

Case No: 60557
Event No: 397960
Dec. No: 390/06/COL

EFTA SURVEILLANCE AUTHORITY DECISION
OF 13 DECEMBER 2006
ON THE PROLONGATION OF THE ACT RELATING TO TEMPORARY
REIMBURSEMENTS IN RESPECT OF FILM MAKING IN ICELAND

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) in Part I and Article 4(3) in Part II of Protocol 3 to the Surveillance and Court Agreement,

HAVING REGARD TO the Authority's Guidelines on the application and interpretation of Articles 61 and 62 of the EEA Agreement⁴,

HAVING REGARD TO the Authority's Decision of 14 July 2004⁵ on the implementing provisions referred to under Article 27 in Part II of Protocol 3 to the Surveillance and Court Agreement,

HAVING REGARD TO the Authority's Decision No 380/00/COL of 18 December 2000⁶,

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 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 EFTA Surveillance Authority on 19 January 1994, published in OJ 1994 L 231, EEA Supplements 03.09.94 No 32. The Guidelines were last amended on 25 October 2006. Hereinafter referred to as 'the State Aid Guidelines'. The State Aid Guidelines are accessible on: <http://www.eftasurv.int/fieldsOfWork/fieldStateAid/guidelines/>

⁵ Decision No 195/04/COL, hereinafter 'the Authority's Decision 195/04/COL'.

⁶ Available online on the Authority's State Aid Register:

<http://www.eftasurv.int/fieldsOfWork/fieldStateAid/stateAidRegistry/sadecis100/>

I FACTS

1 Procedure

By letter dated 14 August 2006, forwarded by the Icelandic Mission to the EU by letter dated 15 August 2006, the Icelandic government notified the Authority of a proposed prolongation of support measures in favour of film production in Iceland. The measure notified is a draft bill pending before the Icelandic parliament concerning a prolongation of and certain technical amendments to the scheme approved by the Authority's Decision No 380/00/COL.

The notification was received and registered by the Authority on 17 August 2006 (under Case No 60557, Event No 384143). The letter was not sent electronically as required by Article 3(4), second sentence, of the Authority's Decision No 195/04/COL of 14 July 2004. Following email correspondence, however, the Authority decided to make use of its possibility to dispense from this requirement⁷ and acknowledged receipt of the notification by letter of 25 August 2006 (Event No 397960).

The draft bill prolonging the support scheme in question, in Icelandic, was enclosed to the notification letter. Following a meeting between the Authority and the Icelandic Mission to the EU on 20 September 2006, it was agreed that a translation should be submitted. The Authority received, by email, a translation into English on 5 October 2006 (Events Nos 391572 and 391573). Following discussions of the case at the State Aid Package Meeting in Reykjavik on 12 October 2006, the Authority sent a request for information pursuant to Article 5(1) in Part II of Protocol 3 to the Surveillance and Court Agreement on 17 October 2006. Due to technical problems, however, the letter was not received by the Icelandic Mission to the EU until 27 October 2006. The Icelandic government replied by letter dated 6 November 2006, submitted to the Authority in a meeting held on 9 November 2006 at the Authority's premises (registered as Event No 397654).

In the introduction to the letter, the Icelandic authorities state that, since the letter was not received until 27 October 2006, they consider that the two month period allowed for scrutiny under Article 4(5) in Part II of Protocol 3 to the Surveillance and Court Agreement had expired by the time they received the request for information. The Icelandic authorities nevertheless express their intention to continue the notification process. In contrast to the Icelandic authorities, the Authority's view was that, since the translation of the draft bill was only received on 5 October 2006, this was the time from which the two month period referred to in Article 4(5) in Part II of Protocol 3 to the Surveillance and Court Agreement would begin to run in the absence of any further requests from the Authority. In light of the Icelandic authorities' stated intention to continue the case, the Authority finds that Iceland must in any event be held to have agreed to an extension of the two months period pursuant to Article 4(5), fourth sentence, in Part II of Protocol 3 to the Surveillance and Court Agreement.

By letter of 12 December 2006, the Icelandic authorities informed the Authority that the bill had been adopted by the Icelandic parliament on 9 December 2006. The adopted act differed from the draft bill in that the reimbursement percentage was increased from 12 to 14 per cent of production costs. The Icelandic authorities furthermore explained that, in order for the amendments to enter into force, it will now need to be signed by the

⁷ Events Nos 385276 and 385277.

President and published in the Legal Gazette. These procedures are expected to be completed by the end of the year.

2 Description of the notified measure

As referred to above, the notified measure consists of an amendment to Act no 43/1999 on Temporary Reimbursements in Respect of Film Making in Iceland (hereinafter “the Act”), extending its validity until 31 December 2011, and introducing certain technical amendments to the conditions for reimbursement. The Act of 1999 was approved by the Authority on 18 December 2000 and entered into force in 2001. Pursuant to its Article 8, it shall cease to be in effect on 31 December 2006. The Act is accompanied by Regulation no 131/2001 on Temporary Reimbursements in Respect of Film Making in Iceland (hereinafter “the Regulation”), containing *inter alia* detailed procedural rules for the operation of the scheme.

An overview of the main points of the Act, which remain unchanged, is given below.

Pursuant to Article 1 of the Act, the objective of the film support awarded under it is, “*to enhance domestic culture and promote the history and nature of Iceland by temporarily supporting motion pictures and television programmes produced in Iceland*”.

To that end, the Act and the accompanying Regulation establish a scheme whereby a proportion of the production costs, in the Act of 1999 fixed at 12 per cent, may be reimbursed to the producer after production (see Article 2 and 5 of the Act).

To obtain reimbursement, an applicant must submit an application to the Ministry of Industry. Under Article 3 of the Act, a special committee, in charge of the examination of applications, is established; however, pursuant to Article 5, the final decision on the reimbursement is taken by the Minister of Industry on the basis of the committee’s recommendations.

The conditions to be assessed by the committee and the Ministry are set out in Article 4 of the Act, and concern, in essence, the cultural content of the film and information which the applicant is required to submit. The Icelandic authorities have explained that the committee shall give an overall assessment of the conditions. If the application is approved, the reimbursement shall be a fixed proportion of production costs. The authorities have no discretion to grant reimbursement at a lower intensity.

“Production cost” is defined in Article 2 of the Act. That provision also states that when more than 80 per cent of the total production cost is incurred in Iceland, the reimbursement shall be calculated on the basis of the total production cost incurring within the EEA. However, the definition of production cost refers to “all costs incurred in Iceland deductible from the revenue of enterprises pursuant to the provisions of the Act on Income and Net Wealth Tax”, thus seemingly rendering illusory the possibility that reimbursement be granted for costs incurred in other EEA States when these account for 20 per cent or less of the budget. However, the Icelandic authorities have confirmed that the definition should be read, and has been applied, as set out in Article 5 of the Regulation, namely including costs incurred in other EEA States as applicable.

Article 6 of the Act limits cumulation of aid from the Icelandic Film Fund with reimbursements under the notified scheme, since grants shall be deducted from the amount that is considered domestic production costs, and the total amount of aid shall not exceed

50 per cent of total production costs. The Icelandic government has explained that non-cumulation can easily be monitored since the grants from the Icelandic Film Fund are provided prior to production, and the Fund has one representative in the committee established under Article 3 of the Act.

The amending act primarily concerns Article 4 of the Act, laying down the conditions for reimbursement. Certain amendments are introduced to the information requirements, and the formulation of other conditions is harmonised to those set out in Article 2 of the Regulation. A time limit for completion of the production after the date of approval is also introduced. The other substantive amendment concerns the first sentence of Article 5, increasing the reimbursable proportion of production costs from 12 to 14 per cent⁸. Finally, certain technical amendments are made to Article 5 of the Act, and a new interim provision, whereby the amended Act shall be in force until 31 December 2011, is added.

II APPRECIATION

1 Notification requirement

According to Article 1(3) in Part I of Protocol 3 to the Surveillance and Court Agreement, the EFTA States have an obligation to inform the Authority in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. The EFTA State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision.

The Icelandic authorities have signalled that the amended Act will not be published in the Legal Gazette, thereby being put into effect, until the Authority has adopted its decision.⁹ The Authority therefore considers that the notification and standstill obligations in Article 1(3) in Part I of Protocol 3 to the Surveillance and Court Agreement have been complied with.

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

Article 61 of the EEA Agreement stipulates: "*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, insofar as it affects trade between the Contracting Parties, be incompatible with the functioning of the Agreement.*"

In Authority's Decision No 380/00/COL, the Authority found that State resources were present since the scheme was financed through the State budget; the scheme also conferred a financial benefit on recipients that they would not have obtained in the normal course of business, thereby strengthening their position compared with that of competing firms. The scheme was also selective in that it was limited to a specific industry and granted subject to certain conditions. Finally, it affected trade between EEA States as both film production activities and the film product were subject to trade between the Contracting Parties. Consequently, the reimbursements under the scheme in question were found to fall within the above definition of State aid. The Authority has not been presented with new elements calling for a different assessment with respect to the scheme at this

⁸ Change notified by letter from the Icelandic authorities of 12 December 2006

⁹ Timetable indicated in the letter of 12 December 2006

point. State aid within the meaning of Article 61(1) of the EEA Agreement is therefore held to be present.

3 Compatibility of Aid Measures under Article 61(3)(c) of the EEA Agreement

Article 61(3) EEA provides that State aid may in specific circumstances be considered compatible with the functioning of the EEA Agreement. The EC Commission has adopted guidelines for the compatibility assessment of audiovisual support, the so-called “*Cinema Communication*”¹⁰. These guidelines were adopted on the basis of Article 87(3)(d) EC, the so-called “cultural exemption”, to which there is no corresponding provision in the EEA Agreement. However, the Authority has in its previous decisions considered that film support measures may be approved on cultural grounds on the basis of Article 61(3)(c) of the EEA Agreement. According to Article 61(3)(c) of the EEA Agreement “...*aid to facilitate the development of certain economic activities or of certain economic areas...may be considered compatible with the functioning of this Agreement...where such aid does not adversely affect trading conditions to an extent contrary to the common interest*”, may be considered compatible with the functioning of the EEA Agreement. The Authority has applied criteria similar to those applied by the EC Commission in the abovementioned communication and practice on the basis of Article 87(3)(d) of the EC Treaty .

According to the Cinema Communication, the following conditions must be fulfilled:

- the cultural content of the film must be ensured;
- the producer must be free to spend at least 20 per cent of the budget in other EEA States;
- aid intensity must in principle be limited to 50 per cent of the production costs; and
- aid supplements for specific filmmaking activities are not allowed.

Furthermore, following the approach set forth in the Cinema Communication, the Authority verifies that the eligibility conditions in the State aid scheme do not contain clauses contrary to the EEA Agreement in other fields.

3.1 Cultural content

In Decision No 380/00/COL, the Authority found that the fact that the scheme pursues cultural objectives, as stated in the object clause of the Act and reflected in the eligibility criteria to be assessed by the committee, ensured the appraisal of eligible film projects on quality and artistic grounds. The amendments to the eligibility criteria do not concern the requirements to the cultural content of the filmmaking project. The object clause will also remain unchanged. The Authority therefore upholds its previous conclusion with respect to the scheme as prolonged.

3.2 Freedom to spend at least 20 per cent of the budget in other EEA States

¹⁰ Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions on certain legal aspects relating to cinematographic and other audiovisual works (COM(2001)534 final of 26.09.2001, (OJ C 43 of 16.2.2002); prolonged by Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions on the follow-up of the Commission communication on certain legal aspects relating to cinematographic and other audiovisual works of 26.09.2001 (COM(2004)171 final of 16.3.2004, OJ C 123 of 30 April 2004.

In Decision No 380/00/COL, the Authority found that of Article 2 of the Act, providing that aid is calculated on the basis of the total production cost if more than 80 per cent of the total production cost is incurred in Iceland, ensured that the producer may spend up to 20 per cent in other EEA States without losing aid. Furthermore, the Icelandic authorities have confirmed that the definition of production cost also includes costs incurred in other EEA States, thereby ensuring the useful effect of the above provision.

The conclusion reached in Decision No 380/00/COL is therefore upheld.

3.3 Aid intensity must in principle be limited to 50 per cent of the production costs

In its previous approval of the scheme in 2000, the Authority found that the provisions of Article 5 and 7 (now 6) of the Act ensured that aid intensity is kept below the 50 per cent ceiling, even in the case of cumulation of aid under the scheme with aid from the Icelandic film fund. The increase of aid intensity from 12 to 14 per cent introduced by the amending act does not affect this conclusion. On request, the Icelandic authorities have also explained that it can easily be monitored that no such cumulation results in higher aid intensities: Grants from the Fund will be given prior to production, and the Fund is represented in the committee assessing the applications. The amount of aid already given to an applicant may thus easily be established. It is therefore ensured that the total aid intensity will not exceed 50 per cent.

3.4 Aid supplements for specific filmmaking activities are not allowed

The Cinema Communication states as a fourth condition that aid supplements for specific filmmaking 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 Member State granting the aid is avoided. Such supplements are neither foreseen in the scheme, nor can they be granted in the individual case, since the reimbursement rate is fixed at 14 per cent of the overall production costs.

3.5 The aid must satisfy the fundamental principles of the EEA Agreement

In Decision No 380/00/COL, the Authority found that the scheme was in compliance with the basic freedoms of the EEA Agreement in other fields than State aid. The amendments to the eligibility criteria are not of such a nature as to alter the Authority's previous assessment in this respect.

4 Conclusions

As follows from the above assessment, the scheme as prolonged respects the conditions laid down in the Cinema Communication and the Authority is, therefore, in a position to approve it as compatible with the functioning of the EEA Agreement on the basis of Article 61(1)(c) of the EEA Agreement.

The Icelandic authorities are reminded of their duty under Article 21 in Part II of Protocol 3 to the Surveillance and Court Agreement and the EFTA Surveillance Authority Decision No 195/04/COL of 14 July 2004 on the implementing provisions referred to under Article 27 in Part II of Protocol 3 to the Surveillance and Court Agreement, to submit annual reports to the Authority on the approved scheme.

By the amending act, the notified scheme is prolonged until 31 December 2011. The Commission's Communication on State aid concerning cinematographic and other audiovisual works under the EC Treaty expires on 30 June 2007. If the Commission should take a different view on the compatibility criteria after that date, the Authority might adjust its approach under the EEA Agreement accordingly. The Icelandic authorities are reminded of the Authority's right to provide for appropriate measures, concerning any changes deemed necessary during the duration of the scheme.

HAS ADOPTED THIS DECISION:

1. The EFTA Surveillance Authority has decided not to raise objections to the prolongation of and amendments to Act No 43/1999 on Temporary Reimbursements in Respect of Film Making in Iceland.
2. The Icelandic authorities are requested to submit an annual report to the Authority on the implementation of the scheme.
3. This Decision is addressed to the Republic of Iceland.
4. Only the English version is authentic.

Done at Brussels, 13 December 2006

For the EFTA Surveillance Authority,

Bjørn T. Grydland
President

Kristján Andri Stefánsson
College Member