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**COMMUNICATION FROM THE COMMISSION**  
**ON STATE AID FOR FILMS AND OTHER AUDIOVISUAL WORKS**

(Text with EEA relevance)

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## COMMUNICATION FROM THE COMMISSION

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#### 1. INTRODUCTION

1. Audiovisual works, particularly films, play an important role in shaping European identities. They reflect the cultural diversity of the different traditions and histories of the EU Member States and regions. Audiovisual works are both economic goods, offering important opportunities for the creation of wealth and employment, and cultural goods which mirror and shape our societies.
2. Amongst audiovisual works, films still have a particular prominence, because of their cost of production and cultural importance. Film production budgets are substantially higher than for other audiovisual content, they are more frequently the subject of international coproduction, and the duration of their exploitation life is longer. Films in particular face strong competition from outside Europe. On the other hand, there is little circulation of European audiovisual works outside their country of origin.
3. This limited circulation results from the fragmentation of the European audiovisual sector into national or even regional markets. While this is related to Europe's linguistic and cultural diversity, proximity is also built into the public support for European audiovisual works, with which national, regional and local funding schemes subsidise many small production companies.
4. It is generally accepted that aid is important to sustain European audiovisual production. It is difficult for film producers to obtain a sufficient level of upfront commercial backing to put together a financial package so that production projects can proceed. The high risk associated with their businesses and projects, together with the perceived lack of profitability of the sector, make it dependent on State aid. Left purely to the market, many of these films would not have been made because of a combination of the high investment required and the limited audience for European audiovisual works. In these circumstances, the fostering of audiovisual production by the Commission and the Member States have a role to ensure that their culture and creative capacity can be expressed and the diversity and richness of European culture reflected.
5. MEDIA, the European Union's support programme for the film, television and new media industries, offers a variety of funding schemes, each targeting different areas of the audiovisual sector, including schemes for producers, distributors, sales agents, organisers of training courses, operators in new digital technologies, operators of video-on-demand (VoD) platforms, exhibitors and organisers of festivals, markets and promotional events. It encourages the circulation and promotion of European films with particular emphasis on non-national European films. These actions will be continued in the MEDIA Sub-programme within Creative Europe, the new European support programme for the cultural and creative sectors.

## 2. WHY CONTROL STATE AID FOR FILMS AND OTHER AUDIOVISUAL WORKS?

6. Member States implemented a wide range of support measures for the production of films, TV programmes and other audiovisual works. Altogether, Member States provide an estimated €3 billion of film support per year<sup>1</sup>. This funding is provided through over 600 national, regional and local support schemes. The rationale behind these measures is based on both cultural and industrial considerations. They have the primary cultural aim of ensuring that the national and regional cultures and creative potential are expressed in the audiovisual media of film and television. On the other hand, they aim to generate the critical mass of activity that is required to create the dynamic for the development and consolidation of the industry through the creation of soundly based production undertakings and the development of a permanent pool of human skills and experience.
7. With this support, the EU has become one of the largest producers of films in the world. The EU cinema industry produced 1,299 feature films in 2012 compared to 817 in the US (2011), or 1255 in India (2011). In 2012, Europe counted 933.3 million cinema admissions<sup>2</sup>. In 2008 the European audiovisual market for filmed entertainment was valued at €17 billion<sup>3</sup>. Over one million people are employed in the audiovisual sector in the European Union<sup>4</sup>.
8. This makes film production and distribution not only a cultural but also a significant economic activity. Furthermore, film producers are active on an international level and audiovisual works are traded internationally. This means that such aid in the form of grants, tax incentives or other types of financial support is liable to affect trade between Member States. The producers and audiovisual works which receive such support are likely to have a financial and hence competitive advantage over those which do not. Consequently, such support may distort competition and is regarded as State aid pursuant to Article 107(1) TFEU. According to Article 108 TFEU the Commission is therefore obliged to assess the compatibility of aid to the audiovisual sector with the internal market, as it does with State aid measures in other sectors.
9. In this context it is important to stipulate that the Treaty recognises the utmost importance of promoting culture for the European Union and its Member States by incorporating culture among the Union's policies specifically referred to in the Treaty on the Functioning of the European Union (TFEU). Article 167(2) TFEU provides that:

*Action by the Union shall be aimed at encouraging cooperation between Member States and, if necessary, supporting and supplementing their action in the following areas:*

[...]

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<sup>1</sup> €1 billion of support is provided annually by European film funds (<http://www.obs.coe.int/about/oea/pr/fundingreport2011.html>). According to the study into the economic and cultural impact of territorial conditions in film support schemes, a further, estimated €1 billion is provided annually by Member States through film tax incentives, [http://ec.europa.eu/avpolicy/info\\_centre/library/studies/index\\_en.htm#territorialisation](http://ec.europa.eu/avpolicy/info_centre/library/studies/index_en.htm#territorialisation).

<sup>2</sup> Source: *Focus 2012 – World film market trends*, European Audiovisual Observatory, May 2012.

<sup>3</sup> PWC Global Entertainment and Media Outlook 2009-2013, June 2009, p. 193.

<sup>4</sup> Study by KEA European Affairs, Multi-Territory Licensing of Audiovisual Works in the European Union, Final Report prepared for the European Commission, DG Information Society and Media, October 2010, p. 21, <http://www.keanet.eu/docs/mtl%20-%20full%20report%20en.pdf>.

- artistic and literary creation, including in the audiovisual sector.

10. Article 167(4) TFEU provides that: *The Union shall take cultural aspects into account in its action under other provisions of the Treaties, in particular in order to respect and to promote the diversity of its cultures.*
11. Article 107(1) TFEU prohibits aid granted by the State or through State resources, which distorts or threatens to distort competition and trade between Member States. However, the Commission may exempt certain State aid from this prohibition. One of these exemptions is Article 107(3)(d) TFEU for aid to promote culture, where such aid does not affect competition and trading conditions to an extent contrary to the common interest.
12. The Treaty rules on State aid control acknowledge the specificities of culture and the economic activities related to it. Audiovisual aid contributes to the medium- to long-term sustainability of the European film and audiovisual sectors across all Member States and increases the cultural diversity of the choice of works available to European audiences.
13. As Party to the UNESCO Convention on the Protection and the Promotion of the Diversity of Cultural Expressions, the European Union, alongside the EU Member States, is committed to integrating the cultural dimension as a vital element in its policies.

### **3. DEVELOPMENTS SINCE 2001**

14. The assessment criteria for State aid for the production of films and other audiovisual works were originally set out in the 2001 Cinema Communication<sup>5</sup>. The validity of these criteria was extended in 2004<sup>6</sup>, 2007<sup>7</sup> and 2009<sup>8</sup> and expired on 31.12.2012. This Communication pursues the main lines of the 2001 Communication, whilst responding to a number of trends which have emerged since 2001.
15. The aid schemes approved by the Commission since the 2001 rules came into force show that Member States use a wide variety of aid mechanisms and conditions. Most schemes follow the model for which the assessment criteria of the 2001 Communication were designed, namely grants awarded to selected film productions, where the maximum aid is determined as a percentage of the production budget of the aid beneficiary. However, a growing number of Member States introduced schemes which define the aid amount as a percentage of the expenditure on production activity undertaken in the granting Member State only. These schemes are often designed in the form of a tax reduction or otherwise in a way which applies automatically to a film which fulfills certain criteria for its eligibility for aid. Compared to film funds which individually award support to single films upon application, these schemes with their

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<sup>5</sup> 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 audiovisual works, OJ C 43, 16.2.2002, p. 6.

<sup>6</sup> OJ C 123, 30.4.2004, p. 1.

<sup>7</sup> OJ C 134, 16.6.2007, p. 5.

<sup>8</sup> OJ C 31, 7.2.2009, p. 1.

automatic application allow film producers to factor in a foreseeable amount of funding already in the film planning and development phase.

16. Regarding the scope of aided activities, some Member States also offer aid to activities other than film production. This includes aid to film distribution or to cinemas, for example to support rural cinemas or arthouse cinemas in general or to cover their renovation and modernisation, including their transition to digital projection. Some Member States support audiovisual projects which go beyond the traditional concept of film and TV productions, in particular interactive products like transmedia or games. In these cases, the Commission applied the criteria of the Cinema Communication as a reference to assess the necessity, proportionality and adequacy of the aid, whenever such aid was notified to it. The Commission also noted a competition among Member States to use State aid to attract inward investment from large-scale film production companies of third countries. These issues were not addressed in the 2001 Communication.
17. Already the 2001 Communication announced that the Commission would review the maximum level of territorial spending obligations in this sector permitted under the State aid rules. Territorial spending obligations in film-funding schemes require a certain part of the supported film budget to be spent in the Member State granting the aid. The 2004 extension identified territorial spending obligations in film funding schemes as an issue which needs to be further assessed in view of its compliance with the internal market principles of the Treaty. Case-law of the Court of Justice, adopted since 2001 on the importance of the internal market with regard to rules on the origin of goods and services, also needs to be taken into account<sup>9</sup>.
18. Also the application of the "cultural test" has raised issues in practice. The compatibility of aid to film production is assessed under Article 107(3)(d) TFEU which provides for the possibility to grant aid "to promote culture". The 2001 Communication required that the aid was directed towards a cultural product. However, the Commission's detailed scrutiny of cultural criteria in film support schemes has been controversial with Member States, particularly in view of the subsidiarity principle.
19. Accordingly, when extending the State aid assessment criteria of the 2001 Cinema Communication in 2009, the Commission noted the need for further reflection on the implications of these developments and a review of the assessment criteria.

#### **4. SPECIFIC CHANGES**

20. This Communication addresses the issues above and introduces amendments to the criteria of the 2001 Communication. In particular, it covers State aid for a wider scope of activities, highlights the principle of subsidiarity in the area of cultural policy and the respect of internal market principles, introduces a higher maximum aid intensity level for cross-border productions and caters for the protection of and access to film heritage. The Commission believes that these changes are necessary in view of the developments since 2001 and will help European works to be more competitive and pan-European in future.

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<sup>9</sup> In particular the Judgment of the Court of Justice of 10 March 2005 in case *Laboratoires Fournier* (C-39/04), ECR 2005 I-2057.

#### 4.1. Scope of activities

21. Regarding the scope of activities to which this Communication applies, the State aid criteria of the 2001 Cinema Communication focused on the production of films. As noted, some Member States however offer also support for other related activities, such as script-writing, development, film distribution, or film promotion (including film festivals). The objective of protecting and promoting Europe's cultural diversity through audiovisual works can only be achieved if these works are seen by audiences. Aid to production alone risks stimulating the supply of audiovisual content without ensuring that the resulting audiovisual work is properly distributed and promoted. It is therefore appropriate that aid may cover all aspects of film creation, from story concept to delivery to the audience.
22. Regarding aid to cinemas, usually the amounts involved are small, so that for example rural and arthouse cinemas should be sufficiently served by the levels of aid which fall under the *de minimis* Regulation<sup>10</sup>. However, if a Member State can justify that more support to cinemas is required, the aid will be assessed under the present Communication as aid to promote culture in the meaning of Article 107(3)(d) TFEU. Aid for cinemas promotes culture because the principle purpose of cinemas is the exhibition of the cultural product of film.
23. Some Member States considered support to audiovisual projects which go beyond the traditional concept of film and TV productions. Transmedia storytelling (also known as multi-platform storytelling or cross-media storytelling) is the technique of telling stories across multiple platforms and formats using digital technologies, like films and games. Importantly, these pieces of content are linked together<sup>11</sup>. Since transmedia projects are inevitably linked to the production of a film, the film production component is considered to be an audiovisual work within the scope of this Communication.
24. Conversely, although games may represent one of the fastest-growing form of mass media in the coming years, not all games necessarily qualify as audiovisual works or cultural products. They have other characteristics regarding production, distribution, marketing, and consumption than films. Therefore, the rules designed for film production cannot apply automatically to games. Furthermore, contrary to the film and television sector, the Commission does not have a critical mass of decisions on State aid to games. Consequently, this Communication does not cover aid granted to games. Any aid measures in support of games not meeting the conditions of the General Block Exemption Regulation (GBER)<sup>12</sup> or the *de minimis* Regulation will continue to be addressed on a case-by-case basis. To the extent that the necessity of an aid scheme targeted at games which serve a cultural or educational purpose can be demonstrated, the Commission will apply the aid intensity criteria of this Communication by analogy.

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<sup>10</sup> Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to *de minimis* aid, OJ L 379, 28.12.2006, p. 5.

<sup>11</sup> Not to be confused with traditional cross-platform media franchises, sequels or adaptations.

<sup>12</sup> Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty (General block exemption Regulation), OJ L 214, 9.8.2008, p. 3.

## 4.2. Cultural criterion

25. To be compatible with Article 107(3)(d) TFEU, aid to the audiovisual sector needs to promote culture. In line with the subsidiarity principle enshrined in Article 5 TEU, the definition of cultural activities is primarily a responsibility of the Member States. In assessing an audiovisual support scheme, the Commission acknowledges that its task is limited to verifying whether a Member State has a relevant, effective verification mechanism in place able to avoid manifest error. This would be achieved through the existence of either a cultural selection process to determine which audiovisual works should benefit from aid or a cultural profile to be fulfilled by all audiovisual works as a condition of the aid. In line with the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions of 2005<sup>13</sup>, the Commission notes that the fact that a film is commercial does not prevent it from being cultural.
26. Linguistic diversity is an important element of cultural diversity; hence, defending and promoting the use of one or several of the languages of a Member State also serves the promotion of culture<sup>14</sup>. According to the well-established case-law of the Court, both the promotion of a language of a Member State<sup>15</sup> and cultural policy<sup>16</sup> may constitute an overriding requirement relating to the general interest which justifies a restriction on the freedom to provide services. Therefore, Member States may require, as condition for the aid, *inter alia*, that the film is produced in a certain language, when it is established that this requirement is necessary and adequate to pursue a cultural objective in the audiovisual sector, which can also favour the freedom of expression of the different social, religious, philosophical or linguistic components which exist in a given region. The fact that such a criterion may constitute in practice an advantage for cinema production undertakings which work in the language covered by that criterion appears inherent to the objective pursued<sup>17</sup>.

## 4.3. Territorial spending obligations

27. Obligations imposed by the authorities granting the aid on film producers to spend a certain part of the film production budget in a particular territory (so called "territorial spending obligations") have been subject to particular attention since the Commission started looking into film support schemes. The 2001 Cinema Communication allowed Member States to require that up to 80% of the entire film budget needed to be spent on their territory. The schemes which define the aid amount as a percentage of the expenditure on production activity undertaken in the granting Member State do try already by their design to draw as much production activity as possible to the aid granting Member State and contain an inherent element of territorialisation of expenditure. The Cinema Communication needs to take into account these different types of aid schemes now in place.

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<sup>13</sup> The Convention states in Article 4(4): "Cultural activities, goods and services refers to those activities, goods and services, which ... embody or convey cultural expressions, irrespective of the commercial value they may have. Cultural activities may be an end in themselves, or they may contribute to the production of cultural goods and services."

<sup>14</sup> Judgement of the Court of 5 March 2009, *UTECA*, case C-222/07, paragraphs 27-33.

<sup>15</sup> Judgement of the Court of 13 December 2007, *United Pan-Europe Communications Belgium*, case C-250/06, paragraph 43.

<sup>16</sup> Judgement of the Court of 28 October 1999, *ARD*, case C-6/98, paragraph 50.

<sup>17</sup> Judgement of the Court of 5 March 2009, *UTECA*, case C-222/07, paragraphs 34, 36.

28. Territorial spending obligations constitute a restriction of the internal market for audiovisual production. Therefore, the Commission commissioned an external study on territorial conditions imposed on audiovisual production which was completed in 2008.<sup>18</sup> As stated in the 2009 extension of the Cinema Communication, overall, the study was inconclusive: it could not judge whether or not the positive effects of territorial conditions outweighed the negative effects.
29. However, the study found that the costs of film production seem to be higher in those countries which apply territorial conditions than in those which do not. The study also found that territorial conditions may cause some obstacles to co-productions and may make them less efficient. Overall, the study found that the more restrictive territorial spending obligations do not lead to sufficient positive effects to justify maintaining the current levels of restrictions. It also did not demonstrate the necessity of these conditions in view of the objectives pursued.
30. A national measure which hampers the exercise of fundamental freedoms guaranteed by the Treaty may only be acceptable when complying with several conditions: it has to pursue an overriding reason of general interest, it has to be suitable for securing the attainment of the objective which it pursues and must not go beyond what is necessary in order to attain it<sup>19</sup>. The specific characteristics of the film industry, in particular the extreme mobility of productions, and the promotion of cultural diversity and national culture and languages, may constitute an overriding requirement of general interest capable of justifying a restriction on the exercise of the fundamental freedoms. Therefore, the Commission continues to acknowledge that, to a certain extent, such conditions may be necessary to maintain a critical mass of infrastructure for film production in the Member State or region granting the aid.
31. Hardly any Member States impose territorial spending obligations up to the ceiling of 80% of the production budget allowed by the 2001 Communication. Several Member States do not have territorial spending obligations at all in their schemes. Many regional schemes are linked to the aid amount and require that 100% or 150% of this amount must or should be spent in the granting Member State, without being specific on the origin of the subcontracted services or the origin of goods used in the production. In some schemes, the producer receiving the aid is free to spend at least 20% of the production budget outside that Member State. Certain Member States design the film aid as a percentage of just the local expenditure.
32. The amount of expenditure which is subject to territorial spending obligations should at least be proportionate to the actual financial commitment of a Member State and not with the overall production budget. This was not necessarily the case with the territorial criterion of the 2001 Communication<sup>20</sup>.

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<sup>18</sup> 2008 Study on the Economic and Cultural Impact, notably on Co-productions, of Territorialisation Clauses of state aid Schemes for Films and Audiovisual Productions, [http://ec.europa.eu/avpolicy/docs/library/studies/territ/final\\_rep.pdf](http://ec.europa.eu/avpolicy/docs/library/studies/territ/final_rep.pdf).

<sup>19</sup> Judgement UTECA, case C-222/07, §25.

<sup>20</sup> For example: a producer is making a film with a budget of €10 million and applies for aid to a scheme offering at most €1 million per film. It is disproportionate to exclude the film from the scheme on the grounds that the producer does not expect to spend at least €3 million of the production budget in the territory offering the aid.



33. There are essentially two, distinct aid mechanisms applied by Member States awarding aid for film production:
- aid awarded - e.g. by a selection panel - as direct grants, e.g. defined as a percentage of the production budget; and
  - aid awarded and defined as a proportion of the production expenditure in the granting Member State (e.g., a tax incentive).
34. Paragraph 50 sets the limits for each mechanism within which the Commission can accept that a Member State is applying territorial spending obligations which could be still considered as necessary and proportionate to a cultural objective.
35. In the case of aid awarded as grants, the maximum territorial spending obligation should be limited to 160% of the aid amount. This corresponds to the previous '80% of the production budget' rule when the aid intensity reaches the general maximum stated in paragraph 52(2), namely 50% of the production budget<sup>21</sup>.
36. In the case of aid awarded as a percentage of the expenditure on production activity in the granting Member State, there is an incentive to spend more in the Member State to receive more aid. Limiting the eligible production activity to that which takes place in the Member State granting the aid is a territorial restriction. Consequently, to establish a limit which is comparable to the limit for grants, the maximum expenditure subject to territorial spending obligations is 80% of the production budget.
37. In addition, under either mechanism, any scheme may have an eligibility criterion requiring a minimum level of production activity in the territory of the granting Member State. This level shall not exceed 50% of the production budget.
38. In any case, under EU law, Member States are under no obligation to impose territorial spending obligations.

#### **4.4. Competition to attract major foreign productions**

39. When the 2001 Cinema Communication was adopted, few Member States tried to use film aid to attract major foreign film projects to be produced in their territory. Since then, several Member States have introduced schemes with the objective to attract high profile productions to Europe, in global competition with the locations and facilities elsewhere, such as in the United States, Canada, New Zealand, or Australia. Contributors to the public consultations preceding the present Communication agreed that these productions were necessary to maintain a high quality audiovisual infrastructure, to contribute to the employment of high class studio facilities, equipment and staff, and to contribute to transfer of technology, know-how and expertise. The partial employment of facilities by foreign productions would also help to have the capacities to realise high quality and high profile European productions.

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<sup>21</sup> For example: a producer is making a film with a budget of €10 million and applies for aid to a scheme offering at most €1 million per film. The producer can only be expected to spend €1.6 million of the production budget in the territory offering the aid. However, if the film budget had been €2 million and received the maximum aid amount, the producer would face a territorial spending obligation corresponding to 80% of the production budget.

40. Regarding the possible effect on the European audiovisual sector, foreign production may have a lasting impact as it usually makes wide use of this local infrastructure and of local cast. Overall, this may thus have a positive effect on the national audiovisual sector. It should also be noted that many of the films which are considered to be major third country projects are in fact co-productions involving also European producers. Thereby these subsidies would contribute also to the promotion of European audiovisual works and to sustaining facilities for national productions.
41. Therefore, the Commission considers that such aid may in principle be compatible with Article 107(3)(d) TFEU as aid to promote culture under the same conditions as aid for European production. However, as the amounts of aid for major international productions can be very high, the Commission will monitor the further development of this type of aid to ensure that competition takes place primarily on the basis of quality and price, rather than on the basis of State aid.

#### **4.5. Cross-border productions**

42. Few European films are distributed outside their production territories. The likelihood that a European film is released in several Member States is higher in the case of co-productions involving producers from several countries. In view of the importance of co-operation of producers from different Member States for the production of European works which are seen across several Member States, the Commission considers that a higher aid intensity is justified for co-productions funded by more than one Member State and involving producers from more than one Member State.

#### **4.6. Film heritage**

43. Films should be collected, preserved and accessible for future generations for cultural and educational purposes<sup>22</sup>. The Education, Youth, Culture & Sports Council Conclusions on European film heritage of 18 November 2010<sup>23</sup> invited Member States to ensure that films that have been supported by State aid are deposited with a film heritage institution, together with all related material, where feasible, and the appropriate rights in relation to the preservation and cultural and non-commercial use of films and related material.
44. Some Member States have introduced the practice of paying the last instalment of the aid after the film heritage institution has certified the deposit of the aided film. This has proved to be an efficient instrument for enforcing the contractual deposit obligation.
45. Some Member States have also introduced provisions in their grant agreements to allow the use of publicly-funded films for specified purposes in the execution of the public interest missions of the film heritage institutions after an agreed period of time and provided that this does not interfere with the normal use of the film.
46. Therefore, Member States should encourage and support producers to deposit a copy of the aided film in the film heritage institution designated by the funding body for preservation<sup>24</sup>, as well as for specified non-commercial use agreed with the right

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<sup>22</sup> European Parliament and Council Recommendation on film heritage, OJ L 323/57, 9.12.2005.

<sup>23</sup> OJ C 324, 1.12.2010, p. 1.

<sup>24</sup> Film Heritage Institutions are designated by Member States in order to collect, preserve and make available film heritage for cultural and educational purposes. In application of the 2005 European

holder(s) in compliance with intellectual property rights and without prejudice to fair remuneration for the right holder(s) after an agreed period of time set in the grant agreement and such that this does not interfere with the normal use of the film.

## **5. ASSESSING THE COMPATIBILITY OF THE AID**

47. When it assesses aid for films and other audiovisual works, the Commission verifies on the basis of the above considerations

- First, whether the aid scheme respects the "general legality" principle, i.e. the Commission must verify that the scheme does not contain clauses that would be contrary to provisions of the TFEU in fields other than State aid;

- Secondly, whether the scheme fulfils the specific compatibility criteria for aid, set out below.

### **5.1. General legality**

48. The Commission must first verify that the aid respects the "general legality" principle and that the eligibility conditions and award criteria do not contain clauses contrary to the TFEU in fields other than State aid. This includes ensuring that the TFEU principles prohibiting discrimination on the grounds of nationality, free movement of goods, free movement of workers, freedom of establishment, freedom to provide services and freedom of movement of capital have been respected (Articles 18, 34, 36, 45, 49, 54, 56 and 63 TFEU). The Commission enforces these principles in conjunction with the application of competition rules when the provisions in breach of these principles are inseparable from the operation of the scheme.

49. In compliance with the above principles, aid schemes must not, for example, reserve the aid exclusively for nationals; require beneficiaries to have the status of national undertaking established under national commercial law (undertakings established in one Member State and operating in another by means of a permanent branch or agency must be eligible for aid; furthermore the agency requirement should only be enforceable upon payment of the aid); or oblige foreign companies providing filmmaking services to circumvent the terms and conditions of Directive 96/71/EC with respect to their posted workers<sup>25</sup>.

50. In view of the specific situation of the European film sector, film production support schemes may either:

- require that up to 160% of the aid amount awarded to the production of a given audiovisual work is spent in the territory granting the aid; or
- calculate the aid amount awarded to the production of a given audiovisual work as a percentage of the expenditure on film production activities in the granting Member State, typically in case of support schemes in the form of tax incentives.

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Parliament and Council Recommendation on film heritage, Member States have listed their Film Heritage Institutions. The current list is available at:

<http://ec.europa.eu/avpolicy/docs/reg/cinema/institutions.pdf>.

<sup>25</sup> Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, OJ 1997 L 18.

In both cases, Member States may require a minimum level of production activity in their territory for projects to be eligible for any aid. This level cannot, however, exceed 50% of the overall production budget. In addition, the territorial linking shall in no case exceed 80% of the overall production budget.

## **5.2. Specific assessment criteria under Article 107(3)(d) TFEU**

51. The objective for supporting the production of European audiovisual works and ensuring the existence of the infrastructure necessary for their production and exhibition is the shaping of European cultural identities and the enhancement of cultural diversity. Therefore, the purpose of the aid is the promotion of culture. Such aid may be compatible with the Treaty in accordance with Article 107(3)(d) TFEU. Undertakings in the film and TV programme production sector may also benefit from other aid types granted under Article 107(3)(a) and (c) TFEU (e.g. regional aid, aid for SME, Research and Development, training, or employment), within the maximum aid intensities in the case of cumulation of aid.
52. In the case of schemes designed to support the script-writing, development, production, distribution and promotion of audiovisual works covered by this Communication, the Commission will examine the following criteria with reference to the audiovisual work which will benefit from the aid to assess whether the scheme is compatible with the Treaty under Article 107(3)(d) TFEU:
  - (1) The aid is directed to a cultural product. Each Member State ensures that the content of the aided production is cultural according to its own national criteria, through an effective verification process to avoid a manifest error: either through the selection of film proposals, e.g. by a panel or a person entrusted with the selection, or, in the absence of such a selection process, by establishing a list of cultural criteria against which each audiovisual work will be verified.
  - (2) The aid intensity must in principle be limited to 50% of the production budget, with a view to stimulating normal commercial initiatives. The aid intensity for cross-border productions funded by more than one Member State and involving producers from more than one Member State may be up to 60% of the production budget. Difficult audiovisual works<sup>26</sup> and co-productions involving countries from the DAC List of the OECD<sup>27</sup> are excluded from these limits. Films whose sole original version is in an official language of a Member State with a limited territory, population or language area may be regarded as difficult audiovisual works in this context.
  - (3) In principle, there is no limit for aid to script writing or development. However, if the resulting script or project is ultimately made into a film, the costs of script-

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<sup>26</sup> Such as short films, films by first-time and second-time directors, documentaries, or low budget or otherwise commercially difficult works. Under the subsidiarity principle, it is up to each Member State to establish a definition of difficult film according to national parameters.

<sup>27</sup> The DAC list shows all countries and territories eligible to receive official development assistance. These consist of all low and middle income countries based on gross national income (GNI) per capita as published by the World Bank, with the exception of G8 members, EU members, and countries with a firm date for entry into the EU. The list also includes all of the Least Developed Countries (LDCs) as defined by the United Nations. See [http://www.oecd.org/document/45/0,3746,en\\_2649\\_34447\\_2093101\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/45/0,3746,en_2649_34447_2093101_1_1_1_1,00.html).

writing and development are subsequently included in the production budget and taken into account for calculating the maximum aid intensity for the audiovisual work as set out in sub-paragraph (2) above.

- (4) The costs of distributing and promoting audiovisual works which are eligible for production support may be supported with the same aid intensity as they were or could have been for their production.
  - (5) Apart from script-writing, development, distribution or promotion, aid granted for specific production activities is not allowed. Consequently, the aid must not be reserved for individual parts of the production value chain. Any aid granted to the production of a specific audiovisual work should contribute to its overall budget. The producer should be free to choose the items of the budget that will be spent in other Member States. This is to ensure that the aid has a neutral incentive effect. The earmarking of aid to specific individual items of a film budget could turn such aid into a national preference to the sectors providing the specific aided items, which would be incompatible with the Treaty.
  - (6) Member States should encourage and support producers to deposit a copy of the aided film in the film heritage institution designated by the funding body for preservation, as well as for specified non-commercial use agreed with the right holder(s) in compliance with intellectual property rights and without prejudice to fair remuneration for the right holder(s) after an agreed period of time set in the grant agreement and such that this does not interfere with the normal use of the film.
  - (7) The aid is awarded in a transparent manner. Member States must publish at least the following information on a single website, or on a single website retrieving information from several websites: the full text of the approved aid scheme and its implementing provisions, the name of the aid beneficiary, the name and nature of the aided activity or project, the aid amount, and the aid intensity as a proportion of the total budget of the aided activity or project. Such information must be published online after the award decision has been taken, kept for at least 10 years and be available to the general public without restrictions.<sup>28</sup>
53. The modernisation of cinemas, including their digitisation, may be aided where the Member States can justify the necessity, proportionality and adequacy of such aid. On this basis, the Commission would assess whether the scheme is compatible with the Treaty under Article 107(3)(d) TFEU.
54. In determining whether the maximum aid intensity is respected, the total amount of public support measures of Member States for the aided activity or project shall be taken into account, regardless of whether that support is financed from local, regional, national or Union sources. However, funds awarded directly by EU programmes like MEDIA, without the involvement of Member States in the award decision, are not State resources. Therefore, their assistance does not count for the purposes of respecting the aid ceilings.

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<sup>28</sup> This information should be regularly updated (for example every six months) and shall be available in non-proprietary formats.

## **6. APPROPRIATE MEASURES**

55. The Commission proposes as appropriate measures for the purposes of Article 108(1) TFEU that Member States bring their existing schemes regarding film funding in line with this Communication within 2 years of its publication in the Official Journal of the European Union. Member States should confirm to the Commission within one month of publication of this Communication in the Official Journal that they agree to the appropriate measures proposed. In the absence of any reply, the Commission will take it that the Member State concerned does not agree.

## **7. APPLICATION**

56. This Communication will be applied from the first day following its publication in the Official Journal of the European Union.
57. The Commission will apply this Communication to all notified aid measures in respect of which it is called upon to take a decision after the Communication is published in the Official Journal, even where the aid measures were notified prior to that date.
58. In accordance with the Commission notice on the determination of the applicable rules for the assessment of unlawful State aid<sup>29</sup>, in the case of non-notified aid the Commission will apply:
  - (a) this Communication, if the aid was granted after its publication in the Official Journal of the EU;
  - (b) the 2001 Cinema Communication in all other cases.

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<sup>29</sup> OJ C 119, 22.05.2002, p. 22.