MOTION PICTURE ASSOCIATION EMEA

Brussels, 17 May 2024

Subject: MPA comments on the study on Finland's model as an investment obligation for subscription programme services (VN/33859/2023)

Submitted by email to: kirjaamo.okm@gov.fi

Sir/Madam:

Thank you for inviting stakeholders to express their views in the public consultation on the report commissioned by the Ministry of Culture on a possible direct financing obligation for VOD services. The Motion Picture Association serves as the global voice and advocate of the international film, television, and streaming industry. Our members are Walt Disney Studios Pictures, Netflix Studios, LLC, Paramount Pictures Corporation, Sony Pictures Entertainment Inc., Universal City Studios LLC, and Warner Bros. Discovery.

We would like to convey our concerns about the conclusion of the study recommending the introduction of a financial obligation of such a proposal for VOD services, among other things, without conducting and considering the results of an updated independent economic impact study. Additionally, we would like to raise the consequences and several obstacles that this would create for the Finnish AV sector such as constraints to the freedom to provide services in Finland[1] as well as hindering the growth and competitiveness of the Finnish audiovisual sector at an international level. Hence, we wish to address three main issues:

1. The introduction of financial obligations will discourage foreign investment in audiovisual production and will be a barrier to entry into the market
2. Preserving contractual freedom is key to attracting investment and protecting the AV industry
3. Safeguards and flexibility would be paramount to ensure a positive impact on the audiovisual sector while being in line with the AVMSD.

The introduction of financial obligations will discourage foreign investment in audiovisual production and will be a barrier to entry into the market

Article 13(2) AVMSD clarifies that if a Member State decides to introduce financial contributions for VOD services, these must respect the principles of proportionality and non-discrimination. According to settled EU law[2] measures affecting the freedom to provide services may only be justified if they are proportionate in light of their objectives and do not go beyond what is

[1] Restrictions on the establishment of service providers are considered contrary to the principle of free movement of services

[2] Judgment of the Court of 5 March 2009, UTECA v Administración General del Estado, C-222/07, EU:C:2009:124.

necessary to attain them. We understand that the study suggests a 5% levy for those media service providers that directly invest less than 5%. In the event a service invests more than 5%, any spend over such threshold would be deducted from the levy[3].

It is worth noting that the European Commission has reminded the authorities of the "need to justify appropriately how the principle of proportionality has been taken into account" when setting a new financial contribution obligation for media services[4]. The study, however, does not justify why it has chosen the mentioned rates, mention any economic assessment that supports this choice[5] of instrument or seem to consider the likely inflationary effect or the legal uncertainty that may arise following a potential legislative change, which can jeopardize the attractiveness of Finland for international services to carry out new productions[6]. While the objective of introducing a levy, according to the study, would be to attract more foreign investment in Finnish content and to promote the internationalization of the Finnish audiovisual sector and reach a wider audience, the introduction of a new financial obligation could have the opposite effect - it is likely that it would have a chilling effect on the inward investment by non-domestic VOD service providers. In fact, the implementation of different obligations in different member states causes fragmentation of capital, which leads to a "tick box" outcome that results in content lacking full entrepreneurial support.

Moreover, the study aimed to evaluate the effect of financial obligations on domestic services. If such financial obligations are to be implemented, any implementation should encourage international operators to participate in the financing of domestic productions, while taking into account the consequences on the domestic providers. Additionally, the study does not look into how financial obligations would affect international services that would be targeted by this new financial obligation and are mentioned throughout the study. MPA members are part of the Finnish audiovisual industry. They are deeply engaged with other players of the ecosystem and are an essential part of the production and distribution ecosystems globally. As such, it is important to include non-domestic companies in discussions surrounding any new financial obligation applicable to all VOD services, at the service of well-rounded policy and an inclusive democratic process.

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[3] For example, if the direct investment of the operator is 6.6% of turnover, the levy is between 5 and 1.6%, i.e. 3.4%.

[4] See Commission's TRIS comments on the Danish draft law submitted in 2022 available here.

[5] The 2023 study does not support any specific model explicitly, rather noting that, "whatever implementation option is chosen, its economic impact, its overall impact on the national audiovisual market and its impact on Finland's competitiveness in the international audiovisual market should be considered as widely as possible from the different players' perspectives. it should also be noted that the potential impact of the implementation models may differ depending on whether they are considered in the short or long term. The audiovisual sector is changing rapidly and it is currently impossible to predict the future".

[6] There are several articles that highlight the potential inflationary effect that investment obligations could potentially create. For instance, a specialized article on the topic entitled "Cultural Levies and the EU Audiovisual Market" has clearly stressed that where local content production is overstimulated, "Member states may drive up the prices for local production, while at the same time oversaturating local markets and providing little avenue for local creators to distribute and market their works more broadly" (page 6). Additionally, the European Commission's 2023 Media Industry Outlook identifies increasing costs and a shortage of specialized workers as principal risk factors for European producers. This is exacerbated by financial obligations, which can drive up production costs and potentially increase dependency on a smaller number of firms that can absorb higher costs (page 7 and 48).

Further to this, we have seen the reference to the *Medialogi Ogy* study[7] regarding the perception of foreign services of a tax, which states that international services consider the levy to be a "tax-like charge that that burdens their business and partly takes away their freedom of choice as to what kind of content they can offer their customers". We would also like to respectfully reiterate that the suggested financial obligation would be indeed disproportionate and unjustified.

In addition, when taking into account the obligations introduced in similar-sized territories, which are lower or non-existent[8], the proposed rates in the study for Finland fall outside of the principle of proportionality. And, in fact, the presence of higher financial obligations on media service providers, whether it is a film fund levy or a direct financing obligation, does not necessarily guarantee superior outcomes in terms of content investment. Countries like Germany and the UK, which have minimal or no additional requirements, also demonstrate robust levels of investment in the content industry[9].

The study, when assessing the most convenient model, mentioned the Norwegian proposal. It is worth noting that the Norwegian government has recently refrained from introducing a financial obligation – foreseen in their preliminary draft law – pending finalization of the work on Pillar One of the OECD Framework[10], under which parties to the agreement commit not to introducing digital services taxes[11]. Therefore, in light of the ongoing international deliberations and the need for comprehensive evaluation, it would be prudent for the Finnish government to examine this issue thoroughly if it decides to continue evaluating possible amendments to the current regulatory framework.

The study brings forward the example of Germany. We would like to stress that it is not "Germany" that has made a proposal regarding a direct financing obligation; rather, it is the Federal Government Commissioner for Culture and the Media (BKM) who has made a proposal, and has specifically noted that her proposal is not an agreed government position. In fact, other ministries and parliamentary groups publicly oppose this initiative[12]. The draft "discussion act" has never been made public and the government in Germany has not made any decisions in this regard yet, so it is not "strongly behind the reform" as it is pointed out in the study.

Finally, it is also necessary to note that this model diverges from implementations of the AVMSD's Article 13.2, creating an additional level of complexity that would increase compliance costs, and contribute to the further fragmentation of the EU's internal market. Direct financing in content implies a higher entrepreneurial effort than a levy since the financial involvement and risk is greater, as recognized in the EU Commission's guidelines[13] – except for the proposal in Denmark,

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[7] Mentioned in page 31

[8] Greece (1.5% investment obligation); Sweden, Ireland, Slovakia, Lithuania, Latvia, Estonia, Luxembourg, Cyprus, Malta, Hungary (0% financial obligation) - but also larger countries such as Germany (1,8% - 2.5% levy on revenues from theatrically released films only) and Poland (1.5% levy) are not much higher.

[9] In fact, Spain experienced an "above-average growth" in spending from 2012 to 2022, with an average growth rate of 9%, compared to 4% in France, the latter having more burdensome restrictions, higher financial obligations and less flexibility.

[10] OECD/G20s Inclusive Framework on Base Erosion and Profit Shifting

[11] Prop. 66 LS (2023–2024) - regjeringen.no, page 68-69

[12] Die dritte Säule der Förderreform wackelt | Kino | Blickpunkt:Film (blickpunktfilm.de)

[13] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020XC0707(03)&from=EN

no other EU country attributes different values to direct financing and levies and the proposal found in the study goes even further requiring double the investment for offsetting the levy fully. Introducing this 'factor' would likely further demotivate companies from investing directly in content, and thereby fail to meet the ambition of the Finnish industry today, which aspires to welcome new investors.

Contributions should be fully made to European works, and the principle of non-discrimination is essential under AVMSD

The study suggests that the projects eligible towards the direct financing requirement would have to comply with a language requirement – at least 75% of the language spoken in the work should be in the official languages of Finland – and with other additional criteria: more than half of the production budget is spent in Finland or the main shoots are made in Finland; or 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.

First, we would like to flag that the European Commission has noted in various TRIS comments[14] that introducing financial obligations in the form of a direct financing or a financial contribution to a film fund (whether as a general obligation or sub-quota) that relate solely to national cinematographic films and audiovisual activities, or national language works are likely not consistent with the AVMSD which requires such contributions be to European works. Particular attention should be paid to the European Commission's recent comments to the draft Danish bill[15], in which there is also a requirement that 75% of production material should be in Danish, expressed that "such percentage is difficult to measure and, consequently, to monitor. In that context it should also be borne in mind that not every work seems to be suited to be produced in more than one language, which might elevate the percentage in practice". Thus, the Commission noted that "a high proportion benefiting from investment obligations, compared in relation to European works, would need to be justify and proportionate". Additionally, the Commission considered that this requirement is exacerbated by other conditions related to the expenditure of the production budget and the territoriality condition of the recording of the production, and that the combination of the two requirements is "even more problematic (...) in terms of the freedom to provide services and thinks that this approach would require additional reasoning from the Danish authorities".

Second, the compliance with additional requirements on top of the language subquota is discriminatory and contrary to EU law, specifically with regard to the internal market rules and particularly to the freedom of establishment and freedom to provide services. This requirement, stressed in Commission TRIS comments[16], may put streaming services and production companies that operate in the Finnish language or are of Finnish origin, most likely based in Finland, at an advantage over foreign companies established in other territories, who must make special efforts

[14] Flagged by the European Commission in its comments on the Norwegian draft law available here, on the Danish draft law submitted in 2022 available here and on the Danish draft law of 2023 available here.
[15] Notification Detail | TRIS - European Commission (europa.eu)
[16] Flagged by the European Commission in its comments on the Danish draft law submitted in 2022 available here.

to meet the criteria. It also is restrictive for Finnish producers who may wish to produce more generally across Europe, e.g. film in Finnish shooting in Greece.

Finally, we would like to remind the authorities that in line with Recital 36 of AVMSD and the European Commission reminder, Member States must ensure that non-domestic AV services that are required to contribute to national film funding schemes can benefit in a non-discriminatory way from those film funding schemes. The study does not seem to consider how services established in other Member States would have access to the film funds in order to benefit from the cultural contribution in an equal manner as domestic services. This could create an advantage for Finnish production companies over media service providers established in other Member States when applying to benefit from the cultural contribution fee (once again, going against the principle of non-discrimination, which the study mentions as one of the "essential principles" in the AVMSD).

Focusing on production incentive schemes could lead to more sustainable long-term investment

Created in 2017 the Finnish incentive has supported more than 150 projects to date. It is available to local as well as foreign companies with a threshold of 25% financing from outside Finland for domestic projects. If the objective is to secure more investment in the local ecosystem and local content, then this can be attained by other less intrusive and inefficient means, such as production incentives, which would not restrict the freedom to provide services but lead to more sustainable long-term investment and growth. An inward investment incentive like the one in place currently increases foreign investors to spend money in Finland. This in turn reinforces the local know-how and helps develop facilities. Making the current scheme stronger for domestic productions could be directly beneficial for the entire local industry and beyond and increase the number of local content.

MPA would respectfully recommend that Finland conduct a study on how strengthening the existing production incentive scheme would lead to an even more sustainable growth of the AV sector and would further generate jobs and growth in a manner that allows for the market to absorb such investment naturally. We salute the government for increasing the yearly budget slightly this year to 12m (instead of 9.5m in previous years). Boosting the overall annual budget is a step in the great direction because it increases the predictability of the program (whether a project will get incentivized or not), which is essential for good planning and putting the country back on the map, for the benefit of the whole ecosystem. Indeed, it is well documented that production incentives, if well-designed, increase investment in the sector greatly and benefit the wider economy[17,]. Undue regulatory constraints may disincentivize or skew inward investment in a manner that is not conducive to the organic growth of the industry and deters new AV services from entering the AV sector.

[17] The production incentive program in Sweden (permanent support from 2022) includes a total of SEK 100 million per year along with a discount on production costs of 25%. After the programme launched, 37 applications for a total sum of over 300 million SEK were received. Other examples are Spain, where the Government through the "Hub" plan which aims to mobilize public resources to boost audiovisual production by 30% between 2021 and 2025, increased incentives to international productions from 10M euro in 2016 to 60M in 2022 (page 83-84). In France, the introduction of the international tax credit scheme for international production (C2I) over the 2017-2021 period "has helped locate €1.1 billion in additional spending in France at a cost of €347 million" (page 42).

Overall, if a country aims to make its AV sector more attractive, and competitive, it requires a stable regulatory environment, which should be flexible, proportionate, predictable, and non-discriminatory. Overly prescriptive regulatory intervention risks unintended consequences that can undermine a country's policy goals[18] as it may disincentivize companies to invest in a country or skew inward investment in a manner that is not conducive to the organic growth of the market.

Preserving contractual freedom is key to attracting investment and protecting the AV industry

The study proposes that direct financing of works for which the service holds all rights should not be counted towards the total investment volume of the service. Considering this, we would like to stress the paramount importance of maintaining contractual freedom when it comes to the implementation of Article 13.2. Associating the compliance with the promotion of European works to IP ownership limitations would distort choices for production partners, as entities sharing high investment-risk (and potentially fully financing a project) in the production of content should be able to expect the required rights to recoup those investments in return possibly make a profit.

Having contractual freedom means producers and commissioning entities can negotiate the sharing of rights based on the financing model which best suits a particular project. Excluding the eligibility of certain local projects or investments in local content based on rights allocation restrictions would result in certain projects being at risk of not being made, and we believe it would not lead to higher investments in local content and promote such content to a broad audience.

Overall, any regulatory intervention which undermines contractual freedom regarding IP ownership would artificially distort the market and financing in AV content and consequently negatively impact the sustainability and competitiveness of Finland's AV ecosystem.

Safeguards and flexibility are paramount

Furthermore, the study did not consider additional and essential measures to be taken into account to make possible financial obligations more proportionate and non-discriminatory. These would ensure that the promotion of European works does not undermine the market development, diversity of services and allow for the entry of new players into the market.

<u>Low audience</u>

Article 13(6)[19] of AVMSD requires that services with low audience and low turnover shall be exempted from the financial contribution obligation in order to be in line and comply with the provisions of the Directive. We observe that the study only acknowledges the low turnover

[18] i.e., encourage investment, grow a country's audiovisual sector, and empower consumer choice among a variety of local, regional, and global content

[19] AVMSD of 14 November 2018, 13(6): "The obligation imposed pursuant to paragraph 1 and the requirement on media service providers targeting audiences in other Member States set out in paragraph 2 <u>shall not apply</u> to media service providers with a <u>low turnover or a low audience</u>. Member States may also waive such obligations or requirements where they would be impracticable or unjustified by reason of the nature or theme of the audiovisual media services"

exemption but not for low audience[20], these requirements being mandatory and individually applicable.

Thematic exemption

We also note that Article 13(6) of the AVMSD explicitly foresees the possibility to waive the obligations or requirements where they would be impracticable or unjustified by reason of the nature or theme of the audiovisual media services. These kinds of services could fall within the scope of a possible draft law, but we believe should be exempted from the obligation, if it is ever put forth, on the basis that there is no logical role for Finnish content in such thematic content offerings.

Flexibility of any direct financial obligation

Moreover, in addition to allowing services to invest in different manners to comply with direct financing obligations such as all forms of co-productions, content commissioning or licensing/acquisition among others, other types of financing such as marketing, theatrical distribution and financing of training, infrastructure development and localization costs should be included in the law. This greater flexibility will allow for a more organic growth, more alignment with the business models and practices of individual VOD service providers, which may have legitimate business reasons for engaging in financing in one category over another.

Furthermore, in order to be in line with the principles of proportionality and fairness, it should be recognized that not all content types are relevant in determining the applicable revenues to be taken into account for any direct financing obligation. In addition, the amount of any financial contribution should be based on the net revenues considering the costs and the possibility of not being profit-making from year to year. Media service providers should also be allowed to distribute any required direct financing across at least a span of three years as well as pool corporate group investments to comply with the requirements.

Against this backdrop, we are at your disposal to discuss all points in greater detail.

Yours sincerely,

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[20] According to the European Commission in its guidelines, media providers with less than 1% audience share should be exempted from the obligations stemmed from Article 13.