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# *EFTA SURVEILLANCE AUTHORITY*

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Ref. No. SAM 030.95.001

EFTA SURVEILLANCE AUTHORITY DECISION

OF 10 MAY 1995

ON AN AID SCHEME FOR AUDIO-VISUAL PRODUCTION (NORWAY)

THE EFTA SURVEILLANCE AUTHORITY,

Having regard to the Agreement on the European Economic Area<sup>1</sup>, in particular to Articles 61 to 63,

Having regard to the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice<sup>2</sup>, in particular Article 1 of Protocol 3 thereof,

WHEREAS:

## **I. FACIS**

### **1. The notification**

By letter dated 5 January 1995, received by the EFTA Surveillance Authority on 9 January 1995 (ref. 95-149 A), the Norwegian Government notified the Authority of an aid scheme for audio-visual production administered by the Ministry of Cultural Affairs. The State Aid and Monopolies Directorate of the EFTA Surveillance Authority by letter dated 23 January 1995 (Doc.No. 95-440 D) informed the Norwegian authorities that it had found the aid scheme to be unlawful on procedural grounds by infringing the last sentence of Article 1(3) of Protocol 3 to the Surveillance and Court Agreement as it had been notified late, i.e. after having been put into effect. By the same letter the State Aid and Monopolies Directorate of the Authority requested additional information on the

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<sup>1</sup>Hereinafter referred to as the EEA Agreement

<sup>2</sup>Hereinafter referred to as the Surveillance and Court Agreement

scheme. The Authority received a fax (Doc.No 95-1086 A) dated 20 February 1994, registered the same date, containing the requested information.

## **2. The contents of the proposal**

The Norwegian Government established as of 1 July 1994 a new aid scheme for audio-visual production. The legal basis for the scheme is Parliamentary resolution No.1 (1993-94)<sup>3</sup>. The regulations for the *Audio-visual Production Foundation*<sup>4</sup> were established by the Ministry of Cultural Affairs on 8 November 1994. The foundation's awards of aid are to be granted in accordance with the criteria laid down in specific guidelines established by the Ministry of Cultural Affairs.

The foundation is managed by a board of seven members appointed by the Ministry of Cultural Affairs. Of these seven members, five are appointed on proposal from organizations representing the audio-visual sector in Norway. The foundation's secretariat is administered by a director appointed by the board. The first board meeting of the foundation for the purpose of awarding aid to individual projects was held in February 1995.

The objective of the aid scheme is to support the development of the Norwegian audio-visual sector notably by strengthening the co-operation between film producers and the broadcasting sector for the purpose of developing quality productions. The foundation shall provide financing for co-production projects between broadcasting companies and film producers. Priority is to be given to projects comparable to feature films. Awards of aid may, in exceptional circumstances, be granted also to documentary and short-story productions. In addition, the foundation shall administer support to local radio stations.

The foundation is financed by appropriations over the State budget and by support from TV 2 A/S<sup>5</sup>. The foundation may in principle receive financing also from other sources. The State budget appropriation for July - December 1994 was NOK 23.5 million, while the budget appropriation for 1995 is NOK 48 million.

The aid is awarded exclusively in the form of direct grants. When awards of aid to individual projects are determined the foundation is to take into account i.a. the total production costs of the individual project, the applicant's own capital contributions as well as any grants from other Norwegian, Nordic or European support schemes. Awards of aid may only be granted to cover documented project costs. Grants are not awarded automatically. A high level of discretion is

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<sup>3</sup>St.prp. nr. 1993-94

<sup>4</sup>Norwegian title; *Audiovisuelt produksjonsfond*, hereinafter referred to as the foundation

<sup>5</sup>TV 2 A/S is a Norwegian commercial broadcasting company

applied. Separate guidelines have been established by the Ministry of Cultural Affairs respectively for grants for a) local broadcasting purposes<sup>6</sup> and b) film and television purposes<sup>7</sup>.

a) Awards of *aid for local broadcasting purposes* are granted to

- local radio stations with a low rate of revenue from advertising,
- radio stations serving language and ethnic minorities and
- projects of a general interest.

b) Awards of *aid for film and television purposes* are primarily intended for the production of feature length films. Grants cannot be awarded to ordinary broadcasting productions or short films (approx. 30 minutes duration or less). In principle, only independent<sup>8</sup> film producers may submit applications for grants. In special cases one of the partaking broadcasting companies<sup>9</sup> may apply for grants, provided that the broadcasting company has established co-operation with one or more independent film-producers. Only projects that are produced jointly between an independent film producer and either of the eligible broadcasting companies may receive grants from the foundation. Projects that have received aid from other national, Nordic or international support schemes for film production are not precluded from receiving support from the foundation.

According to point 7 of the foundation's guidelines for grants to film and television projects<sup>10</sup>, payments of grants to film and television projects are subject to the regulations established by the Ministry of Cultural Affairs on submission of accounts for film projects. The regulations on submission of accounts for film projects were initially established for an existing aid scheme, namely aid no 93-194 *State subsidies for production of Norwegian feature films*. According to these regulations, individual projects that receive grants are subject to auditing. The office of the Auditor General controls that the foundation's activities comply with established regulations and objectives laid down in the State budget appropriations. All costs related to a particular film/television project may in principle be supported by the foundation, thus the theoretical maximum aid intensity is 100 per cent of the production costs.

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<sup>6</sup> "Audiovisuelt Produksjonsfond, Retningslinjer - Tilskudd til nærkringkastingsformål" established by the Ministry of Cultural Affairs on 8 November 1994

<sup>7</sup> "Audiovisuelt Produksjonsfond, Retningslinjer - Tilskudd til film- og fjernsynsformål" established by the Ministry of Cultural Affairs on 9 November 1994

<sup>8</sup> Independent producers in this context refers to non-broadcasting company operated producers.

<sup>9</sup> Only broadcasters which participate in the financing of the foundation may partake in productions funded by the foundation. The broadcasters which at the present contribute to the financing of the foundation are NRK (The public Norwegian broadcasting company) and TV 2 A/S.

<sup>10</sup> See footnote 7

The foundation will annually invite producers to submit applications. The expected number of recipients of aid in 1995 is estimated to 50-100. An applicant, normally an independent producer, must be able to provide documentation confirming that the project is to be screened on cinema as well as broadcasted by either of the broadcasting companies contributing to the financing of the foundation<sup>11</sup>.

The regulations and guidelines established for the foundation do not contain explicit rules concerning the nationality of eligible applicants. However, according to point 10 of the foundation's guidelines for grants to film and television projects, the foundation's grant schemes are to be administered in accordance with the "Guidelines for aid to Norwegian feature films" established for aid no 93-194 by the Ministry of Cultural Affairs on 1 December 1993, unless otherwise provided in specific guidelines or regulations. According to the latter guidelines, applications are in principle restricted to "Norwegian producers". A Norwegian producer is defined in point 2.2 of these guidelines as either

- i) a Norwegian national or a person resident in Norway,
- ii) a company registered in Norway,
- iii) a Norwegian state or municipality institution,
- iv) other company registered in Norway with limited liability, thereunder foundations and societies, of which the directors and the majority of the management are Norwegian nationals or are resident in Norway,
- v) a foreign limited company or co-operative society with a branch office registered in Norway or other foreign company with limited liability registered in Norway, of which the majority of directors and management are Norwegian nationals or resident in Norway,

However, according to point 2.3 of the same guidelines the requirements concerning nationality, permanent residence, home district etc. in Norway do not apply when so is required by international agreements. The EEA Agreement and the agreement on a common Nordic labour market is explicitly referred to as such international agreements in point 2.3.

In its letter of 23 January 1995 requesting additional information, the State Aid and Monopolies Directorate asked the Norwegian authorities to clarify the relation between point 2.2 and 2.3 of the guidelines referred to above.

According to the additional information<sup>12</sup> provided by the Norwegian authorities, the general application of point 2.2 is such that applicants (producers) which are not Norwegian nationals must be registered as resident in Norway at the point of time when their application is handled by the foundation.

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<sup>11</sup>See footnote 9

<sup>12</sup>Fax dated 20 February 1994, Doc.No 95-1086 A

There is no requirement concerning the length of residence. The requirement to have a permanent address in Norway does not apply to Norwegian nationals.

According to the same information, point 2.3. was introduced in the guidelines in order to prevent any discriminatory treatment on grounds of nationality between nationals of the States covered by the EEA Agreement and of the Nordic countries. Therefore, the conditions concerning permanent residence do not apply to EEA nationals applying for grants from the Audio-visual Production Foundation.

The Norwegian authorities hold that the aid scheme is justified with reference to practice established by the EC Commission concerning derogations based on Article 92(3)(c) of the EC Treaty, corresponding to Article 61(3)(c) of the EEA Agreement, for aid to the cultural sector. The Norwegian authorities make a special reference to Article 92(3)(d) of the EC Treaty, inserted by the Treaty on the European Union, and refer to Protocol 27 of the EEA Agreement concerning the requirement for the EFTA Surveillance Authority and the EC Commission to apply the same standards of practice. In addition, a reference is made to point 34 in the 23rd Report on Competition policy in the EC.

## II. APPRECIATION

### 1. Procedure

The existence of the aid scheme administered by the Audio-visual Production Foundation was brought to the Authority's attention by the Norwegian Government's notification by letter of 5 January 1995. As the foundation was established as of 1 July 1994 and a budget was allocated to the scheme by State budget appropriation, the aid scheme was notified late to the Authority, i.e. it was notified to the Authority after having been put into effect. In the present case the Norwegian authorities have failed to live up to their obligations under Article 1(3) of Protocol 3 to the Surveillance and Court Agreement to let the Authority be informed in sufficient time to enable it to submit its comments on any plans to grant or alter aid and not to put the proposed measures into effect until the foreseen procedure has resulted in a final decision. Therefore, the aid scheme is, according to Chapter 6 of the Procedural and Substantive Rules in the Field of State Aid adopted by the EFTA Surveillance Authority on 19 January 1994<sup>13</sup>, unlawful on procedural grounds.

Although it was concluded in the letter from the Authority to Norway of 11 January 1995 that the aid was unlawful on procedural grounds, the State Aid and Monopolies Directorate did not find it necessary, with reference to the merits of the case, to propose to invoke the injunction procedure in accordance with Section 6.2.1. of the State Aid Guidelines.

Although the aid is unlawful on procedural grounds, the Authority is nevertheless, in accordance with Chapter 6 of the State Aid Guidelines, obliged to investigate whether the aid scheme complies with the substantive rules and established practice in the field of State aid and it is obliged to take a decision on the compatibility of the aid.

### 2. Substance

The funds administered by the foundation are financed mainly by the State through appropriations over the State budget. The aid scheme covers only the audio-visual sector. Further, the foundation enjoys wide discretion in exercising its powers to favour certain undertakings by awards of aid in the form of direct grants. Therefore it may be concluded that the funds administered by the foundation are mainly granted by the State or through State resources thereby favouring certain undertakings or the production of certain goods and services.

According to point 3 of the guidelines on aid to local broadcasting<sup>14</sup>, the foundation may award grants in favour of local radio stations experiencing particular difficulties in obtaining financing from advertising or for support to

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<sup>13</sup>Hereinafter referred to as the State Aid Guidelines

<sup>14</sup>See footnote 6

broadcasting directed towards ethnic or language minorities. The activities of local radio stations which may receive support from the foundation are, both by reason of their scope and by their nature, considered by the Authority to have no appreciable effect on trade. Consequently the foundation's support to local radio stations is considered to fall outside the scope of Article 61(1) of the EEA Agreement.

On the other hand, the funds that may be awarded by the foundation to the benefit of film and television broadcasting productions, are directed towards productions which in principle may be marketed in competition with similar productions originating within the EEA. It may therefore be concluded that the foundation's support to film and television broadcasting activities constitute aid in the meaning of Article 61(1) of the EEA Agreement. The EFTA Surveillance Authority is therefore obliged to assess whether any of the exemption clauses under Article 61(2) and (3) are applicable.

In its examination of the notification the Authority has noted in particular that

- the objective of the aid is cultural, i.e. the awards of aid are to benefit the development of the Norwegian audio-visual sector by providing additional financing for an increased number of quality productions,
- the costs to be covered by the aid will be limited to the actual costs of a particular project approved by the foundation and
- that the general conditions and definitions to be applied in relation to applications from film producers for aid to individual projects contain binding rules which explicitly exclude any discrimination on grounds of nationality between nationals of the Contracting Parties to the EEA Agreement.

The Commission's practice on aid to the audio-visual sector was summarized in the 23rd Report on Competition Policy 1993. Point 34 of the report reads as follows:

*"The Commission normally takes a positive attitude towards State aid to the audio-visual sector, another growth area identified by the White Paper. It has never objected to film industry support schemes, except those designed to remove discrimination. Discrimination against EC nationals cannot be allowed even for cultural reasons. New Article 92(3)(d), inserted by the Treaty on European Union, provides a specific exception for aids to cultural activities and the arts."*

The Authority sees no reason to deviate from the established policy of the Commission in this field. On the grounds that the aid is directed towards cultural activities in the audio-visual sector and that the Authority has found that the aid award criteria do not involve any discrimination between EEA nationals, it is concluded that the positive effects of aid awarded by the Audio-visual Production Foundation outweigh any possible distortions of competition and

trade. Therefore, the scheme qualifies for exemption under Article 61(3)(c) of the EEA Agreement by facilitating the development of certain economic activities.

In accordance with Chapter 30 of the State Aid Guidelines, the Norwegian Government is to be obliged to submit a simplified annual report on the activities carried out by the Audio-visual Production Foundation according to the format indicated in Annex IV of the State Aid Guidelines. The submission of annual reports is considered necessary for the Authority to fulfill its obligation under Article 1(1) of Protocol 3 of the Surveillance and Court Agreement to keep all existing systems of State aid under constant review in cooperation with the EFTA States.

**HAS ADOPTED THIS DECISION:**

1. The EFTA Surveillance Authority has decided not to raise objections to the aid scheme administered by the Audio-visual Production Foundation as notified in the letter dated 5 January 1995 from the Norwegian Government.

2. The Norwegian Government is obliged to submit to the EFTA Surveillance Authority a simplified annual report (according to Chapter 30 of and Annex IV to the Procedural and Substantive Rules in the Field of State Aid) on the activities carried out by the Audio-visual Production Foundation.

Done at Brussels, 10 May 1995

For the EFTA Surveillance Authority

Knut Almestad  
President

Björn Friðfinnsson  
College Member