

## COMMISSION DECISION

of 20 July 2010

## on State Aid C 27/09 (ex N 34/B/09) Budgetary grant for France Télévisions which the French Republic plans to implement in favour of France Télévisions

(notified under document C(2010) 4918)

(Only the French text is authentic)

(Text with EEA relevance)

(2011/140/EU)

THE EUROPEAN COMMISSION,

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

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

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

Whereas:

## I. PROCEDURE

- (1) By letter dated 23 January 2009, the French Republic notified the Commission of its intention to provide a budgetary grant of EUR 450 million, already committed in a finance law, in favour of France Télévisions for 2009. On 13 March 2009, the Commission requested additional information, which France provided on 25 May 2009. In this letter, the French Republic extended the object of the notification, expressing its intention to introduce a permanent, multi-annual public financing mechanism in favour of France Télévisions, part of which will be an annual grant.
- (2) In its letter of 1 September 2009, the Commission considered that the budgetary grant voted for 2009 was compatible with the internal market pursuant to Article 106(2) of the Treaty on the Functioning of the European Union (below: 'TFEU') and informed France of its decision to initiate the procedure laid down in Article 108(2) of the TFEU concerning the new public financing mechanism in favour of France Télévisions for the following years.
- (3) The French Republic presented its comments on 7 October 2009.

<sup>(1)</sup> OJ C 237, 2.10.2009, p. 9.

- (4) The Commission decision to initiate the procedure was published in the *Official Journal of the European Union* (?). The Commission invited interested parties to submit their comments on the aid measure in question.
- (5) The Commission received comments on this subject from interested parties. It communicated them to the French Republic, giving it the opportunity to comment on them, and received its comments by letter of 15 January 2010.
- (6) On 23 April, 19 May and 22 June 2010, the French Republic provided the Commission with particulars and additional information.

## II. DETAILED DESCRIPTION OF THE FINANCING MECHANISM

- (7) The multiannual financing mechanism which is the subject of this Decision comes within the context of the financing of the public service missions of France Télévisions which the Commission examined in its Decisions dated 10 December 2003 <sup>(2)</sup>, 20 April 2005 <sup>(4)</sup>, 16 July 2008 <sup>(5)</sup> and 1 September 2009 <sup>(6)</sup>. It nevertheless constitutes a separate measure from those covered by the 2003, 2005 and 2008 decisions. More specifically, the budgetary grants described in more detail below will replenish the public resources allocated to France Télévisions under the television licence fee (*contribution à l'audiovisuel public*), previously known as the *redevance*, which was the subject of the Commission Decision of 20 April 2005 and which, as existing aid, is not modified by the new provisions. These two public resources are intended to cover the cost of the public service mission of France Télévisions, reduced by the net commercial revenues remaining.

## II.1. Principal legal bases

- (8) The principal terms of the new public financing mechanism are contained in Law No 2009-258 of 5 March 2009 on audiovisual communication and the new public television service (*loi n° 2009-258 du 5 mars 2009 relative à la communication audiovisuelle et au nouveau*

<sup>(2)</sup> See footnote 1.

<sup>(3)</sup> Commission Decision 2004/838/EC (OJ L 361, 8.12.2004, p. 21).

<sup>(4)</sup> Commission Decision C(2005) 1166 final (OJ C 235, 30.9.2005).

<sup>(5)</sup> Commission Decision C(2008) 3506 final (OJ C 242, 23.9.2008).

<sup>(6)</sup> Commission Decision 2009/C 237/06 (OJ C 237, 2.10.2009, p. 9).

*service public de la télévision*). The notified aid is part of a wider reform of the structures and tasks of general economic interest of public broadcasting provided for under the Law. The Law in this way amends the legislative provisions governing the public service missions of France Télévisions and, more specifically, Law No 86-1067 of 30 September 1986 on Freedom of Communication (*loi n° 86-1067 du 30 septembre 1986 relative à la liberté de communication*). These missions are specified in further detail in the terms of reference and the agreement relating to objectives and means of France Télévisions, which were approved by legislative texts adopted in implementation of the Law on Freedom of Communication. Law No 2009-258 of 5 March 2009 also contains financial provisions amending the Tax Code, on the one hand, and recognising the principle of a budgetary grant committed in a finance law in favour of France Télévisions, on the other.

## II.2. The activities and financing of the beneficiary: France Télévisions

- (9) France Télévisions is a public limited-liability company, established under Article 44-I of Law No 86-1067 of 30 September 1986 on Freedom of Communication. This Law, as amended, establishes a single undertaking, France Télévisions, grouping together the formerly separate legal entities of different broadcasting channels. It is subject to the economic and financial supervision of the French State. Its registered capital is divided into registered shares which can be held only by the State. Its board of directors consists of the chairman and 14 members, whose term of office is 5 years, i.e. two Members of Parliament designated by the Cultural Affairs Committees of the National Assembly and the Senate respectively, five representatives of the State, five prominent persons appointed by the Conseil Supérieur de l'Audiovisuel and two staff representatives.
- (10) France Télévisions is the leading French broadcasting group. It employs about 11 000 people and comprises the channels France 2, France 3, France 4, France 5 and France Ô broadcasting in mainland France, and RFO, a company grouping together public television and radio channels broadcasting in the overseas departments and territories. The Group also includes a state-owned advertising company, although a divestment is being considered, and companies focusing on diversification activities. Some channels of France Télévisions are widely broadcasted in several Member States, and especially in Belgium and Luxembourg.
- (11) The turnover of France Télévisions in 2007, the last year before the reform of public broadcasting was announced, stood at EUR 2 927 million, 64,2 % of which came from television licence fees, 28,1 % from advertising revenue (advertising and sponsoring) and 7,7 % from other revenue. Between 2003 and 2007, the share of the various components of turnover remained relatively stable, with the revenue from advertising and sponsoring fluctuating within a range of 30 % to 28 %. The Group

as a whole achieved a slightly positive net result each year between 2003 and 2007, totalling EUR 99 million for the period.

- (12) This trend was reversed following the announcement of the public broadcasting reform in January 2008, which included in particular the future loss of revenues from advertising messages. The France Télévisions Group made a loss in 2008, posting a negative net result of EUR [50-100] (\*) million (of which EUR [50-100] million for the public service component), attributable in particular to a significant slump in advertising revenues, which an extraordinary capital injection of EUR 150 million, authorised by the Commission in its Decision of 16 July 2008, was unable to offset in full. For 2009, once the reform of public broadcasting has come into effect, the budgetary grant finally paid of EUR 415 million, authorised by the Commission in its Decision of 1 September 2009, was almost sufficient to compensate for the fall in advertising revenues and the France Télévisions Group posted a slightly positive net result (EUR [10-20] million). However, the public service component remained slightly in deficit to the amount of EUR [0-5] million, the positive result being attributable to the commercial companies of the group.
- (13) The activities and management of France Télévisions in recent years from 2004-2008 and its position as regards the reform of public broadcasting were the subject of a relatively critical report by the French Court of Auditors *France Télévisions et la nouvelle télévision publique*. The report, to which certain interested third parties refer in their comments, was adopted under consultation and made public on 14 October 2009, i.e. after the decision initiating the procedure. The report notes the existence of untapped margins for growth in the management and results of France Télévisions up to that point and contains recommendations for future improvement in the new context of the reform.

## II.3. The public service missions of France Télévisions

### II.3.1. Definition of the public service missions in the Law

- (14) Article 43-11 of Law No 86-1067 of 30 September 1986, amended, describes the public service mission of France Télévisions, establishing that the public channels 'carry out public service missions in the public interest. They shall offer the public, taken as a whole, a group of programmes and services which are characterised by their diversity and their pluralism, their requirement of quality and innovation, respect for the rights of the person and of constitutionally defined democratic principles. They shall present a diversified offer of programmes in

(\*) Square brackets [...] denote confidential data or business secrets replaced by a range.

analogue and digital modes in the areas of information, culture, knowledge, entertainment and sport. They shall favour democratic debate, exchanges between different parts of the population, as well as integration into society and citizenship. They shall implement actions in favour of social cohesion, cultural diversity and combating discrimination and shall offer programming reflecting the diversity of French society. They shall promote the French language and, where appropriate, regional languages, and highlight the diversity of the cultural and linguistic heritage of France. They shall contribute to the development and broadcasting of intellectual and artistic creation and of civic, economic, social, scientific and technical knowledge, as well as to audiovisual education and media. They shall promote the learning of foreign languages. They shall participate in education in the environment and sustainable development. Using adapted devices, they shall promote access to their broadcasted programmes by persons who are deaf and hard of hearing. They shall guarantee the integrity, independence and pluralism of information, as well as the pluralist expression of currents of thought and opinion, respecting the principle of equal treatment and the recommendations of the Conseil supérieur de l'audiovisuel (French Broadcasting Authority). The institutions of the public audiovisual communication sector, with respect to the performance of their missions, shall contribute to the external audiovisual action, the influence of the French-speaking world and the broadcasting of the French language and culture throughout the world. They shall endeavour to develop new services that may enrich or complete their programme offer, as well as the new technologies of production and broadcasting of audiovisual communication programmes and services. A report on the application of the provisions of this Article shall be filed each year in Parliament.'

### II.3.2. *Incorporation of the public service obligations in the activities of France Télévisions*

- (15) As regards the practical incorporation of these missions, Section I of Article 44 of Law No 86-1067 of 30 September 1986 provides that France Télévisions is responsible for designing and programming television programmes and audiovisual communication services corresponding to the public service missions defined in Article 43-11 and in terms of reference provided for in Article 48 of the same Law.
- (16) Decree No 2009-796 of 23 June 2009 establishes the henceforth single terms of reference of France Télévisions. The terms of reference provide a framework for the activity of the channels of France Télévisions, with binding programming commitments to broadcast, often during prime time, daily cultural programmes, music programmes and especially classical music with a variety of European or regional orchestras, theatrical performances or popular science programmes (Articles 4 to 7 of the terms of reference). France Télévisions is also required to integrate the European dimension into all its programmes, in particular by broadcasting reports on the lifestyles or cultural practices of other Member States, and to broadcast programmes of a religious nature devoted to the main religions practised in France (Articles 14 and 15 of the terms of reference). The obligation to attract a wide, balanced audience, including all sectors of the public, is also laid down (Article 18).
- (17) Furthermore, under Article 53 of Law No 86-1067 on Freedom of Communication, multiannual agreements in respect of objectives and means are concluded between the State and France Télévisions for a period of between three and 5 years. The agreements in respect of objectives and means determine, with due respect for the public service missions of France Télévisions:
- the priorities of its development,
  - the undertakings made concerning diversity and innovation in creation,
  - the minimum investments by France Télévisions in the production of European and original French language cinematographic and audiovisual works, as a percentage of its revenues and in absolute value,
  - the commitments ensuring participation and citizenship of disabled people, adaptation for people who are deaf or hard of hearing of all television programmes,
  - the commitments ensuring the broadcasting of television programmes which, by using adapted devices, are accessible to people who are blind or partially sighted,
  - the estimated cost of its activities for each of the years in question and the quantitative and qualitative indicators of performance and results applied,
  - the amount of public resources to be allocated to it, identifying as a priority those devoted to the development of the programme budgets,
  - the amount of the income expected from own revenues, distinguishing those from advertising and sponsoring,
  - the economic prospects for pay services,
  - where appropriate, the prospects for return to financial equilibrium.

(18) At present, the public service obligations of France Télévisions are subject to the agreement in respect of objectives and means for 2007-2010 'France Télévisions, the first package of free channels of the digital age' of 24 April 2007, signed by the competent Ministers and the Chairman of France Télévisions. Under the heading of objective I.2 'To promote the identifying values of the public service', the agreement sets out detailed objectives in concrete measures, together with qualitative or quantitative indicators to be achieved in fields such as:

- to promote access by a wider public to cultural programmes, with a view to democratisation of culture, by broadcasting at least one cultural programme during prime time,
- to reflect pluralism in information and citizens' debate,
- to offer a wide range of sports disciplines, with emphasis on the sports with the least coverage by the private channels,
- to reflect the diversity and enhance the perception of the components of French society,
- to promote the defence of the French and European cultural identity, the understanding of the functioning of the Union and its contributions, and the learning of foreign languages.

(19) The agreement also provides for a multiannual financial component, which includes an adjustment clause providing that the State and the Group agree to consult to adjust the demand for public funding in accordance with the trend in advertising revenues, on the understanding that surpluses not allocated to reducing this demand for public funding will be allocated as a priority to expenditure on audiovisual creation.

(20) Following the reform, the current agreement in respect of objectives and means was the subject of a rider for the period 2009-2012. This rider, the financial component of which is described in more detail below, strengthens still further the identifying values of the public service performed by France Télévisions and sets new quantitative indicators to be attained per year in some of the areas indicated in recital 18.

#### II.3.3. Introduction of new innovative audiovisual services

(21) The new terms of reference of France Télévisions provide for the introduction of a series of innovative services designed to enhance the editorial supply, such as on-line communication services, audiovisual media services on demand or additional content which enriches its programmes. Likewise, the rider to the agreement in

respect of objectives and means also considers the introduction of innovative services, and especially free or pay video on demand, personal mobile television, Internet broadcasting, mobile applications, and regional or thematic WebTV.

#### II.3.4. External control of the public service obligations, including the launch of new services

(22) Under Article 53 of Law No 86-1067 of 30 September 1986, the board of directors of France Télévisions approves the draft agreement in respect of objectives and means of this company and discusses its annual performance, with the result of the deliberations being made public. Before signature, the agreements in respect of objectives and means and any riders to these agreements are forwarded to the Cultural Affairs and Finance Committees of the National Assembly and the Senate and to the Conseil Supérieur de l'Audiovisuel. The committees may submit opinions within a period of 6 weeks.

(23) Furthermore, an annual report on the performance of the agreement in respect of objectives and means of France Télévisions is presented by its Chairman before the Cultural Affairs and Finance Committees of the National Assembly and the Senate. When the report on the performance of the agreement in respect of objectives and means of the company is presented before the competent Committees of the National Assembly and the Senate, the Chairman of France Télévisions also reports on the activity and the work of the Programme Advisory Committee set up within it and composed of television viewers, which is responsible for issuing opinions and recommendations on the programmes.

(24) Likewise, the preliminary draft terms of reference of France Télévisions, established by Decree, was the subject of public consultation from 10 to 24 November 2008 to which some 15 entities made contributions, which gave rise to modifications to the initial text, followed by the opinion of the Conseil Supérieur de l'Audiovisuel. As regards the external control of its performance, Article 48 of the Law of 30 September 1986 provides for the presentation of an annual report by the Conseil Supérieur de l'Audiovisuel to the Cultural Affairs Committees of the National Assembly and the Senate. The report is also forwarded to the Minister for Culture and Communication.

(25) These parliamentary committees, like the Conseil Supérieur de l'Audiovisuel, may hear third parties. In fact, interested parties are regularly heard by these bodies and make their views known on questions relating to public broadcasting.

#### II.4. Financial compensation for the gradual reduction then discontinuance of advertising messages

- (26) In order to increase the freedom of programming of public broadcasting and to reduce its dependence on commercial constraints, Article 53, Section VI of Law No 86-1067 of 30 September 1986, amended, on Freedom of Communication provides for the reduction then the discontinuance of advertising messages: 'The programmes broadcasted between 20:00 and 06:00 of the national television services referred to in Section I of Article 44, with the exception of their regional and local programmes, shall not include any advertising messages other than those for goods or services presented under their generic name. This provision shall also apply to programmes broadcasted by these services between 6:00 and 20:00 from the discontinuance of broadcasting by terrestrial radio link in analogue mode of the television services referred to in the same Section I throughout mainland France. It shall not apply to public interest campaigns.'
- (27) The discontinuance of broadcasting of television services by terrestrial radio link in analogue mode is scheduled for 30 November 2011 at the latest. Apart from the exception for the generic advertising of goods or services, provision is made for derogations for the broadcasting of advertising messages for the overseas departments and territories and New Caledonia, in the

absence of the availability of private television broadcasted by terrestrial radio link without the need for a decoder.

- (28) As provided for in Article 53 of Law No 86-1067, amended, on Freedom of Communication, the reduction, followed by the discontinuance of advertising messages resulting from the entry into force of the Law gives rise to financial compensation by the State allocated to France Télévisions under conditions defined by each finance law. To this end, the French State has created a new programme, entitled '*Contribution au financement de l'audiovisuel public*' (television licence fee), under the heading 'Media' of the general budget of the State. Purely for information, the French authorities consider that the share of public grant supplementing the proceeds from the television licence fee would amount to approximately EUR 460 million in 2010, EUR 500 million in 2011 and EUR 650 million in 2012.
- (29) The French Republic declares that, for each year, the public financing from the budgetary grant will be determined according to the costs of performing the public service mission of France Télévisions and cumulated with the proceeds from the television licence fee, reduced by the commercial revenues remaining. In this respect, the French authorities forwarded the estimated public service costs and revenues of France Télévisions, drawn up on the basis of the 2009-2012 business plan and summarised below:

Table 1

#### Estimated revenues and costs of the public service of France Télévisions 2010-2012

(EUR million)

	2010	2011	2012
	Budget	Estimates	Estimates
A/Public resources	[2 500-3 000]	[2 500-3 000]	[2 500-3 000]
B/Other revenue (advertising, sponsoring, etc.)	[300-600]	[300-600]	[300-600]
C/Gross public service cost	[3 500-3 000]	[3 500-3 000]	[3 500-3 000]
D/Net public service cost (C + B)	[3 000-2 500]	[3 000-2 500]	[3 000-2 500]
Shortfall between net PS cost — public resources (D + A)	[- 50 - 50]	[- 50 - 50]	[- 50 - 50]

Source: Comments by France of 15 January 2010.

- (30) The table above shows an estimated deficit corresponding to the uncovered net cost for the public service accounts of France Télévision in 2010 and 2011. This deficit should be absorbed in part in 2012, with a slight surplus forecasted of EUR [30-50] million, i.e. [0-5] % of the net public service costs. This estimated surplus for 2012, if it were to materialise in fact, which presupposes that the trend in revenues and costs follows the forecasted trend precisely, remains below the cumulated deficit forecasted for 2010 and 2011. Under the current agreement in respect of objectives and means, surpluses not allocated to reducing the public funding requirement will have to be allocated as a priority to the expenditure on audiovisual creation. Since this creation is generally destined for programming, any surplus should not therefore finance commercial activities.

(31) It should be noted that the 2009-2012 business plan shown in Chapter V of the rider to the current agreement in respect of objectives and means is substituted for the financial section of the agreement concluded in April 2007, in view of the new framework introduced by the reform and its financial consequences. The business plan provides for a reduction in the overall gross cost of providing the public service for the period 2010-2012, with a reduction in operating costs compared with the initial agreement, a reduction in broadcasting costs and the exploitation of synergies resulting from the joint venture, despite the introduction of new cost components accompanying the reform.

(32) As regards revenues, the public resources earmarked, although rising, do not totally balance the accounts for the period 2010-2012 and, as indicated in Table 1, remain below the gross public service costs, which means that the financial equilibrium in the projections depends on the commercial revenues remaining each year. The business plan therefore points out that it is in the interests of the undertaking and the State to achieve equilibrium more rapidly than forecasted and states the need for precise, regular monitoring in the light of positive or negative fluctuations.

#### II.5. Capping of the public resources

(33) Article 44 of Law No 86-1067, amended, on Freedom of Communication also specifies that 'The public resources allocated to public broadcasters in compensation for the public service obligations entrusted to them shall not exceed the cost of discharging these obligations'. This provision results from France's commitments to enshrine in law the principle of non-overcompensation for the public service obligations in the context of the procedure which led to the Commission's compatibility decision of 20 April 2005 on the use of the resources from the television licence fee (7).

(34) In implementation of the above-mentioned commitment, Article 2 of Decree No 2007-958 of 15 May 2007 on the financial relations between the State and public sector bodies in the audiovisual communication sector (*décret n° 2007-958 du 15 mai 2007 relatif aux relations financières entre l'État et les organismes du secteur public de la communication audiovisuelle*) takes up the wording of Article 53 of the Law of 30 September 1986, taking account 'of the direct or indirect revenue derived from the public service mission' and specifies that the cost of performance of the public service obligations is to be established by means of separate accounts. Article 3 of the Decree provides for the obligation for France Télévisions and its subsidiaries to respect market conditions in all their commercial activities and for an external body to draw up an

annual report on the performance of this obligation, forwarded to the competent Minister, the National Assembly and the Senate.

(35) The Commission has received and examined reports on the implementation of Articles 2 and 3 of the Decree relating to the financial years 2007 and 2008 (the reports drawn up under Article 3 of the Decree were certified, for 2007, by the auditors PriceWaterhouse-Coopers and KPMG and, for 2008, by Cabinet Rise) and the draft report provided for under Article 2 for 2009.

#### II.6. New taxes planned under the reform of public broadcasting

(36) Law No 2009-258 of 5 March 2009 also amended the Tax Code to introduce new taxes on advertising and electronic communications.

##### II.6.1. Tax on advertising messages

(37) Title II of Part 1 of Book I of the General Tax Code henceforth contains a Chapter VIIF which introduces a tax payable by all television service editors established in France. The tax is based on the total amounts, exclusive of value added tax, paid by the advertisers for the broadcasting of their advertising messages to the taxable persons concerned or to the advertising managers, minus the amounts paid under the tax provided for in Article 302a KC of the General Tax Code, which is payable by television editors and distributors broadcasting audiovisual works eligible for support from the National Centre for Cinematography. These amounts are subject to a standard deduction of 4 %. The tax is calculated by applying a rate of 3 % to the fraction of the total annual payments, exclusive of value added tax, relating to each television service, in excess of EUR 11 million.

(38) However, for the television services other than those broadcasted by terrestrial radio link in analogue mode, this rate is set at 1,5 % in 2009, 2 % in 2010 and 2,5 % in 2011. As a transitional measure, for all taxable persons, until the year of the discontinuance in mainland France of analogue terrestrial broadcasting, the tax is capped at 50 % of the increase in its assessment basis calculated for the calendar year for which the tax is payable in relation to 2008. In any event, the amount of the tax may be no less than 1,5 % of the assessment basis. Nevertheless, for television service editors with a daily audience outside mainland France exceeding 90 % of their total audience, the total sums paid for the broadcasting of advertising messages destined for the European or world market, multiplied by the percentage of the audience obtained outside mainland France of the annual total audience, is deducted from the amount to be taken for the calculation of the tax.

(7) See Decision C(2005) 1166 final, points 65 to 72.

### II.6.2. Tax on electronic communications

- (39) Title II of Part 1 of Book I of the General Tax Code henceforth contains a Chapter VIIg, which introduces a tax payable by all operators of electronic communications which provide a service in France and which have been the subject of a prior declaration to the electronic communications regulatory authority. The tax is based on the amount, exclusive of value added tax, of the subscriptions and other amounts paid by users for electronic communications services provided by electronic communications operators, with the deduction of the amount of the depreciation charges entered in the accounts during the financial year for which the accounts have been closed, in respect of the year during which the tax has become due, where these charges relate to materials and equipment acquired by the operators, from the entry into force of the Law, to meet the requirements of the infrastructures and electronic communications networks established within national territory, with a depreciation period of at least 10 years. The tax is calculated by applying a rate of 0,9 % to the fraction of the assessment basis exceeding EUR 5 million.

### III. REASONS HAVING TRIGGERED THE INITIATION OF THE PROCEDURE

- (40) In its decision to initiate the formal investigation procedure, the Commission considered that the compensation planned from 2010 could constitute state aid within the meaning of Article 107(1) of the TFEU, the compatibility of which with the internal market under Article 106(2) of the TFEU should be examined in accordance with the principles and rules of application provided for in respect of public broadcasting services.
- (41) As regards the existence of a public service activity with missions clearly defined by an official act and subject to appropriate control mechanisms, the Commission did not raise any doubts and concluded, as in its Decisions of December 2003, April 2005, July 2008 and September 2009, that the public service missions of France Télévisions are clearly defined in official acts emanating from or subscribed to by the French State, in accordance with the terms and conditions which provide for independent control of France Télévisions.
- (42) On the other hand, as regards the examination of the proportionality of the planned financial compensation in relation to the net cost of the public service activity, taking account moreover of the effects of the aid, the Commission expressed doubts on two issues, i.e.:

— on the one hand, concerning a risk of overcompensation for the net public service costs for 2012 and, probably, for 2010 and 2011, although, for these years, the Commission did not possess such detailed information as that provided by the French authorities for 2009, and

— on the other hand, concerning the possible existence of hypothecation of the revenues from the taxes on advertising and electronic communications to the aid to be paid to France Télévisions and, if such a link could be established, concerning the negative effects of such revenues and their compatibility with the Treaty, in particular in the context of taking stock of the competition aspects of the reform of the financing of France Télévisions, which was lacking.

- (43) Furthermore, the Commission drew the attention of the French authorities to the adoption on 2 July 2009 of its Communication on the application of State aid rules to public service broadcasting<sup>(8)</sup> (below: the 'Broadcasting Communication'), which is applicable to aid notified from the time of its publication, and invited the French authorities to take account of this revised communication in their comments.

### IV. COMMENTS BY INTERESTED PARTIES

- (44) In its comments of 2 November 2009, the Société des auteurs et compositeurs dramatiques (SACD) drew the Commission's attention to the importance of the binding obligations of France Télévisions to support heritage audiovisual creation. This importance was increased at the end of 2008 by an interprofessional agreement, which would be integrated into a future agreement in respect of objectives. In 2010, France Télévisions will therefore have to devote to heritage audiovisual creation a 19 % share of the turnover included in the assessment basis for 2009, a share which is to be raised to 20 %, i.e. EUR 420 million in 2012. The equivalent share of TF1, on the other hand, is capped at 12,5 % and those of M6 and the digital terrestrial television channels respectively will not exceed 11 %. The commitment in favour of cinema will also be increased by over 1,2 % as an annual average rate until 2012. The discontinuance of advertising would go hand in hand with an increase in the cost of the programme schedule as regards non-imported own production works, which show commitment to an innovative, quality public service.
- (45) The Fédération Française des Télécommunications et des Communications Électroniques (FFTCE), in its comments of 30 October 2009, in which it is joined by Iliad, a non-member of the FFTCE, considers that the discontinuance of commercial advertising does not contribute, as such, to the public service mission of France Télévisions. Since advertising is not an integral part of this mission, any grant aiming solely to compensate for lost earnings without regard for the reality of the mission would inherently be state aid, contrary to Articles 106(2) and 107 of the TFEU. This compensation must cover costs specific to the public service, which must be

<sup>(8)</sup> OJ C 257, 27.10.2009, p. 1.

reflected in separate accounts. However, the amount of the grant seems to have been fixed for the coming years on the basis of the estimate of the loss of commercial revenues which, on a market which has deteriorated, seriously distorts competition with the private broadcasters. Whereas the total turnover from advertising of France Télévisions in an eroded market would undoubtedly not have reached EUR 500 million, the French authorities have committed to pay EUR 450 million in 2009 as a consideration solely for the ban on advertising after 20:00. In the future, the grant revenue would also be well above the advertising revenues which would have been obtained without the reform.

(46) As regards the mission of service in the general economic interest, the FFTCE notes that the obligations incumbent upon France Télévisions, as a member of the European Broadcasting Union (EBU), already exist via the latter's statutes and would be applicable without the obligations laid down in French law. The constraints, which for that matter are vague, imposed by law, would not be substantially different from those deriving from the EBU statutes, to which TF1 and Canal + are also subject as members, so a compensatory grant under the law must be termed as state aid.

(47) The FFTCE considers, finally, that the new turnover tax imposed on the operators of electronic communications, introduced by the reform of public broadcasting, is allocated to the financing of France Télévisions. Apart from the earmarking affirmed in the declarations by the authorities, variations in its assessment basis and in its rate cause variations in the amount of the grant. The introduction of such a tax is in violation of Article 12 of Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services<sup>(9)</sup> since Member States may not impose any turnover tax on operators other than those provided for there.

(48) In its comments of 2 November 2009, the Association des chaînes privées considers that the poor management of France Télévisions, many examples of which have been pointed out by the Court of Auditors, aggravates the inflationary effect found on the market for programme production and the purchase of rights. In the absence of cost accounting, the failure to control costs creates uncertainties as regards the determination of the cost of the public service missions to be financed, with a serious risk of overcompensation. Since various signs point to the new broadcasting tax being allocated to France Télévisions, its destination for the state budget is intended only to enable it to escape Commission control. The competitors of France Télévisions are hereby forced to finance the aid, creating a distortion aggravated by the inadequate differentiation between the programmes of the various old channels.

(49) In its comments of 2 November 2009, the European Broadcasting Union (EBU) stresses the necessarily forward-looking nature of any multiannual estimate of the costs and revenues of the public broadcaster submitted by France. These estimates must ensure the long-term financial visibility which the operator must have to guarantee continuity of service in complete independence. It is *ex post* mechanisms which must ensure the correction of any forecasting errors. The Commission decision must be based on the *ex ante* calculation parameters and on these mechanisms, without imposing constraints on the actual amount of compensation in the future by validating only the cost and revenue estimates. Failing this, the Commission would be establishing and monitoring the annual amounts of an aid scheme, rather than the scheme itself. The EBU also expresses its concern that the Commission seeks to know the estimated amount obtained from synergies and efficiency gains for the years to come, since the efficiency with which a service of general economic interest is performed lies outside the control of the Commission pursuant to Article 106(2) of the TFEU.

(50) In its comments of 2 November 2009, the Association of Commercial Television in Europe (ACT) declares itself in favour of France's decision to undertake a substantial reduction in the commercial advertising of its public broadcaster. The ACT notes that two conditions laid down by the *Altmark*<sup>(10)</sup> case-law are not satisfied in this case, which means that the planned budgetary contribution constitutes aid. However, the ACT considers that if the system of financing the aid by means of a tax levied on the advertising revenues of competitors is considered as being in conformity with Union law, the benefits from the withdrawal from the market would be greatly reduced, while such a system could, in certain respects, introduce more distortions than the traditional dual public and commercial financing systems.

(51) The ACT considers that the public service obligations of France Télévisions have not undergone any fundamental change since 1994 and remained similar to the obligations of other private broadcasters. Likewise the estimates of compensation for the loss of advertising revenues up to 2012 are vague and do not take account of the reduction in investment costs relating to this or the possible reduction in the costs of programming, which is less subject to the constraints of the advertisers, or the anticipated gains from synergies. The mechanism for the adjustment of the public and commercial revenues to the costs provided for in the agreement relating to objectives and means should be verified, in particular in view of the variability of the commercial revenues, failing which the Commission

<sup>(9)</sup> OJ L 108, 24.4.2002, p. 21.

<sup>(10)</sup> European Court of Justice judgment in Case C-280/00 *Altmark Trans* [2003] ECR I-7747, paragraphs 88 to 93.

would not have reliable information to determine the actual costs of the service provided and the existence of any overcompensation. This verification would be undertaken in the absence of any cost accounting by the enterprise, as pointed out by the Court of Auditors.

- (52) Finally, the ACT considers that the aid is in fact financed by the new taxes introduced by the reform and that the tax on advertising revenues of broadcasters introduces a model of public service financing by competitors in France which has been abandoned elsewhere. The aid mechanism protects the resources of France Télévisions whereas it would be increasingly obvious that the advertisers will not transfer their demand in full to the competing channels. Furthermore, such a mechanism would reinforce the entry barriers to the French market.
- (53) In its comments of 2 November 2009, France Télévisions considers that the mechanism notified confers no economic advantage on it in relation to its competitors since, although it is protected from the loss of commercial revenue, on the other hand a constraint has been imposed on it by the State which is not imposed on any private operator in the market: the discontinuance of advertising. When the discontinuance of advertising messages becomes effective, any distortion of competition in this market will disappear, whereas its pressure on competitors for sponsoring, in view of its limited presence, would also be zero. As regards the purchase of 'premium' broadcasting rights, whereas TF1 apparently achieved 96 of the 100 best audiences and 18 of the 20 best audiences in 2008, France Télévisions had no exclusivity contract with the major American companies. Furthermore, it is obliged to invest in audio-visual creation with quality requirements which are incompatible with the audience targets of the commercial channels. It considers it only has a marginal presence regarding the sale of programmes.
- (54) France Télévisions also considers that, as the amount to be allocated to it depends on the cost of its missions established in advance, precisely and objectively each year, with an *ex post* correction in the event of any divergence from real costs, the notified mechanism satisfies the second condition laid down by the *Altmark* case-law. The fourth condition laid down by this case-law would also be satisfied, since synergies which it was impossible to exploit in the past will be exploited with the recasting of the legal organisation and the statutes, since this fourth condition does not require the service to be performed at the least cost possible, but that the costs correspond to those which a typical, well-run undertaking would have incurred.
- (55) According to France Télévisions, as regards the conditions for the compatibility of the notified mechanism with the internal market, since this mechanism is required to last for many years, it will

not be possible for the net public service costs to be known with sufficient certainty for the Commission to be able to carry out *ex ante* checks for the absence of overcompensation. Whereas the indicative estimates provided for 2010 to 2012 are not incompatible with the possibility to make a reasonable profit or to constitute a reserve limited to 10 % of the annual public service expenditure, the laws and regulations establishing *ex post* control will in any case enable the proportionality of the financing to be ensured. On the other hand, since the variation in its scheduling costs depends on its editorial choices, France Télévisions considers that it is bound only to respect the public service obligations imposed by the law, with the French Republic free to define their content. Furthermore, these obligations are also expressed by an audience requirement, which the discontinuance of advertising messages would not reduce. On the contrary, a larger number of programmes will have to be acquired.

- (56) In its comments of 2 November 2009, Métropole Télévisions (M6) considers that the envisaged financing mechanism constitutes state aid within the meaning of Article 107 of the TFEU, especially since the second and fourth conditions laid down by the *Altmark* case-law are not met: compensation based on an estimate of loss of commercial revenues which by nature — and in fact — fluctuate could not be considered as based on objective and transparent parameters for the calculation of the public service costs. In addition, the basis of the calculation is not the costs of a typical, well-run undertaking of the sector, but that of the costs of France Télévisions, which a large number of indications point to being managed inefficiently, which increases the public service costs to be borne by the community.
- (57) As regards the compatibility of the measure with the internal market, M6 considers that the planned financing mechanism is illegal as it generates structural overcompensation for the public service costs. Commission Directive 2006/111/EC of 16 November 2006 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings<sup>(1)</sup> requires France to assign the costs and revenues of the service of general interest on the basis of consistently applied cost accounting principles. However, as the Court of Auditors emphasises, France Télévisions does not possess such accounting tools. No objective element could therefore serve to calculate the amount of compensation. Overcompensation would be inevitable since the grant is calculated on the basis of commercial revenues which do not come under the public service mission and are not to be taken into account in its costs. The randomness of the lost revenue forecasts and the absence of cost accounting would also make overcompensation inevitable.

<sup>(1)</sup> OJ L 318, 17.11.2006, p. 17.

(58) The integration of the new taxes in the financing mechanism aggravates the negative effects of the aid on the markets for the acquisition of broadcasting rights — where the poor management of France Télévisions, protected by public aid, increases the costs of its competitors — and on advertising activities, which France Télévisions will divert to sponsoring, whereas M6 will be unable to fill the gap left by France Télévisions in view of its different audience profile. Under these conditions, only *ex post* financing could be justified. The mechanism would therefore be structurally illegal in the absence of the introduction of independent *ex post* control mechanisms effectively guaranteeing the absence of overcompensation on the basis of real figures, the implementation of which would be ineffective in France, according to M6.

(59) In its comments of 2 November 2009, Télévision Française 1 (TF1) relocates the reform of the financing of France Télévisions in a context of structural changes affecting the advertising market, in which the Internet is experiencing strong growth. Television apparently accounted for only about 11 % of the EUR 33 billion of communication expenditure by advertisers in 2008. Between January and September 2009, the advertising turnover of digital terrestrial television channels experienced 60 % growth, compared to an 8 % fall for the three old private channels broadcasting by terrestrial radio link. For 2008, the taxes paid by TF1 accounted for 60 % of its result. On the other hand, multiannual contracts for the acquisition of rights, price inflation and the inelasticity of costs, including those of scheduling attributable to the regulatory obligations whereby the production and broadcasting of French and European works must represent 30 % of the total, reduce its room for manoeuvre, according to TF1. In parallel, its liability to a new broadcasting tax would reinforce the distortions of competition in the market.

(60) The potential transfer of advertisers' demand to TF1 is the declared object of the tax on advertising revenue of broadcasters. Not only did the expected transfer of EUR 350 million of turnover to the three channels broadcasting by radio link fail to occur in 2009, but the latter recorded an amount EUR 450 million below the forecasts. Furthermore, the scale of this transfer would be limited in any case by laws and regulations which, transposing Union law, limit the time devoted to advertising to a maximum of 12 minutes per hour of broadcasting, provided that a daily average of 6 minutes per hour is not exceeded.

(61) TF1 considers that the tax constitutes state aid in two capacities: firstly, France Télévisions will in fact no longer be required to pay after 30 November 2011 (date on which it will be obliged to discontinue the advertising messages for which the payments constitute the assessment basis) and, secondly, France Télévisions will

be the beneficiary of the resources raised by this tax, since it emerges from many governmental and parliamentary statements during the debates on the draft law that this is allocated to financing the aid. Irrespective of its intrinsic legality, the tax regime which finances it should therefore be taken into consideration to assess the aid.

(62) TF1 considers that it is subject to obligations comparable to those imposed on France Télévisions, the programmes of which do not apparently differ greatly from its own. Even though TF1 welcomes the recasting of the agreement relating to objectives and means and the terms of reference following the reform of public broadcasting, it considers, on the basis of the opinion of the Court of Auditors, that the public broadcasting service supply is insufficiently individualised. It is therefore underlined that, in the former terms of reference, the quantitative broadcasting obligations represented 10 % of the programme schedules.

(63) The cost control and quality of the management of France Télévisions are just as inadequate, which means that the public service is not provided at the least cost to the community and generates a risk of overcompensation. The Commission should therefore check, in this respect, the growth in profits from commercial activities, the synergies which should result after 2009 from the creation of a single enterprise France Télévisions and the reduced pressure on the costs of the programme schedule resulting from lesser dependence on advertisers.

## V. COMMENTS OF THE FRENCH REPUBLIC

(64) In its comments forwarded on 7 October 2009 and subsequently clarified, as regards the application of Article 106(2) of the TFEU, the French Republic refers in particular to the doubts expressed by the Commission concerning, on the one hand, the proportionality of the public financing and the risk of overcompensation and, on the other hand, the taking into consideration of the new taxes introduced by the reform of public broadcasting for the purposes of assessing the compatibility of the notified measure with the internal market.

### V.1. Proportionality of the financing and *ex post* control of the risk of overcompensation

(65) The French Republic specifies that the notified measure is not compensation for the loss of advertising revenues of the France Télévisions group, although the estimates provided for information take account of this, but financing intended to cover the costs of performance of the public service mission. The financing requirements will in fact have to evolve in accordance with the changes in the costs of the programme schedule, fluctuations in commercial revenues or broadcasting media.

- (66) The French Republic emphasises that the *ex ante* confirmation of the absence of risk of overcompensation must be undertaken by verifying the existence of legislative and regulatory control mechanisms, in accordance with the case-law and practical application by the Commission, and not in relation to the indicative estimates of grant and costs given for the future. The indicative amounts are provided for illustration, in the light of the business plan approved by the supervisory authorities and France Télévisions. The method used to calculate the grant is not based on the estimate of the fall in advertising revenues of France Télévisions. The calculation will be based on a general formula, such as: the combined total for each year of the television licence fee and the budget allocation will be proportional to the cost of the public service mission of France Télévisions, minus its commercial revenues, with due regard for the commitments of the French Republic and the *ex post* control mechanisms established by laws and regulations.
- (67) In addition, as regards the new innovative audiovisual services mentioned in the Broadcasting Communication, the French Republic stresses that a certain number are already provided for in the new terms of reference of France Télévisions and the amended agreement relating to objectives and means, which have been and will be the subject of the prior, regular controls and consultations described above. For the future, France considers that the launch of any significant new service must be dealt with under the agreement relating to objectives and means, with the same controls applying.
- (68) Furthermore, since the Broadcasting Communication took effect after the initiation of the present procedure, the French Republic undertakes to complete its *ex post* financial control mechanism to comply with the rules newly specified in this Communication with regard to financial control mechanisms. In this way, it is planned to amend Article 2 of Decree No 2007-958 of 15 May 2007. The purpose of this amendment is:
- to ensure that the report on the separate accounts — a requirement allowing the absence of overcompensation to be verified — like the report provided for in Article 3, is audited by an external body, the choice of which is subject to the approval of the Minister for Communication, forwarded to this Minister and to the National Assembly and the Senate, and drawn up at the expense of France Télévisions,
  - to complete the appropriate functional mechanism to ensure the actual recovery of any overcompensation or cross-subsidisation found in these separate accounts and not compatible with Article 53 of Law No 86-1067 of 30 September 1986 on Freedom of Communication or with the Commission Broadcasting Communication.
- (69) Likewise, in order to complete the information supplied to the Commission during the first few years of the reform initiated by Law No 2009-258 of 5 March 2009, the French authorities undertake to communicate to the Commission, for the years 2010 to 2013:
- the reports drawn up under Articles 2 and 3 of the above-mentioned Decree, after amendment, within a maximum period of 6 months of the General Meetings approving the accounts, including the data concerning the trend in advertising market shares since 2007,
  - the public elements for monitoring the performance of the public service missions by France Télévisions which consist of the report on the channels drawn up annually by the Conseil Supérieur de l'Audiovisuel (provided for in Article 18 of Law No 86-1067 of 30 September 1986) and the report on the hearings by the parliamentary committees (Cultural Affairs and Finance Committees of the National Assembly and the Senate) by the Chairman of France Télévisions on the annual performance of the agreement relating to objectives and means (as provided for in Article 53 of the above-mentioned Law).
- V.2. Taking into consideration of the new taxes introduced by the reform of public broadcasting**
- (70) The French Republic considers that it has not taken account of the new taxes on advertising and electronic communications in its notification. Although introduced by the same legislative instrument as establishes the reform, these taxes would not come within the scope of the notified measure.
- (71) The French Republic specifies that the public statements prior to the Law being passed referred to in the decision initiating the procedure, subsequently contradicted by the provisions of this Law, are not sufficient to establish as a binding link the earmarking of the taxes to finance the aid under Union law. Under French law, these taxes are levied in favour of the general budget of the State, contributing to financing all public expenditure and complying with the principles of universality and unity, which come under the constitutionality of public finances. Under Article 36 of the Organic Law of 1 August 2001 on Finance Laws (*loi organique du 1<sup>er</sup> août 2001 relative aux lois de finances*), the allocation in whole or in part of a resource established in favour of the State to a legal person may result only from an express provision of a finance law, which, in the present case, does not exist.

(72) The French Republic also emphasises that there are no plans to introduce earmarking between these taxes and the financing of France Télévisions. It specifies that, if a change to the architecture of the regime were to be considered, the French authorities would send a new notification to the Commission, in accordance with Article 108(3) of the TFEU.

## VI. ASSESSMENT OF THE AID

### VI.1. Presence of aid within the meaning of Article 107(1) of the TFEU

(73) Article 107(1) of the TFEU provides that 'Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.' These criteria are examined below.

#### VI.1.1. State resources

(74) The budget allocations which are the subject of the present notification will be committed each year in the finance law establishing the French State budget. These are consequently measures granted by means of state resources.

#### VI.1.2. Selective economic advantage

(75) The budgetary grant replenishing the public resources made available to France Télévisions is selective, as France Télévisions will be the sole beneficiary. The annual operational budgetary grant, which is intended in particular to allow the undertaking to continue its activities, will protect it from loss of commercial advertising revenue which partly financed its expenditure and investments hitherto. France Télévisions will in this way be able to achieve an audience share which it could not envisage in the absence of a budget allocation. Consequently, it receives an economic advantage which it could not otherwise have obtained or, if appropriate, since it is a grant, under other market conditions, i.e. those under which its private competitors operate.

(76) Furthermore, the Commission notes that the French Republic did not make any comments calling into question its assessments in the decision initiating the procedure that the planned allocations would not satisfy the cumulative criteria set out in the *Altmark* case-law and would therefore procure an economic advantage constituting state aid<sup>(12)</sup>. It also notes that, without prejudice to subsequent developments in the

management and results of France Télévisions in the coming years, at present the report of the French Court of Auditors on France Télévisions — which was published in October 2009 after the decision initiating the procedure — confirms its arguments that the fourth condition is not satisfied.

(77) To sum up, it follows from the above that the budgetary grants for the France Télévisions group alone, by means of the financial resources of the French State, will confer a selective advantage on this undertaking.

#### VI.1.3. Distortion of competition and effect on trade between Member States

(78) France Télévisions operates in the field of the production and broadcasting of programmes which it exploits commercially, in particular by broadcasting paid advertising for advertisers or sponsored programmes in its programme schedule, by selling its broadcasting rights or by purchasing such rights. These commercial activities are carried out in competition with other channels, such as TF1, M6, Canal +, especially in France, where, as the French authorities emphasise, France Télévisions is the leading audiovisual group. In 2010, the share of France Télévisions is thought to stand at approximately 10 %, which would still make it the third largest supplier in the French market.

(79) Until the deadline for the discontinuance of commercial advertising at the end of 2011, France Télévisions will continue to play an active role in the French televised commercial advertising market, albeit with slot restrictions, in competition with the other broadcasters. Even after 2011, France Télévisions will be able to offer its services to advertisers to advertise goods under their generic name or for programme sponsorship, in competition with the other broadcasters operating in France. Even if the competitors of France Télévisions will have benefited to the full from the almost total withdrawal of France Télévisions from the advertising market brought about by the reform, France Télévisions will nevertheless retain a presence. In fact, assuming constant volumes and market share for the competitors compared with 2007, on the basis of the estimates of advertising revenue and sponsorships of France Télévisions provided by the French authorities, France Télévisions would still hold 3,3 % of the market in 2012, compared with over 50 % and about 20 % for TF1 and M6 respectively.

(80) France Télévisions will be able to achieve an audience share which it could not envisage in the absence of the budget allocation in question, which is liable to have an impact on the audience of the other broadcasters and, therefore, on their commercial activities, thereby distorting the conditions of competition. In any case, France Télévisions will remain just as active on the

<sup>(12)</sup> See decision initiating the procedure, points 68 to 75.

markets for buying and selling broadcasting rights, with sustained bargaining power thanks to the above-mentioned support. Maintaining investments in programming which is made possible by the budget allocations therefore influences the extent to which France Télévisions can act as buyer or seller in these markets.

- (81) It follows from the above that the budget allocations by means of resources financed by the French State for the France Télévisions group only distort, or at the very least, threaten to distort competition in the commercial exploitation of broadcasting in France and, to a certain extent, in other Member States where the programmes of France Télévisions are broadcasted.
- (82) The markets for the purchase and sale of audiovisual programmes and broadcasting rights in which France Télévisions operates have an international dimension, even though acquisitions are made with a territorial restriction generally confined to one Member State. Furthermore, the programmes of France Télévisions, the broadcasting of which can be maintained thanks to the state support, are picked up in other Member States, such as Belgium and Luxembourg. Finally, France Télévisions also broadcasts programmes via the Internet, which are accessible both within and outside France.
- (83) Under these conditions, the planned budgetary grants are likely to distort the conditions of competition and to affect trade between Member States.

#### VI.1.4. *Conclusion on the presence of state aid*

- (84) In view of the above, the budgetary grants which France is planning to pay to France Télévisions constitute state aid within the meaning of Article 107(1) of the TFEU, which must be examined for compatibility with the internal market.

### VI.2. **Compatibility in the light of Article 106(2) of the TFEU**

- (85) Article 106(2) of the TFEU provides that 'Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union.'
- (86) In its Broadcasting Communication, the Commission sets out the principles it follows in the application of Articles

107 and 106(2) of the TFEU to the funding of public broadcasting bodies by the State. In this respect, the Commission's assessment is based on the following two aspects:

- the existence of a clear, precise definition of the public service mission in an official act, including the supply of significant new services, and subject to effective control mechanisms by an entity which is independent from the broadcaster,
- the proportionate and transparent nature of the public financing of the compensation necessary for this mission, without the compensation exceeding the net costs incurred by the public service mission which is also subject to effective control.

#### VI.2.1. *Clear, precise definition of the public service mission in an official act, subject to effective control*

- (87) As stated above, the Commission has not expressed any doubts in its decision initiating the procedure, for the reasons set out in it, concerning the appropriateness of either the definition and entrustment of the public service mission to France Télévisions by official acts or the external controls carried out in respect of the way in which France Télévisions carries out the obligations assigned to it, as described above. The Commission therefore considered that the relevant provisions of Law No 86-1067 of 30 September 1986, amended, (Articles 43-11, 44, 48 and 53) and the Decrees or official acts implementing it, in particular regarding the terms of reference (Decree No 2009-796 of 23 June 2009) and the agreement relating to objectives and means, were in conformity with the rules for the application of Article 106(2) of the TFEU on the assessment of aid to public broadcasting services set out in the Broadcasting Communication.
- (88) This conclusion was the same as those already drawn by the Commission on this subject in application of the communication applicable at that time, in its Decisions of 2003 and 2005 for France 2 and France 3 and of 2008 and 2009 for France Télévisions.
- (89) It is therefore for the sake of completeness that it is appropriate to examine the comments, which are of a general nature all told, made by certain interested parties claiming similarity between the public television programming and that of the competitors and contradicted in fact by the comments of other parties, and which are not of a nature to change this assessment.

- (90) Law No 86-1067, amended, on Freedom of Communication provides a broad, qualitative but precise definition of the public service obligations of France Télévisions. It is to target a wide public and offer a diversified supply, in accordance with the objective, with respect for pluralism, of catering for the democratic, social, civic and cultural needs of society. The fact that certain competitors are required, on account of their EBU membership, to respect the latter's statutes, as the FFTCE emphasises, does not act as a barrier to the existence of specific public service obligations specified in official acts of the French Republic which, contrary to the obligations arising from EBU membership, are imposed solely on France Télévisions.
- (91) As far as is necessary, moreover, the obligations of France Télévisions are specified again in the terms of reference and the agreement relating to objectives and means and are accompanied by precise, quantified indicators to be achieved in its programme schedule, to which the competing broadcasters are not subject. The public resources are allocated to France Télévisions to achieve the objectives and to perform the public service obligations defined by laws and regulations in the general interest, whereas the private resources are allocated to the competing broadcasters purely for lucrative purposes. Likewise, the existence of restrictions under the regulations or voluntarily assumed by the operators in their broadcasting activities does not in fact imply the existence of an undifferentiated supply for the public and private broadcasters. These public service obligations which derive from the law, contrary to those deriving from membership of the EBU, are moreover subject to regular external controls, notably by Parliament, concerning their fulfilment.
- (92) In addition, the SACD highlights the greater commitment of France Télévisions to original French audiovisual and cinematographic creation compared to the competitors, which are subject to far lesser obligations. It is true that the comments made by the SACD neither support nor illustrate the reasons for which imported non-French works, possibly from other Member States, would be of lower quality than those which France Télévisions will finance. The fact still remains that a binding commitment in favour of original creation, increased in absolute terms and in relation to the competitors, contributes and is directly related to the social and cultural needs of French society which the programming of France Télévisions is required to meet on account of its service of general interest obligations.
- (93) From the point of view of the information supplied by the French Republic, this positive assessment on the definition and control of the public service mission of France Télévisions must be extended to the mechanisms applicable to the launch of significant new audiovisual services, within the meaning of the Broadcasting Communication which entered into effect after the decision initiating the present procedure. These services, which extend the offer of broadcasted programmes to other media or formats, are included in the terms of reference and the agreements relating to objectives and means of France Télévisions, which specify and translate the service of general economic interest missions provided for by the law. These documents have been adopted by decree, as indicated above, so that the new services already provided for and those possibly to come are the subject of the same specific *ex ante* consultation procedures and *ex post* annual performance checks as these missions.
- (94) To sum up, it therefore appears that the definition of the public service mission assigned to France Télévisions and the control mechanisms relating to it are in conformity with the rules and principles established in the Broadcasting Communication, which in turn were inspired by the case-law of the Union courts.
- VI.2.2. *The proportionate and transparent nature of the public financing*
- The determination of the annual amount of the budgetary grant
- (95) The financing mechanism notified by the French Republic, which includes the annual grant to compensate for the reduction followed by the discontinuance of advertising messages, is intended to be permanent and therefore to extend beyond the date provided for by the law for the discontinuance of the advertising messages, which is in fact in November 2011.
- (96) The annual public financing will comprise the allocation of part of the resources from the television licence fee (*contribution à l'audiovisuel public*), formerly known as the *redevance*, and the annual grant provided for by Law No 2009-258 of 5 March 2009. The existing aid confirmed by the Commission in its Decision of 20 April 2005, which is not modified by the planned mechanism, will therefore be complemented by a budgetary grant, the exact amount of which will be fixed each year in the finance law for the current year. In its comments, the French Republic specifies that it is the forecasted net public service costs which will serve to determine the amount of the annual grant *ex ante*, before each financial year.
- (97) Moreover, this is shown by the illustrative estimates provided by the French authorities in response to the doubts expressed by the Commission in the decision initiating the procedure. The Commission notes the

indicative nature which the French authorities attach to the business plan forecasts and agrees that it is useful for the undertaking responsible for a public service mission and having to commit multiannual expenditure for this purpose to have a financial framework provided for by the business plan included in the rider to the agreement relating to objectives and means. This being so, the total indicative public resources shown there remain related to, although lower than, the amounts of the gross costs of supplying this service forecasted for the period from 2010 to 2012.

- (98) In view of the relative predictability of the gross costs, which are less volatile than the commercial revenues used to establish the net costs, the indicative figures of the business plan confirm a priori the assertion of the French Republic concerning the decisive nature of the criterion of the net public service costs to set the annual amount of the forthcoming grant. In this way, the obligation of financial compensation by the State, introduced by Law No 2009-258 of 5 March 2009, will constitute the chargeable event for the budgetary grant notified, without conditioning the amount, as against a possible estimate of what the advertising revenues lost through the discontinuance of the advertising messages should be.
- (99) Such an approach appears to be objectively justified. In fact, on account of the permanent nature of the grant, establishing its amount in relation to what the advertising revenues would have been if the advertising messages had not been discontinued on account of the Law, for example, by setting the amount at the level of the revenues before the announcement and introduction of the reform, adjusted where appropriate in accordance with the television advertising market trends, would become increasingly arbitrary. If the amount of the grant were calculated in this way in relation to presumed revenues, a greater reduction in the gross public service costs than predicted resulting, for example, from future synergies from the establishment of the single undertaking France Télévisions, could give rise to a risk of overcompensation by means of public resources.
- (100) The calculation method for the annual grant in relation to the cost of the public service mission, reduced by net remaining commercial revenues, is moreover consistent with the commitment of the French Republic, henceforth expressed in Article 44 of Law No 86-1067, amended, on Freedom of Communication and in Article 2 of the Decree relating to the financial relations between the French State and public sector bodies in the broadcasting sector, that the public resources allocated to France Télévisions will not exceed the net cost of performing the public service obligations entrusted to the latter. As the French authorities recall, this commitment and the above-mentioned provisions are applicable in full to the

budgetary grant notified and to the annual public financing mechanism, of which it will henceforth form an integral part.

- (101) Consequently, the method of calculating the annual subsidy in relation to the net cost of the public service mission — i.e. reduced by the net commercial revenues remaining — appears to be proportionate within the meaning of the Commission Broadcasting Communication.
- (102) In this respect, the comments to the contrary by certain interested third parties are not of a nature to invalidate this conclusion:
- the FFTCE comments asserting that the compensation for lost advertising revenues, which are not part of the public service mission, does not come under the financing of this mission could not be retained and neither could those of M6 concerning the fluctuating and therefore imprecise nature of estimates of loss of commercial revenues; the annual amount of the grant will have to be fixed *ex ante* on the basis of the net public service costs of France Télévisions, the estimates of the amount provided by the French Republic for 2010, 2011 and 2012 being purely indicative,
  - the M6 comments suggesting that an alleged absence of cost accounting tools at France Télévisions established by the French Court of Auditors would result structurally in overcompensation in that the grant would be based on non-objective cost elements, as well as the TF1 comments on overcompensation of uncontrolled or poorly managed costs, are unfounded; firstly, the Court of Auditors established in October 2009 the absence of control management tools integrating the cost accounting tools of the subsidiaries at France Télévisions group level and not the absence of any cost accounting management tool; cost accounting exists for each company of the France Télévisions group,
  - secondly, the examination of the compatibility of the compensation with the internal market, contrary to that relating to the existence of an economic advantage for France Télévisions, is not based on the costs that a typical, well-run undertaking in the sector could incur to perform the service of general interest, but on those which France Télévisions will in fact incur, including therefore the reduction forecasted for the future; as shown above, the total amount of public resources to be paid to France Télévisions will be lower a priori than the costs incurred to provide the public service and will be fixed so as to avoid overcompensation, once the net commercial revenues have been deducted.

(103) These comments, which are unfounded as far as the annual fixing of the amount of the grant *ex ante* is concerned, also do not take account of the existence of *ex post* control mechanisms. In fact, as is shown below, annual fixing of the amount of the grant for the year *ex ante* in a finance law will be followed by *ex post* control mechanisms and, where appropriate, recovery.

#### Financial control mechanisms

(104) The Broadcasting Communication provides that Member States must introduce appropriate mechanisms to ensure that there is no overcompensation, by undertaking regular control of the use of public funding. The effectiveness of the control, as specified in the Communication, should result from its being carried out by an external body at regular intervals, together with mechanisms to ensure the recovery of any overcompensation or correct allocation, during the following financial year, of any reserves not exceeding 10 % of the annual public service costs, on the one hand, or any cross-subsidisation, on the other.

(105) Article 44 of Law No 86-1067 of 30 September 1986 specifies that 'The public resources allocated to public broadcasters in compensation for the public service obligations entrusted to them shall not exceed the cost of discharging these obligations'. This provision results from France's commitments expressly to enshrine in law the principle of non-overcompensation for the public service obligations established under the procedure which led to the Commission's compatibility decision of 20 April 2005 on the use of the resources from the licence fee <sup>(13)</sup>.

(106) Article 2 of Decree No 2007-958 of 15 May 2007 on the financial relations between the State and public sector bodies in the audiovisual communication sector takes up the wording of Article 53 of the Law of 30 September 1986, taking account 'of the direct or indirect revenue derived from the public service mission' and specifies that the cost of the public service mission is to be established using separate accounts. Article 3 of the Decree provides for the obligation for France Télévisions and its subsidiaries to respect normal market conditions in all their commercial activities and for an external body to draw up an annual report on the discharging of this obligation, forwarded to the competent Minister, the National Assembly and the Senate. This latter provision was also referred to in France's commitments taken up in the Commission Decision of 20 April 2005, cited in recital 7.

(107) The General Court of the Union considered that both the provisions enshrining the principle of non-overcompensation and the control and verification of the conditions applied by France Télévisions to its commercial activities responded perfectly to the concerns expressed by the

Commission during the procedure which led to the Decision of 20 April 2005 <sup>(14)</sup>. The appropriateness of the *ex post* controls carried out on the respect of these commitments was also confirmed by the General Court <sup>(15)</sup>.

(108) The Commission has received and examined reports on the implementation of Articles 2 and 3 of the Decree relating to the financial years 2007 and 2008 (the reports drawn up under Article 3 of the Decree were certified, for 2007, by the auditors PriceWaterhouseCoopers and KPMG and, for 2008, by Cabinet Rise) and the draft report provided for under Article 2 for 2009. The reports available conclude that the public resources allocated to the France Télévisions group did not exceed the net cost of discharging the public service obligations entrusted to it and that France Télévisions respected normal market conditions in all its commercial activities. This therefore precludes any cross-subsidisation between commercial activities and public service activities. The preparation of the reports in question shows moreover that it is possible to draw up accounts of the public service costs and resources of the various channels of France Télévisions on the basis of the existing accounting tools, contrary to the assertions made in particular by M6.

(109) The arrangements for the *ex post* control of the public resources provided for in Decree No 2007-958 will apply to the budgetary grant notified. Since the introduction of the control, the total public resources allocated to France Télévisions have been insufficient to cover the net cost of discharging the public service obligations, so the question of the allocation of any overcompensation has not arisen. As regards the medium-term forecasts of the costs and revenues contained in the business plan and illustrated in Table 1 above, a slight surplus seems to be forecasted in 2012 which, if it materialises and is not needed to absorb the deficits forecasted for the years 2010 and 2011, should normally be earmarked as a priority for the expenditure on audiovisual creation.

(110) In any case, to bring the existing mechanism into line with the specifications newly introduced in 2009 by the Broadcasting Communication, the French Republic undertakes to amend Article 2 of Decree No 2007-958 of 15 May 2007:

— to ensure that the annual report on the separate accounts, like the report provided for in Article 3, is audited by an external body, the choice of which is subject to the approval of the Minister for

<sup>(13)</sup> See Decision C(2005) 1166 final, points 65 to 72.

<sup>(14)</sup> Judgment in Case T-354/05, *TF1 v Commission* [2009] ECR II-00471, paragraphs 205 to 209.

<sup>(15)</sup> See in this respect the judgment of 1 July 2010 in Joined Cases T-568/08 and T-573/08 *M6 and TF1 v Commission*, and in particular paragraphs 115 et seq., not yet reported.

Communication, forwarded to this Minister and to the National Assembly and the Senate, and drawn up at the expense of France Télévisions,

opens up a gap which could be filled by new entrants or operators with small-scale presence on the advertising market at present, increasing the dynamism of competition in the future.

— to complete the specific functional mechanism to ensure the actual recovery of any overcompensation or cross-subsidisation arising from these separate accounts and not compatible with Article 53 of Law No 86-1067 of 30 September 1986 on Freedom of Communication or with the Broadcasting Communication.

- (111) Under these conditions, it appears that the French Republic will have appropriate mechanisms in place to undertake regular, effective controls of the use of public funding to ensure that there is no overcompensation or cross-subsidisation, as provided for in the Broadcasting Communication.
- (112) In view of the above, it appears that the potential restrictions of competition attributable to the presence of France Télévisions in commercial markets where it will still operate after the reform has been implemented in full will be limited all told. This presence will probably be very small-scale and the reform will have the foreseeable effect of transferring the demand for television advertising, even if only partially, to the competitors of France Télévisions.
- (113) In fact, as pointed out in a letter made public by seven private television or radio broadcasters, continuing the reform to the end with the discontinuance of the advertising messages of France Télévisions would be liable to: 'give the private media the ability to bounce back which they need', whereas maintaining advertising messages: 'would generate harmful consequences for all French media and would substantially change the economic prospects of the operators...' <sup>(16)</sup>.
- (114) In other words, the partial withdrawal of France Télévisions and the refocusing of the structure of its revenues – commercial or public from compensation – on the broadcasting of programmes corresponding to its general interest mission without direct financial quid pro quo for the viewing public, reduce the potential restrictions of competition on the competitive markets in which France Télévisions operates. This withdrawal
- (115) It results from this that, in the light of the information supplied and the commitments entered into by the French Republic, the public funding will be intended to enable France Télévisions to cover the net costs incurred to perform the obligations incumbent upon it and this funding will have to be confined to these costs and will remain subject to *ex post* controls which meet the criteria of the Broadcasting Communication applicable. In addition, since France Télévisions will reduce its presence in the competitive markets, the envisaged aid is not liable to affect the development of trade to an extent contrary to the interest of the Union, thereby fulfilling the conditions for the application of Article 106(2) of the TFEU.
- (116) Furthermore, the French Republic undertakes to provide the Commission with an annual report until 2013, on which date the reform of public broadcasting will have been completed, which will allow monitoring of the aspects of the implementation of the reform which are the most relevant in terms of the state aid rules, i.e. the annual compensation and the *ex post* control mechanisms, the conditions applied by France Télévisions to its commercial activities and the change in its position on this market, as well as the annual implementation of the agreement relating to objectives and means.
- (117) In view of the scale of the reform, the innovations it introduces concerning the financing of the service mission of France Télévisions, its consequences on the trend in costs and revenues of France Télévisions and the uncertain economic environment of the markets affecting the commercial revenues of France Télévisions and its competitors, this commitment is of a nature to enable the Commission to verify the implementation of the reform and to monitor it very closely, as well as the implementation of the commitments assumed by the French Republic under this procedure.
- The new taxes provided for by the reform of public broadcasting
- (118) In its decision initiating the procedure, the Commission had expressed doubts concerning the existence of possible earmarking between the revenues from the new taxes on advertising and electronic communications and the annual grant to be paid from 2010 to France Télévisions. Such a link, if it could be established, would mean that these taxes would have to be considered as constituting an integral part of the aid and subject to the

<sup>(16)</sup> Letter from the Chairmen of TF1, M6, Canal +, Next Radio TV, NRJ, RTL and Locales TV to the President of the Republic, dated 21 June 2010, available from 24 June 2010 at: <http://www.latribune.fr/technos-medias/publicite/20100623trib000523461/france-telvisions-les-medias-privés-insistent-pour-mettre-fin-a-la-publicite.html>

test of compatibility of the latter with the internal market. Although the existence of such a link could be precluded for 2009, in view in particular of the date of entry into force and implementation of Law No 2009-258 of 5 March 2009 on public broadcasting, a doubt remained for the future, given the declarations made by the highest French authorities.

(119) It follows from the case-law of the Court of Justice, confirmed by the judgment of 22 December 2008 in the case referred for a preliminary ruling *Régie Networks* (C-333/07) (paragraph 99) that 'For a tax to be regarded as forming an integral part of an aid measure, it must be hypothecated to the aid under the relevant national rules, in the sense that the revenue from the charge is necessarily allocated for the financing of the aid and has a direct impact on the amount of the aid and, consequently, on the assessment of the compatibility of that aid with the common market.'<sup>(17)</sup> The two conditions for application established by the Court, i.e. the relevant national rules and the direct impact on the amount of the aid, are examined below.

(120) In French law, under Article 36 of the Organic Law of 1 August 2001 on Finance Laws, the allocation in whole or in part of a resource established in favour of the French State to another legal person may result only from a provision of a finance law. The finance law should therefore provide explicitly that the proceeds from the taxes on advertising and electronic communications introduced by Law No 2009-258 of 5 March 2009 will be earmarked in whole or in part for the financing of France Télévisions. No such provision has been adopted to date. For the future, the French Republic commits to notifying the Commission of any plans to change the architecture of the regime, in accordance with Article 108(3) of the TFEU. Under these conditions, hypothecation of the new taxes to the notified aid under national law cannot be established, within the meaning of the case-law of the Court.

(121) In addition, it appears that the decisive criterion to determine the annual amount of budgetary grant, cumulated with the amount provided for from the television licence fee, will be the amount of the net costs of the public service obligations entrusted to France Télévisions and not that of the revenue obtained from the new taxes. The estimated public service costs are and will be the subject of *ex ante* estimates in the agreement relating to objectives and means under Article 53 of Law No 86-1067 of 30 September 1986,

amended, on Freedom of Communication, the annual grant provided for a draft finance law will be calibrated according to the estimated net costs and the balance between estimates and results will have to be established and, if necessary, corrected *ex post* in the report provided for on the implementation of Article 2 of Decree No 2007-958 of 15 May 2007 on the financial relations between the State and public sector bodies in the audiovisual communication sector. Since the costs are incurred independently of the resources levied as taxes, the proceeds from the taxes cannot have a direct impact on the amount of aid. It appears moreover that the rates of the taxes initially provided for by the French Government have been reduced in the final law passed by Parliament, without this being translated into a concomitant, proportional reduction in the grant to be paid for France Télévisions.

(122) In the light of the above, the taxes on advertising and electronic communications introduced by Law No 2009-258 of 5 March 2009 do not constitute an integral part of the aid and consequently do not have to be integrated into the examination of the compatibility of the aid with the internal market, contrary to the assertions of certain interested third parties, i.e. the ACT, the FFTCE, the Association des chaînes privées, M6 and TF1.

(123) This conclusion is without prejudice to the compatibility of these taxes and their specific provisions as separate measures with Union law, in particular concerning the tax on electronic communications, in respect of the questions examined in the context of infringement procedure No 2009/5061, in the light of Directive 2002/20/EC or Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services<sup>(18)</sup>.

(124) Furthermore, the Commission notes the declaration by France excluding these taxes from the scope of its notification, which is the subject of the present Decision.

## VII. CONCLUSIONS

(125) In the light of the above, the Commission concludes that the annual budgetary grant in favour of France Télévisions, implemented as indicated above, can be declared compatible with the internal market under Article 106(2) of the TFEU, according to the principles and rules for application laid down for public broadcasting services,

<sup>(17)</sup> [2008] ECR I-10807. See also the judgment in Joined Cases C-393/04 and C 41/05 *Air Liquide Industries Belgium* [2006] ECR I-5293, point 46.

<sup>(18)</sup> OJ L 108, 24.4.2002, p. 33.

HAS ADOPTED THIS DECISION:

*Article 1*

The State aid which the French Republic is considering implementing in favour of France Télévisions in the form of an annual budgetary grant in implementation of Article 53, Section VI of Law No 86-1067 of 30 September 1986, amended, on Freedom of Communication is compatible with the internal market in accordance with Article 106(2) of the Treaty on the Functioning of the European Union.

The implementation of this aid is consequently authorised.

*Article 2*

This Decision is addressed to the French Republic.

Done at Brussels, 20 July 2010.

*For the Commission*  
Joaquín ALMUNIA  
*Vice-President*

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