



ROYAL NORWEGIAN
MINISTRY OF CULTURE

EFTA Surveillance Authority
Rue Belliard 35
1040 Brussels
Belgium

Your ref

Our ref

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The Ministry of Cultures answers to The Authority's request for further information regarding the digitization of radio in Norway

The Ministry of Culture refers to letter from The EFTA Surveillance Authority (The Authority) of 9 June 2016 with request for further information regarding the digitization of radio in Norway. Please find our answers to the questions from the Authority below:

- 1. Please explain why the facility licences for all multiplexes (i.e. Riksblokka I, Regionalblokka, Riksblokka II and Lokalradioblokka) have been awarded for a 17-year period. In particular, the Authority invites the Norwegian Government to explain the reasons why this licence period is considered "appropriate" pursuant to Article 5(2) of Directive 2002/20/EC on the authorisation of electronic communications networks and services (OJ L 108, 24.4.2002, p.21).*

According to Directive 2009/140/EC, article 5 (2) the length of the licence period shall take into consideration: "*the service concerned in view of the objective pursued taking due account of the need to allow for an appropriate period for investment amortisation.*" The licences will last until 2031 in order to allow for amortisation of the investments necessary to build a DAB-network. As we highlighted in our answer to question no 9 in our letter of 18 March 2016, Norway's topography and settlement pattern requires the world's most extensive DAB-network serving a population of only 5 million. In any case, the licence-periods for the different DAB-networks in Norway are perfectly normal according to prevailing practice in other EEA-countries and are of similar length as the facility licence for the digital terrestrial TV-network in Norway.

2. *With regard to Riksblokka I, information available to the Authority indicates that Norkring has leased the entire capacity to DigitalRadio Norge which then subleases that capacity to NRK, P4 and Bauer Media. The Authority invites the Norwegian Government to confirm that this information is correct and to indicate when the contract between Norkring and DigitalRadio Norge will expire. In the event that the above cannot be confirmed, the Authority requests that information be provided with regard to how much capacity in Riksblokka I is available for potential national radio broadcasters other than NRK, P4 and Bauer Media.*

The information available to the Authority is not correct. Digitalradio Norge leases 2/3 of the capacity in Riksblokk I from Norkring. Digitalradio Norge has subleased this capacity to P4 (50 % of 2/3) and NRK (50 % of 2/3) until 2017. Radio Norge leases capacity directly from Norkring. From 2017, NRK will not lease any capacity in Riksblokk I. From 2017, P4 will lease 50 % of the total capacity in Riksblokk I via Digitalradio Norge. Radio Norge will lease 50 % of the total capacity in Riksblokk I directly from Norkring. According to the Ministry's information, P4 already uses their entire share of the capacity, but Radio Norge/Bauer Media has not declared whether the company from 2017 will use their entire share of the capacity or if some of the capacity in Riksblokk I, will be subleased. It is therefore unclear how much capacity in Riksblokk I will be available for other broadcasters from 2017.

3. *With regard to Riksblokka II, information available to the Authority indicates that Norkring has leased the entire capacity to DigitalRadio Norge which then subleases that capacity to NRK, P4, Bauer Media and 3 local radio stations. The Authority invites the Norwegian Government to confirm that this information is correct and to indicate when the contract between Norkring and DigitalRadio Norge will expire. In the event that the above cannot be confirmed, the Authority requests that information is provided with regard to how much capacity in Riksblokka II is available for potential radio broadcasters other than NRK, P4, Bauer Media and the 3 local radio stations that currently lease capacity in Riksblokka II.*

Parts of the capacity in Riksblokk II have from 15. April 2015 until 31. December 2016 been utilized as a DAB-network for local radios in the city of Trondheim. The reason for this is that the holder of the facility licence in Lokalradioblokka, 21st Venture has not made Lokalradioblokka available for local radios wanting to broadcast in the DAB-network in Trondheim. Capacity in Riksblokk II was available for this purpose as an ad-hoc solution because no national broadcasters leased any capacity from Norkring in Riksblokk II.

NRK has never had any lease contract in Riksblokk II. Neither Digitalradio Norge, NRK, P4 nor Bauer Media have any lease contract for Riksblokk II after 1 January 2017. Riksblokk II will therefore be available for any national radio provided they reach an agreement with the facility licence holder, Norkring.

4. *The Authority invites the Norwegian Government to submit a copy of the facility licences in their entirety as regards Riksblokk 1, Riksblokk 2 and Lokalradioblokka.*

The Ministry refers to the attached copies of the facility licences. Note that all facility licences in Lokalradioblokka are identical. We have therefore just provided three examples.

5. *The Authority would also like to receive an explanation on how it will be ensured that the increased potential number of radio broadcasters (nationwide and local), which the Norwegian Government has referred to as one the benefits of the migration to DAB technology, will actually result in an increased number of radio broadcasters on the Norwegian market and not only in an increased number of radio channels broadcast by the same number of radio broadcasters as active on the Norwegian market before the switchover to DAB.*

As stated in our answer to question no 2, there might be capacity left in Riksblokk I when NRK leaves the network in 2017. As stated in our answer to question no 3, Riksblokk II is fully available. Furthermore the facility licences in Lokalradioblokka were in March 2016 awarded to different local radios in 20 of 37 regions. Facility licences will be awarded to any qualified applicant in the remaining 17 regions directly or after a public tender if more than one company are interested. There are no obligations to provide local content in Lokalradioblokka. A national radio might cooperate with local radios in different regions in order to establish coverage in different parts of the country.

Furthermore, Riksblokk III was in May 2016 announced by the Norwegian Communications Authority and the Norwegian Media Authority as a digital broadcasting network. The announcement was technology neutral. The frequency resources might therefore be used for DAB or any other digital broadcasting technology. At the closing date for applications, there were no applicants.

There are no obligations for population coverage in Riksblokk II, Riksblokk III or in Lokalradioblokka. These networks might be developed on purely commercial terms. The Ministry recalls that the public service broadcaster, NRK, disposed approximately 2/3 of the capacity in the national FM-network, while NRK will only allocate 1/4 of the total capacity in the national DAB-networks. If a facility licence for Riksblokk III should be awarded at a later stage, NRKs share will drop even further. This is a clear indication that access to frequency resources does not constitute a barrier for establishment of new broadcasters.

Moving from facility licences to broadcasting licences, the increased capacity of the DAB-network will allow for minimal obligations, reducing the barriers for establishment. In the analogue licencing regime, the only possibility to establish a radio in Norway was by purchasing one of the existing licensees or wait until a new tender to be announced every seventh year. The commercial radio licences in the FM-network has been awarded after beauty contents which has been criticised by the radio sector for being unpredictable.

In the DAB-regime all radios with an agreement with the holder of the facility licence are automatically assigned a broadcasting licence by The Norwegian Media Authority. In practice, the system works as a registration scheme. In order to prevent the holders of the facility licences from abusing their position as gatekeepers, the facility licensees are obliged to give broadcasters access to the network on non-discriminatory terms.

6. *As the switchover to DAB technology may constitute a breach of Article 7 (1) of Directive 1999/5/EC on radio equipment and telecommunications terminal equipment and the mutual recognition of the conformity (OJ L 91, 7.4.1999, p. 10), the Authority invites the Norwegian Government to explain if it considers Article 7 (2) of that Directive applicable, and if this is the case, to provide the reasoning for this view.*

It follows from directive 1999/5/EC Article 1 no. 4 together with Annex I no. 4 that the directive does not apply to "Receive only radio equipment intended to be used solely for the reception of sound and TV broadcasting services". Hence, Article 7 no. 2 of directive 1999/5/EC cannot be considered applicable. Nevertheless, looking at the substance of Article 7 no. 2 The Ministry wants to emphasise that Norwegian authorities has not introduced any restrictions on the provision of FM-radio receivers. Furthermore, such receivers would be in demand for listeners to Norwegian local radio stations and radio stations from neighbouring countries, especially in border areas. The Ministry refers to our answer to question no 7.

7. *As the switchover to DAB technology may constitute a restriction on the free movement of FM radio receivers pursuant to Article 11 of the EEA Agreement, the Authority invites the Norwegian Government to explain, whether such a restriction would be considered justified under one of the mandatory requirements established by the case law of the EFTA Court or by the Court of Justice of the European Union. In particular, the Authority invites the Norwegian Government to explain the reasons why the restriction would be considered necessary and proportionate.*

The Ministry emphasises that the FM-network will continue to exist for approximately 215 local radios in Norway and that Norway has not introduced any restrictions on the provisions of radio equipment. The digitization process in Norway is driven by the national radio actors. Any negative effect on the sale of FM-radios is therefore primarily a consequence of technological development in the broadcasting sector and the technological choices of the national broadcasters.

During the meeting between the Ministry and the Authority 13 of June 2016, the Authority mentioned Case C-142/05 Mickelsson & Roos in particular. As the Ministry understood it, it was questioned whether this case could indicate that the digitization process would unduly hinder the free movement of FM radio receivers. The Ministry disagrees.

One question is whether the use of FM radio receivers is prevented or greatly restricted, as set out in para. 28 of the judgment, as long as FM radios may still be used in the local radio

market. Another matter is that such a restriction – if it can be established – will be justified by the objectives of the digitization, i.e. to ensure greater competition and increased diversity, as well as increased content in broadcasting. These are legitimate objectives, capable of justifying restrictions provided being appropriate and necessary in order to reach the said aims. As explained earlier, it is difficult to envisage that the digitization process will be possible in a small country like Norway if the FM network would still be available as it is today. The Ministry refers to our answer to question no 9 in our letter of 18 march 2016 where it is stated that the annual extra cost of broadcasting on FM for NRK is estimated to 139 000 000 NOK (2015), while the cost for the two commercial nationwide radios is estimated to 42 000 000 NOK (2015). Because of the high cost of maintaining the FM-network and the relative high cost of establishing a DAB-network in a country with only 5 million inhabitants, the digitization in Norway is dependent upon a swift and coordinated plan for analogue switch-off, where all national broadcasters and major commercial local radios end their FM-transmissions at the same time. There are hence no other alternatives that will ensure that the objectives are pursued equally effectively. The likely consequences for the number of FM radios sold cannot alter this conclusion.

For the sake of completeness, the Ministry notes that the ECJ found that the national regulations in Mickelsson & Roos would in principle be compatible with EU law, even if it would imply a restriction on the free movement of goods, which was for the national court to determine (para. 28). The Court found that the introduction of general rules were appropriate and necessary, provided certain conditions were fulfilled. It is clear, when reading paras. 37-38 and 12 in combination, that the more detailed conditions set out by the Court were based on the fact that the Swedish authorities had themselves required that further waterways had to be opened for personal watercrafts.

This clearly showed that the level of protection of the environment etc. as set by the Swedish authorities did not call for a ban on all other waters than those already opened up. This is different in the present case, as the Norwegian authorities have demonstrated that the digitization process is at risk if the FM network will remain available as it is today. The necessary level of protection is not reached under a scenario with parallel DAB and FM networks for national broadcasting. The negative consequences for the number of FM radio receivers cannot therefore call into question the legality of the digitization process. The ministry also refers to our answer to question no 12 in our letter of 18. March 2016.

Yours sincerely,

Øyvind Christensen
Deputy Director General

Anders Huitfeldt
Senior Adviser

This document is authorised electronically by the Ministry of Culture and requires no handwritten signature.