DECISIONS

COMMISSION DECISION

of 20 April 2011

concerning State aid C 19/09 (ex N 64/09) which Denmark intends to implement regarding the restructuring of TV2 Danmark A/S

(notified under document C(2011) 2614)

(Only the Danish text is authentic)

(Text with EEA relevance)

(2012/109/EU)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union [1], and in particular the first subparagraph of Article 108(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having called on interested parties to submit their comments pursuant to these provisions [2], and having regard to their comments,

Whereas:

I. PROCEDURE

(1) On 4 August 2008, the Commission notified Denmark of its decision not to raise objections to the rescue aid to be granted to TV2 Danmark A/S in the form of a credit facility totalling DKK 1 000 million (hereinafter 'the rescue aid decision') [3]. That decision found that the planned aid was compatible with Article 87(3)(c) of the EC Treaty, now Article 107(3)(c) of the Treaty on the Functioning of the European Union (TFEU), and, in particular, with the rules laid down in the Community Guidelines on State aid for rescuing and restructuring firms in difficulty [4] (hereinafter 'the Guidelines').

(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 6 months after authorisation of the rescue aid measure, i.e. by 4 February 2009 at the latest.

(3) On 4 February 2009, Denmark notified to the Commission, pursuant to Article 88(3) EC, now Article 108(3) TFEU, a restructuring plan regarding TV2 Danmark A/S.

(4) By letter dated 2 July 2009, the Commission informed Denmark that it had decided to initiate the procedure laid down in Article 88(2) EC, now Article 108(2) TFEU, in respect of the aid.

(5) The Commission decision to initiate the procedure was published in the *Official Journal of the European Union* [5]. The Commission called on interested parties to submit their comments.

(6) The Commission received the following comments from interested parties.

— 1.10.2009 TDC A/S and You see

— 1.10.2009 Canal Digital Danmark

— 1.10.2009 MTV Networks

— 2.10.2009 Niels Jorgen Langkilde

— 2.10.2009 Boxer TV

— 2.10.2009 Discovery Networks Nordic

— 2.10.2009 TV2 Danmark (aid beneficiary)

— 2.10.2009 MTG Viasat (which submitted further annexes by letter of 15 October 2009)

— 2.10.2009 Danish Cable Television Association

[1] With effect from 1 December 2009, Articles 87 and 88 of the EC Treaty have become Articles 107 and 108, respectively, of the TFEU. The two sets of provisions are, in substance, identical. For the purposes of this Decision, references to Articles 107 and 108 of the TFEU should be understood as references to Article 87 and 88, respectively, of the EC Treaty when appropriate.

[2] OJ C 207, 2.9.2009, p. 2.

[3] OJ C 9, 14.1.2009, p. 2.

[4] OJ C 244, 1.10.2004, p. 2.

[5] See footnote 2.

— 2.10.2009 SBS Broadcasting Networks Ltd and SBS TV A/S

— 7.10.2009 Telia Stofa A/S

(7) It forwarded them to Denmark on 27 October 2009. The late comment by Telia Stofa was forwarded to Denmark on 30 November 2009. Denmark was given the opportunity to respond and its comments were received by two letters dealing with different aspects of the third party comments: by letter from the Danish Government dated 29 January 2010, received via the Permanent Representation and registered as received on 23 February 2010, and by letter dated 29 March 2010 and registered as received on 30 March 2010, with the Annexes to that letter later being registered as received on 14 April 2010. On 8 June 2010, the Danish Government provided some further information on the adoption of a new Media Policy Agreement for 2011-2014.

(8) On 9 June 2010, TV2 Danmark A/S submitted an information memorandum on the sale of the TV2 broadcasting network.

(9) The Commission had a meeting with the aid beneficiary TV2 Danmark A/S on 8 June 2010. As a follow-up to the meeting, the Commission sent questions on 30 June 2010 to Denmark, to which Denmark submitted answers on 9 July 2010.

(10) Viasat submitted further information by e-mail of 26 May 2010 and by letters registered as received on 1 June 2010 and 6 July 2010.

(11) Following additional questions by the Commission on 23 and 28 July 2010, Denmark submitted answers to these questions on 17 August 2010. The Commission had a meeting with Denmark on 14 September 2010, after which Denmark provided further comments in a submission dated 15 October 2010.

(12) Viasat submitted more information to the Commission on 22 December 2010 and SBS did so on 7 February 2011.

(13) On 14 January 2011, the Commission sent a request for information to Denmark, to which Denmark replied by letter of 3 February 2011. Denmark requested a further meeting by letter of 28 January 2011. This meeting took place on 7 February 2011. Further information was submitted on 24 February 2011.

(14) At the request of the Danish authorities, a further meeting took place on 4 March 2011. Denmark then submitted more information by letters registered as received on 11, 17 and 18 March 2011 and on 6 and 14 April 2011. In its letter of 11 March 2011, Denmark informed the Commission that parts of the restructuring plan (the 'TV2 Alene card', explained further below) would not be implemented. On 17 and 18 March and on 6 and 14 April 2011, Denmark provided amended financial data taking this amendment into account.

(15) It should further be noted that 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 (now the General Court) ([6]). Moreover, on 15 May 2009, Viasat Broadcasting UK Ltd requested that the Commission initiate proceedings under Article 108(2) TFEU with a view to revoking the rescue aid decision ([7]). These filings concern a different decision and do not prevent the Commission from taking a view on the restructuring plan. However, by order dated 17 May 2010, the proceedings in the court case were stayed until the Commission's adoption of a final decision in the restructuring case ([8]).

(16) On 14 December 2009, MTG/Viasat submitted a complaint alleging that Denmark is infringing inter alia Articles 106 and 102 TFEU by the introduction of user charges for TV2.

II. THE BENEFICIARY: TV2 DANMARK A/S

(17) 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 TV2, which was created in 1986. Danmark A/S has interests in several different companies, involving wholly-owned subsidiaries, associates, joint ventures and minority holdings. TV2 Danmark A/S (hereinafter 'TV2') is the parent company of the TV2 Group and operates the public service television channel TV2 (below also called the 'main channel').

(18) **Current business model:** Historically, the TV2 main channel was funded by television licence fees and advertising revenues. However, although the regional channels are still partly funded this way, television licence funding for the main channel ended in July 2004 and only financing via advertising revenues remained. These advertising revenues are currently the only source of income for the main channel, apart from the profits from the commercial channels. TV2 is currently not allowed to charge subscription fees for its main channel.

([6]) Case T-114/09 *Viasat Broadcasting UK Ltd* v *Commission of the European Communities*.

([7]) This request deals largely with the question of whether TV2 is a firm in difficulty and to a far lesser degree with the question of whether it has used the aid for anticompetitive purposes.

([8]) Order of the President of the Fifth Chamber of the General Court of 17 May 2010 in Case T-114/09.

(19) **Public service obligations:** Section 38a(1) of the Danish Broadcasting Act establishes a public service obligation for TV2 and states that 'the public service programming activities shall be provided to the general public in accordance with the principles referred to in Section 10'. These overall obligations are supplemented by more detailed descriptions in the public service licence and addenda thereto.

(20) The Commission accepted ([9]), and was upheld on this point by the General Court ([10]), that TV2's main channel fulfils a public service obligation. TV 2's public service activity accounts for more than […] (*) of its costs ([11]).

(21) The TV2 main channel is further under a public service obligation to broadcast regional programmes according to point 2.5 of the TV2 public service licence ([12]). The regional content is produced by TV2 regional stations. The eight regional stations are independent from TV2. They are governed by Sections 31 et seq. of the Danish Broadcasting Act ([13]). The eight regional TV 2 stations each have a Board of Representatives, the composition of which reflects a wide variety of aspects of the regional culture and community. TV2 may not sit on these Boards of Representatives. The regional operations are entrusted with public service activities under Sections 31 et seq. of the Danish Broadcasting Act and their programming must emphasise regional affiliation. Their activities are primarily financed by licence fees ([14]). TV2 is under an obligation to transmit these regional programmes in 'windows' in TV2's normal programme flow ([15]). TV2 has no influence on the chosen TV format, e.g. to ensure coherence with general TV programming on the main channel. Between the national and regional programmes, TV2 transmits advertisements which are directed towards the regional market, and it retains the revenues from advertising.

(22) **Must-carry obligation:** Currently, the main channel is covered by a 'must-carry' obligation pursuant to Section 6 of the Danish Broadcasting Act, according to which SMATV distributors (including commercial cable distributors) must give access to the channels mentioned in the provision (i.e. TV2 and DR) in all their packages ([16]).

TV distributors using satellite as a distribution platform were not obliged to include the TV2 main channel in the programme packages, but chose to do so, since the channel is very popular ([17]).

(23) **Distribution of television in Denmark**: Television in Denmark is distributed in five different ways, based on alternative means of receiving the TV signal. These are distribution by cable (distributors YouSee and Stofa), SMATV (local cable distribution), distribution via satellite dish (Viasat and Canal Digital), distribution by broadband (IPTV) and terrestrial distribution. As of 1 November 2009, the analogue terrestrial signal was switched off and Danish terrestrial TV signals were digitised. The company Boxer won the tender to act as the commercial gatekeeper and is responsible for the transmission of subscription-based channels through the terrestrial network. Currently, the TV2 main channel is broadcast 'Free to air' (FTA) without any subscription fees being charged for its viewing ([18]).

(24) **TV2's activities:** TV2 is primarily active in broadcasting and in selling TV advertising. It also acquires and sells audiovisual rights on international markets (e.g. Euro 2008 or the Olympic Games) which it can broadcast itself or resell. TV2 operates almost exclusively on the TV broadcasting market and other media-related markets in Denmark. The TV2 main channel, along with Danmarks Radio (a public undertaking which is exclusively financed by a licence fee and operates two public service channels), is the biggest TV channel.

The TV2 main channel currently competes on the TV advertising market with e.g. Viasat's channels TV3 and TV3+. Viasat is owned by the Swedish Modern Times Group A/S (MTG), which is also active as a distributor

([9]) Commission Decision 2005/217/EC of 19 May 2004 on measures implemented by Denmark for TV2 Danmark.
([10]) Case T-309/04, *TV2 Danmark* v *Commission* [2008] ECR II-2935, paragraphs 101 et seq.
(*) Data omitted on grounds of confidentiality has been replaced by […].
([11]) Letter from TV2 of 2 October 2009.
([12]) Authorisation of 17 December 2009, submitted as Annex 1 to the submission by Denmark of 9 September 2009.
([13]) Act No 477 of 6 May 2010.
([14]) According to the Media Agreement for 2007-2010, the annual licence fee revenues amounted to DKK 428,4 million in 2010.
([15]) Letter from Denmark of 29 January 2010, pp. 13 et seq. and Annex 8 thereto.
([16]) See Annex 5 to the notification from Denmark, p. 2, and letter from Denmark of 3 February 2011, p. 7. SMATV stands for Satellite Master Antenna Television, and refers to a system that uses multiple satellite and broadcast signals to create a single integrated cable signal for distribution to a cabling network.
([17]) 'Information memorandum on Project MUX' submitted by Denmark, p. 32.
([18]) Distributors do not pay a TV channel subscription for TV2 in the cable segment either (see Annex 5 to Denmark's notification, p. 3). According to that document, distributors only charge distribution costs plus fees to copyright owners.

in the satellite segment. TV2 also competes for advertising revenue with SBS A/S, which is owned by the German ProSiebenSat. TV2's pay-TV channels, such as TV2 Zulu and TV2 Charlie, compete with other commercial channels on the wholesale market for distribution in pay-TV packages.

(25) **Commercial operations:** TV2 operates a number of non-public-service commercial channels, including TV2 Zulu, TV2 Charlie, TV2 Film and TV2 News. It also owns 50 % of TV2 Sports. TV2 Zulu, TV2 Charlie and TV2 News are financed through subscriptions and advertising, whereas TV2 Film is exclusively financed through subscriptions.

(26) As acknowledged by Denmark ([19]) and TV2 Danmark A/S and its competitor Viasat ([20]), operation of the main channel is vital for achieving the revenues generated by the commercial channels.

(27) TV2 has been obliged since 2001 to keep the accounts of its commercial and public service activities separate, see Order No 740 ([21]). The accounts are monitored by external auditors.

(28) **Other business:** In addition, TV2 Danmark A/S owns several subsidiaries or is part of a number of TV-related joint ventures in content and radio, and previously also had a broadcasting transmission network (Broadcast Service Denmark (BDS), DTT/Digi-TV, 4M and Fordelingsnet) with DR. According to information furnished by Denmark, Broadcast Service Denmark is the leading Danish broadcaster provider in relation to the planning, construction, operation and service of transmission networks. The transmission network was jointly owned by Danske Radio and TV2 directly or via co-owned partnerships (Fordelingsnet, 4M, Digi-TV). TV2, however, has sold its shares in this network as part of its restructuring.

(29) **National antitrust cases concerning TV2:** The Commission notes that TV2's behaviour in the advertising market is under investigation by the Danish competition authorities. On 21 December 2005, a decision was taken by the Danish Competition Council that TV2 had infringed Article 102 TFEU, and the corresponding national legislative provisions, by using loyalty-enhancing rebates on the advertising market. This decision was annulled by the Competition Appeals Tribunal on 1 November 2006, but then upheld on appeal to the High Court of Eastern Denmark on 22 June 2009. An appeal against the latter judgment was lodged with the Supreme Court, which upheld the High Court judgment on 18 March 2011. The case followed a previous case dating from 29 November 2000 in which the Danish Competition Council had found that TV2's rebates in 2000 were an abuse of a dominant position.

III. OTHER PENDING LEGAL CASES INVOLVING TV2

(30) Support for the operations of TV2 from public funds prior to its incorporation and subsequent recapitalisation was the subject of Commission decisions of 19 May 2004 and of 2 February 2005, respectively ([22]). In the first decision, the Commission ordered the recovery of incompatible aid to TV2 of an amount of DKK 628,1 million. Denmark ordered recovery from the aid beneficiary with interest, and recovered an amount of DKK 1 050 million from TV2. The second decision raised no objections to the recapitalisation, which consisted of a capital injection of DKK 440 million and a further debt-equity swap of DKK 394 million, in terms of its compatibility with the common market.

(31) On 22 October 2008, the General Court annulled the Commission's recovery decision ([23]). On 24 September 2009 ([24]) the General Court issued an order regarding the recapitalisation decision, declaring that there was no need to give a decision, since the recapitalisation decision — which was based on the recovery decision — was based on premises which no longer existed and was therefore deprived of any substance and meaning. The Court considered that the two decisions constituted two aspects of the same legal issue.

(32) The Commission's investigation with regard to the above case has been carried out in parallel with this procedure, and the Commission's decision in the above case will be adopted at the same time as the present Decision.

IV. THE RESTRUCTURING PLAN

1. Context of the original restructuring plan

(33) As outlined in the Commission's decision authorising the rescue aid of DKK 1 000 million during 2008, TV2 Danmark faced serious liquidity problems as a result of heavy investments, in particular in a radio operation, lower than expected advertising revenues and higher interest charges. These liquidity needs could not be met by securing loans from private creditors (banks). Following the rescue aid decision, Denmark notified a restructuring plan within the six-month limit stipulated in the Guidelines.

([19]) Letter from Denmark of 9 September 2009, pp. 10-11.
([20]) Letter from Viasat of 2 October 2009, paragraph 114.
([21]) Order No 740 of 21 August 2001 on keeping separate accounts for Danmark's Radio's and TV2's public service activities and all other activities, adopted for the implementation of Commission Directive 2000/52/EC (OJ L 193, 29.7.2000, p. 75).
([22]) Commission Decision 2005/217/EC (OJ L 85, 23.3.2006, p. 1) and case N 313/04 (OJ C 172, 12.7.2005, p. 3).
([23]) Case T-309/04 of 22 October 2008, paragraphs 101 et seq.
([24]) Case T-12/05, Order of the Court of First Instance of 24 September 2009.

(34) The restructuring plan submitted to the Commission on 4 February 2009 followed an agreement among a large majority of Danish political parties on an addendum to the Media Policy Agreement for 2007-2010, which was made public on 9 January 2009.

(35) In its notification of 4 February 2009, Denmark notified various restructuring aid measures, because, according to Denmark, the short-term liquidity and indebtedness problems identified in the Commission rescue aid decision still existed. Those problems prompted the qualification of TV2 Danmark A/S as a firm in difficulty within the meaning of the Guidelines ([25]), which the Commission, in the opening decision, had no reason to deviate from and which, according to Denmark, remains valid even after TV2's having received the rescue aid. This can be demonstrated by the data mentioned in the Commission's decision opening the formal investigation procedure ([26]).

(36) Later in the proceedings, and in particular as a reaction to the third-party comments, Denmark provided another updated PWC study on TV2's financial situation. The updated data are summarised in the table below ([27]).

Development of TV2 Danmark A/S

Key figures

(million DKK)

	2006	2007	2008	2009
Profit before tax	142	– 213	18	– 28
Turnover	1 980	2 251	2 206	2 029
Net cash flow	79	– 550	– 73	– 60
Net interest-bearing debt	232	564	622	659
Net interest charges	10	19	41	31
Net asset value	815	598	616	601

According to Denmark, the problems of TV2 result, inter alia, from an increasingly unprofitable public service channel ([28]) without a sustainable business model and some losses resulting from unsuccessful investments.

(37) **Losses:** Due to advertising revenues being lower than budgeted, in combination with a series of bad investments (most notably TV2 Radio), TV2 Danmark A/S realised a significant loss in 2007 (DKK 214 million, return on equity – 36 %). Furthermore, at the end of March 2008, the 2008 financial result projection was another pre-tax loss of up to DKK […] million, albeit that the projection was deemed highly sensitive to advertising market developments. Likewise, the company made losses in 2009.

(38) **Turnover/market share:** TV2's main channel experienced a falling market share for years prior to the rescue aid, and continues to do so. The removal of TV2's historical business advantage with the switch-off of analogue terrestrial TV and the introduction of DTT (digital terrestrial television) has led to more equal distribution of opportunities since November 2009. The removal of the must-carry obligation (see recital 52 below) is expected to lead to further market share losses. From 2003 to 2009, the TV2 main channel's 'commercial' market share (21-50 year olds, which is the commercially most interesting viewer group) had already declined by 19 % from 56,2 % to 45,6 % ([29]). TV2's commercial market share is expected to […] % in 2013 ([30]).

(39) **Mounting debt/cash flow/interest charges:** As can be seen from the table, TV2 Danmark A/S's net interest-bearing debt steadily increased from DKK 232 million in 2006 to DKK 622 million in 2008 (prior to the sale of the network and the repayment of most of the debt, the net interest-bearing debt was budgeted at DKK […] million in 2010). The table further demonstrates that TV2 Danmark A/S had negative cash flows, mounting debts, increasing interest charges, and a falling net asset value over the period from 31 December 2006 to 31 December 2009.

(40) **Best case/worst case analysis:** The original restructuring plan contains a base-case, worst-case and best-case scenario with sensitivity calculations. It draws

([25]) Rescue aid decision, paragraphs 7, 8, 10 and 39.
([26]) See paragraphs 10-15 of the Commission decision of 2 July 2009, based on Annex 3 to the original notification.
([27]) Annex 2 to the letter from Denmark of 29 January 2010 providing an updated PWC analysis of 21 January 2010. The figures estimated at the time for 2009 are updated here using the actual outcomes supplied by TV2 as an annex to a letter from Denmark of 9 July 2010.
([28]) See the Commission decision of 2 July 2009, paragraph 11, which provides the figures on the contribution of TV2's various activities and the public service channel's losses over a period from 2008 (DKK […] million) to 2013 (DKK […] million).
([29]) Annex 1 to Denmark's submission of 29 January 2010 and TV2's submission 'Status of TV2's financial position and liquidity', p. 1.
([30]) Comments by TV2 to the European Commission dated 25 August 2009.

upon market forecasts which are exogenous to the company (as compiled by PriceWaterhouseCoopers). The scenarios forecast real GDP growth, and from that derive an estimated growth (or decline) in the TV advertising market which, in combination with market share projections, yields TV2 advertisement revenue projections. In the *base case*, there is a modest increase in GDP ([…] % for 2009 and 2010, […] % for 2011 and […] % for 2012). The TV advertising market was forecast to […] between 2009 and 2012 from DKK […] million to DKK […] million in that period ([…] %). The *worst-case scenario* saw a less positive growth in real GDP (zero in 2009 and 2010 and a […] % and […] % increase in 2011 and 2012 respectively), and […] in advertising expenditure from DKK […] million in 2009 to DKK […] million in 2012 ([…] %). The *best-case scenario* forecast a slightly higher GDP growth than the base scenario and thus a slight increase in the TV advertising market from DKK […] million in 2009 to DKK […] million in 2012 ([…] %). In combination with a projected loss of market share, TV2's advertisement revenues were projected to […] by […] %, […] % and […] % for the base, worst-case and best-case scenarios over the 2009-2012 period, equivalent to […] of […] %, […] % and […] %.

(41) TV2's advertising revenues have grown at a 1,9 % (geometric) average rate over the period 1999-2009 with a 12 % standard deviation ([31]). Hence, given the business-cycle sensitivity of TV2's advertising revenues and the general economic outlook at the time of the assessment, the PWC projections for the 2009-2012 period cannot be rejected as unreasonable.

(42) The PWC report was updated in September 2009 to take account of more recent expectations regarding advertising revenues, and provided for a worse scenario than expected in the base scenario ([32]). The TV advertising market dropped in 2009 by 18,7 % compared with 2008 ([33]). TV2's advertising revenues fell by 4 % in 2008 (DKK 1 667 million to DKK 1 597 million) and a further 24 % in 2009 (DKK 1 597 million to DKK 1 220 million) ([34]).

(43) Denmark submits that TV2's difficulties are a result of debt caused by large investments in the preceding years, uncertainty as to the outcome of the pending State aid case concerning TV2 and, not least, a business model for the public service channel which is based on advertising revenue only. The radio operations in particular have caused significant losses since the start-up in 2007. In April 2008, it was decided to close down the radio operations.

(44) **Lack of external funding from banks:** The restructuring plan takes into account the doubts TV2's bankers have about the main channel's current business model and about the possible outcome of ongoing legal cases regarding past aid to TV2. The restructuring plan limits the banks' risk exposure to the company through further reductions of current loans or credit facilities. Denmark has provided evidence that on 22 April 2009, following the publication of the company accounts, the company's main bank […] asked to reduce its loan and credit facility vis-à-vis the company ([35]).

(45) TV2 experienced difficulties in mortgaging its premises in Odense and reported that not only the value of the buildings, but also the potential mortgage, had decreased ([36]). In the end, TV2 secured a loan of DKK 80 million from Nordea bank, which was less than expected. Denmark later provided updated information regarding the banks' lack of interest in providing commercial loans. From this information it can be seen that none of the banks contacted ([…], […], […] and […]) considered TV2 creditworthy. This was due to expectations regarding the development of the advertising market, which is TV2's only source of income. TV2's earning ability was questioned, and pending legal cases were considered a further risk factor ([37]).

2. **Description of the originally notified restructuring plan and its amendments**

(46) The restructuring plan as notified for TV2 runs between 4 February 2009 and 31 December 2012. It aimed to address TV2's business weaknesses, notably an imbalance towards short-term debt in the balance sheet and a business model for the public service channel that is deemed unsustainable due to its reliance on funding via cycle-sensitive advertising revenues. The plan had the following five main components: (i) financial restructuring affecting the balance sheet, (ii) operational restructuring, (iii) new financing of the public service channel TV2 by introducing a new business model, (iv) aid measures and (v) compensatory measure(s).

([31]) Comments by TV2 to the European Commission dated 25 August 2009.

([32]) Letter from Denmark of 9 September 2009, Annex 2 — updated PWC report.

([33]) Letter from Viasat of 26 May 2010, p. 2 with reference in footnote 2 to the DRRB. The value of the advertising market was DKK 1 903 million in 2009, compared with DKK 2 341 million in 2008. See also the updated PWC report, letter from Denmark of 9 September 2009, Annex 2.

([34]) Comments from TV2 to the European Commission dated 25 August 2009 (p. 20) and Annex 1 to the submission of Denmark of 29 January 2010, 'Status of TV2's financial position and liquidity', point 5, submitted by TV2.

([35]) This has been confirmed by […] in writing in a letter dated 24 April 2009.

([36]) Letter from Denmark of 29 January 2010, Annex 1 'Status of TV2's financial position and liquidity', point 4.

([37]) Letter from Denmark of 29 January 2010, Annex 1, submission by TV2 'Status of TV2's financial position and liquidity', point 4.

(47) The **financial restructuring measures** were to consist primarily of the following four elements: sale of the 50 % ownership interest in the broadcast transmission network BSD ([38]), mortgaging of the business premises in Odense (Kvaegtorvet), which was expected to generate DKK […] million, postponement and scaling down of planned capital investments and divestment of minority interests held in certain companies active in adjacent media sectors, […], Momondo, […] and […]. Those measures were expected to bring proceeds in excess of DKK […] million, part of which was to be used to reduce short-term borrowing.

(48) The **operational restructuring measures** expand on the cost-saving measures worth DKK 280 million already initiated in 2008, and include the closing down of East Production and its integration into TV2, the closing down or downsizing of TV2's interest in […] and further cost savings of an amount of DKK 40 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 DKK 30 million, as well as further recurrent cost reductions amounting to DKK 97 million ([39]).

(49) A new **financing measure (the end-user charge)** ([40]) is intended to broaden the sources of stable revenue for the public service channel TV2. The decision regarding this was adopted in an agreement of 9 January 2009 between the main political parties concerning an amendment to the Media Policy Agreement for 2007-2010.

(50) **Levying of subscription fees:** The business model for the main channel is to be rendered sustainable by allowing TV2 to introduce end-user charges, i.e. subscription fees, to fund the public service channel as from 1 January 2012. In addition, TV2 will continue to receive advertising revenues.

(51) The fees will be charged by the distributors to the end users. The charge to be paid by the end user will not be set by the Government, but agreed upon through normal commercial negotiations between TV2 and the distributors (i.e. for DTT Boxer). TV2 expects the monthly price charged by TV2 to the distributor to be around DKK 10-12 (excl. VAT) per household ([41]). The introduction of user charges from 2012 aims to allow sufficient time for 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. Denmark expects that the introduction of this element of the restructuring plan will restore the long-term viability of TV2. TV2 expects an estimated DKK […] million net increase in revenues from the user charges in 2012 ([42]).

(52) 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 upon the introduction of the user charges ([43]). This follows from the wording of Chapter 6, Section 38a(2) of the current Danish Broadcasting Act, which states that if the Minister of Culture allows TV 2 to charge user fees, the must-carry status shall cease to exist. In other words, the must-carry obligation ceases automatically with the introduction of user charges. It is expected that the TV2 main channel will de facto be distributed by the cable networks and antenna associations in the same way as today. The package structure might be altered by the distributors, with TV2 replacing an existing pay channel.

(53) It was originally anticipated that exceptions would be made to the possibility of levying end-user charges and that TV2 would not charge end users who did not receive any other pay-TV channel (known as the TV2 Alone card system). This would have meant that end users who only receive free-to-air (FTA) channels could still view TV2 free of charge. This possibility, which was contained in a draft proposal by the Ministry of Culture of 18 November 2010, will not, however, be implemented. TV2 will consequently, as of 2012, charge all end users who wish to receive TV2 to view the public service channel. The possibility of charging end-user fees requires a change in TV2's licence conditions, which will be carried out by the Ministry of Culture.

(54) **The originally notified aid measures:** As originally notified, three aid measures totalling a maximum of DKK 1 375 million were envisaged to accompany the restructuring. These were:

— a DKK 300 million subordinated loan,

([38]) TV2's shares in Digi-TV will not be sold, only the direct participations and shares in Fordelingsnet and 4M. See information memorandum by Denmark, 'Project MUX'.

([39]) These cuts include the cancellation of investment in a new channel in 2009/2010. See letter from Denmark of 20 May 2009.

([40]) Hereinafter also called 'subscription fee' or sometimes 'short user fee'.

([41]) Letter from Denmark of 11 March 2011, Annex containing new media agreement. The Danish authorities indicate that TV2 is considering a lower subscription fee than the originally envisaged DKK 25. TV2 indicates a monthly charge in the range DKK 10-12.

([42]) Letter from Demark of 17 March 2011, p. 3. Based on an estimated monthly fee of DKK 12.

([43]) Notification from Denmark of 4 February 2009, p. 6.

— the issue of a guarantee for the sale of the broadcast transmission network for an expected sale amount of DKK 475 million, and

— a temporary credit facility of an initial amount of DKK 600 million if TV2 is unable to secure external financing.

(55) Denmark stated that interest rates and guarantee fees would be similar to those for healthy firms. These measures were never put into place. Further details can be found in the Commission's decision opening the formal investigation procedure ([44]).

(56) The rescue aid credit facility of DKK 1 000, as authorised by the Commission decision of 4 August 2008, remains in place.

(57) Denmark submitted information on the **restructuring costs** and offers two different calculation options in that regard. Firstly, it argues that the restructuring of TV2 is a financial restructuring in which the costs for filling the liquidity gap are in fact restructuring costs, i.e. the costs for ensuring long-term viability. Denmark considers that whatever these costs are, they will have been paid entirely by TV2 itself. The reason for this is that Denmark assumes that by the time of the Commission's decision, all aid measures will either not have been implemented, or will have been repaid in full ([45]). Denmark also states that in the special case of the TV2 restructuring, cost savings should also be acceptable as restructuring costs, since the cost savings are intended not only to increase competitiveness, but also ensure TV2's financial viability from a purely commercial point of view ([46]). In the alternative, a more traditional calculation of restructuring costs, in which cost savings are not included, would lead to focus on the one-off extraordinary costs incurred, which Denmark lists as DKK […] million for transaction costs for the transmission network, the costs associated with the transfer to pay-TV (user charges) and legal and consultancy costs as well as costs for ending staff contracts ([47]).

(58) As a **compensatory measure**, TV2 originally undertook not to open new TV broadcasting channels throughout the restructuring period, i.e. until 31 December 2012. Denmark points out that this is a sacrifice by the company, as new channels would make TV2 less dependent on advertising revenues. In the digital world, viewers are more frequently addressed via specialised viewer channels, and TV2 points out that its competitors are opening new channels during this period.

(59) Regarding the **duration of the restructuring plan**, which was notified as being until 31 December 2012, the Danish authorities submitted that it is in TV2's interest to replace all State aid at an earlier point in time, thus enabling the restructuring period to end at an earlier date if possible ([48]).

3. **Further developments during the restructuring process**

(60) As stipulated in the restructuring plan, TV2 sold its broadcasting network on 30 September 2010 to the Swedish company Teracom AB, the owner of Boxer. The sale proceeds for TV2 are approximately DKK 640 million before tax, which has been used to reduce TV2's debt.

(61) TV2 was also able to mortgage its business premises in Odense, but at a lower rate than originally anticipated. Instead of […] million DKK, it obtained a mortgage of only DKK 80 million.

(62) On 4 October 2010, TV2 repaid all its withdrawals from the temporary credit facility, which was authorised in the Commission's rescue aid decision. In total, TV2 had drawn DKK 223 million from the rescue aid facility. By the end of 2008, i.e. during the 6 months of the rescue aid period, TV2 had drawn 208 million ([49]). In light of the sale of the transmission network, which was more successful than estimated in the restructuring plan, Denmark sent the following amended figures on TV2's financial situation (based on subscriptions to the main channel) ([50]).

([44]) Commission decision of 2 July 2009, paragraph 20.
([45]) Letter from Denmark of 3 February 2011, p. 2.
([46]) Denmark thus finds that all the costs listed in the Commission's letter of 14 January 2010 to be relevant restructuring costs, i.e. DKK […] million plus additional costs for the mortgage. The table in that letter by the Commission corrected a few positions from an earlier submission by Denmark as reproduced in the Commission decision opening the formal investigation procedure on 2 July 2009.
([47]) Letter from Denmark of 3 February 2011, p. 6 and Annex 1, which was later partially amended with regard to the cost of introduction of the end-user charges system by letter of 17 March 2011.
([48]) Notification from Denmark of 4 February 2009, p. 8.
([49]) Letter from Denmark of 29 January 2010, Annex 1 'Status of TV2's financial position and liquidity', end of point 3.
([50]) Letter from Denmark of 15 October 2010, later amended by figures submitted on 17 and 18 March 2011. The forecast for 2011 takes into account that the TV2 Alone card system was given up, which resulted in a lower household penetration rate. The figures also take into account the lower than originally forecast end-user charges of DKK 10-12 and higher than expected advertising revenues. The figures include the subscription revenues for the main channel as of 2012 as well as the cost of transition to pay-TV in 2011.

(million DKK)

	Realised 2009	Estimate 2010	Forecast 2011	Forecast 2012	Forecast 2013
Revenues	2 029	2 147	[…]	[…]	[…]
Costs	– 1 910	– 1 974	[…]	[…]	[…]
EBIT	– 2	25	[…]	[…]	[…]
Profit before tax, continuing activities	– 28	42	[…]	[…]	[…]
Profit before tax, discontinuing activities	1	397	[…]	[…]	[…]
Profit after tax	– 14	353	[…]	[…]	[…]
Equity end of year	601	952	[…]	[…]	[…]
Net interest-bearing debt end of year	659	– 84	[…]	[…]	[…]

(63) On 13 October 2010, […] offered to provide TV2 with additional credit facilities worth DKK […] million. This would increase TV2's long-term facilities at […] from […] million to DKK […] million ([51]). The offer is however subject to the following two conditions:

(a) […];

(b) […].

(64) On that basis, TV2 expects to have financial facilities in the range of around DKK […]-[…] million until the end of 2012. This consists of DKK […]-[…] million and the additional external credit facilities of DKK […] million ([52]).

(65) Denmark also provided data on TV2's capital structure. Due to problems in receiving external financing, in turn due to uncertainty surrounding the pending legal cases and TV2's business model which is sensitive to advertising revenues, Denmark argued that TV2 should rely less on debt than on equity. The Commission also observes discrepancies between the degree of equity funding of TV2 compared with its peers.

(66) More specifically, the capital structure can be assessed in terms of solvency ratio, i.e. the ratio of book equity to balance sheet total. PWC (Denmark's financial consultancy firm) demonstrates that the average (median) solvency ratio of TV2's peers is approximately […] % ([…] % at the end of 2009) ([53]). The average solvency ratio of TV2's peers is significantly lower than the solvency ratio that TV2 is expected to have at the end of the restructuring period. After the sale of the transmission network, the TV2 solvency ratio is […] % at the end of 2010. It is projected to reach […] % at the end of 2011 and […] % at the end of 2012. According to the latest forecasts submitted by TV2, the net debt ratio (net interest-bearing debt over EBITDA) should be approximately […] at the end of 2010, […] at the end of 2011 and […] in 2012. The average (median) net debt over equity ratio at the end of 2009 is […] ([…]) for a sample of TV2's peers ([54]).

4. **Impact of the new financial parameters on the notified restructuring plan**

(67) Denmark confirmed that none of the originally proposed three aid measures in the restructuring plan has ever been put into place, but that Denmark awaited the Commission's decision in accordance with the standstill obligation of Article 3 of Regulation (EC) No 659/1999 ([55]). In light of recent developments, however, only the loan and the credit facility under the restructuring plan as it currently stands are relevant ([56]). The notified aid measure of a proposed guarantee in relation to the sale of the broadcasting network has become irrelevant and inoperable ([57]), since the sale has been carried out successfully without a guarantee in place ([58]). In the meantime, only the temporary credit facility is in place.

([51]) Letter from Denmark of 15 October 2010, pp. 2 et seq.
([52]) Letter from Denmark of 15 October 2010, Annex 1 TV2 restructuring plan, end of p. 2.
([53]) Letter from Denmark of 9 July 2010, Annex TV2 Financial questions.
([54]) Letter from Denmark of 15 October 2010, Annex I, TV2 restructuring plan, and update by e-mail from Denmark of 6 April 2011.
([55]) Letter from Denmark of 15 October 2010. In particular, no guarantee has been issued.
([56]) Letter from Denmark of 3 February 2011.
([57]) Letter from Denmark of 15 October 2010, p. 2.
([58]) Denmark had explained in the meeting with the Commission in September 2010 and reiterated in the letter of 15 October that TV2 had no legal claim under the guarantee, and that it was simply a proposal subject to the Commission's approval, and did not involve state resources since it was not binding on the Danish Government.

In view of the improved financial position of TV2 after the sale of the broadcasting network, Denmark stated that all aid measures can be abolished on the sole condition that the restructuring plan is approved (including the possibility of implementing end-user charges) and that the Commission adopts a decision in the 'old' State aid cases that does not involve any additional repayment of State aid to the Danish Government ([59]). In such a scenario, TV2 says it will have sufficient financing until 2012, when the subscription payments on the main channel will be implemented ([60]). The restructuring plan as such is not withdrawn. Regarding the rescue aid facility still in place, TV2 is currently unable to draw any money from it, because the conditions (certified liquidity need confirmed by an expert) are not met ([61]).

(68) In the original restructuring plan, Denmark had given a commitment that TV2 would not open any new TV broadcasting channels. That commitment was later clarified to also cover radio channels, but the Danish authorities take the view that this compensatory measure should end when all aid measures are repealed, as they consider this to be the end of the restructuring period ([62]). During the Commission's investigation, the Danish Government decided to put a public service radio channel out to tender ([63]). The objective of this new radio channel is to establish competition on the Danish radio market for public service programming which, presently, is dominated by the public broadcaster DR with an almost 80 % audience share. TV2 originally intended to participate in such a tender, in which a bid could be submitted only after aid measures had come to an end. However, during the investigation Denmark confirmed that TV2 will not participate in this tender, due to the Commission's ongoing investigation ([64]).

(69) TV2 states that as long as legal cases are pending, only earning ratios are an adequate benchmark for assessing TV2's financial position in relation to its competitors. However, TV2 acknowledges that capital ratios (like the solvency ratio) will become meaningful only when the uncertainties of business model and the legal disputes have been resolved ([65]). The Danish Government expressed its intention that TV2 should not be overcapitalised and is willing to introduce measures to ensure that this objective will be achieved once the end-user charges are introduced in 2012. The Danish Government, as the owner of TV2, will ensure that once the user charge has been introduced and the financial situation normalised, TV2 will have a capital structure in line with normal market conditions.

(70) To that end, Denmark has committed to instructing an independent financial expert at the end of 2012 or early 2013 to conduct an analysis of TV2's capital structure, comparing it with the capital structure of other relevant media companies. If TV2's capital structure deviates markedly from the median or average of the relevant peer group, the Danish Government has made a commitment to adjust the capital structure at the meeting of the General Assembly in April 2013, to rectify the situation. If there are substantial reasons not to adjust the capital structure, the Danish Government will notify the Commission of an amendment to the restructuring plan. The Danish Government undertakes to achieve restructuring of the capital base by dividend payments to be adopted at the General Assembly in April 2013, and not by increasing TV2's debt, thereby expanding the balance sheet.

(71) Denmark has also undertaken to submit the analysis to the Commission, along with the Government's plans for acting in accordance with the analysis, in good time before the April 2013 meeting.

V. SUMMARY OF THE COMMISSION'S OPENING DECISION OF 2 JULY 2009

(72) In the decision to initiate the formal investigation, the Commission found that the notified loans and guarantee in the restructuring plan constituted State aid within the meaning of Article 87(1) EC, now 107(1) TFEU, and examined the compatibility of the restructuring plan under Article 87(3)(c) EC, now 107(3)(c) TFEU, in conjunction with the Commission's restructuring Guidelines ([66]). The Commission, however, invited comments on whether the application of Article 87 of the EC Treaty (107 TFEU) would obstruct the performance of the public service broadcasting task entrusted to TV2.

([59]) Letters from Denmark of 28 January 2011 and 15 October 2010. The letter of 15 October refers only to the decision of 19 May 2004.

([60]) TV2 restructuring plan, Annex I to the letter of 15 October 2010. TV2 submits that the first two aid measures anticipated in the restructuring plan are no longer valid because of the sale of the transmission network. As to the credit facility, TV2 believes itself to have sufficient financing until 2012 when subscription payments on the main channel will be implemented. In referring to the credit facility of DKK […] million, TV2 at the same time confirms that none of the aid measures in the restructuring plan have been implemented. It is therefore likely that TV2 is referring to the original rescue aid facility.

([61]) For a more detailed description, see N 287/08, paragraphs 13 et seq., in particular paragraph 17.

([62]) E-mail from Denmark of 24 February 2011.

([63]) The tender documents are available at: http://www.bibliotekogmedier.dk/medieomraadet/radio/fm-4/udbud See also the Commission decision of 24 March 2011 in SA.32019, Danish Radio channel FM4.

([64]) E-mail from Denmark of 24 February 2011.

([65]) Letter from Denmark of 9 July 2010, Annex, TV2 Financial questions.

([66]) See footnote 4.

(73) The Commission raised doubts about the compatibility of the notified restructuring plan in the following respects:

— While accepting for the time being that TV2 Danmark A/S was a firm in difficulty within the meaning of the Guidelines, the Commission invited comments given that competitors of TV 2 had pointed out that the cash flow problems were self-inflicted, easily solved and without bearing on the fundamental viability of the company. Competitors also claimed that TV2 was profitable in 2008.

— In addition, taking into account that a restructuring plan must involve the abandonment of activities which would remain structurally loss-making even after restructuring ([67]), the Commission questioned whether the measures in the restructuring plan were able to render TV2 profitable on a stand-alone basis. Nor was the Commission in a position to corroborate the validity of the general market assumptions underlying the plan (e.g. developments in the advertising market, GDP growth, TV2's maintenance of audience shares).

— Given the economic situation in which the restructuring plan is launched, its long duration was questioned.

— Moreover, since a successful implementation of the financial and operational restructuring measures included in the restructuring plan by 2010-2011 could render the introduction of user charges on the TV2 channel unnecessary for ensuring the long-term viability of TV2 Danmark A/S, and because there was no assessment of the effects of these charges on competition, the question was raised as to whether the automatic phasing-in of these charges by 2012, which has already been decided, is appropriate.

— The Commission raised concerns as to whether the sole compensatory measure of a stand-still on launching new TV channels is proportionate to the aid, size and relative importance of TV2 Danmark A/S on the markets on which it is active ([68]).

— The Commission raised the issue of whether the aid, beyond the contribution to restructuring costs, could be used to finance aggressive market behaviour.

VI. **SUMMARY OF THE VIEWS OF THE DANISH AUTHORITIES**

(74) It should be noted that in the following summary of the comments of Denmark and third parties, no comments have been reproduced which relate to the operation of the TV2 Alene card system, as this part of the restructuring plan will not be implemented.

TV2 is a firm in difficulty

(75) The Danish authorities claim that TV2 is a firm in difficulty, as shown by a PWC report ([69]), which was later updated ([70]). That view was also maintained in reaction to third-party comments ([71]).

(76) According to a PWC report carried out shortly before the restructuring notification, TV2 cannot recover through its own resources or by market financing. Denmark also claims that the restructuring plan submitted to the Commission is based on realistic assumptions and scenarios, while showing that the company's long-term viability will be restored. The advertising market has deteriorated, however, relative to the base scenario of the restructuring plan. The advertising market dropped by 19 % in the first half of 2009 and TV2's advertising revenues fell by 24 % in 2009. The restructuring measures will be implemented as soon as possible, except for the introduction of user charges, where operational and technical difficulties require postponement until 2012. Moreover, in a later submission, Denmark, again basing itself on PWC projections, claimed that the forecast had in fact deteriorated since the original restructuring plan and that TV2's EBIT in 2009 was DKK […] million lower than estimated in the restructuring plan ([72]). Denmark also points out that, as proven by statements from various banks, the company is not able to obtain external funds because the banks doubt the business model for the main channel, are critical of cyclical advertising revenues as a source of income and view the uncertainties stemming from pending legal cases as problematic.

(77) The operational and financial restructuring measures are analysed as being the maximum that can be undertaken without compromising the quality of programming in the public service channel TV2. The measures will force TV2 to better exploit its assets, thus reducing the aid to the minimum necessary.

(78) Since the sale of the broadcasting network had proven to be more successful than anticipated, the Government later gave assurances that all aid measures could be repealed and not implemented once the Commission approved the restructuring plan and the pending State aid case of 19 May 2004 has been settled without higher repayments ([73]).

([67]) Guidelines, points 34-36.
([68]) Guidelines, points 38-40.
([69]) Letter from Denmark of 9 September 2009, p. 10, referring to the notification dated 4 February 2009 and the arguments for the rescue aid notification.
([70]) Annex II to Denmark's letter of 9 September 2009.
([71]) Letter from Denmark of 29 January 2010.
([72]) Letter from Denmark of 9 September 2009, p. 14.
([73]) Letter from Denmark of 15 October 2010.

End-user charges

(79) User charges, which do not qualify as State aid, provide a more stable operating income and will reassure banks as to TV2's business model. As a result of the restructuring, the EBIT margin of the company as a whole would allegedly be between […] and […] %, which would allow it to manage on its own funds.

(80) Although changes in the pricing and structure of the distributor packages are impossible to predict, the introduction of user charges for TV2 should not lead to indirect financing from, or capacity reduction for, TV2's competitors. This new financing is regarded as a change in TV2's baseline long-term financing conditions which will put TV2 on equal footing with its private competitors ([74]).

Compensatory measures

(81) Finally, the Danish authorities claim that the proposed compensatory measure of a standstill on launching new TV broadcasting channels (now also radio channels) constitutes a real sacrifice for TV2 Danmark A/S, owing to its interest in a diversification strategy to maintain its overall market share, the loss of revenue incurred and the first-mover advantage that it will confer on competitors, which are currently launching new channels and will continue to do so. Denmark later took the view that the measure should end when all aid measures have been repealed, i.e. as of the date of this Decision.

(82) As to the idea suggested in the opening decision — of amending TV2's capacity to broadcast premium content — Denmark points out that TV2's public service obligation covers sports, including major sporting events, and aid to film production. In addition, Denmark argues that the standard contracts preclude TV2 from assigning rights to third parties, which stands in the way of auctioning.

Legal basis

(83) Denmark considers that the restructuring process complies with the provisions of Article 107(3)(c) TFEU. However, Denmark acknowledges that according to the PWC income projections, the main channel would still be loss-making after the end of the restructuring period ([75]). Denmark points out that TV2 is obliged to fulfil a public service mission, which it cannot fail to discharge. This special situation of TV2, due to its public service mission, should be taken into account when assessing the case under the rescue and restructuring Guidelines or Article 106(2) TFEU. It would be commercially pointless to close the public service channel, as it provides for significant synergies between the main and the niche channels.

([74]) Letter from Denmark of 9 September 2009, p. 16.
([75]) Letter from Denmark of 9 September 2009, pp. 10 and 11.

VII. SUMMARY OF THE VIEWS OF INTERESTED THIRD PARTIES

TV2

(84) In its comments, TV2 first refers in general to what it considers to be key points in the assessment of the restructuring plan.

Public service obligations of TV2 and legal basis

(85) TV2 claims that its principal activity lies in extensive and expensive public service obligations that govern the enterprise's main channel. TV2 states that such activity currently accounts for more than […] % of the costs of the main channel.

(86) TV2 refers to the political decision that led to the current situation. The Danish Government and the parties that supported the current Media Policy Agreement agreed that under the restructuring plan, public compensation would not be reintroduced for expenses that TV2 bears in discharging its public service obligations. It was decided, on the other hand, to introduce a sustainable market-based business model for TV2 which would ensure that the enterprise could compete on the relevant markets despite its public service obligations, a decision welcomed by TV2. TV2 argues that the most important element in this context is the removal of the previous ban on the levying of user charges for the main public service channel, effective from 1 January 2012. TV2 claims that the aid does not entail operational or commercial advantages, but simply ensures that TV 2 will be able to use financing options open to its competitors. TV2 argues that its main channel cannot be seen in isolation, as both the main channel and the niche channels underpin the group's financial result. TV2 cannot, in any case, fail to discharge its public service mission, which should be acknowledged when applying the Guidelines or Article 106(2) TFEU.

The competition situation

(87) TV2 notes that despite the fact that it dominates the Danish television advertising market, competition in this market is strong and is characterised by the presence of financially robust multinational groups. TV2 also claims that its main competitors are not prevented from entering the market, since they have launched a number of new channels in the Danish television market (e.g. SBS 6 (Pro 7), TV3 Puls (MTG) and Canal 9 (Bonnier)).

(88) Moreover, in relation to the competition situation within the Danish television market, TV2 claims that it has experienced significant reductions in both market and audience shares ([76]), which […], inter alia because of the switching-off of the analogue signal in November 2009. TV2 also argues that the ban on launching new television channels until 2012 will further reduce TV2's competitiveness and thus weaken the enterprise.

(89) As regards the pay-TV market, TV2 points out that the group does not have a dominant position on this market, while also noting that the only major Danish commercial TV channel not operating on the market is TV2's public service channel. Furthermore, TV2 estimates that the niche channels currently have a share of approximately […] % of the pay-TV market, and expect the station's total market share to rise to around […]-[…] % once TV2 can start levying user charges for the main public service channel in 2012.

Firm in difficulty/duration of the restructuring plan

(90) TV2 points out that it was not able to obtain any loans from banks and that it was not even easy to get a mortgage for its property in Kvaegtorvet. TV2 points out that the uncertainty resulting inter alia from the open State aid cases has deterred banks from providing the necessary financing. TV2 considers the duration of the restructuring plan to be appropriate and points out that any improvement in its financial situation will only affect its draws on the credit facility, and not its business model, which should ensure TV2's profitability in the medium and long term.

End-user charges

(91) TV2 argues that the introduction of end-user charges for the main public service channel does not entail State aid, but merely gives the channel the same opportunities as its competitors to use the market's most conventional means of operating on the market, namely charging users who choose to use its services. Distortion of competition could be remedied by applying Article 101 or 102 TFEU. According to TV2, the end-user charge, among other elements of the restructuring plan, does not entail any distortion of competition on the relevant markets. TV2 argues in this respect that the plan will ensure that the TV2 group, particularly the main public service channel, will have the necessary liquidity until the introduction of end-user charges. TV2 also states that an alternative re-introduction of non-market based funding as public service compensation would not be preferable to the introduction of end-user charges, in terms of State aid law.

Compensatory measures

(92) TV2 stresses that being prevented from launching new channels is a real sacrifice. It points out that with the digital switchover and sale of its network, it loses the advantage it has hitherto enjoyed via its co-ownership of the network. In response to the opening decision's question of whether the sale of certain programmes to third parties or restrictions on broadcasting (e.g. sports) should be considered, TV2 responds that the standard contracts bar TV2 from assigning rights to third parties. Danish fiction and sports are part of TV2's public service programming.

SBS

(93) SBS sees no reason why a series of possibly bad management decisions should lead to a change in the financing model with significant distortive effects on competition. SBS asserts that leaving bad investment decisions aside, TV2 had positive results in the 2004-2008 period and enjoys a dominant position on the TV advertising market. It is furthermore of the opinion that the restructuring plan goes far beyond what is necessary. The net present value of the right to charge end-user fees is much greater than the estimated optimal equity as identified in the recapitalisation decision. SBS also raises the point that aid granted to the regional channels in the form of licence fees of some DKK 400 million annually should be included in the assessment of the impact of the restructuring plan.

Firm in difficulty

(94) SBS claims that neither TV2, nor any of its subsidiaries, is eligible for aid under the restructuring guidelines. In this respect, SBS points out that TV2 Denmark, in its first half-yearly report for 2009, had a net equity of DKK 644,9 million, and that the company does not fulfil the criteria for insolvency proceedings. Any loss resulting from the public service obligation should be analysed under Article 106(2) TFEU, which has not been invoked by the Danish Government.

(95) SBS argues that the cost allocation between the different parts of the TV2 group must be properly assessed, especially since the costs of the niche channels are very low compared to those of competitors. The main channel was regarded as a stand-alone operation which could be made profitable by proper pricing standards.

([76]) See recital 38.

(96) SBS asserts that the TV2 Group was profitable in the 2004-2008 period, if the now abandoned loss-making activities such as TV2 Radio and the impact of the Commission's recovery decision are taken out of the equation. In any event, TV2 could become profitable, e.g. by reducing costs.

(97) SBS furthermore takes issue with the market analysis supplied by Denmark. SBS particularly disagrees with the outlook for the advertising market, which it expects to grow from 2010 ([77]).

(98) SBS states that the restructuring plan, if it is to be approved at all, should be limited to the time it would take to sell off assets to address liquidity issues.

End-user charges

(99) SBS states that the introduction of end-user charges will in practice have the same effect as an increase in licence fees, and should be classified as State aid in line with Case C-206/06 *Essent Netwerk Noord BV*. There are significant differences from Case C-345/02 (*Pearle*), because the measure was introduced on the sole initiative of Denmark and TV2, and because user fees are not earmarked for specific purposes chosen by the viewers.

(100) SBS stresses the importance of analysing end-user charges within the framework of the restructuring aid. An agreement to introduce end-user charges is likely to affect TV2's market behaviour and that of relevant third parties such as banks, as of the date of approval of the restructuring plan rather than the date of implementation of the end-user charges. It further criticised the fact that there is no cap on the amount of end-user charges which TV2 is able to levy, nor any conditions regarding its use. End-user charges can also be used to finance commercial activities.

(101) SBS states further that the introduction of end-user charges cannot be reconciled with the concept of public service. This means that the restructuring aid as such cannot be justified under Article 106(2) TFEU unless the plans for user charges are dropped. SBS also states that the anticompetitive effects of the user charges are clear, and particularly that it may lead to some operators having to leave the market and that it will also allow TV2 to invest even more aggressively in new content. This is a bad thing, particularly because TV2 is exceptional in that it holds a dominant position on the advertising market.

Compensatory measures

(102) SBS claims that there is a need for sufficiently strict compensatory measures. It therefore suggests that TV2, firstly, should not be allowed to introduce user charges. Secondly, public tendering should be introduced to ensure more correct internal transfer pricing when programmes are sold from TV2 to its subsidiaries. Thirdly, TV2 regional channels could be transferred to Danmarks Radio, since the regional channels receive substantial amounts of State aid and because households paying a licence fee and also receiving pay-TV would be paying twice for the TV2 regional channels. Fourthly, TV2 should be required not only to not launch new commercial channels, but also to sell at least some of the existing channels. Lastly, TV2 should be obliged to allow advertising from competing operators on its network.

(103) SBS also suggests that a number of safeguards should be put in place so as to ensure that TV2 does not use the aid and/or user charges to distort competition. Firstly, Denmark should not be allowed to apply discriminatory user charges. Secondly, TV2 should not be allowed to bundle the main channel with the other channels on the distribution market, and TV2 should be obliged to supply TV2 as a stand-alone channel. Thirdly, TV2 should be barred from using the aid or user charges for any activity other than the main channel, and from dumping prices in the advertising market. Fourthly, TV2 should be obliged to give an undertaking that it will not use non-transparent rebates.

MTG/Viasat (Viasat)

Firm in difficulty

(104) Viasat asserts that TV2 is not a firm in difficulty, pointing in particular to the profit in 2008. It claimed that TV2 would be profitable in the future, referring, inter alia, to TV2's profit for the first half of 2009 (which forecast a profit of DKK 249 million before tax). In view of the later information that TV2 in fact made a loss for 2009, Viasat considers this minor loss to be associated with an overall drop in the advertising market of 18,7 % compared to 2008. It shows that TV2 has now managed to adjust its costs to the current commercial and financial environment. As concerns the losses in 2007, Viasat points out that these are mainly due to TV2 Radio,

([77]) SBS, on page 13 of its letter of 2 October 2009, says that a fall in advertising revenues of 10 % per year is highly unlikely. However, as this will be seen later, this seems to be based on a misunderstanding of the PWC report, which does not indicate a 10 % annual decrease.

which has subsequently been sold off. TV2 did have a decrease in turnover in 2008, but so did most firms, and TV2 still managed to increase its pre-tax profits.

(105) Viasat claims that there is no evidence of short-term cash flow needs. TV2 has, on the contrary, recently spent a considerable amount on new film acquisitions, and has also increased its costs, which according to Viasat is due to an increase in its programming stock, a cost increase in the area of general fiction and over-investment in expensive Danish fiction ([78]).

(106) In more detail, Viasat stresses that even though a large part of TV2's interest-bearing debt is still short-term, this is not a problem as long as TV2 can refinance it. TV2's financial costs dropped in 2009 from DKK 49,2 million to DKK 19 million. TV2 has also spent substantial funds on new content acquisition. Furthermore, the negative cash flow in the 2006-2008 period was mainly due to unusually large investment activities, and not costs related to TV2's operating activities. The negative cash flow could thus have been eliminated by postponing or reducing investments. In the same vein, the reason why TV2 had an increase in its debt was that TV2 invested heavily during 2006-2008.

(107) Viasat also points out that the interest burden seems to have decreased as of 2008. Viasat also questions whether TV2 has problems in obtaining loans, since it seems that TV2 sought to obtain loans from Danske Bank only. Moreover, this took place at a time when it was more difficult to obtain a loan than it is now.

(108) Regarding the exogenous factors, Viasat agrees with the assumption in the opening decision of a 1,02 % GDP growth per year. Viasat especially notes that the forecasts concerning the growth of the advertising market made by PWC, on which the Danish Government relies, are substantially more conservative than those by others, especially forecasts made by firms that are active on the market. In its comments on the opening decision, Viasat provides its own forecast for the TV2 group for the 2009-2019 period (report Audon Partners), which shows that TV2 will not be condemned to going out of business in the short or medium term.

(109) As regards the profitability of the public service channel, Viasat stresses that the TV2 Group consist of such synergies that it is impossible to consider the profitability of each activity in isolation. The main channel should thus not be assessed in a stand-alone perspective. Notwithstanding this, the transfer pricing between TV2 and the niche channels is flawed as the price is significantly less than cost. Viasat supplies calculations of profitability in which costs are split according to the channels' turnover. Viasat also states that when compared to the performance of comparable media companies, the niche channels' financial performance strongly suggests that the segmented reporting in the TV2 group should be disregarded. Viasat finally remarks that TV2 could auction the right to retransmit its most attractive programmes, excluding sporting events, e.g. drama, fiction and documentaries, to boost profits for the main channel. Viasat also fears that the aid could be used for aggressive market behaviour and states that TV2 in the past invested in drama series acquisitions by outbidding competitors, raised prices for TV2 news and granted rebates.

End-user charges

(110) Should the Commission come to the conclusion that there is a need for aid, that aid should target the immediate problem, i.e. the cash flow, rather than operations. This means that TV2 should not be allowed to become a pay-TV channel, as it would be sufficient to supply it with a credit facility. Moreover, the introduction of user charges will supply TV2 with funds with which it will be able to continue abusive behaviour in the advertising market, and risk eliminating competitors from the market. Viasat also questions whether the scheme is in line with TV2's universal public service obligation.

(111) Viasat primarily emphasises the anticompetitive impact of user charges, because these will push other operators' programmes towards more expensive programme packages, leading them to lose revenue from subscriptions and advertising.

Compensatory measures

(112) Viasat moreover claims that the compensatory measures suggested are in fact not a sacrifice, as there is no room for further channels anyway. As stated above, Viasat remarks that TV2 could auction the right to retransmit its most attractive programmes (excluding sporting events), e.g. drama, fiction and documentaries, to boost profits for the main channel.

Legal basis

(113) Finally, Viasat also states that it is unlikely that Article 106(2) could be invoked by the Danish Government.

([78]) Letter from Viasat on 26 May 2010, p. 4.

Boxer TV A/S (Boxer)

(114) Boxer states that the introduction of the user charges will partly remedy the current anticompetitive situation in which Boxer, unlike any other platform provider, cannot commercially utilise the fact that it broadcasts TV2. Boxer suggests that the pricing of TV2 should be made subject to control, either political or by the competition authorities.

Other parties

(115) Regarding the restructuring aid, some parties question whether TV2 is in difficulty (ASK) and whether the compensatory measures in a saturated market are not too weak (FDA). Some state, however, that if the company is in difficulty, user charges could be considered (DI, TDC). Some consider the restructuring period to be too long (Discovery). Others state that if TV2 will be an economically stable company by 2012, it should not be allowed to introduce the user charges.

(116) On the end-user charges: Some parties (Langkilde, MTV Networks AB, FDA, Discovery, Stofa) submit that the user charges will lead to small channels being pushed out of the existing pay-TV packages or to customers having to pay more.

(117) Some parties think that an end-user charge of DKK 25 is too high (FDA, TDC). FDA also thinks that the levy of such end-user charges is not compatible with TV2's role as a public service broadcaster.

VIII. ASSESSMENT UNDER THE STATE AID RULES

1. Scope of the assessment

(118) As can be seen from the submission of Denmark, the notified restructuring plan has not been withdrawn. Denmark states that there is no need for aid measures and that all aid measures will be repealed once the restructuring plan, including the end-user charges, has been approved and TV2 is not required to make additional payments resulting from the Commission's two previous investigations involving TV2 ([79]). In other words, the Commission has not yet received unconditional confirmation from Denmark that these measures are no longer part of the restructuring plan and thus no longer within the scope of the Commission's formal investigation.

(119) The only exception is the proposed guarantee of the broadcasting network sale, which will not materialise since this sale has already taken place and is therefore no longer relevant to the case. The Commission no longer considers this measure to be notified.

(120) In the following, therefore, the Commission will still assess the remaining notified measures (loan and temporary and restructuring credit facilities) as well as the credit facility from the rescue aid authorisation, which remains in place.

2. Presence of State aid within the meaning of Article 107(1) TFEU

(121) Article 107(1) TFEU states:

'Save as otherwise provided in the Treaties, 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 internal market.'

(122) In order for Article 107(1) TFEU 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.

2.1. *State resources*

Loan/credit facility

(123) The subordinated loan and the temporary credit facilities from the original rescue aid and under the restructuring plan ([80]) involve funds released by the Government with the agreement of the Folketinget from the general budget of Denmark, thus constituting state resources.

(124) Denmark submits that the interest rates and charges are those applied on the market for healthy firms. In applying the same conditions to a firm in difficulty such as TV2, Denmark is foregoing state resources. The reason is that a private creditor would take into account the financial difficulties of TV2 and would either not grant a loan or credit facility at all, or do so at rates which are higher than for healthy companies.

End-user charges

(125) The Commission finds that the right granted to TV2 to charge end-user charges as of 2012 does not constitute

([79]) Letters from Denmark of 15 October 2010 and 28 January 2011.

([80]) This has already been assessed in Commission Decision N 287/08 of 4 August 2008.

state resources within the meaning of Article 107(1) TFEU. The end-user charges are of private origin ([81]) and are paid directly by consumers to the distributor as remuneration for viewing the TV2 channel. TV2 has to enter into normal commercial negotiations with the distributor to have its channel included in a digital package and to agree on an acceptable remuneration. There is no legal provision which forces the distributor to carry the TV2 main channel in its package, since the current must-carry obligation laid down in Article 6 of the Danish Broadcasting Act will be repealed upon the introduction of the end-user charges system. Nor are the end-user charges, or their amount, under the permanent control of the Government, or available to it ([82]). The Government is not involved in any price setting, which is a commercial decision by TV2, nor does it collect the charges for TV2 or control or dispose of them in any way.

(126) The user charges cannot be equated with the charging of the licence fee, as claimed by SBS. SBS argues that the user charges will in practice have the same effect for households as an increase in the licence fee, since distributors' operating packages will always include TV2 Danmark. This compulsory element, Together with the fact that user charges can only be amended through a legislative amendment ([83]), should qualify them as State aid ([84]). In this regard, SBS cites the Court's case-law in Essent Netwerks ([85]).

(127) However, contrary to the previous licence fee arrangement in Denmark, which the Commission indeed regarded as State aid ([86]), end users are not legally obliged to pay the charges, but pay the remuneration as part of a contractual arrangement into which they enter voluntarily. Nor are the charges collected by a public institution as was the case for the licence fee, but by the private operator Boxer and other private distributors on the other platforms. The State will not be involved in any enforcement action in cases where users do not pay the charges; the distributor would have to bring a civil action to obtain payment.

(128) The fact that TV2 is granted the right to charge subscription fees by a change in the licence granted by the Ministry of Culture is not sufficient to find that state resources are involved. It is not a case of state intervention leading to a loss of state resources. In that regard, the reference by SBS to the Essent Netwerks case is not relevant. Paragraph 73 of the quoted judgment establishes a distinction between the situation in Essent and that of the Pearle case ([87]), by stating that in the former, the charge in question was embedded in a policy determined by the authorities. In order to distinguish the cases, the Court refers in Essent to the introduction of the charge by legislature, but does not stipulate that any state intervention by legislation automatically leads to an involvement of state resources. This is clear from the cited Essent judgment itself, since paragraph 75 of that judgment further distinguishes the case from the Preussen Elektra case, which did involve a legislative act (and in which no State aid was found to be involved) obliging electricity suppliers to purchase electricity produced in their area of supply from renewable sources at a minimum price. The Court states that in Essent, the undertakings in question had been appointed to 'manage a state resource', contrary to the situation in Preussen Elektra ([88]). In the case in question, TV2 is not called upon by the State to manage a state resource. The change in the licence implements only an already existing right to an additional source of income (for the legislation, see Section 38a(2) of the Danish Broadcasting Act).

(129) The Commission therefore finds that the end-user charges do not involve state resources within the meaning of Article 107(1) TFEU.

([81]) For payments between private undertakings see Case C-379/98, *Preussen Elektra* [2001] ECR I-2009. In this case, the State imposed the charging of a certain minimum price, while in the case at hand the Danish Government is enabling TV2 to charge user fees in the same manner as its competitors.

([82]) Case C-83/98 P *France* v *Commission* [2000] ECR I-3271, paragraphs 48 and 50, Case T-358/94, *Air France* v *Commission* [1996] ECR II-2109.

([83]) SBS is referring to the legislative change which was the model anticipated at the time when SBS submitted its comments. However, the Danish Government no longer envisages an amendment to the Broadcasting Act, but simply an alteration of the licence. It thereby exploits a possibility which is already anticipated in the current Section 38a(2) of the Danish Broadcasting Act, namely that the company is entitled to charge subscription fees if the Ministry of Culture so decides and alters the licence accordingly.

([84]) Letter from SBS of 2 October 2009, pp. 19-22.

([85]) Case C-206/06 *Essent Netwerk Noord BV a.o.* v *Aluminium Delfzijl BV* [2008] ECR II-5497.

([86]) Commission Decision 2005/217/EC (OJ L 85, 23.3.2006, p. 1), as per paragraph 57, upheld on this point by Cases T-309/04, T-317/04, T-329/04 and T-336/04, *TV2 Danmark a.o.* v *Commission*, paragraphs 158 et seq.

([87]) C-345/02, *Pearle and others* [2004] ECR I -7139.

([88]) In C-206/06 (see footnote 85 above), the Court establishes in paragraphs 66 and 47 that the surcharge in question is a real charge, whose excess has to be paid by the recipient to the Minister (see paragraph 67 and description of the law in paragraph 19 of the judgment).

2.2. *Selective advantage*

(130) The state resources involved confer an economic advantage on TV2 in that the same financial instruments at market conditions would attract a higher borrowing cost, or higher fees, if any market operators agreed to make further funds available to the beneficiary at the amount envisaged. According to the evidence submitted by Denmark, none were willing to do so.

2.3. *Distortion of competition and effect on trade*

(131) These resources will allow TV2 to continue operating on markets on which it is currently active. 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 competes with other broadcasters such as SBS or Viasat, among others. It follows that by favouring TV2, the aid in question distorts or threatens to distort competition on those markets.

(132) The affected markets, 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 ([89]). 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 remain or increase their activity on the Danish market may be influenced by the planned aid. The State aid in question therefore affects, or risks affecting, patterns of trade between Member States.

(133) Since Article 107(1) TFEU applies, the restructuring aid package needs to be assessed in terms of its compatibility with the internal market.

3. **Standstill obligation**

(134) Denmark has respected the standstill obligation mentioned in Article 3 of Council Regulation (EC) No 659/1999 ([90]), since it notified the aid measures under the restructuring plan and has to date not implemented them. Implementation of the rescue aid was authorised by the Commission decision of 4 August 2008.

([89]) Regarding the effects on trade between Member States, the Danish authorities seem to share the same view, see Danish Competition Authority (*Konkurrencestyrelsen*) Decision of 21.12.2005, Journal No 3/1120-0301-0095/SEK/SCL.

([90]) OJ L 83, 27.3.1999, p. 1.

4. **Compatibility of the State aid with the internal market**

4.1. *Legal basis*

(135) The compatibility of the measures will be assessed under Article 107(3)(c) TFEU in conjunction with the Guidelines. The application of Article 106(2) TFEU to the measures in question in relation to financing of public service broadcasting is not analysed. While the financial difficulties of TV2 mainly originate from the provision of the public service channel and the absence of a business model with stable revenue sources, the State aid measures are not limited to public service provision, but are directed at TV2 as a group, i.e. including its commercial activities. Furthermore, the Danish authorities have not argued in detail that the State aid measures were compatible with the internal market on the basis of Article 106(2) TFEU and the Commission has not received sufficient information which would enable it to carry out the assessment under Article 106(2) TFEU in conjunction with the Broadcasting Communication ([91]).

(136) The Guidelines provide for the possibility of granting rescue aid as a temporary assistance for firms in difficulty pending the preparation of a restructuring plan or to address an acute liquidity crisis. According to point 26 of the Guidelines, the deadline for putting an end to the aid is extended until the Commission has reached its decision on the plan. The fact that the rescue aid facility is still in place for TV2 is in line with that stipulation, as TV2 has submitted a restructuring plan within the deadline.

(137) Restructuring aid must be based on a feasible, coherent and far-reaching plan to restore the firm's long term viability within a reasonable time frame. Restructuring usually involves the following elements: the restructuring of all aspects of the functioning of the company, the reorganisation and rationalisation of the firm's activities, including the withdrawal from loss-making activities and financial restructuring. Restructuring operations, if benefiting from State aid, cannot be limited, however, to making good past losses without tackling the reasons. Furthermore, the restructuring has to be financed at least partially by the own resources of the company. Finally, compensatory measures must be adopted to minimise the distortive effects of the aid. The Commission will in the following examine whether these conditions are met.

4.2. *Eligibility — Firm in difficulty*

(138) According to point 9 of the Guidelines, a firm is in difficulty where it is unable, whether through its own

([91]) Communication from the Commission on the application of State aid rules to public service broadcasting (OJ C 257, 27.10.2009, p. 1).

resources or with funds it is able to obtain from its owners/shareholders, to stem losses, which, without outside intervention by public authorities, will almost certainly condemn it to going out of business. Point 11 of the Guidelines mentions certain criteria according to which a firm is in difficulty, even where none of the criteria of point 10 of the Guidelines are present. Point 11 stipulates that 'in any event, a firm in difficulty is eligible only where, demonstrably, it cannot recover through its own resources or with the funds it obtains from its owners/shareholders or from market sources'.

(139) The Commission comes to the conclusion that at the time of the notification of the restructuring plan, TV2 constituted such a firm in difficulty. This can be seen from the figures in the Commission's decision opening the formal investigation procedure, and more importantly from the figures produced in recitals 36-42 of this Decision, which were submitted at a later point in January 2010 and which describe a company with losses, declining market shares, mounting debt and in particular negative cash flows due to declining advertising revenues, bad investments and increasing interest charges. While it turned out later that the company had indeed, as competitors estimated, made a profit in 2008 (the estimate at the end of March 2008 still pointed to […] of DKK […] million), this profit was small, and does not in itself alter the finding that the company could not continue its operations without external financing. The private credit facilities at the company's disposal were short term and could be withdrawn any time. The company had an acute liquidity need which it could not overcome by its own resources.

(140) Nor could it obtain external financing. There was a danger that short-term credits would be withdrawn. As already stated in the opening decision, the main financing bank of TV2, […], asked to reduce its loan and credit facilities in 2008. In addition to TV2's problems, which even included mortgaging its own premises in Odense, Denmark produced evidence that other banks had also refused to provide TV2 with long-term loans (see recitals 44 et seq. of this Decision). The banks pointed to the weaknesses in TV2's cyclical income stream based on advertising revenues, which as a business model was considered unsustainable. Pending legal cases added to the problems. As a result, TV2's funding became increasingly tilted towards short-term liabilities, and thus fragile. In other words, TV2 was unable, within the meaning of point 11 of the Guidelines, to recover from the situation using funds obtainable from market sources.

(141) These findings are not called into question by the submissions from competitors. For completeness, it should be mentioned that the Guidelines do not require the company to be in actual insolvency proceedings. On the contrary, aid can be given — under strict conditions — to prevent precisely that.

(142) As to the arguments of the competitors that TV2 is a profitable company, or could become profitable, the above-mentioned results for TV2 show that the company realised a profit in 2008, but contrary to what Viasat had estimated, it incurred a loss for 2009 of DKK 27 million, which deviated significantly from the Viasat forecast of DKK 249 million in profit. The profit for 2010 is also estimated to be much smaller than that assumed by Viasat. The Commission has not found any errors in the methodologies used by TV2 and its consultant PWC (see also recital 41 of this Decision).

(143) As to the study of TV2's credit rating submitted by Viasat and carried out by Audon partners ([92]), according to which TV2 could have obtained credit, the reactions of banks show that the real picture is a different one. The analysis is furthermore based only on figures and assumptions which have not been checked with TV2. Some of the figures are divorced from reality, as can be seen from the figures for 2009 and 2010. The report itself stresses that this is not a full-scale analysis (because for obvious reasons no contact with TV2 was established) and the model used has its limitations for that reason ([93]).

(144) The fact that the company has drawn much less on the rescue aid credit facility than it could have does not mean that it cannot be regarded as a firm in difficulty. It would be an absurd finding to disqualify a beneficiary of rescue and restructuring aid from eligibility for the aid if cost-saving measures and other measures envisaged in the restructuring plan later prove to be successful, and help the company to deal with its financing problems largely using its own resources. This might, however, lead to the result that at a certain point in time ongoing State aid is no longer necessary, which will be discussed below (see recital 149). In any event, the credit facility was always constructed in such a way that the company could only get access to it in the event of a certified need. This was done in order to keep the aid to the minimum, and TV2's behaviour in trying to achieve the restructuring process as much as possible using its own resources is in line with that requirement.

(145) It should furthermore be underlined that the numerous allegations by Viasat and SBS that TV2's weak financial situation is self-inflicted through poor management decisions or bad investments is irrelevant for its eligibility

([92]) Letter from Viasat of 2 October 2009, Annex 14, 'Findings concerning a credit rating analysis of TV2 Denmark'.
([93]) Letter from Viasat of 2 October 2009, Annex 14, p. 13.

under the Guidelines, which do not ask for the cause of the financial problems of the aid beneficiary, but only seek to ascertain that the aid beneficiary is indeed a firm in difficulty.

(146) Competitors have also, in this respect, asserted that TV2's problems largely stem from the public service channel and that internal cost and transfer pricing adjustments could remedy this situation. However, the Commission does not consider this argument relevant in a situation in which the aid goes to the group as such, including the commercial operations. The Commission notes, however, that TV2 has separate and audited accounts for the public service and other activities, and a fully documented and audited transfer pricing policy, which is relatively simple, transparent and aims to give an accurate picture of the different activities based on transfer prices on market terms.

(147) On the exogenous factors, Viasat agrees with the assumption of a GDP growth of 1,02 %. On the development of the advertising market, the parties agree that TV2's advertising revenues decreased by 19 % in 2008. However, Viasat and SBS wrongly interpret Denmark's forecast on the future development of the advertising market. Contrary to their understanding, Denmark did not forecast that the advertising market would drop by 10 % each year in the 2009-2013 period, but simply stated that […].

(148) Regarding the argument that licence fees granted to the regional broadcasting stations should have been included in the assessment of TV2's financial situation, the Commission finds that the licence fees finance the programme production of regional broadcasters and are relevant only in relation to that. In this regard, the Commission notes that the regional TV2 stations are independent from TV2 and subject to their own public service obligations under the Danish Broadcasting Act, for which they receive licence financing. As to SBS's argument that viewers will pay twice for the programme, it should be stressed that one of the payments — the subscription fees for TV2 main channel — result from the customer's choice and have been found not to involve any State aid. In any event, it has been shown above that TV2 as a group was a firm in difficulty suffering from acute financing needs, since it could not obtain any external financing from banks. This included any potential benefits resulting from its obligation to broadcast these programmes.

(149) TV2's dire situation changed, however, with the sale of the broadcasting transmission network. Using the proceeds from the sale of the broadcasting network, TV2 was able to pay back part of its debt, and the financial outlook became much more positive, as can be seen from the figures in recitals 62-64 of this Decision. Trends in the advertising market are also more positive ([94]). TV2 was able to repay its state loan drawn from the rescue aid facility. Subject to the outcome of the pending State aid cases and the approval of the restructuring plan, TV2 expects to have sufficient financing until January 2012 when the subscription charges will be implemented ([95]).

(150) Given that new situation, the Commission does not find that TV2 can still currently be classified as a firm in difficulty. There is therefore no need for any aid measure beyond the approval of this Decision, and the notified, non-implemented loan and credit facility contained in the restructuring plan should be repealed. For the same reason, the existing aid facility under the rescue aid decision should also come to an end.

4.3. *Restoration of long-term viability*

(151) Pursuant to point 34 of the Guidelines, the grant of the aid must be conditional on implementation of a restructuring plan which must restore viability to the company within a reasonable timescale. The restructuring plan describes the circumstances that led to the company's difficulties as having been caused by new activities which did not turn out to be profitable, and the increasingly unprofitable public service channel. In the Commission's view, the restructuring plan adequately addresses these issues.

(152) The Commission notes that the restructuring plan provides for financial and operational restructuring measures which, together with an amended business model, will enable the company to stand on its own feet. In this regard, the Commission firstly notes that the requirement in the restructuring plan to sell assets resulted in the successful sale of the broadcasting network, which provided TV2 with sufficient funds to repay its debts. It also repaid the aid drawn from the rescue aid facility on 4 October 2010. The company itself states that it has now sufficient means to bridge the period until the end-user charges will be adopted ([96]). Other measures in the form of cost savings will also contribute to the long-term viability of the firm (see recitals 47 and 48 above).

([94]) According to the letter from Denmark 9 July 2010, Annex 'TV2 Financial questions', p. 7, a 5 % fall in the advertising market was forecast for 2010, but now the Zenith Optimedia forecast predicts a 1 % increase.

([95]) Letter from Denmark of 9 July 2010, 'TV2 Financial questions', p. 4.

([96]) Letter from Denmark of 15 October 2010, Annex 1, TV2 documents, at the end of point 2.

(153) The company is also giving up loss-making activities; in 2008, it sold its loss-making radio operation to the SBS group.

(154) The company is expected to solve the structural problems leading to its liquidity needs by being permitted to charge subscription fees as of January 2012. The lack of profitability of the public service channel is due to its reliance on one source of income in the form of advertising revenue, which is cyclical and sensitive to the economic climate. This is also demonstrated by the reactions of banks, which refused to provide funding due to their concerns about trends on the advertising market and doubts as to TV2's earning ability. The new business model will provide TV2 with a more stable income base by charging subscription fees for the viewing of its main channel. TV2 has forecast additional income from the end-user charges of DKK […] million in 2012. It also forecasts […] for the group in 2012. The Commission notes that besides […], the second source of revenue in the form of end-user charges will also make the company less vulnerable to downturns in cyclical activities. The Commission notes that the measures to achieve the turnaround originate in the restructuring plan itself and not from external factors.

(155) The originally notified duration of the restructuring plan until 31 December 2012 spans a period of almost 4 years. This period was chosen because the Danish Government believed that with the introduction of a new business model and its first experiences in practice, banks would again be willing to lend money to TV2, i.e. the period was chosen to be long enough to amass this experience. However, given that all aid will be repealed with the adoption of this Decision (see above), the Danish Government now considers that the restructuring period should end on the repeal of all aid measures.

(156) The Commission takes a different view. According to the Guidelines, restructuring should result in the company's return to long-term viability. The Commission considers that the restructuring period lasts until the moment when the company has implemented all restructuring measures, ensuring such long-term viability. While all State aid measures will cease immediately on adoption of this Decision, the restoration of long-term viability to TV2 is not guaranteed as of this moment as long as TV2 still lacks a sustainable business model. Such a business model will only be established with the introduction of the end-user charges. The introduction of end-user charges is also the main restructuring measure directly addressing the most serious cause of TV2's financial difficulties. The Commission therefore concludes that the restructuring period comes to an end on 31 December 2012, or at the point in time when TV2 is able to charge subscription fees from the end user, should this event takes place before 31 December 2012. It currently seems that TV2 is legally entitled to charge user fees only when its licence has been changed (while the current Danish Broadcasting Act already provides a possibility for TV2 to charge end-user fees, it is not allowed in the current licence).

4.4. *Avoidance of undue distortions of competition*

(157) According to point 38 of the Guidelines, in order to ensure that the adverse effects of the aid on trading conditions are minimised as much as possible, so that the positive effects pursued outweigh the adverse ones, compensatory measures must be taken. These measures may comprise divestment of assets or reductions in capacity or market presence. According to point 40 of the Guidelines, they must be in proportion to the distortive effects of the aid and the relative importance of the firm on its markets.

(158) In principle, the commitment not to open any new channels (i.e. limiting market presence), can be seen as a compensatory measure, as it excludes TV2 from competing for new customers and therefore benefits its competitors. The opening of new commercial channels would be beneficial to TV2 because the channels would be financed by a steady revenue source based on non-cyclical subscription fees, and because they would provide the necessary income to the group, partially counterbalancing the negative results from the public service channel. According to the market analysis provided in the restructuring plan, the pay-TV market is growing ([97]). TV2's competitors, however, argue that the option of opening new commercial channels was not available to TV2 anyway, since the market was saturated.

(159) In this regard, the Commission notes that TV2's competitors themselves launched channels in 2009 (SBS launched 6erene, Canal Digital will launch a sports channel, Viasat launched a channel on 23 March 2009, and the TV4 group launched Canal 9 in July 2009).

(160) Denmark has also confirmed that due to the restructuring, TV2 will also be prevented from launching radio channels ([98]). This commitment is highly relevant in that there is an upcoming tender procedure for the operating licence for the new FM 4 radio station. Denmark originally expressed an interest in TV2's possible participation in this tender, but later confirmed that such a bid would not take place in view of the Commission's ongoing investigation of the restructuring plan, despite the fact that plans for this had already been

([97]) Notification of 4 February 2009.
([98]) E-mail from Denmark of 24 February 2011.

made. In other words, contrary to what the competitors claim, the commitment not to open new channels had proven to have a real meaning and constitutes a sacrifice for the company. The Commission considers this commitment to be important in light of point 46 of the Guidelines, according to which aid should not go to finance new investment that is not essential for restoring the firm's viability.

(161) The Commission also considers the proposed compensatory measures to be in proportion to the distortive effects of the aid measures. It should be pointed out that these measures all end on the date of adoption of this Decision. In that regard, the Commission would point out that none of the notified restructuring aid measures has been, or will be, implemented. As can be seen from recitals 150 et seq. the rescue aid facility will also be repealed on adoption of this Decision. This means that the company will not receive any State aid. The actual payments made under the rescue aid facility were, however, limited (DKK 223 million drawn of DKK 1 000 million available). Most of the aid was actually drawn as rescue aid (DKK 208 out of 223 million were drawn until end 2008, i.e. within the six-month rescue period) and all the funds actually drawn from the credit facility have already been repaid to the State. Nor is the actual amount drawn from the credit facility — DKK 223 million — excessive in light of TV2's 2008 turnover ([…] %). In light of this, the Commission does not consider it necessary to demand further compensatory measures from Denmark and the aid beneficiary. For that reason, the Commission does not see any need for further compensatory measures, as suggested by the competitors.

(162) However, the Commission does not agree with the proposal by Denmark that the commitment should cease when all aid measures have come to an end ([99]). Firstly, Denmark itself had stipulated a longer restructuring period, until 31 December 2012. Secondly, the Guidelines nowhere stipulate that the length of the compensatory measure must be identical to the presence of ongoing aid measures. Thirdly, the restructuring plan is based on the premise that it is only when the end-user charges are introduced in 2012 that the company will have access to external financing; only then will long-term viability be restored. Denmark itself has argued that the aid measures, including the rescue aid facility which is still in place, would be needed to fill the liquidity gap until a more stable business model for the public service channel was in place. The rescue aid facility thus had the function of keeping the company afloat until a new business model had begun to apply. Against this background, the Commission does not find that the compensatory measure commitment can come to an end with the end of the aid or the date of this Decision. The Commission considers it feasible, however, that the obligation not to launch new channels may end at an earlier date than the end of the period of the restructuring plan (31 December 2012), namely when the end-user charges have been introduced (via the change in the licence) and TV2 will be able to levy them.

([99]) Letter from Denmark of 28 January 2011 and e-mail from Denmark of 15 October 2010.

4.5. *Aid limited to the minimum*

(163) According to point 43 of the Guidelines, the amount and intensity of the aid must be limited to the strict minimum of the restructuring costs necessary to enable restructuring to be undertaken. The idea behind this provision is that the company, at the end of restructuring, is not equipped with surplus liquidity that it could use for aggressive market behaviour. Beneficiaries are expected to make a significant contribution to the restructuring plan from their own resources, including the sale of assets that are not essential to the firm's survival. Such a contribution must be real, and may not include expected future profits such as cash flow. It must be as high as possible, at least 50 % for large firms. The Commission considers TV2 to be a large firm in the meaning of the Guidelines.

(164) The Commission does not share the view of the Danish Government that any costs at all, in particular cost-saving measures, automatically qualify as restructuring measures. A company might incur expenditure in pursuing cost savings. Cost savings as described by Denmark in the present case do not, in themselves, represent a restructuring cost. Denmark provided a list of 'classical' restructuring costs, which consist of DKK […] million and which cover transaction costs related to the sale of the transmission network (DKK […] million), costs associated with the transfer to the new business model (DKK […]-[…] million) and staff costs for termination of contracts, legal and consultancy fees (DKK […] million). The Commission accepts these costs as restructuring costs.

(165) According to the Commission's case practice, restructuring costs include all extraordinary costs incurred in order for the firm to return to viability, but not regular operating costs incurred in the restructuring period. However, the present case concerns a company's need of liquidity to bridge a transitional period until a new sustainable business model is in place. As outlined above, TV2 had a genuine financing need, since it did not have access to external financing. In this special case involving purely financial restructuring until the company changes to a more stable business plan, the Commission can also accept this need of financing as constituting a restructuring cost. It was the credit facility of the rescue aid

decision (DKK 1 000 million) which provided the necessary temporary buffer to cover the financial gap. However, this facility was only transitional and could only be accessed when TV2 could demonstrate a financing need as certified by an external auditor. In the end, TV2 did not draw much from the credit facility (only […] % of it). In addition, most of the credit drawn (DKK […] million) was drawn during the period covered by the Commission's rescue aid decision, i.e. within the six-month rescue period before the restructuring plan was submitted.

(166) TV2 has contributed towards the above restructuring costs through the sale of assets, with the sale of the broadcasting network for the amount of DKK 640 million, and through external financing by mortgaging its premises in Odense at DKK 80 million. The contribution of DKK 720 million is well beyond the 50 % threshold for large firms. As stated above, TV2 used the proceeds from the sale of the network to reduce its debt. The money thus spent cannot be used for other purposes. In addition, as is clear from the above, all aid measures will end as of the date of this Decision and no new aid measures as notified under the restructuring plan will be introduced (see recital 150 of this Decision). There is therefore no danger, in terms of point 45 of the Guidelines, of any aid in excess of what was needed staying in the company.

4.6. *Other conditions*

(167) According to point 46 of the Guidelines, the Commission may require additional measures from the Member State in order to ensure that the aid does not distort competition contrary to the common interest.

(168) The Commission takes note of the arguments put forward by Denmark throughout the formal investigation, and the intention expressed by the aid beneficiary in supporting documents that the restructuring plan should enable TV2 to use business opportunities in line with its peers and to charge subscription charges. Denmark and TV2 further point out that the currently high equity buffer of TV2 with solvency (and net interest-bearing debt) ratios which are significantly higher (lower) than those of competitors, is only necessary because of the uncertainties of the pending State aid cases and the business model. Both TV2 and Denmark express a general willingness to bring the capital structure back in line with TV2's peers once the State aid investigations are closed.

(169) The Commission does not, on its part, see any need for TV2 to have a capital structure that is different from that of its peers once the business model and the pending legal cases have been resolved. Capital structures based on (artificially) high equity are advantageous for the company, because it will be able to attract funding at relatively low rates. Equally important, TV2 should bring its capital structure back to a level that ensures that competition is not distorted. The Commission would like TV2 to revert back to a normal capital structure by making dividend payments to the State, rather than by aggressively expanding its balance sheet by debt financing.

4.7. *Monitoring and annual report*

(170) In line with points 49 and 50 of the Guidelines, Denmark has committed to submitting reports to the Commission no later than 6 months after the approval of the aid.

4.8. *Antitrust issues*

(171) The Commission notes that one of TV2's competitors has filed an anti-trust complaint regarding the planned introduction of the end-user charges. The Commission is aware that aspects of an aid which contravene specific provisions of the Treaty other than the State aid provisions may be so indissolubly linked to the object of the aid that it is impossible to evaluate them separately ([100]). The Court has stressed that the obligation to ensure that the State aid rules are applied consistently with other provisions of the Treaty is all the more necessary where those provisions also pursue the objective of undistorted competition. However, the case-law of the Court acknowledges that the State aid and antitrust procedures are independent procedures governed by specific rules. The Court has stated that 'when taking a decision on the compatibility of State aid with the common market, the Commission is not obliged to await the outcome of a parallel procedure initiated under Regulation No [1], once it has reached the conclusion, based on an economic analysis of the situation and without any manifest error in the assessment of the facts, that the recipient of the aid is not in breach of Articles [101 and 102 TFEU]' ([101]). The antitrust case therefore does not have to be formally closed for the Commission to take a decision in the State aid case.

(172) The Commission would underline that in the current case it is not the aid itself (the rescue aid facility), but another element of the restructuring plan (the end-user charges), which is the cause of the antitrust complaint. The end-user charges will be introduced in early 2012,

([100]) See Case C-225/91 *Matra* [1993] ECR I-3203, paragraph 41, referring to Case 74/76 *Iannelli* v *Meroni* [1977] ECR I-557.

([101]) Case C-225/91 *Matra, op. cit.*, paragraphs 44 and 45. The judgment refers to Regulation 17, which has now been replaced by Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L 1, 4.1.2003, p. 1), and to Articles 85 and 86 of the EC Treaty, now Articles 101 and 102 TFEU.

i.e. after the aid facility has been repealed, via an amendment in the terms of TV2's licence. It should also be taken into consideration that most of the aid actually drawn was during the rescue period and was authorised in the Commission's rescue aid decision of 4 August 2008, and that all aid will be repealed when this Decision comes into force.

(173) If the antitrust complaint, or third party comments in this proceeding, is to be understood also as a complaint against TV2 becoming a pay-TV channel, suffice to say that the mere introduction of user charges for the main channel cannot constitute an infringement of antitrust legislation. When TV2's main channel becomes a pay-TV channel, this will lead to the entry into the pay-TV market of that channel. The entry of TV2's main channel will most likely affect only competitors active in that market, and e.g. lead to the exit of some players from that market (the respective pay-TV packages), or to their having to lower their prices. These effects, however, are normal effects of entry into the market of a viable competitor. The mere fact that user charges are introduced, and that this will bring about increased competition, does not, therefore, contravene Articles 102 and 106 TFEU.

(174) The complainant, and some other competitors in the third party comments, argue that the planned introduction of the 'TV2 Alene' card would have anticompetitive effects, also favouring the distributor Boxer. In short, the TV2 Alene model meant that customers would receive TV2 free if the customer did not buy other pay-TV services. According to the complainant, the TV2 Alene card would thus have a disincentive effect on customers planning to buy pay-TV, to the detriment of TV2's competitors. As Denmark has withdrawn the suggested TV2 Alene-card, arguments as to whether it would have infringed the antitrust rules are devoid of relevance and do not, therefore, have bearing on the legality of the restructuring plan.

(175) As to the fears of some competitors that the aid as such might be used for aggressive market behaviour, the Commission would point out that there are no indications that the State aid itself entails a breach of other provisions of the TFEU or leads TV2 to automatically engage in anticompetitive behaviour.

Conclusion

(176) The Commission finds that the notified restructuring plan complies with the internal market according to Article 107(3)(c) TFEU in conjunction with the Commission's rescue and restructuring Guidelines, subject to the following conditions.

(177) Since the company is in a better financial condition following the sale of the broadcasting network, the Commission finds that no aid measures from the restructuring plan (loan and credit facility) should be implemented and that the credit facility in place (as authorised in Commission Decision No 287/08 of 4 August 2008) should be repealed with immediate effect from the date of this Decision. The Commission notes that the originally notified guarantee for the sale of the broadcasting network is no longer relevant, due to the completed sale of the network without the guarantee.

(178) The Commission further takes note of the commitment by Denmark that the compensatory measure of not launching any new broadcasting channels covers both television and radio channels. This measure should remain in place until 31 December 2012 or, if the aid recipient is able to levy end-user charges before that date, until the introduction of the end-user charges. The introduction of the end-user charges is considered to be the point in time at which TV2 is legally entitled to ask for such remuneration.

(179) The Commission takes note of the commitment by Denmark to instruct an independent financial expert to compare TV2's capital structure with those of other media companies and to adjust the capital structure if it deviates markedly from the median or average of the relevant peer group. If there are substantial reasons not to adjust the capital, the Danish Government may notify an alteration of the restructuring plan to the Commission,

HAS ADOPTED THIS DECISION:

Article 1

Subject to full compliance with the restructuring plan as notified on 4 February 2009 and to the conditions set out in Articles 2, 3 and 4, the facility which Denmark granted to TV2 and which was authorised as rescue aid by the Commission in its decision of 4 August 2008 is compatible with the internal market.

Article 2

As of the date of this Decision, the rescue aid facility which Denmark granted to TV2 and which was authorised by the Commission in its decision of 4 August 2008 shall be repealed. None of the other aid measures notified by Denmark to the Commission on 4 February 2009 may be implemented.

Article 3

The compensatory measure proposed by Denmark that prohibits TV2 from opening new television or radio broadcasting channels shall remain in place until the notified end of the restructuring period, 31 December 2012. However, if TV2 is allowed to raise subscription fees (end-user charges) before that date, the obligation not to open new radio and television channels ceases to exist as of that date.

Article 4

The Danish Government shall instruct an independent financial expert at the end of 2012 or early in 2013 to conduct an analysis of TV2's capital structure, comparing it with the capital structure of other relevant media companies. If TV2's capital structure deviates markedly from the median or average of the relevant peer group, the Danish Government shall adjust the capital structure at the meeting of the General Assembly in April 2013, in order to rectify any such deviation.

Article 5

Denmark shall inform the Commission, within 2 months of notification of this Decision, of the measures taken to comply with it.

Article 6

This Decision is addressed to the Kingdom of Denmark.

Done at Brussels, 20 April 2011.

For the Commission

Joaquín ALMUNIA

Vice-President