EXPLANATORY MEMORANDUM TO

THE FILMS (DEFINITION OF "BRITISH FILM") ORDER 2015

2015 No. 86

1. 1.1 This Explanatory Memorandum has been prepared by the Department for Culture, Media and Sport and is laid before Parliament by Command of Her Majesty.

2. Purpose of the Instrument

2.1 This Order modifies the statutory test that is used to assess whether a film is culturally British. The test, set out in Schedule 1 to the Films Act 1985 (the "1985 Act"), is to be amended so that points are awarded for use of characters, languages and settings from other European Economic Area ("EEA") states; more points are to be awarded when a high percentage of a film's dialogue is in English or another EEA language; and more points will be awarded when a high percentage of the production's principal photography, special or visual effects work is carried out in the United Kingdom. The effect of the changes will be to increase the number of points available from 31 to 35. The pass mark is accordingly being raised from 16 to 18.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Legislative Context

4.1 Schedule 1 to the 1985 Act sets out the requirements to be satisfied for a film to be certified as a British film by the Secretary of State. The test is split into three sections: ordinary films (paragraph 4A), documentaries (paragraph 4B), and animations (paragraph 4C). The criteria of the test are essentially the same for all three categories of film. Certification under paragraph 4 of that Schedule is a qualifying condition for film production companies to claim corporation tax relief in accordance with Part 15 of the Corporation Tax Act 2009. It is known as "the cultural test".

4.2 Paragraph 10(2) of Schedule 1 to the 1985 Act provides that the Secretary of State may, with the approval of the Treasury, make modifications to paragraphs 1 and 4 to 5 of that Schedule. This power has been exercised three times before[1]. This power is subject to the affirmative resolution procedure of both Houses of Parliament.

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[1] See SI 1999/2386 http://www.legislation.gov.uk/uksi/1999/2386/contents/made , SI 2006/643 www.legislation.gov.uk/uksi/2009/3009/pdfs/uksi_20093009_en.pdf and SI 2006/3430 www.legislation.gov.uk/uksi/2007/3478/pdfs/uksi_20073478_en.pdf

5. Territorial Extent and Application

5.1 This instrument applies to all of the United Kingdom.

6. European Convention on Human Rights

6.1 The Minister of State for Culture and the Digital Economy has made the following statement regarding Human Rights:

In my view the provisions of the Films (Definition of "British Film") Order 2015 are compatible with the Convention rights.

7. Policy Background

7.1 The aim of the cultural test is to apply objective criteria to identify culturally British films. Points are awarded to elements that contribute to the cultural value of a film, including the story and language of the film, where it is set and where it is made, and the nationality of the persons involved in the making of the film. The test also operates a 'golden points' rule, in which films must obtain a minimum number of points under the characters, story and setting criteria in order to pass.

7.2 The existing cultural test for film was introduced in 2007 and has proved highly successful as a means of promoting the British film industry by enabling access to tax relief on film production costs. In 2013 the Government introduced tax reliefs for high-end television, animation programmes and video games, and these reliefs are also accessible on the basis of cultural tests modelled on the cultural test for film (although with drafting and policy improvements based on experience from the application of the film cultural test). This Order will align the film cultural test with the other three cultural tests (for example, by allowing EEA-related content to qualify).

7.3 The changes made to the test by this Order also ensure the scheme for certification and tax relief is compliant with an updated state aid authorisation granted by the European Commission on 17 March 2014.

7.4 Following a consultation (see section 8, below), the Chancellor announced a series of measures aimed at further promoting the film and visual effects industries at Autumn Statement 2013 and confirmed at Budget 2014.

7.5 Amendments to the rate and qualifying expenditure of tax relief on film production costs (available under Part 15 of the Corporation Tax Act 2009) were made by the Finance Act 2014. This Order only relates to the revision of the cultural test for film. A summary of the changes made by this Order is as follows:

- Current criteria that award points for a film's use of British settings, languages and characters will equally award points for use of EEA states' settings, languages and characters;

- More points will be awarded when a high percentage of a film's dialogue is in English or a language recognised for official purposes by another EEA state. Films where 75% of the film is in such language(s) will receive 6 points instead of 4, and where 66% of a film uses such language(s) it will receive 4 points instead of 3.
- More points (4) will be awarded when 80% or more of a film's principal photography, visual or special effects work is carried out in the United Kingdom.
- A maximum of 35 points become available, and test with a pass mark of 18 (previously a 31 point test with a pass mark of 16);

7.6 The Order will not apply to those films that have applied for a certificate (whether interim or final) before the entry into force of the Order. Film companies with films that started principal photography or shooting before the entry into force of the Order and who have not applied for certification by the entry into force date may choose whether to have their application, when submitted, considered under the old test or new test . The Order will also not apply to those films to which the old test did not apply but are governed by predecessor tests. Those films will continue to be assessed against those predecessor tests.

8. Consultation outcome

8.1 At Budget 2013, the Chancellor announced that the Government would consult on options to support the visual effects industry. A consultation was published on 21 May 2013[2].

8.2 The majority of respondents welcomed the consultation's discussion of additional support for the visual effects industry, stating that further support would enable growth in the sector and ensure productions could return to the UK which had been lost to jurisdictions outside of Europe.

8.3 Several respondents made reference to the positive impact that changes to the film tax relief system could have in supporting greater investment within the UK from overseas and in international co-productions, resulting in higher levels of economic contribution from the sector, more stability for a highly skilled workforce, and the creation of culturally important products.

8.4 Respondents pointed towards an increasing trend of visual effects activity moving outside the UK and Europe and the negative impact this could have on the sustainable production of culturally British and European films. A key driver for this trend identified in responses to the consultation was the range of generous tax incentives and subsidies offered for visual effects work in non-European jurisdictions.

[2] https://www.gov.uk/government/consultations/visual-effects-consultation-on-providing-further-support-to-the-visual-effects-industry

8.5 Although the specific changes to the cultural film test proposed by this Order were not consulted on separately, the Treasury did invite comments on the proposed changes in their wider consultation on reform of creative sector tax reliefs. Issues arising from this consultation were raised with industry before the Government approached the European Commission for state aid approval of the measures.

9. Guidance

9.1 The British Film Institute (BFI)'s Certification Unit is responsible for assessing cultural test applications on behalf of the Secretary of State. The Department and the BFI have developed revised guidance for applicants which is available in draft at: http://www.bfi.org.uk/sites/bfi.org.uk/files/downloads/bfi-draft-revised-cultural-test-for-film-guidance-notes-2014-05-12.pdf. The BFI will formalise this guidance to coincide with the coming into force of this Order.

10. Impact

10.1 HM Treasury / HMRC carried out an Impact Assessment as part of their work to introduce the measures outlined at paragraph 7.5 of this document. This assessment can be found here: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/264454/8._Modernising_film_tax_relief.pdf. HMRC have confirmed that this included analysis of the cultural test measure described in this Order at paragraph 7.5.3, and so no further Impact Assessment is required.

11. Regulating Small Business

11.1 The cultural test is a mandatory requirement for any film in respect of which tax relief is sought. This is necessary to ensure the integrity of the tax system. Discussions with industry during and after the consultation process, including the British Film Institute's Certification Unit, which routinely deals with small production companies, as well as with other bodies that represent small firms, has not identified any disproportionate or negative impacts on small firms.

12. Monitoring and Review

12.1 Use of the updated cultural test will be monitored and assessed by the BFI on an annual basis, and assessed by HM Government alongside other measures designed to encourage the growth of UK/international film collaboration. Additionally, the UK is required to submit an annual report to the European Commission on the implementation of the cultural test as part of the State aid authorisation.

13. Contact

13.1 James Butler at the Department for Culture, Media and Sport can answer any queries regarding the Instrument. Tel: 0207 211 6307 or email james.butler@culture.gsi.gov.uk.