

Case No: 48095
Event No: 547079
Dec. No: 36/10/COL

EFTA SURVEILLANCE AUTHORITY DECISION

of 3 February 2010

to close the case on the Norwegian Broadcasting Corporation

(Norway)

THE EFTA SURVEILLANCE AUTHORITY¹,

HAVING REGARD to the Agreement on the European Economic Area², in particular to Articles 59 and 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(1) of Part I and Article 19(1) 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 the Chapter on the application of the State aid rules to public service broadcasting and the Chapter on state aid in the form of public service compensation,

HAVING REGARD to the Authority's Decision No 195/04/COL of 14 July 2004 on the implementing provisions referred to under Article 27 of Part II of Protocol 3⁶, as amended,

HAVING REGARD to the Authority's Decision No 306/09/COL of 8 July 2009 on the Norwegian Broadcasting Corporation,⁷

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/state-aid/state-aid-register/>

⁶ Decision No 195/04/COL of 14.7.2004, published in OJ L 139 of 25.05.2006 p. 57 and EEA Supplement No 26 of 25.05.2006 p. 1. The consolidated version of Decision No 195/04/COL is available on the Authority's website: <http://www.eftasurv.int/media/decisions/195-04-COL.pdf>

Whereas:

On 1 April 2003, TV2 Interaktiv AS and TV2 Nettavisen AS lodged a complaint to the Authority concerning alleged cross-subsidisation of teletext and Internet based services provided by the Norwegian Broadcasting Corporation (*Norsk Rikskringkasting*, hereinafter referred to as NRK), the Norwegian public service broadcaster (Doc. No 03-2020A).

On 23 April 2004, the Competition and State Aid Directorate of the Authority (hereinafter referred to as CSA) forwarded the complaint to the Norwegian Government for comments and requested further information on NRK's financing (Event No 260063), thereby initiating the review on existing aid schemes under Article 17(1) of Part II of Protocol 3.

Regarding the description of allegations raised by the complainants, the scope of the Authority's investigation, the general picture of the media landscape in Norway as well as a specific description of NRK's activities on different platforms, including traditional radio and television broadcasting as well as new media activities and commercial activities of the public service broadcaster, reference is made to Decision No 306/09/COL.

NRK is currently financed by means of the annual revenue from a licence fee scheme and commercial income, in particular from selling advertising space and sponsorships agreements. In addition, according to section 2-32 of the Income Tax Act⁸, NRK is not tax liable for the licence fee or any other income stemming from the company's ordinary production or broadcasting activities.

For the purpose of the present investigation, the Authority classified the licence fee and the tax exemption as existing state aid.⁹ Further, the Authority concluded that the compatibility criteria of Article 59(2) of the EEA Agreement, as interpreted by the Court of Justice of the European Union and by the EFTA Court and further specified in the Authority's State Aid Guidelines and the European Commission's decision-making practice, are not fulfilled where the funding measures in favour of NRK are concerned.

Therefore, by letter dated 12 May 2005 (Event No 317575), according to Article 17(2) of Part II of Protocol 3, the Authority gave the Norwegian authorities the possibility of submitting their views on the Authority's preliminary opinion that the financing of the public service broadcaster, NRK, was not compatible with the functioning of the EEA Agreement.

Furthermore, following numerous exchanges of correspondence and discussions between the Authority and the Norwegian authorities, on 8 July 2009, the Authority adopted Decision No 306/09/COL, based on Article 18 of Part II of Protocol 3, proposing appropriate measures with regard to the financing of NRK. The Authority requested the Norwegian authorities to implement those measures by 1 January 2010.

As a result of co-operation with the Authority, and following further explanations provided by the Norwegian authorities, *inter alia* in the form of a letter dated 13 October 2009 (Event No 533496) and an e-mail dated 23 November 2009 (Event No 541598), the Norwegian authorities have accepted to implement the appropriate measures proposed by the Authority as follows:

⁷ The full non-confidential text of the decision is available on the Authority's website: <http://www.eftasurv.int/?1=1&showLinkID=16906&1=1>

⁸ Act No 14 of 26.3.1999 on Capital and Income (*Lov om skatt av formue og inntekt (Skatteloven)*).

⁹ For detailed assessment, see Decision No 306/09/COL.

First, as regards the clarification of the notion of related services of NRK, a new provision has been added to the Broadcasting Act¹⁰ that specifies that only services that meet the democratic, social and cultural needs of the society may be added to the public service remit of NRK as a result of the new *ex ante* entrustment procedure. Furthermore, new provisions have been inserted into NRK's Company Statutes¹¹ clarifying the content of new media services, in particular on the Internet.

Second, in Decision No 306/09/COL, the Authority requested the Norwegian authorities to clarify the notion of editorial activity in the context of the services on new media platforms carried out by NRK. However, in their most recent correspondence, the Norwegian authorities explained that the new NRK's Company Statutes no longer refer to editorial content for the purpose of defining the public service remit. Hence, there is no longer a need for the Norwegian authorities to accept this appropriate measure.

Third, with regard to the proposal for scrutiny of NRK's current activities by the Media Authority with the view to assessing whether they fall within the public service remit, the Norwegian authorities have made a commitment to instruct the Media Authority to carry out an assessment and to include it in the annual report on the public service activities of NRK for the year 2009. This evaluation will be made on the basis of the newly adopted NRK's Company Statutes. The Norwegian authorities have informally indicated that this report will be published in May-June 2010.

Fourth, the Norwegian authorities presented an illustrative list of NRK's activities that would normally fall outside the public service remit. These are NRK's products or services offered with the aim of generating profits: advertising, e-commerce, sponsoring and merchandising. In order to increase transparency, the list will be published on the website of the Ministry of Culture.

Fifth, in principle, the provision of NRK's programmes on the Internet is free-of-charge. However, as an exception, certain use-related costs (i.e. costs which increase in relation to the number of users) associated with programme provision on the Internet can be recovered by NRK in the form of user fees (cf. Article 17 c of NRK's Company's Statutes). As already expressed in Decision No 306/09/COL, the Authority accepts the inclusion of certain pay-services into the public service broadcasting remit provided that (i) they concern services which would qualify as public service under the qualitative criteria, i.e. fulfil the democratic, social and cultural needs of the society and (ii) the remuneration does not exceed the coverage of certain administrative or variable costs, such as costs of searching in the material or the copyright fees.

Sixth, in Decision No 306/09/COL, the Authority requested the Norwegian authorities to establish an *ex ante* entrustment procedure for significant amendments in the public service remit, based on verifiable national criteria in the form of an "*added public value*" test, on the basis of which it should be possible to compare the new service to be launched to offers already existing in the market and to examine any potential restrictions of competition. A change in the public service remit is considered to be significant if it is likely to have an impact on the market. For this purpose, a number of objective criteria should be established to assess the significance of the change, for example, similarity of the offer, market impact and involved costs. This procedure should also be carried out for

¹⁰ Act No 127 of 4 December 1992 on Broadcasting (*Lov om kringkasting*), last amended on 19.6.2009 by Act No 92, entry into force on 1.7.2009.

¹¹ As adopted by the General Assembly on 29.6.2009.

services of short duration, including short duration television and radio channels, except in cases of changes in unforeseen, exceptional emergency situations. Even if the process of the entrustment as such can be initiated by NRK, the final legal act, by which the public service remit is extended, should be adopted by the Government, following the opinions of competent independent national authorities (such as the Media Authority) as well as other opinions expressed in a public hearing of an appropriate duration. The Authority has indicated that the hearing period should be at least three weeks. Finally, the information about the extension should be made publicly available. The Norwegian authorities committed themselves to introducing the *ex ante* entrustment procedure with the above characteristics within the time-limit of the implementation of Decision No 306/09/COL. To this end, a new framework provision has been inserted in the Broadcasting Act (cf. Article 6-1a of the Broadcasting Act) and draft amendments of the Broadcasting Regulation¹² have been presented to the Authority.

Seventh, with regard to the independence of the monitoring process, an amendment to the Broadcasting Act has clarified that the Media Authority cannot be instructed by the Government when drafting its annual report on NRK's compliance with the entrusted public service remit.

Eighth, pursuant to the new Article 10 in its Company Statutes, NRK is under a formal obligation, to keep separate accounts for its activities not associated with its public service broadcasting remit. The purpose of this provision is to calculate NRK's public service compensation needs and to prevent overcompensation and cross-subsidisation. The Norwegian authorities indicated that separate accounting will be applicable as of the fiscal year 2009.

Ninth, by means of Article 10 in NRK's Company Statutes and based on a standard calculation model developed by the Norwegian authorities, the Norwegian authorities ensure that all direct and indirect revenues from the public service mission are taken into account in calculating the yearly compensation needs of NRK, in line with the Chapter on the application of the State aid rules to public service broadcasting of the Authority's State Aid Guidelines.

Tenth, the Norwegian authorities have committed themselves to ensuring that any overcompensation is subject to repayment to the State at the end of the accounting period or deducted from the subsequent year's general funding by licence fee. In exceptional circumstances where specific investments are necessary for the fulfilment of public service mission, overcompensation exceeding 10% of the yearly public service costs may be justified on a separate basis, provided that it is earmarked for a specific public service purpose. The funding of NRK and the level of overcompensation will be reviewed every four years. Any reserves above the net costs of the public service existing at the end of the four year period will be taken into account for the calculation of the licence fee for the next period. In this context, the Authority refers to the Chapter on the application of the State aid rules to public service broadcasting.

Eleventh, as regards an independent and appropriate monitoring system of NRK's compliance with principles of market conform behaviour, including the relations between NRK and its subsidiaries, NRK's auditor will ensure that cross-subsidisation does not take place and monitor compliance with ordinary market principles by commercial subsidiaries of NRK. Further monitoring, for instance on NRK's commercial activities, is exercised by

¹² Regulation No 153 of 28 February 1997 on Broadcasting (*Forskrift om kringkasting*).

the Auditor General who reports to the Storting. In addition, the prohibition of cross-subsidisation has been incorporated into NRK's Company Statutes.

Twelfth, the Norwegian authorities confirmed that commercial activities carried out by NRK's subsidiaries do not benefit from the tax advantage of section 2-32 of the Income Tax Act. As regards commercial activities carried out by NRK itself, the Norwegian authorities stated that these activities will be subject to ordinary income taxation rules.

The above appropriate measures became binding on Norway by means of the letter of acceptance of appropriate measures submitted by the Norwegian authorities on 13 October 2009 (Event No 533496). Initially, the Norwegian authorities had made a commitment to implement the appropriate measures no later than 1 January 2010. At the request of the Norwegian authorities dated 30 November 2009 (Event No 538413), the Authority extended this time limit until 1 April 2010 by letter of 7 December 2009 (Event No 538888). It should be noted that some of the measures have already been implemented by the Norwegian authorities.

The Authority considers that in view of the acceptance of the appropriate measures by the Norwegian authorities, as set out in Decision No 306/09/COL and further outlined above, and taking into account the commitment to implement the appropriate measures, in particular putting in place the *ex ante* entrustment mechanism for new activities of NRK, by 1 April 2010, there are no longer grounds for pursuing the present case. Therefore, the case can be closed. The Norwegian authorities shall be informed thereof.

HAS ADOPTED THIS DECISION:

Article 1

The EFTA Surveillance Authority records the Kingdom of Norway's acceptance of the appropriate measures proposed by the Authority in its Decision No 306/09/COL on the Norwegian Broadcasting Corporation and further outlined in the present Decision.

Article 2

There are no longer grounds for pursuing the case concerning the financing measures in the form of the licence fee and the income tax exemption in favour of the Norwegian Broadcasting Corporation (*Norsk Rikskringkasting*). Therefore, the case is hereby closed. The Norwegian authorities shall be informed thereof by means of a letter enclosing a copy of the Decision.

Article 3

Only the English version is authentic.

Done at Brussels, 3 February 2010

For the EFTA Surveillance Authority

Per Sanderud
President

Kurt Jaeger
College Member