COMMUNICATION FROM THE COMMISSION ON STATE AID FOR FILMS AND OTHER AUDIOVISUAL WORKS

RESPONSE FROM THE BRITISH SCREEN ADVISORY COUNCIL (BSAC)

14 June 2012

Executive Summary

- **A new Cinema Communication must provide legal certainty for Member States going forward.**
- **Any changes to the state aid rules must not create disincentives to Member States to invest in audiovisual production, and must remain flexible enough to take account of future developments in technology and business models.**
- **No evidence of a 'subsidy race' between Member States has so far been published. Before any action is taken to limit state aid available for inward investment productions, irrefutable evidence of harm must be shown, particularly as Europe is competing on a global basis.**
- **Changes to territoriality rules to limit obligations to 100% of aid provided will significantly damage the European production sector.**

Introduction

We welcome the opportunity to comment on the draft Communication from the Commission on State Aid for Films and other Audiovisual Works. The British Screen Advisory Council (BSAC), an independent membership organisation, uniquely brings together business leaders representing all aspects of the audiovisual value chain in the UK, including a wide range of film industry expertise, making us well placed to provide constructive comments on the issues raised in the Communication.[1] BSAC has contributed to many of the debates in Europe on film policy and the creative industries. In 2006, BSAC was instrumental in securing the UK Film Tax Credit. Most recently, we have provided responses to DG Internal Market and Services on the Green Paper on the Online Distribution of Audiovisual Works in the EU, and DG Education and Culture on the Creative Europe proposal.

BSAC welcomes the Commission's acknowledgement that state aid remains vital in maintaining a culturally diverse audiovisual sector in Europe. The provision of state aid is essential in order for a critical mass of European audiovisual works to be produced, distributed and seen by audiences. The UK Film Tax Credit and aid for development, production and distribution through Lottery Funds has been extremely successful in maintaining production in the UK. It is estimated that the core UK film industry would be approximately 75% smaller without the Tax Credit.[2] The recently announced tax reliefs for high end TV drama and animation in the UK will also be subject to state aid rules.

BSAC agrees with the consensus view across Europe that some of the proposed changes to the Communication would have a destructive effect on the health of the European audiovisual industry if introduced. Of particular concern are the proposals in relation to aid intensity and territoriality obligations. The Commission's proposal to introduce a regressive scale of aid intensity for high budget foreign productions would significantly damage the global competitiveness of Member States in attracting inward investment productions. The knock-on effects on facilities, skills, employment and lost revenue would have a destructive effect on the health of the European audiovisual industry, including on the collaboration between Member States which currently takes place. Similarly, the proposal that territorial obligations (the restriction of the origin of goods, services or people to be used by a beneficiary to the awarding territory as a condition of aid) be limited to 100% of the aid amount, where previously Member States could oblige productions to spend up to 80% of the production budget in their territory, is also very worrying. The Commission has clarified that this will not affect the UK Film Tax credit as the 'used or consumed' rules do not restrict the origin of goods, services or people. However, the likely negative effect of these changes on the European audiovisual sector as a whole is not a desirable outcome for the UK.

BSAC also takes issue with the lack of clarity contained in the draft Communication which has given rise to huge uncertainty within the industry throughout the consultation process. Further attempts to clarify the Commission's intentions through FAQs on the Commission website and public events have been helpful but have not yet provided sufficient certainty as it is still possible to read different meanings into the text. We therefore urge the Commission to undertake a further consultation before any action is taken to ensure that the ramifications of the proposals within the draft Communication are clearly understood, and that industry is certain of the Commission's intentions going forward. We welcome the intention that this Communication will not be subject to periodic review as previous Communications on state

[1] See BSAC's Membership at http://www.bsac.uk.com/membership-list.html
[2] Oxford Economics 'The Economic Contribution of the UK Film Industry': June 2010, p86

aid have been. This should provide stability which will be positive for the industry. However, in line with our reservations concerning certain proposals contained within the Communication, the fact that it will not be revisited means that it is even more important that the Communication supports the ability of Member States to incentivise the European audiovisual industry. It is also important that the Communication is future-proofed. It may be that couching the rules within the Communication in high level terms would be the best way to ensure that it does not become outdated as technological developments and business practices progress.

Scope of activities

BSAC welcomes the initiative to widen the scope of activities which Member States can support under the state aid rules. Where public money is invested into the production of audiovisual content, it is important that audiences are able to access that content. Member States have already successfully notified schemes to support distribution and digital exhibition on a case-by-case basis. However, explicitly stating that aid covering all aspects of film creation will be considered may encourage the broadening of current support schemes which would have a positive impact on the European audiovisual industry as a whole. Given the specificity of activities outside of production across Member States, such as distribution and promotion, the Commission must be careful when stipulating criteria for state aid in these areas. Parameters must be set according to evidence from a number of individual Member States.

Given our broad church of membership, including new media and video games, BSAC welcomes the intention to bring transmedia projects within the scope of the Communication relating to the film component of the project. The definition of non-traditional audiovisual projects in terms of accessing aid should be flexible enough to allow for future developments as it is unclear how technology and business models will develop going forward.

The video games sector is an important contributor to both European cultural diversity and the industrial health of the audiovisual sector, and Member States are increasingly choosing to support its growth, particularly in view of intense global competition from territories such as Canada and South Korea. The UK Government recently announced their intention to introduce a tax relief for games. The Commission acknowledges that it lacks the critical mass of decisions on state aid to games necessary to integrate the sector into the Communication. Given the lack of decisions on state aid to games and the fact that the current rules cannot be applied directly, we welcome the decision to continue to assess video games support schemes on a case-by-case basis. However, we are concerned by the statement of the Commission's intention to apply the proposed aid intensity criteria to aid schemes targeted at cultural and educational games. We feel that if video games are to be considered on a case-by-case basis, applying the aid intensity criteria to particular schemes creates uncertainty. There is evidence to suggest that the proposed changes to aid intensity rules would significantly damage the global competitiveness of the European audiovisual industry. Further detail is provided in the section relating to aid intensity below.

Territorial spending obligations

BSAC believes that Member States should continue to be able to set territorial spending obligations as a condition of aid. Following clarification from the Commission, we understand that the proposed limits to territorial spending obligations will not affect the UK Film Tax Credit as the 'used or consumed' rules do not stipulate the origin of the goods or services to be used or consumed within the UK, and are therefore not an impediment to free movement rights in the internal market. However, the UK audiovisual industry would still be damaged were the proposed changes to territorial obligation rules introduced. Limiting the amount a Member State can oblige a beneficiary to spend in their territory to 100% of the aid amount would have a significant negative impact on other Member States, and therefore, on the health of the European audiovisual sector as a whole. The existence of a vibrant European production industry is a boon to all Member States and attracts third party productions to the region, which may choose to shoot in several different territories across the EEA.

No evidence has been presented which would substantiate the statement in the draft Communication that 'territorial requirements fragment the Internal Market for audiovisual production'. Furthermore, the Commission itself acknowledges that the 2008 Study on the economic and cultural impact of territorial conditions in film support schemes found no evidence that territorial conditions negatively affect the European audiovisual industry or audiences. On the contrary, the territoriality rules help to sustain a relevant skills base and high quality infrastructure within Member States and provide an important political and economic rationale for Member States to invest, ensuring that the results of the support for audiovisual works can be enjoyed by those who have provided it, safeguarding the vital link between the State and its industry and citizens. By requiring only the equivalent of the aid amount to be spent in the territory providing the aid, the rationale for Member States to continue to invest through regional and national film support schemes is severely jeopardised as the multiplier effects of investment would disappear, damaging the sustainability of the European audiovisual sector as a whole. The likely negative impact on job creation and retention in the European audiovisual industry, as production decreased as a result of a lessening of state aid available, would also be at odds with the Europe 2020 strategy. There is a consensus across Europe that the introduction of the proposed changes to the territorial obligation rules would have a destructive effect on the health of the European audiovisual sector.[3]

In the UK, there are plans to introduce similar tax reliefs to video games, animation and high-end television production. The model for this is likely to be the UK film tax credit which has been very successful in building and maintaining a thriving indigenous sector. However, by limiting the territorial obligations that can be imposed, the Commission is limiting the ability of Member States to adopt policies to suit developments in the industry in the future.

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[3] See EFAD Cannes Declaration, May 2012

Competition to attract major foreign productions

BSAC believes that the Commission's proposal to cap, on a regressive scale as the budget increases, the subsidy available to films assessed as non-European works through the proposed new criteria would significantly damage the global competitiveness of the European audiovisual industry. The Commission references a 'subsidy race' among Member States to attract high budget foreign productions. However, there does not appear to be evidence that such a subsidy race exists. State aid schemes currently in place do not have the explicit aim of attracting inward investment; it is a benefit which enables the European audiovisual industry to remain globally competitive. The current 50% aid intensity cap acts as a safeguard to prevent Member States unfairly competing against each other and to encourage private investment into the sector. Attracting big budget productions to a particular territory can also have positive effects for surrounding Member States as such productions will often shoot in more than one territory. Encouraging foreign production companies to make films with a European cultural context using European talent or expertise enriches cultural diversity and the influence of European culture globally. The UK's Cultural Test has been successful in ensuring that films receiving state aid reflect British culture and heritage and are made using a number of British and other EU practitioners.

We understand the Commission's desire to create a level playing field between Member States, however, the proposals will not create a stronger European audiovisual sector; but are likely to have the opposite effect. Creating a significant disparity between the amount of aid which European Member States can offer (10% of production spend once the budget exceeds €20m according to the regressive scale of aid intensity) and the amount offered by some non-European territories such as Canada, New Zealand, Australia and US states such as Louisiana, discourages foreign productions from locating themselves in Europe meaning that the European audiovisual industry will become less globally competitive as a location for inward investment. This would have a negative impact on the European economy as a whole, due to lost revenue from production spend as well as the loss of multiplier effects through the value chain such as tourism. There would also be a destructive impact on employment across Europe. Putting at risk Member States' ability to attract inward investment productions would be extremely damaging to the indigenous European production industry. Inward investment productions provide the critical mass that ensures Member States are able to maintain the world class facilities, creative talent and skilled technicians that are vital for a vibrant indigenous production industry. Furthermore, the Commission has suggested that instead of big budget productions choosing to locate themselves in non-European countries if the proposed regressive scale of aid intensity is introduced, such productions would choose to locate in several different Member States. We refute this assumption as under the proposed changes big budget productions choosing to locate in several Member States would be subject to even higher limitations on aid intensity. Therefore, the introduction of the proposals is likely to have a damaging effect on cross-border collaboration within Europe.

BSAC would urge the Commission not to proceed with the proposed changes to the aid intensity rules but to work closely with industry in drafting proposals in this area which would not adversely affect the health of the European audiovisual industry and the diversity of European content as outlined above. The proposals in the draft Communication have already created uncertainty which could have a damaging effect on inward investment in Europe.

Improving circulation of European films and audience choice

Sequencing of release windows

The UK does not impose mandatory release windows on the provision of state aid. Windowing arrangements are a result of commercial negotiations in the UK. As we noted in our response to the Commission Green Paper on the Online Distribution of Audiovisual Works 'those involved in negotiating film financing deals … need to continue to have the flexibility of deciding what is best for any particular audiovisual work. What is appropriate should continue to be a matter for contractual agreement between right holders and distributors, subject to any constraints imposed by competition law'.[4]

Promoting the international availability of films online

The suggestion that Member States encourage rights holders, as a condition of aid, to release to third parties the online rights for those exploitations (including those territories) that they are otherwise unable to exploit, is problematic. Rights holders continue to experiment with new business models for online distribution. However such experimentation must be as a result of commercial agreements which are advantageous to rights holders, investors and distributors/platforms. As aid intensity is set at a maximum of 50% of the production budget, any film receiving state aid will also be privately financed. Requiring rights holders to release rights to third parties is likely to have a considerable impact for private financiers who must make a return on their investment through the commercial exploitation of the rights. This suggestion cuts across the existing business model for exploiting rights especially for small budget film where the producer of a work may licence the rights in a particular territory for a limited time and reserve a decision on payment for further uses and territories until they have had a chance to judge the success of a work. This is a legitimate business practice and should not be jeopardised by such a rule as is suggested here. There is a danger that linking aid to having an online distribution deal in place compromises the position of the rights holder and forces them to accept poorer terms than might otherwise have been available to them. Furthermore, the vast majority of audiovisual content is not known outside of the territory which it was made for and in order to stimulate demand for it in other territories, a number of factors are important, such as specific marketing and subtitling. If there is no market for a rights holder to commercially exploit their rights online in a particular territory, the third party to whom the rights would be released is also unlikely to be able to successfully exploit

[4] See http://www.bsac.uk.com/2011.html EC Green Paper on the Online Distribution of Audiovisual Works, p15.

them, as a considerable investment will be needed to build an audience in a territory where there was not one before.

We note the proposal for a Council recommendation on promoting appropriate practices by increasing the transparency of reporting and payments. We understand by this that the Commission is calling for more transparency around reporting by online services to rights holders on the number and location of users that have accessed content through their services. This would enable rights holders to ensure that they are paid a fair price for their content and we are supportive of a Council recommendation in this area. Transparency in terms of services reliably reporting to the content owner on how many times their content has been accessed is extremely valuable to content owners both in enabling them to reach a commercial agreement with online services from an informed position, and in terms of future exploitation.

Film heritage

The UK is supportive of protecting film heritage and encouraging the deposit of films into national and regional archives. The deposit of a copy of a film which has received Lottery funding by the BFI is already a requirement in the UK. However, it should be a matter for each individual Member State to decide if this should be made compulsory in respect of a particular intervention.

Assessing the compatibility of the aid

Specific assessment criteria under Article 107(3)(d) TFEU

BSAC supports the continuation of the cap on aid intensity of 50% of the production budget for European works as this measure has now been in place for a number of years and has worked well. Continuing at the same level provides certainty to Member States. We also support the exclusion of ‘difficult’ audiovisual works from the limit. Increasing the cap to 60% for cross-border productions involving more than one Member State may encourage co-productions which will have a positive impact on the cultural diversity of European film.

Whilst the 50% aid intensity cap has worked well for production activity, there may be circumstances where activities such as distribution and promotion require a higher aid intensity in order to garner the maximum cultural benefit. For example, an injection of funds, which may not be available commercially, may be needed quickly if a small budget film is unexpectedly successful at the box office in order to widen the release. It may be better for Member States to decide the maximum aid intensity level based on the nature of the intervention.

BSAC notes the proposed criteria to define what constitutes a European work, and therefore, the maximum aid intensity that applies. We agree with the position of the EFADs Declaration that drawing a distinction between European and non-European works is highly problematic[5], and argue that imposing a cultural definition in this way goes against the principle of subsidiarity. As the Commission acknowledges, it ‘is not in a position to assess the national definitions of what constitutes ‘culture’’.[6] We would argue that a Member State can best decide what constitutes a culturally relevant work in their territory and that imposing a definition of a European film works against the promotion of cultural diversity as it encourages homogenisation. Member States may wish to base a definition upon considerations such as a reflection of national and European culture and the cultural origin of the subject matter or underlying material, as well as the geographical original of the production and practitioners, as the UK Cultural Test does. For the reasons outlined above, if the Commission chooses to introduce the proposed criteria, we would recommend that tests which individual Member States have instituted, such as the UK Cultural Test, should take precedence, and that the proposed criteria should only be used when a relevant cultural test does not exist at Member State level.

[5] See Footnote 4

[6] Issues Paper ‘Assessing State Aid for Films and other Audiovisual Works’, para 36.