“Suomen malli tilausohjelmapalveluiden investointivelvoitteeksi”, Ministry of Culture 2024:15

Consultation response Netflix **May 2024**

Netflix thanks the Ministry of Education and Culture for the opportunity to provide input on the independent expert report regarding a financial obligation in Finland.

Overview

As Netflix, we are happy to contribute to the growth and development of the Finnish audiovisual industry. We are proud to invest in films, series and games. **Finland is home to two Netflix Games studios**: Next Games and Moonlot by which Netflix has a significant physical footprint, employing approximately 130 people in Helsinki. These studios are part of the successful and growing audiovisual industry, are at the forefront of innovation, and are sharing exciting new Finnish games with the world. Next to that, **we commission films and series and license newer and older productions, direct to service and after theatrical release**. When we commission films and series, we work in partnership with Finnish producers and creatives. Netflix has invested in Finnish stories such as *Dance Brothers*, which premiered globally on Netflix service in 2023. The series was co-financed with public service broadcaster Yle. We have also announced the film *Little Siberia*, directed by Dome Karukoski and produced by SF Studios/Bufo with a planned launch in 2025 on Netflix service. In addition, Netflix has invested in titles like *Karpii (Deadwind)*, *Sorjonen (Bordertown)*, *Risto Räppääjä (Ricky the Rapper)* and *Paha Maa (Frozen Land*). As a global operating company, we are proud to bring these Finnish stories to all our members and contribute to **connecting cultures** across the world and **creating empathy and understanding through the stories we tell**.

We believe more people deserve to see their lives on screen, and are committed to creating opportunities in front of and behind the camera for people from all backgrounds and cultures. Therefore we invest in new talent and strive to **build the capacity of creatives & crew** by creating and supporting talent development programs. One such initiative is our partnership with the International Sámi Film Institute, which aims to support and further develop Sámi voices in the Nordic region.[1] The program supports new Sámi creatives to break through in the industry and opens up more opportunities to support representation in the industry.

Analysis of the proposal

We see the proposal in the report as contrary to the intent to support local content as well as the provisions and objectives of the **Audiovisual Media Services Directive** (“AVMSD”), the principles of **non-discrimination**, **equal treatment** and **technological neutrality**, **international standards** and **OECD commitments**.[2]

[1] https://about.netflix.com/en/news/netflix-and-the-international-sami-film-institute-enter-into-a-new

[2] OECD/G20 Base Erosion and Profit Shifting Project Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy, October 2021.

1. Choice of instrument

While recognizing the intent to support the creation of high-quality local content, we fail to see how the proposal in the report fulfills the ambition of more investments, visibility and diversity in Finnish storytelling. We **lack a thorough analysis of the effect of an obligation on investments and the attractiveness of Finland as a production country, and on consumers.** A thorough impact analysis is crucial to understand the potential unintended consequences of such measures.

The Nordic market for on demand programme services is very competitive. Investments in local production in the Nordic region are very high, without having financial obligations in place.[3] The Ministry of Culture showed a growth of the Finnish audiovisual industry by 48% between 2016 and 2021.[4] We have observed for example in Spain and the UK that **organic investments in local films and series result in the production of the most diverse and highest-quality content,** catering to the wide-ranging preferences of consumers. Well-functioning and efficient production incentives also have a proven solid effect on stimulating film and tv productions.[5]

Comparative studies show that a too strict regulatory framework can lead to a **reduction in appetite from on-demand services to invest** as complex and disproportionate regulatory constraints along with limiting contractual freedoms and commercial choices are a strong disincentive.[6] A levy is a cost-increasing tax, and can work as a barrier to entry into the market. This could lead to **fewer services available in Finland, fewer investments** and **less diversity in content available**. It risks undermining the sector's international competitiveness rather than improving it. Levies also add another layer of bureaucracy to the financing of content, as more funds will be diverted to for example a fund. It also risks hurting Finnish consumers, as a levy can lead to price increases.[7]

High investment obligation risks having an inflationary effect, since overstimulating local content production can lead to inflated prices affecting both local and international players as well as linear and on-demand services. It risks leading to oversaturated markets, and limited distribution opportunities for local creators.[8]

The complex model proposed in the report risks disincentivizing investments, since investments would not decrease the levy before they exceed 5% of revenues. A company that would aim to limit the overall impact of the financial obligation could therefore choose to stop investing and only pay the levy, which means that the Finnish industry would lose investments and the visibility of Finnish content on international streaming services decrease.

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[3] A bill to introduce a financial obligation in Denmark is currently being processed in parliament.
[4] Selvitys tilausohjelmapalveluille asetettavan maksuvelvoitteen toteuttamisvaihtoehtojen mahdollisista vaikutuksista Suomessa, Ministry of Culture 2023:5
[5] A study concluded that the incentive scheme in Norway had a ROI of 4,7 krona for each 1 krona invested in the scheme, while a similar study in Iceland found that the ROI was 6,8 per 1 krona invested
[6] Market forces are creating a balanced European AV ecosystem - and it is booming" September 2022. Oliver & Ohlbaum https://www.oando.co.uk/insight/market-forces-are-creating-a-balanced-european-av-ecosystem
[7] Ministry of Culture 2023:5
[8] https://laweconcenter.org/resources/cultural-levies-and-the-eu-audiovisual-market/, Ministry of Culture 2023:5

2. The proposed percentage and proportionality

In the report, it is proposed to introduce a 5% levy or a 10% investment obligation for on-demand services. That would be **one of the highest rates in Europe**, with only one country having a higher levy and two countries with a higher investment obligation, although in those countries also European works can in part count towards the obligation.[9] In comparison, **the majority of countries have chosen to not impose financial obligations** on cross-border services to date. From the countries that have existing instruments in place for audiovisual media services, the current median of a standalone levy is 2% and of an investment obligation 4.5%. Given that the financial obligation is proposed to be calculated based on revenues, it would eat **a very significant portion of the usually achievable profit margin** of a media service provider without any return, and become even more burdensome, if a business cannot achieve a positive margin at such level or if it even makes losses, as it would still be obliged to pay the levy.

There is no analysis of whether there is a lack of funds in the industry, nor a substantiation for the high obligation. We also **lack a thorough explanation of how the principle of proportionality has been taken into account**. As the European Commission has concluded, national authorities "need to justify appropriately how the principle of proportionality has been taken into account"[10] when imposing a new financial contribution obligation for media services. The high rates proposed risk conflicting with the AVMSD, which requires obligations to be proportional. It is not clear if less infringing options to achieve the objective have been explored, as required by the AVMSD and the TFEU.[11]

3. Compatibility with tax commitments

We further **question whether the contemplated levy is compliant with international tax commitments Finland has agreed upon as a member of the Inclusive Framework**. The levy of 5% should be characterized as a **Digital Service Tax** (DST) as 1) the levy should be considered a tax, 2) it is levied on gross revenues from on-demand services provided to Finnish customers, and 3) the main payers of the tax are expected to be large foreign digital service providers. More precisely, the levy would most likely fall into the category of so-called **earmarked taxes**, as the revenue will be used to fund a specific public service within the overall fiscal system. The Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy, agreed by 137 OECD member countries on 8 October 2021[12], requires that Finland **does not enact a DST or any other relevant similar measures**. The Inclusive Framework recognizes that DSTs and similar measures threaten the success of the multilateral project, and therefore a continued ban on DSTs is part of the Inclusive Framework's negotiations. Moreover, if a Multilateral Convention implementing OECD Pillar 1 is agreed on, Finland cannot introduce a new DST or a similar measure and Finland has to remove any DSTs already

[9] Levy (France), investment obligation (France, Italy)

[10] EC: Communication from the Commission. Notification Number 2022/0659/DK

[11] An obligation under Article 13.2 AVMSD, which in fact constitutes a restriction on the freedom of enterprise (art. 57. TFEU), must be proportional and non-discriminatory. The concrete measures chosen should be appropriate to achieve the objective, and no less infringing options should be available.

[12] "The Multilateral Convention (MLC) will require all parties to remove all Digital Services Taxes and other relevant similar measures with respect to all companies, and to commit not to introduce such measures in the future. No newly enacted Digital Services Taxes or <u>other relevant similar measures</u> will be imposed on any company from 8 October 2021 and until the earlier of 31 December 2023 or the coming into force of the MLC. The modality for the removal of existing Digital Services Taxes and other relevant similar measures will be appropriately coordinated. The IF notes reports from some members that transitional arrangements are being discussed expeditiously."

implemented. Therefore, in case Finland would introduce the levy, it would undermine the multilateral negotiations and risk the need to repeal the levy in the short term. This would be a significant compliance burden for both the Finnish institutions as the levy payers.

We are familiar with the argument that article 13 of the AVMSD provides Member States with the opportunity to levy cultural contributions on the turnover of on-demand services. However, **an option mentioned in an EU minimum harmonization directive does not overrule agreements entered into by member states under the auspices of the OECD**. In addition, it should be taken into account that the current version of the AVMSD was adopted back in 2018, whereas the OECD international agreement is from 2021.

It is worth noting that one of the inspirations for the proposed system was the Norwegian proposal from late 2022. However, in late March the **Ministry of Culture in Norway has announced that they will not be introducing a co-financing obligation at the moment,** as 'any future introduction of the co-financing obligation must await the process in the OECD/G20's Inclusive Framework on Base Erosion and Profit Shifting.'[13] Therefore, we would strongly caution against any introduction of measures until the Framework is in place to ensure that the measure complies with it.

4. Eligible investments

The proposal stipulates a clear advantage granted to the **original Finnish-language and Finnish-produced** content, as the criteria for eligible investments are: at least 75% of the language spoken in the work should be in the official languages of Finland, more than half of the production budget is spent in Finland or the main descriptions are made in Finland, the production is carried out by a production company registered in Finland, or the main creative and technical executors of the production are Finnish or resident in Finland. It is not clear from the report whether the criteria would be cumulative or not, however, all stipulate fostering of national works and creators rather than European works as prescribed by the AVMSD.

We expect the three latter **criteria to be contrary to the objective of Art. 13(2) of the AVMSD as well as to EU Internal Market rules**, in particular to the freedom of establishment and freedom to provide services. The three criteria are binding investments in different ways to the territoriality of Finland. As Finland is part of the EU Internal Market of which freedom to provide services and freedom of establishment are key[14], we expect this is not in line with existing laws. Such a definition of eligible works as proposed in the report has also been **strongly questioned by the European Commission.**[15] Additionally, part of the objectives for a possible introduction of an obligation are growth of the Finnish industry and the increase of production budgets, which is not in line with the promotion of European works and cultural diversity, as prescribed by the AVMSD. Also, such economic motivation cannot under

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[13] Endringer i kringkastingsloven mv. (gjennomføring av endringsdirektiv til direktiv om audiovisuelle medietjenester mv.) og samtykke til godkjenning av EØS-komiteens beslutning nr. 337/2022 om innlemmelse i EØS-avtalen av direktiv (EU) 2018/1808, Prop. 66 LS (2023–2024)
[14] TFEU, art. 49
[15] EC: Communication from the Commission. Notification Number 2024/0054/DK, EC: Communication from the Commission. Notification Number 2023/0562/DK

TFEU be considered as a legitimate reason of general public interest to justify any restriction to Internal market freedoms.

All investments in the audiovisual industry, such as investments in films, series, talent development programs and games, contribute to the growth and development of the local industry. They should therefore all count towards an obligation. Within the film and tv industry, there are different investment structures to bring stories to life, such as licensing of new and older productions and exclusive original commissioned works. These are **all important instruments for the financing of films and tv series and bring value to the local ecosystem**.

However, it is proposed that productions to which a streaming service owns the rights, would not count towards the obligation. Regulatory interventions that purport to limit or interfere with IP ownership are a **strong disincentive** that would **distort content development** policies and **discourage inward investments**. There is no market failure that needs to be addressed and having **contractual freedom** means that producers and providers can negotiate the rights allocation based on the financing structure which is the best fit for a particular project. Restricting the scope of those rights negotiations could result in certain projects, especially those of small and independent producers, being at risk of not being produced at all. Limiting investments to a certain deal structure and intervening in commercial negotiations between two private parties would create a **highly distorting effect**.

5. Non-discrimination between media services

AVMSD and Art. 13 (2) of it requires that financial obligations introduced should be non-discriminatory. However, the proposal firstly limits the proposal to be applicable only to VOD providers and secondly, the focus of the report seems to be on effectively exempting incumbent domestic operators, **making the proposal not compliant with the AVMS and its core principle of non-discrimination**. It is clearly stated in the report that 'the AVMS Directive's obligation should be implemented in a way that minimizes the disadvantage of domestic commercial operators (...)'[16]. This will likely lead to **discrimination based on nationality of the service** which is not allowed under AVMSD.

We believe that the envisaged financial obligation would also **disproportionately discriminate against the VOD sector** if compared with other parts of the entertainment industry, such as linear broadcasting. If a financial obligation is introduced, it is crucial that it is evenly applied to relevant competitors. An artificial distinction based on business models is not only discriminatory but also not future-proof in the quickly evolving industry. In line with the European Commission's comments, **authorities would need to provide a justification regarding the non-discriminatory definition of the scope of the measure**, for example, by providing concrete data on the investments undertaken.[17] No such data is provided in the report to motivate the exclusion of linear services. Such artificial divisions based on distribution models also prove difficult in practice, since both linear and on demand content can be offered on a streaming service, and the same content can be shown on subscription and free to air streaming services and linear channels, as noted in the report.[18] In line with the above, if an obligation would be introduced, it

[16] Suomen malli tilausohjelmapalveluiden investointivelvoitteeksi, Ministry of Culture 2024:15
[17] EC: Communication from the Commission. Notification Number 2023/0136/B
[18] Suomen malli tilausohjelmapalveluiden investointivelvoitteeksi

should apply to 'audiovisual media service providers' in line with AVMSD and common practice in Europe[19].

Further, in line with Recital 36 of AVMSD, on-demand services should be **guaranteed equal access** to the public fund, following criteria that are **clear, automatic and predictable**. The report seems to suggest that criteria should be very limited to ensure that IP stays in Finland and the production should fit cultural criteria to be able to gain support from it. This would substantially limit the possibility of non-domestic providers to be able to benefit from it and likely benefit linear providers which will not be contributing to the Fund. The fund should strengthen the diversity of Finnish content being produced, and stimulate access to **all genres, formats** and Finnish stories **without applying a cultural test nor favoring certain distributors or private agreements**. We highlight the need for a robust approach with a high level of understanding of dynamics within the audiovisual industry.

6. Other remarks

We would like to note that while non-domestic providers' point of view were considered in the work for the report *Selvitys tilausohjelmapalveluille asetettavan maksuvelvoitteen toteuttamisvaihtoehtojen mahdollisista vaikutuksista Suomessa*[20], non-domestic providers were not consulted at all when the proposal in the report was prepared, although they are clearly the target of the obligation and have valuable input to give on the effects on the local industry. This report has also failed to describe and take into account the conclusions from the report from 2023.

We would also like to take this opportunity to amend some misunderstandings regarding schemes in other countries. Denmark has not yet imposed obligations given the delay of the legislative process. The Czech Republic subjects domestic linear and non-linear providers to financial obligations. Poland has a levy of 1.5% and Greece adopted a model where providers can choose between contribution to a Fund or investing also at a level of 1.5%. A discussion proposal for an investment obligation has been put forward by one ministry in Germany, but there is however no alignment within the government on whether it will move ahead with any proposal at all.

[19] Article 13.2 of the AVMS Directive: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018L1808&from=EN
[20] Ministry of Culture, 2023:5