

COMMISSION

COMMISSION DECISION

of 10 October 2007

on the State aid implemented by France in connection with the reform of the arrangements for financing the retirement pensions of civil servants working for La Poste

(notified under document number C(2007) 4545)

(Only the French version is authentic)

(Text with EEA relevance)

(2008/204/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular the first paragraph of Article 88(2) thereof,

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

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

Whereas:

1. PROCEDURE

(1) On 21 December 2005 France presented to the Commission the main features of the draft reform of the arrangements for financing the retirement pensions of civil servants working for La Poste.

(2) On 2 March 2006 France sent by e-mail the draft notification of the reform. A pre-notification meeting was held on 29 March at which the Commission stressed that the draft notification was quite incomplete and indicated what information was missing. On 7 April France provided the Commission with some of the missing information.

(3) On 23 June 2006 France notified the Commission of the reform of the arrangements for financing the retirement pensions of civil servants working for La Poste (hereinafter the 'reform') in accordance with Article 88(3) of the Treaty and stated that, in its view, the reform described in the notification did not contain any element of State aid within the meaning of Article 87(1) of the Treaty.

(4) On 20 July 2006 the Commission asked France for further information on both the reform notified and any compensatory measures from which La Poste might have benefited in the past. France replied on 17 August.

(5) By letter of 12 October 2006, the Commission informed France of its decision to initiate the procedure provided for in Article 88(2) of the Treaty in respect of the measures linked to the reform of the arrangements for financing the retirement pensions of civil servants working for La Poste.

(6) France submitted its comments on 14 December 2006.

(7) The Commission Decision to initiate the procedure was published in the *Official Journal of the European Union* ⁽²⁾. The Commission called on interested parties to submit their comments on the measures in question.

⁽¹⁾ OJ C 296, 6.12.2006, p. 6.

⁽²⁾ See footnote 1.

- (8) The Commission received comments from [...] (*) which were forwarded to France. The corresponding observations made by France were received on 27 February 2007.
- (9) The Commission addressed additional questions to France on 12 March and 30 May 2007. France's replies were received on 27 April and 8 June respectively.
- (10) (b) weighing less than 50 g and with a price less than two and a half times the public tariff from 1 January 2006 (an additional opening-up of the market to competition estimated at some 7 %).
- (11) (13) In October 2006 the Commission formulated a proposal⁽⁵⁾ for opening up postal markets in the Community entirely by 2009, the target date indicated in Directive 97/67/EC.

2. DETAILED DESCRIPTION OF THE MEASURES

2.1. Context: liberalisation of the postal sector

- (10) The aim of Community policy in the postal sector is to establish an internal market in postal services and to ensure by way of an appropriate regulatory framework that everyone in the Community has access throughout the territory of the Community to effective, reliable and good-quality services at affordable prices. Given the importance of postal services both for economic prosperity and for the social cohesion and well-being of the Community, this is a priority field of action for the Community.
- (11) These Community objectives for postal services were enshrined in Community legislation by a framework postal directive, European Parliament and Council Directive 97/67/EC 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⁽³⁾, which set in place a comprehensive regulatory framework for Community postal services.
- (12) Directive 97/67/EC, as amended by Directive 2002/39/EC⁽⁴⁾, lays down the stages of the process for opening up the market gradually and in a controlled manner and further limits the sectors that can be reserved. According to Directive 97/67/EC, Member States may exempt from the competition rules items of correspondence:

- (a) weighing less than 100 g and with a price less than three times the public tariff from 1 January 2003 (an opening-up of the market to competition estimated at some 9 %);

- (14) In France the universal postal market is defined as an entity bringing together the reserved sector (national and international items of correspondence, including direct mail, with the weight/price limits laid down in Directive 97/67/EC), and at national and international levels the provision of national and international services for the delivery of parcels weighing 20 kg or less, newspapers, periodicals and the like, and registered, declared-value and forwarding services.
- (15) A feature of the French market is the extent of upstream competition (such as worksharing). As for downstream activities, competition is becoming stiffer, particularly as a result of measures taken by operators in the newspaper sector in connection with both unaddressed and addressed mail. As for bulk mailing, local operators are active in large towns for mail weighing more than 50 g. Lastly, express mail and parcels are liberalised markets on which national and international operators compete⁽⁶⁾.

2.2. Beneficiary of the measures

- (16) French Law No 90-568 of 2 July 1990 on the organisation of the public postal and telecommunications service (the '1990 Law') converted the former Telecommunications Directorate-General into two legal persons governed by public law: La Poste and France Télécom.
- (17) La Poste has been an independent public-law operator since 1 January 1991. Under a planning contract with the State, it is active in the fields of mail, express parcels, financial services and general consumer services.

(*) Confidential data.

⁽³⁾ OJ L 15, 21.1.1998, p. 14. Directive as last amended by Regulation (EC) No 1882/2003 (OJ L 284, 31.10.2003, p. 1).

⁽⁴⁾ OJ L 176, 5.7.2002, p. 21.

⁽⁵⁾ Proposal for a European Parliament and Council Directive amending Directive 97/67/EC concerning the full accomplishment of the internal market of Community postal services (COM(2006) 594 of 18 October 2006).

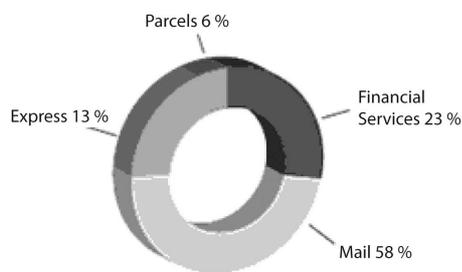
⁽⁶⁾ Study entitled *The Impact on Universal Service of the Full Market Accomplishment of the Postal Internal Market in 2009 — Annexes — May 2006* and carried out on behalf of the Commission.

- (18) La Poste and its subsidiaries form a public group that, subject to the conditions laid down by the texts governing each of its fields of activity, performs services of general economic interest and engages in competitive activities.
- (19) Pursuant to Directive 97/67/EC, La Poste was designated by Law No 99-533 of 25 June 1999 laying down guidelines for planning and sustainable development as

the universal postal service provider in France. At national and international levels, it is responsible for the public postal consignments service, which includes the universal postal service, and in particular the public-service transport and delivery of press materials covered by the specific scheme provided for by the Postal and Electronic Communications Code. It is also responsible for any other service involving the collection, sorting, transport and distribution of postal items, of mail in all its forms, of objects and of goods. It carries out its financial activities in the manner laid down in Article L. 518-25 of the Monetary and Financial Code.

- (20) The turnover of La Poste breaks down as follows (source: La Poste Group Activity Report, 2005):

BREAKDOWN OF TURNOVER BY SECTOR OF ACTIVITY



million EUR	2004	2005
MAIL	10 873	11 242
EXPRESS	2 387	2 534
PARCELS	1 097	1 155
FINANCIAL SERVICES	4 292	4 366

- (21) La Poste's customers include businesses (90 % of its mail and parcels/express activities) and individuals (the remaining 10 %). The opposite is true of financial services, with individuals accounting for 95 % of net banking income.
- (22) The staff at La Poste have two different statuses:
- (i) civil servants, who form part of the state civil service: designation of La Poste as a legal person by the 1990 Law was not accompanied by any change in the status of the postal administration staff assigned to La Poste since the Government had undertaken to safeguard the status of civil servant for those who went to work for La Poste;
 - (ii) employees governed by private law.
- (23) The workforce of La Poste breaks down as follows (source: financial report for the La Poste group, 2005):

In employee/year equivalent	31.12.2005	31.12.2004
Civil servants	180 558	190 261
Contract staff	122 847	119 025
Total	303 405	309 286

- (24) Since 1990 La Poste has gradually cut back on recruiting civil servants and, for the most part, has taken on private-law employees. It has embarked on a gradual process of changing the status of its staff, subject to the limitations imposed by the need to respect the status of civil servants and subject to the legal constraints, by replacing retiring civil servants with private-law employees. In the coming years, when a large number of civil servants will take retirement, La Poste plans to continue replacing them with private-law employees.

2.3. Measures in question

2.3.1. Description of the arrangements for financing the retirement pensions of civil servants working for La Poste prior to the Law of December 2006

Pension scheme for civil servants

- (25) The pension scheme for civil servants is organised by the Civilian and Military Retirement Pensions Code.
- (26) According to the Court of Auditors ⁽⁷⁾, the scheme includes a wage-related payroll deduction (7,85 %) and an employer's contribution payable by public establishments employing seconded staff (33 %). However, legally speaking, there is no 'employer's' contribution for civil servants employed by the State. But comparing spending on pensions by the State (after set-off of revenue from the wage-related deductions) with the sum of the salaries paid to those in employment makes it possible to calculate a rate of 'employer's' contribution that is often described as being implicit ⁽⁸⁾. For 2003, according to estimates by the Economics, Finance and Industry Ministry, the implicit rate of contribution payable by the State as the employer was 51,9 %, i.e. 44,7 % for civilian staff and 91,8 % for military staff, i.e. a rate in the case of civil servants that is more than three times higher than that resulting from the rules and collective agreements covering private-sector wages ⁽⁹⁾.

Basic retirement scheme for civil servants working for La Poste

- (27) Civil servants working for La Poste rank as state civil servants. In accordance with Article 20 of Law No 83-634 of 13 July 1983 laying down the rights and obligations of civil servants, they are covered by the civilian and military staff retirement scheme organised by the Civilian and Military Retirement Pensions Code. Civil servants assigned to La Poste do not benefit from any specific retirement advantage as compared with other civil servants. Moreover, La Poste does not participate in any special business or branch scheme, unlike other public operators.
- (28) Under Article 30 of the 1990 Law ⁽¹⁰⁾, the State remains in law the guarantor of the status of civil servants assigned to La Poste and remains responsible for payment of their retirement pensions. Retirement pensions paid to civil servants, including those assigned to La Poste ⁽¹¹⁾, are voted on each year in the Finance Law.
- (29) La Poste has no control over decisions on the pension arrangements for the civil servants working for it. Nor can it influence the amount of the contributions levied or the level of the benefits paid out.
- (30) Article 30 of the 1990 Law states that La Poste has to ensure the financial equilibrium of the social security scheme covering the civil servants assigned to it and that it is therefore responsible for the full funding of pensions paid by the State to its civil servants by reimbursing it for the amounts paid out (less the contributions paid by the civil servants still working):

⁽⁷⁾ Report by the Court of Auditors, 'Les pensions des fonctionnaires civils de l'État', April 2003.

⁽⁸⁾ According to the Court of Auditors, this implicit rate would also be incomplete as it does not take account of the scheme's management costs.

⁽⁹⁾ The 'employer's' contribution payable in 2003 for private-sector employees was 15,46 % for non-executive staff and 15,60 % for executive staff.

⁽¹⁰⁾ Article 30 of the 1990 Law reads as follows: 'The payment and servicing of pensions granted under the Civilian and Military Retirement Pensions Code to civil servants of La Poste [...] shall be effected by the State.'

⁽¹¹⁾ 'Civil servants assigned to La Poste' means those civil servants who are either working for La Poste or who have retired from La Poste or from the postal administration.

In return, [La Poste (...) is required] to pay to the Public Treasury:

- (a) *the amount of the deduction made from the salary of the civil servant, the level being fixed by Article L. 61 of the Civilian and Military Retirement Pensions Code;*
- (b) *an additional contribution allowing full funding of the pensions that have been and are to be awarded to their retired officials.'*
- (31) These financing arrangements depart from the ordinary arrangements in that the 'employer's' contribution paid by La Poste forms part of a defined-benefit scheme since it is intended to cover the amount of pensions paid out each year by the State but is not correlated to the population of active contributing civil servants at La Poste. Unlike an employer under ordinary law with a pay-as-you-go scheme, La Poste does not make any contribution in full discharge of its liabilities but is required by the 1990 Law to ensure the financial equilibrium of the retirement scheme for its civil servants.
- (32) The 'objective and progress contract' serving as the planning contract between the State and La Poste for the period 1998-2001, which was extended to cover 2002 and 2003, and then the 'performance and convergence contract' for the period 2003-2007 held this repayment steady in constant euros at its 1997 level (the '1998 cap'). The share of pensions paid out by the State but covered neither by the 'employer's' contribution of La Poste nor by the pension deduction for civil servants remains the responsibility of the State.
- (33) The table below gives (in EURm) the contributions paid to the State by La Poste since 1998 (in constant euros) and the payments made by the State in respect of the pensions paid to civil servants working for La Poste.

	1998	1999	2000	2001	2002	2003	2004	2005	Present value as at 30 June 2006
Discount rate	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Pensions paid out ⁽¹⁾	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Contribution paid by La Poste ('employer')	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Pension deduction (civil servants)	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]

⁽¹⁾ Budget figures.

- (34) According to France, the total amount of retirement pensions financed by the State between 1998 and 2005 was therefore around [...] as at 30 June 2006.
- (35) In the absence of the reform, the obligation incumbent on La Poste to ensure the financial equilibrium of the arrangements would result in a state liability being entered as an off-balance-sheet item which would be shown as a provision in the accounts on the changeover to IFRS standards (International Financial Reporting Standards), which is to take place in 2007 at the latest. Since La Poste borrows on the market but is not quoted on the stock exchange, it was decided that it would change over to the IFRS standards as of the publication of its 2007 half-yearly accounts.
- (36) The liabilities in respect of the rights acquired by civil servants as at 31 December 2005 and entered as an off-balance-sheet item in La Poste's accounts amount to EUR 76 billion (of which EUR 34 billion relates to the rights acquired by civil servants still working). France estimates that EUR [...] billion relates to rights acquired before La Poste was set up, i.e. at a time when its main activities had not yet been opened up to competition.

- (37) The gradual cutback in the recruitment of civil servants since 1990 ⁽¹²⁾ and longer life expectancy automatically mean that, since 1990, La Poste has had to pay an increasingly large amount of pensions ⁽¹³⁾ relative to the salary of civil servants still working for La Poste.

Supplementary pension scheme for civil servants working for La Poste

- (38) Article 76 of Law No 2003-775 of 21 August 2003 on the reform of retirement pensions set up a compulsory supplementary public-service pension scheme (*retraite additionnelle de la fonction publique* — RAFP) with effect from 1 January 2005. This is a funded points-based pay-as-you-go scheme for acquiring pension rights that is managed by a public administration overseen by the State and known as the 'public-service supplementary retirement pension body' (*établissement de retraite additionnelle de la fonction publique*).
- (39) La Poste contributes to the RAFP for civil servants assigned to it and pays to the above body each month the contributions for which it is responsible as the employer and the contributions from the civil servants that it deducts direct from their salary. The 'employer's' contributions of La Poste to the RAFP are in full discharge of its liabilities.

Early retirement scheme for civil servants assigned to La Poste

- (40) Like all other civil servants, those working for La Poste may be eligible for the early retirement arrangements introduced for the public service: phased-in retirement and end-of-career leave.
- (41) The entire cost of these early retirement arrangements is borne by La Poste for all the civil servants assigned to it. A provision has been entered in the accounts for the civil servants who have joined one of the pre-retirement schemes.

2.3.2. The reform and the competitively fair rate

Legal bases of the reform

- (42) The legal bases in national law for the reform of the current arrangements for financing the pensions of civil servants working for La Poste will be the amendments to Article 30 of the 1990 Law and to the specifications for La Poste approved by Decree No 90-1214 of 29 December 1990. Article 46 of the specifications sets out in particular the arrangements for reimbursement to the State by La Poste of the pension liabilities for which it was made responsible by the 1990 Law.
- (43) Implementation of the reform requires, in addition to amendments to the two texts, clarification of how to determine and pay the 'employer's' contribution in full discharge of La Poste's liabilities, in place of reimbursement of the State for its pension funding.

⁽¹²⁾ Recruitments by La Poste since 1990:

	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006
Civil servants	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Private-law employees	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]

⁽¹³⁾ Despite the stabilisation in constant euros since 1998.

- (44) The legislative provisions, which had been notified to the Commission as a draft text annexed to France's comments on the decision to initiate the procedure, were adopted unamended by Parliament and now make up Article 150 of the Amending Finance Law 2006 ⁽¹⁴⁾.
- (45) As things stand, the main effect of these provisions is that the 'employer's' contribution paid by La Poste is treated as being in full discharge of its liabilities.
- (46) Article 150 of the Amending Finance Law 2006 also lays down the principle of the competitively fair rate (*taux d'équité concurrentielle* — 'TEC') and leaves to a decree the task of determining how to calculate and pay the 'employer's' contribution. The decree was published on 2 January 2007 ⁽¹⁵⁾. Article 150 above also modifies the financial flows involved, with the contribution now passing through the national public body responsible for financing retirement pensions of La Poste ⁽¹⁶⁾ and no longer being paid direct to the State.

Thinking behind the reform

- (47) According to France, the thinking behind the notified reform is that, in substance, the present contribution paid by La Poste will be replaced by a contribution that will align the retirement costs borne by La Poste on those of its competitors and be in full discharge of its liabilities.
- (48) Under the reform, La Poste will, with effect from 2006, pay an 'employer's' contribution in full discharge of its liabilities and based on a TEC. The contribution will be calculated in such a way as to equalise the levels of wage-related social security contributions and tax payments between La Poste and the other companies in the transport and banking sectors coming under the ordinary social security arrangements. France initially planned to apply this calculation only to the risks that were common to employees of private undertakings and to civil servants ⁽¹⁷⁾.
- (49) Since the assessment bases for, and the rates of, contributions differ as between civil servants and private-law employees and since the contributions may vary slightly from one sector of the economy to another, the equalisation method is based on a reconstruction process.
- (50) As explained in the decision to initiate the procedure, the calculation starts with a reconstruction of what the wage cost would be for a competitor with employees coming under the ordinary social security arrangements (including retirement pensions) if they were guaranteed a net wage equal to that of civil servants working for La Poste as well as an identical employment structure and range of activities.

⁽¹⁴⁾ Amending Finance Law No 2006-1771 of 30 December 2006.

⁽¹⁵⁾ Decree No 2007-3 of 1 January 2007 on the arrangements for determining and paying the employer's contribution — in full discharge of liabilities — in respect of civil servants working for La Poste.

⁽¹⁶⁾ This public body was set up by Decree No 2006-1625 of 19 December 2006.

⁽¹⁷⁾ For the French authorities, the common risks (including old age, family, sickness, maternity, accidents at work and vocational training) were those covered by social security contributions and tax payments, including under contractual rules, in the postal and banking sectors (the comparison includes the banking top-up, which is an additional contribution paid by banks of up to 4 % of the wage and salary bill). Excluded from it were current contributions to provide employment risk cover and cover against the risk of non-payment of wages in the event of insolvency or winding-up (*Association pour la Gestion du régime de garantie des créances des Salariés* — AGS). Conversely, the exceptional solidarity contribution introduced by Law No 82-939 of 4 November 1982 on the exceptional solidarity contribution for unemployed workers, which was paid only by civil servants, was left out of the comparison. In addition, La Poste itself pays the cash benefits for absence from work due to sickness, maternity, paternity and adoption of the civil servants employed by it, whereas its competitors pay contributions for such benefits. The cash benefits paid by La Poste account for over [...] % of gross index-related salaries (*traitement indiciaire brut*), corresponding to the difference between the contribution rates for private-law employees and those for civil servants. They were not taken into account in the TEC notified initially whereas the contributions paid by competitors were.

- (51) The contribution in full discharge of liabilities that will be paid by La Poste to the State after the reform is equal to the difference between the wage cost thus reconstructed and the real wage cost of civil servants (excluding retirement pensions). The contribution calculated in this way will replace the contribution from La Poste provided for in Article 30 of the 1990 Law. It will be paid by La Poste to an administrative public body.
- (52) Calculated on the basis of the gross index-related salaries⁽¹⁸⁾ of the civil servants working for La Poste, this contribution determines the level of the contribution payable by La Poste (TEC). It will be calculated each year in such a way as to take account of the real change in the compensation of civil servants working for La Poste and of the changes that will take place in the levels of social security contributions and tax payments under the ordinary social security arrangements.
- (53) The method of calculating the contribution of La Poste in full discharge of its liabilities is, therefore, based on equalisation of the levels of wage-related security contributions and tax payments between La Poste and other undertakings in the transport and banking sectors under the ordinary social security arrangements. This method does not therefore ensure any equalisation of aggregate wage costs (wages and social security contributions).
- (54) The new method of calculating the contribution of La Poste does not affect the individual situation of civil servants assigned to it, whether as regards their pension rights, contributions or status.

Distinction under the reform between the sectors of activity of La Poste

- (55) As La Poste operates in two sectors, the postal sector and the banking sector, in which 'employer's' contributions under the ordinary social security arrangements differ, two TECs will, in fact be calculated:
- one will apply to the category of civil servants working in the mail/parcels sector and will be calculated by reference to the contributions paid by transport companies, a sector into which postal activities fall; on the basis of the 2005 figures, the 'postal sector' TEC is initially estimated at 36,5 % of the gross index-related wage and salary bill for this category,
 - the other will apply to the category of civil servants seconded to La Banque Postale or working in the resources department⁽¹⁹⁾ and will be calculated by reference to the contributions paid by banks; on the basis of the 2005 figures, the 'banking sector' TEC is initially estimated at 40,9 % of the gross index-related wage and salary bill for this category.
- (56) An aggregate TEC can be calculated each year as the weighted average of the two rates, the weighting being based on the gross index-related wage and salary bill for each of the two categories. On the basis of the 2005 figures, the aggregate TEC is initially estimated at 37,2 % of the gross index-related wage and salary bill of La Poste.

⁽¹⁸⁾ The gross index-related salary is the main component of civil servants' compensation and depends on their index, which is based on their seniority in the service. The components of civil servants' compensation are laid down by Article 20 of Law No 83-634 of 13 July 1983 on the rights and obligations of civil servants.

⁽¹⁹⁾ This category, which has no legal personality, manages all the human and material resources corresponding to the services provided for in the agreements between La Poste and La Banque Postale (e.g. conditions under which la Banque Postale has recourse to the staff of La Poste for its commercial activities).

Transitional period

- (57) The TEC as defined above will be applied over a four-year transitional period. In 2006 the contribution by La Poste in full discharge of liabilities will be set so that the level of the contribution in euros will be equivalent to that calculated under the present arrangements (currently estimated at some [...] % of the gross index-related wage and salary bill). For the period 2007-2009 the contribution will be raised by adding to the TEC a temporary surcharge set at [...] % of the gross index-related wage and salary bill for 2007, at [...] % for 2008 and at [...] % for 2009. This surcharge will be abolished as of 2010.
- (58) The change in the aggregate initial TEC ⁽²⁰⁾ applicable during the transitional period should therefore be as follows (estimation based on the 2005 figures):

	2006	2007	2008	2009	2010
Level of the contribution	[...]	[...]	[...]	[...]	[...]

Exceptional flat-rate contribution

- (59) On 29 December 2006 La Poste paid an exceptional flat-rate contribution of EUR 2 billion ⁽²¹⁾ to the national public agency for the financing of the retirement pensions paid out by La Poste. This was a one-off contribution.
- (60) The principle and amount of this contribution were fixed in negotiations between the State and La Poste. The amount was the result of a trade-off between the immediate budgetary needs of the State and the contributive capacity of La Poste [...].
- (61) The different entities belonging to the La Poste group contributed to the payment of the exceptional flat-rate contribution in proportion to the wage and salary bill for the civil servants working directly for them (see table below):

	Gross wage bill for civil servants (in EURm) base 2004	Exceptional flat-rate contribution
Parent company	[...]	[...]
Banque Postale	[...]	[...] ⁽¹⁾
Sofipost	[...]	[...]
Geopost	[...]	[...]
Total	[...]	[...]

⁽¹⁾ The matter of the breakdown of the cost within the La Poste group, and in particular vis-à-vis La Banque Postale, is not examined here by the Commission and will be dealt with in a later decision.

Affiliation of the retirement arrangements for civil servants working for La Poste to the ordinary schemes

- (62) According to France, one option for the State is to affiliate the retirement arrangements for civil servants working for La Poste to the ordinary social security schemes. As things stand, no negotiations have taken place with the ordinary retirement schemes even though France intends to begin such negotiations as soon as possible.

⁽²⁰⁾ It should be noted that the rate applicable to the 'banking' sector will not be further reduced once it is equal to the 'banking sector' TEC (estimated at [...] % on the basis of the 2005 figures).

⁽²¹⁾ See Article 150 of the Amending Finance Law 2006.

3. REASONS FOR INITIATING THE PROCEDURE

- (63) Following its preliminary analysis, the Commission first noted that the notified reform releases La Poste from charges it would have had to incur under the 1990 Law. It wondered therefore whether the charges of which La Poste was relieved corresponded in aggregate to an 'abnormal' charge within the meaning of Community case law. In particular, in *Combus* ⁽²²⁾ the Court of First Instance of the European Communities seems to treat as 'abnormal' charges resulting from the exceptional status of the employees of an undertaking which, following a reform, finds itself in a situation governed by ordinary law, i.e. identical to that of its competitors, as regards personnel management ⁽²³⁾. However, in the present case, France has not adopted any legislative provision aimed at abolishing or adapting the special employment arrangements for civil servants working for La Poste or the way in which they acquire their pension rights.
- (64) France then claimed that the reform was designed gradually to align the charges borne by La Poste in connection with the retirement pensions paid to civil servants working for it on those borne by its competitors. The Commission expressed doubts as to whether there will actually be a level playing field once the reform is implemented.
- (65) Lastly, according to France, La Poste had not benefited in the past from any other compensatory measures aimed, at the time they were granted, at neutralising the effects of the additional costs imposed by La Poste's ad hoc arrangements for financing the retirement pensions of civil servants. And yet, since 1998, La Poste has not reimbursed the State for the total cost of the retirement pensions paid to its civil servants, contrary to the obligation resulting from Article 30 of the 1990 Law.
- (66) In the light of the above, the Commission could not at that stage rule out the possibility that the measure under scrutiny conferred an economic advantage on La Poste and contain elements of State aid.
- (67) The Commission wondered whether, should the measures in question constitute State aid, they might be declared compatible in the light of the derogations provided for in Article 87(3)(c) of the Treaty.
- (68) In the past, the Commission has authorised State aid measures relieving undertakings of pension liabilities specific to a sector where they exceeded those resulting from the general retirement scheme and were defined during a monopoly period ⁽²⁴⁾. The measures under scrutiny in the present decision are designed gradually to align the costs borne by La Poste in respect of retirement pensions paid to civil servants assigned to it on the retirement pension costs of its competitors. The Commission was unable, however, to conclude at that stage that La Poste was actually in a situation comparable to that of its competitors, and this could have demonstrated that the aid was necessary in order to garner fully the benefits of the liberalisation of the postal services market.
- (69) France has not invoked Article 86(2) of the Treaty during the procedure.

⁽²²⁾ Case T-157-01 *Danske Busvognmænd v Commission* [2004] ECR II-917.

⁽²³⁾ *Combus*, an undertaking charged by the State with the task of managing public bus transport operations in Denmark, employed officials who maintained their employment relationship with the State while being at the disposal of *Combus* under a secondment scheme. Since the officials were working for *Combus*, it had to compensate the State for the remuneration and pensions it paid to them. In September 1998 the State concluded with *Combus* an agreement governing the conditions for a change of status from civil servant to employee under contract for the civil servants working for *Combus*. That agreement consisted essentially in giving civil servants the choice, as of 1 April 1999, between working on a contract basis for *Combus* or being assigned to another suitable post within the Danish State Railways (DSB). In return for their waiving the rights deriving from their civil servant status upon transfer to employment on a contract basis for *Combus*, the civil servants concerned demanded a single payment totalling an estimated amount of DKK 100 million. The payment was made to the officials concerned in 1998.

⁽²⁴⁾ Commission Decision 2005/145/EC of 16 December 2003 on the State aid granted by France to EDF and to the electricity and gas industries (OJ L 49, 22.2.2005, p. 9).

4. COMMENTS BY INTERESTED PARTIES

- (70) Two interested parties have presented their joint comments under the procedure: [...].
- (71) [...].
- (72) It is claimed that the measures referred to in the decision instituting the procedure raised the fundamental question as to whether the employment of civil servants represents an 'abnormal' charge relief from which does not constitute State aid.
- (73) Firstly, [...] claim that the *Combuis* ruling does not apply in the present case. A number of factors distinguish the case of La Poste from that of Combuis. For example, the planned reform would not prevent La Poste from employing civil servants; the absence of aid in *Combuis* was due, above all, to the fact that the charge would have been borne by the staff of Combuis; lastly, the competitive environment would be totally different since La Poste enjoys exclusive rights.
- (74) Secondly, in order to assess the 'abnormal' nature of the charge resulting from the employment of civil servants, all the advantages⁽²⁵⁾ and disadvantages associated with the employment of the said civil servants would need to be worked out.
- (75) Thirdly, the measures under scrutiny would not be compatible with Article 87(3)(c) of the Treaty as they do not promote competition.
- (76) In particular, the strict conditions attaching to the reform of the EDF/GDF retirement scheme as described in Decision 2005/145/EC would not be met since the reform, on the one hand, would restrict the ability of competitors to expand their business on the markets on which La Poste operates instead of removing the barriers to entry and, on the other hand, would not be proportional in nature as France has not demonstrated that the measures under scrutiny are the least harmful to competition.
- (77) In addition, the reform would not be fair since it would not include unemployment in the list of common risks, would not take stock of the competitive advantages conferred on an undertaking enjoying exclusive rights, would introduce a subjective allocation formula favourable to La Poste and would not take into account the compensatory measures from which La Poste might have benefited in the past⁽²⁶⁾.
- (78) No other comments were received by the deadline set in the decision initiating the procedure. The Commission has not extended the deadline since, in its view, no duly justified case within the meaning of Article 6(1) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty⁽²⁷⁾ was made for extending the deadline.

5. COMMENTS FROM FRANCE

- (79) France presented its comments on 14 December 2006. Additional information was provided on 27 April and 8 June 2007 in response to questions put by the Commission.

⁽²⁵⁾ Among the advantages for La Poste, the comments mention the absence of unemployment-insurance contributions for the civil servants, a lower gross remuneration for them compared with private-sector employees, the stability enjoyed by civil servants during periods of growth, the possibilities of early retirement or re-assignment for them during periods of recession, the more favourable retirement conditions for them and the exclusive rights enjoyed by La Poste.

⁽²⁶⁾ According to the judgment in *Deggendorf* (Joined Cases T-244/93 and T-486/93 *Textilwerke Deggendorf* [1995] ECR II-2265), this last point would mean that no new aid could be authorised until such time as La Poste had repaid the unlawful aid received previously.

⁽²⁷⁾ OJ L 83, 27.3.1999, p. 1. Regulation as last amended by Regulation (EC) No 1791/2006 (OJ L 363, 20.12.2006, p. 1).

- (80) France claims to have demonstrated that the planned reform does not contain any State aid element since the current method of financing the pensions of civil servants working for La Poste, which is governed by the 1990 Law, would impose on La Poste an exorbitant financial cost exceeding that under the ordinary arrangements that would place the undertaking at a very marked disadvantage. The planned reform would simply remove the competitive disadvantage resulting from those arrangements by aligning the conditions under which La Poste finances the retirement pension costs of civil servants on those applicable to private companies in respect of their employees in sectors where La Poste operates. Abolition of such an abnormal financial cost imposed by the State on La Poste would not confer any advantage on La Poste vis-à-vis its competitors.
- (81) The retirement costs that La Poste has to pay under the 1990 Law would not be part of its normal costs. The mere fact that a law imposed a particular scheme on an undertaking could not in itself render that scheme normal. This is because assessment of the 'normal' nature of a cost within the meaning of the Community State aid rules is totally separate from the nature of its legal basis. Recalling the arguments set out in the notification, France takes the view that the exceptional obligations under the ordinary arrangements imposed by the 1990 Law do not fall into the category of obligations that would form part of the 'normal costs' of an undertaking in accordance with point 63 of the Community guidelines on State aid for rescuing and restructuring firms in difficulty⁽²⁸⁾ ('the obligation a company itself bears under employment legislation or collective agreements with trade unions to provide redundancy benefits and/or early retirement pensions').
- (82) France challenges the very restrictive interpretation placed by the Commission on the scope of the *Combust* ruling. According to the settled case law of the Court of Justice of the European Communities and of the Court of First Instance, the concept of State aid would apply only to state intervention that, in various forms, reduces the costs normally borne by an undertaking's budget and is, therefore, likely to distort the interplay of competition by conferring an advantage on the undertaking concerned. According to France, it is this principle that underlies the Commission's decision-making practice and the Community case law according to which the removal of a structural disadvantage imposed by the State does not constitute an advantage that could be classed as aid since it is designed to relieve the undertaking of an abnormal charge, thereby restoring a level playing field. This principle, it is claimed, stems directly from the concept of State aid as clarified by the Court of Justice. It has been recognised and applied not only in *Combust* but also in a number of other cases referred to in the notification, including *Sabena/Swissair* and *Enirisorse*⁽²⁹⁾.
- (83) The Commission's objections regarding the different circumstances of the *Combust* ruling should be disregarded. For one thing, the fact that, with *Combust*, the measure in question took the form of compensation paid by the State to the civil servants in return for a change in status would not mean that the abolition of an abnormal charge borne by La Poste in financing their retirement pensions must necessarily be accompanied by a change in their status or by the payment of an allowance to them. In line with the approach taken by the Court of First Instance, it would be necessary to know (i) if *Combust* suffered from a structural disadvantage vis-à-vis its competitors (resulting from the 'privileged and costly status of civil servants' and (ii) if the intervention by the State relieved *Combust* of this competitive disadvantage (by way of a change in personnel status, together with payment by the State of an allowance). France also takes the view that civil servants have, in fact, been gradually replaced by private-law employees at La Poste since 1990, subject to the limitations imposed by the 1990 Law, with private-law employees being recruited to take over from retiring civil servants and with the recruitment of civil servants being cut back gradually. This is, therefore, also the situation in the case under scrutiny. Moreover, the 1990 Law was amended in May 2005 in order to remove the restrictions on the recruitment of private-law employees. It now lays down a general principle that private-law employees are to be recruited, stating that 'La Poste may, under collective agreements, recruit employees on a contract basis within the framework of the guidelines laid down by the planning contract.'

⁽²⁸⁾ OJ C 244, 1.10.2004, p. 2.

⁽²⁹⁾ Case C-237/04 *Enirisorse v Sotacarbo* [2006] ECR I-2843, paragraphs 46-51.

- (84) France points out that La Poste did not in the past, and in particular at the time it was set up in 1990-91, benefit from any compensatory measure which, when it was granted, would have been aimed at offsetting the effects of the abnormal structural charge borne by it in connection with the financing of the retirement pensions of the civil servants working for La Poste.
- (85) The 1998 stabilisation mechanism would relieve La Poste of only some of the abnormal costs incurred by it. It aims to stabilise the gross amounts paid by La Poste to the State on behalf of civil servants but it has no impact on the reduction in the number of those still working and contributing.
- (86) Nor would the mechanism deal with the exorbitant nature of the charge borne by La Poste under the 1990 Law since its contribution is still part of a 'defined-benefit' scheme and is not in full discharge of its liabilities. The mechanism has, therefore, not altered the principle of recording La Poste's retirement pension liabilities as an off-balance-sheet item, the calculation method applied or the obligation to create a provision for these liabilities on the changeover to the IFRS standards if the mechanism is retained.
- (87) Lastly, France makes the point that, in addition to the universal postal service it provides, La Poste incurs additional net costs associated with the services of general economic interest (SGEIs) that it performs with regard to the transport and delivery of newspapers, periodicals and the like and with regard to regional planning. The undercompensation for these two tasks amounted to some [...] per year during the period 2000-2005.
- (88) When it comes to quantifying the additional costs imposed by the exceptional arrangements applicable to it in the period 1998-2005, La Poste has carried out a more detailed retropolation of the CFR over the period in question ⁽³⁰⁾:

	1998	1999	2000	2001	2002	2003	2004	2005
Employer's contribution rate, before stabilisation	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Employer's contribution rate, after stabilisation	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Simulated competitively fair rate — TEC (by retropolation)	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]

- (89) Consequently, stabilisation in constant euros of the repayment to the State of the costs of civil servants' retirement pensions would have offset only in part any structural disadvantage and has not *a fortiori* conferred any advantage whatsoever on La Poste vis-à-vis its competitors. It would not constitute aid.
- (90) As regards the actual existence of a level playing field, France challenges the three misgivings raised in the decision to initiate the procedure.
- (91) Firstly, the exclusion of the unemployment risk from the calculation of the TEC would be justified by the fact that this is a risk that does not affect civil servants on account of their status. In addition, it would be paradoxical to require La Poste to pay unemployment contributions when it does not enjoy

⁽³⁰⁾ These estimates present methodological limitations due to the nature of the exercise.

the flexibility of personnel management normally available in return for such contributions. In response to a question put by the Commission, France notes more particularly that there is no possibility for civil servants working for La Poste to 'return' as of right to the civil service. Such transfers would require three conditions to be met: a request from the person concerned (principle of voluntary transfer), the availability of posts within the host administration and the existence of posts requiring equivalent qualifications. Accordingly, France takes the view that the potential effect of the mobility scheme is not very significant in view of the rigidities linked to the employment of civil servants.

- (92) France also stresses that the employment of civil servants imposes an extra cost on La Poste as compared with the employment of private-law employees⁽³¹⁾, irrespective of the level concerned and after adjustment of the seniority steps. Despite exclusion of the unemployment risk and leaving aside the significant additional costs inherent in the rigid status of civil servants, La Poste would continue therefore, after the reform and despite the contribution of a level playing field, to incur higher aggregate wage costs than those of its competitors for as long as civil servants worked for it.
- (93) Turning to the TEC, Franc considers that it has been careful in defining the term. It emphasises that self-insurance by La Poste in respect of the cash benefits paid for absence from work as a result of sickness, maternity, paternity and adoption is more costly than the contributions paid by companies under the ordinary social security arrangements. But this additional cost was not taken into account in calculating the TEC.
- (94) However, in response to a request from the Commission, France calculated a TEC that took all the risks into account, including those that are not common and those covered by a separate self-insurance scheme of La Poste⁽³²⁾. In 2006 the impact on the TEC of a hypothetical inclusion of unemployment and AGS contributions, the exceptional solidarity contribution and the cash benefits for absences from work as a result of sickness, maternity, paternity and adoption would be as follows: the adjusted overall TEC would be [...] % instead of the 37,2 % notified. Taking the different sectors, the adjusted TEC would be [...] % in the postal sector (instead of 36,9 %) and [...] % in the banking sector (instead of 39,9 %).

	1998	1999	2000	2001	2002	2003	2004	2005	2006
Overall TEC La Poste	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
TEC postal activities	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
TEC banking activities	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Hypothetical overall TEC for La Poste including non-common risks, unemployment and cash benefits for work absences as a result of sickness, maternity, paternity or adoption	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Hypothetical TEC for postal activities including non-common risks, unemployment and cash benefits for work absences as a result of sickness, maternity, paternity or adoption	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Hypothetical TEC for banking activities including non-common risk, unemployment and cash benefits for work absences as a result of sickness, maternity, paternity or adoption	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]

⁽³¹⁾ Notably as a result of higher salaries.

⁽³²⁾ The figures for the period 1998-2004 have been calculated by retropolation on the basis of the 2005 figures. The wage and salary bills for civil servants, including gross index-related salaries, are those recorded for the year for which the TEC is calculated. The breakdown by activity as between executive and non-executive staff has been calculated in proportion to the wage and salary bill for civil servants and the index-related salaries. The contributions are those applicable on 1 January of the year for which the TEC is calculated. The Commission considers the methodology applied to be both consistent and prudent.

- (95) France has also calculated the net present values (NPVs) of La Poste's 'employer's' contributions in the following scenarios:

(in EURbn)	1990 Law	Public establishments ⁽¹⁾	Notified TEC	Adjusted TEC ⁽²⁾
NPV	[...]	[...]	[...]	[...]

⁽¹⁾ France has calculated the NPV that would result from the rates of contribution for public establishments under the pension scheme applicable to state civil servants.

⁽²⁾ Including unemployment and AGS contributions, the exceptional solidarity contribution and the cost of self-insured benefits.

- (96) According to France, adjusting the TEC would result in an increase of EUR 2 billion in the NPV payable by La Poste. France notes that this amount corresponds to the exceptional flat-rate contribution paid by La Poste on 29 December 2006.
- (97) France concludes that the notified reform does not contain any State aid since La Poste will not benefit from any advantage vis-à-vis its competitors.
- (98) Even so, in response to observations and questions by the Commission, France has stated its willingness to commit itself to the following as part of an overall agreement on the current reform:
- (i) the TEC will comprise all the contributions including the AGS and unemployment contributions, the exceptional solidarity contribution and the costs of the benefits self-insured by La Poste;
 - (ii) the actual payments by La Poste provided for by the Law and its implementing decree will be as indicated in the notified reform for as long as the capitalised sum of the differences between the annual contributions resulting from application of the TEC (with account being taken of the non-common risks) and the contribution notified (TEC notified and surcharges 2006-2009) and effectively paid remains below EUR 2 billion (amount of the exceptional flat-rate contribution). If this capitalised sum exceeds EUR 2 billion in capitalised value terms, the contribution by La Poste will be increased at the appropriate moment to the level of the contribution resulting from application of the TEC that takes account of the non-common risks.
- (99) As for demarcation of the total wage and salary bill for civil servants as between the 'financial services' sector and the 'mail/parcels' sector, France points out that it is based on two objective criteria:
- (i) the nature of the skills required to exercise the function in question, depending on whether or not the civil servants possess specific banking skills;
 - (ii) the organising body within La Poste, depending on whether the number, geographical location, training and career development of the civil servants are defined by La Poste or by La Banque Postale.
- (100) Despite some disagreement on the principles but always with a view to an overall agreement on the present reform, France has stated its willingness when calculating the annual TEC to allocate general-purpose staff re-invoiced to La Banque Postale to the banking sector on the basis of the figures taken from the analytical accounts of La Poste.
- (101) In order to answer the Commission's questions, France has also explored an 'intrinsic' approach centring on an analysis of the cover provided by the undertaking for its retirement pension liabilities. It emphasises first of all that, in its view, this approach is particularly inappropriate in the case of La Poste, which (i) has been assigned civil servants whose status has remained unchanged and is still determined by the State and whose retirement scheme is that applicable to all the civilian and military personnel of the State, and (ii) no longer recruits civil servants.
- (102) France then examined whether the contribution paid by La Poste to the State in respect of the financing of the retirement pensions of the civil servants assigned to it corresponds to conditions that would be acceptable to a private-sector operator. For this, the remuneration received by the State would have to be at least equal to the net present value of the liabilities of La Poste and would thus need to ensure full financing of these liabilities on a funded basis. In applying these principles, France has ascertained that, in the past, the payments made by La Poste have covered the normal actuarial costs ⁽³³⁾ and that the NPV of the future payments by

⁽³³⁾ The normal annual actuarial cost corresponds to the rights acquired in the year under consideration in return for the activity performed during the financial year.

La Poste to the State is equal to the NPV of the normal annual actuarial costs. It concludes from this analysis that the rate of the 'employer's' contribution would be [...] %, i.e. much lower than the TEC notified. If this rate were applied, La Poste would have to pay [...] more than the liability imputable to it, i.e. the liability corresponding to the years of activity completed by civil servants within the undertaking since it was set up in 1990.

6. ASSESSMENT OF THE MEASURES

(103) If the Commission were to come to the conclusion that the reform did contain aid, France would subscribe in principle to the reasoning set out by the Commission in the decision to initiate the procedure in relation to the compatibility of the aid, especially as the precise purpose of the notified reform is to place La Poste in a situation comparable to that of its competitors. It stresses that the decision to initiate the procedure recalls that aid is compatible among other things when it relieves an undertaking of a cost predating the liberalisation phase that would significantly affect its competitiveness in an environment that was undergoing liberalisation.

(104) As regards the planned affiliation of the financing arrangements for retirement pensions to the ordinary social security arrangements, France emphasises that this does not affect the analysis of the notified reform as far as State aid is concerned. As for the relations between La Poste and the State, the introduction of a contribution in full discharge of liabilities payable by La Poste on the basis of a TEC is indeed sufficient to guarantee the absence of any State aid without there being any need to examine the arrangements for financing civil servant pensions that will be applied after the reform. In this connection, the planned affiliation would in future involve only two parties, the State and the *Caisse nationale d'assurance vieillesse*, since La Poste would, following the notified reform, be relieved of any responsibility in this respect. As the two parties cannot be classed as undertakings within the meaning of the Treaty, no State aid whatsoever can be involved.

(105) France presented its comments on the observations made by interested parties on 27 February 2007. It takes the view that the observations in question are not such as to call into question the analysis showing that the planned measures, as described in the notification and in the numerous intervening exchanges with the Commission, do not contain any State aid element. It is thus of the opinion that the third parties have been unable to come up with any pertinent arguments and have simply restated the doubts which were expressed in the decision to initiate the procedure and which France claims to have demonstrated were unfounded.

(106) The measures examined by the Commission for the purposes of this decision are the 1998 cap and the notified reform of the pension arrangements of civil servants working for La Poste under Article 150 of the Amending Finance Law 2006.

6.1. Classification as State aid

(107) According to Article 87(1) of the Treaty, a measure constitutes State aid if the following four cumulative decisions are met:

- (i) the measure must confer an advantage on the beneficiary;
- (ii) the measure must distort or threaten to distort competition by favouring certain undertakings;
- (iii) the measure must be taken by the State or must involve state resources;
- (iv) the measure must be capable of affecting trade between Member States.

6.1.1. State resources

(108) Article 87(1) of the Treaty is concerned with aid granted by a Member State or through state resources. In other words, the measures in question must appear as the result of behaviour attributable to the State or must involve state resources.

(109) On the one hand, the 1998 cap was introduced under a contract between the French State and La Poste that is described by France as being '*special arrangements for applying the provisions of the 1990 Law*'. The 2006 reform has a law as its basis. The measures in question can, therefore, be attributed to France.

(110) On the other hand, the measures examined are liable to result in a waiver of financial resources by the State since La Poste no longer guarantees the financial equilibrium of the arrangements for the civil servants working for it. It is settled case law that the waiver by the public authorities of certain tax or other revenues constitutes a state resource⁽³⁴⁾. Accordingly, the measures in question involve state resources.

⁽³⁴⁾ Case T-67/94 *Ladbroke v Commission* [1998] ECR II-1, paragraph 109.

6.1.2. *Effect on trade*

- (111) The Commission takes the view that the markets on which the La Poste group operates have been largely opened up to intra-Community trade as a result, among other things, of Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty ⁽³⁵⁾ (free movement of capital), Second Council Directive 89/646/EEC of 15 December 1989 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions and amending Directive 77/780/EEC ⁽³⁶⁾ (freedom of establishment) and Directive 97/67/EC (Postal Directive). The La Poste Group Financial Report 2005 states that:
- (i) 64,5 % of turnover was generated on competitive markets;
- (ii) 15,2 % of turnover was generated on international markets (outside France), compared with 14,1 % in 2004.
- (112) The financial report referred to also underscores the group's capacity to expand on markets that have been opened up in France and Europe.
- (113) Similarly, in his reply to the Court of Auditors' report on La Poste in 2003 ⁽³⁷⁾, the Chairman of La Poste explained that 'the group will press ahead with its internationalisation in order to take account of the opening up of markets and the internationalisation of its largest customers. This is because companies in the mail, parcels and express mail sectors are resorting increasingly to European calls for tenders. The group must be in a position to respond.'
- (114) In this context, it is sufficient to point out that markets on which La Poste operates have a cross-frontier dimension and that La Poste is competing with companies established in other Member States and with French companies active on these markets at international level.

⁽³⁵⁾ OJ L 178, 8.7.1988, p. 5.

⁽³⁶⁾ OJ L 386, 30.12.1989, p. 1. Directive repealed by European Parliament and Council Directive 2000/12/EC (OJ L 126, 26.5.2000, p. 1). Directive 2000/12/EC has itself been replaced by European Parliament and Council Directive 2006/48/EC of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions (recast) (OJ L 177, 30.6.2006, p. 1).

⁽³⁷⁾ *Les comptes et la gestion de La Poste (1991-2002)*, October 2003.

- (115) The measures in question make life more difficult for Community operators wishing to expand in France.
- (116) Since the measures in question strengthen the position of La Poste vis-à-vis other competing operators in the Community, the Commission takes the view that they affect trade between Member States and are liable to distort competition between operators.
- (117) The fact that certain activities of La Poste are covered by a statutory monopoly does not alter this conclusion. Given the gradual liberalisation under way since 1998 and on the eve of full liberalisation of postal services, the risk of trade being affected is foreseeable ⁽³⁸⁾, even for activities currently covered by a monopoly, especially as such activities, together with competitive activities (e.g. express mail), use common industrial processes in the production system at La Poste. Moreover, the monopolistic activities may also compete — indirectly — with competitive non-postal activities such as electronic messaging ('e-substitution') ⁽³⁹⁾ or fax.

6.1.3. *Existence of a selective advantage for La Poste*

- (118) In order to ascertain whether the measures under scrutiny contain elements of state aid, it needs to be determined whether they confer an economic advantage on La Poste in that they allow it to avoid costs that would normally have had to be borne by its own financial resources and have thus prevented market forces from producing their normal effect ⁽⁴⁰⁾.
- (119) Aid consists in the mitigation of charges normally included in the budget of an undertaking, taking account of the nature or general scheme of the system of charges in question. Conversely, it could be possible to define a concept of 'special charge' which would consist in an additional charge over and above those normal charges ⁽⁴¹⁾. The withdrawal of such a special charge by way of a legislative provision would not grant any advantage to the beneficiary and would not, therefore, constitute State aid.

⁽³⁸⁾ The La Poste Group Financial Report 2005 thus refers to 'the prospect of a total opening up to competition in 2009' as one element in the development plan for each sector.

⁽³⁹⁾ 'The EU postal sector is currently undergoing significant changes including gradual market opening, the rapid growth and falling costs of substitutive electronic media ...' (Commission staff working document, Accompanying document to the proposal for a Directive of the European Parliament and the Council amending Directive 97/67/EC concerning the full accomplishment of the internal market of Community postal services — Executive Summary of the Impact Assessment (SEC(2006) 1292 of 18 October 2006).

⁽⁴⁰⁾ Case C-301/87 *France v Commission* [1990] ECR I-307, paragraph 41.

⁽⁴¹⁾ Case 390/98 *H.J. Banks & Co. Ltd v The Coal Authority and Secretary of State for Trade and Industry* [2001] ECR I-6117.

(120) Like the Court's case law regarding selectivity analysis⁽⁴²⁾, which involves a comparison with a reference framework in order to determine whether differential treatment of certain undertakings and products is in conformity with the 'nature or general scheme of the system', the decision to be taken in what is, from a structural viewpoint, a normal market situation as to whether a charge is 'normal' or 'special' has to be based on a reference framework or comparator with a view to identifying undertakings which would be in a legal and factual situation that is comparable in the light of the objective pursued by the measures in question⁽⁴³⁾.

(121) As a preliminary observation, it should be pointed out that the reform does not envisage any equalisation of the retirement rights of the civil servants concerned with those of the employees of La Poste's main competitors. Similarly, the staff concerned are, by definition, civil servants, who retain their special status, whereas the employees of La Poste's main competitors are covered by private-law contracts. And so the objective pursued by the measures under scrutiny does not, strictly speaking, concern the system of charges set up by the different retirement schemes, whether they concern private-law employees or civil servants. Instead, the objective is wider-ranging, namely to create a level playing field between La Poste and its competitors, taking into account among other things the fact that some of La Poste's employees are civil servants that have been assigned to it.

(122) In theory, there could be several reference frameworks: the situation of La Poste's competitors, the situation of other public undertakings, the pension scheme applicable to state civil servants, or France Télécom (see Section 6.1.3.1). If no exogenous comparator of this kind is appropriate, the reference framework for the existence of the advantage would then be the situation of La Poste itself prior to the granting of the measures (Section 6.1.3.2).

(123) Lastly, in response to the doubts expressed in the decision to initiate this procedure, the Commission will also examine whether or not charges incurred by La Poste that have been mitigated correspond overall to an 'abnormal' charge or to a 'structural disadvantage' within the meaning of the case law of the Court of First Instance (Section 6.1.3.3).

⁽⁴²⁾ Case C-143/99 *Adria-Wien Pipeline GmbH and Wietersdorfer & Peggauer Zementwerke* [2001] ECR I-8365, paragraph 41.

⁽⁴³⁾ This is also a response to an observation by [...] to the effect that, if the charge relating to the employment of civil servants is to be assessed as an 'abnormal' charge, all the advantages and disadvantages associated with the employment of those civil servants need to be taken into account. The Commission would also make the point here that, in practice, this would be impossible.

6.1.3.1. Absence of an exogenous comparator

(124) It would be very difficult for the Commission to identify operators who would be in a legal and factual situation comparable to that of La Poste in respect of the establishment of a level playing field, notably as regards the retirement scheme.

(125) Turning first to La Poste's competitors, these are private-law companies operating on competitive markets, whereas La Poste has a status similar to that of an industrial and commercial public establishment (EPIC)⁽⁴⁴⁾ with a statutory monopoly⁽⁴⁵⁾. The fact too that La Poste's competitors have employees under private-law contracts while the comparison deals specifically with civil servants working for La Poste means that they cannot be regarded in the context of an analysis of the existence or otherwise of an advantage within the meaning of Article 87(1) of the Treaty as being in a comparable legal and factual situation with regard to the objective of the measures. It should be pointed out that, as indicated in paragraphs 25 et seq., the retirement arrangements for the civil servants flow from a scheme that is legally distinct and quite separate from the scheme for the private-law employees. In any event, this means that, with regard to the wider objective of creating a level playing field between them, La Poste and its competitors must clearly be regarded as being in different factual and legal situations.

(126) Accordingly, La Poste's competitors could not be used as a comparator in the analysis which the Commission would have to carry out in order to determine whether or not an advantage within the meaning of Article 87(1) of the Treaty existed.

(127) That said, the Commission would point out that such a comparator will clearly be appropriate for examining the compatibility of any aid measures under review in the light of Article 87(3)(c) of the Treaty when the distortion of competition on the relevant markets is assessed in greater detail.

⁽⁴⁴⁾ In France a distinction in principle is made within public establishments between administrative public establishments (EPAs), which perform the traditional tasks of the administration, and industrial and commercial public establishments (EPICs), which engage in activities of an economic nature. A number of public establishments have not been classified by the law as either EPAs or EPICs. Such is the case with La Poste. However, the Court of Cassation, in its ruling of 18 January 2001 (second civil chamber), accepted the principle whereby La Poste is treated as an EPIC. See Commission recommendation of 4 October 2006 proposing the adoption of appropriate measures regarding the State's unlimited guarantee in favour of La Poste (Case E 15/2005).

⁽⁴⁵⁾ The tariffs applicable are fixed according to principles laid down by Directive 97/67/EC. In particular, Article 12 of the Directive stipulates that prices must be geared to costs and that Member States may decide that a uniform tariff should be applied throughout their national territory.

- (128) The Commission has attempted to identify other comparators.
- (129) One theoretical comparator would have been the pension scheme for civil servants set up under the Code for Civilian and Military Retirement Pensions. However, this scheme could not as such apply to factual circumstances similar to those encountered by La Poste. For example, state civil servants do not, as a rule, work in market sectors such as those where La Poste operates.
- (130) Among the EPICs, to which La Poste is similar by virtue of its status, the Commission has been unable to identify economic operators forming a homogeneous group that could act as comparator. Only a very few EPICs, including the *Office National des Forêts* and the *Monnaie de Paris*, have features in common with La Poste. However, these disparate features would not suffice to constitute a coherent comparator.
- (131) Consequently, the Commission takes the view that neither public establishments nor the pension arrangements for state civil servants would constitute relevant comparators in this case.
- (132) In addition, the Commission has looked into the possibility of comparing La Poste and France Télécom. The 1990 Law converted the former *Direction Générale des Télécommunications* into two legal persons governed by public law: La Poste and France Télécom. Although it employs not only individuals under private-law contracts but also civil servants, France Télécom became a limited listed company in 1996. It would no longer be in a comparable legal and factual situation in the light of the objective of the measures under review. What is more, [...] the compatibility of the rules applicable to France Télécom with regard to social security contributions and tax payments is the subject of a complaint to the Commission, and the Commission cannot, in the present decision, prejudge its ruling in that case.
- (133) To sum up, the Commission is of the opinion that no exogenous comparator exists that would make it possible to define a 'normal' contribution for undertakings in a legal and factual situation comparable to that of La Poste in the light of the objective pursued by the measures under review.
- (134) Had the Commission been able to fund a relevant exogenous comparator for identifying the existence of 'abnormal' costs, the measures under scrutiny might not have constituted State aid if certain conditions relating in particular to calculation of the TEC had been met.
- (135) Neither the Commission Decision in *Sabena/Swissair*⁽⁴⁶⁾ nor the *Enirisorse* ruling, both of which have been referred to by France, affects the Commission's findings as to the existence of an advantage for La Poste. The *Sabena/Swissair* ruling states that a measure for a particular sector (air transport) and not a particular undertaking is a general economic policy measure. The sectoral and not individual (i.e. limited to a single undertaking) nature of the measure represents a major difference with the case of La Poste in that, among other things, it allowed the Commission to identify an exogenous comparator, namely the scheme for social security contributions applied to the other sectors of Belgian industry. Similarly, in *Enirisorse*, the Court bases its conclusion on a comparison of the measure at issue with a 'normal situation'⁽⁴⁷⁾, which the Commission was able to define but which does not exist in similar form in the present case.
- (136) In ascertaining the existence of an advantage within the meaning of Article 87(1) of the Treaty, the Commission should, therefore, examine the situation of La Poste and compare social security contributions and tax payments prior to and following the measures under review.
- 6.1.3.2. Situation of La Poste prior to and following the measures under review
- (137) The social security contributions and tax payments made prior to the measures under review are those stipulated in the 1990 Law. In the absence of an exogenous comparator, they would constitute the reference framework for determining the existence or otherwise of an advantage.
- (138) With the 1998 cap, the amount of the 'employer's' contribution in respect of the pensions of civil servants working for La Poste was reduced by an amount that France itself put at [...] over the period 1998-2006.
- (139) One of the effects of the 2006 Law has been to replace La Poste's contribution by a contribution in full discharge of any liabilities that aligns the retirement costs borne by La Poste on those of its competitors. Without this Law, the level of the 'employer's' contribution would, in the years ahead, continue to rise significantly, notably as a result of the deterioration in the ratio of those in work (contributors) to those not in work (benefit recipients) following the decision by La Poste to halt recruitment of civil servants in spite of the positive effects of the cap.
- (140) The Commission thus notes that the measures under review relieve La Poste of charges which it would have had to bear under the 1990 Law.

⁽⁴⁶⁾ Letter SG(95) D/9783 of 25 July 1995.

⁽⁴⁷⁾ See paragraph 48 of the ruling.

(141) In an analysis of the normal or abnormal nature of retirement costs for La Poste itself, the Commission takes the view that the liabilities a company itself bears under employment legislation or collective agreements with trade unions to provide redundancy benefits and/or early retirement pensions are part of the normal costs of a business which a firm has to meet from its own resources ⁽⁴⁸⁾.

(142) By extension, the Commission concludes that the retirement costs borne by La Poste under the 1990 Law are normal costs ⁽⁴⁹⁾. And so, since the measures under review would relieve La Poste of costs that would normally have had to be financed from its own financial resources, these measures confer on the operator an advantage within the meaning of Article 87(1) of the Treaty.

(143) The advantage in question is selective since it concerns only La Poste. In the absence of any exogenous reference framework, this restriction is not justified by the nature and general scheme of the system under review.

6.1.3.3. Existence of an abnormal charge/ initiation of the procedure

(144) The decision to initiate the procedure discusses in detail the *Combuis* ruling, in which the Court of First Instance seems to regard as 'abnormal' charges resulting from the exceptional status of the personnel of an undertaking which, in the wake of a reform, finds itself in a situation governed by ordinary law and thus identical to that of its competitors as regards personnel management. The Court of First Instance states 'The measure in question had been introduced to replace the privileged and costly status of the officials employed by *Combuis* with the status of employees on a contract basis comparable to that of employees of other bus transport undertakings competing with *Combuis*. The intention was thus to free *Combuis* from a structural disadvantage it had in relation to its private-sector competitors. Article 87(1) EC is aimed merely at prohibiting advantages for certain undertakings and the concept of aid covers only measures which lighten the burdens normally assumed in an undertaking's budget and which are to be regarded as an economic advantage which the recipient undertaking would not have obtained under normal market conditions. [...] Moreover, instead of paying the DKK 100 million directly to the officials employed by *Combuis*, the Danish Government could have obtained the same

result by reassigning those officials, without paying any particular bonus, which would have enabled *Combuis* to employ immediately employees on a contract basis falling under private law.' ⁽⁵⁰⁾.

(145) In general, it must first be recalled that the *Combuis* ruling has not been confirmed by the Court of Justice. Certain points in its case law contradict the assumption that compensation for a structural disadvantage would rule out any classification as aid. For instance, it has consistently ruled that the existence of aid was to be assessed in relation to the effects and not the causes or objectives of state intervention ⁽⁵¹⁾. It has also maintained that the concept of aid covers advantages granted by the public authorities that, in various forms, mitigate the charges normally included in the budget of an undertaking ⁽⁵²⁾. It has also clearly indicated that the costs linked to employee pay naturally place a burden on the budgets of undertakings, irrespective of whether or not those costs stem from legal obligations or collective agreements ⁽⁵³⁾. In this connection, it has ruled that state measures aimed at compensating for additional costs cannot exclude them from being categorised as aid ⁽⁵⁴⁾.

(146) However, France emphatically calls for application of the principle laid down by the Court of First Instance in *Combuis*, stating that the notified reform simply relieves La Poste of an 'abnormal' charge. The Commission must point out that material factors distinguish the *Combuis* case from the present case, including the following:

- (i) The compensation is paid direct to the civil servants employed by *Combuis* whereas the measures under scrutiny in this decision concern the 'employer's' contributions made by La Poste.
- (ii) The Commission takes the view that, in practice, France would not be able to re-integrate the 180 000 civil servants working for La Poste into the administration. France comments that civil servants working at La Poste have no fundamental or automatic right to 'return' to the administration. They belong to the category defined by their special

⁽⁴⁸⁾ See paragraph 63 of the Community guidelines on State aid for rescuing and restructuring firms in difficulty.

⁽⁴⁹⁾ Such a conclusion would not perhaps have been drawn if an exogenous comparator could have been identified. However, this has not been possible in connection with the examination of any selective advantage within the meaning of Article 87(1) of the Treaty.

⁽⁵⁰⁾ See *Combuis*, referred to above, paragraph 57.

⁽⁵¹⁾ Case 173/73, *Italy v Commission* [1974] ECR 709, paragraph 13; Case C-310/85 *Deuflil v Commission* [1987] ECR 901, paragraph 8; Case C-241/94 *France v Commission* [1996] ECR I-4551, paragraph 20.

⁽⁵²⁾ Case C-387/92 *Banco Exterior* [1994] ECR I-877, paragraph 13; Case C-241/94, referred to above, paragraph 34.

⁽⁵³⁾ Case C-5/01 *Belgique v Commission* [2002] ECR I-1191, point 39.

⁽⁵⁴⁾ Case 30/59 *Gezamenlijke Steenkolenmijnen in Limburg v Haute Autorité* [1961] ECR 3, points 29 and 30; Case C-173/73, referred to above, points 12 and 13; Case C-241/94, referred to above, points 29 and 35; Case C-251/97 *France v Commission* [1999] ECR I-6639, points 40, 46 and 47.

status. They are not, therefore, eligible *a priori* to work outside La Poste and, at the same time, there is no way of compelling them to do so. What is more, re-integrating 180 000 civil servants poses problems of professional qualifications. One obstacle to any re-integration that is emphasised by France has to do with the existence of available posts requiring equivalent qualifications. This is a problem specific to La Poste. The qualification structure of civil servants working for La Poste differs significantly from that of civil servants in public administration. The majority of civil servants working for La Poste occupy low-skilled non-executive posts, whereas the needs of state, regional and local administrations correspond primarily to executive posts requiring higher-level qualifications.

- (iii) The relevant state measure in the *Combus* case was designed to replace the privileged and costly status of civil servants working for *Combus* by contract agent status comparable to that of employees of other bus transport companies competing with *Combus*. By contrast, the status and rights of civil servants working for La Poste remain unchanged as a result of the measures under review⁽⁵⁵⁾. That status and those rights are different from those of the employees under private law working for companies competing with La Poste.

Incidentally, as regards the allegedly 'privileged and costly' status of civil servants working for La Poste compared with the employment conditions of the employees of La Poste's competitors, the Commission has carried out a comparison based on the balance-sheet figures published by two banks⁽⁵⁶⁾ between those banks' aggregate wage costs and the aggregate wage costs of civil servants working for La Poste. The findings show that average aggregate wage costs at the banks in question are most likely higher than (or at least equal to) the average aggregate wage costs of civil servants working for La Poste. Questioned on this point, France acknowledges that it does not have access to reliable and relevant information on the average costs of an employee working on a contract basis for La Poste's competitors⁽⁵⁷⁾. It then carries out an

approximation in an attempt to demonstrate that, given equal seniority, the average cost of civil servants working for La Poste exceeds the average cost of 'similar' employees working on the basis of contracts of indeterminate duration (CDIs), whether in the 'mail/parcels' sector or in the banking sector. The approximation is based on the assumption made by France that the average cost of an employee working under private law for La Poste is comparable to that of an employee of a competitor in the same sector. The Commission takes the view that this assumption is unacceptable since it disregards fundamental elements of the definition of wages, and in particular the effects associated with the employer's image. With a positive image, and for example, with the ability to offer long-term career prospects, La Poste would thus be able to pay lower wages than competitors that did not have the same image. This is why, without ruling the possibility out, the Commission considers that France has not convincingly demonstrated that the status of civil servants working for La Poste was both 'privileged and costly' compared with the employment conditions of employees of La Poste's competitors.

- (iv) The competitive background in which *Combus* was operating differed from that for La Poste. *Combus* had to conduct its transport business on a commercial basis and operate on a market under conditions of competition comparable to those for private bus companies. After a tendering procedure, public transport companies divest their bus transport operations to private and public undertakings. Under the tendering rules, the contracts are awarded to the 'economically most advantageous bid', irrespective of the private or public nature of the tenderer. La Poste has a wide-ranging monopoly where economic constraints operate differently.

- (147) The Commission considers that the factual differences between the *Combus* case and the case at issue are sufficient to justify a different reasoning in each case.

- (148) Lastly, the 'intrinsic' approach proposed by France is not deemed appropriate by the Commission, in particular because of the characteristics of the (closed) population of civil servants concerned and the recent establishment of the undertaking. This view is, in any case, shared by France. Moreover, the calculations made by France compare the real costs incurred by La Poste (including therefore the 1998 cap) with those it would have incurred if, when set up on 1 January 1991, it had brought in a new retirement scheme that provided the same benefits but was funded. According to the Commission, this comparison is far too hypothetical to permit any relevant conclusions to be drawn as to the nature of the aid measures under review.

⁽⁵⁵⁾ This is an essential difference from the Commission Decision of 28 March 2003 in Case N 483/2000 — *Netherlands, Sale Ingenieur-bureau Zuid-Holland* (OJ C 5, 8.1.2002, p. 2), referred to in the decision to initiate the procedure and in which the financial compensation paid by the Dutch authorities was paid to the employees who lost their status as provincial civil servants and their entitlement to the associated employment conditions.

⁽⁵⁶⁾ The two banks concerned are *Crédit agricole* and *BNP-Paribas*.

⁽⁵⁷⁾ France also puts forward general arguments regarding the different nature of the activities of *La Banque Postale* as compared with the large all-purpose banks (which also conduct investment and financing activities and have a greater presence at the upper end of the retail banking sector). However, these factors are not quantified by France and, as a result, no unequivocal conclusion can be drawn from the arguments put forward.

6.1.4. *Distorting the conditions of competition*

- (149) The measures under review confer a selective economic advantage since only one undertaking, La Poste⁽⁵⁸⁾, is involved. In principle, such measures threaten to distort the conditions of competition⁽⁵⁹⁾.

6.1.5. *Conclusion*

- (150) In the light of the relevant case law, including *Combust*, it follows that the measures in question constitute State aid within the meaning of Article 87(1) of the Treaty.

6.2. **Unlawful nature of the aid**

- (151) The 1998 cap was imposed without giving the Commission prior notification. It is therefore unlawful.
- (152) The Commission would point out here that the cap produced effects both on liberalised markets and on activities covered by a statutory monopoly. La Poste did not, therefore, engage exclusively in monopolistic activities⁽⁶⁰⁾. The cap cannot, therefore, be regarded as existing aid.
- (153) The 2006 reform was notified to the Commission. Its implementation has been suspended insofar as La Poste is still paying the 'employer's' contribution resulting from the 1998 cap. The 2006 reform has not, therefore, been carried out.

6.3. **Compatibility of the aid measures with the common market**

General framework for examining the compatibility of the aid measures under review

- (154) The derogations provided for in Article 82(2) of the Treaty in respect of aid having a social character that is granted to individual consumers, aid to make good the damage caused by natural disasters or exceptional occurrences and aid granted to the economy of certain areas of the Federal Republic of Germany are clearly irrelevant in the case under consideration.
- (155) As regards the derogations provided for in Article 87(3) of the Treaty, the Commission notes that the aid measures in question are not designed to promote the economic development of areas where the standard of

living is abnormally low or where there is serious under-employment, that they do not constitute a project of European interest and that they are not aimed at remedying a serious disturbance in the French economy. Nor are they designed to promote culture or heritage conservation.

- (156) It should be examined whether the measures can be declared compatible by the Commission pursuant to Article 87(3)(c) of the Treaty, which states that aid to facilitate the development of certain economic activities or of certain economic areas may be declared compatible with the common market where such aid does not adversely affect trading conditions to an extent contrary to the common interest.

- (157) The Commission would also point out that France has not invoked Article 86(2) of the Treaty as justification for the compatibility of the aid granted to La Poste.

Analysis of the effects of the aid measures — intensity of the distortion of competition

- (158) In view of the nature and effects of the reform, which aligns the contributions made by La Poste on those of its competitors, the Commission considers that the assessment of the compatibility of the aid measures must be carried out with regard to the establishment of a level playing field for social security contributions and tax payments between La Poste and its competitors in the mail/parcels and financial services sectors, which make up the bulk of La Poste's activities⁽⁶¹⁾.
- (159) In order to analyse the effects of the aid and to assess the intensity of the distortion of competition, the Commission must first examine the level of contributions paid by La Poste as compared with its competitors, taking into account the commitments given by France. The Commission will then see what would have happened if La Poste had not received the aid in question. The positive effects of the aid will then be examined, together with their negative effects. It will then be possible to take overall stock of the situation.

Level of contributions paid by La Poste

- (160) The Commission has looked very closely at the mechanism for calculating the TEC.

⁽⁵⁸⁾ Two undertakings, La Poste and France Télécom, applied the retirement arrangements laid down by the 1990 Law. The arrangements applicable to France Télécom were amended in 1996-1997. As a result, only La Poste applied the arrangements set out in the 1990 Law.

⁽⁵⁹⁾ Case C-126/01 *GEMO S.A.* [2003] ECR I-13769, paragraph 33.

⁽⁶⁰⁾ See Joined Cases T-298/97, T-312/97, T-313/97, T-315/97, T-600/97 to 607/97, T-1/98, T-3/98 to T-6/98 and T-23/98 *Alzetta Mauro v Commission* [2000] ECR II-2319, paragraph 147.

⁽⁶¹⁾ Since La Poste has no discretion in the matter and given the overall comparable nature of the benefits paid under the general scheme and those under the arrangements for civil servants (in particular, Law No 2003-775 of 21 August 2003 on the reform of retirement pensions provides for the period of insurance required in the civil service in order to receive a full retirement pension to be aligned on the general scheme), the Commission considers that comparison of the benefits offered by the scheme in question is irrelevant. Moreover, such a comparison is not possible since it would take into account indirect and uncertain factors such as comparison of the advantages and disadvantages of employing civil servants as opposed to employees under private law. Be that as it may, the real issue in terms of competition is to analyse what affects the accounts of La Poste relative to its competitors, viz. the contributions payable.

(161) As a preliminary remark, it must first be pointed out that the ordinary-law arrangements for La Poste's contributions has two differentiating features:

- (i) the discharging or non-discharging effect of the contributions;
- (ii) the amount of the contributions.

(162) On the first point, in a pay-as-you-go scheme an employer governed by ordinary law pays contributions in full discharge of its liabilities. La Poste does not pay any such contributions but is required by the 1990 Law to ensure the equilibrium of its retirement scheme for civil servants. The cap imposed in 1998 on the maximum amount of the 'employer's' contribution regardless of the rate of contribution and then, in a more fundamental way, the 2006 Law have the effect of putting in place a contribution in full discharge of liabilities.

(163) The aid measures in question thus resolve the first difference between the La Poste scheme and the ordinary arrangements.

(164) On the second point, the Commission has verified that the NPV of the future financial flows under the 1990 Law is higher than the NPV for future financial flows resulting from application of the adjusted TEC ⁽⁶²⁾. Without the aid, La Poste would therefore have had to pay higher contributions than under the ordinary arrangements.

(165) The Commission would also note that the establishment of a genuinely level playing field with La Poste's competitors required two adjustments to the TEC:

- (i) Extension of the basis of calculation to all social security risks

In the notification ⁽⁶³⁾ calculation of the TEC is restricted to the common risks, thereby excluding in particular the unemployment risk and the risk of non-payment of wages in the event of a company becoming insolvent or being wound up, these being risks to which, with their status, civil servants are not,

⁽⁶²⁾ What is more, since 1998 La Poste has paid aggregate contributions higher than those that would have resulted from the adjusted TEC.

⁽⁶³⁾ See in this connection Annex 2 ('Comparison of the wage contributions for civil servants and for ordinary-law employees') and Annex 3 ('Comparison of the employer's contributions La Poste/private-law employer') in the decision to initiate the procedure.

in principle, exposed. However, the very logic of the reform planned by France is to establish a level playing field between La Poste and its competitors as regards social security contributions and tax payments, irrespective of the differing status of civil servants and employees under private law. Moreover, even if large-scale mobility seems ruled out (see paragraph 146), individual measures, with civil servants working for La Poste moving to a public administration, are not impossible, leaving La Poste with some flexibility in managing the civil servants assigned to it ⁽⁶⁴⁾, as is the case with France Télécom.

The Commission takes the view that these arguments justify inclusion of all the social security risks in the TEC. The commitments entered into by France (see paragraph 98) are a satisfactory response to the Commission's observations.

- (ii) Most accurate calculation possible for alleviating the costs between the mail/parcels sector and the financial services sector

The notified TEC did not include the share of general-purpose staff that was re-invoiced to La Banque Postale in the financial services sector since France took the view that, unlike the civil servants assigned to the resources department, these general-purpose employees do not have specific banking training or skills and since their number, geographical location, training and career development are defined by La Poste.

However, as far as the Commission is concerned, the fact that general-purpose employees also perform financial activities (e.g. at the counter) means that the breakdown of costs between the mail/parcels sector and the financial services sector must be based on the most accurate figures available. The commitment by the French authorities (see paragraph 100) to include in the annual calculation of the TEC the share of general-purpose employees re-invoiced to La Banque Postale in the banking sector on the basis of the figures from La Poste's analytical accounts ⁽⁶⁵⁾ is therefore satisfactory.

⁽⁶⁴⁾ Even though the implementing decrees have not yet been adopted, Law No 2007-148 of 2 February 2007 on the modernisation of the civil service is designed to remove certain regulatory obstacles resulting from the statutory assignment rules and to lay down for La Poste arrangements similar to those applicable to France Télécom. France is of the opinion that the conditions laid down by the Law should ensure that any movements of civil servants working for La Poste to a public administration are 'limited in number'.

⁽⁶⁵⁾ The Commission Decision of 21 December 2005 on the measures involved in setting up and operating La Banque Postale (letter C(2005) 5412) endorsed the system for assigning La Poste's costs to La Banque Postale in the analytical accounts.

The share of the financial services sector in the TEC is thus increased from [...] % to [...] % of the wage and salary bill.

(166) Following the adjustments made by France to the calculation of the TEC, the mechanism in question is able to equalise the levels of wage-based social security contributions and tax payments between La Poste and the other undertakings in the 'mail/parcels' sector and in the banking sector covered by the ordinary social security arrangements. However, the transitional period 2006-2010 announced by France in the notification must not enable La Poste to pay a level of contribution lower than the adjusted TEC.

Scenario without the granting of aid

(167) In the absence of the reform, La Poste would have had to create provisions in its accounts after the financial year 2006 for the retirement liabilities of the civil servants working for it. This provisioning would have resulted directly the fact that the 'employer's' contributions for the retirement pensions of civil servants working for La Poste were not in full discharge of its liabilities.

(168) In the absence of the aid, La Poste's contributions would not be aligned on those paid by its competitors. Consequently, La Poste would be handicapped and would be unable to compete on its merits on the liberalised markets (e.g. in financial services or express mail).

(169) In the absence of the reform, La Poste would have had to ensure that its contributions were financed in an appropriate manner each year, and this would involve an additional annual cost of several hundreds of millions of euros as compared with the reform arrangements⁽⁶⁶⁾. Nevertheless, the Commission takes the view that these additional costs (not borne by competitors) are not such that they would have obliged La Poste to cut back its activities in the sectors open to competition both within and outside the scope of SGEIs.

(170) A substantial proportion of the costs in question is linked to SGEIs, and this should, in principle, enable La Poste to be compensated for the corresponding additional costs⁽⁶⁷⁾. Moreover, the contributions for activities

not falling within the scope of SGEIs would not have any material impact on the activities planned by La Poste. The contributions in question are fixed costs, and this means that they are not such as to affect La Poste's commercial decisions, and in particular its future investment decisions. The fixed costs are borne by La Poste, irrespective of the investment project in question.

(171) The circumstances under which the level of contributions could significantly affect La Poste's activities are either the exceptionally high amount of the contributions, which could oblige La Poste to move out of the market, or a major increase in the cost of capital.

(172) Given its situation, there does not seem to be any material risk of La Poste going into receivership⁽⁶⁸⁾.

(173) In theory, the possibility of the additional contributions payable each year by La Poste seriously affecting its balance sheet, something which could have affected the operator's terms of financing on account of a higher cost of capital, cannot be ruled out absolutely. However, this seems highly unlikely in view of the arguments set out above and the changes, if any, in market conditions would *a priori* not be significant.

Positive effects of the aid measures

(174) The liberalisation of the postal sector has been under way since 1998⁽⁶⁹⁾. The imposition of the cap and the reform of the retirement arrangements applicable to La Poste are important stages in adapting the undertaking to progressive liberalisation and with a view to the full liberalisation of the French postal market⁽⁷⁰⁾. It is also acknowledged that the liberalisation of postal markets at Community level has an important role to play in the Lisbon Strategy for Growth and Employment⁽⁷¹⁾. From a more political viewpoint but still in relation to the Community interest, the Commission considers that the liberalisation of the postal sector could be made more difficult if plans to reform retirement schemes, such as the one being examined here, were not approved.

⁽⁶⁶⁾ In 2005, for example, the difference between the amount payable under the 1990 Law and the adjusted TEC as reconstituted is [...]. For 2010 Standard & Poor's estimates the saving for La Poste at EUR 700 million.

⁽⁶⁷⁾ The State aid rules governing public service compensation prohibits over-compensation. It is also pointed out that the maintenance of reserved services appears justified on the grounds of ensuring the operation of the universal service under financially balanced conditions (see recital 16 to Directive 97/67/EC).

⁽⁶⁸⁾ See, for example, the rating given by Standard & Poor's in April 2007 to La Poste.

⁽⁶⁹⁾ In 1998 liberalisation in the mail sector was limited to letters weighing more than 350 g and costing less than five times the public tariff applicable to an item of correspondence in the first weight step of the fastest standard category (where such category exists). In 2003 the weight limit was reduced to 100 g and the price to less than three times the public tariff and then in 2006 to 50 g and the price to less than two and a half times the public tariff.

⁽⁷⁰⁾ Similarly, in the Commission Decision in Case N 405/2005, *Greece — Financial contribution to voluntary early retirement scheme of OTE* (OJ C 151, 29.6.2006, p. 2), the Commission took the view that the implementation of the scheme (VRS) was a necessary stage in the continuing privatisation of the undertaking.

⁽⁷¹⁾ See, for example, recitals 5 and 6 to the proposal for a European Parliament and Council Directive amending Directive 97/67/EC concerning the full accomplishment of the internal market of Community postal services (COM(2006) 594, 18.10.2006).

- (175) The point should be made here that the retirement arrangements applicable to La Poste under the 1990 Law have specific characteristics (including the non-discharging effect of the 'employer's' contribution of La Poste and the level of the contribution, which is higher than that paid by competitors) which, taken individually, distort competition to the detriment of La Poste. The main effect of the aid measures under review is to align La Poste's contributions on those incurred by its competitors, thereby eliminating the distortion of competition specific to La Poste.
- (176) The Commission also takes the view that the measures in question are tailored to the Community interest in question. No other instrument could have been more effective. In the sectors with an SGEI, public-service compensation could indeed have been granted but such an approach would not be sustainable over the long term because of the structural nature of the problem.
- (177) In addition, the cap and then the reform helped La Poste to act more and more as a private investor operating under normal commercial constraints. A number of measures already adopted, such as the recruitment of employees under private law (instead of civil servants), have now been implemented with this objective in mind.
- (178) As to the proportionality of the measures, the aid granted is limited to the strict minimum since all the relevant contributions are included in the calculation of the adjusted TEC.
- (179) Lastly, the measures under review, even though they do not concern special arrangements for the benefits paid to retirees, provide sustainability for a financing mechanism that past developments had rendered obsolete. The Commission considers that the measures are, therefore, to be seen in the more general framework of the reform of retirement schemes in Member States, which has the support both of the Council and of the Commission.
- (181) On the basis of a static analysis, the Commission considers that:
- (i) the distortions of competition are, by nature, very limited in the reserved sectors, where there are no direct competitors: Given the past history of La Poste and its activities, it is evident that a large proportion⁽⁷²⁾ of the 2006 off-balance-sheet liabilities relate to activities in the reserved sector;
 - (ii) on the postal markets that have already been liberalised and on the financial services market, the financial resources from which La Poste has benefited as a result of the measures under review could, in theory, deter competitors from entering those markets (exclusion): In the financial services sector, La Banque Postale has 10,7 % of the retail banking market (2005) but its activities are far from diversified. The Commission takes the view that the measures would have only a limited effect here, particularly if the special distribution right for livret A were to be abolished⁽⁷³⁾. The shares of La Poste on the already liberalised postal markets (such as express mail) may be significant to the extent that the measures in question may have had an impact on competitors. Nevertheless, since pension charges are a fixed cost, the real impact should be limited.
- (182) On the basis of a dynamic analysis, in particular for the markets that are now in the reserved sector but will normally be opened up to competition in the years ahead, the Commission takes the view that:
- (i) the measures in question could, in theory, enable La Poste to retain a dominant position. However, the Commission regards this as a low risk since the measures simply align the contributions paid by La Poste on those paid by its competitors and no abnormal financial advantage has been gained by La Poste from its monopoly⁽⁷⁴⁾;

Negative effects of the aid measures

- (180) The relevant products and markets can be classified according to whether they belong to:
- (i) the reserved postal sectors covered by a statutory monopoly (such as letters weighing less than 50 g);
 - (ii) the non-reserved postal sectors (such as express mail);
 - (iii) the non-postal sectors, including financial services, which have long since been liberalised.

⁽⁷²⁾ France is unable to provide an accurate figure because, for example, staff who acquire pension rights have careers which see them move from the reserved sector to a liberalised sector and analytical accounting is not designed to follow the activity of staff on the basis of a civil servants/employees breakdown but to keep separate accounts for reserved and non-reserved sectors.

⁽⁷³⁾ Commission Decision of 10 May 2007 on the special rights to distribute *livret A* or *livret bleu* (C(2007) 2110) gives France nine months in which to discontinue this distribution system.

⁽⁷⁴⁾ Even if the 2006 results show an improvement, La Poste's financial situation is not flourishing. During the period 1991-2005 the profit-turnover ratio averaged only 0,5 %. In the reserved sector it was 6,8 % in the period 2000-2004 although the Commission has accepted as a normal level of profitability a much higher ratio in the *Post Office Limited* case, where distribution activities overlap in part with the activities of La Poste. Moreover, no private investor would have built a network similar to the postal network, which is not financially viable and is maintained only because of the SGEI assigned to La Poste and the public-service compensation paid by the State (Standard & Poor's points out here that the network operated by La Poste makes annual losses of EUR 350 million despite compensation of EUR 130 million in the form of tax exemptions).

(ii) even if the exceptional flat-rate contribution referred to by France does, in fact, constitute an advance on the payment of the contributions linked to the adjusted TEC, the payment of EUR 2 billion in 2006, which was possible only because of a loan, is detrimental to the group's financial structure. According to Standard & Poor's, La Poste promised the State that it would restore by 2010 the financial structure that obtained in 2005, in particular by assigning to debt repayment the revenue accruing from the pension reform. This affects the financial situation of La Poste at a crucial time, on the eve of the full liberalisation of the postal sector.

Conclusions

(183) It follows from the foregoing observations that the negative effects of the aid granted to La Poste will be modest.

(184) Since, given the commitments entered into by France, the measures are limited to what is strictly necessary to establish a level playing field for social security contributions and tax payments and put an end to a distortion of competition that was a handicap for La Poste, they do not affect trading conditions to an extent contrary to the common interest. Consequently, the Commission is of the opinion that the aid measures in question are compatible with the common market and that no additional compensatory measures are needed.

6.4. Additional comment: the 'EDF' precedent

(185) By Decision 2005/145/EC in the *EDF* case, the Commission authorised State aid that relieved the undertakings in a particular sector of specific pension liabilities which exceeded those resulting from the general retirement arrangements and which had been defined during the monopoly period. It also took the view that the partial mitigation of the costs arising from the mechanism for financing the specific pension rights acquired before the date of the reform constituted State aid within the meaning of Article 87(1) of the Treaty that could be declared compatible with the common market. In its analysis of the accounts, the Commission concluded that the situation of EDF was not very different intrinsically from that of 'stranded costs' in the energy sector. The aid was, in fact, designed to facilitate the transition to a competitive energy sector. The Commission deemed it appropriate to treat the aid for EDF as compensation for stranded costs and announced that it would take this approach in its analysis of similar cases.

(186) In the *EDF* decision, the aid concerned only activities traditionally carried out in a monopoly situation. This is not so in the present case, which concerns both the reserved sector and the liberalised sector. EDF and La Poste are not, therefore, entirely similar cases. However, in an analysis along the lines of the stranded costs methodology, the decision to initiate the procedure explains: 'The Commission is unable, however, to conclude that the measures are necessary to garner fully the benefits of the liberalisation of the postal services market. Such reasoning can be deployed if the Commission is assured that La Poste is actually in a situation comparable to that of its competitors.'

(187) The Commission has now established that:

(i) La Poste no longer recruits civil servants;

(ii) the adjusted TEC places La Poste in a situation of competitive fairness vis-à-vis its competitors as regards social security contributions and tax payments;

(iii) the obligations resulting from the 1990 Law prior to the liberalisation of the postal sector would have affected La Poste's competitiveness in an environment undergoing liberalisation.

(188) Accordingly, the Commission takes the view that the aid measures in question relieve La Poste of specific pension liabilities which exceeded those resulting from the ordinary pension arrangements and which had been defined during the monopoly period.

6.5. No provisioning for retirement liabilities from 2007

(189) The Commission notes that La Poste entered the pension liabilities for civil servants as an off-balance-sheet item in the annual accounts up to 2006. If the contribution had not been recognised as being in full discharge of its liabilities, La Poste would have had to make provision for the corresponding liabilities in the balance sheet as of 2007. This is a normal unexceptional application of international accounting standards provided for by European Parliament and Council Regulation (EC) No 1606/2002 of 19 July 2002 on the application of international accounting standards⁽⁷⁵⁾. The lack of provisioning does not, therefore, constitute State aid. Nor does it involve in itself state resources over and above those provided by the measures in question.

⁽⁷⁵⁾ OJ L 243, 11.9.2002, p. 1.

7. CONCLUSIONS

(190) The cap imposed in 1998 and the reform of the pension arrangements for civil servants working for La Poste under Article 150 of the Amending Finance Law 2006 constitute State aid that is compatible with the common market, provided that:

- (i) the TEC calculated each year includes in the 'financial services' category the proportion of general-purpose staff re-invoiced to La Banque Postale on the basis of the detailed figures taken from the analytical accounts of La Poste;
- (ii) the TEC takes in all social security contributions and tax payments, including the AGS and unemployment contributions, the exceptional solidarity contribution and the cost of benefits self-insured by La Poste,

HAS ADOPTED THIS DECISION:

Article 1

The cap imposed in 1998 on the repayment by La Poste of retirement pensions paid by the State to civil servants working for La Poste and the notified reform of the pension arrangements for the said civil servants under Article 150 of the Amending Finance Law 2006 constitute State aid that is compatible with the common market provided that the conditions set out in Article 2 are met.

Article 2

1. The competitively fair rate ('TEC') calculated each year in order to determine the amount of the 'employer's' contribution in full discharge of liabilities, which is referred to in Article 150 of the Amending Finance Law 2006, must include in the 'financial services' category the proportion of general-purpose staff re-invoiced to La Banque Postale on the basis of the detailed figures taken from La Poste's analytical accounts.

2. The TEC must include all the social security contributions and tax payments, including the AGS (Wage Guarantee Insurance Association), the unemployment contributions, the exceptional solidarity contribution and the cost of benefits self-insured by La Poste.

Article 3

France shall inform the Commission, within two months of notification of this Decision, of the measures taken to comply with it.

Article 4

This Decision is addressed to the French Republic.

Done at Brussels, 10 October 2007.

For the Commission
Neelie KROES
Member of the Commission