



EUROPEAN COMMISSION

Brussels, 15.07.2015
C(2015) 5032 final

PUBLIC VERSION

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**Subject: State Aid SA.40885 (2015/N) – Spain
Tax deduction for film and audiovisual productions in the Province
of Biscay**

Sir,

1. PROCEDURE

- (1) On 10 February 2015, the Spanish authorities notified certain modifications of a scheme of the Provincial Council of Biscay consisting of tax deductions for cinema and audiovisual productions. Additional information was submitted by the Spanish authorities on 10 March 2015, 17 April 2015, 6 May 2015, 7 May 2015, 12 June 2015, 25 June 2015, 26 June 2015, 29 June 2015, 1 July 2015 and 9 July 2015.

2. DETAILED DESCRIPTION OF THE MEASURE

2.1. General provisions

- (2) The modifications refer to an aid measure which was originally included in the tax system of the historical territory of Biscay by Provincial Law 11/1984 of 27 December on corporation tax (hereafter "original scheme").
- (3) The legal bases of the modified scheme are:
 - (a) The fifteenth additional provision of the Provincial Law 11/2013, of 5 December, on corporation tax (Official Bulletin of Bizkaia, n° 238, 13 December 2013).

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- (b) Provincial Law 3/2015, of 2 March, on the modification of various Provincial Laws on taxation in Bizkaia (Official Bulletin of Bizkaia, n° 46, 9 March 2015).
 - (c) The ninth additional provision of the Provincial Decree of the Bizkaia Provincial Council modifying the Regulation on corporation tax, approved by the Regional Decree of the Bizkaia Provincial Council 203/2013, of 23 December (provided as draft).
- (4) The granting authority is the Provincial Council of Biscay (Diputación Foral de Bizkaia).
 - (5) The measure has a cultural objective: it aims to support the preservation and dissemination of European cultural works.
 - (6) The beneficiaries are producers, subject to the corporation tax.
 - (7) Under the original scheme, the measure provided for a reduction of the net corporate tax payable, corresponding to 20% of the investments made in cinematographic and audiovisual production. The deduction base consisted of the production costs, excluding contributions made by financial co-producers (if any). Such financial co-producers could benefit from a specific tax deduction corresponding to 5% of their investments.
 - (8) In order to be eligible, the audiovisual productions have to obtain a certificate of nationality and a cultural certificate from the Spanish Institute of Cinematography and Audiovisual Arts (Instituto de Cinematografía y de las Artes Audiovisuales (ICAA)).
 - (9) To obtain the cultural certificate, the production must meet at least two criteria out of a list of ten. The criteria refer to the language of the work (original version in one of the Spanish official languages), the location of the story (in Spain), the subject of the story (in relation to expressions of artistic creation, historical events, mythology, European diversity, Spanish reality), the film's characters (linked to the social, cultural or political Spanish reality) and the targeted audience (children or youth). The cultural certificate is described in full detail in (points 5 and 6 of) the Commission Decision on the Spanish scheme for tax deductions in cinema and audio-visual productions, approved in 2014¹.
 - (10) The nationality certificate can be acquired by Spanish production companies or by other EU companies on the condition that they set up an establishment (i.e. a permanent branch or agency) in Spain at the moment of payment of the aid. To receive the certificate, the audiovisual production must fulfil the following requirements:
 - (a) At least 75% of respectively the creative team, the cast and the technical crew should be Spanish or EEA nationals or residents.
 - (b) The original version of the production is preferably in any official language of the Spanish State.

¹ State aid SA.37516 (2013/N) – Spain, Spanish scheme for tax deductions in cinema and audiovisual productions, http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_37516.

- (c) The shooting, post-production and laboratory work should take place in the EU.

These criteria are also described in full detail in an earlier Commission Decision on a Spanish audiovisual scheme, i.e. in paragraph (11) of the Commission Decision of 27 January 2010 in case N 587/2009².

- (11) The effective implementation of the modifications is conditional on their compatibility with Union Law. No aid will be granted under the scheme until the Spanish authorities have received the approval from the Commission contained in this Decision.
- (12) Once approved, the modifications will apply to the tax periods running from 1 January 2014 until 1 January 2020.
- (13) In the past years, the average annual expenditure under the scheme amounted to EUR 800 000. On that basis, the scheme would be implementable under the General Block Exemption Regulation³ (GBER), which covers aid schemes for audiovisual works (Article 54), the budget of which is below EUR 50 million per year (Article 4 (1) (aa)). However, the measure cannot be implemented under the GBER because the exemption does not apply to tax measures that do not provide an upper cap ensuring that the notification threshold is not exceeded (Article 5 (2) (d) GBER). This is the case here and as such, the actual annual expenditure under the scheme may exceed the EUR 50 million threshold. The Spanish authorities have indicated that they expect the annual expenditure under the modified scheme to go significantly above the levels of previous years.

2.2. Modifications to the measure

- (14) The modifications to the measure relate in the first place to the applicable aid intensities and the eligible costs. The Spanish authorities have used the modification process to introduce a number of other provisions that are required by the 2013 Cinema Communication⁴, such as the definition of difficult works and the transparency requirements.
- (15) The modified measure provides for a deduction rate, corresponding to 30% of the production, distribution and promotion costs borne by the production company of a feature film or audiovisual (fiction, animation or documentary) series. The distribution and promotion costs are taken into account up to a limit of 40% of the production budget. Subventions received to finance the production are not included in the deduction base, which is only formed by the costs that have been carried by the production company.

² State aid No N 587/2009 – Spain, Spanish national film support scheme, http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_29638.

³ Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, OJ L 187 of 26 June 2014, p. 1.

⁴ Communication from the Commission on state aid for films and other audiovisual works, Official Journal of the European Union, 15.11.2013, C 332, pp. 1-11.

- (16) The specific provisions for financial co-producers are no longer part of the modified measure.
- (17) The cumulative aid intensity under the scheme amounts to 50% of the production budget. For cross-border productions a higher limit of 60% applies. The aid intensity limits do not apply to difficult audiovisual works and co-productions with countries from the DAC (Development Assistance Committee) list of the OECD.
- (18) According to the Provincial Council of Biscay, the following are difficult audiovisual works:
 - (a) Short films;
 - (b) Films by first-time and second-time directors;
 - (c) Works of which the original version is in the Basque language only;
 - (d) Low-budget works, of which the production costs are not higher than EUR 500 000;
 - (e) Works that because of their theme or because of other elements inherent to their production have difficulties entering the market. For works falling into this category, the beneficiary is required to demonstrate the commercial difficulties of the works and to request from the tax administration that the work is qualified as difficult.
- (19) A specific provision has been introduced, which states that all applicants under the measure give their consent to the dissemination of the data foreseen in point 52 (7) of the 2013 Cinema Communication (transparency requirement). On 21 May 2014, the Commission adopted a Communication aligning the transparency requirements across a number of revised state aid rules⁵, which modifies the transparency requirements included in point 52 (7) of the Cinema Communication. The Spanish authorities have committed that they will put in place these modified transparency mechanisms.

2.3. Other elements

- (20) The 2013 Cinema Communication invited the Member States to encourage and support producers to deposit a copy of the aided film in the film heritage institution designated by the funding body for preservation, as well as for specified non-commercial use agreed with the right holder(s).
- (21) The measure foresees that a copy of the production has to be deposited in the Spanish Cinematheque (Filmoteca Española) or the official film archive recognised by the relevant Autonomous Community.

⁵ Communication from the Commission amending the Communications from the Commission on EU Guidelines for the application of State aid rules in relation to the rapid deployment of broadband networks, on Guidelines on regional State aid for 2014-2020, on State aid for films and other audiovisual works, on Guidelines on State aid to promote risk finance investments and on Guidelines on State aid to airports and airlines (C(2014) 3349/2), http://ec.europa.eu/competition/state_aid/modernisation/state_aid_transparency_en.pdf.

3. ASSESSMENT OF THE MEASURE

3.1. Existence of State aid

- (22) According to Article 107 (1) TFEU: "*Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.*"
- (23) In order to be classified as a State aid, the measure must thus fulfil the following cumulative conditions: a) the measure must be granted through State resources; b) it has to confer an economic advantage to undertakings; c) this advantage must be selective; and d) the measure must distort or threaten to distort competition and affect trade between Member States.
- (24) The measure is financed through State resources since it implies a cost to the State in terms of loss of fiscal revenue, and it is imputable to the State.
- (25) The measure benefits production companies through a reduction of their fiscal obligations and as such confers an economic advantage to undertakings.
- (26) The scheme is selective in nature as it only applies to companies active in audiovisual production.
- (27) The scheme is liable to improve the competitive position of the recipient compared to other undertakings with which it competes and therefore distorts or threatens to distort competition. Since audiovisual works are traded internationally, the financial advantage granted to the beneficiaries under the scheme affects trade between Member States.
- (28) Therefore, the Commission considers that the scheme constitutes State aid within the meaning of Article 107 (1) of the TFEU. The compatibility of the aid therefore has to be assessed.

3.2. Existing or new aid

- (29) The original scheme was adopted by Provincial Law 11/1984 of 27 December on corporation tax, therefore before Spain's accession to the European Economic Community on 1 January 1986. The Commission considers that, to the extent that it constituted State aid, the original scheme constituted existing aid in the sense of article 1(b) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty.
- (30) The Commission notes that, with the notified modification, the original scheme's scope is substantially expanded to cover also promotion and distribution costs borne by the producer. Modifications like this one appear as additions to the original scheme, adding a category of eligible expenses to it without affecting the intrinsic functioning of the initial scheme as regards the other eligible expenses. The increased deduction rate however affects the functioning of the scheme as a whole in a substantial way. When there are significant changes to the existing aid, which affect the substance of the original scheme, the latter is transformed into a

new aid scheme⁶. In light of the above, the Commission considers the modified measure as a new aid measure.

3.3. Compatibility of the aid

- (31) The Commission's Communication on state aid for films and other audiovisual works (2013 Cinema Communication, see footnote 4) provides for special rules for assessing the compatibility of State aid for films and other audiovisual works under Article 107 (3) (d) of the TFEU. The aid can be justified if the aid scheme complies a) with the general legality principle and b) with the specific compatibility criteria set out in the Cinema Communication (in its point (52)).

3.3.1. General legality

- (32) Under the principle of "general legality", the eligibility conditions and award criteria may not contain clauses contrary to the TFEU in fields other than state aid. This includes ensuring that the TFEU principles prohibiting discrimination on the grounds of nationality, free movement of goods, free movement of workers, freedom of establishment, freedom to provide services and freedom of movement of capital have been respected (Articles 18, 34, 36, 45, 49, 54, 56 and 63 TFEU).
- (33) In compliance with the above principles, aid schemes must for example not reserve aid exclusively for nationals or require beneficiaries to have the status of national undertaking established under national commercial law.
- (34) The Cinema Communication (point 50) moreover puts limits to the territorial spending obligations film support schemes can establish.
- (35) The modified scheme does not have any territorial spending obligations. In other words, 100% of the production activity may take place outside the Spanish territory, without impact on the aid.
- (36) The modified scheme does not contain any other provisions that would raise issues with respect to the general legality principle. The Spanish authorities confirmed that not only resident tax-payers, but also non-residents that are subject to the income tax for non-residents may benefit from the measure. The criteria applied to receive the Spanish nationality certificate (see paragraph (10)) do not introduce any problematic restrictions in terms of nationality or residence of the film's cast and crew, nor do they limit the certificate to films of which the production takes place in Spain.

3.3.2. Specific assessment under point 52 of the Cinema Communication

- (37) Under the Cinema Communication, Member States must ensure that the aid is directed to a cultural product, according to their own national criteria and through an effective verification process to avoid manifest error. In line with the subsidiarity principle, the Commission's task is limited to verifying if a Member State has a relevant, effective verification mechanism in place, either through the set-up of a cultural selection process or by conditioning the aid on the basis of a cultural profile to be fulfilled by all applying projects. Under the notified scheme,

⁶ See Joined Cases T-195/01 and T-207/01 *Government of Gibraltar v Commission* 2002 [ECR] II-2309, points 109 to 111.

the productions have to demonstrate their cultural character by acquiring a certificate in that respect from an independent public organisation, the ICAA (see paragraph (9)).

- (38) The (cumulative) aid intensity must in principle be limited to 50% of the production budget, with higher intensity levels possible for cross-border co-productions funded by more than one Member State (up to 60% aid intensity), difficult audiovisual works and co-productions with countries from the DAC list of the OECD. The Basque measure follows these limits. The Spanish authorities have provided a definition of difficult audiovisual works (see paragraph (18)) that is in line with the Cinema Communication.
- (39) According to the Cinema Communication, apart from script-writing, development, distribution or promotion, aid granted for specific production activities is not allowed. The modified scheme is in line with this provision.
- (40) The aid should be awarded in a transparent manner. The modified measure includes a specific provision in this respect (see paragraph (19)).
- (41) In conclusion, the Commission therefore considers the aid measure to be compatible with Article 107 (3) (d) TFEU.

4. CONCLUSION

- (42) The Commission has accordingly decided not to raise objections to the measure on the grounds that it is compatible with the internal market pursuant to Article 107 paragraph 3 (d) of the Treaty on the Functioning of the European Union.

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Your request should be sent electronically to the following address:

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Yours faithfully
For the Commission

Margrethe VESTAGER
Member of the Commission