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**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**

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1. INTRODUCTION

Audiovisual works, and cinema in particular, play an important role in shaping European identities, both in common aspects shared across Europe and in the cultural diversity that characterises our different traditions and histories. They are an essential element for the good functioning of our democracies because of their widespread influence on society. They are also at the heart of the transformations resulting from the development of the Information Society: new technological developments offer new opportunities for promoting culture and heritage conservation, and to increase mutual understanding across Europe. But the multiplication of distribution channels available for distribution of audiovisual goods does not automatically lead to an increase in the creation of quality content.

The principles of the Community audiovisual policy have been expressed in the Commission's communication of December 1999¹ and remain fully valid today. The primary purpose of regulation in the audiovisual sector is to safeguard certain public interest objectives such as pluralism, cultural and linguistic diversity and the protection of minors. At a European level, the necessary balance must be kept to guarantee subsidiarity in an area where major competences are at the national or regional level, while ensuring that European companies can fully benefit from the European dimension. The key European instruments specifically developed in this area, the Television without Frontier Directive, for regulatory aspects, and the Media Plus programme for support mechanisms, have as their main objective to allow European companies in this sector to benefit fully from the European Single Market.

Audiovisual works have unique characteristics because of their double nature: They are economic goods, offering important opportunities for the creation of wealth and employment. In 1999, the European audiovisual market² was estimated at 58.3 billion € (+ 8.7% vs. 1998) . They are also cultural goods which at the same time mirror and shape our societies. This is the reason why the development of this sector has never been left solely to market forces.

The advent of new technologies has not affected the renaissance of the cinema in Europe; such new technologies have been shown to offer additional income for media operators rather than substituting existing media. Total cinema admissions in Europe rose from 662 million in 1995 to 844 million in 2000 (+27%)³. This increase would appear to be due at least in part to the growth in the number of cinema screens in Europe, in particular multiplexes (+22% in 1999 vs. 1995)³ as well as improved facilities at cinemas. Recent figures⁴ show that TV viewing in Europe has increased in most Member States in the past year.

¹ Principles and Guidelines for the Community's Audiovisual Policy in the digital age. 14.12.1999, COM(1999)657 final.

² European Audiovisual Observatory. Includes: television, cinema, video (cassettes and DVD), but not games.

³ European Audiovisual Observatory

⁴ European Audiovisual Observatory: the average for television viewing in Europe varies between 144 minutes per day in Austria and 239 minutes per day in Italy. The trend is positive in almost all Member States.

Amongst audiovisual works, cinematographic works have a particular prominence, because of their cost of production and cultural importance: budgets for the productions of cinema films are substantially higher than for other audiovisual content, they are more frequently the subject of international coproductions, and the duration of their exploitation life is longer, with the potential to use all distribution channels, cinemas, DVDs and videocassettes (both selling and rental), Internet downloading, and television (pay-per-view, pay-per-channel, free-to-air). Cinematographic works face strong competition from outside Europe⁵. There is little circulation of European works outside their country of origin, although there appears to be an upward trend: according to certain estimations, European non-national films reached over 10%⁶ of total attendance in 1999 from less than 8% in 1996.

Because of the particularity of cinema, the Commission had indicated in its Communication on Audiovisual policy in 1999, that there was a need to examine in more detail a number of issues to clarify the legal framework of the cinema sector, including the application of State aid policy in that area. The objective of this review was to determine which measures could be taken in order to improve the circulation of these works in Europe.

In accordance with the principles of the White Paper on Governance⁷, the Commission services organised a public consultation on the basis of a Staff Working Document⁸ in order to give all interested parties the opportunity to make their views known before the adoption of this Communication by the Commission. A hearing attended by around 250 interested parties was held on 15 June. This not only provided an opportunity for the Commission to identify the central issues in respect of the issues raised in the Staff Working Document, but also allowed the interested parties to hear and respond to each other's views.

49 written comments⁹ were received from Member States, national regulatory and self-regulatory authorities, authors artists, film and television producers and directors, cinema operators, video and DVD publishers/distributors, television broadcasters, industry associations, consumer representatives and trade unions.

This Communication sets out the Commission's policy orientations and proposals building upon the consultation exercise. It sets out the principles to be applied for the application of State aid rules to the cinema sector, and identifies the next steps to be taken and the areas where further reflection is needed in order to create a favourable environment for the production and distribution of audiovisual works.

⁵ European Audiovisual Observatory: the market share of American cinema films in Europe in 2000 was above 73%.

⁶ European Audiovisual Observatory; LUMIERE database; data are inclusive of international EU/extra EU co-productions

⁷ 25.7.2001, COM (2001) 428

⁸ 11.4.2001, SEC (2001) 619.

⁹ Representing More than 95% of the production industry, film directors, cinema exhibitors, rightsholders, broadcasters, unions representing workers in the audiovisual sectors, video and DVD associations, film institutes and Member States. See list of comments and full text of those sent electronically without a request for confidentiality at http://europa.eu.int/comm/avpolicy/regul/cine1_en.htm

2. THE GENERAL ORIENTATION OF THE COMMISSION WITH REGARD TO STATE AIDS TO CINEMA SECTOR.

Cinema and TV programmes are two of the most universal media of entertainment, with a powerful impact on a great number of people internationally. The current stage of development and the special characteristics of audiovisual production within the EC, mean that it is difficult for producers to obtain a sufficient level of upfront commercial backing to put together a financial package so that production projects can proceed. In these circumstances, the fostering of audiovisual production by the Member States plays a key role to ensure that their indigenous culture and creative capacity can be expressed, thereby reflecting the diversity and richness of European culture.

The Maastricht Treaty gave Community-level recognition to the utmost importance of promoting culture for the European Union and its Member States by incorporating Culture amongst the Community's policies specifically referred to in the EC Treaty (see Article 151 EC) At the same time, it included in Article 87 (3) d) EC a new specific possibility of exception to the general incompatibility principle of Article 87 (1) EC for aid granted by the Member States to promote culture.

Member States implement a wide range of support measures for the audiovisual production of films and TV programmes. This support focuses on the creation and production phases of filmmaking and generally takes the form of subsidies or repayable advances. 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.

This Communication does not cover the application of Articles 81 and 82 of the EC Treaty (anti-competitive practices by companies) to the audiovisual sector¹⁰.

2.1. Compatibility with the EC Treaty of schemes of aid to cinema and TV production

The basic rules on State aid under the EC Treaty are as follows: Article 88 (3) of the EC Treaty provides that Member States are obliged to inform the Commission of any plans to grant or alter aid before putting it into effect. Article 87 (1) EC prohibits aid granted by the State or through State resources, which distorts or threatens to distort competition and trade between Member States. However, the Commission may exempt certain State aid from this prohibition. In particular, Article 87 (3) EC lists certain aid types that in view of their effects the Commission may authorise. One of these exemptions is Article 87 (3) d) EC for aid to promote culture, where such aid does not affect competition and trading conditions to an extent contrary to the common interest.

¹⁰ For example practices such as blockbookings or the bundling of rights, which could be incompatible with the EC Treaty.

2.2. Enforcement of the EC Treaty rules on State aid to cinema and TV production

In 1997 the Commission received a complaint about exclusionary effects created by the French cinema production aid scheme. This was confirmed by the Commission's assessment. The anti-competitive effects were the result of provisions making the aid conditional on the realisation of certain filmmaking activities in the Member State (so-called "territorialisation").

The French authorities, at the Commission's request, modified a series of incompatible provisions of their cinema production aid scheme and on 3 June 1998 the Commission authorised their scheme. In its decision (N3/98), the Commission set out four specific compatibility criteria (see 2.3b below) to authorise aid to cinema and TV production in accordance with the "culture derogation" contained in Article 87(3)(d) of the EC Treaty. The Commission also undertook to review the schemes in other Member States under the criteria adopted in the French decision.

The Commission launched an inquiry requesting information from all Member States about their aid schemes for the audiovisual sector. The inquiry showed that the majority of the schemes had not been notified to the Commission for prior authorisation.

2.3. Assessment of aid schemes to cinema and TV production

When it assesses aid schemes to cinema and TV production, the Commission must verify

- First, whether the aid scheme respects the "general legality" principle, i. e. the Commission must verify that the scheme does not contain clauses that would be contrary to provisions of the EC Treaty in fields other than State aid (including its fiscal provisions);
- Secondly, whether the scheme fulfils the specific compatibility criteria for aid, set out by the Commission in its 1998 decision on the French automatic aid scheme.¹¹

The second condition is specific to cinema and TV production aid schemes, whereas the other is a routine test applied to all aid schemes irrespective of the sector.

a) Respect of the general legality criterion

The Commission must verify that the eligibility conditions of the State aid schemes do not contain clauses contrary to the EC Treaty provisions in fields other than State aids. The Commission must ensure, inter alia, that the EC Treaty principles prohibiting discrimination on the grounds of nationality, freedom of establishment, free movement of goods and freedom to provide services have been respected (Articles 12, 28, 30, 39, 43, 48 and 49 EC). The Commission enforces these principles in conjunction with the application of competition rules when the provisions in breach of these principles are not detachable from the operation of the scheme.

¹¹ The question whether fiscal relief to producers can be qualified as aid is assessed under the principles contained in the 1998 Commission Communication on the application of State aid rules to measures relating to direct business taxation, OJ C 384 of 12.12.1998.

In compliance with the above principles, aid schemes must not: e.g. reserve the aid for nationals exclusively; require beneficiaries to have the status of national undertaking established under national commercial law (undertakings established in one Member 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); require workers of foreign companies providing filmmaking services to comply with national labour standards.

Certain schemes of aid to cinema and TV production are financed by parafiscal charges. According to the Commission's decision making policy and the Court of Justice's jurisprudence, when such schemes benefit solely national producers or do so to a higher extent than to competitors in other Member States, in order to be compatible with the Treaty, imported products may not be levied and national production may not enjoy a lower rate of taxation when exported.

When the Commission applies the State aid rules to assess the compatibility of aid schemes under the review, it addresses at the same time the problems identified by the Code of Conduct Group on Direct Business Taxation (the so-called Primarolo Group) set up by the Council.¹²

b) The specific compatibility criteria for State aid to cinema and TV programme production

The specific criteria on which basis the Commission currently assesses State aid to cinema and TV programme production under the culture derogation of Article 87 (3) d) EC were established in its decision of June 1998 on the French automatic aid scheme to film production. These specific criteria are as follows:

- (1) The aid is directed to a cultural product. Each Member State must ensure that the content of the aided production is cultural according to verifiable national criteria (in compliance with the application of the subsidiarity principle).
- (2) The producer must be free to spend at least 20% of the film budget in other Member States without suffering any reduction in the aid provided for under the scheme. In other words, the Commission accepted as an eligibility criteria territorialisation in terms of expenditure of up to 80% of the production budget of an aided film or TV work.
- (3) Aid intensity must in principle be limited to 50% of the production budget with a view to stimulating normal commercial initiatives inherent in a market economy and avoiding a bidding contest between Member States. Difficult and low budget films are excluded from this limit. The Commission considers that, under the subsidiarity principle, it is up to each Member State to establish a definition of difficult and low budget film according to national parameters.
- (4) Aid supplements for specific filmmaking activities (e.g. post-production) are not allowed in order to ensure that the aid has a neutral incentive effect and

¹² This group compiled an inventory of harmful measures that includes a certain number of State aid schemes for cinema and TV production.

consequently that the protection/attraction of those specific activities in/to the Member State granting the aid is avoided.

Several considerations arise in respect of the above-mentioned criteria:

The Commission considers that aid should be towards the overall budget of a specific film-making project and the producer should be free to choose the items of the budget that will be spent in other Member States. Aid schemes shaped on this basis are deemed to support the creation of an audiovisual product and not to assist the development of an industrial activity. Consequently, this aid is to be assessed under the culture derogation of Article 87(3)(d) EC rather than the industrial derogation of Article 87(3)(c). Undertakings in the film and TV programme production sector may also benefit from other aid types granted under national horizontal aid schemes authorised by the Commission under the Article 87(3)(a) & (c) EC exemptions (e.g. regional aid, aid for SMEs, R+D aid, training aid, employment aid).

The Commission accepted that Member States may require a certain part of the film production budget to be spent on their territory as an eligibility criterion for aid. This is based on the reasoning that a certain degree of territorialisation of the expenditure may be necessary to ensure the continued presence of the human skills and technical expertise required for cultural creation.¹³ This should be limited to the minimum degree required to promote cultural objectives.

Furthermore, given the particular characteristics of film production, the Commission considers that the overall budget of an audiovisual production is the disbursement at risk necessary for its creation and, consequently, admits that the reference for aid calculation is that overall budget, regardless of the nature of the individual expenditure items of which it is formed. 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 might be incompatible.

Funds provided directly from EC programmes like MEDIA Plus are not State resources. Therefore, their assistance does not count for the purposes of respecting the 50% aid ceiling. Furthermore, this assistance promotes the distribution of national films abroad and, consequently, its effects do not add up to those of national schemes focussing on national production and distribution.

Legal obligations imposed by Member States upon TV broadcasters to invest in audiovisual production do not constitute State aid, where these investments provide a reasonable compensation to broadcasters. The extent to which these legal obligations may be considered State aid as such has to be considered in view of the development of the EC Court of Justice jurisprudence after its judgement of 13.3.2001 in Case C-379/98 (PreussenElektra).

In the Commission's view, the above criteria strike a balance between the aims of cultural creation, the development of the EC audiovisual production and the respect of the EC rules on State aid.

¹³ See reply to Written Question 3173-00 of Mr. Veltroni, OJ C 163 E 6.6.2001, page 50

2.4. Review of schemes

Following its 1998 decision on the French scheme of automatic aid to film production, the Commission has reviewed the schemes in place in other Member States under the above mentioned assessment criteria. The Commission has already reviewed and approved the schemes of a series of Member States¹⁴. The Commission is at present completing discussions with the remaining Member States to bring their schemes in line with EC law. The Commission intends to complete the review by the end of 2001. The completion of the review will provide legal certainty to the sector.

The review has revealed the following key features of national State aid schemes:

- There is a great diversity of aid schemes within EC both in terms of aid type and scope;
- Many of the schemes contained provisions contrary to the general legality principle;
- Very few Member States impose territoriality requirements in order to qualify for aid;
- Only exceptionally, Member States grant State aid levels higher than 50% of the film costs;
- The exceptions to this latter finding normally fall under the "difficult and low budget film" category.

2.5. Future Developments

The specific compatibility criteria for aid to cinema and TV programme production, set out above, will remain valid until June 2004, the time limit set in the decisions adopted so far. Under the review, the other Member States' schemes will be authorised until the same deadline.

The Commission does not intend to alter these criteria unless they prove unable to prevent undue distortion of competition within the EC. The Commission will examine further in the light of the Review the maximum level of admissible territorialisation. Territoriality requirements fragment the Internal Market for the provision of goods and services for audiovisual production and hinder their development. Possible distortion of competition created by aid to cinema and TV programme production would originate more from territorialisation requirements rather than from the level of aid itself. Territoriality requirements exceeding what may be judged acceptable under the necessity and proportionality criteria go beyond the strict limits of cultural promotion and aim basically at industrial objectives. Therefore, the Commission, in its decision on the French aid scheme considered that the Member States should be encouraged to reduce national preferences for an important part of the costs as to the place of expenditure.

In view of the comparatively limited geographic extension of certain languages and cultures, and given the limited circulation of those cultural products within the EC and world markets, the Commission could accept aid intensities higher than 50% where proven to be necessary in cases other than for difficult and low budget films for these Member States.

The Commission intends to continue the multilateral dialogue with the Member States to discuss relevant issues connected with State support to cinema and TV production. This dialogue started in the conference organised by the French

¹⁴ France, The Netherlands, Germany (and certain German Länder), Ireland, and Sweden: see http://europa.eu.int/comm/competition/state_aid/decisions/

National Cinema Centre in Paris in October 2000 that brought together expert officials of the Commission and representatives from the relevant Ministries and Film Institutes in the EU. The dialogue was pursued in a second conference organised by the Swedish Film Institute in Stockholm in June 2001.

3. PROTECTION OF HERITAGE AND EXPLOITATION OF AUDIOVISUAL WORKS

A number of issues relating to protection of heritage, transparency, and effective exploitation of rights have been raised¹⁵: the legal deposit of audiovisual works, the creation of a European register (or the linking of national registers) and other possible forms and use of databases with a commercial aim. These issues could have important consequences for the circulation of audiovisual works within Europe, and for the preservation of Europe's audiovisual heritage.

3.1. The legal deposit of audiovisual works

Different work has been done in various fora on this issue. The Council adopted a Resolution on conservation and enhancement of European cinema heritage in May 2000¹⁶, in which it called on the Commission to take account of the specific needs of this particular form of cultural legacy, and to support and encourage a transnational study to be carried out by the Member States on the situation facing European cinema archives.

From the contributions both at the public hearing and in writing, it is clear that there is consensus on the need to preserve and to safeguard Europe's audiovisual heritage. Opinions diverged as to the best way of achieving this aim, and as to whether regulatory intervention at a European level was required or in fact desirable.

At pan-European level initiatives have been taken by professional organisations¹⁷, and by the Council of Europe, whose draft European Convention for the protection of the Audiovisual Heritage should be adopted shortly. This Convention will provide for a compulsory legal deposit of "moving image material forming part of its audiovisual heritage and having been produced or co-produced in the territory of the Party concerned".

Opinions were divided as to whether the European Union should adhere to this instrument and/or encourage the Member States to do so. A number of commentators considered that the Convention offered a reasonable compromise for action in this area, making Community action unnecessary, or alternatively felt that it constituted a good starting point for a Community initiative. Others favoured a Community initiative, stating that this was still necessary despite the Convention and could provide an added value in terms of the protection of heritage and the promotion of cultural diversity. It was suggested that any Community approach should focus on best practice, although certain

¹⁵ In particular in the Commission Staff Working document – 11.4.2001, SEC (2001) 428.

¹⁶ 2261 Council Meeting (16 May 2000) Press 154 – Nr 8394/00

¹⁷ There are proposals from the European Federation of Film Directors (FERA) and the International Federation of cinema producers associations (FIAPF) (which has proposed a "voluntary" deposit for cinematographic works based on a model contract that they have drawn up - General regulations concerning trust deposit of motion picture prints with film archives (1971))

commentators felt that self-regulation or co-regulation did not function adequately and could lead to disparities as regards the preservation of audiovisual works.

There were conflicting views as to whether such a system should be compulsory or voluntary. A number of commentators supported obligatory legal deposit as a minimum measure. Others considered that such a requirement should not entail any additional costs for the producer and should therefore be publicly financed. The requirement should only apply to new works (older works should be the subject of voluntary deposit). Many commentators favoured a voluntary scheme with details established at Member State level and limited to national works, which could be linked to incentives.

Commentators drew a distinction between cinematographic and other works. Broadcasters considered that it would be inappropriate to make television productions part of any mandatory deposit scheme. They added that if regulatory intervention for the preservation of television productions was to be regarded as necessary, it should be on a voluntary basis, and linked to significant financial support mechanisms. Others favoured the inclusion of all audiovisual works, whilst a third group favoured focusing initially on cinematographic works, which could later be extended to other categories.

In terms of conservation, the cinemathèques stressed the need for the works deposited to be of high quality (either the original copy or one of similar quality), as well as the need to create a database of the different material supports for audiovisual works.

The Commission notes that there is widespread support of the need to preserve audiovisual works in view of the objectives of protection of heritage and the promotion of cultural diversity. The results of the consultation show that there is a need for action to preserve our audiovisual heritage. This appears to be particularly important in respect of cinematographic works. However, there was a lack of consensus as to the type of measures that would be appropriate.

Thus, before putting forward a possible proposal the Commission intends to carry out a stocktaking exercise in respect of the current situation within the Member States. This will be carried out by means of an inquiry addressed to the national authorities later on this year. This exercise will evaluate the role played by legislative and other measures and to further analyse the conditions that should apply. Furthermore, the Commission intends to encourage co-operation between the interested parties in this area together with the spread of ‘best practice’. It notes the consensus between the parties concerned that there should not be a single European archive. Deposit should rather be organised at the national or regional level, with appropriate transparency as to the location of works. It also intends to examine further the issue of creating a database of the different material supports for audiovisual works as suggested during the consultation.

3.2. The creation of a registration scheme

Differing opinions exist as to the value of a registration scheme for films and other audiovisual works. At the moment, only a minority of Member States has put in place such a register. An initiative to create an international register in the context of the World Intellectual Property Organisation (WIPO) only met with limited success.

A European initiative in this domain might encourage transparency and thereby help protect rights holders and facilitate the circulation of European productions. This could be particularly important in view of the complexity of the industry. Such a scheme should not impact on questions relating to different rules on authorship or on the use of rights in line with copyright rules, but could aim to provide certain information relating to the audiovisual works registered.

Although a number of the commentators considered the scheme unnecessary and costly, the majority supported it. There was support for creation of a national public register of films in every Member State, if certain criteria were established. This was seen by some as being an essential element of any policy to promote circulation of audiovisual works. Some went further and saw the absence of such a register (or registers) as a hindrance to exploitation of works.

There were differing opinions on the most appropriate type of action. Some were in favour of the creation of a system of mutual recognition based on individual registers in each Member State. Others felt there was a need to assess market needs before deciding on appropriate action. A number of commentators were in favour of networking national registers at a European level. This was seen as having the advantage of transparency facilitating identification, although others considered that this could be quite cumbersome as a mechanism and that it would be difficult to set up such a scheme.

There was widespread agreement as to the advantages of clear identification and the importance of metadata¹⁸. Public service broadcasters stated that Europe would benefit if there were well-known and well-designed systems for metadata with respect to production, delivery, classification, protection and archiving of media works. In respect of the standards they considered it important to encourage the development of a more widely distributed media registration number network, in order to ensure interoperability between media registration numbers and to reduce registration fees for the European programme maker. Certain operators supported the use of the ISAN¹⁹ standard or another standard established by industry, whereas others were against the use of this particular standard, whilst nonetheless in favour of standardised metadata systems.

Some commentators suggested that it should hold details of all the contracts relating to the production and exploitation of films produced in the country, in particular the identity of the various parties, ownership and exercise of copyright, the exploitation terms in the contract, the duration of the licence and its exclusive or non-exclusive character. Commentators considered that financing should be provided at a European level or alternatively by a combination of private and public funding. Other commentators expressed concern either about the costs of such a scheme, or the possible disadvantages if the information was not accurate or up to date.

The Commission notes that there is considerable support for the creation of public registers of films in Member States based on the argument that such a registration scheme would improve the circulation of films by assuring that the information needed is readily available, although a number of issues remain to be clarified. The

¹⁸ Digital information about an audiovisual work intended to help the production and distribution process (also referred to as Digital Asset Management – DAM).

¹⁹ Developed by the International Standards Organisation (ISO). The current version is known as IVID (International Version Identifier) or V-ISAN.

Commission therefore intends to carry out a stocktaking exercise in respect of the current situation within the Member States. This will be carried out by means of an inquiry addressed to the national authorities later on this year. It will aim to evaluate the role played by legislative and other measures and to further analyse the conditions that should apply.

3.3. Right-holders database

The possibility of creating a new database enabling the identification of “rights” or “licensing” agreements across the European Union was put forward. There was disagreement as to whether information on rights and licensing agreements was difficult to obtain. The availability of this information could have a positive effect on the circulation of films. It should be noted that the Commission is analysing the issue of management of rights, as a follow-up to its 1995 Green Paper on Copyright and Related Rights in the Information Society²⁰ ..

Opinions were divided as to whether there was a lack of transparency regarding this information. The majority stated that sufficient transparency is ensured by producers and collecting societies. It was suggested that there was work to be done in the standardised codification of rights in order that rights may be consistently represented and relevant information exchanged in a legally reliable way. A potential benefit of such a database could be to help producers and distributors to find partners in other European countries.

A large number of commentators asserted that such a database would not seem necessary to improve the circulation of audiovisual works: the view was expressed that such a database might be very slow, costly, cumbersome and unable to keep pace with constant, very rapid changes in property. This would not correspond to the flexibility needed for the efficient exploitation of audiovisual works. Consequences of any mistaken or obsolete information could be considerable. The formalities might be unmanageable and the delays in registering valid rights and the related contracts could be a hindrance to freedom of movement in a very brisk market. There might even be a danger that defrauders could obtain validation for misappropriated rights to the detriment of the entitled parties. Concern was also expressed that the creation of such a database could interfere with the internationally well established rule (cf. Article 5(2) Berne Convention) that the enjoyment and the exercise of copyright and neighbouring rights must not be subject to any formalities. Others maintained that major differences in the relevant contract law for copyright seriously affect the competitiveness of audiovisual producers of one country as compared to such producers in another country and that such a database could play an important role in the circulation of audiovisual works by ensuring that it was possible to obtain information about audiovisual works in other countries. The database could facilitate identification of rights holders but negotiations should still take place on a contractual basis.

The Commission has taken note of the views expressed in the consultation and in particular the lack of support for the creation of a rights holders data base. It will continue to examine the issue of management of rights, which it is analysing as a follow-up to its 1995 Green Paper on Copyright and Related Rights in the

²⁰ COM(95)382 final

Information Society, with a view to evaluating the possible impact of the existing differences in national law on the Internal Market.”

3.4. The exploitation of rights

Copyright and neighbouring legislation vest rights in authors, performers, phonogram producers, broadcasters and other rightsholders to authorise or prohibit certain acts of exploitation of their works or other subject matter. In general, users acquire rights by direct individual contracts with the rightsholders concerned or their representatives.

The issue of the exploitation of rights has been raised by broadcasters who assert they have problems in exploiting some of their productions stored in their archives, which they would like to show again especially in the new online environment. They claim it to be virtually impossible to identify and to trace and negotiate with all individual programme contributors or their heirs, particularly in the case of old productions. They assert that these difficulties prevent them from exploiting their archives today. Public service broadcasters therefore asked for legislative action to facilitate their situation. . The cinemathèques also stated that they were unable to use a number of works and that the public therefore lost access to its own audiovisual heritage.

Producers and certain private broadcasters on the other hand, felt that the matter had been settled in the context of the new Copyright Directive²¹ and should not be re-opened in this context.

A number of commentators considered that the creation of the databases and registers referred to above could facilitate identification. It was also suggested that the matter should be considered in the review of the Television without frontiers (TVWF) Directive. However, it should be noted that this directive does not cover copyright and related rights issues.

The Commission supports co-operation between all parties in order to solve specific difficulties, which may exist in certain situations. This co-operation should in the first place aim to set up an inventory of works for which problems relating to the identification of rightsholders could exist.

4. E-CINEMA

The issue of e-cinema has been raised because of the new pan-European distribution possibilities that are being created by digital technologies. These technologies can also enable the development of local multi-purpose centres in less densely populated areas²². The term e-cinema is used to signify electronic delivery to a cinema screen. The term d-cinema has also been used by the industry, signifying that the final image is either the result of an end-to-end digital chain or the digital projection of material originated on film and transferred to digital medium. The impact on the cost/benefit analysis for film distributors and cinema owners was also raised.

²¹ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society – O.J. L 167, 22/06/2001.

²² For example the Swedish Folket Hus

There was widespread support from commentators for an industry-led approach to the standardisation of e-cinema. Intervention by national authorities or the European Union was not felt to be necessary. A number of contributions referred to the European Digital Film Forum, recently established in Stockholm, at the initiative of the Swedish Presidency, as the appropriate body to take forward actions, and called for support of its objectives and projects.

There were calls for the Commission to support the development of e-cinema through the MEDIA Plus programme and to open its "Multiannual Framework Programme 2002-2006 for research, technological development and demonstration activities aimed at contributing towards the creation of the European Research Area" (The Sixth framework Programme) to the European industries committed to developing a high standard for electronic cinema distribution.

The pilot projects under the MEDIA programme are the way in which Council Decisions 2000/821/EC and 163/2001/EC ensure that the MEDIA Plus²³ and the MEDIA Training²⁴ Programmes respond to rapid technological change. This reflects an expectation that the use of digital technologies will make European audiovisual works more readily accessible as a result of new ways of transporting audiovisual content and thus more widely available outside their country of origin. Competitiveness in a globalisation context will increasingly depend on the use of new technologies in the development, production and distribution stages.

However, the MEDIA Programmes address themselves to the audiovisual industry and not to the research community. The Commission will ensure suitable and effective co-ordination with the measures undertaken in the field of new technologies and in particular, inter alia, with the Sixth Framework Programme, focusing on the needs and potential of SMEs operating on the Audiovisual market.

The Commission's overall objective is to strengthen, through the development and use of new technologies, the European content industry, by improving the chances of such content entering into production, by encouraging its transnational distribution and by improving the potential of professionals through appropriate continuous vocational training. The target should be to develop globally-recognised, open standardised e-cinema systems, through an industry-led process. This could include the following elements: to develop suitable algorithms for the compression of film quality digital content to be exhibited; to develop technologies capable of projecting such content; to develop methods of protecting the use of content through encryption; to develop methods which will allow the billing of content consumed over a network; to develop methods for the digitisation, enhancement, restoration and conservation of content.

The Commission considers that e-cinema offers important new opportunities for increasing the circulation of European audiovisual works. It considers that the priority in this respect is the delivery to cinema, i.e. business to business, although there may possibly be a consumer phase at a later date. The Commission welcomes the establishment of the European Digital Cinema Forum. It supports the objectives of this forum to establish European user requirements for all parts of the

²³ O.J. L 13 of 17.01.2001

²⁴ O.J. L 26 of 27.01.2001

digital/electronic chain, and to facilitate the development of world-wide standards for e -cinema in a timely manner.

5. TAX ISSUES

Certain questions arise concerning the differences that exist between various types of cultural “goods” within the Member States and the effect of fiscal measures in force in the Member States on the production and circulation of audiovisual works. It was considered that national fiscal incentives could be an important factor in the development of co-productions, as well as the harmonisation of tax practices to avoid double liability. Producers and directors felt that the Commission should ask all Member States to facilitate the creation of specialised, national or European, banks or venture capital funds with private finances, and to encourage Member States that don’t have them to introduce fiscal measures to encourage audiovisual investment. A number of commentators referred to fiscal measures (in particular “tax shelters”) that were being used to finance non-European production. Cinema exhibitors considered that the Commission should encourage Member States to lower indirect taxes on cinema seats to the same level as those imposed for other cultural products.

There was widespread agreement from the different players concerned that reduced rates of VAT or a zero rate should apply to audiovisual cultural products and services. Accordingly, a number of commentators suggested that Annex H of the 6th VAT Directive²⁵ should be expanded to cover either certain parts of the sector (video and on-line services) or the entire sector. Certain national authorities however questioned the need for European action although others considered that this subject should be discussed at a European level.

The procedure laid down by the Directive is for the review to be carried out on the basis of a report from the Commission. On the basis of this report, the Council shall review the scope of the reduced rates every two years. The Council, acting unanimously on a proposal from the Commission, may decide to alter the list of goods and services in Annex H. The Commission laid down its policy for VAT in the Communication of 7 June 2000²⁶. In this Communication, the Commission stated that it would look at the harmonisation of rates and assess the impact of their structure on the functioning of the single market. Guidelines will be established on the basis of this analysis once the evaluation of the current pilot project for labour-intensive services²⁷ (for which a reduced rate may be applied until December 2002) has been completed. Particular attention will be paid to the use of reduced VAT rates in the context of the Community’s priorities in this sector.

The Commission notes the views expressed about taxation for cultural goods and services, and in particular the request to enable those Member States who wish to

²⁵ Directive 77/388/EEC of 17.05.1977 as last amended by directive 2001/41/EC of 19.01.01. Annex H includes a number of items of cultural interest such as books and newspapers (including their loan), and entrance fees for cultural and other events (cinema, theatre, fairs, museums etc.) and the reception of broadcasting services.

²⁶ A strategy to improve the operation of the VAT system within the context of the Internal Market – COM (2000) 348 final

²⁷ Introduced by Directive 1999/85/EC of 22.10.1999.

do so to apply a reduced rate of VAT to all cultural goods and services without discriminating between different forms of distribution. The Commission will consider whether to respond to this request in the context of the review of Annex H of the 6th VAT Directive, which will take place after 2002. The Commission would draw attention to the existing possibility for Member States to apply a reduced rate to cinema admissions.

6. RATING

There are two interlinked issues concerning the differences in ratings given to audiovisual works within Member States for different means of distribution and between Member States for the same means of distribution. Audiovisual works are generally subject to rating of their content, indicating for which age ranges they are considered suitable.

On the issue of differences between the Member States, a certain number of commentators (notably national authorities) considered that differences were the result of cultural differences and did not affect circulation significantly and therefore should be dealt with at a national level. Others were in favour of action to address this issue, even though they acknowledged that harmonising rating systems for audiovisual works across Europe could be difficult because of varying cultural traditions and sensitivities. There was support for increased co-operation between the competent authorities and the rating bodies to reduce the disparities from one Member State to another and from one medium to another, and to develop mutual recognition. Certain commentators considered that the role of national and European public authorities could be to support co-operation between relevant authorities possibly with the development at the European level of common descriptive criteria.

In respect of the differences between different means of distributions many commentators thought that content should be treated in the same way through the different distribution outlets. There were requests for harmonised standards, as this would facilitate the circulation of European works. It was argued that judgements about the suitability of material should be made on a more consistent and coherent basis across the media, according to a set of statutory objectives and principles for content regulation. The solution could be to set up a uniform European rating standard across audiovisual media, which would benefit consumers and suppliers and therefore positively affect production and circulation of European audiovisual works.

In its Report on the Recommendation on the protection of minors and human dignity²⁸, the Commission has stressed the need to have a coherent approach across all media. The Commission intends to continue this work and to evaluate which systems could be put in place, which would address this problem, whilst taking account of the cultural differences existing between the Member States. The Commission recognises the important cultural aspects of ratings, to be decided in accordance with the principles of subsidiarity and governance as set out in its recent White Paper⁷, but considers that

²⁸ Evaluation report from the Commission to the European Parliament and the Council on the application of Council Recommendation of 24 September 1998 concerning the protection of minors and human dignity, COM(2001)106, 27.2.2001, http://europa.eu.int/comm/avpolicy/regul/new_srv/pmhd_en.htm

further analysis should be carried out of the role played by self-regulatory schemes such as NICAM in the Netherlands.

The Commission will encourage exchanges of experience in respect of ratings (to include self-regulation) with a view to increasing co-operation on this issue. In this respect, the Commission intends to launch a Study on the rating of films, for cinema, television, DVD and videocassette in the EEA. The study will evaluate the reasons for, and the impact of differences between the different national laws or self-regulatory measures for rating of films on their subsequent marketing. It also will analyse whether such differences in rating create potential confusion amongst the persons responsible for minors.

7. OTHER MEASURES TO IMPROVE THE CIRCULATION OF FILMS

A number of different ideas to increase the production and circulation of European audiovisual works were put forward, notably:

A number of commentators considered that the Commission should encourage the funding of the production sector and/or encourage Member States or other institutions to do so. It should be noted that the Commission, together with the European Investment Bank (EIB) and the European Investment Fund (EIF) launched the “i2i-audio-visual initiative”, which supplements the Media plus programme for 2001-2005 and focuses on both industrial goals of competitiveness together with the promotion of cultural diversity inherent in the promotion of the development of European audiovisual content. The Commission will continue to examine all appropriate financial measures to improve the production and circulation of European audiovisual works.

In this respect, the Commission highlights the positive approach taken in the recent Communication adopted on State Aid and Risk Capital²⁹, which it will apply for the next 5 years. This text is in line with the commitment to risk capital set out as a wider Community objective at the Lisbon European Council, and with the Commission’s general policy of promoting risk capital in the Community³⁰. The Commission has approved a number of schemes launched by the Member States to create such funds. Encouraging exchanges of information and “best practice” between the Member States and the Commission to identify the best means by which the various Member States could help the cinema sector, and to consider opportunities to develop them in every Member State. In this regard it could be useful to create transnational networks of European professionals in the film industry. Others identified a need for the Commission to define broad principles for the Member States and to address key issues such as the need for national approaches to avoid inhibiting transfrontier production or circulation.

It was suggested that the European Commission should use its eLearning initiative that seeks to mobilise the educational and cultural communities, in order to speed up changes in the education systems to introduce the knowledge of classic European films to Europe’s young citizens.

²⁹ Official Journal C 235 of 21.08.2001

³⁰ Risk capital, a key to job creation in the European Union, SEC (1998) 552 final, 31.3.98

Finally, there was support for the creation of a European Union TV channel to broadcast “European films”.

The Commission considers that the exchange of information and best practice is extremely important in the sector. The audiovisual production industry is extremely complex, and faces a number of both technological and market challenges. The Commission intends to create a group of experts to discuss these issues and provide an input for the Commission for the elaboration of policy in this area. This group should gather together multidisciplinary expertise. Its objective should be to provide information and ideas on the technological and market developments in the audiovisual production sector. It should not represent Member States as such but gather the experience and knowledge in all Member States.

The Commission will examine which action could be taken in the context of its eLearning initiative to develop image education and the knowledge of European films to Europe’s young citizens.

The Commission also intends to launch a study on the identification and evaluation of financial flows within the European cinema industry, based on the analysis of the financial records of a selected number of films marketed between 1996 and 2000. This study will identify and evaluate the key factors determining the economic characteristics of the cinema industry. In particular, it will analyse the different project phases of pre-production, development, production, post-production, promotion, distribution and import and export. A description of the impact that possible relations between specific investors and amount of revenues may have had on the film performances will also be carried out.

8. QUESTIONS TO BE CONSIDERED IN THE 2002 REVIEW³¹ OF THE TELEVISION WITHOUT FRONTIERS DIRECTIVE

8.1. Definitions

The definition of a European work: Different definitions of a European work exist at international, Community and national levels. The main issues identified were whether there is a need for an agreed definition at European level, what the level of detail of that definition should be, and whether it should be binding for the various uses envisaged. At Member State level a number of different definitions exist for “European works”. It has been argued that the differences could create barriers to the circulation of European productions. These definitions have been adopted at Member State level both to implement the provisions of the TVWF Directive and for the application of national support schemes for audiovisual works

There was widespread recognition that the issue of “definitions” was important for all types of production. Many commentators stressed the need for such definitions to take account of the relevant context, notably support schemes, co-productions etc. and highlighted the links with the review of the TVWF Directive in 2002. Some felt that certain political objectives would benefit from a harmonised definition or, as an

³¹ Review provided by Article 26 of the directive; see http://europa.eu.int/comm/avpolicy/regul/regul_en.htm

alternative, from co-ordination or mutual recognition of Member State definitions; this could simplify the creation of European co-productions and the combination of different (national or European) support schemes.

A number of commentators (including broadcasters and National authorities) felt that the differences in definition identified did not create difficulties for transfrontier production. Others (notably, film and television producers) considered that the existence of different definitions, as well as the different national interpretation of these definitions, hampers any attempt to clearly assess the economic development of the European production industry as a whole. Opinions were also divided as to whether a more detailed definition should be provided in Community Law, with some asserting that this was not necessary whilst others called for harmonisation.

In respect of the criteria that should be adopted a number of different views were expressed. Views were divided between the merits of the widest possible definition or a stricter approach, and of cultural or economic criteria. Certain criteria such as the control of rights were the subject of disagreement. Other commentators put forward criteria such as the use of a labour-based definition, or “cultural” elements.

The definition of an independent producer: A number of different definitions of an “independent producer” and “independent production” exist across Europe. Many Member States use the notion of independent producer to delimit the beneficiaries of National State aid schemes. The issues of the meaning of “independence” and the criteria to establish whether a producer is independent were raised.

There was broad agreement that it was necessary to clarify the underlying policy objectives, in particular in the light of new industry structures. Certain commentators noted a potential tension between the objectives of increasing European competitiveness and that of promoting cultural diversity within Europe. The latter goal would appear to be in line with the original aims of the TVWF Directive to stimulate the creation of new sources of TV production, notably by favouring the creation of SMEs, which will compete with the existing established producers. It would imply focusing the protection offered by the current system on SMEs, rather than extending it to larger groups linked to broadcasters. In this respect, it was also noted that the distinction between producers and broadcasters is not as clear as it used to be, as they frequently form part of a vertically integrated groups and the relationship is therefore increasingly complex. Any definition should therefore include links with interests in different parts of the audiovisual value chain. There was a certain amount of support for a European definition, which could ensure that Member States used the same interpretation. The general opinion was that the issue should be considered in the review of the TVWF Directive.

The distinction between the notions of independent producer and independent production was highlighted by producers and directors. The important contribution of independent producers was stressed by a large number of commentators, in particular in view of the need to promote cultural diversity. In respect of possible criteria that could be used a number of commentators considered that the starting point should be the relevant recital in the TVWF Directive (Recital 31).

There was disagreement notably between broadcasters and producers as to whether the criteria should include a limitation on the duration of the transfer of rights from producers to broadcasters. Broadcasters considered that any intervention at the European

level to introduce a time or other limit on rights ownership by broadcasters would be unjustified and contrary to the objectives of European audiovisual policy, as well as having an adverse effect on competition. Producers considered that the re-transfer of traditional rights back to the producer and the fair negotiation of new media rights (see below 2.4) can only benefit the circulation of audiovisual works, and increase the quantity and quality of European content available to new delivery platforms.

Key criteria put forward included the free choice of facilities, free choice of international distribution, majority participation link, company ownership and shareholdings. Others suggested that any definition should focus on the notion of “independence” to retain the distinction between broadcasters and producers. A number of broadcasters (public service and commercial) considered that the current definition of “independence from a broadcaster” should be altered to reflect developments in the sector, notably the increasing concentration and creation of media conglomerates and the presence of other platforms linked back to broadcasters.

In respect of the use of this definition for the application of Community competition rules it was suggested that consideration should be given to the question of independent production when looking at mergers and joint ventures to ensure that the sector (composed mainly of SMEs) would not be adversely affected. This should include, in particular, control of production, access to distribution channels, and the retention of rights for independents in respect of catalogues.

The Commission considers that the debate launched in this context will provide useful input to the studies that have been launched in preparation of the review of the TVWF Directive in 2002, and intends to take this issue forward in that context. It notes that the review should pay particular attention to the objectives to be achieved, notably in respect of the need to promote cultural diversity and the role played by the definition in that respect as well as to the wide range of possible criteria to be evaluated.

8.2. Questions on media chronology and on-line rights.

This issue concerns the chronology of windows for the economic exploitation of films in Member States of the European Union, which is based on agreements between the relevant economic actors³². An obligation exists in Community law for Member States to ensure that broadcasters under their jurisdiction do not broadcast cinematographic works outside periods agreed with the rights holders³³.

There was widespread agreement from commentators that this was sufficient and that provided that the principle of media chronology was guaranteed at the European level, deadlines for film exploitation should be left to contractual arrangements between the parties involved. Certain commentators felt that to harmonise practices would be counterproductive. Others spoke up in favour of self-regulation.

The new issues in terms of defining on-line and new media rights created by the distribution of European production on-line were highlighted and comments on the implications for different actors in the value chain (bundling of rights etc) were

³² Supplemented by legislation in Germany, France and Portugal.

³³ Article 7 of the amended TVWF Directive

requested. Broadcasters and producers disagreed as to the need to categorise rights, with producers considering that there was a need to categorise and to define the different groups of rights.

In general, producers considered that broadcasters already acquired new media rights at no additional cost, since these rights were not clearly defined in the contract and negotiated separately. Broadcasters agreed that negotiations for rights must recognise the range of platforms over which there is potential for exploitation, and make clear arrangements either to include or exclude those additional rights in any agreement, subject to fair payment (current practice). In addition, they considered that intervention would curtail commercial freedom for both parties.

The Commission considers that the consultation has confirmed that the current position under Community law remains the best solution, permitting a flexible approach to the use of rights for different media windows. It notes the concerns expressed by producers in terms of bundling of rights and intends to consider this question insofar as it is linked to the definition of an independent producer in the context of the review of the TVWF Directive in 2002.

9. NEXT STEPS

The fundamental principles, which are at the heart of the Community's audiovisual policy, remain fully valid. The Community will develop this policy on the basis of existing regulatory instruments and support mechanisms, but also explore the possibility of using new instruments or initiatives to achieve these objectives. Technological and market developments must be seen in the light of the need to reinforce Europe's cultural and linguistic diversity and preserve our audiovisual heritage. In this respect, the Commission has identified a certain number of initiatives that could be taken to promote the circulation of works and will therefore launch the following actions:

TIMETABLE FOR ACTION

Subject	Action	Completion Date
Ratings	Independent study on the evaluation of rating practices	2002
Other issues	Creation of a cinema experts group	2002
Other issues	Independent study on financial flows within the European cinema industry	2002
Protection of heritage and exploitation of audiovisual works	Stocktaking, before launch of initiative	Mid 2002
Definitions of a European work and an independent producer	Review of the Television Without Frontiers Directive	End 2002
Tax issues	Review of 6 th VAT Directive	after 2002
e-Cinema	Inclusion in MEDIA+ and 6th Framework Programme	2002-2006