

II

(Non-legislative acts)

DECISIONS

COMMISSION DECISION

of 26 January 2010

on State aid C 56/07 (ex E 15/05) granted by France to La Poste*(notified under document C(2010) 133)***(Only the French text is authentic)****(Text with EEA relevance)**

(2010/605/EU)

THE EUROPEAN COMMISSION,

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

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

Having called on interested parties to submit their comments pursuant to the provisions cited above ⁽²⁾,

Whereas:

this presumed unlimited state guarantee was in force before 1 January 1958, the Commission applied the rules of procedure concerning existing aid in accordance with Article 1(b) of the Procedural Regulation ⁽³⁾.

(3) The Commission received the French authorities' reply on 24 April 2006.

(4) On 4 October 2006, in accordance with Article 18 of the Procedural Regulation, the Commission called on France to withdraw, by 31 December 2008, the guarantee given, on all its liabilities, to La Poste by virtue of its legal form.

1. PROCEDURE

(1) On 21 December 2005 the Commission approved the transfer of the banking and financial business of the French Post Office (La Poste) to its subsidiary La Banque Postale ⁽³⁾. In its Decision the Commission stated that the question of the unlimited state guarantee in favour of La Poste would be the subject of a separate proceeding.

(2) On 21 February 2006, in accordance with Article 17 of Council Regulation (EC) No 659/1999 ⁽⁴⁾ laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union ('the Procedural Regulation'), the Commission informed the French authorities of its preliminary finding as to the existence of an unlimited state guarantee which resulted from the legal form of La Poste and which constituted State aid within the meaning of Article 107(1) TFEU, and it invited them to submit their comments. Inasmuch as

(5) On 6 December 2006 the Commission received a memorandum from the French authorities challenging the findings presented by the Commission in its letter of 4 October 2006.

(6) Following a meeting with the Commission department in charge of competition questions ('DG Competition'), by letter dated 16 January 2007 the French authorities submitted to the Commission a draft amendment to the Decree implementing Law No 80-539 of 16 July 1980 on the penalties imposed in administrative matters and on the execution of judgments by legal entities governed by public law ⁽⁶⁾ ('the Law of 16 July 1980'), namely Decree No 81-501 of 12 May 1981 adopted for the implementation of the Law of 16 July 1980 on the penalties imposed in administrative matters and on the execution of judgments by legal entities governed by public law ⁽⁷⁾ ('the Decree of 12 May 1981').

- (7) Following a request from the Commission for clarification, the French authorities sent a memorandum, which was received on 1 February 2007, explaining the situation of creditors of La Poste should the latter find itself in financial difficulties.
- (8) By memorandum dated 19 March 2007 the French authorities made an additional proposal consisting in undertaking, together with La Poste, to mention in any financing agreement or issuing prospectus of La Poste the fact that no guarantee was being provided.
- (9) By letter dated 29 November 2007 the Commission informed France of its decision to open the procedure provided for in Article 108(2) TFEU in respect of the measure ('the opening decision').
- (10) The opening decision was published in the *Official Journal of the European Union* ⁽⁸⁾. The Commission called on interested parties to submit their comments on the measure.
- (11) The Commission received no comments from interested parties.
- (12) By letter dated 23 January 2008 the Commission received comments from France.
- (13) The Commission published on DG Competition's website an invitation to tender for carrying out a study into the unlimited guarantee given by the French Republic to La Poste. Four bids were received before the deadline of 21 April 2008. The study was entrusted to Ms Sophie Nicinski, *professeur des universités, agrégée de droit public*, Doctor of Laws and author of publications on the subject of state guarantees for publicly owned establishments of an industrial and commercial character. The expert ('the Commission's expert') submitted her report on 17 November 2008.
- (14) Following the appearance in the French press of information about the adoption by the French Government of a draft law approving the change of La Poste's legal form, on 20 July 2009 the Commission asked France whether it would agree to undertake to convert La Poste into a public limited company subject to the compulsory administration and winding-up procedures provided for under ordinary law. Under cover of its letter, the Commission forwarded its expert's report to the French authorities.
- (15) By memorandum transmitted on 31 July 2009, France informed the Commission that on 29 July 2009 the Council of Ministers had adopted a draft law on La Poste and postal activities, scheduling La Poste's conversion into a public limited company for 1 January 2010. The French authorities also indicated that they would be sending their comments on the Commission's expert's report.
- (16) After two reminder letters from the Commission dated 9 September and 6 October 2009, France made known, by memorandum transmitted on 27 October 2009, its comments on the Commission's expert's report and forwarded an opinion by Mr Guy Carcassonne, *professeur des universités* and *agrégé des facultés de droit* ('the French authorities' expert').
- (17) An amendment to the draft law on La Poste and postal activities was tabled on 11 December 2009, postponing La Poste's conversion into a public limited company until March 2010.

2. DESCRIPTION OF THE MEASURE

- (18) Law No 90-568 of 2 July 1990 on the organisation of public postal and telecommunication services ⁽⁹⁾ ('the Law of 2 July 1990') converted the former Directorate-General for Posts and Telecommunications into two legal entities governed by public law: La Poste and France Telecom.
- (19) Some legal entities governed by public law are not, legally speaking, publicly owned establishments of an administrative character (*établissements publics à caractère administratif* — EPAs) or publicly owned establishments of an industrial and commercial character (*établissements publics à caractère industriel et commercial* — EPICs) ⁽¹⁰⁾. Such is the case with La Poste. In its judgment of 18 January 2001 (2nd Civil Division) ⁽¹¹⁾, the Court of Cassation nevertheless held that La Poste is to be deemed equivalent to an EPIC ⁽¹²⁾. The legal consequences of La Poste's legal form are as follows:

2.1. INAPPLICABILITY OF INSOLVENCY AND BANKRUPTCY PROCEDURES TO LA POSTE

- (20) Article 1 of the Law of 2 July 1990 states that La Poste is a legal entity governed by public law. Now, in France, legal entities governed by public law are not subject to ordinary law as regards the compulsory administration and winding up of firms in difficulty.

- (21) The inapplicability of insolvency and bankruptcy procedures to legal entities governed by public law apparently derives from the general principle of the immunity from seizure of the assets of legal entities governed by public law, which has been recognised by the French courts, including the Court of Cassation, since the late 19th century⁽¹³⁾.
- (22) Moreover, Article 2 of Law No 85-98 of 25 January 1985 on the compulsory administration and winding up of undertakings⁽¹⁴⁾ (the Law of 25 January 1985), which defines the scope of the ordinary-law procedures of compulsory administration and winding up of undertakings in France, and which has become Article L 620-2 of the Commercial Code, provides that 'administration and winding-up procedures shall apply to traders, persons registered with the craftsmen's register, farmers and private-law entities'. It follows from the wording of that article and from the interpretation of it by the French courts⁽¹⁵⁾ that ordinary-law collective procedures do not apply to legal entities governed by public law.
- 2.2. APPLICABILITY TO LA POSTE OF THE LAW OF 16 JULY 1980 AND OF THE PRINCIPLE OF LAST-RESORT STATE LIABILITY FOR THE DEBTS OF LEGAL ENTITIES GOVERNED BY PUBLIC LAW
- (23) The Law of 16 July 1980 is applicable to La Poste, which is categorised by the Law of 2 July 1990 as a legal entity governed by public law.
- (24) Article 1, Section II, of the Law of 16 July 1980 provides that 'Where a judicial decision which has become final orders a local authority or a publicly owned establishment to pay a sum of money the amount of which is fixed in the decision itself, payment of the sum must be ordered within two months of notification of the decision. If payment is not ordered within that period, the representative of the State in the *département* or the supervisory authority shall issue a mandatory payment order. If insufficient funds are available, the representative of the State in the *département* or the supervisory authority shall give the authority or establishment formal notice to create the necessary resources; if the decision-making body of the authority or establishment has not released or created the resources, the representative of the State in the *département* or the supervisory authority shall do so, and if necessary shall issue a mandatory payment order'.
- (25) The fourth subparagraph of Article 3-1 of the Decree of 12 May 1981 provides that 'If the notice given has had no effect by the time these deadlines expire⁽¹⁶⁾, the representative of the State or the authority responsible for supervision shall enter the expenditure in the budget of the defaulting authority or publicly owned establishment. The representative of the State or the authority responsible for supervision shall, as appropriate, release the necessary resources either by reducing the appropriations allocated to other expenditures and still available or by increasing resources.' Lastly, the fifth subparagraph of Article 3-1 of the same Decree provides that 'If within eight days following notification of entry of the appropriation the local authority or publicly owned establishment has not ordered payment of the sum due, the representative of the State or the authority responsible for supervision shall within one month issue a mandatory payment order'.
- (26) The Decree of 12 May 1981 was repealed and replaced by Decree No 2008-479 of 20 May 2008 on the enforcement of financial penalties imposed on public entities. Nevertheless, Article 10 of the new Decree reproduces the wording of the fourth and fifth subparagraphs of Article 3-1 of the Decree of 12 May 1981⁽¹⁷⁾. It is therefore substantively the same.
- (27) The circular of 16 October 1989⁽¹⁸⁾ states that 'Where there are no or insufficient appropriations, which situation is referred to in the second subparagraph of Section II of Article 1 of the Law of 16 July 1980, the authorising officer shall also, before the expiry of the four-month period, inform the creditor of that fact by registered letter with acknowledgement of receipt, specifying the amount the payment of which will subsequently be ordered. Such payment order will cover either the whole amount due where there are no appropriations or the balance where there are insufficient appropriations'.
- (28) It is clear from all these provisions that the Law of 16 July 1980 and its implementing rules are intended only to ensure the enforcement of final judicial decisions ordering either the State, a local authority or a publicly owned establishment to pay a sum of money. They do not prescribe any compulsory administration or winding-up procedure.
- (29) The Law of 16 July 1980 and its implementing rules expressly identify the State as the authority responsible for covering the debts of publicly owned establishments. The State has important prerogatives: first, the issuing of a mandatory payment order, and second, the creation of sufficient resources. This calls for an examination of the extent to which the possibilities for creditors to obtain compensation through the liability of the State in the event of La Poste defaulting can be likened to a form of guarantee.

- (30) In addition to noting the above-mentioned two elements (inapplicability of insolvency procedures and applicability of the Law of 16 July 1980), the Commission observed in its opening decision that rules applicable to certain EPICs might apply also to La Poste:

2.3. TRANSFER OF THE LIABILITIES OF AN EPIC THAT HAS BEEN WOUND UP TO ANOTHER PUBLICLY OWNED ESTABLISHMENT OR TO THE STATE

- (31) Codifying instruction No 02-060-M95 of 18 July 2002 on the financial and accounting regulation of national publicly owned establishments of an industrial and commercial character⁽¹⁹⁾ (‘the codifying instruction’) provides that two situations may arise in the event of the closure of an EPIC with a public accountant:

- either a new publicly owned establishment replaces the former EPIC and takes over its property, rights and obligations,
- or the publicly owned establishment is declared wound up, in which case ‘the instrument winding up the establishment may already designate the beneficiary of the balance of the liquidation, which will generally be the State’⁽²⁰⁾.

- (32) The guide to the financial organisation of the creation, conversion and abolition of national publicly owned establishments and of public interest groups of 14 November 2006 (‘the guide to financial organisation’), which is available on the website of the Ministry of Finance, states⁽²¹⁾: ‘The instrument abolishing the establishment must explicitly provide for the transfer of the rights, property and obligations of the abolished establishment to the structure which is to take over its activity or its assets (i.e. either a publicly owned establishment or the State) [...] More generally, it must be provided that the new establishment will replace the entities whose activities it is taking over in respect of the rights and obligations resulting from the contracts concluded for the purpose of performing the tasks assigned to it’.

- (33) Although the provisions of the codifying instruction and of the guide to financial organisation are applicable only to EPICs which have a public accountant, there is evidence to suggest that EPICs which do not have a public accountant would also, in the event of their being closed down, have their debts transferred to the State or to another publicly owned establishment.

- (34) Thus, Charbonnages de France stated in the notes to its accounts of 31 December 2000 that all the rights and obligations of an EPIC must, in the event of closure, be transferred either to another legal entity governed by

public law or to the French Government itself, and that the terms and conditions of such a transfer must be specified in the law adopted with a view to closing down the EPIC in question. This statement does not apply only to EPICs with a public accountant, Charbonnages de France being in fact an EPIC without a public accountant.

- (35) According to some rating agencies, if ERAP⁽²²⁾ were to be wound up, although it is also an EPIC without a public accountant, the balance of its debt and of its assets would also be transferred to the State. According to Fitch⁽²³⁾, as an EPIC, ERAP is not subject to winding-up procedures. It can be wound up only by a legislative procedure and, in that event, the balance of its debt and of its assets will revert to the State. According to Moody’s⁽²⁴⁾, ERAP cannot be the subject of restructuring measures imposed by the compulsory winding-up procedures court. Hence, in the event of the company being wound up, its assets/liabilities would be transferred to the authority responsible for creating it, i.e. the State itself.

- (36) In the light of the foregoing, and despite the fact that La Poste does not have a public accountant⁽²⁵⁾, it should be examined whether, in the event of a winding up, the principle of the transfer of the debts to the State or to another legal entity governed by public law is applicable to La Poste given that it is treated as equivalent to an EPIC. If that were the case, creditors would be assured of not losing the money they are owed and could make do with a lower rate of interest or grant more favourable payment terms and conditions than they would if there were no such assurance. Such a transfer would therefore have the same effects as a guarantee.

2.4. DIRECT ACCESS TO TREASURY ACCOUNTS

- (37) Again according to Fitch⁽²⁶⁾, ERAP’s liquidity is guaranteed by its instant access to Treasury imprest accounts. As ERAP is an EPIC, the access which La Poste might also have to Treasury imprest accounts should be examined.

3. OBSERVATIONS AND PROPOSALS BY THE FRENCH AUTHORITIES

- (38) Following the opening decision, the French authorities submitted their observations and proposals to the Commission by letter dated 23 January 2008. That letter supplemented the observations and proposals set out in the previous letters from the French authorities⁽²⁷⁾ that were summarised in the opening decision.

3.1. OBSERVATIONS BY THE FRENCH AUTHORITIES

- (39) The French authorities dispute the existence of both a guarantee and an advantage for La Poste.

3.1.1. ABSENCE OF GUARANTEE

- (40) First, according to the French authorities, publicly owned establishments do not enjoy an automatic guarantee because of their legal form (A) and, second, the Commission's argument in the opening decision is flawed (B).

A. Publicly owned establishments do not enjoy an automatic guarantee because of their legal form ⁽²⁸⁾.

- (41) First, no legislation or decision lays down the principle that the State would, out of principle, indefinitely guarantee the debts of EPICs.

- (42) Second, the courts have found against the existence of guarantees. In particular, in its judgment in *Société de l'hôtel d'Albe* ⁽²⁹⁾, the Council of State held that 'the national tourism office, which has civil personality and financial independence [...] was a publicly owned establishment, so that the State cannot be liable for satisfying the debts contracted by the establishment; the Minister for Public Works therefore correctly refused to accede to the [creditor's] demand'. The same reasoning was followed with regard to local authorities in the two decisions by the Council of State in the *Campoloro* case ⁽³⁰⁾.

- (43) Third, the Organic Law of 1 August 2001 governing the Finance Act ⁽³¹⁾ ('LOLF') lays down that only a provision of a finance act can create a guarantee ⁽³²⁾. Accordingly, according to the French authorities' expert ⁽³³⁾, it has been legally possible to give an implied guarantee since the full entry into force of the LOLF on 1 January 2005. Debts contracted by La Poste since 1 January 2005 are not, therefore, covered by an implied guarantee. As for debts incurred before 1 January 2005, the French authorities' expert takes the view that, in the absence of a court judgment, it is impossible to determine whether the lapsing of the implied guarantees given before 1 January 2005, the giving of which was not expressly authorised by a finance act, could be rejected on the basis of respect for constitutionally protected creditors' rights.

- (44) Fourth, if EPICs enjoyed a state guarantee, the change in their legal form would require the introduction of new measures to protect creditors' rights. Such a mechanism has never been introduced. On the contrary, when the Administration of Posts and Telecommunications was converted into an independent legal entity (La Poste)

on 1 January 1991, the State, by order (*arrêté*) of 31 December 1990, granted an express guarantee for debts incurred before 31 December 1990 and transferred to La Poste. That would not have been necessary if La Poste, as an establishment equivalent to an EPIC, had enjoyed a statutory state guarantee. Legislative and regulatory provisions granting a state guarantee to certain activities of ERAP and of the French Development Agency (*Agence française du développement*), both of which are EPICs, have also been adopted.

- (45) Finally, the French authorities refer to an article ⁽³⁴⁾ by Mr Labetoulle, the former President of the litigation division of the Council of State. According to Mr Labetoulle, 'in law, there is nothing automatic about the granting, enjoyment and scope of this guarantee [a state guarantee that applies *ipso jure* to state-owned public establishments]'

B. The Commission's argument concerning the existence of a guarantee is flawed ⁽³⁵⁾**(a) The reimbursement of individual claims is not guaranteed****1. The Law of 16 July 1980 cannot form the basis of a guarantee**

- (46) According to the French authorities ⁽³⁶⁾, the Law of 16 July 1980 grants the supervisory authority power of substitution for the executive of the person whom it replaces. Therefore, the supervisory authority may exercise only the powers of that executive, which do not include the possibility of having access to the state budget. The Law of 16 July 1980 does not, therefore, provide an obligation for the State to commit its own resources.

- (47) In support of this interpretation, the French authorities cite the preparatory debates for the Law of 16 July 1980. During the debates, the Government opposed the amendments seeking to make it compulsory for the State to pay an exceptional subsidy to a regional or local authority whose resources were insufficient to implement a court judgment.

- (48) The French authorities also refer to academic articles ⁽³⁷⁾. These articles point out that the expression '*y pourvoit*' in Article 1 of the Law of 16 July 1980 refers to a power of 'substitution' in which 'it is a matter of principle that the substitute has the same powers as the substitutee', the granting of an exceptional subsidy being, moreover, 'outside the scope of the power of substitution' and therefore not provided for by the Law of 16 July 1980.

(49) Finally, the French authorities cite the decisions of the Council of State of 10 November 1999⁽³⁸⁾ and 18 November 2005⁽³⁹⁾ in the *Campoloro* case. The Council of State took the view that the financial substitution by the State of the defaulting local authority does not feature on the list of obligations imposed by the Law of 16 July 1980. Moreover, by investigating whether there were grounds for incurring the State's liability in the limited area of fault — gross negligence at that — the Council of State excluded out of principle all forms of *ipso jure* liability and therefore any form of guarantee.

2. *It is not possible to incur the strict liability of the State solely on the ground of lack of assets*

(50) Moreover, the French authorities assert that the possibilities of compensation opened by incurring liability, under restrictive conditions, to creditors of legal entities governed by public law cannot be considered equivalent to a form of guarantee. A guarantee requires the guarantor to accept the fact of the guarantee. If it is a matter of incurring liability for a fault or, in the case of strict liability, the consequences of one's own action, there can be no question of a guarantee.

(51) Then the French authorities maintain that, in any event, the liability of the State cannot be incurred on the sole ground that the Prefect or supervisory authority was unable to take any measures that could allow the claim to be repaid because of the financial and asset situation of the regional or local authority or publicly owned establishment.

(52) First of all, in the field of fault — gross negligence at that — the failure by the Prefect or the supervisory authority to exercise their powers where no measure can enable the claim to be repaid by the regional or local authority or the publicly owned establishment cannot in itself constitute a fault.

(53) With regard to strict liability, at least two aspects suggest the idea be dismissed:

— first, the liability of the person from whom compensation is sought can be incurred only if the fact (including an omission) of which he is accused was the direct cause of the injury. Now, in the case of lack of assets, the action or omission by the administrative authority would not be the cause of the injury

suffered by the creditor, rather the insolvency of the regional or local authority or the publicly owned establishment,

— second, strict liability stems from the principle of equality before public burdens. Now, according to the French authorities, in the case in point it is hard to see how the injury suffered by the creditor could lead to a breach of the principle of equality before public burdens. Unlike the case that gave rise to the *Couitéas* case law⁽⁴⁰⁾, in the present case, no state authority decided not to execute the judgment for imperative reasons of public interest. The case in question is one where the public authority is faced with the practical impossibility of taking measures that would enable the court judgment to be executed and the creditors to be reimbursed, and not an impossibility determined on the grounds of requirements of the public interest. According to the French authorities, liability for a breach of equality before public burdens cannot, therefore, be incurred simply because of insolvency. With regard to the Commission's argument, set out in recital 59 of its opening decision, that 'if the representative of the State gave preference to maintaining the continuity of the public service over the right of the creditor to have his debt repaid, it cannot be excluded that the strict liability of the State could be incurred', the French authorities recognise that the requirement of continuity of the public service is imposed on the representative of the State when implementing the procedure laid down by the Law of 16 July 1980. Nonetheless, according to the French authorities, even if the judge were to order the creditor to be compensated, such compensation would have the effect of reinstating the creditor to the situation in which he would have been under ordinary law because, in this latter case, the good in question would have been sold and the body of creditors would have received the corresponding amount. There would therefore be no advantage to the creditor.

(b) [...] (*)

1. *The inapplicability to legal entities governed by public law of administration and winding-up procedures under ordinary law does not exclude the possibility of the bankruptcy of an EPIC or of bankruptcy proceedings against it*

(54) According to the French authorities, the Commission's analysis is based on its 2000 Notice on State aid in the form of guarantees ('the 2000 Guarantees Notice')⁽⁴¹⁾, and in particular point 2.1.3 thereof, which provides that 'The Commission also regards as aid in the form of a guarantee, the more favourable funding terms obtained by enterprises whose legal form rules out bankruptcy or other insolvency procedures or provides an explicit State guarantee or coverage of losses by the State'.

- (55) While noting that the rules of the Treaty take precedence over the 2000 Guarantees Notice, the French authorities identify two factors which, in their view, remove the case in question from the scope of Notice:
- the 2000 Guarantees Notice stresses the fact that any aid would arise from ‘more favourable funding terms’ that would be imputed to the exclusion of the possibility of bankruptcy proceedings; but the Commission has not demonstrated the existence of ‘more favourable funding terms’,
 - the 2000 Guarantees Notice examines the case where the legal form excludes all bankruptcy or insolvency proceedings and not specific proceedings; but the Commission has not established that La Poste cannot go bankrupt, nor that insolvency proceedings are impossible.
- (56) According to the French authorities, the Law of 25 January 1985 is merely a procedural law. The fact that EPICs lie outside its scope does not mean that an EPIC cannot be in default, nor that the law prohibits administration, winding-up or *ad hoc* bankruptcy proceedings being taken against it.
2. *The application of the ‘procedure’ introduced by the Law of 16 July 1980, rather than the collective procedure under ordinary law, does not confer any advantage on the creditor*
- (57) The French authorities, having analysed recital 68 of the opening decision, conclude that the Commission uses two criteria to assess whether the application of a specific procedure in the event of insolvency confers an advantage on the entity subject to the procedure in relation to undertakings subject to commercial law:
- a criterion relating to publicity: the procedure to be followed in the event of La Poste’s insolvency should be defined and made public,
 - a criterion relating to equivalence: this procedure should be either the private-law procedure or a procedure that gives the creditors of La Poste rights that are no better than those they would have under commercial law.
- (58) Although the French authorities challenge the need to fulfil these two criteria⁽⁴²⁾, in so far as they are regarded as necessary and sufficient by the Commission, they have been used by the French authorities to analyse whether the application of the provisions of the Law of 16 July 1980 confers an advantage on the creditors of legal entities governed by public law compared with the creditors of undertakings subject to collective procedures under ordinary law.
- (59) With regard to the criterion relating to publicity, the French authorities take the view that the procedure introduced by the Law of 16 July 1980 is correctly identified by the rating agencies as applicable in the event of the insolvency of an EPIC, as reported by the rating agencies referred to by the Commission in relation to ERAP.
- (60) With regard to the criterion relating to equivalence, the French authorities draw a distinction between the case where a requirement for continuity of the public service would apply and where such a requirement would not apply.
- (i) the ‘procedure’ introduced by the Law of 16 July 1980 analysed from the perspective of an equivalence test — leaving aside the requirement for continuity of the public service
- (61) According to the French authorities, if La Poste were unable to repay its debts and if there were no requirement for continuity of the public service, the following procedure would apply: in the unlikely event of genuine financial difficulty and before reaching the stage of lack of assets, the undertaking would initially be required to open negotiations with its creditors in order to establish a plan for rescheduling liabilities. Next, if the plan was judged unsatisfactory or if it did not bring an end to the financial difficulties, and in the absence of a new agreement with creditors, they — or some of them — could refer the case to the competent court to obtain a judgment against the debtor and therefore have their claim recognised. The procedure introduced by the Law of 16 July 1980 would then be implemented. Where necessary, the procedure could result in the supervisory authority replacing the executive of La Poste to take the decisions needed for the payment of its debts using the establishment’s resources. If the procedure introduced by the Law of 16 July 1980 were to come up against La Poste’s lack of assets, and if the supervisory authority were therefore faced with financial impossibility, not having any more assets to sell in order to generate the resources needed to pay the amount due, the procedure provided for by the Law of 16 July 1980 would be terminated.
- (62) Therefore, according to the French authorities, assuming that there is no requirement for continuity of the public service, the application of the ‘procedure’ introduced by the Law of 16 July 1980 could result in all La Poste’s assets being sold but, in the event of lack of assets, the procedure would not enable all La Poste’s creditors to be

repaid. At the end of the procedure, the creditors of an entity subject to the Law of 16 July 1980, taken together, would have recovered the same amount as the creditors of an entity subject to commercial law, i.e. the proceeds from the sale of the assets.

(63) This procedure differs in only two respects from the procedure applicable under commercial law:

— the absence of a single procedure for all creditors: unlike the procedure under private law, whereby claims are processed *en masse* and creditors are satisfied in decreasing order of priority and pro rata from the amounts available, the procedure introduced by the Law of 16 July 1980 is different in that only action by the creditor enables him to protect his rights. The logic of the Law of 16 July 1980 is ‘first come, first served’,

— it is the representative of the State who, under the supervision of the administrative court (monitoring for gross negligence as established by the Council of State in the *Campoloro* judgment of November 2005 cited above), takes on the role equivalent to that of the court-appointed liquidator and administrator.

(64) The French authorities take the view that at the end of the procedure the creditors would no longer have any redress. According to the French authorities, the State cannot be held liable solely on the ground of lack of assets. Likewise, under the private-law procedure, the creditors ‘do not recover their right to take individual action’, save in exceptional circumstances, at the end of the compulsory winding-up procedure⁽⁴³⁾.

(ii) the ‘procedure’ introduced by the Law of 16 July 1980 analysed from the perspective of an equivalence test — taking into account the requirement for continuity of the public service

(65) In the event that the continuity of the public service would have to be guaranteed, the French authorities admit that the representative of the State, when exercising the powers conferred by the Law of 16 July 1980, could decide not to sell certain assets needed to perform a public service task. The failure to sell certain goods, for reasons relating to the requirement for continuity of the public service, would be reflected, if the State did not pay compensation, in lower proceeds from the assets and a corresponding reduction in the amounts recoverable by creditors. The procedure would not confer on La Poste’s creditors rights greater than those they would have had under commercial law. According to the French authorities, the criterion relating to equivalence set by the Commission would therefore be met *a fortiori*.

(66) Nonetheless, the French authorities admit that, in such an event, the State’s strict liability would then be likely to be incurred and reflected in compensation to creditors of the amount of the loss they have suffered, i.e. at most the market value of the assets that the State representative lawfully decided not to sell. According to the French authorities, any such compensation would nonetheless merely reinstate the creditor in the situation that would result from the application of ordinary law and could not, therefore, confer on him, with regard to the equivalence test, any rights greater than those he would have under ordinary law.

(67) The French authorities conclude that the procedure introduced by the Law of 16 July 1980 fulfils the equivalence and publicity criteria set by the Commission, which are sufficient to rule out the existence of an advantage. They take the view that there is therefore no justification for subjecting La Poste directly to the procedure under ordinary law, which is cumbersome and complex.

3. *The instruments cited by the Commission on the future of the obligations once the establishment’s resources have been exhausted do not apply to La Poste*

(68) According to the French authorities, the instruments referred to by the Commission in the opening decision, in particular in recital 69, are neither applicable nor transferable to La Poste.

3.1.2. ABSENCE OF ADVANTAGE

(69) According to the French authorities, the Commission’s analysis of the existence of a selective advantage follows two threads:

— a circular argument that is based on the 2000 Guarantee Notice,

— an analysis of the presumed influence of the alleged measure on the rating agencies.

A. *The Commission’s 2000 Guarantees Notice cannot be used to conclude that there is an advantage in the case in question*

(70) The French authorities take the view that the Commission, in recital 77 of the opening decision, wrongly interprets point 2.1.3 of the 2000 Guarantees Notice. According to the French authorities, point 2.1.3 implies that, in the case of an enterprise whose legal form rules out bankruptcy or other insolvency procedures, if the enterprise enjoys more favourable funding terms, those terms constitute State aid in the

form of a guarantee. According to the French authorities, nothing in point 2.1.3 of the Commission's 2000 Guarantees Notice indicates that the Commission considers that the fact that the legal form of an enterprise excludes the possibility of bankruptcy proceedings necessarily leads to the enterprise enjoying more favourable funding terms.

- (71) Moreover, the French authorities take the view that La Poste falls outside the scope of point 2.1.3 of the Commission's 2000 Guarantees Notice because the notice addresses the case where the legal form excludes all bankruptcy and insolvency proceedings, not a specific procedure. But, according to the French authorities, the Commission has not established that La Poste cannot go bankrupt, nor that all insolvency proceedings were inapplicable.

B. Absence of imputability and of state resources

- (72) In recital 79 of the opening decision, the Commission points out the influence of the rating agencies on the funding terms obtained by undertakings.
- (73) After highlighting the weaknesses of the rating agencies, the French authorities confirm that the position taken by a rating agency, where it is not underpinned by a precise analysis of the legal framework in force, cannot be used to create an advantage imputable to the State that may constitute State aid. In addition, even though this assessment would in practice provide an EPIC with advantageous access to funding, in law and in practice it would provide no access to state resources, which would be necessary to establish the existence of State aid.
- (74) The French authorities add that the analyses by the rating agencies are based, not on an objective legal basis, but on a subjective assessment of state support in the event of the undertaking in question running into difficulty.

C. Circular argument

- (75) According to the French authorities, the Commission's argument is circular:

- the Commission has based its argument on the statements by the rating agencies to highlight an economic advantage,
- the market and the rating agencies have accepted the absence of a state guarantee for La Poste but continue to harbour a doubt that is generated only by the position expressed by the Commission.

D. Absence of effect on La Poste's rating

- (76) In any event, according to the French authorities, the opening decision does not establish that La Poste's rating would be higher because of an alleged unlimited state guarantee.

(a) The doctrine of the rating agencies is not sufficient to identify any effect

- (77) The French authorities make a number of comments on the study by Standard and Poor's entitled '*Influence of Government Support on Ratings*', cited by the Commission in recital 80 of the opening decision. In the study, Standard and Poor's identifies a number of categories of government-supported postal companies; the classification determines the methodology applied by Standard and Poor's to set the rating of the company in question.
- (78) The French authorities point out that inclusion in Category 1⁽⁴⁴⁾ depends on broad criteria, such as the nature of the activity and the economic and social environment, but does not refer to the legal form of the rated operator.
- (79) The French authorities note that on 22 November 2004 the French and Italian Post Offices were classified in Category 2⁽⁴⁵⁾. The French authorities conclude from the Standard and Poor's document that the financial performance of Poste Italiane did not justify its rating. According to the French authorities, the Italian Post Office therefore benefited from a rating that was influenced by its owner's rating, even though the Italian Post Office is an SpA under ordinary law.
- (80) The French authorities point out that Standard and Poor's eventually classified La Poste in Category 3⁽⁴⁶⁾. According to the French authorities, the major reforms implemented since the end of 2004 gradually led Standard and Poor's to classify La Poste in the third category. The French authorities conclude that it cannot be established that La Poste's rating is imputable solely to its legal form or to any state guarantee mechanism, nor that the rating may constitute State aid.
- (81) Nonetheless, the French authorities admit that the Standard and Poor's 2004 study raised the question of La Poste's legal form. However, they confirm that the discussions they have had since with Standard and Poor's have clarified the question. The French authorities also informed Fitch about the absence of any state guarantee for La Poste, following which the agency undertook to reconsider the question.

(b) There are many cases in the private sector where the rating of a subsidiary is linked to the parent company's rating

(82) According to the French authorities, the influence of the presence of a stable majority shareholder, which was identified by the rating agencies in the case of the Italian Post Office independently of any specific features relating to legal form, is also found in the case of private groups. The French authorities cite as examples a Standard and Poor's press release on AGF dated 3 December 2003⁽⁴⁷⁾, a press release on Volkswagen Bank GmbH⁽⁴⁸⁾ and a press release on VWFS⁽⁴⁹⁾. According to the French authorities, this type of approach is therefore in no way specific to the public sector.

(c) La Poste's rating would not be adjusted if its legal form were changed

(83) Using the analysis for Standard and Poor's rating of La Poste, the French authorities seek to demonstrate that the rating does not depend on La Poste's legal form.

(84) First, the French authorities point out that when they made their observations, Standard and Poor's rated La Poste AA- with a stable outlook. The rating downgrade was justified by Standard and Poor's by the forthcoming deterioration in the group's financial structure linked to the payment by La Poste of EUR 2 billion to reform the financing of civil servants' pensions and by 'La Poste's greater autonomy in relation to its shareholder'. The French authorities take the view that the downgrade, which did not occur after a change in La Poste's legal form, cannot be explained if La Poste's rating were simply a consequence of its legal form.

(85) Second, despite the detail⁽⁵⁰⁾ provided by Standard and Poor's in its note dated 3 April 2007, which was cited in recital 84 of the opening decision, the French authorities find it difficult to see how La Poste, if it enjoyed a state guarantee, could be rated 3 notches below the State. Likewise, if the Law of 16 July 1980 were interpreted by the rating agencies as establishing, for the benefit of the creditors of the legal persons concerned, a mechanism comparable to a state guarantee, the French authorities do not understand how regional and local authorities could be rated BBB+ while the sovereign rating is rated AAA.

(86) Third, the French authorities stress that the Standard and Poor's note dated 3 April 2007 is based on a list of the strengths and weaknesses of the company that does not mention its legal form. The two factors mentioned by Standard and Poor's in support of the rating, i.e. the economic importance of La Poste's public service tasks and strong shareholder backing, are factors distinct from La Poste's legal form. The French authorities maintain

that strong shareholder backing does not mean financial support in breach of EU law but the interest shown in La Poste's development by the State at arm's length⁽⁵¹⁾. The French authorities conclude that La Poste's legal form is not an essential factor behind the rating.

(87) Fourth, the French authorities point out that in the same note dated 3 April 2007 the rating agency makes clear that it is continuing to use a top-down methodology, which allows an entity to be rated up to two categories below the sovereign State. According to the agency, this methodology is justified by the fact that the State will have to remain the 100 % shareholder in La Poste in the medium term. The French authorities conclude that this approach is in no way justified by La Poste's legal form. Lastly, relying on a quotation from Standard and Poor's⁽⁵²⁾, the French authorities argue that it is not the change in legal form but an opening-up of the capital that would lead Standard and Poor's to adopt a bottom-up methodology for La Poste. They add that, given the expected improvement in La Poste's fundamentals, such a change in methodology would not necessarily be reflected in a change in rating.

(88) Fifth, the French authorities point out that the outlook set by the rating agency is stable, despite the proceedings opened by the Commission against the unlimited state guarantee that La Poste is alleged to enjoy by virtue of its legal form. Now, if the legal form had an influence on the undertaking's solvency, the prospect of changing it should be reflected in a negative and unstable outlook. Moreover, Standard and Poor's justifies the stable outlook by the fact that the State is expected to remain 100 % shareholder in the undertaking for the next two years, despite a possible change to its legal form. Referring to another statement by Standard and Poor's⁽⁵³⁾, the French authorities conclude that it is the undertaking's own performance, and the possibility of a change of ownership, that are taken into account by Standard and Poor's to determine movements in the rating and not a possible change in the legal form.

(89) Sixth, the French authorities, citing another extract from the Standard and Poor's 2007 rating⁽⁵⁴⁾, stress that the rating agency does not reflect the Commission's statement that the consequence of the legal form is to improve the financing conditions granted to La Poste. Based on the citation from Standard and Poor's that: 'The ratings on La Poste were unaffected by this recommendation since we consider that a change in La Poste's status would not necessarily reflect a decrease in the strong state support that underpins LP's ratings and that has been reaffirmed by recent government decisions'⁽⁵⁵⁾, the French authorities conclude that La Poste's legal form has no influence on its rating.

E. Absence of effect on La Poste's financing conditions

(90) Lastly, the French authorities examine La Poste's actual financing conditions to determine whether they are affected by an alleged state guarantee.

(91) According to the French authorities, neither the announcement by the Commission of the existence of the alleged guarantee, its alleged incompatibility with EU law and, consequently, its impending removal, nor the denials by the French authorities concerning the existence of the guarantee made to rating agencies and to the press, have had any influence on La Poste's financing conditions. Accordingly, in October 2006 La Poste issued bonds to the value of EUR 1,8 billion with two maturities, 7 and 15 years, just after the Commission announced that it had recommended measures be taken. La Poste referred to the recommendation in the prospectus and made clear, during the meetings with investors, that it did not enjoy a state guarantee. Now, after the bond issue, La Poste's cost of finance had not changed significantly⁽⁵⁶⁾. The two issues were widely subscribed by European investors with the usual investor profile for La Poste, i.e. investors who hold their bonds until maturity. The French authorities conclude that the Commission's request to withdraw the alleged guarantee and the publicity surrounding the State's position on this issue did not have any influence on La Poste's financing conditions on the bond market. The markets took the view that La Poste's financing conditions were not based on the *de jure* or *de facto* existence of any guarantee.

(92) The French authorities conclude that:

- the analysis set out by the Commission in its opening decision is flawed: La Poste does not, in fact, enjoy any state guarantee,
- the Commission has not demonstrated the existence of an advantage for La Poste deriving from its legal form,
- the Commission has not, therefore, demonstrated the existence of State aid to La Poste.

3.2. PROPOSALS BY THE FRENCH AUTHORITIES

(93) Nonetheless, in order to dispel any doubts on the part of the Commission, the French authorities have indicated that they were willing to implement the following measures if the Commission agreed to close the procedure by a decision that no aid is involved, in accordance with Article 7(2) of the Procedural Regulation:

— clarification of the Decree implementing the Law of 16 July 1980,

— incorporation of a reference spelling out the absence of a guarantee in La Poste's contracts involving a claim,

— a mechanism for transferring from La Poste to the State any negative effect on the spread linked to the fact that La Poste is not subject to collective procedures under ordinary law.

3.2.1. CLARIFICATION OF THE DECREE IMPLEMENTING THE LAW OF 16 JULY 1980

(94) According to the French authorities, there is no need to amend the substance of the provisions in question, but simply to clarify how they are interpreted. They are therefore proposing to amend the Decree implementing the Law⁽⁵⁷⁾. The amendment would apply to the fourth subparagraph of Article 3(1) of the Decree, which organises the supervisory power conferred on the Prefect or on the supervisory authority. The amendment must dispel any misgivings harboured by the Commission concerning the scope of the expression 'shall do so' (*y pourvoit*). It is therefore proposed to spell out that the representative of the State or the supervisory authority must release resources from the budget of the regional or local authority, or the establishment.

(95) Duly amended, the provision in the Decree would read:

'If the notice given has had no effect by the time these deadlines expire, the representative of the State or the authority responsible for supervision shall enter the expenditure in the budget of the defaulting authority or publicly owned establishment. The representative of the State or the authority responsible for supervision shall, as appropriate, release the necessary resources *from the budget of the defaulting authority or establishment*, either by reducing the appropriations allocated to other expenditures and still available or by increasing resources' (the amendment is shown in italic).

(96) According to the French authorities, this proposal, in association with the observations and the academic articles supplied during the previous discussions on the opening letter, prevents the Prefect or the representative of the State, under the procedure introduced by the Law of 16 July 1980, from increasing the resources of the local authority or establishment concerned by a subsidy from the State or an injection of public resources.

3.2.2. INCORPORATION OF A REFERENCE SPELLING OUT THE ABSENCE OF GUARANTEE IN LA POSTE'S CONTRACTS INVOLVING A CLAIM

A. The initial proposal by the French authorities

- (97) In recital 59 of the opening decision, the Commission took the view that the proposal by the French authorities to amend the Decree implementing the Law of 16 July 1980 'does not exclude the possibility that, where the resources of La Poste are exhausted, the creditor who has not obtained repayment of his claim under application of the Law of 16 July 1980 could bring legal action to render the State liable on the basis of a breach of the principle of equality before public burdens'.
- (98) Although the French authorities deny that the State can be held liable solely on the grounds of La Poste's insolvency, in order to dispel any doubts in the Commission, the French authorities are making a proposal based on the exception of accepted risk. This exception, which applies both to the liability of the State with or without fault, is based on the principle that the injury resulting from a situation to which the victim knowingly exposed himself precludes the victim from having any right to compensation (see the judgments by the Council of State in *Sille* ⁽⁵⁸⁾ and *Meunier* ⁽⁵⁹⁾).
- (99) Consequently, in order to ensure that this exception is applied, the French authorities propose to confirm officially to La Poste's creditors that their claim does not enjoy a state guarantee and that, in the event of insolvency, the State would not be obliged to substitute itself for the undertaking financially to pay the claim. Such a notification is not against the law since the law in no way provides that in the event of La Poste's insolvency, the State should replace the undertaking financially in order to pay its debts.
- (100) Beyond the clarification of the Decree implementing the Law of 16 July 1980, the French authorities therefore undertake, jointly with La Poste, to include the following statement in the financing contract for each transaction (for all instruments covered by a contract):

'The issue/programme/loan does not enjoy any form of direct or indirect state guarantee. In the event of insolvency, the State would not be obliged to act as financial substitute for La Poste for payment of the claim'.

B. The Commission's misgivings set out in the opening decision

- (101) In recital 61 of the opening decision, the Commission sets out the following misgivings concerning the above proposals by the French authorities:

— the exception of accepted risk is a rule established by case law that could develop,

— 'this argument, which is derived from the fundamental principles of public law, through secondary law instruments, appears imperfect because those instruments would be likely to be annulled in the event of conflict',

— finally, La Poste's debts are not only financial but also commercial or other; these scenarios are not addressed by the additional proposal by the French authorities.

C. Information provided by the French authorities to address these misgivings

- (102) As pointed out above, according to the French authorities the State's strict liability cannot be incurred solely on the grounds of La Poste's lack of assets because making the State liable requires a decision by the State to act or not to act, and in this case there is a practical impossibility of acting. The French authorities' proposal therefore has value only as an additional means of clarification for creditors since the proposal would incidentally remove any risk of the State's strict liability being incurred thanks to the exception of accepted risk.
- (103) According to the French authorities, the Commission's first objection amounts to taking the view that, even if the national law of a Member State did not include a provision, the mere risk of a change in case law, i.e. a change in national law, is enough to constitute State aid. The French authorities challenge that reasoning. According to them, the exception of accepted risk is a general principle of public law that has been confirmed by case law on many occasions, never contradicted and widely commented. The Commission cannot argue that there is State aid because of a possible change in the law, which in this case is highly improbable.
- (104) The Commission's second objection relates to the fact that these secondary law instruments are easily annulled in case of conflict. It is true that the law and the regulation take precedence over the contract. However, for the Commission's objection to have real weight, it would have to rely on a higher-ranking text. According to the French authorities, there is nothing to support the Commission's objection on this point.

(105) However, the French authorities admit that the third objection, which is that bond issues are not the only instruments giving rise to claims, is pertinent, although of limited scope in the case of La Poste because financial debt is La Poste's main form of debt and the vast majority is bond debt.

D. Extension of the proposal

(106) The French authorities have therefore indicated that they would be willing, if the Commission closed the formal investigation procedure by a decision to the effect that there is no aid within the meaning of Article 7(2) of the Procedural Regulation, to extend their proposal to include a statement concerning the absence of a guarantee to all contracts involving a claim. According to the French authorities, this extension would make it possible to avoid any risk of incurring the State's strict liability based solely on La Poste's insolvency. Moreover, incurring the State's strict liability because of a decision by the supervisory authority not to sell the assets needed for the continuity of the public service would simply have the effect of placing La Poste's creditors in the same situation they would have been in had they been creditors of a public limited company.

E. Assessment by the French authorities of the classification of the measures as aid following their proposals

(107) According to the French authorities, the two clarification measures proposed above would allow La Poste's creditors to be made fully aware of their rights. Consequently, the French authorities cannot be considered as 'responsible for the expectations created in the minds of La Poste's creditors concerning the existence of a guarantee' and as voluntarily maintaining 'an opaque legal situation' that could lead the State 'to be obliged to repay La Poste's debts if it were no longer able to meet its commitments', as the Commission maintains in recital 74 of its opening decision.

(108) According to the French authorities, the fact that La Poste is subject not to collective procedures under ordinary law but to the provisions of the Law of 16 July 1980 does not mean that it is possible to conclude that there is a state guarantee; second, the proposed clarification measures make it possible to dismiss any State responsibility for the market's alleged faith in such a guarantee.

(109) Under these conditions, it is not possible to hold the State responsible for any potential effect. The criterion of imputability is therefore not met, contrary to what the Commission states in recital 76 of the opening decision.

(110) Likewise, recital 75 of the opening decision, in which the Commission refers to the 2000 Guarantees Notice to

justify the presence of state resources, is no longer valid because the facts do not support the existence of a state guarantee.

3.2.3. TRANSFER MECHANISM

(111) In order to supplement the proposed mechanism, the French authorities would be willing to consider with the Commission the following approach.

(112) The proposed approach results from the analysis of the Commission position in point 2.1.3 of its 2000 Guarantees Notice: 'The Commission also regards as aid in the form of a guarantee the more favourable funding terms obtained by enterprises whose legal form rules out bankruptcy or other insolvency procedures or provides an explicit State guarantee or coverage of losses by the State'. Likewise, in recital 114 of its opening decision, the Commission points out that it regards as a problem the fact that 'France is not taking all measures necessary to prevent this legal form producing economic effects to the benefit of an undertaking that operates on competitive markets'.

(113) The French authorities challenge the applicability to La Poste of point 2.1.3 of the Commission's 2000 Guarantees Notice and maintain that the Commission has been unable to establish that the fact that La Poste is not subject to collective procedures under private law is reflected in more favourable financing conditions.

(114) Nonetheless, the French authorities have offered to examine with the Commission the setting up of a transfer mechanism by La Poste to the State, on a euro-for-euro basis, of any adverse effect on the spread that is linked to the fact that La Poste is not subject to collective procedures under private law, using a calculation method that would be validated by the Commission and could be audited. According to the French authorities, the introduction of such an approach would complement the clarification proposals set out above in order to extinguish the myth of a state guarantee, while definitively avoiding any risk of aid.

4. ASSESSMENT

4.1. CLASSIFICATION AS AID

(115) Article 107(1) TFEU reads: 'Save as otherwise provided in this Treaty, 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 common market'.

4.1.1. UNLIMITED STATE GUARANTEE: STATE RESOURCES

- (116) As was pointed out in recital 56 of the opening decision, La Poste has the status of a publicly owned establishment of an industrial or commercial character, or 'EPIC', and consequently enjoys a special legal position with regard to the payment of its creditors and its continuation in business in the event of insolvency.
- (117) By way of introduction, the Commission would point out that La Poste is not subject to the ordinary law rules governing the administration and winding up of firms in difficulty⁽⁶⁰⁾. The French authorities do not contest this point, but deny that there is any mechanism that might be equivalent to a state guarantee for La Poste. However, according to the Commission Notice on the application of Articles 107 and 108 of the TFEU to State aid in the form of guarantees ('the 2008 Guarantees Notice'), point 1.2, second paragraph, fourth indent⁽⁶¹⁾, the Commission considers that there is aid in the form of a guarantee where more favourable funding terms are obtained by enterprises 'whose legal form rules out bankruptcy or other insolvency procedures or provides an explicit State guarantee or coverage of losses by the State'. Consideration must therefore be given to the arguments by which the French authorities seek to show that there is no state guarantee here.
- A. Guarantee of payment of individual claims**
- (118) In order to establish whether there is a guarantee for individual claims, the Commission will first consider whether, as the French authorities contend, any such guarantee is ruled out by the legislation or the case law (a).
- (119) The Commission will then examine the steps to be taken by creditors of La Poste in order to recover their claims in the event that La Poste should be in financial difficulty and should be unable to pay its debts (b). The Commission will seek to determine whether the procedure to be followed is such that the position of a creditor of La Poste is comparable to that of a creditor of a firm governed by commercial law.
- (a) **Contrary to the French authorities' affirmation, French law does acknowledge the existence of implied guarantees, and in particular the existence of a state guarantee deriving from the status of publicly owned establishment**
1. *The arguments of the French authorities*⁽⁶²⁾
- (120) First, the French authorities assert that there is no legislation or decision laying down the principle that the State is to guarantee the debts of EPICs.
- (121) The Commission observes that while it is true that there is no legislation or decision providing expressly for a state guarantee for EPICs — just as there is no legislation or decision expressly ruling out any state guarantee for such establishments — this does not mean that there can be no implied guarantee.
- (122) Second, according to the French authorities, the courts have held, notably in the judgment in the case of *Société de l'hôtel d'Albe*⁽⁶³⁾ and in *Campoloro*⁽⁶⁴⁾, that there is no such guarantee.
- (123) The Commission would observe that in *Société de l'hôtel d'Albe*, as pointed out by the Commission's expert, the Council of State merely refused to grant an application brought by a creditor directly against the Minister for Public Works. A guarantee would come into play in the event of insolvency. The judgment cited did not concern the specific situation in which a guarantee might be invoked. A guarantee mechanism does not require the State to pay a debt of a publicly owned establishment whenever a creditor so requests.
- (124) The Commission's analysis of the *Campoloro* case is set out in section 4.1.1.A(b)(3) of this Decision. It will be shown that the judgment in *Campoloro* establishes a scheme of state liability in proceedings for the recovery of the debts of publicly owned establishments which displays all the characteristics of a guarantee mechanism.
- (125) Third, the French authorities' expert concludes that the debts contracted by La Poste since the entry into force, on 1 January 2005, of the Organic Law governing the Finance Act ('LOLF') do not qualify for an implied guarantee. With regard to debts contracted before that date and whose lifetime extends beyond it, the expert acknowledges that two views are possible.
- On the first view, the Constitutional Council has found that guarantees do not lapse merely because they are not expressly authorised by the Finance Act, and the constitutional grounds on which it made this finding, in particular the principle of equality before public burdens and the right of property⁽⁶⁵⁾, apply to guarantees whether express or implied. In so far as there is an implied guarantee for the debts of La Poste, therefore, the fact that it was not authorised by the Finance Act would not mean that it would lapse in respect of debts contracted by La Poste before 1 January 2005.

- On the second view, rights as indisputable and decisive as these cannot be claimed by the holders of a supposed implied guarantee. In so far as there is an implied guarantee for the debts of La Poste, therefore, the fact that that guarantee is not authorised in the Finance Act means that it also lapses in respect of debts contracted before 1 January 2005.
- (126) The Commission notes that the French authorities' expert accepts that it is not certain that the absence in the Finance Act of authorisation for an implied guarantee means that the guarantee lapses in respect of debts contracted before 1 January 2005. More fundamentally, the Commission believes that, in order to determine whether or not the implied guarantee given by the State to La Poste has lapsed as a result of the Organic Law governing the Finance Act, what has to be considered is not the dates on which the debts were contracted by La Poste, but the date from which La Poste has enjoyed the guarantee. The guarantee links the State and La Poste; creditors of La Poste benefit only indirectly; and the guarantee covers not just the payment of individual claims (see Section 4.1.1.A of this Decision) but also the continued existence of La Poste or its obligations or both (see Section 4.1.1.B). The implied state guarantee to La Poste dates from before 1 January 2005, and the Commission takes the view that the argument that there can be no implied guarantee since 1 January 2005 is false.
- (127) In paragraph 110⁽⁶⁶⁾ of its decision of 25 July 2001 on the Organic Law on the Finance Act, the Constitutional Council found that guarantees which were given before the enactment of the Organic Law governing the Finance Act and which have not been identified and listed have not lapsed as a result. According to the Commission's expert, this reasoning applies squarely to implied guarantees, linked to the status of publicly owned establishments, which have not yet been identified and listed but which nevertheless remain valid.
- (128) But although the Constitutional Council has indeed found that guarantees given without the authorisation of the Finance Act have not lapsed, the French authorities' expert doubts whether the arguments that led to that conclusion apply without distinction to express guarantees and to implied guarantees. He takes the view that holders of a supposed implied guarantee cannot claim rights as indisputable and decisive as those conferred by an express guarantee.
- (129) The French authorities' expert merely expresses doubt, so his argument is not decisive, and the Commission notes that it is not suggested in this paragraph 110 of the Constitutional Council's decision that guarantees given expressly do not lapse whereas implied guarantees do. Article 61 of the Organic Law on the Finance Act, to which the paragraph relates, does not confine itself to express guarantees either. The Commission believes that the opinion of the Constitutional Council that a guarantee does not come to an end merely because it is not authorised in the Finance Act applies whether the guarantee is express or implied. The Commission takes the view, therefore, that the fact that the implied guarantee given by the State to La Poste has not been authorised in the Finance Act does not mean that it has lapsed.
- (130) In addition, as the Commission's expert pointed out, the obligation to enter state guarantees in a Finance Act is confined to the 'giving' (*octroi*) of such guarantees. To 'give' a guarantee the State must by an express manifestation of its intention confer a guarantee on an organisation or an operation. The scope of the obligation to enter guarantees in the Finance Act does not extend to guarantees that arise out of the legal form of an organisation, or out of an obligation established in case law, which are guarantees of an implied and automatic character. This category is not the result of a decision of the State, but of the fact that the State places itself in an existing legal framework, the guarantee being only one effect of that framework. The existence of this second category outside the scope of Article 34 of the Organic Law on the Finance Act explains why the rule established by the case law on guarantees given by concessionaires has continued beyond 2001. It also explains why when the State is a shareholder or partner in a company or grouping whose debts are covered under the Commercial Code by an unlimited guarantee, the State is not required to specify that fact in a Finance Act.
- (131) The Commission concludes that the argument put forward by the French authorities on the basis of the Organic Law on the Finance Act is not convincing, and that the fact that it is not stated in any Finance Act that the State extends a guarantee to La Poste by reason of its legal form does not mean that there is no such guarantee. The Commission would emphasise that it is not in any event bound by the description of the measure as a 'guarantee' for purposes of French law, or by the fact that a guarantee is or is not caught by the Organic Law on the Finance Act. From the Commission's point of view the only relevant consideration is how the measure is to be described for purposes of Community law, and the Guarantees Notice in particular. Community law recognises the existence of a guarantee once a Member State legally has to repay a claim on another person in the event of that person's defaulting⁽⁶⁷⁾.
- (132) Fourth, the French authorities contend that if EPICs enjoyed a state guarantee, any change in their legal form would necessitate measures to preserve the rights of creditors arising before the change. No such mechanism has ever been set up (for example in connection with the conversions of France Télécom, Gaz de France, EDF or ADP)⁽⁶⁸⁾, which proves, it is claimed, that there is no guarantee.

- (133) The Commission's expert explains that this assertion is based on a very broad interpretation of the constitutional protection of the right of property. According to the French authorities' argument, the protection of the right of property requires that all claims be preserved. The constitutional protection of the right of property is not confined to cases where the right of property depends on a public body; on the French authorities' interpretation, therefore, claims would have to be protected whenever they were rendered more fragile by any event in the life of any company. But in French positive law as it stands there is nothing to preserve such claims. If the argument is confined to claims guaranteed by the State, it would mean that a right of property that had once been guaranteed by the State would enjoy constitutional protection superior to other property rights. There is nothing to suggest that this is so. Lastly, a claim is a right *in personam*, not to be confused with a right of property, which by its nature is a right *in rem*. Rights *in personam* cannot be brought within the more far-reaching protection extended to rights *in rem*.
- (134) The Commission concludes that, when an EPIC is converted into a company that can be made the subject of court proceedings for administration or winding up, the right of property does not require that a specific measure be taken to preserve the entitlements of creditors. The fact that no such measure has been taken, therefore, does not constitute evidence that there is no implied guarantee.
- (135) Contrariwise, the French authorities argue that, if La Poste had enjoyed a state guarantee by reason of its legal form, there would have been no need to give an express guarantee for the debts contracted by the old Administration of Posts and Telecommunications which were transferred to La Poste. But, they argue, such a guarantee was in fact given, in an order dated 31 December 1990.
- (136) The Commission points out that the fact that the French authorities may have decided to give an express guarantee does not mean that there was no implied guarantee. The same reasoning applies to an argument put forward by the French authorities regarding the guarantee given by the State for certain activities of ERAP or the French Development Agency. In choosing to give an express guarantee in certain cases even though there was already an implied guarantee, the State may have been motivated for example by a concern for transparency and a desire to augment the creditors' legal certainty. As the French authorities' expert asserts, 'holders of a supposed implied guarantee cannot claim rights as indisputable and decisive as those conferred by an express guarantee'.
- (137) Last, the French authorities cite an article by Mr Labe-toulle, former president of the litigation division of the Council of State ⁽⁶⁹⁾. This article will be considered along with the judgment in *Campoloro* in the section of this Decision dealing with the liability of the State ⁽⁷⁰⁾.
- (138) The Commission concludes that:
- contrary to the affirmations of the French authorities, there is no legislation or decision that excludes the existence of a state guarantee to La Poste; and
 - the fact that there is no legislation expressly providing for such a guarantee does not mean that there can be no implied guarantee.
2. *The existence of implied guarantees arising out of the legal form of publicly owned establishments is confirmed by a memorandum of the Council of State*
- (139) The existence of an implied guarantee arising out of the legal form of publicly owned establishments is confirmed by a memorandum of the Council of State drawn up in 1995 in the *Crédit Lyonnais* case, which was cited in the opening decision ⁽⁷¹⁾. The Council of State there took the view that the organisation concerned enjoyed an implied guarantee by reason merely of its character as a publicly owned establishment: 'In connection with the draft law on state involvement in the recovery plans for *Crédit Lyonnais* and *Comptoir des Entrepreneurs*, the Council of State [...] took the view that there was a state guarantee for this establishment which derived without any express legislative provision from the very fact that it was a publicly owned establishment' ⁽⁷²⁾.
- (140) The Commission has repeatedly asked the French authorities to send it the full text of this memorandum.
- (141) The French authorities have replied that the memorandum in question was not drawn up at the request of the Government and was not given formal status in any official document ⁽⁷³⁾. According to the French authorities, the memorandum to which the Commission refers consisted only of the one sentence quoted in the annual report.
- (142) In addition, the French authorities argue, that opinion cannot be transposed to the case of La Poste, for several reasons: because it concerned a publicly owned establishment with a public accountant set up specifically to manage state support for the recovery of *Crédit Lyonnais*; because it predated the Organic Law on the Finance Act, which was adopted on 1 August 2001; and because its application is contrary to the subsequent case law of the Council of State.

- (143) The Commission would point out that the interpretation put forward by the French authorities according to which the Council of State's opinion cannot be transposed to the case of La Poste contradicts that opinion's very wording. The Council of State does not refer to the aims of the establishment. And it speaks of publicly owned establishments, and not of publicly owned establishments with public accountants. The French authorities do not explain why it should apply to publicly owned establishments only if they have a public accountant.
- (144) As regards the arguments put forward by the French authorities to the effect that the opinion is not applicable because it predates the Organic Law on the Finance Act, and is contrary to the subsequent case law of the Council of State, the Commission has already shown here that the Organic Law does not stand in the way of an implied guarantee given by the State to La Poste.
- (145) The Commission takes the view, therefore, that the Council of State's opinion is indeed applicable to La Poste, and that it acknowledges the existence of a state guarantee deriving from the public character of an organisation.
- (146) That there are state guarantees that derive from an administrative or legislative act which 'produces and entails financial consequences for the State' is confirmed in a memorandum from the Minister for Economic Affairs, Finance and Industry dated 22 July 2003, concerning a 'Census of implied and express guarantee arrangements granted by the State'. That memorandum shows that a state guarantee can derive from legal acts of very different kinds (74).
- (147) In an explanatory note attached to the memorandum, in part 3, under the heading 'Experience of calls made on guarantees and the judgments of the Council have clarified a number of textbook cases of guarantees which need to be identified', the French authorities affirm that 'Some legal forms by their structure entail a liability on the part of their shareholders; this is true in particular of [the forms of partnership known as] the *société en nom collectif*, or SNC, and the *groupement momentané d'entreprises*, or GIE. With these last two forms third parties will always seek out the State shareholder. The same applies to the creation of publicly owned establishments and to some shareholdings in public limited companies'. Here the French authorities themselves point out that the setting up of a publicly owned establishment entails an implied guarantee given by the State to the establishment's creditors.
- (b) **A creditor of La Poste can be sure that his claim will be repaid**
- (148) The Commission will now consider the steps to be taken by creditors of La Poste in order to settle their claims if La Poste were to be in financial difficulty and unable to meet its debts. The Commission will seek to determine whether, at the end of a procedure that is defined in advance and conducted in public, a creditor of La Poste will be in a position comparable to that of a creditor of an enterprise governed by commercial law.
- (149) This examination will show that:
- the conventional obstacles to the settlement of a claim against a body governed by private law are absent in the case of a publicly owned establishment (1);
 - the procedure laid down by the Law of 16 July 1980 for the recovery of the debts of a publicly owned establishment that has been found by a court to be in default does not in any way lead to the cancellation of the debt (2);
 - the rules governing the liability of the State in the procedure for the recovery of the debts of a publicly owned establishment have all the characteristics of a guarantee mechanism (3);
 - even if he were to fail to obtain satisfaction, a creditor could always invoke the effects of a legitimate mistake that he made when his claim arose regarding the prospect that it would always be honoured (4).
1. *The conventional obstacles to the settlement of a claim against a body governed by private law are absent in the case of a publicly owned establishment*
- (150) It was made clear in the description of the measure that La Poste is not subject to the ordinary law rules governing the compulsory administration or winding up of firms in difficulty. A creditor of La Poste is not in danger of seeing his claim cancelled because compulsory winding-up proceedings have been brought (75), or of obtaining only partial payment of his initial claim at the end of compulsory administration or winding-up proceedings under the ordinary law.
- (151) In addition, as the Commission's expert has pointed out, the fact that La Poste has legal personality is no bar to the existence of a guarantee given by the French State. There are commercial forms of enterprise such as public limited companies (SAs) or private limited companies (SARLs) whose members are not obliged to pay the debts of the organisation in which they take part, but there are also many categories of organisation or legal person carrying on a commercial activity in which private members are indeed liable for the debts of the

organisation they have set up. This is true of the forms of partnership known as the *société en nom collectif*, the *groupement d'intérêt économique*, or the *société civile*. Thus there is no express principle of ordinary law governing the liability of members for debts. In the absence of legislation, it cannot be said that the principle that applies must necessarily be that debts or losses are not guaranteed. In French law, the independence conferred by legal personality, or the existence of funds that belong only to the company, is not a test that allows it to be determined how the debts contracted by a legal person are guaranteed. It may also be concluded that there is nothing to prevent the legislature from providing that a publicly owned establishment can be set up by a public body that will bear any loss only up to the limit of its initial contribution or endowment.

Thus every partner has unlimited liability for the debts he has contracted. The Commission does not seek to deduce from this one consideration that the State is liable for the debts of La Poste; but it does believe that the French authorities' argument does not invalidate the Commission's expert's argument that in so far as there is a principle of ordinary law it would be a principle of guarantee. In addition, the Commission would point out that in the explanatory note attached to the memorandum of 22 July 2003 from the Minister for Economic Affairs, Finance and Industry ⁽⁷⁶⁾, the French authorities themselves draw a parallel between the liability of a shareholder for a *société en nom collectif* and the liability of the State for a publicly owned establishment.

(155) The Commission concludes that:

(152) The Commission's expert has sought to complete the picture by considering whether there is an implicit principle of ordinary law governing the guaranteeing of debts in cases where the partners or members in an organisation have not chosen to join together in one of the legal forms offered by the legislature; the Commission's expert finds an answer in Articles 1871 *et seq.* of the Civil Code. These articles deal with partners who have not registered their partnership. Article 1871-1 provides as follows: 'Unless another form of organisation has been provided for, the relations between partners are governed, to the extent reasonable, either by the rules applying to *sociétés civiles*, if the partnership is of a civil character, or, if the partnership is of a commercial character, by the rules applicable to *sociétés en nom collectif*'. It has been explained above that both of these forms of partnership are legal persons whose members have unlimited liability for their debts. The expert concludes that in so far as there is a principle of ordinary law, it would be a principle whereby those who set up a legal person guarantee its debts.

— unlike the creditors of undertakings governed by commercial law, creditors of La Poste (which is not subject to the ordinary law rules governing the compulsory administration and winding up of firms in difficulty) are not in danger of seeing their claim cancelled in whole or in part following court liquidation proceedings;

— the fact that La Poste has legal personality is no bar to a state guarantee to La Poste; and

— in the absence of any express limitation on the State's liability in respect of La Poste, La Poste's creditors may legitimately act on the principle that the State will bear the debts of La Poste, even though La Poste possesses legal personality.

(153) In their memorandum of 27 October 2009, the French authorities dispute this view. The conclusion, they argue, is not based on any legislation, since the reference in Article 1871-1 of the Civil Code is concerned with 'relations between partners' and not relations with third parties. The legislation is silent on the matter, and its silence cannot be made to imply a principle of guarantee without infringing the rights of the defence that apply in French law and in the law of the Union.

2. *The procedure laid down by the Law of 16 July 1980 for the recovery of the debts of a publicly owned establishment that has been found by a court to be in default does not in any way lead to the cancellation of the debt*

(156) The Commission will now consider the procedure for the recovery of the debts of publicly owned establishments that have been found by a court to be in default, in order to determine whether the procedure can result in the extinction of a claim on La Poste, which would make the outcome for the creditor similar to that of insolvency proceedings in the courts, as the French authorities assert. The procedure is laid down in the Law of 16 July 1980 and in implementing provisions which are cited in the section of this Decision describing the measure ⁽⁷⁷⁾.

(154) The Commission would observe, however, that Article 1871-1 of the Civil Code provides that every partner in an unregistered partnership contracts in his own name and is liable personally to third parties.

(i) The Law of 16 July 1980 confers important prerogatives on the State: the mandatory payment order and the creation of sufficient resources

- (157) As has been explained in the description of the measure, the Law of 16 July 1980 provides that 'if the decision-making body of the authority or establishment has not released or created the resources [...] the supervisory authority shall do so, and if necessary shall issue a mandatory payment order'. The Decree of 12 May 1981, which on this point remains unchanged by the amending Decree of 2008, states that the representative of the State or the authority responsible for supervision 'shall, as appropriate, release the necessary resources, either by reducing the appropriations allocated to other expenditures and still available, or by increasing resources'.
- (158) Thus the Law of 16 July 1980 and the measures implementing it designate the State as the authority responsible for covering the debts of publicly owned establishments. They also confer important prerogatives on the State: the mandatory payment order and the creation of sufficient resources.
- (159) The French authorities deny that the resources referred to here can ever be state resources. As has been indicated in the part of this Decision concerning the observations of the Member State ⁽⁷⁸⁾, the French authorities contend that the power conferred on the supervising authority by the Law of 16 July 1980 is only one of substitution. The supervising authority is empowered only to exercise the powers of the executive into whose shoes it steps, and those powers do not include the power to avail itself of the state budget. In support of this interpretation the French authorities cite the legislative history of the Law of 16 July 1980, a number of scholarly articles, and the decisions of the Council of State in *Campoloro*. They acknowledge, however, that the 1980 Law does not in principle prevent the State from providing financing to support the public body concerned.
- (160) The Commission accepts that the legislation does not expressly require the State to subsidise a publicly owned establishment on an exceptional basis if it is in financial difficulty. This does not in any way invalidate the demonstration of the existence of an implied guarantee.
- (161) The Commission also accepts that the resources to be released in the first place are the resources of the establishment itself. But this does not prevent a finding that once a publicly owned establishment's own resources are exhausted its debts can be honoured only out of state funds ⁽⁷⁹⁾. Such a finding is consistent with the fact that a guarantee mechanism is a subsidiary mechanism, in that the debtor's own resources are called upon before those of the guarantor.
- (ii) The Law of 16 July 1980 and the measures implementing it do not lay down a procedure for liquidation with cancellation of obligations: a shortage of funds will be covered, or will be only temporary
- (162) The Commission will now consider the interpretation of the French authorities which maintains that at the end of the procedure laid down by the Law of 16 July 1980 some creditors may see their claim irrevocably cancelled ⁽⁸⁰⁾, and that their situation is equivalent to that of creditors of undertakings subject to court proceedings.
- (163) The Commission's expert ⁽⁸¹⁾ observes that the Law of 16 July 1980 and the Decree implementing it support the view that in the event that funds are insufficient there are only two possibilities open: either the supervising authority releases the necessary resources, or the payment is deferred. At no stage does the procedure indicate that in the event of a continuing insufficiency of funds the debt will come to an end.
- (164) The Law of 16 July 1980 and the measures implementing it do provide for a situation where funds are insufficient, but they treat this situation as a temporary one, pending the creation of additional resources, which is the only outcome they envisage. At no stage do they contemplate a situation where the creation of additional resources is impossible or the resources thereby created are in turn insufficient. After the creation of resources, the legislation indicates that the responsible authority is to issue a mandatory payment order. The 1989 circular referred to above is more precise with regard to a shortage of funds, stressing that it is necessarily of a temporary character, since the creditor must be informed of the balance that will be paid later. According to the Commission's expert, 'from a reading of this legislation, creditors can conclude that if their claim is not met immediately it will be met at a later date'.
- (165) The Commission's expert also rightly observes that the procedure laid down by French law is a procedure only for the recovery of claims, and not for winding up. In the case of private persons the legislation links cessation of payments to winding up. The prospect of a cessation of payments may be grounds for a suspension of payments ⁽⁸²⁾, and a cessation of payments is expressly stated to be grounds for winding up under the supervision of the court ⁽⁸³⁾. But in the case of public bodies in general, and publicly owned establishments in particular, the legislature and the regulatory authorities have passed over the situation of cessation of payments, without linking it to any form of winding up, and have thus given creditors to understand that their claims will be honoured without limitation, if necessary by a third party such as the State.

- (166) Lastly, the Commission's expert observes that in the course of the reform of 2008, which took place after the opening decision in these proceedings, the French authorities did not take the opportunity to make it clear that the resources to be released had to be the establishment's own, and that state resources would not be drawn upon. Such a clarification would have sent a strong signal to creditors at a time when in proceedings initiated by the Commission an express link was being made between a state guarantee and the vague wordings in the legislation. The fact that the necessary clarification was not supplied supports the affirmation that the French State does not wish to deny that it may supply the necessary resources itself.
- (167) In the memorandum they sent on 27 October 2009, the French authorities argue that the statement of the Commission's expert that 'from a reading of this legislation, creditors can conclude that if their claim is not met immediately it will be met at a later date' rests on a biased reading of the relevant wordings: apart from the fact that these are merely circulars, rather than statutes or regulations, there is nothing in them to show that state resources are to be substituted for those of the publicly owned establishment. There is no reason why publicly owned establishments should not become dormant, leaving their creditors unable to force them to pay their debts. In addition, the French authorities take the view that publicly owned establishments could fail to meet a claim without automatically being in a state of cessation of payments.
- (168) The Commission will now consider whether, once a court has ordered a publicly owned establishment to pay a sum of money, and the order is no longer open to appeal, it is legally possible for the establishment to be allowed to fall into dormancy, with the result that the claim will never be honoured, as the French authorities contend. The Law of 16 July 1980 and the measures implementing it are binding on the State. In the case least favourable to the creditor, they require the State to inform the creditor of the balance that will be paid later. If no payment follows, the creditor can always claim that the State is liable (this point will be developed in Section 3 below). On the theoretical hypothesis that the debtor were to become dormant, therefore, the debt would not in any event be extinguished. In addition, the French authorities have not provided any specific example where this situation has actually arisen.
- (169) The Commission concludes as follows:
- The specific procedure laid down by the Law of 16 July 1980 and the measures implementing it is a procedure only for the recovery of claims, and not a procedure for winding up. At the end of the procedure the claim is not cancelled, whereas at the end of winding-up proceedings a judgment terminating the proceedings on the ground that the assets are insufficient, without penalty, prevents creditors from pursuing the proceedings further.
 - The Law of 16 July 1980 and the measures implementing it provide for the deferral of a payment order, and nowhere envisage a cessation of payments, and thereby give creditors to understand that there are or that there will be the resources necessary to settle a claim they hold on a legal person governed by public law.
 - It follows that a shortage of funds will be covered, if necessary by the State, or is temporary only. But winding-up procedures never provide for the possibility that a third party can become liable for the debts of the insolvent party, except of course in the case of a guarantor, or of a partnership with unlimited liability.
 - (iii) An exceptional subsidy can be envisaged that would be granted by the State to enable a publicly owned establishment to meet its obligations, and such a subsidy is in fact envisaged by certain legislation
- (170) The Commission's expert observes that:
- (a) [...] (*)
- (171) In order to establish that the guarantee arising out of La Poste's legal form constitutes State aid, it is not necessary to show that the resources of its own that La Poste would be able to mobilise in the event of a shortage of funds are limited; but the Commission would nevertheless point out that this is in fact so. The sale of assets⁽⁸⁴⁾ and the prices charged for providing the universal postal service⁽⁸⁵⁾ are both subject to very strict rules laid down by the French legislature. The difficulty of mobilising the undertaking's own capital and reserves in order to meet its debts exacerbates the need for state action in the event of a shortage of funds. First, the fact that resources cannot be mobilised by selling assets means that more frequent use has to be made of other guarantee mechanisms (advances, efforts to establish a liability on the part of the State, etc.). Second, in the event of a default on the part of La Poste, the fact that the legislature has laid down rules protecting the assets might be invoked in any dispute in which it is alleged that there is a strict liability resting on the State⁽⁸⁶⁾.

(172) In their memorandum of 27 October 2009 the French authorities deny that it is 'impossible' for La Poste to mobilise its own capital and reserves.

— As regards the sale of assets, the State is free to determine at its discretion whether an asset is 'indispensable' for the provision of the public service. Even if it does object to a sale, it does not thereby incur any obligation to compensate via a guarantee mechanism. As a matter of fact the State never has objected to a sale of assets under Article 23 of the Law of 2 July 1990, which has in any event fallen into desuetude since 2005, when La Poste transferred almost all of its immovable property assets (including post offices) to a subsidiary that was not subject to this system of prior authorisation.

— As regards increases in charges for the universal postal service, ARCEP, the postal regulator, does not decide prices, and sets a price cap only for La Poste's regulated activities, below which prices can be determined freely (with the exception of the prices of stamps, which are laid down by the Minister responsible for posts, who must stay within the price cap). It is reasonable to suppose that ARCEP would have difficulty refusing an increase in rates that was indispensable to the survival of La Poste and the public service functions it provides. The price cap applies only to the regulated sector, which accounts for less than half of the La Poste group's operating profit.

(173) The Commission takes note of the clarifications provided by the French authorities, and makes two observations.

— The French authorities contend that even if the State were to object to a sale, that would not entail a guarantee. Nevertheless, they have acknowledged that in applying the procedure laid down in the Law of 16 July 1980 the representative of the State is bound by the requirement of continuity of public service⁽⁸⁷⁾, which means that the State might have strict liability for a breach of the principle of equality before public burdens, as will be shown below⁽⁸⁸⁾.

— Creditors of La Poste cannot turn to another company in the La Poste group to seek satisfaction of their claims, so that the proportions between the regulated area and the reserved area have to be considered in relation of the turnover of La Poste, and not of the La Poste group as a whole. Given the scope of the regulated sector in France⁽⁸⁹⁾, it is clear that regulated activities form a preponderant

part of the business of the public undertaking La Poste. Thus the share of La Poste's business which is subject to the price cap is large, and the charges for reserved services are set by ministerial order.

(β) Some functions and schemes provided for in the state budget could be used to help a publicly owned establishment to repay its debts

(174) The programmes identified by the Commission's expert are the following:

— Programme No 823, advances to organisations distinct from the State that manage public services: The object is 'to allow the State to grant advances to various organisations, distinct from the State, that manage public services'⁽⁹⁰⁾. 'The purpose of such advances is to respond to emergency situations, whether in order to ensure the continuity of public business, or to expedite the implementation of a particular measure. The advances also allow an unforeseen funding requirement to be met provisionally, pending a permanent source of finance. This means that financing does not have to be obtained from banks or the market, and prevents greater fragmentation of the debt of public departments or an increase in their interest charges'.

— Under the heading 'State financial holdings' there are two programmes, entitled 'Capital transactions with regard to state financial holdings' (programme No 731) and 'Reduction of the debts of the State and of publicly owned state establishments' (programme No 732). In this latter programme there is a measure No 1 which relates to 'increases in capital, contributions to capital, shareholders' advances and equivalent loans'.

(175) The funds allocated to these advances are substantial. For programme No 732 there is express provision for a reserve of EUR 85 million. Payment appropriations for measure No 1 in programme No 732 amount to EUR 600 million. Payment appropriations for programme No 823 amount to EUR 50 million.

(176) In the event of financial difficulties at La Poste, the State would be able to help it with funding from these programmes. There is no legislation limiting the possibility of granting advances to EPICs carrying on an economic activity and operating in the competitive sector.

- (177) In their memorandum of 27 October 2009, the French authorities argue that they have never denied that publicly owned establishments may receive state advances — which would be granted expressly — but that this in no way implies that publicly owned establishments are entitled to draw on the state budget; as the Commission's expert indicates, shareholders' advances may be available in respect of any state holding, whatever the legal form involved, so that no conclusion can be drawn in respect of EPICs alone; and contrary to what the Commission's expert maintains, these advances take full account of the constraints imposed by the Community, because they would be the act of a prudent investor.
- (178) The Commission draws the following conclusions:
- In the event of a shortage of funds, French legislation authorises or indeed encourages the State to provide capital to publicly owned establishments, rather than expecting them to secure conventional bank loans. Access to these resources is in no way conditional on prior compliance with the rules governing State aid. The 'additional resources' referred to in the Law of 16 July 1980 may consist of contributions of this kind.
 - The relevant legislation is known to creditors, who consequently have good reason to believe that the supervising authority will be in a position to secure the resources necessary to ensure that their claims are satisfied.
 - However, La Poste has no entitlement to draw on these resources.
- (179) Given
- that the Law of 16 July 1980 and the measures implementing it do not provide for winding up with the cancellation of rights and obligations,
 - that the Law of 16 July 1980 and the measures implementing it do not at any stage contemplate the possibility that resources might not be available, and
 - that the budgetary documentation shows that EPICs may receive exceptional advances in the event of an urgent funding requirement,
- the Commission takes the view that the probability that a creditor might fail to obtain satisfaction of his claim under the procedures laid down by the Law of 16 July 1980 is low.
- (180) The Commission has not found that publicly owned establishments have any direct access to the accounts of the Treasury, 'direct access' being taken to mean a facility by which an EPIC can itself decide to draw directly on funds belonging to the State and placed at its disposal, without any action being required on the part of the State.
- (iv) The French authorities' proposal for a clarification of the Decree implementing the Law of 16 July 1980 is not sufficient
- (181) The Commission would like to emphasise straight away that the French authorities have not made the change in the Law of 16 July 1980 that will be discussed in this section. The Commission must necessarily examine the existence or otherwise of a guarantee to La Poste on the basis of the legislation actually enacted, rather than seeking to assess whether proposals which seek to exclude any guarantee but which have not yet been adopted are or are not adequate. The purpose of the analysis that the Commission will carry out in this section is essentially to provide a complete description of the proceedings that have taken place before the Commission.
- (182) In order to establish that the resources released by the supervising authority must come from the resources of the defaulting authority or establishment itself, the French authorities propose to amend the Decree implementing the Law of 16 July 1980 as follows (the amendment is shown in *italics*): 'If the notice given has had no effect by the time these deadlines expire, the representative of the State or the authority responsible for supervision shall enter the expenditure in the budget of the defaulting authority or publicly owned establishment. The representative of the State or the authority responsible for supervision shall, as appropriate, release the necessary resources *from the budget of the defaulting authority or establishment* either by reducing the appropriations allocated to other expenditures and still available or by increasing resources'.
- (183) As the Commission pointed out in recital 58 of the opening decision, neither in its present wording nor in the amended wording proposed by the French authorities does the legislation prevent an increase in resources from being made possible by a subsidy or injection of public funds.

(184) The Commission will now go on to examine the courses open to a creditor in the unlikely event that the procedure laid down by the Law of 16 July 1980 does not result in payment. The Commission will give particular consideration to the rules governing the liability of the State, in order to determine whether they have the characteristics of a guarantee mechanism.

3. *The rules governing the liability of the State in the procedure for the recovery of the debts of a publicly owned establishment have all the characteristics of a guarantee mechanism*

(185) According to the French authorities, the State has in principle no liability, whether for a fault on its part or in the absence of any such fault⁽⁹¹⁾. The French authorities acknowledge that if there is a requirement of continuity of public service that is binding on the representative of the State in the procedure laid down by the Law of 16 July 1980, a court may order that the creditor be compensated. But, they argue, this merely places the creditor in the position in which he would have been under the ordinary law, so that the creditor is not given any advantage.

(186) The Commission would point out, however, that under the ordinary law creditors, or at any rate unsecured creditors, will not as a general rule recover the whole of their claims. In addition, the enterprise being wound up will not have its debts paid by a third party, as happens here.

(187) The French authorities further argue that any possibility of compensation of creditors that may be opened up if the State is held liable cannot in any event be considered equivalent to a guarantee.

(188) The Commission takes the view, however, that in the procedure for the recovery of the debts of the public bodies referred to in the Law of 16 July 1980 the liability of the State, with or without fault, is indeed equivalent to a guarantee mechanism for purposes of Community law, as will be seen, because it ensures creditors that if La Poste should default the Member State will be required to meet their claims. In addition, the judgment of the European Court of Human Rights in the *Campoloro* case establishes something like an automatic guarantee. Although they are free to do so, the French authorities have not limited these liability or guarantee mechanisms.

(i) The earlier case law, illustrating the special character of the scheme introduced by *Campoloro*

(189) The Commission's expert has observed that before the *Campoloro* case, which will be considered below, when a creditor of a public body subject to the Law of 16 July 1980 sought to render the State liable for its

use of the prerogatives provided for in the Act, an administrative court would distinguish between two kinds of injury. The creditor suffered one kind of injury because his claim had not been settled: this was due only to the insolvency of the debtor. The creditor might also suffer a separate injury due to shortcomings in the exercise of the State's prerogatives — delays, reluctance to act, refusal to initiate proceedings, initiation of proceedings in respect of only part of the subject-matter, etc. This second kind of injury could not be evaluated by reference to the amount of the debt, but rather by estimating the cost of a delay or a refusal to exercise the prerogatives provided for by the law. That was the approach accepted by the Administrative Court of Appeal in the *Campoloro* case⁽⁹²⁾.

(ii) The judgment given by the Council of State in the *Campoloro* case in 2005

(190) In the view of the Commission's expert, the judgment given by the Council of State in *Campoloro* marks a development, in that one of the possibilities it contemplates is no longer a case of liability as such but instead operates as a guarantee mechanism.

(191) The judgment delivered by a division of the Council of State on 18 November 2005 in *Société fermière de Campoloro*, No 271898, found as follows:

'In the event of a failure on the part of a local or regional authority to ensure the application of a judgment no longer open to appeal, after proper notice, the legislature here sets out to give the representative of the State the power to step into the shoes of that authority, in order to release or create the resources that will allow the judgment to be enforced in its entirety. The representative of the State consequently has a duty, subject to judicial review, to take the measures necessary in the light of the situation of the authority and the requirements of the public interest. Such measures include the possibility of selling assets belonging to the authority, provided they are not indispensable to the proper operation of the public services for which the authority is responsible. If the prefect refuses or neglects to exercise the prerogatives conferred on him by law, a creditor of the authority is entitled to bring an action against the State in case of serious fault committed in the exercise of the supervisory power. In addition, if, having regard to the situation of the local or regional authority, and in particular to an insufficiency in its assets, or by reason of requirements of the public interest, the prefect legitimately refuses to take certain measures with a view to ensuring that the judgment is enforced in full, the State as holder of public authority may be liable for any injury caused to a creditor of the local or regional authority if the injury is of an abnormal and specific kind'.

- (192) The Council of State here establishes a dual mechanism.
- (193) First, there is a liability on the State for a failure in the exercise of the prerogatives conferred by the Law of 16 July 1980 and its implementing measures. This is a scheme of liability for serious fault. It has been made to depend on serious fault because of a desire to avoid an automatic transfer of debt from the debtor authority to the State. A learned commentator observes ⁽⁹³⁾, 'if the prefect takes measures that seek to release additional resources, but these then prove to be insufficient in view of the scale of the debts of the municipality, the court will probably take the view that no fault has been committed'. The liability for serious fault described here is of a conventional kind, and does not operate as a guarantee mechanism in the event of an insolvency of the debtor, because the liability does not arise merely as a consequence of the insolvency.
- (194) Second, the judgment provides for strict liability in two cases.
- (195) The first case is one where 'by reason of requirements of the public interest, the prefect legitimately refuses to take certain measures with a view to ensuring that the judgment is enforced in full'. This is a classic case of inaction on the part of public administration motivated by the public interest, and in such a case the public administration may be liable for breach of equality before public burdens. The debtor is in theory not insolvent, but the State decides not to exhaust the debtor's potential resources on grounds of the public interest. There is no guarantee mechanism here, because the injury to the creditor is the result of a decision of the State, and not of the debtor's financial situation. But the consequences are identical to those of a guarantee mechanism.
- (196) The second case of strict liability resembles a guarantee mechanism more closely. The Council of State finds that 'if, having regard to the situation of the local or regional authority, and in particular to an insufficiency in its assets [...] the prefect legitimately refuses to take certain measures with a view to ensuring that the judgment is enforced in full, the State as holder of public authority may be liable for any injury caused to a creditor of the local or regional authority if the injury is of an abnormal and specific kind'. Here the liability arises only out of the financial situation of the debtor authority. Liability has not been made to depend on fault, and the burden of proof resting on the creditor is lighter, as the creditor has to show only the factual situation that gives rise to liability, the causal link, and the damage.
- (197) In the view of the Commission's expert there are two similarities between this scheme of liability and a guarantee system. First, the liability arises out of something that is not objectively imputable to the State, namely the situation of the debtor organisation: liability of this kind is triggered by the insolvency of the debtor, like a guarantee. Second, the injury to which the Council of State refers appears, in the absence of any indication to the contrary, to be the failure to pay the debt itself, which is likewise the trigger for a guarantee.
- (198) It is true that the Council of State restricts the liability of the State to injury 'of an abnormal and specific kind'. As regards the 'abnormal' character of the injury, the Commission's expert takes the view that one can proceed by elimination. Either the debt is a small one, in which case it is fair to suppose that it will not leave a national publicly owned establishment, or La Poste in particular, in a position of insolvency; or the debt is a large one, in which case the injury will necessarily be abnormal. As regards the 'specific' character of the injury, it may be supposed that creditors making large claims on publicly owned establishments will not be numerous. Thus the restriction imposed by the Council of State is a restriction in appearance rather than in fact, because it is fair to suppose that the claims involved will always be large, so that the injury will always be abnormally serious.
- (199) This is the interpretation accepted by the best academic opinion. According to the commentary by P. Bon already cited, 'in that case, which very likely corresponds to the case under consideration, given the flagrant disproportion between the sum that the court has ordered the municipality to pay and the smallness of the municipality's resources, the prefect is in an impossible situation, because he is not likely to be able to release sufficient resources to enable the municipality to pay the whole of the debt. But equity demands that after so many years the two applicant companies should be compensated [...] it turns the State into a forced insurer of the damage caused by the incompetence [of the municipality]'. The Commission's expert observes that the correct term is not 'forced insurer' but rather 'forced guarantor'.
- (200) In their report on the judgment in *Société fermière de Campoloro* ⁽⁹⁴⁾, C. Landais and F. Lenica, who were in charge of documentation at the Council of State at the time the judgment was delivered, stress the singularity of this second case, and refuse to interpret it as transferring to the State the burden of the debts of local and regional authorities'. The Commission's expert points out that this interpretation is debated precisely because on a reading of the judgment it has to be envisaged. The end of the commentary is revealing: the commentators speak of a loan or an exceptional subsidy. It will be observed that commentators who refuse to consider this scheme of liability to be equivalent to a guarantee mechanism ultimately invoke other components of a guarantee mechanism, such as subsidies.

- (201) The Commission's expert also rejects the assessment made by D. Labetoulle in an article on strict liability in administrative law⁽⁹⁵⁾ which is cited by the French Government in its observations. Labetoulle observes that the Council of State held in *Campoloro* only that in the event of a decision taken legitimately by the prefect the State 'may be liable'. He deduces that liability is not automatic. According to the Commission's expert, this interpretation is not convincing. The Council of State found that the prefect's decision could render the State liable (*est susceptible d'engager la responsabilité*) 'if the injury is of an abnormal and specific kind'. What is uncertain is not the principle of the existence of liability, or the fact that liability is incurred if the conditions that give rise to it are met, but the existence of injury presenting certain features. As has been explained, once the injury is specific and abnormal, nothing stands in the way of liability. Thus by its very nature the liability does indeed arise automatically, and has all the characteristics of a guarantee.
- (202) Finally, the Commission's expert observes that none of the commentators on the *Campoloro* judgment has envisaged the possibility that the claim might go unpaid.
- (203) The Commission's expert concludes that the Council of State's judgment in *Campoloro* installed a scheme of liability which has the characteristics of a guarantee mechanism.
- (iii) Settlement of the *Campoloro* case by the European Court of Human Rights (ECHR)
- (204) In a judgment of 6 December 2006 — *Société de gestion du port de Campoloro and Société fermière de Campoloro v France*⁽⁹⁶⁾, the ECHR settled the *Campoloro* case by making the State liable for all of the sums due to the applicant companies by Santa-Maria-Poggio Commune. The case demonstrates that, in this instance, the liability accepted by the French State operates as an implied guarantee of the public authorities' liabilities and is not linked to any condition relating to loss.
- (205) Before the Court, the French authorities attempted to base their case on the absence of, firstly, an operative event imputable to the State and, secondly, a guarantee on the part of the State to public authorities possessing legal personality. '[The French Government]', we read, 'considers that only objective reasons concerned exclusively with its being materially impossible for the commune to release sufficient resources have delayed the complete enforcement of the judgments'; 'The Government therefore maintains that the non-enforcement of the judgments given is not the result of a deliberate refusal to enforce them on the part of the national authorities, State or commune. The absence of funds is not a pretext, but a reality due to the insolvency of the debtor legal entity'; 'The non-payment of the debt is due entirely to the commune's financial difficulties, and these circumstances do not appear to be such as either to release the authority from its obligations or to transfer the burden of its debt to the State (Council of State, commune of Batz-sur-Mer, 25 September 1970). There is no legal basis under national law for substituting the State for the commune where the payment of compensation is concerned. Nor can Article 6-1 of the Convention form the basis of any such substitution in so far as a solution of that kind would be contrary to the very concept of legal personality, which presupposes autonomy and a distinct set of assets'. While the French Government attempted specifically to invoke the differences — highlighted above — between the liability scheme and the guarantee mechanism, these arguments were not in the end accepted by the Court.
- (206) To reinforce the point being made, the applicants' arguments — which were, in contrast, accepted by the Court — need also to be reproduced.
- 'That is why no arrangements to soften the blow have been made under national law to confront a situation of default on the part of the commune'; 'The State cannot offload its obligation to implement judicial decisions by invoking the absence of funds or the autonomy of regional or local authorities — an autonomy that it has not been able to guarantee to date, since the commune is in no position to pay its debts. The applicants therefore denounce the State's incapacity to adopt positive measures that would have enabled the commune to contribute in accordance with its obligation'. 'The applicants note that, in its judgment of 18 November 2005, the Council of State held that the legislature intended to give the representative of the State, in the event of a local or regional authority's not being able to implement a judicial decision, the power to take the place of that authority's decision-making bodies in order to release or create the resources enabling the judicial decision concerned to be fully implemented. It is on the basis of these omissions on the part of the French State that the applicants demand both acknowledgement of Article 6-1's having been breached and the resulting compensation — an initiative that no more contradicts the concept of legal personality than it does the concepts of independence and of a distinct set of assets'.
- (207) The Court finally noted that a breach of Article 6-1 of the European Convention on Human Rights had taken place and added that: 'These judgments need, therefore, to be implemented, and the Court would point out that a State authority cannot use lack of resources as a pretext for not honouring a debt based on a judicial decision (Bourdov, cited above, Section 30)'.

- (208) The Court also noted that a breach of Article 1 of Protocol No 1 to the European Convention on Human Rights had taken place: 'The interested parties' inability to have these judgments implemented constitutes interference with those parties' property rights — interference such as is referred to in the first sentence of the first paragraph of Article 1 of Protocol No 1. The Government has provided no justification at all for such interference, and the Court considers that lack of resources cannot legitimise the omission concerned (ibid)'. 'In sum, the Court considers that the applicant companies have been, and are still, subject to a huge and special burden due to the non-payment of the sums from which they should have benefited in implementation of the aforesaid judgments dated 10 July 1992. There has therefore been a breach of Article 1 of Protocol No 1'. The Court ended by charging the whole of the debtor communes' debt to the State: 'In view of the above, the Court holds that it is for the defendant state to pay the applicants or, if appropriate, their legal successors the sums (including interest) due to them as from the delivery, on 10 July 1992, of the judgments of the Bastia administrative tribunal (ibidem) until the day on which this judgment has been given'.
- (209) The Commission's expert deduces from this case law that the State must cover the debts of the public authorities.
- (210) The Commission considers this to have three important implications:
- liability functions as an implied guarantee. Firstly, the French State is required to pay the whole of the debt, and no distinction has been made between debt conceivably due to the public authority's insolvency and possible defaults imputable to the State. The terms used are worth emphasising, since the Court does not refer to a possible liability on the part of the State but holds that it is the responsibility of the State to 'ensure' that payment is made. Such terms relate more to the concept of a guarantee than to that of liability. What is more, the Court does not at any time seek an operable event imputable to the State and looks no further than the debtor's insolvent status. Finally, the Court transfers the whole of the offending communes' debt to the State. These various factors tend to show that this system of liability operates in reality as a guarantee mechanism. It will be noted, however, that the applicants must first obtain a judicial decision recognising their claim. Moreover, this guarantee is implied because it is not set out in any legislation. This demonstrates that a judicial mechanism under national law can be interpreted as an implied guarantee,
 - this liability covers the debts of public authorities possessed, however, of legal personality. The existence of legal personality and of assets specific to the authority was expressly invoked by the French Government in its opposition to holding the French State liable. This argument was rejected by the Court,
 - the scope of the state guarantee extends to include public authorities dependent on the State. The guarantee is therefore intimately connected with the debtor's public law legal form.
- (211) It must be pointed out that the solution adopted by the ECHR in the *Campoloro* case is not an isolated one and stems from a well established tradition of case law. Thus, in its judgment of 13 May 1980 in *Artico v Italy*⁽⁹⁷⁾, the ECHR decided that, where a failure to act is imputable to an entity other than the State, it is for the State, as giver of the guarantee provided for in Article 6-1, to act in such a way that the applicant in practice enjoys the right conferred on him by that Article. In Case No 59498/00 of 19 March 1997, *Bourdov v Russia*, the Court also held that an authority of the State cannot use lack of resources as a pretext for not honouring its debt.
- (iv) Examination of the observations of the French authorities
 - (a) Observation relating to the difference between regional or local authorities and publicly owned establishments
- (212) According to the French authorities⁽⁹⁸⁾, the case made out by the Commission's expert is by no means conclusive and is limited to comparing various interpretations of the *Campoloro* judgment; above all, it draws no distinction between publicly owned establishments and local authorities, although this difference is central to the issue of whether a claim can remain unpaid. On this matter, the French authorities adopt the opinion of their expert. The latter questions the premise underlying the Commission's arguments based on the *Campoloro* case law: the Commission's argument rests on likening local and regional authorities to publicly owned establishments, which are all legal entities separate from the State and governed by public law. In fact, these two types of body do not have the same constitutional status. Thus, the existence of local authorities is a constitutional requirement, and the State has an obligation to guarantee the survival of such bodies. EPICs do not have anything like the same constitutional status and do not have to survive. The *Campoloro* case law, which relates to cases of default on the part of local authorities, cannot therefore be used in relation to publicly owned establishments.

- (213) The Commission will now examine whether the difference in constitutional status between local or regional authorities and publicly owned establishments is likely to place a question mark over the conclusions drawn by its expert on the basis of the decisions taken in the *Campoloro* case by the ECHR and the Council of State.
- (214) The Commission notes that the ECHR's decision is based on the need to preserve, not the existence of the local or regional authority concerned, but the rights of the creditor, that is to say his right to a fair trial (Article 6-1 of the European Convention on Human Rights) and the protection of his property (Article 1 of Protocol No 1): whether the debtor is a publicly owned establishment or a local or regional authority, the creditor's rights are infringed in the same way.
- (215) As for the decision of the Council of State, a distinction needs to be made between the various liability schemes:
- the liability due to gross negligence scheme is based on the State's deficient use of the prerogatives introduced by the Law of 16 July 1980; it is therefore independent of the nature of the debtor: local or regional authority, or publicly owned establishment,
 - the strict liability scheme is, for its part, based on two scenarios,
 - (a) in the first scenario, the prefect refuses to take certain measures because of requirements of the public interest: these might include the need to preserve not only the existence of the regional or local authority but also the public service task. The French authorities' expert emphasises that continuity is required only of the service and not of the establishment that manages the service. It nonetheless remains the case that, in the short term and until such time as the public service task is conceivably transferred to an establishment capable of taking over that task, the continuity of public service may involve the prefect's taking a number of measures, for example measures to preserve the assets necessary to the public service task or to increase the resources required to pay the claim. Moreover, the French authorities recognise that the representative of the State is required to preserve the continuity of public service in implementing the procedure introduced by the Law of 16 July 1980;
 - (b) in the second scenario, the strict liability scheme can be invoked if, having regard to the situation of the local or regional authority, and in particular to an insufficiency in its assets, [...] the prefect legitimately refuses to take certain measures with a view to ensuring that the judgment is enforced in full, the State as holder of public authority may be liable for any injury caused to a creditor of the local or regional authority if the injury is of an abnormal and specific kind. As indicated above, the operative event giving rise to the liability is nothing but the financial situation of the debtor authority. Moreover, the latter may just as well be an establishment as a local or regional authority.
- (216) In conclusion, the Commission considers that the difference in constitutional status between local or regional authorities and publicly owned establishments does not invalidate the conclusions drawn from the *Campoloro* case law by the Commission's expert. Moreover, the Commission would observe that the set of arguments put forward by the French authorities is designed to question the relevance of the *Campoloro* judgment in this particular case, which does not relate to a local or regional authority; yet the *Campoloro* judgment was first invoked by the French authorities themselves in support of their position.
- (β) Observation relating to the lack of any basis for holding the State liable
- (217) Moreover, the French authorities fail to see on what basis the State might incur strict liability in the event of a publicly owned establishment defaulting, since the State can be held liable in such a context only if the act (or omission) imputed to it has been the direct cause of the injury, which is not the case here.
- (218) The Commission nonetheless notes that the decisions of the Council of State and the ECHR clearly establish that the State can be held strictly liable.
- (γ) Observation relating to the lack of abnormal and specific injury
- (219) Finally, the French authorities fail to see why the judge would consider the injury to be 'specific' when it apparently concerns all the creditors of the establishment, or as 'abnormal' if creditors agreed to supply funds to a body in an uncertain financial situation.

- (220) The Commission would observe that, according to the case law of the Council of State, the existence of an abnormal and specific injury does in practice limit the liability of the State. The French authorities doubt that the injury is abnormal in a situation in which creditors agreed to supply funds to a body in an uncertain financial situation. The Commission would point out, in this connection, that this argument presupposes that there is no guarantee (and that the creditors think that there is no guarantee), whereas the analysis given above shows the opposite to be true. Indeed, if the creditors believe in the existence of the guarantee, any creditor will view the establishment's financial situation as being much less of a crucial factor both when he decides to grant funds to the establishment and when he negotiates the conditions under which such funds are to be granted. Moreover, it has to be borne in mind that the debt may have been incurred either when the publicly owned establishment was not in danger or when the creditor could not reasonably have been aware of the establishment's financial difficulties. In any case, the concept of abnormal injury has to be understood as going beyond the issues of whether or not the establishment was aware of the financial difficulties and even of whether the injury was sustained by all the creditors or by only one. According to the case law relating to strict administrative liability⁽⁹⁹⁾, the existence or otherwise of abnormal and specific injury is assessed with reference to the public interest. To be categorised as abnormal and specific, the injury to the person concerned must be out of proportion to the public interest intended to be served. The Commission deduces from this that the abnormal and specific character of the injury undoubtedly constitutes a filter that may prevent a number of claims from being met, but that the higher the debt the less likely it is that this filter will come into play. Finally, the Commission would point out that the existence of an abnormal and specific injury is not a condition imposed by the ECHR's case law. Any creditor may, therefore, in principle obtain compensation from the State, covering his debt, at the conclusion of judicial proceedings.
- (v) Absence of limitation of liability and/or of a guarantee by the State
- (221) The Commission would emphasise that, as has been seen above, there is nothing to prevent the legislature — as it does in the case of a number of companies — from providing that the State will pay the EPICs' debts only up to the limit of its initial contribution (or endowment). In particular, there is nothing to prevent the legislature from providing for a limitation of liability or from quite simply specifying that the State as shareholder can be liable for an EPIC's debt only in the event of a fault or situation distinct from the EPIC's mere insolvency — a state of affairs directly imputable to the EPIC and the cause of a particular injury. It is therefore possible for the legislature to preclude the State's guarantee in respect of EPICs and to limit the State's liability in relation to the injuries sustained by creditors. However, these clarifications have not been supplied by the French authorities.
- (vi) Commission's conclusion
- (222) The Commission concludes from points (i) to (v) that, as French law currently stands, a creditor who has not obtained the payment of his claim through the use of the procedures set out in the Law of 16 July 1980 may receive all of the sums corresponding to the unmet claim by invoking the State's last-resort liability. This is the opposite of what happens within the framework of winding-up proceedings under ordinary law where the reimbursement of the creditor is limited by the value of the available assets. The State's liability is treated as a guarantee. It is not the subject of any limitation by French legislation. It is intrinsically connected with the public-law legal form possessed by the debtor body.
- (vii) Analysis of the French proposal relating to the clause in the contracts
- (223) If the Commission were to adopt a decision finding that there was no aid, the French authorities would be prepared to extend their proposal for recording the absence of a guarantee so that it includes all contracts involving claims. The French authorities consider that such an extension would make it possible to prevent any risk of triggering the State's strict liability based on La Poste's insolvency alone.
- (224) Firstly, the Commission wishes to point out that the remark made in recital 181 is obviously applicable to this section of the present Decision. Moreover, as indicated in the opening decision, the Commission acknowledges that this is a measure likely to restrict the opportunities for a creditor who has signed such a contract to obtain payment of his claim through legal proceedings. The Commission nonetheless has doubts about the durability of this solution, the exception for accepted risk being a rule established by case law, which could always evolve (the overturning of existing case law is all the more likely as the trend in case law is towards extending the scheme of strict liability on the part of the State). In response to the observations of the French authorities, the Commission would emphasise that the preceding remarks do not lead the Commission entirely to reject the French authorities' proposal but to emphasise how fragile the resultant legal framework would be.

(225) Moreover, the Commission considers the French authorities' proposal to be inadequate as the State's guarantee could come into play for any type of liability including, for example, non-contractual liability and criminal liability, which present the same characteristics from this point of view: it is impossible to make it contractually clear in advance to debtors that the State is not liable for La Poste's debts. In general, La Poste may find itself indebted towards a third party through a variety of judicial mechanisms — a state of affairs that would imply a guarantee on the part of the State in the event of insolvency. For example, if La Poste were to absorb another structure (another publicly owned establishment), the rights and obligations of that structure would be transferred to it at the same time. If it were subsequently to meet that structure's debts towards a third party, no contract or other legal document would have laid down that the State was not required to pay La Poste's debts towards creditors of the absorbed structure, since no one would have been able to foresee the situation. Thus, through a mechanism (such as merger or absorption) for converting certain public sector structures, La Poste may acquire a number of debts towards third parties, without its being possible contractually to provide for a limitation of the guarantee on the part of the State. It is not, therefore, enough to insert such a clause into the 'contracts' with the 'creditors', as the clause would not cover all eventualities. Such a formulation would be likely to overrule claims by initially unidentifiable third parties. Only a text of general scope applicable in any situation and to any type of third party, indicating that the State is not the guarantor of La Poste, would be enough.

(226) Finally, even in a scenario in which the French proposals would make it quite impossible for a creditor of La Poste to hold the State liable for paying its claim (a scenario that the Commission considers not to have been shown to exist), such proposals would not enable it to be clearly established what would happen in the event of La Poste's becoming insolvent. Indeed, a creditor of La Poste who had not been able to have his claim met by requesting payment of his individual claim could always hope to obtain payment within the framework of an overall State-financed restructuring of La Poste, as will be shown subsequently in this Decision.

4. *Even if he were to fail obtain satisfaction, the creditor could invoke legal effects from the legitimate mistake he made, when the claim arose, that it would always be honoured.*

(227) Use of the theory of appearance⁽¹⁰⁰⁾ enables what has been demonstrated to be confirmed. Indeed, even if one were to follow the French authorities' argument, according to which there is no unlimited guarantee in favour of La Poste because of the latter's legal form — an argument refuted by the Commission — the factors

analysed above legitimately lead creditors to believe that such a guarantee does nonetheless exist. The theory of appearance amplifies the effect produced by the concordance of a series of indices.

(228) The main relevant indices in relation to the theory of appearance are noted below:

— regarding the state guarantee in favour of EPICs, a variety of legislative instruments (Law of 16 July 1980 and the measures implementing it) or official (budgetary) documents lead the creditor to believe that the State would take over EPICs' debts in the event of their having a shortage of funds or that it would assume liability for those debts,

— the lack of clarification of the legal situation following the *Campoloro* case and of the initial procedures undertaken by the Commission on the legal form of EPICs also increases creditors' confidence that such a guarantee does in fact exist,

— the lack of any clear indication as to the effects of a situation in which an EPIC is in default also militates in favour of this view,

— the reaction of the rating agencies is also relevant in this context in that, rightly or wrongly, third parties attach importance to the legal form of the debtor, attributing to the latter a rating whose role is crucial in the matter of funding (this will be demonstrated in section 4.1.2(a) of this Decision).

(229) In accordance with the conclusions of its expert, the Commission has arrived at the view that, even if, in the scenario championed by the French authorities, it was in error that a creditor came to consider that the State was required to guarantee the debts of publicly owned establishments and of La Poste in particular, his error would be legitimate given the above-mentioned factors, and the law could impart effects to it. If, exceptionally, the creditor did not succeed in obtaining the payment of his claim, he could nevertheless rest assured that there was no likelihood of the claim being cancelled.

B. Guarantee of the continued existence of La Poste and/or of its obligations

(230) As will be shown, even if, within a reasonable period and after the use of the procedures described in the previous section, the creditor does not succeed in obtaining the payment of his claim, he will be secure in the knowledge that the claim will not be cancelled. When a company constituted under private law is closed down, its rights and obligations are likely to disappear with it. The procedure for winding up companies provides no guarantee at all that claims will be paid. The situation regarding publicly owned establishments is different. As shown above, there is no procedure for the closing down/winding up of publicly owned establishments in default, involving the elimination of those establishments' debts. In the event of publicly owned establishments being closed down following a decision of the public authority — and despite the fact that no legislation expressly provides for this — experience and certain basic principles of administrative law tend to show that the rights and obligations of publicly owned establishments that are closed down as such are always taken over by another body and, failing that, by the State. There is no public authority-motivated winding up/closing down of publicly owned establishments in which the rights and obligations of the establishments are also cancelled. Each creditor can therefore be certain that the right arising from his claim may be invoked against another body and that his claim will not, therefore, be cancelled.

(231) This demonstration is based on a practical study of organic developments affecting publicly owned establishments. This study, conducted by the Commission's expert, shows that the debts of publicly owned establishments are always transferred to another legal entity, which cannot refuse them.

(232) The Commission's expert has identified three reasons why publicly owned establishments may be closed down⁽¹⁰¹⁾: because they have reached the ends of their lives (1), because the tasks assigned to them no longer need to be carried out (2), and (the case most frequently encountered) because the tasks assigned to them have been transferred elsewhere, necessarily implying a transfer of the rights and obligations (3).

(a) Publicly owned establishments that have reached the ends of their lives

(233) There are few cases of publicly owned establishments reaching the ends of their lives. The only example⁽¹⁰²⁾ found by the Commission's expert shows that the rights and obligations of the publicly owned establishment — particularly its debts (which are expressly referred to) — are transferred to other legal entities governed by public law.

(b) Publicly owned establishments closed down due to their tasks no longer needing to be carried out

(234) The cancellation of the task of the publicly owned establishment is almost always preceded by the cancellation of a public-service task, meaning that the public authorities no longer wish to see a particular activity as representing a public-interest task that they are obliged to take over or guarantee. In fact, the trend is to identify more and more activities as public services. This explains why the cancellation of public service tasks is a very rare phenomenon.

(235) It is necessary, however, to set aside cases of publicly owned establishments without a public-service task whose closing down due to the cancellation of their task does not imply the prior cancellation of a public-service task. La Poste does not fall into the latter category. Even in this hypothetical case, experience in any case demonstrates that the rights and obligations of these establishments are systematically taken over by another legal entity governed by public law, more often than not the State itself, as shown by the numerous legislative instruments and examples identified by the Commission's expert⁽¹⁰³⁾ on the basis of the study carried out by S. Carpi-Petit⁽¹⁰⁴⁾.

(c) Transfer of the task, implying a transfer of the rights and obligations

(236) Transfer of the task of a publicly owned establishment to another body, implying a transfer of the rights and obligations, is the most frequent scenario. The principle of continuity of public service implies a transfer of the assets assigned to the task and, therefore, a transfer of the rights and obligations.

(237) A basic principle emerges: if the task remains, the debts of the former publicly owned establishment are transferred to the body that takes over the task.

(238) More often than not⁽¹⁰⁵⁾, the task is transferred to a single body and, as a result, the assets are transferred in their entirety rather than being split up. The same principle applies in scenarios in which the assets are transferred to a private person⁽¹⁰⁶⁾.

(239) There are also scenarios in which assets are split up, showing in this case too that there is continuity in the rights and obligations of publicly owned establishments.

- (240) Article 1 of Decree No 74-947 of 14 November 1974, concerning the transfer to the *Institut de l'audiovisuel* of the ORTF's assets, rights and obligations, gives concrete expression to the existence of a principle whereby a successor body is appointed 'by default': 'it will be possible for the assets, rights and obligations of the *Office de radiodiffusion-télévision française* that have not been transferred [...] to the public broadcasting establishment or to one of the companies created by this law to be transferred to the *Institut de l'audiovisuel* as from 1 January 1975 by order of the Prime Minister'.
- (241) The scenarios in which the assets are transferred in more than one stage confirm the trend described above ⁽¹⁰⁷⁾.
- (242) When a publicly owned establishment is converted into a public limited company, there are several 'conversion' procedures:
- closing down/abolition: the simplest procedure is that of closing down by abolition, the publicly owned establishment then being wound up,
 - closing down/substitution: as B. Plessix expresses it ⁽¹⁰⁸⁾, closing down by substitution is 'the abolition of the publicly owned establishment, accompanied by the creation of a new legal entity to which is entrusted the statutory task for which the wound-up establishment was responsible'. In other words, a new legal entity is substituted in the rights and obligations of the wound-up publicly owned establishment; a new legal entity inherits the tasks of the abolished establishment',
 - conversion without abolition: conversion without abolition, or without closing down, is an operation based on organising the continuity of the converted legal entity.
- (243) The legislature has committed itself in recent years to conversion without closing down. Where the initial conversions, and especially that of France Télécom, were concerned, the legislature abolished the EPIC, then transferred all of its assets, rights and obligations to a new legal entity taking the form of a company governed by private law ⁽¹⁰⁹⁾. Then, in the course of the subsequent operations, the legislature effected only a change in legal form without creating a new legal entity. There is therefore no transfer of the assets, rights and obligations of the EPIC, nor cessation of activity but, rather, the organisation of legal continuity by the legislature, as shown for example by Article 25 of Law No 2004-803 of 9 August 2004 relating to the public gas and electricity service and to gas and electricity companies: 'conversion into the companies *Electricité de France* and *Gaz de France* involves neither the creation of new legal entities nor the cessation of activity. The assets, rights, obligations, contracts and authorisations of any kind of the companies *Electricité de France* and *Gaz de France*, both within France and outside France, are those of each of the publicly owned establishments at the time when their legal form is changed. Such a conversion does not allow these assets, rights, obligations, contracts and authorisations to be in any way called into question and, in particular, has no effect on the contracts concluded with third parties by *Electricité de France*, *Gaz de France*, etc. The operations brought about by this conversion do not lead to the collection of duties or taxes of any kind' ⁽¹¹⁰⁾.
- (244) Guided by its expert, the Commission concludes that analysis of the various scenarios whereby publicly owned establishments are closed down enables the following conclusions to be drawn:
- although there is no overall judicial scheme for organising the closing down of publicly owned establishments, experience shows that the legislation always provides for transferring the rights and obligations of the establishment that is to be closed down either to the State or to the body that is to take over its task. To the Commission's knowledge, no example of legislation is to be found noting the cancellation of the debts,
 - it is the 'rights and obligations' that are transferred, with the term 'obligations' undoubtedly referring to debts. Some legislation uses the vaguer term, 'assets' [*patrimoine*]. According to Cornu's *Vocabulaire juridique* ⁽¹¹¹⁾, by 'assets' is meant a 'collection of the property and obligations of one and the same person (that is to say of his duties and charges assessable in monetary terms)' — a formulation that would also include debts. The only example found of the pure and simple closing down of a publicly owned establishment involves, in any case, the transfer of the 'debts' themselves,
 - even when the task disappears, the establishment's rights and obligations are, in practice, taken over by another body,

- the practice described is in accordance with codifying instruction No 02-060-M95 of 18 July 2002 and the *Guide sur l'organisation financière des créations, transformations et suppressions des établissements publics nationaux* [Guide to the financial organisation of the creation, conversion and abolition of national publicly owned establishments]. Even though such legislation concerns only establishments with a public accountant — such as La Poste does not have — it nonetheless confirms the lessons drawn from actual practice, namely that the rights and obligations of a wound-up EPIC go either to the State or to the legal entity that will take over the establishment's task.
- (245) The Commission concludes that this analysis shows that the creditor of such a publicly owned establishment can be certain that his claim will not be cancelled with the closing down of the establishment.
- (246) The demonstration would not be complete without examining the issue of whether, on the model of successions under private law, the heir may refuse the succession, particularly if the debts are too great. It appears that there is only very limited scope for refusing a succession under administrative law.
- (247) According to S. Carpi-Petit⁽¹¹²⁾: 'unlike in civil law, which makes the option available to all beneficiaries, the ability to exercise an option is not a general principle of administrative law governing successions. It is offered only to certain beneficiaries, depending on the nature of the operation carried out. Thus, the transfers implied by abolition pure and simple are not optional. As for transfers brought about by replacements, whether or not they are optional depends on the pre-existence of the testator'. Where abolitions pure and simple are concerned, S. Carpi-Petit deduces from his exhaustive study that 'there being no option available for the benefit of the State is a situation that also obtains in administrative law. This implies that, where the existence or otherwise of the right to exercise an option is concerned, the simplest scenario is doubtless that in which a national publicly owned establishment is abolished, without its task being taken over. In that case, the successor in title is always the State. If the State were to refuse the assets left by the abolished publicly owned establishment, the assets would then necessarily have no one in charge of them — a state of affairs that is not permitted. Moreover, it is not possible to impute the burden of the succession to another property. Thus, there is no ability to exercise an option in the case of the abolition pure and simple of a national publicly owned establishment'.
- (248) With regard to possible ways of finding a replacement body to carry out an establishment's task, 'there are two types of replacement in administrative law in relation to successions. In the first scenario, a legal entity to replace the natural person/testator is created for this function. This legal entity then constitutes the universal successor in title. It therefore seems only right to refuse it the right to exercise an option'.
- (249) The Commission's expert points out that, when it comes to the abolition pure and simple of publicly owned establishments through the abolition of their tasks, the objection could be made to this reasoning that the fact that the State is in no position to refuse the assets does not necessarily imply that it is also unable to refuse the debts. It nonetheless seems that, where publicly owned entities are concerned, inability to refuse a succession is based mainly on the public law status of publicly owned establishments rather than on its not being possible to leave assets with no one in charge of them.
- (250) Guided by its expert, the Commission concludes that the debts of publicly owned establishments are in practice always transferred to another legal entity governed by public law in the event of the closing down of the publicly owned establishment that carried out the task concerned. The creditors of these publicly owned establishments, such as La Poste, therefore have a guarantee that their unpaid claims will not be cancelled.
- C. Conclusion regarding the existence of a state guarantee in favour of La Poste**
- (251) On the basis of the evidence of the existence of a guarantee ensuring the payment of individual claims and the continued existence of La Poste's obligations, the Commission concludes that:
- the creditors of La Poste do not encounter the usual private and public law obstacles to the payment of a claim,
 - in recovering the amounts owed to them, the creditors of La Poste may use specific procedures authorising the State to force the debtor body to settle the claim and, if need be, enabling the State to increase La Poste's resources for settling it,
 - nowhere does French law give the creditors of La Poste to understand that La Poste could face, for good, a situation in which it had a shortage of funds,

- the budgetary documents indicate that, if there is a shortage funds, the State could give an exceptional grant to public sector bodies, of which La Poste is one,
 - if the procedures described above do not enable the creditor to obtain satisfaction, he can hold the State liable in order to obtain the payment of his claim in full,
 - if the actions envisaged above were to be spread out over time, the creditor can be certain that his claim will not be cancelled, even if La Poste were to be subject to organic development of the kind that, as experience shows, in fact takes place.
- (252) These special factors are intrinsically linked to La Poste's legal form as a publicly owned establishment.
- (253) The procedures described above imply that the State performs the role of guarantor of last resort. It may therefore be legitimately concluded that La Poste benefits from an unlimited guarantee on the part of the French State because of its legal form as a publicly owned establishment.
- (254) The unlimited state guarantee to La Poste results in a transfer of state resources within the meaning of point 2.1 of the 2008 Communication on guarantees⁽¹¹³⁾. Indeed, La Poste pays no premium for this guarantee, and the State therefore waives the remuneration that normally accompanies guarantees. Moreover, the guarantee creates the risk of a potential and future claim on the resources of the State, which could find itself obliged to pay La Poste's debts⁽¹¹⁴⁾.
- (255) Finally, the State's unlimited guarantee to La Poste is imputable to the State because it derives from the combination of La Poste's public-law legal form, principles of national law and two legislative acts, namely the Law of 25 January 1985, now the Commercial Code, and the Law of 16 July 1980 and the measures implementing it.

4.1.2. EXISTENCE OF A SELECTIVE ADVANTAGE

- (256) The guarantee is an essential component of state support, thanks to which La Poste enjoys more favourable borrowing terms that it would have obtained had it been judged solely on its own merits (a). Given the unlimited nature of the guarantee, it is not possible to calculate the amount of the market premium that La

Poste should pay to the State, which renders the transfer mechanism proposed by the French authorities inapplicable (b). The more favourable borrowing terms obtained by La Poste thanks to the implicit state guarantee constitute a selective advantage (c).

- (a) **The guarantee is an essential component of state support, thanks to which La Poste enjoys more favourable borrowing terms that it would have obtained had it been judged solely on its own merits.**

1. *Borrowing terms are set on the basis of the financial rating in particular*

- (257) Borrowing terms are set on the basis of the financial rating in particular⁽¹¹⁵⁾: the more an undertaking's rating deteriorates because of an increased risk of insolvency, the higher the remuneration required by the investor. *A contrario*, an undertaking with a very low risk of insolvency will be able to borrow on very favourable terms.

2. *Contrary to what the French authorities maintain, the rating agencies take the view that the guarantee is a determining factor of state support for La Poste, thanks to which the latter enjoys a higher rating than it would have obtained had it been judged solely on its own merits*

- (i) The guarantee, as an essential component of state support for La Poste, influences La Poste's financial rating

(a) Rating-agency analyses⁽¹¹⁶⁾ concerning the existence of a state guarantee in favour of La Poste

- (258) In a study on the influence of government support on the ratings of postal operators dated 22 November 2004, Standard & Poor's point out that 'La Poste's legal status, which ensures a last-recourse sovereign guarantee, confers the ultimate statutory guarantee of the Republic of France on its obligations'⁽¹¹⁷⁾.

- (259) On 3 April 2007, Standard & Poor's confirmed its conclusion that the status of publicly owned establishment confers on La Poste an ultimate state guarantee, even though the guarantee is not timely and express, as reflected by the rating differentiation between La Poste and the Republic of France⁽¹¹⁸⁾.

- (260) As for Fitch, another leading rating agency, it pointed out on 31 March 2006, when confirming the AAA rating given to La Poste, that La Poste was a public group that enjoyed a guarantee from the French State.

- (261) However, on 17 April 2008, Fitch downgraded La Poste's rating to AA, basing its decision on the fact that 'La Poste's status as a public operator no longer justifies its ratings being automatically aligned on the State.' Although Fitch pointed out that it 'did not presuppose the existence of an implied state guarantee', it nonetheless confirmed that 'the statutory obligation on the State to assume La Poste's commitments remains'. In this respect the Commission would point out that, from the perspective of EU law, it does not matter whether the obligation on the State to assume liability for La Poste's commitments derives from what is termed a guarantee under national law or from a simple statutory obligation. Under both scenarios, there is a state guarantee from the perspective of EU law (see the 2008 Guarantees Notice, which explains that public guarantees may be linked to the status of the undertaking itself and imply coverage of losses by the State ⁽¹¹⁹⁾).
- (262) On 4 September 2009 Fitch pointed out ⁽¹²⁰⁾: 'However, as the agency had pointed out in 2008 when downgrading La Poste's rating from AAA to AA, it does not recognise the existence of an implied state liquidity guarantee in favour of La Poste. Since 2006 it has been possible to activate State aid schemes only if the liquidity requirements are consistent with European competition rules; accordingly, La Poste's status as a public operator no longer justifies automatically aligning its ratings on those of the State. Therefore, access to advances from the Treasury in the event of a liquidity crisis is no longer guaranteed, which may substantially delay state support when needed'. Fitch therefore takes the view that it has not been possible to activate the liquidity guarantee since 2006 because it no longer complies with European competition rules. This confirms that the agency took the view that, before 2006, there was such a guarantee that could be activated. Fitch attaches decisive importance to the Commission letter dated 26 February 2006 which informed France of its preliminary findings concerning the existence of an unlimited state guarantee ⁽¹²¹⁾. However, Fitch does not take account of the fact that the Commission, in that letter, classified the guarantee as existing aid and that the letter dated 26 February 2006 contained only a preliminary, non-binding assessment as to the existence of the guarantee, which did not prevent it being called upon if necessary. Therefore, if a guarantee existed before 2006, its existence and the possibility of activating it were not rendered null and void by the Commission letter dated 26 February 2006. That would be possible only by the annulment of the guarantee itself, either by France or the Commission on the basis of an act with binding legal effect. In conclusion, even though Fitch mistakenly believes that the Commission letter invalidates the guarantee, Fitch nonetheless continues to recognise the 'exceptional level of support that La Poste can receive from its principal, and the high probability that it would be provided if necessary'.
- (β) The guarantee, as an essential component of state support for La Poste, influences La Poste's financial rating
- (263) An examination of the analyses and methodologies of Standard & Poor's and Fitch demonstrates that the guarantee, as a determining factor of state support, influences the financial rating.
- Standard & Poor's (S & P) Methodology
- (264) In the above-mentioned study on the influence of government support on the ratings of postal operators, S & P explains that it decides on the methodology to be used to set the rating of a postal operator on the basis of the estimated degree of government support for the operator. S & P distinguishes postal operators that receive government support (the French and Italian Post Offices, for example) from those that do not receive any (Deutsche Post and TNT, for example). Within the category of government-supported postal companies, S & P identifies three broad categories:
- entities whose rating is the same as the state owner: this category includes entities that are highly integrated into the mechanisms of government and extremely unlikely to be privatised; no postal company falls into this category,
 - entities whose rating is notched down from that of the state owner (by up to two categories or 6 notches): entities that, while autonomous in their operations, are largely public-policy based institutions still in receipt of substantial direct or indirect financial backing from the state, even though there is a high level of uncertainty surrounding the level and timeliness of the state support ⁽¹²²⁾; La Poste was classified in this category at least until the study was published,
 - entities whose rating is based on the entities' own merits, with notching up depending on the level of state support. Classification in the third category assumes that the postal operator receives state support but in the form of policy, regulation or the potential for emergency support rather than regular direct financial subsidy.

- (265) In the same study, S & P explains that it assesses state support to the postal operator (and hence the methodology to use to determine the rating of the operator and *in fine* the rating) on the basis of the four following factors: the operator's status, the likelihood of privatisation, governance and the regulatory regime. With regard to the operator's status, S & P correctly cites the case of the French Post Office by highlighting the 'extremely strong' state support and by adding immediately thereafter that La Poste enjoys the ultimate statutory guarantee of the Republic of France ⁽¹²³⁾.
- (266) S & P therefore illustrates the influence of the 'extremely strong' support from the French State for La Poste by the existence of an ultimate statutory guarantee. S & P concludes from this extremely strong support that La Poste's rating may be determined on the basis of that of the French Republic, notching down by up to three categories or six notches. Although the rating given to La Poste by S & P was gradually downgraded, it was never more than 4 notches below the rating of the French Republic (AAA) ⁽¹²⁴⁾.
- (267) The Commission infers from the above that the state guarantee enjoyed by La Poste is a fundamental factor in S & P's analysis that La Poste receives 'extremely strong' state support. It is because of the 'extremely strong' state support that S & P applies a top-down methodology to La Poste. If S & P applied a bottom-up methodology or, worse still, did not increase La Poste's rating because of its state support, as is the case for Deutsche Post and TNT, La Poste's rating would be lower than it is currently. In the study on the influence of government support on the rating of postal operators, S & P takes the view that the commercial and financial performance of Deutsche Post and TNT are better than that of La Poste. Yet the ratings of Deutsche Post and TNT, cited in the S & P study, are lower than La Poste's rating. If La Poste were assessed on its own merits, it would therefore have a rating below its current rating, which is thanks to the 'extremely strong' state support that is illustrated by S & P by the existence of the ultimate statutory guarantee.
- Latest ratings
- (268) In its assessment of La Poste dated 3 April 2007, S & P refers to the change in capital structure involving a change in status and a loss of the guarantee as a factor taken into account in its rating ⁽¹²⁵⁾. S & P points out that it already takes into account the probable change in these three factors (capital structure, legal status and guarantee) in the long term. Until the changes occurs, S & P continues to apply a top-down methodology. The previous paragraph demonstrated that, thanks to this methodology, La Poste can and does obtain a better rating than it would have obtained on its own merits.
- (269) However, the Commission accepts that in the same analysis dated 3 April 2007, S & P stresses that La Poste's rating was not affected by the Commission recommendation because S & P considers that a change in La Poste's status would not necessarily reflect a decrease in the strong state support that underpins La Poste's rating and that has been reaffirmed by recent government decisions ⁽¹²⁶⁾. The Commission would point out that there are factors other than the guarantee that are taken into account by S & P when it comes to the conclusion that La Poste receives strong state support justifying a top-down methodology. These factors may offset the pressures that exist on La Poste's status and which lead S & P to anticipate a change in the status and the removal of the guarantee in the long term. It remains true that S & P regards the guarantee as an essential component of state support, which influences the rating.
- (270) In its assessment dated 21 January 2009 that followed the announcement on 18 December 2008 by the President of the French Republic of a draft law converting La Poste into a public limited company, S & P lowered La Poste's rating to A+ with a negative outlook. The negative outlook was justified by the likely change in the company's legal status and ownership the next two years ⁽¹²⁷⁾. According to S & P, these initiatives could limit the government's ability to provide the postal operator with exceptional support where necessary. Once again, the company's legal status, to which the guarantee is linked, is cited as an indication of the strong state support for La Poste.
- Fitch Ratings
- (271) Fitch based the AAA rating, awarded to La Poste until 17 April 2008, on the fact that La Poste is a public group that enjoys a guarantee from the French Government.
- (272) On 4 October 2006, the day the Commission recommended that France terminate the unlimited guarantee enjoyed by La Poste as a legal entity governed by public law, the rating agency Fitch lowered its rating (from AAA stable to AAA negative) on the grounds that 'the European Commission's recommendation' had to be interpreted as 'the first tangible sign of pressure on La Poste's legal status and, therefore, on its rating'. The rating downgrade, and the justification given by Fitch, illustrates the link between the legal status and the guarantee enjoyed by La Poste on the one hand and the rating by Fitch on the other.

- (273) On 17 April 2008, Fitch downgraded the rating to AA. Fitch nonetheless continues to apply a top-down methodology, which it justifies by the fact that La Poste belongs to the public sector. As pointed out above, Fitch based its decision on the fact that 'La Poste's legal status as a public operator no longer justifies its ratings being automatically aligned with the sovereign rating'. Fitch explains that La Poste's ratings are now based on the support from the parent company, i.e. the State, to its subsidiary, La Poste. Fitch now also uses the top-down methodology: La Poste's rating is no longer the same as the sovereign rating but, having regard to the strong state support for La Poste, whose statutory obligation to take on La Poste's commitments is an essential component, La Poste's rating is derived from the sovereign rating and not only on the basis of the undertaking's economic situation. This approach, and the rating, were confirmed by the assessment dated 4 September 2009.
- Conclusion
- (274) The Commission concludes from the above analyses that the ultimate statutory guarantee in favour of La Poste was regarded by Fitch, at least until 2008, and by S & P as an essential component of the state support for La Poste. It is because of that support that the rating agencies adopted a top-down methodology, which resulted in La Poste having a higher rating than it would have obtained on its own merits. The Commission therefore regards the guarantee as constituting or having constituted an essential factor in La Poste's rating, even though it is not the only factor. Given that Fitch and S & P are two leading rating agencies and it is established that the market takes their ratings into account for the purpose of assessing the credit to be granted to a given undertaking, a rating by these agencies (either or both) higher than would have been the case without the guarantee is likely to produce an advantage for La Poste that it would not have obtained under normal market conditions.
- (ii) Refutation of the arguments put forward by the French authorities
- (a) The essential nature of the existence of an implied guarantee in the rating of entities governed by the Law of 1980 is not contradicted by the finding that their rating may be lower than the sovereign rating
- (275) The French authorities dispute the economic impact of the Law of 16 July 1980 by arguing that if that Law were interpreted by the rating agencies as establishing, for the benefit of the creditors of the legal persons concerned, a mechanism comparable to a state guarantee, it would be difficult to understand how regional and local authorities could be rated BBB+ or AA-. Moreover, the French authorities find it difficult to understand how La Poste could have a rating below the sovereign rating if it enjoyed a state guarantee⁽¹²⁸⁾.
- (276) In this regard, the Commission would refer to the S & P analysis dated 22 November 2004 on the influence of government support on ratings of postal entities, the analysis dated 14 June 2006 on rating government-related entities⁽¹²⁹⁾ and the 2007 study on La Poste. According to these analyses, the rating of an undertaking that enjoys strong state support is derived from the sovereign rating; however, it may be downgraded by two categories (or 6 notches) where the financial links between the undertaking in question and the State may change in the medium or long term⁽¹³⁰⁾. The fact that La Poste's rating is lower than the sovereign rating can therefore be explained by the fact that S & P expects state support to fall in the years ahead, which clearly demonstrates that state support, of which the guarantee is an essential component, allows La Poste to obtain a better rating than would otherwise be the case.
- (277) S & P adds that in 1991 La Poste became an independent publicly owned entity with *établissement public* status, which ensures La Poste an ultimate state guarantee on its obligations, but not a timely and express guarantee, as reflected by the rating differentiation between La Poste and the Republic of France⁽¹³¹⁾. Therefore, although S & P downgraded La Poste's rating in relation to the sovereign rating, it certainly takes the view that La Poste enjoys an implied state guarantee by virtue of its status as an *établissement public*, which has a direct effect on the method used to determine the rating.
- (278) The above reasons explain why S & P decided to differentiate La Poste's rating from that of the State. However, the Commission is not obliged to take a view on the analysis of the reasons that explain the difference between the sovereign rating and the rating of regional and local authorities because that question is not the subject of this investigation.
- (β) The French authorities draw incorrect conclusions because their argument is not based on the *ceteris paribus* assumption
- (279) According to the French authorities, the analyses by the rating agencies are based not on an objective legal analysis but on a subjective assessment of what state support would be in the event that La Poste ran into difficulty. In support of that statement, France refers to the S & P analysis dated 3 April 2007. As pointed out above, S & P states in the analysis that La Poste's rating was unaffected after the Commission announced its letter recommending the end of the guarantee, because S & P considers that a change in La Poste's status would not necessarily reflect a decrease in the strong state support that underpins La Poste's ratings and that has been reaffirmed by recent government decisions⁽¹³²⁾.

- (280) The Commission acknowledges that there are factors other than the guarantee that are taken into account by S & P when coming to the conclusion that La Poste receives strong state support justifying a top-down methodology. In the case in question, recent government decisions, in particular the resolution of the issue of the financing of civil service pensions, the maintenance of services reserved for La Poste, the support for the distribution of the *livret A* and the increase in postal tariffs (which incidentally also constitute government acts, if not State aid in themselves) offset the effect of the Commission's recommendation letter. This does not mean that the Commission's recommendation letter and, more generally, the pressure exerted on the change in La Poste's legal status, and therefore the guarantee enjoyed by La Poste, are not taken into account by the rating agencies. Of course, these pressures are taken into account and analysed as a weakening of the support that the State could provide to La Poste: they therefore influence the rating. Moreover, that is why, on 4 October 2006, the day the Commission recommended that France terminate the unlimited guarantee enjoyed by La Poste as a legal entity governed by public law, the rating agency Fitch lowered its rating (from AAA stable to AAA negative) on the grounds that 'the European Commission's recommendation' had to be interpreted as 'the first tangible sign of pressure on La Poste's legal status and, therefore, on its rating', which confirms that the legal status is a key factor.
- (281) In order to illustrate the need to argue on the basis of the *ceteris paribus* assumption, the Commission would point out that S & P, in the same note from 2007, also spelled out that a change in La Poste's ownership structure (and hence a loss of the guarantee) would lead to a change in the methodology applied to determine the rating, but that the change would not necessarily lead to a change in the La Poste's rating given the expected improvement in La Poste's stand — alone situation in the coming years⁽¹³³⁾. This seems to confirm that in the absence of this status, La Poste would have to improve its stand-alone situation to maintain the same rating. However, assuming that La Poste's stand-alone situation were to remain constant, the weakening in the state support given to La Poste would lead to its rating being downgraded⁽¹³⁴⁾.
- (γ) The French authorities' arguments intended to demonstrate that La Poste's legal status and the resulting guarantee are not the only factors taken into consideration by the rating agencies in no way invalidate the Commission's argument
- (282) Most of the observations made by the French authorities intended to demonstrate the alleged 'absence of effect of the guarantee on La Poste's rating'⁽¹³⁵⁾ simply amount to demonstrating that the guarantee is not the only factor taken into account by the rating agencies. The Commission accepts this point: it in no way invalidates the finding that the guarantee is taken into account by the rating agencies when determining the rating of postal operators. Moreover, the French authorities do not argue on the basis of the *ceteris paribus* assumption.
- Arguments by the French authorities drawn from the rating agencies' doctrine on the rating of postal entities
- (283) The French authorities examine the methodology used by the rating agencies set out in the S & P note on the influence of government support on the ratings of postal operators⁽¹³⁶⁾. They stress that, in the classification described by S & P, qualification for category 1 is based on broad criteria but does not refer to the status of the operator being rated. The French authorities conclude that legal status is not an important factor for the rating agencies.
- (284) The Commission challenges this analysis and points out that S & P clearly defines the legal status of operators as one of the key factors in assessing the strength of state support (see paragraphs 264-267 on S & P methodology).
- (285) Moreover, the French authorities stress that the Italian Post Office was classified by S & P in the same category as La Poste, even though it is governed by private law and its financial performance does not justify its being classified in this category⁽¹³⁷⁾.
- (286) The finding that a postal operator governed by private law, namely Poste Italiane, may be regarded by a rating agency as enjoying strong state support and classified in the same category as La Poste in no way invalidates the Commission's argument to establish that the existence of a guarantee dependent on La Poste's legal status is taken into account by the rating agencies. The Commission recognises that postal entities such as Poste Italiane may be classified in the same category as La Poste without enjoying a guarantee because other factors show that they also have strong state support. In order to demonstrate that the guarantee has no influence on the rating, it would have to be shown that Poste Italiane and La Poste were in a strictly comparable situation with regard to the different factors taken into account by the rating agencies to estimate the level of state support and that the only difference between them was the existence of a guarantee enjoyed by La Poste. In other words, in order for the comparison to be meaningful, it must be shown that *ceteris paribus* applies, which the French authorities have not done.

(287) Moreover, even if the French authorities had demonstrated that the situations of Poste Italiane and La Poste are strictly comparable — apart from the existence of a guarantee in favour of the French Post Office (which has not been demonstrated) — it should be noted in any event that S & P has a different assessment of the degree of support provided by the Italian and French States to their respective post offices. S & P takes the view that the potential support provided by the Italian State to the Italian Post Office is 'strong', whereas the support provided by the French State to La Poste is 'extremely strong' ⁽¹³⁸⁾. The Commission does not rule out that this difference in assessment should be seen as the influence of the guarantee, whose existence was recalled by S & P in the same note just after the confirmation that La Poste enjoyed extremely strong support ⁽¹³⁹⁾. In any event, there are no grounds for drawing any conclusions about the reasons why the Poste Italiane was, at a particular moment, classified in the same category as La Poste. First, the current proceedings do not address those reasons. Second, the many different factors that the rating agencies have to take into account in their assessments means that it is not possible to draw conclusions about the specific effect on the rating of the existence or otherwise of an ultimate statutory guarantee.

— Arguments by the French authorities drawn from ratings in the private sector

(288) The French authorities recall that 'there are many cases in the private sector where the rating of a subsidiary is linked to the parent company's rating'. They conclude that this type of approach is therefore not a specific feature of the status of a legal entity governed by public law.

(289) The Commission does not deny that the rating of a subsidiary may be linked to that of its parent company, including in the private sector, and in particular to the estimated degree of support that the parent company is willing to offer its subsidiary, which may possibly be reflected in guarantee commitments made by the parent. This argument serves only to confirm the Commission's analysis. It illustrates that the status of *établissement public* and the resulting guarantee are factors demonstrating state support that have been taken into account by the rating agencies when rating La Poste.

— Arguments by the French authorities drawn from La Poste's rating

(290) The French authorities also stress that in 2005 La Poste's rating was downgraded by S & P to AA- with a stable

outlook even though there had been no change to its legal status. The French authorities conclude that La Poste's rating is not a consequence of its legal status ⁽¹⁴⁰⁾. The French authorities also point out that the two factors mentioned by S & P in support of the rating are the economic importance of the public service tasks and the strong shareholder backing, not the legal status ⁽¹⁴¹⁾.

(291) As pointed out above, the Commission recognises that the existence of a guarantee is not the only factor taken into account by the rating agencies when assessing the degree of support that the public authorities are willing to provide to an undertaking in difficulty. In basing its argument on the S & P study on the influence of government support on the ratings of postal operators ⁽¹⁴²⁾, the Commission has nonetheless shown that the existence of a guarantee is taken into account by the rating agencies as an essential component of the state support for La Poste.

(292) In this regard, the Commission challenges the analysis by the French authorities that the strong shareholder backing referred to by S & P in its note dated 3 April 2007 is distinct from the question of the public status and of the guarantee. The study on the influence of government support on the ratings of postal operators shows that the legal status and the guarantee are indeed essential factors when estimating the level of state support for La Poste.

(293) The Commission also challenges the interpretation by the French authorities of the note dating from April 2007 stating that S & P chose a top-down methodology solely on the basis of its hypothesis that the State would remain a 100 % shareholder in La Poste over the medium term and not at all on the basis of La Poste's status as an entity governed by public law and the guarantee associated with that status. The Commission would point out that the 'likelihood of a change in the group's capital structure' which, according to S & P, would lead to the loss of the status of a publicly owned establishment and the guarantee attached to that status, is explicitly taken into account by S & P in its rating ⁽¹⁴³⁾. It is therefore clear that for S & P, it is not only the change in the capital structure that is important, but also the implications (loss of publicly owned establishment status and of the guarantee); the change in capital structure is the most far-reaching step in the La Poste's increasing independence from the State.

3. The borrowing terms actually obtained by La Poste

- (294) The French authorities argue that the announcement by the Commission of the existence of the guarantee and of its imminent removal as a result have had no effect on La Poste's financing terms. During the bond issue in October 2006, just after the Commission's announcement of its recommendation that measures be taken, La Poste obtained a mid-swap spread⁽¹⁴⁴⁾ of 12 basis points for the 15-year bond and 4 basis points for the 7-year bond. In 2004, on the occasion of the previous bond issue of a 15-year bond, the mid-swap spread was 8 basis points. The French authorities conclude that La Poste's financing terms were not based on the *de jure* or *de facto* existence of a guarantee.
- (295) The Commission takes the view that the French authorities' conclusion that the Commission's announcement had no effect on the financing terms is unfounded since, on the contrary, the spread deteriorated, moving from 8 to 12 basis points.
- (296) In addition, even assuming that the spread had been reduced, which is not the case, the Commission had misgivings about the conclusions that could be drawn about the influence of the Commission's announcement on La Poste's financing costs, since many other factors are also taken into account by investors, for example La Poste's financial structure, which changed between 2004 and 2006.
- (297) Moreover, even if the financing terms before and after the Commission's announcement had been identical, or if the difference had not been significant, that would not prove that the guarantee does not influence borrowing terms. At the time of the bond issue referred to by the French authorities, the guarantee enjoyed by La Poste was classified as State aid. It therefore remained valid and covered the bond issues. The guarantee becomes illegal aid, if that is the case, only from the date set by this decision for it to be withdrawn.
- (298) Lastly, provided that the Commission has demonstrated that the guarantee deriving from La Poste's legal status is likely to provide an advantage to La Poste because of the positive impact on its rating, the Commission takes the view that it does not have to demonstrate the specific effects that the guarantee has had in the past. It is an established principle of the State aid rules that the Commission does not have to prove the real effects of aid measures because in that case, the Member States which do not notify aid measures would be at an advantage compared to those that do⁽¹⁴⁵⁾. A Member State notifying an unlimited guarantee would have the measure prohibited because of its potential effects only, whereas a Member State which did not notify the aid would be able to defend itself by demonstrating that, in the specific case, the guarantee has not produced any advantages to the beneficiary. Moreover, as for new measures, the Commission must assess the compatibility of existing measures with the Treaty rules for the future and must not necessarily demonstrate that the measure has, in the past, produced effects that are incompatible with the Treaty⁽¹⁴⁶⁾. Moreover, the Commission cannot order recovery of the advantages that may already have been generated by an existing aid measure. Accordingly, nor is it necessary to demonstrate the specific effects of the guarantee on borrowing terms.
- (b) **Given the unlimited nature of the guarantee, it is not possible to calculate the amount of the market premium that La Poste should pay to the State, which renders the transfer mechanism proposed by the French authorities inapplicable**
- (299) On the basis of the above, the Commission concludes that the guarantee enjoyed by La Poste is unlimited with regard to duration, amount and scope, and is not remunerated. Moreover, it covers both universal service activities and competitive activities. The Commission takes the view that, having regard to the unlimited nature of the state guarantee in favour of La Poste, and in accordance with the Commission's decision-making practice⁽¹⁴⁷⁾, it is not possible to calculate the amount of the market premium that La Poste would have to pay to the State for granting it the unlimited guarantee. For any guarantee, the aid is granted at the time the guarantee is offered. In the case of an unlimited guarantee, which may potentially cover all the undertakings debts for an unlimited period, it is impossible to determine in advance the amount of aid granted at the time the guarantee is given, and therefore impossible to calculate an appropriate market premium⁽¹⁴⁸⁾. This makes the transfer mechanism proposed by the French authorities inapplicable.
- (c) **The more favourable borrowing terms obtained by La Poste thanks to the implied state guarantee constitute a selective advantage**
- (300) The advantage is selective because La Poste's competitors do not enjoy the same advantage: La Poste's competitors are, in effect, subject to compulsory liquidation and winding-up procedures; they do not benefit from the unlimited state guarantee linked to the status of publicly owned establishment.

4.1.3. DISTORTION OF COMPETITION AND EFFECT ON TRADE

- (301) The measure at issue is liable to result in a reduction in La Poste's operating costs, which would have the effect of favouring La Poste and hence of distorting competition within the meaning of Article 107(1) TFEU. Moreover, in view of the fact that the sectors in which La Poste is active, i.e. *inter alia* the distribution of parcels, undressed deliveries and letters the distribution of which is not reserved for La Poste, are largely open to intra-Community trade, such measures might have an unfavourable impact on undertakings which carry on, or which wish to develop, a similar economic activity in France. It should be noted here that, pursuant to Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service, as amended by Directives 2002/39/EC and 2008/6/EC⁽¹⁴⁹⁾ ('the Postal Directive'), all postal services will have to be subject to competition in France by 1 January 2011. In these circumstances, the existence of an unlimited guarantee in favour of La Poste is liable to distort competition and affect trade within the meaning of Article 107(1) TFEU.

4.1.4. CONCLUSION AS TO THE AID NATURE OF THE MEASURE

- (302) The state guarantee in favour of La Poste by virtue of its having the legal form of a publicly owned establishment therefore leads to a transfer of state resources imputable to the State and distorts or threatens to distort competition and trade between Member States by favouring La Poste. The Commission concludes that this guarantee constitutes State aid within the meaning of Article 107(1) TFEU.

4.2. COMPATIBILITY

- (303) In view of the fact that the measure at issue falls within the scope of Article 107(1) TFEU, it must be examined whether it can be declared compatible by the Commission under the exemptions provided for in Articles 107(2) and (3) and 106(2) TFEU.
- (304) Clearly, the unlimited state guarantee in favour of La Poste does not satisfy any of the tests for exemption provided for in Article 107(2) TFEU, given that the measure at issue has none of the objectives mentioned in that provision.
- (305) Article 107(3)(a) TFEU provides that an aid measure may be declared compatible with the internal market where it

is intended to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment. In view of the fact that the unlimited state guarantee in favour of La Poste is an individual measure granted in a discretionary manner which does not pursue any regional objective, that it is of unlimited duration, that it is not linked to any investment and that it is not degressive, the exemption provided for in Article 107(3)(a) TFEU does not apply.

- (306) As for the exemptions provided for in Article 107(3)(b) and (d) TFEU, the aid in question is not intended to promote the execution of an important project of common European interest or to remedy a serious disturbance in the French economy. Nor is the unlimited state guarantee in favour of La Poste intended to promote culture and heritage conservation.
- (307) The exemption provided for in Article 107(3)(c) TFEU provides that aid may be considered compatible if it is intended to facilitate the development of certain economic activities or of certain economic areas, where such aid does not affect trading conditions to an extent contrary to the common interest. The unlimited state guarantee in favour of La Poste concerns neither an investment nor job creation and therefore constitutes unconditional operating aid. In keeping with its decision-making practice the Commission cannot consider such aid as being intended to facilitate the development of certain economic activities or of certain economic areas.
- (308) Lastly, the unlimited state guarantee in favour of La Poste cannot be considered to be compatible on the basis of Article 106(2) TFEU. This exemption provides that undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly are to be subject to the rules contained in the Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union.
- (309) French law has imposed public service obligations on La Poste. On that basis, the postal operator may receive financial compensation or enjoy certain prerogatives derogating from certain generally applicable rules of law. However, such financial measures or prerogatives must be limited to what is necessary to offset the additional costs incurred by La Poste by virtue of its public service obligations.

(310) The Community framework for State aid in the form of public service compensation sets out the conditions under which the Commission considers such compensation to be compatible under Article 106(2) TFEU. In particular, the compensation paid cannot exceed the cost of providing the public service, taking into account the relevant receipts and a reasonable profit for discharging the obligations.

(311) In the present case, such an analysis would presuppose a market valuation of the unlimited state guarantee in favour of La Poste in order to verify that its value does not exceed the net cost of providing the universal postal service. However, this analysis is impossible to carry out, which rules out application of the exemption provided for in Article 106(2) TFEU.

(312) Moreover, even if such a valuation were possible, it could relate only to the activities covered by the universal postal service task. In its current form, however, the unlimited state guarantee covers all the activities of La Poste, including those not covered by the universal postal service task.

(313) The Commission is of the opinion that the development of trade is thus affected to an extent contrary to the interests of the Union.

(314) Nor has France presented any evidence demonstrating the compatibility of the measure with Articles 107(2) or (3) or 106(2) TFEU, but has merely disputed the existence of the guarantee. Hence it has not demonstrated the compatibility of the aid despite the fact that under the case law the burden of proof rests with it.

(315) In conclusion, even in amended form following the French proposals concerning clarification of the Decree implementing the 1980 Law and inclusion of a restrictive clause in contracts of La Poste involving a claim, the measure at issue constitutes existing State aid within the meaning of Article 1(b) of Regulation (EC) No 659/1999 and, in accordance with the Commission's decision-making practice concerning unlimited state guarantees granted to undertakings entrusted with economic activities⁽¹⁵⁰⁾, this aid does not satisfy any of the tests for exemption laid down in the TFEU. Consequently, the above-mentioned unlimited state guarantee is incompatible with the internal market.

4.3. NEUTRALITY WITH REGARD TO THE RULES GOVERNING THE SYSTEM OF PROPERTY OWNERSHIP

(316) By this conclusion the Commission is in no way disputing the State's ownership of La Poste, nor is it challenging its status as a legal entity governed by public law as such. The Commission simply views as

problematic the guarantee flowing from that status, as French law stands, for La Poste.

(317) Under Article 345 TFEU the Union is neutral with regard to the rules governing the system of property ownership in the Member States and no provision of the Treaty prevents a State from owning enterprises (whether wholly or partly). That being so, the rules of competition must be applied equally to private and public enterprises. Neither of these two types of enterprise may be placed at an advantage or disadvantage by the application of those rules. In the present case, the guarantee stems, not from the ownership, but from the legal form, of the enterprise. The Member States are free to choose the legal form of enterprises, but they must, when making their choice, comply with the competition rules of the Treaty. In particular, the mere fact that the state guarantee is automatically linked to a special legal form does not prevent the guarantee from constituting State aid within the meaning of Article 107(1) TFEU if the necessary conditions are met⁽¹⁵¹⁾. This conclusion is not affected by Article 345 TFEU. On the contrary, in a competitive scenario the neutrality principle would involve abolishing any unjustified advantage for the benefit of publicly owned enterprises to the detriment of their private competitors. An identical approach was followed by the Commission, for example, in the case concerning publicly owned credit institutions in Germany⁽¹⁵²⁾ and in that concerning EDF⁽¹⁵³⁾.

4.4. THE DRAFT LAW ON LA POSTE AND POSTAL ACTIVITIES

(318) In their letter dated 31 July 2009, the French authorities communicated to the Commission the draft law on La Poste and postal activities adopted by the Council of Ministers on 29 July 2009, converting La Poste into a public limited company on 1 January 2010.

(319) An amendment to this draft law was subsequently adopted, postponing the date of the conversion of La Poste into a public limited company until March 2010.

(320) Article 1, second paragraph, of the draft law as amended, modifying Law No 90-568 of 2 July 1990 on the organisation of the public service of La Poste and France Telecom provides that 'The public-law entity La Poste shall be converted as from 1 March 2010 into a public limited company called La Poste [...]'.
(321) The French authorities have stated that the conversion of La Poste into a public limited company will have the effect of making it subject to the ordinary law rules applicable to companies undergoing compulsory administration or winding up.

(322) The Commission agrees that the effective conversion of La Poste into a public limited company as provided for by the draft law transmitted by the French authorities will directly result in the unlimited guarantee which it enjoys being withdrawn. The Commission considers that this conversion constitutes a measure that will remove the State aid from which La Poste currently benefits.

(323) Adoption of the draft law by Parliament is scheduled for January 2010. On 4 October 2006, in accordance with Article 18 of the Procedural Regulation, the Commission asked that the unlimited guarantee be withdrawn by 31 December 2008. In view, however, of the circumstances of the case, the fact that the discussions with the French authorities lasted until October 2009 and the time needed to approve the legal instruments terminating the guarantee, the Commission considers it reasonable to ask the French authorities to effectively withdraw the unlimited guarantee by 31 March 2010,

HAS ADOPTED THIS DECISION:

Article 1

The unlimited guarantee given by France to La Poste constitutes State aid that is incompatible with the internal market. France must withdraw it by 31 March 2010.

Article 2

The Commission considers that the effective conversion of La Poste into a public limited company will result in the unlimited guarantee which La Poste enjoys being withdrawn. The effective withdrawal of the unlimited guarantee by 31 March 2010 is a measure that will remove, in accordance with Union law, the State aid referred to in Article 1.

Article 3

France shall provide the Commission, within two months of notification of this Decision, with a detailed description of the measures already taken and planned for the purpose of complying with this Decision.

Article 4

This Decision is addressed to the French Republic.

Done at Brussels, 26 January 2010.

For the Commission

Neelie KROES

Member of the Commission

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- (¹) With effect from 1 December 2009, Articles 87 and 88 of the EC Treaty have become Articles 107 and 108, respectively, of the Treaty on the Functioning of the European Union ('TFEU'); the two sets of provisions are, in substance, identical. For the purposes of this Decision, references to Articles 107 and 108 of the TFEU should be understood as references to Articles 87 and 88, respectively, of the EC Treaty where appropriate.
- (²) OJ C 135, 3.6.2008, p. 7.
- (³) Case N 531/05, Measures relating to the creation and operation of La Banque Postale (post office bank) (OJ C 21, 28.1.2006, p. 2).
- (⁴) OJ L 83, 27.3.1999, p. 1.
- (⁵) Since the reasons for classifying the aid as existing aid have already been set out in recitals 93 to 97 of the decision to open the formal investigation into the aid (see footnote 2) and the Commission has received no comments on this point, the Commission will not return to this issue but will simply confirm the preliminary assessment contained in the said decision.
- (⁶) *Official Journal of the French Republic* of 17 July 1980, p. 1799.
- (⁷) *Official Journal of the French Republic* of 14 May 1981.
- (⁸) See footnote 2.
- (⁹) *Official Journal of the French Republic* of 8 July 1990.
- (¹⁰) In France, besides the public authorities themselves such as central and local government, there are two main categories of legal person governed by public law, namely publicly owned establishments and public interest groups, which were created by Law No 82-610 of 15 July 1982. Within the publicly owned establishment category, a distinction can be drawn between publicly owned establishments of an administrative character (EPAs), which perform the tasks normally associated with an administrative authority, and publicly owned establishments of an industrial and commercial character (EPICs), which pursue economic activities.
- (¹¹) The Court of Cassation followed the reasoning in a judgment of the Douai Court of Appeal of 22 October 1998, in which La Poste was likened to a publicly owned establishment of an industrial and commercial character.
- (¹²) In a report submitted to the French Senate in 2003, the Economic Affairs Committee stated that it was common knowledge that, since the reform of 1990, the parent company, La Poste, had a legal form similar to that of a publicly owned establishment of an industrial and commercial character.
- (¹³) See the judgment of the Court of Cassation of 21 December 1987 (1st Civil Division).
- (¹⁴) *Official Journal of the French Republic* of 26 January 1985, p. 1097.
- (¹⁵) Administrative Court of Appeal, Paris 15 February 1991, JCP E1991, pan. 742; Court of Cassation, Soc. 6 November 1991, JCP E1992, pan. 85, Bull. V No 476.
- (¹⁶) The deadlines in question are those mentioned in the third subparagraph of Article 3-1 of the Decree.
- (¹⁷) Article 10 of Decree No 2008-479 provides that 'If the notice given has had no effect by the time these deadlines expire, the representative of the State or the authority responsible for supervision shall enter the expenditure in the budget of the defaulting authority or publicly owned establishment. The representative of the State or the authority responsible for supervision shall, as appropriate, release the necessary resources either by reducing the appropriations allocated to other expenditures and still available or by increasing resources'.

- (18) *Official Journal of the French Republic* of 20 February 1990.
- (19) *Bulletin officiel de la comptabilité publique*. NOR: BUD R 0200060 J.
- (20) See Chapter 3 of codifying instruction No 02-060-M95 of 18 July 2002 on the financial and accounting regulation of national publicly owned establishments of an industrial and commercial character, *Bulletin officiel de la comptabilité publique*.
- (21) See Part IV, B: 'Quelles dispositions juridiques prévoir?', p. 21.
- (22) Established in 1965, ERAP is an EPIC whose purpose is to acquire, at the request of the State, shareholdings in undertakings in the energy, pharmaceutical and telecommunications sectors.
- (23) See Article 'Fitch attribue la note préliminaire AAA au programme EMTN garanti de EUR 10 MD de ERAP'. Consultable on ERAP's website: www.erap.fr/pdf/CP_Fitch_Ratings_fr.pdf
- (24) See Article 'Moody's attribue la notation Aaa au programme d'EMTN de l'ERAP portant sur 10 milliards d'euros'. Consultable on ERAP's website: www.erap.fr/pdf/CP_Fitch_Ratings_fr.pdf
- (25) In accordance with article 15 of Law No 90-568 of 2 July 1990 the accounts of La Poste comply with the rules applicable to commercial enterprises.
- (26) See Article 'Fitch attribue la note préliminaire AAA au programme EMTN garanti de EUR 10 MD de ERAP'.
- (27) See, in particular, the letters from the French authorities dated 24 April 2006, 6 December 2006, 16 January 2007, 1 February 2007 and 19 March 2007.
- (28) See Part III of the letter from the French authorities dated 23 January 2008.
- (29) Council of State, 1 April 1938, *Société de l'hôtel d'Albe*, reported in *Recueil*, p. 341. See recital 33 of the opening decision.
- (30) Council of State, 10 November 1999, *Société de gestion du port de Campoloro*, reported in *Recueil*, p. 348; Council of State, 18 November 2005, *Société de gestion du port de Campoloro*, reported in *Recueil*, p. 515. See recital 34 of the opening decision.
- (31) *Official Journal of the French Republic*, No 177, 2 August 2001, p. 12480.
- (32) See Part IIIB of the memorandum from the French authorities dated 23 January 2008 and the observations sent by the French authorities on 27 October 2009.
- (33) See the memo from the French authorities sent on 27 October 2009.
- (34) D. Labetoulle, 'La responsabilité des AAI dotées de la personnalité juridique: coup d'arrêt à l'idée de "garantie de l'Etat"' in *RJEP/CJEG* No 635, October 2006.
- (35) See Part IV of the letter from the French authorities dated 23 January 2008.
- (36) See paragraph 78 of the letter from the French authorities dated 23 January 2008.
- (37) P. Bon, 'Le Préfet face à l'inexécution par une collectivité territoriale d'un jugement la condamnant pécuniairement', in *RFDA* — March April 2006, p. 341. C. Landais and F. Lenica, 'Le pouvoir de substitution du préfet en cas d'inexécution de la chose jugée par les collectivités territoriales', in *AJDA*, 23 January 2006, p. 137.
- (38) Council of State, 10 November 1999, *Société de gestion du port de Campoloro*, cited above.
- (39) Council of State, 18 November 2005, *Société de gestion du port de Campoloro*, cited above.
- (40) Council of State, 30 November 1923, reported in *Recueil*, p. 789.

- (*) parts of this text have been omitted to ensure that confidential information is not disclosed. Those parts are indicated by three full stops enclosed in square brackets and marked with two asterisks.
- (41) Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees (OJ C 71, 11.3.2000, p. 14).
- (42) According to the French authorities, compliance with these criteria is sufficient, albeit not necessary, to rule out the existence of any advantage. In particular, it would be counter-intuitive to regard the alleged existence of a doubt about the procedure applicable in the event of insolvency to be reflected in more favourable funding terms.
- (43) Article L 643-11 of the Commercial Code.
- (44) 'Category 1: equalization of ratings with those of the state owner. This first category includes those entities [...], generally loss making or with poor financial profiles, and extremely unlikely to be privatized [...] given the nature of their activity, as well as their home country's economic, social and political environment. None of the postal companies currently rated by Standard & Poor's falls into this category [...].'
- (45) 'Category 2: notching down with respect to the state owner's rating. [...] La Poste and Poste Italiane currently fall within this category.'
- (46) 'Category 3: notching up from the postal entity's stand-alone rating. [...] The entity's postal activities are still a key public service, but the clear aim of the entity is to achieve a high level of operational and financial independence, either through privatization or commercial autonomy (state ownership, but independent management) [...].'
- (47) 'Standard & Poor's Ratings Services lowered its counterparty credit [...] ratings on French issuer AGF [...] to "A" from "A+" [...], following a review of AGF's parent, the Munich-based Allianz group (AA-/Negative/A-1+). [...] The downgrade of AGF, the holding company, is not specific to any issues within the French franchise and generally reflects the Allianz group's financial leverage and fixed-charge coverage, which are increasingly aggressive relative to the group's ratings and are a result of the group's weakened consolidated capital base and reduced earnings.'
- (48) 'The ratings also take into account the unchallenged status of both it and its parent, Germany-based Volkswagen Financial Services AG (VWFS), as core and captive finance entities to VW' and 'the ratings on VW Bank could moderately diverge (generally not more than one notch) from the ratings on VW or VWFS; currently only its outlook differs.'
- (49) 'The ratings on Germany-based Volkswagen Financial Services AG (VWFS) are based on its unchallenged status as a core subsidiary of German automaker Volkswagen AG (VW; A-/Negative/A-2) and reflect its strategic importance for and close operational integration into its parent.'
- (50) 'The rating of a company that enjoys strong state support [...] may be lowered by two categories because the financial relationship between the company and the State may change in the medium or long term.'
- (51) Similarly, according to the French authorities, the 'strong state support' referred to by the Commission in recital 84 of the opening decision bears no relation to the legal form of the company or any guarantee mechanism, but refers to decisions such as the setting up of the Banque Postale and the reform of pensions financing, which are intended to provide La Poste with the resources to grow on a level playing field with its competitors and at arm's length from the State. However, some of these measures themselves constitute a considerable amount of State aid (see in particular the Commission Decision dated 10 December 2007 concerning the reform of the financing of the pensions of public sector workers employed by La Poste). Consequently, they cannot be indicators of the State's arm's-length interest in La Poste's growth.

- (⁵²) 'A change in the group's ownership structure would lead Standard & Poor's to shift to a bottom-up rating approach, focusing more on LP's stand-alone business and financial profiles. This rating approach may not necessarily translate into rating changes given the expected improvement in LP's stand-alone situation in the coming years.'
- (⁵³) 'The ratings could come under pressure if the group significantly underperforms its operational and financial trajectory at the dawn of full postal deregulation, or if an ownership changes occur sooner than we expect.'
- (⁵⁴) 'The EC recently recommended that the French government end this guarantee by year-end 2008, which they believe provides LP with more favorable financing conditions than its competitors in a market in the process of being liberalized.'
- (⁵⁵) Original in English.
- (⁵⁶) According to the French authorities, the mid-swap spread was 12 basis points for the fifteen-year bonds (i.e. 33 basis points on fungible treasury bonds) and 4 basis points for the seven-year bonds. By way of comparison, the French authorities indicate that the previous bond issue, made in 2004, concerned a fifteen-year bond for EUR 580 million and had led to a mid-swap spread of 8 basis points. The mid swap is the median between the rate offered and the rate proposed by the banks at any moment for their interbank dealings by maturity, i.e. it is the fixed rate that a bank is willing to exchange for a 6-month Euribor as a general rule. That rate is the market reference for bond issues in particular.
- (⁵⁷) Decree No 81-501. When the French authorities made their proposal, the implementing decree was Decree No 81-501 of 12 May 1981 for implementation of the Law of 16 July 1980 on penalties imposed in administrative cases and the enforcement of judgments by legal entities governed by public law and relating to the 'Reports and Studies' Section of the Council of State.
- (⁵⁸) Council of State, 16 November 1998, *Sille*: 'First, having regard to the fact, as the judges in the court of first instance decided, whether the public authorities can be held liable, even without fault, on the grounds of the principle of the equality of citizens before public burdens, where a measure lawfully adopted has the effect of causing a special loss of a certain degree of gravity to a natural or legal person, that does not hold true in this case because Mr Sille, in his capacity as a real-estate professional, could not be unaware of the risks necessarily involved in the execution of a building project such as that planned in this case, in respect of which it was necessary, in particular, to amend the provisions of the land-use plan and obtain the agreement of the local council that Mr Sille should have contemplated the possibility or, faced with the negative findings of the public enquiry and the hostility encountered by the project, that it would be dropped by the local authority; that having taken on the risk in full knowledge of the facts, he cannot usefully maintain that he has suffered an abnormal loss and that the local authority must bear the substantial consequences for him arising from the shelving of the project'.
- (⁵⁹) Council of State, 10 July 1996, *Meunier*: 'By taking the view that, as a result of choosing to locate the business in such a place and of a letter from the mayor concerning the possibility of land slip, the interested party had accepted in full knowledge of the facts the risks of instability to which his establishment was exposed, the Administrative Appeal Court made a final decision on the facts. By taking the view that the loss resulting from a situation to which the interested party knowingly exposed himself did not give him grounds for compensation, the Court did not fail to apply the rules governing the liability of legal entities governed by public law'.
- (⁶⁰) For further details see recitals 11 to 13 of the opening decision.
- (⁶¹) OJ C 155, 20.6.2008, p. 10.
- (⁶²) See Section 3.1.1.A of this Decision.
- (⁶³) See footnote 29.
- (⁶⁴) See footnote 30.
- (⁶⁵) Constitutional Council, decision No 2001-448, 25 July 2001: 'On the basis of Article 34 of the Constitution, Article 61 could properly require any guarantee given by the State to be authorised by the Finance Act within three years, in order to ensure clarity in the State's financial commitments; but it does not follow that if no such authorisation is granted the guarantee concerned must lapse. Such a consequence would be contrary to the principle of equality before public burdens (*égalité devant les charges publiques*) and, if the injury caused is especially serious, to the right of property. In any event, the legislative history makes it clear that the purpose of Article 61 is to ensure that Parliament is informed of guarantees given by the State, and not to bring an end to any guarantees given in the past which have not been authorised within the time laid down. That being so, Article 61 is not contrary to the Constitution'.
- (⁶⁶) Paragraph quoted in the preceding footnote.
- (⁶⁷) Court of First Instance in Case T-442/03 *SIC v Commission* [2008] ECR II-1161, paragraphs 124 to 127. See also the Guarantees Notice.

- (⁶⁸) See paragraphs 62 to 68 of the French authorities' letter of 23 January 2008.
- (⁶⁹) See footnote 34.
- (⁷⁰) Section 4.1.1.A(b)3 of this Decision.
- (⁷¹) Opening decision, footnote 39. The memorandum is not public, but it was referred to in the annual report for 1995.
- (⁷²) This part of the memorandum was published in the annual report for 1995 (p. 219).
- (⁷³) Memorandum from the French authorities to the Commission sent on 9 September 2008.
- (⁷⁴) See point 5 in the annex to that memorandum, which lists different acts including for example 'a ministerial letter, or any other basis'.
- (⁷⁵) It may be borne in mind that a judgment closing compulsory winding-up proceedings without penalty, on the ground that the assets are insufficient, prevents the creditor from reopening proceedings: his claim is definitively lost.
- (⁷⁶) See recital 147.
- (⁷⁷) The section of this Decision describing the measure explains the terms of the Law of 16 July 1980, the Decree of 20 May 2008 replacing the decree of 12 May 1981, and the Circular of 16 October 1989.
- (⁷⁸) See Section 3.1.1.B(a)1 of this Decision, which in turn refers to Section IV.A.1, pp. 19-20, of the French authorities' letter of 23 January 2008.
- (⁷⁹) As the Commission's expert points out, if the publicly owned establishment's funds are insufficient, the possibilities open to the supervisory authority for dealing with the situation are limited. The necessary funds may come from resources that were previously allocated to other expenditure and are now reallocated in order to honour the debt. They may come from the sale of assets or an increase in charges, if those courses are feasible. The establishment may also borrow. But if these few possibilities are not feasible, the only solution remaining is to obtain funding from the State as shareholder.
- (⁸⁰) In cases where continuity of public service is not a requirement.
- (⁸¹) Expert's report, section I.2.A.2, p. 18.
- (⁸²) Article 620-1 of the Commercial Code.
- (⁸³) Article 640-1 of the Commercial Code provides that 'a procedure is established for winding up under the supervision of a court which is open to any debtor in any of the categories referred to in Article L 640-2 of the Commercial Code who is insolvent and whose reconstruction is manifestly impossible'.
- (⁸⁴) La Poste's assets were brought under ordinary law by the Law of 11 December 2001, known as the Murcef Law. But that law provides that 'where the terms of a transfer of an asset to or from La Poste compromise the proper performance by La Poste of its statutory or regulatory obligations or commitments entered into in its programme contract [...] the State shall object to the transfer or make it subject to the condition that it must not prejudice the proper performance of those obligations'.
- (⁸⁵) Charges for services in the reserved area have to be approved by ARCEP, the postal regulator. Charges for universal services are restricted by ARCEP.
- (⁸⁶) See Section 4.1.1.A(b)3 of this Decision.
- (⁸⁷) See paragraphs 112 and 113 of the French authorities' letter of 23 January 2008.
- (⁸⁸) See Section 4.1.1.A(b)3.

- (⁸⁹) According to the French regulator, ARCEP, regulation extends to the activities of postal services comprising the clearance, sorting, transport and delivery of postal items in regular rounds. It does not include the distribution of unaddressed advertising material, urban parcel deliveries, and express deliveries.
- (⁹⁰) See the strategic presentation of the annual performance plan.
- (⁹¹) For a more detailed account of the position of the French authorities see in particular Section 3.1.1.B(a)2 of this Decision.
- (⁹²) Administrative Court of Appeal, Lyon, 6 June 1996, *Société fermière de Campoloro*, No 95LY00935.
- (⁹³) P. Bon cited in footnote 37.
- (⁹⁴) See footnote 37.
- (⁹⁵) See footnote 34.
- (⁹⁶) No 57516/00.
- (⁹⁷) Series A, No 37.
- (⁹⁸) See Memorandum transmitted on 27 October 2009.
- (⁹⁹) Council of State, 29 December 2004, *Société d'aménagement des coteaux de Saint-Blaine*, No 257804: compensation in respect of public easements is possible when the owner bears a specific and exorbitant burden out of proportion to the public interest objective pursued.
Administrative Court of Appeal, Bordeaux, 14 October 2003, *Mr and Mrs Claude X.*, No 99BX01530: disruption to motor vehicle traffic on local roads damaged in a landslip may cause abnormal and special loss to the owner who thereby finds himself isolated. The administrative judge held, in particular, that the duration of the loss (traffic was disrupted for seven months — the time taken to carry out the work required) lent it an abnormal and specific character, placing a greater than usual burden on the two users of the public highway, and that compensation needed therefore to be provided.
Administrative Court, Montpellier, 23 June 1999, *Mr Van der Velden*, No 97-03716: The once-and-for-all closure of a camp site because of a major risk of flooding caused the owner an abnormal and specific injury such as to entitle him to compensation in so far as the closure brought the interested party's only professional activity to an end and caused the total loss of the goodwill relating to his business.
- (¹⁰⁰) The concept of legitimate error such as to impart legal effects is linked to the theory of appearance. According to Cornu's *Vocabulaire Juridique*, appearance is 'the aspect resulting — intentionally or otherwise — from the combination of external signs through which states and functions (status as representative, heir, owner, etc.) normally manifest themselves and that give rise to the belief that the person invested with these signs really does possess such a state or function'. The theory of appearance is a 'praetorian theory according to which appearance alone is enough to produce effects in respect of third parties who, following a legitimate error, have been unaware of the real state of affairs'. The theory of appearance is used in case law and has even led to some high-profile outcomes (ECHR, 7 June 2001, Kress). It is used in private law when it is necessary to impart legal effects to a contract in respect of which one of the parties has legitimately relied on simple appearance. The examples of apparent domicile or, in public law, of *de facto* officials whose decisions are likely to remain legitimate may also be cited. The theory of appearance has the advantage of making it easier to demonstrate the existence of a legal attribute or legal effect not expressly and explicitly affirmed by any legislation.
- (¹⁰¹) Distinction drawn on the basis of the developments of the thesis of S. Carpi-Petit, *Les successions en droit administratif*, PUR, 2006.
- (¹⁰²) This emerges from the Decree of 15 July 2002 (*Official Journal of the French Republic* of 23 July 2002), establishing the means of winding up the *Université thématique d'Agen*, Article 1 of which provides that the liquidator is responsible for 'proposing to the Minister for Higher Education that the assets, claims, debts and balance of the liquidation account remaining at the end of the winding-up period be distributed between Bordeaux I and Bordeaux IV universities'.

- (¹⁰³) — Decree No 53-404 of 11 May 1953, winding up the *Caisse de compensation pour la décentralisation de l'industrie aéronautique*, *Official Journal of the French Republic* of 12 May 1953, Article 3: 'in accordance with Article 7 of the above-mentioned decree of 24 May 1938, the installations and plant belonging to the *Caisse* and the sums still available after the discharge of liabilities will become the property of the State' (in this case, the balance is obviously positive).
- Article 2 of Decree No 75-926 of 6 October 1975 relating to the abolition of the *Bourse d'échanges de logements*: 'transactions for paying the debts, recovering the claims and liquidating the assets of the *Bourse d'échanges de logements*', and (if appropriate) legal proceedings for the purposes both of bringing and defending actions in connection with the *Bourse* will fall within the competence of the Minister for Economic Affairs and Finance. The entries will be transferred to a special Treasury 904.14 account entitled 'Winding-up of public Government bodies and para-administrative or professional bodies, and various windings up'.
- Decree No 81-1009 of 12 November 1981, abolishing the *Institut Auguste Comte pour l'étude des sciences et de l'action*: any surplus on the winding up is paid to the State.
- Decree No 83-1185 of 27 December 1983, winding up the *Etablissement public chargé de l'aménagement de la ville nouvelle de Lille-Est*: 'the assets and liabilities of the *Etablissement public d'aménagement de la ville nouvelle de Lille-Est* shall be transferred on this date to the *Communauté urbaine de Lille* under the conditions established by the above-mentioned agreement of 5 December 1983, with the exception of the goods listed in the Annex to this decree, which shall be transferred to the *Institut de recherche des transports*'.
- Decree No 83-1263 of 30 December 1983 relating to the winding up of the *Service national d'examen des permis de conduire*: 'the transactions are listed in the special "Winding up of publicly owned establishments" Treasury account'.
- Article 1 of Decree No 87-590 of 30 June 1987, laying down the conditions for winding up the *Centre mondial informatique et ressources humaines*: 'as from 1 July 1987, the date on which the *Centre mondial informatique et ressources humaines* (CMIRH) is wound up, the movable property and rights and obligations of this establishment shall be transferred to the State'.
- Decree of 17 November 1987 relating to the winding up of the *Centre d'étude des systèmes et des technologies avancées* (*Official Journal of the French Republic* of 18 November 1987) and Article 1 of Decree No 87-1167 of 31 December 1987, laying down the winding-up conditions: 'the assets, rights and obligations of the *Centre d'études des systèmes et technologies avancées* (CESTA) shall be transferred to the State as from 1 January 1988, the date on which this establishment is to be wound up'.
- Judgment of 28 September 1988, laying down the conditions for completing the winding up of the *Agence de l'informatique* (*Official Journal of the French Republic* of 23 December 1988): the winding up operations shall be carried out by the Minister for Industry and Town and Country Planning.
- Decree No 93-775 of 26 March 1993 relating to the abolition of the publicly owned establishment *Musée de la Poste* (*Official Journal of the French Republic* of 30 March 1993): transfer of the rights and obligations to La Poste.
- Decree of 26 December 1996, winding up the publicly owned establishment *Caisse française des matières premières* (*Official Journal of the French Republic* of 29 December 2006): 'the assets, rights and obligations of this establishment shall be transferred to the State'.
- Decree No 97-882 of 26 September 1997, winding up the *Etablissement public du centre de conférences international de Paris*: the surplus on the winding up shall be paid to the State.
- Article 2 of Decree No 99-1151 of 29 December 1999, winding up the publicly owned establishment *Musée national de la Légion d'honneur*: 'the tasks and the assets, rights and obligations of this publicly owned establishment shall be transferred as from the same date to the *Ordre national de la Légion d'honneur*'.
- Decree No 2000-1126 of 22 November 2000, transferring the surplus for the winding up of the *Etablissement public d'aménagement de la ville nouvelle du Vaudreuil*: the balance shall be transferred to the State budget, and Article 2 specifies that 'the rights and obligations arising from the activities of the establishment or during the winding-up period and not known about at the end of the winding-up period shall be transferred to the State'.
- Decree No 2001-1383 of 31 December 2001, winding up the *Etablissement public chargé de l'aménagement des rives de l'Etang de Berre*: Article 6 provides that a decree will determine the transfer to the State of the assets and liabilities remaining at the close of the liquidation account and of the rights and obligations arising from the establishment's activities or during the winding-up period and not known about at the end of that period. Decree No 2004-234 of 17 March 2004, including a variety of provisions relating to the winding up of the public establishment responsible for land use on the banks of the Etang de Berre transfers 'disputes arising from the establishment's activities' to the State.
- Article 4 of the Decree of 29 April 2004, winding up the *Syndicat mixte pour le développement de la zone industrielle et portuaire Eure-Calvados* (*Official Journal of the French Republic* of 6 May 2004): 'the charges remaining on the date when the *Syndicat mixte* is wound up shall be distributed between its members in accordance with its articles of association'.

(¹⁰⁴) S. Carpi-Petit, *Les successions en droit administratif*, PUR, 2006.

- (105) — Judgment of 24 February 2004, winding up *Les Houillères de bassin du centre et du Midi* (Official Journal of the French Republic of 28 February 2004): transfer of the activities, assets, rights and obligations to *Charbonnage de France*.
- Order No 59-80 of 7 January 1959, reorganising the tobacco and matches tax monopolies: creation of the publicly owned establishment SEITA, with allocation of funds.
 - Decree No 65-116 of 17 December 1965 concerning the unification of the *Régie autonome des pétroles* and the *Bureau de recherches du pétrole*: ‘all the assets, rights and obligations of the *Régie autonome des pétroles* and of the *Bureau de recherches de pétrole* shall be transferred *ipso jure* to the *Entreprise de recherches et d’activités pétrolières*’.
 - Article 2 of Decree No 67-796 relating to the unification of the *Mines domaniales de potasse d’Alsace* and the *Office national industriel de l’Azote*: ‘all the assets, rights and obligations of the *Mines domaniales de potasse d’Alsace* and the *Office national industriel de l’azote* shall be transferred *ipso jure* to the *Entreprise minière et chimique*’.
 - Decree No 68-369 of 16 April 1968, merging the *Houillères du bassin du centre et du midi*: ‘all the assets, rights and obligations of the abolished *Houillères du bassin* shall be transferred *ipso jure* to the *Houillères du bassin du centre et du midi*’.
 - Decree No 69-69 of 24 January 1969 relating to the transfer of the ORTF: ‘as from 1 January 1969, the movable and immovable assets, rights and obligations of the *Office de coopération radiophonique* shall be transferred to the ORTF’.
 - Article 2 of Decree No 93-1176 of 13 October 1993, winding up the publicly owned establishment of *l’Opéra de la Bastille*: ‘the assets, rights and obligations of the *Etablissement public de l’Opéra de la Bastille* shall be transferred to the *Etablissement public du parc de La Villette*’.
 - Article 2 of Decree No 2000-1294 of 26 December 2000, winding up the *Etablissement public chargé de l’aménagement de la ville nouvelle d’Evry* and transferring its rights and obligations to the *Agence foncière et technique de la région parisienne*: ‘the assets and liabilities of the *Etablissement public chargé de l’aménagement de la ville nouvelle d’Evry* shall be transferred on this date to the *Agence foncière et technique de la région parisienne*’ [...]. ‘it shall take over all the rights and obligations relating to the activity carried on by the *Etablissement public*’.
 - Decree No 2004-103 of 30 January 2004 relating to *Ubifrance*, the French agency for the international development of undertakings: ‘transfer to *Ubifrance* [...] of the rights, obligations and immovable and movable assets of the *Centre français du commerce extérieur*’.
 - Article 6 of Law No 2004-105 of 3 February 2004, creating the *Agence nationale pour la garantie des droits des mineurs*: ‘Subject to the winding up, by decision of its general meeting, of the *Association nationale de gestion des retraités des Charbonnages de France et des Houillères de bassin ainsi que de leurs ayants droit*, the assets, rights and obligations of this association shall be transferred to the *Agence nationale pour la garantie des droits des mineurs*’.
 - Decree No 2004-186 of 26 February 2004, creating the *Université en sciences des organisations* and bringing about the decision of *Paris-Dauphine*: ‘the assets, rights and obligations of *Université Paris IX* shall be transferred to *Université Paris-Dauphine*’.
- (106) — Article 2 of Law No 80-495 of 2 July 1980, amending the legal form of the *Service d’exploitation industrielle des tabacs et allumettes*: ‘the assets of the EPIC known as *Service d’exploitation industriel des tabacs et allumettes* shall be transferred to the company created by this law, in accordance with the procedures laid down by the competent authority’.
- See also Decree No 80-1025 of 19 December 1980 relating to the transfers of assets, rights and obligations from the *Caisse nationale des marchés de l’Etat, des collectivités et établissements publics* to the company known as CEPME.
 - Article 1 of Law No 88-50 of 18 January 1988 relating to the mutualisation of the *Caisse nationale de crédit agricole*: ‘The assets of the *Caisse nationale de crédit agricole* and those of the *Fonds commun de garantie* shall be transferred to the company specified in paragraph 1, above — holder of all of the rights and obligations of the *Caisse nationale* and of the *Fonds commun de garantie*, together with the guarantees and sureties attached to them’.
 - Decree of 19 April 1989, authorising the *Centre d’études des systèmes d’information des administrations* to transfer all of its assets, rights and obligations to the limited company *Cesia* and winding up this establishment.
 - Law No 92-665 of 16 July 1992, adapting the legislation applicable to insurance and banking to the single European market: transfer to a limited company of all the assets, rights and obligations of the EPIC *Caisse nationale de prévoyance*.
 - Decree No 2001-1213 of 19 December 2001, authorising the publicly owned State establishment *Agence pour la diffusion de l’information technologique* to transfer its assets to a limited company with the same name, winding up this public establishment and authorising the transfer of this company to the private sector.
- (107) The example may be referred to of the abolition of the *Caisse nationale des marchés de l’Etat, des collectivités et établissements publics*: Decree No 80-1025 of 19 December 1980 provides that the assets, rights and obligations of the publicly owned establishment shall be transferred to a public limited company (CEPME) and that the publicly owned establishment shall receive shares in exchange. Then, by Decree No 80-1076 of 23 December 1980, the publicly owned establishment shall be abolished and its assets transferred to the State. The same mechanism shall be put in place for abolishing the *Agence pour la diffusion de l’information technologique* (Decree No 2001-1213 of 19 December 2001).

- (¹⁰⁸) 'Publicly owned establishments', J-cl. admi. fasc. 135, 2007.
- (¹⁰⁹) For example, Law No 80-495 of 2 July 1980 relating to the conversion of the *Service d'exploitation des tabacs et allumettes* into a national company; Article 1 of Law No 96-660 of 26 July 1996 relating to the national undertaking *France Télécom*: 'The legal entity governed by ordinary law *France Télécom*, referred to in Article 1, shall be converted as from 31 December 1996 into a national undertaking to be known as *France Télécom*, more than half of whose share capital shall be held directly by the State'; 'The assets, rights and obligations of the publicly owned legal entity *France Télécom* shall be transferred *ipso jure*, as per 31 December 1996, to the national undertaking *France Télécom*'. This procedure is obviously the only conceivable one when the service concerned is a state service that is supplied with an additional budget and that is 'converted' into a company governed by private law. Article 1 of Law No 93-1419 of 31 December 1993 relating to the *Imprimerie nationale*: 'All of the rights, assets and obligations of the State relating to the tasks of the departments concerned with the additional budget of the *Imprimerie nationale* shall be transferred to a national company to be known as *Imprimerie nationale*'; more recently, Article 78 of the amending Finance Law for 2001, No 2001-1276 of 28 December 2001, converting the DCN national service into a public limited company and transferring to it the rights, assets and obligations of the State that relate to the service.
- (¹¹⁰) The same procedure was used for *Aéroports de Paris (ADP)* through Article 1 of Law No 2005-357 of 20 April 2005 relating to airports: 'The publicly owned establishment *Aéroports de Paris* shall be converted into a public limited company. This conversion entails neither the creation of a new legal entity, nor consequences for the legal arrangements to which the staff are subject'.
- (¹¹¹) G. Cornu, *Vocabulaire juridique*, PUF.
- (¹¹²) See S. Carpi-Petit, *Les successions en droit administratif*, cited above, p. 207.
- (¹¹³) See footnote 61.
- (¹¹⁴) Joined Cases T-204/97 and T-270/97 *EPAC v Commission* [2000] ECR II-2267, paragraphs 80 and 81.
- (¹¹⁵) The financial rating is a required step for obtaining funding for undertakings on the capital markets; in addition, it is increasingly used as a benchmark for bank lending. In this regard, see footnote 46 to the opening decision.
- (¹¹⁶) Standard & Poor's and Fitch, two of the leading global rating agencies.
- (¹¹⁷) Extract from 'International Postal Entities: Influence of government support on ratings', Standard & Poor's, 22 November 2004. Original in English.
- (¹¹⁸) Extract from 'Ratings direct' on La Poste, S & P, 3 April 2007. Original in English.
- (¹¹⁹) Second and fourth indents of Point 1.2 of the 2008 Guarantees Notice.
- (¹²⁰) See article 'Fitch confirme la note "AA" attribuée à La Poste', Fitch Ratings, Paris/London, 4 September 2009.
- (¹²¹) See recital 2 of this Decision.
- (¹²²) Extract from 'International Postal Entities: Influence of government support on ratings'. Standard & Poor's, 22 November 2004: 'Category 2: notching down with respect to the state owner's rating. The second category includes those entities that, while autonomous in their operations, are largely public-policy-based institutions, still in receipt of substantial direct or indirect financial backing from the State. There is, however, a high level of uncertainty surrounding the level and/or timeliness of this state support. A top-down approach that assumes notching down from the sovereign rating by up to two categories (six notches) applies to such postal entities. La Poste and Poste Italiane currently fall within this category'.
- (¹²³) Extract from 'International Postal Entities: Influence of government support on ratings'. Standard & Poor's, 22 November 2004: 'Unlike the credit quality of companies that operate in a commercial manner at arm's length from the government, like SingPost, Deutsche Post or TPG, a major factor underpinning La Poste's robust credit quality is its extremely strong state support. La Poste's legal status confers the ultimate statutory guarantee of the Republic of France (AAAA/Stable/A-1+) on its obligations'.
- (¹²⁴) The most recent downgrade of La Poste's rating took place on 21 January 2009, shortly after the President of the French Republic had announced the conversion of La Poste into a public limited company: La Poste's rating was downgraded to A+, which once again confirms that La Poste's status as a public entity does indeed have an important influence on the rating, *ceteris paribus*.

- (¹²⁵) Extract from 'Ratings direct' on La Poste, S & P, 3 April 2007: 'S & P continues to follow a top-down rating methodology for La Poste — which allows for a government supported entity to be rated by up to two categories below the sovereign — as we expect the French state to remain La Poste's 100 % shareholder in the medium term. The ratings nevertheless already factor in the long-term likelihood of a change in the group's capital structure, which would require a change in its current 'établissement public' legal status and result in the loss of the state's ultimate guarantee on LP's financial obligations, the elimination of which was recently recommended by the European Commission'.
- (¹²⁶) Extract from 'Ratings Direct' on La Poste, S & P, 3 April 2007: 'The EC recently recommended that the French government end this guarantee by year-end 2008, which they believe provides LP with more favorable financing conditions than its competitors in a market in the process of being liberalized. Original in English'.
- (¹²⁷) Extract from ADP news dated 21 January 2009: 'S & P lowers ratings on La Poste with negative outlook' [...] 'The announced legal status and ownership change will give the company a greater autonomy from the government, which is why its rating has a four-notch differential with the rating on the Republic of France, rated AAA/A-1+ with a "stable" outlook. S & P's "negative" outlook reflects concerns that the changes in the company's legal status and ownership, likely to take place in the next two years as part of a capital hike, could pressure the ratings. These initiatives could limit the government's ability to provide the postal operator with exceptional support without improving its standalone profile in the short term, as the capital hike should not decrease La Poste's debt relative to its cash generation'.
- (¹²⁸) See point 197 of the observations submitted by France on 23 January 2008.
- (¹²⁹) 'Rating Government-Related Entities: A Primer'. Standard & Poor's, 14 June 2006.
- (¹³⁰) See also 'Ratings Direct' on La Poste, S & P, 3 April 2007: 'The entities' credit standing is linked to that of the government, but ratings can be notched down from those on the State by up to two categories as the financial links between these companies and the state may be increasingly subject to change in the medium or long term'.
- (¹³¹) Extract from 'Ratings Direct' on La Poste, S & P, 3 April 2007: Original in English.
- (¹³²) Extract from 'Ratings Direct' on La Poste, S & P, 3 April 2007. 'The EC recently recommended that the French government end this guarantee by year-end 2008, which they believe provides LP with more favorable financing conditions than its competitors in a market in the process of being liberalized. The ratings on La Poste were unaffected by this recommendation since we consider that a change in La Poste's status would not necessarily reflect a decrease in the strong state support that underpins La Poste's ratings and that has been reaffirmed by recent government decisions'.
- (¹³³) Extract from 'Ratings Direct' on La Poste, S & P, 3 April 2007: 'A change in the group's ownership structure would lead Standard & Poor's to shift to a bottom-up rating approach, focusing more on LP's stand-alone business and financial profiles. This rating approach may not necessarily translate into rating changes given the expected improvement in La Poste's stand-alone situation in the coming years'.
- (¹³⁴) Extract from 'Ratings Direct' on La Poste, S & P, 3 April 2007: 'The ratings on La Poste could be downgraded, however, if state backing for the company were to weaken'.
- (¹³⁵) See section 3.2.1.D of this Decision and part V.4 of the observations submitted by the French authorities on 23 January 2008.
- (¹³⁶) Part V.4(a) of the observations submitted by France on 23 January 2008.
- (¹³⁷) See point 186 of the observations submitted by France on 23 January 2008.
- (¹³⁸) See Table 1 in 'Ratings Direct' on La Poste, S & P, 3 April 2007.
- (¹³⁹) Extract from 'International Postal Entities: Influence of government support on ratings', Standard & Poor's, 22 November 2004: 'Unlike the credit quality of companies that operate in a commercial manner at arm's length from the government, like SingPost, Deutsche Post or TPG, a major factor underpinning La Poste's robust credit quality is its extremely strong state support. La Poste's legal status confers the ultimate statutory guarantee of the Republic of France (AAAA/Stable/A-1+) on its obligations'.
- (¹⁴⁰) See point 196 of the observations submitted by France on 23 January 2008.

- (¹⁴¹) See points 198-200 of the observations submitted by France on 23 January 2008.
- (¹⁴²) 'International Postal Entities: Influence of government support on ratings', Standard & Poor's, 22 November 2004.
- (¹⁴³) Extract from '*Ratings Direct*' on La Poste, S & P, 3 April 2007: The ratings nevertheless already factor in the long-term likelihood of a change in the group's capital structure, which would require a change in its current '*établissement public*' legal status and result in the loss of the state's ultimate guarantee on LP's financial obligations, the elimination of which was recently recommended by the European Commission'. Moreover, La Poste's identified weaknesses include: 'Likely capital structure change at company or bank level in the long term'.
- (¹⁴⁴) The mid swap is the median between the rate offered and the rate proposed by the banks at a particular moment for their interbank dealings by maturity, i.e. it is the fixed rate that a bank is willing to exchange for a 6-month Euribor as a general rule. That rate is the market reference for bond issues in particular.
- (¹⁴⁵) Judgment of the Court of Justice in Case C-301/87 *France v Commission*, '*Boussaç*', [1990] ECR I-307, paragraph 33.
- (¹⁴⁶) Judgment of the Court of First Instance in Case T-354/05 *TF1 v Commission* [2009] ECR II-471, paragraphs 166 and 167.
- (¹⁴⁷) In particular, in its decision on EDF (paragraph 57 of the Commission Decision 2005/145/EC of 16 December 2003 on the State aid granted by France to EDF and the electricity and gas industries, OJ L 49, 22.2.2005, p. 9), the Commission took the view that 'EDF cannot be subject to administration or compulsory liquidation proceedings, and therefore cannot be declared bankrupt, is equivalent to a general guarantee covering all its liabilities. Such a guarantee cannot be the subject of any remuneration according to the rules of the market. Such a guarantee, which is unlimited in scope, time and amount, constitutes State aid'.
- (¹⁴⁸) See the third paragraph of point 2.1 of the 2008 Guarantees Notice.
- (¹⁴⁹) OJ L 15, 21.1.1998, p. 14.
- (¹⁵⁰) See, for example, Decision 2005/145/EC.
- (¹⁵¹) See *inter alia* point 1.5 of the Guarantees Notice, which confirms the principle of neutrality, and point 1.2, which explains that a state guarantee may result from the simple fact of the legal form (second and fourth indents of this point).
- (¹⁵²) Case E 10/2000, *Anstaltslast und Gewährträgerhaftung*, point 5 of the proposal for appropriate measures of 8.5.2001. Consultable on the Commission website: http://ec.europa.eu/community_law/state_aids/comp-2000/e010-00-1.pdf
- (¹⁵³) See Decision 2005/145/EC.
-