

**EUROPEAN FILM AGENCIES DIRECTORS
CONTRIBUTION TO THE CONSULTATION
OF THE EUROPEAN COMMISSION ON THE ISSUES PAPER
“ASSESSING STATE AID FOR FILMS AND OTHER AUDIOVISUAL WORKS”
September 2011**

Key points

1. A new Cinema Communication on state aid for audiovisual and interactive works should be based on the cultural derogation as provided by art. 107. 3 (d) TFEU. Aid must benefit all audiovisual and interactive works and projects intended by policy makers in the member states to have a cultural impact.
2. A new Communication should be compatible with the principles of necessity, proportionality and effectiveness but, respecting the principle of subsidiarity, it should be for individual Member States to decide the basis and objectives for this support.
3. A new Communication must cover all aspects of up stream and down stream activities in the value chain for the creation, production, distribution and promotion of audiovisual and interactive works.
4. A new Communication must cover all kinds of fiscal instruments (such as selective and automatic aid, regional aid and tax incentives) aimed at strengthening cultural impact whether directed to the creation and dissemination of audiovisual and interactive works or directed at improving the talent base, the technological infrastructure, or the development and implementation of new business models (such as aid for digitisation of cinemas, new business models for creation and distribution).
5. The European Film Agency Directors (EFADs) acknowledges the Commission's concern to avoid “subsidy races”, but we are not aware of any evidence, that Aid mechanisms which help attract inward investment in the European audiovisual sector have a negative effect on the functioning of the European internal market. We expect the Commission will want to test its concerns further undertaking systematic collection and analysis of available data. EFADs would want to offer every assistance to the Commission with this work.
6. Territorialisation requirements should be maintained as they stand now. Given that the European audiovisual sector is fragmented, characterised by plural language areas, an industry based on SMEs and weak ties to the capital markets, exacerbated by the economic downturn this is not the time to disrupt member states willingness to support their own creative industries.
7. The current aid intensity limit of 50% should be maintained, but only for production costs. A new Communication should allow for higher aid intensity for low budget and difficult films based on the member states cultural impact assessments.
8. The EFADs want to stress the importance of the Commission putting in place a new Cinema Communication that guarantees long-term legal certainty, simplicity and transparency to Europe's film funding agencies and film professionals.

Introductory remarks

The European Film Agencies Directors (EFADs) welcome the initiative of the European Commission to launch a consultation related to the rules to be implemented for State aids in the film and audiovisual sector post 2012.

For several years now, in the absence of adequate rules, the European Commission has found it necessary to implement “by analogy” the rules contained in the 2001 “Communication of the Commission on certain legal aspects relating to cinematographic and other audiovisual works” (also called the “Cinema Communication”) to activities for which they were not intended. This has resulted in a lack of transparency and, a growing juridical uncertainty for Member states and funding agencies, who have been unable to anticipate how criteria originally applicable to production aids would be transposed to other activities.

Therefore, the EFADs welcome the European Commission's approach not simply to extend the longevity of the existing rules but to start a deep reflection on current aid systems and criteria for future aid systems to ensure a simple and efficient evaluation framework compatible with other European rules.

To that end, the decision of the European Commission to involve the Member states and European professionals from the onset in the process is a very positive. It should allow the Commission to gather precise data on the sector, information indispensable to the preparation of the new Communication.

EFADs would like to take the opportunity to underline that when drawing up a new Cinema Communication the following should be taken into account:

- The relevant articles of the treaties as article 3 (3) TEU, article 107 (3) (d) and article 167 TFEU, that anchor the commitment of the European Union to protect and promote culture and cultural diversity.
- The UNESCO Convention of Cultural Diversity, signed by the European Union in 2006 has become an acknowledged pillar in European cultural policies. The Convention recognises the double nature (cultural and economic) of audiovisual goods and services, the Convention encompasses cultural industries and reaffirms the sovereign rights of member states to implement policies and measures that they deem appropriate for the protection and promotion of the diversity of cultural expressions on their territory.

The structural and economical characteristics of the film industry are unique and must be taken into consideration when applying the rules of the internal market. Films and audiovisual works are “global” goods and therefore the audiovisual sector has to face the challenges of globalisation. The EU policies and the EU legal framework should allow for and encourage a dynamic interplay between EU and national policies in order to maintain and develop cultural distinctiveness and diversity in Europe. The dominance of US film on the European market is the real competition problem.

- The film and audiovisual sector has the potential to contribute to the goals of European policies laid down in the EU 2020 strategy for smart, sustainable and inclusive growth. EU 2020 emphasizes the need for new strategies for innovation as well as strategies for social, educational and cultural cohesiveness and development.

Audiovisual policies at EU level as well as member state level have for a long time been characterised by objectives for innovation, economy, culture and education.

- According to the Commission Green Paper on the Online Distribution of Audiovisual Works (COM (2011) 427 final) “The cultural industries in Europe, including the audiovisual sector, make a significant contribution to the EU economy, creating about 3% EU GDP corresponding to an annual market value of 500 billion EUR and employing about six million employees.”

According to the same paper “the European cinematographic industry is confronted with some unique structural characteristics including the language and cultural specificities and preferences of national markets and the limited availability of finance. The European audiovisual sector is deeply fragmented, consisting of a large number of small and medium sized enterprises (SMEs). Europe has not been in a position to develop a studio system of the scale developed by the Hollywood majors. It suffers from under-investment in comparison with other countries and the average film budget is a fraction of that of the major studios. European films often enjoy success in their home territory but... they tend to have limited distribution and appeal outside the territory of their production. Given the structural challenges for European cinema, the development of this sector has not been left solely to market forces. Pluralism, cultural and linguistic diversity and protection of minors are some of the objectives of general interest safeguarded by EU legislation.”

To respond to the discussion paper, we shall take one by one the issues raised by the European Commission:

3.2. Why do we fund the European film?

The support measures provided by the EFADs have a very clear cultural objective: to allow the creation and the dissemination of European audiovisual works and as such to contribute to cultural diversity in the EU. By enabling artists to receive support for writing, developing, producing, distributing works, these support systems constitute the backbone for the European audiovisual sector.

As a consequence of the sector’s specific characteristics, audiovisual creation depends on a robust infrastructure (skills, finance and production and post-production plant). Given this, the economic development of the audiovisual and film sector is a necessary precondition to artistic creation and cultural diversity.

This complementarity of economic conditions and cultural objectives, which is characteristic of the cultural / economic duality of audiovisual and film goods and services, occurs throughout Europe. The totality of the support systems set up at the national or regional level, whether classical assistance systems, tax stimuli, devices to stimulate access to finance and regional systems, allows the creation of works promoting the cultural diversity of Europe and underpinning the industrial tissue indispensable to creation.

The Commission raises the question of the possible existence of conflicting financing sources. EFADs are not of the opinion that such a risk exists. The quantum of European co-productions suggests that professionals can balance with the multiple requirements of national and regional funds to finance their works, which they would not be able to finance from a single territory. In a period of economic crisis, the trend of some states to reduce budgets to culture, including those dedicated to the audiovisual and film sector, highlights the need to protect even more strongly aid systems we have in place. European films are indispensable to national identities and to the building of a European identity and should therefore be provided every opportunity possible for success.

The EFADs, therefore, cannot agree with the Commission when it says in its analysis paper that the fragmentation of the European cinematographic sector is exacerbated by public aid. On the contrary, EFADs would like to underline that this fragmentation is the basis of our cultural diversity. The reductive approach to consider the fragmentation exclusively as an “obstacle” to the internal market would clearly endanger Europe’s cultural diversity.

The results of support measures granted by the EFADs are manifest. Whereas the market portion of European films is still smaller than the US productions market share, its diffusion worldwide is significant. This would not be possible without public funding.

What should be the objective of State aid for films and audiovisual works?

State aids for films and audiovisual works have a cultural goal since they are aimed at allowing European creators to develop projects conveying a national identity and as a consequence for European audiences an alternative to films from across the Atlantic. In this respect, it should be noted that preserving and developing various national identities is not in conflict with pursuing a European cultural objective. Indeed, the coexistence of those national identities is constitutive of the European identity favoured by the European Union through all its policies; to quote José Vidal Beneyto, when he was a director for education, culture and sports at the Council of Europe: “European culture, more than any other, is conceivable only in the plural (...). We may thus describe European culture as a set of differences and as a pre-eminent area of diversity”.

The EFADs consider it necessary to question the criterion set forth in the 2001 Communication that stipulates that any aid must be aimed at a cultural product. This notion of cultural product possibly made sense in 2001 against a background which only needed to take into consideration classical aid devices for production; but it becomes questionable in today’s context of diversification of aid systems. For that reason, we suggest it should be replaced.

An approach could be that support measures covered by the new Cinema Communication under the cultural derogation should have an overall cultural objective or a cultural impact assessment by political decision-makers in the member states. This would allow an extension of the scope of the Communication to such activities such as, promotion and distribution for which it is difficult to isolate a “product”. The concept of cultural could cover all the different types of support systems including tax incentives and regional funding which also aim at achieving a cultural outcome.

The concept of cultural impact implies that cultural tests as they today exist (i.e to confirm the nature of “cultural product” of a film) would no longer be necessary. However, as explained below (point 3.3), a nationality test may still be useful in order to define what a non European film might be.

How should one measure that this objective is fulfilled?

The cultural impact or contribution of a film or audiovisual work is not easy to measure – the short term and long term effects of cultural policies are not easy to quantify. Nevertheless a framework and methodology could be devised and agreed by experts and the EFADs would be interested to contributing to this work.

3.3 How should the subsidy race to attract major film production be controlled?

The European film sector can not ignore global developments and challenges without running the risk of becoming increasingly marginalised and less competitive. The development of support mechanisms to attract international investment has to be seen against this background. Attracting film production from abroad means, alongside the positive economic effects for the audiovisual sector, importing technical, artistic know-how and promoting the exchange of knowledge and skills. This exchange results in an increase of the range, quantity and level of production skills and technical expertise with positive effects on the quality of European film and on the promotion of culture. Moreover, these schemes have to a large extent benefited national productions and European co-productions

Given the disparity between the resources available in Europe and in the USA for production, promotion and distribution of film or audiovisual works, any aid system, that could assist the promotion of cultural diversity and reinforce the European film and audiovisual sector should be encouraged rather than thwarted.

What would be the most effective way for the Commission to control this subsidy race?

As mentioned above, the EFADs consider that every support system set up in Europe can have a positive effect on cultural diversity and on the reinforcement of the European audiovisual sector. However, the European Film Agency Directors (EFADs) acknowledge the Commission's concern to avoid "subsidy races", but we are not aware of any evidence, that aid mechanisms which help attract inward investment in the European audiovisual sector has a negative effect on functioning of the European internal market. We expect the Commission will want to test its concerns further undertaking systematic collection and analysis of available data and/or discussing with EFADs and others professionals any evidence that might be available. EFADs would want to offer every assistance to the Commission with this work.

Furthermore, in EFADs' view, there are already generally accepted tools which help define European works, such as the MEDIA Programme's "schedule of European elements" or the criteria set up in the Council of Europe's Convention on cinematographic co-production as well as the member states bilateral treaties with third countries all of which constitutes and encourage cooperation within the EU and with third parties for cultural reasons. These tools take into account the technical and artistic participation and are routinely used in all Member States. They could therefore contribute to any cultural impact framework that would allow the Member States and the Commission to define whether or not a film can be considered as non-European and therefore be subject to limitations in one way or another.

3.4. What activities other than production should be included in the scope of the Communication and which State aid criteria are appropriate for such activities?

The EFADs consider that it is now necessary to expand the scope of the Communication beyond production to the other activities across the film value chain from development to production and consumption, and to provide criteria adapted to those activities.

The EFADs welcome the Commission's thoughts to include in its next Cinema Communication criteria for the various stages of film and audiovisual creation and consumption. With this in mind, we think the new Communication should cover the following activities:

- pre-production support to scriptwriting and development
- production
- post-production
- promotion (including film festivals)

- distribution
- International sales
- exhibition (cinemas, dvd, VoD platforms)
- aids to digitisation (cinemas)
- educational programmes

All these stages contribute to the realisation of a cultural project and to its accessibility for the public. Adopting criteria for them would greatly increase the juridical security of support systems.

What factors should be taken into account by State aid assessment criteria for activities other than production?

The EFADs consider that the main element to be taken into account is linked to culture: does the aid granted contribute to strengthening cultural diversity and/or reinforcing a vital and sustainable film sector in Europe?

The level of aid intensity might also vary across the stages noted above (keeping a specific intensity for pre-production, production, distribution ...).

How should the switch of cinemas to digital projection be covered by future rules on aid to cinema?

The switch to digital projection is an imperative and Member States are working to find solutions by mobilising financial means to help European cinemas move into the digital age. At stake is the future of European cinemas and also of European films: without switching to digitisation, our cinemas will no longer have access to films, without digitisation, our films will no longer have access to screens which have already been digitised with the help of large-scale American studios.

It is imperative that the Member States support survival of a network of cinemas by assisting them. Therefore Member States should be given the freedom and flexibility to support any type of movie theatre when they judge that it is necessary and particularly small independent cinemas.

3.5 What should be the scope of products to be supported?

Should the scope of the Communication extend beyond films and TV productions to other types of audiovisual projects? If so, what definition of “audiovisual project” should be used?

As the European Commission observes, the current Cinema Communication applies only “audiovisual works”, television and cinematographic works.

Given the recent technological developments and the possibility that the new Communication could be for an unlimited period (with no periodic revision), the EFADs consider it beneficial in the future to include aids to other types of audiovisual production such as:

- aid to works conceived for the Web (web fictions, web docs)
- aid to works created from or for mobile phones
- aid to experimental works to develop new types of audiovisual creation (for instance supporting works conceived for a cross-media exploitation).
- aid to interactive works, including video games

With the exclusion of works aimed at eg. advertising and pornography.

A priori, it could be easier to have criteria that would be applicable to all audiovisual production (cinema, television and other types of audiovisual productions) and not only to films; criteria based on the objective of the given assistance, its intensity and the territorialisation of expenses.

3.6 What should the maximum aid intensities be?

Should the current maximum overall aid intensity remain at 50% of the production budget, with higher aid intensities for difficult and low-budget films?

The EFADs think it is vital to keep the existing rule of 50% of aid intensity, with a possibility of derogation for difficult or low budget audiovisual projects based on national definitions and justified by the assessment of the potential cultural impact.

If activities other than production are to be covered by the Communication as well, would it be appropriate to set the maximum overall aid intensity as 50% of the total project budget (covering script-writing, development, pre-production, principal photography, post-production, distribution, promotion and marketing costs)?

The EFADs consider that the threshold of 50% should not be made uniformly applicable to all activities and should only remain the basis regarding the support granted for production.

Indeed, all the activities upstream production such as writing and development are highly risky stages that should therefore benefit from a higher level of intensity.

Downstream activities such as distribution or promotion and theatrical release should also benefit from a higher intensity level because these activities are mainly located in a specific geographic location and therefore do not have a significant impact on competition and trade between Member states¹.

Would it be appropriate to encourage cross-border cooperation by allowing a higher overall aid intensity 'of perhaps 60% for film projects which involve activities in more than one member state, including co-production?

Allowing a higher intensity for films which involve activities in more than one member state, including co-productions, could be a relevant stimulus to facilitate their artistic and financial set-up and thereafter their circulation on the territories involved with the co-production.

If other types of audiovisual projects are to be covered by the Communication, what should the appropriate maximum overall aid intensity be?

Other types of audiovisual projects, whether works conceived for the Web or works for mobile phones, are often only developed at the experimental stage. There does not exist, today, any business model guaranteeing their development and dissemination. Therefore, it falls to public authorities wishing to diversify the offer of audiovisual works, to support research into and the development of such audiovisual works by granting them subsidies without a limitation at 50%.

3.7 To what extent are territorial conditions justified?

¹ This reasoning can also be found in the decision N257/2007 about subsidies for theatre productions in the Basque country

The current Cinema Communication allows a member state to require that up to 80% of the production budget of a subsidised film production should be spent on the territory of the member state offering the aid. This requirement so leaves the producers the opportunity to spend 20% of this budget on the territory of one or several other Member States.

In 2007, the Commission commissioned a study on the economic and cultural impact, notably on co-production of territorialisation clauses of State Aid ie. a study into the consequences of territorial conditions on the respect of the free circulation of persons, goods and services. That study did not yield a clear conclusion in one direction or another but did articulate why territorial conditions are indispensable to ensure the sustainability of public support.

The objective of these conditions is not to impede the liberty of the producer to spend subsidies where she/he wishes. The aim of those clauses is to ensure that the State that provides the financial assistance will see part of the given financial support will be invested in activities developed at the local or national level and this with the goal in mind of professionalising the sector and to maximise audiovisual enterprises that benefit from these measures.

From a juridical point of view, some may argue that these clauses constitute impediments to the fundamental liberties warranted by European treaties. However, these clauses should be considered in association with other articles from these treaties, especially those related to the obligation for the European Union to take into consideration cultural objectives and diversity within the framework of the implementation of its policy and the assessment of those implemented by Member States.

With this in mind, the jurisprudence of the Court of Justice² of the European Union provides ideas of how such clauses could be reconciled with fundamental liberties inasmuch these clauses are justified through the concretisation of an objective of general interest, as cultural objectives for instance. An equilibrium should be found between the respect of fundamental liberties and that of the cultural objectives.

It is normal that a production company works with service providers from its own territory because they complement the artistic and logistical needs of the creation team. So, contrary to the argument developed by the European Commission, the switch to digitisation should have no influence; the production and postproduction of a film should remain the competence of local experts chosen for artistic reasons and producers for logistical reasons.

The use of local teams remains indispensable to structure their activities; this, as a consequence, enables them to contribute to infrastructures and to the development of creative industries of appropriate size and of appropriate skills in each member state of the European Union and thereby to constitute the cultural distinctiveness and diversity of the union.

Furthermore, should territorial conditions be suppressed or reduced, European professionals would be tempted to have recourse not to service providers from other European countries but to service providers from countries outside the European Union (essentially Asiatic ones) that would work for lower prices. Our professionals would not have gained anything, on the contrary.

² UTECA judgment 5 March c-222/07, points 26 & 27 ; judgment of 28.10.1999 - Case C-6/98, ARD, n° 50 ; Judgement of 05.10.1994 – case 23/93, TV 10, n° 18, 19, judgment of 16.12.1992 - case C-211/91, Commission/Belgium, n° 9 ; Judgment of 25.07.1991 - case 288/89, Mediawet I, n° 22 à 25 ; judgment of 25.07.1991 - case C-288/89, Mediawet I, n° 27 ; judgment of 18.01.1979 – joint cases 110/78 et 111/78, Van Wesemael, n° 28

Moreover, as the European Commission reminded us, reducing the opportunity to explicitly impose territorial conditions will lead to the development of 'implicit territorialisation' conditions. These will mitigate the concerns of the Commission and will render more difficult the work of producers since the rules imposed on them would then not be explicitly worded and would therefore be the possible object of a case-per-case treatment.

As stressed by the European Commission, the impact of local expenses on political decisions at the national level in cultural matters should not be neglected. Indeed, the argument that audiovisual creations generate local expenses is decisive in the decision by political authorities to provide budgets for that sector. It should not be ignored, above all in periods of crisis during which culture budgets are often first to be cut.

Finally, the amount of co-productions shot every year in Europe show that territorialisation criteria do not prevent co-operation and exchanges between European countries as shown by the high number of co-productions between European countries.

Should member states be allowed to impose territorial conditions on aid for audiovisual projects? If so, would it be fair to limit this to 100% of the aid amount or is there a more appropriate benchmark?

The rules worded in the Cinema Communication as regards support to territorialisation are based on a percentage of the production budget of a work and not on a percentage related to the amount of public aid. We think this device should continue to be implemented to enable Member States, while respecting the subsidiarity principle, to determine the percentage of the aid that will be spent on their territory, with respect for the general rule of territorialisation fixed in the Communication.

However, since it is true that one of the concerns of the Commission resides in the nature of expenses permissible in the territory of the Member State granting funding and which does not come into consideration as a contribution to the structure shaping of the audiovisual sector, we could consider, in the new Communication, to clearly specify that the given expenses should strictly be limited to the audiovisual sector.

Further analysis is therefore needed before the EFADs could support any change in the accepted level of territorialisation.

3.8 Does the digital revolution affect the State aid rules?

The EFADs consider it imperative that the new Cinema Communication encompasses the digital revolution. The proposals mentioned by the Commission, such as aids to development, production and marketing tools, should be covered by the next Cinema Communication, as well as classical aids to promotion and distribution, since they contribute to the development of alternative communication systems aimed at strengthening the audiences access to works audiovisual works.

Should conditions on production support be imposed to encourage a smooth digital transition, such as ensuring that a digital master is produced and requiring that publicly-funded works are released under Creative Commons Attribution-Share Alike licences?

Since most European films receive public support, it could help to develop film culture/literacy and ensure that supported films are safeguarded for future generation if such funding is conditional on the supported films being deposited and available for

cultural/educational use. Should a new Communication invite member states to do so, especially if the public funding is over 50% of the film's budget?

Respecting the subsidiarity principle, member states should retain the competence to impose as a condition of funding, if it so wishes, the production of a digital master and archiving of it. In the same way, requiring that the work which has been funded, be it only partially, by a member state could be screened for cultural or commercial reasons seems, to us, to undermine the right of each Member State to determining its own cultural policy. Nevertheless we invite the Commission to explore these possibilities further as they should be referred to positively but not included in the next Cinema Communication as mandatory obligations.

Should distribution support cover distribution on all platforms (i.e. not only, for example, for releasing in cinemas)?

European films find reaching their audience increasingly difficult. , namely, as a consequence of the dominance of American productions which have a particularly efficient promotion.

It is, for these reasons, imperative that member states could contribute to the development of new means of dissemination, such as VOD platforms, which could hugely assist European films to reach an audience, whether specialised or for the public at large.

Austrian Film Institute

Ministère de la Fédération Wallonie Bruxelles - Centre
du Cinéma et de l'Audiovisuel

Flanders Audiovisual Fund

Bulgarian National Film Center

Italian Ministry of Cultural Heritage and Activities

Danish Film Institute

ICAA, Instituto de la Cinematografía y de las Artes
Audiovisuales

Estonian Film Foundation

Finnish Film Foundation

CNC, Centre national du cinéma et de l'image animée

Cyprus Ministry of Education and Culture

Greek Film Center

National Film Office

Irish Film Board

National Film Center of Latvia

Ministry of culture of the republic of Lithuania

Luxembourg Film Fund

Malta Film Commission

Dutch Film Fund

Polish Film Institute

ICA (Instituto do Cinema e Audiovisual)

Ministry of culture of the Czech republic, Media and AV
Department

National Film Center Romania

Slovak Audiovisual Fund

Slovenian Film Fund

Swedish Film Institute

BFI, British Film Institute

Norwegian Film Institute