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Subject: Notification 2024/54/DK

Draft Bill for an Act on the contribution by certain media service providers to the promotion of Danish culture (Cultural Contribution Act)

Delivery of comments pursuant to Article 5(2) of Directive (EU) 2015/1535 of 9 September 2015

Sir,

Within the framework of the notification procedure laid down by Directive (EU) 2015/1535¹, the Danish authorities notified to the Commission on 2 February 2024 the “Draft Bill for an Act on the contribution by certain media service providers to the promotion of Danish culture (Cultural Contribution Act)” (the notified draft). This notification constitutes a new notification, following the notification of the previous version of the bill on 29 September 2023, which prompted the Commission to issue comments pursuant to Article 5(2) of Directive (EU) 2015/1535 on 20 December 2023 (2023/0562/DK). According to a note accompanying the notification (‘Note – The Danish Cultural Contribution’, note regarding the contribution), the Danish authorities have taken these comments into consideration.

According to the notification message of the Danish authorities, the notified draft “aims at implementing Article 13(2) of Directive (EU) 2018/1808² [...] by introducing a

¹ Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (codification), OJ L 241, 17.9.2015, p. 1.

² 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.

cultural contribution scheme for on-demand audiovisual media service (AVMS) providers established in Denmark or another EU Member State targeting audiences in Denmark”.

The providers of on-demand audiovisual media services under the scope of the notified draft constitute information society services as defined in Article 1(b) of Directive (EU) 2015/1535.

The notified draft aims to make use of the possibility provided for in Article 13(2) of Directive 2010/13/EU as amended by Directive (EU) 2018/1808 (Audiovisual Media Services Directive, hereafter “AVMSD”) for a Member State to require media service providers established in other Member States but targeting audiences in its territory (hereafter “cross-border provider”) to contribute, in a non-discriminatory and proportionate way, to the production of European works. The notified draft also aims at transposing Article 13(6) of the AVMSD, which provides for mandatory exemptions from the possible requirement under Article 13(2) for companies with a low turnover or a low audience.

According to its § 2, the notified draft applies to media service providers established in Denmark providing on-demand audiovisual media services as well as to media service providers established in other EU Member States providing on-demand audiovisual media services targeting audiences in Denmark. According to § 2(3) of the notified draft, the provision shall not apply to media service providers whose annual turnover is less than DKK 15 million³ or whose audience represents less than 1% of the total number of users of on-demand audiovisual media services on the Danish market. Moreover, the provision does not apply either to media services provided “as part of the exercise of public service activities”, performed by providers established in Denmark or in other Member States (§ 2(4) of the notified draft). The exclusion of public service media providers has been justified by the Danish authorities in the note regarding the contribution by pointing to their already extensive obligations to invest in and broadcast Danish language content, as part of their public service remit. In each of the last three years, each of the two existing public service media providers would have invested at least EUR 114 million in Danish language content, not counting sports and news programmes.

All media service providers providing on-demand audiovisual media services other than those exempted by § 2(3) of the notified draft shall pay an annual contribution (‘cultural contribution’) of 2% of their taxable turnover in Denmark (§ 4(1) of the notified draft). Media service providers who directly invest less than 5% of their taxable turnover in Denmark in ‘new Danish content’ shall, in addition to the contribution of 2%, pay an annual contribution of 3% of their taxable turnover in Denmark (§ 4(2)). The proceeds of the cultural contribution (after deduction of certain elements) are allocated to the Public Service Fund and the other aid schemes of the Danish Film Institute; the Minister of Culture may lay down detailed rules on this allocation (§ 6). It is expected, according to an explanatory memorandum accompanying the notified draft, that a share of 20% will be allocated to the Public Service Fund and a share of 80% to the other aid schemes. The Danish authorities have explained in their replies to the supplementary questions provided by the Commission during the previous notification that the explanatory memorandum “is used by the Danish administration as primary sources of interpretation

³ DKK 15 million correspond to slightly more than EUR 2 million.

when implementing the legislation” and that “Danish courts will use the explanatory memorandum as ground for their jurisprudence”.

The taxable turnover is defined in § 3(4) of the notified draft as including “gross revenues of a media service provider in Denmark resulting from the making available of audiovisual content by the on-demand audiovisual media service” without “revenues related to the making available of sports or news programmes, revenues from linear programming services made available through the on-demand audiovisual media service, and revenues from the redistribution of other media service providers’ on-demand audiovisual media services.”

The exclusion of commercial linear media services from the contribution obligation and the deduction of the revenues concerning linear programmes have been justified by the Danish authorities in the note regarding the contribution by pointing to an average investment in Danish content of approximately 13% of the aggregate annual sales done by the two relevant commercial providers, per year.

The notified draft bears a date of entry into force on 1 July 2024. The cultural contribution is scheduled to be due for the first time in 2025 based on the media service providers’ statements of taxable turnover in Denmark for 2024.

According to § 4(3) and (4) of the notified draft, an investment will be considered as having been made in new Danish content if at least 75% of the production material for new European films, series or documentaries is in Danish. In addition, “more than half of the individual production budget will have to be spent in Denmark or more than half of the individual production’s recordings will have to take place physically in Denmark.”

Examination of the notified draft, which is limited to the text notified to the Commission on 2 February 2024, has prompted the Commission to issue the following comments.

1. On the exclusion of linear audiovisual media services from the contribution obligation

According to the notified draft, the contribution obligation only applies to media service providers providing on-demand audiovisual media services. As the Danish authorities have clarified in the note regarding the contribution, this includes commercial broadcasters offering (also) on-demand audiovisual media services, but only as far as the revenues from the on-demand services are concerned. On the other hand, as described above, revenues from linear programming services made available through an on-demand audiovisual media service are not subject to the contribution obligation.

On that basis and taking into account the data provided by the Danish authorities regarding the current level of investment of commercial broadcasters in Danish content, the Commission is of the view that the exclusion of linear audiovisual media services from the contribution obligation should not be considered to be discriminatory.

2. On the contribution to the Public Service Fund and the other aid schemes of the Danish Film Institute

As indicated above, according to §§ 4 and 6 of the notified draft, media service providers providing on-demand audiovisual media services shall pay an annual contribution of 2%

of their taxable turnover in Denmark, which is then allocated to the Public Service Fund and the other aid schemes of the Danish Film Institute. If they choose to invest less than 5% of their taxable turnover in ‘new Danish content’, they must contribute a further 3% of their annual taxable turnover. The explanatory memorandum states that the services required to contribute to these funds shall be able to benefit in a non-discriminatory manner from the support available from them.

According to settled case-law, measures affecting the freedom to provide services may be justified if they pursue a legitimate public interest, such as cultural and linguistic diversity. Considering, in particular, the obligation to finance the production of European works, the Court of Justice of the European Union (CJEU) has ruled⁴ that protecting linguistic diversity can justify restrictions to the free movement of services, as long as the national measures are proportionate. While the judgment concerned obligations imposed on providers under the Member State’s jurisdiction, the Commission understands that the same objective can be invoked also in relation to obligations imposed on cross-border providers to contribute financially to European works. This requires as well, however, that the principles of non-discrimination and proportionality are respected.

A note accompanying the notification (‘Note on the existing Danish film support schemes and the Public Service Fund’, note regarding the support schemes) explains that the Public Service Fund supports works in Danish, and that the other aid schemes of the Danish Film Institute are also limited to a film production that provides a “particular artistic and/or technical contribution to the promotion of cinematography and film culture in Denmark”. This means that “the film production must be recorded in Danish or in a Danish version, and/or the main creative forces and/or technical functions of the film production, must, regardless of nationality and ethnic origin, reside or stay permanently in Denmark, or otherwise have a material and significant affiliation to and/or importance for Danish cinematography or film culture”.

It should be noted at the outset that the Commission’s assessment can only address the notified draft. This does not include the accompanying documents, including those containing or referring to the terms and conditions of the Danish Film Institute’s support schemes. In that context, the Commission would like to clarify only that the compliance of the schemes with State aid law, which the Danish authorities have pointed out, is a separate matter from the one on compliance of the contribution obligation with the AVMSD. Pursuant to Article 108(3) TFEU, Member States must notify to the Commission any plans to grant aid and cannot not put such proposed measures into effect until the Commission has issued a final decision on those measures. In accordance with Article 108(3) TFEU, the Danish authorities notified the cultural contribution to the Commission on 26 February 2024⁵.

3. On investment in ‘new Danish content’

According to § 4 of the notified draft, the additional contribution of 3% of the annual taxable turnover can be avoided if the media service provider invests at least 5% of its taxable turnover in Denmark in ‘new Danish content’.

⁴ Judgment of 5 March 2009, *Unión de Televisiones Comerciales Asociadas (UTECA) v Administración General del Estado*, C-222/07, EU:C:2009:124;

⁵ Case SA.112857.

At the outset, it must be noted that Article 13(2) AVMSD refers to the financial support for the production of European works and does not include any similar provision concerning financial obligations for the production of national audiovisual works. Equally, the AVMSD does not include any provision concerning the earmarking of a part or all of the relevant revenues to works in the official language of a Member State or that are produced to some extent in the respective Member State.

The Commission notes that, where the media service provider pays the “basic fee” of 2% and additionally invests at least 5% of its taxable turnover in ‘new Danish content’, its total investment is 7% of the annual taxable turnover in Denmark, according to the rules set out by the notified draft. This threshold is (slightly) higher than the one considered as proportionate under the quoted case-law⁶. However, as opposed to the scheme which has been considered proportionate by the case-law, no part of the investment is dedicated to ‘European works’ as such, but rather all to ‘new Danish content’ and to the works that are funded by the Public Service Fund and the other aid schemes of the Danish Film Institute, which refers to works in Danish or works which provide a “particular artistic and/or technical contribution to the promotion of cinematography and film culture in Denmark”, as it has been noted above.

The Commission recalls that the CJEU has adopted a narrow interpretation of the lawful restrictions to the freedom to provide services, as laid out above. In this regard, the Commission refers to its comments issued under the TRIS reference 2023/0562/DK. There the Commission had remarked in particular that the originally foreseen high proportion (75%) of audiovisual works with Danish as their main language benefitting from investment obligations would need to be justified and proportionate under the relevant provisions of the Treaty on the Functioning of the European Union. The Commission considered that the proportionality of such a high threshold of audiovisual works with Danish as their main language would require additional reasoning.

The Danish authorities have amended the concept of ‘new Danish content’ in the new notified draft, as laid out above. In the note regarding the contribution, they compare the direct investment threshold of 5% reserved for new Danish content with the threshold of 3%⁷ which was reserved for works in one of the languages of Spain in the case decided by the CJEU. In this regard, they justify their higher threshold by referring to the situation of a smaller market such as the Danish one: in a small market, investments would need to represent a higher percentage of the annual turnover in order to achieve the same output in terms of quality content as in a bigger market.

In case this argument is meant to be understood in the way that the annual turnover in a small market is inferior to the annual turnover in a bigger market and that, therefore, a higher percentage is needed to produce quality content, it could be basically understood. However, even in that case, the threshold of 3% rather would have to be compared with the threshold of 7%. This is because – as opposed to the scheme which has been considered proportionate by the case-law –, no part of the investment is dedicated to “European works”, but rather to ‘new Danish content’ and to the works that are funded by the Public Service Fund and the other aid schemes of the Danish Film Institute. The funding conditions of the aid schemes of the Danish Film Institute, even though they

⁶ In the above-cited case C-222/07 *Uteca*, the Spanish law at issue provided for an investment of 5% of their operating revenue in European works, with 60% of that investment having to be reserved for works in one of the official languages of the Kingdom of Spain.

⁷ 60% of 5%, see footnote 7 above.

cannot be assessed here, do not refer to European works but have a strong nexus with the Danish language and Denmark, according to the description provided by the Danish authorities. Seen that way, the threshold would be twice as high as in the *Uteca* case. Moreover, only an investment made in ‘new’ films, series or documentaries can qualify for the fulfilment of the direct investment obligation, which further restricts the freedom of the media service providers concerned. Against the background of the wording and the goal of Article 13(2) AVMSD to promote European works, the Commission would like to remind the Danish authorities that such a high proportion of Danish content (100%) benefitting from investment obligations, compared in relation to European works, would need to be justified and proportionate in view of the Treaty on the Functioning of the European Union. The Commission considers that the proportionality of this choice related to the investment obligation that applies exclusively to “new Danish content”, as defined in the notified draft, would require additional reasoning as opposed to an investment obligation that earmarks only a part of the overall investment obligations dedicated to European works for such content.

This assessment is not significantly affected by the explanation from the Danish authorities, included in the note regarding the contribution that, in order for investments to qualify as investments in Danish content, “the requirement that 75% of production material should be in Danish should be viewed in light of the fact that it is not unusual to have significant parts of productions aimed at a Danish audience in other languages”. This explanation provides no approximate concretisation of the percentage of works with such a language regime. The Commission also is of the opinion that such a percentage is difficult to measure and, consequently, to monitor. In that context it should also be borne in mind that not every work seems to be suited to be produced in more than one language, which might elevate the percentage in practice. Moreover, a work which must have its production material in Danish by a percentage of 75%, will likely be perceived by the audience as a Danish work just as much as a work which has Danish as its sole language.

This is exacerbated by the additional condition that, in order to qualify for ‘new Danish content’, more than half of the individual production budget must be spent in Denmark or more than half of the individual production’s recordings must take place physically in Denmark (territoriality condition). The previous notification, according to which economic criteria applied to the remaining 25% of the works⁸, already led the Commission to indicate that additional reasoning would be needed. The new notified draft now applies the territoriality condition to any work – on top of the language requirement. The Danish authorities justify the territoriality condition by pointing to the Communication from the Commission on State aid for films and other audiovisual works⁹, which would include variations of the condition. However, that Communication is not applicable in this case, since the investment in ‘new Danish content’ at stake does not seem to fall in the scope of Article 107(1) TFEU. Nevertheless, in the context of State aid law, a Member State’s requirement of a level of production activity in the Member State’s territory up to 50% of the overall production budget is acceptable. However, “up to 50%” is exactly the opposite of “more than half”.

⁸ According to the previous notification, the media service provider would have had to fulfil at least one of three criteria, namely: 1) more than half of the production budget would have had to be spent in Denmark, 2) the production’s filming would have had to take place physically in Denmark, or 3) the production would have had to be carried out by a production company established in Denmark, or the central creative or technical roles having been carried out by persons established or residing in Denmark.

⁹ 2013/C 332/01 from 15 November 2013.

Consequently, the Commission considers the combination of the two requirements which now would apply to any work that wants to qualify as ‘new Danish content’ even more problematic than the first version of the bill in terms of the freedom to provide services and thinks that this approach would require additional reasoning from the Danish authorities.

The Commission invites the Danish authorities to take into account the abovementioned comments and recalls the Danish authorities that these comments are without prejudice to the ongoing procedure pursuant to Article 108(3) TFEU.

The Commission furthermore recalls that once the definitive text has been adopted, it must be communicated to the Commission in accordance with Article 5(3) of Directive (EU) 2015/1535.

Yours faithfully,

For the Commission

Kerstin Jorna
Director-General

Directorate-General for Internal
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