

## PART IV: SECTOR SPECIFIC RULES

### State aid for films and other audiovisual works<sup>1</sup>

(“2014 Film and Audiovisual Guidelines”)

*CONSOLIDATED VERSION\**

#### 1. Introduction

- (1) Audiovisual works, particularly films, play an important role in shaping European identities. They reflect the cultural diversity of the different traditions and histories of the States and regions within the European Economic Area (“EEA”). Audiovisual works are both economic goods, offering important opportunities for the creation of wealth and employment, and cultural goods which mirror and shape our societies.
- (2) Amongst audiovisual works, films still have a particular prominence, because of their cost of production and cultural importance. Film production budgets are substantially higher than for other audiovisual content, they are more frequently the subject of international coproduction, and the duration of their exploitation life is longer. Films in particular face strong competition from outside Europe. On the other hand, there is little circulation of European audiovisual works outside their country of origin.
- (3) This limited circulation results from the fragmentation of the European audiovisual sector into national or even regional markets. While this is related to Europe's linguistic and cultural diversity, proximity is also built into the public support for European audiovisual works, with which national, regional and local funding schemes subsidise many small production companies.
- (4) It is generally accepted that aid is important to sustain European audiovisual production. It is difficult for film producers to obtain a sufficient level of upfront commercial backing to put together a financial package so that production projects can proceed. The high risk associated with their businesses and projects, together with the perceived lack of profitability of the sector, make it dependent on state aid. Left purely to the market, many of these films would not have been made because of a combination of the high investment required and the limited audience for European audiovisual works. In these circumstances, the fostering of audiovisual production by the EFTA Surveillance Authority (“the Authority”) and the EEA States have a role to ensure that their culture and creative capacity can be expressed and the diversity and richness of European culture reflected.

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*\*Consolidated version including amendments introduced by Decision 302/14/COL. See paragraph 51(7). The amendments are shown in italicized text.*

*This document is meant purely as a documentation tool and the Authority does not assume any liability for its contents. It is without prejudice to the official text as published in the Official Journal.*

<sup>1</sup> These Guidelines correspond to the Communication from the European Commission on State aid for films and other audiovisual works, OJ C 332, 15.11.2013, p.1-11.

- (5) MEDIA,<sup>2</sup> the European Union's support programme for the film, television and new media industries, offers a variety of funding schemes, each targeting different areas of the audiovisual sector, including schemes for producers, distributors, sales agents, organisers of training courses, operators in new digital technologies, operators of video-on-demand (VoD) platforms, exhibitors and organisers of festivals, markets and promotional events. It encourages the circulation and promotion of European films with particular emphasis on non-national European films. These actions will be continued in the MEDIA Sub-programme within Creative Europe, the new European support programme for the cultural and creative sectors.

## 2. Why control state aid for films and other audiovisual works?

- (6) EEA States have implemented a wide range of support measures for the production of films, TV programmes and other audiovisual works. EEA States annually provide substantial sums of film support, through national, regional and local support schemes. The rationale behind these 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.
- (7) With this support, Europe has become one of the largest producers of films in the world. In 2012, the European audiovisual market for filmed entertainment was valued at € 17 billion.<sup>3</sup> A large number of people are employed in the audiovisual sector in the EEA.<sup>4</sup>
- (8) This makes film production and distribution not only a cultural but also a significant economic activity. Furthermore, film producers are active on an international level and audiovisual works are traded internationally. This means that such aid in the form of grants, tax incentives or other types of financial support is liable to affect trade between EEA States. The producers and audiovisual works which receive such support are likely to have a financial and hence competitive advantage over those which do not. Consequently, such support may distort competition and is regarded as state aid pursuant to Article 61(1) of the Agreement on the European Economic Area ("EEA Agreement"). According to Article 62 of the EEA Agreement the Authority is therefore obliged to assess the compatibility of aid to the audiovisual sector with the EEA market, as it does with state aid measures in other sectors.
- (9) Article 61(1) of the EEA Agreement prohibits aid granted by the state or through state resources, which distorts or threatens to distort competition and trade between EEA States. However, the Authority may exempt certain state aid from this prohibition. One of these exemptions is Article 61(3)(c) of the EEA Agreement for aid to facilitate the development of certain economic activities where such aid does not adversely affect trading conditions to an extent contrary to the common interest.

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<sup>2</sup> The EFTA states are full members of the MEDIA programme.

<sup>3</sup> PWC Global Entertainment and Media Outlook 2013-2017, <http://www.pwc.com/gx/en/global-entertainment-media-outlook/segment-insights/filmed-entertainment.jhtml>

<sup>4</sup> Study by KEA European Affairs, Multi-Territory Licensing of Audiovisual Works in the European Union, Final Report prepared for the European Commission, DG Information Society and Media, October 2010, p. 21, <http://www.keanet.eu/docs/mtl%20-%20full%20report%20en.pdf>.

- (10) The EEA Agreement recognises the need to strengthen cultural cooperation in Article 13 of Protocol 31 to the Agreement. The EEA Agreement does not contain a “cultural exemption” similar to Article 107(3)(d) TFEU, which provides for a specific possibility of exemption to the general incompatibility principle of Article 107(1) TFEU for aid granted to promote culture. Nevertheless, the Authority considers that, in line with its constant practice,<sup>5</sup> support measures for films and other audiovisual works may be approved on cultural grounds on the basis of Article 61(3)(c) of the EEA Agreement. In its assessment, the Authority will apply the same criteria as those applied by the European Commission for the purposes of Article 107(3)(d) TFEU.
- (11) Audiovisual aid contributes to the medium- to long-term sustainability of the European film and audiovisual sectors across all EEA States and increases the cultural diversity of the choice of works available to European audiences.
- (12) As Parties to the UNESCO Convention on the Protection and the Promotion of the Diversity of Cultural Expressions, Norway and Iceland are committed to integrating the cultural dimension as a vital element in their policies.<sup>6</sup>

### 3. Developments since 2001

- (13) The European Commission set out assessment criteria for state aid for the production of films and other audiovisual works in its 2001 Cinema Communication.<sup>7</sup> The validity of these criteria was extended in 2004,<sup>8</sup> 2007<sup>9</sup> and 2009<sup>10</sup> and expired on 31 December 2012. The Authority’s Guidelines on state aid to cinematographic and other audiovisual works (“the Authority’s 2008 Guidelines”) were originally set out in 2008 and were based on the above-mentioned Communications of the European Commission from 2001, 2004 and 2007.<sup>11</sup> The current Guidelines pursue the main lines of the 2001 Communication and of the Authority’s 2008 Guidelines, whilst responding to a number of trends which have emerged since 2001.
- (14) The aid schemes approved by the Commission and the Authority since the 2001 rules came into force show that EEA States use a wide variety of aid mechanisms and conditions. Most schemes follow the model for which the assessment criteria of the 2001 Communication were designed, namely grants awarded to selected film productions, where the maximum aid is determined as a percentage of the production budget of the aid

<sup>5</sup> Norway: Decision No 32/02/COL of 20.2.2002, No 169/02/COL of 18.9.2002, No 186/03 of 29.10.2003, No 179/05/COL of 15.7.2005, No 342/06/COL of 14.11.2006, No 430/08/COL of 2.7.2008, No 774/08/COL of 10.12.2008, No 289/09/COL of 1.7.2009 as well as Decision No 180/09/COL of 31.3.2009; Iceland: Decisions No 114/99/COL of 4.6.1999, No 380/00/COL of 18.12.2000, No 390/06/COL of 13.12.2006, No 255/09/COL of 10.6.2009 and No 262/12/COL of 4.7.2012; Liechtenstein: Decision No 192/00/COL of 27.9.2000, No 267/06/COL of 20.9.2006 and No. 395/11/COL of 14.12.2011.

<sup>6</sup> The Principality of Liechtenstein is however not a Party to the UNESCO Convention on the Protection and the Promotion of the Diversity of Cultural Expressions.

<sup>7</sup> Communication from the 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, OJ C 43, 16.2.2002, p. 6.

<sup>8</sup> OJ C 123, 30.4.2004, p. 1.

<sup>9</sup> OJ C 134, 16.6.2007, p. 5.

<sup>10</sup> OJ C 31, 7.2.2009, p. 1.

<sup>11</sup> The updated version of the State Aid Guidelines is published on the Authority’s website at: <http://www.eftasurv.int/state-aid/legal-framework/state-aid-guidelines/>. Part VII of the State Aid Guidelines sets out Sector Specific rules on state aid to cinematographic and other audiovisual works, OJ L 105, 21.4.2011, p 32-78 EEA Supplement No 23.

beneficiary. However, a growing number of EEA States introduced schemes which define the aid amount as a percentage of the expenditure on production activity undertaken in the granting EEA State only. These schemes are often designed in the form of a tax reduction or otherwise in a way which applies automatically to a film which fulfills certain criteria for its eligibility for aid. Compared to film funds which individually award support to single films upon application, these schemes with their automatic application allow film producers to factor in a foreseeable amount of funding already in the film planning and development phase.

- (15) Regarding the scope of aided activities, some EEA States also offer aid to activities other than film production. This includes aid to film distribution or to cinemas, for example to support rural cinemas or arthouse cinemas in general or to cover their renovation and modernisation, including their transition to digital projection. Some EEA States support audiovisual projects which go beyond the traditional concept of film and TV productions, in particular interactive products like transmedia or games. In these cases, the Commission and the Authority have applied the criteria of the Cinema Communication and the Authority's 2008 Guidelines as a reference to assess the necessity, proportionality and adequacy of the aid, whenever such aid has been notified. Increased competition among EEA States to use state aid to attract inward investment from large-scale film production companies of third countries has also been noted. These issues were not addressed in the 2001 Communication nor in the Authority's 2008 Guidelines.
- (16) Already the 2001 Communication announced that the Commission would review the maximum level of territorial spending obligations in this sector permitted under the State aid rules. Territorial spending obligations in film-funding schemes require a certain part of the supported film budget to be spent in the EEA State granting the aid. The 2004 extension identified territorial spending obligations in film funding schemes as an issue which needs to be further assessed in view of its compliance with the internal market principles of the Treaty. Case-law of the Court of Justice and the EFTA Court, adopted since 2001 on the importance of the internal market with regard to rules on the origin of goods and services, also needs to be taken into account.<sup>12</sup>
- (17) Accordingly, when extending the state aid assessment criteria of the 2001 Cinema Communication in 2009, the Commission noted the need for further reflection on the implications of these developments and a review of the assessment criteria.

#### **4. Specific changes**

- (18) These Guidelines address the issues above and introduce amendments to the criteria of the 2001 Communication and the Authority's 2008 Guidelines. In particular, these Guidelines cover state aid for a wider scope of activities, highlight the principle of subsidiarity in the area of cultural policy and the respect of the fundamental freedoms (Articles 4, 8, 28, 31, 36 and 40 of the EEA Agreement), introduce a higher maximum aid intensity level for cross-border productions and cater for the protection of and access to film heritage. The Commission and the Authority believe that these changes are necessary in view of the developments since 2001 and will help European works to be more competitive and pan-European in the future.

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<sup>12</sup> In particular the Judgment of the Court of Justice of 10.3.2005 in case *Laboratoires Fournier (C-39/04)*, ECR 2005 I-2057.

#### 4.1 Scope of activities

- (19) Regarding the scope of activities to which these Guidelines apply, the state aid criteria of the 2001 Cinema Communication and the Authority's 2008 Guidelines focused on the production of films. As noted, some EEA States however offer also support for other related activities, such as script-writing, development, film distribution, or film promotion (including film festivals). The objective of protecting and promoting Europe's cultural diversity through audiovisual works can only be achieved if these works are seen by audiences. Aid to production alone risks stimulating the supply of audiovisual content without ensuring that the resulting audiovisual work is properly distributed and promoted. It is therefore appropriate that aid may cover all aspects of film creation, from story concept to delivery to the audience.
- (20) Regarding aid to cinemas, usually the amounts involved are small, so that for example rural and arthouse cinemas should be sufficiently served by the levels of aid which fall under the *de minimis* Regulation.<sup>13</sup> However, if an EEA State can justify that more support to cinemas is required, the aid will be assessed under the present Guidelines as aid to promote culture under Article 61(3)(c) of the EEA Agreement. Aid for cinemas promotes culture because the principle purpose of cinemas is the exhibition of the cultural product of film.
- (21) Some EEA States considered support to audiovisual projects which go beyond the traditional concept of film and TV productions. Transmedia storytelling (also known as multi-platform storytelling or cross-media storytelling) is the technique of telling stories across multiple platforms and formats using digital technologies, like films and games. Importantly, these pieces of content are linked together.<sup>14</sup> Since transmedia projects are inevitably linked to the production of a film, the film production component is considered to be an audiovisual work within the scope of these Guidelines.
- (22) Conversely, although games may represent one of the fastest-growing form of mass media in the coming years, not all games necessarily qualify as audiovisual works or cultural products. They have other characteristics regarding production, distribution, marketing, and consumption than films. Therefore, the rules designed for film production cannot apply automatically to games. Furthermore, contrary to the film and television sector, the Commission and the Authority do not have a critical mass of decisions on state aid to games. Consequently, these Guidelines do not cover aid granted to games. Any aid measures in support of games not meeting the conditions of the General Block Exemption Regulation (GBER)<sup>15</sup> or the *de minimis* Regulation will continue to be addressed on a case-by-case basis. To the extent that the necessity of an aid scheme targeted at games

<sup>13</sup> Commission Regulation (EC) No 1998/2006 of 15.12. 2006 on the application of Articles 87 and 88 of the Treaty to *de minimis* aid, OJ L 379, 28.12.2006, p. 5, incorporated as point 1 e a into Annex XV of the EEA Agreement by Joint Committee Decision No 29/2007 (OJ L 209, 9.8.2007, p. 52 and EEA Supplement No 38, 9.8.2007, p. 34), e.i.f. 28.4.2007. This Regulation has been replaced by Commission Regulation (EC) No 1407/2013 of 18.12.2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid OJ L 352, 24.12.2013, p.1. Regulation to be incorporated into the EEA Agreement.

<sup>14</sup> Not to be confused with traditional cross-platform media franchises, sequels or adaptations.

<sup>15</sup> Commission Regulation (EC) No 800/2008 of 6.8.2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty (General block exemption Regulation), OJ L 214, 9.8.2008, p. 3, as amended by Commission Regulation (EU) No 1224/2013 of 29.11.2013 as regards its period of application, OJ L 320, 30.11.2013, p. 22, incorporated as point 1 j into Annex XV of the EEA Agreement by Joint Committee Decision No 29/2014 (not yet published in the OJ or EEA Supplement), e.i.f 15.2.2014.

which serve a cultural or educational purpose can be demonstrated, the Authority will apply the aid intensity criteria of these Guidelines by analogy.

#### 4.2 Cultural criterion

- (23) To be compatible with Article 61(3)(c) of the EEA Agreement, aid to the audiovisual sector needs to promote culture and the definition of a cultural product is primarily a responsibility of the EEA States. In assessing an audiovisual support scheme, the Authority acknowledges that its task is limited to verifying whether an EEA State has a relevant, effective verification mechanism in place able to avoid manifest error. This would be achieved through the existence of either a cultural selection process to determine which audiovisual works should benefit from aid or a cultural profile to be fulfilled by all audiovisual works as a condition of the aid. In line with the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions of 2005,<sup>16</sup> the Authority notes that the fact that a film is commercial does not prevent it from being cultural.
- (24) Linguistic diversity is an important element of cultural diversity; hence, defending and promoting the use of one or several of the languages of an EEA State also serves the promotion of culture.<sup>17</sup> According to the well-established case-law of the European Court of Justice, both the promotion of a language of an EEA State<sup>18</sup> and cultural policy<sup>19</sup> may constitute an overriding requirement relating to the general interest which justifies a restriction on the freedom to provide services. Therefore, EEA States may require, as condition for the aid, *inter alia*, that the film is produced in a certain language, when it is established that this requirement is necessary and adequate to pursue a cultural objective in the audiovisual sector, which can also favour the freedom of expression of the different social, religious, philosophical or linguistic components which exist in a given region. The fact that such a criterion may constitute in practice an advantage for cinema production undertakings which work in the language covered by that criterion appears inherent to the objective pursued.<sup>20</sup>

#### 4.3 Territorial spending obligations

- (25) Obligations imposed by the authorities granting the aid on film producers to spend a certain part of the film production budget in a particular territory (so called "territorial spending obligations") have been subject to particular attention since the European Commission started looking into film support schemes. The 2001 Cinema Communication and the Authority's 2008 Guidelines allowed EEA States to require that up to 80% of the entire film budget needed to be spent on their territory. The schemes which define the aid amount as a percentage of the expenditure on production activity undertaken in the granting EEA State do try already by their design to draw as much production activity as possible to the aid granting EEA State and contain an inherent element of territorialisation of expenditure. The current Guidelines need to take into account these different types of aid schemes now in place.

<sup>16</sup> The Convention states in Article 4(4): "Cultural activities, goods and services refers to those activities, goods and services, which ... embody or convey cultural expressions, irrespective of the commercial value they may have. Cultural activities may be an end in themselves, or they may contribute to the production of cultural goods and services."

<sup>17</sup> Judgement of the Court of Justice of 5.3.2009, *UTECA*, case C-222/07, paragraphs 27-33.

<sup>18</sup> Judgement of the Court of Justice of 13 December 2007, *United Pan-Europe Communications Belgium*, case C250/06, paragraph 43.

<sup>19</sup> Judgement of the Court of Justice of 28.10.1999, *ARD*, case C-6/98, paragraph 50.

<sup>20</sup> Judgement of the Court of Justice of 5.3.2009, *UTECA*, case C-222/07, paragraphs 34, 36.

- (26) Territorial spending obligations constitute a restriction of the internal market for audiovisual production. Therefore, the Commission commissioned an external study on territorial conditions imposed on audiovisual production which was completed in 2008.<sup>21</sup> As stated in the 2009 extension of the Cinema Communication, overall, the study was inconclusive: it could not judge whether or not the positive effects of territorial conditions outweighed the negative effects.
- (27) However, the study found that the costs of film production seem to be higher in those countries which apply territorial conditions than in those which do not. The study also found that territorial conditions may cause some obstacles to co-productions and may make them less efficient. Overall, the study found that the more restrictive territorial spending obligations do not lead to sufficient positive effects to justify maintaining the current levels of restrictions. It also did not demonstrate the necessity of these conditions in view of the objectives pursued.
- (28) A national measure which hampers the exercise of fundamental freedoms guaranteed by the EEA Agreement may only be acceptable when complying with several conditions: it has to pursue an overriding reason of general interest, it has to be suitable for securing the attainment of the objective which it pursues and must not go beyond what is necessary in order to attain it.<sup>22</sup> The specific characteristics of the film industry, in particular the extreme mobility of productions, and the promotion of cultural diversity and national culture and languages, may constitute an overriding requirement of general interest capable of justifying a restriction on the exercise of the fundamental freedoms. Therefore, the Authority continues to acknowledge that, to a certain extent, such conditions may be necessary to maintain a critical mass of infrastructure for film production in the EEA State or region granting the aid.
- (29) Hardly any EEA States impose territorial spending obligations up to the ceiling of 80% of the production budget allowed by the 2001 Communication and the Authority's 2008 Guidelines. Several EEA States do not have territorial spending obligations at all in their schemes. Many regional schemes are linked to the aid amount and require that 100% or 150% of this amount must or should be spent in the granting EEA State, without being specific on the origin of the subcontracted services or the origin of goods used in the production. In some schemes, the producer receiving the aid is free to spend at least 20% of the production budget outside that EEA State. Certain EEA States design the film aid as a percentage of just the local expenditure.
- (30) The amount of expenditure which is subject to territorial spending obligations should at least be proportionate to the actual financial commitment of an EEA State and not with the overall production budget. This was not necessarily the case with the territorial criterion of the 2001 Communication<sup>23</sup> or the Authority's 2008 Guidelines.
- (31) There are essentially two, distinct aid mechanisms applied by EEA States awarding aid for film production:

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<sup>21</sup> 2008 Study on the Economic and Cultural Impact, notably on Co-productions, of Territorialisation Clauses of state aid Schemes for Films and Audiovisual Productions, [http://ec.europa.eu/avpolicy/docs/library/studies/territ/final\\_rep.pdf](http://ec.europa.eu/avpolicy/docs/library/studies/territ/final_rep.pdf).

<sup>22</sup> Judgement UTECA, case C-222/07, §25.

<sup>23</sup> For example: a producer is making a film with a budget of €10 million and applies for aid to a scheme offering at most €1 million per film. It is disproportionate to exclude the film from the scheme on the grounds that the producer does not expect to spend at least €8 million of the production budget in the territory offering the aid.

- aid awarded - e.g. by a selection panel - as direct grants, e.g. defined as a percentage of the production budget; and
- aid awarded and defined as a proportion of the production expenditure in the granting EEA State (e.g. a tax incentive).

(32) Paragraph (48) sets the limits for each mechanism within which the Authority can accept that an EEA State is applying territorial spending obligations which could be still considered as necessary and proportionate to a cultural objective.

(33) In the case of aid awarded as grants, the maximum territorial spending obligation should be limited to 160% of the aid amount. This corresponds to the previous '80% of the production budget' rule when the aid intensity reaches the general maximum stated in paragraph 50(2) namely 50% of the production budget.<sup>24</sup>

(34) In the case of aid awarded as a percentage of the expenditure on production activity in the granting EEA State, there is an incentive to spend more in the EEA State to receive more aid. Limiting the eligible production activity to that which takes place in the EEA State granting the aid is a territorial restriction. Consequently, to establish a limit which is comparable to the limit for grants, the maximum expenditure subject to territorial spending obligations is 80% of the production budget.

(35) In addition, under either mechanism, any scheme may have an eligibility criterion requiring a minimum level of production activity in the territory of the granting EEA State. This level shall not exceed 50% of the production budget.

(36) In any case, EEA States are under no obligation to impose territorial spending obligations.

#### **4.4 Competition to attract major foreign productions**

(37) Since 2001, several EEA States have introduced schemes with the objective to attract high profile productions to Europe, in global competition with the locations and facilities elsewhere, such as in the United States, Canada, New Zealand, or Australia. Contributors to the public consultations preceding the new Commission Communication agreed that these productions were necessary to maintain a high quality audiovisual infrastructure, to contribute to the employment of high class studio facilities, equipment and staff, and to contribute to transfer of technology, know-how and expertise. The partial employment of facilities by foreign productions would also help to have the capacities to realise high quality and high profile European productions.

(38) Regarding the possible effect on the European audiovisual sector, foreign production may have a lasting impact as it usually makes wide use of this local infrastructure and of local cast. Overall, this may thus have a positive effect on the national audiovisual sector. It should also be noted that many of the films which are considered to be major third country projects are in fact co-productions involving also European producers. Thereby these subsidies would contribute also to the promotion of European audiovisual works and to sustaining facilities for national productions.

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<sup>24</sup> For example: a producer is making a film with a budget of €10 million and applies for aid to a scheme offering at most €1 million per film. The producer can only be expected to spend €1.6 million of the production budget in the territory offering the aid. However, if the film budget had been €2 million and received the maximum aid amount, the producer would face a territorial spending obligation corresponding to 80% of the production budget.

(39) Therefore, the Authority considers that such aid may in principle be compatible with Article 61(3)(c) of the EEA Agreement as aid to promote culture under the same conditions as aid for European production. However, as the amounts of aid for major international productions can be very high, the Authority will monitor the further development of this type of aid to ensure that competition takes place primarily on the basis of quality and price, rather than on the basis of state aid.

#### **4.5 Cross-border productions**

(40) Few European films are distributed outside their production territories. The likelihood that a European film is released in several EEA States is higher in the case of co-productions involving producers from several countries. In view of the importance of co-operation of producers from different EEA States for the production of European works which are seen across several EEA States, the Authority considers that a higher aid intensity is justified for co-productions funded by more than one EEA State and involving producers from more than one EEA State.

#### **4.6 Film heritage**

(41) The Authority is of the view that films should be collected, preserved and accessible for future generations for cultural and educational purposes. The Education, Youth, Culture & Sports Council Conclusions on European film heritage of 18 November 2010<sup>25</sup> invited EU Member States to ensure that films that have been supported by State aid are deposited with a film heritage institution,<sup>26</sup> together with all related material, where feasible, and the appropriate rights in relation to the preservation and cultural and non-commercial use of films and related material.

(42) Some EU Member States have introduced the practice of paying the last instalment of the aid after the film heritage institution has certified the deposit of the aided film. This has proved to be an efficient instrument for enforcing the contractual deposit obligation.

(43) Some EU Member States have also introduced provisions in their grant agreements to allow the use of publicly-funded films for specified purposes in the execution of the public interest missions of the film heritage institutions after an agreed period of time and provided that this does not interfere with the normal use of the film.

(44) The Authority is of the view that EEA States should also encourage and support producers to deposit a copy of the aided film in a film heritage institution designated by the funding body for preservation, as well as for specified non-commercial use agreed with the right holder(s) in compliance with intellectual property rights and without prejudice to fair remuneration for the right holder(s) after an agreed period of time set in the grant agreement and such that this does not interfere with the normal use of the film.

### **5. Assessing the compatibility of the aid**

(45) When it assesses aid for films and other audiovisual works, the Authority verifies on the basis of the above considerations

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<sup>25</sup> OJ C 324, 1.12.2010, p. 1.

<sup>26</sup> Film Heritage Institutions are designated by Member States in order to collect, preserve and make available film heritage for cultural and educational purposes.

- 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;
- Secondly, whether the scheme fulfils the specific compatibility criteria for aid, set out below.

### 5.1 General legality

- (46) The Authority must first verify that the aid respects the "general legality" principle and that the eligibility conditions and award criteria 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 and the principles regarding free movement of goods, free movement of workers, freedom of establishment, freedom to provide services and freedom of movement of capital have been respected (Articles 4, 8, 28, 31, 36 and 40 of the EEA Agreement). The Authority enforces these principles in conjunction with the application of competition rules when the provisions in breach of these principles are inseparable from the operation of the scheme.
- (47) In compliance with the above principles, aid schemes must not, for example, reserve the aid exclusively for nationals; require beneficiaries to have the status of national undertakings established under national commercial law (undertakings established in one EEA State 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); or oblige foreign companies providing filmmaking services to circumvent the terms and conditions of Directive 96/71/EC with respect to their posted workers.<sup>27</sup>
- (48) In view of the specific situation of the European film sector, film production support schemes may either:
- require that up to 160% of the aid amount awarded to the production of a given audiovisual work is spent in the territory granting the aid; or
  - calculate the aid amount awarded to the production of a given audiovisual work as a percentage of the expenditure on film production activities in the granting EEA State, typically in case of support schemes in the form of tax incentives.
- (49) In both cases, EEA States may require a minimum level of production activity in their territory for projects to be eligible for any aid. This level cannot, however, exceed 50% of the overall production budget. In addition, the territorial linking shall in no case exceed 80% of the overall production budget.

### 5.2 Specific assessment criteria under Article 61(3)(c) of the EEA Agreement

- (50) The objective for supporting the production of European audiovisual works and ensuring the existence of the infrastructure necessary for their production and exhibition is the shaping of European cultural identities and the enhancement of cultural diversity. Therefore, the purpose of the aid is the promotion of culture. Such aid may be compatible

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<sup>27</sup> Directive 96/71/EC of the European Parliament and of the Council of 16.12.1996 concerning the posting of workers in the framework of the provision of services, OJ 1997 L 18, incorporated as point 30 to Annex XVIII to the EEA Agreement by Joint Committee Decision No 37/98 (OJ L 310, 19.11.1998, p. 25), e.i.f 1.05.1998.

with the EEA Agreement in accordance with Article 61(3)(c) of the EEA Agreement. Undertakings in the film and TV programme production sector may also benefit from other aid types granted under Article 61(3)(a) and (c) of the EEA Agreement (e.g. regional aid, aid for SME, Research and Development, training, or employment), within the maximum aid intensities in the case of cumulation of aid.

(51) In the case of schemes designed to support the script-writing, development, production, distribution and promotion of audiovisual works covered by these Guidelines, the Authority will examine the following criteria with reference to the audiovisual work which will benefit from the aid to assess whether the scheme is compatible with Article 61(3)(c) of the EEA Agreement:

- 1) The aid is directed to a cultural product. Each EEA State ensures that the content of the aided production is cultural according to its own national criteria, through an effective verification process to avoid a manifest error: either through the selection of film proposals, e.g. by a panel or a person entrusted with the selection, or, in the absence of such a selection process, by establishing a list of cultural criteria against which each audiovisual work will be verified.
- 2) The aid intensity must in principle be limited to 50% of the production budget, with a view to stimulating normal commercial initiatives. The aid intensity for cross-border productions funded by more than one EEA State and involving producers from more than one EEA State may be up to 60% of the production budget. Difficult audiovisual works<sup>28</sup> and co-productions involving countries from the DAC List of the OECD<sup>29</sup> are excluded from these limits. Films whose sole original version is in an official language of an EEA State with a limited territory, population or language area may be regarded as difficult audiovisual works in this context.
- 3) In principle, there is no limit for aid to script writing or development. However, if the resulting script or project is ultimately made into a film, the costs of script-writing and development are subsequently included in the production budget and taken into account for calculating the maximum aid intensity for the audiovisual work as set out in sub-paragraph (2) above.
- 4) The costs of distributing and promoting audiovisual works which are eligible for production support may be supported with the same aid intensity as they were or could have been for their production.
- 5) Apart from script-writing, development, distribution or promotion, aid granted for specific production activities is not allowed. Consequently, the aid must

<sup>28</sup> Such as short films, films by first-time and second-time directors, documentaries, or low budget or otherwise commercially difficult works. Under the subsidiarity principle, it is up to each EEA State to establish a definition of difficult film according to national parameters.

<sup>29</sup> The DAC list shows all countries and territories eligible to receive official development assistance. These consist of all low and middle income countries based on gross national income (GNI) per capita as published by the World Bank, with the exception of G8 members, EU members, and countries with a firm date for entry into the EU. The list also includes all of the Least Developed Countries (LDCs) as defined by the United Nations. See: [http://www.oecd.org/document/45/0,3746,en\\_2649\\_34447\\_2093101\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/45/0,3746,en_2649_34447_2093101_1_1_1_1,00.html). It shall be noted that only Norway and Iceland are DAC members and thus follow the [DAC guidelines and reference documents](#) in formulating national development co-operation policies.

not be reserved for individual parts of the production value chain. Any aid granted to the production of a specific audiovisual work should contribute to its overall budget. The producer should be free to choose the items of the budget that will be spent in other EEA States. This is to ensure that the aid has a neutral incentive effect. 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 would be incompatible with the EEA Agreement.

- 6) EEA States should encourage and support producers to deposit a copy of the aided film in a film heritage institution designated by the funding body for preservation, as well as for specified non-commercial use agreed with the right holder(s) in compliance with intellectual property rights and without prejudice to fair remuneration for the right holder(s) after an agreed period of time set in the grant agreement and such that this does not interfere with the normal use of the film.
- 7) *EFTA States shall ensure the publication of the following information on a comprehensive State aid website, at national or regional level:*
- *the full text of the approved aid scheme or the individual aid granting decision and its implementing provisions, or a link to it,*
  - *the identity of the granting authority(ies),*
  - *the identity of the individual beneficiaries, the form and amount of aid granted to each beneficiary, the date of granting, the type of undertaking (SME/large company), the region in which the beneficiary is located (at statistical region level 2)<sup>(i)</sup> and the principal economic sector in which the beneficiary has its activity (at NACE group level).<sup>(ii)</sup>*

*Such a requirement can be waived with respect to individual aid awards below EUR 500 000. For schemes in the form of tax advantage, the information on individual aid amounts<sup>(iii)</sup> can be provided in the following ranges (in EUR million): [0.5-1]; [1-2]; [2-5]; [5-10]; [10-30]; [30 and more].*

- (i) *The term “Statistical region” is used instead of the acronym “NUTS” in the corresponding Commission Guidelines. NUTS is derived from the title “Nomenclature of Territorial Units for Statistics” according to Regulation (EC) No 1059/2003 of the European parliament and of the Council of 26.5.2003 on the establishment of a common classification of territorial units for statistics (NUTS) (OJ L 154, 21.6.2003, p.1). This regulation has not been incorporated into the EEA Agreement. However, in order to achieve common definitions in an ever-increasing demand for statistical information at a regional level, the Statistical Office of the European Union, Eurostat, and the National Institutes of the candidate countries and EFTA have agreed that statistical regions would be established similar to the NUTS classification.*
- (ii) *With the exception of business secrets and other confidential information in duly justified cases and subject to the Authority's agreement (See the Authority Guidelines on professional secrecy in state aid decisions (OJ L154, 8.6.2006, p. 27 and EEA Supplement No 29, 8.6.2006, p.1).*
- (iii) *The amount to be published is the maximum allowed tax benefit and not the amount deducted each year (e.g. in the context of tax credit, the maximum allowed tax credit shall be published rather than the actual amount which might depend on the taxable revenues and vary each year).*

*Such information must be published after the decision to grant the aid has been taken, must be kept for at least 10 years and must be available to the general public without restrictions.<sup>(iv)</sup> EFTA States will not be required to publish the abovementioned information before 1 July 2016.<sup>(v)</sup>*

- (52) The modernisation of cinemas, including their digitisation, may be aided where the EEA States can justify the necessity, proportionality and adequacy of such aid. On this basis, the Authority would assess whether the scheme is compatible with Article 61(3)(c) of the EEA Agreement.
- (53) In determining whether the maximum aid intensity is respected, the total amount of public support measures of EEA States for the aided activity or project shall be taken into account, regardless of whether that support is financed from local, regional, national or EU sources. However, funds awarded directly by EU programmes like MEDIA, without the involvement of EEA States in the award decision, are not State resources. Therefore, their assistance does not count for the purposes of respecting the aid ceilings.

## **6. Appropriate Measures**

- (54) The Authority proposes as appropriate measures for the purposes of Article 62(1) of the EEA Agreement that EEA States bring their existing schemes regarding film funding in line with these Guidelines within 2 years of its publication in the EEA Supplement to the Official Journal of the European Union. EEA States should confirm to the Authority within one month of publication of these Guidelines in the EEA Supplement to the Official Journal that they agree to the appropriate measures proposed. In the absence of any reply, the Authority will take it that the EEA State concerned does not agree.

## **7. Application**

- (55) The Authority will apply the principles set out in these Guidelines from 1 April 2014.
- (56) The Authority will apply these Guidelines to all notified aid measures in respect of which it is called upon to take a decision after 1 April 2014, even where the aid measures were notified prior to that date.

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<sup>(iv)</sup> *This information shall be published within 6 months from the date of granting (or, for aid in the form of tax advantage, within 1 year from the date the tax declaration is due). In case of unlawful aid, EFTA States will be required to ensure the publication of this information ex post, at least within 6 months from the date of the Authority decision. The information should be available in a format which allows data to be searched, extracted, and easily published on the internet, for instance in CSV or XML format.*

<sup>(v)</sup> *Publication of information on aid awards granted before 1 July 2016, and for fiscal aid, publication for aid claimed or granted before 1 July 2016, will not be required.*

(57) The Authority will examine the compatibility with the EEA Agreement of any aid granted without its authorisation and therefore in breach of Article 1(3) of Part I of Protocol 3 to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice on the basis of:

- a) these Guidelines if some or all of that aid is granted after the publication of these Guidelines in the EEA Supplement to the Official Journal of the European Union;
- b) the Authority's 2008 Guidelines, in all other cases.