

Case No: 71061  
Event No: 644987  
Dec. No: 262/12/COL

## EFTA SURVEILLANCE AUTHORITY DECISION

of 4 July 2012

on the amendments to the support scheme relating to temporary reimbursement in respect of  
film making

(Iceland)

The EFTA Surveillance Authority (“the Authority”)

HAVING REGARD to the Agreement on the European Economic Area (“the EEA Agreement”), 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 Justice (“the Surveillance and Court Agreement”), in particular to Article 24,

HAVING REGARD to Protocol 3 to the Surveillance and Court Agreement (“Protocol 3”), in particular to Article 1(3) of Part I and Article 4(3) of Part II,

Whereas:

### I. FACTS

#### 1. Procedure

- (1) The Icelandic authorities approached the Authority in October 2011 in order to discuss the proposed amendments to the Icelandic film support scheme (“the Film Support Scheme”).
- (2) By letter dated 7 October 2011 (Event No 611469), the Icelandic authorities informed the Authority of the amendments they intended to make to the Film Support Scheme.
- (3) In the context of the pre-notification phase, by email dated 12 October 2011 (Event No 611442), the Competition and State Aid Directorate (“CSA”) provided the Icelandic authorities with some preliminary comments.

- (4) By letter dated 24 October 2011 (Event No 616165) received on 8 November 2011, the Icelandic authorities provided the Authority with a new version of the proposed amendments in an effort to address the concerns expressed.
- (5) By letter dated 24 November 2011 (Event No 616165), CSA indicated to the Icelandic authorities that it still had some concerns.
- (6) The Icelandic authorities formally notified the proposed amendments to the Film Support Scheme pursuant to Article 1(3) of Part I of Protocol 3 by letter of 20 December 2012 received on 3 January 2012 (Event No 619839).
- (7) By letter dated 31 January 2012 (Event No 623037), the Authority requested additional information from the Icelandic authorities.
- (8) By letter dated 1 March 2012 (Event No 626684), the Icelandic authorities replied to the information request.
- (9) The Authority and the Icelandic authorities were in regular contact during the months of April and June.
- (10) By letter dated 6 June 2012 (Event No 637079), the Icelandic authorities submitted to the Authority a new notification amending the notification dated 20 December 2012.

## 2. The support scheme in place in Iceland

- (11) The support scheme in place in Iceland is laid down in Act No 43/1999 on Temporary reimbursements in respect of Film Making in Iceland, with later amendments<sup>1</sup> and in a regulation.
- (12) The Act covers a mechanism for support of film productions in Iceland whereby a share of production costs may be reimbursed to the producer after the production.
- (13) Pursuant to Article 1 of the Act, the objective of the film support is “*to enhance domestic culture and promote the history and nature of Iceland by temporarily supporting motion pictures and television programmes produced in Iceland*”.
- (14) The Film Support Scheme entered into force on 30 March 1999.
- (15) By Decision No 114/99/COL of 4 June 1999, the Authority decided to initiate a formal investigation procedure regarding the aid measures provided for in the Act. In the opening decision, the Authority expressed doubts as to the compatibility of the aid measures under the Act with Article 61(3)(c) of the EEA Agreement. In their response, the Icelandic authorities amended the Act, taking into account the concerns raised by the Authority.
- (16) By Decision No 380/00/COL of 18 December 2000, closing the formal investigation procedure commenced by Decision No 114/99/COL, the Authority approved the amended Act which entered into force on 29 December 2000. The amended Act was to cease to be in effect on 31 December 2006.
- (17) By Decision No 390/06/COL of 13 December 2006, the Authority approved the prolongation of the scheme until 31 December 2011. Moreover, the Authority approved certain amendments to the scheme, *inter alia* the increase of the reimbursable share of production

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<sup>1</sup> “Lög um tímabundnar endurgreiðslur vegna kvikmyndargerðar á Íslandi” hereinafter referred to as the Act.

costs from 12% to 14%. For a detailed description of the support scheme, reference is made to section 2 of decision No 390/06/COL of 13 December 2006.

- (18) By Decision No 255/09/COL of 10 June 2009, the Authority approved an amendment to the support scheme whereby the reimbursable share of production costs under the Act would be increased from 14% to 20%.
- (19) By letter dated 7 October 2011 (Event No 611469), the Icelandic authorities proposed “*to widen the scope of the 20% reimbursements so that, in addition to the objective in Article 1 and conditions of Article 4(1)(a) to enhance domestic culture and promote the history and nature of Iceland, reimbursements will also be granted for the promotion of film industry in Iceland*”. (Emphasis added)
- (20) During the pre-notification discussions, the Authority indicated to the Icelandic authorities that it had some concerns regarding the “cultural test” used as it considered that the promotion of the Icelandic film industry did not comply with the requirements clearly set in the Cinema Guidelines that the support be targeted at a cultural product, *i.e.* an audiovisual work meeting certain conditions set out under a “cultural test”.
- (21) Further to the concerns expressed by the Authority, the Icelandic authorities made some amendments to the cultural test for identifying the films which should benefit from support: “*the production shall be suited for disseminating Icelandic culture, promoting the history or nature of the country, or the production shall be suited to promoting increased experience, knowledge and artistic ambitions of the parties involved*”.<sup>2</sup> (Emphasis added)
- (22) The Icelandic authorities furthermore indicated that “*in case the CSA remains doubtful as to whether the proposed amendments comply with the Cinema Guidelines, the Icelandic authorities would be willing to propose additional cultural criteria, of a more general nature than the criteria under point a above. For example, parts of the cultural eligibility test of the newly accepted Czech film support scheme could be used as a model*”.
- (23) By letter dated 24 November 2011 (Event No 616165), the Authority indicated to the Icelandic authorities that it still had some concerns regarding the proposed amendments.
- (24) By letter dated 20 December 2011 (Event No 612859), the Icelandic authorities formally notified the amendments to the Film Support Scheme based on the last version of the cultural test they had submitted to the Authority.

### 3. The amendments notified in December 2011

- (25) The Icelandic authorities notified the following amendments to the Film Support Scheme in place:
- To widen the scope of the reimbursements so the work will benefit from the aid where “*the production shall be suited for disseminating Icelandic culture, promoting the history and nature of the country, or the production shall be suited to promoting increased experience, knowledge and artistic ambitions of the parties involved*”.
  - The Act will be in force from 1 January 2012 until 31 December 2016, and

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<sup>2</sup> See letter of 24.10.2011 (Event No 616165).

- The reimbursement of production costs under the Film Support Scheme will continue to be limited to 20% of eligible costs. However, the current 50% limit of total grant from the Icelandic Film Fund together with the reimbursement under the Film Support Scheme shall be replaced with a new 85% upper limit. The Icelandic authorities have indicated that they will ensure that, in compliance with the Cinema Guidelines, any project requesting aid intensity over 50% will be assessed on the basis of whether it is a very difficult and/or low budget project according to national parameters. The criteria used will be projects with dialogue primarily in Icelandic language and films with a budget under ISK 250 million (approx. EUR 1.6 million) will be considered low budget.

#### 4. Draft Regulation to further define the scope of the support scheme

- (26) By letter dated 31 January 2012 (Event No 622733), the Authority enquired whether the amending Act had been adopted despite the fact that the Authority had not approved the amendments to the Film Support Scheme, and even more, had expressed some concerns relating to the definition of the cultural test.
- (27) By letter dated 1 March 2012 (Event No 626684), the Icelandic authorities indicated that *“the law incorporating the new cultural test was passed by Alþingi on 23 December 2011 and entered into force on 31 December 2011”*.
- (28) They furthermore explained that *“the Ministry of Industry, Energy and Tourism has prepared a secondary legislation, in the form of a regulation, in which conditions for meeting the cultural test are stipulated further with the purpose of alleviating the concern expressed by the Authority in the pre-notification phase”*.
- (29) The Authority questioned the possibility to restrict by way of a regulation the scope of a law but left it to the Icelandic authorities to assess this issue of domestic legislative process.
- (30) By letter dated 6 June 2012 (Event No 637079), the Icelandic authorities communicated to the Authority the new draft Regulation setting out the cultural test and meant to clarify the provision of the Law of 23 December 2011.
- (31) The new cultural set out in Article 3 of the Draft Regulation dated 27 May 2012 is as follows:  
*“A condition for eligibility for reimbursement is that the production is suited for disseminating Icelandic culture, promoting the history or nature of the country or the production shall be suited to promoting increased experience, knowledge and artistic ambitions of the parties involved.*

*When evaluating whether par. 1 is fulfilled the following product evaluation shall be applied. The evaluation scheme is divided into two parts, a cultural and a production evaluation.*

*In the cultural part a maximum of two points can be awarded for each of the items below if fully complied with, but partial compliance awards one point.*

- a. *Storyline, screenplay, central theme of the film is based on events that are a part of Icelandic or European culture, history, mythology, religion,*
- b. *Film is based on a character, personality from Icelandic or European culture, history, society, religion.*

- c. *Storyline of the film is connected with an Icelandic or European setting, place, location, architectural or cultural setting*
- d. *Storyline, script, central theme of the film is based on a literary work or adapted from another artistic discipline (fine arts, music, etc.) of cultural importance*
- e. *Storyline, script, central theme of the film focuses on current cultural, sociological, political themes in Icelandic or European society*
- f. *Film reflects important Icelandic or European value(s), such as cultural diversity, solidarity, equality, protection of minorities or human rights, tolerance, environmental protection, respect for cultural or family traditions, respect for nature and sustainable use of natural resources*
- g. *Film focuses on Icelandic or European culture, identity or Icelandic or European customs and traditions*
- h. *Storyline, script, central theme of the film is based on current or historical events affecting Icelandic or European society.*

*In the production part points are awarded for the items below and the maximum points are stipulated.*

- i. *Film is a cinematographic work that contributes to the development of its genre, maximum 3 points.*
- j. *Film is suited to increase the capacity of the film makers involved to undertake ambitious and demanding productions of cultural value, maximum 4 points.*
- k. *The film makers are Icelandic citizens or citizens of EEA member states. Half a point is awarded for each point below but a maximum of 3 points*
  - i. *Director*
  - ii. *Producer/co-producer*
  - iii. *DOP*
  - iv. *Assistant DOP*
  - v. *Script writer*
  - vi. *Lead actor/actress*
  - vii. *Supporting actor/actress*
  - viii. *Composer*
  - ix. *Production designer*
  - x. *Costume designer*
  - xi. *Editor*

- xii. *Makeup artist*
- xiii. *Head of production/line producer*
- xiv. *Postproduction or VFX supervisor*
- l. *Final version of the film is in any language of the EEA. 1 point shall be awarded for 10% of the dialogue; 2% for 25%; 3 points for 50%; 4 points for 75%.*
- m. *At least 51% of the crew (excluding those in Point k) are citizens of EEA countries, maximum 4 points.*
- n. *Shooting takes place on locations or in studios in Iceland, maximum 4 points.*
- o. *Production uses Icelandic service providers in Iceland, maximum 4 points.*
- p. *Post production (including sound and visual post-production, laboratories, soundtrack recording, etc.) takes place in Iceland or the EEA, maximum 4 points.*

*The points for categories n, o and p. shall be awarded on a pro-rata basis based on to what extent the production fulfils each criterion. The Committee evaluates to what extent the shooting/ service provision/post-production takes place in Iceland and adds to the permanent pool of skills and experience in the industry.*

*The production must score a minimum of 4 points from the Cultural criteria, and receive a minimum of 23 points overall, out of a possible 46 points”.*

## **II. ASSESSMENT**

### **1. The presence of state aid**

(32) 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.”*

(33) The aid measure under review is the scheme providing for the reimbursement of 20% of production costs for films which meet the cultural test as set out by the Regulation of 27 May 2012.

#### **1.1 Presence of state resources**

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

(35) The Film Support Scheme is financed through the state budget. The Authority therefore considers that the condition regarding state resources is met.

## 1.2 Favouring certain undertakings or the production of certain goods

- (36) Firstly, the aid measure must confer on the recipients advantages that relieve them of charges that are normally borne from their budget.
- (37) The Film Support Scheme confers a financial benefit on the recipients in the form of a reimbursement of production costs they would normally have to bear thereby strengthening their position compared with that of undertakings active in the production of audiovisual products within the EEA.
- (38) Secondly, the aid measure must be selective in that it favours “*certain undertakings or the production of certain goods*”.
- (39) The Film Support Scheme is selective in that it is specifically limited to firms active in the film industry and granted subject to certain conditions.

## 1.3 Distortion of competition and affect on trade between Contracting Parties

- (40) 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 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.
- (41) The Authority consequently considers that the Film Support Scheme as amended entails state aid.

## 2. Procedural requirements

- (42) 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*”.
- (43) By submitting a notification of the amendments to the Film Support Scheme with letters dated respectively 20 December 2012 (Event No 619839) and 6 June 2012 (Event No 637079), the Icelandic authorities have complied with the notification requirement.
- (44) Furthermore, the Icelandic authorities have undertaken not to make any commitments based on the Film Support Scheme until the Authority has approved the notified amendments.
- (45) The Authority can therefore conclude that the Icelandic authorities have respected their obligations pursuant to Article 1(3) of Part I of Protocol 3.

## 3. Compatibility of the aid

- (46) The aid measure shall be assessed with reference to Article 61(3) of the EEA Agreement, read in conjunction with the Chapter of the Authority’s State Aid Guidelines relating to state aid to cinematographic and audiovisual works (“the Cinema Guidelines”)<sup>3</sup>.

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<sup>3</sup> Available at: <http://www.eftasurv.int/state-aid/legal-framework/state-aid-guidelines/>

- (47) The Cinema Guidelines (para. 11) provide that “when it assesses aid schemes to cinema and TV production, the Authority must verify:
- 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 and explained below”.

### 3.1 The general legality principle

- (48) 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 and 36 EEA)”.
- (49) 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.
- (50) The Icelandic authorities have indicated that the Film Support Scheme will not reserve aid for nationals, or require beneficiaries to have the status of national undertakings established under national commercial law. The aid offered under the Film Support Scheme will not solely benefit national producers or benefit them to a greater extent than competitors located in other EEA States. Foreign productions may thus benefit from the amended scheme on equal grounds as domestic productions.<sup>4</sup>
- (51) The Authority concludes that the Film Support Scheme complies with the general legality principle.

### 3.2 The specific compatibility criteria for state aid to cinema and TV programme production

- (52) The Cinema Guidelines (para. 15) provide that the Authority will base its analysis on the following criteria:
- (1) “The aid is directed to a cultural product. Each EFTA State must ensure that the content of the aided production is cultural according to verifiable national criteria.”
  - (2) The producer must be free to spend at least 20% of the film budget in other EEA States without suffering any reduction in the aid provided for under the scheme. In other words, the Authority accepted as an eligibility criteria territorialisation in terms of expenditure of up to 80% of the production budget of an aided film or TV work.
  - (3) Aid intensity must in principle be limited to 50% of the production budget with a view to stimulating normal commercial activities (...). Difficult and low budget films are excluded from this limit. The Authority considers that it is up to each EFTA State to

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<sup>4</sup> See notification letter from the Icelandic authorities dated 20.12.2011 (Event No 619836).



*establish a definition of difficult and low budget film according to national parameters.*

- (4) *Aid supplements for specific film-making activities (e.g. post production) are not allowed in order to ensure that the aid has a neutral incentive effect and consequently that the protection/attraction of those specific activities in/to the EFTA State granting the aid is avoided*<sup>5</sup>.

(Emphasis added)

### 3.2.1 Aid directed to a cultural product

- (53) One of the amendments to the Film Support Scheme that has been notified by the Icelandic authorities concerns the modification of the “cultural test” *i.e.* the criteria that will be used by the Icelandic authorities to determine which audiovisual products are cultural and may therefore benefit from state support according to the Cinema Guidelines.
- (54) Regarding the issue of the cultural test, one must bear in mind that the purpose of the Cinema Guidelines is to promote European and EEA audiovisual products and not to protect the cinema industry as a whole.<sup>5</sup>
- (55) The role of the Authority is not to define what constitutes a cultural product in lieu of the EFTA States but to ensure that national verifiable criteria are in place.
- (56) The Authority has adopted some decisions setting out the requirements that must be met by the cultural test.<sup>6</sup> Reference may also be made to the extensive decision practice of the European Commission.<sup>7</sup>
- (57) The cultural test that has been proposed by the Icelandic authorities is in line with Commission practice.<sup>8</sup>
- (58) The Authority consequently considers that the condition set at paragraph 15(1) of the Cinema Guidelines is met.

### 3.2.2 Freedom to spend at least 20% of the budget in another EEA State

- (59) The Icelandic authorities have indicated that they will not impose any condition regarding territorialisation of expenditure of the budget.
- (60) The Authority therefore takes the view that this condition set at paragraph 15(2) of the Cinema Guidelines is met.

### 3.2.3 Maximum aid intensities

- (61) The Film Support Scheme will continue to provide for a maximum reimbursement of the production costs of 20%. However, the current 50% maximum cumulated aid intensity with

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<sup>5</sup> See draft Communication from the Commission on state aid for films and other audiovisual works: “*it is generally accepted that aid is important to sustain European audiovisual production*”.

<sup>6</sup> See Decision 180/09/COL of 31.3.2009 on the aid schemes for audiovisual productions and development of screenplays and educational measures.

<sup>7</sup> See Decision N742/07 Estonia of 13.2.2008, decision N 233/08 – Latvia of 16.7.2008 on Latvian film support scheme, decision N 742/07 – Estonia, Estonian film support scheme of 13.2.2008, decision N 291/07 – The Netherlands Film Fund of 10.7.2007.

<sup>8</sup> See Case N 98/2010 – Czech Republic- Czech film support scheme.

aid afforded by the Icelandic Film Fund for a same audiovisual product will be replaced with a new 85% upper limit.

- (62) The Icelandic authorities have however indicated that only films considered as “difficult” or low budget in the meaning of the Cinema Guidelines will benefit from support from the Icelandic Film Fund.
- (63) The Authority therefore considers that the Film Support Scheme complies with the condition set at paragraph 15(3) of the Cinema Guidelines.

#### *3.2.4 Aid supplements for specific film-making activities*

- (64) The Icelandic authorities have indicated that the support will be granted for production costs and not for post-production costs.
- (65) The Authority therefore takes the view that the condition set at paragraph 15(4) of the Cinema Guidelines is met.

### **4. Conclusion**

- (66) On the basis of the foregoing assessment, the Authority considers that the notified amendments to the Film Support Scheme which the Icelandic authorities are planning to implement are compatible with the functioning of the EEA Agreement within the meaning of Article 61 of the EEA Agreement.
- (67) The Icelandic authorities are reminded of the obligation resulting from Article 21 of Part II of Protocol 3 in conjunction with Articles 5 and 6 of Decision No 195/04/COL to provide annual reports on the implementation of the scheme.
- (68) The Icelandic authorities are also reminded that all plans to modify this scheme must be notified to the Authority.
- (69) The Authority has taken note of the Icelandic authorities’ commitment to review the Film Support Scheme by 31 December 2012 if this is rendered necessary by the adoption of the new Cinema Guidelines.

HAS ADOPTED THIS DECISION:

#### *Article 1*

The EFTA Surveillance Authority concludes that the amended support scheme relating to temporary reimbursement in respect of film making is compatible with the EEA Agreement and raises no objections to the amendments to the support scheme relating to temporary reimbursement in respect of film making on the basis of Article 61(3)(c) of the EEA Agreement.

#### *Article 2*

The implementation of the measure is authorised accordingly.

*Article 3*

This Decision is addressed to Iceland

*Article 4*

Only the English language version of this decision is authentic.

Decision made in Brussels, on 4 July 2012

*For the EFTA Surveillance Authority*

Oda Helen Sletnes  
*President*

Sverrir Haukur Gunnlaugsson  
*College Member*