# [CH] Qualification as a “Swiss Film” for the Purpose of the Cinema Act

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The *Tribunal administratif fédéral* (Federal Administrative Tribunal - TAF) has defined the notion of what constitutes a “Swiss film” for the purposes of the *Loi fédérale sur la culture et la production cinématographiques* (Cinema Law - LCin). Recognition of an audiovisual work as a “Swiss film” means that it has access to the Federal aid provided for in the Cinema Act. According to Article 2 (2) of the Act, the term “Swiss film” is deemed to mean a film (a) that has been produced in the main by an author who has Swiss nationality or is domiciled in Switzerland, (b) that has been produced by a natural person domiciled in Switzerland or a company that has its registered office in Switzerland and the majority of both its own and its investors’ capital and management are in the hands of persons domiciled in Switzerland, and (c) that has been made as far as possible by actors and technicians of Swiss nationality or domiciled in Switzerland and by technical industries established in Switzerland. These conditions are cumulative.

In determining whether the third of these conditions is met, the *Office Fédéral de la Culture* (Ministry of Culture -OFC) used to apply by analogy Article 8 (2) of the *Ordonnance sur l’Encouragement du Cinéma* (order on encouragement for the cinema- OECin), in the version in force since 1 July 2006. According to this provision, a film was recognised as Swiss if, in the absence of an international co-production agreement, the Swiss part amounted to at least 50%. The OFC therefore considered the condition contained in Article 2 (2)(c) of the LCin as being met only if the majority of the artistic and technical participants were of Swiss nationality or domiciled in Switzerland.

In its decision published recently, the TAF nevertheless considered that Article 8 (2) of the OECin was not applicable where a film, produced exclusively by Swiss producers, involved the participation of foreign actors or technicians. According to the TAF, the very open, vague wording of Article 2 (2)(c) of the LCin did not make it possible to lay down a strict quota for a minimum of 50% participation, nor in consequence to apply by analogy Article 8 (2) of the OECin to films that were not co-produced with foreign interests. Indeed Article 2 (2)(c) of the LCin required an appreciation, taking into consideration the specific features of each individual case, of whether the film involved the sufficient participation of elements connected with Switzerland. The term “as far as possible” should consequently be understood as a criterion of what may reasonably be demanded,

as the authority has considerable latitude in its appreciation of the issue. The TAF therefore judged the OFC's practice as being contrary to the law.

It should be noted that the OECin was amended on 28 October 2008. The new Article 8a of the OECin provides that, for Swiss films, the number of artistic and technical collaborators of Swiss nationality or domiciled in Switzerland and the proportion of the Swiss technical industries referred to in Article 2 (2)(c) of the LCin should reach a minimum of 50%. The OFC may nevertheless authorise exceptions, particularly in the case of documentary films which, because of their theme, need to be produced mainly in another country, or when it has not been possible to find a qualified person or industry in Switzerland. - The authors referred to in Article 2(2)(a) of the LCin and the producers referred to in Article 2(2)(b) of the LCin are not taken into account in determining Swiss participation.

### *Urteil des Bundesverwaltungsgerichts Nr. C-5736/2007 vom 8. August 2008*

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