

BRITISH FILM INSTITUTE

EUROPEAN COMMISSION ISSUED PAPER ASSESSING STATE AID FOR FILMS AND OTHER AUDIOVISUAL WORKS SEPTEMBER 2011

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Introduction

The British Film Institute (BFI) is the Government's lead body for film in the UK. It has become the Lottery Distributor for film, and assumed certain other key functions following the closure of the UK Film Council earlier in 2011.

The BFI welcomes the European Commission's initiative to update the Cinema Communication in order to address the needs of the European film and television sector in 2012 and beyond. It looks forward to continued discussion with the Commission on this hugely important topic.

Key points

- It is critical that any new Cinema Communication is evidenced-based, and respects the principle of subsidiarity that allows member states to decide the basis and objective of how their own audiovisual sector is supported.
- Any changes to the current regime, such as any move to end what the Commission calls a "subsidy race" would need to have been agreed using published evidence of harm.
- A new Cinema Communication must allow member states to support all activities that contribute towards the creation and distribution of cultural goods.
- Territorialisation requirements should be maintain at their current levels.
- The current aid intensity limit of 50% should be maintained. A new Communication should allow for higher aid intensity for low budget and difficult films based on member states cultural impact assessments.

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

The BFI believes state aid should be used to support national and European film cultures. For such cultures to thrive, two sets of pre-conditions are necessary: a durable, renewable indigenous talent and skills base, not just for production but throughout the value chain; and an open, competitive market that encourages innovation, risk-taking and the most diverse offer to the public. It is therefore necessary for European Union member states, through their governments, national and regional film agencies and other relevant bodies, to intervene so as to help create the conditions for national and European films to be made, to circulate and to be accessible to the public.

As such, member states have put in place state aids to cinema and/or the audiovisual sector at a national and/or regional level according to their own specific needs. These evidence-based measures are dedicated to activities including development, production, distribution, exhibition, promotion, training, education, and access to heritage. They are justified not only by the structural weaknesses of feature film markets in Europe, but also by the significant role played by cinema in the expression of cultures.

The BFI believes that it should be for each member state to independently decide the basis and objectives for supporting films and audiovisual works based on their own examination of their national needs and in accordance with the subsidiarity principle.

2. How should one measure that this objective is fulfilled?

The BFI welcomes the Commission's desire to measure the effectiveness of state aid for films and audiovisual works. As we believe that it should be for each member state to define their own objectives, it therefore follows that the measures of "success" would also vary.

For example, to complement established methodologies for measuring economic impact, in the UK, the BFI (and previously the UK Film Council) has been working with policy makers, academics, economists and film professionals to develop a cultural impact framework to capture the impact of film and subsidy interventions benefitting film. This work has been discussed with the EC's Education and Cultural Committee. It may also be of interest to the Commission in the context of any new Cinema Communication.

That said, the BFI believes that a core set of principles should be used. The assessment should be open and transparent and draw on both qualitative and quantitative evidence. Any set of performance measures should conform to SMART principles – Specific, Measurable, Attainable, Relevant and Time-bound.

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

The BFI acknowledges that some individual Member States are keen to attract inward investment from large scale, mainly US, film production companies but contends that subsidy is not primarily aimed at this objective nor is subsidy the only attraction that individual Member States can offer.

Moreover, the BFI is not aware of any evidence that a subsidy race exists between member states to attract major film production. We would therefore expect that the Commission will provide an analysis of any evidence they have of a subsidy war and of any harm that it has on the European film sector.

The BFI agrees with the Commission's statement that major international productions are extremely mobile. There is a great deal of competition globally to attract such productions with other territories such as Australia, Canada and various states within the US providing fiscal and subsidy incentives to attract such films to their territories. For Europe to remain competitive with such territories,

and without a central EU subsidy to attract inward investment, Member States need to be encouraged to incentivise the production of films in their territories as these films benefit the economies and culture of multiple member states. Member States also need to ensure that its own domestic production takes place in its country or within Europe and does not “run away” to other non-EU countries that offer subsidies.

The Member State offering subsidy can act as a hub for the film’s production with other member states contributing facilities, location, people and services to the same film. If a film is attracted to Australia, Canada or one of the US states it is highly unlikely to spend part of its production budget in Europe as those areas have a diversity of facilities and locations. However, if a film is attracted to Germany by the availability of some form of incentive there is a high likelihood that it will spend part of its budget on locations or facilities in nearby Member States. As such BFI would suggest that it is not accurate to say that use of public subsidies leads to competition with other member states but can in fact benefit more than one State.

The BFI would therefore reject the assertion that use of public subsidies to attract inward investment is detrimental to the sector and to taxpayers in Europe and we do not believe that there is evidence to that effect.

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

The BFI welcomes the Commission’s interest to expand the Cinema Communication to areas that merit state aid within the film and television sector such as film distribution and digital projection and to clarify that film related activity can, if proportionate, necessary and effective, be considered under the cultural derogation set out in Article 107(3)(d).

The BFI suggests that while a number of member states have already successfully notified schemes in film distribution or digital projection, it is unconvinced that there is sufficient evidence upon which to set specific parameters particularly as it is not yet clear in what other areas of film activity a member state may feel aid is necessary.

The film production process is common to all member states and as such it is easier to set assessment criteria for state aid. Other aspects of film culture have to take account of the specificity of each member state – it may be difficult to attempt to stipulate parameters as a ‘one-size fits all’ approach may not work.

However, if the Commission believes that it has the evidence to set out assessment criteria for activities other than production, then that should be provided so that member states can help produce new guidance that could be included in a new Communication.

The Commission suggests that it may be appropriate to extend the scope to include all aspects such as film development and distribution. Film development is part of the film production process and is counted in the film production budget against which the aid intensity limit is measured, and as such falls within the

existing criteria. However, it would be helpful if this was clarified within the Communication. As set out in paragraphs 13 and 17 distribution support is essential to ensure the promotion of European film to a diverse range of audiences and confirmation that it falls within the Communication would be welcomed.

The BFI would also acknowledge that certain support for film-related activities may not meet the four tests for state aid (and therefore may not need to be referenced within the scope of the Communication) and other measures (that do constitute aid) can be made available by applying the *de minimis* rules or the GBER. As such, the type of activity that is state aid, is not within the film production process (such as distribution), could not be covered by one of the existing exemptions, and may be so minimal that it does not require specific criteria within the Communication. It should therefore be assessed on a case by case basis under the cultural derogation.

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

The BFI recognises that the Commission has been asked to review measures for cinema digitisation over the past few years and that – given the costs of digitisation and the commercial mechanisms involved (in particular the Virtual Print Fee) - there will remain a case for public funding support for a number of cinemas seeking to convert from 35mm projection systems to digital. There are cultural as well as economic justifications for such an intervention and it should be for member states to find ways of supporting the cinema sector in this transfer provided that any aid measures that they seek to introduce are not automatically anti-competitive nor distort the market.

The UK has already successfully notified state aid support for the conversion of certain cinemas to digital projection and believes that the Commission is reviewing these requests on a case by case basis. This process worked well and we therefore see no evidence of a need to change the previous approach.

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

The BFI's remit does not extend beyond film and television, we therefore believe that others are better placed to answer this question.

However, the BFI does recognise that the primary policy objective is the promotion of a cultural product and as such it may become increasingly redundant to limit state aid to a specific number of platforms.

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

The BFI believes that the current level of aid intensity works well. It has been applied for ten years and has created legal certainty for the member states. We

therefore see no case for change, other than that the increase to 60% suggested by the Commission for films that involve activity in more than one member state is welcome.

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

Those activities listed in the question (apart from distribution, promotion and marketing costs) are part of the film production process – the costs are contained within the film production budget – and therefore the aid intensity limit is applied to them. The BFI agrees that maximum aid intensity relates to the film production irrespective of whether it is from a different aid scheme or member state. Distribution and promotion and marketing costs can be limited to 50% aid intensity unless the distribution activity is so limited that the aid provided is minimal (in which such aid could be provided under the *de minimis* rules).

However, if there is a proposal to apply an aid intensity limit of 50% to other activities, not listed in the question, then as set out in the answer to Question 4 above, we need to know what those activities are likely to be, and how the aid is provided, before confirming that a 50% aid intensity limit is applicable. Looking at a specific example, the UK Film Council Digital Screen Network allowed the leasing of digital equipment to cinemas (the lease arrangement being paid for by state aid) in return for those exhibitors programming 'specialised', including non-national European, films in the cinema. This was essentially an 'in-kind' aid measure that could not be quantified in aid intensity terms. As such it may be counter-productive to apply an aid ceiling when the form that the aid measure could take is not yet known.

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

Yes, the BFI believes that it could be a positive move to increase the acceptable level of aid intensity for films which involve activities in more than one member state.

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

As set out in 6 and 8 above, it is difficult to set a limit when the form and purpose of the aid measure is not yet known.

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

The BFI believes that member states should be free to impose territorial conditions on aid for audiovisual projects. Territorialisation does not constitute a barrier to free circulation. It not only makes possible a sustainable film sector, it also assures the maintenance and development of film culture in Europe. It is founded on the legitimate will of member states and of regions to enable the benefits of support to be enjoyed by people in those member states and regions who provide that support - both in terms of opportunities to make and have access to both their own films and those from other parts of Europe. In this sense, the territorialisation of support makes it possible to cement the link between the state and its industry.

Territorialisation requirements are indispensable to the development of a strong creative fabric without which the film sector cannot grow and cannot guarantee innovation and creativity. Cinema is subject to the dynamic of the value chain and challenging these requirements is likely to weaken national industries and to undermine the very foundations of the sector. Territorialisation makes it possible to safeguard the value chain and thus to assure the development and deployment of that value chain both by the country's professionals and those from other parts of Europe.

While territorialisation requirements give rise to local spending obligations, they do not prevent spending by professionals and European companies that are free to decide to work in any market they choose.

The Commission's 2007 study the economic and cultural impact, notably on co-production of territorial clauses of state aid, also said that territorialisation requirements did not hinder co-productions and in fact facilitated funding for all kinds of productions that might not otherwise have been available.

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

Conditions on production support should only be applied if they are addressing a market failure or contributing to a cultural objective for film. It should be for each member state to address what conditions should be imposed and we are not convinced that this issue is relevant to the Communication.

The creation of delivery materials is dependent on the market – there is no need for the public funder to require the creation of a digital master as the need for materials will be driven by the distribution requirements. The film's producer will create whatever is needed to get the film seen.

It may also be unfair to copyright creators and owners to be required to allow their films to be made use of commercially by others and to be edited and adapted into other works (under the Creative Commons Licence) particularly if those can be commercial exploited. As the Commission is aware, aid intensity is limited to 50% - as such no feature films will be fully funded public works. It is highly unlikely that a private financier would consent to the dilution of their recovery of monies from the film by allowing their film to be exploited by third parties at no

cost and this may be counterproductive to attracting private finance into the marketplace.

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

Traditional windows of distribution for film are being challenged by new technology and a new audience appetite to consume film by new means. The challenge to existing business models has resulted in a reduction in established revenue streams, whilst new revenue streams are still in their infancy.

In principle, therefore, the BFI believes that state aid incentives for distribution should be allowed for all platforms but again it would be for individual member states to determine if aid measures are actually needed across other platforms and the nature and extent of such measures (provided that they are necessary, proportionate and effective).

14. Since most European films receive public support, it could help to develop film culture/literacy and ensure that supported films are safeguarded for future generations if such funding is conditional on the supported films being deposited and available for cultural/educational use. Should a new Communication invite member states to do so, especially if the public funding is over 50% of the film's budget?

The BFI supports the deposit of films in order to safeguard culture for future generations, and it is a requirement of its Lottery funding for film production, but respecting the subsidiarity principle believes that it is for each member state to determine whether to make this compulsory. In the UK we strongly support and encourage deposit of films in national and regional archives and believe that it would be helpful if the Communication recommended and encouraged deposit as a matter of good practice, but if this was limited to those films where public funding is over 50% of the film's budget this would mean limiting it to difficult and low budget films. There might not then be sufficient capacity in the film's budget to produce a digital master of a high enough quality to be used purely for the purpose of deposit at an archive.

15. Should a new Communication include additional State aid rules for supporting initiatives designed to encourage businesses to take advantage of the digital revolution?

The BFI agrees that aid measures encouraging businesses to take advantage of the digital revolution should be encouraged. To the extent that such measures could not be designed to fall within any of the GBER (e.g. in relation to research and development) a statement from the Commission that, provided they are linked to a cultural product, they could be permitted under the cultural derogation is welcome. However, the BFI also acknowledges that without some discussion at member state level and among the European film agencies as to what form that aid measure might take it is difficult to prescribe what rules should apply (beyond the general considerations applied by the Commission).

16. Are there any other issues which the Commission should consider in a new Communication?

The BFI wants to stress the importance of the Commission delivering an outcome which guarantees long-term legal certainty, simplicity and transparency to Europe's film funding agencies and film professionals as this will maximise the benefit to European citizens.

Any changes should only be made following a careful analysis of published evidence and consultation with member states and film agencies and professionals.