



**IMDA'S PUBLIC CONSULTATION
ON
A CONVERGED COMPETITION CODE FOR THE MEDIA AND
TELECOMMUNICATION MARKETS**

**COMMENTS
FROM
DISCOVERY NETWORKS ASIA-PACIFIC PTE LTD**

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IMDA'S PUBLIC CONSULTATION ON A CONVERGED COMPETITION CODE FOR THE MEDIA AND TELECOMMUNICATION MARKETS – COMMENTS FROM DISCOVERY NETWORKS ASIA-PACIFIC

Discovery Networks Asia-Pacific Pte Ltd (“**Discovery**”) appreciates the opportunity to provide comments to the Info-communications Media Development Authority of Singapore (“**IMDA**”) on the Public Consultation on a Converged Competition Code for the Media And Telecommunication Markets issued on 20 February 2019 (the “**Consultation Paper**”).

A. INTRODUCTION AND STATEMENT OF INTEREST

Discovery is a subsidiary of Discovery Inc., a global mass media business that owns and operates several channel brands, including the Discovery Channel, Animal Planet, Asian Food Channel, Setanta Sport and TLC, which are broadcasted in Singapore and more than 220 territories worldwide.

Singapore is a key country for Discovery. We have been operating in Singapore for over 20 years and currently employ more than 150 people in our Singapore office. Initially launching with one channel in 1995, we have since expanded our portfolio here to 10 brands and grown our regional presence to 10 offices.

Discovery firmly believes in high quality programming and the development of the Singapore media landscape. We have therefore constantly sought to contribute to the growth of the local media industry. For example, we launched the First Time Film Makers initiative¹ in 2014 to provide local filmmakers with hands-on training and professional development from our channel's award-winning producers, with the films of the five winners' documentaries premiering on the Discovery Channel. IMDA will also be aware of the JumpCut Asia workshop², which we launched 2016 as part of our mutual content partnership. These initiatives, led by Discovery's experienced producers, have helped foster local filmmaking talent, support local production companies and create high-quality content that adds to Discovery's extensive library. Many of the filmmakers, production companies, and shows resulting from these initiatives have received recognition locally and internationally.

In view of the ever-evolving media landscape, Discovery has also, in collaboration with IMDA, recently launched new digital products and platforms that serve as extensions of our existing brands and produced innovative 4K and VR content.

In the spirit of the collaborative relationship we have had with IMDA and as a global content owner committed to a thriving Singapore media landscape, we therefore hope that IMDA will consider seriously our comments below. We welcome a further dialogue with IMDA on any part of our response.

B. COMMENTS ON THE CONSULTATION PAPER

Firstly, we wish to commend the IMDA for its ongoing efforts to monitor the developments in the digital economy and review the frameworks for the telecommunication and media markets to ensure they remain relevant in the face of a converging media landscape.

¹ Please see: <https://www.imda.gov.sg/infocomm-and-media-news/sg-spotlight/2015/7/discoverys-first-time-filmmakers-a-singapore-story>

² Please see: <https://www.facebook.com/IMDAsg/posts/as-part-of-imdas-partnership-with-discovery-channel-southeast-asia-for-content-p/1228202617262460/>

Discovery agrees that it is vital to implement appropriate policies and regulations that achieve the twin goals of: (a) promoting fair market conduct and effective competition; and (b) safeguarding consumer interests.

In light of this, we strongly object to IMDA's proposals raised in Part IX: Public Interest Obligations of the Consultation Paper, in particular the proposal to expand the Cross-Carriage Measures ("CCM") to all genres of programming and the proposal to expand the CCM regime to content carried on over-the-top ("OTT") platforms operated by pay TV operators.

B1. The proposed CCM measures will negatively impact consumers.

Discovery welcomes further dialogue on IMDA's motivations behind the proposed changes to the CCM regime. The current Consultation Paper is not clear as to how the extension of the CCM regime will achieve the twin goals of effective competition and safeguarding consumer interests. Discovery, as a global content owner, firmly believes that the proposed extension of the CCM regime to all genres of content (and not just certain specified types of sporting content) will, in fact, have a negative impact on consumer interests.

As IMDA rightly highlights in paragraph 14 of Annex A to the Consultation Paper, pay TV subscription numbers have declined substantially from their peak in 2014 and price competition to attract new subscriptions is intensifying as new regional and international OTT service providers gain traction. In our experience, pay TV operators are therefore only willing to invest in premium content where this is likely to translate into returns for them in the form of increased subscriptions. Exclusive content licenses are often a means to encourage such increased subscription.

A regulatory regime that mandates cross-carriage of all content across all pay TV platforms therefore disincentivises platforms from investing in exclusive, premium content since such content would no longer provide the platform with a competitive advantage. This would produce a number of, doubtless unintended, consequences. The return on the investment in the form of increased subscriptions would be rendered non-existent and consumers would consequently be disadvantaged by the resulting limited range and quality of available content.

A further effect of this is that content owners and creators would then also be dis-incentivised from investing in high quality content. While these negative effects may have been limited under the existing CCM regime, there is a key difference in the demand for and funding of non-sporting content. Drama and documentary programmes often cost more to produce and are usually green-lit based on the potential returns, calculated based on the licensing fees generated.

Content production for these genres is expensive and funding is often acquired through a variety of means, including by agreeing distribution deals with distributors (including pay TV platforms) in advance. Such pre-sale agreements are often based on forecasted viewership and subscriber demand. Where prospective demand for a particular type of content is high, exclusive content licensing deals are even more attractive to a distributor and contribute to a willingness to pay higher licensing fees since these can be recovered later through the increased sale of subscriptions. This in turn means higher available amounts for production financing.

It is common knowledge that most film and television projects have tight margins and may not always turn a profit. Content producers and owners therefore often base their future production decisions on how such content can be licensed to maximise profits, including through exclusive licences. Without the ability to exploit rights through exclusive licensing, forecasted revenue would decrease, and greater

uncertainty would result, causing content producers and investors to be less willing to commit funds ahead of production. Without assured funding, there is a much lower probability that content will be funded in the first place, leading to both less variety of content, and less high quality content that benefits from higher production values.

Finally, restrictions on the ability of channel providers to agree to licence their channels exclusively should only be applied where the channel is so premium as to be able to distort the market as the channel provider can name its price, and where the channel provider is owned/affiliated with the platform it gives exclusive rights to, it can be used to drive out competitors. This is clearly not the case for our genres of content and all it does is remove any negotiating leverage we have with platforms who already hold the power to render our channels non-viable if they refuse to distribute them on reasonable commercial terms.

Lower potential licensing fees therefore results in lower investment in content. This again contributes to the result of decreased consumer benefit due to the consequent decrease in range and quality of content on pay TV platforms in Singapore.

Furthermore, IMDA has not provided any evidence that consumers: (a) are disadvantaged by the existing CCM regime; and (b) will benefit from a broader CCM regime. IMDA cites in paragraphs 9.4 and 9.5 of the Consultation Paper that its rationale for broadening the CCM regime is due to the fact that non-sporting content is important to pay TV subscribers, but does not explain how or why this inevitably leads to the conclusion that the CCM regime must therefore be expanded to all content genres and to OTT services. To the extent that the proposed measures are intended to increase consumer welfare, we reiterate our comments above that demonstrate how the opposite result is far more likely and request that IMDA reconsider these proposals.

B2. The playing field will be further tilted in favour of pure OTT services

As highlighted in paragraph 12 of Annex A to the Consultation Paper, there has been significant growth in the OTT media services sector in Singapore. Purely OTT media service (e.g. Netflix) are currently subject to much less stringent regulation than pay TV operators. We do note however that there has been a recent shift to both level the regulatory playing field and to reduce the regulatory burden on traditional TV broadcasters and operators in order to foster greater competition and choice for consumers – for example, the Content Code for Niche Services was amended to clarify that it would also apply to OTT services, and the Goods and Services Tax (“GST”) regime was updated to make certain classes of offshore OTT services subject to GST.

Having reviewed the Consultation Paper, Discovery considers that extending the CCM regime to OTT services operated by pay TV platforms would run counter to the overarching regulatory aims to level the playing field and would ultimately give a further advantage to pure-OTT service providers who would still be able to enter into exclusive content deals and therefore gain a further advantage over traditional pay TV platforms.

We do not propose applying the CCM regime to offshore OTT services but, rather, request that IMDA ensure that the measures applicable to onshore pay TV platforms are not substantially more onerous than those that apply to offshore OTT, so that they can remain competitive.

IMDA notes in paragraph 2.29 of the Consultation Paper (as well as in paragraph 79 of Annex A) that the existing pay TV operators continue to innovate their service offerings, for example by introducing OTT services and media streaming boxes, to better cater to the needs of consumers and remain

competitive. By extending the CCM regime however, IMDA runs the risk of further handicapping pay TV operators' ability to compete and offer innovative services to their consumers. This would not serve IMDA's goals of strengthening consumer interest, and Discovery therefore strongly disagrees with this proposal.

B3. Singapore's reputation as a positive environment for global media companies will be damaged.

Discovery firmly believes that the proposed expansion of the CCM regime will have a chilling effect on rights transactions and the overall health of the pay TV industry in Singapore, damaging Singapore's reputation as a positive commercial environment for global media companies.

By introducing a requirement for cross-carriage of all content, IMDA would be fostering greater uncertainty and complexity in rights transactions in Singapore.

In our experience, pay TV platforms typically include rights for the platform to terminate or reduce fees that is triggered if licensed content becomes Qualified Content ("QC") subject to the CCM regime. This has been manageable while the list of QC is confined to certain types of sporting content. However, if the scope of QC is expanded to all genres of content, this would not only make future content deals unworkable, but also have the effect of impacting content currently available to consumers. An expansion of the CCM regime will therefore most certainly result in a decrease in the quantity and quality of licensed content for consumers, as existing content will either become unavailable to consumers or subsequently not licensed at all. Such market-distorting effects are certainly not in keeping with the aims of the IMDA to foster greater competition and consumer welfare.

The proposed measures would also run the risk of re-opening negotiations between content owners and existing exclusive platform partners which could result in a reduction in options for consumers, the exact opposite outcome of what IMDA is trying to achieve. A regulatory environment that effectively creates contractual uncertainty will undoubtedly cause a lack of confidence in the Singapore media rights market.

As a result of the above, the added difficulty that an expanded CCM regime brings to negotiating content rights deals will play straight into the hands of those who illegally pirate content. In an environment with reduced programme quality and diversity, content pirates will ensure that viewers continue to have access to the content they want, but via illegal services and illicit streaming devices, further damaging the ecosystem and exposing consumers to unregulated services and its attendant risks.

Furthermore, the proposed measures will undermine the basic Singapore contract law principles of freedom to contract. In some cases, content rights owners may have non-financial reasons for choosing certain platforms over others. The proposed measures are tantamount to a compulsory licence to all platforms, depriving content owners from this right to choose who they contract with. This is out of step with international practices as, in Discovery's experience, there are no other countries that have a similarly broad CCM regime. These issues raise material questions about Singapore's position as a media and television "hub" for international organisations in the region. Great progress has been made in this respect in recent years but implementing the proposed measures would be a major step backwards.

B4. The proposed measures are inconsistent with Singapore's international obligations

Lastly, the expansion of the CCM regime is inconsistent with Singapore's obligations to copyright owners as a signatory of the World Trade Organisation's Agreement on Trade-Related Aspects of Intellectual Property Rights ("**TRIPS**") and the Berne Convention for the Protection of Literary and Artistic Works ("**Berne Convention**").

Both TRIPS and the Berne Convention obligate signatories to provide copyright owners with, amongst others, exclusive rights of "communication to the public" and "broadcasting and other wireless communications"³. The proposed expanded CCM regime infringes upon these rights through the effective compulsory licence that content owners are expected to grant to all pay TV platforms for all genres of content.

Article 13 of TRIPS does acknowledge that countries may impose limitations to the exclusive rights of copyright owners above, but only where they are limited to special cases that do not conflict with normal exploitation of the work and do not unreasonably prejudice the legitimate rights interests of the rights holder (the "**Three Step Test**"). However, it is difficult to see how the proposed expansion of the CCM regime complies with the Three Step Test, as the new regime appears to be an indiscriminate overreach without any justifiable boundaries.

Again, such actions would further damage Singapore's reputation as a supporter of intellectual property rights and creative industries. The proposed amendments do not accord with accepted principles of intellectual property rights across the world and should be rethought.

C. CONCLUSION AND NEXT STEPS

Discovery requests that IMDA consider the comments above to ensure that Singapore retains its reputation as a regional and global hub for intellectual property rights and media transactions.

Overall, the existing CCM regime already manages to strike a balance between the protection of consumers' interests and the need to maintain a competitive environment. Therefore, we strongly discourage IMDA from implementing any further changes to the CCM framework, particularly to broaden the regime beyond sports content and to the OTT services of pay TV operators.

More detailed engagement and workshops with all parts of the industry is essential before any further steps are taken with respect to the proposed approach in the Consultation Paper. As such, Discovery suggests a meeting with the IMDA to engage in further discussion on this Consultation Paper and to find a workable solution.

Please do not hesitate to contact Shalini Ratnarajah (Shalini.Ratnarajah@discovery.com) for any further information on this submission and to arrange a dialogue session. Thank you.

Yours faithfully,

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³ Please see Articles 11(1)(ii), 11ter(1)(ii), 14(1)(ii) and 14bis(1) of the Berne Convention as well as Article 9 of TRIPS.