



COMMISSION OF THE EUROPEAN COMMUNITIES

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COMMISSION DECISION

of 21 March 2007

ON THE MEASURE

implemented by Germany

for Bavaria Film GmbH

C 51/2003 (ex NN 57/2003)

(Only the German version is authentic)

(Text with EEA relevance)

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THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 88(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having called on interested parties to submit their comments¹ and having regard to their comments,

Whereas:

1. PROCEDURE

(1) Following complaints concerning alleged state aid to Bavaria Film GmbH (hereinafter called "BAV"), the Commission opened a formal investigation procedure on 23 July 2003. Germany submitted comments on 20 October 2003; no comments were received from competitors and other interested parties. The Commission requested information on 3 May 2005, which Germany provided by letter dated 1 July 2005. Following a meeting on 12 October 2005, Germany submitted further information on 9 and 21 November 2006.

¹ OJ C 249, 17.10.2003, p. 2.

2. DESCRIPTION OF THE ORIGINAL MEASURE

2.1. Introduction

- (2) In 1999, the construction and fitting-out of a state-of-the-art film studio (hereinafter called “the studio”) was begun on a site owned by BAV. BAV has its headquarters on the site, called Filmstadt Geiseltal, in the German *Land* of Bavaria. BAV is a privately incorporated film production company².

2.2. The investor – the special-purpose vehicle BFH

- (3) The above-mentioned investment was effected through a special-purpose vehicle called Bayerische Filmhallen GmbH (hereinafter called “BFH”).
- (4) BFH’s equity capital amounts to €50 000. The company is owned 49% by the public-sector bank LfA Förderbank Bayern (hereinafter called “LfA”), 21% is held in trust by a private individual, Lothar Wedel³, while the remaining 30% belongs to BAV. The nominal value of BAV’s equity stake is, therefore, €15 000. The stakes held by LfA and BAV were determined on the basis of their respective funding contributions to BFH.

2.3. Investment conditions

- (5) In addition to the paid-up equity capital, LfA awarded BFH a grant of €3.8 million and a loan (to be converted into a grant at a later stage) of €3.1 million⁴. The total of €6.9 million was intended to finance the full cost of building the new studio.
- (6) In addition to the paid-up equity capital of €15 000, BAV leased the land on which the studio stood to BFH free of charge for 25 years. At the end of the 25-year period, ownership of BFH’s new building together with its fixtures and fittings was to revert free of charge to BAV.
- (7) BAV administers the facility on behalf of BFH. Under a business management contract, the income earned from renting out the studio was allocated for the first three years, from October 1999 to October 2002, as follows:
- (a) BAV guaranteed BFH a rental income of at least DEM 300 000 (€153 000) a year.
- (b) Rental income of between DEM 300 000 (€153 000) and DEM 500 000 (€256 000) was retained by BAV to compensate it for the cost of repairs, maintenance, insurance and marketing.
- (c) Any income in excess of DEM 500 000 was to be divided between BAV and BFH⁵.

² From its early beginnings as a studio in 1919, Bavaria Film has steadily grown until it now has more than 30 subsidiaries and joint ventures in Germany, Austria, Italy and the Czech Republic. The Bavaria group operates worldwide in every sector of the audiovisual industry. BAV's share capital is more than 50% owned by regional public broadcasters.

³ It was originally intended that LfA should hold 70%. For legal reasons (exceeding of the single large loan ceiling under the Banking Act), a 21% share was made over to a lawyer, Mr Lothar Wedel.

⁴ Contrary to what was stated in the decision opening the procedure, the €3.1 million was only partly converted into a grant. Following the Commission’s decision to open the procedure, the last loan instalment of €1.345 million was not converted into a grant, the loan plus interest being instead prolonged.

Table 1 shows the actual income from renting out the new studio during the first three years and its distribution:

Table 1 - Income and payments 1999-2002

	From October 1999	2000	2001	Up to September 2002
	EUR	EUR	EUR	EUR
Rental income	61 000	333 000	250 000	174 000
Guaranteed rent for BFH	38 000	153 000	153 000	115 000
Remaining income of which:	23 000	180 000	97 000	59 000
- compensation for BAV	23 000	103 000	97 000	59 000
- surplus divided between BAV and BFH		77 000 of which: 39 000 BFH 38 000 BAV		
Total BFH	38 000	192 000	153 000	115 000
Total BAV	23 000	141 000	97 000	59 000
of which direct costs incurred for repairs and maintenance, water, electricity, heating, etc.⁶	7 000	53 000	66 000	52 000

(8) After the three-year start-up phase, as of the fourth year starting in October 2002, the business management contract provides that the income from renting out the new studio – less the cost of repairs, maintenance, insurance and marketing – will be divided among the shareholders in proportion to their equity stakes in BFH⁷.

⁵ The underlying reason for this roughly 50/50 split, which does not correspond to the actual shareholdings of 30% and 70%, is the recognition that the value of the infrastructure services and activities provided by BAV (including the rent-free use of the site) far exceeds the share it receives by way of compensation from the rental income (i.e. a maximum of €103 000).

⁶ There are other, indirect costs for administering the facility, such as security costs, overheads (marketing, client acquisition, etc.) which have not been included here.

⁷ It was agreed that the approach would change after three years, because the first few years were considered to be a start-up phase needed to stabilise BFH.

Table 2 shows the actual income from renting out the new studio from 2002 to 2005 and its distribution:

Table 2 - Income and payments 2002-05

	From October 2002	2003	2004	2005
	EUR	EUR	EUR	EUR
Income	31 000	252 000	258 000	181 000
Repair and maintenance costs (real cost to BAV)	10 000	18 000	42 000	31 000
Overall security (BAV)	3 000	13 000	13 000	13 000
Overall marketing (BAV)	12 000	48 000	48 000	48 000
After deduction of costs, the remaining income is distributed as follows:				
70% of remaining income (BFH)	4 000	121 000	109 000	62 000
30% of remaining income (BAV)	2 000	52 000	46 000	27 000
Total BAV				
	17 000	113 000	107 000	85 000

3. OPENING OF THE PROCEDURE

- (9) In opening the procedure, the Commission took the view that the terms on which the respective parties had invested in BFH were such that LfA's investment amounted to aid within the meaning of Article 87(1) of the EC Treaty, and it expressed doubts about the compatibility of the financing with the common market. In particular, the Commission expressed doubts whether LfA's shareholding in BFH was in keeping with the principle of a private investor in a market economy, since BAV and LfA did not invest in BFH on equal terms. In fact, LfA had received a 70% share of BFH's share capital in return for a €6.9 million cash injection on top of the cash payment for BFH's shares, while BAV had received a 30% share in exchange for €15 000 plus the 25 years' rent-free lease of the site, the value of which was tentatively put at around €3 million.
- (10) In its decision to open the procedure, the Commission reasoned that LfA was a public-sector bank and that the investment financed by it through state resources potentially constituted aid incompatible with the common market of which BAV was the ultimate beneficiary.

4. COMMENTS FROM GERMANY

- (11) Germany essentially took the view that no aid was involved as the investment was in infrastructure and no advantage was conferred on any particular undertaking. If aid was involved, however, in Germany's opinion it fell under the so-called cultural exception in Article 87(3)(d) of the EC Treaty.
- (12) The studio is rented out for film productions. According to Germany, all tenants - including, therefore, BAV and its subsidiaries - rent the studio under the same conditions. This is laid down, moreover, in the business management contract, which governs the way in which BAV manages the complex and runs the studio. In Germany's view, BAV does not, therefore, enjoy any favourable treatment.
- (13) Germany submitted a list of films produced in the studio, demonstrating that more than two thirds of the films had been produced by companies unrelated to BAV⁸.
- (14) In order to prove that neither BAV nor any other user of the facility enjoyed preferential treatment, in 2005 Germany submitted a price list showing the rental prices for 25 film studios (ranging in size from 748 m² to 4 225 m²) located *inter alia* in Germany, the Czech Republic, Slovakia, Bulgaria, the United Kingdom and Italy. The rental prices varied between €0.27/m² (Italy) and €4.34/m² (United Kingdom). In 2005, the rental price for BFH's new 3 060 m² studio was €1.02/m². All users of the studio, including BAV, were charged this price.

5. DEVELOPMENTS IN THE COURSE OF THE PROCEDURE

- (15) Following the opening of the procedure, Germany proposed, in order to remove any doubts that aid was involved and to make the transaction more transparent, to amend the scheme as follows (hereinafter called "the new approach"):
- (a) LfA will become BFH's sole owner. It will purchase BAV's 30% shareholding at its total nominal value of €15 000. It should be pointed out here that BFH's articles of association make provision for the sale of the shares at their nominal (original) value to the other shareholder(s). LfA will also acquire the remaining 21%⁹.
- (b) BAV will waive its 30% share of the profits corresponding to its original shareholding and will henceforth be responsible only for running the new studio. BAV will charge BFH annually for the actual cost of administering the business. For 2006, this cost has been estimated at €106 405 and will be audited by an independent expert.

Table 3 - 2006 business administration costs

Cost head	Explanation	2006 costs EUR
Services concerning land and buildings: cleaning, snow clearing and gritting, gardening; maintenance and repair	The calculation basis is the land and buildings share of 6%. Comparative offers were in same price range.	21 539.29

⁸ Of the 14 films produced in the studio between 1999 and 2005, two were produced by BAV and another two by Odeon Film AG or Odeon Pictures GmbH. In 2000, when these films were produced, BAV held between 32.75% and 38.45% of Odeon Film AG, which in turn held 100% of Odeon Pictures.

⁹ LfA will buy the shares held by Lothar Wedel at their nominal value of €10 500.

work, waste disposal, etc.		
Commercial transactions, e.g. issuing of invoices, drawing up of contracts.	2 hours per week at €40	4 160
Property management	1 hour per week at €40	2 080
Fire brigade, security services, alarm system, maintenance of fire installations	BAV is obliged by law to have its own fire brigade. The overall cost comes to €1 million per year	50 906.13
Marketing, distribution, services; including secretarial services, client acquisition, marketing, budget calculations, project management, production supervision, etc.	Overall costs of the department: €175 000 secretarial services: €200 per month; coordination of distribution: €100 per month; coordination of marketing: €100 per month; marketing activities: €400 per month; regular client care: €200 per month; acquisition of new clients in Germany: €200 per month; international acquisition of new clients: €100 per month; calculation of budget: €100 per month; production supervision: €200 per month; project management: €150 per month; client complaints: €200 per month; analyses of competitors: €100 per month	25 800
Press: press releases, press cuttings, Intranet and Internet, etc.	2 hours per week at €40	960
Accountancy	2 hours per week at €40	960
		<u>106 405.42</u>

(c) BFH undertakes to pay a market rent for use of the site. This rent, following market practice, amounts to 5% of the site's value, which was assessed by an independent expert in January 2006 at € 670 000. The rent was accordingly set at €183 500 per annum, plus VAT. It will be linked to the consumer price index. However, BFH will not pay the rent monthly but will accumulate it as debt, to which interest amounting to the base rate plus 4% will be applied.

(d) In 2024, the market value of the new studio will be assessed by an independent expert and BAV will pay BFH that market price to acquire the new studio's assets, possibly offsetting it against the accumulated unpaid rent plus interest. If the value of the studio exceeds the debt, BAV will pay the difference to BFH (LfA).

6. ASSESSMENT

- (16) The original measure under investigation is composed of the €6.9 million investment in the new studio by LfA and its shareholding in BFH.
- (17) As indicated in the decision opening the procedure, the operation could constitute state aid within the meaning of Article 87(1) of the EC Treaty in favour of BAV for the following reasons:
- (a) LfA is a public-sector bank whose acts and decisions are imputable to the State (the *Land* of Bavaria); state resources are thus involved.
- (b) LfA's investment might have conferred on BAV an economic advantage stemming from possible overcompensation for the costs of administration, benefits from the BFH share acquisition on unwarranted preferential terms compared with those of LfA, the unconditional ownership of the new studio after 25 years, and, finally, preferential access to, and the low-cost availability of, the studio, which BAV might not have obtained under normal market conditions.
- (c) Since the advantage was selectively granted to BAV and not to its competitors, LfA's investment might have distorted competition.
- (d) Finally, the operation of the new studio might have had an effect on trade between Member States in view of the fact that BAV competes with other undertakings on international markets.

6.1. Existence of aid - effect of the new approach

6.1.1. For the future

- (18) Germany has prepared all the amendments needed to implement the new approach, eliminating all possible aid elements both for the past and for the future, and has undertaken to put it into effect as soon as the Commission's decision is adopted.
- (19) With regard to BAV's 30% stake in BFH, LfA will buy it back from BAV for €15 000. This price was provided for in BFH's articles of association, being the price BAV originally paid for the shares. BAV will not receive any advantage which could be regarded as aid in return for selling its shares in BFH. LfA will own 100% of the shares and will accordingly receive 100% of the revenues from BFH.
- (20) In future BAV will invoice BFH annually for the "actual costs" incurred in administering the new studio. According to the information provided by Germany in November 2006, the annual costs in 2006 amounted to €106 405. The actual costs will be calculated and charged on an annual basis and will be audited by an independent expert. It will be ensured that BAV will be paid only for services actually provided, so that any overcompensation can be ruled out. There will therefore be no advantage to BAV in the form of excessive compensatory payments for administering the facility, which would be tantamount to aid.

- (21) BFH will pay BAV a market rent for the site until 2024. This rent amounts to 5% of the site's value, as assessed by an independent expert¹⁰. It can thus be considered to be a market rent and to provide BAV with a reasonable return on its asset. However, BFH will not pay the rent monthly in cash but can accumulate as debt the unpaid rent plus interest¹¹. It will be ensured that BAV will be paid only for the use of the site, so that any overcompensation can be ruled out.
- (22) After 25 years, in 2024, the market value of the new studio will be assessed by an independent expert and BAV will be able to buy the new studio from BFH at that price, possibly offsetting it against the accumulated unpaid rent plus interest. If the market value of the building in 2024 exceeds the accumulated debt to BAV, BAV will have to pay the difference. It can be excluded, therefore, that BAV will enjoy any advantage in acquiring the studio¹². It can thus be concluded that the new approach ensures that, in future, BAV will not derive any advantage within the meaning of Article 87(1) of the EC Treaty from the operation of the new studio and that, accordingly, possible future state aid to BAV can be excluded. BAV will give up its 30% shareholding and charge BFH the real cost of administering the new studio and of renting the building. After 25 years BAV will also have to pay the market price for acquiring the facility. It was originally planned that, when the 25 years were up, ownership of BFH's new building, together with its fixtures and fittings, would be transferred free of charge to BAV.

¹⁰ The value of the site is estimated at € 670 000. The annual payment will be €183 500€ thus ensuring a nominal rate of return of 5%, reflecting normal market conditions.

¹¹ BAV will charge a market interest rate. The interest rate is the prime lending rate plus 4%, which would appear to reflect the rate that can be expected from lending money to an undertaking such as BFH.

¹² In view of the fact that payment of the rent is deferred, according to Germany the possibility can be excluded that BFH might become insolvent and that BAV might derive in the course of the insolvency proceedings an advantage from the fact that the studio is built on its land.

6.1.2. For the past - effects already produced by the operation prior to the new approach

- (23) Tables 1 and 2 indicate the payments received by BAV from 1999 to 2005. These payments can be divided into two categories: compensation for administering the site and BAV's agreed share of the earnings. They can be summarised as follows:

Table 4 - Payments to BAV - compensation and profit

	From October 1999 EUR	2000 EUR	2001 EUR	2002 EUR	2003 EUR	2004 EUR	2005 EUR
A. Total income	61 000	333 000	250 000	205 000	252 000	258 000	181 000
B. Guaranteed payments to BFH	38 000	153 000	153 000	115 000			
C. Operating costs (paid to BAV)	23 000	103 000	97 000	84 000	79 000	103 000	92 000
<i>of which:</i>							
<i>D. Maintenance, water, electricity, heating, etc.</i>	7 000	53 000	66 000	62 000	18 000	42 000	31 000
<i>E. Security, marketing, overheads and administration</i>	16 000	50 000	31 000	22 000	61 000	61 000	61 000
F= A-B-C. Profits	0	77 000	0	6 000	173 000	155 000	89 000
<i>of which:</i>							
<i>G. Profits to BFH</i>		39 000		4 200	121 100	108 500	62 300
<i>H. Profits to BAV</i>		38 000		1 800	51 900	46 500	26 700
Total payments to BAV: I = C+H.	23 000	141 000	97 000	85 800	130 900	149 500	118 700

- (24) The payments which BAV has received for administering the site (see item C and the breakdown in items D and E of Table 4) reflect in part actual expenditure and in part estimated costs agreed ex-ante in the business management contract. These sums are, even allowing for the "good" years 2000 and 2004, when payments to BAV amounted to €103 000, consistently lower than the detailed cost projections made for 2006, amounting to more than €106 405 (see Table 3), and have not conferred on BAV any undue advantage.
- (25) As regards BAV's share in the earnings, this was intended to compensate BAV for the rent-free use of the land. These payments are lower than the market price for renting the land, which currently amounts to €83 500 per annum (see paragraph 15).

- (26) Even adding up all revenues accrued to BAV (administration and profits, as indicated in item I), it can be concluded from Table 4 that the sum of all payments made to BAV during the period 1999-2005 is lower overall than the estimated market value of the use of the site (currently €183 500 per annum). The reason for this is that it was originally planned that, at the end of 25 years, ownership of BFH's new building, together with its fixtures and fittings, would be transferred free of charge to BAV, and this would have constituted an "additional" advantage for BAV. Under the new approach, however, BAV will pay a market price for acquiring the studio. On the basis of these considerations, it can be concluded that BAV has not derived from the operation – in the years from 1999 to 2005 – any advantage within the meaning of Article 87(1) of the EC Treaty.
- (27) Accordingly, concerning the past operation of the new studio, it can be concluded that BAV has not received any state aid.

6.2. Possible aid in connection with the use of the studio

- (28) It could be argued that, apart from any possible overpayments to BAV for administering the studio (see Table 4), BAV might benefit from preferential treatment when using the studio.
- (29) According to the information provided by Germany, most of the films were produced by companies unrelated to BAV¹³. Germany has confirmed that BAV does not have preferential access to the studio. Furthermore, all film producers have been, and will continue to be, entitled to use the studio under the same conditions and at the same price as BAV. The Commission has been assured that BAV is treated on an equal footing with all its competitors and that it did not and will not benefit from any preferential treatment and thus has not derived and will not derive any advantage within the meaning of Article 87(1) of the EC Treaty from the use of the new studio.

6.3. Conformity of the new approach with the market economy investor principle

- (30) As for the market economy investor principle, to which reference was made in the decision opening the procedure, this had to do with the fact that LfA and BAV did not invest on equal terms in BFH, which was considered tantamount to aid in favour of BAV. The new approach tackles this problem by making LfA sole owner of BFH. Under the new approach, LfA will own 100% of the income earned by BFH, which will be charging all users of the studio market prices, and it will receive all the dividends paid by BFH. Finally, in 2024, LfA will receive the market price for the sale of the studio. Therefore, *prima facie* LfA's investment in BFH is in line with the market economy investor principle.

¹³ See footnote 8.

7. CONCLUSIONS

- (31) In the light of the foregoing, the Commission has found that, under the terms of the new approach, the measure under review does not confer any advantage on BAV and therefore does not constitute state aid within the meaning of Article 87(1) of the EC Treaty in favour of BAV,

HAS ADOPTED THIS DECISION:

Article 1

LfA Förderbank Bayern's investment in Bayerische Filmhallen GmbH, as communicated by Germany in an amended form, does not constitute state aid within the meaning of Article 87(1) of the EC Treaty in favour of Bavaria Film GmbH.

Article 2

This Decision is addressed to Germany.

Done at Brussels, 21 March 2007

For the Commission

Neelie KROES
Member of the Commission
