Court of First Instance: Judgment in the State Aid Case against Danish Public Service Broadcaster TV2

IRIS 2009-2:1/4

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Following a complaint from commercial Danish broadcasting operators, the EC Commission in 2003 decided to launch a State aid probe into the possible overcompensation of the Danish Public Service Broadcaster TV2 by the Danish State (see IRIS 2003-2: 3).

In 2004, the Commission decided that part of the aid granted by Denmark to TV2 between 1995 and 2002 in the form of license fee resources and other measures, namely DKK 628.2 million (approx. EUR 84 million), constituted overcompensation of TV2's net costs for public service activities (re: Decision 2006/217/EC of 19 May 2004 on measures implemented by Denmark for TV2/Denmark). The Commission ordered Denmark to recover that sum from TV2, with interest. The rest of the State aid granted to TV2 in the aforementioned period the Commission found to be compatible with the common market.

TV2 and Denmark brought actions before the Court of First Instance requesting the annulment of the Commission's decision. Also, the two commercial broadcasters SBS and Viasat brought actions before the Court of First Instance for the annulment of the part of the decision that found the aid granted to be compatible with the common market.

In its judgment of 22 October 2008, the Court of First Instance ruled in favour of TV2 and Denmark, thus annulling the Commission's decision of 2004.

The Court found that the Commission's decision of 2004 was based on an inadequate statement of reasons, amounting to an infringement of essential procedural requirements. According to the Court, the failure to provide an adequate statement of reasons was attributable to the Commission's complete failure to examine seriously, during the formal investigation procedure, the actual conditions that governed the setting of the amount of license fee income payable to TV2. Moreover, the Court found that the Commission's assertion that the Danish authorities did not regularly check the level of the accumulated reserves was an unsubstantiated claim which was expressly disputed by Denmark during the formal investigation procedure.

As it appears, the judgment was based on formal grounds. However, the judgment also contains interesting points with regard to some of the material aspects of the

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case. First, the Court noted that Member States enjoy a broad discretion for defining what they regard as services of general economic interest and can legitimately extend the definition of such services so as to cover broadcasting of full-spectrum programming. Second, the Court noted that license fees, though paid by the users, should be considered State funds, as the obligation to pay the license fee does not arise from a contractual relationship between TV2 and the person liable to pay, but simply from the ownership of a television or radio receiver in accordance with statutory law.

The judgment of the Court of First Instance does not put the case to rest. The Commission has chosen not to appeal the judgment to the ECJ, but, since the decision was annulled on formal grounds, the Commission can re-examine the case from the beginning and make a new decision. Further, the judgment may be appealed by SBS and Viasat. In addition, two other cases are pending before the Court of First Instance concerning the Commission's approval in 2004 of Denmark's recapitalization of TV2, following the Commission's decision regarding State aid and TV2's repayment thereof.

Judgment of the Court of First Instance in Joined Cases T-309/04, T-317/04, T-329/04 and T-336/04, 22 October 2008

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