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how much Trust does a State Deserve when it Subsidises Cultural Goods and Services?

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**Abstract**

This paper focuses on the way welfare states distribute subsidies to cultural industries. It takes the example of the film industry and analyses jurisprudence which addresses so-called "selective state aid" schemes based upon European and Swiss law. States grant selective aid as opposed to "automatic aid" by asking independent experts to decide upon the merits of projects according to criteria that usually refer to subjective elements such as quality or cultural value. Decisions founded on such experts' opinions normally cannot be challenged in the courts. In fact, these decisions constitute a legal "no man's land" through which these states preserve a strong decision-making power that allow them to reject projects for "implicit" or "tacit" reasons under the cover of stated conditions and reasons that leave a broad margin of assessment. If states abuse this power, they are able to censor content as well as tolerate and even facilitate forms of clientelism and corruption that can eventually destroy artistic creativity and entrepreneurial innovation. These possible consequences are not only detrimental to the competitiveness of the cultural industries affected by such practices, but also to cultural diversity within and beyond the borders of the states that proceed in this way. The author of this paper therefore advocates protecting cultural industries not only from market economies that suffer from oligopolitic private power, but also from the abuse of the power of the states to correct market failures that damage cultural diversity. He suggests the introduction of the constitutional principle of an effective separation between the state and the culture by analogy of the separation between the church and the state as inspired by the rationale underlying the French "principe de laïcité". This new principle should promote freedom of opinion and expression by protecting the authors of contemporary cultural expressions from the control of states, their bureaucracies and favouritism in a way that would be legally enforceable.

**Keywords**

State aid; competition; intellectual property; selective state aid; automatic state aid; cultural industries; cultural diversity; freedom of opinion and expression; administrative law; censorship; clientelism; abuse of state power; principle of separation.

*"Viele Köche verderben den Brei."*[1]

[1] "Too many cooks spoil the broth."

*The "Rougemarine Dilemma":*
*how much Trust does a State Deserve when it Subsidises Cultural Goods and Services?*

CHRISTOPHE GERMANN♦

## *Introduction*

State aid for cultural industries raises several questions from the legal perspective. What are the objectives and purposes of granting subsidies to private actors to create, produce and disseminate cultural goods and services? How is the taxpayers' money distributed among the applicants? Who makes the decisions on the content to be publicly supported? What are the results of this state intervention in terms of achieving its stated goals (effectiveness) and its cost-benefit ratio (efficiency)? Are there alternative instruments to achieve the same objectives better? Does the legal framework which structures the public funding of cultural goods and services comply with general principles of law, in particular with regard to the procedural aspects? Does it preserve freedom of opinion and expression? What are the positive and negative side-effects of cultural and economic policies that award aid for both the stakeholders and for third parties? In summary, how much trust does a state deserve when it finances cultural goods and services?

The large majority of rich countries have cultural policies aimed at protecting and promoting cultural diversity in the production and distribution of so-called "cultural goods and services" by taking recourse to state aid in the form of subsidies. This type of state intervention can distort trade and competition in a way that is contrary to the objectives of cultural diversity as contemplated by the Convention on the Protection and Promotion of the Diversity of Cultural Expressions that was approved by the General Conference of the United Nations Educational, Scientific and Cultural Organisation (UNESCO) on 20 October 2005, and which entered into force on 18 March 2007.[2]

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[2] See the text of the convention and related documentation in the section "Convention on the Protection and Promotion of the Diversity of Cultural Expressions" of the UNESCO website at:www.unesco.org/culture/en/diversity/convention.

When state aid disturbs the balance of the exchanges of cultural goods and services between developed and developing countries by favouring those countries that can economically afford subsidies, and making those that cannot disappear, it arguably runs against the very rationale of protecting and promoting cultural diversity.[3] Furthermore, state aid generally constitutes no satisfactory remedy against the abuse of private undertakings' market domination that result from cultural discrimination. In an ideal world, appropriate competition law should relieve tax-payers and consumers from the costs of such abuse.

There are two main mechanisms of awarding state aid, automatic and selective criteria and procedures. Criteria and procedures are "selective" if they are based upon conditions which, for example, refer to the quality, originality, cultural value and similar appreciation values applied by experts who are mandated by public funding schemes to evaluate, in their personal capacity, projects or completed works. In contrast, state aid granting criteria and procedures are "automatic" if they are based upon conditions established by the applicable rules which involve no discretionary judgement on the part of experts, for example, when a funding scheme grants a flat amount for each cinema ticket sold to the producer of a film that is eligible for such state aid.

When subsidies are granted on the basis of state-appointed expert opinions, *i.e.*, the so-called "selective state aid", it can damage the creators' freedom of expression and the public's freedom of opinion in the absence of effective legal safeguards. As a matter of fact, selective state aid provides a *quasi*-unrestricted discretionary power to governments. It relies on procedural rules that are, in practice, insufficiently subject to the principles of transparency, accountability and predictability. In a worst case scenario, this way of distributing subsidies can oblige the audience to consume mediocre, uniform and censored cultural goods and services by destroying the creativity, originality and autonomy of artists, and the competitive and innovative spirit of entrepreneurs.

Using the example of the European film industry, I shall argue in this paper that the issues of selective state aid schemes in combination with the Member States' passivity to effectively fighting anti-competitive practices of market dominating enterprises constitute the main plague on cultural diversity today.

### *The state of the play in the European film sector*

The planetary champions of state aid to the cinematographic sector, the European Union and its Member States, annually grant more than one billion euros to promote the creation, production and distribution of local films.[4] This amount represents approximately one tenth of the investments made by the oligopoly of the Hollywood

[3] For a detailed analysis, see Christophe Germann, *Diversité culturelle et libre-échange à la lumière du cinéma – Réflexions critiques sur le droit naissant de la diversité culturelle sous les angles du droit du commerce international, de la concurrence et de la propriété intellectuelle*, Helbing/Bruylant/LGDJ, Basel/Bruxelles/Paris 2008.

[4] If one includes the support from tax incentives, the total amount of State aid is substantially higher, see the figures in appendix Abis of the Study on the economic and cultural impact, notably on co-productions, of territorialisation clauses of state aid schemes for films and audio-visual productions, a report by Cambridge Econometrics / Ramboll Management / DGA David Graham & Associates/Germann Avocats for the Directorate-General Information Society and Media of the European Commission at: www.eufilmstudy.eu.

major studios each year in marketing expenses for stars and publicity to sell their films on a worldwide scale.[5] In 2001, for example, the budgets of the principal national and regional public-funding schemes for the cinematographic sector of the European Union of the 25 Member States amounted to approximately 1.2 billion euros;[6] by way of comparison, during this same year, the majors spent more than 10 billion dollars in stars, prints and advertisements to sell their films.[7] The funds from the MEDIA programme complement the national aid from the Member States. Furthermore, one must take the effects of the attraction of additional financing triggered by state aid from private and semi-private sources into account (in particular, from local broadcasters that are often legally obliged to support the local cinema industry).[8] One can, however, doubt that these sums reach the total amount which the Hollywood majors invest in marketing for their blockbusters during the same period of time.

The European Union's MEDIA programme, which aims to help the development, distribution and promotion of European audio-visual works, had a budget of 400 million euros over the period 2001 to 2006, an amount equivalent to the marketing budget of approximately 8 out of the 1,000 blockbusters marketed by the Hollywood major studios during the same period.[9] In 2006, the European Parliament and the Council adopted a follow-up programme to support the European audiovisual sector called "MEDIA 2007". The budget will be 755 million euros over seven years (2007-13).[10] Like its forerunners, MEDIA 2007 will focus on film-related pre-production and post-production activities (distribution and promotion). However, in contrast to MEDIA II (1996-2000) and MEDIA Plus/MEDIA Training (2001-2006), the EU funding will be channelled through a single programme. The stated objectives of this programme are:

- to preserve and enhance European cultural diversity and its cinematographic and audiovisual heritage, and to guarantee accessibility to this for Europeans and promote intercultural dialogue;

[5] The Hollywood majors include Walt Disney Company, Sony Pictures Entertainment, Inc., Metro-Goldwyn-Mayer Inc., Paramount Pictures Corporation, Twentieth Century Fox Film Corp., Universal Studios, Inc. and Warner Bros.; see the website of the Motion Picture Association of America (MPAA), the majors' trade organisation at: www.mpaa.org.

[6] See European Audiovisual Observatory, Annuaire 2002, Volume 3, p. 100 for the figures of 2001.

[7] See figures from the MPAA for 2002 quoted in Christophe Germann, *Diversité culturelle et libre-échange à la lumière du cinema*, op. cit., p. 449 (for the figures of 2006, see MPAA, 2006 U.S. Theatrical Market Statistics, at: http://www.mpaa.org/2006-US-Theatrical-Market-Statistics-Report.pdf), and European Audiovisual Obervatory, Focus 2003, at:www.obs.coe.int/online_publication/reports/focus2003.pdf.en

[8] Except for the category of the so-called "difficult films" that are defined by Member State law, a film project can only be subsidised up to 50% of its production budget; for further details, see Chapter 2 of 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, COM(2001)534 final of 26.09.2001, OJ C 43 of 16.02.2002; see: http://europa.eu.int/eurlex/lex/LexUriServ/site/en/com/2001/com2001_0534en01.pdf

[9] For the figures of the MEDIA Plus programme (2001-2006), see: http://ec.europa.eu/information_society/media/overview/plus/index_en.htm.

[10] Decision No 1718/2006/EC of the European Parliament and of the Council of 15 November 2006 concerning the implementation of a programme of support for the European audiovisual sector (MEDIA 2007). For further information and references on the MEDIA programme, see http://ec.europa.eu/information_society/media/index_en.htm.

- to increase the circulation of European audiovisual works inside and outside the European Union;
- to strengthen the competitiveness of the European audiovisual sector in the framework of an open and competitive market.

The European Commission specified that the measures funded under MEDIA 2007 must:

> take account of both the importance of the creative process in the European audiovisual sector and the cultural value of Europe's cinematographic and audiovisual heritage;
>
> strengthen the production structures of small businesses in order to make the European audiovisual sector more competitive, as they constitute its core. This will mean contributing to the diffusion of a business culture for the sector and facilitating private investment;
>
> reduce imbalances between European countries with a high audiovisual production capacity and countries with low production capacity or a restricted linguistic area.

*Creation, heritage and state intervention*

The first point above distinguishes between "creative process" and "cultural value of heritage". The life circle of the primary commercial exploitation of a motion picture (*i.e.*, the first run in cinemas and on television, and the first release on DVD, via downloads and similar means) is very short. It can range from the day of the première in the case of a flop, to approximately two or more years for a worldwide distribution of a high audience-appeal film that is well-marketed. After the initial commercial exploitation cascade, the film arguably becomes "heritage". This does not mean that it will no longer generate revenue, on the contrary. In particular, cinematographic and audiovisual content for children often have a very long-lasting secondary commercial exploitation period. I define the moment when a film leaves the ambit of "cultural creation" in order to become "cultural heritage" as the transition from the primary commercial exploitation phase to the secondary one. This definition is founded upon the assumption that the "creative process" generating the so-called cultural goods and services should extend to their initial access to the audience. In the primary commercial exploitation stage, the audience is expected to provide immediate feedback to, and to ensure direct economic viability for, the "cultural process". In comparision, the audience of the secondary commercial exploitation stage essentially conditions the cultural value of the goods and services as "heritage", *i.e.*, the audience no longer grants its material and immaterial consideration to a work's creators and producers, but celebrates (or forgets) the work itself. Steven Spielberg, for example, whose film "*Jaws*" initiated the so-called "blockbuster strategy" in 1975, is commercially successful in his *creative process* if one relies on measurable indicators such as box office results;[11] however, for the time-being, the cultural value of Spielberg's *creative heritage* remains open: it may well happen that none of his works will eventually be of any value in a few years, whereas film-makers who were independent from the Hollywood major studios, and therefore without any significant marketing-induced

[11] For details on this film, see http://en.wikipedia.org/wiki/Jaws_(film).

visibility and recognition from their contemporary audience, could one day reach the pantheon of world cinema in terms of their cultural heritage. The same applies *mutatis mutandis* to literature and music.

In the context of the debate on cultural diversity and international trade, I argue that one should focus the analysis on the so-called "world cultural goods and services" generated by creative processes and creative heritage. This concept addresses cultural content - such as films, literature and music - which a significant segment of the population from the majority of countries and regions around the world shares in common. The cultural origin of creative processes and heritage in combination with the perception of people from other cultures should provide a measurable indicator of cultural diversity on a global scale as well as in each country. From this perspective, policy and law-makers should achieve two main goals in order to implement cultural diversity in their jurisdictions: first, ensure a level playing-field for creative processes by designing trade and competition laws and policies in a way that takes the economic specificity of cultural industries into account; second, preserve and promote the cultural value of heritage via appropriate international regulations and cross-border resource allocation.

*Competitiveness and intellectual property rights*

As to the second point of the MEDIA objectives listed above, which aims to strengthen the production structures of small businesses to make the European audiovisual sector more competitive, I advocated - in an other paper - that the European Union needs to re-think radically the way in which intellectual property rights are granted to producers of subsidised films.[12] This argument revolves around the allocation of copyright and other relevant forms of intellectual property, such as the trademarks and tradenames that are generated by film production in Europe. Most of the holders of intellectual property rights pertaining to films in the European Union are heavily subsidised private players. Since these are mainly small and medium-sized enterprises, there is a great fragmentation in the ownership of the rights. In my assessment, this fragmentation causes the European film industry to be substantially less competitive than the North American one in which the ownership of intellectual property rights' catalogues is highly concentrated. This concentration allows the Hollywood major studios to attract the huge capital that is necessary to bear the considerable production and marketing costs.[13] Thus, to grant full private ownership of rights to independent film producers substantially generated via public funds makes little sense from the economic perspective when one invokes the rationale of intellectual property protection, *i.e.*,

[12] See Christophe Germann, Towards a Cultural Contract to counter trade related cultural discrimination - "Cultural Treatment" and "Most-Favoured-Culture" to promote cultural diversity *vis-à-vis* international trade regulations, in Nina Obuljen / Joost Smiers (editors), UNESCO Convention on the protection and promotion of the diversity of cultural expressions – Making it work, Culturelink, Zagreb 2006.

[13] Furthermore, the majors' high corporate concentration allow them to manage the considerable enterpreunerial risk that are inherent to cultural industries mainly dealing with prototype goods and services better: The majors can compensate huge losses from the many flops by the revenues from a/the few blockbusters, hits and bestsellers; see Christophe Germann, *Diversité culturelle et libre-échange à la lumière du cinema*, op. cit., p. 36 and pp. 85.

securing investments for new creative processes.[14] Furthermore, the currently prevailing allocation of intellectual property rights raises questions of equity and effeciency: Why should state supported private producers and distributors solely own the exclusive rights generated by the collective creative efforts which involve many different artistic professions (screenwriters, directors, actors, *etc*.)?[15] This runs against the very rationale that intellectual property protection should function as an incentive to perform creative and innovative efforts when this protection is granted to intermediaries such as subsidised producers who take no genuine entrepreneurial risks and bear no significant liability in a competitive context in which the state "mothers" them.[16]

*The dark side of selective state aid*

The last point of the MEDIA objectives quoted above responds to "the need to preserve and enhance cultural diversity and inter-cultural dialogue in Europe". This priority is aimed at fostering "transparency and competition on the single market, and thereby potential economic growth for the whole Union". In this paper, I shall focus on the issue of granting state aid via so-called "selective aid" mechanisms. I shall argue that these modalities of awarding subsidies run *contrary* to elementary principles that come within the rule of law. For these reasons, selective aid destroys the *competitive animus* of the clientele that applies for state aid, and favours mediocrity by driving creative talent and innovative entrepreneurship out of the market. At the end of the day, the only true winners in this game - besides local rent-seekers - are the the members of the Hollywood oligopoly.

Selective criteria and procedures refer to concepts such as quality, originality and cultural value, which are essentially subjective, and, therefore, provide a broad discretion for their interpretation. I submit that the most efficient recipe for a country that is afraid of home-made artistic quality and cultural value consists in keeping local creators marginalised by the market dominating private players and dependent upon selective state aid. Such mechanisms are currently in force in most European jurisdictions that award subsidies for the creation, production and distribution of cultural goods and services. Under these procedures, the public funding schemes in charge of distributing the tax-payers' money for cultural purposes can hide everything

[14] On the role of intellectual property to attract borrowers and investors, see The Economist, "Securitising intellectual property - Intangible opportunities", 17 June 2006, p. 77: "Securitisations of intellectual property can be based on revenues from copyrights, trademarks (such as logos) or patents. The best-known copyright deal was the issue in 1997 of $55m-worth of 'David Bonds' supported by the future sales of music by David Bowie, a British rock star. Bonds based on the films of DreamWorks, Marvel comic books and the stories of John Steinbeck have also been sold. As well as Dunkin' Brands, several restaurant chains and fashion firms have issued bonds backed by logos and brands. Intellectual-property deals belong to a class known as operating-asset securitisations. These differ from standard securitisations of future revenues, such as bonds backed by the payments on a 30-year mortgage or a car loan, in that the borrower has to make his asset work. If investors are to recoup their money, the assets being securitised must be 'actively exploited', says Mr. Yarett: DreamWorks must continue to churn out box-office hits."

[15] Christophe Germann, Towards a Cultural Contract to counter trade related cultural discrimination, *op. cit*.

[16] For the incentive rationale of intellectual property rights at the example of patents, compare Fritz Machlup & Edith Penrose, "The Patent Controversy in the Nineteenth Century", in: (1950) 10 *The Journal of Economic History*, pp. 1-29: http://links.jstor.org/sici?sici=0022-0507%28195005%2910%3A1%3C1%3ATPCITN%3E2.0.CO%3B2-L.

ranging from racial, cultural and gender discrimination via political censorship to clientelism and corruption: selective state aid granting procedures can favour men over women, white over black creators, WASP over Jewish or Muslim artists (or vice-versa since there is no monopoly for racism and discrimination), censor critical content, promote economic interests over cultural ones, priviledge relatives and friends, feed rent-seekers, and, last but not least, celebrate mediocrity and opportunism, fight creativity and innovation and kill talent. Selective state aid support is essentially located in a law free zone that is protected by a bullet-proof presumption of good faith which which is difficult to rebut in practice.

***Cultural diversity and competition***

It is arguable that the European Commission fails to apply competition law to forms of collective market-domination, to cartels, and to transactions which lead to concentration (mergers and acquisition) in cultural industries in an effective way that takes the economic specificities of these industries into account. To date, the European Commission does not seem to discharge fully its mandate under Article 151 of the EC Treaty prescribing the promotion of cultural diversity when it deals with anti-competitive situations, transactions and practices in the area of cultural industries. In this way, it contributes to maintain local film-makers, producers and distributors dependent upon public help. As a consequence, the European tax-payers must finance the absence of a coherent and efficient competition policy that should apply to cultural industries by means of subsidies. From a Community perspective, this *laissez-faire* attitude also means tolerating the distortion of both competition and trade induced by state aid between film-makers and producers from Member States that present discrepancies in terms of economic performance and market size. This is particularly true for Central and Eastern European countries where highly-gifted artists flourished before the new market economy that opened the door to the importation of heavily-advertised American content which drove them out of competition. For example, under the corporate Hollywood *diktat*, a Croatian film talent will have a much harder time, or even no sustainable opportunities at all, to finance - via state aid - his or her work reflecting local culture, and to show it to a larger audience than his or her colleague in France where the state grants subsidies of over 300 million euros per year. This does not mean that the Croatian artist would not have any demand for his or her content. The private censorship by the market-dominating Hollywood oligopoly and the lack of a critical mass of public resources to overcome it will - especially in economically weak countries - hinder the audience from seeing what it may want to see. In this sense, I assess the current passivity of the European Commission and the competition agencies of the Member States as inconsistent with Article 10 of the European Convention on Human Rights that protects freedom of opinion and expression. Subsidies are an instrument to fulfil cultural policies that usually only the rich countries can afford today. In this sense, they contribute to exclude less wealthy countries from the benefits of cultural diversity.[17]

[17] In another paper, I advocated using certain features of the international intellectual property system in combination with competition law mechanisms as legal instruments to oblige rich countries to contribute to cultural diversity in developing and less developed economies; see Christophe Germann, "Culture in times of cholera, A vision for a new legal framework promoting cultural diversity", in: *ERA Rechtszeitschrift der Europäischen Rechtsakademie Trier*, ERA-Forum 1/2005, pp. 109-130.

Furthermore, I consider the state aid granted by the wealthy countries - as a (weak) palliative against abuses of dominant market-positions – which substantially distorts creative and economic competition between creators and producers from Europe on the one hand, and from the developing and the less developed economies on the other, to be equally damaging. This state induced distortion of trade and competition is used as an *ersatz* measure in European countries against the distortion of trade and competition caused by the market-dominating Hollywood major studios. The negative side-effects of this palliative upon the cultural industries of the developing and the less-developed countries needs further research.

The Hollywood major studios claim that state aid distorts competition and trade. One can reply that public support constitutes a comparatively modest and benign reaction to the Hollywood majors's own much bigger and more damaging distortion of competition and trade. In view of the figures above, the core issue in the competitive relationship between the Hollywood majors on one side, and local creators, producers and distributors on the other, is not caused by the subsidies granted to the latter, but, arguably, by the collective market-domination of the former.

***Types of state aid for cultural industries***

States subsidising their cinema sector normally use three types of instruments: grants, soft loans and tax incentives. Funding schemes generally award grants "*à fonds perdus*", which means that the beneficiaries are not required to pay them back, except if the film is not completed. Certain funding schemes require reimbursement out of the profits, if and once the film has reached "break even", *i.e.*, when the revenues from the commercial exploitation have covered all the costs, which occurs very seldom. This latter requirement, however, generally does not allow the producers to offset the losses generated by flops with a reasonable amount of the receipts earned from successful films.[18] "Soft loans" are loans given on more favourable conditions than market terms. "Tax incentive" means tax reductions aimed at encouraging investors to invest in a specific product or service.[19] Both forms qualify as state aid.[20]

As an example of efficient and effective state intervention in the film sector, one can point to the French system, which is remarkable for three reasons. First, it insures a relatively high amount of state aid that is financed, to a large extent, by market dominating (foreign) players, second, it relies mainly on automatic aid, and, last and most importantly, it translates into relatively higher market shares for local content in comparison to most other countries subsidising their film industry.

The main originality of the French system is that the film sector *itself* finances most of the subsidies granted to local film production and distribution by a mandatory

[18] In the highly risky cultural industries, economic sustainability is insured by cross-financing within the content portfolio: winners pay for losers. For example, a percentage of commercially very successful films - between 5% to 10% of the 200 films on average - that the oligopoly of the Hollywood majors produces and markets each year pay for the films that do not generate any profits.

[19] See glossary of the Study on the economic and cultural impact, notably on co-productions, of territorialisation clauses of state aid schemes for films and audio-visual productions at: www.eufilmstudy.eu.

[20] See Section 2.3 of Study on the economic and cultural impact, notably on co-productions, of territorialisation clauses of state aid schemes for films and audio-visual productions (www.eufilmstudy.eu) on the definition of "state aid" according to European law.

contribution called "*taxe parafiscale*" (parafiscal tax).[21] This sector specific tax is collected from private undertakings engaged in the commercial exploitation of cinematographic and audiovisual works in France, *i.e.*, from the film theatres, television broadcasters and like facilities, as well as video rental and sale retailers, respectively. The French tax system comprises two main components. First, it provides state aid to local film producers and distributors from a so-called "support account" that is managed by the *Centre National de la Cinématographie* (CNC). The subsidies granted to the cinematographic sector are financed by the parafiscal tax on:

- the price of the tickets of cinema/theatres at an current rate of 10.72% of the price of the ticket;
- the television broadcasters, including so-called "television service distributors" such as telecommunication and internet service providers, at a rate of 5.5% for the former, and, for the latter, a progressive rate ranging from 0.5% to 4.5% of their turnover (*i.e.*, revenues from advertising, subscription fees, programme sponsoring, and value added phone calls; 36% of the revenues from these sources go to the cinematographic sector); and
- video sales at a rate of 2% of the sales turnover (80% of the revenues from this source are granted to the cinematographic sector).[22]

Based upon this parafiscal tax in France, the commercial exploitation of local as well as foreign films finances most of the state aid granted to local film producers. In other words, the Hollywood majors co-finance the state aid that is annually awarded to French productions up to the percentage of the market share achieved by their films in France.[23]

The second source of film financing comes from the obligation imposed upon national television broadcasters to invest in French and European cinematographic works by way of "prepayment" of the licence rights to broadcast films and via contributions resulting from their participation in co-production agreements. One must, however, consider that these resources qualify as private funds under EU law.[24]

[21] For an overview of the French system of state aid to the film sector, see the "France Synthesis Sheet" that is digitally attached to the Study on the economic and cultural impact, notably on co-productions, of territorialisation clauses of state aid schemes for films and audio-visual productions at: www.germann-avocats.com.

[22] See the attachment to the report by Yann Gaillard, *Rapport d'information fait au nom de la commission des Finances, du contrôle budgétaire et des comptes économiques de la Nation sur les aides publiques au cinéma en France*, Paris 2003, page 147: www.senat.fr/rap/r02-276/r02-2761.pdf For further details and updates, see www.cnc.fr.

[23] The author of this paper shall publish an analysis in 2008 that will be based upon a field study on the question of whether the French system could be implemented in other jurisdictions; see the questionnaire on comparative cultural diversity laws and policies North and South, "North South Comparative Cultural Diversity in the Light of Cinema - Diversité culturelle comparée Nord – Sud à la lumière du cinema" at: www.umrdc.fr.

[24] Chapter 2 of the European Commission's cinema communication of 2001, see footnote 8 above.

Eventually, a loan facility ("*avance sur recettes*") financed by tax incentive schemes called "SOFICA" ("*Sociétés de financement du cinéma et de l'audiovisuel*") completes this system at national level.[25]

### *The "Rougemarine" case:* De gustibus non est disputandum

The judgment of the European Court of First Instance of 9 July 2002 in Case T-333/00, of the French independent film production company, *Rougemarine SARL*. versus *the European Commission*, supported by the Council of the European Union, illustrates the issue of limited judicial scrutiny that is inherent to the selective aid criteria and procedures commonly followed in cultural industries.

*Project of bad quality or discrimination relating to nationality?*

The case in question concerned the refusal by the Commission to award financial support to Rougemarine in the framework of the programme to encourage the development and distribution of European audiovisual works (MEDIA II). The applicant, Rougemarine, an independent film production company, was majority-owned by its manager, who was not a national of any of the Member States of the European Union or of any other European State that participated in the MEDIA programme. Rougemarine alleged that the European Commission's refusal to aid its film project was discriminatory. It claimed that the Commission had refused to award financial support on the grounds that its majority shareholder was a Tunisian. While this was *not made explicit* in the contested decision, Rougemarine argued that it was *in fact* the decisive factor. It held that it was a victim of discrimination, and challenged the legality of the contested decision, and claimed illegality with regard to the nationality condition laid down in the fourth paragraph of Article 3 of Decision 95/563.

Rougemarine alleged, first, that the contested decision infringed Article 12 of the EC Treaty and the fundamental principle of equality. In the applicant's view, the nationality criterion applied to it resulted in discrimination between European companies according to the nationality of their majority shareholder. Rougemarine argued that such discrimination was contrary to the general principle of equal treatment laid down in case-law and in Article 12 of the EC Treaty. It further claimed that the projects which it had submitted in response to several calls for proposals satisfied the selection criteria with regard to the quality and originality of the concept, the know-how of the production company and its staff, the project's production potential, and the possibilities of transnational production. Last, but not least, it argued that the subjective criterion of the quality of its project had been met. The applicant therefore considered the Commission's systematic rejection of its various projects as evidence that the real basis for the contested decision was the nationality of its majority shareholder.

[25] In addition, beneficiaries of subsidies have access to a facility of credits and bank guarantees that is supervised by the Institute of financing for cinema (Institut de financement du cinema, "IFCIC"). In particular, it allows producers to obtain cash advances at favourable conditions upon the basis of concluded production contracts and expected subsidies. Producers can apply to other public funding-schemes in the French regions; for further details, see the "France Synthesis Sheet" that is digitally attached to the Study on the economic and cultural impact, notably on co-productions, of territorialisation clauses of state aid schemes for films and audio-visual productions (www.germann-avocats.com), and, at supra-national level, for example, to the MEDIA and Eurimages programmes.

*The Commission invokes selective aid criteria*

The Commission stated that all the projects submitted in the context of the call for proposals at stake had been carefully examined in the light of the following selection criteria:

- quality and originality of the concept;
- experience of the applicant company and its team members;
- suitability of the project for production;
- suitability for transnational distribution.

The Commission refuted Rougemarine's allegation that its project had not been selected because it was not considered to be a "European" production company.[26] It submitted that the sole basis of its decision was the fact that, following an assessment by an independent expert, the applicant's project had not satisfied the stated selection criteria of quality, and was not, therefore, eligible for Community funding. It stated that there were no unstated grounds for rejection, and claimed that the refusal to grant support to Rougemarine's film project was exclusively attributable to its intrinsic weaknesses and not to discrimination of any kind which might infringe the EC Treaty.

In support of this claim, the Commission produced the report of the independent expert who was responsible for evaluating the applications for financial support. This report pointed out the shortcomings of Rougemarine's project, in particular, the fact that the script did not seem to be developed to a sufficient degree, and that the proposed budget was too large, given the potential audience.

*Burden of proof for alleged implicit reasons*

The European Court of First Instance ruled that Rougemarine had the *burden* to prove its allegation that the Commission's decision was in fact based upon the nationality of Rougemarine's main shareholder. Since Rougemarine was not able to provide this evidence, and since it was clear from the file that the Commission had considered the merits of the applicant's project without mentioning the question of nationality, the Court concluded that Rougemarine's project had been properly evaluated against the stated selection criteria.[27]

The Court came to the conclusion that it was because of the inherent quality of the project, and not for any reason relating to the applicant's possible ineligibility, that the Commission had rejected Rougemarine's application for financial support. In other words, the Court concluded that Rougemarine had been refused the subsidy because its project was qualitatively bad, and not because its main owner was Tunisian.

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[26] The Council submitted that the nationality criterion challenged by the applicant was objective and non-discriminatory. It pointed out that there was no general principle of Community law obliging the Community to accord the same treatment in all respects to third countries and their nationals as that accorded to Member States and their citizens Case 52/81 Faust v Commission [1982] ECR 3745, paragraph 25; Case C-122/95 *Germany* v *Council* [1998] ECR I-973, paragraph 56; and Joined Cases C-364/95 and C-365/95 T.

[27] The Court left Rougemarine's claim that the Commission's decision infringed Article 12 of the EC Treaty open because it considered it as irrelevant since the Commission's decision made no mention of Rougemarine's eligibility for the MEDIA II programme with regard to the nationality of Rougemarine's majority shareholder; see points 37 and 41 of the Judgment.

*Terse statement of reasons*

The Court of First Instance also rejected Rougemarine's complaint that the reasoning in the contested decision had been inadequate. It assessed the question of whether the statement of reasons met the requirements of Article 253 EC not only in the light of its wording, but also in the light of its context and of all the legal rules governing the matter in question as follows:

> "It is clear from the contested decision that the Commission rejected approximately 84% of the 577 applications for financial support which it examined. In those circumstances, providing more detailed reasons in support of each individual decision would have significantly slowed down the process of awarding the Community funds available under Call for proposals No 3/2000 (see by way of analogy Case C-213/87 *Gemeente Amsterdam and VIA* v. *Commission*, [1990] ECR I-221 (Summary publication), paragraph 2). Although terse, the statement of reasons in the contested decision did enable the applicant to defend its rights and the Court of First Instance to exercise its supervisory jurisdiction."[28]

The Court therefore concluded that the summary nature of the statement of reasons in the decision by which the Commission refused to award financial support seemed to be an inevitable consequence of the large number of applications for support submitted, on which the Commission had to give a decision within a short period of time.

### *The "Pro Helvetia" case and the statement of reasons*

In a more recent judgement, the Swiss federal administrative court ("*Tribunal fédéral administratif*") addressed the question of the statement of reasons of a decision refusing state aid in greater detail. In the case in question, the plaintiff applied for a guarantee from Pro Helvetia, a Swiss funding scheme granting selective state aid for cultural projects, to cover the potential deficit of a music band's tour in the Southwest of England. Pro Helvetia summarily motivated its refusal to grant support by arguing that the band's music was not innovative enough because it was musically too conventional. In particular, it stated that one can recognise neither an "outbreak towards new musical borders" nor any "enlargement of the aesthetic via new elements of sound or instrumental techniques". It also mentioned that one cannot consider a tour with five concerts in pubs and clubs in Southwest England as particularly significant, and thus it would have been inappropriate to establish the band on a sustainable international level.[29]

The Swiss federal administrative court found that this ruling did not meet the requirement of due reasoning of decisions. It argued that a judgement must explain why a party's claim has been rejected. In reference to Swiss case law, it recalled that the required "density of the statement of reasons" ("*Begründungsdichte*") depends upon the complexity of the facts and the level of the authorities' discretionary power ("*Ermessenspielraum*"). In particular, the interpretation of the legal concepts that are undetermined as well as the exercise of the authorities' discretionary power must be articulated in a comprehensible way ("*nachvollziehbar*").

[28] Point 44 of the Judgment.
[29] Tribunal administratif fédéral, judgment of 4 October 2007, B-2782/2007, point 4.

The Court ruled that, in view of the very short statements of reasons, one must doubt that the lower instance had appropriately addressed the plaintiff's application and claims. The Court recalled that the obligation to provide due statements of reasons falls under the procedural guarantees which address the right to be legally heard ("*Anspruch auf Gewährung des rechtlichen Gehörs*") that is set forth in Article 29 paragraph 2 of the Swiss federal Constitution.[30] According to the Court's findings, the lower instance had rejected the claims with a very general motivation that did not respect this constitutional right.[31]

The Court provided some guidance to the lower instance on the way to deliver statements of reason that would comply with this constitutional requirement in the case in question. For example, it stated that the lower instance should have addressed the applicant's allegation that some of the band's songs were exclusively accompanied by instruments of percussion and therefore qualified as innovative elements of sound and instrument-related technique. One must, however, make the criticism that this type of guidance makes little sense. It refers to one of the selective aid criteria which were applied by the lower instance and which required the music to be "innovative" in order to be eligible for state aid. One must aknowledge that this criterion cannot be interpreted in an objective way unless one defines it in a very broad way to encompass everything that does not constitute mere imitation. As a consequence, it remains, to a very large extent, a matter of subjective understanding as to whether music consisting of songs that are exclusively accompanied by percussion instruments qualifies as "innovative" or not.[32] Therefore, even if the lower instance had discussed the meaning of the percussion instruments percussion in relation to the criterion of musical innovation, it might have come to the same conclusions as it did without addressing this question at all.

The Court highlighted the limited scope of judicial scrutiny that it has in disputes involving the granting of subsidies. Although the standards of review are formally not limited in scope, the court indicated that it applied these standards with restraint where the factual questions at issue were difficult to verify due to their particular nature. It explained the reason for this practice by the fact that the instance of recourse often does not know all the factors that were relevant for the lower instance's assessment of the application for subsidies. In addition, the Court noticed that subsidies are often related to specific areas in which the instance of recourse does not possess knowledge of its own. As a consequence, the instance of appeal generally confirms the lower instance's decision as long as there is no evidence of partiality and as long as the assessment of the application for subsidies is free from errors or is not obviously clearly inappropriate. As a rule, the Court cancels a decision from a lower instance only if the criteria of assessment were irrelevant in a way that the decision cannot be upheld. However, the Court applies this self-restraint only to disputes pertaining to the exercice of the funding scheme's "exercise of appreciation" or "discretionary power" ("*Ermessensausübung*"). In contrast, the Court reviews without restriction all questions

[30] Federal Constitution of the Swiss Confederation of 18 April 1999, RS 101; for an English translation, see: http://www.admin.ch/org/polit/00083/index.html?lang=en.
[31] Point 4.1.
[32] In comparison, the criteria of "novelty" and "inventive step" for the patentability of inventions refer to the disclosed "state of the art". In contrast, there is no concept of "state of the art" that could apply for the instrumentalisation of songs.

of substantive or procedural law without restriction.[33] Thus, one can conclude that this limited judicial scrutiny over the administrative practice on selective aid grants considerable decision-making power to the experts appointed by the funding schemes who are in charge of assessing the projects.

***The "Colza Klo" case and freedom of expression***

"*Colza Klo*" is a narrative film of 42 minutes with some experimental features that the author of this paper produced for the Geneva based association Boheme Films in the framework of the so-called "*Doegmeli*" movement, an artists' collective protest action that took place in Switzerland in 2001.[34] The "*Doegmeli*" movement denounced, among other issues and abuses, certain practices of favoritism in the selective state aid granting procedures at the level of the Swiss federal state's funding scheme.

The film "*Colza Klo*" was shot with professional actors in one single afternoon and edited within two months. The cinema office of the Swiss federal agency for culture refused to grant selective state aid to this work. Boheme Films appealed against this decision by arguing that a small cartel of insiders constituted by established subsidised film producers captures most of the public support via clientelism and like forms of manipulation of the selective state aid granting procedures. It alleged that the experts were incompetent, dependent and partial, and claimed that "*Colza Klo*" was refused support not because of insufficient quality, but implicitly because its producer did not belong to the alleged cartel of the usual beneficiaries of subsidies. It submitted that this alleged cartel of rent-seekers excludes all other creators from operating in the local film sector on a sound economic basis, and therefore violates the artistic freedom of these outsiders. It invoked the Swiss federal state and its cultural bureaucracy to be in violation of Article 10 of the European Convention on Human Rights and its equivalent provision of the Swiss Constitution that protects freedom of expression by tolerating the practice of the alleged cartel. The claimant requested that the instances of recourse analyse the official statistics on federal film subsidies upon the basis that it would provide evidence in support of his claims.

The attachment at the end of this paper contains a more detailed excerpt from Boheme Films' brief to the Federal Council (Swiss government) that acted as the ultimate instance of recourse. The Federal Council fully confirmed the funding scheme's refusal of a grant to "*Colza Klo*" in a decision of 12 April 2006.[35] It rejected

[33] Point 2 of the judgement: "Der Grund dafür liegt darin, dass der Rechtsmittelbehörde zumeist nicht alle massgebenden Faktoren und Fachkenntnisse für die Bewertung von Gesuchen um Subventionen durch die Vorinstanz bekannt sind. Hinzu kommt, dass sich Subventionen oft auf Spezialgebiete beziehen, in denen die Rechtsmittelbehörde über keine eigenen Fachkenntnisse verfügt. (…) Dies hat zur Folge, dass, solange konkrete Hinweise auf Befangenheit der Mitglieder des Entscheidgremiums fehlen und die Beurteilung des Gesuchs um Subventionen nicht als fehlerhaft oder völlig unangemessen erscheint, auf die Meinung der Vorinstanz abzustellen ist. Das Bundesverwaltungsgericht hebt deren Entscheid nur dann auf, wenn sich die Vorinstanz von sachfremden Beurteilungs-kriterien hat leiten lassen, so dass der auf ihrer Begutachtung beruhende Entscheid als nicht mehr vertretbar erscheint. Die dargelegte Zurückhaltung gilt jedoch nur bei der Frage nach der Ermessensausübung durch die Subventionsbehörde. Sind hingegen die Auslegung und Anwendung von Rechtsvorschriften streitig oder werden Verfahrensmängel in der Vergabepraxis gerügt, hat die Rechtsmittelbehörde die erhobenen Einwendungen in freier Kognition zu prüfen, andernfalls sie eine formelle Rechtsverweigerung beginge."

[34] See documentation and picture of "*Colza Klo*" at: www.boheme.net.

[35] Excerpts of this decision are published at: www.vpb.admin.ch/franz/doc/70/70.83.html. Shortly after this decision, an amendment of the federal administrative law entered into force that replaced the Federal

all claims which challenged the experts' competence, independence and impartiality without providing a convincing statement of reasons.[36] Furthermore, it did not address the claim regarding the alleged cartel of rent-seekers in a relevant way (Point 4 of the decision) which I consider to be a violation of the right to be heard.[37]

"*Colza Klo*" was shown in several international film festivals and on television. On occasions, it obtained very enthusiastic reactions from the audience.[38] This film eventually generated revenues only from a licence agreement with the Swiss national broadcaster SF DRS, which relied upon copyright law. It demonstrates that intellectual property protection, understood as a complement or as an alternative to subsidies, can contribute to artistic freedom when selective state aid for cultural goods and services is granted without sufficient legal safeguards against the incompetence, dependence and partiality of the "so-called" experts.

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Council, which is part of the public administration, by the Federal administrative court to hear *inter alia* cases on state aid.

[36] For example, in Point 5 in fine of its decision, the Federal Council alleged that according to the statistics of 2002, there was no evidence that one or more members of the jury were partial because of direct links with one of the awarded films. In reality, during the same round and from the same pot of selective state aid, the film section of the Swiss federal culture agency decided, upon its experts' proposal, to grant a "life-time achievement award" of around € 20,000 to a sound engineer who happened to have worked on many films produced by the experts' president.

[37] For instance, the Federal Council did not take into account the published statistics that the film production company of the jury's president allegedly received for over a decade each year around one tenth of the federal cinema subsidies without making any artistically and/or commercially succesful film during this period of time. This regularity in terms of the amount of state aid that the Swiss federal funding scheme granted to this producer in combination with the steady failure of his films arguably suggests that the experts of the Swiss federal film agency are either incompetent or captured by private interests on a sustainable level.

[38] A researcher in cinema studies, Fred Truniger, reviewed the film as follows: "Colza Klo comes as a surprise especially because one would not expect it to be possible to produce a film in Switzerland today without any concessions. There are hardly any films produced in this country that consciously refer to the forms in literature and in cinema elaborated in the 1960s. The fascination for the almost evil situations of constraints reminds us of Buñuel's *El Angel Exterminador*. The actors' reactions to violence that they cannot understand point to current tendencies in cinema. The film shows a formal strength that is astonishing for a fictional work. For example, the concept of the colours: full red, full green, full blue, full yellow – wonderful! (…) Of course, one can question whether a motion picture like *Colza Klo* still fulfils any function in contemporary cinema or whether it retrospectively triggers an interest because it reminds us of a way of thinking and of making films that has been lost." (Translation from: "An Colza Klo erstaunt vor allem, dass in der Schweiz heute ein so konsequent sperriger Film entstanden ist. Es gibt hierzulande ja kaum mehr Filme, die bewusst auf Formen zurückgreifen, die beispielsweise in den Sechzigerjahren des 20. Jahrhunderts in der Literatur und im Film entwickelt wurden. Die Faszination für die fast dämonische Zwangssituation erinnert an Buñuels El angel exterminador. Die quasi-dokumentarische Reaktion der SchauspielerInnen auf eine nicht fassbare Gewalt wiederum verweist auf aktuelle Tendenzen im Kino. Und dann ist der Film von einer formalen Strenge, die gerade für einen narrativen Film erstaunlich ist. Nehmen wir nur einmal das Farbkonzept: klares Rot, klares Grün, klares Blau, klares Gelb – wunderbar! Man fragt sich, ob der Autor – der namentlich bisher nicht bekannt ist – ein noch junger Filmemacher ist. Oder wie erklärt sich die Faszination für die Zwangssituation in der Kiesgrube und die quasi-dokumentarische Reaktion der SchauspielerInnen auf eine nicht fassbare Gewalt? – Möglicherweise aus einer Mischung von Einflüssen der Filmgeschichte und der aktuellen Diskussion um dokumentarische Formen im Kino. Natürlich kann man sich fragen, ob ein Film wie Colza Klo im und für das zeitgenössische Kino noch eine Funktion erfüllt, oder ob er retrospektiv ein Interesse weckt, weil er ein Denken und eine filmische Haltung wieder in Erinnerung ruft, die verloren gegangen ist.")

Furthermore, this case shows that there is not only a serious issue of distortion of competition and trade induced by subsidies at macro-level between rich and poor countries, but often also at micro-level between individual applicants. Granting state aid necessitates a heavy and costly administrative apparatus that can be very vulnerable to clientelism and other forms of corruption. Where subsidies are granted via selective state aid schemes, there are no effective legal safeguards against private interests that monopolise the support offered and exclude other applicants outside of their cartels from its benefit.[39]

## Critical analysis

*No judicial scrutiny over state intervention*

In Europe, a very large part of the state aid dedicated to independent film and television production and distribution is granted upon the basis of the assessments of the projects made by experts on the basis of various criteria that essentially refer to considerations of quality, originality, cultural value and other similar concepts. Usually, under this way of providing state aid, one or more experts assess the value of the film and television projects based upon their screenplays and other relevant documentation (production file, the budget, the financial and commercial exploitation plan, the track records of the directors, producers, actors, *etc*.). Although such an assessment is also supposed to rely on more-or-less objective criteria (for example, a feasibility check of the financial plan in relation to the applicant's track record), the evaluation of the quality of a film or television project, in relation, for example, to its artistic or entertainment value, is essentially based upon highly subjective elements which rely on individual taste. For this very reason, the decisions and funding recommendations of the experts are hardly suitable for judicial review, except on purely formal grounds: *De gustibus non est disputandum*[40] - or, to put it concretely, criteria of quality, originality and cultural value are intrinsically unsuitable for a substantive judicial review.

From the legal perspective, the core issue resides in the fact that, in most jurisdictions, there is be no critical mass of case law that is able to develop and refine definitions of undetermined terms and concepts. I argue that the reason for the small quantity of jurisprudence results from the applicants' reluctance to challenge, via administrative and judicial litigation, decisions on selective aid from funding schemes because they fear sanctions. In practice, one can perceive a law of silence, a kind of "*omertà*" that is imposed on stakeholders when it comes to decisions on selective aid. The "*Rougemarine*", "*Pro Helvetia*" and "*Colza Klo*" cases are remarkable exceptions.

[39] In the Swiss practice, a member of the alleged producers' cartel can arguably cash in up to 15% of the film budget even if the film generates no revenues at all from its release, see Christophe Germann, *Diversité culturelle et libre-échange à la lumière du cinema*, op. cit., p. 193. This means that such a producer does not need to care about the commercial exploitation of his or her films in order to survive comfortably if he or she is well-embedded in the cartel. In the "*Colza Klo*" case, the claimant also argued an analogy between selective aid for the film producers' cartel and the "Ticino Asphalt" case in terms of the way of functioning of the alleged trust. This case dealing with a group of asphalt providers that submitted their proposals to the canton of Ticino in the framework of public procurement procedures upon the basis of an agreement assigning suppliers in rotation and fixing prices above national market standards was still pending at the time of the procedure initiated by Boheme Films; see Swiss Competition Commission, Decision of 19 November 2007 concerning "22-0323: Strassenbeläge Tessin".

[40] "In matters of taste there is no dispute" or "there's no arguing taste". A similar expression in English is "there's no accounting for taste"; see List of Latin phrases: http://en.wikipedia.org/wiki/E.g.

The claimants in these cases all had to overcome their real or imagined apprehension that the funding bodies would reject their future applications for subsidies based upon the implicit reason that they had dared to challenge the quality of these funding bodies' decision-making processes in the past.[41] One must highlight that this situation is exceptional in liberal democracies that rely on the rule of law.

The *Rougemarine* case illustrates, in an emblematic way, several issues of selective state aid granting mechanisms that concern not only the film sector, but also cultural industries in general, including the book and music sectors.[42] I shall name this problem the "*Rougemarine* Dilemma".

Since the market-place does not work properly due to dominant market positions, which, arguably, practice cultural discrimination, local content providers need the help of the state to ensure their economic viability.[43] Applicants for selective state aid face a dilemma between the necessity to ask the state to finance their projects, and the need to trust that the state will act in good faith and in compliance with general principles of law when granting or refusing support on the one hand, and doubts about the state appointed experts' competence, independence and impartiality to opine on the quality of their projects on the other. The core issue lies in the absence of satisfactory legal protection for the applicant against abuses by the state and its experts since subjective statements of reasons, which form the essence of a decision on selective aid, are, on the whole, excluded from judicial control.[44] The *Rougemarine* Dilemma arises whenever a party alleges that implicit conditions or reasons have been applied by funding schemes in order to refuse to support a film project for which the stated grounds of such a refusal are insufficient quality or originality or similarily vague concepts such as "artistic merits" or "cultural value", *etc*. Generally, rejected applicants will find no evidence of unstated reasons. Their dilemma in this case is either to continue trusting the state, and to submit new applications in the future, or to stop wasting their time and resources, and get out of the 'unfair' game, be it imaginary or real. In the latter case, those who disappear will be lost also for cultural diversity – buried in the tomb of the Unknown Artist fallen under the state's unstated taste and its experts' expertise…[45]

State intervention necessitates a presumption of good faith. Accordingly, one should presume that both funding schemes and their experts act in good faith when assessing the quality of the projects submitted, and do not refuse selective aid upon the basis of hidden "implicit" conditions or reasons. As a consequence of this presumption,

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[41] Since, in patent disputes, the litigators are usually all private parties as opposed to litigation on subsidies where private claimants face the state, the patent disputes generate in most jurisdictions a critical mass of case law that provide a clearer understanding of undetermined concepts such as "novelty", "inventive step" and "state of the art"; see footnote 32 above.

[42] For a definition of "cultural industries", *i.e.*, industrial sectors producing cultural goods and services, see The Economy of Culture in Europe, Study prepared for the European Commission (Directorate-General for Education and Culture), October 2006.

[43] On the concept of "cultural discrimination", and on new legal approaches to address it upon the basis of the "cultural treatment" and "most favoured culture" principles in international trade and culture law, see Christophe Germann, *Diversité culturelle et libre-échange à la lumière du cinema*, *op. cit.*, pp. 387.

[44] In practice, this means not only that one cannot challenge bad decisions, but also that the quality of the experts themselves remains beyond scrutiny.

[45] I believe that an artist like Rainer Werner Fassbinder, who made 40 films before he died at the age of 38, would have ended in this tomb today if he had not had the good fortune to be born earlier. As a matter of fact, the inflation of selective state aid schemes started in Europe once Fassbinder was, in fact, no longer dependent on experts' opinions.

the burden of proof lies with the party that argues that a project was denied selective aid for such an implicit condition or reasons. Nevertheless, one should treat this presumption with due scepticism as I shall outline in the following, for it is precisely this scepticism which is at the heart of the *Rougemarine* Dilemma.

*Unclear objectives of selective state aid*

Weber and Zulauf analysed the selective aid related objectives and concepts underlying the Swiss film promotion from 2003 to 2005 as set forth in an ordinance to the Swiss cinema law of 2002. They found a dozen "wishful expectations" ("*Wunschvorstellungen*"). They assessed that the stated aims of film promotion are mere "shall endeavour" obligations. Furthermore, due to the high number of goals, they submitted that one cannot exclude contradictions or, at least, tensions between the various purposes. They concluded that these provisions are excessively open and vague for legal purposes.[46] One must add to these comments that the interpretation of unclear legal objectives is even more complex and open if the state uses them in relation to goals of industrial and trade policies, goals upon which cultural goals are usually contingent in the film and television sector.

In a reply to Weber and Zulauf's paper, Zufferey, who used to work as an in-house lawyer for the Swiss federal cinema funding body, explained that experts based their selection of film projects upon the quality criteria articulated in the relevant film regulations. Experts must examine the conceptional elements of a project such as the quality of the dramatic structure and of the dialogues, as well as the financial aspects (financing plan, staff and facilities to be contracted, *etc*.). She admitted that, in this context, the experts' assessments and interpretations were intrinsically subjective, since any qualitative evaluation presents a subjective character resulting from each individual's emotions, sensitivities, perceptions and judgements. As a consequence, in her opinion, experts seek to "objectivise their subjective considerations" by drafting a report which articulates their positive and negative arguments about the project. Furthermore, they needed to keep in mind the objectives of the applicable regulations when they assess projects.[47]

Zufferey's description and opinion of the legal framework and practice for granting selective aid deserve two comments. First, subjective considerations clearly

[46] Rolf H. Weber & Rena Zulauf, "Filmförderung und Recht – Schwierige Ausbalancierung von Anforderungen", in: (2003) *Jusletter*, 14 April 2003, points 13–15.

[47] Nathalie Zufferey, "Section du cinéma, Encouragement du cinéma en Suisse", in: *Jusletter*, 7 July 2003, point 7: "Pour opérer leur sélection, les experts s´appuient d´une part sur les critères mentionnés à l´art. 4 al. 2 OECin. Ces critères ont avant tout une nature qualitative (voir l´art. 8 LCin : « qualité »). Il s´agit d´examiner les aspects conceptionnels d´un projet (par ex. intérêt de la matière, qualité de la dramaturgie et des dialogues), mais également ses aspects financiers (financement prévu, collaborateurs et industries envisagés). Dans ce contexte, les appréciations et les interprétations des experts sont inévitablement empreintes de subjectivité, car il y a au fondement de toute appréciation qualitative une certaine subjectivité résultant des sentiments, de la sensibilité, des perceptions et des évaluations de chacun. Par conséquent, afin de rendre compréhensibles les raisons pour lesquelles un projet est retenu ou rejeté, les experts s´efforcent d´objectiver leur subjectivité, ce qu´il font à travers la rédaction d´un procès-verbal contenant les arguments favorables et défavorables (art. 23 al. 5 OECin). Dans le cadre de leur mandat, les experts doivent d´autre part garder à l´esprit les objectifs arrêtés par les Régimes d´encouragement pour la période considérée et suivre les directives fixées, à tout le moins lorsque ces dernières sont directement applicables (…)"

cannot become more objective merely by recording their findings in written form. Second, when the objectives set forth in regulations governing public funding schemes are contradictory or vague, they do not contribute to making the experts' opinions more legitimate.

*Selective state aid, impartiality and accountability*

Selective state aid relies on a peer-review. The experts in charge of selecting film and television projects for public funding are, in practice, often recruited from among local professionals. One may not exclude the possibility that they express a preference towards their priviledged business partners, which makes the selection procedure biased. For example, a screenwriter serving as an expert is likely to favour the producers for whom he or she has worked on other projects, and *vice-versa*. Clearly, such a practice is not likely to inspire any trust towards the system.[48]

Furthermore, I suggest that experts working for selective funding schemes are generally not chosen from among the most recognised professionals in the film business. Working as an expert is often the only way to survive economically for those who cannot get a better job in the industry – good professionals normally have no time for such kind of activies. Mediocre screenwriters, for example, who are not able to sell their work on the market-place can be real nuisances as experts: they will assess "good" projects as "bad" and *vice-versa*, and will not find any guidance in their choices from the confusing purposes and objectives set forth in the law. They will not be fired if they defend a "bad" project or reject a "good" one. They do not have to bear any consequences from their wrong opinions. They have no personal incentives to make "good" decisions since they will not receive any reward for them. Moreover, they will have no personal disincentive to make "bad" decisions because nobody can hold them liable for the decisions that they take. As a matter of fact, nobody can question the quality of their decisions.[49] In this sense, selective state aid granting mechanisms are a rather sophisticated way of wasting public money.

*Selective state aid, transparency and predictability*

Producers who apply for state aid face the unpredictable and arbitrary nature of selective aid granting mechanisms that leave considerable discretion to the taste of the selecting experts. These experts have significant decision-making power without any of the corresponding creative and entrepreneurial accountability that belongs to the recipients of the aid. Thus, from the perspective of the producers who are concerned to sustain their economic viability, there is a legitimate interest in achieving as much control as possible over what is essentially an arbitrary and unpredictable aid-granting mechanism. Under these circumstances, one cannot exclude the possibility that the producers will tend to channel subsidies towards their own projects by - more or less overtly - influencing the procedures for granting selective aid. This type of interference usually takes the shape of informal arrangements aimed at sharing the cake among the established players and at excluding third parties from the game.[50]

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[48] See, also, footnote 36 above.

[49] In comparison, Hollywood's decision-makers are generally driven by the "hire and fire" dynamic that put their personal performance under the private investors' scrutiny.

[50] The novelist Jacques Brenner discloses in his diary the way in which some established Parisian publishers used to manipulate the awarding procedures for the main prizes for literature that are

The legal uncertainty which results from the possible implicit conditions or reasons underlying decisions on the granting of selective state aid can have far-reaching implications for the sectors concerned at both cultural and economic levels, as well as for society at large. Arguably, this partially explains why the European film and television industry is, in many respects, less competitive that its American and Indian counterparts in terms of market shares.[51] European producers who apply for state aid face the unpredictability of arbitrary choices made by experts who cannot be held accountable for their decisions. In particular, this situation renders financing from private sources often very problematical, especially in relation to banks. Furthermore, one cannot exclude that experts may be captured by private interests, for example, established producers who join forces within cartels to distribute the state's financial support among themselves, and, as a consequence, exclude the possibly more deserving outsiders from the cultural funds as alleged in the "*Colza Klo*" case.[52] The state has generally no effective means and insufficient motivation to ensure that these experts are, for example, independent from particular interests that conflict with the overall cultural policy goals. Often, the state prefers to wash its hands, rather than infuriate the heavy-weights within the cinema lobby in its jurisdiction.

*Selective state aid, dependency and censorship*

When stakeholders lobby in the political arena for the maintenance and the increase of public support for the film and television sector, they usually argue that such state aid is not only beneficial for cultural matters, but that it also has a positive impact on the local economy in general, in order to gain broader political support for their interests. As a matter of fact, from the perspective of the public sector, in most countries, there is generally no other way to generate direct economic value from granting subsidies than via some forms of "territorialisation", *i.e.*, the obligation imposed by funding schemes to producers as the recipients of state aid to spend part of it locally.[53] This situation arguably results from the fact that most of the subsidised cultural goods and services (films, books and music) today will not reach any significant audience because they are being driven out of competition by the heavily-advertised content of the market-dominating majors. Since state aid may have a very limited effect on the promotion of cultural identities and cultural diversity among local consumers, it makes sense that funding schemes should try to ensure at least some public money for local creators and producers. Especially in countries with small market shares of local content, the most effective way to recoup state intervention consists of restricting the tax-payers' money

distributed each autumn in France; see Jacques Brenner, *Journal*, Tomes I et V, Paris 2006; and the article by Josyane Savigneau, "La vérité des prix", in: *Le Monde*, 3 November 2006, p. 10. One should critically recall the description of these practices in the context of selective aid granting mechanisms and the presumption that funding schemes and their experts always act in good faith. Whereas the French literary awards essentially constitute privately-funded marketing value, selective state aid is financed by tax payers.

[51] Compare European Audiovisual Observatory (ed.), Focus 2006 - World Film Market Trends, pp. 36ff. and 48ff., at: www.obs.coe.int/online_publication/reports/focus2006.pdf.en.

[52] See footnote 39 above.

[53] On the question of territorialisation requirements, see Cambridge Econometrics/Ramboll Management/DGA David Graham & Associates/Germann Avocats, Study on the economic and cultural impact, notably on co-productions, of territorialisation clauses of state aid schemes for films and audio-visual productions, a report for the Directorate-General Information Society and Media of the European Commission, Brussels 2008, at: www.eufilmstudy.eu.

to being disbursed abroad as much as possible. This behaviour arguably qualifies as industrial policies disguised as cultural ones. Thus, one cannot fully exclude that selective state aid granting procedures contribute to the implementation of such territorialisation requirements, especially in the absence of the relevant case law. Since creators and producers have, in most jurisdictions, no alternative to public financing, public funding schemes are able to impose their own conditions. This situation also increases the dependency of the recipients of subsidies *vis-à-vis* the state. Besides implicit local-spending obligations, the state can also request, through implicit selective aid criteria, that the subsidised content does not deliver a negative picture of the public authorities and their actions. According to this hypothesis, the state generally subsidises projects that benefit the local economy and are not critical towards the ruling politicians and their politics. In the worst case scenario, the selective decision-making procedures constitute a way of practising censorship without formally involving the state, since they rely on the opinions and recommendations of experts who, as individuals acting in their personal capacity, are legally independent from the public authorities. I suspect that most selective state aid funding scheme would have refused to fund a critical and polemical film such as "*Fahrenheit 9/11*" by Michael Moore. The problem that is common and intrinsic to all selective state aid systems is that nobody can verify this hypothesis.[54] One can only blindly trust the state that it does not abuse the selective aid system for censorship purposes, but is that enough? As a matter of fact, there are no legal safeguards against state control over selectively subsidised content in order to guarantee freedom of expression and opinion.

When film producers cannot rely on predictable rules, they may tend to pro-actively avoid submitting unconventional or critical projects in order not to infringe imagined or real "silent" expectations from funding schemes, *i.e.*, so-called "implicit", "*de facto*" or "implied" conditions. This behaviour may result from groundless speculation on the practice of the funding schemes, and can rationally only be explained by the desire to "stay on the safe side". In particular, when producers have to apply to different funding schemes in order to finance their project, they will usually try to sell content that presumably appeals to the current mainstream and meets the lowest common standards. This reality damages freedom of speech, wastes state resources, destroys creativity, originality and entrepreneurial spirit among talented stake-holders, and tends to favour those who are mediocre, conformists, opportunists and rent-seekers at the expenses of the tax-payers and the public at large. In this system, as a creator, one must either be a rich heir or look for another job in order to survive according to one's convictions.

I conclude that the most efficient way to control the content generated by local cultural industries is public assistance via selective state aid combined with the state's passivity towards anti-competitive practices of market-dominating players. From this perpective, intellectual property protection plays a double game: On the one hand, it shields local creators from the risk of state censorship induced by dependence upon subsidies. On the other, it drives these same creators out of competition by granting

[54] An industry of consultants and advisors that is often itself subsidized appeared in the last decades to train creators and producers on the right way to "draft", "format" and "structure" their content and submissions. For example, US screenplay gurus teach European film makers "story telling", "dramaturgy" or "script doctoring" for all genres of film. Under cover of mere formal guidance, this "narrative technology transfer" arguably conditions contents towards cultural uniformisation.

excessive copyright and similar forms of protection to marketing investments for the content distributed by market-dominating players.[55]

Ultimately, this situation can be highly detrimental to essential values such as freedom of opinion and expression. The Commission articulated these values in its statement of 1999 which highlighted the particular meaning of the audiovisual sector as follows:

> "The audiovisual media play a central role in the functioning of modern democratic societies. Without the free flow of information, such societies cannot function. Moreover, the audiovisual media play a fundamental role in the development and transmission of social values. This is not simply because they influence to a large degree which facts about and which images of the world we encounter, but also because they provide concepts and categories - political, social, ethnic, geographical, psychological and so on - which we use to render these facts and images intelligible. They therefore help to determine not only what we see of the world but also how we see it.
>
> The audiovisual industry is therefore not an industry like any other and does not simply produce goods to be sold on the market like other goods. It is in fact a cultural industry *par excellence*. It has a major influence on what citizens know, believe and feel and plays a crucial role in the transmission, development and even construction of cultural identities. This is true above all with regard to children."[56]

***Proposed solutions***

In this context, one must recall that state intervention in the audiovisual sector via subsidies and quotas arguably has - among its primary objectives - the promotion of cultural identities, and, resulting from there, cultural diversity.

The main alternative to selective state aid schemes are "automatic" ones. One can argue against automatic state aid in that it favours established producers to the disadvantage of new entrants, since the box-office results of already existing films trigger the subsidies. Automatic aid, arguably, also tends to promote more conservative works that often essentially imitate mainstream content imposed by market-dominating players rather than favouring "cultural originality" which departs from the dominant and repetitive patterns. This is the case when producers believe that imitating commercially successful films is more likely to perform well at the box office and, accordingly, obtain more automatic support. Selective aid-granting mechanisms, on the other hand, can favour artistically more innovative and ambitious works when the experts' decisions rely upon these criteria. In France, for example, the main funding body, CNC, grants a relatively small part of the state aid on a selective basis, mainly for the films of newcomers and so-called "difficult films", *i.e.*, artistically more challenging and

[55] See Christophe Germann, *Diversité culturelle et libre-échange à la lumière du cinéma – Réflexions critiques sur le droit naissant de la diversité culturelle sous les angles du droit du commerce international, de la concurrence et de la propriété intellectuelle*, *op. cit.* p. 152.

[56] Communication of 14 December 1999 from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions: Principles and guidelines for the Community's audiovisual policy in the digital age [COM (1999) 657 final - not published in the Official Journal], p. 7-8 (see: http://eur-lex.europa.eu/LexUriServ/site/en/com/1999/com1999_0657en01.pdf).

pioneering works, while it awards a major part of the subsdies via automatic mechanisms combined with a nationality check ("procédure d'agrément").[57]

Automatic schemes and tax incentive schemes are can fail to achieve the cultural purposes and goals underlying state intervention in the film and television sectors, *i.e.*, primarily, the protection and promotion of cultural identities and cultural diversity. Such blind public-financing of the creation, production and distribution of cultural goods and services may only serve the interests of commercial private players. It can result in mere "cultural mimetism" of the largely homogeneous content that the Hollywood majors dictate to the audience via their marketing hammer. Clearly, it is not the task of cultural policies to encourage this type of activities.

As a response, one could elaborate a kind of test to assess the contribution of projects to the promotion of cultural identities and diversity. In comparison to the evaluation of projects based upon the quality and originality criteria, such an assessment would be more objective and more likely to generate case law. Similar legal approaches have been tested in various fields of law such as intellectual property, competition and international trade. For example, in order to claim copyright protection, a right-holder must prove that the alleged infringer imitated his or her work. In such a case, the court compares the original work with the alleged imitation. A comparable procedure applies for litigation relating to trademarks in which the court must decide whether two words or logos are similar in a way that can trigger confusion as to the origin of the products or services at stake.[58] In order to obtain patent protection, the registration office checks whether the application meets the conditions of novelty and takes an/makes an inventive step by making reference to the state of the art.

I submit that these legal approaches could inspire a test on the contribution to cultural identities and cultural diversity that would avoid all the negative features of the selective state aid criteria and procedures discussed in this paper. In a nutshell, a project is either identical or confusingly similar to the mainstream content imposed by the market-dominating players, or it contributes to the promotion of cultural identities and cultural diversity. In both cases, the project can be "good" or "bad", "original" or not. These criteria, however, would remain irrelevant in the proposed test. I advocate that state intervention in the field of cultural industries should not control "quality", "originality" and similar values, since it is technically impossible to implement satisfactory legal safeguards against abuses of state power that take the form of hidden censorship and favoritism. Concretely, a funding scheme can refuse to grant automatic state aid or tax benefits to a project which constitutes mere imitation ("mimetism") of the mainstream films imposed by marketing. In all other cases, the applicant is entitled to support without further state control, with the exception of content that is not consistent with human rights and human dignity. In contrast to the "*Pro Helvetia*" case law discussed above, this test, that can be compared to the French "*procedure d'agrément*", would apply exclusively in the context of automatic aid. This means that

[57] See figures in Table 3.9 and the Synthesis Sheet for France, digital attachment to Part A of the Study on the economic and cultural impact, notably on co-productions, of territorialisation clauses of state aid schemes for films and audio-visual productions, a report for the Directorate-General Information Society and Media of the European Commission (www.eufilmstudy.eu and www.germann-avocats.com). In fact, this nationality check comes close to an assessment of the cultural origin of the projects.

[58] During the registration phase, the trademark office rejects *ex officio* application of signs for the same categories of products or services that are identical to earlier registered trademarks.

an applicant will already have a right to subsidies when the funding body checks its contribution to the promotion of cultural identities and cultural diversity. If a given project constitute mere imitation, the producer keeps the right to state aid for other projects that fulfill the cultural diversity criterion. In this sense, it serves only and specifically as a legal safeguard against the use of state aid that is not consistent with the cultural policies in question.

***Conclusions: separation between the state and the culture***

Selective aid criteria usually refer to undetermined concepts such as quality, originality and cultural value of film projects. For this reason, they leave a broad margin of interpretation and, accordingly, much discretion to both the funding schemes and the experts in charge of evaluating such projects. As a consequence, they are hardly suitable for judicial scrutiny, a fact that can partially explain the lack of reported practice.

Implicit reasons that remain outside the domain of legal scrutiny may provide a claim-proof hideout for abuses, which include censorship and corruption. Selective aid mechanisms may function as a disincentive to creation and innovation when abuse harms talented artists and entrepreneurs by hindering them from obtaining such aid in a situation where no sufficient private sources of financing are available because the state neglects to keep such alternative sources open through an appropriate implementation of competition law.

I conclude that selective aid-granting procedures provide excessive decision-making power to funding schemes without any serious legal safeguards. For this reason, and because state aid inherently distorts competition and trade, the allocation of public support ought not to be conditioned, under the misleading cover of apparently impartial considerations of quality, by particular interests or private purposes that are not founded on legitimate grounds of cultural policy, *i.e.*, the general interest of the creators and their audience in artistic freedom and, more broadly, freedom of opinion and expression. In summary, I recommend the reduction of the selective state aid schemes to a minimum, and that automatic state aid schemes be used, instead. However, this approach would require elaborating legal safeguards in order to insure that the subsidies fullfill cultural diversity policies. For this purpose, I suggest that the contribution of the project to promoting cultural identity and diversity be taken as a main reference ("cultural identity and diversity criterion") to allocate state aid.[59]

In summary, I advocate elaboration and implementation - in *both* international law *as well as* at the level of national constitutions – of the principle of a clear separation between culture and the state that is not merely formal, but also substantive, by analogy to the principle of the separation between the church and the state. The "*principe de laïcité*" constitutes an essential building-block of modern liberal democracies based upon the rule of law. Since religion and culture have - to some extent

[59] For smaller jurisdiction, automatic state aid would require a regrouping of the resources, for example, via supra-national funding schemes. In *Diversité culturelle et libre-échange à la lumière du cinéma*, *op. cit.*, Chapter III, I further proposed to make better use of competition law by taking into due consideration the economic specificities of cultural industries, *i.e.*, by defining "competitive relationships" upon the basis of marketing investments, to concentrate intellectual property rights funded by state aid within management structures that are commited to act in compliance with public policies aimed at promoting cultural diversity.

- comparable symbolic meanings for society, the interaction between the state and the culture should be legally structured in a way that preserves reciprocal autonomy. While the "*principe de laïcité*" preserves the state from the church, its application by analogy to the cultural domain would preserve culture from the state.

***Attachment: Excerpts from the brief for "Colza Klo"***

Departement fédéral de l'Intérieur Genève, le 14 novembre 2003

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## RECOURS

pour

**boheme.net films production**, association de droit suisse, (…) Genève, représentée par Christophe Germann (…)

(ci-après "Boheme Films")

contre

**Office fédéral de la culture, section du cinéma,** (…) Berne, représenté par M. Marc Wehrlin, Chef de la section du cinéma

(ci-après "Section du cinéma")

concernant

la décision de la Section du cinéma du 20 octobre 2003 refusant la demande pour la prime à la qualité et la prime d'étude du 11 décembre 2002 pour le long métrage de fiction COLZA KLO de Chris Dejusis produit par Boheme Films et violant ainsi l'article 10 de la Convention Européenne des Droits de l'Homme (CEDH), les articles 2, 16, 21 et 71 de la Constitution fédérale et la Loi fédérale sur le cinéma (…).

## I. EN FAIT

Boheme Films conteste par avance tous les allégués de la Section du cinéma qui ne seraient pas strictement conformes aux siens ou expressément admis par elle, et expose au surplus ce qui suit :

### A. OBJET DU RECOURS

1. Boheme Films dépose le 11 décembre 2002 une demande pour une prime d'étude ou à la qualité concernant le long-métrage COLZA KLO de Chris Dejusis. Par courrier du 16 septembre 2003, la Section du cinéma informe Boheme Films que le Jury des primes recommande par 6 vois contre 0 de rejeter cette demande. En outre, la Section du cinéma informe Boheme Films de la possibilité de demander la notification d'une décision motivée pouvant faire l'objet d'un recours.

(Pièce 1)

2. Par fax du 28 septembre 2003, Boheme Films exige une décision motivée de la part de la Section du cinéma. Celle-ci notifie une décision par lettre signature du 20 octobre 2003. Cette décision fait l'objet du présent recours.

(Pièces 2 et 3)

3. Le jury des primes motive sa décision négative comme suit :

> "La facture de ce film, tant sur le plan de la maîtrise technique que narrative, ne parvient pas à atteindre un niveau qualitatif suffisant pour justifier l'attribution d'une prime."
>
> "- Scénario confus
> - Direction des acteurs insuffisante
> - Montage, découpage et traitement des images ne sont pas satisfaisants
> - Son mauvais
> - Le projet donne l'impression d'être une expérience faite pour les auteurs mais pas destiné à un public."

(Pièces 3 et 4)

## B. LE LONG METRAGE "COLZA KLO" : UN MANIFESTE CONTRE LE CINEMA ALIENANT

4. Le long-métrage de fiction COLZA KLO a été tourné de manière totalement improvisée en un seul après-midi. Par la suite, il a fait l'objet d'un travail de montage qui a duré six mois. (…)

5. La télévision suisse alémanique SF, la chaîne la plus importante en Suisse en terme de taux d'écoute, a décidé de le diffuser en 2004.

6. Les artistes et techniciens suivant ont contribué à la réussite artistique et technique de ce film :

| | |
|---|---|
| Acteurs : | Dominique Gubser, Fabienne Thonney, Pietro Musillo |
| Ecrivain : | Patrick Weidmann |
| Musique : | Jérôme Ogier, Paul Courlet, Stephan Mauclaire |
| Montage : | Damien Plandolit (montages préalables : Jeannetta Ionescu, Dani Rytz et Chris Dejusis) |
| Son : | Federica Rossi |
| Mixage : | Maurice Engler |
| Conseils techniques : | Dani Rytz |
| Conseils artistiques : | Piotr Jaxa |
| Réalisation et caméra : | Chris Dejusis |
| Production : | Federica Rossi et Christophe Germann pour boheme.net films production |

(Pièce 6)

7. COLZA KLO refuse par sa forme et par son contenu le diktat d'un cinéma aliénant imposé par l'abus de position dominante de l'oligopole des grands studios d'Hollywood (ci-après "Corporate Hollywood"). COLZA KLO est ainsi un acte de résistance contre la *censure privée* pratiquée par "Corporate Hollywood" sur les marchés audiovisuels de la planète.

(Pièces 5 et 7)

8. En même temps, COLZA KLO est un acte de résistance contre la *censure publique* exercée de manière camouflée par la Section du cinéma au moyen du système de l'aide sélective selon l'article 8 de la Loi fédérale sur la culture et la production cinématographique du 14 décembre 2001 (RS 443.1 ; ci-après "Lcin"). Selon cette disposition, les critères sur la base desquels les aides financières sont allouées par la Confédération à la production nationale relèvent soit de la qualité (aide sélective) soit du succès (aide liée au succès).

9. COLZA KLO est ainsi une manifestation politique qui a été réalisé dans le cadre de l'action "doegmeli – résolution 261" en juin 2001 :

"Doegmeli a tenu son pari: 30 films tournés en 4 mois

Le cinéma suisse devrait se souvenir de cet été 2001 comme d'une commotion. Lui qui ronronne depuis si longtemps à une dizaine de longs métrages de fiction par an et à peine davantage de documentaires, se retrouvera bientôt avec trente nouveaux films. Trente réalisations à l'économie, qui se sont épargné l'enfer des subventions grâce à la légèreté des caméras DV. Quatre mois après son lancement, l'opération Résolution 261 a porté ses fruits.

Doegmeli.00, ce regroupement des cinéastes de la relève fondé à Locarno en août dernier, est l'origine de la Résolution 261. Lancée le 26 janvier (26.1), lors des Journées cinématographiques de Soleure (LT du 27 janvier), cette action s'achève officiellement aujourd'hui (2.6.1) et bousculera, comme il était prévu, le monde du cinéma suisse, ainsi que le système de répartition de l'aide au cinéma. Selon celui-ci, en effet, le réalisateur qui n'a pas deux longs métrages à son actif reste confiné à l'aide la plus ténue: celle allouée à la relève (25% du budget).

Dans le tract distribué à Soleure, les signataires de Doegmeli (plus de 200 cinéastes répartis dans toute la Suisse) décidaient, littéralement, de quitter l'appellation «relève» dans les plus brefs délais. Il suffit, disait le texte, de tourner deux longs métrages pour échapper à la commission responsable des débutants et rejoindre celle, mieux dotée, qui distribue l'argent aux «auteurs confirmés». «Nous n'avons pas de temps à perdre, écrivaient-ils, ni l'envie de faire la queue... Nous n'acceptons pas de quitter la relève à 50 ans!»

Se faire violence

Passée la prime provocation, il fallait encore que plusieurs «Doegmeli» passent à l'acte. Deux films en quatre mois: le pari allait d'abord leur faire violence à eux-mêmes. Or leur nombre – une trentaine – est déjà un succès quantitatif dont la mesure qualitative pourra être estimée pour la première fois lors d'un «salon vernissage». Ce sera à Locarno, durant le Festival du film, du 2 au 12 août. L'équipe de Doegmeli a déjà fixé les dates de l'événement (du 8 au 11) et la liste des films, qui donne la mesure du succès de la Résolution, est consultable sur Internet (www.doegmeli.ch/Pages/261/liste261.html).

L'idée d'un vernissage collectif au Tessin réconcilie Doegmeli avec le Festival, qui a d'abord craint que les cinéastes noient le comité de programmation sous des dizaines de films. «Ils ont vu ça d'un mauvais œil», se souvient Vincent Pluss, l'un des principaux animateurs du mouvement, également réalisateur de deux films pour la Résolution 261. «Et puis, ajoute-t-il, nous nous sommes dit que l'important, dans cette idée, était son aspect productif. Pourquoi parasiter un Festival de Locarno contre lequel nous n'avons aucune animosité? L'idée première, c'est de diffuser nos films simultanément sur dix ou vingt moniteurs. L'exercice nous a tous poussés à prendre des risques et j'anticipe, sans avoir vu les films des autres, des fragments de moments magiques. Il faut que ces instants-là apparaissent comme une fresque d'images, comme l'état des lieux d'une nouvelle vague du cinéma suisse.»

Nouvelle vague... L'expression n'est pas trop forte. Les cinéastes se sont rapprochés, ont parfois collaboré et tirent déjà un premier bilan de l'aventure. «Nous nous sommes vus il y a quinze jours pour faire le point, raconte Vincent Pluss. L'expérience semble avoir produit une excitation, une qualité désinhibitrice. La Résolution aura été le parcours Vita d'une communauté de cinéastes à laquelle il faut donner l'occasion de se montrer.»

Montrer, projeter: c'est là l'autre souci des cinéastes suisses. Doegmeli y a pensé. Avec le projet locarnais, le mouvement prévoit déjà une édition vidéo des trente films. Et puis, coïncidence absolument pas fortuite, l'un des initiateurs de la Résolution, le Lausannois Laurent Toplitsch, est également le président de Microciné. Cette association inaugurait, hier soir à Lausanne, la salle indépendante Zinéma (LT du 25 mai). «Après Locarno, nous diffuserons très certainement les films issus de la Résolution, jubile Toplitsch. Doegmeli.00, la Résolution 261 et le Zinéma sont issus d'un même mouvement.»

«Nous offrons un cadeau à la nation!»

Au-delà de la provocation, l'urgence a poussé les cinéastes vers une nouvelle pratique de l'esthétique.

«Lorsque la Résolution 261 a été lancée, rappelle le réalisateur Vincent Pluss, nous avons appris que l'Office fédéral de la culture s'est attendu à recevoir des centaines de demandes d'aide. La Section cinéma n'avait pas compris que nous allions travailler sans aide. L'idée, c'était de prendre l'outil caméra DV et de presser le tube pour voir ce qui en sort.»

A quoi ressemblent deux longs métrages tournés en quatre mois seulement? La Résolution 261, en raison de son urgence, pouvait laisser entendre que les cinéastes mettraient leur ambition entre parenthèses. Un a priori que Vincent Pluss nuance: «Je n'ai pas vu les films des autres. Mais ce dont je suis certain, c'est que nous avons réalisé là des ouvrages complémentaires des films que nous aurions envie de faire avec plus d'écriture et de moyens. Nous disons: «Voilà les esquisses de notre volonté créatrice. Voilà pourquoi nous sommes cinéastes.» C'est un geste fort... Un cadeau à la nation! Un cadeau brut, qui va peut-être aboutir à un cinéma plus vivant que la production suisse de ces dernières années.»

Poussés par l'aspect libérateur d'une expérience qui n'exigeait pas que les films soient minutieusement aboutis, seize cinéastes se sont prêtés au jeu: Hélène Faucherre, Elena Hazanov, Céline Macherel, Tania Zambrano-Ovalle, Julien Basler, Francesco Cesalli, Chris Dejusis, David Epiney, Ulrich Fischer, Frédéric Landenberg, Pascal Magnin, Stéphane

Mitchell, Luc Peter, Antoine Plantevin et Vincent Pluss. Ainsi que Laurent Toplitsch qui, lui, parle de «cinéma travaillé-bâclé» pour sa propre expérience. Ainsi son documentaire Reusser, Sandoz, Yersin et moi, qu'il décrit comme «l'histoire du cinéma suisse pour les nuls»: «C'est le fruit d'une rencontre avec le cinéaste Claude Champion, commente-t-il. J'ai eu l'idée de filmer les questions d'un jeune réalisateur vaudois – moi-même – à un collègue vaudois qui a débuté dans les années 60. Le parallèle est frappant: sa génération avait pu émerger grâce à l'accès économe à la caméra 16mm et à l'absence de tournages dans cette région; aujourd'hui, nous avons la caméra vidéo numérique, mais nous devons nous battre, au contraire, contre une culture cinématographique moribonde.»

Le cinéma suisse se réveille secoué

Doegmeli est né il y a moins d'un an. A l'époque, cette réunion agitée de la relève du cinéma suisse faisait tout au plus ricaner. Puis le mouvement a grandi, passant de 86 signataires à plus de 200. Mais les sarcasmes des professionnels ne faiblissaient pas: génération action, d'accord, mais où est la génération idée?

Aujourd'hui, Doegmeli sort du terrain de la provocation. Grâce à une Résolution 261 qui incitait ses membres à réaliser deux longs métrages en quatre mois seulement, il s'apprête à lâcher trente films d'un coup sur un cinéma suisse assoupi. Le mouvement a permis au milieu d'affronter des questions aussi essentielles que l'attribution des subventions ou le népotisme du système. Et voilà qu'il possède aujourd'hui une existence concrète. Remise en question de l'exercice du cinéma, rassemblement des forces créatrices. Le pas est énorme. Le défi avait l'air simple. Il ne l'était pas: le cinéma suisse s'est endormi, après l'électrochoc des années 60, quand la plupart des réalisateurs confirmés se sont tissé des cocons institutionnels. C'étaient, croyaient-ils, la seule manière de survivre dans un système d'aides pingre et sélectif qui n'encourage que l'individualisme. Doegmeli prouve le contraire."

Thierry Jobin, Doegmeli a tenu son pari: 30 films tournés en 4 mois, dans : Le Temps, 2 juin 2001.

10. (…)

11. (…)

12. (…)

## C. LA "REVUE DES PAIRS" ET SES "EXPERTS"

13. Le Jury des prime qui a décidé de refuser une prime à la qualité ou d'une prime d'étude au long-métrage "Colza Klo" lors de la séance 5/2003 était constitué de

- Gérard Ruey, producteur hautement subventionné (présidence) ;
- Alberto Chollet, responsable de la fiction à la Télévision Suisse Italienne, chaîne subventionnée ;
- Peter Liechti, réalisateur subventionné ;
- Alexandra Schneider, profession inconnue (une recherche sur internet par "Google" mène sur le site www.amazon.com où Alexandra Schneider figure comme l'auteur d'un livre à paraître "Bollywood – Das indische Kino und die Schweiz" – s'il s'agit de la même personne, il est probable qu'il s'agisse d'une critique de cinéma subventionnée) ;
- Elizabeth Waelchli, monteuse subventionnée ;
- Yves Yersin, réalisateur subventionné.

(Pièce 4)

14. Ce qui frappe tout d'abord, c'est le manque total de compétence artistique et technique de ces "experts" au regard des films subventionnés qu'ils ont fait ces dix dernières années (cf. recherche sur Internet par "Google" avec les noms de ces "experts" comme mots-clé).

15. En effet, tous les films de ces "experts" des dix dernières années sont mauvais du point de vue du scénario, de la direction des acteurs, du montage, du découpage, du traitement des images et du son ; au vu de leurs résultats au box office, ils donnent l'impression d'avoir été une expérience (lucrative, car généreusement financée par les contribuables) pour les auteurs, mais pas destiné à un public. L'absence de succès de ces films le démontre. En résumé, la facture de ses films, tant sur le plan de la maîtrise technique que narrative, ne parvient pas à atteindre un niveau qualitatif suffisant pour justifier le titre d'"expert" attribué par la Section du cinéma à ces producteurs, réalisateurs et monteurs.

(Offre de preuve :

Visionnement des films en question par des experts compétents)

16. En outre, tous ces films ont été faits grâce à des subventions importantes, contrairement à COLZA KLO qui a été produit sans argent public.

17. La prime à la qualité et la prime d'étude sont des subventions octroyées par la Confédération après l'achèvement d'un film de fiction ou d'un film documentaire. Le but des aides étatiques au cinéma est de corriger un dysfonctionnement du marché afin de réaliser l'identité et la diversité

culturelle dans le domaine audiovisuel. Sans subventions, la production cinématographique n'est pas économiquement viable en Suisse.

(Pièces 5 et 7)

18. Les modalités pour distribuer les deniers des contribuables par l'aide dite "sélective" se basent essentiellement sur l'opinion d'"experts", (…). L'aide financière liée au succès, par contre, se calcule sur la base des entrées enregistrées par les cinémas. Elle est ainsi "automatique", c'est-à-dire elle ne repose pas sur une évaluation subjective d'"expert". En Suisse, l'aide sélective et l'aide liée au succès sont généralement être cumulées. En effet, l'aide liée au succès est insuffisante sans l'aide sélective. La prime à la qualité et la prime d'étude relève de l'aide sélective. Depuis 2003, cette forme d'aide est remplacée par une aide sélective plus importante intitulée "récompense" selon l'article 7 Lcin.

(Pièce 8)

19. En 2001, les aides publiques au secteur cinématographique en France s'élevaient à EURO 438'680'000 au niveau national et à EURO 14'404'170 au niveau régional, tandis que cette aide se limitait en Suisse à EURO 12'399'170 au niveau fédéral. L'aide suisse se répartit de la manière suivante :

EURO 651'320 au développement, EURO 8'707'240 à la production et EURO 1'184'210 à la distribution, soit EURO 9'006'580 sous forme d'aide sélective et EURO 2'514'300 sous forme d'aide liée au succès (cf. Annuaire de l'Observatoire européen de l'audiovisuel 2002, Volume 3, Strasbourg, 97, 101 et 102).

(Pièce 5)

## D. CENSURE DU CONTENU SOUS COUVERT DE CENSURE DE LA FORME

20. L'aide sélective se base sur l'appréciation d'"experts" qui jouissent d'une très grande marge d'appréciation. L'Etat se décharge ainsi de la tâche d'octroyer directement les deniers publics, cela pour éviter d'être accusé de censure, tout en se réservant une intervention pour certains cas politiquement sensibles. Cette délégation de compétences n'est pas au-dessus de tout soupçon : Bien qu'il existe des règles sur la récusation, les

"pairs" établis peuvent se regrouper en une sorte de cartel et exclure les nouveaux venus de cette aide. En pratique, il est très difficile de prouver l'existence de tels cartels, qui peuvent prendre des formes allant d'une répartition des parts selon un système de quotas («entente») à un trafic d'influence (par exemple, le troc d'un vote favorable pour un certain projet contre des avantages liés à d'autres projets).

21. (…)

22. Indéniablement, il s'agit là d'un sujet largement tabou, qui pourtant mine la création cinématographique dans les Etats intervenant sur le marché dans le but de poursuivre une politique d'encouragement à la diversité culturelle. L'aide sélective repose essentiellement sur une appréciation subjective de la qualité. Cette appréciation consacre l'arbitraire le plus total.

(Pièce 9)

(cf. également Thierry Jobin,
Doegmeli a tenu son pari: 30 films tournés en 4 mois,
dans : Le Temps, 2 juin 2001)

23. Pratiquée sans encadrement juridique efficace assurant une égalité de traitement au départ et une sélection basée sur le talent à l'arrivée, elle devient un terreau fertile pour le clientélisme, le népotisme et autres formes de corruption. Ce dysfonctionnement aboutit à une forme de censure exercée par les "pairs", qui est générée et soutenue par l'Etat, (…). Il en résulte une économie de rentes, nuisant à la qualité et à la popularité de la production audiovisuelle. C'est la raison principale pourquoi les films suisses de qualité ont été pratiquement absents de la scène nationale et internationale depuis plus d'une décennie, à savoir des "pairs" incompétents, dépendants et partiaux qui censurent les créateurs de talent pour préserver leurs parts du gâteau des subventions.

(Pièce 5)

24. Dès lors, il est possible de mieux comprendre la position actuelle des Etats-Unis à l'OMC, qui est dictée par "Corporate Hollywood", selon laquelle toute aide étatique substantielle fausse la concurrence et cause ainsi une distorsion dans le commerce international, tandis qu'une aide minimale demeure acceptable :

"In conjunction with negotiated commitments for audiovisual services, Members may also want to consider developing an understanding on subsidies that will respect each nation's need to foster its cultural identity by creating an environment to nurture local culture. To this end, many Members subsidize theatrical film production. There is a precedent in the WTO for devising rules which recognize the use of carefully circumscribed subsidies for specifically defined purposes, all the while ensuring that the potential for trade distortive effects is effectively contained or significantly neutralized."

(Pièce 5)

25. En effet, les régimes d'aides substantielles tels que pratiqués par la France (EURO 438'680'000 en 2001) ont un impact réel sur les parts de marchés, tandis que les aides minimales selon le modèle suisse (EURO 12'399'170 en 2001) contribuent, plus qu'autre chose, à fausser la concurrence entre les artistes d'un même pays, soit entre les artistes de mèche avec la bureaucratie culturelle et ceux qui ne le sont pas. Ceci contribue à saboter la création cinématographique locale et ainsi à faire l'affaire de "Corporate Hollywood".

(Pièce 5)

26. La Section du cinéma s'est montrée incapable de faire augmenter les aides au cinéma afin qu'ils atteignent une masse critique. (…)

27. La Section du cinéma prétend corriger le dysfonctionnement du marché notamment par l'aide sélective au cinéma. Ce système repose sur l'arbitraire. Les juristes Rolf H. Weber et Rena Zulauf soulèvent les insuffisances de ce système comme suit :

Eine Durchsicht des Anhanges zur FiFV («Filmförderungskonzepte 2003 bis 2005») lässt unmittelbar erkennen, dass Dutzende von Wunschvorstellungen vorhanden sind. Die Umschreibung der Förderungsziele erfolgt regelmässig mit dem Wort «sollen» (zwölfmal allein in Ziff. 2.1.1 zur Produktionsförderung), teilweise auch mit der Umschreibung «es ist anzustreben» (Ziff. 2.1.1 lit. c). Die Zahl der zu verfolgenden Ziele ist zudem so umfangreich, dass sich Widersprüche oder zumindest Spannungsverhältnisse nicht ausschliessen lassen. Ziff. 1 lit. b der «Filmförderungskonzepte 2003 bis 2005» bekennt zwar, dass die Förderungsziele die «gewünschte Wirkung in der Filmkulturpolitik» umschreiben, doch erscheint der Begriff «gewünscht» unter rechtsstaatlichen Gesichtspunkten als nicht ganz unproblematisch. Die Ausrichtung einer staatlichen Leistung muss nämlich nach allgemeinen verwaltungsrechtlichen Prinzipien auf einer gesetzlichen Grundlage beruhen, und zwar gemäss ständiger Rechtsprechung und Lehre auf einer genügend bestimmten generell-abstrakten Norm. Prüfungskriterien im Einzelfall sind somit (1) das Vorhandensein der gesetzlichen Grundlage und (2) deren ausreichende Bestimmtheit.

Das Kriterium der gesetzlichen Grundlage ist für die selektive und die erfolgsabhängige Filmförderung erfüllt (Art. 8 FiG, Art. 4/5 FiFV). Als fraglich erscheint hingegen, ob die

gesetzlichen Anordnungen ausreichend bestimmt sind. Diesbezüglich geht das Bundesgericht davon aus, das Legalitätsprinzip diene «einerseits dem demokratischen Anliegen der Sicherung der staatlichen Zuständigkeitsordnung, andererseits dem rechtsstaatlichen Anliegen der Rechtsgleichheit, Berechenbarkeit und Vorhersehbarkeit des staatlichen Handelns». Teilweise verlangt die Rechtsprechung sogar eine klare und ausdrückliche Regelung.

Das Erfordernis der ausreichenden Bestimmtheit einer gesetzlichen Anordnung zwingt zu einer Folgenabschätzung mit Bezug auf die Auswirkungen gesetzgeberischer Anordnungen. Zwar hat die Bundesgerichtspraxis in der Vergangenheit keine sehr hohen Anforderungen an die Bestimmtheit von Normen gestellt und eine relativ weite Formulierung genügen lassen; immerhin lässt sich die Frage stellen, ob die Anordnungen im Filmrecht zur Filmförderung nicht etwas gar offen geblieben sind.

Rolf H. Weber / Rena Zulauf, Filmförderung und Recht – Schwierige Ausbalancierung von Anforderungen, dans : Jusletter du 14 avril 2003, notes 13 - 15 (sans notes de bas de page)

28. Dans sa réplique à l'article de Weber / Zulauf, la Section du cinéma admet implicitement le caractère foncièrement arbitraire de l'aide sélective, sans pour autant le justifier valablement :

Pour opérer leur sélection, les experts s´appuient d´une part sur les critères mentionnés à l´art. 4 al. 2 OECin. Ces critères ont avant tout une nature qualitative (voir l´art. 8 LCin : « qualité »). Il s´agit d´examiner les aspects conceptionnels d´un projet (par ex. intérêt de la matière, qualité de la dramaturgie et des dialogues), mais également ses aspects financiers (financement prévu, collaborateurs et industries envisagés). Dans ce contexte, les appréciations et les interprétations des experts sont inévitablement empreintes de subjectivité, car il y a au fondement de toute appréciation qualitative une certaine subjectivité résultant des sentiments, de la sensibilité, des perceptions et des évaluations de chacun. Par conséquent, afin de rendre compréhensibles les raisons pour lesquelles un projet est retenu ou rejeté, les experts s´efforcent d´objectiver leur subjectivité, ce qu´il font à travers la rédaction d´un procès-verbal contenant les arguments favorables et défavorables (art. 23 al. 5 OECin). Dans le cadre de leur mandat, les experts doivent d´autre part garder à l´esprit les objectifs arrêtés par les Régimes d´encouragement pour la période considérée et suivre les directives fixées, à tout le moins lorsque ces dernières sont directement applicables (par ex. soutenir au maximum 2 courts métrages par cinéaste de la relève, ch. 2.2.4 let. g ou favoriser les films de télévision qui « investissent » dans la relève, ch. 2.2.5 let. e). Ces lignes de conduites doivent également être observées par l´OFC.

Nathalie Zufferey, Section du cinéma, Encouragement du cinéma en Suisse, dans : Jusletter du 7 juillet 2003, note 7.

29. Le Conseil fédéral refusé en 1976 la prime à la qualité au film documentaire "Die Erschiessung des Landesverräters Ernst. S." de Niklaus Meienberg et Richard Dindo pour des raisons liées au contenu : Ce film traite

de manière critique du passé helvétique durant la deuxième guerre mondiale. Ce refus a suscité des protestations virulentes.

(Pièce 5)

30. La Confédération a tiré une leçon de ces protestations : Elle se sert aujourd'hui de l'aide sélective comme un mécanisme de censure des plus sophistiqués et des plus pervers. En effet, la censure publique portant sur les contenus se fait aujourd'hui au moyen de la censure sur les formes. L'Etat se sert d'"experts", de "professionnels de la profession" dépendants, partiaux et intéressés, qui censurent leurs collègues par une "revue des pairs".

(cf. Thierry Jobin,
Doegmeli a tenu son pari: 30 films tournés en 4 mois,
dans : Le Temps, 2 juin 2001)

31. Ainsi, un réalisateur "expert" se prononcera sur une demande de subvention déposée par un autre réalisateur. Il évitera de remettre le contenu en question - tout soupçon de censure portant directement sur le contenu doit être évité afin de ne pas tomber sous le coup de l'article 10 CEDH. Pour surmonter cet interdit, l'"expert" refusera un projet sur la base d'une évaluation de la forme. Par exemple, on l'entendra dire pour refuser une demande de prime d'étude ou de qualité : "*La facture de ce film, tant sur le plan de la maîtrise technique que narrative, ne parvient pas à atteindre un niveau qualitatif suffisant pour justifier l'attribution d'une aide sélective. Ce film a un scénario confus, la direction des acteurs est insuffisante, le montage, découpage et traitement des images ne sont pas satisfaisants, le son est mauvais, le projet donne l'impression d'être une expérience faite pour les auteurs, mais pas destiné à un public.*"

(Pièces 1 et 4)

32. Par contre, si l'"expert" donne une suite favorable à une demande - sans doute pour rendre un service intéressé à un proche - il motive de manière tout aussi arbitraire sa décision en invoquant la forme : "*La facture de ce film, tant sur le plan de la maîtrise technique que narrative, parvient à atteindre un niveau qualitatif suffisant pour justifier l'attribution d'une aide sélective. Ce film a un scénario structuré selon les recettes des gourous de l'écriture du scénario à la mode, la direction des acteurs est suffisante, le montage, découpage et traitement des images sont satisfaisants, le son est léché, le projet donne l'impression d'être un blockbuster destiné à un public aliéné.*"

(Pièce 9)

33. Ainsi, l'Etat se lave les mains : Ce n'est pas lui qui censure, ce sont les "collaborateurs" de la profession ; et ceux-ci ne censurent pas des contenus, mais des formes. Celles-ci sont indiscutables, car on ne discute pas des goûts et des couleurs. Ce système aussi sophistiqué que pervers mis en place par la Section du cinéma est corrompant et corrompu.

## E. INCOMPETENCE, PARTIALITE, DEPENDANCE ET CONFLITS D'INTERET DES "EXPERTS"

34. Selon Weber / Zulauf, le bon fonctionnement de l'aide sélective et son acceptation par les administrés exigent des "experts" compétents, indépendants et libres de conflits d'intérêt :

> Die Schwierigkeit, justiziable Massstäbe im Kulturbereich einzuführen und den Begriff der Vielfalt positiv zu umschreiben, ist nicht zu unterschätzen. Ähnliche Probleme zeigen sich auch bei der Verwirklichung des publizistischen Wettbewerbs zwischen den Kommunikatoren in den Medien. Dennoch darf der Gesetzgeber die Aufgabe der Regelsetzung nicht allzu stark an den Rechtsanwender delegieren. Gerade das Ziel, die Unterstützung des Schweizer Films zu verstärken, sollte nicht durch das Risiko diskretionärer Entscheide gefährdet werden.
>
> Im Lichte der Tatsache, dass selbst im Falle der Eliminierung gewisser Widersprüche und der Konkretisierung der Zielvorgaben auf wenige, aber genauer identifizierte Zwecke eine gewisse Offenheit der Normierung im Kulturbereich nicht auszuschliessen ist, bleibt doch die Anforderung im Raum, dass angesichts dieser Offenheit die (personellen) Entscheidungskörper eine sehr hohe persönliche und sachliche Integrität aufweisen müssen16 [*note de bas de page 16* : Angesichts der erschwerten Justiziabilität der Filmförderungskriterien ist die Beschwerdemöglichkeit an das Eidg. Departement des Innern eine stumpfe Waffe (Art. 14 FiG)]. Bei der Bestellung der Mitglieder der zuständigen Kommissionen, welche die Förderungsbeiträge zusprechen, ist durch den Bundesrat und das Bundesamt für Kultur besonders im Auge zu behalten, dass Interessenkollisionen und Abhängigkeiten keine Rolle spielen dürfen, und zwar über die allgemeine Ausstandsregel von Art. 24 FiFV hinaus. Nur wenn es gelingt, eine hohe Akzeptanz mit der Zuweisung von Förderungsbeiträgen in der Filmbranche zu erreichen, wird das heutige Förderungskonzept überlebensfähig bleiben.

Rolf H. Weber / Rena Zulauf, op. cit., notes 22 – 23.

35. Ces exigences ne sont pas remplies dans le cas concret. Tous les "experts" qui ont refusé la prime à la qualité et la prime d'étude à COLZA KLO sont, à la lumière de la mauvaise qualité de leurs films des dix dernières

années, incompétents pour émettre un jugement crédible sur la qualité artistique et technique de COLZA KLO.

36. En outre, nous constatons que le jury est composé de personnes qui contrôlent depuis maintenant plus de dix ans la distribution des deniers publics censés promouvoir la création cinématographique en Suisse.

(Offre de preuve : Audition de la Section du cinéma)

37. A juger la faillite du cinéma suisse sur le plan international aujourd'hui, il sied de se poser de sérieuses questions sur la compétence des personnes qui monopolisent actuellement l'octroi des subventions.

38. Nous mettons ainsi en doute la crédibilité du système actuel. Celui-ci a notamment fait l'objet de critiques sévères dans le cadre du mouvement "doegmeli". Le système actuel repose sur la cooptation et le copinage.

(cf. Thierry Jobin,
Doegmeli a tenu son pari: 30 films tournés en 4 mois,
dans : Le Temps, 2 juin 2001)

39. De nombreux indices laissent présumer une entente entre les "experts", en particuliers entre les producteurs établis, pour se partager le "gâteau" des subventions, à l'exclusion des nouveaux talents. Ces subventions deviennent alors des rentes que les producteurs établis s'attribuent entre eux, (…). Tout porte à croire qu'il existe un cartel de rentiers très dommageable au cinéma suisse. Par conséquent, nous demandons à l'instance de recours d'auditionner la Section du cinéma pour obtenir des clarifications concernant les questions suivantes :

- Quelles sont les modalités, lignes directrices, normes dont se sert la Section du cinéma pour recruter les "experts" censés formuler des opinions dans le cadre de l'aide sélective?

- Quels sont les garde-fous juridiques contre le clientélisme, le népotisme, la corruption, le "copinage" et le trafic d'influence que la Section du cinéma met en place dans le cadre de l'aide sélective ?

- Comment la Section du cinéma empêche-t-elle les ententes entre "experts" visant à exclure de l'aide les demandeurs ne faisant pas partie du "cartel" ?

- Est-ce que la Section du cinéma dispose-t-elle de données statistiques confirmant l'absence d'un tel "cartel" ?

- Est-ce que la Section cinéma pratique-t-elle une censure des contenus sous couvert d'une censure quant à la qualité formelle des projets, cela par procuration au moyen de la "revue des pairs" ?

- Dans la négative, est-ce que la Section du cinéma peut-elle prouver que le reproche de censure est infondé ?

40. Les membres du cartel des rentiers monopolisent depuis plus de dix ans l'octroi des subventions fédérales et, dans certains cas, cantonales en matière de cinéma, sans pour autant contribuer à la qualité de celui-ci.

41. Le cinéma suisse n'est presque plus visible sur la scène internationale depuis plus d'une décennie et n'est pas capable, sur le plan national, d'obtenir une augmentation substantielle de l'aide fédérale à la création ("Quantensprung"). Cette débâcle du système doit être assumée par les bénéficiaires actuels de celui-ci. Pour les victimes de ce système, il faut admettre un grave problème de confiance, qui implique la responsabilité de la Section du cinéma. Celle-ci a contribué à pervertir la "Filmförderung" en une "Produzentenförderung".

42. (…)

43. (…)

43. Finalement, une recherche sur Internet révèle l'existence d'au moins un lien de dépendance rendu public, à savoir celui entre le producteur subventionné X et le réalisateur subventionné Z, qui collaborent ensemble au développement des projets "A" et "B".

(Pièce 11)

44. Ce lien de dépendance entre l'employeur X (producteur subventionné) et l'employé Z (réalisateur subventionné) suffit pour annuler la décision du 20 octobre 2003.

(Pièce 11)

45. (…)

46. L'aide sélective de la Section du cinéma a fait l'objet de critiques virulentes dans le cadre du mouvement "doegmeli" (cf. groupe de discussion www.doegmeli.ch). Ces critiques ont notamment soulevé un sérieux problème de confiance. Il incombe à la Section du cinéma de prendre enfin ces critiques au sérieux et de démanteler le cartel des rentiers. Il en va de la survie d'un cinéma suisse de qualité.

(cf. Thierry Jobin,
Doegmeli a tenu son pari: 30 films tournés en 4 mois,
dans : Le Temps, 2 juin 2001)

47. Sur la base de ces considérations, nous estimons que les "experts" qui ont refusé la prime à la qualité et la prime d'étude à COLZA KLO n'ont pas les qualités de compétence, d'indépendance et d'impartialité suffisante pour émettre un jugement de valeur artistique et technique crédible sur ce film.

48. (...)

## F. POLITIQUE INDUSTRIELLE SOUS COUVERT DE POLITIQUE CULTURELLE

49. La Section du cinéma privilégie un groupe de producteurs établis, cela en violation de ses obligations constitutionnelles et légales. Les raisons sociales des maisons de production concernées ressortent des statistiques fédérales en matière d'aide sélective.

(Pièces 9 et 10)

50. Ainsi, au lieu de pratiquer la promotion culturelle du cinéma ("Filmförderung"), la Section du cinéma pratique, dans les faits, la promotion économique d'un petit groupe de producteurs établis ("Produzentenförderung").

51. Ces producteurs sont devenus la plaque tournante du système mis en place par la Section du cinéma. Ils encaissent régulièrement une rente prélevée sur l'aide sélective qu'ils s'auto-attribuent chaque année au moyen de la "revue des pairs". Au lieu d'agir comme des entrepreneurs, ils se bornent à remplir des formulaires d'aide sélective, qui, dans leurs cas, s'avère automatique grâce à la "revue des pairs" qu'ils contrôlent de manière ferme.

(Pièces 9 et 10)

52. Sur le plan juridique, les producteurs agissent comme employeurs (ou mandants) des artistes et techniciens et comme cessionnaires des droits d'auteur et des droits voisins générés par la création cinématographique. Comme partenaires contractuels des bailleurs de fonds publics et des opérateurs de la chaîne d'exploitation (distributeurs, télévisions et vidéos), ils squattent une position de pouvoir qui n'est pas légitimée dans un système de subventions (…)

53. La "Produzentenförderung" de la Section du cinéma se fait au détriment des créateurs cinématographiques, des artistes et des techniciens. La Section du cinéma agit ainsi au détriment de la qualité du cinéma suisse. Le jugement porté sur ce cinéma à l'étranger est révélateur à ce sujet : Les films subventionnés en Suisse sont largement absents au niveau international depuis maintenant plus de dix ans.

(Pièce 12)

54. En pratiquant de la "Produzentenförderung" en lieu et place d'une véritable "Filmförderung", en tolérant et en favorisant le cartel des rentiers et ses pions, la Section du cinéma pratique de la politique économique en lieu et place d'une politique culturelle exigée par la Constitution fédérale et la Loi sur le cinéma. La Section du cinéma nuit ainsi gravement à la culture, à l'identité et à la diversité culturelle cinématographique en Suisse.

(Pièce 12)

## II. EN DROIT

Recevabilité

(…)

B. Bien-fondé du recours

Au fond

1. Violation de la liberté d'expression

L'article 10 de la Convention européenne des droits de l'Homme (CEDH) garantit la liberté d'expression. Cette disposition a la teneur suivante :

> Article 10
>
> 1 Toute personne a droit à la liberté d'expression. Ce droit comprend la liberté d'opinion et la liberté de recevoir ou de communiquer des informations ou des idées sans qu'il puisse y avoir ingérence d'autorités publiques et sans considération de frontière. Le présent article n'empêche pas les Etats de soumettre les entreprises de radiodiffusion, de cinéma ou de télévision à un régime d'autorisations.
>
> 2 L'exercice de ces libertés comportant des devoirs et des responsabilités peut être soumis à certaines formalités, conditions, restrictions ou sanctions prévues par la loi, qui constituent des mesures nécessaires, dans une société démocratique, à la sécurité nationale, à l'intégrité territoriale ou à la sûreté publique, à la défense de l'ordre et à la prévention du crime, à la protection de la santé ou de la morale, à la protection de la réputation ou des droits d'autrui, pour empêcher la divulgation d'informations confidentielles ou pour garantir l'autorité et l'impartialité du pouvoir judiciaire.

L'article 16 de la nouvelle Constitution fédérale (RS 101) garantit cette liberté aux articles 16 (libertés d'opinion et d'information) et 21 (liberté de l'art) :

Article 16

1 La liberté d'opinion et la liberté d'information sont garanties.
2 Toute personne a le droit de former, d'exprimer et de répandre librement son opinion.
3 Toute personne a le droit de recevoir librement des informations, de se les procurer aux sources généralement accessibles et de les diffuser.

Article 21

La liberté de l'art est garantie.

Sur la base des données statistiques disponibles, la majeur partie de l'aide sélective est annuellement octroyée au même petit groupe de producteurs, cela à l'exclusion systématique des artistes, techniciens et entrepreneurs du cinéma suisse ne faisant pas partie de ce groupe. Les membres de ce cartel jouissent ainsi d'une rente qu'ils s'auto-octroient *par le biais* d'"experts" autoproclamés.

Depuis plus d'une décennie, les abonnés actuels aux subventions fédérales n'ont jouit d'aucune consécration véritable aux niveaux national et international qui confirmerait la qualité artistique de leurs œuvres. Le cinéma suisse subventionné est largement absent de la scène nationale et internationale. On peut parler d'une débâcle artistique résultant d'une entente entre les abonnés actuels aux subventions, à savoir le cartel des rentiers et de leurs pions. Ce cartel étouffe la création cinématographique dans ce pays.

L'aide sélective pratiquée par la Section du cinéma doit être qualifiée d'instrument de censure. En effet, au lieu de lutter de manière efficace contre les abus de position dominante de "Corporate Hollywood" sur le marché du cinéma suisse, la Section du cinéma intervient sur ce marché en octroyant de modestes subventions qui faussent la concurrence entre cinéastes locaux subventionnés et non-subventionnés.

L'aide sélective fausse la concurrence non pas entre "Corporate Hollywood" et les cinéastes locaux, mais entre cinéastes locaux, à savoir entre les cinéastes que la censure finance et ceux que la censure cherche à détruire économiquement.

Cette censure publique est conditionnée par la censure privée résultant d'un abus de position dominante sur le marché du cinéma pratiqué par "Corporate Hollywood". Au lieu de sanctionner cet abus par le droit de la concurrence et le droit de la propriété intellectuelle et par les autres domaines du droit susceptibles de remédier au problème (droit fiscal, droit du commerce

international, etc.), la Confédération pratique de la censure au moyen d'une aide sélective basée sur le clientélisme, le népotisme et le trafic d'influence. Par-là, l'Etat fait le jeu de "Corporate Hollywood" et favorise un cinéma aliénant et uniformisant.

Sous couvert d'une censure portant sur la qualité des formes, la Section du cinéma censure par procuration - par le "revue des pairs" - les contenus, cela en violation de l'article 10 CEDH et des articles 16 et 21 de la Constitution fédérale. Dans les faits, ce procédé empêche les cinéastes qui ne font pas partie du cartel des rentiers d'exercer leur liberté d'expression.

Les auteurs et producteurs de COLZA KLO sont victimes de cette violation du droit.

L'aide sélective serait admissible si elle était pratiquée de manière transparente et conforme au droit, à savoir sur la base d'une appréciation de la qualité des projets par des experts compétents, impartiaux et désintéressés, cela conformément à l'opinion de Weber / Zulauf citée ci-dessus. On ne peut pas raisonnablement affirmer que les "experts" de la Section du cinéma remplissent ces critères. En tant que "professionnels de la profession" subventionnés, ils sont par définition partiaux et intéressés. A la lumière de la mauvaise qualité de leurs films des dix dernières années, ils sont en outre incompétents pour émettre un jugement de valeur artistique et technique crédible. En maintenant l'aide sélective telle qu'elle est pratiquée actuellement, la Section du cinéma viole les principes généraux du droit administratif.

La Section du cinéma se lave les mains alors que les "experts" se répartissent le modeste gâteau entre eux. Pour devenir "expert", il faut passer par le chemin humiliant du "copinage" : Il faut se créer un réseau ("network") qui permette de survivre dans un système essentiellement basé sur le clientélisme et le trafic d'influence. Cette appréciation de la situation est largement partagée par les professionnels de la profession. Toutefois, elle fait l'objet d'un tabou sujet à la loi du silence : Ceux qui profitent du système n'ont aucun intérêt à le changer et ceux qui n'en profitent pas encore espèrent en profiter un jour.

En l'espèce, il faut admettre une ingérence de la Section du cinéma au moyen d'une aide sélective effectuée par des "experts" dénués de compétence, d'indépendance et d'impartialité. Cette aide sélective apparaît comme être biaisée par le clientélisme, le népotisme, la corruption et le trafic d'influence. Par conséquent, la Section du cinéma viole la liberté d'expression des producteurs, auteurs et collaborateurs de COLZA KLO en faussant la concurrence entre ceux-ci et les membres du cartel des rentiers.

2. Violation de l'obligation de promouvoir le cinéma

La Section du cinéma dans sa composition actuelle est notoirement hostile aux créateurs cinématographiques. Ses interlocuteurs privilégiés sont les intermédiaires, à savoir les producteurs subventionnés. Contrairement aux créateurs, qui assument une véritable responsabilité artistique, les producteurs subventionnés n'assument aucune responsabilité entrepreneuriale digne de ce nom : Il leur suffit d'être membre du cartel des abonnés aux subventions et de remplir les formulaires d'aide au cinéma pour percevoir des rentes.

Sous couvert de politique culturelle la Section du cinéma pratique en réalité une politique économique en faveur du cartel des producteurs abonnés à l'aide sélective.

Cette pratique sabote le cinéma indépendant dans ce pays et viole ainsi le mandat constitutionnel et légal de promouvoir un cinéma de qualité ainsi que l'identité et la diversité culturelle dans le domaine audiovisuel.

(…)

## III. CONCLUSIONS

Par ces motifs et tous autres à développer ultérieurement s'il y a lieu;

vu les faits de la cause;

vu les pièces produits;

vu en droit les articles 10 CEDH, 16, 21 et 71 de la Constitution fédérale, 1 ss. Lcin et 1 ss. PA et toute autre disposition applicable ainsi que les principes généraux du droit administratif,

Boheme Films conclut à ce qu'il

**PLAISE AU DEPARTEMENT FEDERAL DE L'INTERIEUR (DFI)**

Préalablement

Déclarer recevable le présent recours.

Dispenser Boheme Films du paiement des frais de la présente procédure.

Principalement

Interdire à la Section du cinéma de pratiquer de la censure au moyen de l'aide sélective et violer ainsi la liberté d'expression.

Interdire à la Section du cinéma de pratiquer de la politique économique au lieu de la politique culturelle dans le domaine du cinéma.

Annuler la décision de la Section du cinéma du 20 octobre 2003 concernant le refus d'octroyer une prime à la qualité et une prime d'étude au film COLZA KLO de Chris Dejusis.

Ceci fait

Condamner la Section du cinéma à soumettre la demande de Boheme Films du 11 décembre 2002 concernant la prime à la qualité et la prime d'étude pour le long métrage COLZA KLO à l'examen d'un jury constitué de membres compétents, indépendants, impartiaux et libres de conflit d'intérêt.

Condamner la Section du cinéma en tous les dépens de l'instance qui comprendront une équitable indemnité de procédure valant participation aux honoraires d'avocat de nom.

Subsidiairement

Acheminer Boheme Films à prouver par toute voie de droit utile les faits allégués par la présente sous les chiffres 1 à 54.

En tout état de cause

Débouter la Section du cinéma de toute autre ou contraire conclusion.

SOUS RESERVE
DONT ACTE

Pour Boheme Films

Christophe Germann

(…)

BORDEREAU DES PIECES

(…)