

## PORTUGAL

Vieira de Almeida



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## 'Netflix tax' is coming to Portugal

**Conceição Gamito and Teresa Teixeira Mota of Vieira de Almeida assess the proposed 'Netflix tax' and analyse its shortcomings against the backdrop of European and constitutional principles.**

A subscription to Netflix was among the items which topped many Christmas wish-lists in December 2020, which was in line with the trend of the ever-increasing migration towards digital entertainment. Thus, it is perhaps of no surprise to see global tax policies attempting to keep pace with this shift.

The 'Netflix tax', as it has been labelled, is coming to Portugal and other countries. It emerged as an amendment to the Cinema and Audiovisual Act, transposing the recast Audiovisual Media Services Directive (AMSD). The Act had already imposed investment obligations on media service providers and specific levies and fees to foster the development of the cinema and the audiovisual sectors. Through the amendments, it creates an annual subscription fee for on-demand audiovisual services targeting on-demand audiovisual services providers, namely video-on-demand (VoD) and streaming services providers (which includes multinational giants Netflix, HBO, Apple TV, Amazon TV and Disney+, and smaller-scale European or national providers).

International tax law's inability to keep pace with the digital economy's evolution brought about an asymmetry that required states to step in and try to balance the tax burden imposed on traditional industry companies against digital services companies. Although the OECD and the EU have recommended harmonised and uniform solutions at an international level, states have sought and implemented distinct solutions at a national level, even when required to adopt European directives.

The AMSD and the ensuing amendment to the Portuguese Cinema and Audiovisual Act show an attempt at piecemeal solutions to tax some digital services, while there is still yet to be an agreement reached on the Proposal for a Council Directive Laying Down Rules Relating to the Corporate Taxation of a Significant Digital Presence (SDP Directive Proposal)

and on the Proposal for a Council Directive on the Common System of a Digital Services Tax on Revenues Resulting from the Provision of Certain Digital Services (DST Directive Proposal).

### A closer look at the new on-demand audiovisual services fee

The new fee will be levied on the 'relevant income' at an annual 1% rate. The law is silent on what 'relevant income' might be exactly, leaving taxpayers at a loss as to what the tax base is to which this annual 1% rate will apply.

If the similar concept foreseen for investment obligations is anything to go by, 'relevant income' might mean the income earned by providing audiovisual commercial communications and subscriptions services or derived from related one-off transactions.

The Act does however establish that if the relevant income cannot be ascertained, the tax authority will assume an annual tax base of €1 million (\$1.21 million).

The decree-laws that will determine how and when operators must provide certified accounts proving their relevant income to the *Instituto de Cinema and Audiovisual, I.P.* (ICA) (the Portuguese regulator), and how this fee will be assessed, collected, paid, controlled and supervised, are still in the pipeline.

It is already known that if taxpayers fail to satisfy their tax obligations, the Portuguese tax authority can follow the enforcement procedure set for the subscription fee and launch enforced recovery proceedings based on a debt certificate issued by the ICA.

Another common feature of the 'Netflix tax' and the subscription fees is that their aggregate proceeds are allocated as own revenue to the ICA and used to support Portuguese cinema, audiovisual and multimedia production.

### Critical analysis against the backdrop of European and constitutional principles

The framework of the new on-demand audiovisual services fee regime remains unclear and requires further clarification.

Firstly, the fact that the law is silent on what 'relevant income' might be will likely prove a fertile ground for disputes.

Secondly, the true nature of this fee is unclear. According to the Portuguese constitution, in general and the so-called tax constitution in particular, taxes mostly abide by the ability-to-pay principle, while fees are a consideration for a service provided by the state. The fee is levied on the taxpayers' relevant income and could arguably be classified as an income tax.

Thirdly, the legality of the €1 million tax base presumption is highly question-

able under the Portuguese constitution and a poor legal workaround for the omission of a key concept.

As a principle, tax presumptions should only be admissible if they can be rebutted by taxpayers, otherwise they may be deemed unconstitutional.

'Real' fees, as it were, do not abide by the ability-to-pay principle. However, the new on-demand audiovisual services fee does tax the relevant income, a defining feature of taxes and not of fees under the Portuguese constitution.

Lastly, it will be important to check how the fee relates with EU law. The AMSD makes the fee chargeable in the country of reception, which goes against the AMSD's cornerstone, namely the country of origin principle. There is a double risk that this fee will bring about an unacceptable distortion of EU fundamental principles (and an undue benefit to the contents of the countries of reception) and double taxation, with the country of origin and the country of reception charging fees regarding the same targets/services.

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