A new legal framework for film funding? Introduction to the current debate

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Levelling the Playing Field?
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> Susan’s [Newman-Baudais] quotation continues like this: “it has been observed that no two Chancery lawyers can talk about it for five minutes without coming to a total disagreement as to all the premises”.

I will leave the legal hair splitting to the upcoming panel. My role here today is that of a neutral observer who has been asked to fill you in on the facts of current policy shaping in Brussels. As such, I will firstly provide you with a general overview of the Cinema Communication adopted by the European Commission in 2001. Secondly, I will describe briefly the current consultation process that aims at adopting a new Cinema Communication before the end of 2012.

Some of you may be asking yourselves: Why a bunch of bureaucrats in Brussels have to decide on how European countries support cinema?

According to the EU treaty, the actions of the European Union in the field of culture are governed by the principle of subsidiarity (Article 5.3 TEU). That is, the EU does not have exclusive competence on culture, so it can only act if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the member states but can rather be better achieved at Union level.

So, if the EU has no exclusive competence in culture matters, what’s the problem?

The problem (if we wish to call it like this) is that the European Union has exclusive competence for establishing the competition rules that guarantee the functioning of the internal market (Article 3(b) TFEU). And competition rules include rules on state aid (Articles 107-109 TFEU). Said otherwise, rules on public funding.

As the EU competition watchdog, the European Commission has the duty to judge upon the compatibility of national public funding schemes with EU law. Firstly, the Commission has to assess whether national aid schemes respect the general provisions of the EU Treaty. Here the Commission must verify, for example, that the EC Treaty basic principles like the prohibition of discrimination on the grounds of nationality, freedom of establishment, free movement of goods and freedom to provide services have been respected (Articles 18, 34, 36, 45, 49, 54 and 56 TFEU).

Secondly, the Commission assesses the compatibility of the support scheme with the specific provisions of the TFEU dealing with state aid.

Under these provisions (Article 107.3(d) TFEU), aid to promote culture and heritage conservation is compatible with the treaties “where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest”.

There are further rules but I do not want to bore you with those.

As you may know, in 2001 the European Commission issued a so-called Cinema Communication. This document explains the Commission's specific criteria for assessing public funding schemes under state aid rules. Such a scheme must fulfil the following rules in order to be compatible with EU state aid rules:

> (1) The aid must be directed to a cultural product. The definition of what "cultural" is belongs to each member state, but each member state must ensure that the content of the aided production is cultural according to verifiable national criteria.
> (2) Aid intensity must in principle be limited to 50% of the production budget but there is an exception to this rule for difficult and low budget films.
> (3) Aid for specific film-making activities (e.g. post-production) is prohibited.
> (4) The producer must be free to spend at least 20% of the film budget in other member states. Otherwise said, a member state can impose that up to 80% of the film budget be spent in its territory.

Please keep in mind this 4th criterion, which I will call the "territoriality criterion", since it will come up later in my presentation and indeed in the panel discussion thereafter.

The state aid rules contained in the 2001 Cinema Communication were originally meant to cover the period until June 2004. However, for various reasons the Commission decided to extend their validity three times thereafter, so that the Communication will expire at the end of 2012.

The fact that the Cinema Communication expires in seven months is one of the reasons why the Commission has engaged a public consultation on this topic. But there are also other reasons. The Commission has identified a number of issues that require further reflection, such as the support for aspects other than production (such as film distribution and digital projection), the territorial criterion, as well as the so-called "subsidy race", that is, the competition among some EU Member States to use state aid to attract investments from large-scale, mainly US, film production companies.

A first public consultation took place last year on the basis of an issues paper published by the Commission. The Issues Paper proposes among many other actions the introduction of measures to counter the subsidy race and the revision of the territoriality criterion. This has been seen with critical eyes by some member states and professional organisations.

In March 2012, the Commission published a draft Cinema Communication based on the Issues Paper and the contributions received during the first consultation. A public consultation on the draft Communcation is currently open until the 14th of June 2012.

The draft Communication keeps intact the spirit of the 2001 Communication but introduces three important amendments:

- extension of the scope of activities covered by the Communication to include all aspects from the story concept to the delivery to the audience;
- introduction of measures to control the subsidy race;
- limitation of the territoriality criterion.

Let me explain these three points:

One major change is the **scope of activities** covered by the draft Communication, which will include all aspects of film creation, from the story concept to the delivery of the film to the audience.

With regard to aid to cinema theatres, the Commission deems it unnecessary to establish specific rules for operating or investment aid to cinemas.

The draft Communication leaves aside certain new forms of audiovisual works, like so-called transmedia projects and video games.

The maximum cumulative aid intensity must in principle be limited to 50% of the production budget. With regard to co-productions, the aid intensity for cross-border productions funded by more than one member state and involving producers from more than one member state may be up to 60% of the production budget. Difficult audiovisual works and co-productions involving certain developing countries are excluded from these limits.

The costs of distribution and promotion of a European audiovisual work may be supported with the same aid intensity as they were or could have been for the work’s production.

The rule concerning maximum aid intensity applies only if the aided audiovisual work is a European work. For films and TV productions that do not meet the definition of a European work, the aid shall therefore be limited to the following regressive maximum aid intensities related to the production budget:

Part of the production budget	Maximum aid intensity
Less than EUR 10 million	50%
EUR 10 million - EUR 20 million	30%
Over EUR 20 million	10%

This rule aims at controlling the **subsidy race** mentioned before. And as you will surely notice in the panel discussion, it is not of everybody’s liking.

Let me give you an example of how this rule works: an EU film EUR 25 million budget could be subsidised with EUR 12,5 million (50% mamimum aid intensity). However, if a non-EU film costs EU 25 million, you have to cut the film budget cake in three parts: 1) less than EUR 10 million, 2) between EUR 10 million and EUR 20 million and 3) any money in excess of EUR 20 million. In this case, the EU country could subsidise 50% of the first EUR 10 million, 30% of the second EUR 10 million, and 10% of the resting EUR 5 million. In practice, and due to territorialisation clauses, the funds provided to a non-EU production by an EU country may have to be spent in that country (in our example that is EUR 8,5 million). Another example: if the film budget is EUR 50 million, a EU film could get EUR 25 million whereas a non-EU film would only get EUR 11 million.

Another controversial issue is the modification of the **territoriality criterion**. As I explained before, under the 2001 Communication a member state can impose that up to 80% of the film budget be spent in its territory.

In the Commission's view, it is not proportionate that Member States require film producers to spend 80% of the production budget in their territories, regardless of the aid amount available. The Commission gives the following 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. In the Commission's view, it is disproportionate to exclude the film from the scheme because the producer does not want to spend at least 8 million euro of the production budget in the territory offering the aid.

The new rule introduced in the draft Communication allows member states to require that up to 100% of the aid awarded to a film production be spent in the territory offering the aid.

Under the new rule, the producer of the film mentioned by the Commission would only have to spend 1 million euro in the country providing the aid, instead of (hypothetically) 8 million euro.

For support schemes such as film tax incentives, in which the aid intensity is based on the production expenditure in a given territory, any production expenditure within the EEA must be eligible. The member state may nonetheless require that up to 100% of production aid be spent in its territory. I have been told that there is a decision of the Court of Justice of the EU that is relevant in this case, but I will leave it to the representative of the Commission to explain this.

That is the state of play right now. According to the responses to the first public consultation, it is to be expected that the European Commission will have an interesting discussion at least with some member states and professional organisations on the most controversial issues such as territorialisation and the "subsidy race". But let's first see what the panellists have to say about all this.

Thank you.