

The applicant claims that the Court should:

- annul Article 1 of Commission Decision of 19 May 2004 in State aid Case C 2/2003 (ex NN 22/2002) concerning Denmark's measures in favour of TV2/Danmark in so far as the decision declares the aid to be compatible with the common market under Article 86(2) EC;
- order the defendant to pay the costs.

*Pleas in law and main arguments:*

By the contested decision, the Commission approved the aid granted to TV2/DANMARK A/S from 1995 to 2002 in the form of licence-fee resources and certain other measures as compatible with the common market, except for an amount of DKK 628.2 million which, in the Commission's view, constitutes unlawful State aid which the Kingdom of Denmark is obliged to recover from TV2/DANMARK A/S. The applicant has applied for annulment of that part of the decision by which the Commission declares part of the aid to be compatible with the common market.

The applicant submits that the Commission's assessment is incorrect in the re-examination of the question of whether TV2/DANMARK A/S's public service obligations are defined in sufficient detail, since it has found that all of TV2/DANMARK A/S's programme range forms part of its public service obligations. It is precisely this aspect which makes it difficult to re-examine whether the Danish State has complied and continues to comply with the Community competition rules, in particular Article 87(1) EC, together with Article 86(2) EC.

The applicant adds that the Commission's method for assessing whether the aid found to exist within the meaning of Article 87(1) EC pursuant to Article 86(1) EC is compatible with the common market is incorrect because the method does not take account of the presence of indirect (horizontal) State aid (cross-subsidisation), contrary to Article 87(1) EC:

- because the anti-competitive conduct by TV2/DANMARK A/S in the market for sales of television advertising cannot be necessary for the performance of TV2/DANMARK A/S's public service obligations pursuant to Article 86(2) EC, with the result that Article 87(1) EC applies absolutely in relation to TV2/DANMARK A/S's conduct in commercial markets;
- because the Commission assessed only whether possible excess compensation from the State (the direct vertical and prohibited State aid) had been provided to assist the commercial activities, and not whether the compensation from the State (the direct vertical and permitted State aid) had been provided in order to obtain an economic advantage in the commercial activities which distorted competition;
- because the 'stand alone' test applied by the Commission is not applicable to the present case, because it is based on a

comparison between TV2/DANMARK A/S's competitors' costs (instead of TV2/DANMARK A/S's own costs) and TV2/DANMARK A/S's income from commercial activities, thereby ignoring possible differences in levels of efficiency, with the result that the test does not show fully whether TV2/DANMARK A/S's commercial activities through cross-subsidisation have generated an economic advantage which distorts competition;

- because the price test applied by the Commission is not applicable to the present case, either.

**Action brought on 13 August 2004 by TV Danmark A/S and Kanal 5 Denmark Ltd., against the Commission of the European Communities**

(Case T-336/04)

(2004/C 262/95)

*(Language of the case: English)*

An action against the Commission of the European Communities was brought before the Court of First Instance of the European Communities on 13 August 2004 by TV Danmark A/S, Copenhagen, Denmark and Kanal 5 Denmark Ltd., Hounslow, United Kingdom represented by Mr D. Vandermeersch, Mr K. Karl and Mr H. Peytz, lawyers with an address for service in Luxembourg.

The applicant claims that the Court should:

- annul Article 1 of Decision C 2/03 Commission of 19 May 2004 on State financing of Danish public broadcaster TV2/Danmark by means of licence fee and other measures, in so far as the Commission found that aid granted to TV2/Danmark between 1995 and 2002 in the form of licence fee resources and other measures identified in the decision is compatible with the common market under Article 86(2) EC;
- order the Commission to pay the applicant's legal fees, costs and other expenses incurred in connection with this application.

*Pleas in law and main arguments:*

In the contested decision, the Commission held that, between 1995 and 2002, the Danish public broadcaster TV2/DANMARK benefited from State aid within the meaning of Article 87(1) EC. The Commission concluded that the aid is compatible with the common market under Article 86(2) EC, except for an overcompensation amounting to 628.2 million DKK which should be repaid by TV 2 / DANMARK A/S.

The applicants request the annulment of Article 1 of the decision to the extent that it held that a part of the aid is compatible with the common market. The applicants submit that in adopting that part of the decision, the Commission has infringed Article 86(2), 87 and 88 EC, as well as the Protocol annexed to the EC Treaty on the system of public broadcasting in the Member States.

The applicants allege that the Commission infringed Articles 87 and 88 EC, when, after having found that the aid was new aid, it nevertheless proceeded to hold that the aid (with the exception of the amount found in overcompensation) was compatible with the common market while it should have established the illegality of the entire aid due to lack of notification.

Furthermore, the applicants submit that the Commission infringed Articles 86(2), 87 and 88 EC and the Protocol, when it held that all of TV2's costs relate to public service obligations and could therefore be funded by the State in spite of the lack of a sufficiently precise definition of the public service obligations of TV2. The Commission also infringed the said articles when it approved the State aid on the basis of the test of whether TV2 attempted 'to maximise revenues' and put the burden of proof on the applicants. It committed a manifest error of assessment when it disregarded the evidence of TV2 undercutting prices of a stand alone efficient operator.

The applicants also allege that the Commission infringed Article 86(2) EC and the Protocol when it approved the aid notwithstanding its own finding of doubt as to the pricing behaviour of TV2 and the price level in Denmark. Furthermore, the Commission infringed Article 86(2) EC when it failed to examine whether the net costs of TV2 were proportionate to the public service obligations and when accepting the absence of any, or in the alternative, sufficient Danish public control over TV2's performance of its public service remit.

**Action brought on 11 August 2004 by Centro Europa 7 srl  
against the Commission of the European Communities**

(Case T-338/04)

(2004/C 262/96)

(Language of the case: Italian)

An action against the Commission of the European Communities was brought before the Court of First Instance of the European Communities on 11 August 2004 by Centro Europa 7 srl, represented by Vittorio Ripa di Meana and Roberto Mastroianni, lawyers.

The applicant claims that the Court should:

- annul the decision not to take any further action on the complaint lodged by the applicant on 18 October 2001,

notified to the applicant by letter by the Director of DG Competition, Mr Menshing, on 4 June 2004, sent by fax on 9 June 2004, No D (2004)/471;

- order the Commission to pay the costs.

*Pleas in law and main arguments:*

The applicant in the present case participated in July 1999 in the tender procedure organised in Italy for the granting of private terrestrial analogue television broadcasting licences, obtaining the award of a six-year contract for unencrypted transmission, renewable for a further six years. However, the applicant has still not been able to transmit in the clear because it has still not been allocated the frequencies under the contract. Implementation of the national frequency plan, which would have fulfilled its legitimate expectations, has not been carried out because, in accordance with the Italian legislation in force, the frequencies are taken up by television operators which have not obtained a licence and have been able to continue operating under the 'transitional arrangements' introduced by Law No 249 of 1997. Accordingly, the fact that the third network of the group Mediaset (Retequattro) continues to carry on business has made it impossible to free up the necessary frequencies in order to allow the applicant to commence transmission as it should after obtaining the broadcasting licence.

This action has been brought against the decision not to take action against the complaint regarding distortion of competition as a result of the abovementioned situation and of the request to the Commission asking it to take action, pursuant to Article 86(3) of the EC Treaty, regarding measures favouring the undertaking RTI on which Italian law has conferred special rights.

In support of its claims, the applicant alleges infringement of Articles 82 and 86 of the Treaty and breach of the obligation to provide reasons inasmuch as the defendant:

- should have examined the complaint in question for not having replied to the principal complaint regarding the discrimination suffered in respect of access to the television broadcasting market.
- adopted the act in question without taking into consideration the fact that the measures which the Italian authorities adopted or failed to adopt, by excluding Europa 7 from the market in television broadcasting, strengthened RTI's dominant position.
- failed to take into consideration the consequences of the entry into force of Law No 11 of 2004 on the applicant's position. In that connection, the applicant also alleges breach of the general principle of sound administration, as enshrined in Article 47 of the Charter of Fundamental Rights.