Surveillance Authority: Norwegian Ban on Certain Cross-Border Television Broadcasts Compatible with EEA Law

IRIS 2003-10:1/1

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On 8 October 2003, the EFTA Surveillance Authority delivered a decision pursuant to Article 2a(2) of the Television Without Frontiers Directive (Directive 89/552/EEC as amended by Directive 97/36/EC), confirming the compatibility with EEA law of measures taken by Norway that restrict retransmission of certain pornographic television programmes deemed to be detrimental to minors, in Norwegian digital cable TV networks. The prohibition concerns broadcasts of three different pay-TV channels based in Sweden.

On 25 June 2003, Statens medievorvaltning (the Norwegian Mass Media Authority) decided to prohibit retransmission of pornographic programmes on the Swedish television channels Canal+ Gul, Canal+ Blå and TV1000 in Norwegian digital cable TV networks, as the programmes were judged to be in contravention of Section 204 of the General Civil Penal Code. Norway notified the transmitting State, Sweden and the EFTA Surveillance Authority of the decision taken by the Mass Media Authority in July 2003. Prior consultations held between the parties had not produced an amicable settlement in the matter.

The Television Without Frontiers Directive requires the EEA States to ensure freedom of reception and not to restrict retransmission on their territory of television broadcasts emanating from another EEA State. The Directive institutes the principle of home state control over broadcasters. Article 2a(2) of the Directive provides, however, for an exception to these principles where a television broadcast from another EEA State "might seriously impair the physical, mental or moral development of minors, in particular programmes that involve pornography or gratuitous violence." The alleged violation needs to be manifest, serious and grave and several other conditions must be fulfilled before any such derogating measures may be taken by the receiving state. The Directive requires the EFTA Surveillance Authority to evaluate the compatibility with EEA law of measures taken by an EEA EFTA State under this safeguard provision.

The EFTA Surveillance Authority concluded in its decision that the measures taken by the Norwegian authorities were compatible with EEA law since they did not discriminate on grounds of nationality, were proportionate to the objective to protect minors and were, although limited in their effectiveness, were not unsuitable for the purpose of achieving the desired aim.

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The Authority acknowledged that an EEA State commands a wide, although not unfettered, discretion to restrict the broadcast on its territory of programmes that conflict with its national moral standards and that might thereby seriously impair the physical, mental or moral development of minors. It concluded that the programmes prohibited by Norway did not fall outside the application of Article 22(1) of the Directive and that, therefore, the prohibition had to be deemed - in the present case - to be within the discretion that Norway enjoyed in this regard. Furthermore, the Authority accepted in principle that an EEA State lays down in abstract terms - in the present case in the Penal Codewhich types of content it deems to have detrimental effects on the development of minors, as long as the programmes prohibited thereby fall within Article 22(1) of the Directive.

The Surveillance Authority's decision is in line with the advisory opinion delivered by the EFTA Court in Case E-8/97 TV1000 Sverige AB v. Norway [1998] EFTA Court Report 68.

"EFTA Surveillance Authority confirms compatibility of Norwegian ban on certain cross-border television broadcasts with EEA law", Press Release of the EFTA Surveillance Authority PR(03)25, 8 October 2003

http://esa.gazette.no/information/pressreleases/2003pr/dbaFile4425.html

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