

Discovery Response to EC Communication on the Application of State Aid Rules to Public Service Broadcasting

Discovery Communications is the world's number one non-fiction media company reaching more than 1.5 billion cumulative subscribers in over 170 countries. Discovery empowers people to explore their world and satisfy their curiosity through 100-plus worldwide networks, led by Discovery Channel, Animal Planet, Discovery Science and Discovery HD, as well as leading consumer and educational products and services, and a diversified portfolio of digital media services including HowStuffWorks.com and Treehugger.com.

Discovery Networks UK and EMEA are headquartered in London and have additional offices in Amsterdam, Bucharest, Budapest, Copenhagen, Madrid, Milan, Munich, Oslo, Paris, Stockholm and Warsaw. In the EU, 16 Discovery brands¹ reach 300 million cumulative subscribers with programming customized in 24 European languages.

Discovery is committed to expanding its investments² in the EU and is in constant dialogue with national and European regulators to ensure the applicable regulatory framework promotes a level playing field and a business friendly environment conducive to business growth and further investments.

Summary Position

Discovery welcomes the European Commission (EC) initiative to update the 2001 Broadcasting Communication to align it with current market realities. In particular, Discovery is pleased to see the EC re-examine the issue of state aid to public broadcasters and assess

¹ Discovery Channel, Animal Planet, DMAX, Discovery Science, Discovery World, Discovery Travel & Living, Discovery Real Time, People + Arts, Discovery Geschichte, Discovery Turbo, Discovery Historia, Discovery HD.

² The following launches represent the continued expansion of Discovery's European footprint: Discovery Civilisation rebranded to Discovery World in April 2008, Discovery Historia in Poland – November 2006, Discovery HD in the Netherlands and Scandinavia – November 2006, Discovery HD in Poland – October 2006, XXP re-launched as DMAX – September 2006, Acquisition of German free-to-air channel XXP – March 2006, Discovery HD in Germany and Austria - February 2006, Discovery Real Time in France and Italy – October 2005, Animal Planet in Italy - May 2005, Discovery Geschichte, a contemporary history channel in Germany and Austria - April 2005, Discovery Channel in France - September 2004, Animal Planet in Germany - April 2004.

what impact it has in the very competitive and rapidly changing European media landscape. As the European media industry begins to transition to a fully digital economy, it is critical that there be a level playing field that encourages the development of new services and content for media savvy consumers, and which allows companies such as Discovery to plan effectively and optimize its investments in the EU market.

Discovery recognizes that EU Member states are best placed to define the parameters of their public service broadcasting (PSB) entities to meet the democratic, social and cultural needs of their society and fund those accordingly. However, Discovery believes that PSBs are not the only broadcasters able to meet these needs and therefore suggests that there needs to be a new paradigm for how state aid is considered for new services that grow beyond the PSBs' remit of traditional broadcasting. It is critical that companies such as Discovery, which work with local companies, employ local people, invest in local cultural and creative industries are not put at a further disadvantage in the market because of a system that fosters anti-competitive behaviour. Therefore Discovery supports a public value test of all projects by PSBs.

In addition, Discovery objects to any form of charge by PSBs at the point of consumption. It is hard to reconcile that distribution of PSBs would only be guaranteed to paying subscribers when PSBs receive public money to ensure universal availability. This development would lead to further over-compensation for PSBs many of which already enjoy dual funding.

There is a Need for a Public Value Test

Discovery recognizes the subsidiarity principle enshrined in the Amsterdam Protocol which notes that EU Member states are best placed to define the parameters of their public service broadcasting (PSB) entities to meet the democratic, social and cultural needs of their society. However, it is imperative that stronger guidelines are put in place by the Commission in order to ensure that national definitions of public service remits are underpinned by independent, robust and enforceable mechanisms to monitor and render entrusted broadcaster/s accountable for the fulfilment of the associated obligations and for the level of public funding (and regulatory assets) assigned to this purpose. Remit clarity and financial transparency constitute an essential prerequisite for the Commission to fulfil its supervisory functions under Article 87 (1) EC with a view to ensuring that competition is not distorted in the internal EU market. We strongly believe that the guidelines contained in the "draft Communication on the application of state aid rules to public service broadcasting" by

and large respect the difficult balance between subsidiarity and ensuring a level playing field across the EU for both public and commercial broadcasters.

A myriad of complaints from commercial broadcasters across the EU has brought to the fore the inadequacy of current guidelines and the need for the Commission to review and clarify the rules. The absence of national robust independent procedures to address concerns has left commercial broadcasters with no other recourse than to complain to the European Commission about PSB's use of public money to fund ventures in new platforms which are in direct competition with their operations. Indeed, the use of state aid by PSBs to launch new digital services serves to decrease competition and therefore much needed investment from private enterprises in the EU market. PSBs activities influence the rates by which programming and advertising are sold in their markets, affecting the true maturation of the digital economy and impacting the ability of companies such as Discovery from growing their investments in the EU. These legal recourses are expensive and time consuming exercises for commercial broadcasters and broadcasting stakeholders (and the Commission services alike). We agree with the Commission that this litigious state of affairs could be greatly minimised if there were simple but effective mechanisms in place at the national level where all stakeholders' concerns are heard and where independent regulators publish reasoned and evidence-based decisions.

In this context, we welcome the ongoing Commission emphasis that in order for Member states to benefit from state aid they ought to:

- 1) Define in a clear and precise manner the obligations imposed upon the PSBs.
- 2) Conduct an independent ex-ante market test to ensure that new services (or alteration of existing ones) have a public value and do not lead to harmful effects on the market.
- 3) Ensure the entrustment of the obligations has a binding status and is supervised by an independent body able to apply sanctions if these are not met.
- 4) Ensure competition is not distorted through over-compensation and cross-subsidization.

This approach would go a long way to ensure the introduction of creative mechanisms to fund public service content in the future. As a general point, Discovery believes that PSBs are not the only broadcasters able to produce high quality programming which displays the democratic, social and cultural needs of each Member state. Discovery's public service mission and contribution in this respect is widely acknowledged. Just as we have argued in our response to the recent Ofcom PSB review we see great merits in opening up the regulatory assets (i.e. gifted spectrum, EPG prominence, must carry status etc.) currently

enjoyed by a few PSBs to other broadcasters with a commitment and history of producing programming of public service value. In an environment of economic recession and declining advertising revenues it is increasingly crucial for regulators to provide creative regulatory solutions which incentivise pan-European companies like Discovery to continue its contribution towards strengthening European diversity in the internal market. Additionally, Discovery defends the benefits of instituting contestable mechanisms in Member states in order to produce certain key PSB genres where all players, not only the PSBs, are incentivised to compete for funding and raise the quality bar for the benefit of European citizens. This system provides more value for money to tax payers and is more flexible and suitable to respond to changing consumer behaviours than institutional PSBs. Discovery has ample experience bidding in this kind of competitive funds and believes they could easily be adapted to the needs of each Member state.

Protectionism Undermines the Role of the Independent Competition Authority

Member states are currently holding national public debates to implement the Audiovisual Media Services (AVMS) Directive and some of them are concurrently reviewing their Broadcasting Acts in order to “modernise” the legal framework to better reflect the realities and needs of their particular broadcasting ecologies in the digital era.

Discovery is watching developments of some national debates and legislative proposals with great concern. We are alarmed to observe a trend in EU national governments’ attitude to public service broadcasters and its effect on overall competition in the market which appear to run counter to the main principles upon which the EC Treaty has been built. In addition, there is already established case law regarding the requirements of Article 86 (2) EC as interpreted in *Altmark* which essentially set out the criteria by which public funding is provided to PSBs.

The protectionist trend is crystallised in the “Common Position” on the Revision of the Broadcasting Communication (of 24th September 2008) instigated by the Dutch Government and signed by 19 Member states which outlines the “main principles” for a revision of the Broadcasting Communication 2001. The position paper seeks to create *de facto* immunity from the Treaty rules for PSBs with no regard to distortion of competition and impact on markets affected by the activities of public broadcasters. The signatories support minimal amendments to the current Communication which they purport has worked satisfactorily -- despite the sheer number of legal challenges by commercial broadcasters for alleged infringements of art. 86 and 87 of the EC Treaty over recent years!

PSB Definitions and Ex-Ante Market Test

Although the role of the EC with regards to PSB definition is limited to checking for *manifest errors*, the EC has emphasised in its Decisions that definitions should be sufficiently clear and precise to leave no doubt as to whether a given activity performed by the entrusted operator is intended by the Member state to be included in the public service remit. Discovery believes that in order to enhance marketplace and legal certainty, Member states should include in their definitions a list of examples of commercial activities which cannot, under any circumstance, be classified as public service by national governments. In this light we observe that some Member states are watering down already broad definitions of PSBs hindering further the ability of the Commission, the Governments, supervisory authorities and commercial broadcasters to establish whether the public obligations are being observed. Clearly, the clarity requirement will not be satisfied in Ireland where the Minister for the Media appears to believe that public service broadcasting is “*whatever RTE does*”. In the proposed Dutch new Media Act the distinction of “main tasks”, “side tasks” and “side activities” has disappeared giving an open ended remit to the Dutch PSB. Further, the new draft does not include any effective *ex ante* market/public value test to establish whether a new service (or an alteration of an existing one) is within the PSB remit or indeed whether it does impact the market adversely. Equally in Germany the PSB definition enshrined in the Interstate Broadcasting Agreement since 2004 is regarded by commercial broadcasters as not precise enough to set limits for the expansion of PSBs. Further, the market test is conducted in Germany by the PSB itself and although open to stakeholder input, the independence of the mechanism is a moot point.

A striking case in point is the new Mediathek VOD offer planned by the PSBs where a vast archive will be made available without proper consideration on the effect of this offering on the nascent pay entertainment market in Germany. Another example of the shortcomings of broad definitions and lack of robust *ex ante* impact assessments is the cooperation of PSBs with publishing houses on online activities (i.e. WDR and WAZ) at below the market rates.

In Spain, the “generalist content” remit of the RTVE makes its offering indistinguishable from that of the commercial broadcasters that have no access to public funding.

In Italy, the PSB remit is also formulated in rather vague terms. Although the agreement between RAI and the Ministry of Communications signed in 2007 is based on AGCOM guidelines, which aim to adjust PSBs to market developments and national needs, the notion still remains very vague.

In Scandinavia, the 3 PSBs have already or are about to launch niche channels. For example, Denmark Radio is launching this year a children’s channel and a history channel and launched a 24 hours news channel two years ago. There is no market test mechanism

in any of these Member states and the public value of these channels in such a mature and competitive market is debatable. PSBs in the Scandinavian countries account for 40% of the viewing share (the strongest presence in the EU) and any new services PSBs launch can only aggravate that dominance in the market to the detriment of commercial operators.

Finally, in the UK where Discovery Networks Europe is headquartered and its biggest EU market in terms of investment, the BBC is a dominant force whose activities and impact on the market is monitored very closely by all market players which naturally do not benefit from its substantial licence-fee/BBC Worldwide funded resources, branding, cross-promotional as well as regulatory advantages. The effect of the BBC commercial activities on the market has given rise to a myriad of complaints and is currently the subject of a Parliamentary investigation. Planned PSB joint ventures like VoD services platform Kangaroo (between BBC Worldwide, Channel 4 and ITV) seriously threaten to skew the market.

The UK introduced recently *ex ante* regulation for new BBC services in the form of the Public Value Test (PVT) conducted by the BBC Trust and Ofcom. Although not perfect, this is a step in the right direction and the Commission should carefully watch and learn from the UK experience (the only Member state where the mechanism has been tested) to codify its best practice in the revised Communication. To its credit, the BBC Trust recently rejected plans to launch a network of local news websites due to the negative impact on commercial regional media. However, commercial PSBs (ITV, C4, 5), which benefit from regulatory privileges, are not subject to this *ex ante* evaluation and that puts commercial competitors at a disadvantage.

Entrustment and Supervision

With regard to entrustment, the Commission urges governments to nominate a broadcaster which is entrusted by an official act to deliver a set of public service objectives which will be supervised by an independent body that can apply penalties for failure to comply. Discovery deems that in order to *legitimise* the entrustment between the broadcasters and the government (through an “entrustment act” or agreement) a formal consultation procedure needs to be in place for broadcasting stakeholders to voice concerns and contribute to delineate clear parameters which will help them plan future investments. Crucially, the agreements need to be binding for the broadcaster and enforceable via the court system. In this regard, we are watching with concern developments in the Netherlands where the PSB is responsible for drafting their own agreements with no formal procedure for public consultation, supervision or enforcement. Equally in Germany supervision of delivery of PSB

obligations is ensured by internal councils (e.g. the broadcasting councils of the regional public-service broadcasters of the ARD) and not by independent regulators as is the case for private broadcasters.

In Poland, Programming Councils are charged with the monitoring of the delivery of PSB obligations by TVP which are also based on a vague definition. The role of the Programming Council and that of the National Broadcasting Council is merely advisory and for information purposes and cannot result in any binding measure or sanction. The Commission is now investigating TVP and its commercial activities masked under an imprecise PSB remit.

Funding

One common complaint across EU commercial broadcasters relates to the lack of adequate and independent supervision of PSB budgets and the relation with the costs of its public remit. An independent body must be charged with the role to establish transparency of cost allocation and proportionality of any financial flows in order to guarantee that it is limited to the necessary amount to compensate for the cost of delivering PSB obligations. In case of overcompensation the independent regulator must have competence to mandate recovery of excess finance. Indeed, opaque funding methods and lack of independent supervision is not conducive to efficient and accountable PSBs. Discovery supports the auditing of accounts by independent auditors on a yearly basis followed by publication of the audit reports.

PSBs are often requesting increases to these budgets and these are often approved without *a priori* or *a posteriori* challenge by the authorities and with little regard to other relevant receipts of the PSBs like advertising which has resulted in considerable risk of overcompensation. For instance, in the Netherlands, the government has decided to introduce an increase of the general media budget from €50 million in 2008 to €100 million by 2011. In Germany the “GEZ” fee has been raised to €17.98 per month (for a TV and radio receiving device) providing the German PSB from 2009 – 2012 with a total volume of € 7,5 Billion a year – circa twice as much as the advertising revenue generated by all private broadcasters in Germany.

Further, another reason for concern is the excessive privilege given to public service broadcasters in some Member states where they still have privileged access to terrestrial and cable capacity through must-carry obligations, as it is the case in Germany. In Poland there is concern that the PSBs would enjoy a further competitive advantage over commercial broadcasters by being appointed the national multiplex operator and having privileged access to multiplex capacity.

Allowing Member states a free hand in protecting their own PSBs with no accountability to the market will only undermine the role of the independent EC competition authority and ultimately create market barriers that defy the purposes of the European Union and the internal market.

PSB's should Not Receive State Aide to Launch Pay-Entertainment services

Finally, Discovery objects to any form of charge by PSBs at the point of consumption. A pay element is hard to reconcile with the expected universal availability of PSB services funded by public money when distribution will only be guaranteed to paying subscribers. Signatories to the Common Position state that the payment element may be justified to ensure "appropriate and secure funding". Again, this development would lead to further over-compensation for PSBs many of which already enjoy dual funding. In Portugal PSBs are already allowed to offer Pay-TV services; however consumers are challenging the rationale of having to pay an extra fee for a VoD or news service provided by the heavily subsidised RTP.

In the light of the enormous differences and level of complexity of national PSB arrangements Discovery would urge the Commission to make publicly available, for all stakeholders to refer to, a grid listing mechanisms in place at the national level to comply with the new Communication Guidelines. This would help reinforce the goodwill and perception of a level playing field on the part of commercial broadcasters as well as contribute to uphold the principles of clarity, proportionality and transparency which all Member states purport to endorse.

Conclusion

In order to preserve a thriving, diverse and competitive European dual broadcasting landscape all players need to have absolute clarity about the rules of the game. Precise and clear rules are required for public service remits and obligations when they enter new markets. New ventures have to be carefully evaluated to ensure that innovation by private players is not stifled by subsidising new services and that public money provides the best possible value for citizens. Without a clear role for all players and robust rules on how state aid should be spent there is no certainty for the market and no incentives for investment for pan-European companies. Additionally, in the midst of the unfolding economic recession, we urge the Commission and national governments and regulators to explore more creative and flexible ways to fund public service content in the future (as set out in Ofcom's second Public Service review) to provide other players – not only established broadcasters - with a commitment to public service content with the right incentives to continue and enhance their

programme offering for the benefit of European consumers and citizens and the sustainability of the European broadcasting industry as a whole.