

## II

(Non-legislative acts)

## DECISIONS

## COMMISSION DECISION

of 20 December 2011

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

(notified under document C(2012) 9403)

(Only the French version is authentic)

(Text with EEA relevance)

(2012/540/EU)

THE EUROPEAN COMMISSION,

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

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

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

Whereas:

## 1. PROCEDURE

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

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

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

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

<sup>(2)</sup> OJ L 1, 3.1.1994, p. 3.

<sup>(3)</sup> OJ C 213, 21.8.2008, p. 11.

<sup>(4)</sup> See footnote 3.

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

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

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

## 2. DETAILED DESCRIPTION OF THE AID

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Table 1

France Télécom employees' and employer's contributions 1991-96 <sup>(8)</sup>

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

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

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

##### The status of the company France Télécom

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

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

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

<sup>(8)</sup> Figures rounded off.

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

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

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

*The statuses and recruitment of staff of the company France Télécom*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Table 2

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

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

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

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

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

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

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

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

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

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

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

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

<sup>(15)</sup> France Télécom, Annual Report 1996, p. 56.

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

- (35) In addition, the amount of the exceptional flat-rate contribution provided for by the 1996 Law in return for the payment and servicing by the State of the pensions awarded to the civil servant staff of France Télécom was fixed at FRF 37,5 billion (EUR 5,71 billion) by the Finance Act 1997. It was financed by an increase in the company's short-term and long-term debts<sup>(17)</sup> and paid in several instalments between January and October 1997. The revenue from this exceptional contribution allowed the deficit of the French public administrations to be reduced to EUR 41,8 billion in 1997. Without it, the deficit would have represented 3,7 % of GDP that year.
- (36) The revenue from this contribution was allocated to the public body managing the exceptional contribution from France Télécom (Etablissement Public de Gestion de la Contribution Exceptionnelle de France Télécom) established by the Finance Act 1997. The exceptional contribution, together with any financial income it generates, constitutes the sole income of this body. Its expenditure takes the form of an annual transfer to the State budget, which has been allocated as revenue since 2006 to the account earmarked for State civilian and military pensions. This payment was set at FRF 1 billion (EUR 152,4 million) for 1997, and subsequently increased by 10 % per year, in the absence of a specific provision to the contrary in the Finance Act. The public body will be wound up after the payment of its revenue in full to the State<sup>(18)</sup>.
- (37) The application of the provisions of the Finance Act 1997 establishing the annual payments resulted in the life-span of the public body being estimated at 17 years in 1999, without further contributions to its funds<sup>(19)</sup>. However, on account of the annual payments larger than

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

- (38) In any event, the amount of the exceptional contribution of FRF 37,5 billion allocated to the public body managing the exceptional contribution from France Télécom in 1997 corresponds to the amount of the contribution, below FRF 40 billion, mentioned during the discussion of the draft of the 1996 Law. Although it was paid to the State budget in 1997 and fed it each year for the payment of civilian and military pensions, the amount of this contribution was set in order to offset the additional cost to the State resulting from the application of the 1996 Law.
- (39) The wage share of the financing of the pension liabilities for the civil servants, established pursuant to Article L 61 of the Civilian and Military Retirement Pensions Code since the foundation of the public operator France Télécom in 1991, was not changed by the 1996 Law. Moreover, the 1990 and 1996 Laws did not change the pension arrangements for the ordinary employees of France Télécom, which are those of the ordinary social security rules for pension insurance, supplemented by the complementary pension schemes AGIRC for executives and ARRCO for non-executives. Under this arrangement, France Télécom and its ordinary employees assume equivalent obligations to those of competing undertakings with regard in particular to the payment of contributions in full discharge of liabilities by the employer.

<sup>(16)</sup> France Télécom, Annual Report 1996, pp. 35, 60 and 64.

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

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

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

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

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

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

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

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

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

Table 3

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

(million EUR)

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

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

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

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

(million EUR)

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

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

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

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

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

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

<sup>(26)</sup> OJ L 192, 24.7.1990, p. 10.

<sup>(27)</sup> OJ L 74, 22.3.1996, p. 13.

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

<sup>(29)</sup> France Télécom, Annual Report 1997.

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

<sup>(25)</sup> OJ L 131, 27.5.1988, p. 73.

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

### 3. REASONS FOR INITIATING THE PROCEDURE

(51) In its decision initiating the investigation procedure, the Commission set out its preliminary assessment of the measures introduced by the 1996 Law, comparing them with the reference framework for France Télécom's social security contributions and tax payments established by the 1990 Law. It considered that these measures would seem to confer, through State resources, a selective advantage on France Télécom liable to distort competition and affect trade between Member States and potentially constituting State aid within the meaning of Article 107(1) of the TFEU.

(52) The Commission also noted that, insofar as these measures constitute State aid, this aid was not notified to the Commission prior to its implementation although it was to be regarded as new aid according to case-law. The French Republic had thus not complied with its notification obligation under the Treaty and the measure was therefore to be considered unlawful.

(53) The Commission concluded that on the basis of Article 107(3)(c) of the TFEU that it was able to examine whether the aid was compatible with the internal market. The Commission also noted that the same provision had permitted it to conclude that the aid granted to La Poste on the reform of the arrangements for financing the retirement pensions of its civil servants was compatible with the internal market<sup>(32)</sup> and that in view of the similarities between these two cases, it seemed appropriate in this case to carry out a similar analysis.

(54) In its preliminary analysis of the compatibility of the aid with the internal market, and notwithstanding the similarity with the reform of the arrangements for financing the retirement pensions of La Poste, the Commission informed the French Republic of the following doubts:

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

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

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

### 4. COMMENTS BY INTERESTED PARTIES

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

#### 4.1. France Télécom

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

(57) Secondly, France Télécom considers that the retirement pension costs borne between 1990 and 1996 were abnormal and placed it at a structural disadvantage in relation to its private-sector competitors, as referred to

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

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

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

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

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

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

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

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

#### 4.2. The complainants

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

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

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

<sup>(37)</sup> See footnote 32.

<sup>(38)</sup> See footnote 32.

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

<sup>(40)</sup> See footnote 33.

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

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

#### 4.3. The telecommunications operator

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

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

### 5. COMMENTS OF THE FRENCH REPUBLIC

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

#### 5.1. Concerning the existence of State aid

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

<sup>(42)</sup> See footnote 32.

<sup>(43)</sup> Text available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=1\\_38233](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_38233)

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

<sup>(45)</sup> See footnote 32.

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

- (72) The 1996 reform is claimed to have aligned the financing of the pensions with ordinary law, without having the effect of placing the undertaking in a more favourable competitive situation, since the contribution of France Télécom is calculated annually so as to align the level of social security contributions and tax payments with those of its competitors in the telecommunications sector. However, not taking into account contributions corresponding to the risks not common to ordinary employees and civil servants in the calculation of the contribution in accordance with the competitively fair rate is justified on account of the status of the latter, which rules out, for example the risk of unemployment apart from in exceptional cases of dismissal or removal from post.
- (73) The French Republic considers that the situation of the competitors of the undertaking in France must constitute the reference framework for determining whether the costs payable by France Télécom are normal or abnormal. In the present case, taking account of the exorbitant, derogating from ordinary law, inequitable and unsustainable burden imposed on France Télécom by the 1990 Law, its abolition and the alignment with the situation of competitors provided for in the 1996 reform simply re-established the normal conditions of competition. For that matter, France Télécom has not been compensated for the disadvantages suffered under these arrangements, whereas, as emphasised in its comments, it still has to cope with structural disadvantages, additional costs and inflexibilities on account of the status applicable to the civil servants it employs as regards financial measures associated with departure or return to the public administration, vocational training measures or higher wage cost. Consequently, the current arrangements resulting from the reform confer no advantage on France Télécom and therefore contain no element of State aid within the meaning of the Treaty.
- (74) This interpretation is based on the general principles derived by the Union courts according to which, since only measures which lighten the burdens normally assumed in an undertaking's budget constitute State aid, a law which makes it possible to prevent an undertaking's budget being burdened by a cost which, under normal circumstances, would not have existed, does not constitute State aid<sup>(46)</sup>. This would also be the case of measures relieving a public competitor from a structural

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

- (75) Finally, more generally, the French Republic does not consider it relevant to include in the present procedure the compensation and over-compensation mechanisms under which France Télécom paid the costs between 1991 and 1996 (see Table 1) to determine the existence of aid or the date on which an advantage resulting from the reform introduced by the 1996 Law, which contains no provision to this effect, arose. The payment of such costs also resulted from a scheme departing from the ordinary arrangements in which the pensions scheme applicable to France Télécom was considered as an autonomous scheme, which was no longer the case from 1997.
- (76) With this reservation, the French Republic has refined the estimate, supplied by France Télécom and referred to under recital 61, of the costs which the undertaking has no longer paid from 1997. On the basis of a real reconstruction for 2008 to 2010, retropolated by applying a conversion factor, the French Republic considers that the costs that would have been paid by France Télécom in this capacity are EUR 165 million less than those calculated by the undertaking.

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

- (77) In any event, the French Republic considers that if the 1996 reform relating to France Télécom were to constitute State aid, this should be declared compatible with the internal market, in accordance with the analysis followed by the Commission in its *La Poste* decision<sup>(49)</sup>. The 1996 reform releases France Télécom from a structural burden which was affecting its competitiveness in a market in the process of liberalisation and its contributions are henceforth calculated on the basis of a competitively fair rate for the common risks.
- (78) The fact that the contribution paid by France Télécom since 1997 does not include the risks not common to private sector employees would not preclude compatibility with the internal market. In this regard, Table 4, derived from information provided by the French Republic, illustrates the difference between the contribution paid by France Télécom and what it would have paid if the non-common risks had been included in the calculation, minus the benefits self-insured by France Télécom and other levies that put more of a strain on it than its competitors.

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

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

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

<sup>(49)</sup> See footnote 32.

Table 4

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

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

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

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

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

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

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

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

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

<sup>(50)</sup> See footnote 32.

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

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

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

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

## 6. ASSESSMENT OF THE AID

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

- (89) Article 107(1) of the TFEU provides that: 'Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.'
- (90) The application of the cumulative conditions of this Article to the facts of the case is examined in Sections 6.1.1 to 6.1.5.
- 6.1.1. *Aid granted by the State through State resources*
- (91) The 1990 Law and the 1996 Law originate from the French State. They provide for the measure by which France Télécom pays the Public Treasury compensation for the payment and servicing of the pensions granted to the civil servants of France Télécom made by the State. Since, pursuant to the 1996 Law, the compensation paid by France Télécom to the Public Treasury is less than in the original wording of the 1990 Law, the aid is granted to France Télécom with the resources of the French State.
- 6.1.2. *Favouring certain undertakings*
- (92) The provisions of the 1990 Law defined the arrangements applicable to France Télécom, a public operator with legal personality. The 1996 Law on the national company France Télécom amends these arrangements with provisions applicable to France Télécom in accordance with the conditions it defines only for this company.

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

<sup>(52)</sup> See footnote 33.

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

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

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

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

*The logic of the pension arrangements applicable*

(95) The funding by the State of the payment and servicing of the pensions granted to the civil servants of France Télécom results from the application of the Civilian and Military Retirement Pensions Code, which alone applies to the former civil servants in question. Neither the 1990 Law nor the 1996 Law changed the status of these civil servants or the principle of the State funding the payment of their pension. This funding seems to arise from the principle whereby employees with civil servant status serve the common good independently and in the public interest. This is not the case where these civil servants work for an undertaking providing a paid-for service, with the aim of serving the interests and benefit of this undertaking, in competition with other undertakings which provide the same services.

(96) In this perspective, the payment of compensation to the State, provided for by the 1990 Law, both in its original wording and after the amendments introduced by the 1996 Law, constitutes an exception to the principle of funding by the French State. This exception is justified by the nature and overall structure of the arrangements applicable to the pensions of the civil servants employed by France Télécom. In fact, the French State is obliged to effect the payment and servicing of the pensions granted, under the Civilian and Military Retirement Pensions Code, to the civil servants of

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

(97) Even in the absence of the payment of compensation by France Télécom, the French State would still be bound to honour its pension commitments to the civil servant staff concerned, unless it amended these commitments unilaterally. On the contrary, making available State-trained civil servants to France Télécom with no compensation for pensions paid or to be paid would confer a clear advantage on the latter.

(98) Since France Télécom's competitors do not employ staff with civil servant status for whom the French State would be under a similar financial obligation, the logic of the arrangements for funding pensions and the payment of compensation for France Télécom introduced by the law is not transferable to them. This is shown by the fact that, since the status of the staff employed by the competitors differs with regard to the risks of non-payment of wages covered by the ordinary law on social security benefits, the French authorities appear to consider that the payment of social security contributions to cover the risk is justified in their case. However, it is precisely this status that the French Republic is using to consider that the inclusion of the risks not common to the civil servants and the ordinary employees in the calculation of the compensation paid by France Télécom to the State pursuant to the 1996 Law is not justified.

(99) Therefore, as regards the costs paid on account of the employment of their ordinary staff, these undertakings are not in a comparable situation in fact or in law to that of France Télécom as regards its civil servant staff, contrary to the arguments of the French Republic and France Télécom presented in their comments.

(100) Likewise, the compensation arrangements applied to France Télécom cannot be compared with the arrangements defined for other public bodies with employees with civil servant status, such as the Paris Mint or the National Forestry Office, which can be categorised as undertakings for some of their activities within the meaning of Article 107(1) of the TFEU, or other public industrial and commercial undertakings, such as EDF or GDF in the past. EDF or GDF had specific retirement pension schemes, which were not aligned with the civil service scheme. Moreover, EDF and GDF have since been affiliated to the general scheme, even though it should be emphasised that the Commission concluded that no State aid existed solely on condition that affiliation is financially neutral for the State<sup>(54)</sup>, which is not so regarding the 1996 reform in the present case.

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

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

#### *The financial advantages*

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

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

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

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

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

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

- (108) The French authorities were aware that the 'transfer of the pension costs for the civil servants of France Télécom to the general State budget' was 'a new and heavy burden for the State' that the exceptional flat-rate contribution or the proceeds of the sale of part of the shares in the undertaking held by the State would only cover in part. The debates mentioned in recital 31 show that the French State did not seek in 1996 to offset in full the new burden it was assuming for the future but, on the contrary, sought to assume a new burden and for 'the interests of the undertaking to be taken into account first in this matter'.
- (109) It is obvious that, even with different actuarial assumptions from those used by the French State to estimate the new burden it was assuming and notwithstanding the exceptional flat-rate contribution paid in 1997, the reform granted a substantial economic advantage in the form of lower employer pension contributions. Since the flat-rate contribution or balance compensation did not allow the charges transferred to the French State to be covered in full but, at the very most, to be reduced, and in view of the proportions in question, the actuarial calculation used at the time and the accuracy of the estimates resulting from it for the period up to 2043 as a whole cannot be confirmed as appropriate.
- (110) Moreover, the financial advantages resulting from the lower contributions by France Télécom cannot be compared with the alleged disadvantages arising from the employment of civil service staff, as France Télécom argues, supported by the French Republic. In fact, the 1996 Law did not, in any case, increase these alleged disadvantages, since it did not lead to the recruitment of additional civil servants. In addition, by discharging France Télécom from a part of its financial liabilities, the objective of the 1996 Law was not to compensate for an alleged disadvantage associated with wages or, according to the words of France Télécom, the lesser fluidity of employment of civil service staff.
- (111) It is therefore for the sake of completeness that it is necessary to respond to the arguments concerning the alleged disadvantages caused by the employment of civil servants, invoked by the French Republic and France Télécom.
- Firstly, France Télécom, on the eve of the full opening-up of the French market to competition, had a trained, competent body of staff, without which, if it had had to be replaced entirely, its market position could not have been maintained, which France Télécom omits to point out in its written submissions.
  - In addition, the amount of the wages and the investment in staff training that France Télécom

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

- Moreover, although it is true that France Télécom does not have the option of adjusting its total wage bill by implementing a social plan to cut the workforce regarding the staff concerned, it is doubtful that such a plan targeting employees with civil servant status only on the grounds of this status, could validly be implemented, whereas the stop on the recruitment of civil servants in 1997 and the recourse to ordinary employees offered it certain possibilities for flexibility of adjustment of its total wage bill.
  - Finally, although it is true that the undertaking devotes a substantial budget to encouraging early retirement by the staff in question, the fact remains that the incentive and the interest for the undertaking to introduce such a measure would have been less without the passing on to the French State of financial liabilities assumed by France Télécom, provided for by the 1996 Law. The mechanism in this way allows the encouragement of early retirement and therefore funding at an earlier stage by the State for the staff concerned. Without the 1996 Law, France Télécom would have continued to provide this funding.
- (112) In the absence of a link to the question of whether or not an economic advantage exists resulting from the measures in question, taking into consideration competitive advantages drawn by France Télécom from its former monopoly, invoked by the complainants, would appear to be equally baseless. The alleged advantages and disadvantages are in fact unrelated to the question of levelling the conditions of competition on the telecommunications markets with regard to social security costs.
- (113) Only the exceptional flat-rate contribution provided for by the 1996 Law immediately placed a cost burden on France Télécom in relation to the reference situation already identified. The payment of the flat-rate contribution reduced the amount of aid from which France Télécom has benefited and will benefit until the expiry of the financial burden assumed by the French State in the place of France Télécom pursuant to the 1996 Law. Without prejudice to the accuracy of the actuarial methods used by the French Government at the time, without this flat-rate contribution, the amount of the burden from which France Télécom would have been relieved would have amounted to EUR 18,9 billion and not EUR [...] billion, in 1996 net value.

*The effect of distorting or threatening to distort competition*

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

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

- (115) Released from the obligation to set aside provisions for the future retirement costs of its civil service staff and subject to a lower annual contribution level, France Télécom's balance sheet was relieved of liabilities and costs, thereby increasing its attractiveness to raise capital, which placed it in a more favourable situation than before the 1996 reform. Released from a burden incurred from its historical French market, France Télécom was in this way able to develop more easily on the markets of other Member States newly opened to competition, which it in fact did, as shown in recitals 48 to 50.
- (116) As a result, relieving the burden of France Télécom arising from the method of calculating the compensation to pay to the French State for funding the pensions of the civil service staff distorts or threatens to distort competition between France Télécom and these new operators in France and in the other Member States where France Télécom is present.

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

- (117) The markets on which France Télécom operates in France have been opened up gradually to competition since 1988 and, as a result, are largely open to trade between Member States. Directive 96/19/EC aimed for total liberalisation of the telecommunications sector from 1 January 1998. Operators whose capital is held in part by undertakings of Member States other than France have in this way become established there. Some of these markets concern international communications between Member States. Likewise, via subsidiaries, France Télécom provides electronic communications services in other Member States, and notably Spain, Belgium and the United Kingdom.
- (118) Under these conditions, a measure which reduces the general operating costs of France Télécom, and thereby releases resources which become available to that undertaking to invest or to improve its commercial offers in France or to establish in other Member States, could affect trade between Member States.

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

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

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

- (121) The Commission notes that France did not refer to Article 106(2) of the TFEU as a basis for the compatibility of the measures in question.
- (122) The derogations provided for in Article 107(2) of the TFEU concerning aid having a social character, granted to individual consumers, aid to make good the damage caused by natural disasters or exceptional occurrences and aid granted to certain areas of the Federal Republic of Germany, are obviously irrelevant in the present case.
- (123) As for the derogations provided for in Article 107(3) of the TFEU, the Commission finds that the aid in question is not intended to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, that it is not a project of common European interest and does not aim to remedy a serious disturbance in the French economy. It is not intended either to promote culture and heritage conservation.
- (124) It therefore appears that only Article 107(3)(c) of the TFEU could be applied to assess the compatibility of this measure.

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

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

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

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

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

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

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

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

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

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

#### 6.3.2. *Necessity for the aid measure*

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

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

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

<sup>(58)</sup> See footnote 33.

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

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

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

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

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

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

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

### 6.3.3. Proportionality of the aid measure

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

*The competitively fair rate is not achieved*

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

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

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

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

- (149) In this respect, France's argument that the civil servants are not exposed to certain risks and, that as a result, it is not justified to pay a contribution for these risks, cannot be accepted. Firstly, it is pursuant to State measures that these risks would not arise, so there is no justification for France Télécom to draw a pecuniary advantage. For example, it is by virtue of the commitment by the French State to the civil servants still working at France Télécom and on account of the fact that the French State is its own insurer that the risk of non-payment of wages in the event of the firm going into receivership would not arise. However, the possibility of France Télécom filing for bankruptcy, just like a competitor, cannot be ruled out. In both cases, it is not a matter of an advantage supplied to the undertaking, but directly to its employees. The guarantee of the payment of wages takes effect after the undertaking has ceased to exist. However, a competing undertaking will have to pay contributions to guarantee the risk of non-payment of wages after its disappearance, in contrast to France Télécom. It is therefore not justified to give the latter an advantage, in the form of a lower contribution or, in fact, an exclusion of this risk from the method of calculating the contributions of France Télécom.
- (150) Then, more fundamentally, the objective itself of the reform introduced in 1996, which does not seem to have been brought to its logical conclusion, is to equalise the conditions of competition with regard to tax and social security payments between all the competitors of the sector, irrespective of the status of their staff and the existence of an actual obligation for France Télécom to affiliate with and subscribe to the competent management bodies. It is precisely this logic of equalisation of the conditions of competition which would be liable to make the measure examined compatible with the internal market. Whether or not the staff of France Télécom are exposed to such risks is not therefore relevant under this logic.
- (151) In conclusion, a reduction in the funding of the pensions with a transfer of the net burden to the State would respect the principle of proportionality only if it allowed a level playing field. However, France Télécom has not been placed in a situation which is fully equivalent to that of the undertakings in the sector as regards wage-based social security contributions, since

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

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

- (152) Likewise, contrary to the claims of the French Republic and France Télécom, it is not justified to take into consideration the amount of the exceptional flat-rate contribution of EUR 5,7 billion already paid by France Télécom in 1997 to compare it with the insufficiency of the rate of the contribution in full discharge of liabilities applied to France Télécom.
- (153) As a preliminary point, the Commission wishes to recall that, in each situation, it has to establish whether the conditions of application of the derogation provided for in Article 107(3)(c) of the TFEU have been fulfilled, without being bound by its earlier decision-making practice, assuming that is established <sup>(63)</sup>.
- (154) In any event, the reform examined here displays clear differences, in several respects, from the reform referred to in the La Poste decision <sup>(64)</sup>, which the French authorities attempt to rely on.
- (155) In fact, contrary to the reform as foreseen by the La Poste decision invoked by the French Republic and France Télécom, the reform of the arrangements for financing the retirement pensions of the civil servant staff of France Télécom occurred on the eve of the opening-up, at Union level, of the markets where France Télécom could operate.
- (156) Moreover, it appears that France Télécom took advantage of this liberalisation by establishing itself in the markets of other Member States, thanks not only to its change of status into a public limited company, but also, in part, from the elimination of retirement pension commitments from its balance sheet and the lower future potential charges resulting from the reform. This reduction in its balance-sheet commitments enabled France Télécom to boost its solvency and borrowing capacity. The debt figures, supplied by the complainants in their comments and not contested by the French Republic regarding the amounts, show that the net financial debt of France Télécom rose from EUR 19,2 billion in 1997 to EUR 83 billion in 2002.
- (157) It is true that a dedicated investment policy for expansion on the markets of other Member States, made possible by the liberalisation, may be at the origin of this very

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

<sup>(64)</sup> See footnote 32.

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

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

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

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

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

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

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

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

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

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

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

<sup>(67)</sup> La Poste Decision, cited above in footnote 32, point 169.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Table 5

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

(million EUR)

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

<sup>(71)</sup> La Poste decision, cited above under footnote 32.

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

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

<sup>(74)</sup> See footnote 69.

(million EUR)

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

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

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

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

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

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

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

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

<sup>(75)</sup> This is an approximate estimate.

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

#### 7. CONDITIONS OF COMPATIBILITY FOR THE FUTURE

(189) Consequently, it is necessary for the French Republic to amend the legislative and regulatory provisions applicable for establishing, calculating and levying the contribution in full discharge of liabilities to be paid by France Télécom so as to equalise the levels of wage-based social security contributions and tax payments between France Télécom and the other undertakings of the telecommunications sector subject to the ordinary social security arrangements. In addition, it is appropriate that the calculation methods and parameters are established transparently and objectively and can be subject to control and appeals.

(190) The French Republic should also, when calculating the rate of the contribution in full discharge of liabilities, equalise in fact the levels of wage-based social security contributions and tax payments between France Télécom and the other undertakings of the telecommunications sector subject to the ordinary social security arrangements, also taking account of the risks not common to the ordinary employees and the civil servants employed by France Télécom.

(191) In the comments of the French Republic, set out in further detail in its updated Annexes III and V, the French authorities have produced estimates of what the rate of the contribution in full discharge of liabilities to be paid by France Télécom from 1997 (see Table 4) would be if the non-common risks had been integrated into the calculation method (hereinafter: the 'adjusted rate'). The adjusted rate includes both the contributions for unemployment and insurance guaranteeing wage claims, which are added to it, and the specific contributions which the competitors of France Télécom do not pay, such as the 1 % solidarity and the cash benefits for absence from work self-insured by France Télécom, which are subtracted from it. The result is a rate about 7 % higher than the rate in fact applied at present.

(192) Such a rate ensures a genuine level playing field compared to the only partial equality introduced by the 1996 Law, whilst taking account of the specific social costs of France Télécom. The Commission does not therefore dispute the principles, assessment basis and methods of calculation applied by the French Republic to establish a rate of contribution in full discharge of liabilities adjusted to equalise the levels of wage-based social security contributions and tax payments between France Télécom and the other undertakings of the telecommunications sector subject to the ordinary social security arrangements, as indicated in the updated comments of the French Republic and described and detailed in Annexes III and V to these comments.

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

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

#### 8. CONCLUSIONS

(195) The Commission concludes that the French Republic unlawfully implemented State aid introduced by the 1996 reform of the arrangements for financing retirement pensions of the civil servants working for France Télécom in breach, since its entry into force, of Article 108(3) of the TFEU.

(196) The implementation of this aid since 1997 has allowed a reduction in the annual social security costs incurred by France Télécom. However, this effect was neutralised, at least until 2010, by the payment of the exceptional flat-rate contribution provided for by that reform. This neutralisation justifies the fact that the conditions which would create a genuine level playing field for France Télécom and its competitors regarding these charges and which would render this aid compatible with the internal market should be applied from a date after 31 December 2010 still to be set.

(197) Consequently, in so far as and provided that the French Republic takes into consideration, in the calculation of the contribution in full discharge of liabilities payable by France Télécom, the levels of wage-based social security contributions and tax payments between France Télécom and the other undertakings of the telecommunications sector covered by the ordinary social security arrangements, taking into account the risks which are common and not common to ordinary employees and civil servants, the reform introduced by the 1996 Law can be declared compatible with the internal market pursuant to Article 107(3)(c) of the TFEU. The French Republic is therefore required to take the measures, notably of a legislative and regulatory nature, necessary to fulfil the condition mentioned in the present recital,

HAS ADOPTED THIS DECISION:

#### Article 1

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

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

#### Article 2

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

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

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

#### Article 3

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

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

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

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

#### Article 4

This decision is addressed to the French Republic.

Done at Brussels, 20 December 2011.

For the Commission  
Joaquín ALMUNIA  
Vice-President