

## European Film Agency Directors

*Study on the economic and cultural impact, notably on co-productions, of territorialisation clauses of State aid schemes for films and audio-visual productions*

### Contribution to the online consultation July 2007

On July 6<sup>th</sup>, the European Commission organised a consultation workshop in Brussels where Cambridge Econometrics presented the preliminary results of its *Study on the economic and cultural impact, notably on co-productions, of territorialisation clauses of State aid schemes for films and audio-visual productions*. The subject could not be exhausted in one day, and stakeholders were invited to send back written contributions by 31<sup>st</sup> August 2007.

This paper constitutes the contribution of the European Film Agency Directors (EFADs)<sup>1</sup>.

#### I. THE STUDY

- The EFADs welcome this opportunity to submit their comments, and thank the consultants' consortium for the impressive work they've been carrying out: the study represents a much needed analysis of the role of territorialisation in State aid schemes.
- **The conclusions mirror conclusions previously drawn by the EFADs' position (as set-out in a number of Declarations on this topic – see attached):**

The report presents results which confirm that “territorialisation” should not be confused with “protectionism” in terms of preventing the functioning of the internal market, nor prevents European producers from making co-productions. The study makes clear that national support for audiovisual production to a large extent constitutes the foundation of the diverse European audiovisual sector, and enables artistic and cultural exchanges between European countries - in line with the audiovisual policy of the European Union. It rejects the assumption of causal links between territorialisation and the malfunctioning of the internal market, highlighting the fact that the market alone cannot sufficiently stimulate co-productions.

- **While the EFADs welcome these findings, we wish to bring to the attention of the consultants the following issues:**

*The way data were collected and analysed*

EFADs are unpersuaded by the way the level of territorialisation has been calculated, statistical analyses and the conclusions drawn from them (for example the link made between prices and the

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<sup>1</sup> EFAD is hereby commenting the report that was posted online on the consultants' website, before the workshop took place in Brussels, and not subsequent revised versions of the same report.

level of territorialisation), as well as the lack of exhaustiveness and accuracy in the national “legal fact sheets” delivered.

#### *The assessment of the “cultural impact”*

Part of the consultant’s brief was to assess the cultural impact of suppressing/maintaining territorialisation. This task was not carried out with the same level of detail and attention as for the micro- and macro- economic assessments. Whereas film policies are first and foremost cultural policies, we regret that the section addressing the cultural impact of territorialisation lacks depth, breadth and any real insight.

#### *A failure to grasp the specifics of the EU film environment*

Given the study brief, the issue of the specific characteristics of the EU film environment cannot be addressed *per se* and it must be linked to its context, i.e. to the specific characteristics of the European film market.

Whereas the European film market is part of the audiovisual market with its high potential for growth, innovation and dynamism, it is at the same time split into different markets, defined by different languages and cultures. Operating mostly within their national borders, film-companies are predominantly small and medium-sized enterprises, producing often only one or two films per year. As a result, film markets in Europe are essentially a function of regional or national conditions, representing the multitude of cultural identities, and the market for European film in Europe does not resemble the European internal market for merchandises (goods and services).

In addition, and this is not a particularly European feature but a genuine characteristic of the creative economy, for the creation of films to take place, a number of inputs need to be combined, including artistic inputs (authors, actors, technicians), technical inputs (human know-how, equipment, plant) and economic inputs (investment capabilities, financing, sales and marketing, distribution, exhibition, etc.). In other words, the development of a creative and competitive film industry requires the development of industrial “clusters”, and is difficult to reconcile with an open market without frontiers. This was clearly demonstrated in the *Study on the economy of culture in Europe*, undertaken for the European Commission and published in Autumn 2006.

**On all these three important issues, EFAD would have welcomed deeper investigation.**

## **II. THE CHALLENGE: A RESTRICTIVE INTERPRETATION OF THE 2001 COMMUNICATION**

Over and above our comments on the Cambridge Econometrics study, the EFADs would like to reaffirm their serious concern at the way the 2001 Communication is currently being interpreted and applied. These concerns were stressed in the EFAD Declaration issued in Cannes this year.

With the European Commission’s recent emphasis on the necessity for National Film Agencies to define “cultural tests” (recent examples include Hungary, Finland, Slovakia and The Netherlands), the four criteria set out in the 2001 Communication appear to be interpreted and applied very differently than has been custom and practice.

Any automatic introduction of cultural tests could lead to the adoption of a restrictive and reductive approach towards film and culture. While the “four criteria” of the 2001 Communication have succeeded in reconciling Community competition principles with the right and duty of each Member State to implement cultural policies that help promote and develop European cultural diversity for film, EFAD is concerned that the new approach could lead to a less sustainable European film industry, thus threatening cultural diversity.

This move is all the more surprising as:

- the recent announcement by the European Commission to postpone until the end of 2009 the revision of the 2001 Communication was aimed to secure legal certainty for film professionals;
- the Commission unveiled in May this year an ambitious “cultural agenda”, with the objective of developing a coherent policy approach to the cultural sector, in partnership with all stakeholders.

**In this context, the EFADs take the opportunity of the current consultation to:**

- **Strongly reaffirm that State aid to cinema, provided according to the criteria set out in the 2001 Cinema Communication, is a *sine qua non* condition to strengthen European cinema and cultural diversity.**
- **Reiterate serious concerns at the way EU competition policy is implemented, and urge the Commission to maintain the implementation of existing criteria without changing the interpretation it makes of these criteria.**
- **In the light of the principles laid down under the recent Communication *on a European agenda for culture in a globalised world*, insist on the need to develop a coherent policy approach to the cultural sector, and to implement a constructive discussion process with all stakeholders, including EFAD.**

## European Film Agency Directors - Membership

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Österreichisches Filminstitut (Austria)  
Centre du Cinéma et de l'Audiovisuel de la Communauté française (Belgium)  
Vlaams Audiovisueel Fonds (Belgium)  
National Film Centre (Bulgaria)  
Cultural Services of the Ministry of Education and Culture (Cyprus)  
Czech Film Chamber (Czech Republic)  
Danish Film Institute (Denmark)  
Estonian Film Foundation (Estonia)  
Filmförderungsanstalt (Germany)  
Greek Film Centre (Greece)  
Finnish Film Foundation (Finland)  
Centre National de la Cinématographie (France)  
National Film Office (Hungary)  
Irish Film Board (Ireland)  
Ministero per i Beni e le Attività Culturali - Direzione Generale per il Cinema (Italy)  
National Film Centre (Latvia)  
Ministry of Culture - Department for Arts (Lithuania)  
Film Fund Luxembourg (Luxembourg)  
Maltese Film Commission (Malta)  
Nederlands Fonds v.d. Film (Netherlands)  
Polish Film Institute (Poland)  
Instituto do Cinema Audiovisual e Multimedia (Portugal)  
Centrul National al Cinematografiei (Romania)  
Instituto de la Cinematografía y de las Artes Audiovisuales (Spain)  
Slovak Film Institute – The National Cinematographic Centre (Slovakia)  
National Film Foundation (Slovenia)  
Swedish Film Institut (Sweden)  
UK Film Council (United Kingdom)

**EFADs' principal Declarations on the topic of « territorialisation »:**

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- 1. EFAD COMMON DECLARATION  
2004**
- 2. EFAD NEW COMMON DECLARATION  
2005**
- 3. EFAD - Cine-Regio - Capital Regions of Cinema  
COMMON DECLARATION  
on the new European culture agenda  
2007**

**1.**  
**EFAD COMMON DECLARATION**  
**2004**

1 - The European national film agencies exist 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 national film agencies and other relevant bodies, to intervene so as to create the conditions for national and European films to be made, to circulate and to be accessible to the public.

2 – To this end, 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 measures are dedicated notably to 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.

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3 - In its Communication of 26 September 2001, the Commission acknowledges that audiovisual works, and in particular the cinema, play a key role in the forging of European identities and that these works present unique characteristics associated with their dual economic and cultural nature. This is why the development of this sector has never been left solely up to market forces.

4 - However, the examination of State Aids schemes by the European Commission remains based on rules that reflect adequately neither the cultural, economic and social specificity of cinema, nor the objective differences in conditions encountered in the different Member States. The definition – for each country – of the criteria for granting support, and sometimes the very existence of national support measures, continue to be questioned and therefore give rise to uncertainty. We therefore consider that :

- The rationale for supporting films cannot be confined only to those considered as “cultural”. A clear-cut distinction between commercial and cultural works is artificial, since each film is both a commercial venture and an expression of culture. Similarly, it is not possible to single out “difficult” films.
- Restricting the level of state support to a predetermined percentage of the costs may not adequately reflect market conditions; in no member state is the market of sufficient size or stability to provide the conditions for a healthy and diverse film market.
- The fabric of the industry needs to be strong enough to enable creativity. It is therefore legitimate for the facilities sector to benefit both from direct or indirect support (e.g. through contributions to the budgets of films that satisfy criteria regarding the proportion of local expenditure).
- The support measures do not confer any kind of dominant position on national films in their national markets. On the contrary, the status of those films is often fragile. The support measures do not therefore represent a barrier to the circulation of films from other parts of Europe. Moreover, the measures have functioned to encourage and reinforce co-operation and networking

between Member States' film industries by granting access to each other's national support schemes, by stimulating the framing of bilateral agreements and by fostering the use of multilateral funds.

- Such competition as exists between films from different European countries is indeed marginal as compared to the competition with non-European films, especially given the position of the films of the US Majors. As a rule, circulation of films within the EU is possible only if, in a first instance, they can exist in their own national markets.

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5 - For those reasons, the rules of examination and approval by the European Commission undermine the effectiveness of our state aids because of their failure to take into account the specificity of the sector. The short duration of the approvals (that the Commission has limited to 2004) serves to remove certainty and deny the long-term well-being, both of which are necessary for the development of coherent and structurally-effective cultural policies that are capable of adapting to evolving market conditions.

6 - We therefore wish to draw to the attention of our governments:

- The need to affirm the legitimacy of prevailing cultural policies and to reiterate to the European Commission this legitimacy,
- The urgent need to work with the European Commission to find a solution that guarantees the maintenance and evolution of systems of state aids for the cinema in the long term.
- The particular usefulness of measures that serve to make markets open and audiences receptive to the widest range of works, and therefore stimulate pluralism and diversity.

**2.**  
**EFAD**  
**NEW COMMON DECLARATION**  
**2005**

**Towards a greater clarity, coherence and consistency for European policy  
on the public funding of film**

**Summary**

1 – This Common Declaration dated [May 2005] is addressed to national governments and the European institutions by the directors of Europe's national film agencies. It reaffirms the necessity for public funding of film in Europe and the need for greater clarity, coherence and certainty in the rules drawn up by the European Commission that govern that public funding. These rules came into force in 2001 and are set to expire in June 2007.

**Background**

2 – In March 2003, the directors of the national film agencies of European Union member states (the EFADs) issued a Common Declaration in which they called on the European Commission to find a solution that guaranteed the maintenance and evolution of systems of state aids for the cinema in the long term. At that time, there was considerable uncertainty about the criteria to be used by the European Commission to assess the compatibility with the EC Treaty of aid schemes for cinema and TV production: these criteria, set out by the Commission in its Cinema Communication of 26 September 2001, were only valid until June 2004.

3 – In December 2003, the Commission issued proposals for the adjustment of the specific compatibility criteria. The EFADs, along with other representatives of Member States, accession States and cinematographic industry professionals, were unanimous in rejecting those proposals. In March 2004, the Commission agreed to extend the specific compatibility criteria, as set out in the Cinema Communication, until 30 June 2007.

4 – On 1 May 2004, the European Union welcomed the ten new member states. Some of the ten have yet to establish national film agencies and to put in place policies and systems to support their national film industries and cultures, and thereby participate in the building of a viable and vibrant film sector in Europe. The specific compatibility criteria have a crucial bearing on whether these countries and the rest of Europe succeed in maintaining and enhancing the film industries and cultures of Europe.

5 – This EFADs Common Declaration is signed by the directors of the national film agencies and national representatives of film of the EU25. In addition to affirming the principles of the original Common Declaration, it also envisages a European policy towards film that integrates all the dimensions – diversity, the internal market, competitiveness, competition policy, information society, regional development and the public interest – that have a bearing on that policy.

## **The role of public funding for film in Europe**

6 – The European national film agencies exist 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 availability to the public of the widest possible range of films. These pre-conditions will not prevail in the absence of a clear political will and the necessary public resources. It is therefore necessary for European Union member states, through national film agencies and other relevant bodies, to intervene so as to create the conditions for national and European films to be made, to circulate and to be accessible to the public.

7 – To this end, 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 measures are dedicated notably to 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 European cultures.

8 - In its Communication of 26 September 2001, the Commission acknowledged that audiovisual works, and in particular the cinema, played a key role in the forging of European identities and that these works presented unique characteristics associated with their dual economic and cultural nature. The Commission therefore judged that public funding for film should be assessed under the cultural derogation of Article 87 (3) (d) of the EC Treaty. For the same reason, the development of this sector had never been left solely up to market forces.

## **The issues**

9 - The examination of State Aids schemes by the European Commission remains based on rules that adequately reflect neither the cultural, economic and social specificity of cinema, nor the objective differences in conditions encountered in the different Member States. The definition – for each country – of the criteria for granting support, and sometimes the very existence of national support measures, continue to be questioned and therefore give rise to uncertainty. In relation to the 2001 Communication, we therefore consider that:

- The rationale for supporting films cannot be confined only to those considered as “cultural” or “difficult” (the term used in the 2001 Communication). A clear-cut distinction between commercial and cultural works is artificial, since each film is both a commercial venture and an expression of culture. Similarly, it is not possible to single out “difficult” films.
- Restricting the level of state support to a predetermined percentage of the costs does not adequately reflect market conditions: it must be understood that in no member state is the market of sufficient size or stability to provide – in the absence of public intervention – the conditions for competitive and diverse film production, distribution and exhibition.
- The fabric of the industry needs to be strong enough to enable innovation and creativity. It is therefore legitimate for the technical industries to benefit both from direct and indirect support

(e.g. through contributions to the budgets of films that satisfy criteria regarding the proportion of local expenditure).

- The support measures do not confer any kind of dominant position on national films in their national markets. On the contrary, the status of those films is often fragile. The support measures do not therefore represent a barrier to the circulation of films from other parts of Europe. Moreover, the measures have functioned to encourage and reinforce co-operation and networking between Member States' film industries by granting access to each other's national support schemes, by stimulating the framing of bilateral agreements and by fostering the use of multilateral funds.
- Such competition as exists between films from different European countries is indeed marginal as compared to the competition with non-European films, especially given the position of the films of the US Majors. As a rule, circulation of films within the EU is possible only if, in a first instance, films are viable in their own national markets.

10 – In its Communication of 30 April 2004, the Commission expresses its concern over the the 'territorialization' clauses of certain aid schemes ... that "fragment the internal market and hinder its development."<sup>2</sup> The Commission does go on to acknowledge that "these clauses may be justified under certain circumstances and within limits set in the Communication in order to ensure the continued presence of human skills and technical expertise required for cultural creation."

11 – The EFADs reject the proposition that these territorialization clauses constitute a barrier to free circulation. We consider that they are vital not only to the "continued presence" but also to the maintenance and development of film culture throughout the European Union. These territorialization clauses arise out of the legitimate will of member states and of regions to ensure that the benefits of the support made available flow back to the people in those nations and regions –the people who are paying for that support – in terms of opportunities to create and enjoy their own films and those from the rest of Europe.

12 – We consider that support schemes neither impede mobility of labour and firms' freedom of establishment, nor that they discriminate against persons in other Member States in ways that run counter to the general legality criterion. Rather we judge that the schemes serve to promote national cultures and the capabilities of national industries, objectives recognised and endorsed by the Commission in its Communication.

### **What is needed**

13 – The EFADs propose that the efforts of the Commission, as it embarks on its next review of the Communication, should be devoted not to looking for barriers that do not exist but rather to achieving consistency across policies at the European Union level for information society and audiovisual, education and culture, internal market, competition, and regional development. Notably, regional development policies, even while recognizing the vital social and political contribution the audiovisual sector has to make to European cohesion and competitiveness, fail fully to acknowledge the vital role of culture to regional development. Furthermore, we consider that by considering there to be a contradiction between industrial and cultural intervention, the

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<sup>2</sup> op. cit. para 2.6

Commission is contributing to the currently unsatisfactory regime for State Aids, one which encourages the Commission – through the Competition Directorate General – to seek to undermine national and regional film support schemes that must, to be effective, encompass both industrial and cultural objectives.

14 – Resolving this contradiction has particular relevance for the new member states if they are to put in place coherent and effective measures to promote the development of their film sectors. We have already seen, in the course of the last twelve months, how the application of rules on aid intensity, eligibility and territoriality has worked to hinder the introduction of viable film support in those countries. For example, following their accession to the EU, the legal status of the already-established film support schemes was thrown into question. Likewise, since March 2004, the Commission seems to have ignored the incoherence and contradictions of its conflicting policies towards the audiovisual sector and has thereby heightened the degree of uncertainty in the operation even of schemes the effectiveness of which is proven. On occasions, in approving a film-funding scheme, the Commission has chosen to treat the scheme as only cultural, or only economic, when the scheme embraced both dimensions.

15 – The rules of examination and approval by the European Commission undermine the effectiveness of our state aids because of their failure to take into account of the specificity of the sector. The short duration of the approvals (that the Commission has limited to 2007) serves to remove certainty and deny the long-term well-being, both of which are necessary for the development of coherent and structurally-effective cultural policies that are capable of adapting to evolving market conditions.

## **Conclusions**

16 – In this Common Declaration, made by the directors of Europe's national film agencies, in the context of the current debate about the future of the rules governing the public funding of film, we therefore wish again to draw to the attention of our governments:

- The need to affirm the legitimacy of prevailing cultural policies and to reiterate to the European Commission this legitimacy,
- The urgent need to work with the European Commission to put in place a lasting solution, as article 151.4 of the Treaty clearly allows, that achieves greater coherence and better acknowledgement of dual nature of cinema as both cultural and industrial, across competition, regional development, internal market and diversity policies, and that enables systems of state aids for the cinema to be enhanced and to evolve in the long term.
- The particular effectiveness of measures that serve to make markets open and audiences receptive to the widest range of works, and therefore stimulate pluralism and diversity.

**3.  
EFAD  
Cine-Regio  
Capital Regions of Cinema**

**COMMON DECLARATION  
on the new European culture agenda  
2007**

**The European Film Agency Directors, Cine-Regio and Capital Regions of Cinema welcome the European Commission's *Communication on a European agenda for culture in a globalised world*. This marks a turning-point and a fundamental first step in the development of a coherent policy approach towards culture.**

The approach of the European Commission (EC) is reinforced by the conclusions of the Council of Ministers which recognise culture's role as a catalyst for growth, employment and competitiveness in the European Union (EU) and rightly insist on its specificity, in particular, on its dual nature, both cultural and economic. The Council has also affirmed that the cultural industries are anchored in local, regional and national contexts.

The European Film Agency Directors, Cine-Regio and Capital Regions of Cinema especially welcome three of the themes set out in the Culture Communication, namely:

- The support for evidence-based policy-making
- The setting up of a "Cultural Forum" of stakeholders to bring a cultural dimension to European public debates
- The strengthening by the EC of its internal coordination in order properly to reflect the interface between cultural diversity and other Community policies.

The importance of this last theme is amplified in the context of the review and possible revision of the 2001 Cinema Communication's guidelines for the public funding of film production.

That said, recent trends in the EC's interpretation of EU competition policy raise concerns. On the one hand, were the EC to move towards the automatic introduction of "cultural tests," it could lead to the adoption of a restrictive and reductive approach towards culture and film. On the other hand, although Europe's film professionals and the national and regional film funds have consistently stated that territorialisation plays a vital role in maintaining the fragile equilibrium in both the film industry's structure and its public and private financing, the EC appears to retain a critical attitude towards "territorialisation clauses" contained in film support schemes.

Therefore, in keeping with the tenets of the UNESCO *Convention on the Promotion and Protection of the Diversity of Cultural Expressions 2005*, we would like to highlight to the EC two considerations:

- We have previously confirmed our satisfaction with the 2001 Cinema Communication guidelines. As Commissioner Reding acknowledged in December 2006 before the Culture Committee of the European Parliament, these have succeeded in reconciling Community competition principles with the right and duty of each Member State to implement cultural policies that help promote and develop European cultural diversity for film. Any new Communication on Cinema should therefore be no more restrictive than the 2001 Communication.
- It is vital to ensure that EU policies and legislation relating to the cultural and creative sectors, including film, be consistent and that they help to strengthen Europe's cultural richness. This would be in line with the Culture Communication which states that "the right balance needs to be struck between different legitimate public policy objectives, including the promotion of cultural diversity", and explicitly calls for "cultural considerations" to be taken into account when dealing with State aids in the audiovisual sector.

In conclusion, we, the directors of Europe's national and regional film agencies, reaffirm our responsibility for developing and implementing coherent national and regional cultural policies that are built on an appropriate application of the EU State aids regime.

25 May 2007

Signed by:

**EFADs**

Österreichisches Filminstitut (Austria)

Centre du Cinéma et de l'Audiovisuel de la Communauté française (Belgium)

Vlaams Audiovisueel Fonds (Belgium)

National Film Centre (Bulgaria)

Cultural Services of the Ministry of Education and Culture (Cyprus)

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UK Film Council (United Kingdom)

### **Cine-Regio, European Network of Regional Film Funds**

#### **Capital Regions of Cinema**

Medienboard Berlin Brandenburg GmbH  
Commission du Film d'Ile de France  
Madrid Film Commission  
Rome Lazio Film Commission