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On 1 September 2016, the European Commission issued its decision on measures Germany planned to implement for the funding of film production and distribution. The Commission found that the measures were compatible with the Treaty on the Functioning of the European Union (TFEU), and did not infringe the Audiovisual Media Services Directive (2010/13/EU) (AVMS Directive) (see also IRIS 2016-6/11). The decision concerned the amendment of section 66a(2) of the Film Support Act (Filmförderungsgesetz) (FFG). Currently, cinema operators, video suppliers and video-on-demand (VoD) providers have to pay a compulsory tax to the Federal Film Board ("Filmförderanstalt" - FFA) based on their income from film exploitation. The FFA redistributes the proceeds from these taxes for the production and distribution of films.

The amendment sought to subject VoD distributors located outside Germany to the tax. The tax would be charged on the turnover which they make "with possibly aided products, that is to say with offers via their German language internet appearance to customers in Germany, and only to the extent that this turnover is not subject to a comparable tax for cinematographic support at the place of the establishment of the provider". Of the funds generated by the tax on domestic and foreign video suppliers, 30 percent will be earmarked for the support of the distribution of films by video or VoD; the rest will, together with the contributions from cinemas and broadcasters, contribute to the support of film production or distribution via other channels. This earmarked 30 percent will be the only source of financing the aid for video distribution. Notably, at present, only suppliers of VoD services with a registered office or a branch office in Germany were entitled to obtain support from the FFA. However, under the amendments at issue, "video on demand suppliers without an establishment or agency in Germany may benefit in the same way for their offers via internet in German language addressed to customers in Germany".

The Commission's decision first considers whether the aid to VoD distribution violated the state aid rules contained in Article 107 TFEU. Article 107(1) provides that "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". However, Article 107(3)(d) provides that "aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest" may be considered to be compatible with the internal market. The Commission noted that it had already found the current scheme compatible with Article 107 in its Decision SA.36753 (3 December 2013), and stated that "the extension of the range of possible beneficiaries to firms established elsewhere does not negatively affect the compatibility assessment under that Article".

Next, the Commission considered whether the tax violated Article 110 TFEU, which provides that "no Member State shall impose, directly or indirectly, on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products [or] any internal taxation of such a nature as to afford indirect protection to other products". The Commission decided that the new tax did not infringe Article 110, as "foreign video on demand providers may benefit also in practical terms equally from the funding", and "[the] scheme provides for effective means to allow the foreign VoD providers to apply for distribution aid in the same way as their German competitors".

Finally, the Commission examined whether the measures violated the AVMS Directive. In this regard, Article 2(2)(a) contains the country of origin principle, and provides that "media service providers under the jurisdiction of a Member State are 04046 those established in that Member State in accordance with paragraph 3". While Article 13(1) concerns promotion of European works, and provides that member states must "ensure that on-demand audiovisual media services provided by media service providers under their jurisdiction promote, where practicable and by appropriate means, the production of and access to European works".

Two interested parties argued that the tax would constitute a measure to promote access to European works, in violation of the country of origin principle. However, the Commission decided that "validity of the application of the tax to certain VoD providers which provide their services from locations outside Germany" did not violate the AVMS Directive. The Commission stated that "an interpretation according to which the country of origin principle" applies to the tax at issue would lead "to situations in which providers active on the same market are not subject to the same obligations". Moreover, the Commission had regard to a proposed amendment to the AVMS Directive published by the Commission in May 2016 (see IRIS 2016-6/3), which "clarifies in particular that Member States have the right to require providers of on-demand audiovisual media services, targeting audiences in their territories, but established in other Member States, to make such financial contributions". The Commission decided that the proposal was "a clarification of what could already be possible under the Directive currently in force”.

• *Europäische Kommission, Kommissionsbeschluss vom 01.09.2016 zum Beihilfemodell SA.38418 - 2014/C (ex 2014/N), welches Deutschland zur Förderung von Filmproduktion und -vertrieb umzusetzen gedenkt, C(2016) 5551 endg., 1. September 2016* (European Commission, Commission decision of 1.9.2016 on the aid scheme SA.38418 - 2014/C (ex 2014/N) which Germany is planning to implement for the funding of film production and distribution, C(2016) 5551 final, 1 September 2016)
http://merlin.obs.coe.int/redirect.php?id=18143
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• *Europäische Kommission, Kommissionsbeschluss vom 03.12.2013 zum Beihilfemodell SA.36753 (2013/N) - Deutsches Filmförderungsgesetz, C(2013) 8679 endg., 3. Dezember 2013* (European Commission, Commission decision of 3.12.2013 on the aid scheme SA.36753 (2013/N) - Germany Filmförderungsgesetz, C(2013) 8679 final, 3 December 2013)
http://merlin.obs.coe.int/redirect.php?id=18144
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