

Case No: 65120
Event No: 517161
Dec. No: 180/09/COL

EFTA SURVEILLANCE AUTHORITY DECISION
of 31 March 2009
on the aid schemes for audiovisual productions and development of screenplays and
educational measures
(Norway)

THE EFTA SURVEILLANCE AUTHORITY¹

Having regard to the Agreement on the European Economic Area², in particular to Articles 61 to 63 and Protocol 26 thereof,

Having regard to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice³, in particular to Article 24 thereof,

Having regard to Article 1(3) of Part I and Article 4(3) of Part II of Protocol 3 to the Surveillance and Court Agreement⁴,

Having regard to the Authority's Guidelines on the application and interpretation of Articles 61 and 62 of the EEA Agreement⁵ and in particular the Chapter thereof relating to state aid to cinematographic and other audiovisual works⁶,

Whereas:

¹ Hereinafter referred to as the Authority.

² Hereinafter referred to as the EEA Agreement.

³ Hereinafter referred to as the Surveillance and Court Agreement.

⁴ Hereinafter referred to as Protocol 3.

⁵ Guidelines on the application and interpretation of Articles 61 and 62 of the EEA Agreement and Article 1 of Protocol 3 to the Surveillance and Court Agreement, adopted and issued by the Authority on 19 January 1994, published in the Official Journal of the European Union (hereinafter referred to as OJ) L 231 of 03.09.1994 p. 1 and EEA Supplement No 32 of 03.09.1994 p. 1. The Guidelines were last amended on 29 January 2009. Hereinafter referred to as the State Aid Guidelines. The updated version of the State Aid Guidelines is published on the Authority's website: <http://www.eftasurv.int/fieldsofwork/fieldstateaid/guidelines/>

⁶ Hereinafter referred to as the Cinema Guidelines.

I. FACTS

1 Procedure

The Norwegian authorities notified the aid schemes for audiovisual productions and development of screenplays and educational measures, pursuant to Article 1(3) of Part I of Protocol 3 by letter of 14 July 2008 (Event No.: 485556).

By letter dated 12 September 2008 (Event No.: 490741), the Authority requested additional information.

By letter dated 20 November 2008 (Event No.: 499438), the Norwegian authorities replied to the information request.

By letter dated 23 January 2009 (Event No.: 504469), the Authority requested further clarifications. By letter dated 13 February 2009 (Event No.: 508899), the Norwegian authorities provided the requested information.

By letter dated 27 March 2009 (Event No.: 513848), the Norwegian authorities have committed themselves to implementing any changes that may be required after the expiry of the Authority's Cinema Guidelines.

2 Description of the proposed measures

The Norwegian authorities have notified two schemes: firstly, the aid scheme for audiovisual productions (2.1) and, secondly, the aid scheme for the development of screenplays and educational measures (2.2).

The scheme for audiovisual productions contains a number of measures which correspond to measures which have already been approved by the Authority in the past.⁷ By Decision No. 774/08/COL of 10 December 2008, the Authority prolonged the support schemes to audiovisual production, film related activities and film production companies until 1 July 2009.

Each scheme contains a number of measures which will be reviewed individually.

The objective of the aid schemes

The objective of the schemes is to advance audiovisual productions as a means of cultural expression. The grants shall contribute to a continuous production of a diversity of audiovisual productions which:

- are based on Norwegian language, culture and social conditions;
- are recognised for high quality, artistic courage and innovation, and
- challenge and reach a big audience in Norway and abroad.

⁷ See Decision No. 32/02/COL of 20 February 2002 regarding support to film production and film related activities, Decision No. 169/02/COL of 18 September 2002 regarding public support for film production companies, Decision No. 186/03/COL of 29 October 2003 on proposed support measures to audiovisual production, Decision No. 179/05/COL of 15 July 2005 regarding amendments to the Norwegian aid scheme "support to audiovisual production", Decision No. 342/06/Col of 14 November 2006 on the prolongation of the support schemes to audiovisual production, film related activities and film production companies, Decision No. 430/08/COL of 2 July 2008 on the prolongation of the support schemes to audiovisual production, film related activities and film production companies, Decision No 774/08/COL of 10 December 2008 on the prolongation of the support schemes to audiovisual production, film related activities and film production companies

National legal basis for the aid schemes

The national legal bases for the notified schemes are the:

- Draft regulation for support to audiovisual productions;
- Draft regulation for support for screenplay development and educational measures, and
- State budget 2009 (Chapter 0334 regarding film and media).

The schemes will be managed by the new Norwegian Film Institute (hereinafter the “NFI”) which was set up on 1 April 2008 and which replaces the former Norwegian Film Institute, Norwegian Film Fund and Norwegian Film Development.

Duration of the aid schemes

The Norwegian authorities indicated in their notification that support under the two schemes may be granted until 31 December 2014.

Budget

The Norwegian authorities have indicated that the annual budget for both schemes in 2008 was NOK 321 million. The support granted in 2009 should be of an equivalent level.⁸

2.1 Scheme for audiovisual productions

Aid must benefit a cultural product

The scheme for audiovisual productions is targeted at providing support to audiovisual productions which are cultural products. In order to be eligible under the scheme, the film/documentary/interactive product must be a cultural product as defined by the Norwegian authorities.

The applicable test is as follows:

“A cultural product is a product which fulfils at least three of the following criteria:

- a) *the screenplay or the literary work of which the film is adapted is originally written in Norwegian or Sami,*
- b) *the main theme concerns Norwegian history, culture or society,*
- c) *the film is set in Norway, another EEA State or Switzerland,*
- d) *the work has a significant contribution from creative originators or practicing artists living in Norway, another EEA State or Switzerland.*

Support may also be granted if the audiovisual production is defined as a cultural product in its country of origin”.

Source and form of the aid

⁸ Most of the measures notified by the Norwegian authorities correspond to previously applicable measures.

The aid is granted from the State budget in the form of direct grants. Under the support scheme for audiovisual production, the amount of aid is calculated on the basis of the budget or account. If the actual expenditure is lower than the budget, the exceeding amount will have to be repaid.

The support that a production company receives prior to the release of a film, *i.e.* support for the development of a film project, production support and promotion and distribution support is defined as “advance support”. Support may also be granted after the release, *i.e.* support to other kind of promotion and distribution and income bonuses.

Beneficiaries

The beneficiaries of the scheme for support to audiovisual production are independent audiovisual companies. Independent audiovisual companies are defined as companies with audiovisual production as their main purpose and activity. The production company shall not be publicly owned or the subject to dominant influence by a broadcasting company. Dominant influence is present where one broadcasting company has ownership or voting rights of 25% or more in the production company. When there is more than one broadcasting company, the limit is 50%. The company must be based in the EEA.

Territorialisation

There is no rule regarding territorialisation whereby a minimum share of the production budget must be spent in Norway.

The scheme for audiovisual productions covers thirteen measures:

- support for the development and production of cinema films (2.1.1);
- support for the development and production of short films (2.1.2);
- support for the development and production of documentaries (2.1.3);
- support for the production of cinema films based on market potential (2.1.4);
- support for the development and production of television series (2.1.5);
- support for the development of interactive production (2.1.6);
- support for slate funding of development and production of cinema films (2.1.7);
- support for the production of cinema films with a Norwegian co-producer (2.1.8);
- income bonuses (2.1.9);
- support for the promotion and distribution of cinema films in Norway (2.1.10);
- support for the promotion and distribution of interactive productions in Norway (2.1.11);
- support for the promotion and distribution abroad (2.1.12) and
- support for cinema film subtitling (2.1.13).

2.1.1 Support for the development and production of cinema films

This measure corresponds in substance to the previously applicable scheme.

Films of at least 60 minutes that are produced for cinema screening are eligible for aid. The applicant must be organised as a limited company and the key participants in the production (writer, producer, director, etc.) must have significant professional experience with film production.

This measure is directed specifically towards films with restricted market potential and budgets. Grants are given on the basis of a thorough screening of projects and continuous

supervision of the project throughout the production process. Projects are evaluated on an individual basis and monitored closely by a professional film consultant. The NFI's regulations will give detailed instructions on criteria that must be met before payments are made, supervision and control measures and sanction mechanisms in case of breach of the regulations.

The eligible development costs are those related to screenplay development, pre-examinations, financial work etc. The eligible production costs are the relevant production costs occurring until finalisation of an A print or equivalent. Only accounted costs directly connected to the development and production are covered.

The maximum aid intensity will be 50%. A general ceiling of NOK 35 million will furthermore limit the support.

The NFI has predicted that the support to this measure will be of approximately NOK 110.3 million which corresponds to approximately 33% of its total funds.

2.1.2 Support for the development and production of short films

This regulation corresponds in substance to the previously applicable scheme.

Short films are defined as films of less than 60 minutes. They have little or no commercial value and are primarily employed as a means of training and development of talent and are mainly distributed on the festival circuit.

The support mechanism will permit a maximum aid intensity of 100%. The Norwegian authorities have indicated that the support per project is normally well below the *de minimis* ceiling.

The Norwegian authorities have indicated that the support to this measure was about NOK 21 million in 2008.

Projects are evaluated on an individual basis and monitored closely by a professional film consultant. The NFI's regulations will give details on the terms and conditions for payment of the grants and the control/sanction mechanisms.

The eligible development costs cover screenplay development, pre-examination, research, financial work, etc. The eligible production costs are the relevant production costs occurring until finalisation of an A print or equivalent. Only accounted costs directly connected to the development and production are covered.

2.1.3 Support for the development and production of documentaries

This regulation corresponds in substance to the previously applicable scheme.

The objective of the aid is to stimulate the production of Norwegian documentaries of high artistic and production quality.

As documentaries have limited commercial value, the support mechanism will permit a maximum aid intensity of 90%.

The NFI has indicated that the support to this measure was approximately NOK 15.7 million in 2008.

Single documentary projects are eligible for aid under this measure. The key participants in the production (producer, director, writer, etc.) must have significant professional experience with film production.

The NFI's regulations will give detailed instructions on criteria that must be met before payments are made, supervision and control measures and control and sanction measures in case of breach of the regulations.

The eligible development costs cover screenplay development, pre-examinations, research, financial work, etc. Eligible production costs cover relevant production costs occurring until finalisation of an A print or equivalent. Only accounted costs directly connected to the development and production are covered.

2.1.4 Production support for cinema films based on market potential

The regulation corresponds in substance to the previously applicable scheme.

Under this support mechanism, also called "50-50 grants", independent producers of feature films, feature-length documentaries or animation films primarily intended for cinema screening may receive support of up to 50% of the approved production budget, provided that the producer contributes with own capital of at least 50% of total production costs. The aid takes the form of grants.

The intended objective is to accommodate films that have the potential to attract private investments. The absence of the close direction and supervision of a public body will prove attractive by offering the production company full artistic and commercial control. The scheme may thus contribute to a reduction of the Norwegian film industry's overall reliance on public support. Thus, the objective of the aid is to stimulate productions of Norwegian cinema films with a potential for a large audience.

The aid intensity is limited by the fact that the producer must provide at least 50% of the film's budget. In addition, a general ceiling on cumulated public support of NOK 35 million will apply.

The NFI has indicated that the support to this measure was approximately NOK 49.4 million in 2008.

Only cinema films are eligible for aid under this measure. The NFI must assess whether the film could be expected to have an audience of at least 150 000 viewers. The quality of the project in market terms is ensured by the project's ability to raise capital. Individual projects will therefore not be scrutinized for cultural content to the same extent by the funding body.

The eligible development costs cover screenplay development, pre-examinations, financial work, etc. eligible production costs cover relevant production costs occurring until finalisation of an A print or equivalent. Only accounted costs directly connected to the development and production are covered.

2.1.5 Support for the development and production of television series

The regulations for this scheme correspond in substance to the previously applicable scheme.

Audiovisual productions taking the form of more than one component produced for screening on television are eligible. The aim of this measure is to raise the artistic and production quality of Norwegian television series. The applicant must be organised as a limited company and key personnel will be required to prove considerable prior experience in film production. The producer must raise a minimum of 50% of the production budget and hold a letter of intent from a broadcasting company willing to contribute to a significant part of the financing.

The support measure permits a maximum aid intensity of 50%. When it comes to documentary series and series suitable for children, a higher percentage may be accepted. Documentary series should benefit from an aid intensity of up to 85%. Indeed, they are a type of programming attracting audiences far below the average ratings and both public service and commercial broadcasters pay very low market prices for documentaries. Audiovisual production aimed at children should also benefit from higher aid intensities as children constitute a minority market.

The NFI has indicated that the support to this measure was approximately NOK 16 million in 2008.

The eligible development costs are screenplay development, pre-examinations, research, financial work, etc. The eligible production costs are relevant production costs occurring until finalisation of a digital master or equivalent. Only accounted costs directly connected to the development and production are covered.

2.1.6 Support for the development of interactive production

The regulations for this scheme correspond in substance to the previously applicable scheme.

Support will be given to project development of interactive productions (*e.g.* development of computer games). The scheme is to be directed to production with restricted market potential and budgets, especially products for children and young people. The support is not meant for the whole production process until the product is finished but only through the first development stage.

Grants will target independent audiovisual producers.

The aid intensity will be of up to 75%. The Norwegian authorities have indicated that support to each project will normally be below the *de minimis* limit.

The NFI has indicated that the support to this measure was approximately NOK 7 million in 2008.

Interactive productions, computer games or other audiovisual productions requiring the user's activity may be eligible for aid. The following projects are however not eligible for aid: projects marketing commercial products, versions of existing projects, educational products, tools, manuals, reference books, etc. The applicant must be organised as a

limited company and key personnel will be required to prove considerable prior experience in interactive production.

The eligible costs are development costs.

2.1.7 Support for slate funding of development and production of cinema films

This measure encompasses the development of three to six cinema films or the production of up to three films is eligible for aid. The applicant must be organised as a limited company and the producer must have had the main responsibility for a cinema film with common cinema distribution within five years preceding the application. When assessing and prioritising between projects, the NFI will emphasize the production company's solidity, experience and documented results, competence in developing projects and its ability to put in place a creative environment. The NFI will take into account the collaboration between producer, director and writer and the director's verifiable artistic results.

The cultural objective of the aid is to strengthen the production companies' possibilities to achieve a long term artistic target on development and production of film projects. In addition, the objective is to enhance long term cooperation between production companies and film creators.

The aid intensity will be of up to 75%.

The Norwegian authorities have indicated that the budget for this measure was approximately NOK 3 million in 2008.

2.1.8 Support for the production of cinema films with a Norwegian co-producer

The regulations for this scheme correspond in substance to the previously applicable scheme.

The purpose of the scheme is to encourage international co-operation. To be eligible for aid, the cinema film must have a foreign main producer and a Norwegian co-producer. The production must have a certain Norwegian contribution which means it must meet certain conditions set out in the regulation (Norwegian script or adaptation of Norwegian work, action of the film takes place in Norway, etc.).

The maximum aid intensity will be of 75% of the Norwegian contribution.

The NFI has indicated that the support to this measure was approximately NOK 6 million in 2008.

2.1.9 Income bonuses

The income bonuses scheme will replace the previously applicable box office bonuses scheme.

The income bonuses scheme is an automatic support scheme. In order to be eligible, the film must normally have sold 10 000 tickets in normal cinema distribution, but the NFI

may grant the support below this threshold for documentaries or films suitable for children.

The bonus is directly linked to the film's income and the size of the budget of the film released the year in question. The income bonuses are awarded on the basis of the film's total income in the last three years after the film's official opening night. The new scheme provides for the payment to the producer of a bonus equal to 100%⁹ of all incomes derived from the sales or hire of the film rights. For the income from cinemas the basis of the bonus will be of approximately one third of the ticket price; for television, DVDs and other rights, the producer's share of the income is negotiated between the producer and the distributor/buyer. The possibility to take into account sales of the film rights in other formats will encourage the producer to develop all the stages of the distribution.

The Norwegian authorities have argued that the income bonus is a part of the production bonus which is granted *ex post*. When the NFI assesses the aid amount given *ex ante* of the production, it estimates the film's commercial potential and the sales of the film. If the film does not have good prospects of commercial success, more support is granted *ex ante*. If, on the contrary, the NFI presumes that the movie will have a certain success, the *ex ante* aid will be less.

Support awarded under this scheme is taken from the same budgetary line as the rest of the film production schemes.

For films that have benefited from *ex ante* production support, the main producer must apply for aid before the start of the recording of the film. Regarding Norwegian cinema films that have not received aid pursuant to the scheme, the application for income bonuses must be available to the NFI at least four weeks before the opening night.

The income bonuses are capped by absolute ceilings of NOK 9 million for films suitable for children, of NOK 7 million for all other films. Films that are in need of particularly large amount of risk capital in the financing may be given an absolute ceiling of NOK 15 million.

The cumulated aid intensity must not exceed 75%¹⁰ of the approved development, production and promotion & distribution costs.

2.1.10 Support for the promotion and distribution of cinema films in Norway

The regulations for this scheme correspond in substance to the previously applicable scheme.

The aid intensity is capped by the requirement that the producer must provide at least 50% of the approved promotion/distribution budget. In addition, the budget cannot exceed NOK 2 million.

The aid is granted for the promotion and distribution of cinema film in ordinary cinema distribution. Cinema screening of short films or short film programmes may also be eligible for aid.

⁹ 200% in the case of films for children.

¹⁰ In certain cases, a difficult film with a particularly high artistic value and a low acceptance by and in the market, may receive up to 85% cumulated intensity.

Eligible costs are costs related to promotion and distribution and manufacturing distribution prints.

The NFI has indicated that the support to this measure was approximately NOK 20 million in 2008.

2.1.11 Support for promotion and distribution of interactive productions in Norway

Aid intensity is capped by the requirement that the producer must provide at least 50% of the approved promotion/distribution budget. In addition, the budget shall not exceed NOK one million.

The measure being new, no specific funds were allocated to it in 2008.

The eligible costs cover, *inter alia*, promotion and distribution costs such as marketing costs.

2.1.12 Support for the promotion and distribution abroad

This measure corresponds to the previously applicable scheme.

The aid will ensure Norwegian presence on the main film festivals and other important events and make Norwegian film culture known abroad.

The support mechanisms will permit a maximum aid intensity of 100% of the approved promotion/distribution budget. However, the Norwegian authorities have indicated that the grants are in general well below the *de minimis* limit.

This scheme has been included in the general budget of the former NFI and no specific funds were allocated to the scheme in 2008.

Aid is granted to promotion and distribution of films on film festivals and sale markets. Cinema films are only eligible if the producer has a contract with a sales agent.

Eligible costs cover, *inter alia*, marketing, manufacturing distribution prints, festival participation fees. The grants may not cover expenses for providing requisite material in accordance with law, regulation or the NFI's decision.

2.1.13 Support for cinema film subtitling

The regulations for this scheme correspond in substance to the previously applicable regulations.

The objective of the scheme is to make films in the Norwegian language accessible for the hearing impaired.

The maximum aid intensity is of 100% of the approved costs associated with both the transcription of dialogue to subtitles and subtitling of each copy and the promotion associated with the subtitling. In addition, the support to extra promotion shall not exceed NOK 100 000.

To be eligible for the aid, the applicant must undertake an obligation to subtitle all prints that will be shown in Norway. The beneficiary of the support will be the distributor.

2.2 Scheme for the development of screenplays and educational measures

This regulation is aimed at individual workers in the early stages of a film project development and education of film workers. The scheme entails three different measures: an educational measure (2.2.1), a scholarship (2.2.2) and a screenplay development measure (2.2.3).

Each measure has a specific objective.

2.2.1 Educational measure

The objective of the educational measure is to enhance a professional and solid environment for audiovisual production in Norway through the development of talent and competence in Norwegian film workers and artists.

The amount of aid granted for educational purposes is determined by the costs. The aid may cover 100% of expenses for courses, travel and stay.

Professional film workers attending courses or other educational measures are eligible for aid. Aid is granted to cover educational expenses for film workers. The applications are evaluated on an individual basis. When assessing and prioritising between projects, the NFI will emphasize the applicant's professional motivation for the application. Grants covering courses in France are prioritised in accordance with the Troll agreement¹¹. Eligible costs are expenses for courses, travelling and stay. The eligible courses include *inter alia* the Media programme and post-graduate studies.

2.2.2 Scholarships

The objective of the scholarships is to contribute to the development of talents and integration of qualified film workers in the professional audiovisual branch.

The amount of aid granted for scholarships will be determined by the NFI. The amount of aid granted for educational purposes is determined by the costs. The aid may cover 100% of expenses for courses, travel and stay.

Professional film workers are eligible for scholarships. Aid is granted, *inter alia*, for trainees/visiting workers in the audiovisual business. The trainee shall not replace a paid worker but have a full-time stay with an educational purpose. To be eligible for the aid, the applicant must present a declaration that a relevant film business is willing to have the trainee on full time. When assessing and prioritising between projects, the NFI will emphasize the applicant's professional motivation for the application. The scholarship is granted as a lump sum to the trainee. The applications are evaluated on an individual basis.

¹¹ The "troll agreement" covers Franco-Norwegian cooperation in areas such as energy, education, research and culture.

2.2.3 Screenplay development

The objective of the screenplay development measure is to stimulate development of screenplays of a high artistic and professional quality. The measure will contribute to continuity in screenplay work and ensure a broad repertoire for all groups.

The aid for screenwriters is granted as a lump sum. If the screenplay develops into a film project supported by the NFI for development and production, the individual screenplay aid will be taken into account when assessing the aid.

Aid is granted for the development of screenplays for films, TV-series and interactive productions. Aid is only granted for the development of the first draft or until a producer has taken an option on the rights of the script. To be eligible for aid, the application must contain a synopsis or a project description and a time schedule. If the screenplay is an adaptation of a literary work, the applicant must describe his artistic intentions. The aid is granted as a lump sum. If the screenplay develops into a film project supported by the NFI for development and production, the individual screenplay aid will be taken into account when assessing the aid.

II. ASSESSMENT

The presence of state aid

State aid within the meaning of Article 61(1) EEA Agreement

Article 61(1) of the EEA Agreement reads as follows:

“Save as otherwise provided in this Agreement, any aid granted by EC Member States, EFTA States or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Contracting Parties, be incompatible with the functioning of this Agreement.”

2.1 Scheme for audiovisual productions

2.1.1 Presence of state resources

The aid measure must be granted by the State or through state resources.

The support measures will be financed by the NFI which will receive State budgetary allocations for the purpose of granting subsidies in relation to film production and film related activities. The Authority therefore considers that the film support is granted by the State.

2.1.2 Favouring certain undertakings or the production of certain goods

Firstly, the measures must confer on the producers of audiovisual products, advantages that relieve them of charges that are normally borne from their budget. The aid gives undertakings eligible under the mechanisms, a financial benefit they would not have enjoyed in the normal course of business. It thus strengthens the financial position of the eligible production company compared with other undertakings in production of audiovisual products within the EEA.

2.1.3 Distortion of competition and effect on trade between Contracting Parties

State aid to specific undertakings is regarded as distorting competition and affecting trade between the Contracting Parties if the recipient firm carries on an economic activity involving trade between the Contracting Parties. Audiovisual products may be produced in different alternative locations within the EEA. They are subsequently traded between the Contracting Parties to the EEA Agreement and may compete to attract audience and users. Production aid may therefore alter the competition existing between different locations for the realisation of films, TV series or interactive products, as well as it may influence the trading conditions for their commercialisation. Therefore the proposed aid may be considered as distorting competition and affecting trade between the Contracting Parties.

The Authority considers that the measures included in the scheme for audiovisual productions involve state aid.

2.2 Scheme for the development of screenplays and educational measures

The Norwegian authorities have indicated that this scheme is aimed at individual film workers in the early stages of a film project development and at the education of film workers.

The Court of Justice of the European Communities (hereinafter “the Court of Justice”) has consistently held that the concept of an undertaking covers any entity engaged in an economic activity, regardless of the legal status of the entity or the way in which it is financed.¹²

It has also consistently held that “*any activity consisting in offering goods and services on a given market is an economic activity*”.¹³

In *Pavel Pavlov* the Court of Justice held that dentists amounted to undertakings as they carried out an economic activity: “*in the present cases, the medical specialists (...) provide, in their capacity as self employed economic operators, services on a market, namely the market in specialist medical services. They are paid by their patients for the services they provide and assume the financial risks attached to the pursuit of their activity*”.¹⁴

The fact that the scheme is targeted at individuals and not legal persons does not, as such, preclude the possibility that those individuals may be considered as undertakings within the meaning of state aid rules of the EEA Agreement.

The Authority considers that the following measures should be distinguished: support for the development of screenplay (2.2.1) on the one hand and the educational measures and scholarships on the other (2.2.2).

2.2.1 Support for the development of screenplays

Script writers carry out an economic activity as scripts may be sold and bought on a market. The direct grants from the general Norwegian budget obtained by the beneficiaries constitute an advantage that they would not receive under normal market circumstances.

¹² See in particular, Case C-41/90 *Höfner and Elser* [1991] ECR I-1979, Joined cases C-159/91 and C-160/91 *Poucet and Pistre* [1993] ECR I-637 paragraph 17, Case C-244/94 *Fédération Française des Sociétés d'Assurance* [1995] ECR I-4013, paragraph 14.

¹³ See Case 118/85 *Commission v Italy* [1987] ECR 2599, paragraph 7 and Case C-35/96 *Commission v Italy* [1998] ECR I-3851, paragraph 36.

¹⁴ See Joined Cases C-180/98 to C-184/98 *Pavel Pavlov and others* [2000] ECR I-6451, paragraph 76.

As the measure only covers script writing it is selective in nature. The distortion of competition may be limited as the financed activity is in itself not subject to a high degree of economic competition. However, the support may be cumulated with other measures provided under the scheme for audiovisual productions. Furthermore, such measures may have an economic impact on intra-community trade, even if it is expected to be limited.

The Authority, in line with Commission practice¹⁵, considers that the measure concerning script writers amounts to state aid.

2.2.2 Educational measures and scholarships

The measures are of a purely educational nature and do not participate in any way in the production process of an audiovisual product.

The individuals who may benefit from the measures are not as such acting on a market and not carrying an economic activity. Indeed, it is a clear condition for receiving a scholarship that the trainee will not replace another film worker but rather be an addition to the film crew for educational purposes. The measure concerning education involves aid to cover educational expenses: courses, travelling and stay.

The Authority therefore considers that those measures do not amount to state aid.

3 Procedural requirements

Pursuant to Article 1(3) of Part I of Protocol 3, “*the EFTA Surveillance Authority shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid (...). The State concerned shall not put its proposed measures into effect until the procedure has resulted in a final decision*”.

By submitting notification of the schemes for audiovisual productions and development of screenplays and educational measures by way of a letter dated 14 July 2008 (Event No.: 485556), the Norwegian authorities have complied with the notification requirement. As the scheme will enter into force only after approval by the Authority the Norwegian authorities have respected the standstill obligation.

The Authority can therefore conclude that the Norwegian authorities have respected their obligations pursuant to Article 1(3) of Part I of Protocol 3.

4 Compatibility of the aid

The Authority will assess the compatibility of (i) the measures included in the scheme for audiovisual productions and, (ii) regarding the scheme for the development of screenplays and educational measures, the measures concerning script writing only as it takes the view that the educational and scholarship measures do not entail any state aid (see above **2.2.3**).

In its analysis, the Authority will distinguish the measures to be reviewed under/with reference to the Cinema Guidelines (**4.1**) and those to be reviewed under Article 61(3)(b) EEA (**4.2**).

As referred to in the facts parts, the Authority has previously approved most of the measures here under examination. Therefore, as regards the compatibility of those measures the Authority also refers to the reasons contained in its previous decisions.¹⁶

¹⁵ See Decision N70/2006, Finland of 26 November 2008, paragraph 33.

4.1 Measures assessed under/with reference to the Cinema Guidelines

Regarding the scheme for audiovisual productions, all measures except those relating to promotion and distribution and subtitling will be assessed on the basis of Article 61(3)(c) EEA in combination with the Cinema Guidelines.¹⁷

Regarding the scheme for development of screenplays and educational measures, the measure supporting script writers will also be assessed with reference to Article 61(3)(c) EEA and the Cinema Guidelines. Indeed, even though such measure would intervene before the production of the film in the meaning of the Cinema Guidelines, the scripts are intended to be integrated in the production of films. Therefore, the Authority applies the conditions of the Cinema Guidelines by analogy in order to assess the compatibility of the support measure for script writing with Article 61(3)(c) EEA.¹⁸

In the Community pillar, the Maastricht Treaty gave Community-level recognition to the outmost importance of promoting culture for the European Union and its Member States by incorporating culture amongst the Community's policies specifically referred to in the EC Treaty (Article 151 EC). At the same time, a new Article, now Article 87(3)(d) was included providing for a new possibility to declare aid granted to promote culture compatible with the EC Treaty. Article 87(3)(d) provides that the EC Commission may consider compatible with the common market "*aid to promote culture and heritage conservation, where such aid does not affect trading conditions and competition in the Community to an extent that is contrary to the common interest*".

The EEA Agreement also recognises the need for strengthening cultural cooperation in Article 13 of Protocol 31. The EEA Agreement does not contain the same cultural exception as that included in Article 87(3)(d) EC. Nevertheless, the Authority considers that, in line with its consistent practice, film, TV and other audiovisual works production support measures may be approved on cultural grounds on the basis of Article 61(3)(c) EEA. In its assessment, the Authority will apply the same criteria as those applied by the European Commission for the purposes of Article 87(3)(d) EC.

In the Cinema Guidelines, the Authority has established criteria for its assessment of cinema and TV productions under Article 61(3)(c) EEA.

In analysing support measures in the audiovisual field, paragraph 11 of the Cinema Guidelines provide that the Authority must verify:

¹⁶ See Decision No. 32/02/COL of 20 February 2002 regarding support to film production and film related activities, Decision No. 169/02/COL of 18 September 2002 regarding public support for film production companies, Decision No. 186/03/COL of 29 October 2003 on proposed support measures to audiovisual production, Decision No. 179/05/COL of 15 July 2005 regarding amendments to the Norwegian aid scheme "support to audiovisual production", Decision No. 342/06/Col of 14 November 2006 on the prolongation of the support schemes to audiovisual production, film related activities and film production companies, Decision No. 430/08/COL of 2 July 2008 on the prolongation of the support schemes to audiovisual production, film related activities and film production companies, Decision No 774/08/COL of 10 December 2008 on the prolongation of the support schemes to audiovisual production, film related activities and film production companies

¹⁷ Measures relating to promotion & distribution and subtitling will be assessed with reference to Article 87(3)(c) EEA only, see below section 4.2.

¹⁸ This is in line with Commission practice, see Decision N70/2006, Finland of 26 November 2008, paragraph 57.

- *first, whether the aid scheme respects the “general legality principle”, i.e. the Authority must verify that the scheme does not contain clauses that would be contrary to provisions of the EEA Agreement in fields other than state aid;*
- *secondly, whether the scheme fulfils the specific compatibility criteria for aid, set out by the European Commission in its Communication (...).”*

4.1.1 Legality criterion

The Cinema Guidelines provide in paragraph 12 that *“the Authority must verify that the eligibility conditions of the state aid schemes do not contain clauses contrary to the EEA Agreement in fields other than State aid. The Authority must ensure, inter alia, that the principles prohibiting discrimination on the grounds of nationality, freedom of establishment, free movement of goods and freedom to provide services have been respected (Articles 4, 11, 13, 28, 31, 34 and 36 EEA)”*.

In compliance with these principles, aid schemes must not, for example, reserve the aid to nationals exclusively or require the undertakings to have the status of national undertakings established under national commercial law.

The notified schemes are open to any undertaking of the EEA area. The beneficiaries of the scheme for audiovisual productions will however be required to register with the Norwegian commercial register either as a Norwegian company or as a branch or agency of a foreign enterprise. The Norwegian authorities have indicated that the reason for such a requirement is the need for the NFI to be able to exercise some control on the use of government funds.

Therefore, the Authority considers that the general legality criterion is complied with.¹⁹

4.1.2 Compatibility criteria

The notified measures need to comply with the following conditions:

- the aid must be directed to a cultural product (**4.1.2.1**);
- the producer must be free to spend at least 20% of the film budget in other EFTA States without any reduction in the aid provided for under the scheme (**4.1.2.2**) and
- the aid intensity must in principle be limited to 50% of the production budget (possible to exceed this cap where difficult and low budget films) (**4.1.2.3**).

4.1.2.1 The aid must be directed to a cultural product

The Cinema Guidelines provide in paragraph 15 that *“each EFTA State must ensure that the content of the aided production is cultural according to verifiable national criteria”*.

The Authority considers, in line with European Commission’s practice²⁰, that the “cultural test” notified by the Norwegian authorities complies with this condition.

¹⁹ This is line with the practice of the European Commission which has already considered that this type of condition does not violate any of the fundamental provisions of the EC Treaty. See Decision N742/07 – Estonia of 13 February 2008 and Decision N291/07 – The Netherlands Film Fund of 10 July 2007.

4.1.2.2 The producer must be free to spend at least 20% of the film budget in other EEA States without any reduction in the aid

Moreover, paragraph 15 of the Cinema Guidelines require that the producer must be free to spend at least 20% of the film budget in other EEA States without any reduction in the aid.

The Norwegian authorities have indicated that they will not impose any condition regarding territorialisation of expenditure of the budget.

The Authority considers that this condition is met.

4.1.2.3 The aid intensity must in principle be limited to 50%

The Norwegian authorities have indicated that the following aid intensities are applicable:

SUPPORT MEASURE	MAXIMUM AID INTENSITY
Support for the development and production of cinema films	50%
Support for the production of cinema films based on market potential	50%
Support for the development and production of cinema films for <u>difficult and low budget films</u>	75%
Support for the production of cinema films based on market potential for <u>difficult and low budget films</u>	75%
Support for the development and production of cinema films for unconventional films with an expected low acceptance in the market	85%
Support for the development and production of short films	100%
Support for the development and production of documentaries	90%
Support for the development and production of television series	50%
Support for the development and production of television series – documentaries or series suitable for children	85%
Support for the development of interactive production	75%
Support for slate funding of development and production of cinema films	75 %
Support for the production of cinema films with a Norwegian co-producer	75% of the Norwegian contribution
Support to screenwriters	/

²⁰ See Decision N742/07 Estonia of 13 February 2008, paragraph 27.

The principle set by the Guidelines whereby the aid intensity may not exceed 50%

The notified scheme contains three types of measures which comply with the rule whereby the maximum aid intensity may not exceed 50%: support for the development and production of cinema films, support for the production of cinema films based on market potential and support for the development and production of television series.

The Authority considers that as regards these measures the aid intensity threshold of the Guidelines is fulfilled.

The Norwegian authorities have however notified some measures which allow for an aid intensity exceeding 50%.

The possibility afforded by the Cinema Guidelines to exceed in certain cases the maximum aid intensity of 50%

The Cinema Guidelines provide expressly that the maximum 50% cap may be exceeded in the case of difficult and low budget films.

The Norwegian authorities have argued that, in principle, any Norwegian audiovisual production must be considered as a difficult film because the Norwegian market consists of an audience of 4 700 000 potential viewers only and because Norwegian films have a very low commercial potential outside the home market.

The Norwegian authorities have indicated that the 50% ceiling would be exceeded in the case of support for the development and production of cinema films for difficult and low budget films (75%) and support for the production of cinema films based on market potential for difficult and low budget films (75%). The Norwegian authorities have also decided to afford higher aid intensities on the basis of the difficult movie exception for the following measures: support for the development and production of cinema films for unconventional films with an expected low acceptance in the market (85%), support for the development and production of short films (100%), support for the development and production of documentaries (90%), support for the development and production of television series – documentaries suitable for children (85%), support to the development of interactive production (75%) and support to the production of cinema films with a Norwegian co-producer (75%).

The Norwegian authorities have provided the Authority with the following definition of what constitutes a “difficult film”:

“a difficult film is a film with little prospects of commercial success because it has one or more of the following characteristics:

- *contains mainly Norwegian or Sami dialogue*
- *is a film of a pronounced artistic nature*
- *uses experimental and/or innovative cinema language*
- *focuses on Norwegian culture and/or Norwegian history*

- *is a film for children or young audience, based on an original screenplay by (a) Norwegian author(s)”.*

The Norwegian authorities have furthermore indicated that a low budget film is a film with a production budget of less than NOK 17 200 000.²¹

The Authority considers that the definition of a “difficult film” provided by the Norwegian authorities is in line with the European Commission’s practice²² and that aid intensities exceeding 50% may therefore be granted on the basis of the Cinema Guidelines. The same applies with regard to low budget films with regard to the specific context of the Norwegian market, the Norwegian authorities have established a definition of the low budget films according to national parameters.²³

Cumulation

Cumulation between the support measures provided under the notified schemes:

The Norwegian authorities have indicated that it is not possible for a single project to benefit – within the scheme for audiovisual productions – from more than **one** of the following measures: support for the development and production of cinema films, support for the production of cinema films based on market potential, support for the development and production of cinema films for difficult and low budget films, support for the production of cinema films based on market potential for difficult and low budget films, support for the development and production of cinema films for unconventional films with an expected low acceptance in the market, support for the development and production of short films, support for the development and production of documentaries, support for the development and production of television series, support for the development and production of television series – documentaries or series suitable for children, support for the development of interactive production, support to slate funding of development and production of cinema films and support to the production of cinema films with a Norwegian co-producer.

However, any film fulfilling the conditions regarding income bonus may, in addition to **one** of the support measures described here above, benefit from the income bonus. The income bonuses are capped by absolute ceilings of NOK 9 million for films suitable for children, of NOK 7 million for all other films. Films that are in need of particularly large amount of risk capital in the financing may be given an absolute ceiling of NOK 15 million. Income bonuses will however be taken into account in order to verify that the maximum authorised aid intensity of 75%²⁴ is not exceeded.

Likewise, where a film project supported by the NFI is based on a script which has benefited from the scheme for the development of screenplays and educational measures, the individual screenplay aid will be taken into account when assessing the authorised level of the aid.

²¹ The production budgets of Norwegian films in 2007 were as follows (figures correspond to millions of NOK): 2.1, 3.1, 3.4, 3.5, 4.7, 4.8, 6.1, 7.3, 7.6, 14.3, 17.2, 17.6, 19.4, 19.8, 20, 20, 20.3, 21, 22.7, 22.8 and 26.5. The median production budget is NOK 17.2 million.

²² See Decision N742/07 Estonia of 13 February 2008, paragraph 32.

²³ See Decision N742/07 Estonia of 13 February 2008, paragraph 59, where the Commission approved aid intensities of 95% stating: “in view of the characteristics of the market for Estonian film productions which meet the criteria for difficult and low-budget films, the Commission considers that the scheme complies with the aid intensity rules of the Cinema Communication.”

²⁴ In some cases, up to 85%, see footnote 9 above.

Similarly, any film benefiting from development - production support, may also benefit from one of the support measures regarding promotion and distribution (support to the promotion & distribution of cinema films in Norway, support to the promotion & distribution of interactive productions in Norway and support to the promotion and distribution abroad).

Cumulation between the support granted under the notified scheme and aid granted under other schemes:

The Norwegian authorities have indicated that they will ensure that cumulation of the support granted under the notified schemes and aid granted under other schemes will not result in exceeding the authorised thresholds:

“if the production received public support from several sources, the cumulated aid shall not exceed the limits given for each individual measure. Public support in this section means state aid which falls within Article 61(1) of the EEA Treaty, such a support from municipalities, regional municipalities and public investments that are not on market terms. Support from supranational and international bodies is not considered state aid.”

In paragraph 19 the Cinema Guidelines provide that *“funds provided directly from EC programmes like MEDIA 2007 do not count for the purposes of respecting the 50% aid ceiling. This assistance promotes the distribution of national films abroad and, consequently, its effects do not add up to those of national schemes focusing on national production and distribution.”*

The notified regulation furthermore provides that the producer must notify the NFI of any support prior to the application for production support. The NFI will be responsible for monitoring that cumulation rules are complied with. The applicant is indeed obliged to inform the NFI of all other public support measures and the NFI must calculate the maximum amount of support on the basis of these figures. The sanction in case of violation of the rules regarding duty to provide information, misuse of aid or any other form of irregularity is the withdrawal of the promise to receive aid or recovery.

4.2 Measures assessed under Article 61(3)(c) EEA

The notified measures relating to promotion and distribution cannot be assessed under the Cinema Guidelines which deal with aid schemes to cinema and TV production only.²⁵ The Authority must carry out a separate assessment of the necessity and proportionality of this aspect directly under Article 61(3)(c) EEA.²⁶

Similarly, the support measures for subtitling for the deaf and hearing impaired cannot be approved under the Cinema Guidelines which do not cover support for post-production.

²⁵ See section 2 paragraph 8, section 2.2 of the Cinema Guidelines.

²⁶ See Decision N233/08 Latvia of 16 July 2008 paragraph 37: *“The criteria of the Communication can also serve as a reference for assessing the compatibility of the scheme’s support for the promotion and distribution of films with the state aid rules of the EC Treaty. However, given that promotion and distribution activities do not form part of the production of films, the Commission has to carry out a separate assessment of the necessity and proportionality of this aspect directly under Article 87(3)(d)”*.

The Authority considers that the Cinema Guidelines do not apply to the measure relating to support for subtitling as it concerns a specific post-production activity linked to the commercialisation of the works.²⁷

Four different measures will be reviewed hereunder: support to cinema film subtitling (4.2.1), support to promotion and distribution of cinema films in Norway, of interactive productions in Norway and support to promotion and distribution abroad (4.2.2).

The Norwegian authorities have argued that such measures are compatible with Article 61(3)(c) of the EEA Agreement as they are both necessary and proportionate.

4.2.1 Support to subtitling

The objective of the measure is to make films in the Norwegian language accessible to the deaf and hearing impaired. In Norway most foreign language movies are subtitled and thus accessible to the hearing impaired. The measure is aimed at subtitling Norwegian films in Norwegian for screening in Norway.

As mentioned above, such a measure must be assessed with reference to Article 61(3)(c) EEA.

Policies concerning disability are primarily within the competence of the EFTA States. However, equal opportunities for disabled citizens are also a concern for UNESCO. One of the guiding principles of UNESCO's Convention on the protection and promotion of the diversity of cultural expressions adopted on 20 October 2005 and adopted by the European Union, most of its Member States and Norway is the principle of equitable access. Article 2 provides: *"equitable access to a rich and diversified range of cultural expressions from all over the world and access of cultures to the means of expressions and dissemination constitute important elements for enhancing cultural diversity and encouraging mutual understanding"*.

The interest for subtitling Norwegian films amongst producers and distributors is very low. Given the absence of a viable commercial market for Norwegian movies dubbed in Norwegian, it is likely that no commercial distributor would consider spending money on subtitling movies in Norwegian since the commercial value added to the product would be low. The activity would not take place without public funding. Because of the relatively low commercial value of the aided activities, the maximum aid intensity of 100% can be accepted. Moreover, the measure is unlikely to significantly distort competition and have an appreciable effect on trade in view of the limited audience it is targeted to.

The Authority therefore considers that this measure meets the conditions of Article 61(3)(c) of the EEA Agreement.

4.2.2 Support for promotion and distribution

The objective of the scheme is to support and promote the development of Norwegian interactive productions and art and film culture for a broader audience. Norway has a limited population of 4 700 000 inhabitants and the Norwegian language is not widely

²⁷ This is in line with Commission practice, see Decision N481/2007 Spain of 13 November 2007 Promotion of movies and DVDs in Basque, paragraph 33.

spoken or understood. The reach of Norwegian films outside Norway is very limited, in 2005, the audience figures for Norwegian films abroad was of approximately 179 000.

Assessing whether the measures can be regarded as compatible with the EEA Agreement on the basis of Article 61(3)(c) EEA, the Authority balances the positive impact of the aid measures in reaching an objective of common interest against its potentially negative side effects, such as distortion of trade and competition.

The Authority considers that the support measures for promotion and distribution pursue the cultural objective of the promotion and distribution of works with cultural and artistic content. This objective is in line with Article 13 of Protocol 31 of the EEA Agreement. Furthermore, there are no conditions on the geographical origin of the films selected for promotion and distribution support. The Authority considers that the notified measures are suitable to promote cultural products originating from the EEA. The measure has a clear incentive to promote the distribution of films and interactive products from the EEA.

Both the support to promotion and distribution of cinema films and of interactive productions in Norway is limited to maximum 50%. Support to promotion and distribution abroad may be as high as 100% but the Norwegian authorities have indicated that the grants will in most cases be low.

As regards aid granted for distribution and promotion in Norway is aid is principle available to everyone who wants to promote his films on the Norwegian market. The Authority considers that it does not exceed what is necessary to achieve its cultural objective.

With regard to promotion and distribution abroad, as stated above the penetration of Norwegian audiovisual products abroad is very limited. The aid measures are mainly meant to ensure that Norwegian films can be presented at film festivals and other cultural events. In addition the amount of the grants will be low, in many cases it might even be well below the *de minimis* threshold. It follows from the above that the measures will have a limited impact on trade and competition, therefore, the Authority considers that such aid intensity may be considered as necessary and proportionate.

Consequently, the Authority considers that the measures are proportionate to the objective pursued and do not distort competition to an extent which would be contrary to Article 61(3)(c) EEA.

5 Conclusion

On the basis of the foregoing assessment, the Authority considers that the schemes for audiovisual production and development of screenplays and educational measures are compatible with the functioning of the EEA Agreement within the meaning of Article 61 of the EEA Agreement on the basis that the Norwegian authorities will implement any changes that may be required after the expiry of the Authority's Cinema Guidelines.

The Norwegian authorities are reminded about the obligation resulting from Article 21 of Part II of Protocol 3 in conjunction with Article 6 of Decision 195/04/COL to provide annual reports on the implementation of the scheme.

The Norwegian authorities are also reminded that all plans to modify this scheme must be notified to the Authority.

HAS ADOPTED THIS DECISION:

Article 1

The EFTA Surveillance Authority has decided not to raise objections to the schemes for audiovisual production and development of screenplays and educational measures on the basis of Article 61(3)(c) of the EEA Agreement.

Article 2

This Decision is addressed to the Kingdom of Norway.

Article 3

Only the English version is authentic.

Done at Brussels, 31 March 2009

For the EFTA Surveillance Authority,

Per Sanderud
President

Kurt Jaeger
College Member