

## II

(Acts whose publication is not obligatory)

## COMMISSION

## COMMISSION DECISION

of 15 October 2003

on ad hoc measures implemented by Portugal for RTP

(notified under document number C(2003)3526)

(Only the Portuguese version is authentic)

(Text with EEA relevance)

(2005/406/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 88(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 provisions cited above <sup>(1)</sup> and having regard to their comments,

Whereas:

I. PROCEDURE

(1) By three complaints submitted in 1993, 1996 and 1997 by the commercial broadcaster SIC, the Commission was informed that Portugal had implemented a number of ad hoc measures and annual compensation measures in favour of the Portuguese public broadcaster RTP.

(2) By letter dated 15 November 2001, the Commission informed Portugal that it had decided to initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of a number of ad hoc measures granted to RTP.

(3) The Commission's decision to initiate the procedure was published in the *Official Journal of the European Communities* <sup>(2)</sup>. The Commission invited interested parties to submit their comments.

(4) The Commission received observations from the Portuguese authorities by letters of 28 and 31 January 2002. It subsequently received comments from several interested parties.

(5) Comments were received by letters of 8 February and 9 May 2002 from the complainant SIC, by letter of 8 May 2002 from the Portuguese commercial broadcaster TV1, by letter of 9 May 2002 from the Association of Commercial Broadcasters (ACT) and by letter of 12 June 2002 from the Italian commercial broadcaster Mediaset. The Commission received further letters on the case from SIC on 16 May and 4 August 2003.

(6) The Commission forwarded the comments to the Portuguese authorities, which reacted by letter dated 25 March 2003. By letter of 29 July 2003, the Portuguese authorities replied to the additional questions put by the Commission.

<sup>(1)</sup> OJ C 85, 9.4.2002, p. 9.

<sup>(2)</sup> *Ibidem*.

(7) The present decision will deal only with the ad hoc measures covered by the decision to initiate the procedure. Accordingly, it focuses on the financial relationship between RTP and Portugal in the period 1992 to 1998.

(8) Like the decision to initiate the procedure, the present decision does not deal with questions relating to the legal classification and compatibility with the Treaty of the annual compensation payments granted to RTP. Since, on a preliminary basis, those measures are regarded as existing aid, they are being dealt with in a separate procedure under Article 17 of Council Regulation (EC) No 659/1999 <sup>(3)</sup>.

(9) However, in order to have a complete picture of the financial relationship between the Portuguese State and RTP over the period covered by the present investigation, the Commission has to take into consideration not only the ad hoc measures but also the financial support granted to RTP by means of annual compensation payments. Accordingly, in the present decision, the Commission will refer to the annual compensation payments only to the extent necessary to clarify its reasoning on the ad hoc measures.

## II. DETAILED DESCRIPTION OF THE ISSUES AT STAKE

### Measures for RTP

#### *Annual compensation payments*

(10) The annual compensation payments constitute the main mechanism for compensating RTP. In the period 1992 to 1998 RTP received annual compensation payments totalling PTE 66 495 million to cover the costs of its public service obligations. The legal basis for the compensation payments is Article 5 of Law No 21/92 <sup>(4)</sup>.

<sup>(3)</sup> Council Regulation (EC), No 659/99 of 22 March 1999 laying down detailed rules for the application of Article 93 (now Article 88) of the EC Treaty (OJ L 83, 27.3.1999, p. 1). Regulation as last amended by the 2003 Act of Accession.

<sup>(4)</sup> According to Article 5, 'Performance of the public service obligations entrusted to RTP SA [...] shall confer on that company the right to a compensation payment the exact amount of which will correspond to the actual cost of providing the public service, which shall be determined on the basis of objectively quantifiable criteria and in accordance with the principle of sound management.'

(11) Table 1 gives a breakdown of the annual compensation payments granted to RTP in the period covered by the present decision.

Table 1

#### **Amount of annual compensation payments from 1992 to 1998**

(PTE million)						
1992	1993	1994	1995	1996	1997	1998
6 200	7 100	7 145	7 200	14 500	10 350	14 000

Source: Council of Ministers Resolutions No 18/92, No 21/93, No 19/94, No 25-A/95, No 97/96, No 83/97 and No 1/99.

#### *Exemption from registration charges*

(12) RTP was exempted from the payment of registration charges amounting to PTE 33 million on registration of the legal transformation of RTP into a limited company. Under Portuguese law any legal subject has normally to pay taxes for the constitution of a company, the amendment of statutes or modifications to the company.

(13) The legal basis for the exemption is Article 11(1) of Law No 21/92, which provides that:

'The statutes of RTP SA [...] are hereby approved; they do not need to be converted to a deed, but shall be automatically registered, free of duties and expenses, on the basis of the Official Journal of the Republic (*Diário de República*) in which they are published.'

(14) Article 11(1) is derived from Law No 84/88, Article 1 of which provides that public undertakings, even if nationalised, can be converted by decree-law into public limited companies. Such a decree-law constituted the act approving the statutes of the limited company and was sufficient to comply with all registration requirements <sup>(5)</sup>.

(15) Furthermore, under Article 11(2) of Law No 21/92, RTP was exempted from paying other registration fees directly linked to the modification of the legal nature of the company.

<sup>(5)</sup> Article 3(2) and (3) of Law No 84/88 of 20 July 1988.

- (16) Article 11(2) is derived from Decree-Law No 404/90 <sup>(6)</sup>, on the basis of Article 1 of which undertakings that, up to 31 December 1993, performed acts of cooperation or concentration could be granted exemption from transfer tax on the fixed assets necessary for such concentration or cooperation as well from the emoluments and other legal charges payable for the performance of those acts.

*Payment by the State for the hiving-off of the television signals network*

- (17) With the opening-up of the Portuguese television market it was decided to hive off the television signals network from the broadcasting activities of RTP and to create a separate legal entity 'Teledifusora de Portugal' (TDP) with a capital of PTE 5 400 million <sup>(7)</sup>. The value of the new entity was established by two independent institutions, Banco Nacional Ultramarino (BNU) and Banco Português de Investimento (BPI) <sup>(8)</sup>.
- (18) In 1993 the State acquired from RTP the TDP broadcasting network for PTE 5 400 million (this figure was the result of an independent valuation), which corresponded to the value of the assets that had been hived off <sup>(9)</sup>.

*Facilities granted for payment of the annual fee for using the television broadcasting network*

- (19) An overview is given below of the context in which the agreements were concluded. The developments in the ownership of Portugal Telecom will be described, as well as the rates charged and the agreements reached with RTP.

- (20) Between 1991 and 1994 the television broadcasting network was owned by the public company TDP SA. After 1994 the network was owned by Portugal Telecom, a company created from the combination of Telecom Portugal SA, Telefones de Lisboa e Porto SA and TDP SA. After the creation of Portugal Telecom, the State periodically decreased its holding in the company. In 1995 26,3 % was sold in a public offering. A second tranche was auctioned in June 1996, bringing state ownership down to 51 %. State ownership was further reduced to 25 % in mid-1997 and to 10,5 % in mid-1999. The company is now privatised <sup>(10)</sup>.

- (21) Law No 58/90 explicitly determines that private operators can lose their broadcasting licence if they do not pay the network fee on time <sup>(11)</sup>.

- (22) There has been no difference in the rates charged by the network operator to RTP and to private television operators. In fact, it is forbidden by law to charge different rates to the public broadcaster RTP and to private broadcasters that use the network <sup>(12)</sup>. Until 1997 the level of the rates charged by the network operator was based on legally determined parameters <sup>(13)</sup>. Since 1997 an agreement between the Media Institute, the Director-General for Trade and Competition and Portugal Telecom laid down the maximum prices chargeable by Portugal Telecom for distributing the television signal.

- (23) RTP had to pay an annual fee for the use of the broadcasting network to the owner <sup>(14)</sup>. It has always challenged the level of the fee as the annual fee was equal to more than half of the value of the network when it was hived off. Although RTP entered as liabilities all the costs of the broadcasting network, including interest for late payment, it did not pay the fees on time.

- (24) The network is indispensable for RTP to broadcast its programmes. Furthermore, RTP is one of the main users of the network (alongside the commercial operator SIC).

<sup>(6)</sup> Decree-Law No 404/90 of 21 December 1990.

<sup>(7)</sup> Decree-Law No 138/91 of 8 April 1991.

<sup>(8)</sup> For an analysis of the value of the network, see the Commission Decision of November 1996 in which the Commission decided that the value of the network was in line with the market value.

<sup>(9)</sup> In 1991 RTP hived off its assets to TDP and participated in TDP to the value of the assets. Afterwards the State became the sole direct owner of TDP. However, it appears that the State did not pay RTP in cash but became a debtor of RTP for the amount of PTE 5 400 million. Eventually, RTP adjusted its claims against retained losses. Additionally, in view of the fact that RTP had effectively lost certain assets, the State decided in 1993 to provide resources to RTP by injecting capital equivalent to the assets given up by RTP.

<sup>(10)</sup> The main shareholders are the Banco Espírito Santo group (9,3 %), Brandes Investments Partners (5,5 %), Telefonica (4,8 %), the Caixa Geral de Depósitos group (4,7 %) and the BPI group (2,9 %).

<sup>(11)</sup> Article 13(1)(f) of Law No 58/90 of 7 September 1990, which governs the activity of television broadcasting.

<sup>(12)</sup> Article 5 of Decree-Law No 401/90 of 20 December 1990, replaced by Article 13 of Decree-Law No 40/95 of 15 February 1995.

<sup>(13)</sup> Article 4(2) of Decree-Law No 401/90 of 20 December 1990.

<sup>(14)</sup> PTE 3 650 million in 1992, PTE 3 680 million in 1993, PTE 3 101 million in 1994, PTE 2 866 million in 1995 and PTE 5 400 million in 1996.

- (25) In the period 1992 to 1998 the network operator accepted late payment of the fee by RTP and several agreements were concluded between RTP and Portugal Telecom on debt rescheduling <sup>(15)</sup>. After 1998 debt rescheduling agreements have also been concluded between the two companies. In an agreement of 31 May 2001 RTP's accumulated debt to Portugal Telecom was consolidated, including the amount represented by interest on late payment. At the time, the two companies reached agreement that the total debt would be paid in ten half-yearly instalments with 30 June and 30 December as the due dates each year.
- (26) On 3 July 2003 ANACOM, the body currently responsible for the pricing rules for the television broadcasting network, ruled that Portugal Telecom had to reduce its 2002 prices onwards by 14 % plus an additional 1,2 % from January 2003.
- (27) Portugal Telecom is obliged under its telecommunication concession to provide the broadcasting and distribution service for telecommunication signals. Its universal service obligation, whose negative profit margin can be compensated for by the State, does not include the provision of a television signal distribution service to RTP <sup>(16)</sup>.
- (30) On 6 May 1993 a joint decree of the Ministry of Finance and the Ministry of Social Security formally authorised the rescheduling of the debt into 120 monthly instalments and waived the fines and interest due for the amount of PTE 1 206 million.
- (31) The conditions for authorising exceptional arrangements for settling debts owed to the social security scheme are laid down in Decree-Law No 411/91, according to Article 2(1) of which the authorisation must be indispensable in order to guarantee the viability of the debtor and the arrangements may be applied *inter alia* on the ground that, as provided for in (d), the indebted undertaking 'has been the subject of occupation, worker self-management or state intervention'.

#### *Bond issue*

- (32) In 1994 RTP issued bonds totalling PTE 5 000 million. According to the issue prospectus, however, RTP itself guaranteed payment of the debt with its own revenue.

#### *Protocol on cinema promotion of September 1996*

- Rescheduling of debt due to the social security scheme and waiver of interest for late payment*
- (28) In the period 1983 to 1989 RTP built up a debt to the social security scheme of PTE 2 189 million arising from failure to pay social security contributions. The background of the debt was a dispute between RTP and social security on the interpretation on the social security deductions for overtime and artists fees.
- (33) On 18 September 1996 a protocol on cinema promotion was concluded between RTP and the Ministry of Culture that specified RTP's obligations in terms of support for cinema production but did not provide for any specific ad hoc financing for RTP in respect of its obligation to support the cinema.

#### *Restructuring plan for 1996 to 2000*

- (29) The social security's interpretation was laid down in Article 2(e) of Implementing Decree No 12/83 of 12 February 1983. In order to avoid legal proceedings, the two parties reached an agreement under which social security would waive its interest claim for late payment and accept a rescheduled payment of the debt. Following the settlement of the legal dispute, the Implementing Decree was never revoked.
- (34) RTP carried out a study on the possibilities for restructuring the company in the period 1996 to 2000. The study did not lead to any financial commitment on the part of the State.

#### *Annual capital injections in the period 1994 to 1997*

- (35) In the period 1994 to 1997 the State increased the capital of RTP each year. The table below gives an overview of the different capital increases, which amount to PTE 46 800 million.

<sup>(15)</sup> In March 1996 and December 1997.

<sup>(16)</sup> Decree-Law No 40/95 of 15 February 1995, as amended by Decree-Law No 458/99 of 5 December 1999.

Table 2

**Increases in RTP's share capital 1994 to 1997**

(PTE million)

Year	1994	1995	1996	1997
Increase in share capital	10 000	12 800	10 000	14 000
Share capital as at 31 December	22 708	35 508	45 508	59 508

Source: Balance sheets of RTP.

- (36) The public service contracts that the Portuguese State concluded with RTP provide for state participation in investments made by RTP, preferably in the form of capital increases <sup>(17)</sup>.

*Loan in 1998*

- (37) In December 1998 a contract was concluded for a subordinated loan between the Public Debt Stabilisation Fund (*Fundo de Regularização da Dívida Pública*) and RTP laying down the conditions of a loan of PTE 20 000 million to increase RTP's capital.
- (38) The Public Debt Stabilisation Fund is managed by the Public Debt Management Institute (*Instituto de Gestão de Crédito Público*), which is responsible for managing the debt of the Portuguese State and for implementing the central borrowing programme, in accordance with the Public Debt Law <sup>(18)</sup> and the guidelines laid down by the Government. The Institute is subject to the authority and supervision of the Ministry of Finance <sup>(19)</sup>.
- (39) From the date on which the sums were available to RTP the loan was subject to annual interest payments at the 12-month Lisbon rate, calculated on the first date of each period, plus 20 basis points <sup>(20)</sup>.
- (40) According to the contract, the loan was to be reimbursed on 31 December 2003 but could be extended for one or two years by mutual agreement. RTP did not pay interest on the loan, as the loan contract stipulates that the interest payable on the first four annual payments should be capitalised <sup>(21)</sup>.

<sup>(17)</sup> Clause 14 of the Old Public Service Contract and Clause 21 of the New Public Service Contract.

<sup>(18)</sup> Law No 7/98.

<sup>(19)</sup> Article 1 of Decree-Law No 160/96.

<sup>(20)</sup> A rate of 3,54 % was applied in 1999, 4,14 % in 2000, 5,05 % in 2001, 3,62 % in 2002 and 2,95 % in 2003.

<sup>(21)</sup> Article 5 of the amended loan contract.

- (41) The contract between the Public Debt Stabilisation Fund and RTP was drawn up in accordance with the guidelines set out in a joint resolution of the State Secretaries for the Media, for the Treasury and for Finance on 17 December 1998.

*The recipient*

- (42) The Portuguese public broadcaster RTP was set up on the Government's initiative by an act of 15 December 1955 following its decision to establish a public company that would be awarded a concession for the provision of public service television broadcasting <sup>(22)</sup>.
- (43) RTP had a monopoly position on the broadcasting market until the 1980s. In the 1990s it began to face competition from commercial broadcasters after the State had granted licences in February 1992 to SIC and TVI to broadcast on a third and fourth channel respectively <sup>(23)</sup>.
- (44) The 1992 statutes of RTP, which were set out in Law 21/92 converted the entity into a public limited company <sup>(24)</sup>.
- (45) RTP performs both public service broadcasting activities and commercial broadcasting. It is legally allowed to pursue commercial or industrial activities related to the activity of television <sup>(25)</sup>.
- (46) RTP's commercial activities have been conducted through financial participation in companies that are legally distinct from RTP and have their own structure and accounting system.

*Financial position of RTP*

- (47) As the table below shows, RTP made losses during the period under investigation. In 1996 its financial situation deteriorated to the extent that its net equity became negative.

<sup>(22)</sup> Decree-Law No 40 341 of 18 October 1955, in which the Portuguese Government undertook to promote 'the establishment of a public limited company [...] with which it will conclude a concession contract for public service television broadcasting on Portuguese territory'.

<sup>(23)</sup> Points 11.4 and 11.5 of Council of Ministers Resolution No 49/90 of 31 December 1990 and point 3 of Council of Ministers Resolution No 6/92 of 22 February 1992.

<sup>(24)</sup> Law No 21/92 of 14 August 1992.

<sup>(25)</sup> The Annex to Law No 21/92 on the Statutes of RTP states in Article 3(2) and (3) that RTP may perform the following activities: (i) television advertising; (ii) marketing of products (notably programmes and publications related to its activities); (iii) provision of technical consultancy and vocational training, and cooperation with other national and foreign entities; (iv) marketing and rental of television equipment, films, magnetic tapes, videocassettes and similar products; (v) participation in additional company groups and European economic interest groups as well as in the capital of other companies, in whatever form provided for under commercial legislation.



Table 3

**RTP economic and financial data 1993 to 1998**

	(PTE million)					
	1993	1994	1995	1996	1997	1998
Net profits (losses)	(7 883)	(19 558)	(26 581)	(18 512)	(32 223)	(25 039)
Net equity	1 557	8 071	4 269	(4 274)	(20 586)	(50 827)
Assets	39 418	42 262	56 078	67 654	62 340	83 843
Financial debts <sup>(1)</sup>	22 402	26 855	30 258	44 922	44 885	92 775

<sup>(1)</sup> Short-, medium- and long-term debts to credit institutions and bonds.

Source: RTP's financial accounts.

*RTP's public service obligations in 1992 to 1998*

performing its activity as concessionaire <sup>(28)</sup>, while Article 4(3) outlines the obligations of the public television broadcasting service <sup>(29)</sup>.

(48) RTP has to provide public service television. Different laws prescribe the definition, assignment and financing of that service.

(49) Law No 58/90, which governs the activity of television broadcasting, laid down the conditions for private broadcasters and the obligation on the State to guarantee public service television broadcasting <sup>(26)</sup>. As regards the statutes of RTP, Law 21/92 defines the main public service obligations and the financing of that service.

(50) Two public service contracts signed between RTP and the Portuguese State described the public service and its financing in greater detail <sup>(27)</sup>.

**Definition**

(51) Article 4 of Law No 21/92 states that a concession contract is to be concluded between the State and RTP and specifies the main public service obligations that have to be performed under the contract. Article 4(2) establishes the general principles that RTP has to observe when

(52) The public service contracts confirm RTP's public service obligations. Firstly, general obligations and obligations relating to programme content are imposed on RTP <sup>(30)</sup>. RTP has to provide a public television service as part of which it has to broadcast two channels and provide the population of mainland Portugal with general coverage. The first channel is of a more general nature and has to offer more general programming. The second channel has to aim more at specific audiences and to provide educational, cultural and scientific programmes. One of the channels has to cover the Autonomous Regions of the Azores and Madeira.

<sup>(28)</sup> RTP has: (a) to respect the principles of freedom, independence, non-discrimination and non-concentration; (b) to safeguard its independence from the public authorities; and (c) to adapt programmes to quality and variety requirements in the interests of the public.

<sup>(29)</sup> RTP has: (a) and (c) to contribute to enlightening, informing and educating the population; (b) to guarantee news coverage; (d) to (h) to make broadcasting time available for official messages, religious events, political parties, trade unions, the government and the public administration; (i) to broadcast two general coverage programmes, one of which should cover the Autonomous Regions of Madeira and the Azores; (j) and (m) to broadcast programmes on education, training, sport and culture; (l) to support and promote the cinema; (n) to keep audiovisual files; (o) to exchange programmes and information with Madeira and the Azores; (p) to produce and broadcast programmes for Portuguese communities abroad; (q) to cooperate with Portuguese-speaking countries; (r) to ensure direct coverage of main events abroad; (s) to maintain contacts with other European public service television broadcasters; and (t) to ensure that television broadcasting is in conformity with the guidelines laid down by the competent international bodies.

<sup>(30)</sup> Clause 4 of the Old Public Service Contract and Clauses 4 and 5 of the New Public Service Contract.

<sup>(26)</sup> Law No 58/90 of 7 September 1990 on the activity of television broadcasting.

<sup>(27)</sup> On 17 March 1993 a public service contract (Old Public Service Contract) was signed between the Portuguese State and RTP. On 31 December 1996 it was replaced by the New Public Service Contract.

(53) Secondly, the contracts impose specific programming obligations on RTP <sup>(31)</sup>. Standards are set for programme quality (pluralism, impartial information, etc.) and programme content (new fiction, sport, children, Portuguese culture, domestic news, entertainment). RTP has to allow viewing time for specified entities, to support the cinema and other forms of audiovisual production, to promote the production of educational or training programmes, to exchange programmes with the Autonomous Regions and to promote cooperation with other public service television bodies in the European Union. Furthermore, it has to fulfil specific programming obligations relating to international cooperation. For example, it has to produce programmes for, and broadcast them to, Portuguese communities living abroad and Portuguese-speaking countries in Africa and Macau. It has to ensure the functioning of RTP Madeira and RTP Açores and to maintain its production centres and delegations abroad.

(54) Thirdly, the contracts impose specific obligations on RTP. For example, RTP has to maintain audiovisual archives, to introduce technological innovations in its equipment and activities, to support the S. Carlos National Theatre Foundation and to provide other services to be specified on an ad hoc basis.

#### Assignment

(55) Article 5 of Law No 58/90 assigned to RTP the concession for public service broadcasting for a period of 15 years, renewable for a further 15 years and covering the frequencies corresponding to the first and second channels. Article 4 of Law No 21/92 stresses that RTP is the concessionaire for public service television broadcasting. Clause 1(a) of the public service contracts confirms that RTP is the provider of the public service television <sup>(32)</sup>.

#### Control

(56) The public service contracts <sup>(33)</sup> provide for the setting up of a Public Opinion Council consisting of representatives from the different sections of public opinion that can

intervene in order to assess whether the general and specific public service television broadcasting obligations are being complied with.

(57) RTP has to provide the Minister for Finance with an activity plan and budget for the public service for the following year, accompanied by opinions issued by the company's board of auditors and the Public Opinion Council. Furthermore, it has to provide a report on the public service obligations during the previous year, accompanied by an opinion of the board of auditors <sup>(34)</sup>.

(58) The Minister for Finance and the member of the government responsible for the media have to verify compliance with the public service contracts. The Inspector-General of Finances has to audit the financial plan. Furthermore, an annual audit has to be conducted by a specialised auditing firm <sup>(35)</sup>.

(59) The New Public Service Contract also provides for sanctions to be imposed by the State for breach of contract in the form of fines, seizure, redemption or termination of the contract.

#### Financing

(60) Article 5 of Law No 21/92 confers on RTP the right to receive state compensation for its public service obligations. This right is confirmed in the public service contracts.

(61) In addition to the system of annual compensation payments, the public service contracts provide for funding for:

— the payment of specific services under agreements to provide services signed or to be signed by the public administration and RTP <sup>(36)</sup>;

<sup>(31)</sup> Clauses 5 to 8 and 10 of the Old Public Service Contract and Clauses 6 to 13 of the New Public Service Contract.

<sup>(32)</sup> Clause 1 of the Old Public Service Contract stated that the aim of the contract was to lay down the terms under which RTP would provide the public television service. Clause 1 of the New Public Service Contract states that RTP is the sole provider of public service broadcasting within the meaning of Article 5 of Law No 58/90 and Article 4 of Law No 21/92.

<sup>(33)</sup> Clause 9 of the Old Public Service Contract and Clause 23 of the New Public Service Contract.

<sup>(34)</sup> Clauses 15, 16, 18 and 19 of the Old Public Service Contract and Clauses 18 and 25 of the New Public Service Contract.

<sup>(35)</sup> Clause 19 of the Old Public Service Contract, Clause 25 of the New Public Service Contract and Article 47(2) of Law 31-A/98.

<sup>(36)</sup> Clause 13 of the Old Public Service Contract and Clause 20 of the New Public Service Contract.

- state participation in all investments made by RTP, particularly those for the infrastructures required for the operation of the production and broadcasting centres in the Azores and Madeira, the audiovisual archives and RTP's international broadcasts and other technological investments that RTP is required to make <sup>(37)</sup>.
- (62) In order to determine the costs and revenues of the public service obligations that qualify for compensation payments, RTP applies an analytical accounting system. The contracts specify the criteria for calculating the eligible costs for compensation of each public service obligation <sup>(38)</sup>.
- (63) On the basis of analytical accounting system, RTP allocates costs and revenues (e.g. personnel and equipment) to a defined number of activities (management of programming, direct and indirect programme costs, diffusion costs, emission costs, marketing costs and overheads).
- (64) The direct costs of the different activities are divided between the different cost items (e.g. RTP 1, RTP 2, RTPi and RTP África). The indirect costs are allocated to the cost items on the basis of consistent analytical criteria (e.g. number of broadcasting hours) <sup>(39)</sup>.
- (65) The cost-allocation system has the following characteristics:
- under the public service contracts, only net operating costs can be compensated for in accordance with the method described in the contracts. The financial cost, the extraordinary expenditure and provisions not directly related to an activity are excluded from compensation <sup>(40)</sup>,
  - in order to calculate the net reimbursable operating costs, RTP has to deduct from the operating cost the operating revenues deriving from each public service obligation,
  - under the Old Public Service Contract, no compensation was possible for the general public service obligation to operate RTP 1 and RTP 2 and to cover the Autonomous Regions with one of the channels <sup>(41)</sup>,
  - under the New Public Service Contract the operating costs of RTP 1 and RTP 2 can be compensated for, but no extra compensation is possible in the event of the real net operating costs of RTP 1 and RTP 2 exceeding the planned cost <sup>(42)</sup>.
- (66) RTP has reported the net cost of providing the public service in the annual public service reports in line with the cost calculation method described above. The table below gives an overview of the costs of each public service activity entitled to receive compensation payments.

<sup>(37)</sup> Clause 14 of the Old Public Service Contract and Clause 21 of the New Public Service Contract.

<sup>(38)</sup> Clause 12 of the Old Public Service Contract lays down in detail which costs can be compensated for and how they are to be calculated: the coverage differential (the difference in costs borne by RTP Channel 1 and the costs borne by the largest private television operator), the operating deficit in the Autonomous Regions, the deficit in running the audiovisual library, the operational cost of RTP-International, the cost of operating the structure for cooperation with the Portuguese-speaking African countries (PALOPs), the cost of allowing viewing time for certain entities, the cost of delegations and correspondents, and the costs of the S. Carlos National Theatre Foundation. Clause 15 of the New Public Service Contract lays down in detail which costs can be compensated for and how they are to be calculated. The items to be covered are: the operating costs of RTP 1 and RTP 2; specific services referred to in Clause 7(a) to (l); and the coverage differential.

<sup>(39)</sup> Information provided by the Portuguese authorities by letter of 31 March 1999.

<sup>(40)</sup> Clause 14(2) of the New Public Service Contract.

<sup>(41)</sup> Excluding the cost associated with the coverage differential.

<sup>(42)</sup> Clause 19(1) and (3) of the New Public Service Contract. The New Public Service Contract provided that the operating costs of RTP 2 could be compensated for retroactively from 1 January 1996.



Table 4  
**Net reported and reimbursable costs of the public service**

(PTE million)

	1992	1993	1994	1995	1996	1997	1998
Teletext						112,9	86,8
Operation of RTP International	882,3	1 517,4	1 826,9	1 890,8	2 059,6	3 999,1	3 712,9
RTP África	—	—	—	—		654,7	1 332,0
Direct broadcasting by RTP 1 to Azores and Madeira	—	—	—	—	—	76,8	295,4
Audiovisual archives	509,1	241,6	402,7	492,7	184,9	909,4	672,1
Cooperation with Portuguese-speaking countries in Africa	186,9	128,4	172,2	148,6	144,9	202,4	200,3
Coverage differential	406,7	1 312,8	1 314,2	1 050,3	1 050,0	622,6	208,6
Delegations/correspondents	797,8	658, 2	681,1	642,7	583,2	457, 2	211,0
S. Carlos National Theatre Foundation		50,0	55,0	60,0	60,0	60,0	60,0
Cinema promotion		215,0	95, 0	27,5	156, 5	391,1	352,8
Operation of autonomous regional centres	3 453,4	3 486,0	3 685,9	3 696,1	3 846,6	3 459,2	2 855,2
Broadcasting for specific entities	482,0	350,6	151,1	94,6	80,8		
Sport TV <sup>(1)</sup>							– 440,0
Net operating costs of RTP 1						16 946,1	11 916,6
Net operating costs of RTP 2					9 050,6	10 080,6	8 637,6
Total net operating costs	6 718,2	7 960,0	8 384,1	8 103,3	17 217,1	37 972,1	30 101,3

<sup>(1)</sup> Although Sport TV is not a public service activity eligible for compensation, RTP deducted the profits of Sport TV from the public service cost. The basis for this is Article 47(3) of Law No 31-A/98 of 14 July 1998, which provides that profits made by RTP from participation in other channels are to be used for the financing of public service initiatives.

Source: Portuguese authorities and public service reports.

(67) The table below gives an overview of RTP investments in equipment for public service activities. It presents both the real investments in public service activities, as shown in the annual financial accounts, and the investments reported in

the public service reports. It will be noted that the real investments in public service activities were higher than the investments reported in the public service reports.

Table 5  
**Investments in public service activities**

(PTE million)

	1992	1993	1994	1995	1996	1997	1998	Total
Financial accounts	2 632,6	2 102,0	2 763,9	992,7	1 480,4	4 037,4	6 054,2	20 063,2
Public service reports	2 327,3	98,0	1 975,1	154,4	28,1	4 037,4	6 127,8	14 748,1
Difference	305,3	2 004,0	788,8	838,3	1 452,3	0	– 73,6	5 315,1

Source: RTP financial accounts and public service reports.

*Objective of the measures*

- (68) The objective of the measures was to compensate RTP for the public service obligations imposed on it and to finance its investments.

*Possible effects of the measures*

- (69) In Portugal the public service operator was not selected as a result of a procedure in which all interested undertakings had the opportunity to state the amount of compensation they would need to operate a public service television broadcasting concession. RTP was appointed by the Government to provide public service television.

- (70) Since 1992, both commercial and public service broadcasters have been active in the Portuguese television market. Apart from RTP, the commercial broadcasters SIC and TVI are licensed to broadcast television channels. SIC was the first private operator to start broadcasting on 6 October 1992. The measures in favour of RTP could have the effect of distorting competition in the television broadcasting market.

*Grounds for initiating the procedure*

- (71) The Commission initiated the procedure following a judgment by the Court of First Instance in 2000 <sup>(43)</sup> which annulled the Commission's 1996 decision <sup>(44)</sup>.
- (72) Furthermore, considering the duration of its preliminary assessment and its doubts as to the proportionality of the financing of RTP's reimbursable public service costs, the Commission initiated the procedure following complaints made by SIC in 1996 and 1997. The measures objected to were a payment by the State for the hiving-off of the television broadcasting network, a bond issue, cinema promotion, the 1996 to 2000 restructuring plan, capital injections in the period 1994 to 1997 and a loan.
- (73) When initiating the formal investigation procedure, the Commission, taking into account the total reimbursable public service costs of RTP in the period 1992 to 1998, expressed doubts as to whether the Portuguese State did not overcompensate for the net public service costs of RTP.

**III. COMMENTS FROM INTERESTED PARTIES**

- (74) Following the initiation of the investigation procedure, several interested parties commented on the measures. Below is an overview of the relevant comments from these parties on each measure.

- (75) SIC and TVI argued that the exemptions from registration charges are an exception to the rules normally applicable to any change in a company's statutes. SIC commented that the measure is not limited to the creation of RTP. On the basis of Article 11(2) of its statutes, RTP enjoys a general exemption from the payment of taxes and charges for any kind of registration.

- (76) TVI commented that RTP was also exempt from any costs linked to the publication of the deed.

- (77) As regards the facilities for paying the fee for use of the television broadcasting network, the interested parties commented that it should be made clear whether interest was actually charged and at what rate and whether any payments were made to Portugal Telecom. Furthermore, clarification should be provided on RTP's current level of indebtedness towards Portugal Telecom.

- (78) SIC and TVI commented on the rescheduling of debt due to the social security scheme. They argued that RTP was allowed to amortise that debt on different terms from those applicable to other undertakings under Decree-Law No 411/91. ACT underlined the central role of the State in the agreement.

- (79) As regards the sale of the television network, ACT and TVI commented that an accountancy and economic analysis of the value of the assets of the newly created company TDP should be carried out to determine whether there had been any overcompensation. On this issue Mediaset and ACT stated that the television network has been created thanks to state financing and not by the operator itself. They therefore questioned whether the compensation to RTP for this state asset was justified.

- (80) As regards the bond issue, SIC stressed that, in view of RTP's financial situation, it was only because the State is 100 % owner of the shares that the bond was accepted on the market. Furthermore, Mediaset observed that the Commission should look at the substance of any guarantee rather than the form.

<sup>(43)</sup> Judgment of the Court of First Instance of 10 May 2000 in Case T-46/97 *SIC v Commission* [2000] ECR II-2125.

<sup>(44)</sup> NN 141/95 Financing of the Portuguese public television service (OJ C 67, 4.3.1997, p. 10).

- (81) As to the protocol on cinema promotion, SIC commented that the State had undertaken to provide compensation each year for the costs of the public service obligation, including cinema promotion. This thus represented double financing for RTP for the same aim. TVI commented that similar protocols have been signed with private broadcasters but that only RTP receives state support. Furthermore, TVI argued that the 1996 protocol on cinema promotion was replaced in 2000, with RTP having to cofinance as a co-producer all film projects receiving financing from ICAM (Cinema, Audiovisual and Multimedia Institute). On this issue Mediaset observed that, in so far as the terms of funding require the public broadcaster to participate in co-productions with independent producers, it is necessary to ensure that such participation does not confer an indirect benefit on the public operator in its relationship with such film producers.
- (82) As regards the capital injections in 1994 to 1997, SIC, ACT, Mediaset and TVI commented that no rational shareholder would have increased the capital of a company with the characteristics of RTP. The capital injections benefited a company with a huge deficit but without a coherent restructuring plan for restoring viability.
- (83) SIC also argued that, given the situation of technical bankruptcy in which RTP found itself in 1996, no financial institution would have approved a loan for it.
- (84) Mediaset and ACT requested that greater emphasis be placed during the investigation procedure on the independent supervision of the delivery of the public service remit. The commercial broadcasters SIC and TVI commented that the Commission should conclude that the measures constituted incompatible state aid as the public funds granted to RTP were disproportionate.
- (86) As regards the comments of SIC on Article 11(2) of Law No 21/92, they responded that the Portuguese legislator did not grant public undertakings specific tax benefits in the event of business conversion or restructuring. The exemption was based on Decree-Law No 404/90.
- (87) As regards late payment of amounts payable for use of the network, the Portuguese authorities claim that the rescheduling of debt by Portugal Telecom was a common strategy in commercial relations between creditor and debtor and did not result from intervention by the State.
- (88) The Portuguese authorities claim that the background to the initial agreement between the social security scheme and RTP on the rescheduling of debt and the waiver of interest and fines was a legal dispute surrounding the constitutionality of Implementing Decree No 12/83, which governs social security contributions in connection with remuneration for overtime. The agreement acknowledged RTP's interpretation — confirmed by a tax specialist — that the remuneration was not subject to social security contributions.
- (89) Secondly, the authorities claim that the formal authorisation of this agreement by the Government did not confer a specific financial advantage on RTP compared with other undertakings in similar circumstances under Decree-Law No 411/91. They maintain that the derogation of Article 2(1)(d) applies to RTP as it was the subject of state intervention and experienced various vicissitudes under the management of an administrative commission appointed by the Government in 1977 <sup>(45)</sup>. According to the Portuguese authorities, the general nature is underlined by the fact that an arrangement has been made with one of the interested parties on the basis of the same law.

#### IV. COMMENTS FROM PORTUGAL

- (85) As regards the exemption from registration charges, the Portuguese authorities commented that, since it was not necessary to issue a public deed formalising the act of conversion of the public undertaking into a public limited company, no basis existed for the collection of the respective taxes and emoluments.
- (90) As regards the payment for the hiving-off of the television network, the Portuguese authorities commented in 1993 that the funding was directly linked to the process of splitting off and selling the network for carrying and transmitting television signals. The State purchased TDP from RTP. Since it paid for the purchase by increasing RTP's capital by an amount exactly equal to the value of the assets that had been hived off, the measure does not constitute state aid.

<sup>(45)</sup> Decree-Law No 91/A/77 annulled the 1976 Statutes of RTP and stipulated that RTP would be governed by an Administrative Council.

- (91) As regards the bond issue accompanied by a state guarantee the Portuguese authorities argued that this shareholder loan did not involve any guarantee by the Portuguese State, as demonstrated by the technical documents relating to the matter.
- (92) As regards the 1996 protocol on cinema promotion, the Portuguese authorities commented that it clarifies and lays down the terms of RTP's public service obligation to support and promote cinema production. Under the protocol, RTP was required to co-finance 'projects receiving financial support' that had been pre-selected by the responsible government body. According to the Portuguese authorities, the terms of the protocol concluded with RTP were not comparable to those concluded with SIC and TVI, as RTP was obliged to co-finance cinematographic works whose television viewing interest might be low or even non-existent. In any case, the value of the subsidy granted by RTP was, as a general rule, far greater than the average value of the rights for showing works suitable for television broadcasting.
- (93) As regards the restructuring plan for the period 1996 to 2000, the Portuguese authorities stated that the plan never got beyond the preparatory study and therefore did not form the basis for any financial support from the State to RTP.
- (94) As regards the loan, the Portuguese authorities commented that the technical conditions attached to it provided that the financial operation should carry interest calculated according to market criteria.
- (95) Furthermore, the Portuguese authorities argued that the capital injections in the period 1994 to 1998 constituted an instrument for financing the costs of providing a public television service, together with payment of the compensatory allowances.
- (96) According to the Portuguese authorities, the financing model chosen to compensate RTP for its public service costs proved inadequate and led to trading deficits. Firstly, the compensatory allowances were always calculated at below the real needs of public service television financing. Secondly, the Portuguese State systematically paid the allowances late. RTP then had to resort to bank financing in order to meet its operating expenditure but could not include the interest and amortisation charges in the calculation of the public service cost. Thirdly, RTP had to pay value added tax (VAT) to the State on the allowances, thereby reducing the net amount of the compensatory allowances.
- (97) The Portuguese authorities claim that (i) the tax exemptions, (ii) the facilities for the payment of the tax on the use of the broadcasting network, (iii) the rescheduling of the debt to the social security scheme (iv) payment for the hiving-off of the television network, (v) the protocol on cinema promotion and (vi) the loan taken out by RTP in 1998 do not fall within the concept of state aid. As regards the compatibility of the other measures, the Portuguese authorities argued that they should be regarded as compensation for public service costs and therefore not as state aid <sup>(46)</sup> or, alternatively, their compatibility with Community legislation should be assessed in the light of Article 86(2) of the EC Treaty.
- (98) As regards calculation of the overcompensation, the Portuguese authorities argued that:
- the inclusion in 1996 of the operating costs of RTP 2 as reimbursable public service costs is based on the 1996 Public Service Contract, according to which compensation for RTP 2's operating costs under the Contract took effect from 1 January 1996 onwards <sup>(47)</sup>;
  - the loan of PTE 20 000 million should not be regarded as compensation since it was granted on market terms,
  - the capital increases were also designed to finance investments and not simply to provide financial compensation for reimbursable public service costs. The State's obligation as shareholder to participate in the financing of investments deemed to be necessary is laid down in the 1993 and 1996 Public Service Contracts <sup>(48)</sup>,
  - the compensation payments were subject to VAT, with the result that the net value received by RTP was lower,
  - under the 1996 Public Service Contract, the public service costs were reimbursable only up to the allotted budget.

<sup>(46)</sup> See judgment of the Court of Justice of 22 November 2001 in Case C-53/00 Ferring SA v Agence centrale des organismes de sécurité sociale (ACOSS), [2001] ECR I-9067.

<sup>(47)</sup> Clauses 3 and 4 of the New Public Service Contract.

<sup>(48)</sup> According to Clause 14 of the Old Public Service Contract and Clause 21(3) of the New Public Service Contract, 'Participation in the above-mentioned investments shall be covered preferably by the first contracting party and as shareholder in the form of an increase in capital'.

- (99) In view of the foregoing, the Portuguese authorities concluded that the financial compensation for the public service obligation of RTP should not be regarded as excessive or inappropriate.

## V. ASSESSMENT OF THE MEASURES

### State aid nature of the measures

- (100) In order to ascertain whether the measures constitute aid within the meaning of Article 87(1) of the Treaty, the Commission has to assess whether the measures for RTP:

- are granted by the State or through state resources,
- are capable of distorting competition,
- favour certain undertakings or the production of certain goods,
- affect trade between Member States.

#### *Presence of public resources*

- (101) Public resources are present in the exemption from registration charges, as a loss of tax revenue is equivalent to the consumption of state resources in the form of fiscal expenditure <sup>(49)</sup>.
- (102) The Commission notes the following regarding the presence of public resources in the acceptance by the broadcasting network operator of RTP's late payments for using the broadcasting network. By accepting non-payment of the network fee and interest, thereby giving rise to accumulated debt during the whole period under investigation, the network operator decided to forgo revenue and may have had to borrow money from the market in order to finance its operations.
- (103) Since Portugal Telecom was gradually privatised during the period under investigation, the Commission has to distinguish between the period during which the State had a majority holding in the company and the period during which it had a minority holding.

<sup>(49)</sup> Point 10 of the 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).

- (104) For the period after mid-1997, the Commission considers that any loss of income by Portugal Telecom cannot be regarded as public resources since state involvement in Portugal Telecom was limited to 25 % and was progressively reduced in subsequent years, with other major shareholders acquiring shares in the company <sup>(50)</sup>. Furthermore, as can be seen in paragraph 27, Portugal Telecom could not receive state compensation for possible losses resulting from the acceptance of late payments by RTP. Accordingly, the Commission concludes that after mid-1997 no state resources were involved.

- (105) For the period before mid-1997, the State controlled Portugal Telecom as it had a majority holding in the company. Therefore, any loss of income resulting from the acceptance of late payments from the period before mid-1997 should be regarded as public resources <sup>(51)</sup>.

- (106) Firstly, the Commission should assess whether the behaviour of the network operator before mid-1997 led to a loss of state resources. In fact, by granting payment facilities, the network operator acted as a public creditor towards RTP. Its behaviour should therefore be compared with that of a public or private creditor that seeks to recover sums due to it and, to that end, concludes agreements with the debtor under which the accumulated debts are to be rescheduled or paid by instalments in order to facilitate their repayment <sup>(52)</sup>. The interest normally applicable to that type of debt is intended to make good the loss suffered by the creditor because of the debtor's delay in performing its obligation to pay off its debt, namely default interest. The rate of default interest applied by the public creditor should be equal to the rate a private creditor would apply in similar circumstances <sup>(53)</sup>.

- (107) Following the opening of the procedure and the comments put forward by third parties, the Portuguese authorities did not provide sufficient information on the interest rate applied by the public network operator or on the market reference rate. Therefore, the Commission cannot rule out the possibility that the interest rates charged by Portugal Telecom before mid-1997 constituted a loss of state resources.

<sup>(50)</sup> See in this respect the definition of a public undertaking given in Article 2(1)(b) of Commission Directive 2000/52/EC of 26 July 2000 amending Directive 80/72 on the transparency of financial relations between Member States and public undertakings (OJ L 193, 29.7.2000, p. 75).

<sup>(51)</sup> See judgment of the Court of First Instance of 12 December 1996 in Case T-358/94 *Compagnie Nationale Air France v Commission*.

<sup>(52)</sup> See judgment of the Court of Justice of 29 April 1999 in Case C-342/96 *Kingdom of Spain v Commission* [1999] ECR I-0000, paragraph 46.

<sup>(53)</sup> *Ibidem*, paragraph 48.



- (108) Secondly, the Commission needs to ascertain not only whether the measure involves state resources but also whether the public authorities were actually involved in the adoption of the measure <sup>(54)</sup>.
- (109) It was not disputed that before mid-1997 the State was in a position to control Portugal Telecom and to have a dominant influence over its operations since it held more than 50 % of the company's shares.
- (110) During its investigation the Commission did not find any indications that the Portuguese authorities were actually involved in the adoption of the agreements on the acceptance of the delayed debt repayment by the operator of the broadcasting network <sup>(55)</sup>.
- (111) As can be seen from paragraph 22, the State regulated the tariffs and the television signals distribution service that the network operator had to deliver as part of its concession contract with the State. However, the legal provisions did not make a distinction between the services and tariffs that the network operator was required to deliver to the public broadcaster RTP and those to private television operators. Nor did the network operator have to provide RTP with an obligatory universal service in terms of a broadcasting network service.
- (112) The Commission does not, therefore, agree with the third parties who argued that they were discriminated against since the Television Law stipulated only that private operators could lose their broadcasting licence if they did not pay the network fee on time. Although the Law provided only for the consequences of possible non-payment by private operators, Portugal Telecom was under no obligation to deliver its services to RTP, regardless of whether RTP paid its fees or not.
- (113) Furthermore, the network operator was not integrated into the structures of the public administrations as it was set up under company law as a public limited company. ('sociedade anónima').
- (114) The Portuguese authorities explicitly stated that the public authorities did not intervene, directly or indirectly, in the acceptance of delayed payments by Portugal Telecom. Similarly, third parties did not come forward with any indications suggesting state involvement in the measure.
- (115) Lastly, as can be seen from paragraph 25, the behaviour of the network operator before and after mid-1997 did not change. After mid-1997 the network operator continued to conclude agreements with RTP on payment of the fees. A dispute over the level of the annual fee in connection with the interdependence of the two companies seems to have been the main reason for the agreements. This seems to be underlined by the decision of ANACOM in 2003 that Portugal Telecom had to reduce its prices significantly.
- (116) In view of the arguments put forward above, the Commission concludes that it has no indications that the network operator was required by the public authorities to accept late payment. Nor are there any other indications to suggest that the public authorities were involved in the adoption of the measure <sup>(56)</sup>. Furthermore, similar arrangements were agreed upon once the company was clearly privatised. Therefore, the measure cannot be considered to be attributable to the State and so did not lead to a loss of state resources.
- (117) As regards the rescheduling of debt due to the social security scheme and the waiver of interest for late payment, the Commission considers that the social security scheme cannot be regarded as an undertaking. It does not carry out an economic activity but is a public body with the task of administering social security <sup>(57)</sup>. Furthermore, authorisation for the debt rescheduling was given not by the social security scheme itself but by a joint decree of the State Secretaries for Finance and Social Security and the Deputy State Secretary to the Deputy Minister. With the authorisation, the State did forgo income since normally it would have received PTE 1 206 million in interest on the outstanding debt. Therefore, it is clear that state resources are involved and that the measure is attributable to the State.
- (118) The capital increases granted to RTP and the payments for the television network were provided by the State direct from the public budget. It is therefore clear that these funds constitute state resources within the meaning of Article 87(1).

<sup>(54)</sup> Judgment of the Court of Justice of 16 May 2002 in Case C-482/99 *Republic of France v Commission*.

<sup>(55)</sup> By letter of 16 June 2003, the Commission specifically requested information on the indicators given by the Court of Justice in Case C-482/99.

<sup>(56)</sup> See judgment of the Court of Justice of 2 February 1988 in joined cases 67, 68, and 70/85 *Kwekerij Gebroeders van Der Kooy v Commission* [1988] ECR 219, paragraph 37.

<sup>(57)</sup> Judgment by the Court of Justice of 17 February 1993 in Joined Cases C-159/91 and C-160/91 *Christian Poucet v Assurances Générales de France and Caisse Mutuelle Régionale du Languedoc-Roussillon* [[1993] ECR I-637.

(119) The Commission cannot agree with the Portuguese authorities that no state resources are involved in the loan. It should be recalled that the concept of state resources also includes advantages granted by bodies designated or established by the State for that purpose <sup>(58)</sup>. The loan contract was concluded between RTP and the Public Debt Stabilisation Fund, a fund managed by the Public Debt Management Institute. A legal act determines that the Institute is subject to the authority and supervision of the Minister for Finance <sup>(59)</sup>. It can therefore be concluded that the funds granted by the Public Debt Stabilisation Fund should be regarded as state resources.

(120) Moreover, the measure can be considered as being directly attributable to the Portuguese authorities since a resolution agreed on 17 December 1998 between the State Secretaries for the Media, the Treasury and Finance laid down the conditions of the contract.

(121) No information was received to show that the bond issue by RTP was accompanied by a state guarantee. According to the prospectus for the bond issue, RTP guaranteed servicing of the debt. It had no legal status at the time the bond was issued, and this resulted in an implicit state guarantee. In 1992 the company was transformed from a public entity into a public limited company by Law No 21/92. The Commission therefore considers that the bond issue was carried out under market conditions and the State did not forgo income. As a result, no state resources are involved. Contrary to the opinion of third parties, the Commission considers that the fact that RTP is publicly owned does not alter this conclusion as the EC Treaty is neutral as regards public or private ownership <sup>(60)</sup>.

(122) As regards the protocol on cinema promotion of September 1996, the Commission cannot agree with the comments from third parties that RTP received additional funding on the basis of the protocol. The protocol specified in detail how RTP was to fulfil its public service obligation to support the cinema <sup>(61)</sup> but did not provide for additional financial compensation for RTP. Financial compensation for RTP's obligations in respect of cinematographic production was already possible under the general system of compensation payments in accordance with Law

No 21/92 <sup>(62)</sup>. Accordingly, the protocol cannot be seen as a separate ad hoc financing measure and, as such, does not lead to a loss of state resources, as no new financial measures are granted by the State to RTP on the basis of the protocol.

(123) The restructuring plan for the period 1996 to 2000 seems to have been simply a preliminary study carried out by RTP without any financial commitment by the Portuguese State. Therefore, the Commission considers that no state resources are involved. No new elements were presented by any third parties on this aspect.

(124) Accordingly, it can therefore be concluded that the protocol on cinema promotion, the restructuring plan for the period 1996 to 2000, the late payments for the use of the broadcasting network and the bond issue do not constitute state aid as no state resources are involved.

#### *Favouring of certain undertakings*

(125) As regards the exemption from registration charges, the Commission has to assess whether the measure conferred a general tax exemption on RTP and whether it applied specifically to RTP (and, alternatively, to only public companies) and not to private companies. Furthermore, it has to determine whether RTP received an additional advantage by not paying any cost linked to the publication of the deed and whether RTP was also exempted from the registration charges in respect of all other assets under Article 11(2) of Law No 21/92.

(126) Firstly, the Commission considers that the purpose of Article 11 was to exempt RTP from registration and similar charges directly linked to the change of its legal status. Whereas paragraph 1 relates to the basic requirement to register the legal document at the National Commercial Registry, paragraph 2 refers to other mandatory registration directly linked to the change in the legal nature of the company (e.g. registry of movable or immovable assets). Indeed, information from the Portuguese authorities shows that RTP does not enjoy a general exemption for registration charges as it has on several occasions paid notary and registration charges related to changes in the company after its conversion into a public limited company <sup>(63)</sup>. The Commission cannot, therefore, agree with comments from interested parties that RTP enjoyed a general exemption from registration charges.

<sup>(58)</sup> Judgment of the Court of Justice of 17 June 1999 in Case C-295/97 *Industrie Aeronautiche e Meccaniche Rinaldo Piaggio SpA v International Factors Italia SpA (Ifitalia), Dornier Luftfahrt GmbH and Ministero della Difesa* [1999] ECR I-3735, paragraph 35.

<sup>(59)</sup> Article 1 of Decree-Law No 160/96.

<sup>(60)</sup> See point 1.2 of the Commission notice on the application of Articles 87 and 88 of the EC Treaty to state aid in the form of guarantees (OJ C 71, 11.3.2000, p. 14).

<sup>(61)</sup> As laid down in Article 4(3)(l) of Law No 21/92, in Clause 5(1)(j) of the Old Public Service Contract and in Clause 7(1)(m) of the New Public Service Contract.

<sup>(62)</sup> Article 5 of Law No 21/92.

<sup>(63)</sup> Letter from the Portuguese authorities of 14 December 1995.

- (127) Secondly, the Commission agrees with the Portuguese authorities that Article 11(1) of Law No 21/92, on the basis of which RTP is exempt from payment of registration charges, does not confer a specific advantage. It merely reaffirms the applicability of Law No 84/88 in the specific case of RTP, under which public undertakings could be converted by decree-law into public limited companies, with the decree-law having to approve the statutes of the limited company and to constitute a sufficient document for all registration requirements.
- (128) The different treatment for public undertakings transforming their legal status into a public limited company arises from the internal logic of the system and does not confer on them a specific advantage since relevant chargeable events do not exist. The issuing of a notarial deed is necessary to certify the documents that create or alter a company in order to give them legal force. However, such a deed seems superfluous for public undertakings whose legal status has been changed into that of a public limited company through a legislative act since such an act already has the necessary legal force.
- (129) The same reasoning is valid for registration charges as well as for publication costs. In its responsibility as a public authority, the State has to publish legislative amendments in the *Diário de República*. As Law No 21/92 approving the new statutes of RTP had already been published by the State, it would have been superfluous to impose on RTP any other publication requirements to which private companies may be subject. The *Diário de República* contains the full text of RTP's statutes, thereby producing the same effects as registration, including the required effects regarding information for third parties.
- (130) Thirdly, the Commission agrees with the Portuguese authorities that Article 11(2) of Law No 21/92, under which RTP was exempted from the payment of other registration charges linked directly to the modification of the legal status of the company, does not confer a specific advantage to RTP. Article 11(2) merely confirms the applicability of Article 1 of Decree-Law No 404/90, under which undertakings could be exempted from transfer tax and other legal charges payable on assets necessary for the concentration or cooperation in question. Decree-Law No 404/90 applied to all undertakings that carried out acts of concentration or cooperation before 31 December 1993. The exemption from payment of other registration fees granted to RTP does not confer a specific advantage on RTP since it was applicable to all undertakings in the same situation.
- (131) After considering the comments from third parties and the Portuguese authorities, the Commission concludes that the initial agreement between the social security scheme and RTP cannot be regarded as representing typical behaviour of a private operator. The dispute was whether or not the interpretation of certain social security rules as laid down in Implementing Decree No 12/83 was legally correct. The agreement confirmed RTP's interpretation, which was supported by the analysis of a tax expert who concluded that the Implementing Decree was unconstitutional. However, following the agreement, the Implementing Decree was not revoked. Therefore, it has to be concluded that the measure was selectively applied to RTP without affecting the applicability of the social security scheme's interpretation to other companies.
- (132) Furthermore, the Commission cannot agree with the Portuguese authorities that the authorisation for the debt rescheduling and for the waiver of fines and interest was given within the framework of a general system applicable to all undertakings in a similar situation on the basis of Decree-Law No 411/91 and therefore did not confer a specific advantage on RTP.
- (133) Without prejudging the selective or general nature of such a scheme, the purpose of the present decision is to determine whether the application of the scheme to RTP was selective.
- (134) In order to prove that the rescheduling is indispensable to ensure the viability of the company, Decree-Law No 411/91 requires a financial/economic study to be carried out. RTP never carried out such a study of its viability pursuant to Article 2(3) of Decree-Law No 411/91.
- (135) Furthermore, the condition laid down in Article 2(1)(d) was not applicable to RTP as the debt regularisation did not follow state intervention. The Commission does not agree with the Portuguese authorities, which claim that the history of state intervention affected the operation of the debtor enterprise and that RTP was governed by statutory rules at the time of the state intervention. Although RTP was subject to a special management regime in 1977<sup>(64)</sup>, this regime came to an end with the adoption of the 1980 statutes, whereas the debt to the social security scheme was built up in the period 1983 to 1989. The Commission considers that the debt regularisation for RTP cannot be considered part of a general regime under Law No 411/91 as RTP did not meet the criteria laid down in this Law for such authorisation. Therefore, the measure was applied in a selective manner to RTP.
- <sup>(64)</sup> Law 91/A/77 stipulated that an Administrative Council should govern RTP on account of its structural crisis.

- (136) Furthermore, by granting the debt rescheduling, the State should have acted like a public or private creditor that seeks to recover sums due to it and, to that end, concludes debt rescheduling agreements to facilitate payment <sup>(65)</sup>. The rate of default interest applied by the State should be equal to the rate a private creditor would apply in similar circumstances. The Commission considers that a private creditor that pursued the recovery of the debt by legal means would obtain at least the statutory interest rate. Therefore, by not requiring any interest payments at all, despite available enforcement mechanisms, the Portuguese authorities did not act like a private creditor would have done in order to maximise the rate of interest. Furthermore, the debt with the social security scheme built up in the period 1983 to 1989 and a rescheduling arrangement was agreed only in 1993. Under the same conditions a private creditor would not have allowed a similar accumulation of outstanding debt over such a long period without initiating collection procedures. Therefore, it seems that the measure conferred a specific advantage on RTP.
- (137) As regards the payments for the hiving-off of the television signals network, the Commission cannot take into account the comments of third parties that question the calculation of the value of the broadcasting network. The Commission already concluded in its decision of 2 October 1996 on the financing of RTP that the price paid by the State to RTP for the network represented the market value and did not constitute state aid <sup>(66)</sup>. This conclusion was not contested by SIC before the Court of First Instance <sup>(67)</sup>.
- (138) Furthermore, the Commission does not agree with the comments to the effect that the compensation is not justified because the television network has been built with the help of state financing. It considers that the function of the State as an investor should not be confused with its function as a public authority. Although the State is the sole owner of RTP and became the sole owner of TDP, the two companies should, for transparency reasons, be legally and financially independent. The network was part of the assets of RTP. Therefore, the compensation granted by the State to the public company RTP in respect of the market value of the network, which it had decided to split off from the assets of RTP, does not confer any financial advantage on RTP as the compensation matched the real value of those assets. And so, the measure does not confer an advantage on RTP and does not, therefore, constitute state aid within the meaning of Article 87(1) of the EC Treaty.
- (139) After considering the comments from third parties and the Portuguese authorities, the Commission concludes that the capital increases in the period 1994 to 1997 provided a financial advantage for RTP. As can be seen from Table 3, considering the weak financial position of RTP in the period when the capital increases were made, no private investor would have injected capital into the company as no normal return could be expected from the company within a reasonable time. In fact, despite the capital injections, the financial position of RTP deteriorated. Neither the Portuguese authorities nor third parties alleged that the Portuguese State acted as a private investor when injecting capital into the company.
- (140) The Commission does not agree with the Portuguese authorities that the loan granted in 1998 was in conformity with market conditions. For the loan not to constitute state aid, the conditions attached to it (the security sought and the interest rate) should reflect the inherent risk of lending to an undertaking <sup>(68)</sup>. The risk and subsequently the interest rate are higher when a company is in an economic and financial situation the soundness of which is below the level at which a financial institution would lend to it.
- (141) As can be seen from Table 3, at the time the loan was agreed, RTP was in severe financial difficulties to the extent that its debts exceeded the value of its assets and net equity was negative. Technically, the company was bankrupt.
- (142) Firstly, it should be borne in mind that the loan was a subordinated loan, i.e. it had no asset-based security and, in the case of bankruptcy, it ranked for repayment purposes after all creditors but before shareholders. The absence of appropriate asset-based security was a clear indication that the loan was not granted at market conditions and that aid was involved. In view of the technical bankruptcy of RTP at the time the loan was granted, no financial institution would have granted a subordinated loan to the company as there was little likelihood of RTP being able to repay it. Indeed, the loan was not granted by a private financial institution but by the Public Debt Stabilisation Fund.

<sup>(65)</sup> Case C-342/96.

<sup>(66)</sup> NN 141/95, Financing of the Portuguese public television service (OJ C 67, 4.3.1997, p. 10).

<sup>(67)</sup> Case T-46/97, paragraph 50.

<sup>(68)</sup> Commission communication on the application of Articles 92 and 93 of the EEC Treaty and of Article 5 of Commission Directive 80/723/EEC to public undertakings in the manufacturing sector (OJ C 307, 13.11.1993, p. 3).



(143) Secondly, it can be argued that the interest rate applied to the loan clearly does not reflect its intrinsic risk. Not only is it below the reference rate that the Commission normally uses to calculate the aid element in interest subsidy schemes for loans <sup>(69)</sup>, but also a normal market operator would require, on the top of sound guarantees, an interest rate that compensated for such a high risk of non-repayment.

(144) Given that its financial position was such that RTP would not have been able to obtain a subordinated loan under normal circumstances, the loan effectively equates to the payment of a grant and constitutes an advantage for RTP.

(145) Accordingly, the Commission considers that the debt rescheduling with the social security scheme, the capital injections in the period 1994 to 1997 and the loan granted in 1998 provided a financial and economic advantage as compared with competitors that did not receive the same funds.

#### *Distortion of competition*

(146) Since the Portuguese television market was open to competition by 1992 at the latest, there were competitors on the market during the period that RTP benefited from the different measures. In February 1992 broadcasting licences were granted to the commercial broadcasters SIC and TVI and in October 1992 SIC started broadcasting in Portugal.

(147) The Commission does not agree with the Portuguese authorities that the agreement on the debt with the social security scheme would fall outside the concept of state aid, as the debt itself had been created before the Portuguese broadcasting market was opened up to competition. The financial advantage was granted to RTP in May 1993 after the opening-up of the broadcasting market and was therefore able to confer an economic advantage on RTP.

(148) Accordingly, the Commission concludes that the measures granted by the State were able to confer an economic and financial advantage on RTP compared with competitors not receiving the same funds and thereby to distort competition within the meaning of Article 87(1).

<sup>(69)</sup> The reference rate is based on the five-year interbank swap rate plus a premium (OJ C 273, 9.9.1997, p. 3). The reference rates for Portugal since 1 January 1997 can be found at [http://europa.eu.int/comm/competition/state\\_aid/others/reference\\_rates.html](http://europa.eu.int/comm/competition/state_aid/others/reference_rates.html).

#### *Effect on trade between Member States*

(149) State measures fall within the scope of Article 87(1) in so far as they affect trade between Member States. This is the case whenever the activities in question are subject to intra-Community trade. In the present case, the beneficiary RTP is itself active on the international market. Indeed, through the European Broadcasting Union it exchanges television programmes and participates in the Eurovision system <sup>(70)</sup>. Furthermore, RTP is in direct competition with commercial broadcasters that are active on the international broadcasting market and have an international ownership structure <sup>(71)</sup>.

(150) Accordingly, it can be concluded that the measures granted to RTP affect trade between Member States within the meaning of Article 87(1).

#### *Conclusion on the aid nature of the ad hoc measures*

(151) It transpires from the above that, leaving aside possible public service obligations imposed on RTP, the following measures involve state aid within the meaning of Article 87(1) of the EC Treaty: the debt rescheduling with the social security scheme, the capital injections during the period 1994 to 1997 and the loan granted in 1998.

(152) However, as mentioned above, RTP is entrusted with a public service broadcasting obligation. The European Court of Justice ruled in *Altmark* that state measures compensating for public service costs do not qualify as state aid under Article 87(1) of the EC Treaty when the following four conditions are all satisfied <sup>(72)</sup>:

- the recipient undertaking must actually have public service obligations to discharge, and the obligations must be clearly defined,

<sup>(70)</sup> See judgment of the Court of First Instance of 8 October 2002 in joined Cases T-185/00, T-216/00, T-299/00 and T-300/00 *Métropole Télévision SA (M6) (T-185/00), Antena 3 de Televisión, SA (T-216/00), Gestevisión Telecinco, SA (T-299/00) and SIC - Sociedade Independente de Comunicação, SA (T-300/00) v Commission of the European Communities* [2002] p. II-3805.

<sup>(71)</sup> According to the case law of the Court of Justice, when aid strengthens the position of an undertaking compared with other undertakings competing in intra-Community trade, the latter must be regarded as affected by that aid. Judgment of the Court of Justice of 17 September 1980 in Cases 730/79 *Philip Morris Holland v Commission of the European Communities* [1980] ECR 671, paragraph 11; judgment of the Court of Justice of 21 March 1991 in Case C-303/88 *Republic of Italy v Commission of the European Communities* [1991] ECR I-1433, paragraph 17; judgment of the Court of Justice of 19 September 2000 in Case C-156/98 *Federal Republic of Germany v Commission of the European Communities* [2000] p. I-6857, paragraph 33.

<sup>(72)</sup> Judgment of the Court of Justice of 24 July 2003 in Case C-280/00 *Altmark Trans GmbH et Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH* [2003] p. I-7747.



— the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner,

— the compensation cannot exceed what is necessary to cover all or some of the costs incurred in the discharge of public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations,

— when the company is not chosen pursuant to a public procurement procedure, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately equipped, would have incurred in discharging those obligations.

(153) Leaving aside the first and third conditions, the ad hoc measures mentioned in paragraph 151 do not seem to fulfil the second and fourth conditions of *Altmark* for the reasons given below:

(154) It is clear that the financing granted by means of the agreement with the social security scheme and the loan were not part of a compensation system the parameters of which had been established beforehand in an objective and transparent manner (second condition). On the contrary, they were based on ad hoc decisions attributable to the State.

(155) Furthermore, as stated in paragraph 61, the public service contracts provided for a specific financing possibility for investments in public service equipment by means of capital injections. They do not restrict the investments to public services or define clearly the conditions and limits of state participation; they merely refer to the possibility for the State to participate in RTP's investments as a shareholder. Therefore, the Commission considers that the capital injections too cannot be considered to be part of a compensation system the parameters of which have been established beforehand in an objective and transparent manner.

(156) Furthermore, it is clear that RTP was not chosen pursuant to a public procurement procedure guaranteeing the lowest possible cost. There are no indications that the amount of the ad hoc payments was determined on the basis of an analysis of the costs that a typical undertaking would incur (fourth condition).

(157) Accordingly, it is clear that in the present case not all the *Altmark* conditions are satisfied. Therefore, the measures mentioned in paragraph 151 must be regarded as state aid under Article 87(1) of the EC Treaty.

### Assessment of the compatibility of the measures

(158) The Court of Justice has consistently held that Article 86 may provide for an exemption from the ban on state aid for undertakings entrusted with a service of general economic interest (SGEI). It has been implicitly confirmed in *Altmark* that state aid which compensates for the costs incurred by an undertaking in providing an SGEI can be regarded as compatible with the common market if it meets the conditions of Article 86(2) of the EC Treaty <sup>(73)</sup>.

(159) The Court of Justice has made it clear that, for a measure to benefit from such exemption, the principles of definition, entrustment and proportionality must all be fulfilled. The Commission considers that, where these principles are fulfilled, the development of trade is not affected to an extent contrary to the interests of the Community.

(160) The way these principles apply in the broadcasting sector is explained in the Commission communication on the application of state aid rules to public service broadcasting <sup>(74)</sup>. According to the communication, the Commission has to assess whether or not <sup>(75)</sup>:

— the activities of RTP are public service obligations clearly defined as such by the Member State (definition),

— RTP is officially entrusted by the Portuguese authorities with the provision of that service (entrustment),

— the funding is proportionate to the net cost of providing the public service.

<sup>(73)</sup> *Ibidem*, paragraphs 101 to 109. In those paragraphs the Court examined the question of whether some state payments to transport undertakings classified as state aid could be found to be compatible with the common market under Article 77 of the Treaty as reimbursement for the discharge of public service obligations. It did not rule out this possibility, provided that the binding conditions laid down by the secondary legislation for the transport sector were met. This reasoning must apply *mutatis mutandis* to undertaking entrusted with an SGEI outside the transport sector and in relation to Article 86(2).

<sup>(74)</sup> OJ C 320, 15.11.2001, p. 5.

<sup>(75)</sup> See paragraph 29 of the communication on broadcasting.

### Definition

(161) As stated in the Amsterdam Protocol <sup>(76)</sup> and the communication on broadcasting <sup>(77)</sup>, it is for the Member States to define the public service remit of the public service broadcaster. In the broadcasting sector the role of the Commission is limited to checking whether the public service definition contains any manifest error. Such error would constitute an abuse of the definition of the public service.

(162) Given the specific nature of the broadcasting sector, the Commission considers, in view of the interpretative provisions of the Protocol, a definition entrusting a given broadcaster with the task of providing balanced and varied programming to be legitimate <sup>(78)</sup>. Such a definition would be consistent with the objective of fulfilling the democratic, social and cultural needs of a particular society.

(163) As described in paragraphs 51 and 52, RTP is, by virtue of Law No 21/92 and the public service contracts, obliged to ensure as a general public television service the broadcasting of two channels with general coverage. Whereas the first channel has to offer more general programming, the second channel has to aim more at specific audiences. Furthermore, as described in paragraphs 53 and 54, Law No 21/92 and the public service contracts impose more detailed obligations on RTP regarding programme content and international cooperation, as well as some other specific obligations.

(164) Although the definition of RTP's public service broadcasting is of a qualitative and rather broad nature, the Commission, in view of the interpretative provisions of the Amsterdam Protocol, considers such a 'broad' definition to be as legitimate <sup>(78)</sup>. Therefore, it also considers the

general definition of RTP's public service remit to provide two television channels of national coverage, one more general and the other more focused on specific audiences, to be legitimate. Such a definition can be regarded as fulfilling the democratic, social and cultural needs of Portuguese society.

(165) Furthermore, the Commission regards as legitimate the obligations which determine in detail how RTP should perform the general public service broadcasting remit. Indeed, in line with wording of the Amsterdam Protocol, these obligations can also be considered to fulfil the democratic, social and cultural needs of Portuguese society.

(166) Although the Commission regards the public service mission of RTP as legitimate, it must, however, ascertain whether or not this definition contains any manifest errors.

(167) Taking into account recital 45 to the Television without Frontiers Directive, the Commission could accept, in so far the resulting film rights are shown on public service television, that the public service definition of public service broadcasters includes the obligation to contribute substantially to investment in European audiovisual production <sup>(79)</sup>.

(168) The Commission considers that the obligation imposed on RTP to promote the cinema falls within the scope of public service broadcasting, as RTP subsequently broadcasts on public service television the films for which it acquired the distribution rights.

<sup>(76)</sup> The Protocol considers that the system of public broadcasting is directly related to the democratic, social and cultural needs of each society and to the need to preserve media pluralism. More specifically, Member States have 'the competence [...] to provide for the funding of public service broadcasting insofar as such funding is granted to broadcasting organisations for the fulfilment of the public service remit as conferred, defined and organised by each Member State, and in so far as such funding does not affect trading conditions and competition in the Community to an extent which would be contrary to the common interest, while the realisation of the remit of that public service shall be taken into account'.

<sup>(77)</sup> See paragraph 33 of the communication.

<sup>(78)</sup> *Ibidem*.

<sup>(79)</sup> Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (OJ L 298, 17.10.1989, p. 23). According to Article 5, 'Member States shall ensure [...] that broadcasters reserve at least 10 % of their transmission time [...], or alternately, [...], at least 10 % of their programming budget, for European works created by producers who are independent of broadcasters.'

Furthermore, according to recital 45 to Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, 'the objective of supporting audiovisual production in Europe can be pursued within the Member State through the definition of a public interest mission for certain broadcasting organisations, [...] including the obligation to contribute substantially to investment in European production' (OJ L 202, 30.7.1997, p. 60).

(169) The Commission cannot, therefore, agree with the comments by interested parties that RTP's obligation regarding cinema promotion and its financing is discriminatory. The parties argued that private broadcasters also concluded protocols on cinema promotion with the Portuguese authorities that do not provide for compensation. The Commission is of the opinion that a distinction has to be made between the voluntary agreements on cinema promotion concluded between the State and the private broadcasters, on the one hand, and the public service broadcasting obligations imposed on RTP to broadcast cinema productions and to finance them, on the other. It is clear that RTP is explicitly entrusted with a public service task to support certain film productions that are subsequently broadcast as public service television programmes, whereas no such public service task is entrusted to private broadcasters. In fact, RTP becomes an instrument used by the State to support the cinema. Any resulting advantages granted by RTP to the cinema could constitute state aid and should be assessed as such. This decision is without prejudice to any assessment of possible advantages granted to film producers.

(170) Accordingly, the Commission concludes that the co-financing by RTP of Portuguese cinematographic works that are shown on the public service channels can be considered as a legitimate specific obligation that is instrumental in fulfilling RTP's general public service broadcasting obligation. This obligation does not, therefore, constitute a manifest error.

(171) However, the Commission considers that the legal obligation imposed on RTP to provide 'other services to be specified on an ad hoc basis' <sup>(80)</sup> is not sufficiently precise to enable the Commission to assess beforehand with sufficient legal certainty whether such services can be considered as a public service. Although it takes the view that the 'other services to be specified' are not clearly defined, it notes that no payments were made under this provision during the period under investigation <sup>(81)</sup>.

(172) In view of the foregoing, the Commission concludes that the activities of RTP as described in Law No 21/92 and redefined in the public service contracts are clearly defined public service obligations. Although the obligation to

provide 'other services to be provided on an ad hoc basis' is not sufficiently precise for it to be concluded beforehand that all the services provided under this heading could be considered public services, no payments were made under this provision in the period 1992 to 1998.

### Entrustment

(173) Secondly, the Commission has to assess whether the public service obligations were entrusted to the recipient of the funding.

(174) In line with the Communication on broadcasting, the Commission has to verify whether the public service remit has been entrusted to RTP by means of an official act <sup>(82)</sup>.

(175) As can be seen from paragraph 55, the public service obligations are clearly entrusted to RTP under various laws and contracts: Article 5 of Law No 58/90, Articles 4(1) and 5 of Law No 21/92 and Clause 1 of the public service contracts.

(176) The Commission did not receive any comments from interested parties or the Portuguese Government to the effect that the public service was not sufficiently entrusted to RTP by means of an official act. In line with the communication and in view of the above laws and contracts, it concludes that there is no doubt that RTP has to perform the public service television obligations and the public service remit has, therefore, been officially entrusted to RTP.

(177) Not only should the public service be entrusted to RTP by means of an official act; steps should also be taken to ensure that the public service is provided as provided for. As stated in paragraphs 56 to 59, different control mechanisms were in place to ensure that RTP carried out the public service obligation in the manner provided for.

(178) Firstly, RTP had to present reports on the public service performance as well as plans accompanied by an opinion of the internal board of auditors. In the period 1992 to 1998 it did indeed present such reports describing how each public service obligation had been fulfilled and identifying the costs of each public service obligation by using an analytical accounting system.

<sup>(80)</sup> Clause 13 of the Old Public Service Contract and Clause 7(1)(a) of the New Public Service Contract.

<sup>(81)</sup> Letter of the Portuguese authorities of 30 June 1999.

<sup>(82)</sup> Communication on broadcasting, paragraph 40.

- (179) Secondly, the Minister for Finance and the member of the Government responsible for the media verified compliance with the public service contracts and the Inspector-General of Finances audited the financial plan.
- (180) Thirdly, an external audit had to be carried out each year. The Commission cannot agree with SIC that the public service costs as presented by the Portuguese authorities and the RTP figures included in its public service contracts and annual accounts are not reliable and therefore could not be properly verified. It points out that a statutory auditor carried out an annual audit of RTP's financial accounts in the period 1992 to 1998. Furthermore, although an audit statement did not systematically accompany the public service reports, the strict rules of the cost accounting system ensured that the costs of each public service obligation eligible for compensation payments could be identified and properly verified.
- (181) From the above it is clear that verification took place at three different levels: internally by the board of auditors, by the responsible government bodies and by an external auditing firm. Although no systematic external auditing of the public service reports seems to have taken place, the system described ensured that the public service obligation was carried out in the manner provided for. Therefore, the Commission concludes that an effective mechanism was in place in the period 1992-98 to ensure effective monitoring of the fulfilment of RTP's public service obligations.
- (185) As described in paragraphs 62 to 64, the public service contracts define the method of cost and revenue allocation that RTP has to apply. In the present case, the Commission's task is, in principle, made easier by the fact that RTP has implemented an analytical accounting system which permits quantification of the eligible costs incurred by the undertaking to fulfil each of the reimbursable public service obligations.
- (186) By means of this system, each item of eligible expenditure is allocated to an activity and subsequently divided between the different reimbursable public service tasks of RTP on the basis of objective accounting principles.
- (187) As the revenues derived from each reimbursable public service task are deducted from the operating costs, the system guarantees that the annual compensation payments are limited to the net cost of each public service obligation (see paragraph 65).
- (188) The Commission has, therefore, come to the conclusion that the parameters for determining the cost are, in principle, established in an objective and transparent manner.
- (189) However, it notes that the rules of cost compensation might underestimate the real net cost of RTP's public service and could lead to structural underfinancing of the real funding needs.

### Proportionality

- (182) The third criterion the Commission has to assess is whether the financing is proportionate to the net cost of the public service.
- (183) In the communication on broadcasting, the Commission described the criteria on the basis of which it intends to assess the proportionality of state funding. It requires that the state aid should not exceed the net costs of the public service mission and that no market distortions should occur that were not necessary for the fulfilment of the public service mission <sup>(83)</sup>.
- (184) Firstly, in order to determine the cost of the public service activities correctly, the communication requires a proper allocation of costs and revenue between the public service and commercial activities.
- (190) As can be seen from paragraph 65, under the cost calculation method laid down in the contracts, certain public service costs were excluded from payment by means of annual compensation <sup>(84)</sup>. Moreover, the Portuguese authorities informed the Commission that, although RTP had to pay VAT on the annual compensation payments received, the resulting costs could not be taken into account under the accounting rules (paragraph 96). Finally, in its public service reports RTP did not include all the investments made in public service equipment, although these were accounted for in its financial accounts (see paragraph 67).
- (191) However, under the Amsterdam Protocol, it is for the Member State to provide for the funding of the public service broadcasters. In the present case, the Portuguese authorities decided not to reimburse some of the costs incurred by the service provider in fulfilling its tasks.

<sup>(83)</sup> Communication on broadcasting, paragraphs 57 and 58.

<sup>(84)</sup> The operating costs of the first and second channel under the Old Public Service Contract correspond to the financing costs and the costs of correspondence where other operators were also set up.

- (192) In the case at hand, the State granted not only annual compensation payments to RTP but also additional financing in the form of share capital increases, loans and an agreement with the social security scheme.
- (193) Although the public service contracts provided for state compensation in the form of annual compensation payments for operating costs and the possibility of capital increases for investments made by RTP, the legal provisions relating to RTP's public service did not provide for any financing by means of loans and social security deductions. However, in line with paragraph 57 of the communication on broadcasting, the Commission has to analyse whether all measures are proportionate to the net public service costs. Only then can the financing of RTP be considered to be compatible with Article 86(2) of the EC Treaty.
- (194) The Commission also considers that the public service obligations imposed on RTP which were not eligible for compensation under the public service contracts can, in fact, be considered as legitimate and clearly defined public service obligations formally imposed by the State on the service provider. Therefore, under Community law, the Portuguese State may finance all the net public service costs of RTP.
- (195) For the purposes of the present decision, it is not necessary to recalculate exactly all the real net costs incurred by RTP in performing its public service obligations. It is sufficient to demonstrate that the total state financing received by RTP in the period 1992 to 1998 did not exceed the net extra costs incurred by the undertaking in fulfilling over the same period the public service tasks referred to.
- (196) Table 6 gives an overview of RTP's public service costs (both investment costs and net operating costs), as calculated under the cost accounting rules applicable, and of the compensation received for investment and operating costs.
- (197) Firstly, the investments in public service equipment (Table 5) and compensation provided for to finance investments (Table 2) are presented. Secondly, the net operating costs of RTP (Table 4) and the compensation payments for these costs (Table 1) are presented. Lastly, the table shows the advantage gained from ad hoc aid resulting from the agreement with the social security scheme and the loan.

Table 6

### Summary of funding needs and compensation for the public service net operating cost under the accounting rules

	(PTE million)							
	1992	1993	1994	1995	1996	1997	1998	Sum
Investment costs	2 632,6	2 102,0	2 763,9	992,7	1 480,4	4 037,4	6 054,2	20 063,2
Capital injections	- 0	- 0	- 10 000,0	- 12 800,0	- 10 000,0	- 14 000,0	- 0	- 46 800,0
Difference between investment costs and compensation	2 632,6	2 102,0	- 7 236,1	- 11 807,3	- 8 519,6	- 9 962,6	6 054,2	- 26 736,8
Public service operating costs	6 718,2	7 960,0	8 384,1	8 103,3	17 217,1	37 972,1	30 101,3	116 456,1
Compensation payments	- 6 200,0	- 7 100,0	- 7 145,0	- 7 200,0	- 14 500,0	- 10 350,0	- 14 000,0	- 66 495,0
Social security	—	- 1 206,0	—	—	—	—	—	- 1 206,0
Loan							- 20 000,0	- 20 000,0
Difference between operating costs and compensation	518,2	- 346	1 239,1	903,3	2 717,1	27 622,1	- 3 898,7	28 755,1

Source: Financial report and public service reports.



- (198) As emphasised above, the system of annual compensation payments chosen by the Portuguese authorities had the effect of underestimating the actual costs of the public service tasks performed by RTP. The system led to an accumulation of debt. At a second stage, in order to maintain the financial equilibrium of RTP, the authorities used ad hoc instruments to finance RTP's public service costs.
- (199) As Table 6 shows, the capital injection overcompensated for public service investments by PTE 26 736,8 million, whereas the operating costs were underfinanced by the compensation payments and the other ad hoc aid to the tune of PTE 28 755,1 million. Indeed, although the capital injections were basically meant to finance investments in equipment, they were also used to repay accumulated debt.
- (200) As Table 6 also shows, the total compensation was PTE 2 018,3 million less than the net public service costs (PTE 28 755,1 minus PTE 26 736,8 million). The Commission concludes, therefore, that under the Community rules total state funding is proportionate to the net operating public service costs of RTP for the period under investigation.
- (201) The Commission considers that the funds received were probably even lower than the total net costs incurred in fulfilling the obligations imposed on it by the State owing to the fact the table above does not take into account all the public service costs of RTP in the period 1992 to 1998.
- (202) According to the communication on broadcasting, the Commission should ensure that the state funding is proportionate to the net costs of providing the public service but also that no market distortions occur with respect to the commercial activities which derive from the public service activities and for which no correct cost allocation is possible on the revenue side that are not necessary for the fulfilment of the public service mission. There would be such a distortion if RTP depressed the prices of advertising on the market so as to reduce the revenue of competitors<sup>(85)</sup>. In such a case, RTP would not maximise its commercial revenues and would unnecessarily increase the need for state funding. According to the communication, such conduct, if demonstrated, cannot be considered as intrinsic to the public service mission attributed to the broadcaster<sup>(86)</sup>.
- (203) In the decision initiating the investigation procedure the Commission stated that, if such conduct were found to have taken place, it would take these distortions and the resulting need for higher state funding into account when assessing possible overcompensation. At that stage in the procedure, the Commission noted that 'on the basis of the information the Commission has in its possession at this moment, it cannot be established whether RTP engaged in such behaviour'<sup>(87)</sup>.
- (204) Following the invitation to submit comments on the initiation of procedure, the Commission did not receive any observations from RTP's competitors indicating or demonstrating that RTP was engaged in anti-competitive behaviour in commercial markets that could lead to increased state funding incompatible with the Treaty<sup>(88)</sup>.
- (205) Under the circumstances, the Commission considers that there are no indications suggesting such behaviour. Consequently, it concludes that RTP does not seem to have engaged in anti-competitive behaviour in commercial markets leading to an increased need for state funding and that no overcompensation took place as a result of such behaviour.
- (206) Accordingly, the Commission concludes that the agreement with the social security scheme, the capital injections and the subordinated loan have to be regarded as state aid under Article 87(1). However, the funding of RTP by means of ad hoc aid is compatible with the common market under Article 86(2) of the EC Treaty. The total funding is proportionate to the net costs of clearly defined, entrusted public service obligations. Therefore, the state funding did not affect trading conditions and competition in the Community to an extent which would be contrary to the common interest under Article 86(2) of the EC Treaty<sup>(89)</sup>.

<sup>(86)</sup> *Ibidem*.

<sup>(87)</sup> Paragraph 91 of the decision initiating the procedure.

<sup>(88)</sup> It should be pointed out that in 1993 the complainant SIC also alleged a violation of Article 86(1) of the EC Treaty (formerly Article 90) as regards the legal structure put in place by the Portuguese State on the advertising market and RTP's programme acquisition policy (see also Commission Decision 89/536/CEE of 17 September 1989). Subsequently, the Commission assessed these allegations under Article 86(1).

<sup>(89)</sup> Communication on broadcasting, paragraph 58.

<sup>(85)</sup> Communication on broadcasting, paragraph 58.

## VI. CONCLUSION

(207) The Commission finds that Portugal has unlawfully implemented the ad hoc aid in question in breach of Article 88(3) of the Treaty. On the basis of the above analysis, it concludes that the agreement with the social security scheme in 1993, the capital injections in the period 1994 to 1997 and the loan in 1998 constitute state aid under Article 87(1) of the EC Treaty. The measures are granted through state resources, threaten to distort competition by favouring RTP and have an effect on trade. As analysed above, the measures do not fulfil the conditions set out in *Altmark* as they cannot be regarded as forming part of a compensation system whose parameters have been established beforehand in an objective and transparent manner. Furthermore, it is clear that RTP was not chosen by means of a public procurement procedure guaranteeing the lowest possible cost and there are no indications that the amount of the ad hoc payments was determined on the basis of an analysis of the costs that a typical undertaking would have incurred.

(208) The exemption provided for in Article 86(2) is applicable to the ad hoc measures. As analysed above, the measures compensated for clearly defined public service obligations duly entrusted to RTP. As stated earlier, the ad hoc measures are proportionate to the net public service costs of RTP. The measures do not distort competition to an extent contrary to the Community interest since they are proportionate to the net public service cost of RTP and since RTP did not behave in an anti-competitive manner in its commercial activities,

HAS ADOPTED THIS DECISION:

*Article 1*

The state aid of PTE 68 006 million granted by Portugal to RTP in the form of an agreement with the social security scheme in 1993, capital injections in the period 1994 to 1997 and a loan in 1998 is compatible with the common market within the meaning of Article 86(2) of the Treaty since it did not lead to any over-compensation of the net costs of the public service tasks entrusted to RTP.

*Article 2*

The following measures do not constitute state aid: the exemption from registration charges, the payment for the hiving-off of the television broadcasting network, the facilities granted for payment of the annual fee for use of the television broadcasting network, the protocol on cinema promotion, the bond issue and the restructuring plan for the period 1996 to 2000.

*Article 3*

This Decision is addressed to the Portuguese Republic.

Done at Brussels, 15 October 2003.

*For the Commission*  
Mario MONTI  
*Member of the Commission*