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II

(Non-legislative acts)

DECISIONS

COMMISSION DECISION

of 20 December 2011

on State aid C 25/08 (ex NN 23/08) reform of the arrangements for financing the retirement pensions of civil servants working for France Télécom implemented by the French Republic in favour of France Télécom

*(notified under document C(2012) 9403)***(Only the French version is authentic)****(Text with EEA relevance)**

(2012/540/EU)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular the first subparagraph of Article 108(2) thereof ⁽¹⁾,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof ⁽²⁾,

Having called on interested parties to submit their comments ⁽³⁾ pursuant to the provisions cited above and having regard to their comments,

Whereas:

1. PROCEDURE

- (1) By a complaint dated 4 October 2002, supplemented on 16 January 2003, the Commission received allegations that the French Republic had implemented aid in favour of France Télécom which reduced its financial charges in part, and notably those relating to the financing of retirement pensions. By letter dated 17 March 2004, the French Republic sent the Commission the information it had requested concerning the complaint.
- (2) By letters dated 2 April 2004 and 24 February 2006, the complainants supplied additional information relating to the complaint.
- (3) By letter dated 20 May 2008, the Commission informed the French Republic of its decision to initiate the

procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union (TFEU) in respect of this aid.

- (4) The French Republic presented its comments on 18 July 2008.
- (5) The Commission's decision to initiate the procedure was published in the *Official Journal of the European Union* ⁽⁴⁾ and the Commission invited interested parties to submit their comments.
- (6) On 22 September 2008, the Commission received comments from France Télécom and, after extending the deadline, it received comments from the complainants and a telecommunications operator on 1 and 16 October 2008, respectively. The Commission forwarded these to the French Republic, giving it the opportunity to comment on them, and received comments from the French Republic by letter dated 13 February 2009.
- (7) On 16 February 2009, France Télécom presented comments drawing the Commission's attention to a General Court judgment of 28 November 2008 ⁽⁵⁾ which, in its opinion, confirms its arguments. On 14 May 2009, the telecommunications operator referred to in recital 6 presented supplementary information in relation to its comments during the procedure, referring to a Commission decision dated 11 February 2009 ⁽⁶⁾ which, in its opinion, supports its comments.

⁽¹⁾ With effect from 1 December 2009, Articles 87 and 88 of the EC Treaty have become Articles 107 and 108, respectively, of the Treaty on the Functioning of the European Union (TFEU). The two sets of provisions are, in substance, identical. For the purposes of this decision, references to Articles 107 and 108 of the TFEU should be understood as references to Articles 87 and 88, respectively, of the EC Treaty where appropriate.

⁽²⁾ OJ L 1, 3.1.1994, p. 3.

⁽³⁾ OJ C 213, 21.8.2008, p. 11.

⁽⁴⁾ See footnote 3.

⁽⁵⁾ Judgment of 28 November 2008 in Joined Cases T-254/00, T-270/00 and T-277/00 *Hotel Cipriani and others v Commission* ECR II-3269.

⁽⁶⁾ Commission Decision 2009/703/EC of 11 February 2009 on State aid C55/2007 granted to BT Plc (OJ L 242, 15.9.2009, p. 21).

- (8) Meetings were held between representatives of the Commission and France Télécom at the request of the latter on 17 December 2009, 23 September 2010 and 12 October 2010. France Télécom submitted additional comments on 18 October 2010.
- (9) On 18 March 2010, at the Commission's request, the French Republic provided clarifications and an update of certain information contained in its initial observations, to which it attached an outline of the initial observations.
- (10) On 22 September 2010, the French authorities forwarded further comments to the Commission and requested a meeting, which was held on 22 October 2010. By letter of 28 October 2010, the Commission sent them the factual clarification referred to during the meeting together with the supplementary comments made by France Télécom and invited the French Republic to return any comments it may have. On 17 November 2010, the Commission sent the additional clarifications requested by the French authorities on 10 November 2010 to enable them to prepare their comments.
- (11) By letter of 9 December 2010, supplemented on 24 June 2011, the French Republic submitted its supplementary comments, together with an update of certain information contained in its initial comments. Meetings were held with the French authorities on 28 June and 4 July 2011. Further comments were presented on 7 October 2011.

2. DETAILED DESCRIPTION OF THE AID

- (12) The measures covered by the present procedure consist of the changes made in 1996 to France Télécom's financing arrangements relating to the payment of the retirement pensions of its staff members with civil servant status. The previous arrangements were introduced in 1990 when France Télécom was founded as a separate entity from the State administration. In practice, the 1990 Law maintained the existing system for France Télécom's social security contributions. A new scheme was introduced in 1996 when France Télécom was set up as a public limited company, listed on the stock exchange and opened up an increasing share of its capital on the one hand and exposed itself entirely to competition from the markets in which it operated in France and in the other Member States of the European Union on the other. For the most part, the scheme introduced in 1996 is still in force today.

2.1. The legal framework of the status of France Télécom and its staff between 1990 and 1996

2.1.1. Status of France Télécom and situation of its staff between 1990 and 1996

- (13) Pursuant to Law No 90-568 of 2 July 1990 (hereinafter 'the 1990 Law')⁽⁷⁾, France Télécom was set up as a

public operator with legal personality. Previously it was a Directorate-General of the Ministry of Postal and Telecommunications Services. Through this same Law, full ownership of the State's movable and immovable assets assigned to the departments within this Directorate-General was transferred automatically and free of charge to France Télécom.

- (14) Article 3 of the 1990 Law assigned France Télécom a mandate: (i) to provide all national and international public telecommunications services; (ii) to establish, develop and operate the public networks necessary for supplying these services and to ensure their connection to foreign networks; (iii) to provide all other telecommunications services, installations and networks, and to establish networks distributing radio and television broadcasting services by cable.
- (15) Pursuant to Article 29 of the 1990 Law, the staff of France Télécom has a special status, adopted in accordance with to the Law on the rights and obligations of civil servants (loi portant droits et obligations des fonctionnaires) and the Law laying down the Staff Regulations for the civil service (loi portant dispositions statutaires relatives à la fonction publique de l'Etat). The 1990 Law permitted the employment of contract staff under collective agreements in the framework defined by a planning contract concluded between the State and the undertaking. This provided for a 3 % cap on staff numbers for this type of recruitment.
- (16) Continuing the previous budgetary practice, Article 30 of the 1990 Law established the allocation of responsibilities relating to financing the employees' social benefits between the French State and France Télécom as follows:

The active and retired staff of the Ministry of Postal and Telecommunication Services and those of the public operators covered by the Staff Regulations for civil servants, and their beneficiaries, shall be entitled to benefits in kind under sickness, maternity and invalidity insurance, through the Mutuelle Générale des P.T.T. [a French mutual benefit society], under the conditions stipulated in Book III and in Chapter II of Title I of Book VII of the Social Security Code. However, the part of the contribution for which the State is responsible under Article L. 712-9 shall be assumed by the public operators for their civil servants.

The payment and servicing of pensions granted under the Civilian and Military Retirement Pensions Code to civil servants at La Poste and France Télécom shall be effected by the State. In return, the public operators shall be required to pay to the Public Treasury:

- a) The amount of the deduction made from the salary of the civil servant, the level being fixed by Article L. 61 of the Civilian and Military Retirement Pensions Code;

⁽⁷⁾ Law No 90-568 of 2 July 1990 on the organisation of the public postal and telecommunications service (*Loi n° 90-568 du 2 juillet 1990 relative à l'organisation du service public de la poste et des telecommunications*), JORF No 157 of 8 July 1990, p. 8069.

- b) An additional contribution allowing full funding of the pensions that have been and are to be awarded to their retired officials.

The charges resulting from applying the provisions of Article L. 134-1 of the Social Security Code to civil servants at La Poste and France Télécom of are payable in full by the public operators.

A Council of State Decree shall determine, if necessary, the conditions for the application of these provisions.'

- (17) Between 1991 and 1996, pursuant to Article 30 of the 1990 Law, the employer's contribution (i.e. the additional contribution referred to in Article 30, point (b), of the 1990 Law in its original wording), which was payable by France Télécom for the civil servants it employs was

established by calculating the difference between the total amount of retirement pensions financed by the French State and the share deducted from the salaries of civil servants still in active service. France Télécom also participated in the 'compensation' and 'over-compensation' schemes, providing for transfers designed to ensure an equilibrium with the pension schemes for civil servants of other public bodies. The employee contribution to the funding of civil servants' retirement pensions was determined, pursuant to Article L 61 of the Civilian and Military Retirement Pensions Code, by withholding a contribution from the civil servant's salary, set at 7,85 % of the gross index-related salary.

- (18) The payments by France Télécom rose from EUR 920 million to EUR 1 151 million between 1991 and 1996 and were as follows:

Table 1

France Télécom employees' and employer's contributions 1991-96 ⁽⁸⁾

	(million EUR)					
	1991	1992	1993	1994	1995	1996
A/Total pensions paid	939	983	1 070	1 079	1 173	1 214
a 1/employees' contributions	195	201	217	213	229	238
a 2/employer's contribution	743	782	853	866	944	976
B/Compensation and over-compensation	176	188	277	136	201	175
Total charges (A + B)	1 115	1 171	1 348	1 215	1 375	1 389
Total share from France Télécom (a2 + B)	920	970	1 131	1 002	1 146	1 151

- (19) France Télécom recorded the pension-related expenditure in the books on the basis of the contributions paid. On account of the certainty that this expenditure would increase, given the foreseeable trend in retirement pensions to be paid to its former civil servants, France Télécom also entered in its accounts an annual provision designed to spread the estimated effect of future increases in payments over a 30-year period. The total amount of the provision thus set aside up to 1996 was FRF 23,4 billion (EUR 3,6 billion). According to the French authorities, the French State, acting as its own insurer, for its part, did not set aside reserves for these pensions ⁽⁹⁾.

2.1.2. The changes made to the status of France Télécom and the position of its civil service staff from 1996

The status of the company France Télécom

- (20) Law No 96-660 of 26 July 1996 ⁽¹⁰⁾ (hereinafter 'the 1996 Law') amended certain provisions of the 1990

Law. With effect from 31 December 1996, on the one hand it conferred on France Télécom the title of public company subject to the laws and regulations applicable to public limited companies, in so far as they are not contrary to the law, and on the other hand, it transferred, free of charge, the bulk of the assets, rights and obligations of the legal entity governed by public law France Télécom to the public company France Télécom.

- (21) The capital of the company France Télécom SA ('France Télécom') was established by decree at FRF 25 billion (EUR 3,8 billion) based on net assets recorded in the balance sheet at 31 December 1995. The France Télécom shares were admitted in October 1997 to the premier marché of the Paris Bourse and to the New York Stock Exchange (NYSE). According to the annual report for 1998, 63,6 % of France Télécom's capital was held by the State, 31,2 % by private investors, 3,2 % by France Télécom staff and 2 % by Deutsche Telekom. From 7 September 2004, with the transfer of 10,85 % of the capital, the French State no longer held a majority stake. Subsequently, this share continued to fall to reach 26,65 % of the capital at 31 December 2008. However, with 26,65 % of the voting rights and in the absence of other significant shareholder groups, the French State appoints the Chief Executive Officer, remains the principal shareholder of France Télécom

⁽⁸⁾ Figures rounded off.

⁽⁹⁾ France Télécom, Annual report 1996, pp. 35, 60 and 64 and reply from the French authorities dated 17 March 2004, point 4(1) a).

⁽¹⁰⁾ Law No 96-660 of 26 July 1996 on the national company France Télécom (Loi n° 96-660 du 26 juillet 1996 relative à l'entreprise nationale France Télécom), JORF No 174 of 27 July 1996, p. 11398.

and in practice can determine the outcome of shareholder votes on questions requiring a simple majority⁽¹¹⁾.

The statuses and recruitment of staff of the company France Télécom

- (22) The change of status of France Télécom provided for by the 1996 Law also included various provisions relating to its staff. According to this Law, the category of civil servants of France Télécom is attached to the national company France Télécom and comes under its management. The staff with civil servant status retained this status and the guarantees attaching to it. The conditions of employment of the civil servants working for France Télécom are identical to those of the civil service: they benefit from the guarantee of employment and may be dismissed only on serious grounds, in the cases defined by law. As regards the recruitment of new staff, the 1996 Law allowed France Télécom to recruit civil servants until 1 January 2002, whilst at the same time allowing it to recruit employees on a contract basis under collective agreements.

- (23) At 31 December 1996, France Télécom employed 165 200 persons, of whom 94,1 % were civil servants. In fact, without awaiting the deadline of 1 January 2002 established by the 1996 Law, France Télécom stopped recruiting civil servants from 1997. Consequently, the number of civil servants decreased by 47 % in 10 years, from 133 434 civil servants in 1997 to 69 892 in 2007. This decline is distinctly steeper than that of the total workforce of France Télécom (– 25 %), which stood at 124 166 employees at 31 December 2007.

The employer's contributions for retirement pensions of the company France Télécom

- (24) Article 6 of the 1996 Law also amended Article 30 of the 1990 Law by adding two paragraphs c) and d) to the original text. The Law requires France Télécom to pay to the Public Treasury, in return for the payment and servicing by the State of pensions granted to civil servants working for France Télécom:

'c) (...), an employer's contribution in full discharge of liabilities, due from 1 January 1997, in proportion to the sums paid as salary subject to pension deduction. The rate of the contribution in full discharge of liabilities shall be calculated in such a way as to equalise the levels of wage-related social security contributions and tax payments between France Télécom and the other companies in the telecommunications sector under the ordinary social security arrangements, for the risks that are common to employees under ordinary law and to civil servants.

This rate may be revised in the case of an adjustment to these charges. The arrangements for the determination and payment to the State of the employer's contribution shall be established by Decree of the Council of State;

- d) (...), an exceptional flat-rate contribution, of which the amount and the arrangements for payment shall be established by Finance Law before 31 December 1996.'

- (25) The 1996 Law also excluded France Télécom from the scope of the general and specific compensation for old-age provided for by the 1990 Law and resulting, for France Télécom, in the payment of compensation and over-compensation in addition to the employer's contribution, as shown in Table 1. Between 1991 and 1996, the amounts paid in this respect accounted for 18 % of the pensions paid to the civil service staff.

- (26) The employer's contribution in full discharge of liabilities, introduced by the 1996 Law, replaces the additional contribution provided for in point (b) of Article 30 of the 1990 Law. This contribution is based on a competitively fair rate based on equalisation of the levels of wage-related social security contributions and tax payments from equal net salary. The method of equalisation is based on a reconstruction of what the costs would be for a competitor with employees coming under the ordinary social security arrangements, including retirement pensions, providing them with a net wage equal to that of the civil servants of France Télécom with an identical employment structure.

- (27) The method excludes the contributions paid by competitors to insure against the risks not common to employees and civil servants, notably that of unemployment and the claims of employees in the event of the company going into receivership or compulsory liquidation (hereinafter 'wage guarantee insurance' or 'WGI'). When the 1996 Law was passed, this difference between France Télécom and its competitors did not go unnoticed by the legislator, which pointed out that: 'the combination of the provisions of Article 6 allows France Télécom to be relieved of the UNEDIC[French unemployment insurance scheme] contributions that its potential competitors, for their part, pay'⁽¹²⁾.

- (28) The employer's contribution paid by France Télécom, recalculated each year, is expressed as a percentage of the gross index-related salaries of the civil servants still

⁽¹¹⁾ Reference document 2008 France Télécom, lodged with the Financial Markets Authority, p. 18.

⁽¹²⁾ Senate, Report No 406 drawn up on behalf of the Committee on Economic Affairs and the Plan on the national company France Télécom Bill (*projet de loi relatif à l'entreprise nationale France Télécom*) by Mr Gérard Larcher, p. 17.

working. The rate of this employer's contribution averaged [...] (*) % between 1997 and 2010 and was as indicated in Table 2, according to the observations of the French Republic:

Table 2

Employer's contribution in full discharge of liabilities paid by France Télécom between 1997 and 2010

Year	Rate of contribution	Million EUR
1997	36,20 %	1 088,9
1998	35,40 %	1 069,6
1999	36,70 %	1 108,5
2000	36,40 %	1 085,0
2001	37,00 %	1 088,6
2002	37,70 %	1 100,1
2003	37,60 %	1 085,0
2004	[...] %	1 048,6
2005	[...] %	984,6
2006	[...] %	957,6
2007	[...] %	917,6
2008	[...] %	859,2
2009	[...] %	805,4
2010	[...] %	744,5

(29) The end to the recruitment of civil servants from 1997 capped the staff of civil servants working for France Télécom. Despite the retirement of a growing proportion of the staff of civil servants between 1991 and 2010, the table shows that the employer's contribution of EUR 744 million paid by France Télécom in 2010 was EUR 407 million less than the retirement pension costs that the company paid to the French State before the entry into force of the reform in 1996 and was equivalent to the only employer's contribution that France Télécom paid 20 years previously in 1991 (EUR 1 151 million and EUR 743 million respectively, see Table 1).

(30) The effect therefore of the reform introduced by the 1996 Law is that the amount of France Télécom's contribution is falling in absolute value and is no

longer linked to the number of retired civil servants. The transfer of costs to the State introduced by the 1996 Law occurred when the forecasts used by the Senate showed a significant increase in retirement costs from 2005, rising from FRF 13 billion (EUR 1,98 billion) in 2007, to FRF 21,5 billion (EUR 3,3 billion) in 2017 and FRF 34 billion (EUR 6,1 billion) in 2027 ⁽¹³⁾.

(31) The debates on the draft law at the National Assembly and the Senate report a transfer of FRF 250 billion of retirement costs to the State budget, that would not be covered by FRF 100 billion in annual contributions and an exceptional contribution of FRF 40 billion, even with the addition of the proceeds from the sale of a percentage of the company's shares. The same debates indicate a maximum estimated exceptional contribution of FRF 40 billion to reduce the new, heavy burden for the State. This amount was determined with the advice of bankers so as to be compatible with a debt-to-equity ratio of 150 % and to correspond to the retirement pension provisions made by the company and to the additional cost for the State, over 10 years, and no more than 10 years, resulting from the difference between the pensions paid and the contribution in full discharge of liabilities levied henceforth ⁽¹⁴⁾.

(32) The aim of compensating the State is recalled, not only in the wording of Article 30 of the Law adopted by the legislator and during the debates on the draft 1996 Law, but also in the Annual Report of France Télécom for 1997, which reports on the 'payment to the French State of an exceptional contribution of 37,5 billion francs relating to the future retirement of former civil servants' ⁽¹⁵⁾. The provisions made by France Télécom enabled France Télécom to reduce the net financial effort to be made, since it confined itself to paying, in a single year, the additional cost of the reform to the State for 10 years.

(33) In this way, it appears that the provision intended to spread the effect of future increases in contributions resulting from the 1990 Law, set aside each year by France Télécom for a total amount of FRF 23,4 billion (EUR 3,6 billion) in 1996, was taken into consideration when calculating the amount of the exceptional contribution (or compensating balance). The part of this contribution which did not correspond to the provisions set aside would cover this additional cost for a period of 10 years. Its amount was established taking into account the amount already set aside by the company as clearly emerges from the discussions at the time.

(34) In fact, since the employer's annual contribution introduced by the 1996 Law is in full discharge of liabilities, France Télécom's obligation has since been confined

⁽¹³⁾ Senate, Report No 406 by Mr Gérard Larcher, cited above, p. 15.

⁽¹⁴⁾ National Assembly, Transcript of the debate of 26 June 1996, pp. 4 to 6 and 20. Senate, Transcript of the session of 10 June 1996, p. 6.

⁽¹⁵⁾ France Télécom, Annual Report 1996, p. 56.

(*) The figures or passages between square brackets [...] are confidential or protected as business secrets.

to the payment of this contribution, without any other commitment to cover any future deficits either from the retirement pension scheme of its civil servant staff or from other civil service schemes. The accounting provision therefore was rendered redundant by the 1996 Law. The provision was credited to the profit and loss account of France Télécom at 31 December 1996, at a value of FRF 17,5 billion (EUR 2,7 billion) in the net result ⁽¹⁶⁾.

(35) In addition, the amount of the exceptional flat-rate contribution provided for by the 1996 Law in return for the payment and servicing by the State of the pensions awarded to the civil servant staff of France Télécom was fixed at FRF 37,5 billion (EUR 5,71 billion) by the Finance Act 1997. It was financed by an increase in the company's short-term and long-term debts ⁽¹⁷⁾ and paid in several instalments between January and October 1997. The revenue from this exceptional contribution allowed the deficit of the French public administrations to be reduced to EUR 41,8 billion in 1997. Without it, the deficit would have represented 3,7 % of GDP that year.

(36) The revenue from this contribution was allocated to the public body managing the exceptional contribution from France Télécom (Etablissement Public de Gestion de la Contribution Exceptionnelle de France Télécom) established by the Finance Act 1997. The exceptional contribution, together with any financial income it generates, constitutes the sole income of this body. Its expenditure takes the form of an annual transfer to the State budget, which has been allocated as revenue since 2006 to the account earmarked for State civilian and military pensions. This payment was set at FRF 1 billion (EUR 152,4 million) for 1997, and subsequently increased by 10 % per year, in the absence of a specific provision to the contrary in the Finance Act. The public body will be wound up after the payment of its revenue in full to the State ⁽¹⁸⁾.

(37) The application of the provisions of the Finance Act 1997 establishing the annual payments resulted in the life-span of the public body being estimated at 17 years in 1999, without further contributions to its funds ⁽¹⁹⁾. However, on account of the annual payments larger than

provided for by the Finance Act 1997, this period was shortened. As shown in Table 3, the cumulative amount of the annual payments by the public body already amounted to EUR 5,47 billion in 2010. The winding-up of the public body as a result of the transfer in full of the available resources was scheduled for 31 December 2011 ⁽²⁰⁾. The Finance Act 2011 therefore provides for a payment of EUR 243 million to the earmarked account for pensions for that year, which should clear the revenue of the public body ⁽²¹⁾.

(38) In any event, the amount of the exceptional contribution of FRF 37,5 billion allocated to the public body managing the exceptional contribution from France Télécom in 1997 corresponds to the amount of the contribution, below FRF 40 billion, mentioned during the discussion of the draft of the 1996 Law. Although it was paid to the State budget in 1997 and fed it each year for the payment of civilian and military pensions, the amount of this contribution was set in order to offset the additional cost to the State resulting from the application of the 1996 Law.

(39) The wage share of the financing of the pension liabilities for the civil servants, established pursuant to Article L 61 of the Civilian and Military Retirement Pensions Code since the foundation of the public operator France Télécom in 1991, was not changed by the 1996 Law. Moreover, the 1990 and 1996 Laws did not change the pension arrangements for the ordinary employees of France Télécom, which are those of the ordinary social security rules for pension insurance, supplemented by the complementary pension schemes AGIRC for executives and ARRCO for non-executives. Under this arrangement, France Télécom and its ordinary employees assume equivalent obligations to those of competing undertakings with regard in particular to the payment of contributions in full discharge of liabilities by the employer.

⁽¹⁶⁾ France Télécom, Annual Report 1996, pp. 35, 60 and 64.

⁽¹⁷⁾ France Télécom, Annual Report 1996, pp. 70 to 73. Note No 15 to the accounts notes the increase in short-term and long-term debts, which rose from FRF 6,2 billion to FRF 30,8 billion and from FRF 66,9 billion to FRF 74,2 billion respectively, i.e. a total increase of FRF 31,8 billion during 1996. The increase in the company's debts in 1996, almost three quarters of which occurred through an increase in short-term notes and commercial paper, is allocated by the auditors to financing the exceptional contribution of FRF 37,5 billion due to the State. The average interest rates applied to the France Télécom debt at 31 December 1996 were 4,33 % for the short term and 6,57 % for the short and long term.

⁽¹⁸⁾ Article 46 of Finance Law No 96-1181 for 1997 (*loi n°96-1181 de finances pour 1997*), JORF No 304 of 31 December 1996, p. 19490.

⁽¹⁹⁾ Report before the National Assembly No 3030 by Mr Philippe Auberger on the Finance Bill for 1997, p. 453.

⁽²⁰⁾ In 2006, the annual payment by the public body was increased by EUR 1 billion for the working capital requirements of the earmarked accounts for pensions. Other derogations from the 10 % cap on the annual payment on account of financing needs of the earmarked account, reflected in larger annual payments, have been made since 2006, see Annex 37 on 'Benefit and Pension Schemes — Pensions', No 1198 (Chapter II-2 B-3) to the Report before the National Assembly No 1127 on the Finance Bill for 2008 by Gilles Carrez. Also see the Report by the Inspectorate General for Finance M2007-005-02, 'The multiannual management of public finance', April 2007, Annex VI, p. 9.

⁽²¹⁾ Finance Law No 2010-1657 of 29 December 2010 for 2011 (*Loi n° 2010-1657 du 29 décembre 2010 de finances pour 2011*), Statutory Statements Annex III, Earmarked Accounts, Pensions, line 60, JORF No 0302 of 30 December 2010, page 23033. In Annex 37 on 'Benefit and Pension Schemes — Pensions', No 1198, the legislature provided in 2008 that a payment of EUR 252 million would clear the available resources of the public body at 31 December 2011 on the basis of an annual payment of EUR 626 million for 2010, whereas the actual payment was EUR 635,8 million. This difference of EUR 10 million seems to explain the payment of EUR 243 million provided for in the 2011 Finance Act.

The estimates of the costs to the French State resulting from the reform introduced by the 1996 Law

- (40) In connection with the reform introduced by the 1996 Law, the firm of actuaries appointed as adviser to the French State estimated that the payment and servicing by the State of the pensions granted to the civil service staff working for and retired from France Télécom would amount to FRF 242 billion (EUR 36,9 billion⁽²²⁾) in expected value at 1 January 1997⁽²³⁾. This figure is close to the rounded amount of FRF 250 billion mentioned at the Senate. The employer's contribution in full discharge of liabilities that France Télécom would pay in exchange was estimated, on the basis of the same actuarial assumptions, at EUR 15,2 billion, to which must be added the compensating balance or exceptional contribution of EUR 5,7 billion paid in full in October 1997. The French authorities estimate the value of the future employees' contributions at EUR [...] billion, at the time of the entry into force of the reform. The value of the net cost transferred by France Télécom to the French State, as estimated in 1996, therefore amounted to EUR [...] billion.
- (41) For the 10-year period (1997 to 2006) mentioned during the debates on the draft 1996 Law, the cumulated amount of benefits to be paid estimated by the firm of actuaries appointed as adviser to the French State was EUR [...] billion. During this period, the total amount of benefits actually paid was almost identical, EUR [...] billion, i.e. a forecast difference of less than 0,83 %⁽²⁴⁾. This confirms *ex post* the accuracy of the forecasts informing the discussions on the Law.
- (42) On the basis of these figures, it can be concluded that the amounts and their justification debated at the National Assembly and the Senate to set the amount of the compensating balance or exceptional contribution from France Télécom correspond to the proportions verified *ex post* during the 10-year period mentioned in the debates on the draft law. Indeed, the maximum amount of the exceptional contribution announced, EUR 6 billion (FRF

40 billion) corresponds to the forecasts drawn up by the public body until 1996 to meet the future retirement costs forecasted at that time, i.e. EUR 3,6 billion (FRF 23,4 billion) plus the difference of EUR 2,4 billion payable by the State between the employer's and employees' contributions levied between 1997 and 2006, on the one hand, and the benefits to be paid, estimated in 1996 for the same 10-year period, on the other.

- (43) Furthermore, the information communicated by the French Republic and shown in Table 3 shows that, for the period 1997 to 2010, the cumulated cost of pensions for the civil servant staff of France Télécom to be financed by the French State as a result of the 1996 reform reached EUR [...] billion. The costs to be financed by the State are defined as the balance between the annual contributions of France Télécom and the civil servants working there and the pensions paid to the retired civil servant staff, year-on-year, with the deduction of the annual payments from the public body managing the exceptional contribution from France Télécom. Between 1997 and 2010, the trend in the costs was as follows:

Table 3

Costs to the French State resulting from the 1996 reform (1997-2010)

(million EUR)

	Contributions (employer's and employees')	Annual payments by the public body managing the exceptional contribution from France Télécom	Benefits paid	Costs to the State
1997	[...]	152,4	[...]	[...]
1998	[...]	167,7	[...]	[...]
1999	[...]	184,5	[...]	[...]
2000	[...]	202,9	[...]	[...]
2001	[...]	223,2	[...]	[...]
2002	[...]	245,5	[...]	[...]
2003	[...]	270,0	[...]	[...]
2004	[...]	297,1	[...]	[...]
2005	[...]	326,9	[...]	[...]
2006	[...]	1 359,5	[...]	[...]
2007	[...]	395,4	[...]	[...]

⁽²²⁾ The amount of EUR 36,9 billion (FRF 242 billion) corresponds to the expected value of future commitments as at 1 January 1997. It is therefore different, and more appropriate for estimating the measures in question than that of EUR 35,7 billion (FRF 234 billion) mentioned under point 24 of the decision to initiate the investigation procedure, which corresponds to the expected value of future commitments as at 1 January 1996, i.e. before the entry into force of the 1996 Law.

⁽²³⁾ Such a valuation, which covers the entire period up to the expiry of the financial liabilities of the French State in relation to retired civil servants and their beneficiaries, is necessarily based on a large number of assumptions concerning in particular, the marriage rate, births and dates of retirement and death of the population concerned, at the same time depending on the discount rate applied, i.e. 7 % in this case. The actuary JWA hired by the French Government considered that this rate seemed high since, after subtracting an inflation rate in the order of 2 %, a net discount rate of 5 % remained, 'a value to be compared, for example, to the maximum value of 3,5 % authorised under the French Law for the discounted cash flow of annuities'. See JWA report, Annex 2 to the letter of the French authorities dated 17 March 2004, pp. 6 and 13 to 15.

⁽²⁴⁾ Observations of the French Republic of 9 December 2010 and France Télécom (JWA report) of 18 October 2010.

(million EUR)

	Contributions (employer's and employees')	Annual payments by the public body managing the exceptional contribution from France Télécom	Benefits paid	Costs to the State
2008	[...]	435,0	[...]	[...]
2009	[...]	578,0	[...]	[...]
2010	[...]	635,8	[...]	[...]
Total	[...]	5 473,9	[...]	[...]

- (44) On account of the provisions of the Finance Act 1997 which governs them, the amounts of the annual payments of the public body managing the exceptional contribution from France Télécom paid in 1997 did not correspond to the amounts of the benefits estimated or actually paid to the retired staff of France Télécom or to the amounts of the remaining costs to be financed by the State and were not determined on the basis of these amounts. Examination of the amounts actually transferred confirms this dissociation. Despite the exceptional contribution paid by France Télécom in 1997, Table 3 shows that the amounts of the benefits paid to retired civil servant staff of France Télécom exceeded annual resources from 2004, with the exception of the year 2006.
- (45) Therefore the payments of annual contributions by France Télécom and the annual payments of the public body managing the exceptional contribution are not allocated separately and *ex ante* to the benefits paid to the retired staff of France Télécom in the earmarked account for pensions. In fact, the allocation of the exceptional contribution solely to the financing of the benefits in question since 1997, if it had been applied instead of the system of payment of the amount plus 10 % per year provided for in the Finance Act 1997, would have led to the public body being wound up at the end of 2008, rather than at the end of 2011 as planned, in view of the amount not covered by the annual contributions, shown in Table 3. In any event, in either case, the amount of the exceptional contribution would have been used up at 31 December 2011.

2.2. The gradual, then total opening-up of the telecommunications markets

- (46) The reform of the financing of pensions of the civil servant staff of France Télécom took place against the backdrop of the total opening-up to competition of the services markets on which France Télécom was operating. From 1988, the telecommunications sector has been gradually liberalised by Commission Directive 88/301/EEC of 16 May 1988 on competition in the markets in telecommunications terminal equipment⁽²⁵⁾ and by Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommuni-

cations services⁽²⁶⁾. Directive 90/388/EEC provided for liberalisation measures to be implemented by 31 December 1990 regarding data communication and voice telephony and data services for corporate networks and closed user groups. Commission Directive 96/19/EC of 13 March 1996 amending Directive 90/388/EEC with regard to the implementation of full competition in telecommunications markets⁽²⁷⁾ aimed for full liberalisation of the telecommunications sector from 1 January 1998.

- (47) Law No 96-659 of 26 July 1996 on the regulation of telecommunications (loi n° 96-659 du 26 juillet 1996 relative à la réglementation des télécommunications) laid down the conditions allowing full effect to be given to the liberalisation of the sector by ending France Télécom's monopoly in fixed line telephony and data transmission and organising charges and connections with competitors. Even in other sectors, which are not subject to exclusive rights and have therefore been competitive since 1987, such as the mobile telephony market, France Télécom had clear leadership, with a market share falling from 53,3 % to 49,8 % between 1997 and 2002⁽²⁸⁾. Law No 96-659 also assigned general economic interest tasks to France Télécom and provided for the introduction of a fund to finance the associated obligations, with contributions from its competitors.
- (48) Pursuant to the provisions cited in recitals 46 and 47, since 1988, France Télécom has had to cope with the arrival of competitors — some partially owned by international groups — on the goods and services markets on which it was operating in France, some of which, such as mobile telephony or international communications, have a trans-border element. This movement gathered pace when the markets were liberalised from 1998. Moreover, France Télécom entered into alliances with foreign operators, such as Deutsche Telekom and Sprint in 1996 (Global One), whilst multiplying its partnerships and participating interests from 1997 in Italy (Wind), the Netherlands (Casema) or by obtaining mobile licences in Denmark and Portugal⁽²⁹⁾.
- (49) The reform of the financing of the France Télécom retirement pensions therefore took place at the same time as the liberalisation of the market at European Union level. It therefore took effect on a market fully open to competition where, moreover, France Télécom entered into alliances and took significant stakes in other Member States. In fact, the desire to promote the expansion of France Télécom on the European markets outside France is the a backdrop to the 1996 Law and the opening of the undertaking to private capital, as shown in declarations during the discussion of the draft, which report 'the ambitions nurtured by the French Government for its national champion, France Télécom'⁽³⁰⁾.

⁽²⁶⁾ OJ L 192, 24.7.1990, p. 10.

⁽²⁷⁾ OJ L 74, 22.3.1996, p. 13.

⁽²⁸⁾ See France Télécom Annual Report 1997 and the Report of the Telecommunications Regulatory Authority for 1997 and 2002, available at: <http://www.arcep.fr/index.php?id=2105>

⁽²⁹⁾ France Télécom, Annual Report 1997.

⁽³⁰⁾ National Assembly, Transcript of the debate of 26 June 1996, p. 3.

⁽²⁵⁾ OJ L 131, 27.5.1988, p. 73.

- (50) At present, France Télécom claims to be the leading provider of broadband internet access and the third largest mobile operator in Europe and among the world leaders for telecommunications services to multinationals. Outside France, France Télécom is significantly active via its subsidiaries, with prominent market positions in Spain, the United Kingdom, Poland, Slovakia, Belgium and Austria⁽³¹⁾.

3. REASONS FOR INITIATING THE PROCEDURE

- (51) In its decision initiating the investigation procedure, the Commission set out its preliminary assessment of the measures introduced by the 1996 Law, comparing them with the reference framework for France Télécom's social security contributions and tax payments established by the 1990 Law. It considered that these measures would seem to confer, through State resources, a selective advantage on France Télécom liable to distort competition and affect trade between Member States and potentially constituting State aid within the meaning of Article 107(1) of the TFEU.
- (52) The Commission also noted that, insofar as these measures constitute State aid, this aid was not notified to the Commission prior to its implementation although it was to be regarded as new aid according to case-law. The French Republic had thus not complied with its notification obligation under the Treaty and the measure was therefore to be considered unlawful.
- (53) The Commission concluded that on the basis of Article 107(3)(c) of the TFEU that it was able to examine whether the aid was compatible with the internal market. The Commission also noted that the same provision had permitted it to conclude that the aid granted to La Poste on the reform of the arrangements for financing the retirement pensions of its civil servants was compatible with the internal market⁽³²⁾ and that in view of the similarities between these two cases, it seemed appropriate in this case to carry out a similar analysis.
- (54) In its preliminary analysis of the compatibility of the aid with the internal market, and notwithstanding the similarity with the reform of the arrangements for financing the retirement pensions of La Poste, the Commission informed the French Republic of the following doubts:

- (a) Firstly, whilst emphasising that it was not in possession of detailed information demonstrating that the contribution rates paid by France Télécom are equal to those paid by private enterprises governed by ordinary law operating in the telecom-

munications sector in France, the Commission noted that the rate of the contribution in full discharge of liabilities applied to France Télécom since 1997 is insufficient to put it on a level playing field with its competitors. This results from the fact that the rate applied to France Télécom includes only the contributions corresponding to the risks common to ordinary employees and civil servants and, in this regard, it excludes the contributions corresponding to the risks that are not common, such as unemployment and non-payment of wages in the event of a firm going into receivership or compulsory liquidation;

- (b) secondly, the Commission did not have sufficient information concerning the effects on competition of reducing the cost of retirement pensions, in order to assess whether any positive effects exceeded the negative effects. To this end, the Commission also had to take into account the fact that France Télécom had not yet repaid in full the unlawful and incompatible aid pursuant to the Commission Decision of 2 August 2004 concerning State aid implemented in France for France Télécom (hereinafter: 'Decision on the application of business tax to France Télécom')⁽³³⁾, a decision with which France failed to conform within the time limit given, as established by the Court of Justice⁽³⁴⁾.

4. COMMENTS BY INTERESTED PARTIES

- (55) The comments presented by interested parties are summarised in Sections 4.1 to 4.3.

4.1. France Télécom

- (56) In its comments, which it considers to be supplementary to those submitted by the French Republic, France Télécom considers that it suffering from chronic over-staffing linked to its former status as a public administration and that, for the population concerned, it does not have the same potential for fluidity of employment as its competitors. France Télécom has to bear very heavy training costs amounting to EUR 180 million, equivalent to 4,5 % of the total wage bill, compared to 2,9 % on average for French companies. France Télécom also alleges that its wage bill is about [...] % higher, excluding surcharges and bonuses. In addition, since it cannot implement social plans, France Télécom financed the cost of measures associated with the departures of civil servants, such as end-of-career leave, to an amount exceeding EUR 8 billion between 1996 and 2006.
- (57) Secondly, France Télécom considers that the retirement pension costs borne between 1990 and 1996 were abnormal and placed it at a structural disadvantage in relation to its private-sector competitors, as referred to

⁽³¹⁾ See in this respect, 2008 France Télécom Reference Document, lodged with the Financial Markets Authority, and in particular, 'Description of the Activities', pp. 25-122.

⁽³²⁾ Commission Decision of 10 October 2007, in case C 43/2006 (OJ L 63, 7.3.2008, p. 16).

⁽³³⁾ Commission Decision 2005/709/EC, notified under document number C(2004) 3061 (OJ L 269, 14.10.2005, p. 30).

⁽³⁴⁾ Judgment of 18 October 2007 in Case C-441/06 *Commission v France* ECR I-8887.

in the *Combus* judgment ⁽³⁵⁾, the reference framework for assessing whether these charges were normal or abnormal being the ordinary law arrangements applicable to competitors. The principles laid down in the *Combus* judgment would appear to have been confirmed since by the Court in its *Hotel Cipriani* judgment ⁽³⁶⁾. France Télécom disputes that the situation of a single operator, in this case itself, before and after the reform introduced by the 1996 Law, constitutes an appropriate comparison for assessing whether there is an economic advantage within the meaning of the case-law. In any event, if the reference framework were to be reduced to France Télécom before and after the 1996 reform, the measure could not be classified as selective since it would be applied homogeneously within that framework.

- (58) As a result, the measures in question would either not constitute State aid within the meaning of the Treaty in that they release France Télécom from an abnormal structural disadvantage or cannot be classified as a selective advantage constituting State aid.
- (59) Alternatively, France Télécom considers that State aid, if it were confirmed, would be compatible with the internal market in accordance with the criteria established by the Commission in its decision on the retirement pension arrangements of La Poste (hereinafter: 'La Poste decision') ⁽³⁷⁾. In this regard, the specific nature of its arrangements, in that it pays a contribution calculated on the basis solely of the common risks, does not mean that France Télécom has been placed in a favourable situation in relation to its competitors since 1996: apart from the structural disadvantages associated with the status of the civil servants it employs, France Télécom has had to pay a considerable amount associated with the 1996 reform, the compatibility of which with the internal market needs to be analysed and, of EUR 5,7 billion, which far exceeds that which France Télécom would have had to pay if its contribution had been subject to the risks that are not common.
- (60) France Télécom considers that, in its La Poste decision ⁽³⁸⁾, the Commission accepted that the amount of an exceptional one-off contribution (EUR 2 billion), in the context of a reform which came into effect after the notification but before the Commission decision, offsets the contributions corresponding to the non-common risks, until the amount of the one-off contribution has been exhausted. According to France Télécom, there is nothing to justify the Commission departing from this principle, since it cannot be assumed from the policy declarations at the time of the debate on the draft 1996 Law that the amount of the flat-rate contribution of France Télécom was set by the French legislature so as to maintain the status quo for 10 years.

- (61) Furthermore, the figures available in 1996 would seem to contradict the argument that the amount of EUR 5,7 billion was estimated at the time to correspond precisely with the additional cost to the State of the applying the 1996 Law by compensating, year after year, the lower annual costs paid by the public body, even taking into account the charges to compensate between retirement pension schemes from which France Télécom was discharged in 1996 ⁽³⁹⁾. The amount of the exceptional contribution was intended as overall compensation for the French State on account of the reform. It therefore needs to be taken into account when analysing the level playing field since its entry into force in 1997.

- (62) Finally, France Télécom considers that, since without the 1996 reform, it would have suffered a significant competitive handicap on the markets which the Union aimed to liberalise and that the French authorities have now complied in full with the decision on the application of business tax to France Télécom ⁽⁴⁰⁾, the measure does not have a negative impact on competition.

4.2. The complainants

- (63) The complainants share the Commission's view in the decision to initiate the procedure concerning the existence of State aid as defined in the Treaty in the reduction of the retirement pension costs to be paid by France Télécom, introduced by the 1996 Law. According to the reasoning followed in that decision, concerning which the complainants regret the lack of quantification, the amount of aid is EUR 12,3 billion and under no circumstances less than EUR 9,9 billion ⁽⁴¹⁾. The complainants consider that it is the effects of the measure, i.e. the reduction in the social security contributions normally assumed in the undertaking's budget, and not its object, i.e. the compensation of an alleged disadvantage, that mean it is State aid. For that matter, there is no disadvantage in the employment of civil servants by France Télécom, since the undertaking pays unemployment contributions and wage costs which are 13 % lower than those paid by its competitors and has at its disposal a stable and flexible staff, with regard to reducing the total wage bill through early retirement and reorientation to the civil service.

⁽³⁵⁾ Judgment of 16 March 2004 in Case T-157/01 *Danske Busvognmaend v Commission* ('Combus'), ECR II-917, point 57.

⁽³⁶⁾ Judgment of 28 November 2008 in Joined Cases T-254/00, T-270/00 and T-277/00 *Hotel Cipriani and others v Commission* ECR II-3269, points 181, 185, 186, 189, 192 and 193.

⁽³⁷⁾ See footnote 32.

⁽³⁸⁾ See footnote 32.

⁽³⁹⁾ The continuation of the payments interrupted by the 1996 Law would have led to a compensation charge of about [...] % of the pensions granted in 1997, falling [...] % per year subsequently. Comments of France Télécom dated 18 October 2010, table p. 4.

⁽⁴⁰⁾ See footnote 33.

⁽⁴¹⁾ The amount is calculated by subtracting from the total net present value of the debt of France Télécom for the retirement pensions of its civil servants (EUR 38,1 billion), the discounted amount of the employer's contributions in full discharge of liabilities from 1996 (– EUR 15,2 billion), the flat-rate contribution determined in 1996 (– EUR 5,7 billion) and the contributions of the employees concerned (– EUR 4,9 billion, not discounted), i.e. in total EUR 12,3 billion or, at the very least, EUR 9,9 billion if the total discounted liability of France Télécom for retirement pensions of its civil servants was estimated at EUR 35,7 billion, as indicated in the decision initiating the procedure.

- (64) According to the complainants, State aid thus defined would be incompatible with the internal market. In fact, the considerable competitive advantage procured by France Télécom was all the more detrimental as the reduction in costs was unnecessary to avoid jeopardising its financial structure: relieved of a pension debt with a net value of EUR 9,9 billion at least in 1996 and no longer having to enter this cost in its balance sheet or the notes to the accounts, France Télécom then increased its debt considerably, with a net financial debt of EUR 44 billion on average between 1997 and 2007. Then, the aid releasing France Télécom from retirement pension costs inherited from the monopoly enabled the international expansion of the undertaking to be financed, whilst strengthening its position in France, where it benefited from substantial advantages as a monopoly, of which the costs were merely fair compensation..
- (65) Moreover, the unlawful and incompatible aid not repaid in the past would preclude the operating aid at issue from being declared compatible, in view of their cumulative effect. Finally, the absence of a level playing field from the 1996 reform on account of the non-payment of contributions corresponding to the risks of unemployment and non-payment of wages in the event of the firm going into receivership makes it impossible for the reform to be compatible with the rules of the Treaty. The pension liability of France Télécom should be calculated by an independent expert and France should undertake to ensure the financial neutrality of the arrangements, in particular by providing mechanisms for adjusting the employer's contribution and the compensation balance of EUR 5,7 billion in the event of variation in the costs.

4.3. The telecommunications operator

- (66) The telecommunications operator endorses and supports the preliminary analysis set out in the Commission's decision initiating the procedure, regarding as new, unlawful State aid the amendments introduced by the 1996 Law with a view to substituting the annual contributions in full discharge of liabilities by France Télécom for the payments of pensions actually made by the State, with the deduction of the contributions paid by the employees still working with the status of civil servant. The same would also apply, according to this operator, to the social security contributions corresponding to the risks not common with the ordinary employees paid by France Télécom's competitors but which France Télécom has not paid at least since 1996 for its civil service staff and for its staff governed by ordinary law. Moreover, contrary to the case which was the subject of the La Poste decision⁽⁴²⁾, the calculation of the employer's contribution from France Télécom did not, and still does not, include these contributions, which would make it impossible to declare the aid compatible.

- (67) As regards the aid resulting from the disappearance of the repayment to the State of the pensions granted, the operator considers that the analysis of the competitive balance carried out by the Commission in its La Poste decision should lead it to conclude, on the contrary, that it is incompatible. This analysis should be based on the facts that have occurred since 1996 and not, as in the La Poste decision, hypothetically for the future.
- (68) According to this operator, on several of the markets on which it operates, France Télécom holds market power which can be assimilated to a dominant position. As a result, it is subject to *ex-ante* regulatory obligations on the wholesale markets for high and very high speed broadband and for the origin and termination of calls on fixed lines. In its decision of 16 July 2003 relating to proceedings under Article 82 of the EC Treaty in the case COMP-38.233, the Commission established and imposed a penalty for an infringement of Article 102 of the TFEU on the part of France Télécom via its subsidiary Wana-doo⁽⁴³⁾. Since the undertaking is financially sound in particular through the acquisition of Orange, Retevisión and AMENA.
- (69) Finally, the operator asks the Commission to quantify precisely the amount of aid at issue and, pursuant to the Deggendorf case-law⁽⁴⁴⁾, to refuse to accept the compatibility of the measures in question with the internal market until the unlawful aid from the past has been repaid.

5. COMMENTS OF THE FRENCH REPUBLIC

- (70) The French Republic considers that the changes made in 1996 to the arrangements for financing the retirement pensions of civil servants of the French State working for France Télécom do not contain any elements of State aid. In any event, the 1996 reform is compatible with the internal market, in particular, through the transposition to this case of the reasoning followed by the Commission in its La Poste decision⁽⁴⁵⁾.

5.1. Concerning the existence of State aid

- (71) According to the French Republic, the 1990 Law placed France Télécom in an abnormal situation departing from the ordinary arrangements according to which undertakings pay an employer's contribution in full discharge of liabilities, proportional to the total wage bill and not linked to the level of pensions granted. The cost assumed by France Télécom is in this way abnormal, since the financial deficit from the arrangements for the

⁽⁴²⁾ See footnote 32.

⁽⁴³⁾ Text available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_38233

⁽⁴⁴⁾ Judgment of 6 October 2011 in case C-421/10 *Deggendorf*, not yet published in the ECR.

⁽⁴⁵⁾ See footnote 32.

population concerned was certain and set to become intolerable, given the inevitable reduction in the number of civil servants still working and the associated increase in the number of pensioners.

(72) The 1996 reform is claimed to have aligned the financing of the pensions with ordinary law, without having the effect of placing the undertaking in a more favourable competitive situation, since the contribution of France Télécom is calculated annually so as to align the level of social security contributions and tax payments with those of its competitors in the telecommunications sector. However, not taking into account contributions corresponding to the risks not common to ordinary employees and civil servants in the calculation of the contribution in accordance with the competitively fair rate is justified on account of the status of the latter, which rules out, for example the risk of unemployment apart from in exceptional cases of dismissal or removal from post.

(73) The French Republic considers that the situation of the competitors of the undertaking in France must constitute the reference framework for determining whether the costs payable by France Télécom are normal or abnormal. In the present case, taking account of the exorbitant, derogating from ordinary law, inequitable and unsustainable burden imposed on France Télécom by the 1990 Law, its abolition and the alignment with the situation of competitors provided for in the 1996 reform simply re-established the normal conditions of competition. For that matter, France Télécom has not been compensated for the disadvantages suffered under these arrangements, whereas, as emphasised in its comments, it still has to cope with structural disadvantages, additional costs and inflexibilities on account of the status applicable to the civil servants it employs as regards financial measures associated with departure or return to the public administration, vocational training measures or higher wage cost. Consequently, the current arrangements resulting from the reform confer no advantage on France Télécom and therefore contain no element of State aid within the meaning of the Treaty.

(74) This interpretation is based on the general principles derived by the Union courts according to which, since only measures which lighten the burdens normally assumed in an undertaking's budget constitute State aid, a law which makes it possible to prevent an undertaking's budget being burdened by a cost which, under normal circumstances, would not have existed, does not constitute State aid⁽⁴⁶⁾. This would also be the case of measures relieving a public competitor from a structural

disadvantage in relation to its private competitors⁽⁴⁷⁾. This interpretation is also regarded as being in conformity with the Commission's practice⁽⁴⁸⁾.

(75) Finally, more generally, the French Republic does not consider it relevant to include in the present procedure the compensation and over-compensation mechanisms under which France Télécom paid the costs between 1991 and 1996 (see Table 1) to determine the existence of aid or the date on which an advantage resulting from the reform introduced by the 1996 Law, which contains no provision to this effect, arose. The payment of such costs also resulted from a scheme departing from the ordinary arrangements in which the pensions scheme applicable to France Télécom was considered as an autonomous scheme, which was no longer the case from 1997.

(76) With this reservation, the French Republic has refined the estimate, supplied by France Télécom and referred to under recital 61, of the costs which the undertaking has no longer paid from 1997. On the basis of a real reconstruction for 2008 to 2010, retropolated by applying a conversion factor, the French Republic considers that the costs that would have been paid by France Télécom in this capacity are EUR 165 million less than those calculated by the undertaking.

5.2. Concerning the compatibility of possible State aid with the internal market

(77) In any event, the French Republic considers that if the 1996 reform relating to France Télécom were to constitute State aid, this should be declared compatible with the internal market, in accordance with the analysis followed by the Commission in its *La Poste* decision⁽⁴⁹⁾. The 1996 reform releases France Télécom from a structural burden which was affecting its competitiveness in a market in the process of liberalisation and its contributions are henceforth calculated on the basis of a competitively fair rate for the common risks.

(78) The fact that the contribution paid by France Télécom since 1997 does not include the risks not common to private sector employees would not preclude compatibility with the internal market. In this regard, Table 4, derived from information provided by the French Republic, illustrates the difference between the contribution paid by France Télécom and what it would have paid if the non-common risks had been included in the calculation, minus the benefits self-insured by France Télécom and other levies that put more of a strain on it than its competitors.

⁽⁴⁶⁾ Judgment of 23 March 2006 in Case C-237/04 *Enirisorse* ECR I-2843.

⁽⁴⁷⁾ Judgment of 16 March 2004 in Case T-157/01 *Danske Busvognmaend v Commission* ('Combus') ECR II-917.

⁽⁴⁸⁾ Commission decision of 25 July 1995, *Sabena/Swissair* — Aid aspect.

⁽⁴⁹⁾ See footnote 32.

Table 4

Employer's contribution from France Télécom between 1997 and 2010 calculated on the basis of the competitively fair rate applied (TEC) and a competitively fair rate adjusted to integrate the non-common risks (TEC*)

Year	TEC	EUR million	TEC*	EUR million	TEC-TEC*
1997	36,2 %	1 088,9	48,1 %	1 446,9	- 358,0
1998	35,4 %	1 069,6	47,1 %	1 423,1	- 353,5
1999	36,7 %	1 108,5	48,4 %	1 460,3	- 351,8
2000	36,4 %	1 085,0	48,0 %	1 429,3	- 344,3
2001	37,0 %	1 088,6	47,9 %	1 407,9	- 319,3
2002	37,7 %	1 100,1	43,5 %	1 267,9	- 167,8
2003	37,6 %	1 085,0	45,0 %	1 298,5	- 213,5
2004	[...] %	1 048,6	[...] %	[...]	[...]
2005	[...] %	984,6	[...] %	[...]	[...]
2006	[...] %	957,6	[...] %	[...]	[...]
2007	[...] %	917,6	[...] %	[...]	[...]
2008	[...] %	859,2	[...] %	[...]	[...]
2009	[...] %	805,4	[...] %	[...]	[...]
2010	[...] %	744,5	[...] %	[...]	[...]

(79) The French Republic considers that, since 1997 and until 2043, the discounted value of the contributions actually paid and to be paid by France Télécom is EUR 13,5 billion. A competitively fair rate adjusted to take into account the non-common risks in the calculation, minus the contributions imposed on France Télécom and not on its competitors, would lead to a higher annual contribution for the same period, i.e. EUR 16,7 billion. Whilst considering the inclusion of these risks as irrelevant, the French authorities calculated that the difference (EUR 3,2 billion) would be largely offset by the exceptional flat-rate contribution of EUR 5,7 billion paid by France Télécom in 1997.

(80) In the French Republic's opinion, it can be considered, as in the La Poste decision⁽⁵⁰⁾, that this flat-rate contribution can be assimilated to a balance compensation that could offset the payment of the contributions associated with an adjusted rate including the contributions for non-common risks. In this case, it

appears that the amount of this balance compensation currently exceeds the amount resulting from the difference between the rate set by the 1996 reform and the adjusted rate indicated in Table 4 and that the amount of the balance compensation will never be used up in full by the divergence in rates. Under these circumstances, the doubts expressed by the Commission in its decision initiating the procedure regarding the absence of a true level playing field between France Télécom and its competitors would be resolved.

(81) For the French Republic, the reform of the arrangements for financing the retirement pensions of civil servants working for La Poste, introduced in 2006 and inspired by that of France Télécom in 1996, is perfectly comparable with the latter, with regard to the key aspects. In view of this parallelism, there is no justification for the Commission to diverge from the precedent set with La Poste. In particular, the Commission should accept that the exceptional flat-rate contribution imposed on France Télécom is taken into consideration in the analysis of the level playing field arising from the reform, considering it de facto as an advance on the payment of the contributions associated with the non-common risks.

(82) On the other hand, the debates at the National Assembly and the Senate referring at the time to a 10-year period of financial cover for the reform apparently arose from ad hoc statements. Such reasoning is not to be found in either the explanatory memorandums to the draft laws or the acts in question or the texts adopted to implement them. The legislature's intention in 1996 was apparently to set the costs for France Télécom retirement pensions at a level equivalent to that of the competitors and not to render the reform void for a 10-year period, as would appear from the reasoning that the Commission could adopt if it relies on out-of-context declarations.

(83) The parliamentary work seems to indicate unequivocally that the amount of the contribution was fixed as a flat rate, without any link to the burden that the State will in fact have to assume. Likewise, in its Decision No 96-385 DC of 30 December 1996, the Constitutional Council pointed out that the flat-rate contribution of FRF 37,5 billion was justified by the State financing of the retirement pensions of the civil servants, without constituting compensation, whereas, on the other hand, the payments to the State budget would not be earmarked for a specific expenditure and would contribute to the general conditions for the balance of this budget, in accordance with Article 18 of the Ordinance of 2 January 1959 on the Organic Law relating to Finance Bills (ordonnance organique du 2 janvier 1959 relative aux lois de finances).

(84) For the French Republic, the precise amount of the exceptional contribution was established by the Finance

⁽⁵⁰⁾ See footnote 32.

Act 1997, taking account not of a 10-year period during which this contribution would be used to 'repay' the State, but on the contrary, depending on the effect on the balance-sheet structure of France Télécom, which was to remain tolerable. Its amount would not be gauged using the logic of compensation of costs to the State, but taking account of the contributive capacity of the undertaking.

- (85) The way in which this contribution was managed dissociated from the retirement benefits actually paid since 1997 confirms its flat-rate nature. In this way, the figures supplied by the French Republic show that, between 1997 and 2006, the pensions paid to the civil servants of France Télécom via the account earmarked for pensions amounted to EUR [...] billion, while the public body managing the exceptional contribution of France Télécom transferred an amount of EUR 3,4 billion to that account. For the same period, the balance not financed by contributions paid amounted to EUR 1,2 billion. Moreover, in 1997, it was estimated that this fund would exist for 17 to 25 years, without any relation to the 10-year period on which the Commission bases the reasoning that it appears to wish to adopt.
- (86) The French Republic considers that France Télécom would have been evicted from the market without the reform, with contribution rates reaching 77 % of the gross index-related salary in 2010 and provisioning in its accounts for retirement liabilities for the civil servants working for it. The reform was therefore a decisive stage in adapting to the liberalisation of the market, in accordance with a Union objective, adapted to this and limited to the minimum necessary. Without this reform, France Télécom would have left the market and could not have made the necessary investments, in particular to allow unbundled access to the local loop, without ruling out a potential risk of bankruptcy, so the reform would not have had a negative impact on competitors.
- (87) In addition, according to the French Republic, the reform of the arrangements for financing the retirement pensions of France Télécom and, in particular, the imposition of the payment of an exceptional contribution, did not cost the State between 1997 and 2006 but in fact generated net revenue exceeding EUR 9,1 billion for the French State, according to the estimates of the French authorities⁽⁵¹⁾. If a calculation of the return on the exceptional contribution were to be made, the French Republic considers that a discount rate of 7 % should be applied. Hence, the principle of an exceptional contribution was established as early as 1996. The investment horizon should be long since the expected differences between benefits to be paid

and anticipated contributions did not exceed EUR 500 million until 2005, i.e. 9 years later and EUR 1 billion 12 years later. On average for 1996, the rate on 15-year fungible French Treasury bonds (hereinafter 'OATs') stood at 6,9 %. For its part, France Télécom floated bond issues between November 1991 and November 1997 at the comparable average rate of 7 %.

- (88) Finally, the sequestration of the amounts demanded by the Commission in application of its decision on the application of business tax to France Télécom⁽⁵²⁾, then the payment of these amounts, should lead to the Commission to consider its decision to have been executed, in accordance with its 2007 Notice on the subject⁽⁵³⁾. Consequently, there is no cause to examine the cumulated effect of these aids.

6. ASSESSMENT OF THE AID

6.1. Existence of aid within the meaning of Article 107(1) of the TFEU

- (89) Article 107(1) of the TFEU provides that: 'Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.'
- (90) The application of the cumulative conditions of this Article to the facts of the case is examined in Sections 6.1.1 to 6.1.5.

6.1.1. Aid granted by the State through State resources

- (91) The 1990 Law and the 1996 Law originate from the French State. They provide for the measure by which France Télécom pays the Public Treasury compensation for the payment and servicing of the pensions granted to the civil servants of France Télécom made by the State. Since, pursuant to the 1996 Law, the compensation paid by France Télécom to the Public Treasury is less than in the original wording of the 1990 Law, the aid is granted to France Télécom with the resources of the French State.

6.1.2. Favouring certain undertakings

- (92) The provisions of the 1990 Law defined the arrangements applicable to France Télécom, a public operator with legal personality. The 1996 Law on the national company France Télécom amends these arrangements with provisions applicable to France Télécom in accordance with the conditions it defines only for this company.

⁽⁵¹⁾ It is claimed that this sum of EUR 9,1 billion covers the amount of the balancing cash adjustment of EUR 5,7 billion plus EUR 3,4 billion surplus. This surplus results from the difference between the real cost of the reform for the State in the period, estimated at EUR 2,37 billion, on the one hand, and EUR 4,9 billion in interest on the balancing cash adjustment invested at a rate of 7 % plus EUR 840 million in addition from corporate tax revenue on the lower annual contributions of France Télécom.

⁽⁵²⁾ See footnote 33.

⁽⁵³⁾ Notice from the Commission 'Towards an effective implementation of Commission decisions ordering Member States to recover unlawful and incompatible State aid' (2007/C 272/05) (OJ C 272, 15.11.2007, p. 4).

- (93) The object of the arrangements introduced by the 1990 Law is to determine a specific compensation for the principles and amounts of the employer's contribution for the pensions paid by France Télécom to the French State. Therefore the compensation payable by France Télécom in accordance with the 1990 Law in its original wording, which was applied between 1991 and 1996, in the same way as the different compensation introduced by the 1996 Law, which has been applied since 1997, is a specific measure which concerns only France Télécom, thereby fulfilling the condition of selectivity, contrary to France Télécom's argument.

6.1.3. *Economic advantage distorting or threatening to distort competition*

- (94) It should be determined whether the measures establishing the amount of compensation in question favour France Télécom. The question of whether the amendments introduced in Article 30 of the 1990 Law by the 1996 Law constitute aid because they confer an economic advantage on France Télécom must be seen in the light of the nature and the overall structure of the pensions arrangements in question and the effects this has had on France Télécom, and not the causes or objectives of the amendments. The objective pursued by amending the 1990 Law is not therefore relevant, in principle, for assessing its effects, contrary to the French Republic's argument.

The logic of the pension arrangements applicable

- (95) The funding by the State of the payment and servicing of the pensions granted to the civil servants of France Télécom results from the application of the Civilian and Military Retirement Pensions Code, which alone applies to the former civil servants in question. Neither the 1990 Law nor the 1996 Law changed the status of these civil servants or the principle of the State funding the payment of their pension. This funding seems to arise from the principle whereby employees with civil servant status serve the common good independently and in the public interest. This is not the case where these civil servants work for an undertaking providing a paid-for service, with the aim of serving the interests and benefit of this undertaking, in competition with other undertakings which provide the same services.
- (96) In this perspective, the payment of compensation to the State, provided for by the 1990 Law, both in its original wording and after the amendments introduced by the 1996 Law, constitutes an exception to the principle of funding by the French State. This exception is justified by the nature and overall structure of the arrangements applicable to the pensions of the civil servants employed by France Télécom. In fact, the French State is obliged to effect the payment and servicing of the pensions granted, under the Civilian and Military Retirement Pensions Code, to the civil servants of

France Télécom, who are covered by the general status of civil servants of the French State and not by the ordinary law on social security benefits.

- (97) Even in the absence of the payment of compensation by France Télécom, the French State would still be bound to honour its pension commitments to the civil servant staff concerned, unless it amended these commitments unilaterally. On the contrary, making available State-trained civil servants to France Télécom with no compensation for pensions paid or to be paid would confer a clear advantage on the latter.
- (98) Since France Télécom's competitors do not employ staff with civil servant status for whom the French State would be under a similar financial obligation, the logic of the arrangements for funding pensions and the payment of compensation for France Télécom introduced by the law is not transferable to them. This is shown by the fact that, since the status of the staff employed by the competitors differs with regard to the risks of non-payment of wages covered by the ordinary law on social security benefits, the French authorities appear to consider that the payment of social security contributions to cover the risk is justified in their case. However, it is precisely this status that the French Republic is using to consider that the inclusion of the risks not common to the civil servants and the ordinary employees in the calculation of the compensation paid by France Télécom to the State pursuant to the 1996 Law is not justified.
- (99) Therefore, as regards the costs paid on account of the employment of their ordinary staff, these undertakings are not in a comparable situation in fact or in law to that of France Télécom as regards its civil servant staff, contrary to the arguments of the French Republic and France Télécom presented in their comments.
- (100) Likewise, the compensation arrangements applied to France Télécom cannot be compared with the arrangements defined for other public bodies with employees with civil servant status, such as the Paris Mint or the National Forestry Office, which can be categorised as undertakings for some of their activities within the meaning of Article 107(1) of the TFEU, or other public industrial and commercial undertakings, such as EDF or GDF in the past. EDF or GDF had specific retirement pension schemes, which were not aligned with the civil service scheme. Moreover, EDF and GDF have since been affiliated to the general scheme, even though it should be emphasised that the Commission concluded that no State aid existed solely on condition that affiliation is financially neutral for the State⁽⁵⁴⁾, which is not so regarding the 1996 reform in the present case.

⁽⁵⁴⁾ Commission Decision of 16 December 2003 on the State aid granted by France to EDF and the electricity and gas industries (C(2003) 4637 fin), Article 2 (OJ L 49, 22.2.2005, p. 9).

- (101) On the other hand, the compensation scheme in favour of the State for the payment of the pensions of civil servants working at La Poste, before the amendments described and approved under certain conditions by the Commission in its La Poste decision, was also that of a national company comparable to a public industrial and commercial undertaking and remained, pursuant to the 1990 Law in its original wording, similar to that of France Télécom, in that it provided for the annual repayment to the State of the pensions granted to the retired civil servants and the payment of the costs provided for in Article L-134 of the Social Security Code.
- (102) Even if it seems that La Poste is not in competition with France Télécom, which the advantages granted to the latter could distort or threaten to distort, the fact remains that the logic and provisions of the retirement scheme for the civil servants of France Télécom before the 1996 reform were the same as those of the comparable scheme applied to La Poste at the same time. Moreover, the Commission considered in its La Poste decision that the reform of the scheme applicable to La Poste constituted State aid, contrary to the arguments put forward by the French Republic in respect of France Télécom. More generally, to assess the situation of France Télécom, the reference situation is that of a public or private undertaking employing civil servant staff who have retained their status. Such undertakings would be in the same reference situation as France Télécom. It is therefore in terms of this reference scheme that the existence of State aid in favour of France Télécom can be assessed.

The financial advantages

- (103) Likewise, it cannot be argued that a measure does not confer an advantage on an undertaking, France Télécom in the present case, through the mere fact that it is in compensation for a certain disadvantage that this undertaking allegedly suffered in the past, contrary to the assertions of the French Republic and France Télécom. The Commission also recently dismissed the argument of a historic telecommunications operator, a competitor of France Télécom, according to which specific social benefits in the form of pensions comparable to those of the civil service inherited from the past and different from those under ordinary law for part of the staff justify measures for the reduction of the social security costs associated with the pensions for this category of staff incurred by the operator⁽⁵⁵⁾. In this respect, as the French authorities emphasised during the discussions on the draft, the 1996 Law imposed a new, substantial burden on the French State for the payment and servicing of the pensions granted to the civil servants of France Télécom. At the same time, the 1996 Law therefore had the effect of reducing the compensation that France Télécom had always paid.
- (104) On account of the detailed rules for calculating the rate of the employer's contribution provided for by the Law,

since 31 December 1996, France Télécom pays the State less compensation than it would have paid if the Law had not been passed. In addition, on account of the fact that the employer's contribution introduced by this Law is in full discharge of liabilities, France Télécom immediately wrote back at 31 December 1996 the provision earmarked in these accounts for the payment of its future liabilities. Hence the burden from which France Télécom was released was neither new, since the 1990 Law adopted the previous budgetary practice, nor unforeseeable, since the undertaking set aside provisions for this purpose, nor did it derogate from ordinary social security arrangements since these do not apply to the compensation paid by France Télécom.

- (105) From its entry into force, the 1996 Law transferred to the French State liability for the annual contribution ultimately covering in full the cost of funding the pensions of the staff concerned. The amount of aid granted in this way by the 1996 Law can be calculated, since its entry into force, by the annual difference between the compensation consisting of the contribution in full discharge of liabilities paid by France Télécom to the French State and the costs that it would have paid pursuant to the 1990 Law, indicated in Table 1, if this Law had not been amended, minus the amount of the flat-rate contribution paid in 1997.
- (106) It can be seen from the estimates supplied by the French Republic and set out in recital 40 that, at the time of the 1996 reform and until the foreseen expiry of the financial liabilities resulting from the burden assumed by the French State, the French authorities were able to estimate this total amount of net new costs until 2043, the date on which the financial liabilities of the State in relation to the retired civil servants or their beneficiaries would end, at EUR [...] billion. The present value of the net cost amounted to EUR [...] billion in 1996, after deduction of the annual contributions by France Télécom (EUR 15,2 billion), those of the employees (EUR [...] billion) and the exceptional flat-rate contribution of EUR 5,7 billion.
- (107) Moreover, it should be noted that the amounts estimated at the time of the 1996 reform represent an approximation of the actual amount⁽⁵⁶⁾. The amounts of compensation provided for which are payable by France Télécom in the form of annual contributions, like the balance compensation of EUR 5,7 billion paid

⁽⁵⁵⁾ Commission Decision 2009/703/EC of 11 February 2009 concerning the State aid C 55/07 to BT Plc, point 80 (OJ L 242, 15.9.2009, p. 21).

⁽⁵⁶⁾ This approximation remains valid only in so far as the many underlying assumptions are confirmed by the facts. In addition, the discount rate of 7 % used for the France Télécom pensions is well above, for example, that of 3 % which the French Republic applied — admittedly retrospectively in this case — in the case of the reform of the pension scheme of the electricity and gas industries which was the subject of the Commission decision of 16 December 2003 (Commission Decision of 16 December 2003 on the State aid granted by France to EDF and the electricity and gas industries (C(2003) 4637 fin) cited above.

in 1997, had neither the object or the effect of seeking budgetary neutrality for the French State. If that had been the case, subject to the appropriate nature of the actuarial calculation assumptions, the costs and receipts would have been equal for the period as a whole and, consequently, there would have been no economic advantage for France Télécom.

(108) The French authorities were aware that the 'transfer of the pension costs for the civil servants of France Télécom to the general State budget' was 'a new and heavy burden for the State' that the exceptional flat-rate contribution or the proceeds of the sale of part of the shares in the undertaking held by the State would only cover in part. The debates mentioned in recital 31 show that the French State did not seek in 1996 to offset in full the new burden it was assuming for the future but, on the contrary, sought to assume a new burden and for 'the interests of the undertaking to be taken into account first in this matter'.

(109) It is obvious that, even with different actuarial assumptions from those used by the French State to estimate the new burden it was assuming and notwithstanding the exceptional flat-rate contribution paid in 1997, the reform granted a substantial economic advantage in the form of lower employer pension contributions. Since the flat-rate contribution or balance compensation did not allow the charges transferred to the French State to be covered in full but, at the very most, to be reduced, and in view of the proportions in question, the actuarial calculation used at the time and the accuracy of the estimates resulting from it for the period up to 2043 as a whole cannot be confirmed as appropriate.

(110) Moreover, the financial advantages resulting from the lower contributions by France Télécom cannot be compared with the alleged disadvantages arising from the employment of civil service staff, as France Télécom argues, supported by the French Republic. In fact, the 1996 Law did not, in any case, increase these alleged disadvantages, since it did not lead to the recruitment of additional civil servants. In addition, by discharging France Télécom from a part of its financial liabilities, the objective of the 1996 Law was not to compensate for an alleged disadvantage associated with wages or, according to the words of France Télécom, the lesser fluidity of employment of civil service staff.

(111) It is therefore for the sake of completeness that it is necessary to respond to the arguments concerning the alleged disadvantages caused by the employment of civil servants, invoked by the French Republic and France Télécom.

— Firstly, France Télécom, on the eve of the full opening-up of the French market to competition, had a trained, competent body of staff, without which, if it had had to be replaced entirely, its market position could not have been maintained, which France Télécom omits to point out in its written submissions.

— In addition, the amount of the wages and the investment in staff training that France Télécom

analyses as disadvantages, are normal costs in the budget of an undertaking, and it has not been established that they do not improve staff recruitment and productivity compared to competitors.

— Moreover, although it is true that France Télécom does not have the option of adjusting its total wage bill by implementing a social plan to cut the workforce regarding the staff concerned, it is doubtful that such a plan targeting employees with civil servant status only on the grounds of this status, could validly be implemented, whereas the stop on the recruitment of civil servants in 1997 and the recourse to ordinary employees offered it certain possibilities for flexibility of adjustment of its total wage bill.

— Finally, although it is true that the undertaking devotes a substantial budget to encouraging early retirement by the staff in question, the fact remains that the incentive and the interest for the undertaking to introduce such a measure would have been less without the passing on to the French State of financial liabilities assumed by France Télécom, provided for by the 1996 Law. The mechanism in this way allows the encouragement of early retirement and therefore funding at an earlier stage by the State for the staff concerned. Without the 1996 Law, France Télécom would have continued to provide this funding.

(112) In the absence of a link to the question of whether or not an economic advantage exists resulting from the measures in question, taking into consideration competitive advantages drawn by France Télécom from its former monopoly, invoked by the complainants, would appear to be equally baseless. The alleged advantages and disadvantages are in fact unrelated to the question of levelling the conditions of competition on the telecommunications markets with regard to social security costs.

(113) Only the exceptional flat-rate contribution provided for by the 1996 Law immediately placed a cost burden on France Télécom in relation to the reference situation already identified. The payment of the flat-rate contribution reduced the amount of aid from which France Télécom has benefited and will benefit until the expiry of the financial burden assumed by the French State in the place of France Télécom pursuant to the 1996 Law. Without prejudice to the accuracy of the actuarial methods used by the French Government at the time, without this flat-rate contribution, the amount of the burden from which France Télécom would have been relieved would have amounted to EUR 18,9 billion and not EUR [...] billion, in 1996 net value.

The effect of distorting or threatening to distort competition

(114) The 1996 Law therefore permitted and still permits France Télécom to have increased financial resources at its disposal to operate on the markets in which it is active. On account of the 1996 Law, these resources

were therefore greater than those at France Télécom's disposal under the 1990 Law in its original wording. The telecommunications services markets on which France Télécom operated and operates throughout French territory and in other Member States have been gradually opened up to competition through the progressive disappearance of exclusive or special rights from 1988, then, with the exception of specific derogations, totally from 1998. There was total opening-up to competition in France in 2002. The removal of the legal barriers was accompanied by the entry of other operators with which France Télécom was and is in competition, even before the legislative measures of 1990 and 1996 which are the subject of the present decision.

- (115) Released from the obligation to set aside provisions for the future retirement costs of its civil service staff and subject to a lower annual contribution level, France Télécom's balance sheet was relieved of liabilities and costs, thereby increasing its attractiveness to raise capital, which placed it in a more favourable situation than before the 1996 reform. Released from a burden incurred from its historical French market, France Télécom was in this way able to develop more easily on the markets of other Member States newly opened to competition, which it in fact did, as shown in recitals 48 to 50.

- (116) As a result, relieving the burden of France Télécom arising from the method of calculating the compensation to pay to the French State for funding the pensions of the civil service staff distorts or threatens to distort competition between France Télécom and these new operators in France and in the other Member States where France Télécom is present.

6.1.4. *Effect on trade between Member States*

- (117) The markets on which France Télécom operates in France have been opened up gradually to competition since 1988 and, as a result, are largely open to trade between Member States. Directive 96/19/EC aimed for total liberalisation of the telecommunications sector from 1 January 1998. Operators whose capital is held in part by undertakings of Member States other than France have in this way become established there. Some of these markets concern international communications between Member States. Likewise, via subsidiaries, France Télécom provides electronic communications services in other Member States, and notably Spain, Belgium and the United Kingdom.

- (118) Under these conditions, a measure which reduces the general operating costs of France Télécom, and thereby releases resources which become available to that undertaking to invest or to improve its commercial offers in France or to establish in other Member States, could affect trade between Member States.

6.1.5. *Conclusion on the existence of aid within the meaning of Article 107(1) of the TFEU*

- (119) It ensues from the above that, by reducing the compensation consisting of the employer's contribution to be paid to the State for the retirement pension expenses provided for by the 1990 Law in its original wording and by substituting for this the compensation provided for by the 1996 Law, in so far as the latter compensation is lower than that previously applied, the French Republic, through its resources, has granted aid to France Télécom which distorts or threatens to distort competition and affects trade between Member States within the meaning of Article 107(1) of the TFEU at the time of the transfer of the costs instituted by the 1996 Law.

- (120) Consequently, it is necessary to examine whether this aid can be declared compatible with the internal market.

6.2. **Alternative legal bases for compatibility of the aid**

- (121) The Commission notes that France did not refer to Article 106(2) of the TFEU as a basis for the compatibility of the measures in question.

- (122) The derogations provided for in Article 107(2) of the TFEU concerning aid having a social character, granted to individual consumers, aid to make good the damage caused by natural disasters or exceptional occurrences and aid granted to certain areas of the Federal Republic of Germany, are obviously irrelevant in the present case.

- (123) As for the derogations provided for in Article 107(3) of the TFEU, the Commission finds that the aid in question is not intended to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, that it is not a project of common European interest and does not aim to remedy a serious disturbance in the French economy. It is not intended either to promote culture and heritage conservation.

- (124) It therefore appears that only Article 107(3)(c) of the TFEU could be applied to assess the compatibility of this measure.

6.3. **Compatibility of the aid in terms of Article 107(3)(c) of the TFEU**

- (125) Under Article 107(3)(c) of the TFEU: 'The following may be considered to be compatible with the internal market: [...] aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest [...]'].

(126) For aid to be considered compatible with the internal market on the grounds that it facilitates the development of economic activities or certain economic areas, it must improve the way in which the economic activity is carried out. Aid is compatible within the meaning of Article 107(3)(c) only if it does not adversely affect trading conditions to an extent contrary to the common interest. In its assessment, the Commission puts particular emphasis on the criteria of necessity and proportionality⁽⁵⁷⁾.

(127) By way of a preliminary remark and in view of the doubts raised by the Commission in its decision to initiate the procedure, it should be noted that the French Republic collected from France Télécom a satisfactory amount corresponding to the recovery of the aid required by the Commission in its decision on application of the business tax to France Télécom⁽⁵⁸⁾. The Commission considers, after confirmation of the judgment of the General Court dismissing the action for annulment of this decision by the Court of Justice⁽⁵⁹⁾, that the French Republic has taken the necessary measures to fulfil the obligations arising from this decision. Since the due recovery of the aid paid through the application of the business tax eliminates the economic advantage enjoyed by France Télécom in this respect, there is no need to examine the effects of any cumulation with the aid which is the subject of the present procedure.

(128) For the rest, it should be noted straight away that, contrary to investment costs, the social costs of an undertaking are recurrent operating costs and that aid reducing them is aid for the operation of the undertaking, the compatibility of which with the internal market must, according to the Court of Justice case-law, be assessed very restrictively by the Commission.

6.3.1. *Conformity of the aid measure with an objective of common interest*

(129) In the present case, the aid implemented since 1997 can be considered as being intended to facilitate the development of the economic activity of supplying electronic communications services, in the context of the full liberalisation of these markets. In fact, the 1996 Law was adopted hand in hand with Law No 96-659 of 26 July 1996 on the regulation of telecommunications (loi n° 96-659 du 26 juillet 1996 de réglementation des télécommunications), which transposed the obligations arising for France from Union law and, in particular from Directive 96/19/EC.

(130) In this respect, the general objective aimed for by the 1996 Law regarding the payment of financial compensation to the French State is to align the levels of wage-

related social security contributions and tax payments, between France Télécom and the other undertakings in the telecommunications sector coming under the ordinary social security arrangements. The means used, i.e. an aid measure targeting directly and exclusively the way in which the employer's contributions of France Télécom are established seems an appropriate way of achieving the objective.

(131) An aid measure which aims to reduce the current social security costs of France Télécom, assumed at a time when the bulk of its activities were covered by a monopoly and the provision of a service did not require efficient economic behaviour, may contribute, in a different competitive environment, to improving the way in which the services formerly covered by the monopoly are supplied, provided that the allocation of the financial resources by the competing undertakings to their respective social security costs does not introduce any bias in a merit-based competition process. Admittedly, reservations are expressed below on the appropriateness of certain provisions of the Law to achieve the objective it sets. However, neither its legitimacy nor its conformity with the common interest objective of developing competitive electronic communications services markets, thereby contributing to technological progress and rapid economic growth in this activity, could be doubted.

6.3.2. *Necessity for the aid measure*

(132) The capping of the civil service staff working for France Télécom, brought about by the ban on recruitment after 1 January 2002 provided for by the 1996 Law, would have had the inevitable consequence of a considerable increase in the burden of retirement pensions imposed on France Télécom in proportion to the civil servant staff still working. Deprived in this way of the possibility of recruiting civil servants, which is understandable for that matter given the henceforth competitive nature of the provision of the services in question, France Télécom would have had to shoulder an excessive burden to pay the retirement pensions for the staff concerned in relation to that which its competitors had and still have to pay. It should therefore be noted that the commitments in exchange to be paid to the French State provided for by the original provisions of the 1990 Law concerned not only the civil servant staff working on competitive markets in 1990 and afterwards, but also the civil servants of the Directorate-General of the Ministry of Postal and Telecommunications Services who had retired in 1990.

(133) For illustration, the contribution rate which would have resulted for France Télécom from retaining the provisions of the 1990 Law would have been 77 % of the gross index-related salaries of the civil service staff working in 2010, according to the French Republic. This rate is to be compared to a rate of [...] % which would allow a totally level playing field for the common and non-common risks between France Télécom and its competitors. In absolute value, the difference would represent an additional cost of about EUR [...] million per year in relation to the contribution rate ensuring the

⁽⁵⁷⁾ Judgment of 7 June 2001 in Case T-187/99 *Agrana Zucker und Stärke AG v Commission* ECR II-1587, point 74.

⁽⁵⁸⁾ See footnote 33.

⁽⁵⁹⁾ Judgment of 30 November 2009 in Joined Cases T-427/04 and T-17/05 *French Republic and France Télécom SA v Commission* ECR II-4315. Judgment of 8 December 2011 in Case T-81/10 *France Télécom v Commission* (not yet published).

level playing field. In addition, in the absence of including in the Law the fact that the employer's contributions are henceforth in full discharge of liabilities, France Télécom would have had to continue to meet significantly higher provisioning needs in relation to the provisions of EUR 3,6 billion already set aside in 1996.

(134) In this respect, the considerations of the complainants concerning the fact that France Télécom was able to assume a far larger financial debt from 1996 than the burden from which the French State had relieved it are not relevant as they are unrelated to the question examined. Even if the increase in the financial debt assumed by France Télécom since 1996 and the amounts in question now seem to rule out the risk of bankruptcy of the undertaking referred to by the French Republic if the arrangements provided for by the 1990 Law had continued, the aid measure seems to be necessary in the future to allow France Télécom to be able to compete on the markets concerned on the basis of merit, without being handicapped by the burden of social security costs inherited from the past which its competitors do not have to bear.

(135) The considerations of the complainants and the telecommunications operator on the relevance of an overall balance with a view to assessing the need for aid in the light of the other advantages derived by France Télécom from its past monopoly are unfounded in this case. It is true that, since 1996, France Télécom's position on a number of the services markets in which it operates in France remains dominant, especially on account of network effects inherent in the communications markets. Likewise, France Télécom has increased its presence on the markets of other Member States by acquiring significant positions there, especially in Poland and Spain. The fact remains that, as emphasised indirectly by the telecommunications operator in its comments, as a result of its dominant position within the meaning of Article 102 of the TFEU or its significant market power within the meaning of the regulations applicable to electronic communications in the Union⁽⁶⁰⁾, France Télécom is subject to specific asymmetric obligations which are not imposed on the competing undertakings with lesser market power.

(136) These obligations, for example regarding access to its network, cost-orientation of prices or refraining from commercial behaviour which would be permitted to a

non-dominant undertaking, have as their object precisely to ensure that the position of France Télécom inherited from its former monopoly is not more damaging to competition. These ad hoc regulatory instruments, designed and applied consistently by the national regulatory and competition authorities and by the Commission⁽⁶¹⁾, are a more targeted and effective remedy to the persisting effects of the advantages derived by France Télécom from its former monopoly, invoked by the complainants.

(137) Consequently the State aid which is the subject of the present procedure appears, in principle, necessary to attain an objective of common interest by improving the conditions of competition relating to the retirement costs and, therefore, the provision of electronic communications services.

6.3.3. Proportionality of the aid measure

(138) It must be concluded that the financial compensation in favour of the State introduced by the 1990 Law for the payment and servicing of the pensions is specific to France Télécom and sui generis. The principle of total repayment provided for by the original 1990 Law has been replaced by different arrangements for determining the amount of the compensation to be paid to the State from 1996. Several options for determining the amount of the employer's contribution to be paid by France Télécom, ranging to full funding by the State without repayment, were theoretically possible. This compensation has been calculated since 1997 by referring to certain costs borne by the competing undertakings in the sector. For the purposes of determining whether the aid is proportionate for achieving the objective, it is therefore appropriate to examine the objective and justified nature of the reference to establish the amount of the compensation adopted in the 1996 Law.

(139) It should be noted straight away that, in the procedures relating to reductions in retirement costs for civil servant staff of former monopoly operators in the telecommunications sector, OTE in Greece and BT Plc in the United Kingdom, the Commission checked in particular whether these undertakings were subject to equivalent social security costs to those of their competitors to decide the respective compatibility and incompatibility with the internal market pursuant to Article 107(3)(c) of the

⁽⁶⁰⁾ Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) (OJ L 108, 24.4.2002, p. 33); Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive) (OJ L 108, 24.4.2002, p. 7); Commission Directive 2002/77/EC of 16 September 2002 on competition in the markets for electronic communications networks and services (OJ L 249, 17.9.2002, p. 21).

⁽⁶¹⁾ As regards the regulations of the French regulator of electronic communications, ARCEP, the positions of the Commission in relation to the plans notified since 2003 are available at: <http://circa.europa.eu/Public/irc/info/ecctf/library?l=/commissionsdecisions&vm=detailed&sb=Title>.

The Commission decision of 16 July 2003 in Case COMP-38.233 imposing a penalty for abuse of a dominant position on Wanadoo, a subsidiary of France Télécom at the time, is available at: http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_38233. The appeal against the judgment of the Court of First Instance was dismissed on 2 April 2009 by the Court of Justice, in Case C-202/07 P *France Télécom v Commission* ECR I-2369.

TFEU of the State aid granted to the operators in question⁽⁶²⁾. The Commission finds that in the present case, the contributions in full discharge of liabilities paid each year by France Télécom and provided for by the 1996 Law do not enable it to be ensured that the social charges levied are equivalent to those of its competitors. The competitively fair rate (hereinafter: 'TEC') is not achieved.

- (140) However, the French Republic and France Télécom rely on the exceptional flat-rate contribution of EUR 5,7 billion paid in 1997 by France Télécom under the 1996 Law. The amount of this flat-rate contribution was established in 1996 so as to compensate, for a period of 10 years of application of the 1996 Law, the additional cost foreseen at the time for the State, also taking into account the accounting provisions that France Télécom had set aside and that the undertaking could write back in the financial year 1996-97. The exceptional flat-rate contribution is subdivided into two components:

- firstly, an amount of EUR 3,6 billion corresponding to the provisions set aside by France Télécom up to 1996 in order to defray the future retirement costs of the civil servants foreseen at the time;
- secondly, an amount of EUR 2,1 billion (hereinafter: the 'additional amount'), corresponding to both the forecasts of the public authorities and in fact to the net social security costs for paying the pensions which the State would have to defray over a period of 10 years, between 1997 and 2006, on account of the transfer of the cost of the pensions of the civil servants in telecommunications.

- (141) The flat-rate sum of EUR 5,7 billion was never intended to compensate for the absence of the competitively fair rate between France Télécom and its competitors, so it would not be justified to weigh this sum against the annual contributions in full discharge of liabilities which were not paid by France Télécom when they would have been necessary to attain a competitively fair rate.

- (142) On the other hand, an examination of the parliamentary debates shows that the additional amount of EUR 2,1 billion was intended to cover this transfer of costs from 1997 to 2006 and, in fact, to eliminate the effects of aid for a 10-year period. In this way, the net financial effort by France Télécom corresponding to this additional amount consisted in financing, for a 10-year period, the additional cost of the reform for the French State.

- (143) Moreover, the exceptional contribution includes the write-back of the accounting provisions set aside until

1996 and which had become redundant. The provisions written back by the State had been set aside by France Télécom to defray the cost of future retirements and this write-back eliminates the effects of aid for the period of payment of the retirements which they are intended to cover.

- (144) However, the 1996 Law refers to a one-off exceptional contribution, without the applicable provisions, either of the Finance Law or of the subsequent Decrees, determining an amount arising from the provisions, which should have been deducted from the burden transferred to the State for the duration of this period. Article 6 of the 1996 Law clearly specifies that the exceptional flat-rate contribution is paid in return for the funding by the State of the pensions granted to the civil service staff. The amount of this exceptional contribution must therefore be included in its entirety in the analysis of the reform.

- (145) As France Télécom, through the payment of this exceptional flat-rate contribution, covered the cost of the retirement pensions of the civil servants in telecommunications and the cost of the compensation between arrangements for a period of about 15 years, the effects of the aid were neutralised. France Télécom, by paying this exceptional contribution, therefore neutralised the effects of the aid during this period. Consequently, it is justified that, during this period, France Télécom is not obliged to fulfil the conditions of compatibility of this aid, and therefore that it does not pay the annual contribution necessary to ensure a competitively fair rate including the non-common risks in respect of the private-law employees.

- (146) It is appropriate to return in detail to the stages of this reasoning.

The competitively fair rate is not achieved

- (147) The fact remains that the annual levies in full discharge of liabilities paid by France Télécom since the 1996 reform do not permit a competitively fair rate to be achieved, as emphasised in the decision to initiate the procedure. This results from the fact that the rate applied to France Télécom includes only the contributions corresponding to the common risks of private-sector employees and civil servants and, as a result, excludes the contributions corresponding to the non-common risks, such as unemployment or non-payment of wages in the event of the firm going into receivership or compulsory liquidation.

- (148) It therefore results from Table 4 that not taking the non-common risks into account in the calculation of the contribution to be paid by France Télécom is reflected in a considerable difference between the compensation paid by France Télécom to the State and what it would pay if the contribution rate were calculated to ensure an

⁽⁶²⁾ Commission Decision 2008/722/EC of 10 May 2007 on State aid C 2/2006 planned for OTE, point 137 (OJ L 243, 11.9.2008, p. 7). Commission decision 2009/703/EC of 11 February 2009 on State aid C 55/2007 granted to BT Plc, cited above, points 72, 81-82 and 98.

entirely level playing field with the bases for the calculation of the costs paid by competitors. Consequently, the aid measure resulting from the Law does not comply with the principle of proportionality. For it to comply with this principle and in order to attain the legitimate objective stated of improving the conditions of competition by equalising the calculation methods relating to the costs borne by the undertakings operating on the telecommunications markets concerned in France, the aid granted to France Télécom pursuant to the 1996 Law should have equalised, and should effectively in future equalise, these costs by including those relating to the risks not common to the two categories of staff.

(149) In this respect, France's argument that the civil servants are not exposed to certain risks and, that as a result, it is not justified to pay a contribution for these risks, cannot be accepted. Firstly, it is pursuant to State measures that these risks would not arise, so there is no justification for France Télécom to draw a pecuniary advantage. For example, it is by virtue of the commitment by the French State to the civil servants still working at France Télécom and on account of the fact that the French State is its own insurer that the risk of non-payment of wages in the event of the firm going into receivership would not arise. However, the possibility of France Télécom filing for bankruptcy, just like a competitor, cannot be ruled out. In both cases, it is not a matter of an advantage supplied to the undertaking, but directly to its employees. The guarantee of the payment of wages takes effect after the undertaking has ceased to exist. However, a competing undertaking will have to pay contributions to guarantee the risk of non-payment of wages after its disappearance, in contrast to France Télécom. It is therefore not justified to give the latter an advantage, in the form of a lower contribution or, in fact, an exclusion of this risk from the method of calculating the contributions of France Télécom.

(150) Then, more fundamentally, the objective itself of the reform introduced in 1996, which does not seem to have been brought to its logical conclusion, is to equalise the conditions of competition with regard to tax and social security payments between all the competitors of the sector, irrespective of the status of their staff and the existence of an actual obligation for France Télécom to affiliate with and subscribe to the competent management bodies. It is precisely this logic of equalisation of the conditions of competition which would be liable to make the measure examined compatible with the internal market. Whether or not the staff of France Télécom are exposed to such risks is not therefore relevant under this logic.

(151) In conclusion, a reduction in the funding of the pensions with a transfer of the net burden to the State would respect the principle of proportionality only if it allowed a level playing field. However, France Télécom has not been placed in a situation which is fully equivalent to that of the undertakings in the sector as regards wage-based social security contributions, since

certain social security contributions and tax payments have not been integrated into the basis of assessment for calculating the annual contribution.

It is not justified to compare the insufficiency of the rate of the contribution in full discharge of liabilities applied to France Telecom since 1997 and the exceptional flat-rate contribution paid to the State by France Télécom

(152) Likewise, contrary to the claims of the French Republic and France Télécom, it is not justified to take into consideration the amount of the exceptional flat-rate contribution of EUR 5,7 billion already paid by France Télécom in 1997 to compare it with the insufficiency of the rate of the contribution in full discharge of liabilities applied to France Télécom.

(153) As a preliminary point, the Commission wishes to recall that, in each situation, it has to establish whether the conditions of application of the derogation provided for in Article 107(3)(c) of the TFEU have been fulfilled, without being bound by its earlier decision-making practice, assuming that is established ⁽⁶³⁾.

(154) In any event, the reform examined here displays clear differences, in several respects, from the reform referred to in the La Poste decision ⁽⁶⁴⁾, which the French authorities attempt to rely on.

(155) In fact, contrary to the reform as foreseen by the La Poste decision invoked by the French Republic and France Télécom, the reform of the arrangements for financing the retirement pensions of the civil servant staff of France Télécom occurred on the eve of the opening-up, at Union level, of the markets where France Télécom could operate.

(156) Moreover, it appears that France Télécom took advantage of this liberalisation by establishing itself in the markets of other Member States, thanks not only to its change of status into a public limited company, but also, in part, from the elimination of retirement pension commitments from its balance sheet and the lower future potential charges resulting from the reform. This reduction in its balance-sheet commitments enabled France Télécom to boost its solvency and borrowing capacity. The debt figures, supplied by the complainants in their comments and not contested by the French Republic regarding the amounts, show that the net financial debt of France Télécom rose from EUR 19,2 billion in 1997 to EUR 83 billion in 2002.

(157) It is true that a dedicated investment policy for expansion on the markets of other Member States, made possible by the liberalisation, may be at the origin of this very

⁽⁶³⁾ See in particular the General Court judgment of 15 June 2005 in Case T-171/02 *Regione autonoma Sardegna v Commission*, point 177.

⁽⁶⁴⁾ See footnote 32.

substantial increase in financial debt. Nonetheless, raising the necessary funds was rendered possible in part by reduction in retirement costs for a net amount of EUR [...] billion transferred to the French State in 1996. As a result, the comments of the telecommunications operator claiming that the aid enabled France Télécom to finance its international expansion (comments set out in recital 68), albeit indirectly, are not without foundation.

(158) On the other hand, the group of postal markets on which the French La Poste can operate in the Union is not yet entirely open to competition and would only have to be in 2012, i.e. six years after the reform of financing the pensions of La Poste⁽⁶⁵⁾. The effect of restricting competition of the aid granted to France Télécom on markets which have been fully opened up is therefore greater than that of the aid to La Poste. Complete parallelism in the conditions necessary for compatibility of the aid is not therefore required, since the competitive situations are separate on markets for which the priority in opening-up at Union level and the contribution to the competitiveness of its economy were also different. As a result, the common interest criterion referred to in Article 107(3)(c) of the TFEU need not necessarily be assessed in an identical fashion in the two cases in point.

(159) In addition, the financial situation of La Poste and, consequently, its capacity for expansion on external markets or for reinforcement on the French market were not comparable to those of France Télécom. As emphasised in the La Poste decision, without the reform of 2006, on account of the changeover to new accounting standards, La Poste had to enter into its accounts a provision for the State liability which it hitherto entered as an off-balance-sheet item for an amount of EUR 76 billion⁽⁶⁶⁾. However, unlike La Poste, France Télécom set aside accounting provisions in its accounts to meet its future liabilities in the absence of the reform, which means that the financial situations of each undertaking were objectively different.

(160) Likewise, the absence of reform for France Télécom and the continuation of the arrangements introduced by the 1990 Law would have been reflected in an increase in the retirement pension costs which would become significant from 2005-07 according to the forecasts of the time set out in recital 30, which is corroborated *ex post* by the results shown in Table 3. At the time of the reform, the continuation of the arrangements established by the Law applicable to La Poste was reflected

immediately in an additional annual cost of approximately EUR [...] million for La Poste⁽⁶⁷⁾.

(161) It has not therefore been established that the situation of the two undertakings under the effect of the law applicable before the respective reforms and, consequently, the competitive impact of these reforms, was similar. The facts point to the contrary. As a result, an examination coming to similar conclusions in both cases is not justified.

(162) Furthermore, in the case of the La Poste decision, there were sufficient reasons to consider that the exceptional flat-rate contribution could be reallocated in the future as an advance on the payment of the contributions linked to the adjusted competitively fair rate. Such reasons are lacking in the present case. In fact, the condition imposing the reallocation of the exceptional contribution by La Poste was established after the Commission had initiated the formal investigation procedure, calling into question the underestimation of the contribution in full discharge of liabilities necessary to attain a competitively fair rate.

(163) To a large extent, and even though the French authorities did not recognise it explicitly, the allocation of the exceptional flat-rate contribution in question in the La Poste decision was therefore the result of negotiations between the Commission and the Member State with a view to ensuring the payment of a contribution in full discharge of liabilities ensuring a competitively fair rate. In these negotiations, the starting point of the French authorities expressed in their notification of 23 June 2006, after the first contacts on the file in December 2005, was that the exceptional contribution for La Poste provided for was not necessary from the point of view of the level playing field, contrary to the envisaged draft reform of the annual contribution.

(164) In this way, the Commission decision did not confirm a reform which had entered into force, as France Télécom seems to maintain. In fact, the notification and the decision to initiate the procedure of 12 October 2006 preceded the establishment of the amount of the exceptional contribution by Law No 2006-1771 of 30 December 2006 (Amending Finance Act 2006). These negotiations concerned several aspects of the reform and in particular, the taking into account of the advantage which the notified reform could have represented in the past, the scope of the contribution rate envisaged and the terms for taking into account the specific nature of the La Banque Postale in relation to the postal activities and the staff allocated. These negotiations continued and it is only in their comments of 8 June 2007 that the French authorities accepted the

⁽⁶⁵⁾ Directive 2008/6/EC of the European Parliament and of the Council of 20 February 2008 amending Directive 97/67/EC with regard to the full accomplishment of the internal market of Community postal services (OJ L 52, 27.2.2008, p. 3). Some of the markets have been opened up since 30 December 2010.

⁽⁶⁶⁾ La Poste Decision, cited above in footnote 32, points 35-36 and 167, 169.

⁽⁶⁷⁾ La Poste Decision, cited above in footnote 32, point 169.

terms of allocation of the exceptional contribution under an overall agreement relating to the reform, in this way going back on their position notified on the subject of the exceptional contribution and the method of calculating the future annual contributions.

- (165) On the other hand, contrary to the provisions of the Finance Act 1997 setting up the public body managing the contribution of France Télécom, which provided for inflexible rules concerning the annual repayments to the State, the public body managing the contribution of La Poste did not have specific rules imposed on it ⁽⁶⁸⁾. Since it was an exceptional contribution to be paid and was not earmarked, the Commission was able to consider that the French Republic could have reduced the amount and at the same time increased the annual contribution rate of La Poste.
- (166) Moreover, it must be noted that the terms of the 1996 Law define the parameters for the calculation of the annual contribution paid regularly to the State in return for the pensions of the civil service staff, without there being any question of taking into account the risks not common to civil servants and ordinary employees. In this respect, the Court and the Court of Justice specified, with regard to the business tax payable by France Télécom, that a reduction in charges could not be offset by a different specific charge, in particular where the Member State, the French Republic in this case, has failed to demonstrate that earlier charges were introduced in anticipation of a reduced tax burden in the future under different arrangements ⁽⁶⁹⁾.
- (167) The Commission cannot disregard the fact that the purpose of the specific flat-rate contribution already paid in 1997 was, as expressly established by Article 6 of the 1996 Law, to compensate the French State in part for the financial burden it was assuming on account of the 1996 Law.
- (168) In addition, it is inferred from the content of the Senate report cited in recital 27 that, in adopting the principle of the exceptional contribution, the legislator did not seek to take into consideration, and still less to compensate for, the difference between the annual contributions of France Télécom and the relatively higher contributions of the competitors. On the contrary, the legislator deliberately imposed on France Télécom the payment of annual costs not covering the risks which are not common to the two categories of staff (civil servant and non-civil servant) and did not establish a link between this choice and the levying of the exceptional contribution paid in 1997.

⁽⁶⁸⁾ See Annex 37 on 'Benefit and Pension Schemes — Pensions', No 1198 (Chapter II-2 B-3) of the Report before the National Assembly No 1127 on the Finance Bill for 2008 by Gilles Carrez.

⁽⁶⁹⁾ Judgment of 30 November 2009 in Joined Cases T-427/04 and T-17/05 *French Republic and France Télécom SA v Commission* ECR II-4315, points 215 and 217. The Court of Justice dismissed the appeal against this judgment (Judgment of 8 December 2011 in Case C-81/10 P *France Télécom*, see in particular points 43 *et seq.*).

- (169) The burden for France Télécom represented by the flat-rate contribution was paid as general revenue to the State budget, assigned to the public body responsible for its management and used. Under these circumstances, the Commission cannot therefore, in whole or in part, reallocate fictitiously and retrospectively the exceptional flat-rate contribution already used for a purpose totally divorced from that assigned to it by the French authorities and not provided for by the Law, i.e. compensation of not taking into account risks not common to ordinary employees and civil servants. This flat-rate contribution was not therefore introduced in anticipation of full equalisation, under different legislative and regulatory arrangements, of the annual charges of France Télécom with those of its competitors.
- (170) For the same reasons, on account of the rules for the management and repayment to the budget provided for in the Finance Law since 1997 and implemented up to now, the allegations and calculations of the French Republic intended to show that the 1996 reform has ended now with considerable surplus revenue for the State cannot be accepted.
- (171) In fact, taking into account the terms for the management and use of France Télécom's exceptional flat-rate contribution by the competent public body, as laid down in a Finance Act and the figures for the actual repayments since 1997 forwarded by the French Republic, described in recitals 36 and 37 and in Table 3, it has to be concluded that the revenue which the French Republic tries to claim, with an investment producing interest at the rate of 7 %, has never existed.

[...] In addition, the allegation does not reflect the actual behaviour of the French authorities. In view of the management rules established in the Finance Acts passed since it was set up, this public body has not generated such revenue, which for that matter was not foreseen and did not generate interest. On the contrary, the resources of the body were to have been drawn down in full as at 31 December 2011. They would have been drawn down earlier if they had been allocated to financing the 1996 reform — which the French Republic challenges incidentally — even by including in them the higher revenues from corporation tax, as argued by the French authorities. Also, taking into account higher revenue from corporation tax is unlawful, as it leads to confusion of the different roles of the State. The combination of these different roles proposed by the French authorities cannot be accepted and a distinction should be maintained between on the one hand the State granting aid to France Télécom by financing the payment of the retirement pensions of the civil servants, in order to develop a merit-based competition process, and on the other hand, the State as shareholder of France Télécom and, ultimately, the State as a public authority exercising its power to raise taxes.

- (172) In addition, it should be noted that the application made by the French Republic and France Télécom to take into

consideration the exceptional contribution when examining the compatibility of the reform is in contradiction with the comments the French Republic made in its letter of 17 March 2004, according to which 'the exceptional flat-rate contribution provided for by Article 6 of the Law of 26 July 1996 could not therefore be seen as compensation for an alleged 'advantage'. The analysis of its amount is all the less relevant in the light of the State aid rules' since this amount was 'an extraordinary contribution in favour of its sole shareholder [the French State], which can be assimilated to an extraordinary dividend distributed before any opening-up of the capital to private investors'.

(173) The reasoning underlying the argument put forward at the time by the French Republic shows a certain economic and financial logic. It is reasonable, for a sole shareholder, on the eve of the opening-up of the capital to other investors, to absorb, for its benefit alone and as far as possible, the funds available in the undertaking before the opening-up of the capital, provided that this does not compromise the attractiveness of the investment. This last aspect was taken into consideration in the financial parameters imposed on the opening balance of France Télécom, from which the exceptional flat-rate contribution results indirectly, as mentioned before Parliament in 1996. Consequently, it was perfectly consistent on the part of a prudent single shareholder State to draw out the largest possible amount in extraordinary dividend, according to the terms of the French Republic, rather than to leave the funds in the undertaking, from which after opening-up the capital in 1997, it would draw at most its pro rata in the capital maintained.

(174) The validity of this reasoning put forward at the time by the French Republic, which called for the analysis of the amount of the balance compensation of EUR 5,7 billion not to be taken into account in any way for the assessment of the reform in the light of the State aid rules, is also corroborated by its comments during the procedure. In fact, by declaring that the gauging of the amount of the balance compensation was undertaken in terms not of the estimated cost of the reform for the State or the advantages which France Télécom would draw, but of the contributive capacity of the undertaking, the French Republic points out that the imposition of a balance compensation would result more from the behaviour of a prudent single shareholder than that of a regulatory State concerned about the balance of the retirement pension costs it was assuming under the reform.

(175) If such reasoning were to be accepted, the Commission should not, as requested at the time by the French Republic, take into account the exceptional flat-rate contribution in the analysis of the compatibility of the reform with the State aid rules. As a result, only the reduction in the annual contributions of France Télécom to below the level of those of the competitors, called for by the reform since 1997, should be taken into account.

(176) For the same reasons, the Commission cannot accept the complainants' comments calling for the introduction of mechanisms to adjust the exceptional flat-rate contribution paid in 1997 and the annual employer's contribution from France Télécom to ensure the financial neutrality of the reform. This would also amount to a new calculation and a retrospective fictitious reallocation in whole or in part of the exceptional flat-rate contribution paid to the State budget in 1997. Likewise, the mechanism proposed would amount to introducing an *ex-post* control, year after year, the purpose of which would not be to ensure the proportionality of the aid granted, although reduced by the exceptional flat-rate contribution, in 1997, but to eliminate any aid under the reform.

(177) On the other hand, it is worth examining whether the payment of the exceptional contribution can be taken into account in the assessment of the compatibility of the aid measure with the internal market by retaining the justification of this payment as established by the 1996 Law.

It is justified not to require from France Télécom the payment of an additional contribution ensuring a competitively fair rate for the period 1997-2010

(178) Under the 1996 Law, the exceptional flat-rate contribution in 1997 was paid in return for the financing of the pensions by the French State. Under these conditions, the effects of its imposition on the overall financial equilibrium of the reform introduced by the 1996 Law as applied so far must be taken into consideration. It is appropriate to take into account the time during which the cost of the retirement pensions was covered by the exceptional flat-rate contribution.

(179) Since it is a matter of comparing financial flows for France Télécom spread over a period of time, i.e. the payment of the exceptional contribution in 1997 and the reduced annual charges resulting from the 1996 Law since then, discounting to present value is necessary. During 1997, several exceptional contribution payments were staggered up to October 1997, even though the financing of this by the loan in fact postponed the financial burden for France Télécom. On the other hand, payments of the contribution in full discharge of liabilities were made from the start of 1997. The discount rate must in principle be that resulting from the Commission notice applicable on the subject⁽⁷⁰⁾, a rate which, for illustration, amounted to 5,53 % in October 1997. It should be examined whether it is appropriate in this case to use a different rate from that in the applicable notice and in this way to depart from the rules, communicated to the Member States, that the Commission has set itself and that it must apply save in properly justified circumstances.

⁽⁷⁰⁾ Commission notice on the method for setting the reference and discount rates (OJ C 232, 10.8.1996, p. 10) and Commission notice on current State aid recovery interest rates and reference/discount rates for 15 Member States applicable as from 1 January 2005 and historic recovery interest rates and reference/discount rates applicable from 1 August 1997 (OJ C 88, 12.4.2005, p. 5).

- (180) In this respect, the choice of the rate of 7 % used by the actuary of the French Government to discount the financial flows from the 1996 reform until 2043 would not be justified, [...], on account of the fact that the present analysis covers a shorter period owing to the schedule of financial payments established. The rate of 7 % is also far above the average of 4,4 % of annual discount rates for the period 1997-2010 applied by the French Republic in its comments on the decision to initiate the procedure or at the discount rate of [...] % adopted for 1998 in the reform of the arrangements for financing retirement pensions of La Poste ⁽⁷¹⁾.
- (181) The rates of around 7 % for 15-year OATs for 1996 put forward by the French Republic cannot be accepted either. The rate needs to be established in 1997 and not for the average of 1996. In addition, a term of 15 years is too long in the light of the scale of the annual payment flows which the exceptional flat-rate contribution should theoretically have had to cover during the period, for which the interest alone would not have sufficed. Alternatively, the choice of a composite rate constructed on the basis of different rates for optimisation of the investment of the exceptional flat-rate contribution to comply with the schedule of flows brought about by the 1996 reform from the point of view of the French State could be considered. Apart from the fact that such a rate, at around 5,50 %, would not differ significantly from the Commission's reference rate for October 1997, the choice would not take account of the fact that the analysis is being carried out from the point of view of France Télécom ⁽⁷²⁾.
- (182) Finally, in this regard, the reference rate of 7 % for the bond loans of France Télécom between 1991 and 1997 put forward by the French Republic covers a six-year period well before the facts. In this case, the fact is that France Télécom financed the exceptional flat-rate contribution in 1996 through mainly short-term issues and, to a far lesser extent, through bond issues. A discount rate resulting from the interest rates paid by France Télécom on the new debts contracted in 1996 would amount to 4,8 % on the basis of its balance sheet at 31 December 1996 ⁽⁷³⁾. Such a rate is adjusted to the materiality of the real financial costs incurred by France Télécom at the time to finance the exceptional contribution. However, it seems appropriate not to make the discount rate depend on the choice made by the undertaking at the time, but to use the objective reference rate adopted by the Commission in its Notice on discount rates ⁽⁷⁴⁾.
- (183) All in all, it is not appropriate in this case to use a different reference rate to that resulting from the Commission notice applicable on the subject and in this way to depart from the rules, communicated to the Member States, that the Commission has set itself.

Table 5

Financial flows resulting from the 1996 reform for France Télécom (1997-2011)

(million EUR)

Year	Pensions paid (A)	Compensation and over- compensation (B)	Annual contributions (C)	Advantage FT (D) (A + B - C) (*)	Balance compensation 1 January (E)	Interest (F)	Balance compensation 31 Dec. (E + F - D)
1997 (**)	[...]	[...]	[...]	122,3	5 716,8	184,4	5 777,9
1998	[...]	[...]	[...]	188,2	5 777,9	319,5	5 909,2
1999	[...]	[...]	[...]	189,8	5 909,2	326,8	6 046,2
2000	[...]	[...]	[...]	298,3	6 046,2	334,4	6 082,2
2001	[...]	[...]	[...]	302,9	6 082,2	336,3	6 115,6
2002	[...]	[...]	[...]	305,9	6 115,6	338,2	6 148,0

⁽⁷¹⁾ La Poste decision, cited above under footnote 32.

⁽⁷²⁾ This approach would consist in fictitious investment of parts of the amount of the exceptional contribution in financial instruments with different maturities (e.g. x % at 1 year, y % at 3 years, z % at 10 years), according to the schedules of flows to be paid (the annual balance of benefits not covered by the contributions). For the 2nd half of 1997, the average rate on 10-year OATs stood at 5,49 %, the rates for shorter maturities being below this value.

⁽⁷³⁾ See footnote 17. The discount rate reflects the average interest rate at 31 December 1996 for the short-term and long-term debts of France Télécom, weighted by the respective amounts of new short-term and long-term debts contracted in 1996, that the auditors allocate mainly to the financing of the payment of the exceptional contribution to the French State. Almost three quarters (72 %) of this increase resulted from short-term instruments (Treasury notes and commercial paper), on which the average rate for the year stood at 4,33 % at 31 December 1996.

⁽⁷⁴⁾ See footnote 69.

(million EUR)

Year	Pensions paid (A)	Compensation and over- compensation (B)	Annual contributions (C)	Advantage FT (D) (A + B - C) (*)	Balance compensation 1 January (E)	Interest (F)	Balance compensation 31 Dec. (E + F - D)
2003	[...]	[...]	[...]	364,7	6 148,0	340,0	6 123,3
2004	[...]	[...]	[...]	477,4	6 123,3	338,6	5 984,5
2005	[...]	[...]	[...]	619,1	5 984,5	330,9	5 696,3
2006	[...]	[...]	[...]	744,4	5 696,3	315,0	5 266,9
2007	[...]	[...]	[...]	909,9	5 266,9	291,3	4 648,2
2008	[...]	[...]	[...]	1 101,0	4 648,2	257,0	3 804,3
2009	[...]	[...]	[...]	1 255,8	3 804,3	210,4	2 758,9
2010	[...]	[...]	[...]	1 386,6	2 758,9	152,6	1 524,8
2011 (est.)	[...]	[...]	[...]	1 497,5	1 524,8	84,3	111,6

(*) This column reflects the reduced annual contribution of France Télécom under the 1996 Law, deducting from the employer's and employees' contributions paid the cost of the benefits granted and the cost of compensation and over-compensation that France Télécom would have continued to pay in the absence of the reform, as estimated by France Télécom, and corrected by the calculations of the French Republic, reducing the burden by EUR 165 million for the period 1997-2010.

(**) For the year 1997 when the payments of the exceptional contribution were split into tranches until October, the equivalent date of payment calculated by the French Republic is 4 June 1997. The interest is calculated at that date.

(184) Capitalised at the discount rate of 5,53 %, taking into consideration the balance compensation should compensate up to the 1st quarter of 2012 ⁽⁷⁵⁾ the reduction in annual costs from which France Télécom benefited as a result of the implementation of the 1996 reform.

(185) Furthermore, the schedule for this compensation, which neutralises the effects of the reform, coincided furthermore, to within a few months, with the resources of the public body responsible for managing the exceptional contribution of France Télécom actually being exhausted, which was scheduled for 31 December 2011. The flow analysis is supported by the fact that, in any case, the exceptional contribution will have been in fact drawn down in full. As a result, no amounts would remain that were not repaid to the State budget that it would be possible to reallocate otherwise than as provided for by the Finance Law applicable.

(186) It is therefore justified that, on account of the payment of this exceptional contribution in 1997, France Télécom is not required to pay an annual contribution supplement for the period between 1 January 1997 and a date after 31 December 2010 which still has to be determined precisely. In fact, in so far as, in Table 5, the figures for 2011 and those for the cost of compensation and over-compensation result from estimates, in particular, it

is appropriate for the precise date to be decided by the French Republic on the basis of the final dates for the payments made, the final amounts of the benefits paid and the lower contributions and other advantages for France Télécom resulting from the 1996 Law, following the calculation principles indicated in Table 5.

(187) On the other hand, after neutralisation of the effects of the exceptional contribution and the drawdown in full of the resources paid to the State, the aid granted in 1996 to France Telecom will have full effect by conferring an advantage on France Télécom in relation to its competitors. The aid will then be justifiable only by subjecting France Télécom to the payment of a contribution in full discharge of liabilities, calculated at a rate ensuring a true level playing field. Hence, if the provisions of the 1990 Law, as amended by the 1996 Law and the secondary regulatory provisions applicable, in that they provide that the rate of the contribution in full discharge of liabilities is calculated so as to equalise the levels of wage-based social security contributions and tax payments between France Télécom and the other undertakings in the telecommunications sector subject to the ordinary social security arrangements, by limiting the calculation to the risks which are common to the ordinary employees and the State civil servants, were to remain unchanged, the aid granted to France Télécom until the expiry of the financial obligations assumed by the French State instead of France Télécom pursuant to the 1996 Law would not comply with the principle of proportionality.

⁽⁷⁵⁾ This is an approximate estimate.

- (188) To fulfil the criterion of conformity with the common interest provided for in Article 107(3)(c) of the TFEU, the compatibility of the aid therefore requires compliance with the conditions accompanying the present decision.

7. CONDITIONS OF COMPATIBILITY FOR THE FUTURE

- (189) Consequently, it is necessary for the French Republic to amend the legislative and regulatory provisions applicable for establishing, calculating and levying the contribution in full discharge of liabilities to be paid by France Télécom so as to equalise the levels of wage-based social security contributions and tax payments between France Télécom and the other undertakings of the telecommunications sector subject to the ordinary social security arrangements. In addition, it is appropriate that the calculation methods and parameters are established transparently and objectively and can be subject to control and appeals.
- (190) The French Republic should also, when calculating the rate of the contribution in full discharge of liabilities, equalise in fact the levels of wage-based social security contributions and tax payments between France Télécom and the other undertakings of the telecommunications sector subject to the ordinary social security arrangements, also taking account of the risks not common to the ordinary employees and the civil servants employed by France Télécom.
- (191) In the comments of the French Republic, set out in further detail in its updated Annexes III and V, the French authorities have produced estimates of what the rate of the contribution in full discharge of liabilities to be paid by France Télécom from 1997 (see Table 4) would be if the non-common risks had been integrated into the calculation method (hereinafter: the 'adjusted rate'). The adjusted rate includes both the contributions for unemployment and insurance guaranteeing wage claims, which are added to it, and the specific contributions which the competitors of France Télécom do not pay, such as the 1 % solidarity and the cash benefits for absence from work self-insured by France Télécom, which are subtracted from it. The result is a rate about 7 % higher than the rate in fact applied at present.
- (192) Such a rate ensures a genuine level playing field compared to the only partial equality introduced by the 1996 Law, whilst taking account of the specific social costs of France Télécom. The Commission does not therefore dispute the principles, assessment basis and methods of calculation applied by the French Republic to establish a rate of contribution in full discharge of liabilities adjusted to equalise the levels of wage-based social security contributions and tax payments between France Télécom and the other undertakings of the telecommunications sector subject to the ordinary social security arrangements, as indicated in the updated comments of the French Republic and described and detailed in Annexes III and V to these comments.

- (193) Consequently, the annual determination of the rate creating a level playing field by the French Republic will have to follow the principles, assessment basis and methods of calculation of the contribution in full discharge of liabilities which appear in the comments referred to in recital 191. In particular, the adjusted rate will integrate both the unemployment contributions and the insurance guaranteeing wage claims and the contributions or specific charges not paid by the competitors of France Télécom, such as the 1 % solidarity and the cash benefits for absence from work self-insured by France Télécom.

- (194) This de facto equalisation will ensure a level playing field between France Télécom and its competitors and will guarantee proportionality and compatibility with the internal market of aid implemented in 1996.

8. CONCLUSIONS

- (195) The Commission concludes that the French Republic unlawfully implemented State aid introduced by the 1996 reform of the arrangements for financing retirement pensions of the civil servants working for France Télécom in breach, since its entry into force, of Article 108(3) of the TFEU.
- (196) The implementation of this aid since 1997 has allowed a reduction in the annual social security costs incurred by France Télécom. However, this effect was neutralised, at least until 2010, by the payment of the exceptional flat-rate contribution provided for by that reform. This neutralisation justifies the fact that the conditions which would create a genuine level playing field for France Télécom and its competitors regarding these charges and which would render this aid compatible with the internal market should be applied from a date after 31 December 2010 still to be set.
- (197) Consequently, in so far as and provided that the French Republic takes into consideration, in the calculation of the contribution in full discharge of liabilities payable by France Télécom, the levels of wage-based social security contributions and tax payments between France Télécom and the other undertakings of the telecommunications sector covered by the ordinary social security arrangements, taking into account the risks which are common and not common to ordinary employees and civil servants, the reform introduced by the 1996 Law can be declared compatible with the internal market pursuant to Article 107(3)(c) of the TFEU. The French Republic is therefore required to take the measures, notably of a legislative and regulatory nature, necessary to fulfil the condition mentioned in the present recital,

HAS ADOPTED THIS DECISION:

Article 1

The State aid resulting from the reduction of the compensation to be paid to the State for the payment and servicing of the pensions granted, pursuant to the Civilian and Military

Retirement Pensions Code, to the civil servants of France Télécom pursuant to Law No 96-660 of 26 July 1996 on the national company France Télécom amending Law No 90-568 of 2 July 1990 on the organisation of the public postal and telecommunications service shall be compatible with the internal market on the conditions provided for in Article 2.

Article 2

The employer's contribution in full discharge of liabilities, payable by France Télécom under Article 30, point (c) of Law No 90-568 of 2 July 1990 on the organisation of the public postal and telecommunications service, shall be calculated and levied so as to equalise the levels of all the wage-based social security contributions and tax payments between France Télécom and the other undertakings of the telecommunications sector covered by the ordinary social security arrangements.

To fulfil this condition, no later than within seven months of the notification of the present decision, the French Republic:

- (a) shall amend Article 30 of Law No 90-568 of 2 July 1990 on the organisation of the public postal and telecommunications service and the regulatory or other texts adopted to implement it so that the bases for calculating and levying the employer's contribution in full discharge of liabilities, payable by France Télécom, are not confined solely to the risks common to ordinary employees and civil servants, but also include the non-common risks;
- (b) shall levy on France Télécom, from the day on which the amounts of the exceptional contribution introduced by Law No 96-660 of 26 July 1996 capitalised at the discount rate resulting from the application of the Commission notice on the method for setting the reference and discount rates applicable in this case equal the amount of the contributions and costs that France Télécom would have continued to pay under Article 30 of Law No 90-568 of 2 July 1990 in its initial wording, an employer's contribution with full discharge of liabilities calculated according to the terms specified in point (a), taking into account the risks that are common and not common to ordinary employees and civil servants.

Article 3

1. The French Republic shall communicate to the Commission, within two months of notification of this

Decision, a detailed description of the measures that it proposes to take and that it has already taken to comply with it. It shall inform the Commission in particular:

- (a) of the state of progress in the amendments to the legislative and regulatory provisions referred to in Article 2;
- (b) of the final amounts of compensation and contributions for the year 2011 and of those provided for, where appropriate, for 2012, in the light, in particular, of any balance from the capitalised amounts of the exceptional contribution;
- (c) of the amounts of the employer's contribution in full discharge of liabilities, calculated in accordance with the terms specified in Article 2 for the future instalments, pending the amendment of the legislation;
- (d) of the payments of the employer's contribution made after the amounts of the exceptional contribution introduced by Law No 96-660 of 26 July 1996 capitalised at the discount rate resulting from the application of the Commission notice on the method for setting the reference and discount rates applicable in this case have ceased to neutralise the effects of the 1996 reform.

2. The French Republic shall keep the Commission informed of the progress in the national measures taken to implement this decision. It shall forward immediately, on request by the Commission, any information on the measures already taken or planned to comply with this decision.

Article 4

This decision is addressed to the French Republic.

Done at Brussels, 20 December 2011.

For the Commission
Joaquín ALMUNIA
Vice-President

COMMISSION DECISION

of 22 February 2012

on the State aid SA.26534 (C 27/10 ex NN 6/09) implemented by Greece in favour of United Textiles S.A.

(notified under document C(2011) 9385)

(Only the Greek text is authentic)

(Text with EEA relevance)

(2012/541/EU)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular the first subparagraph of Article 108(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having called on interested parties to submit their comments pursuant to Article 108, paragraph 2, first quotation of the Treaty ⁽¹⁾, and having regard to these comments,

Whereas:

also several additional ones, in favour of United Textiles and its lending banks, by letters of 20 March 2009 and 8 February, 17 March, 19 July and 23 August 2010. The Greek authorities answered by letters of 7 April 2009 and 25 February, 26 March, 13 August and 30 August 2010.

(4) At the request of the Greek authorities, a meeting was held on 7 July 2010. At that occasion, a draft new restructuring concept of United Textiles was submitted. The company acknowledged that the latter was not linked with previous restructuring actions taken in 2007, which had failed.

(5) By letter dated 27 October 2010 the Commission informed Greece that it had decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union ('TFEU') in respect of the following measures:

(a) state guarantee of May 2007;

(b) rescheduling of debts of 2009 for social insurance contributions;

(c) state guarantee of June 2010.

(6) Greece submitted its comments to the Commission's opening decision on 31 December 2010.

(7) The Commission decision to initiate the procedure was published in the *Official Journal of the European Union* ⁽³⁾. The Commission invited interested parties to submit their comments on the measures.

(8) The Commission received comments from United Textiles on 7 and 9 February 2011. The comments were transmitted to Greece which was given the opportunity to comment on them. Its comments were received on 4 May 2011.

I. PROCEDURE

(1) Following information that Greece planned to grant a State guarantee for new loans of EUR 35 million to finance United Textiles, the Commission asked the Greek authorities to comment on the specific measure by letters dated 11 September, 14 October, 20 October, 18 November and 4 December 2008. The Greek authorities provided incomplete answers by letters of 15 October and 10 November 2008.

(2) For that reason, on 3 March 2009 the Commission issued an information injunction under Article 10(3) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 (*) of the EC Treaty ⁽²⁾, requesting Greece to submit all information necessary to assess whether United Textiles had received State aid and to assess if that aid would be compatible with the internal market. Greece submitted the requested information by letter of 11 March 2009.

(3) The Commission requested further information, regarding the State measure mentioned in recital 1 and

⁽¹⁾ OJ C 357, 30.12.2010, p. 18.

^(*) Subsequently Article 88 of the EC Treaty and from 1 December 2009 Articles 87 and 88 of the EC Treaty were replaced with the corresponding Articles 107 and 108 of the Treaty on the Functioning of the European Union.

⁽²⁾ OJ L 83, 27.3.1999, p. 1.

⁽³⁾ See footnote 1.

- (9) The Commission requested additional information from the Greek authorities on 28 July 2011, to which Greece replied by letter of 30 August 2011.
- (10) At the request of the Greek authorities, a meeting was held on 4 April 2011. In that meeting, the Greek authorities presented arguments as regards the alleged aid measures.

II. DETAILED DESCRIPTION OF THE ALLEGED AID

II(a) The potential beneficiaries

United Textiles

- (11) United Textiles is a large Greek textile company listed on the Athens Stock Exchange. It realised 45 % of its 2008 sales in Greece (38 % in 2007), 54 % in other EU countries (60 % in 2007) and 1 % to non-EU countries (2 % in 2007).
- (12) In 2009 it had total assets of EUR 201,7 million and a turnover of EUR 4,5 million (limited sales of stock). Previous years' sales were EUR 30,6 million in 2008 and EUR 74,7 million in 2007. At the end of 2009 it had 839 employees. The company has four subsidiaries in three countries: Albania, Bulgaria and the former Yugoslav Republic of Macedonia. Its main shareholder is an off-shore company named European Textiles Investments Ltd (Mauritius).
- (13) United Textiles' business is production of clothing, fibre and fabric. Its sales are realised in both wholesale and retail markets. It has 12 plants in several districts of Greece. The plants in question, as well as those of the subsidiaries mentioned in recital 12, have not been operating since 2008, because of lack of working capital.
- (14) The company's situation has constantly deteriorated at least since 2004, with gradually decreasing sales, negative Earnings Before Taxes and negative own equity since 2008. Because of the latter, the company could be dissolved, according to Greek Legislation⁽⁴⁾.
- (15) According to the company's annual report's, since 2001 lending banks' support to the company has been limited, with reduced credit lines and loans. Since June 2008, a large part of its operations has been stopped. Since

March 2009, production has almost completely stopped. In July 2008, the company's main shareholder decided not to participate in a scheduled capital increase. Since 2008, almost all its bank loans have been overdue. Since February 2010, trading of its shares in the Athens Stock Exchange has been suspended. According to the company's announcements, as published in its webpage⁽⁵⁾ as well the webpage of the Athens Stock Exchange⁽⁶⁾, its financial statements for 2010 were not published because of a work retention which was ongoing until 29 August 2011 (the last available announcement).

Lending banks

- (16) The lending Greek banks of United Textiles, which are involved in the State aid measures under scrutiny, are the National Bank of Greece, Emporiki Bank, Agricultural Bank of Greece, Alpha Bank and Eurobank. They are all commercial banks, active in providing a full range of financial products and services. They all have presence, through subsidiaries, in other EU countries, in particular Bulgaria, Germany, France, Cyprus, Luxembourg, Netherlands, Poland, Romania and the United Kingdom⁽⁷⁾.

II(b) The measures under examination

- (17) In the period 2007-10, three State measures were taken in favour of the company United Textiles that could involve State aid elements, as follows in recitals 18 to 23.

Measure 1: The State guarantee of May 2007

- (18) On 30 May 2007, the National Bank of Greece, lending bank of United Textiles, was granted a State guarantee for a new loan to include: (a) a rescheduling of an existing loan of EUR 7,5 million; and (b) a new loan of EUR 12,5 million. The State guarantee covered 80 % the loan. This new loan had an interest rate of six-month EURIBOR, plus spread of 1,85 %⁽⁸⁾, equal to a total interest rate of 6,10 % on 30 May 2007. There was no premium for the State guarantee. According to the submitted rescheduling contract, the original existing loan was covered with a mortgage on a fixed asset. Also, according to the annual reports of United Textiles for 2007, 2008 and 2009, the above new loan was covered with the guarantee of the main shareholder and also envisaged to be covered with pledges on assets, however there is no reference to any realisation of the latter pledge.

⁽⁵⁾ <http://www.unitedtextiles.com/Alist.asp?catid=312§ion=0.08.00>.

⁽⁶⁾ http://www.ase.gr/content/gr/companies/ListedCo/Profiles/pr_press.asp?Cid=111&coname=%C5%CD%D9%CC%C5%CD%C7+%CA%CB%D9%D3%D4%CF%DB%D6%C1%CD%D4%CF%D5%D1%C3%C9%C1+%C1%2E%C5%2E

⁽⁷⁾ As stated in the banks' financial reports and internet sites.

⁽⁸⁾ Including a tax of 0,6 %, applicable in all loans in Greece (except for mortgage and agricultural loans, where tax is 0,12 %).

⁽⁴⁾ According to Article 47 of Greek Law No 2190/1920, in case that a company's own equity falls below 50 % of its share capital, the company's shareholders must decide (within six months from the expiry of the relevant fiscal year) either to dissolve the company or to adopt other measures.

(19) The guarantee was based on a Ministerial decision of 26 January 2007 (Decision 2/75172/0025/26.01.2007). The decision foresaw that State guarantees could be issued to existing loans of industrial, mining, livestock farming and hotel companies, located in the district of Imathia, Northern Greece (where part of United Textiles' operations is located). The scheme did not exclude firms in difficulty and did not foresee a premium for the State guarantee. The scheme did not foresee any kind of objective criteria for the selection of beneficiary companies. The Commission notes that the scheme has not been notified, in line with Article 108 TFEU, therefore the Commission reserves the right to investigate other State measures possibly granted on the basis of the scheme.

(20) On the basis of the guarantee, the loan agreements were signed on 11 October 2007.

Measure 2: Rescheduling of social insurance debts

(21) On 25 May 2009 the Greek authorities rescheduled the company's overdue social insurance debts of the period 2004-09, amounting to EUR 14,57 million, to 96 monthly payments of EUR 0,19 million each. The rescheduling took place in the context of Law No 3762/2009⁽⁹⁾. The rescheduled amount partly included debts already arranged in previous reschedulings, which had not been respected. In addition, on the basis of the information submitted, it does not seem that United Textiles has paid any contributions so far.

Measure 3: The State guarantee of October 2009 and June 2010

(22) On 30 June 2010, with ministerial decision 2/35129/0025, the Greek State granted a guarantee to the lending banks of United Textiles. Those banks are the National Bank of Greece, Emporiki Bank, Agricultural Bank of Greece, Alpha Bank and Eurobank. The guarantee covered a new planned syndicated loan of EUR 63,6 million, separated in three sub-amounts for the purpose of the following:

- (a) EUR 36,6 million to reschedule loans granted to the company by its lending banks in the period August 2008-September 2009. According to the information available, the loans in question had interest rates between three-months and six-months EURIBOR, plus 1,25 % to 3 %. Also according to the information available, those loans were initially not covered by a State guarantee.
- (b) EUR 15 million to finance the payment of overdue debts of the company to the State, to suppliers and to its employees.
- (c) EUR 12 million to finance investments and operating expenses.

(23) The underlying planned syndicated loan had duration of nine years. The ministerial decision 2/35129/0025 granting the guarantee did not specify any interest rate for the loans to be covered. It merely specified that the loans have to be at 'market' rate. The State guarantee covers 80 % of the loan. A yearly premium of 2 % on the loan's yearly average outstanding amount is foreseen for the State. Lending banks receive, in addition to the State guarantee, securities for the new loan in the form of pledged shares of the company for at least 25,9 % of its total shareholding and first rank mortgages on real estate assets of the company. The State does not receive any security for its guarantee; however, in case the guarantee is called, the securities will be transferred to the State.

(24) The guarantee granted in June 2010 under ministerial decision 2/35129/0025 replaced (by revoking it) a previously granted one of 2 October 2009 (ministerial decision 2/71055/0025). The latter was granted for a new loan of EUR 40 million, also aiming at financing the rescheduling of the loans granted to the company in the period August 2008-February 2009 (see recital 22(a)). The loan of EUR 40 million, however, was never issued and therefore the October 2009 guarantee was not activated. Instead, the latter was replaced with the new guarantee of June 2010, which covered the syndicated loan of EUR 63,6 million. According to the Greek authorities, the reason for that replacement was that the extent of the loan of EUR 40 million was not sufficient anymore to cover the company's liquidity needs.

(25) Despite the guarantee, the underlying loan has never been granted. In view of the company's acute difficulties, the banks refrained from signing the loan agreement and never paid out the loan.

III. GROUNDS FOR INITIATING THE FORMAL INVESTIGATION PROCEDURE

(26) In the opening decision of 27 October 2010, the Commission questioned whether the terms of the State guarantees of 2007 (Measure 1) and 2010 (Measure 3) were market conform and in line with the Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees⁽¹⁰⁾ ('the Guarantee Notice').

(27) As regards the measure of the rescheduling of overdue social insurance obligations (Measure 2), in the opening decision of 27 October 2010, the Commission questioned whether a private creditor in the given circumstances would have accepted any type of rescheduling of debts. Indeed, the possibility of obtaining a late repayment of the debt appeared restricted, since United Textiles was already in serious financial difficulties and had stopped most of its production.

⁽⁹⁾ FEK A' 75, 15.5.2009.

⁽¹⁰⁾ OJ C 155, 20.6.2008, p. 10.

- (28) The Commission thus questioned whether the measures under investigation constituted illegal State aid in the meaning of Article 107(1) TFEU and whether the measures were compatible with the TFEU.

IV. COMMENTS FROM GREECE AND THE BENEFICIARY

- (29) The information submitted by the Greek authorities and United Textiles (the beneficiary) on the measures in question can be summarised as follows:

IV(a) Measure 1: The State guarantee of May 2007

- (30) With regard to Measure 1, the comments of Greece and the beneficiary overlap to a large extent, therefore the Commission will expose them together, as follows:
- (31) Greece and the beneficiary acknowledge that at the time of the 2007 guarantee the company was in difficulty, allegedly due to international competition of lower cost countries. Greece also acknowledges having granted the above guarantees.
- (32) Greece and the beneficiary also support that the 2007 guarantee does not constitute aid, as it was not selective to United Textiles: it was granted on the basis of a ministerial decision not only for United Textiles but also for other companies.
- (33) Apart from the above, Greece and the beneficiary argue that the 2007 guarantee was granted pursuant to Greek Law No 2322/1995, which allowed the Minister of Finance to grant State guarantees to banking institutions for loans that reschedule debts or grant new working capital.
- (34) Furthermore, Greece and the beneficiary claim that before having been granted the guarantee, the company had submitted to the Greek authorities a restructuring plan with financing from banks and without any State guarantee. Such a restructuring plan was never formally submitted to the Commission.
- (35) Greece also argues that the 2007 guarantee was granted in line with the State aid rules in force in the EU. According to Greece's allegations, the guarantee had a maximum coverage of 80 % and was granted for loans with market interest rates. Also, Greece supports that the loan was properly securitised with pledged commodities and personal guarantees of shareholders and that it was granted for a specific transaction and duration.
- (36) Moreover, Greece and the beneficiary support that the latter is one of the most significant textile companies in Greece, employing a significant number of staff and operating mainly in regions close to the border.
- (37) Greece and the beneficiary also claim that the National Bank of Greece (the lending bank) has accepted to

decline the State guarantee and in its place to inscribe a mortgage on real estate assets of United Textiles, which will inactivate the guarantee.

- (38) Finally, Greece and the beneficiary argue that the guarantee was incorporated in the guarantee of 2010, therefore there is a continuum in the settlement of the company's lending.

IV(b) Measure 2: Rescheduling of overdue public insurance debts

- (39) Greece and the beneficiary argue that the measure is based on Law No 3762/2009, which is a general law, applicable to all companies with overdue or unpaid public insurance obligations, therefore the measure in question is not selective.

IV(c) Measure 3: The State guarantee of June 2010

- (40) Greece acknowledges having granted the 2010 guarantee and argues that the latter was granted because the extent of the previous guarantee of 2009 (which has never been implemented) was not sufficient anymore to cover the company's liquidity needs, therefore the 2009 guarantee was incorporated into the 2010 guarantee.
- (41) Greece argues that the 2010 guarantee is in line with the communication from the Commission — community guidelines on State aid for rescuing and restructuring firms in difficulty⁽¹⁾ ('Rescue and restructuring guidelines') and that it does not confer an advantage to United Textiles. Moreover, it claims that there is no infringement of the 'one time last time' principle as enshrined in the Rescue and restructuring guidelines, since the 2010 guarantee replaces the 2009 guarantee and changes several provisions of the 2007 guarantee (see Measure 1 in recital 18). Therefore, the 2010 guarantee embodies the totality of the clauses of the company's loans in a single text with unified provisions. Greece also states that the guarantee is not valid yet, because the Ministry's competent service has not approved it yet.
- (42) Finally, Greece informed the Commission that the 2010 guarantee has not yet been activated, as the company has not signed any loan contract with any bank and no loan payment has taken place. Also, the Greek authorities have drawn the Commission's attention to the fact that the granting ministerial decision 2/35129/0025/28.06.2010 foresees that the loan's first two sub-loans (EUR 36,6 million + EUR 15 million) had to be paid until 28 July 2010 and this date has expired, therefore the guarantee actually cannot be activated.
- (43) United Textiles argues that the underlying loan contract has not been signed yet, therefore there is no interest rate defined yet. When this is done, the interest rate will be market conform.

⁽¹⁾ OJ C 244, 1.10.2004, p. 2.

- (44) Regarding the restructuring plan of 2010 (see recital 4), United Textiles supports that it foresees a drastic reduction of production, therefore the forecasted return to viability does not distort competition.

(Section V(a)). Secondly, the Commission will assess the presence of aid in the measures under scrutiny, in order to conclude if there is aid or not (Section V(b)). Thirdly, where a measure indeed involves aid, the Commission will assess its compatibility with the internal market (Section V(c)).

V. ASSESSMENT OF THE AID

- (45) On the basis of the above facts and also of the arguments of Greece and United Textiles, the Commission will assess the measures in question in this section. First, the Commission will assess the status of United Textiles at the time of the measures under scrutiny, in order to conclude if the company was in difficulty or not

V(a) Status of the company

- (46) As shown in recitals 14 and 15 and set out in more detail in Table 1 below, the company's operating and financial performance deteriorated significantly in the period 2004-09.

Table 1

United Textiles' key financial data (million EUR)

	2004	2005	2006	2007	2008	2009
Turnover	154,3	97,5	64,6	74,7 (*)	30,6	4,5
EBT	-89,6	-61,3	-49,3	-38,5	-62,4	-60,6
Accumulated losses	264,1	316	378,3	418,7	481	520,3 (**)
Registered capital	276,3	283,3	280,8	288,9	290,4	290,4 (**)
Own equity	95,2	35,7	32,9	4,6	-49,1	-111,5
Debt/equity	281 %	692 %	829 %	6 243 %	-561 %	-280 %

Data from 2004-09 financial statements.

(*) Increase because of increased funds that allowed more factories to operate.

(**) September 2009.

- (47) On the basis of these financial figures, the Commission concludes that the company has been in difficulty in the meaning of point 10 of the Rescue and restructuring guidelines at the time of the granting of the measures under scrutiny (the period 2007-10). The Commission equally considers that the company is in difficulties at present.

of capital or the capitalisation of losses, which would wipe out the registered capital. It appears that only the latter case would be feasible for United Textiles, due to its critical financial situation (see Table 1) and its difficult access to finance (see recital 15). On the basis of the above, the Commission considers that the company lost more than half of its registered capital.

- (48) More specifically, with regard to point 10(a) of the Rescue and restructuring guidelines, the company's registered capital, as appearing in its financial statements of years 2004-09, was not lost but increased in the period 2004-09. However, the Commission notices that in the same period the company's own equity was reduced to minimal (2007) or negative level (2008 and 2009). At the same time, the company did not adopt appropriate measures in order to tackle the decrease of its own equity, as foreseen by Greek legislation⁽¹²⁾. If adopted, those measures would be either the increase

- (49) Furthermore, concerning point 10(c) of the Rescue and restructuring guidelines, since 2008 the company fulfilled the criteria under Greek law for being the subject of collective insolvency proceedings⁽¹³⁾.

- (50) Finally, as regards point 11 of the of the Rescue and restructuring guidelines, the usual signs of a firm being in difficulty, such as increasing losses, diminishing turnover and mounting debt, have been present since at least 2004.

⁽¹²⁾ See footnote 4 above.

⁽¹³⁾ See footnote 4 above.

V(b) Presence of aid in the meaning of Article 107(1) TFEU

- (51) Article 107(1) TFEU states that 'Save as otherwise provided in the Treaties, any aid granted by Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market'.
- (52) The Commission will assess whether the measures under scrutiny in favour of United Textiles constitute State aid in the sense of Article 107(1) TFEU.

V(b)(1) Measure 1: State guarantee of May 2007

Aid to United Textiles

(a) State resources

- (53) The Commission notes that the State guarantee in question indeed involves State resources, as it has been granted directly by the State. The decision has been made by the responsible minister; therefore, the measure is also imputable to the State. Thus, the criterion of State resources is fulfilled.

(b) Advantage

- (54) Greece and the beneficiary claim that the National Bank of Greece (the lending bank) has accepted to decline the State guarantee and in its place to inscribe a mortgage on real estate assets of United Textiles, which will deactivate the guarantee. To demonstrate their claim, Greece and the beneficiary submit a letter of the National Bank of Greece, dated 24 December 2010 (replying to a letter of United Textiles dated 23 December 2010).
- (55) The Commission cannot accept the above. Indeed, in the submitted letter of the National Bank of Greece, it is only stated that the bank would be willing to examine the proposed exchange of securities, mainly under the conditions that the bank would choose the assets to be pledged and that the exchange would be accepted by all concerned parties. Thus, the Commission considers that the National Bank of Greece has not actually accepted the proposed exchange of securities.
- (56) Greece also argues that the 2007 guarantee was granted in line with the State aid rules that are in force in the EU. According to Greece's allegations, the guarantee had a maximum coverage of 80 % and that it was granted for loans with market interest rates.
- (57) The Commission cannot accept the above argumentation and considers that the 2007 guarantee has indeed procured an undue advantage to United Textiles.

According to the Guarantee Notice, points 2.2 and 3.2, when the borrower does not pay a market-oriented price for the guarantee, it obtains an advantage. In some cases, the borrower, as a firm in financial difficulty, would not find a financial institution prepared to lend on any terms, without a State guarantee.

- (58) In the case at hand, the 2007 guarantee was granted for loans of a firm in difficulty and did not foresee a premium for the guarantor (State). In the light of points 3.2 and 4.2 of the Guarantee notice, the Commission notes the significant deterioration of the company's financial situation in the period 2004-07, the overdue situation of its loans and the fact that already since 2001 its lending banks' support had been limited, with reduced credit lines and loans. The Commission considers that, since at the time that the measure was taken United Textiles was in serious difficulty, it must be classified in the credit category 'bad'.

- (59) In addition to the above, the Commission notes that, according to the company's annual reports of 2007, 2008 and 2009, the guaranteed loan was still envisaged to be securitised with assets of the company, therefore that securitisation was apparently not realised yet (see recital 18). In addition, the Commission notes that the National Bank of Greece (the lending bank) was proposed in December 2010 to decline the State guarantee and in its place to inscribe a mortgage on real estate assets of United Textiles (see recital 37). The Commission considers this proposal to be a clear indication that indeed the securitisation in question was not realised. On this issue, the Greek authorities submit that the 2007 guarantee was securitised with commodities of the company and personal guarantees of its shareholders (see recital 35), however the facts of the case only verify the shareholders' personal guarantees. Thus, the Commission considers that the underlying loan was not securitised.

- (60) On the basis of the above, the Commission doubts that any private guarantor would have offered such a guarantee and that any private bank would have accepted to finance the company without a State guarantee at all, as in a similar situation it would appear extremely difficult for such company to be able to repay the loan and for the guarantor to avoid to honour the guarantee. Thus, the Commission considers that the aid amount stemming from the 2007 guarantee amounts up to the whole amount of the guaranteed loan, i.e. EUR 16 million (80 % of EUR 20 million).

(c) Selectivity

- (61) Greece and the beneficiary also support that the 2007 guarantee does not constitute aid, as it was not selective to United Textiles: it was granted on the basis of ministerial decision 2/75172/0025/26.01.2007 which concerned not only United Textiles but also other companies.

- (62) The Commission notes that the ministerial decision on which the guarantee was based targeted certain sectors of a specific geographical area, i.e. the Imathia district. In addition, in the case at hand, the Greek authorities had a wide range of manoeuvre in granting a guarantee in favour of United Textiles, as there were no objective criteria set for deciding whether to grant the guarantee or not. In the absence of such objective criteria, the measure was indeed selective, because the authorities applied it individually on a discretionary basis⁽¹⁴⁾. According to established case-law⁽¹⁵⁾, where the public body granting financial assistance enjoys a degree of latitude which enables it to choose the beneficiaries or the conditions under which the financial assistance is provided, that assistance cannot be considered to be general in nature. Thus, the criterion of selectivity is indeed fulfilled.

(d) Distortion of competition and affectation of trade between Member States

- (63) United Textiles is active in a sector whose products are widely traded among Member States and who is subject to intense competition. At the time of the granting of the aid measures, United Textiles was an undertaking which realised most of its sales to other Member States (see recital 11). Also, the aid measure in question granted United Textiles an advantage over its competitors (see recitals 45, 46 and 47). According to established case-law⁽¹⁶⁾, when State aid strengthens the position of an undertaking compared with other undertakings competing in trade between Member States, those other undertakings must be regarded as affected by that aid. Thus, the criterion of distortion of competition and affectation of trade between Member States is indeed fulfilled.

Aid to the lending bank

- (64) Regarding the bank lending the underlying loan of the 2007 guarantee (the National Bank of Greece), the investigation has shown that it did not benefit from the guarantee in question. Indeed, the guarantee was granted in the context of a new loan contract, with a new duration of 10 years. According to point 2.3.1 of the Guarantee Notice, if a State guarantee is given *ex post* in respect of a loan, without the terms of this loan being adjusted, then there may also be aid to the lender; in the case at hand, however, the terms of the existing loan were changed, through the change of the loan's duration. Therefore the Commission considers that the 2007 guarantee did not constitute aid to the lender.
- (65) At the same time, the 2007 guarantee merely resulted in the bank not seeking immediately to collect its loan.

However, the bank would be able to recover the existing loan through liquidation procedures. In this regard, the Commission notes that the 2007 loan was already covered with a mortgage on a fixed asset⁽¹⁷⁾.

Conclusion on the existence of aid in Measure 1

- (66) On the basis of the above, it is concluded that the State guarantee of May 2007 (Measure 1) constitutes unlawful State aid in favour of United Textiles in the meaning of Article 107(1) TFEU.
- (67) The Commission considers that the State guarantee of May 2007 did not constitute State aid in favour of the lending bank the National Bank of Greece in the meaning of Article 107(1) TFEU.

V(b)(2) *Measure 2: Rescheduling of overdue social insurance obligations*

(a) State resources

- (68) The Commission notes that the aim of social insurance contributions is to finance the budget of Social Security Organisations, which constitute public legal entities under the State's supervision. Therefore the non-collection of such contributions deprives the State of resources. Thus, this criterion is fulfilled.

(b) Advantage

- (69) The Commission notes that United Textiles was effectively granted a delay of eight years to the payment of a financial obligation, at the time of severe financial difficulty and high probability of default. According to well-established case-law⁽¹⁸⁾, in order to establish whether a selective advantage is conferred by non-enforcement of debts and whether the advantage could be classified as State aid for the purposes of Article 107(1) TFEU, it must still be established that United Textiles could not have obtained such an advantage under normal market conditions. In this regard the essential question to be asked is whether the behaviour of the State as creditor in the given circumstances could be compared to the behaviour of a diligent private creditor.
- (70) According to the Greek authorities, previous rescheduling agreements had not been respected by United Textiles. At the same time, the company was effectively granted an extension of eight years for the payment of a financial obligation of EUR 14,57 million (see recital 16), at the

⁽¹⁴⁾ See Commission Notice on the application of the State aid rules to measures relating to direct business taxation, OJ C 384, 10.12.1998, p. 3. See also decision of the Court of 26 September 1996 in case C-241/94 *France v Commission* (Kimberly Clark Sopalin) [1996] ECR I-4551.

⁽¹⁵⁾ Judgement of the Court of First Instance (now General Court) of 11 July 2002 in case T-152/99, *Hamsa v Commission*, 2002 ECR 3049, paragraphs 156-157.

⁽¹⁶⁾ Judgement of the Court of 17 September 1980 in case 730/79, *Philip Morris v Commission*, paragraph 11, 1980 ECR 2671, Greek special version 1980/III, p. 13.

⁽¹⁷⁾ It is also noted that, in principle, banks in Greece usually accept as securities only assets whose 'fire sale' value (around 75 % of the market value) is at least equal to the loan.

⁽¹⁸⁾ See e.g. Judgement of the Court of 29 April 1999 in C-342/96 *Spain v Commission*, Rec.1999, p. I-2459; Judgement of the Court of First Instance (now General Court) of 11 July 2002 in T-152/99 *HAMSA v Commission*, Rec.2002, p. II-3049; Judgement of the Court of 29 June 1999 in C-256/97 *DM Transport*, Rec.1999, p. I-3913.

time of severe financial difficulty and high probability of default. Such an extension would not have been granted by a market economy creditor, especially since previous reschedulings had already failed.

(71) For the above-stated reasons, the Commission considers that the behaviour of the Greek authorities could not be compared to that of a diligent private creditor, since the rescheduling of 2009 was applied in spite of previous failed rescheduling agreements and the company was already in serious financial difficulties and had stopped most of its production, thus the perspective of obtaining a repayment of the debt appeared unlikely.

(72) Thus, the Commission considers that the 2009 rescheduling of the company's public insurance debts has conferred an advantage within the meaning of Article 107(1) TFEU on the company.

(c) Selectivity

(73) The Greek authorities and the beneficiary claim that the rescheduling was based on a general national law⁽¹⁹⁾, applicable to all companies in Greece, therefore the measure was not selective.

(74) The Commission cannot accept the above argument. Indeed, in the case at hand, the Greek authorities had a wide range of manoeuvre in the treatment of United Textiles' social insurance debts, as there were no objective criteria set for deciding whether to grant the rescheduling or not. In the absence of such objective criteria, the measure was indeed selective, because the authorities applied it individually on a discretionary basis⁽²⁰⁾. Also, according to established case-law, where the public body granting financial assistance enjoys a degree of latitude which enables it to choose the beneficiaries or the conditions under which the financial assistance is provided, that assistance cannot be considered to be general in nature⁽²¹⁾. Thus, the criterion of selectivity is indeed fulfilled.

(d) Distortion of competition and affectation of trade between Member States

(75) Finally, the criterion of distortion of competition and effect on trade between Member States is fulfilled in the same way as in recital 63.

(e) Conclusion on the existence of aid in Measure 2

(76) On the basis of the above, the Commission concludes that the 2009 rescheduling of overdue social insurance

obligations constitutes State aid in favour of United Textiles in the meaning of Article 107(1) TFEU.

(77) The amount of aid equals to EUR 14,57 million, granted to the company at the moment of the overdue debts' rescheduling on 25 May 2009, as the total amount of the rescheduled debts.

V(b)(3) *Measure 3: State guarantee of June 2010*

(78) The Commission notes that the company stopped operations already in 2009 and did not even publish financial statements since then (see recital 15). The guarantee was not sufficient to obtain any fresh funding and the undertaking did not resume its activities while it was valid. Under these circumstances, the Commission considers that the guarantee did not distort or threaten to distort competition. Therefore, it does not constitute State aid.

V(c) **Compatibility of the aid measures with the Internal Market**

V(c)(1) *General*

(79) Inasmuch as Measures 1 and 2 constitute State aid within the meaning of Article 107(1) TFEU, their compatibility must be assessed in the light of the exceptions laid down in paragraphs 2 and 3 of that Article.

V(c)(2) *Company in difficulty*

(80) As shown in recitals 46 to 50, the company's operating and financial performance deteriorated significantly in the period 2004-09. On this basis, the Commission concludes that the company has been in difficulty in the meaning of points 10 and 11 of the Rescue and restructuring guidelines at the time of the granting of the measures under scrutiny (the period 2007-10), as also acknowledged by Greece and the beneficiary. The Commission equally considers that the company is in difficulties at present because the situation has not improved since.

V(c)(3) *Exemptions under Article 107(2) and (3) TFEU*

(81) The derogations laid down in Article 107(2) and Article 107(3), points (d) and (e), are clearly not applicable and have not been invoked by the Greek authorities.

(82) Article 107(3)(a) states that 'aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious under-employment' may be declared compatible with the internal market. United Textiles is located in an assisted area under Article 107(3)(a), therefore it could potentially be eligible for regional aid.

⁽¹⁹⁾ Law No 3762/2009, FEK A'75 15.5.2009.

⁽²⁰⁾ See footnote 14 above.

⁽²¹⁾ See footnote 15 above.

- (83) The Guidelines on regional aid 2007-2013 ⁽²²⁾ ('Regional aid guidelines'), which were applicable at the time of application of the 2007 guarantee and the 2009 debt rescheduling (Measures 1 and 2), set out the conditions for the approval of regional investment aid.
- (84) The Regional aid guidelines clearly exclude firms in difficulty from their scope. United Textiles was already in difficulty at the time when Measures 1 and 2 were granted, therefore it was not eligible for regional aid. On this basis, the Commission concludes that the aid cannot be declared compatible on the basis of the Regional aid guidelines.
- (85) The Commission will also assess the compatibility of the measures in question under the Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the EC Treaty (General block exemption Regulation) ⁽²³⁾. The Commission notes that aid to firms in difficulty is excluded from the scope of the general block exemption Regulation. United Textiles was already in difficulty at the time when Measures 1 and 2 were granted, therefore the aid granted to United Textiles is not compatible under the general block exemption Regulation.
- (86) The Commission has also to assess whether any of the measures concerned could be compatible under the crisis rules enshrined in the Communication from the Commission — Temporary Community framework for State aid measures to support access to finance in the current financial and economic crisis ⁽²⁴⁾ (hereinafter 'Temporary Framework'). However, the Commission notes that United Textiles was clearly a company in difficulties before 1 July 2008 and therefore not eligible for aid under the Temporary Framework.
- (87) Since United Textiles was a firm in difficulty at the time of the granting of the measures, the compatibility of the aid measures can only be assessed in the light of the Rescue and restructuring guidelines, i.e. under Article 107(3)(c) TFEU.
- (88) First, the Commission considers that the measures in question cannot be found compatible as rescue aid. Indeed, the guarantee does not have a limited duration of six months, as foreseen in point 25(c) of the Rescue and restructuring guidelines, and the debt rescheduling, which could be comparable to a loan, also goes beyond a six-month period admissible as rescue aid. Also, the measures are not restricted to the minimum necessary amount, as foreseen in point 25(d) of the Rescue and restructuring guidelines and stemming from the formula set out in the Annex to those guidelines.
- (89) Second, none of the measures could be found compatible as restructuring aid either. Greece and the beneficiary claim that before having been granted the 2007 guarantee, the company had submitted to the Greek authorities a restructuring plan with financing from banks and without any State guarantee. However, such a restructuring plan was never officially submitted to the Commission, therefore, the grant of these measures was made in the absence of a restructuring plan; however, such a restructuring plan is the condition for ensuring the restoration of a firm's long-term viability. In fact, based on the evidence of the investigation, no such plan existed, and all restructuring efforts in this period have failed, to the point that the company practically ceased to operate and was taken off the stock exchange. Despite this failure to restructure, the State continued to provide working capital to United Textiles, through the 2007 State guarantee. Thus, the Commission considers that Measures 1 and 2 constituted mere operating aid without any underlying credible restructuring.
- (90) Finally, no compensatory measures in the sense of points 38 to 42 of the Rescue and restructuring guidelines have been officially submitted.
- (91) As regards United Textiles' eligibility to receive restructuring aid, the Commission notes that the company has been granted operating aid since at least 2007, at a time when it was already in difficulty. The Commission considers that the above fact is an infringement of the 'one time last time' principle, as it demonstrates that the company's difficulties are of a recurrent nature and that the aid measures in the company's favour have distorted competition contrary to the common interest. In addition, the beneficiary argues that the 2007 guarantee was incorporated in the guarantee of 2010, therefore there is a continuum in the settlement of the company's lending. However, the Commission considers that there are no elements suggesting that the restructuring should be considered to form a continuum, as the aid measures of 2007, 2009 and 2010 were granted over several years and were not granted on the basis of a single restructuring project or concept capable of restoring the company's viability.
- (92) On the basis of the above, the Commission considers that the 'one time last time' principle is not respected.
- (93) Finally, as United Textiles was in difficulty at the time of the granting of the measures, the Commission cannot conceive of another set of State aid rules that could make the alleged aid measures compatible with TFEU.

⁽²²⁾ OJ C 54, 4.3.2006, p. 13.

⁽²³⁾ OJ L 214, 9.8.2008, p. 3.

⁽²⁴⁾ OJ C 16, 22.1.2009, p. 1, as modified by the Communication from the Commission amending the Temporary Community Framework for State aid measures to support access to finance in the current financial and economic crisis, OJ C 303, 15.12.2009, p. 6.

V(c)(4) *Conclusion on compatibility*

- (94) In the view of the above, the Commission concludes that Measures 1 and 2 are incompatible with TFEU.

VI. **RECOVERY**

- (95) On the basis of the foregoing, the Commission concludes that the 2007 State guarantee and the 2009 rescheduling of overdue social insurance obligations constitute State aid which is incompatible with the internal market. The Commission has also come to the conclusion that the 2010 State guarantee does not constitute State aid.
- (96) Article 14 of Regulation (EC) No 659/1999 lays down that 'where negative decisions are taken in respect of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary'.
- (97) Thus, given that the measures at hand are to be considered as unlawful and incompatible aid, the amount of aid must be recovered in order to re-establish the situation that existed on the market prior to the granting of the aid. Recovery shall be hence affected from the time when the advantage occurred to the beneficiary, i.e. when the aid was put at the disposal of the beneficiary and shall bear recovery interest until effective recovery.
- (98) The incompatible aid element of the 2007 State guarantee (Measure 1) is calculated as amounting up to the total of the guaranteed loan. The Commission estimates that the aid thus granted to United Textiles amounts up to EUR 16 million.
- (99) The incompatible aid element of Measure 2 is calculated as the total amount of the rescheduled debts, thus the amount of aid granted to United Textiles is EUR 14,57 million. Payments made other than the amounts paid under the agreement may be deducted from the sum to be recovered as unlawful and incompatible aid.
- (100) The exact recovery amount and the recovery interest to be applied on these amounts have to be calculated by Greece,

HAS ADOPTED THIS DECISION:

Article 1

1. The State aid granted by Greece in breach of Article 108(3) of the Treaty on the Functioning of the European Union, in favour of United Textiles S.A., in the form of a 2007 State guarantee and a rescheduling of overdue social insurance obligations in 2009, is incompatible with the internal market.
2. The 2010 State guarantee does not constitute aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union.

Article 2

1. Greece shall recover the aid stipulated in Article 1, paragraph 1, from the beneficiary.
2. The sums to be recovered shall bear interest generated from the date on which they were put at the disposal of the beneficiary until their actual recovery.
3. The interest shall be calculated on a compound basis in accordance with Chapter V of Commission Regulation (EC) No 794/2004 ⁽²⁵⁾.
4. Greece shall cancel all outstanding payments under the aid stipulated in Article 1, paragraph 1, with effect from the date of notification of this decision.

Article 3

1. Recovery of the aid referred to in Article 1, paragraph 1, shall be immediate and effective.
2. Greece shall ensure that this decision is implemented within four months following the date of notification of this Decision.

Article 4

1. Within two months following notification of this Decision, Greece shall submit the following information to the Commission:
 - (a) the total amount (principal and recovery interests) to be recovered from the beneficiary;
 - (b) a detailed description of the measures already taken and planned to comply with this Decision;
 - (c) documents demonstrating that the beneficiary has been ordered to repay the aid.
2. Greece shall keep the Commission informed of the progress of the national measures taken to implement this Decision until recovery of the aid stipulated in Article 1, paragraph 1, has been completed. It shall immediately submit, on simple request by the Commission, information on the measures already taken and planned to comply with this Decision. It shall also provide detailed information concerning the amounts of aid and recovery interest already recovered from the beneficiary

Article 5

This Decision is addressed to the Hellenic Republic.

Done at Brussels, 22 February 2012.

For the Commission
Joaquín ALMUNIA
Vice-President

⁽²⁵⁾ OJ L 140, 30.4.2004, p. 1.

COMMISSION DECISION**of 21 March 2012****on the measure SA.31479 (2011/C) (ex 2011/N) which the United Kingdom plans to implement for Royal Mail Group***(notified under document C(2012) 1834)***(Only the English text is authentic)****(Text with EEA relevance)***(2012/542/EU)*

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular the first subparagraph of Article 108(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having called on interested parties to submit their comments pursuant to the provision(s) cited above ⁽¹⁾ and having regard to their comments,

Whereas:

1. PROCEDURE

- (1) On 10 June 2011, after informal (pre-notification) contacts with the Commission, the United Kingdom of Great Britain and Northern Ireland (the 'United Kingdom') notified a series of measures (see section 2.3) in favour of Royal Mail Group ('RMG').
- (2) By letter dated 29 July 2011, the Commission informed the United Kingdom that it had decided to initiate the procedure laid down in Article 108(2) of the Treaty in respect of the notified measures in question.
- (3) The Commission Decision to initiate the procedure was published in the *Official Journal of the European Union* ⁽²⁾. The Commission called on interested parties to submit their comments.
- (4) By letter dated 9 August 2011 the United Kingdom requested an extension of the deadline to respond until 14 September 2011, which was granted by the Commission by letter of 11 August 2011. The United Kingdom transmitted its observations on 8 September 2011.
- (5) The Commission received the following comments from interested parties:
 - 5 October 2011 UK Mail
 - 6 October 2011 Communication Workers Union
 - 6 October 2011 UPS
 - 7 October 2011 Deutsche Post

- 7 October 2011 DX Group
- 7 October 2011 Mail Competition Forum
- 7 October 2011 TNT
- 7 October 2011 Free Fair Post Initiative
- 9 October 2011 Secured Mail.

- (6) The comments received from interested parties were forwarded to the United Kingdom on 12 October 2011. The United Kingdom submitted its observations on the comments by letter registered on 16 November 2011.
- (7) On 22 August 2011 the Commission sent an information request to the United Kingdom, to which it replied by letter of 14 September 2011.
- (8) A meeting with UK authorities, RMG and its bankers took place on 20 September 2011 in which the latter provided more detailed information on the notified restructuring plan.
- (9) The Commission held several other meetings with the UK authorities on 12 October 2011, 10 and 23 November 2011 and 12 January 2012 to discuss the case. The United Kingdom submitted several pieces of additional information by e-mail or letter dated 30 September 2011, 20 October 2011, 7, 11, 18, 20, 28 and 30 November 2011, 6 December 2011 and 14 February 2012.
- (10) The United Kingdom authorities submitted final updates to the notification and clarifications on the restructuring plan on 17 February 2012.

2. DETAILED DESCRIPTION OF THE MEASURES**2.1. Context: liberalisation of the UK postal sector**

- (11) The United Kingdom places the notified measures in the context of its wider policy for postal services and underlines the strategic importance of RMG to ensure the permanent provision of universal postal services.

⁽¹⁾ The initiation of proceedings was announced in OJ C 265, 9.9.2011, p. 2.

⁽²⁾ See footnote 1.

(12) The United Kingdom Government's policy is set out in the Postal Services Act ⁽³⁾ ('Postal Services Act 2011'), which received Royal Assent on 13 June 2011. The Act implements the recommendations of an independent review led by Richard Hooper ('Hooper Reports') ⁽⁴⁾ and, in summary:

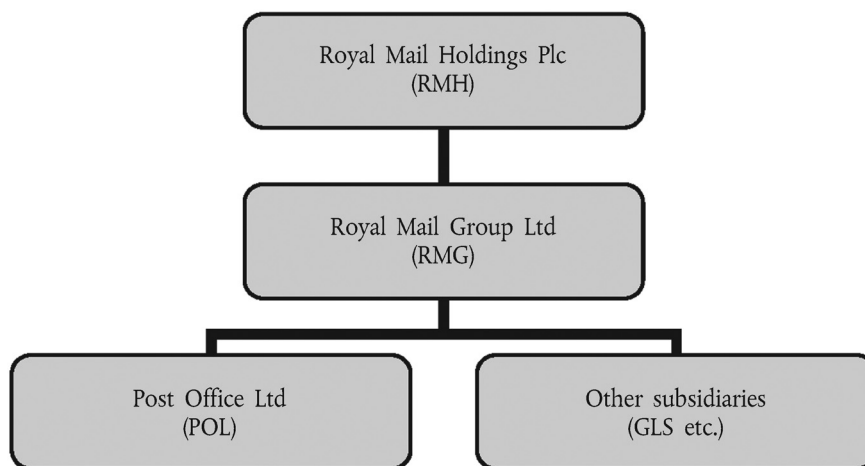
- (i) allows for private sector investment into RMG, with a view to injecting commercial disciplines and new capital;
- (ii) enables the transfer of the historic pension deficit to the United Kingdom Government leaving the company with a smaller fully funded scheme ('the pension relief');
- (iii) makes clear that Post Office Limited ('POL', the retail arm of RMG) is not for sale but will remain in State ownership;
- (iv) paves the way to modernise the regulation of the postal services sector; and
- (v) requires an employee share scheme which will hold at least 10 % of the equity in RMG by the time the UK Government has sold its entire shareholding in RMG.

2.2. Beneficiaries of the measures

2.2.1. Structure of the Royal Mail Group

- (13) RMG is 100 % State-owned through the Royal Mail Holdings plc ('RMH'). RMG is the United Kingdom's main postal operator and had a legal monopoly over certain basic letter services until the end of 2005 when the postal markets in the United Kingdom were fully liberalised. RMG is providing the collection, sorting, transportation and delivery of mail (letters, packets and parcels), using the 'Royal Mail' and 'Parcelforce Worldwide' brands.
- (14) The post office network is operated by POL, which is currently wholly owned by RMG (and hence by the UK Government). RMG and POL are separate legal entities though they are part of the same group. Consistent with the recommendations of the Hooper Reports, it is proposed that POL will remain in full public ownership after the reform and will become a sister company of RMG under RMH.
- (15) RMG has also other subsidiaries, notably General Logistics System BV ('GLS') which is RMG's European parcels business, providing parcel services, logistics and express services throughout Europe. The GLS network comprises subsidiary companies and network partners covering 36 European countries.

Chart 1: current organisational structure of RMG



2.2.2. Royal Mail Group (RMG)

(16) RMG has held a license to provide letter services in the United Kingdom under the Postal Services Act 2000 since 23 March 2001. Under the terms of its license, it

is required to discharge the universal service obligation ('USO'). These arrangements implement the requirements of Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service ⁽⁵⁾ ('Postal Services Directive'). RMG is required by its license to negotiate commercial agreements with any interested operator for access to its national network. New operators have tended to enter the market through such access agreements with RMG.

⁽³⁾ <http://services.parliament.uk/bills/2010-12/postalservices.html>

⁽⁴⁾ 'Modernise or Decline — Policies to maintain the universal postal service in the United Kingdom; an independent review of the UK postal services sector', 16 December 2008, available at <http://www.berr.gov.uk/files/file49389.pdf>, updated by Hooper's December 2008 report, 'Saving the Royal Mail's universal postal service in the digital age', available at: <http://www.bis.gov.uk/assets/biscore/business-sectors/docs/s/10-1143-saving-royal-mail-universal-postal-service.pdf>.

⁽⁵⁾ OJ L 15, 21.1.1998, p. 14.

- (17) RMG is the only licensee in the United Kingdom postal market with universal service obligations. The main aspects of the current USO are (i) the delivery of postal packets (letters, packets and parcels) up to 20 kg every working day to the home or premises of every individual or other person in the United Kingdom (Mon-Sat delivery obligations for letters), (ii) at least one collection every working day from each access point, and a service of conveying, receiving, collecting, sorting and delivering postal packets at affordable prices determined in accordance with a uniform tariff, and (iii) the provision of a registered post service at prices determined in accordance with a uniform tariff.
- (18) RMG's license imposes price controls in relation to the provision of regulated services. The current price control was set in April 2006 for a four-year period, but has been extended to March 2012.
- (19) Furthermore, RMG is required by its license to allow customers and other postal companies access to its national network on a non-discriminatory basis and in practice most of the competitors to RMG have entered the market by using third party access to RMG's downstream network (for example final sorting of mail and delivery on the 'last mile' to customers).
- (20) Downstream access competition involves the third party operator collecting and processing the mail through its own network until delivered to RMG's sorting centres, where it is injected into RMG's network for final sorting and delivery to receiving customers. Under equivalent agreements known as 'customer direct access' agreements, high-volume customers may deliver their pre-sorted mail to RMG's mail centres for downstream delivery.
- (21) Competition in the United Kingdom's letter mail services has arisen through downstream access to RMG's network and not end-to-end competition between RMG and new entrants. Since the market opening in 2006, the letter volumes that other UK postal operators inject into RMG's downstream network have grown on average by more than 1 000 million items per annum and now account for over 45 % of the United Kingdom addressed inland mail market. RMG expects to lose even more market shares to its competitors in the coming years. For certain high volume markets, competitors are expected to achieve market shares of [...] (*).
- 2.2.3. *Post Office Limited (POL)*
- (22) POL, the so-called retail arm of RMG, is responsible for the network of around 11 500 Post Office branches. Just fewer than 400 of these are directly owned and managed by POL. All others are privately owned and operated by subpostmasters or franchise partners. POL is entrusted to maintain a network meeting certain access criteria for the UK population (99 % of the population to be within 3 miles (4,8 km) of an outlet, etc.).
- (23) POL does not currently have any employees as all personnel currently working for POL (except those who are self-employed) are seconded from RMG. Approximately 9 000 RMG employees are seconded and work wholly for POL.
- (24) POL provides retail counter services to RMG, whilst RMG provides shared back-office support services to POL. Furthermore, there are a number of shared services in place between RMG and POL (for example vehicle services, building security etc.) which are currently provided at cost by RMG. The provision of these services is currently subject to a service agreement between RMG and POL that will be replaced by a series of new service agreements when POL becomes a sister company of RMG.
- (25) In addition to being a provider of services of general economic interest ('SGEIs'), POL carries out some 'commercial' activities (such as selling telephony and insurance products) through its network and also through a direct internet sales channel.
- (26) On 23 March 2011, the Commission authorised GBP 180 million of public assistance to POL for the funding of its network of post offices during one year starting 1 April 2011 ⁽⁶⁾. The Commission also authorised the continuation, over the same period, of existing loan facilities funding the provision of cash services at post office counters. The Commission concluded that the aid is compatible with Union rules because it does not over-compensate the net costs of the public service tasks entrusted to POL.
- (27) On 24 January 2012, the United Kingdom has notified a package of measures in support of the SGEIs provided by POL, broadly similar to the measures authorised in 2011.
- 2.2.4. *Financial difficulties*
- (28) The United Kingdom considers RMG to be a firm in difficulty because it is currently facing severe financial difficulties (the reported financial figures refer to the consolidated results of RMG including all subsidiaries, if not stated otherwise):
- (i) the State of its balance sheet, in particular the substantial size of the pension deficit;
 - (ii) its projected cash flow shortages;

(*) Business secret.

⁽⁶⁾ Commission Decision C(2011) 1770. The current authorisation of these measures expires on 31 March 2012.

- (iii) its future inability to repay its debts when they fall due in the absence of the notified measures;
- (iv) RMG's declining revenues from the letter business: between the 2008/09 and 2010/11 financial years, external revenue fell by 3,1 %, in the same period inland addressed delivered volumes decreased by 11,7 %.
- (29) RMG's balance sheet shows that the company had serious financial difficulties at the end of the 2010/11 financial year; both its working capital and net operating assets were negative.
- (30) According to the projections provided by the United Kingdom, RMG will have negative cash headroom [...], that is to say, it will not have sufficient funds to pay for its day-to-day operations, if the notified measures are not implemented. Consequently, RMG will also be unable to repay its existing loan facilities when they fall due in [...].
- (31) On the basis of these factors, RMG will face severe difficulty in meeting its payment obligations by [...] and subsequently will be unable to undertake a restructuring program and return to viability out of its own resources, leaving the firm in a situation where it must rely on State aid in order to ensure a return to economic viability and the uninterrupted availability of the public service.

2.3. Measures under investigation

2.3.1. Pension relief

- (32) The Postal Services Act 2011 envisages that the United Kingdom will assume responsibility for certain of the accrued liabilities under the Royal Mail Pension Plan ('RMPP'). The proposed measure will relieve RMG of the obligation to make good the deficit that has arisen under that scheme, thus relieving RMG of a significant financial burden.
- (33) According to the United Kingdom, the size and volatility of the RMPP is out of all proportion to RMG's current business and has proved to be a severe handicap to RMG's ability to compete on its own merits in the liberalised United Kingdom postal market. The United Kingdom believes that by taking certain liabilities over from the RMPP and thereby contributing to the restoration of RMG's viability, RMG will, as the sole universal service provider in the United Kingdom, have the ability to adapt to the liberalised industry environment through modernisation. The pension relief, as a consequence, will remove one of the principal obstacles to attracting private sector capital to RMG.
- (34) Besides the RMPP, RMG currently sponsors 3 other pension plans: the Royal Mail Senior Executives Pension Plan ('RMSEPP'), the Royal Mail Retirement

Savings Plan ('RMRSP') and the Royal Mail Defined Contribution Pension Plan ('RMDCPP'). The notified measure concerns only the RMPP and will not affect members of the RMSEPP, the RMRSP or the RMDCPP.

The RMPP

- (35) The RMPP is an occupational pension scheme for RMG's employees, including those employees seconded to and working wholly for POL ⁽⁷⁾. It is a private sector scheme in the sense that it operates under normal UK pensions law as applied to private sector companies. As at 31 March 2011, the RMPP had approximately 436 000 members, of which approximately 130 000 were current employees accruing benefits in the scheme (active members), approximately 118 000 were former employees who had left service before retirement age and not yet drawn pension benefits (deferred members) and approximately 188 000 were pensioners.
- (36) The RMPP is governed by the Third Principal Trust Deed and Rules dated 21 December 2009, as subsequently amended (the 'Trust Deed'). The principal employer in relation to the scheme is RMG and the trustee is a company, Royal Mail Pensions Trustees Limited ('the Trustee'). In addition to the Trust Deed, the obligations of the Trustee and RMG under the RMPP are governed by legislation introduced by the Department for Work and Pensions applying to occupational schemes, set out, principally, in the Pension Schemes Act 1993, the Pensions Act 1995 and the Pensions Act 2004. The RMPP falls within the jurisdiction of the UK Pensions Regulator.
- (37) The RMPP is a defined benefit scheme, that is, benefits are determined by reference to a pension of a target amount at normal retirement age, related to the amount of the member's annual pay and length of service with the employer. This is in contrast to defined contribution schemes under which only the level of the contributions required from the employer/employee is specified. The contributions are invested and when a member retires, the value of the accumulated fund is used to provide the member with an income for life.
- (38) There are two main types of defined benefit scheme, known as final salary and career average. A final salary scheme provides a pension based on a stated fraction or percentage of the employee's final pensionable salary for each year of pensionable service. In contrast, a career average scheme provides a pension based on a stated percentage of the employee's average pay over the whole period of pensionable service (usually adjusted in some way to take account of inflation) for each year of pensionable service.

⁽⁷⁾ The RMPP and the other UK schemes sponsored by RMG do not cover employees of GLS.

- (39) Until April 2008, benefits accrued by members of the RMPP were calculated on the basis of a final salary method. However, in April 2008 RMG implemented pension reforms by amendment of the RMPP rules which included changes to benefits accrued in respect of service from 1 April 2008, such that they are now calculated on the basis of a career average salary method rather than a final salary method (although benefits accrued in respect of service prior to that date will continue to be linked to a member's salary at the date of leaving service). Other reforms implemented on 1 April 2008 included raising the retirement age to 65 for service accrued from 1 April 2010 (benefits built up before that date can still be taken at age 60 without an early retirement reduction being applied) and closure of the RMPP to new members and joiners with effect from 1 April 2008. The RMPP was replaced with a defined contribution scheme for new members and joiners after 1 April 2008, the RMDCPP.
- (i) from 1 April 2009 to 31 March 2047: annual deficit payments of GBP 282 million per annum increasing in line with retail prices inflation;
- (ii) from 1 April 2013 to 31 March 2023: additional contributions of 4,0 % of members' contributions.
- (44) POL contributes a 7 % share of the deficit payments. The share is calculated on the basis of the number of employees seconded to POL in relation to RMG's total number of employees. POL's annual contribution to the pension deficit in the 2010-11 financial year was GBP 21 million.

Previous measures to fund the pension deficit of the RMPP

- (40) The United Kingdom points out that RMG's ability to amend the RMPP over time has been materially constrained. These constraints derive from general UK pensions law and from specific features of the RMPP scheme.
- (41) Under UK law RMG has no power of veto over its contribution rate to the RMPP. The contribution rate is normally agreed between the sponsoring employer and the trustee of a pension scheme, but against a background where a failure to reach agreement within 15 months of the effective date of a valuation will lead to contributions being determined by the UK Pensions Regulator, which was established on 6 April 2005 by the Pensions Act 2004 and which enforces compliance with pensions legislation. The Pensions Regulator has made clear, among other things, that it expects schemes to have a certain level of solvency and that it expects trustees to seek recovery of any deficit as against that technical provisions funding target from the sponsoring employer 'as quickly as the employer can reasonably afford'.
- (42) In that context, RMG agreed a memorandum of understanding with the Trustee in June 2006 to fund the RMPP deficit over 17 years, in addition to the annual payments RMG makes to the RMPP to fund the cost of the accrued benefits. Conditions included the establishment of the escrow accounts totalling GBP 1 billion secured in favour of the RMPP that were the subject of Commission Decision 2009/613/EC⁽⁸⁾.
- (43) On 30 June 2010, RMG agreed on a further recovery plan with the Trustee aiming to fund the RMPP deficit by March 2047, by paying the following annual contributions:
- (45) Relief of pension deficit
- (45) The United Kingdom authorities propose to set up a new statutory pension scheme which will be a liability of the UK Government and will have no legal connection to RMG or the RMPP. Certain part of accrued liabilities and assets held by RMPP will be transferred to the new scheme. It is intended that pension benefits accrued up to 31 March 2012 will be transferred to the scheme. The persons to whom this proposal applies include current pensioners, deferred members and active members of the RMPP.
- (46) In broad terms, it is estimated that the new pension scheme will be taking over GBP 32 200 million of liabilities and associated assets of GBP 27 700 million (based on the 31 March 2011 actuarial valuation figures) and hence a deficit of GBP 4 500 million. After the pension relief on 1 April 2012, RMG will continue paying only the normal pension contributions for all members of the RMPP, who still work for RMG, and consequently only remain liable for new pension rights acquired after March 2012 (hereafter referred to as on-going RMPP scheme).
- (47) The on-going RMPP scheme will immediately after the pension relief consist of approximately GBP 2 100 million⁽⁹⁾ of liabilities and a matching amount of assets remaining with RMG. RMG will continue to bear all future service costs, including liability for any current obligations under the RMPP to maintain a continuing final salary link together with certain enhancements (for example on early retirement) in respect of the historic pension benefits. This means that after the pension relief, RMG will continue to bear the risk that the historic liabilities for deferred members may increase by reason of any salary increases, which exceed price

⁽⁸⁾ OJ L 210, 14.8.2009, p. 16.

⁽⁹⁾ Based on latest estimates. Precise amount will depend on market movements to March 2012 and could be more or less than this amount.

inflation, as the pension benefits have to be linked to the current final salary level. RMG would also retain responsibility for the existing RMSEPP which shows liabilities of GBP 300 million and a deficit of approximately GBP 30 million (as valued at 31 March 2011).

2.3.2. Restructuring aid

The Restructuring of RMG

(48) To address its financial difficulties, in June 2011 RMG drew up a restructuring plan covering the period 2008-2016.

(49) RMG's plans, which are focused primarily on reduction of costs and revenue diversification, build on the significant restructuring measures that RMG has taken since 2002 (including implementing significant changes to the RMPP) to modernise its business and drive costs down. RMG's plan of June 2011 for restoring the company to viability is split into five key areas:

(i) operational modernisation, covering changes in all areas of RMG's activities and results in significant cost savings for the business;

(ii) corporate and back-office restructuring measures;

(iii) commercial transformation;

(iv) investment in a new IT Platform;

(v) cash generation initiatives.

(50) The restructuring plan aims to restore long-term viability of RMG. According to the United Kingdom, the ability to take structurally high levels of fixed cost out, enhance the overall regulatory environment and diversify revenues to replace lost revenues from declining mails volumes will promote a viable RMG capable of attracting private sector investment to ensure its long term future.

Debt reduction measures

(51) The United Kingdom claims that the restoration of RMG's long term viability is a central policy objective in order to achieve universal availability and effective discharge of the USO. According to the United Kingdom, the pension relief alone will not be sufficient to secure RMG's long term viability: even after the relief

of the deficit RMG cannot overcome its financial difficulties with its own resources or with funds obtained from market sources.

(52) Therefore, in addition to the pension relief, the United Kingdom also notified certain measures to strengthen RMG's balance sheet, consisting of:

(i) writing off a certain amount of debt owed by RMG to the UK Government (hereafter 'debt reduction measures'), expected to be up to GBP 1 700 million (plus accrued interest); and

(ii) RMH making available certain amounts in the 'Mails Reserve' ⁽¹⁰⁾ to RMG by way of a revolving credit facility with a maximum drawdown of GBP 200 million.

2.4. Grounds for initiating the in-depth investigation

(53) The United Kingdom contended in its notification that the pension relief could be found compatible with the internal market as legacy costs from the pre-liberalisation period, based on the Commission practice. Furthermore, it claimed that the proposed measures are in line with the Guidelines on State aid for rescuing and restructuring firms in difficulty ⁽¹¹⁾ ('the R&R Guidelines'). The United Kingdom did not invoke Article 106(2) of the Treaty as justification for the notified measures during the procedure.

(54) In its Decision to initiate the formal investigation, the Commission questioned whether the pension relief could be found compatible as compensation for an exceptional burden resulting from RMG's past status as public sector monopoly. In 2007, the Commission indeed approved a French reform regarding the financing of the current and future pensions of the employees of La Poste with a civil servant status ⁽¹²⁾. However, while the 2007 decision ensured that La Poste's effective social security costs were comparable to those of competitors; it seemed that relieving RMG from its whole pension deficit would put it in a better

⁽¹⁰⁾ RMG holds certain investments in Government securities or National Loan Fund deposits, classed as current assets and often referred to as the 'gilts'. They are subject to a specific legal regime of directions by the UK authorities under section 72 of the Post Office Act 2000. Following directions dated 30 January 2003, RMG placed these assets in a special reserve ('the Mails Reserve'), to be used for financing specific measures as directed.

⁽¹¹⁾ OJ C 244, 1.10.2004, p. 2.

⁽¹²⁾ Commission Decision 2008/204/EC of 10 October 2007 on the State aid implemented by France in connection with the reform of the arrangements for financing the retirement pensions of civil servants working for La Poste, (OJ L 63, 7.3.2008, p. 16).

position than an average UK company. The Commission wondered therefore whether the charges of which RMG was relieved correspond entirely to legacy costs within the meaning of the case-law of the Court of Justice of the European Union and whether there indeed would be a level playing field once the relief was implemented.

- (55) Furthermore, the Commission also expressed reservations about the restructuring plan's compatibility with the R&R Guidelines, notably regarding the prospect of a return to viability, the extent of RMG's contribution, and the level of compensatory measures.
- (56) According to the Commission, the United Kingdom did not convincingly demonstrate that the originally submitted restructuring plan would comply with the R&R Guidelines. In particular, the Commission doubted that RMG's role as the sole universal service provider and the liabilities resulting from its public sector monopoly legacy would justify mitigating the conditions of the R&R Guidelines and notably those ensuring that competition distortions are limited and that the cost of restructuring is shared by the required 50 % own contribution.
- (57) The Commission also considered that the duration of the original restructuring plan from 2008 to 2016 was particularly long and that the projections in the original restructuring plan were sensitive to changes in the assumptions such as total mail volumes. The Commission therefore expressed doubts as to the restoration of long-term viability of RMG by the implementation of the notified plan and to the robustness of the viability projections.

2.5. Modification to the notified measures after the opening of the formal investigation procedure

- (58) In the course of the discussions with the Commission during the formal investigation, the United Kingdom renounced part of the debt reduction of 1 700 million and reduced the notified debt reduction measures to GBP 1 089 million. Furthermore, the United Kingdom also renounced the notified GBP 200 million revolving credit facility. The Commission therefore no longer considers those measures to be notified but only the debt reduction measure amounting to GBP 1 089 million.
- (59) Furthermore, during the investigation, the United Kingdom provided an updated restructuring plan, covering a shorter restructuring period: 2010-2015. During that period RMG will undertake operational and industrial measures to restructure its business. The plan for restoring the viability of RMG can be split into the following key actions: labour related restructuring, structural restructuring to reduce its capacity and restructuring of IT systems.

Labour-related restructuring

- (60) Labour related restructuring is at the heart of the RMG's changes to ensure that a financially sustainable universal service can be provided for the long term in the United Kingdom. RMG has already made progress and intends to significantly reduce its workforce further through a programme of voluntary redundancy and natural attrition over the period of the plan. This alone represents around one third of the total relevant restructuring costs from the plan, and will reduce significantly one of RMG's core costs.
- (61) The restructuring plan envisages, over the course of the restructuring period, a reduction in RMG's headcount in UK Letters & Parcels and International (UKLPI) from approximately 160 000 people at the start of the year ending in March 2011 to approximately [...] people in March 2015. This represents a total reduction of approximately [...] in UKLPI between March 2011 and March 2015, representing the equivalent of around [...] a year. This labour-related restructuring includes a reduction of close to [...] central managers (over 1 000 of whom had already left by March 2011). Labour cost savings of GBP [...] million in real terms are forecast to be achieved between March 2010 and March 2015.
- (62) The labour changes proposed will impact virtually every part of the RMG's business. For example:
- (i) outdoor delivery and collections, which are labour intensive activities with high fixed costs, are being restructured; the restructuring is focused on achieving savings including by World Class Mail (see recital (68)) being introduced with savings arising from this comprehensive system for improving safety, customer service, quality and productivity in all delivery offices;
 - (ii) there is a move away from manual labour intensive processing to automated processing, with corresponding implications for labour;
 - (iii) close to [...] managers in central functions are also being removed.
- (63) The key elements of the labour restructuring cost included in the June 2011 restructuring plan are (i) redundancy payments, (ii) travel and outplacement costs and (iii) certain exceptional lump sum payments. Redundancy payments are expected to be approximately GBP [...] million from March 2010 to March 2015. Travel and outplacement costs (which are paid to staff

that have been retained but must now work at alternative facilities as part of the restructuring of RMG's infrastructure, including the closure of various mail centres) will amount to a cost of approximately GBP [...] million by 2014/15. Exceptional lump sum payments — which are required to sustain the pace and depth of change as they form a key part of the 2010 modernisation agreement with the Communication Workers Union amount to GBP [...] million. Those payments would not have been required with a slower, more conventional, pace of modernisation.

- (64) Those key elements of labour restructuring together amount to approximately half of the total relevant restructuring costs during the period from March 2010 to March 2015.

Structural restructuring to reduce capacity

- (65) In addition to the measures to address the labour force at RMG, the notified restructuring plan includes structural restructuring to reduce capacity in the business over the period. In total, the amount spent on structural restructuring represents approximately one third of the total relevant restructuring costs during the period from March 2010 to March 2015. In particular this element of the restructuring relates to the significant reduction of the mail centre network, which has a corresponding impact on labour.
- (66) Structural restructuring also consists of automation and, critically, new delivery methods to enable longer more flexible delivery spans. This again has significant implications for the workforce and forms a key part of restructuring.
- (67) The restructuring plan includes a one-off property rationalisation programme reducing the number of mail centres from 64 at the start of the financial year 2010/11 to [...] by March 2015, significantly reducing the RMG's footprint and streamlining its operations. The restructuring plan therefore envisages closure of [...] mail centres between 2010/11 and 2014/15 which equates to a [...] reduction across the network. During the year from March 2010 to March 2011 a total of 5 mail centres were closed.
- (68) In conjunction with this, RMG is introducing World Class Mail in all mail centres which will remain open. World Class Mail is a comprehensive system for improving safety, customer service, quality and productivity, and reducing breakdowns. World Class performance is achieved by involving all employees in attacking wasted time and resources caused by sub-standard reliability, and operating performance of processing systems. All mail centres will be part of

World Class Mail by the end of financial year 2011/2012 and World Class Mail is also being introduced in delivery offices.

- (69) In addition, the deployment of intelligent letter sorting machines will bring about a change in automated sorting and reduce the costs associated with manual sorting. These machines are considerably faster than existing methods and equipment, which have been used by RMG for nearly 20 years.
- (70) Further to this, the deployment of walk sequencing, which automates the sorting of letters to the order of delivery is being implemented. This is a critical part of the restructuring and requires the acquisition and deployment of compact sorter sequencer machines and results in changes to working practices for postmen and women working in delivery in particular. Automated sequencing of letters reduces manual sorting in delivery offices (and associated costs), and therefore allows for more efficient scheduling of start and finish times for delivery staff. Walk sequencing is a structural change to mail processing for RMG that will increase its productivity. RMG sequenced 0 % of mail in 2008; 1 % of mail in 2009, and 50 % by August 2011.
- (71) RMG's restructuring plan includes the automation of sorting of small parcels which is currently done manually. The company is determining the best solution to deploy during the restructuring period.
- (72) Finally, new delivery methods allow RMG to change from traditional delivery methods (on foot, by bicycle) to delivery mainly using secure trolleys (either manual or powered) and vans. These new methods represent a major change for RMG and the change being implemented, including the expenditure incurred, will facilitate longer, flexible delivery spans. This, in turn, allows RMG to reduce the number of delivery routes and outdoor delivery operating costs.

IT restructuring

- (73) The restructuring includes business critical capital investment in IT over the period of the plan. To complement the labour changes, RMG is in the process of introducing handheld electronic devices to replace paper-based processes and therefore increase efficiency. One of their basic functions is to store customer signatures which confirm receipt of tracked items. The devices allow RMG to track items in real time. This removes the need for further processing of signatures and receipts on paper when the postman or woman has finished deliveries.

(74) In addition, RMG will be making other investment in IT and operations — including significant investment in several critical areas:

- (i) improving operational reporting capabilities;
- (ii) modernisation of human resources processes;
- (iii) enabling automatic reading of address information and use of the information for performance reporting;
- (iv) [...]; and
- (v) [...].

(75) The investment in systems and IT restructuring in total represents approximately one fifth of the total relevant restructuring costs during the period from March 2010 to March 2015.

Conclusions

(76) According to the United Kingdom, after the implementation of the pensions' measures and the completion of the restructuring measures, RMG is forecast to be in a position to:

- (i) cover its costs including depreciation and financial charges — in particular the company will have a positive free cashflow after interest and tax of GBP [...] million by March 2015;
- (ii) make a return on capital which will enable it to compete in the marketplace on its own merit — in particular the company will make a positive return on invested capital of [...] by March 2015; and
- (iii) generate cash from the underlying business (pre-asset sales) — in particular the company will have a positive operating free cashflow of GBP [...] million.

(77) This conclusion also applies on the basis of the reasonable downside scenario (an additional [...] decline in volumes over the period of the restructuring plan) submitted to the Commission on 30 November 2011 as part of the sensitivity analysis. Under such a downside scenario, by March 2015 RMG would be in a position to:

- (i) have a positive free cashflow after interest and tax of GBP [...] million by March 2015;
- (ii) make a positive return on invested capital of [...] by March 2015; and

(iii) have positive operation free cashflow of GBP [...] million.

(78) These forecasts are claimed to prove the robustness and strength of the proposed restructuring.

3. COMMENTS FROM INTERESTED THIRD PARTIES

(79) Comments on the opening decision were received from a wide range of interested third parties including RMG's smaller domestic competitors and their industry associations, its larger international peers, pressure groups and a workers union representing the majority of RMG staff.

Comments submitted by the Mail Competition Forum

(80) As an industry association of smaller postal operators in the United Kingdom, the Mail Competition Forum ('MCF'), places a great emphasis on the importance of a sound and viable RMG as the only company capable of fulfilling the universal service obligation in the United Kingdom, whilst at the same time voicing concerns that an artificially strengthened RMG could squeeze its smaller competitors out of an already difficult market by means of predatory pricing, margin squeeze and denial of access to essential facilities. In this context the MCF urges far reaching *ex ante* regulatory measures to protect smaller competitors and ensure that they have access to the Royal Mail network.

(81) MCF agrees with the United Kingdom in its assessment that RMG is a firm in difficulty and agrees with the application of the R&R Guidelines as the appropriate framework to assess the proposed measures. Moreover, it notes that the United Kingdom does not seek to justify the aid on grounds that such aid is necessary to sustain an SGEI, but it records that in case that any SGEI compensation to RMG would be authorised by the Commission, it would need to be coupled with rigorous safeguards to protect competition.

(82) The MCF believes that the measures should be confined to the strict minimum necessary and designed to deal with the pension deficit alone. MCF rejects any balance sheet repair measures or any other measures undertaken with a view to making the firm more attractive for a market economy investor. In this context MCF expresses scepticism about a privatisation of the firm.

(83) With respect to the own contribution of 50 % required under the R&R Guidelines for large undertakings, MCF urges a strict adherence to the prescribed threshold and recommends the divestiture of assets and seizure of loss-making activities to finance this.

(84) With regards to compensatory measures the MCF believes that a number of far reaching structural, fiscal

and regulatory measures are necessary including a reform of the UK Postal Services Act with a view to preventing the RMG from getting additional aid for the same purpose in the future, a full structural separation of the retail and network aspects of the business, and an end to the VAT exemption enjoyed by RMG for services which are outside the universal service.

Comments submitted by Secured Mail

- (85) Secured Mail points to the importance of RMG for the discharge of the USO in the United Kingdom. At the same time Secured Mail urges the Commission to ensure that RMG will not gain the opportunity to exploit its new found strength in a way which would endanger the smaller competitor's business model. Just as the Mail Competition Forum, Secured Mail emphasises the need for a sufficient own contribution financed through divestiture of assets, and seizure of loss-making activities. Furthermore Secured Mail would like to see regulatory action like a separation of the network and retail aspects of RMG businesses.

Comments submitted by UK Mail

- (86) UK Mail, a small domestic competitor comments that whilst the firm generally welcomed State aid to RMG with a view to safeguarding the effective discharge of the USO, the measures should only be authorised under strict adherence to the R&R Guidelines.

Comments submitted by DX

- (87) DX, another small domestic competitor also expresses concerns about strengthening RMG's position on the UK market in an unchecked fashion and advocates compensatory measures in order to make up for potential distortions of competition.

Comments submitted by the Communication Workers Union

- (88) The Communication Workers Union ('CWU') places the measures in the context of the wider modernisation efforts of RMG over the past years. CWU welcomes the aid measures but voices concerns about the level of stress put on the workforce by the restructuring process and points to the profound and sustained changes in the general working condition of Royal Mail employees. CWU asks the Commission to confine restructuring to a minimum with a view to limit the adverse effects on the general working conditions. CWU rejects an appraisal under the R&R Guidelines and opines that the Commission should authorise the aid as compensation for a service of general economic interest instead. CWU believes that no own contribution should be required from RMG and advocates a generous appreciation of the aid measures with a view to making the transition process as smooth as possible for RMG's workers.

Comments submitted by the Free and Fair Postal Initiative

- (89) The Free and Fair Postal Initiative ('FFPI'), a pressure group, generally welcomes the State aid measures in favour of RMG and only voices some concern about RMGs return to viability according to the restructuring plan. In light of the current economic climate FFPI questions the sale prospects and bemoans the lack of a comprehensive privatisation plan.
- (90) Furthermore the FFPI is keen to point out that all requirements of the R&R Guidelines must be met, especially as regards the own contribution which FFPI would like to be substantial (50 %) in line with the R&R Guidelines. Furthermore FFPI considers that far reaching compensatory measures should necessarily, include the sale of assets which are not essential to the discharge of the USO and especially guarantees with regards to market access for competitors.
- (91) FFPI furthermore submits that it rejects the application of a legacy cost reasoning pursuant to the *EDF*⁽¹³⁾ and *La Poste*⁽¹⁴⁾ decisions in this case on the grounds of substantial dissimilarities with the facts in this case, especially in respect of the pension systems in France and the United Kingdom.

Comments submitted by Deutsche Post

- (92) Deutsche Post places the aid requirement of RMG within the context of the liberalisation and process of the UK postal market and the consequential requirement for the incumbent ex- monopolist to adapt to the conditions of a competitive postal market and modernise its business practices accordingly. In this context Deutsche Post urges the Commission to ensure a uniform application of the law across all Member States in this regard. Subsequently Deutsche Post rejects the reasoning put forward by the United Kingdom that RMG presented an 'exceptional case' within the meaning of the R&R Guidelines and voices doubts about the applicability of the R&R Guidelines to the case.
- (93) In this context, Deutsche Post also argues on the basis of the judgment of the Court in *Combust*⁽¹⁵⁾ that, in the course of the privatisation of formerly State-owned universal service providers, the public compensation of pension costs — which go beyond the level normally assumed by private competitors — do not constitute aid. Deutsche Post claims that the relief of RMG's pension deficit should escape the prohibition of Art 107 of the Treaty on the grounds that this measure is designed to rectify a structural disadvantage within the meaning of the *Combust* judgment.

⁽¹³⁾ Commission Decision 2005/145/EC of 16 December 2003 on the State aid granted by France to EDF and the electricity and gas industries (OJ L 49, 22.2.2005, p. 9).

⁽¹⁴⁾ See footnote 12.

⁽¹⁵⁾ Case T-157-01 *Danske Busvognmænd v Commission* [2004] ECR II-917.

- (94) Deutsche Post also considers that the Commission would be obliged to take into account that RMG has already received compensation for its pension deficit in the form of higher stamp prices.

Comments submitted by TNT

- (95) TNT observes that the aid should be no more than the smallest amount strictly necessary to rescue RMG from its financial difficulties. At the same time TNT is concerned that RMG could use its new found strength to unduly restrict competition on the UK postal market in a bid to regain control of the market and recoup lost market shares.
- (96) In order to prevent such a move, TNT asks for far reaching measures as a compensation for State aid, including a guarantee of future network access, if possible by way of unbundling, and the end of the VAT exemption to strengthen the evolution of competition in the end to end delivery markets.
- (97) With respect to the proper legal framework, TNT agrees with the United Kingdom that the measures should be assessed as restructuring aid pursuant to the R&R Guidelines and rejects the notion of an analysis under Article 106(2) of the Treaty.

Comments submitted by UPS

- (98) In its statement UPS opines that the proposed aid measures could have severe implications on the postal market and produce effects beyond the markets directly targeted — in the express service parcel markets in the United Kingdom and Europe. In this context UPS raises doubts about the way in which the advantages for RMG have been calculated and the applicability of the R&R Guidelines to this case.
- (99) Furthermore, UPS has doubts about the compatibility of the measures under Article 107(3) of the Treaty and the R&R Guidelines.
- (100) With regard to compensatory measures UPS contends that the required measures must be proportional to the distortions of competition. UPS thereby rejects the notion forwarded by the United Kingdom that the burden of discharging the public service obligation should be taken into account when assessing the measures under the R&R Guidelines. UPS places a particular emphasis on the need to analyse and account for potential spill-over effects into neighbouring markets, should the measures not only strengthen RMG but also its subsidiaries, especially GLS.
- (101) With respect to the amount of aid, UPS emphasises that the amount should be limited to the strict minimum necessary and that a substantial own contribution should be made by RMG. In this context UPS expresses doubts over the presence of exceptional circumstances

which would allow for an own contribution below 50 %, as suggested by the United Kingdom. UPS furthermore believes in case that the Commission should accept the United Kingdom's reasoning in this regard, the own contribution should under no circumstances be lower than 40 % based on the Commission's decision practice in previous decisions.

- (102) With regards to the legacy cost reasoning under Article 107(3) of the Treaty, UPS points out that the measures could not be justified upon the basis of precedent (*La Poste*) or as a matter of principle, but require a comprehensive balancing test in which the positive effects of the measure are balanced against the way in which it distorts competition.

4. COMMENTS FROM THE UK AUTHORITIES

4.1. On the existence of aid and aid beneficiaries

- (103) The United Kingdom accepts that the notified pension relief and debt reduction measures constitute State aid within the meaning of Article 107(1) of the Treaty.
- (104) The United Kingdom maintains that there is no aid involved in the tax treatment of the transfer of net liabilities from RMG to the United Kingdom since the pension liabilities currently in RMG's accounts represent amounts which are as yet unpaid, and they are only tax deductible when payment is actually made. As such, RMG has not claimed tax relief for any of the liabilities in its accounts. According to the United Kingdom, it would be inequitable for RMG to be charged tax on the release of provisions, when it has not received tax relief on those provisions in the first place ⁽¹⁶⁾.
- (105) In response to the Commission's assertion in the opening decision that it is unclear whether POL would benefit from the debt reduction measures, the United Kingdom claims that POL's funding and accounting is ring-fenced from that of RMG. According to the United Kingdom, this is further assured by the fact that the businesses are legally separated.

4.2. On the compatibility of the pension relief as compensation for legacy pension costs under Article 107(3)(c) of the Treaty

- (106) The United Kingdom first of all maintains that there are significant parallels between the present case and the *La Poste* case. Although the United Kingdom acknowledges that the UK pension environment is different to that of France, and there is no UK specific comparator to RMG's scheme, this does not mean that the *La Poste* precedent

⁽¹⁶⁾ In reference to the Commission's decision in the *British Energy* case (Case No C52/03, Decision of 22 September 2004 (OJ L 142, 6.6.2005, p. 26)).

cannot be applied. The United Kingdom strongly believes that there are sufficient similarities between the two cases to merit a full application of the precedent, because both cases involve material economic risk and uncapped liabilities and because both cases involved inflexible schemes.

(107) Furthermore, the United Kingdom considers that, whilst there are parallels between the cases, the proposed solution for RMG is not as extensive or material as that for La Poste because the United Kingdom is only relieving RMG of its past liabilities and because the pension liabilities assumed by the United Kingdom are accompanied by the majority of the RMPP pension assets, such that the aid concerned is limited to the deficit rather than the amount of the liabilities.

(108) The United Kingdom also contends that the scale of RMG's pension liabilities is unusual due to a combination of factors that include the scale of RMG's employment costs, the indexation and early retirement arrangements, and the enhanced redundancy terms imposed by collective agreements with the unions. The United Kingdom submits that these liabilities can be regarded as 'stranded costs' within the meaning of previous Commission decisions on pension liabilities in the energy sector. This means that the pension deficit should be regarded as an irreversible (social) investment made before the liberalisation of the sector which turned unprofitable under the new conditions of sector liberalisation which could not be foreseen at the time when the decision was taken. The United Kingdom bases its stranded cost reasoning on the following factors:

(i) the shape and scale of the liabilities are directly linked to RMG's civil service and monopoly legacy;

(ii) the RMPP was less problematic to manage when it was in a monopoly environment; and

(iii) the generous entitlements granted to members, combined with the sheer number of active, deferred and retired members (which was unavoidable given RMG's USO), represent additional pension costs that RMG's competitors do not have to bear.

(109) During the course of the investigation, the United Kingdom has also provided further information on the abnormal nature of RMG's pension liabilities, which would be relieved as part of the UK Government's proposals. It further developed the initial analysis carried out by the expert Towers Watson who examined the level of abnormality inherent in the RMPP.

(110) This additional analysis compared the RMPP to the average private sector defined benefit scheme and according to the United Kingdom demonstrates that approximately GBP 6 900 million of the RMPP's pension liabilities relate to abnormally high costs when compared to the average scheme.

(111) This exceeds the level of the RMPP's pension deficit of GBP 4 500 million on an accounting basis at March 2011, which, according to the United Kingdom, suggests that all of RMPP's pension deficit could be considered abnormal.

4.3. On the compatibility of the debt reduction measures under the R&R Guidelines

(112) The United Kingdom first of all maintains that the Commission should apply the R&R Guidelines in such a way as to avoid a negative effect on the availability of the universal service in the United Kingdom. Consequently, the United Kingdom points out that RMG is indispensable to the availability of the universal service and argues that the difficulties of the firm endanger not only the survival of RMG as an undertaking but also the availability of the universal service in the United Kingdom. The United Kingdom therefore asks the Commission to take the legislative intent of Article 106(2) of the Treaty into account when assessing the measures under the R&R Guidelines. In support of its argument the United Kingdom points to case-law from the Court of Justice according to which the rules of the Treaty should be applied in consideration of the effective discharge and undistorted availability of the universal service in cases where an undertakings ability to deliver a core service is threatened, and in particular where the survival of the undertaking delivering this service is threatened ⁽¹⁷⁾.

(113) Hereby, the United Kingdom submits that the compatibility criteria under the R&R Guidelines should be qualified to the extent required to allow the measures to be implemented as contemplated in the restructuring plan in order to ensure that the UK Government's ability to meet its obligations under the Postal Services Directive is not jeopardised.

(114) Furthermore, the United Kingdom maintains that RMG is to be considered as a firm in difficulty within the meaning of the R&R Guidelines i.e. a firm that — bar State intervention — would be unable to obtain the necessary capital to stem losses which endanger its very survival from either its shareholders or market sources. In this respect the United Kingdom points to the severe financial difficulties of the firm caused by diminishing revenues, the considerable size of the pension deficit which causes a deeply troublesome balance sheet, and projected shortages in its cash flow positions.

⁽¹⁷⁾ *Commission v France*, C-159/94, ECR 1997, I-5815, paragraph 59.

- (115) In its submissions, the United Kingdom provided much more information on the restructuring plan. In particular it presented:
- (i) a more detailed description of the operational and industrial measures which RMG is undertaking to restructure its business and in respect of which the notified UK restructuring measures would also provide financial support;
 - (ii) the United Kingdom's clarification about the duration of the restructuring plan;
 - (iii) reassurance that, on the basis of the restructuring plan, the future viability of RMG is ensured, even in a reasonable downside scenario;
 - (iv) a clarification of the full extent of own contribution which RMG is providing towards its restructuring.
- (116) As regards the length of the restructuring plan, the United Kingdom contends that the Commission should take into account the pace at which it is possible to roll out the scale of operational restructuring required having regard to the scale of RMG's operations, its industrial relations environment and its obligation to continue providing the universal service to specified quality standards throughout the process.
- (117) As regards the restoration of the long-term viability and the deliverability of the restructuring plan, according to the United Kingdom it has been sufficiently demonstrated in the restructuring plan that RMG will return to viability by the end of the restructuring period in accordance with the R&R Guidelines.
- (118) The United Kingdom believes, based on the assessment of its financial advisors, that the delivery of the restructuring plan will restore RMG to viability by the end of financial year 2014/15 (that is to say by the end of March 2015). In practice this means that after the implementation of the pension relief and the completion of the restructuring measures which are relevant for State aid purposes, the United Kingdom forecasts that RMG should be in a position to bear all its costs, including depreciation and financial charges. Moreover the expected return on capital would be enough to enable the restructured RMG to compete in the market place on its own merits.
- (119) As regards the own contribution requirement, the view of the United Kingdom remains that the particular circumstances of this case justify a flexible approach to own contribution.
- (120) Nevertheless, the United Kingdom has clarified how RMG is also using its own resources to fund the costs associated with the restructuring activity set out in section 2.5.
- (121) The United Kingdom considers that any distortion of competition arising from the notified measures will be minimal. It also reiterates that RMG's subsidiary GLS is not directly impacted by the measures and there will therefore be no impact on competition from the measures in the European parcels and express markets in which GLS operates.
- (122) As regards compensatory measures, the United Kingdom maintains that the Commission should consider the extent to which this principle should be applied in order to avoid any action which would directly or indirectly obstruct RMG in its performance of the universal service.
- #### 4.4. On the comments from third parties
- (123) In response to the third party submissions the United Kingdom addresses the issues at hand thematically.
- (124) In response to the fears of potential spill-over effects on neighbouring markets via RMG subsidiary GLS the United Kingdom elaborates that GLS is not benefitting from the proposed aid measures due to the fact that GLS employees are neither currently nor have ever been part of the RMPP, and that its pension system has no connection whatsoever to the RMPP, making spill over effects impossible. Furthermore the United Kingdom stresses that the measures, however implemented will not have any effect any cash position of GLS.
- (125) In response to comments which question the level of debt deriving from the statutory pension contribution, the United Kingdom asserts that the size of the deficit was directly linked to the legacy costs incurred and that RMG should therefore be relieved of the deficit in its entirety.
- (126) With regards to the general compatibility of the measures with the R&R Guidelines the United Kingdom considers that the proposed measures fit within the scope of the R&R Guidelines. Furthermore the United Kingdom maintains its position expressed in the notification that the Commission should undertake its assessment of the proposed measures under Article 107(3) of the Treaty in the spirit of Article 106(2) of the Treaty.
- (127) In response to comments questioning the long term viability of RMG after the aid is granted, the United Kingdom rejects the concerns of the interested parties and submits that on the basis of the independent advice from its economic advisers, it firmly believed that RMG will return to viability and prosper in the long-term.

- (128) The United Kingdom rejects comments alleging that the amount of aid was not limited to the strict minimum necessary and in essence aimed at making RMG more attractive to potential investors with a view to realise a successful privatisation in the future. It explains that the measures were specifically designed to spend only the strict minimum necessary to secure the future of the universal service and restore RMG to viability to that end.
- (129) The United Kingdom furthermore rejects claims that the measures would lead to an undue distortion of competition since the benefits to consumers flowing from RMG's survival would significantly outweigh the limited degree of market distortion.
- (130) In response to the comments on the required own contribution, the United Kingdom rejects arguments forwarded by interested parties who question the existence of exceptional circumstances which would justify a deviation from the 50 % own contribution rule prescribed in the R&R Guidelines. The UK maintains its position voiced in the notification that the Commission should take account of RMG's public sector heritage and its public service burden when determining appropriate level of own contribution.
- (131) Furthermore the United Kingdom points out that the separation of POL from RMG already puts RMG in a position where it will lose businesses opportunities in the development of related fields such as personal banking and other usage of POL's infrastructure.
- (132) The United Kingdom also firmly rejects calls to divest its express parcel operator GLS as a compensatory measure as suggested in some of the third party comments. The United Kingdom clarifies that it considers GLS to be a vital part of RMG's overall strategy and that it regards the firm as crucial to the attainment of long term viability. In this context the United Kingdom is keen to stress that diversification of a firms activities into more profitable areas is expressly recognised by the R&R Guidelines (paragraph 17) as a vital part of the recovery of a struggling enterprise. Furthermore the United Kingdom believes that a divestiture of GLS would threaten the viability of RMG in such a way that it would endanger not only the restructuring plan but also the provision of the universal service in the United Kingdom.
- (133) The United Kingdom emphasises its position with regards to the applicability of the legacy cost reasoning along the lines of the *La Poste, EDF* ⁽¹⁸⁾ and *OTE* ⁽¹⁹⁾ case-law to the present case. The United Kingdom maintains its position that, despite of the technical differences between the United Kingdom and French pension systems a sufficient logical analogy remained which allowed for a legacy cost reasoning to be applied to this case.
- (134) In response to comments which recommended assessing the measures under Article 106(2) of the Treaty rather than the R&R Guidelines pursuant to Article 107 of the Treaty, the United Kingdom again stresses its position that such a move would not be the appropriate step for RMG under the present circumstances. Nevertheless the United Kingdom believes that the Commission should bear Article 106(2) of the Treaty in mind in its application of the R&R Guidelines.
- (135) The United Kingdom also remarks on Deutsche Post's submission calling on the Commission to discount any proceeds already generated in favour of RMG with respect to its pension liabilities in the form of higher prices in price regulated areas from the pension relief. The United Kingdom seeks to refute this line of reasoning and expresses a belief that there is effectively no double counting between regulated prices and the pension deficit due to the methodology and regulatory arrangements employed by RMG and the past and present regulators which ensured that RMG would not receive funds for the same purpose twice.
- (136) The United Kingdom rejects Deutsche Post's submission that the assessment of State aid to former postal monopolies should be undertaken on an identical set of criteria to ensure a uniform application of Union law across the Member States, and argues instead that the Commission should be free to assess each case on its particular circumstances taking account of the particularities of each individual case.
- (137) Finally the United Kingdom comments on the many remarks and suggestions made by some third parties which the United Kingdom believes to fall within the scope of regulatory activity rather than this case. With regards to those issues, such as structural separation, transparency, review and cessation of certain activities, the United Kingdom is keen to stress that such measures are of a regulatory nature and should be raised in the appropriate forum with the national regulator rather than the context of State aid proceedings. In addition, the United Kingdom notes that the extent of the VAT exemption for postal services in the United Kingdom has already been considered by the Court of Justice of the European Union ⁽²⁰⁾ and is expected to be further reviewed by the UK tax authorities.
- 5. ASSESSMENT**
- 5.1. Existence of aid under Article 107(1) of the Treaty and potential beneficiaries**
- (138) Article 107(1) of the Treaty provides that 'any aid granted by a Member State or through State resources

⁽¹⁸⁾ See footnotes 12 and 13.

⁽¹⁹⁾ Commission Decision 2008/722/EC of 10 May 2007 on State aid C 2/06 (ex N 405/05) which Greece is planning to implement for the early voluntary retirement scheme of OTE (OJ L 243, 11.9.2008, p. 7).

⁽²⁰⁾ Case C-357/07, *TNT Post UK* [2009] ECR I-3025.

in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, insofar as it affects trade between Member States, be incompatible with the internal market'. In determining whether a measure constitutes State aid within the meaning of Article 107(1) of the Treaty, the Commission has to apply the following criteria: the measure must be imputed to the State and use State resources, it must confer an advantage on certain undertakings or certain sectors which distorts competition and it must affect trade between Member States.

5.1.1. State resources

- (139) Article 107(1) of the Treaty is concerned with aid granted by a Member State or through State resources. In other words, the measures in question must appear as the result of behaviour attributable to the State or must involve State resources.
- (140) As regards the pension relief, the United Kingdom's taking over of certain of RMG's accrued pensions liabilities is financed by State resources and is imputable to the State: the United Kingdom will set up a new statutory pension scheme which will be a liability of the UK Government and to which certain part of the accrued liabilities held by the RMPP will be transferred.
- (141) Concerning the debt reduction measures, those are clearly financed from State resources and imputable to the State: the United Kingdom will write off the debt from the outstanding loans that RMG currently owes to it.

5.1.2. Selective advantage

- (142) In order to ascertain whether the measures under scrutiny contain elements of State aid, it needs to be determined whether they confer an economic advantage on RMG in that they allow it to avoid costs that would normally have had to be borne by its own financial resources and have thus prevented market forces from producing their normal effect ⁽²¹⁾.
- (143) In this respect, it should also be borne in mind that several of the Court of Justice's rulings contradict the theory that compensation for a structural disadvantage exempts a measure from being qualified as aid. The Court of Justice has constantly held that the existence of aid is to be assessed in relation to the effects and

not in relation to the causes or objectives of State intervention ⁽²²⁾. The Court of Justice has also held that the concept of aid includes advantages granted by public authorities which, in various forms, reduce the charges which are normally included in the budget of an undertaking ⁽²³⁾. The Court of Justice has also clearly stated that the costs linked to remuneration of employees naturally place a burden on the budgets of undertakings, irrespective of whether or not those costs stem from legal obligations or collective agreements ⁽²⁴⁾. In that context, the Court of Justice has considered that the fact that State measures aim to compensate for additional costs cannot constitute grounds for disqualifying them from the definition of aid ⁽²⁵⁾.

- (144) The Commission takes the view that the liabilities a company bears under employment legislation or collective agreements with trade unions, such as pension costs, are part of the normal costs of a business which a firm has to meet from its own resources ⁽²⁶⁾. Those costs are inherent to the economic activity of the undertaking ⁽²⁷⁾. It does not matter in that regard whether the undertaking bears the pension costs by directly financing the pensions of its former staff or by paying contributions to a pension fund, which in turn uses the collected contributions to finance the pensions of the companies' employees. The decisive element is that, in one way or another, undertakings bear the full costs for pensions.
- (145) As regards the pension relief, the Commission observes that it will provide a financial advantage to RMG, given the effects on RMG of the deficit in the RMPP, and the obligations RMG has towards the RMPP under UK pensions law. These obligations include the payment of contributions, in particular to address the deficit, and are reflected in the fact that the deficit is recorded on RMG's balance sheet as required by rule 19 of the International Accounting Standards (hereinafter referred to as IAS). Therefore, the Commission finds that the taking over of certain accrued pensions liabilities by the United Kingdom will relieve RMG of financial obligations that

⁽²¹⁾ E.g. Case C-301/87 *France v Commission* [1990] ECR I-307, paragraph 41.

⁽²²⁾ Case 173/73 *Italy v Commission* [1974] ECR 709, paragraph 13; Case 310/85 *Deufil v Commission* [1987] ECR 901, paragraph 8; Case C-241/94 *France v Commission* ECR I-4551, paragraph 20.

⁽²³⁾ C-387/92 *Banco Exterior* [1994] ECR I-877, paragraph 13; aforementioned judgment in Case C-241/94, paragraph 34.

⁽²⁴⁾ Case C-5/01 *Belgium v Commission* [2002] ECR I-1191, paragraph 39.

⁽²⁵⁾ Case 30/59 *Gezamenlijke Steenkolenmijnen in Limburg v High Authority* [1961] ECR 3, paragraphs 29 and 30; aforementioned judgment in Case C-173/73, paragraphs 12 and 13; aforementioned judgment in Case C-241/94, paragraphs 29 and 35; Case C-251/97 *France v Commission* [1999] ECR I-6639, paragraphs 40, 46 and 47; and Joined Cases C-71/09 P, C-73/09 P and C-76/09 P *Comitato Venezia vuole vivere v Commission* [2011] ECR I-0000, paragraphs 90 to 96.

⁽²⁶⁾ *La Poste* decision (see footnote 12), recital 141, and R&R Guidelines (see footnote 11), recital 63.

⁽²⁷⁾ Case T-20/03 *Kahla v Commission* [2008] ECR II-2305, paragraphs 194 to 197. See also EFTA Court judgment of 22 August 2011 in Case E-14/10, *Konkurrenten.no AS v EFTA Surveillance Authority*, n.y.p., paragraph 86.

the undertaking would normally have had to bear and thus prevent market forces from producing their normal effect.

(146) Furthermore, the Commission observes that the pension relief not only confers an advantage on RMG, but also on its subsidiary POL as it relieves the latter of the obligation under the secondment arrangements with RMG to contribute to the pension deficit. GLS on the other hand is not considered to be a beneficiary of the pension relief in view of the fact that its employees are not part of the RMPP, and its pension system has no connection whatsoever to the RMPP.

(147) The Commission also notes that arguments intended to demonstrate that the pension costs borne by RMG are higher than those of its competitors are irrelevant for the purpose of finding whether the pension relief constitutes a State aid. However, their comparative level can be taken into consideration in the assessment of the compatibility of the pension relief.

(148) The Commission finds therefore that the pension relief provides a selective advantage to RMG and POL within the meaning of Article 107(1) of the Treaty.

(149) As regards the non-taxation of the release of the provisions made in the accounts as a result of the pension deficit, the Commission accepts the argument of the United Kingdom that this is justified because the building up of the provisions could not be deducted from tax. The pension liabilities currently in RMG's accounts represent amounts which are as yet unpaid under the RMPP and under UK tax legislation, tax relief is only available for pension contributions where and when those pension contributions are paid. As such, RMG has not claimed tax relief for any liabilities reflected in its accounts to date. Following the transfer of those liabilities to the new scheme, RMG will no longer be responsible for funding the RMPP and therefore will not claim any tax relief. As RMG will not be able to claim tax relief in respect of the related pension obligations which are currently reflected in its accounts, equally, it would not expect to suffer tax on the reversal of the accounts provisioning. Therefore, the Commission finds that the tax treatment of the pension relief does not involve a selective advantage for RMG and does therefore not constitute State aid.

(150) As regards the assessment whether the debt reduction measures provide a selective advantage, the Commission assesses this type of measures under the private creditor

test⁽²⁸⁾. This test asks whether a private creditor in the same situation would have acted the same way in order to maximise its chances to recover its credit. The Commission observes first that the United Kingdom has not claimed that it is acting in line with the behaviour of a private creditor in relation to the debt reduction measures and therefore it has not provided the Commission with any information that would enable it to apply such test. Second, the Commission is of the view that a private creditor would not have agreed to a reduction of his credit without demanding any further covenants or at least agreements on a rescheduling of the reminder of its credit with a view to maximise his chances of debt repayment after a successful restructuring. Therefore, the Commission finds that the debt reduction measures in the restructuring plan provide a selective advantage to RMG within the meaning of Article 107(1) of the Treaty.

5.1.3. Distortion of competition and affectation of intra-Union trade

(151) When aid granted by a Member State strengthens the position of an undertaking compared with other undertakings competing in intra-Union trade, the latter must be regarded as affected by that aid. In accordance with settled case-law⁽²⁹⁾, for a measure to distort competition and affect trade between Member States it is sufficient that the recipient of the aid competes with other undertakings on markets open to competition.

(152) The UK postal market was fully opened to competition in 2006, while already being open to competition before that date in certain market segments (for example delivery of parcels and delivery of bulk mail in case of postings above 4 000 items and in general any postal service that was not reserved to a specific undertaking). In this context, it is sufficient to point out that RMG is competing with companies established in other Member States (such as Post NL or Deutsche Post) and is itself active on markets outside the United Kingdom through its express parcel subsidiary GLS. Therefore, the measures in question are liable to distort competition and affect trade between Member States.

5.1.4. Conclusion as regards the existence of aid

(153) In light of the above, the Commission concludes that both the pension relief as well as the debt reduction measures in the restructuring plan constitute State aid within the meaning of Article 107(1) of the Treaty.

⁽²⁸⁾ Case-342/96, *Spain v Commission* (Fogasa) [1999] ECR I-2459, par.31-34; Case-256/97, *Déménagements-Manutention Transport (DMT)*, [1999] ECR I-3913, par.24; Case T-152/99, *Hijos de Andres de Molina SA (HAMSA) v Commission* [2002] ECR II-3049, par.166.

⁽²⁹⁾ Case T-214/95, *Het Vlaamse Gewest v Commission* [1998] ECR II-717.

5.2. Compatibility of the aid

(154) As the derogations provided for in Article 107(2) of the Treaty and Article 107(3)(a)(b) of the Treaty do clearly not apply, the Commission will assess to which extent the pension relief and the debt reduction measure can be found compatible with the internal market under Article 107(3)(c) of the Treaty.

(155) The United Kingdom has not invoked Article 106(2) of the Treaty as such as justification for the compatibility of the aid granted to RMG.

5.2.1. *Compatibility of the pension relief as compensation for legacy pension costs under Article 107(3)(c) of the Treaty*

(156) The Commission will assess whether the pension relief can be declared compatible pursuant to Article 107(3)(c) of the Treaty, which provides that aid to facilitate the development of certain economic activities or of certain economic areas may be declared compatible with the internal market where such aid does not adversely affect trading conditions to an extent contrary to the common interest.

(157) According to the case-law, the Commission may declare State aid compatible with the internal market if the aid contributes to the attainment of an objective of common interest⁽³⁰⁾, is necessary for the attainment of that objective⁽³¹⁾, and does not adversely affect trading conditions to an extent contrary to the common interest (proportionality).

(158) Postal services contribute to social, economic and territorial cohesion in the Union. The gradual opening of postal services to competition, which started at Union level in 1998, has brought about increased quality, greater efficiency and better responsiveness to users. Market opening has allowed the establishment of an internal market for postal services. It therefore contributes to the objective of the establishment of the internal market set out in Article 3(3) of the Treaty on European Union.

(159) However, during the process of liberalisation, the former incumbent may suffer from a competitive disadvantage because he is burdened with 'legacy costs', that is to say costs which come from commitments entered into prior

to the beginning of market opening and which can no longer be honoured under the same conditions in a competitive market environment because the historic operator is no longer able to pass on the corresponding costs to consumers.

(160) The Commission has recognised in its decision-making practice that the gradual transition from a situation of largely restricted competition to one of genuine competition at Union level must take place under acceptable economic conditions⁽³²⁾. Therefore, it has accepted in a number of decisions that Member States grant State aid to relieve the historic operator of a part of its 'legacy' pension liabilities⁽³³⁾.

(161) In its Decision regarding the State aid granted to EDF⁽³⁴⁾, the Commission declared compatible with the common market State aid that relieved EDF of specific pension liabilities which exceeded those resulting from the general retirement arrangements and which had been defined during the monopoly period. The Commission stated that these liabilities were not dissimilar in nature to that of stranded costs in the electricity sector⁽³⁵⁾ and that aid to compensate excessive pension costs would therefore be treated in the same way as compensation for stranded costs. Therefore, the Commission declared that the same approach would be applied in the analyses of similar cases in the future.

(162) In its Decision of 10 October 2007 on the State aid granted to La Poste⁽³⁶⁾, the Commission declared compatible with the common market State aid that relieved La Poste of specific pension liabilities which exceeded those resulting from the ordinary pension arrangements and which had been defined during the monopoly period. These liabilities arose from, first, the higher pension contributions payable in respect of employees with civil servant status and, secondly, the requirement to ensure the equilibrium of its retirement scheme for these employees.

⁽³⁰⁾ Case T-162/06, *Kronoply v Commission* [2009] ECR II-1, especially paragraphs 65, 66, 74 and 75.

⁽³¹⁾ Case T-187/99, *Agrana Zucker und Stärke v Commission* [2001] ECR II-1587, paragraph 74; Case T-126/99, *Graphischer Maschinenbau v Commission* [2002] ECR II-2427, paragraphs 41 to 43; Case C-390/06, *Nuova Agricast* [2008] ECR I-2577, paragraphs 68 and 69.

⁽³²⁾ See Commission Communication relating to the methodology for analysing State aid linked to stranded costs, Commission letter SG (2001) D/290869 of 6.8.2001.

⁽³³⁾ Decision 2005/145/EC on the State aid granted by France to EDF and the electricity and gas industries (see footnote 13); Decision 2008/204/EC on the State aid implemented by France in connection with the reform of the arrangements for financing the retirement pensions of civil servants working for La Poste (see footnote 12); Commission Decision 2009/945/EC concerning the reform of the method by which the RATP pension scheme is financed (State aid C 42/07 (ex N 428/06)) which France is planning to implement in respect of RATP; Commission Decision of 20 December 2011 in case C 25/2008 concerning the Réforme du mode de financement des retraites des fonctionnaires de l'Etat rattachés à France Télécom, not yet published.

⁽³⁴⁾ See footnote 13.

⁽³⁵⁾ See also Commission Communication relating to the methodology for analysing State aid linked to stranded costs, adopted by the Commission on 26 July 2001.

⁽³⁶⁾ See footnote 12.

- (163) The Commission noted that the measures were limited to what was strictly necessary to establish a level playing field for social security contributions and ultimately would therefore favour the development of competition and further liberalisation of the postal sector. It further noted, by way of drawing a parallel with the *EDF* decision, that *La Poste* no longer recruited civil servants and that the future pensions payments of *La Poste* placed it in a comparable situation vis-à-vis its competitors as regards social security contributions.
- (164) In its Decision of 25 January 2012 concerning subsidies for the financing of the civil servants' pension costs at *Deutsche Post* ⁽³⁷⁾, the Commission verified, in line with its *La Poste* Decision, whether the social security contributions borne by *Deutsche Post* were equivalent to those of private competitors. The Commission found that, in addition to pension subsidies, *Deutsche Post* has also benefitted from dedicated stamp price increases to finance the civil servants' pension costs. Taking account of this extra relief, *Deutsche Post* had effectively borne significantly lower social contributions than private competitors in certain market segments. Accordingly the Commission declared the pension subsidies as partly incompatible with the internal market and ordered Germany to recover the incompatible share of the pension subsidies.
- (165) In its Decision on the same day in *BPost* ⁽³⁸⁾, the Commission found the State aid granted to *BPost* for the relief of civil servants' pension liabilities as compatible with the internal market under Article 107(3)(c) of the Treaty since it only relieved *BPost* of legacy pension costs without placing the company in a more favourable position than its competitors as regards the social security contributions. The Commission verified that the social security contributions borne by *Belgian Post* were equivalent to those of private competitors.
- (166) There are certain parallels between the case on *RMG* and previous case-law.
- (167) First of all, all cases involve material economic risk and involve uncapped liabilities: *RMG* bears the economic risk of a pension scheme which stems from *RMG*'s public monopoly legacy. The other postal incumbents bore a similar economic risk prior to being relieved of their liabilities, and were similarly disadvantaged when compared to their competitors. All cases concern aid beneficiaries in equivalent positions because their pension arrangements differed very significantly from the competitors' pension arrangements.
- (168) Second of all, as with the previous cases, the Commission considers that in the absence of any State intervention to relieve *RMG* of at least part of the pension liabilities, *RMG* would not be able to compete on its merits with its competitors. After all, leaving *RMG* with the pension deficit would lead to its bankruptcy. As mentioned in recital 29, *RMG* has shown at the end of the 2010/2011 financial year negative operating assets on its balance sheet. Even after a successful implementation of the restructuring plan *RMG* would remain with net liabilities of at least GBP 2 000 million without a relief of the pension deficit.
- (169) However, there are some factors which distinguish the previous cases from this case.
- (170) In the first place, the UK pension arrangements differ significantly from those in other Member States. Most occupational pension schemes are 'contracted out' of the State pension arrangements known as the State Earnings Related Pension Scheme. Most large employers run their own pension schemes. Under UK pension law, those schemes must provide a pension entitlement which meets certain standards, and employers have certain obligations to ensure that schemes are adequately funded. Under current accounting standards (IAS), employers must record deficits on such pension schemes on their balance sheets.
- (171) In this respect, the *RMPP* is in principle similar to pension funds of private competitors. The only difference between *RMG* and competitors lies in the fact that the level of pension liabilities — and thus the deficit of the *RMPP* — has arisen from terms and conditions which were agreed during the monopoly period and in line with the status of civil servants.
- (172) Furthermore, the terms and levels of other social costs (for example contributions to the State pension arrangement, contributions to health and unemployment insurances) do not differ between *RMG*'s employees and private competitors' employees.
- (173) Finally, *RMG* will remain liable for all newly accrued liabilities in the future as well as for new liabilities from an increase in the previously-acrued benefits of current employees as a result of future above-inflation wage increases. This means that *RMG* will continue to

⁽³⁷⁾ N.y.p., see Press release IP/12/45 and MEMO/12/37 of 25 January 2012.

⁽³⁸⁾ N.y.p., see Press release IP/12/45 and MEMO/12/38 of 25 January 2012.

bear the same level of pension costs for newly accrued pension rights. The notified pension relief will therefore only reduce historic pension liabilities up to the date of the pension relief on 1 April 2012, while RMG remains fully responsible for any deficit that may arise from newly accrued pension rights after the pension relief on 1 April 2012.

(174) These differences justify an adjustment of the approach followed in previous cases to assess the compatibility of the measure at issue and to account for the specificities of the UK pension arrangements. In the previous cases, the compulsory social security contributions (for example the contribution to the social insurances for pension, health, and unemployment) were used as a benchmark but this is not appropriate in the current case.

(175) First, as RMG bears — apart from the pension costs — the same level of costs as competitors for the other social insurances (for example the financing terms for health and unemployment insurances do not differ from those of competitors), the benchmarking has to be carried out with regard to the funding of pension's liabilities. It has to be ensured that RMG is placed in the same position as competitors in respect of their obligations as regards the financing of pension funds.

(176) Second, in the previous cases, the Commission approved a level of aid such that the postal incumbent's future social costs were capped at the competitors' social contribution rates. The United Kingdom reform does not go that far but leaves RMG the full financial responsibility for any deficit that results from the newly accrued pension rights. Therefore, the comparison has to be done on the basis of RMG's accrued pension liabilities at the date of the pension relief on 1 April 2012.

(177) Third, it is not straightforward to find a single benchmark for the level of competitors' pension costs because the pension benefits offered by the pension funds differ from one company to another. Each pension fund has individual arrangements with the sponsoring companies. At most, the comparison can be done based on an average of comparable pension funds.

(178) Therefore, the Commission will assess whether RMG will, as a result of the pension relief, be placed in a comparable situation vis-à-vis its competitors and other UK companies as regards the liability for accrued pension deficits.

(179) With regard to Deutsche Post's comment that the assessment should take into account the extent to which pension costs were passed on through increased regulated stamp prices, the Commission has reviewed the UK postal regulator's pricing decisions. The Commission finds that in the RMG case pension costs were evenly apportioned between the different business segments of RMG according to generally accepted cost allocation principles. This means that both the price-regulated as well as the other services in competition have carried an appropriate share of the pension deficit. It is therefore not true that in the RMG case the regulated prices financed a disproportionate share of pension costs for the benefit of the non-price regulated business segments. The UK postal regulator has ensured that all of RMG's business segments have equally and proportionally contributed to the financing of the RMPP's deficit and have not been placed in a better position than competitors.

(180) The Commission will first assess the United Kingdom's contention that the current deficit of the RMPP can be fully relieved because the amount of liabilities which are due to more generous entitlements that the RMPP offered to its members exceeds the current deficit.

(181) The United Kingdom has submitted a study to support its assertion that the pension deficit has been caused by abnormally high pension liabilities. This study estimates that the level of abnormal liabilities of the Royal Mail scheme is GBP 12,7 billion when compared to the liabilities that would result from a pension fund that offers pension benefits in line with the statutory minimum. An amount of GBP 6,9 billion of abnormal liabilities results when compared to the UK average pension fund's liabilities. As, in both cases, those liabilities would be higher than the current deficit of GBP 4,5 billion, the United Kingdom claims that a total relief of the pension deficit is justified.

(182) First, the Commission refutes the comparison to the statutory minimum because the submitted data on the average UK pension schemes clearly shows that the majority of UK pension schemes offer benefits that go significantly beyond the statutory minimum.

(183) Second, the Commission considers that the provided comparison to the average pension schemes must be critically reviewed because the different elements of the comparison show different degrees of quality and reliability.

(billion GBP)		
		Costs relative to average pension scheme
1	RMPP's retirement age of 60 compared to average retirement age of 63,5	3,5
2	Redundancy benefits	0,5
3	Deferred pension revaluation for employees who left service before 1991	1,1
4	Increases to paid-out pensions relating to pre-1997 service	1,9
	TOTAL	6,9

of GBP 1,9 billion depend sensitively on the assumptions about the future behaviour of the private sector schemes and are therefore the least robust estimate out of the four items of legacy costs.

(184) Compared to RMPP's retirement age of 60, the average retirement age was 63,5 across United Kingdom private sector schemes over the period 1990 to 2010. The difference in pension costs of GBP 3,5 billion is calculated based on reliable data.

(185) The redundancy benefits of GBP 0,5 billion under the RMPP are an unusual feature for private sector schemes and are identified as pension costs that go beyond those of general pension arrangements.

(186) For members of UK pension schemes who left active service prior to 1991, pension schemes are not required to provide inflationary increases on all their benefits in the period between leaving employment and retiring. However, the RMPP does provide inflationary increases on all benefits for such members. The United Kingdom was not able to provide exact numbers of private sector schemes that also offer deferred pension revaluation for pre-1991 leavers but assures the Commission that a clear majority of schemes do not provide such revaluation. In the calculation of the abnormal liabilities of GBP 1,1 billion, it is assumed without sufficient justification that 75 % of all private sector schemes would not offer such additional benefits.

(187) Contrary to the RMPP, pensions accrued prior to 1997 are generally not required to increase once retirement benefits have started to be paid to the respective member of the scheme. However, 36 % of private sector schemes guarantee increases in line with inflation as does the RMPP. The other private sector schemes do not offer guaranteed increases in the same magnitude but it was common practice in the past that a majority of those schemes decided at their own discretion increases that came close to the guaranteed increases. The United Kingdom's expert doubts that this practice will continue in the future because also private schemes are now in deficit and may decide to cut back on the discretionary increases. The calculated legacy costs

(188) As the United Kingdom itself admits, an analysis of legacy cost compared to an average benchmark is necessarily characterised by a certain margin of approximation given the diversity of UK pension schemes and the lack of detailed benchmarking data stretching back 20-30 years. While the United Kingdom considers that the estimates of the four items are considered reasonable based on their expert's experience, the United Kingdom notes nevertheless that the degree of confidence and level of external supporting data does vary by item.

(189) The Commission considers that the estimates of legacy costs concerning the retirement age and the redundancy benefits are reliable because they are calculated based on objective data. Consequently, the Commission notes as an intermediate result of its assessment that the provided data by the United Kingdom on the abnormality of the pension liabilities would provide sufficient evidence to justify a (partial) relief from the pension deficit in so far as the aid was limited to the legacy costs stemming from these two items.

(190) However, concerning the other items, the magnitude of abnormality depends sensitively on the assumptions made by the expert. Although the Commission recognises that the RMPP offered more generous benefits than average private sector schemes, it is difficult to exactly quantify them.

(191) The Commission therefore concludes that although the submitted expert study is based on reasonable assumptions as regards abnormality resulting from early retirement age and redundancy benefits, it suffers from a lack of (historical) data on the other sources of abnormality and can therefore not be considered reliable enough to justify a complete relief of RMPP's pension deficit.

(192) Moreover, the Commission is of the opinion that a total relief of the pension deficit would place RMG in a better position vis-à-vis its competitors and other UK companies as regards its pension liabilities. Indeed, when looking at the pension deficits that the FTSE 100 companies⁽³⁹⁾ show on their balance sheets, the vast majority of those companies with a comparable profile to RMG, currently do carry pension deficits due to the rising life expectancy of the pension schemes' members and the adverse conditions on the stock markets.

⁽³⁹⁾ The FTSE 100 Index is a share index of the 100 most highly capitalised UK companies listed on the London Stock Exchange.

- (193) In order to overcome these difficulties in assessing the compatibility of the aid at issue, the Commission has looked at the average pension deficits of companies with a profile similar to that of RMG.
- (194) The United Kingdom puts forward that the ratio of pension deficit to EBITDA (= Earnings before Interest, Tax, Depreciation, and Amortisation) provides a measure of the relative burden of the pension liabilities and a company's ability to fund such liabilities. The United Kingdom submitted the latest available accounting data from 2011 on the pension deficits and EBITDAs of the FTSE 100 companies. The Commission considers that on average, the FTSE 100 companies show a pension deficit that amounts to [16 to 23 %] of the EBITDA.
- (195) In contrast, RMG's pension deficit is significantly higher than its EBITDA — for example measured in relation to its 2011 EBITDA — RMG's pension deficit amounts to more than 12 times its EBITDA. As the latter business is highly labour intensive, RMG is particularly exposed to the increased pension deficits from the defined-benefit schemes that RMG entered into in the pre-liberalisation period. Compared to other companies of a similar profile, RMG is therefore in a worse financial situation in respect of its ability to cover the pension deficits from on-going revenues.
- (196) The Commission considers that the ratio of pension deficit to EBITDA provides a reasonable benchmark for the pension deficit that is generally assumed by UK companies with a comparable profile to RMG. Aid granted to relieve RMG of abnormal pension liabilities can therefore be considered as compatible insofar as RMG carries after the grant of the aid a liability on its balance sheet that is comparable to the pension deficit that a UK company of a similar size generally assumes on its balance sheet. Using as benchmark group the FTSE 100 companies, which show an average liability for pension deficits of [16 to 23 %] of their EBITDA, RMG should also retain a liability for a pension deficit that equals [16 to 23 %] of its EBITDA. This way, the pension relief will be limited to those pension costs that comparable private sector companies have generally not assumed.
- (197) The United Kingdom has calculated RMG's ratio of pension deficit to EBITDA based on RMG's realised EBITDA in 2011. However, the Commission considers that it is erroneous to use the 2011 EBITDA because the 2011 EBITDA is particularly low because of RMG's financial and operational difficulties.
- (198) To benchmark the pension deficit, the Commission finds it therefore appropriate to use the projected average EBITDA over the period from 2010 to 2015 to take account of the fact that RMG's profits are expected to increase in the coming years. As the average EBITDA is estimated to amount to GBP [...] million, the pension deficit that RMG should keep on its balance sheet after the pension relief amounts to GBP 150 million.
- (199) To correctly value the impact on RMG's balance sheet, further clarifications are necessary:
- (i) as the benchmarking is done on the level of the total exposure of a company to its pension deficit, the benchmarked deficit of GBP 150 million should be understood to include the deficits of all pension schemes that RMG currently sponsors;
 - (ii) the benchmark value of GBP 150 million represents RMG's total liability for historic pension deficits accrued at the date of the pension relief on 1 April 2012 in line with the generally accepted IAS rules.
- ### Conclusions
- (200) The Commission considers that in order to be considered as compatible with the internal market under Article 107(3)(c) of the Treaty, the pension relief must be limited such that RMG remains liable for a pension deficit that is in line with the average pension deficit that UK companies with a comparable profile assume on their balance sheets. Therefore, taking the average pension deficit of FTSE 100 companies as a benchmark, the pension relief under Article 107(3)(c) as compensation for legacy pension costs must be limited such that RMG will retain at the date of the pension relief on 1 April 2012 a liability of GBP 150 million on its balance sheet for the accrued deficits of the pension schemes that RMG sponsors.
- (201) Furthermore, the Commission notes that, contrary to previous cases, the pension relief will not affect RMG's on-going pension costs since the pension relief is restricted to the historic pension deficit accrued up to the date of the pension relief on 1 April 2012. As the RMPP was closed for new members on 31 March 2008 and currently active member of the RMPP agreed to a reduction in their pension benefits, RMG's defined-benefit exposure will decrease over time. The Commission considers therefore that RMG should not receive any aid in the future as compensation for legacy costs in respect of pension liabilities accruing after 31 March 2012 for RMPP members.

- (202) The Commission considers that the implementation of these conditions will ensure that the pension relief will not place RMG in a better position than competitors concerning the liability for the accrued pension deficits as well as payment of on-going pension costs.

5.2.2. *Compatibility of the debt reduction measures under the R&R Guidelines*

- (203) In line with the R&R Guidelines, in order for an aid to be compatible under Article 107(3)(c) of the Treaty it must comply with criteria for compatibility listed in section 3.2.2 of those Guidelines:

Eligibility

- (204) The R&R Guidelines consider a firm to be in difficulties where it is unable, whether through its own resources or with the funds it is able to obtain from its owner/shareholders or creditors, to stem losses which, without outside intervention by the public authorities, will almost certainly condemn it to going out of business. The R&R Guidelines also list some usual signs of such companies, such as mounting debt or falling or nil net asset value.
- (205) As already set out in section 3.4 of the opening decision, RMG is a company in difficulty as defined in section 2.1 of the R&R Guidelines because RMG shows the usual signs of a such company: e.g. negative net worth of approximately GBP 3 000 million on its balance sheet at March 2011, declining revenues by 3 % from 2008 to 2011, and a negative cash-flow before interest of approximately GBP [...] million in the financial year 2011/2012.
- (206) Although the pension relief, which the Commission considers to be a compatible aid for the compensation of pension legacy costs pursuant to Article 107(3)(c) of the Treaty in so far as it is limited such that RMG will retain GBP 150 million on its balance sheet, will reduce RMG's liabilities and improve its cash-flow, RMG's financial difficulties will not be resolved. Even after the pension relief, RMG's expected cash-flows before interest remain negative or only slightly positive. In any case, RMG would not be able to afford to repay its debt facilities of GBP [...] million when they fall due for repayment in [...]. In the same vein, even though the balance sheet is expected to show net assets of GBP [...] million after the pension relief, RMG will not reach a sufficiently high credit rating to be able to raise funds from the financial markets.
- (207) In view of the above, the Commission considers that RMG qualifies as a 'firm in difficulty' in the meaning of

the R&R Guidelines and is consequently eligible for restructuring aid.

Restructuring plan and restoration of viability

- (208) According to points 34-37 of the R&R Guidelines, the grant of aid must be conditional to the implementation of a restructuring plan endorsed by the Commission and to which the Member State has committed itself. The restructuring plan has to analyse in detail the problems which have led to the difficulties and to set out the means by which to restore the long-term viability and health of the firm within a reasonable timescale. It has to be ensured that the restructuring measures are appropriate to address the company's problems and enable the company to progress towards a new structure that allows it to stand on its own merits. The improvements in viability must derive mainly from internal measures.
- (209) The restructuring plan must also be as short as possible and be based on the basis of realistic assumptions as to future operating conditions. The expected return on capital must be enough to enable the restructured firm to compete in the marketplace on its own merits.
- (210) The updated restructuring plan submitted to the Commission by the United Kingdom covers the period 2010/2015.
- (211) Indeed, RMG started in the financial year 2010/2011 to take significant measures to address its inefficiency problems in the letter business. In 2010 that RMG started to close loss-making mail centres to a larger extent, to deploy new machines for the automation of its sorting activities and to re-organise delivery offices according to the 'World Class Mail' efficiency programme.
- (212) Furthermore, in 2010 the United Kingdom engaged in pre-notification contacts with the Commission to provide information about the envisaged restructuring measures and the need for restructuring aid.
- (213) Starting from 2010 onwards, RMG has undertaken significant restructuring measures — as described in the restructuring plan — that have introduced a step-change in RMG's letter business. Those measures address the inefficiencies of the letter operations (overstaffing, lacking automation, too high number of mail sorting centres) compared to other European postal incumbent who have already undertaken those modernisation efforts and have achieved a financially sound standing.

- (214) RMG's proposed operational modernisation covers changes in all areas and results in significant cost savings for the business. The modernisation will deliver savings via the introduction of new technology and more effective working practices as RMG rolls out 'World Class Mail' operations throughout the letters network, which aims to raise productivity through the deployment of best practices. The operational modernisation is projected to result in annual cost savings of GBP [...] million (net of pay increases) by 2014/2015, driven by a headcount reduction of [...].
- (215) The Commission concludes therefore that the updated restructuring plan address appropriately the weaknesses of RMG's letter business and allows RMG to progress towards a new and sustainable structure. The improvement in RMG's profitability comes from the internal measures (for example closure of mail sorting centres, streamlining of internal processes and significant reduction of workforce) that increase RMG's productivity in a declining letter market.
- (216) The Commission further notes that according to the R&R Guidelines, the restructuring plan must ensure that the company returns to long-term viability. Since the restructuring plan shows that RMG will already reach profitability to sustain its operations by the end of the 2014/2015 financial year in March 2015 reach, it is therefore not necessary to provide any further aid after March 2015.
- (217) Viability will therefore be re-established in a restructuring period of five years, which the Commission considers to be a reasonable length of time ⁽⁴⁰⁾. In the present case it does not appear possible to restore the long term viability of RMG within a shorter time period because of the extent of the restructuring — including a large change in RMG's business operations, staff reduction and closure of a huge number of mail centres — combined with the necessity to ensure the uninterrupted provision of the USO.
- (218) As regards the assumptions on the future supply and demand on the relevant markets, the Commission notes that the restructuring plan already assumes in the base-case scenario (see recital 76) an annual decline in letter demand by [...]. In view of the substitution of traditional letters by e-mail, the Commission agrees to base the projections on a substantial reduction of letter volumes. The United Kingdom has also provided financial projections of RMG under more pessimistic and optimistic scenarios: With the pessimistic scenario, the annual decline in the letter business would be [...] instead of [...] per year, while with the optimistic scenario would assume an annual decline of only [...].
- The expected demand would therefore decrease [...] faster in the pessimistic scenario and [...] slower in the optimistic scenario than in the base case. The Commission considers that those projections provide a realistic picture with a sufficiently broad range of outcomes (for example the expected letter volumes would after 10 years fall in a range of [...] of RMG's current volume).
- (219) The base-case business plan shows that RMG expects to break even in [...] and achieve a return of [...] % on invested capital after March 2015. Compared to postal incumbents in other Member States and private UK operators ⁽⁴¹⁾, RMG's expected return is within the range of returns that those companies currently achieve. As the restructuring measures will bring RMG to a level of operational efficiency comparable to that of other postal operators, it is reasonable to expect that RMG will, in the long-term, generate profits in the same range as its peers.
- (220) With regard to the pessimistic scenario, RMG is expected to break even during financial year [...] and reach onwards a level of profitability to finance its operations and provide a return of [...] on invested capital from 2015. RMG will therefore also achieve long-term viability under less favourable market conditions.
- (221) In light of the above, the Commission is of the opinion that the restructuring plan is based on realistic predictions. The assumptions submitted with regard to the development of the market are plausible, and the forecasts made in the restructuring plan with regard to progress in terms of RMG' overall result therefore appear credible.
- (222) Having analysed and verified the updated restructuring plan, the Commission considers that that the plan complies with the requirements of points 34-37 of the R&R Guidelines and in particular it will restore the viability of RMG in line with the R&R Guidelines.
- Own contribution and minimum necessary
- (223) Pursuant to points 43-45 of the R&R Guidelines, the aid must be limited to the minimum necessary and the beneficiary is expected to make a significant contribution to the restructuring from its own resources or from external commercial financing. The R&R Guidelines clearly indicate that a significant part of the financing of the restructuring must come from own resources, including the sale of assets not essential to the firm's survival and from external financing at market terms. Such contribution must be real and must be as high as possible, at least 50 % for large firms. The Commission considers RMG to be a large firm within the meaning of the R&R Guidelines.

⁽⁴⁰⁾ Also in previous cases, the Commission has accepted restructuring periods of five years or more, e.g. in Commission Decision in the *Austrian Airlines* Case (OJ L 59, 9.3.2010, p. 1), in particular paragraph 296 (six years restructuring period).

⁽⁴¹⁾ The United Kingdom has submitted a benchmarking data on the profitability of other postal operators in the United Kingdom and Europe.

- (224) In the opening decision, the Commission raised doubts about the level of restructuring costs necessary to enable the restructuring. During the investigation, the UK authorities have provided a more detailed list of restructuring costs:

(million GBP)

		2010/2015 UK's proposal	2010/2015 Commission's assessment
Labour restructuring costs		[...]	[...]
— Redundancy payments	[...]		
— Travel and outplacement costs	[...]		
— Exceptional lump-sum payments	[...]		
Capacity restructuring costs		[...]	[...]
— Mail centre reduction	[...]		
— Flexible delivery methods	[...]		
— Walk sequencing deployments	[...]		
— Other investment operations	[...]		
— Intelligent letter sorting machines	[...]		
— Packets sortation	[...]		
IT restructuring costs		[...]	[...]
Pension deficit relief		150	150
Exceptional restructuring costs to Royal Mail of separating from Post Office Limited		[...]	0
Total		2 357	2 179

- (225) In that regard, the Commission notes that not all costs should automatically qualify as restructuring costs. According to the Commission, the costs for the separation of POL are not related to the restructuring of RMG's letter business but rather to the future privatisation of RMG and can therefore not be accepted as eligible restructuring costs.
- (226) However, the Commission does accept all costs that are related to the labour, capacity, and IT restructuring programs as eligible because they are necessary for RMG's letter business to catch up to industry standards and earn a sufficient return from its letter operations. Furthermore, the Commission accepts further relief of the remaining pension deficit as eligible financial restructuring costs to regain long-term viability.
- (227) Restructuring costs are primarily related to RMG's activities in the letter business that are of vital importance for both the maintenance of the universal postal service as well as RMG's role as provider of downstream access for the other postal operators. Both the labour and the capacity restructuring costs concern solely the modernisation efforts for the sorting centres and the downstream delivery of letters (for example 'on the last mile' to customers). Both facilities are essential for competitors who deliver their letters to the sorting centres for the final delivery to customer because they do not themselves possess downstream delivery networks.

- (228) In particular, the labour restructuring costs contain, inter alia, redundancy payments of GBP [...] million for leaving staff due to the closing down of sorting centres and the rationalisation of outdoor delivery; and GBP [...] million of travel and outplacement costs for staff that has been retained but now works at alternative locations.
- (229) The capacity restructuring consists of the automation of the sorting centres and the introduction of new delivery methods to achieve more efficient operations. The most important capacity restructuring cost items are inter alia:
- (i) GBP [...] million for the property rationalisation program reducing the number of mail centres from 64 in March 2010 to [...] by March 2015;
 - (ii) GBP [...] million for the implementation of new and more flexible delivery methods;
 - (iii) GBP [...] million for the investment of new sorting and walk sequencing machines.
- (230) The Commission concludes therefore that, in view of the own-contribution requirement of 50 % for large companies, the restructuring aid should not exceed the amount of 50 % of GBP 2 179 million.
- (231) The Commission in its opening Decision also questioned whether RMG would make a significant own contribution to the restructuring, as required by point 44 of the R&R Guidelines.
- (232) In response to the concerns raised by the Commission in its opening decision, the UK authorities have provided several details on the amounts considered as own contribution of RMG to the restructuring costs.
- (233) According to the latest submission, RMG will contribute to finance the costs of the 2010-2015 restructuring measures by the sale of assets and the additional funds from releasing of the pension escrow account as follows:
- (234) The assets to be sold include the disposal of stakes in other companies as well as real estate property that are not essential to RMG's survival. In addition, RMG has sold or will sell real estates, vehicles, and equipment that are essential for the operations but are leased back. The complete list includes the following items:
- (i) sale of RMG's 20 % stake in Camelot plc, the operator of the UK national lottery, to a Canadian pension fund (OTPP) in June 2010;
 - (ii) divestment of Romec Services Limited in April 2011;
 - (iii) sale, or sale and leaseback, of certain mail centres and other properties. This includes the sale or sale and leaseback of sites in London, such as the [...]. Under the sale and leaseback programme, RMG has divested or will divest of the freehold interest in these properties, and has been granted a leasehold interest to use the properties by the new freeholder;
 - (iv) sale of surplus land; and
 - (v) sale and leaseback of equipment and vehicles.
- (235) While the value of the sales that have already been concluded are based on the actual proceeds of the disposal (amounting up to GBP [...] million), the valuations of the future sales are conservative and based on RMG's experience with recent sale transactions.
- (236) Further financial means are generated by the release of the RMG's pension escrow account upon implementation of the pension relief on 1 April 2012. As the Pension Trustee will no longer require the escrow account security, the amount of the RMG Escrows will revert to RMG. At that date, the RMG escrow (GBP 150 million) is expected to have accrued interest of GBP [...] million (resulting in a total value of GBP [...] million).
- (237) Having verified that the measures regarding RMG's own contribution have already been implemented or will be completed by March 2015 and that, as confirmed by the United Kingdom, the sale values are on market terms, the Commission can accept that the amount of GBP 1 090 million constitutes an own contribution to the restructuring plan. Putting the own contribution in relation to the eligible restructuring costs, the Commission notes that 50 % of the restructuring costs are financed by own contribution from RMG and that the own-contribution requirement of the R&R guidelines for large companies is fulfilled.

(million GBP)

Sale of assets	[...]
Release of pension escrow account	[...]
Total own contribution	1 090

(238) In view of RMG's own contribution, the Commission concludes therefore that the aid in the form of debt reduction measures of GBP 1 089 million is limited to the strict minimum of the necessary restructuring costs. In comparison to the initial notification of debt reduction measures of GBP 1 700 million and an additional GBP 200 million revolving credit facility, the restructuring aid in the form of a debt reduction of maximum GBP 1 089 million is now limited to 50 % of the necessary restructuring cost for the period from March 2010 to March 2015. The significant reduction in the aid amount compared to the initial notification ensures that RMG will not be left with surplus cash after the completion of the restructuring plan in March 2015.

Avoiding undue distortions (compensatory measures)

(239) Pursuant to points 38-42 of the R&R Guidelines, measures must be taken to mitigate as far as possible any adverse effects of the aid on competitors. The aid must not unduly distort competition. This usually means a limitation of the presence which the company can enjoy on its markets at the end of the restructuring period. The compulsory limitation or reduction of the company's presence on the relevant market represents a compensatory factor in favour of its competitors. It should be in proportion to the distortive effects of the aid and to the relative importance of the firm on its market or markets.

(240) First, the Commission notes that at the moment, based on the existing regulatory conditions concerning access to its delivery network, RMG is an indispensable business partner for other UK postal operators since it delivers the competitors' letters on the 'last mile' to the customers. RMG fulfils therefore an essential function for the working of the UK postal market that is currently primarily based on upstream competition and not on end-to-end competition. Furthermore, the importance of RMG for the postal sector is clearly reflected by the comments of its competitors who emphasise the necessity of a healthy and sound RMG for downstream letter delivery and thereby the maintenance of the universal service. The restructuring of RMG will therefore provide economic benefits for the whole UK postal sector and allow all postal providers to provide better and more efficient services

(241) Therefore, when determining the required level of compensatory measures the Commission has to take account of the particular role played by RMG in the UK postal sector as universal service and access provider for all UK postal operators.

(242) In this respect, it has to be underlined that the significantly reduced restructuring aid — compared to the United Kingdom's initially notified restructuring aid measures of more than GBP 1 700 million — will primarily be used to secure the functioning of RMG's downstream network which is essential for safeguarding the permanent provision of universal postal services and ensuring, where applicable according to Article 38 of the Postal Services Act and the subsequent regulatory conditions (see below), the provision of access to its delivery network.

(243) As explained in recital (227), the debt reduction measure of GBP 1 089 million supports primarily the restructuring of RMG's essential downstream activities (for example sorting centres, delivery on 'last mile'). Both the labour restructuring costs of GBP [...] million as well as the capacity restructuring costs of GBP [...] million concern solely the downstream activities that are essential for universal service and the competitors' letter business. Also the remaining restructuring costs are for the most part related to those downstream activities.

(244) In view of RMG's key role in the downstream letter delivery that is vital for all UK postal operators, RMG's restructuring appears to have limited distortive effect on the current structure of UK postal sector. The restructuring in RMG's downstream network will bring about a more efficient and affordable service both for the general public as well as for the other UK postal operators who have to rely on access to RMG's downstream network as set out by the relevant regulatory provisions.

(245) The Commission has verified that the other UK postal operators will continue to have access to RMG's downstream network. The competent regulator — Office of Communications (Ofcom) — has proposed to impose access conditions upon RMG for the next seven-year regulatory period starting on 1 April 2012 requiring, inter alia, the fulfilment of the following conditions ⁽⁴²⁾:

- (i) RMG shall provide access to other postal operators on reasonable request and to offer such access on fair and reasonable terms;

⁽⁴²⁾ Statutory Notification of proposals to impose a regulatory condition in accordance with the Postal Services Act 2011; see Annex 12 to Ofcom's consultation on 'Review of regulatory conditions — postal regulation', published on 13 December 2011.

- (ii) RMG shall not unduly discriminate ⁽⁴³⁾;
- (iii) RMG shall not obtain an unfair commercial advantage from allowing access to the network and shall not use information in its possession as a result of giving access for its own benefit;
- (iv) RMG shall set access prices so as to maintain a minimum level of margin between access prices and analogous retail services to avoid that other postal operators will be prevented from competing with RMG by means of margin squeezes.
- (246) The Commission considers that those conditions will effectively limit RMG's exercise of market power and appropriately safeguard the competitors' access to RMG's downstream network. They will therefore ensure for other UK postal operators that they can compete on their merits on the upstream markets with RMG and can maintain or even further expand their strong presence on the upstream market. The Commission considers therefore that those conditions can be considered as an appropriate compensatory measure in favour of RMG's competitors, which mitigate the adverse effects of the aid.
- (247) In this respect, the Commission takes note that [...] Ofcom will take a decision on mandatory access requirements for the next seven years as laid out in its proposals.
- (248) As the restructuring aid is essentially limited to those downstream activities in the general interest as well as in the interest of the other UK postal operators and does not enhance RMG's position on other upstream letter markets or in the express parcel markets, the Commission considers that the restructuring aid will lead to limited distortive effects to the detriment of competitors.
- (249) Second, the restructuring plan involves a significant reduction in employment that is due to the technical change and higher automation in the postal sector. In this respect, the Commission notes that it generally takes a favourable view of State aid to cover the social costs of restructuring. According to point 64 of the R&R Guidelines the Commission has no a priori objection to such aid when it is granted to firms in difficulty, for it brings economic benefits above and beyond the interests of the firm concerned, facilitating structural change and reducing hardship.
- (250) The Commission observes that a large part of the restructuring costs consists of redundancy payments as well as travel and outplacement costs based on agreements with the trade union. On the other hand, aid that will be granted to finance those labour-related costs benefits not only RMG but also the redundant employees. The Commission considers therefore that this aid for the labour-related restructuring facilitates structural changes and reduces hardship.
- (251) Third, the Commission notes that RMG will divest POL. In view of the future privatisation of RMG and therefore different owners of RMG and POL, RMG will lose direct control on the retail operations of POL and its market position will be weakened. In particular, it must be noted that the agreement between RMG and POL is limited to 10 years [...].
- (252) Contrary to the current situation, RMG will not anymore benefit from a retail network under its direct control but will have, as any of its competitors, to negotiate and contract its retail activities with an independent third party (e.g. comparable to DHL's service point network which is made up of independent retail shops (for example WHSmith and Staples shops)). Thereby, RMG will be placed on an equal level compared to its competitors and will not anymore benefit from its ownership of a fully fledged retail network. In particular, RMG will no longer be able to decide which other services and products (for example banking services) POL will offer which means that RMG loses leverage into other markets. The Commission considers therefore that the divestment of POL will limit RMG's presence on the UK postal market and can be considered as a measure mitigating the effect of the restructuring aid for RMG's competitors.
- (253) In view of the positive effects that RMG's more efficient downstream network will bring about for the general public, who has to rely on RMG as universal postal service provider, and to all UK postal operators, who need access to RMG's downstream network to have their letters delivered to customers, as well as the fact that a considerable share of the restructuring costs is for the benefit of redundant employees, and the divestment of POL the Commission considers that the competitive distortions resulting from the restructuring aid are rather limited such that no further compensatory measures are necessary.
- ⁽⁴³⁾ RMG may be deemed to have shown undue discrimination if it unfairly favours an activity carried on by it so as to place at a competitive disadvantage other postal operators.

One time, last time condition

- (254) Finally, the one time, last time condition as stipulated in point 72 and following of the R&R Guidelines is met, as RMG has not benefited from rescue and restructuring aid in the past.

Implementation and monitoring

- (255) According to point 47 of the R&R Guidelines, RMG must fully implement its restructuring plan and the United Kingdom has committed to the fulfilment of this obligation. The Commission will need to be kept informed of the progress in the implementation of the restructuring plan in conformity with points 49 and 50 of the R&R Guidelines.

Conclusion on the restructuring aid

- (256) The Commission finds that the five-year restructuring plan from 2010 to 2015 for RMG fulfils the conditions of the R&R Guidelines and that debt reduction measures in the amount of GBP 1 089 million constitute restructuring aid that is compatible with Article 107(3)(c) of the Treaty.

6. CONCLUSION

- (257) In line with previous case practice, the Commission can only allow aid as compensation for legacy pension costs to such an extent that the beneficiary is not placed in a better position than competitors in terms of the general obligations for contributions to social insurances.
- (258) Due to the peculiarity of this case, the Commission has adapted its compatibility assessment for aid to compensate for legacy pension costs and has carried out a comparison of RMG's current pension deficit to the pension deficits that UK companies of a comparable size carry on average on their balance sheet.
- (259) The Commission considers that the pension relief constitutes a compatible State aid for legacy pension costs pursuant to Article 107(3)(c) of the Treaty subject to the following two conditions:
- (i) at the date of the pension relief on 1 April 2012, RMG will retain on its balance sheet a liability of GBP 150 million that is in line with the average pension deficit of comparable UK companies;
 - (ii) RMG will not receive any aid as legacy compensation for pension liabilities accruing after 31 March 2012 for members of the RMPP.
- (260) With regard to the notified restructuring aid, the Commission considers that the updated restructuring

plan covering the period 2010 to 2015 is appropriate and sufficient to address RMG's difficulties and to restore long-term viability. The Commission considers that RMG's own contribution to the restructuring costs limit the aid to a strict minimum of GBP 1 089 million. In view of the positive benefits that the restructuring brings to the efficiency of the whole UK postal sector, the unique position of RMG as universal service provider, the separation of POL, and that the restructuring aid facilitates to a large part the necessary reduction of RMG's workforce, the Commission finds that the aid of GBP 1 089 million does not create distortive effects that will be disproportionate to the positive effects of a successful restructuring of RMG,

HAS ADOPTED THIS DECISION:

Article 1

1. The notified measures in relation to the pension relief which the United Kingdom is planning to implement for Royal Mail Group constitute aid which is compatible with the internal market within the meaning of Article 107(3)(c) of the Treaty on the Functioning of the European Union, provided that the conditions set out in paragraphs 2 and 3 are met.

2. At the date of the pension relief on 1 April 2012, Royal Mail Group shall retain a liability of GBP 150 million on its balance sheet for the accrued deficits that have resulted from the pension plans that it has sponsored.

3. The United Kingdom shall not grant State aid to Royal Mail Group as compensation for legacy costs in relation to newly accrued pension liabilities for members of the Royal Mail Pension Plan after the date of the pension relief on 1 April 2012.

Article 2

The debt reduction measures which the United Kingdom are planning to implement for Royal Mail Group, amounting to GBP 1 089 million, constitute aid which is compatible with the internal market under Article 107(3)(c) of the Treaty, provided that the restructuring plan notified to the Commission is implemented in full.

Article 3

The United Kingdom shall submit to the Commission annual reports on the implementation of the restructuring plan. The first report shall be submitted within one year from the notification of this decision to the United Kingdom. The subsequent reports shall be submitted within one year of the previous report until the end of the restructuring plan.

Article 4

This Decision is addressed to the United Kingdom of Great Britain and Northern Ireland.

Done at Brussels, 21 March 2012.

For the Commission
Joaquín ALMUNIA
Vice-President

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