

Brussels, 8 May 2009

Case No: 63891

Event No: 517778

Comments of the EFTA Surveillance Authority on the revised Draft Communication from the Commission on the application of state aid rules to public service broadcasting

The EFTA Surveillance Authority (hereinafter referred to as the Authority) wishes to thank the Commission for the opportunity to submit comments on the revised Draft Communication from the Commission on the application of state aid rules to public service broadcasting (hereinafter referred to as the Draft Broadcasting Communication). In general, the Authority supports the proposal of the Competition Directorate-General and welcomes the modernisation of the rules on state aid to the public broadcasting sector.

As to particular comments, the Authority would like to invite the Commission to consider revising section 4.2. of the Draft Broadcasting Communication concerning the qualification of the aid measures as existing as opposed to new aid.

In our view, in the context of qualification of the aid measure as new or existing, the assessment by the Commission of “*all the legal and economic elements related to the broadcasting system of a given Member State*”, as indicated in paragraph 29 of the Draft Broadcasting Communication, would seem to go beyond the requirements established in the jurisprudence of the European Court of Justice. In this context, we would like to refer to the judgment in *Namur-Les Assurances*¹, which provides: “*Whether aid may be classified as new aid or as alteration of existing aid must be determined by reference to the provisions providing for it.*” In our opinion, this means that the relevant elements subject to evaluation by the Commission would be solely the legislation (or other legal basis, e.g. a contract), on the basis of which the aid measure is granted to the beneficiary. Accordingly, there seems to be no need to take into account any other factors, legal or economic, in order to examine whether or not the legal framework under which the aid is granted has undergone any substantial amendments since its entry into force, i.e. whether the aid measure in question can still be qualified as existing aid. In *Namur-Les Assurances*, the Court of Justice further held that “*the emergence of new aid or the alteration of existing aid cannot be assessed according to the scale of the aid or, in particular, 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.*”² Moreover,

¹ C-44/93 *Namur-Les Assurances*, [1994] I-03829, paragraph 28.

² *Ibidem*.

changes to the legal basis which “*affect the activity of the undertaking and which may have an impact on the functioning of the common market, on competition or simply on the actual amount, over a specific period, of aid which is available in principle but which necessarily varies in amount according to the undertaking’s turnover*” seem to be of no relevance for the assessment of the nature of the aid.³ Having ascertained that the legal basis has been changed, it needs subsequently to be assessed whether the nature of the change is such as to alter the classification of the aid, i.e. whether the changes are substantial and/or severable.

³ *Ibidem*, paragraph 32.