

Update on Film Act revision: investment obligation and quotas for European films

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Introduction

On 12 October 2021, the Swiss Confederation published the revised Film Act after controversial debates in Parliament (for further details, please see "Proposed Film Act revision: investment obligation for online film providers and quotas for European films"). Parliament decided to boost the diversity of film offers and strengthen Swiss film culture by including online film providers within the scope of the Film Act. All companies offering films as part of their programmes or as electronic services on demand or by subscription (ESDS) in Switzerland must abide by a new investment obligation in independent Swiss film productions. In addition, companies offering films as ESDS in Switzerland must allocate a minimum of 30% of their platform capacity to European films.

Investment obligation of 4% of gross revenues for all film providers in Switzerland

The existing imbalance in Switzerland between the traditional player (eg, broadcasters) and ESDS providers when it comes to the funding of domestic film productions shall be solved by including a new investment obligation in independent Swiss film productions.

Accordingly, companies offering films as part of their programmes or as ESDS in Switzerland must annually spend at least 4% of their gross revenue on independent Swiss film productions or pay a corresponding compensation fee. Although the National Council initially wanted an investment obligation of 1%, the Council of States ultimately prevailed. The compensation fee shall be due if the investment obligation is not achieved on average over a period of four years. This obligation also applies to companies domiciled abroad, provided that they target the Swiss public. However, their investment obligation will only be calculated on the gross revenues generated in Switzerland and only on revenues accruing from film offerings. Exempted from this investment obligation are companies that do not reach a certain minimum turnover, only occasionally show or offer films, or for which the obligation would be disproportionate or impossible. The Film Act provides examples of such disproportionality or impossibility, namely:

- the type of films offered or the thematic focus of the offer;
- a low reach of the television programme; or
- an unchanged offer of programmes or offers of third parties.

A company can offset certain expenses against the owed investment amount, such as expenses for the acquisition, production or co-production of Swiss films and recognised Swiss-foreign co-productions. However, certain expenses cannot or can only be partially offset.

Noteworthy is that only expenses paid to third parties independent from the instructing company are eligible to be offset. Moreover, subventions from the Confederation, cantons, communes or contributions that are otherwise financed by public institutions must be deducted from the expenses. Expenses for the promotion of Swiss films or Switzerland as a film location can only be accounted for a maximum of 500,000 Swiss francs per year and per television programme. Finally, expenses to film funding institutions can only be considered if the institution is recognised by the Federal Office of Culture (FOC).

Online film providers subject to 30% quota for European films

In line with the EU Audiovisual Media Services Directive, the Film Act provides for a quota for European films. Accordingly, companies offering films as ESDS must ensure that at least 30% of the movies available on their platform are European films. This obligation also applies to companies with a registered domicile abroad targeting the Swiss public. Exempted from this obligation are companies that do not reach a minimal revenue or offer films only occasionally. There is also an exemption if the obligation must be qualified as being disproportionate or impossible, in particular:

- because of the type of films offered;
- because of the thematic orientation of the offer; or
- because the company only offers unchanged offers of third parties.

In addition, European films must be specifically labelled and easily accessible.

New registration, reporting and notification obligations subject to fines

The Film Act provides for additional obligations directly linked with the aforementioned investment obligation and quota. All companies offering Swiss films in their programmes or as ESDS must register in a designated public register of the Swiss Confederation (currently led by the FOC). Furthermore, if a company is not registered in the Swiss commercial register, it must indicate a domicile of service in Switzerland and name the responsible persons. Additionally, all companies subject to the Film Act must annually report to the FOC on their quota fulfilment and investment obligation. Finally, all companies offering ESDS for a fee in Switzerland have to report the number of views per film to the Swiss Confederation. This data will be published periodically. Any person that deliberately violates their duty to

register, or any member of the management who fails to comply with their reporting and notification obligations or deliberately provides false information, is punishable with a fine.

Comment

The revised Film Act is subject to a possible referendum. Various stakeholders have already launched their referendum campaigns against the revised Film Act. The referendum deadline is 20 January 2022. It remains to be seen whether the Swiss people will have to vote on the matter. In the meantime, companies offering films, in particular online film providers, are well advised to adapt their businesses structures and offers to prepare for these new investment and quota obligations.

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