

From: Apple Distribution International Limited ("**Apple**")

To: The Dutch Ministry of Education, Culture and Science
Ministerie van Onderwijs, Cultuur en Wetenschap

Date: [25 November, 2020]

Subject: AVMS Directive - proposed investment obligation in the Netherlands

To whom it may concern,

Apple welcomes the opportunity to participate in the consultation process of the proposed act on the investment obligation for Dutch cultural audiovisual works (*Wetsvoorstel investeringsverplichting voor het Nederlands cultureel audiovisueel product*, ref. ID11368.versie K-1) (hereinafter referred to as the "**Draft Act**").

Apple seeks to provide a constructive contribution, especially with regard to the implementation of investment obligations of providers of audiovisual services established in other EU Member States.

In this submission, Apple expresses its support for a number of features of the Draft Act and makes recommendations for further clarifications for the legislator to consider including in the Draft Act in order to promote a simple and flexible approach to incentivise investments for audio-visual media services providers, while also ensuring a sufficient degree of legal certainty and predictability for industry participants and the regulator.

The main recommendations / suggestions for the Dutch legislator to consider Apple wishes to bring across are the following and are detailed in paragraphs A - G below:

- Lower the rate / percentages of investments to be made exclusively in Dutch works (A)
- Extend the scope of eligible Dutch cultural audiovisual works (B)
- Extend the scope of eligible investments (C)
- Allow for exemptions and/or a ramp-up period for new services that are not (yet) profitable (D)
- Limit mandatory investment in independent productions (E)
- Clarify and stimulate uniformity in reporting obligations in view of cross-border application (F)

A. Rate (amount) of investment obligation

Apple supports the legislator's approach to calculate investments over locally generated net annual turnover (article 3b.4 under 4 of the Draft Act). However, Apple is concerned by the high rate for the investment obligations currently indicated in the Draft Act, i.e. the rates under Article 3b.4 under 2 and 3 of the Draft Act, being 6% of the net annual turnover generated in the Netherlands for subscription-based VOD (SVOD), and 3% for VOD service providers that commercialize content under an advertising model (AVOD) or transaction model (TVOD). The Dutch Raad voor Cultuur advised a 3% rate for TVOD and it is unclear why this advice has not been followed. We also noticed that there is no clear argumentation or reasoning why the rates should be 3% and 6%.

In general, the proportionality of any such investment obligation should be considered based on all relevant facts and circumstances surrounding the obligation, particularly the characteristics of the relevant market (languages, population), the restrictions on eligible investments and productions (European vs. domestic works), as well as the actual percentages / rates envisaged.

The percentages imposed in the Dutch Draft Act seem particularly high in comparison to similar investment obligations imposed, or contemplated to be imposed, in other comparable EU markets. For instance, in Poland the levy rate is expected to correspond to 1.5%.

Not only do the 3% and 6% rates seem high in comparison to other Member States, such rates will be more difficult for service providers to comply with because on the basis of the Draft Act, the mandatory investment must be made in (only) Dutch cultural audiovisual content, rather than in European works more generally. The Dutch legislator hereby goes beyond the primary objective of the recently amended AVMS Directive, which aims to stimulate the production and prominence of European works more broadly.¹ Though Apple respects the Dutch legislator's ambition, the limitation to invest in Dutch works substantially narrows the type of eligible investments available and will make it extremely difficult for service providers to meet the specified investment percentages without risk of compromising the financial viability of their services in the Dutch market.

An important factor to consider is that the Dutch market and audience is relatively small as compared to other Member States, such as Germany or France. Not only do those countries have larger populations to start with, there are also greater possibilities (for example) for German or French content to cross borders and be commercialized in other countries in Europe or internationally where the same language is spoken (e.g. Austria, Switzerland, Canada). With a smaller potential audience in the Netherlands, the return on investment of Dutch works will be significantly lower.

In view of these circumstances surrounding the investment obligation, Apple would urge the legislator to reconsider the percentages proposed in the Draft Act, and to either lower the percentages of net turnover to be invested in Dutch content, or to tie the 3% and 6% percentages to an obligation to invest in European works, of which only a portion (e.g. 50%) should be invested specifically in Dutch cultural audiovisual content, more in line with the approach taken in other Member States.

B. Scope of eligible audiovisual works

Apple understands that, based on article 3b (2) of the Draft Act, eligible Dutch works are documentary films, documentary series, drama series or feature films (including animated content) that meet the following two (2) cumulative conditions (each with two (2) alternative criteria):

- a. the original scenario is predominantly written in Dutch or Frisian language, or the main characters express themselves predominantly in the Dutch or Frisian language (hereinafter referred to as "**Language Requirement**"), and
- b. the scenario is based on an original literary work in the Dutch or Frisian language or the main theme is related to Dutch culture, history, society or politics (hereinafter referred to as "**Culture Requirement**").

Overall, applying the Language Requirement and Culture Requirement cumulatively leads to unnecessary disqualification of works that could well be relevant and appealing to the Dutch audience and stimulate and support the Dutch cultural audiovisual production economy. This could consequently hinder the artistic freedom of Dutch content creators. Besides, it adds another constraint on the ability of service providers to meet the proposed 3% and 6% investment obligation.

In Apple's view, a work related to Dutch culture, history, society or politics does not necessarily have to be predominantly (>50%) written or expressed in the Dutch language in order to be a "Dutch" work. The Netherlands is a multicultural society with a rich history, as a result of which Dutch cultural, historic, societal or political themes could well relate to individuals that speak languages other than Dutch. There are plenty of examples imaginable of works created by Dutch content creators, directed by Dutch directors and/or edited by Dutch editors, that are not predominantly written or expressed in the Dutch language, but can nonetheless be regarded as 'Dutch' (e.g. a silent movie about the Dutch islands (*Waddeneilanden*), a series

¹ Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities.

about migrants that left the Netherlands during or after WW2).² Besides, imposing a Language Requirement could impact the artistic freedom of content creators that are keen to produce eligible works, and even limit the international potential of a production, given that - as stated before - the Dutch speaking audience is relatively small on a global scale.

Also, though Apple welcomes the legislator's approach that animated films and series are eligible to qualify as Dutch works, it questions whether the Culture Requirement could be compatible with animated content (with fictitious characters), especially where it concerns content designed for children. Animated movies or series often have a general educative character, without being connected to a particular culture or society. By imposing a Culture Requirement on top of a Language Requirement, animated (children's) series or films with a more universal or neutral story line (that are not based on an original literary work in the Dutch or Frisian language) would not be eligible to qualify as a Dutch cultural audiovisual work under the current Article 3b.2 of the Draft Act. This will place the Dutch creators of such works in a detrimental position, as their content would be of less interest to service providers that seek to comply with their investment obligation.

Introducing the Language Requirement and the Culture Requirement as indicative and alternative criteria would better serve the overall objective of the legislator to stimulate the creation and availability of Dutch content and support local production economy. A movie or series that is based on Dutch literature or pertains to Dutch culture, politics, society or history could still be considered 'Dutch content', regardless of the language written or spoken (for example, "*Kidnapping Freddie Heineken*", a movie starring Anthony Hopkins based on novel by Peter R. de Vries, language: English) and could also help export Dutch culture internationally. Likewise, a work that is written or expressed in the Dutch language could be considered Dutch, regardless of the topic or theme of the production (e.g. "*De Vogelwachter*", a movie starring Freek de Jonge who plays a bird watcher on a fictitious island, language: Dutch). All works that involve either Dutch language or Dutch literature, culture, politics, society or history will ultimately still require a level of involvement of professionals active in the Dutch production market, and thereby stimulate and benefit the content production economy in the Netherlands.

Therefore, Apple would like to ask the legislator to reconsider the conditions proposed under Article 3b.2 of the Draft Act, and suggests to introduce the Language Requirement and Culture Requirement as indicative and alternative criteria instead of strict cumulative criteria.

C. **Scope of eligible investments**

Apple understands that, based on article 3b (5)(2) of the Draft Act, the investment must be spent on:

- a. a production or co-production, or
- b. the acquisition in advance of an exploitation license with respect to a not yet finished production, or
- c. the acquisition of an exploitation licence in respect of a production that is produced on the is not older than four years at the time of acquisition.

When defining the scope of qualifying investments, it is important to take into account that there is not an automatic link between a service provider offering VOD services and engaging in traditional forms of original content production. Original content production is a significant financial commitment and not every VOD service provider will be able to follow that strategy as a means of increasing the size or scope of its catalogue. Equally, from a policy perspective, we understand that the goal of the Draft Act is not just to incentivise the production of content, but to ensure that it can be brought to market for audiences to enjoy, and that the investment framework should also create incentives to invest in culturally relevant and enriching content and give it new audiences.

Apple therefore recommends taking a broad approach to the concept of qualifying investments that extends beyond traditional primary production and license costs, and includes costs incurred by service providers in

² See for also the catalogue of documentaries / films submitted by Dutch creators to the IDFA, the International Documentary Film Festival Amsterdam.

the development, production, promotion and distribution of European and Dutch audiovisual works more generally.

Specifically, in addition to investments in (co-)production and license rights which are currently expressly mentioned in 3b (5)(2) of the Draft Act, Apple asks the legislator to allow the following types of costs as eligible investment costs:

- Production costs, including hiring personnel to perform the work, sourcing and identifying potential new projects, engaging in the early development of talent ideas, assisting in the writing process, assembling creative casts, crews, technical supplies, filming and editing;
- Post-production costs: being additional investments required following production before a work is ready for the market, including formatting of the work for each distribution channel (digital, broadcasting, physical), localisation (dubbing, subtitles for each market) as well as advertising and marketing support for the launch of the new content;
- Accessibility costs: costs incurred to develop and implement accessibility features to support audiences that are hearing impaired, visually impaired or have other sorts of disabilities;
- Digitisation costs: costs of encoding/formatting of works in order to make them available on online platforms. This should in particular include the digitisation of classic works or simply of works that never had been digitised before. This would create significant cultural value and help these works find new audiences. For the same reasons, Apple asks the legislator to allow for costs for acquisition of an exploitation licence for a production that is older than four years, e.g., if it concerns a classic work that has not been digitized yet, and/or a (independent) production that has remained on the shelf for four years or longer.
- Ancillary investments: Investments in training of new talent and authors (e.g., partnership with schools, charity initiatives for the development of underrepresented categories of workers etc.) as well as other distribution and promotional activities including events, ceremonies, festivals, sponsoring, partnerships which are essential elements of the content development ecosystem.

D. Turnover calculations and threshold

Apple supports the legislator's approach to not take into account in the investment calculations the first EUR one (1) million of revenue for each type of media service (Article 3b.4 under 5 of the Draft Act) and to allow for the Dutch Media Authority (*Commissariaat voor de Media*) to offer a commercial media service provider an exemption (*onthefing*) from the investment obligations where it would be impracticable or unjustified by reason of the nature or theme of the audiovisual media services (Article 3b.4 under 6 of the Draft Act).

The period of time in order to launch and develop a new service is a relevant factor to consider in determining whether compliance with investment obligations would be impracticable or unjustified. This is because service viability and actual value in the local market requires significant initial investments, such that even if a service achieves a significant turnover, that turnover may not be profitable for the service provider in the early years, and it also takes time to develop or acquire new local content that is valuable for the local audience. Adding only one title in a small catalogue of a new service in development is a significant enterprise. We therefore consider it fair for new services to have a reasonable delay to implement investments in the local market.

In order to encourage new services to develop in the Dutch market, Apple would welcome a (secondary) exemption for new services based on the period of time since the service was initially launched in the Dutch market and/or a ramp-up period for the applicable investment rate and rules (depending on the number of years since the service was initially launched in the Dutch market). In terms of the length of the ramp up period or exemption, Apple believes a reasonable period would be in the order of several (at least 5+) years in order to take into account the typical lead time between the identification of new production projects and the availability of new productions as part of a VOD service to create value. This period can take up to five years for more complex productions.

E. Investment in independent productions

Apple understands that the legislator plans to determine, by general order in council (*algemene maatregel van bestuur*), which percentage of the required (3% and 6%) investment must be used to the benefit of independent productions (Article 3b.5 under 3 of the Draft Act).

In Apple's view, carving out special financing quotas for independent producers is not the right approach to incentives investments in audiovisual content. Online services will often commission a production with a producer and will assume all the economic and exploitation rights. The trade off in such a deal is that the producer is guaranteed a payment and financing of a production, whilst the service provider carries all the financial and economic risk.

VODs are likely to pay less for reduced rights or participation and therefore financing will have to be secured from multiple parties, which increases financing costs for all parties and may entail additional interest and costs. The producer in turn will have to pay more to distribution agents to license rights, and the VOD services will be less likely to finance pre-buys that limit producer risk instead of favouring completed content where the AVMS does not take on completion risk. The result is less content from independent producers, less investment in local talent and less investment on screen. Moreover, smaller producers will be disadvantaged because they cannot finance the content themselves. So long as independent producers can freely negotiate the contractual relationship, flexibility should be permitted as to the duration of rights, scope of rights, and the share of the producer, including permitting co-productions where an independent studio in another Member State is the lead producer. Such flexibility is particularly favourable to smaller independent producers that do not have a track record of completing films and/or cannot finance content themselves.

Apple asks the legislator to consider the foregoing market practice when determining the further rules with respect to independent production investment obligations.

F. Reporting Requirements and Practicalities

Apple understands that the legislator may set additional rules by ministerial regulation (*ministeriële regeling*) in relation to the annual reporting obligations to the Dutch Media Authority (Article 3b.6 of the Draft Act). Apple is also aware that the investment obligations shall have cross-border effect, and thus apply to service providers that are active on the Dutch market but established in another Member State. Similar cross-border obligations apply in other Member States.

The practical challenge with cross-border reporting obligations for internationally operating service providers is that service providers have to deal with a variety of local laws and regulations in various Member States. Often, each Member State has its own way of working, its own paperwork, processes, deadlines, language requirements and other formalities. For larger, internationally operating companies it takes time and effort to ensure that all local law requirements are addressed in relevant internal policies and procedures, that the policies and procedures are implemented in the organization and individuals responsible for carrying out the necessary tasks are appointed within the organization. For companies to prepare and organize themselves, it is important to get an understanding of the nature and scope of the exact reporting obligations sooner than later. Also, for service providers established outside the Netherlands it is helpful if the service provider is notified by the competent authority in advance (annually) of any upcoming reporting due date, and that the English language may be used in relevant documentation and correspondence with the authorities.

Apple would like to ask the legislator to consider the foregoing practical matters when setting the additional rules on the reporting obligation by ministerial regulation.

Finally, Apple notes that the obligation for commercial media service providers shall essentially start to apply as of the fiscal year (*boekjaar*) that commences on or after the date that the relevant provisions enter into force (Article 9.14 under e of the Draft Act). Apple is also aware that service providers must report to the Dutch Media Authority each year before 1 July on the turnover of the previous fiscal year (Article 3b.6 under 1 of the Draft Act).

In this respect, Apple wishes to point out that organizations may have a fiscal year that is not synchronized with the calendar year. For legal certainty and equality, Apple would like to ask the legislator to clarify that fiscal year (*boekjaar*) within the meaning of the relevant provisions under the Draft Act shall be the same as the calendar year (as also stipulated in the current article 2.172 of the Dutch Media Act).
