



MOTION PICTURE ASSOCIATION EMEA

Brussels, 16 December 2022

SUBJECT: Submission of the Motion Picture Association – Ministry of Culture consultation

Sir/Madam:

Thank you for inviting stakeholders to express their views in the context of the Ministry of Culture's public consultation on the amendments to the Norwegian Broadcasting Act.

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. Entertainment Inc. They each operate on an international scale and, thus, are an essential part of the production and distribution ecosystems throughout Europe. Our members strive to add value to the local AV ecosystem, through both, inward investment, and possibly through the global dissemination of locally produced content.¹

We understand that the Green Paper assesses 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 one, services would be required to contribute up to 5% of their annual turnover to the Norwegian film fund (the exact percentage depends on the services' investments in "Norwegian language audiovisual productions"). According to alternative two, services would be required to invest 5% in 'Norwegian language independent productions'. We understand that investments where intellectual property rights to the production are fully acquired by the commissioning service (i.e., not limited in geography or time) would not be considered for the purpose of the investment obligation.

In general, we would recommend that the Ministry of Culture carefully assesses international tax implications of such a proposal, including in light of the OECD statement (and possible future agreement) concerning digital services taxes.

Please allow us to share with you our initial observations on the Green Paper as well as MPA's top line recommendations for creativity and investment in Europe's AV sector. We hope that this consultation is just the beginning of a fulsome process and are at the Ministry of Culture's disposal for any questions or more detailed discussions.

¹ See for example the recent production 'Troll' from Netflix or 'Ice Road Rescue' from National Geographic's/Disney.

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MPA recommendations to foster the optimal regulatory framework conducive to creativity, growth, and investment in Europe's audiovisual industry

The film and television content production sectors are rapidly evolving and highly competitive. Companies in the sector, both large and small, are individually developing and refining a wide range of business models, all while increasing consumer choice.

As an organization made up of companies which operate, produce, and invest globally, MPA has observed that overly prescriptive regulatory intervention risks unintended consequences that could undermine a country's policy goals to encourage investment, grow a country's audiovisual sector and empower consumer choice among a variety of local, regional, and global content. Our members view the production of audiovisual works (including local works) not as a regulatory consideration but as an integral part of our members' DNA and carefully curated brands and content. A regulatory constraint on our members to invest a part of their revenues generated in Norway might artificially distort the production sector and would not be conducive to its organic growth.

Norway already has in place a production incentive programme that has allowed local and international companies to produce in Norway. To further promote the creation of local content and thus strengthen Norwegian language culture and identity, we would respectfully encourage the Norwegian government to avoid undue regulatory constraints that may impair inward investment. Instead, Norway could improve its existing incentive program and render it more flexible that would facilitate further inward investment.²

Impact assessment

The Green Paper takes into consideration pre-existing studies in order to examine the benefits and consequences that the introduction of a financial obligation for VOD services would have in the short and long term. However, we would respectfully advise the Ministry of Culture to conduct an independent and neutral impact assessment that should at least examine:

- Whether there is in fact any market failure that a financial contribution obligation is meant to resolve: according to the Oslo Economic study³ mentioned in the Green Paper, investment of streaming services in Norwegian content will continue to increase in the following years, thus regulation is not needed.
- The capacity of the market to absorb new investment requirements efficiently and the inflationary effect that it might have on the production sector: the inflation of costs, the shortage of crews, technicians and production lots are among the biggest challenges for producers that a financial contribution or investment obligation may not address.
- The effect on business activities caused by a possible legislative change that would create legal uncertainty regarding business planning and attractiveness of a territory; this change

² MPA made a submission in 2021 asking for more flexibility on Norway's production incentive scheme. Please see it [here](#).

³ "Oslo Economics estimates that the streaming services (Norwegian and international) invested about NOK 668 million in Norwegian content in 2020 and that investments in Norwegian content will increase by almost NOK 200 million from 2020 to 2023.10", Green paper page 162

could influence future decisions on inward investment and the sustainable growth of the AV sector.

- The direct relation between a high financial contribution obligation (which we consider too high in comparison to other similar sized markets⁴), stronger investment and the production of more local content.⁵

The proposal of a new financial contribution obligation would constitute a substantial burden for operators and does not appear to be necessary to encourage investment in local content

Oslo Economics' estimation pointed out that "(...) investments in Norwegian content [*by streaming services*] will increase by almost NOK200 million from 2020 to 2023". This positive trend of private investment is also supported by a recent O&O study which states that "it is expected content investment to continue to rise across all players to 2026 with SVOD growing substantially"⁶. Therefore, we have doubts that either of the two proposed models, which clearly constitute a new regulatory burden, is necessary to achieve the policy goal stated in the Green Paper. Furthermore, we would like to emphasise that the proposed financial contribution seems to benefit solely Norwegian language audio-visual works, which appears to be too restrictive and disproportional as AVMSD refers to the financing of European works.

Non-discrimination

Under the principle of non-discrimination, any measure which amounts to economic protectionism should be avoided. Regarding the possible introduction of a contribution to the Norwegian film fund, AVMSD clarifies that services contributing to such fund should have a right to access those funds easily and fairly, even if they are established in other EEA Member States. The Green Paper does not clearly articulate how services will be able to access those funds. MPA members respectfully request clarity to ensure that all genres of film and AV works are supported and that there are no conditional requirements that would effectively prevent MPA members from being able to access funds on a fair and non-discriminatory basis.

Additional observations:

- MPA welcomes the exemption to providers with low turnover and low audience, as well as the possibility to exempt services that are specialized in specific content as given the nature or theme of the service, the financial contribution obligation (either in alternative one or two) would be impracticable or unjustified⁷. The proposal for a financial obligation lacks flexibility: companies' investments in Norway should be recognized as eligible contributions to the local AV sector, including all forms of co-productions, content

⁴ For example, Sweden, where there is currently no financial contribution obligation in place, or Belgium where the contribution is up to 2,2%.

⁵ According to a recent [O&O report commissioned by Netflix](#), "stricter local content regulation is not a clear indicator of better outcomes in terms of content investment. Investment levels are also strong in countries with no or few additional requirements such as Germany, Sweden, the UK and Spain".

⁶ [O&O study](#), page 25

⁷ See Article 13(6) of the [Audiovisual Media Services Directive 2018/1808](#)

commissioning, licensing/acquisition, etc., as well as other direct investments such as in training or infrastructure development that broadly support the local AV sector.

- The proposal for a financial obligation lacks flexibility: companies' investments in Norway should be recognized as eligible contributions to the local AV sector, including all forms of co-productions, content commissioning, licensing/acquisition, etc., as well as other direct investments such as in training or infrastructure development that broadly support the local AV sector.
- Further to companies being given recognition for all of their investments in Norway, it would also be more efficient if services had the choice as to whether to make direct investments (ideally over a two-to-three-year period) or to contribute to the film fund.
- The amount of financial contribution should be based on the net revenues reflecting that such services also have costs. There should also be proportionality as to the applicable content revenues that are relevant for the determination of the amount payable for an investment obligation, having regard to the fact that not all content types are relevant when determining European Works content quotas.

Contractual freedom is the backbone of the AV ecosystem

We understand that the Ministry of Culture proposes that investments in local content made under financial obligations, in which the copyright is fully acquired by the commissioning party, are not deductible from the proposed contribution to the Norwegian Film Fund under alternative one nor will qualify as a direct investment under alternative two.

The development and the creation of AV works implies significant risk taking, encompassing the selection of projects and the funding of the development of the project, which includes securing finance from various investors, including public/commercial broadcasters, VOD services, distributors of theatrical content and home entertainment. The cost of one unsuccessful project can have significant consequences for the Norwegian creative community. Therefore, it is often necessary to offset this cost with the successes of other projects, to ensure a steady flow of investment and sustain the broader ecosystem.

Regulatory interventions artificially imposing IP ownership limitations would distort content development policies. Entities making high investment risks (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. 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. Restricting the eligibility of certain local projects or investments in local content based on the rights allocation would result in certain projects being at risk of not being made at all.

The MPA strongly encourages the Norwegian government to respect contractual freedom which allows each work to have its own tailor-made partnership between the investors and the producers under a "risk and reward" model. Any indirect intervention that undermines contractual freedom would distort the market and investments in AV content and consequently have a negative impact on the sustainability and competitiveness of the Norwegian AV ecosystem.

If the Norwegian Government is minded to nonetheless introduce a financial contribution, MPA respectfully advises a flexible and reasonable financial contribution obligation allowing services to be free to invest over a two-to-three-year period. The MPA also suggests conducting an impact assessment in order to see the impact of any proposed financial obligations (including the analysis of the current situation of no financial obligation), especially in the light of the proposed rate. In addition, such a new financial obligation should:

- allow for a phase-in to provide for market adjustments.
- allow for corporate group wide investments and pooling (e.g., if both a linear and a streaming service must invest, consider allowing them to pool).
- do not restrain the commercial freedom of services when determining types of project(s) to be funded under a possible investment requirement (e.g., allow for investment in a wide range of content types and not a trade-off between types of content such as, say, fiction vs 'reality' series).
- allow services to invest directly in content of their choice, aligning with the editorial offering.
- maximize contractual freedom to allow tailoring contracts to the needs of the partners.

Against this backdrop, we are at your disposal to discuss all points in greater detail. We also wish to help you in data gathering and fact-finding, which is key to understanding the diverse business models and service offerings made available to consumers.

Yours sincerely,



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