

# The new Cinema Communication

The following article:

## *The New Cinema Communication: All's Well that Ends Well?*

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# Foreword

*A mark, a yen, a buck, or a pound  
A buck or a pound  
A buck or a pound  
Is all that makes the world go around,  
That clinking clanking sound  
Can make the world go 'round.  
"Money Money" (from Cabaret, lyrics by Fred Ebb)*

Younger generations nowadays take the existence of the European Union for granted. Today's European adolescents were born into the European Union, so to speak, but it is a very recent development if we take into consideration the history of Europe as a whole. It is an organisation that was not created overnight, not even in seven days, but one that evolved gradually. Some would argue that the EU is still an unfulfilled dream, but despite this much has been achieved since its creation. Among the many advantages that citizens of an EU member state enjoy, the fundamental freedoms enshrined in the EU treaties allow them to move around, do business and live in other EU countries.

The younger generations may not remember, for instance, that there was a time not so long ago when each European country had a different currency. Now more than 300 million Europeans share the Euro and can move freely inside the Eurozone without need to change money at the border or the airport.

Of course, the fact that circulation inside the EU is significantly easier than in the past does not *oblige* EU citizens to benefit from this freedom. Something similar could be said about the circulation of European films inside the EU. If certain films benefit from EU rules on the free circulation of goods and services and are successful in going beyond their national borders, it is an exception rather than the rule. There are surely different explanations for this phenomenon. According to the Commission, it results from the fragmentation of the European audiovisual sector into national or even regional markets. Another reason for this could be the absence of a common language in the EU. Paraphrasing Nelson Mandela, you can only reach a person's heart if you talk to him or her in his/her own language.

The EU has changed many things, but one thing that remains unshaken is that money still makes the (cinema) world go round. And in Europe "that clinking clanking sound" comes partly from the public coffers. The European Commission, as guardian of the EU treaties and defender of the general interest, has the duty to assess whether national support schemes for film and audiovisual production comply with EU law. Until very recently, the Commission based this assessment on rules contained in the 2001 Cinema Communication, with its subsequent temporary extensions. In 2011, the Commission launched a public consultation process with the aim of adapting its ten-year-old rules to the current times.

In a previous publication The Observatory described the situation up to 2012, see Nikoltchev S. (ed.), *The Future of State Aid*, IRIS *plus* 2012-3, European Audiovisual Observatory, Strasbourg, 2012. The publication you are holding in your hands (or reading on your screen) updates it with information about the rules included in the Communication on State aid for films and other audiovisual works adopted in November 2013. The Lead Article tells the story of how these new rules came to life, and gives special consideration to the consultation process that led to the adoption of the new Cinema Communication. Also, in the two years that have passed since the publication of our previous IRIS *plus*, many important developments have taken place in different member states of the European Union. These are described in the Related Reporting section of this publication. Finally, the Zoom section provides a set of basic facts and figures on the quantitative development of the market segments in question drawn from recent European Audiovisual Observatory publications. This includes the most recent development of European theatrical markets, the relative success of European and US films in the European Union, the total number of theatrical feature films produced in Europe, and the roll-out of digital projection in Europe's cinemas and assistance for cinemas in difficulty.

Willkommen, bienvenue, welcome to the 2013 Cinema Communication!

Strasbourg, March 2014

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# The New Cinema Communication: All's Well that Ends Well?

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## Prologue

Since 2011, the cinema and audiovisual industries have awaited with great interest and in most cases some apprehension the results of a public consultation process that aimed at adapting the European Commission's 10-year-old state aid rules – the so-called Cinema Communication – to the new connected, multiscreen audiovisual landscape. Great interest because the European cinema and audiovisual industries rely to an important extent on public funding to survive in a commercial environment dominated by US productions. Apprehension because the Commission's initial proposals on two fundamental topics (territorial spending obligations and the so-called subsidy race) were perceived by many stakeholders as a rapier thrust under the belt of public funding schemes. Time and negotiation bore their fruit, and in November 2013 the Commission finally adopted its Communication on State aid for films and other audiovisual works (hereinafter: "2013 Communication"). This Communication contains revised criteria for assessing under EU state aid rules member states' support schemes in favour of films and other audiovisual works. This article tells the story of how these new rules came to life.<sup>1</sup> The first part provides a short description of the general EU rules concerning culture and state aid. The second part offers an overview of the Cinema Communication that the European Commission adopted in 2001, with its subsequent temporary extensions. The third part describes the consultation process that led to the adoption in 2013 of a new Cinema Communication. The fourth part gives an overview of the 2013 Communication and the various reactions to it. The article finishes with a short reflection on the near future.

## I. Culture and the European Union

### 1. EU competence in cultural matters

The actions of the European Union in the field of culture are governed by the principles of conferral, subsidiarity and proportionality enshrined in Article 5 of the Treaty on European Union (TEU).<sup>2</sup> Under Article 2.5 and Article 6(c) of the Treaty on the Functioning of the European Union (TFEU), the European Union has competence to carry out actions to support, co-ordinate

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1) This article builds upon and serves as an update to a previous one published in the IRIS plus series, which describes the situation up to 2012, see Cabrera Blázquez F.J., "Towards a New Cinema Communication" in Nikoltchev S. (ed.), *The Future of State Aid*, IRIS plus 2012-3, European Audiovisual Observatory, Strasbourg, 2012. The article is available at: [www.obs.coe.int/documents/205595/865104/IRIS+plus+2012en3LA.pdf](http://www.obs.coe.int/documents/205595/865104/IRIS+plus+2012en3LA.pdf)

2) Consolidated versions of the Treaty on European Union and of the Treaty on the Functioning of the European Union are available at: [eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2010:083:SOM:EN:HTML](http://eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2010:083:SOM:EN:HTML)

or supplement the actions of the member states in the field of culture. According to Article 167 TFEU (ex Article 151 TEC), the European Union contributes “to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore”.

## 2. EU state aid rules

According to Article 3(b) TFEU, the European Union has exclusive competence in establishing the competition rules necessary for the functioning of the internal market. An important part of the competition rules are those concerning state aid (Articles 107-109 TFEU).

Member states’ aid schemes have to be communicated in advance to the European Commission for authorisation (Article 108.3 TFEU). The Commission assesses whether the aid scheme respects the “general legality” principle, i.e. whether or not the scheme contains clauses that would be contrary to the provisions of the EU Treaty in fields other than state aid (including its fiscal provisions). It then assesses the compatibility of the support scheme with the provisions of the TFEU dealing with state aid.

With regard to the general legality criterion, the Commission must verify, *inter alia*, that the EC Treaty principles prohibiting discrimination on the grounds of nationality and relating to freedom of establishment, free movement of goods and freedom to provide services have been respected (Articles 18, 34, 36, 45, 49, 54 and 56 TFEU). These principles are enforced together with the application of competition rules when the provisions in breach of these principles are not detachable from the operation of the scheme.

Article 107 TFEU (ex Article 87 TEC) declares incompatible with the common market “any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods ... in so far as it affects trade between Member States”. However, there are exceptions to this rule, the most relevant for the audiovisual sector being Article 107.3(c) and (d) TFEU. According to these paragraphs, two types of aid may be considered to be compatible with the common market:

- (c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest;
- (d) aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest.

Small amounts of state aid may be exempted from the above-mentioned rules since they do not have a potential effect on competition and trade between member states (so-called *de minimis* aid).<sup>3</sup> Furthermore, the General Block Exemption Regulation<sup>4</sup> identifies aid for general training measures, up to an aid intensity of 80%, as state aid that can be considered acceptable. Such training aid, which may not exceed EUR 2 million per training project, is exempted from individual notification.

When assessing concrete cases, the Commission has to consider the necessity, proportionality and adequacy of the aid measure in order to assess its compatibility with the TFEU.

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3) Commission Regulation (EC) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid (Official Journal L 352, 24 December 2013 p. 1-8), available at: [http://ec.europa.eu/competition/state\\_aid/legislation/de\\_minimis\\_regulation\\_en.pdf](http://ec.europa.eu/competition/state_aid/legislation/de_minimis_regulation_en.pdf)

4) 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) (Text with EEA relevance), available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32008R0800:EN:NOT>. The Commission plans to adopt a revised version of the General Block Exemption Regulation (GBER) in the second quarter of 2014, see [http://europa.eu/rapid/press-release\\_IP-13-1281\\_en.htm](http://europa.eu/rapid/press-release_IP-13-1281_en.htm)

Until the adoption of the 2013 Communication, the Commission's assessment of aid for film production was based on the state aid rules indicated in the 2001 Cinema Communication.<sup>5</sup> When assessing other types of support in the film sector under Article 107.3(d) TFEU, the Commission often referred to the rules in the 2001 Cinema Communication.

## II. The 2001 Cinema Communication

### Assessment criteria under Article 107.3(d) TFEU

In its 1998 decision on the French automatic aid scheme for film production,<sup>6</sup> the Commission established the following specific criteria that it still uses in order to assess whether state aid to cinema and TV programme production qualifies under the culture derogation of Article 107.3(d) TFEU:

- (1) The aid is directed to a cultural product. Each member state must ensure that the content of the aided production is cultural according to verifiable national criteria (in compliance with the application of the subsidiarity principle).
- (2) The producer must be free to spend at least 20% of the film budget in other member states without suffering any reduction in the aid provided under the scheme. In other words, the Commission accepted territorialisation criteria in terms of the requirement that up to 80% of the production budget of an aided film or TV work has to be spent in the country providing the aid.
- (3) Aid intensity must in principle be limited to 50% of the production budget with a view to stimulating normal commercial initiatives inherent in a market economy and avoiding a bidding contest between member states. Difficult and low budget films are excluded from this limit. The Commission considers that, under the subsidiarity principle, it is up to each member state to establish a definition of difficult and low budget film according to national parameters.
- (4) Aid for specific film-making activities (e.g. post-production) is prohibited in order to ensure that the aid has a neutral incentive effect and consequently to prevent aid granted to those specific activities from having an attraction effect to the member state granting the aid.

In its 2001 Cinema Communication, the Commission gave further explanations as to the meaning and purpose of these criteria. Firstly, state aid schemes under these rules shall support the creation of an audiovisual work and not industrial activities. State aid should be geared towards the overall budget of a specific film-making project and the producer should be free to choose the items of the budget that will be spent in other member states. Undertakings in the film and TV programme production sector may also benefit from other types of aid granted under national horizontal aid schemes authorised by the Commission under the Article 107.3(a) and (c) TFEU exemptions (e.g. regional aid, aid for SMEs, R+D aid, training aid, employment aid).

Secondly, with regard to territorialisation requirements, the Commission considers that a certain degree of territorialisation of the expenditure may be necessary to ensure the continued presence of the human skills and technical expertise required for cultural creation. This should be limited to the minimum degree required to promote cultural objectives. As to the reference for aid calculation, the Commission considers that the overall budget of an audiovisual production is the reference for aid calculation. The earmarking of aid to specific individual items of a film budget could turn such aid into a national preference towards the sectors providing the specific aided items, which might be incompatible with the Treaty.

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5) 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, COM/2001/0534 final. Official Journal C 043, 16 February 2002 p. 0006 - 0017. Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52001DC0534:EN:HTML>

6) Decision of the European Commission of 29 July 1998 (N 3/98).

Thirdly, funds provided directly from EU programmes like the MEDIA programme are not state resources. Therefore, their assistance does not count for the purposes of respecting the 50% aid ceiling. Furthermore, this assistance promotes the distribution of national films abroad and, consequently, its effects do not cumulate with those of national schemes focusing on national production and distribution.

Fourthly, legal obligations imposed by member states upon broadcasters to invest in audiovisual production<sup>7</sup> are not considered state aid, as long as these investments provide a reasonable compensation to broadcasters.

### III. Towards a new Cinema Communication

#### 1. The 2011 Issues Paper and the first public consultation

The state aid rules contained in the 2001 Cinema Communication were originally meant to remain valid until June 2004. However, for various reasons the Commission decided to extend their validity three times thereafter, namely in 2004, 2007 and 2009.<sup>8</sup> The extension of 2009 set the expiry date of the 2001 Communication on 31 December 2012.<sup>9</sup> For the purposes of adopting new assessment rules, on 20 June 2011 the European Commission launched a public consultation on public support to the film sector. To this effect, the Commission published an Issues Paper identifying areas for reflection and invited interested parties to submit their comments by 30 September 2011.<sup>10</sup> The responses to the Issues Paper<sup>11</sup> focused mainly on the Commission's proposals concerning three fundamental points: the intensity of state aid, the so-called subsidy race and the territorial conditions.<sup>12</sup>

Most interested parties agreed that the maximum overall aid intensity, as set under the current rules, should not be lowered. Some professional organisations even proposed to increase several of the maximum intensity caps. However, the Commission's proposals with regard to the subsidy race and to territorial spending obligations met with harsh criticism. The existence of the subsidy race identified by the Commission was either disputed or not regarded as a problem by some European organisations representing different branches of the audiovisual sector, and some member states also disputed the necessity of introducing measures to correct the alleged subsidy race. The Commission's proposals concerning territorialisation were not well received either by some EU member states. The film funds and some professional organisations were against any modification of the rules.

#### 2. The 2012 Draft Communication

Based on the Issues Paper and the contributions received during the first consultation, the European Commission published a draft Communication on state aid for films and other audiovisual works on 14 March 2012<sup>13</sup> and opened a three-month consultation period ending on 14 June 2012.<sup>14</sup>

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7) For more information on these obligations see Nikoltchev S. (ed.), *Broadcasters' Obligations to Invest in Cinematographic Production*, IRIS Special, European Audiovisual Observatory, Strasbourg, 2006.

8) See Cabrera Blázquez, F.J., *op.cit.*

9) Communication from the Commission concerning the State aid assessment criteria of the Commission communication on certain legal aspects relating to cinematographic and other audiovisual works (Cinema Communication) of 26 September 2001 (Text with EEA relevance), OJ C 31, 7 February 2009, p. 1. Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52009XC0207%2801%29:EN:NOT>

10) Issues Paper, Assessing State aid for films and other audiovisual works, available at: [http://ec.europa.eu/competition/consultations/2011\\_state\\_aid\\_films/issues\\_paper\\_en.pdf](http://ec.europa.eu/competition/consultations/2011_state_aid_films/issues_paper_en.pdf)

11) All replies to the consultation are available at: [http://ec.europa.eu/competition/consultations/2011\\_state\\_aid\\_films/index\\_en.html#contributions](http://ec.europa.eu/competition/consultations/2011_state_aid_films/index_en.html#contributions)

12) For an in-depth presentation of the responses to the Issues Paper see Cabrera Blázquez, F.J., *op.cit.*

13) Draft Communication from the Commission on state aid for films and other audiovisual works: [http://ec.europa.eu/competition/consultations/2012\\_state\\_aid\\_films/draft\\_communication\\_en.pdf](http://ec.europa.eu/competition/consultations/2012_state_aid_films/draft_communication_en.pdf)

14) For more information on the public consultation see: [http://ec.europa.eu/competition/consultations/2012\\_state\\_aid\\_films/index\\_en.html](http://ec.europa.eu/competition/consultations/2012_state_aid_films/index_en.html)

The Commission also prepared a frequently asked questions document<sup>15</sup> (FAQs section) accompanying the consultation, which aimed to clarify the major changes<sup>16</sup> in the draft Communication by giving some illustrative examples and by further explaining some of the issues raised in stakeholders' responses to the first public consultation.

In order to ensure that European audiences be offered a more culturally diverse choice of audiovisual works, the draft Communication proposed amendments to the 2001 Communication that aimed to:

- extend the scope of activities covered by the Communication to include all aspects from the story concept to the delivery to the audience;
- limit the possibility to impose territorial obligations on production expenditure;
- control the competition between member states to attract inward investment from major productions by offering state aid; and
- recall other Commission initiatives aimed at improving the circulation of European films and increasing their audience for the benefit of both the European audiovisual industry and European citizens.

### *2.1. Scope of activities*

One major change was the scope of activities covered by the draft Communication. According to the Commission, the protection and promotion of Europe's cultural diversity through audiovisual works can only be achieved if these works are seen by audiences. Therefore, the Commission considered it necessary and appropriate that support schemes go beyond film production to cover all aspects of film creation, from the story concept to the delivery of the film to the audience. But the general rules included in the 2001 Communication would still apply: any aid granted to a specific audiovisual work should contribute to its overall budget (excluding aid specifically granted for scriptwriting, development, distribution or promotion) and the producer should be free to choose the items of the budget that will be spent in other member states. The Commission believed that the earmarking of aid to specific components of the 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.

With regard to co-productions, the aid intensity for cross-border productions funded by more than one member state and involving producers from more than one member state could be up to 60%. Difficult audiovisual works and co-productions involving countries from the Development Assistance Committee (DAC) List of the OECD<sup>17</sup> would be excluded from these limits. In this context, a film whose sole original version is in the national language of a member state with a limited territory, population and language area would be regarded as a difficult audiovisual work.

Aid to scriptwriting or development was not limited in principle. However, the costs of scriptwriting and development were considered to be part of the production budget of a film and therefore were taken into account for calculating the maximum aid intensity for the audiovisual work.

The costs of distribution and promotion of a European audiovisual work could be supported with the same aid intensity as they were or could have been for the work's production.

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15) European Commission, "State aid: Commission consults on future film support rules - Frequently asked questions (updated: 15 May 2012)", MEMO/12/186, 15 May 2012, available at: [http://europa.eu/rapid/press-release\\_MEMO-12-186\\_en.htm?locale=en](http://europa.eu/rapid/press-release_MEMO-12-186_en.htm?locale=en)

16) The topics covered by the frequently asked questions section updated on 15 May 2012 are the territorial spending obligations, the so-called "subsidy race", the assessment criteria under Article 107.3(d) TFEU, the definition of "European work", the transmedia/cross media and games issue and the sequencing of release windows.

17) The DAC List of ODA Recipients shows all countries and territories eligible to receive official development assistance (ODA), see [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)

With regard to aid to cinemas, the Commission deemed it unnecessary to establish specific rules for operating or investment aid to cinemas. In the case of support for rural and art-house cinemas or to cover their transition to digital film projection, the amounts involved are usually small, so that they would fall under the *de minimis* Regulation. Aid for renovation investment of small and medium-sized enterprises (SME) could meet the conditions of the General Block Exemption Regulation (GBER). Special cases would be assessed on a case-by-case basis.<sup>18</sup>

Finally, the draft Communication left aside certain new forms of audiovisual works. So-called transmedia projects (that is, stories told across multiple platforms and formats using digital technologies, like films and games) have among others a film production component, which would be considered to be an audiovisual work within the scope of this draft Communication. Only this film production component would fall under the scope of the draft Communication. Concerning video games, they do not necessarily qualify as audiovisual works or cultural products and have other characteristics regarding production, distribution, marketing and consumption. Therefore the Commission considered it premature to integrate this sector in the present draft Communication. Despite this, the Commission would apply the aid intensity criteria of the draft Communication by analogy if the necessity of an aid scheme targeted at cultural and educative games could be demonstrated. Aid measures in support of games not meeting the conditions of the GBER or the *de minimis* Regulation would continue to be addressed on a case-by-case basis.

## 2.2. Territorialisation

Fighting territorialisation seems to be a very important policy of the European Commission in recent times and at the same time one of the most controversial.

The 2012 Draft Communication introduced a radical modification of the rules applying to territorial conditions. It relied on the fact that the 2008 territorialisation study could not elucidate whether or not high territorial conditions lead to sufficient positive effects to justify maintaining the rules included in the 2001 Communication. Furthermore, the Commission recalled that new digital technologies enable the shooting and editing of films in different countries without having a detrimental effect on their technical or cultural quality, which reduced the need for linking a production to a single territory.

The draft Communication allowed member states to require that up to 100% of the aid awarded to the production of a given audiovisual work be spent in the territory offering the aid and not up to 80% of the production budget as is the case under the 2001 Communication. On top of that, for support schemes such as film tax incentives, in which the aid intensity is based on the production expenditure in a given territory, any production expenditure within the EEA should be eligible. The member state could nonetheless require that up to 100% of production aid be spent in its territory.

## 2.3. The subsidy race

Another controversial issue was the so-called “subsidy race”. The draft Communication tackled this issue despite opposition expressed by some member states and different professional organisations in the audiovisual sector.

The Commission was convinced that member states were increasingly using public funding to compete with each other to attract film productions to their territory. Even though financial aid used to attract inward investment may in principle be compatible with Article 107.3(d) TFEU in that it may promote culture, the Commission believed that it was appropriate to develop different standards for aiding, on the one hand, European films and, on the other hand, other films. For films

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18) For more information on public support to the digitisation of cinemas see Cabrera Blázquez F.J., “Public Aid for Digital Cinema”, in Nikoltchev S. (ed.), *Digital Cinema*, IRIS plus 2010-2, European Audiovisual Observatory, Strasbourg, 2010. The article is available at: [www.obs.coe.int/documents/205595/264589/IRIS+plus+2010en2LA.pdf](http://www.obs.coe.int/documents/205595/264589/IRIS+plus+2010en2LA.pdf). See also Kanzler, M. and Brunella, E., *The European Digital Cinema Report - Understanding digital cinema roll-out*, European Audiovisual Observatory, Strasbourg, 2011.

and TV productions that do not meet the definition of a European work,<sup>19</sup> the aid would therefore be limited to the following regressive maximum aid intensities related to the production budget:

Part of the production budget	Maximum aid intensity
Less than EUR 10 million	50%
EUR 10 million - EUR 20 million	30%
Over EUR 20 million	10%

According to the Commission, this rule would limit the possible distortion of competition and would avoid further increases of budgets used for a subsidy race. It would also ensure that the location will primarily be chosen on the basis of quality and price of services, rather than on the basis of state aid.

#### 2.4. Circulation of films and audience choice

In recent years, the European Commission has launched a number of forward-looking initiatives. They include the Europe 2020 Strategy,<sup>20</sup> the Digital Agenda for Europe,<sup>21</sup> and the Commission Communication "A Single Market for Intellectual Property Rights".<sup>22</sup> In addition, the European Commission published in July 2011 a Green Paper on the online distribution of audiovisual works<sup>23</sup> with the aim of gathering views on how Europe can seize the opportunities offered by the digital era and move towards a digital single market. The Green Paper should provide the basis for a debate on the possible adaptation of the regulatory framework which in turn should achieve the following three goals: enable the European industry to develop new business models, the creators to find new distribution channels and the European consumers to have better access to content throughout Europe. It also takes into account the public policy missions of film heritage institutions. An ensuing consultation sought the views of all interested parties and replies could be submitted up until 18 November 2011.<sup>24</sup>

The 2012 Draft Communication dealt with three related issues addressed in the Green Paper: 1) release windows, 2) the promotion of the international availability of films online and 3) film heritage.

1. Some member states impose "release windows", that is, rules concerning the release sequence of an audiovisual work (via cinemas, pay-TV, home video sale, home video rental, free TV, and video-on-demand), as a condition for granting aid. According to the case law of the European Court of Justice,<sup>25</sup> such restrictions comply with the treaties if (i) their aim is to encourage cinematographic production as such and (ii) they do not exceed that which is necessary in order to ensure the attainment of the objective in view. Because mandatory release windows may have an impact on the visibility and circulation of audiovisual works, the Commission, however, advised member states not to link financial support of an audiovisual work to unnecessary limitations on its distribution and marketing.

19) The annex to the draft Communication provides a detailed definition of what a European audiovisual work is, based on the MEDIA programme definition.

20) [http://ec.europa.eu/europe2020/index\\_en.htm](http://ec.europa.eu/europe2020/index_en.htm)

21) [http://ec.europa.eu/information\\_society/digital-agenda/index\\_en.htm](http://ec.europa.eu/information_society/digital-agenda/index_en.htm)

22) Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Single Market for Intellectual Property Rights - Boosting creativity and innovation to provide economic growth, high quality jobs and first class products and services in Europe, Brussels, 24.5.2011, COM(2011) 287 final. Available at: [http://ec.europa.eu/internal\\_market/copyright/docs/ipr\\_strategy/COM\\_2011\\_287\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/ipr_strategy/COM_2011_287_en.pdf)

23) Green Paper on the online distribution of audiovisual works in the European Union: opportunities and challenges towards a digital single market. Brussels, 13.7.2011, COM(2011) 427 final. Available at: [http://ec.europa.eu/internal\\_market/consultations/docs/2011/audiovisual/green\\_paper\\_COM2011\\_427\\_en.pdf](http://ec.europa.eu/internal_market/consultations/docs/2011/audiovisual/green_paper_COM2011_427_en.pdf)

24) More information on the public consultation is available at: [http://ec.europa.eu/internal\\_market/consultations/2011/audiovisual\\_en.htm](http://ec.europa.eu/internal_market/consultations/2011/audiovisual_en.htm)

25) Case 60-61/84 Cinéthèque SA, Judgment of 11 July 1985, [1985] ECR-2605.

2. The Commission was concerned about the poor distribution of most European films outside their production territories and recommended that member states promote the cross-border availability of European films. The Commission proposed that member states encourage rightsholders to grant third parties the online rights for those exploitations (including those territories) that they cannot exploit. According to the Commission this could be achieved by conditioning financial aid on the licensing of rights. Furthermore, the Commission planned to follow up on the Audiovisual Green Paper by examining a possible adaptation of the regulatory framework in order to promote the online distribution of audiovisual works. Likewise the Commission's proposal for a Council recommendation on European film in the digital era examined how to promote appropriate practices, notably by increasing the transparency of reporting and payments. Such transparency would serve to promote trust among the actors and assist in the development of digital distribution.
3. With regard to preservation of films, the Commission recommended that member states require, as a condition of financial aid, the deposit of a copy of the aided film suitable for long-term preservation in a film heritage institution designated by the relevant funding body.

### 3. Selected responses to the 2012 Draft Communication

Following the end of the consultation period on 14 June 2012, about sixty contributions submitted to the Commission were made available on the public consultation web page.<sup>26</sup> The consultation responses were received mainly from public authorities, film institutions and professional organisations, most of which had already expressed their views during the first consultation.

The section below is an attempt to distil the main criticisms and recommendations which emerge from the responses. Nevertheless, the linguistic diversity and the number of responses limit this reporting exercise. It is important to point out that this section must in no circumstances be considered as a full and exhaustive overview of the consultation responses. This selection is organised around five major changes in the draft Communication, i.e. the scope of activities, the territorial spending obligations, the so-called "subsidy race" issue and the circulation of films and audience choices.

#### 3.1. *Scope of activities*

Overall, many respondents welcomed the broadening of the scope of activities across the film-making process. However, the comments which emerge relating to the eligibility of interactive products such as games and ways of delivery to the audience are worth mentioning.

A specific point relates to the explicit exclusion of games from the scope of the draft Communication. The Commission indicated in the FAQs section updated on 15 May 2012 that many respondents to the first consultation were against extending the scope to games. However, this approach was also still disputed by some of the respondents in the second round of consultation. By way of illustration, the European Film Agencies Directors (EFADs) highlighted that "[a]lthough the proposed scope has been widened, it excludes critical audio-visual elements such as VoD platforms, video games, and cinema exhibition. This omission reflects a limited understanding of what constitutes audio-visual culture. Secondly, it does not address the major challenges for the audio-visual sector in particular the challenge of digitisation, market fragmentation and the lack of risk capital. Thirdly, it illustrates a lack of consistency in relation to the Commission's supranational policies for the cultural and creative industries, especially in relation to the MEDIA Programme and the EC's overall political objectives as set-out in the EU 2020 strategy." To take another example, the UK Government supported "the rationale for not including video games in the Cinema Communication at this time but suggest[s] that this may be reconsidered at a future

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26) All replies to the consultation on the draft Communication are available at: [http://ec.europa.eu/competition/consultations/2012\\_state\\_aid\\_films/index\\_en.html](http://ec.europa.eu/competition/consultations/2012_state_aid_films/index_en.html)

date.” Also, the FAQs section includes further clarifications on the manner in which games should be handled. The document recalls in particular that “any state aid measures in support of games will continue to be addressed on a case-by-case basis”. The European Coordination of Independent Producers (CEPI) welcomed the fact that the draft Communication will not apply automatically to games. In addition, the European Network of Regional Film Funds, Cine-regio, stressed that the draft Communication still lacks clarity in that respect: “As for games & cross-media with a clearly cultural aim and/or related to the promotion of a film work it is our understanding that aid schemes for this type of work will be allowed/approved in a new Cinema Communication on a case-by-case basis. In other words computer games are not excluded. This we find could be more clearly expressed in the final Communication.”

A second related problem is the question whether Video-on-Demand platforms should fall within the scope of activities. In their joint statement, the professional organisations EuroFIA, FERA, FIAPF, IVF and UNI MEI suggested that “as regards delivery to the audience, offline and online distribution/publication of films should both fall under the definition of the term ‘delivery’”. The *Centre du Cinéma et de l’Audiovisuel de la Fédération Wallonie Bruxelles* (Cinema and Audiovisual Centre of the French Community of Belgium – CCA) and the *Vlaams Audiovisueel Fonds* (Flanders Audiovisual Fund – VAF) stated that it is crucial that the new Communication also covers aid to VoD platforms. Similarly, the *Société des auteurs et compositeurs dramatiques* (SACD) and the European Coalitions for Cultural Diversity regretted that the new text omits to cover these online platforms arguing that such an approach is not in line with other EU instruments and forward-looking initiatives such as the Audiovisual Media Services Directive<sup>27</sup> or the Digital Agenda for Europe.

### 3.2. The territorial spending obligations

An important issue under discussion was the new Communication’s territorial spending criterion. Despite an attempt to clarify this aspect in the FAQs section published as part of the second consultation process, the Commission’s proposals met again with criticism from public authorities and professional organisations in the member states. The views expressed in the responses stressed the lack of clarity of the related provisions of the draft Communication and some respondents favoured the status quo. The BFI stated that “there is a great deal of uncertainty around the rules set out in the draft Communication as to whether aid schemes do or do not comply with the proposed new rules on territorial obligations and so, for the avoidance of doubt, the guidance in the FAQs should be incorporated into the Communication itself in order to provide some legal certainty to the industry”. According to the Belgian respondents (the CCA and the VAF), the new rule could have some harmful effects, i.e. encouraging production to relocate outside the European Union and encouraging states to abandon support systems which would no longer provide an adequate financial return. Croatia, represented by the Croatian Audiovisual Centre, the Croatian Producers Association, the Croatian Film Directors Guild and the Croatian Film Workers Association, suggested maintaining the rules as they stand. “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.” Also the French authorities suggested maintaining the existing rules. The particular concern of the UK Government was “the effect of the Commission’s proposals on the UK’s film tax relief, which is the primary mechanism for providing support for UK film production” and “the potential impact of requiring all EEA expenditure to qualify for support regardless of whether such expenditure benefits the Member State providing the aid in question.” The UK response called for more formal clarification in the draft Communication itself. The EFADs regretted “that these proposals were made without the EC having demonstrated that the territorial conditions so far implemented by Member States have had any detrimental effect on the internal audio-visual market – the production and circulation of European works. Quite the contrary, the study commissioned by the EC on this topic confirmed that territorial spending obligations had had no negative effect. The proposed new rules clearly threaten the stability and the sustainability

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27) Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services

of European public support to the audiovisual sector and the ability of Member States to develop and adopt policies and strategies to meet the future challenges of the sector. The proposed criteria will significantly reduce, if not eliminate, the leverage or multiplier effect of public policies. They will, therefore, jeopardize the viability of national and regional film support schemes in many Member States, increase uncertainty for producers, threaten jobs and the level and the diversity of European film production." The Broadcasting Entertainment Cinematograph & Theatre Union (BECTU) believed "the territoriality requirements should remain as they are. This is not the time to disrupt member state willingness to support their cultural industries." The *Associazione Nazionale delle Industrie Cinematografiche, Audiovisive e Multimediali* (ANICA) was against "any change of the currently applicable criteria, in particular as proposed by the draft Communication" and stressed that the "1:1 ratio between the awarded aid and the spending obligation in the territory offering the aid is tremendously dangerous for the very survival of the movie production industry, as well as for the cultural industry in general."

### 3.3. *The so-called subsidy race*

In the response submitted to the Commission, the Danish Government stated that it "is not aware of the extent of the use of public subsidies that could lead to a subsidy race among the Member States. But a higher transparency for these schemes could be needed as an overview of the numbers of European and US films that are subsidised by these schemes. On this question the Commission should be aware of not disturbing the conditions for European co-production and bilateral treaties with third countries." The British Screen Advisory Council (BSAC) affirmed that "[n]o evidence of a 'subsidy race' between Member States has so far been published. Before any action is taken to limit state aid available for inward investment productions, irrefutable evidence of harm must be shown, particularly as Europe is competing on a global basis." EuroFIA, FERA, FIAPF, IVF and UNI MEI jointly stated "that the Commission's analysis is profoundly flawed in this respect. Contrary to what the Commission hopes to achieve, such revision of the Cinema Communication would have unpredictable and harmful consequences for the vitality as well as the cultural and linguistic diversity of the European film and audiovisual production and distribution sectors. It would challenge the capacity of each and every EU/EEA Member State to ensure that the entire film and audiovisual value chain, skilled workforce and high-level quality production undertakings continue to be present and/or remain viable in their country." The European Film Commissions Network (EUFCN) believed that the Commission's concern that member states will increasingly use public funds to compete for foreign film productions was unfounded. According to the EUFCN, "[a] single member state – with this also applying to the large-sized ones – does not have the capacities to secure all large-sized projects. This means that such projects are automatically apportioned among several countries. The need for regulation is therefore unnecessary. Quite the contrary, stricter regulations would lead to a lessening of the attractiveness of Europe as a base for the production of films, and to high-budget productions increasingly heading towards other continents."

Regarding the proposed reduction of the maximum intensity aid for non-European audiovisual works (when part of the production budget is over EUR 20 million), the Czech Republic said that they "have concerns that the proposed regulation may have a negative impact on the EU competitiveness in the global scale where the non-European productions will focus on support from the North America, Australia or Asia. We should take into account the benefits of the presence of non-European productions in the territory of the EU, e.g. building the film infrastructure, new technologies, know-how, promotion of Europe as a whole, increased employment related services. The evaluation of non-European aid intensive schemes shows that any reduction in the maximum intensity rate below 20% can be considered as declining EU competitiveness." Hungary believed that the "proposed new rules on the aid intensity of non-European films will harm the prospering of the European audiovisual industry on a long term and with that its capability to transmit high level cultural content to the citizens." The respondent insisted on the fact that "big-budget Hollywood productions contribute to the vital development of the sector in numerous Member States, to the ongoing training of a significant number of European professionals who provide high-level services to these productions." The UK Government was "concerned about the potential implications of introducing a regressive aid intensity scale for those productions classed as 'foreign productions' according to the criteria set out in the annex of the draft Communication, particularly given that the proposed definition of a European film is not focused on the cultural content

of the product.” Furthermore, the Polish Audiovisual Producers Chamber of Commerce (KIPA) suggested implementing “specific regulations in order to determine rules for funding non-European productions, by implementing a requirement, for example, for binding contributions to the European funds, or by determining how the non-European countries could participate in existing system of European funds. Taking into account extensive added value benefits from such co-productions, it still seems important to establish rules under which the non-European countries could bear the responsibility and certain financial obligations, entitling them to use European public funding.”

The European Producers Club highlighted the risk of losing “a certain number of foreign shootings which currently allows local industries to reap a small part of their business quote” and stated that “the consequences of this measure would lead to the closing of numerous enterprises, to the destruction of net jobs, as well as risking the culture of countries of weakened capacity of production, for which a foreign shooting can represent the survival of a crippled industry.” For Cine-regio, it was unclear “how the table of maximum aid intensities for non-European works should operate in the case of minority co-productions with non-EEA countries with which a Member State has a coproduction treaty. For example, a German (20%)-Brazilian (80%) co-production. According to the German-Brazilian coproduction treaty, such a film should be regarded as German. However, according to the definition in the draft Communication, the film would not be a European work. In the updated FAQ of 15th May 2012 it is suggested that in addition to the definition of a ‘European work’ in annex, films made under co-production treaties between Member States and third countries could also be added.”

#### 3.4. *The circulation of films and audience choices*

Some respondents expressed their views on the issues relating to the distribution of audiovisual works addressed in the new proposed Communication, i.e. sequencing of release windows and promoting the international availability of films online. As far as “the sequencing of release windows” is concerned, the inclusion of this provision met with criticism, for instance, in France and in Ireland. France stated that it is somehow inappropriate to deal with this issue in this Communication. The Irish Film Board affirmed that it should be left to the individual member states to decide what is or is not needed. The Irish Film Board also fully supported the cross-border availability of European films. “However the non-exclusive retention of the on-line rights by the producer is a matter that in the first instance should be left to the market place and not as a mandatory condition of aid for film production”. In its response, Buma/Stemra (the Dutch collective rights organisation for copyrights regarding musical works) asserted that there are some preconditions in order to improve the exposure of European productions, i.e ensuring that copyrights are exploitable and enforceable, especially in the online world.

#### 4. The revised 2012 Draft Communication

On 30 April 2013, the Commission published a revised version of the 2012 Draft Communication<sup>28</sup> and launched a third public consultation<sup>29</sup> on which the Commission invited comments by 28 May 2013. The revised draft Communication aimed at reflecting the contributions received on the first draft Communication. The main changes introduced by this revised version concerned mainly the territorial spending obligations and the subsidy race. Most of these changes were translated into the final Communication, which will be explained in detail in the following chapter. However, one important aspect introduced in the revised draft Communication disappeared in the final Communication adopted in November 2013: the prohibition for member states to use criteria based on the origin of goods, services or workers in the internal market. This prohibition would have meant that expenditure on goods, services or workers from any EEA country would have been eligible for support even if the scheme required that certain production activity take place in the

28) The revised draft Communication is available at: [http://ec.europa.eu/competition/consultations/2013\\_state\\_aid\\_films/draft\\_communication\\_en.pdf](http://ec.europa.eu/competition/consultations/2013_state_aid_films/draft_communication_en.pdf)

29) Information about the public consultation and all replies from stakeholders are available at: [http://ec.europa.eu/competition/consultations/2013\\_state\\_aid\\_films/index\\_en.html](http://ec.europa.eu/competition/consultations/2013_state_aid_films/index_en.html)

territory granting the aid. According to the Commission, obligations for producers to use local subcontractors and suppliers of goods and services would constitute a discrimination of services provided by non-resident firms and would go well beyond what is required to promote cultural objectives and diversity, in particular where technical services are concerned. Such discrimination would limit the freedom of companies providing film production services within the internal market and artificially increase the costs of film production, limiting the room for European films to be more competitive. For these reasons the Commission found it appropriate to exclude discrimination based on the origin of goods and services involved in film production. The Commission considered this prohibition as consistent with the case law of the CJEU, and mentioned especially the case *Laboratoires Fournier*<sup>30</sup> in this regard. In its judgment concerning a French company which manufactures and sells pharmaceutical products, the CJEU concluded that the principle of freedom to provide services precludes legislation of a member state which restricts the benefit of a tax credit for research only to research carried out in that member state.

This prohibition, which constituted a major modification of the territorial rules of the original draft Communication, was widely criticised by many participants to the public consultation. Of particular interest is a legal opinion<sup>31</sup> drafted by Philip Lee Solicitors on behalf of Bord Scannán na hÉireann/Irish Film Board, which among others argues that the *Laboratoires Fournier* case is not applicable to the subject of funding for audiovisual production within the Union, nor should it be read as such. According to this legal opinion, the European Court of Justice (the current CJEU) “did not make reference to the state aid provisions generally, nor did it refer to any of the exemptions under Article 107(3), cultural or otherwise. The rationale behind the cultural exception, namely to permit aid to maintain an industry capable of expressing and preserving the culture of a Member State, is in no way comparable to the facts involved in the *Fournier* decision”.

## IV. The 2013 Communication

On 14 November 2013, the Commission finally announced the adoption of a new Communication on State aid for films and other audiovisual works.<sup>32</sup>

The new Communication introduces a number of amendments to the assessment criteria of the 2001 Communication. As foreseen in the Issues Paper and the draft Communication, they concern the scope of activities covered by the criteria, the cultural criterion, obligations concerning territorial spending, the competition to attract major foreign productions, cross-border productions and film heritage. However, the most controversial proposals made by the Commission appear somewhat “watered down” in the final Communication.

### 1. The new rules

#### 1.1. Scope

The assessment criteria of the 2001 Communication focused only on the production of films. According to the Commission, aid to production alone risks stimulating the supply of audiovisual content without ensuring that the resulting audiovisual work is properly distributed and promoted. Therefore the 2013 Communication includes aid covering all aspects of film creation, from story concept to delivery to the audience.

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30) Judgment of the Court of Justice of 10 March 2005, *Laboratoires Fournier* (C-39/04), ECR 2005 I-2057. Available at: <http://curia.europa.eu/juris/showPdf.jsf?text=&docid=54087&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=241755>

31) The legal opinion is available at: [http://ec.europa.eu/competition/consultations/2013\\_state\\_aid\\_films/irish\\_film\\_board\\_annex\\_en.pdf](http://ec.europa.eu/competition/consultations/2013_state_aid_films/irish_film_board_annex_en.pdf)

32) Communication from the Commission on State aid for films and other audiovisual works (Text with EEA relevance) (2013/C 332/01), available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2013:332:0001:0011:EN:PDF>

Aid to cinemas that do not fall under the *de minimis* Regulation will be assessed under the 2013 Communication as aid to promote culture in the meaning of Article 107.3(d) TFEU. Aid for cinemas promotes culture because the principal purpose of cinemas is the exhibition of the cultural product of film. Also the film production component of a transmedia project will be considered to be an audiovisual work within the scope of this Communication.

However, the 2013 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) 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.

### 1.2. Cultural criterion

As explained *supra*, the rules concerning state aid for the audiovisual sector are based on the exception included in Article 107.3(d) TFEU concerning the promotion of culture. However, the definition of cultural activities is primarily a responsibility of the member states. Therefore, the Commission limits itself to checking whether a member state has a relevant, effective verification mechanism in place able to avoid manifest error, such as 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.

The Commission makes reference to linguistic diversity as an important element of cultural diversity and quotes the jurisprudence of the CJEU in this regard.<sup>33</sup> The 2013 Communication allows member states to require, as a 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>34</sup>

### 1.3. Territorial spending obligations

Surely the most controversial of all topics debated during the public consultation process, the new rule is one of the most important changes introduced by the 2013 Communication, but it resembles little the initial proposals made by the Commission.

From the beginning, one of the Commission's main aims was to introduce a measure of proportionality into the member states' territorial spending obligations. The Commission acknowledges that 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 justify that, to a certain extent, territorial spending obligations may be necessary to maintain a critical mass of infrastructure for film production in the member state or region granting the aid. However, following *à la lettre* the rules of the 2001 Communication, it was theoretically possible to impose territorial spending obligations up to the ceiling of 80% of the production budget, which the Commission considered disproportional to the aid granted.

In practice, hardly any member states impose territorial spending obligations up to the ceiling of 80% of the production budget allowed by the 2001 Communication. Moreover, several member states do not even have territorial spending obligations at all in their funding 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

33) Judgment of the Court of 5 March 2009, UTECA, Case C-222/07, Judgment of the Court of 13 December 2007, United Pan-Europe Communications Belgium, Case C-250/06 and Judgment of the Court of 28 October 1999, ARD, Case C-6/98.

34) See UTECA judgment, paragraphs 34, 36.

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.

In the Commission’s view, the amount of expenditure which is subject to territorial spending obligations should at least be proportionate to the actual support provided by a member state.

The new rules allow film production support schemes to 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.

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.

The Commission explains that the new 160% rule for aid awarded as grants corresponds to the 2001 Communication rule of 80% of the production budget, but only when the aid intensity reaches the general maximum of 50% of the production budget. For example: a producer is making a film with a budget of EUR 10 million and applies for aid to a scheme offering at most EUR 1 million per film. The producer can only be expected to spend EUR 1.6 million of the production budget in the territory offering the aid. However, if the film received the maximum aid amount (50% of the budget, that is, EUR 5 million), the producer would face a territorial spending obligation corresponding to 80% of the production budget (160% of the aid awarded, that is, 8 million). Under the old rules a member state could offer e.g. EUR 1 million and impose in return a territorial spending obligation of 80% of the budget, that is, EUR 8 million on a EUR 10 million film.

The following table explains the differences between the old and the new rules on the basis of a film with a budget of EUR 10 million:

Film Budget	Aid intensity up to 50%	Example of aid granted	Territorial spending obligation <i>maximum possible</i>	
			New rules up to 160% of aid	Old rules up to 80% of budget
10 million	5 million	1 million	1.6 million	8 million
		2.5 million	4 million	
		5 million	8 million	

As explained, the difference between the old and the new rule can be huge (at least in theory).

1.4. The “subsidy race”

In an interesting twist of events, the Commission has dropped its proposed rules on the so-called subsidy race. According to the 2013 Communication, foreign production on a member state’s territory may have a positive effect on the national audiovisual sector and therefore such aid may in principle be compatible with Article 107.3(d) TFEU. The Commission points to the fact 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.

Despite this, the Commission considers it its duty to 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, notably because the amounts of aid for major international productions can be very high.

### 1.5. *Film heritage*

The Commission invites member states to 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 rightsholder(s) in compliance with intellectual property rights and without prejudice to fair remuneration for the rightsholder(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.

### 1.6. *The next steps*

The 2013 Communication was published in the Official Journal of the European Union on 15 November 2013. Member states have two years from that date to bring their aid schemes in line with this Communication. The Commission will apply the rules contained in the 2013 Communication from the first day following its official publication to all notified aid measures in respect of which it is called upon to take a decision after the Communication has been officially published, even where the aid measures were notified prior to that date. In the case of non-notified aid<sup>35</sup> the Commission will apply:

- (a) the 2013 Communication, if the aid was granted after its official publication;
- (b) the 2001 Cinema Communication in all other cases.

## 2. Reactions to the adoption of the 2013 Communication

Most reactions to the adoption of the 2013 Communication showed relief and satisfaction, especially with regard to the compromise reached on the territorial spending obligations. The European Film Agency Directors group (EFAD) expressed its satisfaction that the Commission committed itself “to reconciling the rules of the internal market with the specificities of the European audiovisual sector” and “recognized by the new territorialisation rules the need to ensure the continuous preservation and the development of the national and local *savoir-faire*.”<sup>36</sup> The film and audiovisual industry also seemed pleased with the final text of the 2013 Communication: in a joint statement,<sup>37</sup> representatives from diverse branches of the film and audiovisual industry<sup>38</sup> welcomed that the “principle of territorial spending, which is the cornerstone of the cinematographic and audiovisual support schemes, has been preserved and will continue to apply, avoiding a serious break-up of diversified European production based on vibrant national production systems”. They also welcomed “the flexibility given to co-production schemes and the *de facto* recognition by the European Commission of the importance of co-productions in the internal market as a way to build a dynamic European market for creation”.

Member states also joined the choir to praise the 2013 Communication. In France, Aurélie Filippetti, minister of culture and communication welcomed the fact that the European Commission heard the call of the French authorities, the network of European cinema centres, artists and professionals,

35) See Commission notice on the determination of the applicable rules for the assessment of unlawful State aid, OJ C 119, 22 May 2002, p. 22, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2002:119:0022:0022:EN:PDF>

36) [www.filmfonds.nl/uploads/media\\_items/cinema-communication-efad-press-release-14-november-2013.original.pdf](http://www.filmfonds.nl/uploads/media_items/cinema-communication-efad-press-release-14-november-2013.original.pdf)

37) See [www.ivf-video.org/new/public/media/EC\\_Cinema\\_Communication\\_Follow-up\\_Joint\\_statement\\_21.11.2013.pdf](http://www.ivf-video.org/new/public/media/EC_Cinema_Communication_Follow-up_Joint_statement_21.11.2013.pdf)

38) The signatories are: Association of film and television producers (Eurocinema), Federation of European Film Directors (FERA), International Federation of Actors (FIA), International Federation of Film Distributors Associations (FIAD), International Federation of Film Producers Associations (FIAPF), Fédération des Industries du Cinéma Audiovisuel Multimédia (FICAM), International Video Federation (IVF), Society of Audiovisual Authors (SAA), International Union of Cinemas (UNIC), UNI Global Union – Media Entertainment and Arts (UNI-MEI).

to preserve the founding principles of state aid support systems (especially the territorial spending obligations) and considered this as a “victory not only for the cinema and the audiovisual sector, but also and especially for Europe and its citizens, in favour of a dynamic, rich, and resolutely innovative cultural diversity”.<sup>39</sup> In the UK, Ed Vaizey, minister for culture, communications and creative industries declared that “[i]t is fantastic that we now have a new Cinema Communication in place, confirming the on-going viability of our extremely successful film tax regime that attracts moviemakers from all over the world”. And Amanda Nevill, CEO of the BFI said that “[t]he BFI is delighted that the Commission has listened to our representations, made in partnership with other European countries, on behalf of the industry. This successful outcome is a great example of what can be achieved when the main agencies for film in the UK and across Europe come together and pool expertise”.<sup>40</sup>

## V. After the curtain falls

There is a category of Shakespearean works that are called “problem-plays” by scholars. This term was coined by critic F. S. Boas in 1896,<sup>41</sup> and applies to some plays which are difficult to classify according to the usual definitions of comedy and drama. Boas explains that “throughout these plays we move along dim untrodden paths, and at the close our feeling is neither of simple joy nor pain; we are excited, fascinated, perplexed, for the issues raised preclude a completely satisfactory outcome, even when, as in *All’s Well* and *Measure for Measure*, the complications are outwardly adjusted in the fifth act. In *Troilus and Cressida* and *Hamlet* no such partial settlement of difficulties takes place, and we are left to interpret their enigmas as best we may.”

The long process that led to the adoption, in November 2013, of a new Cinema Communication resembles in some ways a Shakespearean problem-play. For more than two years the audiovisual industry has been “excited, fascinated, perplexed” about issues raised by the Commission that seemed to “preclude a completely satisfactory outcome”, notably with regard to the rules concerning territorial spending obligations and the so-called “subsidy race”. However, now it seems that “the complications” have been “outwardly adjusted in the fifth act” with the final adoption of the 2013 Communication. The curtain has fallen and everybody seems to applaud.

In the words of the immortal Bard, could it be said that in the case at hand *all’s well that ends well*? In the next two years member states will have to bring their aid schemes in line with the Communication, and the Commission will start to apply its rules and “interpret its enigmas as best it may”. It will be interesting though to see how the Commission will “monitor” the so-called subsidy race and it is also not to be excluded that the CJEU may be called on to check on the compatibility of the 2013 Communication with the EU Treaties, notably with regard to rules on territorial spending obligations.

That means that a new play may be just about to begin...

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39) See [www.culturecommunication.gouv.fr/Espace-Presses/Communiqués-de-presses/Adoption-de-la-Communication-cinema-et-audiovisuel-par-la-Commission-europeenne-une-victoire-pour-le-cinema-et-l-audiovisuel-europeens-et-Annonce-d-un-grand-forum-sur-l-Europe-et-la-Culture](http://www.culturecommunication.gouv.fr/Espace-Presses/Communiqués-de-presses/Adoption-de-la-Communication-cinema-et-audiovisuel-par-la-Commission-europeenne-une-victoire-pour-le-cinema-et-l-audiovisuel-europeens-et-Annonce-d-un-grand-forum-sur-l-Europe-et-la-Culture)

40) See [www.bfi.org.uk/news-opinion/news-bfi/announcements/government-bfi-respond-ec-cinema-communication](http://www.bfi.org.uk/news-opinion/news-bfi/announcements/government-bfi-respond-ec-cinema-communication)

41) Boas F.S., *Shakespeare and his Predecessors*, 1896.