



Consultation on the draft communication from the Commission on State aid for films and other audiovisual works

June 2012

The movement of European Coalitions for Cultural Diversity (ECCD) was created in 2005 by several national coalitions of cultural professional organisations in Belgium, Germany, France, Slovakia and Spain in order to foster the signature and ratification of the 2005 UNESCO Convention for the Protection and the Promotion of the Diversity of Cultural Expressions. Today, it includes thirteen European Coalitions: Austria; Belgium; France; Germany; Hungary; Italy; Ireland; Portugal; Slovakia; Spain; Sweden; the UK and Switzerland.

Its main objective is to keep the European institutions informed of the expectations and needs of creators and European cultural professional organisations. This is not only with regard to the UNESCO Convention but also to all subjects related to culture under European competence, particularly trade negotiations.

According to the ECCD, the integration of culture into European policies is of the utmost importance. On January 31 2012, the ECCD held a Conference in Brussels called "*Culture : an added value for Europe*". This event was to affirm that Culture is not a simply a luxury or something to take into account when no other policy is at stake. On the contrary, it is a crucial element which conveys both strong economic values and factors of identity and cohesion amongst European citizens.

However, the characteristics of the cultural sector need to be understood and taken into account in order to achieve results in the field of cultural policy. Cultural and audiovisual sectors cannot be assessed only from the perspectives of competition, trade and internal market policies without undermining their main attributes.

As a consequence and according to both the treaty provisions (art. 167.4 TFUE) and the commitments of the European Union in favor of the promotion and protection of the diversity of cultural expressions, it is in the European Commission remit/mission to implement exceptions to the market and competition rules in accordance with culture policies.

This is the main message of the ECCD and its national Coalitions since their creation and we deplore that five years after the adoption of the 2005 UNESCO Convention and two years after the green paper *Unlocking the Potential of Cultural and Creative Industries*, it needs to be restated once again.

Regarding the rules on State aid to cinema, the ECCD expressed its concerns on the issues paper published in June 2011 and now considers the draft communication as a step in the right direction.

Although a greater importance should have been given to the 2005 UNESCO Convention¹, the ECCD welcomes the attention given by the European Commission to audiovisual specificities and values, notably in the introductory remarks of the draft communication.

Thus, we view positively:

✓ the deletion of:

-the efficiency criteria which was mentioned several times in the first paper as an assessment element of the State aid to cinema;

-the idea of the overproduction of European works.

We consider that the great number of audiovisual works and movies produced each year in the European Union is the expression of the diversity and wealth of cultural expressions in Europe.

✓ the reference to:

-the double nature of the audiovisual sector (economic and cultural);

-the legal basis of the European cultural policy and of its integration into other European policies (art. 167.2 and art. 167.4 TFUE);

¹ The draft communication only refers to the 2005 UNESCO Convention to justify its assertion on the nature of cultural goods and services (confere § 12)

- the subsidiarity principle;
- the MEDIA program;
- cultural diversity as an objective of the new Cinema Communication²

However, the draft Communication fails in part to implement these principles in the cinema state aid rules. Considering that the 2005 UNESCO Convention is an international instrument placing obligations on the European Union, it is of the utmost importance that the European Commission respects the letter and the spirit of this text. Consequently, two crucial elements need to be reviewed: the scope of the communication on the one hand and the territorial spending obligations on the other hand.

1. The scope of the communication

As the ECCD previously expressed, it considers that the extension of the Cinema Communication to other activities, be they before or after production, is positive. On the one hand, it means the recognition of their value and hence of their need for public support and on the other hand, it ensures an effective legal transparency for the sector. A third positive point could be added which is the opportunity offered by the European Commission to stakeholders to play a part in the definition of the new rules.

Despite the announcement of such a development in the issues paper, the draft communication seems to have a more limited scope than expected. For instance, it does not mention a relevant activity either from the perspective of promotion or circulation of European works: the VoD platforms.

Keeping such a stance in the communication would be in contradiction to:

- the audiovisual policy whose centrepiece, the SMA directive, aims to promote and enhance the circulation of European works;
- the Digital Agenda, the Single Market Act, the EU 2020 Strategy and several conclusions from the Council, among them *the conclusions on the digital single market and governance of the Single market* adopted on May 31 2012.

² [;;;] this Communication aims to ensure that European audiences are offered a more culturally diverse choice of audiovisual works (§14 draft communication)

All of these documents include the set-up of a genuine Digital Single Market in their priorities.

Consequently, the ECCD recommends the integration of this activity into the cinema communication as well as a more flexible approach to aid allowance. Since developing European VoD platforms which promote European works is of the utmost importance for the construction of a European Digital Single Market, the ceiling for State aid should be increased to at least 60% of the budget of relevant to this activity.

Regarding scriptwriting and the development activities which the EC aims to introduce into the new communication, the ECCD also recommends raising the ceiling for State support on the grounds of its importance for culture and cultural diversity in the European Union.

2. The territorial spending obligations

In order to explain the need to change the ceiling on permitted territorial spending obligations, the European Commission mentions:

a) that the 2001 communication rule on this point is an exception to the Internal market rules ;

b) that this exception is not justified by the necessity of the measure since :

i) the 2008 study on the impact of territorialisation clauses³ was inconclusive on its positive effects ;

ii) the new technologies fosters the mobility (*it is possible to shoot and edit films in different countries without harming their technical or cultural quality*⁴)

iii) the “Laboratoires Fournier” decision of the European Court of Justice (ECJ) prevents the application of a rule such as the one provided for by the 2001 Cinema communication⁵.

³ Study on the Economic and Cultural Impact, notably on Co-productions, of Territorialisation Clauses of state aid Schemes for Films and Audiovisual Productions, 25. 06.2008.

⁴ §24, p.5 of the draft communication

⁵ This reference is not included in the draft communication but only in the Q&A document-updated on 15 May 2012

We consider that the case made by the European Commission is not convincing because:

-it should be mentioned that the 2008 study was inconclusive with regard to both the positive as well as the negative impacts of the territorialisation clauses. Moreover, before giving too much credit to this study, it should be taken into account that it has been criticized by audiovisual specialists, amongst them André Lange from the European Audiovisual Observatory⁶ who found fault with the methodology and various producers familiar with these schemes.

The European Commission should pay more attention to the experience of the audiovisual and cinematographic sector. Reports from the national cinematographic institutions show the positive impact of the current state aid systems on the development of the sector.

-the argument about mobility due to new technologies does not change *the need of the continued presence of human skills and technical expertise* which is the reason (recognized by the EC⁷) why territorialisation clauses are crucial.

-the analogy made with the ECJ case “*Laboratoires Fournier*” is not convincing because the measures questioned in the decision and the territorialisation clauses are not similar. In the ECJ decision, it is the application of the general public interest objectives to the case which is questioned by the judge⁸ whereas in the draft Cinema Communication it is the proportionality of the measure which is in question.

More generally, the ECCD considers that exception to the internal market rules justified by cultural objective is not comparable to exception based on other public interest considerations. Exceptions based on culture objective should be given full recognition on the basis of the EC commitments to the diversity of cultural expressions (2005 UNESCO Convention) and of the EC remit provided for by articles 164.1,164.2, 164.4 TFUE and 3.3 TEU. The ECJ case UTECA, dated 5 March 2009 which explicitly refers to the UNESCO Convention should also be considered in this respect.

⁶ Confere its public intervention during the Cannes Conference of the European Audiovisual Observatory on this issue (19.05.2012)

⁷ Confere §22 of the draft communication.

⁸ The first general interest objectives mentioned as a derogation to the internal market used could not be applied to the case and the second one (the research and development promotion) could not be used as a derogation to the internal market rules because the treaty provision on research and development entails the objective of an internal market.

Consequently, in applying the criteria of necessity and proportionality in the assessment of the validity of an exception related to cultural policy, the importance of the objective of cultural diversity should be taken into account as provided for in the European primary law and with respect to the inherent characteristics of the cultural and audiovisual sectors.

When reviewing the 2001 communication, the European Commission should not neglect the *multiplier effect of culture* and *the double aspect of the audiovisual field* (which is both industrial and cultural).

Member States, regions or local entities give their support to a film because they can count on the positive economic and social impact of this industrial activity for their city/region/country. This multiplier effect is given much more strength if associated with a strong territorialisation clause. ECCD considers with the European Film Agency Directors (EFAD)⁹ that limiting its effect to 100% of the production budget will trigger the diminution of state aids as well as the transfer of the filming to countries outside the EU or to other Member States with lower production costs due to their lower economic development.

Moreover, this change could result in a lack of human skills and technical expertise which will be detrimental to the creation of films and ultimately to the preservation of cultural diversity in Europe.

The European Commission published on May 15 a new Q&A document on the draft communication which gives a more flexible interpretation of the newly proposed rule on territorial spending obligations.

The ECCD appreciates the Commission endeavor to take into account the observations made by the audiovisual sector on this topic. However, we consider that more transparent methods could have been used to communicate on this new interpretation (we find it difficult to be properly informed on these changes). In addition, for legal transparency reasons, we feel that this information should have appeared in the communication with all the necessary details.

As we understand it, by giving a new interpretation to the “territorial spending obligation”, the European Commission makes the distinction between two categories

⁹ Confere Cannes Declaration on State aid for films and other audiovisual works (May 2012)
<http://www.cnc.fr/web/fr/actualites/-/liste/18/1773981>

of clauses regarding internal market policy. This would mean that only the clauses which are manifestly in contravention with internal market policies will be considered as “territorialisation clauses” and governed by the “cinema communication”. Conversely, the rules regarding activities in specific Member States which usually involve local expenditures will be out of the scope of the new Communication.

An impact assessment of the territorialisation rule with this new interpretation should be carefully undertaken in order to evaluate its consequences on the cinema sector in the different Member States. **At this stage, the ECCD advocates that the current rule should be maintained.**

The ECCD thanks the European Commission for having had the possibility to express its views on the draft communication and hopes that its recommendations will be taken into account in the rules soon to be adopted. The ECCD is at the disposal of the European Commission should it wish to discuss these issues further.