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COMMUNICATION FROM THE COMMISSION TO THE COUNCIL, THE EUROPEAN PARLIAMENT, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS

on the follow-up to the Commission communication on certain legal aspects relating to cinematographic and other audiovisual works (Cinema communication) of 26.09.2001 (published in OJ C 43 on 16.2.2002)

Proposal for a

RECOMMENDATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on film heritage and the competitiveness of related industrial activities

(presented by the Commission)

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(text with EEA relevance)

1. INTRODUCTION

1. The 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[1] (hereinafter referred to as "the Communication") tackled, among others, two issues that are of vital importance for the cinematographic industry: State aid to cinema and protection of heritage.

2. The present Communication is the follow-up to that Communication. In the field of State aid, the Commission intends to provide legal security to the sector, by clearly stating the rules to be applied until 30 June 2007. In relation to film heritage, the Commission proposes adopting a Recommendation of the European Parliament and of the Council on film heritage and the competitiveness of related industrial activities.

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

1. The criteria used by the European Commission to assess the compatibility with the EC Treaty of aid schemes for cinema and TV production were clarified in chapter 2 of the Communication. This Communication contains the general approach of the Commission with regard to State aid to the cinema and TV production sector.

2. These criteria are two-fold:

a) Respect of the general legality criterion;

b) Specific compatibility criteria for State aid to cinema and TV programme production.

3. The Communication stated that the specific compatibility criteria would remain valid until June 2004. Member States' aid schemes for cinema and TV production are currently authorised by the Commission until the same deadline.

4. The Commission organised a broad consultation exercise on the possible adjustment of the specific compatibility criteria with Member States, accession countries and professionals, within the framework of the Cinema Expert Groups, which met on 9 and 19 January 2004 in

[1] COM(2001)534 final of 26.09.2001, OJ C 43, 16.02.2002

Brussels. Member States and professionals unanimously expressed their satisfaction with the criteria set out in the Communication and did not raise any concern regarding their impact on competition.

5. In their view, the cinema sector in Europe is under pressure and therefore aid is needed to support it. They fear that a modification of the existing rules could threaten the stability of the sector and therefore they pleaded to maintain the set of rules as it now stands.

6. The Commission's main concerns are not related to the volume of the aid, which, being aimed at supporting culture is compatible with the Treaty. However, the Commission recalled its worries over certain territoriality requirements, *i.e.* the "territorialization" clauses of certain aid schemes. Such territorialization clauses impose on producers an obligation to spend a certain amount of the film budget in a particular Member State as an eligibility condition for receiving the full aid amount. Territorialization clauses may constitute a barrier to the free circulation of workers, goods and services across the EC. They may, therefore, fragment the internal market and hinder its development. However, the Commission considers that these clauses may be justified under certain circumstances and within the limits set in the Communication in order to ensure the continued presence of human skills and technical expertise required for cultural creation. Of course, this Communication is without prejudice to the Commission's obligations under the Treaty to deal with complaints relating to possible breaches of other Treaty rules than the State aid provisions.

7. The Commission has therefore carefully considered the arguments put forward by the national authorities and the professionals of the cinematographic sector. It accepts that the sector of film production is under pressure. It is therefore willing to consider, at the latest at the time of the next review of the Communication, higher aid amounts being made available provided that the aid schemes comply with the conditions of general legality under the Treaty and, in particular, that barriers to the free circulation of workers, goods and services across the EC in this sector are reduced.

8. In advance of the next review of the Communication, the Commission intends, in addition to further analysing the arguments of the sector, to carry out an extensive study on the effects of the existing State aid systems. The study should examine in particular the economic and cultural impact of the territorialization requirements imposed by Member States, in particular taking into account their impact on co-productions.

9. In the light of the above, the Commission extends the validity of the specific compatibility criteria for aid to cinema and TV programme production, as set out in the Communication, until 30 June 2007.

3. PROTECTION OF FILM HERITAGE

1. The Cinema Communication examined the legal deposit of audiovisual works at national or regional level as one of the possible ways of conserving and safeguarding the European audiovisual heritage and launched a stocktaking exercise of the situation regarding the deposit of cinematographic works in the Member States, accession countries and EFTA countries. All Member States already have systems in place for collecting and preserving cinematographic works forming part of their audiovisual heritage. Four-fifths of these systems are based on a legal or contractual obligation to deposit all films, or at least those films that have received public support.

2. Cinematography is an art form contained on a fragile medium, which therefore requires positive action from the public authorities to ensure its preservation. Cinematographic works are an essential component of our cultural heritage and therefore merit full protection. In addition to their cultural value, cinematographic works are a source of historical information about European society. They are a comprehensive witness to history of the richness of Europe's cultural identities and the diversity of its people. Cinematographic images are a crucial element for learning about the past and for civic reflection upon our civilisation. In order to ensure that the European film heritage is passed down to future generations, it has to be systematically collected, catalogued, preserved and restored. In addition, European film heritage should be made accessible for educational, academic, research and cultural purposes, without prejudice to copyright and related rights.

3. There have been a number of EU and international actions aimed at protecting film heritage. At EU level, the following should be mentioned:

- The Council Resolution of 26 June 2000[2] on the conservation and enhancement of European cinema heritage calls on Member States to cooperate in the restoration and conservation of cinema heritage, including through recourse to digital technologies, to exchange good practice in this sector, to encourage progressive networking of European archival data and to consider the possible use of these collections for educational purposes.

- European Parliament Report on the Commission Communication on cinema of 7 June 2002,[3] in which the European Parliament underlined the importance of safeguarding the cinematographic heritage.

- The Council Resolution of 24 November 2003 on the deposit of cinematographic works in the European Union[4] invited Member States to put in place an efficient system of deposit and preservation of the cinematographic works forming part of their audiovisual heritage in their national archives, film institutes or similar institutions, if such systems do not yet exist.

4. At international level, The European Convention for the protection of the Audiovisual Heritage[5] was open for signature on 8.11.2001. It provides that each Party has to introduce the obligation to deposit moving image material forming part of its audiovisual heritage and having been produced or co-produced in the territory of the Party concerned.

5. The transfer of the possession of cinematographic works to archiving bodies does not imply transferring copyright and related rights to them. Nevertheless, 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[6] stipulates that Member States may provide for an exception or limitation in respect of specific acts of reproduction made by publicly accessible libraries or by archives which are not for direct or indirect economic or commercial advantage.

6. Finally, the cinematographic industry in Europe has great potential for creating employment and contributing to economic growth. This refers not only to the production and

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2 OJ C 193, 11.7.2000.
3 PE 312.517, not yet published in the Official Journal.
4 Council Press Release 1457/03, OJ C 295/5, 5.12.2003.
5 http://conventions.coe.int, Council of Europe, ETS No 183.
6 OJ L 167, 22.06.2001.

showing of films, but also to the collection, cataloguing, preservation and restoration of cinematographic works. The conditions for the competitiveness of these industrial activities related to film heritage need to be improved, especially as regards better use of technological developments, such as digitisation.

7. In the light of the above, the Commission proposes adopting a Recommendation of the European Parliament and of the Council on film heritage and the competitiveness of related industrial activities. Member States, accession countries and professionals have been consulted on the draft proposal, within the framework of the Cinema Expert Groups, which met on 9 and 19 January 2004 in Brussels.

EXPLANATORY MEMORANDUM

4. INTRODUCTION

The Commission Communication on certain legal aspects relating to cinematographic and other audiovisual works[7] examined the legal deposit of audiovisual works as one of the possible ways of conserving and safeguarding the European audiovisual heritage. The Commission noted that while there was widespread support for the objective of conserving and safeguarding the European audiovisual heritage, there were different views on the legal status of deposit of audiovisual works.

As announced in the Communication, the Commission carried out a stocktaking exercise of the current situation in the Member States. A questionnaire was sent to Member States, accession countries and EFTA countries on 26 March 2002.

An analysis of the replies shows that ten Member States have established a legal obligation for producers to deposit their cinematographic works in the national libraries or film institutes. For three other Member States, the obligation of deposit, established by law or by contractual relationship, concerns exclusively films that receive public funding. In two Member States, the deposit is done on a voluntary basis. In summary, four-fifths of Member States have a system of compulsory deposit for all or publicly financed works.

The Commission set up two groups of cinema experts as a follow-up to the Cinema Communication: one composed of Member States representatives and one of professionals. The Cinema Member State Expert Group discussed the protection of film heritage at its meetings of 20 September 2002 and 9 January 2004. The Cinema Professional Expert Group also discussed the matter on 5 November 2002 and 19 January 2004.

Consultations confirm that there is general agreement that cinematographic works are an important part of Europe's cultural heritage. According to the replies to the questionnaire, private initiative or voluntary systems cannot ensure systematic deposit and preservation of all cinematographic works. This objective can only be achieved via systematic deposit systems. In addition, there is a majority view that the national systems should be interlinked and best practices exchanged.

5. CONTEXT

Both the Council and the European Parliament have underlined the importance of collecting and preserving the European film heritage.

The Council has adopted two Resolutions on this matter. The first one, adopted on 26 June 2000,[8] called on Member States to cooperate in the restoration and conservation of cinema heritage, including through recourse to digital technologies, to exchange good practice in this sector, to encourage progressive networking of European

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7 COM(2001)534 final, 26.9.2001, OJ C 43/6, 16.2.2002.

8 OJ C 193, 11.7.2000.

archival data and to consider the possible use of these collections for educational purposes. The latest one, adopted on 24 November 2003,[9] confirmed that European cinematographic works are an essential manifestation of the richness and diversity of European cultures and that they constitute a heritage that has to be conserved and safeguarded for future generations. It also stressed that European cinematographic works forming part of Member States' audiovisual heritage must be systematically deposited in national, regional or other archives, in order to ensure their preservation.

In its Report on the Commission Communication on cinema of 7 June 2002,[10] the European Parliament stressed the need for a compulsory legal deposit of audiovisual works by Member States, in line with the European Convention for the protection of the Audiovisual Heritage. In the view of the European Parliament, legal deposit should be compulsory for beneficiaries of State aid, as a transitional measure.

In addition, the Council of Europe opened the Convention for the protection of the Audiovisual Heritage[11] for signature on 8 November 2001. This Convention requires its signatories to set up a system of compulsory legal deposit of all moving image material, and voluntary deposit of ancillary material. The Convention has not yet entered into force.

6. SCOPE OF THE RECOMMENDATION

The Recommendation focuses on cinematographic works. For other audiovisual works, e.g. television programmes, the Recommendation provides only for voluntary deposit.

The Recommendation covers all aspects of film heritage: collection, cataloguing, creation of databases, preservation, restoration, and use for educational, academic, research and cultural purposes, and cooperation between the institutions responsible at European level.

7. WHY A RECOMMENDATION FROM THE EUROPEAN PARLIAMENT AND THE COUNCIL RATHER THAN A RECOMMENDATION FROM THE COMMISSION?

Given that the harmonisation of laws of the Member States is excluded from industrial and cultural policies, the Community is bound to use non-binding instruments, such as recommendations, to fulfil the tasks and obligations enshrined in the Treaty.

The EC Treaty gives the Commission extensive powers to adopt Recommendations: Article 249 provides that "in order to carry out their task and in accordance with the provisions of this Treaty … the Commission shall ... make recommendations". Article 211 states that "in order to ensure the proper functioning and development of the common market, the Commission shall … formulate recommendations or deliver opinions on matters dealt with in this Treaty, if it expressly so provides or if the Commission considers it necessary".

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9 Council Press Release 1457/03, OJ C 295/5, 5.12.2003.

10 PE 312.517, not yet published in the Official Journal. The Rapporteur was Luckas Vander Taelen.

11 http://conventions.coe.int.

Nevertheless, the Commission considers that a Recommendation from the European Parliament and the Council has to be preferred to a Recommendation from the Commission on this matter, for two reasons. First of all, the Recommendation in question seeks effective cooperation between Member States on the protection of film heritage. This can be better achieved if the Recommendation is discussed and adopted by the Council. Secondly, the European Parliament has fully backed the need to preserve film heritage in two Reports.[12] Therefore, it seems appropriate to fully involve the European Parliament in the discussion and adoption of the Recommendation. The involvement of the European Parliament will result in more public debate and a bigger impact of the Recommendation. In conclusion, the objective pursued by the Community can be better achieved by the adoption of a Recommendation from the European Parliament and the Council rather than a Recommendation from the Commission.

8. LEGAL BASIS FOR THE RECOMMENDATION

The cinematographic industry in Europe has great potential for creating employment and contributing to economic growth. This refers not only to the production and showing of films, but also to the collection, cataloguing, preservation and restoration of cinematographic works. The conditions for the competitiveness of these industrial activities related to film heritage need to be improved, especially as regards better use of technological developments, such as digitisation. Therefore, the legal basis proposed for the Recommendation is Article 157 of the EC Treaty, which requires the Community and the Member States to ensure that the conditions necessary for the competitiveness of the Community's industry exists, with action aimed, inter alia, at fostering better exploitation of the industrial potential of policies of innovation, research and technological development.

Article 157 has already formed the legal basis for acts adopted in the field of audiovisual policy, such as Council Decision of 20 December 2000 on the implementation of a programme to encourage the development, distribution and promotion of European audiovisual works (MEDIA Plus – Development, distribution and promotion 2001-2005)[13] and Council Recommendation of 24 September 1998 on the development of the competitiveness of the European audiovisual and information services industry by promoting national frameworks aimed at achieving a comparable and effective level of protection of minors and human dignity.[14]

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12 PE 303.777, OJ C140, 2.6.2002, and PE 312.517, not yet published in the Official Journal.

13 OJ L 13/35, 17.1.2001.

14 OJ L 270/48, 7.10.1998.

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on film heritage and the competitiveness of related industrial activities

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 157 thereof,

Having regard to the proposal from the Commission,[15]

Having regard to the Opinion of the European Economic and Social Committee,[16]

Having regard to the Opinion of the Committee of the Regions,[17]

Acting in accordance with the procedure referred to in Article 251 of the Treaty,

Whereas:

(1) Article 157 of the Treaty stipulates that the Community and the Member States must ensure that the conditions necessary for the competitiveness of the Community's industry exist.

(2) Article 151(4) of the Treaty stipulates that the Community must take cultural aspects into account in its action under other provisions of the Treaty, in particular in order to respect and to promote the diversity of its cultures.

(3) The cinematographic industry in Europe has great potential for creating employment and contributing to economic growth. This refers not only to the production and showing of films, but also to the collection, cataloguing, preservation and restoration of cinematographic works. The conditions for the competitiveness of these industrial activities related to film heritage need to be improved, especially as regards better use of technological developments, such as digitisation

(4) The Council Resolution of 26 June 2000[18] on the conservation and enhancement of European cinema heritage calls on Member States to cooperate in the restoration and conservation of cinema heritage, including through recourse to digital technologies, to exchange good practice in this sector, to encourage progressive networking of

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15 OJ C […], […], p. […]
16 OJ C […], […], p. […]
17 OJ C […], […], p. […]
18 OJ C 193, 11.7.2000.

European archival data and to consider the possible use of these collections for educational purposes.

(5) The Commission Communication on certain legal aspects relating to cinematographic and other audiovisual works[19] examined the legal deposit of audiovisual works at national or regional level as one of the possible ways of conserving and safeguarding the European audiovisual heritage and launched a stocktaking exercise of the situation regarding the deposit of cinematographic works in the Member States, accession countries and EFTA countries.

(6) At its meeting of 5 November 2001,[20] the Council (Cultural/Audiovisual Affairs) welcomed the content of the Commission Communication and the approach taken by the Commission.

(7) In its Report on the Commission Communication on cinema of 7 June 2002,[21] the European Parliament also underlined the importance of safeguarding the cinematographic heritage.

(8) The Council Resolution of 24 November 2003 on the deposit of cinematographic works in the European Union[22] invited Member States to put in place an efficient system of deposit and preservation of the cinematographic works forming part of their audiovisual heritage in their national archives, film institutes or similar institutions, if such systems do not yet exist.

(9) The European Convention for the protection of the Audiovisual Heritage[23] provides that each Party has to introduce the obligation to deposit moving image material forming part of its audiovisual heritage and having been produced or co-produced in the territory of the Party concerned.

(10) All Member States already have systems in place for collecting and preserving cinematographic works forming part of their audiovisual heritage. Four-fifths of these systems are based on a legal or contractual obligation to deposit all films, or at least those films that have received public support.

(11) "Moving image material" means any set of moving images recorded by whatever means and on whatever medium, whether or not accompanied by sound, capable of conveying an impression of movement.

(12) "Cinematographic work" means moving image material of any length, in particular cinematographic works of fiction, cartoons and documentaries, which is intended to be shown in cinemas.

(13) Cinematography is an art form contained on a fragile medium, which therefore requires positive action from the public authorities to ensure its preservation. Cinematographic works are an essential component of our cultural heritage and therefore merit full protection.

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19 COM(2001)534 final, 26.9.2001, OJ C 43/6, 16.2.2002.
20 2381st Council meeting – Cultural/Audiovisual Affairs (PRES/01/377, 5.11.2001).
21 PE 312.517, not yet published in the Official Journal.
22 Council Press Release 1457/03, OJ C 295/5, 5.12.2003.
23 http://conventions.coe.int, Council of Europe, ETS No 183, open for signature on 8.11.2001.

(14) In addition to its cultural value, cinematographic works are a source of historical information about European society. They are a comprehensive witness to history of the richness of Europe's cultural identities and the diversity of its people. Cinematographic images are a crucial element for learning about the past and for civic reflection upon our civilisation.

(15) In order to ensure that the European film heritage is passed down to future generations, it has to be systematically collected, catalogued, preserved and restored, while respecting copyright and related rights.

(16) European film heritage should be made accessible for educational, academic, research and cultural purposes, without prejudice to copyright and related rights.

(17) Transferring the possession of cinematographic works to archiving bodies does not imply transferring copyright and related rights to them.

(18) Article 5(2)(c) of 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[24] stipulates that Member States may provide for an exception or limitation in respect of specific acts of reproduction made by publicly accessible libraries or by archives which are not for direct or indirect economic or commercial advantage.

TAKE NOTE OF THE COMMISSION'S INTENTION:

1. To consider making it compulsory for the beneficiaries of EU funding to deposit a copy of European films that have obtained EU funding in at least one national archive.

2. To support cooperation between designated bodies.

3. To consider the funding of research projects in the fields of long-term preservation and restoration of films.

4. To promote European standardisation on film cataloguing, with the purpose of improving the interoperability of databases.

5. To facilitate the negotiation of a standard contract at European level between designated bodies and copyright holders regulating the conditions under which designated bodies can make deposited cinematographic works accessible to the public.

6. To monitor and assess the extent to which the measures set out in this Recommendation are working effectively, and to consider the need for further action.

HEREBY RECOMMEND THAT MEMBER STATES:

1. Adopt appropriate legislative or administrative measures to ensure that cinematographic works forming part of their national audiovisual heritage are systematically collected, catalogued, preserved, restored and made accessible for

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[24] OJ L 167 of 22.06.2001.

educational, academic, research and cultural purposes, while respecting copyright and related rights, if these measures do not yet exist.

2. Designate appropriate bodies, which could be national or regional archives, film institutes or similar institutions, to carry out the tasks described in point 1 with independence and professionalism, and make financial and technical resources available to them.

3. Encourage the designated bodies to specify, by contract with rightholders, the conditions under which deposited cinematographic works may be available to the public.

Collection

4. Undertake the systematic collection of cinematographic works forming part of their national audiovisual heritage through a legal or contractual obligation. When setting the conditions for the deposit, Member States have to ensure that:

(a) they cover at least those productions or co-productions that have received public funding at national or regional level;

(b) the deposited copies are of good quality, so as to facilitate preservation and reproducibility, with accompanying metadata in standardised form, as appropriate;

(c) deposit is done at the time when the film is made available to the public, and in any case not more than two years later.

Cataloguing and creation of databases

5. Adopt appropriate measures to promote the cataloguing and indexing of deposited cinematographic works, making use of European and international standards, as well as creating databases containing information about the films.

6. Promote the interoperability of databases and their availability to the public, for instance, through the internet.

7. Invite archiving bodies to give value to stocks by organising them in collections at EU level, for instance, by theme, author, period, etc.

Preservation

8. Introduce legislation or use other methods in accordance with national practices in order to ensure preservation of deposited cinematographic works. Preservation measures should include, in particular:

(a) the reproduction of films on new storage mediums;

(b) the preservation of equipment for showing cinematographic works on different mediums.

Restoration

9. Permit, within their legislation, the reproduction of deposited cinematographic works for the purpose of restoration.

10. Encourage plans for restoration of old films or films with high cultural or historical value.

Making deposited cinematographic works accessible *for educational, academic, research and cultural purposes*

11. Adopt all the necessary legislation and administrative measures to allow designated bodies to make deposited cinematographic works accessible for educational, academic, research and cultural purposes, while respecting copyright and related rights.

Professional training

12. Promote professional training in all fields related to film heritage.

Voluntary deposit

13. Consider a system of voluntary deposit of:

(a) ancillary and publicity material related to cinematographic works forming part of the national audiovisual heritage;

(b) cinematographic works forming part of national audiovisual heritages from other countries;

(c) moving image material other than cinematographic works;

(d) cinematographic works of the past.

Cooperation between designated bodies

14. Encourage, and support, designated bodies to exchange information and coordinate their activities at national and European levels, for example, with the aim of:

(a) ensuring the coherence of collecting methods and the interoperability of databases;

(b) producing releases, for example on DVDs, of archival material with subtitles in the maximum number of languages of the European Union, while respecting copyright and related rights;

(c) compiling a European audiovisual filmography;

(d) developing a common standard for electronic information exchange;

(e) producing common research and educational projects.

Follow-up to the Recommendation

15. Inform the Commission every two years of action taken in response to this Recommendation,

Done at Brussels,

For the European Parliament
The President

For the Council
The President