



Film Funding Law in the European Union: Discussing the Rationale and Reviewing the Practice

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1 Introduction: EU's State Aid Rules in a Nutshell

In the audiovisual sector, European States have well-rooted promotional legislation and have put in place a distinct form of “cultural welfare” (Bellucci, 2010, p. 211). A 2011 study of the European Audiovisual Observatory estimates that, in 2009, the total amount of audiovisual support spent in Europe amounted to 2.1 billion euros (European Audiovisual Observatory, 2011; European Commission, 2014a). The funding tools which States resort to in order to sustain film production and distribution take various forms: direct grants, tax rebates, screen quotas, licencing restrictions and soft loans (i.e. loans given on more favourable terms than the market would provide). These measures generally come within the scope of the EU State aid rules when they meet the conditions laid down in Art. 107(1) of the *Treaty on the Functioning of the European Union* (TFEU).¹

It is well known that Article 107(1) TFEU provides that any aid granted by a Member State or through State resources, which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods, is incompatible with the internal market, insofar as it affects trade between the Member States (Biondi, 2013; European Commission, 2014b; Quigley, 2015). However, Art. 107(2) and (3) TFEU sets out exemptions to the general ban contained in Art. 107(1) TFEU on the premise that markets are not entirely self-regulating and do not always operate efficiently if left alone. These provisions recognize that public

¹Funds provided directly from EU programmes like *Creative Europe* programmes do not fall within as *State aid* (Katsrova, 2014, p. 5).

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intervention may be necessary where market failures occur or when it is necessary to protect and promote specific rights or values (Buelens, Garnier, Meiklejohn, & Johnson, 2007, p. 9).

Art. 107(2) TFEU specifies a number of cases in which national support measures are permissible.² Art. 107(3) TFEU provides that some forms of aid may be considered compatible with the internal market by the European Commission. Among them, this provision lists “aid to facilitate the development of certain economic activities” (Art. 107(3)(c)) and “aid to promote culture and heritage conservation” (Art. 107(3)(d)). The latter exception for the so-called cultural aid is clearly aimed to promote the right to access cultural goods and services and, more generally, to foster cultural diversity (Ferri, 2008).³ The exception provided for in Art. 107(3)(c), better known as “industrial aid derogation”, allows the Commission to take into account the necessity of the aid when relevant to achieve cultural policy goals.

The TFEU also establishes a system of *ex ante* supervisory control by which Member States must notify the European Commission in advance of aid measures that they intend to implement. Put simply, State aids are prohibited unless the Commission has been notified of the aid, has assessed and finally approved it. For an aid to be declared compatible with the internal market and lawful under EU law, it must not only pursue one of the EU objectives of common interest recognized in Art. 107(3) TFEU, but it must also be necessary and proportionate to that end (Court of Justice of the European Union, 1980).

To increase legal certainty within the EU State aid framework, to ensure the transparency of aid assessment and to complement Treaty rules, a large body of guidelines and secondary legislation has also been developed. Over time, these measures have also been able to address new economic and political priorities within the EU.

Broadly speaking, guidelines are considered to “codify” the Commission’s own practice with regard to the most common types of aid and structure the way in which the Commission exercises the discretion conferred upon it by Art. 107(3) TFEU (Quigley, 2015; pp. 262–265). In the matter of audiovisual products, the most relevant document is the “2013 Communication on State aid for films and other audiovisual works” (European Commission, 2013a), which superseded the former “2001 Cinema Communication” (European Commission, 2001). This clarifies the

²Article 107(2) TFEU lists aid that (a) has a social character and is granted to individual consumers, provided that such aid is granted without discrimination as regards the origin of the products, or (b) makes good the damage caused by natural disasters or exceptional occurrences. It also mentions at letter (c) “aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required in order to compensate for the economic disadvantages caused by that division”. This exemption is of limited practical relevance, and indeed it is now about to be *ex lege* repealed.

³The term “cultural diversity” involves regimes of cultural federalism and the guarantee of religious, linguistic and other rights for persons belonging to cultural minorities but also recognition of the distinctive nature of cultural goods and services.

scope of activities that may be supported by public funding and spells out clear criteria for permitting aid to the cinema sector, in order to ensure consistency and equality of treatment among Member States.

Within the composite system of secondary regulations, the 2014 General Block Exemption Regulation—GBER (European Commission, 2014c)—declares certain types of aid to be lawful and exempts them from the obligation of prior notification. The 2014 GBER covers several categories of aid and includes differently from the previous 2008 GBER (European Commission, 2008a) a provision on aid schemes for audiovisual works. The Commission has also passed various *de minimis* regulations, which exclude certain measures from the scope of EU State aid control as they have no impact on competition and trade in the internal market. The most recent *de minimis* (European Commission, 2013b) covers small aid amounts up to 200,000 euros per undertaking over a 3-year period. Small funding to sustain cinemas (in particular rural and arthouse cinemas) or preliminary work for a film promotion in most cases have been covered by the *de minimis*.

Against this background, and building on existing literature (Bellucci, 2010; Germann, 2008; Herold, 2010; Psychogiopoulou, 2005, 2008, 2010), this chapter explores the implementation of the EU State aid rules in the film sector. It first discusses the Commission's approach to Member States' support schemes active until 2012. It then goes on to discuss the innovation brought about by the "2013 Cinema Communication" and attempts to highlight to what extent the Commission has balanced the competing needs to sustain the EU film industry and to avoid unduly distortions of competition. Then the chapter analyses the recent 2014 GBER and the role it plays in allowing Member States to sustain audiovisual products. The final section takes stock of the analysis and highlights trends and patterns in film funding within the EU. It investigates to what extent EU State aid policy has complied with Article 167 TFEU, which places on the EU the duty to contribute to the flowering of the cultures of the Member States and to take cultural aspects into account in its action under other provisions of the Treaties. The chapter further argues that the EU's State aid control has become a highly politicized field, and the Commission's reasoning is vested of clear cultural policy objectives. In fact, the analysis of the decisions of the Commission conducted throughout this contribution shows that the Commission looks thoroughly at the cultural purpose of the national aid schemes and evaluates them against the overall goals set forth in Art. 167 TFEU.

2 The "2013 Cinema Communication" and the Commission's Practice Until 2012

2.1 Film Funding as "Cultural Aid"

Prior to 2012, national measures dictated to foster film production, including all the activities during the actual shooting of a film, were generally assessed as "cultural aid" under Article 107(3)(d) TFEU. This assessment was based, following the

famous Commission decision of 3 June 1998 on the French aid scheme *Soutien a la production cinematographique* (European Commission, 1998), on specific criteria. These criteria, which were formalized in the “2001 Cinema Communication”, included a “general legality” criterion and four specific conditions (Blair, 2011). To comply with the former, the aid scheme should not contain any clauses contravening other provisions of the Treaty. The specific criteria singled out different issues.

Firstly, support was to be directed at a cultural product. Each Member State was then responsible for ensuring that the content of the aided production was considered to be cultural according to national standards. Secondly, the producer should be free to spend at least 20% of the film budget in a Member State other than that providing the aid. This criterion aimed at limit “territorialization” clauses. These clauses provide that, in return for State aid granted, part of this aid or of the film budget must be spent in the territory where such funding scheme is located or administered (Brettell et al., 2008). Under the “2001 Cinema Communication”, Member States could still require up to 80% of the film production budget to be disbursed on their territory as an eligibility criterion for aid. Thirdly, aid intensity should be limited to 50% of the film budget, except for difficult and low-budget films or for films coming from geographic areas whose language and cultures had a limited circulation within and outside the EU market. And, finally, aid supplements for specific film-making activities were not allowed in order to ensure a neutral incentive effect and, consequently, avoid the attraction of those activities (e.g. post-production) in specific Member States.

The validity of this Communication was extended in 2004, 2007 and 2009 till 2012, and until 2012, the Commission authorized a variety of schemes, mainly aimed to promote national and regional film production (Psychogiopoulou, 2010). It generally favoured audiovisual support schemes (Psychogiopoulou, 2006; Zagato, 2010) and endorsed both direct grants such as the *UK Film Development and Production Funds* (European Commission, 2007a) and tax incentive and tax relief schemes for investment in film productions such as the *Irish Film Support Scheme* (European Commission, 2009a).

Overall, the Commission did not raise any issue with regard to the general legality principle and focused on the compatibility of the aids reviewed with the specific criteria. As noted by Psychogiopoulou (2010), the Commission evaluated in a stringent manner the existence of a verifiable national system to validate the cultural nature of the aided audiovisual content. Though it was indirect, the Commission tended to consider verifiable criteria measuring the artistic value of the project, the level of promotion of the national/regional identity and the conditions related to the curricula of the authors, producers and distributors. In addition, the Commission largely endorsed the performance of a cultural assessment by ad hoc independent bodies. For example, when assessing the *Lazio regional film support scheme* (European Commission, 2012a), the Commission noted that the assessment of cultural criteria by a commission of experts would actually “safeguard the cultural content of the audiovisual and cinematographic works financed”. However, a far less severe evaluation of the verifiability of national cultural criteria transpired when the

national aids were an extension of existing, already approved, schemes. In such instances, the Commission commonly limited itself to recalling the evaluation that has already been carried out (e.g. European Commission, 2009b, 2010a), without raising any objection (Ferri, 2015).

With regard to territorialization clauses, a study published in 2008 found that almost all the Member States included in their schemes obligations to spend a percentage of the film budget or of the grant in the same Member State or in one of its regions (Brettell et al., 2008, p. 15). These explicit territorialization requirements were generally kept under the cap of the 80% in compliance with the “2001 Cinema Communication”. However, it was found that several States resorted to quantitatively indeterminate requirements, for instance, providing that a film should, to a predominant extent, be shot locally or that use should be made of local technical goods and service providers (ibid.). These requirements appear far more problematic as they lack certainty, and their effects are not easily quantified. However, the Commission seemed to adopt a positive approach towards them. It considered the territorial criterion of the “2001 Cinema Communication” to be fulfilled, unless there was clear evidence that producers could not spend at least 20% outside the State. This approach is apparent in the *Spanish national film support scheme* decision (European Commission, 2010b). The scheme did not include any obligation to spend any of the costs of the cinematographic activities in Spain. By contrast, the measure included a territorial restriction in that, in case the majority of the shooting took place outside the Spanish territory, the aid was lowered by 5%. The latter condition did not provide a distinct intensity of territorialization, but was clearly intended to encourage producers to shoot locally. The Commission considered the requirement unproblematic.

Overall, the Commission considered film funding schemes necessary and proportionate and, in most cases, highlighted how the objective of supporting audiovisuals was in line with Art. 167 TFEU and with the EU goal of respecting and promoting cultural diversity, as well as with the commitments undertaken with the ratification of the UNESCO Convention on the protection and promotion of the diversity of cultural expressions, which are often cited in its decisions.

Even in cases where the State failed to notify the aid in a first instance (European Commission, 2012b), the Commission took the view that the positive net benefits of targeted State aid for the audiovisual sector were likely to overcome the potential distortion of competition (Ferri, 2015).

2.2 Film Funding as Industrial Aid

The “2001 Cinema Communication” mainly applied to production support. Schemes directed at post-production (i.e. activities related to editing, music, sound and effects, which are completed after shooting of the film), commercialization and aid for the support of film studios were mainly assessed under Article 107(3)(c) TFEU.

An evaluation under the “industrial aid derogation” is carried out under a three-step test (Quigley, 2015, p. 211). First, the Commission ascertains whether the aid

measure includes a well-defined objective of common interest, i.e. whether the aid addresses a market failure. Secondly, the Commission verifies whether the aid is appropriate and proportionate to deliver the objective of common interest pursued. Thirdly, the Commission balances the distortions of competition and the effect on trade against the beneficial effects of the aid.

In examining the Commission's practice, it seems possible to identify two main trends. On the one hand, in several cases, small post-production schemes were found to be State aid within the meaning of Article 107(1) TFEU, even when it was of utmost evidence that the aid was unlikely to distort competition and that the effect on trade between the Member States was minimal. Then, on most occasions, the aid was approved under Art. 107(3)(c) TFEU. An illustrative example is the Basque scheme for the promotion of dubbing and subtitling of movies in Basque (European Commission, 2008b). Although the distortion of competition arising from that measure was potentially very limited, the Commission affirmed that it could not be excluded that undertakings distributing cinema productions in the Basque autonomous region would benefit from the measure to a greater extent than other foreign distributors. In addition, considering the presence of the Basque language in the territory of two Member States and taking into account the international competition in the distribution of cinema products, the Commission declared that a certain effect on intra-EU trade though improbable could not be a priori excluded. Then, the Commission assessed the Basque scheme. It first underlined that, aside from promoting the use of the Basque language, the scheme was supporting commercial activities, subject to international competition, and for this reason, the measure did not satisfy the restrictive interpretation warranted for the application of Article 107(3)(d) TFEU. In evaluating the aid under Article 107(3)(c) TFEU, it weighted the cultural goal of the measure (i.e. the promotion of Basque language) as a common interest objective and finally concluded that the aid was necessary to the preservation of the Basque language and proportionate.

On the other hand, the Commission retained a quite cautious approach, primarily based on an economic analysis, with regard to aid to film facilities in the form of investment or shareholding. While in the *Bavaria Film GmbH*, it decided that the measure did not fall within the scope of Article 107(1) TFEU (European Commission, 2007b),⁴ in the *Ciudad de la Luz film studios* (European Commission, 2012c), the Commission bluntly dismissed the claim of Spanish authorities that the measure was not an aid for the purpose of EU law. This decision appears particularly interesting. It originated from a complaint concerning a support allegedly given by the Region of Valencia to *Ciudad de la Luz*, a major film studio complex just outside Alicante, without any prior notification to and assessment of the Commission. *Ciudad de la Luz* was in fact incorporated in November 2000, and 75% of the original share capital was

⁴The essence of the MEIP is that when a public authority invests in an enterprise on terms and in conditions, which would be acceptable to a private investor operating under normal market economy conditions, the investment is not a State aid.

owned by a public entity which carried out investment activities on behalf of the Valencia Regional Government (*Sociedad Proyectos Temáticos de la Comunidad Valenciana SAU—SPTCV*). In 2004, SPTCV became the sole shareholder, and by 2010, the investment of public funds by SPTCV in *Ciudad de la Luz* totalled over 274 million euro by the end of 2010. The complainants alleged that the development of *Ciudad de la Luz* had been allowed by the injection of public money. The commercial operation of *Ciudad de la Luz* had been loss-making, and the studios, despite the massive public investment, had failed to attract the planned amount of non-Spanish productions. In response to the complaint and further to the formal investigation opened by the Commission, the Spanish authorities counterargued that the investment at hand did not constitute State aid within the meaning of EU law.⁵ Surprisingly, they did not contest or mention the cultural nature of the aid.

The Commission inevitably rejected the arguments put forward by the Spanish authorities. It instead affirmed that the financial investment reviewed by them fell within the scope of Article 107(1) TFEU. Further, the Commission went on to assess whether they could benefit from a State aid derogation under Article 107(3)(c) of the TFEU and considered *motu proprio* the cultural purpose of the aid. However, the Commission denied the existence of a market failure. It disregarded the arguments put forward by Spanish filmmakers intervening in the procedure. They tried to claim that the Spanish market did not have high-quality services prior to the construction of *Ciudad de la Luz* and that having access to a local film studio would allow them to reduce the cost of production. However, the Commission maintained that *Ciudad de la Luz* was directed towards large film productions, rather than local ones, and these claims were immaterial. As there was no well-defined market failure addressed by the measure, the aid could not be considered to be appropriate and proportionate to address any market failure and risk adversely affecting competition and trade. As a consequence, the Commission considered the public investment in the *Ciudad de la Luz* in breach of State aid rules. Overall, this decision shows that under Art. 107(3)(c), the Commission is open to investigate the cultural purposes or effects of a measure. But it also shows that the Commission is unwilling to approve a measure which does not target specific market failures within the audiovisual market. This approach was endorsed by the General Court, which, in 2014, rejected the appeal raised by *Ciudad de la Luz* and by the Spanish authorities (General Court, 2014).

2.3 Support for Digitization and Digital Projection of Films

Until the entry into force of the “2013 Cinema Communication”, the area in which the Commission adopted the most prudent and somewhat inconsistent approach is that of schemes aimed at supporting digitization. The Commission itself indicated in its Communication of 28 January 2009 (European Commission, 2009c),

⁵The Spanish authorities argued that a market investor would have invested in the project on the same terms and conditions.

extending the validity of the 2001 criteria for film production schemes, that the public support for digital projection was an area in which the Commission had not yet defined a policy. Few precedents involving such support could be found until then. In 2004, the Commission had applied the cultural derogation to the *UK Digital Screen Network* (European Commission, 2004). The scheme required that those receiving the aid show a high proportion of specialized films using the digital projection equipment. In that case, the Commission considered the aid compatible with the internal market under the “cultural derogation”. In 2007, the *Finnish support for digital cinema* was partially assessed and approved under the “industrial aid derogation”. The de minimis rules applied to support given to cinemas in small localities, which was deemed to fall outside the scope of State aid. In 2009, the Commission opened an investigation on the *Italian tax incentive for digital projection* (European Commission, 2009d). The Commission expressed doubts on both the necessity and the proportionality of the Italian measure. In assessing the scheme under Art. 107(3)(c) TFEU, the Commission doubted that the social and cultural advantages of such State aid would have outweighed the distortion of competition. Following the opening of the formal investigation, the Commission renewed its commitment to clarify the role of public funding in the digital transition of cinemas (European Commission, 2010c). The Italian scheme was finally approved in 2014, under Art. 107(3)(d) TFEU, in compliance with the “2013 Cinema Communication” (European Commission, 2014d).

3 The “2013 Cinema Communication”

3.1 The Revised Criteria

After a long period of gestation and further to a highly participated public consultation, in November 2013, the “2013 Cinema Communication” was released. Its primary objective is to create a modernized framework capable of facing the profound changes that the audiovisual sector has undergone in recent years, especially with the introduction of digital technology. This Communication represents a clear attempt to update the State aid assessment taking into account digital production and distribution techniques and to end the period of uncertainty in the assessment of schemes supporting digitalization.

The scope of application of the “2001 Cinema Communication” was cinematographic and audiovisual production only. Aids to upstream activities, such as scriptwriting and script development, were assessed under Art. 107(3)(c) by applying the criteria of the “2001 Cinema Communication” by analogy. By contrast, the new guidelines include among the activities that may be supported all phases of audiovisual creation, from initial concept to the delivery of the work to audiences. Notably, the 2013 Communication covers aid to trans-media and cross-media projects (insofar as such projects are linked to the production of a film). Support for restoring cinemas is also clearly included among the measures assessed always under Article 107(3)(d) TFEU, while in the past, the Commission had assessed aid

schemes also under Article 107(3)(c) TFEU (Orssich, 2014). However, the guidelines keep an ambivalent attitude towards mere post-production activities. Although it is relatively early to detect the effects of this enlarged scope, this seems to diminish the Commission's assessment of schemes under Article 107(3)(c) TFEU and to broaden the reach of Article 107(3)(d) TFEU.

The new rules retain the "general legality" criterion, which has been considered essential to ensure that the prohibition of discrimination on the grounds of nationality as well as the right to free movement is respected. In this respect, the Commission has however adopted certain flexibility and has balanced free movement provisions with other interests as it is shown in the assessment of the recent Croatian *Investment incentives for the production of audiovisual work* scheme (European Commission, 2014e). This scheme included among the eligibility requirements that for aid over 522.000 euros, one Croatian trainee (Croatian national or resident) should be engaged in each of the main production activities (production design, production, camera, costume design, make-up and prosthetics, stunts). Despite the recognizable dubious compatibility with the non-discrimination principle, the Commission considered it compatible with the legality criterion by accepting that such a requirement "stems from the cultural and educational objectives of (re-)building Croatian skills and contributing to the transfer of know-how and expertise".

With regard to the specific criteria, the new communication affirms explicitly that the definition of cultural activities remains primarily the responsibility of the Member States. The Commission "acknowledges that its task is limited to verifying whether a Member State has a relevant, effective verification mechanism in place able to avoid manifest error". The most recent State aid decisions seem in line with previous practice. The Commission endorses cultural selection processes carried out by independent experts or independent public organizations on the basis of precise criteria directly spelled out in the aid scheme. This is evident in the *Tax deduction for film and audiovisual productions in the Province of Biscay* (European Commission, 2015a). The Commission found that the eligibility requirement for audiovisual productions to obtain a cultural certificate from the Spanish Institute of Cinematography and Audiovisual Arts constituted an effective verification mechanism. In compliance with the subsidiarity principle, the Commission did not question the fact that to obtain the cultural certificate, the production must meet at least two criteria out of a list of ten. Nor did it discuss the content of the criteria, which refer to the language of the work (the original version in one of the Spanish official languages), the location of the story (which must be in Spain), the subject of the story (which must relate to expressions of artistic creation, historical events, mythology, European diversity, Spanish reality), the film's characters (linked to the social, cultural or political Spanish reality) and the targeted audience. Similarly, in the case of the *UK Film Tax Relief (FTR)*, the Commission did in fact exercise a purely external control (European Commission, 2014f, 2015b). The case seems particularly interesting because it constituted a modification of a previous scheme, and some of the changes introduced concerned the cultural test. Under the previous scheme, a film in order to be eligible for support had to be certified as a British film.

The revised cultural test, however, has been expanded to allow for European film as well as British film to be supported. In the scheme references to British, United Kingdom and English are replaced with a more general reference to Europe or to the European Economic Area (Blair & Athoff, 2014). The Commission does not engage in any consideration on the enlarged scope of the cultural test, nor on the effects of it. Rather, it limits itself to highlighting that the modified tax relief remains dependent on a cultural assessment on the basis of a clear point system. Consequently, the Commission considers that the UK authorities have put in place an “effective verification process to avoid a manifest error”.

Thirdly, the Communication slightly modifies the criteria concerning aid intensity. The applicable aid intensity for film production continues to be 50% of the overall budget. However, there is no limit set for aid to scriptwriting or development. Co-productions funded by more than one Member State can receive aid of up to 60% of the production budget. Commercially “difficult” works (e.g. short films, films by first-time and second-time directors, documentaries, low-budget works, etc.) are excluded from these limits. The Communication leaves the definition of difficult films to each Member State according to national parameters. The rationale behind this new rule is clearly to increase diversity in the film market, which is the result of the variety, balance and distance between the products supplied, distributed and consumed (Lévy-Hartmann, 2011). This provision could indirectly encourage the freedom of expression of different social, religious, philosophical or linguistic identities, but it is quite early to appraise the effects of this renewed criterion.

The 2013 Communication maintains a positive attitude towards territorialization clauses and has slightly modified the limits of territorial spending. Even though territorial spending obligations constitute a restriction of the internal market (Brettell et al., 2008), they might be justified in view of promoting “cultural diversity and national culture and languages”—objectives which constitute “an overriding requirement of general interest capable of justifying a restriction on the exercise of the fundamental freedoms” (European Commission, 2013a). Member States are allowed to include, as an eligibility criterion, that a minimum of up to 50% of the production budget, and up to 160% of the aid amount granted, be spent in their territory. As provided for in the 2001 Communication, however, the territorial spending obligation cannot go beyond 80% of the production budget.

3.2 A Copernican Revolution or a Missed Opportunity?

Overall, the 2013 Communication does not adopt a more market-oriented attitude than its predecessor, as it seemed at the outset (Lewke, 2014). Rather, it constitutes another effort on behalf of the Commission to integrate the cultural dimension as a vital element in its State aid assessment. The Commission attempted with these revised rules to encourage the creation of a vibrant audiovisual sector within Europe while preserving cultural diversity and while maintaining competitiveness.

The changes introduced were not necessarily that revolutionary and did not seem to have impacted substantially on the Commission's practice. In its most recent decisions, often on prolongation or modification of existing schemes, such as the *Film Tax Relief Modification* (European Commission, 2015b) or the *Crédit d'impôt cinéma et audiovisuel et Crédit d'impôt pour les œuvres cinématographiques et audiovisuelles étrangères* (European Commission, 2015c), the Commission has not raised objections and approved the aid. This confirms a long-standing trend of endorsement of national support for the film industry.

The 2013 Communication also sanctions the plain acceptance of the double nature (economic and cultural) of audiovisual works, of their role in shaping European identities and the subsequent need for a preferential treatment. Indeed, the Commission has often recognized that public support is essential to film production (European Commission, 2014a). In most Member States, without public funding, most productions would have already disappeared.

One of the problems that State aid rules and this new Cinema Communication do not appear to tackle is the imbalance between production and consumption, i.e. between the number of films produced in the EU and the number of films that actually reach their audience (European Commission, 2014a; Hick, 2010). When it comes to box office receipts and cinema admissions, European films fall far behind those of US productions. For example, in 2015 cinema attendance in Europe has significantly increased by 7.6% to 980 million tickets sold, which means 69 million more than in 2014; however, such a growth was primarily driven by the high attractiveness of a number of US blockbusters, such as *50 Shades of Grey* or *Jurassic World* (European Audiovisual Observatory, 2016). The EU is trying to address this imbalance using different policy instruments and has launched other initiatives to increase the complementarity between the different distribution platforms and ultimately upsurge the audience for European films. However, a more serious consideration on how to use State aid to better reinforce distribution channels and a more decisive approach to post-production activities could have been adopted in the Communication.

4 The 2014 General Block Exemption Regulation (GBER): New Opportunities for Film Funding?

The new 2014 GBER replaced, and significantly revised, the former regulation, which had been passed in 2008. Like its predecessor, it sets out the categories of aid and the conditions under which aid measures can receive the benefit of an exemption from notification and defines the eligible beneficiaries, the maximum proportion of the eligible costs and the eligible expenses. However, this new GBER significantly extends the possibilities for Member States to grant aid and include new categories of aid. This significant extension in the scope of the GBER allows Member States greater flexibility and more leeway in granting aid without prior notification and approval by the Commission.

In particular, the new GBER includes a novel section on aid for culture that contains two interrelated but distinct provisions: Article 53 on culture and heritage conservation and Article 54 on aid for audiovisuals. This novel section was included in the text for the explicit purpose of protecting and promoting cultural diversity, as prescribed by Article 167 TFEU. Recital 72 of the Preamble makes clear that “[b]ecause of the dual nature of culture, being on the one hand an economic good that offers important opportunities for the creation of wealth and employment, and, on the other, a vehicle of identities, values and meanings that mirror and shape our societies, State aid rules should acknowledge the specificities of culture and the economic activities related to it”. This statement is reinforced by Recital 73, according to which “[a]udiovisual works play an important role in shaping European identities and reflect the different traditions of Member States and regions”. Overall, the rationale of these rules is to allow (and possibly to encourage) public funding that guarantee the protection of cultural and linguistic identities across the EU and the multiplicity of artistic expressions.

The GBER covers aid schemes for audiovisual works, the budget of which is below 50 million euros per year. It covers aid to production, pre-production, post-production and distribution activities. Interestingly, and differently from the “2013 Cinema Communication”, the eligible costs include costs to improve accessibility for persons with disabilities. The criteria for eligibility echo the criteria included in the “2013 Cinema Communication”. Article 54 provides that the aid must support a cultural product and that it is up to each Member State to establish effective processes, such as the selection of proposals by one or more persons entrusted with the selection or verification against a predetermined list of cultural criteria. Territorial criterion is spelled out similarly to the 2013 Cinema Communication. The GBER makes it clear that territorial requirements are admissible in so far as they do not require specific activities to take place in the territory of the Member State or part of it or that specific infrastructures are used. The aid intensity for the production of audiovisual works shall not exceed 50% of the eligible costs but, in line with the “2013 Communication”, may be increased for cross-border productions and for difficult audiovisual works and co-productions involving developing countries. The aid intensity for pre-production must not exceed 100% of the eligible costs.

At present, only the amended Austrian Film Funding Act has been monitored and approved under the new GBER. It remains to be seen whether and to what extent the other Member States will avail of the opportunity offered by the GBER.

5 Conclusion: Sustaining the European Audiovisual Sector Through EU State Aid Policies

Direct grants, tax rebates, screen quotas, licencing restrictions or soft loans have made the European Union (EU) one of the largest film producers in the world (Katsrova, 2014). These public funding tools used to support audiovisual products, when assessed by the Commission, have been generally considered viable and

compatible with the internal market. Before the entry into force of the 2013 Cinema Communication, both the exceptions laid down in Art. 107(3)(d) and (c), to a different extent, have allowed Member States to keep their promotional legislation and enhance public funding to the audiovisual sector. The de minimis regulation has also been important to improve the infrastructure of small cinema theatres and their accessibility (Psychogiopoulou, 2006).

The “2013 Cinema Communication” has substantially reduced the relevance of the “industrial derogation” and streamlined the assessment of film falling under Art. 107(3)(d) TFEU. The proper effects of these new rules are still to be seen as the schemes appraised and approved at the time of the writing of this chapter are few. Nonetheless, the preceding analysis illustrates that the Commission is increasingly willing to make full use of the “cultural derogation” and to exploit the potential of the 2013 Communication. The area in which the impact of the new rules is likely to be significant is that of digitization. As it is evident in the 2014 Commission’s decision on the *Italian tax incentive for digital projection*, the EU authorities have acknowledged that the ongoing transition to the digital cinema poses challenges for the film sector, especially in those countries in which small cinemas still lag behind in the digitalization process.

The new GBER represents the latest piece in the puzzle of EU State aid rules on film funding. It is too early to detect the effects of the GBER. Nevertheless, what is evident is that the Commission appears to have taken seriously Article 167 (4) TFEU and Article 22 of the EU Charter of Fundamental Rights, which spell out an obligation to respect cultural diversity.

As noted elsewhere (Ferri, 2015), while it is undeniable that EU State aid policy is aimed to ensure free competition, State aid control has become one of the most politicized EU fields, and the Commission’s reasoning is vested of clear cultural policy objectives. The approval of the GBER on the one hand and, on the other, the widening of the scope of the “cultural derogation” under the 2013 Communication show that the Commission is actively promoting cultural diversity. The analysis of the most recent Commission’s decisions conducted in this chapter attempted to show that the Commission is currently pursuing a stronger European audiovisual sector. However, it is far from clear whether the imbalances and structural weaknesses that characterize the EU film market in the area of distribution have been tackled effectively under the new rules.

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