II

(Non-legislative acts)

DECISIONS

COMMISSION DECISION

of 20 December 2011

on the State aid C 85/01 on ad hoc measures implemented by Portugal in favour of RTP

(notified under document C(2011) 9429)

(Only the English text is authentic)

(Text with EEA relevance)

(2012/365/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) [1] thereof,

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

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

Whereas:

I. PROCEDURE

(1) By three complaints submitted in 1993, 1996 and 1997 by the commercial broadcaster *Sociedade Independente de Comunicação SA* (SIC), the Commission was informed that Portugal had implemented a number of ad hoc measures and annual compensation measures in favour of the Portuguese public broadcaster, *Radiotelevisão Portuguesa SA* (RTP).

(2) By letter dated 15 November 2001, the Commission informed Portugal that it had decided to initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of a number of the ad hoc measures granted to RTP.

(3) The Commission's Decision to initiate the procedure was published in the *Official Journal of the European Communities*. Subsequently, Article 1 of Commission Decision 2005/406/EC of 15 October 2003 on ad hoc measures implemented by Portugal for RTP [3], found that certain of those measures, namely the State aid of PTE 68 006 million granted by Portugal to RTP in the form of an agreement with the social security scheme in 1993, capital injections in the period 1994 to 1997 and a loan in 1998 to be compatible with the common market within the meaning of Article 86(2) of the EC Treaty [4]. In addition, Article 2 of that Decision stated that certain measures did not contain State aid, namely the exemption from registration charges, the payment for the hiving-off of the television broadcasting network, the facilities granted for payment of the annual fee for the use of the television broadcasting network, the protocol on cinema promotion, the bond issue and the restructuring plan for the period 1996 to 2000.

(4) On 26 June 2008, the Court of First Instance in Case T-442/03 [5] annulled part of Decision 2005/406/EC on two grounds. It annulled Article 2 of that Decision insofar as it found that the 'exemption from registration charges' does not constitute State aid. The Court found that the Commission's task was to establish, in relation to the ad hoc advantage consisting of the exemption from payment of the registration charges and fees relating to its transformation into a public limited company (hereafter '*temporary* exemption'), whether it

[1] With effect from 1 December 2009, Article 88 of the Treaty establishing the European Community (EC) has become Article 108 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 Article 108 of the TFEU should be understood as references to Article 88 of the EC Treaty, where appropriate. In the same manner, Article 86(2) of the Treaty establishing the European Community has become Article 106(2) of the Treaty on the Functioning of the European Union.

[2] OJ C 329, 24.12.2008, p. 24.

[3] OJ C 85, 9.4.2002, p. 9.

[4] OJ L 142, 6.6.2005, p. 1.

[5] Judgment of the Court of First Instance of 26 June 2008, in Case T-442/03, *SIC* v *Commission* [2008] ECR II-1161.

was compatible with the logic of the Portuguese system for the transformation of public undertakings into public limited companies to occur by legislation, or whether the recourse to legislation was a derogation which was intended to confer an advantage on public undertakings in relation to other undertakings.

(5) For the *permanent advantage* resulting from an unlimited exemption from registration charges and other charges in respect of any act of inscription, registration or annotation granted to RTP (hereafter '*permanent* exemption'), the Court found that while it is not unlikely that the exemption in reality was not permanent (see paragraphs 73 and 79 of the judgment), that would not alter the finding that the general nature of that exemption had not been demonstrated by the Commission. The Court further found that while it might be that RTP was transformed by Portugal into public limited company because that was considered necessary for the fulfilment of the public service remit, this was not accompanied by sufficient evidence.

(6) The Court dismissed the applications as regards the finding in Decision 2005/406/EC not to classify the 1994 bond issue and the payment facilities for the license fee as State aid.

(7) As regards the compatibility of the State aid measures (Article 1 of Decision 2005/406/EC), the Court found that the Commission could not rely on the public service reports and the data contained therein, without having an external audit for those reports, as required by national law. The Commission was therefore not entitled to conclude that the State aid measures were compatible with the common market within the meaning of Article 86(2) of the Treaty (now 106(2) TFEU and the 'internal market') ([6]). The Court annulled Article 1 of the Decision 2005/406/EC.

(8) Following the judgment of the Court in Case T-442/03, the Commission drew the attention of interested parties to the fact that the Commission's investigation in this case had been reopened and invited comments from third parties ([7]).

(9) The Commission received comments from the complainant on 10 March 2009, which were forwarded to Portugal on 8 April 2009. Further comments from the complainant were received on 17 June 2009, which were forwarded to Portugal on 28 July 2009. Portugal replied to both sets of comments by letters dated 7 and 8 September 2009. Portugal sent further information to the Commission on 23 February 2010, 4 March 2010 and 15 April 2010. The Commission sent an information request to Portugal on 10 May 2010, requesting in particular that independent external audits of the public service reports for the period from 1992 to 1997 be conducted.

([6]) See paragraph 255 and 256 of the Judgment in Case T-442/03.
([7]) See footnote 2.

(10) Portugal replied to the Commission's request for information by letter dated 8 June 2010 and submitted the requested external audits on the public service reports by letter dated 12 August 2010. Further information by Portugal was submitted by letter dated 29 September 2010. A meeting took with Portugal on 29 March 2011 and further information was supplied by Portugal to the Commission on 17 June 2011, 25 August 2011 and 26 October 2011.

By letter registered on 15 December 2011, Portugal exceptionally agreed that this Decision be adopted in English as its authentic language.

(11) This Decision only deals with the ad hoc measures covered by the Decision to open the formal investigation proceedings. Some of the measures, which were declared not to constitute State aid within the meaning of Article 87(1) EC Treaty in Decision 2005/406/EC, have not been annulled by the Court in Case T-442/03 and Article 2 of Decision 2005/406/EC has therefore become final. Those measures concern the payment for the hiving-off of the television broadcasting network, the facilities granted for payment of the annual fee for the use of the television broadcasting network, the protocol on cinema production, the bond issue and the restructuring plan for the period from 1996 to 2000. However, as required by the Court in Case T-442/03, the Commission will make a new assessment as regards the temporary and permanent exemption from notarial deed charges as well as registration charges and publication costs.

This Decision focuses on the financial relation between RTP and Portugal in the period from 1992 to 1998 with regard to the agreement with the social security scheme in 1993, the capital injections during the period from 1994 to 1997 and the loan of in the year 1998. This Decision does not deal with the questions of the legal classification and compatibility with the Treaty of the annual compensation payments granted to RTP, which has been dealt with in the Commission's Decision of 22 March 2006 in Case No E 14/05 ([8]). In addition, on 4 July 2006, the Commission adopted a Decision regarding RTP's financing restructuring agreement, in Case NN 31/06 ([9]).

(12) However, in order to have a complete 'picture' of the financial relations between Portugal and RTP during the period covered by the Commission's investigation in this Case, the Commission must consider not only the ad hoc measures, but also the financial support granted to RTP by means of annual compensation payments. Therefore, this Decision refers to the annual compensation payments to the extent necessary to clarify the Commission's reasoning on the ad hoc measures.

([8]) Case No E 14/05 of 22 March 2006 — Compensation payments to public service broadcaster RTP.
([9]) Case NN 31/06 of 4 July 2006 — Financial support to restructure the accumulated debt of the Portuguese public service broadcaster RTP (OJ C 222, 15.9.2006, p. 4).

II. DETAILED DESCRIPTION OF THE ISSUES AT STAKE

A. *MEASURES IN FAVOUR OF RTP*

A.1. DESCRIPTION OF THE RECIPIENT RTP

(13) RTP (at the time Rádio e Televisão Portuguesa SARL) was set up as a public limited company by deed of 15 December 1955, following the decision of Portugal to establish a broadcasting company that would be entrusted with the concession for the provision of the public service of television broadcasting ([10]). The public service concession contract was signed on 16 January 1956.

(14) By Decree-Law No 674-D/75 of 2 December 1975, RTP was nationalised. That Decree-Law converted RTP into a public undertaking with the name '*Radiotelevisão Portuguesa EP*', to which all the legal rights and obligations of its predecessor were transferred under the Decree-Law.

(15) RTP had a monopoly position on the national broadcasting market until the 1980s. It operated two television channels, RTP1 and RTP2. In the 1990s, it started facing competition from commercial broadcasters after Portugal granted licences in February 1992 to SIC and the commercial broadcaster TVI to broadcast on a third and fourth channel respectively ([11]).

(16) Law No 21/92 of 14 August 1992 converted RTP, EP into a public limited company with the name '*Radiotelevisão Portuguesa SA*' and approved its new statutes.

(17) RTP performs both public service broadcasting activities and commercial activities. RTP is legally allowed to pursue commercial or industrial activities related to the activity of television ([12]).

(18) RTP's commercial activities have been conducted through financial participation in companies, which are legally distinct from RTP and have their own structure and accounting system.

([10]) Law No 40341 of 18 October 1955 in which the Portuguese Government undertook to promote: 'the establishment of a public limited company (…) with which it will conclude a concession contract for public service television broadcasting on Portuguese territory'.

([11]) Points 11.4 and 11.5 of Cabinet Resolution No 49/90 of 31 December 1990 and point 3 of Cabinet Resolution No 6/92 of 22 February 1992.

([12]) The Annex to Law No 21/92 on the Statutes of RTP provides in Article 3(2) thereof that RTP may perform the following commercial activities: (i) television advertising; (ii) marketing of products (namely of programmes and publications related to their activities); (iii) providing technical consultancy and professional training and cooperation with other national and foreign bodies; (iv) marketing and rental of television equipment, films, magnetic tapes, videocassettes and similar products; (v) take interests in additional company groups and European economic interest groups as well as hold shares or quotas in other companies, under any of the forms foreseen under commercial legislation.

A.2. MEASURES ([13])

Annual compensation payments

(19) The annual compensation payments to RTP constitute the main mechanism for compensating RTP for its public service obligations. In the period from 1992 to 1998, RTP received annual compensation payments totalling PTE 66 495 million (around EUR 332 million) ([14]) to cover the costs of its public service obligations. The legal basis for the annual compensation payments is Article 5 of Law No 21/92 ([15]).

(20) Table 1 gives a breakdown of the annual compensation payments granted to RTP in the period from 1992 to 1998, covered by this Decision.

Table 1

Amount of annual compensation payments 1992-98

(PTE and EUR million)

1992	1993	1994	1995	1996	1997	1998
6 200	7 100	7 145	7 200	14 500	10 350	14 000
EUR 26,9 (*)	EUR 35,4	EUR 35,6	EUR 35,9	EUR 72,3	EUR 51,6	EUR 69,8

(*) In the Commission Decision of 4 July 2006, in State aid Case NN 31/06 (ex-CP 164/01, CP 60/03 and CP114/04) — Portugal Financial support to restructure the accumulated debt of the Portuguese public service broadcaster RTP, in footnote 25, the Commission clarified that the compensation amount in the original decision in case C 85/2001 should be EUR 26,9 million rather than EUR 30,9 million as stipulated originally in decision C 85/2001. As the figure of EUR 26,9 million was considered the correct amount in Decision NN 31/06, it is also be used in this Decision.

Source: Council of Ministers Resolution.

Exemption from notarial deed charges, registration charges and publication costs

(21) At the time when RTP was transformed into a public limited company, the Portuguese law on company registration can be described as follows. Article 7(1) of the Portuguese company code (*Código das Sociedades Comerciais*), in its version in force at the time of the transformation of RTP provided that the articles of association (*contrato de sociedade*) of a trading company had to be formalised by a notarial deed.

([13]) This Decision contains no further description of the measures, which were not been annulled b y the Court in Case T-442/03. See recital 11 of this Decision.

([14]) EUR 1 = 200,482 PTE, fixed exchange rate at the time when Portugal adopted the euro (OJ L 359, 31.12.1998, p. 1).

([15]) According to Article 5 of Law No 21/92: 'Performance of the public service obligations entrusted to RTP SA […] shall confer on that company the right to a compensation payment the exact amount of which will correspond to the actual cost of providing the public service, which shall be determined on the basis of objectively quantifiable criteria and in accordance with the principle of sound management.'.

Article 18(5) of the company code provided that the act setting up a public limited company, after the company had been established in due legal form, had to be recorded in the commercial registry. Registration was compulsory pursuant to article 15(1) and 3(a) of the Commercial Registry Code (*Código do Registo Comercial*) and Article 166.º of the company code.

In accordance with Article 70(1)(a) of the Commercial Registry Code, in its version in force at the relevant time, the act setting up a public limited company had to be published in the *Diário da República* (see Article 70(2) ([16])) The publication must be carried out ex officio by the registrar, at the expense of the interested party (see Article 71(1) of the Commercial Registry Code)

(22) Upon its transformation into a public limited company in 1992, RTP was exempted from the payment of the notarial and registration charges related to the registration of the legal transformation of RTP from a public company into a public limited company. The value of the exemptions was PTE 33 million (approximately EUR 164 000). Normally, under Portuguese law, all legal persons have to pay the charges levied on the setting up of a company and the amendment of the company's statutes or any other relevant modifications of the company.

(23) The legal basis for the exemption from registration charges is Article 11(1) of Law No 21/92, which provides that:

'the statutes of RTP SA (…) are hereby approved; they do not need to be transformed into a deed, but shall be automatically registered, free of duties and expenses, on the basis of the Journal of the Republic (Diário da República) in which they are published.'.

(24) Article 11(1) of Law No 21/92 is derived from the application of Law 84/88 of 20 July 1988 on the transformation of public undertakings into public limited companies. Article 1 of Law No 84/88 provides that public undertakings, even if nationalised, could be converted by decree-law into public limited companies. It reads:

'Public undertakings … may be transformed by decree-law into public limited companies owned entirely or in majority by public entities, in accordance with the Constitution and with this law.'.

(25) Article 3(2) of Law No 84/88 on the transformation of public undertakings into public limited companies, also provides that such a decree-law must approve the statutes of the public limited company. Pursuant to Article 3(3) of Law No 84/88, that decree-law constitutes a sufficient document for the registration requirements to be carried out ([17]).

(26) Under Article 11(2) of Law No 21/92, RTP was exempted from paying other registration fees directly linked to the modification of the legal nature of the company. Article 11(2) reads as follows:

'All acts of inscription, registration and annotation before all registration departments, all authorities and all public bodies, in particular the national register of legal persons, the register of mortgages and the vehicle registration department shall be carried out on the basis of a simple request signed by two members of the undertaking's Board of Administration and shall be free of any charges and fees.'.

(27) According to Portugal, the provision of Article 11(2) was derived from the application of Decree-Law No 404/90 ([18]) and confirms the applicability to RTP of a provision of general application. On the basis of article 1 of this law, undertakings which, up to 31 December 1993, performed acts of cooperation or concentration could be granted exemption from transfer tax on fixed assets, which were necessary for the concentration or cooperation. Article 1 of that law also provided for an exemption from the emoluments and other legal charges which could be due for the performance of such acts.

(28) Portugal stated that RTP has, on several occasions in the past, paid notarial and registration charges related to certain capital increases and other operations after its transformation into a public limited company ([19]).

Rescheduling of debt due to the social security scheme and waiver of interest for late payment

(29) In the period from 1983 to 1989, RTP 'built up' a debt to the social security scheme of PTE 2 189 million arising from its failure to pay social security contributions. The background to that debt was a dispute between RTP and Social Security administration on the interpretation of the social security deductions for overtime and artists fees.

(30) The Social Security administration's interpretation was laid down in Article 2(e) of Implementing Decree No 12/83 of 12 February 1983. In order to avoid legal proceedings, the two parties reached an agreement under which the Social Security administration would waive its interest claim for late payment and accept a rescheduled payment of the debt. Following the settlement of the legal dispute, the Implementing Decree was never revoked.

(31) On 6 May 1993, a joint decree of the Ministry of Finance and the Ministry of Social Security formally authorised the rescheduling of the debt in 120 monthly instalments and waived the fines and interest due for the amount of PTE 1 206 million (EUR 6 million).

([16]) This provision has now been amended and stipulates publication on a publicly accessible internet site.
([17]) Article 3(2) and (3) of Law No 84/88 of 20 July 1988.
([18]) Decree-Law No 404/90 of 21 December 1990.
([19]) Submission Portugal 8 June 2010, paragraph 248 et seq.

(32) The conditions for authorising the exceptional arrangements for settling RTP's debts owed to the Social Security Scheme are laid down in Decree-Law No 411/91. Article 2(1) of that Decree-Law provides that the authorisation for must be indispensable in order to guarantee the viability of the debtor and the arrangements for may be applied, inter alia, on the ground that, as provided for in Article 2 (d) of the Decree-Law, the indebted undertaking 'has been the subject of occupation, worker self-management or state intervention'.

Annual capital injections in the period 1994 to 1997

(33) In the period from 1994 to 1997, Portugal increased the capital of RTP each year. The following table gives an overview of the different capital increases, which amounted to PTE 46 800 million (EUR 233 million).

Table 2

Increases in RTP's share capital 1994 to 1997

(PTE million)

Year	1994	1995	1996	1997
Increase in share capital	10 000	12 800	10 000	14 000
Share capital as at 31 December	22 708	35 508	45 508	59 508

Source: Balance sheets of RTP.

(34) The public service contracts that the Portugal concluded with RTP provide for state participation in investments made by RTP, preferably in the form of capital increases ([20]).

Loan in 1998

(35) In December 1998, a contract was concluded between the Public Debt Stabilisation Fund and RTP for a subordinated loan between from the Public Debt Stabilisation Fund (Fundo de Regularização da Dívida Pública) to RTP and laying down the conditions of a loan of PTE 20 000 million (EUR 99,8 million) to increase RTP's capital.

(36) The Public Debt Stabilisation Fund is managed by the Public Debt Management Institute (Instituto de Gestão de Crédito Público), which is responsible for managing the debt of the Portuguese State and for implementing the central borrowing programme, in accordance with the Public Debt Law ([21]) and the guidelines laid down by the Portuguese Government. That Institute is subject to the authority and supervision of the Portuguese Ministry of Finance ([22]).

(37) From the date on which the sums were available to RTP, the loan was subject to annual interest payments at the 12-month Lisbor rate, calculated on the first date of each period, plus 20 basis points ([23]).

(38) According to the contract, the loan was to be reimbursed on 31 December 2003 but could be extended for a further period of one or two years by mutual agreement. RTP did not pay interest on the loan, as the contract stipulates that the interest payable on the first four annual payments should be capitalised ([24]).

(39) The contract concluded in December 1998 between the Public Debt Stabilisation Fund and RTP was drawn up in accordance with the guidelines set out in a joint resolution of the State Secretaries for the Media, for the Treasury and for Finance on 17 December 1998.

B. *FINANCIAL POSITION OF RTP*

(40) As the following table shows, RTP made losses during the period that is subject to the Commission's investigation In 1996, RTP's financial situation deteriorated to the extent that its net equity became negative.

Table 3

RTP economic and financial data 1993 to 1998

(PTE million)

	1993	1994	1995	1996	1997	1998
Net profits (losses)	(7 883)	(19 558)	(26 581)	(18 512)	(32 223)	(25 039)
Net equity	1 557	8 071	4 269	(4 274)	(20 586)	(50 827)
Assets	39 418	42 262	56 078	67 654	62 340	83 843
Financial debts (*)	22 402	26 855	30 258	44 922	44 885	92 775

(*) Short-, medium- and long-term debts to credit institutions and bonds.
Source: RTP's financial accounts.

([20]) Clause 14 of the old public service contract from 17 March 1993 and Clause 21 of the new public service contract from 31 December 1996 concluded between the Portuguese State and RTP, see footnote 26.

([21]) Law No 7/98.

([22]) Article 1 of Decree-Law No 160/96.

([23]) A rate of 3,54 % was applied in 1999, 4,14 % in 2000; 5,05 % in 2001; 3,62 % in 2002; and 2,95 % in 2003.

([24]) Article 5 of the amended loan contract.

C. *RTP'S PUBLIC SERVICE OBLIGATIONS IN 1992 TO 1998*

(41) RTP is obliged to provide public service television. Different laws lay down the definition, assignment and financing of that service.

(42) Law No 58/90, which governs the activity of television broadcasting, laid down the conditions for private broadcasters and the obligation on the State to guarantee public service television broadcasting ([25]). As regards the statutes of RTP, Law No 21/92 defines the main public service obligations and the financing of that service.

(43) Two public service contracts signed between RTP and the Portuguese State in 1993 and in 1996 described the public service and the financing thereof in greater detail, (hereafter either 'old public service contract' or 'new public service contract' or 'public service contracts', when both contracts are referred to) ([26]).

Definition

(44) Article 4 of Law No 21/92 provides that a concession contract is to be concluded between Portugal and RTP and specifies the main public service obligations that must be performed under that contract. Article 4(2) of that Law establishes the general principles that RTP has to observe when performing its activity as concessionaire ([27]), while Article 4(3) thereof outlines the obligations of the public television broadcasting service ([28]).

([25]) Law No 58/90 of 7 September 1990 on the activity of television broadcasting.

([26]) On 17 March 1993, a public service contract (the old public service contract) was signed between Portugal and RTP. On 31 December 1996, it was replaced by the new public service contract.

([27]) RTP must: (a) respect the principles of freedom, independence, non-discrimination and non-concentration; (b) safeguard its independence from the public authorities; and (c) adapt programmes to quality and variety requirements in the interests of the public.

([28]) RTP must: (a) and (c) to contribute to enlightening, informing and educating the population; (b) to guarantee news coverage: (d) to (h) to make broadcasting time available for official messages, religious events, political parties, trade unions, the government and the public administration; (i) to broadcast two general coverage programmes, one of which should cover the Autonomous Regions of Madeira and the Azores; (j) and (m) to broadcast programmes on education, training, sport and culture; (l) to support and promote the cinema; (n) to keep audiovisual files; (o) to exchange programmes and information with Madeira and the Azores; (p) to produce and broadcast programmes for Portuguese communities abroad; (q) to cooperate with Portuguese-speaking countries; (r) to ensure direct coverage of main events abroad; (s) to maintain contacts with other European public service television broadcasters; and (t) to ensure that television broadcasting is in conformity with the guidelines laid down by the competent international bodies.

(45) The public service contracts confirm RTP's public service obligations. Firstly, general obligations and obligations relating to programme content are imposed on RTP ([29]). RTP must provide a public television service, as part of which it has to broadcast two channels and provide the population of mainland Portugal with general coverage. The first channel is of a more general nature and is required to provide more general programming. The second channel must aim more at specific audiences and provide educational, cultural and scientific programmes. One of the channels has to cover the autonomous regions of the Azores and Madeira.

(46) Secondly, the public service contracts impose specific programming obligations on RTP ([30]). Standards are set for programme quality (such as pluralism, impartial information, etc.) and programme content (new fiction, sport, children, Portuguese culture, domestic news, entertainment). RTP must allow viewing time for specified entities, to support the cinema and other forms of audiovisual production, to promote the production of educational or training programmes, to exchange programmes with the autonomous regions of the Azores and Madeira and to promote cooperation with other public service television bodies in the European Union. Furthermore, it must fulfil specific programming obligations relating to international cooperation. For example, it has to produce programmes for, and broadcast them to Portuguese communities living abroad, to Portuguese-speaking countries in Africa and to Macau. It is required to ensure the functioning of RTP Madeira and RTP Açores and to maintain its production centres and delegations abroad.

(47) Thirdly, the public service contracts impose specific obligations on RTP. For example, RTP must maintain audiovisual archives, introduce technological innovations in its equipment and activities, support the S. Carlos National Theatre and to provide other services to be specified on an ad hoc basis.

Assignment

(48) Article 5 of Law No 58/90 assigned to RTP the concession for public service broadcasting for a period of 15 years, renewable for a further period of 15 years and covering the frequencies corresponding to the first and second channels. Article 4 of Law No 21/92 provides that RTP is the concessionaire for public

([29]) Clause 4 of the old public service contract and Clauses 4 and 5 of the new public service contract.

([30]) Clauses 5 to 8 and Clause 10 of the old public service contract and Clauses 6 to 13 of the new public service contract.

service television broadcasting. Clause 1(a) of the public service contracts confirms that RTP is the provider of the public service television ([31]).

Control

(49) The public service contracts ([32]) provide for the setting up of a Public Opinion Council (*Conselho de Opinião*) consisting of representatives from the different sections of public opinion that may intervene in order to assess whether RTP is complying with its general and specific public service television broadcasting obligations.

(50) RTP is required to provide the Minister for Finance with a Public Business Plan and Budget for the fulfilment of its public service mission, (*Plano de Actividades e Orçamento do Serviço Público*) for the following year, accompanied by opinions issued by RTP's board of auditors and the Public Opinion Council. Furthermore, it has to provide a report on its compliance with its public service obligations during the previous year (*Relatório sobre o Cumprimento das Obrigacões do Serviço Público*, (the 'public service reports'), accompanied by an opinion of RTP's board of auditors ([33]).

(51) The Minister for Finance and the member of the government responsible for the media are required to verify compliance with the public service contracts. The Inspector-General of Finances is required to audit the financial plan. Furthermore, an annual audit on the public service reports has to be conducted by an external specialised auditor ([34]).

(52) The new public service contract also provides for sanctions to be imposed by Portugal for breach of contract in the form of fines, seizure, redemption or termination of the contract.

(53) During the period 1992 to 1998, RTP had external audits on all its annual accounts by an independent auditor.

(54) RTP also had produced the *public service reports* for all the years, with the exception of the public service report 1992, as the obligation to have external audits was first stated in the old public service contract dating from 1993. Portugal claims that for the years 1995 to 1998 a legally independent auditor issued a favourable and autonomous opinion on the public service reports ([35]). Portugal also argues that all public service reports during that period were accompanied by an opinion of RTP's Board of Auditors and by an audit of the Inspector General of Finance (*Inspecção-Geral de Finanças*), the latter being independent of RTP.

The situation as regards the *external audits of the public service reports* can be described as follows:

(55) The 1993 and the 1994 public service reports contained a compliance statement by that RTP's public service obligations were fulfilled, but only by RTP's management.

(56) For the years 1995, 1996, 1997 and 1998, the public service report contained compliance statements by an external auditor independent to the company, *Maia, Mesquita & Associados* — (*Revisor Oficial das Contas*), that that the audit did not disclose any matters that would significantly affect the calculation of the compensation payments to RTP referred to in those reports for those years.

(57) In 2010, Portugal submitted more comprehensive external audits of the public service reports for the period from 1992 to 1997 to the Commission. The external audits of the public service reports for that period were organised by the national media regulator, *Entidade Reguladora para a Comunicação Social (ERC)*. They were carried out for that period by Pedro Roque SROC, an external auditor, that is independent of RTP ([36]). Portugal also provided a synthesis report summarising the audit results for all the years.

An external audit on the public service report was already in existence for the year 1998. That external audit for the year 1998 was carried out by *BDO Binder*, an external auditor the 'BDO Binder report') ([37]).

(58) The mandate of the audits 1992-97 was, for each year in question, to assess whether RTP fulfilled its mandate as stipulated in the public service contracts in force at the time and whether there was a correspondence between the public service costs and the compensation payments. The external audits listed the public service obligations resulting from the public service contracts, took into

([31]) Clause 1 of the old public service contract stated that the aim of that contract was to lay down the terms under which RTP would provide the public television service. Clause 1 of the new public service contract states that RTP is the sole provider of public service broadcasting within the meaning of Article 5 of Law No 58/90 and of Article 4 of Law No 21/92.

([32]) Clause 9 of the old public service contract and Clause 23 of the new public service contract.

([33]) Clauses 15, 16, 18 and 19 of the old public service contract and Clauses 18 and 25 of the new public service contract.

([34]) Clause 19 of the old public service contract, Clause 25 of the new public service contract and Article 47(2) of Law No 31-A/98.

([35]) Paragraphs 53 and 54 of the Letter of Portugal of 8 June 2010. See also paragraph 108 of the submission 7 September 2009.

([36]) The full name of the auditor is: *'Pedro Roque SROC, Revisores Oficias de Contas, inscrita na Lista das SROC/s com no 125'*, Lisbon. It is a statutory auditor registered in the official list of auditors in Portugal, which means the auditor has to adhere to certain auditing standards and give an independent audit view.

([37]) BDO Binder & Co. Auditoria, Impostos e Consultoria, Lisbon, Portugal.

account the various laws governing RTP's public service obligations (for example, the Television Act No 58/90 of 7 September 1990) as well as the Public Business Plan and Budget (*Plano de Actividades e Orçamento do Serviço Público*) and the public service reports. The external audits examined whether the public service obligations were respected. The reports made a comparison with the compensation payments by Portugal compared to the costs established in the public service reports.

(59) For all the years under investigation, i.e. 1992-97, the audits come to the conclusion that RTP essentially fulfilled its main broadcasting obligations. The audits also state that 'with regard to the correspondence between the public service tasks provided and the compensation of the 'real and actual costs', there are no materially relevant distortions which affect compliance with the legislation in force at the time'. For all years, the synthesis report finds that the compensation payment by Portugal was less than the amounts indicated in every public service report. The audits are published on the ERC website ([38]). Likewise did the BDO Binder report not point to any overcompensation for the public service provided.

Financing

(60) Article 5 of Law No 21/92 confers on RTP the right to receive compensation for its public service obligations. That right is confirmed in the public service contracts.

(61) In addition to the system of annual compensation payments (see recital 19 above), the public service contracts provide for funding by Portugal for:

(a) the payment of specific services under agreements to provide services signed or to be signed by the public administration and RTP ([39]);

(b) State participation in all investments made by RTP, particularly those for the infrastructures required for the operation of the production and broadcasting centres in the autonomous regions of Azores and Madeira, the audiovisual archives and RTP's international broadcasts and other technological investments that RTP is required to make ([40]).

(62) In order to determine the costs and revenues of the public service obligations that qualify for compensation payments, RTP applies an analytical accounting system. The public service contracts specify the criteria for calculating the eligible costs for compensation in respect of each public service obligation ([41]).

(63) On the basis of the analytical accounting system mentioned in the previous recital, RTP allocates costs and revenues (for example, personnel and equipment) to cover a defined number of activities (such as management of programming, direct and indirect programme costs, diffusion costs, emission costs, marketing costs and overheads).

(64) The direct costs of the different activities are divided between the different cost items (for example, RTP 1, RTP 2, RTPi and RTP África). The indirect costs are allocated to the cost items on the basis of consistent analytical criteria (for example, the number of broadcasting hours) ([42]).

(65) The analytical accounting system has the following characteristics:

(a) under the public service contracts, only the net operating costs may be compensated for in accordance with the method described in the public service contracts. The financial cost, the extraordinary expenditure and provisions not directly related to an activity are excluded from compensation ([43]);

(b) in order to calculate the net reimbursable operating costs, RTP must deduct the operating revenues derived from each public service obligation;

(c) under the old public service contract, no compensation was allowed for the general public service obligation to operate RTP 1 and RTP 2 and to cover the autonomous regions with one of the channels ([44]);

([38]) http://www.erc.pt/pt/estudos-e-publicacoes/auditorias-ao-servico-publico-de-radio-e-televisao

([39]) Clause 13 of the old public service contract and Clause 20 of the new public service contract.

([40]) Clause 14 of the old public service contract and Clause 21 of the new public service contract.

([41]) Clause 12 of the old public service contract lays down in detail which costs may be compensated for and how they are to be calculated: the coverage differential (the difference in costs borne by RTP Channel 1 and the costs borne by the largest private television operator), the operating deficit in the Autonomous Regions, the deficit in running the audiovisual library, the operational cost of RTP-International, the cost of operating the structure for cooperation with the Portuguese-speaking African countries (PALOPs), the cost of allowing viewing time for certain entities, the cost of delegations and correspondents, and the costs of the S. Carlos National Theatre Foundation. Clause 15 of the new public service contract lays down in detail which costs can be compensated for and how they are to be calculated. The items to be covered are: (1) the operating costs of RTP 1 and RTP 2; (2) specific services referred to in Clause 7(a) to (l); and (3) the coverage differential.

([42]) Information provided by Portugal by letter of 31 March 1999.

([43]) Clause 14(2) of the new public service contract.

([44]) Excluding the cost associated with the coverage differential.

(d) under the new public service contract, the operating costs of RTP 1 and RTP 2 can be compensated for, but no extra compensation is allowed in the event of the real net operating costs of RTP 1 and RTP 2 exceeding the planned cost ([45]).

(66) RTP has reported on the net cost of providing the public service in the annual public service reports in line with the cost calculation method described in recitals 60-65. The following table gives an overview of the costs of each public service activity for which RTP is entitled to receive compensation payments.

Table 4

Net reported and reimbursable costs of the public service

(PTE million)

	1992	1993	1994	1995	1996	1997	1998
Teletext						112,9	86,8
Operation of RTP International	882,3	1 517,4	1 826,9	1 890,8	2 059,6	3 999,1	3 712,9
RTP África	—	—	—	—		654,7	1 332,0
Direct broadcasting by RTP 1 to Azores and Madeira	—	—	—	—	—	76,8	295,4
Audiovisual archives	509,1	241,6	402,7	492,7	184,9	909,4	672,1
Cooperation with Portuguese-speaking countries in Africa	186,9	128,4	172,2	148,6	144,9	202,4	200,3
Coverage differential	406,7	1 312,8	1 314,2	1 050,3	1 050,0	622,6	208,6
Delegations/correspondents	797,8	658,2	681,1	642,7	583,2	457,2	211,0
S. Carlos National Theatre Foundation		50,0	55,0	60,0	60,0	60,0	60,0
Cinema promotion		215,0	95,0	27,5	156,5	391,1	352,8
Operation of autonomous regional centres	3 453,4	3 486,0	3 685,9	3 696,1	3 846,6	3 459,2	2 855,2
Broadcasting for specific entities	482,0	350,6	151,1	94,6	80,8		
Sport TV (*)							– 440,0
Net operating costs of RTP 1						16 946,1	11 916,6
Net operating costs of RTP 2					9 050,6	10 080,6	8 637,6
Total net operating costs	6 718,2	7 960,0	8 384,1	8 103,3	17 217,1	37 972,1	30 101,3

(*) Although Sport TV is not a public service activity eligible for compensation, RTP deducted the profits of Sport TV from the public service cost. The basis for this deduction is Article 47(3) of Law No 31-A/98 of 14 July 1998, which provides that profits made by RTP from participation in other channels are to be used for the financing of public service initiatives.
Source: Portuguese authorities and the public service reports.

(67) The following table gives an overview of RTP's investments in equipment for its public service activities. It presents both the real investments in public service activities, as shown in the annual financial accounts, and the investments reported in the public service reports. The real investments in public service activities were higher than the investments reported in the public service reports.

Table 5

Investments in public service activities

(PTE million)

	1992	1993	1994	1995	1996	1997	1998	Total
Financial accounts	2 632,6	2 102,0	2 763,9	992,7	1 480,4	4 037,4	6 054,2	20 063,2
Public service reports	2 327,3	98,0	1 975,1	154,4	28,1	4 037,4	6 127,8	14 748,1
Difference	305,3	2 004,0	788,8	838,3	1 452,3	0	– 73,6	5 315,1

Source: RTP financial accounts and public service reports.

([45]) Clause 19(1) and (3) of the new public service contract. The new public service contract provided that the operating costs of RTP 2 could be compensated for retroactively from 1 January 1996.

Objective of the measures

(68) The objective of the ad hoc measures was to compensate RTP for the public service obligations imposed on it and to finance its investments.

Possible effects of the measures

(69) In Portugal, the public service operator was not selected as a result of a competitive procedure in which all interested undertakings had the opportunity to state the amount of compensation they would require to operate a public service television broadcasting concession. RTP was appointed by the Government to provide public service television.

(70) Since 1992, both commercial and public service broadcasters have been active in the Portuguese television market. Apart from RTP, the commercial broadcasters SIC and TVI are licensed to broadcast television channels. SIC was the first private operator to start broadcasting on 6 October 1992. The measures in favour of RTP could have the effect of distorting competition in the television broadcasting market.

III. COMMENTS FROM INTERESTED PARTIES

(71) Following the initiation of the Commission's investigation procedure in this case several interested parties commented on the measures referred to in recitals 21-39. The following recitals provide an overview of the relevant comments received from the interested parties, categorised by measure.

(72) Only comments pertaining to the issues left open following the judgment of the Court in Case T-442/03 are referred to in this Section, namely those relating to the exemptions from notarial and registration charges and publication costs, as well as in relation to the other measures (the agreement with the social security scheme in 1993, capital injections in the period 1994 to 1997 and a loan in 1998), as referred to in Article 1 of Decision 2005/406/EC. These comments of interested parties include views submitted after the Commission's first opening decision of 15 November 2001 as well as comments received after the publication of the invitation to submit comments on 24 December 2008 ([46]).

(73) SIC and TVI argued that the *exemptions from notarial and registration charges* are an exception from the rules that are normally applicable under Portuguese law for any modification in company statutes. SIC commented that the scope of the exemption is not limited to the transformation of RTP in 1992. On the basis of Article 11(2) of Law No 21/92 RTP enjoys a general exemption from the payment of taxes and rights for any kind of inscription and registry.

(74) TVI commented that RTP was also exempted from the *payment of costs linked to the publication of the notarial deed*.

(75) On the *capital injections in the period 1994 to 1997*, SIC, ACT, the Association of commercial broadcasters, the Italian commercial broadcaster Mediaset and TVI commented that no rational shareholder would have increased the capital of a company of the characteristics of RTP. The referred capital injections were made in a severely deficit company without a coherent restructuring plan to make the undertaking viable.

(76) Furthermore, as regards the loan in 1998, SIC argued that taking into account the fact that RTP was 'technically bankrupt' in 1996, no financial institution would have approved such a loan to RTP.

(77) SIC, in particular, stressed the *absence of external audits*, which should have taken place on a regular basis. It also referred to flaws found for the year 1998 as described in the BDO Binder report for that year, the only existing external audit, which the Commission should have taken into account. It pointed to several criticisms in the BDO Binder report for 1998, including, inter alia, an excess of the advertising limits for RTP television broadcasts. SIC points out that according to the public service contracts, RTP is required to respect advertising limits and can e.g. only show a certain number of minutes of advertising per hour. According to the findings in the BDO Binder report, this was not respected for the year 1998. SIC also quoted the finding in that report that certain assets had not been accounted for, which SIC seems to take as proof that the respective investments for these assets have not been made.

(78) Following the annulment of Article 1 and part of Article 2 of Decision 2005/406/EC by the Court in Case T-442/03, SIC argues that the Commission must in this Decision also take into account the report of the Portuguese Court of Auditors (*Tribunal de Contas*, hereafter referred to as Court of Auditors) of June 2002 (No 8/2002), which according to SIC had the objective duty to examine RTP's management and its provision of public television service in terms of effectiveness, efficiency and economy and which dealt with the period 1997 to 2000. However, that period was extended to 1993. Summarising the findings of the report, SIC underlines that there was a lack of strategy for defining RTP's programmes and internal board directives concerning cost limits were not observed and annual budget drawn up were not complied with. SIC also stated that the Court of Auditors points out that Portugal has not yet specified that the award of State aid is related to RTP's actual compliance with its public service obligation.

([46]) See footnote 2. Comments from interested parties on other measures can be found in recitals 74 to 84 of Decision 2005/406/EC.

(79) SIC pointed to the Portuguese Court of Auditor's general findings on the public service contracts, which give an incentive to RTP to disregard efficiency and effectiveness in RTP's management, which goes along with a vague and non-specific public service remit.

IV. COMMENTS FROM PORTUGAL

Exemption from notarial charges and registration charges/publication costs

(80) On the exemption from notarial charges, registration charges and publication costs, Portugal agues that, since the transformation of the public undertaking into a public limited company (*sociedade anónima*) had to be carried out by legislative act, no basis existed for the collection of the taxes and emoluments related to formalisation by notarial deed of that transformation, nor to its registration and publication.

(81) The transformation of RTP into a public limited company was carried out in 1992 in order to bring it under private law and the way in which it operates closer to that of private operators. It was considered necessary to equip RTP with the means and conditions to allow it to best fulfil its public service objectives in a market that was increasingly open to competition. The aim was to give RTP's operations and management the same flexibility afforded to 'normal' companies, operating under private commercial law. According to Portugal, the public limited company format was less cumbersome than the State control procedures that previously applied to RTP as a public undertaking, thus offering it better conditions for developing television channels and their programming.

Temporary tax exemption provided for in Article 11(1) of Law No 21/92

(82) Portugal argues that the transformation of RTP by law in 1992, with the consequence that no '*notarial deed*' for the formalisation of that act was necessary, was in line with the nature and logic of the Portuguese legal system. In that regard Portugal recalls that RTP had been established as a public undertaking in 1975 by way of legislation, namely, by the Decree-Law No 674-D/75. Therefore, as specifically required by Law 84/88 that governed the transformation of public undertakings into public limited companies, such acts had to be carried out also by way of legislation.

Pursuant to Article 3(2) of Law No 84/88, which is a general law on the transformation of public undertakings (see above recital 25), the legislative act that provided for the transformation of the public undertaking had to approve the statutes of the public limited company resulting from the transformation. This was, moreover, in line with the principle of the equivalence of acts, according to which legislative acts may only be amended, suspended or revoked by acts having an equivalent ranking within the hierarchy of legal acts. Portugal points out that the principle of the equivalence of acts is provided for in the Portuguese Constitution (currently Article 112(5) or Article 115(5) of the Constitution at the time when RTP was transformed in 1992) which states that 'no law shall create other categories of legislation, or grant other types of act the power to interpret, integrate, modify, suspend or revoke any of its provisions with any external effect'. The application of this principle to the transformation of public undertakings is supported by legal authors ([47]). Portugal also refers to a number of judgments of its Constitutional Court which reiterate the interpretation that a law may only be interpreted by another law ([48]) and not by an act with a different and inferior ranking within the hierarchy of legal acts.

(83) Portugal argues that the transformation of RTP into a public limited company by Law No 21/92 was carried out in compliance with that general scheme of Portuguese law and could not lawfully have been carried out simply under private law in the form of a notarial deed. Portugal also quotes several examples of other public undertakings transformed by legislative act into public limited companies ([49]).

(84) Portugal refers to Decree law No 267/76 of 8 April 1976 which established for the first time a general scheme for public undertakings. That decree-law established that public undertakings could only be created by way of a decree-law, which must approve their statutes. That applied also to subsequent alterations of the statutes.

(85) Portugal further refers to Law No 84/88 of 20 July 1988 (see recital 25 of this Decision) which stipulated that a decree-law was necessary to transform public undertakings into public limited companies and that it also should approve the statutes of the public undertaking. Portugal consequently concludes that for the transformation of RTP in 1992 first a decree-law was necessary and that secondly also the statutes could only be approved by law and not by notarial deed.

(86) In addition, Law No 58/90 of 7 September 1990 required public service television to be provided by operators owned exclusively or in majority by public entities, and the statutes of such operators had to be approved by decree-law.

([47]) See, for instance, *Rui Gerra da Fonseca*: Having established the legislative nature of the statutes of a public undertaking based on a decree law, it is unconstitutional for them to be amended by any instrument other than a decree law, just as rules permitting their amendment by a mere instrument of private law are also unconstitutional, *Autonomia Estatutária das Empresas Publicas e Descentralização Administrativa, Coimbra 2005*.

([48]) Judgment No 224/95 of 26 April 1995 and Judgment No 576/96 of 16 April 1996.

([49]) Submission by Portugal of 8 June 2010.

(87) As regards the '*registration charges*', Portugal observes that while the registration of the statutes approved by Law No 21/92 was exempted from such charges, the registration formalities still had to be carried out 'ex officio'. Registration formalities were considered necessary because the Commercial Registration Code (*Código do Registo Comercial*) requires acts relating to companies to be registered and published. According to Portugal, the value of the registration charges is 11 000 contos ([50]) which equals PTE 11 000 000.

(88) Regarding the *publication requirement*, Portugal stresses that since RTP's statutes were published in the Diário da República as an Annex to Law No 21/92 which approved them, that requirement was fulfilled.

Permanent tax exemption in accordance with Article 11(2) of Law No 21/92

(89) With regards to SIC's comments concerning Article 11(2) of Law No 21/92, Portugal replied that the Portuguese legislator did not reserve specified tax benefits in business transformation or restructuring operations for public undertakings. The exemption was based on Decree-Law No 404/90. Portugal argues that RTP was not exempted from the payment of registration charges on the basis of Article 11(2) of Law No 21/92, outside the 1992 transformation. Portugal also argues that the classification of Article 11(2) of Law No 21/92 as a permanent exemption from charges is due to a linguistic misunderstanding. Instead of stipulating that the decree law was sufficient for all legal purposes and any acts necessary to regularise 'the situation' (that is to say the 1992 transformation, *own emphasis added*), Article 11(2) provided that RTP would be exempted from any charges and fees that gave effect to the acts in the property registers. This meant, according to Portugal, that RTP was not exempted from registration charges outside the context of the 1992 transformation operations except for those concerning the 1992 transformation. Portugal also provided documentation for several situations in which RTP has paid registration charges.

Settlement between the Social Security and RTP on the rescheduling of debt and the waiver of interest

(90) Portugal claims that the background of the initial settlement between the Social Security administration and RTP on the rescheduling of debt and the waiver of interest and fines was a legal dispute on the constitutionality of Implementing Decree No 12/83 regarding mandatory social security deductions on remuneration for overtime. The settlement acknowledged RTP's interpretation that the remuneration was not subject to social security deductions, which was supported by a tax expert.

([50]) Submission by Portugal 17 June 2011.

(91) Secondly, Portugal claims that the formal authorisation of this settlement by the Portuguese government did not confer a specific financial advantage on RTP compared to other undertakings under similar circumstances under Decree Law No 411/91. Portugal claims that the derogation provided for in Article 2(1)(d) applied to RTP, as RTP was the subject of state intervention and experienced various vicissitudes under the management of an administrative commission appointed by the Government in 1977 ([51]). Portugal argues that the general nature of the derogation is underlined by the fact that an arrangement has also been made with one of the interested parties on the basis of Decree Law No 411/91.

Loan in 1998

(92) As regards the loan, Portugal commented that the technical conditions attached to it provided that the financial operation should carry interest calculated according to market criteria.

Capital injections in the period 1994 to 1998

(93) Portugal argued that the capital injections in the period 1994 to 1998 constituted an instrument for financing the costs of providing a public television service, together with payment of the compensatory allowances.

The financing model/overcompensation

(94) According to Portugal, the financing model chosen to compensate RTP for its public service costs proved inadequate and led to trading deficits. Firstly, the compensatory allowances were always calculated at below the real needs of public service television financing. Secondly, Portugal systematically paid the allowances late. RTP then had to resort to bank financing in order to meet its operating expenditure but could not include the interest and amortisation charges in the calculation of the public service cost. Thirdly, RTP had to pay value added tax (VAT) to the State on the allowances, thereby reducing the net amount of the compensatory allowances.

(95) Portugal claims that: (i) the tax exemptions (i.e. exemption from notarial deed charges, registration charges and publication costs); (ii) the facilities for the payment of the tax on the use of the broadcasting network; (iii) the rescheduling of the debt to the social security scheme; (iv) the payment for the hiving-off of the television network; (v) the protocol on cinema

([51]) Law No 91/A/77 annulled the 1976 Statutes of RTP and it provided that RTP would be governed by an Administrative Commission.

promotion; and (vi) the loan taken out by RTP in 1998 do not fall within the concept of State aid. As regards the compatibility of the other measures, Portugal argued that they should be regarded as compensation for public service costs and therefore not as State aid ([52]) or, alternatively, their compatibility with Union legislation should be assessed in the light of Article 86(2) of the EC Treaty (now Article 106(2) TFEU).

(96) As regards calculation of the overcompensation, Portugal argued that:

(a) the inclusion in 1996 of the operating costs of RTP 2 as reimbursable public service costs was based on the new public service contract, according to which compensation for RTP 2's operating costs under the Contract took effect from 1 January 1996 onwards ([53]);

(b) the loan of PTE 20 000 million should not be regarded as compensation since it was granted on market terms;

(c) the capital increases were also designed to finance investments and not simply to provide financial compensation for reimbursable public service costs. The State's obligation as shareholder to participate in the financing of investments deemed to be necessary is laid down in the public service contracts ([54]);

(d) the compensation payments were subject to VAT, with the result that the net value received by RTP was lower;

(e) under the new public service contract, the public service costs were reimbursable only up to the allotted budget.

Taking into account the matters the foregoing, Portugal concluded that the financial compensation for RTP's public service obligations should not be regarded as excessive or inappropriate.

Absence of external audits

(97) As regards the absence of external audits, Portugal argues that the Commission had already taken a position on RTP's financial situation, also covering the period from 1992 to1998, without requiring an external audit of the public service in its Decisions of 2006 in case E 14/05 and NN 31/06 and those decisions were not challenged in Court. Portugal argues that, in particular, the Commission already took the Court of Auditors Report No 8/2002 into account in Decision NN 31/06. It further underlines that the Commission concluded in Decision NN 31/06 that RTP's financial situation from 1992 to 1998 resulted from the chronic under-financing of its public service activities. In Decision NN 31/06, the Commission based its finding on an external report, namely the PriceWaterhouse Cooper report of 2005 and on the externally audited annual accounts of RTP which Portugal considers to be the only relevant accounts.

(98) Portugal also reiterates that the public service reports for the period from 1993 to 1998 were audited by RTP's company auditors ([55]). However, Portugal later submitted external audits of the public service reports for the period from 1992 to 1998, together with a final summarising report covering all of those years. The external audits were organised by the independent Media Authority, *Entidade Reguladora para a Comunicação Social (ERC)*, which asked the external auditors, Pedro Roque ([56]) to carry out the external audits.

(99) Portugal replied in greater detail to some of SIC's allegations on specific points. As regards SIC's allegation that according to the BDO Binder report, the opinion of Public Opinion Council was missing, Portugal emphasises that that opinion did not extend to RTP's public service report. While the opinion of that body was warranted, in the old public service contract, it had not become a legally binding requirement. Also, the new public service contract did not require the opinion of that body to be given on the public service report.

(100) As regards SIC's allegations that the BDO Binder report for the year 1998 included some EUR 53 million of tangible assets, although no inventory existed for such assets, Portugal has confirmed that the respective investments have been made for those assets. The fact that no inventory was originally drawn up for those assets (although except for 4 million the value of such assets could later be identified and inventory could retroactively be drawn up), does not mean that no investment had been made. The external auditor confirmed balances and figures and transaction with third parties.

(101) As regards SIC's allegation that according to the BDO Binder report for the year 1998 advertising times limits had been exceeded, Portugal pointed out that this would in no way involve a reduction in the financial compensation. The reason for that is that the amounts, which RTP received from the excess of advertising times was way below the under-financing of that year. In any event, Portugal confirmed that the total advertising revenues (including revenues from the excess of advertising

([52]) See Judgment of the Court of Justice of 22 November 2001 in Case C-53/00 *Ferring SA* v *Agence centrale des organismes de sécurité sociale (ACOSS)* [2001] ECR I-9067.
([53]) Clauses 3 and 4 of the new public service contract.
([54]) Clause 14 of the old public service contract and Clause 21(3) of the new public service contract stipulate that: 'Participation in the abovementioned investments shall be covered preferably by the first contracting party and as shareholder in the form of an increase in capital.'.
([55]) See paragraph 108 of the letter from Portugal of 7 September 2009.
([56]) See footnote 36 of this Decision.

limits) were taken into account when calculating the financing need, i.e. the compensation for the fulfilment of the public service obligation.

(102) Portugal claims that the 8/2002 report of the Portuguese Court of Auditors should not be taken into account in this Decision as the judgment of the Court in Case T-442/2003 only found an objective weakness of the information contained in the public service reports, which were not accompanied by an external audit. Portugal emphasises that the 8/2002 report of the Court of Auditors only relates to the years 1997 to 2000 and not the whole period covered by the current investigation. The years 1993 to 1997 were only covered in the report for the purpose of a general description of RTP's financial situation and restructuring needs, but do not constitute the very subject matter of the report. The report purpose is to assess RTP's management, the role of the State as a shareholder and the provision of the public broadcasting service.

Portugal claims that the Court of Auditor exceeded its mandate of auditing public finances and instead entered into an analysis of efficacy and cost effectiveness of the public expenditure. The report has, in the view of Portugal, no relevance except that it constituted an independent audit on the company, confirmed the accounts of Portugal and detected no illegality. Portugal argues that the Commission should take into account in this Decision the 20/98 Report of the Court of Auditors instead of the 8/2002 audit report, as the 20/98 audit report covers the RTP 's economic and financial situation for the period from 1994 to 1996. The 20/98 audit report concluded that the criteria used to finance the public service are more clearly defined in the new public service contract than under the old public service contract, which is disputed by the later 8/2002 Report.

V. **ASSESSMENT OF THE MEASURES**

State aid nature of the measures

(103) In order to ascertain whether the ad hoc measures implemented by Portugal for RTP constitute State aid within the meaning of Article 107(1) of the Treaty, the Commission has to assess whether those measures:

(a) are granted by the Member State or through State resources;

(b) are capable of distorting competition;

(c) favour certain undertakings or the production of certain goods;

(d) affect trade between Member States.

Involvement of State resources

(104) In the following, the State aid character of the loan of 1998, the settlement on the rescheduling of debt and interest waiver and the capital injections 1994-97 will be examined. Likewise, the presence of State resources in the exemptions from notarial deed charges, registration charges and publications costs will be assessed.

(105) State resources are involved in the exemption *notarial deed charges, registration charges and publications costs*, as a loss of tax revenue is equivalent to the consumption of State resources in the form of fiscal expenditure ([57]).

(106) As regards the rescheduling of *debt due to the social security scheme and the waiver of interest for late payment*, the Commission considers that the body responsible for social security scheme cannot be regarded as an undertaking. It does not carry out an economic activity but is a public body with the task of administering social security ([58]). Furthermore, the authorisation for the debt rescheduling was given not by the social security scheme itself but by a joint decree of the State Secretaries for Finance and Social Security and the Deputy State Secretary to the Deputy Minister. With the authorisation, the State did forgo income since normally it would have received PTE 1 206 million in interest on the outstanding debt. Therefore, it is clear that State resources were involved and that the measure is attributable to the State.

(107) The *capital increases granted to RTP* were provided by the State directly from the public budget. It is therefore clear that such funding constituted State resources within the meaning of Article 107(1) TFEU.

(108) The Commission cannot accept the claim by Portugal that no State resources are involved in the *loan to RTP*. The concept of State resources also includes advantages granted by bodies designated or established by a Member State for that purpose ([59]). The loan contract of 1998 was concluded between RTP and the Public Debt Stabilisation Fund, a fund managed by the Public Debt Management Institute. A legal act determines that the Institute is subject to the authority and supervision of the Minister for Finance ([60]). It may therefore be concluded that the funds granted by the Public Debt Stabilisation Fund should be regarded as State resources.

(109) That measure can be considered as being directly attributable to the State, since a resolution agreed on 17 December 1998 between the Secretary for State for the Media, the Treasury and Finance laid down the conditions of the contract.

([57]) Point 10 of the Commission notice on the application of the State aid rules to measures relating to direct business taxation (OJ C 384, 10.12.1998, p. 3).

([58]) Judgment by the Court of Justice of 17 February 1993 in Joined Cases C-159/91 and C-160/91 *Christian Poucet* v *Assurances Générales de France and Caisse Mutuelle Régionale du Languedoc-Roussillon* [1993] ECR I-637.

([59]) Judgment of the Court of Justice of 17 June 1999 in Case C-295/97 *Industrie Aeronautiche e Meccaniche Rinaldo Piaggio SpA* v *International Factors Italia SpA (Ifitalia), Dornier Luftfahrt GmbH and Ministero della Difesa* [1999] ECR I-3735, paragraph 35.

([60]) Article 1 of Decree-Law No 160/96.

The favouring of certain undertakings

(110) *Exemption from notarial deed charges, as well as registration charges and publication costs:* As regards the exemption from notarial deed charges, registration charges and publication costs it should be assessed whether that measure conferred a general tax exemption that benefited RTP or whether it applied specifically to RTP. In the following recitals the Commission distinguishes between the temporary exemption provided for in Article 11(1) of Law No 21/92 and the permanent exemption provided for in Article 11(2) of Law No 21/92.

Temporary exemption in accordance with Article 11(1) of Law No 21/92

Material selectivity

(111) The Commission finds that the exemption from the necessity of a notarial deed, registration and publication costs conferred an advantage in favour of RTP by relieving it of charges that it would otherwise have to bear from its own budget.

(112) That advantage is also materially selective by being granted, as Article 11(1) of Law No 21/92 demonstrates, only to RTP. The fact that that law might reaffirm, as argued by Portugal, the application of a more general law, namely Law No 84/88, does not change this finding. Law No 84/88 refers to public undertakings and provides that such undertakings may be transformed into public limited companies by way of a decree-law. However, the fact that that law refers to 'public undertakings in general' does not affect the material selectivity found in Article 11(1) of Law No 21/92 in favour of the specific company RTP. In any event, an exemption for only public undertakings would likewise constitute a materially selective measure for that group of undertakings (compared to private undertakings), of which RTP forms part.

Nature and logic of the Portuguese legal system

(113) State measures can however, despite being materially selective, not fall within the notion of a selective measure within the meaning of Article 107(1) TFEU, if the State measure, instead of derogating from the normal application of the system becomes an inherent part of it ([61]). It is therefore necessary to examine whether the measure was compatible with the nature and logic of the Portuguese legal system to transform the public undertaking RTP into a public limited company by way of legislation or whether resource to legislation for the purpose of transforming RTP was chosen in order to confer an advantage to it in relation to other undertakings. In line with the approach by the Court in its judgment, the Commission will in the following distinguish between the exemption from notarial costs on the one hand and registration and publication costs on the other hand ([62]).

([61]) See paragraph 64 of Judgment in Case T-442/03,
([62]) See paragraph 51 of Judgment in Case T-442/03.

(114) *Exemption from the notarial deed and the notarial costs:* The Commission finds that the transformation of RTP into a public limited company and the approval of its statutes by way of legislation instead of by a notarial deed complies with the logic and nature of the Portuguese legal system. The transformation into a public limited company was done in order to give RTP a more flexible company form and thereby put it on an equal footing with private operators. The fact that this transformation was done by law, rather than by a notarial deed, was not an attempt to circumvent the requirement of a notarial deed, but resulted from the general principle of Portuguese law that legislative acts may only be modified by equivalent legislative acts.

(115) Under that principle of '*equivalence of acts*', a law may only be repealed, suspended or modified by a legal act which is of the same hierarchical rank as the constitutive act and not by an act which has a lower rank in the hierarchy of laws. This principle was introduced into the Portuguese Constitution in 1982, that is to say, long before the transformation of RTP in 1992 took place. Article 115(5) of the Portuguese Constitution in its form in force at the time of RTP's transformation provided that no law should: 'create other forms of legislation or grant other types of act the power to interpret, integrate, modify, suspend or revoke any of its provisions in such a way to produce effects in relation to third parties'. As RTP was nationalised in 1975 by an act of legislation, namely by Decree-Law No D 674-D/75, its transformation into another legal form could again only be achieved by way of a decree-law, or by a law which has an equivalent or even higher rank than that of a decree-law. There is also nothing to suggest that RTP's original nationalisation in 1975 was carried out in order to circumvent the applying to companies governed by private law and created a benefit for the company.

(116) There is no evidence to suggest that all the other laws in place before RTP's transformation (see recitals 84 to 86 of this Decision) were for the purpose of creating a pecuniary advantage for public undertakings by avoiding notarial deeds (and the respective costs) applying to private transactions. In particular, Law No 84/88 which allowed public undertakings to be transformed into public limited companies by decree-law, reflected the constitutional and legal principles in force at the relevant time.

(117) *Conclusion:* Taking those matters into consideration, the exemption from the requirement to carry out the RTP transformation via a notarial deed (and thus incur the respective costs) does not constitute State aid within the meaning of Article 107(1) TFEU.

(118) *Exemption from registration charges and publication costs:* It is necessary to assess whether RTP enjoyed a benefit by not

paying any costs linked to the registration of the company in the commercial registry and the publication of the notarial deed. In accordance with Portuguese law in force at the time, a notarial deed which formalised the setting up of a company governed by private law and its articles of association had to be published in the Diário da República by the Registrar in charge of the Commercial Registry in order to make third parties aware of the contents of those documents. RTP did not incur these publication costs since the mandatory publication in the Diário da República of Law No 21/92 ensured that the act of transformation of RTP and the contents of its new articles of association were afforded the necessary publicity.

(119) There is no indication that the Portugal chose to transform RTP into a public limited company by way of Law No 21/92 in order to grant RTP an advantage in the form of savings in registration and publication costs. It was rather that a second publication of RTP's statutes would have been entirely meaningless as the transparency and publicity requirements were already fulfilled through the publication of Law No 21/92 in the Diário da República. While the registration is done with a view to later publication and the two measures are linked, it is questionable whether the exemption from registration charges can also be justified by the nature and logic of the Portuguese legal system and the mandatory conversion of RTP by way of legislation. Portugal does not dispute that the registration was still required by the Commercial Companies Code. As Portugal stated: 'registration was not dispensed with, it was only that no deed was needed, but that the decree-law constituted a sufficient document for registration purposes'. This also follows from Article 3(3) of Law No 84/88, (see recital 25 of this Decision). In addition, Portugal emphasised that in order for RTP to register in the future all other acts relating to the company, the fact of its creation (i.e. the result of the 1992 transformation into a public limited company) needed to be registered ([63]) If however, registration is necessary, then the Commission sees no reason why RTP should not have to bear the corresponding charges.

(120) *Conclusion:* It should be concluded that the exemption of RTP from the requirement of a notarial deed (including notarial costs), as well as the exemption from the requirement for publication and the respective publication costs according to Article 11(1) of Law No 21/92, do not constitute State aid within the meaning of Article 107(1) TFEU.

The exemption from registration charges according to Article 11(1) of Law No 21/92 does constitute State aid.

However, as referred to later in recitals 160 and 161 of this Decision, these exemptions would, in any event, be justified as a legitimate compensation for the costs of the provision of a service of general economic interest costs under Article 106(2) TFEU.

Permanent exemption in accordance with Article 11(2) of Law No 21/92

(121) Portugal claims that Article 11(2) of Law No 21/92 does not actually grant a permanent exemption to RTP, but that it was only intended to cover the same situation as before in relation to the temporary exemption, namely the transformation of RTP into a public limited company in 1992. Portugal also claims that on several occasions RTP paid notarial registration charges. However, the wording of Article 11(2) of Law No 21/92 covers all further inscription, registration or annotation acts which, in accordance with that Article, may be effectuated free of charge for an unlimited amount of time.

(122) Such a permanent exemption also confers an advantage on RTP by relieving it of charges which it otherwise would have to bear from its own budget. The argument by Portugal that to its knowledge Article 11(2) of Law No 21/92 has never been applied and RTP paid all necessary charges, is evidence which is relevant in a potential recovery of State aid, but does not alter the finding on the provision's wording.

(123) That advantage is also selective, as Law No 21/92 refers to RTP. Portugal cannot claim that Law No 21/92 is the mere application of a general rule of Portuguese law. In particular, Articles 1 and 2 of Decree-Law No 404/90 cannot be used in order to prove the absence of selectivity as the decree-law deals with acts of concentration and, thus, does not cover this Case which concerns the transformation of a public undertaking into a public limited company ([64]).

(124) Contrary to a temporary exemption from registration charges, a permanent exemption cannot also be justified by the equivalence of acts doctrine which, due to the legislative adoption process, dispensed with the requirement of a notarial deed and its publication when RTP was transformed in 1992. Compliance with the nature and logic of the Portuguese legal system could be accepted for the temporary exemption because in the concrete case of RTP's transformation into a public limited company could only be achieved, as demonstrated, by a decree-law. However, the wide scope of Article 11(2) of Law No 21/92 does not preclude that exemptions from notarial requirements (and costs) would be possible for *other* situations than the 1992 transformation of RTP into a public limited company. It is sufficient to state that a *permanent* exemption in favour of one company (or one group of companies such as public limited companies) from various registration charges can never be within the nature and logic of a legal system ([65]).

([63]) See paragraphs 214 to 221 of the submission by Portugal of 8 June 2010.

([64]) See paragraphs 75 to 77 of Judgment in Case T-442/03.

([65]) See also judgment of the Court of 8 November 2001 in C-14/99, *Adria-Wien Pipeline GmbH and Wietersdorfer & Peggauer Zementwerke GmbH* v *Finanzlandesdirektion für Kärnten* [2001] ECR I-8365.

Conclusion: It should be concluded that the permanent exemption for RTP resulting from Article 11(2) of Law No 21/92 constitutes State aid within the meaning of Article 107(1) TFEU.

(125) *Social security settlement (debt rescheduling and interest waiver):* After considering the comments from third parties and Portugal, the Commission concludes that the initial agreement between the body responsible for the social security scheme and RTP cannot be regarded as representing typical behaviour of a private operator. The dispute was whether or not the interpretation of certain social security rules as laid down in Implementing Decree No 12/83 was legally correct. The agreement confirmed RTP's interpretation, which was supported by the analysis of a tax expert who concluded that the Implementing Decree was unconstitutional. However, the Implementing Decree was not revoked following the agreement. Therefore, it must be concluded that the measure was selectively applied to RTP without affecting the applicability of the social security scheme's interpretation in relation to other companies.

(126) The Commission cannot accept the Portugal's claim that the authorisation for the debt rescheduling and for the waiver of fines and interest was given within the framework of a general system applicable to all undertakings in a similar situation on the basis of Decree-Law No 411/91 and therefore did not confer a specific advantage on RTP.

(127) Without prejudging the selective or general nature of such a scheme, the purpose of this Decision is to determine whether the application of the scheme to RTP was selective.

(128) In order to prove that the rescheduling is indispensable to ensure the viability of the company, Decree-Law No 411/91 requires a financial/economic study to be carried out. RTP never carried out such a study of its viability pursuant to Article 2(3) of Decree-Law No 411/91.

(129) Furthermore, the condition laid down in Article 2(1)(d) of Decree-Law No 411/91 was not applicable to RTP as the debt regularisation did not follow state intervention. The Commission does not accept Portugal's claim that the history of State intervention affected the operation of the debtor enterprise and that RTP was governed by statutory rules at the time of the State intervention. Although RTP was subject to a special management regime in 1977 ([66]), that regime came to an end with the adoption of the 1980 statutes, whereas the debt to the social security scheme was 'built up' in the period from 1983 to 1989. The Commission considers that the debt regularisation for RTP cannot be considered part of a general regime under Law No 411/91, as RTP did not meet the criteria laid down in that Law for such authorisation. Therefore, the measure was applied in a selective manner to RTP.

(130) By granting the debt rescheduling, the Portugal should have acted in the same way as a public or private creditor that seeks to recover sums due to it and, to that end, concludes debt rescheduling agreements to facilitate payment ([67]). The rate of default interest applied by the State should be equal to the rate a private creditor would apply in similar circumstances. The Commission considers that a private creditor that pursued the recovery of the debt by legal means would obtain at least the statutory interest rate. Therefore, by not requiring any interest payments at all, despite available enforcement mechanisms, Portugal did not act in the same way a private creditor would have acted in order to maximise the rate of interest. Furthermore, the debt with the social security scheme 'built up' in the period from 1983 to 1989 and a rescheduling arrangement was agreed only in 1993. Under the same conditions, a private creditor would not have allowed a similar accumulation of outstanding debt over such a long period without initiating collection procedures. Therefore, it seems that the measure conferred a specific advantage on RTP.

(131) *Capital increases:* After considering the comments from third parties and Portugal, the Commission concludes that the capital increases in the period from 1994 to 1997 provided a financial advantage for RTP. As can be seen from Table 3 in recital 40, considering the weak financial position of RTP in the period when the capital increases were made, no private investor would have injected capital into the company as no normal return could be expected from the company within a reasonable time. In fact, despite the capital injections, RTP's financial position deteriorated. Neither Portugal nor third parties have alleged that Portugal acted as a private investor when injecting capital into the company.

(132) *Loan 1998:* The Commission cannot accept Portugal's claim that the loan granted in 1998 was in conformity with market conditions. For the loan not to constitute State aid, the conditions attached to it (namely, the security sought and the interest rate) should reflect the inherent risk of lending to an undertaking ([68]). The risk, and consequently the interest rate, are higher when a company is in an economic and financial situation the soundness of which is below the level at which a financial institution would lend to it.

(133) As can be seen from Table 3 in recital 40, at the time the loan was agreed, RTP was in severe financial difficulties

([66]) Law No 91/A/77 stipulated that an Administrative Council should govern RTP on account of its structural crisis.

([67]) See Judgment of the Court in Case C-342/96, *Kingdom of Spain* v *Commission* [1999] ECR I-02459.

([68]) 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/EEC to public undertakings in the manufacturing sector (OJ C 307, 13.11.1993, p. 3).

to the extent that its debts exceeded the value of its assets and its net equity was negative. Technically, the company was bankrupt.

(134) Firstly, it should be borne in mind that the loan was a subordinated loan, that is to say, it had no asset-based security and, in the case of bankruptcy, it ranked for repayment purposes after all creditors but before shareholders. The absence of appropriate asset-based security was a clear indication that the loan was not granted at market conditions and that State aid was involved. In view of RTP's technical bankruptcy at the time the loan was granted, no financial institution would have awarded a subordinated loan to it as there was little likelihood of RTP being able to repay it. Indeed, the loan was not granted by a private financial institution but by the Public Debt Stabilisation Fund.

(135) Secondly, it may be argued that the interest rate applied to the loan clearly does not reflect its intrinsic risk. Not only is it below the reference rate that the Commission normally uses to calculate the State aid element in interest subsidy schemes for loans ([69]), but also a normal market operator would require, on the top of 'sound' guarantees, an interest rate that compensated for such a high risk of non-repayment.

(136) Given that RTP's financial position was such that it would not have been able to obtain a subordinated loan under normal circumstances, the loan effectively equates to the payment of a grant and constitutes an advantage for RTP.

(137) Accordingly, the Commission considers that the debt rescheduling with the social security scheme, the capital injections in the period from 1994 to 1997 and the loan granted in 1998 provided a financial and economic advantage as compared with competitors that did not receive the same funds.

Distortion of competition

(138) Since the Portuguese television market was open to competition by 1992 at the latest, there were competitors on the market during the period that RTP benefited from the different measures. In February 1992, broadcasting licences were granted to the commercial broadcasters SIC and TVI and in October 1992 SIC started broadcasting in Portugal.

(139) The Commission does not accept Portugal's claim that the agreement on the debt with the social security scheme would fall outside the concept of State aid, as the debt itself had been created before the Portuguese broadcasting market was opened up to competition. The financial advantage was granted to RTP in May 1993 after the opening-up of the broadcasting market and was therefore able to confer an economic advantage on RTP.

(140) Accordingly, it should be concluded that the measures granted by Portugal were able to confer an economic and financial advantage on RTP compared with competitors not receiving the same funds and thereby to distort competition within the meaning of Article 107(1) TFEU.

Effect on trade between Member States

(141) State measures fall within the scope of Article 107(1) TFEU in so far as they affect trade between Member States. This is the case whenever the activities in question are subject to trade between Member States. In this case, the beneficiary, RTP, is itself active on the international market. Indeed, through the European Broadcasting Union it exchanges television programmes and participates in the Eurovision system ([70]). Furthermore, RTP is in direct competition with commercial broadcasters that are active on the international broadcasting market and have an international ownership structure ([71]).

(142) Accordingly, it can be concluded that the measures granted to RTP by Portugal affect trade between Member States within the meaning of Article 107(1) TFEU.

Conclusion on the State aid nature of the ad hoc measures

(143) It transpires from the above that, leaving aside possible public service obligations imposed on RTP, the following measures involve State aid within the meaning of Article 107(1) TFEU:

— the debt rescheduling with the social security scheme,

— the capital injections during the period from 1994 to 1997, and

— the loan granted in 1998.

([69]) The reference rate is based on the five-year interbank swap rate plus a premium (see Commission notice on the method for setting the reference and discount rates (OJ C 273, 9.9.1997, p. 3). The reference rates for Portugal since 1 January 1997 can be found at http://europa.eu.int/comm/competition/state_aid/others/reference_rates.html

([70]) See judgment of the Court of First Instance of 8 October 2002 in joined Cases *Métropole Télévision SA* (M6) (T-185/00), *Antena 3 de Televisión SA* (T-216/00), *Gestevisión Telecinco SA* (T-299/00) and *SIC — Sociedade Independente de Comunicação SA* (T-300/00) v *Commission* [2002] ECR II-3805.

([71]) In accordance with the case law of the Court of Justice, when State aid strengthens the position of an undertaking compared with other undertakings competing in intra-Union trade, the latter must be regarded as affected by that State aid. See Judgment of the Court of Justice of 17 September 1980 in Cases 730/79 *Philip Morris Holland* v *Commission* [1980] ECR 671, paragraph 11; judgment of the Court of Justice of 21 March 1991 in Case C-303/88 *Italian Republic* v *Commission* [1991] ECR I-1433, paragraph 17; judgment of the Court of Justice of 19 September 2000 in Case C-156/98 *Federal Republic of Germany* v *Commission* [2000] ECR I-6857, paragraph 33.

Likewise, the temporary exemption from registration charges in accordance with Article 11(1) of Law No 21/92 and the permanent exemption from registration and other charges in accordance with Article 11(2) of Law No 21/92 constitutes State aid within the meaning of Article 107(1) TFEU.

(144) However, as referred to in recitals 44-48 of this Decision, RTP is entrusted with a public service broadcasting obligation. In the Case of *Altmark Trans GmbH and Regierungspräsidium Magdeburg* v *Nahverkehrsgesellschaft Altmark GmbH*, and *Oberbundesanwalt beim Bundesverwaltungsgericht* ('the Altmark case'), the Court of Justice held that State measures compensating for public service costs do not qualify as State aid under Article 87(1) of the EC Treaty, (now Article 107(1) TFEU) when the following four conditions are all satisfied ([72]):

(a) the recipient undertaking must actually have public service obligations to discharge, and the obligations must be clearly defined;

(b) the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner;

(c) the compensation cannot exceed what is necessary to cover all or some of the costs incurred in the discharge of public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations;

(d) when the company is not chosen pursuant to a public procurement procedure, 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 equipped, would have incurred in discharging those obligations.

(145) Leaving aside the conditions referred to the first and the third conditions, the ad hoc measures (see recital 143 of this Decision) do not seem to fulfil the second and fourth condition of the *Altmark* judgment for the following reasons:

(146) It is clear that the financing granted by means of the agreement with the body responsible for the social security scheme and the loan in 1998 were not part of a compensation system the parameters of which had been established beforehand in an objective and transparent manner (second condition). On the contrary, they were based on ad hoc decisions attributable to the State.

(147) Furthermore, as referred to in recital 61 of this Decision, the public service contracts provided for a specific financing possibility for investments in public service equipment by means of capital injections. They do not restrict investments public services or define clearly the conditions and limits of state participation; they merely refer to the possibility for the State to participate in RTP's investments as a shareholder. Therefore, the Commission considers that the capital injections too may not be considered to be part of a compensation system the parameters of which have been established beforehand in an objective and transparent manner.

(148) RTP was clearly not chosen pursuant to a public procurement procedure guaranteeing the lowest possible cost. There are no indications that the amount of the ad hoc payments was determined on the basis of an analysis of the costs that a typical undertaking would incur (fourth condition).

(149) Accordingly, it is clear that in this case not all the conditions set out in the Altmark case are satisfied. Therefore, the measures referred to in recital 143 of this Decision must be regarded as State aid within the meaning of Article 107(1) TFEU.

Assessment of the compatibility of the measures

(150) The Court of Justice has consistently held that Article 106 TFEU may provide for an exemption from the ban on State aid for undertakings entrusted with a service of general economic interest (SGEI). It has been implicitly confirmed in the *Altmark* case that State aid which compensates for the costs incurred by an undertaking in providing an SGEI may be regarded as compatible with the internal market if it meets the conditions of 106(2) TFEU (ex-Article 86(2) of the EC Treaty and formerly referred to as the 'common market') ([73]).

(151) The Court of Justice has made it clear that, for a measure to benefit from such exemption, the principles of definition, entrustment and proportionality must all be fulfilled. The Commission considers that, where those principles are fulfilled, the development of trade is not affected to an extent contrary to the interests of the Union.

(152) The way those principles apply in the broadcasting sector is explained in the Communication from the Commission on the application of State aid rules to public service broadcasting (the Broadcasting Communication) ([74]). According to that Broadcasting Communication, the Commission must assess whether or not ([75]):

([72]) Judgment of the Court of Justice of 24 July 2003 in Case C-280/00 *Altmark Trans GmbH et Regierungspräsidium Magdeburg* v *Nahverkehrsgesellschaft Altmark GmbH* [2003] ECR I-7747.

([73]) Ibidem, paragraphs 101 to 109. In those paragraphs the Court examined the question of whether some state payments to transport undertakings classified as State aid could be found to be compatible with the common market under Article 77 of the EC Treaty [now Article 93 TFEU] as reimbursement for the discharge of public service obligations. It did not rule out this possibility, provided that the binding conditions laid down by the secondary legislation for the transport sector were met. This reasoning must apply *mutatis mutandis* to undertaking entrusted with an SGEI outside the transport sector and in relation to Article 86(2) of the EC Treaty [now 106 (2) TFEU].

([74]) OJ C 320, 15.11.2001, p. 5. It is still the 2001 Communication which applies to this case for reasons of *ratione temporis*.

([75]) See paragraph 29 of the Broadcasting communication.

(a) the activities of RTP are public service obligations clearly defined as such by the Member State (definition);

(b) RTP is officially entrusted by the Portuguese authorities with the provision of that service (entrustment);

(c) the funding is proportionate to the net cost of providing the public service.

Definition

(153) As stated in the Protocol on the system of public broadcasting in the Member States (the Amsterdam Protocol ([76])) and the Broadcasting Communication ([77]), it is for the Member States to define the public service remit of the public service broadcaster. In the broadcasting sector the role of the Commission is limited to checking whether the public service definition contains any manifest error. Such error would constitute an abuse of the definition of the public service.

(154) Given the specific nature of the broadcasting sector, the Commission considers, in view of the interpretative provisions of that Protocol, a definition entrusting a given broadcaster with the task of providing balanced and varied programming to be legitimate ([78]). Such a definition would be consistent with the objective of fulfilling the democratic, social and cultural needs of a particular society.

(155) As referred to in recitals 44 to 48of this Decision., RTP is, by virtue of Law No 21/92 and the public service contracts, required to ensure as a general public television service the broadcasting of two channels with general coverage. While the first channel has to offer more general programming, the second channel has to aim more at specific audiences. Furthermore, as described in recitals 44 and 45 of this Decision, Law No 21/92 and the public service contracts impose more detailed obligations on RTP regarding programme content and international cooperation, as well as some other specific obligations.

(156) Although the definition of RTP's public service broadcasting is of a qualitative and rather broad nature, the Commission, in view of the interpretative provisions of the Amsterdam Protocol, considers such a 'broad' definition to be legitimate ([79]). Therefore, it also considers the general definition of RTP's public service remit to provide two television channels of national coverage, one more general and the other more focused on specific audiences, to be legitimate. Such a definition can be regarded as fulfilling the democratic, social and cultural needs of Portuguese society.

(157) Furthermore, the Commission regards as legitimate the obligations which determine in detail how RTP should perform the general public service broadcasting remit. In line with wording of the Amsterdam Protocol, those obligations can also be considered to fulfil the democratic, social and cultural needs of Portuguese society.

Manifest error in defining RTP's public service remit

(158) Although the Commission regards the public service mission of RTP as legitimate, it must, however, ascertain whether or not the definition contains any manifest errors.

The Commission will assess whether the temporary and permanent exemption from notarial deed charges, registration and publication costs can be considered as a compensation for a public service cost and will further analyse whether the obligation on RTP to support cinemas can be considered to be within the public service remit of RTP.

(159) The Commission will first assess whether the temporary exemption from notarial deed requirements (and related costs), registration charges and publication costs during the 1992 transformation into a public limited company in accordance with Article 11(1) of Law No 21/92, as well as the permanent exemption from various charges in accordance with Article 11(2) of Law No 21/92 may be considered as a compensation for costs resulting from the provision of the public service.

Exemption from registration charges

(160) Temporary exemptions: Firstly, it is necessary to examine whether costs involved in the transformation of RTP into a public limited company in 1992 (i.e. costs normally occurring for a notarial deed, its registration and publication) may be legitimately compensated for as public service costs. The compensation takes form, as stated above, by way of exemption according to Article 11(1) of Law No 21/92.

(161) At the time of its transformation, RTP conducted public service activities only (see recital 18 of this Decision),

([76]) The Amsterdam Protocol considers that the system of public broadcasting is directly related to the democratic, social and cultural needs of each society and to the need to preserve media pluralism. More specifically, Member States have 'the competence […] to provide for the funding of public service broadcasting insofar as such funding is granted to broadcasting organisations for the fulfilment of the public service remit as conferred, defined and organised by each Member State, and in so far as such funding does not affect trading conditions and competition in the Community to an extent which would be contrary to the common interest, while the realisation of the remit of that public service shall be taken into account'.

([77]) See paragraph 33 of the Broadcasting Communication.

([78]) Ibidem.

([79]) Ibidem.

while commercial activities were carried out by legally distinct subsidiaries. Therefore, the costs related to the transformation of the public service broadcaster automatically constituted public service costs, which the State legitimately could compensate. It is not necessary to consider whether the reorganisation of RTP was legally mandatory or needed ([80]). The assessment under Article 106(2) TFEU and the Broadcasting Communication require that the compensation does not exceed the net public service costs, but does not require an assessment on whether these costs, provided that they are limited to the provision of the public service, could have been avoided ([81]). In line with the Amsterdam Protocol and the Broadcasting Communication, Member States are, in principle, free to decide on the organisation of their public service broadcaster, which does not only apply to the broadcaster's organisation of which content will be distributed, but also under which legal form the public service broadcaster will carry out its operations. The Commission's role is limited to control of whether this freedom by the Member State was used in an abusive manner. In this case, there are no indications that the transformation was carried out with the sole aim of conferring an advantage to RTP. There is no reason to question Portugal's reasoning that the 1992 transformation was carried out in order to give RTP more flexibility in its operations rather than being a State organisation with cumbersome State control proceedings. It should therefore be concluded that the exemption from registration charges (i.e. notarial deed charges, registration charges, publication costs) at the time of the RTP transformation constitutes a legitimate compensation for the provision of the public service broadcasting.

(162) *Permanent exemption:* However, the above reasoning (set out in recital 161 of this Decision) cannot apply to the permanent exemption in Article 11(2) of Law No 21/92, which is not limited in time and therefore open to also cover registrations and inscriptions for activities of RTP outside its public service remit (e.g. when RTP would take up commercial activities itself rather than through legally distinct subsidiaries).

In view of the wide scope of Article 11(2) of Law No 21/92, both as regards time (i.e. unlimited) and in kind (i.e. not limited to public service activities), a justification of any potential future exemption from registration charges as a public service cost is not possible. It should therefore be concluded that the exemption from charges in accordance with Article 11(2) of Law No 21/92 is not compatible with the internal market.

(163) While Portugal argued that Article 11(2) of Law No 21/92 has never been applied and that RTP always paid all necessary registration charges after the 1992 transformation, that argument might prove valid in the case of recovery, but does not change the fact that that provision, as such, grants State aid to RTP which is not justified by Article 106(2) TFEU or any other provision of that Treaty.

Promotion of cinema

(164) Taking into account recital 45 to the 'Television without Frontiers' Directive, the Commission could accept, in so far the resulting film rights are shown on public service television, that the public service definition of public service broadcasters includes the obligation to contribute substantially to investment in European audiovisual production ([82]).

(165) The Commission considers that the *obligation imposed on RTP to promote the cinema* falls within the scope of public service broadcasting, as RTP subsequently broadcasts on public service television the films for which it has acquired the distribution rights.

(166) The Commission cannot, therefore, agree with the comments by interested parties that RTP's obligation regarding cinema promotion and its financing is discriminatory. The parties argued that private broadcasters also concluded protocols on cinema promotion with the Portuguese authorities that do not provide for compensation. However, the Commission considers that it is necessary to distinguish between the voluntary agreements on cinema promotion concluded between the State and the private broadcasters, on the one hand, and the public service broadcasting obligations imposed on RTP to broadcast cinema productions and to finance them, on the other hand. It is clear that RTP is explicitly entrusted with a public service task to support certain film productions that are subsequently broadcast as public service television programmes, whereas no such public service task is entrusted to the private broadcasters. In fact, RTP has become an instrument used by the State to support the cinema. Any resulting advantages granted by RTP to the cinema could

([80]) See paragraph 81 of the judgment of the Court of First Instance in Case T-442/03. The Commission's statement that the transformation was not necessary was not made in the context of the compatibility assessment under Article 86(2) EC Treaty, now Article 106(2) TFEU.

([81]) See paragraph 139 of the Judgment of the General Court in Joined Case T-568/08 and T-573/08, *Métropole télévision (M6) and Télévision française 1 SA (TFI)*, not yet published in the Court reports.

([82]) Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (OJ L 298, 17.10.1989, p. 23). According to Article 5, 'Member States shall ensure […] that broadcasters reserve at least 10 % of their transmission time […], or alternately, […], at least 10 % of their programming budget, for European works created by producers who are independent of broadcasters. Furthermore, according to recital 45 to Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, the objective of supporting audiovisual production in Europe can be pursued within the Member State through the definition of a public interest mission for certain broadcasting organisations, […] including the obligation to contribute substantially to investment in European production' (OJ L 202, 30.7.1997, p. 60), repealed by Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) (OJ L 95, 15.4.2010, p. 1).

constitute State aid and should be assessed as such. This decision is without prejudice to any assessment of possible advantages granted to film producers.

(167) Accordingly, it should be concluded that the co-financing by RTP of Portuguese cinematographic works that are shown on the public service channels may be considered as a legitimate specific obligation that is instrumental in fulfilling RTP's general public service broadcasting obligations. This obligation does not, therefore, constitute a manifest error.

Other services

(168) However, the Commission considers that the *legal obligation imposed on RTP to provide 'other services to be specified on an ad hoc basis'* ([83]) is not sufficiently precise to enable the Commission to assess beforehand with sufficient legal certainty whether such services can be considered as a public service. Although it takes the view that the 'other services to be specified' are not clearly defined, it notes that no payments were made under this provision during the period under investigation ([84]).

Conclusion

(169) In view of the foregoing, the Commission concludes that the activities of RTP as described in Law No 21/92 and redefined in the public service contracts are clearly defined public service obligations.

Although the obligation to provide 'other services to be provided on an ad hoc basis' is not sufficiently precise for it to be concluded beforehand that all the services provided under this heading could be considered public services, no payments were made under this provision in the period from 1992 to 1998.

However, the permanent exemption from registration and other charges is not limited to the compensation of a public service cost and can therefore not be justified under Article 106(2) TFEU.

Entrustment/supervision

Entrustment

(170) Secondly, it is necessary to assess whether the public service obligations were entrusted to the recipient RTP of the State funding.

(171) In line with the Broadcasting Communication, the Commission has to verify whether the public service remit has been entrusted to RTP by means of an official act ([85]).

(172) As referred to in recital 48 of this Decision, the public service obligations are clearly entrusted to RTP under various laws and contracts: Article 5 of Law No 58/90, Article 4(1) and Article 5 of Law No 21/92 and clause 1 of the old and new public service contracts.

(173) The Commission did not receive any comments from interested parties or Portugal to the effect that the public service was not sufficiently entrusted to RTP by means of an official act. In line with the Broadcasting Communication and in view of the laws and contracts referred to in recital 48 of this Decision, it should be concluded that there is RTP undoubtedly must perform the public service television obligations and a public service remit has, therefore, been officially entrusted to RTP.

Supervision

(174) Not only is it necessary that the public service be entrusted to RTP by means of an official act; steps should also be taken to ensure that the public service is provided as required by the law and the public service contracts As referred to in recitals 49 to 59 of this Decision., different control mechanisms were in place to ensure that RTP carried out the public service obligations in the manner provided for.

(175) Firstly, RTP was required to provide reports on the performance of its public service obligations and plans accompanied by an opinion of its internal board of auditors. RTP produced public service reports in for the years 1993 to 1998 that described the fulfilment of each public service obligation and identified the costs of each public service obligation through an analytical accounting system.

(176) Secondly, the Minister of Finance and the responsible government member for mass media audited the observance of the public service contract and the Inspector General of Finances audited the financial plan.

(177) Thirdly, annual external auditing had to take place. The Commission cannot accept the argument by Portugal, repeated after the judgment of the Court in Case T-442/03, that in fact the public service reports were

([83]) Clause 13 of the old public service contract and Clause 7(1)(a) of the new public service contract.

([84]) Letter from Portugal of 30 June 1999.

([85]) Broadcasting Communication, paragraph 40.

externally audited and that thus no further action was necessary. The situation before the adoption of Decision of 15 October 2003 may be described as follows:

(a) for the year 1992, no public service report existed, as the obligation to provide public service reports and an audit on such reports first came into place with the concession contract of 1993;

(b) for the years 1993 and 1994, there was no external audit, just a statement by the company representatives, namely of the Fiscal Council of RTP (Conselho fiscal da RTP), which is merely internal to the company;

(c) for the years 1995 to 1998, a statement by an external auditor independent from RTP and its representatives accompanied the reports. Those statements confirm that RTP respected its public service obligations. No more detailed public service reports which led to these findings could however be accessed.

(178) However, in view of the findings of the Court in Case T-442/03 and in particular in paragraphs 232 to 256 of the judgment, the Commission could not rely exclusively on the (short) audit statements on the public service reports referred to in recital 177 of this Decision and instead accepted Portugal's offer to carry out an external audit on the basis of the existing public service reports for *all* the years concerned. That is to say, external audits on the fulfilment by RTP of the public service obligations were carried out for the years 1992 to 1997. For the year 1992, the external audit was carried out despite the absence of a public service report. However, the external auditor relied on other document to assess whether the public service mandate had been fulfilled. For the year 1998, no external audit has been performed, as there always existed, undisputed also by SIC, an external audit in form of the BDO Binder report 1998, which is referred to later in recitals 186-188 of this Decision.

(179) The new audits for the years 1992 to 1997 have been organised by the national media regulator, namely the *Entidade Reguladora para a Comunicação Social*, ERC. The ERC is an independent administrative body which, in accordance with the Portuguese Constitution, is responsible for ensuring, among other things, the respect for the statutes and rules governing mass media activity. It organised audits to be carried out for the years from 1992 until 1997 by contracting with the external auditor, Pedro Roque, which is independent of RTP.

(180) Given the time elapse between 1992 and the public service report audits carried out in 2010, it has been difficult to access all the data. This explained the length of the investigation and the time it took to conduct new audits. However, in the end, the audits could be carried out, as the public service reports already (except for the year 1992) existed and the auditors thus had a basis for their audit. The audits for the years from 1992 to 1997 have been submitted to the Commission.

(181) The external audits state that their mandate is to assess and monitor the public broadcasting service, as provided by RTP and the payment received by it for that task. They contain a description of the information taken into account. They refer, inter alia, to Law No 58/90 (Public service broadcasting Act, Law No 21/92 on the transformation of RTP, the public service contracts, the yearly accounts and the external audits on the yearly accounts, the Public Business Plan and Budget (*Plano de Actividades e Orçamento do Serviço Público*), the public service reports for the respective years (*Relatorio sobre o Cumprimento das Obrigaçaoes do Servico Publico, RCOSP*). The audits mention that due to the long period of time which elapsed between the years 1992 to 1997 and the auditing contract in 2010, some documents were destroyed and certain information was not available. For that reason, the audit report mainly focused on the available reports, in particular the public service reports ([86]) and the certified annual accounts.

(182) Despite those constraints due to the lapse of time, the auditors found it possible to fulfil their contract and carry out the audits and make an assessment of the fulfilment of RTP's public service obligation and the compensation received by it. The audits expressly state that the auditors were able to surmount the difficulties incurred to the lapse of time and carryout out the audits. For example, while the auditors make the reservation that the cost accounting criteria and methods of cost allocations were not able to be consulted, that did not prove to be an impediment for carrying out the audit and for coming to a positive conclusion. The synthesis report states that: 'all the costs and revenues of RTP are based on the premise that its activity only refers to the provision of public television services, and that the present audits were based on financial statements audited by both the company's internal auditor and external auditors, from which did not result any relevant facts other than the ones described in detail in the annual accounts' ([87]). The Commission had already established (see recital 18 of this Decision) that RTP

([86]) For 1992, a public service report was not available, but also not legally required, as it was only the old public service contract which stipulated that requirement. However, also for the year 1992 the auditors come to the conclusion that there was no infringement of the legislation valid at the time. Neither do they find any overcompensation.

([87]) Synthesis report of the external audits, point 1.4(b).

had only conducted public service activities during the years under investigation, whereas the commercial activities were carried out by legally distinct subsidiaries of RTP. The cost allocation criteria and are therefore only relevant for placing cost allocation *within* the public service costs incurred by RTP and should not have any effect on the amount of the total public service costs.

As regards the financial information, the Commission found that the external auditors could legitimately rely on the annual financial accounts, which were always accompanied by an audit certifying the accuracy of the accounts of RTP. According to the public service contracts, the objective of the external audit on the public service report was to verify that RTP had fulfilled its public service obligations as mandated and that the public service compensation is in line with these costs performing such obligations. Therefore, while the financial data for the public service provision during the years under investigation related to the provision of public service by RTP, a *further* independent verification was necessary to ascertain whether the costs incurred complied with the public service mandate.

(183) The external auditors confirm that point. For the years 1992-97, the auditors come to the conclusion that: 'RTP had essentially fulfilled its broadcasting obligations in terms of quantity, as set out in the concession contract, with a special focus on the Broadcasting Content obligation'. The auditor finds that 'having analysed the documents available, namely the reports of the Auditor and the Statutory Audit Committee, we did not find anything that would lead us to conclude that the documents presented, relating to the correspondence between the public service tasks provided and the payment of their real and actual cost, contain materially relevant distortions that affect their compliance with the legislation in force on that date' ([88]).

(184) A number of audit reports mention that RTP could have requested a higher amount of compensation but was prevented from doing so due to the terms of the public service contracts, due to Article 15(4) of the old public service contract and Article 19(3) of the 1996 new public service contract. The individual external audits for the years 1994, 1996 and 1997 contain statements regarding the difference between the high costs actually incurred by RTP for providing the public service and the compensation received by it which was less than the costs incurred ([89]). The final synthesis report for all the years which have been audited states explicitly that: 'for all years, the compensatory indemnification that was attributed and paid was inferior to the amounts indicated in each RCOPS (Relatório sobre o cumprimento das obrigações de serviço público, the public service reports)' ([90]).

(185) Certain audits (with the exception of those for the years 1992 and 1993), state that RTP exceeded the legal advertising limit, i.e. it broadcasted more advertisements than it was permitted to do by the public service contracts. The revenue that RTP received for such advertising must be taken into account for calculating the public service costs, in accordance with the Broadcasting Communication, as income generated by the public service, including advertising revenues, should be integrated into the calculation of the company's public service financing need.

The fact that advertising limits were exceeded did not affect the auditor's analysis that for all 1992-97 the public service compensation corresponded to the public service tasks carried out by RTP and there was no overcompensation. Portugal also confirmed that in respect of the years 1994, 1995 and 1996, *all* advertising profits (so including those resulting from an excess of allowed advertising time) were taken into account and reduced the public service financing need respectively ([91]). As regards the year 1996, article 15 in the new public service contract stipulated that, for the determination of the compensation the profits resulting from the exploitation of the channels, may not be taken into account when summed the costs for the purposes of calculating the total cost of the public service. The 'profits' includes the advertising revenues. Portugal explicitly confirmed that the advertising profits were deducted from the amount of compensation required ([92]).

(186) As regards the year 1998, the external BDO Binder carried out an investigation regarding the relationship between RTP's public service remit and the costs related thereto. The BDO Binder report gives several future oriented recommendations and suggests strengthening RTP's internal controls to ensure compliance with internal regulations, but does not include any finding that RTP had received too much compensation in relation to the public service tasks carried out by it or that the figures used in the public service report drawn up by RTP and used by the Commission in Decision of 15 October 2003 could not be relied upon. When the BDO Binder report addresses concrete figures, it refers to a failure in drawing up an inventory for certain assets. However, the BDO Binder Report appears more to criticise the

([88]) The translation reflects the Portuguese original, which speaks of 'concession contracts'. The concession contracts are identical with the public service contracts, i.e. the old and the new public service contract as referred to throughout the decision, see also footnote 26 of this Decision.

([89]) For 1994, a value of PTE 14 034 734 000 was found which was found to exceed the amount allocated by the Government, but according to clause 15.4 no further compensation could be claimed than the PTE 7 145 million granted, as shown in Table 1 of this Decision. For 1996, an amount of PTE 14 594 568 000 was found, which was above the amount allocated of PTE 14 500 million. For the year 1997 a value of 11 752 261 000 was found which compares to PTE 10 350 million of actual allocation.

([90]) Page 23 of the synthesis report on all the audits.

([91]) Submission from Portugal of 25 August 2011.

([92]) See also recitals 27 and 116 of the Commission Decision in Case NN 31/06.

absence of an asset inventory ([93]), rather than concluding that the respective investments had not been made and that the investment values have wrongly been accounted for. However, as stressed by Portugal, figures for the respective investments were, in any event, not included in the compensation calculation, which excluded that depreciation costs for fixed assets could be reimbursed.

(187) As regarding the excess of advertising times the BDO Binder report found that all advertising income had been taken into account for the calculation of the public service financing need. Again, none of these factors lead the auditor to give a negative opinion on the fulfilment — by RTP of its public service obligations nor does it point to any overcompensation.

(188) But most importantly for the analysis in this Decision is the conclusion in the BDO Binder Report (which is not disputed by SIC), that RTP could have claimed PTE 25 billion for the fulfilment of its public service obligations, but instead only received PTE 14 billion. In other words, the BDO Binder report does not point to any overcompensation but instead comes to the opposite conclusion.

The PWC audit

(189) As stated in Decision NN 31/06 regarding the restructuring of RTP, an external audit by PriceWaterhouse Coopers has scrutinised whether the financial information provided by the Portuguese authorities was in accordance with the RTP's financial accounts in the period 1991 to 2003, with the amounts included in the public service audit reports and with other sources of information which were considered relevant to ensure the conformity of the reported audits (see recital 38 of Decision NN 31/06). The PWC audit report validated the data without any significant remark (recital 52 of Decision NN 31/06). The PWC audit report expressly confirmed that the amounts received by RTP as public service compensation corresponded to the amounts indicated in the resolutions from the Council of Ministers (see recital 41 and table 39 of Decision NN 31/06). The PWC audit report remarked on the global under-financing of RTP. It pointed out that in addition to the public service tasks which were reimbursable under public service contracts there were public service tasks which were carried out RTP, but for which no reimbursement from the State could be demanded. The Commission concluded in Decision NN 31/06 that the PWC audit report could therefore correctly base itself on RTP's financial accounts and found that RTP was indeed chronically underfinanced. Therefore, for the purposes of this Decision, the PWC audit report can be taken as another element, in addition to the external audits on the public service reports, that the data used by the Commission in Decision 2005/403/EC were correct.

([93]) It should be noted that according to Portugal, the dimension of this criticism is much smaller as of the amount of EUR 53 million, only 4 million were lost.

The findings of the *Tribunal de Contas*

(190) Regarding the complainant's argument that the report No 8/2002 of the State auditor, the Tribunal de Contas, should be taken into account, the Commission has indeed considered that report in its assessment in this Decision. Firstly, it must be acknowledged, as admitted also by SIC, that the audit report No 8/2002 covers the period from 1997 to 2000, and is therefore only relevant for the years 1997 and 1998. While figures in respect of earlier years have been mentioned in that report, they were meant to use to describe the general financial development of RTP, but were not themselves subject of the Court of Auditor's investigation.

(191) Most importantly, report No 8/2002 does not point to any irregularity in RTP's financing or to any overcompensation for the years 1997-2000 (or for any of the other years). On the contrary, the report No 8/2002 points a number of times to RTP's structural financial difficulties. Accordingly, the Commission is not in a position, on the basis of the report No 8/2002 report to single out certain payments as constituting overcompensation and illegal State aid. On the contrary, the report No 8/2002 report explicitly confirms that from 1993 until late 1999, RTP's survival was achieved using a continuous and increasing indebtedness of the company.

(192) As mentioned by the complainant, the report No 8/2002 report criticises, the management of the company a number of times and points to inefficiencies which could have been avoided. The objective of the report No 8/2002 report is defined as a general review of RTP's management and the provision of public service television, in terms of efficiency, effectiveness and economy. As pointed out by the complainant, the report No 8/2002 report indicated that RTP had inflexible structures and excessive staff levels and was providing a public service in an inefficient manner. The report No 8/2002 report also criticise the excessively vague and generic concept of the public service remit and the public service contracts which invite, according to the State auditor, managerial inefficiency.

(193) However, the concept of RTP's public service remit was investigated by the Commission in the decision of 15 November 2003. In Case T-442/03, the Court upheld that the wide definition of RTP's remit was

acceptable ([94]). As to the alleged inefficiencies, the Commission would like to point out that this is not an aspect which needs to be considered in the application of the Broadcasting Communication.

Proportionality

(194) The third criterion the Commission should assess is whether the financing is proportionate to the net cost of the public service.

(195) The Broadcasting Communication describes the criteria on the basis of which the Commission assesses the proportionality of state funding. It requires that the State aid should not exceed the net costs of the public service mission and that no market distortions should occur that were not necessary for the fulfilment of the public service mission ([95]).

(196) Firstly, in order to determine the cost of the public service activities correctly, the Broadcasting Communication requires a proper allocation of costs and revenue between the public service and commercial activities.

(197) As referred to in recitals 61-67 of this Decision, the public service contracts define the method of cost and revenue allocation that RTP must apply. In this case, the Commission's task is, in principle, made easier by the fact that RTP has implemented an analytical accounting system which permits quantification of the eligible costs incurred by it to fulfil each of the reimbursable public service obligations.

(198) By means of that system, each item of eligible expenditure is allocated to an activity and subsequently divided between the different reimbursable public service tasks of RTP, on the basis of objective accounting principles.

(199) As the revenues derived from each reimbursable public service task are deducted from the operating costs of the public service, the system guarantees that the annual compensation payments are limited to the net cost of each public service obligation (see recital 65 of this Decision).

(200) The Commission has, therefore, come to the conclusion that the parameters for determining the cost are established in an objective and transparent manner.

(201) However, the rules of cost compensation might underestimate the real net cost of RTP's public service and could lead to structural under-financing of the real funding needs.

([94]) See paragraphs 194 et seq. and in particular paragraphs 201 and 203 of the Judgment in Case T-442/03.

([95]) Broadcasting Communication, paragraphs 57 and 58.

(202) As referred to in recital 65, under the cost calculation method laid down in the public service contracts, certain public service costs were excluded from payment by means of annual compensation ([96]). Moreover, Portugal informed the Commission that, although RTP had to pay VAT on the annual compensation payments received, the resulting costs could not be taken into account under the accounting rules (see recital 94) Finally, in its public service reports, RTP did not include all the investments made in public service equipment, although these were accounted for in its financial accounts (see recital 67).

(203) However, under the Amsterdam Protocol, it is for the Member State to provide for the funding of the public service broadcasters. In this case, the Portugal decided not to reimburse some of the costs incurred by the service provider in fulfilling its tasks.

(204) In this case, the State granted not only annual compensation payments to RTP but also additional financing in the form of share capital increases, loans and an agreement with body responsible for the social security scheme. In accordance with paragraph 57 of the Broadcasting Communication, the Commission must analyse whether all measures are proportionate to the net public service costs. Only then can the financing of RTP be considered to be compatible with Article 106(2) TFEU.

(205) The Commission also considers that the public service obligations imposed on RTP which were not eligible for compensation under the public service contracts may be considered as legitimate and clearly defined public service obligations formally imposed by the State on the service provider. Therefore, under the State aid rules, Portugal may finance all the net public service costs of RTP.

(206) Table 6 in recital 207 gives an overview of RTP's public service costs (both investment costs and net operating costs), as calculated under the cost accounting rules applicable, and of the compensation received for investment and operating costs.

(207) Firstly, the investments in public service equipment (Table 5) and compensation provided for to finance investments (Table 2) are presented. Secondly, the net operating costs of RTP (Table 4) and the compensation payments for these costs (Table 1) are presented. Lastly, the table shows the advantage gained from ad hoc aid resulting from the agreement with the social security scheme and the loan of 1998.

([96]) The operating costs of the first and second channel under the old public service contract correspond to the financing costs and the costs of correspondence where other operators were also set up.

Table 6

Summary of funding needs and compensation for the public service net operating cost under the accounting rules

(PTE million)

	1992	1993	1994	1995	1996	1997	1998	Sum
Investment costs	2 632,6	2 102,0	2 763,9	992,7	1 480,4	4 037,4	6 054,2	20 063,2
Capital injections	– 0	– 0	– 10 000,0	– 12 800,0	– 10 000,0	– 14 000,0	– 0	– 46 800,0
Difference between investment costs and compensation	2 632,6	2 102,0	– 7 236,1	– 11 807,3	– 8 519,6	– 9 962,6	6 054,2	– 26 736,8
Public service operating costs	6 718,2	7 960,0	8 384,1	8 103,3	17 217,1	37 972,1	30 101,3	116 456,1
Compensation payments	– 6 200,0	– 7 100,0	– 7 145,0	– 7 200,0	– 14 500,0	– 10 350,0	– 14 000,0	– 66 495,0
Social security	—	– 1 206,0	—	—	—	—	—	– 1 206,0
Loan							– 20 000,0	– 20 000,0
Difference between operating costs and compensation	518,2 (*)	– 346	1 239,1	903,3	2 717,1	27 622,1	– 3 898,7	28 755,1

(*) For 1992, the registration charges of PTE 11 000 000 will have to be taken into account, see recital 210 of this Decision below.
Source: Financial report and public service reports.

(208) As emphasised in recital 201 and 202, the system of annual compensation payments chosen by Portugal had the effect of underestimating the actual costs of the public service tasks performed by RTP. The system led to an accumulation of debt. At a second stage, in order to maintain RTP's financial equilibrium, Portugal used ad hoc measures to finance RTP's public service costs.

(209) As Table 6 in recital 207 shows, the capital injection overcompensated for public service investments by PTE 26 736,8 million, whereas the operating costs were underfinanced by the compensation payments and the other ad hoc measures to the tune of PTE 28 755,1 million. Although the capital injections were basically meant to finance investments in equipment, they were also used to repay accumulated debt.

(210) As Table 6 in recital 207 also shows, the total compensation was PTE 2 018,3 million less than the net public service costs (PTE 28 755,1 minus PTE 26 736,8 million). The Commission concludes, therefore, that under the Union rules total State funding is proportionate to the net operating public service costs of RTP for the period under investigation. That finding does not change if it is considered that the PTE 11 000 000 resulting from the exemption from registration charges also to be State aid (see recitals 119 and 120 of this Decision), contrary to the Commission's original assumption. Taken into account that amount, there would still be an under-financing of RTP of PTE 2 007,3 million.

(211) The Commission considers that the funds received by RTP were even lower than the total net costs incurred in fulfilling the obligations imposed on it by the State owing to the fact that Table 6 in recital 207 does not take into account all the public service costs of RTP in the period from 1992 to 1998.

(212) In accordance with the Broadcasting Communication, the Commission should ensure that the State funding is proportionate to the net costs of providing the public service, but also that no market distortions occur with respect to the commercial activities which derive from the public service activities and for which no correct cost allocation is possible on the revenue side that are not necessary for the fulfilment of the public service mission. There would be such a distortion if RTP depressed the prices of advertising on the market so as to reduce the revenue of competitors ([97]). In such a case, RTP would not maximise its commercial revenues and would unnecessarily increase the need for State funding. According to the Broadcasting Communication, such

([97]) Broadcasting Communication, paragraph 58.

conduct, if demonstrated, cannot be considered as intrinsic to the public service mission attributed to the broadcaster ([98]).

(213) In the Decision initiating the investigation procedure of 15 November 2001, the Commission stated that, if such conduct were found to have taken place, it would take such distortions and the resulting need for higher State funding into account when assessing possible overcompensation. At that stage in the procedure, the Commission noted that 'on the basis of the information the Commission has in its possession at this moment, it cannot be established whether RTP engaged in such behaviour' ([99]).

(214) Following the invitation to submit comments on the initiation of procedure in this case, the Commission did not receive any observations from RTP's competitors indicating or demonstrating that RTP was engaged in anti-competitive behaviour in commercial markets that could lead to increased state funding incompatible with the Treaty ([100]).

(215) Under the circumstances, the Commission considers that there are no indications suggesting such behaviour. Consequently, it concludes that RTP does not seem to have engaged in anti-competitive behaviour in commercial markets leading to an increased need for State funding and that no overcompensation took place as a result of such behaviour.

Conclusion

(216) Accordingly, the Commission concludes that the agreement with the body responsible for the social security scheme, the capital injections and the subordinated loan as well as the temporary exemption from registration charges should be regarded as State aid within the meaning of Article 107(1) TFEU. However, the funding of RTP by means of ad hoc measures is compatible with the internal market within the meaning of Article 106(2) TFEU. The total funding is proportionate to the net costs of clearly defined, entrusted public service obligations. Therefore, the State funding did not affect trading conditions and competition in the Union to an extent which would be contrary to the interests of the Union under Article 106(2) TFEU ([101]).

VI. **CONCLUSION**

(217) The Commission finds that Portugal has unlawfully implemented the ad hoc aids in breach of Article 108(3) TFEU ([102]). This does not apply to the temporary exemption from notarial deed charges and publication fees according to Article 11(1) of Law No 21/92, as these measures are not considered to constitute State aid within the meaning of Article 107(1) TFEU.

(218) As referred to in recital 143, the Commission concludes that the agreement with the body responsible for the social security in 1993, the capital injections in the period from 1994 to 1997 and the loan in 1998 constitute State aid within the meaning of Article 107(1) TFEU. Similarly, the exemption from registration charges according to Article 11(1) of Law No 21/92 and the permanent exemption from charges in accordance with Article 11(2) of Law No 21/92 constitute State aid. The ad hoc measures are granted through State resources, and threaten to distort competition in the internal market by favouring RTP and have an effect on trade.

The ad hoc measures do not fulfil the conditions set out in the *Altmark* judgment, as they may not be regarded as part of a compensation system, whose parameters have been established beforehand in an objective and transparent manner. Furthermore, it is clear that RTP was not selected by means of a public tender procedure guaranteeing the lowest possible cost and there are no indications that the amount of the ad hoc payments was determined on the basis of an analysis of the costs that a typical undertaking would incur.

(219) The exemption provided for in Article 106(2) TFEU is applicable to the ad hoc measures with the exception of the *permanent* exemption of RTP under Article 11(2) of Law No 21/92. As analysed the measures compensated clearly defined public service obligations sufficiently entrusted to RTP by Law No 21/92 and the public service contracts. The ad hoc measures are proportionate to the net operating public service cost of RTP. The ad hoc measures do not distort competition to an extent contrary to the Union's interest, as the measures are proportionate to the net public service cost of RTP. RTP also did not behave in an anti-competitive manner in commercial activities.

([98]) Ibidem.
([99]) Recital 91 of the decision initiating the procedure in this case.
([100]) It should be pointed out that in 1993 the complainant SIC also alleged a violation of Article 86(1) of the EC Treaty (formerly Article 90), now Article 106(1) TFEU as regards the legal structure put in place by the Portuguese State on the advertising market and RTP's programme acquisition policy (see also Commission Decision 89/536/EEC of 17 September 1989). Subsequently, the Commission assessed these allegations under Article 86(1).
([101]) Broadcasting Communication, paragraph 58.
([102]) Reference in this regard is made to the facts part of the decision, which outlines the implementation for each of the measures.

(220) The Commission finds that the permanent exemption provided for in Article 11(2) of Law No 21/92 constitutes State aid which is not compatible with the internal market as it does not qualify as a compensation for the operation of a service of general economic interest within the meaning of Article 106(2) TFEU. Therefore, Portugal should abolish that law. Portugal should also ensure that any aid paid to RTP under that Law should be recovered from it.

(221) Considering the above conclusions, the Commission,

HAS ADOPTED THIS DECISION:

Article 1

1. The following ad hoc measures granted by Portugal in favour of Radiotelevisão Portuguesa, SA, (RTP) constitute State aid within the meaning of Article 107(1) of the Treaty.

(a) the rescheduling of a debt of PTE 1 206 million by Portugal to RTP in the form of an agreement with the body responsible for the social security in 1993;

(b) capital injections in the period 1994 to 1997 amounting to PTE 46 800 million;

(c) a loan of PTE 20 000 million granted in 1998;

(d) a temporary exemption from registration charges provided for in Article 11(1) of the Portuguese Law No 21/92 and amounting to PTE 11 000 000.

2. The State aid measures referred to in paragraph 1 of this Article are compatible with the internal market within the meaning of Article 106(2) of the Treaty since they did not lead to any overcompensation of the net costs of the public service tasks entrusted to RTP.

Article 2

The exemption from notarial deed charges and publication costs provided for in Article 11(1) of the Portuguese Law No 21/92 does not constitute State aid.

Article 3

1. The unlimited exemption accorded to RTP from the payment of any charges and fees in respect of any act of inscription, registration or annotation, as provided for Article 11(2) of the Portuguese Law No 21/92, constitutes State aid within the meaning of Article 107(1) of the Treaty.

2. The State aid unlawfully granted by Portugal, in breach of Article 108(3) of the Treaty, on the basis of Article 11(2) of Law No 21/92, in favour of RTP, is incompatible with the internal market.

Article 4

1. Portugal shall repeal the law referred to in Article 3(1) of this Decision and shall order recovery of any State aid received by RTP under that provision until the repeal of the law.

2. The sums to be recovered shall bear interest from the date on which they were put at the disposal of RTP 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 Regulation (EC) No 271/2008 amending Regulation (EC) No 794/2004.

Article 5

1. Recovery of the aid granted under the law referred to in Article 3 shall be immediate and effective.

2. Portugal 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, Portugal shall submit the following information to the Commission:

(a) a detailed description of the measures undertaken to abolish Article 11(2) of Law No 21/92;

(b) the total amount (principal and recovery interests) to be recovered from RTP;

(c) a detailed description of the measures already taken and planned to comply with this Decision;

(d) documents demonstrating that RTP has been ordered to repay the aid.

2. Portugal shall keep the Commission informed of the progress of the national measures taken to implement this Decision until recovery of the aid referred to in Article 3 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 RTP.

Article 7

This Decision is addressed to the Portuguese Republic.

Done at Brussels, 20 December 2011.

For the Commission
Joaquín ALMUNIA
Vice-President