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# EFTA SURVEILLANCE AUTHORITY

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COLLEGE

Brussels, 10 December 1999

Doc. No: 99-8633-D ✓

Ref. No: 308/99/COL

SEA103.400.001

## REASONED OPINION

**delivered in accordance with Article 31 of the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice regarding the Acts referred to in points 2 and 3 of Annex XI to the EEA Agreement (Commission Directive 90/388/EEC and Council Directive 90/387/EEC as amended by European Parliament and Council Directive 97/51/EC).**

### A. The complaint from Teletopia AS

1. In a letter dated 13 November 1996 the law firm Advokatfirmaet Lippestad & Co, on behalf of the Norwegian undertaking Teletopia AS (hereinafter *Teletopia*), lodged with the EFTA Surveillance Authority a complaint against Norway. The complaint was subsequently amended twice, through letters dated 21 August and 21 September 1997.

2. The complainant refers to a dispute between Teletopia and Telenor AS (hereinafter *Telenor*), regarding Teletopia's access to Telenor's public-switched telecommunications network. Having negotiated for some time with Telenor about the terms of access without reaching an agreement thereon, Teletopia filed a complaint against Telenor with the *Norwegian Post- and Telecommunications Authority (Post- og Teletilsynet*,<sup>1</sup> hereinafter "the NPTA"). That Authority issued a decision in the matter imposing certain obligations on Telenor, but parts of the decision were subsequently *deferred* through a decision by the *Norwegian Ministry of Transport and Communications*. On behalf of the Norwegian State, the Ministry is also the sole shareholder of Telenor.

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<sup>1</sup> Formerly "Statens Teleforvalting".

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3. Following the Ministry of Transport and Communications' decision Teletopia filed with the Authority its original complaint against Norway. The complaint and the subsequent amendments allege, *inter alia*, that Norway has failed to fulfil its obligations under the applicable EEA rules to establish an independent telecommunications regulator.

4. In a letter dated 19 December 1996 (Doc. No: 96-7591-D) the Authority informed the Norwegian Government of Teletopia's complaint and its claims, and asked the Government to comment on the subject matter and to provide any other information it considered relevant. In a letter of 17 February 1997 (Ref. 96/156-98 543.10) the Government transmitted to the Authority the Ministry of Transport and Communications' letter of 10 February 1997 (Ref. 97/45 872.5a).

## **B. The obligation of Norway under the EEA Agreement**

5. The obligation of Norway to take the necessary measures to comply with the acts referred to in the Annexes to the EEA Agreement follows from the provisions of those acts, as adapted by way of Protocol 1 to the EEA Agreement, and from Article 7 of that Agreement.

6. Norway was to comply with the Act referred to in point 3 of Annex XI to the EEA Agreement, Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services (hereinafter "*the Telecommunications Services Directive*"), by 1 January 1994.

7. Furthermore, Norway was to comply with the act referred to in point 2 of Annex XI to the EEA Agreement, Directive 97/51/EC of the European Parliament and of the Council of 6 October 1997 amending Council Directives 90/387/EEC and 92/44/EEC for the purpose of adaptation to a competitive environment in telecommunications ("*hereinafter the amended ONP Framework Directive*"), before 1 May 1998.

8. Article 7 of the Telecommunications Services Directive requires EEA States to ensure that the *surveillance* of usage conditions is carried out by an organisation *independent of the telecommunications organisations*.

9. Similarly, Article 5a (2) and (3) of the amended ONP Framework Directive stipulates that

*"2. In order to guarantee the independence of national regulatory authorities:*

- national regulatory authorities shall be legally distinct from and functionally independent of all organizations providing telecommunications networks, equipment or services,*
- Member States that retain ownership or a significant degree of control of organizations providing telecommunications networks and/or services shall ensure effective structural separation of the regulatory function from activities associated with ownership or control.*

*3. Member States shall ensure that suitable mechanisms exist at national level under which a party affected by a decision of the national regulatory authority has a right of appeal to a body independent of the parties involved."*



### C. Norway's observations to Teletopia's complaint

10. The reply of 10 February 1997 from the Ministry of Transport and Communications can be summarised as follows:

11. The NPTA was established as an independent regulatory authority in 1987, and the Norwegian Parliament has stated that the organisation shall be the central supervisory body within the telecommunications sector.

12. The Ministry of Transport and Communications has the superior regulatory responsibility as regards telecommunications. Matters of regulation are separated from those concerning the Ministry of Transport and Communications' role as owner of Telenor. The Ministry's regulatory duties include drafting of laws and regulations and the issuing of licences and permissions. These duties follow fixed procedures such as publicity and public hearings, thus securing objective rules in the area. Supervision of the application of the rules is a matter for the NPTA, who undertakes these tasks on an independent basis.

13. The complaints system for decisions made by the NPTA that involves *competition* aspects, including cases concerning the ONP rules, are decided by the *Ministry for Planning and Co-ordination*, after the Telecommunications Council has delivered a reasoned proposal for decision. Therefore, the Ministry of Transport and Communications do not handle complaints with competition aspects; typically complaints involving Telenor and private service providers.

14. The *deferment* of the implementation of the NPTA's decision continues to be within the competence of the *Ministry of Transport and Communications* as the administratively superior body to the NPTA. The legal basis for such a deferment is the Public Administration Act, Section 42.

15. The Ministry concluded that, in its opinion, the allegations made in Teletopia's complaint to the Authority are unfounded.

### D. The letter of formal notice of 24 March 1999

16. In its letter of formal notice of 24 March 1999, the Authority concluded:

- Through the present telecommunications surveillance system, under which the Ministry of Transport and Communications, while being the shareholder of Telenor, is competent to take decisions in individual appeals cases - including decisions to defer decisions of the NPTA - involving Telenor, Norway has failed to comply with *Article 5a* of the ONP Framework Directive.
- According to the said *Article 5a*, Norway must ensure, in order to guarantee the independence of national regulatory authorities, that such authorities shall be legally distinct from and functionally independent of all organisations providing telecommunications services or networks, that effective structural separation must exist between functions associated with ownership and control of such organisations on the one side, and regulatory functions on the other side, and that the independence



such separation is devised to secure must include the appeals level of the regulatory system.

- The above-mentioned regulatory system, under which the Ministry of Transport and Communications is being vested with the competence of issuing concessions, is in breach of *Article 7* of the Telecommunications Services Directive under which Norway must ensure that *inter alia* the grant of operating licences and the surveillance of usage conditions is carried out by an organisation independent of the telecommunications organisations.

#### **E. The Norwegian observations to the letter of formal notice**

17. On 21 May 1999, the Authority received a letter from Norway requesting an extension of the time-limit set for replying to the letter of formal notice. In a letter of 26 May 1999, the Authority granted such an extension until 10 June 1999.

18. In a letter dated 10 June 1999, the Ministry of Transport and Communications refuted that the Norwegian system entails any breach of the Telecommunications Services Directive or the amended ONP Framework Directive. The main arguments presented by Norway are reiterated in the following:

- Several safeguards have been established aiming to take care of the concerns expressed by the Authority in its letter of formal notice. Telenor was established in 1994 as a limited company, in which the Norwegian State is the sole shareowner, and the Minister of Transport and Communications execute ownership, and is the company's acting General Assembly. According to Norwegian law, it is the board who is legally responsible for a company's activities, and the Ministry is, except from being the acting General Assembly, not taking part in Telenor's Board or other bodies.
- The Ministry has superior responsibility for the telecommunications sector. The exercise of the Ministry's powers in this field include preparing and deciding upon legislation, which follow fixed procedures laid down by law and internal instructions, which secure open and transparent procedures and fair, non-discriminating and balanced results.
- The NPTA was established already in 1987, in order to ensure structural separation of regulatory functions and ownership and control functions. The Norwegian Parliament has stated on several occasions that the NPTA shall be the principal authority responsible for carrying out market surveillance and control in the telecommunications sector, something which is also ensured through legislation. The Ministry's powers to instruct the NPTA has been abolished by law, which according to Norwegian legal practice is the means of establishing independence between a Ministry and a Directorate under its administrative responsibility.
- According to the appeals system for decisions taken by the NPTA, appeals involving Telenor and competition related questions are to be handled by the Ministry of Labour and Government Administration. Only when a case involves a telecommunications policy side which is clearly of greater significance than the competition aspects, will a case be handled by the Ministry of Transport and Communications, in co-operation with the Ministry of Labour and Administration.



- The power to defer implementation of decisions passed by the NPTA, does not prejudice a later decision on the subject-matter of the complaint, but is of a purely procedural nature, with no influence on the dispute itself.
- Finally, the Norwegian Government refers to the proposed merger between Telenor and the Swedish incumbent telecommunications operator Telia AB. The merger will be followed by an initial public offering, whereby the Norwegian State will reduce their ownership of the merged entity, after which the Norwegian Government will review and possibly move the ownership of the merged entity to another Ministry.

#### F. The Authority's assessment

19. The Norwegian Government has presented a number of arguments in support of its contention that its present telecommunications regulatory system does not entail any breach of the amended ONP Framework Directive and the Telecommunications Services Directive.

20. The Authority will assess each of these arguments in turn.

21. In the introductory parts of the Norwegian Government's reply, reference is given to 222 of the Treaty of Rome, concerning restriction on the ability to retain State ownership. As the numbering of the Treaty of Rome changed as from 1 May 1999, the Article in question is Article 295, which states:

*"This Treaty shall in no way prejudice the rules in Member States governing the system of property ownership."*

A corresponding rule is found in the EEA Agreement's Article 125.

22. The 9<sup>th</sup> recital of the preamble to the amended ONP Framework Directive states that

*"...[the] requirement of independence is without prejudice to the institutional autonomy and constitutional obligations of the Member States, or to the principle of neutrality with regard to the rules in Member States governing the system of property ownership in accordance with Article 222 of the Treaty..."*

23. The Authority is of the opinion that this preamble may not be construed so as to relieve the EFTA States of their obligation to ensure the structural separation stipulated in Article 5a. The Authority is not in a position to request specific changes to the Norwegian system of property ownership, nor is it attempting to do so. The Authority is simply stating that under the present Norwegian regime, the requirement under Article 5a is not fulfilled.

24. The Norwegian Government states that several safeguards have been established with an aim to counter the Authority's concerns. Reference is made to the fact that Telenor is a limited company, and that the Ministry of Transport and Communications is not represented on the Board of the company, which is legally responsible for the company's activities.



25. Firstly, the Authority would like to point out that by owning all or a very substantial part of the shares in Telenor, the Ministry of Transport and Communications in effect controls the company, regardless of whether it is represented on the Board. It is in fact the Ministry who elects the Board. Secondly, regardless of whether the Ministry is in control of the Telenor's activities, as a significant owner, it has an interest in the company's performance. Such an interest could influence the Ministry's role as regulator.
26. The Norwegian Government refers to a framework of company legislation on State owned limited companies and Norwegian Constitutional and administrative legislation, without stating any closer what legislation it refers to.
27. The Authority can not see any legally binding rules in effect that remedies its concerns, namely that no structural separation exists between the Ministry's role as owner of Telenor on the one side, and regulator of the telecommunications markets on the other side.
28. According to the Norwegian Government, its responsibility to grant concessions follows fixed, transparent and open procedures. The number of concessions may only be limited for lack of radiospectrum, which is controlled by the NPTA. Furthermore, the Ministry grants concessions to those operators who have been determined as having significant market power. For these reasons, concessions are less important than general legislation, which contains most rights and obligations.
29. The Telecommunications Services Directive stipulates specifically that EFTA States shall ensure that the grant of operating licenses shall be carried out by an organisation independent of the telecommunications organisations. "Telecommunications organisations" is defined in Article 1 of the Directive as
- "(...) public or private bodies, and the subsidiaries they control, to which a Member State grants special or exclusive rights for the provision of a public telecommunications network and, when applicable, telecommunications services."*
30. In light of the developments in the European Telecommunications sector in the time since the Telecommunications Services Directive was introduced, the Authority is of the opinion that "telecommunications organisations" must be interpreted to include all organisations providing telecommunications networks and/or services, *inter alia* Telenor.
31. Furthermore, the granting of concessions is a regulatory function which in EFTA States that retain ownership or a significant degree of control of telecommunications operators should, according to Article 5a of the amended ONP Framework Directive, be undertaken by a body independent of and structurally separate from activities associated with ownership and control.
32. As the Ministry of Transport and Communications is responsible for the granting of the licenses granted to Telenor and other telecommunications operators, as well as being the owner of or executing the Norwegian State's ownership interests in Telenor, the obligation under Article 7 of the Telecommunications Directive and Article 5a of the amended ONP Framework Directive to ensure proper separation of regulatory functions and ownership functions is not fulfilled.
33. The Norwegian Government points out that an independent regulator, the NPTA, has existed in Norway since 1987, to ensure structural separation between regulatory functions and ownership and control functions. It further argues that in 1998, changes



were made to the Telecommunications Act, abolishing the right of the Ministry of Transport and Communications to instruct the NPTA.

34. The Authority has not stated concerns over the role of the NPTA as such, but rather the role of the Ministry of Transport and Communications. It is not the right of instruction in general or individual cases, but rather the appeals structure by which that Ministry has influence over decisions that may involve or otherwise affect Telenor that is the main concern.

35. According to the Norwegian Government, the appeals system for NPTA involves the Ministry of Transport and Communications only where the complaint involves a telecommunications policy issue clearly of greater significance than any competition issue. Furthermore, only in quite exceptional cases will an appeal not be handled by the Ministry of Labour and Government Administration.

36. Article 5a (2) and (3) of the amended ONP Framework Directive states however that Member States shall ensure effective structural separation, and that appeals shall be handled by a body independent of the parties involved. The Authority would like to reiterate that according to the Norwegian Telecommunications Regulations, which has been notified to the Authority as implementing the amended ONP Framework Directive, certain complaints are still to be handled by the Ministry of Transport and Communications as a final appeals body, cf. Article 5-4 of that Regulation. According to the third paragraph, complaints being of principal importance or involving telecommunications policy will be decided upon by the Ministry of Transport and Communications. It does not follow from Article 5-4 when a case will be considered as being of principal importance or involving telecommunications policy, or when such considerations weigh more heavily than the competition aspects. It appears that this is left for the Ministries to sort out between themselves. Thus, it is clear that the legislation leaves the Ministry of Transport and Communications with a degree of influence over which individual cases it is competent to handle as an appeals body. The Authority has been informed that complaints directly involving Telenor or one of its subsidiaries, or which otherwise may affect Telenor's business, have been handled by the Ministry of Transport and Communications, in spite of seemingly involving issues that according to the enumeration in paragraph 2 of Article 5-4 are to be handled by the Ministry of Labour and Government Administration<sup>2</sup>. In sum the Authority finds it is still to a large extent left to the Ministry of Transport and Communications to exercise authority in complaints involving Telenor. Hence, the structural separation required by Article 5a of the amended ONP Framework Directive is not in place.

37. The Norwegian Government refers to a Annex 1 of a report of 7 June 1996 from COREPER to the Council according to which the essential point as regards the implementation of the requirements in Article 5a is that appropriate safeguards are put in place, and that the emphasis is on the effectiveness of the separation and not its form.

38. The Authority would like to point out that as long as the same Ministry operates as owner and regulator, proper structural separation and hence the appropriate safeguards have not been introduced in the first place. The issue of the efficiency of separation does therefore not arise in the present case.

<sup>2</sup> *Inter alia* complaint from Sense Communications, see letter from the Authority to Norway dated 12 February 1999, Doc. no. 99-1039-D.



39. As regards deferment of implementation of the NPTA's decision, the Norwegian Government refers in its reply to the fact that such deferment in no way prejudices the final decision as regards the substance of the complaint.

40. The Authority does not claim that such a deferment influences on a subsequent decision on the substance of a complaint. However, a decision to defer or not defer implementation of a decision may still be of utmost importance to the parties involved. A decision to defer implementation is likely to benefit one party to a dispute and harm the other, and *vice versa*. This is particularly relevant in the field of telecommunications, where business opportunities are likely to appear and disappear within a short period of time. As such, the right to defer implementation of decisions is a regulatory function which, when it lies with the Ministry of Transport and Communications, is not structurally separated from ownership functions as required in Article 5a of the amended ONP Framework Directive.

41. An example, for illustration, would be the case of Sense Communications AS. Following a complaint by Telenor Mobil AS over the NPTA's decision ordering Telenor Mobil to enter into negotiations with Sense Communications, the NPTA refused on 18 November 1998 deferment of its own decision. The Ministry of Transport and Communications, which was the final appeals body in the case, overruled the NPTA's decision on deferment 22 December 1998, to the detriment of Sense Communications AS and for the benefit of the complainant, Telenor Mobil AS. During the spring of 1999, Sense Communications AS filed for bankruptcy. Telenor's complaint was then dismissed by the Ministry, who found that, following the bankruptcy, the complaint was no longer relevant due to the lack of *locus standi*. The Authority find it likely that the decision to defer implementation in December 1998 could have influenced the position of Sense Communications AS as a potential competitor to Telenor Mobil AS.

42. Under point 2 of its letter, the Norwegian Government seems to presume that the Authority's position is based on sole ownership of Telenor by the Ministry of Transport and Communications. This is not the case, as follows from the letter of formal notice. In that letter, it is stated that the breach of EEA law relates to a situation where the Ministry "retains ownership of the whole or part of one of the organisations providing telecommunications network and services..."<sup>3</sup>, and "In the case that a Member State retains ownership or a significant degree of control of an organisation providing telecommunications services or network"<sup>4</sup>. The second indent of Article 5a (2) of the amended ONP Framework Directive, reads: "Member States that retain ownership or a significant degree of control of organisations...". Whether the Ministry is the sole shareholder or a significant shareholder, or otherwise has a significant degree of control over the company, the obligation to ensure effective structural separation is present.

43. The Norwegian Government refers in its letter to the present plans to merge Telenor AS with Telia AB and the subsequent Initial Public Offering. According to the Government, the merger will reduce the state influence over the merged company. Furthermore, administration of the Norwegian State ownership will be reviewed following the merger.

44. In the Authority's view, such changes have not yet taken place, and contains no promise of sufficient measures to remedy the breaches of EEA law. Firstly, it is the Authority's understanding, both from information in the public domain and its involvement with the present merger, that the Norwegian Government will retain

<sup>3</sup> Letter of formal notice of 24 March 1999, chapter 6, last paragraph.

<sup>4</sup> *Idem*.



considerable influence over the merged entity. Secondly, regardless of its influence over and involvement with the company's business, it will still have considerable financial interest in its performance, and will act as owner on the General Assembly. As regards possible changes to the administration of the Norwegian State's ownership interests, the Authority has not seen sufficiently detailed plans of such to assess whether they would remedy its concerns. Nor are such plans in any way binding, as far as the Authority knows.

**G. Conclusion**

FOR THE ABOVE REASONS,

THE EFTA SURVEILLANCE AUTHORITY,

Pursuant to the first paragraph of Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, and after having given the Norwegian Government the opportunity of submitting its observations,

DECLARES AS ITS REASONED OPINION

That through the present telecommunications surveillance system, under which the Ministry of Transport and Communications, while being the shareholder of Telenor, is competent to take decisions in individual appeals cases - including decisions to defer decisions of the NPTA - involving Telenor, Norway has failed to comply with *Article 5a* of the ONP Framework Directive.

The regulatory system, under which the Ministry of Transport and Communications is being vested with the competence of issuing concessions, is in breach of *Article 7* of the Telecommunications Services Directive under which Norway must ensure that *inter alia* the grant of operating licences and the surveillance of usage conditions is carried out by an organisation independent of the telecommunications organisations and *Article 5a* of the amended ONP Framework Directive, under which EFTA States that retain ownership or a significant degree of control of telecommunications operators should ensure that regulatory functions are undertaken by a body independent of and structurally separate from activities associated with ownership and control.

Pursuant to the second paragraph of Article 31 of the Surveillance and Court Agreement, the EFTA Surveillance Authority requests the Norwegian Government to take the necessary measures to comply with this Reasoned Opinion within three months following notification thereof.

Done at Brussels, 10 December 1999

For the EFTA Surveillance Authority

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