

Case No: 67377
Event No: 542352
Dec. No: 491/09/COL

EFTA SURVEILLANCE AUTHORITY DECISION
of 2 December 2009

to initiate the procedure provided for in Article 1(2) in Part I of Protocol 3 to the Surveillance and Court Agreement with regard to alleged state aid granted to companies belonging to the Norsk Film group

(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(2) of Part I and Articles 4(4), 6 and 16 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,

HAVING REGARD to the Authority's Decision of 14 July 2004 on the implementing provisions referred to under Article 27 of Part II of Protocol 3⁶,

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 updated version of the State Aid Guidelines is published on the Authority's website: <http://www.eftasurv.int/state-aid/legal-framework/state-aid-guidelines/>

⁶ Decision 195/04/COL of 14 July 2004 published in OJ C 139 of 25.05.2006 p. 57 and EEA Supplement No 26 of 25.05.2006 p. 1 as amended by Decision 319/05/COL of 14 December 2005 published in OJ C 286 of 23.11.2006 p. 9 and EEA Supplement No 57 of 23.11.2006 p. 31.

I. FACTS

1 Procedure

BY LETTER dated 23 March 2006 (Event No 368163), nine Norwegian film companies (The Chimney Pot Oslo AS, Dagslys AS, Egg & Bacon AS, Grip Teknikk AS, Bob Aas Carho ENK, Kamerautleien AS, Lydhodene AS, Megaphon AS and Krypton Film AS) (hereinafter collectively referred to as “the Complainants”) complained that the Norwegian authorities have awarded grants to Norsk FilmStudio AS. The Complainants claim that Norsk FilmStudio AS/Filmparken AS has benefited from the payment of annual grants from the Norwegian State for the years 2000-2005.

BY LETTER dated 9 June 2006 (Event No 377607), the Authority requested additional information from the Norwegian authorities. By letter dated 11 August 2006 (Event No 383774), the Norwegian authorities replied to the information request.

BY LETTER dated 19 October 2006 (Event No 388927), the Authority requested further clarification. The Norwegian authorities provided the information by way of a letter dated 27 November 2006 (Event No 400048).

BY EMAIL dated 13 February 2007 (Event No 409688), the complainant informed the Authority of the existence of a report by PriceWaterhouseCoopers commissioned by the Norwegian Ministry of Culture and Church Affairs in 2006 regarding the State’s continued ownership of Norsk FilmStudio AS and Filmparken AS.

BY LETTER dated 20 February 2007 (Event No 410408), the Authority requested that the Norwegian authorities provide a copy of the report drawn by PriceWaterhouseCoopers. By letter dated 13 March 2007 (Event No 413540), the Norwegian authorities provided the Authority with supplementary information.

A third request for information was sent by the Authority on 27 March 2007 (Event No 412939). By letter dated 30 April 2007 (Event No 419437), the Norwegian authorities requested an extension of the deadline to answer until 19 May 2007 which was accepted by the Authority by way of a letter dated 2 May 2007 (Event No 419570).

A fourth request for information was sent to the Norwegian authorities on 16 May 2007 (Event No 421730).

BY LETTER dated 18 May 2007 (Event No 422627), the Norwegian authorities provided the Authority with further information.

By letter dated 8 June 2007 (Event No 424512), the Norwegian authorities replied to the request for information which had been sent by the Authority on 16 May 2007.

BY EMAIL dated 8 June 2009, the Authority was informed that The Chimney Pot Oslo AS had merged with Norsk Film AS and consequently had withdrawn from the complaint.⁷

2 The Norsk Film group

Norsk Film AS was established in 1932 by the association of municipal cinemas. The company’s film studio was opened in 1935. In the State budget for 1947, the Norwegian

⁷ The Chimney Pot Oslo AS and Norsk FilmStudio AS have merged to become Storyline Studios AS.

government decided to take greater responsibility for film production. During the 1950s and 1960s, Norsk Film AS was faced with financial difficulties which led to government interventions with grants to guarantee its further existence. After the company was declared bankrupt in the late 1960s, the government decided to assume full responsibility for the future of the company. Since 1974, the State has kept an ownership of 77.6% of the shares in the company. Norsk Film AS served two purposes: to provide Norwegian feature film production with the necessary facilities and to produce Norwegian films.

ScanCam AS was founded in 1986 by Norsk Film AS and the newspaper VG (Verdens Gang) on the basis of the existing camera department of Norsk Film AS. On 31 December 1998, the owner of Verdens Gang sold its 50% stake in ScanCam AS to Norsk Film AS. From 1999, ScanCam AS continued as a subsidiary of Norsk FilmStudio AS.

Norsk Film AS had a wholly-owned subsidiary, Norsk FilmStudio AS which was founded in 1989. Until 1989, the studio and technical facilities were an integral division of Norsk Film AS. Norsk FilmStudio AS was founded in order to establish a clear-cut distinction between the company's role as a producer and its role of maintaining the infrastructure for film production (studio and technical facilities).

In 2001, the Norwegian government reformed its film policy and a clearer distinction was made between the State's areas of responsibility and the responsibility of the private sector. Private production companies should have the responsibility for producing films. It was therefore proposed to sell the shares in Norsk Film AS. The State would maintain its responsibility for the studios as this part of the production process was considered not sustainable in market conditions. In 2001, Norsk Film AS was de-merged into two separate companies: a company for film production, named Norsk Film AS and a company for infrastructure, named Filmparken AS. The remaining assets of the company stayed in Filmparken AS. Norsk FilmStudio AS continued as a wholly-owned subsidiary of Filmparken AS. On 25 June 2001, Norsk FilmStudio AS merged into Filmparken AS. The State sold its shares in the production company Norsk Film AS to a private production company called Diopter AS on 4 January 2002.

In 2002, Filmparken AS was re-named Norsk FilmStudio AS again.

In 2004, ScanCam AS merged into Norsk FilmStudio AS.

In 2005, Norsk FilmStudio AS was named Filmparken AS. Later that year, Norsk FilmStudio AS was founded as a subsidiary of Filmparken AS.

In 2009, Norsk FilmStudio AS and the Chimney Pot AS merged to become Storyline Studios AS. After the merger Filmparken AS owns 60% of the business with 40% left to the share holders of the prior The Chimney Pot AS.

Storyline Studios AS is a full spectre supplier of equipment and services to the film industry, providing film studios, grip and light, camera, post production, costumes, financing, office facilities, line production and film catalogues.

3 Issues under assessment

As part of its investigation, the Authority identified two issues in addition to the one raised by the Complainants. It will in the following examine the three following issues: the payment of the yearly grants (3.1), the payment in 1998 and 1999 of a grant of NOK 36 000 000 for the upgrading, modernisation and development of the production facilities

(3.2) and the preferential tax treatment of some of the companies belonging to the Norsk Film group (3.3).

3.1 Payment of yearly grants

Following the complaint, the Authority has verified that grants have indeed been paid by the Norwegian authorities to Norsk FilmStudio AS/ Filmparken AS since the 1970s. Annual budgets for 1971-1972 refer to an “existing aid scheme”. The grants were paid by the Ministry of Culture and Church Affairs until 2006. Thus, the grants referred to in the complaint form part of those annual grants.

3.2 Payment of the grant of NOK 36 000 000

As part of its investigation the Authority was made aware of the payment of a grant of NOK 36 000 000 for the specific purpose of upgrading the infrastructure of the production facilities. The sum was allocated over a two-year period, with NOK 10 000 000 being paid in 1998 and NOK 26 000 000 in 1999. Such grant was paid from a budget different from that of the annual grants paid before. The grant was allocated over the national budget’s section for grants to national cultural buildings whereas the yearly grants were paid out of the budget allocation to film funding.

3.3 Preferential tax treatment

From 1995 to 2001, Norsk Film AS and its subsidiary Norsk FilmStudio AS were granted a corporate tax exemption. ScanCam AS was not exempted from tax in the years 1994-1997 but was given a tax exemption from 1998-2001.

The Authority questioned the Norwegian authorities regarding the preferential tax regime as it was concerned that such regime may entail state aid.

4 Comments by the Norwegian authorities

The Norwegian authorities provided their comments by way of a letter dated 11 August 2006 (Event No 383774).

4.1 Regarding the payment of NOK 36 000 000 for upgrading production facilities

The Norwegian authorities indicated that neither film production nor studio facilities are areas of business which, left to the market alone, are viable in Norway. Until 2001, Norsk Film AS received annual grants from the government. Such grants made it possible for the company to serve its task as both a production company and to maintain a national infrastructure considered necessary for the production of feature films.

Until 2001, Norsk Film AS was given grants as a share of the national budget allocation to film funding. The funds made available were used to produce the company’s own productions. After the reform of the Norwegian film policy in 2001 (see above, Section 2), the support to the production company lapsed whilst the support to ensure that the company could provide the necessary infrastructure for film production was maintained. The government reduced the support to a minimum, but until 2006, it was necessary to continue the grants in order to maintain the infrastructure. The Norwegian authorities argued that the NOK 36 000 000 support to infrastructure was therefore a part of the existing aid scheme.

In 2006, the annual grants were interrupted.

4.2 Regarding the applicable favourable tax regime

The Norwegian authorities have explained that Norsk Film AS and Norsk FilmStudio AS benefited from a tax exemption as from 1995. The exemption was based on the former Taxation Act No.8 of 18.8.1911, para 26.1(k) (replaced by Act 1999-03-26-14).⁸

Norsk Film AS, Norsk FilmStudio AS and ScanCam AS were granted a tax exemption based on the fact that the purpose of the companies was not to make profit.

When deciding if an institution has a non profit purpose, the authorities make an overall evaluation taking into consideration several elements: the statutes of the institution, how the institution was funded, whether it served public or private interests, etc. Until 1995, Norsk Film AS and Norsk FilmStudio AS did not apply for the special regime. Following their applications they benefited from such a regime from 1995 until 2001.

In their evaluation, the tax authorities considered that the companies could benefit from the non-profit organisation status on the basis of the following elements: the statutes of Norsk Film AS which provide that its purpose is non-profit, the fact that 97.7% of the shares were held by the State and local municipalities and that the company was funded essentially through state subsidies. The tax authorities furthermore indicated that the tax exemption was given under the proviso that a possible profit should be used in full to achieve the purpose of the company within the framework of being a non-profit undertaking. The subsidiary Norsk FilmStudio AS was regarded as an integrated part of Norsk Film AS' activity and covered by the same tax exemption. The Norwegian authorities have indicated that Norsk FilmStudio AS did not generate a profit in the years 1995-2001 and that consequently, the application of the favourable tax regime was without effect.

Norsk Film AS and Norsk FilmStudio AS merged in 2001. As from 2002, the companies were no longer funded by government subsidies and they carried out normal business activities. They were therefore considered as normal profit-making companies and consequently subject to standard corporate tax.

Before 1998, Norsk FilmStudio AS and Schibsted Film AS each owned 50% of the shares in ScanCam AS. ScanCam AS was therefore not considered an integrated part of Norsk Film AS' business. From December 1998, ScanCam AS was 100% owned by Norsk FilmStudio AS. After this change, the tax authorities considered that ScanCam AS was an integrated part of Norsk Film AS' activity and could therefore benefit from the same tax regime for the years 1998-2000.

The companies are now all subject to standard corporate tax.⁹

II. ASSESSMENT

1 The presence of state aid

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

⁸ This regime provides exemption from corporate tax for so-called "ideal organizations".

⁹ Norsk FilmStudio AS and Norsk Film AS merged in 2001, Norsk Film AS is now called Filmparken AS. Norsk FilmStudio AS was founded in 2005 as a subsidiary of Filmparken AS. Filmparken AS and Norsk FilmStudio AS are now subject to normal corporate taxation rules.

“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.”

1.1 Presence of state resources

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

The payment of the yearly grants and of NOK 36 000 000 for infrastructure

The grants made until 2006 were paid by the Norwegian State. The yearly grants were paid by the Ministry of Culture and Church Affairs and the NOK 36 000 000 grant was paid from the state budget's section for grants to national cultural buildings. The Authority therefore considers that the condition that state resources must be involved is met.

The favourable tax regime

Norsk Film AS and its subsidiary Norsk FilmStudio AS were granted a tax exemption for the years 1995 to 2001. In a letter dated 18 March 1996, the Bærum Tax Office granted the tax exemption for the fiscal year 1995 on the proviso that a possible profit should be used in full to achieve the purpose of the company within the framework of being a non-profit company. ScanCam AS (the subsidiary renting cameras) was given a tax exemption from 1998-2001 on the same grounds.

As a result of the favourable tax regime, the State renounces tax revenue which it would normally have received from the undertakings concerned. The absence of these funds represents a burden on state resources from charges that are normally borne from the budgets of the undertakings concerned.¹⁰

A loss of tax revenue is equivalent to the consumption of state resources in the form of fiscal expenditure.

1.2 Favouring certain undertakings or the production of certain goods

Firstly, the measure must have conferred on Norsk FilmStudio AS/Filmparken AS/ScanCam AS advantages that relieved them of charges that are normally borne from their budget. The grant and the preferential tax regime gave the beneficiaries a financial benefit they would not have enjoyed in the normal course of business. It thus strengthened the financial position of Norsk FilmStudio AS/Filmparken AS/ScanCam AS compared with the other undertakings active in the production of films within the EEA.

Secondly, the aid measure must be selective in that it favours “*certain undertakings or the production of certain goods*”.

The Authority considers that the payment of the yearly grants and of the amount of NOK 36 000 000 for the upgrading of the studio facilities is selective as the beneficiary is expressly designated.

Regarding the preferential tax treatment some of the companies belonging to the Norsk Film group have benefited from, the Authority recognises that the European Court of Justice and the EFTA Court have consistently held that measures granting advantages to

¹⁰ Case C-156/98 Germany v Commission, [2000] ECR I-6857, paragraph 26.

certain recipients are not selective if they can be justified by the nature and general scheme of the system of which they are part.¹¹ Indeed, the Authority's Guidelines on the application of state aid rules to measures relating to direct business taxation provide specifically that "*obviously, profit cannot be levied if no profit is earned. It may thus be justified by the nature of the tax system that non-profit-making undertakings, for example foundations or associations, are specifically exempt from the taxes on profits if they cannot actually earn any profits.*"¹² (Emphasis added) For a selective measure to be justified by the logic of a system there has to be a general system to which it relates. According to the information available to the Authority, it is not clear whether the non taxation of the revenues of companies belonging to the Norsk Film group are justified by the nature and general scheme of the corporate tax system which object is precisely taxation of income.

The Authority is in doubt regarding the justification based on the fact that the purpose of the company was to not make profit. Indeed, it appears that, even though the primary object of the companies belonging to the Norsk Film group benefiting from the favourable regime was of a cultural nature, some of the companies did generate a profit and were carrying out an economic activity in competition with other economic operators.

Furthermore, the Authority is also in doubt as to whether, regarding the application of an existing system of aid, the fact that companies may decide whether to apply for such a preferential regime has a bearing on the classification as new or existing aid. Even though the law allowing for such a preferential tax treatment pre-dates the entry into force of the EEA Agreement, the actual decision to apply the preferential regime was made after, following the company's application in 1995.

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. Cinema films may be produced in alternative locations within the EEA. They are subsequently traded between the Contracting Parties to the EEA Agreement. Support to an undertaking producing feature films and providing studio services may therefore alter the competition existing between different locations for the realisation of films. Therefore the measure under scrutiny may be considered as distorting competition and affecting trade between the Contracting Parties.

1.4 Conclusion on the presence of state aid

The Authority consequently considers that the measures under scrutiny may involve aid.

2 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*".

¹¹ Case C-143/99 *Adria-Wien pipeline GmbH and Wietersdorfer & Peggauer Zementwerke GmbH* [2001] ECR I 8365, paragraph 42 and the judgment of the EFTA Court in the joined cases E-5/04, E-6/04 and E-7/04 *Fesil and Finnjord and others v EFTA Surveillance Authority*, [2005] EFTA Court Report, page 117, paragraph 77.

¹² Chapter of the Authority's State Aid Guidelines on the application of state aid rules to measures relating to direct business taxation, Section 3.4, para. 3.

The Authority notes that none of the measures referred to above in Part I, section 3 of this decision were notified by the Norwegian authorities.

The Authority, however, considers that the yearly payments made by the Norwegian State since the 1970s to Norsk FilmStudio AS/Filmparken AS for the production of feature films and to maintain an infrastructure necessary for the production of films were based on an existing system of aid. The Authority considers that in this case, where regular payments were consistently made over a very long period of time, the practice shows that state support was an essential element in the financing of the company. The Authority considers on that basis that the annual grants were made under an existing system of state aid within the meaning of Article 62 EEA. The Authority furthermore considers that none of the changes that have taken place over the years are such as to change the classification from existing aid into new aid. The Norwegian authorities have confirmed that they have put an end to such payments in 2006. The Authority takes note of the termination of these yearly payments made by the Norwegian State until 2006 and will not investigate this issue further.

Neither measures referred to above in Part I, section 3.2 and section 3.3 of this decision were notified by the Norwegian authorities. The Authority has doubts with regard to their classification as existing aid. In the event the measures constitute new aid, the Authority would conclude that the Norwegian authorities have not respected their respective obligations pursuant to Article 1(3) of Part I of Protocol 3.

3 Compatibility of the aid

Consequently, the Authority will review the compatibility of the *had hoc* grant of NOK 36 000 000 (3.1) and of the preferential tax regime some companies belonging to the Norsk Film group have benefited from (3.2).

3.1 Payment of the grant of NOK 36 000 000

The Norwegian authorities have indicated that in 1997, the Norwegian Parliament decided to grant NOK 36 000 000 to Norsk Film AS for the upgrading, modernisation and development of the production facilities called "Filmparken". The grant was allocated over the national budget's section for grants to national cultural buildings. The sum was allocated over a two-year period, NOK 10 000 000 being paid in 1998 and the remaining NOK 26 000 000 in 1999. The grant partly covered the modernisation and upgrading of the studio facilities and partly the development of new administration facilities.

The Norwegian authorities have argued that the payment of such aid did not constitute a separate aid but was part of a general aid scheme. Thus, payments that were made since the 1970s always included an investment part and an operating part. The only difference was that in 1998 and 1999 the portion of the grant allocated to investment aid was actually clearly identified.

The Authority has taken note that as the payment of the grant of NOK 36 000 000 was based on a different budget allocation and the specific amount was singled out for a specific aim (renovation of the jar site), this may amount to new aid. For this reason, it has doubts as to whether this contribution formed part of the existing system of aid or whether it constituted a new aid measure.

The Authority has moreover doubts regarding the compatibility of such measure and invites the Norwegian authorities to provide additional information regarding this aspect.

3.2 Preferential tax treatment

Companies belonging to the Norsk Film group benefited from the favourable tax regime whereby they were exempted from paying corporate tax for certain years. The Authority is in doubt whether the application of the exemption from corporate tax based on the logic of exemption for non profit organisations may justify the tax exemption in the case of the companies belonging to the Norsk Film Group.

Support measures caught by Article 61(1) of the EEA Agreement are generally incompatible with the functioning of the EEA Agreement, unless they qualify for a derogation in Article 61(2) or (3) of the EEA Agreement. The derogation of Article 61(2) is not applicable to the aid in question, which is not designed to achieve any of the aims listed in this provision. Nor does Article 61(3)(a) or Article 61(3)(b) of the EEA Agreement appear to apply to the case at hand.

The aid in question reduces the costs the companies would normally have to bear in the course of pursuing their day-to-day business activities and is consequently to be classified as operating aid. Operating aid is normally not considered suitable to facilitate the development of certain economic activities or of certain regions as provided for in Article 61(3)(c) of the EEA Agreement. Operating aid is only allowed under special circumstances, and, in particular, in situations where the criteria provided for in the Authority's Guidelines are met (e.g for certain types of environmental or regional aid). However, none of these Guidelines seem to apply to the aid in question.

The Authority therefore doubts that the special tax rules as applied to some of the companies belonging to the Norsk film group can be justified under the state aid provisions of the EEA Agreement.

4 Conclusion

Based on the information submitted by the Norwegian authorities, the Authority cannot exclude the possibility that the aid measures referred to above in Part II, sections 3.1 and 3.2 of this decision constitute aid within the meaning of Article 61(1) of the EEA Agreement. Furthermore, the Authority has doubts that these measures can be regarded as complying with Article 61(3)(c) of the EEA Agreement. The Authority thus doubts that the above measures are compatible with the functioning of the EEA Agreement.

Consequently, and in accordance with Article 4(4) of Part II of Protocol 3, the Authority is obliged to open the procedure provided for in Article 1(2) of Part I of Protocol 3. The decision to open proceedings is without prejudice to the final decision of the Authority, which may conclude that the measures in question are compatible with the functioning of the EEA Agreement.

In light of the foregoing considerations, the Authority, acting under the procedure laid down in Article 1(2) of Part I of Protocol 3, invites the Norwegian authorities to submit their comments within one month of the date of receipt of this Decision.

Moreover, the Authority requests the Norwegian authorities, within one month of receipt of this decision, to provide all documents, information and data needed for the assessment of the compatibility of the two measures examined here above.

The Norwegian authorities are invited to forward a copy of this decision to the potential aid recipient of the aid immediately.

The Authority would like to remind the Norwegian authorities that, according to the provisions of Protocol 3, any incompatible aid unlawfully put at the disposal of the

beneficiaries will have to be recovered, unless this recovery would be contrary to the general principal of law.

HAS ADOPTED THIS DECISION:

Article 1

The EFTA Surveillance Authority has decided to open the formal investigation procedure provided for in Article 1(2) of Part I of Protocol 3 against Norway regarding (i) the payment of an *ad hoc* aid of NOK 36 000 000 to Norsk Film AS for the upgrading of infrastructure and (ii) the application of the preferential tax treatment to Norsk Film AS, Norsk FilmStudio AS and ScanCam AS.

Article 2

The Norwegian authorities are invited, pursuant to Article 6(1) of Part II of Protocol 3, to submit their comments on the opening of the formal investigation procedure within one month from the notification of this Decision.

Article 3

The Norwegian authorities are requested to provide within one month from notification of this Decision, all documents, information and data needed for assessment of the compatibility of the aid measure.

Article 4

This Decision is addressed to the Kingdom of Norway.

Article 5

Only the English version is authentic.

Done at Brussels, 2 December 2009

For the EFTA Surveillance Authority

Per Sanderud
President

Kristján Andri Stefánsson
College Member