COMMISSION DECISION (EU) 2016/2042

of 1 September 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

(notified under document C(2016) 5551)

(Only the German text is authentic)

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular the first subparagraph of Article 108(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 comments pursuant to the provisions cited above ([1]) and having regard to their comments,

Whereas:

1. PROCEDURE

(1) By letter dated 4 March 2014 Germany notified the Commission of the modification of the aid scheme on the support of film production and distribution (Filmförderungsgesetz ('FFG')). It provided the Commission with further information by letters dated 17 April and 16 July 2014.

(2) By letter dated 17 October 2014, the Commission informed Germany that it had decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union in respect of the measure.

(3) The Commission decision to initiate the procedure ('the opening decision') was published in the *Official Journal of the European Union* ([2]). The Commission called on interested parties to submit their comments.

(4) Germany sent observations on the opening decision by letter dated 11 December 2014.

(5) The Commission received comments from interested parties. It forwarded them to Germany, which was given the opportunity to react; its comments were received by letter dated 5 March 2015.

2. DETAILED DESCRIPTION OF THE MEASURE

2.1. Title, scheme

(6) The legal basis of the scheme is the act on measures for the promotion of German Cinema in its seventh version (FFG in der Fassung des Siebten Änderungsgesetzes), which details the conditions for audiovisual support given by the German Federal Film Board (Filmförderanstalt ('FFA')). It had been approved by the Commission until 31 December 2016 by decision in case SA.36753 of 3 December 2013. The intended notified amendment of that scheme concerns the funding of and the tax on the services of video on demand suppliers without an establishment or agency in Germany.

(7) The existing federal scheme for the funding of film production, distribution and exhibition is financed out of a special tax ('Sonderabgabe') imposed on undertakings in the cinema and video industry and the broadcasting sector. Cinema operators, video suppliers and video on demand providers have to pay a compulsory tax to the

([1]) OJ C 437, 5.12.2014, p. 57.
([2]) Cf. footnote 1

FFA based on their income from film exploitation. Cinema operators are paying a tax based on the box office revenues per screen. Video suppliers and video on demand providers are paying a tax based on their net annual turnover, provided that it exceeds EUR 50 000 ([3]).

(8) The amendment to the scheme takes place against a background of rapid technological developments, particularly in the distribution of films. Film viewing in private homes increasingly takes place through on-line access rather than through rental of physical carriers. The place of establishment of the provider of the relevant services — in this case the making available of films for private viewing — is becoming less relevant to the successful development of a business model. From a chosen location a supplier may be able to provide services into another territory without significant transport cost or costs of physical presence. No registered office or branch office is required to deliver on-demand services to consumers in a targeted Member State. The measure which Germany intends to implement with the proposed amendment of its federal scheme concerns the funding of the video on demand distribution of films. So far, only suppliers of video on demand services with a registered office or a branch office in Germany were entitled to obtain the support. In the future, 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 at customers in Germany.

(9) In addition, section 66a (2) of the FFG is amended as regards the financing system for the scheme to take account of this change and to ensure that, in exchange for their entitlement to aid, video on demand distributors which are located outside Germany will be subject to a tax. The tax will 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.

(10) Germany justifies this inclusion of video on demand distributors which are located outside Germany with firstly an overall strongly growing share of video on demand in the distribution and consumption of films, and secondly with the recent phenomenon that large video on demand distributors, which are active on an international level, choose a single establishment within the Union from where they serve many or all Member States. The objective of the extension is to remain in line with the existing system and philosophy of the FFG, i.e. that the consumption of films in Germany — through any carrier means — ensures income into a government owned fund, which supports various cultural objectives including film production and distribution.

(11) Regarding the use of the funds generated by the tax on domestic and foreign video suppliers, 30 % will be earmarked for the support of the distribution of films by video or video on demand, the rest will, together with the contributions from cinemas and broadcasters, contribute to the support of film production or distribution via other channels. These earmarked 30 % will be the only source of financing the aid for video distribution.

(12) The notified measure is planned to apply from the moment of its approval by the Commission until 31 December 2016. The estimated annual amount of funds available from the proceeds of the tax on video supply is EUR 13 million.

2.2. **Presence of aid**

(13) As concluded in the opening decision, the described measure constitutes State aid within the meaning of Article 107(1) of the Treaty. According to this Article, 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. The described measure fulfils the cumulative conditions which have to be met to qualify it as aid. The film distribution support is granted out of State resources, it confers an economic advantage to undertakings, the advantage is selective, and it is capable to distort or threaten to distort competition and trade in the internal market.

([3]) The tax for the video industry amounts to 1,8 % in case of a turnover up to EUR 30 million; to 2,0 % for a turnover between EUR 30 million and EUR 60 million; to 2,3 % in the case of a turnover above EUR 60 million.

(14) Regarding State resources, the support foreseen by the FFG is granted from funds financed by the revenues from various parafiscal charges imposed by that act. The FFA, an institution incorporated under public law, redistributes the proceeds from these taxes for the production and distribution of films. Therefore, these measures involve State resources and are imputable to the State.

(15) The beneficiaries of the scheme — film producers, script writers, film distributors, cinema operators — carry out economic activities and therefore qualify as undertakings. The State support constitutes an advantage that they would not receive under normal market conditions. The scheme is also selective as its only beneficiaries are undertakings involved in the production, distribution and exhibition of films.

(16) The market for film production and distribution is international. The beneficiaries compete at international level with producers and distributors in other Member States. Therefore, the measure which intends to support the production, distribution and promotion of films affects competition and trade between Member States and qualifies as State aid in accordance with Article 107(1) of the Treaty.

2.3. **Grounds for initiating the procedure**

2.3.1. *Compatibility of the amended aid to video on demand distribution with Article 107(3)(d) of the Treaty*

(17) The intended measure — the funding of and the tax on the services of video on demand suppliers without an establishment or agency in Germany — constitutes an amendment of the scheme which the Commission had approved until 31 December 2016. The State aid assessment criteria have not changed since the previous approval of the scheme and the proposed change only concerns aid to video distribution of films and the tax on foreign video on demand distributors.

(18) Concerning the aid to the distribution of films by video on demand suppliers as such, the Commission has already found it compatible with Article 107(3)(d) of the Treaty ([4]). The extension of the range of possible beneficiaries to firms established elsewhere does not negatively affect the compatibility assessment under that Article.

2.3.2. *Possible infringement of other provisions of Union law*

(19) The Commission has to include in the State aid analysis the compliance of the financing of the aid measure with rules of Union law other than the competition rules if the financing forms an integral part of an aid measure. This is the case if the tax is hypothecated for the financing of the aid in the sense that the revenue from the tax is necessarily allocated to the financing of the aid and has a direct impact on the amount of the aid ([5]). If in such a case the tax proves to be contrary to other provisions of the Treaty, the Commission cannot declare the aid, of which the tax forms part, to be compatible with the internal market ([6]).

(20) The notified scheme establishes that 30 % of the revenues from the tax on video suppliers are used to finance the support of the distribution of films by video. Furthermore there is no other source of funding for this type of aid. This establishes a link between the financing of video distribution and the revenue from the tax on this activity by which the revenue from the taxes is the only source of its funding and has a direct impact on the amount available for this aid. Therefore the tax is hypothecated and it is necessary to verify that it is in line also with other rules of Union law than the competition rules.

(21) Accordingly, it has to be assessed if the extension of the tax to video on demand suppliers located outside Germany is compatible with Article 110 of the Treaty, according to which no Member State shall impose on the products of other Member States a tax which it does not impose on similar domestic products. Furthermore,

([4]) Commission Decision of 3 December 2013 in State aid case SA.36753 — Germany, Filmförderungsgesetz, referring to paragraphs 80-95 of the Commission Decision of 10 December 2008 in case N 477/2008 — Germany, German Film Support Scheme,.

([5]) Judgment in,*Regie Networks*, C-333/07, EU:C:2008:764, paragraph 99; Judgment of 11 July 2014, *DTS Distribuidora de Televisión Digital v Commission*, T-533/10, ECR, Appeal pending, EU:T:2014:629, paragraph 51, and Judgment in *Telefónica de España et Telefónica Móviles España v Commission*, T-151/11, ECR, Appeal pending, EU:T:2014:631, paragraph 101.

([6]) Judgments in *DTS Distribuidora de Televisión Digital v Commission*, footnote 5 above, EU:T:2014:629, paragraph 50, and in *Telefónica de España et Telefónica Móviles España v Commission*, footnote 5 above, EU:T:2014:631, paragraph 100.

it must be assessed if the tax could infringe the rules concerning the jurisdiction on video on demand suppliers established in other Member States, as determined by Directive 2010/13/EU of the European Parliament and the Council ([7]).

2.3.2.1. **Article 110 of the Treaty**

(22) A tax would be incompatible with Article 110 and therefore prohibited to the extent to which it discriminates against imported products, that is to say to the extent to which the support financed by it substantially offsets the burden borne by the taxed domestic product compared with the imported product ([8]).

(23) Accordingly, parafiscal charges, like those imposed under the described scheme, may be contrary to Article 110 of the Treaty when the scheme benefits solely national service providers or does so to a higher extent than it does for competitors in other Member States. In such a case, in order to be compatible with the Treaty, imported services must not be subject to the tax. If however the imported services of the service providers in other Member States, which are subject to the tax, can benefit from the scheme in the same way as the domestic service providers, this is not contrary to Article 110 of the Treaty.

(24) Even if, like in the present case, a scheme provides in its rules that foreign suppliers may also benefit from the aid in a non-discriminatory way, this is in itself not sufficient. It must also be excluded that the conditions structurally favour domestic operators in practice.

(25) The Commission invited Germany and interested parties to give comments and to provide relevant facts on the compliance of the scheme with Article 110 of the Treaty.

2.3.2.2. **Directive 2010/13/EU**

(26) The notified measure imposes a tax on video on demand suppliers established in other Member States based on the turnover they make with video on demand services on the German market. This raises the question whether Directive 2010/13/EU applies to the tax.

(27) According to Article 13 of Directive 2010/13/EU, Member States have to 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. Article 13 mentions as examples of such promotion financial contributions to the production and rights acquisition of European works, as well as a share of European works in the catalogues of on-demand service providers and ensuring their prominence in these catalogues. According to its Recital 19, Directive 2010/13/EU does not affect the responsibility of the Member States and their authorities 'with regard to the organisation — including the systems of licensing, administrative authorisation or taxation — the financing and the content of programmes.'

(28) It is noted that at the time of the coming into force of Directive 2010/13, on demand services where the service provider would have no establishment in the Member State of the reception of the services were still a phenomenon of minor importance. Up to today, however, their market share has increased significantly. In 2014, the VoD market in the EU was worth EUR 2,501 billion which represents an increase of 272 % since 2010. In Germany, the VoD market was worth EUR 315,2 million in 2014 which accounts for an increase of 172 % since 2010 ([9]).

(29) If the FFG were to be considered as a measure implementing Article 13 of Directive 2010/13/EU, Germany's exercise of jurisdiction over video on demand suppliers established in other Member States would have to be assessed against the rules on jurisdiction set out in that Directive. According to Articles 2(1), (2)(a) and (3) of Directive 2010/13/EU, each Member State has the jurisdiction to regulate the audiovisual media services transmitted by media service providers which are established in that Member State, according to the specific rules set out therein. Furthermore, according to Article 3(1) of Directive 2010/13/EU, 'Member States shall ensure freedom of reception and shall not restrict retransmissions on their territory of audiovisual media services from other Member States for reasons which fall within the fields coordinated by this Directive.'

([7]) Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) (OJ L 95, 15.4.2010, p. 1).

([8]) Commission Decision 2000/116/EC in Case C-34/97, *Netherlands — parafiscal charges for promoting ornamental plants*, OJ L 34, 9.2.2000, p. 20, paragraph 63.

([9]) European Audiovisual Observatory — Trends in Video-on-Demand revenues, p. 3-4, https://ec.europa.eu/digital-single-market/en/news/study-data-and-information-costs-and-benefits-audiovisual-media-service-directive-avmsd.

(30) Thus, where Directive 2010/13/EU applies, it is for the Member State where the media service provider is established to ensure compliance with the rules applicable to audiovisual media services under its jurisdiction. For on-demand audiovisual media services, possible grounds of derogation from this principle are exhaustively stated in Article 3(4)(a) of Directive 2010/13/EU.

(31) Accordingly, the Commission expressed doubts in the opening decision as to the compatibility with the internal market of the notified amendment of the existing State aid measure FFG. These doubts referred in particular to the compatibility with Directive 2010/13/EU of the aid to film distribution which is financed from a fund which includes levies on video on demand suppliers situated outside Germany.

3. **COMMENTS FROM INTERESTED PARTIES**

(32) Comments were received from 10 interested parties. They came from the German public broadcasters ARD and ZDF, the association of German commercial broadcasters (VPRT), European Digital Media (EDiMA), the Verband Deutscher Kabelnetzbetreiber (ANGA), the public film fund Mitteldeutsche Medienförderung (MDM), the Spitzenorganisation der Deutschen Filmwirtschaft (SPIO), representing members in the areas of film production, technique, and distribution, the cinema operators (AG Kino and HDF Kino), and the association of German film producers (Produzentenallianz). One contributor asked for its identity to be kept confidential.

3.1. **On a possible violation of Article 110 of the Treaty**

(33) On the one hand, the contributor whose identity is confidential ('Company X'), is concerned that Article 110 of the Treaty is infringed. Even if the scheme provides in its rules that foreign suppliers may also benefit from the aid in a non-discriminatory way, in practice the conditions would structurally favour domestic operators.

(34) There would be discrimination because, at least currently, the members of the board which decides on grants are all German. The allocation of the grants would be discretionary and therefore the funds most likely directed to German companies. Furthermore, Company X alleges that non-domestic providers would offer a higher share of non-domestic content, even if addressed to a German audience. Thus they would have fewer films eligible for distribution aid, because they offer fewer German films. Furthermore, the foreign VoD providers would be faced with a language barrier because the relevant rules are available in German only and the applications have to be submitted in German.

(35) Company X criticises the low aid amount per film for distribution aid, and the overall low share of VoD distribution in that type of aid in comparison to video sales on DVD or BluRay. It also criticises the fact that the tax is imposed on the turnover with all films, irrespective of whether they are suitable, as German or European films, for distribution funding or not. Finally, domestic VoD providers would be less affected by the tax because some of them would be vertically integrated VoD and TV or cable operators which may also benefit from production aid from the Federal Film Fund alimented by VoD providers.

(36) ANGA, which also represents VoD providers in Germany, on the other hand, finds a discrimination of domestic providers because they are subject to taxation of their domestic offer, while the non-domestic competitors competing with them with offers tailored for the same market are not subject to taxation of the relevant turnover just because they chose to elect domicile abroad. SPIO, VPRT, Produzentenallianz and MDM also suggest that the tax would end a discrimination of domestic providers. According to SPIO, the main part of the turnover with VoD in Germany is made by 13 undertakings, of which 6 are established abroad. These figures do not yet include the recent entry into the market of a leading VoD provider from the United States which is established in the Netherlands. For SPIO the decisive element for taxation should not be the more or less fortuitous location of the provider. In the digital era a provider does not need more than one place of establishment in the internal market.

The more relevant question for taxation should be whether the provider acquires film licences for the German market to do business there with final consumers. SPIO also points to data collected by it which shows that the foreign VoD providers have in their offer a similar focus on German productions as the domestic providers.

3.2. **On the compatibility with Directive 2010/13/EU**

(37) Regarding Directive 2010/13/EU, Company X and EDiMA are of the view that the notified measure would constitute a measure to promote access to European works pursuant to Article 13(1) of that Directive, in violation of the country of origin principle.

(38) The other interested parties supported the German proposal and were of the opinion that the tax would not constitute a violation of Article 13(1) in connection with Articles 2 and 3 of Directive 2010/13/EU.

4. **COMMENTS FROM GERMANY**

(39) Germany observes that, in general, it would be in the interest of all Member States to prevent a distortion of competition for location decisions in the film sector due to the fact that companies choose their establishment mainly for tax reasons. The exclusion of VoD providers established outside Germany which aim at a German clientele would have a negative effect on the funding of European works.

4.1. **On a possible violation of Article 110 of the Treaty**

(40) Germany confirms its conviction that the proposed tax on foreign VoD providers does, also in practice, not favour domestic operators over foreign ones. The suggestion of Company X that the funding would be directed to German companies because the board awarding grants is composed of Germans is not sustainable, according to Germany. The criteria for funding are not the establishment of the applicant but the cultural and creative quality of the audiovisual works eligible for distribution support. Germany explicitly recognises and welcomes that the foreign VoD providers offer a significant number of eligible German films.

(41) Also the argument that non-domestic providers would offer a higher share of non-domestic content and would therefore have fewer films eligible for distribution aid, although the tax is imposed on the turnover with all films, is not valid. Firstly, this is not discriminating between domestic and foreign providers. Also domestic providers with a mainly non eligible film offer would face this situation. Secondly, this would not constitute an indirect discrimination because the foreign providers actually offer not less eligible films than their domestic competitors, but even more, as evidenced by data of the European Audiovisual Observatory cited in the Commission Communication on the European film in the digital era ([10]).

(42) Germany also rejects the argument that foreign VoD providers would be faced with a language barrier. The tax is addressed only to those providers which are actively marketing their offer in German on the German market; they have to be familiar with relevant legislation anyway. Furthermore, the fund advises applicants, if needed, also in English.

(43) Regarding the alleged low aid amount per film for distribution aid, and the overall low share of VoD distribution in that type of aid, Germany is of the opinion that the conditions for distribution aid would not be different for the various forms of technical support. In no case would it for instance be possible that the costs for creating the general technical infrastructure for the printing or uploading of films on the various distribution supports would be eligible for aid. The aid is oriented towards a single eligible work.

(44) Finally, regarding the argument that domestic VoD providers would be less affected by the tax because some of them would be vertically integrated VoD and TV or cable operators, Germany underlines that firstly only some providers are integrated. Secondly, this argument does not take into account the fact that the broadcasting branches of these companies also have to contribute to the film fund.

([10]) (COM(2014) 272 final, pages 4 and 5) 'As regards the presence of European films, available data shows that a global player (present in 26 countries of the EU) proposes, in the main national stores, more EU blockbusters and European Film Awards winners than national VoD providers'.

4.2. **On the compatibility with Directive 2010/13/EU**

(45) Germany maintains that the planned tax would not fall in the scope of Directive 2010/13/EU. Therefore it would not constitute a violation of Article 13(1) in connection with Articles 2 and 3 of that Directive. The tax cannot be considered as a regulatory measure with effect on the media service, its programming and diffusion. Film funding is not harmonised at Union level. Taxation at the place of consumption or destination of the media service also follows the logic applied for the VAT taxation of services in the Union, as applicable since 1 January 2015.

(46) In view of the fast growing market share of foreign VoD providers, German providers would be at a competitive disadvantage if they would continue to be taxed while the foreign competitors on the national market would not be subject to the same tax. iTunes for instance, which is not established in Germany, would already today be the leading VoD supplier of German films.

5. **ASSESSMENT OF THE MEASURE**

5.1. **Presence of aid**

(47) As explained in recitals 13 to 16 of this decision, the described measure constitutes State aid within the meaning of Article 107(1) of the Treaty. The film distribution support is granted out of State resources, it confers an economic advantage to undertakings, the advantage is selective, and it is capable to distort or threaten to distort competition and trade in the internal market.

5.2. **Compatibility of the amended aid to video on demand distribution with Article 107(3)(d) of the Treaty**

(48) The intended measure — the funding of and the tax on the services of video on demand suppliers, which are not having an establishment or agency in Germany — constitutes an amendment of the scheme which the Commission had approved until 31 December 2016. The State aid assessment criteria have not changed since the previous approval.

(49) Concerning the aid to the distribution of films by video on demand suppliers as such, the Commission has already found it compatible with Article 107(3)(d) of the Treaty ([11]). It has therefore concluded already in the opening decision that the extension of the range of possible beneficiaries to firms established elsewhere does not in itself negatively affect the compatibility assessment under this Article.

5.3. **Possible infringement of other provisions of Union law**

5.3.1. *Compatibility with Article 110 of the Treaty*

(50) The new tax does not infringe Article 110 of the Treaty. Foreign video on demand providers may benefit also in practical terms equally from the funding. As explained by Germany, 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.

(51) Foreign undertakings can be aware of this funding possibility in the same way as the undertakings located in Germany. They will in any case be made individually aware through the fact that they have to contribute to a fund which provides for aid to film distribution. Furthermore, aid is granted on application only, and their applications will be treated exactly like those of German companies. The selection board is bound to assess the application exclusively on the basis of the cultural quality of the films for which the aid is requested. Therefore, the place of establishment of the distributor is not among the criteria which the selection board may apply when taking a decision.

(52) The foreign providers of German language films also benefit indirectly in the same way as their German competitors from the support of film production in Germany. This support ensures a constant supply of German-funded films which the foreign providers may include in their offer. This is evidenced by the fact that their catalogues contain a share of German films which is comparable to the catalogues of domestic providers.

([11]) See footnote 4.

(53) Company X put forward the argument that domestic VoD providers would be less affected by the tax because some of them are vertically integrated VoD and TV or cable operators which may also benefit from production aid. This argument does not take into account that the differentiation between integrated and non-integrated undertakings has nothing to do with the place of establishment. There would also be different effects among German TV and VoD providers. It furthermore overlooks the fact that VoD providers are also producing films eligible for aid.

5.3.2. *Compatibility with Directive 2010/13/EU*

(54) The question arises whether the tax concerned, which by its design is imposed on services targeted at an audience in Germany, would fall within the scope of Directive 2010/13. The tax in question contributes to a public fund, the FFA, which is used to promote various cultural objectives in the audiovisual sector. 30 % of the funds generated by the tax will be earmarked for the support of the distribution of films by video or video on demand. The remainder will, together with the contributions from cinemas and broadcasters, more generally contribute to the support of film production or distribution via other channels.

(55) Article 13(1) of Directive 2010/13/EU is intended to cover measures which are linked to the promotion of European works by on-demand audiovisual media services and provides that the Member State having jurisdiction over the provider of such services ensures that promotion. This can for example be done by a financial contribution made by such services to the production of European works.

(56) The fact that the tax under consideration serves to contribute to funding a public body which, as only one task among others, has the obligation to support the production and distribution of European works, raises doubts as to whether it may fall under Article 13(1) of Directive 2010/13/EU. Article 13(1) of Directive 2010/13/EU does not specify whether the promotion of European works must take place without the intervention of parties other than the on-demand services provider itself.

(57) Furthermore, the application of a tax such as the one in question to services targeted from one Member State to the market in another Member State could raise the question whether such tax would not call into doubt the principle that the Member State where a media service provider is established has jurisdiction over the provider, as laid down in Article 2(2)a of Directive 2010/13/EU.

(58) An amendment of Directive 2010/13/EU has been proposed in order to ensure that the Directive appropriately caters for market developments regarding audiovisual media services, both linear and non-linear. The proposal for such amendment was adopted by the Commission on 25 May 2016 ([12]). It clarifies that Member States have the right to require providers of on-demand audiovisual media services under their jurisdiction to contribute financially to the production of European works. The proposed amendment of Article 13 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. In this case, the proposed amendment foresees that financial contributions shall be based only on the revenues earned in the targeted Member State. If the Member State where the provider is established imposes a financial contribution, it shall take into account any financial contribution imposed by targeted Member States.

(59) The Commission considers the proposed wording of Article 13 of Directive 2010/13/EU as a clarification of what could already be possible under the Directive currently in force. This article, also when applied for the purpose of this Decision, could not be considered as attributing an exclusive competence to the Member State where the provider is established for the taxation of on-demand media service providers so as to contribute to the production and rights acquisition of European works or to the share and/or prominence of European works in the catalogue of programmes offered by the on-demand audiovisual media service. Indeed, its wording is not categorical and unreserved. Furthermore the taxation of on-demand audiovisual media services providers is only an example of measures which can be taken by the Member State which has jurisdiction.

(60) An interpretation according to which the country of origin principle, as laid down in Article 2(1) of Directive 2010/13/EU, applies to a tax such as the one in question, leads to situations in which providers active on the same market are not subject to the same obligations. In fact, an interpretation which would require a Member

([12]) Proposal for a Directive of the European Parliament and of the Council amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services in view of changing market realities, COM/2016/0287 final, http://eur-lex.europa.eu/legal-content/DE/TXT/HTML/?uri=CELEX:52016PC0287&from=EN.

State to exempt VoD providers specifically targeting its audience but being established in another Member State from a contribution to the promotion of European works would discriminate against providers established in the former Member State which are subjected to a tax, while they are competing on the same market.

(61) Furthermore, the extent, to which the importance of the market share of the cross-border provision of videos on demand would grow, and accordingly its significance for the contribution to film funds, was not yet evident on the date of entry into force of Directive 2010/13/EU, as described in recital 28. The Commission notes in particular that the measure notified by Germany explicitly limits the revenues subject to the tax to revenues made in the targeted Member State, and only to the extent that they are not already subject to a contribution in the Member State of establishment.

(62) As a consequence, the validity of the application of the tax to certain VoD providers which provide their services from locations outside Germany is not called into question by Directive 2010/13/EU in particular.

6. **CONCLUSION**

(63) The Commission therefore concludes that the amendment to the aid scheme FFG which Germany is planning to implement for the funding of film distribution by VoD providers is compatible with Articles 107(3)(d) and 110 of the Treaty and does also not infringe Directive 2010/13/EU,

HAS ADOPTED THIS DECISION:

Article 1

The measure which Germany is planning to implement with the Filmförderungsgesetz in der Fassung des Siebten Änderungsgesetzes is compatible with the internal market within the meaning of Article 107(3)(d) of the Treaty on the Functioning of the European Union.

Implementation of the measure is accordingly authorised.

Article 2

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 1 September 2016.

For the Commission
Margrethe VESTAGER
Member of the Commission