Court of First Instance: Commission's Decision to Approve Recapitalisation of Danish Broadcaster TV2 Contested

IRIS 2005-5:1/1

Elisabeth Thuesen
Law Department, Copenhagen Business School

By its Decision of 19 May 2004 the European Commission required the Danish broadcaster TV2/Danmark A/S (known as TV2) to pay back to the Danish State EUR 84.4 million (DKK 628.2 million) which amount was considered to have been granted as illegal State support to TV2 (see IRIS 2004-7: 4). In July 2004 the Danish government and TV2 appealed the Commission Decision before the Court of First Instance of the European Communities (see IRIS 2004-8: 3). Despite contesting the alleged illegality of the amount granted by the State, TV2 has complied with the Decision by setting up a recapitalisation plan which has been approved by the Decision of the European Commission in a meeting held on 6 October 2004 with the Danish government and TV2. In accordance with the plan, TV2 has paid back to the State the amount of DKK 1.073 million and the State has further converted a State loan of DKK 393,7 million into share capital in TV2 and has contributed DKK 453,5 million in cash to its assets. Furthermore, TV2 has raised a bank loan of DKK 394,3 million. The plan has been set up in order to avoid bankruptcy of TV2 and to prepare it for sale to a private broadcaster.

On 7 January 2005, the commercial broadcasters TV Danmark A/S (known as TV Danmark) and Kanal 5 (Channel 5) brought an action against the European Commission before the Court of First Instance (case T-12/05) claiming that the Court should annul the Commission Decision of 6 October 2004 in the State aid matter N 313/2004 - Denmark Recapitalisation of TV2/Danmark A/S. The Commission holds that State aid might be involved in the recapitalisation plan but that this would be compatible with art. 86 of the EC Treaty.

Firstly, the applicants submit that the Commission has infringed articles 86 (2), 87 (1) and 88 (2) of the EC Treaty as it has failed to establish and quantify the State aid after having found that the private investor principle, as applied to long-term investment, could not be invoked because of the uncertainty surrounding the planned privatisation of TV2.

Secondly, it is submitted that the Commission has infringed Art. 86 (2) EC, the Protocol annexed to the EC Treaty on the System of Public Broadcasting in the Member States and the Communication from the Commission on the Application of the State Aid Rules to Public Service Broadcasting (OJ 2001 C 320, p. 5) as it

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has laid down a definition of a service of a general economic interest which is too broad and imprecise and which creates distortion of competition and has an effect on trade contrary to Art. 86 (2) EC; according to the applicants, the Commission has also failed to establish that compliance with the Recovery Decision without the subsequent recapitalisation plan would obstruct TV2 in the performance of its public service tasks.

The applicants also allege that the Commission has failed to establish that the development of trade would not be affected by the recapitalisation to such an extent as is contrary to the interest of the Community.

Thirdly, the applicants submit that the Commission has infringed Art. 86 (2) EC, the Protocol and the Communication concerning Public Service Broadcasting as it has failed to establish TV2´s net public service costs which could be funded by the State, and has committed errors when applying the proportionality test.

The applicants also allege the infringement of articles 87 and 88 of the EC Treaty and the right to equal treatment as the Decision of 6 October 2004 perpetuates the unlawful advantage of the illegal aid and the resulting distortion of competition. They also find that the interested parties have not been given the opportunity to be heard.

Finally the applicants claim the Commission has infringed Art. 253 EC as it has not properly stated its reasons for adopting the Decision of 6 October 2004.

As a consequence of the court actions the Danish government decided on 8 April 2005, to postpone the sale of TV2 until the court cases are concluded. The Minister of Culture, Brian Mikkelsen, has declared that until then the government will not be able to provide the buyer of TV2 with a guarantee against the uncertainty of the economic foundation of the broadcaster.

Following the 2001 Media Agreement (see IRIS 2001-3: 9) and the conversion of TV2 into a limited company the Minister of Culture has decided it will no longer receive license income from January 2005 and must draw its income from publicity and other commercial activities.

Commission Decision of 19 May 2004 C 2/2003 (ex NN 22/2002) on the measures of Denmark in favour of TV2/DANMARK

http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:2006D0217:20060323:EN:PDF

Action brought on 7 January 2005 by TV Danmark A/S and Kanal 5 Denmark Ltd., against the Commission of the European Communities (Case T-12/05), see Official Journal of the European Union of 19 March

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2005 C 69 p. 23

http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2005:069:0023:01:EN:HTML

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