[DE] Cinema Operators Forced to Pay Film Tax

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Based on a decision issued by the *Verwaltungsgericht Berlin* (Berlin Administrative Court) on 20 September 2007, cinema operators are obliged to pay the so-called "film tax" in pursuance of Art. 66 of the *Gesetz über Maßnahmen zur Förderung des deutschen Films* (Act on measures to support the German film industry - *Filmförderungsgesetz* - FFG). A cinema operator had appealed against a similar decision taken by the national film support institute (FFA).

According to Art. 66(1) FFG, the film tax must be paid by anyone who charges customers to watch films with a duration of more than 58 minutes. The tax applies to each cinema with an annual turnover of more than EUR 75,000 and is levied on the income from ticket sales.

The plaintiff argued, in particular, that the Federal Government was not responsible for regulating the film tax because, according to the revised FFG of 2003 (which entered into force on 1 January 2004, see IRIS 2004-1: 10 and IRIS 2003-5: 14), the quality and cultural value of a film, rather than economic aspects were now central to the distribution of film aid. They also claimed that the principle of equal treatment enshrined in Art. 3(1) of the *Grundgesetz* (Basic Law - GG) had been breached, since TV companies were exempted from paying the film tax for no objective reason. They only paid voluntary contributions.

The Administrative Court dismissed the appeal as unfounded. It was not of the opinion that legislative powers had been exceeded. Since the film tax was a special tax with a specific purpose rather than a general tax, the question of the Federal Government's powers was dealt with in Art. 74(1)(11) GG. This stated that the so-called "concurrent legislative powers" of the Federal Government extended to the "law relating to economic affairs". The Court held that this term should be interpreted in a broad sense and that the purpose of the Act should be determined on the basis of an objective interpretation of its provisions. In contrast to the plaintiff's claim, even after the amendment of the FFG, the economic rather than the cultural aspects of films were still more important. Although the concept of quality was referred to in some provisions, the fact that promoting artistic quality was an objective did not mean that the FFG was no longer a "law relating to economic affairs", since it considered the quality of a film to be an economic factor. The fact that the legislator had limited itself to promoting film as an economic activity was demonstrated, for instance, by how the funds were used.

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Film aid was granted, for example, not just on the basis of a film's quality, but also taking into account the profitability of the film or screenplay (predicted chance of market success, level of ticket sales). The Court also explained that the Federal Government's powers still applied even though the German *Bundesländer* operated extensive film aid systems of their own. As far as concurrent legislative powers were concerned, if any powers were to be blocked, it would be those of the *Länder* , superseded by the Federal Act. In the Administrative Court's opinion, the national regulation of film aid was necessary in order to protect economic unity, which was in the interests of the state as a whole.

With regard to special requirements that the film tax should be required to meet, particularly in terms of equal treatment, in order for it to be admissible as a special tax, the Court considered that these had been met. The film tax was used, for example, to support the production, sale and screening of German films and was therefore more than just a money-making tax. In addition, cinema operators, together with the video industry and public and private TV companies, formed a homogeneous group because of their common economic interest in the marketing of German films and in an independent German film production industry that enjoyed success on the international market. The fact that broadcasters were not obliged to pay the film tax did not stand in the way of the group's homogeneity. Rather, there were objective reasons for the different rules concerning TV broadcasters' contributions to German film aid, which were made on the basis of contractual agreements with the FFA (Art. 67 FFG). Unlike cinema operators, TV broadcasters did not charge their customers to watch films and made considerable payments in kind to support the German film industry through their own productions or involvement in productions. The Court also disagreed with the plaintiff insofar as it considered that the film tax revenue benefited the whole group, since cinema operators profited from the tax both directly through the support for film screenings in cinemas (Art. 68(1)(5) FFG) and indirectly through the exploitation of films which had received funding at the production stage (Art. 67a(2), 67(1), 68(1)(1 to 4) FFG).

Urteil des Verwaltungsgerichts Berlin vom 20. September 2007 (Az. VG 22 A 5.05)

http://www.berlin.de/imperia/md/content/senatsverwaltungen/justiz/gerichte/vg2/entscheidungen/vg_22_a_5.05.urteil.pdf

Ruling of the Berlin Administrative Court of 20 September 2007 (case no. VG 22 A 5.05)

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