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II

(Non-legislative acts)

DECISIONS

COMMISSION DECISION

of 23 February 2011

on State aid granted by Italy to Portovesme Srl, ILA SpA, Eurallumina SpA and Syndial SpA (State aid measures C 38/B/04 (ex NN 58/04) and C 13/06 (ex N 587/05))*(notified under document C(2011) 956)***(Only the Italian text is authentic)****(Text with EEA relevance)**

(2011/746/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 ⁽¹⁾, and having regard to their comments,

Whereas:

(3) By letters dated 22 January 2004 and 19 March 2004, the Commission requested further information on these measures. The Italian authorities replied by letters dated 9 February 2004 and 9 June 2004. By letter of 20 September 2004, Italy submitted further information.

(4) By letter dated 16 November 2004, the Commission informed Italy that it had decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union (TFEU) in respect of the measure.

(5) The Commission's decision to initiate the procedure was published in the *Official Journal of the European Union* ⁽²⁾. The Commission invited interested parties to submit their comments on the measures.

1. PROCEDURE

1.1. Case C 38/B/04

(1) By letter dated 4 December 2003, a law firm representing a complainant brought to the Commission's attention a series of articles published in the Italian press concerning the Italian Government's intention to introduce preferential electricity tariffs for certain undertakings located in Sardinia.

(2) The tariffs were introduced by Article 1 of the Prime Ministerial Decree of 6 February 2004 ('the 2004 Decree'). The Decree had two distinct effects: a) it introduced new preferential electricity tariffs for the companies Portovesme Srl, ILA SpA and Eurallumina SpA, and b) it prolonged an existing preferential tariff in favour of Alcoa Trasformazioni, a producer of primary aluminium ('Alcoa').

(6) Italy submitted observations by letters dated 4 February 2005 and 11 February 2005.

(7) The Commission also received observations from other interested parties, including three of the undertakings benefiting under the measures and a competitor of Portovesme. By letter dated 22 March 2005 the Commission forwarded those observations to Italy, which was given the opportunity to comment. Italy's comments were received by letter dated 20 September 2005.

(8) On 29 October 2008 the case C 38/04 was split into part A, concerning Alcoa, and part B, concerning Portovesme, ILA and Eurallumina.

⁽¹⁾ OJ C 30, 5.2.2005, p. 7, and OJ C 145, 21.6.2006, p. 8.

⁽²⁾ OJ C 30, 5.2.2005, p. 7.

- (9) On 19 November 2009 the Commission adopted a final negative decision with respect to Alcoa, ordering recovery of the aid ⁽³⁾.

1.2. Case C 13/06

- (10) By Article 11(12) of Decree-Law No 35 of 14 March 2005, converted into statute by Law No 80/2005 of 14 May 2005 laying down urgent provisions under the Action Plan for Economic, Social and Territorial Development ('Law No 80/9005'), the Italian authorities prolonged until 2010 the preferential electricity tariff for Portovesme, ILA and Eurallumina, and extended the benefit of the tariff to Syndial SpA, a chlorine producer also based in Sardinia.

- (11) The Commission received a complaint from a company competing with Syndial by letter dated 22 July 2005, followed by further submissions from the same company dated 7 October 2005 and 7 December 2005.

- (12) Italy notified the measure to the Commission by letter dated 23 November 2005. By letter dated 28 November 2005, Italy provided additional information.

- (13) By letter dated 22 December 2005 the Commission asked for further information, which Italy provided by letter dated 3 March 2006.

- (14) In the meantime, by letter dated 20 January 2006, the same competitor of Portovesme which had submitted observations in case C 38/B/04 complained about the new measure.

- (15) By letter dated 26 April 2006, the Commission informed Italy that it had decided to initiate the procedure laid down in Article 108(2) TFEU in respect of the changes and the extension of the special tariff scheme introduced by Law No 80/2005.

- (16) The Commission asked Italy for further clarification by letter dated 22 August 2006; Italy replied by letter dated 28 September 2006.

- (17) The Commission's decision to initiate the procedure was published in the *Official Journal of the European Union* ⁽⁴⁾. The Commission invited interested parties to submit their comments on the measures.

- (18) The Commission received observations from interested parties, including the beneficiaries, the two competitors of Portovesme and Syndial, and a producer of renewable energy. By letter dated 5 October 2006 the Commission forwarded those observations to Italy, which was given the opportunity to comment. Italy's comments were received by letter dated 1 December 2006.

- (19) Italy provided additional information by letters of 16 April 2007, 10 May 2007, 14 May 2007 and 22 June 2010.

1.3. Scope of the present Decision

- (20) The present decision covers both the tariffs introduced by Article 1 of the 2004 Decree for beneficiaries other than Alcoa ('the 2004 tariffs') and those introduced by Article 11(12) of Law No 80/2005 and subsequently spelt out in decisions taken by the Electricity and Gas Authority (*Autorità per l'Energia Elettrica e il Gas* — 'AEEG') ('the 2005 tariffs').

2. DETAILED DESCRIPTION OF THE MEASURE

2.1. The disputed 2004 tariffs

- (21) Article 1 of the 2004 Decree extended 'the [tariff] treatment laid down in Article 2 of the Decree of the Ministry for Industry, Trade and Crafts of 19 December 1995 ("the Alcoa Decree") to energy supplies for the production and processing of aluminium, lead, silver and zinc, but only in respect of plants already in existence at the date of entry into force of the present Decree and located on islands with insufficient or no interconnection to the national electricity and gas grids'.

- (22) This tariff treatment was to be transitory; it was to end 'upon the completion or upgrade of the connections with the national electricity and gas grids' and no later than 30 June 2007.

- (23) In practice, the 2004 Decree extended the preferential tariff already enjoyed by aluminium producer Alcoa to three energy-intensive companies located in Sardinia: Portovesme, a producer of zinc, silver and lead ⁽⁵⁾; ILA, a producer of processed aluminium products; and Eurallumina, a producer of alumina ⁽⁶⁾.

- (24) At the regulatory level, the tariff was implemented through decisions (*delibere*) of the AEEG.

⁽³⁾ Commission Decision 2010/460/EU of 19 November 2009 on State aid measures C 38/A/04 (ex NN 58/04) and C 36/B/06 (ex NN 38/06) implemented by Italy for Alcoa Trasformazioni (OJ L 227, 28.8.2010, p. 62).

⁽⁴⁾ OJ C 145, 21.6.2006, p. 8.

⁽⁵⁾ For its plants in Portoscuso and San Gavino.

⁽⁶⁾ Alumina is an intermediate raw material, obtained from bauxite, which is used for aluminium smelting. A large part of Eurallumina's output serves Alcoa's nearby smelting facilities.

(25) AEEG decision No 110/04 stipulated that the preferential tariffs would be applied only if the notification procedure had a positive outcome. However, following instructions from the Prime Minister's Office specifying that the 2004 Decree had not been formally notified under the State aid rules but only 'presented' to the Commission in the framework of a 'preliminary inquiry' (*indagine conoscitiva preliminare*), the AEEG implemented the 2004 Decree through decision No 148/04 ⁽⁷⁾.

(26) The system allowed the beneficiaries to be given compensatory payments on the terms laid down in the Alcoa Decree. For a given plant covered by the scheme, the compensatory payment was equal to the difference between the price paid to the company supplying the plant with electricity and a preferential price set by the State, multiplied by the electricity consumption of the plant. The method used to calculate the preferential price (or 'preferential tariff') was laid down in decision CIP No 15/1993. The price was subject to an indexation mechanism based on the variation of Italian power generation costs (the 'Ct component'). In 2004 the preferential price applied to the Sardinian beneficiaries ranged between EUR 26 and EUR 35 per MWh.

(27) The administrative management of the scheme was entrusted to the Electricity Industry Equalisation Fund (*Cassa Conguaglio per il Settore Elettrico*) ⁽⁸⁾. In practice, the tariff system worked as follows. The beneficiaries sent the Equalisation Fund detailed monthly data on the quantities of electricity they had consumed and the prices they had paid to their power suppliers. They then received from the Equalisation Fund cash payments calculated as indicated above ⁽⁹⁾.

(28) The resources required to finance the compensatory payments were raised through a parafiscal charge

⁽⁷⁾ The tariff mechanism is described in Article 73 of the consolidated rules for the provision of the services of transmission, distribution, measurement and sale of electricity for the regulatory period 2004–2007 (*Testo integrato delle disposizioni per l'erogazione dei servizi di trasmissione, distribuzione, misura e vendita dell'energia elettrica per il periodo di regolazione 2004-2007*). This document is drawn up and regularly updated by the AEEG.

⁽⁸⁾ The Equalisation Fund is a public body established by Legislative Decree No 98 of 26 January 1948; it acts on instruction from the AEEG, and among other things handles the financial flows related to preferential electricity tariffs (collection of levies and payment to final recipients).

⁽⁹⁾ The beneficiaries could also terminate their existing supply contracts and turn directly to the Single Buyer (*Acquirente unico*), a State-owned body responsible for pooling demand from consumers who wish to be supplied by it and procuring electricity on their behalf on the wholesale electricity market at the best possible price. If a beneficiary of the compensatory payments had decided to opt for this system, the State would have taken the Single Buyer price as the reference for the calculation of the compensatory payments. This arrangement was designed to minimise the costs of the scheme to the general public, as it discouraged beneficiaries from concluding unfavourable supply contracts with their own power suppliers (which would have resulted in higher compensatory payments). However, it was optional: the beneficiaries were not required to address themselves to the Single Buyer in order to receive the compensatory payments.

imposed on all Italian electricity consumers via component A4 of the standard electricity tariff ⁽¹⁰⁾.

(29) The scheme was to have ended on 30 June 2007. However, its implementation was discontinued on instructions from the AEEG soon after the Commission opened the formal investigation in November 2004 ⁽¹¹⁾.

(30) The data provided by Italy shows that Portovesme and Eurallumina received subsidies for electricity consumed between April and October 2004, and ILA received subsidies for electricity consumed between April and September 2004. The total payments made by the Equalisation Fund to these three undertakings under the scheme are set out below (in euro).

Portovesme Srl	12 845 892,82
Eurallumina SpA	5 208 152,05
ILA SpA	291 120,27

2.2. The disputed 2005 tariffs

(31) By Article 11(12) of Law No 80/2005, the Italian authorities extended 'the tariff treatment laid down in the Decree of the Ministry for Industry, Trade and Crafts of 19 December 1995 to energy supplies for the production and processing of aluminium, lead, silver and zinc and for the chlorine-soda cycle, by reference to prices applied to similar supplies on the European markets, but only in respect of plants already in existence at the date of entry into force of the present Decree, located in Sardinia and connected to the high-voltage network. This tariff treatment shall be subject to long-term commitments to be agreed between the beneficiaries, the Sardinian local authorities and the responsible Ministries.'

(32) Thus Law No 80/2005 in substance reintroduced the tariff scheme implemented in 2004, which extended the Alcoa treatment to other energy-intensive beneficiaries based in Sardinia. In practice, the Law applied only to Portovesme, ILA and Eurallumina, and to Syndial, a chlorine-soda producer which had not benefited from preferential prices before.

⁽¹⁰⁾ The standard Italian electricity tariff, which reflects the mechanism for imputing electricity costs to end-users, is divided into tariff components. Each component is designed to finance specific costs. Component A2, for example, finances the costs of dismantling old nuclear plants, while component A3 finances renewable energy installations. Component A4 financed preferential electricity tariff schemes. All end-users' bills share this structure.

⁽¹¹⁾ Letter from the AEEG to the Ministry for Production Activities dated 17 December 2004. According to the information available, however, the 2004 Decree has not been formally repealed by the Italian authorities.

(33) It should be noted that from 2005 onwards the preferential price was no longer pegged to the historical tariff originally laid down in the 1995 Alcoa Decree, but was now to be set independently by the AEEG so as to match the average electricity prices paid by the beneficiaries' competitors on the European market ⁽¹²⁾. The price was subject to annual updates: according to Article 11(13) of the Law, 'the tariff terms referred to in Articles 11 ⁽¹³⁾ and 12 shall apply from 1 January 2005 and shall be updated by the AEEG, which shall each year increase the nominal values of the tariffs by 4 %, or, if this latter value be higher, by the percentage increase in the average wholesale price of electrical energy recorded on the main European electrical energy exchanges, principally Frankfurt and Amsterdam.' In decision No 217/05, the AEEG gave an interpretation of this update mechanism which was more favourable to the beneficiaries, as it laid down that the annual increase in the tariff could not exceed 4 %.

(34) In the same decision, the AEEG set the preferential prices applicable to the various industries for the year 2005 as follows:

Industries qualifying for preferential tariffs	Preferential price EUR/MWh
Aluminium processing	50
Lead and zinc	23
Aluminium production	27
Chlorine cycle	27

(35) Like the 2004 tariffs, the 2005 tariffs were to be financed by means of a parafiscal levy charged to all electricity end-users via component A4 of the standard electricity tariff. The management of the financial flows of the system was again entrusted to the Equalisation Fund.

(36) Entitlement to the tariff was conditional upon a commitment by which the beneficiaries undertook to carry out productive investment in Sardinia on the basis of industrial plans to be submitted to the regional authorities. For example, Portovesme undertook to invest in the self-generation of electricity or to participate in the construction of new power plants.

(37) Italy notified Article 11(12) of Law No 80/2005 in accordance with Article 108(3) TFEU. Payment of the

2005 tariffs was subject to the authorisation of the scheme by the Commission. The 2005 tariffs have consequently not been implemented.

2.3. Proceedings before national courts

(38) Solvay Chimica Italia and Solvay Chimica Bussi SpA, which operate in the chlorine-soda cycle and are located outside Sardinia, brought legal proceedings before the Regional Administrative Court of Lombardy ⁽¹⁴⁾ challenging the decisions taken by the AEEG in implementation of Article 11(12) of Law No 80/2005, on the grounds that they involved the granting of unlawful State aid and that they breached other provisions of Italian law ⁽¹⁵⁾. On 27 November 2006 the Court stayed the proceedings before it, pending the conclusion of the State aid investigation initiated by the Commission in Case C 13/06.

2.4. Combination with previous incompatible aid — Deggendorf

(39) After the opening of proceedings, Italy indicated that Eurallumina had not reimbursed the incompatible aid which had been the subject of Case C 80/01 (aid for alumina production) ⁽¹⁶⁾, but that, according to the company, the Sardinian regional authorities had issued a recovery order in respect of this measure on 8 May 2006.

3. DECISION TO INITIATE PROCEEDINGS UNDER ARTICLE 108(2) TFEU

(40) The Commission decided to initiate the formal investigation on the following grounds.

3.1. Case C 38/B/04

(41) In its decision to open the formal investigation ⁽¹⁷⁾, the Commission considered whether it might be that the 2004 tariffs for Portovesme, ILA and Eurallumina did not constitute State aid, on the ground that they were similar to the preferential tariff granted to Alcoa in 1996, which the Commission had held not to constitute State aid in its decision of 4 December 1996 ('the Alumix decision') ⁽¹⁸⁾.

⁽¹⁴⁾ Case reference R.G. n. 2317/2005.

⁽¹⁵⁾ In particular Legislative Decree No 79/1999, which implemented Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity (OJ L 27, 30.1.1997, p. 20).

⁽¹⁶⁾ Commission Decisions C/2005/4436/06 of 7 December 2005 and C/2007/286/3 of 7 February 2007.

⁽¹⁷⁾ Commission Decision C(2004) 4329 of 16 November 2004 (OJ C 30, 5.2.2005, p. 7).

⁽¹⁸⁾ OJ C 288, 1.10.1996, p. 4.

⁽¹²⁾ This term is in all likelihood be understood as referring to the EU/JEEA market.

⁽¹³⁾ This Article extended the Alcoa and Terni tariffs to 2010.

(42) The Commission observed that the new tariff seemed different from the *Alumix* tariff, as the *Alumix* tariff was granted directly by ENEL, the Italian monopolist electricity operator, while the new tariff involved the selective intervention of the State to compensate the difference between the market price agreed by the beneficiaries with their power suppliers and the preferential price fixed in 1996. The Commission concluded that the 2004 Decree did not merely extend to new beneficiaries the scope of an existing measure that did not constitute State aid, but rather introduced a new scheme for the benefit of the three undertakings concerned, with a financial mechanism that was very different from the *Alumix* tariff.

(43) The opening decision classified the tariffs introduced by the 2004 Decree as operating aid, and assessed whether that aid could be authorised on the basis of the Guidelines on National Regional Aid ('the Regional Aid Guidelines')⁽¹⁹⁾, since Sardinia was an assisted region within the scope of Article 107(3)(a) until the end of 2006. The Commission doubted whether the aid could be authorised on that basis, since ad hoc aid of that kind, granted to a limited number of undertakings, did not seem to promote regional development.

(44) The Commission also expressed concern that the measure might have the effect of reducing the level of taxation applicable to electricity. Any such reduction would have to have a legal basis in Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity⁽²⁰⁾.

3.2. Case C 13/06

(45) In its decision of 27 April 2006 opening the formal investigation, the Commission classified the 2005 tariff scheme as new operating aid.

(46) The Commission considered whether the preferential tariff could be authorised as regional operating aid on the basis of the Regional Aid Guidelines, since Sardinia was to be an assisted region within the scope of Article 107(3)(a) TFEU until the end of 2006.

(47) Despite Italy's insistence that high electricity prices in Sardinia handicapped the development of the island, the Commission took the view that Italy had not

shown that prices were significantly higher in Sardinia, either on average or specifically for energy-intensive users⁽²¹⁾. The Commission pointed out that the over-capacity that existed in electricity generation in Sardinia could only have the effect of encouraging power generators to sell electricity at the lowest possible price, until such time as the completion of the interconnection projects, which was scheduled for 2010, enabled them to export power from Sardinia.

(48) Besides, Italy had not explained why higher prices should be regarded as a regional handicap, or how the tariff would contribute to regional development. The Commission accordingly doubted whether the aid was necessary.

(49) The Commission also doubted whether ad hoc aid of this kind was proportional to the regional disadvantages, in particular in view of the method used to calculate the preferential price, which bore no relation to the prices charged in the rest of Italy but was based on the average prices charged in Europe to energy-intensive users.

(50) The Commission noted that the duration of the measure exceeded five years, which was usually the maximum period for which regional operating aid would be authorised, and that the aid was not degressive in real terms, in view of the 4 % cap imposed on increases in the tariff.

(51) As regards the period covered by the Guidelines on National Regional Aid 2007–2013⁽²²⁾, the Commission noted that Sardinia would cease to qualify for aid under Article 107(3)(a) TFEU, and in particular for operating aid. The Guidelines would allow a two-year transitional period for the linear phasing-out of existing operating aid schemes, but it did not seem appropriate to allow new operating aid to be introduced for a few months and then phased out, especially given the doubts expressed and the distortive nature of the aid.

(52) In conclusion, the Commission doubted whether the preferential tariff for Portovesme, ILA, Eurallumina and Syndial could be authorised either as regional aid or on any other grounds, which Italy had in any event failed to identify.

⁽¹⁹⁾ OJ C 74, 10.3.1998, p. 9, points 4.15 to 4.17, as amended (OJ C 258, 9.9.2000, p. 5).

⁽²⁰⁾ OJ L 283, 31.10.2003, p. 51.

⁽²¹⁾ In particular, the Italian authorities argued that prices for energy-intensive users were negotiated bilaterally and were therefore not in the public domain. This meant that they were unable to quote electricity prices paid by the beneficiaries and by their competitors in other Italian regions.

⁽²²⁾ OJ C 54, 4.3.2006, p. 13.

- (53) As regards Eurallumina, the Commission observed that the company had not yet reimbursed unlawful and incompatible State aid it had received⁽²³⁾, and that under the rule in *Deggendorf*⁽²⁴⁾ it consequently could not receive aid under any new measure.

4. OBSERVATIONS SUBMITTED BY INTERESTED PARTIES

4.1. Case C 38/B/04

- (54) In response to the Commission's invitation to submit comments on the 2004 decision to open the in-depth investigation, observations were received from the original complainant, several of the beneficiaries (Portovesme, Eurallumina and Alcoa), and other interested parties. Only the observations relevant to the preferential tariff for Portovesme, ILA and Eurallumina are summarised here. The observations made by Alcoa are not included, as they are comprehensively addressed in the final decision specifically concerning that company⁽²⁵⁾.

4.1.1. Observations submitted by Portovesme

- (55) Portovesme argued that the preferential tariff addressed a market failure, namely the failure of the recently liberalised Sardinian electricity market to deliver competitive prices owing to the market power of the incumbent operators. Portovesme claimed that ENEL and Endesa (whose power generation assets in Sardinia were subsequently sold to E.ON) formed a duopoly, and artificially kept electricity prices in Sardinia in line with average Italian prices, whereas in fact Sardinian prices should be much lower, especially for large electricity consumers, given the overcapacity in electricity generation, which ought to encourage generators to sell at competitive prices.
- (56) Portovesme contended that the preferential price enjoyed corresponded to the price the company would have obtained under normal market conditions, i.e. if the electricity market functioned correctly.
- (57) According to Portovesme, the compensatory payments received from the Equalisation Fund (amounting to EUR 37 per MWh) brought the price paid by Portovesme into line with power prices paid by its competitors, and did not distort competition, since all EU zinc producers

paid equivalent prices, and the measure merely offset the competitive disadvantage suffered by the company as a result of Sardinia's structural problems (which included the absence of natural gas).

- (58) Metals like zinc, aluminium and lead were commodities for which there was one world price, arrived at on the London Metal Exchange. Variations in local production costs did not translate into differences in world prices. In particular, Portovesme's zinc production was so small (at less than 1 % of world production) that it could not affect the world price.

- (59) Without the tariff Portovesme would have to close its plant, but the closure would not benefit other EU zinc producers, who would not be in a position to increase output, and the gap would be filled by imports from third countries. Portovesme concluded that the preferential tariff did not affect competition or trade in the EU.

- (60) Moreover, according to Portovesme, the compensatory payments from the Equalisation Fund did not involve State resources, since the Equalisation Fund merely redistributed private funds which came from electricity end-users.

- (61) Portovesme noted that power off-take by energy-intensive industries was important to ensure security and continuity of supply in Sardinia, and to avoid inefficiencies in power generation which would lead to higher electricity costs for end-users.

- (62) Finally, the company points out that, if it was obliged to close down its plant, the consequences for Sardinia's production base would be very serious, as 790 direct jobs and 500 indirect jobs would be lost.

4.1.2. Observations submitted by Eurallumina

- (63) Eurallumina argued that alumina production costs in Europe were higher than in other regions of the world, owing mainly to higher electricity and fuel prices and to the cost of transporting bauxite⁽²⁶⁾. The higher costs could not be passed on in the form of higher prices, since the price of alumina was set on the London Metal Exchange and individual producers had no influence over it. European alumina production therefore suffered from a competitive disadvantage compared with the rest of the world.

⁽²³⁾ Case C 80/01 (alumina case, Commission Decision 2006/323/EC). The case concerned exemptions from excise duties on heavy oil used for the production of alumina in Sardinia, in Gardanne (France), and in Shannon (Ireland).

⁽²⁴⁾ Judgment of the Court of Justice in Case C-355/95 *Textilwerke Deggendorf v Commission* [1997] ECR I-2549.

⁽²⁵⁾ See recital 9 of the present Decision.

⁽²⁶⁾ Aluminium ore, the raw material for the production of alumina.

(64) In addition to the general problems affecting European alumina refineries, Eurallumina also pointed to specific Sardinian problems that prevented local industries from reaping the benefits of electricity market liberalisation, notably the market power of incumbent electricity operators (see Portovesme's observations in recital 55 above). Eurallumina also contended that the absence of natural gas was a specific handicap for the production of alumina in Sardinia, as the large quantities of steam required for the process had to be obtained using more expensive heavy oil.

(65) According to Eurallumina, after liberalisation the market power of electricity generators in Sardinia led to an increase in electricity prices: without the tariff, Eurallumina would have had to pay EUR 65,95 per MWh for its electricity supplies, as against the EUR 44 per MWh it used to pay before liberalisation. The 2004 tariff brought the price down to EUR 35 per MWh.

(66) Like Portovesme, Eurallumina contended that, if it was forced to go out of business, other EU alumina producers would not be able to step in, as they already worked at maximum capacity, and the gap would be filled by imports from third countries. Closure would lead to the loss of 400 direct jobs and 250 indirect jobs⁽²⁷⁾. Given that it was the sole supplier of alumina for Alcoa's smelter, Eurallumina considered that the closure of its alumina plant might also jeopardise Alcoa's viability in Sardinia.

(67) Eurallumina concluded that the tariff introduced by the 2004 Decree was necessary pending the development of the new infrastructure that would remove the main factors of competitive disadvantage affecting Sardinian industry.

4.1.3. Observations submitted by other interested parties

(68) A competitor of Portovesme — the same company that had originally brought the case to the Commission's attention — wrote to the Commission again after the opening of the formal investigation. It submitted an analysis of the 2004 preferential tariff in which it concluded that the tariff constituted unlawful State aid. The disputed tariff scheme was fundamentally different from the *Alumix* tariff granted to Alcoa: it was impossible to take the view that it did not constitute State aid. The aid must be held incompatible with the common market, as it could not be approved either as regional operating aid or as restructuring aid.

⁽²⁷⁾ At the time of the drafting of this decision, Eurallumina has been out of production for more than a year, with workers receiving *cassa integrazione* layoff benefit.

(69) Solvay Chimica Italia and Solvay Chimica Bussi, who operate in the chlorine-soda industry, sent observations on the 2004 tariffs in July 2005, after the expiry of the one-month deadline for submitting comments in response to the decision to open the formal investigation. Despite the delay, these companies asked to be considered interested parties. In their observations they submitted that both the 2004 and the 2005 tariffs constituted unlawful and incompatible State aid.

4.1.4. Observations submitted by Italy

The tariff addresses a market failure

(70) Italy argued that the electricity market in the EU was not yet fully competitive, as the Commission had itself acknowledged in its fourth Annual Report on the Implementation of the Gas and Electricity Internal Market⁽²⁸⁾. Undertakings, in particular energy-intensive ones, were unable to choose their suppliers freely and to procure electricity on comparable terms in the various Member States. These difficulties were not related to the undertakings' own entrepreneurship, but were the result of the structural deficiencies of energy markets. The current situation in the EU energy market had negative effects on free competition in the product markets of energy-intensive users.

(71) In Italy, despite the liberalisation of the sector, there were particular structural deficiencies, such as insufficient interconnection between the different parts of the national grids and a concentrated market structure. In these circumstances, liberalisation had not translated into better prices for energy-intensive users. The problems were particularly acute in Sardinia, where interconnection was limited.

(72) Italy submitted, therefore, that a special tariff system reflecting demand profiles should be considered justified, as a regulatory measure that simulated the mechanisms that would be at play in a fully competitive market. The measure restored the level playing field between energy-intensive undertakings operating in different Member States, eliminating the geographical disadvantages which affect undertakings located in Sardinia. The scheme anticipated the expected effects of the liberalisation process. According to Italy, similar measures were implemented in other Member States, where energy-intensive users benefited as a result of regulated electricity tariffs.

(73) According to Italy, the 2004 decree pursued two further objectives: to support employment in Sardinia, which was concentrated in the metals sector, and to maintain a sufficient level of demand for power generation in Sardinia, which suffered from overcapacity.

⁽²⁸⁾ Document COM(2004) 863 final.

The tariff is not State aid

- (74) Italy contended that the new tariff scheme was equivalent, de facto, to the *Alumix* tariff, which the Commission had found did not constitute State aid. The differences between the old and the new scheme were due solely to the new 'tariff structure' required by the launch of the liberalised energy market.
- (75) Italy submitted that the tariff scheme did not constitute State aid. As regards the use of State resources, the tariff system was comparable to the arrangement in the *PreussenElektra* case, which the Court of Justice had held did not involve State resources⁽²⁹⁾. The Equalisation Fund was a technical body that kept the accounts of the system, and could not dispose freely of the financial resources it handled. The fact that the AEEG and the Ministry of Finance exercised a measure of control over the Equalisation Fund's activities did not mean that the State could freely dispose of those resources. According to Italy, therefore, the resources used to finance the tariff mechanism were entirely private.
- (76) Italy further submitted that the tariff did not have an impact on trade within the Union, and could not distort competition, for reasons linked to the existence of a world price for the products, which were commodities (see observations submitted by Portovesme, recital 55 above). Moreover, both EU and Italian production had failed to keep pace with rising demand for the metals concerned. In 2005 domestic production covered only 12 % of Italian demand for aluminium, 55 % of Italian demand for zinc, and 80 % of Italian demand for lead. There was a worsening production deficit for these metals in the EU and in Italy, and demand was increasingly being met by imports from third countries. If the metals industry in Italy disappeared, no new EU entrant would replace the capacity shut down in Italy, as EU plants were already working at full capacity, and no existing producer or new entrant would have an incentive to increase capacity, since the long-term prospects for the availability of affordable power were uncertain. The maintenance in Italy of these production capabilities consequently could not damage competitors. Since the preferential tariff was not lower than the electricity prices paid on average by the companies' competitors, it did not encourage exports from Sardinia towards other Member States.

If the tariff did constitute aid, it would be regional operating aid and would be compatible

- (77) Italy argued that, even if the Commission were to conclude that the measure was indeed State aid, the tariff could be considered compatible with the internal market on the ground that it was regional operating aid, which was admissible in Sardinia on the basis of the exemption in Article 107(3)(a) TFEU.

- (78) According to Italy, the imperfections of the Sardinian electricity market (market concentration, poor interconnection, and overcapacity in electricity generation) and the lack of access to gas infrastructure constituted a regional handicap, and the tariff sought to alleviate that handicap.
- (79) Electricity prices in Italy were 38 % higher than the EU average for energy-intensive users. This created a competitiveness problem which was exacerbated, in Sardinia, by the shortcomings of the local electricity market and the absence of access to the natural gas grid.
- (80) Italy contended that the measure contributed to regional development because the metals industry made a major contribution to the economy and to employment in Sardinia: the metals industry accounted for 12 % of the employed workforce and for 12,2 % of regional GNP in manufacturing. The tariff had positive repercussions on employment and the maintenance of the social and economic fabric of the island.
- (81) According to Italy, the tariff was proportional to the disadvantages faced by the beneficiaries, because it merely aligned the electricity prices paid by Sardinian producers on the average prices paid by their EU competitors.
- (82) The tariff was also short-term and transitional, since it was expected to end upon the completion of infrastructure projects aimed at improving interconnection with the electricity and gas grids (the new SAPEI interconnection cable and the GALSI gas pipeline)⁽³⁰⁾.
- (83) According to Italy, the measure was also degressive, because the preferential price was indexed on the basis of variations in fuel prices, and could only increase or remain unchanged.

4.2. Case C 13/06

4.2.1. Observations submitted by Portovesme

- (84) Portovesme considered that the 2005 tariffs did not distort competition, that they were necessary to ensure the survival of the industries concerned, and that they could be considered compatible as regional aid. The company's arguments are similar to those put forward by Italy, to which reference may be made (see recitals 87 to 104).

⁽³⁰⁾ Italy had estimated that these infrastructures would be completed in 2007. In the context of Cases C 13/2006 and C 36b/2006 Italy put back the expected date to 2010. At the time of the adoption of this decision, the GALSI pipeline has not been built (it is expected to be commissioned in 2014), and the SAPEI cable is only partly operational.

⁽²⁹⁾ Case C-379/98 [2001] ECR I-2099.

4.2.2. Observations submitted by Eurallumina

- (85) Eurallumina likewise considered that the 2005 tariffs did not distort competition, were necessary to ensure the survival of the industries concerned, and could be considered compatible as regional aid. The company's arguments are similar to those put forward by Italy, to which reference may be made.

4.2.3. Observations submitted by other interested parties

- (86) The two competitors of Portovesme and Syndial that had submitted observations in Case C 38/B/04 submitted observations in this case too. Both of them contended that the disputed measure constituted operating aid which should be considered incompatible with the internal market.

4.2.4. Observations submitted by Italy

The tariffs are part of a regional support strategy

- (87) Italy contended that the 2005 tariffs were very different from the tariffs implemented in 2004, since they were now in line with the requirements of the Regional Aid Guidelines.
- (88) According to Italy, the tariffs might, on the basis of a superficial assessment, be classified as operating aid, but in reality they were part of an array of measures designed to favour regional development in Sardinia. Italy drew attention, in particular, to the close link between the tariffs and the commitment to carry out long-term investments that beneficiaries were requested to give. The suspensive clause making the implementation of the measure subject to authorisation by the Commission testified, according to Italy, to its regional aid character.
- (89) The memorandum of understanding (*protocollo d'intesa*) signed by the Region and the beneficiaries was the lynchpin of this strategy. It comprised the following:
- (a) the productive investments described in the industrial plans submitted by the beneficiaries;
 - (b) the speedy authorisation of energy interconnection infrastructure enabling the beneficiaries to source energy at competitive prices (the GALSI gas pipeline and the SAPEI interconnection cable);
 - (c) the award of an integrated concession for the exploitation of the Sulcis coalmine and the construction/operation of a new coal-fuelled power plant intended to supply power to the beneficiaries; and
 - (d) the preferential tariffs.

- (90) Italy took the view that the tariffs should be seen as a policy instrument aimed at safeguarding sectors threatened by high energy prices, which would otherwise relocate outside Italy and Europe, owing to aggressive competition from non-EU companies with lower production costs. The tariffs were to be applied until the completion of the planned infrastructure and the achievement of a competitive internal market for energy. The measure was in line with the spirit of regional aid, because it promoted economic growth and employment on an island where energy-intensive production suffered from a competitive disadvantage owing not only to the imperfect state of liberalisation of the electricity market but also to exceptional infrastructural deficiencies in Sardinia as regards interconnection to the national electricity and gas grids.

- (91) In support of this integrated approach, Italy cited the First Report of the High Level Group on Competitiveness, Energy and Environment ⁽³¹⁾, which found that the liberalisation process in the energy sector had not produced satisfactory results, that better interconnection was necessary, and that long-term supply contracts with predictable prices or partnerships between customers and energy suppliers were desirable. Italy argued that the measures planned for Sardinia moved in this direction, but that short-term measures such as the tariffs were also needed in order to safeguard the competitiveness of Sardinian industry and ensure its survival until the planned investments were carried out and the structural problems were resolved.

The aid offsets a regional disadvantage

- (92) Italy contended that it was not possible to compare power prices paid by the Sardinian beneficiaries and average power prices paid by comparable undertakings on the Italian mainland, since energy-intensive undertakings purchased electricity via bilateral contracts which were not in the public domain. According to Italy, the Commission erred in carrying out a comparison based on prices recorded on power exchanges, since only a marginal part of these undertakings' energy supplies was procured on exchanges.
- (93) According to Italy, prices negotiated via bilateral contracts would be favourable to consumers only if the consumers could freely choose their suppliers and source electricity which was produced using competitive technologies. This was not possible in Sardinia, where power generation plants could not produce cheap electricity since they had no access to natural gas. Besides, new investments in modern power generation were discouraged by the limited electrical interconnection which made it impossible to export electricity. Another factor was market concentration and the role played by incumbent operators.

⁽³¹⁾ First Report of the High Level Group on Competitiveness, Energy and the Environment, 'Contributing to an integrated approach on competitiveness, energy and environment policies', http://ec.europa.eu/enterprise/policies/sustainable-business/policy-integration/high-level-group/reference-material/index_en.htm. The High Level Group was a forum in which representatives of the Commission and business leaders took part.

(94) In these circumstances, according to Italy, there was justification for applying tariffs which stabilised electricity prices until more effective competition was achieved on the electricity market. Italy once again argued that the preferential tariffs simulated the mechanism of a fully competitive market.

(95) As regards the overcapacity in electricity generation which led the Commission to doubt that power prices in Sardinia were higher than on mainland Italy (since overcapacity should rather encourage generators to sell at competitive prices to large consumers — see recital 47), Italy put forward the following arguments. Sardinian overcapacity in electricity generation could not lead to lower prices for consumers, because in this specific case overcapacity was the result of limited interconnection, which made it necessary to establish a very high power reserve in order to safeguard the continuity of electricity supplies on the island ⁽³²⁾. Since this reserve was in any event remunerated via charges imposed on all electricity end-users, power suppliers had no interest in selling the electricity produced using this idle capacity at more competitive prices.

The aid is proportional

(96) According to Italy the measure was proportional, because the price fixed by the AEEG for 2005 (see recital 34 above) corresponded to the average price paid in the EU by the beneficiaries' competitors, which was calculated objectively by the regulator. Italy also pointed out that in Member States with regulated tariffs large industrial consumers paid prices as low as EUR 25 per MWh for their electricity supplies in 2005.

(97) Italy therefore contested the data submitted by the complainants, which in its view were methodologically flawed, in that they overestimated the average electricity prices paid by the beneficiaries' competitors in the EU.

The aid is temporary and degressive

(98) According to Italy, the duration of the scheme, at six years rather than five, was justified by the need to wait for the completion of the energy infrastructure.

(99) Italy also contended that the degressivity requirement was met: the tariffs were degressive because they were adjusted on the basis of the weighted average of variations on the Amsterdam and Frankfurt power exchanges and could only increase but not decrease.

(100) The tariffs were pegged to price variations on the power exchanges because, according to Italy, this was an objective benchmark which was broadly representative of trends in energy prices. However, Italy maintained that actual price increases for EU energy-intensive users were generally considerably lower than the increases

recorded on exchanges, as such users paid prices agreed through bilateral contracts, or set by the State where there were regulated tariffs, and these prices were less prone to variation.

(101) Italy concluded that that the annual 4 % increase applied to the Sardinian tariffs was in line with the increases in energy prices applied to their direct EU competitors.

(102) Italy drew attention to the existence in the EU of measures which had effects equivalent to the disputed preferential tariffs, and argued that all of them should be assessed in the same way, regardless of their form, since their common objective was to ensure the survival of energy-intensive industries in the EU and prevent their relocation outside the national territory.

Eligibility of Sardinia for regional aid after 2007

(103) Although from 2007 onwards Sardinia could no longer benefit from regional operating aid, Italy argued that the Regional Aid Guidelines made provision for a phasing-out of schemes which were ongoing at the time a region ceased to be eligible for the exemption in Article 107(3)(a) TFEU. Thus the Commission was still in a position to authorise the measure under the 2007 Regional Aid Guidelines. In any event, Italy contended that the disputed measure should not be viewed as ordinary operating aid.

No impact on trade within the Union

(104) Italy contended once again that the tariffs did not affect trade between Member States, on the basis of the arguments already set out with respect to aluminium, zinc and lead in recital 76. The same reasoning, Italy maintained, applied to the chemical industry. Italy pointed out that in 2003 imports of chemical products into Italy had exceeded exports, and that EU and Italian production had slumped since 2001. With specific reference to the production of PVC, which was the main application of chlorine, Italy pointed to a production deficit in the country: in 2002, only 470 000 tonnes of PVC had been produced in Italy, while consumption had been 970 000 tonnes.

5. ASSESSMENT OF THE MEASURE

5.1. Existence of State aid pursuant to Article 107(1) TFEU

(105) A measure constitutes State aid within the meaning of Article 107(1) TFEU if the following conditions are all fulfilled: the measure (a) confers an economic advantage on the beneficiary; (b) is granted by the State or through State resources; (c) is selective; and (d) affects trade between Member States and is liable to distort competition within the EU.

⁽³²⁾ This high reserve level (80 % of maximum power absorbed by the network) was fixed by Ministerial Decree of 7 August 2000.

5.1.1. Existence of an advantage

- (106) Under the 2004 and 2005 tariff arrangements, the State intervened to subsidise the electricity price negotiated by the beneficiaries with their suppliers. In 2004, for example, on the basis of the bilateral supply contracts in force at the time and in the absence of the compensatory payments, Portovesme would have paid EUR 63 per MWh⁽³³⁾ and Eurallumina EUR 65,95. These figures were provided by Italy and the beneficiaries themselves, and are therefore not in dispute.
- (107) In 2005, according to the data provided by Italy, the electricity price negotiated by Syndial with its supplier exceeded EUR 60 per MWh, whereas the tariff would bring it down to EUR 27 per MWh. The rationale of the two measures was that the State would reimburse to the beneficiaries the extra costs they had sustained in order to purchase electricity in Sardinia compared to average prices paid by their EU competitors.
- (108) Portovesme contends that the preferential price corresponds to the price which would prevail in a fully competitive market, and therefore does not provide an advantage. The Commission has already rejected this line of reasoning in the *Alcoa* case, which concerned virtually identical tariffs. When assessing the presence of an advantage, neither the Union lawcourts nor the Commission have ever taken into account the conditions that would prevail in a hypothetical market that functioned better. The framework of reference has always been the conditions prevailing on the actual markets concerned⁽³⁴⁾.
- (109) This argument also supposes that where a market was not functioning properly a Member State would be justified in setting prices that simulated conditions of effective competition (see Italy's comment in recital 72 above).
- (110) This reasoning cannot be accepted, as it runs counter to the settled principle of EU case-law according to which 'the fact that a Member State seeks to approximate, by unilateral measures, conditions of competition in a particular sector of the economy to those prevailing in other Member States cannot deprive the measures in question of their character as aid'⁽³⁵⁾. The Commission considers that the same principle applies to situations

where a Member State seeks to approximate conditions of competition to those that would prevail in a fully competitive market.

- (111) Further, if this submission were to be accepted, there would be no State aid where a Member State granted a subsidy to bridge the gap between a price freely negotiated between two market operators and the theoretical price at which agreement might have been arrived at in conditions of full competition. This would defeat the fundamental purpose of State aid control.
- (112) Italy contends that these tariffs are identical to the *Alumix* tariff, which the Commission considered not to constitute aid (see recital 74 above), and should likewise be considered free of aid.
- (113) The Commission points out that the situation on which the Commission took a position in the *Alumix* case was very different. In *Alumix*, the tariff was granted by ENEL, which at the time was a public body supplying electricity on a monopoly basis in an electricity market which had yet to be liberalised⁽³⁶⁾. In that situation, the Commission had to ascertain whether ENEL was selling at an artificially low price or behaving like a rational market economy operator. Given the monopoly over electricity generation and supply held by ENEL, there was no competitive market price to which the Commission could refer to assess the existence of an advantage. Therefore, the Commission devised a method to identify the lowest theoretical market price at which a rational supplier would be prepared to sell to its 'best customer'.
- (114) However, this method cannot be applied in a situation where prices are negotiated by end-users with power suppliers on a liberalised market and are subsidised by compensatory payments ex post. Thus the analysis in the *Alumix* decision, and the Commission's findings in that case, are manifestly devoid of relevance here. This was borne out by the judgment of the Court of First Instance which upheld the decision to open the formal investigation in *Alcoa*⁽³⁷⁾ (paragraph 132 of the judgment).
- (115) In the present case, the market operator principle does not apply. The position would have to be assessed in the light of the market operator test if the State sold electricity to the companies concerned, either directly or through a State-owned company, as it did in *Alumix*. But here the electricity is supplied by private companies. There is therefore no need, as there was in *Alumix*, to examine whether the State's behaviour has been comparable to that of a rational market operator.

⁽³³⁾ This figure was obtained by adding to the preferential price of approximately EUR 26 per MWh a compensatory payment of EUR 37 per MWh.

⁽³⁴⁾ See, for example, the Dutch glasshouse growers case, Commission Decision 85/215/EEC of 13 February 1985 on the preferential tariff charged to glasshouse growers for natural gas in the Netherlands (OJ L 97, 4.4.1985, p. 49). In order to assess the presence of an advantage in certain gas prices in that case, the Commission considered actual market conditions and applied the market economy operator test.

⁽³⁵⁾ See, for example, the judgment of the Court of Justice in Case C-372/97 *Italy v Commission* [2004] ECR I-3679, paragraph 67.

⁽³⁶⁾ The first liberalisation directive, Directive 96/92/EC, was implemented in Italy by Decree No 79/1999 (see footnote 15).

⁽³⁷⁾ Case T-332/06 *Alcoa Trasformazioni* [2009] ECR II-29 (appeal pending).

- (116) It must be concluded that the 2004 and 2005 compensatory payment systems mitigate the charges payable under the supply contracts concluded by the beneficiaries, which would normally have to be included in the companies' budgets. In line with well-established case-law, therefore, the disputed measures confer an economic advantage on the recipients ⁽³⁸⁾.

5.1.2. Selectivity

- (117) Since the preferential electricity tariffs in Italy are granted exclusively to undertakings operating existing facilities located in Sardinia and belonging to a closed list of industries identified in the legislative and regulatory instruments that form the legal basis of the measures, the advantage they confer is a selective one.

5.1.3. State resources and imputability to the State

- (118) It is settled case-law that an advantage constitutes State aid within the scope of Article 87(1) TFEU only if it is granted directly or indirectly through State resources ⁽³⁹⁾ and is imputable to the State ⁽⁴⁰⁾.
- (119) As explained in recital 28, the compensatory payments at issue here are financed by means of a parafiscal charge collected by the Equalisation Fund via the A4 component of the electricity tariff. This charge is obligatory, being imposed by means of decisions of the AEEG that implement national legislation. The Equalisation Fund is a public body established by law which carries out its functions on the basis of precise instructions laid down in the decisions of the AEEG.
- (120) It is also settled case-law that the yield of a levy which is obligatory under national law and is paid to a body established by law constitutes a State resource within the meaning of Article 87(1) of the Treaty when it is earmarked for the funding of a measure which fulfils the other criteria of that Article ⁽⁴¹⁾.
- (121) Italy relies on the judgment of the Court of Justice in *PreussenElektra* ⁽⁴²⁾ to substantiate the thesis that the measure at hand is not financed through State resources. Italy argues that the funds required to finance the tariff are transferred by private parties (electricity consumers) to private parties (the beneficiaries); the role of the State is confined to the enactment of a law requiring payment of the required sums, with no discretion to dispose of the funds other than in the implementation of the statutory scheme. In particular, according to Italy and several of

the beneficiaries, the Equalisation Fund cannot exercise any control over the funds, and is merely an accounting intermediary.

- (122) In the *PreussenElektra* case, the Court held that an obligation imposed on private electricity supply undertakings to purchase electricity produced from renewable energy sources at minimum prices higher than the real economic value of that type of electricity did not constitute State aid, because the measure did not involve any direct or indirect transfer of State resources.
- (123) The Commission points out that in *PreussenElektra* the resources required to finance the measure were provided by the electricity suppliers directly to the producers of renewable energies, without transiting through any public body. In that system, the sums to be transferred could never be at the disposal of the Member State's authorities. In the case at hand, however, the monies transit through a public body, the Equalisation Fund, before being channelled to the final beneficiary. Thus *PreussenElektra* addresses different factual circumstances, and is not relevant to the present case.
- (124) The judgment in *Pearle* ⁽⁴³⁾ cannot assist Italy or the beneficiaries either. In *Pearle*, the Court found that, under certain specific conditions, the yield of a levy which transited through a public body did not constitute State resources. In *Pearle*, the measures were financed entirely by a particular trade at the sole initiative of the trade itself. The monies were collected via a parafiscal levy transiting through a public body which could not at any time dispose of the funds freely. In addition, there was a correspondence between the entities which paid the levy and those which received the benefits of the measure.
- (125) Italy contends that the Equalisation Fund does not have any discretion in the disbursement of the funds, which are earmarked for the financing of the tariffs and never come within 'the perimeter of public finance'. Thus the State cannot freely dispose of the funds, and consequently the funds do not constitute State resources.
- (126) As a preliminary remark, it should be pointed out that, while some of the *Pearle* criteria may subjectively be viewed as more central than others, there is no such thing as a 'key criterion' in *Pearle*. The tests enumerated in the judgment are cumulative. This is also the interpretation given by the Court of First Instance in *Earl Salvat*, where it examined a parafiscal levy challenged in that case in the light of each and every one of the *Pearle* criteria ⁽⁴⁴⁾.

⁽³⁸⁾ Judgment of the Court of Justice in Case C-241/94 *France v Commission* [1996] ECR I-4551, paragraph 34.

⁽³⁹⁾ See for example *PreussenElektra*, cited above, paragraph 58.

⁽⁴⁰⁾ See for example the judgment of the Court of Justice in Case C-482/99 *France v Commission (Stardust Marine)* [2002] ECR I-4397, paragraph 24.

⁽⁴¹⁾ See the judgments of the Court of Justice in Case 78/76 *Steinike & Weinlig* [1977] ECR 595 and Case 47/69 *French textiles* [1970] ECR 487.

⁽⁴²⁾ See footnote 29.

⁽⁴³⁾ Judgment of the Court of Justice in Case C-345/02 *Pearle and Others* [2004] ECR I-7139.

⁽⁴⁴⁾ Judgment of the Court of First Instance in Case T-136/05 *Earl Salvat v Commission* [2007] ECR II-4063, paragraphs 137–165.

- (127) Before considering the role played by the Equalisation Fund, the Commission has ascertained whether any of the other tests enumerated in *Pearle* are satisfied. It is clear that here, by contrast with the *Pearle* case, the disputed tariffs were established at the initiative of the State, not at the initiative of an economic sector. In *Pearle*, moreover, the beneficiaries of the measure were also the sole contributors of the resources used, so that the intervention of the public body did not tend to create an advantage which would constitute an additional burden on the State. In the case at hand, the beneficiaries do not bear the financial burden of the levy, which rests solely on electricity consumers. Thus the *Pearle* judgment cannot validly be relied upon irrespective of whether merit can be found in the argument that the Equalisation Fund is a mere accounting intermediary.
- (128) Turning now to the Equalisation Fund itself, the Commission points out that, according to settled case-law, no distinction should be made between cases where the aid is granted directly by the State and cases where it is granted by a public or private body designated or established by the State⁽⁴⁵⁾. Thus the public or private status of the Equalisation Fund is not a determining factor for the purpose of applying the State aid rules. The fact that the Equalisation Fund is a public body does not automatically mean that Article 107 TFEU is applicable⁽⁴⁶⁾; similarly, the intervention of a private body would not in itself preclude application of that Article.
- (129) However, the analysis cannot be limited to the powers of the Equalisation Fund in its capacity as a public body. What has to be ascertained, rather, is the more general question whether the State, either directly or through any other body designated by it, can exercise control over the funds used to finance the tariff. The same test would have to be applied if the Equalisation Fund were a private body.
- (130) The recent judgment of the Court of Justice in the *Essent*⁽⁴⁷⁾ case provides definitive guidance on this point. In *Essent*, the Netherlands had introduced by law a surcharge on electricity prices. The surcharge was paid by electricity consumers to network operators, which in turn transferred the monies to a designated company, SEP. SEP had no discretion in the management of the funds and operated under close control by the authorities. The Court came to the conclusion that the proceeds of the surcharge constituted State resources, because the surcharge on the price of electricity was imposed by national law, and therefore constituted a charge, and SEP was not entitled to use the proceeds from the charge for purposes other than those provided by the law, so that the monies remained under public control and were thus available to the national authorities. The Court considered that this was sufficient for such monies to be characterised as State resources.
- (131) The similarities with the case at hand are evident. The surcharge on the electricity price used to finance the tariffs at issue here is imposed, as in *Essent*, by law. The Equalisation Fund plays the same role as SEP, as it centralises and manages the proceeds of the parafiscal charge, and is subject to the same constraints, as it cannot use the proceeds from the charge for purposes other than those provided by law (the financing of preferential tariffs). The State is in a position to control and orient the use of the resources: the Equalisation Fund discharges its accounting functions on precise instructions from the AEEG, which acts within its statutory regulatory powers and/or in implementation of national legislation. Thus the resources handled by the Equalisation Fund remain under public control at all times.
- (132) This analysis is consistent with the Commission's decision in the Italian stranded costs case, in which it classified as State resources the monies administered by the Equalisation Fund in the A6 account⁽⁴⁸⁾.
- (133) The classification as State resources of the monies administered by the Equalisation Fund was borne out in the judgment of the Court of First Instance in the *Iride* case⁽⁴⁹⁾.
- (134) Italy's Supreme Court of Cassation had already ruled that the legal personality of the Equalisation Fund was not separate from that of the Italian State, and that the monies transferred to the Equalisation Fund should be considered State property, even if they derived from private entities and were intended for private undertakings (judgment No 11632/03 of 3 April 2003). In the *Iride* case, the applicants, Iride SpA and Iride Energia SpA, brought an action in the Court of First Instance challenging a decision whereby the Commission had categorised as State resources the sums administered by the Equalisation Fund in the A6 account. The arguments put forward by the applicants were very similar. They disputed the substance of the Court of Cassation's ruling, contending that the role of the Equalisation Fund was merely that of an accounting intermediary between private citizens subject to a financial obligation and the beneficiaries of the sums concerned, a role which did not allow the Equalisation Fund to make use of the monies deposited even for a short period of time. The applicants also claimed that the case-law developed in *PreussenElektra* was applicable.
- ⁽⁴⁵⁾ Judgment of the Court of Justice in Case 57/86 *Greece v Commission* [1988] ECR 2855, paragraph 12; *PreussenElektra*, cited above; judgment of the Court of Justice in Case C-126/01 *Gemo* [2003] ECR I-13769, paragraph 23.
- ⁽⁴⁶⁾ Judgments in *Stardust Marine*, cited above; *Pearle*, cited above; and *Earl Salvat*, cited above.
- ⁽⁴⁷⁾ Judgment of the Court of Justice in Case C-206/06 *Essent Netwerk Noord v Aluminium Delfzijl* [2008] ECR I-5497, paragraphs 69 and 70.
- ⁽⁴⁸⁾ Commission Decision C(2004) 4333 of 1 December 2004, Case No N 490/2000 *Italy — stranded costs of the electricity sector*.
- ⁽⁴⁹⁾ Judgment in Case T-25/07 *Iride* [2009] ECR II-245, paragraph 39.

(135) The Court of First Instance, after pointing out that it had no jurisdiction to review the interpretation of Italian legislation by the Court of Cassation, confirmed that the monies held in the Equalisation Fund's A6 account were to be classified as State resources, because, in addition to being State property, they were under constant State control ⁽⁵⁰⁾.

(136) That conclusion concerned the Equalisation Fund's A6 account, used to finance the stranded costs of Italy's electricity sector. It can, however, logically be extended to the A4 component, which finances the disputed tariffs. The judgment of the Court of Cassation was based on an analysis of the legal personality of the Equalisation Fund, and its finding with respect to State property therefore applies to all of the monies deposited with the Equalisation Fund. The same is true of the finding by the Court of First Instance that the State can control the resources administered by the Equalisation Fund. There is no difference between the A6 account and the A4 component other than the purpose to which the resources are put (covering stranded costs in the case of the A6 account, and financing preferential tariffs in the case of the A4 component). The sums transferred to the Sardinian beneficiaries from the A4 component must therefore also be categorised as State resources.

(137) In addition to being financed by State resources, the disputed tariffs are imputable to the State, since the legal basis for the measures is laid down in national legislation and decrees and in the decisions taken by the AEEG, which is a public body, in the exercise of its public authority functions ⁽⁵¹⁾.

5.1.4. *Effect on trade and distortion of competition*

(138) As regards the effect of the measures on trade between Member States and the ensuing distortion of competition, it is undisputed that the markets concerned (lead, zinc, silver, aluminium and chlorine/soda) are fully open to competition. This by itself is enough to establish that the tariffs have an effect on intra-Union trade.

(139) Nevertheless, the Commission has considered the argument advanced by the beneficiaries and by Italy that in the metals industry (the argument has not been put forward expressly in respect of chlorine) the tariffs

have no effect on trade and do not distort competition because there are no actual trade flows between Member States; no such trade flows are likely to develop, and in view of the particular features of the industry the tariffs do not damage the beneficiaries' competitors in the Union.

(140) In the Commission's decisions and the judgments of the Court of Justice it has never been accepted that an absence of actual trade flows shows that an aid measure has no effect on intra-Union trade. The Court has in fact consistently ruled that aid to an undertaking may be such as to affect trade between the Member States and distort competition even if the beneficiary undertaking does not participate in intra-Union trade itself. Where a Member State grants aid to an undertaking, domestic production may for that reason be maintained or increased, with the result that undertakings established in other Member States have less chance of exporting their products to the market in that Member State ⁽⁵²⁾.

(141) Moreover, the pattern of decreasing EU production, increasing imports from non-Union countries, and limited or no trade flows between Member States is not unusual: indeed it is typical of industries which are experiencing structural difficulties or which are subject to high competitive pressure. Such industries are particularly sensitive to measures taken by Member States to improve the competitive position of their domestic industries.

(142) The fact that production of zinc, lead and silver in Italy is too modest to affect the reference price is irrelevant. The fact that there is a reference price for these metals which is not easily influenced by conditions of production in a single Member State does not mean that there cannot be competition between undertakings based in the EEA and selling on the worldwide metal markets. It is conceivable that aid to the Sardinian beneficiaries will not enable them to reduce the world price for their products and squeeze competitors out of the market, and that other European producers may remain in business as long as they can sell profitably at the world price. But the profits obtained in Italy thanks to the subsidised electricity tariffs strengthen the companies' competitive position in a general sense. For example, accumulated capital reserves can be used to take over competitors and to increase market share. This reasoning is all the more relevant considering that some of the beneficiaries belong to multinational companies ⁽⁵³⁾.

⁽⁵⁰⁾ *Iride*, cited above, paragraph 28.

⁽⁵¹⁾ See the judgments of the Court of Justice in Case 303/88 *Italy v Commission* [1988] ECR 1433 and Case 47/69 *France v Commission* [1970] ECR 4393; see also the judgment of the Court of First Instance in Case T-351/02 *Deutsche Bahn v Commission* [2006] ECR II-1047.

⁽⁵²⁾ Judgments of the Court of Justice in Case 102/87 *France v Commission* [1988] ECR 4067, paragraph 19, and Case C-305/89 *Italy v Commission* [1991] ECR I-1603, paragraph 26.

⁽⁵³⁾ Portovesme is owned by the multinational Glencore. Eurallumina is owned by the Russian company Rusal.

(143) Contrary to what the beneficiaries claim, the fact that the price paid in Italy in the sectors concerned is comparable to the average electricity price paid in Europe by competing producers cannot be taken as evidence that the interests of other European producers are not threatened by the Italian tariff. It was clearly established in Case C-372/97 *Italy v Commission* that unilateral measures aimed at approximating conditions of competition in a Member State to those prevailing in other Member States do affect trade (and therefore cannot escape classification as aid). Moreover, some of the power supply agreements in place in other Member States may involve State aid, and the Commission has opened in-depth investigations into several measures of this kind⁽⁵⁴⁾. Even though this defence has not been put forward expressly by Italy or Alcoa, the Commission considers it useful to draw attention to the well-established principle that the existence of unlawful aid in some Member States cannot justify the adoption of similar measures by another Member State.

(144) In any event, the complaints received from the beneficiaries' competitors provide an indication that the disputed tariffs do raise competition problems and affect trade within the Union.

(145) Moreover, Italy did not notify the 2004 tariffs. According to settled case-law, where aid has not been notified, the Commission is not obliged to demonstrate the actual consequences of the measure on competition and trade between Member States: 'If the Commission were required in its decision to demonstrate the real effect of aid which had already been granted, that would immediately favour those Member States which grant aid in breach of the duty to notify laid down in Article 93(3) of the [EC] Treaty, to the detriment of those which do notify aid at the planning stage'⁽⁵⁵⁾.

(146) The conclusion must be drawn that the disputed preferential electricity tariffs are liable to improve their beneficiaries' competitive position vis-à-vis competing undertakings in the EU. It is settled case-law that in such circumstances it must be held that trade between Member States is affected and competition distorted⁽⁵⁶⁾.

⁽⁵⁴⁾ See, for example, the Commission decisions to open proceedings in respect of regulated electricity tariffs in France (Case C 17/07, Commission decision C/2007/2392 of 13 June 2007, OJ C 164, 18.7.2007, p. 9) and in Spain (Case C 3/07, Commission decision C/2007/123/3 of 24 January 2007, OJ C 43, 27.2.2007, p. 9).

⁽⁵⁵⁾ Judgment of the Court of Justice in Case C-301/87 *France v Commission* [1990] ECR I-307, paragraphs 32 and 33; judgments of the Court of First Instance in Case T-214/95 *Vlaams Gewest v Commission* [1998] ECR II-717, paragraph 67; and Joined Cases T-298/97, T-312/97, T-313/97, T-315/97, T-600/97 to 607/97, T-1/98, T-3/98 to T-6/98 and T-23/98 *Alzetta and Others v Commission* [2000] ECR II-2319, paragraph 79.

⁽⁵⁶⁾ See, for example, the judgments of the Court of Justice in Case 730/79 *Philip Morris v Commission* [1980] ECR 2671, paragraph 11, and in Joined Cases C-393/04 and C-41/05 *Air Liquide Industries v Ville de Seraing and Province de Liège* [2006] ECR I-5293.

5.1.5. Conclusions on the presence of aid

(147) The Commission concludes that the disputed 2004 and 2005 tariffs constitute State aid within the meaning of Article 87(1) TFEU and can be authorised only if they qualify for one of the exemptions provided for in the Treaty. This conclusion is consistent with that arrived at in the *Alcoa* case, which concerned virtually identical tariffs.

5.2. New aid or existing aid

(148) The situations in which a measure constitutes existing aid are exhaustively enumerated in Article 1 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty⁽⁵⁷⁾.

(149) It is undisputed that the measures at issue were not put into effect before Italy's accession to the Union (Article 1(b)(i) of the Regulation), are not deemed to have been authorised owing to the Commission's failure to take a decision within the prescribed procedural deadlines (Article 1(b)(iii)), and cannot be deemed to be existing aid owing to the expiry of the limitation period (Article 1(b)(iv)). They did not become aid as a result of the evolution of the common market and without having been altered by the Member State (first sentence of Article 1(b)(v)).

(150) In the light of the above, the Commission considers that the disputed tariffs constitute new aid.

5.3. Lawfulness of the aid

(151) Pursuant to Article 108(3) TFEU, Member States must notify any plans to grant or alter aid, and may not put the proposed measures into effect until the notification procedure has resulted in a final decision.

(152) Since Italy failed to notify Article 1 of the 2004 Decree, the 2004 tariffs constitute unlawful aid.

⁽⁵⁷⁾ OJ L 83, 27.3.1999, p. 1. The second sentence of Article 1(b)(v) of the Regulation reads: 'Where certain measures become aid following the liberalisation of an activity by Community law, such measures shall not be considered as existing aid after the date fixed for liberalisation'.

- (153) But Italy did notify Article 11(12) of Law No 80/2005, and refrained from implementing that measure. It has therefore complied with its obligations under Article 108(3) TFEU.

6. COMPATIBILITY OF THE AID

- (154) In derogation from the general prohibition on State aid laid down in Article 107(1) TFEU, aid may be declared compatible if it qualifies for one of the exceptions enumerated in the Treaty.
- (155) The 2004 and 2005 tariffs constitute operating aid. Italy's claim that the 2005 tariffs should not be considered operating aid because they are part of a regional support strategy and are conditional upon productive investment should be dismissed. Even though the memorandum of understanding provides that the beneficiaries must carry out certain investments, the aid component in the 2005 preferential tariffs is not a proportion of the eligible expenditure, and is not subject to a maximum aid intensity. There are no indications that the measure complies with the criteria for investment aid, or that the aid is proportional. Instead, the measure is clearly pegged to electricity consumption and aimed at mitigating electricity procurement costs, which are operating costs incurred by the companies concerned. Thus it cannot be construed as investment aid.
- (156) Operating aid is, in principle, incompatible with the internal market. In Case C-86/89 *Italy v Commission*, the Court of Justice found 'that the aid in question, which was granted without any specific conditions and solely according to the quantities used, should be regarded as an operating aid to the undertakings concerned and that, as such, it affected trading conditions to an extent contrary to the common interest' ⁽⁵⁸⁾.
- (157) In Case T-459/93 *Siemens v Commission* the Court of First Instance recalled the principle that 'operating aid, that is to say, aid intended to relieve an undertaking of the expenses which it would itself normally have had to bear in its day-to-day management or its usual activities, does not in principle fall within the scope of Article 92(3) aforesaid [now Article 107(3) TFEU] ... According to the relevant case-law, the effect of such aid is in principle to distort competition in the sectors in which it is granted, whilst nevertheless being incapable, by its very nature, of achieving any of the objectives of the aforesaid exceptions'.
- (158) Nevertheless, there are clearly defined situations in which operating aid may be granted. In particular, operating aid

may be granted for environmental purposes on the basis of the Community guidelines on State aid for environmental protection ⁽⁵⁹⁾. In assisted areas operating aid can also be authorised on an exceptional basis as regional aid. The Commission has assessed whether the disputed tariffs might fall into one of these categories.

- (159) The Commission observes that the tariffs do not pursue any environmental purpose, and consequently cannot be authorised as environmental aid.

6.1. Compatibility with the 1998 Regional Aid Guidelines

- (160) Exceptionally, operating aid may be granted in assisted areas eligible for aid under the exemption in Article 107(3)(a) TFEU. The Region of Sardinia was eligible for such aid until the end of 2006. The Commission has therefore examined whether, during that period, the 2004 and the 2005 tariffs could be authorised under the 1998 Regional Aid Guidelines.
- (161) According to point 4.15 of the Guidelines, operating aid can be granted exceptionally, provided that (i) it is justified in terms of its contribution to regional development and its nature and (ii) its level is proportional to the handicaps it seeks to alleviate. It is for the Member State to demonstrate the existence of any handicaps and gauge their importance. Under point 4.17 of the Guidelines, operating aid must be both limited in time and progressively reduced.
- (162) According to point 2 of the Guidelines, 'An individual *ad hoc* payment made to a single firm, or aid confined to one area of activity, may have a major impact on competition in the relevant market, and its effects on regional development are likely to be too limited ... Consequently, the derogations in question [from the general prohibition of aid] will normally be granted only for multisectoral aid schemes open, in a given region, to all firms in the sectors concerned'. An electricity tariff which is granted selectively to a few individual undertakings in certain sectors is clearly not in line with the spirit of regional aid, which expected to be multisectoral. However, since there is no absolute prohibition of *ad hoc* regional aid, the Commission has considered whether there are any exceptional circumstances that would warrant the granting of the tariff.
- (163) The Commission has considered, in particular, the deficiencies of the Sardinian electricity market, as documented by Italy and the beneficiaries, to assess whether they might constitute a regional handicap.

⁽⁵⁸⁾ [1990] ECR I-3891; see also Case C-301/87 *France v Commission* [1990] ECR I-307, paragraph 50.

⁽⁵⁹⁾ OJ C 37, 3.2.2001, p. 3 and OJ C 82, 1.4.2008, p. 1.

6.1.1. *The Sardinian electricity market in the Italian context*

(164) The Italian electricity market is generally highly concentrated, although less so in the north of the country. The dominant operator in all zones is the former monopolist ENEL, except in Sardinia, where it holds a duopoly with E.ON. ENEL has considerable market power and has been found by the Italian competition authority to have abused this power in several instances. Electricity prices in Italy are generally high, owing to a generation mix based largely on fossil fuels (essentially gas), the absence of nuclear capacity, and congestion on the interconnectors with the rest of Europe.

(165) In Sardinia, which accounts for 4,1 % of net installed power in Italy⁽⁶⁰⁾, electricity is produced mainly in thermoelectric power plants using fossil fuels (coal, fuel oil, and refinery tar). The island has no natural gas distribution infrastructure.

(166) Sardinia suffers from excess generation capacity, especially in the high-cost segment (oil-fired plants), owing to the Government's plans to concentrate Italy's heavy industry on the island, which have never come to fruition, and which led ENEL to overinvest in generation plants. Apart from being structurally more expensive, the plants are quickly becoming technically obsolete. During the period under consideration, the export of Sardinian electricity to the Italian mainland was limited by the modest capacity of the interconnector, which was prone to congestion⁽⁶¹⁾.

(167) Two power companies, ENEL and E.ON, together hold a 95 % market share of electricity supply in Sardinia (roughly 58 % E.ON and 42 % ENEL). According to the Energy Sector Inquiry⁽⁶²⁾, Sardinia can be classified in competition terms as a duopoly with collective dominance. Market concentration is high, though not the highest in Italy⁽⁶³⁾. Owing to their control of virtually all mid-merit to peak plants, E.ON and ENEL set the price at most times of the day. However, the situation in Sardinia appears less critical than in the south of Italy, where ENEL alone sets the price at all times of day⁽⁶⁴⁾.

⁽⁶⁰⁾ Source: *Indagine conoscitiva sullo stato della liberalizzazione dei settori dell'energia elettrica e del gas naturale*, May 2005.

⁽⁶¹⁾ Sardinia was connected to mainland Italy via an obsolete 270 MWh interconnector known as SACOI. In 2009 the first section of a new interconnection cable, SAPEI, became operational.

⁽⁶²⁾ Communication from the Commission — Inquiry pursuant to Article 17 of Regulation (EC) No 1/2003 into the European gas and electricity sectors (Final Report), SEC(2006) 1724, COM(2006) 851 final.

⁽⁶³⁾ The HHI index in Sardinia varies between 3 000 and 3 500. In the South zone, however, the HHI is higher.

⁽⁶⁴⁾ In Sardinia, E.ON can set the price for 67 % of the hours, and ENEL for 29 % of the hours. If adjacent zones are also considered, ENEL is price-setting in the macrozone Macrosud-Sardegna for 63 % of the hours. In the MacroSud region, ENEL is price-setting for 100 % of the hours.

(168) Wholesale electricity prices in Italy are among the highest in Europe⁽⁶⁵⁾, and prices in Sardinia are among the highest in Italy. In 2007, the national average price (PUN) was EUR 70,99 per MWh, whereas the average Sardinian zonal price was EUR 75,00 per MWh, down from EUR 80,00 per MWh in 2006⁽⁶⁶⁾. In 2008 and 2009, average regional prices in Sardinia continued on an upward trend. In the first half of 2009, prices in Sardinia remained constantly above the national average (with an average price of EUR 106,60 per MWh compared with a PUN of EUR 60,50 per MWh).

(169) Prices paid in Sardinia by the beneficiaries of the tariffs in 2004/2005, on the basis of bilateral contracts, ranged from EUR 60 to EUR 65 per MWh. It has not been possible to compare these prices to those recorded on the Italian mainland, as the Commission does not possess the relevant data (which Italy has claimed it is unable to provide — see recital 92 above). However, based on the above analysis of general price trends, which may be broadly representative of price trends in bilateral contracts, it seems possible to presume that, in the period under consideration, energy-intensive undertakings in Sardinia paid a higher price than on the Italian mainland.

(170) In conclusion, the electricity market in Sardinia exhibits a combination of problems, including high prices, a high degree of market concentration, dominant operators' market power, excess generation capacity in the high-cost segment, relative inefficiency of obsolete generating plants, lack of access to natural gas infrastructure, and insufficient interconnection. These problems are likely to translate into higher electricity prices for end-users, including the most energy-intensive ones.

6.1.2. *Existence of a regional handicap*

(171) The first issue to be addressed is whether such problems constitute a regional handicap, i.e. whether they have a severe impact on the economic development of Sardinia. In case C 34/02, the Commission did not accept that the lack of energy interconnection constituted a handicap⁽⁶⁷⁾. While it is true that SMEs suffer less from high electricity prices than do large, energy-intensive industries, nevertheless the welfare of an individual industry cannot be automatically equated to the welfare of a region. The Commission considers that Italy has not sufficiently substantiated the alleged regional handicap arising from the state of the Sardinian electricity market.

⁽⁶⁵⁾ For example, in 2007 the average wholesale price in Italy (for baseload power on the day-ahead market) on IPEX (Italy's electricity exchange) was EUR 70,99 per MWh, compared with EUR 37,97 on Germany's EEX exchange and EUR 40,78 on France's Powernext exchange.

⁽⁶⁶⁾ 2008 Report of the AEEG, based on data from the exchange manager, GME.

⁽⁶⁷⁾ Commission Decision C(2002) 3715 of 16 October 2002, *Region of Sardinia: measures to reduce the energy costs of small and medium-sized enterprises* (OJ C 132, 4.6.2002, p. 6).

- (172) But even if one were to suppose that there was indeed a regional handicap, the criteria laid down by the Regional Aid Guidelines would still have to be fulfilled. The Commission has accordingly assessed whether these tests are satisfied.

6.1.3. Contribution to regional development

- (173) Aid must sustainably contribute to regional development and be proportional to the handicaps it seeks to alleviate. Operating aid in an assisted region cannot be authorised by reason of difficulties experienced by one industry, but must be shown to make a lasting contribution to regional development. In the case at hand, this is unlikely. Even if one were to accept that the maintenance on the island of some industrial production facilities would contribute to employment and to the maintenance of a manufacturing base on the island, the effects would not be lasting. If high electricity prices are a structural problem in Sardinia, as Italy claims, the difficulties experienced by energy-intensive industries will resurface as soon as the tariffs are removed.

- (174) The Italian authorities present the tariffs as a temporary measure, designed to last only until the completion, in 2010, of the infrastructure projects currently under way in connection with energy generation and interconnection (the GALSI pipeline and the SAPEI marine cable)⁽⁶⁸⁾. Italy's argument is that better interconnection will bring the prices charged to these companies down. The Commission considers that, while the new infrastructure may reduce or level out price disparities between Sardinia and the mainland, it seems highly unlikely that such projects could halve electricity prices, so as to bring them to the levels allegedly required to make these industrial activities profitable in the long term.

- (175) The Commission also points out that the existence of a State subsidy aimed at reducing electricity costs for large users does not encourage electricity suppliers to bring prices down in order to avoid losing their largest customers, nor does it prevent a worsening of their cost structures. Instead, the subsidy tends to heighten the incentive for suppliers to exploit their market power. Therefore, even if were true, given the situation of overcapacity, that energy-intensive companies would normally be able to obtain a competitive price were it not for the market power of the electricity suppliers (who, according to Italy and the beneficiaries, have an interest in keeping prices high), the Commission considers that the preferential tariff is not the appropriate instrument to curtail such market power.

⁽⁶⁸⁾ At the time of writing (December 2010), the SAPEI cable is partly operational, whereas the GALSI pipeline is not expected to come on stream before 2014.

6.1.4. Proportionality

- (176) The subsidy granted to the beneficiaries of the tariffs is not calculated in such a way as to offset the regional disparity (i.e. the differential between electricity prices in mainland Italy and prices in Sardinia for the same category of customer), but rather aims to align Sardinian prices on those paid by the beneficiaries' competitors in the EU. The prices set for the Sardinian beneficiaries are particularly low, and certainly below prices on mainland Italy, which are among the highest in the EU. Therefore, the tariffs are not proportional to the regional handicap they allegedly seek to alleviate.
- (177) The very method chosen to calculate the amount of the subsidy suggests that the measure pursues an industrial policy objective rather than a regional objective. Indeed, the industrial policy dimension of the tariffs has been underlined repeatedly by Italy in its submissions.

6.1.5. Degressivity

- (178) Regional operating aid must be progressively reduced (point 4.17 of the Regional Aid Guidelines). Since the updating mechanisms for the 2004 and the 2005 tariffs are different, they have been assessed separately.
- (179) The 2004 tariffs are indexed on the basis of variations in fuel prices and can only increase or remain unchanged. According to Italy, this ensures that the aid is progressively reduced. The Commission considers that the requirement of degressivity can be considered fulfilled only if the compensatory payments — which are equal to the effective amount of the aid — are guaranteed to decrease over time. It is not sufficient that the tariff should increase over time, since a higher tariff may nevertheless represent a higher volume of aid if, in the meantime, the prices charged to end users in the market concerned have increased faster than the tariff. The Italian method does not provide any guarantee in this respect⁽⁶⁹⁾.
- (180) As regards the 2005 tariffs, The Commission has assessed the indexation mechanism introduced by Article 11(13) of Law No 80/2005, as interpreted by the AEEG in decision 217/05 (see recital 33). According to the implementing rules laid down by the AEEG, the tariff is to be increased yearly by a percentage reflecting trends in electricity prices in the EU, but the increase cannot exceed 4 %. According to Italy, this mechanism ensures progressive reduction.

⁽⁶⁹⁾ It should be noted that variations in market prices are not correlated only with variations in fuel prices. Other factors are liable to push up market prices: in the specific context of Sardinia, these may include the market power of incumbent operators, imbalances between supply and demand, or interconnection problems. The Italian method does not ensure that over time the actual amount of aid will decrease, or even remain stable.

(181) The Commission takes the view, however, that the fact that the nominal tariff is subject to a rather limited annual increase does not mean that the net amount of aid — as measured by the compensatory payments — will decrease over time.

(182) If it is accepted that price trends on power exchanges can be considered broadly representative of changes in bilateral contract prices, as Italy has suggested, the 2005 tariffs would be degressive only in the event of a drop in average EU prices (since the tariffs cannot decrease, but only increase). In all other cases the tariffs would confer a growing advantage⁽⁷⁰⁾. Since, from 2004 until at least 2007, EU average electricity prices were on a sharp upward trend (rising faster than 4 % a year) the element of aid contained in the 2005 tariffs would have increased over time.

(183) Italy further contends that, in reality, bilateral contracts are less prone to price increases than prices on power exchanges, and that therefore the 2005 tariffs are de facto degressive. The Commission points out that the indexation method submitted for assessment is based on variations in prices on power exchanges, and that Italy has not submitted data on the evolution of bilateral contract prices. Thus Italy's statement is not sufficiently substantiated.

(184) In fact, the limited information at the Commission's disposal suggests the opposite, i.e. that bilateral contract prices increased sharply in Sardinia (see, for example, Eurallumina's statement that in 2005/2006 it paid a price of EUR 80 per MWh on the free market, up from EUR 65 per MWh in 2004). In these circumstances, had the tariffs been implemented, the compensatory payments would have increased over time.

(185) Thus neither the 2004 tariffs nor the 2005 tariffs fulfil the degressivity requirement.

6.1.6. *Conclusions on the compatibility of the measure as regional aid*

(186) The Commission concludes that the tariffs at issue cannot be considered compatible as regional aid under

the 1998 Regional Aid Guidelines. Since Sardinia ceased to be assisted pursuant to Article 107(3)(a) after December 2006, it is not necessary to examine the compatibility of the aid in the light of the Regional Aid Guidelines for 2007–2013.

(187) The Commission took a similar negative position in 2005 in respect of a measure designed to reduce Eurallumina's energy costs in Sardinia. The Commission considered that the disputed measure, which took the form of an exemption from excise duties on heavy oils, could not be authorised on the basis of the Regional Aid Guidelines⁽⁷¹⁾.

6.2. **Other considerations relevant to compatibility**

(188) It has been submitted by Italy and the undertakings concerned that the schemes serve the purpose of remedying the shortcomings of the electricity markets, which have not yet delivered competitive prices. They argue that energy prices are threatening the competitiveness of energy-intensive industries. The aid has an incentive effect, they contend, since without it the companies would close down.

(189) The Commission does not consider it possible to accept that operating aid for a few industrial companies is an appropriate response to the lack of competition on the local electricity market, which affects all electricity users.

(190) It is also questionable whether the aid is an appropriate and proportional means of preventing relocation outside the EU. There is no precedent in the Commission's decisions or in the judgments of the Union's lawcourts for accepting this argument as a justification for the granting of State aid. Decisions to relocate production, in whole or in part, are part of a company's business strategy, and the Commission has never held that they constitute a market failure. In the *Terni*⁽⁷²⁾ and *Alcoa*⁽⁷³⁾ cases the Commission expressed doubts about similar arguments linking aid measures to the goal of preventing the relocation of industry outside the EU.

⁽⁷⁰⁾ In particular, even in the event of an increase in average EU prices smaller than 4 %, the tariff advantage would still increase in absolute terms. For example, if the preferential price was EUR 30 per MWh and the average electricity price in Europe was EUR 60 per MWh (compensatory payment: EUR 30), a 3 % increase in the average EU price (bringing it to EUR 61,8) would lead to an updated tariff of EUR 30,90. The new compensatory payment per MWh would be EUR 61,80 – EUR 30,90 = EUR 30,90, which is a higher amount of aid.

⁽⁷¹⁾ The *Alumina* case, Decision 2006/323/CE of 7 December 2005.

⁽⁷²⁾ Commission Decision of 20 November 2007 on the State aid C 36/A/06 implemented by Italy in favour of ThyssenKrupp, Cementir and Nuova Terni Industrie Chimiche, paragraphs 144 and 145. That decision was upheld by the General Court in Cases T-53/08, 62/08, 63/08 and 64/08; an appeal is pending.

⁽⁷³⁾ Decision referenced in footnote 3, at paragraph 244.

- (191) It should also be pointed out that the conclusions of specialised bodies such as the High Level Group on Competitiveness, Energy and the Environment ⁽⁷⁴⁾, which have been cited in the course of the proceedings, do not suggest that special State aid should be granted to address the competitiveness issues raised by high energy prices, but instead defend the need for full compliance with the applicable State aid rules ⁽⁷⁵⁾.
- (192) In the light of the above, the Commission considers that the disputed 2004 and 2005 tariffs do not qualify for any of the exemptions in Article 107 TFEU. The exemptions in Article 107(2) TFEU are not applicable, since the aid is not of a social character, is not designed to make good the damage caused by natural disasters or exceptional occurrences, and was not granted to compensate for the economic disadvantages caused by the division of Germany. The exemptions in Article 107(3)(b) and (d) TFEU are also inapplicable, since the measure is not aimed at promoting the execution of an important project of common European interest, or remedying a serious disturbance in the economy of a Member State, or promoting culture and heritage conservation. Turning to the exemption in Article 107(3)(a) TFEU, the analysis carried out above in recitals 160 to 187 demonstrates that the tariff cannot be approved as aid aimed at promoting the economic development of an area where the standard of living is abnormally low or where there is serious unemployment. With respect to Article 107(3)(c) TFEU, operating aid does not qualify for this exemption in principle, as indicated in recitals 155 to 158, and the Commission has not been able to identify any specific circumstances which might justify the granting of such aid in this case.
- (193) The Commission therefore considers that both the 2004 and the 2005 tariffs are incompatible with the internal market.
- (194) Having drawn this conclusion, the Commission does not need to examine the possible cumulative effect of the new aid and the old incompatible aid referred to in recital 31 in the light of the *Deggendorf* judgment.

⁽⁷⁴⁾ See footnote 31.

⁽⁷⁵⁾ For example, in its Third Report, in February 2007, the High Level Group states 'Against this background, the use of incentives, including general purpose subsidies and state aids can be justified as a policy instrument. They may promote responsible social and environmental behaviour, regional cohesion, sustainable development and cultural diversity. However, they should only be used where there is a clear market failure, where subsidies prove to be the appropriate instrument for meeting a well defined common interest objective, and when they do not distort competition or harm the environment ... Action is justified when such subsidies undermine other policy objectives such as fighting climate change, the Lisbon Strategy for Jobs and Growth, proper functioning of energy markets, or access to raw materials, without meeting their initial objective' (http://ec.europa.eu/enterprise/policies/sustainable-business/policy-integration/high-level-group/reference-material/index_en.htm).

7. RECOVERY

- (195) Article 14(1) of Regulation (EC) No 659/1999 states that in cases of unlawful aid which is not compatible with the internal market effective competition must be restored, unless recovery would be contrary to a general principle of Community law.
- (196) In the present case, only the 2004 tariffs (Case C 38/A/04) are subject to recovery, since the 2005 tariffs (Case C 13/06) have not been implemented.

7.1. Legitimate expectations and other general principles of Community law which might prevent recovery

- (197) According to settled case-law, when aid has been granted without prior notification under Article 108(3) TFEU the recipient of the aid cannot have a legitimate expectation that its grant is lawful ⁽⁷⁶⁾. A diligent undertaking should be able to establish whether the notification procedure has been followed and whether the aid is lawful.
- (198) However, a recipient of illegally granted aid is not precluded from relying on exceptional circumstances on the basis of which it had legitimately assumed the aid to be lawful, and thus declining to refund that aid ⁽⁷⁷⁾.
- (199) The beneficiaries of the 2004 tariffs have not made any submissions in this respect, nor has the Commission identified any exceptional circumstances which might have led the beneficiaries to entertain any legitimate expectation. In particular, no expectation that the tariffs would not constitute State aid could have arisen as a result of the 1996 *Alumix* decision. As indicated in the 2004 opening decision (see recital 37) the tariff that served as a blueprint for the disputed 2004 tariffs was not the original *Alumix* arrangement, which the Commission found did not constitute aid in 1996, but an entirely new measure, which had been substantially modified (in particular as regards its financing mechanism) ⁽⁷⁸⁾ and extended in time by the Italian authorities. In this situation, a prudent recipient should have verified that the new measure was lawful.

⁽⁷⁶⁾ Judgments of the Court of Justice in Case C-24/95 *Alcan Deutschland* [1997] ECR I-1591, paragraphs 25, 30 and 31, and in Joined Cases C-183/02 P and C-187/02 *Demesa and Territorio Histórico de Álava v Commission* [2004] ECR I-10609, paragraph 45.

⁽⁷⁷⁾ Judgment of the Court of Justice in Case C-5/89 *Germany v Commission* [1990] ECR I-3437, paragraph 16.

⁽⁷⁸⁾ Whereas the original *Alumix* tariff was granted directly by State-owned power supplier ENEL, which was held to be acting as a rational market operator in selling electricity at the *Alumix* price, the 2004 tariff was subsidised by the State from the proceeds of a parafiscal levy.

- (200) The Commission further considers that recovery would not breach any other general principle of Community law.

7.2. Quantification of the amounts to be recovered

- (201) All incompatible aid received by Portovesme, ILA and Eurallumina under Article 1 of the 2004 Decree must be recovered, with interest, in accordance with Chapter V of Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty ⁽⁷⁹⁾.
- (202) The purpose of recovery is to restore the recipients to the competitive position they occupied before the grant of the incompatible aid by eliminating the undue advantage conferred by it. In the case at hand, the advantage conferred is equal to the difference between the preferential tariff and the electricity price the beneficiaries would have paid on the market in the absence of the disputed tariffs.
- (203) All the companies concerned were purchasing electricity on the basis of bilateral contracts at the time the tariffs were introduced. The State intervened to subsidise the contractually agreed price by making compensatory payments. The amounts to be recovered are therefore equal to the compensatory payments received by the recipients over the period concerned (see recital 30).

8. CONCLUSION

The Commission finds that both the 2004 and the 2005 tariffs constitute operating aid which is not eligible for any exemption from the general prohibition of State aid under the EC Treaty, and is therefore incompatible with the internal market.

In the case of the 2004 tariffs, which were unlawfully implemented in breach of Article 108(3) TFEU, all payments of outstanding aid must be cancelled, while the aid already paid must be recovered. The amount to be recovered corresponds to the sum of all compensatory payments made by the Equalisation Fund to Portovesme, ILA and Eurallumina.

The 2005 tariffs, which were duly notified by Italy as required by Article 108(3) TFEU, must not be applied,

HAS ADOPTED THIS DECISION:

Article 1

1. The State aid which Italy plans to grant to Portovesme Srl, Eurallumina SpA, ILA SpA and Syndial SpA under

Article 11(12) of Decree-Law No 35 of 14 March 2005, converted into statute by Law No 80/2005 of 14 May 2005, is incompatible with the internal market.

2. The aid may accordingly not be granted.

Article 2

The State aid unlawfully granted by Italy in breach of Article 108(3) TFEU, on the basis of Article 1 of the Prime Ministerial Decree of 6 February 2004, amounting to EUR 12 845 892,82 for Portovesme Srl, EUR 5 208 152,05 for Eurallumina SpA, and EUR 291 120,27 for ILA SpA, is incompatible with the internal market.

Article 3

1. Italy shall recover the aid referred to in Article 2 from the beneficiaries.
2. The sums to be recovered shall bear interest from the date on which they were put at the disposal of the beneficiary until their actual recovery.
3. The interest shall be calculated on a compound basis in accordance with Chapter V of Regulation (EC) No 794/2004.
4. Italy shall cancel all future payments of the aid referred to in Article 2 with effect from the date of adoption of this Decision.

Article 4

1. Recovery of the aid referred to in Article 2 shall be immediate and effective.
2. Italy shall ensure that this Decision is implemented within 4 months following the date of notification of this Decision.

Article 5

1. Within two months following notification of this Decision, Italy shall submit the following information to the Commission:
 - (a) the total amount (principal and recovery interest) to be recovered from the beneficiary;
 - (b) a detailed description of the measures already taken and planned to comply with this Decision;
 - (c) documents demonstrating that the beneficiary has been ordered to repay the aid.

⁽⁷⁹⁾ OJ L 140, 30.4.2004, p. 1.

2. Italy shall keep the Commission informed of the progress of the national measures taken to implement this Decision until recovery of the aid referred to in Article 2 has been completed. At the Commission's request, it shall immediately submit information on the measures already taken and planned to comply with this Decision. It shall also provide detailed information concerning the amounts of aid and recovery interest already recovered from the beneficiary.

Article 6

This Decision is addressed to the Italian Republic.

Done at Brussels, 23 February 2011.

For the Commission
Joaquín ALMUNIA
Vice-President

COMMISSION DECISION

of 24 May 2011

on State aid C 88/97 implemented by France in favour of *Crédit Mutuel*

(notified under document C(2011) 3436)

(Only the French text is authentic)

(Text with EEA relevance)

(2011/747/EU)

THE EUROPEAN COMMISSION,

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

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

Having given interested parties notice to submit their comments pursuant to those Articles ⁽¹⁾, and having regard to those comments,

Whereas:

(5) *Crédit Mutuel* sent a letter to the Commission on 18 June 1998 setting out arguments to reject the description of the measures covered by the opening Decision as State aid, together with a cost account files concerning the *Livret bleu*. A number of interested parties also submitted their comments to the Commission (see Sections 3 and 4, recitals 48 to 59), which forwarded them to the French authorities on 3 September 1998.

(6) The complainants sent four additional written statements to the Commission by letters dated 29 October 1999, 16 May 2000, 16 October 2000 and 19 January 2001, which the Commission forwarded to the French authorities on 21 February 2000 and 3 November 2000.

(7) On 5 February 2001, the Commission forwarded to France the documents received from the AFB.

1. PROCEDURE

(1) On 25 January 1991 the Association française des banques (AFB), the Chambre syndicale des banques populaires and *Crédit Agricole* lodged a complaint alleging that France had granted State aid to *Crédit Mutuel*.

(2) The Commission first requested information concerning the *Livret bleu* in a letter dated 27 May 1991.

(3) By letter dated 6 February 1998, the Commission informed the French authorities that it had decided to initiate the procedure laid down in Article 88(2) of the EC Treaty (now Article 108(2) TFEU) in respect of the potential aid measures contained in the *Livret bleu* savings vehicle ⁽²⁾.

(4) On 8 April 1998 the French authorities replied to the questions raised by the Commission in its opening Decision.

(8) From November 1998 to December 1999, at the Commission's request, a consultant ⁽³⁾ (hereinafter: 'the Commission's consultant') carried out an audit of the cost accounts of the *Livret bleu*. The consultant's report was submitted to the French authorities and to *Crédit Mutuel* for examination on 10 January 2000. A technical meeting on the report was organised on 7 February 2000 for the Commission, assisted by its consultant, the French authorities and *Crédit Mutuel*.

(9) By letter dated 14 September 1999, the Commission asked the French authorities to explain the general interest tasks entrusted to *Crédit Mutuel*. On 21 February 2000, 3 November 2000 and 5 February 2001, the Commission sent to the French authorities for comment various documents ⁽⁴⁾ submitted to the file by the complainants concerning the potential 'pull effect' of the *Livret bleu* (see subsection 7.2.3, recitals 110-118). The French authorities presented their comments on 1 February 2001.

⁽¹⁾ OJ C 146, 12.5.1998, p. 6, and OJ C 210, 1.9.2006, p. 12.

⁽²⁾ This is the commercial name of the savings account in question, referred to by the name of '*compte spécial sur livret du crédit mutuel*' (special savings account of the *crédit mutuel*) until 31 December 2008 in Article L221-1 of the Monetary and Financial Code.

⁽³⁾ The chartered accountants Littlejohn Frazer, assisted by two French accountancy firms, Auditec and Scacchi.

⁽⁴⁾ Including two statistical studies by the consultants Concurrence et Stratégie headed by professor of economics Michel Glais.

- (10) On 11 April 2000, the European Banking Federation (EBF) lodged a complaint with the Commission against the aid granted by the French State to Crédit Mutuel in the form of exclusive rights to distribute the *Livret bleu*.
- (11) In May 2000 the Confédération nationale du Crédit Mutuel commissioned the Arthur Andersen accountancy firm to review the methodology used in the Crédit Mutuel cost accounts and to draw up the operating statement for the *Livret bleu*. This task was completed in September 2000 with the submission of a detailed report on the *Livret bleu* operating statement, which assessed the result of the *Livret bleu* cost accounts at a pre-tax loss of FRF 498 million. This conclusion was based on the taking into account of 'adjustments'. A meeting on this report was organised on 2 February 2001 for the Commission and Crédit Mutuel. Following observations by the Commission, Crédit Mutuel asked Arthur Andersen to forward a memo dated 8 February 2001 justifying the method used, namely 'correction of the excess weighting granted to the IARD insurance activity (Crédit Mutuel's general insurance business ⁽⁵⁾)', which had been criticised by the Commission.
- (12) In April 2001 the Commission asked its consultant to identify the differences between its report and that of Arthur Andersen and to determine the changes to data or methodology that could, if necessary, be included in its previous report. A new final report from the Commission consultant was handed over on 23 July 2001. It evaluates the result of the *Livret bleu* cost accounts at a cumulated non-capitalised profit of FRF 1,074 billion (EUR 163,7 million). The report was sent to the French authorities on the same day. At a meeting on 26 July 2001 between the Commission, the French authorities, Crédit Mutuel and Arthur Andersen, Crédit Mutuel and Arthur Andersen announced that they disagreed with the final conclusions of the Commission's consultant. Arthur Andersen defended its earlier conclusions in a document dated 13 September 2001, forwarded as an annex to a memo by the French authorities dated 15 September 2001. The French authorities sent the Commission a new memo on 26 October 2001 containing a legal analysis of the *Livret bleu* from the perspective of Community competition law, as well as a memo of 7 January 2002 concerning the cost of the public-service task, reiterating the figures already presented by Crédit Mutuel without providing any new information.
- (13) The memo sent to the Commission by the French authorities on 26 October 2001 explained why, according to them, (i) the *Livret bleu* scheme did not
- constitute State aid; (ii) if the Commission did classify the scheme as aid, it could only be existing aid, and (iii) in any event it was compatible aid.
- (14) By Decision of 15 January 2002 ⁽⁶⁾ (hereinafter: 'the annulled Decision'), the Commission declared the State aid granted by France to Crédit Mutuel incompatible with the common market.
- (15) The Decision of 15 January 2002 was annulled by judgment of the Court of First Instance on 18 January 2005 ⁽⁷⁾.
- (16) The Commission did not appeal against the judgment. In accordance with Article 266(1) TFEU, the Commission is required to take the necessary measures to comply with the judgment. With regard to State aid, this means that, following the annulment of the Decision, the procedure is returned to the formal investigation stage.
- (17) By Decision of 7 June 2006 ⁽⁸⁾ (hereinafter: 'the extension Decision'), the Commission extended the formal investigation procedure and clarified the purpose of its assessment of potential aid.
- (18) France submitted its comments on the extension Decision to the Commission by letters dated 1 September 2006 and 7 September 2006.
- (19) On 19 September 2006 the Commission received a complaint from the *Association des Victimes du Crédit Mutuel* (Association of Victims of Crédit Mutuel).
- (20) The Commission received the comments of Crédit Mutuel by letter dated 13 October 2006.
- (21) By letter dated 31 October 2006, the Commission forwarded the observations by Crédit Mutuel to the French authorities.

⁽⁵⁾ IARD stands for 'Incendie, Accidents, Risques Divers' (fire, accident, other risks).

⁽⁶⁾ Commission Decision 2003/216/EC of 15 January 2002 on State aid granted by France to Crédit Mutuel (OJ L 88, 4.4.2003, p. 39).

⁽⁷⁾ Judgment of 18 January 2005 in Case T-93/02 *Confédération nationale du Crédit Mutuel v Commission* [2005] ECR II-143.

⁽⁸⁾ Commission Decision C 88/97 of 7 June 2006 on Crédit Mutuel (*Livret bleu*) — Invitation to submit comments pursuant to Article 88(2) of the EC Treaty (OJ C 210, 1.9.2006, p. 12).

- (22) Following two requests for further information from the Commission dated 22 September 2006 and 28 November 2006, France submitted additional comments by letters dated 8 November 2006 and 28 February 2007.
- (23) The Commission met the French authorities on 19 December 2006 and Crédit Mutuel on 15 January 2007.
- (24) On 10 May 2007 the Commission adopted a decision pursuant to Article 86(3) of the EC Treaty (now Article 106(3) TFEU) in conjunction with Articles 43 and 49 of the EC Treaty (now Articles 49 and 56 TFEU) requiring France to put an end to the special rights⁽⁹⁾ of Crédit Mutuel, Caisses d'Épargne and Banque Populaire for the distribution of the *Livret bleu* (Crédit Mutuel) and *Livret A* (Caisses d'Épargne and Banque Postale)⁽¹⁰⁾.
- (25) Since France did not put an end to the special rights for the distribution of the *Livret A* and *Livret bleu* within the nine-month deadline set by the Decision of 10 May 2007, the Commission opened infringement proceedings pursuant to Article 226 of the EC Treaty (now Article 258 TFEU) by sending France on 5 June 2008 a letter of formal notice for not complying with the Decision.
- (26) On 19 September 2009 the Commission asked France for more information, which was provided on 13 October 2009.
- (27) On 8 October 2009 the Commission terminated the infringement proceedings because France, by adopting the reform of 1 January 2009 liberalising the distribution of the *Livret A* and *Livret bleu*⁽¹¹⁾, had complied with its obligation to put an end to the special rights for the distribution of the *livrets*⁽¹²⁾.
- (28) Over the course of 2010 the Commission sent e-mails with several questions to Crédit Mutuel, to which e-mailed replies were received.

⁽⁹⁾ Crédit Mutuel has an exclusive right to distribute the *Livret bleu*. However, this right was called 'special right' in the Decision of 10 May 2007 because the *Livret bleu* is almost identical to the *Livret A*.

⁽¹⁰⁾ Decision C(2007) 2110 of 10 May 2007, available on the European Commission's website at: http://ec.europa.eu/competition/liberalisation/livret_a_en.pdf

⁽¹¹⁾ See recital 41.

⁽¹²⁾ See the Commission press release dated 8 October 2009, available on the Commission's website at: <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/1482&format=HTML&aged=1&language=EN&guiLanguage=en>

- (29) This Decision closes, pursuant to Article 13 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty⁽¹³⁾, the procedure relating to the potential aid contained in the *Livret bleu* savings vehicle.

2. DESCRIPTION OF THE *LIVRET BLEU* SAVINGS VEHICLE

2.1. Description of Crédit Mutuel

- (30) Crédit Mutuel is a decentralised banking and insurance group consisting of a national network of branches with the status of cooperative companies with open-ended capital. Crédit Mutuel is governed by the law of 10 September 1947, which laid down the principles of cooperation. It is organised on three levels: local, regional and national.
- (31) The Crédit Mutuel group, under the group's two trade names (Crédit Mutuel and Crédit Industriel et Commercial (hereinafter: 'CIC')), has almost 6 000 outlets and more than 72 000 employees. Crédit Mutuel's local branches are attached to 18 regional federations that are members of Crédit Mutuel's national confederation, the central body of the network. The CIC federates 6 regional banks and specialised subsidiaries in France and abroad.
- (32) Crédit Mutuel is a group with a single management that pursues a global policy. It maintains internal financial solidarity at the level of the confederation, which ensures the liquidity of the regional federations. The group has the features of a single undertaking from the perspective of competition law because it has a single decision-making body at central level.

2.2. Description of the *Livret bleu*

- (33) The *Livret bleu* was a savings product regulated by the State and distributed exclusively by Crédit Mutuel.
- (34) The product was partially tax-exempt under the terms of the Amending Finance Act for 1975⁽¹⁴⁾. The interest on sums deposited paid to savers qualified for a tax exemption to the tune of two thirds. The State set the gross interest rate on the *Livret bleu* for savers in such a way that, after deduction of tax⁽¹⁵⁾, the net rate was identical to that earned on the *Livret A*, which was fully tax-exempt.

⁽¹³⁾ OJ L 83, 27.3.1999, p. 1.

⁽¹⁴⁾ Article 9 of Law No 75-1242 of 27 December 1975, Amending Finance Act for 1975 (French Official Gazette, 28.12.1975).

⁽¹⁵⁾ Through the compulsory system of withholding tax at source, paid by Crédit Mutuel on behalf of savers.

- (35) The State set the interest rate on the *Livret bleu* at a level above inflation, indexed to the money market. The last net rate of remuneration on the *Livret bleu* before this savings product was discontinued by the reform of 1 January 2009 (see recital 41) was 4 %⁽¹⁶⁾. The maximum amount that savers could deposit in their *Livret bleu* account was EUR 15 300. The amount invested in the *Livret bleu* rose from EUR 13 billion (FRF 85 billion) in 1991 to EUR 22 billion in 2008.
- (36) The *Livret bleu*'s features — immediate availability of funds, minimum initial deposit authorised from EUR 15, no costs (in particular on opening the account), etc. — led to great liquidity. In addition, it was possible to set up direct debits from the *Livret bleu* account to the national exchequer or public companies such as EDF or France Télécom. The *Livret bleu*, which was a savings product aimed at the general public, was therefore similar in some respects to a current account.
- (37) The obligations associated with the use of the funds collected through the *Livret bleu* changed over time.
- (38) Initially Crédit Mutuel was obliged to allocate 50 % of the resources (in 1983⁽¹⁷⁾) this proportion was increased to 65 % of the resources and 80 % for new deposits) to general-interest uses (notably the financing of local authorities and other public bodies), with the balance being left to the bank to dispose of freely (hereinafter: 'non-earmarked uses').
- (39) The system was radically reformed by a Decree of 27 September 1991⁽¹⁸⁾ to bring the *Livret bleu* gradually into line with the *Livret A* system. After the Decree was adopted, all new deposits⁽¹⁹⁾ were centralised with the Caisse des Dépôts et Consignations (hereinafter: 'CDC') which, in return, paid Crédit Mutuel a brokerage commission. This commission, which was initially set at 1,3 % of the *Livret bleu* deposits allocated to the CDC, was reduced to 1,2 % on 1 January 2005, then to 1,1 % on 1 November 2005. The CDC uses the funds collected by Crédit Mutuel mainly to finance social housing.
- (40) Moreover, this radical reform of the system was reflected in a gradual reallocation of existing deposits⁽²⁰⁾. Since the Decree of 27 September 1991 until the end of the first half of 1999, the share of existing 'general-interest uses' and 'non-earmarked uses' fell until all the deposits were allocated to the CDC.

FRF billion and %	1991	1992	1993	1994	1995	1996	1997	1998	1999
Annual average deposits	85,5	83	80,2	83,4	88,7	91,5	92,7	98,1	98,7
Centralised allocation CDC	1 %	7 %	12 %	24 %	39 %	46 %	51 %	69 %	100 %
General-interest uses	67 %	54 %	46 %	35 %	27 %	20 %	15 %	10 %	0 %
Non-earmarked uses	32 %	39 %	42 %	41 %	35 %	34 %	34 %	21 %	0 %

Source: Littlejohn Frazer.

- (41) On 1 January 2009 a reform of the *Livret A* and *Livret bleu* came into force that granted all banking institutions the right to distribute *Livret A* accounts and ended the distinction between the *Livret A* and *Livret bleu* accounts. Since 1 January 2009, the Crédit Mutuel *Livret bleu* has simply been a *Livret A* marketed under a different name. On that date the *Livret bleu* ceased to exist, and so did the exclusive right of distribution by the Crédit Mutuel.
- 2.3. Reasons for initiating the procedure/extending the procedure**
- (42) As set out in the extension Decision⁽²¹⁾, the Commission took the view that it was possible that France had granted aid to Crédit Mutuel through the brokerage commission.

⁽¹⁶⁾ The rate was 3 % on the date of the annulled Decision, see footnote 6. On 1 February 2011 the rate of remuneration on the *Livret A* was 2 % net of tax.

⁽¹⁷⁾ Decree of 31 October 1983 'Amount of the obligation by Crédit Mutuel to use funds for the general interest', French Official Gazette, 9 November 1983, p. 3278.

⁽¹⁸⁾ Decree of 27 September 1991 defining the general-interest uses of the Crédit Mutuel, French Official Gazette No 275, 26 November 1991, p. 15383.

⁽¹⁹⁾ Whereas the stock of existing deposits was gradually transferred to the CDC; see recital 40.

⁽²⁰⁾ Unlike the new deposits, which were fully centralised with the CDC after the Decree of 27 September 1991, see recital 39.

⁽²¹⁾ See recitals 36 and 50.

(43) The *Altmark* case-law of the Court of Justice holds that public-service compensation does not constitute State aid within the meaning of Article 107 TFEU if it satisfies certain cumulative conditions referred to in the *Altmark* judgment of 24 July 2003 ⁽²²⁾.

(44) In its extension Decision, the Commission took the view that the fourth condition under the *Altmark* case-law might not be satisfied where the State did not assign this public-service task of collecting deposits intended for social rented housing to the highest bidder in a tendering procedure, but entrusted it directly through negotiations with Crédit Mutuel, which does not allow for any guarantee, by deduction, that the remuneration awarded to Crédit Mutuel is not higher than the amount required by a well-run undertaking. The Commission also took the view that the French authorities had not demonstrated that the level of compensation had been determined by reference to the costs of a typical, well-run undertaking in the banking sector. It is not enough for the French authorities to highlight that Crédit Mutuel is a well-run undertaking to establish that the level of compensation has been determined on the basis of an analysis of the costs which a typical undertaking, within the meaning of the *Altmark* case-law, would have incurred.

(45) The Commission's view is that the brokerage commission was a state resource that could constitute a selective advantage likely to distort competition and affect trade between Member States, which had not been notified. The brokerage commission could therefore contain elements of unlawful aid.

(46) In its extension Decision, the Commission thought it possible that the measure was not compatible with Article 86(2) of the EC Treaty (now Article 106(2) TFEU) and took the view that none of the exceptions referred to in Article 87(2) and (3) of the EC Treaty (now Article 107(2) and (3) TFEU) seemed to apply.

(47) It seemed possible to the Commission, on the basis of the calculations by its consultant, that the amount of the compensation had exceeded what was necessary to cover the costs incurred in discharging the public service obligations (the collection of deposits intended for social rented housing), taking into account the related income and a reasonable profit for discharging that obligation. The Commission, having reiterated that the amount of the compensation had to include all the advantages granted by the State or through state resources in any form whatsoever, took account in the calculation of the compensation not only of the net cost of collecting the deposits centralised with the CDC, but also of the net result (cost or profit) of the general-interest uses and

non-earmarked uses. The report by the Commission's consultant revealed over-compensation to Crédit Mutuel for the years 1991, 1992, 1993 and 1998.

3. THE COMPLAINANTS' ARGUMENTS

(48) The complainants' arguments were presented by the Commission in its Decision of 6 February 1998 on the initiation of proceedings pursuant to Article 88(2) of the EC Treaty (now Article 108(2) TFEU). The additional written statements submitted since then contain the following new arguments.

(49) A paper (updated at the end of February 1999 and communicated to the Commission in October 1999) on the pull effect of the *Livret bleu* assessed the net banking income generated by this effect at FRF 17 billion (EUR 2,6 billion), assuming that the increase in Crédit Mutuel's market shares in every segment over the period 1986 to 1997 was exclusively the result of distributing the *Livret bleu*.

(50) A study conducted by Caisse Nationale du Crédit Agricole, submitted in May 2000, analysed developments in the number of Crédit Mutuel branches. It emerges that the overall number of permanent branches fell between 1991 and 1994, and then increased gradually to reach, in 1998, the same level as in 1990. This trend differed according to the regions: the number of permanent, and subsequently non-permanent, branches of Crédit Mutuel dropped in the regions in which Crédit Mutuel was traditionally very strong (Loire Region, Brittany and Alsace), while the number of branches in other regions grew. It is therefore likely that Crédit Mutuel reduced its establishments in rural areas in order to concentrate on urban areas. These figures appear to refute Crédit Mutuel's allegations that it was obliged to maintain a large number of branches in rural areas in the 1990s. They also tend to show that Crédit Mutuel is capable of maintaining an exceptionally dense network of branches even after the removal of all controls by the authorities.

(51) On 4 June 1998 the AFB sent the Commission a letter stating that the commission of 1,3 % on *Livret bleu* deposits centralised with the CDC was excessive given that, at the same time, the Caisses d'Épargne and la Poste received 1,2 % and 1,5 % respectively on *Livret A* savings, which were also held centrally by the CDC. The AFB pointed out in this letter that it proposed to the French authorities in 1997 that it would ensure the collection of *Livret bleu* deposits for a charge of only 1 %, but that the Government had not replied to this offer. The AFB underlined in particular that the April 1998 report by Mr Douyère, a member of parliament, on the modernisation of the Caisses d'épargne indicated that the cost of collecting savings for an average Caisse

⁽²²⁾ Case C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg* [2003] ECR I-7747.

d'épargne such as that of Burgundy was 0,96 % of its total funds, and that there was no reason why Crédit Mutuel's management costs should be higher.

- (52) A memorandum produced by the Glais consultancy dated August 2000, submitted at the request of the AFB, contains statistics concerning the competitive advantage thought to be enjoyed by Crédit Mutuel as a result of the exclusive rights to distribute the *Livret bleu*. An examination of time-series data shows the total amount of *Livret bleu* deposits and the total amount of other deposits increased considerably until a turning point in 1985 to 1987. The growth in loans to households continues after that date and remains stronger for Crédit Mutuel than for its main competitors. The Glais consultancy expert deduced that 'the *Livret bleu* effect therefore seems to have worked by attracting customers and, from the mid-1980s, the positive effect seems to have continued without an increase in deposits. Thus the customers who remained loyal appear to have been the ones who financed Crédit Mutuel's expansionist strategy from that period on'. The expert concluded that Crédit Mutuel's (essentially credit) activities appear to have been unrelated to average developments in the banking market, notably on the basis of an indicator of the persistence of random economic shocks on activity variables and by creating a model based on a simple credit-demand equation. The expert explains this phenomenon by the fact that Crédit Mutuel's customers remain much more loyal than those of other banking networks, for example because of the *Livret bleu*.
- (53) In a second memorandum (December 2000), the Glais consultancy proposed a new econometric analysis of the degree of loyalty of each set of customers to each banking network. According to the expert, the figures corroborate the hypothesis that Crédit Mutuel and Caisses d'Épargne have much better means of retaining their customers' loyalty than other banks. But it is impossible to determine whether the offer of a tax-free savings account or the use of a dense network of branches in different regions (two instruments shared by these networks) is the reason for the greater customer loyalty.
- (54) On a matter incidental to these proceedings, the Commission also received an additional statement from the complainants which stated that the purchase by Crédit Mutuel in April 1997 of Crédit Industriel et Commercial (CIC), when the latter was being privatised (it had previously been owned by the public insurance group GAN), had been possible because of the aid it had received for the *Livret bleu*, which increased its market share of savings from 2 % in 1969 to approximately 6,9 % in 1997. According to the complainants, the undertaking's own funds had increased rapidly because of the aid in question, rising from FRF 650 million (EUR 99 million) in 1974 to FRF 47,3 billion (EUR 7,2 billion) in 1997.

- (55) Finally, the complaint by the Association of Victims of Crédit Mutuel dated 19 September 2006 contains a simple allegation of 'diversion of public savings for private and commercial ends [...] to the detriment of savers and of the French economy', which is not backed up by any serious arguments or evidence relating to potential unlawful State aid.

4. COMMENTS FROM THIRD PARTIES

- (56) Following the publication of the opening Decision of 6 February 1998, the Commission received comments from numerous third parties.
- (57) Some of Crédit Mutuel's competitors cited the damage they had suffered as a result of exclusive distribution rights for the *Livret bleu* being granted to Crédit Mutuel. These banks generally argued that the *Livret bleu* generated a pull factor making them lose clients to Crédit Mutuel and they wanted to see the end of this exclusive right. The following establishments sent comments to this effect to the Commission:

Banque Dupuy de Parseval
 Banque Natexis
 Banque de Picardie
 Banque Populaire de Bourgogne
 Banque Populaire Bretagne Atlantique
 Banque Populaire du Centre
 Banque Populaire Centre-Atlantique
 Banque Populaire de Champagne
 Banque Populaire de la Côte d'Azur
 Banque Populaire du Dauphiné et des Alpes du Sud
 Banque Populaire de Franche-Comté, du Maconnais et de l'Ain
 Banque Populaire du Haut-Rhin
 Banque Populaire de La Loire
 Banque Populaire de Lorraine
 Banque Populaire de Lyon
 Banque Populaire du Midi
 Banque Populaire du Massif Central
 Banque Populaire de l'Ouest
 Banque Populaire Provençale et Corse
 Banque Populaire des Pyrénées Orientales, de l'Aude et de l'Ariège
 Banque Populaire du Quercy et de l'Agenais
 Banque Populaire Savoienne
 Banque Populaire de la Région Économique de Strasbourg
 Banque Populaire du Sud-Ouest
 Banque Populaire du Tarn et de l'Aveyron

B.P.ROP Banque Populaire
Banque de Savoie
Crédit Commercial de France
Crédit Commercial du Sud-Ouest
Crédit Lyonnais
Société Générale
Union des Banques à Paris.

- (58) At the same time, in addition to the comments in defence of Crédit Mutuel, presented in Section 4, the Commission received comments from the following third parties which were in favour of the *Livret bleu* vehicle:

M. Mr Bertholet, MP (Drôme Department)
Mr Blondel, Member of the General Council of the Nord Department
Mr Cabot, Director of the Regional Youth Information Centre of Toulouse
Mr Cormorèche, Mayor of Montluel
Mr Cornelis, Member of the General Council of the Nord Department
Mr Chavannes, Mayor of Angoulême
Mr Crépeau, MP (Charente Maritime Department)
Mr Debavelaere, Senator (Pas-de-Calais Department)
Mr Decool, Mayor of Brouckerque
Mr Delevoye, Senator (Pas-de-Calais Department)
Mr Delnatte, MP (Nord Department)
M. Mr Dolez, MP (Nord Department)
M. Mr Ewald, Regional Delegate of the *Association pour le Droit à l'Initiative Economique*
Mr Fronton, *Union Départementale des Associations Familiales de Haute-Garonne*
Mr Foy, Senator (Nord Department)
Mr Galiègue, President of the Solesmes Caisse de Crédit Mutuel
Ms Gournay, Mayor of Caëstre
Ms Armelle Guinebertière, Member of the European Parliament
Mr Hervé, Mayor of Rennes
Mr Humez, President of the Pas-de-Calais *Comité départemental de lutte contre la mucoviscidose*
Ms Ingelaere, President of *Flandr'action*
Mr Juppé, Mayor of and MP for Bordeaux
Mr Lapalu, President of the *Association Animation et Gestion d'Organismes Privés*
Mr Lazaro, MP (Nord Department)
Mr Lebreton, President of the General Council of Côtes d'Armor Department
M. Mr Ledieu, Mayor of Le Cateau-Cambrésis

Mr Leleu, Director of Crédit Mutuel Nord
Mr Maille, President of the Brest urban area
Mr Masclet, Member of the Nord-Pas-de-Calais Regional Council
Mr Méhaignerie, President of the General Council of the Ille et Vilaine Department
Mr Mio, Member of the Nord-Pas-de-Calais Regional Council
Ms Novak, President of the *Association pour le Droit à l'Initiative Economique*
Ms Permuy, Member of the Nord-Pas-de-Calais Regional Council
M. Mr Albert Rivaux, Member of the General Council of the Pas-de-Calais Department
Mr de Rohan, President of the Brittany Regional Council
Mr Valla, Member of the General Council of the Ardèche Department
Mr Vanlerenberghe, Mayor of Arras
Mr Villain, Mayor of Cambrai
Mr de Villiers, MP (Vendée Department).

- (59) The vast majority of third parties underlined the role played by Crédit Mutuel, particularly at regional level, in financing the social economy, especially non-profit-making organisations. They also stressed the supporting role it plays with respect to people in lower income groups, from which a large part of its customers come. Several local elected representatives emphasised Crédit Mutuel's role in setting up undertakings and creating jobs, and in developing local initiatives in conjunction with the local authorities. Others considered that because of its decentralised structures, Crédit Mutuel was better able than centralised institutions to meet local needs and respond to the requirement of balanced regional development.

5. CRÉDIT MUTUEL'S COMMENTS

- (60) Crédit Mutuel criticises the Commission for having taken a particularly long time in dealing with the case.
- (61) Furthermore, according to Crédit Mutuel, the judgment by the Court of First Instance, in addition to stressing the failure to state valid grounds, contained criticism of the argument presented by the Commission, which was not taken into account in the extension Decision, in particular as far as the calculation of any overcompensation was concerned. In this respect, Crédit Mutuel accuses the Commission of adding together the positive full-year amounts without deducting the figure for the negative full-year amounts, contrary to the method put forward in the Community framework for State aid in the form of public service compensation (hereafter 'the 2005 Community framework') ⁽²³⁾.

⁽²³⁾ OJ C 297, 29.11.2005, p. 4.

(62) According to the bank, the brokerage commission fulfils the four conditions of the *Altmark* case-law:

(a) With respect to the first condition, Crédit Mutuel was engaged in the provision of two services of general economic interest, firstly by maintaining a significant branch presence in rural areas for regional development purposes and secondly by gathering deposits intended to finance social housing. As far as maintaining branches in rural areas is concerned, it disputes the Commission's conclusion that French laws and regulations remain too vague to entrust Crédit Mutuel with any such role and thus for the first condition of the *Altmark* case-law to be fulfilled. According to Crédit Mutuel, the Commission draws this conclusion from the fact that this legislation did not place any specific constraints on Crédit Mutuel since it applied to the banking sector as a whole. Crédit Mutuel also holds that the Commission is trying to transfer to it the burden of proof that the first condition of the *Altmark* case-law has been met, which is not what is laid down in the case-law in question.

(b) With respect to the second condition, Crédit Mutuel stresses that the brokerage commission was created at the same time as the obligation to centralise to centralise deposits with the CDC and that the conditions for calculating the commission were drawn up in an objective and transparent manner.

(c) As for the third condition, the bank states that the compensation was not sufficient to cover the costs of gathering deposits, since the activity relating to the funds transferred to the CDC posted a loss over the whole of the 1991-2005 period.

(d) Crédit Mutuel further holds that the fourth condition was met. The level of the brokerage commission was based on the costs actually incurred by Crédit Mutuel in distributing the *Livret bleu*. Crédit Mutuel is a well-run undertaking within the meaning of the *Altmark* case-law, since its administrative costs are amongst the lowest. The Commission is, moreover, said to have acknowledged this in its extension Decision ⁽²⁴⁾;

It is of the opinion that the Commission has not provided sufficient grounds to underpin its view that this condition has not been met.

(63) In any event, Crédit Mutuel holds that the measure is compatible with the internal market on the basis of Article 106(2) TFEU. Crédit Mutuel criticises, inter alia, the method used to calculate the overcompensation to which reference was made in the extension Decision. In its view, the Commission made calculation errors in its assessment of gross operating profit for the *Livret bleu* by making its own the mistaken conclusions of its consultant, despite the areas of disagreement outstanding between the Commission's consultant and Crédit Mutuel's consultant ⁽²⁵⁾.

(64) Crédit Mutuel also disagrees with the annual approach used by the Commission (that is the fact of taking into account only the amounts relating to years of overcompensation, without offsetting them with the amounts for years of undercompensation), which it believes runs counter to a number of precedents, the annulled Decision and, in its view, the Community framework of 2005 ⁽²⁶⁾. The Commission should adopt an overall approach (that is offsetting all of the amounts relating to years of overcompensation by those for years of undercompensation) for the whole of the 1991-98 period, on the one hand, and for the whole of the period beginning in 1999, on the other.

(65) In addition, in its extension Decision the Commission did not take reasonable profit into account properly. It based its assessment of reasonable profit on the costs of regulatory capital, estimated at 6 %, whereas these costs represent a cost accounting expense, not a margin. The Commission should have taken into account the return on equity recommended by Arthur Andersen ⁽²⁷⁾. Moreover, the calculation of reasonable profit was made on the basis of a rapidly diminishing base, which falls to zero on the complete centralisation of deposits

⁽²⁴⁾ Crédit Mutuel simply refers to paragraph 13 of the extension Decision where the Commission mentions Crédit Mutuel's financial results for 2004 (balance sheet total, net profit, cost-to-income ratio, shareholders' funds and solvency ratio).

⁽²⁵⁾ These were (i) non-life insurance restatement; (ii) the calculation of a normal margin (reasonable profit); and (iii) member liability. See Annex 1 of the extension Decision.

⁽²⁶⁾ Crédit Mutuel refers to point 21 of the Community framework of 2005, according to which, when services of general economic interest have costs that vary significantly each year, overcompensation in excess of 10 % in certain years may prove necessary.

⁽²⁷⁾ Arthur Andersen suggested a method for calculating shareholders' funds which increased the cost of equity compared to the initial assessment made by Crédit Mutuel. Arthur Andersen suggested using a rate calculated as the ratio between pre-tax profit and own funds. This rate, in Arthur Andersen's view, would reflect more accurately the overall profitability of the bank, whereas Crédit Mutuel had adopted as the cost of own funds the amount of dividends actually distributed, giving a rate of profitability for all its activities of 6 %.

with the CDC, since such deposits incur no cost in terms of regulatory capital. Crédit Mutuel emphasises that the indicator used by the Commission leads to it being deprived of any normal margin on the *Livret bleu*. In its view, any bank must be able to generate a normal margin, even on a centralised use incurring no cost of capital within the strict regulatory meaning of the solvency ratio.

(66) Nor did the Commission correctly take into account the expenses arising from the other service of general economic interest which Crédit Mutuel regards itself as providing, that is maintaining a branch presence in rural areas with a view to encouraging saving by the general public throughout the country's territory by facilitating access to banking services to the greatest number of people.

(67) Crédit Mutuel also denies that there was ever any pull factor. It notes that the Commission had acknowledged in its annulled Decision that there was no formal evidence attesting to a pull factor and is of the view that no new evidence has appeared since then.

(68) With respect to the proceedings, Crédit Mutuel relies on a number of general principles of Community law to dispute the recovery of potential aid, inter alia, the principle of legitimate expectation and the duty to act within a reasonable time.

6. COMMENTS BY FRANCE

(69) France is of the opinion that the conditions of the *Altmark* case-law have been met:

(a) With respect to the first condition, it emphasises that the Commission has acknowledged that Crédit Mutuel was attributed the task of providing a service of general economic interest by gathering deposits to finance social housing. It recalls that the Commission stated in its extension Decision that maintaining branches in rural areas for regional development purposes could also be regarded as a service of general economic interest⁽²⁸⁾, but does not react to the arguments raised by the Commission in its extension Decision that the first condition of the *Altmark* case-law has not been met because there is no national legislation or regulations requiring, in a sufficiently clear manner, the institution to perform this task pursuant to Article 106(2) TFEU⁽²⁹⁾.

(b) With respect to the second condition, France is of the opinion that the parameters for calculating the compensation were established in advance in an objective and transparent manner.

(c) As for the third condition, it argues that the amount of compensation (the brokerage commission) did not exceed what was necessary to cover the costs of the system and refers in this respect to Crédit Mutuel's detailed profit-and-loss accounts for the *Livret bleu* for the years 1999 to 2005.

(d) The fourth condition is also fulfilled, with France stating that Crédit Mutuel's management meets the efficiency requirements⁽³⁰⁾.

(70) With respect to the conditions relating to the existence of aid, France refers to the arguments it put forward before the annulment of the 2002 Decision:

(a) The state resources condition is not fulfilled since the income derived by Crédit Mutuel from the deposits not centralised with the CDC (non-earmarked uses and general-interest uses) arose from resources of private origin (monies deposited by savers) which were not at the disposal of the public authorities.

(b) Trade between Member States could not have been affected before completion of the single market for banking and financial activities on 1 January 1993, following the adoption of Second Council Directive 89/646/EEC of 15 December 1989 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions and amending Directive 77/780/EEC (hereinafter 'the Second Banking Directive')⁽³¹⁾. The French authorities considered that, after that date, given the absence of an official European statute for cooperative societies and the constraints that this situation produced in terms of the cross-border expansion of cooperative societies such as Crédit Mutuel, the latter's constituent regional entities did not operate across national borders. Moreover, the *Livret bleu* accounts opened for non-residents represented less than 0,1 % of the total. The French authorities also stated that foreign banks in France were targeting a very different market to that of Crédit Mutuel.

⁽²⁸⁾ See paragraph 25 of the extension Decision.

⁽²⁹⁾ See paragraph 28 of the extension Decision.

⁽³⁰⁾ France simply refers to paragraph 13 of the extension Decision where the Commission mentions Crédit Mutuel's financial results for 2004 (balance sheet total, net profit, cost-to-income ratio, shareholders' funds and solvency ratio).

⁽³¹⁾ OJ L 386, 30.12.1989, p. 1.

(c) The brokerage commission paid by the CDC to Crédit Mutuel on the total *Livret bleu* deposits centralised with it did not constitute aid, but rather remuneration for a service rendered by the bank, the price of which had been set in 1991 at 1,3 %. The French authorities underlined the scale of the management costs for the *Livret bleu* because of the number of accounts with deposits totalling less than FRF 5 000 (EUR 762). They referred to the cost accounts produced by Crédit Mutuel (after the measure at hand was adopted), concluding that this level of remuneration was fully justified. The French authorities argued that the advantages which Crédit Mutuel received from the *Livret bleu* should be examined in the light of the costs relating to a general economic interest objective. In this respect, they drew the attention of the Commission to the increase in the attribution of the deposits to financing objectives of general interest, for which the proportion rose from 50 % of *Livret bleu* deposits between 1975 and 1983, to 65 % between 1983 and 1991, to 100 % of deposits centralised with the CDC from 1998 onwards.

(d) Even assuming that there had been aid, it would have been existing aid as the *Livret bleu* scheme was set up before the liberalisation of the banking sector on 1 January 1993 (the deadline for transposing the Second Banking Directive).

(71) In their letter of 26 October 2001, the French authorities provided the reason why, were the Commission to conclude the existence of aid, that aid would in any event be compatible with the internal market in accordance with Article 106(3) TFEU. They criticise the Commission for making mistakes in its calculation of the gross operating profit from the *Livret bleu* by not following the method put forward by Crédit Mutuel's consultant ⁽³²⁾. They also contend that the Commission should take into account a reasonable profit, which they estimate at [...] ^(*).

(72) In their comments on the extension Decision, the French authorities also criticise the Commission for its 'asymmetrical reasoning', in that it did not offset the amounts for years in which overcompensation was found (1991, 1992, 1993 and 1998) by those for years of undercompensation (1994 to 1997) and for repeating in their entirety in Annex 1 to the extension

Decision the conclusions of its consultant on the three areas of disagreement between France and the Commission. France specified that for the whole of the 1999-2005 period the system relating to the *Livret bleu* was undercompensated by the state. The amount of the brokerage commission did not exceed what was required to cover the distribution costs of the *Livret bleu* as reflected in the cost accounts for the *Livret bleu*, which were drawn up in partnership with the Commission (subject to two adaptations ⁽³³⁾) and meet the requirements of Commission Directive 80/723/EEC of 25 June 1980 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings ⁽³⁴⁾. France also explained that the recent reductions in the brokerage commission were made to meet the requirements of those engaged in financing social housing ⁽³⁵⁾.

(73) The French authorities explained that a mechanism for the repayment of any overcompensation has existed since 1999.

(74) France also explained that the risk of a lack of liquidity for the first month was borne by Crédit Mutuel and the risk of a lack of liquidity beyond that was borne by the CDC. With respect to deposits collected for *Livret bleu* accounts, France further explained that the risk-weighting percentage for the calculation of capital requirements needed for the solvency margin was zero. It pointed out that the risk weighting for Crédit Mutuel's capital requirements for other savings products and resources other than the *Livret bleu* ranged from [...] % to [...] % from 1999 to 2005. The French authorities specified that, given the irrelevance of applying the European solvency ratio after the complete transfer of the deposits to the CDC in 1999, in order to calculate the reasonable profit corresponding to the *Livret bleu*, Crédit Mutuel factored in a cost of capital in reference to its other savings products and resources, which it capped ([...] % to [...] % between 1999 and 2005). At the Commission's request, France also provided precise information on the margin of compensation relating to the establishment of a compulsory reserve fund with the Banque de France.

⁽³²⁾ On the areas of disagreement between the Commission's consultant and Crédit Mutuel's consultant, see footnote 25.

^(*) Covered by the business secret obligation

⁽³³⁾ The first change concerns the inclusion of the compulsory payments to the deposit guarantee fund introduced by the Law of 25 January 1999 on savings and financial security, and the second concerns the change in the calculation of own funds to take account of reasonable profit from 1999.

⁽³⁴⁾ OJ L 195, 29.7.1980, p. 35. This Directive was repealed by 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 (OJ L 318, 17.11.2006, p. 17).

⁽³⁵⁾ According to the French authorities, the reduction in the brokerage commission enabled the CDC to lower the cost of financing for social landlords.

7. ASSESSMENT

7.1. Existence of aid

(75) In the extension Decision the Commission considered that the only measure at issue likely to contain aid elements was the brokerage commission paid to Crédit Mutuel by the CDC ⁽³⁶⁾.

(76) Such aid as may be hidden in the brokerage commission was introduced on 27 September 1991 by the Order of the same date and, in the present Decision, is analysed up to the liberalisation of the distribution of the *Livret A* and the harmonisation of the *Livret bleu* with it on 1 January 2009 ⁽³⁷⁾.

7.1.1. The conditions of the *Altmark* judgment are not met

(77) According to the *Altmark* case law ⁽³⁸⁾ compensation paid in consideration of public-service tasks does not constitute State aid within the meaning of Article 107(1) TFEU if four cumulative conditions are met.

(78) In their comments in response to the extension Decision the French authorities and Crédit Mutuel invoke the existence of two services of general economic interest, namely the maintenance of a significant branch presence in rural areas for regional development purposes and the gathering of deposits intended for social housing financing.

(79) However, even before the measure at issue was introduced, Crédit Mutuel was no longer under any obligation to maintain rural branches since the 1987 repeal of the Bank Branches (opening and closing) Act (*loi relative à l'ouverture et à la fermeture des agences bancaires*) and the abolition on 1 July 1991 of the supervision arrangements (which were kept in place with respect to Crédit Mutuel from 1987 to 1991) ⁽³⁹⁾. Moreover,

neither the French authorities nor Crédit Mutuel challenged the conclusion in the extension Decision that, after 1991 (or, to be precise, 1 July 1991), there was no longer any instrument in force on the basis of which Crédit Mutuel might have been entrusted, within the meaning of Article 86 EC (now Article 106 TFEU), with the task mentioned in paragraph 24, point (iii) of the extension Decision (maintenance of branches in rural areas for regional development purposes) ⁽⁴⁰⁾.

(80) It is therefore only as regards the task of gathering deposits with a view to financing social housing that it falls to be examined whether the *Altmark* case law applies.

(81) The Commission would recall that Member States have a wide margin of discretion as to the nature of services which may be classified as services of general economic interest. It considers that the Decrees implementing the provisions of Article 9 of the Amending Finance Act for 1975 ⁽⁴¹⁾ and of Article 24 of the Amending Finance Act for 1982 ⁽⁴²⁾, and in particular the Order of 27 September 1991, clearly entrust to Crédit Mutuel the task (as defined in Articles R 323-10 and R 331-14 of the Construction and Housing Code) of gathering funds for transfer to the CDC in order that the latter might finance social housing. The Commission is of the opinion that, in classifying this task as a service of general economic interest, France has not committed a manifest error of assessment.

(82) According to the fourth condition of the *Altmark* judgment, 'where the undertaking which is to discharge public service obligations, in a specific case, is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run [...] so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations' ⁽⁴³⁾.

(83) The Commission considers that the fourth condition is not met in the case of the task of gathering deposits to

⁽³⁶⁾ See paragraph 50 of the extension Decision (exists only in French): '[...] la Commission ne vise dans la présente procédure comme mesure pouvant éventuellement contenir des éléments d'aide d'Etat que la commission d'intermédiation'.

⁽³⁷⁾ See recital 41.

⁽³⁸⁾ See footnote 22.

⁽³⁹⁾ The French authorities referred to the Bank Branches (opening and closing) Act, which was repealed in 1987. From 1987 to 1991, supervision arrangements were nevertheless kept in place with respect to Crédit Mutuel. The rules provided for a system for the authorisation, and not a system for the formal prohibition, of branch closures or restructurings, in particular as from 1987. These supervision arrangements were abolished on 1 July 1991 within the more general framework of the renegotiation of the contractual relations between the State and Crédit Mutuel.

⁽⁴⁰⁾ See paragraph 29 of the extension Decision.

⁽⁴¹⁾ See recital 34 and footnote 14.

⁽⁴²⁾ Law No 82-1152 of 30 December 1982 (French Official Gazette of 31.12.1982, p. 3995).

⁽⁴³⁾ See paragraph 93 of the *Altmark* judgment, cited above in footnote 22.

be centralised with the CDC for the purpose of financing social housing. It should be noted that the State assigned this task, not to the highest bidder via a public procurement procedure, but directly by negotiation with Crédit Mutuel. The level of brokerage commission was not determined by reference to the costs connected with the performance of the service of general economic interest incurred by a typical, well-run undertaking. The brokerage commission of 1,3 % could not be based on the actual costs incurred by Crédit Mutuel in performing the service of general economic interest because there was no separate accounting for the *Livret bleu* in September 1991 making it possible to trace the costs linked specifically to the *Livret bleu* in the bank's accounts. The separate accounting for the *Livret bleu* was developed several years later and applied retroactively for the years up to 1991. There is therefore nothing to indicate that the level of brokerage commission was determined by reference to the costs of a typical, well-run undertaking performing the general-interest task in question. The French authorities argue that Crédit Mutuel is, on the whole, well run. However, they do not really back up this claim, but instead refer mainly to paragraph 13 of the extension Decision, where the Commission simply mentions the overall financial results (balance-sheet size, net profit or loss, cost/income ratio, equity capital and solvency ratio) of Crédit Mutuel in 2004. At all events, if a Member State has determined the level of compensation on the basis of an analysis of the costs of a typical, well-run undertaking, it should have no difficulty proving it to the Commission and outlining the methodology followed — something which France has not done in this case. Finally, the fact that, as soon as the distribution of *Livrets A* and *Livrets bleus* was liberalised on 1 January 2009, Crédit Mutuel's brokerage commission went down from 1,1 % to 0,6 % seems to indicate that the level of that commission was higher than it would have been had it been based on the costs of a typical, well-run undertaking performing the same general-interest task.

- (84) In so far as the conditions of the *Altmark* judgment are cumulative, it is enough that only one of the conditions is not met for the case law not to apply and for the measure at issue to be able to constitute State aid. It follows from the above that the measure at issue does not meet the fourth condition of the *Altmark* judgment. The *Altmark* case law therefore does not apply and it needs to be considered whether the measure does in fact constitute State aid ⁽⁴⁴⁾ ⁽⁴⁵⁾.

⁽⁴⁴⁾ According to point 7 of the 2005 Community framework, 'If the Member States do not respect these criteria [that is to say, the four conditions of the *Altmark* case] and if the general criteria for the applicability of Article 87(1) of the EC Treaty [now Article 107(1) TFEU] are met, public service compensation constitutes State aid' (underlining added).

⁽⁴⁵⁾ This examination is independent of the fact that the reform of 1 January 2009 put an end to the infringement of European public procurement law resulting from the direct assignment to Crédit Mutuel of the public-service task of gathering deposits intended for social rented housing.

7.1.2. The conditions relating to the existence of aid are met

- (85) Article 107(1) TFEU provides that 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.

7.1.2.1. Imputability to the State and state resources

- (86) The brokerage commission was paid annually ⁽⁴⁶⁾ to Crédit Mutuel by the CDC under an agreement between the State and Crédit Mutuel laying down detailed rules for implementing the Order of 27 September 1991. The amount of brokerage commission is set by the State to compensate for the public service obligations. Moreover, the CDC is a public undertaking the conduct of which is imputable to the State ⁽⁴⁷⁾. The condition concerning imputability to the State and state resources is therefore met.

7.1.2.2. Selectivity

- (87) The brokerage commission was granted exclusively to Crédit Mutuel in return for its gathering savings, to be centralised with the CDC for the purpose of financing social housing, by means of the *Livret bleu*, for which Crédit Mutuel held an exclusive right of distribution. This measure is therefore selective in nature.

7.1.2.3. The conditions of the *Altmark* judgment being inapplicable, examination as to the existence of an advantage distorting competition

- (88) Given that it constituted a transfer of state resources for the benefit of Crédit Mutuel alone, the brokerage commission improved the competitive position of that bank compared with its competitors. According to the case law of the Court of Justice, an improvement in the

⁽⁴⁶⁾ Under the agreement between the State and Crédit Mutuel laying down detailed rules for implementing the Order of 27 September 1991, the CDC must pay annually to Crédit Mutuel [...] the amount of compensation due on the last working day of each year.

⁽⁴⁷⁾ See the judgment of the Court of First Instance in Case T-358/94 *Air France v Commission* [1996] ECR II-2019, in particular paragraphs 58 to 61. See also the Commission Decision 2010/606/EU of 26 February 2010 on State aid C 9/09 (ex NN 49/08, NN 50/08 and NN 45/08) implemented by the Kingdom of Belgium, the French Republic and the Grand Duchy of Luxembourg for Dexia SA (OJ L 274, 19.10.2010, p. 54), recitals 123, 124 and 125.

competitive position of an undertaking as a result of State aid generally constitutes proof that competition with other undertakings which have not received similar aid is being distorted ⁽⁴⁸⁾.

7.1.2.4. Effect on trade between Member States

(89) Moreover, according to settled case law, there is an effect on trade between Member States where the undertaking in receipt of aid carries on its activities in a sector which is open to competition and in which there is trade between Member States ⁽⁴⁹⁾. From 1979, the share of the market held by foreign banks reached 8 % in the case of lending business (4 % for branches without legal personality, 4 % for subsidiaries constituted under French law) and 4,5 % in the case of deposit business (2 % and 2,5 % respectively). The share held by non-French European banks compared with all foreign banks was 50 % in the case of loans and 70 % for deposits. *Crédit Mutuel* has therefore been faced since the 1970s with competition from foreign networks on French soil. Moreover, the liquid bank savings market to which the *Livret bleu* belonged, and which also includes the *Codevi*, the *LEP*, the *Livret jeune*, ordinary savings accounts and the *CEL* ⁽⁵⁰⁾, was already open to competition during the period considered.

(90) The Commission concludes, therefore, that the four necessary preconditions for the existence of aid are met.

7.1.2.5. Unlawfulness of the aid measure

(91) Lastly, the aid measure is unlawful because it was not notified to the Commission in accordance with Article 108(3) TFEU and was implemented after the entry into force in France of the Treaty establishing the European Economic Community.

(92) In answer to the French authorities' argument that the aid is existing aid since it was adopted before the expiry of the time limit for transposal of the second Banking Directive, namely 1 January 1993, the Commission would point out that that Directive sought to complete the internal market in the area of credit institutions from the point of view of freedom of establishment and freedom to provide services. It does not imply that the relevant market was closed to competition before the brokerage commission was adopted, but simply that

there were still certain obstacles to freedom of establishment and freedom to provide services in the banking sector. The Decision of 10 May 2007 states that the *Livret bleu* belongs to a 'market' for liquid bank savings, which implies that the activity in question is open to competition and in no way supports the French authorities' argument that that activity was not opened to competition until 1993. On the contrary, the Decision refers to the existence of a 'mature' market ⁽⁵¹⁾.

7.2. Compatibility of the aid with the internal market

(93) Since the measure at issue contains elements of State aid, the Commission must analyse the compatibility of the said measure with the internal market.

(94) Article 106(2) TFEU provides that: 'Undertakings entrusted with the operation of services of general economic interest [...] 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'.

(95) According to the case law of the Court of Justice, the decision-making practice of the Commission and the 2005 Community framework, Article 106(2) TFEU signifies that State aid to an undertaking entrusted with the operation of a service of general economic interest may be declared compatible with the internal market if the aid measure fulfils the following conditions:

- (a) the service provided has the features of a service of general economic interest;
- (b) the undertaking is actually required to perform this service of general economic interest by the State by means of one or more official acts;
- (c) the principles of necessity and proportionality are respected; and
- (d) the development of trade must not be affected to such an extent as would be contrary to the Union's interests.

⁽⁴⁸⁾ Judgment in Case C-730/79 *Philip Morris v Commission* [1980] ECR 2671, paragraphs 11 and 12.

⁽⁴⁹⁾ Judgment in Case C-102/87 *France v Commission* [1988] ECR 4067, paragraph 19.

⁽⁵⁰⁾ See recital 45 of the Decision of 10 May 2007.

⁽⁵¹⁾ See recitals 58 and 90 of the Decision of 10 May 2007.

- (96) Conditions (a) and (b) are fulfilled for the reasons set out in recital 81.
- (97) As far as condition (d) is concerned, there is no evidence in the Commission's possession to suggest that intra-Community trade has been affected to such an extent that the aid does not satisfy this condition. In particular, the Decision of 10 May 2007 asked for an end to the exclusivity of the right of distribution of the *Livret bleu* since the special rights connected with the distribution of the *Livret bleu* constituted a restriction on freedom to provide services within the Community ⁽⁵²⁾. Nevertheless, provided that it has not overcompensated the general interest service entrusted to Crédit Mutuel, the brokerage commission cannot be considered as affecting the development of trade to an extent contrary to the Union's interests.
- (98) The Commission examines, therefore, below whether the principles of necessity and proportionality have in fact been respected, that is to say, whether the amount of the compensation which the brokerage commission constitutes has not exceeded what is necessary to cover the costs incurred in discharging the public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations ⁽⁵³⁾.
- (99) In verifying the absence of any overcompensation (see subsection 7.2.5), the Commission follows — for the period from 27 September 1991 (see subsection 7.2.1) to 31 December 2005 — a global approach (see subsection 7.2.2). It takes account of all the advantages connected with the *Livret bleu*, without, however, including a possible pull effect whose scope could not be established (see subsection 7.2.3). A reasonable profit is taken into account (see subsection 7.2.4), including for deposits centralised with the CDC.
- 7.2.1. *Beginning of the period considered (27 September 1991)*
- (100) In the extension Decision, the calculation of the net results of the *Livret bleu* for the purpose of assessing whether there was any overcompensation included the results for the whole of 1991 ⁽⁵⁴⁾. In other words, the net revenue from non-earmarked uses and general-interest uses was factored in as of 1 January 1991.
- (101) As stated in recitals 75 and 76, the only measure at issue in the present case is the brokerage commission, the principle of which was established on 27 September 1991, at the same time as Crédit Mutuel was tasked with centralising its deposits with the CDC with a view to financing social housing. Before that date, neither the brokerage commission nor the centralisation with the CDC existed. Consequently, the Commission must begin its assessment of the proportionality of the aid as from that date.
- (102) The costs and revenues connected with the performance of the service of general economic interest cannot therefore predate 27 September 1991. In other words, it is only as from the creation of the aid measure at issue (the brokerage commission) that account can be taken of the costs and revenues connected with the performance of the general economic interest service financed by that aid. The Commission considers in conclusion that its extension Decision was inconsistent in limiting the aid measure to the brokerage commission created on 27 September 1991 while continuing to take into account the net revenue from *Livret bleu* accounts during the period from 1 January 1991 to 27 September 1991.
- (103) In view of the fact that Crédit Mutuel is able to communicate the net results of general-interest uses and non-earmarked uses only on an annual basis, the Commission considers that, for the year 1991, account must be taken only of the net results corresponding to the period from 27 September 1991 to 31 December 1991, based on the proportion between the number of relevant days and the net results for the whole of 1991, i.e. 96/365. The net results for deposits centralised with the CDC for the year 1991 can be taken into account in their entirety since, as explained in recital 101, such centralisation was in fact introduced after 27 September 1991, with the result that, by definition, no part of these results relates to the period from 1 January 1991 to 27 September 1991.
- 7.2.2. *Global approach up to the end of 2005 and each year thereafter*
- (104) In its extension Decision, the Commission advocated the adoption of an annual approach to assessing the existence of any overcompensation. This approach stems from the 2005 Community framework and represents a change compared with its previous

⁽⁵²⁾ See recital 223 of the Decision of 10 May 2007.

⁽⁵³⁾ See point 14 of the 2005 Community framework.

⁽⁵⁴⁾ See the tables in paragraphs 68, 69, 73, 75, 76 and 79 of the extension Decision.

practice. When, prior to the adoption of the 2005 Community framework, the Commission had to assess the existence of any overcompensation, it followed an approach which may be described as 'global' whereby the amounts relating to the years of overcompensation could, without limit, be offset by the amounts for the years of undercompensation ⁽⁵⁵⁾.

(105) Pursuant to point 26 of the 2005 Community framework, the Commission will apply the framework's provisions to non-notified aid if the aid was granted after publication of the framework in the *Official Journal of the European Union* and the provisions in force at the time the aid was granted, in all other cases. The aid at issue was granted annually ⁽⁵⁶⁾ and was not notified. The 2005 Community framework was published in the *Official Journal of the European Union* on 29 November 2005. It is therefore necessary to apply the rules in force at the time the aid was granted with respect to the period before 2006 and the 2005 Community framework with respect to the period from 1 January 2006 to the measure's termination on 31 December 2008.

(106) The 2005 Community framework advocates an 'annual' approach inasmuch as the calculation of any overcompensation has to be done annually without it being possible to carry forward the amount of any annual overcompensation to the next year, save where that amount does not exceed 10 % of the amount of annual compensation ⁽⁵⁷⁾.

(107) On the other hand, prior to the adoption of the 2005 Community framework, where the Commission checked

whether the undertaking had not been overcompensated for the performance of the public-service task, it followed a 'global' approach (see recital 104) ⁽⁵⁸⁾.

(108) In the global approach, the net results for each year, cumulated year on year, are discounted by applying the reference rate for France on 1 January of each year ⁽⁵⁹⁾.

7.2.3. Advantages taken into account

(109) According to the first sentence of point 17 of the 2005 Community framework, 'The revenue to be taken into account must include at least the entire revenue earned from the service of general economic interest'. When checking for the absence of any overcompensation, it is necessary, therefore, to take account of the net result of general-interest uses and non-earmarked uses during the investigation period. The Commission considers that these results are revenue introduced by France as from 27 September 1991 in favour of Crédit Mutuel for its performing the general-interest service of financing social housing through the CDC. These uses are, in cost accounting, backed by a specific resource, the deposits gathered thanks to the distribution of the *Livret bleu*. In competitive market conditions (without the special right to distribute a tax-free savings product), Crédit Mutuel might not have been able to procure that resource at the same cost, with the result that the corresponding uses and resources must be taken into account in the overall structure of the *Livret bleu* system. Moreover, France has itself confirmed the existence of a link between these uses, the *Livret bleu* and the task of financing social housing by redirecting the amounts relating to these uses to the CDC as from 1991 ⁽⁶⁰⁾. In other words, when on 27 September 1991 it entrusted to Crédit Mutuel the general economic interest service consisting in gathering deposits centralised with the CDC and intended for financing social housing, France confirmed the entrustment to Crédit Mutuel of the distribution of the *Livret bleu*. The profit resulting from the use of funds deposited on the latter must therefore be considered as from that date to be revenue granted to Crédit Mutuel for the provision of the service of general economic interest.

⁽⁵⁵⁾ This mostly involved cases in which the undertakings entrusted with a public service task operated in the audiovisual sector (see, for example, the Commission Decision 2004/838/EC of 10 December 2003 on State aid implemented by France for France 2 and France 3 (OJ L 361, 8.12.2004, p. 21)).

⁽⁵⁶⁾ See footnote 46.

⁽⁵⁷⁾ See point 21 of the 2005 Community framework. In answer to Crédit Mutuel's argument (see footnote 26) in favour of application of the global approach under the second and third sentences of point 21 of the 2005 Community framework, according to which, where the service of general economic interest has costs that vary significantly from year to year, overcompensation in excess of 10 % in certain years may, exceptionally, prove necessary, the Commission would point out that, according to the fourth sentence of point 21, such 'exceptional' overcompensation '[...] necessary for the operation of the service of general economic interest' must be justified by the Member State 'in the notification to the Commission' (underlining added). However, the measure at issue was not notified to the Commission and the Commission considers that Crédit Mutuel has not been in a highly specific situation justifying the authorisation, by way of exception, for certain specific years, of overcompensation in excess of 10 %.

⁽⁵⁸⁾ See, for example, the Commission Decision 2004/838/EC of 10 December 2003 on State aid implemented by France for France 2 and France 3 (OJ L 361, 8.12.2004, p. 21).

⁽⁵⁹⁾ See the Commission notice on current State aid recovery interest rates and reference/discount rates for 25 Member States applicable as from 1 January 2007 (OJ C 317, 23.12.2006, p. 2). See also the following webpage: http://ec.europa.eu/competition/state_aid/legislation/reference_rates.html

⁽⁶⁰⁾ See recital 39.

- (110) The complainants and other authorities or bodies (the Competition Council and reports by parliamentarians or research organisations ⁽⁶¹⁾) consider that the exclusive right to distribute the *Livret bleu* has had a 'pull effect' by enabling Crédit Mutuel to attract and retain customers to whom it has sold banking products other than the *Livret bleu*. In its extension Decision the Commission did not rule out the possibility that the *Livret bleu* may have generated indirect revenue via the pull effect ⁽⁶²⁾, but it pointed out that such revenue had so far not been quantified ⁽⁶³⁾.
- (111) Following its investigation into this case, the Commission would observe that, while the existence of a pull effect cannot be ruled out, the data it has collected do not enable it in this case to quantify the potential pull effect in a sufficiently precise manner.
- (112) The documents submitted by the complainants presume the existence of pull effects but do not formally prove their existence and succeed even less in precisely determining the financial impact of such effects.
- (113) As for the studies by the Glais consultancy (see recitals 52 and 53), the Commission would observe that Crédit Mutuel is right to assert that these statistical analyses provide no certain proof of a quantifiable pull effect.
- (114) Three subjective evaluations have been proposed in the complainants' comments. First of all, in view of the fact that other banks had offered to distribute the *Livret bleu* in return for a 1 % commission, the complainants proposed an approximate order of magnitude for the pull effect by calculating the difference between the level of commission charged by Crédit Mutuel and this rate of 1 %, i.e. 0,3 %, which corresponds to approximately FRF 300 million a year. However, there is no evidence to suggest that, during the period considered, Crédit Mutuel's competitors could have performed this task under the same conditions at this level of remuneration of 1 %. Moreover, this first argument does not demonstrate the pull effect but seems to amount to alleging that Crédit Mutuel was over-compensated, which, as will be shown, is not the case. There is no evidence to suggest that the pull effect corresponds to the difference between the brokerage commission and a hypothetical lower commission which Crédit Mutuel's competitors proposed to charge in return for their distributing the *Livret bleu*.
- (115) According to the second method proposed by the complainants, the pull effect would be measured by reference to the growth in Crédit Mutuel's market share. Such an evaluation method cannot be adopted as it is based on the assumption that the gains in market share are due solely to the *Livret bleu*, whereas there is no objective basis for this assumption.
- (116) The third evaluation of the exclusive distribution right is based on the tax revenue loss due to the tax exemption allowed under the *Livret bleu*. If Crédit Mutuel had wished to distribute a savings account without any tax exemption by offering, irrespective of the saver's tax position, the same net yield as the *Livret bleu*, it would in fact have incurred an opportunity cost equal to the amount of the notional tax (potentially) payable by the saver. According to the complainants, the cumulated tax advantage of the order of FRF 4,5 billion over the period 1991-97 must be considered as having accrued to Crédit Mutuel advantages worth the same amount. This reasoning cannot be accepted as Crédit Mutuel would probably not have distributed the *Livret bleu* under the same conditions if it had had to bear the full cost of the tax exemption, which, besides, benefits members directly.
- (117) The advantages in question, if any, are difficult to prove and to quantify. The direct financial advantage deriving from the operation of the *Livret bleu* is directly measurable from the *Livret bleu*'s accounts. However, the financial advantage arising from the sale of other products or services to customers who remained loyal because of the *Livret bleu* would be observable in the cost accounts of these other products if it were possible to distinguish immediately between what was sold to customers who remained because of, or were attracted by, the *Livret bleu*, and what was sold to customers who came to Crédit Mutuel for other reasons, which is not the case. For these reasons, the Commission's consultant was unable to evaluate the potential pull effect using the accounting method applied to assess all the direct financial advantages deriving from the *Livret bleu*.

⁽⁶¹⁾ See, for example, a Competition Council opinion (opinion No 96-A-12 of 17 September 1996, p. 8), an information report by Senator Alain Lambert (report No 52 of 30 October 1996, p. 72) and a study by Nathalie Daley of the industrial economics centre CERNA (*La banque de détail en France: de l'intermédiation aux services*, February 2001, p. 9).

⁽⁶²⁾ See paragraphs 52 and 53 of the extension Decision.

⁽⁶³⁾ See paragraph 67 of the extension Decision, 'Les éventuels résultats liés à la distribution exclusive du *Livret bleu* n'ont pu être quantifiés'.

- (118) The more sophisticated attempts by the Commission's consultant at evaluating the pull effect were unsuccessful. Consequently, the Commission considers that it cannot take into account the advantage, if any, due to the pull effect in the calculation of whether or not there is any overcompensation.

7.2.4. Calculation of a reasonable profit

- (119) When checking for the absence of overcompensation of an undertaking entrusted with a service of general economic interest, account must be taken of a reasonable profit⁽⁶⁴⁾. The 2005 Community framework states that 'reasonable profit' should be taken to mean a rate of return on own capital that takes account of the risk, or absence of risk, incurred by the undertaking [...] This rate must normally not exceed the average rate for the sector concerned in recent years' (65).

- (120) The Commission considered in the extension Decision⁽⁶⁶⁾ that there should be applied to general-interest uses and non-earmarked uses a reasonable profit amounting to on average 6 % of the capital devoted to those uses. This rate, which varies from year to year and averages 6 %, corresponds to the rate of return originally advocated by Crédit Mutuel: Crédit Mutuel had taken as the cost of capital the amount of the dividends actually distributed during the year in question. In this Decision, as regards the taking into account of a reasonable profit when checking for the absence of any overcompensation, the Commission does not deviate, in the case of non-earmarked uses and general-interest uses, from the approach already followed in the extension Decision, described in Section 7.2.5.

- (121) In its extension Decision⁽⁶⁷⁾, the Commission considered, however, that it did not have to apply this reasonable profit to deposits centralised with the CDC in so far as they have no cost of capital from the point of view of the prudential rules, such deposits being not so much invested by Crédit Mutuel as simply assigned to the CDC. From a prudential point of view, the credit risk connected with deposits centralised with the CDC is

considered equal to the exposure vis-à-vis the State (the French Republic), i.e. a risk weighting equal to zero and hence requiring no capital.

- (122) If it were to be assumed that no reasonable profit is to be derived from deposits centralised with the CDC, this would mean that the total reasonable profit (that relating to general-interest uses and non-earmarked uses and that relating to deposits centralised with the CDC) decreased from 1991 to 1999, disappearing altogether from 2000 following the centralisation with the CDC of the entire stock of deposits in 1999⁽⁶⁸⁾.

- (123) In their letter of 1 September 2006 presenting their comments in reply to the extension Decision, the French authorities confirmed that the funds centralised with the CDC consumed no regulatory capital. Nevertheless, according to the French authorities, 'in view of the lack of relevance of the application of the European solvency ratio from the time of full centralisation with the CDC in 1999, Crédit Mutuel [proposes to] include, in order to calculate the reasonable profit in the *Livret bleu*, a cost of capital obtained by reference to that of the other savings products and other resources'. The Commission does not consider such an approach to be satisfactory as it results in applying artificially to the resources centralised with the CDC a regulatory capital need dependent on the average capital need of Crédit Mutuel's other assets, which are completely independent of the *Livret bleu*.

- (124) The absence of a regulatory capital need illustrates the absence of a credit loss risk, which is the case with the deposits centralised with the CDC. The activity of gathering deposits on behalf of the CDC likewise does not present a liquidity risk (apart from the intra-month risk) or a risk of maturity transformation, since the amount made over to the CDC is adjusted each month in the light of the trend in deposits and the interest paid by the CDC is immediately transferred to depositors. It is therefore certain that this general economic interest service presents a low level of risk to Crédit Mutuel. However, some other types of risk, such as the operational risk, the economic risk (the risk that the level of remuneration will not cover the costs incurred), the legal risk and the risk to reputation, do exist. Moreover, other banking activities such as the distribution of mutualised funds, asset management or the selling of financial products (such as shares and bonds) do not consume any regulatory capital but are nonetheless highly profitable. There is therefore no direct link

⁽⁶⁴⁾ See paragraph 48 of the extension Decision and point 14 of the 2005 Community framework, which provides that: 'The amount of compensation may not exceed what is necessary to cover the costs incurred in discharging the public service obligations, taking into account the relevant receipts and reasonable profit for discharging those obligations' (underling added).

⁽⁶⁵⁾ See point 18 of the 2005 Community framework.

⁽⁶⁶⁾ See Section 2 of Annex 1 to the extension Decision, paragraphs 124 to 137.

⁽⁶⁷⁾ See Section 2 of Annex 1 to the extension Decision, paragraph 132.

⁽⁶⁸⁾ See recitals 39 and 40.

between the consumption of regulatory capital — calculated on the basis of prudential rules the specific aim of which is in no way to evaluate the profitability of an activity — and the profit expected from an activity.

(125) In the present case, while the Commission authorises Crédit mutuel to earn a reasonable profit in respect of that part of deposits which is centralised with the CDC, it acknowledges that determining the appropriate level of that profit is an exercise which involves a complex economic assessment. The *Livret bleu* is an atypical banking product with the mixed characteristics of a savings product and a current account, the gathered deposits of which are centralised with a public authority. There are therefore no directly comparable products as such which might give an indication of a reasonable profit for a similar activity.

(126) For want of a product sufficiently comparable to the *Livret bleu*, the Commission considers that it can in the present case use two indicators making it possible to

evaluate whether, with respect to deposits centralised with the CDC, a given profit may be considered reasonable. The two indicators are:

- (a) the profit margin of the French banking sector, that is, the profit before tax divided by turnover (in the present case, the banks' turnover is represented by their operating results). Using the French banking sector's figures for the period considered (from 27 September 1991 to the end of 2008), the profit margin is on average 23 % a year;
- (b) the rate of return of the French banking sector, that is, the profit before tax divided by assets. The average annual rate of return throughout the period considered is 45 basis points (0,45 %).

(127) The following table ⁽⁶⁹⁾ shows the profit margin and the rate of return of the French banking sector for the period 1993-2008 (pre-1993 data are unavailable):

⁽⁶⁹⁾ The data in the table are the result of calculations based on Banking Commission data: http://www.banquedefrance.fr/fr/supervi/analyses_comparatives/analyses_comparatives.htm

	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008 (**)
Profit before tax (*)	15,2	2,7	25,0	41,0	67,5	14,4	19,8	22,5	24,6	23,5	23,4	29,6	31,3	46,2	34,3	– 4,4
Operating profit (*)	362,4	335,4	345,6	356,1	375,3	60,8	64,6	70,5	74,9	77,0	80,6	83,5	89,5	104,1	98,0	79,1
Profit margin	4,2 %	0,8 %	7,2 %	11,5 %	18 %	23,7 %	30,6 %	31,9 %	32,8 %	30,6 %	29,0 %	35,5 %	35,0 %	44,4 %	35,1 %	– 5,6 %
Average profit margin	22,8 %															
Assets (*)	Unavailable	16 333	17 216	18 291	19 894	3 052	3 394	3 452	3 783	3 793	3 960	4 390	5 275	6 041	7 061	7 699
Rate of return	Unavailable	0,02 %	0,15 %	0,22 %	0,34 %	0,47 %	0,58 %	0,65 %	0,65 %	0,62 %	0,59 %	0,68 %	0,59 %	0,77 %	0,49 %	– 0,05 %
Average rate of return	0,45 %															

(*) The amounts are in billions of French francs before 1998 and billions of euro thereafter.

(**) The 2008 data are estimates.

(128) To calculate Crédit Mutuel's profit margin and rate of return in respect of the activity of gathering deposits centralised with the CDC, the Commission uses the following values:

(a) for the profit margin denominator, the revenue earned from the activity of gathering deposits centralised with the CDC, that is to say, the annual amount of the brokerage commission;

(b) for the rate of return denominator, the deposits transferred to the CDC;

(c) for the numerator, that is to say, the profit before tax, the Commission considers that, by taking into account as a reasonable profit a margin of 4,2 % on the activity of gathering deposits centralised with the CDC, that is to say, a pre-tax profit amounting to 4,2 % of the brokerage commission received from the CDC, Crédit Mutuel does not receive any overcompensation (see the table in recital 132).

(129) As regards the second indicator (the rate of return), the Commission would point out that, if a rate of return of 5 basis points is taken as a reasonable profit from the activity of gathering deposits centralised with the CDC, that is to say, if account is taken of a pre-tax profit equivalent to 0,05 % of the total amount of deposits transferred to the CDC, then Crédit Mutuel did not receive any overcompensation for administering the *Livret bleu* during the period considered.

(130) According to the 2005 Community framework, the reasonable profit must not exceed the average rate for the sector concerned during the relevant period. A profit margin of 4,2 % represents less than one fifth of the average profit margin of the banking sector (22,8 %). Since, as was stated in recital 124, the activity of gathering deposits centralised with the CDC is a low-risk, and hence low-return, activity, the Commission considers that a profit margin of 4,2 % is not manifestly excessive and may be deemed in this case to be a reasonable profit.

(131) Similarly, the Commission considers that a profit of 5 basis points for deposits centralised with the CDC is reasonable in the light of the average return of 45 basis points of the French banking sector for the relevant period and represents a low, conservative threshold for what may be considered a profit which is not manifestly unreasonable in this case. Moreover, this low profit level reflects appropriately the level of risk incurred by Crédit Mutuel on its activity of gathering deposits for the CDC, which, as indicated in recital 124, is low.

7.2.5. Verification of the absence of overcompensation

(132) On the basis of the above considerations the Commission has carried out a verification — set out in the table below — of the absence of overcompensation in accordance with the method outlined in subsections 7.2.1 to 7.2.4 ⁽⁷⁰⁾:

(EUR million)

Year	COMPEN- SATION	OVER- OR UNDERCOMPENSATION	
	(Annual) brokerage commission	Global approach (*) (up to the end of 2005)	Annual approach (**) (from 2006)
1991 (from 27.9.1991 to 31.12.1991)	1,5	43,8	Not applicable (the global approach was applied until 2005, see subsection 7.2.2)
1992	9,1	125,1	
1993	16,8	184,0	
1994	36,6	127,3	
1995	59,5	114,5	
1996	74,7	107,8	
1997	82,3	88,4	
1998	118,9	92,0	
1999	188,9	98,3	
2000	188,2	106,3	
2001	181,9	91,3	
2002	187,8	76,3	
2003	197,7	61,2	
2004	204,4	45,7	
2005	196,7	15,0	
2006	[...]		– 39,1

⁽⁷⁰⁾ The following reference rates are used for the years 1992 to 2008: 10,61; 11; 8,93; 7,94; 8,22; 7,01; 5,83; 4,77; 5,7; 6,33; 5,06; 4,8; 4,43; 4,08; 3,7; 4,62; 5,19.

(EUR million)

Year	COMPEN- SATION (Annual) brokerage commission	OVER- OR UNDERCOMPENSATION	
		Global approach (*) (up to the end of 2005)	Annual approach (**) (from 2006)
2007	[...]		– 24,3
2008	[...]		– 6,1

(*) Net cumulative, discounted result, in EUR million, taking into account brokerage commission, net results (costs minus revenue), deposits centralised with the CDC, non-earmarked uses and general-interest uses, and introducing a reasonable profit of 5 basis points for deposits centralised with the CDC together with a reasonable profit amounting on average to 6 % of the own capital allocated to general-interest uses and to non-earmarked uses (see subsections 7.2.1 to 7.2.4).

(**) Net non-cumulative, non-discounted result, in EUR million, taking into account brokerage commission, net results (costs minus revenue), deposits centralised with the CDC, non-earmarked uses and general-interest uses, and introducing a reasonable profit of 5 basis points for deposits centralised with the CDC together with a reasonable profit amounting on average to 6 % of the own capital allocated to general-interest uses and to non-earmarked uses (see subsections 7.2.1 to 7.2.4).

(133) It can be seen that the overcompensation at the end of 2005 (EUR 15 million) is less than 10 % of the compensation for 2005 (EUR 196,7 million). By virtue of point 21 of the 2005 framework this amount may be carried forward to the next year. The final result is undercompensation of EUR – 6,1 million at the end of 2008 for the whole of the period considered.

(134) The Commission can therefore conclude that the brokerage commission has not overcompensated Crédit Mutuel for the service of general economic interest which

was entrusted to it from 27 September 1991 until the end of 2008.

8. CONCLUSION

(135) The Commission finds that France has unlawfully implemented the measure at issue in infringement of Article 108(3) TFEU. However, the aid may be considered compatible with the internal market under Article 106(2) TFEU, inasmuch as the compensation paid by the State has not exceeded what is necessary to cover the costs occasioned by the discharge of public service obligations, having regard to the revenues relating thereto and a reasonable profit for discharging those obligations,

HAS ADOPTED THIS DECISION:

Article 1

The State aid implemented by France in favour of Crédit Mutuel on the basis of the Decree of 27 September 1991 defining the general-interest uses of Crédit Mutuel is compatible with the internal market.

Article 2

This Decision is addressed to the French Republic.

Done at Brussels, 24 May 2011.

For the Commission

Joaquín ALMUNIA

Vice-President

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