

Irish Film Finance Rebooted: The New Section 481

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Introduction

2014 saw the winding down of one of the most popular tax write-offs for Irish individuals, as the Section 481 state film subsidy transitioned from an investor-led to a so-called producer-led structure, following a review of the scheme by the Department of Finance. In reality, the incentive might be more appropriately classified as *exchequer-led*, as State largesse continues to underpin the scheme, by some measure the most significant market support mechanism subsidising film, TV drama, documentary and animation production in Ireland.

Since its inception in 1987 as Section 35 of the Finance Act 1987, the relief has played an important role in attracting private investment into the Irish film industry. It is relevant that the introduction of the relief coincided with the Irish Film Board's six year hiatus before its reinstatement in 1993. This juxtaposition underscored a shift in film policy away from the encouragement of low-budget, indigenous arts activity and towards a more outward-looking commercial-industrial concept. Over the years, the value of the relief for an individual project has increased significantly and is now worth up to 50 million euro, depending on the amount of overall Irish expenditure. While this amount is large in Irish terms, it is unremarkable by international standards: the comparable UK scheme has no limit, for example (BFI 2015). The cap remains unchanged since 2008. Indeed the industry has been lobbying for an increase, and the Minister for Finance has committed to keeping the scheme under close review (Brosnan 2015).

The 2015 changes

Apart from the relatively superficial switch from an investor-funded to a tax-credit structure,

there are several major changes affecting Irish film industry practitioners. First, the scheme can now contribute up to 32 percent of eligible expenditure on qualifying projects (an increase from 28 percent under the previous version). Second, the definition of eligible expenditure has been expanded to include the cost of all cast and crew working in Ireland, *regardless of nationality*. This change, dubbed the "Tom Cruise clause" by the Irish press even before the new regulations came into operation in January 2015, removes the previous limitation to cast and crew from the European Extended Economic Area (EEA) (Webb 2013).

This has important potential implications for film workers, as does a third change, whereby S481 certification will now be granted to the production company ("producer company") itself rather than the one-off company ("qualifying company") established to produce the film. The producer company is not required to be Irish resident; it can be based anywhere in the EEA, as long as it carries out business in Ireland through a local branch or agency. As under the previous version of the scheme, S481 productions nevertheless require an "Irish-based" producer, co-producer or executive producer, who must be credited as such in the film titles. An interesting addition to the legislation is the stipulation that the producer company must be in the business of making theatrical or television films "on a commercial basis with a view to realisation of profit" (Revenue 2015: 8). In a further modification, the new legislation specifically excludes broadcasters and Internet based VOD companies such as Netflix.

The main procedural changes to S481 lie in the logistics of claiming or obtaining payment. One of the advantages of the old version was that funds raised were available from the first day of

production. The new structure, with funding granted as a credit against a company's end-of-year corporation tax liability, was greeted initially with a degree of trepidation, as it was unclear how production cash flow might be affected (e.g. O'Neill 2013: 93). The Revenue Commissioners have subsequently provided some clarification on this: while producers may defer payment until completion of the film, they also have the presumably far more useful option of receiving payment in two instalments: 90 percent in advance, and 10 percent on completion of production (Revenue 2015: 16-17). It is as yet unclear, however, how quickly Revenue will pay this first instalment. According to their published guidelines, "any payment due will be transferred...no earlier than *seven days after the issue date of the certificate*" (ibid: 5, our emphasis). However the fact that seven days is the minimum period, with no maximum given, leaves open the possibility that producers may require recourse to alternative funders to bridge this gap.

A further concern was whether a tax credit would be of much practical use to a producer companies with a corporation tax liability lower than the maximum relief available. Helpfully for such companies, the full credit can still be claimed, provided the company has no other outstanding taxes (ibid: 1, 4).

Implications

One of the more significant changes to S481 down through the years was the 1994 requirement that all funded projects be certified by the Minister for Arts, Culture and the Gaeltacht (now Arts, Heritage and the Gaeltacht), and the introduction of a 'cultural test' as part of the certification process. Prior to this, there was no formal requirement that S481-funded filmmaking activity have any relevance at all to Ireland or Irish culture (thus, for example, allowing a film about a 13th Century Scottish folk hero – Braveheart – to draw down millions of punts of S481 funding). The test was thus formulated with some form of territorial protection in mind. However, bearing in mind the fundamental aims of the tax incentive, namely to promote both inward investment and indigenous development, the test was drafted in as wide a

manner as possible. Given the expansion in scope represented by the 2015 changes, it is perhaps surprising that this cultural test remains unchanged.

With the new Section 481 in effect only since January 12, 2015, it is of course far too early to assess their impact on the industry. One suspects that certain changes, such as the specific exclusion of broadcasters and netcasters from certification, is a response to certain ambiguities in the old regulations. However the new regulations engender a number of new ambiguities, prompting some reservations in trade union circles especially about the implications for Irish film workers – including Irish producers.¹ By design, Section 481 has always functioned as an incentive for mobile international film capital to locate production in Ireland. While the new regulations continue the requirement for the participation and accreditation of an "Irish based" producer, there is no stipulation that he or she be attached to an Irish production company. In practice, incoming producers have tended historically to outsource Irish production in whole or in part to a local co-producer, whose duties typically have included the application for Section 481 certification; compliance with the conditions of same; and the hiring and management of local crews. It is of course possible that Irish production companies will continue to provide the "agency" required by the legislation, and that indeed is the Irish Film Board's recommendation (IFB 2015). There is nothing in the letter of the law, however, requiring the participation of an Irish production company that might come under the remit of SPI and its labour agreements with Irish film unions.

Added to this, the Tom Cruise clause's removal of the EEA limitation removes with it the incentive to hire EEA cast and crew. In theory at least, a production company could function with no Irish or European workers, beyond the scope of established labour agreements, and with few obligations to workers beyond the minimum wage and health, safety and working time standards. That such a situation is

1. Personal interviews with trade union officials, Sept 2014.

at least theoretically possible is a stark reminder of the precarity inherent in the new international division of cultural labour (Miller *et al* 2005). Also, perhaps, it explains and justifies the “cultural test” requirement that certifiable projects function as “an effective stimulus to film making in Ireland” (Revenue 2015: 7).

In relation to production cash flow, the increase in producer benefit from 28 to 32 percent arguably compensates for the inconvenience of getting only 90 percent of the relief up front. It is nevertheless likely that some producers will access bridging finance to plug this gap. One of the reasons for revising the format

of the relief was to minimise ‘leakage’, namely the difference between the amount of tax forgone by the exchequer and the amount of finance received by the production. However, the costs associated with this bridging finance, and the possibility that producers, under certain conditions, might require a surety bond to access the 90 percent upfront payment, could mean a certain amount of leakage may still take place (*ibid*: 17). As a result whilst bringing clarity to some areas of the funding mechanism, the new regulations also introduce some new uncertainties: how the new S481 will play out in practice, only time will tell.

Works Cited

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