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Consultation response Netflix

16 December 2022

Netflix thanks the Ministry of Culture for the opportunity to provide input on the hearing note that implements the Audiovisual Media Services Directive into Norwegian law. In this submission we will focus on Chapter 12 which contains the proposal to implement a financial obligation for on-demand services.

Overview

A strong local audiovisual sector is important for producing high-quality content. The funding base for Norwegian audiovisual content production has historically been high, the number of employees and investments in Norwegian film industry has been steadily increasing in recent years. Despite its small language area, the **demand for Norwegian quality content is large** in the Nordics and has **increased in line with the international services' launch** for the Norwegian public. From 2011-2019 production companies have had an average annual growth in turnover of 12%. By comparison, average annual growth in gross domestic product in mainland Norway was 2 per cent in the same period¹. Between 2016-2021, applicants for the Norwegian production incentive spent in total NOK 3638 million on production expenditure in Norway².

Netflix is proud and humble to be part of building this Norwegian ecosystem. As Netflix, we are partnering with many great Norwegian talents, producers, crew and broadcasters. We value giving producers and creators the **creative freedom** to tell the stories they want to tell, while allowing them to **explore different genres with new and exciting perspectives** to ensure continuous development of **high quality** Norwegian film and series. We license and acquire Norwegian series and film at many stages of the production lifecycle. During the last few years, we commissioned Netflix series such as *The Lørenskog Disappearance*, *Mr. Good: Cop or Crook?*, *Post Mortem: No one dies in Skarnes*³, *Ragnarok*, *Home for Christmas* as well as recently released *A Storm for Christmas*⁴; Netflix commissioned films such as *Troll*⁵, *Battle Freestyle*, *Cadaver*, *Royalteen* and co-financed titles like *Lillyhammer*⁶ and *the Girl from Oslo* and licensed titles such as *Norseman* and *Borderliner*. These productions are not only appreciated by our Norwegian members, but also by a global audience. In only two weeks *Troll* became the **most-watched non-English film released on Netflix**⁷. Our first of its kind **framework agreement with Norsk Skuespillerforbund and the Norsk Filmforbund**, in place since 2020, allows actors and

¹ Oslo Economics "Evaluering av insentivordningen for film", 2021: p 18.

² Oslo Economics "Evaluering av insentivordningen for film", 2021: p 10.

³ Vampire drama comedy series which was filmed in Skarnes, directed by internationally renowned Harald Zwart together with the up-and-coming writer Petter Holmsen.

⁴ Per-Olav Sørensen (Nobel, The Half Brother, Royalteen, Home for Christmas) has reunited with award-winning writer Lars Saabye Christensen to create this Christmas series set at Oslo Airport. Starring a pan-Nordic cast, including Dennis Storhøi, Ida Elise Broch, Jan Gunnar Røise, Thea Loch Næss, Jon Øigarden and Ravdeep Singh.

⁵ Directed by Roar Uthaug, *Troll* was the most watched non-English Film worldwide in the week after launch with over 75 mln viewing hours, followed by over 50 mln viewing hours in week 2 (Dec 2022): <https://top10.netflix.com/films-non-english>

⁶ Co-production with NRK and first Netflix Series globally in 2012.

⁷ <https://top10.netflix.com/films-non-english> *Troll* is in the Netflix top 10 in 93 countries including Norway, the United States, the United Kingdom, Japan, France, Germany, South Korea, Brazil and Mexico.

creative film workers to receive **additional remuneration** and **share in the success of the production** if a series or a film performs well⁸.

We are proud to bring Norwegian stories to all our members globally and contribute to **connecting cultures** across the world and **creating empathy and understanding through the stories we tell**. TV- and film productions are a great way to **disseminate Norwegian culture and language throughout the world**⁹ which presents an unprecedented opportunity to attract tourism through the screen.

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, specifically focusing on better representation of underrepresented groups. The Netflix Production Scheduling & Budgeting Workshop and On the Job Training are examples of such programmes. In addition to these, we have a partnership with the **International Sámi Film Institute**¹⁰ to support and further develop Sámi voices in the Nordic region. The program supports new Sámi creatives to break through in the industry and opens up more opportunities to support representation in the industry. The ISFI x Netflix Writing Academy is part of the partnership.

Hearing note

Fostering a healthy audiovisual industry

While recognizing the policy intent to support the creation of high-quality local content, we question if the alternatives being proposed fulfill the ambitions of the Norwegian government: more investments, visibility and diversity in Norwegian storytelling.

- In recent years, we have seen **investments into Norwegian content grow significantly**¹¹ leading to a **lack of workforce capacity** and **increased competition on local productions**¹² between both national and international media services. These developments do not seem to be in line with the statement in the hearing note that “global actors” “offering Norwegian content to a limited extent” which “will affect the audience’s approach to Norwegian films and series” and leads to reduction of private investments”¹³. The hearing note explains that in the film settlement (2015-2016) there was political support for “a clear expectation that the various links in the value chain that earn money from disseminating film and audiovisual content also contribute to

⁸ See for more information: <https://filmforbundet.no/norsk-filmforbund-og-netflix-er-blitt-enige-om-suksessbasert-betaling/> and <https://www.skuespillerforbund.no/netflix-utvider-samarbeidet-med-norsk-skuespillerforbund-tilsvarende-det-med-norsk-filmforbund-viktige-partnerskap-for-norsk-film-og-tv-bransje/>

⁹ According to TCI Research (<https://www.nhoreiseliv.no/vi-mener/filminsentivordning/>) 40 million tourists every year choose destinations based on where movies and series are filmed. People who watched local content on Netflix are 2.4x more likely to say the country is their #1 travel destination and 1.8x more likely to want to learn the local language.

¹⁰ ISFI: <https://isfi.no/article/netflix-and-isfi-enter-into-a-new-partnership/> and <https://isfi.no/article/isfi-x-netflix-writing-academy/>.

¹¹ Oslo Economics “Evaluering av insentivordningen for film”, 2021.

¹² <https://www.dagbladet.no/kultur/alle-steiner-snus/76962152>.

¹³ Hearing note, p.112.

financing new audiovisual content.” Current investment levels in Norwegian storytelling by national and international services, make us **question the need for a regulatory intervention**.

- A **majority of European countries** have recognized this and choose to **not implement** any financial obligation under 13(2) of the AVMSD.
- We have learned from other countries 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. This could lead to **fewer players in the market** and **less diversity in content available**. Denmark had the intention to impose a levy, but is refraining from this as they recognize the instrument would lead to less investments¹⁴. Therefore we suggest the Ministry of Culture establish a framework which **attracts investments**, is **flexible** and **respects the investments already done** by media services.
- Research from [Oliver & Ohlbaum¹⁵](#) shows that:
 - Even where any **new requirements are set below current investment levels**, they may divert resources into compliance and monitoring, and they might **alter the overall business environment and attractiveness of a territory** seeking inward investment.
 - Territories have decided against introducing additional requirements to avoid contributing to content **cost inflation** or to avoid applying **additional pressure to domestic production resources**.
 - In a comparative study between Sweden, France, Italy, Germany, Spain and the UK, O&O concludes that **stricter regulation does not in itself lead to more investment**¹⁶.

The proposed percentage

The hearing note introduces a financial obligation of 5% of annual revenues of on-demand services.

- A 5% financial obligation that on-demand service providers must pay from their revenues in Norway is **one of the highest in Europe**, and substantially higher than countries of a similar size. **The European average is currently ~3%.**
- For comparison, Greece has recently introduced an investment obligation and its rate is set at 1.5%. In Belgium the rates of investment obligations are determined according to the turnover of the undertaking concerned, going from 0% up to 2.2% or fixed at 2% depending on the Community. In Croatia, financial obligations amount to 4%. We consider 5% to be too high, especially in view of the **limited size of the Norwegian audiovisual sector** and the **small language area**. With such **a high percentage** we expect an **exhaustion of the market**.
- The 5% may **conflict with the AVMSD and TFEU** which are pointing¹⁷ to the need that **no less infringing options should be available** to achieve the objective of proposed legislation.

¹⁴ Danish coalition agreement: <https://www.stm.dk/statsministeriet/publikationer/regeringsgrundlag-2022/>

¹⁵ “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>

¹⁶ Sweden is high performing in a European context, with a Compound Annual Growth Rates on Content of +5.8% ('16-'20) and project growth of 8.9% ('21-'25). This is a higher CAGR than Germany, UK, Italy and France.

¹⁷ 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.

- We lack the substantiation of the proposed financial obligation. What is the scheme meant to generate and how does this relate to the already existing capacity gap? What are the objectives and how does the financial obligation contribute to the ambitions of the government? How does this relate to data that shows the availability, distribution, and investments in Norwegian-language productions are increasing significantly without regulatory intervention?

The instrument & proportionality

- We appreciate the effort (in alternative 2) that has been made to give services the opportunity to invest directly in content. When investing directly into content (versus paying a levy into a fund) Norwegian works will be more visible and accessible across different services, as it is more likely that media services have the incentive to make Norwegian productions into a success if they have been able to choose them themselves.
- When choosing between the different two alternatives, we see alternative 2 provides a better basis for investments to thrive as is more predictable. For Netflix, it is key to maintain the freedom to invest in stories that fit our members' needs and prevent another layer of complexity to film financing with one body deciding which Norwegian films and respectively which series will be produced. All kinds of genres and Norwegian stories should have the opportunity to be told. It is important to keep the compliance burden limited and report ex-ante based on clear and straightforward criteria.
- We believe Alternative 1 is too restrictive as it is based on a levy and the proposed steps do not take all investments done into account¹⁸. The ceiling of 100mln NOK is extremely high as a legal obligation and is more discriminatory as the impact is different for each service (Alternative 2 provides the same level of the obligation). In addition, we question if the levy is in line with the OECD agreement in which Norway has committed to not introduce taxation on digital services.

Eligible productions & Contractual freedom

- The purpose of the proposed financial obligation is to boost Norwegian storytelling and to increase the visibility of Norwegian content. At Netflix, there is no “one size fits all” approach for how we acquire/commission content. 100% of our original European content production is undertaken in collaboration with independent producers, most of which are small or medium-sized. The terms of our deals are varied, and we embrace different ownership/licensing structures depending on many factors, such as the level of Netflix investment and the wishes of the producer and Netflix.
- All ways of collaboration bring value to the local ecosystem: licensing and pre-buys of Norwegian productions and exclusive original content are all ways in which we bring Norwegian stories to life and are all important instruments for the creation of financing for films and TV series. Productions such as Troll are of added value to the industry in terms of providing large investments; upskill the level of professionals and allow for further degrees of specialization; showing Norwegian stories, culture and nature to the world.

¹⁸ What if services invest between 85-100 mln NOK? Alternative 1 seems to have a gap in contribution obligations. Hearing note p. 117.

- 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 commissioning 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. In this context, we also want to highlight the framework **agreement with Norsk Skuespillerforbund and the Norsk Filmforbund** which allows actors and creative film workers to receive **additional remuneration** and **share in the success of the production** if a series or a film performs well.
- Limiting investments to a certain deal structure and intervening in commercial negotiations between two private parties would create a **highly distorting effect**. It will not lead to more visibility of Norwegian stories, cultural diversity and specialization of the workforce. We therefore strongly recommend to allow all Norwegian productions, regardless of genre and contractual structure, to be eligible under the investment obligation.

Flexibility

- In making legislation it is key that it is **future proof, allows innovation** and **absorbs trends** in the audiovisual industry. As the market is currently overheated, it is even more important to **incentivize investments** into a broad segment of Norwegian productions. Therefore, the following elements are suggested to be accepted as direct investments:
 - a) direct investments in Norwegian audiovisual productions, including **original and licensed content up to 7 years old**. The possibility of including a license up to **7 years** old (instead of 3) would extend the life cycle of a production, preserve back-end payments for producers and incentives to bring Norwegian stories over the world.
 - b) **Spend on subs/dubs in the local language(s)**. These are direct investments into the Norwegian cultural ecosystem (by working with voice actors for example) to make it possible to distribute Norwegian content to an international audience.
 - c) **Workforce development as educational and training initiatives** to create talents in front and behind the camera, diversity and inclusion initiatives and other initiatives such as studio facilities and infrastructural investments strengthening the cultural ecosystem.
- If policy makers want to ensure the development of Norwegian industry and avoid unpleasant consequences of the obligation (such as putting additional pressure on the industry), it can be done by making it possible for services to '**spread out**' the investment obligation **over several years**, a possibility which is already applicable in Portugal and Croatia. We propose the investment is made before **three financial years** have elapsed since the end of the financial year in which the relevant turnover was generated.
- We recommend including the possibility under Alternative 2 to pay **a potential residual/remainder to the national cultural fund** when the full amount is not invested as per the agreed approach. Thereby the funds are kept in the cultural sector instead of it being paid as a fine to the state budget.

Scope of the proposal: non-discrimination of services

- As pointed out in the Draft bill (page 9) the AMT must contribute to ensuring the **free movement** of audiovisual media services in the EEA and to a **level playing field** for television and audiovisual on-demand services. However, the proposal targets on-demand audiovisual media services¹⁹. The proposal is not clear why it chooses this **discriminatory scope**. While we do not oppose contributing to the cultural ecosystem, we believe that the envisaged financial obligation features would **disproportionately discriminate against the VOD sector** if compared with other parts of the entertainment industry, such as linear broadcasting.
 - the financial obligations should be designed in a way that does not create severe distortions and is non-discriminatory.** If a media service targeting the Norwegian market is obligated to invest in Norwegian content or pay into the fund, it is crucial that it evenly is applied to relevant competitors. A distinction based on business models is not only discriminatory, but also **not future-proof**. The past few years have shown how enormously innovative this sector is: time and again, new forms are developed for showing productions to consumers. Linear, non-linear, SVOD, TVOD and AVOD will increasingly **converge**. By applying **one regulatory framework** for all audiovisual media services, regardless of the form of payment or viewing, room is given for continuous innovation in business models. If this is not the case, the new financial obligation will actually end up **distorting competition and creating an uneven playing field**.
 - We suggest to use '**media service providers**', which is in line with the AVMSD²⁰ and common practice in Europe. In fact, we see that Norway is one of the few countries with this level of discrimination in Europe. Recently the European Commission asked for further justifications of a similar discrimination²¹.

Recommendations

Netflix acknowledges the political desire to strengthen the audiovisual sector and is looking forward to being a partner in this realization. We wish the Norwegian government to be **clear in the objectives** that the regulatory framework should meet, to be able to **evaluate** all available options including status quo accordingly. We recommend the Norwegian government to:

- Preserve contractual freedom**. Ensure all kinds of investments in Norwegian content, regardless of genre and deal structure, are supported and valued under the regulatory framework.
- Include more proportionality**: based on the analysis, formulate evidenced based justification for the proposed % rate and explore less distortive measures such as production incentives or

¹⁹ Hearing note p. 115.

²⁰ Article 13.2 of the AVMS Directive: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018L1808&from=EN>

²¹ Comments by the Commission on notification Number: 2022/548/NL- December 2022: "However, in the case that a Member State decides to apply levies only to on-demand media services, it would be necessary also to comply with principles of EU law such as proportionality and non-discrimination, pursuant to Article 13(2) and (3) AVMSD." (...) The Commission would encourage the Dutch authorities to further substantiate their justifications regarding the non-discrimination of the scope of the measure, for example, by providing concrete data regarding the existing investments of broadcasters and of on-demand media service providers (commercial and public ones) in Dutch audiovisual productions." <https://ec.europa.eu/growth/tools-databases/tris/index.cfm/en/search/?trisaction=search.detail&year=2022&num=548&mLang=EN>



giving media service providers the option to choose between direct content investments (investment obligation) and an indirect investment through a fund.

3. **Provide flexibility:** a three year compliance period, and flexibility in types of investments eligible. Include the possibility under Alternative 2 to pay a potential residual/remainder to the national cultural fund.
4. **Non-discrimination:** broaden the scope of any framework to 'media services providers', which is in line with the AVMSD²² and connects to the common practice in Europe preventing negative impact on competition between services.

We would like to thank you for the opportunity to set out our vision. We remain available to explain our suggestions in more detail.

²² Article 13.2 of the AVMS Directive: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018L1808&from=EN>