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Price: EUR 4

⁽¹⁾ Text with EEA relevance

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Acts whose titles are printed in light type are those relating to day-to-day management of agricultural matters, and are generally valid for a limited period.

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II

(Non-legislative acts)

DECISIONS

COMMISSION DECISION

of 25 January 2012

Measures C 36/07 (ex NN 25/07) implemented by Germany for Deutsche Post AG*(notified under document C(2012) 184)***(Only the German version is authentic)****(Text with EEA relevance)**

(2012/636/EU)

THE EUROPEAN COMMISSION,

aid to Deutsche Bundespost POSTDIENST (hereafter POSTDIENST).

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

Having called on interested parties to submit their comments pursuant to the provision(s) cited above ⁽²⁾ and having regard to their comments,

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

Whereas:

- (2) Following the opening of proceedings on 23 October 1999 (hereafter 1999 Opening Decision), Germany submitted comments on 16 September 1999. Following publication, the Commission received comments from 14 interested parties, which were duly transmitted to the German Government by letter dated 15 December 1999 providing it with an opportunity to make its own observations concerning these comments. The German authorities responded by letter dated 1 February 2000, which was registered as received on 2 February 2000.

I. PROCEDURE

I.1. State aid Procedures

I.1.1. 1999 Opening Decision and 2002 Decision

- (1) In 1994 United Parcel Service (hereafter UPS) filed a complaint concerning the granting of unlawful State

- (3) The Commission adopted a final negative decision on 19 June 2002 ⁽³⁾ (hereafter 2002 Decision) finding that POSTDIENST and its successor Deutsche Post AG (hereafter DPAG, while POSTDIENST and DPAG will be hereafter jointly referred to as Deutsche Post) priced door-to-door parcels below incremental costs and that its aggressive pricing policy did not to fall within Deutsche Post's universal service obligation. The resulting losses of EUR 572 million were ultimately financed, in contravention of Articles 106 and 107 TFEU, by the State resources which were granted to Deutsche Post in various forms (e.g. public transfers from sister company Deutsche Bundespost TELEKOM (hereafter TELEKOM), public guarantees for loans, and public subsidies to finance the civil servants' pensions).

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

⁽²⁾ Invitation of 17 August 1999 to submit comments pursuant to Article 88(2) of the EC Treaty on aid C 61/99 (ex NN 153/96) — State aid to Deutsche Post AG (OJ C 306, 23.10.1999, p. 25); invitation of 19 October 2007 to submit comments pursuant to Article 88(2) of the EC Treaty on aid C 36/07 (ex NN 25/07) — State aid to Deutsche Post AG (OJ C 245, 19.10.2007, p. 21); and invitation of 11 May 2011 to submit comments pursuant to Article 108(2) TFEU on aid C 36/07 — State aid to Deutsche Post AG (OJ C 263, 7.9.2011, p. 4).

⁽³⁾ Commission Decision 2002/753/EC of 19 June 2002 on measures implemented by the Federal Republic of Germany for Deutsche Post AG (OJ L 247, 14.9.2002, p. 27).

(4) Following the Commission's order, Germany recovered the incompatible State aid of EUR 572 million from DPAG. Deutsche Post challenged the decision in the Union Courts.

(5) In its 2008 judgment ⁽¹⁾, the General Court annulled the 2002 Commission Decision because the Commission failed to carry out a comprehensive analysis of all universal service revenues and costs to determine whether Deutsche Post had been under- or over-compensated.

(6) Germany subsequently paid back the recovered State aid of EUR 572 million plus accrued interest to Deutsche Post.

(7) On 2 September 2010, the Court of Justice dismissed the Commission's appeal against the General Court's judgment ⁽²⁾.

I.1.2. Further complaints after 2002 Decision

(8) On 13 May 2004, UPS lodged a further complaint concerning unlawful State aid granted to Deutsche Post following the 2002 Decision. UPS argued that the 2002 Decision failed to examine all measures listed in the original 1994 complaint, and that Deutsche Post enjoyed significantly higher financial benefits than the incompatible aid of EUR 572 million. In addition, UPS is of the opinion that Deutsche Post used State resources to expand its parcel operations (e.g. for the purchase of other companies) and to sell services at excessively low transfer prices to its subsidiaries Postbank AG and Deutsche Post euro Express GmbH & Co. OHG (hereafter DPEED), which have been active respectively in banking services and marketing of business parcels under the brand name DHL.

(9) The Commission services sent information requests to Germany on 9 November 2004 and 1 April 2005. Germany submitted its answers on 2 December 2004 and 3 June 2005 respectively.

(10) On 16 July 2004, TNT Post AG & Co KG (hereafter TNT) filed a complaint also alleging that Deutsche Post sold services at excessively low transfer prices to Postbank AG. It claimed that, whereas Postbank AG only paid variable costs for the provided services, Deutsche Post financed the common fixed costs of the distribution network entirely out of the revenues of its letter monopoly.

(11) The Commission services sent information requests to Germany on 11 November 2004 and 25 April 2005. Germany submitted its answers on 17 December 2004 and 23 June 2005 respectively.

I.1.3. 2007 Extension decision

(12) Following the further complaints, the Commission informed Germany by letter of 12 September 2007 ⁽³⁾ (hereafter 2007 Extension decision) of its decision to extend the proceedings that had originally been initiated in 1999. The objective of the 2007 Extension decision was to include the newly submitted information and to comprehensively address all potential distortions of competition which resulted from the public measures that were granted to Deutsche Post (see Section I.1.14 for more details on the public transfers, the public guarantees, the pension subsidies, and the exclusive right for the provision of letter services).

(13) The Commission considered it necessary to reconstruct in detail Deutsche Post's accounts for the period from 1990 to 2007 to gain clarity on the impact of the public measures on the revenues and costs of the different services provided by Deutsche Post.

I.1.4. Comments by Germany on 2007 Extension decision

(14) Germany submitted its comments on 14 December 2007 and Deutsche Post challenged the validity of the 2007 Extension decision (see also Section I.3.1).

I.1.5. Comments by third parties to the 2007 Extension decision and comments by Germany on third party comments

(15) On 16 November 2007 UPS and TNT submitted their comments.

(16) After an initial request for a delay extension on 20 December 2007, Germany eventually submitted on 12 March 2008 its comments on TNT's and UPS' observations.

I.1.6. Procurement of external expert

(17) On 23 January 2008, the Commission published an invitation to tender for an expert study to assist the Commission in determining whether Deutsche Post was overcompensated for its universal service obligations for the period 1990-2007 ⁽⁴⁾.

⁽¹⁾ Case T-266/02 *Deutsche Post AG v Commission* [2008] ECR II-1233.

⁽²⁾ Case C-399/08 P *European Commission v Deutsche Post AG* [2010] ECR I-0000.

⁽³⁾ Invitation of 12 September 2007 to submit comments pursuant to Article 88(2) of the EC Treaty on aid C 36/07 (ex NN 25/07) — State aid to Deutsche Post AG (OJ C 245, 19.10.2007, p. 21).

⁽⁴⁾ Contract notice 2008/S 15-018228 published on 23 January 2008 (OJ S 15, 23.1.2008).

- (18) On 18 June 2008, the Commission concluded a contract with WIK Consult GmbH, an accounting expert for the postal sector.

I.1.7. Comments by Germany on appropriate length of investigation period

- (19) By letters of 10 June 2008 and 18 June 2008, Germany signalled its disagreement with the envisaged length of the investigation period (1990-2007) and maintained that it would be sufficient to limit the investigation to the period of 1990 until 1994 when the public transfers were granted because the losses in that period were higher than the public transfers so that Deutsche Post did not benefit from any overcompensation. Furthermore, the provision of accounting information for the period after 1994 would be disproportionate as the Community framework for State aid in the form of public service compensation (hereafter 2005 Framework) ⁽¹⁾ would limit the period for the calculation of overcompensation to a maximum of four years.

- (20) On 27 June 2008, Germany submitted an expert opinion on the obligation of the Commission to investigate separately the public transfers, the public guarantees, and the pension subsidy ⁽²⁾. Furthermore, it claimed that an investigation of accounting data would be unnecessary for the assessment of the public guarantee and of the pension subsidy.

- (21) The German authorities affirmed the same position in the meeting with the Commission services on 29 May 2008 and 15 July 2008.

I.1.8. Information request of 17 July 2008

- (22) The Commission sent an information request to Germany on 17 July 2008 on all public measures under investigation including a questionnaire on revenues and costs of Deutsche Post for the period 1990-2007. The information request was prepared in cooperation with WIK Consult. On 5 August 2008, Germany asked for an undefined deadline extension because the availability of certain data would have to be checked in advance.

I.1.9. Reminder for information of 12 August 2008 and 22 August 2008

- (23) On 12 August 2008, the Commission explained why the investigation on the costs and revenues of Deutsche Post should be effected within the period 1990-2007 and insisted on the submission of the requested information.

- (24) In its submission of 14 August 2008, Germany maintained that there was no reason for examining the revenues and losses of Deutsche Post for the period after 1994. On 22 August 2008, the Commission reserved the right to adopt an information injunction pursuant to Article 10(3) 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 ⁽³⁾ if Germany did not provide the requested information.

- (25) With the submission of 29 September 2008, Germany presented the results of a further expert opinion — which was eventually submitted on 2 October 2008 — to support the position that an accounting analysis after 1994 was not necessary and therefore the appropriate investigation period should be 1990-1994 ⁽⁴⁾.

- (26) On 28 October 2008, Germany submitted information on the public guarantee and the pension subsidy.

I.1.10. Information injunction of 30 October 2008

- (27) The Commission did not accept Germany's arguments and insisted that an analysis until 2007 was necessary to fully appreciate the competitive effects of the granted public measures. Following the two reminders for information of 12 August 2008 and 22 August 2008, the Commission issued an information injunction on 30 October 2008 to enjoin Germany to deliver all necessary accounting information for the whole period 1990-2007.

- (28) Germany and Deutsche Post challenged the validity of the information injunction (see Section I.3.2).

- (29) On 27 November 2008, Germany submitted the requested accounting information for the period 1990-1994. On 5 and 16 December 2008, Germany updated the accounting information which had been submitted on 27 November 2008.

I.1.11. Submission of accounting information for the period 1990-2007

- (30) After a meeting between Mr Pfaffenbach, German Secretary of State, Mr Appel, CEO of DPAG, and the Commissioner with responsibility for Competition Policy on 6 February 2009, Germany and Deutsche Post agreed to provide accounting information for the period after 1994.

- (31) On 3 March 2009, Germany submitted a first set of accounting information for the whole investigation period 1990-2007.

⁽¹⁾ Community framework for State aid in the form of public service compensation (OJ C 297, 29.11.2005, p. 4).

⁽²⁾ Opinion of Prof. Ehlermann, WilmerHale (16 June 2008), 'Die Verpflichtung der europäischen Kommission zur Einzelprüfung angeblicher Beihilfen an die Deutsche Post AG' (on the obligation of the European Commission to investigate separately the alleged State aid measures in favour of Deutsche Post AG).

⁽³⁾ OJ L 83, 27.3.1999, p. 1.

⁽⁴⁾ Opinion of Prof. Ehlermann, WilmerHale (10 October 2008), 'Die Periodizität der Überkompensationsrechnung gemäß Artikel 86 (2) EG' (on the periodicity of the calculation of overcompensation according to Article 86(2) EC).

- (32) Meetings between Deutsche Post and the Commission services took place on 3 March 2009 in Brussels as well as on 12 March 2009, 2 April 2009, 28 May 2009, 23 June 2009, and 18 September 2009 in Bonn. Germany submitted the respective presentations by Deutsche Post on 26 March 2009, 7 May 2009, and 22 June 2009.
- (33) Following those meetings and two lists of questions which the Commission services submitted to Deutsche Post on 4 June 2009 and 30 July 2009, Germany provided updated accounting information and further clarifications on 9 July 2009, 31 July 2009, 17 August 2009, 8 September 2009, 10 September 2009 and 15 October 2009.
- (34) On 16 and 24 September 2009, the Commission services submitted further questions to which Germany provided the answers by 14 October 2009.

I.1.12. Submission of WIK Study

- (35) Due to the delay in the provision of the accounting data, the contract with WIK Consult had to be prolonged several times. WIK Consult finally submitted the expert study (hereafter WIK study) on 9 November 2009.
- (36) On 14 and 21 January 2010, Germany submitted comments on the WIK study. On 11 February 2010, Germany submitted an expert study by KPMG (hereafter KPMG study) on the legal nature of the Ablieferungen (hand-over payments) ⁽¹⁾ that Deutsche Post had to pay to the public budget until 1995 and an expert study by Deloitte ⁽²⁾ (hereafter Deloitte-I study) on the profit benchmark used in the WIK study.
- (37) On 23 April 2010, Germany submitted a further study by Deloitte (hereafter Deloitte-II study) that provided its views on the level of reasonable profit to be used for Deutsche Post's universal services.
- (38) On 9 August 2010, Germany submitted further comments on the calculation of overcompensation and the application of the market investor principle to the assessment of the public transfers.

I.1.13. Comments following annulment of 2002 Decision

- (39) On 5 November 2010, Germany submitted a further expert opinion that analysed the significance of the judgment in Case C-399/08 *Commission v Deutsche Post* (see Section I.3.5) for the current investigation ⁽³⁾.

⁽¹⁾ See Section VI.2.1 for a detailed explanation of the Ablieferungen.

⁽²⁾ Expert Study by KPMG (11 February 2010), 'Deutsche Post AG — Rechtliche Qualifikation der Ablieferungen nach § 63 PVerfG'; Expert Study by Deloitte (9 February 2010), 'Assessment of the WIK consult report for the European Commission — A report for Deutsche Post AG'.

⁽³⁾ Opinion of Prof. Ehlermann, WilmerHale (5 November 2010), 'Bedeutung des Urteils des Gerichtshofes in der Rechtssache C-399/08 *Kommission v Deutsche Post AG* für das laufende Beihilfeprüfverfahren im Fall C 36/2007 *Deutsche Post AG*' (on an analysis of the significance of the Court judgment in Case C-399/08 *Commission v Deutsche Post* for the current investigation).

I.1.14. 2011 Extension decision

- (40) By letter dated 10 May 2011, the Commission notified Germany of its decision to extend the procedure laid down in Article 108(2) TFEU that had originally been initiated in 1999 and extended in 2007, in order to conduct an in-depth investigation with regard to the pension subsidies that Deutsche Post has received since 1995 (hereafter 2011 Extension decision).
- (41) After an initial request for a deadline extension on 23 May 2011, Germany submitted its comments on 29 July 2011, together with further expert studies on the necessity of a calculation of overcompensation to prove the alleged cross-subsidisation ⁽⁴⁾, on the comparison between social costs paid by Deutsche Post and market-average social costs ⁽⁵⁾, as well as on the amount of excess social costs borne by Deutsche Post ⁽⁶⁾.
- (42) On 4 October 2011, UPS submitted its comments. They were followed by comments submitted by Free and Fair Postal Initiative (hereafter referred to as FFIP) on 5 October 2011 and comments submitted by Bundesverband Internationaler Express und Kurierdienste (hereafter referred to as BIEK) on 7 October 2011. On 13 October 2011, the Commission communicated the comments by interested parties to Germany.
- (43) On 14 November 2011, Germany submitted its comments on the third parties' observations.
- (44) On 18 November 2011, the Commission sent a further information request concerning details of the pension financing for the period after 2007. On 2 January 2012 and 19 January 2012, Germany submitted replies. On 16 December 2011, the Commission submitted to Germany an expert study by Charles River Associates concerning profit benchmarking ⁽⁷⁾ (hereinafter CRA study) for comments to which Germany replied on 16 January 2012.

⁽⁴⁾ Opinion of Prof. Ehlermann, WilmerHale (19 July 2011), 'Die Verpflichtung der Europäischen Kommission zum Nachweis einer Überkompensation bei der beihilferechtlichen Beanstandung angeblicher Quersubventionierungen' (on the necessity of the calculation of overcompensation to prove an alleged cross-Subsidisation)

⁽⁵⁾ Opinion of Prof. Ehlermann, WilmerHale (19 July 2011), 'Der Vergleich der effektiv getragenen Sozialkosten mit den marktüblichen Sozialkosten im laufenden Beihilfeprüfverfahren im Fall C 36/07 (*Deutsche Post AG*)' (on a comparison between social costs paid by Deutsche Post and market-average social costs).

⁽⁶⁾ Opinion of Prof. Weber, WHU — Otto Beisheim School of Management Vallendar (July 2011), 'Gutachten zur Ermittlung der Höhe der über das Marktniveau hinausgehenden Sozialkosten der DPAG' (on the calculation of DPAG's excess social costs); an update to the study was submitted on 2 January 2012.

⁽⁷⁾ Charles River Associates (March 2011), 'Estimating a reasonable profit margin for provision of letter services', submitted by Belgium in State aid Case SA.14588 State aid to bpost.

I.2. Antitrust Procedures

- (45) Based on UPS' 1994 complaint, the Commission found that Deutsche Post infringed Article 102 TFEU by predatory pricing for Business-to-Consumer parcels in the period 1990-1995. A fine of EUR 24 million was imposed on Deutsche Post ⁽¹⁾.
- (46) On 22 April 2004, UPS lodged a further complaint regarding Deutsche Post's abuse of dominant position under Article 102 TFEU. UPS claimed that Deutsche Post had charged excessive stamp prices for its regulated letter services.
- (47) During its investigations, the Commission received on 5 November 2004 documents relating to the decision by the German postal regulatory agency (hereafter Postal regulator) on the price cap for Deutsche Post's regulated letter services for the period starting 1 January 2003 (hereafter 2002 Price cap decision). By letter of 13 June 2007, Germany agreed that those documents could also be used in the State aid procedure.
- (48) On 25 March 2008, the Commission decided to close the antitrust investigation because of the limited likelihood of establishing such an infringement under Article 102 TFEU ⁽²⁾.

I.3. Court Procedures

I.3.1. Case T-421/07 Deutsche Post AG v Commission

- (49) Deutsche Post challenged the validity of the 2007 Extension decision, claiming that the 2002 Decision created legitimate expectations that the Commission would not resume its investigations.
- (50) On 8 December 2011, the General Court rejected that challenge as inadmissible ⁽³⁾.

I.3.2. Case T-570/08 Deutsche Post AG v Commission and Case T-571/08 Germany v Commission

- (51) Germany as well as Deutsche Post challenged the validity of the Commission's information injunction of 30 October 2008 because they considered that the information injunction requested irrelevant information and put a disproportionate burden on Deutsche Post.

- (52) On 16 July 2010, the General Court declared both actions as inadmissible because neither Deutsche Post's nor Germany's procedural rights could have been infringed by the issuance of the information injunction.

I.3.3. Case C-463/10 P Deutsche Post AG v Commission and Case C-475/10 P Germany v Commission

- (53) On 27 September 2010, Deutsche Post and Germany appealed the GC's judgment and maintained that the information injunction infringed their rights. On 13 October 2011, the Court of Justice overruled the General Court's judgment of 16 July 2010 ⁽⁴⁾. Consequently, the case was sent back to the GC and is currently pending.

I.3.4. Case T-344/10 UPS v Commission

- (54) On 20 August 2010, UPS lodged an application with the General Court claiming an unlawful failure to act by the Commission in respect of the 2007 State aid investigation. Given that a period of almost three years had lapsed since the 2007 Extension decision, UPS believed that the Commission had had ample opportunity to investigate the abovementioned measures and to assess the circumstances of facts and law in order to adopt a final decision and close the investigation procedure. That case is still pending.

I.3.5. Case T-388/11 Deutsche Post AG v Commission

- (55) On 22 July 2011, Deutsche Post challenged the validity of the 2011 Extension decision because it considers that the Commission has manifestly erred in its preliminary assessment of the pension subsidy as aid within the meaning of Article 107(1) TFEU and as a new aid measure in the meaning of Article 108(1) TFEU. That case is still pending.

II. DETAILED DESCRIPTION OF PUBLIC MEASURES

- (56) Deutsche Post has been granted public support in form of several different measures since 1989:

— Pension subsidy based on:

— Postpersonalrechtsgesetz 1994 ⁽⁵⁾ (hereafter Post-PersRG 1994)

⁽¹⁾ Commission Decision 2001/354/EC of 20 March 2001 relating to a proceeding under Article 82 EC Treaty (Deutsche Post AG) (OJ L 125, 5.5.2001, p. 27).

⁽²⁾ Commission Decision of 25 March 2008 — Case COMP/37.821 — UPS and DVPT/DPAG, recitals 6, 63, 66, 70-72.

⁽³⁾ Case T-421/07 Deutsche Post AG v European Commission [2011] ECR II-0000.

⁽⁴⁾ Joined Cases C-463/10 P and C-475/10 P Deutsche Post AG v European Commission [2010] ECR I-0000.

⁽⁵⁾ Gesetz zum Personalrecht der Beschäftigten der früheren Deutschen Bundespost of 14. September 1994 (BGBl. I S. 2325).

— Public transfers and guarantees based on:

— Postverfassungsgesetz 1989 ⁽¹⁾ (hereafter PostVerfG 1989)

— Postumwandlungsgesetz 1994 ⁽²⁾ (hereafter PostUmwG 1994)

— Exclusive right and price regulation based on:

— Gesetz über das Postwesen 1989 ⁽³⁾ (hereafter PostG 1989)

— Postgesetz 1997 (hereafter PostG 1997)

II.1. Pension subsidy in the context of social benefits and contribution schemes for civil servants and private employees

(57) The pension subsidy has financed since 1995 a major share of the pensions for Deutsche Post's retired civil servants. To fully apprehend the effects of the pension subsidy in the later assessment, the following sections will describe in more detail the civil servants' social benefits and contributions in comparison to the compulsory social insurances for employees under private law contracts (hereafter: private employees).

II.1.1. Social benefits for civil servants

(58) Civil servants are entitled to old age pensions, health care and nursing care. The benefits for Deutsche Post's civil servants are equal to the benefits which are granted to all other civil servants:

— The level of the pension is pre-defined, pursuant to Article 14 BeamtVG ⁽⁴⁾, at a certain percentage of the last salary that the civil servant earns. Thus, for example, a civil servant who retired in 2010 and had worked the required number of years will receive a pension that is equal to 71,75 % of his last salary.

— Civil servants are entitled to reimbursement of 50 % to 70 % of health and nursing care expenses, while they have to assume the remaining expenses themselves. The exact breakdown of health care costs depends on several criteria such as the number of children. The civil servant can choose either to

insure himself with a voluntary complementary insurance or to pay his share of the health care expenses out of his own pocket.

II.1.2. Financing of civil servants' social benefits in the period 1989-1994 at POSTDIENST

(59) After the first postal reform of 1989, pursuant to Article 54(2) PostVerfG 1989, POSTDIENST, TELEKOM and POSTBANK had to fully finance the pension payments and health expenses of the retired civil servants who were allocated to the respective sections on basis of their former activities. That provision lays down that whereas the claim of the civil servant continues to be directed against the State, the State has the right to claim the entire amount from POSTDIENST, TELEKOM and POSTBANK respectively.

II.1.3. Financing of social benefits for DPAG's civil servants since 1995

(60) With the second postal reform of 1994, civil servants who had worked for POSTDIENST were, pursuant to Article 2(1) PostPersRG 1994, transferred to DPAG. Thereby, the civil servants kept, pursuant to Article 2(3) PostPersRG 1994, their existing legal status. DPAG took over, pursuant to Article 1(1) PostPersRG 1994, all employer's rights and obligations from the federal State and assumed, pursuant to Article 2(3) PostPersRG 1994, all the civil servants' proprietary claims.

(61) Pursuant to Article 15 PostPersRG 1994, the payment of pension and health expenses to retired civil servants was taken over by a newly created pension fund for Deutsche Post's civil servants. On 1 July 2001, the pension funds for Deutsche Post, Deutsche Telekom AG, and Postbank AG were merged into the 'Postbeamtenversorgungskasse' (hereafter jointly referred to as Pension fund for the whole period since 1 January 1995).

(62) Pursuant to Article 16(1) PostPersRG 1994, Deutsche Post had to pay a yearly contribution of EUR 2 045 million to the Pension fund for the period 1995-1999 which totals EUR 10 225 million. From 2000 onwards and based on Article 16(2) PostPersRG 1994, Deutsche Post has had to pay a yearly contribution of 33 % of the sum of the incurred civil servant wages to the Pension fund (e.g. from EUR 735 million in 2000 to EUR 540 million in 2010).

(63) The pension subsidy has covered, pursuant to Article 16(2) PostPersRG 1994, the remaining deficit (e.g. the difference between the pensions for the retired civil servants' pensions and the contribution by Deutsche Post to the Pension fund). The pension subsidy increased from EUR 151 million in 1995 to EUR 3 203 million in 2010 and totalled EUR 37 121 million for the period 1995-2010.

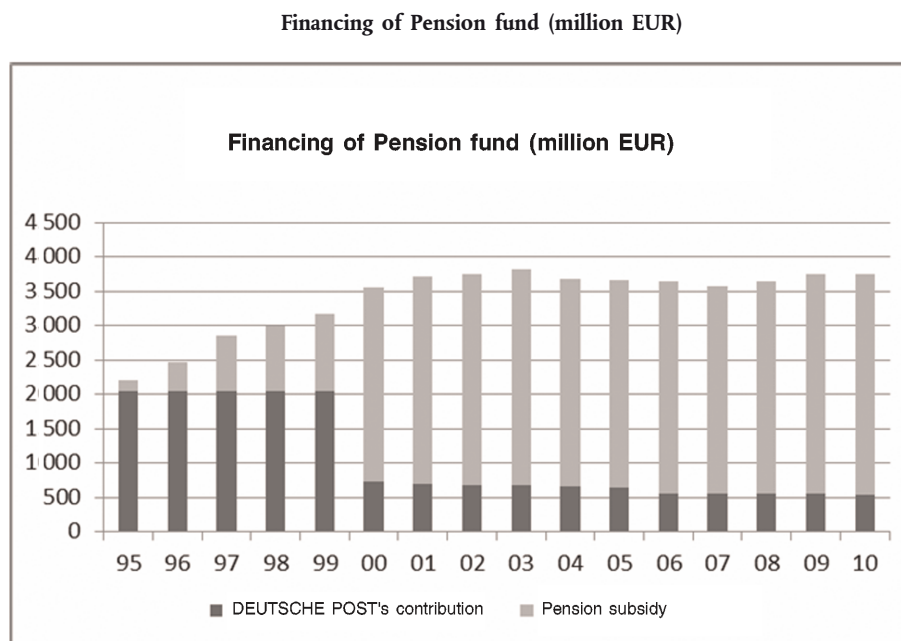
⁽¹⁾ Gesetz über die Unternehmensverfassung der Deutschen Bundespost of 8 June 1989 (BGBl. I S. 1026).

⁽²⁾ Gesetz zur Umwandlung von Unternehmen der Deutschen Bundespost in die Rechtsform der Aktiengesellschaft of 14 September 1994 (BGBl. I S. 2325).

⁽³⁾ Gesetz über das Postwesen of 3 July 1989 (BGBl. I S. 1450).

⁽⁴⁾ Gesetz über die Versorgung der Beamten und Richter des Bundes of 24. August 1976 (BGBl. I S. 322).

Figure 1



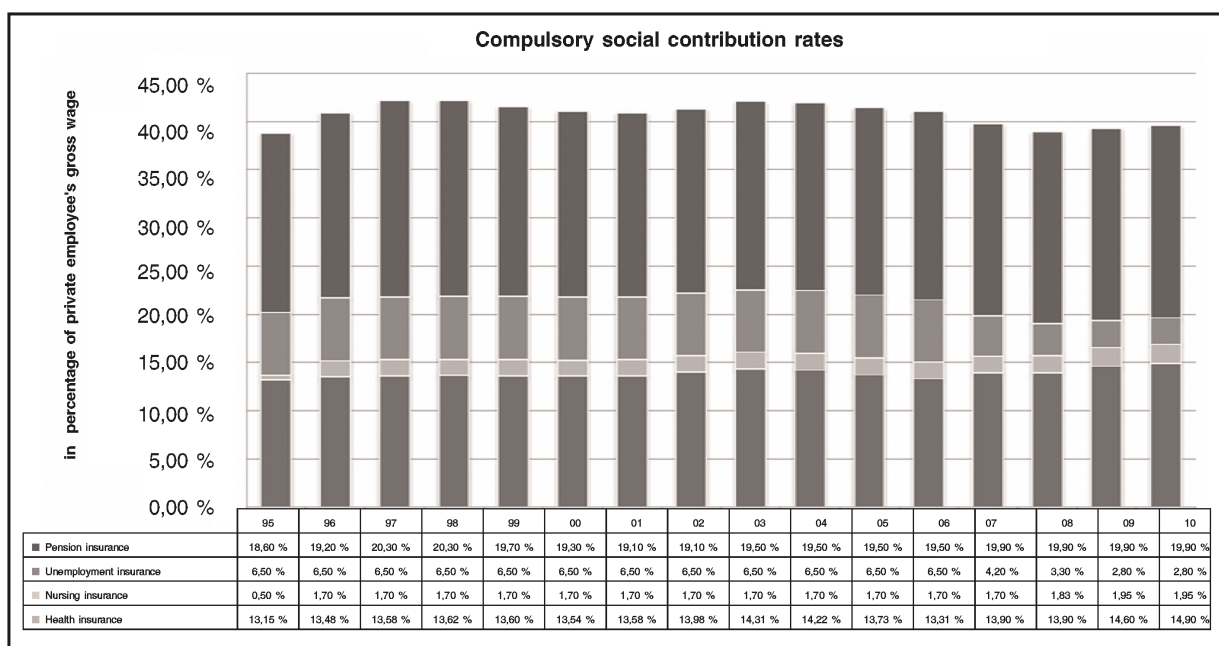
II.1.4. *Statutory social insurances for private employees and supplementary pension insurance for Deutsche Post's private employees*

- (64) Private employees are compulsory members of four social insurances: pension, unemployment, health and nursing care insurance ⁽¹⁾. Compared to the civil servant's regime, the statutory social insurance schemes offer a different coverage for the pension and health insurances:
- The level of the pension is not defined in percentage of the last monthly salary but of an average life-time salary.
 - The expenses for health and nursing care are fully covered.
- (65) There also exist important differences in the financing of the social benefits compared to those of civil servants: The statutory social insurances are financed by joint contributions from the employee and the employer during the employee's working life (hereafter referred to as compulsory social contributions). The total social contribution rate is formally divided into an employee's and employer's share which both covers about half of the total contribution rate. However, the employer has the formal obligation to pay the total contribution rate to the social insurances.

⁽¹⁾ The Sixth Social Code (SGB VI) regulates the pension insurance; The Third Social Code (SGB III) regulates the unemployment insurance; The Fifth Social Code (SGB V) regulates health insurance; Long Term Care Act (PflegeVG) and Eleventh Social Code (SGB XI) regulate the long-term care insurance.

Figure 2

Compulsory social contribution rates in percentage of private employee's gross wage (see also the Annex)



(66) Figure 2 shows that the compulsory social contribution rates have since 1995 ranged from 38 % to 42 % of the gross wage (= net wage + employee's share). The employer's and employee's shares of the social contribution rate have been in the range of 19 % to 21 % of the gross wage (see the Annex for a more detailed time series).

(67) Deutsche Post's private employees have not only benefited from the statutory social insurances but also from supplementary pension insurance. Private employees who started before 1997 were offered a supplementary pension insurance cover that would allow them to receive a similar level of pension as civil servants. Thus the supplementary pension insurance covered the difference between the private employees' statutory social insurance pension — which is equal to a certain percentage of the average life-time salary — and the civil servant's pension that equals to a certain percentage of the last salary. The detailed rules are laid down in the Charter of the Versorgungsanstalt der Deutschen Bundespost (hereinafter VAP) ⁽¹⁾.

(68) Deutsche Post financed the supplementary pension benefits for the retired private employees up to 1997 by a contribution that amounted to approximately [5 to 10 %] (*) of the active private employees' gross wage. Since 1997, Deutsche Post has built up a

provision for the outstanding obligations to the VAP (see also description of burden #4 in Section II.3.1.3).

(69) Since 1997, newly hired private employees were offered a significantly reduced supplementary pension insurance for which Deutsche Post, in the period 1997-2007, paid a contribution between [0 and 5 %] of the gross wage.

II.2. Public transfers and guarantee in the context of Deutsche Post's exclusive right and universal postal service obligations

II.2.1. Exclusive right until 2007

(70) Before 1998, Article 2 PostG 1989 granted Deutsche Post the exclusive right to establish and maintain facilities for the carriage of letter items. Other postal services — like parcels, newspapers or periodicals — were not reserved to Deutsche Post but open to competition. Pursuant to Article 37 PostVerfG 1989, the profits accruing from those reserved letter services were to be used to finance the losses of those universal services that were offered in markets open to competition. Pursuant to Article 4 PTRRegG 1994 ⁽²⁾, the Minister for Post and Telecommunication was the competent authority to approve the prices for the reserved letter services.

⁽¹⁾ Satzung der Versorgungsanstalt der Deutschen Bundespost (1969 i.d.F.).

(*) Business secret.

⁽²⁾ Gesetz über die Regulierung der Telekommunikation und des Postwesens of 14 September 1994 (BGBl. I S. 1509).

(71) Beginning with the entry into force of the PostG 1997 in 1998, the scope of the reserved services started to be progressively reduced for Deutsche Post. Pursuant to Article 51 PostG 1997, the exclusive right extended to the transport of letters and addressed catalogues below 200 grams in 1997 but afterwards the limit was successively reduced, reaching 50 grams in 2006. The exclusive right finally expired on 31 December 2007.

II.2.2. Universal postal service obligation until 2007

(72) The universal service obligations for Deutsche Post were set out in two formal entrustment acts:

- The 1994 Postdienst Mandatory Service Regulation ⁽¹⁾ (hereafter 1994 Mandatory service regulation) appointed Deutsche Post as the universal postal service provider for letters and parcels not exceeding 20 kg, charging it with the provision of those services throughout Germany at uniform tariffs.
- The 1997 PostG and the accompanying 1999 Implementing Regulation ⁽²⁾ (hereafter 1999 Universal service regulation) continued the entrustment for DPAG.

(73) Article 11 PostG 1997 defined the universal service as a basic set of postal services that are rendered nationwide at affordable tariffs. Those services include the transport of letters, addressed parcels weighing no more than 20 kg, or books, catalogues, newspapers and magazines (hereafter universal services).

(74) The 1999 Universal service regulation set out the minimum quality requirements of the universal service:

- There must be at least 12 000 post offices located throughout Germany.
- An annual average of 80 percent of letters and parcel must be delivered within certain time targets (one working day for letters and two working days for parcels) and deliveries must be made at least once daily on weekdays.
- While the general requirement for prices of universal services is affordability, DPAG had to charge uniform prices in respect of letter services performed under the exclusive license that eventually expired in 2007. However, DPAG has some degree of pricing flexibility for the reserved services because it could conclude individual price agreements with customers mailing at least 50 items per transaction.

(75) Article 52 PostG 1997 maintained the entrustment of DPAG with the provision of universal services until 31 December 2007, which is the date of the abolishment of DPAG's exclusive right for the provision of letter services. Since the expiry of the exclusive right, no postal operator in Germany has been legally entrusted with the universal service obligation, which means that all postal service providers are assumed to ensure the provision of universal postal services ('market forces'). Where a universal service is not being appropriately or adequately provided or where there is reason to believe that such will be the case, PostG 1997 provides for legislative instruments to safeguard the provision of those services.

(76) As shown by the WIK study (see Figure 3), the universal services accounted for about 88 % of total revenue over the period from 1990 to 2007: The majority of the universal letter services were subject to price regulation because of Deutsche Post's dominant position on those markets (see Section II.2.1). Apart from those price-regulated services that made up about 62 % of total revenue, Deutsche Post has provided in competition with other operators the universal parcel services (about 15 % of total revenue) and further non-price regulated universal letter services (about 11 % of total revenue).

(77) Moreover, Deutsche Post has also offered commercial services (e.g. retail banking services for Postbank, sales services for Telekom, delivery of unaddressed mail items, etc.). In total, the commercial services amounted to 12 % of Deutsche Post's revenue for the period 1990-2007.

II.2.3. Public transfers

(78) Since its creation in 1950, Deutsche Bundespost had been a *Sondervermögen* of the Federal Government. Under German administrative law, a *Sondervermögen* does not have a legal personality that is independent from the State, but does have its own budget and is not liable for the general debts of the State.

(79) The first postal reform in 1989 foresaw that the *Sondervermögen* would have three different sub-sections, — POSTDIENST, POSTBANK, and TELEKOM — which were qualified as 'public undertakings' but still did not enjoy independent legal personality from the State.

(80) Pursuant to Article 37(2)(3) PostVerfG 1989, although each service of the three entities should be able to finance its costs out of its own revenues, a cross-financing between the three entities was permissible to the extent that losses resulted from universal service obligations. On that basis, in the period 1990-1993 POSTDIENST received transfers of EUR 2 844 million from TELEKOM to cover its losses.

⁽¹⁾ Verordnung zur Regelung der Pflichtleistungen der Deutschen Bundespost POSTDIENST of 12 January 1994 (BGBl. I S. 86).

⁽²⁾ Post-Universaldienstleistungsverordnung of 15 December 1999 (BGBl. I S. 2418).

(81) In the course of the second postal reform, the three sub-sections of the *Sondervermögen* were transformed as of 1 January 1995 into public limited companies: POSTDIENST became DPAG, POSTBANK became Postbank AG, and TELEKOM became Telekom AG. Pursuant to Article 2(2) PostUmwG 1994, Telekom AG assumed all liabilities arising from loans which were attributable to the *Sondervermögen* as a whole but retained the right to reclaim funds from DPAG and Postbank AG to the extent that those loan commitments could be attributed to their legal predecessors.

(82) However, Article 7 PostUmwG 1994 waived the right of Telekom AG (arising from Paragraph 2(2) PostUmwG 1994) to bring claims against DPAG up to the amount of losses accrued by POSTDIENST until 31 December 1994. It resulted in a transfer of assets in the value of EUR 2 822 million from Telekom AG to DPAG. According to Germany, that transfer from Telekom AG was — as with the previous transfers based on Article 37(3) PostVerfG 1989 — indispensable for DPAG to discharge its universal service obligations.

(83) In total, POSTDIENST received EUR 5 666 million in the period 1990-1995 as compensation for its universal service obligation.

II.2.4. Public guarantee for debt obligations issued before 1995

(84) Since 1953, § 22 (4) PostVwG 1953 ⁽¹⁾ provided that debt obligations issued by Deutsche Bundespost had the same legal value as debt obligations issued by the Federal Republic of Germany. When the PostVwG 1953 was repealed by the PostVerfG 1989, the same provision was taken over in § 40 PostVerfG 1989.

(85) After the creation of the three sub-sections in 1989, POSTDIENST itself did not issue the debt obligations autonomously but POSTBANK administered those transactions for all entities of Deutsche Bundespost. The debt obligations were then allocated to POSTDIENST, TELEKOM and POSTBANK according to their financial requirements.

(86) After 1995, pursuant to Article 2(4) PostUmwG 1994, Germany remained liable for all debt obligations entered into prior to 1995 by Deutsche Bundespost and subsequently allocated to POSTDIENST, TELEKOM and POSTBANK. However, Germany did not bear any liability for debt obligations issued by DPAG thereafter.

II.3. Revenues from regulated prices as additional compensation for pension costs and universal services' net costs

(87) The PostG 1997 also established the *Bundesnetzagentur* (hereafter referred to as Postal regulator) for the

supervision of the reserved and liberalised letter markets. Pursuant to Article 19 PostG 1997, the Postal regulator is competent to regulate Deutsche Post's pricing in the letter markets in which Deutsche Post enjoys a dominant position. Deutsche Post has had a dominant position not only with the reserved services — pursuant to Article 51 PostG 1997 — but also with almost all other letter services which have had been opened up to competition. Price regulation can take the form either of an *ex ante* price cap or of an *ex post* price control.

(88) According to the market studies by the Postal regulator, Deutsche Post has held average market share of 90 % to 97 % on the price-regulated letter markets. In his latest report, the Postal regulator deplores that the gradual market opening since 1997 has not achieved a functioning competition on the German letter market ⁽²⁾.

(89) The price-regulated letter services account for the majority of Deutsche Post's total revenues (e.g. about 62 % of Deutsche Post's total revenue for the period 1990-2007 (see Figure 3); in the period 2008-2010, the price-regulated services accounted for about 56 % of Deutsche Post's total revenue).

(90) All other universal and commercial services, which do not fall under price regulation pursuant to Articles 19 to 27 PostG 1997 ⁽³⁾ will be hereafter termed as non-price regulated services.

(91) For the price regulated letter services, Article 20(1) and (2) PostG 1997 provide that the prices shall reflect the costs of the efficient service provision. However, if factually justified, the Postal regulator should, inter alia, appropriately account for:

— Costs arising from the universal provision of postal services, and

— Costs arising from the financing of pension and health care benefits for employees who were taken over from POSTDIENST.

(92) Article 57 PostG 1997 and a ministerial decree of 27 March 2000 maintained the regulated prices at the level of 1997 until 31 December 2002.

⁽¹⁾ Gesetz über die Verwaltung der Deutschen Bundespost (Postverwaltungsgesetz), BGBl. I S. 676.

⁽²⁾ Bundesnetzagentur, Zwölfte Marktuntersuchung (12th Market Report), September 2009.

⁽³⁾ About 38 % of Deutsche Post's total revenue for the period 1990-2007; about 44 % of Deutsche Post's total revenue for the period 2008-2010.

II.3.1. 2002 Price cap decision

- (93) It was only in 2002 that the Postal regulator took its first decision concerning the price cap for the period starting on 1 January 2003 until 31 December 2007 (hereafter 2002 price cap decision). Price cap regulation means a system of regulating the prices of a bundle of services under which the individual price for each service is not controlled but there is a ceiling on the weighted average of all the prices in the bundle. Pursuant to Article 19 PostG 1997 *ex ante* price cap regulation covered all postal services for which Deutsche Post held a dominant position.

- (94) For the 2002 price cap decision, Deutsche Post submitted accounts to the Postal regulator (hereafter 2002 regulatory accounts) for the first time that covered the period 1998-2006. The regulatory accounts were based on realised results up to 2001 and on projections for the later years.

- (95) Deutsche Post claimed in 2002 so-called 'burdens' for the provision of universal service as well as for the employment of civil servants and private employees who had been taken over from POSTDIENST. Those burdens show the alleged costs that Deutsche Post would not have assumed without the universal service obligation and without the take-over of the POSTDIENST personnel and infrastructure (see Table 1 for a detailed list).

Table 1

Burdens as approved by 2002 Price cap decision (million EUR, nominal values)

#	Burdens from 2002 Price cap decision	Average burden (1998-2006) million EUR	%
1	Excess wage costs	[...]	[...]
2	Excess social costs	[...]	[...]
3	Infrastructural burden post shops	[...]	[...]
4	Supplementary pension insurance for employees (VAP)	[...]	[...]
5	Infrastructural burden freight	[...]	[...]

#	Burdens from 2002 Price cap decision	Average burden (1998-2006) million EUR	%
6	Social and health cost (BANstPT)	[...]	[...]
7	Personnel restructuring	[...]	[...]
8	Deficit coverage for civil servants' health insurance	[...]	[...]
Total average burden		[...]	100 %

- (96) The Postal regulator eventually accepted Deutsche Post's reasoning that it would not have incurred those burdens, had it not been subject to the universal service obligation (for burdens #3 and 5 on universal service costs) respectively to the obligation to take over the civil servants and private employees from POSTDIENST (burdens #1, 2, 4, 6, 7, and 8). The Postal regulator approved increased regulated letter prices to finance the claimed average annual burdens of EUR [...] million for the period 2002-2006 out of the revenues of the regulated letter services. Under the 2002 price cap decision, 100 % of the burdens are imputed to the prices which are subject to the *ex ante* price cap.

II.3.1.1. Excess wages (burden #1)

- (97) Burden #1 shows the claimed excess of the wage costs for postal workers over the industry average. Deutsche Post used as a 'competitive' wage benchmark the wages that had been stipulated in a collective labour agreement ('Entgelttarifvertrag') with the trade unions for newly hired personnel after 2002 (hereafter ETV wages). For the calculation of burden #1, that benchmark is, however, applied for all personnel. It is also retroactively applied in the submitted accounts back to 1998.

II.3.1.2. Excess social contributions (burden #2)

- (98) The Postal regulator also approved Deutsche Post's claim that it had to bear higher social contributions for its private employees and civil servants than private competitors would normally have to assume for their private employees.

(99) Deutsche Post starts its calculations from a social contribution rate that it deems as 'competitive' (hereafter 'regulatory contribution rate') for both civil servants and private employees. That regulatory rate is defined as the sum of

- Employer's share of social contributions for a private employee (about 19 % to 21 % which equals roughly half of the total social contribution rate as shown in Figure 2),
- Contribution to the accident insurance (in the range of [0 to 5 %]; Deutsche Post has added that contribution to the regulatory contribution rate since 2001),
- Contribution to supplementary pension (in the range of [0 to 5 %]; Deutsche Post has added that

contribution to the regulatory contribution rate since 1997 because a contribution to the supplementary pension insurance of that magnitude is considered as 'competitive'. The rate is based on the supplementary pension insurance that Deutsche Post has offered since 1997 to newly hired private employees).

(100) The regulated revenues finance all social contributions that are in excess of the regulatory contribution rate (hereafter 'excess social contributions'). Taking e.g. the calculations of the excess social contributions in 2001 for civil servants, Table 2 shows that the incurred social contributions for civil servants are almost double those of the allegedly 'competitive' social contributions based on the regulatory contribution rate.

Table 2

Calculation of excess social costs for civil servants in 2001 according to 2002 regulatory accounts
(million EUR)

					% of incurred wages
(1)		Contribution rate for pension fund	33 %		
(2)		Civil servants' wage sum	[...]		
(3)	= (1)*(2)	Contribution to pension fund	[...]		
(4)		Health care expenses	[...]		
(5)	= (3)+(4)	Incurred social contributions		[...]	[40 to 45 %]
(6)		Employer's share of social contributions	20,43 %		
(7)		Accident insurance	[...]		
(8)		Supplementary pension insurance	[...]		
(9)	= (6)+(7)+(8)	Regulatory contribution rate	[...]		
(10)	= (2)*(9)	Regulatory benchmark social cost		[...]	[20 to 25 %]
(11)	= (5)-(10)	Excess social contributions		[...]	[15 to 20 %]

(101) The incurred social contributions include Deutsche Post's payment of 33 % of the incurred civil servant wages to the pension fund (respectively an annual lump-sum payment of EUR 2 045 million in the period 1995-1999) as well as the contributions to the civil servants' health care expenses. In total, the incurred social contributions amount to [40 to 45 %] of the incurred civil servants' wages in 2001.

(102) Although the social contribution rate is defined in percentage of the private employee's gross wage (net wage + employee's share of social contribution),

Deutsche Post multiplies the regulatory contribution rate of [20 to 25 %] by the incurred civil servant wage to calculate the regulatory benchmark.

II.3.1.3. Supplementary pension insurance for private employees (burden #4)

(103) Burden #4 is to compensate for the build-up of the provision for the pre-1997 liabilities from the supplementary pension insurance scheme VAP for Deutsche Post's private employee.

(104) As explained in Section II.1.4, Deutsche Post's private employees — who had been hired before 1997 — were offered supplementary pension insurance to guarantee them a pension similar to civil servants. However, POSTDIENST did not build up a corresponding provision for the future pension payments. It was only after the incorporation of DPAG that provisions of EUR 8 153 million were made in the balance sheet.

II.3.1.4. Miscellaneous excess social costs (burdens #6, 7, 8)

(105) Burden #6 contains the contribution of Deutsche Post to the *Bundesanstalt für Post und Telekommunikation (BAnSTPT)* that provides certain social benefits (e.g. social housing) to civil servants and private employees who were taken over from POSTDIENST. Burden #7 includes the contributions by Deutsche Post to the deficit of the civil servant's health insurance. Burden #8 on personnel restructuring concerns both civil servants and private employees.

II.3.1.5. Universal service burdens (#3 and 5)

(106) Those burdens shall show the cost savings that Deutsche Post could have achieved if it had been able to design its shop and parcel network only based on commercial considerations. The cost savings are calculated based on e.g. the counterfactual number of post shops that Deutsche Post would run without the universal service obligation.

II.3.2. 2007 and 2011 Price cap decisions

(107) On 7 November 2007, the Postal regulator approved the price cap for the period from 1 January 2008 until 31 December 2011 (hereinafter referred to as 2007 Price cap decision). On 14 November 2011, the Postal regulator approved the price cap for the period from 1 January 2012 until 31 December 2013 (hereinafter referred to as 2011 Price cap decision).

(108) Since the 2007 Price cap decision, the prices for the posting of more than 50 letters are no longer controlled *ex ante* but are subject to an *ex post* price control pursuant to Article 25 PostG 1997 ⁽¹⁾. The prices for all other postal services for which Deutsche Post holds a dominant position continue to be approved *ex ante* in line with Article 19 PostG 1997.

(109) The Commission will refer throughout this Decision to 'price-regulated services' when dealing with those services

⁽¹⁾ Article 53 PostG 1997 provided that after the expiration of the exclusive licence, the posting of letters with a minimum number of 50 is no longer subject to *ex-ante* price control but rather to *ex-post* price control.

for which Deutsche Post holds a dominant position and which are subject to either *ex-ante* price control pursuant to Article 19 PostG 1997 or *ex-post* price control pursuant to Article 25 PostG 1997. All other services for which Deutsche Post does not hold a dominant position and which are not subject to price control will be referred to as 'non-price regulated services'.

(110) Deutsche Post continued to claim the burdens for excess wages and social costs from the takeover of personnel from POSTDIENST (e.g. average burden #2 on excess social costs of EUR [...] million from 2008 onwards) as well burdens from the universal service obligation. As with the 2002 Price cap decision, the Postal regulator approved the financing of those burdens out of the price-regulated revenues and set the price cap at an accordingly higher level. The Postal regulator's recognition of those burdens in the 2002, 2007, and 2009 Price cap decisions has therefore remained unchanged with regard to the non-price regulated services.

II.4. Financial results of DPAG

(111) The financial results of DPAG for the years 1995 to 2006 are shown in Figure 2 of the 2007 Extension Decision. Whereas they were mixed, some years with losses and some with profits, in the years 1995 to 1999, DPAG constantly made profits of between EUR 1 and 2 billion before taxes for the years 2000 until 2006.

(112) For the years 2007 until 2010, DPAG has realised the following net profits: EUR 1,8 billion (2007); – EUR 2,0 billion (2008); EUR 0,7 billion (2009); EUR 2,6 billion (2010).

(113) The published accounts of DPAG do not allow for an allocation of the profits to the different services. Therefore, it is not possible on the basis of the published accounts to see whether the price-regulated universal services were loss- or profit-making overall.

III. GROUNDS FOR INITIATION OF PROCEDURE

(114) As the General Court confirmed in its ruling in Case T-421/07 ⁽²⁾, all measures under investigation have been part of the proceedings since the 1999 Opening decision, which has been continued by the 2007 Extension decision.

⁽²⁾ Case T-421/07 *Deutsche Post AG v Commission*, paragraphs 74 and 75.

III.1. Pension subsidy

- (115) The 2011 Extension decision considered that the pension subsidy constituted a new aid measure because Deutsche Post had, before the 1995 pension reform, been fully liable to finance the pensions costs out of own resources. Furthermore, the 2011 Extension decision rejected Germany's claim based on the *Combust* judgment⁽¹⁾ that the pension subsidy did not constitute aid.
- (116) For the compatibility assessment of the pension subsidy as compensation for 'legacy' pension costs (e.g. following the Commission decision on French La Poste (hereafter La Poste decision)⁽²⁾), the 2011 Extension decision took into account that the claimed excess social costs have not only been compensated by the pension subsidy but also from the price-regulated revenues (e.g. burden #2 on excess social contributions).
- (117) When taking into account both sources of compensation, the 2011 Extension decision's calculations showed that Deutsche Post has effectively benefited from social contribution rates that have been 10 to 14 percentage points below the total compulsory social contribution rates (including employer's and employee's share) that private competitors have had to carry.
- (118) The 2011 Extension decision therefore expressed doubts about the compatibility of the pension subsidy as compensation for 'legacy' pension costs pursuant to Article 107(3)(c) TFEU.

III.2. Universal service compensation

- (119) Germany has evoked Article 106(2) TFEU as a justification for the compatibility of the public transfers and the public guarantee as compensation for the universal service obligation.
- (120) Based on the *Altmark* judgment⁽³⁾, the Commission considered in the 2007 Extension decision that the public transfers and guarantee constitute aid within the meaning of Article 107(1) TFEU.

- (121) The Commission expressed doubts in the 2007 Extension decision whether the public transfers and guarantee were necessary for the fulfilment of the universal service obligations, and proportional to that end. In particular, the Commission considered it necessary to review, in line with the principles codified in the 2005 Framework, the cost allocation between the universal and commercial services. It also raised doubts with regards to the determination of a reasonable profit, taking into account the average profitability of the sector and Deutsche Post's risk position.

IV. WIK STUDY

- (122) The WIK study was commissioned to assist the Commission in the review of Deutsche Post's accounts for the period 1990-2007 with a view to establish whether Deutsche Post had been overcompensated for its universal service obligations. More specifically, WIK was assigned the following tasks:

- Benchmarking of reasonable profit;
- Review of internal cost allocation and transfer pricing arrangements; and
- Calculation of overcompensation for the net costs of the universal service obligation.

IV.1. Description of the 2009 regulatory accounts

- (123) As sought by the Commission in the information injunction of 30 October 2008, Germany eventually submitted in 2009 a complete set of regulatory accounts for the period 1990-2007 (hereafter 2009 regulatory accounts).

IV.1.1. The revenues

- (124) Deutsche Post's revenues can be classified in three broad categories:
- Price-regulated universal letter services (62 % of total revenue in the period 1990-2007)

⁽¹⁾ Case T-157/01 *Danske Busvognmænd v Commission* [2004] ECR II-917, paragraph 57.

⁽²⁾ Commission Decision 2008/204/EC of 10 October 2007 on the State aid implemented by France in connection with the reform of the arrangements for financing the retirement pensions of civil servants working for La Poste (OJ L 63, 7.3.2008, p. 16).

⁽³⁾ Case C-280/00 *Altmark Trans GmbH* [2003] ECR I-7747.

The price-regulated letter services include all universal services that are provided on markets on which Deutsche Post has enjoyed a dominant market position, including those services that benefited

from the grant of the exclusive right. Those services earned 62 % of Deutsche Post's total revenues in the period 1990-2007 ⁽¹⁾.

- Non-price regulated universal services (26 % of total revenue in the period 1990-2007)

The universal parcel services have always been provided on markets open to competition, in which Deutsche Post has only held an average market share of 30 %. In the period 1990-2007, the universal parcel services raised 15 % of Deutsche Post's total revenue.

The non-price regulated universal letter services (e.g. catalogues, cross-border mail) achieved about 11 % of Deutsche Post's total revenue.

- Non-price regulated commercial services (12 % of total revenue in the period 1990-2007)

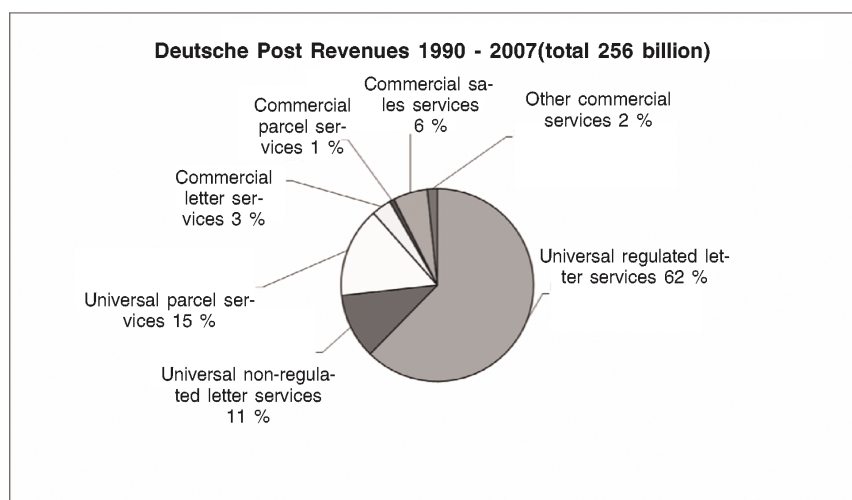
Deutsche Post has used its post shop network not only for the distribution of postal services but also to sell products and services for Postbank AG and — to a lesser degree — for Deutsche Telekom. Those commercial sales services achieved about 6 % of Deutsche Post's total revenues.

The commercial parcel and letter services (e.g. addressed publications) account for about 4 % of Deutsche Post's total revenues.

Finally, Deutsche Post provided a number of miscellaneous services, e.g. in its function as holding for international subsidiaries active in other businesses (e.g. DANZAS, DHL). Those other commercial services achieved about 2 % of Deutsche Post's total revenues.

Figure 3

Average revenue shares in the period 1990-2007 (based on nominal values)



- (125) The WIK study only covers commercial services that were provided together with universal services by the legal entity DPAG and its predecessor POSTDIENST. Commercial services (e.g. the worldwide express operations of DHL) — which were provided by different legal entities within Deutsche Post World Net (hereafter referred to as DPWN) — were not investigated.

- (127) Deutsche Post claims, based on the 2009 regulatory accounts, an average burden of EUR [...] million for the period 1990-2006 compared to EUR [...] million based on the 2002 regulatory accounts.

Figure 4

Claimed universal service burdens with 2009 regulatory accounts compared to approved burdens with 2002 Price cap decision (annual average, million EUR nominal value)

[...]

IV.1.2. The calculation of burdens in the 2009 regulatory accounts

- (126) Unlike the regulatory accounts that Deutsche Post submitted to the regulator for the 2002, 2007 and 2011 Price cap decisions, the 2009 regulatory accounts — which have never been submitted to the Postal regulator — contain a significantly higher amount of burdens that Deutsche Post allocates to the price-regulated services.

- (128) While burden #2 on excess social costs and burden #4 on supplementary pension insurance do not differ significantly between the 2002 and 2009 regulatory accounts, burden #1 on excess wages has almost [...]. Unlike the 2002 regulatory accounts, Deutsche Post no longer uses the ETV wages as 'competitive' wage benchmark. Instead it used the minimum wage for the postal sector based on a regulation issued by the Federal Ministry for Labour in

⁽¹⁾ The 2009 regulatory accounts show the regulated letter revenues within different business divisions over time. That definition includes for each year the sum of all regulated revenues independently of the business division in which they are listed.

2007 (hereafter referred to as 2007 minimum wage). However, it has to be noted that that regulation was finally declared illegal by the Federal Administrative Court and never became legally effective.

(129) Furthermore, Deutsche Post claims with the 2009 regulatory accounts a new 'infrastructure mail' burden that shows the incremental costs of the sixth delivery day (e.g. on average EUR [...] million per year). The calculation is based on the counterfactual scenario that, without the universal service obligation, Deutsche Post would since 1990 have delivered mail on only five instead of six days.

(130) The infrastructure burden #3 on the post shop network is calculated differently compared with the calculation in the 2002 regulatory accounts. The burden now shows the alleged cost savings that could have been achieved if all post offices had been run as agencies since 1990. It is calculated based on the remuneration that Deutsche Post paid to third-party agents for sales services in 2007.

IV.1.3. The profit margins in the 2009 regulatory accounts

(131) The allocation of the burdens to the price-regulated universal letter services provides a significant relief for the non-price regulated services from costs that were incurred for them (e.g. wage and social costs). That reallocation leads to significantly positive profit margins of [15 to 25 %] on sales for the commercial services and losses of almost [0 to 10 %] on sales for the price-regulated letter services.

(132) While Deutsche Post shows in its annual accounts very high profits for its letter division (see also Section V.3), those profits are more than eaten up by the burdens that have been shifted from the non-price regulated to the price regulated services.

Figure 5

Average returns on sales based on 2009 regulatory accounts

[...]

IV.2. Profit benchmarking

IV.2.1. Deutsche Post's value chain: low-tech operations and low level of business risk

(133) An analysis of the value chain and the assumed business risks is indispensable to prepare the profit benchmarking and the evaluation of the cost allocation. Only if the function and risk characteristics are known is it possible to search for a set of 'comparable' companies and to calculate a benchmark for the reasonable profit which Deutsche Post shall earn.

IV.2.1.1. The value chain of a low-tech business

(134) Deutsche Post's value chain can be divided into two main functions:

— Nationwide delivery network for the distribution of letters and parcels,

— Nationwide network of post shops.

(135) The logistics of a parcel and letter network is a low-tech business that does not involve large research or development efforts. Thus all other operators in the industry work in a similar and standardised way. Such activities are therefore often labelled as 'routine' functions. The high degree of outsourcing that Deutsche Post undertakes to third parties also proves their routine nature. The same goes for the sales services that are performed through the nationwide shop network and have also increasingly been outsourced.

(136) Apart from those routine functions, the main intangibles of Deutsche Post are the customer base, the brand name and the strong market position, especially in the letter markets. However, the WIK study considers that those intangibles are essentially not due to own efforts or investments by Deutsche Post but much more due to the historic exclusive rights. Deutsche Post did not have to invest heavily into marketing functions. Instead, it could rely on its legally guaranteed market position until 2007. Therefore, Deutsche Post should not be allowed any remuneration for those intangibles.

IV.2.1.2. Low risk due to public measures

(137) Deutsche Post was exposed to fewer risks both for regulated as well as non-regulated services than competitors for several reasons.

(138) Firstly, Deutsche Post was protected by a legal monopoly until 2007 for its letter services. Furthermore, within the scope of regulated letter services, Deutsche Post benefited from a market share of 90 % and a non-existing or low level of competition. The regulated services accounted for almost two-thirds of Deutsche Post's revenues.

(139) Secondly, the Postal regulator approved a price cap for regulated letter services. That cap was set above the cost of an efficient undertaking, to allow, inter alia, for the compensation of allegedly excessive costs linked of non-price regulated services. None of the competitors of DPAG enjoyed an exclusive right or a dominant position, which would have allowed him to cross-finance social costs. Therefore, the exclusive right respectively the dominant position not only led to a significant reduction of the business risks for the regulated services, but also for the non-price regulated universal and commercial services.

(140) Thirdly, other public measures also significantly reduced the risk for both universal and commercial services: e.g. the public transfers hedged the losses of the early 1990s and the public guarantee allowed Deutsche Post to borrow at the rate of the Sovereign until 1995 despite its difficult financial situation in the early 1990s.

(141) Taken together, Deutsche Post faced significantly lower market and cost risks than competitors because it did not have to build up its own customer base and could pass on cost increases through higher regulated prices. Based on that reasoning, the WIK study concludes that the preferred comparable competitors would be postal companies who only exercise routine functions (e.g. do not invest heavily in marketing and brand name) and are not exposed to a high degree of risk (e.g. can rely on long-term contracts).

IV.2.2. Quantification of profit benchmarks

(142) Based on the results of the function and risk analysis, the WIK study performs a financial-database analysis (e.g. using ORBIS database covering about 10 million companies worldwide) to search for comparable postal

companies. A mixture of controlled quantitative and qualitative selection steps identifies the set of comparable companies that provide postal services on competitive markets.

(143) The WIK study chooses a comparator group of 26 postal companies that mainly provide parcel services and perform the typical routine activities of postal operators. All comparable competitors come from the industry sector of 'Post and courier activities' based on the NACE ⁽¹⁾ code 641.

(144) It is important to note that the number of comparable competitors is limited because private companies have rarely provided letter services in larger scale due to the postal incumbents' exclusive right that covered a significant share of the letter services. Furthermore, the WIK study excludes postal incumbents from other countries as comparators because they have — as Deutsche Post — been protected by exclusive rights and are not primarily active on competitive markets.

(145) To measure the reasonable profit, the WIK study uses the return-on-sales margin (ROS) that is the accounting profit (e.g. Earnings before interest and tax (EBIT)) divided by revenues. Furthermore, the WIK study calculates the return-on-asset margin (ROA), e.g. EBIT as percentage of assets, as a capital-based profit benchmark.

Table 3

Benchmark ROS and ROA from WIK study

	Return on Sales (ROS)	Return on Assets (ROA)
Median	3,48 %	7,33 %
Upper bound (75th percentile)	6,77 %	13,41 %

(146) From the chosen sample, it results that the median ROS in the competitive part of the postal sector amounts to 3,48 % for the period 1998-2007. However, the WIK study not only presents the median return but also an upper bound for the reasonable profit, e.g. the third quartile of the comparable competitors' profit which

⁽¹⁾ The NACE codes (Nomenclature statistique des activités économiques dans la Communauté européenne) represent the statistical classification of economic activities in the European Union.

amounts to a ROS of 6,77 %. Put another way, 75 % of the comparable competitors show a profit that is lower than a ROS of 6,77 % ⁽¹⁾.

- (147) Concerning the return on assets, the WIK study shows a median ROA of 7,33 % and an upper bound of 13,41 %.
- (148) As Deutsche Post is exposed to considerably less risk than the comparables who operate on highly competitive markets (e.g. express parcels), the WIK study considers that the median ROS of 3,48 % is a prudent and conservative profit benchmark for Deutsche Post. It does not recommend using a higher rate in the range up to the third-quartile ROS of 6,77 %. On the contrary, a lower benchmark could be also defensible because the median ROS of 3,48 % translates into a ROA of 7,33 % that would still be significantly above the risk-free interest rate.

IV.3. Review of cost allocation

- (149) The WIK study rejects the allocation of burdens in the 2009 regulatory accounts because the commercial services' ROS margins between [15 to 25 %] are significantly above the industry average ⁽²⁾. As private competitors are viable despite significantly lower profit margins, the WIK study concludes that a higher share of costs should be allocated to Deutsche Post's commercial services and accordingly reduces the burdens for the price-regulated services.
- (150) As final outcome of the WIK study, all commercial services carry costs to such an extent they still show a profit in line with the median ROS of 3,48 % of competitors. The price-regulated services' average annual burden is accordingly reduced by EUR [...] million for the period 1990-2007.
- (151) As a large share of the commercial sales services has been provided to the related parties Postbank and Telekom, the WIK study also investigates whether the final prices charged to them can be considered as at arm's length and therefore as appropriate benchmark

⁽¹⁾ To back up the results of the postal sample that contains only a small number of comparable competitors, the WIK study has chosen an additional larger set that includes about 1 160 companies from the road freight sector (NACE code 60) because road freight transport is a highly competitive sector and often provided by companies which perform similar transport activities to postal operators. The results from the second comparable set give a median ROS of 2,59 % respectively third-quartile ROS of 5,57 % and confirm the results of the smaller set.

⁽²⁾ The median ROS of 3,48 % or the upper-bound ROS of 6,77 %.

for the costs that the commercial sales services should carry. Based on the available evidence, the WIK study considers that the contracts between Deutsche Post and those related parties reflect the conditions that independent third parties would also have agreed on. As neither POSTBANK nor TELEKOM had in the years immediately after 1990 real outside-options to use other distribution networks, they accepted to share the incurred costs. However, subsequently, as Postbank and Telekom could more easily find other distribution networks and the costs of the universal service network went down, the contract was changed to a revenue-based commission fee that was more in line with a typical sales-service contract ⁽³⁾.

IV.4. Adjustment of 2009 regulatory accounts

- (152) The WIK study undertakes several adjustments to the 2009 regulatory accounts based on the following scheme:

Table 4

Calculation scheme for annual excess result with 2009 regulatory accounts and WIK study

Revenues of universal services
– Costs of universal services
– Reasonable profit
+ Public transfer
Excess result

IV.4.1. Adjustment of universal service revenues

- (153) Deutsche Post sold a considerable amount of real estate (e.g. real estate which has become redundant during the restructuring of the postal operations). Those revenues should be shown with the universal services that were the primary user of those assets and have rented them to the commercial services.
- (154) The corresponding adjustment results in an average annual increase of EUR [...] million of the universal service revenues over the whole period 1990-2007.

⁽³⁾ Deutsche Post submitted a study by CTcon (2005), 'Rentabilität der Schalterleistungen der Postfilialen für die Postbank 2002 bis 2004' (Profitability of Deutsche Post's sales services for Postbank) that allocates the direct and common costs of the shop network between the commercial and universal services using an activity-based costing approach. It seems that, in general, the remuneration that Postbank paid covered an appropriate share of the shop network's full costs (e.g. including a proportionate share of the infrastructure burden #3 for the postal network).

IV.4.2. *Adjustment of universal service costs*

IV.4.2.1. Dissolution of accounts

- (155) The 2009 regulatory accounts do not correctly dissolve the internal transactions: The universal services do not show the total profit which they earn because profits which originate from certain functions (e.g. post shops) are not divided between universal and commercial services (e.g. according to costs incurred for each services) but lumped together and reported as commercial profits. Deutsche Post has therefore not been able to provide correctly separated accounts in line with the requirements of Commission Directive 2006/111/EC of 16 November 2006 on transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings ⁽¹⁾.

- (156) While Deutsche Post provided an approximate dissolution of internal accounting for the years up to 1997, the WIK study has to adjust the accounts for the years after 1997 and shift wrongly 'parked' costs from the universal to the commercial service accounts.

- (157) The corresponding adjustment results in a decrease of the universal service costs by EUR [...] million over the period 1998-2007.

IV.4.2.2. Adjustment of burdens between price-regulated and non-price regulated services

- (158) As previously explained, the WIK study does not adjust separately each burden. Instead, it bases its recalculation on the commercial services' final prices that were judged as robust benchmarks for the industry average costs. Consequently, all excess profits from the commercial services ⁽²⁾ are used to finance the initially claimed burdens. The average annual decrease in the burdens amounts to EUR [...] million over the whole period 1990-2007.

IV.4.2.3. Off-balance costs with supplementary pension insurance (burden #4)

- (159) With burden #4 on supplementary pension insurance, Deutsche Post added costs that are not shown in its annual accounts. As the ROS-benchmark is calculated on the basis of the comparable competitors' statutory accounts, only costs that are also admitted according to national accounting standards or the international accounting standard (IAS) can be included. Therefore, any additional costs — which are normally not included in IAS accounts — cannot be accepted as cost items but must be financed out of the benchmarked profit margin.

- (160) The corresponding adjustment results in an average annual reduction by EUR [...] million for burden #4 on supplementary pension insurance over the whole period 1990-2007.

IV.4.3. *Adjustment of capital costs to reasonable profit*

- (161) Deutsche Post imputed capital costs to the 2009 regulatory accounts that had not initially been included in the statutory accounts: e.g. [...] costs and [...] costs. The WIK study eliminates both the [...] costs as well as the [...], and substitutes them with the benchmark for the reasonable profit.

IV.4.3.1. Period 1996 to 2007

- (162) The reasonable profit is calculated on the basis of the adjusted revenues of the universal services and the ROS benchmark of 3,48 % that result in annual average reasonable profit of EUR [...] million. The average annual capital costs of EUR [...] million (interest costs of EUR [...] million and increased regulatory depreciation of EUR [...] million) are eliminated from the 2009 regulatory accounts.

- (163) It is important to note that, compared to the 2009 regulatory accounts, the benchmark ROS of 3,48 % yields in absolute terms a reasonable profit that is higher than Deutsche Post's claimed capital costs (e.g. interest costs based on an internal rate-of-return of about [...] on capital employed and increased depreciation on market value).

IV.4.3.2. Period 1990 to 1995

- (164) Pursuant to Article 63(1) PostVerfG, Deutsche Post had until 1995 to pay the so-called Ablieferungen ⁽³⁾ of EUR 5 838 million to the federal government that amounted to about 8 % of sales. As counterpart to that obligation, Article 63(4) PostVerfG relieved Deutsche Post, however, from the obligation to pay any further dividends beyond the Ablieferungen.

- (165) The WIK study refuses therefore to add a 'reasonable profit' for the period up to 1995 because the Ablieferungen has already fully covered Deutsche Post's equity costs. Consequently, the Deutsche Post's average annual capital costs of EUR [...] million (interest costs of EUR [...] million and increased regulatory depreciation of EUR [...] million) are eliminated from the 2009 regulatory accounts and the universal service costs are decreased in consequence.

⁽¹⁾ OJ L 318, 17.11.2006, p. 17.

⁽²⁾ Excess of the profit margins in Figure 5 over the reasonable profit rate of 3,48 % on sales.

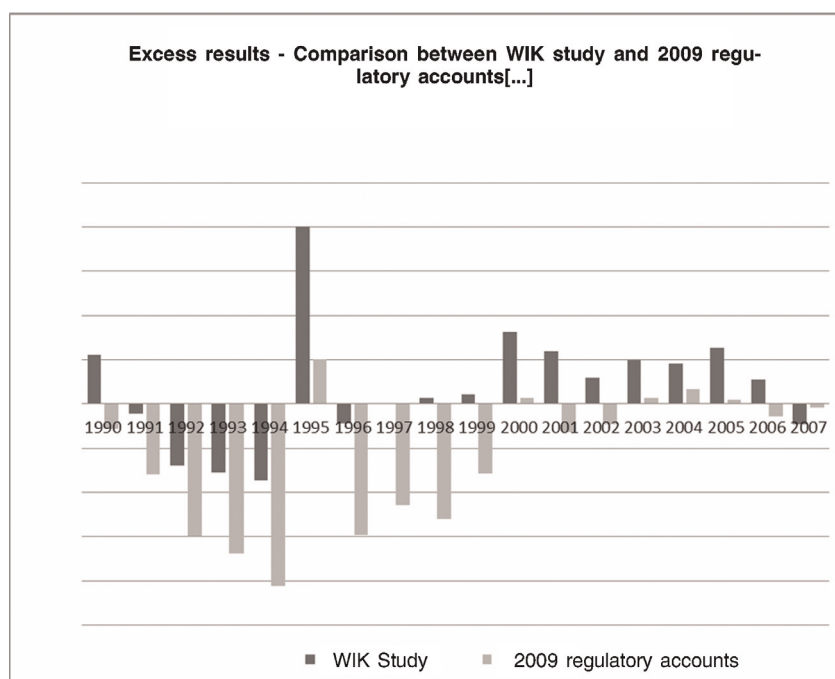
⁽³⁾ See Section VI.2.1 for a detailed explanation of the Ablieferungen.

IV.4.4. Conclusions

- (166) The 2009 regulatory accounts as well as the WIK study agree that the revenues universal services were insufficient to cover their costs up to 1996. However, while Deutsche Post is left with a cumulated deficit for the whole period to 2007, even after taking account of the public transfers in the 2009 regulatory accounts, the WIK study comes to the conclusion that the public transfers were sufficient to allow Deutsche Post break even in 1997.
- (167) The 2009 regulatory accounts show hardly an improvement in the profitability of the universal services up to 1999. It has only been since 2000 that universal service revenues on average cover the costs. On the contrary, the WIK study shows since 2000 significant excess profits for the universal services above the median ROS of 3,48 % despite the fact that the universal parcel services have only shown a below-average return of [...] on sales (see Figure 6)

Figure 6

Comparison of annual excess results of universal services for the period 1990-2007 (million EUR, nominal annual values)



V. COMMENTS BY INTERESTED PARTIES

- (168) Interested parties submitted comments on the 1999 Opening Decision, the 2007 Extension Decision and the 2011 Extension Decision. The most important comments on all three decisions are summarised in this section.

V.1. Right to use official German stamps

- (169) TNT questions whether Deutsche Post paid a fee for the exclusive right to use official German stamps. According to § 43 PostG 1997, the authorisation to distribute stamps with the inscription 'Germany' has been reserved to the Federal Ministry of Finance. A postal operator who files an application to use those stamps is required to pay a fee and to cover incidental costs. Pursuant to § 54 PostG, Deutsche Post had the exclusive right to use German stamps until 31 December 2007.

- (170) TNT considers that, if Deutsche Post effectively used the stamps issued by the Federal Ministry of Finance free of charge, the non-payment of the application fee would constitute illegal State aid.

- (171) The Commission observes that this measure has not been addressed in the 1999 Opening Decision, the 2007 Extension Decision or the 2011 Extension Decision. It falls therefore outside the scope of the present Decision.

V.2. Pension subsidy

- (172) According to UPS, Deutsche Post has benefited from an advantage as it has been partially released from the payment obligation it had to bear before 1995. Since normal operators have to bear their own pension costs, Deutsche Post was put into an advantageous position compared to its competitors. Furthermore, UPS agrees

with the Commission's reasoning that the aid cannot be regarded as existing aid given the fundamental changes in the position of Deutsche Post and the introduction of new legislation to remove part of Deutsche Post's obligations to incur the costs of the civil servants pensions. According to UPS, those major amendments of the system do not qualify as simple modifications of a purely formal or administrative nature.

(173) UPS supports the Commission's preliminary conclusion that the pension subsidy cannot be considered compatible aid under Article 107(3)(c) TFEU. Given the level of sustained profitability as well as Deutsche Post's exclusive rights, the necessity of any relief for alleged legacy costs can surely be doubted. Furthermore, the subsidy granted is not proportional to the objective of common interest as brought forward by Germany, especially as the legacy costs are compensated by both increased letter prices and the pension subsidy. UPS points out that the burden of proof of the proportionality of the measure lies with Germany. However, Germany has not given precise indications of the proportionality of the benefits derived by Deutsche Post from the measure.

(174) According to UPS, the aid received by Deutsche Post has enabled it to acquire an advantageous position not only in Germany but also in other European markets in which it competes with other postal industry players such as UPS. As the pension subsidies have allowed Deutsche Post to strengthen its position in the commercial sector at the disadvantage of other players, competitors of Deutsche Post have suffered from a distortion of competition.

(175) UPS requests the Commission to additionally apply the assessment of the necessity and proportionality of any pension subsidies as set out in the 2011 Extension decision for the period 2007-11 and to scrutinise whether Deutsche Post still benefits from unlawful State aid within the meaning of Article 107(1) TFEU.

(176) Finally, UPS requests the Commission to provide more information as to how it has come to the conclusion that Deutsche Post benefited from an incompatible aid. In particular, UPS requests a copy of the WIK study to receive clarification as to the extent to which the results of the WIK study have been used for the assessment of the pension subsidy with the 2011 Extension Decision.

V.3. Universal service compensation

(177) UPS fully supports the Commission's investigation and fully subscribes to the contents of the 2007 Extension decision concerning the assessment of the universal service compensation. Additionally, UPS provided an update⁽¹⁾ of the NERA study of October 2006⁽²⁾ that the Commission referred to at recital 58 of the 2007 Extension decision.

(178) While the 2006 NERA study estimated an average return on capital employed above 20 % for the letter division of DPWN for the period after 1999⁽³⁾, the updated study emphasises that the return on capital employed would have remained even above 50 % in the period 2000-2005. Over the period from 2003 to 2005 the return on capital employed would have even been estimated at more than 100 %. UPS concludes that the profits of the extremely profitable regulated letter services would have been more than sufficient to cover the losses of the universal services.

(179) Furthermore, UPS considers that Deutsche Post's own cost accounting data would not provide a good basis for an analysis and understanding of the profitability and burdens in the reserved sector. Therefore, a thorough analysis of the cost allocation between regulated, universal and commercial services should be undertaken. All benefits that Deutsche Post received to cover its burdens of the past, such as capital endowments granted to Deutsche Post by Germany in 1995 as well as assets in the form of real estate and infrastructure, should be included in the determination of the aid amount and the amount of overcompensation.

(180) Regarding the internal transfer pricing arrangements with related parties, UPS claimed that the arm's length principle should be maintained in line with the Chronopost judgment⁽⁴⁾. Therefore, the Commission should review the terms of the contract governing the

⁽¹⁾ National Economic Research Associates (NERA) (November 2007), 'The Profitability of the Mail Segment of Deutsche Post — An Update'.

⁽²⁾ National Economic Research Associates (NERA) (October 2006), 'The Profitability of the Mail Division of Deutsche Post — A Final Report'.

⁽³⁾ DPWN's letter division goes beyond DPAG's German activities and includes all worldwide mail activities. However, domestic business constitutes the major share of DPWN's letter division.

⁽⁴⁾ Joined Cases C-83/01 P, C-93/01 P et C-94/01 P *Chronopost* [2003] ECR I-6993.

relationship between Deutsche Post and DPEED, in particular the pricing arrangements agreed between the parties.

a market share of more than 90 %, Deutsche Post is able to cross-finance the cost of services in more competitive markets.

V.4. Excessive letter prices

- (181) FFPI fully supports the 2011 Extension decision: FFPI states that legislative and administrative changes resulting in higher pension costs constitute normal business risk that may impact the business' profitability. As undertakings operating under normal market conditions have to bear such additional costs out of their own resources, Deutsche Post should also not receive pension subsidies granted by Germany.
- (182) Furthermore, FFPI points out that Deutsche Post stressed the importance of the pension reform in its 2000 Annual Report, thereby claiming that lower contributions to the Pension fund for civil servants constitute the main reason for an increase in EBITA by 98,6 % in the mail corporate division. Consequently, the pension reform should not be considered to be of minor importance or primarily administrative in nature.
- (183) According to a study conducted by FFPI from 2001 to 2008, stamp prices applied in Germany in 2009 for 20g standard letters, sent via first class stamped mail, were among the highest. With reference to 500g parcel sent first class, the prices in Germany were instead in the cheap area, indicating the existence of cross-subsidisation.
- (184) FFPI is convinced that the aid to Deutsche Post was not aimed at stimulating growth of the German postal market or of certain postal services. During the years under investigation, Deutsche Post was a profitable company. It managed to strengthen its leadership in the German market, increased its performance and expanded its business. Therefore, the pension subsidies should not be considered compatible with the internal market under Article 107(3)(c) TFEU.
- (185) BIEK is of the opinion that other postal operators have suffered from Deutsche Post's practice of using its dominant position on certain letter markets to cross-finance costs of letter and parcel services that have been offered on more competitive markets. In particular, as Deutsche Post can increase its prices on the markets where it used to have an exclusive license and still holds
- (186) Furthermore, BIEK claims that, despite the alleged legacy costs, Deutsche Post is significantly more profitable than its peers in other European countries, as shown by a ROS margin of 10 % to 20 % for its domestic mail division. That profit margin may even be distorted downwards because it must be taken into account that the domestic mail division also includes domestic parcel services that earn on average lower margins than letter services.
- (187) Concerning Deutsche Post's claimed burden from increased wage costs, BIEK points out that Deutsche Post uses average wages in the transport sector as a benchmark to calculate the differences in wage costs borne by Deutsche Post as compared to its competitors. While the Commission seems to adopt those numbers in the 2011 Extension decision as benchmarks for its calculations, BIEK claims that wages paid by the competitors of Deutsche Post are at least 15 % above those average wages. Consequently, the allegedly excessive wages borne by Deutsche Post are significantly smaller than claimed by Deutsche Post. BIEK argues that the remaining difference in wage costs does not result from legacy costs but is caused by Deutsche Post's size and dominant position in the market.
- (188) Finally, BIEK considers that Deutsche Post's legacy costs, including pension costs, have been more than compensated by the increased regulated letter prices. The aid measures, which the Commission is assessing, have led to the situation that competition has effectively not emerged for letter services and has been severely distorted for parcel services.

VI. COMMENTS BY GERMANY

VI.1. Comments on pension subsidy

VI.1.1. *No financial advantage from compensation of excess social costs*

- (189) Based on the *Combus* judgment⁽¹⁾, Germany is of the opinion that, in the course of the privatisation of formerly State-owned universal service providers, the public compensation of pension costs — which goes beyond the level normally assumed by private competitors — does not constitute aid.

⁽¹⁾ Case T-157/01 *Danske Busvognmænd v Commission* [2004] ECR II-917, paragraph 57.

- (190) Germany agrees therefore with the Commission that a comparison should be undertaken between the social costs paid by Deutsche Post and competitors' social costs. However, that comparison should already be made under Article 107(1) TFEU and not subsequently at the stage of the compatibility assessment under Article 107(3)(c) TFEU.

VI.1.2. *No financial advantage compared to pre-1995 situation*

- (191) Germany is of the opinion that the pension subsidy has not relieved Deutsche Post from a cost that it would normally have had to bear out of its own resources. Thus, Deutsche Post has not benefited from an advantage within the meaning of Article 107(1) TFEU. According to Germany, Deutsche Post was not legally liable or economically capable to pay the pensions to the civil servants before and after 1995.

- (192) First of all, Germany claims that, pursuant to Article 46 PostVerfG 1989, the civil servants, who were taken over by Deutsche Post in 1989, remained in the service of the federal government. Also after the second postal reform in 1995, pursuant to Article 2(3) PostPersRG 1994 and the newly inserted Article 143b of the Constitution, Deutsche Post's civil servants continued to stay in the federal government's service.

- (193) Therefore, as the federal government has always remained the sole debtor for the civil servants' pension liabilities, Deutsche Post has never been under a legal obligation to use its own resources.

- (194) Even though Deutsche Post was obliged pursuant to Article 54(2) PostVerfG 1989 to finance civil servants' pension costs, Germany maintains that the provision was only an internal arrangement to raise funds for the public budget (e.g. as the obligation to pay *Ablieferungen* pursuant to Article 63 PostVerfG 1989). It did not establish any liability by Deutsche Post towards the civil servants.

- (195) After the second postal reform in 1995, pursuant to Article 2(3) PostPersRG 1994 and Articles 14 to 16 PostPersRG 1994, the federal government further remained the sole debtor towards the civil servants. The obligations, which Articles 16(1) PostPersRG imposed on Deutsche Post to contribute to the Pension fund, constitute therefore, as with the obligations under Article 54(2) PostVerfG 1989, only a relief for the public budget. They do not change the federal government's sole liability with respect to the civil servants' pensions.

- (196) Furthermore, under private law, it would also not have been possible for the federal government to discharge its liability for the civil servants' pension rights to the newly

set-up DPAG in 1995. According to general principles of private law, if existing liabilities were transferred to a legally independent subsidiary the parent company would nevertheless remain liable for those liabilities towards third parties.

- (197) Secondly, Germany claims that Deutsche Post has never had enough own resources to effectively finance the pension costs. On the one hand, before 1995, POSTDIENST had incurred only losses that in turn had to be financed from the public transfers of EUR 5,6 billion. On the other hand, when POSTDIENST was transformed into DPAG in 1995, the accrued civil servants' pension liabilities amounted to approximately EUR [...] billion. It would not have been possible to set up DPAG as a private-law company with those liabilities on its balance sheet because the federal government had not provided sufficient assets to make DPAG viable.

VI.1.3. *Pension subsidy as existing aid pursuant to Article 108(1)*

- (198) Germany is of the opinion that if the pension subsidy were to be considered as State aid it would have to be qualified as existing aid pursuant to Article 1(b)(i) of Regulation (EC) No 659/1999 because the State has been the sole debtor and the party liable to finance the civil servants' pensions since the entry into force of the relevant provision in the German Basic Law in 1953. Germany maintains that neither the first postal reform in 1989 nor the second postal reform in 1995 has changed the State's liability towards the civil servants. According to Germany, Deutsche Post has neither before nor after 1995 been legally liable or economic capable to pay the civil servants' pensions.

- (199) Furthermore, Germany refers to a statement by the Commission before the General Court in Case T-266/02. According to Germany, it becomes clear from paragraph 54 of the judgment that the Commission 'had taken the view, for the purpose of the contested decision, that only the transfer payments made by DB-Telekom had conferred an advantage on it.'⁽¹⁾

- (200) Germany concludes from that statement that the Commission had already declared the pension subsidy as not providing any financial advantage to Deutsche Post. It therefore had effectively taken a 'decision not to raise objections' within the meaning of Article 4 of Regulation (EC) No 659/1999. Furthermore, pursuant to Article 1(b)(ii) Regulation (EC) No 659/1999, such a positive decision would mean that the pension subsidy must subsequently be qualified as existing aid.

⁽¹⁾ Case T-266/02 *Deutsche Post AG v European Commission* [2008] ECR II-1233, paragraph 54.

VI.1.4. *Pension subsidy as compatible compensation for legacy costs pursuant to Article 107(3) TFEU*

made two mistakes in the calculation of the benchmark for Deutsche Post's social costs.

(201) In light of the Commission's reasoning in the La-Poste decision, Germany is of the opinion that the pension subsidy is compatible aid under Article 107(3)(c) TFEU:

— Germany points out that Deutsche Post has consistently paid a higher level of social costs than the employer's contribution to pension, health and nursing care.

— Germany objects to the Commission's calculations of the comparative advantage insofar as it is considered that the price-regulated services cover the claimed burden #2 on excess social contributions. Germany points out that La Poste — as any other postal incumbent — has also refinanced social costs through increased regulated letter prices but that the Commission did not take that fact into account in its La Poste decision.

— Although Germany agrees in principle that the price-regulated revenues should cover the claimed burdens, the Commission has neither proven that the regulator effectively approved Deutsche Post's claim to finance the excess social costs out of the regulated revenues nor that the regulated revenues were effectively sufficiently high to finance those excess social costs.

(202) Furthermore, Germany points out that the Commission in its 2007 Opening decision on Royal Mail⁽¹⁾ emphasised the need to assess pension costs of former public undertakings according to consistent criteria, which should lead to consistent decisions. Consequently, the Commission should take into account its La Poste decision and its preliminary assessment in Royal Mail. In the latter, the Commission did not object to the compensation of pension deficits even though the Hopper-Report 2008 shows that Royal Mail's pension costs had partly been covered by increased regulated letter prices.

VI.1.4.1. Benchmark to be based on 'competitive' social costs

(203) Germany argues, based on the expert study by Professor Ehlermann of 19 July 2011⁽²⁾, that the Commission

(204) The employee's share should not be included in the benchmark because a private employer would not be legally liable for the payment of the employee's share. It would only be for administrative reasons that the employer executes the payment of the total social contribution but it does not make him legally liable to carry the total burden of the social contributions. Furthermore, the inclusion of the employee's share in the benchmark would also contradict previous decisional practice, as in the La Poste decision.

(205) The calculation of the benchmark social costs should be based on the 'competitive' wage benchmark⁽³⁾ because the civil servants' wages have significantly been higher than the market average.

VI.1.4.2. Insufficient level of price-regulated revenues to cover excess social costs

(206) First of all, Germany emphasises that the consideration of a full coverage of burden #2 by the price regulated revenues would only be hypothetical because it would not be possible to establish whether the regulated prices were effectively increased to compensate the excess social costs. On the one hand, it is not retrievable from the 2002 Price cap decision whether and to which extent the Postal regulator had taken the claimed burdens for excess social costs into account. On the other hand, until 2002, the prices were kept at the approved 1997 level and it is not possible to establish whether those prices included a compensation for the non-regulated services' excess social costs.

(207) According to Germany, it would not be sufficient to show that the non-price regulated services have benefited from lower social contributions than competitors. It must also be established whether the price-regulated services have effectively been able to finance the claimed burdens of excess social costs out of their revenues.

⁽¹⁾ Commission Decision 2011/C 265/02 of 29 July 2011 on State aid measures to Royal Mail (OJ C 265, 9.9.2011, p. 2).

⁽²⁾ See recital 41.

⁽³⁾ The 2007 minimum wages as used by the 2009 regulatory accounts for the calculation of the excess wage burden #1.

- (208) A financial advantage for Deutsche Post from the compensation of its excess social costs would only exist if the granted compensation was higher than the total excess social costs that Deutsche Post has had incurred for the civil servants.
- (209) Consequently, Germany deplores the lack of a comprehensive calculation to establish whether Deutsche Post was in total over- or under-compensated for the civil servants' excess social costs. It emphasises the necessity of such a calculation in order to establish a financial advantage with the meaning of Article 107(1) TFEU.
- (a) *Under-compensation of excess social costs based on expert study*
- (210) To remove that defect, Germany submitted the expert study by Professor Weber⁽¹⁾ to establish Deutsche Post's financial advantage in social cost from the employment of civil servants. First, the expert study establishes by how much Deutsche Post's incurred social costs for civil servants exceed those that a private competitor has to carry for a private employee (hereinafter referred to as excess social costs). Second, the expert study compares those excess social costs to the compensation under burden #2.
- (211) As shown in Table 5, the expert study includes in the incurred social costs due to the employment of civil servants: Deutsche Post's contribution to the Pension fund and other social costs as Deutsche Post's contribution to the health expenses, accident insurance, further miscellaneous insurance payments.
- (212) The expert study defines as social costs from the employment of a private employee: the employer's share of the contribution rate for the statutory pension, unemployment, health and nursing insurance multiplied by allegedly 'competitive' wages (e.g. the 2007 minimum for the majority of the civil servants).the
- (213) The excess social costs are the result of the excess of Deutsche Post's incurred social costs for civil servants over the defined benchmark of social costs based on the employer's share of social contributions for a private employee.

Table 5

Calculation of net result following Germany's expert study

–	Contribution to Pension fund
–	other social costs
+	'Competitive' social cost benchmark (based on employer's share of social contribution rate and 'competitive' wage (e.g. 2007 minimum wage))
	Excess social costs
+	Compensation from regulated revenues (burden #2 on excess social contributions)
	Net result (under- or over-compensation)

- (214) For the period 1995-2007, the calculations arrive at the conclusion that burden #2 was insufficient to cover the excess social costs. In fact, the expert claims that Deutsche Post has been under-compensated by EUR [...] million. The expert concludes that, even if it was considered that the price-regulated revenues include burden #2, Deutsche Post would remain under-compensated for its excess social costs.
- (b) *2009 regulatory accounts confirm insufficiency of price-regulated revenues to cover excess social costs*
- (215) Germany argues that in any case, as long as the price-regulated services incur losses that are higher than the excess social costs, it cannot be established that the regulated revenues effectively compensated the excess social costs. In that context, Germany submitted an

⁽¹⁾ See recital 41.

expert study by CTcon based on the 2009 regulatory accounts⁽¹⁾ to show that the losses of the price-regulated services have consistently been higher than the excess social costs.

- (216) The calculations are based on the 2009 regulatory accounts and assume that the price-regulated services should earn a reasonable profit of ROS of 7 % (based on the Deloitte-II study that is discussed in more detail in Section VI.3.2). After deduction of the reasonable profit, the price-regulated services show a loss of EUR [...] million that is higher than the claimed excess social cost for the period 1995-2007. The price-regulated revenues have therefore been insufficient to cover the claimed excess social costs.

VI.2. Comments on universal service compensation

VI.2.1. Public transfers

- (217) Germany argues that the public transfers have not provided any economic advantage to Deutsche Post because the public transfers of EUR 5 666 million only compensated for the Ablieferungen of EUR 5 838 million that Deutsche Post had to pay until 1995.
- (218) As explained in the 2007 Extension decision, the Ablieferungen had their origins with the former postal administration that was obliged to transfer about 10 % of the annual operating revenue to the public budget. In the period 1989-1995, the Ablieferungen were phased out pursuant to Article 63(1) PostVerfG 1989. Up to 1993, Deutsche Post had to pay 10 % of its operational revenue. As of 1993, the Ablieferungen were successively reduced to 10 % of the operational revenue minus EUR 153 million in 1993. For 1994, the Ablieferungen amounted to 70 % of the 1993 Ablieferungen. In 1995, Deutsche Post paid 50 % of the 1993 amount. In total, Deutsche Post paid EUR 5 838 million from 1990 to 1995.
- (219) Article 63(4) PostVerfG 1989 provided that any dividends paid were to be subtracted from the Ablieferungen. Based on that provision and the exemption from any direct or indirect taxes, the Commission contended in the 2007 Extension decision that the Ablieferungen were to be considered as a substitute for indirect and direct taxes as well as to provide a remuneration to the State as shareholder for the provided capital.
- (220) In response to that contention, Germany submitted the KPMG study that comes to the conclusion that the Ablieferungen could neither be considered as a substitute for taxes nor for dividends for a number of reasons.
- (221) First, the Ablieferungen would not qualify as a corporate tax because the Ablieferungen had been calculated as a percentage of the realised revenues since 1931. As a result, they had to be paid even in years where Deutsche Post incurred a loss. In contrast, corporate tax is based on the realised annual profit. A qualification of the Ablieferungen as a corporate tax would also contradict the legal practice of the Bundesverfassungsgericht, according to which a corporate tax must be based on the economic performance ('Leistungsfähigkeit') of a company.
- (222) Furthermore, the Ablieferungen would also not qualify as a value-added tax. Since there was no possibility to deduct the value-added tax paid on the inputs from the Ablieferungen, the calculation of the Ablieferungen differed substantially from the usual calculation of the value-added tax liabilities.
- (223) Second, Germany argues that the Ablieferungen could not be qualified as a dividend. The distribution of dividends usually requires that profits were earned in the corresponding financial year or the years before. However, Deutsche Post did not earn any profits between 1990 and 1995 but nevertheless paid the Ablieferungen. As a result, the Ablieferungen could not be qualified as dividends.
- (224) The KPMG study concludes that the Ablieferungen could not be qualified as tax or dividend payment but should be viewed as a levy *sui generis* that only Deutsche Bundespost and its successors was liable to pay.
- (225) Based on the KPMG study, Germany rejects the Commission's contention that the Ablieferungen should be considered as a substitute for tax and dividend payments. It maintains that the Ablieferungen constituted a burden for Deutsche Post that could not be justified on factual or economic terms. As the public transfers only relieved Deutsche Post of the Ablieferungen, they did not provide any economic advantage and therefore did not constitute aid.
- (226) In the alternative, Germany puts forward two further justifications why the public transfers would not constitute aid. First, the public transfers would fulfil the market-economy-investor principle in light of the substantial return on investment in later years and the high proceeds realised in the stock-market flotation of Deutsche Post. Second, the public transfers would also not constitute aid because both the 2009 regulatory accounts as well as the WIK study show that the

⁽¹⁾ See recital 41.

cumulated universal service losses from 1990 to 1994 were higher than the public transfers. Deutsche Post was therefore under-compensated for its universal service obligation.

VI.2.2. *Public guarantee*

(227) Germany argues that the continued public guarantee pursuant to Article 2(4) PostUmwG 1994 for debt obligations that were issued prior to 1995 did not provide any selective advantage to Deutsche Post after 1995 because of several reasons.

(228) Firstly, any private company, hiving off a subsidiary, would continue to be liable for debt obligations entered into by that subsidiary. A private company would remain liable for its outstanding debts even after selling those debts to a third party. Furthermore, it must be noted that the initial public guarantee for the debt obligations was only a consequence of the non-existence of a separate legal personality of POSTDIENST. Article 40 PostVerfG 1989, which provided that debt obligations issued by Deutsche Bundespost had the same legal value as debt obligations issued by Germany, had therefore only declaratory character.

(229) Secondly, DPAG would not have benefited from the takeover of the POSTDIENST debt obligations because DPAG could have refinanced itself in 1995 at lower interest rates. The stock of POSTDIENST debt obligations as of 1 January 1995 amounted to EUR 931 million at an average interest rate of 7,17 % with a remaining duration of 8,8 years. As the short-term interest rate amounted to about 5 % to 5,5 % at 1 January 1995, DPAG suffered a cost disadvantage of 1,7 % which amounted to higher annual interest costs of about EUR 15,3 million.

(230) Thirdly, by comparing the average market interest rates for debt obligations issued by private companies and the interest rates for POSTDIENST debt obligations with reference to date when the obligations were initially issued, Germany estimates that POSTDIENST borrowed on average at interest rates above the market average. Germany did not carry out a comprehensive investigation but only compared the interest rates of certain POSTDIENST debt obligation with an aggregated market average.

(231) Alternatively, Germany argues that the public guarantees constitute existing aid according to Article 1(b)(i) of Regulation (EC) No 659/1999. As Deutsche Bundespost was part of the public administration until the end of 1994, the debt obligations were equal to debts of the State since its creation in 1950. If the public guarantee had provided any advantages to Deutsche Post regarding interest rates they would have to be considered as

existing aid. Germany also refers to the Commission decision on EDF ⁽¹⁾ where a similar guarantee was considered as existing aid.

VI.2.3. *Exclusive right*

(232) Germany argues that the regulated letter revenues are not State resources in light of the Preussen-Elektra judgment ⁽²⁾.

(233) Consequently, as the regulated letter revenues would not constitute State resources, any allegations of excessive pricing could only be the subject of proceedings pursuant to Article 102 TFEU.

VI.3. **Comments on WIK study**

VI.3.1. *WIK study confirms the necessity of public transfers as compensation for net costs of universal service obligations up to 1995*

(234) Regardless of all methodological objections, Germany considers that the WIK study confirms Germany's point of view that the public transfers were necessary as compensation for Deutsche Post's losses with its universal services in the period 1990-1995.

(235) Any excess profits after 1995 must not be taken into account because the public transfers were depleted by the net costs of the universal service obligations that Deutsche Post had incurred up to 1995. The Court's annulment of the 2002 Decision also confirms that what had been 'consumed' once could not be 'consumed' again. Given that the public transfers had been eaten up by the universal service losses up to 1995, it would not be possible for the public transfers to finance later excess profit.

VI.3.2. *Defective profit benchmarking*

(236) Based on the Deloitte studies, Germany's main objection is that the WIK study includes too many small companies. The set of comparable companies should

⁽¹⁾ Commission Decision 2005/145/EC of 16 December 2003 on the State aid granted by France to EDF and the electricity and gas industries (OJ L 49, 22.2.2005, p. 9).

⁽²⁾ Case C-379/98 *PreussenElektra* [2001] ECR I-2099.

focus much more on large parcel and logistics companies that are comparable in size and complexity of their network to Deutsche Post ⁽¹⁾.

(237) The Deloitte-II study considers that companies in the parcel and postal sector that operate a complex, large collection and delivery networks are reasonable comparators to Deutsche Post. The importance of economies of scale, scope and density prevalent in postal networks implies that large businesses would be more relevant comparators than small mail businesses. Freight transport and logistics companies are also — to a limited degree — suitable comparable undertakings because they employ similar assets.

(238) Consequently, the Deloitte-II study admits only companies with annual revenue higher than EUR 100 million. It leaves a comparator set with 6 postal companies, e.g. the big multinational express parcel operators (UPS, FedEx, and TNT Express) and some other postal operators mostly from the United States and the United Kingdom.

(239) That comparator set shows a median ROS of 7,4 % for the period 1998-2007 and a third-quartile ROS of 12 % as upper bound for reasonable profit. A larger comparable set, which includes 18 logistic and 19 freight companies yield a median ROS between 4,6 % and 5,7 %, but the Deloitte-II-study expresses some doubts on their comparability to Deutsche Post.

(240) Based on the data of both comparable sets, the Deloitte-II study recommends a range from a lower bound ROS of 6,1 % up to an upper bound ROS of 11,7 % as benchmark for a reasonable profit.

(241) Concerning the determination of the appropriate profit range from the comparator set, the Deloitte-II study notes that a simple multi-year ROS as reasonable profit benchmark underestimates reasonable profit because (i) there would be significant and systematic dispersion from one year to the other and (ii) there would be also a significant dispersion between the companies' profitability within the sector. Using an inappropriately low reasonable profit benchmark would incur the risk of deterring efficient investment.

⁽¹⁾ Germany considers that the results of the Deloitte studies are confirmed by the CRA study that Belgium submitted in the State aid Case SA.14588 (see recital 44).

(242) Moreover, as emphasised by the Deloitte-I study, the use of the comparable firms' median profit as a benchmark by the WIK study entirely ignores the efficiency gains that Deutsche Post achieved to an extraordinarily large extent from 1990 onwards. In line with margin numbers 14 and 18 of the 2005 Framework, the reasonable profit should, however, take into account appropriate incentives for productivity and quality.

(243) Accordingly, the appropriate profit benchmark should be based on an annual range. Profits at the top-end or even in excess of that reasonable-profit range may reflect out-performance of the average company due to superior operating or commercial performance. As such, such profits should be permitted by regulatory authorities in order to preserve incentives for efficiency.

(244) Finally, Germany points out that the level of the reasonable profit should be in line with previous Commission decisions that have approved ROS in the range between 7 % and 8 % for railways and bus companies ⁽²⁾.

VI.3.3. *Inappropriate cost allocation and valuation*

(245) Firstly, Germany maintains that any reallocation of universal service burdens to the commercial services would be factually and legally ill-founded. Pursuant to Article 7 of the Postal Directive ⁽³⁾, any net costs caused by the universal service obligations are to be funded by the revenues of the letter monopoly and not by the commercial services.

(246) Secondly, Germany considers that the WIK study underestimates certain of Deutsche Post's costs:

— The *Ablieferungen* — which Deutsche Post had to pay until 1995 — should have been deducted as costs and not been used as a proxy for the capital costs or reasonable profit. Based on the KPMG study, Germany rejects the WIK study's contention that the *Ablieferungen* should be considered as a substitute for tax and dividend payments. It maintains that the *Ablieferungen* constituted a burden for Deutsche Post that could not be justified on factual

⁽²⁾ Commission Decision 2008/C 35/10 on public service contract between Deutsche Bahn Regio and the Länder of Berlin and Brandenburg (OJ C 35, 8.2.2008, p. 13); Commission Decision 2009/325/EC of 26 November 2008 on Czech Republic concerning public service compensations for Southern Moravia Bus Companies (OJ L 97, 16.4.2009, p. 14).

⁽³⁾ OJ L 15, 21.1.1998, p. 14.

or economic terms. The *Ablieferungen* should therefore have been deducted as universal service costs in addition to a reasonable profit as remuneration for the employed capital.

- The depreciation charges should have been based on the realistic market values of the fixed assets as reported in the tax accounts and not on the lower book values in the annual accounts.
- The costs for private employees' supplementary pension commitments should have fully been taken into account.

VI.4. Comments on interested parties' comments

VI.4.1. *Pension subsidy*

- (247) Germany recalls that Deutsche Post was not legally liable or economically capable to take over civil servants' pension liabilities in 1995. Consequently, pension costs constitute a debt incurred by the State in line with the Commission's decision in *Poste Italiane*⁽¹⁾. Thus, the pension subsidies have not granted a financial advantage to Deutsche Post.
- (248) While UPS emphasises that a normal operator has to bear its own pension costs, Germany argues that civil servants' pension costs are abnormal costs which cannot be compared to social contributions paid by the competitors of Deutsche Post for their private employees. The latter only pay the employer's share to the social contribution scheme without facing legacy costs relating to pension claims.
- (249) Germany emphasises the necessity of an overcompensation calculation, as the comments submitted by UPS and FFIP are based on the assumption that the Commission conducted such a calculation to prove that Deutsche Post was overcompensated.

VI.4.2. *Universal service compensation*

- (250) Referring to the 2006 NERA study, Germany highlights that the Commission itself considered in the context of Case COMP/37.821 that the returns on capital employed — which the 2006 NERA Study estimated for DPWN's mail division — were insufficient to prove the existence of excessive pricing for the purposes of Article 102 TFEU.
- (251) On a more general level, Germany considers that the return on capital employed is not the appropriate measure for determining excessive profits. It explains

that with low capital intensity, a high return on capital employed could be linked to a low return on sales. As most risks are related to revenue and costs, the return on sales is the appropriate measure to determine the excessiveness of profits, especially for companies with low capital intensity. To the extent that the NERA studies use in the alternative the return on sales as profit measure, it shows that Deutsche Post had a higher return on sales as Royal Mail but a significantly lower return on sales than TNT. The returns on sales for DPWN's mail division — which the NERA studies had estimated — therefore remain significantly below the benchmark for excessive profits.

- (252) Germany considers therefore that the 2006 NERA Study and its update are neither of relevance for the State aid investigation nor could they provide sufficient evidence for excessive profits.

- (253) Regarding UPS' allegation that Deutsche Post's own accounting data would not be a good basis for analysing the revenues and burdens of the universal services, Germany retorts that the accounts would have been checked and approved by a certified accountant as well as by the Postal regulator. It adds that they are in line with the requirements of the Postal Directive.

- (254) Regarding the transfer pricing arrangements between Deutsche Post and DPEED, Germany emphasises that those arrangements follow the requirements of the 2001 Antitrust Decision. Deutsche Post sent reports on their fulfilment to the Commission on a regular basis. There have been no objections by the Commission so far.

- (255) Finally, Germany objects to the inclusion of the capital endowments granted to Deutsche Post by Germany in 1995 (e.g. assets in the form of real estate and infrastructure) into the calculation of overcompensation. Germany argues that it already submitted pertaining information with its comments to the 1999 Opening Decision. As the Commission neither objected to those measures in the 2002 State aid decision nor mentioned them in the 2007 Opening, the capital endowments could not be subject of the current investigation.

VI.4.3. *Wage level*

- (256) Germany agrees that market-average wages should be used as benchmark to calculate social contribution rates paid by competitors of Deutsche Post. However, according to Germany, such a benchmarking is in contradiction to the 2011 Extension decision, as the Commission uses adjusted gross wages of civil servants instead of market-average wages in order to calculate the amount of social contributions paid by competitors of

⁽¹⁾ Commission Decision 2002/782/EC of 12 March 2002 on the aid granted by Italy to Poste Italiane SpA (formerly Ente Poste Italiane) (OJ L 282, 19.10.2002, p. 29).

Deutsche Post. Following the expert study by Prof. Weber, market-average wages only amount to approximately [...] % of civil servants' gross wage. As such, it is not reasonable to use adjusted civil servants' gross wage as a benchmark to calculate social contribution rates.

- (257) According to Germany, BIEK's assumption that Deutsche Post uses agreed wages in the transport sector as a benchmark to calculate the differences in wage costs borne by Deutsche Post as compared to its competitors is ill-founded. The expert study by Prof. Weber shows that Deutsche Post calculates market-average wages on basis of actual wages paid by its competitors.

VII. AID ASSESSMENT OF PENSION SUBSIDY

VII.1. Assessment of existence of aid pursuant to Article 107(1) TFEU

- (258) 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, insofar as it affects trade between Member States, be incompatible with the internal market'. In determining whether a measure constitutes State aid within the meaning of Article 107(1) TFEU, the Commission has to apply the following criteria: the measure must be imputed to the State and use State resources, it must confer an advantage on certain undertakings or certain sectors which distorts competition and it must affect trade between Member States.

- (259) As the pension subsidy is based on the Article 16 PostPersG 1994 and financed out of the public budget, it is imputable to the State and it is granted through State resources within the meaning of Article 107(1) TFEU. Moreover, as the pension subsidy has only been granted to the Pension fund to relieve Deutsche Post from the civil servants' pension costs and therefore ultimately benefits Deutsche Post, it is selective.

VII.1.1. Financial advantage from 1995 pension reform

- (260) On the basis of the Combus judgment, Germany claims that the pension subsidy would not provide any financial advantage because it relieved Deutsche Post from excess social costs.

- (261) In order to ascertain whether the pension subsidy has provided a selective financial advantage, it needs to be determined whether it allowed Deutsche Post to avoid costs that would normally have had to be borne by the company and have thus prevented market forces from producing their normal effect ⁽¹⁾.

- (262) The Commission cannot accept Germany's claim based on the Combus case-law: It must be borne in mind that the Combus ruling has not been confirmed by the Court of Justice. Several of the Court of Justice's rulings contradict the theory that compensation for a structural disadvantage exempts a measure from being qualified as aid. In that regard, the Court of Justice has constantly held that the existence of aid is to be assessed in relation to the effects and not in relation to the causes or objectives of state intervention ⁽²⁾. The Court has also held that the concept of aid includes advantages granted by public authorities which, in various forms, reduce the charges which are normally included in the budget of an undertaking ⁽³⁾. The Court of Justice has also clearly stated that the costs linked to remuneration of employees naturally place a burden on the budgets of undertakings, irrespective of whether or not those costs stem from legal obligations or collective agreements ⁽⁴⁾. In that context, the Court of Justice has considered that the fact that State measures aim to compensate for additional costs cannot constitute grounds for disqualifying them from the definition of aid ⁽⁵⁾.

- (263) The Commission takes the view that the liabilities a company bears under employment legislation or collective agreements with trade unions, such as pension costs, are part of the normal costs of a business which a firm has to meet from its own resources ⁽⁶⁾. Those costs are inherent to the economic activity of the undertaking ⁽⁷⁾. It does not matter in that regard whether the undertaking bears the pension costs by directly financing the pensions of its former staff (as is

⁽¹⁾ Case C-301/87 *France v Commission* [1990] ECR I-307, paragraph 41.

⁽²⁾ Case 173/73 *Italy v Commission* [1974] ECR 709, paragraph 13; Case 310/85 *Deufil v Commission* [1987] ECR 901, paragraph 8; Case C-241/94 *France v Commission* ECR I-4551, paragraph 20.

⁽³⁾ C-387/92 *Banco Exterior* [1994] ECR I-877, paragraph 13; aforementioned judgment in Case C-241/94, paragraph 34.

⁽⁴⁾ Case C-5/01 *Belgium v Commission* [2002] ECR I-1191, paragraph 39.

⁽⁵⁾ Case 30/59 *Gezamenlijke Steenkolenmijnen in Limburg v High Authority* [1961] ECR 3, paragraphs 29 and 30; aforementioned judgment in Case C-173/73, paragraphs 12 and 13; aforementioned judgment in Case C-241/94, paragraphs 29 and 35; Case C-251/97 *France v Commission* [1999] ECR I-6639, paragraphs 40, 46 and 47; and Joined Cases C-71/09 P, C-73/09 P and C-76/09 P *Comitato Venezia vuole vivere v Commission* [2011] ECR I-0000, paragraphs 90 to 96.

⁽⁶⁾ La-Poste decision, recital 141, and Community guidelines on State aid for rescuing and restructuring firms in difficulty (OJ C 244, 1.10.2004, p. 2), recital 63.

⁽⁷⁾ Case T-20/03 *Kahla v Commission* [2008] ECR II-2305, paragraphs 194 to 197.

the case for the civil servants employed by Deutsche Post) or by paying a contribution to the private employees' pension insurance, which in turn uses the collected contributions to finance the pensions of all private employees. The decisive element is that, in one way or another, undertakings bear the full costs for pensions.

(264) In addition, the Commission notes that since its establishment in 1950, Deutsche Bundespost had the legal form of a *Sondervermoegen*. A *Sondervermoegen*, while not enjoying independent legal personality, has to establish its own budget and its own accounting system (§ 3 PostVwG 1953 and § 48 HGrG⁽¹⁾). According to the legal rules applicable to the budgets of public entities, the budget has to contain the costs for personnel, which include the costs for pensions of retired civil servants formerly employed by the public entity (§ 10 HGrG). In consequence, since 1950, Deutsche Post has financed those costs from its revenues. § 15 PostVwG 1953 explicitly prohibits any subsidy from the federal budget to Deutsche Bundespost. That rule has been taken over in § 37(1) PostVerfG 1989.

(265) The PostVerfG 1989 restates that obligation in its chapter on personnel. Deutsche Post was required, pursuant to Article 54(2) PostVerfG 1989, to finance out of its own resources all costs, including the pensions of its civil servants.

(266) After the second postal reform in 1995, Deutsche Post continued to assume the responsibility to finance all pecuniary claims of civil servants under the terms of Article 2(3) PostPersRG 1994 but was partly relieved from the payment of the civil servants' pension costs. Pursuant to Article 16(1) PostPersRG 1994, Deutsche Post paid for the years 1995 to 1999 a yearly lump sum of EUR 2 045 million to the Pension fund. Pursuant to Article 16(2) PostPersRG 1994, the annual lump-sum payments were replaced as of 2000 by a contribution which is calculated as 33 % of the salary mass of the civil servants. Article 16(2) PostPersRG 1994 furthermore sets out that the remainder of the pension costs was to be borne by the Federal Budget from 1995 onwards. Figure 1 shows the annual payments from the Federal Budget for each year since 1995, starting with EUR 151 million in 1995.

(267) It follows that the arguments raised by Germany aiming at demonstrating that DPAG supported pension costs higher than those of its private competitors are irrelevant for the purpose of finding whether the pension subsidy

constitutes a State aid, but will be assessed in the context of the analysis of the compatibility of that measure.

(268) In particular, Germany has argued that in order to identify an advantage in favour of Deutsche Post deriving from the pension subsidy, the contribution made by Deutsche Post to the pension fund should be compared to private employers' share of the pension contributions excluding the employees' share. That argument relates to the compatibility of the measure, but for the sake of completeness the Commission will note, on the one hand, that the employer has the obligation to pay the total contribution rate to the social insurances on behalf of the employee and out of the employee's gross salary. On the other hand, and more fundamentally, when a Member State relieves the employees of a certain undertaking from a burden otherwise due, it translates into an advantage for the employer, because such a measure will reduce the difference between the gross salary and the net salary. It will make it possible for the employer to hire or retain employees by paying a lower gross salary. Therefore, the advantages concerning the employee's share of the social contribution also constitute an advantage for the employer.

(269) Germany has also argued that a financial advantage for Deutsche Post from the compensation of its excess social costs would only exist if the granted compensation was higher than the total excess social costs that Deutsche Post has had to incur for the civil servants working in the price regulated and in the non-price regulated sector. The Commission recalls that the compensatory nature of a measure does not rule out its qualification as State aid and further makes reference to recitals 262.

(270) Moreover, Germany maintains that the civil servants' pension rights have always been a genuine liability of the federal government. Consequently, as the 1995 pension reform did not change the federal government's liability towards the civil servants, the pension subsidy does not provide any financial advantage to Deutsche Post.

(271) It is not disputed that the federal government was the ultimate guarantor of civil servants' pensions before and after 1995, even if the Commission observes in that regard that § 3 PostVwG 1953 and § 2 PostVerfG 1989 clearly state that the only the *Sondervermoegen*, and not the Federal State, are liable for the debts of the *Sondervermoegen*. However, until 1995, pursuant to the applicable postal and general legislation, the pension payments were included in the budget of the *Sondervermoegen* Deutsche Bundespost. Those payments had to be covered in their entirety by the revenues realised by the *Sondervermoegen*. For the State aid assessment, who is the ultimate guarantor of the civil servants' pensions is not decisive. The key question is who had, pursuant to the applicable legislation, the obligation to finance them in the ordinary course of events. In that regard, the

⁽¹⁾ Haushaltsgrundsatzgesetz vom 19. August 1969 (BGBl. I S. 1273), das zuletzt durch Artikel 1 des Gesetzes vom 27. Mai 2010 (BGBl. I S. 671) geändert worden ist

PostVwG 1953, the HGrG and the PostVerfG 1989 establish clearly that the obligation lies in its entirety with Deutsche Post.

(272) Furthermore, the financing of pension costs is a normal operating cost for any undertaking, public or private, be it incorporated or not. Both between Member States and within Member States, a broad variety of financing mechanisms for pensions has developed. Often, different systems apply depending on when a person has been hired. Therefore, Deutsche Post has to carry pension costs for the people it employs, including its civil servants, in the same way as any other undertaking. The fact that the way of financing the pensions of civil servants is different from the way of financing the pensions of private employees has no impact on the obligation of Deutsche Post to include the financing of their pension costs in its normal operating expenditures. Accepting the argument of Germany would be tantamount to saying that the State could relieve public undertakings from a major cost item linked to their ordinary operations.

(273) Finally, when Germany puts forward that Deutsche Post never has had enough own resources to finance the civil servants' pension liabilities, that argument overlooks the fact that the assessment of a financial advantage is independent of the economic capabilities of an undertaking.

(274) As the 1995 pension reform relieved Deutsche Post partially from the obligation to finance the pension costs of its civil servants, the pension subsidy has provided a financial advantage to Deutsche Post.

VII.1.2. *Distortion of competition and affectation of trade*

(275) When aid granted by a Member State strengthens the position of an undertaking compared with other undertakings competing in intra-Union trade, the latter must be regarded as affected by that aid. In accordance with settled case-law⁽¹⁾, for a measure to distort competition and affect trade between Member States it is sufficient that the recipient of the aid competes with other undertakings on markets open to competition.

(276) In Germany, the markets for parcels, newspapers and periodicals have never been closed to competition. On those markets, POSTDIENST has always been in competition with other companies, including undertakings from other Member States (such as UPS, FedEx, TNT Express, GLS, or DPD). From 1998 to 2007, DPAG gradually lost its exclusive right for letters. As the market opened up for competition, competitors also entered that market. Therefore, the aid affects trade between Member States and is liable to distort competition.

(277) Furthermore, the Commission observes in that regard that Deutsche Post and its holding company DPWN started in 1997 acquiring parcel operators in European and international markets: In 1999, DPWN was already market leader in the European express and parcel markets with annual revenues of about EUR 4,600 million. With the acquisition of DHL in 1998, DPWN entered into the Asian and North-American markets. Further acquisition of logistic companies (e.g. Danzas, Nedlloyd, ASG, Air Express International) turned DPWN into one of the world's major providers of air cargo, sea freight, and global logistic services. Furthermore, DPWN became also active in mail markets outside Germany (e.g. acquisition of Unipost in Spain and Williams Lee in the United Kingdom). Between 1998 and 2007, DPWN acquired, in total, companies worth about EUR 21 000 million⁽²⁾.

(278) The Commission finds therefore that the pension subsidy constitutes aid within the meaning of Article 107(1) TFEU.

VII.2. **Assessment of existing aid pursuant to Article 108(1) TFEU**

(279) Germany is of the opinion that if the pension subsidy was to be considered as State aid it should be qualified as existing aid pursuant to Article 1(b)(i) of Regulation (EC) No 659/1999. It argues that the State has been the ultimate debtor and the party liable to finance the civil servants' pensions since the entry into force of the relevant provisions of German Basic Law in 1953. It maintains that the creation of the Pension fund did not change that obligation.

(280) According to Article 1(d)(i) of Regulation (EC) No 659/1999, the concept of new aid includes all aid which existed prior to the entry into force of the Treaty in the respective Member States, that is to say, aid schemes and individual aid which were put into effect before, and are still applicable after, the entry into force of the Treaty.

(281) Until 1995, pursuant to the applicable postal and general legislation, pension payments were included in the budget of the Sondervermögen Deutsche Bundespost and had to be covered in their entirety by the revenues realised by the Sondervermögen (see detailed assessment of that legislation above in recitals 262 and 263). Before the second postal reform in 1995, Deutsche Post was therefore required to finance out of its own resources the pensions of its civil servants and did not receive any aid that had the objective to relieve Deutsche Post from pension costs.

⁽¹⁾ Case T-214/95 *Het Vlaamse Gewest v Commission* [1998] ECR II-717.

⁽²⁾ See also WIK study, Section 2.

(282) The creation of DPAG and the Postal pension fund in 1995 led to a complete overhaul of pension funding for civil servants. After that second postal reform in 1995, Deutsche Post took over the principal obligation to finance all pecuniary claims of civil servants under the terms of Article 2(3) PostPersRG 1994 but was partly relieved from the payment of the civil servants' pension costs. Pursuant to Article 16(1) and (2) PostPersRG 1994, Deutsche Post was no longer liable to finance the pension costs beyond the lump sum payments (period 1995-1999) or the defined contributions (as of 2000). The remaining deficit has been further on covered by the pension subsidy.

(283) Therefore, the pension subsidy constitutes new aid because it was set up in 1995.

(284) With regard to Germany's reference to the Commission statement in Case T-266/02, the Commission first of all points out that in paragraph 54 of the judgment the General Court reports the position of Germany (and not, as alleged by Germany, of the Commission). Paragraph 54 of the judgment illustrates, that even in the view of Germany, the 2002 Decision did not assess the pension subsidies. Further on, paragraph 61 of the judgment reports the position of the Commission:

An erster Stelle entgegnet die Kommission, dass sie nur den Transferzahlungen der DB-Telekom Bedeutung für die angefochtene Entscheidung beigemessen habe.

(285) The judgment does therefore not support the view of Germany that the declaration of the Commission's agent would have implicitly authorised the pension subsidy. In any event, it is obvious that such a declaration could not have that effect.

(286) Moreover, in Case T-421/07 ⁽¹⁾ the General Court found that the 1999 Opening decision concerned the pension subsidy as well and that the procedure concerning that measure was not closed with the 2002 Decision.

(287) In conclusion, since the Commission has never taken a decision declaring that the pension subsidy was not an aid or was a compatible aid, the Commission concludes that the pension subsidy constitutes a new aid measure.

VII.3. Assessment of compatibility pursuant to Article 107(3)(c) TFEU

(288) The derogations provided for in Articles 107(2) TFEU and 107(3)(a)(b) TFEU do clearly not apply.

⁽¹⁾ Case T-421/07 *Deutsche Post v Commission* [2011] ECR II-0000, paragraphs 52 and 75.

(289) In the 2007 Extension decision, the Commission envisaged the possibility that the pension subsidy might be at least partly compatible with the internal market as public service compensation on the basis of Article 106(2) TFEU. Germany, in its reply to the 2007 extension decision, insisted that the pension subsidy, if it was aid, had to be assessed on the basis of Article 107(3)(c) TFEU, and not on the basis of Article 106(2) TFEU. In the 2011 extension decision, the Commission further described a method for assessing the compatibility of the pension subsidy on the basis of Article 107(3)(c) TFEU and Germany provided comments in that respect.

(290) According to the case-law of the Court ⁽²⁾, it is up to the Member State to invoke possible grounds of compatibility and to demonstrate that the conditions for such compatibility are met. It follows *a fortiori* from that case-law that the Commission is under no obligation to assess the compatibility of the pension subsidy under Article 106(2) TFEU in the present case, where the Member State and the beneficiary explicitly reject a possible compatibility assessment under that provision.

(291) The Commission therefore will assess whether the pension subsidy is a compatible aid pursuant to Article 107(3)(c) TFEU. Pursuant to that provision, aid to facilitate the development of certain economic activities or of certain economic areas may be declared compatible with the internal market where such aid does not adversely affect trading conditions to an extent contrary to the common interest.

(292) According to the case-law, the Commission may declare State aid compatible with the internal market if the aid contributes to the attainment of an objective of common interest ⁽³⁾, is necessary for the attainment of that objective ⁽⁴⁾, and does not adversely affect trading conditions to an extent contrary to the common interest (proportionality).

VII.3.1. Market opening of the postal sector as an objective of common interest

(293) Postal services contribute to social, economic and territorial cohesion in the Union. The opening of postal services to competition, which has started at EU level in 1998, has brought about increased quality, more

⁽²⁾ Case C-364/90 *Italy v Commission*, paragraph 20.

⁽³⁾ Case T-162/06 *Kronoply v Commission* [2009] ECR II-1, especially paragraphs 65, 66, 74 and 75.

⁽⁴⁾ Case T-187/99 *Agrana Zucker und Stärke v Commission* [2001] ECR II-1587, paragraph 74; Case T-126/99 *Graphischer Maschinenbau v Commission* [2002] ECR II-2427, paragraphs 41 to 43; Case C-390/06 *Nuova Agricast* [2008] ECR I-2577, paragraphs 68 and 69.

efficiency and better responsiveness to users ⁽¹⁾. Market opening has allowed the establishment of an internal market for postal services. It therefore contributes to the objective of the establishment of the internal market set out in Article 3(3) TEU.

- (294) Deutsche Post has not recruited any civil servants since its incorporation as a joint stock company in 1995. The liabilities for social benefits for civil servants therefore have their origin in the period prior to the opening of the postal market to competition. They are comparable to so-called stranded costs. Such costs come from commitments entered into prior to the beginning of market opening which can no longer be honoured under the same conditions in a competitive market environment because the historic operator is no longer able to pass on the corresponding costs to consumers. If Deutsche Post had not at least partially been relieved from those 'legacy' costs, it would have had to exit the market.
- (295) The Commission has recognised that the gradual transition from a situation of largely restricted competition to one of genuine competition at Union level must take place under acceptable economic conditions ⁽²⁾. Therefore, it has accepted in a number of decisions that Member States grant State aid to relief the historic operator of a part of its 'legacy' pension liabilities ⁽³⁾.

VII.3.2. *Necessity and proportionality of the pension subsidy*

- (296) The Commission has considered in its decisional practice that pension relief has to be limited to what is necessary to equalise the rate of social contributions that the historic operator bears as a cost with the rate of social contributions born by its competitors ⁽⁴⁾.

⁽¹⁾ See Directive 2008/6/EC of the European Parliament and of the Council of 20 February 2008 amending Directive 97/67/EC with regard to the full accomplishment of the internal market of Community postal services (OJ L 52, 27.2.2008, p. 3), recitals 9 ff.

⁽²⁾ See Commission Communication relating to the methodology for analysing State aid linked to stranded costs, Commission letter SG (2001) D/290869 of 6.8.2001.

⁽³⁾ Decision 2005/145/EC on the State aid granted by France to EDF and the electricity and gas industries; Commission Decision 2008/208/EC on the State aid implemented by France in connection with the reform of the arrangements for financing the retirement pensions of civil servants working for La Poste (OJ L 65, 8.3.2008, p. 11); Commission Decision 2009/944/EC concerning the reform of the method by which the RATP pension scheme is financed (State aid C 42/07 (ex N 428/06)) which France is planning to implement in respect of RATP (OJ L 327, 12.12.2009, p. 6); Commission Decision of 20 December 2011 in Case C 25/2008 concerning the Réforme du mode de financement des retraites des fonctionnaires de l'Etat rattachés à France Télécom, not yet published.

⁽⁴⁾ Commission Decision 2008/208/EC on the State aid implemented by France in connection with the reform of the arrangements for financing the retirement pensions of civil servants working for La Poste; Commission Decision 2009/944/EC concerning the reform of the method by which the RATP pension scheme is financed (State aid C 42/07 (ex N 428/06)) which France is planning to implement in respect of RATP; Commission Decision of 20 December 2011 in Case C 25/2008 concerning the Réforme du mode de financement des retraites des fonctionnaires de l'Etat rattachés à France Télécom, not yet published.

- (297) In the present case, the Commission recognises that in the absence of any State intervention to relieve Deutsche Post of part of the pension liability for its civil servants, Deutsche Post would not be able to compete on its merits with its competitors. The social charges inherited from the past which are not supported by its competitors would have forced it out of the competitive parts of the market for postal service.

- (298) In the La Poste Decision, the Commission for the first time assessed the necessity and proportionality of an aid measure that provided relief from pension costs for civil servants which were hired before market opening. In that decision, the Commission assessed whether the pension subsidy equalises the level of compulsory social contributions between the historic operator and other undertakings in the mail/parcel sector ⁽⁵⁾.

- (299) The Commission will apply that same approach in this Decision. The Commission will carry out its analysis in three steps:

1. In a first step, the Commission establishes the level of wage-based social security contributions of other undertakings in the mail/parcel sector.
2. Then it has to establish the level of wage-based social security contributions which Deutsche Post bears for its civil servants.
3. Finally, it has to verify whether or not the two levels are equal.

VII.3.2.1. *Level of wage-based social security contributions of other undertakings in the mail/parcel sector*

- (300) The level of wage-based social security contributions is determined by two factors: the rate and the wage base to which it is applied.

(a) Calculation of the benchmark rate

- (301) Private competitors have to compulsorily finance both the employer's share as well as the employee's share out of their revenues. As shown in Figure 2, that the total contribution rate has since 1995 been in the range of 38 % to 42 % of the private employee's gross wage (= net wage + employee's share). The employer's and employee's shares of the social contribution rate have been each in the range of 19 % to 21 % of the gross wage (see the Annex for a more detailed time series).

⁽⁵⁾ La Poste Decision, recital 166.

- (302) Unlike private employees' share of the social contributions, the civil servants' share only includes 30 % to 50 % of their health care expenses but not any further contributions to their pension, health and nursing care expenses. Deutsche Post's contribution goes therefore beyond the private employer's share and includes the entire pension cost as well as the remaining health and nursing care expenses.
- (303) To determine an equivalent benchmark rate for Deutsche Post, account therefore has to be taken of the fact the civil servants' contribution is below the private employees' contribution.
- (304) The civil servants' contribution of 30 % to 50 % to their health and nursing care expenses can be assumed to largely corresponds in its economic effect to the private employees' contribution to the statutory health and nursing care insurances (which is e.g. in 2006 equal to 8,50 % of the private employees' gross wage).
- (305) As civil servants do not pay any contributions to statutory pension and unemployment insurances, Deutsche Post has to assume their equivalent, in order to effectively bear a level of social contributions equivalent to the compulsory social contributions that a private undertaking has to finance out of its revenues.
- (306) The benchmark rate for Deutsche Post's wage-based social contributions (hereinafter benchmark rate) has therefore to include the total contribution rates (= employer's + employee's share) for the pension and unemployment insurances and the employer's share of the health and nursing insurances, as illustrated in Table:

Figure 7

Determination of benchmark rate for DP's social contribution

compulsory social insurance contributions with private competitor		Determination of social insurance benchmark for Deutsche Post	
Employer	Employer's share of pension insurance	Employer's share of pension insurance	Deutsche Post
	Employer's share of unemployment insurance	Employer's share of unemployment insurance	
	Employer's share of health insurance	Employer's share of health insurance	
	Employer's share of nursing insurance	Employer's share of nursing insurance	
Arbeitgeber	Employee's share of pension insurance	Employee's share of pension insurance	Civil servants
	Employee's share of unemployment insurance	Employee's share of unemployment insurance	
	Employee's share of health insurance	Civil servants pay themselves share of health care expenses(assumed at 50 %)	
	Employee's share of nursing insurance		

- (307) As shown in Figure 8, the benchmark rate has been between 30 % and 34,1 % of the private employees' gross wage in the period 2003-2010 ⁽¹⁾.
- (308) Germany objects that any benchmark above the employer's share of the social contribution rate would put Deutsche Post at a disadvantage compared to competitors who are only liable to pay the employer's share. However, as the following simplified example shows (based on 2006 contribution rates), Deutsche Post would clearly be advantaged compared to private competitors if the benchmark rate were only equal to the employer's share of social contributions:

1. Deutsche Post and a private competitor pay the same net wage of EUR 79,5 to a civil servant and a private employee respectively.

⁽¹⁾ For a detailed presentation see the Annex.

2. The employer's and employee's share of the social contribution rate both amount to 20,5 % of the private employee's gross wage. Adding the net wage of EUR 79,5 to the employee's share of EUR 20,5 gives the gross wage of EUR 100. The total social contributions are therefore equal to EUR 41 (= 41 % of private employee's gross wage).
3. By contrast, Germany considers that Deutsche Post should only assume the employer's share of the social contributions in addition to the civil servant's contribution to the health care expenses (assumed to be equal to the private employee's contribution of EUR 7,5 to the health and nursing insurances).
4. Germany calculates the employer's share based on the incurred civil servant wage of EUR 87 (e.g. the sum of the net wage of EUR 79,5 and the civil servant's contribution to health care expenses of EUR 7,5). The social costs are therefore the sum of EUR 17,8 (employer's share of 20,5 % of incurred civil servant wage of EUR 87) and the civil servants' contribution to health care expenses of EUR 7,5.
5. Based on Germany's calculations, the civil servant's social costs would amount to only EUR 25,3 compared to EUR 41 for the private employee.
- (309) Although Deutsche Post and the private competitor pay the same net wage, Deutsche Post would have to bear social costs that are only about 62 % of the compulsory social contributions for a private employee if the employee's share of the social contributions is included in the benchmark.
- (310) Furthermore, it must be noted that since 1999 the employer's share of the social contribution rate (which has been in the range of 19 % to 21 % since 1995) has also been significantly below the contribution rate of 33 % of the incurred civil servant wages that the 1995 Pension law defined as the benchmark for Deutsche Post's contribution to the Pension fund. The German legislator did therefore not intend that Deutsche Post should only finance the employer's share but required Deutsche Post to pay a significantly higher contribution to the civil servants' pension costs and to assume as well all remaining social cost (e.g. contribution to civil servants' health care expenses).
- (311) The Commission rejects therefore the use of the employer's share of the social contribution rate as benchmark rate because civil servants — unlike private employees — are not obliged to contribute to the pension and unemployment insurances. Therefore, those contributions must necessarily be included into the benchmark rate to ensure that both Deutsche Post and private competitors bear, directly or indirectly, equivalent levels of contributions.
- (b) *Calculation of the wage base*
- (312) As the level of social contributions that Deutsche Post has to bear for its civil servants should be aligned to the level of compulsory social contributions that private competitors have to carry, it is important that Deutsche Post is not only subject to an equivalent rate but also that the rate is applied to an equivalent wage base. As shown in the example above, calculating the employer's share of 20,5 % based on the incurred civil servant wages leads to a contribution of EUR 17,8 while the private competitor has to assume EUR 20,5 (e.g. 20,5 % based on the gross wage of EUR 100).
- (313) It is therefore necessary to construct a gross wage for the civil servant (hereinafter referred to as civil servants' gross wage) that provides an equivalent wage base to the private employees' gross wage. It is assumed that the civil servants' contribution to health expenses equals the private employees' contribution to the health and nursing insurances. Therefore, the remaining difference between gross and incurred wage amounts to the employee's share of the contributions to the pension and unemployment insurances. The following formula converts the incurred wage into a gross wage that is equivalent to the private employees' gross wage:

Table 6

Calculation of civil servants' gross wage (based on 2006 contribution rates)

Civil servants' gross wage =
$= \text{incurred wage} * \frac{100}{100 - (\text{employee share of unemployment and pension insurance})} =$
$= \text{incurred wage} * \frac{100}{100 - (3,25 + 9,75)} = \text{incurred wage} * 1,15$

(314) Taking e.g. the 2006 contribution rates, the civil servants' gross wage is 15 % higher than the incurred civil servant wage. That percentage quantifies therefore the error that would be made if the incurred wage were used instead of the gross wage as a base to calculate Deutsche Post's compulsory social contributions compared to private competitors' compulsory social contributions. The example given at recital 308 illustrates that point as the employer's share of EUR 20,5, which is correctly based on the gross wage, is 15 % higher than an employer's share of EUR 17,8 which would result on the incorrect basis of the incurred wage.

(315) To conclude, the Commission finds that the benchmark rate for Deutsche Post's social contributions must be based on the employers' and the employees' contribution to pension insurance and unemployment insurance and the employers' contribution to health and nursing care. The benchmark rate has to be applied to the civil servants' gross wage (as defined in Table 6).

VII.3.2.2. Establishment of the wage-based social security contributions borne by Deutsche Post for its civil servants

(316) Pursuant to Article 16(1) PostPersRG 1994, Deutsche Post had to pay a yearly contribution of EUR 2 045 million to the Pension fund for the period 1995-1999 which totals EUR 10 225 million. Pursuant to § 16(2) PostPersRG 1994, Deutsche Post pays as of the year 2000 a rate of 33 %. That rate is applied to the incurred wage for civil servants.

(317) However, the assessment of the necessity and proportionality of the aid also has to take into consideration the fact that from an economic point of view Deutsche Post does not have to bear the entire contribution of EUR 2 045 million corresponding to 33 % of the incurred wages to the Pension Fund. In that regard, the

Commission considers that it is necessary to distinguish between the period from 1995 to 2002 and from 2003 until today.

(a) Deutsche Post's contribution in the period 1995-2002

(318) Germany claims that, notably with regard to the annual lump-sum payments to the Pension fund of EUR 2 045 million in the period 1995 to 1999, Deutsche Post paid social contributions above the compulsory social contributions that competitors had to pay. Therefore, for the period up to 1999 but also over the entire period of the investigation, Deutsche Post would have then paid at least the same if not higher contributions than those private companies had to face. Accordingly, it would not be possible to maintain that the pension subsidy has placed Deutsche Post in a more favourable position than its competitors. The Commission has to reject argument because it does not take into account the specific regulatory arrangements decided by the German authorities with respect to the coverage of costs of non-price regulated services.

(319) The Commission finds in this decision that Deutsche Post has been placed at an advantageous positions vis-à-vis competitors in the non-price regulated markets because a share of the incurred social costs for the civil servants working in those services has not been borne by those services themselves. Instead, that share of the incurred social costs has been put on the account of the price-regulated services whose revenues have been maintained at a sufficiently high level to allow the financing of those costs in addition to the incurred costs for the price-regulated services.

(320) In fact, Deutsche Post's management accounts show since 1995 that Deutsche Post has allocated to the non-price regulated services only an amount of social contributions based on the regulatory contribution rate. Furthermore, the 2002 and subsequent regulatory accounts confirm that practice. Therefore, the economic advantage for the non-price regulated services has thus existed before and after 1999 because those services have been unambiguously relieved from incurred costs.

- (321) To the contrary, Germany's claim that Deutsche Post has suffered from a comparative disadvantage in the price-regulated markets because it had to finance higher social costs due to the lump-sum payments in the period 1995 to 1999 is not supported by the facts. First, Deutsche Post still benefited from the exclusive right for most of its regulated services. Second, and more importantly, the prices for the services subject to the exclusive right were set at a sufficiently high level to cover those costs from the captive consumers.
- (322) For the period until 1995, price regulation based on the Postdienstverordnung ⁽¹⁾ of 24 June 1991 was applicable. It set out that prices for the monopoly were to be balanced. In the administrative practice, this included pension costs. For the period 1995-1997, price regulation was based on the Gesetz über die Regulierung der Telekommunikation und des Postwesens of 14. September 1994 (BGBl. I S. 2325, 2371). Article 4 in conjunction with Article 2 and Article 7 thereof allowed the price-regulated revenues to cover not only the costs incurred by the regulated services, including the contributions to the pension fund, but also to finance costs of non-price regulated services.
- (323) As Deutsche Post's annual accounts show, at the time of the 1995 pension reform, the level of the regulated prices was kept at the pre-existing level which had been in place when Deutsche Post had still to assume the total pension costs. While the pension costs were later either capped (for the period 1995-1999) at the level of the lump sum or fixed (as of 2000) at 33 % of the salary mass of the civil servants, which decreased year by year, the regulated prices were not correspondingly decreased to cover only social contributions in line with the compulsory social contributions that competitors pay. As the defined contributions to the Pension fund until 1999 (EUR 2 045 million per year) remained about equal to the pension costs in 1994, the economic situation did not change for Deutsche Post with regard to the coverage of pension costs from the price-regulated services. Both the level of Deutsche Post's revenues as well as its contribution to the Pension fund remained in balance.
- (324) The PostG 1997 clearly set out that the regulated prices should not only cover the 'efficient' costs but also burdens from e.g. civil servants' social costs. The PostG 1997 recognised therefore explicitly that the price-regulated revenues had to be set such that the coverage of the entire lump-sum payments was ensured. As the German legislator appeared to consider that the current level of regulated prices fulfilled the requirements of PostG 1997, he decided that the prices were to be kept at the existing level of 1997 until 1999. The Minister of Economics and Technology later decided as well on 27 March 2000 that the prices which were approved on 1 September 1997 should remain in force until 31 December 2002.
- (325) The regulated prices were therefore kept at the historically high level and were not reduced to a level such that Deutsche Post would have suffered from a comparative disadvantage.
- (326) In fact, Deutsche Post has been placed in an even better position compared to its competitors since 2000, because the defined contributions to the Pension fund were reduced to 33 % of the incurred civil servant wages. That level gives in absolute terms a reduction in costs, which fell from EUR 2 045 million to EUR 735 million (even further in the subsequent years, as the number of civil servants was shrinking and that phenomenon was only off-set in part by the increase in wages). As the regulated prices were kept at the historically high level, Deutsche Post was allowed to earn since 2000 significantly positive profits from the price-regulated services.
- (327) Reviewing Deutsche Post's profitability from the price-regulated services over the whole period 1995-2002, the WIK study comes to the conclusion that Deutsche Post has e.g. until 1999 not suffered from losses from the price-regulated services despite the lump-sum payments to the Pension fund. Since 2000, the WIK study even shows significantly positive returns.
- (328) The Commission has therefore to reject Germany's claim that Deutsche Post was placed in a worse position than competitors with regard to the coverage of social contributions in the price-regulated services, and that the pension subsidy was necessary and proportionate before 2002.
- (329) Notwithstanding the above, the Commission has to admit that in this case there is insufficient evidence for it to quantify exactly the level of wage-based social security contributions that Deutsche Post paid in the years 1995 to 2002. It considers that such a quantification could not properly be based on *ex-post* de facto findings that a certain proportion of social costs from

⁽¹⁾ Bundesgesetzblatt 1994 Teil I Seite 336.

non-price regulated services was shifted to be financed out of price regulated revenues and that Deutsche Post was not disadvantaged in overall terms under the pension fund arrangements because the price regulated revenues were de facto set at a level which was sufficient to cover its contributions to the pension fund including the shifted burdens. It is also not possible to devise a method as to how the Member State could calculate such a level for that period. The Commission finds, after an assessment of legal basis for the regulated prices in force during the period 1995-2002, that it cannot be inferred with certainty from the legislative provisions how the competent authorities decided the composition of the regulated prices on an *ex-ante* basis. In particular, it cannot be proven in this case with certainty that when the competent authorities fixed the regulated prices at such a level that ultimately covered the shifted costs de facto, they unequivocally earmarked in their decisions a share of the regulated price to precisely cover the amount of claimed burdens from the non-price regulated services.

(330) Unlike the 2002, 2007 and 2011 price cap decisions where those burdens are explicitly acknowledged and approved by the Postal regulator, that earlier de facto coverage could have been due to considerations of the competent pricing authorities as regards the evolution of other cost components or the development of other business variables. That earlier de facto coverage is therefore in this case not sufficient to quantify exactly and with certainty to which extent the competent authorities have increased the regulated price to take account of the claimed burdens for the non-price regulated services.

(331) By contrast, for the period since 1 January 2003, it can be clearly established from the 2002, 2007 and 2011 Price cap decisions how the Postal regulator set the composition of the regulated prices. It is certain that they were unambiguously set at a higher level to cover the burdens of the non-price regulated services out of the price-regulated revenues.

(b) *Deutsche Post's contribution since 2003*

(332) The PostG 1997 allows Deutsche Post to request that, when the regulator is setting the allowed level of revenues from the exclusive right and the regulated services, the regulator includes into the costs to be recovered from consumers, inter alia, the 'excess social burden' as well as the costs for the efficient provision of the universal service. That method was applied by the

Postal regulator for the first time in the 2002 price cap decision. The Postal regulator also approved the burden on excess social contribution in the 2007 and 2011 Price cap decisions. The fact that only a share of the price-regulated services is subject to *ex-ante* price control does not alter the Commission's assessment. Deutsche Post was still authorised to recover the entire burden by making use of its dominant position. In that regard, it does not make a difference whether the regulator exercises control *ex ante* or *ex post*.

(333) The Postal regulator has consistently approved Deutsche Post's claim that the burden #2 on incurred social costs in excess of the regulatory contribution rate should be refinanced by the price-regulated revenues. Thus for 2001, to determine the excess social costs (burden #2), the incurred social contributions of Deutsche Post for its civil servants of [40 to 45 %] of the incurred wages ⁽¹⁾ were compared to the regulatory benchmark. That benchmark consists of the employers' share of social contribution, accident insurance and supplementary pension insurance, which together total [20 to 25 %] of the incurred wages.

(334) That difference between the two rates of [15 to 20 %] of the incurred civil servant wage was included in burden #2 and covered by the price-regulated revenues (see Table 2).

(335) From an economic point of view, Deutsche Post therefore does not bear a rate of 33 % of the incurred wages as wage-based social security contributions, but only a rate of [20 to 25 %]. Since 2003, the remainder has been borne by captive consumers, who pay tariffs calculated to cover Deutsche Post's social costs for the services for which Deutsche Post had an exclusive right until 2007, respectively for the universal services for which Deutsche Post enjoys a dominant position.

(336) In order to compare the rate applied to the incurred wages to the level of social security contributions of a competitor, it is then still necessary to convert the incurred wage into the gross wage of the civil servants.

⁽¹⁾ E.g. the sum of the 33 % contribution to the pension fund and [7 to 12 %] expenditures for health and nursing care in percentage of the incurred civil servant wage.

(337) The incurred wage corresponds to between [85 % and 90 %] of the civil servants' gross wage ⁽¹⁾. On that basis, [20 to 25 %] of incurred wages corresponds to [17,5 to 22,5 %] of the gross wage.

(338) As a result of the limitation of Deutsche Post's contribution to the Pension Fund at 33 % and the approval, by the Postal regulator, of burden #2, Deutsche Post thus pays a level of wage-based social security contributions of [17,5 to 22,5 %] of the gross wage of the civil servants.

VII.3.2.3. Comparison

(a) The period 1995-2002

(339) In the period 1995-2002 the revenues from the tariffs applied by Deutsche Post in the reserved sector considerably reduced the actual economic burden of the contribution made by it to cover its social costs. However, in the absence of an earmarked element of the tariff, the Commission can only establish that the level of Deutsche Post's contribution remained below

the benchmark rate. The Commission is unable to calculate the exact difference between those two levels, nor to devise a method that would enable the Member State to do so.

(b) The period since 2003

(340) In order to compare the regulatory contribution rate to the benchmark rate, it must be noted that the regulatory contribution rate is based on the incurred civil servants' wages that are a too low wage base compared to the private employees' gross wage. The regulatory contribution rate needs therefore to be recalculated as a percentage of civil servants' gross wage.

(341) Carrying out the comparison for 2006, the non-price regulated services have effectively carried social contributions of [17,5 to 22,5 %] of the civil servants' gross wage (respectively [20 to 25 %] of the incurred civil servants' wage) compared to the benchmark rate of 33,5 %. In terms of social contribution rates, Deutsche Post has therefore benefited from a comparative advantage of [10 to 15 %] of the civil servants' gross wages in 2006.

Table 7

Comparison of the regulatory contribution rate and the benchmark rate for DP's social contribution in 2006

	Social contribution rate	Regulatory contribution rate	Benchmark rate for DP's social contribution charge
in percentage of	Private employee's gross wage	Civil servant's gross wage	Civil servant's gross wage
Employer's share	20,50 %	17,84 %	20,50 %
Health insurance	6,65 %	5,79 %	6,65 %
Nursing insurance	0,85 %	0,74 %	0,85 %
Unemployment insurance	3,25 %	2,83 %	3,25 %
Pension insurance	9,75 %	8,48 %	9,75 %
Employee's share	20,50 %		
Health insurance	6,65 %		
Nursing insurance	0,85 %		
Unemployment insurance	3,25 %		3,25 %
Pension insurance	9,75 %		9,75 %
Supplementary pension insurance		[0 to 5 %]	
Accident insurance		[0 to 5 %]	
Contribution rate		[17,5 to 22,5 %]	33,50 %

⁽¹⁾ See the Annex for more details.

(342) Table 7 shows that the benchmark level for Deutsche Post amounts to 33,5 % of the civil servants' gross wage and is [10 to 15] percentage points higher than the level which Deutsche Post has *de facto* borne.

(343) The difference of [10 to 15] percentage points for 2006 goes beyond the nominal difference of [8 to 13] % between the benchmark rate of 33,5 % and the regulatory contribution rate of [20 to 25] %. The difference includes a top-up of [2 to 3] percentage points that accounts for fact that the nominal regulatory contribution rate of [20 to 25] % has been inappropriately based on the incurred civil servants' wage and not on the civil servants' gross wage that is equivalent to the private employees' gross wage.

VII.3.2.4. Preliminary conclusion on necessity and proportionality

(344) The pension subsidy, which covers the funding need of the Pension fund that goes beyond the contribution of 33 % of incurred wages of Deutsche Post's civil servants, is neither necessary nor proportionate, for the following reasons:

1. Between 1995 and 2002 Deutsche Post actually bore costs below the benchmark level, but the exact difference cannot be determined.

2. Since 2003 Deutsche Post has on average only borne costs of about [17,5 to 22,5] % of the civil servants' gross compared to the average benchmark rate of 32 % of the civil servants' gross wage; the remainder has been borne by the consumer, because the revenues authorised under the price cap include the burden on excess social costs which cover the remaining [10 to 15 %] of civil servants' gross wage.

(345) The difference in the rates since 2003 comes from two effects:

1. The level of wage-based social security charges which is borne by undertakings in the mail/parcel sector is 41 % of gross wages. In order to compare it to the level that Deutsche Post pays for its civil servants, it is necessary to make a correction taking into account the fact that the civil servants bear 30 % to 50 % of their health and nursing care expenditures. That contribution by the civil servants is equivalent to the employees' share of health and nursing care expenditures of 7,5 % of gross wages.

2. The contribution of Deutsche Post is calculated based on the incurred wage, not on the gross wage of the civil servants. The benchmark rate for Deutsche Post's

civil servants is therefore 33,5 % of gross wages. The relief that goes beyond that level is in principle neither necessary nor proportionate.

(346) For the period 1995-2002 it is impossible to determine the exact part of the relief that goes beyond what can be accepted as necessary and proportionate. Since 2003 that part corresponds to [10 to 15 %] of gross wages.

VII.3.2.5. Impact of the particular competitive and regulatory environment on necessity and proportionality

(347) The assessment of the necessity and the proportionality of the pension subsidy has, however, to take into consideration the particular competitive and regulatory environment.

(348) As explained in Section II.2.1, Deutsche Post enjoyed until 31 December 2007 an exclusive right for certain letter services. It was entrusted by § 52 PostG 1997 until that date with the universal service obligation foreseen in Chapter 2 of Directive 97/67/EC of the European Parliament and of the Council⁽¹⁾ and § 11 PostG 1997. It has since 1 January 2008 continued to assume the universal service obligation on a voluntary basis.

(349) As long as and to the extent that Deutsche Post enjoyed an exclusive right for certain letter services, its competitors could not compete for that part of the postal market. Therefore, the fact that for the civil servants who were in charge of the services falling under the exclusive right the Postal regulator allowed Deutsche Post to fully refinance all incurred social costs beyond the level of wage-based social security contributions of its competitors through increased regulated prices was unlikely to affect trade to an extent contrary to the common interest.

(350) The rationale for the universal service obligation is that in a competitive market, postal operators will not offer certain services in rural and remote areas, or only at prices that are not affordable. Therefore, Article 4 of Directive 97/67/EC obliges Member States to ensure that users enjoy the right to a universal service involving the permanent provision of a postal service of specified quality at all points in their territory at affordable prices for all users.

(351) The German national legislation places in that regard a particular burden on any postal operator which enjoys a dominant position on a market which falls within the

⁽¹⁾ OJ L 15, 21.1.1998, p. 14.

remit of the universal services. Pursuant to § 2 PDLV ⁽¹⁾, such an operator has to offer its services on the same conditions to all users. Up to now, only Deutsche Post has enjoyed such a dominant position and has been subject to that obligation.

(352) Since its incorporation, Deutsche Post has not received any State aid as compensation for universal service obligations. For the services for which it enjoys a dominant position, the Postal regulator has, however, approved increased regulated prices to finance the costs of ensuring the universal service. When assessing the proportionality and necessity of the pension subsidy, the Commission considers it appropriate to take that fact into account.

(353) The Commission concludes therefore that for the civil servants' social costs that have been incurred for the provision of the price-regulated services, which fall under the universal service obligation and for which Deutsche Post has enjoyed a dominant position, the fact that the Postal regulator has approved a full pass-on of those social costs through higher regulated prices — even if those social costs go beyond the level that is normally assumed by competitors — does not affect trade to an extent contrary to the common interest. That conclusion is based on the particular competitive and regulatory environment in which those services are performed. Therefore, it cannot be extended to cover other sectors.

VII.3.3. Conclusion

(354) It can therefore be concluded that, from 2003 onwards, Deutsche Post has assumed for the civil servants working for its non-price regulated services a level of wage-based social security contributions that has been 11 to 14 percentage points below the level that competitors have paid.

Figure 8

Comparative advantage in social contribution rate with non-price regulated services (contribution rates in percentage of civil servants' gross wage)

[...]

(355) That lower level of contributions is neither necessary nor proportionate to attain the objective of a gradual market opening in postal services. On the markets concerned, Deutsche Post is in fierce competition with other undertakings. The Commission therefore considers that the lower level of contributions affects trade to an extent contrary to the common interest and cannot be declared compatible with the internal market.

(356) The incompatible share of the pension subsidy for the period since 1 January 2003 is calculated as the difference between the benchmark rate and regulatory contribution rate based on the civil servants' gross wage sum in the non-price regulated services according to the formula below:

Table 8

Calculation formula for incompatible aid for period since 1 January 2003

Incompatible aid =	
= (Benchmark rate — regulatory contribution rate)	× Civil servants' gross wage sum in non-price regulated services

(357) Based on the available data, the calculations estimate a cumulated comparative advantage of EUR [500 to 1 000] million for the period 2003-2010 (see annex). The annual amount of the incompatible aid has decreased over time from EUR [...] million in 2003 to EUR [...] million in 2010 due to the shrinking workforce of civil servants.

has effectively been 11 to 14 percentage points lower than the level that private competitors have had to carry. The 2011 Extension decision quantified the resulting annual advantage to be in the range of EUR 100 to 200 million.

(359) In reply to the 2011 Extension decision, Germany raises two main objections:

VII.3.4. Response to the arguments presented by Germany

(358) The 2011 Extension decision expressed doubts about the necessity and proportionality of the pension subsidy because the non-price regulated services benefited from a level of wage-based social security contributions that

1. Germany insists that the benchmark rate can only be based on the employer's share of social contributions, because private undertakings have no legal obligation to pay the employees' contribution. Furthermore, the benchmark rate should take into account the fact that Deutsche Post has always paid higher than 'competitive' wages.

⁽¹⁾ Postdienstleistungsverordnung vom 21. August 2001 (BGBl. I S. 2178).

2. Germany claims that the Commission has failed to establish that the revenues from the price-regulated universal services were sufficient to finance the claimed burdens of excess social costs.

VII.3.4.1. The Commission is right to include the employees' contribution into the benchmark rate and not to adjust the wage level to a 'competitive wage'

(360) Germany argues that any benchmark above the employer's share of the social contribution rate would put Deutsche Post at a disadvantage compared to competitors who are only liable to pay the employer's share.

(361) With regard to that first argument, the Commission observes that civil servants — unlike private employees — are not obliged to contribute to the pension and unemployment insurances. Therefore, those contributions must necessarily be included in the benchmark rate to ensure that both Deutsche Post and private competitors carry, directly or indirectly, equivalent levels of contributions.

(362) Germany furthermore maintains that the benchmark rate is applied neither to the gross wage of the civil servants nor to the incurred wage of the civil servants, but to 'competitive' wages. In the 2002, 2007 and 2011 regulatory accounts, Deutsche Post considers that the 'competitive wage' should be based on the ETV wage or on collective wage agreements for the postal sector from 2003.

(363) In the 2009 regulatory accounts, the 'competitive' wage is defined as the 2007 minimum wage, which is even lower than the ETV wage.

(364) Germany claims that the calculation based on those 'competitive' wages is necessary to place the social costs of Deutsche Post at the same level as those of its competitors.

(365) The Commission cannot accept that argument because the aid must be limited to the minimum necessary to ensure that the gradual transition from a situation of largely restricted competition to one of genuine competition at Union level takes place under acceptable economic conditions.

(366) It would be disproportionate to increase the aid to such an extent that since 1995 Deutsche Post would have to finance only social costs based on 'competitive' wages that do not reflect labour market conditions in earlier years. Differences in wage levels for personnel hired at different points in time between incumbents and new entrants are a normal fact of economic life.

(367) In the France Telecom case ⁽¹⁾, the Commission also rejected the argument presented by France that the level of wage-based social security contributions should also take into account the fact that civil servants are paid higher wages than the personnel employed by competitors. The Commission pointed out in that context that thanks to civil servants, at the time of the market opening the historic operator had well-qualified and competent personnel, without which it would not have been able to maintain its market position. In any event, it would be entirely artificial to single out specific disadvantages of the postal incumbent and to disregard its considerable advantages e.g. in terms of market share, brand recognition and customer base.

(368) Finally, Deutsche Post's calculations cannot credibly establish that, without the obligation to employ civil servants, Deutsche Post would have achieved the calculated savings in wage costs. Even assuming that the civil servants would in 1995 have effectively changed to a private employee status, it is neither established how many civil servants would have been replaced in 1995 and later years by private employees nor at which wage level. Just the sheer number of Deutsche Post's civil servants in 1995 ⁽²⁾ renders implausible the assumption that it would have legally and economically possible to replace since 1995 all civil servants by equally productive private employees at a lower wage.

(369) The Commission therefore rejects those two claims made by Germany with regards to the benchmark rate and the wage.

VII.3.4.2. On Germany's claim that price-regulated revenues have not been sufficient to finance the claimed burdens

(370) Germany claims that the Commission only assessed the level of wage-based social security contributions for the non-price regulated services but did not verify whether the profits from price-regulated universal services were sufficient to finance the claimed burdens.

⁽¹⁾ Commission decision of 20 December 2011 in Case C 25/2008, not yet published in the OJ, recitals 110 and 111.

⁽²⁾ About 140 000 civil servants in 1995.

(371) Germany presents two lines of reasoning. First of all, it claims that the Commission did not prove that the national regulator effectively approved the burdens which Deutsche Post has claimed. Secondly, Germany argues that, even if the regulator had approved those burdens, the profits from price-regulated universal services were insufficient to finance them. Germany submitted two expert studies by Professor Weber and CTcon to show that the price-regulated services have not been sufficient to cover the claimed burdens on excess social costs and, consequently, Deutsche Post has been under-compensated for its excess social costs.

(a) *The 2002, 2007 and 2011 price cap decisions are based on the regulatory accounts submitted by Deutsche Post and approve all burdens that have been claimed*

(372) Since the 2002 Price cap decision, it has also been clearly documented that the Postal regulator approved the burdens that Deutsche Post had and set the regulated prices accordingly to cover them. The 2007 and 2011 Price cap decisions also confirm that the Postal regulator accepted Deutsche Post's claims and approved the fact that the claimed excess social costs were financed by the price-regulated revenues.

(b) *The study by Professor Weber does not support the claim that the profits from the regulated universal services were insufficient to cover the burdens that Deutsche Post had claimed*

(373) The study by Professor Weber covers the period 1995-2010 and recognises that Deutsche Post has not only benefited from the pension subsidy but also from a full coverage of burden #2 by the price-regulated revenues (see Section VI.1.4.2(a) for a detailed description of the study).

(374) To assess the expert study, it is useful to first recall the price setting rule of Article 20(2) PostG 1997. It requires that the price cap covers the efficient costs of the price-regulated services plus the burdens from social excess costs and net costs from the universal service obligation:

Table 9

Price-setting rule according to Article 20(2) PostG 1997

$\begin{aligned} &\text{Price cap for regulated services} = \\ &= \text{Efficient costs for regulated services} + \text{burdens} = \\ &= \text{Total costs for regulated services} + \text{burden for non-regulated services} \end{aligned}$
--

(375) The Postal regulator has to set the regulated prices such that the revenue covers the price-regulated services' own 'efficient' costs and the approved burdens. Expressed in a slightly different way, the regulated prices fully finance the total costs of the regulated services — irrespective of whether they are earmarked as 'burden' or 'efficient' cost — as well as the share of the burden that comes from the non-price regulated services. Article 20(2) PostG 1997 ensures therefore that the approved burdens are fully covered by the price-regulated revenues. Contrary to Germany's claim, it is therefore excluded by law that the price-regulated services suffer from under-compensation due to the take-over of excess social costs from the non-price regulated services.

(376) The expert study defines in a first step the excess social costs for civil servants as the difference between all social costs incurred by Deutsche Post for its civil servants (contribution to the Pension fund, health expenses, accident insurance, further miscellaneous insurance payment) and the employers' contribution for pension, health and nursing care based on the 2007 minimum wage. In a second step, it compares that difference to burden #2.

(377) The expert study by Professor Weber suffers from two main defects: First, it exaggerates the level of the excess social costs. Second, it overlooks that as a result of the exaggeration, the excess social costs include cost items for which Deutsche Post receives compensation not under burden #2, but under different headings. In detail, the Commission would point to the following defects:

(378) First, the expert study calculates the excess social costs based on the employer's share of the social contribution rate. However, the burden #2 is calculated based on the regulatory contribution rate. As the latter is higher than the employer's share of the social contribution rate, the

expert study's excess social costs are higher than burden #2. Thus, the expert study includes excess social costs that the Postal regulator has considered as 'efficient' costs.

(379) Second, the expert study omits that burden #1 on excess wages also covers a share of the excess social costs (e.g. due to the difference between incurred wages and the 'competitive' wage benchmark) and that they are subsequently financed through burden #1. Further social costs that the expert study includes are covered by separate burdens (e.g. the payments to BAnstPT by burden #6) and consequently compensated. Thus, while the total sum of incurred social costs is shown for civil servants, it is omitted that also other burdens than burden #2 cover excess social costs.

(380) Third, it must be taken into account that the burden #2 contains excess social costs for both civil servants and private employees: The private employees' incurred social contributions were higher than the regulatory benchmark before 2003 because interest expenses of about EUR [...] million for the private employee's supplementary pension insurance were included in those costs. Since 2003, those interest costs have been allocated to the financial costs and the incurred social costs for private employees have been below the regulatory benchmark since then.

(381) As the expert study includes the total of burden #2 as compensation for the civil servants' excess social costs, the burden #2 provided excessive relief before 2003 and insufficient relief since 2003 for the civil servants' social costs. To calculate the appropriate compensation that burden #2 has provided for civil servants' social excess costs, the burden #2 needs to be accordingly split between civil servants and private employees.

(382) Consequently, the result of under-compensation is erroneous because the expert study overlooks that the claimed excess social costs are not only covered by burden #2 but and that the Postal regulator has considered a higher share of social costs as 'efficient' cost. An appropriate correction of the expert study's mistakes on the compensation side puts the burdens exactly in balance with the excess social costs as required by Article 20(2) PostG 1997.

(383) Germany's objection that the Commission erred in the 2011 Extension decision to only calculate the comparative advantage for the non-price regulated services must therefore be rejected because, pursuant to Article 20(2) PostG 1997, the Postal regulator has to set the price cap so that the price-regulated revenues cover the efficient costs of the price-regulated services and the approved burdens.

(c) No proof of under-compensation of excess social costs based on WIK study

(384) Referring to the 2009 regulatory accounts, Germany maintains that Deutsche Post has actually suffered significant losses with its price regulated services since 1990 because the regulated revenues have been eaten up by the costs for the price-regulated services as well as the net costs from the universal service obligations ⁽¹⁾ Thus, for that reason as well, Germany denies that the profits from price-regulated services would have been sufficient to finance any excess social costs from the non-price regulated services.

(385) The Commission observes in that regard first that, since 2003, it is obvious from the Postal regulator's decisions that he has earmarked a share of the price-regulated revenues as compensation for burden #2. The existence of the contribution from the price-regulated revenue is therefore unambiguously established by the regulator's decisions.

(386) Second, the WIK study shows, in contrast to the 2009 regulatory accounts, that the price-regulated services have since 2000 achieved significantly positive profit margins of more than [6,5 to 8,5]% on sales.

Figure 9

Calculation of ROS for price-regulated services based on WIK Study

[...]

Note: The calculations are based on the WIK study's adjustments to the 2009 regulatory accounts. Furthermore, it is assumed that the price-regulated services cover all losses of the non-price regulated universal services. The lower profit in 2007 is mainly due to an extraordinary depreciation charge for the real estate portfolio.

⁽¹⁾ E.g. maintenance of extensive post office network, sixth delivery day.

- (387) The higher profits since 2000 are directly linked to the reduction in the defined pension contributions according to the 1995 Pension law: While Deutsche Post had assumed annual lump-sum payments of EUR 2 045 million up 1999, the pension contribution went down in 2000 to about EUR 735 million (according to 33 % of incurred civil servant wages). As the Postal regulator did not adjust in 2000 the regulated prices downwards in line with the decreased pension contribution, Deutsche Post's profit increased significantly. The realised profit has also remained after the 2002 price cap decision on a high level because the regulated prices were not sufficiently decreased to be in line with the price-regulated services' costs.
- (388) With regard to Germany's criticism of the WIK study, the Commission finds that the WIK study provides a more appropriate description of Deutsche Post's economic situation in general and of the profits from the price-regulated services in particular compared to the 2009 regulatory accounts. The reasons are the following:
- (i) More appropriate allocation of costs to commercial services
- (389) According to the Chronopost judgment, commercial services should bear their direct costs as well as provide an appropriate contribution to the common costs. The appropriate allocation of costs between different services can be proven either by external benchmarks (e.g. market prices) or by internal cost data ⁽¹⁾.
- (390) The 2009 regulatory accounts are based on the principle of Article 20(2) PostG 1997 that mandates that the non-price regulated services should only be allocated 'efficient' costs while all burdens (e.g. excess costs from the employment of POSTDIENST staff and net costs from the universal service obligation) should be financed by the price-regulated revenues. However, the WIK study finds in its review of the 2009 regulatory accounts that Deutsche Post allocates too high burdens to the price-regulated services and too few costs to the commercial services based on a comparison to the profitability of private competitors.
- (391) The results of the WIK study are confirmed by the assessment of the allegedly 'competitive' benchmarks that Deutsche Post has used accounts to calculate the individual burdens: It has already been shown that the regulatory contribution rate for the calculation of burden #2 on excess social costs is a too low benchmark compared to the compulsory social contributions that private competitors have to pay. Furthermore, considering e.g. the infrastructure burden on the post shop network, it is a purely hypothetical and unprovable benchmark that Deutsche Post would not have run any own post office since 1990 without the universal obligation. Similarly it cannot be proven whether Deutsche Post could have since 1990 operated only with personnel for whom it just has to pay wages at the level of the 2007 minimum wage.
- (392) The Commission finds therefore that the results of the WIK study provide a more appropriate calculation of the costs to be allocated to the commercial service.
- (393) Furthermore, the cost valuation must be in line with general accounting principles, in line with Directive 97/67/EC and Directive 2006/111/EC. Neither the increased depreciation charges nor the upward valuation of the supplementary pension costs are contained in the annual accounts of Deutsche Post. Such costs are normally financed out of the accounting profit that a company earns, which holds true for Deutsche Post as well as for its competitors. An upward re-evaluation would therefore favour Deutsche Post compared to competitors.
- (ii) Profit benchmarking in consideration of Deutsche Post's risk position
- (394) Deutsche Post's realised profits have since 2000 been significantly above the median ROS of 3,48 % of the WIK-study as well as the lower bound ROS of 6,1 % of the Deloitte-II study. Germany's claim that Deutsche Post has suffered from such high losses that it has not been able to cover the burdens from the price-regulated revenues can therefore not be accepted.
- (395) Furthermore, the Deloitte-II study, which builds on a small comparator set of mainly multinational express parcel operators (e.g. UPS, FedEx, TNT Express), needs to be critically reviewed. The Deloitte-II study's recommendation of a reasonable-profit range starting at a ROS of 6,1 % and a median ROS of 7,4 % neglects the fact that Deutsche Post runs a considerably less capital-intensive and less risky business:

1. Deutsche Post itself does not operate international express parcel services, which are operated only by its DHL subsidiaries.

⁽¹⁾ Chronopost judgment, paragraph 38; Opinion of Advocate General Tizzano for the Chronopost cases, paragraph 54; Commission Decision of 21 December 2005 on aid measure N 531/05 *La Banque Postale*, recitals 75 ff.

2. Letter operations, which make up to 75 % of Deutsche Post's revenues, need significantly fewer capital investments compared to the multinational parcel operators because the main costs of letter delivery are the labour costs of postmen. Express parcel operators must invest much more heavily in capital-intensive equipment ⁽¹⁾.

3. Deutsche Post's dominant position on the letter market was created and guaranteed by the exclusive right that conferred a captive customer base to Deutsche Post without having had to undertake any major investments into marketing and brand name. By contrast, the multinational parcel operators had to build up their positions in each national market from scratch and have established some of the best known consumer brands ⁽²⁾ at their own risk and expense.

4. Finally, the market and cost risks of Deutsche Post have been hedged through the granted public measures ⁽³⁾. In particular, price regulation has provided for coverage of all burdens from the non-price regulated services ⁽⁴⁾.

(396) The WIK study is therefore right to apply a profit benchmark below the Deloitte-II range to take proper account of the lower capital intensity and lower business risks of Deutsche Post compared to multinational express parcel operators. However, it is not necessary to determine precisely the level of the benchmark profit because the realised average ROS margins of 8,3 % are already higher than the Deloitte-II study's lower bound estimate of a ROS of 6,1 %. Even based on Germany's own expert study, it could not be established that Deutsche Post would have been under-compensated since 2000.

(397) In any case, Germany's criticism of the WIK study is hard to understand because the median ROS of 3,48 % does not go beyond the level of profit that the regulator and Deutsche Post have themselves considered as reasonable. On the one hand, as explained in Section IV.4.3, the benchmark ROS of 3,48 % yields in absolute numbers a higher profit than the capital costs (e.g. [...] and [...]) claimed by Deutsche Post in its regulatory accounts and approved by the regulator. On the other hand, WIK's median ROA of 7,66 % is similar to the return on capital that Deutsche Post [...].

⁽¹⁾ E.g. worldwide air transport and integrated delivery network.

⁽²⁾ E.g. UPS or TNT.

⁽³⁾ E.g. increases in regulated prices, public transfers, public guarantee, and pension subsidy

⁽⁴⁾ E.g. excess social costs above the 'competitive' benchmark

(398) The conclusions on profit benchmarking are not affected by Germany's reference to reasonable profit rates of 7 % to 8 % on sales in the railways and bus transport sectors. Those sectors are more capital-intensive and therefore require a higher return on sales to cover capital cost. On the contrary, those figures confirm that the Deloitte-II study's profit benchmark is more in line with the average ROS of a capital- rather than of a labour-intensive industry.

(c) Conclusions

(399) The Commission has to reject Germany's claim that the price-regulated revenues have not been sufficient to cover the burdens on excess social costs. Neither the submitted expert study nor the 2009 regulatory accounts support Germany's claim.

(400) On the contrary, it is clearly documented by the Price cap decision from 2002, 2007 and 2011 that the Postal regulator has consistently approved the compensation of the claimed burdens out of the price-regulated revenues.

VII.3.5. Elimination of incompatible aid for the period from 1 January 2003

(401) According to the Court's established case-law, the Commission is competent to decide that the Member State concerned must abolish or alter aid ⁽⁵⁾ when it has found that that aid is incompatible with the internal market. As the Court has consistently held, that obligation is designed to re-establish the previously existing situation ⁽⁶⁾. In that context, the Court has established that that objective is attained once the recipient has repaid the amounts granted by way of unlawful aid, thus forfeiting the advantage which it had enjoyed over its competitors on the market, and the situation prior to the payment of the aid is restored.

(402) In line with that case-law, Article 14(1) of Regulation (EC) No 659/1999 lays down that: 'where negative decisions are taken in respect of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary [...]. The Commission shall not require recovery of the aid if this would be contrary to a general principle of Community law.'

⁽⁵⁾ Case 70/72 *Commission v Germany* [1973] ECR 813, paragraph 13.

⁽⁶⁾ Joined Cases C-278/92, C-279/92 and C-280/92 *Spain v Commission* [1994] ECR I-4103, paragraph 75.

- (403) The Commission further observes that the 2007 and the 2011 Extension decisions focussed on the period 1990-2007. However, the pension subsidy is a continuous aid scheme that did not stop in 2007. Likewise the compensation of the burdens from the price-regulated revenues did not cease in 2007. Indeed, in its submission of 2 January 2012, Germany provided data on the pension subsidy and the price-regulated revenues including 2010. Therefore, the Commission concludes that the recovery of the incompatible share of the pension subsidy should not stop in 2007 but should continue until go until the date of notification of this Decision.
- (404) For the calculation of the aid element which has already been put at the disposal of Deutsche Post, it should be pointed out that, according to the case-law of the Court of Justice, no provision of Union law requires the Commission, when ordering the recovery of aid declared incompatible with the internal market, to fix the exact amount of the aid to be recovered. It is sufficient for the Commission's decision to include information enabling the Member State to work out itself, without overmuch difficulty, that amount ⁽¹⁾.
- (405) The incompatible aid has to be calculated according to the formula in Table 8 based on the regulatory contribution rate and the benchmark rate, as defined in the annex and shown in Table 7, and the civil servants' gross wage as defined in Table 6. The amount of incompatible aid granted each year should bear interest until recovery. Interest should be established pursuant to 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 ⁽²⁾.
- (406) The calculations in the annex, which estimate the incompatible aid for the period from 2003 to 2010, excluding interest, are based on the assumption that civil servants work in the same proportion for price-regulated and non-price regulated services. The available data does not provide information on the exact number of civil servants who have worked for the price-regulated and non-price regulated services. It is therefore assumed that the revenue shares of the price-regulated and non-price regulated services provide a reliable first approximation for the split of the incurred wage costs.
- (407) More detailed data may therefore lead to a more precise calculation and change the results. Germany has recently submitted new information on the civil servants' wage sum in the non-price regulated services for the period from 1995 to 2007. That information suggests that the civil servants' wage sum should be estimated by means of a split based on personnel costs in accordance with the regulatory accounting of Deutsche Post. Such an approach might result in a lower civil servants' wage sum than estimated by the split based on revenue shares. Germany submitted comments on 2 and 19 January 2012 which suggest that, at least with regard to the 2011 Price cap decision, the relative sharing of burdens within the price-regulated services and also between price-regulated and non-price regulated services has been changed. That information seems to indicate that from 2008 onwards a share of burdens has been allocated to non-price regulated services. In the execution of this decision, the precise amount of the incompatible aid will be calculated in cooperation with Germany, taking those considerations into account.
- (408) Despite all its efforts, the Commission has been unable to arrive at a reliable assessment of the amount of incompatible aid for the period 1995 to 2002. Equally, it does not seem possible to incorporate in this Decision calculation parameters which are sufficiently precise to enable the Member State (whether alone or in cooperation with the Commission) to carry out the final calculation during the Decision's implementing phase. In those particular circumstances, respect for the Member State's rights of defence and the principle of legal certainty constitute obstacles to recovery pursuant to Article 14(1) of Regulation (EC) No 659/1999, according to which 'the Commission shall not require recovery of the aid if this would be contrary to a general principle of Community law'.
- (409) The recovery should therefore start at 1 January 2003 and continue until the comparative advantage for the non-price regulated services has ceased to exist.
- (410) For the time period from the date of notification of this decision, it must be ensured that the level of wage-based social security contributions that Deutsche Post pays for its civil servants is not lower than the level paid by its competitors for private employees. That comparison must take into account any compensation Deutsche Post receives on the basis of price regulation under § 20 PostG.

VIII. AID ASSESSMENT OF PUBLIC TRANSFERS

VIII.1. Assessment of existence of aid pursuant to Article 107(1) TFEU

- (411) 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, insofar as it affects trade between Member States, be incompatible with the internal market'. In determining whether a measure constitutes State aid within the meaning of Article 107(1) TFEU, the Commission has to apply the following criteria: the measure must be imputed to the State and use State resources, it must confer an advantage on

⁽¹⁾ See, in particular, Case C-480/98 *Spain v Commission* [2000] ECR I-8717, paragraph 25, and Case C-415/03 *Commission v Greece* [2005] ECR 0000, paragraph 39.

⁽²⁾ OJ L 140, 30.4.2004, p. 1.

certain undertakings or certain sectors which distorts competition and it must affect trade between Member States.

- (412) The public transfers constitute State resources, because they were based on Articles 37, 40 PostVerfG 1989 and Article 2 PostUmwG 1994, and were financed from public resources, because they came from the resources of the publicly-owned TELEKOM.

VIII.1.1. *Financial advantage granted by public transfers*

VIII.1.1.1. Germany's claim of *Ablieferungen* as special charge

- (413) Germany claims that the public transfers would only have compensated the *Ablieferungen* that were costs that private competitors would not have normally had to finance. It views the *Ablieferungen* as a levy '*sui generis*' which could be qualified neither as a tax nor a dividend.

- (414) Deutsche Post had to pay the *Ablieferungen*, which ranged between 6,6 % and 10 % of the earned revenues, from 1924 until 1995. According to the KPMG report, the Bundesverfassungsgericht in its judgment of 22 March 1984 did not define the exact legal nature of the *Ablieferungen* but characterised them as income for the public budget ('*Erwerbseinkünfte*'). Furthermore, the *Ablieferungen* were identified as costs ('*Kosten der Leistung*') that Deutsche Post had to pay for the provision of its services.

- (415) Although the Bundesverfassungsgericht did not define exactly to which extent the *Ablieferungen* should be considered as a substitute for taxes or dividends, it is clear that the *Ablieferungen* generated revenue for the public budget:

- (416) Firstly, many Member States used the revenues of the postal and telecommunication monopolies as an income source for the public budget in the past. As BUNDESPOST and their predecessors were up to 1995 exempted from general taxes because of their public-law status, an imposition of a *sui-generis* levy was used to generate income for the public budget from those sectors. Furthermore, it was sensible from an economic point of view to impose levies on those monopolies. Consumers were ready to accept price increases without greatly reducing their consumption so that a high level of revenue could be generated for the public budget.

- (417) Secondly, unlike private undertakings, Deutsche Post was neither liable to pay direct and indirect taxes nor liable to pay any dividends on the provided equity. As a result, the *Ablieferungen* were the only means for the federal

government — whether in its role of tax authority or shareholder — to receive income from Deutsche Post. In that respect, it does not matter whether the *Ablieferungen* fully correspond to the definitions of certain tax or dividend regimes. In any case, the *Ablieferungen* were payments that Deutsche Post had to pay since 1924 that generated revenue for the public budget.

- (418) To conclude, the imposition of the *Ablieferungen* was in line with the public objective to generate revenues for the public budget — whether in the form of taxes or dividends — from a State monopoly. The *Ablieferungen* constituted therefore a normal cost that Deutsche Post was liable to finance out of its own resources.

VIII.1.1.2. Germany's claim of public transfers in accordance with private-investor behaviour

- (419) Germany claims that it acted partly as a private investor when granting the public transfers because the public transfers financed profitable investments into Deutsche Post's network.

- (420) However, as the public transfers were granted based on accrued losses as opposed to on investment plans, it is evident that a private investor would have never adopted such an investment strategy.

- (421) Consequently, the public transfers provided a financial advantage to Deutsche Post.

VIII.1.1.3. Germany's claim of compensation of net costs from universal service obligation

- (422) Germany claims that the public transfers would not constitute aid because they compensated the net costs of the universal service obligation.

- (423) The Court ruled in the *Altmark* judgment⁽¹⁾ that public service compensation does not constitute State aid for the purposes of Article 107 TFEU provided that four cumulative criteria are met: First, the recipient undertaking must actually have public service obligations to discharge, and the obligations must be clearly defined. Second, the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner. Third, the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of the public service obligations, taking into account the relevant receipts and a reasonable profit. Finally, 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

⁽¹⁾ Case C-280/00 *Altmark Trans GmbH*, paragraphs 89 ff.

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 and adequately provided with means of transport, would have incurred.

- (424) As Deutsche Post was not selected by means of a public tender and as Germany has not proven that Deutsche Post was a well-run undertaking, the fourth condition of the Altmark judgment is not fulfilled.

VIII.1.2. *Conclusions on existence of aid*

- (425) The public transfers were granted from State resources and relieved Deutsche Post from costs that are normally assumed by private undertakings. Germany has not been able to prove that the public transfers fulfilled the Altmark criteria to escape the classification of aid.
- (426) For the reasons set out above in Section VII.1.2, the public transfers are liable to distort competition and affect trade.
- (427) The Commission finds therefore that the public transfers constitute aid within the meaning of Article 107(1) TFEU.

VIII.2. **Assessment of existing aid pursuant to Article 108(3) TFEU**

- (428) The public transfers were introduced by Article 37(2)(3) PostVerfG 1989 and constitute therefore a new aid measure.

VIII.3. **Assessment of compatibility pursuant to Article 106(2) TFEU**

- (429) Article 106(2) TFEU provides that undertakings entrusted with the operation of services of general economic interest, or having the character of a revenue-producing monopoly are subject to the rules contained in the Treaty, in particular to the rules on competition. However, it foresees an exception from the rules contained in the Treaty, providing that a number of criteria are met: Firstly, there must be an act of entrustment, whereby the State confers responsibility for the execution of a certain task to an undertaking. Secondly, the entrustment must relate to a service of general economic interest. Thirdly, the exception has to be necessary for the performance of the tasks assigned and proportional to that end. Finally, the development of trade must not be affected to such an extent as would be contrary to the interests of the Union.
- (430) The Commission has — in the 1996 and 2001 Communications ⁽¹⁾, ⁽²⁾ as well as in the 2005 Framework on services of general economic interest — explained the application of the necessity and proportionality requirements for the exception under

Article 106(2) TFEU. Section 2.4 of the 2005 Framework is the latest codification of the meaning and extent of those requirements that have consistently been applied in the past by the Court of Justice, the General Court and the Commission.

- (431) According to Section 2.4 of the 2005 Framework, the necessity and proportionality of the granted compensation must be in line with the following principles:

1. 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.
2. The amount of compensation includes all advantages granted by the State or through State resources in any form whatsoever — irrespective of their classification for the purposes of Article 107(1) TFEU.
3. The amount of compensation must be actually used for the operation of the service of general economic interest concerned. Public service compensation used to operate on other markets is not justified, and consequently constitutes incompatible State aid.

- (432) In the Commission's decisional practice, public compensation for universal service costs has been considered as compatible aid (or even no aid) as long as the public compensation is lower than the incurred net costs of the universal service ⁽³⁾.

VIII.3.1. *Entrustment with a service of general economic interest*

- (433) The successive Postal Directives as well as Court jurisprudence ⁽⁴⁾ have always recognised the universal provision of postal services as a service of general economic interest.
- (434) Deutsche Post was entrusted until 31 December 2007 with the provision of universal postal services by the successive postal laws.

VIII.3.2. *Necessity and proportionality of public transfers*

- (435) Germany maintains that the public transfers were a proportional compensation measure because they were, according to the 2009 regulatory accounts, significantly below the incurred net costs of the universal service

⁽¹⁾ Services of general interest in Europe (1996/C 281/03).

⁽²⁾ Services of general interest in Europe (2001/C 17/04).

⁽³⁾ Commission Decision of 12 March 2002 on State aid N 650/01 — Ireland — Equity injection to An Post for the purpose of restructuring the counter network (C(2002)941 fin); Decision 2002/782/EC on the aid granted to Poste Italiane SpA.

⁽⁴⁾ See e.g. Case C-320/91 *Corbeau* [1993] ECR I-2533, paragraphs 15 and 19.

obligations from 1990 to 1995. The 2009 regulatory accounts show in 1995 that, despite the public transfers, Deutsche Post would have suffered from an under-compensation of EUR [...] million (actualised value in 1995) of the cumulated net costs deriving from the universal service obligations for the period 1990-1995.

(436) After the adjustments of the cost allocation and valuation in the 2009 regulatory accounts, the WIK study comes to the conclusion that the public transfers compensated the cumulated net costs from the universal service obligation for the period 1990-1995.

(437) The WIK calculations show that the compensation exceeded the cumulated net costs by EUR [0 to 20] million in 1995. However, the Commission acknowledges that the quality of the accounting data for those years is poor. Furthermore, WIK has only accepted the Ablieferungen as a capital cost, and not allowed any further reasonable profit.

(438) For those two reasons, the Commission finds that the WIK study cannot be used as a base to refute Germany's claim that the public transfers constituted a proportional compensation of Deutsche Post's universal service costs.

Table 10

Calculation of cumulated net costs from universal service obligation and public transfers (actualised 1995 values)

	2009 regulatory accounts	WIK study
Cumulated net costs	– EUR [...] million	– EUR [...] million
Public transfers	+ EUR 6 707 million	+ EUR 6 707 million
Over-/under-compensation	– EUR [...] million	+ EUR [0 to 20] million

(439) The public transfers are therefore compatible aid pursuant to Article 106(2) TFEU because they did not exceed the net costs that Deutsche Post had incurred because of its universal service obligations.

IX. THE PUBLIC GUARANTEE FOR DEBT OBLIGATIONS ISSUED BEFORE 1995 CONSTITUTES EXISTING AID PURSUANT TO ARTICLE 108(3) TFEU

(440) The Commission observes that the rules on the public guarantee for debt obligations were introduced in 1953 by § 22 (4) PostVwG 1953. When the PostVwG 1953 was repealed by the PostVerfG 1989, the same provision was taken over in § 40 PostVerfG 1989 without any modification.

(441) As the public guarantee for debt obligations was introduced in 1953, and therefore prior to the entry into force of the Treaty of Rome in 1958, it constitutes existing aid according to Article 1(b)(i) of Regulation (EC) No 659/1999.

(442) § 2(4) PostUmwG 1995 put an end to that existing aid. The fact that the State remained guarantor for the debt obligations issued prior to the incorporation of Deutsche Post does not constitute new aid, as the advantage for Deutsche Post has been granted at the point in time at which the debt obligation was issued.

X. CONCLUSIONS

(443) The Commission finds that the pension subsidy and the public transfers constitute aid measures within the meaning of Article 107(1) TFEU because they have relieved Deutsche Post AG of costs that are normally assumed by undertakings.

(444) The Commission finds that Germany has unlawfully implemented the pension subsidy and the public transfers in breach of Article 108(2) TFEU. The public guarantee for debt obligations issued by Deutsche Post prior to its incorporation constitutes existing aid, which was abolished in 1995.

(445) The pension subsidy is incompatible with the internal market, in light of Article 107(3)(c) TFEU, to the extent that it provided a comparative advantage for the non-price regulated services whose financing from the price-regulated revenues in light of the burdens was approved by the Postal regulator. Germany has disproportionately relieved Deutsche Post AG from social contributions, since under the pension relief arrangements it not only granted the pension subsidy but also in addition allowed Deutsche Post AG to pass on to consumers of the price-regulated services a share of the non-price regulated services' social costs that should have been borne by itself in order to be in line with private competitors.

(446) As a result, the pension relief arrangements have placed Deutsche Post AG at an advantageous position with respect to private competitors, since Deutsche Post AG has borne for its non-price regulated services fewer social contribution charges compared to those that private competitors have to compulsorily bear as costs.

(447) Accordingly, the incompatible aid should be calculated as the difference between the benchmark rate, which aligns Deutsche Post AG's social contribution charges for the non-price regulated services to those of competitors, and the regulatory contribution rate, effectively borne by Deutsche Post AG for its non-price regulated services, multiplied by the civil servants' gross wage sum in the non-price regulated services. In particular, the incompatible aid should be calculated according to the

formula in Table 8 based on the definitions of the regulatory contribution rate and the benchmark rate as in Table 7 and in the Annex and the civil servants' gross wage as defined in Table 6.

- (448) The incompatible aid, which has been put at the disposal of Deutsche Post since 1 January 2003, should be recovered from that date until the comparative advantage will have ceased to exist. Furthermore, Germany should take the necessary steps to amend the pension cost relief based on the pension subsidy and the price regulation with a view to abolish the comparative advantage.
- (449) The Commission finds that the public transfers are a compatible aid measure pursuant to Article 106(2) TFEU because they compensated the Deutsche Post's cumulated net costs from the universal service obligation,

HAS ADOPTED THIS DECISION:

Article 1

1. The pension subsidy to Deutsche Post AG constitutes State aid pursuant to Article 107(1) TFEU and has unlawfully been granted by Germany in breach of Article 108(3) TFEU.
2. The pension subsidy is incompatible with the internal market in so far as Germany has disproportionately contributed to the financing of Deutsche Post AG's retired civil servants' pensions.

Article 2

The public transfers that constitute aid to Deutsche Post AG pursuant to Article 107(1) TFEU and were unlawfully granted by Germany in breach of Article 108(3) TFEU are compatible with the internal market.

Article 3

The public guarantee constitutes existing aid to Deutsche Post AG pursuant to Articles 107(1) and 108(3) TFEU.

Article 4

1. Germany shall recover from Deutsche Post AG the incompatible aid referred to in Article 1, which has been put at the disposal of Deutsche Post AG for the period from 1 January 2003 until the comparative advantage has been brought to an end.
2. The sums to be recovered pursuant to paragraph 1 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

and to Commission Regulation (EC) No 271/2008 ⁽¹⁾ amending Regulation (EC) No 794/2004.

4. From the date of notification of this Decision, Germany shall ensure that Deutsche Post AG will no longer benefit from a comparative advantage for the non-price regulated services in light of the financing from the price-regulated revenues of the burdens approved by the Postal regulator.

Article 5

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

Article 6

1. Within two months following notification of this Decision, Germany shall submit the following information to the Commission:
 - (a) Total amount (principal and recovery interests) to be recovered from Deutsche Post AG;
 - (b) Detailed description of the measures already taken and planned to comply with this Decision;
 - (c) Documents demonstrating that Deutsche Post AG has been ordered to repay the incompatible aid.
2. Germany shall keep the Commission informed of the progress of the national measures taken to implement this Decision until recovery of the incompatible State aid referred to in Article 1 has been completed. It shall immediately submit, on simple request by the Commission, 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 Deutsche Post AG.

Article 7

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 25 January 2012.

For the Commission
Joaquín ALMUNIA
Vice-President

⁽¹⁾ OJ L 82, 25.3.2008, p. 1.

ANNEX

Methodology for Calculation of incompatible aid (million EUR); Provisional calculation based on the data available as at 31 December 2011 for the period 2003- 2010 (*)

[illegible]

	2003	2004	2005	2006	2007	2008	2009	2010
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Regulatory contribution rate (recalculated based on civil servants' gross wage)

(24)	Employer's share	= (6)*(21)	18,36 %	18,27 %	18,07 %	17,84 %	17,46 %	17,20 %	17,27 %	17,14 %
(25)	Supplementary pension insurance	= (16)*(21)	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
(26)	Accident insurance	= (17)*(21)	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
(27)	Regulatory rate		[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]

Social insurance benchmark

(28)	Employer's share		21,10 %	21,00 %	20,77 %	20,50 %	19,85 %	19,46 %	19,48 %	19,33 %
(29)	Unemployment insurance (employee)		3,25 %	3,25 %	3,25 %	3,25 %	2,10 %	1,65 %	1,40 %	1,40 %
(30)	Pension insurance (employee)		9,75 %	9,75 %	9,75 %	9,75 %	9,95 %	9,95 %	9,95 %	9,95 %
(31)	Social insurance benchmark		34,10 %	34,00 %	33,77 %	33,50 %	31,90 %	31,06 %	30,83 %	30,68 %

Revenue share for non-regulated services

(32)	Total revenue		14 683,21	14 726,82	14 479,35	13 773,79	13 479,96	13 392,81	12 846,17	12 656,75
(33)	Non-regulated revenue		[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
(34)	Share of non-price regulated services	= (33)/(32)	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]

Incompatible aid

(35)	Difference in contributions rates	= (31) - (27)	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
(36)	Incompatible aid	= (23)*(34) *(35)	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
(37)	Sum 2003 to 2010									[...]

Explanatory notes

Lines (1) to (17): Data on social contribution rates

Those lines present the social contribution rates that have to be compulsorily paid to the social insurances (decomposed in the employer's and employee's share) by private employers. The last two lines show the contribution rates to the supplementary pension and the accident insurances that are included in Deutsche Post's regulatory rate.

Lines (18) to (23): Calculation of civil servants' gross wage

To have a common denominator for the benchmark rates, it is important to note that the private-employee's gross wage is generally defined as net wage plus the employee's share of the social contributions. As civil servants have to finance 30 % to 50 % of their health care expenses but do not contribute to the pension and unemployment insurance, the incurred civil servant wage equals the private employee's gross salary (100 %) minus the employee's share of the social contribution rate for pension and unemployment insurances. It rests on the assumption of a 50 % contribution to the health insurance by civil servants themselves.

Line (21) expresses the incurred civil servant wage in percentage of the private employee's gross wage). To calculate the civil servant's gross wage sum, the incurred civil servant wage is inflated by $100/(100 - \text{employee's share of unemployment and pension insurance})$ as shown in line (23).

Lines (24) to (27): Regulatory contribution rate

The regulatory contribution rate includes the employer's share of the social contribution rate plus the contribution rates to the supplementary pension and accident insurances. To have a common base to compare the regulatory contribution rate to the social insurance benchmark, the regulatory contribution rates are expressed in percentage of the civil servants' gross wage. Due to the change in the base, the adjusted regulatory contribution rates are lower than the respective statutory rates.

Lines (28) to (31): Social insurance benchmark

As it is assumed that civil servants cover 50 % of their health expenses out of their own pockets, the social insurance benchmark includes the total contribution rate for pension and unemployment insurance but only the employee's share for health and nursing insurance.

Lines (32) to (34): Calculation of the civil servants' gross wage sum for the non-price regulated services

The civil servants' gross wage sum in the non-price regulated services is approximated by taking the revenue shares of the non-price regulated services because the precise number of civil servants who have worked for the non-price regulated services was not retrievable from Deutsche Post's accounting.

Lines (35) to (37): Calculation of incompatible aid

The comparative advantage in terms of the contribution rate is given as the difference between the benchmark contribution rate and the regulatory contribution rate. The incompatible aid is calculated based on the civil servants' gross wage sum for the non-price regulated services.

(*) This table is based on the assumption that 100 % of burden 2 has been put by the regulator on the price-regulated services. This assumption would have to be adapted if Germany were to show during the recovery phase that the Postal regulator has actually placed a certain percentage of burden 2 on the competitive services.

COMMISSION DECISION

of 21 March 2012

on State aid SA.29864 (C 6/10) (ex NN 1/10) implemented by the Czech Republic for České aerolinie, a. s. (ČSA — Czech Airlines a.s. — possible State aid implications of a loan provided by Osinek a.s.)

*(notified under document C(2012) 1664)***(Only the Czech version is authentic)****(Text with EEA relevance)**

(2012/637/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 regard to the decision by which the Commission decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union ⁽¹⁾, in respect of the aid SA.29864 (C 6/10, ex NN 1/10, CP 371/2009) ⁽²⁾,

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

Whereas:

further questions by letter dated 6 July 2010, to which the Czech Republic replied on 15 September 2010.

(3) The opening decision was published in the *Official Journal of the European Union*. The Commission invited interested parties to submit their comments on the measure.

(4) The Commission received comments from four interested parties: Travel Service and Icelandair Group on 10 March 2011, Czech Connect Airlines a.s. on 11 March 2011, JOB AIR Technic a.s. on 10 March 2011, and ČSA on 14 March 2011. The Commission forwarded these comments to the Czech Republic, which was given the opportunity to reply; the Commission received the reply by letter dated 12 May 2011.

1. PROCEDURE

- (1) In May 2009, on the basis of publicly available information, the Commission learned that a state-owned company in liquidation called Osinek a.s. ('Osinek') had agreed to grant a loan of CZK 2,5 billion (approximately EUR 100 million) to ČSA — Czech airlines, a. s. ('ČSA'). The Commission requested information from the Czech Republic by letters dated 14 May 2009 and 24 September 2009. The Czech Republic provided the Commission with further information by letters dated 10 September 2009 and 25 November 2009.
- (2) By letter dated 24 February 2010 the Commission informed the Czech Republic of its decision to initiate the procedure laid down in Article 108(2) TFEU in respect of the measure ('the opening decision'). The Czech Republic provided comments on that decision by letter dated 26 April 2010. The Commission asked

2. DETAILED DESCRIPTION OF THE MEASURE

2.1. The Osinek loan

- (5) The measure under investigation is a loan granted on 30 April 2009 by Osinek to the Czech national flag carrier, ČSA. The loan was disbursed in three tranches as follows:
- (a) the first tranche, for CZK 800 million, was drawn on 11 May 2009;
- (b) the second tranche, for CZK 900 million, was drawn on 30 July 2009; and
- (c) the third tranche, for CZK 800 million, was drawn on 24 September 2009.
- (6) The expected date of repayment was 30 November 2010, with the possibility of prolongation. The interest rate on the loan was the three-month Prague Inter Bank Offered Rate ('PRIBOR') plus 300 basis points as a risk premium, i.e. 5,51 % at the date on which the loan agreement was signed. Interest was due on a quarterly basis on the last business day of a calendar quarter (interest period). Interest was calculated daily from the day preceding the repayment of the Osinek loan.

⁽¹⁾ With effect from 1 December 2009, Articles 87 and 88 of the EC Treaty have become Articles 107 and 108 respectively of the Treaty on the Functioning of the European Union ('TFEU'). The two sets of provisions are, in substance, identical. For the purposes of this Decision, references to Articles 107 and 108 of the TFEU should be understood as references to Article 87 and 88, respectively, of the EC Treaty when appropriate. The TFEU also introduced certain changes in terminology, such as the replacement of 'Community' by 'Union' and 'common market' by 'internal market'. The terminology of the TFEU will be used throughout this Decision.

⁽²⁾ Commission Decision C(2010) 987 final of 24 February 2010 (OJ C 43, 11.2.2011, p. 6).

- (7) According to the Czech authorities, the risk margin of 300 basis points correctly reflects an appropriate risk margin for the financial situation of the company, which had a Standard & Poor's B rating (vulnerable financial situation), and the level of collateralisation of the loan, which amounted to 110 % of the loan amount.
- (8) The collateral used to secure the loan-comprised buildings located at Prague Ruzyně airport, land, inventories and spare parts. The market value of most of the collateral was established by an independent expert. Four addendums to the Osinek loan agreement were concluded, extending and modifying the collateral assets ⁽¹⁾. The Czech authorities claim that all these changes respected the condition stipulated in the Osinek loan agreement that the actual loan amount must not exceed 90 % of the value of the collateral at any point in time or the agreed maximum loan amount.
- (9) The Osinek loan was not repaid as initially envisaged, but was instead decollateralised and the debt capitalised on 30 June 2010 (debt-for-equity swap).

Table 1

Overview of the assets securing the Osinek loan

Collateral	Value in CZK (million)	Value determined by	Period of use
Operational building — Hangar F (including land under the building)	[925 - 990] (*)	YBN Consult — Znalecký ústav s.r.o., Expert opinion of 1 June 2009	from 11 May 2009 (1st tranche)
Administrative building 'APC' (including land under the building)	[735 - 770]	YBN Consult — Znalecký ústav s.r.o., Expert opinion of 5 July 2009	from 30 July 2009 (2nd tranche) until 9 December 2009 (cancelled by 3rd Addendum)
Spare parts (rotating spare parts and/or replacement engines)	[150 - 165]	Valuation based on net book value at 30 September 2009	from 24 September 2009 (3rd tranche)
Spare parts (rotating, type A310 (all) and Boeing)	[520 - 575]	Valuation based on net book value at 30 September 2009	from 24 September 2009 (3rd tranche) until 25 January 2010 (4th Addendum)
Land around the 'APC' administrative building	[60 - 65]	YBN Consult — Znalecký ústav s.r.o., Expert opinion of 5 July 2009	from 23 July 2009 (1st Addendum) until 25 January 2010
Land around and adjacent to Hangar F	[105 - 115]	YBN Consult — Znalecký ústav s.r.o., Expert opinion of 5 July 2009	from 23 July 2009 (1st Addendum)
Spare parts, type: A319/320	[265 - 290]	Based on net book value	from 23 July 2009 (1st Addendum)
Spare parts, type: A310, ATR and Boeing	[440 - 485]	Based on net book value	from 22 September 2009 (2nd Addendum)
Flight simulator	[155 - 170]	YBN Consult — Znalecký ústav s.r.o., Expert opinion of 10 September 2009	from 22 September 2009 (2nd Addendum)
1 Boeing 737-55s, registration mark: OK CGK	[140 - 155]	YBN Consult — Znalecký ústav s.r.o., Expert opinion of 7 December 2009	from 9 December 2009 (3rd Addendum)
2 Boeing 737-55s, registration marks: OK CGH, OK CGJ	[300 - 330]	YBN Consult — Znalecký ústav s.r.o., Expert opinion of 7 December 2010	from 9 December 2009 (3rd Addendum) until 25 January 2010 (4th Addendum)
IT	[80 - 85]	PROSCON — s.r.o., Expert opinion of 30 November 2009	from 9 December 2009 (3rd Addendum)
'ČSA CZECH AIRLINES' trademark	[140 - 155]	Vladimír Cmejla, Expert opinion of 30 November 2009	from 9 December 2009 (3rd Addendum)
ČSA's share in ČSA Support, s.r.o.	[790 - 865]	PROSCON — s.r.o., Expert opinion of 20 January 2010	from 25 January 2010 (4th Addendum)

(*) Business secret.

⁽¹⁾ The first addendum was concluded on 23 July 2009, the second on 22 September 2009, the third on 9 December 2009 and the fourth on 25 January 2010.

2.2. Scope of this Decision

- (10) The opening decision dated 24 February 2010 refers to the Osinek loan of CZK 2,5 billion on the basis of the loan agreement concluded on 30 April 2009 and assumes that the decollateralisation of the loan on the basis of Czech Government Resolution No 1343 of 26 October 2009 had already been carried out. However, the decollateralisation of the loan and its capitalisation (the debt-for-equity swap) was notified to the Commission on 12 May 2010 (SA.30908 ČSA — Czech Airlines — Restructuring plan) and implemented in June 2010. Therefore, this decision deals only with the Osinek loan of CZK 2,5 billion itself on the basis of the loan agreement concluded on 30 April 2009. The assessment of the decollateralisation and subsequent debt-for-equity swap of the Osinek loan will be the subject of the final decision in Case SA.30908.

2.3. Osinek

- (11) Osinek was a financial vehicle corporation founded in order to supervise the closure of coal mines in the Czech Republic and their revitalisation. At the time when the loan was granted, it was 100 %-owned by the Czech authorities under the supervision of the Ministry of Finance. On 5 November 2008 Osinek went into liquidation. Before its liquidation, Osinek still had funds at its disposal, and was reportedly looking for different investment possibilities. The Osinek loan agreement was concluded and signed on 30 April 2009 on behalf of Osinek by its liquidator. In order to identify potential risks associated with the loan, Osinek commissioned an economic analysis of ČSA from an independent expert, European Business Consulting spol. s.r.o. ('EBC'), as well as a legal analysis from the law firm, JUDr. Jiří Rybář & JUDr. Pavel Štrbík.
- (12) On 29 September 2009 Osinek and the Ministry of Industry and Trade of the Czech Republic signed an agreement under which Osinek's accounts receivable from ČSA arising from the Osinek loan agreement were assigned to the Ministry as a result of the Osinek liquidation procedure. ČSA received notice of this assignment on the same day. On 8 March 2010 the Osinek liquidation procedure was completed.
- (13) On 3 May 2010 the Czech Government adopted Resolution No 333 on a restructuring plan for ČSA under which the Czech Government instructed the Ministry of Industry and Trade to implement the release of pledges over some of the collateral before

the increase of ČSA's registered capital. The loan capitalisation (debt-for-equity swap) was legally based on that Resolution and implemented on 30 June 2010.

2.4. The beneficiary, ČSA

- (14) ČSA has been the national air carrier of the Czech Republic since 1923. It is headquartered in Prague and operates from Prague Ruzyně airport. ČSA is the largest airline based at Prague Ruzyně airport, accounting for 37 % of the passengers whose trip originates or finishes in Prague. ČSA is a member of the Sky Team alliance. Before restructuring, the fleet of ČSA comprised 51 aircraft. ČSA offers scheduled air transport services (to 104 destinations in 44 countries). ČSA also provides charter flights, cargo services, ground handling services (it handles approximately 60 % of all passengers at Prague Ruzyně airport), aircraft maintenance services, crew training services, catering services, and it operates duty-free shops at Prague Ruzyně airport and duty-free sales on board.

2.4.1. Ownership structure

- (15) ČSA is a state-owned company with 95,69 % of its shares owned by the Czech Republic through the Ministry of Finance. The minority shareholders are Česká pojišťovna, a.s. (2,26 %), the City of Prague (1,53 %) and the City of Bratislava (0,51 %).
- (16) Upon completion of the restructuring process, the State aims to find a strategic partner for ČSA. As preparation for the planned privatization, the Czech Government decided to create a new corporate structure under the umbrella of Český Aeroholding, a.s. ('ČAH').
- (17) On 25 October 2011, the Czech competition authority approved the creation of ČAH that will include ČSA, Prague Ruzyně airport and ČSA's current subsidiaries, i.e. Czech Airlines Handling, Holidays Czech Airlines, Technics and ČSA Services s.r.o. ČAH's management and structure would comprise elements of a financial holding structure, its purpose being to restructure the companies grouped within the holding to facilitate their access to commercial financing and to prepare them for the upcoming privatisation.

2.4.2. Financial situation of the company

- (18) ČSA has experienced difficulties which worsened significantly in 2009 at the peak of the current economic crisis. Although the company did not qualify at any point in time for insolvency proceedings under Czech national law, it experienced a clearly negative trend in the development of its key financial indicators.

Table 2

ČSA's equity and registered capital, 2006-2008 (CZK thousand)

	2006	2007	2008	2009
Equity	938 646	1 238 093	101 686	- 2 352 045
Registered capital	2 735 510	2 735 510	2 735 510	2 735 510

Source: Annual Reports of ČSA

Table 3

Changes in ČSA's finances (CZK thousand)

(thousands) CZK	31.12.2006	31.12.2007	31.3.2008	30.6.2008	31.12.2008	31.3.2009	30.6.2009	30.9.2009	31.12.2009
Profit/Loss	- 396 951	206 600	[- 880 000 - - 800 000]	[- 180 000 - - 165 000]	470 057	[- 1 320 000 - - 1 190 000]	[- 1 840 000 - - 1 660 000]	[- 2 625 000 - - 2 365 000]	- 3 756 125
Turn- over ⁽¹⁾	23 375 950	23 399 853	[4 625 000 - 5 080 000]	[10 175 000 - 11 250 000]	22 581 692	[4 385 000 - 4 820 000]	[9 265 000 - 10 235 000]	[14 300 000 - 15 830 000]	19 789 620
Net cash flow from operations	- 533 192	- 275 234	[- 1 110 000 - - 1 000 000]	[- 640 000 - - 580 000]	- 1 762 376	[- 1 230 000 - - 1 115 000]	[- 1 320 000 - - 1 195 000]	—	- 3 066 694
Debt	6 476 911	4 391 070	[4 410 000 - 4 890 000]	[3 665 000 - 4 065 000]	6 494 752	[5 685 000 - 6 285 000]	[5 550 000 - 6 065 000]	[6 290 000 - 6 960 000]	6 581 325
Net asset value	11 679 439	10 161 647	[8 945 000 - 9 855 000]	[9 535 000 - 10 065 000]	10 418 871	[8 340 000 - 9 255 000]	[8 990 000 - 9 920 000]	[8 470 000 - 9 390 000]	7 948 571

Source: Financial statements provided by ČSA

⁽¹⁾ The turnover data within a financial year are cumulative.

(19) The company made profits in 2007 and 2008. However, its business result deteriorated significantly in 2009. Its turnover had diminished slightly over the previous four years, but cash flow was declining considerably. The level of debt was more or less stable. The company was offsetting its losses by the sale of assets, especially in the 2009 financial year.

(20) The situation of the company worsened in the course of 2009, in particular after the summer, which is traditionally a profitable period for ČSA.

2.5. The opening decision

(21) On 24 February 2010 the Commission opened the formal investigation procedure. In its decision the

Commission expressed doubts as to whether ČSA was already in difficulty within the meaning of the Community guidelines on state aid for rescuing and restructuring firms in difficulty ('the R&R Guidelines') ⁽¹⁾ at the time of receiving the loan.

(22) In addition, the Commission expressed doubts as to whether the conditions of the loan provided by Osinek to ČSA, taking into account its financial situation, conferred an economic advantage upon it which the recipient undertaking would not have obtained under normal market conditions. Furthermore, the Commission questioned whether, if the loan did involve state aid, this aid could be found compatible under the applicable state aid rules, especially the Commission communication *Temporary Community Framework for state aid measures to support access to finance in the current financial and economic*

⁽¹⁾ OJ C 244, 1.10.2004, p. 2.

crisis ('the Temporary Framework') ⁽¹⁾. If the Osinek loan was found to involve state aid, the measure would have detrimental effects on competition, i.e. to companies operating routes from Prague Ruzyně airport or competing with ČSA and its subsidiaries in other markets.

3. COMMENTS FROM THE CZECH REPUBLIC

- (23) In reply to the opening decision, the Czech Republic submitted comments in which it argued that the Osinek loan met the 'market economy investor principle' test because it did not provide ČSA with undue economic benefits.
- (24) In particular, the Czech Republic is of the opinion that on the date of signing the Osinek loan agreement, ČSA was not a firm in difficulty and only became a firm in difficulty as late as August 2009. The Czech Republic argues that despite its growing problems ČSA has always been able to secure its viability. However, the situation changed in late 2008 and early 2009 and continued to deteriorate throughout the year due to the global economic recession, which had a severe impact on the world transport markets ⁽²⁾. This, combined with destabilised oil markets and currency fluctuations, contributed to the deterioration of ČSA's financial condition.
- (25) In the course of 2009 ČSA relied on forecasts based on previous years' results and expected significantly better results in the summer season. None the less, the first half of 2009 results reported to management in mid-August showed a substantial decline in ČSA's average revenue for June. In August 2009 it became clear to management that the company was no longer able to operate without immediate cost-cutting measures and financial assistance from external sources.
- (26) In relation to the possible state aid element in the Osinek loan, the Czech Republic maintains that the interest rate meets the requirements of the communication from the Commission on the revision of the method for setting the reference and discount rates ('the Reference Rate Communication') ⁽³⁾. In particular, the Czech Republic submits that it was appropriate to use the three-month PRIBOR rate as the base rate to determine the interest of the loan in question given the volatility of the financial markets at the time of signing the Osinek loan agreement.
- (27) ČSA is not assessed according to rating systems, so the Czech Republic is unable to provide evidence for its assumption that ČSA qualified for a B rating at the

time when the Osinek loan agreement was signed. However, the Czech Republic refers to a report of 27 April 2009 written by EBC according to which ČSA was solvent and creditworthy.

- (28) The Czech Republic reiterates that for the purposes of securing the loan ČSA was required to provide collateral amounting to at least 110 % of the loan for its entire duration. Thus, the amount of the loan actually granted to ČSA was not at any time to exceed 90 % of the value of all the collateral. The Czech Republic confirmed that this requirement was met in all cases and submitted appraisal reports of assets that were used as collateral for the loan.
- (29) In addition, the Czech Republic argues that the liquidator of Osinek, in view of the fact that Osinek had a considerable amount of available financial resources, sought investment opportunities to generate a return. Before entering into the Osinek loan agreement, the liquidator commissioned the independent consulting company, EBC and the law firm JUDr. Jiří Rybář & JUDr. Pavel Štrbík to draw up an economic and legal analysis of the loan offer. The analysis by EBC confirmed that ČSA could be considered solvent and that the risk that lending to ČSA might cause loss or harm to Osinek was minimal. Based on this analysis, the liquidator decided that lending to ČSA would be an advantageous means of depositing Osinek's available financial resources.
- (30) Additionally, the Czech Republic argues that, even if the Commission found that the terms of the Osinek loan were more favourable than those offered in the market, then the loan would be compatible with the conditions laid down in the Temporary Framework.

4. COMMENTS FROM INTERESTED PARTIES

- (31) During the formal investigation procedure the Commission received comments from three interested third parties and from the beneficiary of the measure under investigation, ČSA (paragraph 4).
- (32) ČSA's comments reflect in essence the Czech Republic's comments on the opening decision set out above. ČSA reiterates that the Osinek loan was granted on market terms, since Osinek acted as a rational operator in a market economy motivated by commercial rather than economic or social policy objectives. Moreover, ČSA comments on the quantification of the possible aid element, should the Commission conclude that the Osinek loan was granted at an advantageous interest rate, i.e., assuming that ČSA's rating were worse than 'B' and/or the collateral were not be classified as 'high'.

⁽¹⁾ OJ C 83, 7.4.2009, p. 1.

⁽²⁾ In 2009 the Czech market experienced a 6 % drop in passenger traffic at Prague Ruzyně airport.

⁽³⁾ OJ C 14, 19.1.2008, p. 6.

(33) All of the interested third parties are competitors of ČSA and are represented by the same law firm; therefore, their reasoning is identical to some extent. The interested third parties argue that the Osinek loan provided ČSA with state aid which enabled the company to compete unfairly by charging prices which the other competitors who have not received any state subsidies cannot offer without losing the capacity to cover their costs and generate a reasonable profit ⁽¹⁾.

(34) The interested third parties argue that ČSA was in severe difficulties already before 1 July 2008. Furthermore, they argue that the Osinek loan was provided at a substantially lower interest rate than what a bank would require under similar circumstances, considering the financial situation of ČSA, the length of repayment, the quality of the collateral and the low probability of actual repayment. In such circumstances, the Osinek loan would constitute illegal state aid incompatible with EU rules. One competitor who provided comments claims that ČSA fulfilled the condition that more than half of its registered capital had disappeared in 2007, 2008 and 2009. Moreover, in the years 2008 and 2009, more than one quarter of the registered capital of ČSA had disappeared over the preceding 12 months. The same competitor explains that it may be assumed from the decrease of registered capital of ČSA in 2008 that already on 1 July 2008 the company met both conditions for a firm in difficulty within the meaning of point 10(a) of the R&R Guidelines.

(35) The interested third parties further claim that due to the negative operating cash flow, the plurality of creditors and the existence of financial obligations due and payable within 30 days, it may be assumed that the company suffered from impending insolvency from the end of the year 2007 and should, therefore, qualify as a firm in difficulty since 2007 (pursuant to point 10(c) of the R&R Guidelines).

5. COMMENTS FROM THE CZECH REPUBLIC ON THE OBSERVATIONS OF INTERESTED PARTIES

(36) The Czech Republic disagreed with the comments of the interested third parties and agreed with the comments of ČSA. The Czech Republic maintained its argument that

the Osinek loan was granted on market terms and in accordance with the Reference Rate Communication. Furthermore, the Czech authorities argue that ČSA was able to operate without state aid until the second half of 2009. The condition of ČSA's assets was not seriously impaired even in the first half of 2009, and its value actually increased from CZK [8 340-9 255] million in the first quarter of 2009 to CZK [8 990-9 920] million in the second quarter of 2009.

(37) The Czech Republic notes that, although ČSA publishes the results of its operations compiled in accordance with both Czech Accounting Standards ('CAS') and International Financial Reporting Standards ('IFRS'), the interested third parties based their comments solely on results compiled in accordance with CAS, the methodology of which does not provide a true picture of the company's operations. Accounts compiled in accordance with IFRS provide better information about the company's financial condition and are therefore more appropriate. ČSA is using CAS because of its obligation under Czech tax laws. However, ČSA's activities are not limited to the Czech Republic but are global, which is why ČSA has been using IFRS as well. The Czech Republic points out that IFRS are applied by banks in their lending decisions because they are considered to be more precise than CAS.

(38) Finally, the Czech Republic provided evidence showing that at the time when the Osinek loan was granted ČSA did not fulfil the conditions for insolvency under the Czech Insolvency Act ⁽²⁾.

6. PRESENCE OF STATE AID

(39) By virtue of Article 107(1) TFEU, 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.

(40) The criteria laid down in Article 107(1) TFEU are cumulative. Therefore, in order to determine whether the notified measures constitute state aid within the meaning of Article 107(1) TFEU all of the following conditions must be fulfilled. The financial support would have to:

- be granted by the State or through state resources;
- confer an economic advantage on the recipient;
- favour certain undertakings or the production of certain goods;

⁽¹⁾ Additional comments made by the interested third parties concerning: (i) the capitalisation of the Osinek loan via the debt-for-equity swap; (ii) the alleged payment of remuneration of the Chairman of the Board of Directors and of the President of ČSA by the state-owned Prague Ruzyně airport, and (iii) transfers of property of ČSA to the state-owned Prague Ruzyně airport with the subsequent lease-back to ČSA, do not relate to this case and will be analysed in the final decision in Case SA.30908 ČSA — Czech Airlines — Restructuring plan.

⁽²⁾ Act No 182/2006

— distort or threaten to distort competition; and

— affect trade between Member States.

6.1. State resources and imputability

- (41) The concept of state aid applies to any advantage granted directly or indirectly, financed out of state resources, granted by the State itself or by any intermediary body acting by virtue of powers conferred on it.
- (42) Therefore, it has to be established, first, whether the Osinek loan must be regarded as state resources. As mentioned above, Osinek was, at the time when the loan was granted, 100 %-owned by the Ministry of Finance of the Czech Republic and, for this reason, irrespective of its corporate or any other legal status, it is a public undertaking within the meaning of Article 2(b) of Commission Directive 2006/111/EC of 16 November 2006 on the transparency of financial relations between Member States and public undertakings as well as financial transparency within certain undertakings⁽¹⁾. Thus, the Commission considers that the Osinek loan is financed from state resources.
- (43) However, the Court of Justice has also ruled that, even if the State is in a position to control a public undertaking and to exercise a dominant influence over its operations, actual exercise of that control in a particular case cannot be automatically presumed. A public undertaking may act with more or less independence, according to the degree of autonomy left to it by the State. Therefore, the mere fact that a public undertaking is under state control is not sufficient for measures taken by that undertaking, such as the loan agreement in question, to be considered imputable to the State. It is also necessary to examine whether the public authorities must be regarded as having been involved, in some way or other, in the adoption of this measure. On that point, the Court indicated that the imputability to the State of a measure taken by a public undertaking may be inferred from a set of indicators arising from the circumstances of the case and the context in which that measure was taken⁽²⁾.
- (44) Such indicators can be the integration of the undertaking into the structures of the public administration, the nature of its activities and the exercise of the latter on the market in normal conditions of competition with private operators, the legal status of the undertaking (in the sense of its being subject to public law or ordinary company law), the intensity of the supervision exercised by the public authorities over the management of the undertaking, or any other indicator showing, in the particular case, an involvement by the public authorities in the adoption of a measure or the unlikelihood of their not being involved, having regard also to the scope of the measure, its content or the conditions which it contains.

- (45) The Commission notes that the majority of Osinek Supervisory Board members are representatives of public authorities (such as the Ministry of Finance).
- (46) Osinek went into liquidation on 5 November 2008 by virtue of the decision of its sole shareholder of the same date. Although, under Czech law, the liquidator has to act on his/her own and without instructions from the company's bodies during the liquidation process, the Commission further notes that the liquidator was appointed by the Ministry of Finance of the Czech Republic acting as the sole shareholder of Osinek.
- (47) In addition, the Czech authorities have provided the Commission with expert opinions from JUDr. Jiří Rybář and JUDr. Pavel Štrbík which recommended that before taking the decision to grant a loan to ČSA the liquidator of Osinek should consult Osinek's shareholder, i.e. the Czech Republic.
- (48) As regards the supervision of the activities of Osinek by the State, the Commission further observes that the Czech Government subsequently also took the decision to decollateralise the Osinek loan and swap the debt for ČSA's equity by Resolution No 333.
- (49) Therefore, the Commission concludes that the decision to grant the Osinek loan is imputable to the Czech State. The Osinek loan must, therefore, be regarded as being financed from state resources.

6.2. Economic advantage

- (50) The Commission notes that, according to well-established principles of EU law, if additional capital is made available by the State to an undertaking on conditions better than normal market conditions, this could fall within the scope of Article 107(1) TFEU, as it would result in favouring the particular undertaking within the meaning of that Article. In order to determine whether an undertaking has been granted an economic advantage by the State which it would not have obtained under normal market conditions, the Commission applies the 'market economy investor principle' ('the MEIP')⁽³⁾.
- (51) According to that principle, no state aid would be involved where, in similar circumstances, a private investor of a comparable size to that of the bodies operating in the public sector could, while operating in normal market conditions of a market economy, have been prompted to make the capital contribution in question. The Commission must therefore assess whether a private investor would have entered into the transaction in question on the same terms. The projected behaviour of the hypothetical private investor is that of a prudent investor whose goal of profit maximisation is tempered by caution about the level of risk acceptable for a given rate of return. According to this principle,

⁽¹⁾ OJ L 318, 17.11.2006, p. 17.

⁽²⁾ Case C-482/99 *France v Commission* ('Stardust Marine') [2002] ECR I-4397, paragraphs 52 and 57.

⁽³⁾ Joined Cases T-228/99 and T-233/99 *Westdeutsche Landesbank GZ v Commission* [2003] ECR II-435, paragraph 251.

capital put at the disposal of a company by the State, directly or indirectly, in circumstances which correspond to the normal conditions of the market, should not be regarded as state aid ⁽¹⁾.

(52) According to established case law, the MEIP is applicable to loans. When applied to the grant of a loan, this principle raises the question of whether a private investor would have granted the loan to the beneficiary on the terms on which it was actually granted ⁽²⁾. In this respect, the Commission assesses whether the loan is made on normal commercial terms and whether such loans would have been available from a commercial bank. With regard to the terms of such loans, the Commission takes into account in particular both the interest rate charged and the security sought to cover the loan. The Commission assesses whether the security given is sufficient to repay the loan in full in the event of default and the financial position of the company at the time when the loan is made ⁽³⁾.

(53) The Commission notes that ČSA is a legal person engaged in economic activities and is therefore regarded as an undertaking within the meaning of Article 107 TFEU. In order to determine whether the Osinek loan was granted on favourable conditions or on market conditions, the Commission verified the compliance of the interest rate for the loan in question with the Commission reference rate as laid down in the Reference Rate Communication, which is applied as a proxy for the market rate.

(54) As regards the relevant date to be taken into account when comparing the interest rate of the loan in question with the reference rate, the Commission already expressed its opinion in the opening decision that this should be the date of the legally binding act according to which the loan was granted, i.e. 30 April 2009 (date of conclusion of the loan agreement between Osinek and ČSA).

(55) The Czech Republic claims that, at that time, ČSA still had access to external financing by private banks and became a firm in difficulties only in August 2009. In early 2009 ČSA's creditworthiness corresponded to rating category B.

(56) In order to verify the claims of the Czech Republic, the Commission consulted several private banks having

business relations with ČSA on their internal rating for ČSA in the first six months of 2009, the changes of the internal rating for ČSA between July 2008 and July 2009, the conditions of loans which were granted to ČSA in the first six months of 2009, and other comments concerning ČSA's creditworthiness in the first six months of 2009. Three private banks provided information on the condition that the information would be held in confidence, would be used only for the Commission's internal assessment and would not be disclosed to any third party, including ČSA and the Czech authorities.

(57) Although all of these banks acknowledged the worsening of ČSA's financial situation in early 2009, working capital loans and credit facilities were provided to ČSA during the first half of 2009. The internal rating for ČSA of the three private banks corresponds roughly to a B rating.

(58) The Commission notes that the banks' answers are consistent and sound. Although the internal ranking of the company deteriorated, the downgrading does not seem significant enough to justify a higher risk margin.

(59) In addition, the Commission observes that, as already indicated in the opening decision and based on the information provided by the Czech Republic, UniCreditBank provided a working capital, medium-term loan (4 years) of CZK 200 million to ČSA in September 2008, secured by a flight simulator. On 25 June 2009, due to the deviation from the financial indicators agreed in the loan agreement, UniCreditBank increased the risk margin for the ČSA loan from 160 basis points (agreed in September 2008) to 325 basis points above the one-month PRIBOR (i.e. an interest rate of 5,10 % p.a. on 25 June 2009). The Commission notes that this interest rate, which reflected the recent worsening of ČSA's financial situation, is below the interest rate of the Osinek loan (5,51 % p.a.) and corresponds approximately to a reference rate for a company with a B rating (with high collateralisation).

(60) In view of the above, it can be concluded that, in principle, ČSA had access to external financing at the time the Osinek loan was granted and that ČSA's creditworthiness in the first half of 2009 corresponded to a B rating.

(61) The collateral used to secure the loan comprised buildings located at Prague Ruzyně Airport, land, inventories and spare parts. The market value of the collateral was established by independent experts from the Czech Republic, who are registered either in the Register of Expert Institutes or the Central Register of Authorised

⁽¹⁾ Commission Communication to the Member States *Application of Articles 92 and 93 of the EEC Treaty and of Article 5 of Commission Directive 80/723/CEE to public undertakings in the manufacturing sector*, OJ C 307, 13.11.1993, p. 3, point 11. The Communication deals with the manufacturing sector, but is applicable to other economic sectors. Cf. Case T-16/96 *Cityflyer* [1998] ECR II-757, paragraph 51.

⁽²⁾ See Case T-16/96 *Cityflyer Express Ltd v Commission* [1998] ECR II-757, paragraphs 45 and 46.

⁽³⁾ See Communication on the application of Articles 92 and 93 of the EC Treaty and Article 61 of the EEA Agreement to state aid in the aviation sector, OJ C 350, 10.12.1994, p. 5.

Experts maintained by the Czech Ministry of Justice and have experience in the field of the evaluation of assets ⁽¹⁾.

- (62) The Commission notes that the date of the appraisal report for the collateral Hangar F (see Table 1) is 1 June 2009, whereas the first tranche of the Osinek loan was paid on 11 May 2009. The Czech authorities have submitted a declaration by YBN Consult, dated 6 May 2009, which confirms the value of the collateral used. Such a declaration is in line with paragraph 5.9.11 of the Osinek loan agreement provided that the complete appraisal report is submitted within one month from the date of payment of the first tranche. The Commission notes that this condition was fulfilled.
- (63) Furthermore, the Commission has critically evaluated the submitted appraisal reports. The evaluations give no cause for concern since no manifest errors have been detected, accepted methodologies are applied and the evaluations are based on credible assumptions. Therefore, the Commission considers that the results of the present appraisal reports are an appropriate approximation for the realistic market prices of the assets used as collateral

for the Osinek loan. For one type of collateral (the spare parts), the value was based on their net book value. The Commission considers that this valuation method is appropriate for this type of asset given that spare parts can easily be traded and their value should therefore correspond to their original acquisition cost less accumulated depreciation.

- (64) The loan agreement stipulated that the actual loan amount must not exceed 90 % of the value of the collateral, i.e. the value of the collateral must be at least equal to 110 % of the loan amount. Based on the submitted information, at the time when the first tranche was granted in May 2009, the value of the original collateral as agreed in the loan agreement of 30 April 2009 was at least [110-117] %; at the time when the second tranche was granted in July 2009 at least [120-132] %; and at the time when the third tranche was granted in September 2009 at least [128-141] %. In addition, by several addendums to the Osinek loan agreement (see recital 8) additional collateral assets were added and some assets were released.

Table 4

Overview of collateralisation at different time periods of the Osinek loan

Date of change	Amount drawn (CZK million)	Value of collateral (CZK million)	% level of collateral
11 May 2009	800	[880-935]	[110-117] %
23 July 2009	800	[1 350 - 1 485]	[169-186] %
30 July 2009	1 700	[2 040 - 2 240]	[120-132] %
22 September 2009	1 700	[2 485 - 2 760]	[146-162] %
24 September 2009	2 500	[3 190 - 3 535]	[128-141] %
9 December 2009	2 500	[3 275 - 3 615]	[131-145] %
25 January 2010	2 500	[3 310 - 3 640]	[132-146] %

- (65) The Reference Rate Communication assumes that 'high' collateralisation implies a loss given default below or equal to 30 %, which corresponds to a value of the collateral of at least 70 % of the loan amount. The Commission notes that the collateralisation provided for the loan is significantly higher, which creates an important safety margin as regards any possible deviation in the estimates of the value of the collateral.
- (66) The appropriate interest rate following the Reference Rate Communication at that time would be 5,16 % p.a. (base rate 2,96 % + 220 basis points = 5,16 % p.a.). The

margin of 220 basis points reflects a B rating as confirmed by the private banks and the high collateralisation described above.

- (67) That rate is lower than the applied interest rate for the Osinek loan (three-month PRIBOR ⁽²⁾ + 300 basis points), which on 30 April 2009 came to 5,51 % p.a.
- (68) An analysis of the applied rate (three-month PRIBOR plus 300 basis points) and the reference rate plus a margin of 220 basis points shows that these rates are comparable in terms of the methodology of the base as well as of the overall level of the applied rates, including the relevant risk margin.

⁽¹⁾ YBN Consult — Znalecký ústav, s.r.o. is an expert institute qualified to provide expert advice in economics and the building industry. PROSCON — s.r.o. is an expert institute qualified to provide expert advice with respect to economics. Mr Vladimír Čmejla is an expert in economics, patents and inventions.

⁽²⁾ For the daily PRIBOR rates see http://www.cnb.cz/en/financial_markets/money_market/pribor/daily.jsp.

(69) PRIBOR is the reference value of the interest rates on the market of interbank deposits which is calculated (fixed) from the quotations of the reference banks for the sale of deposits (i.e. offers) by the calculation agent for the Czech National Bank and for the Czech Forex Club (Financial Markets Association of the Czech Republic — A.C.I.)⁽¹⁾.

(70) The rate for the Osinek loan is based on PRIBOR calculated for the maturity of 3 months. The reference rate is based on one-year money market rates. However, the Commission reserves the right to use shorter or longer maturities adapted to certain cases.

(71) An analysis of the development of the two rates during the lifetime of the Osinek loan (April 2009 to June 2010) shows that the two rates are indeed comparable. The average rates⁽²⁾ for the period from April 2009 to June 2010 are nearly the same (4,77 % for the PRIBOR + 300 basis points; 4,79 % for the reference rate including a risk margin of 220 basis points). The small difference between two basis points is due to the different method of adjustment. PRIBOR is adjusted on a daily basis; the reference rate is adjusted only every few months.

(72) Against this background, the applied interest rate can be accepted as an appropriate proxy for a market rate. On the basis of the Reference Rate Communication, the measure is in line with the market and does not, therefore, involve an economic advantage to ČSA.

(73) Finally, the Commission notes that the payments of interest by ČSA to the creditor were executed in full compliance with the terms of the Osinek loan agreement⁽³⁾.

6.3. Selectivity

(74) Article 107(1) TFEU requires that a measure, in order to be defined as state aid, must favour 'certain undertakings or the production of certain goods'. In the case at issue, the Commission notes that the Osinek loan was granted to ČSA only. Thus, it is selective within the meaning of Article 107(1) TFEU.

6.4. Distortion of competition and effect on trade

(75) With regard to the cumulative criteria of state aid, in the current case the effect on intra-EU trade and distortion of competition of the contested measure are indisputable and were not even contested by the Czech authorities. ČSA is in competition with other European Union airlines, in particular since the entry into force of the third stage of liberalisation of air transport ('third package') on 1 January 1993. The measures in question enabled ČSA to continue operating so that it did not have to face, as other competitors did, the consequences normally deriving from its poor financial results.

6.5. Conclusion

(76) On the basis of the above, the Commission considers that the measure does not involve any state aid to ČSA as the Osinek loan was provided under conditions that a market economy investor would require. In particular, the interest rate at which the Osinek loan was granted in conformity with the reference rate determined on the basis of the Reference Rate Communication in view of the fact that ČSA had a B rating at the time when the loan was granted, which was confirmed by private banks and the loan was secured the whole time by collateralisation significantly higher than the 70 % of the loan amount stipulated in the Reference Rate Communication.

7. COMPATIBILITY OF THE AID WITH THE INTERNAL MARKET

(77) The Commission nevertheless also analysed whether, if the loan were considered to involve state aid, the measure would be compatible with the internal market under Article 107(3)(b) TFEU, on the basis of the Temporary Framework.

(78) The Osinek loan was granted in 2009. The measure aims therefore at facilitating the access of a firm to external finance at a period of time when the normal functioning of credit markets is severely disturbed because of the financial crisis and when the financial crisis ('credit crunch') is affecting the wider economy and leading to severe disturbances of the economy of Member States.

(79) On 17 December 2008 the Commission addressed this crisis by adopting the Temporary Framework. In it the Commission acknowledged the 'seriousness of the current financial crisis and its impact on the overall economy of the Member States'. The Commission further concluded 'that certain categories of state aid are justified, for a limited period, to remedy these difficulties and that they may be declared compatible with the common market on the basis of Article 107(3)(b) TFEU.'

⁽¹⁾ For the methodology of the PRIBOR see http://www.cnb.cz/docs/ARADY/MET_LIST/prib_en.pdf.

⁽²⁾ The average rates are derived from the arithmetic mean of the monthly three-month PRIBOR averages plus 300 basis points according to the Czech National Bank and the relevant reference rates plus 220 basis points between April 2009 and June 2010 (for the relevant data see the tables at http://www.cnb.cz/en/financial_markets/money_market/pribor/averages_form.jsp and http://ec.europa.eu/competition/state_aid/legislation/reference_rates.html).

⁽³⁾ Interest was duly paid for five consecutive calendar quarters and on one occasion a contractual penalty was charged for two day's delay in payment.

7.1. Compliance with Section 4.4.2 of the Temporary Framework

- (80) The measure must be assessed against the requirements of Section 4.4.2 of the Temporary Framework ('Aid in the form of subsidised interest rate').

Compliance of the interest rate applied

- (81) According to the Temporary Framework, the interest rate applied must be at least equal to the central bank overnight rate plus a premium equal to the difference between the average one-year interbank rate and the average of the central bank overnight rate over the period 1 January 2007 to 30 June 2008, plus the credit risk premium corresponding to the risk profile of the recipient, as stipulated by the Reference Rate Communication.
- (82) The overnight rate for the Czech Republic on 30 April 2009 was 1,45 % ⁽¹⁾. The difference between the average one-year interbank rate and the average of the central bank overnight rate over the period from 1 January 2007 to 30 June 2008 was 68 basis points.
- (83) The credit risk premium corresponding to the risk profile of the recipient was 220 basis points. This premium is based on a B rating (see recital 57) and a high level of collateralisation given the collateral offered (see recitals 64 and 65).
- (84) Under the Temporary Framework the minimum rate would therefore be 4,33 % (1,45 % + 0,68 % + 2,20 %). The actual rate for the Osinek loan was 5,51 %. As a result, the Osinek loan was granted at a rate higher than the minimum allowed under the Temporary Framework.
- (85) Furthermore, Section 4.4 of the Temporary Framework requires two additional conditions to be fulfilled for a loan to be considered to be compatible aid:

Contract concluded before 31 December 2010

- (86) First, the contract must have been concluded by 31 December 2010 at the latest. The reduced interest rates may be applied to interest payments before 31 December 2012.

- (87) The Osinek loan agreement was concluded on 30 April 2009. The loan was supposed to be paid back in one single payment on 30 November 2010. The loan contract therefore fulfils the first condition.

Not a firm in difficulty on 1 July 2008

- (88) Second, the beneficiary must not have been in difficulty on 1 July 2008.
- (89) Point 9 of the R&R Guidelines states that there is no EU definition of what constitutes a firm in difficulty and adds that the Commission regards a firm as being in difficulty where it is unable, whether through its own resources or with the funds it is able to obtain from its owners/shareholders or creditors, to stem losses which, without outside intervention by the public authorities, will almost certainly condemn it to going out of business in the short or medium term.
- (90) Subsequently, point 10(b) of the R&R Guidelines clarifies that a firm is regarded as being in difficulty, in the case of a company where at least some members have unlimited liability for the debt of the company, where more than half of its registered capital has disappeared and more than one quarter of that capital has been lost over the preceding 12 months.
- (91) In 2008 ČSA's registered capital totalled CZK 2 735 million. Based on the CAS standard, the company's equity fell to CZK 101 million in the same year.

Table 5

Equity and registered capital in 2007 and 2008 (CZK thousand)

2007	6/07	7/07	8/07	9/07	10/07	11/07	12/07
Equity	[1 035 000 - 1 140 000]	[1 415 000 - 1 555 000]	[1 450 000 - 1 595 000]	[1 410 000 - 1 565 000]	[1 950 000 - 2 145 000]	[1 260 000 - 1 390 000]	1 238 093
Registered capital	2 735 510	2 735 510	2 735 510	2 735 510	2 735 510	2 735 510	2 735 510

⁽¹⁾ CZEONIA (Czech Over Night Index Average) is defined as the weighted average of the interest rates of all unsecured O/N deposits placed by reference banks on the interbank market. It is calculated and published by the Czech National Bank (http://www.cnb.cz/en/financial_markets/money_market/czeonia/daily.jsp).

2008	1/08	2/08	3/08	4/08	5/08	6/08
Equity	[585 000 - 645 000]	[385 000 - 420 000]	[110 000 - 120 000]	[690 000 - 755 000]	[860 000 - 950 000]	[965 000 - 1 065 000]
Registered capital	2 735 510	2 735 510	2 735 510	2 735 510	2 735 510	2 735 510

	7/08	8/08	9/08	10/08	11/08	12/08
Equity	[945 000 - 1 030 000]	[1 220 000 - 1 340 000]	[1 270 000 - 1 410 000]	[1 295 000 - 1 430 000]	[610 000 - 670 000]	101 686
Registered capital	2 735 510	2 735 510	2 735 510	2 735 510	2 735 510	2 735 510

Source: Financial statements provided by ČSA

- (92) Although more than half of the registered capital of the company had already disappeared on 1 July 2008, the second condition of point 10(a) of the R&R Guidelines — that more than one quarter of the registered capital must have been lost over the preceding 12 months — is not fulfilled. The equity lost between June 2007 and July 2008 (CZK [31 570 000-34 875 000]) corresponds to only [0,8-1,5] % of the registered capital.
- (93) Furthermore, point 10(c) of the R&R Guidelines considers a company to be in difficulty where it fulfils the criteria under its domestic law for being the subject of collective insolvency proceedings. The Czech authorities confirmed that ČSA was not eligible for insolvency proceedings under paragraph 3 of the Czech Insolvency Act.
- (94) According to point 11 of the R&R Guidelines, even when none of the circumstances set out in point 10 of those Guidelines are present, a firm may still be considered to be in difficulties, in particular where the usual signs of a firm being in difficulty are present, such as increasing losses, diminishing turnover, growing stock inventories, excess capacity, declining cash flow, mounting debt, rising interest charges and falling or nil net asset value.
- (95) The changes in ČSA's financial results during the relevant period did not show a clear negative trend (see Table 3). The company made a loss at the end of 2006, but recuperated and showed a positive result for 2007. A loss of CZK [800-880] million was subsequently recorded at the end of the first quarter of 2008. However, the situation improved by the end of the second quarter, i.e. by 30 June 2008. A similar trend can be observed in the cash-flow situation. ČSA's turnover diminished slowly on a yearly basis over the observed period. However, it cannot be concluded that the turnover diminished significantly before 30 June 2008.
- (96) The debt of the company was reduced between March 2008 and June 2008, and then increased in the following six months. Finally, the value of the assets fluctuated over the observed period without any clear trend.
- (97) In conclusion, the trend in the financial criteria as set out in point 11 of the R&R Guidelines does not clearly point to all the usual signs of a firm being in difficulty before 30 June 2008. Furthermore, ČSA still had access to finance at that time, as demonstrated by the fact that it was able to obtain a loan from a private bank in September 2008 (see recital 59).
- (98) The Commission observes that aid compatible under Section 4.4 of the Temporary Framework may be granted to firms that were not in difficulty on 1 July 2008 but entered into difficulty thereafter as a result of the global financial and economic crisis. Therefore, the fact that ČSA became a firm in difficulty at a later date is without prejudice to the compatibility under the Temporary Framework.
- (99) Consequently, the Commission considers that ČSA was not a firm in difficulty on 1 July 2008 and that it was therefore eligible for the application of the Temporary Framework.

7.2. Conclusion

- (100) In view of the above, the Osinek loan fulfils all the conditions outlined in Section 4.4 of the Temporary Framework. Therefore, even if the Osinek loan were deemed to involve state aid, the measure would still be compatible with the internal market under Article 107(3)(b) TFEU.

8. CONCLUSION

- (101) The Commission concludes that the Osinek loan does not involve any state aid. Moreover, even if the Osinek loan were deemed to involve state aid, the measure would still be compatible with the internal market under Article 107(3)(b) TFEU.

(102) This Decision does not cover the decollateralisation and the capitalisation of the Osinec loan of 30 June 2010. The assessment of this measure will be the subject of the final decision in Case SA.30908,

HAS ADOPTED THIS DECISION:

Article 1

The measure which the Czech Republic has implemented for České aerolinie, a. s. in the form of a loan totalling CZK 2,5 billion provided by Osinec a.s. on the basis of the loan agreement of 30 April 2009 does not constitute aid within the meaning of Article 107(1) of the Treaty on the Functioning

of the European Union and, even if it did, it is compatible with the internal market under Article 107(3)(b) of that Treaty.

Article 2

This Decision is addressed to the Czech Republic.

Done at Brussels, 21 March 2012.

For the Commission
Joaquín ALMUNIA
Vice-President

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