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Your ref
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Our ref
18/6614

Date
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Comments on complaint alleging unlawful state aid to TV 2 AS

1. Introduction

We refer to the State aid complaint 12 December 2018 submitted to the EFTA Surveillance Authority ("the Authority") on behalf of Discovery Networks Norway AS ("Discovery"). The complaint concerns the compensation model to remunerate TV 2 AS ("TV 2") delivery of a commercial public service broadcasting remit ("the Remit"), see the entrustment act and compensation model by the Norwegian Ministry of Culture ("the Ministry") dated 26 September 2018 ("the Agreement"). Discovery has taken the view that the Agreement entails illegal and incompatible State aid contrary to Article 61 (1) EEA. The Ministry is of the opposite view, and hereby submit our comments.

2. The special status of public service broadcasting in the EEA

Public service broadcasting is not comparable to public services in any other sector. No other service *"has access to such a wide sector of the population, provides it with so much information and content, and by doing so conveys and influences both individual and public opinion"*.¹

The importance of public service broadcasting for the fulfilment of social, democratic and cultural needs in society is broadly recognised.² Public service broadcasting is an important media policy tool to ensure a diverse offering of high quality content. Historically and presently, public service broadcasting has included a mix of both popular and niche content

¹ 2009 Commission Broadcasting Communication, EFTA Surveillance Authority's Broadcasting Communication

² There are a number of academic studies in the media sector analysing these effects, see R. Craufurd Smith [2011] *The Evolution of Cultural Policy in the European Union* in Craig / de Burca, *The Evolution of EU Law*, Oxford University Press, p. 869-897 with further references

for the society as a whole and for groups that are less valued in the advertising market, such as younger and older age groups, minorities etc. Consequently, public broadcasting contributes to a common arena, enabling better communication and increasing mutual respect and understanding in society.³ Public service broadcasting can therefore be viewed as an important prerequisite for a well-functioning democracy. This is the case in Norway as well, where there is a strong reliance on public broadcasting to safeguard social, democratic and cultural needs of society.⁴

In short, public service broadcasting provides an example of the public interest being linked to a certain ethos and value orientation that is inherently foreign to any form of market rationality.⁵ As the General Court stated in case T-442/03 *SIC v. Commission*:

*"Although the public service of broadcasting is considered to be an SGEI and not a service of general non-economic interest, it must none the less be pointed out that that classification as an SGEI is explained more by the de facto impact of public service broadcasting on the otherwise competitive and commercial broadcasting sector, than by an alleged commercial dimension to broadcasting."*⁶

It is difficult to consider public service broadcasting as an economic activity given that the market is considered per se to be incapable of providing the public interest task. Unlike other public services, for example in the sectors of communication and transport, even periodic competition for the market is incompatible with the values attached to public service broadcasting.⁷

The special character of public service broadcasting is recognised at EU primary law level as well. Of particular importance is the introduction of the Protocol on public broadcasters in the Amsterdam Treaty.⁸

According to the Protocol, "(...) *the system of public broadcasting in the Member States is directly related to the democratic, social and cultural needs of each society and to the need to preserve media pluralism.*" Furthermore, the Protocol states that the provisions of the Treaty "(...) *shall be without prejudice to the competence of Member States to provide for the funding of public service broadcasting insofar as such funding is granted to broadcasting organisations for the fulfilment of the public service remit as conferred, defined and*

³ See the development of the 'cultural model' for public service broadcasting with citizenship, universality and quality, T. Prosser [2005] *The limits of competition law: markets and public services*, published to Oxford Scholarship online, p 210 with further references

⁴ A fairly recent Report to the Norwegian Parliament discusses these concerns in view of the Norwegian model for delivering public service broadcasting; see Stortingsmelding Meld. St.38 (2014-15) [Åpen og opplyst – Allmennkringkasting og mediemangfold](#)

⁵ H. Schweitzer [2011] *Services of General Economic Interest: European Law's Impact of the Role of Markets and of Member States* in M. Cremona (ed) *Market Integration and Public Services in the European Union*, Oxford University Press, p 11-62, p 46.

⁶ Case T-442/03 *SIC v Commission* [2008] ECR II-1161, paragraph 153

⁷ M. Cremona (ed) *Market Integration and Public Services in the European Union*, Oxford University Press, p 5.

⁸ Treaty of Amsterdam, Protocol on the Systems of Public Broadcasting in the Member States (1997), now Protocol 29 annexed to the TFEU

organised by each Member State, and insofar as such funding does not affect trading conditions and competition in the Community to an extent which would be contrary to the common interest, while the realisation of the remit of that public service shall be taken into account."

The Amsterdam Treaty entered into force in 1999, and the Commission published its first Communication on public service broadcasting in 2001 with a revised version in 2009. This Communication underlines the Commission's dedication to interpret the Treaty provisions in compliance with Article 14 TFEU and the Amsterdam Protocol, see also relevant primary law in Article 167 TFEU on the promotion of culture and Article 107(3)(d) on compatible aid based on cultural concerns.

The Treaty provisions on culture demand that the compatibility assessment under the state aid rules take cultural considerations into account.

Even if the EEA Agreement does not include the revised primary law of the EU the Authority has made it clear that they will provide similar exceptions based on Article 61(3)(c) EEA.

Paragraph 17 in the public broadcasting communication by the Authority states the following:

"The EEA Agreement does not contain a provision similar to Article 167 of the Treaty on the Functioning of the European Union (hereinafter referred to as TFEU) (ex Article 151 of the EC Treaty) concerning culture or a "cultural exemption" for aid to promote culture similar to that contained in Article 107(3)(d) TFEU (ex Article 87(3)(d) of the EC Treaty). However, this does not mean that an exemption for such measures is excluded. As accepted by the Authority in previous cases, such support measures might be approved on cultural grounds on the basis of Article 61(3)(c) of the EEA Agreement."

In summation, the special characteristics of public service broadcasting compared to other public services is recognised both in EU legislation and in case law.⁹ Public service broadcasting is not only in the public interest, but contributes to an interested public. In the Ministry's view therefore, the performance of this task is not suitable for, and should not be left to, the market.

⁹ Joined Cases T-568/08 and T-573/08, M6 [2010] ECR 2010 II-3397, appeal rejected Case C-451/10, Case T-442/03 SIC v Commission [2008] ECR II-1161, paragraphs 151, 153, 154, at least where it has decided to ensure that public service itself through a public company, Case T-442/03 SIC v Commission [2008] ECR II-1161, paragraphs 151, 153, 154. In such circumstances the Court's concerns seems to be limited to ensuring that the competition *in* the market is distorted as little as possible. See the view of the General Court in Joined Cases T-309/04, 317/04, 329/04 and 336/04 TV 2 Denmark A/S v Commission [2008] ECR II-2935, paragraphs 232-233 and the analysis by H. Schweitzer [2011] Services of General Economic Interest: European Law's Impact of the Role of Markets and of Member States in M. Cremona (ed) Market Integration and Public Services in the European Union, Oxford University Press, p 11-62, p 47

3. Background

3.1. General media policy objectives in Norway

Norwegian media policy is based on the so-called “infrastructure requirement” in the Norwegian Constitution (paragraph 6, section 100), which states that “[...] *it is incumbent upon the state government to create conditions that facilitates an open and enlightened public discourse*”. The provision obliges the government to ensure that individuals and groups are able to express their opinions, obtain information and participate in an open political debate. Public service broadcasting is one of several media policy measures to facilitate an open and enlightened public discourse. Public service broadcasting is a substantial part of Norwegian media policy. The main media policy objective for public service broadcasting is to ensure a diversity of content offerings for all groups in the population, and to provide content that fulfils social, democratic and cultural needs of the society.

3.2. The Norwegian broadcasting market

In Norway, the broadcasting market is small, with the state owned Norwegian Broadcasting Corporation (NRK) holding a strong position with a market share (10-79) of around 40 %, followed by TV 2 with around 30 % market share (10-79). TV 2 and its main channel is the only broadly profiled TV-channel competing with NRK, and the only broad Norwegian TV news provider besides NRK. NRK and TV 2 are public service broadcasters. TV 2 is a privately owned commercial company. NRK is state owned, and mainly financed through a licence fee. According to the NRK's remit, the company shall offer a broad range of public service content on radio, TV and the Internet. The NRK's public service remit is adopted by the Parliament and incorporated into the NRK's company statutes.

The two other main commercial broadcasters on the market, Discovery and NENT-Group, both have a narrower and more commercial profile, focusing on entertainment and sports. The Discovery owned channel, TVNorge, discontinued its new production as early as in 2009. All the other commercial broadcasters aimed at a Norwegian audience, except for the Discovery-owned channel TVNorge, carry out their activities under UK broadcasting licenses. TV 2 is the only commercial broadcasting house operating fully from Norway, under Norwegian broadcasting regulations. In Norway, it has been apparent that the existence of a commercial public service broadcaster has been a very important contributor to media pluralism, through securing a genuine competitor to the NRK and nationwide news coverage produced and broadcasted outside of Oslo. The existence of a commercial public broadcaster outside Oslo therefore contributes to enrich and broaden the perspectives in news coverage and public debate in Norway.

This is confirmed by the independent Commission for Media Pluralism in their report to the Ministry dated 17 October 2016, included in the white paper Meld. St. 14 (2016-2017) ("*Different models for a commercial public broadcaster*"), section 5.2, paragraph 5:

"TV 2's news coverage is of considerable size and represents to many an alternative to NRK's news coverage. A commercial alternative to NRK contributes to a broader and more diverse news coverage, opening for a wider range of perspectives. The competition from TV 2 also contributes positively by making NRK focused on maintaining high quality on their offerings. Several foreign news offerings are now available in Norway and the competition from such foreign and global market players is today probably a greater challenge for both TV 2 and NRK, than the reciprocal competition. Nonetheless, it will be a loss for the diversity, the Norwegian language and the society-at-large if TV 2's offerings are reduced. This supports the need for ensuring a wider diversity than provided by NRK alone." (Our English translation.)

3.3. TV 2 as commercial public service broadcaster – historic overview

In 1990, the Norwegian Parliament decided that there should be a nationwide commercial public broadcaster in Norway, and announced the possibility to apply for this task. The concession was awarded to TV 2 in 1991, and TV 2 started broadcasting in 1992. The concession was renewed in 2004, with a duration until 2010.

Until 2010, the public service broadcasting task entrusted to TV 2 was based on an exclusive license to nationwide frequencies and an exclusive right to provide commercial broadcasting in the analogue terrestrial network, giving TV 2 an advantage in the advertisement market in terms of nation-wide TV coverage.

However, during the last concession period from 2004 until 2010, the terrestrial network was digitised (in 2007). After the digitalisation and the following shut-off of the analogue terrestrial network, TV 2 no longer had an advantage, as all the main commercial broadcasters now had the same coverage.

From 2010, The Ministry instead based the appointment of a commercial public service broadcaster on guaranteed terms with the cable TV distributors at market conditions. An agreement for the provision of the service was entered into with TV 2 with a duration until 2015. The agreement was subsequently prolonged for one year, until 31 December 2016.

In May 2016, the Ministry chose to announce the possibility to apply for the status as commercial public broadcaster. To be appointed this status the Ministry required daily production of news and headquarters in Bergen. This temporary agreement for a two-year period was to be replaced by a more permanent agreement after the report from the Commission for Media Pluralism was available. However, no one applied for the status of commercial public broadcaster. In connection with the announcement, TV 2 wrote a letter to the Ministry, explaining that in their view, the appointment did not have an economic value commensurate with the costs TV 2 would have to endure to fulfil the duties of a commercial public broadcaster.

4. The process to ensure the continuation of a commercial public broadcasting service in Norway

4.1. Process leading up to the tender – 2015 to 2017

In September 2015, the Government appointed the Media Pluralism Committee to review the use of economic media policy instruments by March 2016. In August 2016, the Ministry asked the Committee to submit an interim report with an assessment of models for commercial public service compensation. The committee published its interim report on 17 October 2016.¹⁰

The Commission for Media Pluralism referred to several analyses, including the Foros and Kind report *"Market Failure in News Production"*, commissioned by Discovery and enclosed with the Complaint, professor Trond Bjørnenaks report *"Allmennkringkastingsoppdrag uten lisens"* dated 30 October 2014¹¹ and Oslo Economics' report from 2016¹².

Bjørnenak, who was commissioned by TV 2 to examine how the public broadcaster remit affected the costs of TV 2, concluded that TV 2 had substantial net costs from the public broadcasting remit, due to inter alia the high costs of offering own news programming in an increasingly competitive market:

"[...] the calculations indicate that there are considerable additional costs related to the public service broadcasting tasks. Even more important is the fact that the tendency is probably that the costs are increasing. The news area demonstrates a decrease in income and increase in costs. In addition, the competition is increasing, due to the total offering of TV and Internet on the market, partly caused by increased sharing of the program offerings. Last, but not least there is competition in the news area from NRK, which does not need to take the same considerations to value multipliers [verdimultiplikatorer]. This increases the costs for a commercial broadcaster like TV 2. All these arguments point in the same direction, and could give (and gives) TV 2 great challenges."¹³ (Our English translation.)

Oslo Economics, who evaluated Bjørnenak's report on assignment from the Ministry confirmed Bjørnenak's main conclusion:

¹⁰ *Vurdering av modeller for offentlig kompensasjon til kommersiell allmennkringkasting, Delutredning fra mediemangfoldsutvalget til Kulturdepartementet*, 17. oktober 2016. Available here:

https://www.regjeringen.no/contentassets/3ed45ed8d5654dfd8f8188acd8d11ee8/delutredning171016-mediemangfoldsutvalgets_delrapport.pdf

¹¹ Bjørnenak, Trond (2014) "Allmennkringkastingsoppdrag uten lisens – "Hva er kostnaden og hvorfor vil den stige?"

¹² Oslo Economics (2016) "Vurdering av rapporten "Allmennkringkastingsoppdrag uten lisens – Hva er kostnaden og hvorfor vil den stige?"

¹³ Bjørnenak, Trond (2014) "Allmennkringkastingsoppdrag uten lisens – "Hva er kostnaden og hvorfor vil den stige?" page 15

"[...] if the same tendency continues TV 2 will go from a situation with large profits to a new situation whereby the company will have moderate or low profits" (Our English translation.)¹⁴

The Commission for Media Pluralism's proposal to establish a compensation model for a commercial public broadcaster was based on the following conclusions¹⁵:

"As pointed out in chapter 3.3.1 [of the interim report], debate, culture, and religious programming, as well as content intended for children, youngsters, elderly, including language and ethnic minorities, has been prioritised less by TV 2 in the past few years. As regards this type of programming, there is therefore reason to believe that the programming would not be provided by an unregulated market.

All in all, there is considerable uncertainty connected to whether the market [and a commercial TV channel] will be able to finance news and debate programming, cultural and religious content, content intended for children, youngsters, elderly, including language and ethnic minorities in the future. Furthermore, there is considerable uncertainty as to whether there exists a financial basis to maintain a heavily editorial presence outside Oslo and in two different geographical locations." (Our English translation)

When the Commission for Media Pluralism provided its final report,¹⁶ the Commission underlined the importance of commercial public broadcasting for the Norwegian culture, freedom of speech and information, and as an alternative to NRK.¹⁷ A united Commission agreed to the proposal to establish a compensation model for a commercial public broadcaster.

Following this thorough process, the Norwegian Government brought a white paper to the Parliament,¹⁸ whereby a tender for a new commercial public broadcasting remit would be issued, offering a compensation model for net costs limited to the maximum amount of NOK 135 million annually.

In the report, the Ministry concluded that the media policy goals for commercial public service broadcasting should be:

a) Maintaining media pluralism

Media pluralism is necessary for society to have access to a broad range of credible information enables an open public debate and opinion formation, which is a prerequisite for an actively participating citizenry and a well-functioning democracy that meets the needs of all groups in our society. Norwegian content that reflects Norwegian language, culture,

¹⁴ loc. cit.

¹⁵ See the interim report page 39, section 5.3

¹⁶ NOU 2017:7 *Det norske mediemangfoldet – En styrket mediepolitikk for borgerne* Available here: <https://www.regjeringen.no/no/dokumenter/nou-2017-7/id2541723/>

¹⁷ See the final report section 1.3.2

¹⁸ Meld. St. 14 (2016-2017) *Kommersiell allmennkringkasting* Available here: <https://www.regjeringen.no/no/dokumenter/meld.-st.-14-20162017/id2524407/>

identity and Norwegian society is important in this context. Media diversity is also an essential prerequisite for freedom of speech and democracy.

b) Securing a genuine competitor to the Norwegian Broadcasting Corporation

The rationale for this goal is that it may weaken the media pluralism if NRK should be alone in providing public service content on television. Without competition in providing certain programme categories, the NRK may lose an incentive to prioritize quality and diversity. Since the media market is largely characterized by increased competition from international players, the Ministry believes that it is particularly important that the viewers be provided with a genuine alternative to the NRK.

c) Securing nationwide newscasts, produced and broadcasted outside Oslo

Nationwide news broadcasts produced and broadcasted from outside Oslo is important for media pluralism. Most national news media in Norway are established in the Oslo region. Being established in Oslo may influence the media coverage from other parts of the country, by misrepresentation or underrepresentation of certain geographical areas, interests or issues. A nationwide commercial public service broadcaster situated outside Oslo may therefore contribute to multiple perspectives in news coverage and serve as an alternative to the Oslo dominance in most nationwide media.

The white paper was unanimously approved by the Norwegian Parliament in April 2017. The Parliament emphasised in its decision that the market alone could not provide the program services included in the remit¹⁹:

"The Committee refers to the fact that the authorities have facilitated commercial broadcasting services for several years. The reason is that spectrum resources for broadcasting has been in scarce supply with conditions attached. It has also been a political priority to secure a competitor to NRK. Today, spectrum resources are not scarce, and the number of TV channels and audiovisual subscription services in the Norwegian market have never been higher. However, this diversity is not per se a guarantee that the market will produce program categories that are covered by the public broadcasting remit (e.g. children's and cultural programs or news and current affairs)" (Our English translation.)

4.2. The tender process

The Ministry published the notice to tender on 23 June 2017, with an application deadline 22 September 2017. The notice prepared for a proper basis to ensure competition among market players in full compliance with the political objective of establishing a commercial public service broadcasting remit at the least cost for the community.

The announcement listed a set of required qualifications that the applicants had to fulfil to be considered in the tender. In addition, the announcement stated that the TV channel must

¹⁹ See the Committee recommendation available here: <https://www.stortinget.no/no/Saker-og-publikasjoner/Publikasjoner/Innstillinger/Stortinget/2016-2017/inns-201617-235s/?all=true>

have its main editorial office and its main news desk in Norway, and at least 100 km outside Oslo. It was also a prerequisite that the content would be offered on a single linear television channel with a minimum of 95% coverage of all households in Norway. In addition, the public broadcasting content must be made available on an on-demand audio-visual media service.

The tender required applicants to establish an accounting separation mechanism based on the principle of net cost/fully allocated costs (not net avoided cost). Applicants were also required to describe their plan for how the requirement would be implemented, and the allocation principles used.

When the deadline expired, TV 2 was the only applicant. As part of the application, and in response to the requirement of accounting separation, TV 2 provided an extensive and detailed description of a proposed compensation model for calculating the net cost of the Remit (appendix A4 to the application). The model was prepared in collaboration with, and according to the recommendations of one of the foremost experts in the field, Professor Trond Bjørnenak, professor of Management Accounting at the Norwegian School of Economics since 2000. This was done to avoid any risk of overcompensation or cross-subsidisation, taking into account the complexity of establishing a compensation model with separate accounts in the field of public broadcasting.

4.3. The Ministry's assessment of TV 2's application

The Ministry had originally planned to finish the assessment of TV 2's application during the fourth quarter of 2017. However, after receiving the application from TV 2, the Ministry quickly saw that there was a need to do an a thorough assessment of the application, in particular TV 2s proposed model for separation of accounts. The Ministry therefore commissioned external legal and economic experts to review the application, and the accounting separation model in particular. For the next twelve months, from the application deadline 22 September 2017 until the agreement was entered into on 26 September 2018, the Ministry engaged in a thorough process, examining all the aspects of the application, the Remit and the compensation model to establish net costs. On the basis of this process, the Ministry, together with external economic and legal experts, drew up guidelines for the separation of accounts (the Guidelines)²⁰, in which several changes were made to TV 2s proposed model for separation of accounts.

4.4. The agreement between the Ministry and TV 2

The agreement between the Ministry and TV 2 (the Agreement)²¹ was entered into on 26 September 2018. On the same date, the Ministry made a decision to award a commercial public service broadcasting remit to TV 2 (the Decision)²².

²⁰ See attachment 3 to this letter

²¹ See attachment 2 to this letter

²² See attachment 1 to this letter

The Agreement entered into force 1 January 2019 and lasts until 31 December 2023. The Agreement sets up the conditions and obligations for both TV 2 and the Ministry.

The Agreement section 3-1 sets out the content obligations in the public service remit, which are as follows:

- i. Production of nationwide self-produced daily news programmes based in the central news desk

TV 2 will send minimum 40 minutes of news (including sports news) from Monday to Thursday between 17.00 and 24.00, and a minimum of 25 minutes Friday to Sunday between 17.00 and 24.00 (cf. section 5 of the Decision).

- ii. Programmes for both children and youth in Norwegian

TV 2 will send weekly children's programmes in Norwegian on Saturdays and Sundays and in holidays, a total of 72 hours annually. TV 2 will send 20 hours of programmes for youth annually (cf. section 5 of the Decision).

- iii. First-time viewings of Norwegian film and TV drama.

TV 2 will invest a minimum of NOK 250 million in Norwegian film and TV drama during the agreement period.

TV 2's main channel, TV 2 Hovedkanalen, must also fulfil several localisation criteria, cf. the Agreement section 3.3. According to this section, the main editorial office and the central news desk must be located in Norway, at least 100 km outside Oslo. This entails that the majority of the editorial workforce and the decisions on editorial content must be taken in the main office/main newsroom.

TV 2 is also obligated to distribute the public service content through linear television on Hovedkanalen, reaching at least 95 % of the households in Norway, and on an on-demand media service via internet through the streaming platform TV 2 Sumo, c.f. section 3-2 of the Agreement.

According to the Agreement, the state will only cover the net costs of fulfilling the public service remit, including a reasonable profit cf. section 5-1. The net costs are defined as the difference between TV 2's costs and revenues related to the public service remit as defined in section 3. Reasonable profit is limited to a 10 % operating margin on the business related to the public service remit. The reasonable profit was determined after a benchmark of reasonable profits of commercial broadcasters. The amount of compensation is limited to an annual average amount of 135 million NOK, paid in the form of a direct quarterly grant. The exact aid amount is to be determined and paid by Medietilsynet (the Media Authority), cf. section 5-1 and 5-2 of the Agreement. TV 2 may retain overcompensation not exceeding 10 % of total annual compensation, which is to be deducted when calculating the aid amount for the following year, see section 5-4.

The Media Authority will annually supervise that TV 2's obligations under the Agreement have been complied with. The Media Authority shall prepare an annual report on TV 2's fulfilment of the obligations under the Agreement. The Media Authority cannot be instructed by the King or the Ministry when preparing this report, cf. the Agreement section 6. TV 2 is obliged to provide the Media Authority with the information necessary to supervise the fulfilment of the Agreement, cf. section 6. In addition to this, the Agreement section 4-5 lists in detail which information TV 2 must give to the Media Authority on an annual basis. This includes the obligation to provide the Media Authority with:

- A report of the company's activities in the previous year related to the public broadcasting remit,
- an annual financial statement,
- a report from an external auditor which confirms that there is no cross-subsidization and that the business which is covered by the public broadcasting remit is in accordance with market principles, and
- a separate account regarding the public broadcasting remit, which is to be reconciled with the total accounts for the business.

The Media Authority may, if they find it necessary, lay down further guidelines for TV 2's reporting.

5. Absence of state aid

Article 61 (1) of the EEA Agreement reads as follows:

"Save as otherwise provided in this Agreement, any aid granted by EC Member States, EFTA States or through state resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Contracting Parties, be incompatible with the functioning of this Agreement."

The qualification of a measure as aid within the meaning of this provision requires that the measure must (i) be granted by the state or through state resources; (ii) confer an advantage on an undertaking; (iii) favour certain undertakings (selectivity); and (iv) be liable to distort competition and affect trade between the Contracting Parties.

As regards (i), (iii) and (iv), the Ministry would agree that the Agreement with TV 2 fulfils the conditions. However, as regards the existence of an advantage, the Ministry objects to the claim set forth by Discovery in section 3 of the Complaint regarding the Altmark criteria. It is the Ministry's opinion that the Agreement may indeed be in line with these criteria.

However, as the Agreement at any rate complies with the SGEI Decision, the Ministry sees no need to provide in depth commentary on Altmark in this letter.

Should the Authority find it necessary to assess the Agreement against the Altmark criteria, the Ministry will of course provide information in line with the Authority's requirements.

6. The commercial public broadcasting service constitutes a genuine SGEI

6.1. Legal framework

The notion of SGEI is not a static concept, but an evolving notion that depends upon, among other things, the needs of citizens, technological and market developments and social and political preferences in the specific State concerned. The Court of Justice has consistently held that SGEIs are services that exhibit special characteristics as compared with those of other economic activities. In the absence of specific EEA rules defining the scope for the existence of an SGEI, EEA States have a wide margin of discretion in defining a given service as an SGEI and in granting compensation to the service provider.²³

This notion of SGEI is consistent also with the case law of the EFTA Court.²⁴

Given that Norway has a wide margin of discretion, the Authority's competence in this respect is limited to checking whether the authorities have made a manifest error when defining the Remit as SGEI.

However, for a task to be considered a *SGEI*, the task entrusted must be such that the undertaking at issue, if it were considering its own commercial interest, would not assume it to the same extent or under the same conditions.²⁵ It would thus not be appropriate to consider as SGEI an activity which is already provided (or can be provided) satisfactorily and under conditions, such as price, objective quality characteristics, continuity and access to the service, by undertakings operating under normal market conditions.²⁶ It follows from the SGEI Guidelines that the Authority's assessment of whether a service fulfilling the common interest objective can be provided by the market, is limited to checking whether the State has made a manifest error.²⁷

6.2. Necessity of the public service broadcasting remit

The role of public service broadcasting and the necessity of a commercial public service broadcaster as an alternative to NRK is already explained in section 4.1. above. The Ministry will therefore in the present section only briefly comment on Discovery's arguments to the contrary (cf. section 4.2 of the Complaint).

²³ Case C-179/90 *Merci convenzionali porto di Genova* [1991] (ECR I-5889), para 27; Case C242/95 *GT-Link A/S* [1997] (ECR I-4449), at para 53 and Case C-266/96, *Corsica Ferries France SA* [1998] (ECR I-3949), at para 45; see also the Authority's SGEI Guidelines, at paras 45-46.

²⁴ Joined Cases E-10/11 and E-11/11 *Hurtigruten ASA and Kingdom of Norway v EFTA Surveillance Authority* [2012], at para 150.

²⁵ The Authority's SGEI Guidelines, at para 47.

²⁶ Case C-205/99 *Analir* [2001] (ECR I-1271), at para 71.

²⁷ The Authority's SGEI Guidelines, at para 48.

In essence, Discovery argues that TV 2 would perform the public service tasks even without public funding.

As explained above in section 4, the Ministry has conducted a long and thorough procedure both for the assessment of the need for and selection of the public broadcasting service provider.

Discovery claims that the fact that TV 2 has produced news since 1992 should demonstrate the profitability of this venture. It suffices to refer to what has been explained in further detail in section 3.3. Since its establishment in 1992, TV 2 has been under obligations to provide commercial public broadcasting services, except for short interim periods (2010-2011 and 2016-2017) during which new remits have been prepared, based on consistent political support to ensure the continued provision of such services. Therefore, the public service tasks of TV 2 have never been performed without incentives being provided by the state, or without well founded expectations that the provision of such services would continue to be supported in some way by the state.²⁸

The introduction of a financial compensation as part of the Remit was decided due to the fact that previous measures offered in return for the undertaking of commercial broadcasting services (frequencies, must carry obligations) were either no longer available or rendered unattractive for private undertakings due to technological and market developments.

The need for a new compensation model to ensure a continued delivery of commercial public service broadcasting was clearly identified by the independent Commission for Media Pluralism in its interim report of 2016. The Commission emphasised the fact that no broadcasters had applied for the 2016 remit (which did not involve compensation):

*"As described in chapter 3, previous agreements and licenses have been based on the fact that there would be an exchange between the public service broadcasting tasks, and advantages offered by the state. The state has been able to offer the broadcaster privileges, in the shape of access to limited frequency resources, while the broadcaster has been tasked with delivering programs assumed to have a limited commercial value. After the transition to a digital ground network, frequency transmission was no longer a limited resource, which meant that the state could no longer had the same privileges to offer. No broadcasters applied for the public broadcasting remit announced by the Ministry 4. May 2016. This indicates that the benefit to be appointed the status as a commercial public broadcaster according to the Norwegian Broadcasting Act is not, at least not in isolation, attractive enough to a commercial public service broadcaster."*²⁹ (Our English translation)

In summation, historically the commercial public broadcasting task has always been provided within a special regulatory environment, as described above. Without some form of advantage provided by the state, the Ministry sees it as highly unlikely that the task will be performed to the same extent and under the same conditions as the Norwegian parliament

²⁸ See for further explanation TV 2's comments in section 2.2 in the attached letter of 15 February 2019

²⁹ See section 5.3 of the report

and government require c.f. section 4.1. The independent Commission for Media Pluralism has expressed a similar view. The unlikelihood of the market providing the required tasks sufficiently has already been demonstrated by the fact that no broadcaster chose to apply for the 2016 remit. In addition, TVNorge, a Discovery channel, discontinued its news production as early as in 2009.

As for Discovery's assertions regarding some statements previously made by TV 2, the Ministry refers to section 2.2 of TV 2's letter (attached). TV 2 holds that these statements can in no way be taken to mean that TV 2 would deliver a public broadcasting service in line with the state's requirements without compensation.

7. The Agreement compensates for net costs exclusively, cf. SGEI Decision Article 5

7.1. Legal framework

The basis for determining the amount of compensation is set out in Article 5 of the SGEI Decision. According to this provision, compensation shall not exceed what is necessary to cover the net cost incurred in discharging the public service obligation, including a reasonable profit. The net cost of providing the SGEI can be calculated either as the difference between costs as defined in Article 5 (3) and revenues as defined in Article 5 (4) (cost allocation methodology), or as the difference between the net cost for the undertaking of operating with the public service obligation and the net cost or profit of the same undertaking operating without the public service obligation (net avoided cost methodology). The Ministry has chosen the cost allocation method as the basis for compensation.

Under the cost allocation method, Article 5 (3) provides that "*the costs to be taken into consideration shall comprise all the costs incurred in operating the service of general economic interest.*" Further details on the allocation of costs are set out in Article 5 (3) (a) to (d). Notably, Article 4 (3) (c) provides that the costs allocated to the service of general economic interest may cover all the direct costs incurred in operating the service of general economic interest and an appropriate contribution to costs common to both the service of general economic interest and other activities.

However, this provision does not specify how to allocate, or determine precisely what is an "*appropriate contribution*" to common costs.

According to Article 5 (4) the revenues "*shall include at least the entire revenue earned from the service of general economic interest.*" Again, the provision does not specify how to allocate, or determine precisely what is the actual "*entire revenue*" earned from the SGEI.

To summarize, the relevant requirements in Article 5 of the SGEI Decision are the following:

- The compensation amount shall not exceed the net cost, including a reasonable profit.

- The net cost shall be calculated on the basis of either net avoided cost or cost allocation.
- Where the cost allocation methodology is used (actual revenues minus actual costs), at least the "*entire revenue*" from the SGEI shall be included on the revenue side, and the entire costs from the SGEI as well as an "*appropriate contribution*" of common costs shall be included cost wise.

As noted above, according to the tender, the net cost of the Remit shall be calculated based on the second alternative; cost allocation (fully allocated costs). The SGEI Decision provides the framework for calculating net costs. However, the Decision does not provide any guidance on how the calculations themselves should be performed. It must therefore be for the Member States to choose a method of calculation, provided the method is based on generally accepted cost accounting principles, and ensures that all costs and revenues as described in Article 5 (3) and (4) are taken into account. This view is supported by the case law, where it has been stated several times that the State concerned has a wide margin of discretion and that the Authority's competence, as is the case when defining a genuine SGEI, is limited to checking whether the State has made a manifest error when assessing what are the additional costs (i.e. the net costs).

In *BUPA and Others v Commission*, the General Court provided:

*"[...] it must be observed that that control is necessarily restricted on account of the fact that Ireland justified the RES by the existence of an SGEI mission (see paragraph 166 above). Given the discretion enjoyed by a Member State in defining an SGEI mission and the conditions of its implementation, including the assessment of the additional costs incurred in discharging the mission, which depends on complex economic facts, the scope of the control which the Commission is entitled to exercise in that regard is limited to one of manifest error."*³⁰

The General Court made a similar statement in *Germany v Commission*, where it held that:

"[...] the Member State has a broad discretion, not only in defining a task of general economic interest, but also in determining the compensation for the costs which depend on the assessment of complex economic facts (see, to that effect FFSA and Others v Commission, cited in paragraph 44 above, paragraphs 99 and 100)."^{31 32}

³⁰ Case T-289/03 *BUPA and Others v Commission* [2008] (ECR II-81), paragraph 220

³¹ Case T-295/12 *Germany v Commission* [2014] (EU:T:2014:675), paragraph 87

³² The judgement is available in German and French. The English translation is our own.

In summation, as long as all costs and revenues as described in Article 5 paragraph 3 and four are taken into account, it is within the Member State's discretion to choose a method of calculation.

Discovery alleges that the methodology for determining the amount in the Agreement is not in line with the net cost principle in Article 5 of the SGEI Decision. This fails to recognise two important points:

First, Discovery fails to recognize that Article 5 does not regulate how to determine precisely the "entire revenue" and the "appropriate contribution" of common costs under the cost allocation method for determining the net cost of the Remit. Discovery offers its own alternative answers on certain points in the allocation model, but without taking the effort to explain why and how the suggested principles would be acceptable under Article 5, while the chosen compensation model is not. As a result, Discovery fails to explain in what way the chosen compensation model does not comply with Article 5.

Second, Discovery fails to recognize that the state has a wide margin of discretion in determining what is the "entire revenue" and the "appropriate contribution" of common costs for determining the net cost. To determine this involves an assessment of complex economic facts. The wide margin of discretion means that different methods for allocating the "entire revenue" and the "appropriate contribution" of common costs may be compliant with Article 5, as there may be several ways and methods to reach a correct reflection the economic realities. However, as most methods have inherent imperfections or weaknesses, any method may be subject to criticism. In other words, it does not follow from Article 5 that there is only one single correct method or principle. It is within the discretion of the state to determine the principles to be used, as long as these adhere to the general provisions of Article 5. Discovery has not provided any support for its claim that the principles used in the model do not fulfil Article 5. The fact that other methods or principles could also be used is of no relevance.

As will be further explained in the following, the method the Ministry has chosen for allocation of costs and revenues is based on best practise for accounting and relevant economic theory of allocation. The compensation model under the Agreement is therefore well founded, thorough, consistent and robust, and in line with the requirements of the SGEI Decision Article 5.

7.2. General principles of the model for calculating net costs

The principles for calculating the net costs of the commercial public broadcasting tasks (the AKO) are laid out in the Guidelines for account separation in TV 2 (the Guidelines). As explained in section 4 above, the Guidelines form part of the Agreement between the Ministry and TV 2.

According to the Guidelines section 1.1, there shall be a separation of accounts between the AKO and TV 2's other activity (ØV), and between the news channel Nyhetskanalen (NK) and

ØV. This entails setting up separate accounts for AKO, NK and ØV respectively. In addition, there shall be a separate account consisting of costs and revenue for the entire news area (Nyheter Samlet). Nyheter Samlet forms the basis for allocation of costs and revenues between AKO and NK.

The allocation principles are based on the economic principle of causality. Revenues and costs shall – where possible - be allocated based on the circumstances causing such revenues and costs, see the Guidelines section 1.3. To this end, the general principles for allocating revenues and costs are as follows

1. **Revenues** shall be allocated directly where possible. For example, the sponsorship revenues related to a specific program are allocated directly to such program. Where direct allocation is not possible, revenues are allocated between the AKO and other operations based on actual viewing; see section 2.1 of the Guidelines and section 2.2 through 2.4.
2. The allocation of **costs** distinguish between direct costs, indirect costs and true common costs. *Direct costs* shall be allocated directly. For example, the costs of external production of a program is allocated to this program, see the Guidelines section 3.1 (1). *Indirect costs* are allocated between the AKO and other operations based on specific allocation keys which are chosen based on the principle of causality, and provided they are robust, transparent and objective, see the Guidelines section 3.1 (2). *True common costs* are allocated between the AKO and other operations based on the proportionate allocation of direct costs between the same.

Apart from these general principles, the Guidelines also establish specific allocation keys where necessary. The allocation keys are based on the principle of causality, and are designed to ensure a robust, transparent and objective system for allocating costs and revenues, in line with Article 5 of the SGEI Decision.

Given the specific complexities regarding the allocation of costs and revenues for the production of news, which will be further elaborated on in section 7.3.3, a separate mechanism has been established. According to the Guidelines section 1.4, *direct costs* shall be allocated directly to the AKO News or the NK respectively. *Costs that cannot be allocated directly*, including indirect costs and true common costs, are allocated in their entirety to the AKO News. *All profits for the NK* shall be allocated to the AKO News, with the exception of a 10% operating margin for NK.

Discovery's complaint seems to be directed at the specific allocation keys for revenue, and the mechanism for allocating costs and revenues connected to the AKO News and NK.

The specific allocation keys for revenue will be explained in section 7.3.1 below. As will become evident, the same parameter, *actual viewing*, is consistently used for all the main

revenue sources³³, where revenues cannot be allocated directly. Viewing can be objectively and transparently measured, and as an allocation principle, it clearly complies with the requirement of Article 5 (4) that the "*entire revenue*" must be taken into consideration. The more popular a program is, the more revenue is allocated to that program category. For the sake of completeness, and even though Discovery's complaint does not seem to be directed at the model for cost allocation in general, the model will be briefly explained in section 7.3.2.

The mechanism for allocation of costs and revenues for *the news* will be explained in 7.3.3. below. As will become evident, the mechanism ensures that all relevant costs and (more than) all relevant revenues are taken into account for the AKO News.

7.3. The model for calculating net costs

7.3.1. Allocation of revenues

7.3.1.1. Allocation of advertising revenues

The Norwegian advertisement market and TV 2's sale of advertisement in this market

A large share of TV 2's revenues are from sales of advertisement between programs. The demand-side of the market consists of advertisers, seeking to market their products and services to the relevant target group of consumers, whereas the supply-side consists of different marketing channels; such as newspapers, digital services, radio and TV. On a general level, marketing channels are substitutable, as they represent different ways to reach the same consumers, although they have different characteristics. In 2017, TV advertisement represented 20% of the total advertisement spending in Norway.³⁴

For the advertiser, the willingness to pay for advertisement depends on how well the marketing channel can fulfil the purposes of its campaign; usually to reach as many relevant consumers as possible with the advertisement message, within a defined period of time.

Estimating and measuring the effects of marketing, and creating the most efficient marketing strategy, is a complex matter, requiring experience and data. The advertisement market therefore has a wide range of intermediaries assisting advertisers in preparing campaigns, deciding which marketing channels to use ("marketing mix") and negotiating with the marketing channels, like TV 2 and Discovery. There are also separate audit agencies working for advertisers by controlling and measuring how well the media agencies and marketing channels have delivered on reaching the different target groups, and the corresponding contact price, usually expressed in terms of cost per thousand viewers. It is a

³³ Advertisement revenues, third party distribution revenues (indirect subscription revenues) and direct subscription revenues.

³⁴ Source: IRM/Medier Norge, <http://medienorge.uib.no/statistikk/medium/avis/362>

highly professional market. For simplicity, we refer only to advertisers in the description below, even though they will often be represented by professional advisors.

The ability to measure the effect of marketing is important for all actors in the advertisement market. In the Norwegian TV sector, all the main broadcasters (including Discovery and TV 2) have co-operated to establish a common service that provides measuring of viewing, based on end-user panels. The measurements are carried out by a professional and independent third party (TNS Kantar), according to recognised standards, and the data enjoy a high level of confidence. The service was recently updated to include not only traditional linear TV viewing, but also delayed/on-demand viewing on various devices. The viewing data can be broken down into target groups, based on age and sex. The widest group measured is currently the age group of 10-79. The measuring service provides daily data for each broadcaster and each separate program, which are used by all actors in the market. In other words, both the demand side and the supply side have transparent information on how well the broadcasters succeed in reaching the different target groups.

It is undisputed that advertisers assign different value to different target groups. This is also confirmed in the Foros and Kind report "Market Failure in News Production", section 2.1, commissioned by Discovery, where the authors state that "*(...) all viewers are not equally valued by the advertisers; roughly speaking age group 15-49 is the most attractive group.*"³⁵

In general, the most attractive group for advertisers are young adults, who are considered the most likely to be influenced by marketing. Consumers on the older end of the age spectrum, although often having a high level of spending, are assumed to be less inclined to change their habits, and therefore less influenced by marketing. The youngest consumers on the other hand, have little spending ability of their own. There are also regulatory restrictions on marketing towards young audiences. According to the act relating to broadcasting and audiovisual on demand services section 3-1 first paragraph, advertisements may not be broadcast in connection with children's programmes, nor may advertisements on television or in audiovisual on-demand services specifically target children. This makes the youngest age groups (children and adolescents) less interesting from an advertisement perspective.

This also applies to the TV market, where the main commercial target group currently is the age group 20-49. TNS Kantar has been delivering viewing data on this group for a long time. Now, with the new system, it is possible to measure at a more detailed level.

A large part of the sales of TV advertisements is made through annual negotiations, where the advertiser undertakes a certain level of spending during the next year. As neither party knows in advance exactly how the viewing will turn out, the negotiations are based on best estimates and expectations. In the negotiations, the broadcaster needs to demonstrate that it will be able to deliver viewing in the target groups that are most attractive for the advertiser. If the broadcaster demands a price that is too high, compared to how well the advertiser (and

³⁵ Our English translation. In Norwegian, the quote is as follows: "*(...) ikke alle seere [er] like verdifulle for annonsørene; grovt regnet, er aldersgruppen 15-49 år den mest attraktive.*"

its advisor, the media agency) considers that the broadcaster is likely to perform in relation to the target groups, the broadcaster risks that the advertiser chooses to place its advertisements at a competitor; another broadcaster or an entirely different marketing channel instead. One characteristic feature, which distinguishes advertisement from other service markets, is that the parties can only estimate the viewing. How many and what kind of viewers the programs attract (and thereby the viewing on the blocks of advertisement between the programs) will depend on several factors.

Facing the demand from advertisers, the broadcaster must decide upon a pricing strategy. One challenge for the broadcaster is that most advertisers, if allowed to choose, would only want the ads to be displayed around the most popular programs, to get the broadest coverage over the shortest amount of time, and reaching the most attractive target group. However, to capitalize on its entire sales inventory, the broadcaster cannot only sell the most attractive spots, but must allocate the ads across its portfolio of channels and programs, to be able to capitalize on its entire sales inventory. In other words, the broadcaster needs to bundle the more attractive spots with some that are less attractive. The broadcaster therefore usually reserves the right to place the ads on the channels and around programs at the discretion of the broadcaster (so called "Run By Station").

Some broadcasters bundle all viewing and all target groups into one product, so called "Gross Rating Points" or "GRP".³⁶ This makes pricing less complex, but also less transparent for the advertiser. However, even if the viewing is bundled in this way, and offered at one price, the different target groups will still be of different value to the advertiser, and both the broadcaster and the advertiser will know - and measure - how well the broadcaster actually performs in delivering each such target group. The broadcaster will therefore also endeavour to schedule the ads in such a way that it meets the advertisers' expectations. This scheduling, which is done manually, is an important and time-consuming operation for advertising funded broadcasters.

Some broadcasters, such as Discovery, offer different prices for different target groups, taking a higher price for the most attractive commercial target groups, so called "Target Rating Points" or "TRP". This strategy entails increased complexity and risk for the broadcaster, as the broadcaster must balance the pricing between each target group. If the pricing is out of balance, and one target group is priced too low, the advertiser could speculate by increasing its spending on this target group, getting more value for money (the ads would still be spread out across programs, and would be viewed by the entire audience of the programs, both inside and outside the target groups). This strategy also increases the risk of not being able to sell the whole inventory, because the demand for the less commercial target groups is too low.

It is important to bear in mind that the actual viewing delivered to the advertiser will not depend on the pricing strategy of the broadcaster. Furthermore, regardless of which target

³⁶ The GRP shows what percentage of viewers watch a specific television programme, out of the total viewing audience.

group the broadcaster offers, the advertiser will be able, through the available data, to measure the delivery and effective contact price in its preferred target group. This means that advertisers will be able to compare prices for GRP and TRP across broadcasters. The value delivered by the broadcaster to the advertiser, namely the number of consumers reached in the relevant target group, is the same in both cases, regardless of whether the relevant broadcaster offers packages of GRP or TRP. Put simply, Discovery and TV 2 operate in the same market, and offer advertisement to the same advertisers. An advertiser will compare the offers and prices of TV 2 and Discovery (and other marketing channels) based on how well these marketing channels are deemed to perform in that particular advertisers target group, regardless which marketing “currency” is used, here GRP or TRP.

The decision of TV 2 to, for the time being, continue to offer GRP does not change the fact that advertisers estimate and measure how well TV 2 performs in their preferred target group. In other words they will “exchange” GRP and TRP into their own currency, to assess the actual contact price and value for their investment. There is clearly a causal relationship between TV 2’s ability to attract viewers in the most attractive target groups and the revenue generated from advertisers.

As advertisement is largely purchased in “bulk” (i.e. sold as a bundled service) and rarely designated to an individual program, or even to an individual channel, advertisement revenues for the AKO need to be allocated through an allocation key based on the causality principle and generally accepted accounting principles.

The chosen allocation key – Weighted actual viewing

The Ministry, with the input of external consultants BDO as well as from TV 2, has chosen an allocation key of *weighted viewing* for determining the advertising revenue generated by the AKO.

Firstly, this entails that the advertising revenue will be allocated according to actual viewing figures, which provides an objective and transparent basis for the allocation. Secondly, the allocation key takes into account that advertisers’ demand and willingness to pay is higher target groups, by weighing the different target groups, based on how attractive such target groups are to the advertisers. The allocation model, with indicative allocation keys for each target group, is incorporated in the Guidelines section 2.2, and is as follows:³⁷

Age group	Weight	Consideration
10-19	25-35 %	Age group without any particular buying power. In addition, advertising directed at children is prohibited by law. Interest for advertisers increases when the viewer approaches 20 years of age.

³⁷ Our English translation

20-49	100 %	The most commercially attractive age group for advertisers, and therefore the age group which contributes the most to advertising revenue.
50-59	50-75 %	Age group of some commercial attractiveness, and with a particularly high buying power.
60-69	25-35 %	Strongly falling commercial interest for this age group.
70-79	10-15 %	Age group of little commercial interest for advertisers, but since TV 2's pricing model exclusively consists of the 10-79 package, some revenue may be generated from these viewers.

As is evident from the allocation keys, programs that attract viewers in the commercially most attractive segments of viewers, will be allocated a larger share of advertisement revenues than programs that attract – from the advertiser's perspective – a less attractive audience. As set out below, the decision of final allocation keys are subject to a separate control mechanism by the Media Authority.

The allocation of (not directly attributed) TV advertising revenue between AKO and ØV takes into account all relevant advertisement revenue. It also includes all viewers and target groups offered by TV 2 in the market, and a weighing of the target groups based on how attractive such target groups are to the advertisers. The allocation key is merely a tool to reflect the market value of the viewers of each program. Therefore, all revenues from the AKO-programming will be allocated to the AKO and serve as a basis for calculating the net costs.

The following example demonstrates how the model will work in practise. To simplify, we assume here that there is only one TV channel which has only two programs, one AKO and one ØV. Each program has the same number of viewers (1000), but the distribution of viewers between age groups differs (as it normally will), as follows from "AKO Actual viewing" and "ØV actual viewing". The actual viewing within each target group is then multiplied with the set weight (here set at round figures to simplify the example).

Target group	Weight	AKO actual viewing	AKO weighted viewing	ØV actual viewing	ØV weighted viewing
10-19	30 %	50	15	50	15
20-29	100 %	100	100	100	100
30-39	100 %	200	200	200	200
40-49	100 %	200	200	300	300
50-59	60 %	200	120	250	150
60-69	30 %	200	60	50	15
70-79	20 %	50	10	50	10
Total		1000	705	1000	790
Allocation key = share			47 %		53 %

of total weighted viewing					
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If we then assume a total sale of advertisement on the channel at 10 MNOK, this will be allocated with 47 % to AKO = 4,7 MNOK and 53 % to ØV = 5,3 MNOK.

If an AKO program is broadcast on another channel, this viewing will be included in the total AKO viewing, thereby allocating all relevant advertisement revenues to AKO.

In the Complaint Discovery states that "it is unclear whether the advertising revenue is to be based on viewings in respective commercial breaks or whether it is to be based on viewing of the respective programs". As the example shows, the entire advertisement revenue will be allocated proportionately according to viewing of each program, accurately reflecting how each program contributes to advertisement revenues.

The model chosen for allocation of advertisement revenues is therefore clearly designed in such a way that the entire advertising revenue from the AKO will be taken into account when calculating the net costs, in line with the requirement of Article 5. The model is robust, transparent and objective, and is based on the economic realities of and the actual functioning of the advertising market.

Furthermore, control mechanisms are in place to prevent any arbitrary results. The allocation keys set in the Guidelines are indicative, and the final decision on the weighting of each age group will be made annually ex post by the controlling authority, the Media Authority. The decision will be based on documentation to be provided by TV 2, see section 2.2 of the Guidelines. The documentation could include market data and assessments by market experts. Other stakeholders may also provide input, and any decision made by the Media Authority may, in accordance with the Agreement § 9, be appealed to Medieklagenemda, further enhancing and securing transparency and objectivity.

This means that, if the documentation shows that the allocation keys should be amended, or should the Media Authority, based on its own assessment or on input from other stakeholders, find that the target groups are not accurately weighted, the Media Authority may make the necessary adjustments.

In the complaint Discovery seems to claim, without providing any documentation, that the specific weighing factor for the target group 50-59 is not correct. Firstly, as explained above, the weighting of each age group is at this point indicative, and the Media Authority will be able to make any necessary adjustments ex post. Second, the fact that Discovery mainly sells TRP in the target group 20-49 (and not 20-59) is a clear indication that there is a variation in demand between these groups. This is also supported by the Foros and Kind report, which states that the age group of 15-49 is considered the most attractive by advertisers.

In summation, Discovery's entire argument seems to be that the allocation method used for the advertisement revenues is not based on the cost allocation method, but “*seemingly based on a net avoided cost mentality*” and a “*hypothetical scenario (which resembles a net avoided cost approach)*”. This claim is unfounded. As has been thoroughly explained above, only actual revenues included in the accounts of TV 2 are used to calculate the net cost and the basis for compensation. Where allocation is necessary, the allocation key ensures that all revenues from the AKO are allocated to the AKO.

A model for advertisement revenues that allocates the same value to all viewers regardless of the target group, as required by Discovery, would disregard the important economic fact that advertisers value viewers differently, and thus that the payment from advertisers to TV 2 (advertising revenue) depends on the actual number of viewers in each age group they can expect to reach. A model disregarding this fact would systematically allocate a too high share of revenue to programming that attract less valuable target groups, typically programs with public service content, such as the news or children's programming. This would cause an artificially high revenue to be allocated for programming that generates less demand from advertisers, and an artificially low revenue for the most commercial content (outside the AKO).

The allocation key chosen by the Ministry ensures that the advertisement revenues are calculated as realistically and accurately as possible. Therefore, the allocation key is in line with Article 5 of the SGEI Decision. In any event, as explained in section 7.1 above, it is within the Ministry's discretion to choose a method for cost compensation, as long as the method ensures all relevant costs and revenues are taken into account.

7.3.1.2. *Allocation of direct subscription revenues*

The allocation of direct subscription revenues is regulated in the Guidelines section 2.4. The revenues are generated from the sale of different types of subscriptions of TV 2 Sumo, which are sold directly to the consumer at a monthly price. The consumer has a choice between several different subscription packages, which include different categories of programming, such as news, entertainment and sports.

The allocation key is designed to ensure proper allocation of the revenues generated by the AKO programming in each subscription, and is based on *documented actual viewing*. The revenue is divided between the AKO programming and other programming, based on the percentage of viewing of each category. In other words, the actual viewing of programs falling within the AKO in the subscription packages determines how much the AKO contributes to TV 2's subscription revenue from the package in question. Unlike in the advertisement market, where advertisers value certain age groups higher than other groups, a direct subscriber has the same value for TV 2, regardless of age, namely the sum the subscriber pays for the subscription. Therefore, it is not relevant to distinguish between target groups when allocating subscription revenues.

Using viewing as an allocation key is, in the Ministry's view, clearly in line with the causality principle. The revenue is allocated based on actual viewing, which is a parameter for measuring the cause of the subscription revenue, namely the interest the viewers have in watching the AKO programs present in the subscription package. Therefore, the allocation key is in line with the requirement in Article 5 that the entire subscription revenue generated by the AKO must be taken into account.

Discovery seems to question the allocation key on the basis that TV 2 uses a different method when accounting for subscribers in connection to the zero VAT regime for electronic news services.

The Ministry's focus when designing the cost allocation model for the public service remit has been on finding a method that accurately reflects and takes into account the costs and revenues of the AKO. The cost allocation key described above is designed specifically to ensure an accurate allocation of revenues in accordance with the SGEI Decision Article 5. Comparing this key to a different method used by TV 2 when calculating eligibility for VAT exemption, an entirely different subject matter, is in the Ministry's view irrelevant for the compatibility assessment.

In the Ministry's view, Discovery has failed to substantiate why the method used when qualifying programs for zero VAT should have any bearing on whether or not the allocation key for calculating revenue from the AKO is in line with the SGEI Decision. Programs qualifying for zero VAT and calculating revenue from the AKO are two different matters, subject to different criteria. For instance, when allocating between AKO and ØV, AKO news consists of the news produced for Hovedkanalen. However, the definition of "news services" within the VAT regime is much broader, inter alia encompassing current affairs programming such as talk shows and consumer programming. Another example is the fact that the electronic news service needs only to consist *mainly* of weekly news or current affairs. It can include a part - around 20 % according to practise – of any other programming that is neither news or current affairs. This is not the case for AKO. In short, the two situations are not comparable.

As the Ministry has explained above, the allocation key used for direct subscription revenues properly reflects TV 2's entire subscription revenue as generated by the AKO, and is therefore in accordance with generally accepted accounting principles and Article 5 of the SGEI Decision. The fact that a different method is used within the context of the zero VAT regime is irrelevant for the assessment of the allocation key against Article 5.

7.3.1.3. Allocation of indirect subscription revenues (distribution revenue)

The last category of revenues regulated in the Guidelines, is indirect subscription revenues. These are revenues generated through the sale of the rights to broadcast TV 2

Hovedkanalen and other TV 2 channels to operators of TV services such as Telenor or Get. According to the Guidelines section 2.3, revenues are first allocated between channels according to the agreements with the distributor, and then between the AKO programming and other programming by using *documented actual viewing* as the allocation key. As will be further explained below in section 7.3.3, since NK has a common cost base with the news content included in the AKO, the *entire indirect subscription revenue* from NK is included.

As is the case for direct subscription revenues, TV subscribers have the same value for TV 2 regardless of age, and no weighing of target groups is required.

7.3.2. Allocation of costs

The allocation of costs is regulated in the Guidelines section 3.1 through 3.4. According to section 3.1, *direct costs* are allocated directly to the relevant cause. For example, the costs of external production of a program is allocated directly to this program.

Indirect costs are defined in section 3.2 as costs where it is possible to establish causality between the level of costs and a specific cost driver, even though it is not possible to allocate the costs directly. According to the Guidelines, indirect costs shall be allocated using the most relevant cost driver for the specific group of costs as an allocation key. For instance, costs of staff shall be allocated based on the number of full time equivalent work year's [Norwegian: *årsverk*] connected to the public service remit.

True common costs are defined in section 3.3 as costs which generally are not affected by the specific characteristics of a program or other cost drivers, and which can not be allocated either directly or indirectly. For instance, costs connected to distribution and costs for the technical platform TV 2 Sumo are *true common costs*. These costs shall be allocated proportionally to each channel and programming area, with the same share as the direct costs.

Additional costs connected to the location requirement are regulated in the Guidelines section 3.4. According to the Guidelines, *actual additional costs* related to the requirement of locating the public broadcasting service 100 km outside of Oslo, shall be allocated to the AKO. However, costs already allocated to the AKO shall be deducted. TV 2 is obligated to document the causality between the location requirement and the costs.

The *actual additional costs* are defined as necessary costs for travel and stay, and doubling of reception, security and technical functions. An exception has been made for the costs of travel and stay for TV 2's management team [Norwegian: *lederguppen*]. These costs shall not be allocated to the AKO.

7.3.3. Costs and revenues for the AKO News and NK

The production of daily news has been required of TV 2 since 1992 and is part of the public service remit. The Remit requires TV 2 to have daily news on its main channel, produced in its own newsroom. To deliver own daily news, a large news operation is required. In 2008,

TV 2 established a 24/7 news channel, Nyhetskanalen, utilizing the same editorial and technical resources as those already in place for the main channel at the time. TV 2 has explained that establishing NK enabled them to capitalize better on the news investment and contribute to the commercial funding of the news operation. It is unlikely that Nyhetskanalen would be upheld without the continued news production for Hovedkanalen. Compared to Hovedkanalen, Nyhetskanalen is more of a breaking news channel, focusing on live studio based broadcasting, which generally means lower direct costs.

TV 2 has organised its news production across its various TV-channels and media platforms in a single news department. All the resources TV 2 uses to produce its news content are allocated in a single organizational unit that produces news for all of TV2s news platforms, i.e. the different TV channels. This means that the same news journalist may on any given day produce content that will be used throughout that day on different TV-channels. The journalist may for instance cover a story in the morning on the NK and in the evening at the nine o'clock news on the public service channel, Hovedkanalen. In addition, TV 2 may reuse its public service news content produced for Hovedkanalen on Nyhetskanalen, for example by looping news stories produced for the nine o'clock news.

Since both the public service and the non-public service news production in TV 2 to a large extent share the same input, both in terms of personnel and equipment, it is not possible to separate the costs in a meaningful way. To allocate costs between the Hovedkanalen and the Nyhetskanalen, and to prevent the related risk of overcompensation, the Guidelines section 1.4 therefore state that the combined news production in TV 2 shall be presented in a single account (Nyheter Samlet). This account shall again be sub-divided into two separate accounts: The public service news account (AKO), and the non-public service account (NK).

When allocating costs within Nyheter Samlet, the costs shall be divided into three categories. Costs which can be allocated *directly to AKO News*, costs which can be allocated *directly to NK*, and *costs which are not possible to allocate directly*, including common production resources, indirect costs and true common costs. Direct costs are allocated to the AKO News and NK respectively. The costs which are not possible to allocate directly, shall in their entirety be allocated to the AKO News. This is an appropriate contribution, given that the entire revenue from NK, except for a 10% operating margin, will be allocated back to the AKO (see below).

As regards revenues, all revenues from the AKO News are allocated to the AKO News, using the allocation keys described in section 7.3.1 above. In addition, *all revenues from NK* shall be allocated to the AKO News once a 10 % operating margin has been deducted. This essentially means that the total revenue from TV 2s total news production, both public service and non-public service (with a deduction of a 10 % profit margin) in its entirety is allocated to the public service account.

Discovery claims that the accounting separation model does not prevent cross-subsidization of TV 2's commercial activities related to NK. This is clearly a misunderstanding. The

mechanism described above ensures a limitation of the profits gained for NK. The profits from the Nyhetskanalen exceeding 10% will add to the revenue stream of Hovedkanalen, thereby reducing the overall net costs of the Remit. There is no cross-subsidization of NK; rather the mechanism ensures the opposite effect of allocating profits from the NK and adding to the revenues of the AKO News on Hovedkanalen.

The Ministry would like to point out that a premise for the single account (Nyheter Samlet) is that NK continues to be profitable, based on the principles set out above. Based on its business model, it seems likely that NK will remain profitable during the term of the Agreement. However, should NK indeed cease to be profitable, an alternative model to the single account will have to be established. If such an alternative model cannot be established, the Ministry will be entitled to terminate the aid scheme before the end of the compensation period in accordance with § 7 of the Agreement.

7.3.4. "Added value" of the public service remit

Finally, Discovery argues that the Remit will generate additional benefits, and that the compensation model fails to take this added value into account, contrary to Article 5 of the SGEI Decision. Discovery states in Section 4.3.4 of the complaint that the model *"fails to recognise that the public service obligations of TV 2 give the company a commercial advantage in the sense that they generate a broad audience, which again generates advertising income as it enables advertisers to reach a unique number of viewers simultaneously.* Discovery also states that *"the inclusion of news programmes in TV 2's programme profile increases the value proposition for advertisers, an advantage that is also not taken into account."*

This argument must be rejected. In the event that there should be an increase in advertisement revenues due to the general profile of TV 2 (this is disputed by TV 2), such revenues are already included and fully accounted for, as described in section 7.3.1.1. The entire advertising revenue generated by programs within the AKO, whichever size this revenue may be, and whether or not the size may be explained by TV 2's profile as a public service broadcaster, will be fully allocated to the AKO when determining the net cost in line with Article 5.

8. The Agreement safeguards against overcompensation and cross-subsidisation, cf. SGEI Decision Article 6

According to Article 6 of the SGEI Decision, "the Member States shall ensure that [...] the undertaking does not receive compensation in excess of the amount determined in accordance with Article 5."

Discovery claims that the net cost model "does not allow for the entire revenue earned from the SGEI to be taken into account" and that consequently "the requirement in Article 6 of the SGEI Decision that Member States shall have mechanisms in place that prevent overcompensation is not fulfilled in the present case."

Firstly, as has been made clear in section 7 above, the Guidelines under the Agreement are designed to ensure that the appropriate costs cf. Article 5 (3) (c), and the entire revenue from the AKO, cf. Article 5 (4), are taken into account when calculating the net costs of TV 2's fulfilment of the Remit.

Furthermore, the Guidelines section 1.2 include detailed provisions on the basis and auditing of costs and revenues. The accounting principles, and the correct use of the allocation methods in the Guidelines, shall be controlled annually ex post by an independent accountant, based on principles laid down by the Media Authority. As regards the allocation key for advertising revenues, the Media Authority will have laid down the weighting to be used for that accounting year, cf. the Guidelines section 2.2., ahead of the independent accounts control.

If required, the Media Authority may also ask for further reporting from TV 2 as part of its verification measures.

In the event it turns out TV 2 has been overcompensated, the Media Authority may require any overcompensation paid back, cf. the Agreement § 5-3, unless the amount of overcompensation does not exceed 10% of the amount of the average annual compensation, in which case such overcompensation may be carried forward to the next period and deducted from the amount of compensation payable in respect of that period.

In summation, the Agreement has mechanisms in place to prevent overcompensation, and is therefore in line with Article 6 of the SGEI Decision.

9. Conclusion

In section 6 to 8 above, the Ministry has shown that the public broadcasting service must be considered a genuine SGEI, that the compensation model in the Agreement is designed to ensure that TV 2 will be compensated for their net costs incurred in discharging their public service obligations in line with Article 5, and that the Agreement has safeguards in place to prevent overcompensation, in line with Article 6.

Discovery has recognized in section 4.3.2 that the maximum amount that may be granted through the Agreement is in line with the SGEI Decision. In section 4.3.3 of the complaint, Discovery also recognizes the public service obligation has been entrusted in line with the requirements of the SGEI Decision.

Finally, the Ministry will add that the reporting obligations in Article 9 will be fulfilled through the report the Ministry of Trade, Industry and Fisheries provides the Authority on Norway's behalf every 2 years.

The conclusion based on the above must therefore be that the Agreement is in line with the SGEI Decision, and should be considered compatible with the EEA Agreement.

10. Comments on the process going forward

The Ministry recognizes that it is within the Authority's discretion to prioritise complaints brought before it.³⁸ The Ministry therefore merely wishes to underline that it is crucial for the proper implementation of the Remit that both the Ministry and TV 2 can be sure that the Remit combined with the compensation model in the Agreement, can remain operative without the Agreement as such infringing EEA State aid law.

TV 2 has commented on the importance of prioritizing the complaint by stressing the fact that the compensation will "[...] incentivise[s] additional investments from TV 2 through the co-financing obligation under the Agreement. In fact, the costs of the Remit will mainly be funded by TV 2 itself. Due to the nature of the services, the continued provision necessitates irreversible (sunk cost) investments by TV 2 for both its content production (e.g. production of news), the obligation to have the main news room – and most of the editorial staff – outside of the capital and administrative obligations. As long as the complaint is pending, and although TV 2 believes the allegations are clearly unfounded... [they] cannot entirely rule out the risk that the Authority will intervene. This pending risk impedes TV 2's incentives to co-finance the Remit, clearly damaging the purposes of the Remit; to ensure media pluralism and a broad offering of high-quality public service broadcasting content."³⁹

As it is of great importance to both the Ministry and TV 2 that the Authority obtains all the necessary facts in order to assess the complaint without undue delay, the Ministry and TV 2 would be happy to discuss the information provided in this letter and the complaint in a meeting, at the Authority's earliest possible convenience.

Yours sincerely

Øyvind Christensen
Deputy Director General

Vera Karena Perez Øian
Adviser

This document is signed electronically and has therefore no handwritten signature

³⁸ Dec. no. 534/09/COL on the best practices for the conduct of State aid procedures, para. 48

³⁹ See attached letter from TV 2 section 3

Attachments:

1. *The Decision to award the Public Service Broadcasting Remit to TV 2 of 26 September 2018*
2. *The Public Service Broadcasting Agreement between the State and TV 2 AS of 26 September 2018 (the Agreement)*
3. *The Guidelines for separation of accounts in TV 2 (annex to the Agreement)*
4. *Letter from TV 2 to the Authority of 15 February 2019*