

Catch 22: The Privatization of Danish TV 2 vs. EU Rules on State Aid

Since 2001 the Danish government wants to privatize the public broadcaster TV 2 but the sales process is now cancelled. Apparently the EU rules on competition blocks for the will of the majority in the Danish parliament. This article explains this paradox by describing the historical development of the process, following two crossing tracks: the privatization of TV 2 and the state aid cases against TV 2 before the EU Court of First Instance.

Since November 2001, a majority in the Danish parliament have wanted to privatize TV 2, a public broadcasting station. The government put the station for sale, but the sales process was cancelled due to a group of lawsuits filed with the EU Court of First Instance regarding unlawful state aid to TV 2. How can a government be unable to fulfill its media policy when it is backed by a majority? In this case, the government wants to remove state aid from a public broadcaster and privatize it; however, the EU rules on state aid appear to block doing so. How could this happen? The article explains this situation by describing the historical development of the process, following criss-crossing processes: the privatization of TV 2 and the state aid cases against TV 2.

The creation of Danish public broadcaster TV 2

TV 2 was established by law in 1986 as part of a national, cultural counter-strategy to reduce the influence of foreign television brought by growing reception in the years to come. TV 2 was created as an independent public institution in competition with the other existing public and license fee-financed television channel, DR-TV, established in 1953. In other words, Denmark would have two mutually independent television channels, and according to the government, competition would promote versatility and diversity, hereby contributing to the reinforcement of national culture.

TV 2 has public service obligations and is financed by a combination of the sale of advertising, license fees and other financial schemes. License fees have always accounted for 1/3 of the revenue, advertising for roughly 2/3. The Minister of Culture determines TV 2's share of the total license fees and appoints the board. TV 2 purchases most of its programs from private, independent producers, itself only producing news and current affairs (model Channel 4). TV 2 quickly achieved remarkable viewer success. In the autumn of 1990, only two years after going on-air, TV 2 had 51 percent of the total viewing time, the old public broadcaster DR-TV had 41 percent, and the rest – local and foreign channels – had 8 percent. In other words, the national Danish public service TV had 92 percent of all of the viewing time (TV 2 1991).

There were few commercial competitors in the Danish television market. The London-based ScanSat channel TV3 was launched as a Scandinavian satellite broadcaster in December 1987. In October 1990, TV3 was split in three national channels for Sweden, Norway and Denmark, respectively – meaning that TV 2 had a genuine commercial Danish competitor with full-scale programming for the first time. There were local commercial channels in Denmark, but they developed slowly. In 1995, local channels formed an unofficial network, and the TvDanmark network consisting of eight local stations was officially created in April 1997 as a part of

the Scandinavian Broadcasting System (SBS, an US-plc). None of these competitors had national coverage due to a lack of frequencies. TvDanmark could be received by 73 percent of all Danish households in 2001, TV3 by 69 percent. In the end of 2001 – shortly before the decision to privatize TV 2 – the four competing television companies in the Danish market all had a sister satellite channel, and the competitive situation was as follows:

TABLE 1

	Viewing time in %	Part of advertising revenue in %
TV 2/TV 2 Zulu	41.3	57.6
TV3/TV3+ (Viasat)	16.1	24.4
TvDanmark 1+2 (SBS)	11.1	18
DR1/DR2	31.4	0

Compared to the European level, the national public broadcaster's percentage of viewing time remained high, namely 73 percent. The commercial competitors took 27 percent, most of which were satellite channels located in London (TV3, TV3+, TvDanmark 1). However, they were broadcasting in Danish or with Danish subtitles, hereby circumventing the Danish rules on advertising (ban on commercials for alcohol and medicine, no breaks etc.).

EU Rules pertaining to state aid

When TV 2 started broadcasting in 1988, nobody in Denmark thought that the financing schemes could involve state aid and that the Commission therefore should have been notified about the scheme. First, all of the political parties represented in the Danish parliament believed that broadcasting was part of the national cultural policy, which the EU had no right to interfere in. Second, the government did not consider license fees as state resources, and therefore the aid could not be aid granted by the state. The Danish legislation regarding media policy have therefore not considered the EU rules for state aid (cf. Mortensen 2005).

State aid rules are an important part of EU competition policy, and the central provisions are stated in articles 86-88 of the Treaty. Article 87 sets the conditions for state aid. *First*, the aid must be granted through state resources, i.e. resources controlled by the state. They may come from the state budget or license fees, possibly collected by the broadcasters themselves, but the amount and application must be determined by the state, as is the case for DR and TV 2.

Second, the aid must distort or threaten to distort competition by favoring certain undertakings. It is not usually difficult to establish that a limited number of television companies receive aid and that this aid is *selective*. In Denmark, only DR and TV 2 receive license fees, while TvDanmark does not. But it has been much more difficult to establish this aid to constitute a *favor*. There has been lengthy discussion on this subject between the Court of First Instance, the Court of Justice and the Commission.¹ Some have pointed out that economic support from the state was provided on the grounds that the undertaking had to perform a specific task, i.e. that it was therefore compensation for the expenses to perform the task, not *aid*. If it was *compensation*, then the scheme should not be handled by the rules for state aid and could not be affected by Articles 87 and 88. Others have argued that despite the economic subsidy being granted in connection with the duty to perform a given task, it was nevertheless aid and therefore covered by Articles 87 and 88.

“The aid must distort or threaten to distort competition by favoring certain undertakings.”

Third, the scheme must affect trade between the member states. Television programs and rights are traded internationally, and the television station in question or one of its competitors could have an international set of owners or be part of an international cooperation (European Broadcasting Union e.g. where TV 2 is a member). This means that the scheme affects trade between member states. If these three conditions are fulfilled, it is state aid; and, in principle, state aid is allowed.

Article 88 draws a distinction between two forms of aid: *existing aid*, which is a scheme established prior to the

member state entering the Community; and *new aid*, a scheme established after the member state had entered the Community. New aid must be announced before coming into effect, and the Commission must evaluate the schemes and decide on the compatibility with the rules for state aid. If new aid comes into effect before notification and approval, then it is "unlawful aid" (subsection 3); however, only *aid* must be notified – not *compensation*.

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Article 88(2) contains 'the formal investigation procedure.' It requires the Commission to allow interested parties to submit their comments on the scheme, and the Commission must subsequently decide on the compatibility. Article 88(2) is important for the complainants and the member states on the grounds that it allows them to follow the handling of the case in some detail. As long as the Commission performs the 'preliminary examination', it is not obligated to inform the public. However, if the Commission has

"not even enabled all the difficulties raised by the assessment of the measure in question to be overcome, the institution has a duty to gather all necessary views and to that end to initiate the procedure under Article 88(2)" (T-95/96, 52).

Article 86(2) contains a derogation from the ban on state aid. It states that undertakings entrusted with the operation of a "services of general economic interest" [henceforth SGEI] do not have to follow the rules of competition if this would obstruct the performance of the particular tasks assigned to them. This provides an opening for state aid, though under certain conditions (cf. Léger 2001, 157-166). *First*, the task must be *defined* as an SGEI, and the member states make this definition; *second*, the task must be *entrusted* the undertaking by the relevant authorities; *third*, the state aid must be *necessary* for performing the task. If the service could be performed in the same manner by observing the rules of competition, the aid must not be given to the undertaking; *fourth*, the aid must be the *least*

detrimental to competition; and *fifth*, the development of trade must be affected, but not to *such an extent* as would be contrary to the interests of the Community.

Complaint over state aid to TV 2

On 5 April 2000, the European Commission received a complaint alleging that the financing scheme in the period 1995-2000 in favor of the Danish public broadcaster TV 2 was incompatible state aid. At that time, such complaints concerning unlawful state aid to national public broadcasters was not unusual. The first complaint came in 1992 from the commercial station Gestevisión Telecinco SA, which sought to have the grants for the regional television companies in Spain declared incompatible with the common market. Since then, 15 complaints were lodged against financial schemes for public broadcasting in eight countries (Spain, Portugal, France, Italy, Greece, Germany, UK and Ireland). The Commission had passed decision in only three of these cases. The Court of First Instance had convicted it for not acting in 1998 and 1999, and it had approved the schemes in all of the decisions until then.

The complaint came from one of TV 2's competitors, namely TvDanmark, which claimed that TV 2 received unlawful state aid, partly via license fees, partly via a number of minor financing schemes, and that TV 2 used this state aid to illegally dump advertising prices, thereby causing damage to TvDanmark. The Commission initiated the handling of the complaint with a meeting with the complainant in May 2000, after which letters were sent and meetings held with TvDanmark in 2001 and 2002, and with Danish authorities in 2002.

On 21 January 2003, the Commission sent the 'letter of formal notice' to Denmark (Commission 2003), thereby starting the 'Formal investigation procedure'. Here, the Commission must summarize the relevant issues of fact and law and include a preliminary assessment of the aid character of the measure. Furthermore, it must call upon the member state concerned and together with other interested parties to submit comments. Before examining the Commission's handling, however, the other track in the article must be opened.

The privatization of TV 2

TV 2 was created in 1986 by a Centre-Government; however, over the course of the 1990s, TV 2 gained bro-

ad acceptance from all of the Danish political parties as the nation's most popular television station measured in terms of the number of viewers. It was therefore somewhat of a surprise when, prior to the 2001 general election, two center-right parties announced that they wanted to privatize TV 2. The media-political spokesman for Venstre (the Danish liberal party) went so far as to declare, "within the first 100 days of the new government, TV 2 will be privatized."

The result of the general election in November 2001 was a new center-right government, which proposed the privatization of TV 2. This proposal initially assumed the form of a "Media Policy Accord 2002-2006", negotiated with the government supporting party the Danish People's Party (*Dansk Folkeparti*) on 3 June 2002. The central parts of the accord are as follows:

"On the one hand, there is a need to strengthen public service broadcasting and thereby Danish language and culture, and on the other there is a need to create the best possible conditions for a robust private commercial media sector [...] The increasing globalization of the media market and technological advances are making it a matter of urgency for Danish electronic media to have a better basis for competition. This presupposes that Denmark, like other countries, draws a clear distinction between public service and commercial media and ensures fair competition between the two. The first steps towards the privatization of TV 2 are now being taken and the advertising rules are being liberalized" (Accord of 3 June 2002).

Denmark did not have any more frequencies for a new private commercial nationwide television channel, and as the existing private competitors were weak (cf. Table 1), a robust private commercial media sector could only be created by privatizing TV 2. TV 2 was to be turned into a government-owned limited liability company and the financing was to come from advertising and other commercial activities. TV 2 was to continue to have public service obligations, cf. the words in the Media Policy Accord to "strengthen public service broadcasting

and thereby Danish language and culture." All of the shares or the majority were to be put on sale.

The Media Policy Accord was met with strong opposition from the rest of the parliament. It was hardly convincing that financing by commercial funding alone (mostly advertising) in a small country such as Denmark could be sufficient to fulfill the public service obligations. TV 2 CEO Cristina Lage and Chairman of the Board Jens Bilgrav-Nielsen emphasized this argument. In October, this argument led the Minister for Culture to give both persons a sharp reprimand in public. When the Minister subsequently appointed a new board for TV 2 in January 2003, Bilgrav-Nielsen was replaced by Erik Ross-Pedersen. After the first board meeting on 16 January 2003, TV 2 had a new CEO. Cristina Lage was replaced by the TV 2 CFO Peter Parbo. Since the middle of the 1990s, Parbo had been responsible for TV 2's financial strategy. Parbo was assigned to get TV 2 ready for sale as quickly as possible. Only one week after this appointment, however, on 21 January 2003, the letter of formal notice was received by the Danish authorities.

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The letter of formal notice

The Commission had come to the conclusion that some financial measures favored TV 2 and that this favor was granted through state resources. Both the license fee resources and state guarantees for operating loans were state resources, because the state had constant control over them. The measures affected trade between member states, meaning that it was state aid according to Article 87(1).

In January 2003, the opinion of the Court, as reflected in the judgement in the Ferring case (cf. note 1), was that there was no state aid if the funding does not go beyond the net costs of the public service obligation. The Commission then observed that TV 2 had been properly *entrusted* with the public service obligation by law in 1986. The *definition* of the task, though 'wide', is accepted, according to the Communication on state aid to public service broadcasting from November 2001 (Commission 2001); and then comes the critical assessment

of the relationship between the compensation by state funds and the costs for performing the task.

The Commission examines TV 2's annual accounts from 1995-2002 and concludes that the net costs for performing the public service task were roughly EUR 87.8 million less than the compensation provided to TV 2. The Commission also notices that the equity capital of TV 2 has developed from negative DKK 97.8 million in 1995 to positive 484.6 million in 2001. TV 2 has therefore been overcompensated and used the overcompensated amount to establish a free equity capital. Peter Parbo's financial strategy was for TV 2 to become a financially sound company. In this context, the Commission mentions that the Danish authorities had stated that the accumulation of the equity capital did not exceed what a normal market investor would have done.

Finally, the Commission examines whether the overcompensation had been used to cross-subsidize some of the commercial activities, especially advertising. The Commission has doubts as to whether the TV 2 advertising prices have been high enough to enable an efficient commercial operator to cover its stand-alone costs. This must be examined more precisely in the formal investigation procedure, but the Commission has come to the conclusion that the Danish authorities could have granted state aid to TV 2 along the lines of Article 87(1).

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Prior to 19 May 2004

The letter of formal notice was published 14 March 2003, and interested parties could submit their comments within one month. The complainants were TvDanmark and TV3, the lobby organization ACT and the two Spanish TV-stations Gestevisión Telecinco and Antena 3 TV. The Commission then started its investigation. In the meantime, the privatization developed. The Minister presented the proposals to transform TV 2 into a limited liability company in April, and he received the acts adopted by the Parliament in May 2003. In September 2003, the government and the majority in parliament decided to introduce digital terrestrial television in Den-

mark as soon as possible: to start with only one multiplex and the three public service channels (DR1, DR2 and TV 2), but more multiplex could later be brought into use. The importance of this will appear later.

The agreement between TV 2 and the state on the public service task was reformulated, and TV 2 was finally transformed into a limited liability company in December 2003, with effect as of 1 January 2003. The Minister for Culture announced that he would prefer a Scandinavian buyer for TV 2; and certainly not Rupert Murdoch or Silvio Berlusconi. However, experts pointed to the EU rules for anti-discrimination and stated that the rules prevented such stipulations. A sales offer was put on hold, after which came the Commission's decision of 19 May 2004.

The Commission's decision of 19 May 2004

Compared to the letter of formal notice, the decision (Commission 2006) has a few – but important – modifications. In June 2003, the Court of Justice had delivered the Altmark Judgment, hereby specifying the terms for a scheme for compensation instead of aid. According to the Ferring Judgment, the task should be *defined* and *entrusted* to the undertaking, and the aid must *not exceed* what was necessary to perform the task. Two conditions were now added: the parameters on the basis of which the compensation is calculated should be established *beforehand* in an objective and transparent manner; and the undertaking which is to discharge the public service obligations must either be chosen in a public procurement procedure, or the level of compensation required must be determined on the basis of the costs of a typical well-run undertaking.

The financial support for TV 2 was caught by both of these conditions. First, the parameters for the calculation of the aid were not set beforehand, as this had not been a prior requirement. The Communication from November 2001 (Commission 2001) says nothing about it; however, the Commission now states that "there is no publicly available annual budget establishing a link between compensation and output" (71).

Second, there was neither public procurement nor was the amount of aid that of a typical well-run undertaking. The latter condition would also have been difficult to fulfill, as there is no market for public service broadcasting in a country as small as Denmark, rende-

ring benchmarking impossible. The scheme was therefore aid along the lines of Article 87(1). However, while the letter of formal notice in keeping with the Ferring Judgment had rejected the derogation in Article 86(2), the Commission now includes this possibility and examines the conditions for it.³

The definition and the entrustment were approved by the Commission, but it did not control the necessity of the scheme for performing the service. Nor did the Commission ensure the solution to be "the least detrimental to competition" (Léger 2001) It could therefore not examine whether there was a difference between the necessary expenses to perform the task and the actual expenses. A publicly available annual budget could have indicated as much. This error in the procedure also appears in the Communication from 2001, where conditions number three, four and five (cf. section 2 of this presentation) are combined in the so-called proportionality test (Commission 2001, 29-62).

However, when the necessary, least detrimental scheme has not been selected beforehand, the Commission must restrict the calculation of the actual aid according to the principles in the proportionality test; and it reaches the same result as previously: TV 2 was overcompensated by an amount of DKK 628.2 million (€ 84.3 million). This overcompensation was not a reserve for a specific purpose; instead, it represented the accumulation of equity capital that can be used for any purpose. Moreover, TV 2 did not at any point have to draw on its reserves. As a result, TV 2 has never actually required the accumulated capital (113-114).

As regards the suspicion for cross-subsidization, the Commission concluded after detailed calculations that "there is currently no clear evidence that TV 2 did not attempt to maximize its advertising revenues", and therefore no evidence of misuse. The final conclusion is therefore that the aid granted between 1995 and 2002 to TV 2 in the form of license fee resources and the other measures is compatible with the common market under Article 86(2) – with the exception of an amount of DKK 628.2 million. Recovery shall be effected without delay.

The first court cases

In the summer 2004, the Commission's decision was brought before The Court of First Instance four times. Tv-Danmark and Viasat brought actions against the approval

of the aid as compatible with the Common Market under Article 86(2) (T-336/04 and T-329/04). TV 2 and the Kingdom of Denmark brought actions against the part concerning overcompensation (T-309/04 and T-317/04). TvDanmark and Viasat state that the Commission had made mistakes when calculating the costs and had committed a manifest error of assessment when calculating the cross-subsidization. Moreover, Viasat submits that the Commission committed an error in accepting all of the TV 2 programs as part of its public service obligation.

TV 2 and the Kingdom of Denmark also stated that there are errors in the statement of account. TV 2 also submits that there is no state aid, since the extra funds have in fact not been used to cross-subsidize commercial activities. Furthermore, the Danish authorities maintain that license fee resources do not represent state resources. Both are also of the opinion that the accumulation of TV 2's net capital does not exceed what was necessary to perform the public service task. The four cases are pending.

The recapitalization

Including interest, the amount to be recovered was calculated to be € 144 million. The recovery would naturally pose a burden on the economy of TV 2, so the Danish authorities decided to recapitalize the company. The Danish authorities planned to inject capital for an amount of DKK 440 million and swap their current debt investment of DKK 394 million in the company for equity. TV 2 should raise commercial loans for the amount of DKK 394 million. The Commission was notified of this plan in June 2004, and Denmark called for approval according to the market economic investor principle (TV 2 2005, p. 55).

The Commission made a quick decision (Commission 2004), where it states that it has not yet had opportunity to state its decisions on cases in which the recapitalization of a publicly owned company intervenes immediately after the recovery of unlawful state aid.

First, the Commission examines whether the scheme is state aid along the lines of 87(1). The capital injection to be granted to TV 2 will be directly provided by the state from the public budget, so it represents state resources. The question on *favoring* is complicated: when member states inject capital into a public undertaking, they must follow the principle of "the market economy investor" for not providing a favor to the underta-

king (Commission 1993). Moreover, here the decision must be guided by prospects of profitability in the longer term (cf. C-305/89, 20). The Danish authorities have calculated the optimal level of capital of TV 2 to be DKK 640 million, and the Commission has no objection.

However, that calculation was based on the assumption of a longer term investment in TV 2. "This assumption is, however, not valid in the present case since the Danish authorities have indicated themselves that they intend to privatize the company in the near future" (33). Denmark would therefore only act like a market economy investor if the recapitalization were financially more favorable than alternative options. The Commission does not investigate such options, and according to its own Communication from 1993, it shall not as long as it analyses investments under the principle of the market economy investor (Communication 1993, 27). The Commission therefore "presently cannot assess with any reasonable degree of certainty whether this [that the recapitalization was the most favorable option] would be the case" (33). The conclusion with regard to Article 87(1) is that "the Commission cannot exclude that the envisaged recapitalisation of TV 2 in the context of the intended privatisation [...] includes state aid elements" (38).

It is not easy to say that "the Commission had overcome all the difficulties raised by the assessment of the measure in question," and possibly the Commission ought to have opened the procedure in Article 88(2), hereby giving the interested parties the possibility to submit their comments; but this did not happen.

Instead, the Commission proceeded to examine the compliance of the aid with the requirements in Article 86(2). The *definition* and the *entrustment* were naturally approved on the grounds that they have not been changed since the decision of 19 May 2004. Then the Commission should investigate the necessity, i.e. if the public service task could be performed without the proposed aid. And in this connection, the Commission should consider the other options "least detrimental to competition." The necessity was not documented, because other least detrimental options were not rejected. Especially surprising is the fact that the possibility of taking out bigger commercial loans was not considered. The state aid could hereby be totally escaped. According to the facts of the case, the market value of TV 2 is greater than the total recovery amount (p. 16); the financial statement for 2003 showed a

little surplus even without the state aid (TV 2 2005); and the new commercial channels (TV 2 Zulu and TV 2 Charlie) would contribute to TV 2's income (50). So loans would probably be possible.

There are also problems concerning the *proportionality*. The Danish authorities had calculated the optimal capital of TV 2 to be DKK 640 million; however, this was under the condition that the aid ought to be given according to the principle of the market economy investment, which the Commission had just rejected. Under Article 86(2) encompassing service of general economic interest, other conditions apply. Here, the aid must be restrained to what is necessary for performing the task; otherwise it constitutes overcompensation. The Commission accepts without justification DKK 640 million, and it does not calculate the value of the total state aid (capital injection + the value of the debt-for-equity swap). It is therefore difficult to evaluate whether the demands for proportionality had been fulfilled.

In the decision of 6 October 2004, the Commission approved the recapitalization according to Article 86(2), as it decided to consider that any state aid elements possibly included in the recapitalization of TV 2 are compatible with the Common Market. TV 2 subsequently repaid the Kingdom of Denmark DKK 1,073 million.

TV 2 for sale!

After the approval, the Danish government announced on 28 October 2004 its decision to partly privatize TV 2 by selling between 51-66 percent of the share capital (Ministry of Culture 2004). Eight indicative offers were submitted to the Ministry on 8 December 2004. The offers were anonymous, but some informed the press they were purchasers: a purely Danish consortium comprised of JP-Politiken and Egmont; a Scandinavian consortium consisting of Det berlingske Officin and Swedish TV 4; and two of TV 2's competitors: MTG (owner of Viasat and TV3/TV3+) and SBS (owner of TvDanmark 2 and TvDanmark 1). The last four remain unknown.

The Ministry of Culture started the second phase in the sales process, whereby a shortlist of prospective purchasers should be drawn up and those purchasers should be admitted access to a data room and other confidential information. They should then submit a definitive binding offer, and the selection ought to be complete in the spring of 2005.

More court cases

In January 2005, however, TvDanmark and Viasat brought actions for the Court of First Instance against the Commission decision of 6 October 2004 (T-12/05 and T-16/05). They submitted the following arguments:

- the recapitalization was provoked by the demand for the reimbursement of illegal state aid, and authorization would mean that the Commission decision of 19 May 2004 will be deprived of its independent meaning;
- the recapitalization led to the optimal capital structure, and this was not necessary for performing the public service task;
- Article 86(2) does not cover state investments in companies made ready for sale and the capital injection by the state cannot be compensation for the net costs by performing the task;
- TV 2 does not appear to have net costs connected with its public service obligations, cf. the accounts for 2003, and the Commission failed to establish and quantify the state aid;
- the Commission failed to establish that compliance with the Recovery Decision without subsequent recapitalization would obstruct TV 2 in the performance of its public service task;
- and finally, the applicants submit that the Commission infringed on Article 88(2) when it decided not to open the formal investigation procedure.

Annulment of the sales process

After the Ministry of Culture had taken these arguments into consideration, it decided to cancel the sales process on the grounds that the economical uncertainties would be excessive for the purchasers. The state could not issue a guarantee to the purchasers against any losses if the state aid cases would end with demands for the reimbursement of illegal state aid. Such a guarantee would unto itself constitute new illegal state aid. Moreover, two of the purchasers (Viasat and SBS) had brought actions for the Court, and they will obtain access to information about the development in these cases that would be denied other purchasers. The Ministry could therefore not provide equal treatment for all as it otherwise should. The cases are pending.

Timing and DTT

The six court cases will probably be finished in 2008 at the earliest, and if the principal question concerning the relationship between Article 87(1) (and the Altmark Judgment) and Article 86(2) will be touched upon in one of the judgments, such a case will certainly be taken to the European Court of Justice, cf. the lengthy discussion on *compensation or aid*, as mentioned in note 1. Furthermore, if the Commission loses just one case, it will be forced to take a new decision, which usually requires twenty months. In other words, more time will be required before TV 2 can be put for sale.

In the meantime, digital terrestrial television has been introduced in Denmark. There will be seven or eight multiplex, i.e. large numbers of nationwide television channels. The privilege of TV 2 – to be the only nationwide channel with advertising – will have disappeared. TV 2 will continue to have public service obligations, but now it will be possible to create a robust, private and commercial media sector without TV 2 as a necessary part. So it is possible that there will be little interest in purchasing TV 2 at that time.

Conclusion

There is no inconsistency between the government's wish to sell TV 2 and the Treaty's rules concerning state aid. It is not principles, but the actual bureaucratic behavior of the Danish authorities and the Commission that have created the problems. TV 2 is no longer for sale because of a combination of three factors. For years, the Danish authorities did not respect the EU rules for state aid. TV 2 received opportunity to accumulate an unnecessary and unlawful equity capital with funding intended for public service programming, and the Commission misinterpreted the rules on state aid in the Treaty in its case handling (and in the communication from 2001).

TV 2 gets into trouble because of the attempt to become a financially sound company with substantial equity capital. This was not blocked by the Danish authorities, because a publicly available budget establishing a link between the compensation (the state aid) and the output (the extent of the task) never existed. Without such a budget and with a merely qualitative definition of the task, TV 2 could transfer funding for programming to the accumulation of capital without any problem. When the Commission states that TV 2 had been over-



compensated, this also means that TV 2 did not use all of the funding to fulfill this task. Not necessary that TV 2 got too much money. That which is erroneous is the balance between the expenses to perform the programming and the state aid, and the extent of the expenses is partly determined by TV 2 itself. Had TV 2 used the overcompensated amount on programming, the Commission had not opened a case; and when the Commission did not require documentation for the necessity of the aid, the conditions for the use of 86(2) are reduced to the match between the actual expenses and the revenue. It is not possible to determine whether the necessary and actual expenses match, and this allows for TV 2's transfer of funding to capital.

The case on recapitalization involves the same problem. When the Commission fails to examine the necessity, it never realizes that a commercial loan could pre-

sent the solution. And the calculation of the injection of capital was incorrect, because it was not restricted to that which was necessary, but instead led to the optimal capital structure as proposed by the Danish government.

The long-term consequences will partly depend on the Court's decisions. If the Commission loses just one of the cases, TV 2 will be in trouble. The problems appear to be at their worst in the cases on recapitalization, which will be difficult for the Commission to win. However, the other cases also contain financial threats. If the cases are lost, TV 2 will have to repay the illegal state aid and possibly also compensation to Viasat and SBS. Will TV 2 be able to do so at that time? The immediate conclusion is that the decision to privatize TV 2 has been an obstruction to save TV 2 from the problems created by the state aid cases. And the state aid cases obstruct the privatization of TV 2. *Catch 22!*

NOTES

¹ First 07.02.1985 compensation by C-240/83 ADBHU; 27.02.1997 aid by T-106/95 FFSA; 25.03.1998 possible confirmed aid by C-174/97P FFSA; 10.05.2000 aid by T-46/97 SIC; 22.06.2000 aid by C-332/98 CELF; 22.11.2001 compensation by C-53/00 Ferring; 24.07.2003 compensation by C-280/00 Altmark.

² Mortensen 2006 is a review of the Commission's handling of the complaints against public service broadcasting from 1992 to 2005.

³ Koenig and Haratsch 2004 refer to this procedure as "the rebirth of Article 86(2)." And they are not sure how the Court will react to it. A decision may come in one of the six pending cases connected to TV 2. If the Commission had stopped here in the procedure and followed the logic in the Ferring-case, it should immediately have declared the overcompensated amount for unlawful (cf. Ferring Judgment, 29), since it was not notified.

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Virtual Capital? Internet Competence and Political Participation in Denmark

This article demonstrates that competence in using the Internet is a new form of capital that has become more important in explaining variations in political participation and political efficacy than for example education. What is the significance of this finding for the class structure in advanced societies, and what does this mean for the future of politics and political systems?

This article will argue, firstly, that virtual capital, i.e. competence in using information technology, in particular the Internet, represents a new form of capital or personal resource distinct from existing forms of capital such as economic, educational or organizational capital. Secondly, it will explore whether and how possession of this type of capital translates into online and offline political participation as well as political efficacy on an individual basis. Thirdly, the article will demonstrate that for persons with a high level of virtual capital (super-users), educational differences in terms of political participation evaporate.

The arguments will be based on data from a Danish nationwide representative survey conducted as part of the MODINET research project in late 2003/early 2004. This survey focused on media use and media habits particularly targeting ICT's, political and civic engagement, participation and attitudes. The sample size was 2509 persons from 15 to 79 years, and the response rate was 65 percent.

On the concept of capital

In the last three decades, the concept of capital has become increasingly diluted, or at least assumed meanings unintended or unimagined by the 'founding fathers' of the concept. Marx, who must surely be counted as among this number, narrowly spoke about the means of production and their monetary equivalents as capital

(Marx 1976). In the social and humanistic sciences, however, especially the works of Bourdieu (Bourdieu 1984, 1986, Bourdieu & Wacquant 2001) and Putnam (1993) have taken the thinking about capital in new directions. As Bourdieu sees capital as a resource that can be used to obtain power and dominate 'the game' within a certain social field, there are in principle as many kinds of capital as there are (important) social fields; however, the most important forms of capital are 'economic', 'cultural' and 'social capital'. Moreover, confusion grew with the advent of Putnam's book *Making Democracy Work*, as we were here introduced to another understanding of social capital referring to interpersonal trust based on norms of reciprocity and the extent of social networks (Putnam 1993). More recently, political scientists have begun to speak of 'political capital'; and finally, Tobiasen (2004) and Kim (2006) have begun speaking about 'virtual capital' as a new type of resource, the possession of which is supposed to have positive effects for, among other things, political participation and political efficacy (see also Norris 2001).

In order to make sense of all of these uses and misuses of the concept of capital, we must take a slight detour back to the concept of capital in the Marxist tradition. Thus, Marx considered capital to be a type of resource on the basis of which it was possible to extract surplus value. Furthermore, in *Das Kapital*, he analy-