

## European Commission's Consultation on Assessing State Aid for Films and Other Audiovisual Works

### SAA contribution September 2011

The Society of Audiovisual Authors (SAA) is the association of European collective management societies representing audiovisual authors' rights. Its 25 member societies in 18 European countries manage the authors' rights of over 120,000 European film and television screenwriters and directors.

SAA's main objectives are:

- To defend and strengthen the economic and moral rights of audiovisual authors (screenwriters and directors);
- To secure fair remuneration for audiovisual authors for every use of their works;
- To develop, promote and facilitate the management of rights by member societies.

SAA welcomes the public consultation "Assessing State Aid for Films and Other Audiovisual Works". In its White Paper on Audiovisual Authors' Rights and Remuneration in Europe<sup>1</sup> published in February 2011, SAA emphasised the digital revolution and the support for European films and other audiovisual works among the biggest challenges faced by the audiovisual sector.

"Maintaining and increasing the level of production will depend on sustained financial support and incentives for filmmakers (creators, production companies and distributors) through subsidies, preferential tax measures, loan guarantees and financial aid generally. It is only with these support measures that the industry can flourish and the European film industry can become a strong and sustainable market force.

Whilst in 2009 the level of European film production reached an all-time high it should be noted that the market share of European films of total box office admissions declined in 2009 from 28.3% in 2008 to 26.7%. The market share of US films, however, increased from 65.6% to an estimated 67%, the highest level since 2003.

A firm commitment to **support and promote European production** at national and Community level is essential if this trend is to be halted and reversed."

---

<sup>1</sup> [http://www.saa-authors.eu/dbfiles/mfile/1400/1468/SAA\\_white\\_paper\\_english\\_version.pdf](http://www.saa-authors.eu/dbfiles/mfile/1400/1468/SAA_white_paper_english_version.pdf)

This is why SAA is taking part in this consultation. The SAA contribution will address the questions aiming at securing funds for films and other audiovisual works and ensuring the legal certainty of national support schemes.

### **3.2. Why do we fund film?**

The EU plays a “double role” in film financing thanks to its own MEDIA programme as a source of funding and also through its control of national aid systems through state aid law. Such control is based on Article 107.3d) of the TFEU which considers that aid to promote culture may be considered compatible with the internal market where it does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest. In the 2001 Cinema Communication, the European Commission set out the principles for the application of State aid rules to the cinema sector and has followed them in its examination of each and every system notified by Member States since then. Throughout the last 10 years, DG Competition has gained extensive experience on how Member States support films and audiovisual works and authorised all the support mechanisms notified by Member States, despite the strict rules to be respected.

Today, the European Commission is considering revising these rules in order to adapt them to the situation of the European film and audiovisual sector and the evolution of its funding systems. When drawing up a new Cinema Communication, the European Commission should not only take into account article 107.3d) TFEU but also:

- Other relevant articles of the treaties as article 3.3 TEU and article 167 TFEU, which anchor the commitment of the European Union to protect and promote culture and cultural diversity.
- The UNESCO Convention of Cultural Diversity, signed by the European Union in 2006 which has become an acknowledged pillar in European cultural policies. The Convention recognises the dual nature (cultural and economic) of audiovisual goods and services, encompasses cultural industries and reaffirms the sovereign rights of Member States to implement policies and measures that they deem appropriate for the protection and promotion of the diversity of cultural expressions on their territory.

The issues paper considers that Europe’s national, regional and local film funds do not have a common objective or strategy and is worried that this could lead to contradictory funding. However, such concerns appear to be unfounded as no example is given after 10 years of experience in the application of the existing rules. Whether film funding is provided at international, national, regional or local levels and depending on the market and the stage it addresses, it is reasonable that, according to the subsidiarity principle, every film support scheme pursues a specific objective and has its own selection criteria.

However, all these support mechanisms clearly pursue a cultural objective. A possible approach for the European Commission could be to require that support measures covered by the new Cinema Communication under the cultural derogation should have an overall cultural objective or a cultural impact assessed by political decision makers in the Member States.

The European Commission might be willing to include in the preamble of the Cinema Communication a list of general and specific cultural objectives such as those proposed in the issues paper (increasing audience choice, building audiences for European films, ensuring the cultural diversity of production, stimulating innovation, openness and creativity) and others such as the circulation of European works in order to increase the visibility of these objectives and thus consolidating the legitimacy of state aid to cinema. However, such inclusion should not create additional criteria to be met by Member States and assessed by the European Commission.

### **3.4. What activities other than production should be included in the scope of the Communication and which State aid criteria are appropriate for such activities?**

The SAA strongly supports the continued efforts of national funding schemes to address different aspects of up stream and down stream activities in the value chain for the creation, production, distribution and promotion of audiovisual and interactive works. In this context, SAA favours the broadening of the scope of the Communication beyond production to the other activities across the value chain of film from development to production and consumption, and to provide criteria adapted to those activities.

Areas such as development (in particular scriptwriting), post-production, distribution, promotion, exhibition and digitisation (both for cinemas and works) are essential activities for the success of a film. Public support is necessary and legitimate along the entire value chain, as demonstrated in the scope of intervention of the MEDIA programme.

All these stages contribute to the realisation of a cultural project and to its accessibility for the public. Adopting criteria for them would greatly increase the legal certainty of their support systems.

### **3.5. What should be the scope of products to be supported?**

The current Cinema Communication limits its evaluation of state aid funds to films and TV productions. As the European Commission foresees its extension to support schemes to both prior and posterior to the production stage, it is worth considering its extension to new forms of production as well. The evolutions of the audiovisual sector need to be taken into account, in particular the increased online and on-demand consumption of traditional audiovisual works and the emergence of new innovative formats, whether interactive or cross media, intended for internet or mobile devices. It is essential that Member States accompany these evolutions and adapt their support schemes to make them possible.

In this context, it is important not to define the audiovisual works eligible for aid under the Cinema Communication too strictly and to leave Member States with the maximum flexibility to adapt their current mechanisms and/or develop new ones. It would therefore be appropriate for the Cinema Communication to cover films and other audiovisual works.

### **3.6. What should the maximum aid intensities be?**

SAA is of the opinion that the current maximum overall aid intensity of the support schemes for the production of films and other audiovisual works should remain at 50% of the production budget, with derogations for difficult and low budget films. It seems that this criterion is now well established and accepted by both the Member States and the industry.

However, if activities other than production are to be covered by the Communication as well as audiovisual works other than film and TV productions, 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. Again higher aid intensity could play a role as an incentive for Member States to develop new schemes.

### **3.7. To what extent are territorial conditions justified?**

The territorial criterion of the existing Communication allows Member States to insist that up to 80% of the production budget of a subsidised film production is spent in the Member State offering the aid. The 2008 study on "*the economic and cultural impact, notably on co-productions, of territorialisation clauses of state aid schemes for films and audiovisual productions*" did not conclude in favour of the deletion or restriction of the territorial conditions. To the contrary, the study highlighted the risk that such a deletion might lead to an increase in implicit territorial conditions, reducing transparency for film producers, and the funds available, hence limiting productions and co-productions.

SAA is therefore in favour of the status quo regarding territorial conditions in order to avoid a destabilisation of the industry.

### **3.8 Does the digital revolution affect the State aid rules?**

The issues paper interprets the physical distribution difficulties of European films as a problem of over-production of European films compared to demand. This is an over-simplified analysis of the market which does not take into account the domination of the EU market by US films.

Be that as it may, the digital revolution offers new opportunities for the distribution of films and other audiovisual works and these need to be seized by the European industry. The traditional distribution chain for films is facing radical revision. Video-on-demand services are developing rapidly while the DVD market is in decline. The still nascent VOD market suffers from the unfair competition of high levels of online piracy and needs to establish the value of dematerialised films.

It is imperative that the new Cinema Communication encompasses the digital revolution. The proposals mentioned by the Commission, such as aids to development, production and marketing tools, should be covered by the next Cinema Communication, as well as traditional aids to promotion and distribution, since they contribute to the development of alternative communication systems aimed at strengthening the audiences' access to audiovisual works.

However, the SAA strongly rejects the suggestion of requiring that publicly-funded works are released under Creative Commons' licences. First, such a suggestion ignores the fact that the 50% maximum aid intensity rule of the public support leaves 50% of the budget of the film in the hands of private investors who need to recoup their investment. Second, it is not up to public support to impose a particular copyright status on films (in this case a Creative Commons ShareAlike licence), which would prevent commercial exploitation. This is simply not adapted to films, as demonstrated by the low use of Creative Commons' licences in the film sector.

Ensuring that a digital master is produced to ensure the maximal digital distribution of the film and that a copy is deposited in film archives are part of the missions of the public support schemes, but seem to fall out of the scope of the Cinema Communication which focuses on the compatibility of the film funds with the state aid rules of the Treaty.

In order to build an audience for European films and other audiovisual works online, it is important that distribution support is not limited to release in cinemas but also covers distribution on all platforms, in particular VOD services.

#### **4. The future**

The SAA is in favour of a new Cinema Communication that guarantees long-term legal certainty, simplicity and transparency to Europe's film funding agencies and film professionals.

Issues other than the financial support to activities related to films and other audiovisual works, such as the regulatory issues mentioned at the end of the issue paper, fall outside the scope of the Cinema Communication and should not be dealt with.

The European Commission is currently conducting a parallel consultation process with a Green Paper on the online distribution of audiovisual works to address them. The SAA will contribute to this consultation lead by DG MARKT to ensure that the European legal framework encourage innovative new business models in the digital distribution of European audiovisual works and to address the specific needs of European audiovisual authors to benefit from the successes of their works.