



MOTION PICTURE ASSOCIATION EMEA

Brussels, 28 June 2024

RE: MPA reply to Teavituskiri - Audiovisuaalmeedia teenuste direktiivi artikli 13 lõige 2 rakendamise

Dear Ms Alliksaar,

Thank you for your letter inviting us to share our comments and feedback on the possible introduction of a financial obligation for on-demand services based on Article 13(2) of the Audiovisual Media Services Directive in the updated Estonian Media Services 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. Discovery.

MPA members work in every market around the world and therefore are deeply engaged with both regional and national audiovisual sector communities. However, we are concerned that the introduction of a very high financial obligation for on-demand media service providers (hereinafter referred to as "VOD providers") would constitute a new barrier and restriction to the freedom to make services available in Estonia. Hence, we wish to address the following issues:

1. There are less intrusive means that can achieve the policy objective and lead to more sustainable long-term investment.
2. The proposed financial obligation, if introduced, must meet the proportionality and non-discrimination requirements as prescribed by the AVMSD.
3. Safeguards and flexibility are required in order to be in line with the AVMSD.
4. Additional observations, including OECD Pillar I convention.

1. There are less intrusive means that can achieve the policy objective and lead to more sustainable long-term investment

A prior impact assessment should be conducted to assess possible inflationary effects and legal uncertainty stemming from financial obligations

The introduction of a financial obligation of 5% for VOD providers will constitute a new barrier and restriction to the freedom to provide services in Estonia and might artificially distort the production sector (see below for more detail). Before potentially introducing such an obligation,

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we respectfully submit that the Estonian government should, through a prior impact assessment, cautiously:

- Assess the **inflationary effect** of a new financial requirement on the market via an independent, future-looking and neutral economic impact assessment, particularly at a time when the wide AV sector is facing material economic challenges.
- Examine the **capacity of the market to absorb** the possible mandated obligation: the inflation of costs, the shortage of crews, technicians, and production lots are among the biggest challenges for producers.
- Assess whether there is a need to introduce such a financial requirement. A new financial requirement could influence future decisions on inward investment and the sustainable growth of the AV sector.

In this regard, there are several articles that highlight the potential inflationary effect that financial obligations would create, stressing that overstimulating local content production can lead to higher prices, oversaturated markets, and limited distribution opportunities for local creators. For instance, a specialized article on the topic entitled "[Cultural Levies and the EU Audiovisual Market](#)" has clearly highlighted 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"¹. It also highlights how this can lead to potentially increased dependency on a smaller number of firms that can absorb higher costs.² 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, which would be exacerbated by this inflationary effect of financial obligations. Furthermore, a study by the production company Film i Väst³ underscores how production quotas on streamers can deplete resources and inflate prices, potentially excluding independent work from the market.

A robust production incentive scheme will lead to more sustainable long-term investment

In order to achieve the legislative aim of increasing the Estonian film industry's share in the growth of the streaming market, there exist other more proportionate, efficient and less intrusive means than the introduction of a financial obligation. Production incentives, for example, can encourage investment, grow a country's audiovisual sector, and empower consumer choice among a variety of local, regional, and global content. We believe that making the existing production incentive scheme in Estonia even more robust will lead to more sustainable long-term investment. Indeed, it is well documented that production incentives, if well-designed, typically increase investment in the sector and benefit the AV ecosystem and the wider economy⁴, as it furthers local skills development and strengthens the creative capabilities of the local production community.

¹ Page 6

² Page 7 and 48

³ Streaming Giants and Public Film Funding ([Film i Väst](#)), 2022. Film i Väst (English: "Film in West") is a film company founded in Sweden in 1992 by the Älvsborg County Council.

⁴ 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

Undue regulatory constraints 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 and deters new AV services from entering the market or restricts the freedom to provide services. In other words, a new financial obligation may potentially have an opposite effect - it is likely to have a chilling effect on the inward investment by non-domestic media service providers.

2. The proposed financial obligation, if introduced, must meet the proportionality and non-discrimination requirements as prescribed by the AVMSD

We understand that the amendment to the Media Services Act foresees three possible models for a financial obligation: (1) an obligation to pay a contribution fee of 5% of income earned in Estonia, to be channeled into the production of local audiovisual works; (2) direct investment in AV projects from Estonian producers equal to 5% income earned in Estonia, or; (3) a combined model, with a financial obligation of 5% from which VOD providers can deduct direct investments made to support local audiovisual content.

Note that AVMSD Article 13(2) clarifies that when a Member State decides to introduce financial contributions for media services, these must respect the principles of proportionality and non-discrimination. The draft on the intention to develop a bill to amend the Media Services Act repeatedly focuses on foreign VOD providers and addresses them as the main target of the proposed financial obligation, referring to addressing the competitive advantage of foreign VOD providers and stating that a reason for the amendment is to “find ways to tax international streaming platforms and work towards fair taxation of global digital giants”. We would call for a fair and proportionate approach, in line with the European framework and the principle of non-discrimination.

According to settled EU law⁵, 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 necessary to attain them. In this regard, the European Commission has indeed reminded the authorities of a country when imposing financial obligations 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 services⁶.

It is also important to stress that there is no justification as to why the specific rate has been chosen or its compliance with the two aforementioned principles. The introduction of a 5% financial obligation for VOD providers would be one of the highest rates in the broader region, will constitute a new barrier and restriction to the freedom to provide services in Estonia and might artificially distort the production sector, especially when considering the obligations introduced or lack thereof for non-domestic providers in similar-sized territories⁷. Other countries

of over 300 million SEK were [received](#). Finland has in place a 25% cash rebate [program](#), which successfully helped the AV production during the pandemic.

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

⁶ See Commission’s TRIS comments on the Danish draft law submitted in 2022 available [here](#).

⁷ Greece (1.5% investment obligation yet not in force); Slovakia, Slovenia, Bulgaria, Lithuania, Estonia, Luxembourg, Cyprus, Malta, Hungary (0% financial obligation) - but also larger countries such as Sweden, Ireland, Germany (1,8% - 2.5% levy) and Poland (1.5% levy) are not much higher.

in the region have not implemented a financial obligation under Article 13(2), such as Lithuania, Sweden, Slovakia, Slovenia, Bulgaria, Cyprus, Malta and Hungary. 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.

One of the three possible models suggested for compliance with the financial obligation is the option paying a contribution of 5% of income, to be channelled into the production of local audiovisual works through the Estonian Film Institute. We would like to remind the authorities that in line with Recital 36 of AVMSD, 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 intention to develop a bill to amend the Media Services Act does not set out how services established in other Member States will access the funds in order to benefit from the cultural contribution in an equal manner as domestic services. This could create an advantage for Estonian production companies over media service providers established in other Member States when applying to benefit from the cultural contribution fee.

Contributions should be fully made to European works

Furthermore, the options proposed also explicitly refer to supporting the production of local Estonian audiovisual content or works by Estonian producers. In light of this, we would like to flag the European Commission’s comments which highlight that Article 13(2) AVMSD refers to the financial support for the production of European works⁸ and that obligations 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. This requirement may therefore put production companies that are established in Estonia at an advantage over foreign companies established in other territories as it would be more accessible for them to carry out European audiovisual productions in the territory of Estonia.⁹

Therefore, if the government is minded to nonetheless impose a financial obligation, in order for it to be in line with the purpose of EU legislation, which is to contribute financially to the production of European audiovisual works, we suggest that this is addressed in the proposed amendment.

3. Safeguards and flexibility are required in order to being in line with the AVMSD

If a financial obligation would be introduced despite the risks outlined above, we consider that there are essential measures described below to be taken into account to make any financial contribution obligation more proportionate and non-discriminatory, which are foreseen in the AVMSD.

⁸ Flagged by the European Commission’s 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](#).

⁹ Flagged by the European Commission’s in its comments on the Dutch draft law of 2022 available [here](#) and on the Danish draft law submitted in 2022 available [here](#).

In addition, if introducing a financial obligation Estonia should recognize in the draft amendment that not all content types provided by a VOD service provider are relevant in determining the applicable revenues to be taken into account for the calculation of the obligation. For instance, we respectfully suggest that revenues attributed to content related to news and sport found in the respective VOD catalogues are deducted from the obligation base. Furthermore, the amount of financial contribution should be based on the net revenues taking into account the costs and the possibility of not being profit-making from year to year, and should allow for the multi-year (3-5 years) spread of production costs.

Flexibility of model

If the Estonian government chooses to introduce a financial obligation, when considering which model to implement between the three suggested options, we respectfully submit that option 3, a combined model with a financial obligation from which VOD providers can deduct direct investments made to support local audiovisual content, offers the most flexibility for VOD providers.

Exemptions

We welcome the fact that the intention to develop a bill to amend the Media Services Act proposes that the existing exemptions for low audience, low turnover, and for services where, by reason of its theme, it would be unreasonable to apply the obligation also apply to the financial obligation, in line with Article 13(6) AVMSD. We also welcome that these exemptions are in line with the European Commission's guidelines¹⁰ in relation to the thresholds: less than €2 million of revenue for low turnover exemption and audience share below 1 % for low audience exemptions.

Flexibility of any direct investment obligation

If introducing a direct investment obligation, we emphasize the importance of the definition of "direct investment" encompassing a diverse array of content types eligible for investment under the financial obligation: all forms of co-productions, content commissioning or licensing/acquisition among others of films, series and documentaries regardless of which subcategory the content may otherwise fall under, including e.g. reality, comedy and drama. In addition, other types of investment such as marketing, theatrical distribution and investments in training, infrastructure development and localization costs¹¹ should be accounted for as part of the financial obligation.

This greater flexibility will allow for a more organic growth, more alignment with the business models and practices of individual media service providers, which may have legitimate business reasons for engaging in investments in one category over another.

¹⁰ [EUR-Lex - 52020XC0707\(03\) - EN - EUR-Lex \(europa.eu\)](#)

¹¹ i.e. in the event non-domestic services decide to invest in the dubbing and subtitling into and from Icelandic.

4. Additional observations

Contractual freedom is the backbone of the AV ecosystem

We understand that for the purposes of option 2 (direct investment in audiovisual projects of Estonian film producers), an Estonian film producer is defined as “a private legal entity registered in Estonia or a self-employed person entered in the business register, whose main activity is the production of films and who owns or is licensed by the proprietary copyrights of the authors of the audiovisual works”. As such, investments in local content in which the copyright is fully acquired by the commissioning party will not qualify as a direct investment under option 2.

In this regard, we would like to stress that the development and the creation of AV works imply 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 Estonian 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 Estonian 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 Estonian AV ecosystem.

Other

In addition to the elements that have already been mentioned, Estonia should also take into account other components that would enhance the audiovisual sector's prospects within the potential constraints of financial obligations:

- 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).

Estonia should also consider the compatibility of the proposed financial obligation with Pillar One of the OECD agreement on a two-pillar solution to address the tax challenges arising from the digitalisation of the economy, agreed in October 2021. While the document on the intention to

develop a bill to amend the Media Services Act considers that a financial obligation under the AVMSD cannot be treated as a prohibited digital services tax if it is imposed in the same way for Estonian and foreign companies, this is not yet certain. Note for example that in March 2024, the Ministry of Culture in Norway 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.”¹² This is also particularly relevant considering the stated reason for the proposed amendment of the Media Services Act, which is to “find ways to tax international streaming platforms and work towards fair taxation of global digital giants.” Therefore, we would strongly caution against any introduction of measures until the Framework is in place to ensure that the measure complies with it.

The presence of higher financial obligations on media service providers does not necessarily guarantee superior outcomes in terms of content investment. In light of this, we would respectfully request the government to first reconsider other means to achieve the objective of promoting the production of European audiovisual works through less intrusive means which would not restrict the freedom to provide services (please see section above on production incentives).

If the government remains determined to enforce a financial requirement, it should do it according to the principles of proportionality, non-discrimination and taking into account the level of investment introduced in similar sized countries.

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

Yours sincerely,



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¹² 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)