

Case No: 64968
Event No: 494958
Dec. No: 193/09/COL

EFTA SURVEILLANCE AUTHORITY DECISION

of 22 April 2009

on the establishment by the Norwegian Broadcasting Corporation of a digital archive for
the education sector
(Norway)

THE EFTA SURVEILLANCE AUTHORITY¹

Having regard to the Agreement on the European Economic Area², in particular to Articles 59, 61 to 63 and Protocol 26 thereof,

Having regard to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice³, in particular to Article 24 thereof,

Having regard to Article 1(3) of Part I and Article 4(3) of Part II of Protocol 3 to the Surveillance and Court Agreement⁴,

Having regard to the Authority's Guidelines on the application and interpretation of Articles 61 and 62 of the EEA Agreement⁵, and in particular Chapter on state aid in the form of public service compensation thereof,

Having regard to the Authority's Decision of 14 July 2004 on the implementing provisions referred to under Article 27 of Part II of Protocol 3⁶,

¹ Hereinafter referred to as the Authority.

² Hereinafter referred to as the EEA Agreement.

³ Hereinafter referred to as the Surveillance and Court Agreement.

⁴ Hereinafter referred to as Protocol 3.

⁵ Guidelines on the application and interpretation of Articles 61 and 62 of the EEA Agreement and Article 1 of Protocol 3 to the Surveillance and Court Agreement, adopted and issued by the Authority on 19 January 1994, published in the Official Journal of the European Union (hereinafter referred to as OJ) L 231 of 03.09.1994 p. 1 and EEA Supplement No 32 of 03.09.1994 p. 1. Hereinafter referred to as the State Aid Guidelines. The updated version of the State Aid Guidelines is published on the Authority's website: http://www.eftasurv.int/fieldsofwork/fieldstateaid/state_aid_guidelines/

⁶ Decision 195/04/COL of 14 July 2004, published in OJ 2006 L 139 and EEA Supplement No 26, as amended. A consolidated version of the Decision can be found on www.eftasurv.int.

Whereas:

I. FACTS

1 Procedure

The Norwegian authorities notified the financing of the establishment of a digital archive for the education sector by the *Norsk Rikskringkasting AS* (hereinafter referred to as the Norwegian Broadcasting Corporation or NRK), pursuant to Article 1(3) of Part I of Protocol 3 by letter of 27 June 2008 (Event No 483490).

By letters dated 12 August 2008 (Event No 486782) and 7 November 2008 (Event No 495275), the Authority requested additional information. By letters submitted on 8 September 2008 (Event No 490681) and 8 December 2008 (Event No 500974), the Norwegian authorities replied to the information requests. The information was complemented by the Norwegian authorities by two e-mails sent on 6 March 2009 (Events No 511624 and 511626).

2 Description of the measure

2.1 General description of the project

The Norwegian authorities decided to allocate financial support to the national public service broadcaster NRK with the purpose of partly covering the costs of establishment of an audiovisual digital archive of educational nature (hereinafter referred to as the *NRK Skole* or the archive). The archive will be created by NRK and will be based on radio and television material from NRK's archives, dating mainly from before 1992.⁷ It will include documentation of Norwegian history and aim at political, cultural and social development through coverage of news, documentaries, interviews, programmes about nature and dramatisations. All clips are in the Norwegian and, to a certain extent, the Sami languages. The archive will mainly consist of NRK's own digitised productions, but it may also include material created by third parties.⁸

The archive will be available free-of-charge⁹ to Norwegian schools and pupils, including foreign schools established in Norway. It can be accessed through an Internet online service nrk.no/skole as part of the existing NRK's Internet portal nrk.no. In order to retrieve the media clips, NRK will develop a search engine, with the help of which the content of the archive will be searchable through metadata (data about data)¹⁰ either by free text or by topic (such as theme, persons figured in the clip and competence

⁷ This is the year of the liberalisation of broadcasting services in Norway. The NRK may add material to the archive from the period after 1992, however, the costs of its digitisation will not be financed through the notified grant, but must be covered by the NRK's own means or other sources than those provided by the Norwegian Ministry of Education and Research, the Directorate of Education and Training, see p. 3 of the notification letter of 27.6.2008.

⁸ The NRK will enter into agreements with the rights holders in order to make the content of the digital archive available to all users in the education sector, cf. sec. 19 of the Agreement between the NRK and the Directorate for Education and Training of the Norwegian Ministry of Education and Research on the establishment of and access to the digital clips archive for the sector of education (hereinafter referred to as the Agreement).

⁹ Sec. 40 of the Agreement contains a clause concerning a possibility for the NRK to ask additional payments from the users in order to cover certain variable operating costs related to the content.

¹⁰ In other words, metadata can be described as text based information or a lot of words to describe living pictures, see Annex 9 to the notification letter of 27.6.2008, *Programme Bank NRK*, p. 4.

objectives). In order to monitor the use of the archive, end-users will set up user accounts and will be provided with passwords.

In order to identify, store and recover the content of the digitised material, each clip has to be registered in a searchable database and will be accompanied by metadata. Only a meaningful registration of metadata about each clip ensures a high level of usefulness of the archive. This will be guaranteed by employing specific competences within both journalism and information and data processing, as well as additional competences, in order to meet the pedagogical needs of teachers and pupils.

The project is executed in three phases. In the first phase, from 1 January 2007 until the approval of the project by the Authority, NRK has set up a search engine and started digitisation and metadata tagging of 2,000 clips. In the second phase, digitisation and metadata tagging of clips continue with a view of reaching the size of 5,000 clips within 18 months after the Authority's approval. The third phase will start with the launch of the *NRK Skole* on-line and will consist of the actual operation and maintenance of the service.¹¹

The notified measure only covers part of the costs of the first two phases. The search engine and the Internet on-line service are entirely financed by NRK as part of a larger project called *Programme Bank NRK*.¹² Further potential state support towards the operational costs of the *NRK Skole* is not covered by this decision.

2.2 The objective of the measure

The primary aim of the measure is to contribute to making NRK's archives accessible free-of-charge *via* electronic means to pupils and teachers at primary, secondary and upper secondary education level. The digital clips are specially tailored to users' age in order to support their basic skills and competence objectives as described in the National Curriculum of the Ministry of Education and Research (hereinafter referred to as the Ministry of Education).

In addition, the Norwegian authorities explained that the archives of NRK form a unique source of the Norwegian cultural and social heritage from the 20th century. The Government's aim is to preserve this part of the Norwegian national heritage for future generations. Digitisation of the parts of the archive with a view to making them available for schools and pupils in the educational digital archive contributes to the fulfilment of this objective.

2.3 National legal basis for the measure

On 19 December 2007 on behalf of the Directorate for Education and Training of the Norwegian Ministry of Education (hereinafter referred to as the Directorate for Education) and on 21 December 2007 on behalf of NRK, the parties signed an Agreement on the establishment of and access to the digital clips archive for the sector of education. This Agreement was a result of a letter of intent of 15 December 2006 and a letter of allocation

¹¹ See sec. 9 of the Agreement and Annexes 1 and 2 to the Agreement.

¹² *Programme Bank NRK* is a new television production system of the NRK which provides access and direct control over programmes in production, raw assets and archive material to 3,000 users across the NRK's 13 regional offices and the production headquarter in Oslo. It is a joint project of the NRK and other companies (TSL, OmniBus, Omneon, IPT) with a budget of NOK 160 million over the years 2006-2009. See for further details Annex 9 to the notification letter of 27.6.2009.

from the Directorate for Education dated 18 December 2006 concerning the payment of the first part of the grant (hereinafter referred to as the letter of allocation).

The Agreement is generally based on governmental reports and white papers to the Norwegian Parliament.¹³ The project helps to settle some priority measures in the Government's initiative *eNorge 2009* and to follow up intentions in the *White Paper No 30 (2006-2007) Broadcasting in a digital future*, presented to the Storting on 11 May 2007,¹⁴ *Program for digital competence 2004-2008*¹⁵ and *Digital competence - Plan for learning and the formation and sharing of knowledge 2007-2008*.¹⁶ The project is maintained in the spirit of the *White Paper No 30 (2003-2004) Culture for learning*,¹⁷ in particular as it adds to the initiatives concerning the organisation of training and variety of methods, and of the *White Paper No 17 (2006-2007) An information society for everyone*.¹⁸

2.4 Form of aid and eligible costs

The aid takes the form of a direct grant mainly to cover the costs of digitising the clips, metadata tagging and contextualising of the clips for educational use for the different age groups. The measure under investigation does not cover operational costs of the digital archive in the third phase of the project.

2.5 Budget and duration

The budget of the project in phases 1 and 2 (*i.e.* excluding the operational costs of the archive in the third phase) amounts to NOK 21.47 million. The total contribution from the Ministry of Education towards the establishment of the archive amounts to NOK 15.25 million. In the first phase of the project, the State covers NOK 11.25 million, whereas NRK's own contribution amounts to NOK 6.22 million. The State budget will entirely finance the second phase with an amount of NOK 4 million.

On the basis of a letter of intent dated 13 December 2006, NOK 8 million has already been paid out to NRK within the first phase of the project. The Norwegian authorities stressed that the payment of the remaining NOK 7.25 million will be completed once the measure has been approved by the Authority.

As mentioned above, it is envisaged that the digitisation of the clips and metadata tagging will be finalised within 18 months after the Authority's approval. No timeframe for the operation of the *NRK Skole* as such has been specified by the Norwegian authorities.

¹³ See sec. 3 of the Agreement.

¹⁴ *St.meld. nr. 3 (2006-2007) Kringkasting i en digital fremtid*, url: <http://www.regjeringen.no/pages/1974790/PDFS/STM200620070030000DDDPDFS.pdf>

¹⁵ *Program for digital kompetanse 2004-2008*, url: http://www.regjeringen.no/upload/kilde/ufd/red/2004/0016/ddd/pdfv/201402-program_for_digital_kompetanse.pdf

¹⁶ *Digital kompetanse – Plan for kunnskapsdannelse, læring og erfaringsdeling 2007-2008*, url: http://www.udir.no/upload/Satsningsomraader/digital_kompetanse/Digital_kompetanse_plan_0708.pdf

¹⁷ *St.meld. nr. 30 (2003-2004) Kultur for læring*, presented on 2.4.2004, url:

<http://www.regjeringen.no/Rpub/STM/20032004/030/PDFS/STM200320040030000DDDPDFS.pdf>

¹⁸ *St.meld. nr. 17 (2006-2007) Eit informasjonssamfunn for alle*, presented on 15.12.2006, url: <http://www.regjeringen.no/Rpub/STM/20062007/017/PDFS/STM200620070017000DDDPDFS.pdf>

II. ASSESSMENT

3 The presence of state aid within the meaning of Article 61(1) EEA Agreement

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.”

3.1 Presence of state resources

The aid measure must be granted by the State or through state resources. The financial support for the purpose of establishment of the digital archive is granted directly from the state budget, through the Ministry of Education. State resources are thereby involved.

3.2 Economic advantage

The aid measure must confer on the beneficiary an advantage that relieves it of charges that are normally borne by the undertaking's budget. The contribution of NOK 15.25 million gives NRK an economic advantage, since part of the costs of establishment of the *NRK Skole* will not be covered over NRK's general budget.

As the Norwegian authorities claimed in the notification that the measure constitutes compensation for the provision of services of general economic interest, the Authority has to establish whether or not, according to the conditions set in the *Altmark*¹⁹ judgment of the European Court of Justice, the compensation escapes the classification as state aid under Article 61(1) of the EEA Agreement. These criteria are the following:

- first, the recipient undertaking must actually have public service obligations to discharge, and the obligations must be clearly defined,
- second, the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner, to avoid it conferring an economic advantage which may favour the recipient undertaking over competing undertakings,
- third, the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations,
- fourth, where the undertaking which is to discharge public service obligations in a specific case, is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet

¹⁹ Case C-280/00 *Altmark Trans GmbH, Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH* [2003] ECR I-7747, paragraph 89 seq.

the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.

On the basis of the information available, the Authority considers, that the fourth condition is not met in the case of financing the digital archive for the education sector operated by NRK. Neither the provision of the service as such, nor the digitisation of clips for the purpose of the establishment of the digital archive was awarded as a result of an open public procurement procedure. NRK has arrived at the costs of the digitisation using its own internal estimates. The Norwegian authorities did not provide any information which would allow the Authority to determine whether these costs can be considered as corresponding to those of a typical undertaking and thus to consider that the fourth *Altmark* condition is fulfilled. Accordingly, the measure in question does not meet all the criteria specified in the *Altmark* judgment in order not to be classified as state aid within the meaning of Article 61(1) of the EEA Agreement.

3.3 Selectivity and distortion of competition

The aid measure must be selective in that it favours “*certain undertakings or the production of certain goods*” and “*distorts or threatens to distort competition conditions*”. The measure under investigation is granted solely to NRK. It is therefore selective in nature and has an impact on competition conditions between NRK and its direct competitors in the broadcasting and related markets, such as the market for electronic learning materials.

3.4 Effect on trade between Contracting Parties

The aid measure must affect trade between the Contracting Parties to the EEA Agreement. The fact that the service is primarily intended for schools and pupils established in Norway does not prevent an effect on trading conditions in the EEA. According to the jurisprudence, when aid strengthens the position of an undertaking compared with other undertakings competing in intra-EEA trade, the latter must be regarded as affected by that aid.²⁰

NRK’s main activities consist of operating nine radio channels and three television channels with approximately 100% coverage in Norway. The measure in question might strengthen the position of NRK on the broadcasting markets, both within the traditional radio and television broadcasting activities as well as in the field of new media services. NRK broadcasts programmes on different platforms, thereby competing with commercial broadcasters that might be active on the international broadcasting market or might have an international ownership structure. Competition also takes place in the advertising markets and selling of programme rights. NRK is also active on the international market through the exchange of television programmes in the European Broadcasting Union and participation in the Eurovision system.

The market for on-line digital learning resources, such as the *NRK Skole* is international in scope, as the materials are available in electronic format to users for viewing or even downloading on the Internet, and can be spread globally. The potential of the archive from the linguistic point of view might be explored outside Norway in other Scandinavian

²⁰ Cases 730/79, *Philip Morris Holland v Commission* [1980] ECR 2617, paragraph 11, C-303/88, *Italy v Commission* [1991] ECR I-1433, paragraph 17; C-156/98, *Germany v Commission*, [2000] ECR I-6857, paragraph 33.

countries. Moreover, the Sami language is spoken not only in Norway, but also in Sweden, Northern Finland and North-West Russia.

Services comparable in technical terms can be supplied to Norwegian users by foreign competitors, as for example the Danish on-line internet service www.dr.dk/skole which is of a similar nature to the one being established by NRK. Furthermore, according to the information submitted by the Norwegian authorities, NRK's main competitor on the broadcasting market, TV2, has entered as a partner into an Internet portal www.diglib.no, which distributes digital learning resources for the education sector. DigLib is developed by a leading e-learning company in Scandinavia "*It's learning*". In addition, several of the largest publishing houses in Norway (*Cappelen, N.W. Damm & Søn AS*, *Grieg Music Education AS*, *Gyldendal Norsk Forlag AS*, *Det Norske Samlaget*, *H. Aschehoug & Co.*) are also involved as partners or contributors in DigLib and offer their digital learning resources through the portal. Those publishers might be active on EEA-wide markets or serve internationally defined advertising market, and the ownership structure of the publishing houses and other partners of such a project might involve international players.

Based on the above, the measure under investigation is liable to affect trade between the Contracting Parties to the EEA Agreement.

3.5 Conclusion with regard to the presence of state aid

On the basis of the foregoing assessment, the Authority considers that the financial support of the Norwegian Government for NRK's establishment of the digital archive for the education sector constitutes state aid within the meaning of Article 61(1) of the EEA Agreement.

4 Procedural requirements

Pursuant to Article 1(3) of Part I of Protocol 3, "*the EFTA Surveillance Authority shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid (...). The State concerned shall not put its proposed measures into effect until the procedure has resulted in a final decision*".

The Norwegian authorities submitted a notification of the financial support to the digital archive for educational purposes with a letter dated 27 June 2008. However, the Norwegian authorities already put part of the notified aid measure into effect in December 2006, *i.e.* before the Authority had taken a final decision thereon. The Authority therefore concludes that the Norwegian authorities have not respected their obligations pursuant to Article 1(3) of Part I of Protocol 3. The fact that the service of NRK has not been launched yet and will not be launched until the Authority's approval of the aid in question (third phase of the project) does not change this conclusion.

5 Compatibility of the aid

The aid received by NRK in respect of expenses related to the digitisation of clips and metadata tagging will make it possible to launch the archive and operate it in the third phase of the project. The support from the Ministry of Education aims at financing the preparatory stage of the *NRK Skole*, however, its ultimate purpose is to make the digital archive for the education sector available for the users. Thus, whereas this Decision is limited to the compatibility assessment of the grant of NOK 15.25, as specified above, the Authority will also consider the impact of the measure in connection with the future operation of the service.

The Norwegian authorities regard the measure under investigation as compensation for provision of services of general economic interest. Article 59(2) of the EEA Agreement provides that “[u]ndertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Agreement, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Contracting Parties.”

The European Court of Justice has consistently held that that this derogation must be interpreted restrictively and in order for a measure to benefit from it, it is necessary that all the following conditions be fulfilled:

- the service in question must be a service of general economic interest and clearly defined as such by the Member State (definition);
- the undertaking in question must be explicitly entrusted by the Member State with the provision of that service (entrustment);
- the application of the competition rules of the Treaty (in this case, the ban on state aid) must obstruct the performance of the particular tasks assigned to the undertaking and the exemption from such rules must not affect the development of trade to an extent that would be contrary to the interests of the Contracting Parties (proportionality test).

The Norwegian authorities have argued in the notification that the notified measure relates to funding of NRK’s general broadcasting activities, and thus, should be assessed on the basis of the Chapter on the application of the state aid rules to public service broadcasting of the State Aid Guidelines. In this context, the Authority points out that the Norwegian authorities provided separate funding of the costs of establishment of the digital archive. Since the activity of setting up a digital archive for the education sector and its financing measure are disconnected from the general public broadcasting services of NRK, the Authority does not find the rules on public service broadcasting applicable.²¹ Based on this consideration, the Authority will assess the aid under the Chapter on state aid in the form of public service compensation, which in principle excludes the public service broadcasting sector from the scope of its application.²²

5.1 The definition of service of general economic interest

The EFTA States have a wide margin of discretion regarding the nature of the services that could be classified as being services of general economic interest. Thus, the Authority’s task is to ensure that this margin of discretion is applied without manifest error as regards the definition of services of general economic interest (cf. paragraph 8 of the Chapter on state aid in the form of public service compensation).

²¹ See in this context sec. 24C.5(4) of the Chapter on the application of the state aid rules to public service broadcasting in relation to the application of the cultural exemption of Article 87(3)(d) of the EC Treaty in public service broadcasting cases. In a similar case concerning the financing of BBC Digital Curriculum the Commission did not apply the provisions of its corresponding set of rules on public service broadcasting, see Commission’s Decision of 1.10.2003, State aid No N 37/2003 United Kingdom, BBC Digital Curriculum, OJ C 271 of 12.11.2003, p. 47.

²² See paragraph 2 of the Chapter on state aid in the form of public service compensation.

In view of the Norwegian authorities, education has traditionally been one of the core activities of NRK and it has always offered educational radio and television programmes within the scope of its public service broadcasting remit.²³ The Authority acknowledges that education has been an element of NRK's public service in traditional radio and television programmes. However, the inclusion of other services than traditional television and radio services with a specific content, such as for the purpose of education, which are directed towards certain groups of society and are provided over a different distribution platform, cannot be considered as a mere extension of NRK's core radio and television broadcasting, which mainly consists of traditional programming activities. The Authority also notes that although the service such as the establishment of the digital archive for the education sector builds on the educational traditions of the Norwegian public service broadcaster, it constitutes a digression from the various markets within which NRK has been active so far.²⁴ The Authority is, thus, of the view that the establishment of the *NRK Skole* does not form part of the current general public service broadcasting remit of NRK as specified in the relevant broadcasting legislation. In this context, the Authority wishes to underline that any significant change of the current public service remit entrusted to NRK, for instance, such as the extension of the scope of the remit in order to cover new services, should be done by appropriate adjustment of the definition of public service remit and modification of the official act of entrustment.

According to the Agreement between NRK and the Directorate for Education, NRK shall establish a digital clips archive based on its own archive material from before 1992 (cf. sec. 7 of the Agreement). By means of accompanying the clips with meaningful metadata, the archive is adapted to meet pedagogical needs of teachers and schools at primary, secondary and upper secondary education level. The *NRK Skole* will be made available free-of-charge to users in the education sector, *i.e.* students, apprentices, teachers, instructors and other educational personnel in basic education, including players in both public and private sectors (cf. sec. 8 of the Agreement). The archive includes documentation of Norwegian history and aims at political, cultural and social development through coverage of news, documentaries, interviews, programmes about nature, and dramatisations. All clips are in the Norwegian and, to a certain extent, the Sami languages. The digital clips are specially tailored to users' age in order to support their basic skills and competence objectives as described in the National Curriculum.

In order for the archive to become functional, NRK is obliged to deliver all necessary technical infrastructure. It should be ensured that the solutions for access to the archive clips with associated metadata are based on open standards and work regardless of operating system and learning platform. The clips will normally be viewed on the screen, however, a certain number of them will be made available for download, editing and storage.²⁵ Access for people with disabilities will also be ensured.

On the basis of the above description, the task of NRK is to create a digital library of audio and video clips taken from NRK's own archive and to accompany them with a meaningful search function with a view to making them available for schools and pupils free-of-charge. The Authority considers that the mission discharged to NRK to establish the project *NRK Skole* has been adequately and clearly defined and may qualify as a service of general economic interest.

²³ See Article 3-4 of the NRK's Articles of Association.

²⁴ See for comparison Commission's Decision of 1.10.2003, State aid No N 37/2003 United Kingdom, BBC Digital Curriculum, paragraph 36, OJ C 271 of 12.11.2003, p. 47.

²⁵ Annex 1 to the Agreement stipulates that at least 250 clips should be cleared for downloading and editing at the end of phase 2 of the project.

5.2 Entrustment

In order to benefit from the exemption under Article 59(2) of the EEA Agreement, the public service remit should be entrusted to one or more undertakings by means of one or more official acts, the form of which may be determined by the EFTA State (cf. paragraph 11 of the Chapter on state aid in the form of public service compensation).

NRK applied for a grant from the Directorate for Education towards the establishment of the digital archive in August 2006. In the course of negotiations, the parties signed a memorandum of understanding on 15 December 2006, on the basis of which the first part of the grant was allocated to NRK by means of a letter of allocation dated 18 December 2006. The final act of entrustment of NRK to provide the above defined task is the Agreement between the Directorate for Education and NRK signed in December 2007.

This Agreement is a follow-up of the intention of the Government, expressed first in the memorandum of understanding of 15 December 2006 and later, in a more general manner, in the *White Paper No 30 (2006-2007) Broadcasting in a digital time*, presented to the Storting on 11 May 2007, to create on-line learning resources for the education sector on the basis of NRK's archive and to provide it with financial means for its establishment. The document also stipulates that NRK's statutes should be clarified in respect of NRK's responsibility to the educational sector as part of the public service mission. In this context, the Norwegian authorities explained that the current Statement of Commitments of NRK (*NRK-plakaten*) which was endorsed by the Norwegian Parliament in November 2007, *i.e.* prior to the signing of the Agreement, contains *inter alia* an obligation to contribute to education and learning in order to strengthen Norwegian and Sami languages, identity and culture and to disseminate the Norwegian cultural heritage represented by NRK's archive.²⁶

The Authority considers that the service of establishment of the digital archive has been entrusted by means of the Agreement and that this entrustment act fulfils all the criteria specified in paragraph 11 of the Chapter on public service compensation. In this context, the Authority notes that as regards the duration of the public service obligations, the archive has to be established within 18 months from the Authority's approval. The undertaking concerned is NRK and the territory of the future supply of the service is in principle Norway, but due to the global nature of the Internet, which is the transmission tool of the service, it is not limited to Norway. The nature of the service in question has been described above in section 5.1 above. Further considerations regarding the parameters for calculating, controlling and reviewing the compensation as well as the arrangements for avoiding or repaying any overcompensation are addressed below in section 5.3. below.

5.3 Proportionality

5.3.1 Necessity

The Norwegian authorities explained in the notification that NRK's general archive consists of approximately 90.000 hours of radio recordings and 130.000 hours of television content. Until now, only 2/3 of the radio recordings and 2% of the television content have been digitised. In order to accelerate the process of digitisation of material to be used for the *NRK Skole* it is necessary to provide NRK with additional financial means.

²⁶ The intention of the Norwegian authorities is to incorporate this statement and thereby provision of educational services into the public service remit of the NRK in the revised company's statutes.

Without this support the operation of the educational archive would have to be postponed for many years, since, in view of the Norwegian authorities, it is unlikely that NRK would prioritise the establishment of a free-of-charge digital archive for the use in the education sector.²⁷

The Authority notes that the Norwegian authorities also considered alternative solutions, for instance a possibility of charging schools for the use of the archive. This would, however, in view of the Norwegian authorities, lead to a sub-optimal use of the digitised material and prevent groups of pupils from access to the service.²⁸

In light of the above, the Authority considers that the financial support of the state to the costs of establishment by NRK of the digital archive for the education sector is necessary due to the extensive and diverse content of NRK's archives as well as the nature of the service supplied.

5.3.2 *Limitation of the amount of compensation*

The grant of NOK 15.25 million is allocated to cover the costs of digitisation of 5,000 clips and accompanying them with metadata. The measure under investigation is thus limited in scope and covers the costs of digitising the clips, metadata tagging and contextualising of the clips for educational use for the different age groups. The Norwegian authorities confirmed that the notified financial support will be used exclusively to fund the establishment of the digital archive for the education sector and will not benefit other areas of NRK's activities. To this end, NRK has presented a budget for the establishment of the digital archive and a statement of expenditure in 2007 and 2008. The Authority notes that the compensation from state resources does not exceed the estimated amounts. Moreover, part of the costs is covered by the beneficiary from its own means amounting to NOK 6.22 million, *i.e.* roughly 30% of the costs in the two preparatory phases and more than 40% of the costs in the first phase.

The compensation is limited in time until 18 months after the Authority's approval of the project.²⁹

According to the letter of allocation, any surplus recorded at the end of the project may be channelled by NRK into production of additional pedagogically adapted media clips for the same digital archive for the education sector. The Norwegian authorities stated explicitly that the surplus cannot be used to finance other related or unrelated projects. The use of the surplus must be presented to the Directorate for Education in a separate, independently audited account.

Furthermore, the Authority takes note of the safeguards put in place by the Norwegian authorities in order to monitor the proper fulfilment of the public service task entrusted to NRK at national level. The letter of allocation requires that NRK presents a separate and independently audited account at the end of each year until the grant from the Government is spent. On the basis of the information provided, the Directorate for Education carries out, on a regular basis, an *ex post* monitoring by comparison of the estimates with the actual developments. The *NRK Skole* can also be audited by the Office of the Auditor

²⁷ See letter from the Norwegian authorities dated 27.6.2008, p. 5.

²⁸ See letter from the Norwegian authorities dated 27.6.2008, p. 5.

²⁹ As regards the operation of the archive, the Agreement is afterwards automatically renewed each year for the duration of one year, unless terminated by one of the parties with a notice of three months. After the expiry of the Agreement, the NRK remains the right holder of the digital archive. However, the Directorate for Education has a possibility to launch negotiations with the NRK as to further exploitation of the archive.

General either through its access to the account of the Directorate for Education or to NRK's general account. Finally, NRK's accounts are subject to an audit by an external auditor.

The Authority considers therefore that the State funding of phases 1 and 2 of the establishment of the *NRK Skole* does not go beyond what is necessary to cover the costs of the defined public service task entrusted to NRK.

5.3.3 Market impact

The potentially affected market is defined as the market for digital learning resources (so-called electronic learning materials), in particular the development stage of such materials. However, in view of the Norwegian authorities, the impact on the market players active in Virtual Learning Environments (VLE) and Managed Learning Environments (MLE) will be limited due to the distinctive nature of the digital archive for educational purposes.³⁰ The *NRK Skole* is solely a metadata tagged compilation of radio and television clips for the education sector and has different characteristics from other digital learning resources (for example from traditional publishing houses, on-line games). In particular, the *NRK Skole* will not contain text based study material, interactive elements, administrative tools, communication or personalisation.

According to the Norwegian authorities, the only similar available offer on the market is the Danish online internet service www.dr.dk/skole, which is operated by the Danish public radio service broadcaster *Danmarks Radio*. However, it should be noted that the similarity, and thus possibility of mutual impact, of this or other offers on the market is limited to the technical means of presentation of the service and its availability over the Internet platform, whereas most of the content of such a service differs according to the characteristics of the country, its history, culture and the language(s) spoken.

In addition, the potential distortive effect of the measure is alleviated by the fact that the Government funding for the digitisation of NRK's material is only available for audiovisual material produced before 1992. As of 1992, the year of liberalisation of the Norwegian broadcasting market, other broadcasters have also produced material which might be of interest for similar archives run by other providers than NRK, or the private broadcasters themselves might be interested in setting up such archives for the education sector. However, as explained by the Norwegian authorities, NRK will cover the costs of digitisation of material produced after 1992 from commercial income stemming from arrangements with different suppliers of e-learning resources.³¹

In line with the Commission's practice in the sector,³² commercial exploitation of the public service mission, like for instance selling of digitised clips on the market should be in line with market principles. The Authority notes that the *Guidelines for NRK's commercial operation* adopted on 10 November 2003 specify that products or services that are provided by NRK's divisions that are utilised in a commercial operation shall be priced in accordance with market conditions. Furthermore, the prices that customers pay

³⁰ See in this context Commission's Decision of 1.10.2003, State aid No N 37/2003 United Kingdom, BBC Digital Curriculum, paragraph 41, OJ C 271 of 12.11.2003, p. 47.

³¹ According to these contracts, the full costs of finding and producing a clip are covered by the party to the agreement with the NRK. The party to the agreement has a non-exclusive right to publish the clip on its Internet site, and, at the same time, the NRK supplies the clip with metadata and makes it available in its archive. In 2007, the NRK has delivered approximately 1,000 such clips. See letter of 8.9.2008, p. 3.

³² Commission's Decision of 1.10.2003, State aid No N 37/2003 United Kingdom, BBC Digital Curriculum, paragraph 57, OJ C 271 of 12.11.2003, p. 47

for commercial products and services shall reflect real costs as well as the market prices in force.

Thus, the Authority concludes that appropriate safeguards are put in place to limit any adverse impact on the market, in particular to prevent cross-subsidisation from the public funds in favour of NRK's commercial activities.

6 Conclusion

On the basis of the foregoing assessment, the Authority considers that the financial support, amounting to NOK 15.25 million, to NRK with the purpose of covering part of the costs of the establishment of the digital archive of educational nature is compatible with the functioning of the EEA Agreement on the basis of Article 59(2) of the EEA Agreement.

The Authority regrets, however, that the Norwegian authorities did not respect their obligations pursuant to Article 1(3) of Part I of Protocol 3.

The Norwegian authorities are reminded about the obligation resulting from Article 21 of Part II of Protocol 3 in conjunction with Article 6 of Decision 195/04/COL to provide reports on the implementation of the scheme.

The Norwegian authorities are also reminded that all plans to modify this scheme must be notified to the Authority.

HAS ADOPTED THIS DECISION:

Article 1

The EFTA Surveillance Authority has decided not to raise objections to the financing of the establishment costs of the digital archive for the education sector granted to the *Norsk Rikskringkasting AS*, on the basis that it constitutes compatible aid based on Article 59(2) of the EEA Agreement.

Article 2

This Decision is addressed to the Kingdom of Norway.

Article 3

Only the English version is authentic.

Done at Brussels, 22 April 2009

For the EFTA Surveillance Authority

Per Sanderud
President

Kurt Jaeger
College Member

