

Case No 48095
Event No 432346
Dec. No 306/09/COL

EFTA SURVEILLANCE AUTHORITY DECISION
of 8 July 2009
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 of Part I and Article 18 of Part II of Protocol 3 to the Surveillance and Court Agreement⁴,

Having regard to the Authority's State Aid Guidelines on the application and interpretation of Articles 61 and 62 of the EEA Agreement⁵, and in particular Chapter on the application of the State aid rules to public service broadcasting⁶ and Chapter on state aid in the form of public service compensation,

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 3⁷,

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/guidelines/>.

⁶ Adopted by Decision No 90/04/COL of 23 April 2004 amending for the forty-sixth time the procedural and substantive rules in the field of State aid by introducing a new Chapter 24C: The application of the State aid rules to public service broadcasting, OJ L 327 of 13.12.2007, p. 21. Hereinafter referred to as the Broadcasting Guidelines.

⁷ Decision No 195/04/COL of 14 July 2004, published in OJ L 139 of 25.05.2006 p. 57 and EEA Supplement No 26 of 25.05.2006 p. 1, last amended by Decision No 789/08/COL of 17 December 2008, not yet published. Hereinafter referred to as Decision No 195/04/COL. The consolidated version of Decision No 195/04/COL is available on the Authority's website:

http://www.eftasurv.int/fieldsofwork/fieldstateaid/legaltexts/dec_195_054_col_171208.pdf.

Whereas:

I. FACTS

1 Procedure

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 Authority adopted new chapter in its State Aid Guidelines relating to the application of the state aid rules to public service broadcasting, the Broadcasting Guidelines. On the same date, 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, based on the adopted Broadcasting Guidelines (Event No 260063), thereby initiating the review on existing aid schemes under Article 17 (1) of Part II of Protocol 3 to the Surveillance and Court Agreement.

By letter dated 28 May 2004 from the Mission of Norway to the European Union, forwarding two letters dated 25 May 2004 from the Ministry of Trade and Industry and the Ministry of Culture and Church Affairs (hereinafter referred to as the Ministry of Culture), received and registered by the Authority on 1 June 2004 (Event No 282539), the Norwegian Government provided information on the questions raised by CSA.

By letter dated 17 September 2004 CSA requested additional information (Event No 292736). The case was discussed in a package meeting with the Norwegian authorities on 23 September 2004 in Oslo.

By letter dated 29 November 2004 from the Mission of Norway to the European Union, forwarding two letters dated 26 November 2004 from the Ministry of Modernisation and the Ministry of Culture, received and registered by the Authority on 2 December 2004 (Event No 301755), the Norwegian Government provided the Authority *inter alia* with a list of activities conducted on NRK.no and NRK teletext.

By letter dated 12 May 2005 (Event No 317575), according to Article 17 (2) in Protocol 3 to the Surveillance and Court Agreement, 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 (hereinafter referred to as the Article 17(2) letter). The Authority gave the Norwegian authorities an opportunity to submit comments.

After a prolongation of the time-limit, the Norwegian authorities submitted their comments by letter from the Norwegian Mission to the European Union dated 5 July 2005, transmitting letters by the Norwegian Ministry of Culture of 20 and 21 June 2005 respectively. The letter was received and registered by the Authority on 7 July 2005 (Event No 325837).

Following a meeting with the Norwegian authorities on 16 December 2005, the Norwegian authorities submitted more information by letter from the Ministry of Culture dated 24 April 2006, which was received and registered by the Authority on 27 April 2006 (Event No 371575). The case was further discussed in a meeting with the Norwegian authorities on 15 June 2006.

By letter dated 10 October 2006, the Authority requested more information (Event No 392539). The Norwegian authorities provided more information by letter from the Norwegian Mission to the European Union dated 20 November 2006, forwarding letters from Ministry of Government Administration and Reform and the Ministry of Culture, which was received and registered by the Authority on the same day (Event No 399148).

On 15 March 2007, the complainant filed some further observations on the Authority's investigation, received and registered by the Authority on the same day (Event No 413610),.

By letter dated 16 March 2007 (Event No 413539), the Authority requested more information, in particular with regard to suggested amendments of the public service broadcasting system by the Norwegian authorities in the so-called White Paper on Public Service Broadcasting in a Digital Age (*Kringkasting i en digital fremtid*). By email dated 30 May 2007, received and registered by the Authority on the same day, the Norwegian Mission to the EU forwarded letters by the Ministry of Government Administration and Reform and the Ministry of Culture, providing more information (Event No 423272).

The case was further discussed in a meeting between the Authority and the Norwegian authorities on 24 September 2007 and 29 April 2008. Norway submitted detailed suggestions for changes to the broadcasting system by enclosing a new draft of NRK's Statutes and amendments to the broadcasting regulation by email dated 10 June 2008 (Event No 483040). Some further clarification followed in subsequent emails.

By e-mail of 2 April 2009 (Event No 514310), the Norwegian authorities informed the Authority about the adoption of the Statement of Commitments by the Norwegian Parliament on 24 February 2009. By e-mail of 18 May 2009 (Event No 519154), the Norwegian authorities informed the Authority about publication of Proposal No 81 (2008-2009) on 24 April 2009 concerning amendments to the broadcasting legislation.

2 The complaint

TV2 Interaktiv AS and *TV2 Nettavisen AS* were limited liability companies producing and marketing respectively the teletext services and web services of *TV2 Gruppen AS* (hereinafter referred to as *TV2*), which operates private broadcasting channels in Norway. The companies no longer exist however, and their activities have been taken over by other wholly owned subsidiaries of *TV2 Gruppen*.⁸ The complainants' concerns relate to the fact that NRK, the public service broadcaster, cross-subsidised its teletext and web services (nrk.no) by e.g. direct financial transfers, below market pricing or free of charge provision of editorial content and transmission services.

The original complaint alleged that companies, as for example *NRK Aktivum AS* (hereinafter referred to as *NRK Aktivum*) and *Media Total AS* (hereinafter referred to as *Media Total*), had unlimited free access to editorial content from NRK and could therefore compete on unequal terms in the teletext and Internet market. The complaint further alleged that this also influenced competition in the market for advertising funds.

⁸ In 2006, *TV2 Interaktiv AS* and *TV2 Nettavisen AS* merged. With the effect as of 1 January 2008, the interactive platforms tv2.no, web-tv platform *TV 2 Sumo*, text-TV and telephony business were transferred to *TV2 AS*. Other on-line activities stayed in the company which later changed its name to *Medienhuset Nettavisen AS*. See Annual Reports of the *TV2 Gruppen* for the years 2006-2007 and statement of accounts for 2008, available on the website www.tv2.no.

In reaction to the content of the complaint and to the Authority's information request of April 2004, the Norwegian authorities clarified however, that the complaint was based on a misunderstanding of NRK's organisational structure. It was explained that, contrary to the complainant's assumptions, the *Media Total* did not operate the teletext and website-services of NRK.⁹ The editorial content of both the website and the teletext was in fact produced entirely by NRK in its various content sections. The *Media Total* was solely in charge of production and sale of advertisements on the teletext or Internet pages of NRK.

In March 2007, the complainant completed the information, in particular with regard to the financial relations between NRK and its subsidiaries. The complainant alleged that the suggested amendments by the Norwegian authorities to the Norwegian public service broadcasting system did not ensure *de jure* that an appropriate scrutiny would take place and that advertising prices would not be undercut by NRK or its subsidiaries. Furthermore, it had been alleged that the criteria of the Transparency Directive 2006/11/EC¹⁰ were not met.

3 The scope of the Authority's investigation

The Authority extended its investigation beyond the complaint, both in its Article 17(2) letter and in the current Decision. The investigation covers the general financing regime of NRK by the public authorities, which compensates the broadcaster for the costs of all its activities within the public service remit entrusted to it by the relevant national legislation, including the need for separate accounting.

4 Media landscape in Norway

According to the Norwegian authorities, there are two genuinely national television channels in Norway, NRK 1 and TV 2. 98 % of the population have television sets.¹¹

According to data provided by TNS Gallup (a privately owned custom market research specialist) 98% of the population have access to NRK 1. TV2 is accessible by 97% of the population, whereas NRK 2 covers 94%. TV Norge, a private broadcaster established in 1998, covers 92% of the population, TV3 covers 82% and TV2 Zebra covers 79%.¹² By 30 June 2008, 45 licences for local TV broadcast were in operation.¹³

Regarding radio, there are NRK's three main channels NRK P1, NRK P2 and NRK P3 (with the coverage of respective 100%, 99% and 96%) and two other national radio channels; namely Radio Norge (coverage 92%) and P4 (coverage 80%)¹⁴. By 2 June 2008, 248 licences for local terrestrial radio were allocated.¹⁵

⁹ The complaint gives the impression that NRK transferred the operation of the website and the teletext to *Media Total* and provided *Media Total* with content free of charge.

¹⁰ Act referred to at point 1a of Annex XV to the EEA Agreement (Commission's Directive 2006/111/EC of 16 November 2006 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings, OJ L 318 of 17.11.2006, p. 17), as adapted by Protocol 1 to the EEA Agreement.

¹¹ Data from Medienorge, the Institute for Information and Media at the University of Bergen <http://www.medienorge.uib.no/?cat=statistikk&medium=tv&aspekt=&queryID=290>

¹² Data from Medietilsynet, the Norwegian Media Authority (NMA)

<http://www.medietilsynet.no/no/Oppslag/Konsesjonarer---lokalfjernsyn/>

¹³ *Ibidem*

¹⁴ Figures from Medienorge 2008

<http://www.medienorge.uib.no/?cat=statistikk&medium=radio&aspekt=&queryID=313>

¹⁵ Data from NMA

There is a number of broadcasters present on the teletext platform in Norway which offer similar services as NRK. Apart from the complainant, TV Norge and TV3 are present on the Norwegian teletext market.

According to the Norwegian Telecom Authority, 68% of the Norwegian households had broadband Internet in 2008.¹⁶ In relation to web-based content services and mobile services, including news and entertainment such as games, the Norwegian market is fragmented.

As regards the web-based newspapers market, apart from the complainant, nationwide newspapers such as VG.no, Aftenposten.no and Dagbladet.no are among the strongest providers of similar services. By the end of 2008, about 225 newspapers were published in Norway.¹⁷

As regards other content transmission platforms, in February 2009, 95% of the Norwegian population possessed a mobile phone.¹⁸

5 Description of NRK's activities and financing

5.1 The legal basis environment

The public service broadcasting activities and other activities of NRK are laid down in several legal acts, regulations and guidelines, which will be briefly described below in order to provide a better understanding of the subsequent text. A more detailed description of individual provisions will be given in those sections for which they are relevant. An overview of the history and amendments of the various legal acts can be found under section 5.7 of this Decision.

The Broadcasting Act of 1992¹⁹ is a general act on broadcasting. It contains certain specific provisions regulating NRK's organisational structure and stipulates that NRK is a limited company responsible for providing public service broadcasting and related activities in Norway. The Broadcasting Act contains further provisions on NRK's financing by a licence fee as well as provisions concerning the composition of the Board. It also includes provisions on various bodies involved in the supervision of NRK's activities, such as the Broadcasting Council, regional programme councils and the Norwegian Media Authority (hereinafter referred to as the Media Authority).

The Broadcasting Regulation of 1997²⁰ lays down the broadcasting rules which *all* television companies established within the scope of the Broadcasting Act have to follow. The Broadcasting Regulation mainly deals with the broadcast of European television programme material, advertising durations in relation to transmission time and the protection of children. It has special provisions for local broadcasting and describes the

<http://www.medietilsynet.no/no/Tema/Radio1/FM/>

¹⁶ Broadband is defined as Internet access with a download speed above 640 kbit/s,

http://www.npt.no/ikbViewer/Content/109845/Kapasitetskartlegging_av_bredbandsdekning_i_privatmarkedet.pdf, see pages 12-13 of the report.

¹⁷ Based on the number of newspapers that provide information on circulation to Medienorge:

<http://www.medienorge.uib.no/?cat=statistikk&medium=avis&aspekt=&queryID=190>

¹⁸ Report from the Norwegian Telecom Authority, p. 1

http://www.npt.no/iKnowBase/Content/109448/Rapport_om_forbrukermarkedet_for_mobiltelefoni-9_februar_2009.pdf

¹⁹ Act No 127 of 4 December 1992 on Broadcasting (*Lov om kringkasting*), last amended on 1 July 2008.

²⁰ Regulation No 153 of 28 February 1997 on Broadcasting (*Forskrift om kringkasting*).

role of the complaint committee and the advisory body for NRK, TV2 and P4. According to the Norwegian authorities, NRK is submitted to stricter rules on advertisements and sponsorship than other broadcasters covered by the Broadcasting Regulation.

The Regulation on television receivers²¹ stipulates that every person that possesses a television receiver is obliged to pay a licence fee to NRK.

NRK's activities are mainly described in NRK's Company Statutes of 1996 (*Vedtekter*)²², which contain in particular provisions on NRK's commercial activities. Any change to the public service remit must be done by a change of the statutes which requires an approval of NRK's General Assembly.

Further, on 10 November 2003, NRK adopted Guidelines for NRK's commercial operation (hereinafter referred to as Commercial Guidelines). The Commercial Guidelines contain a description of the commercial activities conducted by *NRK Aktivum* (section 2.2. of the Commercial Guidelines) and by the divisions of NRK (section 2.3 of the Commercial Guidelines). They also contain a number of market behaviour principles, such as the prohibition of cross-subsidisation and the arm's length principle. The Commercial Guidelines are legally binding for NRK and its subsidiaries.

5.2 Organisation of NRK

5.2.1 NRK

Regular radio broadcasts started in Norway in 1925 by the privately owned limited liability company Kringkastningselskapet AS, the predecessor to NRK which was founded in 1933 as a so-called "*forvaltningsbedrift*". NRK and its predecessor initially had a monopoly on broadcasting transmission and content in Norway, which was gradually dissolved from 1975 and came to an end in 1988. Today, NRK is Norway's radio and television public service broadcasting company. NRK is the only company whose right to pursue broadcasting activities is established by law. Other operators must either hold a licence or be registered with the public authorities.

NRK became a limited liability company in 1996. It is owned solely by the Norwegian State, the owner rights of which are exercised *via* the Ministry of Culture. That means that the Minister of Culture convenes NRK's General Assembly.

NRK is a founding member of the European Broadcasting Union (hereinafter referred to as the EBU), which negotiates broadcasting rights for major sports events, operates the Eurovision and Euroradio networks, organises programme exchanges, co-ordinates co-productions, and provides a full range of other operational, commercial, technical, legal and strategic services.²³

NRK is managed by a Director General who is responsible for the running of the day to day operations. The Director General reports to the Board which consists of nine members. The Chairman and Deputy Chairman and four of the members are appointed by NRK's General Assembly, i.e. the Minister of Culture. The remaining three members are representatives elected among NRK's employees.

²¹ Regulation No 8798 of 23 October 1980 on Television Receivers (*Forskrift om fjernsynsmottakere*).

²² NRK's Company Statutes were adopted on 30 April 1996 and subsequently amended, lastly on 21 December 2007, available (in Norwegian) at <http://www.nrk.no/informasjon/fakta/1.5392438>, printed on 8.4.2009.

²³ See further information on www.ebu.ch

Today, NRK offers three television channels, NRK1, NRK2 and NRK3²⁴, and three main radio channels, in addition to several niche channels on the radio, the Internet, podcast and mobile phone.²⁵

NRK is divided into the eight following sections:

- a broadcasting section (*NRK Kringkastingsdivisjonen*),
- a central content-producing section (*NRK Marienlystdivisjonen*),
- a regional content-producing section (*NRK Distriktsdivisjonen*),
- a section for Sámi Radio which produces programmes for the Sámi population (*NRK Sámi Radio*),
- a technology section (*NRK Teknologidivisjonen*),
- a legal section (*Juridisk avdeling*),
- a section for administration and finances (*Administrasjon og finans*), and
- a human resource section (*Organisasjon*).

The broadcasting section has general responsibility for the planning of programmes and for the commission of content for the various channels and media platforms of NRK. NRK broadcasts content via five different media platforms: television, radio, teletext, Internet and mobile phone.

NRK1 is the most popular TV channel in Norway with a varied content, prepared with a view to appeal to broad segments of the population. NRK2 offers news, debate programmes, documentaries, analyses and cultural programmes. NRK3 was launched on 3 September 2007. The channel offers movies, humour, lifestyle and music for a younger audience. NRK3 also hosts the children's channel NRK Super which was launched on 1 December 2007.

The radio (*radio*) division is further subdivided into P1-P3 and niche channels. P1 is Norway's largest radio station, with almost two million listeners each day, covering regional reports, news, current affairs, public service material and music. P2 is a cultural radio station. Cultural material makes up most of the programmes offered, which consist of news, debate programmes, analyses and social commentary. P3 is mainly aimed at young people in the 15–30 age bracket. Between 0600 and 1800 hrs, it is a broad-spectrum radio station for young listeners, and more of a cultural pop and rock station during the evenings and at night. P3's main emphasis is on music, comedy/entertainment and news for a younger audience. NRK's niche channels include *NRK Klassik* (classical), *NRK Alltid Nyheter* (news), *NRK Folkemusikk* (folk music), *NRK mP3*, *NRK P3 Urørt* (untouched), *NRK P1 Oslofjord*, *NRK Sámi Radio*, *NRK1 Tegnspråk* (digital television channel that interprets NRK1's broadcasts into sign language), *NRK Stortinget* (Storting), *NRK Gull* (Gold), *NRK Barn* (Children) and *NRK 5.1* (on-line radio channel offering so-called multi-channel 5.1 sound).²⁶

The net division (*nett*) comprises both nrk.no, i.e. NRK's website, and teletext. The content broadcasted on the radio stations and some of the content broadcasted on the TV stations is also available on the Internet. The net division is on equal footing with the television and radio divisions. It has a separate budget appropriation in the NRK budget

²⁴ See http://fil.nrk.no/informasjon/about_the_nrk/1.3607220, printed on 26.3.2009.

²⁵ See <http://www.nrk.no/about/>, printed on 26.3.2009.

²⁶ See http://fil.nrk.no/informasjon/about_the_nrk/1.3607220, printed on 26.3.2009.

and NRK owns the necessary infrastructure and personnel to produce and publish its teletext and website services. The editorial content on teletext and the website is thus entirely produced and published by the above divisions within NRK. For example, news displayed on the Internet would be produced from NRK's news division.

5.2.2 NRK's subsidiaries

Currently, NRK has one wholly owned subsidiary, *NRK Aktivum*. In addition, NRK has a 10.5% stake in NTB AS²⁷ - Norway's largest news agency, as well as smaller stakes in other companies²⁸.

NRK Aktivum owns a third of the limited liability companies Norges Televisjon AS and RiksTV AS, and a 23% stake in *Phonophile AS* - a Norwegian digital music archive and central distribution office for audio files for independent record labels, a 20% stake in *Media Total*, and a 17% stake in *Innholdsutvikling AS* – a news agency.

NRK Aktivum was founded in 1997 in order to maintain and develop NRK's commercial activities. It consists of three sections; one for selling advertising space on NRK's different media platforms, a section organising events and a publishing house. Pursuant to section 3 of its Commercial Guidelines, NRK engages in commercial activity mainly through its wholly-owned subsidiary *NRK Aktivum*.

As already mentioned above, *NRK Aktivum* has a stake in *Media Total*, the remaining shares are owned by private investors. *Media Total* was established in 1997 to develop and market commercial services and products on NRK's teletext pages and NRK.no. *Media Total* also markets the services of other broadcasters; *TV Norge* and *TV3* on teletext. In addition, *Media Total* develops and markets services in relation to internet, telephone and short message services.

Revenue from the sale of advertisements and other commercial content on the teletext and Internet is partly distributed to NRK.²⁹

5.3 NRK's activities

5.3.1 General remarks

NRK is Norway's public service broadcaster and consequently carries out activities within the public service remit entrusted to it, mainly by broadcasting television and radio programmes.

However, NRK also carries out other activities, in most recent years in particular in the area of new media, i.e. activities carried out on other platforms than the traditional radio and television broadcasting. It will have to be established to what extent these activities can be considered as a public service.

NRK further carries out activities which are of purely commercial nature. The different activities of NRK will be described below.

²⁷ See <http://www.ntb.no/> (under the links "Om NTB" and "Eiere og kunder"), printed on 23.4.2009.

²⁸ See the annual account for 2007, available at:

<http://www.nrk.no/contentfile/file/1.5742217/nrkregnskap2007e.pdf>

²⁹ For instance, the annual account for 2003 (page 51) states that NOK 66.8 million was distributed to NRK.

5.3.2 NRK's traditional public service activities (radio and television)

5.3.2.1 Basic definition of NRK's public service remit

The current legal provisions regulating NRK's public service remit are laid down in the Broadcasting Act of 1992 and in NRK's Company Statutes of 1996.

Pursuant to section 6-1 of the Broadcasting Act, the purpose of NRK is to provide public service broadcasting and so-called related activities (*allmennkringkasting og virksomhet som har sammenheng med dette*).³⁰ Section 6-1 of the Broadcasting Act reads:

“The Norwegian Broadcasting Corporation Ltd. is a limited company. The Companies Act applies to the Norwegian Broadcasting Corporation Ltd., unless otherwise provided in this Act. The State shall hold all shares in the Norwegian Broadcasting Corporation Ltd.

The purpose of the Norwegian Broadcasting Corporation Ltd. is to provide public service broadcasting and related activities. The Norwegian Broadcasting Corporation Ltd. may participate in other activities through subsidiaries. The King may issue regulations laying down further rules on accounting matters between the Norwegian Broadcasting Corporation Ltd. and subsidiaries.

According to section 3-1 of NRK's Company Statutes, NRK's objective is to offer public service broadcasting for the whole Norwegian population on radio, television and other media platforms.

5.3.2.2 The more detailed definition of public service broadcasting activities

With regard to the public service broadcasting activities,³¹ the scope of the public service remit is further specified in section 3.2 of NRK's Company Statutes, which reads:

“NRK's public service broadcasting activity shall comprise:

- *Core activities in the form of the television channels NRK1 and NRK2 and the radio channels P1, P2 and P3.*
- *Other editorial activities which comprise teletext, Internet and other media platforms which are suitable for the transmission of editorial content.”*

Section 3-3 of NRK's Company Statutes contains the paramount objectives NRK shall pursue in relation to its public service activities (core activities and editorial activities). This section reads:

³⁰ That section was introduced into the Broadcasting Act in 1996 on the occasion of NRK's transformation into a limited liability company. It was considered necessary to ensure that NRK would still comply with its public service duties. Before that, the previous NRK's statutes of 29 April 1988, section 2 provided for a definition/entrustment of NRK as the public service broadcaster. Section 2 read “NRK's objective is to produce and disseminate radio and television broadcasting in the public service interest. Furthermore, carry out related activities to fulfil this objective.” See also section 5.7 of this Decision.

³¹ As can be seen from the subsequent text, section 3.2. only contains specifications for “allmennkringskastingsvirksomhet”, not for the so-called related activities.

“The NRK shall via television, radio and interactive media platforms offer the whole Norwegian population a wide selection of public service broadcasting programs and services. The NRK shall pursue high quality and pluralism. Information, freedom of expression and democratic values are of importance in the public service broadcasting. In the information dissemination it is important to pursue objectivity, editorial independency and impartiality. The NRK shall via its public service broadcasting give the population access to important public information and debate. Furthermore, it should contribute to the Norwegian language, identity, and culture. The NRK shall aim at a high ethical standard and be balanced”³².

In relation to the core activities, section 3-4 of NRK’s Company Statutes specifies the following:

“In its core activities NRK’s programs and services shall:

- *Pursue thematic variety between program categories as well as within individual program categories.*
- *Contain programs which are informative and developing, and contribute to the population general knowledge.*
- *Have a content which is interesting for the general population and protect minorities and other special groups.*
- *Mainly consist of the Norwegian language. Both official languages shall be used.*
- *In total have a broad public coverage which mirrors the variety of culture, philosophy and terms of living in the different parts of the country”.*

Furthermore, section 3-5 of NRK Company Statutes lists minimum requirements which NRK is obliged to fulfil in relation to its core activities. NRK is obliged to broadcast the following types of content:

- Daily self produced news,
- Daily programs in Norwegian aimed at children less than 12 years old,
- Daily programs for the Sámi population,
- Frequent debates and documentaries,
- Frequent programs in Norwegian aimed at youngsters,
- Frequent programs in Sámi for children and youngsters,
- Programs aimed at national and linguistic minorities,
- Programs which reflect the cultural diversity in Norway,
- Programs on philosophy and religion,
- Dissemination and production of drama which reflects Norwegian language, identity and culture,
- Dissemination and production of Norwegian music. At least 35 percent of the broadcast music shall be Norwegian,
- Entertainment programs,
- Sports programs which cover the breadth of Norwegian athletics,
- Dissemination of dramatic art and music from state financed cultural institutions,
- Regional programs, including daily self produced programs.

³² Translation by the Authority.

As regards the transmission platform, NRK's core activities currently include all NRK's television and radio programmes.³³

According to section 3-6 of NRK's Company Statutes, NRK is obliged to provide an annual public service account with the purpose of providing an overview of the public service activities during the previous year.

It follows from section 8-1 of the Act on Business Registration³⁴ that the statutes of a limited liability company such as NRK are public and every person who wants to consult the statutes can request a transcript from the Business Enterprise Register.³⁵

5.3.2.3 The integration of *new* activities into the public service remit

Any amendments to the public service remit as so defined must either be done through a legislative change of the Broadcasting Act or through a change of NRK's Company Statutes. All amendments in NRK's Company Statutes are subject to approval of the Minister of Culture. Currently, there are no legal provisions in place, neither in the Broadcasting Act nor in any other legislative act, which would stipulate a different manner of extending the scope of NRK's public service remit to cover new activities and which criteria should be used to that end.

5.3.3 NRK's activities on other platforms (*new media*)

5.3.3.1 Introductory remarks

According to the Norwegian authorities, NRK's activities on other platforms fall within NRK's public service remit, as they are covered by the notion of "related activities" in section 6-1 of the Broadcasting Act.

The activities of NRK carried out on other platforms mainly include the teletext and the Internet platform. However, NRK is also engaged in some activities in the segment of mobile telephony.

5.3.3.2 Definition of the "related activities"

In order to follow the argumentation presented by the Norwegian authorities, the Authority has investigated in which manner the notion of "related services" is to be understood.

The "related activities" are mentioned, but not further defined in section 6-1 or any other provision the Broadcasting Act. Section 3-1 of NRK's Company Statutes which state that NRK is obliged to offer public service broadcasting to the whole of the Norwegian population in radio, television and on other media platforms, but does not refer back to the notion of "related activities".

According to the Norwegian authorities, section 6-1 of the Broadcasting Act contains both radio and television on the one hand and on the other hand, activities on other media platforms. In the view of the Norwegian authorities, also the activities on the other media platforms are further specified by sections 3-1, 3-2 and 3-3 of NRK's Company Statutes.³⁶

³³ See above section 5.2.1 of this Decision.

³⁴ Act No 78 of 21 June 1985 on Business Registration (*Lov om registrering av foretak*).

³⁵ *Foretaksregisteret*. www.brreg.no.

³⁶ Letter of 20 June 2005 by the Ministry of Culture, page 23. However, the Authority would like to point out that the notion of "related activities" might also be understood as covering commercial activities. It is

Nevertheless, as can be seen below (see section 5.7 of this Decision), there is historical evidence that the notion of “related services” comprised commercial activities which were related to the public service activity of NRK, but which were not themselves qualified as a service of general economic interest.

5.3.3.3 Editorial activities on other media platforms

NRK’s activities on other than the traditional platforms are, however, referred to in NRK’s Company Statutes, which stipulate under section 3-2 that so-called other editorial activities on platforms suitable for the transmission of editorial content such as teletext, Internet and other media platforms fall under NRK’s public service broadcasting activities. They are further defined in section 3-3 of NRK’s Company Statutes, laying down that the activities should contribute to pluralism and give the Norwegian population access to information.

5.3.3.4 Integration of new activities into the public service remit

More detailed stipulations, as they exist for NRK’s traditional core activities radio and television (see sections 3-4 and 3-5 of NRK’s Company Statutes), are currently not part of NRK’s Company Statutes.

There are no provisions according to which criteria new activities on other platforms should be incorporated into the public service remit (see above section 5.3.2.3. for the same finding on NRK’s activities with regard to television and radio).

5.3.3.5 Teletext

Following a Governmental proposal, NRK engaged in teletext activities in 1983, after carrying out a pilot project in 1982. The proposal was based on the idea that teletext news, weather reports and other information would be available on a continuous basis.

Article 6-4 of the Broadcasting Act, as amended in 2000, states in relation to teletext that:

“The Norwegian Broadcasting Corporation Ltd’s activities are financed by licence fees, sales revenues etc. The activities cannot be financed by advertising on the NRK’s public service channels. The NRK’s teletext services are not regarded as part of its public service provision. The King may issue regulations laying down further rules on advertising on the Corporation’s teletext services. Licence fees are laid down by Storting.”³⁷

The Norwegian authorities have explained that despite the formulation in the section 6-4 of the Broadcasting Act, teletext is considered part of NRK’s public service remit. In 2000, when the Broadcasting Act was amended, there was an absolute requirement from the Government that commercial activities should not be financed from the licence fee and that the net income from commercial activities should contribute to the financing of the public service obligations. The Norwegian authorities have stated that in order to determine the barriers between commercial activities not to be financed *via* the licence fee and public service activities, for which financing from advertising was not allowed, the concept of public service channels was developed. *I.e.* the classification of teletext as not

e.g.. undisputed that until 1996 NRK was as a foundation only allowed to carry out such “commercial” activities which were related to the public service. E.g. NRK at that time was allowed to sell programmes which were considered as a “related” activity, but were still to be considered as purely commercial.

³⁷ Storting is the Norwegian Parliament (hereinafter referred to as Storting)

being a public service channel should only signify that advertising was permitted on this channel.

According to the Norwegian authorities, advertising only takes place on those sections of the teletext, which are considered to be of a commercial nature, but not on sections such as television and radio guides, culture and pages aimed at children. However, some of the examples submitted by the Norwegian authorities show that also on sections which are considered as public service, advertising has taken place.³⁸

Teletext of NRK1 consists of the following sections: Domestic news, International news, Economy, Regional news, Sports, Weather, Travel, Air traffic (timetables/schedules), Car/Road news, Education, TV/Radio schedules, Magazine, Index, Stock Exchange, Consumers, Sports and Betting, Food, SMS, Subtitles for Television Programming, Public Information and Job announcements³⁹. The content on NRK2 teletext is, according to the Norwegian Government, the same as NRK1 teletext.

5.3.3.6 Internet

NRK launched its Internet activities in February 1995 as a pilot project and established a permanent service in February 1996. According to the Norwegian Government, Internet was considered as an important element and a natural part of NRK's public service remit as the technology evolved made the medium a widely accessible source of information.⁴⁰

Currently, NRK's website mainly provides the following content; news, sports, culture, entertainment and other.

Furthermore, there is a section enabling customised access for mobile phones where it is possible to subscribe to and download general information such as news, weather etc. to be accessed by WAP, MMS or SMS. This service is provided free of charge and, according to the Norwegian Government, NRK does not derive any revenue from this activity. In addition, it is possible to watch a selection of NRK's programmes via mobile phone. The individual consumer is charged for access to the content.⁴¹

Another sub-section contains games made by NRK. These are simple games which are based on various traditional broadcasting programmes available on NRK, e.g. "Puls – Quiz", "Joker Nord" and "Kvitt eller dobbelt". However, there are also games present on the website which are not related to the traditional broadcasting programmes of NRK, e.g. "Travspillet", "NRK Minigolf" and "Latterspillet". There are also about 40 chat rooms on the webpage, some of which, such as e.g. *åpnet forum*, are not related to any of NRK's programmes⁴².

Finally, there is a sub-section named e-shop. In the shop, NRK sells its own program productions, books, audio books and music related to NRK productions. In addition, visitors can buy clothes and other accessories with NRK's brand. The shop is operated by *NRK Aktivum*.

³⁸ See Exhibit 25 to the Norwegian information of June 2004, which according to the Norwegian authorities contains pages related to public service channels, but on which advertising features for tour operators and car financing.

³⁹ Based on information from the teletext available online at: <http://www2.nrk.no/teksttv/>

⁴⁰ Letter by the Norwegian Government dated 25.05.2004, p. 14.

⁴¹ See <http://www.nrk.no/tjenester/mobil/1.442579>

⁴² The chat room "åpnet forum" is described as that the user can discuss *here independently of NRK's programmes or channels*.

5.3.4 *NRK's commercial activities*

5.3.4.1 General remarks

According to the current Broadcasting Act, NRK is allowed to engage in commercial activities outside the public service remit. Section 6-1 (3) of the Broadcasting Act reads in this regard:

“The purpose of the Norwegian Broadcasting Corporation Ltd. is to provide public service broadcasting and related activities. The Norwegian Broadcasting Corporation ltd. may participate in other activities through subsidiaries (...)”

NRK engages in commercial activities mainly through its subsidiary *NRK Aktivum* and via *NRK Aktivum* through *Media Total*. However, some of the activities are also conducted within NRK.

5.3.4.2 *NRK Aktivum*

Further stipulations on these commercial activities are laid down in NRK's Commercial Guidelines. Section 3 of the Commercial Guidelines provides that NRK engages in commercial activity mainly through its wholly-owned subsidiary *NRK Aktivum*.

Pursuant to section 2.1 of the Commercial Guidelines, *NRK Aktivum's* main activities and responsibilities are:

- Marketing of NRK's television programs and archive records, both domestically and internationally;
- Marketing of merchandising (*NRK Aktivum* has developed and is marketing NRK-branded products like purchase-videos, audio books, music, books, toys, computer games and clothing);
- Development and marketing of interactive value-adding services in connection with NRK programmes;
- Securing sponsoring of televisions programmes (while the actual marketing has been outsourced to the *Media Total*);
- Establishing and operating NRK Experience Centre in Oslo.

The Norwegian authorities have stated that the activities of *NRK Aktivum* generate substantial revenues for NRK. According to the annual account for 2007 *NRK Aktivum* transferred 125.6 MNOK to NRK.

5.3.4.3 *Media Total*

In 2000, NRK was allowed to sell advertising space on the Internet and teletext. The company, however, did not possess the necessary knowledge and experience to carry out this activity in a professional manner and so decided to outsource it. This has been achieved by *NRK Aktivum*, on behalf of NRK's net division, administering the outsourcing agreements with the *Media Total*. The agreements which NRK, *NRK Aktivum* and *Media Total* entered into, have discharged *Media Total* with the responsibility for all sale and production of commercial content on teletext and the website. According to the Norwegian authorities, while NRK is a party to the agreements, it is *NRK Aktivum* which bears the full economic risk of *Media Total*'s activities.

5.3.4.4 NRK's own commercial activities

Furthermore, NRK might also follow commercial activities within its organisation.

The Norwegian authorities refer in this regard to section 3-2 of NRK's Company Statutes which regulates *inter alia* the investment of NRK into commercial enterprises and states that:

“NRK can, with the approval of the general assembly, establish companies or participate in companies which deal with other activities than public service broadcasting.”

The Norwegian authorities have explained that commercial activities *related* to the public service can be carried out by NRK and that NRK was always entitled to carry out such activities. Until 1996, while NRK was still a foundation (*stiftelse*), it was not allowed to carry out any commercial activity other than, for instance, sales of programmes, *i.e.* an activity related to the public service. In the Broadcasting Act of 1996, it was explicitly stated that NRK could carry out activities related to the public service.

The fact that NRK can conduct commercial activities also within NRK is further mentioned in section 1-4 of NRK's Commercial Guidelines, which are applicable to all commercial activities engaged in by NRK and its subsidiaries.

It follows from section 2.2 of the Commercial Guidelines that NRK, within its own organisation, may conduct commercial activities related to NRK's public service obligations.

The commercial activities of NRK may be as follows:

- Co-productions with commercial production companies,
- Outsourcing of the production of public service programmes to independent producers and subsequently entitlement to the commercial exploitation of the production,
- Licensing or sub-licensing of programme rights for commercial purposes. This is particularly valid as regards sport rights,
- Contributing with competence to NRK's legitimate commercial activities and participating in the research and development together with commercial organisations,
- Production of profiled products in order to market a television or radio programme (such as mugs, T-shirts),
- Renting out of production equipment for commercial purposes, if they are not required for ordinary programme production (idle capacity).

According to the last paragraph of section 2.2 of the Commercial Guidelines, NRK operates the Norwegian Radio Orchestra.

NRK also generates revenues from non-public service activities carried out within NRK such as the renting out of office space, parking and the running of the canteen. These activities are subject to income taxation.

Finally, NRK is a co-operating partner with *TV2 Gruppen* and *Telenor Media & Content Services AS* in the company *Norges Televisjon AS* in order to establish and operate the digital terrestrial television network in Norway. *Norges Televisjon AS* was established in 2002⁴³.

5.4 The financing of NRK

5.4.1 The licence fee

The licence fee funding scheme currently in place in Norway was introduced as far back as 1924 for radio broadcasting and 1957 for television broadcasting.⁴⁴

The latest available figures show that the licence fee funding of NRK accounted for 94.6% of NRK's total income for 2007. This constituted an amount of NOK 3 738 877 000.⁴⁵

According to section 6-4 of the Broadcasting Act, NRK's activities (in the meaning of section 6-1 in the Broadcasting Act - public service activities and related activities) are financed by licence fees, sales revenues etc.⁴⁶

It follows from section 1 of the Regulation on television receivers that every person that possesses a television receiver is obliged to pay a licence fee to NRK. NRK has no authority with regard to determining the licence fee, the level of which – according to section 8-3 of the Broadcasting Act - is fixed by the Storting. This is done on an annual basis in connection with the approval of the state budget. The licence fee for one year is determined on the basis of the level of the fee and the total income of NRK in the previous year, and is adjusted annually according to the expected growth in the price index.

For the purpose of collecting and administering the compulsory licence fee, NRK has established its own department. According to the Norwegian Government the collection of the licence fee is subject to the general monitoring of NRK by the Office of the Auditor General.

Section 8-4 of the Broadcasting Act stipulates that an unpaid, overdue licence fee is secured with an execution lien in the licensee's television receiver. The position of NRK as creditor for the fee is favourable compared to normal debts in that the fee represents automatic grounds for forceful execution without requiring a prior court decision. NRK can choose to use the services of the relevant public execution officer (*namsmann*) according to the Act on Forceful Execution.⁴⁷ Alternatively, NRK might use the services of the State Collection Agency.⁴⁸ The State Collection Agency is a subordinated agency of

⁴³ <http://www.ntv.no/om-norges-televisjon>

⁴⁴ <http://www.nrk.no/informasjon/lisens/1595883.html>.

⁴⁵ See Annual account for 2007, available at <http://nrk.no/informasjon/1.5297573>.

⁴⁶ For the wording of section 6-4, see above section 5.3.3.5 of this Decision.

⁴⁷ Act No 86 of 26 June 1992 on Forceful Execution (*Lov om tvangsfullbyrdelse og midlertidig sikring (tvangsfullbyrdelsesloven)*).

⁴⁸ *Statens Innkrevingsentral*, further information available at www.sismo.no.

the Ministry of Finance and collects claims on behalf of the State, state agencies or state enterprises.

Since the entry into force of the EEA Agreement, the system of licence fee funding in favour of NRK has not been changed as such. However, in the meantime, NRK has extended its income base by entering into commercial markets. Furthermore, NRK has embarked upon new activities in light of the technological development in the media sector. These activities have been financed, like other activities, from the general means available to NRK.

5.4.2 Other state funding

According to the Norwegian Government, in addition to the broadcasting licence fee, NRK does not receive extra funding from the Norwegian State in respect of its public service mission.

According to section 2-32 of the Income Tax Act⁴⁹, NRK is not tax liable for the licence fee or any other income stemming from the company's ordinary production or broadcasting activities. However, according to section 2-32 subsection 2 of the Income Tax Act, any commercial activity in the company will be subject to taxation. Accordingly, *NRK Aktivum* and commercial activities carried out by NRK mother company are tax liable like any other business.

5.4.3 Other income, in particular advertising and sponsorships

While NRK is generally allowed to engage in the sale of the advertising space, it is prohibited to do so on its public service channels. According to section 6-4 of the Broadcasting Act, NRK's teletext service is not regarded as a public service channel, thus selling of advertising space is legitimate.

Furthermore, it follows from Section 3-4 of the Broadcasting Act that a programme on television or radio might be supported by sponsorships from private parties. Information about the sponsor may be given in the form of a name, trademark or logo of the sponsor prior to and/or after the programme.

5.5 Duties related to the carrying out of public service obligation

5.5.1 Separation of accounts

Currently, no separation of accounts is in place within NRK for public service activities and the activities of commercial nature, except for the income from the renting parking space, for which separate accounts already exist.

5.5.2 Calculation of compensation for the public service remit

There is no explicit provision under Norwegian law which states that the net revenues deriving from the commercial exploitation of the public service (in particular, but not limited thereto, from NRK's subsidiaries) are taken into account for the calculation of the adequate compensation for the discharge of NRK's public service obligations. In particular, when the licence fee is calculated, it is not clear in which manner this income is taken into account.

⁴⁹ Act No 14 of 26 March 1999 on Capital and Income (*Lov om skatt av formue og inntekt (skatteloven)*).

5.5.3 *Financial relations with commercial companies*

Section 1.3 of the Commercial Guidelines describes the establishment of *NRK Aktivum* which is in charge of NRK's commercial operations. It states explicitly that the licence fee income cannot be used to subsidise commercial activities.

Section 1.6 of the Commercial Guidelines provides that there should be a clear separation between activities financed by the licence fee and the commercial activities, in terms of operation and accounting. All intra-group transactions should be conducted on commercial terms as stated in the Limited Liability Company Act⁵⁰. Products and services delivered by NRK's divisions, which are used for commercial activities, shall be priced on market terms. Prices paid by the customers for commercial activities shall reflect the real costs and the market price. The expectation of future income from the licence fee should not be used to secure commercial activities. In line with these principles, NRK's public service channels should not be used for the marketing of commercial products and services.

Section 3 of the Commercial Guidelines describes the competition rules, including the Broadcasting Guidelines. In order to ensure that the licence fee revenue is not used for the financing of commercial operations, NRK as an independent legal entity bears the onus for NRK's commercial ventures and shall maintain its own operating accounts.

Section 3-2 of the Commercial Guidelines contains an explicit prohibition of cross-subsidisation of the commercial services by the licence fee. Commercial deliveries between the various NRK's divisions and to customers shall adhere to market conditions. The prices must be commensurable to those on the relevant markets where the equivalent or similar rights, products and services are on sale. Pricing should be such that it covers the expenses that one would normally have been liable to in the production and distribution of the individual goods and services. Normally, external customers should not be offered lower prices than those that would have been offered internally within NRK.

In certain cases, the fund shall be utilised as start-up capital or else to cover losses in commercial investments. Under such circumstances, capital may only be contributed from:

- Revenue derived from NRK's commercial operations;
- Financing via commercial terms; or
- Resources from an external independent investor, barring any type of security in the form of the broadcasting licence fee.

5.6 Monitoring

5.6.1 *Monitoring of the fulfilment of the public service remit*

According to the Norwegian authorities, NRK is monitored by six bodies.

The Board has no say in fixing and evaluating programmes, but presents cases to the General Assembly which are among others the business plan for NRK and its subsidiaries, the company's main activities, investments, etc.

Furthermore, as a limited liability company, NRK must report to its General Assembly. The General Assembly must also approve amendments to NRK's statutes.

The Media Authority is an administrative body placed under the Ministry of Culture and monitors NRK's programmes as well as the programmes of the commercial broadcasters.

⁵⁰ Act No 44 of 13 June 1997 on Limited Liability Companies (*Lov om aksjeselskaper (aksjeloven)*).

It has sanctioning power under the Broadcasting Regulation. The Media Authority is currently in the instruction line of the Ministry of Culture, which constitutes at the same time NRK's General Assembly.

The Broadcasting Council and the Regional Programme Councils monitor NRK's activities. The Broadcasting Council shall discuss and express its opinion on the general programme policy as well as on specific NRK's programmes.

The economic aspects of the public service obligations of NRK are audited by the Office of the Auditor General. In this regard, the Auditor General may also monitor to what extent NRK has fulfilled its public service obligations.

Finally, a supervisory committee controls that NRK respects both statutory and internal commercial guidelines relating to business activities.

5.6.2 Monitoring of financial relations with subsidiaries

The Norwegian authorities consider that the requirement of arm's length dealings is governed by the Limited Liability Companies Act, which states that transactions between companies in a group must be made in accordance with business conditions and principles. The Auditor General monitors whether the dealings of NRK with its subsidiaries are carried out on an arm's lengths basis. This criterion is checked in a yearly meeting with NRK. However, the Norwegian authorities have confirmed that this control is carried out only if the Auditor General has received any indications of risk of breach of this principle.

The Auditor General reports to Storting and these reports are public and published on the auditor's webpage.

NRK's external auditor checks the arm's length principle in the context of the yearly audit. The accounts of NRK and the declaration of the external auditor are public documents.

5.6.3 Monitoring of commercial behaviour

The compliance with NRK's Commercial Guidelines is controlled by a supervisory organ, which reports to NRK's management. In addition, the commercial operations should be checked by NRK's external auditor, which normally embraces evaluations of procedures and structures to ensure that the operation runs in accordance with normal conditions and principles, random checks of individual transactions and larger new and current accounts (section 5-5 and 5-6 of the Commercial Guidelines). The Auditor General has no formal obligation to check NRK's adherence to its internal Commercial Guidelines.

According to the Guidelines for Corporate Control, section 4.2.3. the Auditor General has, however, a special obligation to ensure that cross-subsidisation does not occur in undertakings which are partially exposed to competition and partially not.

5.7 Amendments to the relevant national broadcasting legislation

5.7.1 Broadcasting Act

5.7.1.1 Changes to NRK's public service broadcasting remit

NRK's role as a public service broadcaster was contained in 1988 NRK's Company Statutes which state in section 2 that "*NRK's objective is to produce and disseminate*

radio and television broadcasting in the public service interest. Furthermore, carry out related activities to fulfil this objective.”

5.7.1.2 Changes in NRK’s financing

The Broadcasting Act was adopted in 1992. At the occasion of NRK’s transformation into a limited liability company in 1996, the Broadcasting Act was amended to include section 6-1 of the Broadcasting Act, which stipulates NRK’s public service remit. It contained the same tasks as given to NRK under NRK’s 1988 Company Statutes.

The 1992 Broadcasting Act contained a provision in section 6-4 concerning NRK’s financing from the licence fee and sales revenues. Already before the Broadcasting Act, NRK had received support for its public service broadcasting activities by means of the collected licence fee as far back as 1924 for radio broadcasting and 1957 for television broadcasting. Section 6-4 has been amended twice, in 1996 and in 2000. The first change concerned NRK’s transformation from a public foundation into a limited liability company.⁵¹ According to the second amendment, the income base for NRK was extended as the company was allowed to use advertisement on its teletext and Internet services as a source of revenue, and to finance part of its public service activity through private sponsorship agreements.⁵² NRK was also allowed to engage in commercial activities outside the public service remit (section 6-1 of the Broadcasting Act) *via* subsidiaries. Before that amendment, NRK was allowed to conduct commercial activities, but only in relation to the public service, whereas this limitation is given up with the amendments of the Broadcasting Act in 2000.

5.7.2 Other broadcasting provisions

The Regulation on television receivers has not been substantially amended since its introduction in 1980. The regulation was amended once in 1997.⁵³ The amendment only concerned a change from annual payment to a six month term in section 2 of the Regulation on television receivers.

NRK first adopted its Company Statutes in 1988, when it was organised as a foundation. NRK’s Company Statutes of 29 April 1988 contained the public service tasks. NRK was to produce and transmit radio and television programs in the public good and engage in other activities related to this. The current NRK’s Company Statutes were established for the constituting General Assembly on 30 April 1996. On that day, NRK was organised as a limited liability company. The public service tasks were laid down in the purpose clause: NRK was to carry out public service broadcasting in radio and television, and engage in other activities related to this. Overarching public service requirements for this activity were laid down. On 20 June 2002, an amendment related to the tasks of the Board was effectuated. On 14 June 2004, a more detailed regulation of the public service tasks was introduced.⁵⁴ Two amendments of 21 June 2005 related to the debt in the company and to NRK’s orchestra.

The Commercial Guidelines of NRK were adopted 10 November 2003. They have never been amended.

⁵¹ Act No 6 of 2 February 1996 (*Lov om endringer i lov av 4. Desember 1992 nr. 127 om kringkasting*).

⁵² Act No 6 of 14 January 2000 (*Lov om endringer i lov av 4. Desember 1992 nr. 127 om kringkasting*).

⁵³ Regulation No 235 of 19 February 1997 (*Forskrift om endring av forskrift om fjernsynsmottakere*).

⁵⁴ See the current wording of sections 3-1 to 3-6 of the Broadcasting Act.

6 Article 17 (2) letter

Based on the information submitted by the complainant as well as the information by the Norwegian authorities, the Authority carried out a first assessment under the state aid provisions of the EEA Agreement. Pursuant to Article 17 (2) in Part II of Protocol 3, it informed the Norwegian authorities of its preliminary view that the existing financing regime was no longer compatible with the functioning of the EEA Agreement. In this so-called Article 17 (2) letter of 12 May 2005, the Authority invited Norway to submit comments.

The Authority's services considered that the licence fee funding of NRK constituted state aid of an existing nature, which is, however, not compatible with the functioning of the EEA Agreement, based on the following considerations.

6.1 Definition of the public service

The Authority's services expressed concerns about the absence of a sufficiently clear definition of what constitutes a public service, in particular with regard to the activities of NRK on new media platforms. The Authority's services expressed concerns that the notion of "related activities" as mentioned in section 6-1 of the Broadcasting Act was not sufficiently defined in order to cover these activities with the public service remit. As to the notion of "editorial content" which is supposed to be part of NRK's public service remit, as expressed in section 3-2 of NRK's Company Statutes, the Authority's services were concerned that this did not sufficiently state which kind of content would be distributed on the platforms. That entailed the danger that the commercial services of NRK would be supported by the licence fee financing. The Authority's services quoted some examples from NRK's webpage and the teletext services, for which the classification as a public service was doubtful (for instance chat rooms, games).

6.2 Entrustment

The Authority's services further found that there was no appropriate *ex ante* mechanism which would ensure that new activities would be formally entrusted to NRK as part of its public service remit.

6.3 Separate accounting

The Authority's services noted that not all commercial activities were carried out by subsidiaries, but that some commercial activities were carried out within NRK. The Authority's services stated that with regard to these services, a system of separate accounting should be introduced.

6.4 Commercial dealings, in particular with subsidiaries

The Authority's services were further concerned about whether the dealings between NRK and its subsidiaries were established at arm's length. The services noted that this requirement was laid down in NRK's Commercial Guidelines, which could, however, be changed at any moment by NRK's Board with the approval of NRK's General Assembly. In addition, it was not clear whether or not the supervision of the respect of this principle was controlled by the Auditor General.

6.5 Supervision/monitoring

Regarding the supervision of whether the public service had been supplied as foreseen, the Authority's services preliminarily found that this control should be carried out by a body

which is independent from NRK and its owner, the Minister of Culture. The Media Authority, which monitors NRK's programmes, is, however, a subordinated agency of the Ministry of Culture.

As regards the role of the Auditor General, the Authority's services were not certain, to which degree the Auditor General was obliged to carry out an assessment of NRK's commercial behaviour. In particular, the Authority's services could not establish whether the assessment carried out by the Auditor General would include the respect for NRK's commercial guidelines, in particular the respect for the arm's length requirement and the prohibition of cross subsidisation.

6.6 Calculation of net costs of the public service

The Authority's services further noted that the way the licence fee funding of NRK was handled, did not ensure that only the net costs of the public service mission were covered as required by section 24C 6.3.3. of the Broadcasting Guidelines.

6.7 Conclusion

In its Article 17(2) letter, the Authority's services stated that the above concerns could be relieved if the following conditions were fulfilled:

- A clear definition of the public service remit as regards "related activity" referred to in section 6-1 of the Broadcasting Act is implemented.
- An *ex-ante* mechanism for inclusion of new public service activities in the public service remit is implemented.
- An independent authority which monitors the fulfilment of the public service remit is established.
- To the extent commercial activities are carried out within NRK, a separation of accounts is implemented in accordance with the Transparency Directive.
- All financial relations between NRK and its commercial subsidiaries should follow market practice. Any commercial exploitation of the public service should be in line with market practice. This implied a duty not to undercut advertising price. An independent authority should periodically assess compliance with these rules.
- The net benefit of the commercial exploitation is taken into account when calculating the net public service costs and relating compensation.

7 The reaction of the Norwegian authorities to the Article 17 (2) letter

7.1 The letter of 20 June 2005

The reaction of the Norwegian authorities to the Article 17 (2) letter in its letter of 20 June 2005 can be summarised as follows.

Regarding the definition of the public service remit, the Norwegian authorities referred to the 2004 amendment of NRK's Company Statutes which provided a clarification of what was considered to be within the remit and what should fall outside. As to the definition of the public service, the Norwegian authorities stated that although the "related activities" were not explicitly defined in the Statutes, section 6-1 of the Broadcasting Act covered

also activities on other platforms and sections 3-1, 3-2 and 3-3 of NRK's Company Statutes were to be understood to apply to these services as well. Nevertheless, the Norwegian authorities seemed to agree that the definition of what constitutes a public service in relation to new media services could have been more precise.

With regard to the entrustment and the absence of an *ex ante* entrustment mechanism, the Norwegian government stated that NRK as a limited liability company was obliged to present to its General Assembly all cases of essential, fundamental, political or social importance. The plans were public and competitors could access them. However, the Norwegian government expressed its intention to clarify the public service remit for services outside the core channels. The Norwegian authorities intended to examine whether the current *ex ante* control related to the General Assembly's handling of NRK's planned activities should have been amplified.

As to the requirement of keeping separate accounts between commercial and public service activities, the Norwegian authorities pointed out that in its relation to *NRK Aktivum* as a separate legal entity, this criterion was fulfilled. All costs specific to non public service activities were shown in the accounts of *NRK Aktivum*. With regard to commercial activities within NRK, the Norwegian authorities admitted that indeed some activities of a commercial nature were conducted within NRK (worth 60 million NOK in 2004). The Norwegian authorities promised to ensure that to the extent that commercial activities were conducted within NRK, a separation of accounts would be implemented.

Concerning the supervision/monitoring, the Norwegian authorities were aware of the objections which could have arisen from the role of the Ministry of Culture as the preparatory body for the General Assembly and at the same time as superior body to the Media Authority. Works had been started to remedy this problem.

With regard to the role of the Auditor General, the Norwegian authorities pointed out that his standard of examination included scrutiny to ensure that competition is not distorted, e.g. as a result of high share of equity capital. The Auditor General reported to the Storting. The Norwegian authorities reiterated that a substantial part of the yearly meeting between NRK and the Auditor General was devoted to the respect of the arm's length requirement. The Norwegian authorities pointed to the decision of the European Commission (hereinafter referred to as the Commission) concerning BBC licence fee,⁵⁵ in which a similar structure was considered sufficient to prevent cross-subsidisation and disproportional market conditions.

As regards calculation of net service costs, the Norwegian authorities admitted that there were no explicit provisions on how the licence fee should be calculated. The Norwegian authorities pointed to the fact that each year the Board submitted a document to the Ministry of Culture, which accounted for the economic development of the company as well as the main plans for the future. It concluded with an assessment of the financial needs of the company and a proposal of the licence fee. NRK also published an annual report and accounts on how it had delivered against its public service remit. On the basis of these document, the Government placed a motion before the Storting on the proposed level of the licence fee. The Norwegian authorities argued in their response to the Article 17(2) letter that the Government also informed the Storting about the financial situation of NRK, including about the revenues from sources other than public service broadcasting. The Norwegian authorities argued that this mechanism was sufficient to guarantee a

⁵⁵ Commission's Decision N 631/2001 of 22 May 2002, *BBC licence fee*, OJ C 23 of 30.1.2003, p. 6.

subsidy of only the net public service costs. They agreed however with the Authority that NRK's commercial revenues should have been taken into account when the Storting fixed the level of the licence fee.

7.2 Further discussions with Norway and the White Paper on Broadcasting in a Digital Future

In three subsequent letters, namely of 24 April 2006, 13 November 2006 and 21 May 2007 as well as in further email correspondence (in particular email of 10 June 2008), the Norwegian authorities explained the ongoing debate about a review of the public service broadcasting system in Norway as laid down in a Government's White Paper No 30 (2006-2007) Broadcasting in a digital future, presented to the Storting on 11 May 2007.⁵⁶ On 24 February 2009, Storting approved NRK's Statement of Commitments, which is to be further incorporated into the NRK's Statutes.⁵⁷ On 24 April 2009, a White Paper No 81 containing proposals to amend broadcasting legislation was presented to the Norwegian Parliament.

In the following, the Authority will describe the Norwegian proposals for modifications of the current system.

7.2.1 Definition of the public service

The Norwegian authorities stated that for the definition of the public service remit they would introduce amendments which emphasised the obligation to offer services that met the democratic, social and cultural needs of the population and specified that purely commercial services would fall outside the public service remit. The definition would contain a list of services which were clearly not considered to fall within the public service remit.

The latest proposal reads as follows, see draft section 11 of NRK's Company Statutes:

“§ 11 General rules concerning the public service broadcasting activities

NRK's public service broadcasting activity shall comprise program activity and other editorial activity on radio, television and other media platforms (Internet and mobile platforms). In this context editorial activity shall mean inter alia production and distribution of content edited according to journalistic criteria and user-generated content.

The provisions in Chapter II regulate NRK's entire activities on radio, television and Internet respectively. Provisions specifically regulating certain distribution platforms do only apply to that platform.

Pay-services which are offered with the aim of generating profits for the NRK, e-commerce, advertisements and sponsorships will in all cases fall outside the public service remit.”

For user-generated content, NRK has *inter alia* provided the following example, which in its view, pertains to its public service remit. *Lokal Torget* (“The Local Square”) is a net-

⁵⁶ St.meld. nr. 3 (2006-2007) Kringkasting i en digital fremtid, url: <http://www.regjeringen.no/pages/1974790/PDFS/STM200620070030000DDDDPDFS.pdf>

⁵⁷ St. meld. nr. 6 (2008-2009) NRK-plakaten – NRK samfunnsoppdrag, presented on 7.11.2008, see e-mail from the Norwegian authorities of 2 April 2009, Event No 514310.

based platform where the audience is invited to comment and debate local cases and events. It is also open for uploading photos and videos in addition to text. The service is also used as a local calendar of cultural events, giving users a chance to share cultural experiences. The service is connected with NRK's district offices and the Sami web-pages.

Chapter II of the draft NRK's Company Statutes contains the following provisions:

According to section 12 of the draft Statutes, NRK should be editorially independent and it should support and promote the democratic process and diversity of opinions. It should enable the public to have access to information in order to participate in the democratic process. Furthermore, it obliges NRK to act as a "watchdog" and to contribute to the protection of individuals, or groups of individuals from infringements of their rights. Finally, it states that NRK should be independent with reference to several soft law documents applicable to the Norwegian press in general.

Section 13 of the Statutes stipulates that NRK should be universally accessible, and that in principle, the three main television stations and three main radio stations should be available, free of charge for licence fee payers. Subtitles should normally be available for all television broadcasting. NRK should develop new services for all important media platforms ensuring a broad accessibility. NRK should use open standards unless economic or quality concerns demand otherwise.

Section 14 of the draft Statutes stipulates that NRK should foster Norwegian culture, language and identity. To obtain this goal NRK shall:

- a. reflect Norway's geographical diversity;
- b. broadcast programming for national and linguistic minorities and specifically, NRK should contribute to the strengthening of Sámi language, identity and culture with daily broadcasts. A large part of the programming shall be rooted in Norwegian culture and shall mirror Norwegian realities;
- c. mirror and spread knowledge of the pluralism of the Norwegian society;
- d. mainly broadcast content in the Norwegian language. At least 25 % shall be in the New Norwegian language (*nynorsk*);
- e. either produce content in different regions of Norway or produce content where the different regions of Norway are the subject matter. NRK shall broadcast such programming every day of the week;
- f. present a broad spectrum of Norwegian culture;
- g. broadcast and produce Norwegian music and drama. NRK shall show Norwegian films and stimulate the Norwegian film community. At least 35% of the music broadcasted shall be Norwegian. Of these 35%, the emphasis should be on music in the Norwegian language and music composed by Norwegians. NRK is obliged to maintain an orchestra playing everything from music for entertainment to symphonic music;

- h. spread the Norwegian cultural heritage, partly by maintaining NRK archives. The archives shall be digitalised and as a main rule, available to the public without cost.
- i. broadcast sports programming reflecting the width of Norwegian sports, hereunder including the sports of the physically disabled and large sporting events.

Section 15 of the draft Statutes stipulates that NRK shall:

- a. produce content of high quality that can be a source for enlightenment, contemplation and knowledge
- b. be innovative and contribute to the development of quality content;
- c. be allowed to broadcast the same type of content that commercial actors are broadcasting. In doing so, NRK shall aspire to make content with an inherent value for society that might be missing from the content broadcasted by the commercial actors;
- d. broadcast thematically and stylistically varied content;
- e. offer certain specific types of content, mainly news and news related programming as well as programming with cultural content;
- f. heighten awareness about international relations;
- g. broadcast content from the Nordic countries that shall contribute to spreading knowledge about Nordic societies, cultures and languages;
- h. contribute to education, partly by offering programming prepared for Norwegian schools;
- i. further children's right to free speech and access to information and protect children from harmful content.

Section 16(a) of the draft Statutes stipulates that NRK's editorial decisions shall not be made on the basis of commercial considerations.

Section 16(b) stipulates that NRK's broadcasts on radio, television and teletext shall be free of commercials and shall not contain commercial-like references to NRK's commercial services or products.

Section 16(c) stipulates that NRK's web pages can contain advertising with the exception of web pages that are directed towards children. NRK shall aspire to make a clear separation between its services as a public broadcaster and services of a commercial nature offered on-line. Download services part of the public broadcasting area shall not contain advertising. NRK should be careful about offering services that expose the public to commercial pressure. This especially applies to programming directed towards children and youngsters.

Section 16(d) stipulates that commercial activities shall not be subsidised by licence fees and other public funding. There shall be a clear division of commercial activities and the public broadcasting activities in the annual accounts, and in the management of NRK.

Section 16(e) stipulates that NRK's public broadcasting activities shall mainly be financed by licence fees. This applies to NRK's broadcasting in all media platforms.

Section 16(f) stipulates that NRK shall be allowed to develop commercial services generating profit that contributes to the financing of the public broadcasting services. The commercial activities shall be in accordance with the standards of quality and integrity that applies to NRK.

Section 17 of the draft Statutes stipulates that NRK shall educate and stimulate users of all ages in order for them to use new forms of media. NRK's on-line services represented by moving images, sound and text shall contain an updated offering of:

- international and national news,
- regional news and other regional content,
- content for children and youngsters developed by NRK,
- facts and background info for news, debates and current affairs,
- arts and culture,
- sports and entertainment,
- services and games that stimulate interactive participation.

NRK shall make available on-line as much of its radio and television programming as possible, for live transmission and for archival availability *via* streaming and/or downloading. In this regard, NRK shall, as a minimum, make its complete self-produced programming from the seven preceding days available as an archival service as long as this does not entail a disproportionately high cost. NRK shall strive to make most of the other programming from the seven preceding days available as an archival service.

NRK's on-line programming shall, as a principal rule, be available without cost to the end user. Where the broadcasting of such programming entails certain special costs, NRK is allowed to require the end user to cover these costs.

The preceding paragraph does not prevent NRK from offering programming as commercial publications. Such publications are not considered as a part of its public broadcasting activity and shall not be of such a scope as to undermine the main principle which entails that NRK's programming on-line shall be offered free of charge.

Section 18 of the draft Statutes provides that NRK shall prepare an annual account of public broadcasting (*allmennkringkasterregnskap*) by the end of March each year, accounting for the undertaking's public broadcasting activities for the preceding year.

The definition will be made public and included in NRK's Company Statutes, which, as NRK is a limited liability company, is available to all interested parties. In addition, the Statutes are published on the website of the Ministry of Culture. NRK's public service report, which it has to prepare each year, shall elaborate on the new criteria as stipulated above.

Regarding the inclusion of certain pay services into the public service remit, the Norwegian authorities argued that certain personalised on-demand services might be included in the public service remit even if they required the end users to pay a charge.

This is the case where the payment merely covers variable costs offering certain services, for instance coverage of costs related to the provision of a programme from the archive on-demand or remunerating copyright fees. If a user asks NRK to provide him/her with a specific programme from the archives, NRK will have expenses connected to the searching for the programme, making it available etc. Even though maintaining the archive and making it available to the public should be considered as part of the public service remit, the Norwegian authorities found it reasonable that the user requiring the personalised service cover the variable costs incurred by NRK following the request. Another example is access to a specific programme containing material covered by copyright, such as music. Such programmes are currently available for podcast most often without the musical content included in the original programme, due to *inter alia* additional expenses related to copyright costs for every download of the programme. The Norwegian authorities found it appropriate that NRK was allowed to charge a small fee covering these costs, so that the radio listener can enjoy the programme in its original version.

In order to include pay services in the public service remit, such services must fulfil democratic, social and cultural needs of society. Programmes available for download are programmes with content initially created within the limits of the public service remit. Thus, NRK should be enabled to make these productions available on new distribution platforms. In order to be able to do that, NRK must adapt to the economic rationale of each platforms. In some instances, that may implicate an element of remuneration.

The Norwegian authorities confirmed that the Media Authority would examine all NRK's existing services on the new media platforms and assess whether they fall within the public service remit.

7.2.2 *Entrustment*

As to the entrustment, the Norwegian authorities indicated that they might establish a system, by amending the Broadcasting Act, whereby NRK should obtain the approval of the King in Council when establishing new permanent programme channels or other considerable extensions of the public service broadcasting offer. Accessibility to the public could be guaranteed by publishing press releases and publishing relevant information material on the Ministry of Culture's website. While the entrustment process would be initialised by NRK, the Media Authority needs to give a non-binding opinion after a public hearing which gives all interested parties three weeks to comment. In detail, the current draft provisions reads as follows:

“NRK must obtain an ex ante approval from the King in Council before introducing new services that will represent a significant change in the current range of PSB services offered to the public. When determining whether a new service will represent such a significant change, importance should be attached to inter alia the similarity of the service to the NRK's existing range of services, whether the service will be offered on a permanent or temporary basis, what impact the service will have on the market and the costs involved in order to offer the service.

Only services that fulfil democratic, social and cultural needs of society may be included in the PSB remit. When determining whether a new service fulfils democratic, social and cultural needs of society, importance should be attached in particular to whether the service may contribute to the fulfilment of the principal public service obligations of the NRK as laid

down in the company statutes and whether the service contains an element of added public value relative to potential commercial offers already existing in the market. This must be weighed against the potential restrictive impact of the services on competition.

Section 6-2 Assessment of the need for ex ante approval

If the NRK wishes to introduce any new permanent or temporary radio or TV channels, it must first obtain an assessment from the Media Authority. The assessment shall determine whether the proposed new service meets the criteria for significance in section 6-1, first subsection, and thus whether the proposed new service should be subject to ex ante approval. The Media Authority shall carry out such an assessment within [two] weeks following the receipt of a request from the NRK.

The setting up of temporary radio and TV channels as a result of emergencies or other similar extraordinary situations do not require an ex ante approval, and is as such outside the scope of subsection 1.

Section 6-3 The procedure to be followed when obtaining an ex ante approval

If the setting up of a new service is subject to ex ante approval in accordance with section 6-1, first subsection, the Media Authority shall issue an advisory opinion on whether the criteria in section 6-1, second subsection are fulfilled. Before issuing the advisory opinion and sending the request to the King in Council for final decision, the Media Authority shall submit the NRK's reasoned proposal for the introduction of the new service concerned to a public hearing with a deadline for responses of at least three weeks.

If the King in Council decides to include the service in the remit, its decision shall specify the scope of the service's content. The King in Council's decision may not be subject to an administrative appeal."

The Norwegian authorities explained that there was no administrative body with a higher rank than the King in Council in Norway. However, the decision could be judicially reviewed in a court of law.

Regarding short duration services, the Norwegian authorities explained that the Media Authority would determine whether a new radio or television channel should be subject to the *ex ante* mechanism and short-duration services would not automatically be exempted from the *ex ante* mechanism unless they were set up to cover emergencies and other extraordinary situations.

7.2.3 Monitoring of the fulfilment of the public service obligation

As to the monitoring of the fulfilment of the public service remit, the Norwegian authorities expressed their intention to introduce an amendment to the Broadcasting Act which precludes the Ministry of Culture from instructing the monitoring body, the Media Authority, in matters regarding the Media Authority's preparation of the annual public service broadcasting report. The draft proposal reads as follows:

“The Media Authority will on an annual basis prepare a report on the broadcasters’ fulfilment of the public service remit. During the preparation of the report, the Media Authority cannot be instructed.”

7.2.4 Separation of accounts between public service and non public service activities

With regard to the separation of accounts, the Norwegian authorities stated their will to insist on NRK implementing separate accounts for public service activities and non-public service activities within the company. The latter refers to the running of NRK’s canteen and income from the letting of parking space (for which, however, separate accounts exist already) as well as office space, which is an ordinary income liable to income tax. The envisaged changes in the draft section 10 of NRK’s Company Statutes reads as follows:

“NRK can carry out commercial activities. With regard to accounting and operation, there shall be a clear separation between NRK’s commercial activities and their public service activities.

Principally, commercial activities shall be carried out in subsidiaries and the activities shall be compatible with NRK’s requirements for quality and integrity. To the extent that the NRK carries out activities within the mother-company that fall outside the scope of its PSB remit, the NRK is required to keep separate accounts for these activities”

7.2.5 Calculation of net public service costs

The Norwegian authorities stated explicitly in the draft section 10 of NRK’s Company Statutes that in principal, NRK’s public service activities, for both traditional broadcasting and new services, shall be financed through the licence fee. In principle, NRK’s annual revenues and expenses should be balanced. Further, section 10 of draft NRK Statutes stipulates that revenues from the licence fee shall not cross-subsidise commercial activities. All transactions between activities financed by the licence fee and commercial activities shall be carried out on ordinary market terms. NRK’s external auditor shall each year issue a report regarding this. All profits from commercial activities shall be used to finance public service activities.

As confirmed by the Norwegian authorities, the calculation of the net public service and the relating compensation should in the future be carried out by the way of deduction from the gross public service costs of the following elements:

- income from the public service mission within NRK (e.g. financial income, income from sales of fixed assets);
- commercial income (i.e. income from *NRK Aktivum*, royalties and sponsorship, income-including profit from non-public service activities within NRK, such as parking space and office space rental, sales in the canteen);
- profit from subsidiary companies (i.e. dividends from subsidiary companies).

NRK shall each year present to the general assembly a report which displays discrepancy between calculated net public service costs and the final account. If licence fee revenues exceed the actual costs for fulfilling the public service mission up to 10%, such over-compensation may be carried forward to the next year. If licence fee revenues exceed the actual costs for fulfilling the public service mission with more than 10%, the exceeding amount shall be repaid to the state. This amount will, however, be transferred to NRK the subsequent year and the licence fee for the same year will be reduced accordingly. If NRK is in an exceptional situation where specific investments are necessary for the operation of

the public service remit, over-compensation in excess of 10% may be justified on an individual basis.

The situation will be reviewed every four years. All over-compensation discovered at the end of that period should be repaid.

The Ministry has recently developed a standard model in Excel for calculating the licence fee. This standard model has been announced to NRK by a formal letter.

7.2.6 Relations with subsidiaries

Concerning the financial relations with subsidiaries, the Norwegian authorities repeated that the external auditor was obliged to check the arm's length principle. Article 10 of the draft amendments in NRK's Company Statutes introduces the obligation that a report on this should be written:

“Revenues from the licence fee shall not cross-subsidise commercial activities. All transactions between activities financed by the licence fee and commercial activities shall be carried out on ordinary market terms. The NRK's external auditor shall each year issue a report regarding this. All profits from commercial activities shall be used to finance public service activities.”

Furthermore, the prohibition of cross-subsidisation, which was so far only incorporated in NRK's Commercial Guidelines, is now also stipulated in the draft amendments of NRK's Company Statutes.

II. ASSESSMENT

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

1.1 Article 61(1) of the 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.”

That means that the measure must be granted by the State or through state resources and confer on the beneficiary undertaking advantages that relieve it of charges that are normally borne from its budget. Furthermore, the measure must be selective in that it favours “*certain undertakings or the production of certain goods*”. Finally, the measure must distort competition and affect trade between the Contracting Parties.

1.2 Presence of state resources

1.2.1 Licence fee

Not only aid granted directly *via* the state budget falls within the definition of state aid in Article 61(1) of the EEA Agreement. The notion is to be interpreted widely and also

covers compulsory contributions imposed by state legislation.⁵⁸ Likewise, contributions which are levied in favour of a body, which is part of the state or which exercises powers characteristically vested in the structure of the state,⁵⁹ are classified as state resources as well as resources, which – while not being held permanently by the state treasury – are continuously subject to the state’s control.⁶⁰ In *Pearle*, the Court of Justice of the European Communities (hereinafter referred to as the Court of Justice) also distinguished between the situation in which a levy is collected for purely commercial purposes or in order to implement a policy determined by the state.⁶¹

Firstly, in the case under investigation, the level of the licence fee is fixed by the Storting upon proposal from the Government. By virtue of section 1 of the Regulation on television receivers (in conjunction with section 8-3 of the Broadcasting Act) this levy is further, imposed by the State on all owners of a receiver, irrespective of whether or not the appliance is used to watch the programmes of NRK.⁶² This demonstrates that the fee is mandatory and does not constitute remuneration for a contractual obligation.

Secondly, overdue licence fees are secured with an execution lien in the television receiver which represents a sufficient basis for execution procedures that are carried out according to the Broadcasting Act on forceful execution (cf. section 8-4 of the Broadcasting Act). NRK does not need to obtain a court decision to enforce its claims, but can directly rely on the lien to enact enforcement *via* the execution officer or the State Collection Agency.⁶³ It therefore exercises public power, which is different from the enforcement possibilities of private individuals.⁶⁴

The licence fee is, further, not levied for commercial purposes but in the public interest in order to finance the public service activities of NRK (cf. section 6-4 of the Broadcasting Act). With the State determining the objective and level of the licence fee as well as granting NRK enforcement possibilities under public law, the levy is under constant control by the State.⁶⁵

The Authority therefore considers the licence fee funding of NRK to constitute a transfer of state resources within the meaning of Article 61(1) of the EEA Agreement.

⁵⁸ *E.g.* parafiscal charges, see Case 173/73, *Italy v Commission* [1974] ECR-709, paragraph 16.

⁵⁹ Opinion of Advocate General Ruiz-Colomer in Case C-345/02 *Pearle and Hoofbedrijfschap Ambachten* [2004] ECR I-7139, paragraph 67.

⁶⁰ Case C-83/98 *Ladbroke Racing* [2000] ECR I-3271, paragraph 50 and Advocate General Ruiz-Colomer in Case C-345/02 *Pearle and Hoofbedrijfschap Ambachten* [2004] ECR I-7139, paragraph 67, See also EC Commission Decisions N 631/2001, *BBC licence fee*, paragraph 20 and C 2/03 (ex NN 22/02), *State financing of Danish public broadcaster TV2 by means of licence fee and other measures*, OJ C 59, 14.03.2003, p.2.

⁶¹ Case C-345/02 *Pearle and Hoofbedrijfschap Ambachten* [2004] ECR I-7139, paragraphs 37 and 38.

⁶² See in this respect Commission Decision NN 88/98, *Financing of 24 hour advertising free news channel out of the licence fee by the BBC*, SG(99) D/10201, paragraph 22: “The licence fee represents an obligation, imposed by the public authorities, on all owners of a receiving appliance, irrespective of whether or not the appliance is actually used to watch the programmes of BBC.”

⁶³ The State Collection Agency is only responsible for collecting claims in favour of the State, State agencies and State enterprises, but not in favour of private persons.

⁶⁴ The Norwegian Government itself has stressed that for the enforcement of the licence fees, NRK is in a better position than for ordinary debts.

⁶⁵ In this respect it does not matter that the collected fee is not transferred to NRK *via* the State budget, but stays within NRK budget, see Commission Decision N 631/2001, *BBC licence fee*, cited above, paragraph 20.

1.2.2 Tax exemptions

The Norwegian authorities clarified that NRK's subsidiaries were tax liable and that commercial activities within NRK were also subject to income tax. However, NRK is not income tax liable for income stemming from the company's ordinary production or broadcasting activities.⁶⁶ The foregone income tax revenues resulting from this exemption are state resources within the meaning of Article 61(1) EEA Agreement.

1.3 Economic advantage

The aid measure must confer on NRK advantages that relieve it of charges that are normally borne from its budget. That means that the licence fee funding and the income tax exemption have to confer an economic advantage upon NRK that it would not have enjoyed under normal market conditions.

The licence fee funding constitutes the main source of income of NRK. It relieves NRK from covering the costs which would normally have to be borne by NRK's own budget. At the outset it therefore constitutes an advantage in favour of NRK.⁶⁷ However, such an advantage might not exist if the licence fee funding fulfils the criteria set out by the Court of Justice in the *Altmark* judgment⁶⁸.

According to *Altmark*, public subsidies compensating the costs of a service of general economic interest (hereinafter referred to as SGEI) do not qualify as state aid within the meaning of Article 61(1) of the EEA Agreement, if the compensation is determined in such a way that it prevents a real advantage in favour of the undertaking. In order to assess this, the Court of Justice held that four conditions have to be fulfilled, namely:

“First, the recipient undertaking is actually required to discharge public service obligations and those obligations have been clearly defined;

Second, the parameters on the basis of which the compensation is calculated have been established beforehand in an objective and transparent manner;

Third, the compensation does not exceed what is necessary to cover all or part of the costs incurred in discharging the 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 is not chosen in a public procurement procedure, the level of compensation needed has been determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of [in the *Altmark* case] transport so as to be able to meet 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.”*

The Authority considers that, in the present case, at least the second and the fourth conditions set out in the *Altmark* case law are not fulfilled. As regards the second

⁶⁶ See section 5.4.2 and footnote 49 above

⁶⁷ Cases T-106/95 *FFSA and Others v Commission* [1997] ECR II-229; T-46/97 *SIC v Commission* [2000] ECR II-2125 and C-332/98 *France v Commission* [2000] ECR I-4833.

⁶⁸ Case C-280/00 *Altmark Trans GmbH, Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH* [2003] ECR I-7747.

condition, the parameters on the basis of which the compensation is calculated are not established in advance in an objective and transparent manner. As regards the fourth condition, NRK has not been chosen as the public service broadcasting provider on a basis of a tender, nor has any analysis been carried out to ensure that the level of compensation is determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with the appropriate production means so as to be able to meet 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.

Therefore the Authority's conclusion is that the licence fee funding and the income tax exemption constitute an economic advantage in NRK's favour within the meaning of Article 61(1) of the EEA Agreement.

1.4 Selectivity

NRK is the only broadcaster in Norway which benefits from licence fee funding and an income tax exemption. Therefore NRK is favoured compared to its competitors, for instance the complainant, who do not receive the same economic advantages.

The Authority's conclusion is, thus, that the licence fee funding and the income tax exemption has to be regarded as a selective measure within the meaning of Article 61(1) of the EEA Agreement.

1.5 Distortion of competition and effect on trade between Contracting Parties

In this context, the Broadcasting Guidelines refer to the case law of the Court of Justice that *“state financing of public service broadcasters can generally be considered to affect trade between Contracting Parties to the EEA Agreement. This is clearly the position as regards the acquisition and sale of program rights which often takes place at an international level. Moreover, the ownership structure of commercial broadcasters may extend to more than one EEA State”*.⁶⁹

NRK is active on the international market as, through its membership in the European Broadcasting Union, it exchanges television programs and participates in the Eurovision system. In addition, NRK is in direct competition with commercial broadcasters that are active on the international broadcasting market and have an international ownership structure. It also competes in the advertising markets and in the new media services. 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.⁷⁰ The licence fee funding and the income tax exemption put at NRK's disposal have provided it with a competitive advantage to acquire audiovisual rights and to invest in programmes that can subsequently be sold.

The Authority concludes that the licence fee and income tax exemption granted in favour of NRK distort competition and are liable to affect trading conditions between Contracting Parties to the EEA Agreement.

⁶⁹ See section 24C.4.1 (3) of the Broadcasting Guidelines.

⁷⁰ 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.

1.6 Conclusion with regard to the presence of state aid

Since all the conditions set out in Article 61(1) of the EEA Agreement are fulfilled, the Authority considers that the licence fee funding and the income tax exemption in favour of NRK constitute state aid.

2 Qualification of the state aid measures involved as existing vs new aid

According to Article 1(b)(i) of Part II of Protocol 3, existing aid shall include:

“all aid which existed prior to the entry into force of the EEA Agreement in the respective EFTA States, that is to say, aid schemes and individual aid which were put into effect before, and are still applicable after, the entry into force of the EEA Agreement”

According to Article 1 (c) in Part II of Protocol 3 and Article 4 of the Authority’s Decision No 195/04/COL, alterations to existing aid, which are not only of a purely formal or administrative nature, constitute new aid.

In *Namur les Assurance*,⁷¹ the Court of Justice held that the emergence of new aid cannot be decided according to the scale of the aid or its amount in financial terms at any moment in the life of the undertaking if the aid is provided under earlier statutory provisions which remain unaltered. As far as the amendments of the legal basis for the aid do not “*affect the aid arrangements put in place by that legislation*” or “*affect the system of aid established by that legislation*” in relation to the nature of the advantages granted, there is no alteration to the existing aid.⁷² It is only when the alteration is substantial that the measure changes its classification to new aid. The Court of First Instance of the European Communities (hereinafter referred to as the Court of First Instance) supplemented this by stating that the emergence of new aid occurs when the alteration affects the actual substance of the original scheme, of which there can be no question, where the new element is severable from the original scheme.⁷³ It is against this background that the Authority analyses whether changes to NRK’s financing system turn either the whole aid into new aid or whether the amendments comprise separable aid elements.

When NRK was reorganised in 1988 from a public enterprise into a public foundation, it was entrusted with the obligation to provide public service broadcasting.

NRK has received support for its public service broadcasting activities by means of a licence fee as far back as 1924 for radio broadcasting and 1957 for television broadcasting. These measures as well as the Broadcasting Act of 1992, which explicitly provided for NRK’s licence fee funding, were thus established before the entry into force of the EEA Agreement in Norway on 1 January 1994.

The Regulation on television receivers has not been substantially amended since its introduction in 1980. The only amendment in 1997⁷⁴ concerned solely a change from the system of annual licence fee payments to a six months term (cf. section 2 of the Regulation on television receivers).

⁷¹ Case C-44/93, *Namur-Les Assurances du Crédit SA v Office National du Ducroire and the Belgian State* [1994] ECR I-3829, paragraph 28.

⁷² *Namur-Les Assurances*, cited above, para 29 and 35.

⁷³ Case T-195/01 and T-207/01, *Government of Gibraltar v Commission* [2002] ECR II-2309.

⁷⁴ Regulation No 235 of 19 February 1997 (*Forskrift om endring av forskrift om fjernsynsmottakere*).

Likewise, the relevant section 6-4 of the Broadcasting Act has not been substantially amended since 1992. As already mentioned above, the provision was amended in 1996 and in 2000.⁷⁵ In 1996, the change only concerned NRK's transformation from a public foundation into a limited liability company. This amendment of the status of the beneficiary did not affect the nature of the public support in its favour. Thus, in the Authority's view, the 1996 amendment to the Broadcasting Act does not constitute a significant change and therefore does not alter the existing nature of the existing licence fee regime into "new aid". The second amendment took place in 2000,⁷⁶ when the income base for NRK was extended as the company was allowed to use advertisement on its teletext and Internet services as a source of revenue, and to finance part of its public service activity through private sponsorship agreements. NRK was also allowed to engage in commercial activities outside the public service remit (cf. section 6-1 of the Broadcasting Act).

The Authority is of the opinion that the extension of the income base to cover commercial revenues does not affect the licence fee funding of NRK. That the need for licence fees might be reduced due to the extension of the income base is not sufficient to constitute a significant alteration, as this only concerns the amount of the aid, and not its structure, the provisions governing it or its objective.

That NRK has, after the entry into force of the EEA Agreement in Norway in 1994, extended the scope of its activities⁷⁷ by entering into new media activities such as Internet is not sufficient to change the licence fee funding into new aid. In line with the Authority's Broadcasting Guidelines (cf. 24C.6.1 of the Broadcasting Guidelines) the dissemination of public service content *via* new technologies in the digital age can be accepted as being part of the public service remit, even if they are not programmes in the traditional sense. The Authority therefore considers that the choice of new technology is not in itself sufficient for new aid to emerge, if the substance of the licence fee funding has not been altered. Whether the on-line services offered by NRK stay materially within the definition of a service of general economic interest is a different question and will be addressed below in section concerning compatibility (section 10.2.2.3 below).

On the basis of the foregoing assessment, the Authority concludes that NRK's funding by means of a licence fee constitutes existing aid.

The legal basis for the income tax exemption in favour of NRK is laid down in sec. 2-32 of the Act No 14 of 26 March 1999 on Capital and Income (*Lov om skatt av formue og inntekt (skatteloven)*). The same exemption was contained sec. 26 (k) first intent of Act No 8 of 18 August 1911 on Capital and Income (*Lov om skatt av formue og inntekt (skatteloven)*). That means that NRK has benefited from the exemption since its inception, i.e. before entry into force of the EEA Agreement in Norway on 1 January 1994. Based on the information before the Authority, no substantial or severable changes were undertaken in the meantime to the legal basis providing for the aid measure in question. The Authority therefore concludes that also the income tax advantage granted to NRK constitutes existing aid.

⁷⁵ Act No 6 of 2 February 1996 (*Lov om endringer i lov av 4. Desember 1992 nr. 127 om kringkasting*).

⁷⁶ Act No 6 of 14 January 2000 (*Lov om endringer i lov av 4. Desember 1992 nr. 127 om kringkasting*).

⁷⁷ The entrustment of NRK with the public service broadcasting activity as such has continued since 1988, where this was provided for in NRK's Company Statutes. Later, the entrustment became part of the Broadcasting Act.

3 Compatibility of the aid

3.1 Conditions of compatibility assessment under Article 59(2) of the EEA Agreement

The existing aid measures in the form of the licence fee funding and the income tax advantage in favour of NRK can be compatible with the functioning of the EEA Agreement on the basis of Article 59(2) of the EEA Agreement which reads:

“Undertakings 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 Broadcasting Guidelines specify further how the Authority assesses aid measures granted to public service broadcasters on the basis of Article 59(2) of the EEA Agreement. The following conditions must be cumulatively fulfilled (cf. section 24C.6.(1) of the Broadcasting Guidelines):

- (i) The service in question must be a service of general economic interest and clearly defined as such by the EFTA State (definition);
- (ii) The undertaking in question must be explicitly entrusted by the EFTA State with the provision of that service (entrustment);
- (iii) The application of the competition rules of the EEA Agreement (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 EEA Agreement (proportionality test).

3.2 Definition of the public service remit

3.2.1 Requirements of the definition of SGEI in the broadcasting sector

As in the case of every service of general economic interest, the establishment of a definition of the public service mandate in the broadcasting sector falls within the competence of the EFTA State concerned. In exercising this function, the EFTA States have a wide margin of discretion regarding which services are considered as services of general economic interest within the meaning of Article 59(2) of the EEA Agreement. According to section 24C.6.1(2) of the Broadcasting Guidelines, a wide definition of the SGEI, based on balanced and varied programming, may be accepted in the specific case of broadcasting. However, an activity should be considered to meet the democratic, social and cultural needs of a society, guaranteeing pluralism, including cultural and linguistic diversity.

According to section 24C.6.1(3) of the Broadcasting Guidelines, the definition of SGEI can also include services which are not programmes in the traditional sense, such as on-line information services, to the extent that, while taking into account the development and

diversification of activities in the digital age, they are addressing the same democratic, social and cultural needs of the society in question.

Furthermore, it is important that the EFTA State concerned provides for a clear definition of the public service remit, which leaves no doubts as to whether a certain activity is intended by the EFTA State to be included in the public service remit or not. This is also important for non public service broadcasters when planning their activities (sections 24C.6.1 (6) and (7) of the Broadcasting Guidelines).

The role of the Authority is limited to assessing whether the public service definition contains any manifest error. The Authority will therefore consider below whether the definition provided for the activities of NRK fulfils the requirements of a clear public service definition.

3.2.2 Assessment of the definition of SGEI of NRK

3.2.2.1 Scope of the activities of NRK

Pursuant to Section 6-1 of the Broadcasting Act, the object of NRK consists in the provision of public service broadcasting and related activities. In addition, NRK may participate in other activities through subsidiaries.

This is further laid down in section 3-1 of NRK's Company Statutes, which specifies that the purpose of NRK is to offer public service broadcasting to the entire Norwegian population through radio, television and other media platforms.

According to section 3-2 of NRK's Company Statutes, NRK's activities are distinguished between so-called "core activities" in the form of the television channels NRK1 and NRK2 and the radio stations P1, P2 and P3, and "other editorial activities" which comprise teletext, Internet and other media platforms suitable for communicating editorial content.

3.2.2.2 Traditional public service broadcasting programmes

The Authority considers that the public service obligation referred to in section 6-1 of the Broadcasting Act and further specified as core activity NRK's Company Statutes, sections 3-3 (primary requirements for NRK's programmes), 3-4 (further requirements as regards NRK's core activities) and 3-5 (programming demands), is sufficiently precise and clear. The Authority accepts a broad definition in the Broadcasting Act, which is further defined in NRK's Company Statutes and which should ensure high quality and balanced programming and foster pluralism.⁷⁸

As NRK's Company Statutes can be accessed by every market participant – according to section 8.1 of the Business Register Act, each person can ask for a transcript of the company statutes – the Authority considers that this gives market participants sufficient planning security as far as the traditional programme activities of NRK are concerned. In this context, the Authority also notes that NRK's Company Statutes are available on NRK's website.⁷⁹

⁷⁸ Joined cases T-308/04, T-317/04, T-329/04 and T-336/04 *TV2/Danmark A/S*, judgment of 22 October 2008, not yet reported, para 117.

⁷⁹ http://fil.nrk.no/informasjon/about_the_nrk/1.4029867, printed on 26 March 2009.

In addition to the main television and radio channels as mentioned in section 3-2 of NRK's Company Statutes, NRK currently offers three television channel and a variety of niche radio channels.⁸⁰ The Authority considers that the broad spectrum of diverse content offered through the traditional broadcasting activities of NRK as a whole comply with the requirement of a balanced and varied programming in the Authority's Broadcasting Guidelines.⁸¹ Thus, traditional public service broadcasting based on television and radio programmes is regarded as a service of general economic interest within the meaning of Article 59(2) of the EEA Agreement.

3.2.2.3 Other activities, including new media

3.2.2.3.1 *The Authority's concerns in the Article 17(2) letter*

In its Article 17(2) letter, the Authority stated that it found the notion of "related services" in section 6-1 of the Broadcasting Act too vague and too broad to adequately cover the provision of new media services and the placement of content on teletext, Internet and other media platforms with the definition of SGEI. The Authority was in particular concerned that certain commercial activities could be qualified as such "related services", which would give indications for manifest errors in the definition of public service remit. Historical evidence showed that, in the past, the notion of "related services" was indeed understood as a commercial activity related to NRK's public service remit, but which did not constitute a public service in its own right.

The Authority was also not certain that the notion of "editorial content" contained in section 3-2 of NRK's Company Statutes was precise enough to accept the new media services within the definition of the public service remit. The Authority pointed out in its Article 17(2) letter that without a further specification of this notion, it could not be excluded that also commercial activities might fall under that notion. The Authority upholds this view as section 3-5 of NRK's Company Statutes, which contains a more specific and more detailed description of programmes that are considered to fall within the public service, is limited to the core activities and not to all activities with editorial content. The Authority observes that there might be a danger that without any further stipulation, almost any activity could be covered by the concept of editorial activity and this might lead to the inclusion of services which are clearly classified as being outside the public service remit in the Broadcasting Guidelines and the Commission's decision making practice (for instance sponsoring, merchandising, e-commerce, advertising).⁸² Thus, current definition of other non-traditional activities of NRK is not sufficiently precise at this stage.

3.2.2.3.2 *Proposal for appropriate measures*

The Authority finds that the amendment of the criteria for the inclusion of new media services into the public service remit would significantly improve the current not sufficiently precise definition of the public service remit. The Authority proposes the following appropriate measures as regards the definition of NRK's public service activities:

Related services

⁸⁰ http://fil.nrk.no/informasjon/about_the_nrk/1.3607220, printed on 26 March 2009.

⁸¹ See, however, further considerations with the regard to the requirement of an *ex ante* entrustment mechanism, valid also for launching of new television and radio channels.

⁸² See section 24C.6.1. (5) of the Broadcasting Guidelines.

In order to clarify the notion of “related services” in Article 6-1 of the Broadcasting Act, the Authority suggests that the Norwegian authorities specify that only services that fulfil democratic, social and cultural needs of society are included in the scope of public service tasks entrusted to NRK. In order to incorporate any new service, including on new media platforms, into this definition, an *ex ante* entrustment procedure with certain specific assessment criteria should be established by the Norwegian authorities.

Editorial content

With regard to the notion of the editorial content in section 3-2 of NRK’s Company Statutes, the Authority suggests this notion should be replaced with a definition which states that the production and distribution of content edited according to journalistic criteria and user-generated content (cf. section 11 of the draft NRK’s Company Statutes), should constitute such editorial activity.⁸³ While NRK is allowed to broadcast the same type of content that commercial actors are broadcasting, the Authority suggests including a specification that, in so doing, NRK shall strive to impart to its services an element of public value beyond that provided by commercial services. This criterion, the compliance of which should constitute part of the monitoring of the fulfilment of NRK’s public service remit, should ensure that NRK does not simply duplicate existing commercial offers, but that some sort of editorial competition will take place (cf. section 15 lit c of the draft NRK’s Company Statutes).

In particular, the Authority suggests that the Norwegian authorities define for *all* services (cf. section 11 of the draft NRK’s Company Statutes), and not only for the traditional core activities, which *specific* criteria the programmes on various platforms should fulfil. These requirements are currently laid down in Part II of the draft NRK’s Company Statutes, which is identical to NRK’s Statement of Commitments, as approved by the Storting on 24 February 2009.

Examination of current activities

Furthermore, the Authority requests the Norwegian authorities to put in place measures in order to ensure that the Media Authority will examine all NRK’s existing services on the new media platforms and assess whether they fall within the public service remit.

List of non-public service activities

The Authority further recommends that the Norwegian authorities establish a list of services not falling within the public service remit of NRK. In general, commercial activities are to be carried out by NRK’s subsidiaries. However, for certain services it should be explicitly specified that they fall outside the public service remit (cf. section 10 of the draft NRK’s Company Statutes). This concerns in particular pay-services which are offered with the aim of generating profits for NRK. In this context, the Authority draws the attention of the Norwegian authorities to the fact that services such as e-commerce, advertisements and sponsorships in all cases constitute commercial activities. The special listing of services not classified to fall within the public service remit increases transparency and predictability for other operators on the market and allows the relevant bodies to monitor compliance.

⁸³ See Commission’s Decision No E 3/2005 of 24 April 2007, *Financing of public service broadcasters in Germany* (OJ C 185 of 8.8.2007, p. 1), paragraph 362 where similar criteria were accepted by the European Commission.

Pay services

As regards inclusion of pay services into the public service remit, the Authority recommends that the Norwegian Authorities specify that only such pay services are within the public service remit, which, while qualifying the qualitative criteria for being a public service, charge no more than a fee which compensates NRK for certain administrative or variable costs in delivering that service. The Authority reminds the Norwegian authorities that, in line with the Broadcasting Guidelines, the democratic, social and cultural needs should be taken into account in defining such services. In addition, the remuneration fee should be set at a level not exceeding the coverage of certain administrative or variable costs, such as cost of searching the material or the copyright fees. Against this background, the Authority could accept the inclusion of these services into the public service remit of NRK.

3.3 Entrustment

3.3.1 Entrustment procedure

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 an official act (cf. section 24C.6.2. of the Broadcasting Guidelines). In its Article 17(2) letter, the Authority raised concerns that there was no procedure that would guarantee that new services would be properly scrutinized and entrusted to NRK. The Authority, in particular, pointed out that a proper entrustment procedure contributed to the possibility for the competitors to plan their activities and, generally, allowed the establishment of objective and verifiable criteria, according to which it would be determined whether or not a new service fell within NRK's public service remit.

In this context, the Authority recommends that the Norwegian authorities introduce certain changes in the current broadcasting legislation, and in particular provide for a new *ex ante* entrustment procedure for the insertion of new services, including services on new media platforms, within the public service remit.

Firstly, the Authority recommends that the Media Authority scrutinise all existing services on new media platforms as to whether they fulfil the public service criteria.

All new services which represent a significant change in the public service remit should be entrusted following a proper entrustment procedure carried out on an *ex ante* basis.⁸⁴ In line with the Commission's decision practice,⁸⁵ it is not necessary that each new service automatically triggers the entrustment procedure, but only those services which due to their scope are likely to have an impact on the market. The Norwegian authorities should establish a number of objective criteria, according to which it will be decided whether a service is new and, thus, needs to undergo the entrustment procedure. Those criteria should include for instance the similarity of the envisaged service to the already existing offers of NRK, the market impact of the introduction of the new service and the involved costs of launching the new service. The Authority recognizes that the assessment of whether a service is permanent or temporary might play a role and recommends that, as a general rule, also short duration services should be subject to the entrustment procedure,

⁸⁴ As an exception to the "*ex ante* criterion", the Authority accepts that the Media Authority scrutinises all current services of NRK with a view to confirming whether they fulfil the newly established criteria of the entrustment procedure.

⁸⁵ See *Financing of public service broadcasters in Germany*, cited above, paragraphs 328 *et seq* and paragraph 371.

unless they are triggered by exceptional circumstances (such as radio and television coverage of emergency situations). In this context, the Authority takes note of the fact that due the relative long duration of the entrustment procedure (in the current proposal at least three weeks), it would not be possible to carry out such a procedure in order for the service to be launched in a timely manner in unforeseen exceptional situations of emergencies.

As to whether a new service is to be considered as a public service, it should likewise be judged according to objective and relevant criteria, based on the democratic, social and cultural needs of the society. The Authority recommends that an “added public value” test should be developed, on the basis of which it would be possible to compare the new service to be launched to offers already existing in the market and to take into account any potential restrictions of competition.

The Authority further finds that by asking the opinion of the Media Authority, an independent element of judgment would be introduced and, against this background, the Authority is in a position to accept that the process of the entrustment as such would be started at the initiative of NRK. While NRK might take the initiative of extending its public service remit, the participation of the Media Authority ensures that an external body pronounces a view on the extension and that competitors are heard. In the Authority’s view, the procedure should cater for at least a three week’s hearing period. It should also be made sure that the potential extension of the remit is publicly available. The Authority finds it of particular importance that the legal act by which the public service remit is extended is adopted by the Government⁸⁶ and not by NRK itself. This should further ensure that there is a proper and independent legal entrustment and that the entrustment is not left to the broadcaster itself.⁸⁷

3.3.2 *Monitoring of the fulfilment of the public service obligations*

In its Article 17(2) letter, the Authority raised concerns as to the existence of an effective supervision, given that the Media Authority which controls whether NRK has fulfilled its public service obligation was subject to instructions from the Ministry of Culture, which at the same time constitutes NRK’s General Assembly. The Broadcasting Guidelines specify that the condition of the effective control is only fulfilled if the monitoring authority is independent from the entrusted undertaking (cf. section 24C.6.2. (3) of the Broadcasting Guidelines).

In the view of the Authority, it is necessary that an appropriate body monitor that the public service tasks are carried out by the public service broadcaster as foreseen and that this process is carried out in an efficient and transparent manner. NRK has to report to, and is subject to supervision by, several bodies. In this regard, the Authority considers that the fulfilment of the public service as controlled by the Media Authority is the most important monitoring.

The Authority therefore recommends that the Media Authority prepare an annual report and that the Ministry of Culture be no longer competent to give any instructions to the Media Authority during this process. The Authority considers that the suggested amendments will lead to ensuring the independence of the Media Authority from the

⁸⁶ The legislation refers to “*Kongen i Statsråd*” which could be translated as King in Council.

⁸⁷ See for a similar reasoning, *Financing of public service broadcasters in Germany*, cited above, paragraph 251.

Ministry of Culture in the exercise of the monitoring process over NRK's compliance with the entrusted public service remit.

3.4 Proportionality

3.4.1 *Separation of accounts*

In its Article 17(2) letter, the Authority raised concerns as to the lack of a separation of accounts within NRK, despite the fact that it seemed that not all activities carried out within NRK related to the provision of a public service.

For funding purposes and in particular in order to ensure that any compensation for SGEI is only used to cover the net additional costs of the public service, there should be utmost transparency between the public service tasks and commercial activities. Only then would the Authority be able to assess any alleged cross-subsidisation and justify the payment of aid for the public service task. This can be ensured by a clear and appropriate separation of accounts. The EFTA States are required by Directive 2006/111/EC to take transparency measures towards undertakings entrusted with the operation of a service of general economic interest and receiving public service compensation in whatever form. This also applies to the public service broadcasters.

The Authority welcomes the fact that, in general, as stated in NRK's Company Statutes, all commercial activities are shifted into subsidiaries. As these are different companies, the separation of accounts criterion is fulfilled in this regard. In addition to that, the Authority recommends specifying that, as far as non-public service activities are carried out within NRK, separate accounts will be established following the principles laid down in the Broadcasting Guidelines (cf. section 24C.6.3.2. of the Broadcasting Guidelines).

3.4.2 *Calculation of net public service costs*

The Broadcasting Guidelines require that the state compensation for the costs of SGEI does not exceed the net costs of the public service mission, also taking into account other direct or indirect revenues derived from the public service mission. (cf. section 24C.6.3.3.(1) of the Broadcasting Guidelines).

The Authority therefore requests the Norwegian authorities to ensure that the licence fee funding granted to NRK is limited to the coverage of net public service costs. The licence fee funding⁸⁸ should only compensate NRK for the costs of public service mission and cannot be used to cross-subsidise NRK's commercial activities.⁸⁹ Commercial subsidiaries of NRK cannot profit from the licence funding.

Furthermore, in order to ensure that the licence fee funding does not exceed the net costs of the public service, the calculation of the yearly compensation needs of NRK should take into account other direct or indirect revenues derived from the public service mission. In addition, revenue from stand-alone commercial activities carried out in subsidiaries can also benefit the costs of public service.

The current Broadcasting Guidelines do not contain any provisions with regard to possible carrying forward of a certain percentage of over-compensation to the subsequent accounting year. However, based on the Chapter on state aid in the form of public service

⁸⁸ As to the proportionality assessment of the income tax advantages, see below in section 10.4.4 of the Decision.

⁸⁹ Compare *Financing of public service broadcasters in Germany*, cited above, paragraph 379.

compensation in the Authority's State Aid Guidelines as well as the Commission's decision practice,⁹⁰ public service broadcasters are allowed a certain buffer, or even overcompensation, provided that it is justified and necessary for the operation of the service of general economic interest, and notified to the Authority (cf. paragraph 20 of the Chapter on state aid in the form of public service compensation).

The Authority therefore accepts that an amount of overcompensation not exceeding 10% of the annual compensation of NRK from the licence fee means is carried forward to the next year, provided that the level of the annual compensation for the following year is adjusted accordingly. If licence fee revenues exceed the actual costs for fulfilling the public service mission by more than 10%, the exceeding amount should be disbursed to the state. The amount can be transferred to NRK the subsequent year, provided that the licence fee funding for the same year is reduced accordingly. The situation should be reviewed at regular intervals, in any event at least every four years. All over-compensation discovered at the end of that period must be disbursed to the State, which should ensure that the future estimates for the licence fee payments will be corrected accordingly. In addition, over-compensation in excess of 10% may be justified on a separate basis in an exceptional situation where specific investments are necessary for the operation of the public service remit.

In this context, the Authority reminds the Norwegian authorities that a transfer of overcompensation to benefit another SGEI operated by NRK must be reported in NRK's accounts and notified to the Authority on a separate basis (cf. paragraph 21 of the Chapter on state aid in the form of public service compensation).

3.4.3 Market behaviour

The Authority pointed out in its Article 17(2) letter that any commercial exploitation of the public service should be in line with market practice. This implies for instance a duty not to undercut advertising prices (cf. section 24C.6.3.3. (2) of the Broadcasting Guidelines). In addition, all financial relations between NRK and its commercial subsidiaries should follow market practice. An independent authority should periodically monitor compliance with these rules.

The Authority considers that NRK's commercial activities are subject to the principle of market conform behaviour as defined in NRK's Commercial Guidelines. Products and services delivered by NRK's divisions which are used for commercial activities have to be traded at market prices. Prices paid by customers for NRK's services of commercial nature (e.g. selling of advertising space) should reflect the market price (cf. section 1.6. of the Commercial Guidelines). Furthermore, relations with NRK subsidiaries should follow the principle of at arm's length (cf. section 3.2. of the Commercial Guidelines).

NRK's Commercial Guidelines further contain an explicit prohibition of cross-subsidisation. The Authority recommends incorporating this principle into NRK's Company Statutes in order to recognise that the instruments governing NRK's market behaviour explicitly list this principle.

⁹⁰ See for instance Commission's Decision No E 14/2005 of 22.3.2006, *Compensation payments to public service broadcaster RTP*, not yet reported, paragraphs 101 and 103; Commission's Decision No C 2/2004 of 22.6.2006, *Ad-hoc financing measures of Dutch public service broadcasters*, OJ L 49 of 22.2.2008, p.1, paragraph 147 *et seq.*; Commission's Decision No E 4/2005 of 27.2.2008, *State aid financing of RTE and TNAG (TG4)*, OJ C 121 of 17.5.2008, p. 5, paragraph 184.

As regards monitoring these principles, the Authority recommends putting in place an independent and appropriate monitoring system of NRK's compliance with principles of market conform behaviour, including the relations with NRK's subsidiaries. This could be ensured by an external auditor monitoring whether the transactions between commercial and public service activities are done on market terms and issuing reports on this. In addition, the Auditor General should also exercise the some monitoring on a regular basis, for instance by conducting a yearly meeting with NRK, during which the respect of the arm's length principle forms an important part of the discussion. The Authority notes that the Auditor General reports to the Storting. Further, the Authority notes that according to the Guidelines on Corporate Control, the Auditor General has an obligation to monitor the absence of cross-subsidisation.

3.4.4 Tax relief

The Authority is satisfied that NRK is subject to the ordinary taxation rules, when carrying out commercial activities. As to the income tax exemption for NRK's resulting from section 2-32 of the Income Tax Act, the Authority, following the Commission's decision making practice in this regard,⁹¹ finds that such additional benefits can be considered as compensating costs that otherwise would have had to be financed from the licence fee, thereby increasing the need for compensation. As the Commission stated in its case concerning TV2/Danmark:

*"[...] in appraising the proportionality of the State funding of the costs of the public service task, these additional advantages should not be included, since paying them would have proportionately increased the initial costs of the public service entrusted to TV2; it would make no difference to the net result. However, when this is the case it must be ensured that these advantages benefit only the public service task and do not spill over to the commercial activities."*⁹²

Thus, the Authority recommends the Norwegian authorities to ensure that the income tax advantage on the basis of section 2-32 of the Income Tax Act does not benefit the commercial operations of NRK carried out by NRK's subsidiaries or within the mother company.

3.5 Conclusion with regard to compatibility

On the basis of the foregoing assessment, the Authority concludes that the compatibility criteria of Article 59(2) of the EEA Agreement, as interpreted by the Court of Justice and further specified in the Authority's State Aid Guidelines, and the Commission's decision practice are not fulfilled in case of current financing measures in the form of the licence fee and the income tax exemption in favour of NRK. Consequently, the Authority recommends introducing appropriate measures as specified below.

⁹¹ Commission's Decision 2004/339/EC of 15 October 2003 on the measures implemented by Italy for RAI SpA, OJ L 119 of 23.4.2004, p. 1 and Commission's Decision 2005/217/EC of 19 May 2004 on measures implemented by Denmark for TV2/Danmark, OJ L 85 of 23.3.2006, p. 1.

⁹² Paragraph 110 of Decision 2005/217/EC, cited above.

HAS ADOPTED THIS DECISION:

Article 1

Pursuant to Article 1(1) of Part I and Article 18 of Part II of Protocol 3, the Authority proposes to the Norwegian authorities the following appropriate measures: to take any legislative, administrative and other measures necessary to eliminate any incompatible aid resulting from the financing of Norwegian Broadcasting Corporation (*Norsk Rikskringkasting*). Such measures should include in particular:

1. Specification of the notion of related services of NRK.
2. Clarification of the notion of editorial activity in the context of the services on new media platforms carried out by NRK.
3. Examination by the Media Authority of NRK's current activities from the point of view of qualification of those activities as public service.
4. Establishment of a list of NRK's non-public service activities.
5. Clarification of the types of pay-services falling within the scope of the public service remit of NRK.
6. Establishment of an *ex ante* entrustment procedure for significant amendments in the public service remit, based on verifiable national criteria in the form of a "added public value" test and taking into account opinions of competent independent national authorities as well as other opinions expressed in the public hearing of an appropriate duration. This procedure should also be carried out for services of short duration, including short duration television and radio channels, except in cases of changes in urgent situations.
7. Clarification that the Ministry of Culture and Church Affairs is no longer competent to give any instructions to the Media Authority in the process of monitoring NRK's compliance with the entrusted public service remit. The monitoring process should include preparation of annual reports by the Media Authority.
8. Establishment of separate accounts for the NRK mother company, as far as non-public service activities are carried out within NRK, in line with the requirements of the Broadcasting Guidelines.
9. Taking into account all direct and indirect revenues from the public service mission in calculating the yearly compensation needs of NRK.
10. Ensuring that all overcompensation is subject to repayment to the State at the end of the accounting period or deducted from the subsequent year's general funding in the form of the licence fee. The situation should be reviewed at regular intervals. In exceptional situations of specific investments necessary for the fulfilment of public service mission, overcompensation exceeding 10% of yearly public service costs may be justified on a separate basis..
11. Putting in place an independent and appropriate monitoring system of NRK's compliance with principles of market conform behaviour, including the relations between NRK and its subsidiaries.

12. Ensuring that all commercial activities of NRK and its subsidiaries are subject to ordinary taxation rules in Norway.

Article 2

The measures specified in Article 1 of this Decision should take effect no later than from 1 January 2010, unless the Authority agrees to a later date should that be considered objectively necessary and justified.

Article 3

The Norwegian authorities shall communicate to the Authority the relevant measures that will be taken to discontinue the incompatible aid as soon as possible and in any event not later than on 1 October 2009.

Article 4

The Authority asks the Norwegian authorities to accept this proposal for appropriate measures, pursuant to Article 19(1) of Part II of Protocol 3, and to provide the answer by 1 October 2009.

Article 5

This Decision is addressed to the Kingdom of Norway.

Article 6

Only the English version is authentic.

Done at Brussels, 8 July 2009

For the EFTA Surveillance Authority

Per Sanderud
President

Kristján A. Stefánsson
College Member

TABLE OF CONTENT

I. Facts	
1	Procedure..... 2
2	The complaint..... 3
3	The scope of the Authority’s investigation 4
4	Media landscape in Norway 4
5	Description of NRK’s activities and financing 5
5.1	The legal basis environment..... 5
5.2	Organisation of NRK..... 6
5.2.1	<i>NRK</i> 6
5.2.2	<i>NRK’s subsidiaries</i> 8
5.3	NRK’s activities 8
5.3.1	<i>General remarks</i> 8
5.3.2	<i>NRK’s traditional public service activities (radio and television)</i> 9
5.3.3	<i>NRK’s activities on other platforms (new media)</i> 11
5.3.4	<i>NRK’s commercial activities</i> 14
5.4	The financing of NRK..... 16
5.4.1	<i>The licence fee</i> 16
5.4.2	<i>Other state funding</i> 17
5.4.3	<i>Other income, in particular advertising and sponsorships</i> 17
5.5	Duties related to the carrying out of public service obligation 17
5.5.1	<i>Separation of accounts</i> 17
5.5.2	<i>Calculation of compensation for the public service remit</i> 17
5.5.3	<i>Financial relations with commercial companies</i> 18
5.6	Monitoring..... 18
5.6.1	<i>Monitoring of the fulfilment of the public service remit</i> 18
5.6.2	<i>Monitoring of financial relations with subsidiaries</i> 19
5.6.3	<i>Monitoring of commercial behaviour</i> 19
5.7	Amendments to the relevant national broadcasting legislation..... 19
5.7.1	<i>Broadcasting Act</i> 19
5.7.2	<i>Other broadcasting provisions</i> 20
6	Article 17 (2) letter 21
6.1	Definition of the public service 21
6.2	Entrustment 21
6.3	Separate accounting..... 21
6.4	Commercial dealings, in particular with subsidiaries..... 21
6.5	Supervision/monitoring 21
6.6	Calculation of net costs of the public service..... 22
6.7	Conclusion..... 22
7	The reaction of the Norwegian authorities to the Article 17 (2) letter 22
7.1	The letter of 20 June 2005 22
7.2	Further discussions with Norway and the White Paper on Broadcasting in a Digital Future..... 24
7.2.1	<i>Definition of the public service</i> 24
7.2.2	<i>Entrustment</i> 28
7.2.3	<i>Monitoring of the fulfilment of the public service obligation</i> 29
7.2.4	<i>Separation of accounts between public service and non public service activities</i> 30
7.2.5	<i>Calculation of net public service costs</i> 30
7.2.6	<i>Relations with subsidiaries</i> 31

1	The presence of state aid within the meaning of Article 61(1) of the EEA Agreement	31
1.1	Article 61(1) of the EEA Agreement.....	31
1.2	Presence of state resources	31
1.2.1	<i>Licence fee</i>	31
1.2.2	<i>Tax exemptions</i>	33
1.3	Economic advantage.....	33
1.4	Selectivity	34
1.5	Distortion of competition and effect on trade between Contracting Parties	34
1.6	Conclusion with regard to the presence of state aid.....	35
2	Qualification of the state aid measures involved as existing <i>vs</i> new aid.....	35
3	Compatibility of the aid.....	37
3.1	Conditions of compatibility assessment under Article 59(2) of the EEA Agreement	37
3.2	Definition of the public service remit.....	37
3.2.1	<i>Requirements of the definition of SGEI in the broadcasting sector</i>	37
3.2.2	<i>Assessment of the definition of SGEI of NRK</i>	38
3.3	Entrustment	41
3.3.1	<i>Entrustment procedure</i>	41
3.3.2	<i>Monitoring of the fulfilment of the public service obligations</i>	42
3.4	Proportionality	43
3.4.1	<i>Separation of accounts</i>	43
3.4.2	<i>Calculation of net public service costs</i>	43
3.4.3	<i>Market behaviour</i>	44
3.4.4	<i>Tax relief</i>	45
3.5	Conclusion with regard to compatibility	45