



## Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

9 November 2017\*

(Appeal — State aid — Article 107(1) TFEU — Public broadcasting service — Measures implemented by the Danish authorities in favour of the Danish broadcaster TV2/Danmark — Concept of ‘aid granted by a Member State or through State resources’ — Judgment in *Altmark*)

In Case C-649/15 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 3 December 2015,

**TV2/Danmark A/S**, established in Odense (Denmark), represented by O. Koktvedgaard, advokat,

appellant,

the other parties to the proceedings being:

**European Commission**, represented by T. Maxian Rusche, B. Stromsky and L. Grønfeldt, acting as Agents, with an address for service in Luxembourg,

defendant at first instance,

**Kingdom of Denmark**, represented by C. Thorning, acting as Agent, and by R. Holdgaard, advokat,

**Viasat Broadcasting UK Ltd**, established in West Drayton (United Kingdom), represented by S. Kalsmose-Hjelmborg and M. Honoré, advokater,

interveners at first instance,

THE COURT (First Chamber),

composed of R. Silva de Lapuerta (Rapporteur), President of the Chamber, C.G. Fernlund, A. Arabadjiev, S. Rodin and E. Regan, Judges,

Advocate General: M. Wathelet,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 30 May 2017,

gives the following

\* Language of the case: Danish.

## Judgment

- 1 By its appeal, TV2/Danmark A/S asks the Court partly to set aside the judgment of the General Court of the European Union of 24 September 2015, *TV2/Danmark v Commission* (T-674/11, EU:T:2015:684) ('the judgment under appeal'), whereby the General Court, first, annulled Commission Decision 2011/839/EU of 20 April 2011 on the measures implemented by Denmark (C 2/03) for TV2/Danmark (OJ 2011 L 340, p. 1; 'the contested decision'), in that the Commission had held that the advertising revenue for 1995 and 1996 paid to TV2/Danmark through the TV2 Fund constituted State aid, and, second, dismissed, for the remainder, the action brought by TV2/Danmark.

### Background to the dispute

- 2 TV2/Danmark is a Danish broadcasting company which was created in 1986. Initially created in the form of an autonomous State undertaking, it was converted, for accounting and tax purposes as of 1 January 2003, into a public limited company. TV2/Danmark is the second public television station in Denmark, the first being Danmarks Radio.
- 3 The mission of TV2/Danmark is to produce and broadcast national and regional television programmes. Broadcasting may be by means of radio equipment, satellite or cable systems. The public-service obligations of TV2/Danmark are determined by the Minister for Culture.
- 4 Apart from the public broadcasters, commercial broadcasters also operate on the nationwide television market in Denmark. These include, first, Viasat Broadcasting UK Ltd ('Viasat') and, second, the group created from the companies SBS TV A/S and SBS Danish Television Ltd ('SBS').
- 5 TV2/Danmark was initially set up with the help of an interest-bearing State loan and its activities were, like those of Danmarks Radio, to be funded with the help of revenue from the licence fee paid by all Danish television viewers. The Danish legislature decided, however, that, unlike Danmarks Radio, TV2/Danmark would also be able to benefit from, in particular, advertising revenue.
- 6 Following a complaint lodged on 5 April 2000 by SBS Broadcasting SA/Tv Danmark, the system for funding TV2/Danmark was examined by the Commission in its Decision 2006/217/EC of 19 May 2004 on measures implemented by Denmark for TV2/Danmark (OJ 2006 L 85, p. 1, corrigendum in OJ 2006 L 368, p. 112; 'the TV2 I decision'). That decision covered the period from 1995 to 2002 and concerned the following measures: license fee resources, transfers granted from funds used to finance TV2/Danmark (TV2 and Radiofonden Funds), sums granted on an ad hoc basis, exemption from corporation tax, exemption from interest and servicing charges on loans granted to TV2/Danmark at the time of its formation, the State guarantee for operating loans and favourable terms for payment of fees by TV2/Danmark for the use of nationwide transmission frequencies (taken as a whole, 'the measures concerned'). Last, the Commission's investigation also concerned the authorisation given to TV2/Danmark to broadcast on local networks and the obligation for all owners of communal aerial installations to relay the public-service programmes of TV2 through those installations.
- 7 After examining the measures concerned, the Commission concluded that they constituted State aid within the meaning of Article 107(1) TFEU, on the ground that the funding system for TV2/Danmark, which sought to offset the cost of that undertaking's public service provision, failed to meet the second and fourth of the four conditions laid down by the Court in its judgment of 24 July 2003, *Altmark Trans and Regierungspräsidium Magdeburg* (C-280/00, EU:C:2003:415; as regards those conditions, 'the Altmark conditions').

- 8 The Commission further decided that that aid, granted between 1995 and 2002 by the Kingdom of Denmark to TV2/Danmark, was compatible with the internal market under Article 106(2) TFEU, with the exception of an amount of 628.2 million Danish crowns (DKK) (approximately EUR 85 million) which it classified as ‘overcompensation’. The Commission accordingly ordered the Kingdom of Denmark to recover that sum, together with interest, from TV2/Danmark.
- 9 The TV2 I decision was the subject of four actions for annulment brought, on the one hand, by TV2/Danmark (Case T-309/04) and the Kingdom of Denmark (Case T-317/04) and, on the other, by the competitors of TV2/Danmark, Viasat (Case T-329/04) and SBS (Case T-336/04).
- 10 By judgment of 22 October 2008, *TV2/Danmark and Others v Commission* (T-309/04, T-317/04, T-329/04 and T-336/04, EU:T:2008:457), the General Court annulled that decision. In its judgment, the General Court held that the Commission had rightly concluded that the public-service mission of TV2/Danmark was consistent with the definition of broadcasting services of general economic interest. The General Court also found, however, several instances of illegality that vitiated the TV2 I decision.
- 11 First, in examining the question whether the measures covered by the TV2 I decision involved State resources, the General Court held that the Commission had failed to state in its decision the reasons why it took advertising revenue for 1995 and 1996 into consideration, de facto, in order to decide whether or not State resources were involved. Second, the General Court held that the Commission’s examination as to whether the second and fourth *Altmark* conditions had been met was not supported by serious analysis of the specific legal and economic considerations which governed how the amount of the licence fee income payable to TV2/Danmark was set. The TV2 I decision was consequently vitiated by a failure to state sufficient reasons on that point. Third, the General Court held that the Commission’s findings on the compatibility of the aid under Article 106(2) TFEU, in particular on whether or not there had been overcompensation, were also vitiated by a failure to state reasons. According to the General Court, that failure to state sufficient reasons was attributable to the failure to undertake a serious examination of the specific legal and economic conditions which governed the setting of the amount of the licence fee income payable to TV2/Danmark during the period under investigation.
- 12 Following the annulment of the TV2 I decision, the Commission re-examined the measures concerned. At that time, it consulted the Kingdom of Denmark and TV2/Danmark and, in addition, received observations from third parties.
- 13 On the conclusion of that examination, the Commission adopted the contested decision.
- 14 That decision concerns the measures implemented for TV2/Danmark between 1995 and 2002. However, in its examination, the Commission also took into account the recapitalisation measures taken in 2004 following the TV2 I decision.
- 15 In the contested decision, the Commission maintained its position as regards the classification of the measures concerned as ‘State aid’ within the meaning of Article 107(1) TFEU. First, it considered that the advertising revenue for 1995 and 1996 constituted State resources and, second, in determining the existence of a selective advantage, the Commission concluded that the measures concerned did not meet the second and fourth *Altmark* conditions. However, whereas in the TV2 I decision the Commission had concluded that the sum of DKK 628.2 million (approximately EUR 85 million) was

overcompensation incompatible with Article 106(2) TFEU, in the contested decision it took the view that that sum was for TV2/Danmark an appropriate capital buffer. In the operative part of that decision, the Commission stated the following:

‘Article 1

The measures implemented by Denmark in favour of TV2/Danmark between 1995 and 2002 in the form of the licence fee resources and other measures discussed in this Decision are compatible with the internal market within the meaning of Article 106(2) [TFEU].’

### **The procedure before the General Court and the judgment under appeal**

- 16 By an application lodged at the Registry of the General Court on 30 December 2011, TV2/Danmark brought an action seeking the partial annulment of the contested decision.
- 17 TV2/Danmark claimed that the General Court should annul the contested decision, in so far as the Commission had found that the measures concerned constituted State aid, within the meaning of Article 107(1) TFEU.
- 18 In the alternative, TV2/Danmark claimed that the General Court should annul the contested decision, in so far as the Commission had considered that:
  - the measures concerned constituted new aid;
  - the licence fee resources which, from 1997 to 2002, were transferred to TV2/Danmark, then passed on to TV2/Danmark’s regional stations, constituted State aid granted to TV2/Danmark;
  - the advertising revenues which, in 1995 and 1996 and at the time of the winding-up of the TV2 Fund in 1997, were transferred from that fund to TV2/Danmark constituted State aid granted to TV2/Danmark.
- 19 By the judgment under appeal, the General Court annulled the contested decision, in so far as the Commission had held that the advertising revenue for 1995 and 1996 paid to TV2/Danmark through the TV2 Fund constituted State aid, and dismissed the action for the remainder.

### **Forms of order sought by the parties**

- 20 By its appeal, TV2/Danmark claims that the Court should:
  - set aside the judgment under appeal in so far as it rejects the principal head of claim in its action before the General Court, give judgment on that head of claim and annul the contested decision in so far as it concludes that the measures examined constituted State aid, within the meaning of Article 107(1) TFEU, or, in the alternative, refer the case back to the General Court;
  - set aside the judgment under appeal in so far as that judgment rejects the second part of its head of claim in the alternative in its action before the General Court, give judgment on that head of claim and annul the contested decision in so far as it holds that the licence fee resources which, between 1997 and 2002, were transferred to TV2/Danmark, then passed on to the regional stations, constituted State aid granted to TV2/Danmark, or, in the alternative, refer the case back to the General Court; and

- set aside the judgment under appeal in so far as it orders TV2/Danmark to bear its own costs and to pay three quarters of the costs of the Commission, and order the Commission to pay the costs incurred by TV2/Danmark, both before the General Court and before the Court of Justice, or, if the case is referred back to the General Court, to also refer the question of costs back to the General Court.

21 The Commission contends that the Court should:

- dismiss the appeal, and
- order TV2/Danmark to pay the costs.

22 The Kingdom of Denmark claims that the Court should uphold the appeal in its entirety.

23 Viasat contends that the Court should:

- dismiss the appeal in its entirety;
- in the alternative, if the Court were to set aside the judgment under appeal wholly or in part, give judgment on the substance and uphold the contested decision on the points challenged by TV2/Danmark; and
- order TV2/Danmark to pay Viasat's costs, both before the Court of Justice and the General Court.

### **The appeal**

24 In support of its appeal, TV2/Danmark relies on two grounds of appeal.

#### ***The first ground of appeal***

##### *Arguments of the parties*

25 By its first ground of appeal, TV2/Danmark claims that the General Court erred in law by rejecting the main head of claim in its action, on the basis of a misinterpretation and misapplication of the fourth *Altmark* condition.

26 TV2/Danmark considers in particular that, in the light of the specific nature of the public-service mission that it must fulfil and the retroactive application of the *Altmark* conditions, the General Court's strictly literal interpretation and application of the fourth *Altmark* condition was not appropriate, and that the General Court should have confined itself to checking whether, in this case, the objective of that condition was fulfilled.

27 According to TV2/Danmark, it is impossible to apply the condition in that way, since the sector of activity in which it operates does not have a competitive and commercial dimension and there is, therefore, no 'reference undertaking' with which to make the comparison required by the fourth *Altmark* condition.

28 Consequently, TV2/Danmark considers that the General Court ought to have applied the fourth *Altmark* condition having regard to the objective of that condition, and have found that, taking into consideration the audit of TV2/Danmark's accounts by the Rigsrevisionen (Court of Auditors, Denmark), that objective had been achieved. Consequently, the General Court ought to have held that that condition was satisfied.

- 29 TV2/Danmark adds that that assessment is supported by the fact that, in this case, the *Altmark* conditions were applied retrospectively and by the fact that legal certainty was thereby undermined.
- 30 The Kingdom of Denmark endorses TV2/Danmark's arguments.
- 31 The Commission and Viasat challenge the admissibility of TV2/Danmark's first ground of appeal and contend that, in any event, it is unfounded.
- 32 In its reply, TV2/Danmark disputes the arguments of the Commission and of Viasat challenging the admissibility of its appeal, and claims, in essence, that the grounds of appeal and arguments in its appeal raise questions of law.
- 33 In its rejoinder, the Kingdom of Denmark submits that the appeal of TV2/Danmark is admissible. In particular, the question of the interpretation and application of the fourth *Altmark* condition is a question of law and the findings of the General Court on that question constitute legal assessments which are subject to review by the Court of Justice on appeal.

### *Findings of the Court*

- 34 It must be recalled that, in accordance with the Court's settled case-law, it follows from Article 256 TFEU and the first paragraph of Article 58 of the Statute of the Court of Justice of the European Union and also from Article 168(1)(d) of the Rules of Procedure of the Court that an appeal must indicate precisely the contested elements of the judgment or order which the appellant seeks to have set aside and also the legal arguments specifically advanced in support of the appeal, failing which the appeal or ground of appeal concerned will be declared inadmissible (see, inter alia, judgment of 20 September 2016, *Ledra Advertising and Others v Commission and ECB*, C-8/15 P to C-10/15 P, EU:C:2016:701, paragraph 35 and the case-law cited).
- 35 The requirements as to reasons stemming from those provisions are not satisfied by an appeal which, without even including an argument specifically identifying the error of law allegedly vitiating the judgment or order under appeal, simply repeats or reproduces the pleas in law and arguments already put forward before the General Court, including those based on facts expressly rejected by the General Court. Such an appeal amounts in reality to no more than a request for re-examination of the application submitted to the General Court, which the Court of Justice does not have jurisdiction to undertake (see, inter alia, judgment of 20 September 2016, *Ledra Advertising and Others v Commission and ECB*, C-8/15 P to C-10/15 P, EU:C:2016:701, paragraph 37 and the case-law cited).
- 36 Moreover, it must also be recalled that it is apparent from the second subparagraph of Article 256(1) TFEU and the first paragraph of Article 58 of the Statute of the Court of Justice of the European Union that appeals are limited to points of law. The General Court therefore has exclusive jurisdiction to find and appraise the relevant facts and to assess the evidence placed before it. The appraisal of those facts and the assessment of that evidence thus do not, save where the facts or evidence are distorted, constitute a point of law which is subject, as such, to review by the Court of Justice on appeal (see, inter alia, judgment of 15 June 2017, *Spain v Commission*, C-279/16 P, not published, EU:C:2017:461, paragraph 36).
- 37 By its first ground of appeal, however, TV2/Danmark does no more, essentially, than repeat or reproduce arguments that it previously presented before the General Court, with a view to the re-examination, by the Court, of its action for annulment.
- 38 Moreover, that ground of appeal contains no precise statement of legal arguments directed specifically to the identification of an error of law that vitiates the judgment under appeal, but consists rather of a challenge to findings of fact made by the General Court, concerning, inter alia, the competitive and

commercial dimensions of the broadcasting sector, the existence of a typical, well-run and adequately resourced undertaking to which the costs of TV2/Danmark could be compared and the nature of the audit of TV2/Danmark's accounts carried out by the Court of Auditors. Nonetheless, TV2/Danmark does not claim that there was any manifest distortion of the facts or the evidence.

- 39 Moreover, TV2/Danmark fails to demonstrate that different findings of fact or a teleological interpretation of the fourth *Altmark* condition would have led to findings other than those made by the General Court.
- 40 Further, in so far as the General Court also held, in paragraphs 132 to 148 of the judgment under appeal, that, in any event, even if, in this case, the fourth *Altmark* condition were to be applied in its essence or less strictly, the arguments submitted by TV2/Danmark would remain insufficient to demonstrate that the Commission had erred in law in the application of that fourth condition, the first ground of appeal is ineffective.
- 41 The same is true of the argument with respect to the retrospective application of the *Altmark* conditions, given that those conditions make it possible to exclude from the scope of Article 107(1) TFEU measures which, in the absence of the judgment of 24 July 2003, *Altmark Trans and Regierungspräsidium Magdeburg* (C-280/00, EU:C:2003:415), would fall immediately under the concept of 'aid' within the meaning of that provision. Therefore, the non-application of those conditions cannot support the claims of TV2/Danmark.
- 42 Consequently, this ground must be rejected as being in part inadmissible and being in part unfounded.

### ***The second ground of appeal***

#### *Arguments of the parties*

- 43 By its second ground of appeal, TV2/Danmark claims that in so far as the General Court examined the merits of the second head of claim in the alternative and rejected it, although TV2/Danmark and the Commission were not in disagreement as to the classification of the licence fee resources transferred by TV2/Danmark to its regional stations, the General Court ruled *ultra petita*, exceeded the limits of its power of judicial review and infringed the principle *audi alteram partem*.
- 44 Further, TV2/Danmark claims that the General Court's assessment of the substance of the dispute is based on a manifestly incorrect interpretation of Danish law.
- 45 In particular, TV2/Danmark claims that the national legislation does not oblige it to pay remuneration to its regional stations for the provision of regional programmes that it broadcasts. Further, it cannot be inferred from that legislation that the transfer to those stations of the licence fee resources amounted to an obligation that TV2/Danmark took upon itself to make payment to those stations in exchange for the provision of those programmes.
- 46 The Kingdom of Denmark endorses TV2/Danmark's arguments.
- 47 The Commission and Viasat challenge the admissibility of the second ground of appeal and contend that, in any event, it is unfounded.

### *Findings of the Court*

- 48 Since the second ground of appeal amounts, in essence, to challenging the General Court's interpretation of Danish law, it must be observed immediately that that is a question of fact which is not, in principle, subject to review by the Court.
- 49 Accordingly, with respect to the examination, in the context of an appeal, of the General Court's findings with regard to national law, the Court of Justice has jurisdiction only to determine whether that law was distorted (see judgments of 3 April 2014, *France v Commission*, C-559/12 P, EU:C:2014:217, paragraph 79, and of 10 November 2016, *DTS Distribuidora de Televisión Digital v Commission*, C-449/14 P, EU:C:2016:848, paragraph 44).
- 50 In that regard, it should be noted that a distortion must be obvious from the documents in the Court's file without any need for a new assessment of the facts and the evidence (see judgments of 3 April 2014, *France v Commission*, C-559/12 P, EU:C:2014:217, paragraph 80, and of 10 November 2016, *DTS Distribuidora de Televisión Digital v Commission*, C-449/14 P, EU:C:2016:848, paragraph 45).
- 51 In this case, however, no such distortion has been established, since TV2/Danmark does not specifically indicate which facts or which items of evidence may have been distorted by the General Court nor does it demonstrate the existence of errors by the General Court, which might have led it to distort the facts or the evidence.
- 52 In particular, TV2/Danmark has failed to demonstrate that the General Court arrived at findings that were manifestly at odds with the content of the provisions of that legislation or that it attached to them a significance they manifestly did not have.
- 53 It must be stated that, under the pretext of claiming that the General Court committed an error of law in the exercise of its judicial review of the contested decision and distorted those provisions, TV2/Danmark does no more, in reality, than criticise the assessment made by the General Court of the evidence constituted by those provisions, which were earlier analysed in detail in paragraphs 169 to 173 of the judgment under appeal, with a view to obtaining a further more detailed examination of Danish law and a further assessment of the facts and the evidence at the stage of appeal.
- 54 The fact that, before the General Court, TV2/Danmark and the Commission did not disagree on the interpretation of the contested decision with respect to the classification of the licence fee resources passed by TV2/Danmark to its regional stations has no effect on the question whether the exercise, by the General Court, of its review was lawful.
- 55 It is apparent from the case-law that it is the task of the Courts of the European Union to interpret the decisions of the Commission in the light of the reasons stated in those decisions and to do so, in some cases, regardless of the arguments developed by the Commission in the course of proceedings (see, to that effect, judgments of 19 July 2012, *Alliance One International and Standard Commercial Tobacco v Commission*, C-628/10 P and C-14/11 P, EU:C:2012:479, paragraphs 72 to 79; of 19 March 2013, *Bouygues and Bouygues Télécom v Commission and Others and Commission v France and Others*, C-399/10 P and C-401/10 P, EU:C:2013:175, paragraphs 126 to 129; and of 30 November 2016, *Commission v France and Orange*, C-486/15 P, EU:C:2016:912, paragraphs 130 to 132).
- 56 Moreover, as is apparent from paragraphs 154, 157 and 173 of the judgment under appeal, TV2/Danmark's observations in that regard were heard and TV2/Danmark declined to withdraw its plea on that point.
- 57 Consequently, the second ground of appeal must be rejected as being in part inadmissible and being in part unfounded.



58 That being the case, the appeal must be dismissed in its entirety.

***The Commission's request that new grounds be substituted***

59 By its request, the Commission claims that the General Court erred in law in finding that the second *Altmark* condition was satisfied in this case and requests that the Court substitute the grounds in that regard. That request would be relevant in the event that the Court were to uphold TV2/Danmark's first ground of appeal, on the application of the fourth *Altmark* condition.

60 TV2/Danmark challenges the admissibility of that request.

61 In accordance with the Court's settled case-law, if a request for substitution of grounds is to be admissible, the party concerned must have an interest in bringing proceedings, in the sense that the request must be capable, if successful, of procuring an advantage to the party making it. That may be the case where the request for substitution of grounds amounts to a defence to one of the applicant's pleas (see judgments of 11 July 2013, *Ziegler v Commission*, C-439/11 P, EU:C:2013:513, paragraph 42, and of 22 June 2016, *DK Recycling und Roheisen v Commission*, C-540/14 P, EU:C:2016:469, paragraph 42).

62 Since, however, the *Altmark* conditions are cumulative and since TV2/Danmark's first ground of appeal has been rejected, the Commission does not have the interest that is necessary to submit its request.

63 Further, that request, which was made by the Commission in its reply to the present appeal, and which does not seek to have that appeal allowed or dismissed, in whole or in part, may not extend the subject matter of that appeal (see, by analogy, judgment of 10 November 2016, *DTS Distribuidora de Televisión Digital v Commission*, C-449/14 P, EU:C:2016:848, paragraphs 100 and 101).

64 It follows that the Commission's request is not admissible.

**Costs**

65 Under Article 184(2) of the Court's Rules of Procedure, where an appeal is well founded and the Court itself gives final judgment in the case, the Court is to make a decision as to costs.

66 Under Article 138(1) of those rules, applicable to appeal proceedings by virtue of Article 184(1) thereof, the unsuccessful party is to be ordered to pay the costs, if they have been applied for in the successful party's pleadings.

67 Since the Commission and Viasat have applied for costs to be awarded against TV2/Danmark, and as the latter has been unsuccessful in all its submissions, TV2/Danmark must be ordered to pay, in addition to its own costs, all the costs incurred by the Commission and Viasat both at first instance and on appeal.

68 Article 140(1) of the Rules of Procedure, which is also applicable to appeal proceedings by virtue of Article 184(1) thereof, provides that the Member States and institutions which intervene in the proceedings are to bear their own costs.

69 The Kingdom of Denmark, as an intervener at first instance, must bear its own costs.

On those grounds, the Court (First Chamber) hereby:

- 1. Dismisses the appeal;**
- 2. Orders TV2/Danmark A/S to bear its own costs and to pay all the costs incurred by the European Commission and Viasat Broadcasting UK Ltd both at first instance and in relation to this appeal;**
- 3. Orders the Kingdom of Denmark to bear its own costs.**

[Signatures]