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<p>In the published version of this decision, some information has been omitted, pursuant to articles 24 and 25 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, concerning non-disclosure of information covered by professional secrecy. The omissions are shown thus [...].</p>		<p><b>PUBLIC VERSION</b></p> <p><b>WORKING LANGUAGE</b></p> <p><b>This document is made available for information purposes only.</b></p>
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**Subject: State aid No C19/2009 (ex N 64/2009)- Denmark - Restructuring aid to TV2 Denmark A/S**

Sir,

The Commission wishes to inform the Kingdom of Denmark that, having examined the information supplied by your authorities on the aid referred to above, it has decided to initiate the procedure laid down in Article 88(2) of the EC Treaty.

#### **THE PROCEDURE**

1. On 4 August 2008, the Commission notified to Denmark its decision not to raise objections on the rescue aid to be granted to TV2 Danmark A/S in the form of a credit facility totalling DKK 1 000 million ("the rescue aid decision" hereinafter)<sup>1</sup>. That decision found that the planned aid was compatible with Article 87 3) c) EC and, in particular, with the rules laid down in the "Community guidelines on state aid for rescuing and restructuring firms in difficulty"<sup>2</sup> ("the guidelines" hereinafter).
2. Pursuant to the rescue aid decision and the guidelines, the Commission had to be provided with a restructuring plan or a liquidation plan or proof that the loan had been reimbursed in full not later than six months after the rescue aid measure was authorised, that is, by 4 February 2009 at the latest.

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<sup>1</sup> OJEU C 9 of 14.1.2009, p.2-3.

<sup>2</sup> OJEU C 244, 1.10.2004, p.2-17.

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3. On 4 February 2009, Denmark notified to the Commission, pursuant to Article 88(3) EC, a restructuring plan regarding TV2 Danmark A/S. By letter dated 2 April 2009, the Commission requested additional information, which Denmark supplied by letter dated 20 May 2009, registered the same day.
4. On 24 March 2009, Viasat Broadcasting UK Ltd brought an application for annulment of the rescue aid decision before the Court of First Instance of the European Communities<sup>3</sup>. Moreover, on 15 May 2009, Viasat Broadcasting UK Ltd requested the Commission to initiate proceedings under Article 88(2) EC with a view to revoking the rescue aid decision. These filings concern a different decision and do not prevent the Commission from taking a view on the restructuring plan. However, as further shown below, the two main substantive aspects raised in these filings overlap with substantive aspects which the Commission is due to examine as regards the compatibility of the restructuring plan with the common market.

#### **THE BENEFICIARY: TV2 DANMARK A/S**

5. TV2 Danmark A/S was incorporated in 2003 as a private limited liability company wholly owned by the Danish State. The company took over the activities of the autonomous public institution TV 2, which was created in 1986. TV2 Danmark A/S has interests in twenty different companies involving fully owned subsidiaries, associates, joint ventures and minority holdings. TV2 Danmark A/S operates the public television channel TV 2 as well as a number of commercial channels including TV2 Zulu, TV2 Charlie and a news sport television channel TV2 Sports.
6. TV2 Danmark A/S activities are nearly exclusively focused on the TV broadcasting market and other media-related markets in Denmark, where TV2 Danmark A/S channel TV 2 and Danmarks Radio, a public undertaking which is exclusively financed by a licence fee and operates two public service channels, are the largest public service broadcasters. According to their own estimates, the audience share of the various channels of TV2 Danmark A/S was nearly 61% in 2008, whilst TV2 channel alone accounted for 50% of the total audience.
7. TV2 Danmark A/S acquires and sells audiovisual rights on international markets (e.g. Euro 2008 or Olympic games) which it can broadcast itself or resell. In that Member State, TV2 Danmark A/S competes with other undertakings in the provision of broadcasting, advertising and media-related services, such as Danmarks Radio, Viasat, which is owned by Swedish Modern Times Group A/S; SBS A/S, which is owned by German ProSiebenSat, and Discovery. In December 2005, the Danish competition authority found that TV2 holds a dominant position on the market for TV advertising in Denmark<sup>4</sup>. Denmark reiterates the view that TV2 holds a dominant position on such market in the letter of 20 May 2009.
8. Whilst recognising that TV2 Danmark A/S qualifies as a large firm within the meaning of the guidelines, Denmark stresses that TV2 is only present on the Danish market whilst its competitors Viasat and SBS are part of two of the largest TV

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<sup>3</sup> Case T-114/09, Viasat Broadcasting UK Ltd v Commission of the European Communities.

<sup>4</sup> Konkurrencestyrelsen Decision of 21.12.2005, Journal nr. 3/1120-0301-0095/SEK/SCL.

broadcasting groups in Europe, so that TV2 Danmark A/S is in reality, a "small player" in Europe.

## **THE RESTRUCTURING PLAN**

### **Context of the restructuring plan**

9. The restructuring plan follows an agreement between major political parties of Denmark at the Folketinget on an addendum to the media policy agreement 2007-2010, which was made public on 9 January 2009.
10. The restructuring plan contains restructuring aid which will replace the existing rescue aid measure as part of a single operation, given the persistence of the short term liquidity and indebtedness problems identified in the Commission rescue aid decision. Those problems prompted the qualification of TV2 Danmark A/S as a firm in difficulty within the meaning of the guidelines<sup>5</sup>, which, according to Denmark, remains still valid. Notably the company has a significant proportion (68%) of short term debt out of interest bearing liabilities totalling DKK 870 million. TV2 Danmark A/S has experienced significant losses in 2007 and reduced turnover in 2008 as well as negative cash flow and mounting debts, raising interest charges and falling net asset value over the period 2006-2008. Denmark has also provided evidence that, on 22 April 2008, following the publication of the company accounts, the company's main banker Danske Bank requested to reduce its loan and credit facility vis-à-vis the company.
11. Moreover, as indicated in the forecast table below, the deep and continued losses of TV2 should lead to continued annual losses or low profits for TV2 Danmark A/S in the future. The forecast of financial results indicate a cumulated loss of EUR [...] million between 2008 and 2013.

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<sup>5</sup> Rescue aid decision, paragraphs 7, 8, 10 and 39.

## Contribution of activities to TV2 Danmark A/S pre-tax profit (own estimate TV2)

DKK million	2008 Estimate	2009 Forecas t	2010 Forecas t	2011 Forecas t	2012 Forecas t	2013 Forecas t
TV 2	[...]*					
Restructuring						
TV 2 Networks						
TV 2 News						
TV 2 Sport A/S						
Other activities						
<b>Pre-tax profit from continuing activities</b>						
Discontinued activities (TV 2 Radio)						
<b>Pre-tax profit</b>						

PWC report 6.11.2008. section 4.2.5.

\*covered by the obligation of professional secrecy

12. Moreover, an analysis of the business and financial position of the company for the period from 2009 to 2013 carried out by PricewaterhouseCoopers underpins the plan. After necessary adjustments are made following a market analysis, the forecast on the operation of the company concludes that the losses of the TV2 Danmark A/S public service channel TV2 are expected to continue in the absence of corrective measures, thereby burdening the operation of the whole company with reduced profits and a deteriorated cash flow position portrayed in the tables below:

### Operation of TV2 Danmark A/S 2009-2013 (adjusted PWC)

DKKm	2009 forecast	2010 forecast	2011 forecast	2012 forecast	2013 forecast
<b>Operating effect</b>	[...]**				
EBIT, acc. to TV 2 forecast					
Less advertising revenues (market analysis)					
Increased cable income (market analysis)					
Estimated cost savings in budget 2009*					
Adjustments to EBIT					
<b>Adjusted earnings before interest and taxes (EBIT)</b>					
Interest expenses					
Associates					
Downward profit in TV2 Sport A/S*					
<b>Adjusted profit before tax</b>					

\* Based on budget process in progress for 2009, and therefore estimates

\*\* Covered by the obligation of professional secrecy

PWC report 6.11.2008. section 7.1.1.

### Cash flow of TV2 Danmark A/S 2009-2013 (adjusted PWC)

DKKm	2009 forecas t	2010 forecas t	2011 forecas t	2012 forecas t	2013 forecas t
<b>Liquidity effect</b>	[...]**				
Cash hand and at bank (TV 2 forecast)					
Less advertising revenues					
Increased cable income					
Possible savings in budget 2009*					
Downward profit in TV2 Sport A/S*					
Adjustments					
Tax on above adjustments					
<b>Adjusted liquidity effect</b>					

\* Based on budget process in progress for 2009, and therefore estimates

PWC report 6.11.2008. section 7.1.1.

\*\* Covered by the obligation of professional secrecy

13. Against these negative prospects in the absence of corrective measures, the restructuring plan aims therefore at restoring the long term viability of TV2 Danmark A/S by addressing notably i) the nearly total dependence of its public service channel TV2 on volatile and shrinking advertising revenues and ii) the imbalance of short term liabilities in the balance sheet.
14. The plan takes into account the doubts the company bankers have on the company business model and on the possible outcome of ongoing procedures regarding past aid to TV2, and substitutes for an additional limitation of their risk exposure on the company through further reductions of their current loans or credit facilities. The plan is also based on the assumption that pending State aid cases concerning TV2 do not lead to repayment claims in excess of what TV2 repaid in the past<sup>6</sup>.
15. The plan contains a base-case, worst-case and best-case scenario with sensitivity calculations. It draws upon market forecasts which are exogenous to the company compiled by PriceWaterhouseCoopers. These include in the base case, for the period between 2009 and 2013, GDP growth of 1.02% per year, a decrease by 1% of the TV advertising market from DKK 2 365 million to DKK 2 308 million, the maintenance of audience shares for, respectively, TV2 Danmark A/S, Viasat and SBS's portfolios of channels and a steady increase of revenues from cable charges. A worst-case or "pessimistic" scenario include, in addition to company-specific

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<sup>6</sup> These procedures concern, firstly, the repayment of possible incompatible aid received by TV2 dealt with in Judgment of 22.10.2008 in joined Cases T-309/04, T-317/04, T-329/04 and T-336/04 TV2 Danmark and Others v. Commission and Case C2 / 2003 - State funding of TV2 – Denmark (open following annulment of Commission decision in previous judgments) as well as, secondly, the subsequent recapitalisation of TV2 dealt with in Case T-12/05, SBS TV A/S and SBS Danish Television Ltd v. Commission.

factors, a further 10% decrease in advertising revenues each year. The best-case scenario includes higher advertising revenue and user fees than in the base-case.

### Detailed description of the restructuring plan

16. The restructuring plan regarding TV2 Danmark A/S runs between 2009 and 2012, with the following five main components: i) financial restructuring affecting the balance sheet, ii) operational restructuring, iii) new financing of the public service channel TV2, iv) aid measures and v) compensatory measure(s).
17. The **financial restructuring measures** will consist primarily of the following four elements: Sale of 50% ownership interest of the broadcast transmission network, mortgaging of the business premises in Odense (Kvaegtorvet), postponement and scaling down of planned capital investments and divestment of minority interests held in certain companies active in adjacent media sectors, [...]\*. Those measures should bring proceeds in excess of DKK [...], part of which will be used to reduce short term borrowing. They will be undertaken as quickly as possible, keeping in mind that the current economic climate may make it difficult to find suitable buyers at terms which reflect the estimated economic value of the assets.
18. The **operational restructuring measures** expand on cost saving measures worth DKK [...]\* already initiated in 2008 and include the closing down and integration of [...]\* into TV2, the closing down or downsizing of TV2's interest in [...]\* and further cost savings for an amount of [...]\* million. Moreover, TV2 has, after the notification, managed to introduce further cost-savings in a plan adopted on 30 March 2009, which includes reductions in capital investments for 2009 by [...]\* as well as further recurrent cost reductions amounting to [...]\*
19. A new **financing measure** broadening the sources of stable income for the public service channel TV2 would be introduced. TV2 will be transmitted in encrypted format by platform operator Boxer and will be allowed to raise user charges that distributors shall charge the viewers by 2012. The charge shall be set through normal commercial negotiations with distributors, at a monthly price which TV2 expects to be around DKK 25 per household. The postponement to 2012 aims at allowing sufficient time to households currently equipped with MPEG 2 technology equipment capable of receiving "free-to-air" digital terrestrial TV (DR1, DR2 and TV2) to switch to MPEG 4 format equipment. There will be no legislative act forcing distributors to include TV2 in their packages. On the contrary, the existing "must carry" obligation will be repealed. However, given that TV2's regional programmes are financed through the TV licence fee, viewers which do not want to subscribe to a package with TV2 along other channels shall be able to obtain TV2 free of charge by obtaining a smart card ("TV2-only" card) from Boxer.
20. Three **aid measures** totalling a maximum of DKK 1 375 million are envisaged to accompany the restructuring. They address the uncertainty as to the timely and fruitful conclusion of the divestitures and the impact of the slowdown of the economy on TV2 Danmark A/S revenues in a worst-case scenario:

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\* Covered by the obligation of professional secrecy.

- A DKK [...] \* subordinated loan at the interest rate of government loan bonds plus [...] \*, which approximates at present [...] \* and which is allegedly comparable to the rate applied to loans to healthy firms. A portion of the loan will be converted into equity i) if the total net interest bearing debt to equity ratio exceeds [...] \* (until the ratio reaches [...] \*) and ii) if TV2 has an accumulated deficit of more than DKK [...] \* over the restructuring period (half of the amount of the loss). Oppositely, a portion of the loan will be repaid i) if the net interest bearing debt to equity ratio falls below [...] \* (until the ratio reaches [...] \*) or if TV2 has a profit after tax (by such amount unless losses are forecasted for that period).
  - The issuance of a guarantee regarding [...] \*. The guarantee will attract a fee of [...] \*
  - A temporary credit facility of DKK [...] if TV2 Danmark A/S is unable to secure external financing. The credit will attract interest at a rate of CIBOR plus [...], which is allegedly comparable to the rate applied to credit to healthy firms. Draw downs on the credit facility up to DKK [...] will be subject to the special conditions of scrutiny and supervision by an independent accountant described in the rescue aid decision, to which reference is made here<sup>7</sup>. However, if the credit facility is increased by the amount of the guarantee [...] \*, the scrutiny and supervision by an independent accountant would only concern draw downs which exceed the amount by which the facility is increased, e.g. DKK [...] \*.
21. As **compensatory measure**, TV2 Danmark A/S undertakes not to open new TV broadcasting channels throughout the restructuring period until 2012, unless the aid measures are removed or replaced by commercial loans beforehand.
  22. In the view of the Danish authorities, TV2 Danmark A/S 's own contribution to the restructuring plan as results from one-off and recurrent measures included in the plan amounts to DKK 2 495 million. The amount of own contribution represents 64% of the amount of the restructuring plan, which includes also DKK1 375 million of aid measures , and is split as follows:

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<sup>7</sup> Rescue aid decision, point 17: "*Draw downs by TV2 Danmark A/S can only be made in accordance with special conditions set out in the agreement, summarised as follows. The firm PriceWaterhouseCoopers is mandated to act as the independent accounting firm under the terms of the loan agreement. TV 2 Danmark A/S must, one week before the beginning of a new month, inform the independent accounting firm of its expected liquidity needs for the upcoming month. Any deviations from the 2008 liquidity budget annexed to the agreement must be motivated. The independent accounting firm shall inform the Ministry of Culture of the planned draw on the loan for the coming month and whether it meets the terms of the loan agreement, in particular whether it is limited to what is necessary to carry on current activities,. A draw on the loan must be authorised by the Ministry of Culture and may not exceed the amount that the independent accounting firm has deemed necessary to cover TV Danmark A/S liquidity needs*" and points 43 and 45.

**DKK million**

**2009-2010**

<b>One off measures</b>	[...]*
Sale Transmission network	
Cutting in capital investment	
Cancelled new channel	
Divestment interest	

<b>One off measures after the notification</b>	<b>2009-2010</b>
Cutting in capital investment	[...]*
Total	[...]*

<b>Recurrent measures</b>	<b>2009</b>	<b>2010</b>	<b>2011</b>	<b>2012</b>
Staff reductions	[...]*			
Cost cut media services				
Admin, Costs, outsourcing				
Sale TV2 Radio				
Savings 2009				
User charges				
<b>Total</b>				

<b>Recurrent measures after the notification</b>	<b>2009</b>	<b>2010</b>	<b>2011</b>	<b>2012</b>
Savings 2009	[...]*			
Total				
<b>Grand Total</b>	[...]*			

\* Covered by the obligation of professional secrecy



23. Finally, Denmark undertakes to communicate to the Commission progress of the implementation of the restructuring plan every six months from the date of approval. Moreover, Denmark accepts that these bi-annual reports could be used to report and confirm that the aid is not used to finance investments to an extent which is not in conformity with the guidelines.

#### **SUMMARY OF THE VIEWS OF THE DANISH AUTHORITIES**

24. The Danish authorities claim that TV2 Danmark A/S cannot recover through its own resources or market funds if a worst-case scenario occurs and that the restructuring plan submitted to the Commission is based on realistic assumptions and scenarios, whilst showing that the company's long term viability will be restored. The restructuring measures will be implemented as soon as possible, except the introduction of user charges, for which operational and technical difficulties require a postponement.
25. The operational and financial restructuring measures are analysed as the maximum which can be undertaken without compromising the quality of programming in the public service channel TV2, given the pressing socio-cultural needs justifying the intervention. With that proviso, these measures will force TV2 Danmark A/S to better exploit its assets, thus diminishing the aid to the minimum necessary.
26. To cater for liquidity in the current troubled economic context and even in the event of the worst-case scenario, the Danish authorities deem it necessary to continue the economic aid measures until 31 December 2012 at the latest, where that aid must have been repaid. However, the restructuring plan and accompanying aid have been allegedly construed to incentivise earlier repayment and are flanked with control mechanisms ensuring that TV2 Danmark A/S will not use the aid for market distorting behaviour such as undercutting prices on the TV advertising market.
27. In any event, user charges providing stable operating income and reassuring banks as to the business model of TV2 will also have been introduced by 2012. As a result of the restructuring, the EBIT margin of the company as a whole would allegedly be between 8-10%, which would allow it to stand on its own feet. The Danish authorities claim that the mere granting of the possibility to set user charges for the public service channel TV2 does neither involve any advantages compared to other market players nor involve any transfer of state resources to TV2 Danmark A/S. Although the changes in the pricing and structure of the distributor packages are impossible to predict, the introduction of user charges for TV2 should allegedly not lead to indirect financing from or capacity reduction for the latter's competitors.
28. Nor do the Danish authorities consider that the introduction of TV2 as a pay-TV channel entails any significant commercial advantage for Boxer, since TV2 will be made available under similar and normal commercial terms as those available to Boxer and other distributors, if they wish, may conclude agreements with TV2 regarding the availability of "TV2 only" cards.
29. Finally, the Danish authorities claim that the proposed compensatory measure of a standstill on launching new TV broadcasting channels constitutes a real sacrifice for TV2 Danmark A/S, owing to the interest of a diversification strategy to maintain the company's overall market share, the revenues foregone and the first mover advantage left to competitors which currently launch new channels and will continue to do so. Denmark submits that the standstill more than compensates

competitors for the aid provided to TV2 Danmark A/S during the restructuring period.

30. In conclusion, Denmark considers that the described measures and the restructuring process comply with the requirement of the guidelines and do not run counter the Community interest, so that they meet the conditions of Article 87(3) c) EC.

#### **ASSESSMENT UNDER STATE AID RULES**

##### **Presence of State aid within the meaning of Article 87(1) EC**

31. Article 87(1) of the EC Treaty states:

*"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".*

32. In order for Article 87(1) EC to be applicable, there needs to be an aid measure imputable to the State which is granted by State resources, affects trade between Member States and distorts competition in the common market by conferring a selective economic advantage to certain undertakings. The application of these conditions to the measures at hand is examined below.
33. The subordinated loan and the temporary credit facility involve funds released by the Government with the agreement of the Folketinget from the general budget of Denmark.
34. The guarantee [...] imposes a liability on the general budget of Denmark which backs it.
35. Denmark submits that the interest rates and fees are those applied on the market to healthy firms. It follows that, by applying the same conditions to a company in financial distress such as TV2 Danmark A/S, Denmark foregoes State resources which would accrue to Denmark if higher interest rates and guarantee fees in keeping with the higher risk of TV2 Danmark A/S compared to a healthy firm, were applied.
36. By contrast, it is not established at this stage that the planned user charges for TV2 channel involve State resources.
37. Moreover, the State resources involved confer an economic advantage to the recipient in that the same financial instruments at market conditions would attract a higher borrowing cost, or higher fees, if at all market operators accepted to further fund the beneficiary for the amount envisaged, contrary to the evidence submitted by Denmark.
38. Those resources will allow TV2 Danmark A/S to continue operations on markets on which it is active at present. These markets include the market(s) for sale and purchase of broadcasting rights, the market(s) for pay TV services and the market for TV advertising in Denmark. On those markets, TV2 Danmark A/S competes with other broadcasters such as SBS or Viasat, among others. It follows that, by

favouring TV2 Danmark A/S, the aid in question distorts or threatens to distort competition on those markets.

39. The markets affected such as the purchase and sale of broadcasting rights and TV advertising for products from other Member States intended for sale in Denmark are subject to trade between Member States<sup>8</sup>. Moreover, some competitors of TV2 Danmark A/S broadcast their channels from the United Kingdom and/or are subsidiaries of groups incorporated in other Member States, whose decision to stay or increase their activity on the Danish market can be influenced by the planned aid. The aid in question, therefore, affects or risks affecting the patterns of trade between Member States.
40. Since Article 87(1) EC applies, the restructuring aid package needs to be assessed as to its compatibility with the common market.

### **Compatibility of the State aid with the common market**

41. Although TV2 Danmark A/S is a public undertaking and its subsidiary TV2 has been entrusted with the operation of a service of general economic interest as to broadcasting, the Danish authorities are not claiming that the application of Article 87 EC would obstruct the performance of that public service mission. Nor are the aid measures confined to funding the costs of fulfilling that mission, but benefit both commercial and public service activities carried out by TV2 Danmark A/S through its various subsidiaries alike. Therefore, at this stage and in accordance with the views of the Danish authorities, the derogation provided for in Article 86(2) EC should be set aside for the assessment.
42. Failing a claim that Article 86(2) EC applies, the Commission will examine hereunder as a basis for compatibility with the common market for the measures at hand exclusively Article 87(3)(c) of the EC Treaty, which states that:

*“aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest may be considered to be compatible with the common market”.*

### ***Assessment under the Community guidelines on state aid for rescuing and restructuring firms in difficulty***

43. It follows that the restructuring plan of TV2 Danmark A/S should be assessed under the rules set for the assessment of rescue and restructuring aid under Article 87(3) c) EC in the relevant Commission guidelines.

### **Eligibility of the firm**

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<sup>8</sup> As to affectation of trade between Member States, the Danish authorities seem to share the same view, see Konkurrencestyrelsen Decision of 21.12.2005, Journal nr. 3/1120-0301-0095/SEK/SCL.

44. According to the guidelines, restructuring plans must concern firms in difficulty which would be almost certainly condemned to going out of business in the short to medium term without public intervention<sup>9</sup>.
45. The Commission notes the reasons which sustain the claim of Denmark that TV2 Danmark A/S was and still is a firm in difficulty within the meaning of the guidelines.
46. However, one of the substantive claims made by Viasat Broadcasting UK Ltd in support of its application for annulment and request for revocation of the Commission rescue aid decision is, in essence, that TV2 Danmark A/S was profitable in 2008 and that its cash-flow and debt problems were self-inflicted, easily solvable and without bearing on the fundamental viability of the company.
47. At this stage, the Commission does not depart from its assessment in the rescue aid decision and notes that the figures submitted by Denmark seem to contradict Viasat Broadcasting UK Ltd views as to the future prospects of TV2 Danmark A/S without corrective measures. However, the Commission is ready to receive comments on this issue.

*Duration of the restructuring plan*

48. According to the guidelines, restructuring plans must have the shortest possible duration<sup>10</sup>.
49. The Commission notes that the duration of the plan until 2012 is particularly long, especially in the light of the reasons allegedly underlying the difficulties of TV2 Danmark A/S.
50. Given the economic and financial situation in which the plan is launched, its long duration and the continuation beyond the short term of the serious difficulties which TV2 Danmark A/S is experiencing might be questionable. The need to review the plan, introduce two stages in the plan or shorten the duration of validity of a possible Commission decision arises in this connection.
51. In particular, one cannot exclude an improvement of the economic situation in Denmark combined with a successful implementation of the financial and operational restructuring measures included in the restructuring plan by 2010-2011. These positive developments could render the introduction by 2012 of user charges on TV2 channel unnecessary to ensure the long term viability of TV2 Danmark A/S. The Commission needs therefore to be fully informed of the financial prospects of the company by 2012-2013 in the absence of introduction of user charges for the main channel TV2.
52. Moreover, since the effects of such measure on competition are, according to Denmark, impossible to predict for the moment, the automatic phasing in by 2012 decided already as of now without any market test might be questionable.

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<sup>9</sup> Guidelines, points 9 to 11.

<sup>10</sup> Guidelines, points 9 to 11.

*Restoration of long term viability*

53. According to the guidelines, the grant of aid must be conditional on implementation of a detailed, credible and consistent restructuring plan endorsed by the Commission. The plan must involve the abandonment of activities which would remain structurally loss-making even after restructuring<sup>11</sup>.
54. Denmark has submitted a restructuring plan describing the circumstances that led to TV2 Danmark A/S's difficulties, taking into account the present state and future prospects on the relevant product markets, notably as to advertising and user charges revenues, with best-case and worst-case scenarios.
55. Although some of the assumptions and financial data in the plan relate to the company's future performance and operating and financial ratios, the plan draws also upon forecasts during the restructuring period which are exogenous to the company, such as GDP growth, a decrease of the TV advertising market, the maintenance of audience shares for, respectively, TV2 Danmark A/S, Viasat and SBS's portfolios of channels and a steady increase of revenues from cable charges.
56. At this stage, the Commission is not in a position to corroborate the validity of those exogenous assumptions as to whether they are reasonable, likely and in keeping with industry expectations and, if they are not, the impact of different, more reasonable assumptions on the planned restructuring measures.
57. As regards return to long-term viability of the company, the figures presented by Denmark show that after the restructuring plan, the EBIT margin of TV2 Danmark A/S as a whole would be between 8 and 10% and its viability would thus be restored. However, that viability is not assured for all activities that are expected to remain in operation and, in particular, for the TV2 public service channel.
58. In that respect, since the incorporation and subsequent recapitalisation in 2005, the operation of the TV2 channel has been by and large unprofitable, unlike the "niche channels" operated by the company. As regards the future, the expected proceeds of the user fees intended to be introduced by TV2 will be DKK [...] in 2012 and DKK [...] in 2013. Yet the losses planned by TV2 of, respectively, DKK [...] and [...] the same years exceed those revenues. The difference could indicate that, taken separately, the activity of TV2 alone could generate losses after the plan.
59. In the absence of indications, based on an appropriate apportioning of proceeds or savings to TV2 alone in isolation from other subsidiaries of TV2 Danmark A/S, that the measures in the restructuring plan should render TV2 profitable on a stand alone basis, the Commission is not in a position to assess whether the operation of TV2 would remain structurally loss-making even after restructuring has been fully implemented, in contravention of the guidelines.

*Avoidance of undue distortion of competition: compensatory measure*

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<sup>11</sup> Guidelines, points 34 to 36.

60. The guidelines require that none of the restructuring aid should go to finance new investment that is not essential for restoring the firm's viability<sup>12</sup>. Moreover, in application of the guidelines, the condition that restructuring aid must be regarded as not contrary to the common interest can be fulfilled if, having regard to the objective of restoring the long-term viability of TV2 Danmark A/S, the compensatory measure(s) is(are) proportionate to the size and relative importance of the firm, in particular on the markets where it will have a significant market position after the restructuring<sup>13</sup>.
61. In that respect, Denmark merely claims that the compensatory measure of a stand-still on launching new commercial TV channels constitutes a real sacrifice by depriving TV2 Danmark A/S of operating revenues but not that investing into new channels is essential for the company survival. Nor do the forecasts on which the restructuring plan is based indicate that any such investment is essential for restoring viability. Given that, under the guidelines, the planned restructuring aid measures should not finance new investment of the kind proposed, the alleged sacrifice from the compensatory measure does not seem to go beyond what TV2 Danmark A/S would have to refrain from doing in any event.
62. Moreover, it is doubtful at this stage that the compensatory measure alone is proportionate to the size and relative importance of TV2 Danmark A/S and, in particular, of its public service channel TV2. The company forecast transmitted by the Danish authorities indicates that, though eroding, the audience share of TV2 Danmark A/S will be 55% by 2013, of which, 42.5% accounted for by TV2 channel. As indicated previously, Denmark considers that TV2 holds already a dominant position on the TV advertising market, owing notably to its audience share. The user charges planned by 2012 are likely to further reinforce the financial strength of TV2 in the long run.
63. In contrast, the divestitures included in the financial measures, the operational restructuring measures and the compensatory measure of a stand-still on new channels do not affect directly TV2 channel's core broadcasting business. Contrary to the guidelines, the planned measures thus fail to reduce both i) TV2 channel's capacity or market presence as to programming and/or ii) barriers to entry on the markets concerned:
- In particular, the compensatory measure does not affect TV2's ability to broadcast premium content (e.g. Olympics, Euro cup World cup soccer, Danish fictions), which, for a broadcaster is tantamount to capacity for manufacturing referred to in the guidelines.
  - Nor does the compensatory measure diminish entry barriers, notably by ensuring that competitors have access at fair conditions to resale of broadcasting rights for re-dissemination of premium content which allegedly remains confined to commercial niche channels within TV2 Danmark A/S. Yet, it is reasonable to

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<sup>12</sup> Guidelines, points 38 to 40.

<sup>13</sup> Guidelines, points 38 to 40.

consider that, compared to the current in-house resale, an auctioning of such rights between prospective buyers, including subsidiaries and competitors alike would ensure that the relevant revenues are maximised for the benefit of TV2 Danmark A/S, thereby diminishing the company liquidity and aid needs.

64. Denmark claims that the restructuring plan has been conceived as the maximum that can be undertaken without compromising the quality of programming in the public service channel TV2.
65. The Commission considers that firms in difficulty are not appropriate vehicles for promoting other policy objectives and that the restructuring of such firms may be compatible with the common market only if the conditions set out in the guidelines are met<sup>14</sup>.
66. Denmark's claim suggests, as regards possible additional compensatory measures, that the restructuring plan supports other public policy objectives not considered appropriate in the guidelines. Indeed, in the context of an assessment under the guidelines, it is not pertinent whether part of the business activity of TV2 Danmark A/S consists in carrying out a public service mission. This question would only be relevant under Article 86 (2) EC, which however has not been invoked by Denmark as a legal basis for compatibility.
67. In the circumstances, it is therefore doubtful that the sole compensatory measure of a stand-still on launching new TV channels alone is proportionate to the size and relative importance of TV2 on the markets on which it operates.

*Impact of the introduction of user charges on TV2's public service channel*

68. The Commission also needs to consider prospectively the effects of the introduction on user charges on competition between pay-TV channels with a reasonable degree of certainty. Given, in particular, the position of strength enjoyed by TV2 on the Danish market, which the levying of user charges could further reinforce, to the detriment of already weakened competition<sup>15</sup>. Denmark has been unable to provide in its notification a sufficiently justified analysis of its contention that the negative effects of such charges outweigh their positive contribution to restoring the company's viability.
69. In particular, consumers might avoid paying such charges when choosing to receive the TV 2 channel alone but might indirectly pay them to distributors when subscribing to a package which includes the TV 2 channel along with other competitors'. This means that the more attractive the channels competing with TV2 are, the more they will indirectly support the financing of TV2. Additionally, the introduction of TV2 into packages risks being done at the detriment of weaker competing channels. The Commission wonders whether these elements could not introduce an additional distortion of competition.

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<sup>14</sup> Guidelines, point 20.

<sup>15</sup> Judgment of the Court of 15 June 1993. *Matra SA v Commission of the European Communities* [1993] ECR I-3203, points 33 and 42.

70. With a view to taking a position in full knowledge of the facts, the Commission considers that it is not sufficiently informed of the likelihood and extent of the possible distortive effects triggered by the introduction of user charges on the TV 2 channel.

*Aid limited to the minimum*

71. In application of the guidelines, the amount of restructuring aid must be kept to the strict minimum of the restructuring costs, include a significant contribution of the beneficiary to the restructuring plan and avoid providing the company with surplus cash which could be used for aggressive, market-distorting activities<sup>16</sup>.
72. In this respect, the amount of own contribution by TV2 Danmark A/S represents 64% of the amount of the restructuring plan, which includes also a maximum amount of DKK 1 375 million of restructuring aid measures. However, the maximum amount of restructuring aid of DKK 1 375 million exceeds the DKK [...] of credit facility of rescue aid.
73. The Commission notes that the same special conditions of scrutiny and supervision of draw downs described in the rescue aid decision, which provided adequate safeguards ex ante against unfair commercial behaviour only apply to increases of the temporary credit facility above the maximum amount of DKK [...]\*. Drawings on the [...] subordinated loan are unconditional.
74. As a result, one cannot exclude that drawings below the amount of increase of the temporary credit facility and/or drawings on the [...] subordinated loan may be used to finance aggressive market behavior beyond the contribution to restructuring costs. It is therefore doubtful that all necessary measures are taken in that respect to keep the aid in question to the minimum necessary.
75. Moreover, although these conditions appear to be adequate ex ante safeguards to prevent that the aid provides surplus cash, the Commission is not sufficiently informed of their implementation ex post since the rescue aid decision. The Commission seeks also comments regarding their effectiveness, notably in the light of the allegations to the contrary made by Viasat Broadcasting UK Ltd in support of its application for annulment and request for revocation of the Commission rescue aid decision.

*Application of the derogation provided for in Article 86 (2) EC*

76. Although TV2 Danmark A/S is a public undertaking and its subsidiary TV2 has been entrusted with the operation of a service of general economic interest as to broadcasting, the Danish authorities have not claimed that the application of Article 87 EC would obstruct the performance of that public service mission. In accordance with the views of the Danish authorities, the Commission has therefore, at this stage, not been in a position to conduct an assessment under the derogation provided for in Article 86(2) EC.

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<sup>16</sup> Guidelines, points 43 to 45.



77. However, given the doubts which the Commission raises at this stage as regards the applicability of Article 87 (3) c) EC to the restructuring plan of TV2 Danmark A/S, the Commission invites comments as to whether and the extent to which the application of Article 87 EC could obstruct the performance of the public broadcasting service entrusted to TV2, in application of Article 86(2) EC.

## CONCLUSION

In the light of the foregoing considerations, the Commission, acting under the procedure laid down in Article 88(2) of the EC Treaty, requests the Kingdom of Denmark to submit its comments and to provide all such information as may help to assess the aid, within one month of the date of receipt of this letter and, in particular, information on the aspects singled out above as regards the application of Article 87(3) c) EC and their arguments as to whether its application would obstruct the performance of the public service mission entrusted to TV2 channel. It requests your authorities to forward a copy of this letter to the potential recipient of the aid immediately.

However, in accordance with point 26 of the "Community guidelines on state aid for rescuing and restructuring firms in difficulty", the deadline for reimbursing the rescue aid credit facility totalling DKK 1 000 million authorised on 4 August 2008 is extended until the Commission reaches its decision on the restructuring plan submitted by the Kingdom of Denmark.

The Commission wishes to remind the Kingdom of Denmark that Article 88(3) of the EC Treaty has suspensory effect, and would draw your attention to Article 14 of Council Regulation (EC) No 659/1999, which provides that all unlawful aid may be recovered from the recipient.

The Commission warns the Kingdom of Denmark that it will inform interested parties by publishing this letter and a meaningful summary of it in the *Official Journal of the European Union*. It will also inform interested parties in the EFTA countries which are signatories to the EEA Agreement, by publication of a notice in the EEA Supplement to the *Official Journal of the European Union* and will inform the EFTA Surveillance Authority by sending a copy of this letter. All such interested parties will be invited to submit their comments within one month of the date of such publication.

If this letter contains confidential information which should not be published, please inform the Commission within fifteen working days of the date of receipt. If the Commission does not receive a reasoned request by that deadline, you will be deemed to agree to publication of the full text of this letter. Your request specifying the relevant information should be sent by registered letter or fax to:

European Commission  
Directorate-General for Competition  
State Aid Greffe  
Rue de Spa 3  
B-1049 Brussels  
Fax No: +32 2 2961242

Yours faithfully,

For the Commission

*Neelie KROES*

Member of the Commission