

Brussels, 16 December 2022

Norway's Public Consultation on Amendments to its Broadcasting Act – Comments from the Walt Disney Company (Financial Contributions from VOD services)

The Walt Disney Company (hereinafter “Disney”) is grateful for the opportunity provided by the Ministry of Culture to submit comments in the context of its public consultation (the “Green Paper”) on amendments to the Broadcasting Act. We are focusing our comments on the possible introduction of a new financial contribution obligation for domestic and non-domestic video-on-demand services (VOD) in Norway.

Disney+, which is our S-VOD streaming platform for films, series and programmes from Disney, Pixar, Marvel, Star Wars, and National Geographic, as well as the newer general entertainment content brand, Star, launched in Norway on 15 September 2020.

Background

Regarding Norway's plans to develop a “financial contribution” model for the strengthening and benefit of the local audiovisual (AV) sector, Disney is grounding its initial observations on the following understanding of the Green Paper and eventual amendments to the Broadcasting Act, namely that it envisages two alternative models in the context of a new financial contribution obligation for domestic and non-domestic video-on-demand services (VOD):

- According to Alternative 1 (“levy system”), services would be required to contribute 5% of their annual turnover to the Norwegian Film Fund (the exact percentage would depend on the services' investments in “Norwegian language audiovisual productions” on the basis of a “sliding scale” model whereby direct investment into local AV works would offset a corresponding share of the levy's financial obligation;
- According to Alternative 2 (“investment requirements”), services would be required to invest 5% in “Norwegian language independent productions”. Investments where intellectual property rights to the production are fully transferred to the VOD service (i.e., not limited in geography or time) would however not be considered/computed for the purpose of determining the exact investment obligation.

General Observations

The media and audiovisual sector is rapidly evolving from both production and distribution points of view. This is true for Norway, the Nordics, Europe as well as on the international stage. In this context, Disney wishes to emphasize the public-policy importance of preserving a fair level-playing field among media players, characterised by limited market distortions and flexibility in what is a rapidly developing market, working to the benefit of cultural diversity, consumer choice and healthy media service providers.

We are of course eminently aware of the fact that the European AVMS Directive (AVMS-D) opens the possibility (not an obligation however) for EEA Member States to include a provision in their

legislation that promotes investment (even of the cross-border kind) into European productions so long as those measures comport with the principles of “proportionality” and “non-discrimination”.

The development of Norway’s audiovisual (AV) sector

Disney is genuinely impressed by the quality and success of Norwegian AV productions on both the national and European stages and deems it fair to say that we are currently witnessing the dawn of a great age of local Norwegian content. In this context, we would like to mention and emphasize one of our company’s contributions to the development of the local AV sector, namely National Geographic’s “Ice Road Rescue”, which first aired in 2015 and is about to launch its 7th season in Norway, available on National Geographic in 70+ countries worldwide and 30 different languages. We would also like to mention that we have several Norwegian projects that are currently at early stages of development.

More broadly, growth of Norwegian AV productions is happening organically as a result of market forces at play as local content responds to consumer demand, both domestically and in export markets. We note that the Ministry’s Green Paper itself acknowledges this positive development and quotes a study from Oslo Economics, which notably estimated that the streaming services (Norwegian and international) had invested about NOK 668 million in Norwegian content by 2020 and that these investments were expected to continue to grow (despite the COVID pandemic) by almost NOK 200 million between that point and 2023. In our mind, these impressive growth figures beg the question of whether there is really any market failure in Norway that would justify the financial contribution proposals that are included in the consultation to update the Broadcasting Act.

Disney shares the objective and desire of the Norwegian Government to strengthen the Norwegian AV sector and we hope to play an active role in its development but would like to caution against regulatory measures that could inadvertently undermine the overall objective. In this context, we would like to recommend certain steps to follow and potential pitfalls to avoid.

An Impact Assessment is Needed to Determine the Best Policies to Ensure the Future Health of the Norwegian AV Sector:

As part of its current reflections, we believe it is essential for the Norwegian Government to conduct a robust and thorough impact assessment that considers legitimate questions regarding the local AV sector’s capacity to absorb the financial end-result of the envisaged measures in terms of availability of technical skills, possible shortages of local content creation resources and infrastructure, and eventual inflationary effects on a national market that might very soon be operating in “overdrive”. Access to accurate figures, predictions and projections will help the Government and all stakeholders to fully understand and weigh the impact of the intended measures on the Norwegian business, investment, innovation and cultural climate.

Such an impact assessment would also help avoid broader unintended consequences. For instance, we worry about a potential chilling effect of a tax measure that might work against local market incentives and dynamics. From our perspective, a flexible, simple and predictable regulatory regime based on incentives rather than obligations – such as Norway’s existing Production Incentives programme – is what will continue to fuel and attract organic and sustainable investment into the local AV market, with a positive effect on employment, inward investment, development of local skills and storytelling; all to the benefit of the Norwegian AV sector, population, culture and economy.

Any Obligation Must Comport with the AVMS Requirements of Proportionality and Non-Discrimination:

Regarding potential national discrimination or lack of proportionality of envisaged national measures, Disney would welcome further clarity on the following aspects:

- The Green Paper provides very little details as to how non-domestic VOD services contributing to the Norwegian film fund could themselves enjoy fair and non-discriminatory access to the “film fund” in order to finance the production of European works in Norway.
- Should VOD services be required to contribute to a cultural fund by means of a levy, the calculation of the fiscal amount due should be based on net revenues, not rely on a gross calculation of how many consumers have subscribed to a given VOD service in Norway.
- The Green Paper seems to suggest that only Norwegian-language content would count against the proposed obligation. In this context, we would like to seek reassurance that all genres of European films and AV works produced in Norway would count since they all contribute to the health and growth of the domestic AV eco-system.

Whilst we would appreciate clarifications on these aspects, we emphasize the importance of avoiding any discriminatory feature with regard to both contributors and beneficiaries of the cultural levy, which is essential in order to avoid any cross-subsidizing effect between media service providers that would suggest the introduction of a measure amounting to economic protectionism rather than serving purposes of legitimate cultural policy governed by independent, predictable and measurable criteria.

If Government Proceeds With A Levy or Investment Obligation, It Should Recognise All Contributions to the Norwegian AV Eco-system:

Companies can and should contribute in many ways to the health of the Norwegian AV eco-system. In order to maximize investments and the expertise of the different media service providers operating in Norway, a VOD service should be able to choose between various options (counting against or fulfilling any obligation) if the Government proceeds with imposing a financial contribution, including:

- Direct investments in content in the market whether by co-productions, content commissioning and/or licensing/acquisition;
- Indirect investments, including contributions to human skills and infrastructure development; and/or
- Contributions to a cultural fund by means of a levy.

As justification for its Alternative 2, the consultation paper proposes to impose an artificial allocation of rights between producers and VOD commissioners/distributors that would disrupt the normal allocation between financial contribution and risk levels. Such limits to contractual freedom on the national AV market would amount to a rejection of the fact that contractual flexibility is essential to get funding for projects. Disney would argue that it is impossible to overlay normal commercial practices from one model to another, be it “fully-commissioned projects”, “co-productions”, “pre-buys”, “mere acquisition of rights”, etc. Regulatory interventions artificially imposing IP ownership limitations would constitute not only a strong disincentive that could distort and discourage agile content development policies but would also bluntly discourage investments in the first place if financing entities may not expect appropriate exclusive rights in return and in the hope to recoup investment.

Calls for regulated (rather than contractually agreed) intellectual property rights retention by independent producers seem to have been largely shaped by perceptions of pre-COVID market conditions (at least 3-4 years old) that no longer seem valid today as we approach 2023 and Nordic AV markets become characterised (see notably publicly available information provided by the Council

of Europe's European Audiovisual Observatory¹) – by over half a dozen major international streaming services as well as a growing number of national or regional European offerings. Most (if not all) of these VOD services might commission European (including Norwegian-language) content and in this fast-moving environment, it would seem rather unwise for Norway to substantially seek to regulate the terms of trade in application between potential commissioning entities and independent producers before fully acknowledging the effects of growing competition between all AV players (both in production and in distribution) in the marketplace, especially in the VOD sector.

Disney would therefore encourage the Norwegian Government to fully respect the contractual freedom that allows each AV work to have its own tailor-made arrangements and contracts, reflecting respective business strategies, marketing and distribution plans rather than imposing regulatory-defined arrangements that might distort markets and investments in AV content, ultimately with a negative impact on the sustainability and competitiveness of the whole Norwegian AV ecosystem.

Thank you again for the ability to share our views with you on this important subject. The Walt Disney Company remains at your disposal to discuss this submission in more detail. We look forward to contributing to an open and constructive dialogue.



*Hans Van Rijn
Senior Vice President
Country Manager & GM Media Nordics
Kalvebod Brygge 24
1560 København*

*Contact person:
Niklas Lagergren
Vice President
Global Public Policy
niklas.lagergren@disney.com*

¹ Top players in the European AV industry. Ownership and concentration. 2021, [EAO](#)