Reports of Cases

JUDGMENT OF THE GENERAL COURT (Eighth Chamber)

24 September 2015*

(State aid — Public-service broadcasting — Decision declaring aid compatible with the internal market — Aid implemented by the Danish authorities in favour of the Danish public-service broadcaster TV2/Danmark — Public funding granted to offset the costs involved in the performance of public-service obligations — Concept of aid — Judgment in Altmark)

In Case T-674/11,

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

applicant,

supported by

Kingdom of Denmark, represented initially by C. Vang and V. Pasternak Jørgensen, acting as Agents, subsequently by V. Pasternak Jørgensen, assisted by K. Lundgaard Hansen, lawyer, and finally by C. Thorning, acting as Agent, assisted by K. Lundgaard Hansen and R. Holdgaard, lawyer,

intervener,

v

European Commission, represented by B. Stromsky, C. Støvlbæk and U. Nielsen, acting as Agents,

defendant,

supported by

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

intervener,

APPLICATION for partial annulment of 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 GENERAL COURT (Eighth Chamber),

composed of D. Gratsias (Rapporteur), President, N.J. Forwood and C. Wetter, Judges,

Registrar: C. Kristensen, Administrator,

* Language of the case: Danish.

having regard to the written procedure and further to the hearing on 15 January 2015,

gives the following

Judgment

Background to and facts of the case

1 The subject matter of this action is a claim for annulment of 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 it finds that those measures constitute State aid or, in the alternative, in that it finds that some of those measures constitute new aid.

2 The action has been brought by TV2/Danmark A/S ('TV2 A/S' or 'the applicant'), which is a Danish public limited broadcasting company. TV2 A/S was created in order to replace, for accounting and tax purposes as of 1 January 2003, the autonomous State undertaking TV2/Danmark ('TV2'), established in 1986, by the Lov No 335 om ændring af Lov om radio-og fjernsynsvirksomhed of 4 June 1986 (Law amending the Law on Broadcasting Services). TV2 A/S is, as was its predecessor TV2, the second public television station in Denmark, the first being Danmarks Radio ('DR').

3 The mission of TV2 A/S, like that of TV2 previously, is to produce and broadcast national and regional television programmes. These may be broadcast, in particular, by means of radio equipment, satellite or cable systems. Rules governing the public-service obligations of TV2 A/S and, previously, TV2, are laid down by the Danish Minister for Culture.

4 Apart from the public broadcasters, commercial television broadcasters operate on the nationwide television broadcasting 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 was set up with the help of an interest-bearing State loan and its activities were, like those of DR, 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 DR, TV2 would also be able to benefit from, in particular, advertising revenue.

6 Following a complaint lodged on 5 April 2000 by SBS Broadcasting SA/TvDanmark, the system for funding TV2 was examined by the Commission of the European Communities in its Decision 2006/217/EC of 19 May 2004 on measures implemented by Denmark for [TV2] (OJ 2006 L 85, p. 1, corrigendum in OJ 2006 L 368, p. 1; 'the TV2 I decision'). That decision covered the period from 1995 to 2002 and concerned the following measures: licensing fees, transfers granted from funds used to finance TV2 (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 at the time of its formation, the State guarantee for operating loans and favourable terms for payment of fees due by TV2 for use of nationwide transmission frequencies (taken as a whole, 'the measures concerned'). Lastly, the Commission's investigation also concerned the authorisation given to TV2 to broadcast on local networks and the obligation for all owners of communal aerial installations to relay TV2's public-service programmes through those installations.

7 After examining the measures concerned, the Commission concluded that they constituted State aid within the meaning of Article 87(1) EC (now Article 107(1) TFEU). It also classified that aid as new aid. However, it is clear from the contested decision (recitals 98 and 99) that, in the Commission's view, the authorisation granted to TV2 to broadcast on local networks and the obligation imposed on

owners of communal aerial installations to relay TV2's programmes did not constitute State aid since they did not involve a transfer of State resources. The Commission's conclusion concerning the measures concerned was based on the finding that TV2's funding system, which sought to compensate it for the cost of providing its public services, failed to meet the second and fourth of the four conditions laid down by the Court of Justice in its judgment of 24 July 2003 in *Altmark Trans and Regierungspräsidium Magdeburg* (C-280/00, ECR; 'the judgment in *Altmark*', and, as regards the aforementioned conditions, 'the *Altmark* conditions', EU:C:2003:415).

8 In addition, the Commission decided that the aforementioned aid, granted between 1995 and 2002 by the Kingdom of Denmark to TV2, was compatible with the internal market under Article 86(2) EC (now Article 106(2) TFEU), with the exception of an amount of DKK 628.2 million which it classified as overcompensation (recital 163 and Article 1 of the TV2 I decision). It accordingly ordered the Kingdom of Denmark to recover that sum, together with interest, from TV2 A/S (Article 2 of the TV2 I decision), which had in the meantime replaced TV2 (see paragraph 2 above).

9 Given that the recovery of aid referred to in Article 2 of the TV2 I decision rendered TV2 A/S insolvent, the Kingdom of Denmark notified the Commission, by letter of 23 July 2004, of a planned recapitalisation of that company. That plan provided, so far as State-funded measures were concerned, for a capital injection of DKK 440 million, on the one hand, and the conversion into capital of a State loan of DKK 394 million, on the other. By its Decision C(2004) 3632 final of 6 October 2004, in State Aid Case No N 313/2004 relating to the recapitalisation of TV2 A/S (OJ 2005 C 172, p. 3; 'the recapitalisation decision'), the Commission concluded that the two measures planned for TV2 A/S were 'necessary to rebuild the capital which TV2 [A/S] need[ed], following its conversion into a limited company, to fulfil its public-service mission' (recital 53 of the recapitalisation decision). Consequently, the Commission decided that any element of State aid that might be connected with the planned recapitalisation of TV2 A/S was compatible with the internal market under Article 86(2) EC (recital 55 of the recapitalisation decision).

10 The TV2 I decision was the subject of four actions for annulment brought, on the one hand, by TV2 A/S (Case T-309/04) and the Kingdom of Denmark (Case T-317/04) and, on the other, by the competitors of TV2 A/S, Viasat (Case T-329/04) and SBS (Case T-336/04).

11 By judgment of 22 October 2008 in *TV2/Danmark and Others* v *Commission* (T-309/04, T-317/04, T-329/04 and T-336/04, ECR, EU:T:2008:457; 'judgment in *TV2 I*'), the Court annulled the TV2 I decision. In its judgment, the Court held that the Commission had rightly concluded that TV2's public-service mission was consistent with the definition of broadcasting services of general economic interest (judgment in *TV2 I*, EU:T:2008:457, paragraph 124). It also found, however, several instances of illegality vitiating the TV2 I decision, which led, in short, to the annulment of that decision.

12 Thus, first, examining the question whether the measures concerned by the TV2 I decision involved State resources, the Court held that the Commission had failed to state in its decision the reasons for which it took advertising revenue from 1995 and 1996 into consideration, de facto, as State resources (judgment in *TV2 I*, cited in paragraph 11 above, EU:T:2008:457, paragraphs 160 to 167). Second, the Court found 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 actual legal and economic considerations which governed the setting of the amount of the licence fee income payable to TV2. The TV2 I decision was, in consequence, vitiated by failure to state reasons on that point (judgment in *TV2 I*, cited in paragraph 11 above, EU:T:2008:457, paragraphs 224 to 233). Third, the Court held that the Commission's conclusions on the examination of the compatibility of the aid in the light of Article 86(2) EC, in particular on whether or not there had been overcompensation, were also vitiated by a failure to state reasons. According to the Court, that inadequacy of the reasons stated was attributable to the failure to undertake a serious examination of the actual legal and economic

conditions which governed the setting of the amount of the licence fee income payable to TV2 during the period under investigation (judgment in *TV2 I*, cited in paragraph 11 above, EU:T:2008:457, paragraphs 192, 197 to 203).

13 The recapitalisation decision was the subject of two actions for annulment, brought by SBS and by Viasat. By two orders delivered on 24 September 2009, the Court declared that, in the light of the annulment of the TV2 I decision and the close link between the obligation to recover the aid resulting from that decision and the measures which are the subject of the recapitalisation decision, it was no longer necessary to rule on those cases (orders of 24 September 2009 in *SBS TV and SBS Danish Television* v *Commission*, T-12/05, EU:T:2009:357, and *Viasat Broadcasting UK* v *Commission*, T-16/05, EU:T:2009:358).

14 Following the annulment of the TV2 I decision, the Commission re-examined the measures concerned. On that occasion, it consulted the Kingdom of Denmark and TV2 A/S and, furthermore, received observations from the third parties.

15 The Commission presented the result of its re-examination of the measures concerned in the contested decision, which is also the subject of another action brought by Viasat Broadcasting UK (*Viasat Broadcasting UK* v *Commission*, T-125/12), in which the Court has delivered its judgment today.

16 The contested decision concerns the measures implemented for TV2 between 1995 and 2002. However, in its analysis the Commission also took into account the recapitalisation measures taken in 2004 following the TV2 I decision.

17 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 in favour of TV2 (recital 153 of the contested decision). First, it considered that the advertising revenue for 1995 and 1996 constituted State resources (recital 90 of the contested decision) and, second, in determining the existence of a selective advantage, it concluded that the measures concerned did not meet the second and fourth *Altmark* conditions (recital 153 of the contested decision). However, whereas in the TV2 I decision it had concluded that the sum of DKK 628.2 million was overcompensation incompatible with Article 86(2) EC, in the contested decision the Commission took the view that that sum was a capital buffer appropriate for TV2 A/S. In the operative part of the contested decision, it therefore declared as follows:

'Article 1

The measures implemented by Denmark in favour of [TV2] 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].'

18 Finally, it should be noted that the Kingdom of Denmark took measures seeking to rescue and restructure TV2 A/S. Accordingly, first, on 16 June 2008, it notified draft rescue aid in the form of a credit facility, intended for TV2 A/S. That aid was approved by the Commission in Decision C(2008) 4224 final of 4 August 2008 in Case No 287/08, concerning rescue aid granted to TV2 A/S (OJ 2009 C 9, p. 1). The Commission's decision was the subject of an action by Viasat. By order of 22 March 2012, the Court, having established that the aid approved by the decision at issue had been repaid in full, decided that the action had become devoid of purpose and that there was no longer any need to adjudicate on it (order of 22 March 2012 in *Viasat Broadcasting UK* v *Commission*, T-114/09, EU:T:2012:144).

19 Second, on 4 February 2009, the Kingdom of Denmark notified the restructuring plan for TV2 A/S to the Commission. In its 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 TV2 A/S (OJ 2012

L 50, p. 21), the Commission considered that restructuring plan to be compatible with the internal market for the purposes of Article 107(3)(c) TFEU on certain conditions, one of them being the prohibition of paying the aid measures provided for by that plan, because the situation of the recipient company had improved. That decision was the subject of an action for annulment brought by Viasat. As Viasat had withdrawn from its action, the case was removed from the Court's register by order of 10 December 2012 in *Viasat Broadcasting UK* v *Commission* (T-210/12, EU:T:2012:660).

Procedure and forms of order sought

20 By application lodged at the Court Registry on 30 December 2011, TV2 A/S brought the present action.

21 By document lodged at the Court Registry on 26 March 2012, the Kingdom of Denmark sought leave to intervene, in the present case, in support of the form of order sought by TV2 A/S.

22 By document lodged at the Court Registry on 25 April 2012, Viasat sought leave to intervene, in the present case, in support of the form of order sought by the Commission.

23 By orders of 13 July 2012, the President of Third Chamber of the Court granted those requests.

24 Following a change in the composition of the Chambers of the Court, the Judge-Rapporteur was assigned, as President, to the Eighth Chamber, to which the present case was, consequently, assigned.

25 On the proposal of the Judge-Rapporteur, the Court (Eighth Chamber) decided to open the oral procedure and, by way of measures of organisation of procedure, invited the applicant and the Kingdom of Denmark to produce documents. The parties complied with that request within the time allowed.

26 As a member of the Chamber was unable to sit in the present case, the President of the Court designated another judge to complete the Chamber, pursuant to Article 32(3) of the Rules of Procedure of the General Court of 2 May 1991.

27 The parties presented oral argument and replied to questions put by the Court at the hearing on 15 January 2015.

28 The applicant claims that the Court should:

— annul the contested decision, in so far as the Commission finds therein that the measures concerned constituted State aid within the meaning of Article 107(1) TFEU;

— in the alternative, annul the contested decision, in so far as the Commission finds therein that:

  — all the measures concerned constituted new aid;

  — the licence fee resources which, from 1997 to 2002, were transferred to TV2 and then passed on to TV2's regional stations constituted State aid granted to TV2;

  — 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 constituted State aid granted to TV2.

29 The Kingdom of Denmark claims that the Court should:

— annul the contested decision in accordance with the applicant's principal claim;

— in the alternative, annul the contested decision, in so far as the Commission finds therein that 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 constituted State aid granted to TV2.

30 The Commission contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

31 Viasat supports the form of order sought by the Commission.

Law

Admissibility

32 The Commission does not challenge the admissibility of the present action. However, the circumstances of the case require an examination of that question, which, in the absence of any challenge, the Court will carry out of its own motion, in accordance with Article 113 of the Rules of Procedure of 2 May 1991.

33 Since the applicant is the sole beneficiary of the measures concerned by the contested decision, its capacity to act is established (judgment of 17 September 1980 in *Philip Morris Holland* v *Commission*, 730/79, ECR, EU:C:1980:209, paragraph 5).

34 However, it should be pointed out that an action is not admissible unless the natural or legal person who brought it has an interest in seeing the contested measure annulled. That interest must be vested and present and is evaluated as at the date on which the action is brought. In order for such an interest to be present, the annulment of the measure must of itself be capable of having legal consequences or, in accordance with a different form of words, the action must be liable, if successful, to procure an advantage for the party who has brought it (see judgment in *TV2 I*, cited in paragraph 11 above, EU:T:2008:457, paragraphs 67 and 68 and the case-law cited).

35 In the present case, the question arises as to whether the applicant has an interest in bringing the action, since, in the contested decision, the Commission classified the measures concerned as State aid compatible with the internal market and therefore did not order the Danish authorities to recover the aid from the applicant.

36 In that regard, it should be pointed out that it is clear from the case-law on actions for annulment brought by aid beneficiaries against a Commission decision finding the aid at issue to be entirely compatible with the internal market, or finding one of the financing measures at issue to be compatible with the internal market, that the interest in bringing proceedings can result from a genuine risk that the applicants' legal position will be affected by legal proceedings or where the risk of legal proceedings was vested and present at the date on which the action was brought before the EU judicature (see judgment in *TV2 I*, cited in paragraph 11 above, EU:T:2008:457, paragraph 79 and case-law cited).

37 Up until now, the case-law has acknowledged the existence of a 'genuine' or 'vested and present' risk of legal proceedings against an applicant in receipt of illegal aid compatible with the internal market, first, where such proceedings were already pending before the national courts when the action for annulment was brought before the General Court (judgment of 14 April 2005 in *Sniace* v *Commission*, T-141/03, ECR, EU:T:2005:129, paragraphs 29 and 30) or where they were brought

before those courts before the General Court had ruled on the action for annulment (see, to that effect, judgment in *TV2 I*, cited in paragraph 11 above, EU:T:2008:457, paragraphs 79 to 81) and, second, where the proceedings pending before the national courts, referred to by the applicant, were concerned with the aid that was the subject of the decision being contested before the General Court (judgment of 20 September 2007 in *Salvat père & fils and Others* v *Commission*, T-136/05, ECR, EU:T:2007:295, paragraphs 41 to 43).

38 In the present case, the applicant argued in the application that its legitimate and present interest in bringing the action was based on the actual classification of the measures concerned as State aid within the meaning of Article 107(1) TFEU and as new aid within the meaning of Article 1(c) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [108 TFEU] (OJ 1999 L 83, p. 1). It points out that such classification exposes it to the consequences of failure to notify the measures concerned, namely, as held by the Court of Justice in paragraphs 52 and 53 of the judgment of 12 February 2008 in *CELF and Ministre de la Culture et de la Communication* (C-199/06, ECR, 'the judgment in *CELF*', EU:C:2008:79), to the obligation to pay interest to the State in respect of the period of unlawfulness and, if appropriate, to pay compensation for any damage caused to competitors by reason of the unlawful nature of the aid. It also pointed out that proceedings for it to be ordered to pay such interest and compensation had been brought before the Danish courts by Viasat in 2006. Those proceedings had been stayed pending, first, the General Court's judgment in *TV2 I*, cited in paragraph 11 above (EU:T:2008:457), and, subsequently, the Commission's new decision.

39 At the hearing, the applicant and Viasat explained that the proceedings brought by Viasat in 2006 were based on several heads of claim. One of them, directed against the applicant, concerns the payment of interest for the period of unlawfulness. Another, directed against the Kingdom of Denmark, concerns compensation sought by Viasat in respect of the payment, which was premature and unlawful according to Viasat, of the State aid that is the subject of the contested decision. The applicant and Viasat also confirmed that, so far as the above two heads of claim were concerned, those proceedings were still pending when the present action was brought and had been stayed by the court seised pending delivery of the Court's judgment in the present dispute.

40 In the light of the foregoing, the applicant must be held to have sufficiently demonstrated the existence, at the time its action was brought, of a vested and present risk of legal proceedings within the meaning of the case-law cited in paragraphs 36 and 37 above.

41 The present action is therefore admissible.

Substance

42 In support of the form of order it seeks, the applicant puts forward four pleas, the first of which relates to the principal head of claim and the three others to the three alternative heads of claim respectively. The first of those pleas alleges infringement of Article 107(1) TFEU and of the principle of legal certainty, in that the Commission found that the measures concerned constituted State aid; the second alleges that the resources paid to TV2 from the licensing fees and the corporation tax exemption granted to it were wrongly classified as new aid; the third alleges infringement of Article 107(1) TFEU, in that the Commission found that the licence fee resources transferred by TV2 to its regional stations constituted State aid granted to TV2; the fourth alleges an error in law, in that the Commission considered that the advertising revenue paid to TV2 through the TV2 Fund constituted State aid.

43 The first, third and fourth pleas call into question the classification of the measures concerned as State aid. The second plea calls into question, in part, the classification of the measures concerned as new aid. The applicant disputes in particular the classification as new aid of the licence fee resources and

the exemption from corporation tax. In so far as the classification as new aid presupposes that those measures constitute State aid, the second plea will be examined last, following the analysis of the validity of the pleas by which the applicant disputes the very existence of State aid.

The first plea, alleging infringement of Article 107(1) TFEU and of the principle of legal certainty, in that the Commission found that the measures concerned constituted State aid

44 In its first plea, the applicant, supported by the Kingdom of Denmark, argues, in essence, that the Commission was wrong to classify the measures concerned as State aid within the meaning of Article 107(1) TFEU, as interpreted by the judgment in *Altmark*, cited in paragraph 7 above (EU:C:2003:415).

45 In the light of the arguments put forward by the applicant and the Kingdom of Denmark, the present plea must be considered to comprise four parts, the first of which alleges a misinterpretation of Article 107(1) TFEU, as interpreted by the judgment in *Altmark*, cited in paragraph 7 above (EU:C:2003:415). The second part alleges an infringement of the principle of legal certainty. The third and fourth parts allege misapplication of the second and fourth *Altmark* conditions, respectively.

46 Before examining those four parts, it should be recalled that classification as State aid within the meaning of Article 107(1) TFEU requires that four conditions are satisfied, namely that there must be an intervention by the State or through State resources, the intervention must be liable to affect trade between Member States, it must confer an advantage on the recipient and it must distort or threaten to distort competition (judgment in *Altmark*, cited in paragraph 7 above, EU:C:2003:415, paragraph 75).

47 It is clear from the definition recalled in paragraph 46 above that one of the conditions for State aid within the meaning of Article 107(1) TFEU is that there must be an advantage conferred on the recipient. In that regard, in the judgment in *Altmark*, cited in paragraph 7 above (EU:C:2003:415), the Court of Justice held that where a State measure must be regarded as compensation for the services provided by the recipient undertakings in order to discharge public-service obligations, it cannot be considered as conferring on the recipient an advantage putting it in a more favourable competitive position than the undertakings competing with it. Such a measure does not therefore satisfy one of the essential conditions for the existence of State aid and is not therefore caught by Article 107(1) TFEU (judgment of 8 May 2013 in *Libert and Others*, C-197/11 and C-203/11, ECR, EU:C:2013:288, paragraph 84).

48 However, the Court of Justice formulated four conditions which compensation for the discharge of public-service obligations must satisfy in order, in a particular case, not to be considered as conferring an advantage on its recipient and hence to escape classification as State aid within the meaning of Article 107(1) TFEU (see, to that effect, judgment in *Altmark*, cited in paragraph 7 above, EU:C:2003:415, paragraphs 87 to 94).

49 The *Altmark* conditions are as follows: first, the recipient undertaking must actually have public-service obligations to discharge and those obligations must be clearly defined. Second, the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner. Third, the compensation must not exceed what is necessary to cover all or part of the costs incurred in discharging the public-service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations. Fourth, where the undertaking which is to discharge public-service obligations, in a specific case, is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and

adequately provided so as to be able to meet the necessary public-service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit.

50 The first plea in the present action is primarily concerned with the interpretation and application of the second and fourth *Altmark* conditions.

– The first part, concerning the misinterpretation of Article 107(1) TFEU, as interpreted by the judgment in *Altmark*, cited in paragraph 7 above (EU:C:2003:415)

51 In the context of the first part, in the first place the applicant, supported by the Kingdom of Denmark, makes some general remarks concerning the interpretation of the judgment in *Altmark*, cited in paragraph 7 above (EU:C:2003:415), and the *Altmark* conditions. It maintains that those conditions must be interpreted in the light of their context and their objective and so as not to extend the concept of State aid to measures which do not confer on undertakings any advantage favouring them over their competitors. The third of those conditions, according to which the compensation must not exceed what is necessary to cover the costs incurred in discharging the public-service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations, is fundamental to an assessment of the existence of State aid and it is clear from the case-law, in particular the judgment of 12 February 2008 in *BUPA and Others* v *Commission* (T-289/03, ECR, 'the judgment in *BUPA*', EU:T:2008:29), that there is the possibility of waiving application of the other conditions.

52 It must be held that, in making that argument, the applicant maintains in essence that, when examining a measure in the light of Article 107(1) TFEU, as interpreted by the judgment in *Altmark*, cited in paragraph 7 above (EU:C:2003:415), the Commission must first of all examine whether the third *Altmark* condition is satisfied and, if so, waive application of the second and fourth *Altmark* conditions. Accordingly, in the present case it is claimed that the Commission infringed Article 107(1) TFEU, since, instead of applying the judgment in *Altmark*, cited in paragraph 7 above (EU:C:2003:415), according to the methodology proposed by the applicant, it found that the second and fourth *Altmark* conditions had to be applied without first checking, in the context of the third *Altmark* condition, whether the advantage conferred on TV2 by the measures concerned actually exceeded what was necessary to cover the costs incurred in discharging its public-service obligations.

53 That interpretation of the applicant's arguments is necessary, since it seems to reduce the concept of advantage within the meaning of Article 107(1) TFEU to that of overcompensation or, in other words, compensation exceeding what is necessary to cover the costs incurred in discharging public-service obligations, within the meaning of the third *Altmark* condition. Hence, according to that point of view, if there is no overcompensation, nor is there an advantage within the meaning of Article 107(1) TFEU and the measure cannot be classified as State aid.

54 In that regard, on the one hand, it is sufficient to point out that in response to arguments similar to that advanced by the applicant, based on the predominance of the third *Altmark* condition, the General Court has already held that that it is clear from the entirely unequivocal terms of the judgment in *Altmark*, cited in paragraph 7 above (EU:C:2003:415), that the purpose of all the four conditions which it laid down is the classification of the measure in question as State aid, and more specifically the determination of the existence of an advantage. State intervention which does not meet one or more of those conditions must therefore be regarded as State aid within the meaning of Article 107(1) TFEU (see judgment of 16 December 2010 in *Netherlands and NOS* v *Commission*, T-231/06 and T-237/06, ECR, EU:C:2010:525, paragraphs 128, 145 and 146 and the case-law cited; see also, to that effect, judgment of 6 October 2009 in *FAB* v *Commission*, T-8/06, EU:T:2009:386, paragraph 65).

55 Moreover, regarding more particularly the relationship between the third and second *Altmark* conditions, it seems impossible to state that compensation granted to a recipient undertaking charged with a public-service mission does not exceed what is necessary to cover all or part of the costs incurred in discharging the public-service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations, without first knowing the parameters on the basis of which the amount of that compensation was set, which is precisely the purpose of the second *Altmark* condition.

56 Accordingly, contrary to what the applicant maintains, all the *Altmark* conditions must be satisfied if a State intervention is not to be caught by Article 107(1) TFEU.

57 On the other hand, nor can the applicant validly rely on the judgment in *BUPA*, cited in paragraph 51 above (EU:T:2008:29), in support of its argument that some of the *Altmark* conditions may be waived. It must be recalled that, in that judgment, the Court examined the validity of the decision in which the Commission had assessed, in the light of Article 87(1) EC, a risk equalisation scheme ('the RES') in force on the Irish private medical insurance market. The private medical insurance system in Ireland was based, in essence, on an enrolment obligation open to all, irrespective of age, sex and health status and on a community rating system, binding on insurers, whereby all insured persons paid the same premium for the same type of product, regardless of their health status. In those circumstances, the RES provided for the payment of a charge to a State body, the Health Insurance Authority ('the HIA'), by insurers whose risk profile was healthier than the average market risk profile and for a corresponding payment by the HIA to insurers whose risk profile was less healthy than the average market risk profile. Those payments were made through a fund specially established for that purpose and administered by the HIA. By establishing that system of solidarity between insurers, the RES sought to ensure the stability of the private medical insurance market in Ireland and to neutralise the differential in risk profiles between insurers in order to prevent them from using selective marketing strategies to target lower-risk consumers. The Commission examined that system following a complaint lodged by an insurer which, by reason of its healthier risk profile, made higher payments than the others. Having examined the RES, the Commission concluded that it involved payments limited to the minimum necessary to compensate recipient insurers for their obligations of services in the general economic interest and therefore did not constitute State aid within the meaning of Article 87(1) EC (judgment in *BUPA*, cited in paragraph 51 above, EU:T:2008:29, paragraphs 27, 37, 41 and 43).

58 It was in the light of the specific nature of the RES as described in paragraph 57 above, that is, first, the neutrality of that compensation system relative to the income and profits of the recipients and, second, the particular nature of the additional costs involved in those recipients' less healthy risk profiles, that the Court conceded that one of the *Altmark* conditions, that is the fourth, could not be strictly applied in that case (judgment in *BUPA*, cited in paragraph 51 above, EU:T:2008:29, paragraphs 246 to 248).

59 However, on the one hand, the applicant does not argue that the compensation paid to TV2 had particular characteristics similar to those that were present in the case giving rise to the judgment in *BUPA*, cited in paragraph 51 above (EU:T:2008:29).

60 To justify the waiver of the *Altmark* conditions in this case, the applicant relies only on the particular nature of public-service broadcasting as such. According to the applicant, that particular nature of public-service broadcasting is connected with the difficulties which arise when defining that public service. In that regard, it refers in particular to the Protocol on the system of public broadcasting in the Member States annexed to the FEU Treaty ('the Amsterdam Protocol'). It states that, when examining the applicability of the *Altmark* conditions, the Commission ought to have taken account of the fact that, under the Amsterdam Protocol, the Member States had the right to define the public-service broadcasting remit in broad, qualitative terms.

61 In that regard, it must be pointed out that it is clear from the wording of the Amsterdam Protocol that its purpose is to interpret the waiver contained in Article 106(2) TFEU (see, to that effect, judgment of 10 July 2012 in *TF1 and Others* v *Commission*, T-520/09, EU:T:2012:352, paragraph 94). It is therefore not relevant for the assessment of the applicability of the *Altmark* criteria, the purpose of which is to establish the existence of State aid and not its compatibility with the internal market. Furthermore, the Court has already found that the Amsterdam Protocol cannot be held to set aside the application of the competition rules or to prevent the Commission from examining whether State funding provides an economic advantage to public-service broadcasters on the basis of the criteria laid down by the Court of Justice in the judgment in *Altmark*, cited in paragraph 7 above (EU:C:2003:415) (judgment in *Netherlands* v *Commission*, cited in paragraph 54 above, EU:T:2010:525, paragraph 149).

62 Moreover, even if the relevance of the Amsterdam Protocol for the assessment of the existence of State aid were to be recognised, it would be limited to the first *Altmark* condition, concerning the definition of public-service obligations. However, the question of whether the first *Altmark* condition is satisfied in the present case is not in dispute.

63 On the other hand, contrary to what the applicant maintains, it is not clear from the judgment in *BUPA*, cited in paragraph 51 above (EU:T:2008:29), that, in the General Court's view, application of the fourth *Altmark* condition can be ruled out completely. On the contrary, while the Court accepted that, owing to the particular nature of the compensation system in question, that condition could not be applied strictly, it stressed that, in spite of that particular nature, the Commission was required to satisfy itself that the compensation did not entail the possibility of offsetting any costs that might result from inefficiency on the part of the recipients (judgment in *BUPA*, cited in paragraph 51 above, EU:T:2008:29, paragraphs 246 and 249).

64 In the second place, the applicant maintains that, in the present case, when applying the *Altmark* conditions, in particular the second and fourth of those conditions, the Commission failed to take account of the fact that those conditions were applied to circumstances that obtained prior to the judgment in *Altmark*, cited in paragraph 7 above (EU:C:2003:415). However, it is clear from paragraphs 228 and 232 of the judgment in *TV2 I*, cited in paragraph 11 above (EU:T:2008:457), that in such a case it was sufficient that the conditions had been complied with 'in essence'.

65 On the one hand, in that regard, it must be made clear from the outset that in paragraph 228 of the judgment in *TV2 I*, cited in paragraph 11 above (EU:T:2008:457), the General Court merely indicated, while pointing out that this did not encroach upon the Commission's competence in matters of State aid, that conceivably and in the light of the evidence placed before it by the Kingdom of Denmark, the procedure for determining the amount of licence fee income payable to TV2 was objective and transparent. Accordingly, in the Court's view, it could not be ruled out that a serious analysis of that procedure might lead to the conclusion that, even before the *Altmark* conditions were laid down by the Court of Justice, the Kingdom of Denmark had, in essence, complied with the second *Altmark* condition. On the other hand, in paragraph 232 of that judgment the General Court noted that it was conceivable that a serious examination of all the conditions governing the setting of the amount of licence fee income payable to TV2 during the period under investigation — the examination which the Commission should have carried out — would have led to the conclusion that the Kingdom of Denmark had ensured that, in essence, the fourth *Altmark* condition was complied with even before the Court of Justice defined those conditions.

66 It is clear from paragraphs 228 and 232 of the judgment in *TV2*, cited in paragraph 11 above (EU:T:2008:457), that, in the Court's view, serious examination of all the conditions governing the setting of the amount of licence fee income payable to TV2 during the period under investigation, which was lacking in the TV2 I decision, could have led the Commission to conclude that the second and fourth *Altmark* conditions were satisfied in that case. The expression 'in essence' can only mean that, in the Court's view, it was conceivable that, given the circumstance of the particular case, the specific objectives of the second and fourth *Altmark* conditions had been achieved. It would be

illogical to state that the *Altmark* conditions must be applied while at the same time suggesting, by use of the expression 'in essence', that it would be sufficient for those conditions to be complied with in part.

67 Moreover, the applicant itself does not explain what it understands by the application 'in essence' of the second and fourth *Altmark* conditions. Its argument may be interpreted as meaning that, since the Commission applied those conditions to circumstances obtaining before delivery of the judgment in *Altmark*, cited in paragraph 7 above (EU:C:2003:415), it ought to have interpreted them more flexibly, adapting them to the particular circumstances of the case.

68 When questioned in that connection at the hearing, the applicant referred to the judgment of 7 November 2012 in *CBI* v *Commission* (T-137/10, ECR, EU:T:2012:584, paragraphs 85 to 89), which suggested the possibility of a less strict application of the *Altmark* conditions, adapted to the specific nature of the sector in question.

69 In that regard, it should be pointed out that in that judgment the General Court examined the validity of a decision in which, without initiating a formal investigation procedure, the Commission had found that the compensation granted to public general hospitals in the Brussels Capital Region (Belgium) constituted State aid compatible with the internal market. In that connection, it noted that although the *Altmark* conditions concern all sectors of the economy without distinction, their application must take into account the specific nature of the sector in question. The Court also pointed out, with reference in this respect to the judgment in *BUPA*, cited in paragraph 51 above (EU:T:2008:29), that, in the light of the particular nature of the public-service mission in certain sectors, it was appropriate to show flexibility with regard to the application of the judgment in *Altmark*, cited in paragraph 7 above (EU:C:2003:415), by referring to the spirit and the purpose of the conditions stated therein, in a manner adapted to the particular facts of the case. Finally, the General Court held that the criteria laid down by the Court of Justice in the judgment in *Altmark*, cited in paragraph 7 above (EU:C:2003:415), concerning transport, which is unquestionably an economic and competitive activity, could not be applied as strictly to the hospital sector, which did not necessarily have such a competitive and commercial dimension (judgment in *CBI* v *Commission*, cited in paragraph 68 above, EU:T:2012:584, paragraphs 85, 86 and 89).

70 It follows from that judgment that a less strict application of the *Altmark* conditions in a particular case may be justified by the absence of a competitive and commercial dimension in the sector in which the recipient of the compensation is active. However, even taking into account the specific nature of the public service broadcasting remit, underlined by the Amsterdam Protocol, the broadcasting sector cannot be regarded as not having a competitive and commercial dimension. In the present case, the existence of such a dimension was obvious, in particular, from the fact that TV2, being partly funded by its advertising revenue, was active on the television advertising market. Unlike the circumstances of the case giving rise to the judgment in *CBI* v *Commission*, cited in paragraph 68 above (EU:T:2012:584), the circumstances of the present case do not therefore justify a less strict application of the *Altmark* conditions.

71 In any event, despite the clarifications provided at the hearing, the applicant's argument that the Commission ought to have interpreted the *Altmark* conditions more flexibly, adapting them to the circumstances of the case, remains vague and imprecise, in so far as the applicant does not explain how the two conditions at issue should have been adapted.

72 Moreover, if that argument was to be summarised as the finding that the two conditions at issue should be considered satisfied in this case, it could not be assessed in the abstract in the context of this part of the plea, but should be examined below together with the arguments put forward in the third and fourth parts, in which the applicant claims that the application of the two conditions in this case is vitiated by errors.

73 In the light of the foregoing, the first part of the first plea must be rejected.

– The second part concerning infringement of the principle of legal certainty

74 In the second part of the present plea, the applicant maintains, in essence, that the contested decision infringes the principle of legal certainty.

75 It is clear from the arguments by which the applicant refers to the principle of legal certainty that there are two aspects to the infringement of that principle.

76 First, the applicant claims that the application of the second and fourth *Altmark* conditions to circumstances prior to the delivery of the judgment in *Altmark*, cited in paragraph 7 above (EU:C:2003:415), is a retroactive application of the conditions in question. In the applicant's view, such retroactive application constitutes an infringement of the principle of legal certainty.

77 Second, the applicant claims that there is an infringement of the principle of legal certainty in this case, in view in particular of the fact that, by reason of the application of the *Altmark* conditions, it could be required to pay interest in respect of the period of unlawfulness and possible compensation to its competitors in accordance with paragraphs 52 and 53 of the judgment in *CELF*, cited in paragraph 38 above (EU:C:2008:79). In that regard, it explains that it is in particular contrary to the principle of legal certainty that it should bear the financial consequences of a failure to notify the Commission of compensation for the public-service obligations imposed on it by law, on the grounds that the compensation scheme is considered not fully to comply with conditions laid down in a judgment which was delivered more than 25 years after that scheme was adopted and with which the authorities had no reason to be familiar. According to the applicant, the infringement of the principle of legal certainty is all the more flagrant in this case because the Court of Justice has with the fourth *Altmark* condition imposed on the Member States a new obligation to act, namely an obligation to organise a public procurement procedure.

78 The applicant's first argument is similar to its reasoning in connection with the first part of the present plea (see paragraph 64 above). Although, in connection with that first part, the applicant claims that application of the *Altmark* conditions to circumstances antedating the judgment in *Altmark*, cited in paragraph 7 above (EU:C:2003:415), ought to have been 'flexible', in connection with this part it pleads that the principle of legal certainty required the Commission entirely to rule out application of the conditions in question to circumstances antedating the relevant Court of Justice judgment.

79 That first argument must be rejected. It should be recalled first of all that the judgment in *Altmark*, cited in paragraph 7 above (EU:C:2003:415), was delivered by the Court of Justice in a preliminary ruling procedure. It must be pointed out that the purpose of the jurisdiction which the Court of Justice has under Article 267 TFEU is to ensure the uniform interpretation and application of EU law, in particular the provisions which have direct effect, through the national courts (judgment of 27 March 1980 in *Denkavit italiana*, 61/79, ECR, EU:C:1980:100, paragraph 15) and that according to settled case-law 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 (see judgment of 8 September 2011 in *Q-Beef and Bosschaert*, C-89/10 and C-96/10, ECR, EU:C:2011:555, paragraph 48 and the case-law cited). It is true that the Court of Justice may exceptionally, in application of the general principle of legal certainty inherent in the EU legal order and in order to avoid serious difficulties, place a temporal limitation on the effects of its judgment in order to prevent any person concerned from relying on a provision which it has interpreted with a view to calling into question legal relationships established in good faith (see, to that effect, judgment in *Denkavit italiana*, cited above, EU:C:1980:100, paragraph 17, and judgment of 19 December 2013 in *Association Vent De Colère! and Others*, C-262/12, ECR, EU:C:2013:851, paragraphs 39 and 40).

However, as already noted in the judgment in *BUPA*, cited in paragraph 51 above (EU:T:2008:29, paragraphs 158 and 159), the Court of Justice did not decide to apply that exceptional measure when delivering the judgment in *Altmark*, cited in paragraph 7 above (EU:C:2003:415).

80 It follows that, contrary to what the applicant maintains, application of the second and fourth *Altmark* conditions cannot be ruled out on the grounds that those conditions are, in this case, applied to circumstances antedating delivery of the judgment, cited in paragraph 7 above (EU:C:2003:415).

81 By its second argument, the applicant seems to be asserting that there is in this case an infringement of the principle of legal certainty, in view in particular of the serious financial consequences for the applicant of classifying as State aid, in accordance with the *Altmark* conditions, the measures concerned, which were adopted long before delivery of the judgment in *Altmark*, cited in paragraph 7 above (EU:C:2003:415).

82 That argument cannot be accepted either. It is clear from the case-law that the financial consequences for the beneficiary of a measure which has not been notified are not a circumstance that would, in the light of the general principle of legal certainty, justify a temporal limitation of the effects of a judgment in which the Court of Justice interprets Article 107(1) TFEU to mean that the measure concerned is State aid (see, to that effect, judgment in *Association Vent De Colère! and Others*, cited in paragraph 79 above, EU:C:2013:851, paragraphs 40 to 42 and case-law cited). It follows that the applicant cannot rely on the negative financial circumstances for it resulting from the application of the *Altmark* conditions to the measures concerned and the classification of those measures as State aid within the meaning of Article 107(1) TFEU, as interpreted by the judgment in *Altmark*, cited in paragraph 7 above (EU:C:2003:415), in order to request, on the basis of the principle of legal certainty, that those conditions not be applied in this case.

83 Furthermore, it must be noted that by its arguments the applicant is actually seeking to call into question not the retroactive application of the *Altmark* conditions as such, but the consequences that follow from the judgment in *CELF*, cited in paragraph 38 above (EU:C:2008:79). The purpose of the present action, which incidentally justifies the applicant's interest in bringing proceedings, is in fact to avoid any payment of interest in respect of the period of unlawfulness, within the meaning of the judgment in *CELF*, cited in paragraph 38 above (EU:C:2008:79), by contesting both the classification of the measures concerned as State aid (first, third and fourth pleas) and their classification as new aid (second plea).

84 However, the question of whether it is consistent with the principle of legal certainty to place the recipient of what, at the material time, was considered compensation for the discharge of a public-service mission under an obligation to repay a sum of money resulting from the joint and retroactive application of the judgments concerning the interpretation of Article 107(1) TFEU and Article 108(3) TFEU, delivered several years after that compensation was paid, cannot be settled within the context of the present dispute, which is concerned with the validity of the decision by which the Commission classified that compensation as State aid. It is for the national court to assess, if necessary after referring questions to the Court of Justice for a preliminary ruling, whether, in the circumstances of the case, the rules set out in the judgment in *CELF*, cited in paragraph 38 above (EU:C:2008:79), are applicable. In any event, as the case-law currently stands, the consequences of applying those principles cannot justify non-application or a less strict application of the *Altmark* conditions.

85 Finally, contrary to what the applicant maintains, the Court of Justice, when it laid down the fourth *Altmark* condition, did not impose on the Member States a new obligation to act which consists of organising, at all times and in all circumstances, a public procurement procedure for the purpose of selecting an undertaking to discharge public-service obligations. It is true that it follows from the way in which that condition is formulated that the organisation of a public procurement procedure allowing for the selection of the tenderer capable of providing those services at the least cost to the

community is one way of ensuring compliance with the fourth *Altmark* condition. However, the Court of Justice also defined another way of checking the efficiency of the discharge of public-service obligations. It noted that where a public procurement procedure has not been organised, the level of compensation needed could be determined on the basis of the costs which a typical undertaking, well managed and adequately provided with the means to meet the public-service requirements in question would have incurred in discharging those public-service obligations, taking into account the relevant receipts and a reasonable profit.

86 It follows from the foregoing that, in the present case, the principle of legal certainty did not prevent the Commission from classifying the measures concerned as State aid within the meaning of Article 107(1) TFEU, as interpreted by the judgment in *Altmark*, cited in paragraph 7 above (EU:C:2003:415).

87 The second part of the first plea must therefore be rejected.

– The third part, concerning the assessment of the procedure for calculating the compensation paid to TV2 in the light of the second *Altmark* condition

88 By the third part of the present plea, the applicant, supported by the Kingdom of Denmark, argues that even if the Commission was right to consider that all the *Altmark* conditions were applicable in the present case and also that those conditions should be applied exactly as defined by the Court of Justice in the judgment in *Altmark*, cited in paragraph 7 above (EU:C:2003:415), the Commission's application of the second of those conditions is vitiated by an error of law.

89 The applicant and the Kingdom of Denmark argue, in essence, that the parameters on the basis of which the compensation paid to TV2 was calculated and the procedures followed in practice for implementing them were known in advance, objective and transparent. The compensation was in fact defined as the difference between the resources which were to be made available to TV2 on the basis of a political decision (four-yearly media agreements between the Government and the Danish Parliament) on the one hand and the estimated income from advertising and other activities on the other.

90 More precisely, first, the applicant maintains that the second *Altmark* condition is less important in a situation such as that in the present case, where only some undertakings are able to offer the services necessary to discharge the public-service obligations.

91 Second, the applicant argues that the fact that the political decision-makers responsible for defining the public-service broadcasting remit also determine the expenditure for discharging that obligation is consistent with the case-law and legal framework applicable.

92 Third, the applicant and the Kingdom of Denmark criticise the Commission for merely asserting that the Danish authorities failed to communicate information concerning the compensation calculation parameters without explaining what calculation criteria might be involved or what characteristics the Danish rules for setting compensation for public service broadcasting should have in order to satisfy the second *Altmark* condition. The applicant also states that the Commission's arguments do not show that the Danish rules for setting compensation for public-service broadcasting were not suitable for preventing overcompensation.

93 Fourth and lastly, the Kingdom of Denmark notes that in the present case the Commission's interpretation of the second *Altmark* condition is erroneous' in so far as it is incompatible with the first *Altmark* condition as interpreted by the case-law giving the Member States considerable scope in defining the public-service remit. Moreover, that interpretation is too broad, resulting in confusion between the second, third and fourth *Altmark* conditions. Those arguments advanced by the Kingdom

of Denmark are very similar to those put forward by the applicant, which maintains that the question of efficiency raised by the Commission and by Viasat in their pleadings is relevant only for the application of the fourth *Altmark* condition.

94 In the contested decision, the Commission first of all set out the content of the relevant provisions of the Lov om radio-og fjernsynsvirksomhed (Law on Broadcasting Services) in force during the period under investigation, as presented by the Danish authorities in their letter of 24 March 2003 (recitals 105 and 106 of the contested decision). It noted in particular that the Minister for Culture determined the amount of compensation granted to TV2 within the framework of a media agreement concluded with a majority of the political parties in the Danish Parliament and that during the period under investigation there were three media agreements: the media agreement for 1994-1997, concluded on 16 September 1993, the media agreement for 1997-2000, concluded on 10 May 1996, and the media agreement for 2001-2004, concluded on 28 March 2000. The Commission went on to point out that during the period under investigation the compensation granted to TV2 was not subjected to any subsequent review, even when TV2's advertising revenue was falling in 1999. The Commission also noted, in recital 108 of the contested decision, that, according to the Danish authorities, the compensation granted to TV2 was determined through price and wage indexing of TV2's budget and accounts, and through economic analyses. As far as those economic analyses were concerned, the Commission indicated that they consisted of two studies carried out by KPMG, a firm of auditors, in 1995 and 1999 ('the KPMG studies'), the purpose of which was to examine different scenarios for how the advertising market might develop in the respective licence fee periods in order to estimate the level of TV2's potential advertising revenue and give the Danish Government and Parliament a better basis for determining and allocating licence fee revenue. The Commission concluded its analysis in recitals 114 to 116 of the contested decision, in the following terms:

'(114)
The Commission considers that the involvement of the Danish Parliament in the process for setting the licence fee ensured a certain degree of transparency and objectivity. Moreover, the media agreements setting the amount of licence fee resources to be allocated to TV2 were decided in advance for several years, and thereafter TV2's compensation was never adjusted during the period under investigation.

(115)
However, the … KPMG [studies] only gave estimates of the amount of advertising revenue accruing to TV2 (i.e. the income side). They said nothing about the cost side of the compensation calculation, and it seems to the Commission that the media agreements were based solely on indexation of TV2's costs in the previous years. Indeed, the Danish authorities stated that the compensation was determined on the basis of price and wage indexing of TV2's budgets and accounts and on the basis of the economic analyses, which only assessed the income side and did not deal with the period covered by the media agreement concluded on 16 September 1993.

(116)
In addition, there was no indication of the parameters to be used to calculate the compensation. The amount of the compensation was set in advance, but the second *Altmark* criterion requires that the parameters used to calculate the compensation must themselves be established beforehand in an objective and transparent manner.'

95 It is clear from the recitals referred to in paragraph 94 above that when examining the procedure for calculating the compensation paid to TV2 in the light of the second *Altmark* condition, the Commission took into account the fact that the amount of that compensation was determined under the supervision of the Danish Parliament and on the basis of the KMPG studies, the content of which it had examined. The Commission even acknowledged, in recital 114 of the contested decision, that the involvement of the Danish Parliament in the process for setting the amount of compensation ensured 'a certain degree of transparency and objectivity'. It is also clear from the same recital that two other

factors, namely the fact that the media agreements determined the licence fee resources allocated to TV2 for several years in advance and that the compensation for TV2 was not adjusted during the period under investigation, reinforced that 'transparency and objectivity'.

96 However, the fact that the Danish Parliament's involvement ensured 'a certain degree of transparency and objectivity' was not in the Commission's view sufficient for it to consider that the procedure for calculating the compensation paid to TV2 satisfied the second *Altmark* condition. The element which determined the Commission's finding that the second *Altmark* condition was not satisfied seems to have been the fact that the KPMG studies were concerned only with TV2's estimated advertising revenue and did not examine the 'expenditure' side of the calculation of the compensation granted to TV2, which was based only on the expenditure actually incurred by TV2 in the previous years, increased by indexation.

97 Accordingly, in the Commission's view, the fact that the amount of compensation paid to the recipient is based on the expenditure which the recipient has actually incurred does not satisfy the second *Altmark* condition. From this it may be inferred that, according to the Commission, if the second *Altmark* condition is to be satisfied, the compensation calculation parameters ought to be formulated in such a way as to enable the level of the recipient's expenditure or costs to be influenced or controlled. It seems therefore that, in the Commission's view, the second *Altmark* condition includes the concept of efficiency of the recipient of the compensation.

98 The interpretation of the contested decision expounded in paragraph 97 above is confirmed by the Commission's response to the applicant's arguments. In its defence the Commission states that the applicant's reasoning is based solely on the sovereignty of the legislature and that it therefore disregards the technical characteristics of the compensation calculation. It adds that, if that reasoning were accepted, it would suffice for the Member State to have determined the amount of compensation, whatever the level, in advance for the second *Altmark* condition to be satisfied. However, in the Commission's view that condition requires the calculation parameter chosen to be such as to prevent overcompensation and to ensure the efficiency of the public service. The Commission also states that, even assuming that TV2 is the only undertaking capable of providing the public service in question, it is nevertheless necessary to avoid overcompensation and to ensure the efficiency of that public service if the compensation granted to TV2 is not to be classified as State aid.

99 It must be stated that the understanding of the second *Altmark* condition as it emerges from the contested decision and interpreted in the light of the defence is erroneous.

100 In so far as the *Altmark* conditions relate to one of the four factors constituting the concept of State aid within the meaning of Article 107(1) TFEU, that is the advantage granted to the recipient (see paragraphs 46 to 49 above), the common objective of all those conditions is to assess whether or not compensation granted to an undertaking for the discharge of a public-service mission involves an economic advantage likely to favour that undertaking over competing undertakings.

101 Although all the *Altmark* conditions are linked by that common objective, each plays a role independent of and different from the others.

102 The second *Altmark* condition, as formulated in paragraph 90 of the judgment in *Altmark*, cited in paragraph 7 above (EU:C:2003:415), requires that the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner, to avoid it conferring an economic advantage which may favour the recipient undertaking over competing undertakings.

103 The content of that condition is determined by the first part of the sentence quoted in paragraph 102 above. It is clear from this that the second *Altmark* condition lays down three requirements which the compensation calculation parameters must satisfy in order to ensure that the calculation is reliable and

open to verification by the Commission. Those requirements are that the compensation calculation parameters must be established in advance in accordance with a transparent procedure and that they must be objective by their very nature. In no way does it follow from the judgment in *Altmark*, cited in paragraph 7 above (EU:C:2003:415), that, in accordance with its second condition, the compensation calculation parameters must be so designed as to influence or control the level of expenditure incurred by the recipient of that compensation.

104 By its interpretation of the second *Altmark* condition, the Commission seems to consider that the compensation calculation parameters must not only be objective and established in advance by means of a transparent procedure, but also ensure that the public service is run efficiently. However, such an interpretation, which is incompatible with the wording of the second *Altmark* condition, results in confusion between the condition examined here and the fourth condition.

105 The Commission's interpretation of the second *Altmark* condition has no support in the case-law or in the second part of the sentence in which the Court of Justice formulated that condition, which is reproduced in paragraph 102 above. Indeed, that passage serves only to recall the common objective of all the *Altmark* conditions, taken together, and not to introduce into the second condition the efficiency requirement which is inherent in the fourth condition.

106 In view of this, it must be considered that, by demanding that the parameters for calculating the compensation payable to TV2 be formulated in such a way as to ensure that TV2's public-service mission is discharged efficiently, the Commission has erred in law. Since that error concerns the very scope of the second *Altmark* condition, it vitiates the Commission's whole assessment of the procedure for calculating the compensation paid to TV2 in recitals 112 to 117 of the contested decision.

107 Finally, it must be held that the applicant's complaints with regard to recital 116 of the contested decision are well founded. In so far as, in recitals 112 to 115 of the contested decision, the Commission examines the procedure for calculating the compensation, which it describes in recitals 105 to 111 of the decision, the conclusion set out in recital 116 thereof, according to which 'there was no indication of the parameters to be used to calculate the compensation', seems to contradict the analysis that precedes it or even to be meaningless. In that recital, the Commission merely repeats the content of the second *Altmark* condition without making a link with the remarks it made in the previous recitals.

108 The third part of the applicant's first plea must therefore be held to be well founded.

109 The Court observes, however, that, where some of the grounds in a decision on their own provide a sufficient legal basis for the decision, any errors in the other grounds of the decision have no effect on its operative part. Moreover, where the operative part of a Commission decision is based on several pillars of reasoning, each of which would in itself be sufficient to justify that operative part, that decision should, in principle, be annulled only if each of those pillars is vitiated by an illegality. In such a case, an error or other illegality which affects only one of the pillars of reasoning cannot be sufficient to justify annulment of the decision at issue because that error could not have had a decisive effect on the operative part adopted by the Commission (see judgment of 14 December 2005 in *General Electric* v *Commission*, T-210/01, ECR, EU:T:2005:456, paragraphs 42 and 43 and the case-law cited; see also, to that effect, judgment of 9 September 2010 in *Evropaïki Dynamiki* v *Commission*, T-387/08, EU:T:2010:377, paragraph 59).

110 In the present case, given, on the one hand, that the *Altmark* conditions are cumulative and, on the other, that in the contested decision the Commission considered that neither the second nor the fourth of those conditions was satisfied, the fact that the part of the contested decision concerning the second *Altmark* condition is vitiated by illegality cannot be sufficient to allow the action and annul the contested decision in so far as it finds that the measures concerned constitute State aid.

111 It is therefore necessary to examine the fourth part of the first plea, concerning the assessment of the procedure for calculating the compensation paid to TV2 in the light of the fourth *Altmark* condition.

– The fourth part, concerning the assessment of the procedure for calculating the compensation paid to TV2 in the light of the fourth *Altmark* condition

112 By the fourth part of the first plea, the applicant, supported by the Kingdom of Denmark, argues, in a manner similar to that in the third part, that even if the Commission were correct in holding that all the conditions set out in the judgment in *Altmark*, cited in paragraph 7 above (EU:C:2003:415), were applicable in this case and, furthermore, that those conditions were to be applied exactly as defined by the Court of Justice in that judgment, the Commission's application of the fourth of those conditions is vitiated by an error of law.

113 In the first place, the applicant maintains that the Commission's assessment is based on the false premiss that it was possible, on the market in question and for the period concerned, to identify 'a typical undertaking, well run and adequately provided', the level of whose costs could reasonably be compared with its own costs. The applicant argues that, both generally and in a situation like the present, where the public-service missions have been entrusted only to State undertakings, there is in Denmark no market for the services in question and therefore no suitable reference for defining the average costs of public-service missions. The applicant is of the opinion that the costs of discharging a given mission may be higher or lower depending on the quantity and quality levels desired by the authorities which define those missions and grant the resources necessary for discharging them. In its opinion, there would, for example, be no objective answer to the question of whether it would be more or less efficient to place the emphasis on Danish drama productions rather than current affairs programmes, with the differences that implies in terms of costs.

114 In that regard, it must be noted that, if the undertaking charged with a public-service mission is not chosen by means of a public procurement procedure, application of the fourth *Altmark* condition is likely to present difficulties in practice. On the one hand, the concept of an undertaking that is 'well run and adequately provided' necessarily implies wide discretion on the part of the entity applying it. On the other hand, a comparison between two undertakings, one public and charged with a public-service mission and the other private and free of any such mission, is not an easy one, especially in view of the fact that the public-service provider is subject to certain specific quality requirements. In that regard, the applicant points out that the Commission itself seems to recognise the difficulties which arise when comparing TV2 and one of its competitors, in particular since the Commission admits in recital 242 of the contested decision that operators on the Danish market cannot be said to be in a comparable situation so as to enable a direct comparison of performance ratios.

115 However, notwithstanding the difficulties involved in applying the fourth *Altmark* condition in a case where, as in the present, the public-service provider was not chosen by means of a public procurement procedure, the applicant's argument must be rejected.

116 In the absence of a public procurement procedure for selecting a tenderer capable of discharging the public-service mission at the least cost, the compensation granted must be determined by reference to a typical undertaking that is well run and adequately provided with the necessary means. The search for such an undertaking is intended to optimise the amount of compensation considered necessary to discharge the public-service mission and avoid the high costs of an inefficient undertaking being taken as the reference for calculating the amount of that compensation. If the amount of compensation is not optimised, it is conceivable that the compensation may confer an economic advantage likely to favour the recipient undertaking over its competitors.

117 Moreover, when laying down the fourth *Altmark* condition, the Court of Justice clearly indicated that, for that condition to be satisfied in cases where the recipient of the compensation was not selected in a public procurement procedure, reference must be made to an undertaking other than the recipient. For that condition to be satisfied, it is therefore not sufficient for the Member State to say that, given the specific nature of the public-service remit, it is not possible to identify on the market an undertaking similar to the recipient of the compensation in order then to seek to show that the recipient itself is 'well run and adequately provided' within the meaning of that condition.

118 The argument advanced by the applicant implies, as the Commission points out, that the costs of public broadcasters can never be compared, owing to the particular situation of each of them and of each service of general economic interest. To accept such an argument would render meaningless the fourth *Altmark* condition.

119 Finally and in any event, in the field of broadcasting a large part of the expenditure of private and public broadcasters is in essence similar and can be compared, even bearing in mind the public-service obligations imposed on public operators. Both private and public broadcasters incur costs relating to intellectual property rights, production and co-production costs, expenditure for the purchase of goods and services in connection with the development of products and projects, and staff costs. Moreover, some of the programming and production of public broadcasters is not fundamentally different from that offered by private companies, which at the very least allows costs to be compared to some extent. In those circumstances, the applicant cannot simply maintain that no 'typical undertaking, well run and adequately provided' within the meaning of the fourth *Altmark* condition, could be identified without having even attempted to make a comparison between its costs and those of another undertaking active on the Danish, or a similar, broadcasting market.

120 Moreover, by that argument, submitted in the fourth part of the present plea, the applicant is in reality merely emphasising the point which it raises in the first part of this plea, namely that the fourth *Altmark* condition was not applicable in this case. However, that reasoning has already been rejected as unfounded.

121 The first argument put forward by the applicant in the fourth part of the first plea must therefore be rejected.

122 In the second place, the applicant maintains that, in any event, the fourth *Altmark* condition was satisfied in essence, in so far as TV2 was, during the period concerned, subject to an annual review by the authorities — the Rigsrevisionen (Danish National Audit Office) in particular — to check that the undertaking was well and efficiently run and that its costs were consistent with the requirements which must be fulfilled by efficiently run and adequately provided undertakings.

123 In response to the applicant's arguments, the Commission maintains that even though it was for the Kingdom of Denmark to demonstrate that the fourth *Altmark* condition was satisfied, it has failed to do so. According to the Commission, the documents produced by the Kingdom of Denmark during the formal investigation procedure contained no analysis of the costs which a typical undertaking, well run and adequately provided, would have incurred in order to discharge the public-service obligations at issue.

124 With regard, first of all, to the question of the burden of proof, raised by the Commission, it should be recalled that, while it is for the Commission to demonstrate the existence of State aid, the Member State concerned is required, under Article 10(2) read in conjunction with Article 2(2) of Regulation No 659/1999, to provide the Commission with all the information necessary in order to enable it to take a decision on the classification of the measure at issue and, if appropriate, its compatibility with the internal market.

125 Moreover, it is clear from the case-law relating to the first *Altmark* condition that, even though the Member State has a wide discretion when determining what it regards as a service of general economic interest, it must demonstrate fulfilment of the requirements set out in the first *Altmark* condition concerning the definition of public-service obligations and concerning the fact that the recipient of the compensation is actually required to discharge public-service obligations (judgment in *BUPA*, cited in paragraph 51 above, EU:T:2008:29, paragraph 172).

126 That case-law concerning the first *Altmark* condition may be applied to the fourth *Altmark* condition, placing the Member State under an obligation to demonstrate that, where the undertaking that is to discharge the public-service mission concerned is not chosen in a public procurement procedure, the level of compensation granted to that undertaking has been determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided so as to be able to meet the public-service requirements in question, would have incurred in discharging that mission. If this is not demonstrated, it is conceivable that the compensation granted to the public-service provider may involve an element of State aid.

127 As regards that demonstration in the present case, the Commission focused its analysis on the audit of TV2's accounts by the Rigsrevisionen. In that regard, it noted, in recitals 128 to 135 of the contested decision, that, according to the Danish authorities, the Rigsrevisionen's appraisal of TV2 involved not only a financial and management audit of its accounts, but also a check of its efficiency. However, the Commission did not consider that the fact that TV2's accounts were submitted for approval by the Danish Minister for Culture was sufficient proof that TV2's costs were those of a typical, well-run undertaking. The Commission went on to say that, during the formal investigation procedure, the Danish authorities relied in particular on the 2000 report from the Rigsrevisionen. That report to some extent compared the productivity of TV2 with that of DR and foreign public-service broadcasters, namely the British Broadcasting Corporation (BBC), Sveriges Television (SVT) and Norsk Riksringkasting (NRK). That report found that DR and TV2 had improved their productivity between 1990 and 1999 and that DR's and TV2's productivity improvements were better than or equal to the productivity increases of the other three public-service broadcasters. The Commission considered that that report was not sufficient proof that the fourth *Altmark* condition was fulfilled, in particular for the following reasons:

— first, the Commission disputed the relevance, from the point of view of the fourth *Altmark* condition, of *ex post* controls where no analysis of those costs was made before compensation was set;

— second, it noted that the 2000 Rigsrevisionen report was produced after the media agreements setting the amount of compensation (see paragraph 94 above). It did not therefore show that the compensation was determined on the basis of the costs that a typical undertaking would have incurred in fulfilling its public-service mission;

— third, the report made a comparison with other public-service broadcasters, none of which could be considered a 'typical' undertaking. The Commission noted in that regard that it was impossible to draw any conclusions, for the purposes of the fourth *Altmark* condition, from the comparison between DR's and TV2's productivity, since DR was not allowed to generate income through advertising and its compensation was set on the same basis as that for TV2. It was not therefore a typical public-service broadcaster. As regards the comparison with foreign public-service broadcasters, the Commission noted that the report only compared the development of TV2's productivity with one of the other public-service broadcasters and was silent on the level of efficiency as such, and hence on the costs themselves. In the Commission's view, that finding was not conclusive for the purposes of the fourth *Altmark* condition, since a lower productivity increase on the part of a public-service broadcaster could be due to many factors;

— fourth, the Commission noted that the Rigsrevisionen had itself pointed out in its report that it had not examined the foreign public-service broadcasters' accounts in detail and that there could therefore be differences between those broadcasters' activities and between the calculation methods used for individual accounting items. The Rigsrevisionen had also stated that the purpose of the report was to compare productivity 'development' rather than the level of productivity as such and that it had not examined the causes of that development in any greater detail.

128 On the basis of all those observations, the Commission concluded that the 2000 Rigsrevisionen report did not show that TV2's costs were those which a typical, well-run and adequately provided undertaking would have incurred in performing its public-service mission.

129 The applicant, supported by the Kingdom of Denmark, criticises that reasoning in two respects. First, it raises arguments concerning the nature of the Rigsrevisionen's audit, in particular arguments directed against recital 128 of the contested decision. Second, it criticises the Commission's assessment of the Rigsrevisionen's 2000 report.

130 Before examining those arguments in detail, it must be observed that, by those arguments, the applicant seeks in essence to establish that TV2 was a 'well-run and adequately provided' undertaking, which, it argues, is confirmed by the Rigsrevisionen's annual audits and documented by the Rigsrevisionen's 2000 report. In particular, the applicant does not dispute the Commission's finding that the Rigsrevisionen's 2000 report was produced on the basis of the media agreements setting the amount of compensation.

131 In that regard, it has already been pointed out in paragraph 117 above that the fourth *Altmark* condition, as formulated by the Court of Justice in its judgment, requires that, where the recipient of the compensation has not been chosen in a public procurement procedure, the level of compensation is to be determined on the basis of an analysis of the costs of a reference undertaking operating under normal market conditions other than the recipient. It must be noted that the Court of Justice in no way suggested that, where the recipient of the compensation was not chosen in a public procurement procedure, it would be possible, in order to satisfy that condition, to show that the recipient itself was 'well run and adequately provided'.

132 The arguments of the applicant, supported by the Kingdom of Denmark, are not therefore as a whole such as to demonstrate that the Commission had committed an error in finding that the fourth *Altmark* condition was not satisfied in this case. In any event, even assuming, as the applicant claims, that the fourth *Altmark* condition was to be applied in its essence or less strictly in this case (see paragraphs 67 to 72 above), those arguments also fail to stand up to a more detailed examination, as is set out below.

133 First, concerning the nature of the audit carried out by the Rigsrevisionen, the applicant maintains that the Commission was wrong to consider that audit to be limited to financial and management audits of TV2's accounts. The Commission's assessment of the Rigsrevisionen's powers and its role in the Danish constitutional order was mistaken. According to the applicant, the Rigsrevisionen audits TV2's accounts every year, at the same time examining whether the undertaking is run efficiently and, more particularly, whether it is managing its costs effectively. Moreover, the Rigsrevisionen's reports are available to the public and submitted to the Danish Parliament and the State auditors, who are able to draw attention to any irregularities. Those reports therefore cannot be considered simply as documents on the basis of which the Danish Minister for Culture approves TV2's accounts. Finally, according to the applicant, the Commission's assertion that *ex post* controls of the accounts are irrelevant for the purposes of the fourth *Altmark* condition is erroneous. The applicant considers that a check of the efficiency of an undertaking's management on the basis of its costs can only be made retrospectively.

134 In that regard, in recital 128 of the contested decision, the Commission states:

'In addition, [the Kingdom of] Denmark argued that the National Audit Office (Rigsrevisionen) carried out financial and management audits of TV2's accounts as part of its routine appraisals of TV2 and that routine checks were made, including on efficiency.'

135 Moreover, in response to that argument the Commission notes, in the same recital that:

'[it] does not consider that the fact that TV2's accounts were submitted for approval by the Ministry of Culture is sufficient proof that TV2's costs were those of a typical, well-run undertaking.'

136 Thus, the Commission seems to make no distinction between an audit performed by an independent administrative body such as a court of auditors, in this case the Rigsrevisionen, and checks by the Minister responsible.

137 When questioned, at the hearing, concerning the relationship between the audit carried out by the Danish Minister for Culture and that performed by the Rigsrevisionen, the applicant and the Kingdom of Denmark explained, without contradiction by the Commission, that under the applicable Danish legislation the reports on the audit of TV2's accounts, prepared by the latter, were submitted for approval to the Danish Minister for Culture, who could on that basis and if appropriate, propose to the Danish Parliament measures to be taken.

138 Also at the hearing, the parties presented their observations on the documents produced by the applicant and the Kingdom of Denmark in response to a measure of organisation of procedure, namely the text of the Lov om revision af statens regnskaber (Law on the audit of State accounts), in particular Article 3 thereof, and other legislative texts governing the powers of the Rigsrevisionen during the period concerned.

139 The documents produced by the Kingdom of Denmark show that, during the period from 1995 to 2002, Article 3 of the Lov om revision af statens regnskaber was worded as follows:

'The audit shall include checks on the accuracy of the accounts and on whether decisions concerning the presentation of the accounts comply with the authorisations granted, laws and other rules and with agreements concluded and standard practice. An assessment shall also be made of whether and to what extent account has been taken of the importance of sound financial management in the administration of resources and the management of the undertakings covered by the accounts.'

140 The Kingdom of Denmark also produced the text of the travaux préparatoires for the Lov om revision af statens regnskaber, arguing that texts of that kind are particularly important in Danish legal tradition. The relevant provisions of those travaux préparatoires state:

'According to Article 3 of the Law on the Audit of State Accounts, the audit performed by the Rigsrevisionen includes, in addition to the financial audit which is a check of the accuracy of the accounts and of compliance with the authorisations and rules, an "… assessment of whether and to what extent account has been taken of the importance of sound financial management in the administration of resources and the management of the undertakings covered by the accounts", that is to say, in particular, an audit of productivity and efficiency. Since these modes of organisation operate only in part under market conditions, the main justification for the management audit is as a substitute for market mechanisms and their corrective effects.'

141 On that basis, the Kingdom of Denmark submits that TV2's productivity and efficiency were subject to on-going review throughout the period concerned. That review was supplemented by an extraordinary audit performed under Article 17(2) of the Lov om revision af statens regnskaber, the findings of which were included in the Rigsrevisionen's 2000 report.

142 Viasat counters this by stating that the annual management audits were not concerned with the productivity and efficiency of TV2, but only with the existence of instruments of governance taking the form of management systems. The only audit of TV2 relating to its productivity during the period concerned was the one giving rise to the 2000 Rigsrevisionen report.

143 It is admittedly clear from the provisions to which the Kingdom of Denmark refers that the scale of the Rigsrevisionen's audit goes beyond a simple administrative audit of the accounts and covers the efficiency of TV2's management. However, it is common ground that the only document showing the practical result of the audit by that institution which was submitted to the Commission during the administrative procedure is the 2000 Rigsrevisionen report.

144 So far as that report is concerned, it must be noted that the applicant does no more than state that the Commission's criticism of that report is invalid, in that the Commission objects that it was produced subsequent to two four-yearly media agreements and contains no comparisons with 'typical television broadcasters'.

145 Such reasoning is not sufficient to call into question the Commission's finding, in recital 135 of the contested decision, that the 2000 Rigsrevisionen report did not show that TV2's costs were those which a typical, well-run undertaking would have incurred in performing the public-service missions. That finding is based on several criticisms made by the Commission concerning the 2000 Rigsrevisionen report (see paragraph 127 above) which are not specifically disputed by the applicant. In particular, the applicant does not dispute the fact that the purpose of that report was to examine the development of the productivity of DR and TV2 over the ten-year period from 1991 to 2000 and not to establish the levels of productivity of those two entities, or the fact that that report does not analyse the reasons for the rise or fall in that productivity. However, the data on the development of TV2's productivity do not allow any conclusions to be drawn as to whether the level of compensation granted to TV2 was consistent with the costs which a typical, well-run and adequately provided undertaking would have incurred in discharging its public-service obligations.

146 Nor does the applicant dispute the fact that the 2000 Rigsrevisionen report is not based on a detailed analysis of the accounts of foreign broadcasters or call into question the Commission's finding that the comparison of TV2's productivity with that of DR and foreign public broadcasters, that is to say broadcasters not operating under normal market conditions, is not conclusive from the point of view of the fourth *Altmark* condition.

147 Finally, it should be pointed out, as Viasat does, that the report in question was published in November 2000, that is to say after the conclusion of the last four-yearly media agreement (see paragraph 94 above). Therefore, even if that report found that TV2's productivity had increased, this could not have influenced the level of compensation granted to TV2 during the period concerned.

148 In the light of the foregoing, the arguments put forward by the applicant must be held to be insufficient to show that the Commission erred in law when examining the procedure for calculating the compensation paid to TV2 in the light of the fourth *Altmark* condition.

149 As has already been pointed out, it is clear both from the judgment in *Altmark*, cited in paragraph 7 above (EU:C:2003:415), and from the case-law which followed it, cited in paragraph 54 above, that the conditions laid down in the judgment in *Altmark* for establishing that compensation granted in respect of public-service obligations did not confer an advantage on the recipient of that compensation are cumulative. Since it has not been established that the Commission erred in law in finding that the procedure for calculating the compensation paid to TV2 to discharge its public-service obligations did not satisfy the fourth *Altmark* condition, the measures concerned must be found to have conferred on TV2 an advantage within the meaning of Article 107(1) TFEU.

150 The fourth part of the applicant's first plea must therefore be rejected.

151 It follows that the first plea must be rejected, notwithstanding the Commission's error in the assessment of the second *Altmark* condition.

The third plea, alleging infringement of Article 107(1) TFEU, in that the Commission found that the licence fee resources transferred by TV2 to its regional stations constituted State aid granted to TV2

152 By its third plea, raised in support of the second alternative head of claim, the applicant argues that the Commission was wrong to include in the compensation calculation the licence fee revenue which, between 1997 and 2002, having been transferred from the TV2 Fund to TV2, was then passed on by TV2 to its regional stations. After the winding up at the end of 1996 of the TV2 Fund, which was responsible for allocating the licence fee income from DR among the regional stations, that task was assigned to TV2 by the legislature. The applicant maintains that TV2's eight regional stations were legally separate persons, responsible for their own programmes, with their own production, income, expenditure, board, accounts and staff. In that context, TV2's role was limited to that of a 'paying body' or a 'payment channel', and it derived no advantage from the revenue transferred to those stations. TV2 could not therefore be described as the recipient of that revenue or be held liable for the payment of interest thereon in respect of the period of unlawfulness within the meaning of the judgment in *CELF*, cited in paragraph 38 above (EU:C:2008:79).

153 In response to those arguments, the Commission asserts that the applicant's plea is the result of an erroneous reading of recital 194 of the contested decision. That recital states only that the sums in question cancelled each other out in the calculation of overcompensation. Those sums were in fact included in both revenue and expenditure and therefore had no effect on the final calculation appearing in Table No 1, which follows recital 195 of the contested decision. The Commission also asserts that in its view TV2 was not the recipient of the aid transferred to the regional stations and derived no advantage from its role as intermediary. The applicant was not therefore liable for interest on those sums in respect of the period of unlawfulness within the meaning of the judgment in *CELF*, cited in paragraph 38 above (EU:C:2008:79), and, accordingly, in that respect had no interest in bringing an action for annulment.

154 Following the Commission's explanations, the applicant concedes in the reply that its third plea is the result of an erroneous reading of the recital in question and notes that this plea may be rejected as devoid of purpose. At the hearing, the applicant stated that the comments it made in the reply should not be interpreted as meaning that it was withdrawing this plea. It asked the General Court to state the reason why its understanding of the contested decision was mistaken on that point and hence to reject its plea as based on a false premiss.

155 Viasat, for its part, distances itself from the Commission's observations and asserts that the revenue in question does constitute State aid of which TV2 was the recipient and refers in that regard to its observations in the reply it submitted in Case T-125/12.

156 In that regard, it should be noted that, according to the case-law, the provisions of the fourth paragraph of Article 40 of the Statute of the Court of Justice and Article 116(3) of the Rules of Procedure of 2 May 1991, governing intervention, do not preclude an intervener from using arguments different from those used by the party it is supporting, provided that they do not alter the framework of the dispute and that the intervention is still intended to support the form of order sought by that party (judgment of 3 April 2003 in *Royal Philips Electronics* v *Commission*, T-119/02, ECR, EU:T:2003:101, paragraphs 203 and 212). In the present case, it should be noted that, like the Commission, Viasat contends that the third plea should be rejected. It is true that the arguments it puts forward are different from those advanced by the Commission, but according to the case-law cited above this is not prohibited. However, the arguments put forward by Viasat in Case T-125/12, to which it refers, cannot be taken into account in the present case since they appear in a document relating to a separate case which has not been filed for the present case.

157 Regarding the applicant's request that its third plea be rejected as being based on a false premiss, it should be noted that, as pointed out in paragraph 154 above, the applicant responded in the negative to the question of whether it was withdrawing the third plea. In those circumstances, its statement that the General Court must dismiss this plea, giving the reason why the applicant's understanding of recital 194 of the contested decision is erroneous, can only be understood as meaning that the applicant considers that its third plea must be rejected only if the Court upholds the interpretation of that recital advocated by the Commission. On the other hand, the applicant's statement also means that if the Court finds that the recital in question has a different meaning to that given to it by the Commission, the Court would have to examine the merits of that third plea. It is therefore necessary, in the first place, to assess whether the Commission's interpretation of recital 194 of the contested decision is correct.

158 Recital 194 of the contested decision is to be found in the part of the decision relating to the assessment, in the light of Article 106(2) TFEU, of the compatibility with the TFEU of the aid granted to TV2. It reads as follows:

'It should also be noted that for the years 1997 to 2002 the Commission has included the licence fees that were transferred to the TV2 regions via TV2. The Commission considers that because these sums were received by TV2 and then transferred to the regions, they should be included in the calculations as both revenue and expenditure, which in practice means that they do not affect the Commission's calculation below.'

159 It is therefore clear from that recital that the resources transferred to TV2's regional stations are part of the licence fee revenue granted to TV2. However, as is clear from recitals 74, 101 and 153 of the contested decision, the Commission classified those resources as State aid within the meaning of Article 107(1) TFEU. By definition (see paragraph 46 above), State aid implies an advantage conferred on a recipient. In the case of a sum paid to a party required to transfer that sum in full to a third party, this cannot in principle be an advantage granted to the party which is acting purely as a 'paying agency' or 'payment channel'. In such a case, the sum in question is merely passing through the latter party's accounts. Any finding to the contrary would be acceptable only if it were demonstrated that by that passage alone an advantage was conferred on the party concerned in the form, for example, of interest for the period in which it was in possession of that sum.

160 If, as the applicant maintains and the Commission seems to accept, the resources paid to TV2's regional stations did not constitute State aid paid to TV2, it would be logical to expect the Commission to make particular reference to those resources in the part of the contested decision dealing with the classification of the measures concerned as State aid, making clear that those resources were not so classified. However, there is nothing to that effect in the relevant part of the contested decision.

161 On the contrary, it is absolutely clear from recitals 101 and 153, which appear in the part of the contested decision dealing with the classification of the measures concerned as State aid within the meaning of Article 107(1) TFEU, that in the Commission's view all the licence fee revenue was State aid granted to TV2. Indeed, in recital 101 of the contested decision the Commission noted that the licence fee revenue gave TV2 an economic and financial advantage and, in recital 153 of the contested decision, it concluded that all the measures concerned, including the licence fee revenue, constituted State aid to TV2.

162 It should also be noted that recital 194 of the contested decision appears in the part of the decision dealing with the assessment of the compatibility with the internal market of the State aid granted to TV2, which obviously presupposes that aid exists. It therefore seems implausible to interpret a recital appearing in that part of the contested decision as excluding from the State aid classification some of the amounts received by TV2. If those sums were not aid, there would be no reason to refer to them when assessing the compatibility of the aid at issue.

163 In those circumstances, an interpretation of recital 194 of the contested decision different from that advocated by both the applicant and the Commission must be adopted. In that regard, account must be taken of the fact that the part of the contested decision containing recital 194 sought to determine whether, and to what extent, the aid granted to TV2 constituted overcompensation. Recital 194 must therefore be understood to mean that the Commission did not consider the resources transferred by TV2 to the regional stations to be overcompensation. It therefore included those sums both in the revenue received by TV2 (which constitute State aid) and in TV2's documented expenditure. However, as the Commission rightly notes in recital 194 of the contested decision, the inclusion of a sum in the revenue column and the subsequent deduction of that very same sum in the expenditure column 'do[es] not affect the … calculation' of overcompensation.

164 It must therefore be concluded that, contrary to what the Commission has argued before the Court, recital 194 of the contested decision cannot be understood as meaning that the resources transferred to the regional stations by TV2 did not constitute aid to the latter.

165 In those circumstances, it is necessary to examine, in the second place, the merits of the arguments put forward by the applicant in connection with the present plea in order to contest the finding that those resources constituted aid.

166 It must be noted in that regard that it follows logically from the considerations set out in paragraphs 161 and 162 above that the resources transferred by TV2 to the regional stations can escape classification as State aid only if the sums in question were transferred to TV2 for the sole purpose of then being passed on to the regional stations in their entirety. In such circumstances, TV2 would have no obligation other than to transfer to the regional stations the sums paid to it for that purpose, which means logically that if no sum had been transferred to it, TV2 would be under no obligation to pay anything to the regional stations at all. Only if those conditions were satisfied could it be claimed, as TV2 does, that its role was limited to that of a 'paying agency' or 'payment channel'.

167 On the other hand, the scenario referred to in paragraph 166 above could not be accepted if it is found that TV2 had itself assumed payment obligations with regard to the regional stations, obligations with which it had to comply in all circumstances, that is to say even if it had received nothing from the licence fee. In such a case, the sums actually paid by TV2 to the regional stations would certainly represent real costs incurred by it and if aid equal to those sums were paid to it to enable it to meet those costs, there could be no question of overcompensation.

168 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.

169 In fact, it follows from Article 1 of the Lov om radio-og fjernsynsvirksomhed, as attached by the applicant to the 24 June 1994 version of the application, that the right to broadcast audio-visual programmes as defined by that law was granted, on the one hand, to DR and, on the other, to 'TV2, as referred to in Chapter 4' of that law. That Chapter 4 included Article 18, which provided that 'TV2 is an autonomous establishment, the purpose of which shall be to produce and broadcast national and regional television programmes by means of independent programming activities' and that 'within the framework of their programming, the regional stations of TV2 referred to in Article 21 shall also ensure that transmissions have a regional base'. Article 21(1) provided that 'a number of regional stations may be created' and that 'each station shall cover the territory of one or more counties'. The subsequent paragraphs of Article 21 set out the conditions for the creation of regional stations, stipulating that the creation of a regional station required ministerial approval.

170 The version of the provisions in question reproduced in paragraph 169 above remained in force until amended by the law of 22 March 2001. Following those amendments, Article 1 of the Lov om radio-og fjernsynsvirksomhed read as follows: 'The following entities shall have the right to broadcast audio-visual programmes as indicated in Article 2: (1) DR, as referred to in Chapter 3; (2) TV2, as referred to in Chapter 3 …'. That Chapter 3 included Article 21, laying down that 'in addition to the national broadcaster, TV2 shall consist of eight regional stations, to which there shall be attached a regional community council consisting of members drawn from cultural, social and regional life in all its forms'.

171 It follows from those texts that, in order to discharge part of the mission entrusted to it by the legislature, namely the broadcasting of regional programmes, TV2 was to use the services of the regional stations, which implies that, in return, it was to assume the obligation to pay to those stations an appropriate remuneration for those services, allowing them to provide the services in question. In other words, TV2 was itself to take on obligations with regard to the regional stations and its role was not confined to that of a mere 'channel' for payments from the licence fee intended for the regional stations. The fact, assuming it is established, that the regional stations had their own legal personality, separate from that of TV2, has no effect in that regard.

172 On the one hand, the foregoing considerations are confirmed by the latest amendment to the Lov om radio-og fjernsynsvirksomhed, which occurred during the period concerned, read in the light of the applicant's arguments. The applicant states in fact that its task of redistributing licence fee resources came to an end in 2003 when TV2 was converted into a joint stock company. However, that is precisely when the amendment to the Lov om radio-og fjernsynsvirksomhed came into force, giving Article 1 of that law the following form: 'The following entities shall have the right to broadcast audio-visual programmes as indicated in Article 2: (1) DR, as referred to in Chapter 4; (2) TV2, as referred to in Chapter 6; (3) TV2 regional stations as referred to in Chapter 6 …'. That amendment confirms that the regional stations were separated from TV2 in January 2003 and that it was therefore no longer necessary for TV2 to assume obligations towards those stations from that date.

173 On the other hand, when questioned in that connection at the hearing, the applicant confirmed that its obligation until the end of 2002 was to finance the activities of its regional stations, even in a — hypothetical — situation where TV2 had not received the licence fee revenue. Once the regional stations became independent of TV2 in 2003, the obligation to finance them out of licence fee revenue disappeared.

174 In the light of all the foregoing considerations, the third plea must be rejected.

The fourth plea, alleging an error in law in that the Commission considered that the advertising revenue paid to TV2 through the TV2 Fund constituted State aid

175 By its fourth plea, advanced in support of the third alternative head of claim, the applicant complains that the Commission erred in law in regarding as State aid the sums derived from the advertising revenue for the years 1995 and 1996 which were transferred to it through the TV2 Fund. The applicant maintains that this was revenue from its own activity, which cannot be regarded as State aid.

176 In order to properly understand the particular question that is the subject of the present plea, it should be noted first of all that, as is clear from the judgment in *TV2 I*, cited in paragraph 11 above (EU:T:2008:457, paragraph 160), during 1995 and 1996 (and by contrast with the period that followed) TV2's advertising space was sold not by TV2 itself, but by a third company (TV2 Reklame A/S), and the income from those sales was transferred to TV2 through the TV2 Fund.

177 In its judgment in *TV2 I*, cited in paragraph 11 above (EU:T:2008:457, paragraphs 162 and 167), the Court found that in the TV2 I decision, the Commission had in practice bracketed the 1995 to 1996 advertising revenue together with the licence fee and had failed to fulfil its obligation to state the reasons on the basis of which it took the 1995 and 1996 advertising revenue into consideration de facto as State resources. The Court therefore concluded that the action in the case should be upheld in so far as it concerned the 1995 and 1996 advertising revenue and that the TV2 I decision should be annulled in so far as it included that advertising revenue among the State resources.

178 That annulment led the Commission to reconsider, in the contested decision, whether TV2's advertising revenue for the years 1995 and 1996 should be classified as State aid, which it did in recitals 75 to 90 of that decision.

179 In recital 77 of the contested decision the Commission noted that, in the light of the judgment of 13 March 2001 in *PreussenElektra* (C-379/98, ECR, EU:C:2001:160) it had to demonstrate whether the advertising revenue for the years 1995 and 1996 could be classified as State resources. It considered that, for that purpose, it had to assess whether that advertising revenue was under the control of the Danish State.

180 The Commission concluded that this was the case, on the basis of the procedures laid down by Danish law for the management of that revenue. Thus it found that, as a separate State-owned vehicle, independent from TV2, TV2 Reklame had been set up to act as an agent for the sale of advertisements on TV2 on a commercial basis. TV2 Reklame had a contractual relationship with its advertising customers (recital 80 of the contested decision).

181 In recital 81 of the contested decision, the Commission stated as follows:

'There was no obligation to transfer revenue from TV2 Reklame to the TV2 Fund. The transfer was instead decided by the Danish State. The Minister of Culture decided what part of TV2 Reklame's profits was to be transferred to the TV2 Fund. The decision was taken for one or more years at a time with the approval of the Danish Parliament (the Finance Committee). The Minister of Culture could decide that non-transferred profit should be used for repayment of the State guarantee issued previously for TV2 Reklame or for cultural purposes.'

182 Footnote 37, to which recital 81 of the contested decision refers, mentions Article 29 of the Lov om radio-og fjernsynsvirksomhed, as amended on 24 June 1994, in support of its argument that the Danish Minister of Culture decided what share of advertising revenue would be paid into the TV2 Fund. That provision provides in particular that 'the TV2 fund shall also receive the profit generated by advertising on TV2' and that 'the Minister of Culture shall, with the assent of the Parliamentary Finance Committee, determine for one or more years the share of the profit of TV2 Reklame A/S that is to be paid into the TV2 Fund'.

183 The Commission nevertheless noted in recital 82 of the contested decision that 'in practice, in 1995 and 1996, the full amount of TV2 Reklame's profits [from TV2 advertising revenue] was transferred to the TV2 Fund'.

184 The Commission went on to find that there was no obligation to transfer money from the TV2 Fund to TV2 every year. The transfer was decided by the Danish State and in practice TV2 did not receive all the advertising revenue from the TV2 Fund in 1995 and 1996 (recitals 84 and 85 of the contested decision). Moreover, no distinction was made in the TV2 Fund accounts between advertising revenue and licence fee resources, and revenue that was not transferred to TV2 accumulated in the TV2 Fund. That revenue was transferred to TV2 when the TV2 Fund was wound up (recital 86 of the contested decision).

185 In recital 87 of the contested decision, the Commission rejected an argument by the Danish authorities, which, relying on a letter from the Danish Minister of Justice of 22 November 2003, had maintained that TV2 was legally entitled to the advertising revenue. That letter stated that the TV2 Fund's resources could be used only to cover TV2's activities. In that regard the Commission pointed to the fact that there was no obligation under Danish law to transfer all the advertising revenue to TV2 and that it was the Danish Minister of Culture who decided whether money was to be paid to TV2 and if so, how much.

186 The Commission added that TV2 had no contractual relationship with advertisers and no influence on advertising activities (recital 88 of the contested decision). It therefore found, in the light of all those factors, that the Danish Minister of Culture had control over the resources of TV2 Reklame and the TV2 Fund and that consequently the advertising revenue for the years 1995 and 1996 which was transferred to TV2 through TV2 Reklame and the TV2 Fund constituted State resources (recitals 89 and 90 of the contested decision).

187 The applicant disputes the finding that the advertising revenue for the years 1995 and 1996 constituted State resources. It explains that the purpose of the particular institutional framework created to manage TV2's advertising activity was to prevent undue account being taken of advertisers' interests, which could have compromised TV2's editorial independence. That was why relations with advertisers had been entrusted to a separate company, TV2 Reklame. However, it was also clear that TV2 Reklame was concerned solely with the sale of TV2 advertising air time to advertisers. The advertising revenue for the years 1995 and 1996 came from what TV2 had produced and could not therefore be considered State aid.

188 The Commission, supported by Viasat, disputes those arguments. In its view, the question of whether the advertising resources were controlled by the State is decisive for the assessment of whether they are State aid. The Commission underlines that it was the Danish State that decided whether or not to transfer advertising revenue to the TV2 Fund. Moreover, TV2 had no right of ownership over the Fund's resources and could not make free use of those resources. Since it was the Danish Government which had the ability to decide whether or not to transfer those resources to TV2, they were in reality under the control of the State. In support of the Commission's argument, Viasat refers to the judgment of 12 December 1996 in *Air France* v *Commission* (T-358/94, ECR, EU:T:1996:194) and that of 16 May 2000 in *France* v *Ladbroke Racing and Commission* (C-83/98 P, ECR, EU:C:2000:248), and maintains that State resources may have a private origin if they are under public control.

189 As noted in paragraph 46 above, classification as State aid within the meaning of Article 107(1) TFEU requires four conditions to be satisfied, one of which is that there must be an intervention by the State or through State resources. Indeed, as the Court of Justice held in *PreussenElektra*, cited in paragraph 179 above (EU:C:2001:160, paragraph 58), to which recital 77 of the contested decision refers, only advantages granted directly or indirectly through State resources are to be considered aid in the above sense. Indeed, the distinction made in Article 107(1) TFEU between 'aid granted by a Member State' and aid granted 'through State resources' does not signify that all advantages granted by a Member State — whether financed through State resources or not — constitute aid, but is intended merely to bring within that definition both advantages which are granted directly by the State and those granted by a public or private body designated or established by the State.

190 It follows from that case-law that advantages which are not granted through State resources are not, in any event, capable of constituting State aid (see, to that effect, judgment in *PreussenElektra*, cited in paragraph 179 above, EU:C:2001:160, paragraphs 59 to 61, and judgment of 15 July 2004 in *Pearle and Others*, C-345/02, ECR, EU:C:2004:448, paragraphs 35 and 36).

191 The Court of Justice has defined the scope of advantage granted 'through State resources' in case-law which it is appropriate briefly to consider below.

192 Thus, in the case giving rise to the judgment in *PreussenElektra*, cited in paragraph 179 above (EU:C:2001:160), the Court of Justice was asked to rule on a measure imposing an obligation on private electricity supply undertakings to purchase electricity produced from renewable energy resources at fixed minimum prices. Noting that the obligation did not involve any direct or indirect transfer of State resources to undertakings which produce that type of electricity, the Court of Justice found that 'the fact that the purchase obligation [was] imposed by statute and confer[red] an undeniable advantage on certain undertakings [was] not capable of conferring upon it the character of State aid' (judgment in *PreussenElektra*, cited in paragraph 179 above, EU:C:2001:160, paragraph 61).

193 Similarly, the case giving rise to the judgment in *Pearle and Others*, cited in paragraph 190 above (EU:C:2004:448), concerned an advertising campaign organised by a public body and paid for with monies collected from its members, who benefited from the campaign, by means of compulsory levies earmarked for the organisation of that advertising campaign. The Court of Justice noted that it did not appear that the advertising campaign was funded by resources made available to the national authorities. Since the costs incurred by the public body for the purposes of that campaign were offset in full by the levies imposed on the undertakings benefiting therefrom, the public body's action did not tend to create an advantage which would constitute an additional burden for the State or that body (judgment in *Pearle and Others*, cited in paragraph 190 above, EU:C:2004:448, paragraph 36).

194 Furthermore, in its judgment of 5 March 2009 in *UTECA* (C-222/07, ECR, EU:C:2009:124, paragraph 47), the Court of Justice held that a measure adopted by a Member State requiring television operators to earmark 5% of their operating revenue for the pre-funding of European cinematographic films and films made for television and, more specifically, to reserve 60% of that 5% for the production of works of which the original language was one of the official languages of that Member State did not constitute State aid in favour of the cinematographic industry of that Member State. The Court of Justice noted in that regard that it was not apparent that the advantage provided by such a measure to the cinematographic industry of that Member State constituted an advantage granted directly by the State or by a public or private body designated or established by the State, since the advantage in question was the result of general legislation requiring television operators, whether public or private, to earmark some of their operating revenue for the pre-funding of cinematographic films and films made for television (judgment in *UTECA*, cited above, EU:C:2009:124, paragraphs 44 and 45).

195 In the light of the case-law referred to in paragraphs 192 to 194 above, it may be concluded that an advantage conferred through State resources is an advantage which, once granted, has a negative effect on State resources.

196 The simplest form that that negative effect can take is a transfer of resources from the State to the party on whom the advantage is conferred. However, according to the settled case-law of the Court of Justice, it is not necessary to establish in every case that there has been a transfer of State resources for the advantage conferred on one or more undertakings to be capable of being regarded as State aid (judgment of 16 May 2002 in *France* v *Commission*, C-482/99, ECR, EU:C:2002:294, paragraph 36, and judgment of 30 May 2013 in *Doux Élevage and Coopérative agricole UKL-ARREE*, C-677/11, ECR, EU:C:2013:348, paragraph 34).

197 However, that latter consideration does not mean that a measure may constitute State aid even though it is not an advantage conferred through State resources. Such an interpretation of the case-law cited in paragraph 196 above would, moreover, be in contradiction with the case-law cited in paragraphs 189 and 190 above.

198 The case-law cited in paragraph 196 above must rather be understood to mean that it is possible to conceive an advantage entailing negative effects for State resources that does not involve a transfer of State resources. Such is for example the case of a measure by which the public authorities grant to certain undertakings a tax exemption which, although not involving a transfer of State resources,

places the persons to whom the tax exemption applies in a more favourable financial situation than other taxpayers (see, to that effect, judgments of 15 March 1994 in *Banco Exterior de España*, C-387/92, ECR, EU:C:1994:100, paragraph 14, and 19 May 1999 in *Italy* v *Commission*, C-6/97, ECR, EU:C:1999:251, paragraph 16). The negative effect of such a measure on State resources results from the fact that the State does not collect from the undertakings concerned a tax or other similar contribution that it levies on other taxable persons and which it also should, as a matter of course, have levied on those undertakings. Moreover, such a measure has precisely the same result as would be achieved if the State also collected the tax in question from the undertakings benefiting from the measure in order then to refund it to them immediately, that is to transfer to them the resources that it had previously collected from them.

199 The case-law on tax exemptions cited in paragraph 198 above is precisely what the Court of Justice refers to in the judgments cited in paragraph 196 above in support of the argument that it is not necessary to establish in every case that there has been a transfer of State resources for the advantage granted to one or more undertakings to be capable of being regarded as State aid.

200 Although it is established from the foregoing considerations that State aid presupposes a negative effect on State resources, it is still necessary to determine what is to be understood by 'State resources'. Clearly, the material or financial means in the State's possession are undeniably State resources. That concept naturally also includes resources which the State has obtained from third parties in the exercise of its powers, through the imposition of a tax, for example (see, to that effect, judgment of 17 July 2008 in *Essent Netwerk Noord and Others*, C-206/06, ECR, EU:C:2008:413, paragraph 66).

201 The case-law of the Court of Justice and the General Court has adopted the more general position that Article 107(1) TFEU covers all the financial means by which the public authorities may actually support undertakings, irrespective of whether or not those means are permanent assets of the State. Consequently, even if the sums corresponding to the measure in question are not permanently held by the Treasury, the fact that they constantly remain under public control, and therefore available to the competent national authorities, is sufficient for them to be categorised as State resources (see judgment in *Doux Élevage and Coopérative agricole UKL-ARREE*, cited in paragraph 196 above, EU:C:2013:348, paragraph 35 and case-law cited; judgment of 15 January 2013 in *Aiscat* v *Commission*, T-182/10, ECR: EU:T:2013:9, paragraph 104).

202 The case-law referred to in paragraph 201 above has its origin in the judgment in *Air France* v *Commission*, cited in paragraph 188 above (EU:T:1996:194), relied on by Viasat. The case giving rise to that judgment concerned the acquisition of virtually all the capital of the airline Air France by a wholly owned subsidiary of the Caisse des dépôts et consignations, a French special public body (judgment in *Air France* v *Commission*, cited in paragraph 188 above, EU:T:1996:194, paragraphs 4 to 7). The question which then arose was whether the resources used for that purpose could be classified as State resources, the French Republic arguing that they were funds of private origin which were merely managed by the Caisse des dépôts et consignations and that the depositors of those funds could require their repayment at any time (judgment in *Air France* v *Commission*, cited in paragraph 188 above, EU:T:1996:194, paragraph 63).

203 The Court answered that question in the affirmative. It observed that deposits with, and withdrawals from, the Caisse des dépôts et consignations produced a constant balance which the Caisse was able to use as if the funds represented by that balance were permanently at its disposal. According to the Court, the Caisse des dépôts et consignations could therefore act as an investor responding to developments on the markets by using that available balance at its own risk. The Court considered that the investment in question, financed by the balance available to the Caisse des dépôts et consignations, was liable to distort competition within the meaning of Article 107(1) TFEU in the same way as if that investment had been financed by means of revenue from taxation or compulsory contributions. It added that that provision therefore covered all the financial means by which the public authorities may actually support undertakings, irrespective of whether or not those means are

permanent assets of the public sector. It concluded from this that it was irrelevant that the funds used by the Caisse des dépôts et consignations were repayable (judgment in *Air France* v *Commission*, cited in paragraph 188 above, EU:T:1996:194, paragraphs 66 and 67).

204 The rule referred to in paragraphs 201 and 203 above was then endorsed by the Court of Justice in the judgment in *France* v *Ladbroke Racing and Commission*, cited in paragraph 188 above, (EU:C:2000:248, paragraph 50), also relied on by Viasat.

205 The case giving rise to that judgment concerned an appeal brought against the judgment of 27 January 1998 in *Ladbroke Racing* v *Commission* (T-67/94, ECR, EU:T:1998:7) concerning an action for annulment of a decision by which the Commission had, inter alia, found that the principal French racecourse undertakings' access to winnings unclaimed by bettors, while designed to finance those undertakings' social expenditure, did not constitute State aid because no transfer of State resources was involved. The General Court had held that the Commission decision in question was based on false premisses and for that reason had to be annulled (judgments in *France* v *Ladbroke Racing and Commission*, cited in paragraph 188 above, EU:C:2000:248, paragraph 45, and *Ladbroke Racing* v *Commission*, cited above, EU:T:1998:7, paragraph 111).

206 The General Court had held that the measure at issue in that case enabled the racecourse undertakings to cover certain social expenditure and that the amount of the sums corresponding to the unclaimed winnings was monitored by the competent French authorities. It had inferred therefrom that, inasmuch as national legislation extended the range of uses to which those sums could be put to activities of the racecourse undertakings other than those initially envisaged, the national legislature, by virtue of that extension, in effect waived revenue which in principle should have been paid over to the Treasury. It had added that, in so far as those resources had been used to finance social expenditure in particular, they constituted a reduction in the social security commitments which an undertaking normally had to discharge and thus constituted aid to it (judgment in *France* v *Ladbroke Racing and Commission*, cited in paragraph 188 above, EU:C:2000:248, paragraphs 47 to 49, and judgment in *Ladbroke Racing* v *Commission*, cited in paragraph 205 above, EU:T:1998:7, paragraphs 105 to 110).

207 The Court of Justice held that the assessment made by the General Court left no room for criticism of its legal correctness and it adopted the formula used in paragraph 67 of the judgment in *Air France* v *Commission*, cited in paragraph 188 above (EU:T:1996:194), referred to in paragraph 203 above. It added that even though the sums involved in the measure allowing the racecourse undertakings access to unclaimed winnings were not permanently held by the Treasury, the fact that they constantly remained under public control, and therefore available to the competent national authorities, was sufficient for them to be categorised as State resources (judgment in *France* v *Ladbroke Racing and Commission*, cited in paragraph 188 above, EU:C:2000:248, paragraph 50).

208 It may be inferred from that case-law that State resources within the meaning of the case-law cited in paragraph 189 above may also consist of resources originating with third parties but which either have been placed at the disposal of the State by their owners voluntarily (see for example the depositors of the Caisse des dépôts et consignations in the case giving rise to the judgment in *Air France* v *Commission*, cited in paragraph 188 above, EU:T:1996:194) or have been abandoned by their owners, the State having assumed management of them by virtue of its sovereign powers (see, for example, the winnings unclaimed by bettors in the case giving rise to the judgment in *France* v *Ladbroke Racing and Commission*, cited in paragraph 188 above, EU:C:2000:248, and the judgment in *Ladbroke Racing* v *Commission*, cited in paragraph 205 above, EU:T:1998:7).

209 However, it cannot be held that resources are under public control and therefore constitute State resources in the above sense simply on the basis that, by legislative action, the State requires a third party to use its own resources in a particular way. Thus, in the case giving rise to the judgment in *PreussenElektra*, cited in paragraph 179 above (EU:C:2001:160), the fact that the State had required

private electricity supply undertakings to use their own resources to purchase electricity produced from renewable energy sources at fixed minimum prices did not lead the Court to conclude that those undertakings' resources were under public control and constituted State resources. The case giving rise to the judgment in *UTECA*, cited in paragraph 194 above (EU:C:2009:124), was similar, the State having required television operators to earmark a certain percentage of their operating income to a particular use (the pre-funding of European cinematographic films and films made for television).

210 The present plea must be analysed in the light of all the foregoing considerations. In that regard, it must be pointed out, as the Commission does, that the answer to the question of whether the advertising revenue for the years 1995 and 1996, transferred from TV2 Reklame to TV2 through the TV2 Fund, constituted 'State resources' within the meaning of the above case-law is decisive for the assessment of the present plea.

211 There is no doubt that the advertising revenue at issue in the present plea is the financial consideration paid by advertisers for the provision of TV2 advertising air time. Accordingly, the source of that revenue is not State resources but private resources, those of the advertisers. The question is therefore whether it is permissible to consider those resources, of private origin, to have been controlled by the Danish authorities, as was the case of the resources at issue in the cases giving rise to the judgments referred to in paragraph 188 above.

212 That is not the case. Unlike those latter cases, there can be no question in the present case of resources voluntarily placed at the disposal of the State by their owners or of resources which have been abandoned by their owners and of which the State has assumed management. The Danish State's intervention in the present case was specifically to determine the percentage of the resources in question (the advertising revenue received by TV2 Reklame) which would be passed to TV2 by the TV2 Fund. All that the Danish authorities could do, if they so wished, was to decide that TV2 would receive not all those resources but only part of them. In other words, the Danish authorities had the power to set a ceiling on the amount of those resources which would be transferred to TV2. However, on the basis of the consideration set out in paragraph 209 above, that power could not be considered sufficient to conclude that the resources were under public control.

213 The measure at issue in this case is in fact similar to that in question in the case giving rise to the judgment in *PreussenElektra*, cited in paragraph 179 above (EU:C:2001:160), except that in the latter case the State had set minimum prices for the purchase of electricity produced from renewable energy sources, whereas in the present case the Danish authorities had the power, in essence, to set a maximum sum that TV2 Reklame was to pay to TV2 in return for the latter making advertising airtime available to the former's clients.

214 If, acting on the instructions of the Danish authorities, TV2 Reklame withheld part of the advertising revenue and placed it at the disposal of those authorities, that part of the advertising revenue would constitute resources of the Danish State. However, there is no reason to consider that the remaining portion of the advertising revenue, which was not withheld by TV2 Reklame, constitutes a State resource.

215 A different conclusion cannot arise from the fact that, as pointed out in recital 81 of the contested decision, the advertising revenue which was not withheld was paid into the TV2 Fund, and not to TV2 direct, and that there was no obligation to transfer the money from the TV2 Fund to TV2 each year.

216 The Commission has not disputed the Kingdom of Denmark's assertion, referred to in recital 87 of the contested decision, that the TV2 Fund's resources could be used only to cover TV2's activities and that there was therefore a legal obligation to transfer the advertising revenue from the TV2 Fund to TV2 eventually. It merely replied, in the same recital of the contested decision, that 'there was no

obligation under the law to transfer all the advertising revenue to TV2'. It added that 'it was for the Minister of Culture to take a specific decision on whether money was to be transferred to TV2, and if so how much'.

217 However, as noted above, the fact that the Danish Minister of Culture was able to withhold part of the advertising revenue does not mean that the remainder, which was not withheld, was a State resource or that its transfer to the TV2 Fund and, eventually, to TV2 was State aid to TV2.

218 The absence of any contractual relationship between the advertisers and TV2, or of any influence by TV2 on advertising activity, referred to in recital 89 of the contested decision, is not relevant either. As pointed out above, what is important in this case is not the existence of a contractual relationship between TV2 and advertisers but whether or not the advertising revenue can be classified as 'State resources'. However, the reasons why that revenue cannot be so classified have already been explained.

219 In any event, it should be pointed out that the advertisers, from whom the advertising revenue came, had a contractual relationship with TV2 Reklame. As for TV2, it was required by Danish law to make advertising air-time available to TV2 Reklame, which sold it to its advertiser clients. In return, TV2 received from TV2 Reklame a proportion, determined by the Danish Minister of Culture, of TV2 Reklame's advertising revenue which could amount to 100% of that revenue. As has already been pointed out a number of times, the proportion of that revenue transferred to TV2 via the TV2 Fund did not come from State resources and could not therefore constitute State aid.

220 It is clear from all the foregoing considerations that the Commission erred in law in classifying the advertising revenue for the years 1995 and 1996 as State aid in the contested decision. The present plea is therefore well founded. The fourth plea must therefore be upheld and the contested decision annulled in so far as it classifies the aforementioned advertising revenue, received by TV2 through TV2 Reklame and the TV2 Fund, as State aid.

The second plea, alleging that the resources paid to TV2 from the licensing fees and the corporation tax exemption granted to it were wrongly classified as new aid

221 By its second plea, the applicant argues that the Commission erred in law when it failed to classify the procedure for financing TV2 from the licence fee as existing aid. It further maintains that the exemption from corporation tax which it enjoyed should also have been classified as existing aid.

222 In that regard, it must first of all be recalled that the procedural rules laid down in the FEU Treaty concerning State aid vary according to whether the aid is existing or new, the former being governed by Article 108(1) and (2) TFEU, the latter being governed (in chronological order) by the third and second paragraphs of the same article (judgment of 23 October 2002 in *Diputación Foral de Guipúzcoa and Others* v *Commission*, T-269/99, T-271/99 and T-272/99, ECR, EU:T:2002:258, paragraph 1).

223 As far as existing aid is concerned, Article 108(1) TFEU authorises the Commission to keep such aid under constant review in cooperation with Member States. As part of that review, the Commission must propose to the Member States any appropriate measures required by the progressive development or by the functioning of the internal market. Article 108(2) TFEU goes on to provide that if, after giving notice to the parties concerned to submit their comments, the Commission finds that aid is not compatible with the internal market having regard to Article 107, or that such aid is being misused, it is to decide that the State concerned must abolish or alter such aid within a period of time to be determined by the Commission.

224 In accordance with Article 108(3) TFEU, new aid must be notified in advance to the Commission and may not be put into effect until the procedure has resulted in a final decision. Under the same provision, the Commission must, if it considers that a plan is not compatible with the internal market, initiate the procedure provided for in Article 108(2) TFEU without delay.

225 It follows that if the Commission applies the procedure laid down for new aid in Article 108(2) and (3) to existing aid, its decision is in breach of that article and must be annulled.

226 Article 1 of Regulation No 659/1999 contains the following relevant definitions of 'existing aid' and 'new aid':

'(a) "aid" shall mean any measure fulfilling all the criteria laid down in Article [107(1) TFEU];

(b) "existing aid" shall mean:

(i) … all aid which existed prior to the entry into force of the Treaty in the respective Member States, that is to say, aid schemes and individual aid which were put into effect before, and are still applicable after, the entry into force of the Treaty;

(ii) authorised aid, that is to say, aid schemes and individual aid which have been authorised by the Commission or by the Council;

…

(v) aid which is deemed to be an existing aid because it can be established that at the time it was put into effect it did not constitute an aid, and subsequently became an aid due to the evolution of the common market and without having been altered by the Member State. …;

(c) "new aid" shall mean all aid, that is to say, aid schemes and individual aid, which is not existing aid, including alterations to existing aid;

(d) "aid scheme" shall mean any act on the basis of which, without further implementing measures being required, individual aid awards may be made to undertakings defined within the act in a general and abstract manner and any act on the basis of which aid which is not linked to a specific project may be awarded to one or several undertakings for an indefinite period of time and/or for an indefinite amount;

(e) "individual aid" shall mean aid that is not awarded on the basis of an aid scheme and notifiable awards of aid on the basis of an aid scheme;

…'

– Admissibility

227 Before analysing the merits of the present plea, it is necessary to examine an argument advanced by the Commission which in essence seeks to reject the present plea as inadmissible.

228 The Commission draws attention to the case-law according to which, in the context of the principle of sincere cooperation between Member States and the institutions, as provided for in Article 4(3) TEU, and in order not to delay the procedure, it is the responsibility of the Member State which considers that the aid in question is existing aid to provide the Commission at the earliest stage possible with the information on which that position is based, as soon as the Commission draws its attention to the measures concerned (judgment of 10 May 2005 in *Italy* v *Commission*, C-400/99, ECR, EU:C:2005:275,

paragraph 55). Recalling also the established case-law that the lawfulness of a decision concerning State aid is to be assessed in the light of the information available to the Commission when the decision was adopted (see judgment of 15 April 2008 in *Nuova Agricast*, C-390/06, ECR, EU:C:2008:224, paragraph 54 and the case-law cited), it argues that the merits of the present plea cannot be examined because, during the administrative procedure, neither the Kingdom of Denmark nor the applicant itself maintained that the fact that the latter was funded out of the licence fee or that it was exempted from corporation tax constituted existing aid.

229 In that regard, it must be pointed out that, according to the case-law, it follows from the consideration that the lawfulness of a decision concerning State aid is to be assessed in the light of the information available to the Commission when the decision was adopted that an applicant who has participated in the investigation procedure provided for by Article 108(2) TFEU cannot rely on factual arguments of which the Commission was unaware and of which the applicant did not inform the Commission in the course of the investigation procedure. By contrast, according to that same case-law, nothing prevents the party concerned from formulating against the final decision a legal plea which was not raised at the stage of the administrative procedure (see judgment of 11 May 2005 in *Saxonia Edelmetalle and ZEMAG* v *Commission*, T-111/01 and T-133/01, ECR, EU:T:2005:166, paragraph 68 and the case-law cited).

230 That case-law thus establishes a distinction between factual arguments of which the Commission was unaware at the time it adopted the contested decision, and which therefore cannot be raised for the first time before the Court as a means of contesting that decision (see, to that effect, judgment in *Saxonia Edelmetalle and ZEMAG* v *Commission*, cited in paragraph 229 above, EU:T:2005:166, paragraph 70, and judgment in *CBI* v *Commission*, cited in paragraph 68 above, EU:T:2012:584, paragraph 233), and pleas in law. The latter category includes in particular pleas based on information which was known to the Commission at the time its decision was adopted. Such pleas cannot therefore be rejected as inadmissible (see, to that effect, judgment of 23 November 2006 in *Ter Lembeek* v *Commission*, T-217/02, ECR, EU:T:2006:361, paragraphs 93 to 101).

231 It follows that, in so far as the applicant does not base the present plea solely on information which was unknown to the Commission at the time the contested decision was adopted, the present plea cannot from the outset be rejected as inadmissible. However, it can be examined only in so far as it is based on information which was known to the Commission at the time the contested decision was adopted.

– Merits

232 The Commission explained the reasons why it considered that the measures concerned constituted new aid in recital 154 of the contested decision, which reads as follows:

‘As TV2 started broadcasting in 1989, all the measures for TV2 were taken after Denmark’s accession to the European Union. Consequently, the measures, including the licence fee resources, constitute new State aid (rather than existing aid within the meaning of Article 108(1) TFEU).’

233 In the first place, concerning its funding through the licence fee, the applicant argues that that funding arrangement predates the Kingdom of Denmark’s accession to the European Union. It continued to be applied following the Kingdom of Denmark’s accession and was adapted following the creation of TV2 so that the latter could enjoy the same funding as was received by DR. However, that extension did not change the nature of the aid and did not mean that the arrangement had been altered in a way which would affect the assessment of its compatibility with the internal market. It was aid granted to an undertaking of the same kind, that is a public television undertaking. TV2 was under the same public-service obligations as DR, the operator which had initially been the sole recipient of the aid.

Neither the fact that TV2 was set up as a separate undertaking and not as a new channel within DR, nor the fact that the aid drawn from the licence fee was transferred to it via the TV2 Fund and was not its only financial resource could lead to a different conclusion.

234 In support of its argument, the applicant refers to several Commission decisions relating to the financing of public television in other Member States. In particular, it refers to Decision C(2005)1166 final of 20 April 2005 France — Licence fee (aid No E 10/2005) (OJ 2005 C 240, p. 20), in which the Commission declared that the aids granted by the French Republic to France Télévision constituted existing aid within the meaning of Article 1(b) of Regulation No 659/1999. According to the applicant, despite many changes in the identity and number of beneficiaries of the licence fee system in France, the Commission considered that the licence fee had always served to pay for public broadcasting and therefore that the nature of the measure in question, its objective, its legal basis, its allocation and the source of its funding had not changed. In the applicant's opinion, all the other decisions to which it referred contained similar analyses.

235 The applicant does not see how its situation is different from those at issue in the other Commission decisions to which it refers. It considers that, according to Commission practice, the extension of an existing funding arrangement to include an undertaking of the same type as those that benefited from it prior to the accession of the Member State concerned to the European Union was not a relevant change such as to justify, in its case, a conclusion different from that which the Commission reached in those other decisions. In its view, it follows that the contested decision must be annulled in so far as it considers its funding from licence fee resources to constitute new aid.

236 In that regard it must be pointed out that it is clear from the very definitions of 'existing aid' and 'new aid', recalled in paragraph 226 above, that where an aid is granted to a new beneficiary, different from the beneficiaries of an existing aid, it can only be new aid in the case of that new recipient.

237 In that regard, a distinction must be made between aid schemes on the one hand and individual aid on the other. The applicant's reasoning fails to take account of that distinction.

238 An aid scheme may consist of a provision defining in general and abstract terms the undertakings which are eligible to receive aids, without there being any need to adopt additional implementing measures. It is therefore conceivable that an aid scheme constituting an existing aid might also benefit undertakings which did not exist when the aid scheme was established but which, if they had existed, would have satisfied the criteria for receiving the aid in question. In such a situation, if such an aid scheme is subsequently altered, it is only where the alteration affects the actual substance of the initial scheme that the latter is transformed into a new aid scheme. On the other hand, where the new element is clearly severable from the initial scheme there can be no question of such a substantive alteration and in that situation only the new element constitutes new aid, granted to beneficiaries who, without the alteration, would have been unable to obtain the aid in question (see, to that effect, judgment of 30 April 2002 in *Government of Gibraltar* v *Commission*, T-195/01 and T-207/01, ECR, EU:T:2002:111, paragraphs 109 to 116).

239 Those considerations cannot apply to existing individual aids. By definition, those aids are granted to specific undertakings. This means that if an aid is subsequently granted to another undertaking different from that in receipt of an existing aid, it is of necessity a new aid in the case of that other undertaking, even if the aid in question is in nature or content identical to the existing aid.

240 It follows that it is in this case necessary to determine whether the provisions concerning the licence fee, as they existed at the time the Kingdom of Denmark acceded to the European Union, constituted an aid scheme or were concerned with individual aid.

241 The applicant has not relied on any information available to the Commission, when it adopted the contested decision, which would support the first of the two scenarios envisaged in paragraph 240 above.

242 The applicant has in fact referred only to the text of the Commission's letter of 21 January 2003 notifying the Kingdom of Denmark of the Commission's decision to initiate the procedure laid down in Article 108(2) TFEU in connection with the measures concerned, as reproduced in the authentic language (Danish) in the *Official Journal of the European Union* (OJ 2003 C 59, p. 2). In recital 86, that letter refers to the first Lov om radio-og fjernsynsvirksomhed, which dates from 1920. However, as the same recital notes and as the applicant itself concedes, the sole purpose of the licence fee introduced by that law was to fund DR. It must therefore be concluded that the provisions concerning the licence fee, as they existed at the time the Kingdom of Denmark acceded to the European Union, established not an aid scheme but individual aid in favour of DR.

243 It should be noted in that regard that, according to established case-law, in the context of competition law, including for the purpose of applying Article 107(1) TFEU, the concept of 'undertaking' covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed (see judgment of 10 January 2006 in *Cassa di Risparmio di Firenze and Others*, C-222/04, ECR, EU:C:2006:8, paragraph 107 and the case-law cited; judgment of 12 September 2013 in *Germany* v *Commission*, T-347/09, EU:T:2013:418, paragraph 48).

244 It follows from that case-law that, for the purpose of identifying the beneficiary of an existing aid, account must be taken of the economic unit that was the beneficiary of that aid, regardless of any change there may have been in its legal status. Consequently, even individual aid may be regarded as existing aid, even if it was granted to a legal entity established after the aid was introduced and the Member State concerned acceded to the European Union, if it is found that the legal entity in question, though non-existent as such at the time the aid was introduced, was at that time part of the undertaking, that is to say of the economic unit, to which the existing aid was granted.

245 It follows from those considerations that, in the present case, what was important for the Commission was to determine not whether TV2 had been established as a legal personality after the licence fee was introduced (it is common ground between the parties that this is the case), but whether it was a new undertaking, entirely independent of DR, or whether, on the contrary, it was only a section of the economic unit that was DR and had been detached from the latter. In the second scenario, the aid represented by the licence fee could have been considered existing aid with regard to TV2.

246 It must, however, be noted that the applicant has not relied on any information which was available to the Commission at the time it adopted the contested decision and ought to have led it to such a conclusion. On the contrary, the applicant itself argues in its written submissions that 'TV2 was set up as a separate undertaking' and that it 'was created in order to increase the plurality of the media in the Danish-speaking region'.

247 Accordingly, the Commission cannot be accused of having been in error when it found, in the light of the information available to it when the contested decision was adopted, that TV2 was not only a legal entity created after the Kingdom of Denmark's accession to the European Union, but also a new undertaking, established following that accession. That is in fact how the finding in recital 154 of the contested decision that 'TV2 started broadcasting in 1989' must be understood. However, according to the consideration set out in paragraph 239 above, that fact necessarily led to the conclusion that the aid granted to it from the licence fee was new aid and not existing aid.

248 That fact also allows a distinction to be made between the present case and the case which was the subject of the Commission decision on which the applicant relies (see paragraph 234 above). It is clear from a reading of recital 33 of the latter decision that although the legal personality of the

entities in receipt of the aid at issue in that case had changed, their origin lay in the breakup of the original recipient of the aid. In other words, by contrast with the present case, in that case the recipient of the aid at issue was part of the economic unit which had benefited from the original aid.

249 In any event, the Commission's decision-making practice in other cases cannot affect the validity of the contested decision, which can be assessed only in the light of the objective rules of the FEU Treaty (judgment of 20 May 2010 in *Todaro Nunziatina & C.*, C-138/09, ECR, EU:C:2010:291, paragraph 21).

250 It is clear from all the foregoing considerations that the present plea must be rejected as unfounded in so far as it concerns the classification as new aid of the licence fee resources transferred to TV2.

251 In the second place, the applicant argues that the corporation tax exemption, also classified as State aid in the contested decision, must be regarded as existing aid.

252 The applicant maintains that Article 3(1)(1) of the version of the Lov om indkomstbeskatning af aktieselskaber (Danish Law on corporation tax) applicable at the time of the Kingdom of Denmark's accession to the European Union provided that the State and its institutions were exempt from tax. That exemption also extended to DR, which had enjoyed such exemption since its formation. The applicant argues that when TV2 was created it was considered appropriate to afford it the same treatment and that it was added to the list of public bodies designated as being exempt from corporation tax. In that regard, the applicant refers to draft law No 145 of 14 January 1987 amending the Lov om indkomstbeskatning af aktieselskaber. The applicant submits that it is clear from the explanatory memorandum to that draft law that its purpose was to place TV2 on an equal footing with DR in tax terms.

253 The applicant thus argues that TV2 was not granted any particular advantage that was not enjoyed by other similar undertakings prior to the Kingdom of Denmark's accession to the European Union. Quite simply, established practice was followed with respect to it, in order to ensure equal treatment for it. The tax exemption that TV2 enjoyed was therefore to be regarded as existing aid.

254 With regard to that reasoning, it should be pointed out that it is clear from the considerations and case-law referred to in paragraph 238 above that aid granted in the context of an aid scheme cannot be considered existing aid in the case of a recipient which would not be entitled to it without a change to the scheme concerned. The question of whether any alteration affects the very substance of the initial scheme, in which case the scheme becomes a new aid scheme, or whether the alteration consists of a new element that is clearly severable from the original scheme, in which case only the new element constitutes new aid, arises only for undertakings which would have benefited from the aid under the scheme in question before any changes were made.

255 In the present case, it is certainly true that a provision providing, in general and abstract terms, a tax exemption for State bodies would be likely to constitute an aid scheme pursuant to Article 1(d) of Regulation No 659/1999. However, it is apparent neither from the applicant's arguments nor from the documents before the Court that, at the time the contested decision was adopted, the Commission was aware of such a provision of Danish law, pre-dating that Member State's accession to the European Union, which would also be likely to apply to TV2.

256 On the contrary, the applicant itself argues (see paragraph 252 above) that, when it was created, it was 'considered appropriate to afford it the same treatment' in tax matters as DR enjoyed. The applicant also refers to a 1987 amendment to the relevant Danish legislation, placing it on the list of public bodies designated as exempt from corporation tax. However, in view of the considerations set out in paragraph 254 above, far from demonstrating that the corporation tax exemption granted to the applicant was existing aid, those statements rather confirm that it was new aid, in so far as the applicant obtained that exemption only under a legislative provision adopted subsequent to the Kingdom of Denmark's accession to the European Union.

257 In its reply, the applicant argued that it was 'covered by the [tax] exemption for the State and its institutions from the time of its creation' and that there was therefore 'no need to introduce an express exemption' in its favour. The subsequent amendment of the relevant law in 1987 was 'simply in order to clarify the fact that DR and TV2 were in the same position so far as tax was concerned'.

258 Quite apart from the fact that those claims seem in part to contradict those appearing in the application, it should be noted that the applicant has not pleaded that, at the time the contested decision was adopted, the Commission had information which should have led it to conclude that the corporation tax exemption granted to TV2 was no more than an application of an existing aid scheme. On the contrary, the applicant acknowledges that 'it was in the application that TV2 informed the Commission for the first time of the corporation tax exemption for the Danish State and its institutions'. However, in the absence of such information and given that the exemption was for the first time expressly provided for in a law adopted in 1987, the Commission cannot be criticised for making any error for having considered it to be new aid.

259 For the sake of completeness, it should be noted that the matter raised before the Court by the applicant in support of its argument summarised in paragraph 257 above (a matter which, incidentally, was not communicated to the Commission during the administrative procedure) does not appear to corroborate the argument that the law adopted in 1987 in order to grant the applicant a tax exemption did no more than confirm an existing situation of law. Indeed, referring to the legal position obtaining before the proposed amendment was adopted, the explanatory memorandum to the draft law referred to in paragraph 252 states as follows concerning the tax position of TV2 and the TV2 Fund: 'Any income from commercial activities would however be taxable'. It therefore appears that the authors of the proposed amendment considered that, without that amendment, TV2's income from 'commercial activities' would be taxable. In other words, that excerpt shows that it was not a question of expressly confirming a legal position that already obtained, but of introducing, in the applicant's favour, a tax exemption that it had not previously enjoyed.

260 It is clear from all the above considerations that the second plea is also unfounded as regards the classification of the applicant's corporation tax exemption as new aid.

261 The second plea must therefore be rejected in its entirety.

262 It follows from all the foregoing considerations that the contested decision must be annulled in so far as the Commission regarded the advertising revenue for the years 1995 and 1996 paid to TV2 through the TV2 Fund as constituting State aid and that the remainder of the action must be dismissed.

Costs

263 Under Article 134(1) of the General Court's Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Under Article 134(3), where each party succeeds on some and fails on other heads, each party is to bear its own costs. However, if it appears justified in the circumstances of the case, the General Court may order that one party, in addition to bearing his own costs, pay a proportion of the costs of the other party.

264 In the present case, both the applicant and the Commission have been unsuccessful in some of their pleadings, in as much as the General Court annuls the contested decision in part and dismisses the action for the remainder. Since the applicant has not pleaded that the Commission be ordered to pay the costs, whereas the Commission has pleaded that the applicant be ordered to pay the costs, the Court rules that the applicant is to bear its costs in full as well as three quarters of the Commission's costs. The Commission will bear one quarter of its own costs.

265 Under the first subparagraph of Article 138(1) of the Rules of Procedure, Member States which intervene in the proceedings are to bear their own costs. The Kingdom of Denmark must therefore bear its own costs. Since Viasat has not formally pleaded that the applicant be ordered to bear the costs of the intervention, it must be ordered to bear its own costs.

On those grounds,

THE GENERAL COURT (Eighth Chamber)

hereby:

1. **Annuls Commission Decision 2011/839/EU of 20 April 2011 on the measures implemented by Denmark (C 2/03) for TV2/Danmark in that the Commission considered that the advertising revenue for the years 1995 and 1996 paid to TV2/Danmark through the TV2 Fund constituted State aid;**

2. **Dismisses the action as to the remainder;**

3. **Orders TV2/Danmark A/S to bear its own costs and three quarters of the European Commission's costs;**

4. **Orders the Commission to bear one quarter of its costs;**

5. **Orders the Kingdom of Denmark and Viasat Broadcasting UK Ltd each to bear their own costs.**

Gratsias Forwood Wetter

Delivered in open court in Luxembourg on 24 September 2015.

[Signatures]