Dynamics in the audiovisual sector and the future of local production

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Audiovisual production under pressure

The audiovisual sector in the Netherlands has been under pressure for some years now. This has consequences not only for the economic health of businesses in the sector, but also for the social significance and cultural impact of Dutch audiovisual productions. The underlying causes of this can be seen in a series of developments.

Public and private sources of finance for the sector are shrinking. The large, often internationally operating distributors and operators at the end of the value chain, like cinema companies and video-on-demand service providers (VOD), are profiting from the income generated by audiovisual productions in the Netherlands.[1] The supply and market share of foreign films screening in both mainstream and arthouse cinemas, particularly American films, has increased more strongly in recent years than those of Dutch productions.[2] This competition from foreign films, which benefit from large marketing budgets, reduces the visibility of Dutch productions – in spite of the fact that the total number of screens in the Netherlands has increased. This has a negative impact on the possibilities for distribution and earn-back on Dutch films, and consequently on the willingness to invest in these. The public broadcasters – a major investor in audiovisual productions – are facing budget reductions due to cuts in government finance and falling advertising revenue, and additionally are about to see their ability to broadcast advertisements curtailed. Remaining competitive is becoming more difficult for the commercial broadcasters too, as advertising revenue declines and new players enter the market, including online digital suppliers. Additionally, the rise of VOD services have all but eliminated income streams from the rental and sale of DVDs.

The incredibly rapid rise of online platforms and digital video services represent a far-reaching, structural change in the audiovisual ecosystem of the Netherlands and Europe. This new ecosystem is dominated by the subscription services, also known as subscription-video-on-demand (SVOD). Netflix is the global market leader, and is recently facing competition from other globally operating players such as Amazon Prime and Disney+. These services are attracting mass audiences and are having major economic and cultural impacts on audiovisual culture and the audiovisual production sector, in Europe in particular. The most significant initiatives in the Netherlands are Videoland (RTL) and NPO Plus, which are putting up some resistance within the Dutch market, but do not enjoy the economic benefits of scale and leverage of the American giants. The internationally operating SVOD services are throwing up considerable challenges for parties traditionally important in the development, production and supply of local productions. These include film distributors, sales agents, public funds and co-producing broadcasters, as well as the existing exhibitors or end-of-chain operators: mainstream and arthouse cinemas and commercial and public broadcasters.

At the same time, the Netherlands is becoming less attractive as a country in which to produce, in part because conditions in other European countries are being kept up to scratch or even improved, whereas in the Netherlands this is not (yet) the case. All of these developments have been exaggerated since 2020 by the COVID-19 pandemic. As a result, the need to achieve greater cohesion and cooperation within the ecosystem has become even more urgent, with the aim of boosting the resilience of the audiovisual sector in the Netherlands and increasing its capability to face the future.

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[1] See also: Paul Rutten, 'Voor een levendige audiovisuele cultuur' (2019). Haarlem: Paul Rutten Research [https://www.filmfonds.nl/page/7808/voor-een-levendige-audiovisuele-cultuur]

[2] The exception to this pattern is the year 2020, which saw the postponement of releases of, among others American films as a result of the lockdown. Logically, this went hand in hand with lower turnover at the box office.

Changes in the ecosystem

In view of their pivotal role in the development and realisation of Dutch audiovisual productions, we turn first to the producers. For them, the successful entry of the global SVOD suppliers to the European market means structural changes to the practice of production and operation.

Firstly, this has resulted in a significant portion of the finance for production budgets shifting from the traditional financiers to the newcomers. The importance of the SVOD players in the market is growing. Netflix's relevance to production practice in Europe is unmistakeable. The internationally renowned trade journal Screen Digest recently reported that in 2020 this company was the most important commissioner of scripted content[3]; bigger than the BBC in Great Britain or Germany's ZDF.[4] Add to this the investments now being made in European productions by Netflix's predominately American competitors, who are strengthening their market position in Europe in this way.

Contractual relations are also changing. The independence of the big international SVOD suppliers is leading to a weakening of producers' negotiating positions. Whereas with cinema distribution and the sale of DVDs revenues for distributors, sales agents and producers are (or were) directly linked to the number of tickets or units sold, the SVOD suppliers pay a one-off sum for the works produced. The contribution of the productions supplied to the turnover generated by these SVOD suppliers, on the basis of their subscribers, remains uncertain. This effect is reinforced as these suppliers consider data on viewing behaviour – such as its scope and spread – to be confidential company information. Another problem of at least equal significance concerns intellectual property rights. When producers are forced to give up (significant parts of) their intellectual property rights, this makes further operation of their own productions by themselves impossible.

Catalysing effect of COVID-19

The coronavirus crisis has accelerated the abovementioned developments and thereby increased further the urgency of the problems described above. Cinema visits have fallen dramatically, production activity has been made more difficult and has been postponed, premières have been cancelled. Income from Dutch box offices has tumbled – not surprisingly – from € 348 million to € 152 million (- 56.3 percent).[5]

The estimated turnover of the VOD suppliers in the Netherlands in 2020 shows the opposite trend: this increased from € 392 million to € 543 million (+38.5 percent). Which means that the conditions for VOD suppliers currently active and entering the market in the future are rapidly becoming much more favourable. One of the consequences of the rise of VOD services is that producers have moved towards focusing more on the production of television series.

Audiovisual Media Services Directive 2018 (AVMSD)

In many countries, for years now attention has been devoted to, and policy developed aimed at, bolstering the position of local audiovisual production. Including in Europe. As part of the amendment of the European Audiovisual Services Directive, the European Union has partly obliged its Member States and partly given them the scope to introduce statutory measures to support their audiovisual sectors, as a counterbalance to the developments signalled above.[6] The new directive contains a number of measures imposing obligations on VOD players.

For example, these providers must ensure that a minimum of thirty percent of their catalogues are made up of European productions. By including language requirements in these obligations, national legislators are able to promote the minimum number of mandatory European productions consisting of

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[3] In which feature films and television drama are the major components.

[4] Melanie Goodfellow, 'How Europe's indie producers are fighting to retain IP and revenues amid streaming boom' (2021). Screen Digest, 2 September 2021 [https://www.screendaily.com/features/how-europes-indie-producers-are-fighting-to-retain-ip-and-revenues-amid-streaming-boom/5162865.article]

[5] See also: Netherlands Film Fund, 'Film Facts and Figures of the Netherlands' (Summer 2021 Issue). Amsterdam: Nederlands Filmfonds [https://www.filmfonds.nl/media/inline/2021/8/24/fff_summer_2021_def.pdf], as well as Boekmanstichting, 'Cultuurmonitor – domein Audiovisueel' (2021). Amsterdam: Boekmanstichting [https://www.cultuurmonitor.nl/rapporten/audiovisueel]

[6] 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. [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018L1808&from=EN]

works from their own countries. In addition, the VOD providers must devote sufficient attention to these productions by making access to these easier, for example on their home pages (prominence).

Member States are also offered the possibility of imposing financial obligations on the VOD suppliers, even if they do not have offices within the boundaries of the Member State in question. This obligation may take the form of an obligation to invest in national productions or of a levy to be paid into a fund intended for the creation of such productions.

There are great variances in the speed at which the measures imposed or proposed in the Directive are being implemented.[7] Front runners include large Member States such as France and Italy, but also smaller ones such as the regions Flanders and Wallonia. As well as differences in the speed of introduction, there are also differences in terms of the content of legislation. These concern the choice of either an obligation to invest or the imposition of a levy, or a combination of the two, as well as the level of the percentages of turnover VOD suppliers must invest or contribute. The highest percentage of annual turnover to be spent on national productions is in France, at twenty-five percent, and the lowest in Portugal, at two percent.

Sometimes the differences in legislation arise out of the specific market circumstances within the Member States, but they seem to be predominately determined by the cultural policy traditions within the various countries. France has always set great store by a strong national cultural sector involving all relevant stakeholders, while the Netherlands follows a more liberal course. National policy has a great influence on the international competitiveness of the audiovisual industry, and this has consequences for the industry's viability. This was previously demonstrated in the introduction of fiscal measures and cash rebates in European countries to stimulate the local production climate, with the Netherlands being a relative latecomer in this respect.

A law is in the pipeline in the Netherlands aimed at introducing an investment obligation; it has already been submitted for consultation twice. However, the legislative process has ground to a halt, partly as a consequence of the fall of the Rutte III Cabinet and the slow progress of the formation of a new government, even though the urgency underlying the introduction of such a measure is growing. Furthermore, the fact that the final form and content of the proposed legislation are not yet known is also contributing to great uncertainty within the audiovisual sector as a whole.

Legislation in the Netherlands

The abovementioned legislative proposal is to be implemented in the Netherlands though an amendment to the Media Act 2008. The draft law as submitted for consultation to the interested parties is dated November 2020 and is in part a response to the recommendations for the audiovisual sector from the Netherlands Council for Culture[8] and is based on the possibilities offered by the amended European Audiovisual Services Directive. The draft explanatory memorandum states that the basic assumption underlying the legislative proposal is that successful end-of-chain operators in the audiovisual sector bear responsibility for the production of a supply of national productions, irrespective of whether their success is based on national product or not. In this respect, the Council for Culture speaks of 'circularity'.

The Dutch legislator is addressing suppliers of VOD services based on a subscription system (SVOD), transactions (TVOD) and advertising (AVOD) and which generate an annual turnover in excess of € 1 million. The principal instrument they are using for this is the investment obligation set at six percent of their annual turnover for SVOD suppliers and three percent for TVOD and AVOD suppliers. This distinction is motivated by the scope and impact of the SVOD players, which is many times greater than that of the other suppliers. This obligation applies to SVOD and TVOD players either with or without offices in the Netherlands, while the obligation on AVOD suppliers applies only to those companies with offices in the

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[7] See also: Marlen Komorowski, Catalina Iordache, Ivana Kostovska, Stephanie Tintel & Tim Raats, 'Investment obligations for VOD suppliers to financially contribute to the production of European works, a 2021 update' (2021). Brussel: imec-SMITVUB [https://smit.vub.ac.be/wp-content/uploads/2021/06/Komorowski-et-al_2021_-A-European-comparison-ofinvestment-obligations-on-VOD-providers-to-financially-contribute-to-the-production-of-European-works_Report2021_FINAL.pdf]

[8] The Council for Culture (Raad voor Cultuur) is a body established by law to advise the Dutch Government and Parliament on the arts, culture and media. The Council provides recommendations regarding the cultural policy in the Netherlands, whether it is requested of them or not. Here, reference is made to the advisory report Audiovisual 'Zicht op zoveel meer. Sectoradvies Audiovisueel' (2018). The Hague: Council for Culture.
[https://www.raadvoorcultuur.nl/documenten/adviezen/2018/02/22/advies-zicht-op-zo-veel-meer] /
English summary: https://www.raadvoorcultuur.nl/documenten/adviezen/2018/02/22/advisory-report-audiovisual]

Netherlands.[9] If suppliers express a preference for making a contribution to a fund, for example because they do not produce productions themselves, this is possible. The legislator indicates that the percentage share VOD suppliers are obliged to spend on independent producers will be further determined and incorporated into the Governmental Decree on Media[10].

In line with the principle of circularity, as argued for by the Council for Culture, the legislative proposal also contains obligations upon end-of-chain operators other than the VOD suppliers: mainstream and arthouse cinemas and linear media services (i.e.: broadcasters). In relation to the cinemas, the legislative proposal stipulates that they should dedicate three percent of their annual turnover to local audiovisual productions if this turnover is in excess of € 1 million. The broadcasters are also addressed in the legislative proposal. A distinction is made here between the national, public broadcasters and the commercial broadcasters. The commercial broadcasters are exempted from obligations on the basis of the argument that they already invest sufficiently in national productions. The same is true of the national public broadcasters. However, the legislator considers it appropriate to impose a six percent investment obligation on the national public broadcasters in view of their public service remit.

The legislative proposal does not apply to cable (audio and video) and telecom operators, such as KPN and VodafoneZiggo, nor to online super-platforms such as YouTube and Google. These are not covered by the Directive as they are not themselves directly responsible for supplying video-on-demand services. When they do so, through their own infrastructure or on their platform, they are covered by the Act.

Conclusions and recommendations

The above analysis shows the increasing urgency of a rapid introduction of measures to support the local production of audiovisual culture in the Netherlands, with COVID-19 being a major factor increasing this urgency. At the same time, we can observe that the legislative process in the Netherlands is stagnating, while opportunities to free up new resources for local production are remaining unused.

It is necessary however, to raise a number of concrete questions concerning the path being taken by the legislator with the legislative proposal at hand. An appeal is rightly being made to the responsibilities of new end-of-chain operators of audiovisual productions in relation to audiovisual culture in the Netherlands. The same applies to the traditional suppliers: mainstream and arthouse cinemas and the public broadcasters.

Mainstream and arthouse cinemas are now addressed by the Media Act 2008[11] through an obligation to release three percent of their annual turnover for local productions. A relevant question here is whether the existing VAT Agreement Film 2018[12], by virtue of which mainstream and arthouse cinemas as well as Dutch and foreign owned film distributors free up financial resources for investment in local productions in exchange for a lower rate of VAT, may not represent a better way of achieving the desired effect. The timing of this measure should also be considered, now that the cinema sector still has to recover from the blows it has suffered from the coronavirus crisis, while this crisis has only strengthened the position of the (S)VOD players.

Additionally, it is not clear what problem the legislative proposal seeks to resolve in relation to the national public broadcasters. After all, the investments in audiovisual production from the public broadcasters can be secured in the returning negotiations on the policy plan, every five years, underlying the public remit[13] drawn up between the broadcasters and the government. The proposed obligation may therefore be unnecessary in this regard. Another factor is that the national government is putting pressure on the budget of the national public broadcasters through budget cuts and advertising restrictions. As a result, investments in audiovisual culture by the public broadcasters are more likely to increase rather than decrease, including those investments resulting from the proposed obligation to dedicate six percent of the available budget.

The biggest and most significant economic and cultural effect of the proposed change to the legislation concerns the stipulations relating to the (S)VOD suppliers. It would be advisable however to

[9] The legislator justifies this distinction by pointing to the relative lack of transparency of the foreign AVOD supply in the Netherlands, but is not ruling out further legislation in this area in the future.
[10] Dutch: Mediabesluit
[11] Mainstream and arthouse cinemas were not previously addressed by the Media Act 2008.
[12] Dutch: btw-convenant Film 2018
[13] Dutch: concessiebeleidsplan

give further consideration to the pros and cons of a system that involves the imposition of a levy on the one hand and an obligation to invest on the other. The advantage of the latter is that this has the least impact on the operation of the market. An obligation is imposed on the demand side, the (S)VOD players, to invest some of their turnover in further defined local productions, but otherwise retain control in terms of determining who works with whom and subject to what conditions, or which productions they obtain screening rights for. A levy on the other hand uncouples the potential makers from direct demand from the (S)VOD players and gives the producers greater freedom to determine the nature and content of their productions. In this case, the conditions subject to which productions take place and resources are allocated are in the hands of an as yet unspecified fund. For countries such as the Netherlands, where the available finance at times seems to sink below a critical level, a levy may be preferable to an obligation to invest, as this may provide a more solid foundation. Large markets such as Germany and France that are able to rely on existing sturdier foundations are less dependent on this kind of finance than the smaller countries.

If a choice is made for an obligation to invest, it is necessary to introduce supplementary conditions to correct the asymmetrical power relations between local producers and globally operating (S)VOD players. If this is not done, there would be a realistic threat of the desired cultural value and the economic basis of the production sector in the Netherlands not being achieved, or even of the situation deteriorating. It is therefore advisable that the legislator look at further conditions concerning commensurate payments for productions delivered and the retention of intellectual property rights by the producers. The European Producers Club has already carried out some relevant preparatory work in this area.[14] Furthermore, the government should strive for the maximum percentage going to the independent producers, as they make up the backbone of the audiovisual sector in the Netherlands. Such a supplement to the legislation perfectly fits in with the cultural policy pursued by the government in recent years in relation to reinforcing the position of makers in their collaboration with commissioning parties and customers. Finally, it is important to work on the implementation of a sector plan for the audiovisual ecosystem as a whole, in co-creation with the relevant stakeholders. At present, what we are seeing is a stacking up of schemes, rules and stipulations, which could be given greater cohesion. An analysis of their interrelations and the definition of a clear framework must of necessity, in view of the urgency of the situation, be accompanied by the implementation of measures and facilities.

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[14] European Producers Club, 'Code of Fair Practices' (2021). [https://www.europeanproducersclub.org/our-code-of-fair-practices]