

Alþingi
Erindi nr. P 130/2441
komudagur 14. 5. 2004

49/14

NORÐURLJÓ

LYNDBALA 5
POSTHOLF 10110
130 REYKJAVÍK
SÍMI 515 6000
WWW.NLJÓ

Reykjavík, 10. maí 2004

Halldór Blöndal, forseti Alþingis

Norðurljós hf. hafa í dag sent Eftirlitsstofnun EFTA í Brussel kvörtun vegna fyrirhugaðra breytinga á útvarps- og samkeppnislögum, sbr. þingmál nr. 974.

Kvörtunina unnu lögmenn Norðurljósa, þau Ragnar Aðalsteinsson og Sigríður Rut Júlíusdóttir. Þessir lögmenn ásamt lögmönnum Gestis Jónssyni, Gunnari Jónssyni, Gísla Guðna Hall, Margréti Stefánsdóttur og Ragnari Hall hafa unnið álitserðir hvorir í sínu lagi sem m.a. víkja að skyldum íslenska ríkisins samkvæmt samningnum um Evrópska efnahagssvæðið. Lögmenn beggja lögmennsstofa hafa komist að sömu niðurstöðu, að frumvarp til breytinga á útvarps- og samkeppnislögum fari í bága við EES-samninginn sem lögfestur var hér á landi með lögum nr. 2/1993. Álitserðir þar að lútandi hafa verið afhentar bæði allsherjar- og efnahags- og viðskiptanefnd Alþingis í dag.

Virðingarfyllst,


Sigurður G. Guðjónsson,
forstjóri Norðurljósa

Reykjavík, 7 May 2004

Efta Surveillance Authority
Rue de Trèves 74
B-1040 Brussels

Attn. Ms. Paulina Dejmek, Officer

Telefax No. oo 32 2 286 1800 1+45

Re: Complaint by Norðurljós h.f. of proposed amendment to the Broadcasting Act No. 53/2000 and the Competition Act No. 8/1993 incompatible with the provisions of the European Economic Area Agreement on freedom of establishment and freedom of movement of capital.

I have been instructed by my Client, Norðurljós h.f., Lynghálsi 5, 110 Reykjavík, (an Icelandic corporation) to file a complaint against the Icelandic State for certain restrictions on the freedom of establishment and freedom of movement of capital through proposed amendments to the Broadcasting Act and the Competition Act. The proposed amendments to the Broadcasting Act impose severe restrictions on entities to invest in broadcasting companies in Iceland or to establish themselves in Iceland in order to participate in the broadcasting market. The proposed amendments also prohibit cross-ownership in the audio-visual media and the daily press. The extent of the restrictions is such that in the opinion of my Client it will violate Article 31 of the EEA Agreement on freedom of establishment and Article 40 on the free movement of capital.

The proposed amendments were tabled in the Althingi by the Government on either 27 or 28 April 2004 and the first reading of the Bill was on 3-4 May. The Parliamentary Committee to which the Bill has been referred to between the first and second reading of the Bill sent the Bill yesterday to some interested parties for comments and representatives of interested parties and Government experts will appear before the committee during the next few days. After that the Committee will present its findings and the majority and the minority of the Committee will table its proposed amendments, if any, with their respective comments. The parliamentary session will at the request of the Government be extended as needed in order to pass the Bill.

The Media Market in Iceland

In Iceland there are three daily papers. *Morgunblaðið* that has until recently been the most widely read newspaper in Iceland. It was established in 1913 and it has had a

dominant position on the newspaper market until quite recently. Morgunblaðið also has the most popular web-edition in Iceland.

Approximately three years ago a new daily, *Fréttablaðið*, appeared on the market. It is distributed to the majority of homes in Iceland free of charge and its earnings are derived only from sale of advertisements in the paper. It went bankrupt after the first year and its assets were bought by a new company in which one of the shareholders is *Baugur h.f.*, which has a strong position on the retail market for food and some other retail markets.

The third newspaper is *DV (Dagblaðið)* the publisher of which went bankrupt last year. The new owner of *Fréttablaðið* then bought the assets of the bankrupt company and succeeded in getting the paper into circulation after a week or two and it is now published in the morning as the two other newspapers. The purchase of the assets of *DV* was considered to be a merger by the Competition Authority and the Authority has now accepted the merger. The two papers have separate and independent editorial managements.

The television market in Iceland is mainly shared between:

The State Broadcast	43%
NL	44%
Skjár 1	21%

There are three television stations that have the largest share of the market:

The State Broadcast (RÚV)	43%
Stöð 2 (NL)	29%
Skjár 1	21%

The two first mentioned do have their own news rooms and carry local and international news every day. The third one does not carry any news and focuses on entertainment.

The radio market is shared by three competitors and their market share is as follows:

The State Broadcast (RÚV)	52%
NL	44%
Pyrit	4%

The funding of the State Broadcast (RÚV) is through subscriptions, advertisement and sponsorship. Every owner of a television set is automatically a subscriber of RÚV and the same applies to owners of radio sets. NL is funded by subscriptions obtained through market activities, advertisements and sponsorship.

The company owning NL has other activities including cinemas. It was in deep financial difficulties for several years and last year it was taken over by new shareholders one of which is the aforementioned company *Baugur* which is the largest shareholder with approximately 30% shareholding.

The result of these events in the media market is that NL is now a holding company and the sole owner of the subsidiary operating the audio-visual media and also the

sole owner of the subsidiary publishing the two newspapers. As mentioned it has other business activities and Baugur is the largest shareholder with appr. 30% holding.

The Bill

The proposed amendments to the Broadcasting Act do not allow for a broadcast licence to be issued to an enterprise:

- which has a main business unrelated to media operations;
- which is partly or wholly owned by a corporation or a conglomerate with a market share in any field of business activity;
- in which the ownership share of another enterprise exceeds 25%;
- which belongs to a conglomerate in which the aggregate ownership share of other enterprises exceeds 25%;
- which belongs to a conglomerate in which one or several enterprises hold an ownership share in a newspaper's publishing company or if it is only or partly owned by such an enterprise or conglomerate.

The above provisions also apply if there are between enterprises "close ties" other than those of the conglomerate which may entail dominance. The Broadcast Licensing Committee shall seek the views of the Competition Council in judging whether an enterprise or a conglomerate has a dominant market position. The committee may make exceptions to the above provisions only in the case of a regional broadcast licences.

According to a temporary provision those to whom the act applies shall have brought operations into compliance with its provisions in two years of the Act's entry into force.

It has been maintained by critics of the Bill that it probably will be in violation of constitutional provisions *i.a.* on protection of property, prohibition of discrimination and freedom of expression.

Freedom of establishment

Article 31 of the EEA Agreement stipulates that there are to be no restrictions on the freedom of the establishment of nationals of an EC member state or an EFTA state.

The proposed amendment imposes severe restrictions on the ability of companies who meet the criteria specified above to invest in broadcasting companies in Iceland or to establish themselves in Iceland in order to be active in the broadcasting sector.

It follows that non-Icelandic companies which are to be considered "nationals" of the EFTA state or the EC member states meeting the criteria and seeking to establish themselves in Iceland for the purpose of engaging in broadcasting activities, will be hampered from doing so.

References also made to article 34 of the EEA agreement which states that companies or firms formed in accordance with the law of the EC member state or EFTA state for

having their registered office, central administration or principal place of business in the EEA, shall be treated in the same way as natural persons.

The above restrictions constitute a restriction to the freedom of establishment within the meaning of Article 31 the EEA agreement.

A restriction of the freedom of establishment can be justified either on the basis of article 33 of the EEA agreement or on the basis of the so called “mandatory requirements”, which have been identified by the case law of the Court of Justice of the European Communities or the EFTA Court.

Article 33 of the EEA Agreement sets out a list of policy grounds which cannot be prejudiced by the provisions on freedom of establishment, even if they provide for special treatment for foreign nationals (discriminatory restrictions). Public policy constitutes one such justification. It does not seem possible to justify the above mentioned restrictions on this ground.

The so-called “mandatory requirements” are an open list of political objectives. They may form the basis for a justification by the Government of Iceland for the proposed amendments, since the proposed amendments apply equally to undertakings and persons having the nationality of Iceland and to other undertakings and persons.

The restrictions arguably aim at safeguarding, to a certain level, diversity in the media market. This policy goal of preserving pluralism in the media has already been accepted by the Court of Justice as a “mandatory requirement”.

Necessity Requirement

The case law of both the European Community Courts and the EFTA Court sets out clear limitations to the extent in which a law-maker may rely on the mandatory requirements in order to justify an enactment imposing restrictions on the freedom of establishment. Such restrictions are subject to the requirements of proportionality and necessity. Rules must be no more restrictive than is necessary to achieve the end in view.

It follows that non-discriminatory national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the EEA Agreement can be justified only if they:

- are justified by overriding reasons based on the general interest;
- are suitable for securing the attainment of the objective which they pursue; and
- do not go beyond what is necessary in order to attain their objective.

Restrictions forming part of a cultural policy intended to safeguard the freedom of expression will be in breach of the provisions stipulating the freedom of establishment if they go beyond the objective pursued. In particular, it can be questioned whether conditions affecting the ownership of organisations operating in the audio-visual sector can be regarded as objectively necessary in order to safeguard the general interest in maintaining a national radio and television system which secures pluralism.

Indeed, it could be argued that less restrictive alternatives exist. Examples would be the introduction of regulations which safeguard the independence of the editorial content of the programmes or the impartiality of the reporting, or measures related thereto.

These options seem preferable also with regard to the nature of the media market in Iceland, whose players have frequently experienced economic difficulties. In this regard, it would not be a favourable option to enact legislation which creates or maintains a fractured market.

Free movement of capital

Article 40 of the EEA Agreement provides that “within the framework of the provision of this Agreement, there shall be no restrictions between the Contracting Parties on the movement of capital belonging to persons resident in EC Member States or EFTA States...”.

The nomenclature of the capital movements which come within the reach of this provision is laid down in Annex I to Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty. It clearly provides that “participation in new or existing undertaking with a view to establishing or maintaining lasting economic links is a “capital movement” within the meaning of Article 40 of the EEA Agreement.”

Clearly, for the reasons identified above, the proposed amendments to the Broadcasting Act constitute a restriction within the meaning of Article 40 of the EEA Agreement.

Freedom of Expression. Media diversity.

In my Client’s opinion the possible result of the proposed amendments will be either the disappearance from the media market of the broadcasting stations and the two dailies of NL. These have been recently funded and the basis for the funding is *i.a.* the synergy flowing from the common ownership of the broadcasting stations and the two newspapers. The premises for the credit obtained from banks are the business model presented a few months ago and the credit agreements would possibly be terminated due to changed conditions. Such results would not be favourable for the aim of increased media diversity, bearing in mind that the supply of radio channels is not an issue in Iceland.

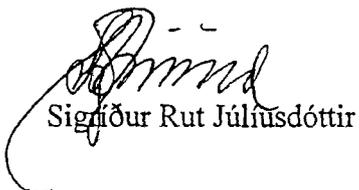
As indicated it is the intention of the Government to have the proposed amendments to the legislation passed as soon as possible and the Parliamentary session will not be closed until the fate of the Bill has been decided. I understand that the Efta Surveillance Authority will not be able to interfere formally until after the passing of the Bill. Under the circumstances and taking into consideration how far reaching effects the Bill will have it is suggested that the Authority might consider whether it could be

useful to approach the Government of Iceland informally already at this stage in order to warn it of the subsequent processing of the complaint received.

Yours faithfully,
Adalsteinsson & Partners



Ragnar Aðalsteinsson



Sigríður Rut Júlíusdóttir

Attachments:

Proposed Amendments of Broadcasting Act No. 53/2000 and Competition Act No.8/1993 with commentary (English translation)

Broadcasting Act No. 53/2000 (English translation)

Regulation on broadcasting activities dated 16 January 2002

Competition Act No. 8/1993