II

(Non-legislative acts)

DECISIONS

COMMISSION DECISION

of 20 April 2011

on the measures implemented by Denmark (C 2/03) for TV2/Danmark

(notified under document C(2011) 2612)

(Only the Danish text is authentic)

(Text with EEA relevance)

(2011/839/EU)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union [1], and in particular the first subparagraph of Article 108(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having called on interested parties to submit their comments pursuant to the provisions cited above [2] and having regard to their comments,

Whereas:

I. PROCEDURE

(1) By letter of 5 April 2000, the Commission received a complaint from the Danish commercial television company SBS Broadcasting SA/TVDanmark (hereinafter 'SBS/TVDanmark') regarding the State financing of the Danish public service television broadcaster TV2/Danmark (hereinafter 'TV2' [3]. A meeting took place with the complainant on 3 May 2000. By letters of 28 February 2001, 3 May 2001 and 11 December 2001, the complainant submitted additional information.

(2) By letter of 5 June 2002, the Commission requested information from the Danish authorities, who replied by letter of 10 July 2002. Two meetings with the Danish authorities were held on 25 October 2002 and on 19 November 2002. Additional information was received by letters of 19 November 2002 and 3 December 2002.

(3) By letter dated 24 January 2003 [4], the Commission informed Denmark that it had decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union (TFEU) in respect of the State financing of Danish public service broadcaster TV2.

(4) The Commission decision to initiate the procedure was published in the *Official Journal of the European Communities* of 14 March 2003 [5]. The Commission invited interested parties to submit their comments on the measures.

(5) The Commission received observations from the Danish authorities by letter of 24 March 2003. The Commission also received comments from several interested parties. TVDanmark submitted comments by letter of 14 April 2003. The Association of Commercial Television in Europe (ACT) sent comments in a letter dated 14 April 2003. The commercial television stations Antena 3 TV and Gestevisión Telecinco submitted comments on 16 April 2003. The commercial station TV3 submitted

[1] With effect from 1 December 2009, Articles 87 and 88 of the EC Treaty have become Articles 107 and 108, respectively, of the TFEU. The two sets of provisions are, in substance, identical. For the purposes of this Decision, references to Articles 107 and 108 of the TFEU should, where appropriate, be understood as references to Articles 87 and 88 of the EC Treaty.

[2] OJ C 59, 14.3.2003, p. 2.

[3] In 2003, TV2 was converted into a limited liability company and its name changed to TV2/Danmark A/S. For the sake of simplicity, 'TV2' will be used in this decision to refer to the Danish public service television broadcaster TV2/Danmark, irrespective of its legal form.

[4] Commission decision of 21 January 2003, 'State financing of Danish public broadcaster TV2 by means of licence fee and other measures' (OJ C 59, 14.3.2003, p. 2).

[5] See footnote 2.

comments in a letter of 14 April 2003. The Commission forwarded these comments to Denmark, which responded by letter of 12 September 2003.

(6) The Commission received further information from the complainant by letters dated 15 December 2003 and 6 January 2004. A meeting was held between the complainant and the Commission's services on 17 December 2003 in order to clarify the information submitted in the complainant's letter of 15 December 2003. The Commission forwarded the information to the Danish Government, which responded by letter dated 15 March 2004. A meeting between the Danish authorities and the Commission's services took place on 9 February 2004.

(7) On 19 May 2004, the Commission adopted a decision on the public funding granted to TV2 between 1995 and 2002 in the form of licence fee resources and other measures ([6]). The decision concluded that the aid was compatible with the common market, with the exception of DKK 628,2 million (about EUR 84,3 million), which had to be recovered together with interest (the 'recovery decision').

(8) Legal actions against the Commission's recovery decision were subsequently brought before the Court of Justice by TV2 and the Danish authorities, and by the private broadcasters Viasat and SBS/TVDanmark.

(9) The Danish authorities implemented the Commission's recovery decision. In fact, TV2 repaid DKK 1 050 million ([7]).

(10) That repayment led to a financial crisis in TV2. Consequently in 2004 Denmark notified a recapitalisation of TV2.

(11) By decision of 6 October 2004 ([8]), the Commission approved the Danish government's decision to recapitalise TV2 by increasing its capital by DKK 440 million and converting a State loan of DKK 394 million into capital (the 'recapitalisation measures'). Both SBS and Viasat took court action against that decision.

(12) On 22 October 2008 ([9]), while confirming the scope of TV2's public service mission, the Court of First Instance (now the General Court) annulled the Commission's recovery decision (the 'judgment'). No appeal was lodged.

(13) Following the Court's judgment, the Commission now has to adopt a new decision since it had to reopen the formal investigation procedure concerning the period 1995-2002.

(14) In addition the Court issued an order ([10]) (the 'order') in the recapitalisation case, stating that there was no need to take a decision. In paragraph 35 of the grounds, the Court found there was a close link between the recovery and the recapitalisation decisions. The Court held that the annulment of the recovery decision rendered the recapitalisation decision devoid of any substance and meaning. It stated that '*[a]lthough the specific circumstances of the present case prompted the Commission to adopt two decisions, it is apparent that those decisions constitute two aspects of the same legal issue relating to the classification as State aid within the meaning of Article 87(1) EC and, if so, to the determination of their compatibility with the common market, of the measures implemented by the Kingdom of Denmark for TV2 and subsequently TV2 A/S*' ([11]). The annulment of the recovery decision therefore called for a '*fresh examination of all the measures implemented by the Kingdom of Denmark for TV2*'. The order was not appealed.

(15) In line with the Court's order, the Commission has to take into account in its assessment in the present decision the measures implemented by the Danish authorities in 2004 as a result of the recovery ordered by the annulled recovery decision.

([6]) Commission Decision 2005/217/EC of 19 May 2004 on measures implemented by Denmark for TV2/Danmark (OJ L 85, 23.3.2006, p. 1).

([7]) The DKK 1 050 million included not only the DKK 628 million plus interest up to the date of recovery, but also a corresponding amount for 2003, which the Danish Government reclaimed on its own initiative.

([8]) Commission decision C(2004) 3632 of 6 October 2004 on the recapitalisation of TV2/Danmark A/S.

([9]) Joined Cases T-309/04, T-317/04, T-329/04 and T-336/04.

([10]) Case T-12/05, Order of the Court of First Instance of 24 September 2009.

([11]) Paragraph 43 of the grounds of the order.

(16) It follows from recitals 13, 14 and 15 that the present decision covers only the measures taken by the State in favour of TV2 for the years 1995-2000 but, in accordance with the Court's order, the Commission will also take into account in its assessment in the present decision the recapitalisation measures taken in 2004, which resulted from the recovery ordered by the annulled recovery decision.

(17) By a letter dated 20 March 2009, the Commission asked the Danish authorities to give their analysis of the implications of the judgment for the case.

(18) After requesting several extensions of the time limit, the Danish authorities sent their observations on 26 June 2009. As an annex to their letter, the Danish authorities also submitted comments from TV2.

(19) A number of meetings were held with the Danish authorities and/or TV2, inter alia, on 25 August 2009, 7 February 2011 and 4 March 2011.

(20) The Commission sent additional requests for information, inter alia, on 22 September 2010, 28 October 2010, 19 November 2010, 14 January 2011, to which the Danish authorities replied on 17 November 2010, 30 November 2010, 3 February 2011, 24 February 2011 and 7 March 2011. The Danish authorities also submitted various items of information in March and April 2011.

(21) The Commission also received comments from third parties, in particular from SBS/TVDanmark on 7 February 2011.

(22) On 4 August 2008 the Commission adopted a decision raising no objection to the rescue aid to be granted to TV2 in the form of a credit facility for DKK 1 000 million ([12]). An appeal against the decision was lodged by TV2's competitor MTG/Viasat. The General Court decided to stay the proceedings until the Commission's decision in the restructuring case ([13]).

(23) On 4 February 2009 Denmark notified the Commission, pursuant to Article 108(3) TFEU, of a restructuring plan regarding TV2 Danmark A/S (hereinafter, the 'restructuring case'). By letter dated 2 July 2009, the Commission informed Denmark that it had opened proceedings in respect of the restructuring case ([14]).

(24) The Commission's investigation in the restructuring case has taken place in parallel with its assessment in the present case and its decision in the restructuring case will be adopted in parallel and simultaneously with the present decision.

II. DETAILED DESCRIPTION

II.1. *NATIONAL BACKGROUND*

II.1.1. THE DANISH BROADCASTING MARKET DURING THE PERIOD 1995-2002

(25) In the years 1995-2002, two public service television broadcasters operated in Denmark, namely Danmarks Radio ('DR') and TV2. DR was almost entirely financed through the licence fee. TV2 was funded partly through the licence fee, but also through advertising revenue.

(26) TV2 was founded in 1986 ([15]) as an independent autonomous institution financed by government loans. The company started national broadcasting on 1 October 1988. It broadcast the terrestrial channel TV2 and also started broadcasting the satellite channel TV2 Zulu in 2000. At the end of 2002, TV2 Zulu changed from a public service channel into a commercial pay-TV channel. In addition, the government approved eight stations as regional TV2 stations. TV2 was required to carry broadcasts from the regional TV2 stations on its national terrestrial channel.

(27) Between 1995 and 2002 two commercial broadcasters, TVDanmark and TV3/3+, were active on the Danish nationwide television broadcasting market, in addition to the public broadcasters. The commercial broadcasters competed with TV2 on the nationwide television advertising market. TVDanmark is part of SBS Broadcasting SA and broadcast two channels in Denmark. From 1997 it broadcast TVDanmark2 through a network of 10 local commercial television stations and from 2000 onwards it broadcast a UK licensed satellite channel, TVDanmark1. The satellite channels TV3 and 3 + began broadcasting in 1992. They are part of the Modern Times Group (MTG).

II.1.2. LEGAL REQUIREMENTS DURING THE PERIOD 1995-2002

(28) The legal provisions governing the public service remit during the period of the investigation from 1995-2002 are laid down in successive versions of the Radio and Television Broadcasting Act (hereinafter 'the Broadcasting Act') ([16]).

([12]) Commission decision of 4 August 2009 (OJ C 9, 14.1.2009, p. 2).
([13]) Case T-114/09, Order of the President of the Fifth Chamber of the General Court, 17 May 2010.
([14]) OJ C 207, 2.9.2009, p. 2.
([15]) By Act No 335 of 4 June 1986, which entered into force on 1 July 1986.
([16]) Act No 578 of 24 June 1994, as amended by Act No 666 of 5 July 1996, Act No 75 of 29 January 1997, Act No 138 of 19 February 1998, Act No 208 of 6 April 1999, Act No 551 of 20 June 2000, Act No 203 of 22 March 2001, Act No 701 of 15 July 2001, Act No 1052 of 17 December 2002.

(29) TV2's mission is to provide and distribute national and regional television programmes. Distribution may be by means of radio equipment, including satellite or cable systems. The Minister of Culture issues the rules governing TV2's obligations.

(30) TV2 has a public service obligation. Under the Broadcasting Act (1994 — the version in force during the period concerned) ([17]), TV2 is an independent institution whose object is to provide and distribute national and regional television programmes through independent programme activities. The range of the programmes provided must focus principally on quality, versatility and diversity. Priority must also be given to regional relevance in planning programmes for the regional TV2 stations.

(31) As noted in the Court's judgment ([18]), the precise definition of TV2's public service mission has changed over time, but all the definitions at different points during the period under investigation require 'quality, versatility and diversity', which are the essential qualitative requirements of the public service activity entrusted to TV2.

(32) A further definition of the public service mission can be found in TV2's Statutes. For example, these specify TV2's broadcasting obligations as regards art and culture, Danish film production, programmes for children, young people, and ethnic minorities. TV2 is also obliged to broadcast emergency warnings to the population.

(33) TV2's public service activities are financed through its share of television licence fees, through advertising income, and through other income. Under the terms of the Broadcasting Act in force in 1994 ([19]) TV2's overall activities are financed by resources transferred from the TV2 Fund in accordance with the framework budgets established by the Minister of Culture, by income from the sale of programmes, and through other contributions, subsidies, etc. It should be noted that for the years 1995 and 1996, TV2 received its share of the licence fees and the advertising revenue from a special fund (the TV2 Fund) ([20]).

(34) The provisions on broadcasting by commercial television stations beyond a single local area are laid down in chapter 5 of the Broadcasting Act. Chapter 6 deals with local radio and television services. The main requirement is to obtain a broadcasting licence. The programming requirements for licence holders are laid down in Executive Orders No 874 on European content and No 1349 concerning local radio and television ([21]). Under those orders, network stations that obtain a local television broadcasting licence must transmit local programmes for at least 1 hour a day and produce a significant share of their programming in Danish or for a Danish audience. As TV3, 3 + and TVDanmark's first channel are broadcast under a British licence, these rules only apply to TVDanmark2.

II.1.3. TV2's COMMERCIAL ACTIVITIES

(35) Between 1995 and 2002, TV2 engaged in a number of commercial activities, having been given a separate legal basis for this purpose as from 1 January 1997 ([22]) allowing it, among other things, to exploit its technical equipment, establish new companies or make capital investments in existing companies. Between 1995 and 2002, these activities included such things as advertising, the sale of programmes, letting out of masts, merchandising, Internet activities, re-sale of sports rights, etc.

(36) From January 2001, TV2 was obliged to keep separate accounts for its public service operations and 'any other operations' if the latter exceeded 5 % of turnover and DKK 3 million per year. Full cost accounting had to be applied, non-public services/products had to be priced according to market value, and transfers of capital between the public service and other undertakings had to take place in accordance with the market economy investor principle and could not involve licence fee resources ([23]).

II.2. *THE MEASURES*

Licence fee revenue

(37) Between 1995 and 2002, TV2 received licence fee revenue.

(38) The Minister for Culture sets the amount of the licence fee payable by the owners of radio receivers and television sets, for one or more years at a time ([24]). The television licence fee is collected by DR and the revenue is then distributed between DR and TV2 as determined by the Minister of Culture under a media agreement with the Danish Parliament.

([17]) Paragraph 18 of the Broadcasting Act (1994 version).
([18]) Paragraph 119.
([19]) Broadcasting Act, Section 30 (1994 version).
([20]) See recitals 79 ff. of the present decision.
([21]) Executive Order No 874 of 9 December 1998 concerning radio and television services by way of satellite or cable; Executive Order No 1349 of 18 December 2000 concerning local radio and television services.
([22]) Executive order 658 of 18 August 1997, Sections 12-13.
([23]) Order No 740 of 21 August 2001, implementing Directive 2000/52/EC on separate accountancy between Danmarks Radio's and TV2's public service undertaking and any other undertakings.
([24]) Sections 61-63 of the Broadcasting Act (1994 version).

(39) The Minister for Culture lays down the rules on when the obligation to pay licence fees comes into effect and when it ceases, on time limits for payment and enforced collection, and on reminder fees etc. Interest is charged on late payments in accordance with the law on interest. Collection of unpaid fees and charges can be enforced by the Hypotekenbank (Danish Mortgage Bank). Unpaid sums can, for example, be deducted from the salary of the person concerned in accordance with the rules on collection of personal taxes as laid down in the Deduction of Taxes at Source Act.

(40) Until 1997, TV2 received its funding (advertising and licence fee revenue) through the TV2 Fund. Since 1997, TV2 has received its share of licence fee revenue directly from DR.

Transfers from the TV2 Fund and the Radio Fund

(41) In 1995 and 1996, TV2 received advertising revenue from the TV2 Fund ([25]).

(42) TV2 also received DKK 58 million from the Radio Fund for increased commitment to Danish film production.

(43) In addition, when the TV2 Fund was wound up in 1997, TV2 received DKK 167 million from the Fund for investment in digitisation of its production systems and DKK 50 million to cover operational costs.

Exemption from corporation tax

(44) TV2 has, moreover, been exempted from paying corporation tax under the Company Act. The resulting benefit to TV2 over the period under investigation amounts to DKK 159,4 million. In January 2001, the Danish State introduced a mechanism to neutralise the effect of the tax exemption on TV2's commercial activities. TV2 has had to transfer 30 % of the annual surplus from its non-public service to its public service activities. That rate corresponds to the standard corporate tax rate that Denmark introduced in 2000.

Interest-free and repayment-free status of start-up loans

(45) Government loans financed the start-up costs and operating deficit of TV2 during its initial period of operation. Under the initial loan agreements, TV2 was to pay interest on the principal and was to repay the loans in full. However, during the entire period of the investigation, TV2 was exempted from interest payments and enjoyed a moratorium on repayments. The advantage resulting from the interest- and repayment-free start-up and operating loans for the period under investigation was DKK 341,8 million.

([25]) See recitals 79 ff. of the present decision.

State guarantee for operating loans

(46) Until the end of 1996 the Government issued guarantees for loans taken out by the TV2 Fund in order to finance the operation of TV2. The amount of the guaranteed loans was transferred to TV2 when the Fund was wound up. The advantage for TV2 resulting from this guarantee is DKK 9,8 million.

Fees paid for use of a nationwide transmission frequency and for a licence to broadcast using local frequencies in a networked configuration

(47) During the period under investigation, Denmark had access to three nationwide terrestrial transmission frequencies that were reserved for the public broadcasters. One frequency was reserved for TV2, a second for DR, and a third for digital television.

(48) TV2 paid a fee for the use of the reserved nationwide broadcasting frequency to the National IT and Telecom Agency, a State body under the Ministry for Research, Technology and Development ([26]). The amount of the fee was laid down in the Danish Finance Act. During the period under investigation, TV2 paid between DKK 2 and 4 million annually in frequency fees.

(49) Denmark also has frequencies for regional coverage only. In 1997, the Government introduced the possibility of linking up regional frequencies to achieve wider coverage (networking). Between 1998 and 2001, local commercial television stations licensed to broadcast in a networked configuration had to pay an annual fee to the State ([27]). TV2's regional services were not liable for payment of the fee as those services broadcast in 'windows' on TV2's national frequency. The commercial television station TVDanmark was the only operator that paid this fee, for its second channel. The total fees that it paid amounted to DKK 85,0 million.

Must-carry status

(50) Owners of communal aerial installations have an obligation to relay the public service programmes of TV2 through their installations (must-carry).

III. COMMENTS FROM INTERESTED PARTIES AND FROM DENMARK

(51) Firstly, the Commission received various comments from interested parties following its decision to open the formal investigation procedure. The main points are summarised below.

([26]) Section 38 of the Danish Act on Radio Communications and Allocation of Radio Frequencies and section 48 of the Danish Act on Radio Frequencies.

([27]) Introduced by Act 1208 of 27.12.1996 and incorporated in Section 60(a) of the 1997 version of the Broadcasting Act; abolished on 1 January 2002 by Act No 259 of 8.5.2002.

(52) TVDanmark considered that the provision by the State of a nationwide transmission frequency constituted State aid, as the State foregoes income on this scarce asset. Competitors had only 77 % coverage at most. TVDanmark argued that because the networking charge was levied only on TVDanmark2 and not on TV2's local stations, even though they were economically and commercially in the same situation, it constituted State aid to TV2's local stations. According to ACT, Antena 3 TV and Telecinco, the EC principle of neutrality regarding means of retransmission required that the fee should have been imposed on any kind of network.

(53) Regarding the exemption from corporation tax, ACT, Antena 3 TV and Telecinco commented that TV2's obligation to transfer 30 % of the profit from its commercial activities to its public activities could not be regarded as equivalent to paying corporation tax to the State, as it distorted competition within the broadcasting market.

(54) Several third parties held that the definition of TV2's public service remit was not legitimate. They disputed that the conditions regarding the transfer of tasks and the proportionality conditions had been met. In particular, TVDanmark argued that the Commission's calculation of overcompensation should take into account the benefit to TV2 of its exemption from corporation tax, its interest- and repayment-free start-up loans, the State guarantee for operating loans, and the free use of a transmission frequency. TVDanmark submitted that in general the market fluctuations in television advertising income were limited and did not justify TV2's build-up of capital.

(55) Concerning the advertising market, TVDanmark submitted that TV2's pricing practices did not allow commercial operators to recover stand-alone costs. TVDanmark had to price its TRP around 30-40 % below TV2 in order to gain market acceptance (TV2's TRP and GRP are more valuable because its coverage is better) ([28]). Thanks to TV2's unique position in terms of coverage and programming budget, an advertiser would always place a certain part of his budget with TV2 to obtain a maximum impact in terms of the number of contacts, reach, and/or frequency with a given budget. TVDanmark supplied figures illustrating that its operations made a loss between 1997 and 2002, alleging that TV2's unfair competition prevented TVDanmark from generating sufficient revenue. TVDanmark also submitted an analysis of pricing for television advertising on the Danish market prepared by Copenhagen Economics. The analysis compared average and marginal prices on the market and concluded that there was competition only for the residual demand and that any comparison should therefore be based on marginal prices. Moreover, TVDanmark submitted information comparing TV2's advertising prices with those for other types of media and with prices in other countries.

(56) TV3 stated that it had to grant very high discounts for its advertising slots in order to get market acceptance, as TV2 offered extra marginal discounts on the remainder of advertiser's television advertising budgets if they also placed it with TV2.

(57) Secondly, the Commission also received comments from the Danish authorities following its decision to open the formal investigation procedure. The main points are summarised below.

(58) The Danish authorities considered that the transmission frequencies for TV2 could not be considered an advantage as local television stations also had transmission frequencies reserved for them. Therefore, TV2 had not received special treatment. TV2 had, like other stations, paid a charge for using the frequency.

(59) On the corporation tax exemption, the Danish authorities observed that the profit on commercial activities was quite limited and that the method chosen to neutralise the effect of TV2's exemption from corporation tax on its commercial activities meant that it did not derive any financial benefit from the exemption.

(60) On the proportionality issue, the Danish authorities stated that the transfer of DKK 167 million from the TV2 Fund was allocated to digitising the broadcasting network. Therefore, it could not be described as free capital.

([28]) Advertisers can purchase advertising time on the Danish TV stations in two ways: on the basis of gross rating points (GRPs), which relate to the total audience aged 12 years and over, or on the basis of target rating points (TRPs), which relate to a narrower target group. TV2 is the only station in Denmark to sell GRP as well.

(61) The Danish authorities also stated that surplus for the years 1995-2002 reflected a reasonable rate of return in relation to TV2's turnover. Moreover, the capital was needed as a buffer in the case of sudden drops in advertising revenue and under the law TV2 was not allowed to take out loans exceeding 4 % of annual turnover. In addition, according to the Danish authorities, the State was acting in accordance with the 'market economy investor principle', as TV2's own capital did not exceed what a normal market investor would have injected. Such capital was not contrary to the Treaty, provided it was not used to cross-subsidise TV2's commercial activities.

(62) Regarding TV2's behaviour in the advertising market, the Danish authorities pointed out that TV2 had consistently set its prices so as to maximise revenue. Prices were set purely according to supply and demand. They were set annually on the basis of estimates by TV2's advertising division of the commercial audience share (21-50 years old), the programme schedule, economic developments and the competitive situation on the market. TV2's operating costs were not a factor in the estimate, nor was the amount of licence fee revenue. TV2's prices were the highest on the Danish market and therefore there was no question of undercutting prices, with an increased need for State funding as a result.

(63) The Danish authorities submitted a report prepared by RBB Economics on competition on the Danish television advertising market. The report concluded that the average net prices charged by TV2 were in fact higher than the prices charged by its competitors and that the differences in advertising rates charged by TV2 and TVDanmark were explained by differences in their relative strength in terms of programming and the ability to attract audiences.

(64) Thirdly, following the Court's judgment, the Commission asked the Danish authorities to give their analysis of its implications for the case.

(65) The Danish authorities sent their observations and also submitted comments from TV2. The main points are summarised below.

(66) Concerning advertising revenue for 1995 and 1996, the Danish authorities and TV2 argued that the Danish State had no control over the amounts and therefore it should not be considered as State resources. The Danish authorities did not confirm the figures put forward by the Commission, but explained that the calculation of advertising revenue for 1995 and 1996 had to take into account the fact that part of the money from the TV2 Fund was used to finance the TV2 regions, and that this part could only be financed from licence fee resources. However, the Danish authorities conceded that advertising revenue should in any case be taken into account for the purposes of calculating the net cost of the public service remit and that it constituted income generated by public service activities.

(67) The Danish authorities and TV2 also pointed to the Court's judgment as proof that the conditions of the Altmark judgment of 24 July 2003 ([29]) were met. They recalled that, like the BUPA case ([30]), the TV2 case concerned circumstances already in existence prior to the date of the Altmark judgment. They contended that when applying the Altmark criteria, the spirit and the purpose of the criteria had to be observed so that the facts of the particular case were taken into account. In their view, it followed from the judgment that the only requirement the Court had imposed on the Danish State was that it should, 'in essence', comply with the Altmark conditions.

(68) More specifically, the Danish authorities and TV2 held that the procedure used to set the licence fee was transparent and complied with the requirements of the second Altmark criterion, at least in essence, and in their view this was sufficient in the light of the Court's judgment. They considered that the third criterion was also met in so far as TV2 was allowed to keep a reasonable profit. Concerning the fourth Altmark condition, they highlighted the extensive controls which applied to TV2 and argued that the BUPA case and the Court's judgment supported their claim that in this particular instance the test should be relaxed somewhat or should only be met in essence. Citing the Chronopost case ([31]), they also pointed out that in practice it was not possible to compare TV2 with a typical well-run undertaking. In addition, the Danish authorities reiterated their view that under the market economy investor test, the compensation should be approved.

(69) The Danish authorities and TV2 argued further that the State aid should be declared compatible. They explained the process that led to the build-up of capital in TV2 and highlighted the different reasons why this capital was necessary for TV2 to fulfil its public service tasks.

([29]) Case C-280/00 *Altmark Trans und Regierungspräsidium Magdeburg* [2003] ECR I-7747.

([30]) Case T-289/03 *BUPA and Others* v *Commission* (OJ C 79, 29.3.2008, p. 25).

([31]) Joined Cases C-83/01 P, C-93/01 P and C-94/01 P.

(70) Some third parties also submitted comments following the Court's judgment. In essence, they argued that the Altmark conditions should not be found to be met, in particular, because the economic reports referred to by the Court were not sufficient to demonstrate that the second and fourth criteria were satisfied. They also contended that the Commission should maintain its conclusion in the annulled recovery decision, i.e. that the aid was not compatible.

IV. **ASSESSMENT OF THE MEASURES**

IV.1. *STATE AID WITHIN THE MEANING OF ARTICLE 107(1) TFEU*

(71) Article 107(1) TFEU provides that '*Save as otherwise provided in the Treaties, any aid granted by a Member State 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 Member States, be incompatible with the internal market*'.

(72) The Commission has to assess whether the measures described above constitute State aid within the meaning of Article 107(1) TFEU.

IV.1.1. STATE RESOURCES AND ATTRIBUTION OF RESPONSIBILITY

(73) The Commission has to assess whether the measures in question involve State resources.

(74) Concerning the **licence fee**, the Commission takes note of the Court's findings in its judgment ([32]). In particular, the amount is determined by the Danish authorities; the obligation to pay the licence fee does not arise from a contractual relationship between TV2 and the person liable to pay but simply from the fact of owning a television or radio receiver; where necessary, the licence fee is collected in accordance with the rules on the collection of personal taxes; and, lastly, it is the Danish authorities that determine TV2's share of the income from licence fees. The Court concluded that licence fee resources are available to and under the control of the Danish authorities and that they therefore constitute State resources.

(75) Concerning the **advertising revenue for 1995 and 1996**, the Court pointed out in its judgment that the licence fee and advertising revenue are different in nature ([33]).

([32]) Paragraphs 158 and 159 of the grounds.
([33]) Paragraph 165 of the judgment.

(76) In its judgment, the Court held ([34]) that the Commission had not stated sufficient reasons why the 1995 and 1996 advertising revenue should be considered State resources.

(77) In light of the PreussenElektra ruling ([35]), the Commission has to demonstrate whether the advertising revenue for the years 1995 and 1996 can be classed as State resources. For this purpose, it has to assess whether this revenue was under the control of the Danish State.

(78) In this respect, the Commission takes note of the following factors relevant for deciding whether the 1995 to 1996 advertising revenue constituted State resources.

(79) In 1995 and 1996, TV2 received the advertising revenue from the TV2 Fund, which itself received the advertising revenue from TV2 Reklame A/S.

(80) TV2 Reklame was a separate State-owned vehicle independent from TV2. The company was set up to act as an agent for the sale of advertisements on TV2 on a commercial basis ([36]). TV2 Reklame had a contractual relationship with its advertising customers.

(81) There was no obligation to transfer revenue from TV2 Reklame to the TV2 Fund. The transfer was instead decided by the Danish State ([37]). The Minister of Culture decided what part of TV2 Reklame's profits was to be transferred to the TV2 Fund. The decision was taken for one or more years at a time with the approval of the Danish Parliament (the Finance Committee). The Minister of Culture could decide that non-transferred profit should be used for repayment of the State guarantee issued previously for TV2 Reklame or for cultural purposes.

(82) In practice, in 1995 and 1996, the full amount of TV2 Reklame's profits was transferred to the TV2 Fund.

([34]) Paragraph 167.
([35]) Case C-379/98 *PreussenElektra AG* v *Schleswag AG* [2001] ECR p. I-02099; judgment delivered on 13 March 2001.
([36]) Section 31, Broadcasting Act (1994 version).
([37]) Section 29 of the Broadcasting Act (1994 version); see also the 4/94 report, paragraph 4: 'The Minister of Culture decides in agreement with the Finance Committee [of Parliament] what share of the advertisement company's profit and what share of the license fees should be paid annually into the TV2 Fund. If insufficient funds go into the TV2 Fund, the Fund can — with the Minister's approval — take out State guaranteed operating loans. The size of the guarantee is determined by the Minister in agreement with the Finance Committee. In line with the framework budgets set by the Minister of Culture, funds are transferred from the TV2 Fund to finance the broadcasting enterprise constituted by a nation-wide television station — TV2/Danmark — and 8 regional stations.'

(83) The TV2 Fund was set up with the aim of providing TV2 with income from the licence fee resources and advertising revenue. The TV2 Fund belonged to the TV2 group. It was administered by TV2's board of directors.

(84) There was no obligation to transfer money from the TV2 Fund to TV2 every year. Rather, the transfer to TV2 was decided by the Danish State. For under the law the TV2 Fund was obliged to transfer funds to TV2 in accordance with the framework budgets laid down by the Minister of Culture ([38]).

(85) In practice, TV2 did not receive all the advertising revenue from the TV2 Fund in 1995 and 1996.

(86) In addition, no distinction was made in the TV2 Fund accounts between advertising revenue and licence fee resources. Revenue that was not transferred to TV2 accumulated in the TV2 Fund. It was transferred to TV2 when the TV2 Fund was wound up.

(87) According to TV2 and the Danish authorities, the advertising revenue belonged to TV2 and TV2 was legally entitled to it. They referred to a letter from the Minister of Justice dated 22 November 2003, which stated that TV2 Fund's resources could only be used to cover TV2's activities. According to TV2 and the Danish authorities, there was therefore a legal obligation to transfer the advertising revenue from the TV2 Fund to TV2 *eventually*. However, as indicated above, there was no obligation under the law to transfer all the advertising revenue to TV2 and it was for the Minister to take a specific decision on whether money was to be transferred to TV2, and if so how much.

(88) Concerning TV2, it should be added that the broadcaster had no contractual relationship with advertisers and no influence on advertising activities ([39]). The Danish government confirmed that the anticipated advertising revenue for the coming year was determined independently of TV2.

(89) On the basis of the above information, the Commission considers that the Minister had control over the funds in TV2 Reklame and the TV2 Fund. In particular, it is noted that (i) it was the Danish State that decided whether part or all of the advertising revenue was to be transferred to the TV2 Fund and to TV2; (ii) in 1995 and 1996 TV2 did not receive all the advertising revenue; and (iii) the advertising revenue that was not transferred accumulated in the TV2 Fund, where it was, in practice, merged with the licence fees.

(90) For these reasons, the Commission considers that, in this specific case, the advertising revenue for the years 1995 and 1996 that was transferred to TV2 via TV2 Reklame and the TV2 Fund constitutes State resources.

(91) But even if the advertising revenue were not classed as State resources (*quod non*), it would make no difference to the amount of State aid that could be considered compatible. In line with the Commission's constant practice and the 2001 Broadcasting Communication ([40]), income derived from public service activity, such as advertising revenue, must be taken into account when calculating the net costs of the public service, which means that such revenue, even if not regarded as State resources, reduces the need for public financing. The Danish authorities share this view ([41]).

(92) The ad-hoc transfer of resources to TV2 from the Radio Fund involved licence fee revenue that was made available to TV2 after a decision by the State. The same is true of the ad-hoc transfer from the TV2 Fund when it was wound up, since quite apart from the fact that the Danish State exercised control over the TV2 Fund, as mentioned earlier, the resources from the TV2 Fund were made available to TV2 by decision of the State. As those resources remained under public control, they have to be regarded as State resources. And since the advertising revenue is regarded as State resources and the transfer to TV2 at the time of the winding-up was in any event decided by the State, the Danish authorities' claim that the lump sum transferred to TV2 when the TV2 Fund was wound up derived exclusively from advertising revenue does not alter this conclusion.

(93) Concerning the other State measures, the Commission considers that the **corporate tax exemption** constitutes use of public resources, since foregoing tax revenue is equivalent to the consumption of State resources in the form of fiscal expenditure ([42]).

([38]) Sections 30-33 of the Broadcasting Act (1994 version); see also the 4/94 report, paragraph 4, quoted above.

([39]) Letter from the Danish authorities, 24 March 2003, p. 8.

([40]) Point 57 of the 2001 Broadcasting Communication.

([41]) Reply from the Danish Government in point 3 of its letter of 26 June 2009.

([42]) Point 10 of the Commission Notice on the application of the state aid rules to measures relating to direct business taxation (OJ C 384, 10.12.1998, p. 3).

(94) The **interest- and repayment-free loans** granted to TV2 are directly provided by the State and allocated from the State budget. By foregoing the interest and repayments on these loans, the Danish State foregoes income and therefore these funds constitute State resources. Furthermore, it is the Danish State that **guarantees** the **operating loans**. The benefit of a State guarantee is that the risk associated with the guarantee is carried by the State. The fact that the State carries the risk should normally be remunerated by an appropriate premium. Where the State foregoes such a premium, there is both an advantage for TV2 and a drain on the resources of the State ([43]).

(95) Moreover, the State has reserved a nationwide **transmission frequency** for TV2, for which TV2 pays a frequency fee to a State body. The annual fee that TV2 paid varied between DKK 2 million and DKK 4 million during the period under investigation.

(96) In the absence of a basis of comparison for the fee paid for the nationwide frequency, it can only be compared with the fee paid for the permit to reach a larger share of the population through a network configuration. The frequency fee paid by TV2 for nationwide coverage is significantly lower than the networking fee that was imposed on TVDanmark, which varied between DKK 5 million in 1997 and DKK 30 million in 2001 even though the network of TVDanmark's regional frequencies only attains a 77 % coverage. Thus, TV2 has been able to reach a larger share of the Danish population at a lower price.

(97) The Commission therefore considers that the frequency fee does not reflect market conditions and that by not asking for the market rate for the asset, the State has foregone revenue that should have gone to the State budget.

(98) In contrast, since TV2 does not broadcast using a configuration of local frequencies in order to create a national network, it is not liable to pay the networking fee. As the State was not entitled to collect this fee from TV2, it did not forego revenue and hence State resources are not involved here.

(99) Similarly, the Commission cannot discern any element of State resources in the legal obligation on owners of common aerial installations to relay public service programmes through those installations (**must-carry**) as the State is neither forgoing any income nor actively transferring funds to such operators. This access rule does not confer on TV2 any financial advantage from State resources ([44]).

([43]) Point 2.1.2 of the Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees (2000/C 71/07).

([44]) See Aid No NN 70/98, 'State aid to public broadcasting channels "Kinderkanal and Phoenix" ' (OJ C 238, 21.8.1999, p. 3).

(100) All the abovementioned measures are attributable to the Danish State because, as described above, they involved a decision by the Danish State in one way or another.

IV.1.2. SELECTIVE ADVANTAGE AND DISTORTION OF COMPETITION

(101) The Commission considers that the licence fee revenue, the transfers from the TV2 Fund (including advertising revenue for 1995 and 1996) and the Radio Fund, the exemption from corporate tax, the interest- and repayment-free loans, and the State guarantee for operating loans, together with access to a nationwide frequency on favourable terms, gave TV2 an economic and financial advantage, relieving it of operating costs that it would normally have had to bear through its budget. Furthermore, TV2's competitors did not receive the same funds.

(102) However, State measures compensating the net additional costs of a service of general economic interest (SGEI) do not qualify as State aid within the meaning of Article 107(1) TFEU when the four conditions set out by the Court of Justice in the Altmark case ([45]) are fulfilled:

— first, the recipient undertaking must actually be required to discharge public service obligations and those obligations must be clearly defined,

— second, the parameters on the basis of which the compensation is calculated must be established beforehand in an objective and transparent manner,

— third, the compensation must 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 that is to discharge public service obligations is not chosen in a public procurement procedure, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of production 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.

([45]) Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* [2003] ECR I-7747.

(103) As will be described more fully in the section of the present decision dealing with the compatibility of the measures (recitals 160 ff. of the present decision), it follows from the Court's judgment that the first Altmark condition is met.

(104) As regards the second Altmark criterion, whereby the parameters used to calculate the compensation must be established beforehand in an objective and transparent manner, the Commission has to assess the legal and economic conditions under which the licence fee revenue payable to TV2 was determined during the period under investigation. In that connection the Commission notes that the procedure was as follows.

(105) According to points 29 and 30 of the Danish authorities' letter of 24 March 2003, the Radio and Television Broadcasting Act applicable during the period under investigation ([46]) laid down how the TV2 station as a whole was to be financed (licence fee resources, advertising revenue, and other sources of income) and assigned responsibility for determining TV2's and DR's share of the licence fee and therefore the amount of compensation to be granted to TV2 to the Minister for Culture. It should be noted that for the years 1995 and 1996, TV2 received its share of the licence fee from the TV2 Fund.

(106) In accordance with established practice, the size of the compensation was determined by the Minister in consultation with the Finance Committee of the Danish Parliament within the framework of a media agreement concluded with a majority of the political parties in the Parliament. At the time in question, there were 3 media agreements: the media agreement for 1994 to 1997, concluded on 16 September 1993, the media agreement for 1997 to 2000, concluded on 10 May 1996, and the media agreement for 2001 to 2004, concluded on 28 March 2000.

(107) The licence fee revenue was thus fixed for a fairly long time. During the period under investigation, the compensation granted to TV2 was not subject to any subsequent review, even when TV2's revenue was falling. For example, although TV2's advertising income suffered a major decline in 1999, the compensation was not adjusted to reflect this fact.

(108) According to the Danish authorities, the compensation was determined through price and wage indexing of TV2's budget and accounts, and through economic analyses.

([46]) Act No 578 of 24 June 1994, as amended by Act No 666 of 5 July 1996, Act No 75 of 29 January 1997, Act No 138 of 19 February 1998, Act No 208 of 6 April 1999, Act No 551 of 20 June 2000, Act No 203 of 22 March 2001, Act No 701 of 15 July 2001 and Act No 1052 of 17 December 2002.

(109) In-depth economic analyses were carried out in 1995 and in 1999 by KPMG, a firm of auditors. For the 1999 report KPMG was assisted by a follow-up group consisting of representatives of the leading players in the market, including TV2's competitors. Particular attention was paid to information on potential income from sources other than the licence fee, such as advertising revenue.

(110) In points 164 and 165 of their letter of 24 March 2003, the Danish authorities stated that the KPMG consultancy studies, which were meant to forecast the likely trend of advertising turnover in the Danish advertising market and TV2's sources of income, and to identify the uncertainties associated with those estimates, were drawn up in order to give the Danish Government and Parliament a better basis for determining and allocating licence fee revenue in the negotiations on media policy.

(111) According to the Danish authorities, the documents used to determine the compensation were publicly available. The media agreements were published in press releases and the Official Record of Parliamentary Proceedings (*Folketingstidende*). The legislation that was to implement the media agreements was published in the Danish Official Gazette (*Lovtidende*). TV2's accounts were also published, together with the abovementioned economic analyses.

(112) In light of the Court's judgment, the Commission has to assess whether, given the procedure described above, it can be concluded that the second Altmark criterion is met.

(113) On the one hand, the Commission takes note that in its judgment ([47]), the Court stated that '(…) *conceivably, the above procedure for determining the amount of licence fee income payable to TV2 was objective and transparent given, in particular, that it involved the Danish Parliament, that it was based on economic analyses prepared by a firm of auditors assisted by a follow-up group of experts in which TV2's competitors participated, and that those analyses were published, as were TV2's annual accounts. Accordingly, it cannot be ruled out that a serious analysis of that procedure might lead to the conclusion that, even before the Altmark conditions were laid down by the Court of Justice, the Kingdom of Denmark had, in essence, complied with the second of those conditions*'. The Court also held that '*the amount of the licence fee income payable to TV2 was calculated on the basis of the specific assumption that TV2 would continue to benefit from those other State measures*' ([48]) (i.e. tax exemption, etc.).

([47]) Paragraph 228 of the judgment.
([48]) Paragraph 229 of the judgment.

(114) The Commission considers that the involvement of the Danish Parliament in the process for setting the licence fee ensured a certain degree of transparency and objectivity. Moreover, the media agreements setting the amount of licence fee resources to be allocated to TV2 were decided in advance for several years, and thereafter TV2's compensation was never adjusted during the period under investigation.

(115) However, the economic reports prepared by KPMG only gave estimates of the amount of advertising revenue accruing to TV2 (i.e. the income side). They said nothing about the cost side of the compensation calculation, and it seems to the Commission that the media agreements were based solely on indexation of TV2's costs in the previous years. Indeed, the Danish authorities stated that the compensation was determined on the basis of price and wage indexing of TV2's budgets and accounts and on the basis of the economic analyses, which only assessed the income side and did not deal with the period covered by the media agreement concluded on 16 September 1993.

(116) In addition, there was no indication of the parameters to be used to calculate the compensation. The amount of the compensation was set in advance, but the second Altmark criterion requires that the parameters used to calculate the compensation must themselves be established beforehand in an objective and transparent manner.

(117) In the light of the foregoing, the Commission considers that the second Altmark criterion is not met. In any event, the Altmark criteria are cumulative and the Commission finds that the fourth criterion is not met (see below).

(118) The fourth Altmark criterion requires that '[*the*] *public service provider should be chosen according to a public procurement procedure or the level of compensation needed* [*should be*] *determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of production 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*'.

(119) In the present case, the public service provider TV2 was not chosen following a public procurement procedure. The Commission therefore has to assess whether the level of compensation was determined on the basis of the costs which a typical undertaking, well run and adequately provided with means of production, would have incurred in discharging the public service obligations.

(120) The economic and legal conditions in which the compensation to TV2 was set have been described above. In the light of the Court's judgment and taking account of its finding that the procedure used by the Kingdom of Denmark to determine the amount of licence fee revenue payable to TV2 between 1995 and 2002 involved, inter alia, economic analyses drawn up with the help of TV2's competitors, the Commission must take particular account of the 1995 and 1999 KPMG reports in assessing whether TV2's costs were compared with those of a typical well run operator.

(121) The KPMG reports consider various scenarios of how the advertising market might develop over the respective licence fee periods. The reports contain no information on TV2 as such (e.g. on its financial situation or its operating costs); they illustrate how advertising revenue might develop and how much of the general advertising market might result in revenue for TV2. By estimating how advertising turnover in the Danish advertising market was most likely to develop and identifying the uncertainties associated with these estimates, the reports were part of the procedure used by the Danish authorities to determine the licence fee to be granted to TV2.

(122) The KPMG reports do not assess any of TV2's costs or the costs of other operators, limiting themselves to considering the development of the advertising market and TV2's share of advertising revenue. It should also be noted that the reports do not cover the first years of the period under investigation, which was covered by the 1993 media agreement.

(123) To a certain extent, competitors were involved in drawing up these reports. The 1995 report states that 'many stakeholders' were involved, but it is not clear from the report who they were. The 1999 KPMG report mentions a follow-up group of experts that did indeed involve competitors of TV2. However, the fact that these economic reports were to some extent drawn up with the help of TV2's competitors does not prove by itself that an analysis of the competitor's costs was carried out.

(124) In other words the reports include no analysis of the costs which a typical undertaking, well run and adequately provided with means of production, would have incurred in discharging public service obligations, but instead dealt with the more general issue of the outlook for the advertising market as well as the amount of TV2's future advertising revenue. It should also be added that prices on the advertising market are determined by a variety of factors, such as audience shares, and not only on the basis of costs.

(125) The Danish authorities and TV2 also put forward legal and factual arguments in relation to the fourth Altmark condition.

(126) Firstly, Denmark cited the BUPA case, arguing that the fourth Altmark condition did not necessarily apply, or at least that the Commission, in light of the Court's judgment, should only assess whether it was met in essence. The Commission takes the view that the situation in the BUPA case was rather special in that the scheme in question, which concerned the provision of health services, was not cost-related but was based on customers' risk profiles, unlike in other public service sectors. In that instance there was thus no possibility for the operator to improve efficiency by way of its costs. However, for public service broadcasters, it is possible to calculate the compensation on the basis of costs and revenue.

(127) Secondly, with reference to the Chronopost ([49]) case, Denmark argued that a public service provider like TV2 could not be compared to a private operator. However, the Commission takes the view that unlike the issue at stake in the Chronopost case, which was cost allocation in the context of a compatibility assessment, the essence of the fourth Altmark criterion is precisely that, in the absence of a tender, the costs of the public service provided should be compared with those of a typical undertaking, well run and adequately provided with means of production.

(128) In addition, Denmark argued that the National Audit Office (*Rigsrevision*) carried out financial and management audits of TV2's accounts as part of its routine appraisals of TV2 and that routine checks were made, including on efficiency. However, the Commission does not consider that the fact that TV2's accounts were submitted for approval by the Ministry of Culture is sufficient proof that TV2's costs were those of a typical well-run undertaking. In addition, it is doubtful whether *ex post* controls can be relevant for fulfilment of the fourth criterion if no analysis of the costs was made before compensation was set.

([49]) Joined Cases C-83/01 P, C-93/01 P and C-94/01 P.

(129) The Danish authorities pointed in particular to the 2000 report from the Danish National Audit Office, in which the change in TV2's productivity was to some extent compared with that of DR and certain foreign public service broadcasters (British Broadcasting Corporation (BBC), Sveriges Television 'SVT' and Norsk Riksringkastning 'NRK'). In the report, the National Audit Office found that both DR and TV2 improved productivity between 1990 and 1999. DR reduced its hourly costs for first broadcasts by more than TV2, but in 1999 those costs were still 53 % higher than TV2's. DR's overall hourly broadcasting costs in 1999 were approximately 29 % higher than TV2's. The National Audit Office also found that DR's and TV2's productivity improvements were better than or equal to the productivity increase of the other three public service broadcasters.

(130) However, that report is not sufficient proof that the fourth condition was fulfilled.

(131) Indeed, the report was produced after the media agreements that set the amount of compensation and therefore did not show that the compensation was determined on the basis of the costs that a typical undertaking would have incurred in fulfilling its public service mission.

(132) Furthermore, the report made a comparison with other public service broadcasters and therefore did not deal with the costs of a 'typical' broadcaster. For example, it did not establish that the costs of DR, which is not allowed to generate income through advertising and whose level of compensation was determined under the same media agreement as TV2, were those of a typical undertaking. For the purposes of the fourth Altmark criterion, it is therefore impossible to draw any conclusions from the comparison with DR's costs.

(133) As regards the comparison with foreign public service broadcasters, the report only compared the development of TV2's productivity with one of the other public service broadcasters, but was silent on the level of efficiency as such, and hence on the costs themselves. In particular, a lower productivity increase could be due to many factors, for instance because efficiency was higher at the beginning of the period or because the broadcaster was not able to increase its broadcasting time. For example, paragraph 51 of the report states that *'During the period in question, the BBC and SVT saw an almost identical rise in costs, an increase of approximately 50 % in real terms, while NRK's costs increased by approximately 60 % in real terms. As*

mentioned above, DR's costs increased by 23 % in real terms, and TV2's by 63 %. Since, as already stated, SVT's and the BBC's broadcasting time did not grow as much as that of the other broadcasters, this cost increase meant that SVT and the BBC did not improve their productivity in the same manner as the other three public service broadcasters'.

(134) The Commission also notes that paragraph 50 of the report states that '*As the National Audit Office has not examined the foreign public service broadcasters' accounts in any greater detail, there may be differences between those broadcasters' activities and between the calculation methods used for individual accounting items. What this means is that the costs used, and the unit costs derived from these, do not necessarily pertain to identical activities and that they have not necessarily been calculated according to identical accounting principles. As a result, unit cost levels do not lend themselves to ready comparison. Because the purpose of including the foreign broadcasters is to compare productivity "development", rather than the level of productivity as such, the National Audit Office has taken the view that the data pertaining to the foreign television broadcasters may nevertheless, in its current form, serve as a reasonable indicator of development*'. Paragraph 53 of the report also points out that '*The National Audit Office has not examined the causes of the above developments in any greater detail because, as stated above, the development of the stated unit costs is dependent on the content of the broadcasters' programme offering and because the analysis presupposes, at any rate, that the quality has remained unchanged. As this presents an immediate difficulty in terms of drawing comparisons between the public service broadcasters concerned, the findings of the analysis should be interpreted with some caution. In this respect, the Ministry of Culture has stated that it agrees with the described unit cost developments and that the comparison of DR's, TV2's and the foreign public service broadcasters' unit costs should be interpreted with some caution*'.

(135) For the above reasons, the Commission takes the view that the report does not show that TV2's costs were those which a typical well-run undertaking would have incurred in performing the public service missions.

(136) To conclude, in view of the foregoing the Commission considers that the fourth Altmark criterion is not met, and because these criteria are cumulative, the compensation granted to TV2 does not satisfy the conditions set by the Court in the Altmark judgment. In any event, as will be shown below, the Commission considers that the compensation can be considered as compatible with the internal market.

(137) The Commission also has to assess whether the measures at issue could meet the 'market economy investor test' ('MEIP test'). The Danish authorities and TV2 argued that the measures do not qualify as State aid because the conditions of the MEIP test are fulfilled. In particular, they held that it was perfectly justified under the MEIP test to leave the surplus in TV2 so as to build up capital.

(138) In this respect, it should first be noted that the question of whether the measures were justified under the MEIP test is not the same as the question of whether they could be considered necessary in order to fulfil public service tasks (see the compatibility assessment below), since the fact that TV2 necessarily had to have a certain level of reserves and capital to perform its public service tasks does not mean that a private investor would have put money into the company and not have sought a return.

(139) The Commission, in accordance with settled case-law, must determine whether, in similar circumstances, a private investor of a size comparable to bodies managing the public sector could be expected to be willing to make capital injections of the same order of magnitude ([50]). Although the behaviour of a private investor that is being compared with the public investor's behaviour need not be the conduct of an ordinary investor laying out capital with a view to realising a profit in the relatively short term, it must at least be the behaviour of a private holding company or a private group of undertakings pursuing a structural policy and guided by prospects of profitability in the longer term.

(140) Furthermore, according to settled case-law, the MEIP test must be applied at the moment the decision is taken and not *ex post* ([51]).

(141) In the present case, as Denmark is the only stakeholder in TV2, it is both the first and the last creditor to be reimbursed in the event of the company's failure. So, from the point of an investor, the Danish State could seek a return on its investment either by asking for remuneration in the form of interest on a loan or a return on a capital stake.

([50]) Case C-261/89 *Italy* v *Commission* [1991] ECR I-4437; Joined Cases C-278/92 to C-280/92 *Spain* v *Commission etc.* [1994] ECR I-4103.
([51]) Case T-16/96 *Cityflyer* [1998] ECR II-757, paragraph 76.

(142) The Commission notes that during the period in question, Denmark waived its claim to interest on the loans and allowed a moratorium on repayments. Moreover, the Danish State did not ask for any remuneration on the capital that was built up in TV2. Therefore, the Danish State did not ask for a normal return on its investment as any creditor or owner of a company normally would.

(143) Furthermore, the Danish authorities have not advanced any valid arguments to justify why it would make sense strategically to reinvest the surplus in TV2 instead of asking for remuneration in the form of interest or dividends. Such a decision would normally be taken by an investor only if he thought that reinvestment would increase the value of his initial investment.

(144) In the present instance, it has not been established that there was a business plan or a clear overall business strategy suggesting that this was the case. Nor have there been any other indications that TV2 was planning to develop its activities to produce such added value. In saying this, the Commission is not trying to use formalistic arguments in order to refute the Danish authorities' argument on the MEIP test but is merely attempting to assesses whether a market economy investor would have decided to leave the funds in TV2 on the basis of the information available to him at the time when he took the decision. However, taking into account the information available at the time when the funds were left in TV2 ([52]) and leaving aside any considerations regarding TV2's public service tasks, which a private investor would not have been taken into account, the Commission considers that there was no business plan and no investment project or any other element on the basis of which a rational private investor would have thought that the reinvestment would increase the value of his initial investment and would therefore have decided to leave the money in TV2 instead of asking for some sort of remuneration.

(145) In addition, the Danish authorities have used the return on turnover as a benchmark in order to show that they acted as a private investor when reinvesting money into TV2. However, in the present case, it has to be emphasised that the Danish Government already acts as a financer of TV2, in that it provides it with significant funds to cover part of its operating costs. The amount of these funds has a direct effect on the results that TV2 is able to generate. In practice, this ratio can be boosted simply by increasing the amount of State funding. However, as excess funding normally also leads to inefficiencies, resulting in a larger drain on State resources, it is far from certain that increased funding produces a corresponding improvement in results.

(146) Thus the Danish authorities cannot be held to have acted as a market economy investor. Nevertheless, the Commission considers that the compensation can be considered compatible, as will be explained in detail below. As already mentioned, the MEIP test is a different issue from the question of whether it was justified for the Danish State to allow TV2 to keep the surplus so as to build up the capital necessary for its public service tasks.

(147) In conclusion, the Commission takes the view that, during the period under investigation, TV2 benefited by the measures. In the television broadcasting market, TV2 competes with other broadcasters who did not receive the same advantages. Therefore, the measures have to be regarded as selective and as distorting competition within the meaning of Article 107(1) TFEU.

IV.1.3. EFFECT ON TRADE

(148) State measures are caught by Article 107(1) TFEU in so far as they affect trade between Member States. This is the case whenever the activities concerned are an object of intra-Community trade.

(149) The Court of Justice has developed a wide interpretation of this notion. It is established case-law that when aid strengthens the position of an undertaking compared with other undertakings competing in intra-Community trade, those undertakings must be regarded as affected by that aid ([53]). The fact that the undertaking in question does not engage in exports does not rule out the possibility that trade might be affected. When a Member State grants aid to an undertaking, its domestic activities may be supported or even boosted thanks to the aid, which in turn reduces the scope for other undertakings to establish themselves on the market. The aid consequently allows the recipient to maintain a market share that might otherwise have been captured by competitors from other Member States ([54]).

([52]) This information is described in detail in recitals 205 ff. of the present decision.

([53]) Cases 730/79, *Philip Morris Holland* v *Commission* [1980] ECR 2671, 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.

([54]) See cases 102/87, *France* v *Commission* [1988], ECR 4067 and 303/88 *Italy* v *Commission* [1989] ECR 801.

(150) In paragraph 18 of the Broadcasting Communication, the Commission, referring to the Court's case-law, stated that the '*State financing of public service broadcasters can generally be considered to affect trade between Member States. This is clearly the position as regards the acquisition and sale of programme rights, which often takes place at an international level. Advertising, too, in the case of public broadcasters who are allowed to sell advertising space, has a cross-border effect, especially for homogenous linguistic areas across national boundaries. Moreover, the ownership structure of commercial broadcasters may extend to more than one Member State.*'

(151) In this case, the Commission notes that TV2 is active on the international market and exchanges television programmes ([55]). It is in direct competition with commercial broadcasters that are active on the international broadcasting market and that have an international ownership structure. The financial resources made available to TV2 gave it a competitive advantage as regards the purchase of television rights and investment in programmes that could subsequently be sold. Moreover, the aid measures placed TV2 in a favourable position compared with its competitors in the European Union by reducing their scope for establishing themselves in Denmark.

(152) The Commission therefore concludes that the measures granted to TV2 had an effect on trade between Member States within the meaning of Article 107(1) TFEU.

IV.1.4. CONCLUSION

(153) Since all the conditions of Article 107(1) TFEU are fulfilled, the Commission concludes that the measures described above in favour of TV2 qualify as State aid within the meaning of Article 107(1) TFEU.

(154) As TV2 started broadcasting in 1989, all the measures for TV2 were taken after Denmark's accession to the European Union. Consequently, the measures, including the licence fee resources, constitute new State aid (rather than existing aid within the meaning of Article 108(1) TFEU).

IV.2. *COMPATIBILITY OF THE AID WITH THE INTERNAL MARKET*

(155) The Commission considers that Article 107(2) and Article 107(3)(a), 107(3)(b), 107(3)(c) and 107(3)(d) TFEU are manifestly not applicable and neither the Danish authorities nor TV2 have put forward any arguments to this effect.

([55]) See Joined Cases T-185/00, T-216/00, T-299/00 and T-300/00, *M6 and others* v *Commission* [2002] ECR II-3805.

(156) The Commission will therefore assess whether Article 106(2) TFEU might apply.

(157) Article 106(2) TFEU 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 the Treaties, 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 Union.*'

(158) For a measure to benefit from this derogation, all the following conditions must be fulfilled:

— the service in question must be a service of general economic interest ('SGEI') and clearly defined as such by the Member State ('definition'),

— the undertaking in question must be explicitly entrusted by the Member State with the provision of that service ('entrustment'),

— the application of the competition rules of the Treaty 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 Union ('proportionality').

(159) The 2001 Broadcasting Communication ([56]) sets out the principles and methods which the Commission intends to apply to ensure compliance with the conditions referred to above.

IV.2.1. DEFINITION

(160) Under the Broadcasting Act (1994) ([57]), TV2 is an independent institution whose object is to produce and disseminate national and regional television programmes through independent programme activities. The range of the programmes provided must principally focus on quality, versatility and diversity. Regional relevance must also be given priority in the planning of programmes for the regional TV2 stations. The public service mission is specified in more detail in TV2's Statutes, which state that TV2 has to provide programmes comprising news coverage, information, entertainment, art and culture to the entire Danish population ([58]).

([56]) OJ C 320, 15.11.2001, p. 5.
([57]) Paragraph 18 of the Broadcasting Act (1994 version).
([58]) Section 4 of Executive Order 658 of 18 August 1997.

(161) The Commission takes note that the Court discussed the public service that TV2 is obliged by law to provide in its judgment ([59]).

(162) First, the Court recalled that Member States enjoy broad discretion when defining what they regard as services of general economic interest. Thus the definition of such services by a Member State can be queried by the Commission only in the event of manifest error ([60]).

(163) Furthermore, as stated in paragraph 33 of the Broadcasting Communication, it is for the Member States to define the public service remit of a public broadcaster.

(164) More specifically, as regards SGEIs in the field of broadcasting, the case-law of the Court has recognised that Member States could legitimately define an SGEI so as to cover the broadcasting of full-spectrum programming ([61]).

(165) When the Member States stated in the Amsterdam Protocol ([62]) that *'the system of public broadcasting in the Member States is directly related to the democratic, social and cultural needs of each society and to the need to preserve media pluralism'*, they were making a direct reference to the public service broadcasting systems they had introduced and the organisations entrusted with broadcasting full-spectrum television programmes for the benefit of the entire population of those States.

(166) In its judgment, the Court ruled that the Member States' power to define broadcasting SGEIs in broad qualitative terms, so as to cover the broadcasting of a wide range of programmes, cannot be disputed, nor can the Member States' freedom to use advertising revenue to finance such SGEIs ([63]).

(167) The possibility open to Member States to define broadcasting SGEIs broadly so as to cover the broadcasting of full-spectrum programming cannot be called into question by the fact that the public service broadcaster also engages in commercial activities, in particular the sale of advertising space. Indeed, the question of the definition of the public service remit must not be confused with the question of the financing mechanism chosen to provide that service ([64]).

([59]) Paragraphs 101-125 of the judgment.
([60]) Paragraph 101 of the judgment.
([61]) Paragraph 103 of the judgment.
([62]) With the entry into force of the Amsterdam Treaty on 1 May 1999, a Protocol on the system of public broadcasting in Member States was annexed to the Treaty.
([63]) Paragraph 113 of the judgment.
([64]) Paragraphs 107 and 108 of the judgment.

(168) Furthermore, the Court made it clear that the Commission does not have to compare TV2's programming with that of the commercial stations. To make the definition of the public service mission dependent on the range of programming offered by the commercial broadcasters — through a comparative analysis of programming — would deprive the Member States of their power to define the public service. In the final analysis, the definition would depend on the commercial operators and their decisions as to whether or not to broadcast certain programmes.

(169) The Court ([65]) also confirmed that the obligations imposed on commercial broadcasters are not comparable with the public service obligations imposed on TV2. The aim of those public service obligations is to provide the entire Danish population with varied programming that satisfies the requirements of quality, versatility and diversity. Those public service obligations determine all of TV2's broadcasting activities and do so more inflexibly than the minimal obligations prescribed by Danish law for the granting of a broadcasting licence.

(170) The Court therefore concluded ([66]) that *'the definition chosen by the Danish authorities is broad since, being essentially qualitative, it leaves the broadcaster free to establish its own range of programmes. None the less, it cannot be called imprecise. On the contrary, TV2's mandate is perfectly clear and precise: to offer the entire Danish population varied television programming which aims to provide quality, versatility and diversity'*.

(171) In view of the foregoing, and given the specific nature of the broadcasting sector, the Commission considers that a 'broad' definition entrusting a broadcaster with the task of providing balanced and varied programming in accordance with its remit, is legitimate under Article 106(2) TFEU in the light of the interpretative provisions of the Protocol. Such a definition would be consistent with the objective of fulfilling the democratic, social and cultural needs of a particular society and guaranteeing pluralism, including cultural and linguistic diversity.

(172) Therefore, on the basis of the foregoing, the Commission considers that the definition of the public service provided by TV2 can be accepted.

([65]) Paragraph 121 of the judgment.
([66]) Paragraph 117 of the judgment.

(173) It should be added that, during the period under consideration, TV2 operated an Internet site as part of its public service mission. The Internet site informs users about TV2's public service television programmes. The Commission can accept that the Internet site that is limited to informing users about TV2's public service television programmes falls within TV2's public service broadcasting tasks. Therefore, treating the operation of this site as part of the public service remit cannot be termed a manifest error. In addition, TV2 operated a commercial Internet site with games etc. This commercial Internet service should be regarded as a purely commercial activity, as it offers interactive products on individual demand, such as games or 'chat rooms', which do not differ from similar commercial products. These latter activities therefore fall outside the scope of TV2's public service mission.

IV.2.2. ENTRUSTMENT

(174) In order to benefit from the exemption under Article 106(2) TFEU, TV2 should be assigned its public service remit by means of an official legal act. The Commission notes that the Broadcasting Act ([67]) formally assigns a public service television broadcasting mission to TV2. The Commission also takes note of the Court's judgment, in which it held that *'[i]t is obvious that TV2 was entrusted with such a [public service] remit'* ([68]).

(175) However, as the definition in the law does not make it sufficiently clear which kinds of other services are allowed as public services, a formal remit must be given prior to any additional activity that TV2 wants to embark on as a public service. The Commission notes that TV2 did not offer any other services beyond its public service broadcasting mission in the period under investigation. The Internet site offering other services such as games was operated as a commercial activity, while the Internet site that simply informed users about TV2's public service television programmes can be considered part of its public service broadcasting remit, as it cannot be separated from the broadcasting service. The Commission therefore concludes that the public service broadcasting remit was legitimately entrusted to TV2 during the period under investigation.

(176) However, as stated in paragraphs 41 to 43 of the 2001 Broadcasting Communication, not only should the public service be formally entrusted to the broadcaster, it must also be delivered as prescribed in the act by which it is entrusted. Since it is not for the Commission to judge whether any quality standards have been met, it is desirable that an appropriate monitoring authority should exist, and it is for the Member State to choose the mechanism to ensure effective supervision, provided that the authority is independent from the undertaking entrusted with the service.

([67]) Chapter 4, Broadcasting Act (1994 version).
([68]) Paragraph 120 of the judgment.

(177) In this connection, the Commission notes that in 2000 the National Audit Office carried out a specific investigation into the substance and nature of TV2's public service obligations and how they were met in practice. The investigation found no failure on the part of TV2 to comply with its public service obligations. Moreover, between 2001 and 2002, a Public Service Council existed to ensure that TV2 complied with its public service obligations, although that body never published any reports on this question during its short lifetime. Nor has the Commission found any indication that TV2 failed to comply with its obligations or that its performance was such that its activities could no longer be considered an SGEI under Article 106(2) TFEU.

(178) As regards financial control of the public broadcasting service, the Commission notes that the National Audit Office audited TV2's accounts throughout the entire period under investigation. The audits included both financial audits and management audits, although the National Audit Office had no power to prevent overcompensation of TV2's public service costs.

(179) The Commission does, however, have the power assess the proportionality of the State aid. The Commission notes that the Transparency Directive has been transposed in Denmark. It has also received data from the Danish authorities enabling it to assess whether or not the State funding is proportionate.

IV.2.3. PROPORTIONALITY

(180) In light of the Court's judgment and the 2001 Broadcasting Communication, the proportionality assessment that the Commission must carry out is twofold.

(181) First, the Commission has to calculate the net cost of the public service mission entrusted to TV2 and verify whether or not this cost has been overcompensated compared with TV2's needs in order to fulfil its public service tasks.

(182) Second, the Commission has to analyse TV2's behaviour in the advertising market. The 2001 Broadcasting Communication points out that, if a drop in revenue were covered by State aid, a public service broadcaster might be tempted to depress its prices for advertising or other commercial activities on the market so

as to reduce competitors' revenue. The Commission therefore considers that whenever a public service broadcaster undercuts prices in its non-public service activities below what is necessary to recover the stand-alone costs that an efficient commercial operator in a similar situation would normally have to recover, this indicates that overcompensation of the public service obligations has occurred.

1. ***Amount of State aid and assessment of overcompensation***

(183) Under the Transparency Directive ([69]), Member States are required to maintain separate accounts for public service and non-public service activities. Costs and revenue must be correctly allocated on the basis of clearly established, objective cost accounting principles.

(184) The Commission has taken the view that separation of accounts in the broadcasting sector may not be straightforward or even feasible on the costs side, as different activities share the same inputs. In this sector, Member States may consider a broadcaster's entire programming to be covered by the public service remit while at the same time allowing for its commercial exploitation ([70]).

(185) In the present decision, the Commission first needs to determine the cost of the SGEI fulfilled by TV2.

(186) As TV2 also carries out commercial activities, it needs to keep separate accounts for its different activities. Since 2001, TV2 has been legally obliged to keep separate accounts for its public service and commercial activities.

(187) When calculating the net costs, the Commission has to deduct from the gross public service costs all the net benefits from the commercial exploitation of the public service activity. The Danish authorities have supplied figures showing the performance of TV2's commercial and public service activities in accordance with the method set out in paragraph 56 of the Broadcasting Communication. The figures show that most of TV2's commercial activities shared the same inputs as its public service activities. As a consequence, no meaningful allocation of costs to these commercial activities could be made. When this is the case, the Commission deducts net revenue from commercial operations in order to calculate the net public service costs. The commercial Internet activities are the only operations that can be regarded as separable from the public service activities. The losses that TV2 has made on its commercial Internet activities since they began in 1997 amount to DKK […] (*) million.

(188) The Commission then deducted the revenue generated from public service activities (advertising income and other commercial revenue) from the gross public service cost to arrive at the net public service cost. The cash financing from the State was then deducted from the net public service cost. The calculation is shown in the table below.

(189) It should be noted that despite numerous requests from the Commission to provide the exact amount of advertising revenue in 1995 and 1996, the Danish authorities and TV2 were not able to provide clear, unambiguous figures.

(190) In their reply of 26 June 2009, the Danish authorities stated that they were unable to confirm that the advertising revenue which TV2 received from the TV2 Fund amounted to DKK 400,1 million in 1995 and DKK 337,7 million in 1996.

(191) In its reply, TV2 indicated that in 1995 and 1996 (i) the TV2 Fund received advertising revenue from TV2 Reklame (DKK 824 and DKK 904,5 million) and licence fees from the State (DKK 330,3 and DKK 356,3 million), and (ii) the TV2 Fund transferred DKK 730,4 and DKK 694 million to TV2, and DKK 269,6 and DKK 275 million to the TV2 regions. The purpose of the amounts transferred to the TV2 Fund was to cover the funding needs of TV2 and its regional stations.

(192) In their replies of 26 June 2009, 17 November 2010 and of 30 November 2010, the Danish authorities confirmed TV2's argument that, with no other commercial income, TV2's regional stations were de facto financed entirely through licence fees and that any sums transferred annually to TV2's regional stations could therefore originate only from licence-fee revenue transferred to the TV2 Fund. This implies that the licence-fee revenue transferred to TV2 can be considered equivalent to the maximum amount of licence-fee revenue that was transferred to the TV2 Fund in all the years in question minus any amounts transferred to TV2's regional stations. The Danish authorities and TV2 claim that this means that the vast bulk of the funding transferred from the TV2 Fund to TV2 in 1995 and 1996 consisted of net advertising income. According to the Danish authorities this line of reasoning would imply that TV2 received DKK 60,7 million in licence fees (net after deducting transfers to the regions) and DKK 669,7 million in advertising

([69]) Commission Directive 2000/52/EC of 26 July 2000 amending Directive 80/723/EEC on the transparency of financial relations between Member States and public undertakings (OJ L 193, 29.7.2000, p. 75).

([70]) Broadcasting Communication, point 53.

(*) In this decision, confidential information that has been omitted is indicated by […].

revenue (net) in 1995, and DKK 81,3 million in licence fees and DKK 612,7 million in advertising revenue in 1996.

(193) The Commission is not convinced by TV2's and the Danish authorities' reasoning on the amount of the advertising revenue for the years 1995-1996. In particular, the Commission notes that the TV2 Fund kept no separate accounts for advertising revenue and licence fees, and therefore all these revenues were mixed together. The Commission regrets that the Danish authorities have not provided clear and unambiguous figures for the amount of advertising revenue in 1995 and 1996. However, in this specific case it considers that there is no need to investigate the issue further as it does not pose a major problem since the Commission, as already stated, considers that the advertising revenue for the years 1995-1996 constitutes State resources which must in any event be deducted from the gross public service cost. In the table below, the advertising revenue transferred from the TV2 Fund for the years 1995 and 1996 is therefore shown in the same column as the licence fees.

(194) It should also be noted that for the years 1997 to 2002 the Commission has included the licence fees that were transferred to the TV2 regions via TV2. The Commission considers that because these sums were received by TV2 and then transferred to the regions, they should be included in the calculations as both revenue and expenditure, which in practice means that they do no affect the Commission's calculation below.

(195) Concerning the capital injection transferred to TV2 for digitisation, it is shown in 1997 as income. The corresponding reductions have been taken into account as costs when the investments were implemented. The costs for digitisation are public service costs. So as not to count the same costs twice, the depreciation corresponding to the investments made have been deducted from the gross public service cost. Despite TV2's criticisms on this point, the Commission is of the opinion that, in line with its constant practice when calculating State compensation, revenue from the State or from a public fund must be taken into account in the year when they are granted and not in the year when they are spent or used.

Table 1

Public service cost and compensation measures 1995-2002 on the basis of the accounts

(million DKK)

Year	1995	1996	1997	1998	1999	2000	2001	2002	Total
Gross public service cost	– 755,8	– 856,2	– 1 415,2	– 1 475,3	– 1 439,1	– 1 531,6	– 1 518,5	– 1 604,1	– 10 595,8
Investment in digitisation	0	0	0	0	– 10,3	– 4	– 56,7	– 23,9	– 94,9
Net advertising revenue directly received by TV2	0	0	1 091,9	1 118,4	1 014,4	1 089,9	1 006,8	1 028,3	6 349,7
Other revenue	83,2	121,6	97,3	76,3	50,9	65,4	58	73,8	626,5
Net public service cost	– 672,6	– 734,6	– 226,0	– 280,6	– 384,1	– 380,3	– 510,4	– 525,9	– 3 714,5
Licence fee and net advertising revenue received in 1995-1996 from the TV2 Fund	730,4	694	328,5	357,5	414,6	449,2	537,3	556,2	4 067,7
Transfer when Radio Fund was wound up	0	0	8	10	15	25	0	0	58
Transfer when TV2 Fund was wound up	0	0	217	0	0	0	0	0	217
Total of (i) the licence fees and revenue from the TV2 and Radio Funds indicated above, and (ii) the net public service cost	**57,8**	**– 40,6**	**327,5**	**86,9**	**45,5**	**93,9**	**26,9**	**30,3**	**628,2**

Source: TV2's yearly profit-and-loss accounts.

(196) As can be seen from the table above, the financing exceeds the costs by DKK 628,2 (EUR 84,4) million.

(197) The Commission takes note of the fact that TVDanmark considers that the other measures that benefited TV2, such as its exemption from interest payments and tax as well as access to a nationwide transmission frequency on favourable terms, should be taken into account for the assessment of the overcompensation. These benefits are summarised in the table below:

Table 2

Estimated benefits from corporate tax exemption, interest waiver, and transmission frequency

(million DKK)

	1995	1996	1997	1998	1999	2000	2001	2002	Total
Corporation tax exemption	19,7	– 13,8	54,6	30,1	16,7	29,7	18,5	3,9	159,4
Accrued interest on establishment loan	44,5	39,2	36,9	41,3	37,5	45,1	51,7	45,6	341,8
State guarantee operating loans	2,4	2,1	1,7	1,4	1,0	0,7	0,4	0,1	9,8
Transmission frequency fee (*)			2,3	7,9	12,6	21,4	26,0		70,2
Total	**66,6**	**27,5**	**95,5**	**80,7**	**67,8**	**96,9**	**96,6**	**49,6**	**581,2**

(*) The difference in the frequency fee that TV2 paid and the networking fee paid by TVDanmark.

(198) The Commission agrees that these measures must be considered in the present investigation. However, when calculating the overcompensation, it is not appropriate to include them in the calculation in Table 1. In line with the Commission's position in the RAI case ([71]), these additional benefits can be considered as compensating costs that would otherwise have had to be financed. Thus, in assessing the proportionality of the State funding of the public service costs, these additional advantages should not be included, since having to pay the costs in question would have resulted in a corresponding increase in the initial costs of the public service entrusted to TV2. In terms of the net result, it would make no difference. However, it has to be ensured that these advantages only benefit the public service tasks and do not spill over to the commercial activities. This point is addressed in recitals 234-237 below.

(199) The Danish authorities and TV2 advanced various arguments to justify the excess funding calculated in recital 196. In particular, in light of the Court's judgment, the Commission has to assess whether the excess funding was in fact necessary for TV2 to be able to fulfil its public service mission.

(200) In this connection, it should first be noted that the Amsterdam Protocol ([72]) emphasised the specificities of the broadcasting sector compared with other SGEI, because '*the system of public broadcasting in the Member States is directly related to the democratic, social and cultural needs of each society and to the need to preserve media pluralism*'. These special features should be taken into account in the Commission's compatibility assessment in the present decision.

(201) Moreover, in previous decisions the Commission has accepted that a certain capital base was justified to secure the provision of a public service by broadcasters. For example, in the Austrian broadcasting case ([73]), the Commission stated that '*Under Article 86(2) EC, as interpreted by the Amsterdam Protocol, Member States may in principle provide as much public financing to public service broadcasters as needed to safeguard the performance of the public service. This not only concerns the running cost of performing the SGEI but also equity capital*'.

([71]) Commission Decision of 15 October 2003 on the measures implemented by Italy for RAI SpA (OJ L 119, 23.4.2004, p. 1).

([72]) With the entry into force of the Amsterdam Treaty on 1 May 1999, a Protocol on the system of public broadcasting in Member States was annexed to the Treaty.

([73]) Commission decision, E 2/2008, 28 October 2009, *Financing of ORF*.

(202) As the Court held in its judgment ([74]), *'the Commission cannot base its decision to order the recovery of all the sums which, according to the Kingdom of Denmark, constituted a reserve which it was necessary to set aside for public service needs, on an alleged failure to carry out adequate checks, since it was perfectly possible, given the information available to the Commission, to examine seriously all the legal and economic conditions that governed the build-up of those reserves during the period under investigation and impossible, without such an examination, to take a valid decision as to whether those reserves were in fact necessary — as a whole or even only in part — to provide the public service'*.

(203) The Court added ([75]) that purely formal requirements such as an obligation for the reserves to be specific and transparent could not justify a recovery order, and the fact that TV2 did not in practice have to draw on its reserves did not support the inference that those reserves had to be regarded as disproportionate to the funding needs of providing the public service ([76]).

(204) Therefore, the Commission has to assess all the factors taken into account by the Danish authorities when setting the compensation granted to TV2 for the years 1995-2002 and deciding to build up reserves. With regard to this issue, the Commission would refer to its earlier assessment of the procedure used to set the licence fee, in recital 105.

(205) As regards the considerations that led the Danish authorities to build up a reserve for the fulfilment of the public service mission of TV2, the following factors cited by the Danish authorities should be considered.

(206) When TV2 was established in 1988, no capital was injected. Its operations were financed solely by a start-up loan of DKK 510,8 million, which enabled TV2 to purchase its production equipment, buildings etc. TV2 was therefore thinly capitalised because it was capitalised with abnormally large loans and abnormally low capital. As a result, TV2 quickly faced financial difficulties.

(207) The National Audit Office, an independent institution under the Danish Parliament, has the task of carrying out both accounting and management audits. It concluded in 1995 that a substantial proportion of TV2's financial problems could be attributed to the station having been established without an injection of capital ([77]). The main recommendation made by the National Audit Office was that the State should inject approximately DKK 530 million of capital into TV2 by converting the start-up loans. This would give TV2 capital of approximately DKK 350 million and a solvency ratio of around 50 %. The recommended solvency ratio of approximately 50 % was equivalent to that of privately owned undertakings such as TV2 Norge (Norway) and TV4 (Sweden).

(208) Following this report, the State auditors — the members of the Danish Parliament appointed to be responsible for a critical audit of, among other things, the accounts of State-owned undertakings — asked the Ministry of Finance for its opinion on the question of whether TV2 should build up capital. In August 1995, in response to the National Audit Office proposal that TV2 should be given a capital injection, the Ministry of Finance stated that *'[b]oth when establishing new undertakings and when converting existing state-owned undertakings, the undertaking must have the necessary capital base. But at the same time the State must not make too large an injection of capital, firstly because this would signify an unnecessary expense for the State and secondly because it could give the undertaking an unfair competitive advantage. The undertaking must be neither under- nor over-capitalised'*. On this basis the Danish State considered that capital should be built up in TV2. However, it was decided that the State would not contribute the capital all at once. TV2 would instead itself build up the necessary capital through ongoing surpluses.

(209) The requirement for a capital base was included in TV2's Statutes in 1997. Since then, TV2's statutes have clearly specified that, from 2001 onwards, TV2's free capital must amount to at least DKK 200 million and that it should be used to offset the broadcaster's operating loss ([78]). The executive order of 18 August 1997 stipulated that to finance any possible operating loss, the free capital — i.e. capital minus reserves and other tied resources — for nationwide activities should amount to at least DKK 200 million by the end of 2000. The free capital was to be built up so that it would total at least DKK 50 million by the end of 1998 and at least DKK 100 million by the end of 1999. From 2001, the free capital at any one time was to be at least DKK 200 million, based on the latest accounts. If capital was expected to fall below these figures, the matter was to be put before the Minister of Culture. In special cases the Minister of Culture can, after consulting the National Audit Office, approve a lower amount of capital, to which he may attach specific conditions.

(210) The 1997 executive order issued by the Minister setting the minimum free capital was published in the Danish Official Gazette (*Lovtidende*). In addition, from 1998 onwards, the build-up of capital in accordance with the requirements of the Statutes was specifically mentioned in TV2's published annual accounts.

([74]) Paragraph 220 of the judgment.
([75]) Paragraph 221 of the judgment.
([76]) Paragraph 223 of the judgment.
([77]) National Audit Office Report 4/94, Section VIII, in particular paragraph 72.
([78]) Executive order No 658 of 18 August 1997, Chapter 6, Section 32, paragraph 4.

(211) According to the Danish authorities, failure to observe with the minimum capital requirement of DKK 200 million under its Statutes would be expected to result in TV2 being placed under State administration.

(212) The Commission considers that the crucial issue is to determine if and to what extent the capital base attained through the compensation was indeed necessary for the performance of TV2's public service mission.

(213) Having regard to the above description of the procedure and the reasons that led to the build-up of TV2's reserves in the form of a capital base, and in the light of the Court's judgment, the Commission considers that the build-up of a reserve was indeed necessary for TV2 to fulfil its public service mission.

(214) However, the Commission wonders whether the entire amount of the reserves was really justified and necessary, i.e. whether the full amount of the capital base built up by the end of 2002 was really necessary for the performance of TV2's public service mission.

(215) In the Commission's view, the size of the capital base that could be considered proportionate and necessary to guarantee the provision of the public service depends on the facts and the legal framework of each individual case.

(216) The figures available to the Commission regarding TV2's capital base are shown in the table below:

(million DKK)

	1995	1996	1997	1998	1999	2000	2001	2002
Earmarked capital (digitisation)			167,0	167,0	156,7	152,6	96,6	72
Free capital	– 97,8	– 138,4	22,1	110,7	173,3	270,3	418,7	478,5
Total capital	– 97,8	– 138,4	189,1	277,7	330,0	422,9	515,3	550,5
Total liabilities	770,3	746,9	1 244,7	1 363,3	1 311,8	1 423,0	1 409,5	1 409,1
Solvency ratio (*)	– 13	– 19	2	8	13	19	30	34

(*) In this table, the solvency ratio is calculated as free capital/total liabilities.

(217) On 31 December 2002, TV2 had built up capital of DKK 550,5 million, including DKK 72 million of earmarked capital (digitisation), which corresponds to a solvency ratio of 34 %. The amount of free capital at the end of 2002 was DKK 478,5 million.

(218) First the Commission notes that part of the capital was not free capital. Indeed, according to TV2's annual accounts for 1997 ([79]), the Media Committee had decided that TV2 should digitise its production equipment before the end of 2000. DKK 300 million was earmarked for the digitisation of both TV2 and the regional stations. In 1997, DKK 167 million was transferred to TV2 for this purpose. The Commission therefore considers that this amount was necessary for TV2's public service needs. The fact that the funds that had not been invested in digitisation by 1 January 2003 (a balance of DKK 72 million) were ultimately released does not alter this conclusion because, during the period under investigation, these sums were clearly entered in TV2's accounts as earmarked capital that could only be used for the purpose of digitisation and, as the Court stated in its judgment, the fact that TV2 did not in practice have to draw on a reserve does not support the inference that this reserve had to be regarded as disproportionate to the funding needs of providing the public service ([80]).

(219) It should also be noted that at 31 December 1994 (at the start of the period covered by the present decision) TV2's capital was negative (minus almost DKK 156 million) and that in 1995 and 1996, TV2 had a negative solvency ratio and negative capital, which explains why the total capital at the end of 2002 was lower than the compensation received. It was only at the end of 2000 that TV2's free capital rose above the required minimum threshold of DKK 200 million.

([79]) Page 58.

([80]) Paragraph 223 of the judgment.

(220) In order to demonstrate that the level of capital in TV2 was justified, the Danish authorities submitted an opinion prepared by PricewaterhouseCoopers dated 18 November 2002. That opinion stated that TV2's solvency ratio at the end of the period of investigation was lower than that of other Scandinavian broadcasters comparable to TV2 in terms of size, activities, structure and the markets in which they operated. For instance, TV2's solvency ratio was lower than that of TV2 Norge (36 %) and considerably lower than that of TV4 (Sweden), whose solvency ratio was 65 %, almost twice that of TV2. According to the opinion, TV2's solvency ratio was below that of its peers and therefore could not be considered excessive. The opinion also pointed out that there was no reason to believe that the capital structure of those comparable broadcasters was not optimised. PricewaterhouseCoopers also indicated that a solvency ratio of less than 30 % over time would be unusual and would render the company vulnerable to income fluctuations.

(221) The comparison with other operators should be interpreted with caution since they do not perform the same public service tasks as TV2, are not financed in the same way, and do not have the same legal status. Nevertheless, the opinion gives some indication and can be taken into account alongside other elements.

(222) In this connection the Commission notes that the Danish authorities submitted information showing that, during the last part of the period under investigation, they planned to convert TV2 into a public limited company and privatise it. As part of the conversion process, an analysis was also made of how the licence fee funding could be phased out, as the Danish authorities intended to abolish funding via licence fees after TV2's privatisation.

(223) To this end, in June 2002 the Danish government entered into an agreement with a majority in Parliament on a thorough liberalisation of Danish media policy. Under the agreement, TV2 was to be converted with a view to privatisation as soon as possible. An analysis was made of the financial basis for converting TV2 into a limited company. The Minister of Culture appointed a steering group in the summer of 2002 with representatives from the Culture Ministry, the Finance Ministry and the Attorney General (*Kammeradvokat*) in order to clarify the economic basis for privatising TV2 and converting it into a limited company. To support its work, the steering group engaged an auditing firm and a financial advisor in order, for example, to calculate the level of capital needed by TV2. The auditing firm concluded that TV2's capital should be set at DKK 640 million.

(224) The Danish Parliament's Finance Committee approved the conversion of TV2 into a limited company and the setting of its capital. TV2's conversion into a limited company took place with retroactive effect from 1 January 2003. In the wake of TV2's change of legal status and its conversion into a company, a number of measures in favour of TV2 were abolished, such as the interest- and repayment-free loans and the tax exemption. In 2005, privatisation was postponed but TV2 no longer received licence fees after 2004.

(225) In view of the foregoing, the Commission considers that one of the factors it must take into account in assessing the compatibility of the reserves is the fact that during the last part of the period under investigation the Danish authorities already planned to change TV2's legal status, which implies the need for a capital base.

(226) In its decisions, the Commission's practice is to look favourably in principle on schemes to convert State entities that compete with commercial enterprises into limited company form, since doing so may reduce distortions of competition by replacing unlimited State advantages with a limited amount of capital and by creating a clear distinction between the role of the State as a public authority and its role as an entrepreneur seeking a return on its investment.

(227) In addition, among the other factors to be taken into account, the Commission considers that the level of TV2's reserves should be viewed in the light of fluctuations in revenue from the advertising market.

(228) TV2 was indeed vulnerable to the revenue fluctuations that are an inevitable aspect of the advertising market. For example, in one year (1998 to 1999) TV2 experienced a drop in advertising revenue of approximately DKK 104 million. According to the Danish authorities, the only way for TV2 to be able to cope with falls of this size was by having a very considerable amount of free capital, as licence fee revenue was fixed in advance for several years. Even though TV2 was less dependent on advertising revenue than TV2 Norge and TV4, which do not receive licence fees, funding via advertising nevertheless constituted an important source of financing for TV2's operations during the period in question.

(229) In this respect, the Commission takes note that the Court made it clear in its judgment ([81]) that '*[t]he fact that TV2 did not have to draw on its reserves in 1999 does not support the inference that those reserves had to be regarded as disproportionate to the funding needs of providing the public service. It is in the very nature of a reserve which is built up to deal with an uncertainty that it does not necessarily have to be used.*'

(230) The Commission agrees with the Danish authorities that in assessing TV2's needs it must also take account of the fact that TV2 experiences substantial fluctuations in liquidity both in the course of a single year and from one year to the next, since major sports events such as the Olympic Games only take place at intervals of several years and programme rights are typically offered under multi-year contracts. For example, it can be seen from the annual report for 1995 ([82]) that the surplus for 1995 was carried forward to 1996 to cover the expected deficit for that year, when there was particularly high expenditure in connection with the Olympics and the European Football Championships.

(231) In addition, it should also be noted that during the period under investigation, TV2 was precluded from using ordinary loan financing. Investment loans were permitted for up to 4 % of revenue, based on the most recent accounts. TV2 was prohibited from taking out any other forms of loans, guarantees, or finance lease obligations, apart from general operating credit. TV2's limited opportunities for loan financing meant that in principle its liquidity needs had to be covered by liquidity from operations.

(232) Finally, the level of capital is shown in the published accounts. During the period in question, the National Audit Office audited TV2's accounts. The audits included both financial and management audits, although the National Audit Office had no power to prevent overcompensation of the public service costs of TV2. As the Court held in its judgment ([83]), the fact that this auditing body did not have any power to prevent overcompensation does not permit the conclusion that the Danish authorities did not carry out checks. On the contrary, the Danish authorities indicated that, had the National Audit Office drawn the conclusion that the capital base was too large, this might, for example, have resulted in licence-fee resources payable to TV2 being reduced in the next media agreement.

(233) In view of all the foregoing considerations taken as a whole, the Commission considers, as regards the first part of the proportionality assessment, that in this specific case, having regard to the Amsterdam Protocol and the Court's judgment, the amount of capital accumulated at the end of 2002 (i.e. DKK 550 million) was necessary for TV2 to fulfil its public service mission. The sum of DKK 628 million received for that purpose therefore satisfied the criteria of proportionality and necessity under Article 106(2) TFEU.

(234) Although the present decision does not assess possible State aid granted to TV2 in 2003 and 2004 other than the recapitalisation measures, the Commission also notes that the Danish authorities submitted information documenting the fact that in 2004, TV2's capital amounted to DKK 640 million. A sum of DKK 96 million was invested in commercial activities and it cannot be determined whether this was financed through capital or outside funding. Assuming that only capital was used, this would imply that DKK 544 million of capital was available for TV2 to carry out its public service broadcasting activities.

(235) With regard to what was stated in recital 198 above, it should be noted that TV2 also performs a number of commercial activities. These are fairly marginal compared with TV2's overall activities. The costs for these commercial activities have been allocated based on the method presented in the 2001 Broadcasting Communication ([84]), under which, contrary to the approach generally adopted in other utilities sectors, costs that are entirely attributable to public service activities while also benefiting commercial activities need not be apportioned between the two and can be entirely allocated to those public service activities. The 2001 Broadcasting Communication considered there was a risk that a strict breakdown of such costs between the two activities would be arbitrary and not meaningful. As for the advantage that TV2 receives from its access to the transmission frequency, the Commission notes that this is inseparably linked to the public service mission. The Commission also considers that in line with the Broadcasting Communication, the financing costs (interest advantages) can be fully attributed to the public service activities.

(236) To neutralise the effect of the tax exemption that the public service activities enjoy, 30 % of the profits from commercial activities are transferred to the public service side. This has only been done since 2001. The Commission therefore recognises that there may have been a distortion on the broadcasting market in that TV2 did not have to take the corporate tax rate into account in setting its commercial prices. However, in future the advantage should no longer exist, given that the share of the transfer corresponds to the actual taxation rate thanks to this 'neutralisation' mechanism. As for the past, this does not pose a problem when it

([81]) Paragraph 223 of the judgment.
([82]) Annual report for 1995, in particular page 14.
([83]) Paragraph 219.
([84]) Paragraphs 53 to 56.

comes to establishing the amount of overcompensation, since the total income from commercial activities was used to reduce the net cost of the public service activities.

(237) TV2 engaged in loss-making commercial Internet activities. As these activities fall outside the public service broadcasting mission, no State funding is possible. Moreover, as no other activities were operated on a 'stand-alone' basis, there is no surplus from commercial activities to cover the losses on Internet activities.

2. ***Assessment of TV2's behaviour in the advertising market***

(238) Paragraph 58 of the Broadcasting Communication states that '*a public service broadcaster, in so far as lower revenues are covered by the State aid, might be tempted to depress the prices of advertising or other non-public service activities on the market, so as to reduce the revenue of competitors (…). Whenever a public service broadcaster undercuts prices in non-public service activities below what is necessary to recover the stand-alone costs that an efficient commercial operator in a similar situation would normally have to recover, such practice would indicate the presence of overcompensation of public service obligations (…)*'.

(239) TVDanmark submitted information showing that it could not cover the stand-alone costs of its television operations with the advertising prices that TV2 charges. TVDanmark compared its costs with the TRP 21-50 advertising prices that TV2 was charging.

(240) For this comparison to be valid, the Commission must, as a first step, establish whether or not TVDanmark can be considered to be in a similar situation to TV2 and whether or not it is an efficient operator.

(241) First, the Commission has to assess whether TVDanmark is in a similar situation to TV2. The Commission notes the following. For the period under investigation, TV2's audience share was in the region of 35 % whereas the corresponding figure for TVDanmark was approximately 15 %. Their shares of the advertising market also differed significantly. TV2's market share was in the range of 60 %, whereas TVDanmark's was around 8 %. TV2's advertising turnover was approximately five times that of TVDanmark. Moreover, TV2 is the only station that reaches 100 % of the population, whereas TVDanmark2 has a coverage of 77 % and TVDanmark1 even less. In view of the above, the Commission considers that TVDanmark cannot be directly compared to TV2.

(242) Secondly, the Commission has to establish whether or not TVDanmark is an efficient market operator. An efficient operator can be determined by analysing commonly used accounting ratios and by comparing the operator's results with average results in the Member State. The analysis has to take into account the different size of the undertakings and their specific cost structures. However, as stated earlier, operators on the Danish market cannot be said to be in a comparable situation so as to enable a direct comparison of performance ratios. Therefore, the Commission is of the opinion that an analysis of such ratios on the Danish market is not appropriate in the present case.

(243) Instead, the Commission has analysed data on the financial performance of TVDanmark and SBS Broadcasting. As a result of its analysis, the Commission cannot establish with certainty whether the losses incurred stem from the fact that TVDanmark had high initial start-up costs which it has not yet been able to recover or whether it is in fact not performing efficiently. Despite several requests, the Commission was not able to obtain data on the financial performance of the third operator, TV3, to allow a comparison with the third operator on the market. Consequently the Commission cannot conclude with certainty whether TVDanmark's losses are a result of TV2's pricing behaviour or whether they are due to other factors over which TVDanmark itself had some control.

(244) Since it cannot be established with certainty whether or not TVDanmark is an efficient operator and since a direct comparison of the two operators is not possible, the Commission is of the opinion that any such assessment is inconclusive in the present case.

(245) The Commission therefore decided to undertake a more detailed analysis of TV2's pricing policies and of the data available concerning the advertising market in order to assess whether or not TV2 acted with a view to maximising its advertising revenue during the period under investigation.

(246) First, the Commission compared the prices of the two operators and analysed the pricing policies of TV2. The analysis focused on the years 1998–2002, the period during which the complainant alleged that TV2 started applying 'dumping' prices on the advertising market. Second, it analysed Danish advertising spending in the EU context and in comparison with the other Scandinavian countries in particular. Third, a comparison of contact prices was made across all the Scandinavian countries and media types.

(247) The Commission notes that TV2's behaviour in the advertising market was investigated by the Danish competition authorities. On 21 December 2005, the Danish Competition Council held that TV2 had infringed Article 102 TFEU and the corresponding national legislation by applying loyalty rebates on the advertising market. This decision was quashed by the Competition Appeals Tribunal on 1 November 2006 but then upheld on appeal to the Eastern High Court on 22 June 2009. That ruling was appealed to the Supreme Court, which confirmed the High Court's

ruling on 18 March 2011. This followed a decision by the Competition Council on 29 November 2000 in which it had found that TV2's rebates for the year 2000 constituted abuse of a dominant position. In this connection, the Commission notes that the Danish competition authorities' investigation covered the years 2000-2005, in other words only the last years of the period covered by the present decision. Most notably, a loyalty rebate does not necessarily imply the existence of cross-subsidies within the meaning of the 2001 Broadcasting Communication ('*Whenever a public service broadcaster undercuts prices in non-public service activities below what is necessary to recover the stand-alone costs that an efficient commercial operator in a similar situation would normally have to recover, such practice would indicate the presence of overcompensation of public service obligations*'). In fact, as explained below, on average, TV2 charged significantly higher prices than its competitors. Moreover, the loyalty rebates imply that customers placed a larger part of their annual advertising budgets with TV2 than they would have done under other circumstances. The allegation therefore implies that TV2 increased its advertising revenue by way of the rebate scheme, which would actually have reduced need for licence fee funding. In any event, the Commission is not bound by the decisions of the Danish competition authorities.

Advertising prices

(248) Audience shares and composition, programming content, the rules on advertising time, and the funding mechanism of stations are all factors that affect the nature of competition in the advertising market. As a result, prices vary between different broadcasters. Stations also sell a range of differentiated 'products' that fetch different prices ([85]).

(249) The prices charged by the stations include significant discounts. It is therefore not relevant to compare listed prices in television advertising. Most television advertising (approximately 90 % of all nationwide advertising) is governed by annual agreements under which television channels grant annual rebates. In addition, there are a number of other discounts (for new advertisers, less attractive advertising slots, additional volume rebates etc.). The agreements are negotiated and facilitated by so-called media agencies.

(250) To allow the different stations to be compared, an average of the different prices charged has to be determined. The table below shows the average prices for the target group TRP 21-50. The average prices were obtained by dividing the relevant stations' turnover from national spots by the number of national TRP 21-50 delivered ([86]):

	1998	1999	2000	2001	2002
TVDanmark	EUR 283	EUR 270	EUR 252	EUR 251	EUR 211
TV2	EUR 480	EUR 409	EUR 364	EUR 381	EUR 325
Difference	EUR 197	EUR 139	EUR 112	EUR 130	EUR 114
TVDanmark CPP as share of TV2 CPP ([1])	58,9 %	66,0 %	69,3 %	65,9 %	64,9 %
TV2 average CPP for TRP 21-50 weighted for coverage (by 0,7)	EUR 336	EUR 286	EUR 255	EUR 267	EUR 228
TVDanmark CPP as share of TV2 weighted CPP	84,2 %	94,3 %	99,0 %	94,1 %	92,7 %

([1]) CPP = cost per point. The cost per point expresses the costs of advertising per rating point, i.e. either per GRP or per TRP.

(251) From the figures above it can be seen that TVDanmark's TRP 21-50 price was around 30-40 % lower than TV2's price. As the Commission held in its decision on State aid for France 2 and France 3, there is a positive relationship between the average number of contacts and the average net price per contact in the television advertising market ([87]). Thus any price difference between broadcasters could be explained by the relative strength of the stations in terms of their ability to attract viewers. In such a situation, it is relevant to establish whether or not the actual price difference reflects conditions on the market.

([85]) Different categories of rating points, spot campaigns etc.
([86]) The Gallup-meter system records how many gross rating points each station actually delivers. This figure has then been adjusted by the station to reflect TRPs delivered.
([87]) Case C 60/1999 (ex NN 167-1995) — France, *State aid in favour of France 2 and France 3*, 10 December 2003.

(252) In contrast to the situation in France, in the present case observations can only be analysed for two operators. The slope of the linear regression line would therefore have to be calculated on the basis of those two operators' prices and would be of little statistical relevance. Thus it would not be possible to draw any conclusion on whether or not the slope of the line is 'appropriate'.

(253) In order to verify whether or not the actual price difference between the two operators could be said to reflect market conditions, a correction factor was therefore applied in an attempt to neutralise TV2's stronger position in the market. The weighting factor was obtained from calculations made by media agencies and reflects the difference in coverage of the desired target group that can be attained by purchasing 100 TRP 21-50 from TVDanmark and from TV2. On average TVDanmark's coverage is just under 70 % of TV2's (on purchasing 100 TRP 21-50). When this factor is applied, the prices are more closely convergent, although TV2's price is still slightly higher than TVDanmark's. The price difference therefore seems to reflect market conditions. However, this result must be treated with caution, as it has to be borne in mind that a correction factor of this kind cannot possibly take account of all the differences between the stations.

(254) The Commission also notes that the complainant maintains that competition in the television advertising market is actually played out neither through the listed prices nor through the average GRP or TRP prices as presented above. Instead, TVDanmark argues that the operators compete on so-called marginal prices. These marginal prices, it is claimed, derived from TV2's stronger position in the market. For advertisers to achieve their campaign goals, they have to buy a certain quota of rating points exclusively from TV2. As there was no competition for these so-called infra-marginal units, TV2 was able to make excess profits on them. As a result, the operators competed on the residual rating points and thus on marginal prices. TVDanmark claims that these prices were even lower than the average prices shown in the table above.

(255) Leaving aside the question of whether this claim is correct, the Commission considers that such behaviour would be possible given TV2's strong position on the market. However, the present investigation has to establish whether or not TV2, through its behaviour on the advertising market, attempted to maximise its revenue. On this question, the possibility cannot be ruled out that TV2 kept its prices low in order to maintain a high market share, but that does not mean that it did not attempt to maximise income.

TV2's pricing behaviour during the period under investigation

(256) The foregoing shows that TV2's prices were higher than TVDanmark's during the period under investigation. It is also clear that, despite increases in listed prices, the actual price level was declining during that time. TV2 raised its discounts substantially.

(257) However it is not possible to establish from an analysis of prices whether or not the price trend actually contributed to reducing the total income from advertising, thereby increasing the need for state funding. To address this issue, the Commission has analysed TV2's pricing behaviour and the impact this had on its overall level of advertising income.

(258) As the following recitals show, TV2 applied a number of price increases and price reductions (by granting higher discounts) during the period under investigation. The table below gives an overview of the trend in TV2's overall level of advertising income (million DKK) from 1998 to 2002, the period during which the complainant alleges that TV2 was forcing down prices on the Danish market:

	1998	1999	2000	2001	2002
National advertising income	1 008	884 (– 11,3 %)	959 (+ 8,5 %)	879 (– 8,3 %)	884 (– 0,6 %)

(259) In 1997, TV2 took the strategic decision not to expand capacity utilisation but to increase its prices in 1998. Another price increase was made in 1999. The Danish authorities contend that by 1999 the competitive situation had become so intense that TV2 suffered as a result of the price increase and its advertising revenue fell by around 10 % from the previous year.

(260) In 2000, TV2 expected competition to intensify and did not raise its prices. Actual prices did indeed fall because of the new rebate scheme introduced by TV2. As a result, TV2 expanded its capacity utilisation by 33 % over the previous year. However, the pricing measures led to an 8,4 % increase in its nationwide advertising turnover. In 2001, TV2 again raised its prices. Despite the price increase, its advertising revenue and capacity utilisation dropped back to the 1999 level. In 2002, TV2 cut prices yet again and experienced a slight drop in total turnover. However, overall turnover in the advertising market shrank even more.

(261) From the above it can be concluded that the use of extensive rebates brought about a reduction in the actual price level. TV2 was able to offset the fall in prices by expanding its capacity utilisation. As its competitors did not have the same capacity reserve, they did not have that option. In order to gain market acceptance, they had to follow TV2's lead. During years when TV2 increased prices, its total advertising turnover fell. By contrast, when TV2 reduced prices, it was able to increase its total turnover. The Commission therefore concludes that TV2's price cuts actually resulted in higher overall income. Consequently, TV2's pricing behaviour cannot be said to suggest that it did not seek to maximise revenue.

TV advertising spending in Denmark compared with the EU as a whole

(262) Comparing prices between the Danish operators and analysing TV2's pricing gives no indication of whether or not overall prices on the Danish television advertising market were too low. A depressed level of prices could stem from TV2 having used its stronger position to bring down the overall level of spending on television advertising below what it would have been under normal competition.

(263) To address this issue, the Commission has analysed economic data on the advertising market in all EU countries and compared them with Denmark. As Danish television advertising is most closely comparable with other Nordic countries, the Commission also compared the data for Denmark and the other Nordic countries (Finland, Sweden and Norway) ([88]). The key figures on television advertising spending that were analysed were: (1) television advertising expenditure as a percentage of total advertising expenditure; (2) television advertising expenditure per capita; (3) television advertising expenditure as a proportion of GDP. The table below gives an overview of these key figures:

Key figures on television advertising spending in Denmark, the EU and other Nordic countries

		1995	1996	1997	1998	1999	2000	2001
TV advertising spending as % of total advertising spending	DK	27 %	29 %	29 %	30 %	28 %	27 %	27 %
	EU	35 %	37 %	37 %	37 %	37 %	37 %	37 %
	Nordic	24 %	25 %	26 %	27 %	27 %	27 %	26 %
TV advertising spending per capita (million EUR)	DK	39	44	48	51	46	47	44
	EU	37	40	45	49	53	60	58
	Nordic	32	36	41	44	45	54	49
TV advertising spending as ‰ of GDP	DK	1,49 ‰	1,61 ‰	1,70 ‰	1,77 ‰	1,51 ‰	1,45 ‰	1,34 ‰
	EU	2,20 ‰	2,34 ‰	2,46 ‰	2,58 ‰	2,70 ‰	2,88 ‰	2,71 ‰
	Nordic	1,45 ‰	1,51 ‰	1,62 ‰	1,72 ‰	1,66 ‰	1,73 ‰	1,55 ‰

Source: European Audiovisual Observatory, Eurostat.

([88]) Both the Danish authorities and the complainant think that the prices in Denmark can best be compared with other northern countries, as the market conditions are similar (size, viewing behaviour).

(264) The table above shows that television advertising accounted for a smaller proportion of total advertising expenditure in Denmark (27 %) than the EU average (37 %). However, the figures show that there is a general north-south divide in Europe ([89]). In the southern Member States, spending on television advertising is considerably higher than in the northern Member States ([90]). The same pattern can be seen for television advertising spending as a proportion of GDP ([91]). Television advertising expenditure per capita also shows a marked difference between the Member States ([92]). Looking at the Nordic figures, the Danish spending pattern is in line with the other Nordic countries.

(265) In view of the above, the Commission concludes that there is no clear, unequivocal evidence that the Danish television advertising market was systematically and consistently depressed as a result of TV2's pricing behaviour.

Inter-media prices

(266) The complainant also submitted comparative data on contact prices (expressed in CPM ([93])) across borders for one media type and across all media types in one particular country. The data submitted by the complainant compares the cost for contacting 1 000 individuals by an advertisement either in print or on television in Denmark, Norway and Sweden ([94]).

(267) The data shows that television advertising is less expensive in Denmark than it is in Sweden and Norway ([95]), whereas the opposite is true for print media ([96]).

([89]) A major reason for the divide is the significantly smaller amount of time people in Nordic countries spent watching TV. In Denmark average daily viewing per capita was 156 minutes in 2002, whereas the figure for the EU was 192 minutes.

([90]) In the EU in 2001, it accounted for the highest proportion in the southern Member States Portugal (60 %), Italy (54 %), and Greece (49 %). In the Netherlands (23 %), Finland (24 %), Austria (26 %), and Ireland (26 %) it turned out to be lower than in Denmark. In Sweden the percentage matched the figure for Denmark.

([91]) TV advertising expenditure as a proportion of GDP was high in southern countries such as Portugal (6,66 ‰), Greece (4,04 ‰), Italy (3,22 ‰), and Spain (3,21 ‰).

([92]) Per capita TV advertising expenditure in 2001 was lower in Finland (EUR 42) and Sweden (EUR 43) and the same as in the Netherlands (EUR 45). It was highest in the UK (EUR 90), Portugal (EUR 80) and Belgium (EUR 73).

([93]) CPM (cost per thousand) represents either the cost to generate 1 000 gross impressions within the group or the cost to reach 1 000 different individuals of the group.

([94]) The TV contact prices for Norway and Denmark are estimated on the basis of information from local SBS station. The print estimates were provided by a media agency.

([95]) CPM for TV is respectively 13 in Denmark, 14 in Sweden and 18 in Norway.

([96]) CPM for print is respectively 21 in Denmark, 17 in Sweden and 12 in Norway.

(268) However, the Commission cannot verify the reliability of the data provided and no such data are publicly available. Since the information is rather limited and does not take possible cultural differences into account, the Commission cannot draw any valid conclusions on the level of contact prices for the different media in the Scandinavian countries.

(269) The Commission therefore concludes that TV2 had the highest price on the Danish market during the period under investigation, being able to price its product 15-40 % higher than its competitors depending on the reach in the relevant target group. Compared with Sweden and Norway, prices are approximately 20 % lower in Denmark.

(270) In the light of the above analyses, the Commission concludes that, from a State aid perspective, there is no clear evidence that TV2 did not attempt to maximise its advertising revenue or that its behaviour in the advertising market led to an increased need for State funding.

V. **CONCLUSION**

The Commission finds that Denmark unlawfully implemented the aid in question in breach of Article 108(3) of the Treaty on the Functioning of the European Union.

However, in the light of the Court's judgment and on the basis of the considerations set out above, the Commission considers that the aid is compatible with the internal market on the basis of Article 106(2) of the Treaty on the Functioning of the European Union.

In the light of the Court's order, the question has to be examined whether the above finding might result in overcompensation of TV2, since the DKK 628 million reclaimed from TV2 by the Danish State with interest in 2004 is now deemed compatible with the internal market and might be repaid to TV2 by the State. Repayment of that sum could conceivably result in overcompensation in view of the recapitalisation measures that were actually implemented in 2004 (case N 313/2004) because of TV2's financial needs following recovery. As paragraphs 34 and 35 of the Court order indicate, the recovery obligation was indeed a necessary prerequisite for the 2004 recapitalisation measures, given that the Danish authorities chose not to allow TV2 to go into bankruptcy. As the Court stated in paragraph 43 of its order, *'[a]lthough the specific circumstances of the present case prompted the Commission to adopt two decisions* [the annulled recovery and recapitalisation decisions], *it is apparent that those decisions constitute two aspects of the same legal issue relating to the classification as State aid within the meaning of Article 87(1) EC and, if so, to the determination of their compatibility with the common market, of*

the measures implemented by the Kingdom of Denmark for TV2 and subsequently TV2 A/S. The annulment of Decision 2006/217/EC therefore entails for the Commission a fresh examination of all the measures implemented by the Kingdom of Denmark for TV2 and subsequently TV2 A/S'. Because of their close link due to the recovery issue, the 2004 recapitalisation measures in favour of TV2 should be seen in conjunction with the State aid granted between 1995 and 2002 so as to ensure that there is no risk of TV2 receiving overcompensation.

In this connection, the Commission notes the following. After the recovery decision, the Danish authorities actually recovered DKK 1 050 million (i.e. more than the DKK 628 million plus interest). As indicated in the Court order, following the Court's annulment of the recovery decision, the reason for recovering the DKK 628 million plus interest ceased to exist. However, the Danish authorities submitted a declaration undertaking not to repay the sum recovered to TV2, or if certain cumulative conditions were met, to repay TV2 a sum equivalent at most to the difference between the amount (including interest) that was actually recovered from TV2 in respect of the period 1995-2002 and the amount of the recapitalisation measures. In line with the Court Order, given the above commitment, there is no risk of TV2 being overcompensated in terms of the State aid for the years 1995-2002 seen in conjunction with the 2004 recapitalisation measures,

HAS ADOPTED THIS DECISION:

Article 1

The measures implemented by Denmark in favour of TV2/ Danmark between 1995 and 2002 in the form of the licence fee resources and other measures discussed in this Decision are compatible with the internal market within the meaning of Article 106(2) of the Treaty on the Functioning of the European Union.

Article 2

This Decision is addressed to the Kingdom of Denmark.

Done at Brussels, 20 April 2011.

For the Commission
Joaquín ALMUNIA
Vice-president