

## **European Film Agency Directors**

### **Contribution to the EC consultation on the Commission's draft Communication on State aid for film and other audiovisual works**

**May 2013**

*The EFAD (European Film Agency Directors (EFAD) see the list of signatories below) was set in 2001 to act as the interlocutor with European institutions on all the film-related aspects of European policies. They represent the directors of national film agencies in all the EU countries as well as in Iceland, Norway, Switzerland and Croatia.*

The EFAD thank the European Commission for giving them the opportunity to comment the draft Communication issued on 30 April 2013. We acknowledge the progress achieved since March 2012 and the Commission's attempt to take Member States' remarks into consideration, in particular on the issue of territorialisation and on the need to maintain a leverage mechanism and effect.

**However, as it stands, the Commission's current proposal is still raising major concerns** as its full implementation, unless modified, will challenge Member States' ability to effectively support the audiovisual sector and pursue the objective of reinforcing and promoting a vibrant and diverse audiovisual creation across Europe.

I. Remarks on the Commission's approach: public financing of the audiovisual sector, territorialisation: What is at stake?
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1. A successful digital Europe needs a strong audiovisual sector "united in its diversity"

The European audiovisual sector is facing numerous challenges which can only be addressed by a close, flexible and dynamic interaction between Member States audiovisual policies and EU policies.

The EFAD recognise the Commission's effort to create a clear and comprehensive legal framework for audiovisual policy-making within the Member States. But unfortunately the result - as we see it - at best will leave the Member States with legal uncertainty and at worst will undermine their ability and incentive to take part in the further development of the European audiovisual industries.

The production and distribution of European audiovisual content and the creation of new financing structures and business models in the sector is an important element for the development of the European digital economy. There is a great risk that Member States lose this capacity by the introduction of a "one size fits all" legal framework for audiovisual policy-making whereas Member states are very different from one another in terms of size, means and cultural traditions. As a result, pulling the rug from under the Member States will have a serious adverse impact on the entire European audiovisual sector and the EU policies targeted at the transformation of the sector in the digital age.

And, yet, in other policy documents the EU Commission has expressed a different approach to the safeguarding and innovation of the audiovisual and film sector:

- The Commission’s proposal on *Creative Europe* addresses three major challenges for the sector: the fragmentation of the market and industry, access to finance and the adaptation of the sector to the digital shift.
- The Commission’s Green Paper on preparing for a Fully Converged Audiovisual World: Growth, Creation and Values asks “...*how to transform the process of convergence in a larger European market into economic growth and business innovation in Europe?*”.

Taking into account that Member States’ public funding of the sector counts for more than 90% of total funding targeted at the cultural and industrial development of the sector, Member states’ main concern in this respect is by nature the promotion of their own national industries – to create a bedrock of risk and innovation capital for the creation and distribution of content that culturally and artistically is mirroring their local culture and everyday life.

We therefore urge the Commission to take these considerations into account while finalizing the future legal framework for audiovisual policy making throughout Europe. We do it by referring to the Treaty objective of promotion of cultural diversity, the UNESCO Convention on the Protection and the Promotion of the Diversity of Cultural Expressions and by stressing that **cultural diversity in Europe is not only a question of respecting the cultural and linguistic variation within the European Union but also a question of creating a common European audiovisual sector that is distinct to that of other parts of the world.**

The very weak understanding of the specific conditions for domestic production and co-productions which is mirrored in the draft, looks set to lead to a loss of momentum and competitiveness which is crucial for the transformation of the sector into a fully digitised industry and marketplace.

## 2. Territorialisation needs to be flexible in order to reconcile the internal market’s principles and the specificities of the cultural sector

On this specific issue, the EFAD would like to express their deepest concerns.

- Art 12 & 13 of the draft Communication read:

*The Treaty rules on State aid control acknowledge the specificities of culture and the economic activities related to it. It contributes the medium – to long terms sustainability of the European film and audiovisual sectors across all Member States, as well as increases the cultural diversity of the choice of works available to European audiences.*

*As Party to the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, the European Union, alongside the EU Member states, is committed to integrating the cultural dimension as a vital element in its policies and the Commission subscribes fully to its objectives and attached great importance to the promotion of cultural diversity.*

In other words, the European Commission, in line with article 167.4 of the Treaty and its commitment to the UNESCO convention, acknowledges that audiovisual works are not mere commodities. Their nature is dual: both economic, i.e. offering “*important opportunities for the creation of wealth and employment*”, and cultural, i.e. reflecting “*the cultural diversity of*

*the different traditions and histories of the EU Member states and regions” therefore “mirroring and shaping our societies” (point 1 of the draft communication).*

**When dealing with State aids to the audiovisual sector, such acknowledgement should result in striking a balance between the EU competition and internal market principles on the one hand, and the requirements deriving from the specificities of the cultural sector on the other hand.** This is what the “cultural derogation” (article 107.3.d of the Treaty, which constitutes the Cinema Communication’s legal base) is about. It aims at authorising aid *“to promote culture and cultural heritage where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest”*.

If Member States were now obliged to finance goods, services and persons taking part in an audiovisual production, whatever their origin in the European Economic Area, it is difficult to see how such measure would affect trading conditions and competition (and it follows that it would be difficult to qualify them as constituting « aids »).

If Member States were fully prevented from implementing discriminations on the ground of the origin that are necessary to reach the cultural objective of common interest they are pursuing, then why should the Cinema communication be based on article 107.3.d. whose aim precisely consists in authorising aids aimed at promoting culture as far as they do not affect trading conditions and competition to an extent that is contrary to the common interest?

**• Up until now, territorialisation has been approached, with the consent of the European Commission, in line with the objectives above mentioned, to contribute to the emergence of a strong European audiovisual sector.** In particular, we have used criteria (validated by the European Commission, on the basis of the same Treaty) aimed at focusing aid to activities that are being carried out by companies having a stable establishment in the territory of the granting authority and/or generating taxable incomes on our territories. Such requirements, although they challenge the full implementation of internal market rules, are key to:

- Enable film-related expertise to build up in the EU at national and regional level;
- Ensure that regions and Member States enjoy a return on investment, and keep sustaining European audiovisual production against the backdrop of the financial and economic crises – and the related constraints on public resources;
- Secure an optimal environment for the development of co-productions (co-productions representing approx. 30% of the total European productions). It is worth mentioning here that the European Convention on coproductions, that was signed by all the EU Member States, and which aims at promoting “European works”, insists on the need, with a view to preserving and promoting cultural diversity, for both artistic and technical providers to originate from the coproducing partners, and that the possibility to impose discriminations on the ground of the language are not sufficient to preserve an audiovisual work’s cultural integrity.

In its March 2012 draft proposal, the European Commission had acknowledged that internal market rules could not be fully applied in the audiovisual sector, and proposed a possibility for Member States to require that “100% of the aid amount (i.e. up to 50% of the production budget) be spent on goods and services provided by local companies” (as explained in the FAQ dated 15.05.2012).

• **However, the Commission is now adopting a completely different and more radical approach**, considering that there should be no discrimination on the origin of the goods and service, which constitutes a basic and non-negotiable principle of the Single Market. Therefore, the possibility to require a direct link between the aid granted and the territory of the granting authority is no longer valid and makes the notion of territorialisation redundant<sup>1</sup>.

As a consequence, the latest Commission's proposals, although they reintroduce a leverage effect, fail to strike the balance between the internal market and the specificities deriving from the cultural nature of the audio-visual sector. It is therefore difficult to understand (as in point 37 of the draft Communication) how the 80% rule would « *correspond to the 80% production budget* » old territorialisation rule when the new territorialisation rule does not use the same definition of territorialisation as in the 2001 Cinema Communication<sup>1</sup>.

**The consequences on European schemes and on the situation of the European audiovisual sector as a whole will be extremely serious and it is our conviction that the implementation of the Commission's proposals as they currently stand would be hugely detrimental to the European audiovisual creation's strength and diversity. The European Commission's proposals as they stand are not proportionate and will prevent it from achieving the objective laid down under article 167 of the TFEU according to which “*action by the Union shall be aimed at encouraging cooperation between Member States, and, if necessary, supporting and supplementing their actions in (...) artistic and literary creation, including in the audiovisual sector*”.**

Moreover, the EFAD believe the **legal reasoning** behind such a shift in the Commission's approach to territorialisation is questionable.

The Laboratoire Fournier case decision concerning the research and pharmaceutical development sector cannot be the only reference to justify that the Treaty would forbid any discrimination on the origin of the eligible expenses to a tax credit in the audiovisual sector. The legislative rules applicable to research on the one hand and culture on the other hand are extremely different, which should lead to two specific ways of applying the principles of the Treaty when a «overriding reason of general interest » is pursued. It is our view that building up a local technical and artistic expertise with a view to promoting the diversity of European cultures constitute such an overriding reason of general interest. The promotion of European culture could therefore justify the existence of restrictions to the free provision of services – including a national measure that would refuse the benefit of a fiscal advantage to film activities that are not taking place in the granting Member State, in so far as this restriction is reasonable and effectively enables to reach the cultural objective pursued.

The EFAD would also like to stress that this new approach to territorialisation would incentivize Member States to territorialise the less cultural expenses (accommodation, catering, etc) while the core creative expenses (creation personnel along the whole value chain) would become very difficult to retain on the national territory.

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<sup>1</sup> and also because, in the case of aid awarded as grants, aid intensity must reach 50% in order for the 160% of the aid awarded to correspond to the “old territorialisation rule” of 80% of the production budget – which is rarely the case in some of our countries

## **II. EFAD's proposals**

First, the EFAD insist on the need to return to a proposal that allows aid to be linked to activities that are the subject of revenues that may be imposed on their territory or to activities carried out by operators – national or European – who are based in their territory. We believe such measure is **necessary** to help us reach the cultural objective we are pursuing, and the it is **proportionate** (as it constitutes the minimum common denominator among our schemes, and because limiting our ability to impose discrimination measures to the mere “discrimination on the ground of the language”, as in the UTECA case, would not be sufficient to help us reach our objectives).

In addition, the EFAD would like to submit the following three remarks aimed at improving the Communication's clarity and the feasibility of its practical implementation:

- In order to bring **legal certainty** and thereby ease the decisions and daily work of the film sector, the text needs to be clear. At this stage, the points linked to territorialisation (37, 38, and 52 + footnotes 25 and 26) are blurred and the multilateral meeting of 14 May has shown that there were not understood in the same way by the different national authorities. The same terms should be used throughout the text (why alternatively use “activity” and “expenses” to say the same thing?) and terms should be clearly defined. Instead of the misinterpreting footnote 26 a clearly worded paragraph should be placed in the text, which states that “film production activity in the granting Member State may be defined as an activity generating income taxable in the territory of that Member State.”
- **Transparency:** the provisions laid down under article 54. 7 would oblige us to disclose confidential business information. In addition, in federal states, it will be impossible to make all this information available on a single website.
- Point 56 on controlling aid intensity in the case of **co-productions** is still unclear and would moreover be impossible to implement in practice:
  - in cases where different intensities would be applicable to the same audiovisual work according to the individual national rules, what would be the intensity level to be applied, and how?
  - in addition, the production process of an audiovisual work will make it impossible to control all the public aids effectively granted to an audiovisual work./.