JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)

22 October 2008 *

In Joined Cases T-309/04, T-317/04, T-329/04 and T-336/04,

TV 2/Danmark A/S, established in Odense (Denmark), represented by O. Koktvedgaard and M. Thorninger, lawyers,

applicant in Case T-309/04,

supported by

European Broadcasting Union (EBU), established in Grand-Saconnex (Switzerland), represented by A. Carnelutti, lawyer,

intervener in Case T-309/04,

Kingdom of Denmark, represented by J. Molde, acting as Agent, assisted by P. Biering and K. Lundgaard Hansen, lawyers,

applicant in Case T-317/04,

* Languages of the case: English and Danish.

Viasat Broadcasting UK Ltd, established in West Drayton, Middlesex (United Kingdom), represented by S. Hjelmborg and M. Honoré, lawyers,

applicant in Case T-329/04,

supported by

SBS TV A/S, formerly TV Danmark A/S, established in Skovlunde (Denmark),

and

SBS Danish Television Ltd, formerly Kanal 5 Denmark Ltd, established in Hounslow, Middlesex (United Kingdom),

represented by D. Vandermeersch, K.-U. Karl and H. Peytz, lawyers,

interveners in Case T-329/04,

SBS TV A/S,

SBS Danish Television Ltd,

applicants in Case T-336/04,

supported by

Viasat Broadcasting UK Ltd,

intervener in Case T-336/04,

v

Commission of the European Communities, represented, in Cases T-309/04, T-317/04 and T-329/04, by H. Støvlbæk and M. Niejahr, in Case T-329/04, also by N. Kahn and, in Case T-336/04, by N. Kahn and M. Niejahr, acting as Agents,

defendant in Cases T-309/04, T-317/04, T-329/04 and T-336/04,

supported by

SBS TV A/S,

SBS Danish Television Ltd,

and

Viasat Broadcasting UK Ltd,

interveners in Case T-309/04,

and

Kingdom of Denmark,

TV 2/Danmark A/S,

and

European Broadcasting Union (EBU),

interveners in Cases T-329/04 and T-336/04

APPLICATION, in Cases T-309/04 and T-317/04, for annulment of Commission Decision 2006/217/EC of 19 May 2004 on measures implemented by Denmark for TV 2/Danmark (OJ 2006 L 85, p. 1; corrigendum in OJ 2006 L 368, p. 112) and, in the alternative, of Article 2 of that decision or of paragraphs 3 and 4 of that Article, and, in Cases T-329/04 and T-336/04, for annulment of that decision in so far as it establishes the existence of State aid which is partly compatible with the common market,

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Fifth Chamber),

composed of M. Vilaras (Rapporteur), President, M.E. Martins Ribeiro and K. Jürimäe, Judges,

Registrar: C. Kristensen, Administrator,

having regard to the written procedure and further to the hearing on 7 and 8 November 2007,

gives the following

Judgment

Legal context

1 Article 16 EC provides:

‘Without prejudice to Articles 73 [EC], 86 [EC] and 87 [EC], and given the place occupied by services of general economic interest in the shared values of the Union

as well as their role in promoting social and territorial cohesion, the Community and the Member States, each within their respective powers and within the scope of application of this Treaty, shall take care that such services operate on the basis of principles and conditions which enable them to fulfil their missions.'

2 Article 86(2) EC provides:

'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 this Treaty, 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 Community.'

3 Article 87(1) EC provides:

'Save as otherwise provided in this Treaty, 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 common market.'

4 Article 311 EC provides:

'The protocols annexed to this Treaty by common accord of the Member States shall form an integral part thereof.'

5 The Protocol on the system of public broadcasting in the Member States (OJ 1997 C 340, p. 109, 'the Amsterdam Protocol'), introduced by the Treaty of Amsterdam and annexed to the EC Treaty, provides that:

'[The Member States], considering 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, have agreed upon the following interpretative provisions, which shall be annexed to the [EC] Treaty:

The provisions of the [EC] Treaty shall be without prejudice to the competence of Member States to provide for the funding of public service broadcasting in so far as such funding is granted to broadcasting organisations for the fulfilment of the public service remit as conferred, defined and organised by each Member State, and in so far as such funding does not affect trading conditions and competition in the Community to an extent which would be contrary to the common interest, while the realisation of the remit of that public service shall be taken into account.'

6 On 15 November 2001, the Commission published a Communication on the application of State aid rules to public service broadcasting (OJ 2001 C 320, p. 5, 'the

Broadcasting Communication'), in which it set out the principles it would follow in the application of Articles 87 EC and 86(2) EC to State funding of public service broadcasting.

Facts

7 Two public broadcasters operate in Denmark, Danmarks Radio ('DR') and TV 2/ Danmark ('TV2'), the latter having been replaced — for accounting and tax purposes as of 1 January 2003 — by TV 2/Danmark A/S ('TV2 A/S'). DR is almost entirely financed through licence fees. TV2 is financed partly through licence fees, but also through advertising revenue.

8 TV2 was established in 1986, by the lov om ændring af lov om radio- og fjernsynsvirksomhed (Law amending the Law on Broadcasting Services), No 335, of 4 June 1986 ('the 1986 Law establishing TV2'), as an independent autonomous institution. TV2 started broadcasting on 1 October 1988. TV2 broadcasts the terrestrial channel TV2 and in 2000 it also started broadcasting a satellite channel, TV2 Zulu. At the end of 2002 TV2 Zulu — which had until then been a public service channel — became a commercial pay-television channel.

9 Apart from the public broadcasters, two commercial television broadcasters operate on the nationwide television broadcasting market in Denmark: the group comprising

SBS TV A/S ('SBS A/S') and SBS Danish Television Ltd ('SBS Ltd'), on the one hand, and Viasat Broadcasting UK Ltd ('Viasat'), on the other.

10 SBS A/S and SBS Ltd are owned by SBS Broadcasting SA, a Luxembourg company which operates television and radio stations in several Member States.

11 SBS A/S, formerly TV Danmark A/S, has broadcast the commercial television channel TV Danmark 2 via a terrestrial channel since April 1997. Broadcasts by the TV Danmark 2 station in Copenhagen are also sent via satellite to certain cable operators and Danish households equipped with DirectToHome (satellite broadcasting directly to the home (DTH)) throughout the rest of the country.

12 SBS Ltd, formerly Kanal 5 Denmark Ltd, established in 1999 under the name TV Danmark 1 Ltd, which it kept until 2004, has since 1 January 2000 broadcast the commercial television channel Kanal 5 (initially called TV Danmark 1) via satellite from the United Kingdom (UK), under a UK licence.

13 Viasat is part of the Modern Times Group (MTG), a multinational group active in the media sector. Since 1992 Viasat has broadcast the TV3 and TV3+ channels in Denmark via satellite, under an authorisation issued in the UK.

14 SBS A/S and SBS Ltd (together, 'SBS') and Viasat compete with TV2 on the Danish national television advertising market.

15 The Danish rules governing the definition of TV2's public service were laid down, for the period 1995 to 2002, by successive consolidated versions of the lov om radio- og fjernsynsvirksomhed (Law on Broadcasting Services), No 1065, of 23 December 1992, including version No 578 of 24 June 1994 ('the Broadcasting Law'). TV2's articles of association set out and explained those rules in detail.

16 By letter of 5 April 2000, SBS sent the Commission a complaint regarding the Kingdom of Denmark's financing of TV2. A meeting with the complainant was held on 3 May 2000.

17 By letters of 28 February 2001, 3 May 2001 and 11 December 2001, SBS submitted additional information.

18 By letter of 5 June 2002, the Commission requested information from the Danish authorities, which replied by letter of 10 July 2002. Meetings with the Danish authorities were held on 25 October 2002 and 19 November 2002. The Danish authorities sent additional information by letters of 19 November 2002 and 3 December 2002.

19 By letter of 24 January 2003, the Commission informed the Kingdom of Denmark that it had decided to initiate the procedure under Article 88(2) EC concerning Danish State funding of TV2 ('the decision initiating the procedure').

20 The decision initiating the procedure was published in the *Official Journal of the European Union* of 14 March 2003 (OJ 2003 C 59, p. 2). The Commission invited interested parties to submit their comments on the measures at issue.

21 The Danish authorities sent the Commission comments by letter of 24 March 2003, as well as additional information by letters of 19 December 2003 and 15 March 2004. The Commission also received comments from several interested parties. SBS submitted its comments by letter of 11 April 2003. The Association of Commercial Television in Europe (ACT) sent comments by letter of 14 April 2003. The commercial broadcasters Antena 3 TV and Gestevisión Telecinco submitted comments on 16 April 2003. Viasat submitted its comments by letter of 14 April 2003. By letter of 4 July 2003, the Commission forwarded those comments to the Kingdom of Denmark, which responded to them by letter of 12 September 2003.

22 The Commission received additional information from SBS by letters of 15 December 2003 and 6 January 2004. On 17 December 2003, the Commission held a meeting with SBS and, on 9 February 2004, with the Danish authorities, who, by letter of 15 March 2004, submitted their comments on the additional information provided by SBS.

23 The general meeting at which TV2 A/S was set up — under Danish law No 438 of 10 June 2003 on TV2 A/S — was held on 17 December 2003; for accounting and tax purposes, the company came into existence on 1 January 2003.

24 By Commission Decision 2006/217/EC of 19 May 2004 on measures implemented by Denmark for TV2/Danmark (OJ 2006 L 85, p. 1, corrigendum OJ 2006 L 368, p. 112; 'the contested decision'), the Commission found that '[t]he aid granted between 1995 and 2002 [by the Kingdom of Denmark] to [TV2] in the form of licence fee resources and the other measures described in this Decision is compatible with the common

market under Article 86(2) EC with the exception of an amount of [Danish kroner] 628.2 million' (Article 1 of the contested decision).

25 The Commission ordered the Kingdom of Denmark to recover that sum, together with interest, from TV2 A/S (Article 2 of the contested decision).

26 By letter of 23 July 2004, the Kingdom of Denmark notified the Commission of plans to recapitalise TV2 A/S. As regards measures financed by the State, the plan was to increase the capital by Danish kroner (DKK) 440 million and to convert a State loan of DKK 394 million into capital.

27 By decision of 6 October 2004 (C(2004) 3632 fin) in State aid case N 313/2004 relating to the recapitalisation of TV 2/Danmark A/S (OJ 2005 C 172, p. 3; 'the recapitalisation decision'), the Commission found that 'the planned capital increase of DKK 440 million and the conversion of debt into equity capital are necessary to rebuild the capital which TV2 needs, following its conversion into a limited company, to fulfil its public service mission' (recital 53 of the recapitalisation decision). Consequently, the Commission decided that 'any element of State aid that might be connected with the planned recapitalisation of TV2 [A/S] is compatible with the common market under Article 86(2) EC' (recital 55 of the recapitalisation decision).

28 Two actions for annulment were brought against the recapitalisation decision by SBS and Viasat, respectively, (Cases T-12/05 and T-16/05), which are currently pending before the Court of First Instance.

Procedure

Cases T-309/04 and T-317/04

29 By applications lodged at the Registry of the Court of First Instance on 28 July 2004 and 3 August 2004, respectively, TV2 A/S and the Kingdom of Denmark brought actions in Cases T-309/04 and T-317/04, respectively.

30 By separate documents, lodged at the Registry of the Court of First Instance on 3 August 2004 and 17 August 2004 and registered as Cases T-317/04 R and T-309/04 R, respectively, the Kingdom of Denmark and TV2 A/S brought actions for interim measures seeking suspension of execution of the contested decision. However, following the withdrawal by those parties of their requests for interim measures, those actions were removed from the register by orders of the President of the Court of First Instance of 14 December 2004.

31 In its application, the Kingdom of Denmark requested that Cases T-309/04 and T-317/04 be joined. Neither TV2 A/S nor the Commission objected to that request.

32 By document lodged at the Registry of the Court of First Instance on 2 December 2004, Viasat requested leave to intervene in support of the form of order sought by the Commission in Case T-317/04.

33 By letter of 17 January 2005, the Kingdom of Denmark requested confidential treatment, vis-à-vis Viasat, of certain details in the application and the defence in Case T-317/04. However, since Viasat's request for leave to intervene was rejected by order of the President of the Fifth Chamber of the Court of First Instance of 13 April 2005, it was held, by order of the President of the Fifth Chamber of the Court of First Instance of 1 March 2007, that there was no need to adjudicate on the application for confidential treatment.

34 By documents lodged at the Registry of the Court of First Instance on 2 December 2004, 10 December 2004 and 13 December 2004, respectively, Viasat and SBS requested leave to intervene in support of the form of order sought by the Commission in Case T-309/04, and the European Broadcasting Union (EBU) requested leave to intervene, in the same case, in support of the form of order sought by TV2 A/S.

35 By orders of the President of the Fifth Chamber of the Court of First Instance of 18 April 2005 and 6 June 2005, Viasat, SBS and the EBU were granted leave to intervene.

36 By letters of 14 January 2005 and 13 February 2005, TV2 A/S requested confidential treatment, vis-à-vis the interveners, of certain details in the application and the defence in Case T-309/04. The interveners did not object to those requests.

37 By order of 1 March 2007, the President of the Fifth Chamber of the Court of First Instance granted the application for confidential treatment.

38 By document of 8 November 2005, SBS requested that Case T-336/04 (*SBS A/S and SBS Ltd* v *Commission*) be joined with the present cases and with Case T-329/04 (*Viasat* v *Commission*). With the exception of the EBU, the other parties submitted observations regarding that request.

39 On 10 November 2006, in reply to a written question from the Court of First Instance of 24 October 2006, the Kingdom of Denmark and TV2 A/S submitted comments on whether they still had a sufficient legal interest in bringing proceedings, following the adoption of the recapitalisation decision.

Case T-329/04

40 By application lodged at the Registry of the Court of First Instance on 2 August 2004, Viasat brought Case T-329/04.

41 By documents of 18 November 2004, 1 December 2004 and 14 December 2004, respectively, the Kingdom of Denmark, TV2 A/S, the EBU and the British Broadcasting Corp. (BBC) requested leave to intervene in support of the form of order sought by the Commission.

42 By document of 9 December 2004, SBS requested leave to intervene in support of the form of order sought by Viasat.

43 By orders of the President of the Fifth Chamber of the Court of First Instance of 18 April 2005 and 6 June 2005, the Kingdom of Denmark, TV2 A/S and the EBU were granted leave to intervene in support of the form of order sought by the Commission, SBS was granted leave to intervene in support of the form of order sought by Viasat and the BBC's request to intervene was rejected.

44 By letters of 6 December 2004 and 17 December 2004, 18 January 2005, 1 March 2005 and 30 May 2005, Viasat requested confidential treatment, vis-à-vis the interveners, of certain details in the application and the corrigendum to the defence submitted on 12 May 2005. Some of the interveners objected to those requests.

45 By document of 8 November 2005, SBS requested that Case T-336/04 be joined with Cases T-309/04, T-317/04 and T-329/04. With the exception of the EBU, the other parties submitted observations on that request.

46 By order of 1 March 2007, the President of the Fifth Chamber of the Court of First Instance partly granted the requests for confidential treatment.

Case T-336/04

47 By application lodged at the Registry of the Court of First Instance on 13 August 2004, SBS brought Case T-336/04.

48 By documents of 18 November 2004, 1 December 2004, 13 December 2004 and 14 December 2004, respectively, the Kingdom of Denmark, TV2 A/S, the EBU and the BBC requested leave to intervene in support of the form of order sought by the Commission.

49 By document of 1 December 2004, Viasat requested leave to intervene in support of the form of order sought by SBS.

50 By orders of the President of the Fifth Chamber of the Court of First Instance of 15 April 2005 and 10 May 2005, the Kingdom of Denmark, TV2 A/S and the EBU were granted leave to intervene in support of the form of order sought by the Commission, Viasat was granted leave to intervene in support of the form of order sought by SBS and the BBC's request to intervene was rejected.

51 By letters of 29 December 2004, 18 March 2005, 20 April 2005, 27 May 2005 and 8 July 2005, SBS requested confidential treatment, vis-à-vis the interveners, of certain details in the application, the defence and the reply. Some of the interveners objected to those requests.

52 By document of 8 November 2005, SBS requested that Case T-336/04 be joined with Cases T-309/04, T-317/04 and T-329/04. With the exception of the EBU, the other parties submitted observations on that request.

53 By order of 1 March 2007, the President of the Fifth Chamber of the Court of First Instance partly granted the requests for confidential treatment.

54 After hearing the parties' observations on the request to join the cases, the Court of First Instance considers, pursuant to Article 50(1) of the Rules of Procedure of the Court of First Instance, that Cases T-309/04, T-317/04, T-329/04 and T-336/04 should be joined for the purposes of the final judgment.

Forms of order sought by the parties

55 In Case T-309/04, TV2 A/S, supported — except as regards costs — by the EBU, claims that the Court of First Instance should:

— annul the contested decision;

— in the alternative, annul Article 2 of the contested decision;

— in the further alternative, reduce by at least DKK 167 million the amount specified at the end of Article 1 of the contested decision and in Article 2(1) of that decision, with effect from 1997, and annul the demand for interest payments in Article 2(3) and (4) of the contested decision;

— order the Commission to pay the costs.

56 In Case T-317/04, the Kingdom of Denmark claims that the Court of First Instance should:

— annul the contested decision;

— in the alternative, annul Article 2 of the contested decision;

— in the further alternative, annul Article 2(3) and (4) of the contested decision;

— order the Commission to pay the costs.

57 In Cases T-309/04 and T-317/04, the Commission — supported, in Case T-309/04 by Viasat and SBS — contends that the Court of First Instance should:

— dismiss the actions;

— order the applicants to pay the costs.

58 In Case T-329/04, Viasat, supported by SBS, claims that the Court of First Instance should:

— annul Article 1 of the contested decision, so far as concerns the part of the decision declaring the aid to be compatible with the common market in accordance with Article 86(2) EC;

— order the Commission to pay the costs.

59 In Case T-336/04, SBS, supported by Viasat, claims that the Court of First Instance should:

— annul Article 1 of the contested decision, in so far as the Commission finds therein that the aid granted to TV2 between 1995 and 2002 in the form of licence fee resources and other measures described in that decision is compatible with the common market under Article 86(2) EC;

— order the Commission to pay the costs.

60 In Cases T-329/04 and T-336/04, the Commission, supported by the Kingdom of Denmark, TV2 A/S and the EBU, contends that the Court of First Instance should:

— dismiss the actions;

— order the applicants to pay the costs.

Law

Admissibility of the actions in Cases T-309/04 and T-317/04

61 In its rejoinders, the Commission raises the question whether the Kingdom of Denmark and TV2 A/S have a sufficient legal interest in bringing proceedings against

the contested decision. The Commission contends that, all things considered, the net effect of the contested decision and the recapitalisation decision is positive for the applicants.

62 Since the conditions for the admissibility of an action, in particular the need for a legal interest in bringing proceedings, relate to the question whether there is an absolute bar to proceedings (orders of the Court of Justice in Case 108/86 *D.M.* v *Council and ESC* [1987] ECR 3933, paragraph 10, and order in Case T-398/02 R *Linea GIG* v *Commission* [2003] ECR II-1139, paragraph 45), it is for the Court to consider of its own motion whether the applicants have an interest in obtaining annulment of the contested decision (order of the Court of First Instance in Joined Cases T-228/00, T-229/00, T-242/00, T-243/00, T-245/00 to T-248/00, T-250/00, T-252/00, T-256/00 to T-259/00, T-265/00, T-267/00, T-268/00, T-271/00, T-274/00 to T-276/00, T-281/00, T-287/00 and T-296/00 *Gruppo ormeggiatori del porto di Venezia and Others* v *Commission* [2005] ECR II-787, paragraph 22, and Case T-141/03 *Sniace* v *Commission* [2005] ECR II-1197, paragraph 22).

63 By way of a preliminary point, it should be recalled that Article 230 EC draws a clear distinction between the right of Community institutions and Member States to bring an action for annulment and the right of natural and legal persons to do so, in that the second paragraph of Article 230 EC gives all Member States the right to contest the legality of Commission decisions by means of an action for annulment without having to establish any legal interest in bringing proceedings. Accordingly, a Member State need not prove that an act of the Commission which it is contesting produces legal effects with regard to that Member State in order for its action to be admissible. Nevertheless, in order for an act of the Commission to be the subject of an action for annulment by a Member State, it must be intended to produce legal effects (see the orders in Case C-208/99 *Portugal* v *Commission* [2001] ECR I-9183, paragraphs 22 to 24 and the case-law cited).

64 As regards the action brought by the Kingdom of Denmark, it is obvious, having regard to the second paragraph of Article 230 EC and in the light of the case-law cited in the preceding paragraph, that that applicant, solely by virtue of its status as a Member State, is entitled to bring an action for annulment in the present case.

65 The parties agree that the contested decision is a decisive measure, in that it is intended to produce binding legal effects.

66 In consequence, the Commission's contention that, all things considered, the net effect of the contested decision and the recapitalisation decision is positive for the Kingdom of Denmark and that the latter does not therefore have a sufficient legal interest in bringing proceedings, is entirely irrelevant. In any event, that contention rests on the unsubstantiated premiss that the recapitalisation decision will not be annulled by the Court of First Instance in the context of the actions for annulment of that decision brought by SBS (Case T-12/05) and Viasat (Case T-16/05), which are currently pending before the Court of First Instance.

67 As regards the action brought by TV2 A/S, it is clear from settled case-law that an action for annulment is not admissible unless the natural or legal person who brought it has an interest in seeing the contested measure annulled. That interest must be vested and present and is evaluated as at the date on which the action is brought (*Sniace* v *Commission*, cited in paragraph 62 above, paragraph 25, and Case T-136/05 *Salvat père & fils and Others* v *Commission* [2007] ECR I-4063, paragraph 34).

68 In order for such an interest to be present, the annulment of the measure must of itself be capable of having legal consequences or, in accordance with a different form of words, the action must be liable, if successful, to procure an advantage for the party who has brought it (see Case T-310/00 *MCI* v *Commission* [2004] ECR II-3253, paragraph 44 and the case-law cited).

69 In the present case, it should be noted that, in the contested decision, the Commission found first that the financial measures granted in favour of TV2 had to be classified as State aid, and then examined whether that aid could be considered to be compatible with the common market in the light of the conditions laid down in Article 86(2)

EC, in this case by assessing whether the State financing was proportionate to the funding needs of providing the public service. The Commission concluded that the aid granted to TV2 between 1995 and 2002 in the form of licence fee resources and other measures described in that decision was compatible with the common market under Article 86(2) EC, with the exception of a sum in the amount of DKK 628.2 million (Article 1 of the contested decision).

70 The contested decision describes TV2 A/S as the actual beneficiary of the measures that were classified as aid which is partly incompatible with the common market and, accordingly, that is the company from which the Kingdom of Denmark is obliged to recover the aid (recital 163 and Article 2 of the contested decision). In addition, it not disputed that TV2 A/S effectively transferred to the Kingdom of Denmark all the sums that the latter was obliged to recover.

71 In those circumstances, it must be held that TV2 A/S has an interest in bringing proceedings against the contested decision, whether to have the decision annulled in its entirety or to have it annulled in part.

72 In this respect, it should first be emphasised that the present case, which concerns a decision finding aid to be partly compatible and partly incompatible, is different from the cases that have given rise to case-law according to which, under certain conditions, an action brought by the beneficiary of aid against a Commission decision classifying that aid as entirely compatible with the common market is inadmissible for lack of sufficient legal interest in instituting proceedings (Case T-212/00 *Nuove Industrie Molisane* v *Commission* [2002] ECR II-347, and *Sniace* v *Commission*, cited in paragraph 62 above).

73 Secondly, it should be noted that the way in which the Commission examined the compatibility of the aid in the present case precludes examining the admissibility of the action brought by TV2 A/S by dividing the contested decision into two parts, the first classifying the contested measures as State aid which is partly incompatible with the common market and the second classifying those measures as State aid which is partly compatible.

74 In the contested decision, the Commission examined whether, taken as a whole, the State funding measures at issue represented, over the period under investigation, a sum exceeding the net cost of the service of general economic interest. Accordingly, the Commission assessed those measures together and undertook a calculation that ultimately disclosed overcompensation in the amount of DKK 628.2 million that was considered to be incompatible, and in relation to which an amount of compatible aid was subsequently established. It is thus clear from the Commission's analysis that the classification of the contested measures as compatible and their classification as incompatible are mutually dependent and inseparably linked.

75 Accordingly, those circumstances are different from those that led the Community judicature to hold that the action brought by the beneficiary of aid for annulment of a Commission decision was inadmissible for lack of sufficient legal interest in bringing proceedings, in so far as that decision found, in a specific provision in its operative part, that one of the three contested financing measures, looked at individually, was compatible with the common market (*Salvat père & fils and Others* v *Commission*, cited in paragraph 67 above, paragraph 48).

76 Moreover, and for the same reasons as those stated at the end of paragraph 66 above, TV2 A/S' interest in bringing proceedings cannot be affected by the Commission's view that the overall net effect of the contested decision and the recapitalisation decision was positive.

77 In any event, even if the admissibility of the action brought by TV2 A/S against the contested decision had to be examined, first, in relation to the fact that it classifies the contested measures as State aid which is partly incompatible with the common market and, secondly, in relation to the fact that it classifies those measures as partly compatible, the action would none the less remain admissible, including in the second respect.

78 It should be borne in mind that an applicant can claim an interest concerning a future legal situation as long as he can demonstrate that the prejudice to that situation is already certain. Accordingly, an applicant cannot rely only upon future and uncertain situations to justify his interest in applying for the annulment of the contested act (Case T-138/89 *NBV and NVB* v *Commission* [1992] ECR II-2181, paragraph 33).

79 It is clear from the case-law on actions for annulment brought by aid beneficiaries against a Commission decision finding the aid at issue to be entirely compatible with the common market, or finding one of three financing measures to be compatible with the common market, that the interest in bringing proceedings can result from a genuine 'risk' that the applicants' legal position will be affected by legal proceedings (see, to that effect, *Salvat père & fils and Others* v *Commission*, cited in paragraph 67 above, paragraph 43), or where the 'risk' of legal proceedings was vested and present (*Sniace* v *Commission*, cited in paragraph 62 above, paragraph 28), at the date on which the action was brought before the Community judicature.

80 The Court of First Instance notes that — in its comments of 10 November 2006 and, subsequently, at the hearing — TV2 A/S stated, without being contradicted, that in February 2006 Viasat had instituted legal proceedings before the Østre Landsret (Eastern Regional Court) against TV2 A/S and the Kingdom of Denmark, claiming that they should be ordered, jointly or separately, to pay Viasat the amount of DKK 200 million, on the grounds that the State aid had not been notified to the

Commission and that the illegal aid enabled TV2 to apply, to Viasat's detriment, a low-price strategy to sales of its advertising space. TV2 A/S explained, again without being contradicted, that those proceedings before the Østre Landsret had been suspended pending the judgments of the Court of First Instance in the cases concerning the legality of the contested decision.

81 While it is not contested that TV2 A/S brought its action for annulment before the Court of First Instance before Viasat commenced proceedings at national level, the Court of First Instance finds that in the present case it has been more than sufficiently demonstrated that the risk of legal proceedings at national level at the date on which TV2 A/S initiated proceedings was vested and present since, far from remaining hypothetical, that risk actually materialised in the form of the legal proceedings brought by Viasat that are currently pending before the national court and which, moreover, have been stayed specifically to await the judgment of the Court of First Instance.

82 Accordingly, TV2 A/S has sufficient legal interest in bringing an action for annulment of the contested decision in its entirety, that is to say, also in so far as that decision classifies the contested measures as State aid which is partly compatible with the common market.

83 It follows from all of the above that the present actions for annulment of the contested decision are admissible.

Substance

84 The actions in Cases T-309/04 and T-317/04 are based on nine pleas in law, alleging respectively: (i) infringement of the rights of the defence; (ii) infringement

of Article 87(1) EC in so far as the licence fee revenue and the advertising revenue transferred to TV2 via the TV2 Fund are not State resources; (iii) error in the calculation of the overcompensation; (iv) that the alleged overcompensation constitutes reasonable profit; (v) that, in the absence of cross-subsidisation, the overcompensation does not constitute State aid; (vi) that there was no State aid, because the State financing satisfied the private investor test; (vii) that the overcompensation was to serve as the reserve necessary for fulfilling the public service remit; (viii) illegality of the recovery of the aid from TV2 A/S and infringement of the principles of the protection of legitimate interests and legal certainty; (ix) illegality of the contested decision as regards the recovery of interest.

85 The action in Case T-329/04 is based on three pleas in law, alleging respectively: (i) that TV2's public service remit was wrongly classified as a service of general economic interest ('SGEI'); (ii) that the test of the efficient commercial operator, within the meaning of paragraph 58 of the Broadcasting Communication, was inappropriate for assessing the cross-subsidisation, through public service funding, of the sale of advertising space, which should have been assessed within the framework of Article 87(1) EC by taking into account TV2's level of efficiency; (iii) that the revenue maximisation test was unsuitable for assessing the cross-subsidisation.

86 The action in Case T-336/04 is based on eight pleas in law, alleging respectively: (i) infringement of Articles 86(2) EC, 87 EC and 88 EC, in that aid that was illegal because it had not been notified was nevertheless found to be compatible; (ii) that TV2's public service remit was wrongly classified as an SGEI; (iii) first, infringement of Articles 86(2) EC, 87 EC and 88 EC and the Amsterdam Protocol in that the State aid at

issue was approved on the basis of the revenue maximisation test and the burden of proof was transferred to SBS and, second, manifest error of assessment; (iv) manifest errors of assessment in the application of the revenue maximisation test; (v) that, in view of the Commission's doubts, Article 86(2) EC was applied illegally; (vi) that it was manifestly wrong to apply Article 86(2) EC to the aid granted to TV2 Zulu; (vii) failure to examine whether TV2's net costs were proportionate to its public service obligations; (viii) infringement of Article 86(2) EC as well as manifest errors in the Commission's assessment of Danish State control over TV2's fulfilment of its public service remit.

87 It is necessary first to examine together the first plea in Case T-329/04 and the second plea in Case T-336/04, alleging that TV2's public service remit was wrongly classified as an SGEI.

The first plea in Case T-329/04 and the second plea in Case T-336/04, alleging that TV2's public service remit was wrongly classified, in the contested decision, as an SGEI

— Arguments of the parties

88 By these pleas, SBS and Viasat take issue with the contested decision in so far as the Commission considered the definition of TV2's public service obligations to be

acceptable in the light of the notion of an SGEI. That definition is too wide and not sufficiently precise.

89 SBS submits that, since TV2's public service obligations are defined in terms of the aims to be achieved, they leave TV2 free to choose the means of achieving those aims and therefore allow it to bring any activity within the scope of the public service funded by the State.

90 The public service can only cover non-profitable television programmes, at least in the case of public service broadcasters with dual funding, that is to say, those which are funded both by the State and through the sale of advertising space. A dual-funded public service broadcaster is inevitably led to depress advertising prices in order to reduce the profits of the commercial operators.

91 The definition of TV2's public service obligation is unacceptable because it is no different from the obligations imposed by Danish law on commercial broadcasters.

92 In addition, the Commission did not correctly examine TV2's public service remit, since it failed to examine that remit for the period 1995 to 2000.

93 Moreover, to regard TV2's entire programming as a public service is incompatible with the Broadcasting Communication, because not all of that programming entails 'supplementary' costs, within the meaning of paragraph 44 of the Broadcasting

Communication. Even if a wide definition of public service broadcasting were acceptable, it would be contrary to Article 86(2) EC to regard all the broadcaster's costs as linked to the public service. Such an interpretation fails to take account of the condition that compensation is possible only for the costs which the broadcaster 'would normally not have incurred'.

94 Viasat submits that a large part of TV2's programming schedule was no different from that of Viasat or SBS A/S. The Commission should have identified which of TV2's programming categories had public service content by carrying out a thorough analysis of all the programming categories and then comparing them with those of the commercial television channels.

95 The Commission, supported by TV2 A/S, the Kingdom of Denmark and the EBU, contends that the applicants' position is based on an excessively narrow understanding of the notion of an SGEI. The Commission emphasises the latitude afforded to Member States as regards the definition of SGEIs, a latitude that is given particular emphasis — in the field of broadcasting — by the Amsterdam Protocol. The Commission maintains that, when it comes to the definition of an SGEI, its own control mandate is limited to checking for manifest error.

96 The Commission contends that the terms of TV2's public service remit are neither vague nor imprecise and are not unusual as compared with the terms of such remits in other Member States. In fact, the applicants' complaint does not really concern the precision of those terms, but rather the breadth of TV2's remit. The applicants are wrong in maintaining that, in the field of broadcasting, only programming which is non-profitable can qualify as an SGEI. The argument that the applicants offer the

same programming as TV2 is unfounded and, in any event, it is simplistic to say that TV2's output cannot constitute an SGEI because commercial broadcasters offer the same 'mix' of programming.

97 As regards the criticism that the Commission should have compared TV2's programming with that of the commercial broadcasters, the Commission states that that is not its role. It is the Member States who determine the scope of the public service remit and they enjoy a considerable degree of latitude in that regard.

98 As regards the allegedly identical nature of TV2's obligations and the obligations of the commercial chains, the Commission points to recital 87 of the contested decision which makes it clear that only TV2 has an explicit statutory obligation to fulfil a public service remit. Its obligations under that remit go beyond the conditions for broadcasting authorisation.

99 Moreover, the fact that TV2 is dual-funded has no bearing on the question of the definition of the SGEI, since the relevance of dual funding arises only when it comes to examining proportionality. The Commission maintains that gaining viewer market share is not the *raison d'être* of a public service broadcaster.

100 Finally, the Commission contends, as regards the argument based on paragraph 44 of the Broadcasting Communication, that in the context of a public service remit requiring a broadcaster to offer programming that meets certain criteria, and in view of the fact that it is recognised that that remit may require the provision of balanced

and varied programming, all programming within such a remit must be regarded as 'supplementary' for the purposes of paragraph 44.

— Findings of the Court

101 It should first be noted that, as stated in the case-law (see, to that effect, *FFSA and Others* v *Commission*, cited in paragraph 144 above, paragraph 99) and as set out by the Commission in point 22 of its Communication of 20 September 2000 on services of general interest in Europe (COM(2000) 580 final), Member States enjoy a broad discretion for defining what they regard as services of general economic interest. Accordingly, the definition of such services by a Member State can be queried by the Commission only in the event of manifest error (Opinion of Advocate General Léger in Case C-309/99 *Wouters and Others* [2002] ECR I-1577, I-1583, point 162; and *Olsen* v *Commission*, cited in paragraph 145 above, paragraph 216).

102 The importance of SGEIs for the European Union and the need to guarantee the proper functioning of those services has, moreover, been underlined through the insertion in the EC Treaty, by the Treaty of Amsterdam, of what is now Article 16 EC (see, in that regard, the Opinion of Advocate General Alber in Case C-340/99 *TNT Traco* [2001] ECR I-4109, I-4112, point 94; the Opinions of Advocate General Jacobs in Case C-475/99 *Ambulanz Glöckner* [2001] ECR I-8089, I-8094, point 175, and Case C-126/01 *GEMO* [2003] ECR I-13769, I-13772, point 124; and the Opinion of Advocate General Poiares Maduro in Case C-205/03 P *FENIN* v *Commission* [2006] ECR I-6295, I-6297, point 26, footnote 35; see also the order of the President of the Court of First Instance in Case T-53/01 R *Poste Italiane* v *Commission* [2001] ECR II-1479, paragraph 132).

103 More specifically, as regards broadcasting SGEIs in the field of broadcasting, in Case 155/73 *Sacchi* [1974] ECR 409 — concerning, inter alia, the question whether the exclusive right granted by a Member State to an undertaking to make all kinds of television transmissions, even for advertising purposes, constitutes a breach of the rules of competition — the Court of Justice recognised, essentially, that Member States could legitimately define such an SGEI so as to cover the broadcasting of full-spectrum programming. In that judgment, the Court of Justice held that 'nothing in the Treaty prevents Member States, for considerations of public interest of a non-economic nature, from removing radio and television transmissions … from the field of competition by conferring on one or more establishments an exclusive right to make them' (*Sacchi*, paragraph 14; see, also, the Opinion of Advocate General Reischl in that judgment, p. 433, p. 445, second to fifth unnumbered points, and the Opinion of Advocate General Léger in *Wouters and Others*, cited in paragraph 101 above, point 163).

104 In addition, when Member States stated in the Amsterdam Protocol 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 public service broadcasting systems introduced by them and entrusted with broadcasting full-spectrum television programmes for the benefit of the entire population of those States.

105 Lastly, it is necessary to bear in mind the terms in which the Council and the Member States, in their resolution of 25 January 1999 concerning public service broadcasting (OJ 1999 C 30, p. 1), reaffirmed the importance of broadcasting SGEIs.

106 In that resolution, Member States, 'considering the fact that public service broadcasting, in view of its cultural, social and democratic functions which it discharges for the common good, has a vital significance for ensuring democracy, pluralism,

social cohesion, cultural and linguistic diversity;… stressing that the increased diversification of the programmes on offer in the new media environment reinforces the importance of the comprehensive mission of public service broadcasters; [and] recalling the affirmation of competence of the Member States concerning remit and funding set out in the [Amsterdam Protocol]' noted and reaffirmed that that protocol confirms their 'will… to stress the role of public service broadcasting' and that 'public service broadcasting must be able to continue to provide a wide range of programming in accordance with its remit as defined by the Member States in order to address society as a whole' and that 'in this context it is legitimate for public service broadcasting to seek to reach wide audiences'.

107 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.

108 Calling such activities into question would be tantamount to making the very definition of the broadcasting SGEI dependent on its method of financing. An SGEI is defined, *ex hypothesi*, in relation to the general interest which it is designed to satisfy and not in relation to the means of ensuring its provision. As the Commission points out in point 36 of the Communication on broadcasting, 'the question of the definition of the public service remit must not be confused with the question of the financing mechanism chosen to provide these services'.

109 For the same reasons, it is wrong for SBS and Viasat to claim that the broadcasting SGEI should be limited, at least where the public service broadcaster is dual-funded, to the broadcasting of non-profitable programming. It is necessary to reject — as a

mere hypothesis — the claim that a broadcaster entrusted with an SGEI defined in broad and qualitative terms and dual-funded will inevitably be led, through the practice of selling its advertising space at artificially low prices, to subsidise its commercial activity through the State funds received for the public service. At the very most, there is only a risk of such behaviour, which it is for the Member States to prevent and, where necessary, for the Commission to penalise.

110 As regards the applicants' reference to the second sentence of paragraph 44 of the Broadcasting Communication, according to which '[public service duties] could justify compensation, as long as they entail supplementary costs that the broadcaster would normally not have incurred', the Court of First Instance finds that that sentence does not seek to preclude — by allegedly suggesting, in referring to 'supplementary' costs, that, conversely, there must also be 'non-supplementary' costs — the possibility of a broad definition of the broadcasting SGEI and, consequently, the possibility of financing all the costs of the public service broadcaster.

111 Paragraph 44 of the Broadcasting Communication simply aims to state — in terms that allow it to cover any possible situation, from a broadcasting SGEI defined in narrow and purely quantitative terms to a broadcasting SGEI defined in broad and qualitative terms — that compensation for public service costs must be proportionate. Accordingly, contrary to what the applicants claim, it is not wrong to find, as the Commission did, that all programming developed within the framework of a broadcasting SGEI defined in broad and qualitative terms is 'supplementary' for the purposes of paragraph 44 of the Broadcasting Communication and, consequently, to find that all the costs incurred by a broadcaster entrusted with that SGEI are 'supplementary' and can be financed by the State.

112 The Court of First Instance adds that to adopt the applicants' position would be tantamount to declaring public service television systems de facto unlawful where the public service broadcaster does not have access to financing from advertising and thus depends on help from the State to cover all of its costs. According to the applicants' position, even in such cases, some costs — namely, the alleged 'non-supplementary costs', the existence of which, according to the applicants, is necessarily to be inferred from the wording of paragraph 44 of the Broadcasting Communication — could not be compensated by the State. That, in essence, is what the Commission is saying when it submits that the applicants' position is predicated on the assumption that, in the absence of State aid, TV2 would nevertheless continue to exist as a broadcaster financed through private funds, even though the facts show that this would not be the case.

113 It follows from all of the foregoing considerations that the power of the Member States to define broadcasting SGEIs in broad and 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.

114 In the second place, it is necessary to determine whether, in the present case, the Commission erred in finding in the contested decision that the Kingdom of Denmark's definition of the SGEI for which TV2 was responsible was acceptable.

115 In recital 84 of the contested decision, the Commission stated that 'TV2 is obliged by [Danish] law to provide as a public service "through television, radio, Internet and the like, a wide range of programmes and services comprising news coverage, general information, education, art and entertainment"'. In that recital, the Commission referred to recital 15 of the contested decision, in which reference is made to the Danish Law as providing that '[TV2's broadcasting] range shall aim to provide quality, versatility and diversity', that '[i]n the planning of programmes, freedom of

information and of expression shall be a primary concern …' and that 'in addition, particular emphasis shall be placed on Danish language and culture'.

116 In recital 85 of the contested decision, the Commission maintained that '[a]lthough TV2's broadcasting obligation is of a qualitative nature and rather widely defined, …this wide definition of the operator's task [is] in line with the Broadcasting Communication'.

117 The Court of First Instance finds that the Commission is not mistaken in its assessment. Admittedly, 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, as alleged by the applicants. 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.

118 Moreover, in so far as the applicants' claim that the definition lacked precision was intended to challenge the latitude left to TV2 by the Danish authorities as regards its actual programming choices, it must be held that it is not unusual — quite the contrary — for a public service broadcaster to enjoy editorial independence from political authority in the choice of its actual programmes, provided, of course, that it satisfies the qualitative requirements to which it is subject as an operator responsible for providing a television SGEI. In this respect, the EBU, intervener in support

of the Commission, was right to stress the importance, for protecting freedom of expression, of the public service broadcaster's editorial independence from public authority — freedom of expression which, as defined in Article 11 of the Charter of Fundamental Rights of the European Union proclaimed in Nice on 7 December 2000 (OJ 2000 C 364, p. 1) and Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, includes 'the freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers'.

119 As regards the claim that the Commission wrongly adhered to the definition of TV2's public service remit as laid down in the version of the Broadcasting Law in force in 2000, the Court of First Instance finds nothing to indicate that that definition — which the Commission used in recital 15 of the contested decision and which was in fact taken from the consolidated version of Broadcasting Law No 203 of 22 March 2001 — fails to take proper account of the public service obligations that were also incumbent upon TV2 during the pre-2000 part of the period under investigation. That definition and that which applied previously (set out in the consolidated version of Broadcasting Law No 578 of 24 June 1994) both require 'quality, versatility and diversity', which are the essential qualitative requirements of the public broadcasting service entrusted to TV2. Moreover, those two definitions both state that all of TV2's broadcasting activities must satisfy those requirements.

120 As regards the applicants' claim that the definition of TV2's public service is unacceptable because it is no different from the statutory obligations imposed on commercial broadcasters, the Commission states in recital 87 of the contested decision that a distinction must be made between the conditions for authorisation that a commercial broadcaster must satisfy in the public interest and the State's assignment of a public service remit to a public or private enterprise. It is obvious that TV2 was

entrusted with such a remit and that that remit goes beyond the obligations imposed by Danish law on all commercial broadcasters. In addition, the Commission states that, of the applicants, only SBS A/S is subject to Danish law and, in consequence, only SBS A/S may rely on that argument; SBS Ltd and Viasat carry out their activities under UK authorisations and, accordingly, are not subject to the Danish rules.

121 The Court of First Instance finds that the Commission's views are correct. Even though, in return for broadcasting authorisation, SBS A/S, like any broadcaster governed by Danish law, could have been placed under a number of obligations in the public interest, as set out in recital 18 of the contested decision — such as the obligation to broadcast local programmes for at least one hour a day and to broadcast a significant part of its programmes in Danish or for a Danish public — those obligations are still not comparable to 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 broadcasting authorisation. The Commission was right, therefore, in recital 87 of the contested decision, to reject the applicants' argument essentially alleging breach of the principle of equal treatment.

122 It is also necessary to reject the argument that TV2 should not have been recognised as a public service channel, on the ground that its programming is no different from that of the commercial channels, and that the Commission should have compared TV2's programming with the programming of those commercial channels.

123 To accept that argument and thereby to make the definition of the broadcasting SGEI dependent — through a comparative analysis of programming — on the range of programming offered by the commercial broadcasters would have the effect of depriving the Member States of their power to define the public service. In fact, the definition of the SGEI would depend, in the final analysis, on commercial operators and their decisions as to whether or not to broadcast certain programmes. As TV2 A/S rightly submits, when the Member States define the remit of public service broadcasting, they cannot be constrained by the activities of the commercial television channels.

124 It follows from all of the foregoing considerations that the applicants have failed to show that the Commission erred in finding that it was not manifestly wrong to define the broadcasting SGEI provided by TV2 in broad and qualitative terms and that that definition could therefore be accepted.

125 The first plea in Case T-329/04 and the second plea in Case T-336/04 must therefore be rejected.

126 It is necessary, next, to examine successively the first and second pleas in Cases T-309/04 and T-317/04, alleging, respectively, infringement of the rights of the defence and infringement of Article 87(1) EC, in so far as the licence fee revenue and the advertising revenue transferred to TV2 via the TV2 Fund are not State resources.

The first plea in Cases T-309/04 and T-317/04, alleging infringement of the rights of the defence

— Arguments of the parties

127 The Kingdom of Denmark and TV2 A/S submit, in essence, that the Commission adopted a position in the contested decision on issues that were not mentioned in the decision initiating the procedure; that if the rights of the defence had not been infringed, the contested decision would have been different; and that various special circumstances should have prompted the Commission to express itself more clearly in the decision initiating the procedure.

128 First, the decision initiating the procedure gave the impression that the aim of the formal investigation procedure was to determine whether the alleged overcompensation had effectively been used, during the period under investigation, to cross-subsidise TV2's commercial activities. That decision never referred to the principle of comparison with a private investor in a market economy ('the private investor principle' or 'the private investor test') as a legally important concept. Moreover, the decision initiating the procedure has to be read as meaning that the Commission did not intend to examine specifically whether the private investor test had been satisfied. Accordingly, the content of that decision did not provide justification for presenting arguments backed by whether, in respect of the alleged overcompensation, the private investor test had been satisfied. Nevertheless, the Commission proceeded to take a view in the contested decision as to whether the Kingdom of Denmark had acted like a private investor in a market economy.

129 Secondly, it is claimed that the Commission would have assessed the case differently if the Kingdom of Denmark had been given an opportunity to present its arguments

and the relevant documentation. In fact, the primary reason for the contested decision was that the Kingdom of Denmark did not submit enough information to prove that the private investor test had been satisfied.

130 Third, it is alleged that the Commission never stated that overcompensation for public service costs borne by a public organisation could, in the absence of cross-subsidisation, constitute in itself State aid that is contrary to the Treaty. Nor does that emerge from the Broadcasting Communication, according to which overcompensation poses a problem only where there is cross-subsidisation of commercial activities (paragraph 58 of the Broadcasting Communication) or where there is some other effect on the development of trade to an extent that would be contrary to the interests of the Community (paragraph 29(iii)). The developments that took place prior to the decision initiating the procedure led the Kingdom of Denmark to believe that the overcompensation was not per se considered to be a problem.

131 For its part, TV2 A/S submits that whether or not it submitted comments in response to the decision initiating the procedure is irrelevant when it comes to respecting the rights of the defence. As an interested party and, moreover, as a party directly affected by a negative decision, it obviously had a legitimate interest in seeing that the scope defined in that decision was respected.

132 The Commission — supported, in essence, in Case T-309/04 by SBS — contends first that the decision opening the formal investigation procedure cannot contain an exhaustive and detailed opinion on the case. All the same, the decision initiating the procedure contains an exhaustive description of the questions regarding the overcompensation for the public service costs and the application of the private investor test. Moreover, for its part, the Kingdom of Denmark did not interpret that decision as meaning that the inquiry concerned only the cross-subsidisation.

133 As regards TV2 A/S, given that the company did not submit comments during the formal investigation procedure, it is not possible to find that its rights of defence were infringed.

134 Secondly, the Commission denies that the factors which the Kingdom of Denmark refers to in its application, concerning the private investor principle, would have led the contested decision to reach different conclusions.

135 Third, as regards the allegation that the circumstances were special, the Commission contends that the twin role of the Danish authorities — as both public authority and alleged investor — implies that a distinction must be made as regards the application of the State aid rules. Those rules differ according to whether the State acts as a 'public authority' or as an investor. The Broadcasting Communication contains guidelines only in respect of compensation for public service obligations, and not in respect of an investment by the State in a public undertaking under market conditions. As regards compensation for public services, the basic premiss is that it is State aid. The Commission examines none the less whether the derogation provided for in Article 86(2) EC applies. As regards investments in public undertakings, the Commission's main task is to assess whether the State's involvement can be treated like the involvement of a private investor in a market economy.

— Findings of the Court

136 According to settled case-law, respect for the rights of the defence is, in all proceedings initiated against a person which are liable to culminate in a measure adversely

affecting that person, a fundamental principle of Community law which must be guaranteed even in the absence of specific rules (see Case 234/84 *Belgium* v *Commission* [1986] ECR 2263, paragraph 27; Case C-301/87 *France* v *Commission* [1990] ECR I-307, paragraph 29; Case C-142/87 *Belgium* v *Commission* [1990] ECR I-959, paragraph 46; and Case C-288/96 *Germany* v *Commission* [2000] ECR I-8237, paragraph 99 and the case-law cited; and Joined Cases T-228/99 and T-233/99 *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen* v *Commission* [2003] ECR II-435, paragraph 121). That principle requires that the person against whom an administrative procedure has been initiated must have been afforded the opportunity, during that procedure, to make known his views on the truth and relevance of the facts and circumstances alleged and on the documents used by the Commission to support its claim that there has been infringement of community law (Case 234/84 *Belgium* v *Commission*, paragraph 27).

137 As regards the rights of undertakings that receive State aid, it is necessary to state that the administrative procedure in State aid matters is initiated only in respect of the Member State responsible (Joined Cases C-74/00 P and C-75/00 P *Falck and Acciaierie di Bolzano* v *Commission* [2002] ECR I-7869, paragraphs 81). Undertakings that receive aid are considered only to be interested parties in this procedure (*Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen* v *Commission*, cited in paragraph 136 above, paragraph 122). It follows that, far from enjoying the same rights of defence as those which individuals against whom a procedure has been instituted are recognised as having, interested parties — such as, in the present case, TV2 A/S — have only the right to be involved in the administrative procedure to the extent appropriate in the light of the circumstances of the case (*Falck and Acciaierie di Bolzano* v *Commission*, paragraph 83; Joined Cases T-371/94 and T-394/94 *British Airways and Others* v *Commission* [1998] ECR II-2405, paragraph 60; and Case T-354/99 *Kuwait Petroleum (Netherlands)* v *Commission* [2006] ECR II-1475, paragraph 80).

138 Moreover, it should be borne in mind that, under Article 6 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [88 EC] (OJ 1999 L 83, p. 1), where the Commission decides to initiate

the formal investigation procedure, it is permissible for its decision merely to summarise the relevant issues of fact and law, to include a preliminary assessment as to the aid character of the State measure in question and to set out its doubts as to the measure's compatibility with the common market (Joined Cases T-269/99, T-271/99 and T-272/99 *Diputación Foral de Guipúzcoa and Others* v *Commission* [2002] ECR II-4217, paragraph 104).

139 Thus, a decision to initiate the procedure must give interested parties the opportunity effectively to participate in the formal investigation procedure, during which they will have the opportunity to put forward their arguments. For that purpose, it is sufficient for the parties concerned to be aware of the reasoning which has led the Commission to conclude provisionally that the measure in issue might constitute new aid incompatible with the common market (Joined Cases T-195/01 and T-207/01 *Government of Gibraltar* v *Commission* [2002] ECR II-2309, paragraph 138, and *Diputación Foral de Guipúzcoa and Others* v *Commission*, cited in paragraph 138 above, paragraph 105).

140 Irrespective even of whether, in State aid matters, the private investor test referred to by the Kingdom of Denmark and TV2 A/S is relevant for the assessment of State funding for public services, the Court of First Instance finds that the decision initiating the procedure cannot be interpreted as capable of leading the applicants to believe that the overcompensation would pose problems in the light of the prohibition on State aid only if there was cross-subsidisation and, in consequence, not to elaborate any further their arguments based on the private investor test.

141 On the contrary, in paragraph 54 of the decision initiating the procedure, the Commission — referring to Case C-53/00 *Ferring* [2001] ECR I-9067, paragraph 27 — states that the classification as State aid of financing intended to compensate for the

costs of a public service obligation depends on whether the consideration exceeds the net supplementary cost of meeting the public service obligation. The Commission adds that if the financing is reasonable in relation to the net cost of the public service remit, that will mean that TV2 has not been granted a real advantage over its competitors. The Commission makes similar statements elsewhere in the decision initiating the procedure (see paragraphs 62, 63, 79 and 83 of that decision).

142 As regards the fact that the Commission stated in the decision initiating the procedure that it had to check whether there was cross-subsidisation during the period under investigation (see paragraph 68 of that decision), that cannot be taken to mean that, in the Commission's view, there would be no State aid if there were no cross-subsidisation. That statement can be explained by the fact that it is normal for the Commission, in the context of the *ex post* assessment of contested measures, to determine whether those measures were in fact used for cross-subsidisation during the period under investigation.

143 Moreover — and once again without prejudice to whether the private investor test is appropriate for assessing State financing of a public service in the light of the State aid rules — contrary to what the Kingdom of Denmark claims, it cannot be inferred from the decision initiating the procedure (paragraph 71, last sentence) that the Commission was indicating that it did not intend to examine whether the private investor test was satisfied. In fact, in the last sentence of paragraph 71, the Commission merely repeated the argument of the Danish authorities that they had acted like a private investor in a market economy.

144 It follows from all of the foregoing considerations that the Kingdom of Denmark was wrong to claim that the decision initiating the procedure prompted it not to

elaborate any further, during the formal investigation procedure, its position in terms of the private investor test, that is to say, its argument that with respect to TV2 it had acted like a private investor in a market economy. For the same reasons, TV2 A/S is wrong to claim that, during the formal investigation procedure, the Commission went beyond the scope of the examination as defined in the initiating decision.

145 Finally, there are no special circumstances that would require the Commission to express itself more clearly in the decision initiating the procedure. In that respect and contrary to what the Kingdom of Denmark claims, the Broadcasting Communication does not indicate that overcompensation is problematic only if cross-subsidisation is known to have occurred.

146 In those circumstances, which show that there has been no infringement of the Kingdom of Denmark's rights of defence or of the more limited rights of TV2 A/S as an interested party, the present plea must be rejected.

The second plea in Cases T-309/04 and T-317/04, alleging infringement of Article 87(1) EC in so far as the licence fee revenue and the advertising revenue transferred to TV2 via the TV2 Fund are not State resources

— Arguments of the parties

147 The Kingdom of Denmark and TV2 A/S — the latter applicant supported by the EBU — submit that the alleged overcompensation cannot be regarded as State aid, in

so far as it is financed through licence fee revenue as well as advertising revenue paid, until 1997, via the TV2 Fund ('the 1995 to 1996 advertising revenue').

148 Licence fees are paid by users, so there is no transfer of State resources. Licence fees have to be regarded as a partial contribution by those users allowing them to receive TV2, similar to fees paid to receive cable channels. The fact that there is a statutory obligation to pay a licence fee in order to receive TV2's programmes makes no difference.

149 The fact that the licence fee is collected by DR — and that until 1997 licence fee revenue was transferred via the TV2 Fund — is also not significant. The reasons for that are purely administrative.

150 The reasons for which the transfer of licence fee revenue to TV2 does not constitute a transfer of State resources, or aid to TV2, also apply — and even more so — to the transfer of the 1995 to 1996 advertising revenue.

151 Neither the licence fee revenue nor the 1995 to 1996 advertising revenue transferred to TV2 via the TV2 Fund can be considered to have been under public control, given that — once the licence fee amount was determined and a decision taken regarding the distribution of licence fee revenue between DR and TV2 — the Danish Minister for Culture had no control over the resources and could not use them for

other purposes. In other words, from that moment onwards, licence fee revenue was intended to be used for the activities of DR or TV2, as appropriate.

152 The Commission — supported, in Case T-309/04, by SBS — contends, as a preliminary point, that it is common ground that the Minister for Culture determines the amount of the licence fee payable by all owners of television or radio receivers in Denmark. That licence fee is collected by DR and the licence fee revenue is then divided between DR and TV2 on the basis of a decision adopted by the Minister for Culture in accordance with a media agreement concluded with the Danish Parliament (recital 22 of the contested decision). The Minister for Culture issues detailed rules on the commencement and termination of the obligation to pay licence fees, and outstanding fees can be collected by attachment of earnings (recital 23 of the contested decision). Until 1997, TV2 received resources via the TV2 Fund, an entity set up by the State for the purposes of providing TV2 with income.

153 According to the Commission, resources must be considered to be State resources where they are under public control and therefore available to the national authorities. The share of licence fee revenue to go to TV2 is decided by the Minister for Culture. When it comes to defining State resources, the common denominator in the case-law is that the Community judicature examines whether the resources were under State control. Clearly, also, the State made sure that the licence fee was collected and that claims for its payment were enforced. Every owner of a television or radio receiver was under an obligation to pay a licence fee, whether or not the DR or TV2 programmes were received. Thus, it was different from other payment obligations such as a subscription to cable.

154 The Commission contends that there is no contractual relationship between TV2 and the person paying the licence fee. In consequence, the licence fee system is not comparable with the situation in Case C-379/98 *PreussenElektra* [2001] ECR I-2099.

— Findings of the Court

155 According to settled case-law, for a measure to be classified as State aid, all the conditions set out in Article 87(1) EC must be satisfied (Case C-142/87 *Belgium* v *Commission*, cited in paragraph 136 above, paragraph 25; Joined Cases C-278/92 to C-280/92 *Spain* v *Commission* [1994] ECR I-4103, paragraph 20; and Case C-482/99 *France* v *Commission* [2002] ECR I-4397, paragraph 68).

156 The principle of the prohibition of State aid set out in Article 87(1) EC entails the following conditions: (i) there must be an intervention by the State or by means of State resources; (ii) the intervention must be liable to affect trade between Member States; (iii) it must confer an advantage on the beneficiary; (iv) it must distort or threaten to distort competition.

157 This plea concerns the first of those conditions, according to which, for measures to be capable of being categorised as State aid, they must, first, be granted directly or indirectly through State resources and, secondly, they must be imputable to the State (*France* v *Commission*, cited in paragraph 155 above, paragraph 24; *GEMO*, cited in paragraph 102 above, paragraph 24; and Case C-345/02 *Pearle and Others* [2004] ECR I-7139, paragraph 36).

158 As regards, first, the licence fee, it emerges from the contested decision — and is not seriously disputed — that the amount is determined by the Danish authorities (recital 22); that 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

ownership of a television or radio receiver (recitals 22 and 59); that, where necessary, the licence fee is collected in accordance with the rules on the collection of personal taxes (recital 23); and, lastly, that it is the Danish authorities who determine TV2's share of the income from licence fees (recital 59).

159 It follows from the above that licence fee resources are available to and under the control of the Danish authorities and that they therefore constitute State resources.

160 As regards, secondly, the advertising revenue, the Court of First Instance notes that the Kingdom of Denmark and TV2 A/S take issue only with the 1995 to 1996 advertising revenue, those being the years during which — by contrast with the period that followed — TV2's advertising space was not sold by TV2 itself, but by another company (TV2 Reklame A/S), and during which the income from those sales was transferred to TV2 via the TV2 Fund (see recital 24 of the contested decision).

161 The Court of First Instance notes, first of all, that the Commission does not distinguish in the contested decision between the 1995 to 1996 advertising revenue, on the one hand, and the licence fee revenue, on the other.

162 In fact, even though the Commission expressly stresses that there is a difference between advertising revenue in general and television licence fees (see recitals 10 and 17 of the contested decision) and briefly mentions how TV2's advertising space was sold in the years 1995 to 1996 (see recital 24 of the contested decision), in practice the Commission brackets the 1995 to 1996 advertising revenue together with the

licence fees. Thus, in recital 21 of the contested decision, the DKK 4 067.7million that the Commission classifies as 'licence fee resources' in fact includes the 1995 to 1996 advertising revenue. That is confirmed by Table 1, which is set out just below recital 107 of the contested decision, in which the 1995 to 1996 advertising revenue does not appear in the row marked 'net advertising income', but in the row marked 'licence fee/TV2 Fund', for which the total is given as DKK 4 067.7million.

163 The Court of First Instance also notes that the de facto mingling of the 1995 to 1996 advertising revenue amounts with the licence fee amounts — which, given the differences between those two funding methods, is not readily understandable — is unaccompanied by any specific statement of reasons relating to that advertising revenue in the part of the contested decision which addresses the question whether or not the various measures implemented by the Kingdom of Denmark in favour of TV2 fall to be classified as State aid (recitals 57 to 68).

164 Even though, in that part of the contested decision, the Commission examines whether the licence fee (recitals 57 to 60), or the ad hoc transfer of resources when the TV2 Fund was wound up in 1997 (recital 61, second sentence), involve State resources, it does not raise the issue of the 1995 to 1996 advertising revenue.

165 In addition, the Court of First Instance finds that recital 24 of the contested decision cannot be accepted as an adequate explanation for the de facto mingling of the 1995 to 1996 advertising revenue with the licence fees. Taking into account, essentially, not only the fact that advertising revenue is inherently different from audiovisual licence fee revenue, but also the fact that the sales in question were not sales of just any advertising space but sales of TV2's advertising space and, finally, the fact that the 1995 to 1996 advertising revenue was always significantly lower than the

funds needed to provide the public service, it is conceivable that, in actual fact, that advertising revenue automatically accrued to TV2 and that transferring it via the TV2 Fund was merely an administrative device that did not reflect real control by the Kingdom of Denmark over those sums.

166 Moreover, the Court of First Instance notes that, in the action before the Court of First Instance, even though the Commission maintains, in detail, that the licence fee revenue represents State resources and stresses, in particular, that the payment of a licence fee by owners of television sets was not based on a contractual relationship, it does not, by contrast, address the specific question of the 1995 to 1996 advertising revenue and, by omitting to do so, fails to rebut the applicants' criticism, which is based on the purely contractual origin of that advertising revenue.

167 It follows from the foregoing considerations that, in the contested decision, the Commission has failed to fulfil its obligation to state the reasons on the basis of which it took the 1995 to 1996 advertising revenue into consideration de facto as State resources. In those circumstances, the present plea should be upheld in part — that is to say, in so far as it concerns the 1995 to 1996 advertising revenue — and, in consequence, the contested decision should be annulled in so far as it includes that advertising revenue among the State resources.

168 It is appropriate, next, to examine a complaint raised by the Kingdom of Denmark and TV2 A/S in the context of the fifth, sixth and seventh pleas in law relied upon in Cases T-309/04 and T-317/04, alleging in essence that the contested decision is based on an inadequate statement of reasons, in that the conditions under which the Kingdom of Denmark provided funding to TV2 during the period under investigation were clearly not adequately examined, with the result that the Commission erred in making a finding of State aid.

The plea, in Cases T-309/04 and T-317/04, alleging that the contested decision failed to provide an adequate statement of reasons, as a result of the Commission's failure to fulfil its obligation to examine

— Arguments of the parties

169 The Kingdom of Denmark and TV2 A/S submit that the contested decision is based on an inadequate statement of reasons because the Commission failed to examine seriously whether the financing received by TV2 between 1995 and 2002 was, in actual fact, proportionate to the funding needs of providing the public service. They submit information to support their submission that that financing was put in place and maintained, throughout the period under investigation, in a manner that was objective, transparent and rational, so as to remain proportionate to the funding needs of providing the public service.

170 Thus, the Kingdom of Denmark refers to the drafts of the Law of 1986 establishing TV2, as well as to the estimates of TV2's revenue and expenditure that featured in the annex to those drafts.

171 TV2 A/S submits that the amount of compensation that TV2 would require was determined by the Minister for Culture in consultation with the finance commission of the Danish Parliament — hence under strict parliamentary control —within the framework of four-yearly agreements called 'agreements on the media and laying the foundations for in-depth economic analyses'. Those in-depth economic analyses were carried out in 1995 and in 1999 by KPMG, a firm of auditors, which was assisted by a follow-up group composed of experts, in which TV2's competitors participated ('the economic analyses of 1995 and 1999').

172 The aim of those economic analyses was precisely to make it possible to determine the portion of the licence fee revenue that had to be given to TV2 in view of its public service obligations and the funding needs arising from those obligations, and an evaluation of the resources potentially available to TV2 from television advertising and other revenue. In addition, the amount of the licence fee and the portion payable to TV2 were determined on the basis of the assumption that the advantages granted by the State — in the form, inter alia, of an exemption from interest payments and a tax exemption, as mentioned in recital 110 of the contested decision — would continue to be available.

173 The economic analyses of 1995 and 1999, which were published, as were TV2's annual accounts, were included as an annex to the comments submitted by the Kingdom of Denmark on 24 March 2003 in response to the decision initiating the procedure.

174 The two media agreements that are relevant to the period under investigation (1995 and 1999) were based precisely on those in-depth economic analyses. By submitting those economic analyses during the formal investigation procedure, the Kingdom of Denmark therefore provided the Commission with written evidence of the financial calculations that supported the various media agreements concluded during the period under investigation.

175 The Kingdom of Denmark and TV2 A/S refer to an investigation and a recommendation, made during the period from 1994 to 1995, by the Rigsrevisionen (Danish Court of auditors) to the Danish Government regarding the build-up of TV2's equity capital and the changes to TV2's articles of association that this would entail. They also refer to a report by the Ministry of Finance of 2 August 1995, prepared at the request of the State auditors, and to the action taken by the Kingdom of Denmark as a consequence of that report, namely, the amendment of TV2's articles of association in 1997 to the effect that the company must build up equity capital amounting to at least DKK 200 million.

176 In the light of all that information — which shows that, during the period under investigation, the financing of TV2 and the build-up of its equity capital were determined in a manner that was economically rational and proportionate to the funding needs of providing the public service — the fact that the contested decision does not provide a detailed analysis in that respect means that it fails to provide sufficient grounds or an adequate statement of reasons.

177 In response to the Commission's claim that it was aware of that information but took the view that that information failed to establish that the overcompensation accumulated by TV2 in actual fact constituted a reserve that was put in place so that TV2 would have the resources needed to provide the public service and that was proportionate to those needs, the Kingdom of Denmark and TV2 A/S argue that the crucial fact is rather that, even though the Commission was supplied with all that information during the formal investigation procedure, it did not take a position on it in the contested decision, other than in an incomplete and imprecise manner. The contested decision is based on formal considerations and contains no economic analysis that would disclose whether — and, if so, to what extent — TV2's equity capital exceeded what was necessary for the company to fulfil its public service remit and, accordingly, whether it was contrary to the common interest. The reasoning and the grounds of the contested decision are thus vitiated by substantive defects.

— Findings of the Court

178 As regards, first, the scope of the obligation to state reasons, it should be borne in mind that the statement of reasons required under Article 253 EC must be appropriate to the act at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent Community court to exercise its power of

review. The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 253 EC must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (see Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 63 and the case-law cited).

179 Moreover, it is necessary to emphasise that where the Commission has the power of appraisal in order to allow it to fulfil its functions, respect for the rights guaranteed by the Community legal order in administrative procedures is of even more fundamental importance. Those guarantees include, in particular, the duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case and to provide adequate reasons for its decisions (Case C-269/90 *Technische Universität München* [1991] ECR I-5469, paragraph 14).

180 In addition, even though, in stating the reasons for the decisions which it takes to enforce the rules on competition, the Commission is not required to discuss all the issues of fact and law and the considerations which have led it to adopt its decision, it is none the less required under Article 253 EC to set out at least the facts and considerations having decisive importance in the context of the decision in order to make clear to the Court and the persons concerned the circumstances in which it has applied the Treaty (see, to that effect, Joined Cases T-374/94, T-375/94, T-384/94 and T-388/94 *European Night Services and Others* v *Commission* [1998] ECR II-3141, paragraph 95, and the case-law cited).

181 It is also clear from the case-law that, other than in exceptional circumstances, the statement of reasons must be contained in the decision itself, and it is not sufficient for it to be explained subsequently for the first time before the Community judicature (see Case T-61/89 *Dansk Pelsdyravlerforening* v *Commission* [1992] II-1931, paragraph 131; Case T-295/94 *Buchmann* v *Commission* [1998] ECR II-813, paragraph 171; and *European Night Services and Others* v *Commission*, cited in paragraph 180 above, paragraph 95 and the case-law cited). The statement of reasons must in principle be notified to the person concerned at the same time as the decision adversely affecting that person and a failure to state the reasons cannot be remedied by the fact that the person concerned learns the reasons for the decision during the proceedings before the Community judicature (Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others* v *Commission* [2005] ECR I-5425, paragraph 463; Case T-16/91 *Rendo and Others* v *Commission* [1996] ECR II-1827, paragraph 45; and Case T-349/03 *Corsica Ferries France* v *Commission* [2005] ECR II-2197, paragraph 287).

182 It must be recalled in this respect that, in the context of an action for annulment brought under Article 230 EC, the Community judicature must confine itself to checking the legality of the contested act. Consequently, it is not for the Court of First Instance to make up for the possible lack of a statement of reasons or to complete the Commission's statement of reasons by adding to it or substituting it with elements that do not come from the decision itself (see, to that effect, Case T-67/94 *Ladbroke Racing* v *Commission* [1998] ECR II-1, paragraphs 147 and 148; Joined Cases T-126/96 and T-127/96 *BFM and EFIM* v *Commission* [1998] ECR II-3437, paragraph 81; Case T-157/99 *Griesel* v *Council* [2000] ECR-SC I-A-151 and II-699, paragraph 41; and *Corsica Ferries France* v *Commission*, cited in paragraph 181 above, paragraph 58).

183 As regards, secondly, the scope, in the context of State aid control, of the Commission's obligation to examine, it is necessary to recall that, even though the Member

State must, in accordance with the duty of genuine cooperation laid down in Article 10 EC, cooperate with the Commission by providing it with the information that will allow the Commission to take a decision on whether the measure at issue contains State aid (see, on the duty of genuine cooperation, Case C-457/00 *Belgium* v *Commission* [2003] ECR I-6931, paragraph 99; Case C-400/99 *Italy* v *Commission* [2005] ECR I-3657, paragraph 48; and *Kuwait Petroleum (Nederland)* v *Commission*, cited in paragraph 137 above, paragraph 67) and even though, where necessary, that Member State must provide evidence that the conditions for the application of Article 86(2) EC are fulfilled (Case C-159/94 *Commission* v *France* [1997] ECR I-5815, paragraph 94, and Case T-157/01 *Danske Busvognmænd* v *Commission* [2004] ECR II-917, paragraph 96), the fact remains that the Commission is under an obligation, in the interests of sound administration of the fundamental rules of the Treaty relating to State aid, to conduct a diligent and impartial examination (see, to that effect, *Commission* v *Sytraval and Brink's France*, cited in paragraph 178 above, paragraphs 60 to 62; Case T-54/99 *max.mobil* v *Commission* [2002] ECR II-313, paragraph 49, first two sentences, not affected by the judgment in Case C-141/02 P *Commission* v *max.mobil* [2005] ECR I-1283; and *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen* v *Commission*, cited in paragraph 136 above, paragraph 167), and that obligation requires, in particular, a careful examination of the information which the Member State provides to the Commission.

184 Moreover, it should be recalled that in the context of an action for annulment under Article 230 EC the legality of a Community measure falls to be assessed on the basis of the information existing at the time when the measure was adopted. In particular, the complex assessments made by the Commission must be examined solely on the basis of the information available to the Commission at the time when those assessments were made (Joined Cases 15/76 and 16/76 *France* v *Commission* [1979] ECR 321, paragraph 7; Case 234/84 *Belgium* v *Commission*, cited in paragraph 136 above, paragraph 16; Case C-197/99 P *Belgium* v *Commission* [2003] ECR I-8461, paragraph 86; *British Airways and Others* v *Commission*, cited in paragraph 137 above, paragraph 81; *BFM and EFIM* v *Commission*, cited in paragraph 182 above, paragraph 88; and Joined Cases T-111/01 and T-133/01 *Saxonia Edelmetalle and ZEMAG* v *Commission* [2005] ECR II-1579, paragraph 67).

185 It is in the light of those principles and considerations that the complaints raised by the Kingdom of Denmark and TV2 A/S must be assessed.

186 In that respect, it is necessary to go back to the relevant wording of the contested decision to find out whether the Commission fulfilled its obligations to state reasons and to conduct a diligent examination as regards the manner in which TV2 was financed during the period under investigation, and the proportionality of that financing to the funding needs of providing the public service.

187 In the descriptive part of the contested decision, the Commission stated that TV2 was established in 1986 as an independent autonomous institution funded by government loans (recital 11). The Commission explained that TV2 was funded through licence fees and advertising revenue (recitals 10 and 17) and mentioned the procedure for determining the amount of the licence fee and dividing the licence fee revenue between DR and TV2 (recital 22).

188 In the part of the contested decision devoted to the Commission's legal assessment, the Commission examined whether, in the present case, the second and fourth conditions of the four conditions set out in paragraphs 88 to 93 of the judgment in Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* [2003] ECR I-7747 ('*Altmark*' and 'the *Altmark* conditions') were satisfied (recital 71).

189 According to the first *Altmark* condition, 'the recipient undertaking must actually have public service obligations to discharge, and the obligations must be clearly defined' (*Altmark*, cited in paragraph 188 above, paragraph 89). According to the second *Altmark* condition, 'the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner, to avoid it conferring an economic advantage which may favour the recipient undertaking over competing undertakings' (*Altmark*, cited in paragraph 188 above, paragraph 90). According to the third *Altmark* condition, 'the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking into account the relevant receipts and a reasonable

profit for discharging those obligations' (*Altmark*, cited in paragraph 188 above, paragraph 92). Lastly, according to the fourth *Altmark* condition, 'where the undertaking which is to discharge public service obligations, in a specific case, is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, 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 transport 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' (*Altmark*, cited in paragraph 188 above, paragraph 93).

190 As regards, first, the second *Altmark* condition, according to which the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner, the Commission found that it was not satisfied. The reasons provided by the Commission in this respect were that 'the compensation is determined in a media agreement set for four years, and … there is no publicly available annual budget establishing a link between compensation and output'. The Commission added that 'furthermore, TV2 receives a number of advantages that are not transparent (tax exemption, interest waiver, etc.)' (recital 71 of the contested decision).

191 As regards, secondly, the fourth *Altmark* condition, the Commission stated that 'TV2 has not been chosen as the public service broadcasting provider on the basis of a tender and [no] analysis [has] been carried out to ensure that the level of compensation is determined on an analysis of the costs which a typical undertaking, well run and adequately provided with the appropriate 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' (recital 71 of the contested decision).

192 In the part of the contested decision devoted to the examination of the compatibility of the aid in the light of Article 86(2) EC and, more specifically, proportionality, the Commission, in response to the Kingdom of Denmark's argument that the capital was necessary as a reserve against fluctuations in advertising income (recital 112; see also recital 111, first sentence), 'recognises that it may be necessary for undertakings to keep such reserves to ensure that they can perform their public service task' (recital 113).

193 However, the Commission states that such a reserve 'must be established for a specific purpose and be regularised at fixed times, when the overcompensation that has been determined must be reimbursed'. The Commission 'notes that in the present case no specific reserves of this nature were built up and what was accumulated instead was equity capital, which can be used for any purpose and need not be applied to performing service tasks' (recital 113).

194 In recital 114 of the contested decision, regarding an example put forward by the Kingdom of Denmark concerning the year 1999 — the year in which TV2's advertising revenue fell significantly — the Commission states that not even that fall in revenue forced TV2 to draw on the capital that had been built up.

195 In recital 115 of the contested decision, the Commission 'is therefore of the opinion that the surplus that was built up was not necessary for TV2 to function properly'. Moreover, the Commission adds, 'if it had been considered necessary to create a buffer against any falls in advertising revenue, an appropriate means would have been to create a transparent reserve and not simply to allow surpluses to accumulate in the company'. Accordingly, the Commission concludes that it 'cannot accept the Danish authorities' first argument' that the overcompensation was, in actual fact, a reserve that was necessary to ensure the provision of the public service.

196 It is clear from that survey of the wording of the contested decision that the Commission's position is, in essence, based on two assertions.

197 First, the overcompensation that TV2 was found to have received was not the result of a build-up of reserves carried out in a transparent and carefully considered manner with the specific aim of guaranteeing the provision of the public service despite fluctuations in advertising revenue, but was simply the result of an uncontrolled accumulation of capital.

198 Secondly, the example taken from 1999 shows that TV2 never actually needed to draw on its reserves.

199 As regards the first of those assertions, it must be held that there is nothing in the contested decision to prove that that assertion is true.

200 Except for the purely descriptive reference to some aspects of the mechanism used by the Kingdom of Denmark to determine the amount of licence fee income payable to TV2 between 1995 and 2002 (see recital 22), the contested decision provides no reasons reflecting an analysis of that mechanism or the legal and economic considerations that governed the setting of that amount throughout that period.

201 It must be held that, in view of the importance of taking into consideration that information when applying the State aid rules in the present case and the wide discretion enjoyed by the Commission when it comes to questions involving complex economic

issues, the statement of reasons of the contested decision should have included, in accordance with the case-law cited in paragraphs 178 and 179 above, a precise and detailed assessment of the actual legal and economic conditions which, during the period under investigation, governed the setting of the amount of licence fee income payable to TV2.

202 The Court of First Instance considers — like the Kingdom of Denmark and TV2 A/S — that the failure to provide an adequate statement of reasons in that regard in the contested decision amounts to an infringement of essential procedural requirements and, accordingly, means that that decision must be annulled, in accordance with the case-law set out in paragraphs 178 to 182 above.

203 Moreover, the Court of First Instance considers that that failure to provide an adequate statement of reasons is attributable to the Commission's complete failure to examine seriously, during the formal investigation procedure, the actual conditions which, during the period under investigation, governed the setting of the amount of licence fee income payable to TV2.

204 In the course of the present proceedings before the Court of First Instance, the Commission stated, with the aim of rebutting the complaint that it had failed to fulfil its obligation to examine, that 'the Danish authorities submitted countless documents and extensive information on the case before and during the formal investigation procedure' but that 'the information submitted was however marred by the fact that the Danish authorities sought to justify the accumulation of overcompensation in TV2's accounts through information and calculations put together after the event'. According to the Commission, the Kingdom of Denmark 'was not able to present information dating from the period when the accumulation of TV2's capital took place, which could perhaps justify a build-up of capital of the amount seen in the case of TV2'.

205 Those assertions are repeated several times in the Commission's written pleadings. Thus, the Commission states that 'the Danish authorities never produce[d] *ex ante* information or documents concerning the capital needs of TV2 at the time it was created or during the period to which the investigation relates', or further that 'all the information on the issue was based on considerations and calculations drawn up after the event'.

206 Moreover, the Commission relies on the alleged failure by the Kingdom of Denmark to submit information that would have allowed the Commission to assume that TV2 needed the capital contribution at issue, in order to justify the fact that the contested decision contains no economic analysis of TV2's funding needs during the period under investigation.

207 Nevertheless, it is not disputed either by the Commission or by the interveners in support of the Commission that the economic analyses for 1995 and 1999, which were carried out because they were needed as part of the procedure to determine, at four-yearly intervals, the amount of licence fee income payable to TV2 (see paragraphs 171 to 174 above), were forwarded to the Commission. Moreover, those analyses are referred to in the comments submitted by the Kingdom of Denmark on 24 March 2003 in response to the decision initiating the procedure and are attached as annexes to those comments.

208 The fact that the Commission did not take that information into account in the contested decision — which does not refer to it at all, even if only to refute it — confirms that the Commission failed during the formal investigation procedure to examine seriously the information which had been passed to it at the time, concerning the financing of TV2 during the period from 1995 to 2002.

209 The Court of First Instance notes, incidentally, that during the proceedings before it, the only economic analyses to which the Commission refers in its submissions are economic analyses separate from the economic analyses of 1995 and 1999, namely analyses concerning the financing of TV2 A/S when it was established in 2003 or its recapitalisation in 2004, analyses which, in fact, have no *ex ante* effect.

210 Thus, the Commission does not respond before the Court of First Instance to the complaint that it failed to take into account the economic analyses of 1995 and 1999 during the formal investigation procedure. On the contrary, the Commission admits, by — wrongly — criticising the Kingdom of Denmark for not making available *ex ante* information that could have been used as part of the assessment (see paragraph 204 above), that it failed to examine the file seriously.

211 The interveners in support of the Commission, which, as mentioned previously, do not contest that those analyses existed and were sent to the Commission, also do not react to this complaint.

212 At the most, SBS submits that the economic analyses of 1995 and 1999 are 'old market studies', which, in short, only underlines how relevant those analyses, which actually dated from the period under investigation, were to the Commission's assessment, both by reason of their timing and the matters covered. In any event, the Court of First Instance notes that, since neither the existence of the economic analyses of 1995 and 1999 nor their purpose are disputed in the present proceedings, any criticism concerning the substance of those analyses must be rejected as irrelevant. According to the case-law set out in paragraph 182 above, it is not for the Court of First Instance, in its review of legality, to make up for the lack of a statement of reasons in the contested decision by substituting its own assessment for the assessment that the Commission should have made during the formal investigation procedure.

213 Even though the Commission does not respond to the complaint that it failed to take into account the economic analyses of 1995 and 1999, the Court of First Instance notes, nevertheless, that the Commission mentions that TV2 A/S did not take part in the formal investigation procedure. However, the Court of First Instance finds that that statement does not call into question the right of TV2 A/S to raise, in the course of the action for annulment, a complaint alleging that the Commission failed to fulfil its obligation to examine, inter alia, the economic analyses of 1995 and 1999.

214 In any event, even on the view that, by that statement, the Commission intended to contend that TV2 A/S could not rely, in its application, on failure to examine, inter alia, the economic analyses of 1995 and 1999, such a contention would be both irrelevant and unfounded, for the following reasons.

215 As for the irrelevance of such a contention, it should be borne in mind that the insufficiency or lack of reasoning constitutes an infringement of essential procedural requirements within the meaning of Article 230 EC and is a matter of public policy which the Community judicature must raise of its own motion (Case T-218/02 *Napoli Buzzanca* v *Commission* [2005] ECR-SC I-A-267 and II-1221, paragraph 55, and Case T-102/03 *CIS* v *Commission* [2005] ECR II-2357, paragraph 46). For the sake of completeness, the Court of First Instance, having found — in response, moreover, to an express complaint by the applicants — that the contested decision failed to provide an adequate statement of reasons as regards the conditions under which the amount of licence fee income payable to TV2 was determined during the period under investigation, notes that that failure to provide an adequate statement of reasons results from the Commission's breach of its own obligation to examine (see paragraphs 202 and 203 above).

216 As for such a contention being unfounded, the Court of First Instance finds that TV2 A/S in no way relies on new factual elements which had not been made known to the Commission during the formal investigation procedure. On the contrary, TV2 A/S limits itself to a complaint that the Commission did not examine information

which had been submitted to it, during the formal investigation procedure, by a party claiming that the financing of TV2 during the period under investigation was necessary and proportionate to the needs of the public service (see recitals 111 and 112 of the contested decision). Accordingly, even though TV2 A/S did not itself take part in the formal investigation procedure, it cannot be precluded from submitting, before the Court of First Instance, the legal argument that the Commission failed to examine that information (see, to that effect, Case T-110/97 *Kneissl Dachstein* v *Commission* [1999] ECR II-2881, paragraph 102 and the case-law cited; Case T-274/01 *Valmont* v *Commission* [2004] ECR II-3145, paragraph 102; *Saxonia Edelmetalle and ZEMAG* v *Commission*, paragraph 184 above, paragraph 68; and Case T-217/02 *Ter Lembeek* v *Commission* [2006] ECR II-4483, paragraphs 84 to 85 and 93).

217 It follows from the foregoing considerations that, by not examining information that nevertheless had a direct bearing on the question whether the measures at issue constituted State aid within the meaning of Article 87(1) EC, the Commission failed to fulfil its obligation to examine, a failure which in turn explains its failure to provide an adequate statement of reasons, as noted in paragraph 202 above.

218 As for the allegation, also contained in the Commission's first assertion that the Danish authorities did not regularly check the level of the accumulated reserves, it must be held that — apart from the fact that it constitutes yet another unsubstantiated claim which was expressly disputed by the Kingdom of Denmark during the formal investigation procedure (see recital 48, second sentence, of the contested decision), the contested decision itself contains information which undermines that allegation.

219 Thus, according to the contested decision, TV2 was required until 2002 to present an annual public service budget and accounts (recital 96). In addition, during the period under investigation, the Rigsrevisionen conducted both a management audit

and a financial audit of TV2's accounts (recital 97). In this respect, the fact, which the Commission mentions in the same recital, that the Rigsrevisionen itself did not have 'any power to prevent overcompensation' is not as such significant — given that the Rigsrevisionen is an auditing body — and does not permit the conclusion that the Danish authorities did not carry out checks.

220 In any event, 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.

221 For the same reasons — precisely because the Commission failed specifically to examine seriously the actual conditions that governed the setting of the amount of licence fee income payable to TV2 during the period under investigation — the Commission's references to the requirement that the reserve be 'specific' (recital 113 of the contested decision) or 'transparent' (recital 115 of the contested decision) appear to be references to a purely formal requirement which cannot justify the recovery ordered by the contested decision.

222 As regards the Commission's second assertion (paragraph 198 above), to the effect that the example from the year 1999 showed that TV2 actually never needed to draw on its reserves, that assertion cannot, in the light of the foregoing considerations, in any way give rise to a finding that there was State aid.

223 The 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. Consequently, for the Commission to conclude, after the event, that the non-use of a reserve is proof that it was unjustified is at odds with its own acknowledgement that such a reserve may be built up and kept for the purposes of guaranteeing the provision of the public service. In short, in order to take a useful decision on the question whether TV2's reserves were proportionate, the Commission ought to have examined the validity of the considerations — especially those of an economic nature — on which the Kingdom of Denmark relied in determining the amount of income from licence fees to be given to TV2 between 1995 and 2002.

224 Moreover, the Court of First Instance finds that the lack of a serious and detailed examination, in the contested decision, of the conditions under which TV2 was financed during the period under investigation is in turn reflected in the peremptory tone of the Commission's assertions in recital 71 of the contested decision.

225 As regards, first, the statement of reasons in recital 71 relating to the second *Altmark* condition, the Court of First Instance notes that it is meaningless to refer to the fact that 'the compensation is determined in a media agreement set for four years', a reference which is purely descriptive but nevertheless deemed by the Commission to justify the assertion that the parameters of the compensation were not laid down beforehand in an objective and transparent manner. While in no way intending to substitute itself for the Commission by exercising the competence which accrues to the latter in matters of State aid control, the Court of First Instance must perforce find that it appears more accurate — at least in the light of an initial analysis — to view as evidence of objectivity and transparency the procedure by which the amount of licence fee income payable to TV2 was determined in the media agreements, in accordance with the conditions described in paragraphs 171 to 174 above, which are wholly undisputed.

226 As regards the assertions in recital 71 of the contested decision that 'there is no publicly available annual budget establishing a link between compensation and output', or that 'TV2 receives a number of advantages that are not transparent (tax exemption, interest waiver, etc.)', it must be held that, once again — subject always to the more detailed assessments which, if appropriate, it will be for the Commission to make — those assertions appear at first sight to be inappropriate and, given the circumstances of the present case, even inaccurate.

227 As regards, first, the fact that there is no annual budget establishing a link between compensation and output, the Court of First Instance notes that the second *Altmark* condition does not impose such a formal requirement. That second condition leaves Member States free to choose how to comply with it in practical terms. Consequently, for the Commission to rely formally on the absence of an 'annual budget establishing a link between compensation and output', when in the contested decision, by contrast, there is no serious analysis of the procedure by which the amount of licence fee income payable to TV2 was determined, as set out in paragraphs 171 to 174 above — that is to say, no serious analysis of the very procedure that the Commission should have examined in the context of checking compliance with the second *Altmark* condition — gives the impression of a statement of reasons which is, in reality, contrived.

228 In addition, the Court of First Instance must perforce note — again without prejudice to the Commission's competence in matters of State aid — 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.

229 Further, as regards the assertion that 'a number of advantages … are not transparent (tax exemption, interest waiver, etc.)', the Court of First Instance must point out that, according to the applicants' submissions, which were not contested, the amount of 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. There is therefore no reason to believe — at least at first sight and in the light of the applicants' description of the procedure for determining the amount of licence fee income payable to TV2 — that the existence and financial significance of those other State measures, which had to be taken into account as part of the procedure for determining the amount of licence fee income, were concealed.

230 It follows from the foregoing that the assertions made in recital 71 of the contested decision in relation to the second *Altmark* condition, which are not based on a serious analysis, in the contested decision, of the actual legal and economic considerations which governed the setting of the amount of licence fee income payable to TV2, are not convincing.

231 As regards, secondly, the reasons stated in the last sentence of recital 71 of the contested decision, in relation to the fourth *Altmark* condition, the Court of First Instance finds that the intention underlying the rather ambiguous wording of that statement of reasons — which states, literally, that '[no] analysis [has] been carried out' in the present case 'to ensure that the level of compensation is determined [by the Kingdom of Denmark] on an analysis [by that Member State] of the costs which a typical undertaking, well run and adequately provided … would have incurred …' — is to state the Commission's belief that the Kingdom of Denmark did not comply with the fourth *Altmark* condition.

232 Such a statement of reasons, which ultimately does no more than reproduce verbatim the wording of the fourth *Altmark* condition, could be sufficient only if it were common ground that the Kingdom of Denmark had put nothing in place that could, in practical terms, ensure compliance with the fourth *Altmark* condition, or if the Commission had established that the analysis carried out by the Kingdom of

Denmark was manifestly inadequate or inappropriate for the purposes of ensuring compliance with that condition. However, such circumstances have by no means been established in the present case. On the contrary, given the procedure put in place by the Kingdom of Denmark for determining the amount of licence fee income payable to TV2 between 1995 and 2002, which — according to the description which is set out in paragraphs 171 to 174 above and which is not disputed — involved, inter alia, economic analyses drawn up with the help of TV2's competitors, it is conceivable that a serious examination of all the conditions governing the setting of the amount of licence fee income payable to TV2 during the period under investigation — the examination which the Commission should have carried out — would have led to the conclusion that the Kingdom of Denmark ensured that, in essence, the fourth *Altmark* condition was complied with, even before the Court of Justice defined those conditions.

233 It follows that, in the light of the finding in paragraph 203 et seq. above, which is mentioned again in paragraph 230 above, that the Commission failed during the formal investigation procedure to examine seriously the actual conditions that governed, during the period under investigation, the Kingdom of Denmark's setting of the amount of licence fee income payable to TV2, the statement of reasons in the last sentence of recital 71 of the contested decision is, in fact, purely formal.

234 In view of all the foregoing considerations, from which it is clear that the contested decision is vitiated by an inadequate statement of reasons, the cause of that inadequacy being the Commission's breach of its own obligation to examine issues which nevertheless have a direct bearing on the question whether State aid was granted, the contested decision must be annulled, there being no need to examine the other pleas in Cases T-309/04, T-317/04, T-329/04 and T-336/04.

Costs

Costs in Cases T-309/04 and T-317/04

235 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs, if they have been applied for in the successful party's pleadings. Since the Commission has been unsuccessful in Cases T-309/04 and T-317/04, it must be ordered to pay the costs of the applicants in those cases, in accordance with the forms of order sought by the latter.

236 Under Article 87(5) of the Rules of Procedure, a party who discontinues or withdraws from proceedings is to be ordered to pay the costs if they have been applied for in the observations of the other party on the discontinuance. Since the applicants in Cases T-309/04 R and T-317/04 R withdrew their applications for interim measures and the Commission did not apply for costs in those cases, each party must bear its own costs in Cases T-309/04 R and T-317/04 R.

237 The EBU, intervener in support of the forms of order sought by TV2 A/S in Case T-309/04, did not apply for costs and must bear its own costs.

238 SBS and Viasat, interveners in support of the forms of order sought by the Commission in Case T-309/04, must bear their own costs.

Costs in Cases T-329/04 and T-336/04

239 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs, if they have been applied for in the successful party's pleadings. Moreover, under Article 87(3) of the Rules of Procedure, where each party succeeds on some and fails on other heads, or where the circumstances are exceptional, the Court of First Instance may order that the costs be shared or that each party bear its own costs.

240 Viasat and SBS, applicants, but also interveners in support of each other in Cases T-329/04 and T-336/04, failed in their respective pleas concerning the classification of TV2's public service remit as an SGEI. Moreover, the Court of First Instance held that, in view of the annulment of the decision contested in Cases T-309/04 and T-317/04, there was no need to examine the other pleas in law relied upon by those applicants.

241 In those circumstances, the Court of First Instance holds that Viasat and SBS must each bear their own costs, incurred both as applicants and as interveners in Cases T-329/04 and T-336/04, together with, respectively, one-tenth of the Commission's costs in Case T-329/04 and one-tenth of the Commission's costs in Case T-336/04.

242 For the same reasons, Viasat must be ordered to pay one-tenth of the costs incurred by TV2 A/S, by the Kingdom of Denmark and by the EBU in their capacity as interveners in support of the forms of order sought by the Commission in Case T-329/04, and SBS must be ordered to pay one-tenth of the costs incurred by the same parties in their capacity as interveners in support of the forms of order sought by the Commission in Case T-336/04.

243 The Commission, together with TV2 A/S, the Kingdom of Denmark and the EBU, interveners in support of the Commission in Cases T-329/04 and T-336/04, must each be ordered to bear nine-tenths of their own costs in Cases T-329/04 and T-336/04.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

1. Joins Cases T-309/04, T-317/04, T-329/04 and T-336/04 for the purposes of the judgment.

2. Annuls Commission Decision 2006/217/EC of 19 May 2004 on measures implemented by Denmark for TV 2/Danmark.

3. Orders TV 2/Danmark A/S, the Kingdom of Denmark and the Commission each to bear their own costs in Cases T-309/04 R and T-317/04 R.

4. Orders the Commission to bear its own costs in Cases T-309/04 and T-317/04, together with the costs incurred by TV 2/Danmark A/S and the Kingdom of Denmark in those cases.

5. Orders the European Broadcasting Union (EBU), SBS TV A/S, SBS Danish Television Ltd and Viasat Broadcasting UK Ltd each to bear their own costs in Case T-309/04.

6. Orders SBS TV, SBS Danish Television and Viasat Broadcasting UK each to bear their own costs, incurred both in their capacity as applicants and in their capacity as interveners, in Cases T-329/04 and T-336/04.

7. Orders Viasat Broadcasting UK to pay one-tenth of the costs incurred by the Commission, by TV 2/Danmark A/S, by the Kingdom of Denmark and by the EBU in Case T-329/04.

8. Orders SBS TV and SBS Danish Television to pay one-tenth of the costs incurred by the Commission, by TV 2/Danmark A/S, by the Kingdom of Denmark and by the EBU in Case T-336/04.

9. Orders the Commission, TV 2/Danmark A/S, the Kingdom of Denmark and the EBU each to bear nine-tenths of their own costs in Cases T-329/04 and T-336/04.

Vilaras Martins Ribeiro Jürimäe

Delivered in open court in Luxembourg on 22 October 2008.

Registrar President

E. Coulon M. Vilaras

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