

2012-3

# The Future of State Aid

## LEAD ARTICLE

### **Towards a New Cinema Communication**

- Culture and the European Union
- The 2001 Cinema Communication
- The 2012 Draft Communication
- Next steps

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# The Future of State Aid



## Foreword

As every year, May 2012 will see an edition of the Cannes Film Festival along with a new Golden Palm winner. Less in the news but more important for the industry will be the Cannes Film Market, which takes place in parallel. It will allow over 10,000 film industry professionals from over 100 countries to pick from around 4,000 films of which approximately 1,500 will be screened. And whenever films are at the center of an event, the money issue is never far away– including the question as to how states may (or may not) aid the film industry.

Since early this year, the audiovisual sector has been waiting for the European Commission's latest input as to the European legal framework that will regulate state aid to cinema after the current rules contained in the Cinema Communication 2001 cease to apply. When the 2012 Draft Communication was finally released in March of this year, the various stakeholders had to sharpen their pens to submit their views on the Commission's proposal once again. In the process it might take them a while to compare earlier proposals of the Commission and related comments from the industry with the latest Commission text, given that the comments of the public hearings preceding the Draft Communication were published by the Commission but not summarized. This task will be significantly eased by the Lead Article of this IRIS *plus* which explains the roots and broad outlines of EU state aid law, the rules of the Cinema Communication 2001, as well as the preceding history of the various moves to change these rules. Last but not least, it highlights the main comments made by the film industry professionals to the Issue Paper that the Commission circulated in preparation of its 2012 Draft Communication.

We would like to stress that because the regulation of state aid to the Cinema sector is as politically important as it is sensitive, the Observatory does count on its readers to understand this publication as a mere "secretarial" service to all parties interested and devoid of any intent to influence the ongoing discussion.

In contrast, the Related Reporting section is very much our own content which will fill you in on the latest developments in Europe concerning cinema. Over the past 6 months we had no reporting on any relevant EU Commission state aid decision and only few entries to related film policies. More activities have been noted by our national correspondents as far as cinema related regulation and policies are concerned. Also, further Observatory-generated content can be found in the ZOOM section, in which one of our Observatory analysts for Information on Markets and Financing updates you on issues such as the relative success of European and US films in the EU, the evolution in funding spend by funds in Europe and the range of activities supported by funds – to mention but a few.

Whether you debate on cinema policies at Cannes or elsewhere, take the advantage of being informed by this *IRIS plus*!

Strasbourg, April 2012

**Susanne Nikoltchev**

*IRIS Coordinator*

*Head of the Department for Legal Information*

*European Audiovisual Observatory*

## TABLE OF CONTENTS

### LEAD ARTICLE

#### **Towards a new Cinema Communication**

<i>by Francisco Javier Cabrera Blázquez, European Audiovisual Observatory</i> . . . . .	7
• Introduction . . . . .	7
• Culture and the European Union . . . . .	7
• The 2001 Cinema Communication . . . . .	9
• The 2012 Draft Communication . . . . .	11
• Next steps . . . . .	23

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<i>by Manon Oostveen and Michiel Oosterveld (Institute for Information Law (IViR), University of Amsterdam), Jurgita Iešmantaitė (Radio and Television Commission of Lithuania), Gabriella Raskó (Media Law Expert), Ofelia Kirkorian-Tsonkova (Attorney at law), Tony Prosser (School of Law, University of Bristol), Harald Karl (Pepelnik &amp; Karl Attorneys at Law), Laura Marcos and Cristina Mora (Enrich Advocats, Barcelona), Eugen Cojocariu (Radio Romania International), Amélie Blocman (Légipresse)</i> . . . . .	25
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#### EU Policy

• European Parliament . . . . .	26
• European Commission . . . . .	27

#### National Developments

• Lithuania . . . . .	28
• Hungary . . . . .	29
• Bulgaria . . . . .	30
• United Kingdom . . . . .	31
• Austria . . . . .	31
• Spain . . . . .	33
• Romania . . . . .	33
• France . . . . .	34

## ZOOM

### **A New Cinema Communication - Background Data**

<i>by Susan Newman-Baudais, European Audiovisual Observatory</i> . . . . .	37
• The European Film Industry in Context – Background Data . . . . .	38
• Public Funding for Film and Audiovisual Works in Europe – Background Data . . . . .	39



# Towards a New Cinema Communication

by *Francisco Javier Cabrera Blázquez*  
*European Audiovisual Observatory*

## I. Introduction

Reportedly, there is a Chinese curse which says “May you live in interesting times”. This curse refers to the dangers inherent to times of change. But novelty also offers opportunities for those able to recognise and willing to grasp them.

We live in interesting times indeed. Those too old to be digital natives will surely remember a long period in recent history where the Encyclopaedia Britannica was a reference for fact checking, the number of television channels available could be counted on the fingers of one hand and small towns had only a one-screen cinema. Nowadays we have Wikipedia online, hundreds of TV channels and screens everywhere: flat-screen TV sets, computers, tablets and mobile phones. Thanks to the Internet and to new digital technologies, audiovisual content is available anytime, anywhere. The way we experience audiovisual works is in constant evolution. Some will even argue that the concept of audiovisual work itself is also changing: for a hundred years a film was actually a film stripe with images and sound imprinted on it. Now films are increasingly digital and new forms of audiovisual works, such as video games and so-called transmedia projects, are constantly developing. All this does not explain why a black-and-white silent film won 5 awards including best film at the 2012 Oscars ceremony, but that is another story...

The European audiovisual sector depends to a great extent on state aid to produce audiovisual works. 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. In 2011, the Commission launched a public consultation process with the aim of adapting its 10-year-old rules for this sector to the interesting times in which we are living. This article retraces the history of these rules. The first part provides a short description of the general EU law 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 current consultation process that aims at adopting a new Cinema Communication before the end of 2012.

## II. Culture and the European Union

### 1. EU competence on 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>1</sup> Under the principle of conferral (Article 5.2 TEU), the European Union acts only within the

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1) 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)

limits of the competences conferred upon it by the member states in the Treaties with the purpose of fulfilling the objectives set out therein. Under the principle of subsidiarity (Article 5.3 TEU), in cases where the Union does not have exclusive competence, the Union can only act if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the member states but can rather be better achieved at Union level. Under the principle of proportionality, the content and form of Union action cannot go beyond what is necessary to achieve the objectives of the Treaties (Article 5.4 TEU). The Protocol (No. 2) on the application of the principles of subsidiarity and proportionality further regulates the action of the European Union under these principles.

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 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”. Action by the Union shall be aimed at encouraging co-operation between member states and, if necessary, supporting and supplementing their action concerning, *inter alia*, artistic and literary creation, including in the audiovisual sector. Also, the European Union has to 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. Finally, the European Parliament and the Council may adopt incentive measures, excluding any harmonisation of the laws and regulations of the member states, and the Council, on a proposal from the Commission, may adopt recommendations.

## 2. EU state aid rules

According to Article 3(b) TFEU, the European Union has exclusive competence in the establishing of 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. The Commission Regulation on so-called *de minimis* aid<sup>2</sup> provides that state aid measures shall be deemed not to meet all the criteria of Article 107.1 TFEU and shall be exempt from the notification requirement of Article 108.3 TFEU (ex Article 88.3 TEC), if they fulfil a number of conditions:

- The ceiling for the aid covered by the *de minimis* rule is in general EUR 200 000 per undertaking over any three fiscal-year period.
- The ceiling applies to the total of all public assistance considered to be *de minimis* aid. It will not affect the possibility of the recipient obtaining other state aid under schemes approved by the Commission.
- The regulation only applies to “transparent” forms of aid, which means aid for which it is possible to determine in advance the gross grant equivalent.

Furthermore, the General Block Exemption Regulation 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.

The Commission’s assessment of aid for film production is currently based on the state aid rules indicated in the 2001 Cinema Communication.<sup>3</sup> When assessing other types of support in the film sector under Article 107.3(d) TFEU, the Commission often refers to the rules in the Cinema Communication.

### III. The 2001 Cinema Communication

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

In its 1998 decision on the French automatic aid scheme for film production,<sup>4</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.

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2) 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, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32006R1998:EN:NOT>

3) 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>

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

- (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.

Thirdly, funds provided directly from EC 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 add up to 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>5</sup> are not considered state aid, as long as these investments provide a reasonable compensation to broadcasters.

## 2. Extensions of the 2001 Cinema Communication

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.

At the beginning of 2004, the Commission organised a consultation between member states, accession countries and professionals on the possible adjustment of the specific compatibility criteria. According to the submissions made, the cinema sector in Europe was under pressure and therefore needed financial support. The participants in the consultation process unanimously expressed their satisfaction with the criteria set out in the Communication and did not raise any concerns regarding their impact on competition. Acknowledging this view, the Commission declared that it would consider, at the latest during its next review of the Communication, to accept as compatible with competition law higher aid amounts provided that the aid schemes comply with the conditions of general legality under the Treaty and, in particular, that barriers to the free circulation of workers, goods and services across the EU in this sector be reduced. Accordingly, the Commission extended the validity of the compatibility criteria until 30 June 2007.<sup>6</sup>

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5) For more information on these obligations see *Broadcasters' Obligations to Invest in Cinematographic Production*, IRIS Special, European Audiovisual Observatory, 2006.

6) Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on the follow-up to the Commission communication on certain legal aspects relating to cinematographic and other audiovisual works (Cinema communication) of 26 September 2001 (published in OJ C 43 on 16 February 2002) (text with EEA relevance), COM/2004/0171 final. Official Journal 123, 30 April 2004 p. 0001 - 0007. Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52004DC0171:EN:HTML>

The Commission's concerns about the free circulation of workers, goods and services across the EU in this sector focused on the territorialisation clauses of certain aid schemes. Therefore, it announced an extensive study on the effects of the existing state aid systems, which should examine in particular the economic and cultural impact of the territorialisation requirements of aid schemes, also taking into account their impact on co-productions. The study was only launched on 24 August 2006, so the Commission decided to continue to apply the 2001 criteria until – at the latest – 31 December 2009.<sup>7</sup>

The results of the study on the economic and cultural impact of territorial spending obligations imposed in film support schemes were published on 22 May 2008.<sup>8</sup> The objective of the study was twofold: firstly, to provide clear and reliable data on the consequences of territorialisation requirements included in support schemes from a legal and economic point of view and secondly, to assess the impact of territorialisation requirements on European co-productions and the likely cultural consequences of a potential removal of the territorialisation requirements.

In January 2009 the Commission considered that the results of the study were not conclusive, one way or the other. Moreover, a number of emerging trends were identified by the Commission which required the refinement of the 2001 Cinema Communication criteria. These trends included support for aspects other than film and TV production (such as film distribution and digital projection), more regional film support schemes, as well as competition among some member states to use state aid to attract inward investment from large-scale, mainly US, film production companies (the so-called “subsidy race”).

As a result, the Commission felt there was a need for further reflection before proposing a modification of the 2001 Cinema Communication criteria and decided to continue to apply the current criteria at the latest until 31 December 2012.<sup>9</sup>

## IV. The 2012 Draft Communication

### 1. The 2011 Issues Paper and the first Public Consultation

On 20 June 2011, one and a half years before the expiry of the existing state aid assessment criteria, 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>

#### 1.1. Objective of public funding

The first question raised by the Issues Paper concerns the objective of state aid for films and audiovisual works and the way in which the fulfilment of this objective should be measured. The

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7) Commission communication concerning the prolongation of the application of the Communication on the follow-up to 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 134, 16 June 2007, p. 5. Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52007XC0616%2801%29:EN:NOT>

8) Study on the Economic and Cultural Impact, notably on Co-productions, of Territorialisation Clauses of state aid Schemes for Films and Audiovisual Productions. A final report for the European Commission, DG Information Society and Media, 21 May 2008. Available at: [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)

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/index\\_en.html](http://ec.europa.eu/competition/consultations/2011_state_aid_films/index_en.html)

Commission questions neither the importance of public subsidies for European film production nor the fact that member states agree on the need to financially sustain production. However, it considers that it is necessary to examine whether public funding is granted as effectively as possible and whether it can be demonstrated that state aid furthers the objectives pursued.

Film funds across Europe use different selection criteria and seem not to have a common objective or strategy. In the Commission's view, this is a sign of cultural diversity and independence, but it should be avoided that these differences lead to contradictory funding.

Greater clarity in objective setting would also help the Commission to develop common rules governing state aid in the sector. As examples of objectives present in many funding schemes the Commission lists increasing the choice for the audience, building audiences for European films, ensuring the cultural diversity of content, and stimulating innovation, openness and creativity.

When it comes to measuring the fulfilment of the objective, transparency is an important issue: the lack of comparable and comprehensive data about the European audiovisual sector hinders effective and rational decision making by public bodies. Also, film production budgets are treated as business secrets no matter whether or not films are supported by public funding. The lack of structural business statistics impedes the evaluation of how economically significant the sector is and what trends it shows.

### **1.2. Controlling the subsidy race**

In 2009, the Commission had already identified "competition among some Member States to use State aid to attract inward investment from large-scale, mainly US, film production companies" as a trend which would require some refinement of the state aid assessment criteria. This so-called "subsidy race" typically includes tax incentives and other measures to attract these productions to a country's location, and to obtain as big a return as possible by way of employment of local film service companies, cast, crew, facilities and further ancillary services.

In the Commission's view, this practice leads to a distortion of competition among European production locations. Avoiding such subsidy races is precisely one of the objectives of the state aid provisions of the Treaty. Even though supporting non-EU productions could have indirect economic benefits (it may support European enterprises providing film services, generate knowledge spinoffs for the European film industry and have ancillary benefits such as boosting tourism), the profits related to such productions are cashed in mostly outside the EU and therefore do not necessarily contribute to the long-term sustainability of the sector. Furthermore, the rationale behind supporting films produced by US majors is not self-evident, because these big studio films do not have the same problem of access to private finance that European producers face.

The Commission mentions in its Issues Paper that in order to address this subsidy race, some member states have put more emphasis on the criterion that the film has to be a "cultural product". For example, in order to benefit from the UK film tax incentive a film must pass the UK Cultural Test that was designed to prevent films without cultural content from benefitting from public aid. Some other member states (e.g. Germany, Hungary, the Czech Republic, France) have followed a similar approach.

The Commission believes that the 2001 Communication criteria are inappropriate for preventing the subsidy race. Moreover, due to the subsidiarity principle, the Commission is not in a good position to assess the cultural conditions attached to some support schemes.

The Commission admitted its difficulties in identifying standard rules which could limit the distortion of competition caused by state aid to major productions. Possibilities considered so far include limiting the amount of aid that may be granted to a single production assuming that big productions can obtain on their own most of the necessary upfront financing. Additionally the Commission contemplated imposing the requirement that the attribution of all aid, or at least aid beyond a certain threshold, carry an obligation of reinvestment or reimbursement in the case of the production in question making a profit.

### 1.3. Further activities suggested for inclusion in the new Cinema Communication

Another issue identified in 2009 by the Commission is the trend of offering support for aspects other than film and audiovisual production and related thereto the need for some refinement of the State aid assessment criteria. In fact, the Cinema Communication so far only covers state aid for film and audiovisual production. Nonetheless, where the support for activities other than production exceeds the de minimis threshold, the Commission applies the criteria of the Cinema Communication as a reference to assess the necessity, proportionality and adequacy of aid for those activities.

According to the Commission, the scope of the Cinema Communication could be expanded to include all aspects relevant to the creation and exploitation of a film, such as project development and distribution. In addition, the new Communication could also cover support for promotion and distribution platforms, such as film festivals, video-on-demand, digital projection and rural cinemas.

With this proposal the Commission aims to avoid a situation where the production of audiovisual content would be stimulated without ensuring that the distribution and promotion of such content matches demand. This proposal would increase legal certainty regarding the support for film activities other than production if these activities are linked to films which are aided as cultural products under Article 107.3(d) TFEU. Moreover, this could ensure that such films reach an audience.

### 1.4. Digital cinema

In recent times, the Commission has approved under Article 107.3(d) TFEU subsidies for digital projection to cinemas that show a certain proportion of European or art-house films and under Article 107.3(c) TFEU state aid for the digitisation of small cinemas and cinemas in remote areas. In addition, subsidies to individual cinemas may fall within the scope of the de minimis rule.<sup>11</sup>

### 1.5. Scope of products to be supported

In the Commission's view the definition of what constitutes an audiovisual work eligible for aid under the Cinema Communication may need to be reconsidered in light of new technological developments. According to the Commission, in 2001 it was reasonable to restrict the definition of "audiovisual works" covered by the state aid criteria of the current Cinema Communication to films and TV productions. However, today new technologies allow for new types of audiovisual works such as "cross-media". Some member states argue that other types of audiovisual works, in particular interactive works such as video games, should be judged by the criteria used for films and television productions. The Commission disagrees as, in its opinion, these sectors have different characteristics than the film and television production sectors, and therefore other state aid assessment criteria may be appropriate.

### 1.6. Maximum aid intensities

The first question asked by the Commission was whether the current maximum overall aid intensity should remain set at 50% of the production budget, with higher aid intensities for difficult and low budget films. This seems acceptable to the cinematographic and audiovisual sectors. However, if, as suggested *supra*, activities other than production are to be covered by the Communication as well, then another question arises: would it be appropriate to set the maximum overall aid intensity at the threshold of 50% of the total project budget (covering scriptwriting, development, pre-production, principal photography, post-production, distribution, promotion and marketing costs)? Furthermore, the Commission asked for comments on whether it would be appropriate to

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11) For more information on public support to the digitisation of cinemas see Cabrera Blázquez, F.J., *Public Aid for Digital Cinema*, available at: [http://www.obs.coe.int/oea\\_publ/iris/iris\\_plus/iplus2LA\\_2010.pdf.en](http://www.obs.coe.int/oea_publ/iris/iris_plus/iplus2LA_2010.pdf.en). See also Kanzler, M. and Brunella, E., *The European Digital Cinema Report - Understanding digital cinema roll-out*, European Audiovisual Observatory (Council of Europe), Strasbourg, 2011.

encourage cross-border co-operation by allowing a higher overall aid intensity (of perhaps 60%) for film projects which involve activities in more than one member state (including co-productions), as well as for suggestions concerning the appropriate level of maximum overall aid intensity for other types of audiovisual projects.

### 1.7. Territorial conditions

According to the Commission, territorial conditions contradict those fundamental principles of the Internal Market that guarantee free movement of goods, persons and services. The 2001 Communication noted, however, that some territorial conditions “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.” Accordingly, the 2001 Communication allowed a member state to condition public support on the requirement that up to 80% of the film production budget be spent in its territory. Regarding co-productions, the Commission interprets this criterion to mean that the amount of inward spending that may be imposed by a member state is limited to 80% of the amount contributed by the co-producer of that state to the overall production budget.

The Commission considers that the deep fragmentation of the European film sector may be worsened by territorial conditions. Film producers have supported territorial conditions in the past mainly because they felt that this helped the funding bodies to encourage Finance Ministries to provide more budget for film funding.

The Commission proposes to limit the discretion of member states to impose territorial conditions to, for example, 100% of the amount of aid granted. In the Commission’s view, this measure could address the legal concerns raised by territorial conditions while maintaining an incentive to support film production. This should also allow the promotion of cultural objectives and it could also lead to more consolidation in the sector, increasing its sustainability.

### 1.8. State aid and the digital revolution

The Commission has identified the problem that more European films are produced than are demanded by conventional distribution practices. In its view, it might be opportune for Europe to explore innovative alternatives making use of the Internet and digital production and distribution techniques. It would therefore be appropriate to adapt the relevant state aid rules to this evolution, including support for development, production, offering marketing tools and providing training in techniques aimed at engaging audiences.

The Commission also asks whether conditions on production support should be imposed to encourage a smooth digital transition. Such conditions could consist of ensuring that a digital master be produced and requiring that publicly funded works be released under Creative Commons Attribution-ShareAlike licences.<sup>12</sup>

With regard to 3D production, digital post-production and digital cinema, the Commission feels it may be necessary to support innovative business models, offer advice, training and seed money, as well as to support archiving, including by building databases and digitising old, analogue content. In this context, and taking into account the high percentage of small and medium sized enterprises active in the European audiovisual sector, the Commission mentions other types of state aid rules whose use might be appropriate, such as the General Block Exemption Regulation but also specific rules for supporting research, development and innovation,<sup>13</sup> providing risk capital<sup>14</sup> and offering

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12) <http://creativecommons.org/licenses/by-sa/3.0/>

13) Community framework for state aid for research and development and innovation, OJ C 323, 30.12.2006, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52006XC1230%2801%29:EN:NOT>

14) Communication from the Commission amending the Community guidelines on State aid to promote risk capital investments in small and medium-sized enterprises Text with EEA relevance, OJ C 329, 7.12.2010, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52010XC1207%2802%29:EN:NOT>



training.<sup>15</sup> These rules should allow member states to help innovative audiovisual businesses and individuals to explore new business models and/or experiment with new film techniques.

The Commission also proposes to make funding conditional on the supported films being deposited and made available for cultural/educational use.

## 2. Selected responses to the Issues Paper

The Commission opened a three-month consultation period ending on 30 September 2011 to allow interested parties to comment on the Issues Paper.<sup>16</sup> This chapter presents a selection of responses to the Issues Paper, focusing on the views expressed on the Commission's proposals concerning three fundamental points: the intensity of state aid, the so-called subsidy race and the territorial conditions. This selection has the purpose of illustrating the dimension of the discussion between the Commission and the stakeholders and in no case should be understood as a summary of all responses to the Issues Paper nor as an evaluation of the various views. The selection is by necessity subjective given the quantity of responses and the limited format of this publication. Additionally, the linguistic diversity of the contributions imposed some limits as to which contributions could be reflected in this article.<sup>17</sup>

### 2.1. Intensity of state aid

Most interested parties agree that the maximum overall aid intensity, as set under the current rules, should not be lowered. Some professional organisations even propose to increase several of the maximum intensity caps:

- The European Film Agencies Directors (EFADs) welcome the Commission's proposal to introduce a higher overall aid intensity to encourage cross-border co-operation.
- The European Producers Club (EPC) proposes an aid intensity of 70%. It supports both an increase of the 50% state aid intensity, and a budget increase for low budgets (2 million). At present, the EPC is neither satisfied with the maximum aid intensity allowed per film, nor the distinction between small and big films. In its view, "it could be more sensible to distinguish between countries with low production capacity and countries with high production capacities, since in low production capacity countries, the idea of recovering the initial investment solely through the market is quite simply unthinkable. To maintain a diversity of works, as well as a base of production companies, aid intensity must be well above 50%".
- The Federation of European Film Directors (FERA) believes that "higher aid intensities for difficult and low budget films are crucial to mitigate insurmountable funding challenges for some feature films, and most documentary films, animation films and short films". FERA would also "welcome a higher overall intensity of the aid for co-productions of 60%".
- The Society of Audiovisual Authors (SAA) is also satisfied with the current overall aid intensity rules. With regard to other activities, "higher aid intensities might be appropriate in some respects. As an example, it is generally admitted that scriptwriting is under financed in Europe. Higher aid intensity could encourage Member States to better support writing. The same applies for innovative formats of audiovisual works for the internet or mobile devices".

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15) Communication from the Commission — Criteria for the analysis of the compatibility of State aid for training subject to individual notification, OJ C 188, 11.8.2009, available at:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52009XC0811%2801%29:EN:NOT>

16) 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)

17) The author would like to thank Mathias Grenier for the help provided in writing this chapter.

- In their joint response, the European Coordination of Independent Producers (CEPI), the International Federation of Film Producers Associations (FIAPF) and the International Video Federation (IVF) also agree with the current rules regarding maximum aid intensity, but point out the fact that “in some Member States with small sized-markets and a national language that is not shared with other European territories, the 50 % -maximum aid intensity has been as *[sic]* a significant challenge”. CEPI/FIAPF/IVF also support a higher overall intensity of aid for co-productions of 60% “considering the positive effects of co-producing both in terms of cultural diversity and circulation of the works”, which would “encourage more cross-border cooperation between producers, distributors and video publishers”.

## 2.2. Subsidy race

The main addressees of the questions relating to the so-called “subsidy race” identified by the Commission are the member states:

- For the United Kingdom, “[t]he introduction of any measures to ensure Member States are not engaging in a European wide subsidy race must be developed in a way that does not compromise the international competitiveness of European Member State’s *[sic]*. ... The UK is not in favour, for example, of introducing a cap to the relief available. Capping the relief available to individual projects would run the risk of deterring investment in Europe in favour of other territories outside of the EU such as Canada, Australia, New Zealand or certain US states where no such restrictions apply ... The UK would want to see strong evidence of distortion of competition between Member States resulting from film production shifting between Member States before any new measures were introduced.” Furthermore, the United Kingdom believes that a “tightly drawn cultural test ... is the most effective way of ensuring that State aid for film is achieving its objectives of promoting film culture. The UK would seek to maintain a cultural test as a means of determining the specific type of film supported.”
- Germany does not share the Commission’s view that aid schemes lead necessarily to a subsidy race. Also, the German Government finds problematic the Commission’s proposed limitation of aid to big foreign productions to a certain amount per production. Even such large-scale international productions should be eligible for sufficient aid in order to avoid the migration of such projects to non-EU countries. In Germany’s view it is also counterproductive to make the granting of aid dependent on reinvestment or reimbursement in the case of the production making a profit.
- For the Irish Film Board “it could be argued that the subsidy race is not intra-European but global and that investment into Europe should be encouraged”. It also stresses the “positive economic effects for the audiovisual sector, importing technical, artistic know-how and promoting the exchange of knowledge and abilities. This exchange results in an increase of the range, quantity and level of production skills and technical expertise with positive effects on the quality of European film and on the promotion of culture”.
- France’s main concern is that Europe as a whole should remain competitive compared to other territories such as Asia, North America or Oceania, which have mechanisms in place to attract film productions. Competition between member states must be reduced without weakening the European territory in the global competition for attracting film productions. France could accept aid capping as suggested by the Commission for non-EU productions. However, the French authorities consider unrealistic conditioning the granting of aid, even partially, on reinvestment or repayment in the case of the work making a profit, in view of the difficulty in defining international standards of profit calculation, and also in view of the ease with which integrated international businesses can allocate or modulate the profits from a given production.
- In a similar vein, Norway considers that “the only way to stop the bidding contest seems to be to introduce upper boundaries to the support”. Norway suggests the introduction in the future communication of “a ceiling e.g. in the form of a maximum percentage of the production budget, or of the national spending”.

- The Polish National Broadcasting Council proposes “to consider determining the maximum admissible percentage threshold on such subsidies at the level of 50% of the production value, or even at a lower level in case of films with substantial attendance potential that are highly likely to gain funds from private sources”. It also agrees with the Commission’s proposal that “in case a producer generates profit on a film production, the producer will have to reimburse at least a part of the subsidy, in an amount proportionate to the generated profit”.

The film funds participated in the discussion mostly through their European organisations:

- The EFADs, while acknowledging the Commission’s concern to avoid “subsidy races”, are not “aware of any evidence that Aid mechanisms which help attract inward investment in the European audiovisual sector have a negative effect on the functioning of the European internal market”. The EFADs expect the Commission “to test its concerns further undertaking systematic collection and analysis of available data”.
- Cine-Regio (European Network of Regional Film Funds) supports the Commission’s proposals to agree on specific rules for non-European films. It considers however that, alongside the Commission’s concerns, “it must also be acknowledged that European territories greatly benefit from inwards investment”. It appreciates “the Commission’s effort to find a way to control the subsidy race and in this respect also will take into consideration that films today are financed on an international market place, where European countries compete with other states, such as Canada, New Zealand, US, Caribbean countries etc.”

The existence of the subsidy race identified by the Commission is either disputed or disregarded as a problem by some European organisations representing different branches of the audiovisual sector.

- CEPI/FIAPF/IVF is of the opinion that “attracting foreign investments into European film production markets is a real boon for the vitality of national film and audiovisual industries. In addition, other real and important direct/indirect macroeconomic contributions are made to national economies and sustained high levels of investment in the film and TV sector”.
- Regarding the competition to attract big US productions to EU countries, the EPC recalls that only a tiny part of the budget of such US productions is spent locally (whereas e.g. half of the budget is dedicated to marketing and promotion costs). On top of that, only a handful of films per year are entirely filmed in Europe, notably because the US itself has similar incentive systems. Therefore, the EPC sees no reason for regulation or for any intervention from the Commission on the matter.
- Studio Babelsberg goes as far as to state that major studio productions like *The Reader*, *Valkyrie* or *Inglourious Basterds* would not have been produced in Europe without attractive and competitive subsidies.
- FERA believes that “the European film industry benefits financially and artistically from attracting external productions. Especially for countries with a low production capacity, foreign productions ensure continuity for local crew and contributes [*sic*] to cost-effective investment in and use of state-of-the-art production facilities and equipment”. FERA also reminds that “any spending by foreign productions will in most cases be greater than the rebate they receive, and this funding (which is usually motivated by additional governmental objectives such as increasing tourism), would in most cases not have been given to the national audiovisual industry”. FERA “would like to see some portion of the profits from a tax incentive supported film be retained in the producing country”.
- The Independent Film and Television Alliance (IFTA) believes that “internationally mobile productions bring economic benefit to Europe” and that the Issues Paper “fails to address the question of whether this distortion (if any) is necessarily adverse to growth in the EU film industry or damaging to the public interest. IFTA believes the Commission’s reflection on the issue would benefit from a more in-depth examination of the costs and benefits for

the European economic balance sheet of having EU Member States competing to attract internationally mobile productions”.

- For the International Federation of Film Distributors’ Associations (FIAD) “the issue is not whether this or that European country attracts a non-European production but whether it comes to Europe or another part of the world”. The FIAD draws attention “to the fact that the aim of avoiding a subsidy race to attract productions must not lead to reducing the principle of subsidiarity in use for cultural productions and, in so doing, to diminishing the legitimacy of States to determine the criteria of their actions to allocate the supports. A more comprehensive study of the existing distortions, if any, should be carried out.”
- UNI MEI Global Union rejects the assessment made by the Commission in the Issues Paper and thinks that new rules at European level are not necessary. For UNI MEI Global Union, “inward investment is beneficial rather than detrimental – as suggested by the Commission – to the film sector in the European Union and to European taxpayers”.

### 2.3. Territorialisation

The Commission’s proposals met with criticism in some EU member states:

- France considers that the territorial conditions are indispensable for the sustainability of public aid schemes and does not see the need for changing the current rules. For the French representatives, territorial conditions allow within a territory activities and economic and technical skills that are essential to the creation of European works. If territorial conditions were removed or reduced, European professionals might have recourse to providers of non-EU countries that offer lower costs. This would obviously be damaging to the whole of the European audiovisual industry. Also if the possibility of imposing explicit territorial conditions were reduced, it is thought that implicit territorial conditions would develop.
- For the United Kingdom, “challenging [territorial conditions] is likely to weaken national industries and undermine the sector. Territorialisation requirements are neither a barrier to free circulation, nor restrictive to the freedom of the development of film culture”. A modification of the rules might have as a consequence that “Member States are unwilling to provide funding for films, which in turn would result in fewer films being made”.
- In Germany’s view, regional film funds cannot justify the use of taxpayers’ money simply with cultural objectives. These funds also have the aim of producing positive economic effects at regional level. (jobs creation, economic growth). Territorialisation is for many regional and national support systems the *conditio sine qua non* for the generation of financial resources. Further limitations on territorialisation would definitely lead to the reduction of public funds allocated in Germany.
- The Irish Film Board “believes that if territorialisation is diluted, Governments will no longer see a value to providing support systems. Therefore there is a trade off in terms of investment and impact”.
- Norway understands that “some Member States need territorial conditions to legitimize public support to the film sector, and also to secure the existence of a national film industry which can deliver the services needed by the directors and scriptwriters”.
- According to the Polish National Broadcasting Council, “imposing territorial restrictions is not the most appropriate solution for supporting the cultural development in the European Union and is not inherent in the building of the internal market”. It sees “possibly scope for maintaining the territorialisation conditions, but provided the amount subject to these conditions is reduced substantially, to maximum 50%”.
- The EFTA Surveillance Authority welcomes the Commission’s proposal “which would address the issue of the current consistency problems with the fundamental principles of the Internal Market”.

The film funds do not agree with the Commission's proposals either:

- The EFADs think it is not the right time "to disrupt member states willingness to support their own creative industries", "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".
- Cine-Regio "firmly believes that territorialisation clauses have positive effects, particularly as regards the preservation of cultural identities, the creation of a critical mass of audiovisual activities and the solidarity between regions, mainly through the facilitation of coproduction projects". Also Cine-Regio affirms that "there is no evidence regarding any positive impacts of lower territorialisation clauses for the European film sector. On the contrary, Cine-Regio believes that territorialisation is beneficial for the sector".

Also some professional organisations are against any modification of the rules:

- For FERA, there is no "evidence that the intensity of current territorial requirements is such as to generate distortion of competition within the EU market" and therefore it "advocates maintaining the present conditions on national spending in the future Cinema Communication". Changing the current regime would mean that "less funding will be available for the creation of cultural products, not only in the region where direct sources of finance are affected, but throughout Europe".
- SAA is also "in favour of the status quo regarding territorial conditions in order to avoid a destabilisation of the industry".
- Outspoken criticism comes from CEPI/FIAPF/IVF, according to which "there is no discernible advantage in revising the territorialisation conditions and there is no evidence that a revision would result in more efficiency in the market for film/TV production. Nor is there evidence that the intensity of current territorial requirements is such as to generate distortion of competition within the EU market". Furthermore, they believe that "territorial conditions stimulate cross-border production and co-productions". To them, "the Commission's choice is between allowing a well accepted practice to continue whose stimulating effects on production, development of national and regional infrastructure and skills enhance cultural diversity, or to restrict it in the name of economic theory and be responsible for the resulting decline in film and TV investment across the European Union".
- EPC also supports the current rules and states that the "introduction of new technologies in production hasn't really changed the way productions and coproductions are set up. It has no effect on the territorialisation of expenses".
- The FIAD lacks "elements to appreciate the links between territorial spending obligations and the fragmentation of the production sector". With regard to the principle of territoriality regarding support to distribution the FIAD considers that "obviously the support goes to a distributor intending to distribute a film on a specific territory and most of the expenses will be spent in that territory (for example advertising or the payments of VPFs to the cinemas showing the film)".
- UNI MEI Global Union believes that "territorial conditions do indeed ensure the continued presence of human skills and technical expertise required for cultural creation. Further, territorial conditions promote the realisation of co-productions covering several Member States since requirements will trigger use of workforce, locations and services in the territories that intervene in the co-productions".

### 3. 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 audio-

visual works on 14 March 2012<sup>18</sup> and opened a three-month consultation period ending on 14 June 2012.<sup>19</sup>

In order to ensure that European audiences are offered a more culturally diverse choice of audiovisual works, the draft Communication proposes amendments to the 2001 Communication that aim 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 that are launched to benefit the European audiovisual industry and European citizens by improving the circulation of European films and increasing their audience.

### 3.1. Scope of activities

In the 2012 Draft Communication, the Commission keeps intact some of the main rules of the 2001 Communication. The purpose of state aid remains the promotion of culture. For the assessment of aid schemes to cinema and TV production, the Commission has to firstly verify whether the aid scheme respects the “general legality” principle, and secondly, whether the scheme fulfils the specific compatibility criteria for aid under Article 107.3(d) TFEU. The criteria remain to a certain extent the same: the aid has to be directed to a cultural product, and the maximum cumulative aid intensity must in principle be limited to 50% of the production budget. However, this rule applies only if the aided audiovisual work is a European work (see *infra*).

One major change is 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 considers 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 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 continues to believe 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 may be up to 60%. Difficult audiovisual works and co-productions involving countries from the Development Assistance Committee (DAC) List of the OECD<sup>20</sup> are 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 may be regarded as a difficult audiovisual work.

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

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18) Draft Communication from the Commission on state aid for films and other audiovisual works, Brussels, available at: [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)

19) 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)

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

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

With regard to aid to cinemas, the Commission deems 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 fall under the *de minimis* regulation. Aid for renovation investment of small and medium-sized enterprises (SME) may meet the conditions of the General Block Exemption Regulation (GBER). Special cases will be assessed on a case-by-case basis.<sup>21</sup>

Finally, the draft Communication leaves 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 is considered to be an audiovisual work within the scope of this draft Communication. Only this film production component will 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 considers it premature to integrate this sector in the present draft Communication. Despite this, the Commission will apply the aid intensity criteria of the draft Communication by analogy if the necessity of an aid scheme targeted at cultural and educative games can be demonstrated. Aid measures in support of games not meeting the conditions of the GBER or the *de minimis* regulation will continue to be addressed on a case-by-case basis.

### 3.2. 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 introduces a radical modification of the rules applying to territorial conditions. It relies 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 recalls 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 reduces the need for linking a production to a single territory.

The draft Communication allows 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 must be eligible. The member state may nonetheless require that up to 100% of production aid be spent in its territory.

### 3.3. The subsidy race

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

The Commission is convinced that member states are 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

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21) For more information on public support to the digitisation of cinemas see Cabrera Blázquez, F.J., *Public Aid for Digital Cinema*, available at: [http://www.obs.coe.int/oea\\_publ/iris/iris\\_plus/iplus2LA\\_2010.pdf.en](http://www.obs.coe.int/oea_publ/iris/iris_plus/iplus2LA_2010.pdf.en). See also Kanzler, M. and Brunella, E., *The European Digital Cinema Report - Understanding digital cinema roll-out*, European Audiovisual Observatory (Council of Europe), Strasbourg, 2011.

that it may promote culture, the Commission believes that it is appropriate to develop different standards for aiding, on the one hand, European films and, on the other hand, other films. For films and TV productions that do not meet the definition of a European work,<sup>22</sup> the aid shall 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 will limit the possible distortion of competition and will avoid further increases of budgets used for a subsidy race. It will 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.

### 3.4. 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>23</sup> the Digital Agenda for Europe,<sup>24</sup> and the Commission Communication "A Single Market for Intellectual Property Rights".<sup>25</sup> In addition, the European Commission published in July 2011 a Green Paper on the online distribution of audiovisual works<sup>26</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.

The 2012 Draft Communication deals 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>27</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, advises member states not to link financial support of an audiovisual work to unnecessary limitations on its distribution and marketing.

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

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

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

25) 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)

26) 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)

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



2. The Commission is concerned about the poor distribution of most European films outside their production territories and recommends that member states promote the cross-border availability of European films. The Commission proposes 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 may be achieved by conditioning financial aid on the rights licensing. Furthermore, the Commission plans 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 examines 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 recommends 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.

## **V. Next steps**

At the time of writing this article (March 2012), the public consultation on the draft Communication had just started. According to the responses to the first public consultation, it is to be expected that the European Commission will meet with resistance from some member states and professional organisations on at least the most controversial issues such as territorialisation and the "subsidy race". According to the indicative timetable published by the Commission, the final Communication is expected to be adopted in the second half of 2012.



## Recent Developments on Film Policy

Before releasing the 2012 Draft Cinema Communication, the European Commission announced the proposal of the “Creative Europe Programme” to boost cultural and creative sectors. Only a couple of days earlier, the European Parliament passed a Resolution on European Cinema in the Digital Area that points to perceived threats to cinemas and proposes, among others, the increase of funding of the European Structural Funds as remedy. The first two articles of the Related Reporting offer details on both developments.

Cinema policy has recently been transposed into legislation and/or budgetary measures in Lithuania, Hungary, Bulgaria, United Kingdom, Austria, and Romania. The second half of the Related Reporting presents the latest information on the adoption of rules on cinema as well as on recent commitments concerning subsidies and tax credits for the film industry. For Spain and France, also included in this section, the Related Reporting fills you in on the debates surrounding existing legislation aimed at securing financial support

## EU Policy

### European Parliament

#### Resolution on European Cinema in the Digital Era

*Manon Oostveen  
Institute for Information Law (IViR), University of Amsterdam*

On 16 November 2011 the European Parliament adopted a resolution on European cinema in the digital era.

In the resolution, the European Parliament emphasises the continued popularity and the financial, growth and employment potential of European cinema. It underlines its growing importance for the economy and stresses its significance for the cultural development and identity of Europe.

However, it also notes that the market is highly fragmented and diversified. The transition to digital and the preponderance of US productions are mentioned as being a threat to European cinema in general and small cinemas in particular.

Additionally, the following issues are also considered to be a threat:

- the high costs of digitisation;
- the closure of small cinemas;
- piracy and illegal downloading;
- the problems relating to the circulation and distribution of films;
- a lack of suitable training for projectionists in handling new digital equipment.

To counteract these threats, the resolution proposes some specific measures. The main priority in this respect is given to avoiding the closure of small, independent and art-house cinemas and to public funding of the aforementioned cinemas. Other suggestions made include:

- the standardisation of systems based on ISO standards (to a certain extent);
- encouraging cinemas to make the digital transition as quickly as possible;
- increasing the funding and altering the procedures of the European Structural Funds.

The European Parliament invites the Commission and the member states to take a number of additional measures to support European cinema and small cinemas in particular.

Moreover, the Virtual Printing Fee commercial model is signaled as being only beneficial to digitisation in large cinema networks. Solutions for other cinemas are suggested. Reference is also made to the MEDIA-programme; its importance is stressed and initiatives, particularly regarding digitisation, are suggested and called for.

The resolution calls on member states to include film education in their national education programmes. It also encourages them to promote European productions and offer technology-neutral support for cinemas that show a high number of European films. The initiative now lies with the Commission and the member states.

- European Parliament resolution of 16 November 2011 on European cinema in the digital era (2010/2306 (INI))  
<http://merlin.obs.coe.int/redirect.php?id=15543>

## European Commission

### Creative Europe Programme

*Michiel Oosterveld  
Institute for Information Law (IViR), University of Amsterdam*

On 23 November 2011, building on the experience of the Culture and MEDIA programmes that have supported cultural and audiovisual sectors for more than 20 years, the European Commission announced the proposal of a new EU programme, termed “Creative Europe”. Declaring herself dedicated to investing more in Europe’s cultural and creative sectors, Androulla Vassiliou, Commissioner for Education, Culture, Multilingualism and Youth, stated: “This investment will help tens of thousands of culture and audiovisual professionals to make the most of the Single Market and to reach new audiences in Europe and beyond. Creative Europe also promotes cultural and linguistic diversity, as well as contributing to our Europe 2020 objectives for jobs and sustainable growth.”

EU studies indicate that the cultural and creative industries account for around 4.5% of the European gross domestic product and provide jobs for over 8.5 million people. This makes Europe the world leader in exports of creative industry products. According to the European Commission, investments in the sector are needed to retain this position: economic growth, employment, innovation and social cohesion would all benefit from a strong cultural and creative sector.

With a proposed EUR 1.8 billion budget for the period 2014-2020, the Creative Europe programme would make it possible to heavily invest in the cultural and creative sector. The European Commission wants to allocate more than EUR 900 million in support of the cinema and audiovisual sector, while EUR 500 million would be available for investments in culture. Furthermore, EUR 210 million is reserved for a new financial guarantee facility, which would make getting bank loans for small operators easier. In addition to decreasing the difficulties in accessing financing, the programme would also enable the European cultural and creative sectors to overcome challenges such as market fragmentation, while it would also contribute to better policy-making through sharing know-how and experience.

The Creative Europe programme, which is now under discussion in the Council of EU Ministers and the European Parliament, is designed to help at least 8,000 cultural organisations and 300,000 cultural professionals and artists, enabling the projects financed by the programme to reach a total of 100 million people.

- Creative Europe: Commission unveils plan to boost cultural and creative sectors, press release, IP 11/1399, 23 November 2011  
<http://merlin.obs.coe.int/redirect.php?id=15544>

IRIS 2012-1/5

## National Developments

### Lithuania

#### A New Law on Cinema Adopted

*Jurgita Iešmantaitė  
Radio and Television Commission of Lithuania*

On 22 December 2011 the (Lithuanian Parliament) adopted a new Act on Cinema. The draft law was prepared by the Ministry of Culture in cooperation with the Union of Lithuanian Cinematographers and the Association of Independent Producers.

The new Law determines the *Seimas* basis for State regulation and financing of Lithuanian cinema, the protection of its heritage and the rules for film distribution and presentation in cinemas. It aims at distinguishing between the State policy forming function and the implementation function in the cinema sector. The Law foresees that the State policy forming function is discharged by the Ministry of Culture, while the implementation function is carried out by a newly-established institution, the Lithuanian Cinema Centre. This Centre will administer the State funds allocated to cinema projects, supervise the expenditure and account of funds, represent Lithuania in international organisations, foundations, events etc., administer the Film Registry and index Lithuanian and foreign films meant for public presentation etc. The Law embeds the right to finance cinema projects from the State and Municipality funds. It defines the areas of State financing, i.e., State funds can only be allocated to film preparatory works, production, distribution, presentation, and the collection and protection of cinema heritage. Besides, the Law establishes certain criteria for a particular area of State financing, e.g., the funds can be allocated to film production provided the screenplay or the main theme is based on events of Lithuanian or European culture, history, religion, mythology, society life etc. In accordance with the provisions of the Law funds can only be allocated to legal persons or other organisations or their units, which are established in Lithuania or another State of the EEA and one of the main activities of which is film production, distribution, presentation and the collection of cinema heritage and its protection. The Act establishes that in case the film is 100 % State-financed, the duty to present the film from the moment it is registered in the Film Registry within one year's time is with the public broadcaster Lietuvos nacionalinis radijas ir televizija.

It also has to be noted that with the new Act a new film rating system was introduced. It differs from the that for television programmes. The following ratings are introduced with regard to the viewers' age: "V" for films of various age; "N-7" from 7 years of age; "N-13" from 13 years of age; "N-16" from 16 years of age and "N-18" from 18 years of age. Besides, the Act obliges cinema owners and/or managers to make information on the meaning of the ratings publicly available. The Law also obliges legal persons who are engaged in film distribution to publish information about the respective ratings in Lithuania or the State of production on the cover of the record. All films, which are either produced in Lithuania or brought to Lithuania from abroad for cinema presentation, should be registered in the Film Registry, except those which are meant to be presented during certain events, e.g., festivals, seminars or retrospectives, which are dedicated towards satisfying the cultural, artistic and educational needs of society. Only films that have been classified according to age categories can be registered in the Film Registry. The Act will enter into force on 1 May 2012.

- *Kino įstatymo pakeitimo įstatymas, 2011 m. gruodžio 22 d. Nr. XI-1897 (Žin., 2002, Nr. 31-1107; 2003, Nr. 108-4812; 2009, Nr. 77-3163 (Act on Cinema, Official Journal, no. 6-192, 10 January 2012)*  
<http://merlin.obs.coe.int/redirect.php?id=15642>

## Hungary

### Significant Amendments to the Film Act

Gabriella Raskó  
Media Law Expert

On 1 January 2012 an amendment to Act II. of 2004 on Motion Pictures came into force significantly changing the institutional and funding system of the Hungarian film industry (see IRIS 2004-2/28).

Under the new law the recently established *Magyar Nemzeti Filmalap Közhasznú Nonprofit Zrt.* (Hungarian National Film Fund – MNF) replaces the *Magyar Mozgóképek Közalapítvány* (Motion Picture Public Foundation – MMKA), becoming the central body for the support of the Hungarian film industry.

The MMKA was established jointly by the Government and organisations of the film industry; the MNF's founder is the *Magyar Nemzeti Vagyonkezelő Zrt* (Hungarian State Holding Company – MNV) which exercises (under current regulations by the Ministry of National Development) the rights of the State of Hungary as owner of public assets. The head of MNF is the chief executive who shall be appointed by the founder of MNF. The tasks of MNF shall be in particular:

- to operate the system for distributing film subsidies, to monitor the use of these subsidies and to contribute to the development of the system;
- to elaborate principles for tender applications;
- to represent and support the Hungarian film industry internationally;
- to utilise films produced with State support.

The *Filmszakmai Döntőbizottság* (Film Industrial Arbitration Committee) shall be responsible for performing the MNF's task of operating the system of subsidies, in a manner defined in the Code of Subsidies of the MNF. Members of this committee are the CEO of MNF and four Hungarian citizens appointed by the CEO, who have at least five years' professional experience in the film industry.

The MNF shall receive 80% of the 6/45 Lotto Game's gambling tax revenues, which will be approximately HUF 4 billion; this will become the MNF's primary fund.

From 1 January 2012 the *Nemzeti Média és Hírközlési Hatóság* (Office of the National Media and Communications Authority – NMHH) shall perform the public administration tasks related to the operation of the motion picture industry. The NMHH shall operate the *Nemzeti Filmiroda* (National Film Office), the body which was previously responsible for these tasks. The head of the office shall be appointed by the president of NMHH. The authority shall in particular:

- rate films in order to protect minors and apply sanctions set out in the Act if rating regulations are breached;
- classify films worthy of support due to their artistic value or films that fulfill the supported cultural requirements, as well as movie theatres distributing such films;
- keep public records about films and organisations of the motion picture industry;
- verify entitlement to use subsidies and issue the subsidy certificate that entitles films to tax benefits;
- issue co-production certificates;
- perform statistical and data provision activities concerning the film industry.

The former Act contained three types of direct subsidies:

- Selective: subsidy that is due to the film producer, distributor or any other applicant under the Act based on the decision of the supporting body made by way of tender applications, by evaluation or individual request subject to the characteristics of the film (in particular script, budget, artistic value, the identity of the authors, producers and actors of the film) or the nature of another objective to be supported;

- Normative: subsidy that is due to a film producer or distributor if he/she meets the conditions specified in this Act or announced by the supporting body and which subsidy may be used by film distributors for distributing films and by film producers to produce films; and
- Structural: subsidy granted to applicants by the supporting body on a continuous basis, by assuming an obligation persisting for several budget years to promote motion picture industry objectives implemented throughout several years or in the same manner every year in accordance with the Act, provided that the applicant complies with the conditions specified by the Act and/or the supporting body throughout the entire duration of support provision.

From 1 January 2012 only the selective subsidy remains; the amendment abolished the others.

The Act contains several other amendments as well, for example in order to protect minors it adds a new rating category to the existing five: "not suitable for viewers below the age of 6".

- 2011. évi CLXIX. törvény a 2004. évi II. törvény módosításáról (Act CLXIX of 2011 amending Act II. of 2004 on Motion Pictures, published in the Hungarian Official Journal of 9 December 2011 (pages 37357-37379))  
<http://merlin.obs.coe.int/redirect.php?id=15591>

IRIS 2012-2/26

## Bulgaria

### Film Industry Funding 2012

*Ofelia Kirkorian-Tsonkova*  
*Attorney at law*

One of the most discussed topics among Bulgarian film industry experts at the beginning of 2011, was the declaration as unconstitutional of the amended Art. 17 of the Film Industry Act (*Закон за филмовата индустрия Обн. ДВ. бр.105 от 2 Декември 2003г.*), which regulates the value of the State subsidy for film production in Bulgaria by the Constitutional Court (see IRIS 2011-5/8).

Up to the end of 2011 the Bulgarian Parliament did not revoke the new wording of Art. 17 of the Film Industry Act and the big question for all was what would be the amount of the State subsidy for producing Bulgarian films in 2012.

The Council of Ministers and the Parliament were obliged to take into consideration the Constitutional Court's decision and officially stated that the subsidy for 2012 is at the value of the average budgets for the previous year of 7 feature films, 14 feature-length documentaries and 160 minutes animation.

In figures, the amount of the subsidy for 2012 is BGN 12,100,000 or approximately less than EUR 6 Mio. This sum is EUR 1 Mio more than the subsidy for 2011, but in the same time, bearing in mind the official statistics for the film budgets in 2011, the determined subsidy is EUR 3 Mio less than the provided value according to the original wording of Art 17.

Additionally, there is still no positive development in connection with the idea for a tax credit for film producers in Bulgaria (see IRIS 2010-5/11).



Cumulatively, these facts make the film industry in Bulgaria feel unsatisfied and no optimism is on the horizon. The official governmental forecasts for the film production subsidy for 2013 and 2014 are for another reduction, to the sum of BGN 10,100,000 (approximately EUR 5 Mio).

- *Тригодишна бюджетна прогноза за периода 2012-2014 в програмен формат на Министерство на култура* (Budget forecast for the Ministry of Culture 2012-2014)  
<http://merlin.obs.coe.int/redirect.php?id=15590>

IRIS 2012-2/9

## United Kingdom

### Government to Continue to Provide Film Tax Relief

*Tony Prosser  
School of Law, University of Bristol*

The Prime Minister has announced that the Government will continue to provide film tax relief, the targeted tax break for the British film industry, until the end of December 2015.

The scheme provides relief for film production companies in relation to the expenses they incur on the production of a film intended for theatrical release in commercial cinemas. For a film to be eligible for relief, it must be certified as British, either by passing a cultural test or under an agreed co-production treaty. The certification process is administered by the British Film Institute on behalf of the UK Government's Department for Culture, Media and Sport. The film must also incur at least 25% of its total production expenditure in the UK. Relief can only be claimed on production expenditure in the UK, up to a maximum of 80% of the total budget; a higher rate of relief is available for limited-budget films (these are films with total production expenditure of GBP 20 million or less). Companies not making a profit may be able to surrender the relief for a payable tax credit worth up to 20% of the total budget for a limited-budget film and up to 16% for other films. A higher value of support may be achieved if the relief is used to reduce company tax liabilities. The extension of support was granted State aid approval by the European Commission.

In 2009/10 the scheme provided around GBP 95 million of support to the British Film Industry, supporting over GBP 1 billion of investment in 208 films. Recent films certified as British include Brighton Rock, Clash of the Titans, Gnomeo and Juliet and Harry Potter and the Deathly Hallows (Parts 1 and 2).

- HM Treasury, "Government announces extension of film tax relief", Press Release 124/11, 10 November 2011  
<http://merlin.obs.coe.int/redirect.php?id=15517>

IRIS 2012-1/29

## Austria

### Repertory and Regional Cinema Digitisation Aid

*Harald Karl  
Pepelnik & Karl Attorneys at Law*

Of the 578 cinema screens in Austria, 388 are digitised, most of them in commercial cinemas. The *Bundesministerium für Unterricht, Kunst und Kultur* (Federal Ministry of Education, Art and Culture – BMUKK) and the City of Vienna are now supporting the digitisation of repertory and regional cinemas.

The rapid conversion of commercial cinema screens from analogue to digital projection technology is putting increasing pressure on repertory and regional cinemas, especially since film distributors are switching more and more to digital film copies, including in the repertory cinema sector. It costs approximately EUR 80,000 to convert each screen; most smaller repertory cinemas cannot afford this from their own funds.

The BMUKK is providing a total of EUR 1 million in digitisation aid, half of which is earmarked for repertory cinemas. The BMUKK defines repertory cinemas as cinemas with a particularly high-quality programme that offer educational programmes linked to the films that they screen and are particularly used to host film festivals. Of the films they have shown in the past three years, at least 10% must have been Austrian and 30% European; they must have no more than five screens, a maximum of three of which have already been converted.

Repertory cinemas are entitled to a maximum contribution of EUR 20,000 per screen. Another condition is that the or municipal authority must also provide some of the funding. It is assumed that the aid will contribute to the digitisation of around 25 screens.

Regional cinemas, on the other hand, are entitled to a maximum contribution of EUR 5,000 per screen. These cinemas serve a wide public and offer a more diverse programme of films.

The aid programme is designed to support the digitisation of as many cinemas as possible, in order to promote Austrian and European cinema, particularly in the regions. The detailed eligibility criteria will be laid down by representatives of cinemas and film distributors. Around 100 screens will be digitised.

The City of Vienna is making EUR 150,000 available for the digitisation of repertory cinemas. There are currently 16 such cinemas in Vienna, with 27 screens whose projection equipment needed to be converted from analogue to digital in order to remain competitive.

Cinemas that show film premieres are entitled to a maximum of EUR 20,000 per screen, while those showing older films can receive up to EUR 15,000. Aid is only available for cinemas that have already been categorised as repertory cinemas and receive support.

The purpose of the aid being offered by the BMUKK and the City of Vienna is to safeguard the future of repertory cinemas and, thereby, of independent, artistic and socio-critical film programmes.

- *Pressemitteilung der BMUKK vom 12. Oktober 2011, BM Schmied und StR Mailath fördern die Kinodigitalisierung mit über 1 Mio Euro* (BMUKK press release of 12 October 2011, BM Schmied and StR Mailath pledge more than EUR 1 million to support cinema digitisation)  
<http://merlin.obs.coe.int/redirect.php?id=15565>

## Spain

### Controversies over the Catalan Cinema Law

*Laura Marcos and Cristina Mora  
Enrich Advocats, Barcelona*

A new Catalan Cinema Law was approved by the Catalan Government on January 2010 and came into force on 7 July 2010 (see IRIS 2009-5/21)

This new Cinema Law has been particularly controversial, as its main innovation is the obligation to dub and subtitle foreign movies into the Catalan language (a co-official language in the Autonomous Community of Catalonia alongside Spanish). By virtue of Article 18, when more than one copy of a dubbed or subtitled movie is released in Catalonia, distribution companies are obliged to distribute fifty per cent of the analogue copies in the Catalan version. The only exemption is for dubbed European movies of which less than sixteen copies are distributed in Catalonia. Previously, foreign language movies were normally only dubbed into Spanish.

Controversy has been caused by the high increase in costs that this new measure will necessitate. As a result, it has been the object of serious debate among producers, distributors and exhibitors.

After much discussion, the Catalan Government and the US majors reached an agreement in September 2011 that will end this conflict at least in the medium term. The agreement states that the Catalan Government shall assign EUR 1.4 million in economic aid in order to help distribution companies in the dubbing and prints, as well as with promotion. This more than doubles the budget of EUR 600,000 assigned in 2010 towards the same concept. As a result of the agreement in 2014, one out of four movie showings will be in Catalan and the number of spectators will rise from 117,000 in 2010 to over 1.5 million by next year.

The European Commission has also intervened in the controversy over the new Cinema Law. The Commission considers that the Law infringes the principle of European competition, as it favours productions in Spanish (Castilian) over other European films, as films in Spanish will not be under an obligation to comply with the new measures. The Commission has accordingly sent a letter to the Spanish Government informing it of the opening of a file that will aim to examine the nature of Articles 17 and 18 of the Cinema Law, which are considered to be unacceptable.

- *Llei 20/2010, del 7 de juliol, del cinema* (Catalan Act 20/2010 of 7 July 2010)  
<http://merlin.obs.coe.int/redirect.php?id=15489>

IRIS 2011-10/14

## Romania

### Lower Support for Film Promotion and Distribution

*Eugen Cojocariu  
Radio Romania International*

The Board of Administration of the *Centrul Național al Cinematografiei* (National Cinematography Centre – CNC) has reduced by 40 percent, starting from 1 September 2011, the maximum amount of non-reimbursable cumulated financial support for the promotion and domestic and/or international

distribution of full-length films (see inter alia IRIS 2011-6/29, IRIS 2011-2/34, IRIS 2010-7/34 and IRIS 2010-2/30).

The Decision no. 151 from 30 June 2011 was taken due to the economic crisis, budgetary constraints and the decrease of the sums collected by the Cinematographic Fund. The document modifies Decision no. 123 of 16 September 2010.

According to this the maximum support for films participating in international FIAPF (International Federation of Film Producers Association) "A"-category festivals (competitive) is of EUR 30,000 for awarded films and of EUR 27,000 for selected/nominated films, irrespective of whether they were produced with or without CNC support. The maximum support for films participating in other international FIAPF festivals is of EUR 27,000 for awarded films and of EUR 24,000 for selected/nominated films, irrespective of whether they were produced with or without CNC support. The support for films participating in other festivals, agreed by the CNC, is of up to EUR 24,000 for awarded films and of up to EUR 21,000 for selected/nominated films. The sums include the support for both promotion and distribution. The maximum total support for participating in several different festivals is in the region of EUR 30,000. The last support category is for films that were not presented at festivals: up to EUR 15,000 for films produced with CNC's support (instead of EUR 25,000 previously) and up to EUR 7,000 for those that were realised without CNC's support (instead of EUR 10,000).

Short-reel films will receive 25 percent of the corresponding full-length film category support.

- *Hotărârea Consiliului de Administrație al Centrului Național al Cinematografiei nr. 151/30.06.2011* (Decision of the Board of Administration of the National Cinematography Centre no. 151/30.06.2011)  
<http://merlin.obs.coe.int/redirect.php?id=15258>
- *Hotărârea Consiliului de Administrație al Centrului Național al Cinematografiei nr. 123/16.09.2010* (Decision of the Board of Administration of the National Cinematography Centre no. 123/16.09.2010)  
<http://merlin.obs.coe.int/redirect.php?id=15259>

IRIS 2011-9/32

## France

### CNC Publishes Comparative Study on Tax Incentives for Location of Audiovisual and Cinematographic Production

*Amélie Blocman  
Légipresse*

The purpose of the international tax credit instituted by the 2009 Budget and embodied in Art. 220 *quaterdecies* of the General Tax Code is to make it easier to shoot and manufacture in France cinematographic and audiovisual works originated by a non-French producer and containing elements that attach it to the culture, heritage or territory of France. Thus the tax credit is granted to a company that carries out the executive production of a work in France, subject to the company being approved by the national cinematographic centre (*Centre National de la Cinématographie* – CNC). The credit represents 20% of the eligible expenditure on the work in France, with a ceiling of EUR 4 million per work.

The results for cinematographic production for the year 2010 show that the producers of certain types of French full-length films are choosing to relocate to the Grand Duchy of Luxembourg and

Belgium. The CNC therefore decided to launch a comparative study of the functioning of certain non-French tax incentive schemes for cinematographic and audiovisual production, in order to measure and analyse this trend objectively. The study covers seven countries - Belgium, the Grand Duchy of Luxembourg, Germany, Ireland, Hungary, the United Kingdom and Canada.

The study shows that while the aims of the various national tax incentive schemes are relatively similar, the ways in which they operate are very varied.

The works covered and the extent of eligible expenditure vary from one country to another. Moreover, the ceilings applied to the tax reductions or credits practiced in the various countries are often much higher than in France; indeed the study shows that, of the seven schemes studied, France's tax credit arrangement is currently the least attractive in strictly financial terms, with a rate among the lowest at 20% of eligible expenditure, compared with 29 to 39% of eligible expenditure in Belgium, and 25 to 65% of eligible expenditure in Quebec. It is also the most restrictive, since it is virtually incompatible with the other schemes and requires filming – unless the scenario justifies otherwise – and post-production (mainly) to be carried out in France. Belgium's "tax shelter" scheme, with its broad base of eligible expenditure, and Canada's tax credit scheme are in theory compatible with the French scheme. The non-French schemes studied are also broadly compatible with each other.

Some French producers explain their repeated collaboration with the European countries studied (particularly Belgium, the Grand Duchy of Luxembourg, and Ireland) by the fact that they do not lose the benefit of the French tax credit. The French scheme of aid for production makes it possible to retain a large part of the benefit of financial support, even if the tax credit is lost because the work is filmed elsewhere. Moreover, such collaboration makes it possible to obtain other forms of national or regional aid in the coproduction countries, or even supranational aid, such as Eurimages, and hence to cumulate financing.

- *Etude comparative des systèmes d'incitation fiscale à la localisation de la production audiovisuelle et cinématographique* (Comparative study of tax incentives for the location of audiovisual and cinematographic production)  
<http://merlin.obs.coe.int/redirect.php?id=15284>

IRIS 2011-9/20



# A New Cinema Communication - Background Data

*by Susan Newman-Baudais  
European Audiovisual Observatory*

As one Cinema Communication expires and another is prepared to take its place, the time is ripe for stock-taking. Both the preliminary consultation, which closed in September 2011, and the subsequent period of consultation on the proposed new text have represented opportunities for a wide cross-section of stake-holders and the European Commission to explore issues related not only to the public funding of the European film industry but also to more general characteristics of the European audiovisual sector and its evolution in a period of accelerated change.

Among the very numerous specific questions addressed during this period have been the following:

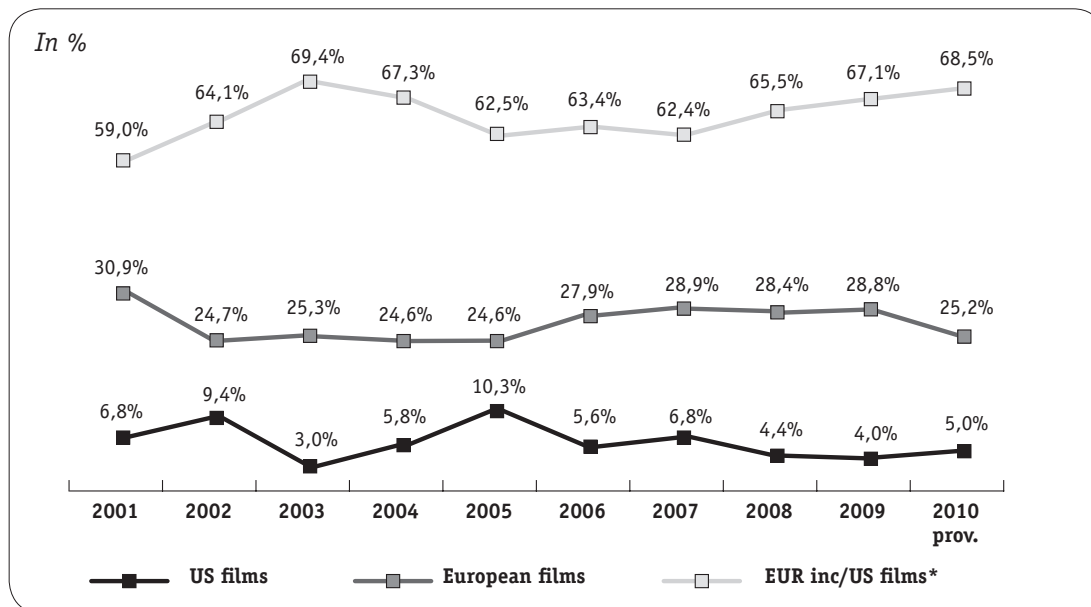
- the relative success of European and US films in the European Union;
- the total number of theatrical feature films produced in Europe;
- the roll-out of digital projection in Europe's cinemas and assistance for cinemas in difficulty;
- evolution in funding spend by funds based in Europe and the impact of the current economic climate;
- the growing importance of regional funding;
- the range of activities supported by funds and the relative weight of these in the funding mix;
- the kinds of projects supported for production and the place of digital media in funding activity.

The following selection of data drawn from recent European Audiovisual Observatory publications provides relevant background information on these issues.

## I. The European Film Industry in Context – Background Data

### Market share of European and US films in the European Union / 2001 - 2010

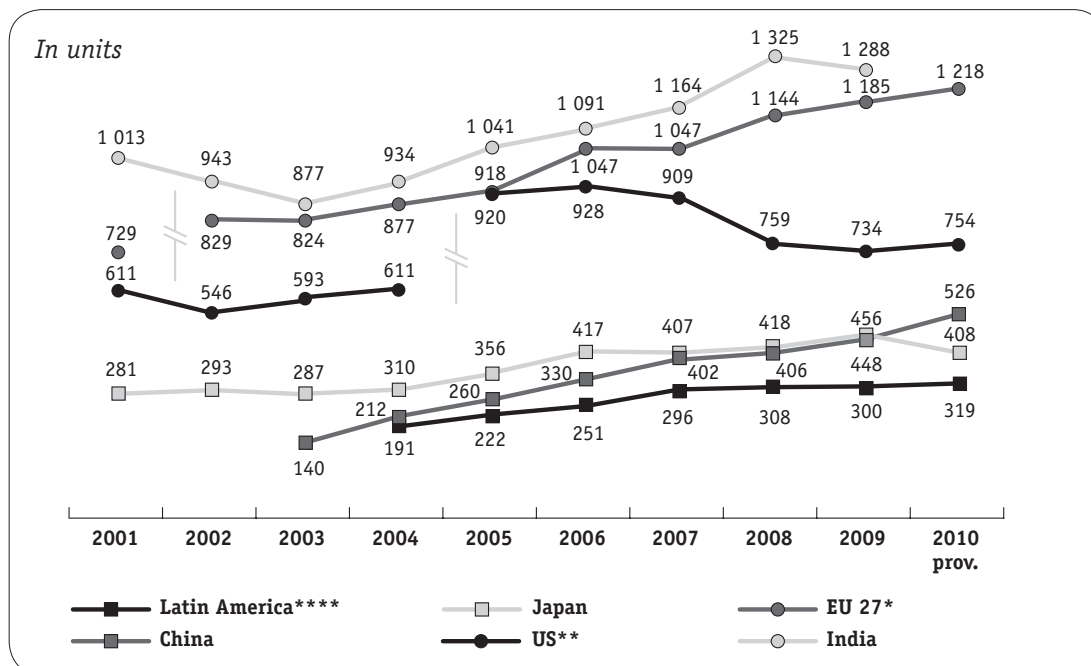
On the basis of admissions to films in cinemas



\*Films produced in Europe but benefitting from US inward investment. Examples include the "Harry Potter" film series

Source: European Audiovisual Observatory

### Number of theatrical feature films produced in major world markets / 2001 - 2010



\* Data 2002 onwards is not comparable with 2001 data. All data is estimated.

\*\* Revised data series from 2005 onwards. Data not strictly comparable with previous year.

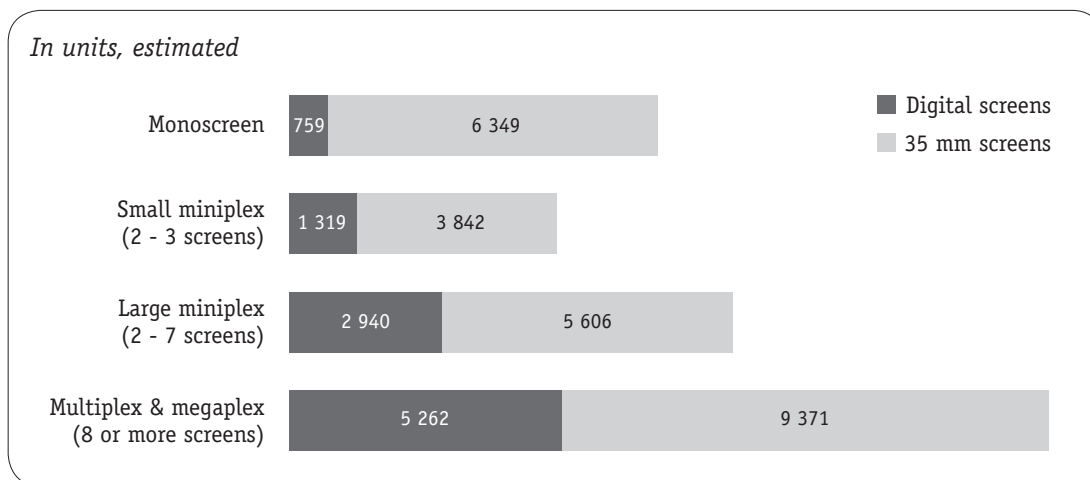
\*\*\* Officially approved films only.

\*\*\*\* Total includes films from Argentina, Brazil, Chile, Colombia, Mexico, Peru, Uruguay and Venezuela.

Source: European Audiovisual Observatory



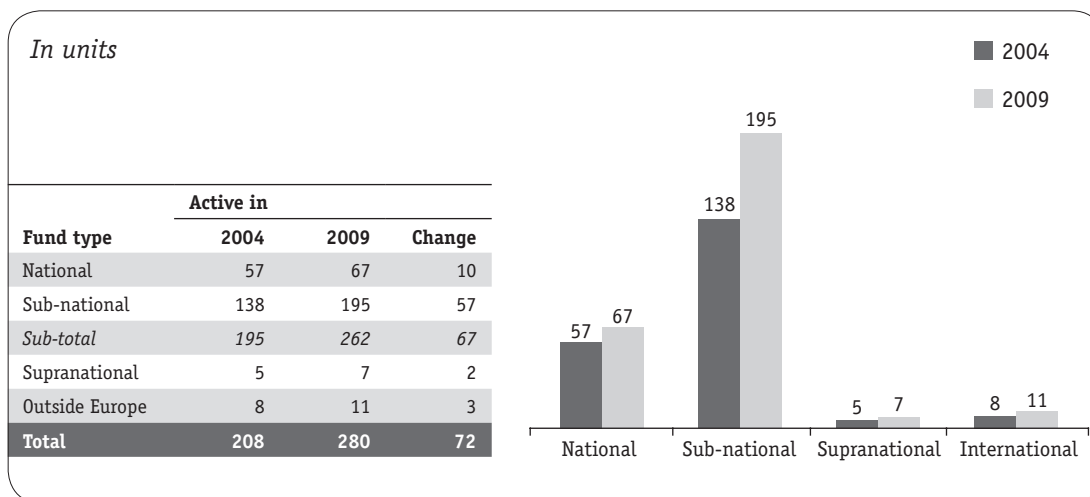
**Number of digital and analogue screens in cinemas by site type in Europe / 2010**



Source: European Audiovisual Observatory / MEDIA Salles - 'The European Digital Cinema Report'.

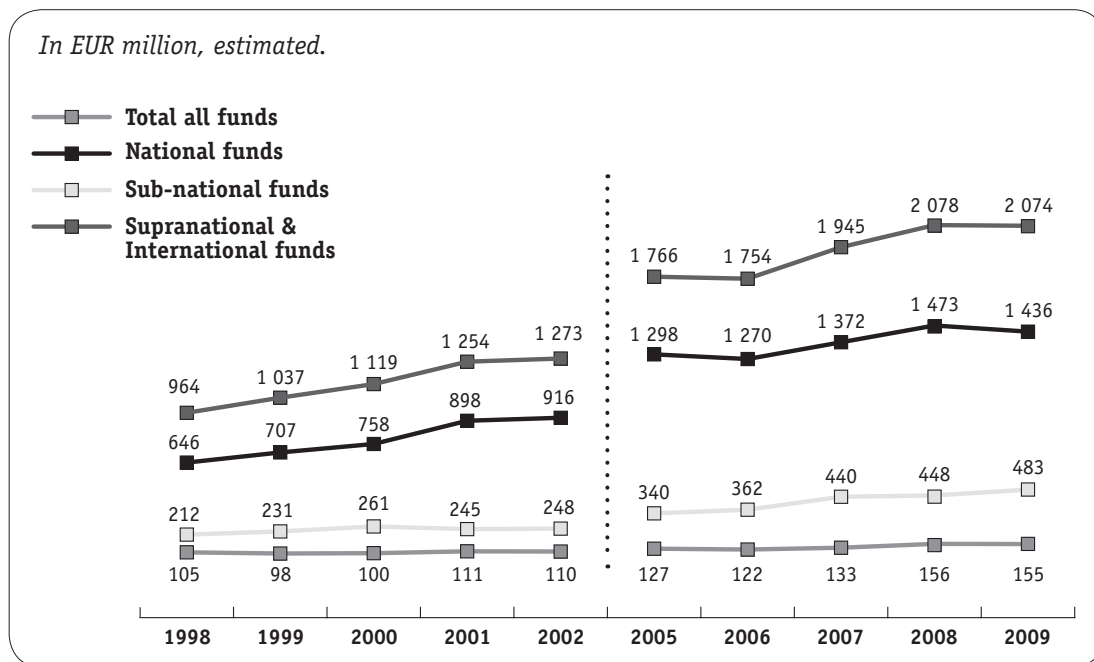
**II. Public Funding for Film and Audiovisual Works in Europe - Background Data**

**Change in the number of public funding bodies in Europe since 2004**



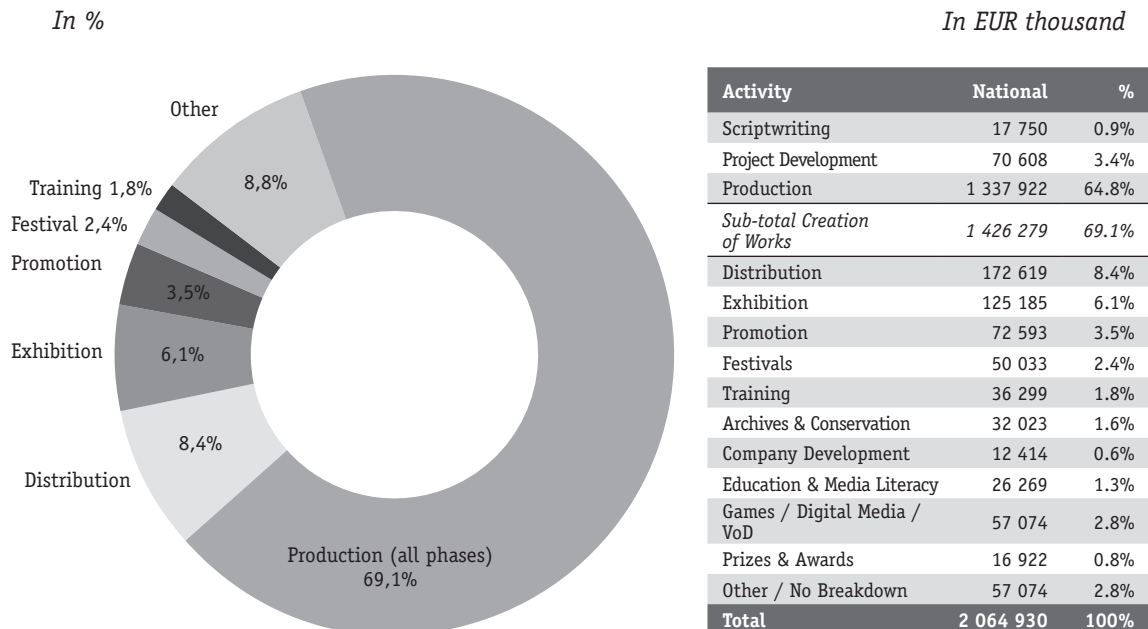
Source: European Audiovisual Observatory - 'Public Funding for Film and Audiovisual Works in Europe - 2011 Edition'

**Evolution in funding body activity spending in Europe / 1998 to 2009**



Source: European Audiovisual Observatory – ‘Public Funding for Film and Audiovisual Works in Europe – 2011 Edition’

**Funding body spending volume by activity – all funds in Europe / 2009**



Source: European Audiovisual Observatory – ‘Public Funding for Film and Audiovisual Works in Europe – 2011 Edition’

## Public funding body activity overview / 2009

Country	Script Development	Project Development	Production	Distribution	Exhibition	Promotion	Festivals	Training	Archives & Conservation	Company Development	Education / Media Literacy	Film Culture	Digital Media	Prizes & Awards	Other
AL			•			•	•								
AT	•	•	•	•	•	•	•	•	•		•	•		•	•
BA			•			•	•								•
BE	•	•	•	•	•	•	•	•		•		•			•
BG	•	•	•	•		•	•								
CH	•	•	•	•	•	•	•	•	•		•	•		•	•
CY			•		•	•	•	•			•				
CZ	•		•	•	•	•	•	•	•		•	•		•	•
DE	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•
DK	•	•	•	•	•	•	•	•		•	•		•		•
EE	•	•	•	•	•	•	•	•	•		•	•		•	•
ES	•	•	•	•	•	•	•	•	•	•	•	•	•		•
FI	•	•	•	•	•	•	•	•			•		•		
FR	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•
GB	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•
GR		•	•			•	•							•	
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HU		•	•	•		•	•					•			•
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IT	•	•	•	•	•	•	•	•	•			•		•	•
LT		•	•	•	•	•	•	•	•		•	•	•		•
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MK			•			•									
NL	•	•	•	•	•	•	•	•			•				•
NO	•	•	•	•	•	•	•	•			•	•	•		•
PL	•	•	•	•	•	•	•	•			•			•	
PT	•	•	•	•	•	•	•	•							
RO		•	•	•	•	•	•	•				•			
RU		•	•	•	•	•	•	•			•	•		•	•
SE	•	•	•	•	•	•	•	•	•	•	•	•			•
SI	•	•	•		•	•	•				•				•
SK	•	•	•	•		•	•	•			•				
TR	•	•	•		•	•	•					•			•
Supra	•	•	•	•	•	•	•	•	•	•		•	•	•	•
Other	•	•	•	•	•	•	•	•						•	•

## Notes

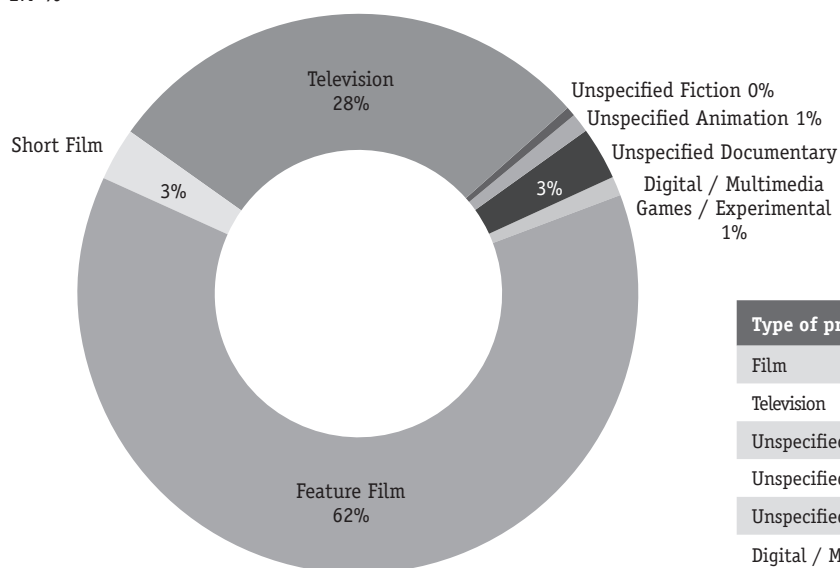
This table covers the activities of the funds studied in this report.

When an activity is shown as not supported, this should not be interpreted as meaning that an activity is not supported at all within a country, simply that the funding bodies studied in this report were not responsible for that particular activity.

Source: European Audiovisual Observatory

**Funding body spending volume by activity – all funds in Europe / 2009**

In %



Type of project	Spend
Film	902 097
Television	388 057
Unspecified Fiction	4 629
Unspecified Animation	16 094
Unspecified Documentary	42 283
Digital / Multimedia / Games / Artists & Experimental Works	17 945
<b>Total</b>	<b>1 371 105</b>

Note.

Not all production spend has been analysed.

Source: European Audiovisual Observatory – ‘Public Funding for Film and Audiovisual Works in Europe – 2011 Edition’

**Number of direct public funding schemes supporting the conversion of cinemas to digital projection / 2005 – 2011**

Year	Launched	In operation	Completed
2005	1	1	-
2006	-	1	-
2007	-	1	1
2008	1	1	-
2009	9	10	-
2010	16	26	2
2011	36	60	3

Note.

Data as identified - may not be exhaustive. Programmes are considered as in operation during their year of launch and during their year of completion.

Source: European Audiovisual Observatory / MEDIA Salles – ‘The European Digital Cinema Report’.

If you are interested in learning more about these topics, in-depth information on public funding and on the transition to digital cinema in Europe can be found in these recent Observatory reports:

**Public Funding for Film and Audiovisual Works in Europe** provides a complete overview of film funding in Europe between 2005 and 2009 and covers the activities of 280 different funding bodies. As well as providing quantitative data on fund income and activities, the report includes special sections on broadcasters' contributions to fund income, tax incentives, co-development funds and inter-regional initiatives. Published in October 2011 and providing comparable data across funds and countries, this is an essential benchmarking tool for professionals active in the field. (For more see [http://www.obs.coe.int/oea\\_publ/funding/fundingreport2011.html](http://www.obs.coe.int/oea_publ/funding/fundingreport2011.html))

**The European Digital Cinema Report**, published by the European Audiovisual Observatory and MEDIA Salles in December 2011, provides the latest figures on digital screens and penetration rates across Europe and goes beyond them to explain the historical development of digitisation including the role played by 3D, Third Party Facilitators and public funding schemes. Based on a comprehensive site-by-site listing of digital cinemas as of 2010, the report provides in-depth structural analysis with regards to concentration levels by exhibitors and cinemas of different sizes. A special chapter is dedicated to the specific challenges faced by the European independent sector. (For more see [http://www.obs.coe.int/oea\\_publ/market/european\\_digital\\_cinema.html](http://www.obs.coe.int/oea_publ/market/european_digital_cinema.html))





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The European Audiovisual Observatory was established in December 1992 and is part of the Council of Europe thanks to its status as a "partial and enlarged agreement". Its offices are in Strasbourg, France. The Observatory's membership currently comprises 37 European States and the European Union, which is represented by the European Commission. Each member appoints one representative to its board, the Executive Council. An Executive Director heads the international Observatory team.

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