Reports of Cases

OPINION OF ADVOCATE GENERAL
WATHELET
delivered on 30 May 2017[1]

Case C-649/15 P

TV2/Danmark A/S
v

European Commission

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

1. By its appeal, TV2/Danmark A/S ('TV2 A/S') seeks to have set aside in part the judgment of the General Court of the European Union in *TV2/Danmark* v *Commission*,[2] by which the General Court, first, annulled Commission Decision 2011/839/EU[3] in that the European Commission had considered that the advertising revenue for 1995 and 1996 paid to TV2/Danmark through the TV2 Fund constituted State aid, and, secondly, dismissed, as to the reminder, the action brought by TV2/Danmark (TV2 A/S is a Danish public limited broadcasting company which was created in order to replace, for accounting and tax purposes as of 1 January 2003, the autonomous State undertaking TV2/Danmark ('TV2')). This case is connected with Cases C-656/15 P and C-657/15 P which also concern appeals against the judgment under appeal and in which I shall also deliver my Opinion today. It is also related to the case which recently gave rise to the judgment of 8 March 2017, *Viasat Broadcasting UK* v *Commission* (C-660/15 P, EU:C:2017:178).

I. The facts of the dispute

2. In so far as the facts of this case are identical to the facts of Case C-656/15 P, I refer to points 2 to 15 of my Opinion in that case, which has also been delivered today.

II. Procedure before the General Court and the judgment under appeal

3. For the same reasons, I refer to points 16 to 19 of my Opinion in Case C-656/15 P.

1 Original language: French.

2 Judgment of 24 September 2015 (T-674/11, 'the judgment under appeal', EU:T:2015:684).

3 Decision 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').

III. The appeal

4. TV2 A/S raises two grounds in support of its appeal, concerning, first, the interpretation and application of the fourth condition laid down by the Court of Justice in its judgment of 24 July 2003, *Altmark Trans and Regierungspräsidium Magdeburg*, (C-280/00, 'the judgment in *Altmark*', EU:C:2003:415 and, as regards those conditions, 'the *Altmark* conditions') and, secondly, the classification of the licence fee resources transferred by TV2 to its regional stations.

5. In accordance with Article 76(2) of its Rules of Procedure, the Court of Justice held that it had sufficient information at the end of the written procedure and that, therefore, a hearing was not necessary.

A. The first ground of appeal (the fourth *Altmark* condition)

1. Summary of the arguments of the parties

6. TV2 A/S submits that the General Court erred in law by dismissing the principal claim in its action on the basis of a misinterpretation and incorrect application of the fourth *Altmark* condition.

7. TV2 A/S considers in particular that, in the light of the specific nature of TV2's public-service mission 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 it should have confined itself to checking whether, in this case, the purpose of the condition was fulfilled.

8. According to TV2 A/S, it is impossible to apply the condition in the way the General Court applied it, since TV2's sector of activity 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.

9. Therefore, TV2 A/S considers that the General Court should have applied the fourth *Altmark* condition in the light of its purpose [4] and found that, in view of the audit of TV2's accounts carried out by the Rigsrevisionen (National Audit Office, Denmark), that purpose had been fulfilled and that, consequently, the condition was satisfied.

10. TV2 A/S adds that its argument is supported by the fact that, in this case, the *Altmark* conditions were applied retrospectively and the fact that legal certainty was undermined as a result of the retrospective application.

11. The Kingdom of Denmark agrees with the arguments put forward by TV2 A/S in support of its appeal.

12. The Commission and Viasat Broadcasting UK Ltd ('Viasat') dispute the admissibility of that ground of appeal raised by TV2 A/S and consider that it is, in any event, unfounded.

13. In its reply, TV2 A/S disputes the arguments put forward by the Commission and Viasat which call into question the admissibility of that ground, claiming, in essence, that its arguments do raise questions of law.

4 According to TV2 A/S, in order for the fourth *Altmark* condition to be satisfied, it would be sufficient, in essence, for compensation for the discharge of public-service obligations to be used effectively so that the public-service mission can be performed as well as possible and at the lowest possible cost.

14. In its rejoinder, the Kingdom of Denmark submits that the question regarding the manner in which the fourth *Altmark* condition must be understood and applied is a question of law and the General Court's findings in relation to that question constitute legal assessments which are subject to review by the Court of Justice on appeal.

2. Assessment

(a) Admissibility

15. I agree with the Commission and Viasat that the arguments put forward by TV2 A/S seek to persuade the Court of Justice to carry out a new assessment of the facts as found by the General Court. TV2 A/S has not put forward a single independent argument relating to the errors of law committed by the General Court. Although there are some arguments concerning questions of law, they are inextricably linked with the head of claim whereby TV2 A/S alleges a misinterpretation of Danish law by the General Court, which is also a question of fact.[5]

16. Furthermore, TV2 A/S does not submit that the General Court manifestly distorted the facts. Indeed, if that were the case, moreover, it would still fall to TV2 A/S to establish that, if the General Court had not distorted the facts (*quod non*), the decision on the case would have been different, and TV2 A/S has not established this.

17. Furthermore, as stated by Viasat, the appeal sets out only very general criticisms of the judgment under appeal. Similarly, the appeal lodged by TV2 A/S does not put forward any new arguments, but rather consists, in essence, of references to arguments already submitted to the General Court, which the latter has carefully examined and rejected.

18. There are a number of additional points which I shall address more specifically.

(1) Application of the fourth Altmark condition in the light of its purpose

19. The General Court held in the judgment under appeal (paragraph 70) that 'the broadcasting sector cannot be regarded as not having a competitive and commercial dimension', which TV2 A/S disputes so as to be able to claim that it is not possible to find a reference undertaking with which the costs of the public service provided by TV2 A/S can be compared, which it claims would justify not applying the fourth *Altmark* condition in accordance with its wording.

20. I would observe, first of all, that the question of whether there is a typical undertaking, well run and adequately equipped, with which TV2's costs could be compared, is a question concerning the facts of the case and is, therefore, not subject to review by the Court of Justice since no distortion of evidence has been claimed and TV2 A/S does not refer to any errors of law in its arguments.

21. In addition, in paragraphs 51 to 73 of the judgment under appeal, the General Court carefully examined the arguments put forward by TV2 A/S and gave very detailed reasons for rejecting the argument that the application of the fourth *Altmark* condition had to be adapted in a case such as this, stating specifically, in paragraph 119 of the judgment under appeal, that it was possible to identify a well-run and adequately equipped typical undertaking with which TV2's costs could be compared, and rejecting the latter's arguments that it was not possible to identify such an undertaking.

5 The fact that the arguments put forward by TV2 A/S are based principally on the statements and explanations it gave in relation to the facts of the case is particularly evident from paragraphs 27 to 48, 54 to 62 and 85 to 111 of the appeal. As regards the arguments put forward by TV2 A/S based on Danish law, see, also, point 68 of this Opinion.

22. TV2 A/S does not dispute those points in its appeal, yet reiterates, nonetheless, that it is impossible to compare it to other commercial undertakings.

(2) The inadequacy of the audit carried out by the National Audit Office

23. TV2 A/S also claims that the General Court should have found that the routine checks carried out by the National Audit Office, to establish whether TV2 was an economically well-run undertaking were sufficient to ensure that the fundamental purpose of the fourth *Altmark* condition was being fulfilled.

24. The General Court concluded, however, after analysing the evidence produced in this case, as it had been set out in the contested decision and presented to the General Court during the proceedings, that 'in any event', the arguments put forward by the applicant on the *ex post* audit of TV2 'also fail to stand up to a more detailed examination'.

25. Therefore, as stated by the Commission, even if it had been appropriate, in this case, not to apply the fourth *Altmark* condition in accordance with its wording, but rather to interpret the provision based on its purpose, it is in any case a matter which concerns the facts of the case and is, therefore, not subject to review by the Court of Justice.

26. It should be noted that here, again, TV2 A/S has neither submitted that the General Court distorted the evidence in the case file nor specified which evidence might have been distorted by the General Court, nor indeed demonstrated that the General Court committed errors in its examination which could have led it to distort the evidence in the case file.

(3) If there are legal arguments, they are, in any event, ineffective

27. In the proceedings before the General Court, TV2 A/S submitted, in support of its applications for annulment of the contested decision, both that the Commission had erred in law (in that it had supposedly used an incorrect legal classification in the context of the fourth *Altmark* condition) and that the Commission had erred in the finding of facts in the case.

28. There were two 'stages' to the General Court's rejection of the pleas raised by the applicant. The General Court stated, first of all, that the Commission had applied the correct legal criterion (namely, the full application of the fourth *Altmark* condition). It then checked whether the decision on the case would have been different if the applicant had been right as to the legal criterion to be applied (namely, an application of the fourth *Altmark* condition based on its purpose). In its assessment of the facts, which is not subject to appeal, the General Court found that the decision on the case would have been identical even if it had applied the legal criterion which the applicant argued should be applied. [6]

29. As stated by the Commission, since the General Court examined the pleas raised by the applicant at first instance in two stages, the appeal lodged by TV2 A/S could be upheld only if it was able to demonstrate the existence of both a manifest distortion of the facts and an error of law as regards the choice of legal criterion applicable.

30. Since TV2 A/S has not claimed that there was a manifest distortion of the facts, it is not necessary for the Court of Justice to examine the question of whether an error of law was committed.

6 Paragraph 70 of the judgment under appeal as regards the question of whether the broadcasting sector has a competitive and commercial dimension; paragraph 119 as regards the question of whether it is possible to identify a typical undertaking with which TV2's costs can be compared; and paragraphs 132 to 148 as regards the question of whether the *ex post* audit carried out by the National Audit Office was adequate.

31. The two purely factual questions and the 'legal' arguments put forward by TV2 A/S — according to which, in the specific case of TV2 A/S, the absence of a reference undertaking operating under normal market conditions and having a commercial dimension in public-service broadcasting should lead to a teleological application of the fourth *Altmark* condition — all rest on the premiss that the findings of fact made by the Court of Justice will be different to those made by the General Court, which is false.

32. Moreover, in paragraphs 132 to 148 of the judgment under appeal, the General Court considered and concluded, for the sake of completeness, that, if the fourth *Altmark* condition was to have been applied in its essence or less strictly in this case, the decision on the case would have been identical.

33. In those circumstances, I consider that the arguments put forward by TV2 A/S must be rejected as being ineffective.

34. It is only for the sake of completeness that I shall examine the substance of the arguments put forward by TV2 A/S.

(b) Substance

(1) Application of the fourth Altmark condition in the light of its purpose

(i) The fourth condition is fully applicable

35. As regards the application and interpretation of the fourth *Altmark* condition, I do not think it can be said that the General Court infringed the principle of legal certainty by ruling that that condition was fully applicable or criticised for applying that condition retrospectively.

36. First, it is clear that the four *Altmark* conditions are cumulative and, secondly, given the fact that the judgment in *Altmark* is a landmark judgment — in which the Court of Justice defined a series of conditions of general application — it is not appropriate to alter the scope of the conditions laid down, which cover a specific situation, namely, the situation where undertakings benefiting from aid for the discharge of their public-service obligations 'do not enjoy a real financial advantage, and the measure thus does not have the effect of putting them in a more favourable competitive position than the undertakings competing with them'.[7]

37. As noted by the Commission, since the concept of 'State aid' is objective, it cannot be interpreted differently depending on the sector concerned in a given case. Accordingly, that concept cannot be understood in the light of the particular characteristics of a sector when assessing the existence of State aid (for which an objective assessment must be carried out) but can be interpreted in that way when assessing the compatibility of that State aid with the internal market.[8]

38. The purpose of the *Altmark* conditions is to establish the price which could have been obtained on a general market (the market price) for providing the public service concerned, so as to determine whether that service could have been provided (under the same conditions without state intervention).

(ii) The ratione temporis application of the Altmark conditions

39. TV2 A/S calls into question the retrospective application of those conditions.

7 Paragraph 87 of the judgment in *Altmark*.

8 This is also clear from the wording of the Amsterdam Protocol, which reproduces the wording of Article 106(2) TFEU.

40. It is sufficient to recall the case-law of the Court of Justice,[9] cited in paragraph 79 of the judgment under appeal, according to which 'a preliminary ruling does not create or alter the law, but is purely declaratory, with the consequence that in principle it takes effect from the date on which the rule interpreted entered into force'.

41. In the same paragraph of the judgment under appeal, the General Court also rightly noted that the Court of Justice had not decided to place a temporal limitation on the effects of its judgment in *Altmark*.

42. As a matter of fact, the arguments put forward by TV2 A/S seem to relate above all to the financial consequences for TV2 of classifying as 'State aid' the measures concerned, in application of the *Altmark* conditions, since these were adopted long before the delivery of that judgment.

43. However, the General Court also rejected the possibility that those potential financial consequences enabled TV2 A/S to request, on the basis of the principle of legal certainty, that those conditions not be applied in this case.[10]

(iii) Comparison with a typical undertaking or a reference undertaking

44. As noted by Viasat, even if it were found that a specific comparison with another undertaking was not possible in this case and that every reasonable attempt had been made to make such a comparison — which is disputed in the judgment under appeal (paragraph 119) — it must be borne in mind that the Kingdom of Denmark could have used a public procurement procedure, since the judgment in *Altmark* proposes two ways in which the fourth condition it lays down can be fulfilled: a public-service operator may be chosen by means of a public procurement procedure *or* the level of compensation for discharging the public service must be limited to the costs incurred by a typical, well-run company in performing the public service.

45. It is clear from paragraphs 116 and 117 of the judgment under appeal that, in order for the fourth *Altmark* condition to be satisfied, it is not sufficient to show that the recipient itself is a well-run and adequately equipped undertaking (the argument put forward by TV2 A/S). It is still necessary to identify a reference undertaking.

46. In any event, the argument put forward by TV2 A/S that it is possible for the fourth *Altmark* condition to be satisfied in the particular case where a reference undertaking cannot be identified is irrelevant here, since the General Court has already concluded, in paragraph 119 of the judgment under appeal, that it *is* possible to identify a reference undertaking with which TV2's costs could be compared.

47. In paragraphs 52 and 53 of its appeal, TV2 A/S relies on the judgments in *BUPA and Others* v *Commission*[11] and *CBI* v *Commission*[12] to argue that, depending on the circumstances, it may be necessary to adapt the fourth *Altmark* condition on the basis of the objectives pursued.

48. However, it is sufficient to note that that argument has already been carefully examined, and rejected, by the General Court (paragraphs 57 to 63 and 68 to 70 of the judgment under appeal,), and TV2 A/S makes no reference to that in its appeal.

9 Judgment of 8 September 2011, *Q-Beef and Bosschaert* (C-89/10 and C-96/10, EU:C:2011:555, paragraph 48 and the case-law cited).

10 Paragraphs 81 and 82 of the judgment under appeal.

11 Judgment of 12 February 2008, *BUPA and Others* v *Commission* (T-289/03, EU:T:2008:29).

12 Judgment of 7 November 2012, *CBI* v *Commission* (T-137/10, 'the judgment in CBI', EU:T:2012:584).

49. As set out in the judgment under appeal (paragraphs 57 and 58), the circumstances were very different in the case which gave rise to the judgment of 12 February 2008, *BUPA and Others* v *Commission* (T-289/03, EU:T:2008:29), and cannot be compared to those in the present case. However, TV2 A/S makes no reference to the General Court's rejection of its arguments on that point.

50. As regards the judgment in *CBI*, it is sufficient to observe that that case did not concern the issue of whether an adapted application of the fourth *Altmark* condition was permissible. The findings of the General Court, concerning the very particular nature of the sector in question, the hospital sector, which does not necessarily have a competitive and commercial dimension, therefore had no bearing on the assessment of whether the fourth *Altmark* condition was satisfied. [13]

51. In any event, I take the view (like the Commission) that it is indisputable that the public-service broadcasting sector has a competitive and commercial dimension, which, moreover, the General Court has already found in its assessment of the facts, which is not subject to appeal, in this case.

(2) The argument relating to the audit carried out by the National Audit Office

52. As noted by Viasat, the grounds of appeal raised and forms of order sought by TV2 A/S must, a priori, be understood as acknowledging that, in this case, the fourth *Altmark* condition, strictly speaking, *is not* satisfied and, consequently, *there was no* analysis of the costs which a typical and well-run undertaking would have incurred to discharge those public-service obligations.

53. Therefore, the assessment of the audit carried out by the National Audit Office, is, in principle, relevant only if the Court were to find (in my view, incorrectly) that the application of the fourth *Altmark* condition in the case of TV2 should have been adapted in the manner suggested by TV2 A/S.

54. I think that the General Court has, in this case, applied the fourth *Altmark* condition correctly in requiring a comparison to be made between TV2's costs and those that a well-run and adequately equipped undertaking would have borne.

55. However, even in the unlikely event that the Court of Justice were to find that the fourth *Altmark* condition should not have been applied in accordance with its wording in this case, but instead should have been applied teleologically, it is not in dispute that the General Court concluded, having analysed the evidence produced in this case as set out in the contested decision and presented to the General Court during the proceedings, that 'in any event' the arguments put forward by the applicant on the *ex post* audit of TV2 'also fail[ed] to stand up to a more detailed examination'. [14]

56. It follows from all the foregoing that the first ground of appeal must be rejected as inadmissible and, in any event, unfounded.

13 Judgment in *CBI*, paragraphs 35 and 36 (see, also, paragraph 289 et seq.).

14 Paragraph 132 of the judgment under appeal. The General Court examines the arguments of TV2 A/S that the fourth *Altmark* condition was satisfied 'in its essence' in paragraphs 133 to 148 of the judgment under appeal.

B. The second ground of appeal (resources of the regional stations)

1. Summary of the arguments of the parties

57. By its second ground of appeal, TV2 A/S 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 A/S and the Commission *were not in disagreement* as to the classification of the licence fee resources transferred by TV2 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*.

58. Moreover, TV2 A/S claims that the General Court's assessment of the merits of the case is based on a manifestly incorrect interpretation of Danish law.

59. In particular, TV2 A/S claims that there is nothing whatsoever in that law to suggest that TV2 was required to pay to its regional stations a remuneration for the provision of regional programmes broadcast by TV2, or that the transfer to those stations of licence fee resources constituted an obligation to be assumed by TV2 itself to pay those stations a remuneration in return for the provision of those programmes.

60. The Kingdom of Denmark supports the arguments put forward by TV2 A/S in support of its appeal.

61. The Commission and Viasat dispute the admissibility of that ground of appeal raised by TV2 A/S and consider that it is, in any event, unfounded.

62. The Commission states, in particular, that if the Court of Justice does not reject that ground of appeal as inadmissible it should rule that, in so far as TV2 A/S and the Commission agreed during the proceedings before the General Court that it was necessary to reject as devoid of purpose the claim for annulment of the contested decision in that the decision classified the transfer of licence fee resources from TV2 to its regional stations as 'State aid', the General Court should have found that that head of claim no longer sought annulment of the contested decision on that point and declared it inadmissible.

63. In that context, the Commission adds that, although it is clear that those resources constitute State aid, it is not actually apparent from the contested decision that the Commission intended to give a decision on that matter (to establish whether the licence fee resources which TV2 transferred to the regional stations constituted State aid or not).

2. Assessment

(a) Admissibility

64. TV2 A/S submits that the General Court's interpretation of Danish law was manifestly incorrect ('the findings on which the conclusion is based cannot be inferred from the case file and are manifestly contrary to Danish law' in paragraph 84 of the appeal).

65. However, the interpretation of national law is a question of fact and is not subject to review by the Court of Justice.

66. Moreover, there is no manifest distortion of the facts of the case on the part of the General Court and, indeed, TV2 A/S did not submit that there was.

67. As noted by the Commission, the facts of the case are indisputably of a very complex nature. That is particularly true of Danish legislation on this subject, which did not facilitate the General Court's task.

68. However, that does not change the fact that TV2 A/S has not identified which evidence might have been distorted by the General Court, nor, moreover, has it demonstrated that the General Court committed errors in its examination which could have led it to distort the evidence in the case file. Instead, it is using this line of argument as a pretext in order to re-examine Danish law in more detail at the appeal stage (see paragraphs 85 to 111 of the appeal) and to challenge the General Court's assessment of the evidence concerning the relevant provisions of that law, although that evidence has already been analysed in detail in the judgment under appeal.

69. TV2 A/S relies on the judgments of 18 July 2007, *Industrias Químicas del Vallés SA* (C-326/05 P, EU:C:2007:443, paragraphs 57 to 60), and of 3 April 2014, *France* v *Commission* (C-559/12 P, EU:C:2014:217, paragraphs 78 to 81), in order to argue that its claim of a manifestly incorrect interpretation of national law is fully subject to review by the Court of Justice.

70. However, by the arguments it put forward in the appeal and the re-examination of Danish law in the appeal, TV2 A/S is in fact merely challenging — as in the case which gave rise to the judgment of 3 April 2014, *France* v *Commission* (C-559/12 P, EU:C:2014:217) — the General Court's assessment of the evidence concerning the relevant provisions of Danish law, which has already been analysed in detail in the judgment under appeal (paragraphs 166 to 173).

71. Thus, the second ground of appeal appears to me to be inadmissible.

72. Therefore, it is only for the sake of completeness that I shall examine the substance of the arguments put forward by TV2 A/S.

(b) Substance

73. TV2 A/S claims that the General Court has disregarded the fundamental principles of procedural law by adopting, in paragraphs 152 to 157 of the judgment under appeal (in which the General Court examines the merits of, and then rejects, the second head of claim which TV2 A/S raised before it in the alternative), a preliminary interpretation of the contested decision (according to TV2 A/S, the General Court should not have found that TV2 had an independent obligation to pay its regional stations).

74. As noted by Viasat, the fact that the Commission and TV2 A/S agreed, before the General Court, on the interpretation of the contested decision does not alter the fact that the General Court is free to interpret that decision in a case where it has been challenged.

75. The EU Courts must assess a measure in the light of the purpose of that measure, and the Commission may not alter that purpose during the proceedings.

76. For example, according to settled case-law, 'the purpose of the obligation to state reasons is to enable the Court [of Justice or the General Court] to review the legality of the decision and to provide the person concerned with sufficient information to make it possible to ascertain whether the decision is well founded or whether it is vitiated by a defect which may permit its legality to be contested … The statement of reasons must in principle be notified to the person concerned at the same time as the decision adversely affecting him and a failure to state the reasons cannot be remedied by the fact that the person concerned learns the reasons for the decision during the proceedings before the Court

[of Justice or before the General Court]'. [15]

77. Therefore, I take the view that the General Court did not err in law in its interpretation of recital 194 of the contested decision, even though, during the proceedings, TV2 A/S and the Commission reached a consensus on the manner in which that measure should be interpreted, and taking account of the fact that TV2 A/S did not wish to withdraw its claim in that regard (see the judgment under appeal, paragraphs 154 and 157).

78. In paragraph 168 of the judgment under appeal, [16] the General Court ruled on the basis of the facts as they appeared from the contested decision and the case file — TV2 could not be considered to have a role limited to that of a 'paying agency' with regard to its regional stations (paragraph 166), but rather should be considered as having an independent obligation to pay those stations (paragraph 167).

79. The General Court's assessment of the facts of the case is clear, moreover, from paragraphs 169 to 173 of the judgment under appeal, in which it examines the Danish legislation on which its conclusion is based.

80. Moreover, even the Commission (notwithstanding its arguments set out in points 62 and 63 of this Opinion) admits that the conclusions which the General Court drew from its interpretation of the contested decision are legally correct. [17]

81. In any event, the question of whether TV2 had an independent obligation to pay its regional stations is a question concerning the facts of the case and is therefore, not subject to review by the Court of Justice.

82. It follows that the second ground of appeal must be rejected as inadmissible and, in any event, unfounded. Therefore, the appeal must be dismissed in its entirety.

C. Substitution of grounds

83. The Commission submits that the General Court erred in law in finding that the second *Altmark* condition was satisfied in this case, and requests that the Court of Justice substitute the grounds in that regard.

84. I believe that, in so far as that request is not made in the Commission's own appeal against the judgment under appeal (see my Opinion in Case C-656/15 P delivered today) [18] or in a cross-appeal but in its reply to the present appeal lodged by TV2 A/S, and that that request does not seek to have the appeal allowed or dismissed, in whole or in part (Article 174 of the Rules of Procedure of the Court of Justice), the Commission may not extend the subject matter of the present appeal, which does not concern those findings. Its request must be dismissed as inadmissible.

15 Judgment of 28 June 2005, *Dansk Rørindustri and Others* v *Commission* (C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, EU:C:2005:408, paragraphs 462 and 463).

16 'However, there is nothing in the applicant's arguments to suggest that the situation envisaged in paragraph 166 above actually obtains in this case. On the contrary, the facts as they appear from the contested decision and the case file, and which are not disputed by the applicant, suggest that it is rather the situation envisaged in paragraph 167 above that corresponds to the actual facts.'

17 In so far as the resources received by TV2 were calculated so as to provide TV2 with compensation for managing a public service for which it was responsible, TV2 was receiving aid the existence of which was established (since the four *Altmark* conditions were not satisfied).

18 The Commission did not dispute the General Court's findings relating to the second *Altmark* condition.

85. Moreover, as even the Commission acknowledges, in so far as the *Altmark* conditions are cumulative, such a request for substitution of grounds is relevant only if TV2 A/S's first ground of appeal, relating to the application of the fourth *Altmark* condition, were to be upheld, which it should not. Consequently, that request must be considered, in any event, to be irrelevant.

IV. Costs

86. Under Article 184(2) of the Rules of Procedure of the Court of Justice, where the appeal is unfounded, the Court is to make a decision as to costs. Under Article 138(1) of those rules, which are applicable to the procedure on appeal 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. Since the Commission and Viasat contend that TV2 A/S should be ordered to pay the costs, and TV2 A/S has been unsuccessful, it must be ordered to support the costs incurred by the Commission and Viasat.

87. Under Article 140(1) of the Rules of Procedure, which are applicable to the procedure on appeal by virtue of Article 184(1) thereof, Member States and institutions which have intervened in the proceedings are to bear their own costs. As intervener before the General Court, the Kingdom of Denmark is to bear its own costs.

V. Conclusion

88. In the light of all the foregoing considerations, I propose that the Court should dismiss the appeal and order TV2/Danmark A/S to pay the costs incurred by the European Commission and Viasat Broadcasting UK Ltd. The Kingdom of Denmark should bear its own costs.