

## PART IV: SECTOR SPECIFIC RULES

### State aid to cinematographic and other audiovisual works

#### 1 Introduction

- (1) Audiovisual works, and cinema in particular, play an important role in shaping European identities, both in common aspects shared across Europe and in the cultural diversity that characterises our different traditions and histories. They are an essential element for the good functioning of our democracies because of their widespread influence on society. They are also at the heart of the transformations resulting from the development of the information society: new technological developments offer new opportunities for promoting culture and heritage conservation, and to increase mutual understanding across Europe.
- (2) Audiovisual works have unique characteristics because of their double nature: they are economic goods, offering important opportunities for the creation of wealth and employment. They are also cultural goods which at the same time mirror and shape our societies. This is the reason why the development of this sector has never been left solely to market forces.
- (3) Amongst audiovisual works, cinematographic works have a particular prominence, because of their cost of production and cultural importance: budgets for the productions of cinema films are substantially higher than for other audiovisual content, they are more frequently the subject of international co-productions, and the duration of their exploitation life is longer, with the potential to use all distribution channels, cinemas, DVDs and videocassettes (both selling and rental), Internet downloading, and television (pay-per-view, pay-per-channel, free-to-air). Cinematographic works face strong competition from outside Europe.<sup>1</sup>
- (4) These Guidelines set out the principles to be applied for the application of State aid rules to the cinema sector and for TV production. They are based on Chapter 2 of the European Commission's Communication on certain legal aspects relating to cinematographic and other audiovisual works.<sup>2</sup>

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<sup>1</sup> European Audiovisual Observatory: the market shares of American cinema films in Europe in 2006 was 62,7%.

<sup>2</sup> Communication from the European Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions on certain legal aspects relating to cinematographic and other audiovisual works, Com(2001) 534 final, OJ C43, 16.2.2002, p.6, hereafter "the Communication". The state aid part of the Communication was prolonged in 2004 (COM(2004) 171 final, OJ C 123, 30.4.2004, p. 1) and 2007, OJ C 134, 16.06.2007, p. 5. The European Commission has proposed to prolong

Chapter 2 sets out the general orientation of the European Commission with regard to state aid in the cinema sector.

## **2 General orientation with regard to state aid to the cinema sector**

- (5) Cinema and TV programmes are two of the most universal media of entertainment, with a powerful impact on a great number of people internationally. The current stage of development and the special characteristics of audiovisual production within the European Economic Area, mean that it is difficult for producers to obtain a sufficient level of upfront commercial backing to put together a financial package so that production projects can proceed. In these circumstances, the fostering of audiovisual production by the EEA States plays a key role to ensure that their indigenous culture and creative capacity can be expressed, thereby reflecting the diversity and richness of European culture.
- (6) In the Community pillar, the Maastricht Treaty gave Community-level recognition to the utmost importance of promoting culture for the European Union and its Member States by incorporating culture amongst the Community's policies specifically referred to in the EC Treaty (see Article 151 EC). At the same time, it included in Article 87(3)(d) EC a new specific possibility of exception to the general incompatibility principle of Article 87(1) EC for aid granted by the Member States to promote culture.
- (7) The EEA Agreement also recognises the need for strengthening cultural cooperation in Article 13 of Protocol 31. The EEA Agreement does not contain a "cultural exemption" similar to Article 87(3)(d) EC. Nevertheless, the Authority considers that, in line with its constant practice<sup>3</sup>, film and TV production support measures may be approved on cultural grounds on the basis of Article 61(3)(c) EEA. In its assessment, the Authority will apply the same criteria as those applied by the European Commission for the purposes of Article 87(3)(d) EC.
- (8) The EEA States implement a wide range of support measures for the audiovisual production of films and TV programmes. This support focuses on the creation and production phases of film-making and generally takes the form of subsidies or repayable advances. The rationale behind these

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the Communication further until other new guidelines will come into effect, or, at the latest, 31 December 2012.

<sup>3</sup> Decision No 32/02/COL of 20 February 2002, No 169/02/COL of 18 September 2002, No 186/03 of 29 October 2003, No 179/05/COL of 15 July 2005 and Decision No 342/06/COL of 14 November 2006.

measures is based on both cultural and industrial considerations. They have the primary cultural aim of ensuring that the national and regional cultures and creative potential are expressed in the audiovisual media of film and television. On the other hand, they aim to generate the critical mass of activity that is required to create the dynamic for the development and consolidation of the industry through the creation of soundly-based production undertakings and the development of a permanent pool of human skills and experience.

- (9) These Guidelines do not cover the application of Articles 53 and 54 EEA (anti-competitive practices by companies) to the audiovisual sector.<sup>4</sup>

## **2.1 Compatibility with the EEA Agreement of schemes of aid to cinema and TV production**

- (10) The basic rules on State aid under the EEA Agreement are as follows: Article 1(3) in Part I of Protocol 3, to the Surveillance and Court Agreement provides that the EFTA States<sup>5</sup> are obliged to inform the Authority of any plans to grant or alter aid before putting it into effect. Article 61(1) EEA prohibits aid granted by the State or through State resources, which distorts or threatens to distort competition and trade between the EEA States. However, the Authority may exempt certain State aid from this prohibition. In particular, Article 61(3) EEA lists certain aid types that, in view of their effects, the Authority may authorise. One of these exemptions is Article 61(3)(c) EEA for aid to facilitate the development of certain economic activities where such aid does not affect competition and trading conditions to an extent contrary to the common interest. In its case practice the Authority has, on the basis of that provision, authorised support to TV and cinema production for the purpose of promoting culture, taking into account the criteria developed by the European Commission.

## **2.2 Assessment of aid schemes to cinema and TV production**

- (11) When it assesses aid schemes to cinema and TV production, the Authority must verify:
- first, whether the aid scheme respects the “general legality” principle, i.e. the Authority must verify that the scheme does not contain clauses that would be contrary to provisions of the EEA Agreement in fields other than State aid;

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<sup>4</sup> For example, practices such as block bookings or the bundling of rights, which could be incompatible with the EEA Agreement.

<sup>5</sup> Hereinafter, the term “EFTA States” means the Republic of Iceland, the Principality of Liechtenstein and the Kingdom of Norway.

- secondly, whether the scheme fulfils the specific compatibility criteria for aid, set out by the European Commission in its Communication and explained below.<sup>6</sup>

The second condition is specific to cinema and TV production aid schemes, whereas the other is a routine test applied to all aid schemes irrespective of the sector.

**a) Respect of the general legality criterion**

- (12) The Authority must verify that the eligibility conditions of the State aid schemes do not contain clauses contrary to the EEA Agreement in fields other than State aid. The Authority must ensure, *inter alia*, that the principles prohibiting discrimination on the grounds of nationality, freedom of establishment, free movement of goods and freedom to provide services have been respected (Articles 4, 11, 13, 28, 31, 34 and 36 EEA). The Authority enforces these principles in conjunction with the application of competition rules when the provisions in breach of these principles are not detachable from the operation of the scheme.
- (13) In compliance with the above principles, aid schemes must not: e.g. reserve the aid for nationals exclusively; require beneficiaries to have the status of national undertaking established under national commercial law (undertakings established in one of the EEA States and operating in another by means of a permanent branch or agency must be eligible for aid; furthermore, the agency requirement should only be enforceable upon payment of the aid); require workers of foreign companies providing film-making services to comply with national labour standards.
- (14) Certain schemes of aid to cinema and TV production are financed by parafiscal charges. In line with the European Commission's decision practice and the European Court of Justice's case law, the Authority's practice is that when such schemes benefit solely national producers or do so to a higher extent than to competitors located in another EEA State, in order to be compatible with the EEA Agreement, imported products may not be levied and national production may not enjoy a lower rate of taxation when exported.

**b) The specific compatibility criteria for State aid to cinema and TV programme production**

- (15) The specific criteria on which basis the European Commission currently assesses State aid to cinema and TV programme production under the culture derogation of Article 87(3)(d) EC were established in its decision of June 1998 on the French automatic aid scheme to film production. These specific criteria, which the

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<sup>6</sup> The specific compatibility criteria have been first developed in a 1998 decision by the European Commission on the French automatic scheme, Commission decision N3/98.

Authority will apply in its analysis of similar cases under Article 61(3)(c) EEA Agreement, are:

- (1) The aid is directed to a cultural product. Each EFTA State must ensure that the content of the aided production is cultural according to verifiable national criteria.
- (2) The producer must be free to spend at least 20% of the film budget in other EEA States without suffering any reduction in the aid provided for under the scheme. In other words, the Authority accepted as an eligibility criteria territorialisation in terms of expenditure of up to 80% of the production budget of an aided film or TV work.
- (3) Aid intensity must in principle be limited to 50% of the production budget with a view to stimulating normal commercial initiatives inherent in a market economy and avoiding a bidding contest between the EEA States. Difficult and low budget films are excluded from this limit. The Authority considers that it is up to each EFTA State to establish a definition of difficult and low budget film according to national parameters.
- (4) Aid supplements for specific film-making activities (e.g. post-production) are not allowed in order to ensure that the aid has a neutral incentive effect and consequently that the protection/attraction of those specific activities in/to the EFTA State granting the aid is avoided.

Several considerations arise in respect of the above-mentioned criteria:

- (16) The Authority considers that aid should be towards the overall budget of a specific film-making project and the producer should be free to choose the items of the budget that will be spent in other EEA States. Undertakings in the film and TV programme production sector may also benefit from other aid types granted under national horizontal aid schemes authorised by the Authority under the Article 61(3)(a) and (c) EEA exemptions (e.g. regional aid, aid for SMEs, research and development aid, training aid, employment aid).
- (17) The Authority accepts that EFTA States may require a certain part of the film production budget to be spent on their territory as an eligibility criterion for aid. This is based on the reasoning that a certain degree of territorialisation of the expenditure may be necessary to ensure the continued presence of the human skills and technical expertise required for cultural creation. This should be limited to the minimum degree required to promote cultural objectives.
- (18) Furthermore, given the particular characteristics of film production, the Authority considers that the overall budget of an audiovisual production is the disbursement at risk necessary for its creation and, consequently, admits that the reference for aid calculation is that overall budget, regardless of the nature of the individual expenditure items of which it is formed. The earmarking of aid to specific individual items of a film budget could turn

such aid into a national preference to the sectors providing the specific aided items, which might be incompatible.

- (19) Funds provided directly from EC programmes like MEDIA 2007 do not count for the purposes of respecting the 50% aid ceiling. This assistance promotes the distribution of national films abroad and, consequently, its effects do not add up to those of national schemes focusing on national production and distribution.
- (20) Legal obligations imposed by EFTA States upon TV broadcasters to invest in audiovisual production do not constitute State aid, where these investments provide a reasonable compensation to broadcasters. The extent to which these legal obligations may be considered State aid as such has to be considered in view of the development of the Court of Justice jurisprudence after its judgement of 13.3.2001 in Case C-379/98 (PreussenElektra).
- (21) In the Authority's view, the above criteria strike a balance between the aims of cultural creation, the development of the EEA audiovisual production and the respect of the EEA rules on State aid.