CONTRIBUTION FROM
THE INTERNATIONAL FEDERATION OF FILM DISTRIBUTORS ASSOCIATIONS (FIAD)
TO THE CONSULTATION ON THE
'COMMUNICATION FROM THE COMMISSION ON STATE AID AND OTHER AUDIOVISUAL WORKS'

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FIAD – International Federation of Film Distributors Associations

The International Federation of Film Distributors' Associations (FIAD) represents national organisations of film distribution companies whose main activity is the release of cinematographic works in cinemas. FIAD's members cover the entire range of companies: small and medium-sized companies specialized in art house films, as well as larger companies focused on mainstream films. The members operate in 16 countries where they cover 90 to 100 percent of the theatrical market.

Film distributors are the intermediates between film producers and cinema exhibitors and play an important role in film financing and promotion. Distributors give films the profile they deserve with the release in the first – theatrical – window of rights exploitation. Depending upon the contracts they have with producers, the distributors may have rights for part or all of the following markets: cinemas, physical video, video on demand, television (free or pay television) and internet (streaming).

In this response we will comment in particular on the parts relating to distributors, letting our colleagues from other sectors of the industry answer for their own fields of activity. FIAD would also be glad to assist the Commission with any further information should this be required in the future.

Introduction

FIAD welcomes the opportunity to contribute to the discussion on the revised draft of the *Communication from the Commission on State Aid and Other Audiovisual Works* which was published on 30 April. We are happy to see that some of the elements included in the revised version match those we have proposed in the previous consultations. We recognise that there are a number of aspects in the new draft Communication that have improved compared to the previous drafts. However, strong concerns remain in certain sections, particularly those relating to the new element restricting territorial spending obligations.

In the feedback which follows we have tried to provide an extensive examination. However, due to the time restraints imposed this has limited our capacity to examine the details and seek clear impact assessments from our members. As a consequence it is still not clear to our members what impact the structural changes introduced in this Communication will have on European distributors and what this will mean for sector and cultural diversity in Europe.

Territorial Spending Obligation

FIAD members are concerned with the changes made to territorial spending obligations in the revised Communication. Although we see some improvements compared to the previous drafts, the Commission also introduces a new aspect relating to 'services and goods' for which we see little justification and very high risks.

Increasing the maximum obligation from 100 percent to 160 percent of the aid as proposed in paragraph 52 is an improvement compared to the previous draft. 160 percent ensures there remains an incentive for national governments to provide aid to the film industry. However, the consequence of linking the territorial obligation to the State aid amount could reduce the incentive to co-finance projects for a percentage less than 50 percent as there is less economic interest for the Member State. The exact consequences of this are still being discussed by our Members. As it currently stands the majority of FIAD members are not yet in a position to provide feedback on the long-term effects.

The rationale behind the Commission's decision in paragraph 34 to exclude the possibility for Member States to specify goods and services as part of territorial spending obligations is unclear. This new aspect differs significantly from previous drafts and has left our members surprised and worried. Under Articles 6[1] and 167(2)[2] of the *TFEU* the Commission is required to "contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore." This was also recognised in the Council Decision in 2006 which adopted the *UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions*. In this respect, the Union is given the "competence to carry out actions to support, coordinate or supplement the actions of the Member States." This supporting role is in compliance with Article 5[3] of the *TEU* which lays the foundations for the principle of subsidiarity. It ensures Member States have the necessary flexibility to protect their local culture and promote cultural diversity.

Territorial spending obligations, including the requirements specifying goods and services, are important conditions in the promotion of culture and cultural diversity. Ensuring investment in a specific Member State establishes permanent concentrations of human resources, technical expertise and cultural agents which facilitates cultural creation and promotes local cultural identities. Furthermore, the absence of such a condition in the Member States could remove the political justification and incentive for such aid. Several Member States in the last consultation expressed that the use of public funds derived from taxpayers is legitimised by territorial spending conditions.[4] Therefore, weakening the conditions that can be included could lead Member States to reduce or eliminate financial support, and may also lead to an over complicated funding scheme.

The draft Communication suggests there is a legal basis for excluding goods and services obligations due to the restriction it places on the fundamental freedoms in the *TFEU*. This is justified in paragraph 17 when the Communication references the case involving Laboratoires Fournier.[5] The conclusion in this case was that territorial spending obligations undermine cross-border activities in the internal market. However, contrary to what the Communication concludes, the territorial spending obligation can be

[1] The Treaty on the Functioning of the European Union (TFEU). 2010. Official Journal of the European Union (C 83/49) § 6

[2] TFEU. 2010. Official Journal of the European Union (C 83/49) §167(2)

[3] The Treaty of the European Union. 2010. Official Journal of the European Union (C 83/15) § 5

[4] See contributions made by France, Germany, Ireland and the UK

[5] Judgement of the Court of Justice. 10 March 2005. Laboratoires Fournier SA v. Direction des verifications nationals et internationals (C 39/04), ECR I-2057

justified. This reference to a case involving a tax credit for research activities suggests that State aid to culture falls under the general regime of State aids. However, this generalization fails to take into account the cultural exception in the *TFEU* under Article 107 3(d)[6], ignoring the dual economic and cultural role of the film industry. Article 107(3) gives the Commission a certain responsibility to assess the compatibility of aid measures concerning culture with the internal market, which deviate from general rulings on state aid made by the European Courts. Thus the court case does not prevent the Commission from permitting territorial obligations if it recognises that they comply with the conditions set out in Article 107(3).

Article 107 3(d) of the *TFEU* states that "aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest" is compatible with the internal market. The question is whether territorial spending obligations are proportionate. There is no evidence to suggest that these obligations have been overly restrictive or negative. Furthermore, in paragraph 28 the Communication itself concludes that there are no negative consequences. The Communication states that a study carried out on fragmentation in the internal market was "inconclusive" and "could not judge whether or not the positive effects of territorial conditions outweighed the negative effects." In fact, the study actually finds that territorial spending obligations encourage funding to productions which may not have been available otherwise. Nevertheless, in paragraph 29 the Communication uses this study to suggest there are no "sufficient positive effects to justify maintaining the spending obligations." The Commission has therefore proposed a change to a Member State activity without demonstrating it has any detrimental effect on the internal market.

As already stated, territorial obligations have a positive impact on the development of the local industry and cultural identity. The cultural exception was formulated to create a balance between promoting culture and strengthening the internal market. By taking away support for local industry the Communication creates an imbalance, undermining the obligation under the *TFEU* to act in the "common interest" and to "contribute to the flowering of the cultures of the Member States."

Based on these considerations FIAD members are unable to see what the justification is for such a risky structural change when the impact is not properly assessed and with the consequences still in doubt. We fear this could weaken Member States cultural and industrial strategies for the film sector without strengthening cinematographic production in the European Union.

Scope of Activities

FIAD members support the expansion of the scope of activities in section 4.1 of the draft Communication. We agree that all areas of a film's creation should be included from the story concept to delivery to the audience. This ensures comprehensive support for all sections of the value chain and provides adequate flexibility for Member States to adjust aid schemes to complement future changes in the film sector. On this FIAD supports the perspective expressed by other industries in the value chain.

The inclusion of distributors in the draft Communication is a good step in recognizing and supporting the industry. The Commission understands that aid to production alone only stimulates supply without ensuring proper distribution and promotion. Many member states have recognised this and provided a vital revenue stream for distribution, supporting the circulation of high quality films in Europe.

[6] TFEU. 2010. Official Journal of the European Union (C 83/49) §107 3(d)

However, we are still unclear about the consequences of paragraph 54(4) due to the lack of clarity in the wording. The Communication states that "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." From FIAD's reading this makes State aid to distributors directly proportionate to the aid received at the production stage. In practice this would mean if the production phase is 50 percent funded by State aid then distribution will also receive aid amounting to 50 percent of the total distribution budget. However, the phrase "could have been" proposes that even if the aid intensity at production level is 30 percent, its potential, based on the maximum aid intensity, would mean distributors could still receive 50 percent. The concern amongst FIAD members is that they are still unclear about the exact meaning of the wording and also the impact this would have on distributors when implemented.

Maximum Aid Intensity

Regarding the provisions on the maximum aid intensity, FIAD agrees that the continuation of the 50 percent requirement is adequate. Furthermore, FIAD members support the addition of measures in paragraph 54(2) which set out criteria for films considered "difficult". We would like to emphasise though that although it is suggested that in the early stages of film production the risk taken is the highest, the level of risk is also very high when distributing the film: only 1 in 10 films recoup their release costs (print and advertising). In the cases where a film does not make a profit the costs and the guarantee allocated to the producer will not be recovered by the distributor. The risk of the release of "difficult films" or low-budget films is obviously even higher.

Foreign Productions

FIAD is pleased to see that caps on aid to major international productions have been removed. We are glad to see the Commission recognizes the important part non-European works play in European Member States in Section 4.4. The Commission is correct in its observation that they use local infrastructure and local casts which develops national audiovisual sectors, and that many of these are often co-productions involving European producers. A cap on aid would have had far reaching negative effects.

Concluding Statement

Due to the short time to assess such a structural change and time given to respond to the revised Communication, the impact of the changes made to State aid guidelines is not entirely clear. This is particularly the case with the alterations made to the territorial spending obligations where further discussion is needed beyond the two months given. Considering this, FIAD would favour both an ex-ante and ex-post impact assessment.

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We remain available for further information where necessary.

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