

Case C-445/19**Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice****Date lodged:**

6 June 2019

Referring court:

Østre Landsret (Denmark)

Date referred:

29 May 2019

Applicant:

Viasat Broadcasting UK Ltd

Defendants:

TV 2/Danmark A/S

Kingdom of Denmark

Subject matter of the main proceedings

Viasat Broadcasting UK Ltd ('Viasat') has asked for TV 2 Danmark A/S ('TV 2') to be ordered to pay so-called 'illegality interest' totalling DKK 1 746 300 000 on the State aid received by TV 2 during the period from 1995 to 2003 in a situation where the aid was subsequently approved as public service compensation pursuant to Article 106(2) TFEU. TV 2 and the Danish State have requested that the case be dismissed and have put forward a number of objections to the existence and magnitude of a claim for illegality interest.

Subject matter and legal basis for the request for a preliminary ruling

Request for a preliminary ruling lodged pursuant to the second paragraph of Article 267 TFEU concerning the content and scope of the obligation on Member States to order a recipient of aid to pay so-called 'illegality interest' as described in, inter alia, the judgments of 12 February 2008 in *CELF*, C-199/06,

ECLI:EU:C:2008:79, and of 18 December 2008 in *Wienstrom*, C-384/07, ECLI:EU:C:2008:747.

Questions referred

1. Does the obligation for a national court to order an aid recipient to pay illegality interest (see the judgment in *CELF*) apply also in a situation such as that in the present case, in which the unlawful State aid constituted public service compensation which was subsequently found to be compatible with the internal market under Article 106(2) TFEU and in which approval was granted on the basis of an assessment of the entire public service undertaking's overall financial situation, including its capitalisation?
2. Does the obligation for a national court to order an aid recipient to pay illegality interest (see the judgment in *CELF*) apply also in respect of amounts which, in circumstances such as those of the present case, are transferred from the aid recipient to affiliated undertakings pursuant to a public-law obligation but which are categorised by a final Commission decision as constituting an advantage for the aid recipient within the meaning of Article 107(1) TFEU?
3. Does the obligation for a national court to order an aid recipient to pay illegality interest (see the judgment in *CELF*) apply also in respect of State aid which the aid recipient, in circumstances such as those of the present case, received from a publicly-controlled undertaking, given that the latter's resources are derived partly from sales of the aid recipient's services?

EU legal provisions cited

Article 102 TFEU, Article 106 TFEU, Article 107 TFEU and Article 108 TFEU.

Commission notice on the enforcement of State aid law by national courts (2009/C 85/01) ('the cooperation notice')

Commission notice: Towards an effective implementation of Commission decisions ordering Member States to recover unlawful and incompatible State aid (2007/C 272/05) ('the recovery notice')

Commission decisions cited

Commission Decision 2006/217/EC of 19 May 2004 on measures implemented by Denmark for TV 2/Danmark, NN 22/2002 ('the 2004 decision')

Commission Decision C(2004) 3632 final of 6 October 2004 in State Aid Case No N 313/2004 relating to the recapitalisation of TV 2 DANMARK A/S ('the recapitalisation decision')

Commission Decision C(2008) 4224 final of 4 August 2008 in Case N 287/08 ('the rescue aid decision')

Commission Decision 2011/839/EU of 20 April 2011 on the measures implemented by Denmark (C 2/03) for TV 2/Danmark ('the 2011 decision')

Commission Decision 2012/109/EU of 20 April 2011 concerning State aid C 19/09 (ex N 64/09) which Denmark intends to implement regarding the restructuring of TV 2 Danmark A/S ('the restructuring decision')

EU Court of Justice case-law cited

Altmark, C-280/00, ECLI:EU:C:2003:415

CELF, C-199/06, ECLI:EU:C:2008:79

Wienstrom, C-384/07, ECLI:EU:C:2008:747

TV 2/Danmark v Commission, C-649/15 P, ECLI:EU:C:2017:835

Commission v TV 2/Danmark, C-656/15 P, ECLI:EU:C:2017:836

Viasat Broadcasting UK v TV 2/Danmark, C-657/15 P, ECLI:EU:C:2017:837

Viasat Broadcasting UK v Commission, C-660/15, ECLI:EU:C:2017:178

TV 2/DANMARK A/S and Others v Commission, T-309/04, T-317/04, T-329/04 and T-336/04, ECLI:EU:T:2008:457

TV 2/Danmark v Commission, T-674/11, ECLI:EU:T:2015:684

Viasat Broadcasting UK v Commission, T-125/12, ECLI:EU:T:2015:687

Eesti Pagar, C-349/17, ECLI:EU:C:2019:172

Residex Capital IV CV, C-275/10, ECLI:EU:C:2011:814

Siemens v Commission, T-459/93, ECLI:EU:T:1995:100

National legislation cited

Lov om radio-og fjernsyns virksomhed ('the Law on Radio and Television Broadcasting'), in particular Paragraphs 24, 29, 30 and 33

Brief presentation of the facts and procedure in the main proceedings

- 1 The applicant in the main proceedings is the commercial television broadcasting company Viasat. The two defendants are, respectively, the Danish State

(represented by the Ministry of Culture) and the State-owned public service broadcasting company TV 2. TV 2 was established in 1986 as an autonomous institution subject to State control under the relevant rules laid down in the Law on Radio and Television Broadcasting. From the time at which it was established, TV 2 has been subject to public service obligations. Viasat and TV 2 are competitors on the Danish market for nationwide distribution of television channels.

TV 2's financing scheme during the period from 1995 to 2004

- 2 The legal basis in Denmark for the financing measures in favour of TV 2 in the years relevant to the present case was regulated in various versions of the Law on Radio and Television Broadcasting: see the description thereof in the 2011 decision.
- 3 TV 2's establishment and initial operations were financed using a start-up loan of DKK 510.8 million without capital injection. TV 2, which had been thinly capitalised since its establishment, financed ongoing operations through licence fee resources and revenues from the sale of its television advertising time, which sales were, until 1997, taken care of by the independent State-owned company TV 2 Reklame A/S. In addition, financing was derived from revenue from sales of programmes and other services. During the period from 1995 to 1996, the financing of TV 2 was regulated as follows: TV 2's share of the licence fees went into a specific State fund, called the TV 2 fund. Profits from TV 2 Reklame A/S derived from that company's aforementioned sales of advertising on TV 2 also went into that fund. Under Paragraph 30 of the Law on Radio and Television Broadcasting, 'TV 2's overall activities' (that is to say, both its nationwide and its regional activities: for further details, see below) were financed 'through amounts transferred from the TV 2 fund in accordance with the framework budgets as determined by the Minister for Culture'. According to the *travaux préparatoires* relating to that legislation, the reason for that scheme of channelling TV 2's advertising revenues through TV 2 Reklame A/S and the TV 2 fund was a political wish to protect TV 2's editorial independence. The detailed provisions for TV 2's activities are set out in Paragraphs 29, 30 and 33 of the Law on Radio and Television Broadcasting (in the version in force at the time).
- 4 The parties to the main proceedings disagree as to whether TV 2 Reklame A/S's profits could be used solely to cover TV 2's financing needs and whether TV 2 was legally entitled to the revenue in question. The referring court (the Østre Landsret (High Court of Eastern Denmark)) has observed in this regard that the rules of the Law on Radio and Television Broadcasting then in force provided expressly that the Minister for Culture could take decisions directing that shares of TV 2 Reklame A/S's profits were not to be transferred to the TV 2 fund. Similarly, the *travaux préparatoires* relating to that legislation stated that the Minister for Culture could 'decide how big a share of the profits from advertising activities is to be transferred to the TV 2 fund'. The situation was thus one

involving financing through budgetary frameworks and not through legal entitlement to the advertising revenue.

- 5 In practice, however, all of the profits from TV 2 Reklame A/S in both 1995 and 1996 were transferred to the TV 2 fund. Moreover, in those same two years a total amount consisting of both licence fee resources and advertising revenues was transferred from the TV 2 fund to TV 2, although this did not include all the advertising revenues that were transferred from TV 2 Reklame A/S to the TV 2 fund.
- 6 TV 2 Reklame A/S and the TV 2 fund were wound up on 1 January 1997. TV 2 then took over the sale of the company's advertising time and thus received the advertising revenues directly. As from that time also, TV 2 also received licence fee resources directly from the other Danish public service channel DR (which took care of the task of collecting those fees). When the TV 2 fund was wound up, the fund's assets were transferred to TV 2.
- 7 In addition, during the period from 1995 to 2002 TV 2 received a number of advantages from the State: these related to (i) a corporation tax exemption; (ii) interest-free and repayment-free terms on the company's start-up loan; (iii) a State guarantee for the operating loan until the end of 1996; and (iv) payment of an excessively low broadcasting frequency fee. Those advantages were all classified as existing State aid.
- 8 TV 2 ceased receiving licence fees on 1 July 2004, when the autonomous institution was converted into the current limited liability company TV 2/DANMARK A/S. TV 2 was precluded from collecting subscription fees and did not have access to external loan financing. From the beginning TV 2 experienced financial difficulties, essentially attributable to its thin capitalisation. The Danish State decided that TV 2 should build up the necessary equity through ongoing profits. During the period from 1995 to 2002, TV 2 went from having negative equity of DKK 97.8 million to having positive equity of DKK 550.5 million. At the end of 2005, TV 2's equity totalled DKK 652 million.

TV 2's public service obligations and relationship to the TV 2 regions

- 9 At the time of its establishment, TV 2 had only one nationwide undertaking. Subsequently a number of 'regional undertakings' were established ('the regions'). During the period in question, the TV 2 undertaking thus consisted of nine independent public undertakings: the nationwide undertaking and eight regional undertakings, with each having its own independent regional council, board of directors, programme council, executive board and budget and programming responsibility.
- 10 During the period from 1995 to 2004, under the Law on Radio and Television Broadcasting TV 2 had an obligation to produce and broadcast nationwide and regional television programmes. The nationwide undertaking and the regions were

to broadcast their programmes on the same broadcasting network, since they shared broadcasting times amongst themselves. TV 2 received the advertising revenues generated in connection with the showing of the regional broadcasts. The regions did not have their own broadcasting licences and their own public service contracts with the State until 2003. Nor did the regions have their own articles of association, and they were not to submit public service reports to the Minister, as it was incumbent upon TV 2 to present public service accounts showing how the overall public service obligation was performed. This, too, was changed in 2003.

- 11 As stated above, until 1997 the TV 2 fund passed on the licence fee resources to TV 2. As also stated, the TV 2 fund was wound up in 1997. After that time, as stated, TV 2's overall activities were financed through TV 2's share of the licence fee resources, through advertising revenues from advertising on TV 2 and through revenue from sales of programmes and other services as well as grants and so forth. Furthermore, TV 2 was subject to a public-law obligation to transfer an annual minimum amount to the regions. It was TV 2's central management which each year fixed the 'budget for the nationwide undertaking, including allocation of resources to each individual TV 2 regional undertaking': see Paragraph 24(1) of the Law on Radio and Television Broadcasting. The resources that were allocated were to be taken from TV 2's total revenue, and it was thus not required that the amount should come from precisely the licence fee resources received by TV 2. During the period from 1997 to 2002, TV 2 allocated a total of approximately DKK 2 billion to the regions.
- 12 The referring court does not find it appropriate to characterise that allocation of resources to the regions as '... remuneration' paid to the regions for the broadcasting of programmes in the regional windows, as the General Court did in paragraph 171 of the judgment in Case T-674/11. The reality was that, during the period from 1997 to 2002, TV 2 was allocated that share of the licence fee resources which the regions had hitherto received from the TV 2 fund, and the task of allocating resources to the regions was subsequently incumbent upon TV 2, since the latter was to allocate an amount to the regions which, according to the *travaux préparatoires* relating to the legislative amendment, was to correspond to at least an amount which the regions had hitherto received by transfer from the TV 2 fund (DKK 275 million in 1996).
- 13 When the nationwide TV 2 undertaking was converted into a limited liability company with effect from 1 July 2004, TV 2's obligation to allocate resources annually to the regions ceased. At the same time, the allocation of resources to TV 2 was amended, such that account was taken of the fact that that obligation was now no longer incumbent upon TV 2. Thus the amount of DKK 151.1 million in licence fees was transferred to TV 2 in 2003, compared with a total of DKK 556.2 million in licence fee resources transferred to TV 2 in 2002. Instead, since 2004 the regions have received a share of the licence fee resources directly from the other Danish public service channel DR.

The EU cases concerning TV 2's financing scheme for the period from 1995 to 2002

- 14 By the 2004 decision the Commission found that the aid granted to TV 2 in the form of licence fee resources and other measures in the years from 1995 to 2002 constituted notifiable State aid granted to TV 2, whilst also finding that the measures were compatible with the common market under Article 86(2) EC, with the exception of an amount of DKK 628.2 million, which the Commission classified as overcompensation, which accordingly had to be recovered from TV 2. Proceedings against the Commission's decision were brought before the General Court by TV 2 and the Danish authorities, and by Viasat and Discovery Networks Danmark (formerly SBS Broadcasting SA/TvDanmark).
- 15 In accordance with the decision, on 29 November 2004 TV 2 repaid the DKK 628.2 million including interest and a corresponding amount for 2003, which the Danish authorities sought to recover on their own initiative (calculated according to the same method as in the 2004 decision) including interest, giving a total of DKK 1 073 million.
- 16 As such a repayment would have rendered TV 2 insolvent, the Commission, by the recapitalisation decision, gave approval for the Danish Government to recapitalise TV 2 by increasing the latter's capital by around DKK 440 million and converting a State loan of around DKK 394 million into equity. The 2004 decision was annulled by the General Court by judgment of 22 October 2008 in *TV 2/Danmark and Others v Commission*, T-309/04, T-317/04, T-329/04 and T-336/04. The Commission's new decision in the case was adopted on 20 April 2011 (the 2011 decision). In the 2011 decision, the Commission found that, during the period from 1995 to 2002, TV 2's financing scheme constituted notifiable State aid granted to TV 2. In that connection, inter alia the licence fee resources transferred by TV 2 to the regions during the period from 1997 to 2002 (around DKK 2 billion), and TV 2's advertising revenues from 1995 and 1996 transferred to TV 2 from TV 2 Reklame A/S via the TV 2 fund (around DKK 1.5 billion) were classified as aid under Article 107(1) TFEU. In that connection the Commission found that all of the revenues transferred to TV 2 from the TV 2 fund from 1995 to 1997 constituted State aid granted to TV 2. At the same time, however, the Commission approved the total amount of the aid granted to TV 2 as being compatible public service compensation pursuant to Article 106(2) TFEU. Actions were brought against the 2011 decision before the General Court by TV 2 and Viasat (Cases T-674/11 and T-125/12), and that decision was finally upheld in the judgments delivered by the Court of Justice on appeal in Cases C-649/15 P, C-656/15 P, C-657/15 P and C-660/15 P. The Court of Justice confirmed inter alia that TV 2 Reklame A/S and the TV 2 fund were public undertakings controlled by the Danish State, that their resources were available to the State and that it was therefore a matter involving an advantage financed using State resources. For a more detailed description of the proceedings, reference is made to, in particular, the judgments of the Court of Justice in Cases C-649/15 P and C-660/15 P.

Other State aid cases concerning TV 2

- 17 In parallel with the State aid case concerning TV 2's financing measures during the period from 1995 to 2002, three other State aid cases concerning TV 2 were also pending: the recapitalisation case, the rescue aid case and the restructuring case, which will be described briefly herein.
- 18 The recapitalisation case arose from the repayment of aid made by TV 2 as a result of the 2004 decision, and concerned the Danish State's recapitalisation of TV 2. In the 2004 recapitalisation decision, the Commission approved the recapitalisation of TV 2 under (at the time) Article 86(2) EC. Actions were brought against that decision before the General Court, which, in Cases T-12/05 and T-16/05, held that it was unnecessary to adjudicate on the case because the recapitalisation measures were closely linked to the 2004 decision and therefore had to be assessed as a whole by the Commission in connection with the fresh examination of TV 2's financing scheme for the years 1995 to 2002.
- 19 The rescue aid case arose from TV 2's encounter with cash-flow difficulties in 2008. On that basis, the State decided to grant TV 2 rescue aid in the form of a credit facility, which was approved as rescue aid by the Commission by the rescue aid decision. An action was brought against that decision before the General Court (Case T-114/09) but was subsequently discontinued.
- 20 The restructuring case concerned the restructuring plan notified by the Danish authorities to the Commission on 4 February 2009 by way of a follow-up to the rescue aid decision. By the restructuring decision the Commission approved the restructuring plan, subject to certain conditions, including the possibility for TV 2 to introduce end-user charges ('the restructuring decision'). An action was brought against that decision before the General Court (Case T-210/02) but was subsequently discontinued.

The national proceedings concerning TV 2's financing scheme during the period from 1995 to 2004

- 21 The present proceedings were brought by Viasat on 28 February 2006, but were stayed pending the outcome of various sets of proceedings before the EU Courts concerning TV 2's financing scheme.
- 22 Following the Court of Justice's judgments in Cases C-649/15 P, C-656/15 P, C-657/15 P and C-660/15 P, it has become finally established that the measures granted in favour of TV 2 in the years from 1995 to 2002 constituted notifiable State aid that is compatible with the internal market pursuant to Article 106(2) TFEU. The measures, including the resources transferred to the regions (see Case T-674/11), were granted contrary to the stand-still obligation set out in Article 108(3) TFEU. It is also established that TV 2's (the nationwide undertaking's) entire programming could be held to be public-service television

and that all costs associated therewith could thus be held to be public service costs (see Case T-309/04).

Principal arguments relied on by the parties to the main proceedings

The first question

Submissions of TV 2 and the Ministry of Culture

- 23 According to TV 2 and the Ministry of Culture, a fundamental distinction must be drawn between public service compensation granted within the framework of Article 106(2) TFEU and State aid granted under Article 107(3) TFEU. No undue interest advantage, as contemplated in the *CELF* judgment, arose for TV 2 because costs of external financing during a given period of illegality would only have led to a corresponding increase in TV 2's public service costs and because, in the light of the presumptions that formed the basis of the 2011 decision, it would have been necessary to increase TV 2's public service compensation correspondingly so as to cover the resulting under-coverage and ensure TV 2's equity and its ability to perform its public service mission.
- 24 Public service compensation is characterised by the fact that the undertaking being compensated has an obligation imposed on it to provide services in the public interest in a manner that hampers the undertaking's competitiveness, and involving services which the undertaking would not have assumed freely if operating on market terms. Public service aid also includes the aspect that the magnitude of the compensation received must not go beyond what is necessary to cover the net costs associated with performing the public service obligations and possibly a reasonable profit.
- 25 As a result of those characteristics, under Article 106(2) TFEU recipients of public service compensation do not gain an undue competitive advantage from the aid. Even if the aid itself does not entail a competitive advantage, a premature payment will in itself also not constitute an undue competitive advantage. On the other hand, enforcement of an illegality interest claim against TV 2 will result in TV 2's public service activities having been undercompensated, thereby entailing a distortion of competition in favour of TV 2's competitors, including Viasat, and jeopardise the performance of TV 2's public service mission. It follows that — even though the stand-still obligation is also applicable to aid under Article 106(2) TFEU — there is no obligation to charge illegality interest in order to neutralise an undue advantage.
- 26 This must in any event hold true in a situation such as the one at issue here, in which the aid in question has been declared by the Commission in the 2011 decision — and subsequently also in the recapitalisation decision and the restructuring decision — to be compatible with the internal market on the basis of an assessment of the entire public service undertaking's overall financial situation,

including its capitalisation. Allowing a claim for illegality interest to succeed in such a situation would, it is argued, render nugatory the Commission's decisions and undermine the Commission's competence under Article 106(2) TFEU.

Submissions of Viasat

- 27 Viasat has argued that public service aid approved under Article 106(2) TFEU is no different from aid approved under Article 107(3) TFEU. Illegality interest, it submits, must therefore be paid in both cases.
- 28 Viasat has referred to the judgment in Case C-657/15 P, in which the Court of Justice held that the public service remuneration paid to TV 2 entailed a financial advantage for TV 2, as it was granted contrary to the conditions laid down in the *Altmark* judgment. Furthermore, under Article 106(2) TFEU it is possible to earn a reasonable profit in connection with the performance of a public service mission. In accordance therewith, and as stated in the 2011 decision, TV 2 has been able to accumulate a total profit of DKK 628.2 million.
- 29 In the television sector a very broad definition of public service is recognised, in which all of TV 2's costs are regarded as public service costs. In Viasat's submission, on that basis it is often more advantageous to receive aid under Article 106(2) TFEU than under Article 107(3) TFEU. There are numerous examples of contractual public service obligations where the undertaking voluntarily enters into agreements with the State in order to provide a public service.
- 30 The aid to culture that was at issue in *CELF* constituted compensation for costs associated with the production and export of French-language books. It is therefore broadly comparable to the public service aid in the present case. It would be artificial to treat the aid granted in *CELF* differently from the aid granted to TV 2.
- 31 In Viasat's submission, the line of argument put forward by the Ministry of Culture and TV 2 would undermine the actual effectiveness of the Member States' notification and stand-still obligation in the field of aid granted under Article 106(2) TFEU, as it would have the result that a failure to notify would entail no consequences. Furthermore, it would leave competitors without legal remedies and render nugatory the *Altmark* judgment if it were not possible for competitors to demand payment of illegality interest in a situation such as that in the present case, where the aid was granted in non-compliance with Article 108(3) TFEU and in non-compliance with the conditions laid down in the *Altmark* judgment concerning transparency, public procurement and efficient operation.

Assessment by the referring court

- 32 The referring court has stated that it is settled case-law of the Court of Justice that the principal objective behind demanding repayment of unlawfully-granted State

aid is to eliminate the distortion of competition caused by the competitive advantage gained through unlawful aid. The undue advantage for the aid recipient — even in cases where the aid is subsequently declared compatible — consists *inter alia* in the non-payment of the interest which it would have paid on the amount of compatible aid, had it been obliged to borrow that amount on the market during the period of unlawfulness: see the judgment in *CELF; Eesti Pagar*, C-349/17, paragraph 130; and *Residex Capital IV CV*, C-275/10, paragraphs 33 and 34.

- 33 The referring court finds in this connection that it is not certain that the character of a public service obligation under Article 106(2) TFEU suggests that the general State aid legal principle about illegality interest in cases involving infringements of the stand-still obligation under Article 108(3) TFEU must not be applicable in cases concerning aid in the form of compensation for public service obligations.
- 34 The aid granted to a public service undertaking is given for the purpose of the performance of a public service mission, not for the purpose of providing compensation for the burden associated with paying illegality interest. The payment of illegality interest in itself can scarcely be viewed as fulfilment of a public service obligation.
- 35 On that basis, it is doubtful whether it can be argued, purely as a matter of law, that the payment of illegality interest increases the aid recipient's costs associated with providing public service activities. For the same reason, the argument put forward by TV 2 and the Ministry of Culture, to the effect that the imposition of illegality interest would lead to 'undercompensation' for the public service undertaking's performance of its mission, does not *prima facie* appear to be correct.
- 36 The imposition of illegality interest will not always mean that an undertaking that performs a public service will lack the resources necessary to perform its public service obligation, since the *Altmark* judgment is, after all, based on a presumption that, depending on the circumstances, some profit may be recognised in an aid measure that is compatible under Article 106(2) TFEU. Conversely, the possibility also cannot be ruled out that an undertaking that has received aid other than public service aid will suffer a net loss on an aid-supported activity affected by a claim for illegality interest. In that connection, it is conceivable that the undertaking in question, as a result of a claim for payment of illegality interest, may have to cease to perform that aid-supported activity and thus that the State aid will not have the intended effect in the same manner as might be contemplated in relation to a public service undertaking.
- 37 The referring court is aware that the payment of illegality interest will, depending on the circumstances, mean that a public service aid recipient will be able to survive only if it receives a capital injection and that, therefore, a capital injection may be necessary in order for the State to achieve the objective that the aid is intended to promote. This may also be the case for other aid recipients, however.

Furthermore, it is obvious to assume that the compatibility of such new aid in a given case — in the same manner as unforeseen losses, which each and every aid recipient must have suffered — must be assessed on the basis of the aid needs which the undertaking might have at that time.

The second question

Submissions of TV 2 and the Ministry of Culture

- 38 TV 2 and the Ministry of Culture take the view that the resources transferred to the regions (around DKK 2 billion) ('the regional resources') must be deducted from the basic amount to be used in the calculation of a possible illegality interest claim in the present case.
- 39 In this connection, TV 2 and the Ministry of Culture submit that it is wrong for Viasat, referring to the General Court's judgment in Case T-674/11, to argue that the regional resources constituted TV 2's payment of remuneration to the regions for the broadcast of regional programmes in the regional windows and that the resources reduced a burden that otherwise would have been incumbent upon TV 2.
- 40 The Danish State had chosen to organise the public service mission imposed on the overall TV 2 undertaking in such a way that it was divided into a regional and a nationwide obligation imposed on each independent undertaking within TV 2 overall. The obligation to broadcast regional programmes was incumbent upon — and is still incumbent upon — the regions, while the nationwide obligation was to be taken care of by the nationwide undertaking. Thus, TV 2's sole obligation was to round out the nationwide programming with programmes and to make broadcasting time available for the regions by giving them access to windows in the nationwide programming, where they could broadcast regional content. The regions, for their part, were under an obligation to produce and broadcast regional programmes in those windows.
- 41 The regional resources were the Danish State's compensation to the regions for fulfilment of the regions' obligation to broadcast regional television programmes. The resources did not lessen any 'burden' for the nationwide undertaking in the form of a 'regional obligation'. The nationwide undertaking had no such obligation under Danish law.
- 42 Thus, during the period from 1997 to 2002, TV 2 acted solely as an intermediate passing on the regional resources and did not draw any advantage therefrom. TV 2 did not obtain any more or less by carrying out the task as intermediate during the period from 1997 to 2002 than during the period prior to 1997, when the TV 2 fund, without TV 2's intervention as intermediary, passed on the State's compensation to the regions, or after 2002, when the regions received their share of the licence fee resources directly from DR.

- 43 The fact that the scheme under which TV 2 as intermediary passed on the regional resources was implemented without prior approval from the Commission under Article 108(3) TFEU therefore did not give TV 2 either an interest advantage or any undue improvement in its market position. So far as the regional resources are concerned, it is therefore particularly the case that they have not had the unlawful effects referred to by the Court of Justice in its judgment in *CELF*.
- 44 TV 2 and the Ministry of Culture have referred to recital 194 of the 2011 decision, in which it is stated that, because the sums were transferred to TV 2 and then transferred to the regions, the Commission included those sums in the calculations as both revenue and expenditure, which in practice means that they did not affect the Commission's proportionality assessment. Similarly, during the proceedings in Case T-6[74]/11, the Commission argued that TV 2 was not the recipient of the aid that was passed on to the regional stations and that it also did not derive any advantage from its role as intermediary. Therefore, according to the Commission, TV 2 could not be under any obligation to pay illegality interest on the aid amounts. According to the Commission, this substantiated the point that TV 2 had no legal standing with regard to the contested decision in so far as that question was concerned.
- 45 TV 2 and the Ministry of Culture have referred to paragraph 41(a) (note 65) of the cooperation notice, in which it is stated that taxes paid on the nominal aid amount may be deducted for the purposes of recovery of illegality interest, and to the recovery notice, in which it is stated that, in calculating the amount to be repaid, national authorities may take account of the impact of the tax rules, so that only the net amount is recovered from the recipient.
- 46 Lastly, TV 2 and the Ministry of Culture have referred to the judgment of the General Court in Case T-459/93, in which it is stated that, in the recovery of unlawful and incompatible State aid pursuant to a Commission decision, national authorities may, as a rule, deduct certain amounts under national rules. TV 2 and the Ministry of Culture contend that the situation in the present case, in which TV 2 transferred licence fee resources to the regions (as a minimum equivalent to the 1996 level) pursuant to an obligation laid down in the Law on Radio and Television Broadcasting, bears similarities to the situation in which a share of the aid amount is paid to the tax authorities as a result of a statutory fiscal obligation.

Submissions of Viasat

- 47 Viasat has disputed the submissions put forward by TV 2 and the Ministry of Culture. Viasat has submitted that it follows from paragraph 51 of the judgment in *CELF* that the allocation of unlawful State aid gives rise to an advantage for the recipient corresponding to what the interest costs would have been if an amount equivalent to the entire compatible aid amount had been borrowed on market terms. It is that advantage that the payment of illegality interest is designed to neutralise. Since the entire aid amount granted to TV 2 was compatible State aid

covered by Article 107 TFEU, illegality interest must accordingly also be paid on the entire amount.

- 48 Viasat has further pointed out that the General Court in Case T-674/11 (paragraphs 152 to 173) and the Court of Justice in Case C-649/15 P (paragraphs 48 to 58) rejected the argument that the regional resources should be deducted from the aid amount, just as the EU Courts rejected the line of argument put forward by the Commission in the case, as no support for such a position was to be found in the contested decision.
- 49 In Viasat's submission, the regional resources reduced a burden that otherwise would have been incumbent upon TV 2, namely, the obligation to produce and broadcast regional programmes. According to Viasat, the regional resources were in reality remuneration paid by TV 2 to the regions for a service that TV 2 alternatively would have had to purchase from another supplier.
- 50 Viasat has also contended that, although TV 2 was subject to a public-law obligation to transfer an annual minimum amount to the regions, it was not specified how that amount was to be financed, including whether it was to come out of TV 2's licence or advertising revenues. Thus, TV 2 decided itself which revenue sources would be used to remunerate the regions. TV 2's obligation to finance the activities of the regions would also have been the same if TV 2 did not receive licence fee resources: see the judgment of the General Court in Case T-674/11, paragraph 173.
- 51 Viasat submits that it does not follow from the recovery notice or the cooperation notice that deductions can be made for anything other than tax in a recovery claim. The same holds true for the abovementioned Case T-459/93. Those three sources concern only tax payments and do not lay down a general principle that there should not be repayment of aid resources. In Viasat's submission, TV 2's transfer of resources to the regions cannot be compared to the payment of taxes. In the case of payment of taxes, the resources are already owing to the State and recovery will, therefore, actually entail double payment, which is not the case here.

Assessment by the referring court

- 52 The referring court has observed that the Commission's decisions concern solely the nationwide TV 2. The regions, by contrast, were not the subject matter of the Commission's decisions and accordingly they are not by their nature aid recipients for the purposes of those decisions. Underlying this question is also the aspect that the transfers made by TV 2 to the regions were not deducted in the amount which the EU bodies regarded as being State aid granted to TV 2. Thus, it can be argued that the amounts that were transferred to the regions — irrespective of the fact that they have been classified as aid — in reality are subtracted from the net advantage conferred on TV 2 through the aid.

- 53 The referring court does not find it appropriate to characterise the allocation of resources made by TV 2 to the regions during the period from 1997 to 2002 as remuneration paid to the regions for the broadcasting of programmes in the regional windows. The reality was that, during those years, TV 2 was allocated that share of the licence fee resources which the regions had hitherto received from the TV 2 fund, and the task of allocating resources to the regions thereafter was incumbent upon TV 2, as TV 2 was to allocate an amount which, as a minimum, was to correspond to the amount which the regions had hitherto received from the TV 2 fund.
- 54 The understanding of Danish law during the period from 1997 to 2002 that was used as a basis by the General Court for its categorisation of the regional resources as State aid in Case T-674/11 is not binding for the purposes of the present case, as the determination of the correct interpretation of Danish law in a dispute before a Danish court is a matter for that Danish court. This must also hold true in relation to the Court of Justice's answer to the questions referred in the case. The referring court has clarified the point that the dispute in the present case does not concern the categorisation of the regional resources as State aid under Article 107(1) TFEU. That categorisation is not challenged in the case. The case concerns solely the question of which consequences follow from the non-compliance with Article 108(3) TFEU, including which understanding of Danish law should form the basis of the Court of Justice's examination of the issues of EU law raised.
- 55 The referring court agrees with the Ministry of Culture and TV 2 on the point that the *CELF* judgment does not address the question as to whether a possible obligation to pay illegality interest can be extended also to apply in respect of aid which is, in reality, passed on to other undertakings.

The third question

Submissions of TV 2 and the Ministry of Culture

- 56 TV 2 and the Ministry of Culture have submitted that the advertising revenues from 1995 and 1996 that were transferred from TV 2 Reklame A/S through the TV 2 fund (around DKK 1.5 billion) ('the advertising revenues') must be deducted from the amount to be applied in the calculation of a possible illegality interest claim. Their view is that the advertising revenues constituted payment for TV 2's supply of advertising time to private advertisers. The categorisation of the resources as State aid was due solely to the fact that, until 1997, the revenue was channelled from the advertisers through the two State-owned entities TV 2 Reklame A/S and the TV 2 fund. However, according to TV 2 and the Ministry of Culture, TV 2 did not obtain more or less through that scheme than its competitors on the television advertising market and nor did it obtain more or less in the period after 1997, when TV 2 itself was responsible for its advertising time and for which the advertising revenues have not been categorised as State aid.

According to TV 2 and the Ministry of Culture, this means that the advertising revenues did not lead to an undue improvement of TV 2's competitive position as contemplated in the *CELF* judgment and that those amounts accordingly should not be included in the calculation of a possible illegality interest claim.

Submissions of Viasat

- 57 Viasat has submitted that the line of argument put forward by TV 2 and the Ministry of Culture runs counter to the Court of Justice's judgment in Case C-657/15 P, in which it was held that the entire aid amount granted to TV 2 — including the advertising revenues — constituted State aid. The immediate consequence of this is that the revenue should not be regarded merely as payment to TV 2 for TV 2's services, as that would lead to its not being State aid. The Court of Justice based this position on, inter alia, the fact that TV 2 would not have received the resources under any circumstances.
- 58 The advertising revenues accrued to the TV 2 fund, from which they could also be used for purposes other than the financing of TV 2. It was thus a case of State resources made available to TV 2, which could then use them in its activities. According to Viasat, TV 2 thus also obtained an interest advantage through the resources having been made available before the Commission issued its approval.

Assessment by the referring court

- 59 As stated above, the parties to the main proceedings disagree as to whether TV 2 Reklame A/S's profits could be used solely to cover TV 2's financing needs and whether TV 2 was legally entitled to the revenues in question. The referring court asks the Court of Justice, in its answer to the third question, to use as a basis the understanding of Danish law as set out above by the referring court. The Court of Justice is thus asked to answer the question on the basis of the assumption that in 1995 and 1996 TV 2 was not legally entitled to (all of) the advertising revenues derived from making advertising space available on TV 2's programming. On this point, therefore, the Court of Justice can base itself on the understanding of Danish law as expressed in recital 81 et seq. of the 2011 decision.
- 60 The referring court further finds that it is worth considering whether or not the infringement of the stand-still obligation in that respect in fact conferred a cash flow advantage on TV 2 in relation to the advertising revenues. Thus, the argument can be made that the decisions taken by the Minister for Culture to transfer resources from TV 2 Reklame to the TV 2 fund and from that fund on to TV 2 amounted to preferential treatment of TV 2, which — had the notification rules been observed — could not have been implemented until the Commission, either generally or on an annual basis, had approved the transfers.

Brief presentation of the grounds for the request

- 61 In order for the referring court to be able to rule on the claims put forward by the applicant regarding payment of illegality interest, it must first obtain a ruling on a number of questions of EU law which do not appear to have been clarified in the case-law of the EU Court of Justice.

WORKING DOCUMENT