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Competition DG

Information, Communication and Media

**State aid**

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**Subject:**        **State aid No N 587/2009 – Spain**  
***Spanish national film support scheme***

Sir, /Madam,

## **1. SUMMARY**

- (1) I am pleased to inform you that the European Commission has assessed the above aid and decided to consider the aid to be compatible with the TFEU<sup>1</sup>. The scheme is approved until 31 December 2015 on the basis that the Spanish authorities have undertaken to amend the scheme if required by changes to the relevant State aid rules during this period.

## **2. PROCEDURE**

- (2) On 29 October 2009, Spain notified to the Commission the above-mentioned aid measure. The measure was notified under the Notice on simplified procedure in particular point 5 (a) (xi) of the Notice<sup>2</sup>. A summary of the notification was published on the website of the Commission on 3 October 2009.
- (3) Before the end of the consultation period the Commission received a complaint from Cineastas contra la Orden, a group of 205 Spanish filmmakers, technicians and critics. As required by the Notice, the

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<sup>1</sup> With effect from 1 December 2009, Article 87 of the EC Treaty has become Article 107 of the Treaty on the Functioning of the European Union (TFEU); the two sets of provisions are in substance identical. For the purposes of this Decision references to Article 107 of the TFEU should be understood as references to Articles 87 of the EC Treaty when appropriate.

<sup>2</sup> OJ C136, 16.06.2009, p. 3-12.

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Commission reverted to the normal procedure and asked the Spanish authorities to respond to the allegations made in the complaint on 27 November 2009. The Spanish authorities replied on 30 November 2009.

- (4) On 30 November 2009, the Commission received a complaint from the Coordinadora de asociaciones profesionales del audiovisual de Galicia. The Commission asked the Spanish authorities to respond to these allegations on 4 December 2009. The Spanish authorities replied on 14 December 2009.
- (5) On 11 December 2009, the Commission received a further complaint, from CIMA Asociación de Mujeres Cineastas de España. The Commission forwarded the complaint to the Spanish authorities on 14 December 2009. The Spanish authorities replied on 14 December 2009.

### 3. DESCRIPTION

- (6) According to the Spanish authorities, the objective of the overall film support scheme is to encourage the cultural and linguistic diversity of Spain in the European context by supporting filmmakers, new creators and independent film production and distribution.
- (7) The legal bases for the scheme are the Ley 55/2007 de 28 de diciembre, del Cine<sup>3</sup>, the Real Decreto 2062/08 de 12 de diciembre<sup>4</sup> que la desarrolla and the Orden<sup>5</sup> por la que se dictan normas de aplicación del Real Decreto 2062/08.
- (8) The granting authority is the Instituto de la Cinematografía y de las Artes Audiovisuales (ICAA), which is part of the Spanish Ministry of Culture.
- (9) The overall budget of the scheme is €576 million. The annual budget varies as follows:  
  
2010: €90m  
  
2011: €93m  
  
2012: €96m  
  
2013: €99m  
  
2014: €99m  
  
2015: €99m
- (10) The scheme includes the following types of aid measures, of which all are selective apart from the audience-based support:

*Selective pre-production & production support*

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<sup>3</sup> [http://noticias.juridicas.com/base\\_datos/Admin/155-2007.html](http://noticias.juridicas.com/base_datos/Admin/155-2007.html)

<sup>4</sup> [http://noticias.juridicas.com/base\\_datos/Privado/rd2062-2008.html](http://noticias.juridicas.com/base_datos/Privado/rd2062-2008.html)

<sup>5</sup> <http://www.boe.es/boe/dias/2009/10/24/pdfs/BOE-A-2009-16839.pdf>

- Support for feature film script-writing;
- Support for the development of feature film projects;
- Support for feature film production projects;
- Support for TV film productions projects;
- Support for the production of animation series projects;
- Aid for financing film activities (also available for distribution).
- Support for production of short films, whether projects or completed;
- Aid for the production of audiovisual works using new technologies for broadcast in cinemas, television or home video;

*Automatic production support*

- General and complementary support for the audience-based support for feature films;

*Selective distribution & promotion support*

- Support for the theatrical distribution of EU and Latin American films;
- Support for the distribution of EU and Latin American films in alternative venues;
- Support for the conservation of film heritage;
- Support for organising film festivals and film competitions in Spain

*Other support*

- Support for the participation of Spanish films in festivals
- Support for cultural projects and for non-formal training ;

(11)The aid is only available to films which meet the Spanish nationality requirement, together with the specific criteria for the separate measures within the scheme, as evaluated by the relevant committees. To obtain Spanish nationality, a film or audiovisual work must have all five of the following characteristics:

- at least 75% of the creative team (director, screenwriter, cinematographer and music composer) are Spanish/EEA nationals or residents. In any case, the director of the film must always meet this requirement;
- at least 75% of the actors and other artists participating in the film or audiovisual work are Spanish/EEA nationals or residents;
- at least 75% of the creative technical personnel, and similar other technical personnel are Spanish/EEA nationals or residents;
- the original version of the film or audiovisual work is preferably in any official language of the Spanish State; and

- the shooting, except as required by the script, post-production and laboratory work take place in the EU. For animated films, all the production processes should be carried out in the EU.
- (12) The Spanish authorities have committed to ensure that a film would only be allowed to avoid the above language requirement in very exceptional cases, particularly coproductions meeting the criteria of the European Convention on Cinematographic Coproduction or those of other international coproduction agreements to which Spain is a signatory.
- (13) The fulfilment of all these requirements is checked for every film by the ICAA (or by the regional authorities in certain cases). Coproductions have to be approved by the Film Production Committee to benefit from the scheme. This committee checks the application of the general Spanish rules on coproductions, or the European Convention on Cinematographic Coproductions, or any other international binding instruments, if applicable.
- (14) Certain films and audiovisual works are excluded from support, such as those produced directly by TV broadcasters, commercials, political propaganda and X-rated films.
- (15) Only independent film producers, distributors and cinemas are eligible for the production and distribution support, respectively, under the scheme. The detailed definitions of independent producers, distributors and cinemas are stated in Article 4 of the December 2007 Film Law. The Spanish authorities have underlined that entities which have majority control from outside the EEA are not eligible for any of the support under the scheme.
- (16) Independent film producers, distributors and cinemas are defined as follows (Article 4(n)-(o), Ley 55/2007):

**Independent producer:** cannot be subject to influence by a dominant service provider of communications / radio / TV broadcasting or a holder of a private television channel, and, in turn, exert a dominant influence, whether, in any of assumptions, for reasons of ownership, financial participation or having the option of influencing in some way, the decisions of boards of respective management.

[...]

**Independent distributor:** major shareholder is not a non-EEA corporate entity, nor does it depend on such an entity for its executive bodies, its shareholders, its capacity of decision or its business strategy. In addition, no television operator, communications company or public entity can have a major share in such a distributor or provide its executive bodies, its shareholders, its capacity of decision or its business strategy.

**Independent exhibitor:** not majority owned by production companies or non-EU capital distribution, or depend upon them according to their executive bodies, its shareholders, its decision-making capacity or their business strategy. Similarly, its major shareholder is not a TV company, a communications network or a public entity, and does not depend on such entities for its executive bodies, its shareholders, its decision-making capacity or its business strategy.

***Selective pre-production, production, distribution & promotion support***

- (17) For the selective support, projects are evaluated by a panel of experts of recognised standing in the field of culture, publishing, film and professional associations representing the sectors concerned. The panel for a particular type of support evaluates projects according to detailed criteria relevant to the activity being supported, such as the originality and quality of the draft screenplay and its cinematographic viability, the project's contribution to knowledge and dissemination of film culture, the cinematographic quality and artistic value of the project, as well as the project's application of gender equality in the creative activities of direction and screenplay.
- (18) The aid for financing film activities allows the ICAA to enter cooperation agreements with banks and other credit institutions, such as the Instituto de Credito Oficial, to offer low interest loans (eg, 2% below the base rate) for film production, distribution and exhibition. Of the total budget of €7 million for this support, €4.5 million is used to subsidise film production loans. According to the Spanish authorities, financial institutions are expected to offer these subsidised film production loans on the basis of the estimated amortisation support a particular film would receive. This allows independent film producers to obtain loan finance during production based on the expected amortisation support which would be received after the film is released.
- (19) Only the aid for short films and for animated TV series can have an aid intensity of over 50% for difficult or low-budget films. Short films can receive up to 100% aid. Animated TV series can receive up to 60% aid.
- (20) The scheme includes support for the organisation of around 45 film festivals or contests of recognised prestige which are held in Spain, and those which pay special attention to programming and promoting Spanish, European or Latin American films or audiovisual works. Apart from five major film festivals, which receive an average of €100,000 per year, the remainder receive an average of €18,000 per year. According to the Spanish authorities, in almost cases, these film festivals or contests are organised by local municipalities directly.

#### ***Automatic production support***

- (21) The general and complementary audience-based support for eligible feature films is intended to reward successful Spanish/European films.
- The general support is proportional to the number of paying viewers<sup>6</sup> in the first twelve months of a film's release. If the number is under 35,000, the aid is 15% of the number. When the number is over 35,000, the aid is  $((N-35000)/1,000,000+1)*N$ . The maximum aid amount is €800,000 per film, subject to the 50% cumulative aid limit and a maximum of 75% of the investment of the independent producer.
  - The complementary support is only available to those films which have a production budget over €600,000 and which have not received any aid

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<sup>6</sup> Including cinema admissions and the number of video-on-demand and physical media sales.

from the measure supporting the production of feature film projects. Those films with budgets between €600,000 and €2 million can only receive this support if they fulfil certain additional criteria, such as being invited to the official selection of a prestigious international film festival, and receiving other awards or honours. Films with budgets over €2 million (or €1.5 million in the case of foreign coproductions or Spanish language films) and at least 60,000 viewers in the first 12 months of release (45,000 in the case of films made by first- and second-time directors or in the Spanish language) representing a high risk for independent producers may receive €15,000 per €45,000 invested by the independent producer. The maximum aid amount is €1.2 million per film, subject to the 50% cumulative aid limit and a maximum of 75% of the investment of the independent producer.

(22) Les autoridades españolas commit to require every film intending to access the automatic support to have a certificate confirming that the film is a cultural work. This certificate would be issued by the Director General of the ICAA (Instituto de la Cinematografía y de las Artes Audiovisuales) who would verify that the film can be considered a cultural work and would increase the cultural diversity of films being released in Spanish cinemas. The Director General will consult the Committee of Aid to Cinematographic Support (a consultative body composed of cultural experts) about the content of these certificates before they are issued. This Certificate would be granted without any further requirement to those film projects which have been approved for an aid under the selective aid scheme ("Ayudas a proyecto de largometraje"), and to those film projects approved as international co productions, since in both cases the cultural content has already been expressly verified by the said Committee. This would be applied in the same terms as all the other changes to the automatic support, that is, to films released after October 1, 2010, or January 1, 2011 if the producer so requires (See Disposición Final Tercera of the Ministerial Order).

### ***Other support***

(23) The support for cultural projects and for non-formal training encourages natural or legal persons to develop film-related professional training, media literacy and book projects. The Spanish authorities have given assurance that most of this support would be granted in accordance with the conditions set by the training aid block exemption while the remainder, namely the support for film-related book projects, would be treated as *de minimis*. Therefore, this part of the scheme is not covered by this decision.

(24) The support for the participation of films at international festivals aims to promote the cultural and artistic values of Spanish cinema at international level. Those films selected in official competition for prestigious international festivals and prizes may be entitled to receive aid for the costs of participation and of promotion during the festival. A committee is responsible for making the preliminary selection of films to be selected for those festivals, and establishing criteria to be taken into account for this selection. The Spanish

authorities have given assurance that this support would be treated as *de minimis*. Therefore, this part of the scheme is not covered by this decision.

#### **4. ASSESSMENT OF THE MEASURE**

##### **4.1. Existence of aid within the meaning of Article 107(1) of the TFEU**

(25) As shown by the features of the measure described in the summary of the notification, the notified scheme allows a selected number of enterprises to be relieved, by means of State resources, of a part of their costs regarding financing cinematographic activities which they would normally have to bear themselves. Consequently, the support from the State strengthens the position of a selected number of beneficiaries in relation to their competitors in the Community and therefore has the potential of distorting competition. Since the beneficiaries are active in selling products or services which are, at least potentially, subject to intra-Community trade, this support is likely to affect trade between Member States.

(26) The Commission therefore concludes that the notified scheme constitutes State aid within the meaning of Article 107(1) TFEU as moreover confirmed by the notifying Member State in its notification.

##### **4.2. Compatibility of the aid**

(27) The Commission's Cinema Communication<sup>7</sup> provides for special rules on assessing aid to the production of cinematographic and other audiovisual works under Article 107 (3) (d) of the TFEU. The aid can be justified if the aid scheme complies with the general legality principle and the four specific compatibility criteria regarding cultural content, territorial conditions, aid intensity and aid supplements, as set out in the Cinema Communication.

(28) Although the Communication applies to aid in favour of the production of films, the criteria of the Communication can serve as a reference for assessing the compatibility of support measures concerning the promotion of films with the State aid rules of the TFEU. Given that a part of the cinematographic activities do not form part of the production of films, the Commission has to carry out a separate assessment of the necessity and proportionality of the measure directly under Article 107 (3) (d) of the TFEU. However, given that these activities are closely linked to the production of films, the Cinema Communication is regarded as a pertinent reference when assessing the compatibility of the State aid.

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<sup>7</sup> 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 26/9/01, OJ C 43/6 of 16/2/02); prolonged in 2004 (OJ C 123/1 of 30/4/04) and 2007 (OJ C 134/5 of 16/6/07) until 31 December 2009.

## A. General legality principle

- (29) As stated in point 2.3 (a) of the Cinema Communication, the Commission must verify that the scheme does not contain clauses that would be contrary to Treaty provisions in fields other than State aid.
- (30) To be in line with the freedom of establishment provisions of the Treaty, the Cinema Communication requires that beneficiaries need not have a permanent branch or agency in the territory before the aid is paid. There is no such requirement in the legislation at stake. In this case, the registration requirement is accordingly only imposed at the time of payment of the aid. The Commission also notes that the scheme is explicitly open to businesses with a fiscal registration in any EEA country. Consequently, on the basis of the information provided by the Spanish authorities, the notified scheme does not raise any issues in respect of the general legality principle.

## B. Cultural product

- (31) According to point 2.3. (b) 1. of the Cinema Communication, the aid must be directed towards a cultural product. Each Member State must ensure that the content of a production which benefits from aid is cultural according to verifiable national criteria (in compliance with the application of the subsidiarity principle).
- (32) Il y a lieu de rappeler tout d'abord que la Commission a approuvé en 2002<sup>8</sup> un schéma espagnol comparable par de nombreux aspects au schéma ici examiné et l'a déclaré compatible avec le marché intérieur en application de l'article 107§3 (d) TFUE.
- (33) L'Espagne se propose de favoriser la production et la distribution d'œuvres cinématographiques culturelles, susceptibles d'attirer un certain public en Espagne, en favorisant la diversité culturelle des œuvres présentées au public, et en mettant particulièrement l'accent sur la préservation des langues nationales espagnoles.
- (34) Selon les autorités espagnoles, la nécessité de soutenir la diversité cinématographique en Espagne résulte en particulier de l'importance considérable des parts de marché des productions américaines. The Spanish authorities have underlined that the market share of Spanish films in 2008 was 13.3% of the Spanish market and 1.4% of the EU market. In comparison, US films had a 71.5% share of the Spanish market<sup>9</sup>.
- (35) The notified scheme comprises complementary selective and automatic measures which the Spanish authorities believe are necessary to achieve their

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<sup>8</sup> State aid: N142/02: [http://ec.europa.eu/community\\_law/state\\_aids/comp-2002/n142-02.pdf](http://ec.europa.eu/community_law/state_aids/comp-2002/n142-02.pdf)

<sup>9</sup> Source: *Focus – World Film Market Trends 2009* published by the European Audiovisual Observatory ([http://www.obs.coe.int/online\\_publication/reports/focus2009.pdf](http://www.obs.coe.int/online_publication/reports/focus2009.pdf))



objective of preserving linguistic and cultural diversity among the films available to Spanish and European audiences.

(36) On the one hand, the selective support is intended to sustain arthouse films. For each type of selective support, projects are evaluated by a panel of recognised cultural experts on the basis of a detailed framework of additional relevant criteria to ensure that the most cultural projects are supported.

(37) On the other hand, to encourage independent producers to make better-financed films which can attract larger audiences, success and risk taking are rewarded by the audience-based support, with the objective of encouraging independent producers, distributors and exhibitors to invest in larger films rooted in Spanish/European culture, which are able to compete with the high, US market share in Spain.

(38) All projects supported by the scheme must fulfil all the requirements in paragraphs (11)-(16).

(39) A cet égard, la Commission observe que :

- les autorités espagnoles ont opté pour un soutien ciblé de la production cinématographique en réservant l'aide à des films produits par des producteurs indépendants ; ce critère d'attribution de l'aide contribue à remplir l'objectif de diversité culturelle, en écartant du mécanisme d'aide large-scale, mainly US, film production companies. Les autorités espagnoles ont encore cherché à éviter les effets d'attraction de l'aide automatique sur les grosses productions commerciales, en limitant le montant maximal de l'aide par film à €2m. De la même manière, l'aide à la distribution de films n'est disponible que pour les distributeurs et exploitants indépendants.
- One of the requirements is that the film's original language version is preferably in any of the official languages of Spain. The Spanish authorities have underlined that, in practice, it would be very exceptional (eg, a European coproduction with a minority Spanish coproducer) for a film in any language other than an official language of Spain to be considered to be a Spanish film for the purposes of the support available under the scheme. Furthermore, for all support offered by the notified scheme, in addition to the language requirement, the Spanish authorities require that at least 75% of the actors and other performers must be Spanish/European and at least 75% of the creative team, particularly the director, must be Spanish/European.
- Coproductions which meet the terms of either the European Convention on Cinematic Co-Production (the European Convention) or one of Spain's bilateral coproduction agreements do not need to fulfil the language requirement. The European Convention considers that "the defence of cultural diversity of the various European countries is one of the aims of the European Cultural Convention" and that cinematographic co-productions are "an instrument of creation and expression of cultural

diversity on a European scale [and] should be reinforced". The explanatory report of the European Convention states that "European cultural cooperation in the cinema field takes place primarily through co-productions". The European Convention therefore aims to encourage European coproductions as an instrument of furthering European cultural diversity and its expression. Spain's bilateral coproduction agreements, have the same objective as the European Convention (encouraging coproductions) and contain similar requirements. Article 167 TFEU requires the Commission to take cultural diversity into account as part of the application of the cultural chapter of the TFEU. Therefore, the Commission considers that productions qualifying under the conditions of the European Convention and Spain's bilateral coproduction agreements may be considered as meeting the cultural criterion of the Cinema Communication.

- The Spanish authorities have committed that every film intending to access the automatic support ("Ayudas a la amortización de largometrajes") will be reviewed by ICAA (Instituto de la Cinematografía y de las Artes Audiovisuales) to verify the cultural character of the work. In particular, the ICAA would verify that the film is not in contradiction with the objective of increasing the cultural diversity of films being released in Spanish cinemas. The review will be carried out with the support of the Committee of Aid to Cinematographic Support (a consultative body composed by cultural experts). In case the film is in contradiction with the objective of increasing the cultural diversity the director general will issue a motivated decision aimed at excluding the film from the automatic support scheme. This would be applied in the same terms as all the other changes to the automatic support, that is, to films released after October 1, 2010, or January 1, 2011 if the producer so requires (See Disposición Final Tercera of the Ministerial Order).

(40)Compte tenu de l'ensemble de ces circonstances et des assurances données par les autorités espagnoles, il apparaît que les critères d'attribution de l'aide, considérés dans leur ensemble, permettent d'assurer que cette aide est bien dirigée vers un produit culturel.

(41)The submissions received from Cineastas contra la Orden, the Asociaciones profesionales del audiovisual de Galicia and CIMA raised issues concerning the automatic part of the scheme, including an allegation that the aid was not available to films under €600,000 and an alleged lack of preference for female film directors.

(42)According to the Spanish authorities, all the complementary aspects of the scheme need to be supported to achieve their objective of defending and promoting cultural diversity. Ainsi, le support dans son ensemble n'est pas réservé aux films ayant un coût supérieur à 600 000 euros: films under €600,000 can benefit from selective support and from the general part of the automatic, audience-based support. La partie du support réservée aux films de plus de 600 000 euros vise surtout à favoriser les films considérés comme

étant les plus viables et les plus susceptibles d'être vus par les spectateurs espagnols.

(43) Cette limitation du support est cohérente avec l'objectif plus général de diversité culturelle; en tout cas, les autorités espagnoles n'ont pas, à cet égard, commis d'erreur manifeste d'appréciation. Les autorités espagnoles sont libres de limiter leur soutien à certains films et oeuvres audiovisuelles dès lors que ce soutien est bien dirigé vers des produits culturels, ce que la Commission a vérifié ci-dessus. De la même façon, les autorités espagnoles sont libres de fixer l'intensité des aides proposées dès lors que les plafonds d'aides fixés par la Communication sont respectés. Enfin, il ne résulte d'aucune règle communautaire que les Etats membres seraient obligés d'assurer que la moitié des aides au cinéma soit attribuées à des films écrits ou réalisés par des cinéastes féminins.

#### C. Territorial conditions

(44) There is no obligation to spend any of the cinematographic activities' costs subsidised by the scheme in Spain. There is also no pre-condition about expenditure of the production budget of the film when awarding the aid. Based on the information provided by the Spanish authorities, the only territorial restriction is that in case the majority of the shooting takes place outside the Spanish territory, the aid is lowered by 5%. Consequently, these conditions allow producers to spend at least 20% outside Spain without incurring any reduction in the amount of aid, as required by the Cinema Communication.

#### D. Aid intensity

(45) For almost all the support under the scheme, the 50% aid intensity limit of the Cinema Communication is applied. However, in exceptional cases, for difficult and low budget films, the cumulated aid intensity may amount up to 60% of the production budget in the case of animated TV series and up to 100% in the case of short films. Consequently, in view of the high production costs of eligible animated TV series and the limited commercial prospects for short films, the scheme satisfies the aid intensity criterion of the Cinema Communication.

#### E. Necessity and proportionality

(46) The Spanish authorities note that the number of spectators for European & South American cultural films in Spain has been decreasing year after year, compared with that for North American films. This is why Spain considers that one way of encouraging spectators to watch quality feature films in cinemas is to support the promotion and marketing of quality feature films which are of high cultural interest.

(47)The maximum aid available is limited to € 1 million and the maximum aid intensity is limited to 50% of the total cinematographic activities budget of the film, except for short films and animated TV series, which are considered by the Spanish authorities to be difficult or low-budget films. Bearing in mind the types of films which are being supported, the Commission considers that the present measure is necessary and proportionate to promoting the common interest objective of promoting the representation of cultural and artistic European films at international level, for example through the support for participation and organisation of film festivals.

(48)Therefore, the Commission considers that the measure is necessary and proportionate to the objective pursued and does not distort competition to an extent which would be contrary to the common interest in line with Article 107 (3) d) of the TFEU.

(49)The Commission's analysis confirms that the notified measure fulfils both the substantive and procedural requirements laid down in the Cinema Communication.

## 5. CONCLUSION

(50)In view of the above, the Commission finds that the aid granted on the basis of the measure in question is compatible with the common market in accordance with Article 107 (3) (d) of the TFEU and has accordingly decided not to raise objections to the notified measure.

(51)The scheme has been approved until 31 December 2015 on the basis that the Spanish authorities have committed to amend the scheme if required by a change in the relevant State aid rules during the lifetime of the scheme.

(52)The Member State has indicated in the context of the notification process that the summary nature of this decision implies that it does not contain any confidential information. Therefore, you will be deemed to agree to the disclosure to third parties and to the publication of the full text of the letter in the authentic language on the Internet site:

[http://ec.europa.eu/community\\_law/state\\_aids/state\\_aids\\_texts\\_es.htm](http://ec.europa.eu/community_law/state_aids/state_aids_texts_es.htm).

Yours faithfully,

For the Commission  
Neelie Kroes  
Member of the Commission