⁴¹¹ Indeed, the Law Decree no. 18/2020 of March 17th established the Fund for emergency in the entertainment and audio-visual sector, with an initial endowment of € 130 M, then increased by following provisions.

permanent increase: today, State resources to the audio-visual cannot fall below € 640 M⁴¹².

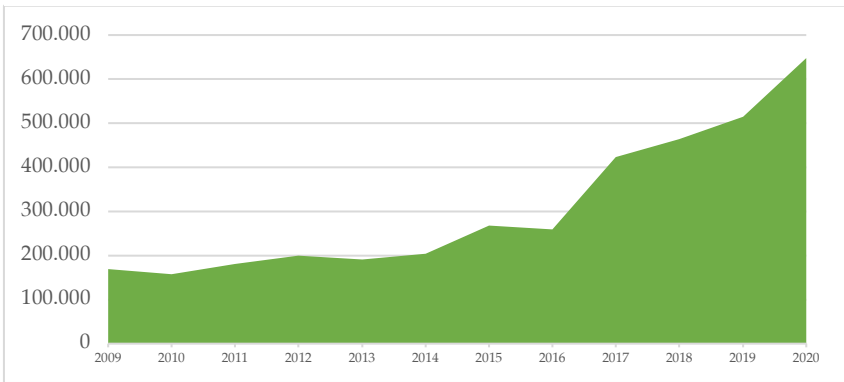
Looking at the French system, the 2016 legislator also introduced a link between the level of the film industry's turnover and that of the annual State's support. The higher the sector's resources, the higher should be those made available by the State for future creation. Indeed, the reform established that the Fund's actual endowment must be parameterized each year to 12% of the IRES and VAT revenue from the audio-visual sector—provided it does not fall below the minimum level. Therefore, the link between State expenditure and industry revenues is not automatic in Italy. The revenues from the taxes paid by theatre exhibitors, production, distribution, home video, television, fixed and mobile telecommunications, and Internet access companies are part of the State's general budget and are used to cover the overall public expenses. However, the State should consider their proceeds while determining the amount of resources to transfer to the film industry⁴¹³.

The arrangements introduced in 2016 generated a significant increase of State resources for the sector (as *fig. 14* shows). However, the increase is less significant than it would appear. In addition to works intended for cinema, the new Fund also supports those for television, the internet, etc. This way, State direct aid ceased to support only to cinematographic works, following the path already initiated in the context of indirect aids.

⁴¹² Art. 1, par. 583, let. a) of Budget Law for 2021.

⁴¹³ Following this mechanism, the Budget Law for 2019 increased the Fund's endowment by € 4 M compared to the minimum level provided by the 2016 Act; the following Budget Law for 2020 increased it by additional € 75 M.

Fig. 14. Evolution of State resources for the audio-visual industry during the period 2009-2020 in Italy.



Source. DGC. Data in millions of euro.

5. Aid to cinema production

Like the other European States, Italy and France aid film production asking for compliance with several requirements, referred to both the work and the operators involved in its realization⁴¹⁴.

First, besides not having a pornographic nature or incitement to violence and hatred, the work must be of cinematographic nature. If this is not the case, the applicant should ask for the aids to other audio-visual products. As explained, in both countries the distribution channel (cinema theatres) determines the work's cinematographic nature⁴¹⁵.

Second, to access State funding, works need to pass a 'cultural test', which operates differently depending on the type of aid concerned. In some cases, the work has to meet a minimum score by fulfilling some

⁴¹⁴ For an in-depth analysis of the requirements and conditions behind European State aid, see EUROPEAN AUDIOVISUAL OBSERVATORY, *Mapping of film and audio-visual public funding criteria in the EU*, 2019.

⁴¹⁵ See [par. 4 of Chapter II](#).

‘cultural criteria’. In other cases, a committee directly recognizes a cultural value to the film.

Finally, the work must have an adequate connection with the country that provides the aid. The criteria determining if such a link occurs come from the compromise reached between two different tensions: the State's desire to favour its national economy, and the need to respect the European principles protecting the treaties' fundamental freedoms. The Italian State requires the work to be of Italian nationality, i.e., it reaches a minimum score calculated on a series of indicators⁴¹⁶; they refer to the nationality of the artistic and technical cast (a Member State's nationality is equivalent to the Italian one); to whether the troupe members are subject to Italian tax law; the use of the Italian language or dialects; and the realization of activities in Italy.

In France, a sufficient connection with the country is measured according to different criteria specific to each aid scheme. However, the regulation provides the need to meet minimum scores related to several conditions for every aid to film production⁴¹⁷. As in Italy, the conditions taken into account are the French/European nationality, the establishment of the production company, the nationality of the cast, the realization of activities in France, the use of the French language, etc.

5.1. Direct aid

Italy and France support production with several direct aids, through which the State directly transfers money to specific works and companies considered worthy.

According to how the presence or lack of worthiness is measured, direct aids can be automatic or selective. In the automatic case, the measurement occurs based on objective criteria pre-established by the law, and the DGC and the CNC only have to verify if the applicant meets

⁴¹⁶ See the DPCM of July 11th, 2017, that implemented the provisions of the 2016 Act on the possession of the Italian nationality, and the following DPCM of August 11th, 2020. The latter partially modified the former, following the European Commission's indications aimed at avoiding possible distortions of competition in the internal market.

⁴¹⁷ See arts. 211-2 and ff. of the CNC's Regulation.

the eligibility requirements. In the selective case, a committee of experts assess whether the project submitted is worthwhile. While operating in compliance with the evaluation criteria established by the law, the committee has discretionary power in carrying out its assessment. Consequently, applicants to selective aids have a mere legitimate interest: they are never entitled to the aid; their only right is that the committee carries out the selection procedure correctly.

Automatic and selective aid also differs in respect of a temporal aspect. Automatic aids are granted on the basis of past productions: operators are 'awarded' for the success of their previous work through resources to realize the future ones. Selective aids follow a reversed logic, normally rewarding a future film's hopefully meritorious. The producer has not yet made a meritorious film but plans to do so, requiring economic support to this end.

5.1.1. Automatic aid: rewarding economic success in France, also the cultural one in Italy

Automatic aids are the most ancient instruments both in France and Italy⁴¹⁸, where they were adopted during fascism in the form of *contributi sugli incassi*. While their characteristics changed over time, their primary purpose has remained constant: to encourage successful companies to continue their activities.

Still today, automatic aids represent *ex-post* success-linked grants, recognized to a production company to realize a new film based on its previous film's success. The system is built to compel producers to move on to the next project continuously: they lose the aid if do not initiate a new film within five years from when the funding has been made available, i.e., credited to their deposit account within the CNC/DGC. The goal to maintain film production explains why automatic aids are given to production companies, not to physical persons: the State does not reward screenwriters or directors for their previous works' success,

⁴¹⁸ In Italy, arts. from 23 to 25 of the 2016 Act and the Ministerial implementing Decree no. 342/2017 of July 31st regulate automatic aid. In France, arts. from 211-1 to 212-63 of the CNC's Regulation govern them.

because it would be challenging for them to ensure the realization of a new film with the aid received⁴¹⁹.

The success—and therefore, the amount of granted subsidy—is measured according to objective and pre-established criteria. France only considers the economic success of the producer's previous films⁴²⁰. Thus, as noted, the French automatic aid «is closer to an industrial policy designed to maintain film production in general, than a cultural policy to support the production of particular films»⁴²¹. The Italian case is different. Like France, Italy assesses the virtuosity of production companies evaluating their previous films' economic success⁴²², which however makes up for only 60% of the total score, integrated with the producers' previous works' artistic and cultural achievements for the remaining 40%⁴²³.

However, to benefit from the Italian automatic aid, it is not necessary to reach a minimum threshold for the different types of success, but just for the overall score. Therefore, the State may end up rewarding companies for the economic success of projects lacking any artistic and cultural merit under the criteria of the State itself. It is what happened, for

⁴¹⁹ However, the Italian auteur body 100 Authors and the Italian Association of Cinematographic, Audio-visual and Multimedia Industries (ANICA) sealed an agreement on the matter. It establishes that story writers, screenwriters, and directors who worked in a film that generated automatic aid are entitled to a percentage of the aid (1,5% to story writers, 1,5% to screenwriters and 1.5% to directors).

⁴²⁰ More precisely, the amount of the aid depends on the revenues realized by the producer's previous film distribution via box office within the first five years following release, via the sale of videos and DVDs within six years of release, and via the sale of television rights within the first eight years.

⁴²¹ WALKLEY, S. E., *To what extent*, p. 95.

⁴²² The elements considered are the theatrical and home entrainment revenues and the proceeds from the sale of the distribution rights to AVMS providers.

⁴²³ This latter evaluation takes into account many aspects, showing that the State wants to reward companies: i) considered meritorious by the industry (criteria related to previous prizes awarded at festivals or international events); ii) able of operating at an international level (sales of the film's rights abroad, number of countries of the film's distribution); iii) likely to favour the emergence of new artists and increase the supply's pluralism and diversity (the work being a documentary, a short film, a first-time or second-time film director, a film of a young author or directed by a woman, etc.).

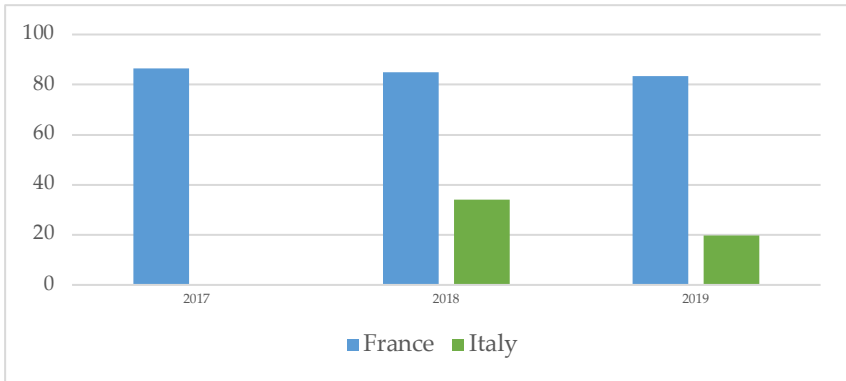
example, in the case of the production company Filmauro, which received € 113.800 to make a new film because of the success of its "*Super Vacanze di Natale*" (2017), that got 111 points for its economic success and 0 its artistic and cultural merit, neither having attended in festivals, nor won prizes, nor involved new talents⁴²⁴. In essence, like France, even Italy might end up granting the aid to companies whose previous films had controversial artistic and cultural impact.

Despite these limits, automatic aids are useful to achieve many State goals. The choice to reward those who have already succeeded (economically and/or artistically) is paradoxical only at first sight. It is true that established players are those that need State aid the less: by the virtue of their already-established success, they are more likely to secure funding from private sources, such as television broadcasters and banks. However, among the many goals behind cinema promotion, there is the one of strengthening the sector's industrial basis, making it capable of generating jobs, local spending, and to attract businesses and investments. The solidity of the sector's industrial basis implies overcoming the 'small-is-good' approach, and therefore the undercapitalization of the companies. There is a need for players with financial solidity, large enough to compensate the losses of one year with another's incomes and rely on budgets that allow for projects likely to competing at the international level. Automatic aids help satisfy these needs: they strengthen already established players and push them to continue their activities. Still, it is worth to notice that there is no evidence that the films financed by automatic aid would not be made even in the absence of such aid.

As **fig 15** shows, the level of automatic aid tends to be considerably higher in France than in Italy. Between 2017 and 2020 the amount of automatic aid yearly recognized for cinema production oscillated between €83 M and €86 in France, €19 M and €34 M in Italy.

⁴²⁴ See Decree of the General Director of the DGC of May 29th, 2019.

Fig. 15 Automatic aid for cinema production in Italy and France during the period 2017-2020



Source. Elaboration by the author of data provided by the CNC in its annual “Bilans” and the DGC. Data in millions of euro.

5.1.2. Selective aid: supporting ‘fragile’ works instead of cultural ambition?

When promoting cinema, States do not merely seek to support the general growth of the national film industries, but also to favour new players’ entering and fostering quality movies that may encounter difficulties in funding. These goals are not pursued with automatic aids: first, credits are available and can be reinvested once a producer has already realized at least one project—thus excluding new operators from the support; second, producers of challenging quality films not appealing to the large public may have no credits (France) or just a few credits (Italy) to call upon.

To address these issues, Italy and France provide a second direct funding mechanism: selective aid⁴²⁵, granted by committees⁴²⁶ in charge of

⁴²⁵ In Italy, art. 26 of the 2016 Act and the Ministerial implementing Decree no. 343/2017 of July 31st regulate selective aid. In France, arts. from 211-1 to 212-63 of the CNC’s Regulation govern them.

⁴²⁶ In Italy, the Committee comprises five experts identified from personalities of evident international reputation and proven professional qualification in the field, appointed by

selecting movies to fund based on artistic and quality considerations. Historically, they appeared later than automatic aids. During the authoritative periods of the past, they were meant to allow a State control over contents; they acquired their current function during the 50s and the 60s, when the two States ceased began to consider also the cultural dimension of the film industry.

In Italy, where at least 15-10% of the Fund's annual resources have to be granted selectively⁴²⁷, there are selective aids for all the sub-stages of the production phase⁴²⁸. Indeed, the State provides a selective aid for i) writing by new and young authors; ii) development and pre-production activities realized by small or medium-sized enterprises and newly established companies; iii) production of difficult, low-budget films, or films of 'particular artistic quality', and by first-time and second-time directors, or young authors. The only aid granted to physical people is the one for writing, otherwise, only production companies can request the contribute for development and production.

France has a broader range of selective aids. Each of them supports a particular aspect of one of the sub-phases of production and is subject to a specific regulation⁴²⁹. Many can be requested, rather than by the

the Minister of Culture. In France, there are several Committees. Each of them is responsible for granting one of the many existing selective aids to production. In any case, the Committees comprise members recognized by the film industry, appointed by the CNC's President.

⁴²⁷ See art. 3(4) of Law Decree no. 59/2019 of Jun 28th, converted by Law no. 81/2019 of August 8th, which modified art. 13(5) of the 2016 Act—that originally provided a higher percentage of resources to be granted selectively (18-15% of the Fund).

⁴²⁸ For the sub-stages of the production phase, see footnote 234 of [par. 3 of Chapter II](#).

⁴²⁹ Their large number generates criticism and discussion. As noted by the Court of Auditors in 2012, out of the 83 selective schemes provided by the CNC, ten absorb two-thirds of the total financial volume. Hence, the concerns about the approach followed: it generates high management costs and risks to have limited effectiveness since it ends up recognizing a limited monetary amount to most of the lines of support (See COUR DES COMPTES, *Les soutiens à la production cinématographique*, p. 90). However, some film operators consider all selective aids fundamental since each of them pursues a different specific goal. Among them: help authors to develop their stories (think about *l'aide à la création de projet, l'aide à l'écriture and à la réécriture*); aid producers to progress their projects, covering costs such as location research and feasibility studies (*aide au développement des*

production company, by authors, directors, and screenwriters. However, the ancient and most important selective aid to production is the advance on receipts, which supports debuts and high-quality films unable to find resources on the free market. It can be requested *avant* or *après* realization. Unlike Italy, France provides indeed selective support not only to fund new films, but also to reward operators which have already carried out a worthy film⁴³⁰.

While selective aid can overcome the limitations of automatic aid, it also causes some concern. One question is how the State can assess the merit of a film without entailing risks of discretionary judgments. The law established principles for the committees responsible for granting selective aids to attend, seeking to anchor their judgment on pre-established criteria, which remain, however, mostly physiologically subjective⁴³¹. There is no objective way to evaluate the cultural and

projets and the *aide pour l'élaboration des documents de préparation aux tournages*); foster the realization of films that promote the culture of French overseas departments and contribute to the training of their resident in film professions (*aide pour les œuvres cinématographiques intéressant les cultures d'outre-mer*); contribute to the emergence of new directors from all around the world by supporting the works they realize in coproduction with France (*aide aux cinéma du monde*, a 'pillar' of the French system, which expresses France's international commitment to cultural diversity); promote the creation of original music (*aide à la création de musique originale*), of works able to foster the emergence of new talents from the suburb area of the cities and showing a more faithful representation of the French society, compose by many immigrant populations (*aide image de la diversité*).

⁴³⁰ Initially, the advance on receipts was awarded only after the films' realization (art. 7 of the Decree no. 733/1959 of Jun 16th). Such an initial approach depended on Malraux's conviction that cinema was a visual medium and that a script could not indicate the look or quality of the completed work: «*il n'est au pouvoir de personne au monde de juger un film autrement que sur ses images*» (MALHARAUX, A., *Discours prononcés à l'Assemblée nationale: 1945-1976*, Assemblée nationale, 1996). Producers were allowed to submit also scripts in competition since 1963.

⁴³¹ Concerning the Italian case, the Decree about selective aid and the calls issued over time establish that the Committee must take into account, among other things: «the quality and originality of the script»; «its actual feasibility», evaluating the curriculum of the producer, the coherence of the work plane, that between the artistic ambition and the costs and between the project and the target audience; the «potential of fruition and diffusion of the work in festivals and cinemas in Italy and abroad»; the «vision and the style of the director and the cinematic language proposed»; the «quality of the artistic and technical

artistic value of a film, without giving rise to disputes. This process will always cause examples of films that were not financed but should have been, or which benefited from unjustified aid. Think, among the many, about the controversy that arose in France on the film "*Les Misérables*" (2019) by Ladj Ly: it did not obtain the advance on receipts, despite the high artistic and cultural quality of the project—testified by the fact that the film then won the Jury Prize in Cannes and four César⁴³².

However, even before wondering how the State can adequately decide what is worthy, one should first wonder if it is legitimate that the State substitutes itself to the market in taking such a decision. Without addressing the deep philosophical implications of such a profound question—which are beyond the purpose of this work and regard the concept of industrial policy at its very core—one can still identify some risks specifically related to the film industry.

For example, it is risky to use public money to support niche works that have little-to-no demand, which furthermore often comes from the richest and more educated part of the society. The risk is to generate an regressive redistribution effect. Obviously, an unsuccessful film does not necessarily represent a total useless expense of public money, since positive effects may still occur: for example, a big producer may stumble across a film of little success, acknowledge new talented artists, and involve them in future projects. In such a case, the selective aid would have achieved its aim of facilitating market access to new entrants. Still, it is desirable that the gap between what the State finances with the citizens' money and what the citizens benefit from is as small as possible.

In the context of Italian selective aid, there is a lack of incentives to push or allow operators to shoulder responsibility so that their cultural project also pursues an economic goal, seeking for an audience.

First, Italian selective aids should not be repaid, which seems to testify that the State considers the projects supported as economically unviable

participation», assessing the curricula of the artistic and technical team; the need to pursue gender equality, which leads to raising the score for projects involving a female direction.

⁴³² However, given the positive results achieved, the production company benefited from the automatic aid after the film realization.

from the outset, with no hope for the provided money of being repaid⁴³³. The French case is different: the advance on receipts is a loan with no interest, and therefore it must theoretically be repaid with the profits from the film's commercial exploitation, once it achieves a certain commercial return (at least € 50 000)⁴³⁴.

Second, the Italian law does not require the applicant to show evidence of a distribution deal as a condition for the disbursement of the last percentage of the subsidy⁴³⁵. Therefore, it is not excluded the possibility that the funded work will never be distributed and not benefit society—as it partially happens also in France⁴³⁶.

Third, Italian selective aid can be granted only to works with small-enough budget⁴³⁷. This way, the State avoids to aid projects realized by incumbent operators able to find resources autonomously. However, such a provision is likely to generate disincentives, since it risks pushing operators to keep their budgets low, hindering them from thinking ambitiously and managing to succeed.

Finally, despite the provision of a maximum number of projects that can be financed in each session, the budget for Italian selective aids ends up being dispersed across many projects—at least compared to France: probably too few resources are divided upon too many works⁴³⁸. By

⁴³³ However, Italian producers affirm that selective aids are not repayable because of the Italian administration's difficulty in managing the procedure of restitution due to the lack of specialized and numerically sufficient staff.

⁴³⁴ Art. 211-115 of the CNC's Regulation.

⁴³⁵ However, note that this condition, not provided by the law, is included in the calls: they require the applicant to give evidence of a distribution deal (to be submitted within 24 months) as a condition for the disbursement of the last 20% of the subsidy.

⁴³⁶ In France, only to benefit from the advance after realization it is necessary a contract for theatrical distribution—to be realized with a company having already distributed at least three films in the preceding two years. See art. 211-130 of the CNC's Regulation.

⁴³⁷ See art. 8 of Decree no. 343/2017.

⁴³⁸ In 2019, the French advance on receipts was worth €25.2 M and supported 87 films, which means an average of €289 for each film (CNC, *Bilan*, 2019, p. 25). In Italy, selective aid for film production was worth €23,7 M and financed 142 films, which means an average of € 167 for each film (DGC, *Elenco soggetti beneficiari contribute selettivi alla produzione*, 2019).

trying to simultaneously avoid both displeasing anyone, and the risk of giving significant resources to a few inexperienced and novice actors, selective aids actually do not appear to be selective⁴³⁹. It would be desirable to invest more resources in fewer projects⁴⁴⁰.

Selective aids indeed, as things stand now, seem not to seek culturally-relevant films that deserve support, but rather to back those which would not be realized due to insufficient funding. Such an approach does not seem consistent with the constitutional ratio of the State promotional action and the principle of substantial equality referred to in art. 3 of the Italian Constitution. The stated need to remove the obstacles to full access equality to the country's working, economic, political, and cultural life does not imply that all those who wish to make a film should have the right to do so with public funds.

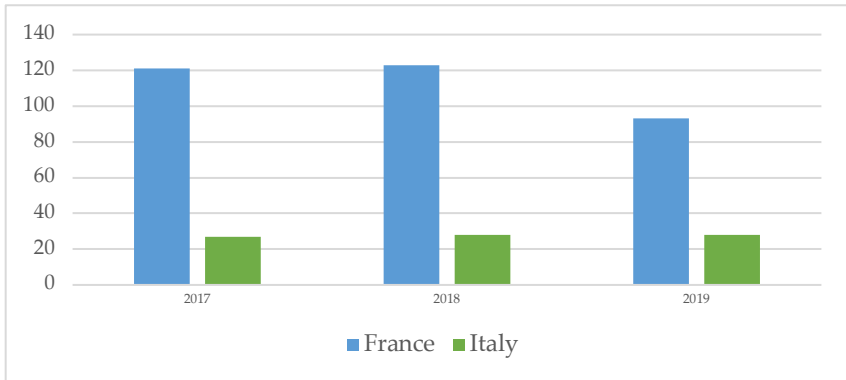
As **fig 16** shows, the level of automatic aid tends to be considerably higher in France than in Italy. Between 2017 and 2020 the amount of direct selective aid yearly recognized for the audio-visual production oscillated between €93 M and €123 M in France, €27 M and €28 M in Italy⁴⁴¹.

⁴³⁹ The difficulty is due, among others, to the composition of the Committee. The provision that its members should not have conflicts of interest makes it difficult for real experts to sit in the Committee: it is unlikely that a real expert does not have relations with film operators. Moreover, the provision that the members do not receive economic compensation for their activity is likely to generate an adverse effect; it can easily make unavailable those with effective competencies. Said provision is unfortunately familiar to those used to analyse the Italian legislation concerning culture.

⁴⁴⁰ This is also because a first work is likely to require more resources to achieve success than the one of an experienced director: the less the experience, the more the risk of unforeseen, and in turn the more the days of shooting and the costs.

⁴⁴¹ The figure presents the entity of automatic aid granted to produce all types of audio-visual works, not only the cinematographic ones. This is because the DGC data about each year's support do not always distinguish for each type of aid the amount given to the cinema and that given to the other audio-visual products.

Fig. 16 Selective aid for the audio-visual production in Italy and France during the period 2017-2020.



Source. Elaboration by the author of data provided by the CNC in its annual "Bilans" and the DGC. Data in millions of euro.

5.2. Indirect aid

Automatic and selective aids are 'imperfect' instruments on their own so that each one is called upon to overcome the limitations of the other. In addition to their specific risks, they both involve the danger that the States interfere with the free evolution of culture. Such a risk is particularly evident in the selective aid, through which the State decides in place of the market the industry's directions, but may also arise from the automatic support. While trying to increase opportunities, the legislator may create distortive effects and put new constraints, altering the choices of operators interested in qualifying for the conditions to obtain support⁴⁴².

Partly to reduce the problems intrinsic to automatic and selective aids and simplify the public administration's action, the European States usually also provide indirect aids to the film industry. Their main

⁴⁴² Think about the disincentive created by the reference system of the Italian Urbani Decree: it ended up pushing operators (interested in reaching higher scores) to resort to established actors and authors. This way, the legislator generated a conservative effect that reduced the incentives to innovate and diversify (see [par. 3.5. of Chapter I](#)).

characteristic is that their recognition does not require any evaluation: through indirect aids, the States create a favourable environment for the industry's general development, leaving it free to choose what to produce. Actually, both Italy and France, to comply with the cultural criterion dictated by the EU, require the work to be 'culturally eligible' to benefit from an indirect aid. However, such compliance is measured on generic and flexible criteria—to the extent that it is difficult to imagine works unable to satisfy them. Shortly, indirect aids seem to rely on the premise that the entire industry is meritorious, given it is a cultural industry.

Both in Italy and France, indirect aids to film production aim at encouraging production companies to realize new films ([par. 5.2.1.](#)), companies outside the sector to invest in the film industry ([par. 5.2.2.](#)) and foreign productions to shoot in Italy and France ([par. 5.2.3.](#)).

5.2.1. The internal tax credit: addressing the limits of direct aid in Italy and opposing the relocation trends in France

The French and the Italian States indirectly support film production companies through tax credits⁴⁴³. They are relatively new instruments: they have been existing in France since 2004⁴⁴⁴, and in Italy since 2008⁴⁴⁵. They allow charging against the producer's tax liabilities a percentage of a film's production costs (40% of the eligible costs in Italy⁴⁴⁶, 20% in

⁴⁴³ In Italy, tax credit to film production is regulated by art. 15 of the 2016 Act and arts. from 14 to 17 of the Ministerial implementing Decree no. 70/2021, which substituted the previous Ministerial Decree March 15th, 2018. In France, arts. from 220 to 220f of the French General Tax Code and arts. from D. 331-1 to D. 331-18 of the CCIA regulate it.

⁴⁴⁴ Budget Law for 2004.

⁴⁴⁵ Budget Law for 2008.

⁴⁴⁶ For dependent producers and non-European production companies, the rate is decreased to 25%.

France⁴⁴⁷), under specific caps⁴⁴⁸. While Italian producers have to reinvest the 80% of the amount received through tax credit within the film industry⁴⁴⁹, the French ones have not. Such a difference can be explained by the dissimilar aims of the tax credit instrument in the two countries.

In Italy, the goal behind tax credits is to simplify the management of State aids for the public administration and to promote the free development and growth of the industry, helping it to realize new films overcoming the limits of direct aids. In France, the primary goal of the tax credit is more limited and targeted: namely, to disincentive French producers from shooting their films abroad. Unlike most of the French direct aids, tax credit indeed includes among the eligibility conditions to realize filming mainly in France. This way, France seeks to foster producers to shoot in France, despite foreign competitive fiscal advantage (such as the Belgian tax shelter) or lower labour costs⁴⁵⁰. Accordingly, the assessment of the French tax credit's effectiveness is

⁴⁴⁷ The rate is increased to 30% for all cinematographic works entirely or mainly shot in French or in a regional language in use in France and also for those realized in a foreign language but having « *forts effets visuels* » (principles introduced in 2016, where previously the 30% rate applied only to films that, in addition to being shoot in French, had budgets below certain thresholds).

⁴⁴⁸ In both the countries, the tax advantage is indeed subject to two ceilings. In France the qualifying costs are capped at 80% of the production budget. Second, each work cannot benefit from a tax credit of more than € 30 M (it was € 1 M at the time of the introduction of the tax credit, raised to €4 M in 2013 and to €30 M since 2016). In Italy, some qualifying costs are capped (see art. 3 of the Decree no. 70/2021). Second, each work cannot benefit from a tax credit of more than € 9 M—increased to € 18 M if foreign resources cover at least 30% of the film's costs. In any case, dependent producers and non-European production companies cannot benefit each year from a tax credit of more than € 5 M.

⁴⁴⁹ See art. 8 of the Decree no. 70/2021.

⁴⁵⁰ For all the discourse, INSPECTION GÉNÉRAL DES AFFAIRES CULTURELLES E INSPECTION GÉNÉRALE DES FINANCES, *Évaluation des divers crédits d'impôt gérés par le Ministère de la culture*, 2018.

realized by considering the evolution of the number of shooting days carried out in France and the subsequent economic impact they entail⁴⁵¹.

Note that the French legislator modified tax credit several times due to the increase of international competition, making it more attractive by enlarging rates, eligible costs, cap, and easing the eligibility conditions. For example, French language is no more mandatory—a choice that made the second main goal behind the introduction of the French tax credit, i.e., promoting Francophonie, progressively disappear.

The tax credits should provide companies sure support: since it should be sufficient to meet the pre-established eligibility conditions and the DGC /CNC should not produce an evaluation assessment, there should be no uncertainty on whether a film qualifies for the benefit. However, the tax credit is a right for everyone who meets the eligibility conditions⁴⁵² only in France, where its resources are not contingent. The requests for tax credits are not satisfied with a percentage of the CNC's fund but by additional resources, defined each year within the budget law, based on the previous year's requests. Therefore, the actual amount of tax credit depends every year on the projects that applied for it.

The Italian case is different: the resources that fund tax credit are contingent, being a percentage of those of the Fund managed by the

⁴⁵¹ The CNC evaluates the instrument positively, noticing that 87.1% of French films spent more than 70% of their expenses in France in 2019; only 73.8% did so in 2003, the year before the entry into force of the tax credit. See CNC, *Bilan*, 2019, p. 259.

⁴⁵² In France, to benefit from the tax credit, the film production must be subject to corporation tax and respect the *législation social*—thus excluding companies misusing the 'intermittent' work. The film should respect the general conditions to be eligible for aid to film production; be carried out mainly on French territory, save exceptions (e.g., artistic reasons that require a part of filming abroad); be shot entirely or mainly in French or a regional language in use in France, save exceptions introduced in 2016 (the use of a foreign language is necessary for artistic reasons; the work is co-produced and its cost—equal to or greater than € 35,000 per minute—is covered for at least 30% by foreign funding); contribute to «the development of French and European film and audio-visual creation and its diversity». The presence of this last requisite is measured based on very vague criteria, suggesting that it can be recognized in every film. Indeed, according to art. D331-4 of the CCIA, it occurs for «*Les œuvres cinématographiques ou audiovisuelles qui, de manière significative, compte tenu du genre auquel elles appartiennent et des conditions de leur réalisation, sont de nature à promouvoir les talents et à stimuler et consolider la présence des ressources humaines et les capacités techniques requises pour la création cinématographique et audiovisuelle*».

DGC. Therefore, companies having the eligibility conditions⁴⁵³ actually 'compete' for the tax credit, presenting their requests to the DGC⁴⁵⁴. However, despite this budget constraint, the industry perceives its funding requests as rights to be satisfied. Although the law expressly provides that tax credits are satisfied within the limits of the resources actually available each year, some Italian producers assume indeed that they will benefit from them, counting tax credit in their projects' budget. This is also because producers know that, although unable to predict when, they will benefit from the aid, sooner or later—provided they present the eligibility conditions. The Ministry is trying indeed to solve the problem of overloading requests in the presence of limited funding by seeking new resources. For example, it has increased tax credits' resources by limiting those for other aid types.

However, it is debatable whether detaching tax credit from a closed fund would be desirable, since it would entail the risk to give foregone tax revenues—something that, however, happens for other types of tax credits in Italy. Moreover, the State would have to recognize an increasing level of support as the industry grows, hence in the absence of a real necessity. This is owed to how the tax credit instrument is built: the amounts of credit due depends on the eligible production costs,

⁴⁵³ In Italy, the film production company must be independent (in order to benefit from the tax credit with the 40% ordinary rate) and have a net worth of at least € 40,000. It must have a registered office in the European Economic Area and be subject to taxation in Italy. It must comply with the obligations related to social security, taxation, insurance, hygiene, and safety at work and apply the existing national collective labour agreements. The work must be of Italian nationality and meet cultural eligibility requirements. To this end, it must obtain a minimum score concerning criteria referred to both the 'production' and the 'content' (listed by Tab. A annexed to Decree no. 70/2021). The production criteria refer to Italian or European workers' employment and the carrying out of activities in Italy. Those related to the content also aim to ensure a link with Italy (setting of the film in Italy, story taken from Italian or European opera) and the existence of a cultural value. However, its presence is measured based on parameters very vague. For example, the script should concern «historical, mythological and legendary, religious, social, fantastic, artistic or cultural themes».

⁴⁵⁴ Initially, the DGC satisfied the requests based on a chronological order until the available resources were exhausted. It then began to recognize a preferential title to companies that did not obtain the tax credit in a previous session although eligible to it. Then, it began to take into consideration the films' shooting beginning: it recognizes tax credit first to the company that began to shoot sooner.

whose increase automatically reflects on an increase of tax credits. An increase in production costs usually happens when the industry expands (a robust industry can produce more films and films with higher budgets). Therefore, an industry's growth generates an increase in the tax credit resources granted to it. In light of this, it seems preferable to solve the problem by introducing stricter requirements to access the tax credit; this would also make it possible to avoid 'shower funds'.

The most recent regulatory interventions have not introduced structural solutions. Neither have they made unlimited the resources to satisfy tax credits nor have they introduced significantly more stringent criteria to access them. It is true that the 2021 Budget Law significantly increased the endowment of the Fund managed by the DGC⁴⁵⁵—a circumstance that should limit the problem of not sufficient resources. However, the same Law also introduced a higher tax credit rate⁴⁵⁶, making permanent its enhancement initially established only temporarily to support the industry during the pandemic. This last innovation is likely to generate an increase in the amount of tax credit required and, therefore, offset the results stemming from the increase of available resources. Even some of the novelties introduced by the 2021 Decree that currently regulates tax credit⁴⁵⁷ are likely to increase the requests. Indeed, the 2021 Decree enlarged the types of works eligible for tax credit (for example, video clips can now benefit from it), and also the type of actors; it established indeed permanent tax credit (at a reduced rate) for non-European and dependent producers⁴⁵⁸. A modification introduced by the 2021 Decree to be welcomed is that about the tax credit's ceilings; although not likely to reduce the tax credit requests, it should ensure the certainty of the rules. The 2021 Decree provided indeed that the ceiling no longer concerns companies and introduced the principle that it applies to the

⁴⁵⁵ See [par. 4.2. of this Chapter](#).

⁴⁵⁶ See art. 1(583) of Law no. 178/2020.

⁴⁵⁷ As said, the Decree no. 70/2021 substituted the previous Ministerial Decree March 15th, 2018.

⁴⁵⁸ See footnote 446.

works that benefit from the support⁴⁵⁹. The ceiling on companies, i.e. the provision that they could not benefit from more than a certain amount of the tax credit each year, was only theoretical. The Italian film industry, extraordinarily ingenious when it comes to finding solutions to overcome the regulatory principles that it does not appreciate, violated it. Large companies benefited from an amount of tax credit above the limits: once they had benefited from the maximum annual tax credit admissible, they continued producing through tax credits by simply outsourcing the realization of their works to other companies. Once the ceiling applies to works, these practices should not occur anymore.

Despite the difficulties due to the two conflicting principles highlighted (a budget constraint and an aid built as a tool to be recognized to anyone meeting the eligibility conditions), the Italian film industry significantly appreciates the tax credit. This is because of its automatic nature and also because it can cover a large percentage of a film's production costs. Moreover, it constitutes 'cash flow', since producers can benefit from it during the ongoing shooting, and not necessarily as a reimbursement at the end of the production. This explains why the tax credit recognition procedure comprises two steps: an initial and a final one.

Before filming commence, the production company asks for the tax credit to the DGC, submitting the documentation that testifies the eligibility conditions' meeting. If the conditions recur, the DGC informs the beneficiary of the temporary recognition to tax credit and transfers the approved amounts to the Revenue Agency, which shall charge the amounts into the tax boxes of the beneficiaries. Once the film is completed, the producer submits its final application, and the credit is definitely either confirmed or revoked. However, before the final approval and after a certain time from having obtained the temporary recognition, companies can start using the credit concerning the eligible expenses realized. Therefore, even before the tax credit's final recognition, producers can deduct the eligible expenses from the taxes they are called to pay. Even in France, producers should obtain a double approbation: one before shooting starts, one at its end. The producer that

⁴⁵⁹ See footnote 448.

obtains the agreement is entitled to the tax credit for all expenses incurred after the submission of its request for a preventive agreement. In both countries, the amount is to be returned in the lack of a definitive agreement⁴⁶⁰.

It is worth to notice that, to help smaller production companies that do not mature enough fiscal debt to exercise the credit, the Italian 2016 Act introduced the possibility of transferring the tax credit to banking-insurance intermediaries, which can use the credit to offset their tax debts⁴⁶¹. However, such a possibility—envisaged also in France⁴⁶²—is proving to be problematic in Italy. Italian banks tend not to accept the transferring. Lacking a clearly defined evaluating system based on which to assess audio-visual enterprises' reliability, they tend not to trust them. Their reluctance is that, if the producer loses the right to tax credit, they might be unable to recover the sums advanced and face a loss. Banks' reluctance is also because the transferee responds jointly with the transferor up to the unduly reimbursed amounts under Italian law⁴⁶³. Paradoxically, the tax credit transfer, designed to help small businesses without enough fiscal debts, seems easily viable only for large companies. Large companies are indeed more likely to have previous relationships with banks, based on which banks can assess their reliability.

⁴⁶⁰ More precisely, in France, the tax credit obtained must be refunded if: eight months after the date of the recognition of the *visa d'exploitation cinématographique*, the *agrément définitif* has not been obtained; two years after the end of the financial year for which the tax credit was obtained, the film has not obtained a *visa* (that is the authorization to screen a film in theaters, once it has been ranked to protect minors). In Italy, the tax credit must be refunded if: the production company does not submit the final request within 24 months from the submission of the prior request; the production company does not submit the final request within 180 days of the ministerial committee has established the rating of the film to protect minors.

⁴⁶¹ See art. 9 of Decree no. 71/2020.

⁴⁶² Note that in France, a producer unable to use the tax credit on time (that is, through the taxes due in the year of realization of the eligible expenditure) may also ask the administration to reimburse the sums to which it is entitled.

⁴⁶³ Art. 43*bis*, par. 2, of Decree of the President of the Republic no. 602/1973 of September 29th.

To conclude, note that, due to the tax credit's ease of application resulting from its automatic nature, Italy used this instrument to facilitate the resumption of filming after the lockdown. Indeed, it enhanced tax credits to allow producers to support the additional costs generated by the pandemic⁴⁶⁴. Before the pandemic, the rate of the tax credit for film production was 30% in Italy; the State temporarily increased it by ten percentage points up to a maximum of 40% in 2020⁴⁶⁵. The budget law for 2021 definitively increased the tax credit rate to 40%, making its enhancement permanent. Moreover: the State has established that the costs incurred to comply with hygiene and safety rules due to the Covid 19 give the right to a tax credit equal to 100% of their amount⁴⁶⁶. In addition, by way of derogation from the ordinary rules, it recognizes the tax credit for the eligible expenses already occurred even to companies that do not manage to complete a film's shooting for reasons entirely due to the epidemiological emergency⁴⁶⁷.

Even France upgraded the tax credit to support the industry during the pandemic by establishing a temporary increase in its rate, relating solely to expenses incurred in the 2021 fiscal year. With the same goal, the French State also granted some aid to film production in advance. However, the main support stemmed from a new, temporary instrument: the *Fonds d'indemnisation contre le risque de Covid-19*⁴⁶⁸. Through this fund, worth more than €M 100, the State covered expenses incurred by French productions forced to halt filming for reasons relating to Covid-19 (up to the value of 30% of their insured capital, with

⁴⁶⁴ The additional costs were due to both the existence of new expenses to implement health regulations on sets (diagnostic and screening tests, sanitization activities, rewrites of scenes to avoid crowds etc.) and the higher overall risk of film production. The risk arose because the more rules and limitations, the slower the shots; the slower the shots, the longer the shooting, and thus the costs. The risk also increased because, while shooting, producers could not know where, how, and when they would have been able to distribute the film.

⁴⁶⁵ See the ministerial Decree no. 312/2020 of July 8th. It was adopted based on art. 183 (7) of Law Decree no. 34/2020 of July 17th, which introduced the possibility of providing greater flexibility in the allocation of resources for cinema tax credits in order to support the industry during the emergency.

⁴⁶⁶ See art. 3, par. 3, let. e) of the Decree no. 70/2020.

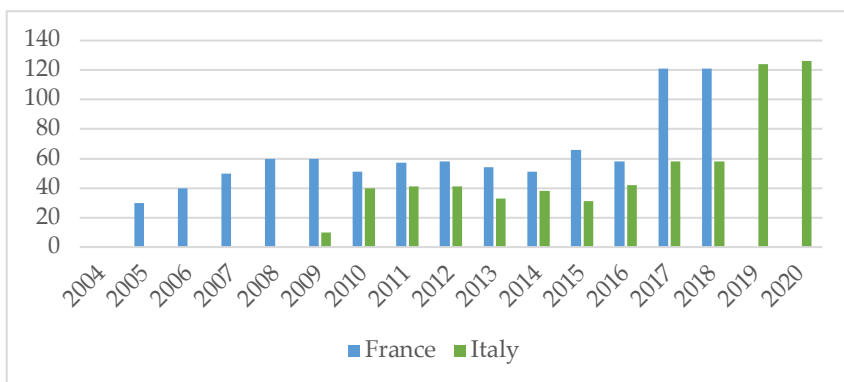
⁴⁶⁷ See art. 26(3) of Decree no. 70/2020.

⁴⁶⁸ Arts. from 911-3 to 911-13 of Book IX of the CNC's regulation govern it.

a ceiling of €1,8 M). This way, France solved the main problem that was compromising the resumption of filming, i.e. the lack of private companies willing to ensure producers from the risks arising from the pandemic. Said lack also occurred in Italy. To avoid it could compromise the resumption of shooting, the Italian State allowed shooting in the absence of insurances to cover the risks arising from Covid-19 if said insurances were not available on the market⁴⁶⁹.

As **fig 17** shows, from their introduction to today, the amount of tax credit yearly recognized to cinema production companies was quite similar in the two countries. It oscillated between €30 M and €142 M in France, €10 M and €126 M in Italy.

Fig. 17 State expenditure for internal tax credit to cinema in Italy and France during the period 2004-2020.



Source. Elaboration by the author of data provided by the CNC in its annual "Bilans" and the DGC. Data in millions of euro.

⁴⁶⁹ See the ministerial Decree no. 312/2020.

5.2.2. Stimulating investments from outside the industry

The Italian and French States provide indirect aid also to encourage individuals outside the industry to invest in film production by reducing the risk of their investments. The instruments adopted to this extent are guarantees to bank loans and fiscal incentives.

i. Loans guarantees (and direct loans). The relevant Italian institution for guarantees to bank loans is the Special Section for Cinema, which should be financed each year by a percentage of the Fund managed by the GDC. Envisaged by the 2016 reform, the Section had been established in 2018⁴⁷⁰. It operates within the Guarantee Fund, which has been in charge since 1996 to provide guarantees to loans in favour of small and medium-sized enterprises⁴⁷¹. The Special Section should provide guarantees (or counter-guarantees) to the banks that grant loans to small and medium-sized production companies (as well as to the companies that already guaranteed bank loans). The guarantee should cover up to 80% of the loan (or the guarantee), provided each company does not receive a guarantee of more than €M 2 and covers on its own at least the 10% of the project's cost.

In France, where exist banks specialized in credit for the film industry with audio-visual experts' teams⁴⁷², since the 80s the competent institution is the IFCIC⁴⁷³. It is in charge of facilitating financing from banks for all the companies active in the cultural and creative industries (such as fashion, design, publishing, etc.). However, the audio-visual industry is the one receiving most of IFCIC's support. Like the Italian

⁴⁷⁰ See Decree of the Minister of Culture, Economic Development and Economy and Finance March 23rd, 2018, adopted to implement art. 30 of the 2016 Act.

⁴⁷¹ For more informations on the Guarantee Fund, see MOCVINI, G. and TURCHINI, V. "Il sostegno pubblico alle imprese, oggi" in *Lo Stato promotore: una ricerca sul mutamento degli strumenti di intervento pubblico nell'economia*, ed by Bassanini, F., Napolitano, G. and Torchia, L., Fondazione Astrid and Istituto di ricerche sulla pubblica amministrazione, 2020.

⁴⁷² Among them: Natixis Coficine, Cofiloisirs, Neufilize-OBC, BNP-Paribas, and Banque Palatine. Note that some of these banks tend to support the realization of films from countries other than France, including Italian films.

⁴⁷³ See [par. 2.4. of Chapter I.](#)

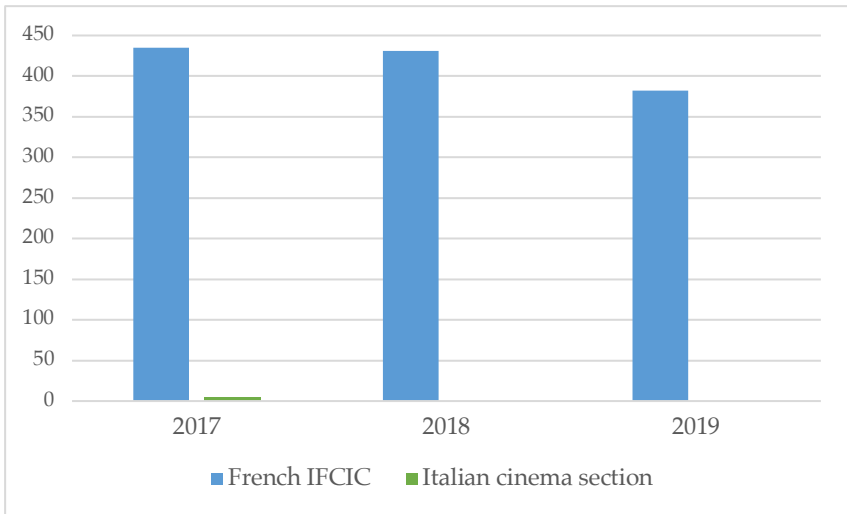
Cinema Section, the IFCIC reduces the risk of banks' loans to the film industry by guaranteeing them a percentage of the provided credit (whose rate usually varies between 50% and 70% in the audio-visual sector). Unlike the Italian Cinema Section, the IFCIC also supports distribution, exhibition, and promotion activities. Moreover, since 2006, the IFCIC's functions have ceased to be only those of a credit facilitator. Besides guaranteeing banks' loans, the IFCIC began to provide direct loans for projects that required reinforced support, actually introducing an additional form of aid to the industry. However, the most of IFCIC's resources (more than 90%) are still used to provide guarantees⁴⁷⁴. To realize its activities, the IFCIC manages a fund financed almost entirely by the public sector (the State, the CNC, and others), whose endowment is determined each year by the budget law. Since 2017, the EU has also begun to finance IFCIC's activities: the program Creative Europe re-guarantees the IFCIC by an average of €30 M each year. Consequently, the IFCIC began to support also non-French films.

As **fig. 18** shows, the quantity of resources by which the IFCIC supported the audio-visual industry in the last years are incomparable higher than those provided by the Italian Cinema Section. The latter received a percentage of the Fund managed by the DGC (€ 5 M) to provide guarantee for the film industry only in 2017. The IFCIC, a much older institution and with established operating methods, recognized instead to the audio-visual industry an amount of guarantees and direct loans annually varying between € 435 M in 2017 and € 382 M in 2019 (most of which devoted to film production⁴⁷⁵). Interestingly, the IFCIC's support to non-French films is increasing: in 2019, non-French films received €39 M in terms of guarantees and €M 3.6 of loans, respectively against €20.5 M and €1.3 M in 2018, and €18.9 M and €0 M in 2017.

⁴⁷⁴ As it appears by analysing the IFCIS's annual activity reports.

⁴⁷⁵ Concerning 2019, out of the overall € 382 M, the film production benefited from nearly €236 M, with an average lending rate of € 4.4 M. The remaining resources supported the exhibition phase (€22,8 M), the cinematographic works national distribution (€5 M) and export (€5,5 M) and audio-visual products other than cinema.

Fig. 9 Resources for the audio-visual industry from the Italian Cinema Section and the French IFCIC in the period 2004-2020.



Source. For Italy, data proved by the DGC; for France, annual reports of the IFCIC. Data in millions of euro.

i. Fiscal incentives. Both the Italian and French States provide fiscal incentives to private individuals investing in film production. This way, the States ensure the restitution of part of the investment, partially compensating the possibility of a flop. The approach of the two States on the matter differs. Only the French one manages to avoid fraudulent behaviours and ensures the State a ‘control’ on the works that benefit from the incentive.

The Italian State allows for a direct relationship between the producer and the external investor. Since 2008⁴⁷⁶, it has recognized to privates outside the film sector the possibility to charge against their tax liabilities a percentage (30%-to-40%) of their investment in independent film production⁴⁷⁷. France intermediates instead between the producers and

⁴⁷⁶ Budget Law for 2008.

⁴⁷⁷ Art. 20 of the 2020 Act and the Ministerial implementing Decree March 15th, 2018 regulate this tax credit (the ‘external tax credit’). The maximum amount of credit is € 1 M

the external investor through the SOFICAs, that have been existing since 1985⁴⁷⁸. They are in charge of private fund-raising for film production in return for a tax advantage. Indeed, the private who subscribes to a SOFICA share acquires a tax advantage on income tax up to 30% of the subscription amount (increased to 36% and even 48% in some cases). Therefore, private individuals do not invest directly in films in France, rather they buy shares in the SOFICAs, which will then decide which products to finance through the amount collected.

The public sector strongly frames the constitution, activities, and dissolution of SOFICAs. Cinema operators or banks can initiate one of them, provided they had obtained the Ministry of Economics' approval. The number of SOFICAs that can coexist is fixed, each of them can operate with a maximum authorized fund-raising amount notified by the Minister of Economy, and is automatically dissolved five years after the constitution. During their activities, SOFICAs are monitored by the CNC, the French office for tax and public finance, and the French Financial Market Authority.

The SOFICA's mediation between external investors and producers ensures two results, which can be missing in Italy. First, the tax revenues foregone by the State to encourage external investments do not finance mostly projects with high commercial potential, less risky for external investors. Through its control, the State pushes SOFICAs to invest the collected money in 'meritorious' but 'difficult' projects. Indeed, the more a candidate company commits to the goals of supporting independent productions, works of first and second-time directors, etc., the more it will have the opportunity to receive the permission to operate and the more its maximum authorized fund-raising amount will be relevant. As noted, «SOFICAs are oriented towards a specific type of production, namely that already targeted by the CNC's selective support schemes, as

per year per enterprise, €2 M per group of enterprises and €4 M for collective investment groups. The external investor's contribution (80% of which must be spent on national territory) shall cover at least 5 % of the film's eligible production cost and shall not exceed 49 % of it. This last ceiling aims to ensure that the producer maintains the responsibility to gather most production resources. This way, the legislator balances the need to attract private investment and that to protect and enhance the role of the film producer.

⁴⁷⁸ Art. 40 of Law no. 695/1985 created SOFICAs. Today art. 199 unviciated and arts. from 238 bis HG to 238 bis HM of the French General Tax Code regulate them.

a supplement to them»⁴⁷⁹. However, such an approach does not compromise the attractiveness of the scheme: SOFICAs diversify the risk investing in several projects, thus mitigating the danger of possible losses from works with limited market potential.

On the opposite, in Italy, where exists a direct relationship between the producer and the investor, the State cannot control the projects that benefit from the tax credit. However, some 'correctives' encourage investments in works that may be less attractive but considered 'meritorious' by the State. Indeed, the tax credit rate raises to 40% in the case of investments in projects funded by selective aid.

The second result ensured by the French approach is a deficiency of fraudulent behaviours . As noted, «in 23 years, unlike other tax incentive schemes, no serious disadvantages nor fraudulent transactions have been recorded [...] Beyond the quality of SOFICAs' managers, this legal soundness is essentially due to the legislator's initial choice to set up a front public limited company between the subscriber beneficiary of the tax advantage and the production company beneficiary of the investment. This approach significantly increased the scheme's transparency and avoided transactions with only fiscal purposes (as occurred instead in other countries). The other key factor of this legal success is the controls exercised on the SOFICAs»⁴⁸⁰.

On the contrary, the Italian approach limits the State's capacity to avoid malpractices. The 2016 reform and its implementing decree modified the

⁴⁷⁹ BOUTONNAT, D., *Rapport sur le financement privé*, p. 11 («En somme, les SOFICA sont orientées vers un type spécifique de production, à savoir celle déjà ciblée par les dispositifs de soutien sélectif du CNC, comme un complément de financement à ceux-ci»).

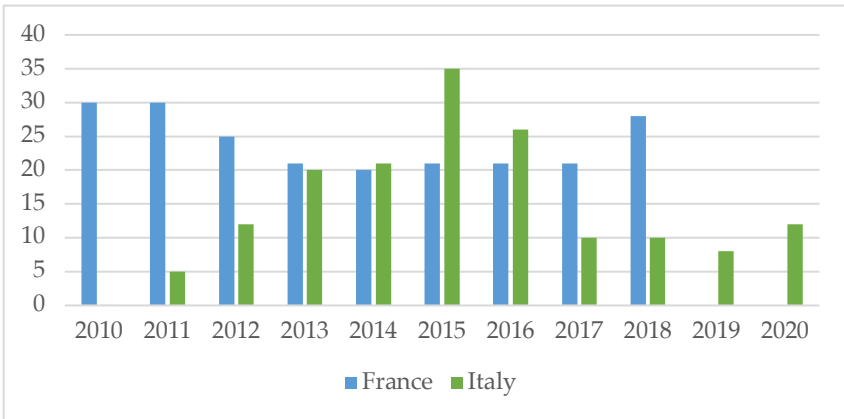
⁴⁸⁰ See CHEVALLIER, P., *Les Soficas: rapport de mission*, 2008, p. 5 («En 23 ans, contrairement à d'autres dispositifs d'incitation fiscale, aucun incident sérieux ni, a fortiori, aucune opération frauduleuse n'ont été constatés, et, pour répondre par avance aux inquiétudes exprimées lors de débats parlementaires précédents, toutes les productions réalisées avec le soutien des Sofica existent réellement et ont été diffusées, en salles et sur les chaînes de télévision. Cette solidité juridique tient essentiellement, au-delà de la qualité des gestionnaires, au choix initial du législateur de créer une société-écran, sous la forme d'une société anonyme, entre le souscripteur, bénéficiaire de l'avantage fiscal, et la société de production, bénéficiaire de l'investissement. Cela a permis d'augmenter considérablement la transparence du dispositif, et d'éviter des opérations dont le seul et unique objectif serait de nature fiscale (comme cela a été le cas dans d'autres pays). L'autre facteur-clé de cette réussite juridique tient aux différents contrôles exercés sur les Sofica»).

procedural rules to reduce the distortions that had occurred over time. However, the external tax credit's concrete application continued to generate elusive behaviours. There are cases in which producers and external investors adopt hidden internal agreements to limit the investors' risk. It can happen that producers accept a financial contribution from the external investor lower than the one declared; or that they ensure a profit to the external investor independently from the film's results. In these cases, the investor defrauds the State: he/she benefits from a tax incentive introduced to reward a meritorious action that he/she does not accomplish—or accomplish to an extent less significant than that declared and based on which the amount of the benefit is calculated.

The reason why some Italian producers accept these practices is that they need liquidity. Indeed, despite the many existing public aids, they often face cash problems. Some forms of support are awards for an already realized project (think to the automatic ones). Sometimes there is a delay in the granting of the aids. In some others, there is no way to mobilize the support in a short time—think of a producer not having sufficient tax debts to use a tax credit and unable to find a bank that is available to accept its transferring.

As **fig 19** shows, the amount of tax credit yearly recognized for attracting investments in the audio-visual industry in the two countries is similar. Between 2010 and 2020, it oscillated between €20 M and € 30,3 M in France, € 0,1 M and €35 M in Italy.

Fig. 19 State expenditure for tax credit for investors outside the industry in Italy and France during the period 2010-2020.



Source. Data provided by the DGC, the CNC, the Cours des Compte and by the Commission des finances. Data in millions of euro.

5.3.2. Competing for attracting major foreign productions

The Italian and French States adopt indirect aids also to attract major foreign film projects in their territories⁴⁸¹. Indeed, they both provide a tax credit to repay a percentage of the foreign production and post-production costs incurred in Italy⁴⁸² and France⁴⁸³.

⁴⁸¹ In Italy, the Budget Law for 2008 introduced *il credito d'imposta per l'attrazione in Italia di investimenti cinematografici e audiovisivi*. Art. 19 of the 2016 Act and arts. from 19 to 24 of the Ministerial implementing Decree March 15th, 2018 regulate it. In France, the Budget Law for 2009 introduced the *crédit d'impôt pour dépenses de production exécutive d'œuvres cinématographiques ou audiovisuelles étrangères*; today, arts. 220quaterdecies and 220z of the French General Tax Code and arts. from D. 331-38 to D. 331-64 of the CClA regulate it.

⁴⁸² In Italy, the tax credit rate varies between 25% and 40%. Each company cannot benefit each year from more than € 20 M trough tax credits.

⁴⁸³ In France, the percentage is normally 30%. However, the rate is increased to 40% for works of fiction that realize in France at least €2 M of expenses for visual effects. The tax advantage is subject to two specific ceilings. First, the qualifying costs are capped at 80%

The two States can recognize tax incentives only to companies liable for corporate income tax within their national territories. For this reason, the tax credit is granted to the national firms that, under an agreement with the foreign ones, are in charge of the management of the production/post-production activities realized in Italy or France. Foreign producers indirectly benefit from the credit by getting an actual cost reduction from the national companies⁴⁸⁴.

The two States want to attract foreign productions in their country for many reasons—similar to those underpinning the support of national territories autonomies. First, foreign productions (particularly the large Hollywood ones) can bring financial benefits to the local economy: consider hotel accommodations, transportations, living costs, etc. of the several hundred people involved in such an activity, as well as the local jobs for national workers and artists; and the fact that the national country usually sources most production materials. Second, foreign films shoot in Italy and France can, as a side effect, increase tourism and promote the two countries as a whole.

The will to pursue an economic impact is clear from the eligibility conditions provided to access this tax credit and the nature of the costs considered admissible: they ensure that foreign companies employ national or other European workers and realize a minimum expenditure level on the national territory⁴⁸⁵. In this case, too, there is no assessment of the merit of the work that tax credits end up financing. The criteria

of the production budget. Second, each work cannot benefit from a tax credit of more than € 30 M.

⁴⁸⁴ Like the procedure for the internal tax credit, even that for obtaining this type of tax credit comprises two steps, that of prior and that of final demand. The goal is to allow companies to start using the benefit during film production, supporting their cash-flow.

⁴⁸⁵ In France, the eligible expenses, increased in 2012, are the recompenses of French and European artists and technical industries; transport costs, catering, food, and lodging. The films, in addition to not being eligible for aid to film production and not being a documentary, should generate an expenditure in France of at least €250,000 or, if the production budget of the works is less than €500,000, of an amount corresponding to at least 50 % of the budget. The Italian case is similar: the eligible expenses are those incurred on Italian territory, using mainly Italian workers.

that assess if a film is 'culturally eligible' are so vague that there could hardly be works unable to meet them⁴⁸⁶.

However, there are also other types of benefits that foreign production can bring. For example, those arising from transfers of technology, know-how, and expertise from the foreign operators to the national audio-visual workers. Finally, the presence of foreign productions can favour the establishment of relations between foreign actors and the national ones, thus increasing the possibilities of advantageous collaboration for the national industry and the involvement of national actors or directors in international projects.

The competition between countries to attract foreign producers is fierce: as the competition intensifies, the States increase their tax credits as well. The French case is paradigmatic⁴⁸⁷. The French international tax credit was introduced in 2008 because producers were increasingly shooting films based on French stories, characters, and locations outside France

⁴⁸⁶ In France, the works should count «in their dramatic content, elements related to the French culture, heritage or territory» («dans leur contenu dramatique, des éléments rattachés à la culture, au patrimoine ou au territoire français»). This requirement is met if the projects reach a minimum score in relation to a set of indicators related to the 'Dramatic Content' (main characters from France, French-speaking country or Europe; story able to valorise the French artistic heritage or a period of the French history or story related to political, social or cultural issues linked to the French or European society; number of scenes set in France etc.); 'Nationality of Creators and Creative Collaborators' (French or European professionals in leading roles, or as a majority of the crew); and 'Production Infrastructure' (use of French shooting or technical production and post-production facilities). In Italy, the work is 'culturally eligible' if it obtains a minimum score concerning criteria referred to both the 'production' and the 'content' (listed by Tab. A annexed to Decree March 15th, 2018). The production criteria refer to Italian or European workers' employment and the carrying out of activities in Italy. Those related to the content also aim to ensure a link with Italy (setting of the film in Italy, story taken from Italian or European opera) and the existence of a cultural value. However, its presence is measured based on parameters very vague. For example, the script should concern «historical, mythological and legendary, religious, social, fantastic, artistic or cultural themes».

⁴⁸⁷ For an in-depth analysis of the improvements of the instrument realized to compete with other countries and the public debate on the matter, INSPECTION GÉNÉRALE DES FINANCES AND INSPECTION GÉNÉRALE DES AFFAIRES CULTURELLES, *Evaluation des divers crédits d'impôt*.

due to the neighbouring fiscal incentives⁴⁸⁸. Despite its introduction, a strong international tax competition environment led to numerous relocations of audio-visual projects outside of France in 2015. Indeed, nine new tax credits were introduced in that period, some in countries already attractive due to their very low cost of labour (Serbia, Ukraine, Montenegro)⁴⁸⁹. Other countries revaluated their schemes to make them more competitive. This was the case of Ireland, whose tax credit rate increased from 28% to 32% in 2015⁴⁹⁰. To counteract the trend of a reduction in foreign films shot in France, the French Government increased the ceiling from €20 M to €30 M in 2016, and introduced a rate of 40% for works of fiction with strong visual effects that produce in France at least €2 M in expenditures of visual effects. This way, the State expenditure to satisfy tax credit for foreign production have progressively increased (as **fig 20** shows).

Several parts consider engaging in this fierce competition not worthwhile. However, although not recent, studies prove that the revenues generated by foreign companies shooting in the national territory are higher than public spending for tax credits. A study about the first years of existence (2008-2011) of the Italian tax credit noted that «for every € 1 not collected by the State, an investment of € 1,56 occurred, with a € 0,56 net effect»⁴⁹¹. A French study of 2014 reports that for € 1 of the tax credit, € 7 of expenditures occurred in the audio-visual sector, and the State receives € 2,7 as taxes and social receipts⁴⁹².

As **fig 20** shows, the amount of tax credit recognized for attracting investments in the audio-visual industry from foreign production

⁴⁸⁸ Thus reported by EUROPEAN AUDIOVISUAL OBSERVATORY, *Impact analysis of fiscal incentive schemes, supporting film and audio-visual production in Europe*, 2014, p. 79.

⁴⁸⁹ Thus reported by COMMISSION DE LA CULTURE, DE L'ÉDUCATION ET DE LA COMMUNICATION, *Avis n° 145 présenté au Sénat par Mme Françoise Laborde sur le projet de loi de finances pour 2020*, 2019, p. 29.

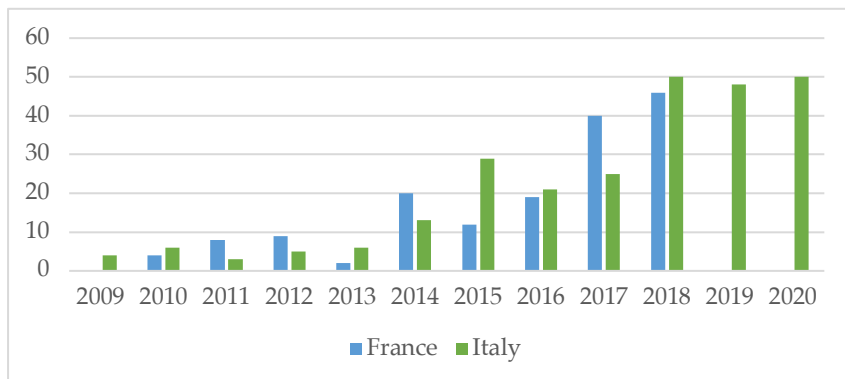
⁴⁹⁰ Thus reported by COMMISSION DE LA CULTURE, DE L'ÉDUCATION ET DE LA COMMUNICATION, *Avis n° 145*, p. 30.

⁴⁹¹ ANICA, DIREZIONE GENERALE CINEMA and LUISS UNIVERSITY, *Le ricadute del tax credit: l'impatto economico delle forme di incentivazione alla produzione cinematografica*, 2012, p. 101.

⁴⁹² CNC and ERNST & YOUNG, *Évaluation des dispositifs de crédit d'impôt*, 2012.

companies is similar in the two country. Between 2009 (the first year of application of the measure) and 2020, it yearly oscillated between € 2 M and € 56 M in France, € 3 M and € 50 M in Italy.

Fig. 20 State expenditure for tax credit for attracting foreign production companies in Italy and France during the period 2009-2020.



Source. Data provided by the DGC, the CNC, the Cours des Compte and by the Commission des finances. Data in millions of euro.

6. Aids for distribution, exhibition, and promotion

In addition to the production phase, which has traditionally obtained the most funding in Europe⁴⁹³, both Italy and France support the other stages of the film's life cycle. Indeed, support to production alone risks stimulating the creation of audio-visual content without ensuring appropriate distribution and promotion for the resulting work and therefore likely to meet an audience.

More precisely, based on the same mechanisms adopted to support production, France and Italy grant aid for distribution (i) and exhibition (ii), as well as for several other activities that contribute to the industry promotion (iii). While Italy relies mainly on indirect instruments, most French support is granted through direct aid.

⁴⁹³ For the reasons of this occurrence, see [par. 3.1. of Chapter II](#).

i. Support to distribution. The French State does not seek to support the whole distribution sector but mainly to encourage distributors to suggest theatres 'meritorious' films with little commercial appeal. To this end, France provides only direct aids, both automatic and selective, not even fiscal incentives.

Automatic aid are granted to distributors based on the box office revenues of the films they have already distributed⁴⁹⁴. The rate of the aid is degressive: the higher the film's revenue, the lower the support. Moreover, the films' revenue is capped: distributors do not receive support for films whose box office revenues exceed € 6,15 M. Also, the support increases if the distributor uses the sums received to distribute French films with a production budget of less than € 8 M. This is way Marc Le Roy affirmed that «*Le but affiché de ce régime de soutien n'est donc pas de récompenser le succès mais de limiter les risques de perte d'argent pour les distributeurs afin de les inciter à distribuer des films qui semblent peu commerciaux*»⁴⁹⁵.

Selective aids⁴⁹⁶ are five: *aides à la distribution d'œuvres inédites*, given for the distribution of films funded via selective aids and those culturally significant but 'difficult' to bring to the market; *aides à la distribution d'œuvres de répertoire*, which encourage the distribution of old French or foreign films; *aides à la distribution d'œuvres destinées au jeune public*, promoting the distribution of films for young audiences, which can be less marketable than those appealing to a broader spread of ages; *aides à la structure*, allocated to distributors with financial fragility that realize a 'quality' activity; *aides à la distribution à l'étranger des œuvres représentatives des cinématographies du monde*, which promote the distribution of films co-produced between a European country (not necessarily France) and a non-European one.

⁴⁹⁴ Arts. from 221-5 to 221-23-10 of the CNC's Regulation govern them.

⁴⁹⁵ See LE ROY, M., "Cinéma".

⁴⁹⁶ Art. from 221-24 to 221-79 of the CNC's Regulation govern them.

The Italian approach is different. As France, Italy provides both automatic⁴⁹⁷ and selective⁴⁹⁸ aids to distribution. However, only the latter aim at supporting the distribution of 'quality films' with limited commercial appeal: they are indeed granted to independent distributors for the national or abroad distribution of the types of works supported by selective aids to production. The former seek instead to strengthen successful distribution companies and incentivize them to continue their activity. Their entity depends on the economic, artistic, and cultural success of the works that distributors have previously distributed.

Unlike France, Italy supports distributors also through indirect aid, providing a tax credit for the costs related to the national and international distribution of Italian works⁴⁹⁹, thus supporting the whole sector, as opposite to France. In the past, the modulation of the tax credit allows for higher support to distributors considered by the State more meritorious than others: for example, the rate of the tax credit increased from 30 to 40% in the case of independent producers that autonomously distributed their work. Today, said corrective does not apply anymore: the maximum rate of 40% applies in any case⁵⁰⁰.

It is worth noticing that both the Italian and French States have increased their support for distributors during the Covid-19 pandemic. The central support stemmed from the possibility to distribute films financed by State aid to the cinema immediately online or in television during the forced closure of theatres⁵⁰¹. Indeed, postponing a film's release for a distributor means postponing the revenues resulting from often very substantial investments; and the longer the delay of a film's distribution,

⁴⁹⁷ Arts. 23, 24 and 25 of the 2016 Act and the Ministerial implementing Decree no. 342/2017 govern them.

⁴⁹⁸ Art. 26 of the 2016 Act and the Ministerial implementing Decree no. 343/2017 govern them.

⁴⁹⁹ Arts. 16 and 20 of the 2016 Act and the Ministerial implementing Decree March 15th, 2018 regulate them. They operate based on the same mechanisms of the tax credits to film production.

⁵⁰⁰ See art. 16 of the 2016 Act, as modified by the Budget Law for 2021 (art. 1, par. 583 and 584 of Law no. 178/2020).

⁵⁰¹ See footnote 313, in [par. 4.3. of Chapter II.](#)

the higher the investments required to keep publicizing it without losing the promotional effects already generated. The two States granted distributors also higher financial aids⁵⁰²; moreover, they allowed operators to use some of the aids not only to realize the activities required by ordinary rules (such as distributing a new film) but also to face pressing liquidity needs arising directly from the consequences of the pandemic.

ii. Support to exhibition. France and Italy pursue the same goals in aiding the exhibition sector. First, they encourage the creation of new theatres and the upgrade of the existing ones. Second, they incentivize the programming of 'meritorious' works with limited commercial appeal. If producers are willing to take the risk of realizing films considered as difficult or risky, and distributors to promote them, then there exists the need for screens for their release. In Italy, the results of these aids are somehow questionable: there are not enough available screens for adequate time for all Italian films funded by the State⁵⁰³.

France incentivizes the creation and maintenance of theatres by providing direct aid, both automatic⁵⁰⁴ and selective⁵⁰⁵. All exhibitors benefit from the automatic ones: like producers and distributors, they receive an aid based on the revenues of films they have exhibited, to be used to renovate and upgrade their facilities. Concerning the selective aids, the most important are *les aides à la petite et moyenne exploitation*, granted for the creation and modernization of small and medium-sized cinema theatres. Their entity increases if the project concerns geographical areas not sufficiently equipped with theatres or art-house

⁵⁰² The Italian State supported distributors by temporarily enhancing the tax credit in their favour (see the ministerial Decree no. 545/2020 of November 30th) and by new direct aid, financed by a percentage of the Fund for the emergency in the entertainment and audiovisual sector (see ministerial Decree no. 26/2020 of January 12th). In France, the CNC adopted different support instruments, all regulated by Book IX of the CNC's Regulation.

⁵⁰³ See [par. 5 of Chapter II](#).

⁵⁰⁴ Arts. from 232-4 to 232-30 of the CNC's Regulation regulate them.

⁵⁰⁵ Arts. from 232-30-1 to 232-42 of the CNC's Regulation regulate them.

theatres, i.e. theatres that program mainly arthouse films⁵⁰⁶. France does not support instead the creation and maintenance of theatres through tax credits.

The Italian case is different. Italy has supported these activities through direct aid only temporarily, during the period 2017-2021, through the 'Extraordinary plan for movie theaters upgrade'⁵⁰⁷. The only permanent instrument to incentivize the creation and maintenance of theatres is the tax credit, which allows exhibitors to charge against their tax liabilities a percentage of the cost faced to this extent⁵⁰⁸. As with distribution, the Italian State wants to aid the whole exhibition sector. However, the modulation of the tax credit rate allows greater support to exhibitors considered worthier than others⁵⁰⁹.

France uses only direct aid even to incentivize the programming of 'meritorious' works—a goal pursued also by regulatory instruments, as

⁵⁰⁶ The label 'arth-house theatres' is granted by the CNC President after the consultation with a committee of film professionals and personalities from the cultural sector. According to art. D-210-3 of the CCLIA, can be qualified as arthouse: films with research or novelty nature; unsuccessful films with undeniable qualities; films reflecting the life of countries whose film production is little diffused in France; old films with artistic or historical interest; short-films able to revamp the cinematographic sector thanks to their qualities or particular choices.

⁵⁰⁷ It is governed by art. 28 of the 2016 Act and Decree of the President of the Council of Ministers August 4th, 2017, then modified by the DPCM March 5th, 2018, and the DPCM October 21st, 2020. The plan was worth € 30 M annually during the first three years, € 20 M in 2020, and € 10 M in 2021.

⁵⁰⁸ Art. 17 of the 2016 Act and the implementing Ministerial Decree March 15th, 2018 govern it.

⁵⁰⁹ The rate of the tax credit for the creation and maintenance of theaters depends on the operator's size and location. It increases if the project is carried out by small and medium-sized enterprises and for projects realized in municipalities with less than 14 thousand inhabitants or without movie theatres. The rate of the tax credit for enhancing the cinematographic supply depends on many aspects. Among them: the type of film (for example, the rate increases if an arthouse film, rather than foreign, is Italian or European); on the operators' nature, since it raises in the case of small and medium-sized enterprises, art-houses theatres, and theatres located in small municipalities.

said⁵¹⁰. To this extent, it provides both automatic⁵¹¹ and selective aid⁵¹². The seconds include *les aides à l'art et l'essai*, that reward exhibitors for the programming of art-house works, and *les aides à la programmation difficile*, that support exhibitors who carry out difficult programming in the face of competition. Even in this case, the Italian approach is different. Like France, Italy encourages exhibitors to program meritorious films through direct selective aids, granted to theatres classified as art-house⁵¹³; however, the most important instrument in this regard is the tax credit for enhancing the cinema supply⁵¹⁴. It allows movie theaters to charge against their tax liabilities a percentage of the revenue from the programming of 'meritorious' but risky films. They are Italian and European films; those that, in addition to being Italian and European, are documentaries, films by first and second time or by young authors, films with a production budget of less than €2,5 M; films that, regardless of their nationality, are art-house.

Note that cinema theaters received a higher support during the Covid-19 pandemic, too. The Italian State, in addition to temporarily enhancing the tax credit instruments⁵¹⁵, established the 'Emergency Fund for

⁵¹⁰ The *Mediateur du cinéma* and the *engagements de programmation and diffusion* (see [par. 5 of Chapter II](#)).

⁵¹¹ Arts. from 231-2 to 231-10 of the CNC's Regulation govern them.

⁵¹² Arts. from 231-11 to 231-49 of the CNC's Regulation govern them.

⁵¹³ Each cinema shall present its request to be recognized as an art-house theater to the DGC, which decides based on the opinion of a committee of experts. As it happens in France, the recognition/not recognition of the status of art-house theatre depends on the number of art-house films exhibited. According to art. 2, par. 1, let. c) of the 2020 Act, art-house films are «*film di qualità, aventi particolari requisiti culturali ed artistici idonei a favorire la conoscenza e la diffusione di realtà cinematografiche meno conosciute, nazionali ed internazionali, ovvero connotati da forme e tecniche di espressione sperimentali e linguaggi innovativi*».

⁵¹⁴ Art. 18 of the 2016 Act and the implementing Ministerial Decree March 15th, 2018 govern it.

⁵¹⁵ See the ministerial Decree no. 545/2020.

cinema theaters', worth of € 110 M⁵¹⁶. The fund provided a fixed contribution of €25,000 to all theaters and a contribution proportional to each theatre's losses (until resources exhaustion). Even the French State established the Compensation fund for loss of cinema theater revenue, worth €100 M and meant to provide a contribution commensurate with each theatre's losses. In addition, the CNC supported theatres by anticipating the granting of some aid to exhibitors and by incentivizing producers and distributors to distribute their works in theatres. Indeed, it increased the rate on which is computed the automatic aid to producers and distributors stemming from the results of works distributed in theatres during their first reopening.

iii. Support to promotion. Italy and France finance several other activities that contribute to promote film culture. Italy does it through the 'selective aids to film promotion', granted by the same experts in charge of allocating selective aid to production and that are financed each year with a percentage of the DGC's Fund⁵¹⁷. Both public and private institutions can apply for them, as well as universities and centres of research, foundations, cultural and trade associations etc. France provides instead different types of aid to this extent, both automatic and selective, each subject to a specific regulation.

The range of activities other than production, distribution, and exhibition supported are similar in the two countries. Among them, those likely to internationalize the sector, thus increasing film export—one of the main goals of the Italian 2016 reform⁵¹⁸, as proven by the fact that co-productions receive advantages and facilities in all the different

⁵¹⁶ It was financed by a percentage of the Fund for emergency in the entertainment and audio-visual sector established by the Law Decree no. 18/2020.

⁵¹⁷ Art. 27 of the 2016 Act and the implementing Ministerial Decree no. 341/2017 of July 31st regulate them. According to the data provided by the DGC, selective aid to film promotion was worth €63,4 M in 2017, €63,5 M in 2018, €63,9 M in 2019 and €87,6 M in 2020.

⁵¹⁸ Consistently with the limited international penetration of Italian films. See footnote 241 of [par. 3 of Chapter II](#).

lines of aid⁵¹⁹. In France, the main instrument adopted to increase films' export is the automatic aid to companies active in selling the distribution rights of French films abroad⁵²⁰. The aid amount depends on the box offices' success in foreign theatres of the French films previously sold by the companies.

Other activities funded are the realization of festivals, reviews, and awards; the conservation, restoration, and fruition of the film cultural heritage⁵²¹; the activities of institutions linked in various ways to the State and various ways active in the sector (it is the case of the Italian Luce Institute and Venice Biennale Foundation); the activities of schools specialized in training to film professions and the activities that promote the knowledge on cinema within schools. Interestingly, the 2016 Italian Act has established that at least 3 % of the DGC Fund's total resources should be devoted each year to this last type of activity. This way, the Italian legislator began to show awareness of the necessity to invest not only in the supply but also in the development of the demand, supporting spectators in addition to spectacles.

7. Discussion

Italy and France transfer significant resources to their national audiovisual industries. In Italy, the 2016 Act and the following interventions have significantly increased them: today, they account for € 640 M at least each year, while they increase if the sector's resources increase. However, the French State still transfers much higher resources to the industry than the Italian one. In addition to the already considerable funds coming from the CNC, there are also those granted through fiscal incentives and by the IFCIF to guarantee bank loans and provide for direct loans.

⁵¹⁹ On the higher ability of coproduction than entirely national films to cross national borders, [par 6.1. of Chapter I.](#)

⁵²⁰ Arts. from 721-1 to 721-30 of the CNC's Regulation regulate them.

⁵²¹ To this extent, France provides both automatic and selective aid, regulated by the annex V to the CNC's Regulation.

While the extent of the resources differs, the types of instruments adopted are similar in the two countries. In Italy, they have been reformed by the 2016 Act and its implementing decrees, which have sought to inaugurate a new course based on an organic and coherent approach.

As noted, «the public promotional legislation aims to 'functionalize' enterprise. It identifies among the possible 'utilizations' of enterprises those that are consistent with the interests of the society at a specific time. The legislator identifies these interests and, at the same time, the behaviours of the enterprises (public and private) likely to allow their satisfaction»⁵²². Italy and France pursue different interests in promoting cinema; consequently, they seek to incentivise different types of behaviour, providing to this extent a wide range of aids and procedures. Each of them is partially in charge of overcoming the limits of the others, contributing to the determination of the balance between the need to develop the cultural dimension of the industry and that to develop its economic soundness.

Direct aids—divided in selective and automatic—support specific works and companies that are considered meritorious. Selective aids seek to ensure supply's diversity and 'quality', helping the realization of films whose making would be otherwise difficult and thus supporting projects with 'cultural merit' and lowering the entrance barrier to the cinematographic market. This way, the State seeks to ensure the possibility of artistic expression also to those who, although worthy, would not be able to autonomously do it. In this sense, the State promotes a 'substantive' rather than merely 'formal' equality. Automatic aids, on the other side, strengthen already-strong operators, sustaining their activities to promote the growth and development of the sector's business. This way, the State seeks to increase the industry's

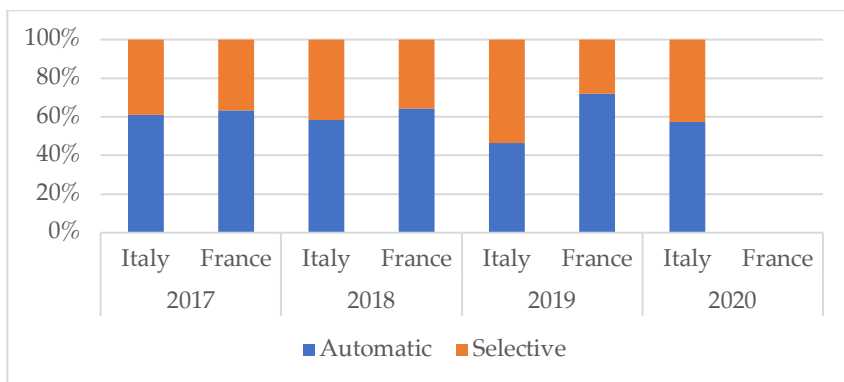
⁵²² SERRANI, D., *Lo Stato finanziatore*, p. 209 («La legislazione di ausilio pubblico è una legislazione di funzionalizzazione dell'impresa. Essa ha lo scopo di individuare tra le "utilizzazioni" possibili dell'impresa quelle che, in un certo momento, sono conformi agli interessi della collettività. La legislazione individua questi interessi e, nello stesso tempo, individua quale tipo di comportamento dell'imprenditore – privato o pubblico – è in grado di permetterne il soddisfacimento»).

ability to generate jobs, attract investments, foster tourism and be competitive at the international level.

Through automatic aids, France supports only operators capable of positive economic results, while Italy supports also those capable of positive artistic and cultural results. If France does not take into account the artistic and cultural results in the scope of automatic aid, it rewards quality *ex-post* through selective aid (given the existence of both an *avance avant* and *après réalisation*). Shortly, the space left to 'selection' is higher in France, where the State supports quality selectively both *ex ante* and *ex post*, while Italy supports quality selectively only *ex ante*, and does it automatically *ex post*.

In any case, most direct aid to the production, distribution, and exhibition of the overall audio-visual sector is granted automatically in both countries (fig. 21). This way, the two States seek to avoid the risks inherent to the selective instruments, stemming from the potential arbitrariness of the assessments.

Fig. 21 Percentage of automatic and selective direct aid to the production, distribution and exhibition of audio-visual works in Italy and France



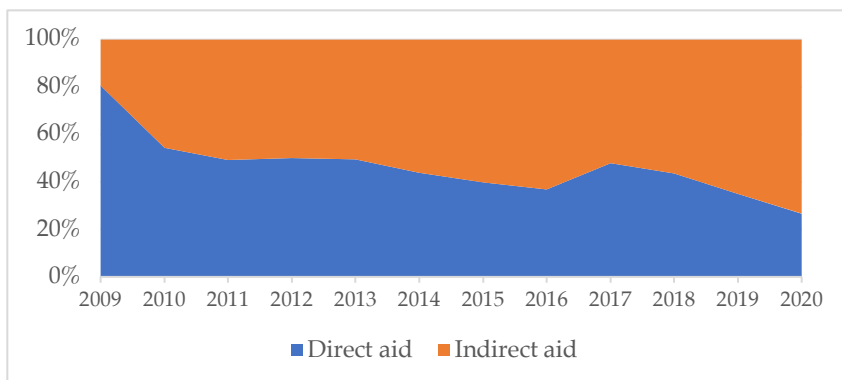
Source. Elaboration by the author of data provided by the DGC and the CNC in its annual "Bilans".

Through indirect aids, the States seek to handle the problems of direct aids, renouncing to establish what is worthy of support by creating an environment favourable to anyone who wants to produce films. They consider the entire industry meritorious, given its cultural specificity. In this case, the presence of cultural value is indeed measured on very general and vague criteria, to the extent that it is difficult to imagine works unable to satisfy them. This way, the State let the industry be free, without a public intervention. Indeed, direct aids inherently involve the risk of altering the freedom of choices of operators, interested in meeting the conditions requested to obtain support. This conflicts with the principle that State actions in culture development should not be contrary to the culture's need of self-determination. Art. 9(1) of the Italian Constitution—under which public powers should promote the development of culture—must be read in conjunction with art. 33(1), declaring art's freedom, indeed.

However, with indirect aids the States do not entirely give up in 'guiding' the market: by modulating the tax credit rates and other correctives, they push operators towards behaviours considered more meritorious than others. The French SOFICAs offer the maximum extent of State control in the context of indirect aid: by intermediating between private investors and producers, the French State can control that the external investments that benefit from fiscal incentives are devoted to the more 'meritorious' works. Moreover: the French approach allows avoiding the occurrence of fraudulent behaviours, i.e. of cases in which the individuals outside the industry do not really realize the investments based on which they benefit from the tax credits—something that, on the opposite, still happens in Italy, despite the modifications introduced by the 2016 Act and its implementing Decree.

In Italy, the resources granted indirectly have been progressively increasing in the last years, while the direct ones have been decreasing (fig. 22), thus following a common trend with the general Italian approach to industrial policy. Although they are quite new instruments, tax credits absorb most of the Italian funds.

Fig. 22 Evolution of the percentage of State resources granted directly and indirectly to the Italian audio-visual industry.



Source. DGC.

Even in France the resources given indirectly have been increasing in the last years. This is due to the progressive establishment of new tax credit types and the repeated reforms of the instruments implemented to increase its international competitiveness (see [fig. 13](#)). Tax credits have thus gradually gained greater weight among the financing sources for films in France. As [tab. 6](#) shows, considering the ten films that obtained the highest tax credit for cinema during 2010-2017, it appears that this instrument covers an increasing percentage of their production budget. In contrast, the budget share covered by automatic aid has gradually become more marginal.

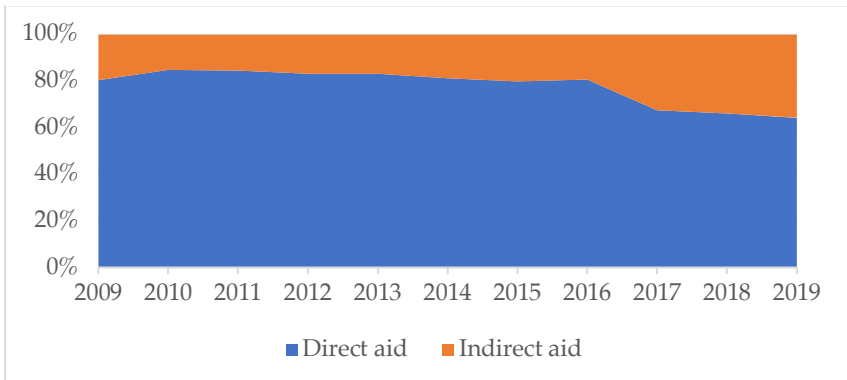
Tab. 6 Extent of public support in the budget of the ten films that benefited from the highest tax credit for cinema production in France during the period 2010-2017.

Year	Average budget	Average <i>crédit d'impôt audiovisuel</i>	Percentage of the <i>crédit d'impôt</i> in the total budget	Average automatic aid	Percentage of the automatic aid in the total budget
2010	9,3	0,82	8,75%	1,5	16,2%
2011	8,7	0,8	9,8%	1,4	16,7%
2012	10,3	1,1	11%	2	20%
2013	11,8	1,3	11,4%	2	17,7%
2014	12,4	1,3	10,7%	1,7	14%
2015	10,9	1,1	10,4%	1,8	16,8%
2016	16,5	2	12,5%	2	12,5%
2017	17,6	2,2	12,9%	2,5	14,6%

Source: Commission des finances, de l'économie générale et du contrôle budgétaire, *Rapport d'information sur l'application des mesures fiscales*, 2018, p. 49. Data in millions of euros.

However, unlike Italy, most of the State resources are still granted directly in France (fig. 23). This is also because France supports through tax credits only the production phase, while Italy provides it also to distribution and exhibition. The French approach is consistent with the main goal behind tax credits' institution, namely arresting French producers' tendency to shoot abroad—a goal that can be pursued only by providing better incentives to film producers.

Fig. 19 Evolution of the percentage of State resources granted directly and indirectly to the French audio-visual industry.



Source. Elaboration by the author of data provided by the CNC, the Court de Comptes and the Commission des finances

The different weight of indirect aid in the two countries shows that Italy's support system is more 'indiscriminate'; the Italian State renounces more than the French one to establish from the above what is meritorious and what is not. This approach ends up making the support in favour of a cultural sector similar to that in favour of the general industry. However, it is consistent with important needs specific to Italy. Here, the need for as-automatic-as-possible mechanisms does not stem only from the problems proper to the direct support already highlighted (jeopardizing the freedom of art, risks associated with discretion in the case of selective direct aid, etc.) but also from the exigence to simplify the action of the public administration. Unlike France, the Italian State does not have an independent agency focused on cinema, with financial and reglementary autonomy and adequate structure to manage the aids. In Italy, where the State's administration on cinema suffers from all the problems that generically affect the national public administration as a whole, there is more need for as-automatic-as-possible mechanisms: a higher presence of the State involves the risks to generate delays and complications.

Despite being the main instrument of support (and although highly appreciated by the industry in theory for their non-interventionism), tax credits are generating concerns in their application in Italy. The problem is due to the presence of an underlying contradiction: on the one hand, the resources to satisfy the requests for tax credits are contingent; on the other, the industry perceives the tax credit as an aid to be recognized to anyone who meets the eligibility conditions. Although the law expressly provides that tax credits are satisfied within the limits of the resources actually available each year, some Italian producers assume that they will benefit from them, counting tax credit in their projects' budget.

Several believe that the solution to the problem is to free tax credit resources from a closed fund—making them theoretically unlimited—rather than introducing more stringent requirements to access the aid. Such a solution does not appear sharable (although undoubtedly consistent with how the instrument was outlined), at least in the long term. Indeed, given how the measure is built, it would end up giving the industry more and more resources as it progressively grows, in an endless loop.

It is worth noticing how the presence of a direct link between the State's support and the film industry's turnover is what happens in France: the CNC's fund directly increases as the industry's revenues increase. It is difficult to share this approach. First, it is not clear why a sector should receive more and more public money as it grows. This derogates from the equalization principle, under which the most profitable activities should contribute to support the most vulnerable ones. Second, said approach may end up to damage even the film industry itself. As shown, in certain periods, the French system generated a disproportion between the level of State aids and the industry's actual needs, eventually leading to a kind of 'inflation' within the film industry.

Therefore, it is unlikely that the Italian State will do in the long run what the French system has been doing until now—namely, to increase the support to the industry as it grows and strengthens. On the contrary, it should be desirable for the industry, once sufficiently strengthened by the State's support, to emancipate from the aids and operate freely. For example, think about the automatic aids, which end up supporting already strong operators. They can be successfully used to strengthen

the industry in the short run, but once this goal is reached, the State should cease to support who is already strong. The risk would be otherwise to use public money to support the realization of works that, probably, would be realized nevertheless. As said, public incentive are effective if they allow the realization of activities that, otherwise, would not be made⁵²³.

If there are many solid reasons for government support, there are many equally valid reasons against making such support systematic. State support always involves several risks. We are far from the most authoritative periods of the past when State support was granted in exchange for films accommodating political power's interests. However, even for the legislator guided by the noblest goals, there is always the risk of adding new constraints while trying to increase opportunities. Think about the disincentives produced by the reference system introduced by the Italian Urbani Decree: it ended up generating a conservative effect that reduced the incentives to innovate and diversify, in turn jeopardizing the emergence of new talents⁵²⁴. State support also risks producing a 'napping' industry, jeopardizing the essential drivers for innovation and experimentation, which are inherently nested in the competitive dynamic. Think about the 1994 Italian Guarantee Fund's operation, which was likely to take any responsibility off both the banks and the cinema operators while transferring the entrepreneurial risk to the State⁵²⁵. State support may also produce free riding effects, keeping too many and too weak operators in the market, letting to survive inefficient activities, thus harming the entire economy. Think how the culture purpose of State support has led to granted aids for the implementation of specific projects rather than as structural support for companies, drifting towards a natalist policy of enterprises and medium-low budget films, with little capacity to penetrate foreign markets and sometimes failing to find a public even in the country of origin⁵²⁶. Finally, State support in favour of culture implies some specific

⁵²³ See footnote 13 of the [Introduction](#).

⁵²⁴ See par. of [par. 3.5. of Chapter I](#).

⁵²⁵ See par. of [par. 3.4. of Chapter I](#).

⁵²⁶ See par. of [par. 3 of Chapter II](#).

risks. Among them, those related to distributive justice issues. To promote the realization of projects with cultural and artistic value driven to the market with a limited extent, the State risks using all citizens' money to carry out works that benefit those already wealthy and educated, with a regressive distributive effect. This is why one should strongly welcome the provision of the 2016 Act under which a minimum percentage of funding should be devoted each year to cinema education initiatives within schools. Increased education may be an effective way—even more consistent with freedom principles—to enhance the demand's 'quality', thus limiting the State's need to enter the market to allow 'meritorious' but fragile actors to express themselves.

Chapter IV – The State promotion through content and investment quotas on AVMS providers

1. Preliminary remarks

Quotas represented the first instrument devised by Italy and France to protect their national film industry from the US surplus. Since the end of WWI, Italy established minimum quotas for national films to be screened in cinema theatres, while France implemented maximum quotas on imported foreign works.

Over time, the US surplus also developed in television, and the focus on quotas shifted to the small screen. To prevent televisions from loading their programming with American films only, Italy and France introduced content quotas for national works. To ensure national production maintenance, the two States also introduced investment quotas, requiring televisions to invest a part of their revenues in financing new national works. France introduced quotas for television in the years of the public broadcaster monopoly. Italy did so in the nineties to transpose the TSF Directive, adopted by the European legislator to protect the internal market.

The European legislator amended the Directive's provisions on quotas for European works several times. In 2007, it extended its scope of application to non-linear providers. Since 2018, it has allowed the Member States to apply quotas also to global digital operators that target their audiences without being established there. This way, it prevented operators from eluding their duty to promote European productions by locating their headquarters in countries whose legislation is looser.

Over time, the French and the Italian legislators also amended the provisions several times to address internal issues and implement the European Directive's developments. Still today, both Italy and France pursue, on top of protecting the European audio-visual market, the goal of promoting national industries: they require providers to finance and distribute national works, in addition to the European ones. In both

countries, providers' obligatory investments are today one of the primary funding sources for the national film industry.

The previous chapters have already touched upon all these aspects, while this chapter analyse them more in-depth. Given the technical nature of the quota instrument, the following pages will be technical. First, an overview of the legislative framework's development on quotas is presented, both at the European ([par. 2](#)) and national level ([par. 3](#)). Then, the current framework on quotas is analysed, first in Europe ([par. 4](#)), and then, from a comparative perspective, in Italy and in France ([par. 5](#)). The work analyses:

- content ([par. 5.1.](#)) and investment quotas ([par. 5.2.](#)) on both linear and non-linear providers,
- what the further restrictions on the AVMS providers programming freedom in France are ([par. 5.1.3.](#))
- which kind of proportionality and flexibility instruments the two countries use ([par. 5.3.](#)),
- what the control methods and sanctions adopted are ([par. 5.4.](#)).

The technicality is not an end in itself. The details of the Italian and French legislation on quotas conceal precious indications on how the two States promote their film industries by regulating the behaviour of providers. In addition to showing that a policy of quotas opens to a variety of questions, the analysis shows that the French system, extraordinarily refined and continually evolving to follow market developments, could be a valuable reference for Italy, rich of useful suggestions ([par. 6](#)).

2. The European regulatory development: from the 1989 Directive to the 2018 one

Since the 1989 TWF Directive, the European Law has required televisions to broadcast a minimum percentage of European works and allowed the Member States to require the broadcasters under their jurisdiction to contribute to financing independent European works⁵²⁷. The final goal was to maintain the diversity of the supply, in fear of European works disappearing in favour of more popular US films.

The establishment of these quotas generated many criticisms from the US and even within the EEC. The Member States with the weakest film industries pointed out that the introduction of such obligations would have generated discriminatory effects across EEC countries. The countries with weaker film industries could struggle to meet the requirements with their national production. They would therefore have to turn to the Member States with stronger audio-visual industry (such as France, Italy, and Germany). In this way, they would have moved from one cultural hegemony—the American one—to another, protected from American products by virtue of the 'common European culture' but still distant from their traditions. Indeed, it is not sure that French films safeguard an Irish or a Danish citizen's cultural identity better than American films⁵²⁸.

The text adopted at the end reflects the presence of different positions⁵²⁹: the provisions of the Directive of 1989 related to quotas⁵³⁰ represented «an almost unique example of language vagueness»⁵³¹. They required

⁵²⁷ See [par. 6.1.1. of Chapter I](#).

⁵²⁸ For the whole discourse, DOLORES, M., *La promozione delle opere audiovisive europee e la libertà di iniziativa economica*, in *La riforma del mercato audiovisivo europeo*, ed. by Abbamonte, G., Apa, E. and Pollicino, O., Giappichelli, 2019, pp. 61-70, p. 63.

⁵²⁹ Not surprisingly, the leading defender of quotas was France. Besides direct aids, quotas were an indispensable instrument for promoting national and European creation and avoiding the market being flooded by American products, according to France.

⁵³⁰ Arts. 4 and 5.

⁵³¹ SALVATORE, V., "Quotas on TV programmes and EEC law", *Common Market L. Rev.* 29 (1992): 967-990.

the Member States to ensure «where practicable and by appropriate means» and «on the basis of suitable criteria» that broadcasters «progressively» reserve: a) «a majority proportion» of their transmission time for European works⁵³²; b) at least 10 % of their transmission time, or at least 10 % of their programming budget, for European works created by producers independent of broadcasters, with «an adequate proportion» for recent works.

Over time, the EU legislator amended the 1989 Directive on several occasions. First in 1997⁵³³ and a second time in 2007⁵³⁴. Then, in 2010, «in the interests of clarity and rationality», the legislator codified the TWF Directive through the adoption of a consolidated version⁵³⁵. Since this moment, the Directive began to be referred to as the AVMS Directive⁵³⁶. Finally, the European legislator modified the Directive in 2018⁵³⁷.

While the modifications realized in 1997 are not significant concerning the topic of quotas, those realized in 2007 and 2018 aimed to extend the range of actors to whom the rules apply.

The 2007 reform represented a first attempt to extend quotas' obligations to non-linear providers, thus overcoming the imposition of unequal legal constraints. The EEC noted that non-linear providers are

⁵³² Or, if this 'majority proportion' could not be attained, a proportion no lower than the average for 1988 in the involved Member State.

⁵³³ See Directive 97/36/EC. For its analysis, VOTANO, G., "TV europea senza frontiere atto secondo", *Diritto dell'informazione e dell'informatica* (1997): 985 ss.

⁵³⁴ See Directive 2007/65/EC. For its detailed analysis, not limited to the issue of quotas, see: BURRI-NENOVA, M., "New Audiovisual Media Services Directive: Television without Frontiers, Television without Cultural Diversity", *Common Market Law Review*. 44 (2007): 1689-1725; CASTENDYK, O., ET AL. *European media law*, Kluwer Law International BV, 2008; VALCKE, P., STEVENS, D., WERKERS, E. and LIEVENS, E., "Audiovisual media services in the EU: next generation approach or old wine in new barrels?", *Communications & Strategies* 71 (2009): 103 ss.; MASTROIANNI, R., *La direttiva sui servizi di media audiovisivi e la sua attuazione nell'ordinamento italiano*, Giappichelli, 2011.

⁵³⁵ See Directive 2010/13/EU.

⁵³⁶ Note that it modified the referring articles on quotas: it moved the provisions of arts. 4 and 5 of the TWF Directive to arts. 16 and 17.

⁵³⁷ See Directive 2018/1808/EU.

developed over time and are « ‘television-like’, i.e. that they compete for the same audience as television broadcasts»⁵³⁸. Moreover, they «have the potential to partially replace television broadcasting. Accordingly, they should, where practicable, promote the production and distribution of European works and thus contribute actively to the promotion of cultural diversity»⁵³⁹.

However, the 2007 Directive used a ‘calibrated’ approach to extend the quotas’ obligations to the non-linear providers⁵⁴⁰. It established that the Member States should have ensured—where practicable and by appropriate means—that non-linear providers under their jurisdiction were committed to promoting the production of and access to European works. The Directive did not clarify how said promotion could have been realized. It merely listed some criteria that the Member States could adopt as guidelines, either jointly or alternatively⁵⁴¹. Therefore, the Member States were free to decide whether and how to require non-linear providers to respect promotional schemes. They might have considered them unworkable in emerging markets and a rapidly changing technological environment⁵⁴².

⁵³⁸ Recital 17.

⁵³⁹ Recital 48. As it is clear from this Recital, the ‘cultural’ aim of quotas became much more explicit in the post-1989 versions of the TWD Directive given the entry into force of the 1992 Maastricht Treaty, that recognized the EU competence in the cultural field. However, the economic reasons for quotas inevitably emerge. Recital 10 reflects them: it explicitly mentions, as one of the European legislator’s primary goals, the promotion and growth of the audio-visual sector through the production of European works so that industries can grow, innovate and create jobs. Thus noted by SAMMARCO, P., *La produzione audiovisiva europea*, p. 64 e 65.

⁵⁴⁰ See art. 3i.

⁵⁴¹ According to art. 3i(1), «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 programs offered by the on-demand audio-visual media service».

⁵⁴² As noted by KAMINA, P., *Droit du cinéma*, LexisNexis, 2014, p. 31, art. 3i is the result of a compromise between two opposing policies: extending the application of arts. 4 and 5 of the TVSF Directive to non-linear services or not subjecting these services to any obligation («L’article 3decies de la directive du 2007 peut être considéré comme un compromis entre deux politiques opposées: étendre l’application des articles 4 et 5 de la directive TVSF aux services non linéaires ou ne soumettre ces services à aucune obligation de promotion»).

The decision to adopt this cautious approach, explicitly expressed by the Directive⁵⁴³, depended on two main reasons. First, the EU legislator was concerned with avoiding overregulation in a rising sector. Second, non-linear providers seemed to ensure greater choice and control for the user and have a lower impact on society than the linear ones: if television programs are pushed on everyone, the on-demand contents are individually pulled⁵⁴⁴. As the Court of Justice has affirmed several times, the principle of 'technological neutrality' (regulators cannot push the market towards the structure they consider optimal) does not refrain from balancing the rules according to the user's role and the modalities of content fruition⁵⁴⁵.

However, the approach adopted in 2007 started to show its flaws overtime. Not all Member States imposed quota obligations on non-linear providers. Even when they did, the rules were looser than the ones imposed on traditional televisions. Moreover, non-linear operators could provide services in the countries that imposed these obligations without respecting them by establishing their headquarters only in those with lighter financial obligations. The internal market is based on the country of origin principle: providers must respect only the law of the country where they are established, as harmonized by the European Law, and not all the laws of the countries in which they operate.

This led to two main issues. First, an unequal competition environment: traditional operators had to respect much stricter rules than the digital ones, freer to decide which content to fund and place on their platforms driven by viewer's demands. Second, the presence of fewer resources for

⁵⁴³ Its Recital 42 stated the intention to impose a «lighter regulation on on-demand audiovisual media services, which should comply only with the basic rules provided for in this Directive».

⁵⁴⁴ See CAGGIANO, G., *Paese di origine, libera circolazione e giurisdizione*, p. 34 («La struttura normativa bi-livello a carattere asimmetrico intende corrispondere al diverso ruolo dell'utente rispetto ai contenuti ("push" e "pull") ed al diverso impatto sociale delle due tipologie di servizi»).

⁵⁴⁵ See CAGGIANO, G., *Evoluzione della direttiva televisione senza frontiere e l'ampliamento del suo campo di applicazione a tutti i servizi audiovisivi*, in *La televisione digitale: temi e problemi: commento al D. lgs. 177/05, T.U. della radiotelevisione*, ed. by Frignani, A. et al., Giuffrè, 2006, pp. 139-155, p. 145.

promoting European audio-visual production than there could have potentially been: the operators with higher revenues were partially escaping the investment schemes.

Given this picture, the European legislator amended the 2010 AVMS Directive in 2018. First, it strengthened the obligations of non-linear providers. According to the new rules, they have to secure at least a 30% share of European works in their catalogues and ensure their prominence. While according to the 2007 Directive these were mere suggestions the States could implement, they now became mandatory measures. Secondly, the new Directive allowed the Member States to require providers that target their territories to invest in the creation of European audio-visual works, albeit being established abroad. This way, providers are disincentivised from locating their headquarters in countries whose legislation is looser. In essence, the European legislator prioritized the cultural and economic reasons behind quotas over those of the internal market liberalization.

3. The national regulatory development

3.1. The use of quotas before the 1989 Directive

The EEC established quotas to limit the vast influx of American works in 1989. However, quotas date much further back in time both in Italy and France. Indeed, quotas represent the first instrument devised by France and Italy to protect their national film industries. Since the end of WWI, France used quotas to restrict the number of US films that could be imported onto the country, while Italy declined them as minimum percentages of domestic films to be projected in theatres. In both countries, legislators adopted quotas despite the opposition of theatre exhibitors, which were interested in screening the more profitable American films⁵⁴⁶.

At the end of WWII, Italy and France stopped using quotas. Italy liberalized the exhibition sector in 1945, under the will of the victorious Americans to pour their production onto the Italian market after the

⁵⁴⁶ See [par. 2.1.](#) and [3.1.](#) of Chapter I.

previous years' blockade. The legislator then reintroduced quotas in 1947 and lastly repealed them in 1994. Since this moment, it began to recognize tax incentives to exhibitors that autonomously reserved a percentage of their projection time to Italian films—something similar to what happens today⁵⁴⁷. In France, the 1946 Blum-Byrnes Agreement opened French doors to the US films that were blocked in return for a proportion of France's war debt being cancelled. However, while accepting not to restrict American imports, France specified minimum quotas for French films in national theatres. Today, the French State pushes exhibitors to screen national films in exchange for financial aid, like the Italian one⁵⁴⁸. However, it also requires the strongest exhibitors to meet *engagement de programmation et de diffusion*, i.e. quotas of difficult and fragile works, including the French and European ones⁵⁴⁹.

With the development of televisions, the focus on quotas shifted to broadcasters. Both Italy and France imposed quotas to them before the 1989 TWF Directive introduced quotas for European works. France established content quotas for French films in television already during the public broadcaster monopoly, in 1971⁵⁵⁰. Following the liberalization process, it extended the same obligations to private televisions, also adding investment quotas.

Even Italy introduced content quotas (not also the investment ones) on televisions before the TWF Directive. In 1984, it established that broadcasters had to reserve at least 25% of the transmission time they dedicated to cinematographic works to Italian or EEC's Member States films⁵⁵¹. The goal was to limit the practice undertaken by Fininvest to fill the programming with American blockbusters, appreciated by the audience and less expensive than national films⁵⁵². However, the provision on quotas was not implemented, given the lack of sanctions in

⁵⁴⁷ See [par. 6 of Chapter III](#).

⁵⁴⁸ *Ibidem*.

⁵⁴⁹ See [par. 5 of Chapter II](#).

⁵⁵⁰ See footnote no. 57 of [par. 2.4. of Chapter I](#).

⁵⁵¹ See art. 3(4) of Law Decree no. 807/1984 of December 6th.

⁵⁵² PERLO, N., *Le droit public du cinéma*, p. 317.

the event of its infringement. Italy will adopt more effective provisions only in the 90s, given the need to implement the European Directive.

3.2. The French approach and the current reforms: the importance of a differential approach and regular evaluations

Through Act Law No. 1067/1986, France extended the obligations to program quota of national works—already applied to the public broadcaster—to private televisions. The same Act also introduced the obligation for broadcasters to invest a percentage of their revenues to produce new national works.

The 1986 Act still established the fundamental principles governing quotas in France. Decrees of the Council of State lay down the detailed provisions after consulting the Superior Council of Audio-visual (CSA), the Independent Administrative Authority of the audio-visual sector⁵⁵³. However, the percentages established in the Law and the Decrees are to be regarded as a minimum standard. Each provider's specific obligations are determined by an agreement between the provider itself and the CSA⁵⁵⁴. According to the 1986 Act, the agreement should take into account «the extent of the area served by the service, its share in the advertising market, the need to ensure equal treatment between the different services, the peculiar competition situation for each of them [...]»⁵⁵⁵. This way, in accordance with the minimum percentages laid down by the Law and the Decrees, the obligations of each actor are determined based on its specificities. Among the elements considered, there is also the way the provider uses media chronology: the sooner it

⁵⁵³ See arts. 27, 33 and 33-2 of the 1986 Act.

⁵⁵⁴ See art. 28(1) and 33 of 1986 Act.

⁵⁵⁵ Art. 28(1) of the 1986 Act («*compte tenu de l'étendue de la zone desservie, de la part du service dans le marché publicitaire, du respect de l'égalité de traitement entre les différents services et des conditions de concurrence propres à chacun d'eux, ainsi que du développement de la radio et de la télévision numériques de terre*»).

distributes a cinematographic work, the higher its investment obligations are⁵⁵⁶.

Over time, the State modified more than 80 times the 1986 Act to address market changes; however, it has always confirmed the system's core principles. Still today, it is possible to say that «the French funding system can be summarized by one sentence: televisions channels finance French cinema»⁵⁵⁷—not only through the investment quotas but also through the TST payment⁵⁵⁸. Indeed, in France, broadcasters play an exceptionally significant role in film financing: their investments accounted for circa 30% of total financing volume for French films during the years 2009-2018⁵⁵⁹. The role they have in France is much more significant than in most other European countries. This is clearly indicated by the fact that European broadcasters' investments tend to account for 24% of total financing volume for European films, compared to only 8% if one excludes French films from the analysis and considers only the other major markets (UK, Germany, Italy, and Spain)⁵⁶⁰.

The fact that broadcasters are the principal supporters of the national film industry looks currently troublesome. The amount of televisions' investment in the creation of new films is proportionate to their income. Since their incomes are decreasing, the resources for the cinema are shrinking as well⁵⁶¹. Such a drop is partially because broadcasters have

⁵⁵⁶ See [par. 4.3. of Chapter II](#).

⁵⁵⁷ LE DIBERDER, A., *La nouvelle économie de l'audiovisuel*, La Découverte, 2019, p. 10 («On peut en résumer le fonctionnement en une phrase: le cinéma français est financé par les chaînes de télévisions»).

⁵⁵⁸ See [par. 4.1.1. of Chapter III](#).

⁵⁵⁹ See CRETON, L., *L'économie du cinéma*, p. 98.

⁵⁶⁰ EUROPEAN AUDIOVISUAL OBSERVATORY, *Fiction film financing in Europe: A sample analysis of films released in 2018, 2020*, p. 59.

⁵⁶¹ The overall contribution of broadcasters to film production (by means of the TST and the investment quotas) decreased by 20% in 6 years (from € 462 M in 2011 to €371 M in 2017). Between 2017 and 2018, broadcasters' investments fell further by 22.5%, becoming the lowest in the last ten years. The reduction of cinema funding is mainly due to Canal+, traditionally one of the most important contributors, given the wide range of films pre-purchased each year—from 115 to 120 (see [par. 5.2.1. of this Chapter](#)). Canal+ contribution went from € 194.5 M in 2010 to € 153.7 M in 2017. Despite the smaller budget, Canal+ has

difficulty reacting to competition from the global digital operators, subjected to looser obligations on cinema promotion. France implemented the 2007 Directive, thus requiring digital providers under its jurisdiction to contribute to the promotion of the European and national production. However, the major operators were not subjected to said obligations since they provide their services in France without being established there.

In light of this, the French Parliament began to discuss a bill (the *Projet de loi relatif à la communication audiovisuelle et à la souveraineté culturelle à l'ère numérique*), aimed at reforming the 1986 Act⁵⁶². Outlined after years of impact evaluations and public consultations⁵⁶³, the Project pursued three lines of action: «*assouplir, élargir et simplifier*»⁵⁶⁴. First, it aimed at easing the constraints on traditional televisions to enable them to return to a growth situation. For example, the legislator wanted to make it easier for broadcasters to access advertising resources by eliminating rules adopted in the 80s to protect entrances to movie theatres, but that it appears anachronistic today. Second, the Project aimed at introducing more stringent rules for digital providers, particularly for those operating in France being established abroad—thus seizing the opportunity recognized by the 2018 Directive. Finally, the Project pursued the general attempt to simplify the 1986 Act, which has become increasingly difficult to understand over time.

continued to buy the same number of films. Consequently, the average budget of the films funded by Canal+ decreased (from € 8.58 M in 2008 to € 6.97 M in 2017). According to estimates made before the pandemic (that exacerbated televisions' losses), the current trend could have led to an overall reduction of cinema funding between 12% and 25%. See BOUTONNAT, D., *Rapport sur le financement privé*, pp. 9, 10 and 19 and Project of Law no. 2488/2019 of December 5th, pp. 49 and 106.

⁵⁶² Project of Law no. 2488/2019.

⁵⁶³ See, among others: COUR DES COMPTES, *Les soutiens à la production cinématographique*; BOUTONNAT, D., *Rapport sur le financement privé*; COMMISSION DES AFFAIRES CULTURELLES ET DE L'ÉDUCATION, *Rapport d'information présenté par Mme Aurore Bergé*, 2018; AUTORITÉ DE LA CONCURRENCE, *Avis 19-A-04*.

⁵⁶⁴ As recommended by the COMMISSION DES AFFAIRES CULTURELLES ET DE L'ÉDUCATION, *Rapport d'information présenté par Mme Aurore Bergé*, p. 17.

The Covid-19 pandemic outbreak disrupted the entire parliamentary calendar and the Project was set aside. However, the State did not give up its content: rather than a single comprehensive law, different regulatory sources will adopt it (and in part already did it⁵⁶⁵). To speed up the process, the Parliament empowered the Government to modify the 1986 Act by way of ordinance⁵⁶⁶. Based on the principles established by the ordinance⁵⁶⁷, new Council of State Decrees will be adopted.

Some of them have already been approved. They ease the constraints on traditional televisions to enable them to return to a growth situation⁵⁶⁸. The central innovation—the introduction of financial commitments for non-linear providers that target France without having a headquarter there—has been implemented by the new ‘SMAD Decree’⁵⁶⁹, which has substituted the previous Decree concerning quotas for non-linear providers⁵⁷⁰. It seeks to ensure that American platforms’ involvement in

⁵⁶⁵ For example, Decree no. 1102/2020 of August 31st implemented art. 36 of the abandoned Project of Law. The Decree introduced a Pole of numerical experts, made up of data scientists, engineers, and economic analysts. It is set up as an administrative service of the State to whom all the public authorities involved in regulating digital platforms can address. Therefore, the Pole is at the disposal not only of the authorities operating in the audio-visual sector but of also those regulating search engines platforms (e.g., Google), online market sellers (e.g., Amazon), connecting platforms (e.g., Blablacar), online hotels providers (e.g., Booking, Airbnb), social networks (e.g., Facebook, Twitter), etc. Its establishment is of particular interest because it highlights two recurrent virtuous traits of the French system—often absent in the Italian one. First, it shows that intensive studies and reflections precede each regulatory initiative. The legislator established the Pole after many studies have shown that in the field of regulation of digital platforms, public authorities as a whole are in a situation of information asymmetry and lack of capacity. Second, it highlights that the State seeks an organic approach to avoid overlapping skills and dispersing resources (See Project of Law, p. 252 « [...] *au regard de ce caractère transversal et multisectoriel des plateformes numériques, il importe de privilégier une approche à la fois globale et ciblée. En l’absence d’un tel service, le risque serait de voir se constituer progressivement au sein de l’État et de ses différents dénombrements une multiplication de petits laboratoires isolés visant à répondre de façon fragmentée aux besoins opérationnels*»).

⁵⁶⁶ See art. 36 of Law no. 1508/2020 of December 3rd (‘*Dadue Law*’).

⁵⁶⁷ Ordinance no. 1642/2020.

⁵⁶⁸ See [par. 5.1.3. of this Chapter](#).

⁵⁶⁹ Decree no. 793/2021 of Jun 22th.

⁵⁷⁰ Decree no. 1379/2010 of November 12th.

the financing of national creation does not compromise the traditional equilibrium gained in France to protect cultural diversity (think of the protection of independent producers' capacity to maintain rights on their works⁵⁷¹).

In the following months, based on the 'SMAD Decree', new conventions between each provider and the CSA⁵⁷² will be adopted. Interestingly, the abandoned Project of Law gave the conventions greater importance than they currently receive. Following the principle of limited recourse to the regulations, the Project provided that the Law and the decrees should have been refocused only on core principles, and co-regulation should have been incremented⁵⁷³.

As affirmed by the CSA, «the increased number and diversification of the actors regulated requires a change in regulatory methods [...]. There is a need to develop a more flexible framework that retains the essential principles while using new tools more adapted to the digital environment. The variety of players now entering the audio-visual regulation scope makes the idea of universal and univocal regulation obsolete. In essence, regulation must evolve in such a way as to understand the complexity of a globalized sector, subject to sudden and hardly predictable developments. In this new heterogeneous environment, which brings together actors with a wide range of legal

⁵⁷¹ See [par. 3.2. of Chapter II](#).

⁵⁷² Note that the Project of Law provided for the merger of the CSA and the *Haute Autorité pour la diffusion des oeuvres et la protection des droits sur l'Internet* (HADOPI) into a single independent administrative authority, the *Autorité de régulation de la communication audiovisuelle et numérique* (ARCOM). Such an operation will be carried out anyway, despite the abandonment of the Project (indeed, the Parliament is discussing a draft law on the matter, the *Projet de loi relatif à la protection de l'accès du public aux oeuvres culturelles à l'ère numérique*). It aims at avoiding ineffective overlapping: the two authorities are both called to regulate digital operators, and the objectives of their activities are becoming close. The CSA has traditionally been responsible for all matters relating to freedom of communication. However, its scope of action is evolving, given the legislator is progressively entrust it with new tasks in the fight against information manipulation and on-line hatred. On the other side, the HADOPI must remedy the piracy of musical, cinematographic and audio-visual works on digital networks.

⁵⁷³ Art. 1 of Project of Law.

statuses, economic models, strategies, or sizes, the regulation's method must be reviewed to encourage 'networked' regulation, in which all stakeholders-regulators, public authorities, and companies dialogue and provide information. Hence a new way of conceiving the regulator's action»⁵⁷⁴.

3.3. The erratic Italian revisions: proceeding *erga omnes* and reforming based on political contingencies?

The evolution of the Italian legislation on quotas shows two main differences compared to France. First, the way of proceeding is less 'sophisticated'. Italy does not diversify the rules based on the peculiarities of each operator; it has always regulated the matter *erga omnes*, requiring all operators to respect the same obligations. Secondly, Italy has shown a less structured approach than France, with frequent changes, often resulting in a non-complementary regulation. The framework's development did not occur based on a coordinated and constant strategy. On some occasions, it seemed to adapt to the circumstances rather than carrying out a general plan, suggesting that important decisions happen to be taken with very short sight, potentially depending on the political contingency and the lobbying activity of the moment.

⁵⁷⁴ CONSEIL SUPÉRIEUR DE L'AUDIOVISUEL, *Refonder la régulation audiovisuelle*, 2018, p. 8 («*La diversification et l'extension du périmètre des acteurs régulés impliquent un changement dans les méthodes de régulation, y compris pour les acteurs traditionnels. Il est nécessaire de faire émerger un cadre plus souple conservant les principes essentiels, tout en recourant à des outils plus adaptés à l'environnement numérique. La variété des acteurs entrant désormais dans le champ de la régulation audiovisuelle rend caduque l'idée d'une régulation universelle et univoque: la régulation doit évoluer de manière à appréhender la complexité d'un secteur mondialisé, soumis à des évolutions brutales et difficilement prévisibles. Dans ce nouvel environnement hétérogène qui regroupe des acteurs aux statuts juridiques, aux modèles économiques, aux stratégies ou aux tailles très divers, les méthodes de régulation doivent être revues, afin d'encourager une régulation « en réseau », dans laquelle l'ensemble des parties prenantes- régulateurs, pouvoirs publics et entreprises- dialoguent et fournissent de l'information. D'où une nouvelle manière de concevoir l'action du régulateur*»).

The first significant provisions on quotas were adopted by the 1990 Mammì Law⁵⁷⁵, given the need for Italy to adapt its legislation to the TWF Directive. However, since the Mammì Law failed to transpose the Directive's provisions on quotas fully, Italy adopted new provisions shortly after, in 1998. Besides systematically implementing the Directive⁵⁷⁶, the 1998 Law also recognized for the first time the AGCOM the power to monitor broadcasters' compliance with quotas and adopt detailed provisions on the matter⁵⁷⁷. Over time, the legislator modified the system several other times. In 2005, it introduced some marginal

⁵⁷⁵ The Mammì Law established quotas only for cinematographic works. It established a content quota for European cinematographic works (40% of broadcasters' transmission time) and a sub-quota for the national ones (at least half of the 50%). It also established that broadcasters had to reserve at least 1/5 of this sub-quota to works produced in the last five years. The Mammì Law did not introduce instead investment quotas. However, it provided a mechanism to push broadcasters to invest in film production: if a broadcaster coproduced a film, it could distribute it after one year—instead of two—from its first screening in the cinema. The Mammì Law overcame the approach adopted in 1984, when the legislator introduced quotas without providing for penalties. It established indeed that the infringement of the introduced provisions was punishable with administrative sanctions to be applied by the Guarantor for broadcasting and publishing and the Minister for Post and Telecommunications.

⁵⁷⁶ Article 2 of Law no. 122/1998 of April 30th went even further, establishing stricter provisions than those dictated by the EEC. It introduced both content and investment quotas in favour of independent production. It no longer concentrated on the sole cinematographic market, establishing that quotas could be satisfied through the different kinds of audio-visual works. Concerning content quotas, broadcasters had to reserve most of their transmission time to European works and either 20% (for the public broadcaster) or 10% (for private ones) to those realized by independent producers. Broadcasters were required to satisfy said quotas «also regarding the hours of highest audience». The legislator repealed the sub-quota for national works but established that quotas should cover products specifically addressed to minors and films. Concerning investment quotas, the law established a higher tax base for calculating the investment share—namely, the total broadcasters' revenue instead of their programming budget. Rai had to invest at least 20% of its total revenues in European works production, while private operators no less than 10%. The legislator established two investment sub-quotas: one for the cinematographic works and one for products specifically addressed to minors.

⁵⁷⁷ The Authority exercised said power through the Decision no. 9/99/CONS. Note that, established the year before by Law no. 249/1997 of July 31st, the Authority had already been partially involved in the quota system: it had been in charge to establish the criteria to grant national broadcasting concessions—giving prominence, among the programming projects submitted by operators, to those likely to guarantee «a significant presence of European products» (see art. 3, par. 3, let. a), no. 2) of Law no. 249/1997).

changes and transferred quotas provisions in arts. 6 and 44 of the Tusmar⁵⁷⁸, which still regulates quotas. In 2010, it implemented the 2007 Directive, thus extending the obligations to non-linear providers⁵⁷⁹. Slightly amended again in 2012⁵⁸⁰, quotas provisions have been further organically reformed by the Legislative Decree no. 204/2017, adopted based on the delegation granted by art. 34 of the 2016 Act. Indeed, the 2016 legislator, which has organically reformed all public rules affecting the film sector⁵⁸¹, has deemed it necessary to reform the quotas' system. In 2019, a new government modified the 2017 reform, revising the new rules so soon that they were not operational yet.

Few institutional sources allow to understand the problems that existed before the last regulatory interventions (the 2017 reform and its 2019 'reshaping'). The only in-depth institutional source is an AGCOM survey of 2015⁵⁸². It shows that the result of the several interventions carried out overtime was a complex, messy, and somehow incoherent system, likely to make it difficult to implement the rules⁵⁸³—although it

⁵⁷⁸ Legislative Decree no. 177/2005. The most significant change was the elimination of the prime-time obligation. By Decision 66/09/CONS of February 13th, 2009, AGCOM adopted a new regulation.

⁵⁷⁹ See Legislative Decree no. 44/2010 of March 15th. In that occasion, art. 6 of the Tusmar was repealed and all the relevant provisions were transferred to art. 44 of the Tusmar.

⁵⁸⁰ See Legislative Decree no. 120/2012 of June 31st. Following its adoption, two new regulations were adopted. First, the Decree of the Minister for Economic Development and that of Cultural Heritage and Activities and Tourism of February 22nd, 2013 (the 'Passera-Ornaghi Decree'). It provided the definition of cinematographic works of original Italian expression and the sub-quotas in their favour (established but not quantified by Tusmar, which art. 44(3) asked a decree their quantification, «taking into account their availability and the development of the market»). Second, the AGCOM's Resolution no. 186/13/CONS of February 29th, 2013, which defined the modalities and criteria for carrying out the verification of quotas' respect by broadcasters.

⁵⁸¹ See [par. 3.6. of Chapter I](#).

⁵⁸² AGCOM, *Indagine conoscitiva*, 2015.

⁵⁸³ In light of all the changes realized over time, the only relevant provision of the Tusmar concerning quotas was art. 44. Broadcasters had to respect two content quotas. First, they had to reserve at least 50% of their transmission time to European audio-visual works. Second, they had to reserve at least 10% of their transmission time (20% in the case of the Rai), to European cinematographic works produced in the last five year. A percentage of

seems that broadcasters were overall compliant with said rules⁵⁸⁴; however, doubts in this regard arise from the fact that they self-certificated on the matter and that they benefited from proportionality and flexibility instruments.

In any case, there was no agreement on the reasons for said complexity and the changes needed. Indeed, interrogated on the problems faced, broadcasters and producers agreed only on the need to adopt more stringent rules for non-linear providers. Concerning all other aspects, they asked for opposite legislative actions. Simplifying and polarizing the different positions: producers expressed the need for a more incisive legislative action, broadcasters for a lighter one.

According to the producers, it was necessary to ensure greater certainty and effectiveness in the application of quotas. They criticised televisions

this quota should be reserved for Italian cinematographic works. In the case of Rai, the sub-quota was 20% or 6,5%, depending on whether the channel concerned was or not focused on cinema. In the case of private broadcasters, the sub-quota was 30% or 10%, based on the same rationale. As regards investment quotas, Rai had to invest at least 15% of its annual net revenues in European independent audio-visual works, private broadcasters at least 10% of their total annual revenues. They both had to reserve a part of this percentage to the investment in Italian cinematographic works. Only Rai had to respect an additional sub-quota for animation works for children, while only private broadcasters had to reserve a percentage of the quota for Italian cinema to the purchase of recent films. Finally, they both had to allocate a percentage of their investment quota in Italian cinematographic works for pre-acquisition. The obligations imposed on non-linear providers were a lot less stringent, in line with the European Law of that time. The Tusmar merely established that non-linear operators subjected to the Italian jurisdiction had to promote the European audio-visual production «gradually and taking into account market conditions», and asked AGCOM to specify how they could realize said promotion. The Authority allowed non-linear providers to choose between content or investment obligations to comply with. More precisely, they could alternatively choose between reserving 20% of the total amount of hours annually available in their catalogues to European works or investing in the European works' production at least 5% of their annual revenues. All the on-demand providers opted for the content quotas (AGCOM, *Relazione annual sull'attività svolta e sui programmi di lavoro*, 2019, pp. 54).

⁵⁸⁴ According to the data available (AGCOM, *Relazione annuale*, pp. 55 ff.), the average value of the programming of European works by national televisions was indeed approximately 17 percentage points higher than the legal threshold. Rai1 transmitted the highest hours of European works (98%); Italia Uno the lowest one (27,3%). The average value of the investment in the production of independent European works was instead 20.9%, well above the minimum thresholds established by law.

for adopting strategies to limit the effectiveness of the obligations and AGCOM for its attitude, considered excessively favourable towards broadcasters. Producers claimed that AGCOM, in charge of controlling the respect of the rules, had been allowing broadcaster numerous derogations from the obligations and adopting proportionality and flexibility mechanisms not provided by the law. This way, the transparency of the system was compromised, as well as the effectiveness of the obligations.

On the other side, broadcasters asked for a more market-oriented legislative action, affirming that the free negotiation between the parties and the competitive encounter between demand and supply could generate efficient and competitive scenarios. They pointed out that proportionality and flexibility mechanisms adopted by AGCOM were essential in a legal framework like the Italian one, characterized by a high degree of complexity. Such a framework required televisions to comply with several programming and investment sub-quotas in addition to the general quota for European audio-visual independent works (the one for the program for minors, for recent cinematographic works, etc.)⁵⁸⁵. In principle, sub-quotas did not generate problems for generalist channels, interested in financing and transmitting different types of products. They were instead problematic for thematic channels: to respect sub-quotas, they had to divert investments from their core product to fund works that might not be consistent with their editorial identity. According to broadcasters, this was the reason for the disconnection between programming and investment obligations, i.e. the lack of correlation between the films financed and those broadcasted by televisions⁵⁸⁶. Such a disconnection raised criticisms, because generated the absence of coordinated support for films through their

⁵⁸⁵ See footnote no. 583 of this paragraph.

⁵⁸⁶ Said disconnect between investment and programming strategies was particularly frequent in the case of Rai. It financed films then considered unable to attract a television audience and, for this reason, broadcasted late at night. Another problem was that Rai met its investment quotas mainly by automatically funding the film of 'cultural interest' already funded by the State. Consequently, there was an overlap of public funding, in the form of ministerial contribution and State television investment, which eliminated any risk for the producer. See CUCCO, M. and MANZOLI, G., *Il Cinema di Stato*, pp. 90 ff.

overall cycle of life, i.e. from the development of the idea to the distribution.

Moreover, broadcasters claimed that the protection granted to producers through quotas had encouraged the spread of many sub-capitalized entities financially dependent on the broadcasters themselves, without entrepreneurial capacity and mostly risk-averse. According to broadcasters, the 'regulated' system had *de facto* encouraged the perpetuation of the existing circumstances, removing the incentive to innovate one's commercial offer, more guaranteed by the stimulus of competition. According to the producers on the other side, sub-capitalisation and the lack of entrepreneurial ability of most companies did not depend on the excessive protection they were granted by law, but rather on the imbalance of the management of secondary rights. Broadcasters buying the almost totality of exploitation rights had been preventing producers to accordingly profit from the works on alternative markets and therefore had been making them unable to build their own consolidated business dimension⁵⁸⁷.

In the light of the different interests involved, the 2017 reform has made two main choices. First, it has strengthened obligations for non-linear providers—as requested by all the operators involved. According to the reform, digital providers should respect both content and investment quotas rather than having the possibility to choose between them. In addition, the reform established that the investment obligations must also be respected by the operators that provide services in Italy being established abroad. In this regard, Italy has anticipated the 2018 Directive.

Second, the 2017 reform, sharing producers' observations, sought to increase broadcasters' actual commitment to promoting national and European independent production. It increased the percentages for both investment and programming quotas and confirmed the application of several sub-quotas. At the same time, it introduced some correctives to limit the cases of operators having to meet requirements inconsistent with their editorial line; this way, the reform sought to reduce the cases

⁵⁸⁷ See [par. 3.2.1. of Chapter II](#).

of operators asking for derogations⁵⁸⁸. The 2017 reform also established higher penalties for the obligations' violation, considering the previous ones too low compared to some providers' high revenues. Finally, the 2017 reform implemented a prime-time obligation to avoid the diffusion of European and Italian films merely at lower audience hours. It also established that the verification of conformity to said obligation should be carried out weekly rather than annually.

Broadcasters have strongly criticized the 2017 reform⁵⁸⁹; hence, the 2019 intervention: before the entry into force of the 2017 reform, a new government modified it. First, the Budget Law for 2019 postponed its entry into force. Second, the following Law no. 81/2019 of August 8th⁵⁹⁰, besides postponing the entry into force of the reform again, has decreased the percentage of programming and investment quotas and introduced a more flexible approach. For example, it eliminated the prime-time obligation. The result seems to be a more balanced system. However, the events testified that important decisions could be taken based on the political contingencies and the strength of the lobbies of the moment in Italy. As well as through the most disparate regulatory sources—such as a Law Decree concerning the personnel of symphonic opera foundations⁵⁹¹. A long-term overview, despite the limited duration of national governments, would be indispensable. Its lack risk to jeopardize the activity of national enterprises, deprived of credible multiannual horizons. It also risks limiting the availability of foreign enterprises to locate assets in Italy.

⁵⁸⁸ See [par. 5.3. of this Chapter](#).

⁵⁸⁹ See MANZOLI, G., "Molto rumore per nulla? Il decreto legislativo in materia di promozione delle opere europee ed italiane da parte dei fornitori di servizi di media audiovisivi", *Aedon* 1 (2018).

⁵⁹⁰ Conversion into law, with amendments, of Law Decree no. 59/2019 of June 28th «concerning urgent measures on symphonic opera foundations' personnel, support for the cinema and audio-visual sector and financing of the activities of the Ministry for Cultural Heritage and Activities and for the holding of the UEFA Euro 2020 event».

⁵⁹¹ See the previous footnote.

4. The current European regulatory framework

In light of the reforms realized over time, today the AVMS Directive, as modified in 2018, regulates quotas. Concerning **linear providers**, the relevant provisions are arts. 16 and 17. They establish that broadcasters have to reserve the majority proportion of their transmission time—excluded that appointed to news, sports events, games, advertising, teleshopping, and teletext services—to European works and that the Member States can require them to reserve to the independent ones at least 10% of either their transmission time or their programming budget⁵⁹². Concerning **non-linear providers**, the relevant provisions is art. 13. Its first paragraph is about content obligations **(i)**, while the second concerns the investment ones **(ii)**⁵⁹³.

i. Content obligations. According to art. 13(1), the Member States shall ensure that non-linear providers under their jurisdiction reserve at least 30% of their catalogues to European works. They also have to ensure ‘prominence’ to those works: given the amplitude of certain catalogues, the effectiveness of quota for European works will mainly lie in their visibility so that viewers can easily access and select them.

It is worth to notice that the alignment between the obligations of non-linear and those of linear providers is still today partial. First, the percentage of 30% is lower than that applied to traditional broadcasters—which, however, do not have to ensure ‘prominence’ to the European works⁵⁹⁴. Moreover, the content obligations risk to be

⁵⁹² Note that these provisions are quite identical to the 1989 ones: the several versions of the Directive adopted over time essentially confirmed them.

⁵⁹³ It is worth noticing that art. 13(6) provides for mandatory exemptions for companies with a low turnover or a low audience from the obligations under art. 13(1), as well as from the possible requirements under art. 13(2). The aim is to ensure that the obligations do not undermine market development and do not inhibit the entry of new market players. For the definition of companies with a low turnover or a low audience, see EUROPEAN COMMISSION, *Guidelines pursuant to Article 13(7) of the Audiovisual Media Services Directive on the calculation of the share of European works in on-demand catalogues and on the definition of low audience and low turnover* (2020/C 223/03).

⁵⁹⁴ Indeed, as noted, <article 16 provides no indication of how linear providers should ensure that a share corresponding to the majority proportion of their transmission time is

much more burdensome for the linear operators than for the non-linear ones. Allocating an hour to European works requires a broadcaster to relinquish the prospect of any alternative programming in that time slot. On the opposite, online catalogues have unlimited space, so that the inclusion of one more European film does not block out another programme. Therefore, content quotas are likely to affect the traditional players' editorial freedom much more than that of the digital ones. This is why, according to several parts, the maintenance of quotas in the digital world is not shareable. The idea is that, because of the situation that had arisen, it would have been more appropriate to eliminate quotas, thus reducing the obligations on both linear and non-linear operators⁵⁹⁵.

To conclude on content quotas, it is worth noticing that the Member States have substantial room for interpretation in the Directive's implementation. Indeed, the latter provides only a few parameters on how operators must fulfil the obligations, while the particularities of their catalogues raise many technical questions. More precisely:

reserved for European works; nor does it specify measures that should be adopted so as to enable viewers to access them. It follows that certain works can be broadcast in time slots with smaller audiences—for example, late at night [...]». See APA, E. and GANGEMI, G. “The New Audiovisual Media Services Directive and the Promotion of European Works by On-Demand Media Service Providers.” *Media Laws 2* (2019): 93-127, p. 104.

⁵⁹⁵ The request to abolish quotas also stemmed from other arguments. Some noted that quotas have become obsolete in the digital era because they can no longer modify consumers' demand. In the past, ensuring that a certain percentage of films shown were European increased the number of European films viewed. In the digital era, it is no longer possible to conditionate consumers' demand: users, being empowered by technology, have the freedom to pick the content of their choice at any given time or place. The control over the supply does not necessarily lead to control over demand, shortly. However, it is worth noting that quotas' purpose cannot be reduced only to make consumers watch movies different from what they would have watched otherwise; if we admit that quotas have a cultural purpose, their effectiveness cannot be measured exclusively on the supported works' commercial results. Another argument against the maintenance of quotas is that this instrument has become pointless in the digital era because no longer needed to protect cultural diversity. The idea is that, since space scarcity has disappeared and there is room on the Internet for films from every country in the world, there is no need to carve out a place for European works or any other national audio-visual industry. However, said argument appears not convincing either: there is no evidence that an infinite space automatically generates a diversified supply (see [par. 3.1.1. of Chapter II](#)).

- the first question is the timeframe for compliance verification (weekly, monthly, or annually). The non-linear providers continuously add new works to those already present in their catalogues. Consequently, the verification of quota compliance should consider the timeframe for which each work is available in the catalogue;
- the second question is how to calculate the attainment of the established percentage. For linear operators, the percentage to dedicate to the European works is measured on the transmission time. This concept cannot be used in the case of a digital catalogue. The Member States may decide if to measure the 30% on the total number of hours in the catalogue or the number of works supplied. Since 2020, the Commission has established guidelines to clarify this aspect: the more appropriate way to calculate the share of European works is by considering the number of titles in each catalogue⁵⁹⁶. The Commission also provided guidelines about what constitutes a title: in the case of feature and TV films, every film should be understood as constituting a title in a catalogue; in the case of series, each season should be intended as one title.
- finally, the Directive does not define prominence and offers guidance by merely outlining some indicators⁵⁹⁷.

ii. Investment obligations. According to art. 13(2), the Member States can require providers under their jurisdiction to financially contribute to the promotion of European works⁵⁹⁸; if they do so, they can also require

⁵⁹⁶ See EUROPEAN COMMISSION, *Guidelines pursuant to Article 13, par. 7*.

⁵⁹⁷ According to Recital 35, «Prominence can be ensured through various means such as a dedicated section for European works that is accessible from the service homepage, the possibility to search for European works in the search tool available as part of that service, the use of European works in campaigns of that service or a minimum percentage of European works promoted from the services' catalogue, for example by using banners or similar tools».

⁵⁹⁸ Note that such a financial contribution should not be necessarily realized by independent producers: differing from art. 17, art. 13 does not refer specifically to independent works.

the providers that target their audience⁵⁹⁹ being established abroad to participate in the funding—thus derogating from the country of origin principle. By this way, non-linear providers should no longer be able to provide services in several countries while respecting only the requirements imposed in the one in which they are established⁶⁰⁰.

While allowing a derogation from the country of origin principle, the Directive contains different provisions to avoid excessive burdens and prevent the single market from being unduly compromised:

- first, the Member State that imposes a financial contribution on a provider established abroad shall base said contribution exclusively on the revenues earned within its territory;
- Second, if the Member State where the provider is established imposes a financial contribution, it shall take into account on top of that any financial contributions imposed by targeted Member States. In other words, the country of origin's power to impose obligations to providers under its jurisdiction is limited by the new prerogatives of the countries of destination. The aim is avoiding the submission of the provider to a double financial imposition—the one from the country of origin and the ones of the countries of establishment. This burden could indeed restrict the freedom to provide services across the EU. However, the Directive does not specify which State is responsible for applying sanctions if a provider fails to respect the investment obligations imposed by the State whose audience it targets while being established abroad. It is unclear whether the country of

⁵⁹⁹ The concept of 'target audience' is not defined by the directive, but Recital 38 offers guidance by outlining some indicators.

⁶⁰⁰ Actually, said provision does not apply only to non-linear providers but also to linear ones. However, it is primarily relevant in the case of the non-linear ones, since the linear ones are often limited in scope to one or few Member States. For this reason, the initial proposal of the Commission was to limit the derogation from the country of origin principle to non-linear providers; however, the European co-legislator, in the course of a dialogue, decided to extend the rule to include all operators (VIOLA, R., *La riforma del quadro normativo dell'audiovisivo tra mercato unico digitale e valori fondamentali*, in *La riforma del mercato audiovisivo europeo*, pp. 11-23, p. 22-23).

- origin's jurisdiction or that of the country of destination should be applied;
- finally, the Directive prevents foreign providers from being required to contribute to national funds that would exclusively benefit national operators⁶⁰¹.

5. The current regulatory framework in Italy and France

Italy and France provide more detailed and incisive rules on quotas than those laid down by the European Directive. Moreover: they are the two Member States that have adopted the stringiest provisions⁶⁰².

In Italy, the main principles are established by the Tusmar; in light of the 2017 reform and its 2019 'reshaping', the relevant provisions are arts. from 44 to 44-*septies*. The detailed framework should be provided by a regulation from AGCOM and one or more decrees jointly adopted by the Ministry of Culture and that for Economic Development. Indeed, the Tusmar requires these secondary sources to establish the exact percentage of quotas, the eventual establishment of additional sub-quotas, and the details of several aspects. Precisely because of the lack of these secondary sources, the new quotas system is not operational yet in Italy. Indeed: the AGCOM regulation implementing the Tusmar's reform is still subject to public consultation⁶⁰³; the Ministry of Culture and that for Economic Development so far adopted only a Decree concerning the definition of Italian cinematographic works⁶⁰⁴, and they

⁶⁰¹ Indeed, according to Recital 36, «media service providers that are required to contribute to film funding schemes in a targeted Member State should be able to benefit in a non-discriminatory way, even in the absence of an establishment in that Member State, from the aid available under respective film funding schemes to media service providers».

⁶⁰² See EUROPEAN AUDIOVISUAL OBSERVATORY, *Mapping of national rules for the promotion of European works in Europe*, 2019.

⁶⁰³ See Annex B («Regulation on programming and investment quotas for European works and works by independent producers») and C («Definition of the technical and editorial criteria for highlighting European works on on-demand audio-visual media services») to the already mentioned AGCOM's deliberation no. 421/19/CONS of October 17th, 2019.

⁶⁰⁴ See the Inter-Ministerial Decree no. 47/2021 of January 29th.

still have to establish the precise regulation concerning quotas in favour of this types of works.

In France, the 1986 Act establishes the fundamental principles, while the Decrees of the Council of State lay down the detailed provisions. There is a Decree about the content quotas for linear providers (the 'Broadcasting Decree')⁶⁰⁵; a Decree about the investment quotas for terrestrial Hertzian channels⁶⁰⁶; a Decree about the investment quotas for non-Hertzian channels, such as cable and satellite ones⁶⁰⁷; finally, a Decree about both the content and investment quotas for non-linear providers (the already mentioned 'SMAD Decree')⁶⁰⁸. In any case, in accordance with the minimum percentages laid down by the Law and the Decrees, the obligations of each actor are determined based on its specificities by the Convention each of them signs with the CSA.

Like the other countries, even Italy and France added, on top of protecting the European audio-visual market, the goal of promoting national audio-visual industries. They require providers to show and finance national works, in addition to the European ones. This is possible given that the definition of 'European works' allows considering intrinsically European the works of all the different Member States⁶⁰⁹.

It is interesting to know how the two countries defined the concept of 'national cinematographic works' in the framework of quotas: it testifies

⁶⁰⁵ Decree no. 66/90 of January 17th.

⁶⁰⁶ Decree no. 747/2010.

⁶⁰⁷ Decree no. 416/2010.

⁶⁰⁸ Decree no. 793/2021.

⁶⁰⁹ See art. 1, par. 1, let. n) of the Directive, which established that three types of works might be understood as constituting European works: i) works originating in the Member States; ii) works originating in European third States that are party to the European Convention on Transfrontier Television; and iii) works that are co-produced within the framework of agreements relating to the audio-visual sector that have been agreed between the EU and third countries. Furthermore, the works must be made by authors and workers who reside in one or more relevant States (i.e., Member States of the EU and States that have signed the Convention), provided that the work is made by, or under the supervision of, a producer that is established in a Member State; or, in the case of co-productions, that co-producers from such States make the most significant contribution to the total co-production costs.

how sometimes legislators end up putting new constraints, while trying to increase opportunities. France defines cinematographic works of French original expression as those whose original language is French or a regional language used in France⁶¹⁰. Historically, at the basis of this definition laid the desire to prevent tensions with the EEC. France claimed that the quotas in favour of French works were not aimed at promoting national audio-visual production but the French language: they could have been satisfied not only by French works but also by Belgian and Canadian ones.

Taking inspiration from France, Italy used a similar definition in the past. Indeed, the almost sole criterion for defining an Italian cinematographic work was the use of the Italian language or Italian dialects⁶¹¹. This definition generated distortive effects, namely the reduction of the Italian film industry's internationalization and the economic value of Italian film: to respect the sub-quota for national cinema, broadcasters had to finance films shot in Italian, which are difficult to export and thus have a limited economic value⁶¹². An investment in highly successful films such as *"Tale of Tales"* by Matteo Garrone or as *"Youth"* by Paolo Sorrentino, shot in English, could not have been taken into account to verify the achievement of quotas in national works⁶¹³. In front of this situation, the 2017 Italian reform considered it appropriate to adopt a new definition of cinematographic work of original Italian expression. It required

⁶¹⁰ See art. 5 of Decree no. 66/1990.

⁶¹¹ Art. 2 of the Inter-Ministerial Decree of February 22nd, 2013.

⁶¹² See MANZOLI, G. "Molto rumore per nulla?".

⁶¹³ Interestingly, similar disincentives occurred in France concerning the music sector. Radio channels as well have to respect quotas for French products, defined as the ones that use the French language. As noted by MESSERLIN, P. and PARC, J., "In search of an effective trade policy for the film industry: Lessons from Korea", *Journal of World Trade* 52.5 (2018), the French legislator has pushed French performers to sing in French since only the ones that use French can benefit from the prime-time radio established by the quotas regulation. This way, quotas have ended up «limit their horizon to an increasingly smaller and introverted domestic market [...]». Indeed, performers singing in French attract a maximum of 10 M views on YouTube per year for the top stars, while those singing in English attract 100-230 M views per year.

indeed a Decree jointly adopted by the Ministry of Economic Development and that of Culture to lay down a new definition of cinematographic work of original Italian expression, considering «culture, history, identity, creativity, language or places» as qualifying elements»⁶¹⁴.

5.1. Content quotas

5.1.1. Linear providers

In Italy, art. 44-*bis* of the Tusmar regulates content quotas for linear providers. In France, art. 7 and ff. of the 'Broadcasting Decree' regulate them. As it is clear from **tab. 7**, the two States have adopted more detailed rules than the European legislator, which simply establishes that the Member States should require broadcasters under their jurisdiction to reserve the majority proportion of their transmission time to European works.

The approach of Italy and France is similar. They both require broadcasters to meet a quota in European works and a sub-quota in the national ones (stricter in the case of public broadcasters), which are both higher in France⁶¹⁵. Only in Italy there will be two further sub-quotas that apply *erga omnes*—established indeed by the scheme of AGCOM's Resolution to implement Tusmar's provisions⁶¹⁶.

The main difference is that only France distinguishes between the quotas for cinematographic works and those for the audio-visual ones. They

⁶¹⁴ See art. 44*sexies*, par. 1, lett. a), of the Decree no. 204/2017. The new definition is provided by art. 2 of the already mentioned Inter-Ministerial Decree no. 47/2021.

⁶¹⁵ For Italy, see art. 44*bis* (2) of the Tusmar; for France, arts. 7 (I, 2°) and 13 of Decree no. 66/1990 and art. 9(3) of Decree no. 796/2009 of June 23rd «*fixant le cahier des charges de la société nationale de programme France Télévisions*», which establishes the specific obligations of France Television.

⁶¹⁶ See Art. 4(4) of the Annex B to the scheme of AGCOM Resolution, implementing art. 34(10) of Tusmar that establishes that «The percentage reserved to the transmission of European works established by art. 44 shall also include [...] works specifically aimed at minors, as well as productions and programs suitable for minors or suitable for viewing by minors and adults. The Authority shall determine the minimum transmission time for such works and programs».

have the same percentages, but that for cinematographic works is calculated on the time that providers devote to such works; in contrast, the quotas for the audio-visual works is calculated on the time that providers devote to works other than cinema. Such an approach prevents providers that do not supply many cinematographic works from being required to transmit high percentages of national and European cinema —and vice versa. At the same time, it ensures the broadcasting of a certain percentage of both cinematographic and audio-visual European and national works.

In Italy, the French 'corrective' does not apply: the legislator provides only quotas for audio-visual works. Before the 2017 reform, it required providers to meet a sub-quota for European and national cinematographic works. Since said sub-quotas were calculated on each provider's general broadcasting time (and not on that devoted to the cinema), they could end applying also to operators that did not transmit cinema. To avoid these occurrences—and the following requests for derogations and criticisms about the uncertainty on the rules' implementation—the 2017 reform repealed the sub-quotas for European and national cinema. Today, the Italian sub-quotas (that for national works and for works for minors) concern the overall audio-visual production: broadcasters can satisfy them with any audio-visual work, whether cinematographic or not.

Tab. 8 Content quotas for linear AVMS providers in France and Italy

France		Italy		
<p>At least 60% (70% for public broadcaster) of the transmission time dedicated to cinematographic works to European cinematographic works</p> <p style="text-align: center;">sub-quota</p> <p style="text-align: center;">↓</p> <p>At least 40% (50% for public broadcaster) to cinematographic works of French original expression</p>	<p>At least 60% (70% for public broadcaster) of the transmission time dedicated to audio-visual works to European audio-visual works</p> <p style="text-align: center;">sub-quota</p> <p style="text-align: center;">↓</p> <p>At least 40% (50% for public broadcaster) to audio-visual works of French original expression</p>	<p>At least the majority of the transmission time to European audio-visual works</p> <p style="text-align: center;">sub-quota</p> <p style="text-align: center;">↓</p> <p>At least 1/3 (50% for public broadcasters) to works of Italian original expression</p>	<p style="text-align: center;">sub-quota</p> <p style="text-align: center;">↓</p> <p>At least 3% to works specifically directed at minors</p>	<p style="text-align: center;">sub-quota</p> <p style="text-align: center;">↓</p> <p>At least 10% to works suitable for minors</p>

Content quotas shall be met during ‘high audience ratings’ (*‘heures de grand écoute’*) only in France⁶¹⁷. The legislator established said rule since the very beginning, thus preventing the airing of imported programs during the hours of the highest audience and the programming of the French ones late at night.

Articles 7 and 14 of Decree no. 66/1990 establishes what must be understood for ‘high audience ratings’ : in the case of cinematographic works, between 6 pm and 2 am for services focused on cinema, and between 8.30 pm and 10.30 pm for others; in the case of audio-visual works, between 8.30 pm and 10.30 pm for services focused on cinema, and between 6 pm and 11 pm for others. Over time, France introduced two possible derogations from this provision:

1. First, Law no. 61/1992 of January 18th has allowed the CSA to substitute the ‘high audience ratings’ with ‘significant audience ratings’ (*‘heures d’ écoute significatives’*), in order to balance the prime-time obligation with each provider’s characteristics. Indeed, the ‘significant audience ratings’ are different for each service and are established each year by the CSA, depending on each service’s audience and programming characteristics, and on the relevance and nature of its contribution to the production.
2. Second, Decree no. 1222/2001 of December 28th has allowed the CSA to modify even the ‘significant audience ratings’ during the

⁶¹⁷ Art. 27 of the 1986 Act.

negotiations of the conventions of each provider. So, if the first derogation is established each year unilaterally by the CSA, this one is negotiated between the CSA and each provider and lasts for all the duration of the convention they sign.

To simplify, the abandoned Project of Law aimed at eliminating the first regime of derogation and conserving only the second one. The rule would have remained that providers shall meet quotas between 8.30 pm and 10.30 pm if they are cinema services, between 6 pm and 11 pm if they are not. The CSA could have continued to define a prime time other than the one established as a general rule, but only while negotiating the rules applicable to each provider. It is still to be known if the change will be confirmed, even though the project has been abandoned.

The Italian case is different. The obligation to meet programming quotas during the time slots with high audiences was established for the first time by Law no. 122/1998, then repealed by Legislative Decree no. 177/2005. The 2017 reform reintroduced the prime-time obligation to prevent broadcasters from programming national works late at night. However, the following Law no. 81/2019, sharing broadcasters' complaints, amended the provision introduced in 2017 and established that only the Rai has to meet quotas during the time of the highest audience⁶¹⁸. This way, it left private operators free to broadcast European and national works whenever they want.

5.1.2. *Non-linear providers*

In Italy, art 44-*quater* of the Tusmar regulates content quotas for non-linear providers; in France, art. 27 and following of the new 'SMAD Decree' regulates them. Both countries require only non-linear providers under their jurisdiction to meet content quotas: the Directive allows for a derogation from the country of origin principle only concerning the investment obligations, not even the content ones.

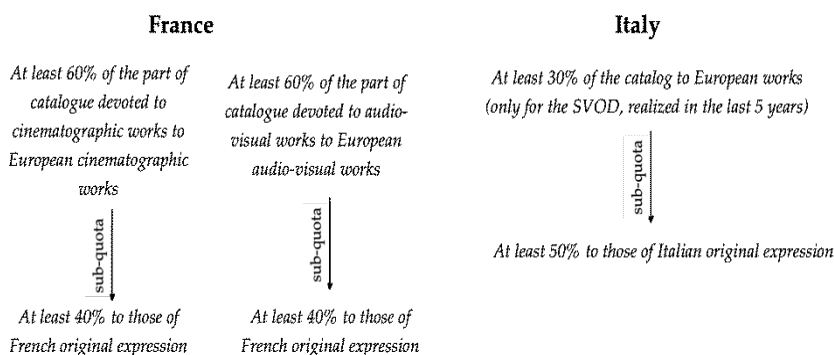
As **tab. 8** shows, the approach of the two countries is similar. They both provide a quota for European works and a sub-quota for the national ones, without more sub-quotas. However, French quotas are higher than

⁶¹⁸ See art. 44-*bis* (3) of the Tusmar.

the Italian ones: while France requires non-linear providers to reserve 60% of their catalogue to European works, Italy established a percentage equal to the minimal one required by the Directive, namely 30%⁶¹⁹.

Even in this case, the main difference is that only France distinguishes between the quotas for cinema and those for the audio-visual sector. They have the same percentages, but that for cinematographic works is calculated on part of catalogue that providers devote to such works; in contrast, the quotas for the audio-visual works is calculated on the part of catalogue that providers devote to works other than cinema.

Tab. 9 Content quotas for non-linear AVMS providers in France and Italy



As demanded by the Directive, the two State require linear providers to ensure prominence to the European works by which they meet quotas: they have to grant such works greater visibility so that viewers can easily access and select them⁶²⁰.

⁶¹⁹ For France, see art. 28 of the Decree no. 793/2021; for Italy, art. 44-*quater* (1, a) and 5) of the Tusmar.

⁶²⁰ For France, see art. 29 of the Decree no. 793/2021; for Italy, art. 44-*quater* (3) of Tusmar, which put AGCOM in charge of establishing the criteria through which non-linear providers must guarantee the prominence of European works. According to the scheme of the Authority Regulation (Annex C of AGCOM's Resolution), non-linear providers must ensure prominence by arranging either a dedicated section to European works on their

5.1.3. Easing the further traditional restrictions of the programming freedom of French broadcasters

In France, the linear providers' programming freedom has long been limited, besides quotas, by several other rules, adopted in the 1980s and 1990s to ensure that televisions do not compromise the attendance to cinemas⁶²¹. These rules were mainly two: the obligation to respect a timetable for the broadcasting of cinematographic works, aimed at protecting theatres attendance (i); the ban on cinema advertising on TV, aimed at preserving French cinema from Hollywood large marketing budgets (ii). However, the French legislator has recently envisaged either an amendment or a repeal of these rules: they were no longer able to protect cinema and their main effect was to compromise televisions' ability to compete with digital providers. Other rules were modified to increase broadcasters' capacity to acquire advertisements' resources, helping them return to a growth situation (iii).

i. The timetable for the broadcasting of cinematographic works. In France, televisions cannot broadcast as many cinematographic works as they wish, nor can they broadcast them every day of the week. The 1986 Act has limited total broadcasting time for cinematographic works and their distribution on days and at times in which people tend to go to the movies the mots⁶²². However, the legislator has recently made the limitations less stringent⁶²³.

First, it increased the maximum number of films that televisions can programme. Under the new rules, non-cinematographic channels

home pages, or a specific category wherein to search for European works. Moreover, they must reserve a share for European works in advertising and promotional campaigns. In France, the prominence obligation is regulated by the Convention each provider signs with the CSA. Still, according to the law, it can be respected by instruments of content recommendation, or by including in the homepage a substantial portion of trailers of European and French works or a dedicated section to them.

⁶²¹ See [par. 2.4. of Chapter I.](#)

⁶²² See arts. 27(5), 33(8) and 70 of the 1986 Act.

⁶²³ See Decree no. 984/2020 of August 5th, that modified the Decree no. 66/1990, adopted to implement the provisions of the 1986 Act.

cannot broadcast more than 244 cinematographic works (instead of 192) each year and cannot broadcast more than 196 works (instead of 144) between 8.30 and 10.30. The channels focused on cinema cannot broadcast in a year more than 800 cinematographic works (instead of 500), which cannot be broadcasted more than seven times in three weeks. Second, the legislator abolished the timetable for cinema's broadcasting, aimed at avoiding the programming of cinematographic works on television during the slots on which theatres made the most revenues⁶²⁴. These bans have become obsolete in the era of the OTTs, which allow consumers to view cinematographic works at any time. Their only effect was the production of a competitive unbalance between linear providers and on-demand ones. The only prohibition confirmed is that to programme cinematographic works on Saturday after 8.30 pm. However, the prohibition does not apply if the broadcaster has pre-acquired the film, or if the film concerned is an art-house work. Also, the exceptions are larger for channels focused on cinema: they can broadcast cinematographic works on Saturday after 8.30 pm also if the concerned work generated less than 2 M admissions in French theaters and if its first theatrical release occurred more than 30 years ago. This way, the legislator recognizes channels focused on cinema a more advantageous framework, considering their higher contribution to film financing⁶²⁵.

⁶²⁴ Before 2020, the timetable for cinema's broadcasting was very precise. It varied according to the different nature of the services. For non-cinematographic channels, bans applied to Wednesday and Friday evening, at any hour on Saturdays and during the day on Sundays. For channels focused on cinema, the rules varied depending on their nature. Generic channels could not broadcast cinematographic works: on Wednesday and Friday evenings (except for works of art and essays broadcasted after 10.30 pm); any time on Saturdays; before 8.30 pm on Sundays. Cinematographic heritage channels could not broadcast cinematographic works: on Saturdays between 6 pm and 11 pm; they can do it on Sundays between 1 and 6 pm only if the concerned works were in black and white. First exclusivity channels could not broadcast cinematographic works on Saturdays from 6 to 11 pm and Sundays from 1 to 6 pm. First-run cinema channels could not broadcast any cinematographic work: on Saturdays, from 6 pm to 11 pm (except those distributed in theatres for the first time more than ten years ago and have made less than €1.5 M entries during the first year of their exhibition); on Sundays from 13 to 18 hours.

⁶²⁵ See the following paragraph, [par. 5.2](#).

The reduction of the prohibited days and hours should benefit the national film industry: by promoting an increase of televisions' revenues, an increase of their investments in favour of future creation should arise. Moreover: as the abandoned Project of law explained, the ban on transmitting cinema in certain days and times produced the effect of concentrating its broadcasting on the same moments. The concentration led to a decline of the audience of cinematographic works on televisions and, therefore, to a decrease of their distribution profitability.

ii. The ban on cinema advertising on TV. In 2020, the French Government took action also concerning the ban on advertising cinematographic works on television⁶²⁶. The ban is established by art. 8 of the Decree no. 280/1992 of March 27th, according to which «cinema advertising is prohibited». It should be understood as prohibiting the advertising of both the film and the products derived from it (such as gadgets, etc.). The first prohibition lasts as long as the work is in cinema's theatres; once the work begins to circulate on other channels, televisions can advertise it. The second prohibition is lighter: it lasts only as long as the work is distributed in the theatres in a 'significant' way⁶²⁷. The idea is that the product as such may be advertised, but its link with the film released in cinemas requires waiting a certain time so as not to operate a disguised advertisement for the film; this risk disappears once the film is no longer screened significantly in theatres. It remains for the companies concerned to assess the scope of the term 'significant'.

The ratio behind these rules is to ensure the diversity of French and European cinema. The promotional marketing budgets of the majority of French films are incomparable to those that the American productions could mobilize. The latter can invest in the advertisement on the most popular television channels, while many national productions cannot afford such promotional expenses. The influence of television is considered such that the opening up of advertising for films on televisions in the course of their exploitation could have the consequence

⁶²⁶ See Decree No. 983/2020 of August 5th.

⁶²⁷ See the Decision of the Plenary Assembly of the CSA of May 10th, 2006.

of directing more light on large productions at the expense of the medium and small ones.

However, in 2020, given the need to allow televisions to return to a growth situation and consequently favour an increase of their investments in support of the French film industry, the Government suspended the ban's applicability for 18 months. In the meantime, the Government shall verify the suspension's effects to decide whether to definitely repeal the prohibition. Note that the suspension of the ban also aims to promote the return of spectators in cinemas after the lockdown due to the Covid-19 pandemic.

iii. Increasing broadcasters capacity to acquire resources. With the same aim to increase the income of traditional televisions and create a more fair competition between them and digital platforms, the 2020 legislator also allowed televisions to realize a '*publicité segmentée*'⁶²⁸. This way, it recognized them the possibility to realize an advertisement strategy targeted at the geographical area or the viewers' profile—an approach already followed by digital providers.

Probably, with the same aim to increase the capacity of televisions to gain advertising resources, France will also modify the rules on advertising breaks of cinematographic works broadcasted on television. Currently, public television channels and those focused on cinema cannot make advertising breaks when they broadcast cinematographic works; the other channels can make a maximum of two advertising breaks if the works have a duration of at least 1 hour⁶²⁹. This provision seeks to protect the integrity of films, besides the interests of viewers. The abandoned Project of law established that a third commercial break could have been authorized during films longer than 2 hours on private channels. As explained in the illustrative relation of the Project, «today, it is important to allow broadcasters to find increased sources of financing [...]. The disadvantage of the third cut for viewers is less than that of the disappearance of cinematographic works from televisions'

⁶²⁸ See Decree no. 983/2020.

⁶²⁹ See art. 73 of the 1986 Act.

screens»⁶³⁰. Moreover, the authorization for a third commercial break should remove an obstacle to the broadcasting of films longer than 2 hours, thus benefiting the level of diversity of the cinematographic supply on television.

5.2. Investment quotas

In Italy, investment quotas are all in favour of independent production. In France, only a proportion (about $\frac{3}{4}$) is specifically directed towards independent works⁶³¹. Promoting independent production is an additional goal to the more general one of ensuring that those who distribute cinematographic works also contribute to creating the future ones in France.

In both the countries, the tax base for investment quotas is the providers' previous year's revenues (Italy) and turnover (France) and not the programming budget—as in the European Directive⁶³². The investment may consist of: pre-acquisition, a modality that involves broadcasters since the beginning and makes it shares with producers both the risks

⁶³⁰ See Project of Law, p. 96.

⁶³¹ France introduced the rule that $\frac{3}{4}$ of the investment should be allocated to independent productions in 1999 to ensure that broadcasters made a real contribution to film production. The original regulations of 1986 mandated televisions to set up dedicated film divisions to administer their investments in the film industry. As these entities were production companies on their own, they too could benefit from the CNC's support via automatic aid. By introducing a proportion to be devoted to independent producers, the State prevented broadcasters from supporting projects that would have secured a subsidy for themselves at a later date, thus reducing their overall investment in film production below the percentage dictated by the law. For the whole discourse, see WALKLEY, S. E., *To what extent*, pp. 106 and 111.

⁶³² On the matter, the Italian 2017 reform shared the observations of producers. Providers had asked to replace the annual net revenues criterion with that of the programming budget, considering it more consistent with EU's provisions and likely to ensure greater flexibility. However, producers noted that the programming budget criterion could have involved circumvention of the obligations; they worried indeed that the transition from a budget item drawn up according to standard civil criteria (revenue) to a more discretionary one anchored to providers' business choice (programming budget) risked introducing aleatory elements and compromising the supervisory activity. See AGCOM, *Indagine conoscitiva*.

and potential benefits of the final work; acquisition; co-production; and production. In addition to these forms, in France, investments may also include adapting works for blind or deaf audiences, funding dubbing and subtitling, supporting screenwriting, films' promotion and authors' training, as well as the restoration and valorisation of the French cinematographic and audio-visual heritage.

Through the 2017 reform, Italy repealed the provision that the investment may also consist of 'financing' the work: this mean of investment was considered too generic and likely to generate not virtuous dynamics, i.e. to compromise the actual degree of independence of producers in front of providers⁶³³.

5.2.1 *Linear providers*

In Italy, art. 44-ter of the Tusmar regulates investment quotas for linear providers. In France, arts. 1 and ff. of the Decree no. 747/2010 regulates those for terrestrial Hertzian channels, whereas arts. 4 and ff. of the Decree no. 416/2010 regulates those for other channels.

As **Tab. 9-12** show, both Italy and France established detailed rules, while the Directive merely gives the Member States the possibility to decide whether to adopt or not measures aimed at promoting investment from providers. However, the French system is much more complex than the Italian one.

In Italy (**tab. 9**), public broadcaster shall invest 17% of its total annual revenues in the production of independent European works⁶³⁴; private broadcasters at least 12,5% of their annual net revenues⁶³⁵. There are three sub-quotas of this central quota: the one for the development of national works produced in the last five years—that will be introduced

⁶³³ See CASINI, L., "Il nastro dei sogni"? Il diritto (pubblico) del cinema e dell'audiovisivo", *Aedon* 3 (2017), and also AGCOM, *Indagine conoscitiva*, p. 169.

⁶³⁴ See art. 44-ter (3) of the Tusmar. Before the changes made in 2019, the percentage was 20%, while before the 2017 reform was 15%.

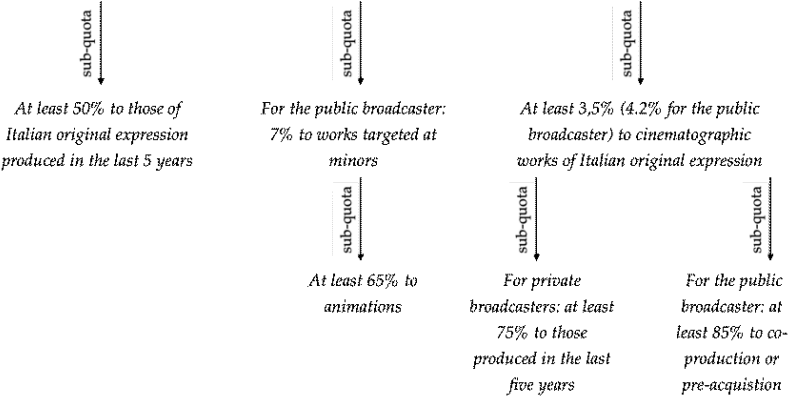
⁶³⁵ See art. 44-ter (1) of the Tusmar. Before the 2017 reform, this percentage was 10%.

by AGCOM to implement Tusmar’s provisions⁶³⁶; the one, which applies only to Rai, for the development of works directed at minors⁶³⁷; the one for the development of the Italian cinematographic works⁶³⁸.

Unlike France, Italy does not distinguish between investment quotas in audio-visual and cinematographic works. However, since the 2017 reform, there should not be cases in which operators that do not program cinema or do so to a limited extent could be required to invest in national and European cinema. Indeed, the 2017 reform established that the investment sub-quota for cinema applies «taking the show schedule into account»⁶³⁹. Based on this, the scheme of AGCOM Regulation provides that said sub-quota applies only to operators that broadcast more than 52 different cinematographic works—or over 104 reruns⁶⁴⁰.

Tab. 10 Investment quotas for linear AVMS providers in Italy.

At least 12.5% of the yearly net revenues (17% of the total revenues for the public broadcaster) to European independent audiovisual works



⁶³⁶ See art. 44-ter (1-bis and 3-bis) of the Tusmar and art. 5 (1-bis and 6-bis) of Annex B to the scheme of AGCOM Resolution.

⁶³⁷ See art. 44-ter (5) of the Tusmar.

⁶³⁸ See art. 44-ter (2 and 4) of the Tusmar.

⁶³⁹ Art. 44-ter (2 and 4) of the Tusmar.

⁶⁴⁰ Art. 5 (5) of Annex B to the scheme of AGCOM Resolution.

The French framework (**tab. 10-12**) is much more complex for several reasons. First, France distinguishes between quotas for cinematographic works and quotas for audio-visual works even in this case, as said. The first apply only to operators that broadcast more than 52 different cinematographic works per year or more than 104 broadcasts or reruns⁶⁴¹. The second apply instead only to operators who reserve at least 20% of their programming time for audio-visual works (or, in the case of non-Hertzian channels, even less if their net turnover for the previous year is more than €350 M)⁶⁴². By doing so, the legislator avoids operators from being forced to distract their investment from their core product to direct it towards works they will not later be interested in distributing; at the same time, it ensures funding for both cinematographic and audio-visual national and European works. Second, the French system is much more complex than the Italian one because French quotas differ depending on if the channel concerned is or not focused on cinema. Channels focused on cinema have to meet lighter quotas than other channels in the audio-visual production; on the opposite, they are subjected to higher investments in cinematographic works.

Concerning the investment quotas in cinema⁶⁴³ (**tab. 10**), French generic channels shall invest at least 3.2% (3.5% for the public broadcaster⁶⁴⁴) of their previous year's turnover in the production of European cinematographic works, and at least 2.5% of it in French works⁶⁴⁵. Three-

⁶⁴¹ Art. 4 of Decree no. 416/2010 and art. 1 of Decree no. 747/2010.

⁶⁴² Art. 11(I) of Decree no. 416/2010 and art. 7 of Decree no. 747/2010.

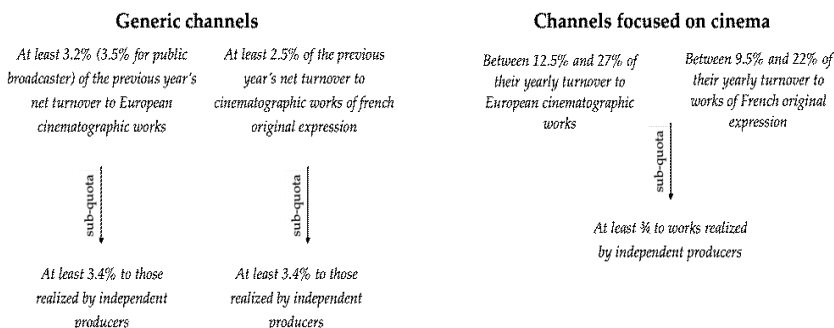
⁶⁴³ Following a proposal of the abandoned Project of law, the Ordinance No. 1642/2020 allows channel groups to merge the cinema investment quotas of each of the services they publish (art. 1(4) of the Project and arts. 11 and 15 of the Ordinance). In other words, the cinema investment obligations should be defined globally for the different channels of the same publisher—provision already in force concerning the investment quotas for audio-visual works. This measure should grant facilitation to providers, increasing their room for manoeuvre and their capacity to adapt to market developments, while maintaining their investment level. Indeed, the CSA must ensure that this option does not decrease these services' investment.

⁶⁴⁴ Art. 9(2) of Decree No. 796/2009.

⁶⁴⁵ Art. 6 of Decree No. 416/2010 and art. 3 of Decree No. 747/2010.

quarters of these quotas shall be reserved for independent works⁶⁴⁶. Channels focused on cinema have to respect higher obligations⁶⁴⁷. Depending on the level of their revenues and number of films they broadcast, they shall invest from 12.5% to 27% of their yearly turnover in the production of European cinematographic works, including a minimum of 9.5% to 22% in French works.

Tab. 13 Investment quotas in cinematographic works for linear AVMS providers in France.



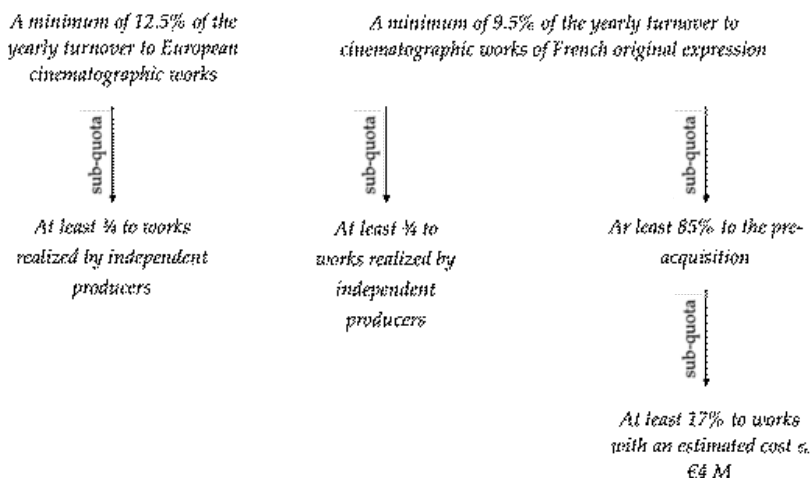
It is worth noticing that even the generic channel Canal+, which has traditionally been the leading producer of French films, is subject to higher obligation than the other channels (**tab. 11**). Created in 1984, as the first private television company, Canal+ accepted indeed to respect more stringent rules than those applied to other channels in exchange for several benefits. Among them: a reduced rate of value-added tax; the right to show films only one year (instead of three) after their theatrical release; the authorization to show many more films than the other stations (up to 320 instead of 192). To this day, it continues to be subject to higher obligations in exchange for some benefits, including the possibility to broadcast films before the other channels. According to the

⁶⁴⁶ Art. 8 of Decree No. 416/2010 and art. 6 of Decree No. 747/2010.

⁶⁴⁷ See art. 35 of Decree no. 747/2010 and art. 21 of Decree no. 416/2010.

current Convention concluded between the CSA and Canal+⁶⁴⁸, Canal+ must devote 12.5% of its yearly turnover to the purchase of the broadcasting rights of European films; 9.5% to the purchase of those of French films. Three-quarters of these sums must support independent works. For at least 85% of its amount, the obligation to purchase the right to broadcast French cinematographic works must be devoted to the pre-purchase of works whose filming has not yet begun. To promote diversity, the Convention establishes that at least 17% of this percentage should be devoted to the purchase of small-budget works.

Tab. 14 Investment quotas in cinematographic works for Canal+.



Once described the French investments quotas in cinema, it is possible to analyse those in favour of the audio-visual production. They vary depending on whether the channel is Hertzian or not. Simplifying and reporting only the general scheme⁶⁴⁹: Hertzian channels shall invest at

⁶⁴⁸ It was adopted on May 29th, 2000, and then amended several times, lastly in November 2019.

⁶⁴⁹ Indeed, the Decrees also establish an 'alternative scheme' for free-to-air Hertzian channels that accept to invest only in the production of 'oeuvres patrimoniales' (see footnote 652) and a 'particular scheme' for musical channels, both Hertzian and non-Hertzian.

least 15% of their yearly turnover in the production of European audio-visual works or works of French original expression⁶⁵⁰; non-Hertzian channels at least 14%⁶⁵¹. They both have to satisfied a part of this obligations by funding European or French ‘*oeuvres patrimoniales*’⁶⁵². As anticipated, thematic broadcasters focused on cinema have to respect less incisive obligations: they shall invest at least 3.6% of their yearly turnover in the production of European audio-visual ‘*patrimoniales*’ works, with a sub-quota of 85% in favour of those of French original expression⁶⁵³. All channels must reserve a percentage of these quotas for independent production⁶⁵⁴. The obligations of the public broadcaster are higher: it has to devoted at least 20% of its previous year’s net turnover to the production of European or French original expression audio-visual works⁶⁵⁵.

Tab. 17 Investment quotas in audio-visual works for linear AVMS providers in France.

Hertzian channels		Others channels		Channels focused on cinema	
<i>At least 15% of the previous year's net turnover to European or French audio-visual works</i>		<i>At least 14% of the previous year's net turnover to European or French audio-visual works</i>		<i>A percentage varying between 3,6 and 6% of the previous year's net turnover to European audio-visual 'patrimoniales' works</i>	
sub-quota ↓	sub-quota ↓	sub-quota ↓	sub-quota ↓	sub-quota ↓	sub-quota ↓
<i>A part (at least a percentage of the previous year's net turnover) to European or French 'oeuvres patrimoniales'</i>	<i>At least a percentage to those realized by independent producers</i>	<i>A part (at least a percentage of the previous year's net turnover) to European or French 'oeuvres patrimoniales'</i>	<i>At least a percentage to those realized by independent producers</i>	<i>At least 85% to those of French original expression</i>	<i>At least a percentage to those realized by independent producers</i>

⁶⁵⁰ See art. 9 of Decree no. 747/2010.

⁶⁵¹ See art. 11 of Decree no. 416/2010

⁶⁵² See art. 9 of Decree no. 747/2010 and 11 of Decree no. 416/2010. They include works of fictions, documentaries, animation, live performances and video clips (see art. 27, 3, of the 1986 Act Law).

⁶⁵³ See art. 40 of Decree no. 747/2010 and art. 27 of Decree no. 416/2010.

⁶⁵⁴ See arts. 15 of Decree no. 747/2010 and of Decree no. 416/2020.

⁶⁵⁵ See art. 9 (IV) of Decree no. 796/2009.

To conclude on investment obligations for linear providers, note that the decrease of advertisement resources due to the pandemic generated a decrease in televisions' revenues in both the countries. To support broadcasters, the CSA adopted a flexible approach in applying the regulatory framework, taking particular account of the nature of the service, the types of obligations, and the difficulties encountered⁶⁵⁶. In Italy, there is a discussion on how to avoid a drop in the broadcasters' investments in the new creation. APA asked the Government not to make levies on Rai's license fee. This way, the Rai—traditionally the leading producer of Italian films— should cover the gap due to lower advertising revenues with the total extra revenue from the license fee, to be used to fulfil its commitments in financing new films and audio-visual works⁶⁵⁷.

5.2.2 *Non-linear providers*

In Italy, art. 44-*quater* of Tusmar regulates the investment quotas of non-linear providers. In France, art. 10 and ff. of the Decree no. 793/2021 regulates them. In both countries, they apply also to providers that target consumers in Italy/France without being established there⁶⁵⁸. Still, in France, only providers with a turnover above € 5 M per year and having an audience higher than 0,5% of the total French have to meet investment quotas.

As **Tab. 13** and **14** show, Italy and France adopted incisive and detailed rules, while the European Directive merely establishes that the Member States may require non-linear providers to contribute financially to the production of European works. In any case, French quotas are higher than the Italian ones.

⁶⁵⁶ See *Courrier du Président du CNC, Roch-Olivier Maistre, aux éditeurs de services et aux syndicats de radios et télévisions*, March 24th, 2020.

⁶⁵⁷ For more information on the matter, see PASQUALE, A., *L'audiovisivo ai tempi della pandemia*, pp. 50 and 51.

⁶⁵⁸ Art. 44-*quater* (2) of Tusmar.

In Italy (**tab. 13**), non-linear providers shall invest at least 12,5% of their previous year's net revenues in Italy⁶⁵⁹ to produce European independent audio-visual works⁶⁶⁰. AGCOM might increase the percentage to 20% if the provider adopts investment methods inconsistent with the balanced growth of the national industry⁶⁶¹. According to the Tusmar, the AGCOM's regulation should increase in any case the percentage to 4.5% in three cases: if the provider does not grant the producer a share of secondary rights proportioned to its financial participation to the work; if the provider adopts contractual models that make the role of the independent producer purely executive; if the provider do not establish an operating office in Italy and do not employ there a certain percentage of workers —a provision that AGCOM will not implement, given its contrariety to European rules⁶⁶². At least 50% of the central quota shall be reserved for Italian independent works produced within the last five years⁶⁶³. At least 1/5 of said sub-quota shall be reserved for Italian independent cinematographic works (75% to those realized within the last five years)⁶⁶⁴. This sub-quota applies to all providers, regardless of the number of cinematographic works they distribute.

⁶⁵⁹ Note that, to limit the need to make adjustments and the difficulties in coordinating with the other Member States, the Italian legislator established that all non-linear providers are subject to investment obligations solely in proportion to their turnover in Italy. In other words, this precautionary measure applies both to the providers under the Italian jurisdictions and those that distribute in Italy being established abroad. Under the 2018 Directive, such a limitation is necessary only for the second type of providers, while the revenues of those established in Italy could be considered in total —applying corrective measures where the provider established in Italy also distributed in other Member States that impose contribution obligations.

⁶⁶⁰ See art. 44-*quater*, 1, b) of the Tusmar.

⁶⁶¹ Art. 44-*quater*, 1-*bis* of the Tusmar. Law Decree no. 59/2020 introduced this principle: it lowered the percentage from 20 to 12.5% and established that the 20% one should apply only if the on-demand service is not 'virtuous'.

⁶⁶² See art. 44-*quater*, 1-*bis* of the Tusmar. For a definition of a merely executive producer, see [par. 3.2.1. of Chapter II](#).

⁶⁶³ See art. 4-*quater* (5) of the Tusmar.

⁶⁶⁴ *Ibidem*.

Tab. 18 Investment quotas for non-linear AVMS providers in Italy.

At least 12,5% (raised to 20% in the case of non virtuous services) of the previous year's net revenues in Italy to the development of European audiovisual works realized by independent producers

sub-quota
↓

At least 50% for works of Italian original expression produced by independent producers within the last 5 years

sub-quota
↓

At least 1/5 for cinematographic works of Italian original expression produced anywhere by independent producers

sub-quota
↓

75% to those produced within the last five years

Unlike Italy, France distinguishes between the quotas for the audiovisual works and those for the cinematographic ones even in this case (tab. 14). The first apply only to providers that distribute more than ten audio-visual works; the second only to those distributing more than ten cinematographic works annually⁶⁶⁵. The provider that offers more than ten audio-visual works and more than ten cinematographic works has to invest in both audio-visual and cinematographic works. In these cases, the quantum to be devoted to the two types of investments depends on the type of provider concerned.

In the case of TVODs and AVODs, the quantum to be invested in cinema depends on the time the users of the provider spent watching cinematographic works (or on the number of cinematographic works they downloaded), and vice versa⁶⁷¹. In the case of SVODs, the quantum to be invested in cinematographic and audio-visual works will be

⁶⁶⁵ See art. 20 (I, 1° e 2°) of Decree no. 793/2021.

established by the Convention signed with the CSA by each provider. Still, the quantum to be devoted to each sector cannot be less than 20 % of the provider total investments (30% in the case of cinematographic works if the provider concerned distributes at least one cinematographic work released for the first time in theatres in the previous twelve months)⁶⁶⁶.

France distinguishes between the TVODs and AVODs, on the one hand, and the SVODs, on the other one, even concerning the entity of the obligations. The TVODs and the AVODs shall invest at least 15% of their previous year's net revenues in producing European works; at least 12% of said percentage should be devoted to French works⁶⁶⁷. In the case of SVODs, the rule is that they shall invest at least 20% of their previous year's net revenues in producing European works; at least 85% of said percentage should be devoted to French works. Still, the investment obligations are higher in the case of providers that distribute films on their platforms before 12 months have elapsed from their first theatrical release⁶⁶⁸: the sooner a provider distributes a cinematographic work, the higher its investment obligations —as said⁶⁶⁹. Still, said rule will be operational only once the *chronologie des médias* will be reformed. Indeed, according to the current rules, SVODs have to wait at least 17 months after the first theatrical release of a film to distribute it on their platform⁶⁷⁰.

⁶⁶⁶ See art. 14, II, of the Decree 793/2021.

⁶⁶⁷ See art. 20 of Decree no. 793/2021.

⁶⁶⁸ See art. 14 of Decree no. 793/2021.

⁶⁶⁹ See [par. 4.2. of Chapter II](#).

⁶⁷⁰ *Ibidem*.

Tab. 20 Investment quotas for non-linear AVMS providers in France

TVOD and AVOD:		SVOD:	
<p>At least 15% of the previous year's net turnover for the development of European works</p>		<p>At least 20% (25% if they include at least a film released in theaters for the first time in the previous 12 months) of the previous year's net turnover in the development of European works</p>	
sub-quota ↓	sub-quota ↓	sub-quota ↓	sub-quota ↓
<p>At least 12% in works of French original expressions</p>	<p>At least 3/4 in independent production</p>	<p>At least 85% in works of French original expression</p>	<p>At least 3/4 in independent production</p>

5.3. The need for proportionality and flexibility in Italy

In France, providers have to respect incisive obligations—higher than the Italian ones—to promote the European and national film industries. However, the obligations do not apply to providers with limited revenues. Also, the legislator distinguishes between quotas on cinematographic and audio-visual works. This way, it ensures that only providers that distribute a significant percentage of cinematographic (audio-visual) works have to meet content and investment quotas in European and national cinematographic (audio-visual) production. With the same aim of parameterizing the obligations on each operator's particularities, the legislator also establishes that channels focused on cinema have to meet less incisive investment quotas in audio-visual production. In contrast, their obligations in favour of the cinematographic one are higher than those applied to other operators. Furthermore: the legislator mainly provides for quotas in favour of the European production and the national one; it establishes *erga omnes* sub-

quotas in favour of specific types of works only to a limited extent. This is because the specific obligations of each provider are established in the convention each of them signs with the CSA.

The Italian case is different. Here, the legislator has not traditionally distinguished between the quotas for audio-visual and those for cinematographic works, formulating the seconds as sub-quotas of the firsts⁶⁷¹. In addition, the legislator has established—and still maintains—a system of sub-quotas that apply to all operators. Their existence has generated issues in the past. Sub-quotas do not generate difficulties for general channels, which may be interested in financing and distributing different types of products. However, they may be problematic for the thematic ones, which represent the majority in Italy—as noted by AGCOM⁶⁷². Faced with some operators' difficulties in implementing the rules, AGCOM adopted proportionality and flexibility mechanisms not provided by the law. The Authority also granted broadcasters numerous derogations from compliance with the obligations. On several occasions, their recognition was challenged in Regional administrative tribunals and the Council of State, in the second instance. As highlighted by the case law developed, some of the derogations recognized allowed to avoid that the system of sub-quotas could generate an excessive compression of the broadcasters' editorial freedom—a manifestation of the freedom of expression guaranteed by art. 21 of the Italian Constitution—and economic initiative—guaranteed by art. 41⁶⁷³. In particular, some derogations were recognized to avoid that a provider whose editorial line is not to broadcast cinema or works targeted to minors was nevertheless required to invest in national and European

⁶⁷¹ Concerning today, think about the content sub-quotas for works for minors, the investment sub-quota for Italian cinema, and the sub-sub quotas for the recent ones.

⁶⁷² See AGCOM, *Indagine conoscitiva*, p. 167.

⁶⁷³ See Judgment of the TAR Lazio (Third Section) of May 23rd, 2018, Case no. 8149, through which administrative judges confirmed the legitimacy of some derogations issued by AGCOM with the resolutions no. 64/16/CONS and 102/16/CONS in favour of thematic channels. This way, administrative judges rejected the position adopted by some producers' associations, which had required thematic channels to respect the obligations to invest in national cinema, even if their editorial line did not include cinema broadcasting. See also Judgments of the TAR Lazio (Third Section) of May 23rd, 2018, Case no. 8169, and of the Council of State (Sixth Section) of May 12th, 2009, Case no. 4509.

works of these types and to program them. However, although useful for these edge cases, the wide use of derogations and other instruments of proportionality and flexibility undermined the certainty of the rules' implementation and the effectiveness of the system. This way, the actual commitment of providers in supporting independent European and national production was limited.

In compliance with AGCOM observations and the case law developed, the 2017 reform has confirmed the admissibility of flexibility and proportionality instruments. At the same time, the reform has sought to balance the demand for flexibility and proportionality with the need to ensure the system's transparency and proper fulfilment of obligations. To this end, it has established two innovations. First, it has regulated the flexibility and proportionality instruments—in the past adopted by AGCOM in practice, in the lack of pre-established rules. Second, it has inserted correctives to limit the requests for derogations, or at least to encourage the adoption of stricter criteria for their recognition. First, it eliminated some sub-quotas of the previous system. In particular, that for the programming of European and cinematographic works; indeed, today the content sub-quotas for linear providers (that for Italian national works and for works for minors) can be satisfied with any kind of audio-visual works—whether cinematographic or not. Second, it introduced the wording «taking the schedule into account», which allowed AGCOM to establish in the scheme of its regulation that the investment quotas in national cinematographic works apply only to operators that broadcast significant percentages of cinematographic works. This way, the 'French corrective' will partially apply also in Italy. These innovations should limit the cases of operators asking derogations to not have to program national cinematographic works and invest in their production even though their editorial line does not include cinema broadcasting. This way, the certainty of the rules' implementation should increase.

In the light of the regulatory framework currently delineated in Italy, the instruments of proportionality and flexibility are three: the derogations (i); the possibility of counting the surplus in terms of engagements of one year to reach those of the following year (ii); and that of recovering subsequently unfulfilled obligations (iii).

i. Derogations. AGCOM recognized for the first time the possibility for broadcasters to require derogations from quotas obligations in 1999, with fairly vague wording⁶⁷⁴. Through the following regulations, the Authority introduced much more detailed formulations, establishing the requirements for the requests' submission and the necessary steps of the investigation. Finally, even the ordinary law (the Tusmar) recognized the admissibility of derogations. Today, art. 44-*quinquies*(2) of the Tusmar and the applicative provisions established by AGCOM Resolution⁶⁷⁵ should regulate them. According to the Tusmar and the scheme of AGCOM's Resolution, a provider may request the Authority to be exempted from content and investment quotas if: it has not made any profit in the last two years; it has a market share of less than 1%; it has the editorial responsibility of a thematic program/catalogue, and the need to respect its editorial line does not allow to source from independent European and national producers or to invest in European and national audio-visual works⁶⁷⁶.

ii. Counting previous surplus engagements to meet the obligations due. The 2017 reform has regulated for the first time the AGCOM's practice to recognize providers the possibility of counting the

⁶⁷⁴ See art. 5 of the AGCOM's Resolution 9/99/CONS of March 16th, which merely provided that thematic channels could ask the Authority for total or partial derogation from content and investment quotas, setting out their reasons.

⁶⁷⁵ Art. 7 of Annex B to the scheme of AGCOM Resolution.

⁶⁷⁶ In deciding whether to grant the derogation, the Authority has a wide margin of discretion. It may take into account the effects on the economic equilibrium of the company—looking, for example, at the average cost of the various products available on the market; the relative cost/audience ratio per minute of the program; the negotiations attempted or initiated, the existence of limits to the acquisition of rights, the presence of exclusivity arrangements, the unwillingness to negotiate by third parties; the actual availability on the market of Italian cinematographic and audio-visual works, also concerning their capacity to meet the entire market demand aimed at satisfying quotas, etc. During the procedure, the Authority may resort to observations from third parties (such as producers) «who are deemed to own information proving the truthfulness of the documents submitted by the applicant or, more generally, the validity of the application» (art. 7(6) of Annex B to the scheme of AGCOM Resolution). AGCOM has to take a final decision within 90 days from the date of submission of the request for a derogation. Where there is a need for further in-depth examinations, it may extend this term (to a maximum of 60 days).

engagements of a year exceeding the obligations due to reach the quota due the following year⁶⁷⁷. The practical effects of this provision are significant. Consider the hypothesis of a provider that has to meet an investment quota in European works of €10 M annually, which invests €15 M in producing an Italian series one year. The aim is to prevent the provider from being penalized if it invests less than what is due the following year (for example, €9 M), even though it previously spent €5 M more than it should have: it will be able to take advantage of the sum in excess spent in the previous year. Note that such a flexibility instrument is also present in France—only for some types of operators. Indeed, the law recognized that the agreement concluded between the providers and the CSA may consider the investments made in the previous year to reach that due in the following one. However, this calculation is admissible within a specific limit, varying between 2% and 15% of the amount due⁶⁷⁸.

iii. Recovering subsequently unfulfilled obligations. The 2017 reform regulated for the first time also the possibility of recovering subsequently unfulfilled obligations, recognized by AGCOM through regulatory practice. The 2019 'reshaping' of the 2017 reform then extended the degree of flexibility of this instrument. Today, a provider that did not fully discharge its annual obligations can recover them in the following year—provided the fluctuations in the deficit does not exceed 15% of the quotas due⁶⁷⁹. Such a possibility should discourage recourse to derogations or at least ensure the adoption of stricter criteria for their recognition. Even this instrument is also adopted in France: if the CSA finds that a broadcaster did not meet the quotas due, it tends to allow it to meet its remaining obligations at a later date.

⁶⁷⁷ See art. 44-*quinquies* (3) of the Tusmar.

⁶⁷⁸ Arts. 14(3) and 30(4) of Decree no. 416/2010 and arts. 14(5) and 43(5) of Decree no. 747/2010.

⁶⁷⁹ See art. 44-*quinquies* (3) of the Tusmar. Before 2019, the degree of flexibility allowed was lower. According to the provisions introduced by the 2017 reform, indeed: the deficit could concern the investment quotas only; it could not exceed 10% of the amount due; it was necessary to recover the deficit during the following six months.

5.4. Controls and sanctions

In Italy, AGCOM monitors the obligations' proper fulfilment, following the procedures it laid down in its Regulation⁶⁸⁰. According to the scheme of said Regulation, the Authority should realise its control by analysing the providers' declarations, monitoring their programming, and carrying out inspections⁶⁸¹. The French case is similar: the CSA uses the same verification methods. In favour of the system's transparency, the Authority publishes each year on its website a balance sheet for each provider, drawn up based on the data furnished by the providers and those gathered by the CSA's services. The data are examined in an adversarial procedure, and providers have the right to be heard.

Both in Italy and France, the time basis for calculating the respect of the obligations is one year. On the matter, the 2017 reform did not take up AGCOM's proposal, which suggested introducing a three years reference period. The Authority considered that this more flexible approach could have been a strategic component to promote a virtuous circuit. Adopting a longer time horizon would have allowed simplifying the competitive dynamics of matching supply and demand and a correct assessment of the providers' economic context. Moreover, according to the Authority, it would have allowed for an effective mechanism for recovering any lower investments made in a single year and adopting more stringent criteria for derogations. However, although the State did not share AGCOM's proposal, the new possibilities regarding exceeding commitments and unfulfilled obligations respond to the need for flexibility. Moreover, the correctives introduced in 2017 should limit the requests for derogations and also encourage stringent criteria for their recognition.

Before 2017, the sanctions could vary from € 10,329 to € 258,228 in Italy⁶⁸². The 2017 reform significantly tightened the penalties: they now range from €100,000 to €5 M, or up to 1% of the defaulting provider's annual

⁶⁸⁰ Art. 44-*quinquies*(3), of the Tusmar.

⁶⁸¹ Arts. 8 ss. of Annex B to the scheme of AGCOM Resolution.

⁶⁸² See art. 51 of the version of Tusmar before the 2017 reform.

turnover if it exceeds €5 M. This way, the State wants to avoid that the rules on the promotion of independent production could have a merely symbolic value—as it risked to be in the previous system, given the high revenues of some providers and the provision of low penalties in case of violation.

Like the AGCOM, which never applied sanctions, even the CSA tries to limit their application. When it finds that a provider did not fulfil the obligations, it sends a warning letter, reminding the operator of its obligations. In the event of non-compliance, a letter of formal notice follows the warning one. When the operator fails to comply even with the second letter, the General Director of the CSA informs a rapporteur appointed by the Vice President of the Council of State. The rapporteur decides whether the fact justifies the initiation of a penalty procedure. If so, he/she shall propose the CSA adopting one of the penalties provided by the law or the Convention between the CSA and the defaulting provider. It is then up to the CSA to decide whether to impose a sanction.

6. A critic review of the two systems and the open questions

The recourse to a policy of quotas makes way for several questions. Such an instrument has been—and partly continues to be—criticized at all levels of governments, with different arguments. First, within national borders, in the past by cinema exhibitors and today by AVMS providers ([par. 6.1](#)). Second, at the European level by some Member States ([par. 6.2](#)). Finally, on the international level by the US ([par. 6.3](#)).

6.1. The criticisms from providers within national borders: useful suggestions from France

Both in Italy and France, independent producers consider quotas indispensable to ensure cultural diversity. By ensuring the financing and distribution of their works, quotas prevent the market from being ‘dominated’ by American products and the national ones realised by vertically integrated producers. On the opposite, providers tend to

criticize quotas. They claim that the State significantly shapes their activity, limiting their editorial and economic freedom and compromising their ability to offer to the public the content they want⁶⁸³. Their opinion reflects the stance of exhibitors at the beginning of State support for cinema: they were contrary to quotas too, as they wanted to screen US cinema without restrictions. Providers also note that indiscriminate support to all independent producers may keep the market too many and too weak operators. Additionally, such strong support may jeopardize the essential drivers for innovation and experimentation, which is inherently nested in the competitive dynamic. The free-market approach of the providers should, in their argument, benefit all the operators involved: providers themselves, producers, and consumers. The market would autonomously ensure a diversified supply, capable of satisfying the needs of the widest possible audience—both mass and niche.

In accordance with these statements, some evidence testifies that broadcasters may autonomously decide to finance multiple types of works, including a significant percentage of the national and European ones. It is the case of the French-German station Arte in France: although not required to meet quotas (not being subjected to the French jurisdiction), it spontaneously invests in French cinema more than national channels do⁶⁸⁴. Moreover: according to a study on the strategies of television in France, Arte appears to fund high-quality films, rather low budget works—even with no obligation to do so. Consequently, «one might wonder what the need for regulation with high transaction costs is, without it being demonstrated that it transforms channels’

⁶⁸³ For Italy, see AGCOM, *Indagine conoscitiva*. For France, among other, DREYER, E., *Droit de la communication*, LexisNexis, 2018, pp. 301 ff. («Les éditeurs de services français contestent beaucoup de ces contraintes qui se traduisent par un renchérissement des coûts (qui les fragilise à l'égard de leurs concurrents étrangers), mais elles sont défendues par les producteurs, auteurs et artistes-interprètes qui y voient un moyen de résister à la concurrence américaine[...]»).

⁶⁸⁴ See BENHAMOU, F., *Les dérèglements de l'exception culturelle*, p. 228.

strategies. In the absence of regulation, it is not certain that funding and programming choices would be significantly different [...]»⁶⁸⁵.

However, Arte represents a peculiarity, and foreign experiences show opposite results⁶⁸⁶. Therefore, one cannot be sure that a high percentage of European and national works would be satisfied even in the lack of quotas and that they should consequently be abolished. What seems to be appropriate is to constantly seek a balance between the different exigences involved, i.e. between the declared need to increase cultural diversity and that to protect the providers' economic freedom. This also stems from the fact that excessively tight restrictions are likely to damage the entire system of a country, in terms of loss of opportunities. Countries that adopt intrusive constraints run the risk of excessively interfering in the market's dynamic and appearing unappealing to investors, resulting in unwanted effects. Since European legislation has achieved only a minimal harmonization, the Member States have proposed different answers to common problems. Some adopted regulations that are very favourable to providers; this way, these countries managed to obtain the headquarters establishment of the

⁶⁸⁵ BENHAMOU, F., GERGAUD, O. and MOUREAU N., "Le financement du cinéma par la télévision: une analyse économétrique des investissements des chaînes", *Economie prevision* 2 (2009): 101-112 («On a enfin souligné le cas particulier d'Arte qui, bien que non soumise à la réglementation de par son statut de chaîne franco-allemande, apparaît comme privilégiant les films de qualité, plutôt à faible budget. De ce point de vue, on peut se demander quelle est la nécessité d'une réglementation dont les coûts transactionnels sont élevés, sans qu'il ne soit démontré de manière évidente qu'elle transforme les stratégies des chaînes. En l'absence de réglementation, il n'est pas sûr en effet que les choix de financement et de programmation seraient résolument différents des résultats [...]»).

⁶⁸⁶ This is the case of New Zealand, «which had committed itself throughout the Uruguay Round negotiations to not using quantitative restrictions in the audio-visual sector only to regret it afterwards. A study conducted a few years later demonstrated that the proportion of local content in relation to total New Zealand broadcasting time had decreased to such a point that in comparison with ten other countries, New Zealand was at the bottom of the scale with 24% percent of content being local. All this seems to indicate that the problem of developing and preserving a shelf-space for the expression of national and regional cultures threatens to remain a major concern in the future for several countries, including developed countries». See BERNIER, I., "Local Content Requirements for Film, Radio and Television as a Means of Protecting Cultural Diversity: Theory and Reality" *Chare UNESCO sur la diversité des expressions culturelles*, 2003, p. 16.

biggest international players in their territories, leading in turn to the creation of new jobs and new activities within national borders.

France is the European country that adopted the more incisive rules, making broadcasters play an exceptionally significant role in film financing. This is clearly reflected by the fact that their investments accounted for circa 30% of total financing volume for French films during the years 2009-2018⁶⁸⁷—a figure much more significant than in most other European countries⁶⁸⁸. However, the French approach seems to ensure a great balance among the exigences of the different actors involved. Indeed, the extreme complexity of the French system should allow the obligations of each provider to be commensurate with its peculiarities. Obligations—however burdensome—should not disproportionately affect anyone, as they are built based on the characteristics of each. First, France distinguishes between quotas for audio-visual works and those for the cinematographic ones. The percentage of the cinema (audio-visual) content quotas is measured on the time/part of catalogue devoted by providers to the distribution of cinematographic (audio-visual) works, and not on their general transmission time/total catalogue. This approach avoids the occurrence of cases in which operators are required to meet quotas of European and national cinema (audio-visual) production even if they do not supply cinema (audio-visual works) in a significant way. Based on the same rationale, cinema (audio-visual) investment quotas apply only to operators who distribute significant percentage of cinematographic (audio-visual) works. The legislator avoids operators being required to distract their investments from their core product to direct them towards works that they will not later distribute. With the same rationale, broadcasters focused on cinema have to meet less incisive obligations concerning the promotion of audio-visual national and European works, while their quotas in favour of the cinematographic production are higher than those applied to other operators. In addition to ensuring that

⁶⁸⁷ See CRETON, L., *L'économie du cinéma*, p. 98.

⁶⁸⁸ EUROPEAN AUDIOVISUAL OBSERVATORY, *Fiction film financing in Europe*, p. 59.

the obligations are calibrated to each operator, the French approach ensures the commitment of providers in the promotion of both the audio-visual and cinematographic European and national production.

Furthermore, quotas established by the French law, however high, are simple: there are quotas in favour of European production and of the national one. The precise obligations of each operator are established in the convention they conclude autonomously with the CSA. In other words, France does not proceed through a system of sub quotas that apply *erga omnes*, but ensures the obligations of everyone to be balanced to its peculiarities—provided they respect the common ‘minimum’ obligations dictated by law, which are already highly diversified for the different types of operators. Moreover, the State is today seeking to increase the space left to self-regulation and co-regulation. As a consequence, the conventions between the CSA and each provider should become increasingly important, while the law and the decrees should be refocused only on core principles. As highlighted by the CSA, the increased number and diversification of the actors entering the field of audio-visual regulation make the idea of universal and univocal regulation obsolete; there is a need to develop a more flexible legislative framework that retains only the essential principles.

The French approach could offer useful suggestions for Italy. Here, the legislator has traditionally dictated the obligations *erga omnes*, and the actual commitment of AVMS providers in the promotion of independent production has been questionable. Among the reasons why it has been questionable, the fact that broadcasters managed to obtain several derogations from the obligations. Some of them were necessary to avoid that operators had to finance and program national and European cinematographic works, although their editorial line did not include cinema broadcasting. The correctives introduced by the 2017 reform and the following new regulation delineated by AGCOM should reduce the requests for derogation—and therefore ensure greater certainty in the rules’ implementation and increase the providers’ commitment to the independent production promotion. Today, investment quotas in cinema apply only to operators that broadcast a significant percentage of cinematographic works. Moreover, broadcasters are not required

anymore to program national and European cinematographic works: they can meet the content quotas in European and national independent works with any work they want, whether cinematographic or not.

However, the instruments of flexibility and proportionality will continue to be indispensable in Italy. Since the obligations are not constructed differently according to the operators' diversity and the legislator still establishes several sub-quotas that apply *erga omnes*, it will still be up to the derogations and the other proportionality and flexibility instruments to avoid the requirements ending up excessively compromising providers in the concrete case⁶⁸⁹. Probably, the indispensable need for a margin of flexibility makes the usefulness of a detailed range of obligations questionable. In the absence of a set of rules targeted on each operator, it could perhaps be preferable to establish only general quotas in European and national production (even higher than the current ones) and leave each operator free to decide which type of product to finance and distribute following its editorial line—in compliance with the overall percentages established by the law. In any case, there is still no knowledge on whether the new rules on quotas are concretely effective or not: to date, the system outlined by the 2017 reform and 'reshaped' in 2019 is not operational yet, as already said.

Besides showing a strong internal coherence, the French system has remained consistent over time. The 1986 Act has been reviewed more than eighty times. However, the foundation of quotas has never been under discussion: the amendments have been realized to adapt to the evolution in technology and accommodate to the European law, based on an organic, coherent, and consistent design. On the opposite, the countless reforms adopted in Italy overtime—on top of coming from the most varied sources—often seem to adapt to the circumstances rather than carrying out a general plan, suggesting that important decisions

⁶⁸⁹ See the Opinion no. 01868/2017 of October 30th of the Council of State on the Legislative Decree no. 201/2017. The Council seems to suggest that derogations are the instrument necessary for introducing stricter constraints without unduly affecting providers («(non) sembra potersi lamentare la mancanza di flessibilità nella fissazione degli obblighi, atteso che è demandata alla fonte regolamentare la fissazione di apposite discipline di dettaglio e resta la possibilità di conseguire deroghe in relazione a specifiche situazioni»).

happen to be taken with very short sight, potentially depending on the political contingency and the lobbying activity of the moment.

The prime example in that sense is that the 2017 reform has been severely altered only two years after its adoption (and even before its actual implementation), following the occurred change in government. Also, think about the Italian vicissitudes on the prime-time obligation—introduced since the very beginning and always confirmed in France. In Italy, said obligation was established for the first time in 1998, then repealed in 2005, re-established by the 2017 reform, and, finally, reshaped by the 2019 intervention. To date, it applies only to the public broadcaster, while private televisions are allowed to keep broadcasting European and national works late at night.

Understanding the French system's evolution is demanding given the high complexity of the legislation. A similar task is perhaps more entertaining when it comes to the Italian system: the impression is not really that of looking for the intrinsic rationality of the rules' evolution, or of recognising a plan designed by others. It is rather the sensation of trying to bring rationality to a body that does not have one, of figuring a development system out of elements that have poor connection one to another.

6.2. The criticisms within EU: ending up with discriminatory effects between the Member States?

Quotas were criticized also at the Community level by those Member States with the weaker audio-visual industries. During the debate leading to the adoption of the TSF Directive, they highlighted that they would not have been able to satisfy high percentages of European works through their national production. Given that all Member States' works are European by definition, these States had stressed the risk of being forced to meet the requirements through products from other Member States. In this way, they would have moved from one cultural 'hegemony' (the American one) to another, that of the most robust European audio-visual industries.

It is difficult not to share their stance. Indeed, the member countries of the EU are different in their traditions, customs and history, and it is not so easy to identify a robust common European culture. As noticed, such a notion implicitly assumes that there is a shared substratum between a Swede or a Spanish and a Greek or a German, which makes them distinct and distant («I dare say, opposed, interpreting the spirit of the legislation»⁶⁹⁰) from ‘American culture’. This presumption does not look so obvious; «a number of exceptions aside, the common European movie culture is essentially a US (Hollywood) one»⁶⁹¹.

If the Member States with the weaker audio-visual industries may have been forced to meet their quotas for European works through products from other Members, the ones with robust film industries may satisfied quotas mainly with their national production. In countries such as Italy and France, the sub-quotas in favour of national works are established as a minimum standard—providers are required to meet ‘at least’ a certain percentage of national works. Therefore, providers are potentially allowed to fully satisfy the quota for European works with products from their own country, which they could consider economically more convenient, since closer to their target audience.

According to data made available by the CNC⁶⁹², the quota of French cinematographic works broadcasted in France is higher than the one required by the legislator. As seen, in France, broadcasters have to devote at least 60% of their transmission time to European works, including at least 40% for French works. However, from 2009 to 2018, French films represented between 41.8% and 45.3% of the televisions' supply. The European ones were only between 16.0% and 19.7%, the American between 33.6% and 38.1%.

Shortly: quotas may hinder the circulation audio-visual works among some Member States instead of promoting it. It is likely to allow those with robust industries to adopt regulations that mainly support the

⁶⁹⁰ GAMBUTO, S., *La produzione audiovisiva europea*, in *La televisione digitale*, pp. 363 ff., 365. («Oserei dire, contrapposti, interpretando lo spirito della normativa»).

⁶⁹¹ DE VINCK, S. and PAUWELS, C., *Beyond borders and into the digital era*, p. 106.

⁶⁹² CNC, *La diffusion des films à la télévision en 2018*, p. 13.

national economic circuit rather than the common European market as a whole. Furthermore: «since the adoption of the Directive, all the Member States, including those which did not previously have an aid system, set up quotas, thus aggravating the separation of the national markets [...]»⁶⁹³.

6.3. The US's criticism: protecting the European economic market instead of enhancing cultural diversity?

The criticism made by the US is that quotas are meant to restrain and distort international trade by hindering the access of American works to European markets, and this to target the US ability to make the most successful films. Since the TWF Directive adoption, the EEC replied that the limitation of free trade generated by quotas was justified because they have not a merely economic protectionist purpose. The goal of quotas is to promote the European culture, safeguarding cultural diversity for the benefit of consumers.

The European argument is not entirely convincing, and the stance of the US is to some extent sharable. If the European legislation (as well as the French and Italian ones) declare the intention to enhance cultural diversity, it lacks any mention on how to measure and verify the achievement of such a challenging target—making it difficult to evaluate the tools used to pursue it. As long as there is enough space occupied by European and national products, the quota regulation is respected⁶⁹⁴. However, one can wonder why positive data in terms of the presence of

⁶⁹³ GAMBUTO, S., *La produzione audiovisiva europea*, p. 361 («Inoltre, dopo l'introduzione della direttiva, tutti gli stati membri, compresi quelli che in precedenza non avevano un sistema di aiuti, hanno istituito le quote di riserva e questo ha aggravato la separazione dei mercati nazionali [...]»).

⁶⁹⁴ As it is written in the impact analysis on the 2017 Italian reform of the Legislative Office of the Ministry of Culture: «the indicators that will make it possible to verify the degree of achievement of the regulation's goals are the numerical ones relating to the programming time reserved for European works (or the percentage of European works in the catalogue for on-demand providers) and the amount of resources spent by providers to fulfil their investment obligations» See UFFICIO LEGISLATIVO DEL MINISTERO DELLA CULTURA, *Analisi tecnico normativa sullo schema di decreto legislativo recante riforma delle disposizioni legislative in materia di promozione delle opere europee e italiane da parte dei fornitori di servizi di media audiovisivi, a norma dell'articolo 34 della legge 14 novembre 2016, n. 220, 2016*, p. 17.

European and national works should be intended as an expression of increase in cultural diversity. Quotas are certainly susceptible to slow down the decline in the production and distribution of European and national works. However, «the higher share of European productions is by no means a sign of increased (or existing) diversity of cultural expressions»⁶⁹⁵. Indeed, a policy of quotas does not necessarily ensure a diversified creation, since such a policy «does little to prevent the increasing homogenization of content and deteriorating quality of programmes»⁶⁹⁶. This is because any program financed with European money and realized by a majority of European authors and workers and according to certain business dynamics could qualify perfectly as both a European and independent work, and thus be used to meet quotas. Quotas apply automatically: to benefit from them, works do not have to respect quality criteria or a particular expression European themes⁶⁹⁷.

The lack of an assessment on the quality or worthiness of the works by which satisfy quotas is comprehensible: there are dangers in attributing to the public power the task of assessing values difficult to gauge impartially. To avoid such risks, the EU and national legislators have assumed that the entire European audio-visual industry is worthy in itself, given its cultural specificity. Consequently, if it is certain that quotas do safeguard the European audio-visual industry, one cannot be sure that they are an effective tool for the enhancement of cultural diversity.

⁶⁹⁵ BURRI-NENOVA, M., "New Audiovisual Media Services Directive", p. 1707.

⁶⁹⁶ *Ibidem*, 1708.

⁶⁹⁷ *Ibidem*, pp. 1707 and 1708.

Conclusions

This work showed how the French State has devised a very sophisticated and complex system to promote its film industry over time. However, the analysis rarely suggested adopting the French instruments to address the yet-to-be-solved problems that affect Italy. In most cases, there is no reason to suppose that the French means would prove effective in Italy, uprooted from the French institutional architecture.

The straightforward evolution of the French system and the Italian fresh start in 2016

The analysis carried out in [Chapter I](#) showed that the two States' history as promoters of cinema presents several common elements. They both initially addressed the sector with mere security and public order intent, adopting a safety and censorship framework, and began to develop promotional legislation at the end of WWI. Initially, the aim was only to restrict American films' import. Over time, measures of direct support in favour of the national film industries appeared. During the 1950s-1960s, both France and Italy began to pay attention to the sector's cultural dimension: in addition to promoting its economic growth, they have sought to favour the realization of works considered worthy and artistically meritorious. Interestingly, since they started to finance the film industry, the two States have never ceased to do so—unlike what happened with other industrial sectors. Therefore, there is no counterfactual evidence of what could have happened without State funding, neither in Italy, nor in France.

Apart from these major common elements, the history of the two States as cinema promoters sharply differs. Telling the evolution of the French system was straightforward: there are five moments in which clearly identifiable circumstances led the legislator to intervene, and the sum of those interventions shaped the current system. On the opposite, it proved difficult to understand why the Italian legislator intervened at certain times and why it did not react in front of disruptive phenomena—such as the outbreak of private televisions. A somehow

'creative' effort was needed to propose a systematization of the Italian system's evolution.

The French State established its promotional system's main features at the end of WWI, based on previous extensive study and analysis activity. This way, France inaugurated since the very beginning an approach that was going to remain consistent over time and still relevant today: decisions are based on data and considerations provided by detailed research carried out by all the actors involved, from the industry's operators to several State bodies (today, mainly the CNC, the CSA—the Independent Authority of the audio-visual sector—the Court of auditors and the Parliamentary Committees for Finance and Culture). The decision-making process rests on two cornerstones. First, an independent agency is in charge of elaborating and implementing State actions promoting cinema. Second, those who benefit from the distribution of today's works must contribute to funding future creations. Subsequent legislation confirmed these two principles, mostly adapting them to address technological and market evolutions. They indeed still exist today and make the French system the most envied by the European cinematographic operators. Still, France is currently in a new phase: to ensure resources for new creations (and for equity reasons), the State is seeking to shift financial burden from traditional televisions— whose revenues are decreasing —to digital platforms, which are experiencing a boom.

The Italian system of cinema promotion was developed under Fascism, which led to refined support mechanisms —strictly linked to control over contents. After the liberalization, the Republican legislator confirmed those measures, only repealing their most authoritative features. Although State promotion aims have radically changed, even several contemporaneous aids have their origin archetype in fascist legislation. In the case of the film industry, it is particularly true that «[...] if policies can change radically, the instruments are normally subject to just incremental changes [...] yesterday's choices are expressed

today not directly but through organizational architectures, principles, and procedures [...]»⁶⁹⁸.

The evolution of the Italian system appears less linear than the French one on many aspects. Think of the structure responsible for promotion activities. In France, the same institute has played this role consistently since 1946. In Italy, many different institutions took turns—from the 1934 General Directorate for Cinema to the current DGC. Moreover, to support the main responsible institution over time, the legislator set up many advisories and consulting bodies comprising experts, representatives of other administrations, and stakeholders. Such an approach (common to State organisation promoting other industrial sectors⁶⁹⁹) made the administrative apparatus «*elefantiaco*»⁷⁰⁰ (huge, of the size of an elephant), weighing it and compromising its activities. The Italian evolution is less systematically concerning regulatory sources, too. France has had a dedicated code containing all the relevant legislation on State aid to the cinema since 1956; over time, the CNC's Regulation added to it. On the opposite, Italian cinema gained an organic and dedicated law only in 2016, when a new, more virtuous phase began.

Indeed, the 2016 Act redefined the scope of responsibilities and functions of ministries, related bodies, and independent institutions involved in the film industry's governance. Moreover, it established only the fundamental principles regarding the relationship between the State and the cinema, requiring secondary sources for their declination. This way, rules can easily be changed when deemed necessary—particularly useful in a fast-changing, technology-intensive industry as the audiovisual one. The 2016 reform also established to provide a yearly impact evaluation of the newly established measures (as well as an annual report of the AGCM). Such a novelty should contribute overcoming, for cinema, one of the biggest issues that have characterized the Italian

⁶⁹⁸ LASCOURMES, P., and LE GALÈS, P., *Gli strumenti per governare*, Bruno Mondadori, 2009, p. 19 (« [...]Se le politiche possono mutare radicalmente, gli strumenti sono, di regola, soggetti a cambiamenti incrementali[...] le scelte fatte ieri si esprimono oggi non direttamente, ma attraverso architetture organizzative, principi, procedure [...]»).

⁶⁹⁹ As noted by SERRANI, D., *Lo Stato finanziatore*, p. 63.

⁷⁰⁰ORSI BATTAGLINI, A., *L'intervento economico statale per il cinema*, p. 92.

industrial policy: the lack of ex-post evaluation of the incentives provided. Finally, the Act extends direct support from cinema to the entire audio-visual sector. This way, the State showed awareness that a product's merits today depend less on the commercial practices adopted to enhance it on the market—as France was already doing.

These days, the effectiveness of the equilibria gained over time is shaken by common phenomena in the two States. First, the outbreak of the Covid-19 pandemic and the subsequent containment provisions, which strongly affected the film industries and called for stronger support from the States. Second, the appearance of global digital operators, in continuous growth⁷⁰¹. In addition to the traditional paradigms of the industry, these players are affecting cinema promotion policies. Indeed, some of their characteristics made outdated and ineffective some support instruments devised by national legislators over time. Moreover, some of them have undermined for a long time the application of the promotional laws of many States through the so-called practice of 'jurisdiction shopping'. Indeed, some of these players operated in many European countries while establishing themselves only in those that do not require AVMS providers to contribute to the promotion of the national film industries, or do so only to a limited extent.

Beyond the States: the less challenging goals of the European and local-self-government cinema promotion

The analysis of the other government levels promoting cinema carried out in [Chapter I](#) showed how their goals are less challenging than the State's ones, since they are less composite. The main goal of the EU is to

⁷⁰¹ Indeed, the VODs' turnover has multiplied thirty times over the course of ten years in Europe: their revenues increased from €388.8 M in 2010 to € 11.6 B in 2020. The SVODs mainly drove this trend, exploding from €12 M of revenues in 2010 to € 9.7 B in 2020, with a compound annual growth rate of 95%—while the revenues of TVODs rocketed from € 377 to €1.87 B. See EUROPEAN AUDIOVISUAL OBSERVATORY, *Trends in the VOD Market in the EU28*, 2021.

promote better circulation of the European audio-visual products, both within and outside the Union. The territorial autonomies' main goal is attracting national and international productions to obtain local economic development and growth.

In principle, the fact that different government levels' goals differ should prevent inefficient overlapping: sub- and supra-national policies should not reproduce State policies on a smaller/larger scale but identify their areas and instruments of intervention. However, while in France there has always been an attempt to coordinate the activities of audio-visual support carried out by the local authorities and the State, the territorial support developed with spontaneous and poorly-coordinated processes in Italy. A partial change of paradigm began with the 2016 Act. While maintaining a centralist approach—unlike what happens today in many other industries⁷⁰²—it acknowledged the regions' fundamental role in promoting the audio-visual sector and establishes some new forms of coordination.

The fact that the EU and local autonomies pursue identifiable and limited goals makes it easier to evaluate their action. There are many ways to assess a film's success: the indicators parameters depend on the goals pursued by those who financed it. For the EU, a film is successful if it meets a significant audience outside its national borders. For a region, if it led to significant expenditure on its territory. For broadcasters, if companies buy advertisement spaces during its programming. It is more difficult to measure the success of a film in the context of the State promotional action, which simultaneously pursues many objectives. For example, the 2016 Act declares the goal to enable the realization of films with exceptional cultural merit, allowing market access to new entrants and supporting less market-driven productions⁷⁰³. In this sense, their realization should testify to the effectiveness of State action. However, the State also declares the goal to

⁷⁰² As noted by AVERARDI, A., “Gli ausili pubblici al settore cinematografico tra eccezione culturale e regole di mercato”, *Munus* 1(2019): 259-287, p. 282.

⁷⁰³ See art. 26 of the 2016 Act.

promote the highest audience consumption of films⁷⁰⁴. Consequently, the State's action may be regarded as ineffective if those same productions do not encounter a large public. Shortly, the very same film may appear successful and unsuccessful, depending on the State objective taken into consideration.

The current state of the film industry: the problems with the cinema-theatre link

[Chapter II](#) analysed the current film industry's organization, considering how State's regulation affects it. Interestingly, the analysis showed that the French State is not a direct regulator about several issues (such as the *chronologie des médias* and the *engagements de programmation et de diffusion*). It mainly establishes the principles based on which the industry should autonomously solve matters that involve different interests and actors. Once the industry finds an agreement, the State makes it binding through law. The State directly intervenes only if there is the impossibility to find autonomous solutions.

The main element that emerged is that the current definition of 'cinematographic work' adopted in the State aid's framework is problematic in Italy. The State defines as cinematographic—and, therefore, eligible to State funding for cinema—those works intended for cinema theatres that do not appear on other distribution channels before a specific time elapsed from their first theatrical release. However, accessing theatres is challenging for many Italian titles. Among other reasons, this is because it is more profitable for distributors and exhibitors to screen American films. In light of this evidence, Italy (like France) provides financial incentives for operators committed to distribute national and European films, and for exhibitors committed to program them. Unlike France, Italy does not use also regulatory instruments to favour theatres' access to fragile films considered worthy. However, French correctives (the *engagements* and the *Médiateur du cinéma*) would not probably be enough to ensure an adequate theatrical

⁷⁰⁴ See art. 3, par. 1, let. g of the 2016 Act.

distribution to all works funded by State to the cinema in Italy. The Italian cinematographic market is indeed saturated, showing a steadily increasing ratio between the produced films and the screens, the highest among the big five European countries in recent years⁷⁰⁵. Many Italian titles that got access to theatres remain programmed shortly—often not long enough for the audience to become aware of their existence. Exhibitors are often forced to make room for incoming films by dismantling the previous ones (or moving them to smaller theatres or to less-attractive time schedules). This is why to keep asking for theatrical distribution of all cinematographic works funded by the State seems to be an inefficient and potentially industry-harmful way to proceed. The path to making it sustainable (increasing the screens theatres or decreasing the number of produced films) is not easily viable.

The need to change the current definition of ‘cinematographic work’ also stems from a more ‘conceptual’ arguments, i.e., that linking the cinematographic nature of a work to its theatrical release grounds on confusing the product with the vehicle that brings it to the audience. To date, the quality of audio-visual works is less influenced by their primal distributional channel. A work intended for cinema is no longer more ‘meritorious’ than others—there is a growing body of examples of high-quality products with no theatrical release ambition. Some of them were recognized by a part of the industry itself as having cinematographic nature, and they participated in film festivals and won awards. Moreover, if products not intended for cinemas are considered cinematographic, theatres are now multi-purpose containers: in addition to films, they exhibit previews of television series and concerts, works challenging to be defined ‘cinematographic’.

It is worth stressing that the proposal to cease to link the definition of a cinematographic work to its distribution in cinema theatres does not rely on the premise that cinema theatres are a failed market. Quite the opposite: the theatres’ results from 1992 to today show that they managed not only to survive but also to grow both during the past era of the televisions’ outbreak and the current one of digital platforms’ expansion—if one excludes the 2020 dramatic results due to their forced

⁷⁰⁵ See fig. 10, p. 143 of Chapter III.

closure to limit the spread of the pandemic⁷⁰⁶. Therefore, the proposal is not to cease to support cinema theatres, but rather to support works regardless of their distribution choices and to support channels (cinema theatres) independently of the works they convey. In essence, at least for funding purposes, the State should cease to identify audio-visual works based on their distribution channels and find new and more reliable criteria. According to some audio-visual operators, a possible solution could consider the 'size' of the work: State aids should be consistent with the budget and the work reference market of the work applying for support.

Promotion through financial aid: the different balance found between vertical, horizontal, selective and automatic approaches

[Chapter III](#) analysed the State action promoting cinema through financial aid. Concerning the range of its action, the European principles on the compatibility between internal market and State aids to the film industry seem relatively light. The Member States have great autonomy in deciding whether to introduce support measures, to which extent and how. Different aspects of the Italian and French aids to the film industry confirm these observations. First, despite the cultural test criterion, some aids provided by the two States seem to rely on the premise that the film industry is cultural on its own. To verify if the work is 'culturally eligible' to said aids, the two States adopt criteria so vague that it is difficult to imagine projects unable to satisfy them. Second, despite the aid intensity criterion, the Italian definition of difficult and low-budget films could allow the Italian State to bear many films' total cost.

Concerning the administrative structure, the analysis showed that the CNC and the DGC have similar functions. However, only the first has financial independence and regulatory autonomy—showing more responsiveness and agility. Its independence is crucial about human resources: the CNC can constantly check which professional figure is lacking and cover it by addressing the market. The DGC is instead part of the Italian Ministry of Culture. Consequently, it suffers from the

⁷⁰⁶ See fig. 7, p. 138 of Chapter II.

limitations that generally affect the Italian public administration: bureaucratic red tapes, limited ability to interact with companies, lack of qualified personnel etc.

Concerning the provenance of State resources, most of the French funding to the film industry does not come from State's general budget but from the proceeds of taxes on the operators who benefit from distributing audio-visual works. Said scheme has applied since the very beginning. The first tax introduced charged cinema tickets. Since most of the theatres' revenues came (and still come) from American films, France transformed the US from the main enemy of national cinema into its leading supporter. Still today, the system brings the domestic producers to hope that US films perform well: the higher the audience, the higher the French movie industry's future money. Over time, even televisions began to pay a tax to fund the CNC Fund. This way, the French cinema's new main rival, national television, was transformed in its turn into its new primary supporter. Progressively, the range of operators taxed has been extended to cover new forms of distribution. Today, taxes also apply to DVD and Blu-ray retailers and digital platforms, including those that target the French audience without being established there.

Since the amount thus collected directly goes to the CNC, bypassing the State general budget, many affirm that the French State does not finance the film sector, limiting itself to a regulatory function by imposing a forced loan on cinema operators and then redistributing the money through the CNC. Such a representation is not agreeable: the funds given to the film industry by the CNC may not represent a direct monetary cost for the State, but are an opportunity cost for sure. The State accepts losing the amounts allocated to the CNC from its general budget, hence agreeing not to use them to finance something other than the audio-visual industry. Moreover, while taxes on film operators finance direct support instruments, the indirect ones are financed by the State general budget.

In Italy, the State traditionally financed the film industry from different sources, compromising the readability of the overall State expenditure favouring the sector—and thus generating an obstacle to assessing the effectiveness of the support. Such a situation was overcome by the 2016

Act, which stated that all the resources that finance the industry come from the newly-established Fund, financed in turn by the State general budget. However, looking at the French system, the 2016 Act established that the Fund's resources must be parametrized to the film industry's turnover level—still guaranteeing for a minimum. This way, the industry should be partially secured from the yearly negotiations on expenditures during the writing of the Budget Law, and from changes in governments' sensitivity to culture.

Considering all the funding sources, the French State transfers much more money to the film industry than the Italian one. In Italy, State resources have significantly increased in the last years⁷⁰⁷; today, all of them (both the direct and indirect ones) account for € 640 M at least each year, while they increase if the sector's resources increase. In France, most of the funding is provided by the CNC; on average its annual support accounted for € 685 M in the last twelve years (ranging from the maximum level of € 806 M in 2011 to the minimum one of € 576,9 M in 2020⁷⁰⁸). In addition to the already considerable funds coming from the CNC, there are also those granted through fiscal incentives, which have progressively increased over time⁷⁰⁹, and by the IFCIF to guarantee bank loans and provide for direct loans⁷¹⁰.

The range of supporting instruments is instead similar in the two countries. They are many, and each of them seems to be in charge of limiting the problems opened by the others.

Direct aids are selective and automatic, and support specific works and companies considered meritorious through direct transfers.

Selective aids seek to ensure supply's diversity and quality, helping to realize films whose making would be otherwise complex and thus supporting projects with 'cultural merit' and lowering market entrance barriers. Although useful to meet some goals of State promotion,

⁷⁰⁷ See fig. 14, p. 174 of Chapter IV.

⁷⁰⁸ See fig. 12, p. 169 of Chapter IV.

⁷⁰⁹ See fig. 13, p. 170 of Chapter IV.

⁷¹⁰ See fig. 18, p. 197 of Chapter IV.

selective aid may generate several risks. First, there is no objective way to evaluate a film's cultural and artistic value without giving rise to disputes. This process will always cause examples of films that were not financed but should have been, or which benefited from unjustified aid. Second, selective aids risk to support niche works with little-to-no demand, which often comes from the wealthiest and more-educated part of society.

Italian selective aids lack incentives to push operators to shoulder responsibility so that their cultural projects also pursue an economic goal, seeking an audience. First, selective aids are not-repayable subsidies in Italy, which seems to testify that the State considers the projects supported as economically unviable from the outset. Second, Italian law does not require the applicant to show evidence of a distribution deal as a condition for the disbursement of the last percentage of the subsidy. Therefore, it is not excluded that the funded work will never be distributed, as it partially happens also in France. Third, Italian selective aids can be granted only to works with a small-enough budget—a provision likely to generate adverse incentives since it may push operators to keep their budgets low, hindering them from thinking ambitiously. Finally, the budget for Italian selective aids is dispersed across many projects—at least compared to France: probably too few resources are divided upon too many works⁷¹¹. By avoiding both displeasing anyone and giving significant resources to a few inexperienced and novice actors, selective aids do not appear to be really selective. It would be desirable to invest more resources in fewer projects. Otherwise, selective aids risk implying that the State does not seek culturally relevant films that deserve support but backs the ones that would not be realized due to insufficient funding.

Automatic aids overcome the problems opened by selective aids. They are granted to a production company to realize a new film based on its

⁷¹¹ For example, in 2019—the most recent year for which data are available—the French advance on receipts was worth €25.2 M and supported 87 films, which means an average of €289 for each film; in Italy, selective aid for film production was instead worth €23,7 M and financed 142 films, which means an average of € 167 for each film. See CNC, *Bilan*, 2019, p. 25, and DGC, *Elenco soggetti beneficiari contribute selettivi alla produzione*, 2019.

previous film's success, measured on non-discretionary assessment. They strengthen already-strong operators, sustaining their activities to promote growth and development of the industry, seeking to increase its ability to generate jobs, attract investments, foster tourism and compete at the international level. However, although functional to meet some goals of State promotion, automatic aids involve risks too. Through them, the State may reward companies for the economic success of projects lacking any artistic and cultural merit under the State's criteria itself—both in Italy and France. Moreover, automatic aids involve the risk of using public money to support the realization of works that would probably be still realised without State support.

With **indirect aids** (tax credits), the State gives up establishing what is worthy of support by creating an environment favourable to every producer. This way, the State considers indeed the entire industry meritorious, given its cultural specificity. However, it does not entirely give up on 'guiding' the market: by modulating the tax credit rates and other correctives, it pushes operators towards behaviours considered more meritorious than others.

The funds given through the different types of aid allows identifying the balance the two States found between the need to support the development of the sector's industrial dimension and supporting cultural pluralism. The analysis showed that France seems more attentive to the second objective than Italy.

First, it is true that French automatic aid reward only operators having achieved positive economic results, while the Italian ones also consider the artistic and cultural ones; however, France does not take into account the artistic and cultural results in the scope of automatic aid because it rewards quality *ex-post*, through selective aid. Unlike Italy, France supports through selective aid both projects still to be realized and those already realized. This way, France supports quality selectively *ex-ante* and *ex-post*—while Italy supports it selectively only *ex-ante* and automatically *ex-post*.

Second, the French State transfers the majority of its resources through direct aids. This is also because it supports only the production phase through tax credits, not even the distribution and exhibition ones—an approach consistent with the main reason behind tax credit's institution,

i.e., arresting French producers' tendency to shoot abroad. On the opposite, tax credits represent the main support instrument in Italy. Here, the resources granted indirectly have been progressively increasing in the last years, while the direct ones have been decreasing⁷¹², following a common trend with the general Italian approach to industrial policy. Although they are pretty new instruments, tax credits absorb therefore most of the Italian funds.

In essence, Italy's support system is more 'generalist'; Italy renounces more than France to establish what is meritorious and what is not. This ends up making the support for the cultural sector similar to the one for the general industry—but it is consistent with essential needs. First, indirect aid allows limiting the risk that State support affects the culture's natural evolution. In the context of direct aid, companies may adequate their activities to appear meritorious based on State parameters—the automatic or the selective ones—and thus obtaining the support. As said, art. 9 (1) of the Italian Constitution—based on which public powers should promote the development of culture—should be read in conjunction with art. 33(1), declaring the art's freedom. Therefore, the State promotional action should be realized without compromising the natural evolution of culture.

Second, this approach responds to the need to simplify the action of the public administration. Unlike France, the Italian State does not have an independent agency focused on cinema, with financial and reglementary autonomy and adequate structure to manage the aids. In Italy, where the administration on cinema suffers from all the problems that affect the national public administration, there is more need for as-automatic-as-possible mechanisms.

The Italian administration's intrinsic limits explain why the analysis rarely suggests adopting the French instruments to address the yet-to-be-solved problems that affect Italy. Think, for example, of the fraudulent behaviours that occurred in Italy with the tax credit to attract private investment. France avoids these phenomena thanks to the SOFICAs, which intermediate between private investors and producers and ensure the State a higher degree of control. They also allow the State

⁷¹² See fig. 22, p. 216 of Chapter III.

to monitor that the private investments that benefit from fiscal incentives are not devoted only to commercial works. However, there are reasons to believe that a similar approach could not prove effective in Italy. In France, SOFICAs have existed since the 1980s, and the public power has constantly monitored them to verify whether corrective measures were needed. SOFICAs, to be effective, need a structure capable of managing a complex instrument, avoiding delays and complications, and a constant evaluation of the effects generated.

Despite being the main support instrument (and although highly appreciated by the industry for its non-interventionism), tax credit generated concerns in its application in Italy. The resources to satisfy the requests for tax credit are contingent, but the industry perceives this instrument as a support to be recognized to anyone who meets the eligibility conditions—to the point that producers include them in their business plan before having obtained the DGC's approval. Still, it is debatable whether detaching tax credit from a closed fund—making it theoretically unlimited—would be desirable. Indeed, this approach would entail the risk to forego tax revenues, which happens for other types of tax credits in Italy. Moreover, the State would have to guarantee an increasing level of support as the industry grows.

The presence of a direct link between the State's support and the film industry's turnover is what happens in France: the CNC's fund directly increases as the industry's revenues increase—an approach with many concerns. First, it is not easy to understand why a sector should receive increasing public money as it grows—this derogates from the equalization principle, under which the most profitable activities should contribute to support the most vulnerable ones. A virtuous system should ensure a proportion between the level of State aids and each industry's actual needs. Second, this approach may even damage the industry itself. In specific periods, the French system generated a disproportion between State aids and the industry's needs, eventually leading to 'inflation' within the film industry.

In light of this, it seems preferable to solve the problem related to the Italian tax credit by introducing stricter requirements to access the support—thus also avoiding 'shower funds'.

Promotion through quotas on AVMS providers: useful suggestions from France

[Chapter IV](#) analysed how France and Italy, implementing European principles, promote their national industry by requiring providers to meet content and investment quotas in national and European production. Since European legislation has achieved only a minimal harmonization, the Member States have proposed different answers to common problems. Italy and France are the countries that have established the most incisive rules, seeking to involve providers in the national production's promotion.

In France, where broadcasters play a massive role in film financing⁷¹³, the State has adopted a very refined legislative technique on quotas. The 1986 Act only establishes the fundamental principles governing quotas, based on which several decrees of the Council of State—each focused on a different typology of providers—lay down the detailed provisions. However, the percentages established in the Law and the Decrees are to be regarded as a minimum standard. Each provider's specific obligations are determined by an agreement between the provider itself and the CSA. Among the elements considered by the CSA, there is also the way the provider uses the media chronology: the sooner it distributes a cinematographic work, the higher its investment obligations are. This way, the legislation should ensure that the obligations of each actor are proportional and adequate. The project of law under discussion before the pandemic's spread also sought to increase the space for co-regulation and self-regulation. The State showed awareness that «[...] the variety of players now entering the audio-visual regulation scope makes the idea of universal and univocal regulation obsolete. [...] regulation must evolve in such a way as to understand the complexity of a globalized sector, subject to sudden and hardly predictable developments. In this

⁷¹³ Indeed, their investments accounted for circa 30% of total financing volume for French films during the years 2009-2018 (see CRETON, L., *L'économie du cinéma*, p. 98). The role they have in France is much more significant than in most other European countries. This is clearly indicated by the fact that European broadcasters' investments tend to account for 24% of total financing volume for European films, compared to only 8% if one excludes French films from the analysis and considers only the other major markets, i.e., UK, Germany, Italy, and Spain (see EUROPEAN AUDIOVISUAL OBSERVATORY, *Fiction film financing in Europe: A sample analysis of films released in 2018, 2020*, p. 59).

new heterogeneous environment, which brings together actors with a wide range of legal statuses, economic models, strategies, or sizes, the regulation's method must be reviewed [...]»⁷¹⁴.

In Italy, quotas are regulated by the Tusmar and two secondary sources: an AGCOM regulation and one or more joint decrees between the Ministry of Culture and the one for Economic Development—both in charge of establishing the exact percentage of quotas, the eventual additional sub-quotas, and the details of several aspects. These three sources provide several quotas and sub-quotas that apply *erga omnes*. To avoid the obligations to result concretely disproportionate, the legislator provided proportionality and flexibility instruments, such as derogations. In the past, their use proved to be problematic, compromising the transparency of the system and limiting the providers' actual commitment to promoting independent national works. The problem should ease with the last regulatory interventions, which eliminated some sub-quotas and introduced some correctives—looking to the French case. However, in the lack of a set of rules targeted on each operator, it could perhaps be preferable to establish only general quotas in European and national independent production (even higher than the current ones) and leave each operator free to decide with which type of works meet them following its editorial line. In any case, there is still no knowledge on whether the new rules on quotas are concretely effective or not: to date, the system outlined by the 2017 reform and 'reshaped' in 2019 is not operational yet.

The French system has remained consistent over time. The 1986 Act has been reviewed more than eighty times, but the foundation of quotas has never been under discussion: the amendments have been realized to adapt to the technology evolution and accommodate European law, based on an organic, coherent, and consistent design. Today's need is to reduce traditional television obligations, helping them to go back to growth, and increase those of non-linear suppliers, especially global ones such as Netflix, Disney, and Amazon Prime. Indeed, the State is seeking to transform American digital platforms into the new leading supporter of the new French creations, while securing the French

⁷¹⁴ CONSEIL SUPÉRIEUR DE L'AUDIOVISUEL, *Refonder la régulation audiovisuelle*, 2018, p. 8.

system's fundamental principles. Just think of the need to ensure French producers' actual independence—a difficult task considering that American digital platform, having vertically integrated players as a model, tend to buy the entire ownership of the film they contribute to fund.

On the opposite, the numerous reforms adopted in Italy over time—on top of coming from the most varied sources—often seem to adapt to the circumstances rather than carrying out a general plan. This may suggest that important decisions are taken with short sight, potentially depending on the political contingency and the moment's lobbying activity. The prime example in that sense is that the 2017 reform has been significantly modified only two years after its adoption (and even before its actual implementation), following the occurred change in government. Also, think about the Italian vicissitudes on the prime-time obligation—introduced since the very beginning and always confirmed in France. In Italy, this obligation was established for the first time in 1998, then repealed in 2005, re-established by the 2017 reform, and, finally, reshaped by the 2019 intervention. To date, it should apply to the public broadcaster only, while private televisions are allowed to keep broadcasting European and national works late at night. A long-term overview, despite the limited duration of national governments, would be indispensable. Its absence risks to jeopardize the national enterprises' activity, deprived of credible long-term horizons, and limit foreign enterprises' availability to do their business in Italy.

Apart from the differences between Italy and France, the analysis has shown that the quotas instrument opens up several questions. The European legislation (as well as the French and Italian ones) declare the intention to enhance cultural diversity through them. However, legislations lack to mention how reliably measure and verify such a challenging target's achievement—making it difficult to evaluate the tools used to pursue it. As long as there is enough space occupied by European and national independent products, the quota regulation is respected. However, one can wonder why positive data in terms of their presence should be automatically intended as the expression of an increase in cultural diversity. Quotas are undoubtedly susceptible to slow down the decline in production and distribution of European and national independent audio-visual works. However, «the higher share

of European productions is by no means a sign of increased (or existing) diversity of cultural expressions»⁷¹⁵. Indeed, a policy of quotas does not necessarily promote a diversified creation, since such a policy «does little to prevent the increasing homogenization of content and deteriorating quality of programmes»⁷¹⁶. This is because any program financed with European money and realized by most authors and workers from Member States according to certain business dynamics could qualify as both a European and an independent work, and thus be used to meet quotas. Quotas apply automatically: works do not have to respect quality criteria or a particular expression of national and European themes. This is understandable: there are intrinsic dangers in asking public powers to assess values that are difficult to gauge impartially—as already said concerning State aids. However, this approach implies that, if it is sure that quotas do safeguard the European and national audio-visual industries, one cannot be sure that they are an effective measure for enhancing cultural diversity.

Strengthen the industry and then let it develop autonomously? The many risks of State support

The relationship between the Italian State and the film industry reflects the widest one between the State and the national industry, as well as the health state of the entire country system. The limits that have characterized the Italian State's support for the film industry are the same for the industry overall: lack of connection between different government levels, lack of assessment of the effectiveness of the choices made, lack of long-term vision, and consequently inability to ensure stable horizons.

The 2016 Act and its implementing decrees sought to inaugurate a new course and should be welcomed. In adopting an organic and coherent approach, the State is pouring considerable resources into the film industry, which may have a significant cultural and economic impact on the entire country system. However, it is difficult to hope, in the long

⁷¹⁵ BURRI-NENOVA, M., "New Audiovisual Media Services Directive", p. 1707.

⁷¹⁶ *Ibidem*, 1708.

term, for a greater presence of the Italian State in the industry. On the opposite, the hope is that the new Act's instruments will strengthen the industry, allowing it to progressively disengage from public support and freely develop. Indeed, if there are many solid reasons for the government's support, there are many equally valid reasons against making such a support systematic. State support always involves risks, whose likely occurrence increases in the lack of both long-term sight and systematic policy evaluations.

We are far from the most authoritative periods of the past when State support was granted in exchange for films accommodating political power's interests. However, even for the legislator guided by the noblest goals, there is always the risk of adding new constraints while trying to increase opportunities. Think about the disincentives produced by the reference system introduced by the Italian 'Urband Decree', which ended up reducing the incentives to innovate and diversify, in turn jeopardizing the emergence of new talents—a result in stark contrast to the constitutional ratios for public support to culture. Think also to the distortive effects generated by the past definition of Italian works in the quotas' framework, namely the reduction of the Italian film industry's internationalization and the economic value of Italian film. As noted, «the tools are not neutral. They bear the marks of the policies for which they were introduced. They enclose values. Nevertheless, they have their own dynamics [...] influencing the ends, modifying and distorting them»⁷¹⁷.

State support also risks producing a 'napping' industry, jeopardizing the essential drivers for innovation and experimentation, which are inherently nested in the competitive dynamic. Think about the 1994 Italian Guarantee Fund's operation, which was likely to take any responsibility off both the banks and the cinema operators while transferring the entrepreneurial risk to the State. Since operators were not risking their capital but gambling with State's money, the mechanism did not incentivize them to make a careful assessment of the

⁷¹⁷ CASSESE, S., *Preface to Gli strumenti per governare*, pp. X and XI («*Gli strumenti non sono neutri. Portano i segni delle politiche per cui sono stati introdotti. Racchiudono valori. Ma poi hanno dinamiche proprie [...] effetti propri, che influenzano i fini, modificandoli e distorcendoli*»).

projects they invested in, as proven by the very poor performance of the cultural interest films produced in that period⁷¹⁸.

State support may also produce free riding effects, keeping too many and too weak operators in the market, letting to survive inefficient activities, thus harming the entire economy. Think how the cultural purpose of State support has led to granted aids for specific projects rather than a structural support for companies, drifting towards a natalist policy of enterprises and medium-low budget films, with little capacity to penetrate foreign markets and sometimes failing to find a public even in the country of origin.

Interestingly, the exponents of the industry themselves have been highlighting said risks since a long time ago. In 1967, the then president of Confindustria, Angelo Costa, noted how «the fact that companies do not earn is mostly due to the incentive policy. Of all dishonest policies, the incentive is one of the most dishonest. The expedient of the incentive can be useful and necessary, but when it becomes systematic is destructive. We have sectors in crisis today simply because we wanted to create by subsidies unnecessary facilities. A small percentage of production more than the absorption possibilities is sufficient to lower prices below the cost limits [...]»⁷¹⁹.

Regarding the current legislation, an additional risk is that the State's action will prove in the long term a mere expense rather than an actual investment. The Italian State does not effectively protect the producers'

⁷¹⁸ According to CUCCO, M. and MANZOLI, G., *Il Cinema di Stato*, p. 45, 94% of the films of cultural interest financed by the State between 1994 and 2002 did not even make up for the amount invested in their production. Moreover: 11% of these films have not been completed or have not found a distribution channel.

⁷¹⁹ Thus reported by SERRANI, D. *Lo Stato finanziatore*, p. 38, footnote n. 11. («il fatto che le aziende non guadagnino deriva in gran parte dalla politica degli incentivi. Fra tutte le politiche disoneste questa degli incentivi è una delle più disoneste. L'espedito dell'incentivo può essere utile e necessario, ma quando lo si erige a sistema diventa distruttivo. Noi oggi abbiamo settori in crisi solo perché si sono voluti creare impianti sovvenzionati non necessari. Una piccola percentuale di produzione in più rispetto alle possibilità di assorbimento, è sufficiente a far ribassare i prezzi sotto i limi di costo. Si vuole favorire l'industrializzazione del meridione e si danno incentivi, e poi si danno gli stessi aiuti a zone depresse sparse in tutto il paese annullando in tal modo gli effetti della prima incentivazione. Unico risultato è che aziende sane non incentivate ne soffrono e con esse tutta l'economia»).

ability to maintain significant exploitation rights on their works in the face of the global digital platforms' tendency to acquire their ownership instead of a license for their exploitation. This way, in the long run the works financed by Italy may end up enriching foreign companies, instead of the national ones.

Finally, State's support to culture implies some specific risks. Among them, those related to distributive justice. To promote projects with exceptional and artistic value but with limited market appeal, the State uses public money to aid works that may benefit the wealthiest and more educated, with a regressive distributive effect. This is why one should strongly welcome the provision of the 2016 Act under which a minimum percentage of funding should be devoted each year to cinema education initiatives in schools. Increased education may be an effective way—even more consistent with freedom principles—to enhance the demand's 'quality', thus limiting the State's need to enter the market to allow 'meritorious' but fragile actors to express themselves. There is the need to support spectators before spectacles.

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