



EUROPEAN COMMISSION

Brussels, 25.7.2024

C(2024) 5143 final

<p>In the published version of this decision, some information has been omitted, pursuant to articles 30 and 31 of Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, concerning non-disclosure of information covered by professional secrecy. The omissions are shown thus [...]</p>		<p style="text-align: center;">PUBLIC VERSION</p> <p>This document is made available for information purposes only.</p>
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**Subject: State Aid SA.112857 (2024/N) – Denmark  
Cultural contribution by on-demand audiovisual media service providers**

Excellency,

## 1. PROCEDURE

- (1) By electronic notification of 26 February 2024, registered on the same day by the Commission, Denmark notified for reasons of legal certainty a financial contribution levied from media service providers of on-demand audiovisual media services for the promotion of Danish culture (the ‘measure’ or the ‘levy’), which in its view does not lead to any granting of State aid to media service providers which do not fall under the measure.
- (2) The Commission requested additional information from Denmark by letter of 26 April 2024 to which Denmark replied on 29 May 2024.
- (3) By letter registered on 25 June 2024, Denmark exceptionally agreed to waive its rights deriving from Article 342 of the Treaty on the Functioning of the European Union.

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Union ('TFEU'), in conjunction with Article 3 of the Council Regulation 1/58 <sup>(1)</sup>, and to have this Decision adopted and notified only in English.

## 2. DETAILED DESCRIPTION OF THE MEASURE

### 2.1. The levy imposed on providers of on-demand audiovisual media services

- (4) The legal basis of the levy is the Act on the contribution by certain media service providers to the promotion of Danish culture (Culture Contribution Act, the 'Act') (*Lov om visse medietjenesteudbyderes bidrag til fremme af dansk kultur (kulturbidragstloven)*) <sup>(2)</sup>. It was adopted by the Danish Parliament on 30 May 2024 and entered into force on 1 July 2024.
- (5) The introduction of the levy takes place against a background of rapid technological developments, particularly in the distribution of audiovisual content. Denmark submits that new global players, including providers of video on-demand services, have challenged not only the production's financial sustainability but also the accessibility and distribution of Danish films, series, and documentaries, which play a pivotal role in connecting the population across the country, while also promoting cultural and linguistic diversity.
- (6) In this context, the levy aims to promote Danish audiovisual content through an obligation for media service providers of on-demand audiovisual media services <sup>(3)</sup> to contribute financially to the production of new Danish films, series, and documentaries. The design of the levy will ensure that on-demand audiovisual media service providers generating revenues in the Danish market contribute to the Danish audiovisual production's financial sustainability <sup>(4)</sup>. As stated in point 3.1.4. of the comments on the draft Act, revenues obtained from linear audiovisual media services <sup>(5)</sup> are exempted from the levy (see recital (11)) in the light of this objective. Denmark explains that linear audiovisual media services, through their TV channels aimed at a Danish audience, already contribute adequately to the broadcasting and production of Danish audiovisual content. Denmark further argues that the gap in the contribution to the production of Danish and European works between TV broadcasters and on-demand audiovisual media service providers is acknowledged in recital 37 of the Audiovisual Media Services Directive ('AVMSD') <sup>(6)</sup>, which states that

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<sup>(1)</sup> Regulation No 1 determining the languages to be used by the European Economic Community, OJ 17, 6.10.1958, p. 385.

<sup>(2)</sup> [https://www.folketingstidende.dk/samling/20231/lovforslag/L159/20231\\_L159\\_som\\_vedtaget.pdf](https://www.folketingstidende.dk/samling/20231/lovforslag/L159/20231_L159_som_vedtaget.pdf)

<sup>(3)</sup> Defined by § 3(2) of the Act, in accordance with Article 1(1)(g) of the Audiovisual Media Services Directive ('AVMSD'), as '*an audiovisual media service provided by a media service provider so that programmes can be received at a time chosen by the user and at his individual request, on the basis of a catalogue of programmes selected by the media service provider*'.

<sup>(4)</sup> Point 3.1.4. of the comments on the draft Act.

<sup>(5)</sup> Defined by Article 1(1)(e) of the AVMSD as television broadcasting or television broadcast, i.e., '*an audiovisual media service provided by a media service provider for simultaneous viewing of programmes on the basis of a programme schedule*'.

<sup>(6)</sup> Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation

*'Broadcasters currently invest more in European audiovisual works than providers of on-demand audiovisual media services'*. Thus, the levy aims to ensure a level playing field as regards the production and promotion of Danish audiovisual content in comparison with linear audiovisual media services.

- (7) Furthermore, Denmark considers that the levy, by ensuring that high quality Danish audiovisual content continues to be produced and distributed in the future, will increase the cultural diversity in the choice of works available to the Danish and European audiences <sup>(7)</sup>.
- (8) As is apparent from point 3. of the comments on the draft Act, the levy aims to make use of the possibility provided for in Article 13(2) of the AVMSD for a Member State to require media service providers established in other Member States but targeting audiences in its territory to contribute, in a non-discriminatory and proportionate way, to the production of European works <sup>(8)</sup>. The Danish authorities submit that it will contribute to the production of European works in the form of new Danish audiovisual content.
- (9) The levy applies to media service providers established in Denmark providing on-demand audiovisual media services <sup>(9)</sup> as well as to media service providers established in other Member States providing on-demand audiovisual media services targeting audiences in Denmark <sup>(10)</sup>. It covers any on-demand audiovisual media service provided against payment irrespective of its business model <sup>(11)</sup>, with the exceptions described in recital (10). Denmark clarifies that the levy applies to broadcasters providing on-demand audiovisual media services insofar as the revenues from the on-demand services are concerned (see recital (11)). The definition of on-demand audiovisual media services entails that revenues obtained from linear audiovisual media services are not in the scope of the levy (see recital (11)). According to the estimates of the Danish Ministry of Culture, up to 50 media service providers will be subject to the measure <sup>(12)</sup>.
- (10) Pursuant to § 2(3) and (5) of the Act, two categories of on-demand audiovisual media service providers are exempted from the levy:

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or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities, OJ L 303, 28.11.2018, pp. 69-92.

<sup>(7)</sup> Point 3.1.4. of the comments on the draft Act.

<sup>(8)</sup> Those obligations can take the form of direct investments in content and contributions to national funds.

<sup>(9)</sup> § 2(1) of the Act.

<sup>(10)</sup> § 2(2) of the Act. In accordance with recital (38) of the AVMSD, Denmark, when assessing, on a case-by-case basis, whether an on-demand audiovisual media service established in another Member State is targeting audiences in its territory, should refer to indicators such as i) advertisement or other promotions are specifically aiming at customers in Denmark, ii) the main language of the service is Danish, and iii) the existence of content or commercial communications aiming specifically at the audience in Denmark.

<sup>(11)</sup> Including subscription video on-demand ('SVOD'), transactional video on-demand ('TVOD') and advertising video on-demand ('AVOD') services.

<sup>(12)</sup> Point 6. of the comments on the draft Act.

- (i) First, the levy does not apply to on-demand audiovisual media service providers with an annual turnover of less than DKK 15 000 000 (approximately EUR 2 000 000)<sup>(13)</sup> or whose audience represents less than 1% of the total number of users of on-demand audiovisual media services on the Danish market. According to Denmark, this exemption applies Article 13(6) of the AVMSD, which states that the requirement on media service providers targeting audiences in other Member States under Article 13(2) (see recital (8)) *'shall not apply to media service providers with a low turnover or a low audience'*.
  - (ii) Second, the levy does not apply to media service providers offering on-demand audiovisual media services solely for library or educational purposes. According to Denmark, this exemption applies by virtue of Article 13(6) of the AVMSD, which allows Member States to waive the requirement on media service providers targeting audiences in other Member States under Article 13(2) (see recital (8)) where such a requirement *'would be impracticable or unjustified by reason of the nature or theme of the audiovisual media services'*.
- (11) On-demand audiovisual media service providers, as referred to in recital (9) and with the exceptions described in recital (10), are liable to an annual levy of 2% (the 'basic levy') of their contributory turnover in Denmark<sup>(14)</sup>, defined as the *'gross revenues of a media service provider in Denmark resulting from the making available of audiovisual content by the on-demand audiovisual media service' without 'revenues related to the making available of sports or news programmes, revenues from linear programming services made available through the on-demand audiovisual media service, and revenues from the redistribution of other media service providers' on-demand audiovisual media services'*<sup>(15)</sup>. According to Denmark, the contributory turnover's definition ensures that the revenues used for the calculation of the levy are limited to the making available of the categories of audiovisual content (films, series, and documentaries) whose production is supported by the levy.
- (12) On-demand audiovisual media service providers who directly invest less than 5% of their contributory turnover in Denmark in 'new Danish content'<sup>(16)</sup> must, in addition to the basic levy, pay an annual levy of 3% (the 'increased levy') of their contributory turnover in Denmark<sup>(17)</sup>. For media service providers with no or a level of investment less than 5% of contributory turnover in new Danish content,

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<sup>(13)</sup> European Central Bank exchange rate on the date of notification: EUR 1 = DKK 7.4542. The threshold of DKK 15 000 000 has been determined in accordance with the Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (OJ L 124, 20.5.2003, p. 36) which sets the financial ceiling defining microenterprises at an annual turnover of EUR 2 000 000 (Article 2(3)).

<sup>(14)</sup> § 4(1) of the Act.

<sup>(15)</sup> § 3(4) of the Act.

<sup>(16)</sup> Pursuant to § 4(3) of the Act, investments in new Danish content include all types of investments in production and co-production of new films, series, and documentaries. Pursuant to § 4(4) of the Act, an investment is considered as having been made in new Danish content when 75% of the production material for European produced films, series or documentaries is in Danish.

<sup>(17)</sup> § 4(2) of the Act.

the total levy amounts to 5% of the annual contributory turnover in Denmark. On-demand audiovisual media service providers can therefore choose between investing directly at least 5% of their contributory turnover in new Danish content or being subject to the increased levy. According to Denmark, the design of the measure therefore ensures that the on-demand audiovisual media service providers' investments in new Danish content are taken into account for the purpose of the measure, while guaranteeing that all media service providers of on-demand audiovisual media services contribute in a proportionate manner to the production of Danish audiovisual content<sup>(18)</sup>. Furthermore, Denmark claims that the design of the measure is in line with Article 13(2) of the AVMSD, which states that the obligations for media service providers to contribute to European works can take the form of direct investment in content and contribution to national funds<sup>(19)</sup>.

- (13) The levy will be collected annually by the Agency for Culture and Palaces based on media service providers' statements of the most recent calendar year's turnover in Denmark<sup>(20)</sup>. It will be due for the first time in 2025 based on the media service providers' contributory turnover in Denmark for 2024<sup>(21)</sup>. According to the estimates of the Danish Ministry of Culture, the proceeds of the levy will amount to approximately DKK 103 000 000 (approximately EUR 14 000 000) per year<sup>(22)</sup>.
- (14) Pursuant to § 6(1) of the Act, the proceeds of the levy, after deduction of certain costs associated with the measure's administration, will be allocated to the Public Service Fund<sup>(23)</sup> and other various Danish aid schemes supporting the development, production and promotion of films, series and documentaries.

## 2.2. The position of Denmark

- (15) Denmark submits that the measure does not constitute State aid.
- (16) In particular, Denmark submits that not imposing the levy on revenues obtained from linear TV services is not selective. The exempted linear audiovisual media

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<sup>(18)</sup> Points 1. and 3.1.4. of the comments on the draft Act.

<sup>(19)</sup> See recital (36) of the AVMSD: *'In order to ensure adequate levels of investment in European works, Member States should be able to impose financial obligations on media service providers established on their territory. Those obligations can take the form of direct contributions to the production of and acquisition of rights in European works. The Member States could also impose levies payable to a fund, on the basis of the revenues generated by audiovisual media services that are provided in and targeted towards their territory.'*

<sup>(20)</sup> § 5(1) of the Act.

<sup>(21)</sup> § 13(2) of the Act.

<sup>(22)</sup> Points 3.1.4. and 6. of the comments on the draft Act. The net proceeds of the levy will amount to approximately DKK 98 000 000 (approximately EUR 13 000 000) per year.

<sup>(23)</sup> State aid case SA.101658 - *Tilskud til produktion af dansk public service tv (Public ServicePuljen)*, implemented under Article 54 of 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 ('GBER'), OJ L 187, 26.6.2014, pp.1-78, as amended.

services would be in a legal and factual situation different from on-demand audiovisual media services.

- (17) In this regard, Denmark explains that on-demand audiovisual media services are not subject to the same content-related obligations as linear services. In fact, public service broadcasters, that amount to the large majority of linear viewing in Denmark <sup>(24)</sup>, already have extensive obligations to invest in and broadcast Danish audiovisual content <sup>(25)</sup>. Moreover, linear broadcasters are required, in accordance with Article 16(1) of the AVMSD, to reserve a majority proportion of their transmission time <sup>(26)</sup> for European works <sup>(27)</sup>. Pursuant to Article 17 of the AVMSD, broadcasters must also reserve at least 10% of their transmission time for European works created by producers who are independent of broadcasters <sup>(28)</sup>. On the other hand, Article 13(1) of the AVMSD requires media service providers of on-demand audiovisual media services to only have at least a 30% share of European works in their catalogues and ensure a suitably prominent placement of those works <sup>(29)</sup>.
- (18) The obligations described in recital (17) only apply to broadcasters and providers of on-demand services under Danish jurisdiction <sup>(30)</sup>. The proportion of undertakings under Danish jurisdiction relative to the total market is much smaller for on-demand audiovisual media service providers than for broadcasters. Thus, Denmark argues that most of the on-demand audiovisual media services provided on the Danish market essentially is not regulated in Denmark as regards the promotion of certain types of content. On the contrary, the vast majority of the market for TV broadcasting is either subject to public service obligations under the Danish law or the above-mentioned requirements under the AVMSD (see recital (17)).
- (19) These different legal situations between linear and on-demand audiovisual media services effectively result in a significantly higher share of Danish produced content by linear broadcasters compared to on-demand services, as acknowledged by recital (37) of the AVMSD (see recital (6)). Indeed, public service broadcasters invest up to DKK 1 billion (approximately EUR 134 000 000) per

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<sup>(24)</sup> The two main Danish public service broadcasters, DR and TV 2, represent between 54% (public service channels only) and 81% (including TV 2's commercial channels) of the linear market in share of viewing (data from Nielsen Media Denmark - *Seermålingen* (TV-audience measurement), based on weeks 33-34 of 2023).

<sup>(25)</sup> § 11 of Consolidation Act No 1350 of 4 September 2020 - Radio and Television Broadcasting Act (*Lov om radio- og fjernsynsvirksomhed*).

<sup>(26)</sup> Excluding the time allotted to news, sports events, games, advertising, teletext services and teleshopping.

<sup>(27)</sup> § 13(1) 1. of Order No 1159 of 18 June 2020 - Order on registration-based programme activities (*Bekendtgørelse om programvirksomhed på grundlag af registrering*).

<sup>(28)</sup> § 13(1) 2. of Order No 1159 of 18 June 2020 - Order on registration-based programme activities (*Bekendtgørelse om programvirksomhed på grundlag af registrering*).

<sup>(29)</sup> § 14 of Order No 1159 of 18 June 2020 - Order on registration-based programme activities (*Bekendtgørelse om programvirksomhed på grundlag af registrering*).

<sup>(30)</sup> Pursuant to recital (8) of the AVMSD, '*Establishing jurisdiction requires an assessment of factual situations against the criteria laid down in Directive 2010/13/EU*'. Those criteria are defined in Article 2(3) to (5) of Directive 2010/13/EU.

year <sup>(31)</sup> in Danish language content. Moreover, the two main commercial broadcasters in Denmark, Viaplay Group and Warner Bros. Discovery <sup>(32)</sup>, invest around between DKK [...] (\*) and [...] (approximately between EUR [...] and [...]) per year in Danish produced fiction and non-scripted content <sup>(33)</sup>. This represents an average annual investment in Danish content of approximately [...] % of the broadcasters' aggregate annual sales <sup>(34)</sup>. By comparison, Danish produced films and series <sup>(35)</sup> represent less than 10% of the on-demand audiovisual media services' total content <sup>(36)</sup>, except for the on-demand audiovisual media services provided by public service broadcasters <sup>(37)</sup>.

- (20) In this context, Denmark submits that the levy, by targeting media service providers of on-demand audiovisual media services, aims to address the gap in the contribution to the production and promotion of Danish audiovisual content between linear and on-demand audiovisual media services and therefore to ensure a level playing field (see recital (6)).
- (21) While emphasising the differences between linear and on-demand audiovisual media services, Denmark underlines that the levy covers all types of media service providers when providing an on-demand audiovisual media service regardless of their business model (see recital (9)), including broadcasters providing such services insofar as the revenues from the on-demand services are concerned (see recitals (9) and (11)).
- (22) In this regard, Denmark recalls that the exemptions provided for on-demand audiovisual media service providers with a low turnover or a low audience (see recital (10)(i)) and on-demand audiovisual media services provided solely for library or educational purposes (see recital (10)(ii)) derive from Article 13(6) of the AVMSD.

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\*Confidential information

- <sup>(31)</sup> Danish language content (scripted and not scripted) in this context does not include sports and news programmes (data from DR and TV 2, based on 2020, 2021 and 2022).
- <sup>(32)</sup> Those two commercial broadcasters represent 16% of the linear market in share of viewing. Along with DR and TV 2, Viaplay Group and Warner Bros. Discovery represent 97% of all linear viewing in Denmark (data from Nielsen Media Denmark - *Seermålingen* (TV-audience measurement)).
- <sup>(33)</sup> Estimates are based on data from the Danish Producers' Association whose members cover more than 95% of the Danish production market.
- <sup>(34)</sup> Estimates are based on publicly available accounts in combination with externally provided revenue estimates. The share of investments in Danish content is calculated based on the companies' aggregate annual sales including revenue from sports which is significant for both companies. According to Denmark, the share of investment in Danish content in proportion for total sales from cultural content only would therefore be significantly higher than [...] %.
- <sup>(35)</sup> Titles are defined as Danish produced content if Denmark is among the listed production countries. In most cases, Denmark is the sole production country but when there are two or more production countries, the share of Danish produced content may be overstated.
- <sup>(36)</sup> For instance, Viaplay's Danish produced content share is 6% for films and 7% for series and HBO Max's Danish produced content share is 7% for films and 1% for series (data from PlayPilot, in November 2022).
- <sup>(37)</sup> TV 2 Play's Danish produced content share is 74% for films and 75% for series and DRTV's Danish produced content share is 47% for films and 49% for series (data from PlayPilot, in November 2022).

- (23) Therefore, the levy does not discriminate between linear broadcasting and on-demand audiovisual media services operating on the Danish market but ensures the same competitive environment for such media service providers in relation to the levy's objective.
- (24) In light of the above, Denmark claims that the measure is not selective and therefore does not constitute State aid.

### 3. ASSESSMENT OF THE MEASURE

- (25) Denmark has notified the measure to the Commission as no aid for reasons of legal certainty. The Commission will therefore assess whether the measure in relation to the levy described in Section 2.1 is free of State aid.
- (26) According to Article 107(1) of the Treaty on the Functioning of the European Union ('TFEU'), *'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'*.
- (27) The qualification of a measure as aid within the meaning of this provision therefore requires the following cumulative conditions to be met: (i) the measure must be imputable to the State and financed through State resources; (ii) it must confer an advantage to an undertaking; (iii) that advantage must be selective; and (iv) the measure must distort or threaten to distort competition and affect trade between Member States.

#### 3.1. Selectivity

- (28) To fall within the scope of Article 107(1) of the Treaty, a measure must *'favour certain undertakings or the production of certain goods'*. Hence, not all measures which favour economic operators fall under the notion of aid, but only those which grant an advantage in a selective way to certain undertakings or categories of undertakings or to certain economic sectors.
- (29) The Court of Justice has established that the selectivity of a fiscal (or similar) measure should in principle be assessed by means of a three-step analysis<sup>(38)</sup>. First, the common or normal tax regime applicable in the Member State is identified: 'the reference system'. Second, it should be determined whether a given measure constitutes a derogation from that system insofar as it differentiates between economic operators who, in light of the objectives intrinsic to the system, are in a comparable factual and legal situation. If the measure in question does not constitute a derogation from the reference system, it is not selective. However, if it does (and therefore is *prima facie* selective), it must be established, in the third step of the analysis, whether the derogatory measure is

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<sup>(38)</sup> See, for instance, judgments of 8 September 2011, *Commission v Netherlands* (NOx), C-279/08 P, EU:C:2011:551; of 8 November 2001, *Adria-Wien Pipeline*, C-143/99, EU:C:2001:598; of 8 September 2011, *Paint Graphos and others*, C-78/08 to C-80/08, EU:C:2011:550 and EU:C:2010:411; and of 29 April 2004, *GIL Insurance*, C-308/01, EU:C:2004:252.



justified by the nature or the general scheme of the reference system. If a *prima facie* selective measure is justified by the nature or the general scheme of the system, it will not be considered selective and it will thus fall outside the scope of Article 107(1) TFEU.

### 3.1.1. Identification of the reference system

- (30) The reference system constitutes the framework against which the selectivity of a measure is assessed. It is composed of a consistent set of rules that generally apply, on the basis of objective criteria, to all undertakings falling within its scope as defined by its objective.
- (31) In the case of taxes, the reference system is based on such elements as the tax base, the taxable persons, the taxable event, and the tax rates. The same applies to special purpose (stand-alone) levies, which do not really form part of a wider taxation system. As a result and provided the boundaries of the levy have not been designed in a clearly arbitrary or biased way<sup>(39)</sup> so as to favour certain products or certain activities which are in a comparable situation with regard to the underlying logic of the levy in question, the reference system is, in principle, the levy itself.
- (32) According to the case law, to assess whether the characteristics of a tax indicate a manifestly discriminatory element, it is necessary to determine whether the choice of criteria for taxation appears inconsistent in the light of the objective of that tax<sup>(40)</sup>. In that regard, outside the spheres in which EU tax law has been harmonised, it is the Member State concerned which determines the characteristics constituting the tax, which define, in principle, the reference system or the ‘normal’ tax regime, from which it is necessary to analyse the condition relating to selectivity. That applies in particular to the determination of the choice of tax rate, the tax base, the taxable event, the threshold and the methods for calculating the basis of assessment<sup>(41)</sup>. Account must be taken of the fact that, in the absence of EU rules, it falls within the competence of the Member States to designate bases of assessment and to spread the tax burden across the various factors of production and economic sectors<sup>(42)</sup>.
- (33) The cultural contribution constitutes a special-purpose (stand-alone) levy based on the revenues generated by on-demand audiovisual media services in Denmark, as defined in recital (11). It pursues its own logic and is independent and distinct from any other tax regime applied in Denmark. Therefore, the levy does not form

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<sup>(39)</sup> See, for instance, judgments of 15 November 2011, *Commission and Spain v Government of Gibraltar and United Kingdom*, C-106/09 P and C-107/09 P, ECLI:EU:C:2011:732, paragraphs 101 et seq., and of 16 March 2021, *Commission v Hungary*, C-596/19 P, ECLI:EU:C:2021:202, paragraphs 48 and 49.

<sup>(40)</sup> See, to that effect, judgments of 16 March 2021, *Commission v Poland*, C-562/19 P, EU:C:2021:201, paragraph 43, and of 16 March 2021, *Commission v Hungary*, C-596/19 P, EU:C:2021:202, paragraph 49.

<sup>(41)</sup> See, to that effect, judgments of 16 March 2021, *Commission v Poland*, C-562/19 P, EU:C:2021:201, paragraphs 38 and 39, and of 26 April 2018, *ANGED*, C-236/16 and C-237/16, EU:C:2018:291, paragraph 43.

<sup>(42)</sup> Judgment of 26 April 2018, *ANGED*, C-233/16, EU:C:2018:280, paragraph 50.

part of a wider taxation regime. Accordingly, in the case at hand, the reference system is confined to the levy.

- (34) Denmark explains that on-demand services have gained importance in the Danish audiovisual media services' consumption. Both the financial sustainability of the Danish creative ecosystem, ensuring that high quality Danish audiovisual content continues to be produced in the future, and the distribution and accessibility of Danish films, series and documentaries have been challenged by these changing market conditions (see recital (5)).
- (35) Against this background, and for the purposes of determining whether the characteristics of the levy indicate a manifestly discriminatory element, it is noted that, as stated in recital (6), the objective of the levy is to promote Danish audiovisual content by requiring media service providers generating revenues from making available audiovisual content on on-demand audiovisual media services targeting audiences in Denmark to contribute to the production of new Danish films, series, and documentaries.
- (36) The main features of the reference system will be assessed below.

#### 3.1.1.1. Taxable persons and taxable event

- (37) In accordance with Article 13(2) of the AVMSD, the levy applies to on-demand audiovisual media service providers established in Denmark but also to media service providers established in other Member States providing on-demand audiovisual media services targeting audiences in Denmark (see recital (9)). The scope of the levy is therefore revenues generated by selling on-demand audiovisual media services to a Danish audience. Revenues obtained from linear audiovisual media services are not in the scope of the levy (see recital (11)).
- (38) As regards the scope of the levy, Denmark underlines that on-demand services are a distinct service from linear services, with a different legal and factual situation (see recital (16)). As explained by Denmark, the Danish market for linear services is dominated by public service broadcasters which are already subject to extensive obligations to invest in and broadcast Danish audiovisual content (see recital (17)). Furthermore, when comparing the obligations applying to on-demand and linear audiovisual media services as regards the production and distribution of Danish and European audiovisual works, it follows that on-demand services are subject to a more lenient regulatory framework (see recital (17)). Although covering all services with audiovisual content, irrespective of the technology used to deliver the content, the AVMSD makes a distinction between linear and on-demand audiovisual media services and provides lighter regulation to the latter. As a result, most of the Danish market for on-demand services is not regulated, while the market for linear services is either subject to public service obligations under the Danish law or to the requirements under Articles 16 and 17 of the AVMSD (see recitals (17) and (18)). These differences in market structures and legal obligations translate into higher levels of investment in Danish works by broadcasters compared to on-demand audiovisual media service providers (see recital (19)). That factual situation is, moreover, acknowledged by recital (37) of the AVMSD (see recitals (6) and (19)).

- (39) As explained in recitals (6) and (20), the levy is designed to address the gap in the contribution to the production and promotion of Danish audiovisual content between linear TV services broadcasters and on-demand audiovisual media services, caused by the different obligations relevant for the objective of the levy.
- (40) In light of the above, limiting the scope of the levy to media service providers of on-demand audiovisual media services generating revenues in the Danish market is consistent with its objective and does not reveal a manifestly discriminatory element in the design of the levy<sup>(43)</sup>. Accordingly, the fact that linear audiovisual media services are not in the scope of the levy and do not form part of the same reference framework cannot be regarded as conferring a selective advantage on those undertakings.

#### 3.1.1.2. Taxable base and tax rates

- (41) As described in recital (11), the levy is calculated based on the contributory turnover defined as the revenues of a media service provider resulting from the making available of audiovisual content through an on-demand audiovisual media service in Denmark.
- (42) The exclusion of revenues generated from sports or news programmes, from linear programming services, and from the redistribution of other media service providers' on-demand audiovisual media services from the contributory turnover (see recital (11)) is consistent with the levy's objective. Sports and news programmes do not fall under the categories of audiovisual content (films, series, and documentaries) which the levy aims to support. Therefore, the exclusion of those programmes from the contributory turnover, even if they are made available through an on-demand audiovisual media service, is consistent with the levy's objective to support the production of new Danish films, series, and documentaries (see recital (11)). The exclusion of linear programming services made available through an on-demand audiovisual media service is also consistent with the underlying logic of the levy. Such services are already subject to the various content-related obligations described in recital (17). Their exclusion from the contributory turnover is therefore consistent with the levy's objective to address the gap in the contribution to the production of Danish audiovisual content between linear and on-demand audiovisual media services (see recitals (6), (20) and (39)). Finally, the exclusion of revenues generated through the mere redistribution of other on-demand audiovisual media services from the contributory turnover ensures that media service providers are not required to pay for revenues from services for which they do not have editorial responsibility and are not providers of within the meaning of the Act. It also aims to avoid the double payment of the levy for the same on-demand audiovisual media service.
- (43) As regards the design of the measure and the tax rates applying for the basic and increased levies (see recitals (11) and (12)), as noted by Denmark, the combination of a levy and direct investments in new Danish content is in line with

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<sup>(43)</sup> See the Commission's comments delivered on 2 May 2024 regarding the notification 2024/54/DK within the framework of the procedure laid down by Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services, OJ L 241, 17.9.2015, pp.1-15.

Article 13(2) of the AVMSD. The differentiation between the basic levy and the increased levy is consistent with the measure's objective. Indeed, on-demand audiovisual media services that invest at least 5% of their contributory turnover in Denmark in new Danish content already provide a contribution to Danish audiovisual content and are subject only to the basic levy. Moreover, the basic levy and the possibility to waive the increased levy by direct investments in new Danish content apply to all entities subject to the measure.

- (44) In light of the above, the Commission considers that the exclusion of the revenues as described in recital (42) from the tax base, and the differentiation in tax rates constitute features that do not reveal a manifestly discriminatory element in the design of the reference system and are consistent with its objective.

#### 3.1.1.3. Interim conclusion

- (45) In view of the above, the Commission concludes that the reference system has not been configured according to manifestly discriminatory parameters intended to circumvent Union law on State aid.

#### 3.1.2. Derogation within the reference system

- (46) As a third step, it is necessary to determine whether the levy involves a derogation from the application of the reference system in favour of certain undertakings, which are in a similar factual and legal situation in light of the objective of the reference system.
- (47) As described in recitals (9) and (10), the levy covers all on-demand audiovisual media services provided against payment, apart from, on the one hand, on-demand audiovisual media service providers with a low turnover or a low audience and, on the other hand, who offer such services solely for library or educational purposes.
- (48) As regards on-demand audiovisual media service providers with a low turnover or a low audience (see recital (10)(i)), this exemption is in line with Article 13(6) of the AVMSD which aims to exclude providers with no significant presence on the market from the requirements on media service providers targeting audiences in other Member States under Article 13(2) (see recital (8)) *'in order to allow for the entry of new players in the market'* <sup>(44)</sup>. This obligation is an indication that the capacity of media service providers with a low turnover or a low audience to contribute to the production of Danish audiovisual content is different and typically lower than larger on-demand audiovisual media service providers' capacity. Imposing the levy on them would therefore risk undermining market development, as stated in recital (40) of the AVMSD. Thus, on-demand audiovisual media service providers with a low turnover or a low audience are not in the same factual and legal situation in light of the objective of the levy.
- (49) The exemption for media service providers offering on-demand audiovisual media services for library or educational purposes (see recital (10)(ii)) is also in line with Article 13(6) of the AVMSD which allows Member States to waive the

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<sup>(44)</sup> Recital (40) of the AVMSD.

requirements on media service providers targeting audiences in other Member States under Article 13(2) (see recital (8)) where such a requirement ‘*would be impracticable or unjustified by reason of the nature or theme of the audiovisual media services*’. Those on-demand services are provided for educational and cultural purposes to users of local libraries and Danish primary and secondary schools<sup>(45)</sup>. Given the general interest nature of those services, it can be concluded that they are not in the same factual and legal situation in light of the objective of the levy.

- (50) The Commission concludes that the above-mentioned media service providers of on-demand audiovisual media services are not in a similar factual and legal situation in light of the objective of the levy. Therefore, their exemption does not constitute a derogation from the reference system.

### 3.1.3. Conclusion on selectivity

- (51) The reference system has been designed by Denmark in a consistent manner and has not been configured according to manifestly discriminatory parameters. It is not designed in a clearly arbitrary or biased way so as to favour certain undertakings over others, which are in a comparable situation with regard to its underlying logic.
- (52) The Commission therefore considers that the notified measure is not selective.

## 3.2. Conclusion on the existence of aid

- (53) For a measure to be categorised as aid within the meaning of Article 107(1) TFEU, all cumulative conditions set out in that provision must be fulfilled.
- (54) Since the notified measure is not selective, not all the conditions laid down by Article 107(1) TFEU are met. Therefore, the Commission concludes that the notified measure does not constitute aid.

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<sup>(45)</sup> This concerns the three TVOD services (*Filmstriben*, *Børnebiffen.dk* and *Filmcentralen*) provided by DBC Digital, a public company whose main mission is to develop and maintain the bibliographic and IT infrastructure in the Danish libraries.

#### 4. CONCLUSION

The Commission has accordingly decided that the measure does not constitute aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union.

If this letter contains confidential information which should not be disclosed to third parties, please inform the Commission within fifteen working days of the date of receipt. If the Commission does not receive a reasoned request by that deadline, 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: <https://competition-cases.ec.europa.eu/search?caseInstrument=SA>.

Your request should be sent electronically to the following address:

European Commission,  
Directorate-General Competition  
State Aid Greffe  
B-1049 Brussels  
[Stateaidgreffe@ec.europa.eu](mailto:Stateaidgreffe@ec.europa.eu)

Yours faithfully,

For the Commission

Margrethe VESTAGER  
Executive Vice-President

